LEGAL ANALYSIS OF SOVEREIGN STATES' LIABILITY FOR THE CONTRACTUAL OBLIGATIONS OF COMPONENT UNITS IN INTERNATIONAL LAW: THE ZHONGSHANG FUCHENG INDUSTRIAL INVESTMENT CO. LTD V THE FEDERAL REPUBLIC OF NIGERIA'S CASE IN PERSPECTIVE.

By Monday Chinaecherem & Danladi Christopher[175]

Abstract

The issue of whether sovereign states can be held liable for the contractual obligations of their constituent units is a complex and evolving area of international law. This question gains particular relevance in federal systems where regional governments or states possess significant autonomy, including the authority to enter into contracts with foreign entities. In such scenarios, delineating the boundary between the obligations of these sub-national units and the responsibility of the sovereign state itself presents a legal challenge. The case of Zhongshang Fucheng Industrial Investment Co. Ltd v The Federal Republic of Nigeria offers critical insight into this issue, especially following multiple court rulings across different jurisdictions that rejected Nigeria's claim of sovereign immunity. After an arbitral award in favour of Zhongshang Fucheng, courts in France and England ordered the seizure of Nigerian state assets, including presidential jets and properties, as part of enforcement efforts. This paper will address these questions by exploring key legal principles, including state responsibility, the doctrine of state immunity, and the concept of attribution in international law. Additionally, it will examine the role of bilateral investment treaties (BITs) and the New York Convention in facilitating enforcement of arbitral awards across multiple jurisdictions.

Keywords: Liability, obligation, enforcement, sovereignty, Treaties.

[175] University: University Of Nigeria; Contacts: Monday Chinaecherem: 07042131206; Email: Mondaychinaeceherem2@Gmail.Com,
Danladi Christopher: 07064924738; Email: Danladichristopher@Gmial.Com

1.0 Introduction

On 14 August 2024, a French court ordered the confiscation of three Nigerian presidential jets in a significant enforcement effort following a $70 million arbitral award against the Federal Republic of Nigeria[176]. The award had been granted in favour of Zhongshang Fucheng Industrial Investment Co. Ltd, a Chinese construction firm, by an arbitration tribunal in London on 26 March 2021[177]. This was not an isolated incident; in June 2024, two Nigerian properties in Liverpool, England, were similarly appropriated as part of enforcement proceedings[178] Prior to these developments, the United States Court of Appeals for the District of Columbia had denied Nigeria's sovereign immunity defence, rejecting the argument that Nigeria could not be sued in U.S. jurisdiction under the Federal Sovereign Immunity Act.[179] The court reasoned that since the arbitral award fell under the New York Convention, it triggered an exception to sovereign immunity under U.S. law, allowing enforcement to proceed.

The case of *Zhongshang Fucheng Industrial Investment Co. Ltd v The Federal Republic of Nigeria* showcases the complex legal question of whether, and to what extent, sovereign states can be held liable for the contractual obligations of their sub-regions.[180] The next part of this article will examine the legal challenges posed by this issue, focusing on the interaction between sovereign immunity, state responsibility, and the doctrine of attribution in international law. In particular, it traces the origins of the dispute between Nigeria and Zhongshang Fucheng, examining how the firm was able to successfully enforce its arbitral award across multiple jurisdictions, despite Nigeria's attempts to claim sovereign immunity. By doing so, it sheds light on the broader implications of this case for the international legal sphere, especially concerning the enforceability of arbitral awards and the liability of federal states for the actions of their sub-national entities.

