MESSAGE FROM THE VICE-CHAIR AND NEWSLETTER EDITOR

Get Involved!

Get involved with your Committee. The Committee leadership values and encourages your participation. If you would like to contribute to the next newsletter, please contact Vice-Chair and Newsletter Editor, Hernán D. Camarero (camarero@rctzz.com.ar). The next issue of the newsletter is planned for September 16th, 2016.

The Section of International Law is accepting panel proposal for the 2017 Spring Meeting!

The Section’s 2017 Spring Meeting will take place on April 25-28, 2017, at the Capital Hilton in Washington, DC and the Section is accepting panel proposals. Each proposal must be supported by a Section Committee, following the guidelines already sent by e-mail to you. Please consider the theme “New Leaders, New Laws: 2017 and Beyond” when drafting your proposals.

THE DEADLINE FOR PROGRAM SUBMISSIONS IS JUNE 30, 2016.

In this Issue

In this issue you will find several updates on trending legal issues. We hope you enjoy the topics below submitted by fellow committee members:

(i) An article on the Brazilian legislation on actions of unavailability of goods, values and rights to possession or ownership and all other real or personal rights directly or indirectly held by individuals or legal entities subject to sanction by United Nations Security Council’s resolutions, by our frequent contributor, Walter Stuber, Walter Stuber Consultoria Jurídica;

(ii) An article about trade finance in Romania, by Sabin Volciuc-Ionescu, Volciuc-Ionescu; and

We hope that you find this Newsletter to be informative and interesting.

Hernán D. Camarero  
Vice-Chair  
Newsletter Editor

International Financial Products and Services Committee  
ABA Section of International Law

The articles in this Newsletter are for general information purposes only and not for the purpose of providing legal advice and should not be relied upon or treated as a substitute for legal advice. Note that statistics used in any of the articles in this newsletter are current as of the date of its writing and not necessarily the date of publication.
ACTION OF UNAVAILABILITY OF GOODS, VALUES AND RIGHTS AS A RESULT OF THE UNITED NATIONS SECURITY COUNCIL’S RESOLUTIONS

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Law No. 13,170, of October 16, 2015 (Law 13,170/2015) regulates the action of unavailability of goods, values and rights to possession or ownership and all other real or personal rights directly or indirectly held by individuals or legal entities subject to this kind of sanction for resolutions of the United Nations Security Council (UNSC). The Brazilian Civil Procedure Code is subsidiary applicable to this matter. This law is already in full force and effect.¹

I. General Provisions

The action of unavailability of goods, values and rights arises from the act that incorporates the UNSC resolution to the Brazilian legal system. The declaration of unavailability will lead to the invalidity of any acts of disposition of such goods, values and rights, except the rights of any third party in good faith.

The resources declared unavailable may be partially released for the payment of personal expenses necessary for the livelihood of the person concerned and his/her family, to guarantee individual rights contemplated by the Brazilian Federal Constitution or for compliance with provisions laid down in UNSC resolutions.

The provisions of Law 13,170/2015 may be used to meet the demands of international legal cooperation coming from other jurisdictions, in accordance with the Brazilian legislation in force.

The supervisory or regulatory entities and bodies will adopt immediately the necessary measures to comply with the court orders relating to the unavailability of goods, values and rights which deal with Law 13,170/2015 before institutions and individuals subject to its regulation and supervision. They also may, within the framework of their competences, edit the rules necessary for compliance with the provisions of Law 13,170/2015.

Institutions subject to regulation and supervision² are the individuals and legal entities which have, on a permanent basis or, as main or ancillary activity, cumulatively or not:

¹ Law 13,170/2015 came into force 90 days after the date of its publication in the Official Gazette of the Union (Diário Oficial da União – DOU). It was published in the DOU on October 19, 2015.

