

Media reports that a China Eximbank contract for Montenegro's expensive mountain highway required land as collateral reflect reporters' lack of understanding of normal international legal practice.

Reporters **erroneously** - and perhaps **deliberately** - presented a standard sovereign immunity waiver as evidence that China is entitled to seize land in Montenegro in the case of a payment default.

After an election, **playing the "China threat" card was useful** to Montenegro's new leadership. France's far-right National Rally party also benefitted.

Criticism of problematic Chinese lending practices **must be based on facts**, not unfair and misguided denunciation.

Montenegro, China, and the Media: A Highway to Disinformation?*

Laure Deron, Thierry Pairault, and Paola Pasquali

CARI Note: *How do Chinese banks really lend in risky countries overseas? Although no documented cases have come to light in Africa (or elsewhere), rumors that Chinese loan contracts allow China to seize land or unrelated strategic assets, like ports, as collateral for sovereign loans are rife in African media and civil society. As part of our ongoing CARI research project on Chinese lending, we are publishing this detailed investigation by our European colleagues into similar media rumors surrounding a Chinese-financed highway in the small Eastern European nation of Montenegro. The Chinese loan contract for this highway has been available online.¹ These scholars' detailed examination of this case sheds light on just how reporters' lack of understanding of common legal terms, in a context where the "China threat" narrative boosts viewership, can lead to rumors like these.*

ON JUNE 21 2021, THE FRENCH PUBLIC TELEVISION channel France 2 evening news aired a report in which it was stated that Montenegro, a heavily indebted nation, was at risk of "having to cede some of its land to China" as a result of its inability to pay back a loan for the construction of a highway.² According to reporters, Montenegro's Port of Bar could be annexed by China "completely legally", thanks to an "extraordinary contract" that had, "already [been] implemented by the Chinese in Sri Lanka or in Djibouti". As the report further explained, Montenegro had accepted conditions "never seen before in Europe (...)": under the contract, should it fail to pay back the loan to the Chinese bank, Montenegro would need to concede lands". The Balkan State, allegedly, had even requested that the European Union "help pay back the Chinese, lest the latter use its territory as a repayment means".³ Is this the case?

To substantiate these claims, the France 2 report showed a screenshot of Article 8.1 of the contract between Montenegro and China which reads

* This article is a revised, updated, and translated version of a post originally published in French under the title *Chine-Monténégro: une manipulation?* on October 26, 2021 in the *Carnets du Centre Chine* (CNRS/EHESS) and on the *Chine-Afrique* website.⁴

(English version): “the Borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise (...)”. However, in French the same screenshot is – inaccurately – translated as: “the debtor irrevocably renounces its immunity on its *sovereign territory*” (*Le débiteur renonce irrévocablement à son immunité sur son territoire souverain*).

As any reasonably aware English-speaker would know, the words “on the grounds” in this context do not refer to a literal piece of Montenegro land: instead, it is an idiom standing for “by reason of” which, in legal terms, indicates the justification of a right – as in the expression “legal grounds”.⁵ The contractual clause stipulates renunciation to any immunity, to which the State of Montenegro is normally entitled to by virtue of its sovereignty.

As international law textbooks explain it, one key attribute of State sovereignty is immunity from execution and jurisdiction.⁶ This means that States are “immune” from being sued in foreign courts and will only answer to their national judges (jurisdiction). In addition, they and their assets are immune from having to carry out the judgment of a court (execution). Nevertheless, States normally choose to waive such immunity privilege when entering contracts with private companies, and sovereignty waiver clauses routinely appear in most commercial contracts entered into by States or their agencies.

The majority of contracts for public infrastructure projects rely on the existence of this clause: in the case of a dispute, sovereignty waiver clauses enable the parties to submit their case for review to an arbitral or judicial tribunal.⁷ Without a sovereignty waiver clause, the State could refuse to appear before the court, thereby paralyzing the enforcement of any contractual remedy mechanism. By contrast, access to the justice system renders the transaction more secure for the private partner as well as enables the State to defend its rights under the contract.

