The Effect of State Immunity on Project Finance Guarantees

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Project finance is said to be the oldest approach to structured finance, others being acquisition finance and securitization (Parra [2003, Exhibit 1]). Structured finance varies from ordinary lending mechanisms by involving debt that is mobilized and established on a limited/non-recourse basis. Unlike other kinds of structured finance, project finance does not rely on asset values but on greenfield projects generating cash flow for debt repayment (Hoffman [1975]). In contrast acquisition finance aims at purchasing ongoing projects, and securitization seeks project receivables (Parra [2003]). See Exhibit 1.

Ever since the 19th century, authors have been describing project finance from their respective expertise in economy, management, law, and banking. Its most formal organization-based definition is that of the Organization for Economic Cooperation and Development (OECD), describing project finance as follows: "Financing of a particular economic unit in which a lender is satisfied to consider the cash flows and earnings of that economic unit as the source of funds from which a loan will be repaid and the assets of the economic unit as collateral for the loan."[1]

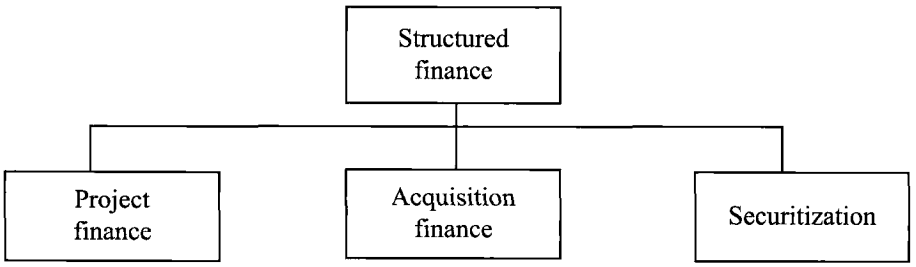
Project finance, therefore, has non-recourse or limited recourse to the sponsors and the ability to mobilize debt as key features that make it different from general conventional lending and from other methods of structured finance by virtue of its project-based workings rather than asset-based structure. The non-recourse or limited recourse basis appeals most as it is project revenue that secures lenders, not sponsors' creditworthiness or project's asset values, with project company third-party contracts being available by way of collateral, for conventional project assets are of no practical value until the project is ready to operate and start generating income. This makes risk mitigation an indispensable factor for commercial lenders.

RISK STRUCTURING PROCESS

As an intrinsic feature of project finance, lenders and sponsors, who are most at risk, need to "structure"—that is, identify, allocate, and mitigate—project risks early on. They start by profiling every single risk according to anticipated frequency and severity (Fight [2006]). Risk identification precedes risk allocation, which requires the party best able to control a risk to be responsible for any loss to cash flow (Parra [2003]). Agreement on the most appropriate risk control and mitigation methods is usually by way of a contract.

Parties to risk structuring—sponsors, contractors, operators, host governments, output purchasers, and suppliers—all take part in allocating risks so that each risk

EXHIBIT 1
Three Approaches to Structured Finance



Source: Parra [2003].

matches the appropriate party's role in the project. Those responsible for project-based activities, such as construction, raw materials supply, operation, or performance management, would mitigate commercial risks, while governments are best able to handle political risks, for it is their sovereign actions, policy, and decisions that cause them.

ROLE OF GOVERNMENTS

Countries, especially those unable or unwilling to invest substantially will give financial support to the purveyors of private investment in housing, domestic agriculture, export-oriented endeavors, or vital infrastructure, not least to keep their debt ratings low (Dailami [1997]). Such financial support is even more necessary for infrastructure projects, for which lenders look for guarantees to protect their investment against country-specific risks that host governments are best equipped to control and bear. Public guarantees are indirect financial assistance from host governments indemnifying projects against risks raised by—their own—sovereign actions, ensuring that states and their subordinate entities, such as enterprises or lower-level authorities, do not affect the flow of money eventually due to investors (Dailami [1997]).

