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

- BETWEEN -

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO. LTD.

(THE "CLAIMANT")

- AND -

THE FEDERAL REPUBLIC OF NIGERIA

(THE "RESPONDENT")

STATEMENT OF REPLY AND WITNESS STATEMENTS

VI. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

146. The Respondent does not dispute the jurisdictional prerequisites set out in the Claimant's Statement of Claim, namely that the Respondent is bound by the Treaty, that the Claimant is a protected investor under the Treaty and that the Claimant's investment qualifies for protection under the Treaty.[317] The sole jurisdictional objection raised by the Respondent is that the fork-in-the-road provision in Article 9(3) of the Treaty operates to preclude the Claimant from bringing this dispute before this Tribunal because of litigation by different parties before the Nigerian courts.[318]

147. The Claimant submits that the Tribunal has jurisdiction to hear this dispute for the reasons provided in its Statement of Claim and because the Respondent's sole jurisdictional objection has no merit.[319] As will be established in this Section, the fork-in-the-road provision in Article 9(3) is not applicable, including because the Claimant has never submitted any dispute – let alone this dispute – to the Nigerian courts.

A The Respondent's jurisdictional objection disregards the language of the Treaty and misinterprets the fork-in-the-road provision in Article 9(3)

148. The Respondent's jurisdictional objection refers to Articles 9(2) and 9(3) of the Treaty, which read as follows:

> "*2. If the dispute cannot the settled through negotiations within six months, the 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 appiy if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.***"[320]

149. The Respondent contends that these provisions present a fork in the road, namely two mutually exclusive options to an investor seeking redress: recourse to national courts or recourse to arbitration.[321]

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[317] Statement of Claim, ¶¶ 155-175.

[318] Respondent's Jurisdictional Objection, ¶¶ 3.13-3.14. The Respondent has also attempted to pre-empt an MFN argument that the Claimant has not made and does not intend to make and, accordingly, we do not address it in this Statement of Reply. Respondent's Jurisdictional Objection, ¶¶ 4.1-4.12.

[319] Statement of Claim, ¶¶ 155-175.

[320] China-Nigeria BIT, Arts. 9(2)-9(3), **CLA-001** (emphasis added).

[321] Respondent's Jurisdictional Objection, ¶¶ 3.9, 3.10, 3.12, 3.13, 3.14 and 3.15.

150. The Claimant's position is that it has clearly not submitted any dispute to the Nigerian courts, let alone an investment treaty dispute regarding the Respondent's breaches of the Treaty, which are at issue in the present proceedings. The Respondent contrives to disagree, arguing that:

> "*Claimant through **ZHONGFU** initiated a raft of litigations against **Ogun-Guangdong Free Trade Zone Company, Nigeria Export Processing Zones Authority (NEPZA), Ogun State Government of Nigeria, the Attorney-Generai of Ogun State** and **Zenith Global Merchant Limited** for alleged unlawful acts resulting in the evisceration of its investment in OGFTZ.*"[322]

151. For the purposes of its jurisdictional objection, the Respondent claims to rely on the Fucheng Park Proceedings, the NEPZA Proceedings and the Anti-Arbitration Proceedings,[323] although ultimately it does not address the Anti-Arbitration Proceedings in its submissions.[324]

152. In order to assess the requirements for the application of a fork-in-the-road provision, the starting point for the Tribunal is the treaty language. The Respondent ostensibly agrees with the Claimant that the treaty interpretation principles in the VCLT are applicable to the present case.[325] However, the Respondent completely fails to apply such principles in its interpretation of the second sentence of Article 9(3) of the Treaty.[326]

153. The terms of the Treaty are clear: "[t]he *provisions of this Paragraph shall not apply if the **investor concerned** has resorted to the procedure specified in Paragraph 2 of this Article.*"[327] The term "investor" is defined in Article 1(2) of the Treaty:

> "*The term 'investor' include* [sic.] *nationals and companies of both Contracting Parties:* [...]
>
> *(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.*"[328]

154. Thus, the language of the Treaty Is clear that the fork-in-the-road provision can only operate in circumstances where the person initiating local proceedings is a foreign

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[322] Respondent's Jurisdictional Objection, ¶ 2.9.

[323] Respondent's Jurisdictional Objection, ¶ 2.9.

[324] Respondent's Jurisdictional Objection, ¶¶ 3.26-3.41.

[325] Respondent's Jurisdictional Objection, ¶¶ 3.6 and 3.7.

[326] Respondent's Jurisdictional Objection, ¶ 3.31.

[327] China-Nigeria BIT, Art. 9(3) of the BIT, **CLA-001** (emphasis added).

[328] China-Nigeria BIT, Art. 1(2), **CLA-001**.

company registered in China.[329] As the Respondent has tacitly admitted by its decision not to object to jurisdiction *ratione personae*, the Claimant fulfils the criteria of the Treaty since it is a company incorporated and constituted under the laws of China. By contrast, Zhongfu Nigeria does not meet the criteria required to qualify as a Chinese investor under the Treaty since it is a company constituted under Nigerian law. The Claimant, the investor for the purposes of Articles 1(2)(b) and 9(3) of the Treaty, has never submitted any dispute to the Nigerian courts. As in *Champion v Egypt*, the Respondent has not shown "*any convincing reason why the Treaty should not be interpreted in good faith in accordance with the ordinary meaning expressed therein which excludes from* [Treaty] *arbitration only those disputes where the* [Treaty] *claimant is also the claimant in the national proceedings.*"[330] Here, there is no identity of the claimants, as required by the Treaty for the fork-in-the-road to apply.

155. The Respondent's jurisdictional objection is thus premised upon a false assumption: that the Claimant and Zhongfu Nigeria are the same legal person. The question of whether a claimant can be equated to its local subsidiary for the purposes of activating a fork-in-the-road clause was considered in *CMS v The Argentine Republic*. The tribunal emphasised that:

> "[the claimant's subsidiary] *is a separate legal entity and is not the investor; only the investor can make the choice of taking a claim to the local courts or to arbitration, and CMS chose the ICSID arbitration option.*"[331]

156. Similarly, in *Genin v Estonia*, the tribunal considered that national litigation "*certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings.*"[332] The Treaty also requires an identity of respondents for the fork-in-the-

[329] See *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, ¶¶ 1.10, 4.78, **CLA-166.**

[330] *Champion Trading Company, Ameritrade International, Inc. v Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, ¶¶ 3.4.3, **CLA-167**: "*According to Article VII 3.(a) of the Treaty recourse to ICSID arbitration is only possible if '(iii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute.' The terms 'national' or 'company' are defined for the purpose of this Treaty in Article I (e) and (a). The nationals and company concerned in the present dispute are the three individuals Claimants and the two corporate Claimants, however not NCC. The Respondents have not shown any convincing reason why the Treaty should not be interpreted in good faith in accordance with the ordinary meaning expressed therein which excludes from ICSID arbitration only those disputes where the ICSID claimant is also the claimant in the national proceedings.*"

[331] *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, ¶ 78, **CLA-168**. See also ¶ 80: "*no submission has been made by CMS to local courts and since, even if TGN had done so – which is not the case –, this would not result in triggering the "fork in the road" provision against CMS. Both the parties and the causes of action under separate instruments are different*"; *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 443, **CLA-029**; *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, ¶ 393 **CLA-169**; *Nissan Motor Co., Ltd., v India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶¶ 201, 205, 212, 214, **CLA-170**; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004, ¶ 76, **CLA-171**; *Alex Genin, Eastern Credit Limited Inc. and A.S. Baltoil v Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 333, **CLA-154**.

[332] *Alex Genin, Eastern Credit Limited Inc. and A.S. Baltoil v Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 331, **CLA-154**.

road provision to operate. The "*dispute*" referred to in Article 9(3) must be interpreted consistently with other references to that term in the Treaty.[333] Article 9(1) makes clear that a "*dispute*" is "*between an investor of the other contracting Party and the other Contracting Party.*"[334] As for the term "*the other Contracting Party*", there can be no doubt that it is the Federal Republic of Nigeria. The Respondent proposes a selective reading of the fork-in-the-road clause by seeking to define the term "*dispute*" in a vacuum and thus failing to consider the context provided by Article 9(1) of the Treaty. However, it is clear that the Federal Republic of Nigeria is not the respondent in the national proceedings.

157. Following from the meaning of the word "*dispute*" in the Treaty, an additional requirement flows from the language of the Treaty. It requires that the dispute have a "*connection with an investment*" as per Article 9(1).[335] Thus, in terms of the object of the dispute, the Treaty requires that the dispute be an investment dispute.[336]

158. The tribunal in *Genin v Estonia* made clear that there is a difference between litigation concerning matters of local law, as in the proceedings before the Nigerian courts, and investment treaty disputes concerning breaches of treaty obligations and international law, as in the case before this Tribunal:

> "*It is quite obvious that this matter* [concerning the revocation of a license] *had to be litigated in Estonia; there was no other jurisdiction competent to deal with the restoration of the status quo. The 'investment dispute' submitted to ICSID arbitration, on the other hand, relates to the losses allegedly suffered by the Claimants alone, arising from what they claim were breaches of the BIT. Although certain aspects of the facts that gave rise to this dispute were also at issue in the Estonian litigation, the 'investment dispute' itself was not, and the Claimants should not therefore be barred from using the ICSID arbitration mechanism.*"[337]

159. Likewise, in the case of *AES v Kazakhstan*, the tribunal explained:

> "*While it is true that the claims before the* [national] *courts and in the present proceedings are based on the same facts and in particular the same alleged basic wrongdoings by Respondent (i.e., the implementation of new laws),*

[333] VCLT, Art. 31(1), **CLA-018**.

[334] China-Nigeria BIT, Art. 9(1), **CLA-001**.

[335] China-Nigeria BIT, Art. 1(1), **CLA-001**.

[336] See, for example, *Nissan Motor Co., Ltd. v Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 211, **CLA-170**.

[337] *Alex Genin, Eastern Credit Limited Inc. and A.S. Baltoil v Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 332, **CLA-154**. See also *Nissan Motor Co., Ltd., v India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶¶ 214: "*That the Writ Proceedings nonetheless may involve certain overlapping facts with the CEPA claim does not change the analysis of Article 96(6)'s clear text.*", **CLA-170**.

> *they present important differences which do not justify considering these claims as having 'fundamentally the same* [normative] *basis* [...]
>
> *While the implementation by the Kazakh authorities of the new Kazakh competition law plays an important role in the present proceedings, it does so only from a factual perspective in the sense that it is one of the factual causes for Claimants' treaty claims in the present ICSID proceedings.*"[338]

160. Furthermore, in addition to the identity of the parties and the object of the dispute, Article 9(3) requires that the dispute relate to claims of breaches of the Treaty under international law to trigger the fork-in-the-road provision (i.e. the same cause of action). This requirement derives from Article 9(7) read in conjunction with Article 9(3). Article 9(7) requires that the dispute be adjudicated in accordance with "*the provisions of this Agreement as well as the generally recognized principles of international law accepting* [sic.] *by both Contracting Parties.*" The dispute before this Tribunal comprises claims under international law for breaches of the Treaty. By contrast, the national proceedings involved claims under national law. Thus, there is also no identity of the cause of action, as the Treaty requires.[339]

B The triple identity test accords with the language of Article 9(3)

161. The Claimant submits that, in order for the fork-in-the-road provision in Article 9(3) of the Treaty to operate, the national court proceedings and this investment arbitration must have: (1) the same parties; (2) the same object; and (3) the same cause of action.[340] These three conditions are cumulative and mirror the proper interpretation of the fork-in-the-road provision in Article 9(3) of the Treaty, as set out above. If any one of these elements is not the same in both cases, the fork-in-the-road will not be triggered. In this case, however, not one of these three elements is the same in the present investment treaty arbitration dispute between the Claimant and the Respondent and the local litigation, thereby highlighting the weakness of the Respondent's jurisdictional objection.

