

PROJECT FINANCE, SECURITIZATION AND CONSENSUALITY

CARL S. BJERRE*

International project finance transactions have generally attracted the attention of legal scholars to a much lesser degree than have securitization 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 essay explores aspects of these transactions ranging from the technical to the broadly social and moral, borrowing in part from the insights of the Nobel prize-winning economist 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,¹ secured loans,² and the like, and tends to ignore more complex transactions, notably including structured finance transactions. 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 essay 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 essay of course makes no at-

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1. See, e.g., Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); Symposium, *Unconscionability Around the World: Seven Perspectives on the Contractual Doctrine*, 14 LOY. L.A. INT'L & COMP. L.J. 435 (1992).

2. See, e.g., Symposium, *The Priority of Secured Debt*, 82 CORNELL L. REV. 1279 (1997); Symposium, *Revision of Article 9 of the Uniform Commercial Code*, 80 VA. L. REV. 1783 (1994).

tempt 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.

In Part I of this essay, I sketch the structural features that project finance and securitizations transactions do or do not have in common with each other, focusing on a number of occasions in which the language usually used to describe the transactions is deceptively simple, and in which differences apparently in kind are revealed actually to be differences in degree. In Part II, I examine the overriding of anti-assignment clauses, which is one of many commercial law doctrines on which both patterns of transaction depend. The doctrine is fascinating because it raises an intractable conundrum of consent and coercion: will the law honor the freedom of contract of the party insisting on the anti-assignment clause, or will it honor the freedom of alienation of the party insisting on violating 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, far more patently so than do securitization 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 business transactions, 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 center an essay 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 essay, 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 essay'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 lender³ 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.⁴ In the words of

3. 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 securitization transaction, the role of lender is filled by buyers of the securities backed by the receivables. See *infra* text accompanying note 8. 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.

4. 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, stand-by letter of credit, or other secondary obligation, see *RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY* § 1(1) (1996), 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 minimized, as by structuring that owner as a special purpose vehicle (SPV) as discussed *infra* text

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 the basis of a financing that is independent as a legal matter, from the bankruptcy risks of the former owner of the assets.”⁵

Securitization, 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.⁶ In a prototypical securitization 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).⁷ 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.⁸

accompanying notes 7–8, 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.

5. COMM. ON BANKR. AND CORPORATE REORGANIZATION OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., STRUCTURED FINANCING TECHNIQUES 4 (1995) [hereinafter STRUCTURED FINANCING TECHNIQUES] (originally appearing at 50 BUS. LAW. 527, 529 (1995)); see also Comm. on Bankr. and Corporate Reorganization of the Ass'n of the Bar of the City of New York, *New Developments in Structured Finance*, 56 BUS. LAW. 95 (2000) (providing an update of the 1995 piece). The term “former owner” in the quoted passage is very apt in the context of securitization 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).

6. Pamela B. Gann, *Foreword to Symposium, International Issues In Cross-Border Securitization and Structured Finance*, 8 DUKE J. COMP. & INT'L L. 229, 230 (1998).

7. The SPV is set up so as to be bankruptcy remote. See *infra* notes 20–22 and accompanying text. The term “special purpose entity” (SPE) is often used in place of the term SPV.

8. See *supra* note 4 (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

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, long-term, revenue-generating infrastructure project.⁹ Typical examples include power plants, oil or gas pipeline systems, ports, and telecommunications networks.¹⁰ 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.¹¹

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

structural matter, then, these buyers can be analogized to lenders, though as a technical matter they are not lenders. *See supra* note 3.

For background reading on securitization transactions, see generally 1 TAMAR FRANKEL, *SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSET POOLS, AND ASSET-BACKED SECURITIES* (1991 & Supp. 2002); 2 TAMAR FRANKEL, *SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSET POOLS, AND ASSET-BACKED SECURITIES* (1991 & Supp. 2002); STEVEN L. SCHWARCZ, *STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION* (3d ed. 2002); 1 *SECURITIZATION OF FINANCIAL ASSETS* (Jason H.P. Kravitt ed., 2d ed. 1996 & Supp. 2002).

