



Harnessing Investment for Sustainable Development Through Public–Private Partnerships (PPPs) in Infrastructure and Public Services: The legal dimension

Joint IISD–UNCTAD workshop

InterContinental Nairobi – Nairobi, Kenya – February 6, 2018

TRAINING MATERIAL – PRESENTATION SLIDES



PPP Contractual Provisions: Selected Issues

Nathalie Bernasconi
Nairobi
February 2018



Risk allocation between the parties

Key feature of PPPs

- In a conventional delivery model, most long-term risks are borne by the public agency.
- A PPP model allows the public agency to transfer risks to the private party: cost overruns during the construction phase, construction delays and long-term maintenance of the asset, etc.
- Aim of public agency: efficient risk allocation to create a “good deal” for society.
- Aim of the private party: efficient risk allocation to ensure that the project is financeable and has an attractive risk-return ratio.
- Risks are dynamic and change throughout the life of the project: 30, 40 years!!

PPP contracts and risk allocation

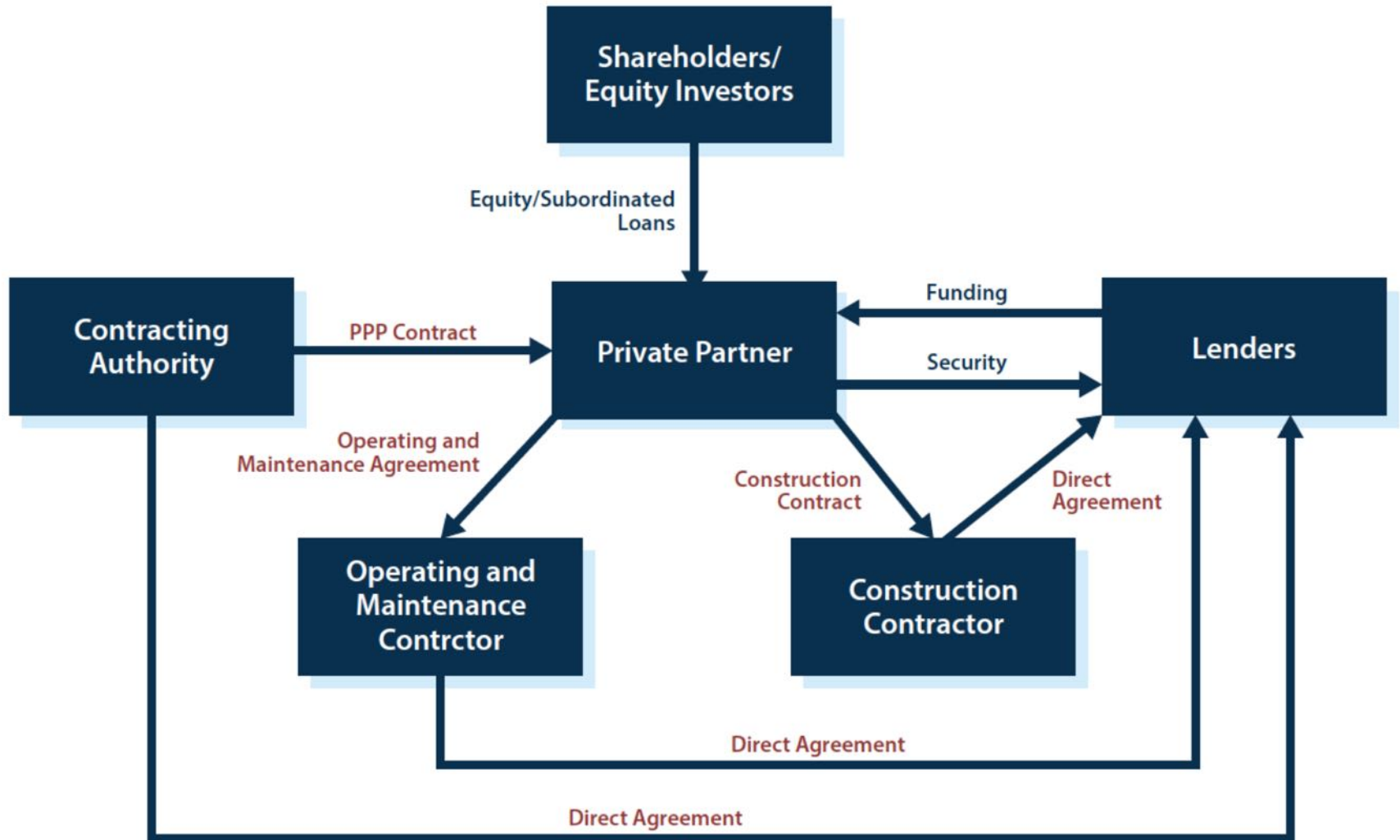


Many risks are still retained by the public agency

- The PPP contract specifies that the private party will receive financial compensation for costs related to the occurrence of certain events.
- These events are sometimes referred to as “compensation events”
- Compensation events usually consist of special circumstances that are *under the control* of the public agency or are most efficiently managed by the public agency.
- Sometimes compensation events can go beyond those that are under the control or manageable by the public sector.
- Some risks may best be shared.



Typical PPP Structure



World Bank Group's 2017 Guidance on PPP Contractual Provisions:



Specific Comments

1. Force Majeure
2. Material Adverse Government Action (MAGA)
3. Change in Law
4. Termination Payments
5. Refinancing
6. Lenders' Step-In Rights
7. Confidentiality and Transparency
8. Governing Law and Dispute Resolution
9. Bond Financing and Corporate Financing
10. Corporate Financing

World Bank Group's 2017 Guidance on PPP Contractual Provisions:



Overarching Comments

1. PPP risk not allocated between government and investor in a balanced manner: privatization of gains, socialization of loss
2. Non-discriminatory regulatory measures in the public interest could lead to state's duty to compensate – regulatory chill
3. Social, human rights & environmental concerns not addressed (e.g., climate change risks, mitigation & adaptation)
4. Possibility of the participation of governments in PPPs as shareholders or partners is excluded

Based on Summary Comments by Foley Hoag LLP

World Bank Group's 2017 Guidance on PPP Contractual Provisions:



1. Force Majeure

2. Material Adverse Government Action (MAGA)

- Encourages governments to take on a greater burden of risk for unforeseeable events than required under international law
- Riots, insurrections, civil commotions, terrorism, war – all classified as MAGA rather than force majeure
- Recommends compensation for lost revenue and costs incurred during force majeure
- Events that could be characterized as MAGA may constitute legitimate exercises of state authority and police powers to regulate (public & occupational health & safety, labour & environment)

World Bank Group's 2017 Guidance on PPP Contractual Provisions:



3. Change in Law

- Restrains state's police & other regulatory powers and ability to
 - Strengthen laws that reduce emissions or manage climate risks
 - Meet its international legal obligations concerning the environment and human rights
 - ...
- As PPP contracts may exceed 20 years, it should be expected that governments **will** change their legal frameworks to protect the environment & human rights

World Bank Group's 2017 Guidance on PPP Contractual Provisions: Summary Comments by Foley Hoag LLP



8. Governing Law and Dispute Resolution

- WBG Guidance only lists disadvantages of the choice of domestic law as the governing law of the PPP contract, without enumerating the benefits:
 - Important domestic public policy issues that are best understood within the local legal framework
 - Licenses issued by the state for a PPP project will almost certainly be governed by local law
 - therefore, adopting local law as the governing law leads to consistency and simplifies dispute resolution
- WBG Guidance fails to address concerns with ISDS mechanisms: transparency of the proceedings, procedural efficiency and conflicts of interest



Thank you!