162. The Respondent contends that this test, known as the triple identity test, is outdated.[341] It argues that "*Investor-State arbitral jurisprudence on the fork-in-the-road principle has evolved beyond the triple identity test*"[342] but nonetheless admits that "*arbitral tribunals*

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[338] *AES Corporation and Tau Power B.V. v Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶¶ 227, 229, **CLA-155**.

[333] See *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶¶ 211-212, **RLA-09**; *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, ¶ 80, **CLA-168**; *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 135-138, **CLA-066**; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 331, **CLA-154**.

[340] See also Statement of Claim, ¶¶ 155-159.

[341] Respondent's Jurisdictional Objection, ¶ 3.16.

[342] Respondent's Jurisdictional Objection, ¶ 3.17.

currently lay emphasis on the substantive language of the applicable BIT and not on an extraneous triple identity test unless in BITs where the language of the fork-in-the-road provision clearly require the triple identity standard."[343] Thus, in the Respondent's own submission, the triple identity test should be applied where the language of the provision requires it. The Claimant agrees. As demonstrated above, the language of the fork-in-the-road provision in Article 9(3) requires the application of the triple identity test.

163. As for the Respondent's contention that the triple identity test is outdated, such an assertion cannot be credited. The Respondent's argument of supposed outdatedness is further undermined by its own reliance on the award in *H&H v Egypt* (issued in 2014) which bases a substantial part of its reasoning on the award in *Pantechniki v Albania* (issued in 2009). By contrast, more recent decisions in investment treaty arbitration have upheld the validity of the triple identity test when assessing the applicability of appropriately-worded fork-in-the-road provisions.[344]

164. Numerous other arbitral tribunals have endorsed the appropriateness and validity of the triple identity test.[345] For example, in *Lauder v Czech Republic*, the tribunal explained:

> "*The purpose of* [the fork-in-the-road provision] *of the Treaty is to avoid a situation where the same investment dispute ('the dispute') is brought by the same the claimant ('the national or the company') against the same respondent (a Party to the Treaty) for resolution before different arbitral tribunals and/or different state courts of the Party to the Treaty that is also a party to the dispute.*
>
> *The resolution of the investment dispute under the Treaty between* [the claimant] *and the* [respondent] *was not brought before any other arbitral tribunal or* [national] *court before – or after – the present proceedings was*

[343] Respondent's Jurisdictional Objection, ¶ 3.17.

[344] See, for example, *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*, SCC Case No. V062/2012, Award, 21 January 2016, ¶¶ 399-410, **CLA-172**. See also *Jin Hae Seo v Korea*, HKIAC Case No. 18117, Concurring Opinion of Dr. Benny Lo, 24 September 2019, ¶ 15, **CLA-173**.

[345] *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶¶ 211-212, **RLA-09**; *Ronald S. Lauder v The Czech Republic*, Final Award, 3 September 2001, ¶¶ 159-166, **CLA-085**; *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, ¶¶ 89-92, **CLA-012**; *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶¶ 43-52, 57, **CLA-070**; *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶ 114-122, **CLA-174**; *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶¶ 154-157, **CLA-152**; *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v The Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶¶ 139, **CLA-175**; *Yury Bogdanov v The Republic of Moldova*, SCC Case No. 091/2012, Final Award, 16 April 2013, ¶¶ 169-176, **CLA-091**; *Champion Trading Company, Ameritrade International, Inc. v Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, ¶¶ 3.4.3.1-3.4.3.5, **CLA-167**; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶¶ 483-486, **CLA-176**; *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v The Government of Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, ¶¶ 386-400, **CLA-169**.

initiated. All other arbitration or court proceedings referred to by the [r]espondent involve different parties, and deal with different disputes."[346]

165. When applying the triple identity test to the facts of the present case, it is obvious that the cases submitted before Nigerian courts do not have: (1) the same parties; (2) the same object; nor (3) the same cause of action as the present proceedings. In particular, the Respondent relies on two cases which, it argues, have the same fundamental basis as the present proceedings: (1) the Fucheng Park Proceedings; and (2) the NEPZA Proceedings.[347]

(i) The Fucheng Park Proceedings

166. As explained in Section IV.E above, the Fucheng Park Proceedings involved Zhongfu Nigeria as plaintiff and the OGFTZ Company, Ogun State and the Attorney General of Ogun State as defendants. These proceedings involved neither the Claimant nor the Respondent.

167. The object of the dispute was to prevent the unlawful ejection of Zhongfu Nigeria from the Zone. Zhongfu Nigeria sought to recover the land granted to Zhongfu Nigeria for the development of the Fucheng Industrial Park within the Zone consistent with its contractual rights under the agreement.[348] By contrast, the present investment dispute relates to the Respondent's breaches of its obligations under the Treaty and the Claimant's claim for compensation under international law.

168. The contractually-based cause of action in the Fucheng Park Proceedings is thus different from the cause of action in the present arbitration, which concerns breaches of the Treaty.

(ii) The NEPZA Proceedings

169. Zhongfu Nigeria filed the NEPZA Proceedings against NEPZA, the Attorney General of Ogun State and Zenith. Once again, these proceedings involved neither the Claimant nor the Respondent. The object of the dispute was the wrongful actions of NEPZA under Nigerian law, especially its unlawful decision not to recognise Zhongfu Nigeria as the lawful manager of the Zone.

170. The claims of Zhongfu Nigeria were based on the recognition of Zhongfu Nigeria as manager of the Zone and the collusion which led to the wrongful termination of the JVA

[346] *Ronald S. Lauder v The Czech Republic*, Final Award, 3 September 2001, ¶¶ 161-162, **CLA-085**.

[347] Respondent's Jurisdictional Objection, ¶¶ 3.27 to 3.33, 3.35 to 3.39.

[348] Zhongfu Nigeria also asked the court to (1) declare that Zhongfu Nigeria was entitled to possession of the land and that Ogun State had no power to eject Zhongfu Nigeria from the area; (2) order Ogun State to restore the land to Zhongfu Nigeria; (3) issue an injunction preventing the defendants from harassing Zhongfu Nigeria's employees; and (4) order the defendants to compensate Zhongfu Nigeria in the amount of USD 1,000,797,000 plus interest.

2013. Once again, the cause of action in the NEPZA Proceedings is thus different from the cause of action in the present arbitration, which concerns breaches of the Treaty.

(iii) The present proceedings

171. In the present arbitration between the Claimant and the Respondent, the Claimant's claims concern breaches of the Treaty under international law. This is an investment treaty dispute.[349]

172. Thus, the triple identity test is not met by either of the cases in the national courts since neither the Fucheng Park Proceedings nor the NEPZA Proceedings have the same parties, the same object nor the same cause of action as the present arbitration – let alone all three which would be required in order for the fork-in-the-road provision to be activated. Accordingly, the fork-in-the-road provision in Article 9(3) of the Treaty is not activated by the present dispute.

C Even if the fundamental basis test were to be applied, the Tribunal has jurisdiction over this investment treaty dispute

173. The Respondent relies on two cases to support its proposition that this Tribunal should apply the fundamental basis test: *H&H v Egypt* and *Pantechniki v Albania*.[350] Both cases are clearly distinguished from the present case on the basis that in each the claimant was the entity that had initiated litigation in the national courts of the respondent. The Respondent's authorities thus do nothing to assist it in this case; rather, they highlight that the Tribunal has jurisdiction on any analysis.

174. Factually, the *H&H v Egypt* case is also very different from the present one. In *H&H v Egypt*, the tribunal held that certain claims in the investor-State arbitration had the same fundamental basis as claims previously brought in other *fora* after finding that the claimant in the investment treaty arbitration had submitted claims before Egyptian courts and a Cairo arbitral tribunal in circumstances where both the courts and the Cairo arbitral tribunal had previously rendered decisions rejecting the claimant's claims.[351]

175. Since most of the claims before the investor-State tribunal had already been resolved by the Cairo arbitration, in accordance with the applicable Egyptian law,[352] the tribunal held

[349] Statement of Claim, ¶ 164.

[350] Respondent's Jurisdictional Objection, ¶¶ 3.19-3.20.

[351] The exact details of the case are not known since only excerpts of the award have been published. *H&H Enterprises Investments, Inc. v Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Excerpts of Award, 6 May 2014, ¶ 360, **RLA-12**.

[352] *H&H Enterprises investments, inc. v Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Excerpts of Award, 6 May 2014, ¶¶ 372-373, **RLA-12**.

that hearing those claims would amount to a re-litigation of issues that the Cairo arbitration had already adjudicated.[353]

176. This factual circumstance is not found in the present case since the Nigerian courts never adjudicated any of Zhongfu Nigeria's claims.

177. The Respondent also relies on *Pantechniki v Albania*, where the claimant in the arbitration had previously initiated proceedings before the Albanian courts concerning the payment of sums from Albania. The national court had ruled against the claimant in the first instance and the claimant subsequently submitted this issue to investor-State arbitration.[354]

178. Sitting as sole arbitrator in the investor-State arbitration, Mr. Paulsson considered whether the fork-in-the-road provision was applicable to the payment claim and held that "[w]*hat I believe to be necessary is to determine whether claimed entitlements have the same normative source.*"[355] In order to assess whether the claims had the same normative source, Mr. Paulsson determined that the relevant question was whether the payment claim brought under the treaty had an "*autonomous existence outside the contract.*"[356] Applying this reasoning, he found that the treaty claim was strictly based on Albania's breaches of its contractual commitments and that the claim did not have an autonomous existence outside the contract.[357] Thus, the fork-in-the road provision applied to this particular claim.

179. However, in the present case, it is abundantly clear that the Claimant's Treaty claim has an autonomous existence outside either the JVA 2013 or the Fucheng Industrial Park Agreement, relating to issues that include the Respondent's lack of due process accorded to the Claimant, the Respondent's harassment of the Claimant and more generally the Respondent's arbitrary, non-transparent, inconsistent and unreasonable actions, the effect of which was to eviscerate the totality of the Claimant's investment in Nigeria and force the employees of Zhongfu Nigeria to flee the country in fear of their safety.

180. The Respondent seems to argue that the current proceedings share factual similarities with the proceedings before the Nigerian courts.[358] However, even under the fundamental

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[353] *H&H Enterprises Investments, Inc. v Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Excerpts of Award, 6 May 2014, ¶ 384, **RLA-12**.

[354] *Pantechniki v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶¶ 3, 52, **RLA-13**.

[355] *Pantechniki v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 62, **RLA-13**.

