The Protection of Foreign Investments: The Zhongshan Investment Claim and Lessons for Nigeria

By:

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1. Introduction

In March 2021, in a final award issued from an investment arbitration, the sum of $55 million was awarded against Nigeria in favour of a Chinese investor, Zhongshan Fucheng Industrial Investment Co Ltd (Zhongshan), in what may be considered as the first successful investment claim instituted against Nigeria. In January 2022, it was in the news that the Chinese investor had sought to enforce the sum awarded, which at the time stood at about $70 million, before a court in Washington DC, in the United States (US).

The above case signifies how foreign investment protection, as usually contained in investment treaties, is enforced and the financial implication for

the host State. This note will briefly discuss the protection of foreign investment in international law in Nigeria – an important, but often understated, area of (international) law, its significance and how it achieves its purpose. More importantly, it will highlight the lessons Nigeria could draw from this recent successful investment claim, which if successfully enforced will be at the expense of tax-paying citizens.

2. Investment Treaties and Foreign Investment Protection in Nigeria

Investment treaties represent the undertakings of the host State guaranteeing protection to the national of the contracting State(s) (who is a foreign investor in the host State). Generally, the main purpose of investment treaties (and more popularly BITs) is to protect foreign investors and their investments in their host State. The usual protection guaranteed by the host State include but are not limited to the following: non-discrimination, which includes national treatment and most-favoured-nation treatment; fair and equitable treatment; full protection and security; and expropriation.

Nigeria's journey into investment treaty making – that is, providing guarantees to foreign investors mainly through bilateral investment treaties (BITs) – began in the early 1990s. Nigeria's first set of BITs were the Nigeria – United Kingdom (UK) BIT and Nigeria – France BIT, both in 1990. Since then, Nigeria has, presently, concluded 29 BITs (with 14 in force) with States of ranging development status, including one with China – that is, the China – Nigeria BIT 2001 – which amongst other provisions contain guarantees against discrimination, unfair treatment and expropriation.

These guaranteed protections culminate into investment obligations owed to the foreign investor by the host State. More, in guaranteeing to offer a foreign investor the above-stated protection, the host State further offers that any dispute that may arise as a result of a violation or perceived violation of any of the investment obligations contained in the investment treaty will usually be referred to arbitration (often called investor-State arbitration, investment treaty arbitration or investment arbitration) for resolution.

Currently, almost 1200 investment treaty-based claims have been instituted against host States. In 2021 alone, according to reports, over 60 new investment claims were initiated, and over 80 investment awards were

delivered. It is for this reason that, presently, aside from investor-related disputes instituted before domestic courts/tribunals, investor-State arbitration has been the most popular and largely the most potent mechanism of resolving disputes between host States and foreign investors, and more importantly for enforcing acquired foreign investor rights. This was the case of Zhongshan, the subject of this piece.

3. Background of the Case and Award

In 2010, Zhuhai Zhongfu Industrial Group Co Ltd (Zhuhai), Zhongshan's parent company, acquired rights from the Ogun State Government (represented by the OGFTZ Company) by virtue of a framework agreement to develop a Fucheng Park (Park) in the Ogun Guangdong Free Trade Zone (the Zone) in Ogun State. Further to the agreement and representations made, in 2011, Zhongshan incorporated a local company, Zhongfu International Investment (Nig) FZE (Zhongfu), to operate and manage the Park to be built in line with the agreement.

After acquiring the rights to develop the Park in the Zone, from 2010, Zhuhai and Zhongfu carried out extensive work towards developing the Park, which included erecting a perimeter fence, installing and/or upgrading road networks, upgrading the sewage system, upgrading power network in the park. Zhongfu further negotiated improved communications systems, the opening of a bank, supermarket and a hotel, all in a bid to attract potential occupiers – who were eventually attracted and let spaces for a period between 10-50 years.

In 2012, Zhongfu was appointed the interim manager of the Zone, after the appointment of the previous manager was terminated. In 2013, after concluding a joint venture agreement (JVA) with Ogun State and another party, Zhongfu was confirmed as the substantive manager of the Zone. As part of the JVA, Zhongfu acquired a majority stake in OGFTZ company. In 2014, further representations were made to Zhongfu on behalf of Ogun State confirming its position as the manager and administrator of the Zone, further solidifying Zhongfu's interest (and by extension that of Zhongshan) in the Zone.

In 2016, an issue arose as to how Zhongfu had obtained the rights to manage and administer the Park. Unfortunately, the issue was not resolved leading to threats, subtle and actual, by and on behalf of Ogun State Government to

remove Zhongfu from the State and Nigeria. By July 2016, at the instance of Ogun State Government, the work permits of the foreign staff at Zhongfu were sought to be retrieved. There were several actions by the State Government, its representatives and agents intended to remove Zhongfu.