Nairobi
February 2018



Contracts for Sustainable Infrastructure

Martin D. Brauch
February 6, 2018



Infrastructure is *essential* to sustainable development

- Transportation, electricity, telecommunications, water, sanitation
 - Productivity
 - Access to markets, jobs, healthcare, education
 - Economic growth and social wellbeing
- Sustainable Development Goals (SDGs)
 - **SDG 9: *build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation***
 - SDG 11: make cities & human settlements inclusive, safe, resilient and sustainable
 - SDG 13: take urgent action to combat climate change [mitigation] & its impacts [adaptation]
 - Paris Agreement on Climate Change



From business-as-usual to sustainable infrastructure

- Conventional project finance valuation methodologies
 - ignore economic, social & environmental risks
 - ignore economic, social & environmental co-benefits
 - sustainable infrastructure: higher upfront capital costs
 - business-as-usual: more attractive financially
 - underinvestment in sustainable infrastructure
- Modern lifecycle assessment methodologies (e.g., SAVi): identify & price risks & impacts
- **Sustainable infrastructure makes business sense**





Sustainable Infrastructure

Definition

Infrastructure that
is economically, socially & environmentally sustainable
and
promotes sustainable development
[governance – climate change]
throughout the lifecycle of the project.
[design – construction – operation – maintenance]



Sustainable Infrastructure

Economic co-benefits

- Optimize value for money economy-wide, for governments, investors, taxpayers and (where applicable) users.
- Create employment across skill and income levels.
- Help boost green economic development through the creation of core infrastructure needed by various economic sectors.
- Build the capabilities of and create opportunities for local suppliers and developers.
- Guarantee reasonable returns for investors across the lifecycle of the project.
- Promote research and development, and technological innovation and transfer, especially in green technologies, across domestic and international value chains.



Sustainable Infrastructure

Social co-benefits

- Generate income, particularly for low-income households.
- Create jobs, including the generation of green jobs.
- Build skills and provide for mid-career up-skilling and re-skilling.
- Contribute to the reduction of poverty and socioeconomic inequality.
- Meet and exceed compliance with core labour standards and human rights.
- Be inclusive, affordable and accessible to all economic strata in cities and rural areas.
- Engage all stakeholders positively or negatively affected by the infrastructure investment in the decision-making process, including through free, prior and informed consent.
- Ensure gender equality in the building of and access to infrastructure.



Sustainable Infrastructure

Environmental co-benefits

- Limit and lower air, water, soil and all other forms of pollution.
- Provide for the stewardship of ecosystems.
- Contribute to ecosystem and biodiversity management and conservation.
- Promote and use clean and environment-friendly technologies.
- Support the conservation and the sustainable and efficient use of natural resources, including water, energy and materials.
- Mitigate greenhouse gas emissions.
- Contribute to the transition to a low-carbon economy.
- Utilize and promote high energy-efficiency standards.
- Be resilient to and help protect against extreme weather events, natural disasters and other climate change-related impacts.

How to ensure the economic, social and environmental co-benefits of infrastructure investment projects?





The Legal Framework

- Key element of an enabling environment
- Treaties governing foreign investment
- Laws, regulations and investor–state contracts governing both domestic and foreign investments

*The onus falls on governments
to embed sustainability criteria in the legal frameworks
to ensure that they promote
—and do not hinder—
investment in sustainable infrastructure.*



Infrastructure Contracts

- Infrastructure contracting through PPPs can deliver on sustainable development
- Sustainability principles must be consistently integrated into contracts and contracting processes
 - Poor contracting designs
→ unsustainable and inefficient outcomes
 - Well-structured and balanced legal frameworks
→ sustainability benefits



Infrastructure Contracts

- Most flexible and specific
- Allow margin for negotiation and adjustment
- Broad range of aspects of the relationship
- Adjusted depending on aspects covered by other instruments (environmental, labour, taxation laws and regulations)
- Tailored to project-specific circumstances, local environment, local communities



Contracts for Sustainable Infrastructure:

Ensuring the economic, social and environmental co-benefits of infrastructure investment projects

IISD REPORT

International Institute for Sustainable Development

**Heinrich Böll Stiftung
North America**



Outline of approaches

Drafting and negotiating infrastructure contracts

- 2015 IISD Handbook on Mining Contract Negotiations for Developing Countries
- 2015 UN Principles for Responsible Contracts
- 2014 IISD Guide to Negotiating Investment Contracts for Farmland and Water
- 2011 UN Guiding Principles on Business and Human Rights
- 2011 OECD Guidelines for Multinational Enterprises
- 2011 Model Mine Development Agreement (MMDA) of the International Bar Association (IBA)
- 2010 Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments (by IIED)



Outline of approaches

Drafting and negotiating infrastructure contracts

1. Feasibility study and impact assessment
2. Economic obligations
3. Social obligations
4. Environmental obligations
5. Stabilization clause
6. Periodic review and renegotiation
7. Grievance mechanisms and dispute settlement
8. Transparency, reporting and public engagement and scrutiny
9. Penalties and termination



1. Feasibility study and impact assessment

- Feasibility or pre-feasibility studies
- Assessment of socioeconomic and environmental risks and impacts
- Plans to address socioeconomic and environmental risks and impacts
- Close consultation with the affected communities
- Subject to government approval



2. Economic obligations

- Co-benefits beyond those directly generated by the infrastructure to be built
- Purchase of local or national goods and services
- Technology transfer
- Broader economic development of the beneficiary community and country



3. Social obligations

- Expected social benefits
- Quantified by indicators amenable to monitoring and enforcement
- Up-skilling of the local or national workforce
- Additional services to employees, families and communities
- Human rights advancement



4. Environmental obligations

- Specify, complement and strengthen the domestic environmental standards
- Empower the regulatory and oversight powers of the government agencies responsible for environmental protection
- Monitoring of project impact
- Project-specific questions:
water, soil, chemicals, emissions



5. Stabilization clause

- Investors often demand clauses aimed at freezing the domestic laws
- Detrimental effects on regulatory powers
- Governments should carefully consider whether to include them in infrastructure contracts and, if so, how to draft them
 - Time-limited
 - Consistent with state's obligations on labour, environment, human rights



6. Periodic review and renegotiation

- Typically lead to increased benefits to investors and detriments to government & citizens
- If included, negotiate and set out circumstances that may trigger a renegotiation or review
- Important in contracts for long-term projects (changing economic, social or environmental conditions could make them unbalanced)



7. Grievance mechanisms and dispute settlement

- State-based and non-state-based mechanisms for the investor to address concerns expressed by affected individuals and communities
 - legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue
- Settlement of disputes between the investor and the government, with community participation
- Key for stakeholders to express sustainability concerns and enforce investor obligations



8. Transparency, reporting and public engagement and scrutiny

- Monitor the sustainability performance
- Require investor's compliance
- Non-party beneficiaries can ensure they receive the expected co-benefits



9. Penalties and termination

- Penalties
 - incentive for compliance
 - way to remediate the consequences of non-compliance
- Termination for the most serious breaches
- “Exit strategy” if the project fails



Contracts for Sustainable Infrastructure:

Ensuring the economic, social and environmental co-benefits of infrastructure investment projects

IISD REPORT



Martin Dietrich Brauch

December 2017

Thank you!