[356] *Pantechniki v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 64, **RLA-13**. See also *H&H Enterprises Investments, inc. v Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Excerpts of Award, 6 May 2014, ¶ 377, **RLA-12**.

[357] *Pantechniki v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶¶ 64, 67, **RLA-13**. See also *H&H Enterprises Investments, Inc. v Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Excerpts of Award, 6 May 2014, ¶ 377, **RLA-12**.

[358] Respondent's Jurisdictional Objection, ¶¶ 3.30, 3.31, 3.37 and 3.40.

basis test advocated by the Respondent, this is not the determinative factor nor is any purported similarity of respective prayers for relief.[359] As noted by Mr. Paulsson in *Pantechniki v Albania*:

> "*The same facts can give rise to different legal claims. The similarity of prayers for relief does not necessarily bespeak an identity of causes of action.*"[360]

181. In conclusion, by application of either the triple identity test (which is the correct test under the Treaty) or even the fundamental basis test, the Respondent's jurisdictional objection based on the applicability of the fork-in-the-road provision contained in Article 9(3) of the Treaty must fail. Accordingly, this Tribunal has jurisdiction to hear the dispute between the Parties.

VII. THE RESPONDENT'S CONDUCT BREACHED THE TREATY AND INTERNATIONAL LAW

182. As a result of the conduct described in the Statement of Claim and Section IV above, the Respondent has breached its international obligations contained in the Treaty and under international law, owed to the Claimant. In response to the Claimant's arguments, the Respondent summarily denies the facts of this case.

183. The Respondent has, in the words of the tribunal in *Desert Line v Yemen*, simply "*contented itself with expressing doubts as to the accuracy of the* [c]*laimant's version of events*" rather than properly addressing the Claimant's factual and legal arguments.[361] Indeed, the Respondent has provided virtually no response to the Claimant's legal submissions, save for simply denying, in one paragraph, that it breached the Treaty.[362] Notwithstanding the paucity of legal arguments in the Respondent's Statement of Defence, the Claimant will, as best it can, address the Respondent's legal arguments or implied arguments, such as they are or appear.

184. Regarding attribution, the Claimant explained in its Statement of Claim that the conduct of Ogun State, NEPZA, the Nigerian police and the Nigerian courts is attributable to the Respondent under customary international law rules codified in Articles 4 and 5 of

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[359] Respondent's Jurisdictional Objection, ¶ 3.34.

[360] *Pantechniki v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 62, **RLA-13**.

[361] *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 159, **CLA-066**.

[362] Statement of Defence, ¶ 134.

ARSIWA.[363] The Respondent rightly has not disputed this and it can be taken as common ground.

185. As the factual circumstances set out in Section IV above demonstrate, nothing in the Respondent's Statement of Defence has altered the position that the Respondent has breached Articles 2(2), 2(3), 3(1) and 4(1) of the Treaty. Each of the Respondent's breaches is addressed in turn.

A The Respondent did not treat the Claimant's investment fairly and equitably

186. 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.*"[364]

187. The Respondent has not contested the constituent components of the FET standard and has limited itself to perfunctory denials of the facts of the Claimant's FET analysis, to which the Claimant responds below.[365]

1. The Respondent did not respect the Claimant's due process rights

188. As set out in Section IV above, the Respondent has engaged in multiple actions which have denied the Claimant's right to due process, thereby violating the FET standard in the Treaty.[366] These include, but are not limited to, the following, which considered, either individually or collectively, entail a breach of the FET standard.

(i) *The Respondent threatened and evicted Zhongfu Nigeria in disregard of its rights*

189. The Respondent violated Zhongfu Nigeria's rights under the Fucheng Industrial Park Agreement and the JVA 2013 by threatening Zhongfu Nigeria's employees and evicting Zhongfu Nigeria from the Zone.[367] The Respondent's only response to this violation is to deny that it threatened or evicted Zhongfu Nigeria or its employees.[368] However, as shown

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[363] Statement of Claim, ¶¶ 208-216.

[364] China-Nigeria BIT, Art. 3(1), **CLA-001**; Statement of Claim, ¶¶ 218-224.

[365] See Statement of Defence, ¶ 134. The relevant factors for the FET standard include: (a) whether the host State has denied the investor due process; (b) whether the host State failed to act in a transparent manner towards the investor; (c) whether the host State has permitted harassment or coercion of the investor; (d) whether the host State has acted in a manner that is arbitrary, unfair, unjust or idiosyncratic; and (e) whether the host State failed to respect the investor's legitimate expectations.

[366] Statement of Claim, ¶¶ 225-232.

[367] Statement of Claim, ¶ 228.

[366] Statement of Defence, ¶¶ 42, 95, 98, 106, 107 and 112.

above, this is plainly false. No explanation is offered for why leading and experienced international businessmen would simply have fled, abandoning their personal possessions and their substantial professional investments, absent the threats that were made.

190. As the evidence demonstrates, Mr. Adeoluwa, despite his denial, sent Dr. Han a direct threat to "*leave peacefully when there is opportunity to do so, and avoid forceful removal, complications and possible prosecution.*"[369] Further threats to Dr. Han were relayed to him to by Mr. Odega, the NEPZA representative in the Zone, and Mr. Onas, the Zone coordinator, who told Dr. Han that "*Zhongfu Nigeria would be forcefully removed from the Zone* [and] *that the Secretary to the Ogun State Government would send the immigration authorities and the Department of State Services to seize* [his] *passport and put* [him] *in jail if* [he] *did not leave.*"[370]

191. As for the eviction of the Claimant from the Zone, the Nigerian police and NEPZA engaged in a series of intimidating tactics to evict Zhongfu Nigeria from the Zone in addition to Mr. Adeoluwa's threats to Dr. Han. These include, amongst others: (a) the police accompanying the Zone coordinator to the Zone as he ordered Zhongfu Nigeria's employees to give access to Zhongfu Nigeria's offices;[371] (b) NEPZA seeking to collect immigration papers (known as CERPACs) from Zhongfu Nigeria's staff;[372] and (c) the Nigerian police arresting, detaining and physically beating Mr. Zhao.[373]

192. Given the blatant misconduct by the Ogun State Government and NEPZA, the Respondent is unable to provide any legal justification for the actions of its State organs. This conduct plainiy breaches the requirements of due process under the FET standard in the Treaty. For example, the tribunal in *OI European Group v Venezuela* held that the occupation of the claimant's property by a Government agency, without following appropriate legal procedures, amounted to a violation of due process and the FET standard.[374]

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[369] Text message from Taiwo Adeoluwa to Jianxin (Jason) Han, 16 July 2016, **C-196**; Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶¶ 70 and 72; First Witness Statement of Jason Han, 30 April 2019, ¶¶ 95-131; Second Witness Statement of Jason Han, 23 January 2020, ¶ 54; 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**.

[370] Second Witness Statement of Jason Han, 23 January 2020, ¶ 55. See also First Witness Statement of Jason Han, 30 April 2019, ¶¶ 115-116. See also Second Witness Statement of Jon Vandenheuvel, 27 January 2020, ¶¶ 11-12; Second Witness Statement of Issa Baluch, 20 January 2020, ¶ 15.

[371] Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

[372] Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**; Second Witness Statement of Jason Han, 23 January 2020, ¶ 66.

[373] First Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 17-38; Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 5.

[374] *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award 10 March 2015, ¶¶ 510-511 and 557, **CLA-177**.

193. In relation to Mr. Zhao's arrest and detention, the Nigerian police committed egregious due process violations. In response to overwhelming witness and contemporaneous documentary evidence, the Respondent merely states that it does not admit the allegations and that "*Nigeria has elaborate procedural laws and rules guiding arrest and performance of their functions by the Police which are strictly adhered to…*"[375] However, despite being ordered to produce relevant documents by the Tribunal,[376] the Respondent has provided no evidence as to the procedural laws and rules guiding arrest and Police performance, as well as no evidence that these procedural laws and rules, if they exist, were complied with in the case of Mr. Zhao. Consequently, the Claimant requests the Tribunal to make the adverse inference that these procedural laws and rules were not complied with in relation to Mr. Zhao.

194. Despite the Respondent not providing the procedural laws and rules guiding police behaviour, the Nigerian police have a public Code of Conduct.[377] This Code of Conduct prohibits police officers from engaging in actions which involve the "*unnecessary infliction of pain or suffering*" and from "*engag*[ing] *in cruel, degrading or inhuman treatment of any person.*"[378] The treatment inflicted on Mr. Zhao, including failing to explain the reason for his arrest, beating him, denying him adequate food and water, keeping him in appalling conditions with other prisoners and making him watch horrific videos, clearly violates the Nigerian police's own Code of Conduct and fails to accord with any semblance of due process.

(ii) The Respondent has failed to accord due process to the Claimant in relation to the Claimant's rights under the Fucheng Industrial Park Agreement and the JVA 2013

195. The Respondent denies that Zhongfu Nigeria's rights under the Fucheng Industrial Park Agreement have been abrogated and asserts that Zhongfu Nigeria is still recognised as a tenant in the Zone.[379] However, as demonstrated above, the Respondent's position now is completely at odds with its previous conduct which ignored the Claimant's rights under the Fucheng Industrial Park Agreement. As an example, the Respondent directed Zhongfu Nigeria in categorical terms to "*vacate the Zone within 30 days.*"[380] This was followed by

[375] Statement of Defence, ¶ 107.

[376] Tribunal's Decision on Claimant's Application for Production of Documents, 29 November 2019.

[377] Nigeria Police Code of Conduct, **CLA-178**.

[378] Nigeria Police Code of Conduct, p. 2, **CLA-178**.

[379] Statement of Defence, ¶ 95; Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶ 69.

[380] 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**.

the use of the Nigerian police to assist in the forceful handing over of the Zone to NSG and eviction of Zhongfu Nigeria from the Zone.[381] This conduct took place despite numerous letters being sent by Professor Elias, counsel for Zhongfu Nigeria, requesting the Ogun State Government to respect the Claimant's legitimate rights in the Zone under the Fucheng Industrial Park Agreement.[382] For example, on 21 September 2016, Professor Elias wrote to NEPZA as follows:

> *"We need to reiterate once again that Zhongfu is a vaiid 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 cannot be evicted from the Zone.*
>
> *We implore you to call your staff, NEPZA Administrator at the Zone, the OGSG and its allies to order and refrain from taking any further steps that would hinder Zhongfu's presence and operation in the Zone."*[383]

196. Despite repeated pleas, the Respondent continued to interfere with the Claimant's investment. This included harassing the employees of Zhongfu Nigeria and inhibiting Zhongfu Nigeria's ability to operate in the Zone.[384] The Respondent's actions, which ran roughshod over the Claimant's rights, are a manifest violation of due process – as is the inconsistency of the Respondent's position in the Statement of Defence that Zhongfu Nigeria is stiil recognised as a tenant in the Zone.

197. A further argument that the Respondent appears to make in relation to the Fucheng Industrial Park Agreement – although it is unclear whether this is its primary position – is to question the validity of that agreement by saying that it was entered into without the consent of the Ogun State Government, who is the Chairman of the OGFTZ Company.[385] Aside from the fact that the Statement of Defence was the first time that any concerns as to the validity of the Fucheng Industrial Park were raised, the premise of the Respondent's argument is incorrect. The knowledge or approval of the Chairman of the OGFTZ

[381] Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; 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**.

