ARE STATES 'PERSONS' FOR THE PURPOSES OF THE NEW YORK CONVENTION?: THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT IN *ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO. LTD V FEDERAL REPUBLIC OF NIGERIA* (No. 23-7016) IN VIEW*

Abstract
The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) applied for the recognition and enforcement of foreign arbitral awards which arose out of differences between 'persons'. The question had persisted on whether 'persons' in the Convention included States, whether acting in their sovereign capacity or acting in their private capacity. The aim of this study was to review the state of law on the purport of the word 'persons' for the purposes of recognition and enforcement under the New York Convention in the light of the recent split decision of the US Court of Appeals for the DC Circuit in Zhongshan Fucheng Industrial Investment Co. Ltd v Federal Republic of Nigeria. The objective of this study was to determine whether 'persons' included States both acting in their sovereign capacity and in their private or commercial capacity. Doctrinal method was employed in the course of this research with the analyses of the relevant sections of the New York Convention itself and case laws. This research found that the New York Convention did not define the word 'persons' used in Article 1 (1). It was further found that the failure to define the word 'persons' in the New York Convention had sometimes led to controversies on whether States qualified as such, whether acting in their sovereign capacity or private capacity. It was also found that except to the extent that States consented, sovereign acts of a State generally enjoyed sovereign immunity. It was therefore recommended that the New York Convention should be amended to include a clause that should specifically define 'persons' as natural and juridical persons, including a State only when acting in private or commercial capacity.

Keywords: New York Convention, Sovereign Acts, Persons, Recognition, Enforcement

1. Introduction

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Award 1958, otherwise known as the New York Convention, came into force on the 7th of June 1959. It replaced the Geneva Protocol on Arbitration Clauses of 1923 and Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[1] Article 1 (1) of the New York Convention provides as follows:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between *persons*, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where recognition and enforcement are sought.

'Persons' as used here is not defined in the Convention. While there is no doubt that 'persons' includes natural and juridical persons, it is not clear whether this includes States both in their sovereign and private capacities. The *travaux preparatoires* of the New York Convention was also not conclusive on whether 'persons' includes States acting in their sovereign capacity and States acting in their private capacity. This distinction is pertinent simply because different rules of immunity apply to States when acting in their sovereign capacity and when acting in their private or commercial capacity. The lack of definite definition of 'persons' in the New York Convention has given room to various interpretations with varying effects. The aim of this study, therefore, is to examine the law on the purport of the word 'persons' for the purposes of recognition and enforcement under the New York Convention. This is manifested in the recent ruling of the United States Court of Appeals for the District of Columbia Circuit in the case of *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria*[2]. The objective of this study is to determine whether the expression 'persons' in the New York Convention includes States both acting both in their sovereign capacity and in their private or commercial capacity.

2. The Ruling of the United States Court of Appeals for the District of Columbia Circuit in the Case of Zhongshan *Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria*[3]

The major issue considered in this case by the United States Court of Appeals for the District of Columbia Circuit was whether States acting in their sovereign capacity qualify as a 'person' under the New York Convention. The appeal is one of the numerous cases that stemmed from an arbitration award made against Nigeria in favour of the Chinese company, Zhongshan Fucheng Industrial Investment Co Ltd (Zhongshan), in 2021 by an arbitration panel

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[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Article VII (2).
[2] No. 23-7016.
[3] *Ibid.*

in the United Kingdom. The arbitration was conducted under the China-Nigeria Bilateral Investment Treaty (BIT) of 2001 by which Nigeria undertook to protect investments by Chinese companies in Nigeria, among other things.

In 2007, Ogun State of Nigeria contracted with Zhongshan to develop the Ogun Guangdong Free Trade Zone. Zhongshan claimed to have invested millions of dollars and resources to develop the park. Following springs of misunderstanding, Ogun State eventually terminated the contract in 2016 and threatened the officers of Zhongshan with eviction. Ogun State later arrested two executives of Zhongshan for 'breach of trust'. Nigerian federal police also arrested one Zhongshan official and detained him for ten days under deplorable conditions. All the efforts Zhongshan made to ventilate their right through the Nigerian courts failed. Consequently, in August 2018, Zhongshan initiated arbitration proceeding against Nigeria pursuant to Article 9 of the China-Nigeria BIT which Nigeria willingly participated in. The Arbitral tribunal eventually in 2021 made a Final Award against Nigeria and awarded USD 55.6 million, moral damages along with interest, legal and arbitral fees. With Nigeria failing to pay these sums of money, Zhongshan brought an action in the United States District Court for the District of Columbia[4]. Nigeria moved to dismiss the case for lack of subject-matter jurisdiction and personal jurisdiction on the ground of immunity. Nigeria's motion for dismissal was refused by the district court which held that the Final Award was governed by the New York Convention and therefore was within the United States' Foreign Sovereign Immunities Act (FSIA)[5] arbitration exception. Nigeria appealed against this ruling to the United States Court of Appeals for the District of Columbia Circuit.

