2022

Sovereignty and the legality of collateralization of strategic national assets as security for loan procurement: China-Africa Relations.

Chuma, Eric Mwendwa
Strathmore Law School
Strathmore University

Sovereignty and the Legality of Collateralization of Strategic National Assets as Security for Loan Procurement: China-Africa Relations

By

Eric Mwendwa Chuma

119996

Master of Laws

2022

Sovereignty and the Legality of Collateralization of Strategic National Assets as Security for Loan Procurement: China-Africa Relations

By

Eric Mwendwa Chuma

119996

Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws at Strathmore University

Strathmore Law School

Strathmore University

Nairobi, Kenya

October 2022

Declaration and Approval

Declaration

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Student's Name: Eric Mwendwa Chuma

Sign: _____ Date: _____

Approval

The thesis of Eric Mwendwa Chuma was reviewed and approved for examination by the following:

Professor Sylvia W Kang'ara
Strathmore Law School,
Strathmore University

Dr. Peter Kwenjera,
Dean, Strathmore Law School,
Strathmore University

Dr. Bernard Shibwabo,
Director of Graduate Studies,
Strathmore University

Abstract

In the early years of the new millennium, African countries long starved of development finance found a new partner in China, with many governments eager to procure readily available loan facilities to spur much needed impetus to economic plans. China looking to tap into new sources of raw material and new markets for Chinese goods have been more than generous with financing especially because the terms of the loans mean Chinese companies are contracted to do the work especially around infrastructure projects. However, the particulars of these loans are shrouded in secrecy, with confidentiality cited as an integral component of the terms and conditions. China is not a member of the Paris Club of creditors and thus operates outside the terms that govern that group of creditors as far as disclosure rules for debtor countries is concerned. There have been concerns about the use of national assets of borrower countries as collateral and what impact a default in repayment would have on the sovereignty of the affected countries. It is from this point of view that this study examines the three countries of Kenya Uganda and Zambia in their relationship with China probing whether their respective legal regimes offer effective protection to strategic national assets. The study in finding significant loopholes around the use of strategic assets as collateral in Kenya and Zambia, recommends various interventions to cure the ambiguity and provide for legal protection to them.

Table of Contents

List of Abbreviations

CHINA EXIM	China Export Import Bank
CRBC	China Roads and Bridges Corporation
FOCAC	Forum On China Africa Cooperation
ICSID	International Court for the Settlement of International Disputes
SGR	Standard Gauge Railway
ZESCO	Zambia Electricity Supply Corporation

List of Cases

1. Khelif Khalifa & Another v The Principal Secretary, Ministry of Transport and others (2022) eKLR.
2. William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR.
3. World Duty Free Company Ltd v Republic of Kenya, Award 4, October 2006

List of Statutes

List of Treaties and International Conventions

1. Treaty of Westphalia, 1633
2. Montevideo Convention on Rights and Duties of States, 1933
3. International Covenant on Civil and Political Rights, 1966
4. United Nations Declaration on the Right to Development, 1986
5. Southern African Development Community Protocol on Finance and Investment

List of Constitutions

1. Constitution of Kenya
2. Constitution of Uganda
3. Constitution of Zambia
4. Constitution of the People's Republic of China

List of Statutes and Bills

Kenya

1. Public Finance Management Act, No.8 of 2012
2. State Corporations Act
3. Kenya Railways Corporation Act
4. Kenya Ports Authority Act
5. The Cabinet Secretary to the Treasury (Incorporation) Act
6. The Office of the Attorney General Act, 2012
7. Kenya Sovereign Wealth Fund Bill 2019

Uganda

1. Public Finance Management Act 2015
2. Public Procurement and Disposal of Public Assets Act 2003
3. State Corporations Act

Zambia

1. Public Finance Management Act 2018
2. Loans, Grants and Guarantees (Authorization) Act
3. Loans and Guarantees (Maximum Amounts) Order
4. Public Finance Management (General) Regulations 2020

Acknowledgement

I would like to acknowledge the encouragement and support from my supervisor Professor Sylvia Kang'ara. Immense gratitude to Dr Celestine Musembi from the University of Nairobi and Dr Mokeira Strathmore University for very useful insights. My gratitude to Strathmore University, and specifically, Dr Fancy Too the director of graduate programs at Strathmore Law School, for exhorting me onwards across the line.

To Ms. Patricia Ouma, who stood on the hilltop shining a light as a beacon towards the shore, *Asante sana na Mungu akubariki*.

Dedication

I would like to dedicate this work to my mother Margaret who insists on academic excellence from all her descendants and relatives.

I would also like to dedicate it to my children, John and Mueni, as an exhortation to them in pursuit of unbounded knowledge. Onwards!

Finally, to my wife Caroline, for remaining steadfast, for her love and friendship.

Soli Deo Gloria

Chapter 1- The Sino African Relationship in a Crux

1.1 Introduction

In the past two decades, the engagement between China and Africa has increased significantly as China seeks new sources of raw materials for its industries and African countries look to expand their economies by expansion of their infrastructure.[1]

The economic relationship between China and Africa has been crystallized by the establishment of what is known as the Forum on China Africa Cooperation commonly referred to by the acronym FOCAC.[2] The engagement between China and individual African nations is governed by numerous legal agreements that all require corresponding obligations and confer certain rights on the contracting parties. China uses various state-owned entities to engage with the individual countries based on the specific projects.

One of the key institutions through which financing is made to the countries is the China Export Import Bank (China Exim bank). The China Exim bank lends money to foreign governments and institutions under four broad heads; Loans for Overseas Contracted Projects, Overseas On-Lending loans, Loans for International Economic Cooperation and Chinese Government Concessional Loan and Preferential Export Credit. A key requirement in the procurement of financing from Chinese State-Owned Entities (SOEs) as readily determined from the China Exim bank website is a waiver of sovereign immunity over assets of the borrower countries.[3] While this condition is not an express waiver of sovereignty it has nonetheless led to considerable concern on the appropriation of key strategic assets of the borrower country should an event of default occur. While the term 'strategic national asset' may generally have different contexts, in this paper it refers to railways, ports, mines and similar infrastructural investments of significant economic value to the countries that form the focus of this study. They are assets with a national character and closely linked to the sentiments of the people in the countries in which they are located.[4]

---

[1] Busse E, Erdogan C & Muhlen H, China's impact on Africa-The role of trade, FDI and Aid, IEE Working Paper, Institute of Development Research and Development Policy, Vol.206, 2014, 4.www.econstor.eu.

[2] Akyeampong E & Fofack H, Special Issue on 'Africa and China – Emerging patterns of engagement' Economic history of developing regions, Vol. 34, 253. https//doi.org/10.1080/20780389.2019.1684691.

[3] www.english.eximbank.gov.cn.

[4] Khan Z, 'Safety and security of Pakistan's strategic assets: A critical appraisal', *Pakistan Horizon*, Vol 67, October 2014, 27.

This study explores the relationship between China and the three African countries of Kenya, Uganda and Zambia and specifically asks the question whether there are any legal safeguards in the agreements to guard against appropriation of strategic assets of a national character in the event of default. It further asks whether those clauses, as drafted in the contracts, interfere with the principle of sovereignty and to what extent.

The legal regimes in the three countries permit the use of guarantees and use of certain assets by state corporations in the procurement of loans. The framework as it exists is prone to misuse, with inadequate safeguards and absence of penalties on officials who might abuse their power.

This paper explores the legality of the clauses that require use of those assets as collateral by the three African countries in order to secure financing from China, and whether the potential default and appropriation of the assets would constitute an attack on the principle of sovereignty.

This thesis hypothesizes that any such use of a strategic asset as collateral would constitute an act *ultra vires* of the constitutions of the three subject countries and in any event would be deemed in contravention of internationally accepted norms of international law as regards sovereignty.[5] The unconstitutionality stems from the use of the assets in the absence of certain conditions precedent laid out in the constitutions of all the studied countries as well as in relevant domestic statutes.

The research takes a look at the international law of co-existence underpinning relations between sovereign nations as propounded by Sienho Yee's exposition on the international law of co-progressiveness.[6] The international law of co-progressiveness is best explained as a movement by all countries towards a safer, progressive, more equitable future for all citizens guided by moral and ethical considerations in contrast to the self-centered, self-aggrandizement preferred at present which invariably disregards the sovereignty of less developed nations. In the law of co-progressives the sovereignty of each nation is not only recognized; it is respected and no action is taken that would undermine it.

In 1902 there was an embargo on Venezuelan ports by European powers using military vessels to compel the payment by Venezuela of debts owed to nationals of Great Britain, Germany and Italy.

[5] Article 1(1) Constitution of Kenya (2010).

[6] Yee S, 'The International law of co-progressiveness: The descriptive observation, the normative position and some core principles', *Chinese Journal of International Law*, Vol 13, Issue 3, September 2014, 485-499.

Argentina, through its foreign minister Dr Louis Drago protested this use of force as being against international law precepts. The basis of the protest was basically that, military force could not be used to compel the payment of sovereign debt. It is that protest that evolved into what is known as the Drago doctrine. The Drago doctrine was a development of the Calvo doctrine also proposed by the Argentines through a previous foreign minister Mr. Calvo.[7]

This study traces the development of international law theories on contractual relations between nations culminating with the Drago doctrine[8] which seeks to prohibit the use of military force by a nation to collect contractual debts owed by another sovereign nation.[9]

The study will demonstrate that there is an emerging pattern in the use of sovereign national assets through illustrations by the use of case studies from three countries in similar relationships with China. The case studies will be supplemented with examples from other jurisdictions for illustrative purposes.

The thesis endeavours to place the rising debt owed by the three countries to China in the context of the potential diminishing of sovereignty by borrowing from views on aid and debt articulated by several writers over the last two decades.[10] There is an exploration into the Chinese articulation on sovereignty which provides interesting perspectives as viewed through the prism of a historical context.[11] An understanding of the Chinese articulation on sovereignty is necessary to illuminate the differences in the constitutional dispensations between the borrowing nations and China. The different philosophical appreciation of sovereignty, as articulated in the constitutions, is instructive in this regard.

The study borrows, in its theoretical framework, from various theories propounded by legal theorists and philosophers past and present, on the nature of sovereignty and makes an attempt to situate them in the overarching argument against the possibility of a strategic asset belonging to

[7] Hersey AS, 'The Calvo and Drago doctrines', *The American Journal of International Law*, Vol 1, 1907, 27.
[8] Drago LM, 'The Drago doctrine in international law and politics', *The Hispanic American Historical Review*, Vol 8, No. 2, (May 1928) 220.
[9] Gathii JT, 'The sanctity of sovereign contracts and its origins in enforcement litigation', 38 *George Washington International Law Review*, 251, 2006.
[10] Nagan WP & Haddad A, 'Sovereignty in Theory and Practice', *San Diego International Law Journal*, 13, 2011-2012, 429.
[11] Duara P, 'Transnationalism and the Predicament of Sovereignty', *American Historical Review*, 102, 4, Oct 1997 1030.

the collective of a sovereign state from being appropriated by another state. The argument rests primarily on the hypothesis that the appropriation of national assets of a sovereign nation for failure to settle a contractual debt may be considered a form of forceful forfeiture as to constructively fall within the contemplation and intended protections of the Drago doctrine.

This research also seeks to ascertain whether the verbal assurances being relied on at present, issued by the Kenyan and Chinese governments, about not appropriating any assets, adequately address the concerns with regard to sovereignty.[12] China is on record explicitly denying any intention to take over the assets of defaulting African creditor nations.[13] Indeed the stated assurances confirm the possibility of an interpretation towards collateralization and appropriation. Further, the role of African and specifically Kenyan, Ugandan and Zambian negotiators, legislators and policy makers in protecting the interests of their respective countries needs to be brought into focus. The need to conduct proper oversight on the loan terms for contracts, by both negotiators and legislators, in the African nations is one of the areas of real concern for the countries.

While the laws around public finance management in the three countries seem clear on the use of certain assets as collateral, it is evident that the safeguards are either completely ignored or deliberately misinterpreted to allow the government unfettered license to utilize them to procure loans.[14] Concern over this seeming lack of synergy in the efforts of the stakeholders to secure the sovereign interests of their respective countries is what dries this study.

1.2 Problem Statement

The contracts between the selected African countries and the Chinese state through state owned entities contain clauses which may lead to collateralization of strategic national assets. The clauses and their potential interpretation call into question various basic assertions of the doctrine of state sovereignty.

Why specifically China, and not any other lender country? That question is be answered in two parts: First, China over the last two decades has been the most significant development partner for

[12] Muchira N, 'Kenya: China Cannot Seize Port of Mombasa if Debt Default Occurs', The Maritime Executive, 16 March 2021. www.maritiime-executive.com.
[13] Mboya C, 'China wont seize assets from African countries but wont forget the debts', African Report, 14 May 2021. www.africanreport.com on 14 December 2021.
[14] Article 225 of Constitution of Kenya(2010) and Sections 12 and 16 of the Public Finance Management Act No.18 of 2012.

the three countries and indeed on the African continent.[15] Secondly, China is not part of the Paris club group of creditor nations and as such is not bound by their disclosure requirements before debt is either advanced or a restructure is considered with a debtor nation.[16] Although China is a part of the G20 initiative, the fact that they are not in the Paris club effectively means they can negotiate their terms with country that seeks to borrow from them.[17]

1.3 Research Objectives

The study intends to determine whether the three African countries: Kenya Uganda and Zambia have deployed adequate measures in their laws to ensure strategic public assets are safe from appropriation especially for loan related defaults.

Further, the study aims to interrogate whether there are any loopholes and if in the affirmative how they can be redressed.

A secondary objective is to determine whether any further measures, where those exist, can be utilised to offer better protections to the laws of the studied countries.

1.4 Research Questions

i) What is the legal effect of collateralization of strategic national assets for loan procurement from China on sovereignty in the sub-saharan African countries of Kenya, Uganda and Zambia?

The main research question will be answered through the following secondary questions as will be answered in each of the chapters of the thesis.

a) How is the conceptual understanding of sovereignty represented in each of the jurisdictions under study?
b) What are the legal safeguards in place in the laws of each of the countries under study for the use of national assets as collateral and do those laws offer adequate protection to said assets?

[15] Shepard W, 'What China is really up to in Africa', Forbes Africa, 3 October 2019.
[16] Biba S and Holbig H, 'China in G20: A narrow corridor for Sino-European cooperation', German Institute of Global and Area Studies, 1 May 2017, 4.
[17] Stanley LE, 'The Emerging market economies & Financial Globalization: Argentina, Brazil, China, India and South Korea', Anthem Press, 2018, 71.

c) What legal implications do the clauses on collateralization of assets have on sovereignty in Kenya, Uganda and Zambia?

1.5 Hypotheses

First Hypotheses

The structure of agreements between China and African nations, specifically clauses on waiver of sovereign immunity over assets for the African nations of Kenya, Uganda and Zambia may lead to potential appropriation of strategic assets by China thereby undermining sovereignty.

Second Hypotheses

The clauses on waiver of sovereign immunity over assets are in conflict with the domestic laws and the constitutions of the borrower countries as well as international law.

1.6 Literature Review

The thesis looks at the latest research on the nature of sovereign debt in Professor James Gathii's paper *The sanctity of sovereign loan contracts and its origins in enforcement litigation.*[18] In the paper, Gathii speaks to the necessity of adherence to sovereign loan contract terms as an absolute but the thesis essentially argues that legal shibboleths such as sanctity of contracts are normally bandied about without being applied with the necessary context especially in relation to sovereign loans. Gathii seems to address the necessity of adherence to contract terms as a party in the international loan market as insurance to the proper functioning of the system. His position in the paper is in keeping with the best traditions of *pacta sunt servanda*, the Latin exhortation that agreements must be kept. There is need and room to investigate options for parties when the terms of the contracts go against sovereign interests and the fundamental obligation to the citizens in the affected countries.

The study also takes a look at Dambisa Moyo's work *Winner takes it all* which lends some African perspective on the Chinese incursion into the continent and what that incursion portends for the ability of African nations to enjoy their independence. She makes an inquiry on whether and how the African countries assert their sovereignty in the agreements that undergird the China- Africa

[18] Gathii JT, 'The sanctity of sovereign contracts and its origins in enforcement litigation', 251.

relationship.[19] *Winner takes it all* takes a long look in the proverbial looking glass and the forecast by Moyo urges African negotiators to rework the rule book on Sino African engagements to account for local challenges and needs. However, the book does not attempt to prescribe solutions to balance the inequalities in bargaining power between African countries and China which the thesis makes an attempt to provide.

To delve into the question of sovereign debt the study unpacks Odette Lienau's *Rethinking Sovereign Debt* and specifically the chapter titled *Open questions in sovereign debt* as it applies to Africa.[20] The study aims to answer the question on how to treat impending default in sovereign debt and place it within the context of the research into the three countries. Lienau makes provocative suggestions to address the issue of sovereign debt that is misappropriated by the leaders in the borrower country by inviting the use of the Odious Debt doctrine to have the debt either restructured or forgiven. In a political and legal reality where misapplication of loan proceeds is rife, the utilization of the doctrine would certainly ensure closer scrutiny by lenders to ensure proper use and absorption of funds. The need for lenders to be more vigilant is because they would bear the consequences of misapplication of the loan proceeds by the borrower countries. The doctrine has supporters and opponents in equal measure depending on which side of the loan spectrum one takes.

The thesis makes an analysis of Craig Jaston's definitive article titled *Practical considerations in drafting a Joint Venture Agreement with China* which provides relatively timeworn but still useful perspectives for african negotiators and also as a template to guide future engagements of the region with the Chinese.[21] One of the key determinants of successful negotiations, in Jaston's enlightened view, is the necessity of having capable negotiation teams to handle the engagement right from the start to the execution of the agreements. He also advises that the negotiators be well resourced and knowledgeable in interpreting the various cultural nuances that might underlie negotiations with different countries. The article provides useful insights for developed nations to utilize in negotiating agreements with their global north counterparts and these can be modified for use in engagements with the China. *The New Sovereignty* by Abram and Antonia Chayes

[19] Moyo D, *Winner take it all*, Penguin Books, New York, 2012.
[20] Lienau O, *Rethinking sovereign debt*, Harvard University Press, 2014.
[21] Jaston C, 'Practical considerations in drafting a joint venture agreement with China', *The American Journal of Comparative Law*, Vol 31, No.3 1983, 230. www.jstor.org/stable/839826.

provides refreshing insights into the dilemna faced by states as they struggle to assert sovereignty in our interdependent modern world.[22]

The report by Africa Confidential titled *Bills, Bonds and even Bigger Debts* provides an almost prophetic analysis of the unravelling situation in Zambia with regard to Chinese debt and is relevant and appropriate to the focus of this research.[23] The report provides useful pointers on the Sino African loan ecosystem and allows room for prescriptive interventions to be suggested where necessary, which is what the research aims to do. Maria Carral's *Sovereignty in China: A genealogy of a concept since 1840* provides interesting perspectives into China's often strained conversations on sovereignty and provides useful context into the problem as identified in this research.[24]

This research seeks to add onto the academic works currently being utilized in relation to Sino Africa engagement and specifically around the use of collateral in the legal contracts that govern those relationships. This research shall seek to provide insights in this academic field on the need for African countries, specifically those that are the focus in this study, to have specific laws on the use of public assets as collateral.

1.7 Theoretical framework

The research will utilise a conceptual framework around the modern concept of sovereignty in an increasingly globalized world where the political, economic and legal interrelatedness between states makes absolute sovereignty difficult if not entirely impossible. The paper will trace the development of the concept of sovereignty from the classic through the modern and resting with the present liberal interpretation as they relate to relationship between nations.