[382] See Letter from G. Elias & Co. to NEPZA, 21 September 2016, **C-181**; Letter from G. Elias & Co. to Managing Director of NEPZA, 21 September 2016, **C-181**. See also Letter from G. Elias & Co. to NEPZA, 8 May 2017, **C-202**; Letter from Zhongfu International Investment (NIG) FZE to NEPZA, 22 August 2017, **C-198**; Letter from G. Elias & Co to NEPZA, 12 June 2017, **C-222**; Letter from G. Elias & Co. to the Governor of the Ogun State, 12 September 2017, **C-203**.

[383] Letter from G. Elias & Co. to Managing Director of NEPZA, 21 September 2016, **C-180**.

[384] See, for example, Report from Steve Allen, 30 March 2017, **C-183**.

[385] Statement of Defence ¶ 42.

Company is not relevant to whether the Fucheng Industrial Park Agreement is valid. Indeed, under the Memorandum and Articles of Association of the OGFTZ Company, the "*Chairman shall not participate or intervene the operation and management of the Company.*"[386] The Fucheng Industrial Park Agreement was validly entered, being signed and sealed by the OGFTZ Company's legal representative, Mr. Zhong.[387]

198. In relation to the JVA 2013, the Respondent purported to terminate that agreement on the basis of a mischaracterisation of Note 1601 without providing Zhongfu Nigeria with an opportunity to discuss its position and have its legitimate rights considered in accordance with due process.[388] It is evident from the purported termination taking place the day after a request to meet was made by Zhongfu Nigeria that the Ogun State Government had no interest in hearing Zhongfu Nigeria explain its position, or to accord it due process.[389]

199. Due process requires that the Claimant be allowed to present its position before any actions which may affect its investment are taken.[390] As the tribunal in *Deutsche Telekom v India* stated, when finding a breach of the due process under the FET standard:

> *"the Indian authorities made no attempt to engage with* [the investor] *to examine whether and how these services could accommodate the public needs that had allegedly arisen. At no time after* [the State official] *had come to the conclusion that the Agreement needed to be annulled did* [the investor] *get the opportunity to explain, fix, amend, or try to meet the concerns asserted."*[391]

200. The tribunal in *Deutsche Telekom v India* went on to hold that:

> *"reaching such a conclusion and issuing the Order as detailed above with its far-reaching consequences, without a proper examination and without giving the banks involved an opportunity to respond, constitutes a breach of*

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[386] Memorandum and Articles of Association of the OGFTZ Company, 30 May 2008, Art. 34, **C-204**.

[387] Fucheng Industrial Park Agreement, p. 11, **C-002**.

[386] Statement of Claim, ¶ 229.

[389] Witness Statement of Taiwo Adeoiuwa, 14 October 2019, ¶ 32; 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**; Second Witness Statement of John Xue, 22 January 2020, ¶ 24.

[390] *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**; *Quiborax S.A., Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 221, **CLA-179**.

[391] *Deutsche Telekom AG v The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 375, **CLA-180**. See also ¶¶ 376 and 378, **CLA-180**.

> *the fair and equitable treatment obligation of Article 2(2) of the BIT in form of a due process violation."*[392]

201. As Mr. Xue explains, Zhongfu Nigeria wrote to Ogun State Government to "*discuss the allegations and resolve any concerns of the Ogun State Government, and, if necessary, remedy any breaches of the JVA 2013 before it was terminated.*"[393] However, far from providing the Claimant with an opportunity to present its position in accordance with the requirements of due process under the Treaty, the Respondent proceeded to engage the police and NEPZA to take over the Claimant's investment in the Zone in breach of its due process obligations.

(iii) The Respondent's refusal to abide by the instructions of the Solicitor-General of Nigeria was a due process violation

202. As shown above, the Respondent ignored unequivocal and direct instructions from the Solicitor-General of Nigeria to preserve the *status quo ante* in the Zone pending court processes which had been commenced to preserve the Claimant's rights.[394] In response, the Respondent asserts that it preserved the *status quo ante* by allowing NSG to continue to manage the Zone.[395] The Respondent's flawed argument misinterprets the term *status quo ante* and ignores the plain language of the Solicitor-General's instructions.

203. In his letter dated 17 October 2016, the Solicitor-General of Nigeria instructed Ogun State Government and NEPZA to maintain the *status quo ante*. In the very next line, the Solicitor-General clarifies the meaning of the term in this particular context, stating that:

> "*Zhongfu* [should] *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.*"[396]

204. The instructions of the Solicitor-General could not be clearer: until the issue was solved before Nigerian courts, Ogun State and NEPZA could not "*forcibly eject Messrs Zhongful* [sic.] *and its personnel from the Zone which is being managed under a subsisting Joint*

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[392] *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 478, **CLA-048**.

[393] Second Witness Statement of John Xue, 22 January 2020, ¶ 24.

[394] 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**.

[395] Statement of Defence, ¶ 118; Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶¶ 86-87.

[396] Letter from Solicitor-General of the Federation and Permanent Secretary to Secretary to the State Government, Ogun State Secretariat, 17 October 2016, **C-013**.

Venture Agreement between the Ogun State Government and Messrs Zhongfu." Despite the instructions of the Solicitor-General, and in clear breach of due process, the Respondent continued to deny Zhongfu Nigeria the ability to exercise its rights in the Zone and repeatedly harassed and denied entrance to the Zone to Zhongfu Nigeria's employees.[397]

(iv) The conduct of Nigerian courts amounts to a violation of due process

205. The actions of the Nigerian judiciary to thwart the Claimant's exercise of its legitimate right to have its contractual claims under the JVA 2013 resolved by a fair and impartial arbitral tribunal through the issue of a permanent injunction in the Anti-Arbitration Proceedings is a further violation of due process under the Treaty.[398] In response to the Claimant's position, the Respondent argues that:

> "*the issue before the High Court in Ogun State* [...] *was the propriety of commencing Arbitration by Zhongfu after initiating legal proceedings in court in respect of the same subject matter and not the applicability or breach of the* [New York Convention]. *Neither Zhongfu* [Nigeria] *nor its lawyers advanced argument on the New York Convention at the said proceedings.*"[399]

206. As explained in Section IV.E, the NEPZA Proceedings did not have the same subject matter as the Singapore Arbitration Proceedings and did not involve the same parties. The NEPZA Proceedings concerned Zhongfu Nigeria's claim challenging NEPZA's decision not to recognise Zhongfu Nigeria as the lawful manager of the Zone. By contrast, the Singapore Arbitration Proceedings were based on contractual breaches of the JVA 2013. As such, there was no basis for the Ogun High Court to conclude that initiating the NEPZA Proceedings impinged Zhongfu Nigeria's arbitration rights under the JVA 2013.

207. Similarly, there was no basis for the Ogun High Court to completely ignore the basic principles of the New York Convention, to which the Respondent is a Contracting Party, when injuncting Zhongfu Nigeria from continuing with the Singapore Arbitration Proceedings. In reaching its decision, the Ogun High Court manifestly failed to give effect

[397] Report from Steve Allen, 30 March 2017, **C-183**.

[398] *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 445, **CLA-089**.

[399] Statement of Defence, ¶ 131; Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶ 94.

to the due process rights of Zhongfu Nigeria by failing to apply the relevant law, which included the New York Convention.[400]

2. The Respondent did not act transparently

208. As shown in Section IV above, the Respondent failed to act "*transparently in its relations with foreign investors*" in multiple respects in violation of its FET obligations under the Treaty.[401]

(i) The Respondent lacked transparency in its refusal to preserve Zhongfu Nigeria's rights under the Fucheng Industrial Park Agreement

209. The Respondent failed to engage with Zhongfu Nigeria's repeated requests to have its rights under the Fucheng Industrial Park Agreement preserved.[402] Indeed, the Respondent admits that NEPZA received at least some of Professor Elias' letters in which he pleaded that the *status quo* be maintained and that Zhongfu Nigeria's rights be respected.[403] However, instead of responding to and acting on those legitimate requests, NEPZA continued to intimidate Zhongfu Nigeria's personnel and to take over its assets without communicating the basis for these actions.[404]

210. Despite the evidence to the contrary, the Respondent continues to obfuscate in its Statement of Defence when it states that "*NEPZA attempted to step in and resolve the dispute in line with its mandate but did not get cooperation from Zhongfu* [Nigeria]."[405] As Dr. Han states, NEPZA did not take such steps and "*Zhongfu Nigeria would have welcomed its assistance and, indeed, requested such assistance on a number of occasions.*"[406]

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[400] See New York Convention, Art. II(1), **CLA-007**; Arbitration and Conciliation Act 1988, Art. 2, **CLA-181**.

[401] *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, Partial Award, 13 September 2001, ¶ 611, **CLA-098**; *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 546, **CLA-080**.

[402] Statement of Claim, ¶ 233; Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**; 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**; Report from Steve Allen, 30 March 2017, **C-183**.

[403] Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**; 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**; Report from Steve Allen, 30 March 2017, **C-183**.

[404] Report from Steve Allen, 30 March 2017, **C-183**.

[405] Statement of Defence, ¶ 104; Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶ 75.

[406] Second Witness Statement of Jason Han, 23 January 2020, ¶ 58; Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Letter from G. Elias & Co to NEPZA, 12 June 2017, **C-222**; Letter from Zhongfu International Investment (NIG) FZE to NEPZA, 22 August 2017, **C-198**.

211. The Respondent's continued failure to act transparently is exemplified by its complete failure to provide any documents requested and / or ordered to be produced in this arbitration. For example, the Respondent failed to produce any documents "*relating to the decision of NEPZA to send the letter of 27 July 2016*" – which compelled Zhongfu Nigeria employees to surrender their original CERPAC immigration papers – as ordered by the Tribunal.[407] Accordingly, the Claimant respectfully invites the Tribunal to draw an adverse inference that the Respondent sought the surrender of CERPAC immigration papers from Zhongfu Nigeria employees to harass and ultimately pressure them to leave Nigeria.

(ii) The Respondent did not act transparently with regards to Mr. Zhao's arrest and detention

212. The Nigerian police failed to act in a transparent manner when arresting and detaining Mr. Zhao.[408] As part of the manifold violations of rights that Mr. Zhao suffered, he did not receive an explanation for the reason of his arrest in a language he could understand. As Mr. Zhao explains, the police officers "*asked* [him] *to sign a piece of paper. They did not say or explain what this paper was or what it said.*"[409] in addition, Mr. Zhao was not told why the police were looking for Dr. Han nor why they were transferring Mr. Zhao to Abuja.[410] Further, the Nigerian police also failed to act in a transparent manner when allegedly conducting an investigation concerning his mistreatment as Mr. Zhao was not contacted to provide evidence in the investigation, nor was he informed of the results of the investigation.[411]

213. It is telling that the Respondent fails to engage with the circumstances of Mr. Zhao's treatment and simply denies that any wrongdoing took place. Further, despite being ordered to by the Tribunal, the Respondent has continued to conceal the circumstances surrounding Mr. Zhao's arrest and detention by failing to produce any documents in relation to his treatment.[412] The Tribunal is accordingly invited to draw the adverse inference that Mr. Zhao was mistreated and abused at the hands of the Nigerian police.

