



TOPE ADEBAYO LP



ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA:

HOW THE CONCEPT OF ATTRIBUTION APPLIES
IN INTERNATIONAL INVESTMENT ARBITRATION

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA: HOW THE CONCEPT OF ATTRIBUTION APPLIES IN INTERNATIONAL INVESTMENT ARBITRATION



INTRODUCTION:

On 14th August 2024, Nigerians woke up to the news of the seizure of three (3) Nigeria's presidential jets, as ordered by a French court.¹ The seizure stems from an application by Zhongshan, a Chinese company whose export processing zone management contract was terminated by the Ogun State government in 2016. Before this time, Nigeria and China had entered a Bilateral Investment Treaty (BIT) in 2001 to encourage investment between both countries. Sometime in 2010, Zhongshan Fucheng Industrial Investment Co. Ltd. (Zhongshan) through its parent company (Zhuhai Zhongfu Industrial Group Co. Ltd), agreed with the Ogun State government to develop the Ogun Guangdong Free Trade Zone (OGFTZ). In 2011,

Zhongshan set up a local entity - Zhongfu International Investment (NIG) FZE (Zhongfu) which was registered by the Nigeria Export Processing Zones Authority, to manage the development of the free trade zone. In 2013, the Ogun State government entered into a Joint Venture agreement with Zhongfu, appointing it as the permanent manager of the OGFTZ and giving it a majority shareholding in the OGFTZ project.² Thereafter, Zhongfu commenced several works regarding the OGFTZ project.

However, it was reported that the Ogun State government abruptly terminated Zhongfu's appointment and also took actions to expel the company from Nigeria, including harassment of its executives and revocation of immigration papers.³ Consequently, Zhongfu initiated an investment treaty arbitration against Nigeria, citing the bilateral investment treaty between the People's Republic of China and Nigeria. On 26th March 2021, an arbitral tribunal issued a final award of \$55,675,000 in addition to an



¹Three Nigerian presidential jet seizure abroad as Ogun State, Chinese firm battle, <https://www.premiumtimesng.com/news/724391-three-nigerian-presidential-jets-seized-abroad-as-ogun-state-chinese-firm-battle.html> accessed on 20th August 2024.

²Explainer: Why Nigerian Presidential aircraft was seized, <https://tribuneonline.ng/explainer-why-nigerian-presidential-aircraft-was-seized/> accessed on 20th August 2024.

³See footnote 2.

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA: HOW THE CONCEPT OF ATTRIBUTION APPLIES IN INTERNATIONAL INVESTMENT ARBITRATION



interest of \$9.4 million and costs of £2,864,445 payable by Nigeria to Zhongshan.⁴ It is in the realization of this arbitral award that the Nigeria's presidential jets and other assets belonging to the Federal Republic of Nigeria, were seized.

From the above, several questions have been asked by Nigerians regarding the propriety or otherwise of the claim against Nigeria instead of Ogun State being the party that terminated the said agreement resulting in the final award that Zhongfu now seeks to enforce against Nigeria. Similarly, there are also questions as to whether a foreign country can seize the Federal Republic of Nigeria's assets, which seems to be a violation of Nigeria's sovereign immunity. The latter question will be addressed in full in our subsequent series on this case. However, this article seeks to address the rationale behind holding the Federal Republic of Nigeria accountable for the actions of its organ(s) in international investment arbitration.

ATTRIBUTION IN INTERNATIONAL INVESTMENT ARBITRATION

In the new era of investment arbitration, one aspect of state responsibility that has gained increasing significance is the attribution of conduct to states. Attribution can be defined as an operation, whereby an internationally wrongful act or omission is linked to a State, to make that State responsible for such an act or omission, irrespective of the fact that the act or omission was not committed by the “central/federal organ” of that State.⁵ The rules and principles governing attribution have become essential, particularly because States and their representatives often appear unaware of them. Thus, States are frequently surprised when investors invoke these rules to hold them accountable for certain actions before an arbitral tribunal.

⁴See footnote 1.