1.8 Significance of Study

This research aims to generate purposeful conversation around the content of agreements with the Chinese to ensure that the relationships are entered into with necessary appreciation of the possible

[22] Chayes A & Chayes A, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1995.
[23] Africa Confidential, 'Bills, Bonds and Even Bigger Debts', Vol 59, No.18, 14 September 2018. www.africa-confidential.com on 14 September 2018.
[24] Carral M, *Sovereignty in China: A genealogy of a concept since 1840*, Cambridge University Press, 2011.

ramifications as well as argue for an increased capacity on the part of negotiators at the inception stage.

As Kenya and other African countries continue to heavily rely on development partners to fund their development it is imperative that the continent through its leadership ensure that such development assistance does not come at a cost to the sovereignty of its member states whether directly or constructively. This study aims to interrogate, where possible, the content of the agreements entered into to anchor such assistance to determine whether the threat is a real one.

The study also aims to assist legislators in the study countries pinpoint areas of concern in sovereign lending agreements and shore up protections in statute where necessary to obviate the need to do so after issues arise. It would also enable them ask pointed questions whenever audits are conducted.

The research aims to build upon and contribute to the body of academic work around Sino-Africa relations and hopefully offer new perspectives in the field.

1.9 Approach and Methodology

This will primarily be a desktop-based study to review the relevant laws and treaties as well as books and reports compiled on the subject matter. The study will also use documentary analysis of the contracts or parts thereof, where those are available, to draw inferences on the nature or import of terms and clauses under review. However, the contracts under scrutiny are unavailable for public scrutiny due to the confidentiality concerns cited and the extracts are of unidentifiable sources. There is an ongoing case in the High Court in Kenya in Mombasa that seeks orders to disclose the contracts on public interest grounds.[25] The High Court has since declared that the government has an obligation to disclose the contracts under the right to information of citizens.[26] The contracts governing the Standard Gauge Railway project remain a secret despite public outrage and even an undertaking by the head of state during a live television interview on 28 December 2016 to have the contents revealed.[27] The Auditor general in his 2018 report flagged the risk to the Mombasa port as a result of the debt owed by Kenya Railways on account of the

[25] Cornel E, 'Why Okoa Mombasa, TISA sued to obtain classified SGR contracts', June 21 2021. www.muhuri.org.
[26] Khelif Khalifa and another v The Principal Secretary, Ministry of transport and others (2021) eKLR.
[27] NTV interview with President Uhuru Kenyatta by Mark Masai in Mombasa on 28 December 2018.

Standard Gauge railway project.[28] Although interviews would have been the ideal method to access the unavailable information, attempts to get an audience with the relevant officials of the Kenyan Government as well as from the Chinese consular office to confirm the contents of the contract have been unsuccessful, with confidentiality cited as the reason. The same challenges have stymied attempts to get the contracts in both Uganda and Zambia despite concerns on sovereignty being in the public domain.

The research will use case studies to test and establish the validity of the hypotheses. The purpose of the case studies here is to investigate whether the circumstances in the three countries are similar and if so, whether the lessons learnt from the case studies can be applied to guarantee protection in future agreements. The case studies will provide necessary context to the challenges with regard to sovereignty in the countries.

The three countries have been specifically chosen for the following reasons:-

Zambia: The choice of Zambia is informed by the fact that it has the longest standing interaction with China on the African continent and is host to the largest number of Chinese companies in Africa. Those circumstances make it a singular candidate for study on the effects of the engagement with China.

Kenya and Uganda: The two East African neighbours are part of the study due to their increased engagement with the Chinese in large infrastructure projects in which their respective auditor generals have reported the potential threats to sovereignty posed by the waiver of sovereign immunity over assets.

1.10 Limitations of this Study

This study cannot fully interrogate the structure and content of all agreements entered into by the three African countries with the Chinese and will only seek to look at the aspects of those agreements that expose the countries to threat of appropriation. It would be far too ambitious to delve into all the aspects of even one of the agreements within the ambit of this paper and the thesis

[28] Omondi G, 'Mombasa Port at risk as audit finds it was used to secure SGR loan', The East African, 20 December 2021. www.theeastafrican.co.ke on 20 December 2021.

will only examine the possible effects of these agreements as they relate to the sovereignty of the three countries.

Another significant limitation lies in the accessibility of the contract documents in all three countries. Indeed, there are several matters filed in court to compel disclosure of those contracts in Kenya with regard to the Standard Gauge Railway project.

The confidentiality of the contracts has also been in support of the decision of the government to withhold the agreements from public scrutiny. As mentioned above the matters are in the Kenyan constitutional court with petitions filed in furtherance of the constitutional right to information.[29]

There are significant challenges especially in sourcing the contract documents themselves as well as getting authoritative comments from the persons entrusted with the agreements and this inaccessibility might affect the conclusions recommended in certain specific regards. The above stated reluctance of authorized persons to discuss the details of the contracts may have a bearing on parts of the study, the inferences and the conclusions made.

1.11 Mitigation Measures to Limitations

The research has made several inferences as a result of the limitations as well as seeking for supporting information from persons who have had access to the documents and subsequently based their reports on them. An example is in the use of reports by the auditor generals in both Kenya and Uganda on the waiver of sovereignty in agreements entered into by their respective governments and Chinese state owned entities.

1.12 Chapter Breakdown

1.12.1 Chapter 1

This chapter will deal with the introduction to the research and give a narration of the engagement between the three countries and China with regard to loans for infrastructural development from the latter part of the twentieth century into the early parts of the twenty first century.

The chapter introduces the research by setting out relations between China and the three African countries. It further contextualizes the problem posed by the collateralization of strategic assets

[29] Mkongo M, 'Activists move to court to compel state publish SGR contracts' The Star, 23 June 2021. www.the-star.co.ke on 23 June 2021.

and the impact the action may have with regard to the sovereignty of the stated countries. It then sets out the main research question that seeks to determine the legal effect of collateralization on the sovereignty of the countries under study. It sets out the terms of the study and explains the methods through which the research question will be answered.

1.12.2 Chapter 2

This chapter will set out the theoretical framework that undergirds the study and analyse the various theories and doctrines around the area of sovereignty. The chapter will explore the legal philosophy from various scholars and theorists around sovereignty and conclude by setting out the current thoughts under international law. The chapter makes an analysis of the theories of public debt and collateral with regard to loan facilities and the nexus between the two theories and the doctrine of waiver of sovereign immunity within the remit of the study.

The chapter also makes reference to the doctrine of odious debt and its applicability in the study is briefly explained.

1.12.3 Chapter 3

This chapter aims to analyse the constitutional and legal framework in Kenya around Chinese financed projects and specifically, the standard gauge railway (SGR), the issue of public debt and external borrowing to determine whether the contracts as drafted and especially those with regard to collateralization of strategic assets are consistent with the framework. The chapter also ascertains whether any gaps as may be identified are inimical to the sovereign interests of the country. The chapter analyses the provisions of the Kenya Railways Corporation Act and the Kenya Ports Authority Act to unpack the symbiotic relationship between the two corporations and ascertain the legal underpinning that governs it. The chapter concludes with an analysis that endeavors to determine what risk, if any, is posed by the relationship as far as Chinese projects and contracts are concerned.

1.12.4 Chapter 4

This chapter will focus on the laws and regulations in Uganda that govern borrowing and public debt with particular focus on collateralization. The projects funded by the Chinese loans in Uganda and specifically, the Entebbe airport expansion and the Entebbe-Kampala city expressway are

brought into focus. The analysis endeavors to determine whether the legislative framework around debt makes provision for strategic national assets and what protections, if any, are in place to prevent appropriation of those national assets.

1.12.5 Chapter 5

The penultimate chapter focuses on Zambia, the Chinese financed and constructed Karuna hydropower project and analyses the legislative framework in the country with regard to public debt, borrowing and collateralization. The chapter unpacks the Constitution as well as the statutes and regulations that govern debt to determine whether there are provisions for identification and classification of national assets owned by the state or state owned enterprises. The chapter seeks to determine whether there are laws around collateralization of strategic assets and what safeguards exist for their protection.

1.12.6 Chapter 6

This chapter will give the conclusion and recommendations. This chapter will sum up the paper and draw conclusions on the state of sovereignty in the study countries resulting from agreements with the Chinese. The focus is on the use of public assets as collateral and the need for specific laws to protect the public interest.

This chapter will also suggest solutions going forward to minimize the risk of any such assault and practical measures to assure against any abuse of powers either by the Chinese and/or other development partners as well as civil servants to whom citizens have delegated the power to negotiate foreign investment contracts.

Chapter 2 - Conceptual framework

2.1 Introduction

This chapter shall primarily focus on sovereignty as it relates to the subject, the principles and waiver of sovereign immunity. It shall then delve into the recognition theory of statehood especially as relates to sovereignty and the principles espoused therein. The works of pre-eminent scholars around sovereignty, in Thomas Hobbes and John Locke, are contrasted for a keener appreciation on the evolution of the concept and its relevance in the modern world. The chapter will aim to give a general appreciation of the theory of sovereignty from the western and the Chinese perspective and highlight any significant point of departure in the two philosophical viewpoints.[30] The need to expound on the philosophical differences is informed by the approach to sovereignty by China on the one hand with an authoritarian interpretation in which the state is supreme as juxtaposed with the democratic social contract model in which the people are the supreme authority.[31] The appreciation of the two divergent philosophies is integral towards understanding why the inclusion of waiver clauses may be viewed as problematic by one side and considered normal practice by the other.

The theory of public debt though primarily economic in nature, is important to gain an understanding of the basic relationship between borrowers and lenders, where loans are procured in the name of and for the benefit of citizens. The theory of lender collateral is briefly expounded upon as it relates to the use of collateral by sovereign states and concludes the theories that underpin the theoretical framework of the study.

2.2 Sovereignty

The treaty of Westphalia provides the first articulation of sovereignty among independent states by providing for three main but general principles:

i. State sovereignty

[30] Treaty of Westphalia, October 1648.

[31] Liu Y, 'Peoples will or the Central Government's plan? The shape of contemporary Chinese local governance', *Journal of Contemporary East Asia Studies*. Published online, 22 March 2020.

ii. Equality of states

iii. Non interference with the affairs of another state

Broadly speaking that treaty provided the building blocks of international law with regard to sovereignty as it exists today with suitable changes to allow for the times. Although there are questions about whether sovereignty was the main issue under discussion at the time, it nonetheless is internationally recognized as the genesis of sovereignty as a mainstay of international relations.[32]

It is from those three principles from Westphalia that every other facet of sovereignty derives context although there is still a correlation to each other. For purposes of this research the focus is on sovereignty over strategic national assets located within a defined territory and the unfettered right to deploy them towards a public purpose for the benefit of the citizens. It implies an inability by any person or government to use it in a way inimical to those interests without the authority of the people in whose name the sovereignty is exercised.

States are the primary subjects of law and as a result the ingredients of statehood are an integral part of any thesis that has as a consideration the affairs of states. The international legal system, of which states are a component, has criteria for determination of membership which guides the process before recognition is given to a new member. The process of a new member attaining statehood was settled at the Montevideo convention at which the criteria was laid down as to the prerequisites of statehood:[33]

i. Permanent population
ii. Defined territory
iii. Government
iv. Capacity to enter into relations with other states

Once the prerequisites of statehood as set out in the Montevideo convention were attained, the state had the recognition theory upon which to make their claim for recognition as a member of

[32] Ciurtin.H, 'When Westphalia Goes to China: Territory, Sovereignty and Legal Narratives across the Strait', *Journal of Territorial and Maritime Studies*, Vol.5, 2018, 24.
[33] Montevideo Convention on the Rights and Duties of States, 26 December 1933.

the community of nations. The recognition as a state then, ideally, enabled an independent community to access the benefits and privileges of statehood under international law.

2.2.1 Statehood as the Genesis of Sovereignty

Recognition theory

The basic premise of the recognition theory is that a state attains the status of an international person and becomes a subject of international law. It is the rationale for attainment of statehood by countries through which they become part of the international community of nations. There are two traditional theories of recognition developed under international law namely; the declaratory theory, and, the constitutive theory.

An understanding of the recognition theory is necessary towards framing the question of sovereignty and the rights of the African countries under study. States and countries can only assert certain rights if they are members of the international community. Rights such as sovereign immunity are only available to states and not individuals unless they are acting as representatives of sovereigns.

2.2.1.1 Declaratory theory of recognition

Under the declaratory theory a state attains recognition through self-determination having met the criteria for statehood set out under the Montevideo convention. The declaratory theory is also known as the 'Evidentiary theory' and one of the chief proponents is Professor Ti-Chiang Chen.[34] The theory views recognition as complete upon a state complying with the set criteria, and no further act from external actors is required or indeed necessary to validate such statehood. There are countries that have declared statehood but not been acknowledged as such, in an apparent conflict between the declaratory and constitutive theories of recognition.[35] The case of Somaliland is the classic example of a country declaring statehood but not receiving recognition from the international community, that still perceives it as an inseparable part of Somalia.[36] Secession is the

[34] Chen T, 'The International Law of Recognition', Fredrick Praeger Inc, 1952, 54.
[35] Vidmar J, 'Remedial Secession in International Law: Theory and (Lack of) Practice', *St Antony's International Review*, Vol.6, No.1, May 2010, 41.
[36] Farley BR, 'Calling a State a State: Somaliland and International Recognition, *Emory International Law Review* 24, No.2, 2011, 810.

unshackling effect of this conflict where one part of a whole declares independence to pursue aspirations that are deemed unmet or frustrated by the original state.[37]

2.2.1.2 Constitutive theory of recognition

In the Constitutive theory a state attains such status only upon recognition by other members of the community of nations and a willingness to enter into relations with the new state. Such willingness is invariably demonstrated by engagement as equal sovereigns among the international community. The Constitutive theory effectively advances the school of thought that requires agreement or affirmation from other nations that a state is indeed one of their number. It is this school of thought that underpins international relations between nations in pursuit of their various objectives as states. It is this theory that informs lending to sovereigns by other states or through institutions resident in their state. The understanding that a country is part of the community of nations and subject to certain rules and norms assures those who intend to deal with the state of their standing and ability to engage or otherwise deal as well as to enter into legal relations on behalf of its people. Without this recognition countries would be hard pressed to provide the necessary assurances so as to enter into relations with either other states or entities.[38]

2.2.2 Sovereignty – Central authority vs The People

The theory of sovereignty was first espoused by Hobbes in his classic treatise on politics, The Leviathan.[39] In his book Hobbes spoke about a sovereign king wielding full authority over his subjects, a political concept that has survived the centuries and is still practiced in various forms in several countries today. The sovereign in Hobbesian thought is a supreme authority wielding divinely ordained power over subjects to whom no explanation is owed or expected.[40] The sovereign is answerable to no one. In chapter 31 of his Leviathan titled 'Of the Kingdom of God by nature' Hobbes identifies three avenues through which he asserts God rules over men: Natural

[37] Bolton G, McGivern L & Steele S, 'Editorial Introduction: Secession, Sovereignty & the Quest for Legitimacy', *St.Antony's International Review*, Vol.6, No.1, May 2010, 4.
[38] Dietrich F, 'State Recognition between Justice and Efficiency', *Annual Review of Law and Ethics*, Vol.21, 2013, 195.
[39] Hobbes T, *The Leviathan*, Penguin Books, 1968.
[40] Rogers GAJ, 'Hobbes, Sovereignty and Consent', New Critical Perspectives on Hobbes' Leviathan upon the 350th Anniversary of its publication, 2004, 242.

reason, Revelation and by the voice of some man.[41] It is the third avenue that concerns itself with rule by man over other men that takes the form of sovereignty.

Hobbes' primary inquiry in the Leviathan was on what made a State, how the State operates and the obligations owed to the State by the citizens by which it is composed.[42] He considered the authority of the law as consisting of and emanating from the command of a sovereign to whom citizens owed obedience.[43] Authority according to Hobbes was divinely ordained and men had a moral imperative to obey a person who had been so ordained. A question he grappled with on account of sovereignty was how men would determine that a certain individual had been ordained by God among several competing claims.[44] This would be settled by men applying natural reason to determine who among the claimants had divine sanction.

Sovereignty, in the context of the three African countries, lies with the people as espoused in their respective constitutions, with the implication being that no action in derogation of sovereignty can be undertaken without the express authority of the people.[45] This political construct and understanding of sovereignty has, at its root, the political theory of John Locke, who imagined a body politic that was sovereign-less or whose sovereignty was held by all the members of the society in question.[46] The design of the three arms of government widely applied in many countries espousing the doctrine of popular sovereignty is a key feature of Lockesian appreciation of sovereignty as propounded in his seminal work on the subject, The Two Treatises.[47]

While the main premise of Hobbes' Leviathan is divinely ordained authority invested in one man he also makes reference to authority consented to by the people which would appear to be a form of popular sovereignty.[48] In contrast with Hobbes's leviathan is the view propounded by Locke of a society in which power and responsibility are shared by the people who for that body politic a forbear of the aspirations of any modern states.

[41] Hobbes T, *The Leviathan*, 1660, 344.
[42] Stone.P, 'Hobbes' Problem', *The Good Society*, Vol.24, No.1, 2015, 3.
[43] Duke.G, 'Hobbes on Political Authority, Practical Reason and Truth', *Law and Philosophy*, Vol.33, No.5, 2014, 609.
[44] Hobbes.T, *The Leviathan*, 1660, 260.
[45] Article 1, Constitution of Kenya: Article 1, Constitution of Uganda : Article 5, Constitution of Zambia .
[46] Scott J, 'The Sovereignless State and Locke's Language of Obligation', *The American Political Science Review*, Vol 94, No 3, 2000, 551.
[47] Locke J, *The Two Treatises of Government*, 1689, 167.
[48] Hobbes.T, *The Leviathan*, 1660, 248.

In the context of the study, sovereignty lies with the people and not one single individual, or other authority, except as may be delegated to them by the people. In the words of Grotius, 'That power is called Sovereign whose actions are not subject to the legal control of another.[49] At the core of popular sovereignty, in that sense, would be the concept of delegated power by the people to persons through whom to exercise their authority. However, the tension between the people and those they choose to exercise sovereign authority on their behalf is a debate that has continued to occupy the minds of political theorists across the centuries.[50]

This theory of popular sovereignty lies at the heart of democracy and is a key tenet of the three Africa countries that are at the core of this research. Any exercise of sovereignty against the good of the people or without their authority is, in an ideal sense, unlawful and without effect. In this instance, governments, who want to exercise those powers in a way that is inconsistent with sovereignty, must seek authority from the people by whichever means framed for the purpose. In this context that might lie with seeking the approval of Parliament, which is the institution deemed to represent the interests of the people. Put another way the prior consent of the people is imperative to ensure the sovereign national economic interest is secured. Locke in his Two Treatises attempts to resolve this tension between the governor and governed through the executive and legislative arms of government.[51]

Although the needs of a global society have resulted in some changes to the appreciation of sovereignty, the basic tenets remain unaltered especially with regard to internal affairs. It underpins the notion that each state is responsible for its own internal affairs and can not be subjected to the control or direction of another state in those affairs and neither should the rights of such sovereign state be subjugated to those of another.[52] International law also canonises those rights in the United Nations declaration on the Right to development under the principle on permanent sovereignty over their natural resources.[53]

[49] Cutler.C, 'The Grotian Tradition in International Relations', *Review of International Studies*, Vol.17, No.1, 1991, 46.
[50] Marden R, 'Who shall be the judge?: John Locke's Two Treatises of Government and the problem of Sovereignty', *Contributions to the History of concepts*, March 2006, Vol 2, No1, 60.
[51] Locke J, *Two Treatises*, 1689, 169.
[52] Article 1, International Covenant on Civil and Political Rights, 16 December 1966.
[53] Article 5, United Nations declaration on the Right to Development, 4 December 1986.

