

Project Finance and Consent

Carl S. Bjerre¹

International project finance is a pattern of structured finance transaction that has generally attracted little attention from legal scholars, and much less attention than have securitisation transactions. This imbalance is unfortunate, because in light of their complexity, sheer magnitude, and social importance, international project finance transactions might fairly be called the 800-pound gorillas of structured finance. This chapter explores aspects of these transactions ranging from the legally technical to the broadly social and moral, borrowing in part from the insights of Amartya Sen.

In the financial transactions arena, there is an unfortunate rift between two kinds of scholarship. Scholarship that confronts the philosophical and policy-based groundings of the transactions tends to focus on relatively simple transactions such as retail sales contracts,² secured loans,³ and the like, and tends to ignore more complex transactions such as structured finance. Instead, the writing on structured finance and other complex transactions dwells almost exclusively on doctrinal and practical questions such as how the transactions work and how they are negotiated. In this chapter I seek to avoid the latter approach, and seek instead to begin bringing to bear on these complex transactions the kind of philosophical and policy-based analysis that generally is seen only in the context of simpler transactions. This chapter of course makes no attempt to fill that void on its own (let alone to offer a practical cure for the dilemmas that it isolates), but I hope that it will serve as the opening of a door to further discussion of that kind.

¹ Associate Professor, University of Oregon School of Law. An earlier version of this paper appeared at 12 *Duke Journal of Comparative and International Law* 411 (2002). Reprinted by permission.

² See e.g. Eisenberg (1982); Epstein (1975); Rakoff (1983); Symposium (1992).

³ See e.g. Symposium (1997) and (1994).

In Part I of this chapter, I sketch the structure of project finance transactions, in part by contrasting that structure with the structure of securitisation transactions. I focus in particular on a number of points at which the deceptively simple language usually used in this area tends to obscure crucial nuances, causing differences in degree to be misperceived as differences in kind. In Part II, I examine the overriding of anti-assignment clauses, which is one of many commercial law doctrines on which project finance as well as securitisation transactions depend. The doctrine is fascinating because it raises an intractable conundrum of consent and coercion: will the law honour the freedom of contract of the party who bargained for the anti-assignment clause, or will it honor the freedom of alienation of the party who owns the property encumbered by the anti-assignment clause? In Part III, I shift Part II's considerations of consent and coercion from the doctrinal to the social level. International project finance transactions have a very high, dramatically visible degree of impact (both positive and negative) on third parties, much more patently so than do securitisation transactions. Though the positive aspects of this impact are far too important to justify simplistic condemnations, and though no one should be surprised by the fact that there are negative externalities in this pattern of business transaction as in many others, I call for fresh and interdisciplinary attention to the negative effects of project finance on non-consenting third parties. These negative effects are cast into unified theoretical perspective by Amartya Sen's 'capabilities approach' to development, which focuses on questions of human agency, and holds that development must be justified, if at all, not only by its economic benefits but also by its impact on substantive human freedoms. In Part IV, I conclude, based on the doctrinal inquiry of Part II and the social inquiry of Part III, that the philosophically crucial term 'consensual transaction,' like much of the structural terminology with which I began in Part I, has been understood in a way that is troublingly simplistic in comparison to the reality that the term purports to describe.

The subject of international project finance transactions is a natural point on which to centre a chapter of this kind because these transactions have such a distinctive profile: their scale is enormous, their structure is sophisticated, their details are arcane and, most important for purposes of this chapter, their effects on the world around them are often highly visible and dramatic. But the points that I make in Parts II, III, and IV in the context of international project finance transactions also hold true, to a greater or lesser degree, for many or most other patterns of large business transactions, even when their profile is less distinctive. Accordingly, my focus on project finance should be understood simply as exploiting a natural, convenient starting place for this chapter's reflections, rather than as isolating one form of financing for special critique. I seek to raise broad questions, rather than to argue narrow points.

I. QUESTIONS OF DEFINITION

Structured finance can be loosely defined as the practice of arranging for a lender⁴ to make a loan under conditions that are structured so as to free the lender from concern over the credit-worthiness of the borrower. Being repaid is, of course, the central concern of any lender, and the credit-worthiness of a borrower is ordinarily of central importance to that concern, but innovative practices in law and finance have generated ways of greatly reducing the importance of borrower credit-worthiness. Specifically, in a structured finance transaction, the lender relies for repayment on assets that are legally separate from the borrower, so as to be independent of certain risks related to the possible bankruptcy of the borrower.⁵ In the words of one respected group of experts, 'Structured financings are based on one central, core principle—a defined group of assets can be structurally isolated, and thus serve as

⁴ In some structured finance contexts, the term *lender* ceases to be entirely appropriate for the provider of funds, even though it occupies a role closely analogous to a traditional lender. Notably, in a securitisation transaction, the role of lender is filled by buyers of the securities backed by the receivables. See *infra* text accompanying note 9. At issue here is not just a terminological nicety: it is problematic simply to call these parties lenders because of the very essence of structured finance, i.e. that they look for repayment primarily to assets other than those of their borrowers.

⁵ Thus, the term does not include garden variety secured lending, because in such a transaction the collateral is not legally separate from the borrower, and thus, if the borrower becomes the subject of a bankruptcy proceeding, the collateral will be property of the bankruptcy estate. See, e.g., 11 U.S.C. § 541(a)(1) (1994) (property of estate includes all legal or equitable interests of the debtor in property as of the commencement of the case); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983) (declaring that although § 541(a)(1) speaks in terms of the debtor's interests in property, rather than property in which the debtor has an interest, 'this choice of language was not meant to limit the expansive scope of the section').

The assets must also be free of bankruptcy risk other than that of the borrower, to the extent possible. For example, a simple loan transaction accompanied by a guaranty, standby letter of credit, or other secondary obligation, see *Restatement (Third) of Suretyship and Guarantee* (1996) § 1(1), is not a structured finance transaction even when the lender relies for repayment solely on the assets of the secondary obligor. The reason is that those assets of the secondary obligor, though independent of the risk of bankruptcy of the borrower itself, remain, of course, subject to the risk of bankruptcy of the secondary obligor. Only when the risk of bankruptcy of the asset owner (whether a secondary obligor or the borrower itself) is minimised, as by structuring that owner as a special purpose vehicle as discussed *infra* text accompanying notes 8–9, do such transactions stand to qualify as structured finance transactions, rather than as the mere substitution of one substantial bankruptcy risk for another substantial bankruptcy risk.

the basis of a financing that is independent as a legal matter, from the bankruptcy risks of the former owner of the assets.⁶

Securitisation, which developed embryonically in the 1970s and now represents '[o]ne of the dominant means of capital formation in the United States and increasingly throughout the world,' illustrates this principle.⁷ In a prototypical securitisation transaction, a business enterprise (called an originator) that generates large volumes of receivables raises capital by selling some or all of those receivables to a special purpose vehicle (SPV).⁸ To take typical examples, a retailer of big-ticket goods (with a high volume of purchase price payments owed to it by customers), or a credit card lender or other finance company (with a high volume of loan repayments owed to it by borrowers) will form a corporation or other entity for the sole purpose of buying its receivables. That SPV will, simultaneously with its purchase of the receivables, issue securities backed by the eventual collections on those receivables. The SPV funds its payment of the purchase price for the receivables with the capital provided to the SPV by the investors who purchase the securities. The sale from the originator to the SPV is carefully set up so as to constitute a true sale for purposes of bankruptcy law, so that in the event of a bankruptcy of the originator, the courts will treat the receivables as being legally separate from the originator, rather than as property of the originator subject to a security interest of the SPV.⁹

Project finance transactions, though also a species of structured finance transaction, are different both in purpose and in procedure. In a project finance transaction, an existing business enterprise (or a cooperative venture among more than one of them) sponsors an SPV for the purpose of building and operating a large-scale,

⁶ Committee on Bankruptcy and Corporate Reorganisation of the Association of the Bar of the City of New York (1995) p. 4; *see also* Committee on Bankruptcy and Corporate Reorganisation of the Association of the Bar of the City of New York (2000) (providing an update of the 1995 piece). The term 'former owner' in the quoted passage is very apt in the context of securitisation transactions, as explained below, but is potentially misleading in other contexts. *See infra* Part I.A (discussing *ab initio* separateness of assets from sponsor in project finance context).

⁷ Gann (1998) p. 230.

⁸ The SPV is set up so as to be bankruptcy remote. *See infra* notes 21–23 and accompanying text. The term 'special purpose entity' (SPE) is often used in place of the term SPV.

⁹ *See supra* note 5 (discussing simple secured loan versus structured finance transaction). The net result is that the buyers of the securities provide the funds to the originators. As a structural matter, then, these buyers can be analogised to lenders, though as a technical matter they are not lenders. *See supra* note 4.

For background reading on securitisation transactions, *see generally* Frankel (1991); Schwarcz (2002); and Kravitt (1996 and Supp. 2000).

long-term, revenue-generating infrastructure project.¹⁰ Typical examples include power plants, oil or gas pipeline systems, ports, and telecommunications networks.¹¹ The capital needed for the building of the project is provided principally by lenders who rely for repayment on the receivables that they expect the project eventually to generate. For example, the power plant will typically have a long-term power purchase agreement with a government utility or other party, and the oil or gas pipeline system will typically have corresponding contracts obligating third parties to pay for the project's services. Lenders decide whether to extend credit to the SPV based on the projected receivables from these contracts (generally called off-take contracts), rather than on the assets of the sponsors.¹²

Beneath the differing profiles presented by these brief descriptions, the two patterns of transaction have important structural similarities as well as differences.