⁵ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries in: II Yearbook of the International Law Commission 2 (2001)

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA: HOW THE CONCEPT OF ATTRIBUTION APPLIES IN INTERNATIONAL INVESTMENT ARBITRATION



It is essential to note that such invocations of attribution are not automatic, as the arbitral tribunal may have to first consider whether the actions or omissions of an entity allegedly in violation of an international obligation are attributable to the State regarding that state's responsibility under the Bilateral Investment Treaty (BIT). This consideration is essential because States can only act by or through their agents and representatives.⁶ The question that may beg for an answer is then, which person(s) should be considered as acting on behalf of the state, or what constitutes an "act of the state." Before proffering an answer to the above question, it is essential to emphasize that the characterization of an act as internationally wrongful is based on international law, irrespective of how such an act is characterized under a State's municipal law.⁷ This implies that even though a particular act is lawful under the State's municipal law, it may nevertheless constitute a violation of an international obligation of the State.⁸

Additionally, it is also essential to state that in attribution, where a person or an entity, is authorized to exercise governmental authority, and it exceeds or contravenes the authority, the conduct of such a person or entity will be considered an act of the State under international law.⁹ This implies that an ultra vires objection from a state in this regard before a tribunal will not purge the state of its obligation. However, such ultra-vires conduct must not be confused with the

private acts or omissions of individuals who happen to be representatives of the state. Thus, only ultra-vires official conducts are attributable to the state.¹⁰

ATTRIBUTION OF CONDUCT OF ORGANS OF A STATE

The States are abstract legal persons and act through their organs. In principle, the acts of these organs are attributable to the state and may result in state responsibility. Given the above, an essential question that may arise is, what constitutes a "state organ." In answering this question, the tribunal in **Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt**¹¹ held that *"in order for an act to be attributed to a State, it must have a close link to the State. Such a link can result from the fact that the person performing the act is part of the State's organic structure (Article 4 of the ILC Articles), or exercises governmental powers specific to the State in relation with this act, even if it is a separate entity (Article 5 of the ILC Articles), or if it acts under the direct control (on the instructions of, or under the direction or control) of the State, even if being a private party (Article 8 of the ILC Articles)."*

From the above, two major approaches can be adopted in identifying a state organ to wit: the structural and the functional approaches. The structural approach examines the governmental structure of a state or the structural position of an entity in

⁶ILC Draft Articles, Art. 2, para. 12

⁷ILC Draft Articles, Art. 2

⁸Kaj Hober, "Part II Substantive Issues, Ch. 14 State Responsibility and Attribution," <https://oxia.ouplaw.com/view/10.1093/law/iic/9780199231386.001.1/law-iic-9780199231386-chapter-14?prd=OSAIL>, accessed on 20th August 2024

⁹ILC Draft Articles, Art. 7

¹⁰Hober Op. Cit.

¹¹Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award (6 November 2008), para. 170

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA: HOW THE CONCEPT OF ATTRIBUTION APPLIES IN INTERNATIONAL INVESTMENT ARBITRATION



the state to determine whether the entity forms part of the state. In this regard, the provision of Article 4 of the ILC Articles¹² provides thus:

***“(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*”**

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

The above provisions imply that the acts of all state organs (exercising executive, legislative, judicial, or any other functions) are considered the acts of the state for state responsibility. This speaks more to the structural position of an entity in a state. These provisions resonate with the trite principle of international law which provides that States are responsible for the acts of their organs acting in the state's capacity. In **Vivendi I v. Argentina**,¹³ the tribunal held that Argentina's internal constitutional structure does not affect attribution under international law and that the actions of the Province of Tucumán (an organ) are attributable to Argentina (State).

It is essential to state that Paragraph 2 of Article 4¹⁴ reproduced above provides some guidance necessary to identifying state organs by stating that if the internal law of a state characterizes an entity as a state organ, it is so for purposes of attribution. However, it will not always be sufficient to refer to the municipal law of the state.¹⁵ This is because a state's municipal law may be silent on the characterization of some of its organs. In such situations, it appears necessary to apply the functional approach, whereby all persons or entities that exercise governmental authority or function are classified as state organs for the purposes of attribution. This approach is based on the widely accepted international law principle that a state cannot evade responsibility by referring to the characterization of state organs under its municipal law. In other words, even if a particular entity is not defined as a "state organ" under a state's municipal law, the acts of that entity can be attributable to the state.¹⁶ This functional approach is well captured in the provisions of Article 5 of the ILC Articles, which provides thus:

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

¹²ILC Draft Articles, Art 4

¹³Vivendi I v. Argentina, Award (21 November 2000), para. 49, citing James Crawford, First Report on State Responsibility 14-15, UNDOC A/CN.4/490 and Add. 5 (1998).