² This list is contained in article 9 of Law No. 9,613, of March 3, 1998 (the Brazilian Anti-Money
(i) raising, intermediation and application of third-party funding, in Brazilian or foreign currency; (ii) purchase and sale of foreign currency or gold as a financial asset or exchange currency instrument; and (iii) custody, issuance, distribution, settlement, negotiation, brokerage or management of securities.

The following entities are subject to the same obligations: (i) stock exchanges, commodities or futures exchanges and trading systems of the organized over-the-counter market; (ii) insurance companies, insurance brokers and pension entities or savings bonds; (iii) accreditation card companies or credit card companies, as well as administrators of consortia for purchase of goods or services; (iv) administrators or companies that use card or any other electronic, magnetic or equivalent means, which permits the transfer of funds; (v) leasing and factoring companies; (vi) companies that distribute money or any movable assets, real estate, merchandise, services, or give discounts on purchase, through sweepstakes or similar method; (vii) branches or representative offices of foreign entities engaged in Brazil any of the activities listed herein, sporadically or not; (viii) other entities whose operation depends on authorization of regulators of the financial, exchange, capital and insurance markets; (ix) any individual or legal entity, domestic or foreign, operating in Brazil as agent, manager, attorney-in-fact, commissioner or representing in any way interests of a foreign entity that carries out any of the activities referred to herein; (x) individuals or legal entities that carry out activities of promotion or purchase and sale of real estate; (xi) individuals or legal entities that trade jewelry, precious stones and metals, objects of art and antiques; (xii) individuals or legal entities that trade luxury or high value goods, intermediate its trading or are engaged in activities involving large volume of cash resources; (xiii) commercial and public registries; (xiv) individuals or legal entities that provide, even if eventually, advisory services, consulting, accounting, auditing, advice or assistance of any kind, in operations: (a) for the purchase and sale of immovable property, commercial or industrial establishments or equity interests of any kind; (b) management of funds, securities or other assets; (c) opening or management of bank accounts, savings, investment or securities; (d) creation, operation or management of companies, foundations, trusts or similar structures (e) corporate, finance or real estate; and (f) transfer or acquisition of rights to contracts related to sports or artistic activities; (xv) individuals or legal entities that act in the promotion, intermediation, trading, agency or negotiation of transfer rights of athletes, artists or fairs, exhibitions or similar events; (xvi) transport and custody services companies; (xvii) individuals or companies that trade rural or animal origin high value goods or intermediate its trading; and (xviii) offshore dependencies of the entities referred to herein, through their parent companies in Brazil, regarding Brazilian residents.

The measures provided for in Law 13,170/2015, in which they fit, will also be adopted by the Corrective Magistrates of Justice of the States and the Federal District (Corregedorias Laundering Law).

3 These entities are mentioned in the sole paragraph of article 9 of the Brazilian Anti-Money Laundering Law.
de Justiça dos Estados e do Distrito Federal), by the Brazilian Agency of Civil Aviation (Agência Nacional de Aviação Civil – ANAC), by the Brazilian Department of Transit (Departamento Nacional de Trânsito – DENATRAN), by the Port Authorities (Capitanias dos Portos), the Brazilian Telecommunications Agency (Agência Nacional de Telecomunicações - ANATEL) and by other competent public registry organs.

The Ministry of Justice shall notify the Ministry of Foreign Affairs about the arrangements adopted in Brazil to comply with the sanctions imposed by resolutions of the UNSC. The Ministry of Foreign Affairs in turn will report such arrangements to the UNSC.

II. Procedure and Administration of Blocking

When the UNSC resolution is incorporated to the Brazilian legal system, the Ministry of Justice will notify the Office of the Solicitor General (Advocacia Geral da União – AGU) to propose within 24 hours an action of unavailability of goods, values and rights. This action will be notified by the AGU to the Ministry of Justice as soon as it is proposed and will be processed under judicial secrecy.