A. True Sale, Other Structural Isolations, and Degrees of Recourse

One marked difference between securitisations and project finance transactions has already emerged from the foregoing brief discussion: the element of true sale that is so crucial to the former is absent from the latter. Given that structured finance is defined by the isolation of assets, and that in a securitisation this isolation is achieved by means of a true sale, how can project finance transactions achieve a parallel kind of structural isolation without a true sale? Project finance does depend on the isolation of receivables, just as securitisation does; the risk of bankruptcy of a sponsor is a cloud to be removed from project finance receivables just as the risk of bankruptcy of an originator is a cloud to be removed from securitisation transactions. But in a project finance transaction, no sale (true or otherwise) is needed to accomplish this goal, for a simple yet, to my knowledge, never-articulated reason: in a project finance transaction, the receivables are isolated inherently from the moment of their inception, simply because they are generated by the SPV rather than by the sponsors. By contrast, in a securitisation, isolation depends on a sale transaction only because the receivables are generated by the originator rather than by the SPV.

¹⁰ The element of new construction is not always implicated here. Some project finance transactions are set up for the purpose of financing the continued operation of already existing projects, for example, in the context of a privatisation of formerly public-sector operations. See *infra* note 43 and accompanying text.

¹¹ Other project finance projects may involve toll roads, wastewater treatment facilities, water desalinisation plants, mining operations, and the like. See Bjerre (1999a) p. 263.

¹² For background reading on project finance transactions, see generally Hoffman (2001); Vinter (2001); Bjerre (1999a); and Symposium (2001).

Associated with this technical distinction is a more commonsense, real-world one. While securitisation transactions enhance the financial profile of an already-operating enterprise (by replacing the enterprise's accounts receivable with immediately available capital), project finance transactions initiate the operations of a wholly new enterprise. Prototypical securitisation transactions do not give birth to new retailers or lenders, but prototypical project finance transactions do give birth to new power plants, pipelines, and other infrastructure operations.¹³ This distinction is powerful and far-reaching, because a transaction that creates an entirely new business enterprise—especially a major infrastructure enterprise in an emerging economy—will inherently have a much more visible impact on non-parties than one that does not.

Related to the absence of a true sale element in project finance transactions is the issue of recourse. If the obligors on the receivables in either pattern of transaction fail to make payments, to what degree may the transaction documents provide that the investors in a securitisation have recourse against the originator, or that the lenders in a project finance transaction have recourse against the sponsor? Under both patterns, the paradigmatic transactions involve little or no recourse, but in practice the answers vary, and can differ sharply as between securitisation and project finance. In a project finance transaction, the level of recourse is important for reasons affecting the business judgment of the sponsors and prospective investors, but is irrelevant to the legal structure of the transactions *per se*.¹⁴ By contrast, in a securitisation transaction, any recourse against the originator in excess of certain guidelines generally has been considered inconsistent with the crucial element of true sale.¹⁵ For that reason, a given marginally higher amount of recourse can

¹³ As noted, however, some project finance transactions are a means of privatisation and thus involve the acquisition of existing operations rather than the creation of new ones. See *infra* note 43 and accompanying text. By the same token, the capital made available to originators in a securitisation transaction may be used by those originators to expand into new business areas.

¹⁴ See e.g. Hoffman (2001) p. 8 (observing that truly nonrecourse project finance 'is rarely the case. In most project financings, there are limited obligations and responsibilities of the project sponsor ... How much recourse [is] necessary to support a financing is determined by the unique risks presented in a project, and the appetite of the credit markets to accept the risks.').

¹⁵ Recourse up to the level of historical patterns of non-payment, or of other expected losses, is generally thought to be permissible, but no more. See e.g. Committee on Bankruptcy and Corporate Reorganisation of the Association of the Bar of the City of New York (1995) pp. 18–20; Standard & Poors (2000) p. 183 ('A guarantee by the seller of payment on the sold assets is acceptable, but only to the level of expected losses.'). In a case in which countervailing factors other than recourse weigh heavily enough in favour of a true sale, a court might not treat a level of recourse in excess of the foregoing

change the economics of the deal for a securitisation originator by far more than that same marginally higher amount would change the economics for a project finance sponsor. The general point behind securitisation's harsher approach to recourse is quite sensible: the more an originator is exposed to risk arising from non-payment by the obligors on the receivables, the more the transaction becomes economically indistinguishable from a loan to the originator secured by an interest in the receivables, as opposed to a true outright sale of those receivables.¹⁶

Ill-considered moves recently have been afoot in Congress to make recourse simply irrelevant to the true sale decision in many securitisations.¹⁷ A much sounder course would be to retain recourse as a crucial factor in the true sale decision while

as being dispositive per se, but the large sums at stake keep the parties who plan these transactions from being willing to explore this murky territory.

¹⁶ See U.C.C. (2000) § 9-109 comment 4 (referring to the 'difficult problems of distinguishing between transactions in which a receivable secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions the distinction is blurred'); Committee on Bankruptcy and Corporate Reorganisation of the Association of the Bar of the City of New York (1995). *But see* Pantaleo et al. (1996) (arguing that a high level recourse, providing it does not assure an ultimate rate of return, should not be inconsistent with true sale); Plank (1991) (arguing that even full recourse to originator should not necessarily be dispositive).

¹⁷ See Bankruptcy Reform Act of 2001, S. 420, 107th Cong. § 912 (2001). This provision would amend 11 U.S.C. § 541(b) (1994) to exclude receivables from the property of the debtor's estate to the extent that they were 'transferred by the debtor, before the date of commencement of the case, to an eligible entity in connection with an asset-based securitisation.' The provision goes on to define 'transferred' for purposes of this section as follows:

the debtor, under a written agreement, represented and warranted that eligible assets were sold, contributed, or otherwise conveyed with the intention of removing them from the estate of the debtor ... irrespective and without limitation of (A) whether the debtor directly or indirectly obtained or held an interest in the issuer or in any securities issued by the issuer; (B) whether the debtor had an obligation to repurchase or to service or supervise the servicing of all or any portion of such eligible assets; or (C) the characterisation of such sale, contribution, or other conveyance for tax, accounting, regulatory reporting or other purposes.

Ibid.; see also Bankruptcy Reform Act of 1999, S. 625, 106th Cong. § 903 (2000) (similar predecessor bill). Although clauses (A) and (B) are classic situations that create recourse against the seller, the bill declares that those situations are not to be considered, nor are others (such as, presumably, more blatant forms of recourse), so long as the debtor has represented and warranted that there has been a true sale. See e.g. Lupica (2000) pp. 226–230; Lupica (2001) pp. 310–322. This bill has had a long, rocky, and highly politicised path through Congress, and its eventual fate remains unclear. See, e.g., Atlas (2001).

also dispensing with the unnecessary woodenness of current doctrine. As just seen, the question of true sale versus security interest is generally imagined in terms of black and white, so that one marginal increase in a transaction's level of recourse may have no effect, while another marginal increase can potentially result in a Draconian recharacterising of the entire transaction. The law can and should be suppler than this, perhaps by coming to recognise that the trueness of a sale can be a matter of degree rather than an all-or-nothing proposition. Both in daily life and in the more exacting context of the law, we routinely adapt our decision-making processes to the simple fact that much of the world is structured in terms of shades of gray, and that those shades of gray cannot all be reduced to simple black or white. In the language of the cognitive sciences, some categories are 'graded,' that is, items can have greater or lesser degrees of membership in these categories.¹⁸ The concept of 'tall' is a simple example from daily life: we are untroubled by the idea that, while some persons are unquestionably tall and others unquestionably not, most persons fall at various intermediate points on the spectrum. Similarly, to take one example from the law, the Bankruptcy Code already imposes on judges the task of determining where, on a spectrum, to fix the value of collateral.¹⁹ Reconceptualising the trueness of a sale in similarly graded terms would accommodate simultaneously the simple reality that the level of recourse in a transaction is a matter of degree, and the common sense conclusion that the effect of that level of recourse should be a matter of degree, too.²⁰

¹⁸ See e.g. Lakoff (1987) pp. 12-57 (providing an overview of the evolution of these and related ideas).

¹⁹ See 11 U.S.C. § 506(a) (1994) (providing that the value of collateral determines the amount of a creditor's secured claim).

²⁰ Current doctrine is premised on the idea that the trueness of a sale is not a graded category: receivables are either property of the estate or are not, 11 U.S.C. § 541 (1994), and buyers of receivables are entitled automatic perfection while those who hold receivables as security for a debt are not. See U.C.C. § 9-309(2), (3), (4) (2000) (providing for automatic perfection of various receivables sales). These doctrines would of course need to be modified as part of the reconceptualisation that I suggest in the text.

Michael Hamilton had the initial insight that the question of true sale *vel non* is a false dichotomy, with all of the seeming exactness of Linnaean taxonomy but none of its suppleness. See Hamilton (n.y.). Although current doctrine treats the true sale question as depending not just on the level of recourse but also on other factors, see Standard & Poor's (2000) pp. 183-185, these other factors can also be accommodated within the structure of a graded category. See e.g. Winter (2001) pp. 139-165 (arguing that the results in seemingly conflicting right-to-counsel cases are in fact harmonised by the convergence of three graded categories).