This study sets out to deal with the consequences, untoward or otherwise, of states providing guarantees and undertaking commitments towards project financing. Historically speaking, states, as privileged subjects under international law, could not be subject to adverse rulings, nor were any enforcement measures available against them. What happens, then, if the government, in breach of project guarantee agreement, exercises the defense of immunity? Will courts grant immunity to such a state and refuse to have jurisdiction over the case? If not, will they be able to apply executive measures of constraint against a state's property in favor of a private party judgment creditor? We aim to give a thorough and transparent definition of state immunity in its historical context, point out recent developments, list some legal issues, and endeavor to show how some countries, including the United Kingdom, Malaysia, and Singapore, deal with these, in both legislation and court practice.

SOVEREIGN IMMUNITY

According to Black's Law Dictionary, immunity means protection or exemption, sovereign immunity being the exemption from any lawsuit or execution of elements subject to a sovereign, including central government, states, political subdivisions, and so on, for them to function effectively on sovereign behalf.

Historical Background

In 1811, the first-ever sovereign immunity came before a U.S. District Court.[2] With no previous record of "explicit state immunity" existing in the classical canon, scholars believe that the concept grew from within domestic judicial practice, with the United States as its pioneer (Moursi [1984]). A thorough study of recorded cases of the kind during earlier times[3] reveals that state immunity appears to be much like traditional diplomatic immunity whereby elements of a foreign state, personal or physical, transit into the territory of a local forum.

State immunity per se, the legal status of a state whose activities somehow affect such a forum, arose later. However different previous concepts of immunity may have been from our present views, rulings even in those days tended to distinguish between public and private acts of state, attaining impressive, if unstated, levels of restrictive doctrine (versus absolute).[4] What follows are different ways that various doctrines treat sovereign immunity.

Absolute Doctrine of Sovereign Immunity

Under the absolute doctrine of sovereign immunity, a state is completely exempt from civil liability in foreign courts. The *Porto Alexandre* case of 1920 is said to be the zenith of acceptance of the doctrine by British courts, since it had raised misgivings, even then, about public property used for commercial purposes. None of this prevented the court from granting immunity to, in this case, a German vessel that the Portuguese government had first condemned then used for trade (Moursi [1984]).

Restrictive Doctrine of Sovereign Immunity

While the "absolute" version exempts any act of government, commercial or otherwise, from jurisdiction, restrictive doctrine distinguishes between acts of government by their nature, conferring immunity only to genuine exercise of sovereign power. While a U.S. court, in dealing with its earliest case ever, had implied a restrictive view, it was the Court of Appeal in Brussels, in 1857, that awarded damages against the Peruvian government, in spite of its claim of immunity (Moursi [1984]), the rationale being that foreign states were comparable to individual foreigners when entering the marketplace (Wood [1995]).

Recent Trends

The acceptance of restrictive doctrine, by now largely universal, coincides with increasing involvement of states in commercial activities; it started in Belgium, with Italy, Egypt, and others following. Statutes evolved to free courts to apply the doctrine, the United States being the first country to enact state immunity, in 1976, followed by the U.K., in 1978, then Singapore, South Africa, Pakistan, and Australia, respectively. Absolute immunity, however, continues to inform court rulings in, for instance, Bulgaria, Poland, Russia, Romania, and the Czech Republic (Gaukrodger [2010]). The restrictive doctrine also owes its worldwide spread to the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States.

PRINCIPAL LEGAL ISSUES

As with sovereign immunity in general, the question of its impact on project finance, in particular, remains unanswered. Two central issues arise when adopting the general rules of sovereign immunity for the purpose of project finance: first, whether or not guarantees provided by host governments in favor of projects are immune from the jurisdiction of foreign courts, and second, whether any forum can actually enforce a ruling against a host government's properties. Also, how are we to distinguish between genuinely sovereign and outright commercial acts or properties?

We should not forget to mention that while lawsuits over state guarantees can be brought before both domestic and foreign courts, sovereign immunity would, inevitably, arise in the latter; yet a domestic forum would also have to consider granting it. Black's Law Dictionary distinguishes general sovereign immunity from that offered to foreign states; a state may well enjoy general sovereign immunity from tort liabilities in its own courts. Yet, the notion and scope of sovereign immunity is not as fundamental to domestic courts as it is to foreign courts, for self-control over domestic courts helps governments to admit such actions more quickly (Wood [1995]). According to this view, and in light of the commercial nature of project financing, it is unlikely for a home government to allege immunity from local forums. Rather it may refuse that a successful judgment be enforced against it but instead satisfy the claim as a matter of course (Wood [1995]). As we study sovereign immunity in foreign courts, we also need to distinguish between a state and its political subdivisions and state-owned companies. Among these, only states are subjects of sovereign immunity, being the ones to provide the guarantees whose infringement raises the issue of immunity.