By a split decision of 2:1, the United States Court of Appeals for the District of Columbia Circuit upheld the decision of the district court. Both the majority decision and the dissenting view extensively referred to the *travaux preparatoires* of the New York Convention and case law to drive home their points but the *travaux preparatoires* of the New York Convention is not conclusive on when States in their sovereign capacity is included in the definition of 'persons'. Nigeria's fault in this case revolved around her failure to uphold the terms of the BIT with China by failing to protect the Chinese investor, Zhongshan. This deals with Nigeria's sovereign act under public international law. Nigeria is not involved in the contract for the construction of the Free Trade Zone in Ogun and so her actions or inactions over this matter did not involve private or commercial acts of Nigeria for which immunity could be lifted. Therefore, a finding that the use of 'persons' in the New York Convention does not include a State acting in her sovereign capacity will automatically clothe Nigeria with sovereign immunity in the case with Zhongshan.

The Majority Decision

The majority decision in this case read by Judge Millett ruled that under the New York Convention 'the term 'persons' includes a foreign state that has entered into a bilateral investment treaty under which it assumes treaty obligations owed to third parties that are connected to commerce.'[6] The majority decision cited a number of cases to buttress the point that arbitral awards under the New York Convention has been enforced against foreign States charged with breach of investment and commercial treaty obligations.[7] The authorities cited by the majority decision did not directly address the issue of whether the sovereign act of a State is covered by the New York Convention. Nigeria's argument here is that a sovereign can be classified as a 'person' under the New York Convention only when it engages in private activity and not when it acts solely as a sovereign as was the case in the Zhongshan matter. The majority decision refuted this argument first on the ground that there is no basis for the 'private-act limitation' under the New York Convention. To further buttress this point, the majority decision referred to *Report of the Comm. On the Enf't of Int'l Arbitral Awards*[8] and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., Part II Introductory Note[9]. The majority decision stated that commercial-activity limitation is expressly provided for in the New York Convention by virtue of the commercial reservation stipulated under Article 1 (3) of the New York Convention. Nigeria's further argument was that the New York Convention applied only to contract claims and not to treaty claims against sovereigns. This was also rejected by the majority opinion on the ground of what it called 'the common practice of confirming arbitral awards' on the basis of 'a sovereign state's violation of a treaty created under public international law'. Nigeria's further argument that the immunity exception under the United States' Foreign Sovereign Immunities Act does not apply because the New York Convention does not govern arbitral awards against sovereigns for the violation of treaties or public international law was equally rejected.

The majority decision, however, did not consider the effect of immunity on the sovereign acts of a State. On the other hand, the dissenting view read by Judge Katsas asserted that reading the text of the New York Convention without the

[4] No. 1: 22-cv-00170

[5] Public Law 94-583-Oct. 21, 1976.

[6] *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria* No. 23-7016, p 19.

[7] *Tatneft v Ukraine,* 21 F.4th 829, 832-834 (D.C. Cir 2021); Chevron Corp., 795 F 3d at 202-203; *Olin Holdings Ltd v State of Libya*, 73 F.4th 92, 96-101 (2d Cir. 2023); *Schneider v Kingdom of Thailand*, 688 F. 3d 68, 70071 (2d Cir. 2012; BG Group, 572 U.S. at 28-31.

[8] 24, U.N. Doc. E/AC.42/4 (Mar. 21, 1955) ('1955 Report').

[9] (AM.L. INST. 1987.

private-act limitation would entail that foreign States would have no immunity for their sovereign acts. In response to this, the majority opinion stated that the essential attribute of sovereign immunity 'is foreign states' ability voluntarily to consent to a suit or proceeding'. The majority decision, therefore, held that by agreeing to arbitrate this dispute, Nigeria no longer had any immunity to this lawsuit.[10]

The Dissenting View

The dissenting opinion read by Judge Katsas found that since the private acts of Ogun State could not be attributed to Nigeria, the award could be said to have arisen out of Nigeria's sovereign acts which was governed by public international law. This now boils down to the question of whether the New York Convention applies to awards made on sovereign acts, that is, whether the use of the word 'persons' in the Convention includes States acting in their sovereign capacity under public law.

