THE LEGAL APPRAISAL OF SOVEREIGN IMMUNITY UNDER CHINA'S SILK ROAD INITIATIVE AND CHINA'S ABSOLUTE IMMUNITY POSITION: THE DOUBLE STANDARDS QUAGMIRE*

Abstract
The People's Republic of China (China) emerged from a socialist background with a history of absolute immunity approach to sovereign immunity. By this, the traditional position of China on the issue of sovereign immunity was that under no circumstances would the immunity of a State or a sovereign be lifted even when such State had engaged in commercial transactions. Even the signing of the United Nations Convention on Jurisdictional Immunity of States and Their Properties by China did not change this position, as was demonstrated by subsequent judicial pronouncements in China. However, the introduction of the Silk Road Initiative by China in 2013 somewhat changed China's approach on sovereign immunity as concerns legal relationship between China and countries participating in this initiative regarding the sovereign immunity of such countries. The initiative was aimed at powering infrastructural developments and investments in Europe, Asia and Africa by China. This situation had therefore created a hypocritical posture of China on the issue of sovereign immunity whereby China upheld absolute immunity theory at home but applied relative immunity theory under the Silk Road Initiative. This work aimed at examining the traditional absolute immunity approach of China vis a vis its sovereign immunity position under the Silk Road Initiative. The objectives of the research were to highlight the sovereign immunity sovereign immunity feature of the China's Silk Road Initiative, and to determine its consonance with China's traditional position on sovereign immunity. The method employed in this research was a doctrinal method which involved reference to primary authorities such as case laws as well as secondary sources like relevant law text books, journal articles and online materials. It was found that while China traditionally upheld the absolute immunity doctrine, in practice, it employed the relative immunity theory in its Silk Road Initiative as a way of preventing the invocation of sovereign immunity by States participating in initiative. This work recommended that China should take step to harmonise its sovereign immunity approach in order to eradicate inconsistent or hypocritical approach on the issue. This work recommended further that China should formally move to adopt the relative immunity approach to sovereign immunity in line with the global trend.

Keywords: Sovereign Immunity, Silk Road Initiative, Absolute Immunity, Relative Immunity

1. Introduction

The People's Republic of China (China) emerged from the background of socialism whereby States maintained monopoly over trade, commerce and means of production. The adherence to the doctrine of absolute immunity of a sovereign by the socialist States is therefore a way of protecting that monopoly. Delaume observed that '…the restrictive doctrine of immunity remains geographically confined to western countries. In contrast, socialist countries continue to adhere, at least in principle, to the absolute doctrine of immunity'.[1] Since socialist States enjoy monopoly in trade and commerce within their domain, they view their absolute immunity position as a means of protecting such monopoly. Leech *et al* described the socialist countries' position on sovereign immunity thus:

> Socialist states are committed to the 'absolute theory' of sovereign immunity and claim international law requires that it be granted even in cases where the litigation arises from commercial activities. In many states in Western Europe and elsewhere, however, the courts apply the 'restrictive theory' and deny immunity to socialist states- and other states- in litigation arising from such activities. Socialist states look upon the denial of immunity in these cases as unwarranted interference with the conduct of their trade abroad through state monopolies.[2]

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[1]G. R. Delaume, 'Sovereign Immunity and Transnational Arbitration' in Julian D M Lew (ed), *Contemporary Problems in International Arbitration* (Springer – Science + Business Media B.V. 1987) 313; Hazel Fox, 'Sovereign Immunity and Arbitration' in Julian D M Lew (ed), *Contemporary Problems in International Arbitration* (Springer – Science + Business Media B.V. 1987) 314; see also Christopher Osakwe, "A Soviet Perspective on Foreign Sovereign Immunity; Law and Practice', 23 *Virginia Journal of International Law* 13 (1982); The People's Republic of China: Aide Memoire of the Ministry of Foreign Affairs, February 3, 1983, 22 ILM 81 (1983); Sgro, 'China's Stance on Sovereign Immunity'. A Critical Perspective of *Jackson v People's Republic of China*', 22 *Columbia Journal of Transnational Law* 101, 1983
[2] N. Leech and C. Oliver and J. Sweeney, 'The International Legal System' 308

China's approach to issues of sovereign immunity traditionally typifies the socialist approach under which the absolute immunity doctrine is strictly upheld. The traditional China's approach to sovereign immunity is typified in the case of *Democratic Republic of the Congo v F G Hemisphere Associates*,[3] otherwise known as the *Congo* case which will be examined in the course of this work. However, following the introduction of the Silk Road Initiative by China in 2013, participating countries that are participating in the initiative are being made to sign contract waiving their sovereign immunities as a way of checkmating the invocation of sovereign immunity by such countries in the course of arbitration or enforcement of awards arising from arbitration under the initiative. This has put China in a rather contradictory and hypocritical position on issue of sovereign immunity.