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[407] Tribunal's Decision on Claimant's Application for Production of Documents, 29 November 2019. Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**.

[408] Statement of Claim, ¶ 238; Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 8.

[409] First Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 23.

[410] Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 5.

[411] Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 8.

[412] Statement of Defence, ¶¶ 104, 106 and 107.

(iii) The Respondent did not act transparently when it purported to terminate the JVA 2013

214. As demonstrated in Section IV above, the Respondent's purported termination of the JVA 2013 was abrupt and the reasons for the termination opaque and inconsistent. On the one hand, the Respondent has asserted that the reason for the termination was a direct result of a request from the Chinese Consulate communicated in Note 1601, and on the other hand, the Respondent has provided a series of *post-facto* justifications for why the JVA 2013 was either not entered into, not enforced, not binding or was allegedly breached by Zhongfu Nigeria.[413] Accordingly, it is still not clear why the JVA 2013 was purportedly terminated.

215. Further, the reasoning of the Respondent for its failure to comply with the 60-day cure period in clause 18.1 of the JVA 2013 is unintelligible. The Respondent asserts, without any explanation, that the alleged breach by Zhongfu Nigeria of the JVA 2013 was "*not capable of being remedied in view of the information in* [Note 1601] *and NSG's Share Purchase Agreement*."[414]

3. The Respondent harassed the employees of Zhongfu Nigeria

216. As shown above, Nigerian authorities engaged in a series of actions to coerce and harass Zhongfu Nigeria and its employees, forcing Zhongfu Nigeria to leave the Zone and the country.[415] These actions included the threats received by Zhongfu Nigeria's Management Team from the Ogun State Government and NEPZA officials, the forcible takeover of the Zone on 22 July 2016 and intimidation and harassment of the remaining Zhongfu Nigeria employees with the assistance of the police and / or NEPZA, which left people in the Zone feeling "*terrorized and fearful*", and the arrest and detention of Mr. Zhao.[416]

217. The Respondent denies these actions, stating, amongst other things, that no threats were ever issued, that the takeover was a legal handover and that Mr. Zhao was arrested in accordance with due process after the filing of a complaint by a fellow Chinese citizen.[417]

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[413] Statement of Defence, ¶¶ 27, 62, 64, 67, 68 and 133.

[414] Statement of Defence, ¶ 94.

[415] Statement of Claim, ¶¶ 240-241.

[416] Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**. See also Email from Jason Han to Elizabeth Uwaifo, 25 September 2016, **C-012**; Witness Statement of Jason Han, 30 April 2019, ¶¶ 106, 108, 111, 114 and 128; First Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 21 and 37; Request for Protection from Zhang Bin to State Security Service (Nigeria), 2 August 2016, **C-197**; Report by Lisa on CAI seizing assets, 16 October 2016, **C-184**; Report from Steve Allen, 30 March 2017, **C-183**; Letter from Zhongfu International Investment (NIG) FZE to NEPZA, 22 August 2017, **C-198**.

[417] Statement of Defence, ¶¶ 83, 95, 100, 101, 102, 106 and 107.

The Respondent's factual denials are unpersuasive in light of the evidence presented.[418] In particular, Mr. Adeoluwa's denial that he did not issue a threat against Dr. Han is contradicted – practically verbatim – by the evidence on record.[419]

218. The conduct of the Respondent is not dissimilar to the circumstances in *Desert Line v Yemen*, where the tribunal in that case found a breach of FET in circumstances where the respondent (Yemen) made a series of physical threats, coercing the claimant to enter into an unwanted settlement agreement.[420] Such threats included: (a) the arrest of its managers; (b) a phone call urging the chairman of the company to leave the country; and (c) a failure to provide the claimant with protection and security in the face of harassment and threats from third parties.[421]

4. The Respondent's actions were arbitrary, unfair and unjust

219. As shown above, the measures taken by the Respondent fall squarely within the notion of arbitrariness under international law, which has been accepted to occur when *"prejudice, preference or bias is substituted for the rule of law."*[422] In its Statement of Defence, the Respondent has not pointed to any rational basis to evict Zhongfu Nigeria from the Zone and eviscerate its rights under the JVA 2013 and the Fucheng Industrial Park Agreement. Indeed, the Respondent's principal rationale for purporting to terminate the JVA 2013 was a mischaracterisation of Note 1601, which contained none of the allegations which were subsequently used as justification in the Notice of Termination.[423] The arbitrariness of the Respondent's actions is further confirmed by the inconsistent statements of representatives of the Respondent:

(a) the Secretary to the Ogun State Government, Mr. Adeoluwa, wrote to Dr. Han following the termination, in which Mr. Adeoluwa wrote "*Be sure, sir, that this is nothing personal against you, or your company*";[424] and

(b) Mr. Adeoluwa and Zhongfu Nigeria's lawyer, Ms. Uwaifo, stating that the "*Ogun State Government* [...] *has no issues with* [Zhongfu Nigeria]" and that the "*complaint*

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[418] See also, for example, Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶¶ 4-9.

[419] Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶ 70; Text message from Taiwo Adeoluwa to Jianxin (Jason) Han, 16 July 2016, **C-196**.

[420] *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 185,193, **CLA-066**.

[421] *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 185, **CLA-066**.

[422] *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 262-263, **CLA-060**.

[423] 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**.

[424] Text message from Taiwo Adeoluwa to Jianxin (Jason) Han, 16 July 2016, **C-196**.

against [Zhongfu Nigeria…] *came from the Government of the People's Republic of China.*"[425]

5. The Respondent failed to respect the Claimant's legitimate expectations

220. It is striking from the Respondent's position, as articulated in its Statement of Defence, that it failed to respect the Claimant's legitimate expectations in relation to its investment, in breach of the FET standard. For example, the Respondent provided Zhongfu Nigeria and the Claimant with multiple assurances with respect to its investment and rights within the Zone from which it subsequently resiled and now asserts a contrary position.

221. In addition to the rights acquired under the Fucheng Industrial Park Agreement and the JVA 2013, on which the Claimant relied to invest and had a legitimate expectation would be respected, the Respondent provided specific assurances to the Claimant with respect to its shareholding rights in the OGFTZ Company, which it now denies. These included the following:

(a) The Ogun State Government represented by way of its letter dated 15 March 2012, titled "*Termination of* [CAI]*'s* ***Participation*** *in Ogun Guangdong Free Trade Zone*",[426] that CAI's shareholding rights in the OGFTZ Company, granted pursuant to the JVA 2007, and had been terminated in accordance with Clause 18.1 thereof.[427]

(b) The Ogun State Government represented in the recitals and operative terms of the JVA 2013 that CAI's shareholding rights in the OGFTZ Company had been terminated and Zhongfu Nigeria was to acquire shareholding rights in the OGFTZ Company.[428] In particular, the JVA 2013 states:

(i) "[CAI] *was participating in the* [OGFTZ Company] *but its participation in the* [OGFTZ Company] *has been terminated by the* [Ogun State Government] *vide a letter dated 15th March, 2012 from the office of the Secretary to* [the Ogun State Government]";[429]

(ii) The "[p]*arties* [to the JVA 2013] *have agreed to take over the shareholding structure of the* [OGFTZ Company] *which shall be responsible to take over*

[425] Email from Taiwo Adeoiuwa to Elizabeth Uwaifo, Jason Han, Gbolahan Elias and others, 18 August 2016, **C-175**.

[426] Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Guandong Xinguang International Group and China Africa Investment Ltd., 15 March 2012, **C-006** (emphasis added).

[427] 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**.

[428] Clause 1.9 of the JVA 2013 refers to the recitals as being the *"Whereas~* [sic.] *Clauses."* Pursuant to Clause 1.9 of the JVA 2013, the "*parties to* [the JVA] *confirm the context contained in the foregoing "Whereas~* [sic.] *Clauses herein is true and accurate…*" (JVA 2013, Clause 1.9, **C-008**).

[429] JVA 2013, p. 3, **C-008**.

and carry out all the obligations of the [OGFTZ Company] *which includes, development, operation, management and administration of the* [Zone] *and to do such acts, matters and things as may be consistent with, necessary for or incidental to the attainment of any of the foregoing and matters hereinafter stated*";[430]

(iii) "*Further to the incorporation of the* [OGFTZ Company], *the shareholding structure is hereby adjusted to reflect the new parties for the purpose of taking over the development, management and operation of the* [Zone]";[431] and

(iv) The OGFTZ Company, with authorised share capital of NGN 2 billion and issued share capital of NGN 1 billion, "*is hereby readjusted*" with Zhongfu Nigeria being allocated 60% of the shareholding.[432]

(c) The Secretary to the Ogun State Government, Mr. Adeoluwa, confirmed "[i]*t is pertinent to note that the appointment of* [CAI] *has been terminated since 15th March 2012*" and "*consequently,* [Zhongfu Nigeria] *is enjoined to be pro-active in the Management/Administration of* [the Zone] *by promptly warding off activities of trespassers callable of causing confusion in the Zone.*"[433]

(d) On the same day, M.A. Banire & Associates, the solicitor of the OGFTZ Company, confirmed:

> *"Ogun State Government has long terminated the interest of [CAI] in the Ogun Guangdong Free Trade Zone. This was done through a letter dated March 15, 2012. Kindly find attached the letter dated 15th March, 2012 written by the Secretary to the State Government of Ogun State terminating the said interest."*[434]

222. Similar types of conduct as that engaged in by the Respondent have been repeatedly recognised by investment tribunals as violating the FET standard. For example, in *NextEra v Spain*, the Tribunal found that the statements made in writing to the investor from Spanish officials "*constitute the best evidence of Spanish assurances that could be the basis for legitimate expectations.*"[435] In acting contrary to these assurances, Spain breached the

[430] JVA 2013, pp. 3-4, **C-008**.

[431] JVA 2013, Clause 2.1, **C-008**.

[432] JVA 2013, Clause 2.2, **C-008**.

[433] 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**.

[434] Letter from M.A. Banire & Associates to Zhongfu International Investment (NIG) FZE, 28 April 2014, **C-095**.

[435] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum, 12 March 2019, ¶ 590, **CLA-182**.

investor's legitimate expectations and the FET standard.[436] Similarly, in *CEF Energia v Italy*, the tribunal held that the letters from an emanation of the respondent to the investor were assurances to the investor that it would receive certain incentives, in a constant currency, for a twenty year period, pursuant to private law contracts.[437] By acting contrary to those assurances, the respondent had breached the FET standard under the relevant treaty.[438]

223. Likewise, in *Crystallex v Venezuela*, the tribunal found that a letter from the respondent's Ministry of Environment created a legitimate expectation that the permit for the exploitation of gold would be issued.[439] Thus, by denying the permit, the respondent frustrated the investor's legitimate expectations.[440] The tribunal in *Pezold v Zimbabwe* also recognised that acting contrary to assurances made by the Zimbabwean Government that the investor's property would be respected, including assurances from the Zimbabwean Minister of Agriculture and President Mugabe, and a *note verbale* from the Government, constituted a breach of the respondent's FET obligations.[441]

224. Accordingly, the Claimant had a legitimate expectation that the Respondent would adhere to its representations and assurances and the Respondent's position to act contrary to those assurances is a clear violation of the FET standard under the Treaty.