The judge will decide the interim protection (tutela provisória) within 24 hours after receiving the complaint and will determine the subpoena of the interested party that will have 10 days to present factual and legal reasons which may lead to the belief that the blockade was irregularly made. Then the judge will inform immediately the supervisory or regulatory entities and bodies so that they may proceed with the prompt blockade of the goods, values and rights identified by them. Once the blockade occurs, the institutions and individuals responsible will have to report the fact immediately to the supervisory or regulatory agency or entity of their activity, the judge who determined the measure, the AGU and the Ministry of Justice.

Early alienation of the goods declared unavailable will be made for preservation of their value whenever these goods are subject to any degree of deterioration or depreciation or when the maintenance of such goods is difficult. The interested party will be summoned of the evaluation of the goods, so that he/she may express himself/herself within ten days. After the evaluation is made and any disagreements on the value assigned to the goods are resolved, the sale of the goods will be determined by public auction or trading floor, preferably electronic, by an amount of not less than 75% of the value assigned by the evaluation. Once the public auction or trading floor is held, the amount so obtained shall be deposited in an interest bearing bank account. Taxes and fines levied on the disposed good will be deducted from the amount ascertained in the public auction or trading floor.

When necessary, a qualified person for the administration, guard or custody of the blocked goods, values and rights will be designated. The designated person will be subject to the legal provisions that apply to the judicial administrator. When the blocked goods are financial assets, the administration of these assets will be made by the
institutions in which such property is held, and the blockage will focus also on interest and any other civil fruits and income arising from the contract.

The definitive confiscation of the goods, values and rights will be enacted by virtue of a final judgment (not subject to appeal), in any national or foreign process. A foreign final judgment that confiscates the goods must be duly ratified by the Brazilian Superior Court of Justice (Superior Tribunal de Justiça – STJ)\(^4\) in order to be enforceable in Brazil.

In the event of expiration or revocation of the sanction by the UNSC, the Union shall request the judge immediately the lifting of the goods, values and rights. The official communication issued by the Ministry of Foreign Affairs that the name of the individual or legal entity has been deleted from the UNSC resolution is also considered a revocation of the sanction. The unblocking of the goods, values and rights shall be notified immediately to the competent judicial authority by the responsible institutions and individuals.

The judge shall ensure the immediate Union subpoena regarding the fulfillment of all the above-mentioned acts, as well as any sentence regarding terrorist acts. The Ministry of Justice will transmit this information to the Ministry of Foreign Affairs to be forwarded to the UNSC, when necessary.

### III. Financial Institutions

The procedures to be adopted by the financial institutions and other entities authorized to operate by the Central Bank of Brazil (Banco Central do Brasil – Bacen) to comply with Law 13,170/2015 are governed by Bacen Circular No. 3,780, of January 21, 2016. These procedures apply to the enforcement of any court order regarding any action of unavailability of goods, values and rights, any demand of international legal cooperation coming from any foreign jurisdiction in accordance with the Brazilian legislation in force, as well as any sentence regarding terrorist acts and other legal provisions.

Once the blocking is made, the financial institutions and other similar entities must immediately communicate the blockade of goods, values and rights to: (i) the Department of Supervision of Conduct (Departamento de Supervisão de Conduta – Decon) of Bacen; (ii) the judge who ruled the measure; (iii) the AGU; (iv) the Ministry of Justice; and (v) the Council for Financial Activities Control (Conselho de Controle de Atividades Financeiras – Coaf).

This will also apply to business relations maintained by the institution or initiated thereafter with customers (individuals or legal entities) subject to sanctions from UNSC resolutions and actions of unavailability of goods, values and rights.

\(^4\) This ratification is required pursuant to sub item (i) of item I of article 105 of the Brazilian Federal Constitution.
The following must be reported to Coaf, in the form determined by Bacen, until the working day following that on which any such events have happened: (i) transactions or services whose value is equal to or greater than R$ 10 thousand and that can configure the existence of anti-money laundering crimes, considering the parties involved, the values, the ways of realization, the tools used or the lack of economic or legal basis; (ii) transactions made or services rendered which for their habit, value or form, configure evidence of action that objective to circumvent the mechanisms of identification, control and registration; (iii) transactions made or services rendered, regardless of their value, involving persons who admittedly have perpetrated or intended to perpetrate terrorist acts or participated or facilitated the practice of such acts, as well as the existence of resources owned or controlled directly or indirectly by such persons; or (iv) suspected acts of financing of terrorism.