In August 2016, a senior staff of Zhongfu/OGFTZ company was arrested and was alleged to have experienced various human right breaches while in detention for several days. Following these events in 2016, Zhongfu instituted actions at both the Federal High Court, Abuja and Ogun State High Court, seeking injunctive reliefs and damages, and an arbitration claim in 2017. Subsequently, all the proceedings were discontinued in 2018. The staff, who was detained, also instituted an action for his mistreatment.

4. The Investor-State Arbitration and Award.

At the heels of discontinuing above-mentioned legal proceedings, Zhongshan, in August 2018, instituted an investment claim against Nigeria under UNCITRAL arbitration rules based on the China – Nigeria BIT 2001. In the investment arbitration, Zhongshan claimed that the actions of Ogun State Government and other State (and non-State) actors, all being part of the Nigerian State, were arbitrary, unreasonable and discriminatory, did not accord with fair and equitable treatment and deprived it of its substantial investment contrary to the provisions of the China – Nigeria BIT 2001.

A three-person tribunal, made up of Lord Nueberger, presiding, and appointed by the party-appointed arbitrators, Mr. Gearing QC, appointed by Zhongshan, and Mr. Oguneso SAN, appointed by Nigeria, was set up to hear the case. At its conclusion, the tribunal's award found that actions attributable to Nigeria were arbitrary, unreasonable and discriminatory, in breach of its investment obligations in respect of the fair and equitable treatment provision and deprived Zhongshan of its investment, amounting to indirect expropriation and contrary to the expropriation provision. Considering these breaches, the sum of $55 million, including for moral damages, was awarded against Nigeria.

5. Lessons for Nigeria

Some important lessons can be drawn from the Zhongshan case above. These lessons, to be discussed briefly below, though from international investment

law, are important to the general governance approach of the Nigerian State. Before delving into the discussion, it is important to state that the description of these lessons is not intended to subjugate the exercise of Nigeria's sovereign authority to the interests of foreign investors. Rather, it is to highlight the need for nuance, and a better understanding of international obligations, in the manner the State engages with those within its jurisdiction, including foreign investors.

Breach of human rights by the State, through its agents, have consequences, at least at the international level, even though liability might be evaded locally. International investment law, by virtue of investment treaties and investor-State arbitration, has been considered as a specie of global administrative law: capable of checking the excesses of State actions that have damaging effect on foreign investors and investments. As such, there is the need to ensure that due process, the rule of law and respect for human rights are observed, especially where State actions may affect the rights and interests of persons or entities within its jurisdiction.

More, actions attributable to the State that are considered arbitrary, discriminatory and unreasonable often arise from the ignorance of its perpetuators of State obligations and responsibilities in international law. In other words, generally, those that operate under the mandate of the State are unaware of the broader implications of their actions, and the effect of such seemingly routine tasks, which could violate international obligations owed by the State to foreign investors. There is the need, therefore, for a holistic understanding of the legal implications of actions which could be attributed to Nigeria, to ensure, as much as practicable, they align with Nigeria's international obligations.

In this regard, it is immaterial, under international investment law, that the action, which is complained of, was not carried out by the State at the federal level. As such, just like in Zhongshan case above, actions by government at the local level, or by the police or any security agency, including the Immigration Service, or even decisions of the judiciary both at the local and federal level, though not by the executive arm of the Federal Government, such as the President or the Ministers, can be attributed to the Nigerian State. The implication is that Nigeria as a sovereign State, by virtue of obligations in

investment treaties, will have to defend or answer to investment claims with no prior direct involvement.

Another important lesson is as regards the financial implication arising from investment claims, which is usually at the expense of taxpayers. The cost of investor-State arbitration proceedings is capital intensive. This includes administrative fees and arbitrator fees, on one hand, and legal fees, on the other hand, depending on the complexity of the case and the length of time to conclude hearing, often run into millions of dollars. Further, a more serious financial liability that results from investor-State dispute is the investment award, which on average ranges from a few tens to hundreds of millions of dollars.

6. Conclusion

This note discussed how the protection of foreign investors work with the recent investment claim by Zhongshan against Nigeria as an example. It highlighted that investment treaties and investor-State arbitration protect the interests of foreign investors and provide them the mechanism to enforce their acquired rights at the international level. More importantly, the piece argues that the investment award provides an opportunity for lessons for Nigeria, especially on the need for those that act under the mandate of the State, at any level, to be aware of Nigeria's international obligations, including towards foreign investors and the far-reaching implications of their actions.

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