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Report available at
<http://iisd.org/library>

Joint IISD-UNCTAD workshop on Harnessing Investment for Sustainable Development Through PPPs in Infrastructure and Public Services

Customizing UNCTAD IIA and ISDS Navigators

6 February 2018

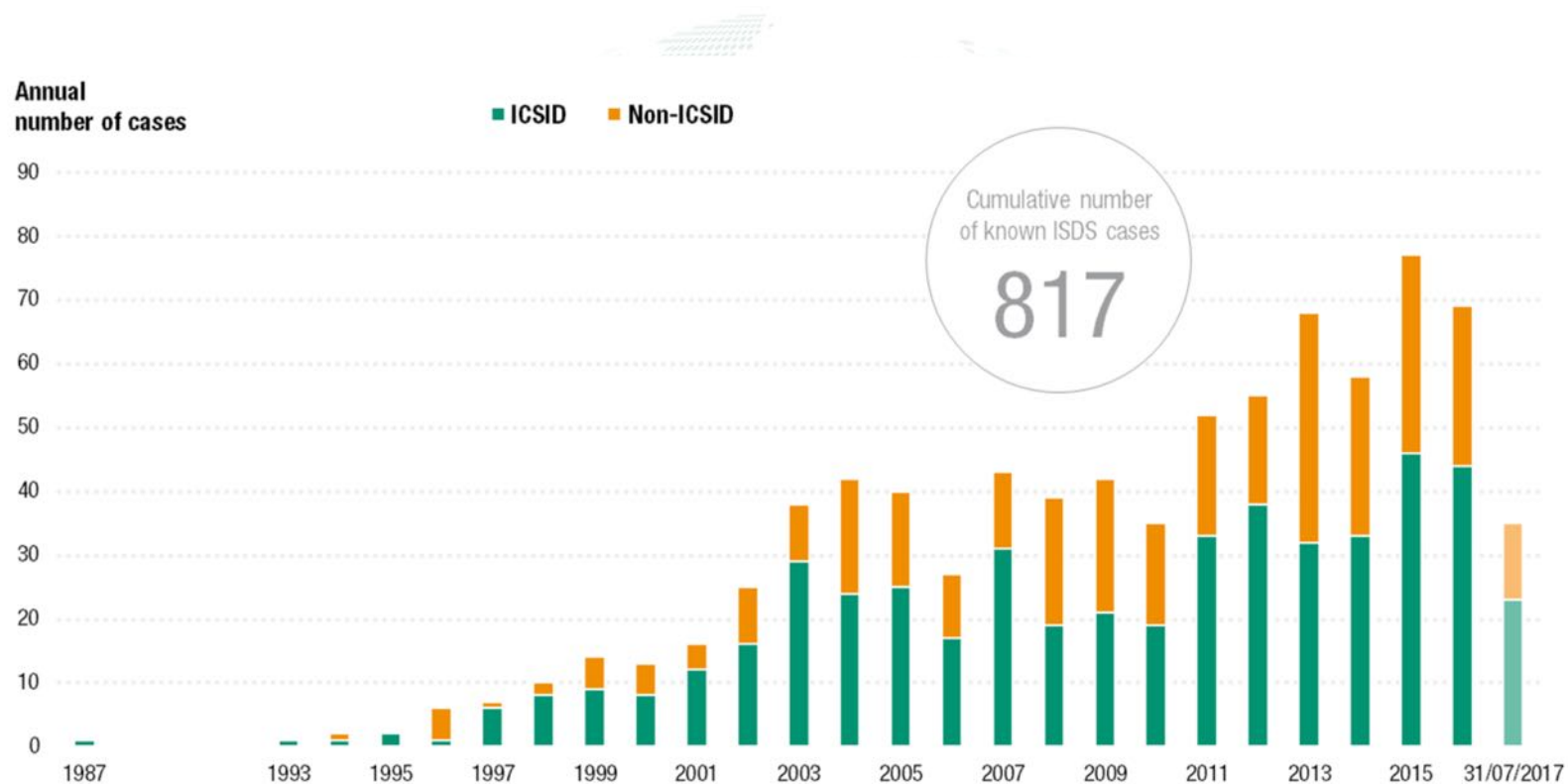
Nairobi, Kenya

Elisabeth Tuerk

Chief, International Investment Agreements (IIA) Section
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Trends in ISDS: The rate of new treaty-based ISDS cases continues unabated

PPP-related ISDS cases per SDG sector



Source: © UNCTAD, World Investment Report 2017.



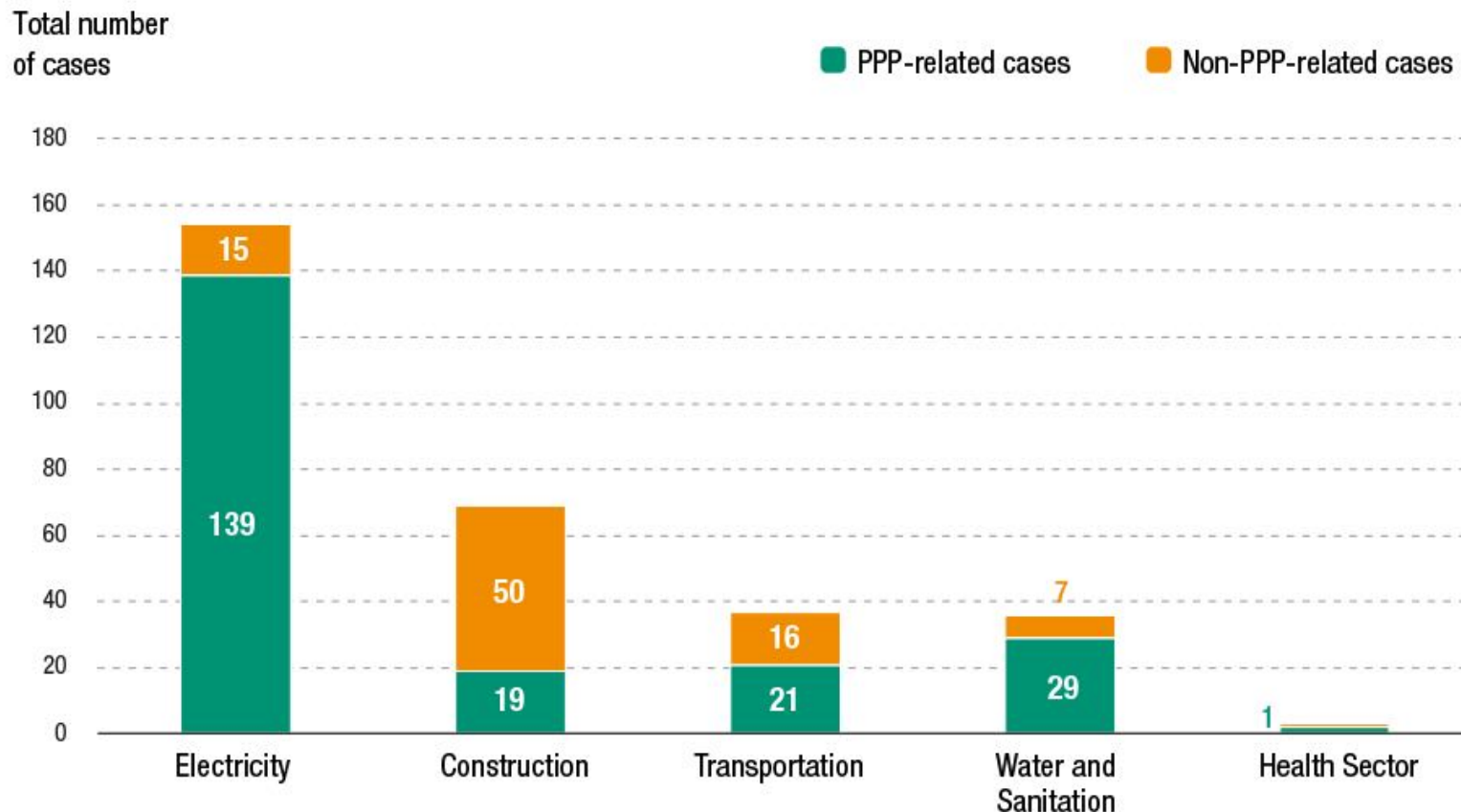
Electricity is the most common economic sector involved in PPP-related ISDS claims

UN Photo Kibae Park

UN Photo/Kibae Park

Electricity is the most common economic sector involved in PPP-related ISDS claims

PPP-related ISDS cases per SDG sector



Source: © Forthcoming on UNCTAD's PPP Policy Hub.