2. Conceptual Framework

Here, the concepts of 'sovereign' and 'sovereign immunity' will be defined.

Sovereign

The terms 'sovereign' and 'State' have been used interchangeably by authors to denote the sovereign entity that has acquired international legal personality on issues of immunity.[4] Article 2 (1) (b) of the United Nations Convention on Jurisdictional Immunities of States and Their Property defines 'State' as follows:

i. The State and its various organs of government
ii. Constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
iii. Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
iv. Representatives of the State acting in that capacity.

Sovereign Immunity

From the foregoing, the term 'sovereign immunity' is used interchangeably with 'state immunity'. Shaw sees sovereign immunity as a derogation from the host State's jurisdiction and is to be construed as 'an essential part of the recognition of the sovereignty of foreign states, as well as an aspect of the legal equality of all states'.[5] Wigwe, on his own, defines State sovereignty as 'the capacity and competence, independence and legal equality of states'[6] According to Fox, the plea of sovereign immunity constitutes a procedural bar to jurisdiction. Fox continued:

> Based on the assumption that states are equal, the essence of the plea is to correct the lop-sided situation where one state by reason of its control of the legislation and courts of the legal system operating in its territory has an unfair advantage over a foreign state which appears as a litigant in these courts.[7]

3. Theoretical Framework

There are two prevailing theories of immunity, namely, absolute immunity theory and relative immunity theory.

Theory of Absolute Immunity

Absolute immunity theory asserts that a sovereign cannot be subject to the judicial process of another State and under no circumstances will this be derogated from. The principle of independence and equality of States made it 'philosophically as well as practically difficult to permit municipal courts of a country to manifest their power over a foreign sovereign State without their consent.'[8] According to Shaw:

> The relatively uncomplicated role of the sovereign and of government of the eighteenth and nineteenth centuries logically gave rise to the concept of absolute immunity, whereby the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances.[9]

[3] LLC (No 1) (2011) 14 HKCFAR 95 (Court of Final Appeal, Hong Kong)
[4] *Op cit* Delaume 323.
[5] M. N. Shaw, *International Law* (7th edn, Cambridge University Press 2014) 506
[6] C. Wigwe, *Internal Law and Practice, The World Bank, IMF and State Sovereignty* (Osu-Accra: Mount Crest University Press) 2011) 19
[7] H. Fox, 'Sovereign Immunity and Arbitration' in Julian D M Lew (ed), *Contemporary Problems in International Arbitration* (Springer- Science + Business Media B.V. 1987) 29
[8] *Op cit.* Shaw 507
[9] *Ibid*

Theory of Restrictive Immunity

Over the years, the extensive involvement of States in commercial activities made it unreasonable to continue to uphold the claim of absolute immunity as that would afford unfair advantage to States especially when dealing with private investors. Accordingly, the theory of absolute immunity began to give way to restrictive immunity approach which asserts that the immunity of a State could be lifted for its commercial transactions. Thus, a distinction was drawn between sovereign acts of a State *(acta jure imperii)* and commercial acts of a State *(acta jure gestionis)*. According to the restrictive immunity theory, a State can only claim immunity in respect of its sovereign acts but never for its commercial acts. According to Bernini and den Berg, 'with respect to immunity from jurisdiction, a distinction is made between acts *iure gestionis* and acts *iure imperii*. Only as far as acts *iure imperii* are concerned can a state claim immunity'.[10]

4. China's Position on Absolute Immunity

The case of *Democratic Republic of the Congo v F G Hemisphere Associates*,[11] otherwise known as the *Congo* case illustrates China's position on sovereign immunity. The case was decided by the Hong Kong's Court of Final Appeal in 2011 where it refused to enforce two ICC arbitration awards in Hong Hong on the basis of absolute immunity. Hong Kong is a Special Administrative Region of China. The *Congo* case was eventually decided by the Court of Final Appeal, Hong Kong, based on the 1st and 2nd letters of the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China (OCMFA). Although at the court of first instance in Hong Kong, the 1st OCMFA letter stated that 'until recently the Mainland took the absolute immunity position', the court of first instance, per Reyes J., stated that the letter did not discuss the signing by the People's Republic of China in September 2006 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 which adopted a restrictive immunity. According to Reyes J. at the court of first instance, the People's Republic of China having signed the above United Nations Convention must be taken to have at least indicated its acceptance of the wisdom of the provisions therein.