State Immunity from Jurisdiction

There is a distinction between immunity from jurisdiction over a foreign state and immunity from

enforcement measures or execution, preventing one forum state from imposing measures of constraint on another. The U.K.'s State Immunity Act of 1978, in the same vein, makes such distinction in Sections 1 and 13, respectively. Most countries, including our selected jurisdictions, now recognize the restrictive approach, allowing jurisdictional immunity only for genuine acts of government—*jure imperii* (sovereign acts), not *jure gestionis* (commercial or private activities).

The U.K.'s Act of State Immunity (SIA), while upholding immunity from jurisdiction, enumerates exceptions in Sections 2 to 10, among them commercial transactions, in Section 3(1) entered into by the state. Referring to the SIA, Section 3(3), where transactions for provision of finance and related guarantee and indemnity are defined as commercial transactions, a state guarantee, being a financial obligation of a state to foreign lender and pertaining specifically to project finance, is considered a commercial transaction and thus, not exempt from jurisdiction of foreign courts.

To decide whether a transaction is commercial or governmental, a test of "nature" and not "purpose" seems relevant as otherwise de-immunization would depend on the state's proceedings in conducting the transaction. For example, the originally military purpose of a loan contract will render such a contract as governmental, regardless of such transaction being commercial in nature (Gaukrodger [2010]).[5] In applying a nature-based test in respect of state guarantee, the question would be whether such guarantee is of commercial nature or not. In other words, is a government's attempt to provide such guarantee, by its nature, part of the exercise of its sovereign authority or is it the same as private person engaging in commercial transactions? If by purpose, a state guarantee—especially one against political risk to support public infrastructure, such as in power generation—to enable public tasks is a sovereign action. Under the nature test, however, state guarantees, providing financial assistance for project finance, are commercial transactions.

State Immunity from Enforcement Measures

Immunity from measures of constraint is usually granted to foreign states,[6] even under the restrictive approach, with foreign courts holding it as more intrusive into another nation's sovereign authority and responsibilities than a mere jurisdiction, which makes scholars characterize it as "the last bastion of state immunity" (Reinisch [2006]).

To define the property for non-sovereign purposes is a challenge, rendering the decision to grant or deny enforcement measures a difficult judicial matter. Section 13 of the U.K.'s SIA upholds the general principle of immunity from enforcement measures with two exceptions in subsections (3) and (4) as written consent of the state or access to a property that is for the time being in use or intended for use for commercial purposes, in order to achieve the enforcement of a judgment or arbitration award or an action *in rem*, for arrest, detention, or sale against a state property.

Dismissal of Immunity from Enforcement Measures

Court practice and domestic norms in most countries, as well as in international law, require pre-conditions to deny immunity from enforcement measures, which are almost impossible to meet—acquisition of executive authority's permission being among them in, for instance, Greece, Italy, and Croatia.[7] The U.K.'s SIA renders case outcomes merely dependent upon proving commercial purposes concerning property. That, in itself, as the minimum basis for exemption from immunity, gives rise to the most difficult evidentiary challenges, as international consensus regards state property as serving sovereign purposes (Wiesinger [2006]). The burden of proving otherwise thus shifts to the plaintiff. Section 5 of the Act, furthermore, accepts as sufficient evidence a declaration by the head, or acting head, of a diplomatic mission in the United Kingdom that a property is not in actual, or future, commercial use.