Based on 767 known, treaty-based ISDS cases. Note: Cases may be mapped twice if they involve two sectors (e.g. many of the power generation/renewable energy protection projects include the construction of the power generation facility).

Outcomes of PPP-related ISDS cases by economic sector

- Electricity:
 - 19 “won”, 15 lost by Respondent, 103 pending
 - Highest amount claimed: Libananco v Turkey (10 billion USD)
 - Highest amount awarded: Total v Argentina (270 million USD)
- Construction:
 - 6 “won”, 4 lost by Respondent, 10 pending
 - Highest amount claimed: TransCanada v USA (15 billion USD)
 - Highest amount awarded: ADC v Hungary (76 million USD)
- Transportation:
 - 6 “won”, 6 lost by Respondent, 9 pending
 - Highest amount claimed: TransCanada v USA (15 billion USD)
 - Highest amount awarded: ADC v Hungary (76 million USD)

Outcomes of PPP-related ISDS cases by economic sector

- Water and sanitation:
 - 4 “won”, 9 lost by Respondent, 16 pending
 - Highest amount claimed: Vivendi v Argentina (834 million USD)
 - Highest amount awarded: Vivendi v Argentina (383 million USD)
- Health:
 - 2 “won”, 0 lost by Respondent, 0 pending
 - Highest amount claimed: Dialasie v Viet Nam (47 million USD)
 - Highest amount awarded: Data not available

PPP-related claims in the agricultural sector

- **Def. “agri-PPP”:** “A formalized partnership between public institutions and private partners designed to address sustainable agricultural development objectives, where the public benefits anticipated from the partnership are clearly defined, investment contributions and risks are shared, and active roles exist for all partners at various stages throughout the PPP project lifecycle.” (FAO 2016)
- E.g. partnerships to develop agricultural value chains, for joint agricultural research, for building or upgrading market infrastructure etc.
- **Of 30 known, treaty-based ISDS cases (1987-2016), none** was in relation to an “agri-PPP”

Join us for further debate!

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THANK YOU!

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Joint IISD-UNCTAD workshop on Harnessing Investment for Sustainable Development Through PPPs in Infrastructure and Public Services

**Harnessing sustainable investment in
infrastructure and public services through
IIAs**

6 February 2018

Nairobi, Kenya

Elisabeth Tuerk

Chief, International Investment Agreements (IIA) Section
Division on Investment and Enterprise, UNCTAD



Relevance of IIA clauses for Public Private Partnerships (PPPs)

Key IIA Clauses

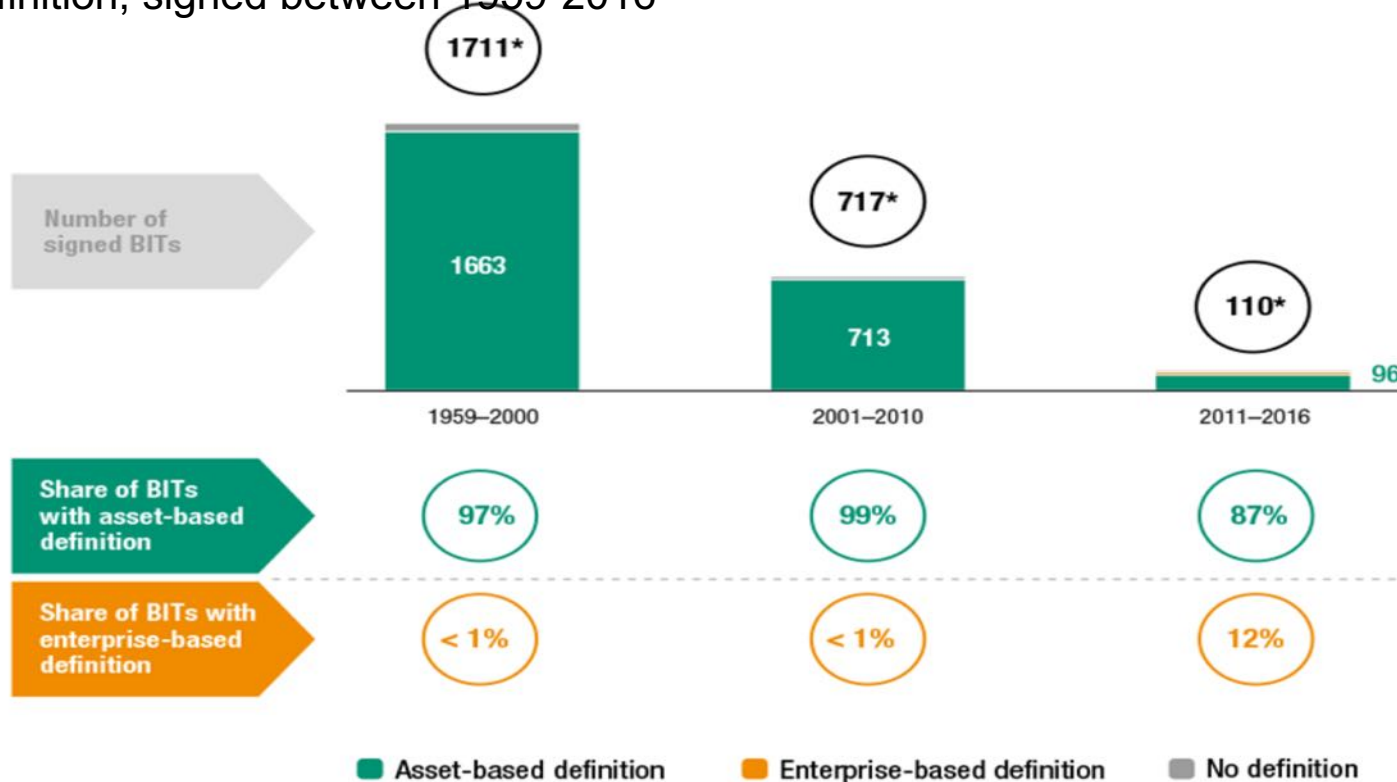
- Definition of investment clauses
- In accordance w domestic law clauses/anti-corruption clauses
- Fair and equitable treatment clauses
- Umbrella clauses
- ISDS clauses
- More recent clauses with PPP reference

Definition of investment

- For a PPP to be covered by an IIA, it needs to fall under the definition of investment set out in the IIA.
- The broader the notion of investment contained in a BIT, the more easily investments based on PPP contracts qualify as protected investment and the greater is the potential exposure of host State to ISDS claims in relation to PPPs.

While the enterprise-based definition is on the rise in recent IIAs, both the enterprise as well as the asset-based definition give IIA coverage to PPPs

Share of BITs containing asset-based, enterprise-based and no investment definition, signed between 1959-2016