The concept of graded categories sheds light on project finance as well as securitisation, and on other commercial transactions too, at the much more general level of the category that we call 'consensual transaction.' See *infra* Part IV.

B. Degrees of Specialness and the Agglutination of the Two Patterns

An interesting sidelight on the basic distinctions discussed above concerns the scope of powers of the respective transactions' SPVs. In both securitisation transactions and project finance transactions, the SPV is set up in a way calculated to make it bankruptcy remote, that is, remote from the prospect of a bankruptcy proceeding of its own, and removed from the risk of its being substantively consolidated in the bankruptcy of the originator or sponsor. Though the details of this process will not be explored here,²¹ one crucial aspect of bankruptcy remoteness is that the SPV's powers, as set forth in its corporate charter or other organisational documents, be kept as limited as possible. Unlike with ordinary operating companies, whose charters typically provide for maximum flexibility,²² the charters of SPVs provide for the entity to have only those powers that are necessary to accomplish the purpose of the transaction. The reason for these restrictions is to keep the risk of the SPV's own bankruptcy as narrow as possible: the smaller the range of the entity's activities, the smaller the range of consensual and non-consensual creditors it will have, and hence the smaller the risk of a bankruptcy.

But while the purpose of the restrictions is the same in both patterns of transaction, the range of those restrictions is dramatically different. The SPV in a securitisation will have the power only to purchase the particular receivables contemplated by the transaction, issue the related capital market securities, make payments thereon, and so on, while the SPV in a project finance transaction (often also called the project company) will have the power only to build the project, operate it, make loan repayments, and so on. The range of activity of the project finance SPV is clearly much broader than that of the securitisation SPV. Compared to the tightly limited activities of a securitisation SPV, the special purpose vehicle in a project finance transaction really isn't very 'special' at all: its powers extend to having employees, owning land, building on that land, and even operating heavy, dangerous machinery—all of which generates a prospect of creditors (consensual or nonconsensual, contract-based or tort-based), and accordingly of bankruptcy, broad enough to give a securitisation lawyer nightmares.²³

²¹ For discussions of the procedures used in setting up SPVs, see Bjerre (1999a) 265 & nn. 17–18 and sources cited there.

²² See e.g. *Delaware Code Annotated* title 8, § 102(a)(3) (1998) (permitting charter to provide that corporation's purpose is 'to engage in any lawful act or activity for which corporations may be organised under the General Corporation Law of Delaware').

²³ This relatively non-special nature of a project finance SPV highlights the fact (already noted, and developed in Part III below) that project finance transactions have a more readily visible effect than do securitisations on non-consenting third parties: the greater visibility of effect is mirrored by the greater range of activity of the SPV.

Contrary to what one might think from a study of securitisations alone (or from a purely abstract description of structured finance in general), then, the difference between a full-blown, freely operating, bankruptcy-prone business enterprise such as a securitisation originator, on one hand, and an SPV, on the other hand, is a difference in degree rather than a difference in kind. The project finance SPV is similar to the securitisation SPV in that it is the locus in which assets are isolated, and in that its activities are limited to protect against its own bankruptcy. But the project finance SPV is also similar to the seemingly opposite pole, the originator in a securitisation, in that its activities are substantial and robust, and that there is therefore a realistic prospect of its bankruptcy.

This similarity between project companies and their odd bed-fellows, securitisation originators, means that the former are natural candidates for treatment as the latter. Given that project finance receivables, even when isolated from the sponsor in the project company, remain substantially exposed to the bankruptcy of the project company, why not enhance project finance transactions with a securitisation component, treating a project company as a securitisation originator that sells its receivables (in a true sale, of course) to an SPV of its own? This SPV of an SPV would issue capital market securities, using the resulting funds to pay for its purchase of the receivables. At the bottom line, the project's receivables would be insulated not only from the risk of the bankruptcy of the sponsors, as is ordinary today, but also from the risk that, in a bankruptcy of the project company itself, the receivables will be treated as property of the project company's estate. Deals like this have, in fact, begun to emerge as an apparently viable technique, though of course a very costly one.²⁴ The two structures are agglutinated, or affixed to each other with a single point of intersection, and as a result, the securitisation element of the deals solves a weakness in the project finance element of the deals.

C. A Glance at Other Points of Comparison

The receivables in a project finance transaction are ordinarily payable by only one or a very small number of obligors or off-take purchasers, for example, the government

²⁴ Heretofore the transactions have taken the form of multi-originator conduit transactions and, notably for the subject of this volume, the project finance transactions being fed into the conduits have included projects in emerging markets. See Project Finance (1999a); see also Forrester et al. (February 1994); and Project Finance (November 1999) (securitisation of equity dividends on power plants).

Beyond the bankruptcy protection described in the text, these conduit structures are also attractive because they provide investors with the diversification inherent in having receivables from many projects rather than just one. This diversification is a further way in which the conduit structures resemble prototypical securitisation transactions. See *infra* note 25.

utility that has contracted to buy the output of a power plant project, or the natural gas utilities that have contracted to pay for the services of a pipeline project. By contrast, the receivables in a securitisation transaction are ordinarily payable by a large number of obligors.²⁵ However, nothing in principle prevents a project finance transaction from having a high number of obligors,²⁶ or a securitisation transaction from having a low number of high dollar-value obligors.

Other points of commonality between the two patterns of transaction are numerous. From the standpoint of commercial law, both patterns of transaction depend heavily on property interests in the receivables to which the lenders look for payment.²⁷ From the standpoint of other law, too, both patterns of transaction draw deeply from the same wells: both implicate important questions about, for example,

²⁵ The limitations on recourse discussed in Part I.A cause the securitisation investors, rather than the originators, to bear the risk of non-payment by these obligors, but their large number tends, in effect, to create a diversified portfolio, which mitigates the risk.

²⁶ In fact, some project finance transactions effectively have innumerable obligors, none of whom however are bound by contract. For example, in a toll road project, the lenders will look for repayment to the small tolls paid by the road's users (as well as, in some cases, subsidies that the host country is contractually obligated to pay).

The term 'host country' is usually used simply to denote the country in which a project operates, and in keeping with general usage I will do the same in this chapter, but the term also has a non-neutral rhetorical dimension that should not be ignored. *See infra* note 84 and accompanying text.

²⁷ In a project finance transaction, the property interest is simply a security interest, while in a securitisation transaction, the property interest is an outright ownership interest, though under U.S. commercial law (as opposed to bankruptcy law) that ownership interest would be governed by the same regime as a security interest, i.e. U.C.C. Article 9. *See* U.C.C. § 1-201(37) (2000) (defining an owner's interest in an account, chattel paper, instrument or payment intangible as a security interest). This lumping together for terminological convenience of two concepts (based though it is on structural similarity, *see supra* note 16 and accompanying text) should not be misconstrued as a declaration that there is no substantive difference between the two. *See e.g.* Plank (1994a and 1994b); and Schwarcz (1993). *But see* Carlson (1998) p. 1059 (arguing 'that, in spite of the hue and cry through the streets of corporate finance, the Octagon Gas case was decided rightly: on its facts, its dictum, and its policy implications').

U.C.C. § 9-318(a) overrules the *Octagon* case, albeit in a less than satisfying way. It declares that the seller of a receivable has no interest in the receivable sold, but this is not necessarily accurate as a simple factual matter. For example, if an originator has accepted a small level of recourse limited to historical default levels, that originator retains pro tanto an interest in the receivables sold. *See supra* notes 14-20 and accompanying text.

raising funds in public markets,²⁸ the power and treatment of trusts,²⁹ and choice of entity,³⁰ to say nothing of the need for exhaustively foresightful contract drafting. Moreover, in the international context, both patterns of transaction are concerned with legal techniques for managing currency risks,³¹ enforceability of contractual choice of law and choice of forum clauses, enforcement of foreign judgments, and the choice of law under which conflicts with third parties over property interests in the receivables will be adjudicated.³²

In sum, from a practical standpoint, the legal apparatuses of the two patterns of transaction have almost everything in common, other than the basic structural differences discussed above. And even these structural differences tend to be differences in degree rather than differences in kind: ranges of levels of recourse, the range of trueness that ought to be recognised in a sale of receivables, and degrees of restriction on the activities of SPVs, to name only some of those discussed above. In fact, even the basic term 'structured finance transaction' stands revealed as a matter of degree rather than a matter of absolutes—project finance fits less well into the category of structured finance than does securitisation, because of the vulnerability to bankruptcy of project finance SPVs.³³

Taken as a whole, the pervasiveness of these ranges of gray—particularly in high-pressure, Wall Street deals such as these, in which certainty is at a premium—is instructive in itself. The point is not, obviously, that there is no difference between the two patterns of transaction, but rather that the seemingly clear-cut nature of those differences is illusory: clear-cut language often fails to do justice to the complexity of the world that it purports to mirror.³⁴ In the remainder of this chapter I lay the groundwork for concluding that the same is true of another linguistic label, 'consensual transaction.'

²⁸ See e.g. Hoffman (2001) pp. 107 and 431.

²⁹ Hoffman (2001) p. 77. Aspects of certain trust-related questions in U.C.C. Article 9 are discussed in Bjerre (1999a) pp. 303–306.

³⁰ See e.g. Hoffman (2001) pp. 121–136.

³¹ Hoffman (2001) pp. 55–82.