In some sovereign States (UK, US) national law permits State sovereignty be waived in commercial contracts undertaken by the State or its agencies.⁸ As an example, in France Eximbank case law has recognized that the State (and its agencies) could be

made accountable for their contractual engagements in commercial dealings before private arbitral tribunals.⁹ Not all legal systems have comparable provisions, hence the established contractual practice that States, when a party to a commercial agreement, expressly specify a renunciation of sovereign immunity. Internationally, the May 18, 1965 Washington Convention has popularized arbitration as a settlement means for investment disputes between States and foreign commercial entities.¹⁰

A publicly available online database hosted by the research group AidData offers multiple examples of non-Chinese loan contracts featuring such routine clauses. A sizeable number of contracts signed by Cameroon can be found, including:

- A 2015 credit agreement between Cameroon and two European banks, Deutsche Bank (Germany) and Caixabank (Spain) for a 13-million-euro loan for the construction of a slaughterhouse and its refrigerated warehouses, article 34.4 provides that the Borrower “irrevocably and unconditionally ... waives and agrees not to claim any sovereign or other immunity... in relation to any Dispute to be resolved in accordance with Clause 34.1 above”.¹¹
- Similarly, a 2017 credit agreement between Cameroon, British Standard Chartered Bank, and German Deutsche Pfandbriefbank for a 96-million-euro loan to renovate Douala’s Stade de la Réunification, where article 40.3 provides that “the Borrower hereby irrevocably undertakes not to claim and hereby irrevocably waives, to the fullest extent permitted by Applicable law, all such immunity”.¹²
- Or again, a 2016 credit agreement between Cameroon and Agence Française de Développement, France’s aid agency, for a 70-million-euro loan for the construction of a highway and a bridge, in which the contract provides article 17.2 that “the signature by the Borrower of the Agreement constitutes, by the express agreement of the Parties, the waiver of any immunity from jurisdiction and execution which it may avail itself of”.¹³ And the list could continue...

The France 2 report erroneously presents a standard sovereignty waiver as evidence that China is entitled to seize land in Montenegro in the case of a payment default, seemingly as a result of a mistranslation. Yet this is not the first time that a sovereignty waiver has been misrepresented as a sovereignty sell-off. In the summer of 2020, a similar controversy sparked in Nigeria over a loan agreement concluded between a Chinese company and Nigeria for an infrastructure project sponsored by China Eximbank.¹⁴ There too, the same banal sovereignty waiver provision came to be denounced by some parliamentarians and media as evidence that Nigeria was at risk of relinquishing its sovereignty to China in case of loan payment default. The confusion over this clause was later dispelled: the panic that gathered around it had very much to do with concerns about the long-term effects of Chinese loans, in a context of high indebtedness and trade imbalances with China, and little to do with the legal implications of the clause itself.

Back to our France 2 report: how can such poor understanding of the English language be explained? Not long ago, when Artificial Intelligence (AI) was still in its infancy and the Cold War was looming, the story circulated of an automatic back-and-forth translation between English and Russian, which turned the biblical statement “the flesh is weak” into a more prosaic “the meat is rotten”.¹⁵ While this story is too good to be true, it illustrates how in the field of international relations, mistranslations may be conducive to misunderstandings and diplomatic tensions. In reality, none of the automatic translators freely available online today give such a misleading translation of the aforementioned contract clause and so, it is hard to believe that the authors could have, in good faith, entertained such gross misunderstanding of its meaning.