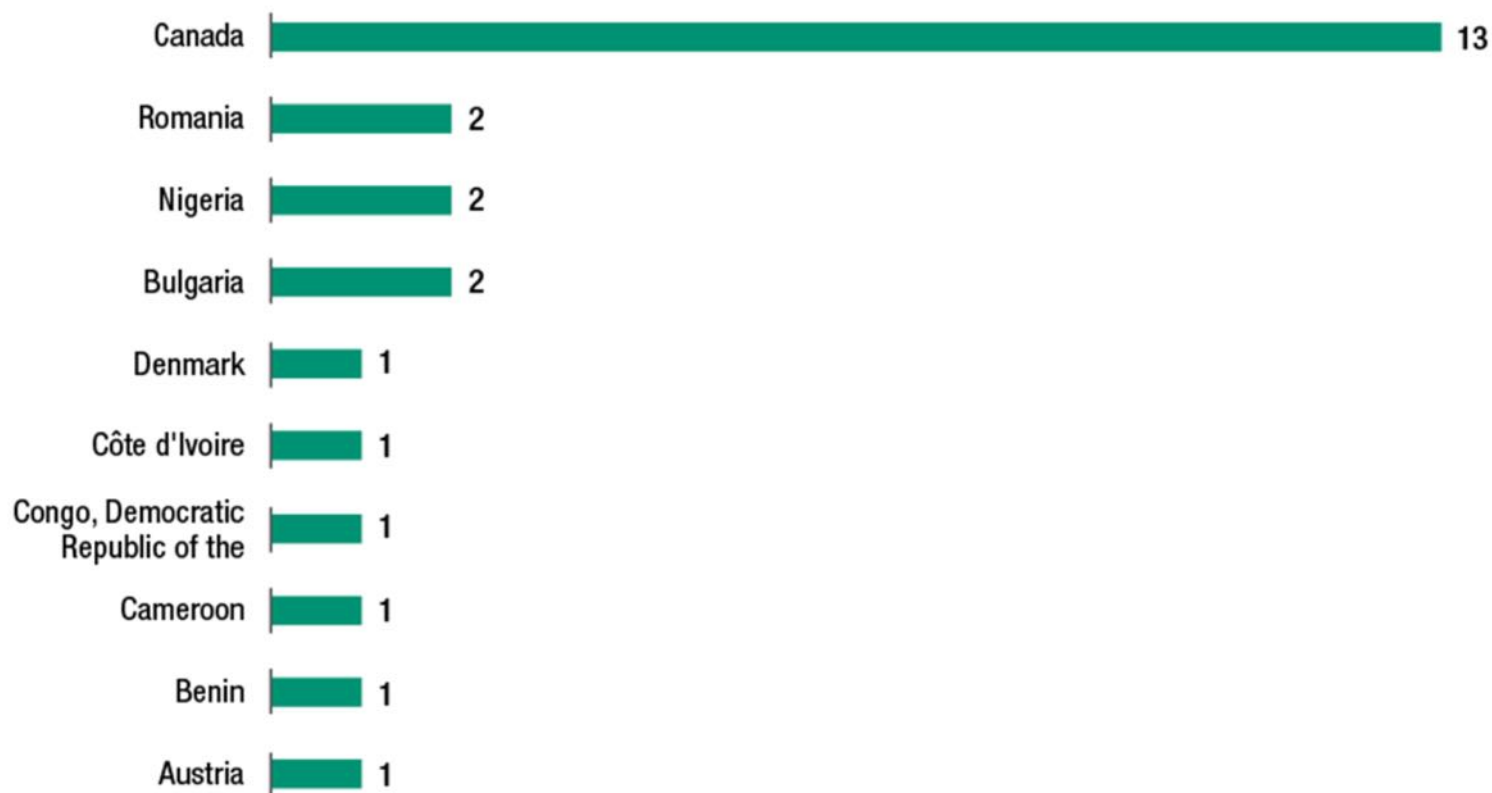


Source: © Forthcoming on UNCTAD's PPP Policy Hub.

Based on 2'538 mapped BITs signed between 1959 and 2016. *Total number of mapped BITs that were signed per period. Note that the presented three options are mutually exclusive, a BIT can have either an asset-based or an enterprise-based definition (or no definition at all), but not both.

Canada is the main user of the enterprise-based investment definition

Top ten countries concluding BITs with enterprise-based definition (by number of BITs)



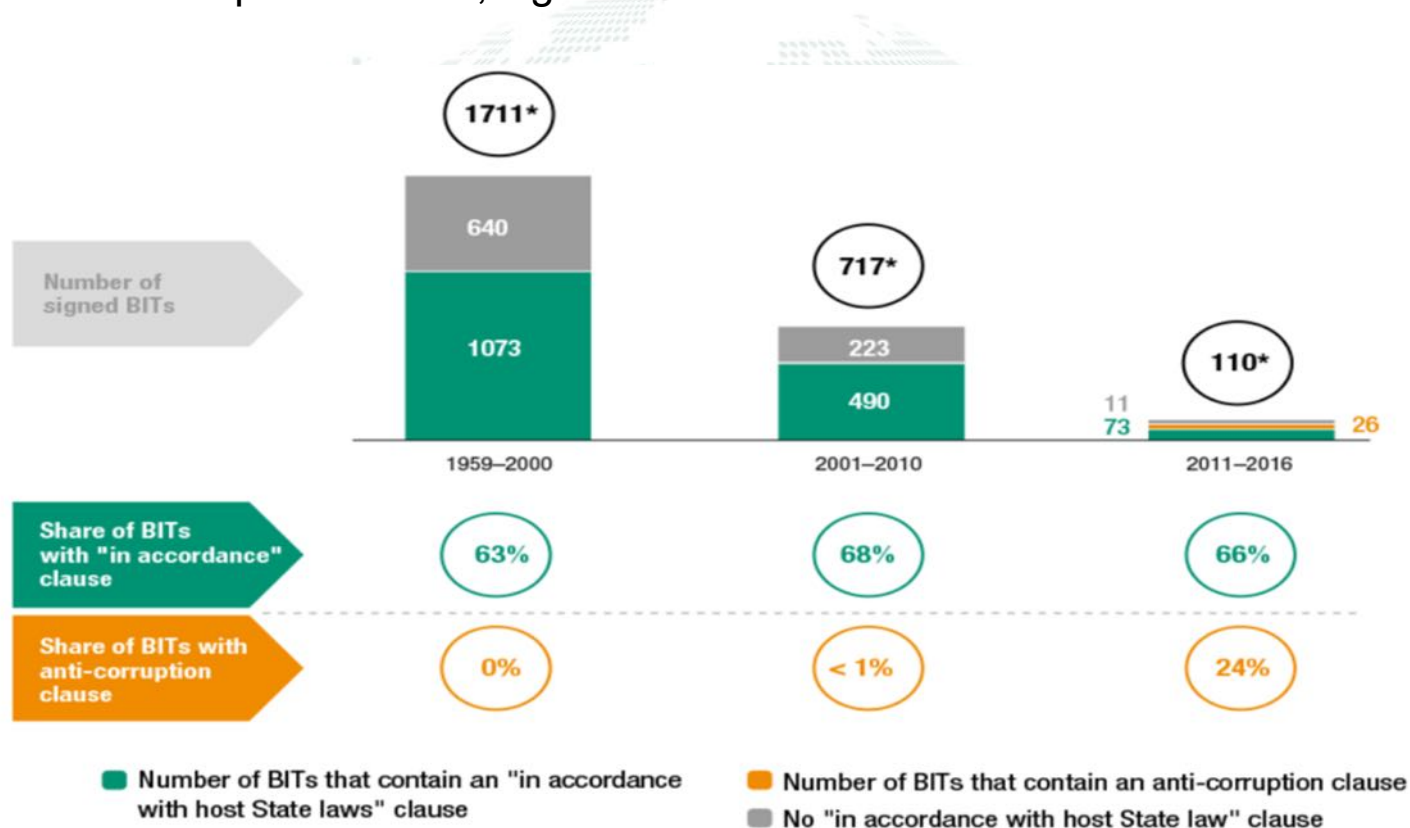
Source: © Forthcoming on UNCTAD's PPP Policy Hub.
Based on 2'538 mapped BITs signed between 1959 and 2016.

“In accordance with host State laws” and “anti-corruption” clauses

- By attaching IIA-based legal relevance to investor behavior, legality requirements (encompassing, among others, “in accordance with domestic law” clauses and “anti-corruption” clauses) can help strengthen the investor responsibility dimension of PPPs and exclude coverage of investments having violated such provisions.

The majority of BITs contain “in acc. W. host State law” clauses, and “anti-corruption” clauses are on the rise in new-generation BITs

Number and share of BITs containing an “in accordance with host State law”/“anti-corruption” clause, signed between 1959 and 2016



Source: © Forthcoming on UNCTAD's PPP Policy Hub.