³² See generally Schwarcz (1998).

³³ See *supra* Part I.B.

³⁴ Great advances on this subject have recently been made in cognitive linguistics and related fields. For important work in this area, see generally Winter (2001) and Lakoff (1987). I develop some of these ideas in the context of the meanings of the term 'property' in an earlier article. See Bjerre (1999b) pp. 353–364.

II. ANTI-ASSIGNMENT CLAUSES AND THE PROBLEM OF CONSENT

Project finance and securitisation transactions also hold in common a number of commercial law doctrines, among which I focus here on the invalidation of anti-assignment clauses. I choose to discuss this doctrine here because it raises important questions of consent versus coercion, and thus relates thematically to the broader social questions raised in Part III and to my questioning of the soundness of the categorical label 'consensual transaction'.³⁵ Much more is at stake here than a question of English usage or even of cognition: too facile a use of the label 'consensual' can help to lull one into a sense of false comfort about the real impact of these transactions.

Consider the following two scenarios:

- (a) An oil drilling company wishes to securitise its rights to receive payment for crude oil sold to large oil refineries. However, the agreements representing those receivables contain anti-assignment clauses: the refineries have bargained for a clause in the sales agreements providing that the drilling company will not sell or assign its rights without the consent of the refineries. The refineries had good reasons for insisting on such a clause: for example, the refineries may have chosen to buy from this drilling company because their long-term, multi-faceted relationship with the drilling company gives them comfort about the drilling company's willingness to waive minor defaults.³⁶ But if the anti-assignment clause is enforced, the securitisation cannot go forward.
- (b) A host government signs a contract obligating itself to purchase the power or minerals, or to subsidise the rail or toll-road usage, that a proposed project will generate, and the host government's creditworthiness thus becomes the linchpin of the project's financing. The contract contains an anti-assignment clause, prohibiting the project company from assigning its rights under the contract to a third party (other than the collateral agent acting on behalf of the lenders³⁷) without the host government's consent. After a dispute with

³⁵ Other commercial law doctrines that raise parallel questions are explored, along with something more of their philosophical background, in a forthcoming article. See Bjerre (n.y.).

³⁶ On relational contracts such as these, see e.g. Macneil (1974) Macneil (1980); and Symposium (2000). For discussion of other reasons for which obligors may be justified in valuing anti-assignment clauses, see Hoffman (2001) p. 581 note 12 and Bjerre (1999a) pp. 292–293.

³⁷ This assumes that the off-take contract is being drafted with a view to the rest of the project finance transaction. As discussed *infra* notes 43–44 and accompanying text, this is not always the case.

the host government, the lenders seek to extricate themselves from the transaction by assigning their rights to other lenders.³⁸

Both of these scenarios involve a confrontation between two deeply held social values: freedom of contract, which would protect the refineries or the host government, and freedom of alienation, which would enable the securitisation or the assignment of the off-take contract. Superficially, this conflict may seem easy to resolve in a way that involves no affront to the ideal of consensuality in business transactions: uphold the restriction on alienation in each case. Neither the securitisation nor the lenders' assignment could then go forward, but in each case the constrained party would have no one to blame but itself, having consented to the constraints beforehand. The drilling company's and lenders' freedom of alienation would be subordinate to freedom of contract.

But such a consent-based resolution to the conflict is not the one that U.S. law, at least, generally takes, and as the law of other countries develops, one can expect it similarly to depart from such a resolution.³⁹ For several decades already, U.C.C.

³⁸ Though these are not the facts of Enron Corporation's ill-fated Dabhol power project, that imbroglia shows that the scenario in the text is perfectly realistic. See e.g. Kripalani (2001) (describing transaction history culminating in Enron's efforts to sell its 'Indian albatross').

If the identity of the collateral agent, and not just of the lenders represented by that agent, would change as the result of the lenders' assignment, then clearly the enforceability of the anti-assignment clause is crucial. But even if the identity of the collateral agent would be unchanged, the enforceability of the anti-assignment clause cannot be ignored. The argument that no real assignment takes place when the collateral agent remains the same is superficial and formalistic, particularly in light of the fact that the collateral agent takes its directions from the lenders that it represents. (U.C.C. Article 9's filing provisions generally do not address such assignments, see Bjerre (1999a) pp. 303–306, but this fact is irrelevant to the anti-assignment clause point.)

³⁹ See e.g. United Nations Commission on International Trade Law (2001) p. 120 paragraph 57 (tacitly recommending measures to permit the granting of security interests notwithstanding restrictions on assignment) (hereinafter UNCITRAL Legislative Guide). On 12 December 2001, the U.N. General Assembly adopted a resolution opening for signature the UNCITRAL Convention on the Assignment of Receivables in International Trade; Article 9 of this convention also overrides anti-assignment clauses. G.A. Res. 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81 (2002 United Nations Convention on the Assignment of Receivables in International Trade (12 December 2001)). Unlike U.C.C. Article 9, the UNCITRAL Convention does not affect the liability of the assignor for breach. United Nations Convention on the Assignment of Receivables in International Trade (12 December 2001) article 9(2). The provision reaches only a defined (but nonetheless quite broad) class of receivables, notably those arising from contracts for the supply or lease of goods or non-financial services, those arising from contracts for the license

Article 9 has overridden anti-assignment clauses in certain accounts receivable,⁴⁰ and in the course of the statute's recent overhaul, this overriding of anti-assignment clauses has been vastly expanded, so that it now covers a much greater range of personal property.⁴¹ The result is to elevate freedom of alienation over freedom of contract, making collateral available that would not be otherwise, and thus

of intellectual property, and those representing the payment obligation for a credit card transaction. *Ibid.* art. 9(3). Countries adopting the Convention would, however, be able to opt out of the invalidation of anti-assignment clauses in cases (such as scenario (b) in the text above) where the government itself is the obligor on the receivable—a concession that stands as testimony to the importance of the effectiveness of anti-assignment clauses. *Ibid.* art. 40. See generally Bazinas (2001); Bazinas (2002); Deschamps (2002); Markell (2002); and Sigman and Smith (2001).

⁴⁰ U.C.C. § 9-318(4) (1994).

⁴¹ U.C.C. §§ 9-406, 9-407, 9-408, 9-409 (2000). For example, terms restricting the alienation of permits, licenses, franchise rights, and the like are now invalidated as well, and these are measures with potentially strong bearing on project finance transactions, which are heavily dependent on governmental permits. In many of the applications of the rule as broadened, however, an important exception to the rule will also apply. The exception provides that, despite the overriding of the anti-assignment restrictions, the assignee does not have the right to foreclose on the rights assigned or otherwise exercise rights against the party imposing the restriction. See U.C.C. §§ 9-408(d), 9-409(b) (2000); Bjerre (1999a) p. 296 and note 165, p. 301 and note 186; Plank (2001) pp. 327-339. Though this exception does not generally rob the main override rule of its force from the point of view of the secured party (for example, the secured party will still benefit from the value of the proceeds of the restricted property in bankruptcy, see U.C.C. § 9-408 cmt. 7 (2000)), it does remove the taint of non-consensuality from those applications of the broadened rule. (Even here, however, to the extent one accepts the arguments made on behalf of unsecured creditors against securitisation, see *infra* notes 85-87 and accompanying text, one can make similar arguments against the new override rules. To the extent the secured party is able to harness the value of the restricted asset in a bankruptcy proceeding, the unsecured creditors are arguably harmed.)

Revised Article 9 nonetheless represents a further step beyond former Article 9 down the road of non-consensuality, in the substantial number of cases in which the overriding of anti-assignment restrictions has been broadened without the countervailing exception described above. For example, no countervailing exception mitigates the effect of the rule on the sale or pledge of accounts, and the definition of account has been greatly broadened. The rule also now applies, without any countervailing exception, to promissory notes and chattel paper, in each case when the transaction is a pledge rather than a sale. And in all of these cases, as well as in former Article 9's accounts and general intangibles cases, restrictions on assignment imposed by law rather than contract are now invalidated, too.

enabling transactions to take place that otherwise might not. From a utilitarian standpoint, at least, the results may ultimately be justifiable, but they are also quite troubling: they impose a result on a party (the refineries or the host government, in the scenarios above) to which that party did not consent, and against which, indeed, it affirmatively sought to protect itself.⁴²

The issue has broader importance to project finance transactions than the foregoing scenarios alone might imply. For example, when the transaction involves the privatisation of a project that formerly was publicly operated,⁴³ the off-take contract typically will already be in place, and as a result (unlike in the second scenario), not even the assignment of rights to the collateral agent will be permitted by the contract's terms, and unless the anti-assignment clause is overridden, the financing cannot go forward.⁴⁴ As another example, even if the assignment to the collateral agent is not problematic, there remains the issue of an eventual assignment by the collateral agent to a post-default purchaser of the project.⁴⁵ (Foreclosures are much more unusual in project finance transactions than are workouts,⁴⁶ but the assignment upon foreclosure issue remains nonetheless, representing the background entitlements against which workout negotiations are conducted.⁴⁷) And finally, because all of the key contracts of a project are generally a part of the collateral

⁴² In Bjerre (n.y.), I root this dilemma in the broader conflict between the libertarian and utilitarian philosophical traditions.

⁴³ Particularly with the move of many economies from centrally planned to market-driven models, privatisation has become an important facet of the project finance world. See e.g. Ambinder et al. (2001) and Project Finance (1999a) p. 26 (quoting an observer as saying that the trend in privatising infrastructure 'is moving around the world').