---

[176] Atake, A & Uka O.A, 'French Court Authorises Chinese Firm to Seize Three ...' (TEMPLARS, 16 August 2024) <https://www.templars-law.com/app/uploads/2024/08/Zhongshan-Fucheng-Vs-Nigeria.pdf> accessed 21 October 2024

[177] Adebayo T et al 'The Zhongshan Fucheng Industrial Investment Co.Ltd. v. Federal Republic of Nigeria Arbitral Award –Analysis of The Issues' (Mondaq) <https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1519804/the-zhongshan-fucheng-industrial-investment-co-ltd-v-federal-republic-of-nigeria-arbitral-award-analysis-of-the-issues> accessed 22 October 2024

[178] Ugwu F, 'US Court Authorises Chinese Investors to Seize Nigeria's Assets' (Daily Post Nigeria, 15 August 2024) <https://dailypost.ng/2024/08/15/us-court-authorises-chinese-investors-to-seize-nigerias-assets> accessed 21 October 2024

[179] Ibid

[180] Zhongshan Fucheng Industrial Investment Co. Ltd v. Federal Republic of Nigeria, No. 23-7016 (D.C. Cir. 2024) (Justia Law) <https://law.justia.com/cases/federal/appellate-courts/cadc/23-7016/23-7016-2024-08-09.html> accessed 21 October 2024

1.1 The Relationship between Sovereign Immunity and State Liability in International Law

The concept of sovereignty incorporates a fundamental aspect of a state's power to be supreme in its existence. It encompasses a state's authority to maintain absolute control within its own borders (internal sovereignty) and to remain independent from external influence or authority in its relations with other states (external sovereignty).[181] A critical component of state sovereignty is the doctrine of state immunity—a crucial principle of international law that protects sovereign states from lawsuits, including, in some cases, enforcement proceedings. This principle posits that one sovereign state cannot be sued before the courts of another sovereign state without its consent. States often rely on this doctrine to challenge the jurisdiction of foreign courts or tribunals and to prevent the enforcement of an award or judgment against any of its assets.[182]

Interestingly, the concept of sovereign immunity has sparked extensive scholarly debate regarding its applicability in the enforcement of foreign arbitral awards. Proponents of sovereign immunity argue that a sovereign state should not be compelled by any court outside its jurisdiction to submit to the enforcement of a foreign arbitral award, as such an obligation fundamentally violates its sovereignty. They maintain that a state should only be held accountable for its actions through its own domestic courts and not through foreign courts or tribunals.[183]

Conversely, other scholars contend that the enforcement of foreign arbitral awards is crucial for the development of international trade and commerce and should therefore be permitted. They argue that the principle of sovereign immunity should not shield a state from its contractual obligations, particularly when it has voluntarily agreed to arbitrate disputes with private parties. This argument aligns with the classical exposition by **Lord Denning** in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*[184]**,** where he articulated:

"A foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a government department goes into the marketplaces of the world and buys boots or cement—as a commercial transaction—that government department should be subject to all the rules of the marketplace."

---

[181] 'Sovereignty | The Princeton Encyclopedia of Self-Determination' (Princeton University) <https://pesd.princeton.edu/node/671> accessed 21 October 2024

[182] 'Sovereign Immunity and Enforcement' (TEMPLARS) <https://www.templars-law.com/app/uploads/2017/01/Sovereign-Immunity-and-Enforcement.pdf> accessed 21 October 2024

[183] Adebayo T, 'An Appraisal Of Defence Of Sovereign Immunity In The Enforcement Of Foreign Arbitral Awards' (Mondaq , 15 May 2024) https://www.mondaq.com/nigeria/trials-appeals-compensation/1465722/an-appraisal-of-defence-of-sovereign-immunity-in-the-enforcement-of-foreign-arbitral-awards

[184] [1977] 2 W.L.R. 356

Similarly, **Section 3(1) of the UK's State Immunity Act 1978** provides that:

> *"(1) A State is not immune as respects proceedings relating to—*
> *(a) a commercial transaction entered into by the State; or*
> *(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."*

A critical examination of the foregoing suggests that the principle affording protection to a sovereign state from lawsuits, including enforcement proceedings of awards without its consent, is now a precarious balancing act. For an arbitration award to be issued, there must be an arbitration agreement or an underlying contract with an arbitration clause executed by the parties capable of enforcement.[185] Thus, it is important to note that the arbitration agreement invokes the principle of consent, often based on the existence of an arbitration clause in the base contract, allowing the parties to submit to the jurisdiction of an arbitral tribunal, whether domestic or international.