On appeal to the Court of Final Appeal, Hong Kong, the position of Reyes J. of the court of first instance was overruled. The decision of the Court of Final Appeal was based on the 2nd OCMFA letter sent to it by the Secretary for Justice which was aimed at explaining the Chinese position regarding the said United Nations Convention. Paragraphs 3 and 4 of 2nd OCMFA explained the China's position on State immunity and the United Nations Convention thus:

> 3. China signed the convention on 14 September 2005, to express China's support of the above coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues.
> 4. After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized the so-called principle or theory of 'restrictive immunity' (annexed are materials on China's handling of the Morris case)

On the basis of the above, the Court of Final Appeal by a majority of 3:2 upheld the absolute immunity position of the People's Republic of China and accordingly refused to enforce two ICC arbitration awards in Hong Kong against the Democratic Republic of Congo. Prior to the *Congo* case, China successfully pleaded sovereign immunity in the case of *Morris v People's Republic of China*[12] *(*the *Morris* case). This is a case brought by Morris *et al,* against China before the United States District Court, S.D New York seeking to recover on defaulted bonds issued by the predecessor government of the People's Republic of China in 1913.

The above outlines China's position on sovereign immunity. China has thus shown itself as an unmitigated adherent to the absolute immunity theory. This position has, however, been shifted by China for arbitration under the Silk Road Initiative.

5. Sovereign Immunity Under China's Silk Road Initiative

In 2013 the President of the China introduced the Silk Road Initiative. This initiative is also known severally as the One Belt One Road (OBOR), the Silk Road Economic Belt, or the Belt Road Initiative (BRI). The aim of this initiative is to to power infrastructural developments and investments in countries of Europe, Asia and

[10] G. Bernini and A.J.V. Berg, 'The Enforcement of Arbitral Awards Against a State: The Problem of Immunity from Execution' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer – Science + Business Media B.V. 1987) 360; *op cit* Shaw, 509-510.
[11] (n3) 3
[12] 478 F. Spp.2d 561

Africa.[13] Zeller *et al* remarked that 'The Silk Road Initiative is aimed at increasing China's global economic dominance and seeks to connect China with East Asia, European and African countries'.[14] Zeller *et al* also noted that between January 2015 and August 2017, Chinese companies under the OBOR Silk Road Initiatives have signed more than 15,300 new construction contracts in BRI countries with a cumulative value of US $300 Billion and that China has also signed cooperation agreements with over 40 countries and international organisations.[15]

For the resolution of disputes under the Silk Road Initiative, the Supreme People's Court of China in July 2018 established the China International Commercial Court ('CICC').[16] The China International Commercial Court has two courts, one in Xian which adjudicates disputes from overland projects and another one in Shenzhen which adjudicates maritime disputes. Nonetheless, this raises serious question on fair fairing as everything about China's Silk Road Initiative including the resolution of any arbitration under it happens in China under the control of the Chinese authorities.

One notable feature of this initiative is that participating countries, notably developing countries, are compelled to sign a clause waiving their sovereign immunity over the assets with which the debts under the Silk Road Initiative are collateralised. This is to forestall a possible invocation of sovereign immunity by such State parties in the event of a dispute and the enforcement of an award or judgment against such State parties under the initiative. For instance, the Kenya came to the verge of losing the control of Mombasa port for its defaults on loans to China's Exim Bank which stood at US $50 billion.[17] Uganda is also facing a similar risk of losing its only international airport, the Entebbe International Airport over the similar circumstances under the Silk Road Initiative.[18]