For the purpose of item (iii) of the preceding paragraph, the same restriction also applies to any entities owned or controlled directly or indirectly by the persons listed therein, as well as by persons and entities acting on their behalf or under their command.

It is also necessary to report to Coaf the proposals for carrying out any of the operations and actions described in items (i) to (iv) above.

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5 This obligation is contemplated in article 13 of Bacen Circular No. 3,461, of July 24, 2009, which consolidates the rules about the procedures to be adopted in preventing and combating activities provided for in the Brazilian Anti-money Laundering Law.
TRADE FINANCE IN ROMANIA: TAKING SECURITY OVER OIL IN STORAGE TERMINALS

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Trade finance is generally not very developed in Romania, at least by comparison with other EU Member States and developed and emerging markets. In this briefing, we set out certain remarks in relation to taking security over oil products which are in storage in oil terminals in Romania, which should be considered in the context of an oil products trade finance transaction.

General principle for taking security. Under Romanian law, present and future (or contingent) obligations can be secured by mortgages over movable assets such as present or future tangible assets which can include crude oil and other petroleum products ("Oil Products").

Security instrument. A mortgage over movable assets such as Oil Products is validly created by means of a contract under private signature (no notarization being necessary) and its enforcement is subject to the perfection thereof - that is when (a) the mortgage becomes effective (i.e. once the secured obligation is born and the mortgagor owns the mortgaged assets) and (b) all publicity formalities are completed. In case of several movable mortgages, a perfected movable mortgage will rank prior to a non-perfected mortgage irrespective of the time of execution.

It is important to highlight for the purpose of trade finance transactions that a movable mortgage created over future assets becomes effective in relation to such assets only at the time when the mortgagor becomes the owner of those future assets.

Description of mortgaged property. The mortgaged assets should be described precisely enough under the mortgage agreement to enable a reasonable identification of the actual assets. Such description can be made by way of lists of assets, by determining a specific class of assets, or by indicating criteria such as quantity or other specific formulas to this end. In case of universalities, the description thereof should include the content and nature of the assets therein. A generic description of the mortgaged property such as "all movable property" or "all present and future movable property of the mortgagor" is no longer sufficient under the new security interests regime regulated by the Romanian Civil Code in force since 2011.

As concerns Oil Products stored in a Romanian oil terminal, for the purposes of avoiding commingling of the assets (which may even mean transfer of ownership to the oil terminal) and ensuring ownership over the Oil Products remains with the trader, the Oil Products should be stored in clearly identified dedicated oil tanks. Details about the location and identification of the tanks, quantity and type of the Oil Products, shipments and others are set out under the holding (warehouse) certificates issued by the relevant oil terminal upon receipt of the Oil Products in storage (and countersigned by the trader and the financier, if applicable). The movable mortgage agreement should include a
description of the Oil Products in particular by reference to these holding certificates which have all details of the Oil Products and, of course, should be updated from time to time to reflect the changes to the certificates using pre-agreed mechanisms.

**Registrations.** A movable mortgage over assets such as the Oil Products will be subject to registration with the Romanian Electronic Archive for Movable Security Interests ("Electronic Archive") and, if such mortgage also covers various receivables under contracts related to such Oil Products (e.g. storage, sale, or purchase thereof), also subject to notices of the mortgage to be made to the mortgagor’s counterparties thereunder. The initial registration of a mortgage with the Electronic Archive can be carried out by any party to the mortgage agreement, while any amendments to the initial registration necessary to reflect new Oil Products and holding certificates and/or to extend the duration of the registration, can only be made by the mortgagee.