Sovereignty, in the basic incarnation in this paper, refers to the equality of states and the recognition of the right of each state to determine its own affairs within a defined territory independently; without the interference of other states or actors from other states. It is this aspect of sovereignty that this research argues is under threat from the actions of an external actor or even inaction by internal actors.

The Chinese Constitution expresses itself on sovereignty in terms similar to other countries. Article 2(1) of the Chinese constitution announces that all power belongs to the people who express that power through various organs at different levels of government.[54] This understanding of the various philosophical approaches is critical to appreciating why the waivers to sovereign immunity are problematic in the absence of corresponding authority from the people in the African countries. While the African countries under study have constitutional democracies that pronounce the people as supreme the Chinese rely on a political system whose direction and agenda is centered around and driven by the Communist party.[55] The Chinese President, being the de facto leader of the party, is the authority-wielding sovereign who acts to safeguard and advance the cause of the people.[56] There is an insistence, in the African democracies, on sovereignty being centered on the people as the authors of their aspirations whereas from the Chinese point of view there is the party which then determines how to exercise such sovereignty without necessarily paying deference to its people. However, it must be mentioned that there is no difference in the appreciation of sovereignty except possibly in practice.

In the final analysis, sovereignty has developed greatly from the black and white description envisioned by classical theorists like Hobbes and Locke where it was discussed within the context of a self-sufficient polity, to one in which nations are interdependent and fortunes linked in more ways than one. This new international dynamic is cognizant of the reality that sovereignty is best demonstrated by the ability of states to coexist and interact in different ways and in legal relationships for the benefit of their citizens.[57]

[54] Article 2(1), Constitution of the People's Republic of China (1982).
[55] Brodsgaard K, 'Politics and Business group formation in China: The Party in Control.', *China Quarterly*, 2012, 628.
[56] Xiaodong.D, 'Law according to the Chinese Communist Party: Constitutionalism and Socialist Rule of Law', *Modern China*, Vol.43, No.3, 2017, 334.
[57] Chayes A & Chayes A, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1995, 86.

2.2.3 Sovereign Immunity

What is the correlation between sovereign immunity and the collateralization of sovereign assets one might ask? The waiver of sovereign immunity over strategic assets is what makes it possible to use those assets as collateral in the international loan market where sovereigns ordinarily borrow funds.[58]

In this research an appreciation of the concept of sovereign immunity demonstrates why any requirement to waive any part of the protections guaranteed by sovereignty may be problematic absent certain conditions. It further contextualizes instances when that waiver can be done in the three countries and the conditions precedent before it can be effected in the name of the people.

The waiver of sovereign immunity is at the core of a majority of the agreements involving sovereign borrowers and is at the crux of the theoretical foundation of this research. From a history of absolute immunity for sovereigns for any acts done as such sovereign to the present where sovereign immunity is anything but absolute, the environment has shifted gradually but definitively. It is now generally accepted that sovereigns are liable for commercial transactions and that sovereign immunity does not extend to such acts.[59] It is the offspring of the international financial market in as far as sovereign borrowers are involved and is intended to maximize on available options in the event of default by the borrower.[60]

Further in the context of this research is the implied requirement for authority to waive sovereign immunity on anyone who purports to exercise the right to do so. It underlines the fact that there must be authority to waive any sovereign rights and sovereign immunity is one such right.[61] Without demonstration of the necessary authority there can be no waiver of any rights inherent in the sovereign.

---

[58] Flandreau M, Pietrosanti M & Schuster C, 'Why do Sovereign Borrowers post collateral? Evidence from the 19th Century', Institute for New Economic Thinking, Working Paper No. 167, October 7, 2021. www.ineteconomics.org/workingpapers.

[59] Panizza U, Sturzenegger F & Zettelmeyer J, 'The Economies and Law of Sovereign Debt and Default', *Journal of Economic Literature*, Vol.47, No.3, 654.

[60] Wall D, 'International Law: Waiver of Sovereign Immunity under United States Law', *International Financial Law Review*, No.1, Vol.7, November 1982, 30.

[61] International Law: Waiver of sovereign immunity, *Duke Law Journal*, Vol.4, 590, Duke University School of Law, 1962.

A critique of the principle of sovereign immunity finds expression in the interdependent relations between nations and citizens of different nations in what is now acknowledged as a global village. The critique advances the view that a strict interpretation of sovereignty and an insistence on the rights inherent in that traditional view, where sovereign immunities were absolute in protecting the acts of foreign states, are inconsistent with the comingled nature of world affairs in the present geopolitical space.

In the arena of global trade and commerce an insistence on the traditional view would effectively hamper the ability of countries to benefit from products available on the international market place.[62] The interconnectivity, economic and political federations that are a global reality in the world today, make sovereignty and the related principles a fluid concept that has to change to suit the present needs of countries.[63] The lending environment that governs lending by and between countries has led to the development of sophisticated instruments to cater for the various interests and protect the lenders in the event of default on the part of a country.[64]

2.3 Collateralization

Collateralization, in the context used in this study, is the use of an asset owned or controlled by a borrower to secure a debt advanced by a lender. In the event of default in repayment of the debt by the borrower, the lender has the option to take over the control and use of the asset in accordance with terms contained in the loan agreement.

2.3.1 Theory of Public Debt

The leading thinkers on public debt are David Hume and Adam Smith, whose views include justification for public borrowing, an overarching theme in this research where there are questions on the necessity of public debt.[65] Hume in his 1752 timeless essay *Of Public Credit* speaks to the responsibility saddled on posterity to repay public debts taken by the preceding generations to undertake public works.[66] In the same essay Hume offers default as a practical solution that would

[62] Buchheit L & Parr J, 'The Pari Passu Clause in Sovereign debt Instruments', *Emory Law Journal*, Vol.53, 2004, 874.
[63] Nour A, 'National Sovereignty and Globalization', *European Journal of Economics, Law and Politics*, Vol.7, No.1, 2020, 4.
[64] Lipworth G & Nystedt J, 'Crisis Resolution and Private Sector Adaptation', 47 IMF Staff Papers, 2001, 192.
[65] Sharp A, Review:A General Theory of Public Debt, *The American Journal of Economics and Sociology*, Vol.19, No.1, 1959, 106.
[66] Hume D, *Essays:Of Public Credit*, Oxford University Press, 1752,

prejudice a few for the benefit of the many who would be affected by insistence on tax increments for purposes of satisfying debt obligations.[67]

The general views from classical thinkers, such as Thomas Jefferson and Adam Smith, were mainly pessimistic with regard to public debt, viewing such debt as wasteful and a drain on public resources.[68]

The other side of the debate is enlivened by intellectuals such as Hamilton and Devenant, who advance the view that public borrowing was what allowed states to offer public services and it was not only necessary but unavoidable within certain circumstances.[69] John Maynard Keynes gave enthusiastic support to public borrowing by governments to support economic growth where there were deficits that restricted the options available.[70]

The novel and complex structures in sovereign debt and conditions introduced to mitigate risk have an impact on the loan terms offered by lenders and the type of collateral required to underwrite it. The next theories unpacked for purposes of this research relate to the kind of collateral and the quality of such collateral.

2.3.2 Lender-based Theory of Collateral

This theory explains the rationale behind a lender's decision to advance a loan with collateral to secure its interests and as well as the type of collateral deemed sufficient to mitigate against the risk of default.[71] In a dynamic financial ecosystem of which credit formed an intrinsic part, lenders developed mechanisms through which assets were offered by the borrower to guarantee repayment of debt on agreed terms.[72] The original use of collateral was a statement of liquidity by a borrower to signify to the lender their confidence in the ability to repay the debt advanced on the terms and to forfeit the collateral upon default. The development of the use of collateral from a borrower

[67] Paganelli MP, 'David Hume on Public Credit', *History of Economic Ideas*, Vol.20, No.1, 2012, 39.
[68] Boettke P & Palagashvili L, 'Taming Leviathan', *Supreme Court Economic Review*, Vo.23, 2015, 286.
[69] Salsman R, *Classical Theories of Public Debt, Financial Crises and Recession in the Global Economy*, 4th edition, Cheltenham UK, Edward Elgar Publishing, 2017.
[70] Niggle CJ, 'Keynes on Monetary Policy: A Comment on Crotty', *Journal of Economic Issues*, Vol.27, No.4, 193, 1265.
[71] Plaut S, Theory of Collateral, *Journal of Banking and Finance*, Vol.9, Issue 3, 1985, 411.
[72] Chan YS & Kanatas G, 'Asymmetric Valuations and the Role of Collateral in Loan Agreements', *Journal of Money, Credit and Banking*, Vol.17, No.1, 1985, 90.

centric process to a lender centered one highlights the centrality of security as part of the loan process.[73] It however does not speak to the nature and quality of collateral offered and whether it is what the process requires to ensure the sufficiency of the security to satisfy the debt in the event of a default by a borrower.[74] At the time the concept of collateral came into usage in the financial arena its use by a borrower was to confirm the ability to repay debt in much the way one could say 'I have xyz so i have the ability to borrow money and repay'.[75]

Collateral as a requirement in the loan process is primarily to mitigate the lender's risk in the event of a default and also has an effect on the amount of credit as well as the interest rate charged on the facility.[76] The lender effectively has a charge on the asset given as security which crystallises upon an act of default by the borrower. It is instructive to note that the charge held by the lender can only crystallize when the borrower defaults on their obligation to repay and does not remedy the default.

2.3.3 Theory of Collateral Quality

This theory speaks to a knowledge that collateral offered needs to be of a nature and quality that would offset any balance in the event of a default. It further gives insights on the way in which collateral may be allowed to deteriorate by deliberate acts by a borrower and the ways in which a lender can mitigate potential loss in the value of the item or asset offered as collateral.[77] It examines the relation between the quality of collateral and the incentive to repay debt giving insights on the insistence by financial institutions on a certain type of asset class to be used as security in loan transactions and the motivation behind it. From a lender's point of view the better the collateral quality the more incentive to the borrower to repay their debt obligations.[78]

[73] Brumm J, Grill M, Kubler F & Schmedder K, 'Collateral requirements and Asset Prices', *International Economic Review*, Vol.56, No.1, 2015, 12.
[74] Booth JR & Booth LC, 'Loan Collateral Decisions and Corporate Borrowing Costs', *Journal of Money, Credit and Banking*, Vol.38, No.1, 2006, 72.
[75] Booth J & Booth L, 'Loan Collateral decisions', *Journal of Money*, Vol 38 2006, 69.
[76] Stroebel J, 'Asymmetric Information about Collateral Values', *The Journal of Finance*, Vol.71, No.3, 2016, 1105.
[77] Lee M & Neuhann D, A Dynamic Theory of Collateral Quality and Long Term Interventions, Federal Reserve Bank of New York Report, August 2019.
[78] Bharath S, Dahiya S, Saunders A & Srinivasai A, 'Lending Relationship and Loan Contract Terms, *The Review of Financial Studies*, Vol.24, No.4, 2011, 1151.

It would follow that China would require collateral that would be so valuable as to incentivize the African countries to repay their debt rather than risk loss of the assets pledged as collateral. Conversely, those assets pledged as collateral are the ones that raise greater concerns about an infringement on the sovereign rights of the affected countries as well as being highly emotive topics to the citizens.

The theory further explains the relation between asset quality and interest rates offered on loans with high quality assets attracting low interest rates while the converse holds true of poor quality assets. In the research the nature and quality of the collateral given by the countries has a relation to public perception about diminished sovereignty and is to that extent relevant. While the collateral from a lender perspective gives the needed impetus on the borrower to repay their debt it raises concern in the citizenry on the risk of loss in the event a default were to occur.

A critique of the collateral quality theory opposes the reasons proffered on the effect of quality on interest rates and instead advances the argument that information asymmetry is the cause of fluctuating interest rates and not collateral quality. While acknowledging the role and importance of collateral in most loan contracts the proponents argue that information on borrowers is of greater significance when setting interest rates and also plays a greater role to mitigate against default.[79]

2.4 Odious Debt doctrine

This doctrine finds its origin in the reluctance of incoming governments' refusal to pay the debt taken by authoritarian regimes which were not put to uses beneficial to the public who were expected to then repay the obligations[80]. It has been utilised with limited success to restructure debt, if not necessarily to avoid the debt repayments, as in the Iraqi case where it was used to renegotiate the debts taken by the Saddam Hussein regime. Is it now time to argue for its use by affected African countries, to avoid liability for repayment of debt that was taken despite protests by the citizens, as also for debt given by lender countries despite the precarious debt positions of the borrowing state.[81] It makes little sense for lenders to extend credit to countries whose ratings

[79] Inderst R & Mueller H, A Lender Based Theory of Collateral, *Journal of Finance and Economics*, Vol.84, 2004, 849.
[80] Gentile C, "The market for Odious Debt' Law and Contemporary Problems, Vol 73,No 4, A Modern Legal History of Sovereign Debt,2010, p 153. www.jstor.org/stable/25800674.
[81] Boyce.J & Ndikumana.L, 'Africa's Debt: Who Owes Whom?', Political Economy Research Institute(2002) Pg.6, University of Massachusetts Amherst.

by international agencies signify a high risk of default. The appetite for money from interest and penalties upon default seems to be a primary consideration for some of these financial institutions, while it might be argued that certain nation also use the same kind of debt arrangements to secure favourable trade advantages.

2.5 Conclusion

The theories discussed in this chapter show a strong correlation between legal and economic principles as they intersect in financial transactions between sovereign borrowers and banks that lend to countries either directly or through state owned entities. The discussion has been centered on the theory of sovereignty from its Westphalian roots and the two theories of state recognition to provide the basis of the relations between the African countries and China. The doctrine of sovereign immunity has also been discussed with emphasis on the requirement of waivers of sovereign immunity in the agreements between the countries and China which is at the crux of the study. The discussion then analysed the theories on public debt and collateral which animate the engagement between the countries and forms the focus of the research. The discussion then proceeds with a discussion on the theory of collateral quality as a main consideration where sovereignty concerns in the African countries in their relation with China are evident. The doctrine of odious debt lends considerable colour to the study with a recognition of problematic debt where the citizens are locked out of the decisions on the use of borrowed funds.

The history of the development of the various theories traces the systemic responses to growth as well as the increasing complexities of global commerce. The concerns around a fetter on the effect of sovereignty by the type and quality of collateral required in certain loan offers are brought into keen focus in the research.

It is expected that the research will show an inter-dependence between the theories as to justify their inclusion in the theoretical framework. The research is founded on these theories and relies on them to frame the questions and provide needed context to those questions.

Chapter 3 – Kenya and the Standard Gauge Railway Project

3.1 Introduction and background

In Kenya, one project is synonymous with concerns over appropriation and the fears of an assault on sovereignty in the country; The Standard Gauge Railway (SGR) project and the contracts for the loan procured to finance its construction.[82] Kenya conceived the SGR project as an integral part of the opening up of the East African region and linking of markets in the interior with the port city of Mombasa.[83] The China Export Import Bank (China Exim bank) funded the project through a loan facility of 3.2 billion US dollars through a government-to-government arrangement.[84] The China Roads and Bridges Corporation (CRBC) managed and constructed the project, which was overseen by the Kenya Railways Corporation as the client. The CRBC is a wholly owned subsidiary of the Chinese Communications Construction Company Limited, which is a state-owned enterprise.[85] The huge cost of construction of the railway raised concerns on the ability of the railway to be profitable and fears of default in the loan repayment.[86] The concerns about default in repayment of the loan have given voice to fears of appropriation of strategic assets belonging to the country by the lender CRBC.[87]

The concern regarding appropriation revolves around the use of the assets of the Kenya Ports Authority (KPA), specifically the Mombasa port, which is also known as Kilindini, and the revenue generated therefrom as collateral to ensure repayment to the financiers. Despite vociferous denials on the possibility of any such adverse action by both the Kenyan government as well as the Chinese government this has remained one of the most raised concerns regarding this project

[82] Suzhen J, 'A Historical Perspective on Railways, Sovereignty and Foreign Powers in East Africa', Princeton School of Public and International Affairs, 1929-2021, 6. www.princeton.edu/ark/88435/dsp018c97kt265.
[83] Juma L, Gogo A, Abdulkadr A & David L, 'Kenya's Standard Gauge Railway in the Context of Theory and Practice of Regional Planning', Acta Carolus Robertus, December 2020, 21. www.researchgate.net/publication/348330786.
[84] Taylor I, 'Kenya's New Lunatic Express-The Standard Gauge Railway', *African Quarterly Studies*, Vol 19, Issues 3-4, October 2020, 6.
[85] www.en.ccccltd.cn
[86] Kacungira N, 'Will Kenya Get Value for Money from its New Railway?', British Broadcasting Corporation, 8 June 2017. www.bbc.com on 8 June 2017.
[87] Odhiambo M, 'China could seize Mombasa Port over Sh364Bn SGR Loan', The Star, 15 March 2021. www.the-star.co.ke on 15 March 2021.

by civil society actors speaking for the wider tax paying public.[88] The reluctance of the Kenyan government to make public the contract documents has served to feed the narrative that there might be some truth to the claims by civil society that the assets of the KPA have been used as collateral to secure the financing therein.[89] No less a personage than the president undertook to disclose the contents and more than a year later the Kenyan public is still waiting for the information. The Chinese government through their consul in Kenya subsequently reiterated their position that the contracts would not be disclosed to the public or media.[90]

The loan for the project was advanced by the China Exim Bank and there is the requirement of a sovereign guarantee as one of the conditions in their loan documentation prior to disbursement. This information is freely available on the China Exim Bank website on the requirements for funding of international projects.[91] In the absence of documentary proof to the contrary, it is logical to infer that the Government of Kenya did give a guarantee of a similar nature in the SGR contract even without the benefit of perusing the agreement.

It seems inimical that the Kenyan people for whose ostensible benefit the contract was entered into would be subject to the confidentiality clause.

Further it is the same people whom, through their taxes, are paying for both the loan and the interest and who would, upon default, stand to lose their collective assets.

A recent government communication directs that all importers must ensure the transportation of all cargo shipped in through the Mombasa port on the Standard Gauge Railway.[92] It is a directive that appears calculated by the government to ensure an increase in the revenues from the standard gauge railway. The directive has since been declared unconstitutional by the constitutional court

[88] Muchira N, 'Kenya: China Cannot seize Port of Mombasa If default Occurs', The Maritime Executive, 16 March 2021. www.maritime-executive.com/article/kenya-china-cannot-seize-port-of-mombasa-if-default-occurs on 16 March 2021.
[89] Mboya C, 'Kenya: Why is the Government hiding its Chinese loan contracts?', The Africa Report, 8 September 2021. www.theafricareport.com.
[90] Wako A, 'Kenya: Chinese Ambassador Explains Why SGR Contract is Still Top Secret', All Africa, 22 May 2019. www.allafrica.com/stories/201905230016.html on 22 March 2019.
[91] www.english.eximbank.gov.cn
[92] Construction Review Online, 'Kenya Railways Urges Importers to Use SGR to Transport Cargo', 7 March 2018. www.constructionreviewonline.com/news/kenya/kenya-railways-urges-importers-to-use-sgr-to-transport-cargo on 7 March 2018.

in what was a relief for truck owners and those reliant on the patronage of the drivers along the transport artery.[93]

The Chinese funded projects have been the cause of considerable alarm not only by civil society actors but also by other development partners not so much in so far as the contracts themselves are concerned, but on the secrecy around the process and more so on what is being kept confidential.[94] Domestically, the National Assembly has sought clarity on the threats posed by any potential default with questions raised on the risk to sovereign assets.[95] The project has come under intense public scrutiny leading to questions on the propriety of some of the terms and conditions that govern the contract. The Kenya Railways Corporation and the Kenya Ports Authority, as the two main stakeholders, undertook the operational ambit of the project. The relationship between the two corporations with regard to the project has come under close scrutiny, with claims that a key asset of the Kenya Ports Authority was used as collateral to secure a loan procured by the Kenya Railways Corporation for development of the standard gauge railway.