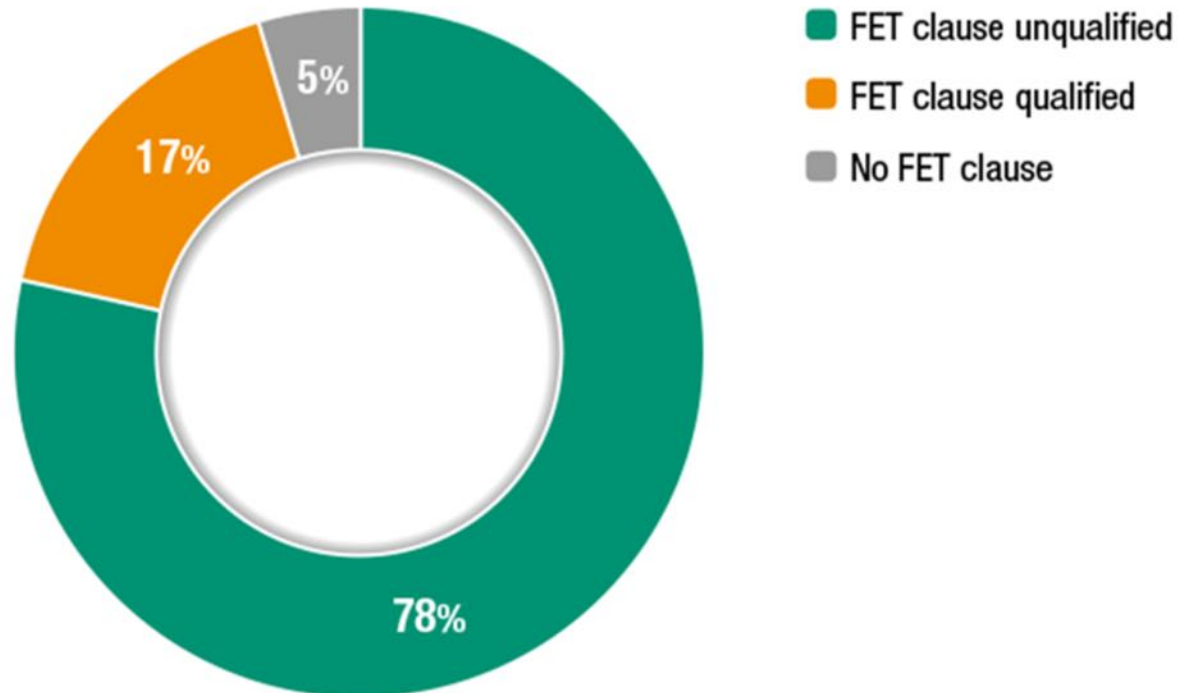
Based on 2'538 mapped BITs signed between 1959 and 2016. * Total number of mapped BITs that were signed per period. Note that the presented options “in accordance with host State law” and no “in accordance with host State law” clause are mutually exclusive, while the options “in accordance with host State law” clause and “anti-corruption” clause are not mutually exclusive. A BIT can therefore have or not have an “in accordance with host State law” clause as well as an “anti-corruption” clause.

Fair and equitable treatment (FET) clauses

- FET clauses touch directly on interactional processes (e.g. tender phases) between the government and the private investor typical of PPPs.
- FET is also the IIA clause on which ISDS claims are most frequently based.

Almost four-fifth of all BITs signed contain unqualified FET clauses

Share of BITs with unqualified, qualified and no FET clause, signed between 1959 and 2016

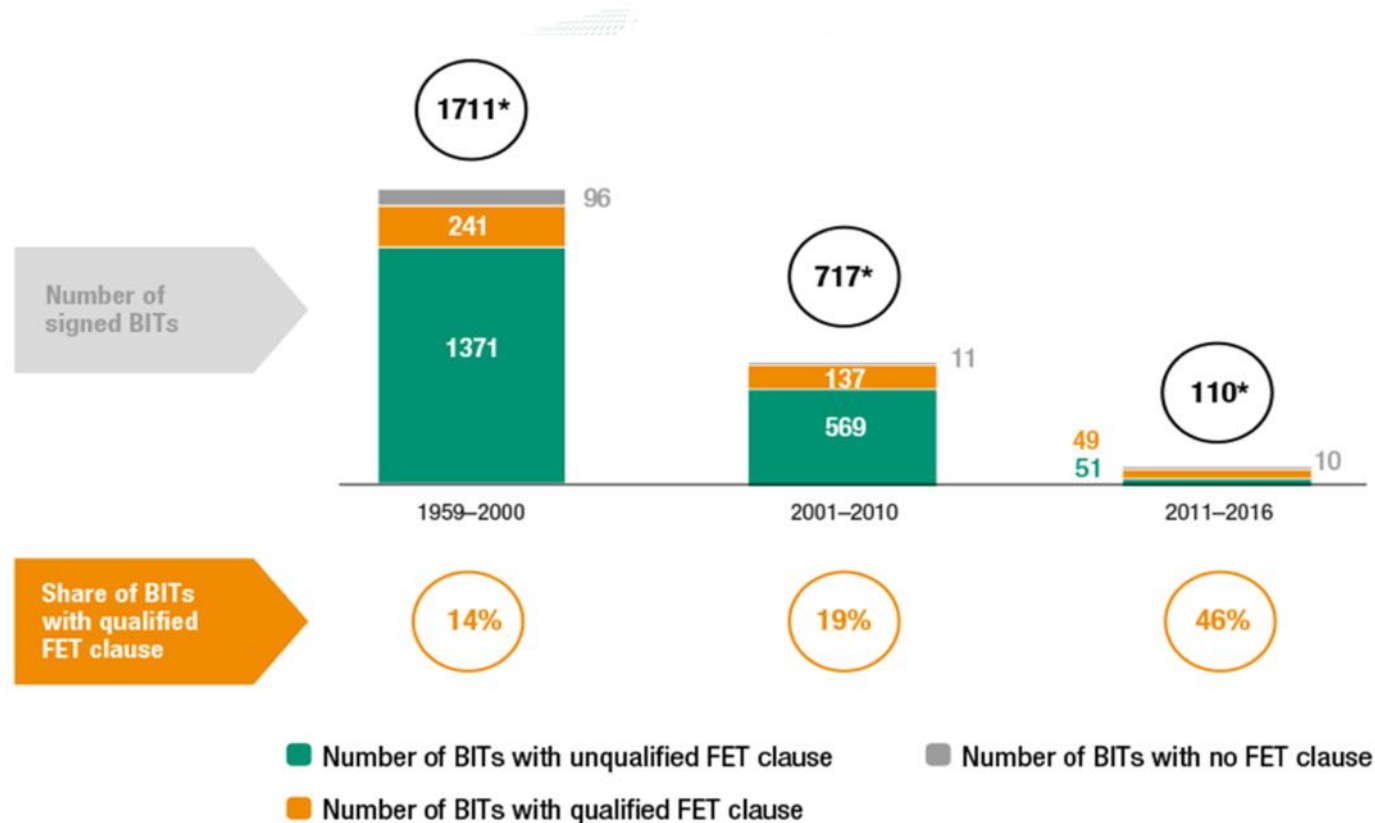


Source: © Forthcoming on UNCTAD's PPP Policy Hub.

Based on 2'538 mapped BITs signed between 1959 and 2016. "Qualified" FET clauses refer to both clauses containing reference to the minimum standard of treatment/customary international law and containing lists of treatments that constitute breaches of FET.

BITs containing qualified FET clauses are on the rise

Number and share of BITs with unqualified, qualified and no FET clause, signed between 1959 and 2016



Source: © Forthcoming on UNCTAD's PPP Policy Hub.