**Priority.** The ranking of a movable mortgage is generally determined by the time of the publicity formalities being performed (i.e. the registration with the Electronic Archive), irrespective of the time when the secured obligations are born. The registration with the Electronic Archive maintains its priority for a period of five (5) years and may be renewed before the lapse of such period, if applicable.

**Enforcement.** As for all security interests, the enforcement of a mortgage is subject to the secured obligation being certain, liquid and payable and subject to the procedures set out under the Romanian Civil Code and/or the Civil Procedure Code (including, without limitation, authorisations by relevant Romanian court and enforcement officer, registration of the commencement of the enforcement with the Electronic Archive, notices to other creditors, if applicable).

There are two main means of enforcement of mortgages over assets such as Oil Products, which are rather frequently used in practice: (i) the sale of the mortgaged assets using "commercially reasonable" methods, as customary for the assets (in relation to the Oil Products, ideally by means of a tender to limit the challenges), and (ii) the taking over the mortgaged assets on account of the debt (debt set-off, which can be effected if (a) mortgagor has agreed to such measure in writing after the default has occurred, and (b) other concerned or affected parties do not oppose).

In case the mortgage covers also receivables (in connection with the Oil Products), the enforcement may be carried out (i) by taking over the title to the receivables, (ii) by notifying the obligor to make the payments under the mortgaged receivables directly to the mortgagee; or (iii) by the direct sale of the receivables.

Under Romanian law and in line with other jurisdictions, enforcement of mortgages and other security interest is suspended upon commencement of insolvency proceedings.

**Final notes.** From a practical perspective, the holding certificates issued by the oil terminal should give additional comfort to the financier by including an undertaking by the oil terminal not to release the Oil Products without the prior approval by the financier and by confirming that the quantity of Oil Products set out in the certificate is free from any charges or deductions (such as (mandatory) technological consumption and sludge).
The World Bank has rolled out an enhanced guarantee program, building on 25 years of experience in issuing “partial risk” and “partial credit” guarantees.

The enhanced guarantee program was recently showcased in the project financing of the 450-megawatt gas-fired Azura power project in Nigeria. This project reached financial close in December 2015 and was supported by two World Bank partial risk guarantees.

The bank’s pipeline of proposed guarantees is growing to unprecedented levels, with dozens of potential projects currently under consideration. That demand suggests that these products address real needs in the relevant markets.

This article summarizes the key features of the new forms of guarantees on offer and explores the potential impact on investment in emerging markets.

History

The World Bank was originally expected to make its primary activity guaranteeing repayment of commercial bank loans to governments in less developed countries and taking participations in such loans.

Contrary to expectations, the bank’s dominant activity since it was established in 1945 has been making direct loans to sovereigns or, subject to a sovereign guarantee, to sub-sovereigns. For a variety of reasons, guarantees have been used only sporadically. Bank guarantees traditionally have helped countries mobilize private financing by protecting private lenders against the risk of debt service default by the borrower as a result of a host government’s failure to fulfill its contractual obligations related to the project.

All World Bank guarantees require a sovereign indemnity of the bank in order to satisfy the bank’s charter obligation to take only sovereign credit risks.

The bank took a step toward issuing guarantees in 1983 by opening a B-loan program in which commercial lenders could co-finance projects with the bank by purchasing participations in certain World Bank loans. The bank suspended that program in 1988 because of concerns raised about certain risks in that structure, but that led in 1988 to the establishment of the “Expanded Co-financing Operations Program.” The revised program focused on using partial — versus all-risk — guarantees to mobilize private finance for public or joint public-private projects.
Shortly thereafter, in 1991, the bank broadened the program also to permit guarantees to support commercial financings for private sector projects. The trend at the time was toward greater private sector involvement in public infrastructure projects, and financings were being done on a limited-recourse project finance basis. The Hub power project in Pakistan was the first application of the guarantee to such a private sector project. The guarantees opened the door to a World Bank role in projects that would otherwise have had no access to traditional World Bank lending.

