$400 Million Chinese Railway Loan;
Has Nigeria Truly Mortgaged Its Sovereignty? A Legal Perspective

> **Relinquishing apparent national sovereignty does not have to entail a loss of national sovereignty but can actually be a benefit...**
>
> Ulrich Beck

Introduction:

Recently, the Nigerian political and economic space was unsettled by the concerns raised by a Committee of the House of Representatives over the clause waiving the sovereign immunity of the country from arbitral proceedings and the enforcement of possible arbitral award in Article 8(1) of the $400 million Loan Agreement ("Loan Agreement") executed by the Ministry of Finance on behalf of Nigeria and the Export –Import Bank of China for the Nigeria National Information and Communication Technology (ICT) Infrastructure Backbone Phase II Project. To many, including opposition political parties, the waiver of sovereign immunity clause is tantamount to ceding Nigeria's sovereignty to China. In response to these concerns, the Honourable Minister of Transportation, Mr. Rotimi Amaechi is reported in Thisday publication of 1st August, 2020 to have said that:

> **The waiving of immunity simply means in trade parlance that I'm not giving you this loan free of charge...The Chinese can never come and take over Aso rock and become President or Minister"**

I am not a fan of the Honourable Minister for Transportation, in fact, I must put it on record that I am completely averse to his style of politics from what I have read from my newspaper cuttings. Regardless of this, his opinion of the sovereign immunity clause is in all fairness and by established principles of international law correct. The purpose of this article is therefore to give a proper legal context to the statement of the Honourable Minister of Transportation.

The Concept of Sovereign Immunity:

Generally, as a principle of public international law, a sovereign state is deemed to be immune from legal proceedings (including arbitration) and/or any process of execution of judgment against its property in the court of a foreign state. This principle is premised basically on broad considerations of public policy, International law and comity as well as on the dignity, equality and independence of States rather than on any technical rules of law.

The immunity enjoyed by the sovereign state from legal proceedings or process of enforcement in a foreign state has been extended over the years to diplomatic missions of sovereign states, agencies of the state and its principal officers such as the Head of State. The principle was first articulated by the United States Supreme Court in the case of Schooner Exchange v MacFaddon (1812) 7 Cranch 116 where Chief Justice Marshall opined as follows:

> **one Sovereign being is in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its Sovereign rights within the Jurisdiction of another...**

Sovereign immunity has since then be applied in several cases such as the case of **Compania Mercantil Argentina v United States Shipping Board (1924) 131 L.T 388** which was an action brought in the United Kingdom to recover freight overpaid to the United States Shipping Board. The action failed because the Board was held to be a department of State and therefore immune from such proceedings in a foreign state. See also: **Swiss Israel Trade Bank v Government of Salta (1972) 1 Lloyd's Rep.497.**

The concept of sovereign immunity was initially enforced in its absolute nature referred to as the theory of absolute sovereign immunity. By this approach, no sovereign State can be impleaded on any ground howsoever in the Court of another State without its express consent or unless the State agrees to waive its sovereign immunity.

However, with the increasing involvement of sovereign states in commercial activities and contracts with private entities in foreign countries, there has been a shift from the theory of absolute sovereign immunity to a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a state which are done as public acts of government of the State (*jure imperii*) or acts of the state carried out for commercial purposes (*jure* gestionis). This application of the restrictive theory unlike the absolute theory does not accord sovereign immunity to a State party to a commercial agreement.

The first indication of this change of view to the restrictive theory was depicted in the case of **Republic of Mexico v Hoffman (1945) 324 U.S 30** decided by the United States Supreme Court. In that case, the owner of an American fishing vessel instituted an action against a vessel owned by the Republic of Mexico in the District Court for Southern California. In rejecting the claim of sovereign immunity, it was held that there should be no immunity for ships owned and operated by a foreign state for ordinary trading purposes.
The United States official support for the restrictive theory was subsequently communicated by Jack B Tate, of the department of Justice by a letter on the 19th of May 1952 ("The Tate Letter") to the effect that the restrictive approach will be the practice in the United States.

The case of **Trendex Trading v Central Bank of Nigeria (1977) 1 Q.B 529** provides to us the Central Bank of Nigeria's (CBN) attempt to rely on the principle of sovereign immunity to avoid the exercise of jurisdiction by the English court in a claim against the bank for payments due in respect of letters of credit issued. In dismissing the claim of sovereign immunity raised by the CBN, it was held inter alia that international law no longer recognize immunity from legal proceedings for a government department in respect of ordinary commercial transactions.