The dissenting view referred to some old authorities made before the New York Convention that established that the word 'persons' did not include the sovereign[11] as well as subsequent authorities to that effect.[12] The dissenting view, however, noted that there was no hard and fast rule about excluding sovereigns from the meaning of 'persons'. To this end, the dissenting view stated that the presumption against including sovereigns as a 'person' was strongest for official acts[13], and that in contrast, whenever the sovereign acted in private capacity, the word 'person' was more likely to include sovereigns.[14] To further illustrate that courts sometimes 'construe words like 'person' to cover sovereigns acting in proprietary capacity but not in a sovereign capacity', the dissenting view referred to the case law where the United States' Supreme Court held that States were regarded as 'persons' under the Sherman act when buying goods,[15] but not regarded as 'persons' under the same Act when acting as regulators[16] or when wielding State powers.[17]

Regarding sovereign immunity defence, the dissenting view traced the history of immunity claim from the absolute immunity theory which proclaims that sovereigns should be immune from the jurisdiction of domestic courts for all of its acts, whether public or private.[18] The dissenting view noted that even though the absolute immunity had over the years been diluted by the restrictive immunity in order to lift the immunity of the sovereign for its commercial activities, when the New York Convention was drafted, no one suggested that States should have no immunity at all. Therefore, the mere use of the word 'persons' could not, according to the dissenting view, 'be deemed to reach the government acts of foreign sovereigns'.

The dissenting view further stated that applying the New York Convention to disputes between private parties and sovereigns under public law not only would eliminate immunity protections but also 'undercut espousal requirements'. In international law, diplomatic protection or diplomatic espousal entitles one State to take diplomatic or other actions (espouse a claim) against another State on behalf of its national whose rights and interests have been injured by that other State. The only exception to espousal that allows private individuals to raise international claims against the offending sovereigns is only when the sovereign itself has agreed to engage directly with the aggrieved individual.[19] The dissenting view stated that disputes under the BIT or multilateral investment treaties were not part of this exception.

The dissenting view further stated that Nigeria's consent to arbitrate directly with Chinese investors under Article of the BIT did not entail consent to enforcement in a domestic court and that consent to the enforcement of an award under Article 9 (6) under the BIT meant enforcement through diplomatic processes or international tribunals.

3. *Travaux Preparatoires* of the New York Convention

Both the majority decision and the dissenting view in the *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria* under reference made extensive references to the drafting history of the New York Convention in support of their positions. The dissenting view first found support in the *Report of the Committee on the Enforcement of International Arbitral Awards*[20]. The dissenting view noted that the Drafting Committee decided to replace 'International' in the name of the New York Convention with 'Foreign' to read 'Convention on the Recognition and Enforcement of *Foreign* Arbitral Award' instead of 'Convention on the Recognition and Enforcement of *International* Arbitral Award'. The reason for this change was that 'International' would suggest state-to-state arbitrations which is

[10] *Zhongshan* op cit p. 22
[11] *United States v United Mine Workers of America*, 330 U.S. 258 (1947); *United States v Cooper Corp*., 312 U.S. 600, 603 - 05 (1941; *United States v Fox*, 94 U.S. 315, 321
[12] Return Mail, Inc. v USPS, 587 U.S. 618, 626-27 (2019); Vermont Agency of Nat. Res. V United States ex rel. Stevens, 529 U.S. 765, 780-81 (2000); Will v Mich. Dep't of State Police, 491 U.S. 58, 64 (1989).
[13] *Georgia v Evans*, 316 U.S. 159, 161 -62 (1942); *California v United States*, 320 U.S. 577, 585-86 (1944).
[14] *Parker v Brown*, 317 U.S. 341, 351-52 (1943); *Wilson v Omaha Indian Tribe*, 442 U.S. 653, 667 (1979); *United States v Knight*, 39 U.S. (14 Pet.) 301, 315 (1840).
[15] *Evans*, 316 U.S. at 161-62.
[16] *Parker*, 317 U.S. at 351-52.
[17] *Bates v State Bar*, 433 U.S. 350, 360 (1977). See also *Goldfarb v Va. State Bar*, 421 U.S. 773, 790-92 (1975); *Jefferson Cnty. Pharm. Ass'n v Abbott Lab'ys*, 460 U.S. 150, 153-154 (1983); *Will,* 491 U.S. at 64 n.5.
[18] *The Schooner Exch. V McFaddon,* 11 U.S. (7 Cranch) 11, 116, 136-37 (1812).
[19] *Philipp* 592 U.S. at 177-78
[20] U.N. Doc. E/AC.42/4 (Mar.21, 1955) (Drafting Committee Report), at 2.

clearly not the subject of the New York Convention. To this end, according to the dissenting view, the Committee explained that the Convention 'does not deal with arbitration between States, but deals with the recognition and enforcement in one country of arbitral awards made in one country'.