In 1994, the World Bank board approved the use of partial risk guarantees and partial credit guarantees.

A partial risk guarantee protects private lenders against debt service defaults on loans, normally for a private sector project, when the defaults are caused by a government’s failure to meet specific obligations under project contracts to which it is a party. Partial risk guarantees were available to both “IBRD-eligible countries,” which are the higher-income borrowing members of the World Bank, as well as to “IDA countries,” which are the lower-income members.

A partial credit guarantee protects private lenders against debt service defaults on a specified portion of a loan, normally for a public sector project, irrespective of the cause of the default. Partial credit guarantees were only available to IBRD-eligible countries.

While this World Bank guarantee program was an exciting development in theory, actual deployment of the guarantees was relatively limited for two reasons.

First, for the first decade of the program, the guarantees were offered only as a source of World Bank Group (IBRD/IDA, IFC and MIGA) support of last resort. Project developers were encouraged to seek debt from the International Finance Corporation and investment guarantees against political risk from the Multilateral Investment Guarantee Agency. Only if such support was unavailable, and only upon success ful navigation of a host of other bureaucratic and policy barriers within and beyond the World Bank such as getting the host government to sign the required indemnity agreement, might an application for a World Bank guarantee receive serious attention.

In 2005, the World Bank decided to lower the barriers to entry into the partial risk guarantee program, recognizing that the guarantee can add value because the more conventional investment support programs through the IFC and MIGA might not address the sovereign risks of projects that depend on host government undertakings. The IFC, as a lender to private borrowers, can be deterred by the very risks of governmental breach that the partial risk guarantee program addresses. While MIGA insures against government misbehavior, it does so without a host government indemnity and without the heavy club of potentially cross-defaulting all of the host country’s outstanding World Bank loans. These two branches of the World Bank Group offer private investment support that can be complementary to the partial risk guarantee. The previous treatment
of such support as substitutes rather than complements limited the availability and effectiveness of the partial risk guarantee program.

A second factor constraining host government demand for partial risk guarantees has been their accounting treatment at the World Bank. Originally, the face amount of a partial risk guarantee was fully counted against a country’s borrowing limit. In that case, if a host government were to accept a US$100 million partial risk guarantee, then it would have received no cash, only enhanced credibility permitting a privately-sponsored project to go forward. However, the ability of the host government to borrow from the Bank for public purposes, like schools and roads, was reduced by the full US$100 million. This rendered the program substantially useless for the poorest countries, which were inclined to allocate their borrowing capacity to actual borrowing rather than supporting the creditworthiness of private projects.

The World Bank in 2005 took several steps to enhance the availability of the partial risk guarantee program.

First, partial risk guarantees were no longer banned from IFC-or MIGA-supported projects. Second, the bank around 2008 reduced the credit limit disincentives for host countries to use the partial risk product so that only 25% — versus the previous 100% — of the amount of a guarantee would count against a country’s borrowing limit.

Third, project sponsors (or lenders or host governments) were for the first time invited to approach the World Bank directly, without prior approaches to MIGA or the IFC, for an initial expression of the bank’s interest in supporting a project.

Finally, the bank announced that, going forward, guarantees could be available to support equity investors as well as lenders. This was a structural innovation rather than a formal change to the program. Equity could benefit from the partial risk guarantee through a letter of credit that is posted to guarantee performance of the host government’s obligations. If the government breach of its undertakings causes a loss, then the letter of credit can be drawn. The beneficiary of the letter of credit can be either a lender or equity investor. If the government does not reimburse the letter-of-credit bank within a certain waiting period, then the World Bank will do so, with recourse to the government pursuant to the indemnity agreement. Multiple deals were closed under this structure, including most recently the Azura power project in Nigeria.