1.2 Sovereign State Liability for the Contractual Obligations of their Component Units In International Law

Without doubt, a sovereign state can potentially be held liable for the contractual obligations of its component units under international law, even if the state itself has not expressly entered into the contract. This will be fully evaluated in subsequent sections.

1.2.1 Obligations under International Agreements and Bilateral Investment Treaties (BITs)

Under international law, many contracts, especially those involving foreign investment, are governed by bilateral or multilateral treaties. These treaties may contain clauses that help determine whether the obligations of component units or subnational entities can be attributed to the federal or national government, depending on the system of government in operation.[186] Intriguingly, some BITs and investment treaties explicitly extend the liability of the central government to cover the obligations of the subnational entity, particularly when the contract or treaty states that the federal government guarantees the obligations of the component units.

1.2.2 Principle of State Responsibility

---

[185] Dautaj Y, 'Enforcing Arbitral Awards Against States and the Defense of Sovereign Immunity from Execution: A US. Perspective' (2023) 11 Penn State Journal of Law & International Affairs

[186] Sacerdoti G, bilateral treaties and multilateral instruments on investment protection https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants'%20documents/CL%20-%20Exhibits/CL-0276.pdf accessed 22 October 2024

According to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), a sovereign state may be held internationally responsible for breaches of contract or wrongful acts committed by its component units, particularly under the direction of the federal government. If the component unit acts independently or outside the authority of the federal government, the sovereign state may contend its immunity against liability for the actions of the contracting entity (in this case, the component unit). Ultimately, the determination of the sovereign state's liability hinges on whether the actions of the component unit can be considered actions of the state itself. This doctrine is closely related to the internationally recognized principle of attribution.

1.2.3 International Principle of Attribution

Attribution is defined as a legal operation whereby an internationally wrongful act or omission can be linked to a state, rendering that state liable for such wrongful act or omission, even if it was not committed by the central or federal organ of that state. Investors can invoke this principle to hold a sovereign state accountable for certain actions by its components before an arbitral tribunal. In *Jan de Nul N.V. & Dredging International 11 N.V. v. Arab Republic of Egypt*[187]**,** the court 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[188], or exercises governmental powers specific to the State in relation to this act, even if it is a separate entity, 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.[189]

Moreover, it is important to note that when a component unit of the government or a subnational entity is authorized to exercise governmental authority and exceeds or contravenes that authority, the conduct of such a unit or entity will be regarded as an act of the federal state itself under international law. This indicates that an ultra vires objection from a state before a tribunal will not absolve the state of its obligations and liabilities. However, such ultra vires conduct must be distinguished from the private acts or omissions of individuals who may represent the state. Therefore, only ultra vires official conduct is attributable to the state. For further clarity, **Article 5 of the ILC** Articles provides:

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be

[187] ICSID Case No. ARB/04/13, Award (Nov. 6, 2008).
[188] Article 4 of the ILC
[189] Article 8 of the ILC

considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".

1.3 Contextual Case Analysis: Zhongshang Fucheng Industrial Investment Co. Ltd V The Federal Republic of Nigeria.

The dispute arose when Zhongshang Fucheng, a Chinese construction firm, initiated arbitration against Nigeria over a contract that had been entered into by one of Nigeria's regional entities. The contract was tied to a construction project, and following disagreements on the performance of the contract, Zhongshang Fucheng sought to enforce an arbitration clause[190]. The arbitration tribunal in London issued an award in favour of Zhongshang Fucheng on March 26, 2021, amounting to $70 million.[191]

When Nigeria refused to honour the arbitral award, Zhongshang Fucheng began enforcement proceedings in various jurisdictions, including the United States, England, and France.[192] As part of the enforcement effort, Nigerian state assets—including three presidential jets—were confiscated in France, while two properties in Liverpool were seized in June 2024.[193] The central legal issue in this case is the extent to which a sovereign state can invoke sovereign immunity to shield itself from the enforcement of an arbitral award involving contractual obligations undertaken by a component unit.[194]