6. The Respondent has breached the principle of good faith under international law by contradicting its earlier assurances

225. Finally, it is undisputed that the principle of good faith is a fundamental principle of international law and an integral element of the FET standard. It is universally accepted that "*one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.*"[442] Under general public international law, the principle of good faith is recognised to be particularly "*relevant to the*

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[436] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum, 12 March 2019, ¶¶ 593-601, **CLA-182**.

[437] *CEF Energia BV v Italian Republic*, SCC Case No. 2015/158, Award, 16 January 2019, ¶¶ 211, 17, 234, **CLA-183**.

[438] *CEF Energia BV v Italian Republic*, SCC Case No. 2015/158, Award, 16 January 2019, ¶¶ 235-246, **CLA-183**.

[439] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 564, **CLA-090**.

[440] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 575, **CLA-090**.

[441] *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 547-551, **CLA-080**.

[442] *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports 1974, 20 December 1974, ¶ 46, **CLA-184**; *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, 20 December 1988, ¶ 94, **CLA-185**.

manner in which a State is required to perform its treaty obligations."[443] As reinforced under the Vienna Convention on the Law of Treaties, "[e]*very treaty in force is binding upon the parties to it and must be performed by them in good faith.*"[444] Accordingly, in application of the principle of good faith, a State is under an obligation to "*apply* [a treaty] *in a reasonable way and in such a manner that its purpose can be realized.*"[445]

226. The principle of good faith has equally been endorsed under investment treaty law. Investment treaty tribunals have acknowledged that "[g]*ood faith is a supreme principle, which governs legal relations in all of their aspects and content…*"[446] and that "*the safeguarding of good faith is one of the fundamental principles of international law and the law of investments.*"[447]

227. In the context of investment treaty protection, the arbitral tribunal in *Sempra v Argentina* emphasised that the:

> "*requirement of good faith* […] *permeates the whole approach to the protection granted under treaties and contracts. Even if the standard were restricted to a question of reasonableness and proportionality not entailing objective liability* […] *there are nevertheless expectations arising from promises that must be respected when relied upon by the beneficiary.*"[448]

228. Similarly, the arbitral tribunal in *Tecmed v Mexico* stated: "*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.*"[449]

229. In light of this, the principle of good faith imposes an obligation on the Respondent to respect any representations, promises or commitments it has made, upon which the Claimant has effectively relied. Any actions by the Respondent to the contrary, would be deemed in violation of the principle of good faith. Indeed, in *Mobil v Argentina*, the arbitral

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[443] *Mobil Investments v Canada (III)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 168, **CLA-186**.

[444] VCLT, Art. 26, **CLA-018**.

[445] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, ¶ 142, **CLA-118**.

[446] *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶ 230, **CLA-187**.

[447] *Malicorp Limited v the Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 116, **CLA-188**.

[448] *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 299, **CLA-189**.

[449] *Tecnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154, **CLA-063**.

tribunal expressly found that Argentina was prevented from denying the Claimant's rights which had been recognised by Argentinian officials.[450] The tribunal held in this regard that:

> *"the principle of good faith and the doctrine of venire contra factum proprium prevent Argentina from denying the validity of the Claimants' acquisition or ownership of the above interests and others constituting its investment. Argentina has consistently and repeatedly, for about a decade recognised and acted on the basis of the validity of the Claimants' title. By its own actions and those of its provincial authorities, for which it clearly bears responsibility under international law, it has shown that it regards the Claimants as the rightful holders of title."*[451]

230. Moreover, in *Chevron v Ecuador*, the arbitral tribunal explained that the:

> *"duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."*[452]

231. As referred to above, the Ogun State Government expressly represented to Zhongfu Nigeria that CAI's shareholding rights in the OGFTZ Company had been terminated and, when entering into the JVA 2013, Zhongfu Nigeria was to acquire its own shareholding rights in the OGFTZ Company.[453] Following the claims of NSG to the Zone in April 2014, Zhongfu Nigeria was subsequently assured of its status in respect of the OGFTZ Company by the Ogun State Government,[454] with such assurances being also confirmed by the lawyer for the OGFTZ Company and the third counter-party to the JVA 2013, Zenith.[455]

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[450] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 221, **CLA-175**.

[451] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 200, **CLA-175**. See also *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 135, **CLA-150**.

[452] *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Award on Track II, 30 August 2018, ¶ 7.106, **CLA-190**.

[453] See, for example, 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**; JVA 2013, pp. 3-4, Clauses 1.9 and 2.1-2.2 **C-008**.

[454] 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**.

[455] Letter from M.A. Banire & Associates to Zhongfu International Investment (NIG) FZE, 28 April 2014, **C-095**; Letter from Zenith Global Merchant Ltd. to Office of the Secretary to the State Government, Ogun State, 23 April 2014, **C-094**.

232. On the basis of these representations, Zhongfu Nigeria continued to invest significant amounts of its own capital into the development of the Zone. Further, the Respondent recognised Zhongfu Nigeria's shareholding rights by not only assuring it of such rights but also knowingly permitting Zhongfu Nigeria to continue investing in the development of the Zone for a period of nearly 2.5 years from the date of signing of the JVA 2013. The Respondent's conduct now to seek to row back on and deny the veracity of its own previous representations concerning the termination of CAI's and acquisition of Zhongfu Nigeria's shareholding rights in the OGFTZ Company offends against the principle of good faith. As in the case of *Chevron v Ecuador*, by virtue of such principle, the Respondent is precluded from "*affirm*[ing] *a thing at one time and* [...] *deny*[ing] *that same thing at another time according to the mere exigencies of the moment.*"[456]

233. Accordingly, the Respondent must comply with its commitments in good faith. This principle would be breached if the Respondent were to not respect the provisions of the JVA 2013 which provide Zhongfu Nigeria with shareholding rights in the OGFTZ Company. The Respondent should, therefore, be precluded from seeking to go back on its representations, contrary to the principle of good faith, and deny that the shareholding rights of CAI in the OGFTZ Company were terminated and Zhongfu Nigeria acquired its own shareholding rights in respect of the same company.

7. The doctrine of estoppel under international law prevents the Respondent from now asserting that Zhongfu Nigeria does not have shareholding rights in the OGFTZ Company

234. In its Statement of Defence, the Respondent denies that Zhongfu Nigeria had shareholding rights in the OGFTZ Company.[457] However, as set out above, the Respondent, through its State organs, explicitly represented and assured Zhongfu Nigeria that it had shareholding rights in the OGFTZ Company and that it had previously terminated the shareholding of CAI in the OGFTZ Company. The Respondent's purported *volte-face* is precluded by the doctrine of estoppel in international law.

235. The doctrine of estoppel is a general principle of international law based on the principles of good faith and consistency.[458] As Judge Spender held in the *Temple of Preah Vihear* case:

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[456] *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Award on Track II, 30 August 2018, ¶ 7.106, **CLA-190**.

[457] Statement of Defence, ¶¶ 55 and 72.

[458] The principle is also known as *non licet venire contra factum proprium* or *allegans contraria non audiendus est*. See, for example, *Duke Energy International Peru investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶

> *"the principle* [of estoppel] *operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself."*[459]

236. The doctrine precludes a party from asserting or acting contrary to a previous (express or implied) statement of fact.[460] Thus, estoppel works as a safeguard against the injustice of that party going back on its word or deed.[461] The application of this doctrine in investment treaty arbitration has been repeatedly confirmed by multiple arbitral tribunals.[462] There are three requirements for estoppel to apply under international law.[463] The State must have made:

(a) an unambiguous statement of fact;

(b) which is voluntary, unconditional and authorised; and

(c) which is relied on in good faith to the detriment of the other party or to the advantage of the State making the statement.[464]

237. The three elements of this test are evidently satisfied in the present case.

238. First, the Ogun State Government made unequivocal statements of fact representing that Zhongfu Nigeria had a 60% shareholding right in the OGFTZ Company in accordance with

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231, **CLA-191;** *Legal Status of Eastern Greenland (Denmark v Norway)*, Judgment, 5 April 1933, PCIJ Series A/B No. 53, pp. 68-69, **CLA-192**; *Oded Besserglik v Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 423, **CLA-193.**

[459] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Judgment on the Merits, 15 June 1962, ICJ Reports 1962, Dissenting Opinion of Sir Percy Spender, pp. 143-144, **CLA-194**. See also, for example, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Reports 1969, ¶ 30, **CLA-195**; *Case concerning the Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)*, Judgment on Preliminary Objections, 24 July 1964, ICJ Reports 1964, pp. 24-25, **CLA-196.**

[460] *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶ 7.89, **CLA-190.**

[461] *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America*, Order of the Consolidation Tribunal, 7 September 2005, ¶ 168, **CLA-197**; *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶¶ 159-160, **CLA-152.**

[462] See, for example, *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, ¶ 47, **CLA-198**; *CME Czech Republic B.V. v Czech Republic*, Final Award, 14 March 2003, ¶ 488, **CLA- 079**; *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador* (II), PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶ 7.106, **CLA-190.**

[463] See *Pope & Talbot Inc. v Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶ 111, **CLA-199**.

[464] *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶¶ 231, 245-246, **CLA-191**.

the terms of the JVA 2013.[465] This representation was unambiguous from recitals and operative terms of the JVA 2013, which confirm:

(a) "[CAI] *was* ***participating*** *in the* [OGFTZ Company] *but* ***its participation*** *in the* [OGFTZ Company] ***has been terminated*** *by the* [Ogun State Government] *vide a letter dated 15th March, 2012 from the office of the Secretary to* [the Ogun State Government]";[466]

(b) The "[p]*arties* [to the JVA 2013] ***have agreed to take over the shareholding structure of the*** [OGFTZ Company] *which shall be responsible to take over and carry out all the obligations of the* [OGFTZ Company] *which includes, development, operation, management and administration of the* [Zone] *and to do such acts, matters and things as may be consistent with, necessary for or incidental to the attainment of any of the foregoing and matters hereinafter stated*";[467]

(c) "***Further to the incorporation of the*** [OGFTZ Company], ***the shareholding structure is hereby adjusted to reflect the new parties*** *for the purpose of taking over the development, management and operation of the* [Zone]";[468] and

(d) the OGFTZ Company, with authorised share capital of NGN 2 billion and issued share capital of NGN 1 billion, "***is hereby readjusted***" **with Zhongfu Nigeria being allocated 60% of the shareholding.**[469]

239. In addition to the representations made in the JVA 2013, Dr. Han explains that the actions of the Ogun State Government, as understood by the Claimant's representative, further confirmed Zhongfu Nigeria's shareholding rights in the OGFTZ Company. Dr. Han states:

> "*Jeffrey told me that he had successfully completed negotiations on behalf of Zhongfu Nigeria with the Ogun State Government for a majority shareholding in the OGFTZ Company* [...]
>
> *I was particularly pleased that Zhongfu Nigeria had been given a majority shareholding in the OGFTZ Company as it meant that Zhongfu Nigeria had more security in respect of the investment into the Zone and would receive additional revenue streams.*"[470]

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[465] See *African Continental Seaways Ltd. v Nigerian Dredging Roads and General Works Ltd.* [1977] NSCC 323, **CLA-200**.

[466] JVA 2013, p. 3, **C-008** (emphasis added).