9. 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 privatization of formerly public-sector operations. *See infra* note 42 and accompanying text.

10. Other project finance projects may involve toll roads, wastewater treatment facilities, water desalinization plants, mining operations, and the like. *See* Carl S. Bjerre, *International Project Finance Transactions: Selected Issues Under Revised UCC Article 9*, 73 AM. BANKR. L.J. 261, 263 (1999).

11. For background reading on project finance transactions, see generally SCOTT L. HOFFMAN, *THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE* (2d ed. 2001); GRAHAM D. VINTER, *PROJECT FINANCE: A LEGAL GUIDE* (2d ed. 2001); Bjerre, *supra* note 10; Symposium, *Project Finance and International Investment Law*, 24 FORDHAM INT'L L.J. 1029 (2001).

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

One marked difference between securitizations 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 securitization 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 securitization 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 securitization 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 securitization, isolation depends on a sale transaction only because the receivables are generated by the originator rather than by the SPV.

Associated with this technical distinction is a more common-sense, real-world one. While securitization 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 securitization 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.¹² 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

12. As noted, however, some project finance transactions are a means of privatization and thus involve the acquisition of existing operations rather than the creation of new ones. *See infra* note 42 and accompanying text. By the same token, the capital made available to originators in a securitization transaction may be used by those originators to expand into new business areas.

may the transaction documents provide that the investors in a securitization 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 securitization 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*.¹³ By contrast, in a securitization transaction, any recourse against the originator in excess of certain guidelines generally has been considered inconsistent with the crucial element of true sale.¹⁴ For that reason, a given marginally higher amount of recourse can change the economics of the deal for a securitization originator by far more than that same marginally higher amount would change the economics for a project finance sponsor. The general point behind securitization'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.¹⁵

13. *See, e.g.*, HOFFMAN, *supra* note 11, at 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.").

14. 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.*, STRUCTURED FINANCING TECHNIQUES, *supra* note 5, at 18–20 (originally appearing at 50 BUS. LAW. 527, 543 (1995)); STANDARD & POOR'S, STRUCTURED FINANCE: LEGAL CRITERIA 183 (2000) ("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 weighed heavily enough in favor of a true sale, a court might not treat a level of recourse in excess of the foregoing 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.

15. *See* U.C.C. § 9-109 cmt. 4 (2000) (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."); STRUCTURED FINANCING TECHNIQUES, *supra* note 5. *But see* Peter V. Pantaleo et al., *Rethinking the Role of Recourse in the Sale of Financial Assets*, 52 BUS. LAW. 159 (1996) (arguing that a high level recourse, providing it does not assure an ultimate rate of return, should not be inconsistent with true sale); Thomas E. Plank, *The True Sale of Loans and the Role of Recourse*, 14 GEO. MASON L. REV. 287 (1991) (arguing that even full recourse to originator should not necessarily be dispositive).

Ill-considered moves recently have been afoot in Congress to make recourse simply irrelevant to the true sale decision in many securitizations.¹⁶ A much sounder course would be to retain recourse as a crucial factor in the true sale decision while 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 recharacterizing of the entire transaction. The law can and should be suppler than this, perhaps by coming to recognize 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.¹⁷ 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 interme-

16. 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 securitization." 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 characterization of such sale, contribution, or other conveyance for tax, accounting, regulatory reporting or other purposes.

Id.; 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., Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199, 226-30 (2000); Lois R. Lupica, *Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic*, 9 AM. BANKR. INST. L. REV. 287, 310-22 (2001). This bill has had a long, rocky, and highly politicized path through Congress, and its eventual fate remains unclear. See, e.g., Riva D. Atlas, *Bill to Alter Bankruptcy Seems to Stall*, N.Y. TIMES, Oct. 19, 2001, at C1.