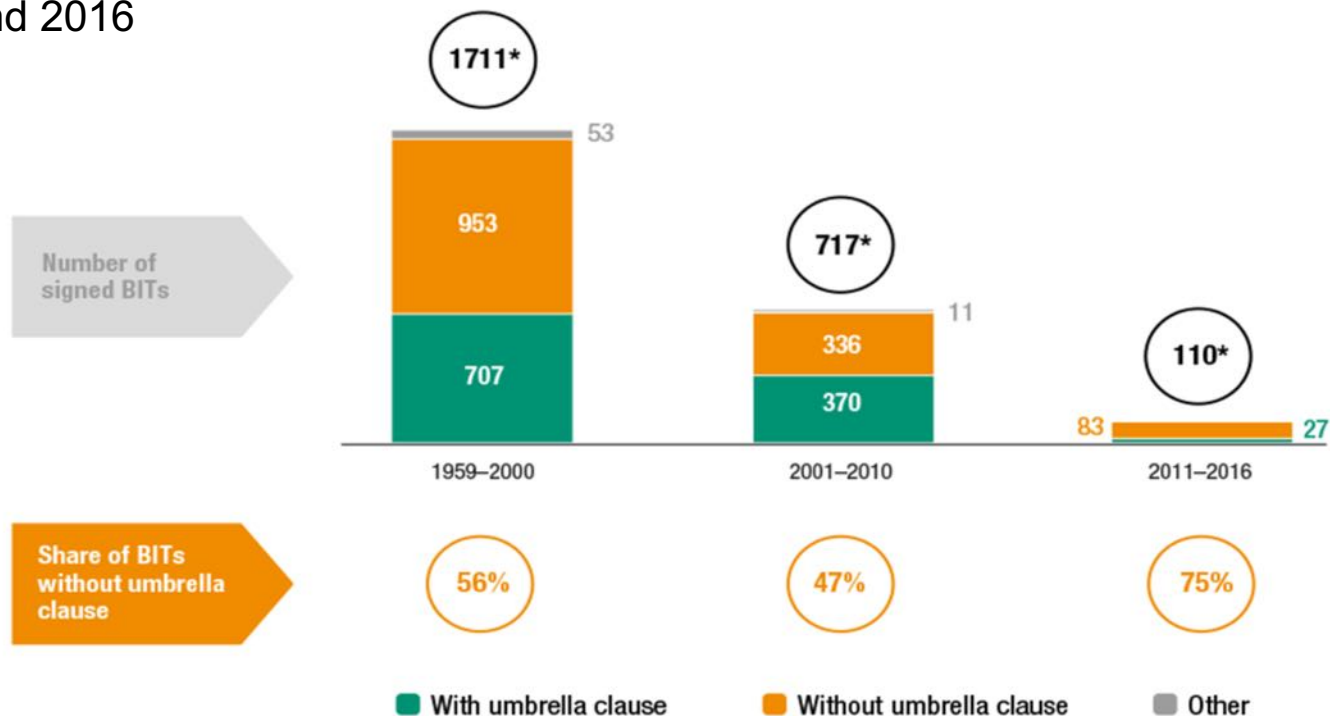
Based on 2'538 mapped BITs signed between 1959 and 2016. * Total number of mapped BITs that were signed per period. "Qualified" FET clauses refer to both clauses containing reference to the minimum standard of treatment/customary international law and containing lists of treatments that constitute breaches of FET.

Umbrella clause

- By elevating non-treaty commitments (such as contractual obligations assumed by the State) to the treaty level, umbrella clauses provide the foreign investor with the possibility to bring an ISDS case in the event of breach of this commitment.

While umbrella clauses were more prevalent in old-generation BITs, new-generation BITs frequently do without them

Number and share of BITs with and without umbrella clause, signed between 1959 and 2016

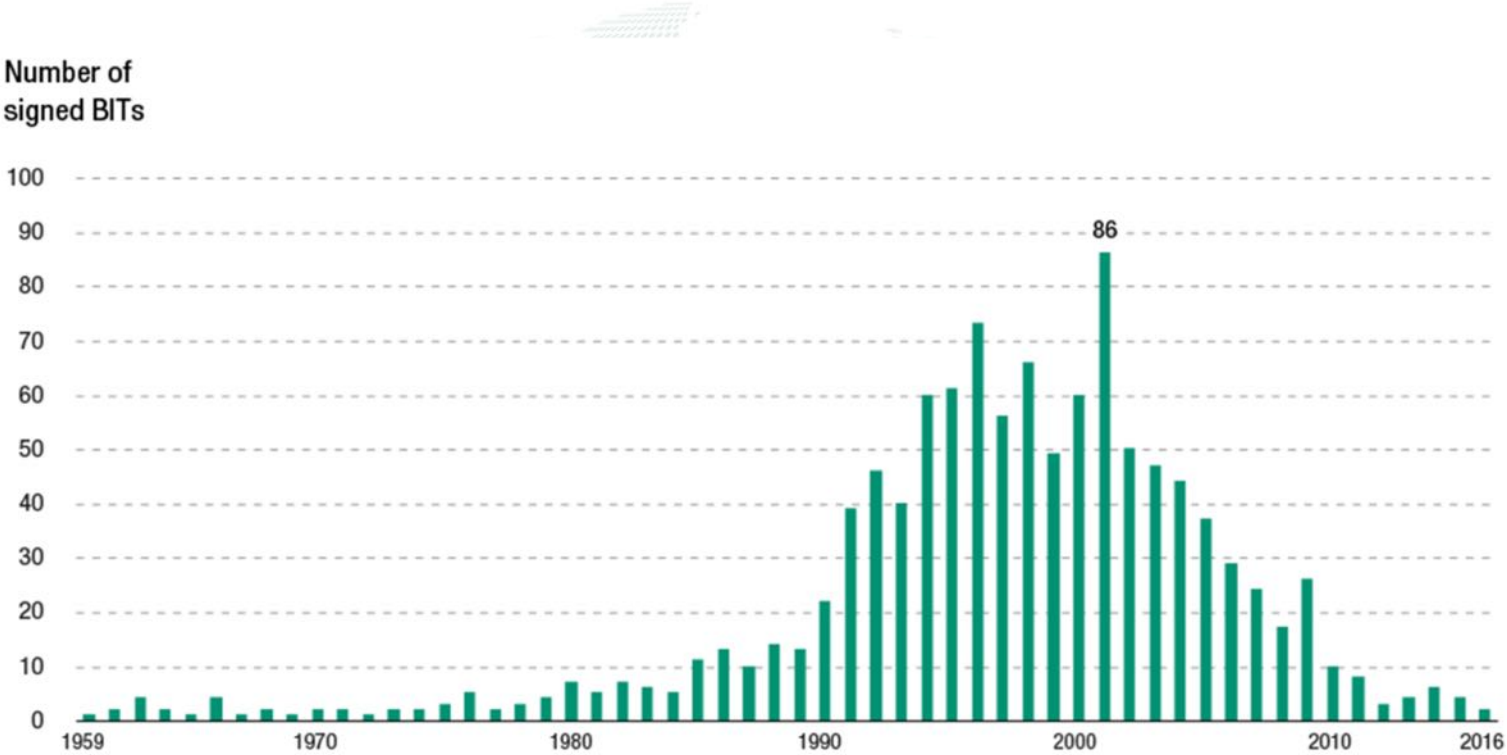


Source: © Forthcoming on UNCTAD's PPP Policy Hub.

Based on 2'538 mapped BITs signed between 1959 and 2016. * Total number of mapped BITs that were concluded by period.