Another question that begs an answer is the role of the Attorney General's office is the review of the agreements around the project and what, if any, recommendations they gave the government, before giving the green light. From a legal standpoint, it would be important to determine whether any advice given by the attorney general ay expose the country to a risk for dispute as demonstrated in earlier cases that have ended up in international arbitration. There is already precedent of cases referred to international arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) that demonstrates the importance of involvement by the attorney general in all contracts on behalf of the country and the consequences of any inaction on the country.[96] In the cited case, the hands on approach by the attorney general, saved the country what would have been a colossal loss of public funds if no vigorous defence been made to what was essentially, a spurious claim.

---

[93] William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) 2020, eKLR.

[94] World Bank, 'Review of Experiences with unsolicited Proposals in Infrastructure Projects', March 2017, 29. www.thedocs.worldbank.org/en/doc/246961488983068025/0100022017/original/ExperienceReviewReportFinalDraftMarch72017.pdf.

[95] Anyanzwa J, 'Renegotiate SGR loan terms to Avoid Default', The East African, 22 June 2020. www.theeastafrican.co.ke/tea/business/renegotiate-sgr-loan-terms-to-avoid-default-1443668.

[96] World Duty Free Ltd v Republic of Kenya (ICSID, Oct 2008) 180-182. www.investmentclaims.com/decisions/WDF-Kenya-Award.pdf

3.2 Review of the Statutes around Public Assets in Kenya

The law review in Kenya relates to laws that have a bearing on the Standard Gauge Railway project, which was as a result of a collaborative effort by both the Kenya and Chinese governments

In the Kenyan body of laws, the research will focus on the following statutes, and where applicable regulations thereunder, to illustrate the legal position with regard to contracts entered into between Kenya and China through the various entities and financial institutions.

1. The Constitution of Kenya
2. Public Finance Management Act, No.18 of 2012[97]
3. The Cabinet Secretary to the Treasury (Incorporation) Act[98]
4. Office of the Attorney General Act 2012[99]
5. The State Corporations Act[100]
6. The Kenya Ports Authority Act[101]
7. The Kenya Railways Corporation Act[102]

3.2.1 Constitution of Kenya 2010

The conversation on any risk to sovereignty must necessarily begin with what that concept means to a people. In Kenya the very first article of the Constitution sets out in detail the extent and prominence with which we chose to describe our sovereignty.[103] Article 1(1) pronounces itself in the following stentorian terms, 'All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution'.

The people may delegate the exercise of their sovereign power to the institutions and in the manner enumerated in the Constitution.[104] Further delegation of those powers would require express

[97] Public Finance Management Act, No. 18 of 2012.
[98] Chapter 101 of the Laws of Kenya
[99] Office of The Attorney General Act, No 49 of 2012
[100] State Corporations Act, Cap 446 Laws of Kenya
[101] Kenya Ports Authority Act, Cap 391 Laws of Kenya
[102] Kenya Railways Corporation Act, Cap 397 Laws of Kenya
[103] Article 1, *Constitution of Kenya* (2010).
[104] Art.1(3), COK, 2010.

authority from the people in accordance with principles of constitutional and administrative law.[105] The primacy with which the issue of sovereignty is addressed in the constitution is an indication of the importance it is given by the people.[106] The Constitution declares Kenya as a sovereign nation in one of the first articles in the citizen charter.[107] This pronouncement in the Constitution follows the declaratory theory of recognition as being self-bequeathed by the people of Kenya unto themselves. A keener appreciation of sovereignty was realized with the promulgation of a new constitution which gave prominence to the doctrine as well as perceivable benefits accruing to citizens.[108] While the legally nuanced conversations on sovereignty are primarily restricted to academic circles, there is an undeniable awakening in the ordinary citizen on what it entails especially in light of the relatively recent colonial adventure.[109] The problematic history of colonialism in Kenya brings to the fore the passion with which any perceived threat to sovereignty is met by the citizens and serves to underline the context for the study.[110] In summation, sovereignty informs the freedoms that are at the core of the charter between the citizen and the state and any infractions upon it is bound to incite animus from the citizens directed at the perceived enemy.[111]

The supreme law under article 201 provides specific principles to guide public finance one of which is to ensure that the benefits and burdens of public borrowing shall be shared equitably between present and future generations. The Constitution in articles 210 through 213 makes provisions by which the National government may borrow funds and even for the granting of guarantees and securities for the loans.

[105] See legal maxim *delagatus non potest delegare*
[106] Chienge R, 'Assaulting Sovereignty? The Case of Kenya and the International Criminal Court', Master of Laws Thesis, University of Nairobi, 2016, 41. (Unpublished)
[107] Art 4, Constitution of Kenya (2010).
[108] Taussig-Rubbo M, 'From the Stranger King to the Stranger Constitution: Domesticating Sovereignty in Kenya', International Journal of critical and Democratic Theory, July 19 2012, 5. https://doi.org/10.1111/j.1467.8675.2012.00681.x.
[109] Ngumbi E, 'Kenya's Wanjiku, The Sovereign who Never Was', April 8, 2021. https://ssrn.com/abstract=3822750.
[110] MacArthur J,'Decolonizing Sovereignty: States of Exception along the Kenya-Somali Frontier', The American Historical Review, Vol.1, Issue 1, 112. https://doi.org/10.1093/ehr/rhy577.
[111] Abuodha J., 'Sovereignty with Responsibility: A Critical Analysis of State Sovereignty in the Context of International Humanitarian Intervention in Internal Conflicts', Kenya Law Review, 2007, Vol.1, 253. www.kenyalaw.org.

In a section aptly titled '**Borrowing by national government.',** article 211 of the Constitution provides as follows,

211. (1) Parliament may, by legislation—

(*a*) prescribe the terms on which the national government may borrow; and

(*b*) impose reporting requirements.

(2) Within seven days after either House of Parliament so requests by resolution, the Cabinet Secretary responsible for finance shall present to the relevant committee, information concerning any particular loan or guarantee, including all information necessary to show—

(*a*) the extent of the total indebtedness by way of principal and accumulated interest;

(*b*) the use made or to be made of the proceeds of the loan;

(*c*) the provision made for servicing or repayment of the loan; and

(*d*) the progress made in the repayment of the loan.

It is obvious from a plain reading of the article to conclude that the Constitution has made some provisions to ensure an effective system of checks on government borrowing and spending. However, there is no provision in the Constitution that addresses the aspect of collateralization of national, or indeed any, assets in the procurement of loans by either level of government. The Constitution, in the provision on budget making, only makes provision that any proposals regarding borrowing must be tabled before Parliament for debate and approval.

Article 213 of the Constitution titled '**Loan Guarantees by national government**' provides as hereunder,

213. (1) An Act of Parliament shall prescribe terms and conditions under which the national government may guarantee loans.

The Public Finance Management Act, 2012 is the legislation under the contemplation of the Constitution as giving life to the provisions as regards public borrowing as well as the terms and conditions around the loans so borrowed.

In instances where the national government has to provide guarantees to lenders for the procurement of any loans, it is article 213 that gives the constitutional imperative to guide such issuance. The China Exim bank requires guarantees from principals in certain circumstances and if indeed one was required of the Kenyan government during the SGR project financing negotiations then this article of the constitution would have been applicable.[112]

Article 214 of the Constitution titled '**Public debt**' provides as follows,

214. (1) The public debt is a charge on the Consolidated Fund, but an Act of Parliament may provide for charging all or part of the public debt to other public funds.

(2) For the purposes of this Article, "the public debt" means all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government.

It is evident that the framers of the Constitution went to great lengths to minimize instances of misinterpretation by providing clear definitions and assigning responsibilities with clear timelines in the matter of public debt. An analysis of the statutes legislated in pursuance of the constitutional imprimatur will determine whether any regard was given towards the use of public assets as collateral.

It must be said that the supreme law has laid out the guidelines to follow in straightforward terms and there does not appear to be room for misinterpretation. In the event of wrong interpretation of any of the provisions it is anticipated that the judiciary will provide clarity and ensure the protection of the overriding interest of the public.[113]

The Constitution under article 124 provides for the power of Parliament to establish committees to guide the functioning of the institution. The two main committees of the Kenyan Parliament as pertains matters oversight and accountability are the Public Accounts Committee and the Public Investments Committee both of which have at various times been seized of matters connected with the Standard Gauge Railway project. The Public Accounts Committee is responsible for examination of the queries raised after the auditor general audits all public projects to ensure monies were used as per purpose. The Public Investments Committee on the other hand is

[112] www.china-eximbank.en

[113] Kibet E & Wangeci K, 'A Perspective on the Doctrine of the Separation of Powers based on the Response to Court Orders in Kenya', Strathmore Law Review, January 2016, 223.

responsible for the examination of the working of public investments.[114] The two watchdog committees are made up of a multi-partisan membership and are ordinarily the first port of call when there are concerns regarding the misuse of public funds or an event perceived as a threat to economic stability. As regards the SGR contract the Public Investments Committee was seized of the matter and raised concerns about the threat to Kenya's sovereignty by the use of strategic assets as security as well whether the Kenyan taxpayer would get value for money from the project. The record does not indicate whether any questions were asked on the legal framework used to support the project except cursory references to the statutes analyzed above as well as the Public Procurement and Disposal Act.

In a report dated 29th April 2014 the Public Investments Committee gave the green light to what they noted as a Vision 2030 project and integral to the country's development agenda.[115] In what has the appearance of egregious sloppiness, the Committee however did not review any of the contracts framing the engagement between Kenya Railways Corporation and China Road and Bridge Company or China Export Import Bank to ascertain the terms of the contracts and whether there were any concerns regarding the country's sovereignty.[116] The committee, under those circumstances, should have exercised restraint in approving the contract in the absence of the details necessary to inform themselves of the soundness of the agreement.

3.2.2 Public Finance Management Act, No.18 of 2012

The fundamental piece of legislation as far as borrowing, debt, the management thereof and all matters incidental to public debt is the Public Finance Management Act[117]. It provides the specifics to the objectives outlined in the Constitution under articles 211,213 and 214 which articles canvass matters pertaining to public finance.

[114] www.parliament.go.ke

[115] Special report of the Public Investments Committee dated 29th April 2014 on the Procurement, Agreements and Financing for the construction of the Standard Gauge Railway from Mombasa to Nairobi. Available at www.africog.org.

[116] Special report of the Public Investments Committee dated 29th April 2014 on the Procurement, Agreements and Financing for the construction of the Standard Gauge Railway from Mombasa to Nairobi. Available at www.africog.org.

[117] PFMA 18 of 2012

The PFMA makes elaborate provisions along the entire borrowing process including in the management of public debt through the Public Debt Management Office.[118] In terms of the workings of it, a lot of responsibility lies with Parliament and its various oversight committees. However, there are shortfalls in the actualization of provisions which have been the subject of rigorous academic debate. There have been notable challenges with regard to implementation of various principles set out in the statute along the public finance management value chain.[119]

The National Treasury is mandated, under the statute, to mobilize domestic and external resources towards the financing of national and county governments' budgetary needs.[120] This section is what lends legitimacy to borrowing by the national treasury.

The Act provides for reporting every four months by the Cabinet secretary in charge of the National Treasury of all borrowing done by the National and County governments and their entities.[121] Further the cabinet secretary must report on all the guarantees given by the National Government[122] and must also provide a National Government debt management strategy.[123] The reports, by the cabinet secretary, as designated in the statute must contain the terms and conditions of the loans or guarantees as the case may be.

In furtherance of the provisions of the PFMA the Cabinet secretary in charge of the treasury in March 2020 gave guidelines on the management of assets and liabilities in the public sector.[124] The codification of the guidelines is undoubtedly one way to deal with new challenges in the management of public resources as has been identified severally in studies of the public finance management space.[125]

The guidelines provide for reporting and accounting of assets and liabilities structure at both the national and county government level with responsibilities assigned to the different duty bearers. There is also a classification of both assets and liabilities into different kinds as well as provision

[118] Section 62, Public Finance Management Act (No. 18 of 2012).
[119] Ewang T.E.A, 'Reforming Public Finance Management in Kenya: Implementation Challenges on the Principle of Openness and Accountability in Public Finance Management', November 2019,
[120] Section 12(1) (d), Public Finance Management Act (No. 18 of 2012).
[121] Section 31, Public Finance Management Act (No. 18 of 2012).
[122] Section 32, Public Finance Management Act (No. 18 of 2012).
[123] Section 33, Public Finance Management Act (No. 18 of 2012).
[124] Guidelines on Asset and Liability management in the Public Sector
[125] Kirira N, 'Public Finance under Kenya's new Constitution', Constitution Working Papers Series No. 5, Society for International Development, 14.

for the maintenance of asset registers for all public owned entities in which the details of the various assets are recorded. The assets are broadly classified as either financial or non-financial depending on whether they generate revenue for the respective public entities. There is no classification based on the assessed importance of the assets which essentially implies all the assets are treated the same. While the guidelines provide for the protection of assets from damage or loss they do not specifically prohibit their use as collateral in the procurement of loans by the public owned entities. In terms of the objectives of the research, the lack of specificity in the guidelines with regard to the use of assets as collateral is a matter of concern. The lack of classification, based on importance and protections on the assets deemed strategic, effectively exposes all to appropriation. The potential or actual appropriation of assets deemed as strategic in the research would have the undesirable effect of undermining the sovereignty of concerned countries. Strategic assets such as railways, ports and other key infrastructure are vital to the economic development of any country and required protection as being integral to sovereignty.[126]

However, it is evident that more clarity and specificity is required to tighten the legislative environment and cater to emerging challenges posed by a dynamic regulatory environment.[127] Previous work done with regard to the public finance management regime did not anticipate any issues with regard to government assets and the potential risk of appropriation and that in itself demonstrates the dynamic nature of the space and the need to adapt and address such challenges.[128]

However, the statute does not make any references to the issue of collateral for procurement of debt and whether government assets can be used for purposes of securing debt. The statute designates the National treasury as the custodian of national government assets but does not set out criteria through which such assets are to be identified.[129] The lack of a criteria for the identification of government assets and a process around the use of those assets as collateral effectively leaves all the assets unprotected. In the present legislative framework, there is no

[126] Lesutis G, 'Infrastructural Territorialisations: Mega Infrastructures and the (Re)Making of Kenya', Political Geography, November 2021, 15. www.elsevier.com/locate/polgeo.
[127] Cheruiyot P, Oketch R, Namusonge G & Sakwa M,' Effect of Public Finance Management Practices on Performance in Kericho County Government, Kenya: A Critical Review', International Journal of Education and Research, Vol.5, No.12, December 2017, 212. www.ijern.com/journal/2017/Decemer-2017/18.pdf.
[128] Kirira N,' Public finance under Kenya's Constitution, SID, 29.
[129] Section.12 (2) (g), Public Finance Management Act (No. 18 of 2012).

mention of the use of public assets as collateral either by the government or the state-owned entities in whose custody the assets are kept.

The PFMA in Kenya is the primary legislation with regard to the procurement of debt and the ideal statute to govern the issuance of public assets as collateral or other related matters. In relation to the research, it provides for the terms and conditions that adhere to loans and the need for collateral is patently one such term.

3.2.3. The Cabinet Secretary to the Treasury (Incorporation) Act

The statute has the primary objective of incorporating the office of the Cabinet Secretary in charge of the National Treasury as a body corporate with perpetual succession.[130] For purposes of the study, the statute remarkably vests all moveable and immoveable property that was vested in the former chief secretary of the protectorate of Kenya in the Cabinet Secretary in charge of the Treasury.[131] It further vests the benefit and burden of all contracts under the ambit of the former chief secretary of the protectorate to the body corporate so set up. In the colonial set up the chief secretary was the individual mandated to enter into any and all contracts on behalf of the protectorate. The CST Act mandates the Cabinet Secretary to the treasury to take over that role. The corporation so created by the statute is not bound by any law which does not bind the government and from that provision enjoys the same immunity from processes as the government.[132] The guidelines on asset and liability management referred to under the previous section are also set up under the ambit of this statute. One of the objectives of the said guidelines is to identify all the assets in the public sector and provide for their maintenance and safety.[133] The guidelines were then distilled into a policy on asset and liability management in the public sector published in June 2020 to take effect in the 2021/2022 financial year.[134] These guidelines were introduced after the commencement of this study and are potentially instrumental in establishing the legal mechanisms to protect strategic national assets from being used as collateral and, if such use is permitted, to provide parameters for that purpose. The main objective of the guidelines is to provide public officers charged with management of assets with a blue print to use in the lifecycle

[130] Section 2(1) of the Cabinet Secretary of the Treasury (Incorporation) Act
[131] Section 7 of the Cabinet Secretary to the Treasury (Incorporation) Act
[132] Section 6 of the CS(I)T Act
[133] Section 7(1) of the General Guidelines on Asset and Liability Management, 2020.
[134] www.treasury.go.ke/wp-content/uploads/2021/03/Asset-Liability-Mgt-Policy.-doc-Final.pdf

of the said assets. It provides a legislative framework for the acquisition, maintenance, safeguard and disposal of assets belonging to public entities. Importantly, it provides for a chain of responsibility in determining whether there was any illegality or impropriety in the management of any asset and for reparation by the public official concerned with the mismanagement. However, there is no specific mention in the guidelines or policy on the use of any public asset as collateral in the procurement of loans by public entities, which is the area in focus of this study.

3.2.4 Office of the Attorney General

The Attorney General is one of the key functionaries where a discussion on the legality or illegality of any agreement, by the government or its agencies, is concerned. This statute outlines as one of the key functions the negotiation and drafting of all documents, agreements and treaties for or on behalf of the government.[135] It then follows that the attorney general was, by law, required to be part and parcel of the negotiations around the SGR project and indeed any other project(s) involving the government. It is noteworthy that the bearer of the office has not said anything to assuage the concerns of the public despite considerable public interest in the matter. It would be interesting to see whether any future bearer of that office would be more forthcoming on the issues raised regarding the project whose loan repayment is set at 30 years.

3.2.5 State Corporations Act

The power to borrow by state corporations under section 5 of the State Corporations Act is the reference point for the review of the statute. The statute provides that the power to borrow shall only be exercised with the authority of the Minister for the time being in charge of Finance.[136] The relevance of this statute for the purposes of the research is to ascertain whether the law as it exists was followed before the assets, or the revenue generated by those assets, were pledged as collateral. The review is also to determine whether the State Corporations Act as the statute governing the operations of all state corporations has provisions requiring the need of approval of any authority prior to certain actions. In the context of the research whether any approvals are required before any asset belonging to a state corporation can be used as collateral. In respect of the corporations, the Kenya Ports Authority and the Kenya Railways Corporation, which were the primary

[135] Section 5(1)(c) Office of the Attorney General Act.
[136] Section 5(2) State Corporations Act.

stakeholders in the standard gauge railway, the State Corporations Act is the first statute of call in auditing whether the legal prerequisites surrounding the projects are sufficient and whether they have been followed.