Properties most likely to be available for attachment tend to be accounts with foreign banks, such as those of a host country's central bank, of its state entities, embassies, and diplomatic missions, or of the state itself. While central bank accounts, according to the U.K.'s SIA, Section 14 (4), are immune, other state accounts may be subject to the enforcement of court rulings, whatever their actual or intended purposes. Because bank accounts may serve dual purposes, as distinct from other types of property, plaintiffs will find exclusive commercial use or purpose difficult to prove (Wiesinger [2006]). Yet, U.K. courts have refused to grant dual-purpose accounts immunity from enforcement (e.g., *Alcom Ltd versus Republic of Colombia*). Embassies, diplomatic missions,

central banks, and state entities also own other types of potentially attachable properties that are still under the same rules as bank accounts. Can a plaintiff attempt to attach any such state-entity property in support of rulings against its government, if such entities do not tend to act in sovereign capacity and their structures and functions are distinct from those of the state itself? Litigants may, arguably, take recourse to these when their owner government is subject to proceedings, provided that it actually uses these commercially, or intends to, seeing that state entities are owned by the state.

Last but not least, there exists the real problem of countries' reluctance to subject states' properties to pre-judgment attachments. Such interim orders, although crucial for the security of any likely future object of execution, have not so far been recognized against state properties.[8] Section 13 (4) of the U.K. SIA prohibits such attachments (giving of relief), except with prior written consent. Without such injunctions, it is hard to execute against such properties whose uses states will likely switch from "commercial" to "public," particularly so with bank accounts, rendering any dispute against a government on any issue almost fruitless. We need to examine some subordinate issues next, in this context, such as waiver of immunity, jurisdictional nexus, and enforcement of foreign judgments.

SECONDARY ISSUES

Waiver of Immunity

Under, for instance, the U.K. SIA, Section 2 (1), a state's submission to another's jurisdiction results in its de-immunization from particular proceedings, amounting to express consent to jurisdiction. Sensitivity of enforcement measures against state properties, however, have made even the U.K. (Section 13, 3) require explicit consent for waivers from such immunity to take effect, while other countries continue to accept these as being implied (Wiesinger [2006]).

Jurisdictional Nexus

A reasonable connection might be required to exist between a forum country and the cause of proceedings (Wood [1995]), such as the place of action, the nationality or residency of the parties concerned, or the issue itself (Foakes and Wilmhurst [2005]). Jurisdictional nexus is not, however, required under U.K. legislation.

Enforcement of Foreign Judgment

For enforcement of foreign judgment to be sought, relevant local laws must be considered. In the U.K., for instance, when dealing with sovereign immunity, courts tend to deal with jurisdictional issues of the respective forum, before ruling on enforcement (Section 31 of U.K. Civil Jurisdiction and Judgment Act 1982), applying, in doing so, the U.K.'s SIA, rather than immunity regulations in force in the forum country (Wood [1995]).

Asian Countries' Contributions

Minor Asian involvement in the formation of international law on state immunity is due partly to legal non-recognition of many Asian nations by Europeans during their formative stages, prior to World War One and also due to the then-undeveloped records on rulings throughout Asia (Sucharitkul [2005]). The resolution in Europe of state immunity coincided with the nearly complete abolition of functional independence of East Asian nations by Western colonial expansion, with virtually no case ever appearing under Asian jurisdiction (Sucharitkul [2005]).[9] Let us look at more recent developments in two Asian countries, Malaysia and Singapore.

Malaysia. Malaysian courts appear to have ruled on only three cases involving state immunity, beginning with the case of *Hai Hsuan/U.S.A versus Young Soon Fe* in 1950 under their predecessors. Their practice since seems to have followed British law from absolute toward restrictive doctrine. There being no enactment as yet of state immunity, we need to confine our examination to court cases, such as in *Village Holding Sdn. Bhd. versus Her Majesty the Queen in Right of Canada* in 1988, the hallmark of absolute sovereign immunity in Malaysia in the late 20th century,[10] contrasting the latter case with *The Commonwealth of Australia v Midford (Malaysia) Sdn. Bhd* in 1990.[11] Malaysia has yet to establish a judicial precedent for the definition of, as well as determine the applicable test for, commercial transaction.[12]

Singapore. Singapore has thus far only been involved in this debate by way of its national legislation, the State Immunity Act of 1979, based upon that of the U.K. The Singaporean Act mirrors that one, section by section. It has yet to be tested in court practice.