17. See, e.g., GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 12-57 (1987) (providing an overview of the evolution of these and related ideas).

diate 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.¹⁸ Reconceptualizing 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.¹⁹

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 securitization 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,²⁰ one crucial aspect of bankruptcy remoteness is that the SPV's powers, as set forth in its corporate charter or other organizational documents, be kept as limited as possible. Unlike with ordinary operating companies, whose charters

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

19. 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 reconceptualization that I suggest in the text.

Michael Hamilton had the initial insight that the question of true sale versus secured loan is a false dichotomy, with all of the seeming exactness of Linnaean taxonomy but none of its suppleness. See Michael D. Hamilton, *True Sale, Recourse and Taxonomy* (unpublished manuscript, on file with the Duke Journal of Comparative and International Law). 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, *supra* note 14, at 183–85, these other factors can also be accommodated within the structure of a graded category. See, e.g., STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND 139–65 (2001) (arguing that the results in seemingly conflicting right-to-counsel cases are in fact harmonized by the convergence of three graded categories).

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

20. For discussions of the procedures used in setting up SPVs, see Bjerre, *supra* note 10, at 265 & nn.17–18 and sources cited there.

typically provide for maximum flexibility,²¹ 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 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 securitization 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 securitization SPV. Compared to the tightly limited activities of a securitization SPV, the SPV 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 securitization lawyer nightmares.²²

Contrary to what one might think from a study of securitizations 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 securitization 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 securitization 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 securitization, in that its

21. *See, e.g.*, DEL. CODE ANN. tit. 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 organized under the General Corporation Law of Delaware").

22. 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 securitizations on non-consenting third parties: the greater visibility of effect is mirrored by the greater range of activity of the SPV.

activities are substantial and robust, and that there is therefore a realistic prospect of its bankruptcy.

This similarity between project companies and their odd bedfellows, securitization 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 securitization component, treating a project company as a securitization 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.²³ The two structures are agglutinated, or affixed to each other with a single point of intersection, and as a result, the securitization 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 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 securitization transaction are ordinarily

23. Heretofore the transactions have taken the form of multi-originator conduit transactions and, notably for the subject of this Symposium, the project finance transactions being fed into the conduits have included projects in emerging markets. See *Returning for more*, PROJECT FIN., Apr. 1999, at 24; see also J. Paul Forrester et al., *Securitization of Project Finance Loans and Other Private Sector Infrastructure Loans*, FINANCIER: ACMT, Feb. 1994, at 7, 7-10; *What heats the hot seat*, PROJECT FIN., Nov. 1999, at 29 (securitization 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 securitization transactions. See *infra* note 24.

payable by a large number of obligors.²⁴ However, nothing in principle prevents a project finance transaction from having a high number of obligors,²⁵ or a securitization 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.²⁶ From the standpoint of other law, too, both patterns of transaction draw deeply from the same wells: both implicate important questions about, for example, raising funds in public markets,²⁷ the power and treatment of trusts,²⁸ and choice of entity,²⁹ to say nothing of the need for exhaus-

24. The limitations on recourse discussed in Part I.A cause the securitization 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.

25. 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 essay, but the term also has a non-neutral rhetorical dimension that should not be ignored. *See infra* note 83 and accompanying text.

26. In a project finance transaction, the property interest is simply a security interest, while in a securitization 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 15 and accompanying text) should not be misconstrued as a declaration that there is no substantive difference between the two. *See, e.g.*, Thomas E. Plank, *When a sale of accounts is not a sale: a critique of Octagon Gas*, 48 CONSUMER FIN. L.Q. REP. 45 (1994); Thomas E. Plank, *Sacred Cows and Workhorses: The Sale of Accounts and Chattel Paper under the UCC and the Effects of Violating a Fundamental Drafting Principle*, 26 CONN. L. REV. 397 (1994) (also criticizing the *Octagon Gas Systems* case); Steven L. Schwarcz, 'Octagon Gas' Ruling Creates Turmoil for Commercial and Asset-Based Finance, N.Y. L.J., Aug. 4, 1993, at 1. *But see* David Gray Carlson, *The Rotten Foundations of Securitization*, 39 WM. & MARY L. REV. 1055, 1059 (1998) (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 13–19 and accompanying text.