3.2.6 Kenya Railways Corporation Act and Kenya Ports Authority Act

For purposes of this research a focus on the constitutive acts of the players in the standard gauge railway project, primarily under the Kenya Railways Corporation and the Kenya Ports Authority, is brought under focus. The Standard gauge railway project in Kenya is primarily anchored on the functioning of the Mombasa port and the new railway and revolves around the symbiotic relationship between the two state entities.[137] A key component of the SGR agreement pertains to the ferrying of all cargo landing at the port in Mombasa through the railway in what was calculated to guarantee revenues for the ports authority.[138]

One of the main issues around the SGR project is on the auditor general report of the Mombasa port, belonging to the Kenya Ports Authority or under its control, being used as collateral for a loan advanced to the Kenya Railways Corporation for the development of their infrastructure. An analysis of the constitutive statutes of the two corporations makes it clear that the respective authorities, with the necessary board approvals, would have been within the confines of the law had they used each other's assets as collateral.

A plain reading of The Kenya Ports Authority Act as well as the Kenya Railways Corporation Act demonstrates that neither of the corporations can borrow money without the authority of the Minister given under the State Corporations Act.[139]

However, both pieces of legislation contain reciprocal powers to enter into arrangements with each other for financing of any project by either or both the corporations.[140][141] It appears that the drafters of the laws contemplated a situation where it would be necessary, due to the symbiotic relationship between them, for the corporations to use each other for purposes of seeking financing or loans for

[137] Taylor I, 'Kenya's New Lunatic Express: The Standard Gauge Railway', African Studies Quarterly, Vol.19, Issues 3-4, October 2020, 14. www.asq.africa.ufl.edu/files/V19i3-4a3.pdf.
[138] Ahmed M & Kazungu S, 'Kenyan Government defends forced use of SGR', February 8 2018. www.tralac.org/news/article/12696-kenyan-government-defends-forced-use-of-sgr.html.
[139] Section 12, State Corporations Act
[140] Section 13(2)(n)(iv) of the Kenya Railways Corporation Act
[141] Section 12(2)(q)(iv) of the Kenya Ports Authority Act.

projects. The specifics of the arrangements between the two corporations and how they can cooperate on joint projects has been left to the deliberations of the respective boards of the authorities to whom the power is vested under both the Kenya Railways Corporation Act and the Kenya Ports Authority Act.[142] The symbiotic relationship between the two is further illumined by the fact that the managing director of the Kenya Ports Authority is a member of the board of the Kenya Railways Corporation.[143] The two statutes make provisions for third parties to join any such arrangement or agreement between the two corporations in joint ventures where there is a convergence of interests.[144]

By logical extrapolation it would then be possible for either corporation to use the other as a guarantor in a financing agreement with a third party. This would provide legal basis for the use of each other to secure a financing arrangement and there is no express prohibition on the use of each other's assets in financing agreements nor any additional conditions except board approval.

For purposes of the Standard Gauge Railway project, it would be useful to determine whether the necessary board approvals, from each of the authorities, were sought for what is evidently a joint project between the Kenya Railways Corporation and the Kenya Ports Authority. However, in terms of the legality of a joint arrangement or agreement, it is manifest that the laws, the KPA and KRC Acts, do permit for the guarantee by one of the corporations for the loans of the other.

The analysis of the constitutive statutes of the two corporations determined that there is need for further checks especially in those provisions that have the effect of committing the other corporation into a legal relationship with a third party. An analysis of the Kenya Ports Authority Act reveals that the authority is tasked to ensure that its net operating income after all deductions by way of expenses and loan repayments is sufficient to assure a return on the assets.[145] In other words, the authority is to operate in such a way as to ensure it remains financially viable and is able to meet all its financial obligations and remain profitable. The statute further provides that the authority can only borrow, domestically or abroad, subject to such limitations as may be set by the

[142] Section 13(2) (n) (iv) of the Kenya Railways Corporation Act and Section 12 (2) (q) (iv) of the Kenya Ports Authority Act
[143] Section 4(e), Kenya Railways Corporation Act.
[144] Section 13(2) (n) (vi) of the Kenya Railways Corporation Act and Section 12 (2) (q) (vi) of the Kenya Ports Authority Act
[145] Section 18(1) of the Kenya Ports Authority Act

Minster responsible for Finance which implies that all loans must be approved by the national treasury.[146]

However, the statute provides that all loans borrowed by the authority shall operate as a charge on all the property and revenues of the authority without the need for any further action except by virtue of the borrowing itself.[147] The lack of any further legalities to encumber the property or revenues of the authority after borrowing serves as a floating charge over all the assets of the authority until repayment of whichever loan facility has been borrowed. From a plain reading of that section, it is evident that the provisions expose the authority to significant loss in the event of a default and it would be prudent to make necessary amendments as will be made in the recommendations. To put the risk into context, from the report of the auditor general, the total revenues for the authority as at June 2020 was KShs 48,853, 626,000/- or approximately USD 480,000,000.[148] The total assets as at the same period stood at KShs 294,769,428,000 or approximately USD 2.9 billion. The authority recently acquired a tugboat for KShs 1.9 billion from Turkey for ease of salvage and related operations at the port of Mombasa.[149] They also completed the acquisition of three gantry cranes from Japan at a cost of KShs 3.3 billion as part of an expansion programme to scale up port operations.[150] This is for purposes of illustrating the potential risk that the authority is exposed to by dint of section 19(3) where all assets and revenue of the authority act as security over any loans borrowed without the need of any further document perfection save for the loan agreement itself.

The two statutes and the provisions on cooperation demonstrate the manner in which synergies between the two authorities can be harnessed but also reveal lacunae that can be exploited to the detriment of the public. The same report from the Auditor General shows transfer of certain assets from the Kenya Railways Corporation to the Kenya Ports Authority along with the loan components for acquisition of the assets.[151]

---

[146] Section 19(2) of the Kenya ports Authority Act
[147] Section 19(3) of the Kenya Ports Authority Act
[148] Report of the Auditor General on Kenya Ports Authority for the Year Ended 30th June 2020 at Pg 101. www.oagkenya.go.ke.
[149] Mwakio P, 'Kenya Ports Authority acquires Shs 1.9 billion salvage boat' The Standard, January 12, 2022. www.standardmedia.co.ke.
[150] Mwakio P, 'KPA buys three new cranes at Shs 3.3 billion in drive to lift efficiency', The Standard, January 13, 2022. www.standardmedia.co.ke.
[151] Report of the Auditor General on Kenya Ports Authority for the year ended 30th June 2020 at Pg 128.

3.3 Analysis

The research and analysis on the Kenyan legislative framework as it pertains to collateralization of national assets has demonstrated a lack of robust mechanism to safeguard strategic assets in the various institutions which have the custody. As applied to the specific contracts and projects in which China has provided the financing, it is manifest that in the event of a default, the revenues and assets of the Kenya ports Authority would be under significant pressure from the lenders to satisfy repayment. There does not appear to be any protection either to the revenue or the assets in the statute governing the authority nor any bar to the lender from effecting the available remedies including appropriation.

In the present context of the SGR project the use of revenues generated from the port as collateral appears to only require the consent of the board of directors under the respective constitutive acts of the Kenya Ports Authority and the Kenya Railways Corporation. In the event the Kenya Railways Corporation wanted to use the same revenues there does not appear to be additional approval from any other authority or institution save for the boards of the Kenya Railways and the Kenya Ports Authority.

There is a proposed draft bill, the Kenya Sovereign Wealth Fund Bill, 2019, that makes specific provisions with regard to collateralization of the fund assets but it does not address the other strategic assets not belonging to the sovereign wealth fund.[152] The bill prima facie appears to be focused on mineral wealth to be generated from the natural resources and not at existing assets. It is equally uncertain if and when the bill will be enacted and whether the provision on collateralization will survive the debate in Parliament. The provisions on collateralization of fund assets in the bill is a timely acknowledgement of a potential risk which can be applied with necessary changes to strategic national assets as may be determined.

The interventions that recommend themselves from the analysis are canvassed in the concluding chapter of the study.

[152] Section 45(b) of the draft Kenya Sovereign Wealth Fund Bill, 2019.

3.4 Conclusion

There are areas in the canvassed statutes that are vague and leave room for either disregard or abuse of the law with potential to cause harm to the Kenyan public. There is need to legislate fit for purpose laws or amend the existing laws to specifically deal with the use of public assets as collateral by state corporations directly. Specifically, there need to be statutory prohibitions on the use of such assets, or their use should be subject to strict conditions, to ensure strategic assets are secured for the continued use and exploitation by the country.

Chapter 4 - Uganda looks to the East: The Entebbe airport expansion

4.1 Introduction and background

The debt owed to China has been the subject of concern and that concern has been expressed by no less a personage than the Auditor General of Uganda in a report to Parliament. There are several significant infrastructure projects funded by the China Exim Bank including the Entebbe Expressway, the Entebbe airport expansion, the Isimba hydropower plant and the Karuma Dam.[153] The project that seems to have raised concern revolves around a loan of Two Hundred and Five (USD 205M) Million United States dollars, advanced to the Ugandan Civil Aviation Authority by the China Export Import bank in 2015 for expansion of the Entebbe International Airport. There has been public disquiet about some of the clauses in the loan facility with regard to the airport expansion with specific reference to a clause giving the lender, China Exim Bank, the sole authority to approve withdrawals from an escrow account set up with the Uganda Civil Aviation Authority for all revenues from the airport.[154] Another problematic clause is one that requires any disputes arising from the contract to be subjected to arbitration at the China International Economic and Trade Arbitration Commission.[155] The same media article quoted an unnamed government official as attributing the adverse clauses to poor negotiation on the part of the Uganda government officials.

In the context of this research there have been public concerns about the risk of the Ugandan people losing the revenues generated by the airport to the China Exim bank as a result of the Entebbe airport expansion loan facility.[156] A reported attempt at re-negotiating the problematic clauses was unsuccessful according to media reports on the matter with the China Exim bank officials insistent that parties abide by the agreement as executed by the contracting parties.[157] The risk of

[153] Ogwang.T & Vanclay F, Resource-Financed Infrastructure: Thoughts on Four Chinese Financed Projects in Uganda, Sustainability 2021, 13, 3259. https://doi.org.10.3390/su13063259.
[154] Naturinda.N, How Uganda Coughed up Entebbe Airport to China, November 25, 2021, The East African. www.theeastafrican.co.ke/tea/business/how-uganda-coughed-up-entebbe-airport-to-china-3631398.
[155] See note 9 above
[156] Benson.E.A, 'Is Uganda going to Lose its Entebbe International Airport due to Chinese Debt?' November 28, 2021, Africa Business Insider. www.africa.businessinsider.com/local/markets/is-uganda-going-to-lose-its-entebbe-international-airport-due-to-chinese-debt/n12phc8.
[157] Ojambo.F, 'Uganda Asks China to amend Airport Loan Clauses, Monitor reports', November 28, 2021. www.bloomberg.com/news/articles/2021-11-28/uganda-asks-china-to-amend-airport-loan-clauses-monitor-reports.

appropriation while not specific to any particular asset is obviously of sufficient gravity as to attract comment by the Auditor General and fits into the overriding thesis objective of this paper. There is enough public concern about the sustainability of the debt Uganda owes to China as to attract comments by a number of actors within the country known as the pearl of Africa.[158] It must be noted that while Uganda has not floated any bonds in the international loan markets they still have significant external debt and their debt to GDP profile while better after the rebasing is still a matter of alarm.[159] Significantly and much like the other two countries subject to this research Uganda is indebted to the Chinese government and Chinese corporations to whom they turned to fund infrastructure projects. Balanced against the concerns about unsustainable debt are the demands of a developing nation and the need for financing to spur economic growth which is the need China has sought to, and has, in considerable measure, filled. The relationship between debt and economic growth in Uganda has been aptly captured in a research paper titled 'Uganda's experience with debt and economic growth: An empirical analysis of the effect of public debt on economic growth-1980-2016' which gives useful insights and context to the issue.[160] Reports about the appropriation of a Ugandan mine that had allegedly occurred for default of a Chinese loan to the Ugandan government have remained unsubstantiated. However, there have been reports in the media about the clauses in the loan agreement between the Uganda Civil Aviation Authority and the China Exim Bank for the expansion of the Entebbe airport.[161] The impugned clauses provide for a measure of oversight by the bank on the budget and strategic plans of the authority to safeguard revenues and ensure repayment of the loan.[162]

4.2 Review of the Statutes around Public assets in Uganda

In starting the analysis on Uganda it is evident that there are similar pieces of legislation to those in Kenya which are analyzed to assess whether the legislative terrain permitted for use of national

[158] Muhumuza R, As China builds up Africa, some in Uganda warn of trouble, October 24, 2019, Associated Press. www.apnews.com/article.
[159] Biryabarema E, 'Uganda Says Its Economy 11% Larger after Rebasing', Thomson Reuters, October 21, 2019. www.reuters.ocm/article/uganda-gdp-idUSL5N2766X9.
[160] Ssempala R, Ssebulime K & Twinoburyo E, 'Uganda's experience with Debt and economic growth: An empirical analysis of the effect of public debt on economic growth, Journal of Economic Structures, 16, 2020.
[161] Okooboh O, 'Was the Ugandan Airport loan a debt trap?', The US-China Perception Monitor, 4th April 2022. www.uscnpm.org.
[162] Saxena P, 'China debt trap dragon swallows up another country, its Uganda now', News Nine, 29th November 2021. www.news9live.com.

assets as collateral in the procurement of debt. Secondly, whether ample protections, if any, exist to prevent the potential appropriation of sovereign assets as intimated by their Auditor General in a report to Parliament[163].

1. The Constitution of Uganda
2. Public Finance Management Act,2015[164]
3. The State Corporations Act
4. The Public Procurement and Disposal of Public Assets Act,2003[165]

4.2.1 The Constitution of Uganda

The Ugandan Constitution heralds the sovereignty of the Ugandan people under clearly defined parameters in the National Objectives and Directive Principles of State Policy (hereinafter NODPSP), which forms part of the preamble to the Constitution, which principles mandate the people with the protection of both the sovereignty and territorial integrity of Uganda.[166] The NODPSP in the preamble are in the way of guiding lights to the provisions in the Constitution.[167] The preeminence of sovereignty in the NODPSP serves to both underscore and illustrate the commitment to the idea and values with which the people regard it.[168] These directive principles can be deemed as the spirit of the Constitution and a beacon to guide interpretation of the supreme law where there is ambiguity.[169]

The Constitution then pronounces itself on the matter of sovereignty as deriving from the people of Uganda.[170] The articulation on sovereignty follows on democratic constitutionalism principles which herald the people of Uganda as the authority-wielding sovereigns.[171]

---

[163] Clause 3(f) of the Auditor General's report to Parliament 2018. www.oag.go.ug/wp-content/uploads/2019/01/Highlights-of-the-Auditor-Generals-report-to-Parliament-2018.pdf
[164] Act 3 of 2015
[165] Act 1 of 2003
[166] Part IV(i) of the National Objectives and Directive Principles of State Policy.
[167] Furley O & Katalikawe J, 'Constitutional Reform in Uganda: The New Approach', African Affairs, Vol.96, No.383, April 1997, 251. www.jstor.org/stable/723860.
[168] Hedling N, 'A Practical Guide to Constitution Building: Principles and Cross Cutting Themes', International Institute for Democracy and Electoral Assistance, 2011, 8. www.idea.int.
[169] Khaitan T, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters', International Journal of Constitutional Law, Vol.16, Issue 2, April 2018, 392. https://doi.org/10.1093/icon/moy025.
[170] Article 1, Constitution of Uganda.
[171] Tripp A.M, 'The Politics of Constitution Making in Uganda', United States Institute of Peace, 161. www.usip.org.

The power to borrow or guarantee any loans derives legitimacy from the Constitution which further mandates Parliament to enact legislation which will guide the procurement and repayment of the loans so taken.[172] The Constitution goes further to provide that the terms and conditions of those loans as may be taken shall not have any force until they are adopted by a resolution of Parliament.[173]

The provisions of the Constitution for parliamentary approval, by way of resolution to the terms and conditions finds form in the Public Finance Management Act which, however, grants exceptions to that proviso in certain cases.[174]

In Uganda, as is the case in Kenya, the Committee on Public Accounts (Central Government) in Parliament is tasked with investigating matters involving the use of public resources and the propriety or impropriety of such use.[175] The procurement of loans and the appropriation of the loans for various purposes would ideally fall under the remit of this committee. Unlike in Kenya there does not appear to be the equivalent of the Public Investments Committee although a number of other committees have the nomenclature that imply a watchdog role to their functions.

4.2.2 Public Finance Management Act 2015

The Act vests the authority to borrow solely on the Minister subject only to the requirement for parliamentary approval in the instances stated in section 36(2). The statute restricts any other body or institution from procuring loans or incurring debt without the prior approval of the minister.[176]

The only instance parliamentary approval is not required is where the loan is for the management of monetary policy. Another instance where parliamentary approval is bypassed is whereby a loan is raised through the issuance of securities by the central bank for specific purposes.[177]

These exemptions are singular and go against the general grain that demands approval from the legislature of all borrowing by the state

[172] Article 159, Constitution of Uganda.
[173] Article 159(3)(a) Constitution of Uganda.
[174] Section 36(5) of the Public Finance Management Act 2015.
[175] www.parliament.go.ug
[176] Sec 36(1) of the PFMA 2015.
[177] Sec 36(5) of the PFMA 2015.

In all other instances, the terms and conditions of any loan shall be laid before Parliament and it shall not be enforceable unless it is approved by a resolution.[178] The Act does however provide for the procurement of loans and issuance of guarantees by state corporations and institutions but only with the prior approval of the Minister.[179] It would follow that prior to any loan being procured by any government entity or institution in Uganda, the approval of the Minister of Finance is mandatory which provides a clear reporting structure. It terms of the focus of the study it is evident from a reading of the statute that all approvals before the loans were procured should have originated from the Minister.

In conclusion, this statute is clear on the need for the approval of parliament to the terms and conditions of all loans as provided under the constitution except where such approval is by-passed as delineated in the statute and related regulations.

4.2.3 Public Procurement and Disposal of Public Assets Act, 2003

The statute deals with the procurement and disposal of public assets as set out in the short title but does not define what constitutes a public asset.[180] The statute does set out the scope of the application to include all public procurement and disposal activities and specifically includes public finances.[181] The implication would be that all procurement and disposal of assets undertaken by public entities fall within the ambit of the statute.

In Uganda the constitutional and legislative terrain suggests that the Minister for Finance is the sole authority, subject to the provisos on parliamentary resolutions, as far as the procurement of any loans or issuance of any guarantees on behalf of the government are concerned.[182] The Minister's authority extends to the procurement of loans by state institutions and entities, where the prior approval of the Minister is required.

4.3 Analysis

In Uganda, the absence of specific legislation, compared to the other jurisdictions under this study, poses a significant risk to the country's strategic assets. This lack of specific laws around

[178] Sec 36(5) of the Public Finance Management Act 2015
[179] Sec 36(1) of the Public Finance Management Act 2015.
[180] Section 1 of the Public Procurement and Disposal of Public Assets Act 2013.
[181] Section 2 of the Public Procurement and Disposal of Public Assets Act 2013.
[182] Sec 36(1) of the PFMA 2015.

collateralization exposes the country to the potential risk of appropriation of strategic, and indeed all, national assets in the event of default of debt. The public debt legislation would benefit from some specificity around the means by which any national assets may be utilized as collateral as well as the persons with the authority to commit the country to such financial arrangements.

In the context of the revenues from the Uganda civil aviation authority being applied towards the payment of the debt to China Exim bank, there does not appear to be any constitutional barrier to such action nor does there appear to be any in legislation.

4.4 Conclusion

It would appear that the protections provided in the Ugandan body of laws with regard to public assets are not nearly as robust as are necessary to ensure that the state operates within clearly defined parameters as regards public debt and the maintenance of an appropriate debt to GDP ratio.