CONCLUSION

As regards jurisdictional state immunity, foreign project investors would have no difficulty in demonstrating the commercial nature of a state guarantee. With respect to enforcement, however, creditors are not as likely to achieve anything, as rules of state immunity tend to be rather stricter towards execution and attachment of a state's properties to satisfy judgment against it. In particular, the description by International Law Commission Special Rapporteur Professor Sucharitkul of enforcement measures as "the last bastion of state immunity" accentuates its meddlesome nature, which serves to protect a sovereign state's authority to maintain its ability to achieve public objectives, in line with sovereign responsibilities. Restrictive doctrine of state immunity, yet again, steps in to limit the extent to which states are entitled to immunity by preserving a creditor's right to prove the non-sovereign purpose of state property in order to seek enforcement of an already-obtained favorable judgment.

The purpose test, however, is the most difficult hurdle to overcome when challenging state immunity from execution; for the burden of proof of a property being used for entirely commercial purposes shifts to the plaintiff. The odds against plaintiffs providing such evidence are immense, especially under the U.K. State Immunity Act, whereby certification by a head, or acting head, of a diplomatic mission in the United Kingdom that a property is not in actual or future commercial use is sufficient evidence. The absolute exemption of central bank properties from execution, failure to uphold pre-judgment attachments against state properties, and the standard consideration of mixed bank accounts as sovereign purpose property increase the likelihood of creditors not getting relief from losses caused by state failure to abide by guarantees.

To sum up, even when a judgment against state immunity is awarded, it remains difficult for investors to prove wholly commercial purposes of state properties. An effective state guarantee means that a foreign investor will be able to hold a state guarantor to its agreement as well as ask tribunals to rule in his favor against a defaulting government. Guarantees are likely to be ineffective if they allow the defense of immunity. For a government guarantee to duly serve project finance purposes, it must leave no room for a state to renege on it, or else projects will lose financial credibility by having to enter into court cases and encounter the defense of immunity in consequence.

Apart from these general conclusions, the lack of Asian countries' contributions to state immunity rulings has not helped foreign investors change their adverse view of Asian investment destinations. Jurisdictional indifference by Asian courts on the issue constitutes a further legal gap. While uncertainty may not directly contribute to any failure of projects in seeking redress in Asian courts, it helps render Asian countries "legal hazard zones." The historical development of Asian legal practice has not only resulted in lack of any early precedents from Asian courts, but also in European priorities in shaping state immunity. Multilateral interaction within Asia may help pioneer future international precedents on state immunity, not least through enacting, and ruling on, state immunity Acts. Asian countries have, so far, adopted restrictive state immunity, the U.K. and the U.S. having been their models. The dependable application of restrictive state immunity under law and in court practice might well encourage international project finance to further focus on Asia.

RECOMMENDATIONS

- *Waiver of immunity clause.* The first, and best, way to deal with state immunity is for project investors to require guarantor states to include waiver of immunity clauses in guarantee agreements, thereby assuring lenders that those governments' fiscal reserves would be available and that their undertakings would be enforceable if the issue of compliance were to arise. Governments may reluctantly grant these waivers for the sake of indispensable infrastructure projects. The distinction between a waiver from jurisdiction and that of enforcement measures does merit close attention.
- *Allocation of earmarked assets.* This is another means to ensure enforceability of state guarantees. For a state to grant such privileged access to property, projects must be of such overriding importance that the state will allocate properties for possible attachment by lenders.
- *Dispute resolution clause.* Such a clause automatically subjects reneging states to the jurisdiction of an agreed venue, whether it be an international tribunal or a foreign forum, such consent implying acceptance of its jurisdiction. The mere insertion

of a dispute resolution clause, thereby removing immunity from jurisdiction, does not automatically lift immunity from execution as well; it requires explicit consent to gain actual jurisdiction over state assets.

- *Involvement of multilateral agencies in a lenders' consortium.* The very recent case of the Chad–Cameroon Pipeline has shown that including multilateral lending agencies, the World Bank in particular, among project lenders discourages host countries from reneging, which would put any future access to international finance at risk (Arbogast [2008]).
- *Multilateral banks and export credit agency guarantees.* Unlike state guarantees, those issued by international agencies against political project risks offer foreign investors genuine recourse. The cost of such business-based guarantees will be higher than state-issued ones, which are usually free of any charge to project owners, but the international agencies tend to furnish more reliable financial support. One such example is OPIC's political risk guarantee of $60 million for a Peruvian power project in 1996 (Dailami [1997]).
- *Policy reform programs versus financial support.* A government that provides financial support, such as a guarantee, to credible foreign project investors indicates its great need for, and overriding goal of, investment potential. Experience shows, however, that macro-economic stability, adequate tariff regimes, and a reputation for contractual reliability are even better protections for foreign investment than outright financial support (Dailami [1997]). Such an environment will guarantee, by its very reputation and based on likely investor experience, successful project outcomes more than any formal financial undertakings ever could.