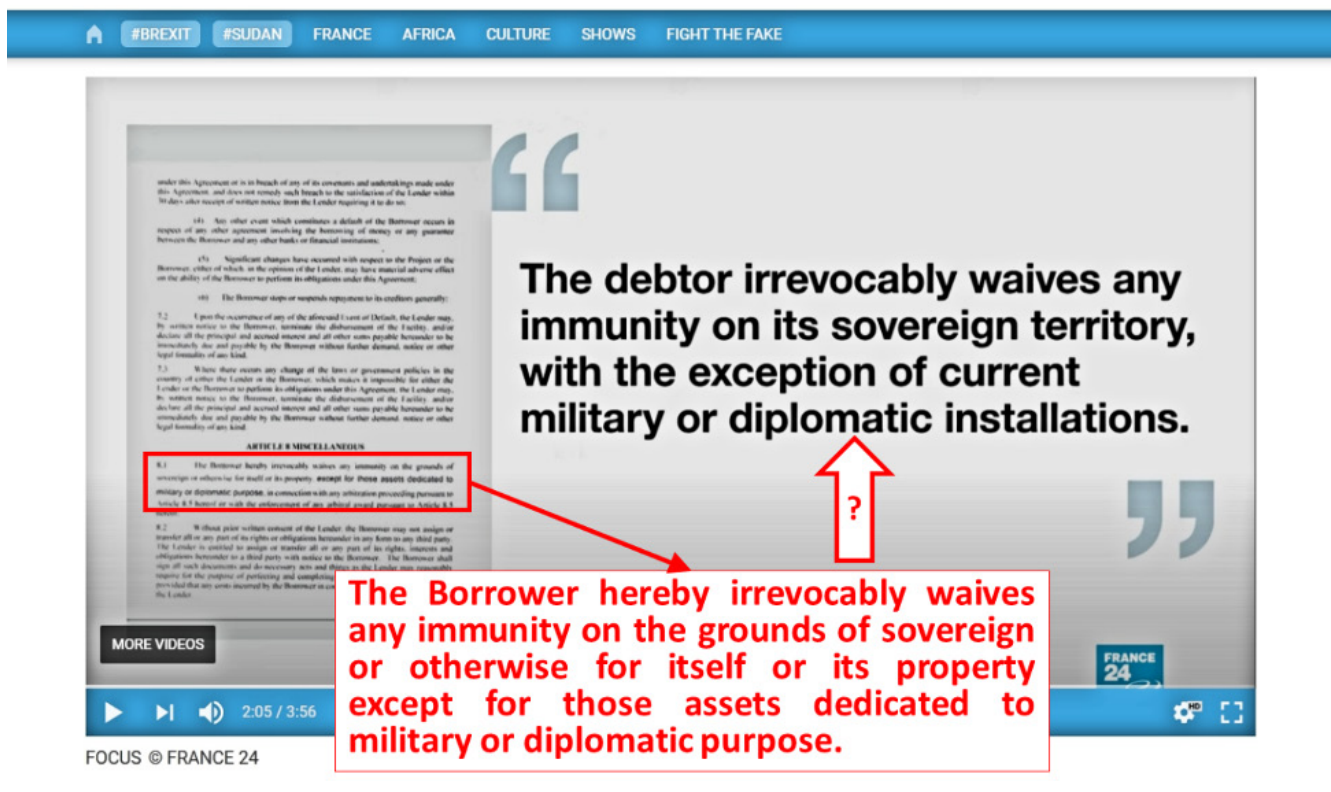
Further in the report, a genuine mistake appears to be even more unlikely: in an interview, Montenegrin Minister of Investments Mladen Bojanić is shown asserting (as the translation goes) that “these counterparts on credit (...) are dangerous for our territory” – but whether he refers to his understanding of the contentious provision as facilitating “land

seizure” or to other contractual mechanisms undisclosed in the report altogether is left somewhat unclear, implying that “land seizure” might indeed be his interpretation. Doubling down on the erroneous translation, France 2 later adds that under the contract, Chinese courts would be the only ones competent in the event of a dispute – when the screenshot presented earlier of Article 8.1 provides for an arbitration mechanism, thus exclusive of state courts as a forum for dispute resolution.¹⁶

Was this a deliberate manipulation? Interestingly, a subsequent story on the same topic was broadcast by France 24, a state-owned television channel aimed at overseas audiences, on August 30, 2021.¹⁷ The video is a substantial copy-paste of the original France 2 report, adapted for an English-speaking audience, and dwelling on exactly the same contractual provision. Its publication has reverberated in other English-speaking news outlets around the world.¹⁸ Since the original text of the contract is English, one would expect the authors to get the meaning of the clause right this time. Intriguingly though, France-24 decided, instead of simply showing clause 8.1 (“*The Borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property except for those assets dedicated to military or diplomatic purpose*”), to display the entire page in small print (far too minuscule to allow any direct reading by the viewer) but accompanied by a misquotation of the text in bold letters: “*The debtor irrevocably waives any immunity on its sovereign territory, with the exception of current military or diplomatic installations*” (see image on the following page, red text added by authors).