There is a need to provide for a definition of a public asset in the Public Procurement and Disposal of Public Assets Act 2003 in addressing the gaps in the statutes.

Chapter 5 - Zambia and the Zambian Electricity Supply Corporation: The Chinese link

5.1 Introduction and background

In terms of economic and development partnerships in Africa it is arguable that Zambia boasts one of the longest relationships with China. Zambia is the country with the longest history with China from a developmental aid perspective and it would follow that the contracts that anchor the projects would be the subject of longer scrutiny.[183] The length of the relationship has led to a series of complex transactions in projects, which has compounded an already tenuous debt cycle between the two countries.[184] The relationship with Zambia follows the same infrastructure heavy investments that the Asian giant has done in many African countries.[185] The intensity with which China has invested in Africa and specifically Zambia has drawn criticism from commentators who cite an exploitative relationship heavily skewed in China's favour.[186]

In the words of one social commentator there are 'concerns about national sovereignty and Chinese ownership of key components of the country's infrastructure'.[187]

The alleged threatened appropriation of the state owned power corporation ZESCO, (Zambia Electricity Supply Corporation limited) in the event of default of the loan, is of obvious and immediate concern to the Zambian public.[188] Zesco is the country's main power supplier and the Kafue hydroelectric project is slated to supply more than 50% of Zambia's electricity needs.[189]

The architecture of the agreements entered into by Zambia and China is more likely than not a standard template, because the main source of the funds is the China Export Import Bank whose

[183] Mwanawina I, 'China-Africa Relations: The Case of Zambia', Africa Economic Research Consortium, February 4, 2008, 6. www.aercafrica.org/wp-content/uploads/2018/07/1Zambia.pdf.
[184] Brautigan D, 'How Zambia and China Co-Created a Debt Tragedy of the Commons', Working Paper No. 2021/51, China Africa Initiative, School of Advanced Studies, Johns Hopkins University, September 2021. http//www.sais-cari.org/publications.
[185] Sautman B & Hairong Y, 'Friends and Interests: China's Distinctive Links with Africa', African Studies Review, Vol.50, No. 3, December 2007, 77. www.jstor.org/stable/27667241.
[186] Ernske K, 'The Dragon's Neocolonial White Elephant Development: China's Urban Infrastructure in Lusaka, Zambia', Senior Theses, Trinity College, Hartford, CT 2020, 8. https://digitalrepository.trincoll.edu/theses/837.
[187] Servant. J-C, 'China steps in as Zambia runs out of loan options',11thDecember 2019, www.theguardian.com/global-development/2019/dec/11/china-steps-in-as-zambia-runs-out-of-loan-options.
[188] Servant, 'China steps in'. www.theguardian.com.
[189] Godet F & Pfister S, 'Case Study of the Itezhi-Tezhi and Kafue Gorge Dam: The science and politics of International Water Management', June 3, 2021. www.researchgate.net/publications/259533453.

terms as required of borrowers have already been interrogated previously in this study. Another key financier for Sino-Zambian projects is the Industrial and Commercial Bank of China who are co-financier, with the China Exim Bank, in the Kafue Hydro Power station project.[190]

The recent history of Zambia is replete with agreements that prima facie seem against the interests of the Zambian people with calls for renegotiation of the agreements to bring a measure of parity.[191] The contracts that undergird those projects have been the subject of intense debate and speculation especially due to the confidentiality with which the parties treat the transactions.[192]

Foreign ownership of key aspects of the economy is not an odd concept in most African countries and Zambia is not an exception especially in their copper industry.[193] However, there are legitimate concerns on the aggression of the Chinese in managing and in some instances taking over resources that are intrinsically bound to the fortunes of the Zambian people.[194] There have been concerns among Zambians, regarding the potential appropriation of national assets, arising from the financing of the Kafue Gorge Hydropower dam, a project whose worth is estimated at two billion (USD 2,000,000,000) dollars.[195]

The threat posed by excessive debt in Zambia has been reported in both national and regional media as well as various forums on sovereign debt.[196] Indeed the threat has since crystallized as the country defaulted on bond repayments owed on one of the Eurobonds it floated in the international loan market exposing itself to adverse action from its creditors.[197] Effectively, that means the risk is no longer a potential but a fact and it will be informative to see how the Chinese

[190] Usman Z, 'What Do We Know About Chinese Lending In Africa?', 2nd June 2021. www.carneegieendowment.org/2021/06/02/what-do-we-know-about-chinese-lending-in-africa-pub-84648.
[191] Lungu.J, 'Copper Mining Agreements in Zambia: Renegotiation or Law Reform?', Review of African Political Economy, Vol 35, No.117 (September 2008) 408. www.jstor.org/stable/20406529.
[192] Wheatley J, 'China's secret Loan Contracts reveal its hold over Low-Income Nations', Financial Times, March 31, 2021. www.ft.com/content/7e98795f-159b-4455-903e.
[193] Kragelund. P, 'Bringing indigenous ownership back: Chinese Presence and the Citizen Empowerment Commission in Zambia' The Journal of Modern African Studies, Vol.50, N0.3 (September 2012) 450. www.jstor.org/stable/41653717.
[194] Anoba I, 'China is Taking Over Zambia's National Assets but the Nightmare is just Beginning for Africa', September 10, 2018. www.africanliberty.org/2018/09/10/china-is-taking-over-Zambia-national-assets-but-the-nightmare-is-just-beginning-for-africa/.
[195] Beyongo.M, "China's Power in Africa: Rhetoric and Reality', ANU Press, 2018.
[196] Smith E, 'Zambia's Spiraling debt offers glimpse into the future of Chinese Loan financing in Africa', Jan 14 2020. www.cnbc.com/2020/01/14/zambias-spiraling-debt-and-the-future-of-chinese-loan-financing-in-africa.html.
[197] Smith E, 'Zambia becomes first Coronavirus-era default: What happens now?, Nov 24 2020. www.cnbc.com/2020/11/23/zambia-becomes-first-coronavirus-era-default-what-happens-now.html.

react to this event in light of the loan owed to various financial institutions by the Zambian government.[198]

Instructively, the Zambian government has denied that any collateral has been offered to finance the project while also downplaying the level of the debt to China.[199] Since the default, a debt restructure has been agreed upon between Zambia and her creditors although little progress seems to have been made in actualizing the agreement from statements attributed to the Zambian government calling on creditors to participate in the process.[200] Notably, China has agreed to join in the restructure exercise after initial reluctance which makes the exercise more inclusive and effective.[201]

5.2 Review of the Statutes around Public assets in Zambia

This section will analyze the existing laws in Zambia, as they pertain to public debt with regard to the possible consequence of default in repayment. The legal framework as regards borrowing and the use of collateral for procurement of debt is a key focus of the analysis. The analysis will also unpack the legal environment regarding the identification and protection of strategic national assets. Strategic national assets have been identified as primarily infrastructure belonging to a country or a state owned enterprise that is critical to the proper functioning of either the whole or part of the economy.[202] The need to interrogate the laws is to determine whether the relevant legislation anticipated and provided for all eventualities around the collateralization of national assets. Further, whether the laws fulfilled the need they were meant to cover and conformed to the intention of the legislators as the representatives of the people.[203]

Since the commencement of this research several developments have occurred which have a significant bearing on the study. For purposes of illumination, the Covid 19 pandemic has had an adverse effect on the ability of the countries to abide by the repayment of the loans which led to

[198] 'Zambia's Chinese Debt in the Pandemic Era', Global Policy Development Center, October 21 2021. www.bu.edu/gdp/2021/10/21.
[199] Reuters, 'Zambia denies White House claim China taking over Power Utility', 15 December 2018. www.reuters.com.
[200] Hill C & Mitimingi T 'Zambia asks G20 to meet on Debt Restructuring', 21 April 2022. www.bloomberg.com.
[201] Nyathi K, 'Relief for Zambia as China joins its debt resolution mechanism', The East African, 29 April 2022. www.theeastafrican.co.ke.
[202] Ding J & Dafoe A,'The Logic of Strategic Assets: From Oil to AI', 2021, 39. Unpublished. www.arxiv.org/ftp/arxiv/papers/2001/2001.03246.pdf.
[203] Bentham,J., 'The Theory of Legislation', Trubner & Co, 1802.

restructures.[204] Significantly, Zambia defaulted in the repayment of their obligations with regard to one of their Eurobonds and have had to enter into restructure talks for the loans borrowed from international partners.[205]

In Zambia, as in the previous two countries, the research will assess the suitability of the existing legislative instruments enacted in the country to shield from potential appropriation of national assets.

The specific legislative instruments to be assessed with regard to Zambia are:-

1. The Constitution of Zambia, 1991[206]
2. The Zambian Public Finance Management Act 2018
3. The Loans, Grants and Guarantees (Authorization) Act[207]
4. The Loans and Guarantees (Maximum Amounts) Order[208]

5.2.1 The Constitution of Zambia[209]

The Zambian Constitution vests sovereign authority in the people and the institutions to whom they may delegate the exercise of such authority[210]. The article provides as follows:

Article 5: Sovereign authority

1. Sovereign authority vests in the people of Zambia, which may be exercised directly or through elected or appointed representatives or institutions.

2. Power that is not conferred by or under this Constitution on any State organ, State institution, State officer, Constitutional office holder or other institution or person is reserved for the people.

3. The people of Zambia shall exercise their reserved power through a referendum, as prescribed.

[204] OECD Policy brief, 'Covid-19 in Africa: Regional Socio-Economic Implications and Policy Priorities', May 7, 2020, 19. www.oecd-ilibrary.org/view/COVID-19-in-Africa-regional-socio-economic-implications-and-policy-priorities.
[205] Fabricius P, 'Zambia Defaults, Economically and Politically', Institute for Security Studies, Jan 14, 2021. www.issafrica.org/iss-today/zambia-defaults-economically-and-politically.
[206] As amended up to 2016
[207] No 13 of 1994
[208] No 25 of 2014
[209] Act No.2 of 2016
[210] Article 5, Constitution of Zambia.

Instructively, under sub section (2) of that article 5, it states that any power not conferred by the Constitution is reserved for the people. The implication would be that powers not specifically conferred by the Constitution and are not granted, for instance by legislation in the exercise of sovereign authority, would be ultra vires and of no import. Article 2 is the fail-safe mechanism which confers a duty on any person who exercises power in the name of the people. The prominence of sovereignty in the constitution as well as the specificity with which reservation is made in certain instances is a reflection of how important the exercise of sovereignty is regarded by the people[211]. The reservation of powers under sub section 2 in article 5 is an incredibly useful constitutional innovation that can be used to question the use of sovereign authority in certain instances.

Article 207 of the Zambian Constitution provides for the borrowing and lending by the government and related matters while 208 describes the character of public debt.

Article 207.

1. The government may as prescribed-
    a. Raise a loan or grant on behalf of itself, a state organ, state institution or other institution;
    b. Guarantee a loan on behalf of a state organ, state institution or other institution; or
    c. Enter into an agreement to give a loan or a grant out of the consolidated fund, other public fund or public account.
2. Legislation enacted under clause (1) shall provide-
    a. For the category, nature and other terms and conditions for a loan, grant or guarantee, that will require the approval of the national assembly before the loan, grant or guarantee is executed; and
    b. That any monies received in respect of a loan or grant approved by the national assembly shall be paid into the consolidated fund, or other public fund or public account.

Article 207 under sub section (2) makes provision for enactment of legislation through which borrowing and lending shall be undertaken as well as for the category, nature and terms of loans,

[211] Section 6.2.1.1 of the Report of the Zambian National Constitutional Conference dated 24th June 2010

grants and guarantees that shall require National Assembly approval. Section 2(a) prescribes that legislation shall determine what categories of a loan, grant or guarantees require parliamentary approval.

In the context of this research, that section provides parliament a clear-cut opportunity for oversight over specific types of loans and the remit to give thresholds. The proper use of this section would ensure particulars of specific transactions fall within parliament's oversight garb.

Article 208.

A public debt shall be a charge on the consolidated fund or other public fund.

1. For the purposes of this article 'public debt' includes the interest on that debt, sinking fund payments in respect of that debt, and the costs ,charges and expenses incidental to the management of that debt.

The Constitution of Zambia makes no express provisions on the use of national assets as collateral in the procurement of debt.

5.2.2 Public Finance Management Act, 2018[212]

The Zambian PFMA prohibits institutions bound by the statute from borrowing and lending otherwise than as permitted by the Constitution[213]. It further provides that in the alternative the borrowing or lending shall be as authorized by the Loans, Grants and Guarantees (Authorization) Act 2018 or any other law[214]. It would appear that as in the other two jurisdictions the PFMA is the principal statute with regard to any public debt. The statute goes further to make the written authority of the Secretary to the Treasury a prerequisite before any institution or public body borrows any money[215]. This provision establishes a clear reporting structure for determination of whether the process was adhered to in the procurement of any loan by a public institution or body.

In an express provision the statute prohibits any public body, where authority to borrow has been granted, from pledging any government asset as collateral in the absence of the written authority

[212] No.1 of 2018
[213] Section 26(1)(a) of the Public Finance Management Act 2018
[214] Section 26(1)(b) of the Public Finance Management Act 2018
[215] Section 26(2) of the Public Finance management Act 2018

of the secretary to the Treasury.[216] The provision has the effect of making it legal to use government assets as collateral subject to the grant of authority in writing from the treasury. This provision is a clear recognition of the need to ring-fence public assets and ensure that any use of such assets as collateral is done with the requisite approval. The regulations to give effect to the use of government assets as collateral are yet to be developed so save for the provisions in the statute there are no further guidelines. The absence of specific regulations to guide the use of government assets as collateral introduces ambiguity within the public finance management sphere, which can be exploited with adverse consequences.

The Statute further provides regulations where there is a requirement to maintain a public asset register in every public body as well as reporting obligations upon the accounting officer of the public body to give quarterly reports to the Accountant General on the status of such public assets.[217] The provisions with regard to the maintenance of public asset registers is important especially for purposes of identification of all public assets held by the various entities as well as whether they are encumbered in any way.

The statute recognizes that certain assets are of strategic importance and the ownership of those assets is a matter of public interest. The statute makes a proviso that in the event of a sale of a state-owned enterprise, such assets belonging to the state owned enterprise as are considered major and strategic, should revert to the ownership of the Government.[218]This is an important provision that essentially ensures that any major strategic assets remain under the control of the government and in the service of the people of Zambia.

The robustness of the Zambian statute was remarked upon in a report by the policy watchdog Policy Monitoring and Research Centre, which highlighted the management of public assets as a key aspect of the Public Finance Management Act 2018.[219]

5.2.3 The Loans, Grants and Guarantees (Authorization) Act, 1994

The constitutional imperative to legislate for loans, grants and guarantees is met in the Loans and Guarantees (Authorization) Act, 1994 which makes provisions for how and on what terms the

[216] Section 26(3) of the Public Finance Management Act 2018
[217] Section 40 of the Public Finance Management (General) Regulations 2020
[218] Section 69(2)(e) of the Public Finance management Act 2018.
[219] Report on the Analysis of the Public Finance Management Act 2018. www.pmrczambia.com

government will procure loans, grants and guarantees on behalf of the Zambian people. This provision on the terms and conditions attaching to loans is where any requirement for collateral would seek to be addressed. It follows therefore that in the current legislative framework it would be imperative to specify the kind of collateral permissible for use as security in the procurement of loans in this specific statute.

Under the statute the Minister for Finance has the sole authority to commit Zambia to any loan but the authority is tempered by the requirement to seek parliamentary approval as provided under the Constitution.[220] While the statute does not provide for it, the constitutional imperative for parliamentary approval before the procurement of loans is a necessary failsafe. The need for parliamentary approval before commitment by the Minister provides the checks and balances contemplated in an effective public finance management environment.[221]

5.2.4 The Loans and Guarantees (Maximum Amounts) Order, No. 25 of 2014

It is an illuminating piece of legislation that served to repeal the earlier Loans and Guarantees (Authorization) Act which provided the framework for public borrowing and related purposes.[222]. The repealed legislation provided some exceptions to the applicability of the provisions which essentially acted to shield some borrowing from the oversight approval of parliament. The present legislation remedied that position with the overriding requirement for parliamentary approval for all borrowing by and in the name of the Zambian people.

Further subsidiary legislation under this Act include the Loans and Guarantees (Maximum Amount) Order, No.25 of 2014 which as the name suggests gives the maximum threshold for public borrowing as a method of managing the debt to GDP ratio at sustainable levels. The legislative landscape around public debt in Zambia reflects a concern by Parliament on the need to keep a tight leash on the executive to curb an appetite for loans beyond the ability of the country to repay.

[220] Article 207(2) of the Constitution of Zambia
[221] Muleya.F, Kalikeka M, Shingwele Z, Ngongo.P & Nalishebo.S, 'An Analysis of the Legal framework for Public Debt Management in Zambia, Zambian Institute for Policy Analysis and research, June 2020, 8.
[222] Chapter 366 of the Laws of Zambia (now repealed)

5.3 Analysis

From the statutes and regulations under review, it is evident that Zambia has laws in place to protect strategic assets from falling outside the control of the government. The laws are all recent enactments and it would appear in response to fears of appropriation of strategic assets and the effect on Zambian sovereignty that have been raised from various quarters in the recent past. In this regard, the Zambian parliament has upheld its mandate as set out in the Constitution under articles 207 and 208 to ensure borrowing in the name of the people is only done with certain safeguards.

The relatively frequent review of laws in Zambia suggests a realization that the repealed legislative instruments were inadequate and also that the landscape is dynamic and ever changing which in turn requires amendments or repeals to adapt to the new realities. The Constitution does reserve some rights for the citizen, which ensure that powers in excess of those conferred cannot be exercised in the name of the people of Zambia.[223]

It is evident that in Zambia, the Constitution not only reserves certain rights to the citizens with regard to the exercise of sovereign authority, but that the rights are further cemented in legislation and penalties assigned to duty bearers in instances where powers are abused.

While it would remain largely a matter of interpretation by the judicial authority, there seem to be sufficient safeguards built into the Zambian body of laws and therefore the proper and judicious exercise of oversight by the institutions so mandated is what is required. In light of the developments in Zambia with regard to untenable public debt after the legislations were enacted, it remains to be seen whether the interventions are sufficient to protect the public assets in issue. However, it is evident that the appetite for debt by successive administrations in Zambia remains keen despite the economic challenges currently affecting the country. A definitive determination on whether the legislative interventions are sufficient can only be made in the event creditors, and specifically the Chinese, assert their right to recover debt by taking over the said public assets or asserting any rights over them.

[223] Article 5(1) of the Zambian Constitution.

It is evident that that the policy to rely on external debt to fuel infrastructural projects remains unaltered although the recent default by Zambia on repayment of international bonds will serve as a red flag for potential investors.

In summary, it appears that Zambia though the country with the most robust public finance management laws ironically is also the African country most extended to China. This raises questions on the sufficiency of only laws to address unmanageable debt and security of their public assets in general.

5.4 Conclusion

In conclusion, of the analysis of the legal and regulatory framework around the use of national assets as collateral and the general environment governing the procurement of debt it is evident that Zambia has made commendable efforts towards providing a transparent process in identification of such assets. The laws also provide a clear authorization channels to guide the use of national assets as collateral in the procurement of debt. However, the lack of an express prohibition on the use of certain national assets as collateral effectively means that such use can occur with the resultant appropriation in the event of default.

