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Sovereign Immunity

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What is Sovereign Immunity?

It is likely that the awarding authority in an infrastructure project will be a government authority and as such may benefit from sovereign immunity. This should be checked with local lawyers. In some cases when concession legislation is enacted, it specifically waives sovereign immunity for the state in relation to infrastructure projects – this is, however, by no means universal. A private operator will be anxious to ensure that any sovereign immunity is waived.

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Two Types of Immunity

States generally benefit from two forms of immunity: ***jurisdiction*** and ***execution*** [1].

- A state's ***immunity to jurisdiction*** results from the belief that it would be inappropriate for one state's courts to call another state under its jurisdiction. Therefore, state entities are immune from the jurisdiction of the courts of another state. However, this immunity can generally be waived by the state entity.

Reference to arbitration is in many legal systems sufficient to demonstrate a waiver of immunity to jurisdiction by the state. However, certain developing countries may be hesitant to submit themselves to international arbitration, believing that arbitration is dominated by Western principles and would not give a developing country a fair hearing. These same developing countries may feel more secure submitting to arbitration under the UNCITRAL rules, which are often considered more culturally neutral than those of the ICC or other Western tribunals [2].

- The state will also have ***immunity from execution***, as it would be improper for the courts of one state to seize the property of another state. Immunity from execution may also generally be waived. Waiving immunity from execution may be difficult for a government to address. As a general proposition under most legal systems, certain assets belonging to the state should not be available for satisfaction of the execution of an arbitral award; for example, the country's foreign embassies, or consular possessions. Therefore, some method may have to be made available for the private party to seize certain state assets, possibly through careful definition of those possessions available for seizure.

Sample Wording for Waiver Of Sovereign Immunity

1. To the extent that the [awarding authority] may be entitled in any state or jurisdiction to claim or benefit from any immunity (whether characterized as state immunity, sovereign immunity, act of state or otherwise) now or hereafter for itself or any of its property or assets (which it now has or may hereafter acquire) in respect of its obligations under this Agreement from service of process or other documents relating to proceedings, jurisdiction, suit, judgment, execution, attachment (whether before awarded or judgment, in aid or execution or otherwise) or legal process or to the extent that in any such jurisdiction there may be attributed to it or any of its property or assets such immunity (whether or not

claimed), the [awarding authority] expressly, unconditionally and irrevocably agrees not to claim, invoke or permit to be invoked on it or its property or assets' behalf or for it or its property or assets' benefit and hereby expressly, unconditionally and irrevocably waives such immunity to the fullest extent permitted by the laws of such jurisdiction.

2. Subject to any applicable appellate rights, the [awarding authority] consents generally in respect of any proceedings to the giving of any relief or the issue of any process in connection with the proceedings including, without limitation, the making enforcement or execution against any property or assets whatsoever (irrespective of its use or intended use) of any order or judgment which may be made or given in the proceedings; and
3. The [awarding authority] irrevocably and unconditionally acknowledges that the execution, delivery and performance of this Agreement constitute private and commercial (and not public) acts of the [awarding authority].

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[1] Jeffrey Delmon, Project Finance, BOT Projects and Risk, 2005

[2] Craig, Park and Paulsson, International Chamber of Commerce Arbitration (3rd edition 2000).

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