IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

THE FEDERAL REPUBLIC OF NIGERIA

Claimant (Respondent in the arbitration)

- and -

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO. LTD.

Defendant (Claimant in the arbitration)

REMEDY CLAIMED AND GROUNDS ON WHICH CLAIM IS MADE

Without prejudice to and without waiver of immunities or privileges

The Remedy Claimed and Section under which Claim is Made

1. The Claim concerns an award of an arbitral tribunal dated 26 March 2021 in arbitration proceedings commenced by the Defendant to this arbitration claim against the Claimant purportedly under "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" ("the BIT").

2. The Claimant seeks an order under section 67(1)(b) of the 1996 Arbitration Act for an order declaring that the Award on the merits is of no effect in whole (or in such part as

the Court thinks fit) because the tribunal did not have substantive jurisdiction. Alternatively the Claimant applies under s67(1)(a) of the Act and seeks an order under section 67(3) setting aside or varying the Award of the tribunal as to its substantive jurisdiction in such terms as the Court thinks fit.

Any questions on which the claimant seeks the decision of the court

3. The Claimant seeks a decision of the Court on the question of whether the Tribunal had substantive jurisdiction. In particular:
   (1) Was there an "investment" within the meaning of Article 1(1) of the BIT?
   (2) Was the fork in the road provision in the second sentence of Article 9(3) of the BIT engaged on the facts of this case, so that the arbitration provision in the first sentence of Article 9(3) did not apply?
   (3) In the light of the answers to (1) and (2) above, was there a valid arbitration agreement between the parties, alternatively was the alleged dispute within the scope of any arbitration agreement?

Details of any arbitration award challenged by the claimant, identifying which part or parts of the award are challenged and specifying the grounds for the challenge

4. The Claimant challenges the award dated 26 March 2021 ("the Award"), by which the Tribunal awarded the Defendant the principal sums of US$55.6m and US$75,000, plus interest and costs. The Arbitral Tribunal comprised co-arbitrators, Mr Rotimi Oguneso SAN and Mr Matthew Gearing QC, and presiding arbitrator, Lord Neuberger of Abbotsbury.

5. In particular, the Claimant challenges:
   (1) Paragraphs 77 to 79 of the Award, finding that there was an "investment" within the meaning of the BIT.
   (2) Paragraphs 82 to 91 of the Award, finding for the Defendant on the "fork in the road argument" concerning Articles 9(2) and 9(3) of the BIT.
   (3) Paragraph 198a of the Award, finding that the Defendant (ie. Claimant in the arbitration) "has locus to pursue a claim for compensation under the Treaty in respect of its rights under the 2010 Framework Agreement and the 2013 JVA".

"Investment"

6. There was no "investment" within the meaning of the BIT. In particular:

(1) The burden is on the Defendant to establish that there was an "investment" within the meaning of the BIT.

(2) Article 1(1) of the BIT states: "The term "investment" means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, . . ."

(3) An investment within the meaning of the BIT must involve certain objective characteristics, specifically: (i) a contribution; (ii) operational risk; (iii) duration (see eg *Romak v Uzbekistan*; see also *Salini Costruttori SpA v Kingdom of Morocco (ICSID Case No ARB/0/4)*).

(4) In this case, there was no sufficient contribution within the meaning of the BIT and/or the Defendant did not make contributions in accordance with the relevant contractual requirements (or has not proved that it has done so) and/or the Defendant has not proved that it made a sufficient contribution.

(5) Furthermore there was no sufficient "operational risk".

7. Accordingly, there was no valid arbitration agreement between the parties, alternatively the alleged dispute was outside the scope of any arbitration agreement. In particular, under Article 9 of the BIT, the Claimant only consented and/or made a standing offer to arbitrate disputes with "an investor" of the other contracting Party "in connection with an investment" within the meaning of the BIT. In this case, there was no "investment" within the meaning of the BIT.

8. The Tribunal erred in holding that there was an "investment" within the meaning of the BIT. In particular it failed to apply the correct legal principles and/or it erroneously concluded that the Defendant had made a sufficient contribution on the facts.

Fork in the Road

9. The fork in the road provision in the second sentence of Article 9(3) of the BIT was engaged on the facts of this case (see generally *Pantechniki v Albania*, Award 30 July 2009; *H&H Enterprises Investments v Egypt*, Award 6 May 2014; *Supervision y Contgrol v Costa Rica*, Award, 18 January 2017) . In particular:

(1) Article 9 of the BIT provided inter alia:

"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 of the Contracting Party accepting the investment.