This leads us to contemplate "trust"—in a sense that includes, but also exceeds, the strict legal and financial meaning of the term—needed between investors and host governments, always allowing for the unexpected, even in the most stable situations. It is in the absence of such trust that project backers seek avenues of redress against government sovereign actions, making investors (and this study for that matter) deal with state immunity and its implications. The more a state—and emerging society in particular—is in need of infrastructure project finance, the more it may be likely to default at a time of political or financial disaster and then be in need of all the protection that a defense of state immunity and its varied implications can give. The more-effective project finance is likely to be, within the parameters of predictable procedural difficulties, the fewer adverse implications of state immunity to project finance will materialize. It may well be true that "he governs best who governs least," for such leadership is most likely to provide and maintain the kind of environment that we were at pains to describe earlier as being most conducive to effective and well-managed international project finance.

ENDNOTES

[1]See the Agreement on Guidelines for Officially Supported Export Credits in Respect of Project Finance Transaction http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TD/CONSENSUS%2898%2927&docLanguage=En.

[2]In that case, *The Schooner Exchange v M' Faddon & others* (called The Schooner Exchange, 1812, 7 Cranch 116), the plaintiff's claim was dismissed, based on the immunity granted to the French government. The Schooner Exchange case, having been the primary case in the realm of sovereign immunity, is consistent with the—historically more recent—restrictive approach based on Chief Justice Marshall's reasoning that immunity was based on an implied voluntary waiver of territorial jurisdiction by the local state, not that there was a rule under international law whereby foreign states enjoyed absolute immunity. In other words, a state's immunity from territorial jurisdiction can be construed only if voluntarily granted to that state by the local forum (Moursi [1984]).

[3]The Prins Fredrik case (1820, 2 Dods 451), Duke of Brunswick v. King of Hanover (1848, 2 HLC 1), DE Haber v Queen of Portugal (1851, 17 Q.B. 171), Charkieh (1873, L.R 4 A & E 59), The Parliament Belge case (1880, 5 PD 197).

[4]As Lord Brougham, in the case of Duke of Brunswick v. King of Hanover (1848, 2 HLC 1), asserted, "... it ought to have been shown that there were private transactions, in order to make it possible that the court could have [had] jurisdiction" (Moursi [1984]).

[5]This is well established in the case of *Empire of Iran,* where concerns about expansion of immunity derived from exercising the purpose test were explained: "[T]he distinction between sovereign and non-sovereign cannot be drawn according to the purpose of state transaction and whether it stands in a recognizable relation to the sovereign duties of the

state. For, ultimately, activities of the state, if not wholly, then to the widest degree, serve sovereign purposes and duties ..." (Gaukrodger [2010]).

[6]The inviolability of state property for sovereign purposes, as an international rule, was first adopted by the Constitutional Court of Germany in 1977 (65 ILR 146), ruling in the case of *Philippine Embassy Bank Account* that "there is a general rule of international law that execution by the state having jurisdiction of a judicial writ of execution ... is inadmissible without assent by the foreign state insofar as those things serve sovereign purpose of the foreign state at the time of commencement of the enforcement measures" (Gaukrodger [2010]).

[7]Nevertheless, in some rare cases, courts may be reluctant to grant immunity, such as, for example, in the ruling on *Societe' Europe'enne d'Entreprises en Liquidite' volontaire (SEEE) v. Yugoslavia*, the so-called Dutch Immunity Case of 1973 (65 ILR 356), which upheld that "International law is not opposed to any execution against foreign state-owned property situated in the territory of another state" (Reinisch [2006]).

[8]Nevertheless, court rulings in such countries as Belgium, the Netherlands, Germany and Switzerland have been in support of pre-judgment attachments (Wood [1995]).