27. *See, e.g.*, HOFFMAN, *supra* note 11, at 107, 431.

28. *Id.* at 77. Aspects of certain trust-related questions in U.C.C. Article 9 are discussed in Bjerre, *supra* note 10, at 303–06.

tively foresightful contract drafting. Moreover, in the international context, both patterns of transaction are concerned with legal techniques for managing currency risks,³⁰ 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.³¹

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 recognized 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 securitization, because of the vulnerability to bankruptcy of project finance SPVs.³²

Taken as a whole, the pervasiveness of these ranges of gray is instructive in itself, particularly in high-pressure, Wall Street deals such as these, in which certainty is at a premium. 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.³³ In the remainder of this essay I lay the groundwork for concluding that the same is true of another linguistic label, “consensual transaction.”

II. ANTI-ASSIGNMENT CLAUSES AND THE PROBLEM OF CONSENT

Project finance and securitization transactions also hold in common a number of commercial law doctrines, among which I focus

29. See, e.g., HOFFMAN, *supra* note 11, at 121–36.

30. *Id.* at 55–82.

31. See generally Steven L. Schwarcz, *The Universal Language of Cross-Border Finance*, 8 DUKE J. COMP. & INT'L L. 235 (1998).

32. See *supra* Part I.B.

33. Great advances on this subject have recently been made in cognitive linguistics and related fields. For important work in this area, see generally WINTER, *supra* note 19; LAKOFF, *supra* note 17. I develop some of these ideas in the context of the meanings of the term “property” in an earlier article. See Carl S. Bjerre, *Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 CORNELL L. REV. 305, 353–64 (1999).

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.”³⁴ 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 securitize 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 benefit from 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.³⁵ But if the anti-assignment clause is enforced, the securitization cannot go forward.
- (b) A host government signs a contract obligating itself to purchase the power or minerals, or to subsidize 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 lenders³⁶) without the host government’s consent. After a dispute with the host government, the lenders seek to extricate themselves

34. Other commercial law doctrines that raise parallel questions are explored, along with something more of their philosophical background, in a forthcoming article. See Carl S. Bjerre, *Commerce and Community: The Redistributionist Streak in Commercial Law* (unpublished manuscript, on file with the Duke Journal of Comparative and International Law).

35. For discussion of other reasons for which obligors may be justified in valuing anti-assignment clauses, see HOFFMAN, *supra* note 11, at 581; Bjerre, *supra* note 10, at 292–93.

36. 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 42–43 and accompanying text, this is not always the case.

from the transaction by assigning their rights to other lenders.³⁷

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 securitization 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 securitization 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 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.³⁸ For several decades already, U.C.C. Article 9 has overridden

37. 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.,* Manjeet Kripalani, *India Needs a Big Jolt of Energy Reform*, *BUS. WK.*, Dec. 3, 2001, at 38, 38 (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, *supra* note 10, at 303–06, but this fact is irrelevant to the anti-assignment clause point.)

38. *See, e.g.,* U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS, U.N. Doc. A/CN.9/SER.B/4, U.N. Sales No. E.01.V.4 (2001) [hereinafter UNCITRAL LEGISLATIVE GUIDE], at 120 ¶ 57 (tacitly recommending measures to permit the granting of security interests notwithstanding restrictions on assignment). On December 12, 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. United Nations Convention on the Assignment of Receivables in International Trade, *opened for signature* Dec. 12, 2001, G.A. Res. 56/81, U.N. GAOR, 56th Sess., art. 9(1), U.N. Doc. A/RES/56/81 (2002), *available at* <http://www.uncitral.org/stable/res5681-e.pdf> (last visited Mar. 5, 2002) [hereinafter UNCITRAL Convention]. Unlike U.C.C. Article 9, the UNCITRAL Convention does not affect the liability of the assignor for breach. *Id.* art. 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 of intellectual property, and those representing the payment obligation for a credit card transaction. *Id.* 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

anti-assignment clauses in certain accounts receivable,³⁹ 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.⁴⁰ The result is to elevate freedom of alienation over freedom of contract, making collateral available that would not be otherwise, and thus 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