The dissenting view further referred to the position of the Belgium representative in the Drafting Committee who opined that the Convention 'should expressly provide that public enterprises and public utilities should be deemed to be legal persons… if their activities were governed by private law'.[21] The Drafting Committee rejected the Belgian proposal as being 'superfluous' but agreed that 'reference in its report would suffice'. The dissenting view further referred to the view of Switzerland that the New York Convention covered 'international awards in private law', but not 'international awards in public law'.[22] The dissenting view also referred to the expression of concern by the Italian representative that the reference to 'disputes between legal persons' could be misconstrued to cover 'a dispute between States,'[23] However, the President of the Conference at which the Convention was finalized responded that the Drafting Committee 'had no such intention when it prepared the draft Convention'.

Finally, the dissenting view pointed out the comment by the representative of the United States that who highlighted the importance of the New York Convention to the efficient settlement of 'private disputes arising out of international trade.'[24]According to the dissenting view, this suggested that there was no extension to disputes under public international law.

On the other hand, the majority decision referred to a number of statements from a 1956 report on an early draft of the New York Convention as follows:

> Since the term 'legal persons' includes States, the draft convention seems admittedly to cover arbitral wards [*sic*] made in their favour or against them in cases of disputes with subjects of private law. Nevertheless, it would be desirable to provide expressly that the convention is also applicable in cases in which corporate bodies under public law, and particularly States, in their capacity as entities having rights and duties under private law, have entered into an arbitration convention for the purpose of the settlement of disputes[25]

The majority decision also noted that the same report equally contains another statement from the Society of Comparative Legislation supporting their view as follows:

> The following words should be added after the words 'persons whether physical or legal' at the end of paragraph 1: the expression to include States, public bodies and undertakings (collectivites publiques), public establishments and establishments serving the public interest, on the condition that the said differences arose out of a commercial contract or a private business operation (acte de gestion privee).[26]

The above excerpts of the report by the Secretary General are not included in the final text of the New York Convention. The statement from the Society of Comparative Legislation above is qualified by the condition that States, public bodies and undertakings (collectivites publiques), public establishments and establishments serving the public interest as mentioned in the statement can only qualify as a 'person' if the differences arose out of a commercial contract or a private business operation. This suggests that States only qualify as 'persons' for the purposes of the New York Convention only for their private and commercial acts and never for their sovereign acts.

As can be seen, the *travaux preparatoires* is not conclusive on the question whether 'person' in the New York Convention includes a State in its sovereign capacity, but there seems to be more compelling evidence that the general intendment would be to exclude States acting in their sovereign capacity which is governed by public international law. The importance of *travaux preparatoires* in interpreting a convention cannot be neglected because it offers clues on the general intendment behind the making of the convention. Courts have frequently relied on it for treaty interpretation even as can be seen in this case.

4. Analytical Overview of the Majority Decision and the Dissenting View

For a start, the arbitration in this case was held under the China-Nigeria BIT. Nigeria as a sovereign did not deal directly with Zhongshan even though it undertook to protect investments by Chinese companies under the BIT. In this regard, this dispute arose primarily from the breach of Nigeria's treaty obligation to China under the China-Nigeria BIT to protect Chinese investors in Nigeria. This primarily falls within the realm of public international law. So, the primary question to be considered in this case is whether a dispute between two sovereigns which is governed by public international law falls under the purview of New York Convention. Again. Another question is whether the New York

[21] *Ibid,* p. 7.
[22] U.N. Secretary-General, *Recognition and Enforcement of Foreign Arbitral Awards*, at annex 1, 8-9, U.N. Doc. E/2822 (Jan. 31, 1956) (*Secretary-General Report*).
[23] U.N. Conf. on Int'l Com. Arb., *Summary Record of the Sixteenth Meeting*, at 5, U.N. Doc. E/Conf.26/SR.16 (June 3, 1958).
[24] U.N. Conf. on Int'l Com. Arb., *Summary Record of the Second Meeting*, at 8, U.N. Doc. E/CONF.26/SR. 2 (May 21, 1958).
[25] *Report by the Secretary-General on the Recognition and Enforcement of Foreign Arbitral Awards*, at Annex I, II, U.N. Doc. E/2822 (Jan. 31, 1956).
[26] *Ibid, Id* at Annex II, 9; *see id* at Annex II, 10.