In Zambia it is clear that there are significant concerns about both the rising levels of debt as well as the terms of the agreements giving rise to those debts especially in regard to the collateral offered up as security. The present corona pandemic with its unheralded effects on the global economy has further exacerbated an already precarious position with regard to debt repayment and significantly increased the risk of default.

Indeed, in Zambia, as set out earlier in the introduction, the risk of default has already crystallized with the country having defaulted on the repayment of one of its issued Eurobonds and seeking a restructure of a majority of the external debt. The default increases the possibility of appropriation of strategic national assets in the absence of legal protections or immunities.

The next chapter concludes the study and proposes to give certain recommendations towards providing a measure of protection to strategic national assets in the countries the subject matter of the theses.

Chapter 6

6.1 Introduction

The previous chapters looked into the specific instances of potential for appropriation of strategic national assets in instances of default on the part of the borrower countries in repayment of loans advanced by China or Chinese related entities. The theoretical framework provided insights into the theories around which the study was based and was intended to give context to the nature of the challenges identified in the research. The paper further explored the constitutional and statutory framework in the three jurisdictions with regard to strategic national assets and their collateralization in loan procurement. The study assessed the main contracts in the three jurisdictions in which Chinese funding had been utilized and related them to potential default with the resultant consequences on the strategic assets used as collateral.

Africa in general, and the studied countries in specific, must reimagine the nature of and the terms of the agreements it enters into with its development partners more closely to ensure the necessary protections are written into both the letter and spirit to secure its sovereignty.

There is a need to relook to Sino-African agreements and determine whether or not they fall afoul of the Odious Debt doctrine especially where there is no discernible public benefit in the projects.[224]

Prima facie, a number of the agreements with Chinese entities in the three south and east African countries could fall within the doctrine and it might be a useful strategy going forward to do an audit and determine a concerted plan of action in seeking reparations.[225] African countries must look to sovereign bonds to finance infrastructure projects to mitigate the risk of appropriation of sovereign assets in the event of default. Further African countries in general and Kenya must adhere to the constitutionally imposed limits of borrowing to avoid a debt crisis as has befallen more stable economies both in the continent and abroad. There is need to also insulate the public from debt that was incurred in excess of constitutionally laid down provisions by incorporating

[224] Backer L, 'Odious Debt wears two faces: Systemic illegitimacy, problems and opportunities in Traditional Odious Debt conceptions in Globalized Economic Regimes', 70 Law and Contemporary Problems 1(2007), No. 4, 9.
[225] Khalfan A, King J & Thomas B, 'Advancing the Odious Debt Doctrine 19, Centre for International Sustainable Development Law, (2003), www.odiousdebts.org/odiousdebts/publications/Advancing-the-odious-Debt-Doctrine.pdf

defined limits into legislation. These will certainly curb the almost insatiable appetites of treasury mandarins to increase indebtedness in complete disregard of law.

The present chapter concludes the study by answering the main research question, confirming the hypothesis and prescribing recommendations to address the challenges identified for the three African nations whose interactions and engagements with China formed the subject matter of the research.

6.2 Answer to Research Question

The research question asked what the legal effect of collateralization of strategic national assets for loan procurement was on sovereignty in the three African countries. It is evident from the research that such collateralization exposes those strategic assets to the risk of appropriation by the lender in the event of default in repayment of the loans. As has been evidenced in other jurisdictions, it is clear that China as a lender would be entitled and willing to exercise their rights over such assets to settle dues owed to them by borrower nations.

6.2.1 Hypotheses

First hypotheses

The structure of the loan agreements between China and African nations and specifically the clauses on waiver of sovereign immunity may result in the appropriation of strategic national assets by China. The appropriation of any strategic assets is antithetical to sovereignty as it is understood and appreciated by citizens in the affected countries.

Second hypotheses

The second hypotheses in the research, has been effectively disproved, as the clauses in question are not in conflict with domestic laws. The clauses, as enacted at the time the agreements were executed, while not expressly granting permission for collateralization, do not prohibit such application. Further the agreements are consistent with internationally accepted financial instruments that govern lending involving sovereign nations.[226] The clauses in question with regard to waiver of sovereign immunity are widely used by other international banks in the business of

[226] Weidemaier W.M & Gulati M, 'Differing Perceptions? Market Practice and the evolution of Foreign Sovereign Immunity', 11. Unpublished. Available at www.ssrn.com.

lending and are in the nature of boilerplate clauses commonly used by lenders in loan agreements.[227]

Further, the use of dispute resolution or arbitration clauses that specify either a neutral jurisdiction or one favourable to the lender is similarly commonplace in the international loan market.[228] As a matter of fact, the waiver of sovereign immunity usually forms part of the arbitration clause in many financial agreements.[229] However, the fact of legality does not address the impact of such clauses on the sovereignty and it is evident from the research that the potential loss of strategic assets used as collateral would have an adverse impact on the sovereignty of the affected countries.[230]

6.3 Conclusions

From the constitutional and legislative analysis, the research determined that Kenya and Uganda do not have a legal framework to define what qualifies, in their respective jurisdictions, as strategic national assets and consequently there are no specific protections in that regard. Zambia, on the other hand, has a nascent legal framework that makes provisions for identification and protection of national assets.

It is clear from the research that China has and in all probability will continue to use debt to cement its foothold in Africa for geopolitical purposes, specifically, to advance a natural resource driven agenda on the continent. The incursion into Africa by the Chinese does raise interesting questions on our understanding of sovereignty and whether an elastic concept of sovereignty is more desirable in the current interdependent international ecosystem. This thesis posits that it would behoove African countries to take specific and urgent measures as a trade bloc to ensure that the sovereignty of its member states is not impugned in future agreements with all development partners. Further, trade negotiations between its constituent members and the developed nations

[227] Siegel J,' Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment', Duke Law Journal, Vol.52, No.6, 2003, 1181. www.jstor.org/stable/1373169.
[228] Stoffregen M, 'Inferred explicit Standard-Waiver of Sovereign Immunity via an Arbitration Clause', Journal of Dispute Resolution, 1997, No.1, 34. https://scholarship.law.missouri.edu/jdr/vol1997/iss1/10.
[229] Stefano C, 'Arbitration Agreement as Waiver to Sovereign Immunity', Arbitration International, Vol.30, Issue 1, March 2014, 65. https://doi.org/10.1093/arbitration/30.1.59.
[230] Gathii J.T., 'Sovereign Debt as a mode of Colonial Governance: Past, present and future possibilities', African Sovereign Debt Justice Network, 13 May 2022, 13.

of the West and East should be made with the interests of present and future generations of Africans and specifically Kenyans.

It is apparent that the protections built into the body of laws in Kenya and Uganda are woefully inadequate to secure the interests of the countries as regards sovereign assets and that more needs to be done towards achieving that end.

It would be insincere to load all the blame on China as it is evident that the terms for other loans from international partners have similar, if not identical, terms.[231] It then behooves African nations to review all the contracts to ensure debt levels are sustainable and that protections are built in the loan instruments to insulate them from avoidable risks. However even as law reforms are made to make loan processes more prudent as pointed out in a Hollywood inspired title *Crouching Tiger, Hidden Dragon*, a report by two researchers posits that African countries must continue engaging China in their aim of driving economic growth forward without falling for anti-Chinese rhetoric.[232]

All the three countries forming the basis of this paper need cheap financing options that will allow them to fund projects necessary to their economic growth and development. As long as Chinese capital is cheaply and readily available it would be foolhardy for their political leadership to shun it entirely for expensive commercial loans or grants that come with strings attached from western development partners and institutions.[233]

6.4 Legislative Recommendations

6.4.1 Kenya

The main problem with Kenya seems to be a reluctance to implement laws that are already in place compounded with a penchant to keep changing goal posts in as far as public debt ceilings are concerned as demonstrated by the latest revision from a percentage to an absolute number. It seems inevitable that that ceiling might be revised upwards as deemed convenient by any incoming treasury mandarin. It is recommended that the country revert to the percentage formula that was set at 50% of the Gross Domestic Product which ensures that adherence to the determined financial

[231] Africa Check website

[232] Ndinga-Muvumba A & Corkin L, 'Crouching Tiger, Hidden Dragon-China Africa Bilateral Relations', Centre for Conflict Resolution, 2009. www.jstor.org/stable.resrep 05146.7

[233] Rono JK, 'The Impact of the structural adjustment', *Journal of Social Development in Africa*, Vol 17, 2002, 89.

principles are upheld.[234] While it is anticipated that there will be instances when the ceiling is broken and countries go above the 50% standard, there should be corrective measures instituted expeditiously to restore public debt to the agreed standard.

In Kenya there are several recommendations that can be incorporated into their body of laws to buttress the existing laws.

Public Finance Management Act

Specifically, there is need to have either amendments to the PFMA, or a stand-alone statute that caters to strategic national assets by way of identification, classification and provisions on collateralization. There is further need to provide comprehensive clauses in the Public Finance Management Act to ensure that provisions with regard to strategic assets are not only properly spelt out, but also that the provisions sufficiently address all the concerns and risks. The statute must make sure to ring fence such assets as are identified as strategic to ensure their utilization as collateral is either prohibited, or that the approval process prior to use as collateral is rigorous and to ensure there are comprehensive protections and reporting mechanisms.

Kenya should adopt the Charter of Fiscal Responsibility to strengthen fiscal probity and provide specific guidelines on identification, classification and management of strategic assets.

Kenya Ports Authority Act and Kenya Railways Corporation Act

In terms of their assets and the way in which they can be deployed as collateral for procurement of loans by either corporation, it seems desirable that the statutes make specific provisions to govern any such process.

It also appears necessary to have reciprocity on membership on the Kenya Ports Authority board for the managing director of the Kenya Railways Corporation.

However, in terms of future projects the process through which the corporations can use each other to guarantee loans or even use assets belonging to the other should be clearly spelt out to ensure that necessary safeguards are built into the approvals.

[234] Article 6(2)(c) of the East African Community (EAC) Monetary Union Protocol prescribes that members should endeavor to maintain a public debt ceiling of 50% of Gross Domestic Product in Net Present Value terms.

The determination on both the amount of acceptable debt as well as the terms should be made by the people through their representatives and ought not to be left to an individual in the person of the Minister for Finance.

It would be useful to write in a requirement for approval from both the Attorney General and the Auditor General to ensure that both financial and legal considerations are made and appropriate mitigation measures put in place where necessary.

6.4.2 Uganda

In Uganda, as in Kenya, there is a need for amendment to existing statutes and in some cases enactment of new laws to address the use of national assets as collateral in the procurement of loans. Uganda, like Kenya does not have specific prohibitions against the use of national or strategic assets as collateral. A starting point would be in the identification of such assets and then enacting legislation to protect such assets and guidelines where applicable for the utilization of national assets as collateral.

6.4.3 Zambia

In Zambia the need to legislate in specific areas to give effect to the constitutional imperative to reserve certain sovereignty related powers for the people.

Zambia as a member of the Southern African Development Community is obligated to maintain a public debt to GDP ratio of below 60% as determined in the relevant protocol.[235] It would therefore be advisable for the country to undertake fiscal probity measures to reign in their public debt to within the prescribed limits.

There is an urgent need to develop the regulations in order to give the full-intended effect of the Public Finance Management Act 2018 with regard to protection of government assets. A specific action would be the identification of all assets deemed as strategic and impose stricter requirements or even outright prohibition of their use as collateral. It is evident that of the three jurisdictions Zambia has the most robust legislation and mechanisms to deal with the issue of collateralization of strategic assets although the laws are of recent enactment. It remains to be seen whether the

[235] Annex 2, Southern African Development Community, Protocol on Finance and Investment. Available at www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf.

interventions are fit for purpose should any lender seek to take over assets for non-payment of debt.

6.4.4 General recommendations

i. Deliberate efforts now need to be made in the next phase of Sino African engagements that have the effect of reducing debt obligations from agreements that seem skewed in favour of external players. Specifically the negotiations for new facilities must take care to shield strategic assets from the risk of appropriation in the event of default.

ii. It is time to consider the utilization of alternatives to restructure debt, especially commercial loans that attract high interest and penalties.[236]

iii. The capacity of the negotiating teams for the respective governments must be scaled up to ensure that Africa has home grown specialists able to put our case strongly and effectively. It is inconceivable that we still rely on foreign lobby firms and lawyers to negotiate on our behalf for loans as well as to defend claims upon default.

iv. A thorough review of all contracts must be made to determine the risk profile in the event of default and to adequately mitigate any potential risk especially around the appropriation of assets whether strategic or not. In tandem with this review of the contracts it is time for African countries to consider the passage of laws in their specific countries to govern engagements with China and other development countries and partners along the lines taken by the United States. The laws should go to addressing key areas like skill transfer, sub-contracting of local companies, need for the use of local labour around contracts especially those around infrastructure projects.[237]

v. Needless to say, it would be imperative to ensure that strategic national assets are ring fenced to guard against the risk of appropriation. Such ring fencing would necessarily involve legal innovations that would have the effect of identifying those assets that meet a set threshold and then ascribing the necessary protections against appropriation except under specified circumstances.

[236] Krueger A, International financial architecture for 2002: A new approach to sovereign debt restructuring,2001, An address to the National Economics Book Club in Washington DC.

[237] Warmerlan W & Van Dijk MP, 'China-Uganda and the question of Mutual Benefits', *South African Journal of International Affairs*, 2013, 272.

vi. For Kenya and Uganda, it might be prudent to consider the inclusion, in their supreme law, of a provision as that under the Zambian constitution that reserves certain non-derogable powers to the people. Under those proposed reservations, the non-assignability of sovereign assets or revenues from those assets would be included.

However, it would require prudence to avoid shackling the governments from the use of financial innovations that ensure development in infrastructure without spending tax payer money directly. A case in point is the deployment of Build Operate Transfer projects that tap into private capital to develop infrastructure and permit the investors to recoup their money through tolls. The SGR in Kenya is a classic case of a build operate transfer project with the investor through a special purpose vehicle given a concession to run the rail for 30 years to recoup their money. It is doubtful whether such innovations would be deemed a breach of sovereignty.

Robust public debt management is necessary to ensure that each country is within the accepted debt to GDP ratio. However the matter of what is an acceptable ratio remains a matter of interpretation with a lot of room for expansion dependent on the fiscal agenda of the specific country. In a 2007 World Bank report titled **Managing Public Debt: From diagnostics to reform implementation** a road map for public debt management strategies was shared from the perspective of twelve pilot countries among which were Kenya and Zambia.[238] It might be useful to redefine what is acceptable as a ratio especially in the present context where governments use the debt ratio of developed countries to justify the increase of their debt ratios. The raising of the debt ceiling in Kenya to KShs 9 trillion (approximately USD 85.7 billion) is certainly not what is contemplated within the realm of good public debt management.[239] It seems antithetical to change the measure from a percentage based one to an absolute one in shilling terms and it is probable that it might be revised upwards to cater for increased appetite for debt. The wisdom of such a redefinition is not readily appreciated from a public debt management perspective. As at the writing of this paper, the Kenyan public debt has now reached 8.5 trillion on the back of a loan negotiated with the World Bank to mitigate the effects of the Covid 19 pandemic on the economy and it is probable that the debt ceiling will be reached within a year or two at the most with the

[238] Managing Public Debt: From diagnostics to reform implementation, The International Bank for Reconstruction and Development, 2007.
[239] Muchira N, 'World bank warns Kenya over $85.7 billion debt ceiling', The East African, 12 October 2019, www.theeastafrican.co.ke/business/world-bank-warns-kenya-over-debt-ceiling/2560-5308712-1.

depressed economic activity and the impact it has on production. There are ongoing talks to further amend the Public Finance Management (National Government) Regulations which prescribe the debt to raise the ceiling upwards.[240] The apprehensions raised by this study of an unhinged standard with regard to the public debt are being proved justifiable by the present proposal.

While there are solutions that cut across all three countries some apply to each country as set out in this final section.

It is also recommended that a criteria of what forms sovereign assets is designed and such assets identified and legally ring-fenced to avoid any threat of appropriation. It appears that there is no definition of what forms a sovereign asset even where it is evident that there is especial regard by the public. Airports, sea ports and railways are among national assets that the author recommends for legal protections against adverse actions by lenders.

6.5 General observation

In the context of debt and the obligations around it there might be cause to include a 'force majeure' clause to take account of a possibility of an occurrence of an event with global repercussions in the vein of this pandemic. Medical experts and social commentators are mostly unanimous that it now seems to be a question of when, rather than if, another pandemic wreaks havoc on a global scale like the still evolving COVID one.[241]

[240] Mwere D, Kenya: Treasury mulls debt ceiling boost as the coffers run dry, 5 January 2021, www.allafrica.com/stories/202101050183.

[241] Smitham E & Glassman A, 'The Next Pandemic could come soon and be deadlier', Centre for Global Development, 25 August 2021. www.cgdev.org.

Bibliography

1. Busse E, Erdogan C & Muhlen H, China's Impact on Africa-The Role of Trade, FDI and Aid, IEE Working Paper, Institute of Development Research and Development Policy, Vol.206, 2014.
2. Akyeampong E & Fofack H, Special Issue on 'Africa and China – Emerging patterns of engagement' Economic History of Developing Regions, Vol. 34.
3. Jaston C, Practical considerations in drafting a Joint Venture Agreement with China, The American Journal of Comparative Law, Vol 31, No.3 1983.
1. Kidane W, '*Reflections on China-Africa BITs*', American Journal of International Law, Vol.107, International Law in a Multipolar World, 2013.
2. Gathii JT, The sanctity of sovereign contracts and its origins in enforcement litigation, 38 George Washington International Law Review, 2006
3. Yee S, The International Law of co-progressiveness: The descriptive observation, the normative position and some core principles, Chinese journal of international law, Vol 13, Issue 3, September 2014.
4. Carral M, 'Sovereignty in China: A genealogy of a concept since 1840', Cambridge University Press, 2011.
5. Plank D. '*Aid, debt and the end of sovereignty: Mozambique and its donors*.' Journal of Modern African Studies 31 September 1993
6. Lienau O, 'Rethinking sovereign debt', Harvard University Press, 2014.
7. Moyo D, 'Winner Take All', Penguin Books, New York, 2012.
8. Chayes A & Chayes A, The New Sovereignty: Compliance with International Regulatory Agreements, Harvard University Press, 1995.
9. Moyo D, 'Beijing, a boon for Africa', Op-Ed, New York Times, 27 June 2012.
10. Nagan WP and Haddad A, 'Sovereignty in theory and practice', San Diego International Law Journal, 13, 2011
11. The Drago doctrine in international law and politics, The Hispanic American Historical Review, Vol 8, No. 2, (May 1928)
12. Duara P, 'Transnationalism and the predicament of sovereignty', American Historical Review, 102, 4, October 1997

13. Litfin K, ‘Sovereignty in world ecopolitics’, Mershon international studies review, 41, 2, November 1997.
14. Simumba T, ‘He who pays the piper: Zambia’s growing China debt crisis’, June 2018.
15. Byers M, Raghavan V & Becerra-Ramirez M. ‘Voices from the outside: Sovereign equality, international law and the imbalance of power’, American Society of International Law 99, March 30 April 2005.
16. Saul JT, ‘Africa: The next liberation struggle’, Review of African political economy, 30, 96, June 2003.
17. Vatikiotis M, ‘The architecture of China’s diplomatic edge’, Brown Journal of World Affairs, 25, 2006.
18. Yuan P, ‘China’s challenge to traditional international law: An exposition and analysis of Chinese views and behavior in international law and politics’ Dalhousie Law Journal 1987.
19. Shepard W, ‘What China is really up to in Africa’, Forbes Africa, 3 October 2019.
20. Loughlin M, ‘The Erosion of Sovereignty’, 45 Netherlands Law Journal, Phil. 57 (2016).
21. Barry C and Tomitova L, Fairness: Its role in our lives, Social Research, Vol. 23, No. 2, (Summer 2002) 649-694, Johns Hopkins University Press.
22. Avgouleas E, ‘The Eurozone Debt crisis & the European Banking union: Hard choices, intolerable dilemnas and the question of sovereignty’
23. Pearenboom R, ‘The fire breathing dragon and the cute cuddly panda: The implications of China’s rise for developing countries, human right and geopolitical stability’, 7 China Journal on International Law. 17 (2006)
24. Murphy T, ‘China’s laws and flaws; 70 Mod Law Review, 1008 (2007).
25. Villaroman N.G., ‘The loss of sovereignty: How international debt relief mechanisms undermine economic self-determination’ Journal of Politics and Law, Vol.2, No.4, December 2009.
26. Swantok M, ‘A brave new world: Credit default swaps and voluntary debt exchanges’, 45 Marshall Law Review, 2012
27. Cornel E, ‘Why Okoa Mombasa, TISA sued to obtain classified SGR contracts’, June 21, 2021. www.muhuri.org.
28. Liu Y, ‘Peoples Will or the Central Government’s Plan? The Shape of Contemporary Chinese Local Governance’, Journal of Contemporary East Asia Studies.