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. *Id.* art. 40. See generally Spiros V. Bazinas, *Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade*, 9 TUL. J. INT'L & COMP. L. 259 (2001); Spiros V. Bazinas, *Multi-Jurisdictional Receivables Financing: UNCITRAL's Impact on Securitization and Cross-Border Perfection*, 12 DUKE J. COMP. & INT'L L. 365 (2002); Michel Deschamps, *The Priority Rules of the United Nations Receivables Convention*, 12 DUKE J. COMP. & INT'L L. 389 (2002); Bruce A. Markell, *UNCITRAL's Receivables Convention: The First Step, But Not the Last*, 12 DUKE J. COMP. & INT'L L. 401 (2002); Harry C. Sigman & Edwin E. Smith, *The Draft UNCITRAL Convention on Assignment of Receivables in International Trade: A Summary of the Key Provisions as Completion Draws Near*, 33 UCC L.J. 344 (2001).

39. U.C.C. § 9-318(4) (1994).

40. 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, *supra* note 10, at 296 & n.165, 301 & n.186; Thomas E. Plank, *The Limited Security Interest in Non-Assignable Collateral Under Revised Article 9*, 9 AM. BANKR. INST. L. REV. 323, 327–39 (2001). 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 securitization, see *infra* notes 84–86 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.

consent, and against which, indeed, it affirmatively sought to protect itself.⁴¹

The issue has broader importance to project finance transactions than the foregoing scenarios alone might imply. For example, when the transaction involves the privatization of a project that formerly was publicly operated,⁴² 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.⁴³ 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.⁴⁴ (Foreclosures are much more unusual in project finance transactions than are workouts,⁴⁵ but the assignment upon foreclosure issue remains nonetheless, representing the background entitlements against which workout negotiations are conducted.⁴⁶) And finally, because all of the key contracts of a project are generally a part of the collateral package, the anti-assignment issue also affects contracts wholly apart from the off-take contract.⁴⁷

41. In *Commerce and Community*, *supra* note 34, I root this dilemma in the broader conflict between the libertarian and utilitarian philosophical traditions.

42. Particularly with the move of many economies from centrally planned to market-driven models, privatization has become an important facet of the project finance world. *See, e.g.*, Loren Page Ambinder et al., *The Mirage Becomes Reality: Privatization and Project Finance Developments in the Middle East Power Market*, 24 *FORDHAM INT'L L.J.* 1029 (2001); *Chasing Power Deals*, *PROJECT FIN.*, July 10, 1999, at 26, 26 (quoting an observer as saying that the trend in privatizing infrastructure "is moving around the world").

43. 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.

44. "[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, supra* note 11, at 511.

45. As Hoffman points out, foreclosure only makes sense if the project as a whole, including the crucial contracts, is being sold as a package. *Id.* at 512. As one wit observed in describing the workout negotiations over the Euro Disney project, "there is not much of a market for second-hand, mechanical teacups." *Meltdown at the Cultural Chernobyl*, *ECONOMIST*, Feb. 5, 1994, at 65, 66. On renegotiation and workouts in project finance generally, see Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 *FORDHAM INT'L L.J.* 1319 (2001).

46. *See, e.g.*, Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

47. 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

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

As observed above,⁴⁸ securitization 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 securitization is not, and project finance transactions accordingly tend to have a more readily visible, more highly dramatic social impact than do securitization transactions.⁴⁹

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.⁵⁰ As such, international project finance transactions are inextricably linked to the longstanding controversies over FDI's effects on devel-

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, *supra* note 10, at 292–93 (describing bookkeeping and double payment concerns that, in addition to relationship concerns, can make anti-assignment clauses important).