[9]Asian countries, however, being regular beneficiaries of state immunity since then, have played their role in evolving and crystallizing customary rules through their political subdivisions, organs, and state properties, by being a party to, or the subject of, European lawsuits. Since their independence and along with their standing in the UN, they have been very active in shaping international law through ILCs (International Law Conventions) and through taking part in decision making within UN organizations (Sucharitkul [2005]).

[10]In arguing his ruling, Justice Shankar stated that, "so far as a foreign sovereign is concerned, I hold that section three of our Civil Law Act [of] 1956 leaves no room for any doubt that we in Malaysia continue to adhere to a pure absolute doctrine of state immunity. ..."

[11]Gunn Chit Tuan, SCJ, while granting immunity to the state of Australia held that "we were of the view that the acts of the two Australian Customs officers could not be classified as 'trading or commercial' and agree that the exercise of function of the customs arm of the Australian Government could not be classed as *acta jure imperii*. ..."

[12]Malaysia has, however, presented its views on the subject, stating that "both the nature and the purpose tests should be taken into account in determining a commercial transaction, as the nature criterion alone does not always permit a court to reach a conclusion."

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analysis. The Value for Capital framework includes components that are important for both policy objectives and economic efficiency, such as "additionality," project output, possible externalities and multiplier effects, and the effect of the proposed guarantee on national debt capacity. Most generally, the article makes the case that a Value for Capital framework should also seek to connect to public discussion and debate wherever possible.

Improving the Bankability of a PFI Financing Application 78

Xianhai Meng and Noel James McKevitt

Due to the current economic and financial crisis, it has become increasingly difficult for Private Finance Initiative (PFI) bidding consortiums in the U.K. to obtain debt capital from financial institutions. Based on interviews with experienced financial professionals in this research, 50 key factors in five positioning groups are identified in terms of their impact on the bankability of a PFI bidding consortium's funding application. The analysis of follow-up survey results further ranks the significance of the 50 key factors, among which 27 factors are recognized as more important than others. During the development of funding applications, bidding consortiums can use the key factors identified to effectively improve the overall bankability of their proposals.

The Effect of State Immunity on Project Finance Guarantees 88

Nazanin Rasekh and Siti Naaishah Hambali

Among the political risks faced by project finance investors is state immunity, particularly in developing countries. Government support agreements, or state guarantees in short, are contractual commitments of the host government with project investors, provided to protect projects against risks of a political, administrative, and public management nature. Such guarantees cease to function when governments fail to fulfill their undertakings. When investors bring a lawsuit before a foreign court to seek redress, governments will very likely plead immunity. Historically, states could not realistically be sued abroad and there were no enforcement measures available for investors to gain relief. Given the fact that investors usually avoid the jurisdiction of local courts as a result of unfamiliarity with local procedures, partiality of those local courts, and corruption or unenforceability of rulings, what are their prospects of prevailing in a foreign forum? What happens if the government, in breach of a project guarantee agreement, exercises the defense of immunity? Will courts grant immunity to such state and refuse to have jurisdiction over the case? If not, will they be able to apply executive measures of constraint against the state's property in favor of private party judgment creditors? The development of rules of state immunity has enabled the courts to de-immunize commercial acts of government, although enforcement of rulings to be backed up from state properties remains an obstacle to some extent.

Roadmap for Power Sector Reform in Nigeria 2010: *Out of the Dark into the Dark Ages* 96

Balkisu Saidu

At a time when most countries in the world, developed and developing, are moving towards strengthening their electricity supply industries (ESIs) via the use of "green" energy sources and are moving away from over-reliance on fossil fuel as the primary source of generation, in August 2010 Nigeria launched a "roadmap" for the reform of its ESI that is predominantly reliant on fossil fuel as a driver of the reform. The rationale behind the policy choice, as canvassed by President Goodluck Jonathan, is that "the high capital costs required to implement commercial power generation through these alternate fuel sources" is too enormous for the federal government to bear. However, some important non-cost aspects of the industry, such as the finite nature of fossil fuel, the volatility of the geographical location where it is concentrated, and the impact of its use on the environment, appear to have been discounted in the analysis leading to the policy choice. This article applies the non-statistical multivariate methodology