In this reformulation, the clause is clearly edited to support the story: the little “adjustment” enables France 24 to report the scoop China may seize Montenegrin territory in the near future if the country defaults on its loan.¹⁹ *Et voilà*.

One can only speculate: if this is manipulation indeed, whom does it profit? A possible explanation is Montenegrin politicians. In 2020, the country went through a political reshuffle after the Democratic Party of Socialists of Montenegro (DPS) (associated with the president Milo Đukanović) lost control of



Montenegro’s parliament for the first time in 30 years.²⁰ Having inherited the heavy financial burden for the Bar-Boljare highway project – a milestone legacy of president Đukanović – the new political guard found itself having to service a debt accounting for as much as one tenth of the country’s GDP.²¹ If truth be told, the opposition had been accusing Đukanović of corruption long before it came into power. Steven Kay, the lawyer for some opposition members, is a world-renowned British international criminal law practitioner.²² In the 2019 trial by opposition groups against Milo Đukanović, Kay created the *Montenegro Watch* (<https://montenegrowatch.com>) and published *Montenegro, the People against the President, Corruption and Conflicts of Interest*.²³ This report asserts that “If Montenegro were to default, the terms of its contract for the loans give China the right to access Montenegrin land as collateral,” a statement which is backed by a reference to an article in the *Financial Times* titled “Montenegro fears China-backed highway will put it on road to ruin.”²⁴ However, neither the report signed by Kay nor the sources it cites refer to specific contract clauses to support the claim.

Could this be the work of Đukanović’s opposition, later espoused by the new technocratic government which replaced Đukanović party rule in 2020? Such a presentation of the contract certainly puts the current government – which is trying to find a way out from under Đukanović’s financially burdensome inheritance – in a better position to play the “China threat” card, with the ultimate goal of inducing European and American financial institutions to financially rescue Montenegro to avoid the looming possibility of China “seizing Montenegro’s territory” in Europe’s backyard.

The specter of a Chinese land seizure has further made its way into European Union Parliament debates thanks to Dominique Bilde, a French EU Parliament member for the far-right, anti-immigration, pro-Russian National Front party (now the National Rally) and a strong opponent to any enlargement of the European Union to the Balkans. On February 17th, 2020, Bilde submitted a question for written answer to the EU Commission titled “Chinese loan and indebtedness of Montenegro” postulating, again, a legal right of China to the territory of Montenegro.²⁵ In a recent intervention in the EU Parliament, she condemned the

prospect of an EU enlargement to Montenegro, not only because of the latter's economic situation (European taxpayers are reluctant to embrace any notion that they could be asked to contribute to salvage yet another financially desperate newcomer), but also on the basis of its (unsuitable) "international allegiances"—read: to China.²⁶

Clearly, the China-seizing-assets story serves to promote several agendas. From a certain European perspective, it provides grounds to deem Montenegro unfit for EU membership. In the view of pro-Russian, pro-Serbian Montenegrin populist Democratic Front (DF), it is a handy piece of evidence to press corruption charges against Đukanović, who remains for now president of Montenegro. Depicting Montenegro as being manipulated in the claws of China also accommodates the Russian opposition to Western influence (NATO, which Montenegro joined in 2017, and the European Union) in the Balkans.²⁷

Pure business considerations may also have a stake in the matter. Feasibility studies conducted since 2006 by French and American engineering firms on the Bar-Boljare highway had determined the project not to be economically viable, leading the European Bank for Investments and the European Bank for Reconstruction and Development's (EBRD) to suggest alternative options to offset the estimated high costs of construction, financial risks, and environmental damage.²⁸ This is the point where Đukanović turned to China. As reports suggest, China Eximbank commissioned a Montenegrin economist to conduct a feasibility study (never made public) which concluded that the project was in fact sustainable.²⁹ In the end however, it became obvious the project was not viable and the debt service was unsustainable. Montenegro turned to the European Union, which was reluctant to help, but eventually supported a solution the China Eximbank agreed to in July 2021.³⁰

Last but not least, France 24's presentation sits well with the hostile stance promoted by some French think tanks, and this depiction of a strategically greedy China just might not be an honest mistake by individual journalists.³¹