48. See *supra* note 12 and accompanying text.

49. As noted at the outset of this essay, 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 securitization and other forms of financing, while very generally less visible and striking, are potentially as enormous as that of project finance.

50. One could attempt to argue that just as project finance is a form of FDI, securitization is a form of portfolio investment. This analogy holds to the extent that securitizations 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 8 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 securitization transactions do not fully rescue the analogy, because they are triggered only by restricted sets of events.

oping nations.⁵¹ 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,⁵² bring technology and know-how into the host country,⁵³ help contribute toward a better-trained, better-educated work force,⁵⁴ and, of course, often result in the providing to the population of 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.”⁵⁵ Sen’s book makes a powerful moral and philosophical case for evaluating the industrialization of developing economies not just in terms of material well-being, but also in terms of what he calls the population’s “capabilities.”⁵⁶ Under this rubric he places factors such as having a political voice,⁵⁷ being educated,⁵⁸ having civil liberties,⁵⁹ being free to live on traditional lands without displacement,⁶⁰ and other 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.⁶¹

51. For general reading on FDI controversies, see THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT: THE NEW POLICY AGENDA FOR DEVELOPING COUNTRIES AND ECONOMIES IN TRANSITION (1998); MICHAEL P. TODARO, ECONOMIC DEVELOPMENT 582–88 (2000); Eduardo Borensztein et al., *How Does Foreign Direct Investment Affect Economic Growth?*, 45 J. INT’L ECON. 115 (1998).

52. 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 63.

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

54. However, in many instances project sponsors may import their own expertise. *See, e.g.*, HOFFMAN, *supra* note 11, at 49–50.

55. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 14 (1999). Sen was awarded the Nobel Prize in economics in 1998.

56. *See, e.g., id.* at 18, 292–94.

57. *See, e.g., id.* at 149–59.

58. *See, e.g., id.* at 128–29.

59. *See, e.g., id.* at 148–49.

60. *See, e.g., id.* at 142–43.

61. *Id.* at 66.

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).⁶² 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 programs.⁶³

This essay 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 one example of the network of social effects that can be at stake. The project's operators proclaim that the project has had a number of favorable effects on the area,⁶⁴ but another side of the coin, according to published reports, is that the continuous

62. See, e.g., *infra* note 64 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.

63. 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 53–54 and accompanying text. On the other hand, this factor is neutralized 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, *supra* note 51, at 584; see also Catherine Pédamon, *How is Convergence Best Achieved in International Project Finance?*, 24 FORDHAM INT'L L.J. 1272, 1312 (2001) (noting that the UNCITRAL LEGISLATIVE GUIDE, *supra* note 38, "does not, for instance, provide for the placement of a minimum amount of work with local contractors").

64. 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 development programs to build a foundation for the community's future prosperity when the mine closes. See OK TEDI Mining, OTML at a Glance, at <http://www.oktedi.com/aboutus/index.php> (last visited Mar. 5, 2002).

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.⁶⁵

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.⁶⁶

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,⁶⁷ but of course much of the population of the developing world does not.⁶⁸ The widely-known case of the Three

65. Don Henry, *Leaving the Scene of the Mine*, AUSTL. FIN. REV., Dec. 28, 2001, available at 2001 WL 31902107.

66. *Successors Line Up for Ok Tedi*, SYDNEY MORNING HERALD, Dec. 2, 2000, available at 2000 WL 30110458.

67. 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 authorized to sign any agreements with [the sponsor] on their behalf," he said.

Legal Challenge Against PNG Government Bill on Ok Tedi Mine, PAC. ISLANDS BROADCAST ASS'N NEWS SERV., Dec. 14, 2001, available at 2001 WL 2825048.