Notwithstanding the 2005 enhancements and a record three partial risk guarantees closed that year, the bank reverted to its more usual pace in issuing partial risk guarantees over the following decade of about one partial risk guarantee a year. The bank decided that it could and should do better.

**Motivation for Further Reform**

More guarantee program reforms were introduced in 2013 in an effort to further enhance the guarantee to address several issues and opportunities.
More private capital is needed for public infrastructure projects. The financing needs of the developing world are large and growing. The gradual withdrawal of quantitative easing in high-income countries is leading to tighter credit conditions for developing economies. Even for developing countries that have made positive strides in market access, keeping the private financing flowing to support development is a challenge.

World Bank guarantees have not been used to their full potential. Limitations in access, policy constraints and gaps that lead to a perceived lack of clarity and added complexity by program participants have been obstacles.

Projects are increasing in size. The bank’s increasing capital constraints prevent it from participating in certain high-cost projects and programs that may be transformational and can have a significant impact on poverty reduction and shared prosperity. A more accessible and flexible guarantee policy framework helps to relieve those limitations.

More flexible and accessible guarantees allow the World Bank Group to work together more effectively to tackle client needs and catalyze private sector participation in member country projects.

The bank took a first step toward reforming the guarantee program on June 26, 2012 when it replaced its environmental and social safeguards policies with a new set of performance standards for financing of projects that are owned, constructed, or operated by the private sector. The previous dual system of the bank safeguards policies on one hand and the IFC/MIGA performance standards on the other had been a significant drag to joint World Bank Group support of public-private partnerships.

What’s New?

The reforms have introduced the following key updates to the prior program of partial risk guarantees and partial credit guarantees.

Under the previous policy framework, the World Bank only guaranteed commercial loans. To meet the needs of infrastructure projects where bankability is constrained by the credit risk of project counterparties, such as offtakers or, in the case of termination payments, local utilities and host governments, guarantees can now run in favor of the direct beneficiaries of a sovereign undertaking, such as the project company, rather than just being in favor of lenders.

The World Bank has traditionally offered partial risk guarantees to ensure repayment of draws on commercial bank letters of credit or by converting the host government payment obligations into a World Bank-guaranteed loan. While useful in some cases, this approach may add to the complexity and transaction costs of already complex project financings, adversely affecting client countries. Furthermore, clients are increasingly seeking World Bank guarantee coverage of non-debt-service-related government payment obligations not only in favor of private entities but also foreign public entities,
where such payment obligations require credit enhancement if the project is to be bankable.

Under the prior policy framework, such guarantees could be designed in principle, but only through very complex structures that increased transaction costs and could deter their use.

The scope of bank guarantees has now been expanded to cover payment defaults in non-loan-related government payment obligations, where three things are true. The payment guarantees will help facilitate investment and serve clear development objectives under the same policy conditions that apply to bank loans. The guaranteed obligation is a direct payment obligation of a government or a state-owned entity. The guaranteed obligations would be subject to an adequate dispute resolution framework so as to avoid entangling the bank in the substance of a contractual dispute. Such guarantees can now be issued not only in favor of private entities, but also to foreign public entities in an effort to promote cross-border, public-to-public operations.

As already alluded to, to avoid entangling the bank in the substance of any contractual dispute, bank guarantee policy requires that a project contract supported by a guarantee contain appropriate dispute resolution procedures and, if a dispute arises as to the government’s obligations, then the bank’s guarantee is triggered only after the government’s liability has been determined in accordance with those procedures. The recent reforms have clarified that this latter limitation is subject to the caveat that, in some cases, payments under a guarantee can be triggered, notwithstanding an unresolved dispute, if there is a clear government payment obligation and adequate mechanisms exist to ensure that the government is reimbursed or otherwise properly compensated should a final decision determine that the amount of the partial risk guarantee payment exceeded the government’s liability.