It must however be understood that the restrictive theory is not an affront on the immunity of a sovereign State, rather it is an avenue to ensure that commercial activities between private and state parties are carried out on level terms without the opportunity for any of the parties particularly the sovereign to avoid its obligations. See the Nigerian case of **Kramer Italo Ltd v. Government of the Kingdom of Belgium & Anor (2004) 12 CLRN 93 at 103.**

Only few countries such as China and Hong Kong still adopt the theory of absolute sovereign immunity. Now to this Chinese loan agreement.

Overview of the Article 8(1) of the Loan Agreement:

Although, the other details and terms of the Loan Agreement are as expected not in the public domain, **Article 8(1)** of the Loan Agreement as reported by various news agencies and confirmed by members of government provides that:

> **The borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceedings pursuant to Article 8(5), thereof with the enforcement of any arbitral award pursuant thereto, except for military assets and diplomatic assets**

A calm and careful consideration of **Article 8(1)** reveals that the entitlement to a claim of sovereign immunity in respect of arbitral proceedings and enforcement of an arbitral award has been expressly waived. Can this waiver be construed on the face of it as an act of ceding our national sovereignty to China? I certainly do not think so for reasons which I will explain briefly.

Firstly, by the clause, sovereign immunity is only waived in connection with arbitral proceedings that may arise in respect of the particular Loan Agreement. This does not mean that the Republic of China can on account of the waiver of immunity proceed to denigrate the status of Nigeria as a sovereign State or treat Nigeria as its subordinate rather, it precludes Nigeria from claiming immunity on grounds of its sovereignty in defeat of any arbitral proceedings commenced in connection with the Agreement. That is the implication. No more no less!

Furthermore, in relation to the assets and properties of Nigeria, the immunity waived by the clause does not grant China the right to at any time of its own choosing take any of the assets of Nigeria, arbitral proceedings resulting in an award against Nigeria will still have to be conducted before any of its assets can be attached or taken over by China.

More so, any asset of Nigeria upon which execution is levied by China pursuant to an arbitral Award arising from the Loan Agreement can only be attached in relation to the recovery of the sum awarded and not for any other purpose.

It must be borne in mind as earlier stated that China still observes the theory of absolute sovereign immunity and this must have in my view warranted the insertion of the waiver of sovereign immunity clause.

It is therefore not unusual for the waiver of sovereign immunity clause to be inserted into the Loan Agreement with China. As demonstrated, it is in fact the usual practice in International law in transactions involving countries where the theory of absolute sovereign immunity is applicable.

Recommendations:

However, I am of the firm view that **Article 8(1)** of the Loan Agreement under consideration is too wide. Granted that the provision of **Article 8(1)** is in itself in form of an exclusion clause, it is my opinion that the drafters ought to have extended the ambit of the exclusion further by limiting the scope of its application particularly as it relates to properties or assets available for execution. Possible further exclusions that could be made in this regard include:

(1.) Limiting the assets available to only mineral resources such as coal or other resources which are yet to be fully converted into commercial purposes in the country to such extent as will satisfy the liability under the Award. This will in effect warrant the investment of more money by China and development of infrastructure as well as creation of more employment in the process of taking benefit of those resources.

(2.) Excluding cash or funds held by a third party on behalf of Nigeria from such assets on which execution can be levied.

(3.) Limiting the attachable assets to the particular infrastructure for which purpose the loan was obtained as in the instant scenario the railway to be constructed e.g the operation or collection of fares for the use of the railway for a number of years.

(4.) Make enforcement subject to ratification by an Act of Parliament in Nigeria or by way of appropriation in the Nigeria's budget for a succeeding year.

Conclusion:

It is my view that the waiver of sovereign immunity clause has been misconstrued. It is not Nigeria's diplomatic immunity or national sovereignty that has been waived, it is only the country's immunity from arbitral proceedings that has been waived. See the case of **Kramer Italo Ltd v. Government of the Kingdom of Belgium & Anor (Supra)**. The Committee of the House of Representatives that raised those concerns are in my opinion either politically mischievous or acted without an understanding of the contractual implications of the clause. Nigeria has neither ceded nor mortgaged its sovereignty to China by **Article 8(1)** of the Loan Agreement with China rather in consonance with current trend in International Law, Nigeria may be impleaded in arbitral proceedings in China in respect of the commercial Loan Agreement.

I must also at this juncture align myself with pundits that have advocated for a more thorough and clinical review of international agreements to be executed on behalf of Nigeria as this will avoid unfavorable consequences in future as we have in the past experienced.

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