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., *Enron in India, Generation Gaps*, ECONOMIST, Jan. 13, 2001, at 62; Salacuse, *supra* note 45, at 1351. In many cases, however, a project's effects will fall primarily on a minority and democracy will not be a panacea.

68. 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

Gorges Dam on China's Yang Tze River is an all too powerful example. When the journalist Dai Qing published a volume⁶⁹ protesting, among other things, the project's projected displacement of well over one million inhabitants⁷⁰ and its incalculable harm to Neolithic and Qing Dynasty archeological sites,⁷¹ the Chinese government banned the book and imprisoned her for ten months.⁷² 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,⁷³ and by recalling two well-known Western European project finance transactions, we can discern instructive parallels to some of the foregoing concerns. First, 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,"⁷⁴ is well known to have deeply disturbed the English (quite apart from having hurt nearby land values, triggered protests by English fruit growers, and the like) by damaging the physical and cultural insularity that had always been one of the country's points of pride.⁷⁵ And second, the Euro Disney theme park in

1.435 billion people live in societies characterized 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, *The Map of Freedom 2001*, available at www.freedomhouse.org/pdf_docs/research/freeworld/2001/map2001.pdf (last visited Mar. 5, 2002).

69. DAI QING, *YANGTZE! YANGTZE!* (Nancy Liu et al. trans., 1994) (1989).

70. See, e.g., Philip M. Fearnside, *Resettlement Plans for China's Three Gorges Dam*, in *DAMMING THE THREE GORGES* 34 (Margaret Barber & Gráinne Ryder eds., 2d ed. 1993); Fang Zongdai & Wang Shouzhong, *Resettlement Problem of the Three Gorges Project*, in *MEGAPROJECT: A CASE STUDY OF CHINA'S THREE GORGES PROJECT* 176 (Shiu-Hung Luk & Joseph Whitney eds., 1993).

71. See, e.g., Dai Qing, *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 *THE RIVER DRAGON HAS COME!* 124 (Dai Qing et al. eds., Yi Ming trans., 1998) (1998); Letter to Jiang Zemin Concerning Archeological Sites (Aug. 8, 1996), in *THE RIVER DRAGON HAS COME!*, *supra*, app. F, at 214.

72. Audrey Ronning Topping, *Foreword*, *THE RIVER DRAGON HAS COME!*, *supra* note 71, at xv, xxv.

73. SEN, *supra* note 55, at 6, 15, 20-24.

74. Richard Evans, *Financing the Channel Tunnel*, *EUROMONEY*, Mar. 1986, at 13, 13.

75. See, e.g., DREW FETHERSTON, *THE CHUNNEL: THE AMAZING STORY OF THE UNDERSEA CROSSING OF THE ENGLISH CHANNEL* (1997); Leigh Montville, *Invasion on Wheels*, *SPORTS ILLUSTRATED*, July 18, 1994, at 40, 41 (Tour de France penetrates England via Channel Tunnel and is viewed as invasion); Daniel Pederson, *Why Do Brits Hate the Chunnel?*,

Marne-la-Vallée, near Paris, has been widely reviled by Europeans seeking to resist what they see as American cultural imperialism.⁷⁶ 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,⁷⁷ 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.⁷⁸ 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 in 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,"⁷⁹ and though traditional Western law thinks of agency in the more restrictive sense of one person acting *for*

NEWSWEEK, May 9, 1994, at 43, 43 (quoting Prime Minister Palmerston as rejecting an 1858 tunnel proposal because it would "shorten a distance we already find too short"); Christopher Redman, *An Island No More*, TIME, Nov. 12, 1990, at 49, 49. As one commentator writes,

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.*

Bruce Wallace, *Tunnel Vision*, MACLEAN'S, May 9, 1994, at 29, 29 (emphasis added).