¹⁴ILC Draft Articles, Art 4

¹⁵Hober Op. Cit.

¹⁶Ibid

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA: HOW THE CONCEPT OF ATTRIBUTION APPLIES IN INTERNATIONAL INVESTMENT ARBITRATION



From the above, it suffices to say that once an act is carried out in the exercise of a governmental authority or function, the said act is attributable to the state. In summary, the task of identifying a state organ can be achieved either by using the structural approach, which focuses on the status of an entity in the state, or by the functional approach, which looks at the functions of the entity in the state. Additionally, it is essential to state that attribution under international investment law is wide in scope to the extent that an act of a person or group of persons acting under the instruction, direction, or control of a state, is deemed the act of that state.¹⁷

ANALYZING THE CASE OF ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA.

Having addressed the issue of attribution in the preceding paragraphs of this article, it is now essential to juxtapose same, viz a viz the case of Zhongshan Fucheng Industrial Investment Co. Ltd. (Zhongshan) v. Nigeria. A convenient place to commence this analysis is to note that in 2001, China and Nigeria entered into a Bilateral Investment Treaty (BIT), which allows nationals or companies from either country to invest in the other.¹⁸ The BIT is an international instrument that donates the right of arbitration in the instant case. It is on the strength of this BIT that Zhongshan started its relationship with the Ogun State Government and finally entered into a Joint Venture Agreement in 2016.

The principal entities whose actions will be considered regarding attribution of state responsibility in this analysis are the Ogun State government, the Nigerian Police, and the Nigerian Immigration. The acts of these three (3) entities precipitated the initiation of the arbitral claim and final award. It was reported that the Ogun State government abruptly terminated the agreement between it and Zhongshan, and also took actions to expel the company from Nigeria.¹⁹ In light of the information in public space, the Ogun State government also breached some of the clauses in the Nigeria-China BIT, particularly Article 3 which provides for national treatment, most-favoured-nation treatment, and fair and equitable treatment.²⁰ The acts of the Ogun State government in this regard, constitute an internationally wrongful act which by the provisions of Article 4 of the ILC Articles, are attributable to Nigeria. This is particularly because Ogun State falls within the governmental structure of Nigeria as defined under its municipal law. Of paramount importance is the provision of **Section 3 of the Nigeria Constitution**²¹ which defines Ogun State as a state of the Federation. Adopting the structural approach of attribution, Ogun State forms part of Nigeria's structure, thus, its acts are attributable to Nigeria. In **Tokios Tokelès v Ukraine**,²² an investment dispute arose. The Respondent (Ukraine) argued that negotiations only occurred between Taki Spravi and the local authorities in Kiev, and not between the Claimant and the Respondent. They also argued that Kiev's

¹⁷ILC Draft Articles, Art 8

¹⁸Agreement 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 (Nigeria-China BIT) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3366/download>, accessed on 20th August 2024

¹⁹Explainer: Why Nigerian Presidential aircraft was seized, <https://tribuneonline.ng/explainer-why-nigerian-presidential-aircraft-was-seized/>, accessed on 20th August 2024

²⁰Nigeria-China BIT

²¹1999 Constitution of the Federal Republic of Nigeria (as amended).

²²Tokios Tokelès v Ukraine ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Rev-FILJ 205 (2005)

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA: HOW THE CONCEPT OF ATTRIBUTION APPLIES IN INTERNATIONAL INVESTMENT ARBITRATION



authorities lacked the authority to negotiate on behalf of Ukraine. The tribunal in resolving the issue noted that under the ILC Articles, actions of municipal authorities (local authorities in Kiev) are attributable to the central government and emphasized that an express authorization to negotiate by the Respondent was irrelevant, as international law prohibits a state from using its internal laws as a defense against an international claim.

A similar decision was reached in **Compagnie Noga D'Importation v. Russian Federation**,²³ where the US Court of Appeal relied on the ILC Articles, particularly Article 4, and held that international courts and arbitrations have consistently applied the principle that the acts of a sovereign's governmental organ are attributable to the sovereign itself.