[467] JVA 2013, pp. 3-4, **C-008** (emphasis added).

[466] JVA 2013, Clause 2.1, **C-008** (emphasis added).

[469] JVA 2013, Clause 2.2, **C-008** (emphasis added).

[470] Second Witness Statement of Jason Han, 23 January 2020, ¶¶ 37-38. See also Second Witness Statement of John Xue, 22 January 2020, ¶ 11.

240. Moreover, repeated assurances given to Zhongfu Nigeria on behalf of the Respondent are pertinent. For example:

(a) In an April 2014 letter from the coordinator of the Zone to the Ogun State Government, Mr. Onas referred to CAI as the "*old manager/stakeholder, whose appointment as manager and caretaker of the* [Z]*one had been terminated*";[471] and

(b) In a May 2016 letter from Mr. Adeoluwa to Zhongfu Nigeria, Mr. Adeoluwa referred to the "*management* ***& participation rights*** *of Messrs* [Zhongfu Nigeria] *in the Ogun Guangdong Free Trade Zone.*"[472]

241. Second, the statements of fact were made in a voluntary and unconditional manner by the Respondent's representatives. As explained in *Duke Energy v Peru*, the State "*assumes the risk for the acts of its organs or officials which, by their nature, may reasonably induce reliance in third parties.*"[473] Thus, the decisive element for estoppel "*is the reasonable appearance that the representation binds the State.*"[474]

242. Third, Zhongfu Nigeria and the Claimant relied on these statements in good faith to their detriment. On the basis of the representations and assurances, the Claimant continued to invest its time, expertise and significant capital in the development of the Zone. For example, part of Zhongfu Nigeria's initial capital investment was made by way of loans to the OGFTZ Company. Those loans, totally NGN 827,532,307, were subsequently converted to an equity contribution into the OGFTZ Company.[475]

243. In the words of the tribunal in *Duke Energy v Peru*, the Respondent's contention that Zhongfu Nigeria was solely the manager of the Zone and not a shareholder "*flies in the face of all of the evidence.*"[476] Accordingly, the doctrine of estoppel acts as a bar to the Respondent's contention that Zhongfu Nigeria was merely the manager of the Zone and did not have shareholding rights in the OGFTZ Company.[477]

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[471] Letter from Zenith Global Merchant Ltd. to Office of the Secretary to the State Government, Ogun State, 23 April 2014, **C-094**.

[472] 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** (emphasis added).

[473] *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶ 246, **CLA-191**.

[474] *Duke Energy International Peru investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶¶ 247, 434, **CLA-191**.

[475] Minutes of Meeting of Directors of Zhongfu International Investment (NIG) FZE, 31 December 2015, **C-210**.

[476] *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶ 439, **CLA-191**.

[477] *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 475, **CLA-076**. See also *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 628, **CLA-139**.

B The Respondent failed to afford continuous protection to the Claimant's investment

244. 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.*"[478]

245. The Respondent does not dispute that it has an obligation to afford the Claimant's investment continuous protection, but asserts a blanket denial that it breached the Treaty.[479] As shown above, the actions taken by the Respondent, as well as its inaction in protecting the Claimant's investment, breached its obligations to protect the Claimant's investment since the Respondent failed to provide physical as well as legal security to the Claimant's investment.[480]

246. In *Biwater Gauff v Tanzania*, the tribunal found that the actions by State organs and representatives in removing the management from the offices of the investor and the seizure of the claimant's subsidiary's premises amounted to a violation of the respondent's obligation to ensure full protection and security.[481] Similarly in the present case, the actions by Nigerian State organs and representatives in forcing Zhongfu Nigeria from the Zone and from the country violates the Respondent's obligation to provide continuous protection. The Respondent's actions, and inaction, in failing to protect the Claimant's investment included, amongst other things:

(a) the Ogun State Government threatening and intimidating the Zhongfu Nigeria Management Team leading to them leaving Nigeria in fear of their safety;[482]

(b) NEPZA and the Nigerian police participating in the taking over of the Zone on 22 July 2016 and assisting NSG in forcibly removing Zhongfu Nigeria;[483]

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[478] China-Nigeria BIT, Art. 2(2), **CLA-001**.

[479] Statement of Defence, ¶ 134.

[480] Statement of Claim, ¶¶ 255-256, 258-260.

[481] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 730-731, **CLA-061**.

[482] Text message from Taiwo Adeoluwa to Jianxin (Jason) Han, 16 July 2016, **C-196**; First Witness Statement of Jason Han, 30 April 2019, ¶¶ 95-131; Second Witness Statement of Jason Han, 23 January 2020, ¶ 54; Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 9; Second Witness Statement of John Xue, 22 January 2020, ¶ 24.

[483] 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**; Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Report from Steve Allen, 30 March 2017, **C-183**.

(c) the Nigerian police arresting, detaining and mistreating Mr. Zhao; [484]

(d) the Respondent allowing NSG to harass and intimidate Zhongfu Nigeria's employees;[485]

(e) the Respondent failing to protect the Claimant's legal rights under the Fucheng Industrial Park Agreement by depriving Zhongfu Nigeria of the ability to operate in the Zone, despite the Respondent now claiming that Zhongfu Nigeria is a valid tenant in the Zone;[486] and

(f) the Inspector-General of Police failing properly to investigate and disclose the outcome of any investigation into the mistreatment of Mr. Zhao.[487]

C The Respondent took unreasonable measures

247. Article 2(3) of the Treaty prohibits the Respondent 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.*"[488]

248. The Respondent has not disputed the Claimant's articulation of this treaty standard. Accordingly, as shown above, the Respondent has violated this treaty standard as its conduct in respect of the Claimant's investment was unreasonable in multiple respects, including through the following actions.

1. The Respondent evicted Zhongfu Nigeria from the Zone and eviscerated its rights under the JVA 2013 and Fucheng Industrial Park Agreement without any proper basis

249. Beyond the purported termination of the JVA 2013 by the Respondent the day after receiving a request for a meeting from Zhongfu Nigeria, the Respondent's actions, through NEPZA and the Nigerian police, to force Zhongfu Nigeria out of the Zone were manifestly unreasonable.

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[484] First Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 10-36. See also Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 5.

[485] Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Report from Steve Allen, 30 March 2017, **C-183**.

[486] Statement of Defence, ¶ 83.

[487] Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 8.

[488] China-Nigeria BIT, Art. 2(3), **CLA-001** (emphasis added).

250. First, the Respondent's claimed rationale for purporting to terminate the JVA 2013 is that it was required to give effect to the request of the Chinese Consulate in Note 1601. However, the Respondent – without any reasonable basis – mischaracterises the content of Note 1601 to justify the termination. As explained above, Note 1601 was a letter sent from the Chinese Consulate in Lagos to Ogun State on 11 March 2016 stating that it received a notification by the State-owned Assets Supervision and Administration Commission of Guangdong Province "*about the replacement of shareholdings owner of* [CAI] *from* [GXI] *to* [NSG]." Contrary to the Respondent's position, Note 1601 does not make a single reference to fraud, corruption or misconduct of Zhongfu Nigeria, either explicitly nor by implication.[489] Further, the Respondent now asserts a series of inconsistent *post-facto* arguments for why the JVA 2013 was allegedly not entered into, not enforced, not binding or was allegedly breached by Zhongfu Nigeria.[490]

251. Second, this conduct is even more egregious considering that the Ogun State Government gave explicit assurances in 2014 to Zhongfu Nigeria that CAI's shareholding in the OGFTZ Company had been terminated and that NSG had no interest in the OGFTZ Company.[491] It was consequently unreasonable for the Respondent to reverse its position, deny the Claimant's shareholding rights in the OGFTZ Company and take action to remove Zhongfu Nigeria from the Zone.

252. Third, the Respondent's conduct eviscerated the Claimant's rights under the Fucheng Industrial Park Agreement by preventing Zhongfu Nigeria from accessing the Zone. This was despite the repeated pleas from Zhongfu Nigeria's legal counsel that Zhongfu Nigeria retained valid and subsisting rights.

253. In its termination letter dated 27 May 2016, the Respondent directed Zhongfu Nigeria to "*vacate the Zone within 30 days.*"[492] Zhongfu Nigeria and its lawyers repeatedly wrote to ask for NEPZA's assistance in preserving Zhongfu Nigeria's rights under the Fucheng Industrial Park Agreement.[493] The Respondent behaved unreasonably by ignoring Zhongfu Nigeria's pleas.

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[489] Statement of Defence, ¶¶ 89 and 92; Witness Statement of Taiwo Adeoiuwa, 14 October 2019, ¶ 66.

[490] Statement of Defence, ¶¶ 85-89, 99; 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**.

[491] 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**.

[492] 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**. This letter contrasts sharply with Mr. Adeoiuwa's assertion that OSGS did not evict Zhongfu Nigeria from the Zone. Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶ 37.

[493] Letter from G. Elias & Co. to Managing Director of NEPZA, 21 September 2016, **C-180**; Letter from G. Elias & Co. to NEPZA, 21 September 2016, **C-181**; Letter from G. Elias & Co. to Managing Director of NEPZA, 21 September 2016, **C-181**. See also Letter from

2. The Respondent harassed, intimidated and detained the employees of Zhongfu Nigeria

254. Moreover, the Respondent harassed and intimidated Zhongfu Nigeria's staff and the Nigerian police arrested and detained Mr. Zhao on alleged charges of criminal breach of trust. In its signature blanket denial, the Respondent argues that no threats took place and that the police arrested Mr. Zhao "*pursuant to its responsibilities under Nigerian law to investigate crime and prosecute offenders in order to protect lives and properties of every one living in the Country.*"[494]

255. Moreover, the Respondent alleges that the police acted in compliance with Nigerian law. This is not true. The following circumstances surrounding Mr. Zhao's detention constitute flagrant breaches of Nigerian law:

(a) Mr. Zhao was not promptly informed of the charges against him in a language that he understood.[495]

(b) Mr. Zhao was not charged nor brought to court within the first 24 hours of his arrest.[496]

(c) Mr. Zhao was intimidated into answering questions without the presence of his lawyer.[497]

(d) Mr. Zhao's right not to be treated in an inhumane and degrading manner was violated on multiple occasions.[498] Among other treatment he was subjected to, he was beaten, not given regular food and water, denied proper shelter and clothing.[499]

G. Elias & Co. to NEPZA, 8 May 2017, **C-202**; Letter from G. Elias & Co to NEPZA, 12 June 2017, **C-222**; Letter from Zhongfu International Investment (NIG) FZE to NEPZA, 22 August 2017, **C-198**.

[494] Statement of Defence, ¶ 108.

[495] Constitution of the Federal Republic of Nigeria 1999, Section 35(3), **C-195**: "*Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention.*"

[496] Constitution of the Federal Republic of Nigeria 1999, Section 35(4) and 35(5)(a), **C-195**: "*Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time*"; "*in subsection (4) of this section, the expression 'a reasonable time' means - (a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day.*"; African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, Art. 7.1(d), **CLA-201**.

[497] Administration of Criminal Justice Act 2015, Section 6(2), **CLA-202**: "*The police officer or the person making the arrest or the police officer in charge of a police station shall inform the suspect of his rights to:* [...] *consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest*"; African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, Art. 7.1(c), **CLA-201**.