⁴⁴ An alternative to overriding the clause, of course, would be for the off-take purchaser simply to consent to the assignment. In a context such as this, however, the off-take purchaser would be tempted to withhold its consent with a view to extracting unfairly large compensation.

⁴⁵ '[I]n the event of foreclosure, the contracts must be assumable by the lender and assignable to a post-default purchaser of the project. Otherwise, the lender may have little ability to recover its unpaid loans, since few projects have value without the underlying project contracts, particularly the off-take contract.' Hoffman (2001) p. 511.

⁴⁶ As Hoffman points out, foreclosure only makes sense if the project as a whole, including the crucial contracts, is being sold as a package. Hoffman (2001) p. 512. As one wit observed in describing the workout negotiations over the notorious Euro Disney project, 'there is not much of a market for second-hand, mechanical teacups.' *The Economist* (1994) p. 66. For further discussion of the Euro Disney project, see *infra* note 77 and accompanying text. On renegotiation and workouts in project finance generally, see Salacuse (2001).

⁴⁷ See e.g. Mnookin and Kornhauser (1979).

package, the anti-assignment issue also affects contracts wholly apart from the off-take contract.⁴⁸

III. THE PROBLEM OF CONSENT WRIT LARGE: THE SOCIAL IMPACT OF PROJECT FINANCE TRANSACTIONS

As observed above,⁴⁹ securitisation is paradigmatically an improvement to the financing of an existing business operation, while by sharp contrast, project finance transactions paradigmatically involve not the improvement of an existing enterprise but the creation of a new one. And because the new enterprise thus created represents an addition to the host country's power, transportation, telecommunications, or other infrastructure, that new enterprise has deep and broad effects on that country in several respects, potentially including the country's economy, politics, culture, and environment, as well as other aspects of its daily life. In short, project finance is a but-for condition of many major enterprises, while securitisation is not, and project finance transactions accordingly tend to have a more readily visible, more highly dramatic social impact than do securitisation transactions.⁵⁰

International project finance transactions are a form of foreign direct investment (commonly called FDI), as opposed to portfolio investment: they involve the direct acquisition and control of hard assets abroad, and they thus represent a continuing stake in the foreign nation, as opposed to the generally more transient acquisition of shares of stock, bonds, or commercial paper of foreign enterprises.⁵¹ As such,

⁴⁸ Contracts other than the off-take contract, such as those between the project company and raw materials suppliers or facilities construction companies, face another problem. The relatively smaller scale of such contracts (and sometimes the lesser sophistication of the counterparty) can make it impractical for the parties to negotiate in advance for ideally contoured exceptions to the anti-assignment clauses. By the same token, the workaday goals of anti-assignment clauses may be all the more important to the smaller counterparties. See Bjerre (1999a) pp. 292–293 (describing bookkeeping and double payment concerns that, in addition to relationship concerns, can make anti-assignment clauses important).

⁴⁹ See *supra* note 13 and accompanying text.

⁵⁰ As noted at the outset of this chapter, many other types of business transactions can have a similarly dramatic social impact, but project finance is a natural starting place for the discussion. The word 'dramatic' here should be taken in the sense of striking or attention-getting rather than, necessarily, the alternative sense of enormous. The impacts of securitisation and other forms of financing, while very generally less visible and striking, are potentially as enormous as that of project finance.

⁵¹ One could attempt to argue that just as project finance is a form of FDI, securitisation is a form of portfolio investment. This analogy holds to the extent that securitisations

international project finance transactions are inextricably linked to the longstanding controversies over FDI's effects on developing nations.⁵² The strength of these controversies is attributable almost entirely to the fact that the transactions have such strong effects on third parties and on the host country as a whole, reaching far beyond the immediate parties to the transaction.

The positive aspects of these third-party effects are undeniable and obvious. The transactions create jobs,⁵³ bring technology and know-how into the host country,⁵⁴ help contribute toward a better-trained, better-educated work force,⁵⁵ and, of course, often provide the population with core services such as power or transportation. In short, they stimulate the economy and lead to economic growth. None of this should be slighted. However, as Amartya Sen writes in *Development as Freedom*, 'Without ignoring the importance of economic growth, we must look well beyond it.'⁵⁶ Sen's book makes a powerful moral and philosophical case for evaluating the industrialisation of developing economies not just in terms of material well-being, but also in terms of what he calls the population's 'capabilities.'⁵⁷ Under this rubric he places factors such as having a political voice,⁵⁸ being educated,⁵⁹ having civil liberties,⁶⁰ being free to live on traditional lands without displacement,⁶¹ and other

involve the acquisition neither of hard assets nor of control over business operations, but it is imperfect to the extent that the true sale aspect of these transactions, *see supra* note 9 and accompanying text, prevents the capital from being simply pulled out of the foreign country on a moment's notice (unlike in the case of the portfolio investments involved in, for example, the Asian economic crisis of the late 1990s). The fast-pay events and commitment terminations that are often a feature of securitisation transactions do not fully rescue the analogy, because they are triggered only by restricted sets of events.

⁵² For general reading on FDI controversies, *see* Moran (1998); Todaro (2000); and Borensztein et al. (1998).

⁵³ Among these are jobs in construction and other front-end aspects of the project; jobs in supplying the raw materials purchased by the project; jobs enabled by the power or other products created by the project; jobs in operating the project when complete, and so on. *But see infra* note 64.

⁵⁴ Technology and training are accepted as crucial engines to the development of economies.

⁵⁵ However, in many instances project sponsors may import their own expertise. *See, e.g.,* Hoffman (2001) pp. 49–50.

⁵⁶ Sen (1999) p. 14. Sen was awarded the Nobel Prize in economics in 1998.

⁵⁷ *See e.g.* Sen (1999) pp. 18, 292–294.

⁵⁸ *Ibid.* pp. 149–159.

⁵⁹ *Ibid.* pp. 128–129.

⁶⁰ *Ibid.* pp. 148–149.

⁶¹ *Ibid.* pp. 142–143.

effects on traditional lifestyles. Sen generally argues that the point of development is to increase not just economic well-being but also freedom, with freedom being understood in a substantive sense rather than in the libertarian, proceduralist sense.⁶²

Sen does not direct explicit attention to project finance transactions, but a moment's reflection makes obvious that these transactions can have powerful effects on many of the substantive freedoms with which Sen is concerned. Briefly to signal just a few of these effects, projects may widen wage differentials, increase the disparity between rural and urban job opportunities and thus exacerbate rural-to-urban migration, displace populations that have lived for generations at, for example, a dam or mining project site, and strengthen the power of governments that may be restrictive of a population's freedom to dissent. Projects can cause severe environmental effects (particularly projects in the dam, transportation, power, and mining sectors).⁶³ Governments intent on attracting project investments (particularly in countries where the population lacks a strong political voice) may award subsidies, tax breaks, and social services to sponsors even at the expense of funding anti-poverty or other needed social programmes.⁶⁴

This chapter is not the place for an in-depth examination of particular cases, but a copper and gold mining project operating at the headwaters of the Ok Tedi River in the Western Province of Papua New Guinea provides an opportunity to focus on the network of social effects that can be at stake. The project's operators assert that the project has had a number of favourable effects on the area,⁶⁵ but another

⁶² *Ibid.* p. 66.

⁶³ See, e.g., *infra* note 66 and accompanying text. Though Sen in *Development as Freedom* pays little attention to the subjects of safety and healthfulness of the natural environment, these seem clearly to belong on the list of substantive freedoms with which Sen's capabilities approach is concerned.

⁶⁴ Another of Sen's central capabilities concerns is education, and the question of project finance's impact in this regard is a complicated and perhaps contrary one. As noted above, project finance transactions tend to bring technology and know-how into the host country and can entail at least some training of local workers in it. See *supra* notes 54–55 and accompanying text. On the other hand, this factor is neutralised to the extent that a project sponsor imports its own trained staff, and the presence of that imported expertise can even stifle the impetus for education that would otherwise exist. See, e.g., Todaro (2000) p. 584; see also Pédamon (2001) p. 1312 (noting that the UNCITRAL Legislative Guide (2001) 'does not, for instance, provide for the placement of a minimum amount of work with local contractors').

⁶⁵ The project's publicly available materials state that its operations 'have made a significant contribution to the Western Province not only economically but by providing community infrastructure (roads, airstrips, water and communications systems), education and training, employment and health services,' as well as community development and business

side of the coin, according to published reports, is that the continuous dumping of mine tailage into the region's river systems has killed large stretches of forest, with effects that reach far beyond the environment per se. According to the Executive Director of the Australian Conservation Foundation,

In a country like [Papua New Guinea], social and environmental issues are inextricably linked. Most people living rurally are subsistence farmers who depend on a healthy natural environment for survival. Some local communities have welcomed the financial benefits and the consequent changes to their lifestyle. On the other hand, ... other communities are far less welcoming. For these people, the loss of forests and crops to flooding and the loss of fish stocks has seen traditional sources of food disappear. Many areas of deep spiritual value for villagers are now submerged in mine tailings. Some local people see the mine as culturally destructive, threatening the integrity of their heritage and identity.⁶⁶

When the project's sponsors moved to terminate its operations earlier than scheduled, the national government resisted, presumably because the mine accounts for about ten percent of the country's gross domestic product.⁶⁷

Dynamics such as this also highlight the fact that the interests of a developing country's government may not always be closely aligned with those of its population. The population of Papua New Guinea, which is part of the British Commonwealth, benefits from a democratic form of government,⁶⁸ but of course

development programmes to build a foundation for the community's future prosperity when the mine closes. See OK TEDI Mining (5 March 2002).