76. See, e.g., *Euro Disney: The not-so-magic kingdom*, ECONOMIST, Sept. 26, 1992, at 87, 88 (reporting that French intellectuals call park a "cultural Chernobyl"); John McGrath, *The lawyers who rebuilt EuroDisney*, INT'L FIN. L. REV., May 1994, at 10, 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"); Jolie Solomon, *Mickey's Trip to Trouble*, NEWSWEEK, Feb. 14, 1994, at 34, 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 sanitized 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." Andrew Phillips, *Where's the Magic?*, MACLEAN'S, May 3, 1993, at 47, 47. See generally ANDREW LAINSBURY, *ONCE UPON AN AMERICAN DREAM: THE STORY OF EURO DISNEYLAND* (2000).

77. See *supra* notes 55–63 and accompanying text.

78. 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 Jolie Solomon, *A Sudden Surrender in Virginia*, NEWSWEEK, Oct. 10, 1994, at 46, 46 (reporting on the demise of Disney's plans for an American-themed park near Virginia's most hallowed Civil War battlefields).

79. See THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 19 (C. T. Onions ed., 1966).

another, perhaps this is only because we have generally been able to take for granted our power to act *for ourselves* in the first place.⁸⁰ 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,⁸¹ 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.⁸² (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.⁸³)

In securitization 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 securitization transactions on unsecured creditors of the originator.⁸⁴ Greatly simplifying the debate,

80. 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 § 1 (1958); RESTATEMENT (THIRD) OF AGENCY § 1(1) (Tentative Draft No. 2, 2001); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 3 (2d ed. 1990).

81. 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 privatize an existing one, *see supra* note 42 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 40. Additional factors such as funding project subsidies at the expense of other government budget items, *see* text accompanying note 63, 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, *supra* note 38 (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 harmonizing project finance law, *see* Pédamon, *supra* note 63. *See also* Don Wallace, Jr., *UNCITRAL Draft Legislation Guide on Privately Financed Infrastructure Projects: Achievements and Prospects*, 8 TUL. J. INT'L & COMP. L. 283 (2000).

82. *See supra* notes 66–72 and accompanying text.

83. 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.

84. *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 23–30 (1996); Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595 (1998).

securitization's defenders take the position that unsecured creditors are not harmed when the receivables are transferred for fair value,⁸⁵ while securitization's critics maintain that there may nonetheless be an unacceptably detrimental alteration of the unsecured creditors' risks.⁸⁶ The principal lesson of that debate for purposes of this discussion is that it centers 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, labor, 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 categorization and, by extension, of moral philosophy. Is there a point at which the negative externalities of a transaction become so heavy that

LoPucki describes securitization 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 strategy," though LoPucki does not discuss them as such. LoPucki, *supra*, at 20–23. The sponsor/SPV arrangement used in project finance, *supra* notes 9–11 and accompanying text, to the extent recourse against the sponsors is limited, is largely a variation on classic parent/subsidiary arrangements.

85. Where this is not the case, the argument continues, the doctrines of fraudulent conveyance or recharacterization and other sanctions should suffice to protect unsecured creditors. See, e.g., STRUCTURED FINANCING TECHNIQUES, *supra* note 5, at 10–11, 57–58; Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999).

86. See, e.g., Lupica, *supra* note 84, at 629–31.

one can no longer candidly label the transaction with the morally comforting word “consensual”?

Project finance, securitization and other large business transactions are generally considered to be consensual transactions. But that label has been non-problematic 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 securitization 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 marginalized 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.⁸⁷ But, by contrast to both of the foregoing examples, and particularly in light of the social issues sketched in Part III, project fi-

87. 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* E. ALLAN FARNSWORTH, *CONTRACTS* 321–61 (3d ed. 1999). Lynn LoPucki provocatively casts ordinary secured transactions in a similar mold: “Security is an agreement between A and B that C take nothing.” Lynn M. LoPucki, *The Unsecured Creditor’s Bargain*, 80 VA. L. REV. 1887, 1899 (1994). 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.” Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1147 (1979).

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.

nance 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 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 impulse to accomplish good results will frequently clash with the libertarian’s insistence on autonomy, agency and consent. 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, as I note at the end of Part III, has heretofore been so largely neglected.