Convention operates to exclude immunity for the sovereign acts of a State. The answers to both questions should be in the negative.

The dissenting view in this case is more compelling in the above regards. The case has to be viewed as springing from an alleged violation of treaty obligation Nigeria owes to China. This cannot be pushed to the extent of stripping Nigeria of her sovereign rights over a third party which Nigeria did not directly deal with. Again, immunity is a different subject-matter that is treated separately in its peculiar category. Therefore, it will be incongruous to side-step the immunity of a State for sovereign acts under the New York Convention.

Judge Katsas who gave the dissenting view also made a number of references to other commentaries to support his dissenting view. He referred to the Restatement (Third) of the Foreign Relations Law of the United States[27], which states that 'Ordinarily, arbitration of a controversy of a public international law character, such as … a dispute about the interpretation of or performance under an international agreement…, is not subject to the New York Convention…' He also referred to the International Chamber of Commerce's *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*[28] which states that 'The expression of 'persons, whether physical of legal' in Article 1 (1) of the Convention is generally deemed to include public law entities entering into commercial contracts with private persons. Courts … frequently invoke the distinction between *acta jure gestionis*… and *acta jure imperii*…'

Finally, Judge Katsas referred to the opinion of Sornarajah to the effect that 'The New York Convention was not designed for enforcement of arbitral awards against state parties…The fact that a dispute was caused by a sovereign act, usually an act of nationalization, makes enforcement under the Convention highly unlikely.'[29]

However, another author, Berg, offered a very instructive opinion on the meaning of 'persons' used in Article 1 (1) of the New York Convention. He stated thus:

> It is generally accepted that the expression also embraces persons under public law. The Convention is frequently applied to States and State agencies. In this field, the defence of sovereign immunity against recognition of the arbitration agreement and enforcement of the arbitral award is virtually always rejected on the basis of theories such as restrictive immunity, the waiver of immunity, the distinction between *acta de jure gestionis* and *acta de jure imperii*, the reliance on *pacta sunt servanda* and the creation of an *ordre public reellement international*.[30]

Even though Berg opined that 'persons' under the New York Convention includes persons under public law, it is instructive to note here that Berg noted the distinction between *acta jure gestionis* and *acta jure imperii* as one of the things to be considered in deciding whether or not to uphold the defence of sovereign immunity on the question of whether the word 'persons' under the New York Convention includes a State. Under the relative immunity theory, it is only for the commercial acts of a State (*acta jure gestionis)* that an immunity of a state can be held inapplicable and never for its sovereign acts (*acta jure imperii).* This, therefore, inexorably implies that the distinction between *acta jure gestionis* and *acta jure imperii* definitely has a bearing on the consideration of the definition of 'persons' under the New York Convention as it affects a State.

5. Conclusion

This work traced the background of the case between the Chinese company Zhongshan and Nigeria for which Nigeria was denied immunity plea by the US Court of Appeals for the District of Columbia Circuit. The primary issue of controversy in this case which led to a split decision is whether the definition of 'persons' in the New York Convention includes a State both for its sovereign acts and its private act. This was fully discussed in this work. This study found that the New York Convention does not define the 'persons' used in Article 1 (1) thereof. It was also found that even though the New York Convention does not define the word 'persons', there is a consensus of opinion that 'persons' under the New York Convention includes a State for its private acts, but there is no such consensus whether it includes a State for its sovereign act. While the majority decision in *Zhongshan Fucheng Industrial Investment Co. Ltd v Federal Republic of Nigeria* does not draw such distinction between the private and sovereign acts of a State in treating a State as a 'person' under the New York Convention, the dissenting view holds that such a distinction exists and that immunity defence should avail a State for its sovereign act. This work found the dissenting view more compelling considering, most especially, that the principle of sovereign immunity covers the sovereign acts of a State. It was further found that except where a State consents, the sovereign acts of a State generally enjoy sovereign immunity, but this is not so for its commercial acts. It is therefore recommended that the New York Convention should be amended to include a clause that should specifically define 'persons' as natural and juridical persons, including a State only when acting in private or commercial capacity.

[27] Part IV. 5.A intro. note (Am.L.Inst. 1987) Third Restatement, 487 comt, f.
[28] 85 (Int'l Council for Comm. Arbitration 2011).
[29] M. Sornarajah, 'The Settlement of Foreign Investment Disputes' (2000), 309-10.
[30] Hanotiau & van den Berg, 'The New York Convention of 1958: An Overview' (*Yearbook* Vol. XXVIII 2003) pp 4-5.