Ironically, denouncing the misinformation of some French and international news outlets has put the authors of this note in line with the rhetoric developed by certain Chinese "*wolf warrior*" diplomats.³² Chinese lending practices overseas may well deserve a healthy dose of criticism: but this must be based on evidence rather than made-up information. To quote a classic Chinese idiom, one should "seek truth from facts" – in our case, starting from the accurate meaning of the contract. However, unfair and misguided denunciation offers an easy way out (it's all too easy to clear the accusations by simply stating the facts) while serious Western commentators see their work analyzing the consequences of the Chinese presence in strategic industrial and geographic domains discredited by extension, by such disreputable methods. ★

ENDNOTES:

1. https://www.dropbox.com/s/2kd2wk6mk4sdjtr/Montenegro_China%20Eximbank.pdf?dl=0; The English version of the contract begins on p. 50.
2. The contents of this report have been echoed by other news outlets over the last months. See for example <https://www.npr.org/2021/06/28/1010832606/road-deal-with-china-is-blamed-for-catapulting-montenegro-into-historic-debt> ; <https://www.dailymail.co.uk/news/article-9753455/Road-Montenegro-1-billion-pocket-China-botched-270-mile-highway.html> While some news outlets such as Reuters completely refrain from claiming that China could seize Montenegrin land, <https://www.reuters.com/article/us-china-silkroad-europe-montenegro-insi-idUSKBN1K6oQX>, others present a mid-way position, still mentioning the claim but without referring to the exact contract clause: <https://www.nytimes.com/2021/08/14/world/europe/montenegro-highway-china.html> ; <https://globalnews.ca/video/8077227/billion-dollar-highway-to-nowhere-has-montenegro-at-chinas-mercy> ; <https://www.dw.com/en/montenegro-struggles-with-chinese-loan/av-57777117> .
3. <https://cecmc.hypotheses.org/63077>; <https://pairault.fr/sinaf/index.php/2283>.

4. https://www.francetvinfo.fr/monde/chine/montenegro-la-construction-d-une-autoroute-financee-par-la-chine-tourne-au-fiasco_4673263.html.
5. The correct French translation would have thus been: “*L'emprunteur renonce irrévocablement à toute immunité tirée de sa souveraineté...*”.
6. In prior times, whenever a State entered into a contract with a private company, if a dispute arose, the former's liability for breach could not be sought in court as State immunity was conceived as absolute. However, in modern times States have come to behave as private market actors when entering such commercial engagements and absolute immunity from any contractual liability has become an unsustainable position if they want to attract other market players as contractual partners. Most of them now adopt a “restrictive immunity approach” according to which, whenever the transaction is of a commercial nature, States will waive their immunity to be at a parity level with their co-contracting parties. In this case, they are open to judicial or arbitral pursuits.
7. Differently from judicial proceedings (i.e., taking the case to a state-run court of law, whether at national or international level), arbitration is a private justice process whereby the parties appoint a panel of arbitrators (generally lawyers or technical experts) to pronounce on the merits of their dispute. The procedure allows for a discrete (the procedure being confidential), relatively expeditious procedure with a trusted, impartial and technically aware panel composed by the parties. Arbitration is the mechanism of choice for the overwhelming majority of commercial contracts nowadays.
8. State agencies are also considered a derived emanation of the sovereign State, and enjoy the same powers and privileges.
9. This principle was first upheld in the 1966 *Galakis* ruling by the *Cour de Cassation*, France's highest judicial court. The decree No. 81-500 of May 12th, 1981 enshrined this notion into law (as well as, indirectly, the French State's waiver of sovereign immunity clearing the way for such arbitral proceeding).
10. Since 2012, Montenegro is among the 156 Members of this Convention, which provides Member States with access to the International Centre for Settlement of Investment Disputes (ICSID).
11. https://docs.aiddata.org/ad4/pdfs/how_china_lends/CMR_2015_122.pdf.
12. https://docs.aiddata.org/ad4/pdfs/how_china_lends/CMR_2017_378.pdf.
13. https://docs.aiddata.org/ad4/pdfs/how_china_lends/CMR_2016_78.pdf.
14. <https://thediplomat.com/2020/08/did-nigeria-really-cede-its-sovereignty-to-china-in-a-loan-agreement/>.
15. <https://www.economist.com/science-and-technology/1997/10/16/a-gift-of-tongues>.
16. See distinction between arbitration and judicial proceedings at endnote no. 5.
17. <https://www.france24.com/en/tv-shows/focus/20210830-montenegro-s-highway-to-debt-unfinished-chinese-road-comes-with-strings-attached>.
18. See for example “China expects part of Montenegro's territory as Podgorica struggles to repay debt,” *ANI News*, August 31, 2021, <https://www.aninews.in/news/world/asia/china-expects-part-of-montenegros-territory-as-podgorica-struggles-to-repay-debt20210831182636> or <https://www.npr.org/2021/06/28/1010832606/road-deal-with-china-is-blamed-for-catapulting-montenegro-into-historic-debt>.
19. Interestingly, in June 2019 former prime minister Duško Marković rejected the accusation that his country did not provide land as collateral for loans, but only the Chinese press reported this information http://www.brsn.net/NEWS/zhiku_en/detail/20201207/100500000032801607303484761873957_1.html and http://www.china-ceec.org/eng/zdogjhz_1/t1845216.htm.
20. In Montenegro's political system, the role of president is mainly ceremonial.
21. IMF, *Montenegro. Request for Purchase under the Rapid Financing Instrument*, 2020, p. 17, <https://www.imf.org/-/media/Files/Publications/CR/2020/English/1MNEEA2020002.ashx>.
22. Kay has dealt with landmark cases at the origin of modern international criminal law - including the International Criminal Tribunal for the former Yugoslavia and the first trial of a sitting head of state, Kenya's Uhuru Kenyatta, at the International Criminal Court.
23. <https://montenegrowatch.com/interim-report-on-montenegro-april-2019-the-people-against-the-president-corruption-and-conflicts-of-interest/>.