Nigeria argued that the arbitration award could not be enforced due to its sovereign immunity under international law, particularly invoking the Federal Sovereign Immunities Act in the United States.[195] However, the courts in various jurisdictions, notably the U.S. Court of Appeals for the District of Columbia, rejected Nigeria's claim of sovereign immunity. The court ruled that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[196], which Nigeria is a party to, created an exception to sovereign immunity in this case. Since Nigeria had

---

[190] Liu E, 'Chinese Investor Succeeded in Investment Arbitration against Nigeria: Zhongshan Fucheng Industrial Investment Co. Ltd -V- Federal Republic of Nigeria' (*Lexology*, 4 March 2022) <https://www.lexology.com/library/detail.aspx?g=22ad75cf-7719-486a-b488-c9685fbbee72> accessed 20 September 2024

[191] Ibid

[192] Tunde-Olowu A, Gomes A and Siyaidon E, 'Seizure Of Nigeria'S Presidential Jets By A Chinese Firm The What And The Why?' (*AELEX*) <https://www.aelex.com/seizure-of-nigerias-presidential-jets-by-a-chinese-firm/> accessed 20 September 2024

[193] Chibelushi W, 'Nigerian Presidential Jets Seized in France amid Dispute with Chinese Firm' (*BBC News*, 16 August 2024) <https://www.bbc.com/news/articles/cdjwlrx8n8xo> accessed 20 September 2024

[194] Ibid

[195] Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1604

[196] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article 3.

agreed to submit to arbitration under the contract, it effectively waived its sovereign immunity in relation to the enforcement of the arbitral award.

A key question in this case is whether the contractual obligations undertaken by Nigeria's regional entity could be attributed to the Nigerian federal government. According to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[197], a state can be held liable for the actions of its component units if those actions can be attributed to the state itself. This principle of attribution is crucial in determining whether Nigeria can be held accountable for the conduct of its regional entity.

In this case, the contractual obligations that gave rise to the dispute were entered into by a regional unit of Nigeria. Under international law, acts by regional entities that exceed their authority or contravene federal policy can still be attributed to the state if the entity was acting under the authority of the national government. The New York Convention and bilateral investment treaties (BITs) also support the attribution of such actions to the sovereign state, especially when the state has benefited from the underlying contract or allowed the regional entity to act on its behalf.[198]

The legal arguments around sovereign immunity in this case rest heavily on the distinction between sovereign and commercial activities. International law, as well as various domestic statutes, recognizes that when a state engages in commercial activities, it can no longer claim absolute immunity from the jurisdiction of foreign courts. This principle is reflected in the U.K. State Immunity Act 1978[199] and was also central to the decisions in the U.S. and French courts, which ruled that Nigeria's defense of sovereign immunity could not extend to commercial transactions like those involving the contract with Zhongshang Fucheng.

Lord Denning's judgment in *Trendtex Trading Corporation v Central Bank of Nigeria*[200] also plays a significant role in interpreting the limits of sovereign immunity in cases where a sovereign state engages in commercial transactions. The rationale is that when a government or its agencies engage in the marketplace, they should be treated like any other commercial actor and subjected to the same rules, including the enforcement of arbitral awards.[201]

---

[197] Article 4

[198] Many Bilateral Investment Treaties (BITs) include "umbrella clauses which require the host state to honor its contractual obligations with foreign investors. These clauses can attribute the actions of regional entities to the central government, holding the state accountable for breaches that occur at the regional level. See Megan Wells Sheffer, Bilateral Investment Treaties: A Friend or Foe to Human Rights, 39 Denv. *J. Int'l L. & Pol'y* 483 (2011).

[199] Section 3(1)

[200] Ibid, n.3

[201]Comment by Lady Hazel Fox Honorary Fellow of Somerville U of O, 'Chapter 53 Lord Alfred T. Denning, Judgment, Trendtex Trading Corporation v Central Bank of Nigeria, 1977' (*Brill*, 4 November 2020)

Zhongshang Fucheng's success in enforcing the award across multiple jurisdictions showcases the global nature of arbitration under the New York Convention. The Convention allows for the recognition and enforcement of arbitral awards in any of its 170 contracting states, provided that the award complies with the Convention's standards. This mechanism enables creditors to pursue state assets in multiple jurisdictions, as was seen in the seizure of Nigerian properties in England and jets in France.