[498] Constitution of the Federal Republic of Nigeria 1999, Section 34(1)(a), **C-195**: "*Every individual is entitled to respect for the dignity of his person, and accordingly – (a) no person shall be subject to torture or to inhuman or degrading treatment*""; African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, Art. 5, **CLA-201**. See also *A.G. Kebbi State v Jokolo* (2013) LPELR-22349(CA), **CLA-203**.

[499] First Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 17-37. See also Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 15.

(e) Mr. Zhao's treatment at the hands of the Nigerian police amounted to torture under Nigerian law.[500] As set out in the *A.G. Kebbi State v Jokolo* case, torture under Nigerian law has been defined as "*the infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.*"[501] As Mr. Zhao explains, he was the victim of physical abuse, he was forced to witness brutal violence, he was made to believe he would be forced to physically attack another prisoner and he was forced to watch horrific videos.[502] Such conduct is contrary to the Respondent's obligations under its own law and under international law, including the Respondent's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the Respondent is a contracting party.[503]

3. The Respondent unreasonably prevented Zhongfu Nigeria exercising its contractual rights under the JVA 2013 in international arbitration

256. It was also unreasonable for the High Court to issue the anti-suit injunction preventing the parties from continuing with the Singapore Arbitration Proceedings. As held by the tribunal in *Vivendi v Argentina* concerning the enactment of two laws designed to prevent the claimant from pursuing lawsuits:

> "[t]*hese measures were, and can only be seen as a vindictive exercise of sovereign power aimed at punishing CAA and its shareholders for seeking to terminate the Concession Agreement and for exercising their rights to arbitrate under the BIT.*"[504]

257. Considering the arbitration clause in the JVA 2013, it is undeniable that the Respondent's courts went out of their way to stop Zhongfu Nigeria from exercising its rights to a fair and independent arbitral tribunal. This judgment undoubtedly amounts to an unreasonable measure under the Treaty.

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[500] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, Art. 5, **CLA-201**.

[501] *A.G. Kebbi State v Jokolo* (2013) LPELR-22349(CA), p. 25, **CLA-203**.

[502] First Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 34; Second Witness Statement of Wenxiao (Areak) Zhao, 21 January 2020, ¶ 5.

[503] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS, Vol. 1465, p. 85, **CLA-204**.

[504] *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, ¶ 7.4.45, **CLA-108**.

D The Respondent expropriated the Claimant's investment without compensation

258. Article 4 of the Treaty provides that:

> *"Neither Contracting Party shall exproprlate, 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 convertlble and freely transferable. The compensation shall be paid without unreasonable delay and include interest at a normal commercial rate."*[505]

259. The Respondent has, again, not disputed the Claimant's articulation of this treaty standard. It has, however, denied that it "*act*[ed] *either directly or indirectly in a way or manner to expropriate either directly or indirectly the investments of the Claimant in OGFTZ*."[506] As shown above, the Respondent's measures resulted in the deprivation or taking of the Claimant's rights and assets in Nigeria. The failure of the Respondent to satisfy any one of the conditions in Article 4 of the Treaty renders the taking unlawful.[507] As the Claimant has not received any compensation for the expropriation of its investment – a point which has not been denied by the Respondent – it was an unlawful expropriation under Article 4 of the Treaty.[508] Furthermore, the Respondent has also not claimed that the expropriation was done for a public purpose nor under any domestic legal procedure.

260. As shown above, multiple actions of the Respondent, and its State organs, constitute an expropriation of the Claimant's investment, these include:

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[505] China-Nigeria BIT, Art. 4, **CLA-001**.

[506] Statement of Defence, ¶ 134.

[507] *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, ¶ 98, **CLA-114**.

[508] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 497-498, **CLA-080**; *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20, Award, 16 May 2012, ¶ 305, **CLA-205**.

(a) *The deprivation by the Respondent of the Claimant's rights and economic benefit under the Fucheng Industrial Park Agreement.* As demonstrated, the Respondent's position that Zhongfu Nigeria is still recognised as a tenant in the Zone and any rights conferred on it by the Fucheng Industrial Park Agreement are still subsisting,[509] is fanciful and is contradicted by the evidence on the record. Through the use of the police and NEPZA, Zhongfu Nigeria was intimidated, harassed and forcefully removed from the Zone. It was "*directed to* [...] *vacate the Zone within 30 days*", which rendered impossible the continuation of its investment and blocked its further involvement in the Zone in all capacities.[510] The direct threats from the Secretary to the Ogun State Government to Dr. Han led to the Management Team to leave the Zone, and the arrest, detention and inhumane treatment levelled against Mr. Zhao led the Management Team to flee Nigeria. These actions resulted in Zhongfu Nigeria's business no longer being able to function in Nigeria and rendered the investment worthless. The evidence that leading and experienced international businessmen fled Nigeria, leaving their substantial investment, highlights that an expropriation took place.

(b) *The evisceration of Zhongfu Nigeria's rights under the JVA 2013, including its shareholding rights in the OGFTZ Company.* As shown above, the Respondent's argument that the JVA 2013 only concerned management rights to the Zone and did not concern shareholding rights is contradicted by the text of the JVA 2013 and multiple representations and assurances made by the Ogun State Government, including those made in the JVA 2013 itself. Accordingly, the Respondent's assertion that the Claimant does not currently have shareholding rights, leads to only one conclusion, which is that they were eviscerated by the Respondent.

(c) *The seizure of Zhongfu Nigeria's physical assets.* Aside from the assets and infrastructure which was built in the Zone,[511] some of Zhongfu Nigeria's physical assets taken included: vehicles, construction materials (which included, for example,

[509] Statement of Defence, ¶ 95.

[510] 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**. This letter contrasts sharply with Mr. Adeoluwa's assertion that the Ogun State Government did not evict Zhongfu Nigeria from the Zone. Witness Statement of Taiwo Adeoluwa, 14 October 2019, ¶ 37.

[511] 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**; 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**.

cement mixers, payloaders, a crane, road rollers, bulldozers and tipper trucks), offices and equipment.[512]

VIII. THE CLAIMANT IS ENTITLED TO COMPENSATION FOR ITS LOSSES

261. As a result of the Respondent's breaches of the Treaty, the Claimant is entitled to compensation for the losses it has suffered in relation to its investment in Nigeria. As set out in the Statement of Claim and underlined in Section IV above, the measures taken by the Respondent have destroyed the Claimant's investment, or alternatively have at least substantially deprived the Claimant of the value of its investment.

262. The Respondent has sought – implausibly – to challenge the role of Zhongfu Nigeria in developing the Zone.[513] However, the Respondent has not disputed, nor provided any evidence to refute the value of the losses suffered by the Claimant. With its Statement of Claim, the Claimant filed the FTI Report of Mr. Noel Matthews, Senior Managing Director at FTI Consulting ("**FTI**" or "**Mr. Matthews**") dated 1 May 2019 (the "**FTI Report**"). The Respondent does not engage with Mr. Matthews' findings contained in the FTI Report nor does it provide evidence to dispute the methodology he has used to calculate the quantum of damages due to the Claimant as compensation for the losses it has suffered in relation to its investments in Nigeria.[514] Similarly, the Respondent does not provide an alternative methodology or calculation of compensation due to the Claimant.

263. Reaffirming the Claimant's position set out in its Statement of Claim, in accordance with international law, the Claimant seeks full reparation for its losses caused by the Respondent's actions, which deprived the Claimant of the value of its investment.[515] The Claimant is entitled to compensation for loss of profits, loss of future profits and loss of assets caused by the Respondent's breaches of the Treaty.[516]

264. For the reasons set out in the Statement of Claim, the appropriate method to calculate reparation for the Claimant's losses, which has been applied by Mr. Matthews in the FTI Report, is the DCF method.[517] This method has been used to calculate the fair market

[512] First Witness Statement of Jason Han, 30 April 2019, ¶¶ 66, 72; Commercial Invoice from Ghassan Aboud Cars Dubai, UAE, to Zhongfu International Investment (NIG) FZE, 3 January 2015, **C-111**; 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**; Report from Steve Allen, 30 March 2017, **C-183**.

[513] Statement of Defence, ¶ 57.

[514] Statement of Defence, ¶ 39.

[515] Statement of Claim, ¶¶ 298-300.

[516] Statement of Claim, ¶¶ 301-307.

[517] Statement of Claim, ¶¶ 308-316.

value of the Claimant's expropriated investment in Nigeria as at 22 July 2016.[518] The DCF method projects the future cash flows that would have been generated by the Claimant's investment in the Zone, and discounts those cash flows to 22 July 2016.[519] On the basis of the DCF method, the value of the Claimant's losses is assessed at US$1,078 million.[520]

265. As an alternative and a cross-check, Mr. Matthews has also calculated the amount of compensation due to the Claimant on the basis of a comparable approach by considering comparable assets at the time of the Claimant's investment in the Zone; in particular, two transactions in the Nkok free trade zone in Gabon.[521] By reference to a comparable Nkok SEZ transaction in 2014, the implied land valuation was calculated at US$26.6 per square metre.[522] Using this figure, the comparable approach valued the Claimant's losses at US$1,446 million.[523]

266. The Claimant and its representatives have also suffered shocking treatment at the hands of organs of the Respondent, including physical abuse, assaults, and threats to personal safety. The Claimant is entitled to moral damages for these actions and mistreatment and has so claimed.[524] Moral damages are claimed in the amount of US$1 million, or such other amount to be determined by the Tribunal.[525]

267. In order to receive full reparation under customary international law, the Claimant re-iterates its request for pre-award and post-award interest, at the commercially reasonable rate which the Claimant would have been able to borrow at the Valuation Date, calculated in the FTI Report to be one-month US$ LIBOR plus 2%.[526]

IX. RELIEF SOUGHT BY THE CLAIMANT

268. The Claimant maintains its request for relief and 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:

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[518] Statement of Claim, ¶ 322; FTI Report, p. ii.

[519] Statement of Claim, ¶¶ 333-360; FTI Report, ¶ 7.61 and Appendix 7-3.

[520] Statement of Claim, ¶¶ 361; FTI Report, ¶ 7.65.

[521] Statement of Claim, ¶¶ 362-365; FTI Report, ¶ 8.12.

[522] Statement of Claim, ¶¶ 366; FTI Report, ¶ 8.18.

[523] Statement of Claim, ¶¶ 367; FTI Report, ¶ 8.21.

[524] Statement of Claim, ¶¶ 323-331.

[525] Statement of Claim, ¶¶ 14-15 and 328-330.

[526] Statement of Claim, ¶¶ 369-372; FTI Report, ¶ 2.18.

(a) Declaring that the Respondent has breached Article 3(1) of the Treaty by failing to accord the Claimant's investment fair and equitable treatment;

(b) Declaring that the Respondent has breached Article 2(2) of the Treaty by failing to accord the Claimant's investment continuous protection;

(c) 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;

(d) 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;

(e) 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;

(f) 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;

(g) 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;

(h) Ordering the Respondent to indemnify the Claimant for all costs and expenses of the arbitral proceedings; and

(i) Ordering such further and / or other relief as the Tribunal deems just and appropriate.

Respectfully submitted,

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31 January 2020