24. <https://www.ft.com/content/d3d56d20-5a8d-11e9-9dde-7aedca0a081a>.
25. https://fr.idgroup.eu/rassemblement_national; https://www.europarl.europa.eu/doceo/document/E-9-2020-000942_EN.html.
26. <https://twitter.com/DominiqueBilde/status/1394730943814963200>.
27. It should be noted that under Đukanović 30-year rule, Montenegro switched alliances several times (first aligning with Milosevic's Serbia, then turned to Russia for investments, and in 2017, turning to the US by joining NATO and negotiating accession to the European Union).
28. <https://www.reuters.com/article/us-china-silkroad-europe-montenegro-insi-idUSKBN1K60QX> and <http://www.mans.co.me/en/fourth-report-on-the-construction-of-the-bar-boljare-highway-road-without-end>.
29. <https://www.reuters.com/article/us-china-silkroad-europe-montenegro-insi-idUSKBN1K60QX>.
30. After negotiations, a hedging agreement was signed whereby the Chinese debt is converted from dollars to euros (swap), the interest rate is reduced from 2% in dollars to 0.88% in euros, the grace period is extended to six years and repayment will be made over twenty years. While the Chinese bank remains the creditor, the agreement ensures a budgetary saving of eight million euros thanks to the reduction in the interest rate and the exchange rate risk. (<https://www.tresor.economie.gouv.fr/Articles/c59e6801-325c-4546-a755-69f6a362d59f/files/29ac20f2-b2a1-4970-aaf5-a3de0a396bb9>).
31. See the recent report by France's Institut de Recherche Stratégique de l'École militaire (IRSEM) "Les opérations d'influence chinoises: un moment machiavélien" by Paul Charon and Jean-Baptiste Jeangène Vilmer, https://drive.google.com/file/d/1ySwlKzVx_j8w5K_A8eqt3R3iOr9qvARg/view?usp=sharing.
32. "Wolf warrior" diplomacy refers to more assertive and strident tactics by Chinese diplomats. For more, see <https://www.nbr.org/publication/understanding-chinese-wolf-warrior-diplomacy/>.

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Support for this policy brief was provided by a grant from Carnegie Corporation of New York. Carnegie Corporation of New York is a philanthropic foundation created by Andrew Carnegie in 1911 to do "real and permanent good in this world."