Nigeria recently also came under this purview for its waiver of its sovereign immunity over the loan of $500 million from China for the financing of a rail project in Nigeria by China. This raised a significant uproar in the media, forcing the Nigeria's House of Representative to initiate a probe. Hon rationalised the waiver of sovereign immunity in the circumstances which he justified as a normal practice in international law. According to Hon, 'The Lenders, to safeguard their commercial and financial interests against the oft-flashed 'sovereign immunity' …inserted the 'waiver of immunity' clause in question, most likely'.[19] Hon is obviously right that the waiver of sovereign immunity is standard practice in international arbitration involving a State party. The essence is to defeat any sudden invocation of a sovereign immunity by a State party at the arbitration stage as well as enforcement stage. However this portrays China as a country that speaks from both sides of its mouth on the subject of sovereign immunity. From the *Congo* and the *Morris* cases discussed above, China definitely shows itself as an absolute immunity-minded country. Nevertheless, China is more than willing to apply relative immunity approach under its Silk Road Initiative as a way of preventing the participating countries from flaunting their sovereign immunity in the event of a dispute, such that will work to its disadvantage. This is most hypocritical for a country that has over the decades resisted the global trend of relative immunity approach, even after signing the United Nations Convention on Jurisdictional Immunities of States and Their Property. Though this Convention is yet to come into force, it represents a codification of the principles of relative immunity and relative immunity-minded States have used it as a platform for the codification of their sovereign immunity laws.[20]

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[13] B. Zeller, G. Mohanty, S. R. Garimella, *Enforcement of Foreign Arbitral Awards and Public Policy Exception (Including an Analysis of South Asian State Practice)* (Singapore: Springer Nature Singapore Ltd 2021) 2

[14] *Ibid* 3

[15] *Ibid* 3; See also J. Tam and K. Lim and L. Cloris, 'A Thousand Miles Begin with a Single Step: Tax Challenges Under the BRI', *International Tax Review* 28 November 2017; Xinhua, 'Full Text of President Xi's Speech at Opening of Belt and Road Forum', 14 May 2017, http//www.xinhaunet.com/English/2017-05/14/c-136282982.htm.

[16] *Op cit* Zeller *et al* P 4;

[17] L. Vankateswaran, 'China's Belt and Road Initiative: Implications in Africa' ORF Issue Brief No 395, August 2020, Observer Research Foundation; See also Development Reimagined, "Countries Along The Belt and Road- What Does It All Mean? September 26, 2019

[18] Editional, 'Museveni to Surrender Uganda's Only International Airport Over Chinese Loan' (26 November 2021) <https://guardian.ngnews> accessed on 15 February 2023

[19] S. Hon, 'Legality of Waiver of Sovereign Immunity Clauses in International Contracts' (11 August 2020) p.5 <https://guardian.ng > accessed on 17 April 2023

[20]For example, the French Law on Transparency, Anti-Corruption and Modernization of Economic Life otherwise known as "Loi Sapin 2" or in English as Sapin 2 Law[20], the French Civil Enforcement Proceedings Code "CEPC" (specifically articles L.111-1-1 to L.111-1-3) and the French Monetary and Financial Code (article 153-1) set the conditions for State immunity from execution. Resort is still had to the French courts for areas not covered by the 'Sapin 2' Law set out the provisions on State immunity based on the United Nations Convention on Jurisdictional Immunities of States and Their Properties

Possibly, it is in realisation of the inconsistent approach of China to the issue sovereign immunity that the Chinese lawmakers in December 2022 published a draft law on foreign State immunity[21] modelled after the United Nations Convention on Jurisdictional Immunity of States and Their Property. It is hoped that this draft legislation will eventually be passed into law in China so as to bring China in tune with the global trend and remove the double-standard posture of China on sovereign immunity.

7. Conclusion and Recommendations

This work traced the background to China's adoption of absolute immunity theory to its socialist orientation under which States maintained monopoly over trade and commerce. Derogation of sovereign immunity under any guise was seen as a derogation of this monopoly. This work also reviewed the prevailing theories of sovereign immunity, namely, the theory of absolute immunity and the theory of relative immunity. The adoption of the relating immunity approach under their Silk Road Initiative by China was also discussed. This is in contrast to China's avowed absolute immunity stance, even though the rationale was for China to shield itself from the invocation of sovereign immunity by State parties participating in the initiative in the event of a dispute. This work welcomed the recent step taken by Chinese lawmakers in publishing a draft legislation incorporating the relative immunity doctrine which show an indication by China to move towards that approach. In the light of the above it is recommended that China should harmonise its approach on sovereign immunity. Accordingly, it is further recommended that China should move for to enact the draft legislation on sovereign immunity in terms of the relative immunity doctrine.

[21]J. Coyle, 'China's Draft Law on Foreign State Immunity – Part II', *Views and News in Private International Law*, April 27, 2003, <http://conflictoflaws.net> accessed on 28 June 2023