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

(2) In this case, "the investor concerned" had "resorted to the procedure specified in Paragraph 2" of Article 9 (ie submitting the dispute to "the competent court of the Contracting Party", in this case Nigeria). In particular:

(a) The Defendant brought proceedings in the Nigerian Courts through its Nigerian incorporated subsidiary, Zhongfu International Investment (NIG) FZE ("Zhongfu") and/or those proceedings must be considered as being brought by the Defendant. That follows from:

(i) The correct interpretation of Article 9 of the BIT and/or

(ii) The fact that the Defendant controlled Zhongfu (given *inter alia* that the Defendant was the majority shareholder of Zhongfu) and/or

(iii) The provision in the BIT that any investment was required to be made "in accordance with the laws and regulations of the other Contracting Party" (ie Nigeria) and/or the "investor's duty to respect the host country's sovereignty and laws" as stated in the preamble of the BIT and the requirement under Nigerian law for any foreign company seeking to do business in Nigeria to do so by obtaining incorporation of a separate entity

in Nigeria (see in particular section 54 of Nigeria's Companies & Allied Matters Act) and/or

(iv) The facts that Zhongfu (rather than the Defendant) entered the 2013 JVA and/or that clause 2.2 of the 2010 Framework Agreement provided that "the actual operation and management organ of Fucheng Industrial Park shall be Party A's wholly-owned subsidiary or a company under Party A's control established in Nigeria with a registered office in Fucheng Industrial Park."

(b) Further or alternatively, Zhongfu brought proceedings in Nigeria which had the same "normative source" and/or the same "fundamental basis" as the treaty claim and/or which pursue the same purposes as the treaty claim and/or the "fundamental basis" of the treaty claim was not autonomous of the claims brought in the Nigerian proceedings. Amongst other matters:

(i) In 2016 Zhongfu brought a claim in the High Court of Ogun State ("the State Court Proceedings") as well a claim in the Federal High Court of Nigeria ("the Federal Court Proceedings"), collectively "the Nigerian Proceedings."

(ii) The treaty claim and Zhongfu's claims in the Nigerian Proceedings arose out of the same factual matrix;

(iii) The treaty claim and the Nigerian Proceedings all concerned alleged rights (and alleged deprivation of rights), in particular rights said to relate to the 2010 Framework Agreement and the 2010 Supplementary Framework Agreement (both of which concerned Fucheng Park); and alleged rights in relation to the Zone.

(iv) In the State Court Proceedings Zhongfu relied specifically on a transfer of rights allegedly from the Defendant herein to itself in relation to Fucheng Park.

(v) In the Nigerian Proceedings and in the treaty claim Diplomatic Note 1601 was said to have played a key role.

(vi) The treaty claim was based on the same alleged wrongful acts (in particular, what the Award describes as "the 2016 Activities") and the same alleged negative impacts as were relied upon by Zhongfu in the Nigerian Proceedings;

(vii) The treaty claim was for damages, whilst Zhongfu also claimed damages in the State Court Proceedings. Furthermore the treaty damages claim was materially co-extensive with Zhongfu's damages claim in the State Court Proceedings of USD 1,000,797,000.00.

(c) Further or alternatively there is no need to show that the Claimant herein was itself a party to the Nigerian proceedings and/or Zhongshan will rely on the facts that Zhongfu brought the State Court Proceedings against *inter alia* Ogun State of Nigeria and the Attorney-General of Ogun State and that it brought the Federal Court Proceedings against *inter alia* Nigeria Export Processing Zones Authority and the Attorney-General of Ogun State.

(d) Further or alternatively, "triple identity" was not the correct test. Alternatively if and insofar as it was the correct test (and/or insofar as certain elements of it applied), then, properly understood, the test was satisfied in this case.

10. Accordingly, there was no valid arbitration agreement between the parties, alternatively the alleged dispute was outside the scope of any arbitration agreement. In particular it follows from the above that the arbitration provision in the first sentence of Article 9(3) "did not apply" and/or that the Claimant did not consent to arbitrate the alleged dispute.

11. The Tribunal erred in applying the wrong legal test ("the triple identity test")" and/or in applying the "triple identity test" incorrectly and/or in failing to apply the correct legal test and/or in failing to recognise that the Nigerian proceeding had been brought by the "investor concerned" within the meaning of the BIT and/or by failing to recognise that the Nigerian proceedings and the treaty claim had the same "normative source" and/or the same fundamental basis.

Statutory Requirements Met

12. The statutory requirements for an application under s67 have been met. In particular, having regard to s70 of the Arbitration Act: (1) there was no available arbitral process of appeal or review; (2) there was no available recourse under s57 of the Arbitration Act 1996; (3) the application has been brought within 28 days of the award.

Furthermore, having regard to s67(1), notice is being given to the Defendant and to the Tribunal.