Additionally, it was also reported that the Nigerian Police detained and brutalized some staff of the Chinese company,²⁴ and there were attempts to revoke their immigration papers by Nigerian Immigration. In the case of the Nigerian Police and Immigration, it could be said that their actions are attributable to Nigeria under Articles 4, 5, and 8 of the ILC Articles. This is because they can be categorized as exercising executive function under Article 4; empowered to exercise governmental authority under Article 5; and controlled or directed by the State under Article 8. In **Luigiterzo Bosca v. Lithuania**,²⁵ the

tribunal after conducting a brief analysis of the issues before it, held that the Lithuanian State Property Fund (SPF) was an entity empowered to exercise governmental authority, as outlined in ILC Article 5. Thus, its acts were attributable to the State.

The acts of the Nigeria Police and Immigration are at large attributable to Nigeria. This is more so that even if it should be argued that they exceeded the powers given to them in the course of exercising same, Article 7 of the ILC Article²⁶ will operate to attribute the acts to Nigeria.

From the above analysis and principles espoused in the parts of this article viz-a-viz the case of *Zhongshan Fucheng Industrial Investment Company Ltd. v. Nigeria*, it is clear that the termination of the Joint Venture agreement between parties by the Ogun State government in 2016 and the ancillary actions of the Nigeria Police and Immigration are attributable to the Federal Republic of Nigeria under International law.

Having addressed the purpose of this article, the next issue to be considered is whether the seizure of Nigeria's assets by another country in the enforcement of a final award (Pre-Enforcement measures) constitutes a violation of Nigeria's sovereign immunity and the possible options available for Nigeria in the circumstance. These issues will be addressed extensively in the next series, including the right of indemnification by Nigeria against Ogun State.

²³Judgment of the United States Court of Appeals for the Second Circuit, 16 March 2004 (Docket Nos. 02-9237(L)-9272(CON)

²⁴Seized Presidential Jets: Policemen Detained, Brutalized Our Top Officers – Chinese Firm, Zhongshan Alleges <https://thestandardnews.com.ng/travel/seized-presidential-jets-policemen-detained-brutalised-our-top-officers-chinese-firm-zhongshan-alleges/> accessed on 21st August 2024

²⁵Luigiterzo Bosca v. Lithuania, UNCITRAL, Award (17 May 2013).

²⁶Article 7 of the ILC Articles provides that the acts of a person exercising governmental authority will be attributable to the State even where such a person exceeds the authority given to him in the official exercise of the authority.

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT COMPANY LTD. V. NIGERIA: HOW THE CONCEPT OF ATTRIBUTION APPLIES IN INTERNATIONAL INVESTMENT ARBITRATION



CONCLUSION

Attribution in international law serves as a fundamental principle for determining state responsibility for actions carried out by its organs, agencies, and other entities exercising governmental authority. It underscores that a state cannot escape liability by invoking its internal legal structures or by distinguishing between different governmental bodies. This principle ensures that states are held accountable for conduct attributable to them under international law, thereby maintaining the integrity and coherence of the international legal system.

It is therefore advised that Nigeria should exercise a high level of caution regarding the acts or omissions of its organs or any person(s) exercising government authority, as these acts or omissions may be attributable to it in the event of an arbitral claim under BITs, potentially leading to liability for breaches of contracts or other obligations. To this extent, Nigeria must ensure that its organs or person(s) exercising government authority act in compliance with both national and international legal standards and obligations, maintaining oversight to prevent actions that could expose it to international responsibility.

PLEASE NOTE THAT THIS ARTICLE IS FOR INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE



MEET THE AUTHORS



HARRISON OGALAGU

PARTNER

h.ogalagu@topeadebayolp.com

NNAMDI EZEKWEM

ASSOCIATE

n.ezekwem@topeadebayolp.com

Brought to you by TALP's Dispute Resolution Department

For further enquiries, log onto www.topeadebayolp.com

Do you need to get in touch with us, to know more on how we can help you and your business?
Kindly contact us by using any of the details provided below:

TOPE ADEBAYO LP

25C Ladoke Akintola Street, G.R.A. Ikeja Lagos, Nigeria

p: +234 (1) 628 4627

e: info@topeadebayolp.com

w: www.topeadebayolp.com