29. Cuirtin H, ‘When Westphalia goes to China: Territory, Sovereignty and Legal Narratives Across the Straits’, Journal of Territorial and Maritime Studies, Vol.5, 2018.
30. Recognition in International Law: A Functional Reappraisal’, The University of Chicago Law Review, Vol.34, No.4.
31. Chen T, ‘The International Law of Recognition’, Frederick Praeger Inc, 1952.
32. Vidmar J, ‘Remedial secession in International Law: Theory and (Lack of) Practice’, St Antony’s International Review, Vol.6, No.1, May 2010.
33. Farley BR, ‘Calling a State a State: Somaliland and International Recognition’, Emory International Law Review 24, No.2, 2011.
34. Bolton G, McGivern L & Steele S, ‘Editorial Introduction: Secession, Sovereignty & the Quest for Legitimacy’, St Antony’s International Review, Vol.6, No.1, May 2010.
35. Dietrich F, ‘State Recognition between Justice and Efficiency’, Annual Review of Law and Ethics, Vol.21, 2013.
36. Rogers GAJ, ‘Hobbes, Sovereignty and Consent’, New Critical Perspectives on Hobbes T, ‘The Leviathan’, 1660.
37. Hobbes’ Leviathan upon the 350th Anniversary of its publication, 2004.
38. Stone P, ‘Hobbes’ Problem’, The Good Society, Vol.24, No.1, 2015.
39. Duke G, ‘Hobbes on Political Authority, Practical Reason and Truth’, Law and Philosophy, Vol.33, No.5, 2014.
40. Cutler C, ‘The Grotian Tradition in International Relations’, Review of International Studies, Vol.17, No.1, 1991.
41. Brodsgaard K, ‘Politics and Business group formation in China: The Party in Control.’, China Quarterly, 2012.
42. Xiaodong D, ‘Law according to the Chinese Communist Party: Constitutionalism and Socialist Rule of Law’, Modern China, Vol.43, No.3, 2017.
43. Flandreau M, Pietrosanti M & Schuster C, ‘Why do Sovereign Borrowers post collateral? Evidence from the 19th Century’, Institute for New Economic Thinking, Working Paper No. 167, October 7, 2021.
44. Panizza U, Sturzenegger F & Zettelmeyer J, ‘The Economies and Law of Sovereign Debt and Default’, Journal of Economic Literature, Vol.47, No.3, 2012.

45. Wall D, International Law: Waiver of Sovereign Immunity under United States Law, International Financial Law Review, No.1, Vol.7, November 1982.
46. International Law: Waiver of sovereign immunity, Duke Law Journal, Vol.4, 590, Duke University School of Law, 1962.
47. Buchheit L & Parr J, 'The Pari Passu Clause in Sovereign debt Instruments', Emory Law Journal, Vol.53, 2004.
48. Nour A, 'National Sovereignty and Globalization', European Journal of Economics, Law and Politics, Vol.7, No.1, 2020.
49. Lipworth G & Nystedt J, 'Crisis Resolution and Private Sector Adaptation', 47 IMF Staff Papers, 2001.
50. Sharp A, Review:A General Theory of Public Debt, The American Journal of Economics and Sociology, Vol.19, No.1, 1959.
51. Hume D, 'Essays: Of Public Credit', Oxford University Press, 1752.
52. Paganelli MP, 'David Hume on Public Credit', History of Economic Ideas, Vol.20, No.1, 2012.
53. Boettke P & Palagashvili L, 'Taming Leviathan', Supreme Court Economic Review, Vo.23, 2015.
54. Salsman R, Classical Theories of Public Debt, Financial Crises and Recession in the Global Economy, 4th edition, Cheltenham UK, Edward Elgar Publishing, 2017.
55. Niggle CJ, 'Keynes on Monetary Policy: A Comment on Crotty', Journal of Economic Issues, Vol.27, No.4, 19, 1265.
56. Plaut S, Theory of Collateral, Journal of Banking and Finance, Vol.9, Issue 3, 1985.
57. Chan YS & Kanatas G, 'Asymmetric Valuations and the Role of Collateral in Loan Agreements', Journal of Money, Credit and Banking, Vol.17, No.1, 1985.
58. Brumm J, Grill M, Kubler F & Schmedder K, 'Collateral requirements and Asset Prices', International Economic Review, Vol.56, No.1, 2015.
59. Stroebel J, 'Asymmetric Information about Collateral Values', The Journal of Finance, Vol.71, No.3, 2016.
60. Lee M & Neuhann D, A Dynamic Theory of Collateral Quality and Long Term Interventions, Federal Reserve Bank of New York Report, August 2019.

61. Bharath S, Dahiya S, Saunders A & Srinivasai A, 'Lending Relationship and Loan Contract Terms, The Review of Financial Studies, Vol.24, No.4, 2011.

62. InderstR & Mueller H, A Lender Based Theory of Collateral, Journal of Finance and Economics, Vol.84, 2004.

63. Juma L, Gogo A, Abdulkadr A & David L, 'Kenya's Standard Gauge Railway in the Context of Theory and Practice of Regional Planning', Acta Carolus Robertus, December 2020.

64. Oirere S, 'Kenyan Court Quashes Mandatory Use of SGR for Freight', International Railway Journal, November 25, 2020.

65. Chienge R, 'Assaulting Sovereignty? The Case of Kenya and the International Criminal Court', Master of Laws Thesis, University of Nairobi, 2016.

66. Taussig-Rubbo M, 'From the Stranger King to the Stranger Constitution: Domesticating Sovereignty in Kenya', International Journal of Critical and Democratic Theory, July 19 2012.

67. Ngumbi E, 'Kenya's Wanjiku: The Sovereign who Never Was', Social Science Research Network, April 8, 2021.

68. MacArthur J, 'Decolonizing Sovereignty: States of Exception along the Kenya-Somali Frontier', The American Historical Review, Vol.1, Issue 1, 2019.

69. Ewang ATE, 'Reforming Public Finance Management in Kenya: Implementation Challenges on the Principle of Openness and Accountability in Public Finance, 2019.

70. Kirira N, 'Public Finance under Kenya's new Constitution', Constitution Working Papers Series No. 5, Society for International Development, 14.Management', November 2019.

71. Cheruiyot P, Oketch R, Namusonge G & Sakwa M,' Effect of Public Finance Management Practices on Performance in Kericho County Government, Kenya: A Critical Review', International Journal of Education and Research, Vol.5, No.12, December 2017.

72. Taylor I, 'Kenya's New Lunatic Express: The Standard Gauge Railway', African Studies Quarterly, Vol.19, Issues 3-4, October 2020.

73. Ogwang T & Vanclay F, Resource-Financed Infrastructure: Thoughts on Four Chinese Financed Projects in Uganda, Sustainability 2021.

74. Ssempala R, Ssebulime K & Twinoburyo E, 'Uganda's experience with Debt and economic growth: An empirical analysis of the effect of public debt on economic growth, Journal of Economic Structures, 16, 2020.
75. Furley O & Katalikawe J, 'Constitutional Reform in Uganda: The New Approach', African Affairs, Vol.96, No.383, April 1997.
76. Hedling N, 'A Practical Guide to Constitution Building: Principles and Cross Cutting Themes', International Institute for Democracy and Electoral Assistance, 2011.
77. Khaitan T, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters', International Journal of Constitutional Law, Vol.16, Issue 2, April 2018.
78. Tripp AM, 'The Politics of Constitution Making in Uganda', United States Institute of Peace, 2010.
79. Godet F & Pfister S, 'Case Study of the Itezhi-Tezhi and Kafue Gorge Dam: The science and politics of International Water Management', June 3, 2021.
80. Usman Z, 'What Do We Know About Chinese Lending In Africa?', Carnegie Group Report, June 2, 2021.
81. Lungu J, 'Copper Mining Agreements in Zambia: Renegotiation or Law Reform?', Review of African Political Economy, Vol 35, No.117, September 2008.
82. Kragelund P, 'Bringing indigenous ownership back: Chinese Presence and the Citizen Empowerment Commission in Zambia' The Journal of Modern African Studies, Vol.50, N0.3 ,September 2012.
83. Chen Y, Raga S, Calabrese L & Mustapha S, 'Four Lessons from Zambia's Emerging Debt Default', October 15, 2020.
84. Ding J & Dafoe A, 'The Logic of Strategic Assets: From Oil to AI', 2021, Unpublished.
85. Bentham J, 'The Theory of Legislation', Trubner & Co, 1802.
86. OECD Policy brief, 'Covid-19 in Africa: Regional Socio-Economic Implications and Policy Priorities', May 7, 2020.
87. Fabricius P, 'Zambia Defaults, Economically and Politically', Institute for Security Studies, Jan 14, 2021.
88. Mwanawina I, 'China-Africa Relations: The Case of Zambia', Africa Economic Research Consortium, February 4, 2008.

89. Brautigan D, 'How Zambia and China Co-Created a Debt Tragedy of the Commons', Working Paper No. 2021/51, China Africa Initiative, School of Advanced Studies, Johns Hopkins University, September 2021.
90. Hersey AS, 'The Calvo and Drago doctrines', The American Journal of International Law, Vol 1, 1907.
91. Sautman B & Hairong Y, 'Friends and Interests: China's Distinctive Links with Africa', African Studies Review, Vol.50, No. 3, December 2007.
92. Ernske K, 'The Dragon's Neocolonial White Elephant Development: China's Urban Infrastructure in Lusaka, Zambia', Senior Theses, Trinity College, Hartford, CT 2020.
93. 'Zambia's Chinese Debt in the Pandemic Era', Global Policy Development Center, October 21 2021.
94. Muleya F, Kalikeka M, Shingwele Z, Ngongo P & Nalishebo S, 'An Analysis of the Legal framework for Public Debt Management in Zambia, Zambian Institute for Policy Analysis and research, June 2020.
95. Weidemaier WM & Gulati M, 'Differing Perceptions? Market Practice and the evolution of Foreign Sovereign Immunity', Social Sciences Research Network, 2016.
96. Siegel J,' Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment', Duke Law Journal, Vol.52, No.6, 2003.
97. Stoffregen M, 'Inferred explicit Standard-Waiver of Sovereign Immunity via an Arbitration Clause', Journal of Dispute Resolution, No.1, 34, 1997.
98. Stefano C, 'Arbitration Agreement as Waiver to Sovereign Immunity', Arbitration International, Vol.30, Issue 1, March 2014.
99. Krueger A, International financial architecture for 2002: A new approach to sovereign debt restructuring, An address to the National Economics Book Club in Washington DC, 2001.
100. Warmerlan W & Van Dijk MP, 'China-Uganda and the question of Mutual Benefits', South African Journal of International Affairs, 2013.
101. Managing Public Debt: From diagnostics to reform implementation, The International Bank for Reconstruction and Development, 2007.
102. Ndinga-Muvumba A & Corkin L, 'Crouching Tiger, Hidden Dragon-China Africa Bilateral Relations', Centre for Conflict Resolution, 2009.

Government Reports

1. Report of the Auditor General on Kenya Ports Authority for the Year Ended 30th June 2020
2. Special report of the Public Investments Committee dated 29th April 2014 on the Procurement, Agreements and Financing for the construction of the Standard Gauge Railway from Mombasa to Nairobi.
3. 2018 Report of Ugandan Auditor-General to Parliament
4. Report of the Zambian National Constitutional Conference dated 24th June 2010
5. Report on the Analysis of the Zambia Public Finance Management Act 2018.

Newspaper Reports

1. Mkongo M, 'Activists move to court to compel State publish SGR contracts', The Star, 23rd June 2021. www.the-star.co.ke
2. Omondi G, 'Why Mombasa Port at Risk as audit finds it was used to secure SGR loan', The East African, December 20, 2021. www.theeastafrican.co.ke
3. Muchira N, 'Kenya: China Cannot Seize Port of Mombasa if Debt Default Occurs', The Maritime Executive, March 16 2021. www.maritiime-executive.com.
4. Africa Confidential, 'Bills, Bonds and Even Bigger Debts', Vol 59, No.18, 14th September 2018.
5. Wako A, 'Kenya: Chinese Ambassador Explains Why SGR Contract is Still Top Secret', All Africa, May 22, 2019.
6. Construction Review Online, 'Kenya Railways Urges Importers to Use SGR to Transport Cargo', March 7, 2018.
7. Anyanzwa J, 'Renegotiate SGR loan terms to Avoid Default', The East African, June 22, 2020.
8. Ahmed M & Kazungu S, 'Kenyan Government defends forced use of SGR', February 8, 2018.
9. Mwakio P, 'Kenya Ports Authority acquires Shs 1.9 billion salvage boat' The Standard, January 12, 2022.
10. Mwakio P, 'KPA buys three new cranes at Shs 3.3 billion in drive to lift efficiency', The Standard, January 13, 2022.

11. Naturinda N, How Uganda Coughed up Entebbe Airport to China, November 25, 2021, The East African.
12. Benson EA, 'Is Uganda going to Lose its Entebbe International Airport due to Chinese Debt?' November 28, 2021, Africa Business Insider.
13. Ojambo F, 'Uganda Asks China to amend Airport Loan Clauses, Monitor reports', November 28, 2021.
14. Muhumuza R, As China builds up Africa, some in Uganda warn of trouble, October 24, 2019, Associated Press.
15. Biryabarema E, 'Uganda Says Its Economy 11% Larger after Rebasing', Thomson Reuters, October 21, 2019.
16. Anoba I, 'China is Taking over Zambia's National Assets but the Nightmare is just Beginning for Africa', African Liberty, September 10, 2018.
17. Servant J-C, 'China steps in as Zambia runs out of loan options', The Guardian, December 11, 2019.
18. Thomas D, 'Zambia's Chinese Debt could be Double Previous Estimates', Africa Business Daily, September 28, 2021.
19. Beyongo M, "China's Power in Africa: Rhetoric and Reality', ANU Press, 2018.
20. Wheatley J, 'China's secret Loan Contracts reveal its hold over Low-Income Nations', Financial Times, March 31, 2021.
21. Smith E, 'Zambia's Spiraling debt offers glimpse into the future of Chinese Loan financing in Africa', CNBC, Jan 14 2020.
22. Smith E, 'Zambia becomes first Coronavirus-era default: What happens now?', CNBC, Nov 24 2020.
23. Muchira N, 'World bank warns Kenya over $85.7 billion debt ceiling', The East African, 12 October 2019.
24. Mwere D, Kenya: Treasury mulls debt ceiling boost as the coffers run dry, All Africa, January 5, 2021.

Appendices

Appendix A: Similarity Report

Document Information

Analyzed document	Sovereignty and the legality of collateralization of strategic national assets as security for loan procurement China-Africa relations.docx (D143139358)
Submitted	2022-08-22 07:40:00
Submitted by	
Submitter email	eric.chuma@strathmore.edu
Similarity	2%
Analysis address	library.strath@analysis.urkund.com

Sources included in the report

W	URL: https://www.mak.ac.ug/documents/Makfiles/theses/Hokororo%20J.pdf Fetched: 2020-10-08 04:54:06	1
W	URL: https://www.nyulawglobal.org/globalex/Kenya1.html Fetched: 2019-10-09 06:02:40	1
W	URL: https://media.ulii.org/files/legislation/akn-ug-act-2015-3-eng-2015-03-06_0.pdf Fetched: 2022-04-25 05:36:35	2
SA	**Jonathan+Schu%CC%88tze+Bachelor+Thesis+Proposal.pdf** Document Jonathan+Schu%CC%88tze+Bachelor+Thesis+Proposal.pdf (D128891516)	2
W	URL: https://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/62575fb9c92fbc7ddb334cd8/1649893307393/WP52-Brautigam-Bhalaki-Deron-Wang-How+Africa+Borrows+From+China.pdf Fetched: 2022-06-30 12:06:09	13
SA	**OtsoPekonen%232640348+PPE+Thesis.pdf** Document OtsoPekonen%232640348+PPE+Thesis.pdf (D109741423)	5
SA	**SIDHARTH RATH - SINO-KENYAN SGR PROJECT - FSP DISSERTATION (2).docx** Document SIDHARTH RATH - SINO-KENYAN SGR PROJECT - FSP DISSERTATION (2).docx (D69275960)	3
SA	**Bachelor+Thesis+IB+EM+Jonathan+Schu%CC%88tze+I6159729.pdf** Document Bachelor+Thesis+IB+EM+Jonathan+Schu%CC%88tze+I6159729.pdf (D140805725)	2
SA	**Debt trap paper 1.0.pdf** Document Debt trap paper 1.0.pdf (D108059503)	2

Entire Document

Sovereignty and the Legality of Collateralization of Strategic National Assets as Security for Loan Procurement: China-Africa Relations
By
Eric Mwendwa Chuma
119996
Master of Laws
2022
Sovereignty and the Legality of Collateralization of Strategic National Assets as Security for Loan Procurement: China-Africa Relations
By
Eric Mwendwa Chuma
119996

92% **MATCHING BLOCK 1/31** W

Submitted in Partial Fulfillment of the Requirements for the Degree of Master of

Laws at Strathmore University
Strathmore Law School
Strathmore University

Appendix B: Ethical Clearance Confirmation

Strathmore UNIVERSITY

18th February 2022

Mr Chuma Eric,
eric.chuma@strathmore.edu

Dear Mr Chuma,

RE: Sovereignty and the Legality of Collateralisation of Strategic National Assets as Security for Loan Procurement: China-Africa Relations

This is to inform you that SU-IERC has reviewed and **approved** your above **SU-master's** research proposal. Your application reference number is **SU-IERC1254/21.** The approval period is **18th February 2022 to 17th February 2023.**

This approval is subject to compliance with the following requirements:

i. Only approved documents including (informed consents, study instruments, MTA) will be used
ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
v. Clearance for export of biological specimens must be obtained from relevant institutions.
vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology and Innovation (NACOSTI) https://research-portal.nacosti.go.ke/ and also obtain other clearances needed.

Yours sincerely,

for: Prof Fred Were,
Chairperson; SU-IERC

STRATHMORE UNIVERSITY INSTITUTIONAL ETHICS REVIEW COMMITTEE
(SU-IERC)
18-Feb-2022
Email:ethicsreview@strathmore.edu
P.O BOX 59857-00200
NAIROBI-KENYA

Ole Sangale Rd, Madaraka Estate. PO Box 59857-00200, Nairobi, Kenya. Tel +254 (0)703 034000
Email admissions@strathmore.edu www.strathmore.edu