

Discussion of Lenders' Documentary Requirements for Public-Private Partnership Transactions

Overseas Private Investment Corporation

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Common Types of Government Participation in Commercial Transactions

- Grantor of a license or concession that gives a private company the right to engage in a particular business or to develop a natural resource (examples: licensing of a telecommunications company; granting a concession to build a port or develop an oil field).
- Lessor of property or facilities that a private company will utilize as part of a commercial project (examples: leasing land on which to build a hotel; leasing a government-owned building or factory for a new manufacturing project).
- Sole purchaser of products or services generated by a privately-owned project (example: government electricity distribution company purchases the entire output of a privately-owned electricity generating plant).

Common Types of Collateral Security Required by International Lenders

- Mortgage/assignment of the shares of the borrower and/or the company carrying out the project.
- Mortgage/assignment of the physical assets of the project (land, if owned by the project, buildings, equipment).
- Mortgage/assignment of any agreements or contracts that are required for the project to be constructed and operated (leases of land, buildings or equipment; licenses or concessions; construction or operation/management contracts; long-term sales contracts).
- Mortgage/assignment of the bank accounts of the borrower and/or the company carrying out the project.

Common Provisions to Ensure that Collateral Security Arrangements are Effective

- The Government and the lender(s) are parties to a direct/consent agreement with the following basic provisions:
 - Government notifies lender(s) of any defaults under project documents to which it is a party and allows lender(s) to step into the place of the borrower/project company, cure the default and do what is necessary to get the project back on track (including selling the project and any rights under project documents to another qualified private party).
 - Government agrees to participate in international arbitration and waive its sovereign immunity in the event of any disputes involving the project.
- It is important to the lender that it be clear which entity within the Government has the authority to enter into these agreements. Internal agreement among Government authorities regarding roles and responsibilities and the development of processes that can be communicated to project sponsors and lenders are critical to the smooth advancement of major projects.

Government Undertakings

- If a government entity has financial obligations with regard to a project, then the lender(s) will usually require the government to ensure that those obligations will be met. Examples of the types of financial obligations that would trigger such a requirement are as follows:
 - A ministry or government-owned company has agreed to purchase the project's output. This is commonly the situation when a public utility purchases power from a private electricity producer.
 - The government has promised to build infrastructure that is crucial to the success of the project. Examples would be access roads, rail links, utility connections or other public works necessary for commercial activity.