⁶⁶ Henry (28 December 2001).

⁶⁷ See Sydney Morning Herald (2 December 2000).

⁶⁸ Questions have nonetheless been raised about the degree to which the population affected by the Ok Tedi project has consented to it.

The PNG government claims that 138 of the required 149 villages have already signed the agreements [relating to continuation of the mining operations], but [a member of Parliament from the region said that the project company] handpicked people to sign on behalf of their villages. 'There has been no consultation with the people. More than 1,500 people have already sent affidavits to the Supreme Court saying no one was authorised to sign any agreements with [the sponsor] on their behalf,' he said.

Pacific Islands Broadcast Association News Service (14 December 2001).

Enron's Dabhol power plant project in India shows that democratic forces can sometimes serve as something of a safeguard: in the 1995 Maharashtra state elections, the issue became such a focal point of controversy that it helped to push the incumbent party from power. See e.g. *The Economist* (13 January 2001) and Salacuse (2001) p. 1351. In many cases,

much of the population of the developing world does not.⁶⁹ The widely-known case of the Three Gorges Dam on China's Yang Tze River is an all too powerful example. When the journalist Dai Qing published a volume⁷⁰ protesting, among other things, the project's projected displacement of well over one million inhabitants⁷¹ and its incalculable harm to Neolithic and Qing Dynasty archeological sites,⁷² the Chinese government banned the book and imprisoned her for ten months.⁷³ Moreover, of course, even in a transparently democratic system, the voices of those who are directly affected by a project do not necessarily prevail, and those voices cannot even begin to be heard unless supported by certain minimal levels of literacy and material wherewithal.

Sen's analysis applies (though in less urgent form) to developed countries as well,⁷⁴ and by recalling two well-known Western European project finance transactions, we can discern instructive parallels to some of the foregoing concerns. The first is the Channel Tunnel, which provides the first land crossing from Europe to England since the Ice Age and has been described as 'the largest project finance operation of the 20th century.'⁷⁵ This project hurt nearby land values, triggered protests by English fruit growers, and the like, and is well known to have deeply disturbed English society by damaging the physical and cultural insularity that had always been one of the country's points of pride.⁷⁶ And the second project, the Euro Disney theme

however, a project's effects will fall primarily on a minority and democracy will be no panacea.

⁶⁹ According to one institutional observer, as of 2001, 2.157 billion people live in societies where 'the political process is tightly controlled and basic freedoms are denied,' an additional 1.435 billion people live in societies characterised by 'some restrictions on political rights and civil liberties, often in a context of corruption, weak rule of law, ethnic strife or civil war,' and the vast majority of both groups are concentrated in the developing regions of Asia and Africa. Freedom House (2001)

⁷⁰ Qing (1989).

⁷¹ See e.g. Fearnside (1993) and Zongdai and Shouzhong (1993).

⁷² See e.g. Qing (1998) and Letter to Jiang Zemin Concerning Archeological Sites (8 August 1996).

⁷³ Topping (1998) pp. xv and xxv. On the dam and other aspects of the Yang Tze, see generally Winchester (1996).

⁷⁴ Sen (1999) pp. 6, 15 and 20–24.

⁷⁵ Evans (1986) p. 13.

⁷⁶ See e.g. Fetherston (1997); Montville (1994) p. 41 ('Tour de France penetrates England via Channel Tunnel and is viewed as invasion'); Pederson (1994) p. 43 (quoting Prime Minister Palmerston as rejecting an 1858 tunnel proposal because it would 'shorten a distance we already find too short'); Redman (1990) p. 49. As one commentator writes,

park in Marne-la-Vallée, near Paris, has been widely reviled by Europeans seeking to resist what they see as American cultural imperialism.⁷⁷ Obviously, neither of these European projects raises issues comparable in starkness or severity to the voting rights, population stability, and other issues that are Sen's most pressing concerns,⁷⁸ but the European projects may nonetheless help bring home to Western observers, if only by weak analogy, the reality and immediacy of Sen's issues, which in their geographic and cultural specificity might otherwise seem to be elusive or comfortably remote.⁷⁹ Even these relatively bland European examples have raised notable social turmoil, and these are only echoes of the more intense upheaval that can be at stake with their developing-world counterparts.

Sen's several capabilities-based concerns are united by the conceptual thread of free agency. The word 'agency' is derived from the Latin for 'to act' or 'to do',⁸⁰ and though traditional Western law thinks of agency in the more restrictive sense of one person acting *for another*, perhaps this is only because we have generally been

nowhere is [the Channel Tunnel] less loved than in communities around Dover on the southeast coast of England ... By and large, people in the area ... abhor the sprawling terminal building that scars the town of Folkstone, do not want the new roads and high-speed railway lines that will cut through the countryside to link the Chunnel with London, and *shudder at the prospect of bringing the European continent closer to their island, even if only psychologically.*

Wallace (1994) p. 29 (emphasis added).

⁷⁷ See e.g. *The Economist* (1992) p. 88 (reporting that French intellectuals call park a 'cultural Chernobyl'); McGrath (1994) pp. 10 and 11 (describing the project's effects on 'cultural sensibilities of Europeans, who were happy to visit Disney in the US but reluctant to consume American culture at home'); and Solomon (1994a) p. 34 ('Despite howls from the intelligentsia about Disney's threat to French culture, France had laid out the red carpet'). One writer describes French intellectuals as chorusing that Euro Disney was 'just the latest example of American cultural imperialism that had appropriated European myths and fairy tales and was now selling back to Europe in sanitised form,' and reports that '[n]ot all the opposition was verbal: hours before the opening, saboteurs blew up an electricity pylon and plunged much of the complex into darkness.' Phillips (1993) p. 47. See generally Lainsbury (2000).

⁷⁸ See *supra* notes 56–64 and accompanying text.

⁷⁹ Other modern Western parallels to these concerns might include the not-in-my-backyard opposition to power plants that is now familiar in the United States, the popular mourning of small businesses' surrender to so-called big-box retailers, and the firestorm of cultural opposition that was provoked by a second Disney venture. See Solomon (1994b) p. 46 (reporting on the demise of Disney's plans for an American-themed park near Virginia's most hallowed Civil War battlefields).

⁸⁰ See Onions (1966) p. 19.

able to take for granted our power to act *for ourselves* in the first place.⁸¹ In other cultures, burdened with severe material privations or lacking strong traditions of freedom from governmental imposition, the question of agency is the much more basic one of acting on one's own behalf at all, as opposed to being acted upon against one's will. Project finance transactions, though privately funded, affect the public at large,⁸² and regardless of whether the project's effects in any given case constitute a net benefit or a net detriment, those effects are often imposed against the will of much of that public.⁸³ (In this light, the very term 'host country' becomes problematic: the term carries metaphorical implications of a close, genuinely consensual, mutually rewarding and terminable-at-will relationship between the country and the sponsors, but as we begin to see when looking through Sen's eyes, this rhetorical freight may not always be entirely legitimate.⁸⁴)

In securitisation transactions, by contrast, one looks in vain for comparably stark or dramatic effects on non-consenting third parties. Some commentators have been concerned, along lines that grow generally from the long-standing debate about the merits of ordinary secured credit, over the impact of securitisation transactions on unsecured creditors of the originator.⁸⁵ Greatly simplifying the debate,

⁸¹ Thus, the issues are whether an employee's acts bind his or her employer, whether one partner's acts bind another partner, etc. See e.g. Restatement (Second) of Agency (1958) § 1; Restatement (Third) of Agency (Tentative Draft No. 2, 2001) § 1(1); and Reuschlein and Gregory (1990) p. 3.

⁸² Project finance transactions are public not just in their effects but also in their origins. The decision whether to permit a new project (or to privatise an existing one, see *supra* note 43 and accompanying text) is inescapably a governmental one, if only because the transactions generally involve, at their core, permits and monopolies granted by the government. See *supra* note 41. Additional factors such as funding project subsidies at the expense of other government budget items, see text accompanying note 64, only strengthen this point.

For a glimpse at the extent to which governments may go in order to attract project finance transactions, see UNCITRAL Legislative Guide (2001) (recommending legislative and even constitutional measures for prospective host governments to take). For a discussion of the Legislative Guide as compared to other possibilities for harmonising project finance law, see Pédamon (2001). See also Wallace (2000).

⁸³ See *supra* notes 67–73 and accompanying text.

⁸⁴ Rhetorical freight can also be turned against the rhetor: opponents of FDI would doubtless remind us that unwelcome guests such as parasites are sometimes said to have hosts, too.

⁸⁵ See LoPucki (1996) pp. 23–30 and Lupica (1998). LoPucki describes securitisation in terms of a broader framework of strategies by which businesses separate their assets from the risk of liability flowing from their operations. Project finance transactions, too, can fit within this framework, and specifically within LoPucki's 'parent/subsidiary

securitisation's defenders take the position that unsecured creditors are not harmed when the receivables are transferred for fair value,⁸⁶ while securitisation's critics maintain that there may nonetheless be an unacceptably detrimental alteration of the unsecured creditors' risks.⁸⁷ The principal lesson of that debate for purposes of this chapter is that the debate centres on the degree of validity of abstract economic models and on the marginal effect of imperfections in those models, and that the effect on unsecured creditors seems accordingly to be more postulatory, empirically elusive, or attenuated than the impact of project finance transactions on third parties discussed above.