Also, the prior program clearly distinguished between partial risk guarantees and partial credit guarantees as separate products. The bank sees a potential for partial credit guarantees and partial risk guarantees to be used in a variety of creative hybrid guarantee structures to attract new sources of financing such as local currency loans and non-bank lenders such as sovereign and pension funds. To encourage innovative uses of World Bank guarantees, the bank no longer retains the distinction between partial credit guarantees and partial risk guarantees and intends rather to differentiate project-based guarantees by the nature of the risks that they propose to cover.

Finally, unlike partial risk guarantees, partial credit guarantees were not available to IDA countries. This restriction limited the opportunities to help IDA countries mobilize financing for critical development needs. Now, all forms of guarantees are available to IDA countries, except for those under high risk of debt distress. Considerations of fiscal sustainability are particularly important for IDA countries given their relatively limited experience with commercial sovereign borrowing and vulnerability to shocks. Thus, access to partial credit guarantees is limited to IDA countries with low or moderate risk of fiscal distress.
World Bank, MIGA and IFC Compared

The World Bank guarantees play a different and yet complementary role to the support available through MIGA and IFC, sister agencies in the World Bank Group.

MIGA provides political risk insurance of cross-border direct investments for a wide range of offshore investors and sorts of projects. MIGA could not directly match the bank’s guarantee of government payment obligations to a project company. Also, MIGA’s breach of contract coverage, patterned after similar coverage available through the Overseas Private Investment Corporation, is typically restricted to standing behind arbitral awards. If a host government is not willing to submit to arbitration in a foreign tribunal (and some constitutions prohibit doing so), then MIGA coverage may not be an option.

The IFC provides credit guarantees, in addition to its traditional project loans, for private sector projects. Neither MIGA nor the IFC requires a host government indemnity against a loss.

Like IFC financing and MIGA insurance, World Bank guarantees also support private sector projects, but only by backstopping public sector obligations for which the member country is willing to provide an indemnity.

An example of natural convergence for World Bank support is the Azura power project in Nigeria, where IFC loans, MIGA political risk insurance and World Bank guarantees were all deployed together, as depicted in the preceding diagram.

Impact on Investment

Most major infrastructure projects include the host government in one or more key roles.

The project economics may depend on the government standing behind the terms of the concession, an offtake agreement or an agreement to supply fuel or facilities. The government may have guaranteed performance or payment by offtakers or suppliers whose own credit ratings are too weak to support the financing for a project of the size proposed.

A perennial question for both project developers and lenders, when considering an emerging market infrastructure project, has been how to be able to take such host government undertakings seriously, particularly where the government in question lacks a track record of performing such obligations, either because such project structures are new to that country or its prior performance record is spotty.

The World Bank guarantee program squarely addresses such risks. In supporting the Hub power project in the 1990s, the World Bank determined that, though it could not lend to private projects, it could, with much developmental benefit, guarantee commercial loans to such a project against the specific risk that the host government might fail to perform its contractual undertakings in favor of the project or its investors.
Conventional political risk insurance coverage against expropriation conceived of insured projects as being private businesses apart from the government. In contrast, the partial risk guarantee was invented with public-private joint ventures in mind. As such, these guarantees — which have now also been offered by the Inter-American Development Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, and the African Development Bank — fill a large gap in the fabric of effective project risk mitigation.

With its recent enhancements, the partial risk guarantee program seems to be coming into its own. In stark contrast to the generally slow rate of issuance of partial risk guarantees over the past two decades, dozens of applications are currently under review at the bank. While not all those will reach financial close, a substantial uptick in both demand for, and the supply of, World Bank guarantees in support of privately-developed infrastructure projects is evident. These numbers are consistent with the bank’s plan for the enhanced guarantees program, which is to make its guarantees more easily available to developers, lenders and host governments.

The requirement of a host government indemnity will continue, so this product will still not fit every project. It will be appropriate only for those seen by host governments as being of such priority as to merit their entering into an indemnity agreement with the bank. For those priority projects, the new guarantee program could be a powerful tool for making important things happen.