The English courts emphasized the right of the creditor to take enforcement actions across jurisdictions, underscoring the broader implications for states like Nigeria. The fact that Zhongshang Fucheng was able to successfully trace and seize Nigerian assets in different countries illustrates the power of the Convention and the importance of asset-tracing mechanisms in international arbitration.[202]

The rejection of Nigeria's immunity defense in multiple jurisdictions signals a growing trend in international law toward holding states accountable for their commercial activities, especially when they voluntarily enter into arbitration agreements. Going forward, Nigeria and other states must ensure stronger oversight of their regional entities and a clearer understanding of the international legal frameworks governing arbitration and enforcement.

1.4 Role of Bilateral Investment Treaties (Bits) and the New York Convention in International Arbitration and the Enforcement of Arbitral Awards

Undeniably, Bilateral Investment Treaties (BITs) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards play a pivotal role in facilitating international investment and arbitration.[203] While BITs provide assurances against expropriation and grant investors access to international arbitration in the event of disputes, the Convention on the other hand aims to promote the enforcement of arbitral awards across borders, thereby enhancing the predictability and reliability of international arbitration as a dispute resolution mechanism. The synergy between the duo creates a robust framework that protects foreign investments and enforces related arbitration awards. Below is the list of their significance.

<https://brill.com/display/book/edcoll/9789004386242/BP000053.xml?language=en> accessed 20 September 2024

[202] Aderoju T, *Cross-border enforcement of judgments against States - Nigeria* <https://www.ibanet.org/document?id=cross-border-enforcement-Nigeria> accessed 21 September 2024

[203]Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> accessed September 21, 2024

A. **Protection Against Expropriation:** BITs typically include provisions that protect foreign investors from expropriation without compensation. This assurance encourages foreign investments by providing a safeguard against arbitrary state actions.

B. **Access to International Arbitration:** it is instrumental in granting foreign investors the right to access international arbitration for dispute resolution, thus ensuring that they can seek redress without being subjected to the host country's domestic courts, which may be biased. An illustrative example is the case of *Metalclad Corporation v. Mexico*[204] , where a Canadian company Metalclad sought to build a hazardous waste facility in Mexico. When the local government denied the necessary permits, Metalclad invoked the NAFTA (North American Free Trade Agreement) BIT provisions, resulting in a favorable arbitral award that recognized its right to compensation for the losses incurred.

C. **Streamlining Enforcement Procedures:** The Convention simplifies the enforcement of arbitral awards by minimizing procedural hurdles for recognition and enforcement, making international arbitration a preferred dispute resolution mechanism. A notable example is the **Chevron v. Ecuador**[205] arbitration under the US-Ecuador BIT, which involves Chevron and Texaco Petroleum Company (TexPet) seeking relief from a US$18 billion judgment awarded by Ecuadorian courts to local citizens for environmental damages caused by Chevron's affiliates. This case illustrates the complexities of arbitration within a multi-forum context, where significant financial stakes and various stakeholders are involved.[206]

1.5 Conclusion

This paper has illustrated the circumstances under which a sovereign state can be held liable for the contractual obligations of its component units under international law. It is therefore imperative for states, particularly Nigeria, to exercise great caution regarding the actions and inactions of its governmental entities or any individuals exercising governmental authority. These actions may be attributed to the state in the event of an arbitral claim under Bilateral Investment Treaties (BITs),

[204] ICSID Case No. ARB(AF)/97/1
[205] PCA Case No. 2009-23
[206] 'Chevron and Texpet v. Ecuador (Ii): Investment Dispute Settlement Navigator: UNCTAD Investment Policy Hub' (Chevron and TexPet v. Ecuador (II) | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/341/chevron-and-texpet-v-ecuador-ii-> accessed 21 October 2024

potentially leading to liability for breaches of contract or other obligations. To mitigate this risk, Nigeria must ensure that all governmental entities strictly adhere to both national and international legal standards, while maintaining stringent oversight to prevent actions that could expose the country to international liability.