In the project finance context, the building blocks of the discussion are stark: the net economic benefits can be patent, and so can the political, social, labour, and environmental detriments. The trade-offs among these competing considerations are complex and subtle, and the task of erecting a philosophical framework within which to judge the acceptability of those trade-offs is difficult if not insuperable. That these questions have been so neglected for so long is testimony to the unfortunate disconnect between the discourse of commercial law and other transactional law fields, on one hand, and the discourses of, for example, sociology, human rights law, history, and development economics on the other.

IV. CONCLUSION

It is no news that business transactions have negative externalities. Analysts of business transactions are adept at weighing those externalities as an element of questions such as economic efficiency. My purpose here is neither to engage in nor to take issue with that mode of analysis, but instead to pose a separate question of categorisation and, by extension, of moral philosophy. Is there a point at which the negative externalities of a transaction become so heavy that one can no longer candidly label the transaction with the morally comforting word 'consensual'?

Project finance, securitisation and other large business transactions are generally considered to be consensual transactions. But that label has been non-problematic

strategy,' though LoPucki does not discuss them as such. LoPucki, *supra*, at 20–23. The sponsor/SPV arrangement used in project finance, *supra* notes 10–12 and accompanying text, to the extent recourse against the sponsors is limited, is largely a variation on classic parent/subsidiary arrangements.

⁸⁶ Where this is not the case, the argument continues, the doctrines of fraudulent conveyance or recharacterisation and other sanctions should suffice to protect unsecured creditors. See e.g. Committee on Bankruptcy and Corporate Reorganisation of the Association of the Bar of the City of New York (1995) pp. 57–58; Schwarcz (1999).

⁸⁷ See, e.g., Lupica (1998) pp. 629–31.

only because observers have generally focused only on the direct parties to the transactions, who do in fact consent to them: the originator, the SPV, and the investors; the sponsor, the project company, and the lenders. That focus is in danger of being myopic. Parts II and III above remind us that the transactions also implicate strong interests of others who are only marginally involved in the transaction per se (the obligors on the receivables in a securitisation transaction, the off-take purchaser in a project finance transaction), and even, in a project finance transaction, of still others who are complete strangers to the transaction. (Even when these third-party effects are noticed, they are usually marginalised by the very label 'negative externalities': to call them 'external' is to paint them as being of secondary importance.)

It is useful, though not dispositive, to think of consensuality in terms of a spectrum (just as it was useful in Part I to think of the questions of recourse, true sale, specialness of SPVs, and even structured finance itself, in terms of a spectrum). When two individuals perform a contract for the purchase and sale of a widget in which no third party has an interest, this transaction belongs at the purely consensual end of the spectrum. By the same token, when two individuals perform a contract to inflict physical violence on a third, this transaction belongs at the opposite end of the spectrum: no one would call it consensual.⁸⁸ But, by contrast to both of the foregoing examples, and particularly in light of the social issues sketched in Part III, project finance transactions occupy some point in the difficult-to-classify middle range of the spectrum.

I do not, however, conclude that project finance transactions therefore cross (or do not cross) some as-yet unarticulated dividing line between consensuality and nonconsensuality. Instead, I submit that it is a mistake to imagine that any such articulable dividing line would be workable, useful or accurate. Just as the tallness of a person or, as I argued in Part I.A, the trueness of a sale is a matter not of black and white but rather of gradient shades of gray, so, too, is the consensuality of a business transaction. The label 'consensual transaction' has a deceptively simple veneer, implying that there is some simple metric available to help us sort out

⁸⁸ In fact, of course, the law refuses to enforce contracts of this nature despite its strong commitment to the autonomy of consenting parties. See generally Farnsworth (1999) pp. 321-361. Lynn LoPucki provocatively casts ordinary secured transactions in a similar mold: 'Security is an agreement between A and B that C take nothing.' LoPucki (1994) p. 1899. Jackson and Kronman's path-breaking article on secured transactions makes a similar observation (though consistent with the authors' efficiency orientation, LoPucki's note of protest is absent): Jackson and Kronman speak of security as 'a private contract with one creditor that demotes the claims of other creditors from an initial position of parity to one of subordination.' Jackson and Kronman (1979) p. 1147.

Adhesion and similar contracts raise comparably difficult questions: it would often be more accurate to speak of parties' acquiescence to these transactions than of their consent to them. This is a subject for a separate article.

which transactions belong in the category and which ones belong outside of it. But if we probe beneath that label we can see that, in reality, most transactions (project finance or otherwise) actually belong both to some degree inside the category and, to some degree, outside of it. The category of consensual transactions, like so many others, turns out to be a graded category.

In evaluating the bodies of law that facilitate structured finance or other complex transactions, then, we cannot take great comfort from the transactions' assertedly consensual nature. The transactions may indeed be perfectly justifiable when all is said and done (after all, the American culture, at least, has a strong utilitarian and pragmatic orientation), but if so, the justification will not be founded on the simple basis of consensuality. Any ultimate conclusion about the transactions' moral justification can only be reached after a much more difficult weighing process: one which acknowledges that the utilitarian's or consequentialist's impulse to accomplish good results will frequently clash with the libertarian's insistence on autonomy, agency and consent.⁸⁹ We currently have no accepted guidelines for this task. And whether we will develop them in the future depends in large part on whether we have the resolve and candor to pursue the richer, synoptic, cross-disciplinary dialogue that has heretofore been so largely neglected.

BIBLIOGRAPHY

- Ambinder, L.P. et al. (2001), 'The Mirage Becomes Reality: Privatisation and Project Finance Developments in the Middle East Power Market' 24 *Fordham International Law Journal* 1029
- Atlas, R.D. (2001), 'Bill to Alter Bankruptcy Seems to Stall,' *The New York Times* (19 October 2001) C1
- Bazinas, S.V. (2001), 'Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade' 9 *Tulane Journal of International and Comparative Law* 259
- Bazinas, S.V. (2002), 'Multi-Jurisdictional Receivables Financing: UNCITRAL's Impact on Securitisation and Cross-Border Perfection' 12 *Duke Journal of Comparative and International Law*

⁸⁹ Sen himself argues that one aspect of this clash between outlooks is unresolvable. See Sen (1970) (explaining the conflict between even a mild version of liberalism and even a mild version of the Pareto optimality principle). On the other hand, Sen's capabilities approach to justice, discussed above, is presented as among other things a means of reconciling the substantive goal of 'individual freedoms (not utilities)' with 'sensitivity to consequences which, I would argue, is an appreciable asset of the utilitarian approach.' Sen (1999) p. 58.

- Bjerre, C.S. (1999a), 'International Project Finance Transactions: Selected Issues Under Revised UCC Article 9' 73 *American Bankruptcy Law Journal* 261
- Bjerre, C.S. (1999b), 'Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection' 84 *Cornell Law Review* 305
- Bjerre, C.S. (n.y.), 'Commerce and Community: The Redistributionist Streak in Commercial Law' (unpublished manuscript, on file with the Duke Journal of Comparative and International Law)
- Borensztein, E. et al. (1998), 'How Does Foreign Direct Investment Affect Economic Growth?' 45 *Journal of the International Economy* 115
- Carlson, D.G. (1998), 'The Rotten Foundations of Securitisation' 39 *William and Mary Law Review* 1055
- Committee on Bankruptcy and Corporate Reorganisation of the Association of the Bar of the City of New York (1995), *Structured Financing Techniques*
- Committee on Bankruptcy and Corporate Reorganisation of the Association of the Bar of the City of New York (2000), 'New Developments in Structured Finance' 56 *Business Law* 95
- Deschamps, M. (2002), 'The Priority Rules of the United Nations Receivables Convention' 12 *Duke Journal of Comparative and International Law*
- The Economist* (1992), 'Euro Disney: The Not-So-Magic Kingdom,' *The Economist* (26 September 1992) 87
- The Economist* (1994), 'Meltdown at the Cultural Chernobyl,' *The Economist* (5 February 1994) 65
- The Economist* (2001), 'Enron in India, Generation Gaps,' *The Economist* (21 January 2001) 62
- Eisenberg, M.A. (1982), 'The Bargain Principle and Its Limits' 95 *Harvard Law Review* 741
- Epstein, R.A. (1975), 'Unconscionability: A Critical Reappraisal' 18 *Journal of Law and Economics* 293
- Evans, R. (1986), 'Financing the Channel Tunnel' *Euromoney* (March 1986) 13
- Farnsworth, E.A. (1999), *Contracts* (3rd edn)
- Fearnside, P.M. (1993), 'Resettlement Plans for China's Three Gorges Dam' in M. Barber and G. Ryder (eds.), *Damming the Three Gorges* 34 (2nd edn)
- Fetherston, D. (1997), *The Chunnel: The Amazing Story of the Undersea Crossing of the English Channel*
- Forrester, J.P. et al. (1994), 'Securitisation of Project Finance Loans and Other Private Sector Infrastructure Loans,' *Financier ACMT* (February 1994) 7
- Frankel, T. (1991), *Securitisation: Structured Financing, Financial Asset Pools, and Asset-Backed Securities* (1991 and Supplement 2001)
- Freedom House, *The Map of Freedom 2001* available at <www.freedomhouse.org/pdf_docs/research/freeworld/2001/map2001.pdf> (last visited 5 March 2002)

- Gann, P.B. (1998), 'Foreword to Symposium, International Issues In Cross-Border Securitisation and Structured Finance' 8 *Duke Journal of Comparative and International Law* 230
- G.A. Res (2002), 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81 available at <www.uncitral.org/stable/res5681-e.pdf> (last visited 5 March 2002)
- Hamilton, M.D. (n.y.), 'True Sale, Recourse and Taxonomy' (unpublished manuscript, on file with the Duke Journal of Comparative and International Law)
- Henry, D. (2001), 'Leaving the Scene of the Mine' *Australian Financial Review* (28 December 2001) available at 2001 WL 31902107
- Hoffman, S.L. (2001), *The Law and Business of International Project Finance* (2nd edn)
- Jackson, T.H. and A.T. Kronman (1979), 'Secured Financing and Priorities Among Creditors' 88 *Yale Law Journal* 1143
- Kravitt, J.H.P. (ed.) (1996), *The Securitisation of Financial Assets* (2nd edition and Supplement 1999)
- Kripalani, M. (2001), 'India Needs a Big Jolt of Energy Reform,' *Business Week* (3 December 2001) 38
- Lainsbury, A. (2000), *Once Upon an American Dream: The Story of Euro Disneyland*
- Lakoff, G. (1987), *Women, Fire and Dangerous Things: What Categories Reveal About the Mind*
- 'Letter to Jiang Zemin Concerning Archeological Sites (8 August 1996)' in D. Qing et al. (eds.), *The River Dragon Has Come!* Appendix F 214 (Y. Ming translation 1998)
- LoPucki, L.M. (1994), 'The Unsecured Creditor's Bargain' 80 *Virginia Law Review* 1887
- LoPucki, L.M. (1996), 'The Death of Liability' 106 *Yale Law Journal* 1
- Lupica, L.R. (1998), 'Asset Securitisation: The Unsecured Creditor's Perspective' 76 *Texas Law Review* 595
- Lupica, L.R. (2000), 'Circumvention of the Bankruptcy Process: The Statutory Institutionalisation of Securitisation' 33 *Connecticut Law Review* 199
- Lupica, L.R. (2001), 'Revised Article 9, Securitisation Transactions and the Bankruptcy Dynamic' 9 *American Bankruptcy Institute Law Review* 287
- Macneil, I.R. (1974), 'The Many Futures of Contracts' 47 *Southern California Law Review* 691
- Macneil, I.R. (1980), *The New Social Contract*
- Markell, B.A. (2002), 'UNCITRAL's Receivables Convention: The First Step, But Not the Last' 12 *Duke Journal of Comparative and International Law*
- McGrath, J. (1994), 'The Lawyers Who Rebuilt EuroDisney' (May 1994) *International Financial Law Review* 10
- Mnookin, R. and L. Kornhauser (1979), 'Bargaining in the Shadow of the Law: The Case of Divorce' 88 *Yale Law Journal* 950
- Montville, L. (1994), 'Invasion on Wheels' *Sports Illustrated* (18 July 1994) 40

- Moran, T.H. (1998), *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition*
- Ok Tedi Mining, OTML at a Glance available at <www.oktedi.com/aboutus/index.php> (last visited 5 March 2002)
- Onions, C.T. (ed.) (1966), *The Oxford Dictionary of English Etymology*
- Pacific Islands Broadcast Association News Service. *Legal Challenge Against PNG Government Bill on Ok Tedi Mine*, Pacific Islands Broadcast Association News Service (14 December) available at 2001 WL 2825048
- Pantaleo, P.V. et al. (1996), 'Rethinking the Role of Recourse in the Sale of Financial Assets' 52 *Business Law* 159
- Pédamon, C. (2001), 'How is Convergence Best Achieved in International Project Finance?' 24 *Fordham International Law Journal* 1272
- Pederson, D. (1994), 'Why Do Brits Hate the Chunnel?', *Newsweek* (9 May 1994) 43
- Phillips, A. (1993), 'Where's the Magic?', *Maclean's* (3 May 1993) 47
- Plank, T.E. (1991), 'The True Sale of Loans and the Role of Recourse' 14 *George Mason Law Review* 287
- Plank, T.E. (1994a), 'When a sale of accounts is not a sale: a critique of Octagon Gas' 48 *Consumer Finance Law Quarterly Report* 45
- Plank, T.E. (1994b), 'Sacred Cows and Workhorses: The Sale of Accounts and Chattel Paper under the UCC and the Effects of Violating a Fundamental Drafting Principle' 26 *Connecticut Law Review* 397
- Plank, T.E. (2001), 'The Limited Security Interest in Non-Assignable Collateral Under Revised Article 9' 9 *American Bankruptcy Institute Law Review* 323
- Policy Agenda for Developing Countries and Economies in Transition* (1998)
- Project Finance* (1999a), 'Returning for More', *Project Finance* (April 1999) 24
- Project Finance* (1999b), 'Chasing Power Deals', *Project Finance* (10 July 1999) 26
- Project Finance* (1999c), 'What Heats the Hot Seat', *Project Finance* (November 1999) 29
- Qing, D. (1989), *Yangtze! Yangtze!* (N. Liu et al. translation 1994)
- Qing, D. (1998), 'The Danger to Historical Relics and Cultural Antiquities In and Around the Three Gorges Area: Interviews with the Director of the National History Museum of China, Yu Weichao' in D. Qing et al. (eds.), *The River Dragon Has Come!* 124 (Y. Ming translation)
- Rakoff, T.D. (1983), 'Contracts of Adhesion: An Essay in Reconstruction' 96 *Harvard Law Review* 1173
- Redman, C. (1990), 'An Island No More', *Time* (12 November 1990) 49
- Reuschlein, H.G. and W.A. Gregory (1990), *The Law of Agency and Partnership* (2nd edn)
- Salacuse, J.W. (2001), 'Renegotiating International Project Agreements' 24 *Fordham International Law Journal* 1319

- Schwarcz, S.L. (1993), 'Octagon Gas' Ruling Creates Turmoil for Commercial and Asset-Based Finance,' (4 August 1993) *New York Law Journal* 1
- Schwarcz, S.L. (1998), 'The Universal Language of Cross-Border Finance' 8 *Duke Journal of Comparative and International Law* 235
- Schwarcz, S.L. (1999), 'The Inherent Irrationality of Judgment Proofing' 52 *Stanford Law Review* 1
- Schwarcz, S.L. (2002), *Structured Finance: A Guide to the Principles of Asset Securitisation* (3rd edn)
- Sen, A. (1970), 'The Impossibility of a Paretian Liberal' 78 *Journal of Political Economy* 152
- Sen, A. (1999), *Development as Freedom*
- Sigman, H.C. and E.E. Smith (2001), 'The Draft UNCITRAL Convention on Assignment of Receivables in International Trade: A Summary of the Key Provisions as Completion Draws Near' 33 *Uniform Commercial Code Law Journal* 344
- Solomon, J. (1994a), 'Mickey's Trip to Trouble,' *Newsweek* (14 February 1994) 34
- Solomon, J. (1994b), 'A Sudden Surrender in Virginia,' *Newsweek* (10 October 1994) 46
- Standard & Poor's, *Structured Finance: Legal Criteria* (2000)
- Sydney Morning Herald* (2000), 'Successors Line Up for Ok Tedi,' *Sydney Morning Herald* (2 December 2000) available at 2000 WL 30110458
- 'Symposium in Honor of Ian R. Macneil' (2000) 94 *Northwestern University Law Review* 735 (2000)
- Symposium (1992), 'Unconscionability Around the World: Seven Perspectives on the Contractual Doctrine' 14 *Loyola Los Angeles International and Comparative Law Journal* 435
- Symposium (1994), 'Revision of Article 9 of the Uniform Commercial Code' 80 *Virginia Law Review* 1783
- Symposium (1997), 'The Priority of Secured Debt' 82 *Cornell Law Review* 1279
- Symposium (2001), 'Project Finance and International Investment Law' 24 *Fordham International Law Journal* 1029
- Todaro, M.P. (2000), *Economic Development* (2000)
- Topping, A.R. (1998), 'Foreword' in D. Qing et al. (eds.), *The River Dragon Has Come!* xv (Y. Ming translation)
- UN Commission on International Trade Law (UNCITRAL) (2001), *Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Doc. A/CN.9/SER.B/4, U.N. Sales No. E.01.V.4
- Vinter, G.D. (2001), *Project Finance: A Legal Guide* (2nd edn)
- Wallace, B. (1994), 'Tunnel Vision,' *Maclean's* (9 May 1994) 29
- Wallace Jr., D. (2000), 'UNCITRAL Draft Legislation Guide on Privately Financed Infrastructure Projects: Achievements and Prospects' 8 *Tulane Journal of International and Comparative Law* 283

- Winchester, S. (1996), *The River at the Center of the World: A Journey Up the Yangtze and Back in Chinese Time*
- Winter, S.L. (2001), *A Clearing in the Forest: Law, Life and Mind*
- Zongdai, F. and W. Shouzhong (1993), 'Resettlement Problem of the Three Gorges Project' in S.-H. Luk and J. Whitney (eds.), *Megaproject: A Case Study of China's Three Gorges Project* 176