BITs with umbrella clauses hit an all-time high in the 1990s and early 2000s, but are largely absent from new-generation BITs

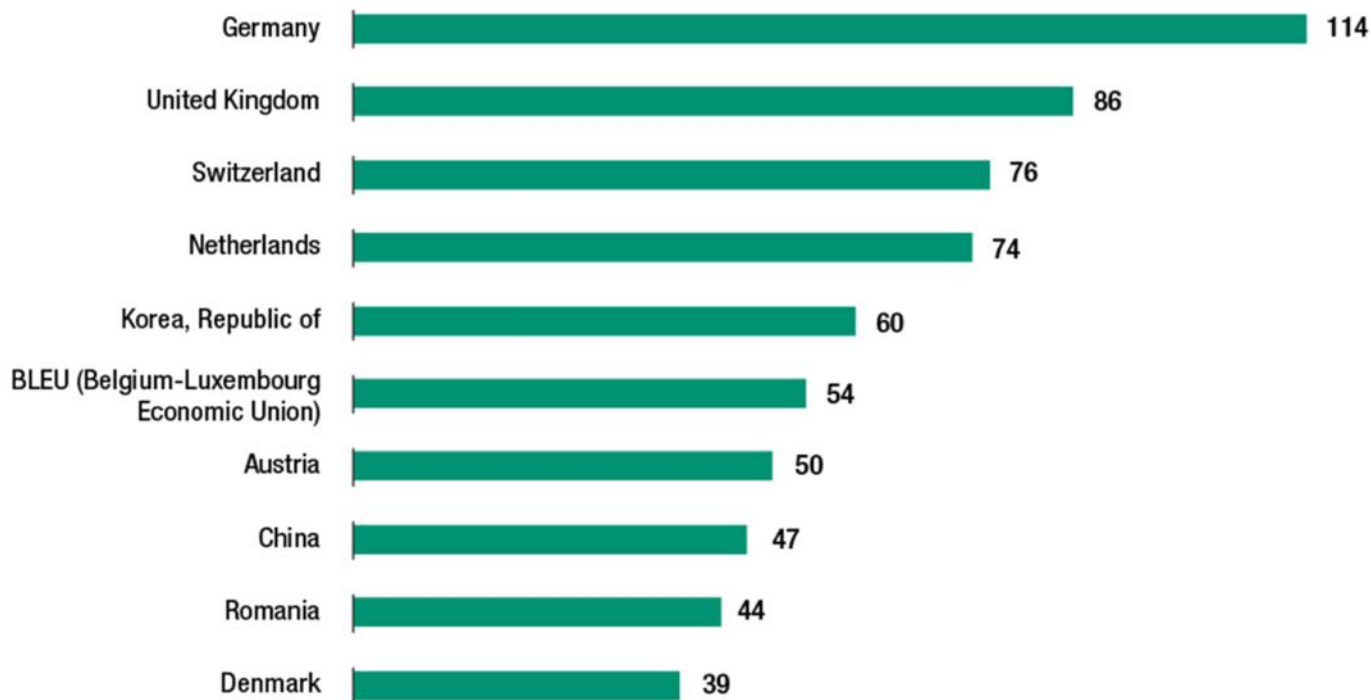
Evolution of BITs with umbrella clause, signed between 1959 and 2016



Source: © Forthcoming on UNCTAD's PPP Policy Hub.
Based on 2'538 mapped BITs signed between 1959 and 2016.

In particular capital-exporting countries have included umbrella clauses in their old-generation BITs

Top ten countries concluding BITs with umbrella clause (by number of BITs)



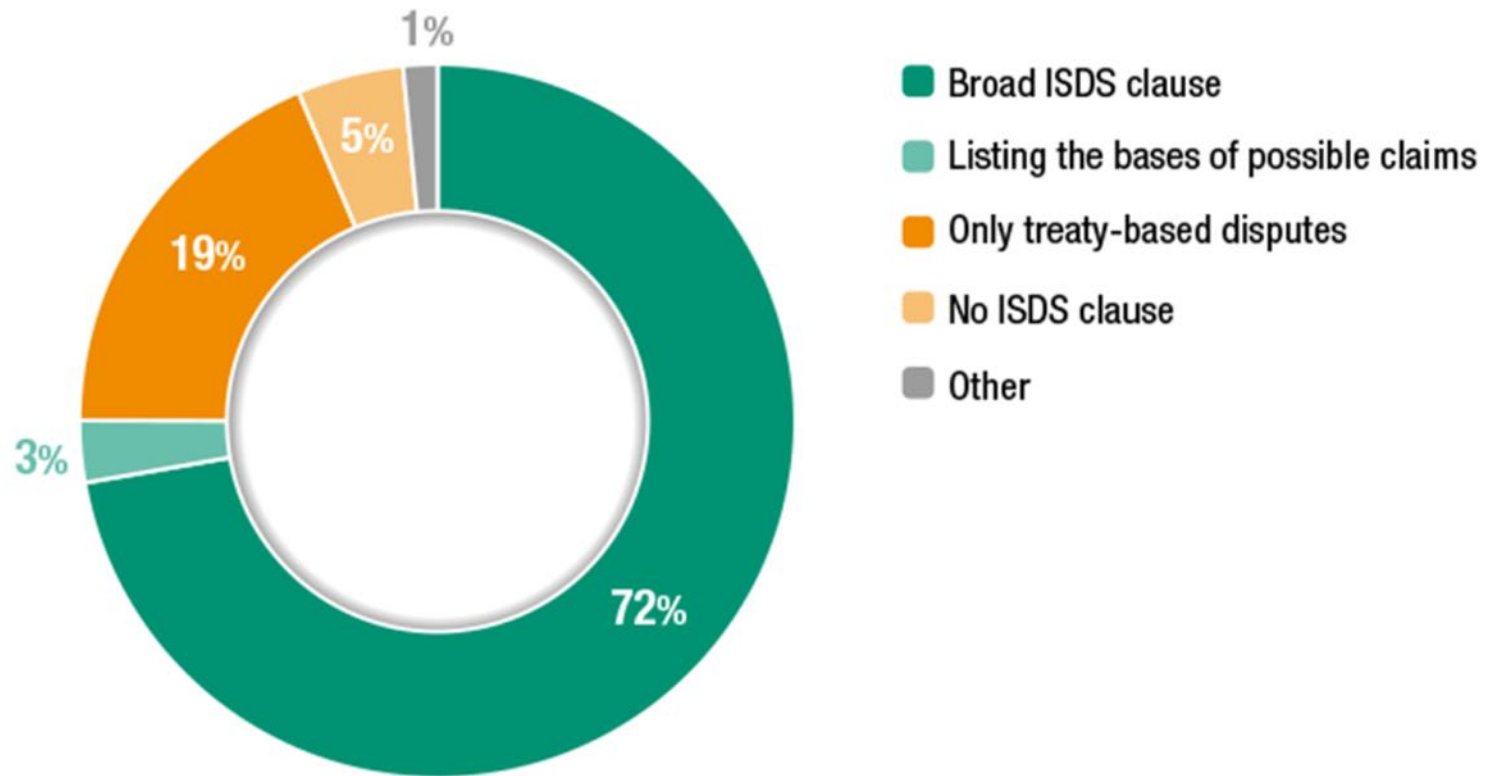
Source: © Forthcoming on UNCTAD's PPP Policy Hub.
Based on 2'538 mapped BITs signed between 1959 and 2016.

ISDS clauses

- Dispute settlement clauses typically determine which kind of disputes the contracting States agree to submit to investor-State arbitration.
- Depending on whether the “consent to dispute settlement” clause is narrowly or broadly framed, the host State may be exposed to ISDS claims based only on alleged breaches of a treaty or also based on other legal grounds (e.g. breach of contract).

Close to three-quarter of all BITs signed contain broad ISDS clauses

Share of BITs containing broad, list-based, treaty-based only or no ISDS clause, signed between 1959 and 2016

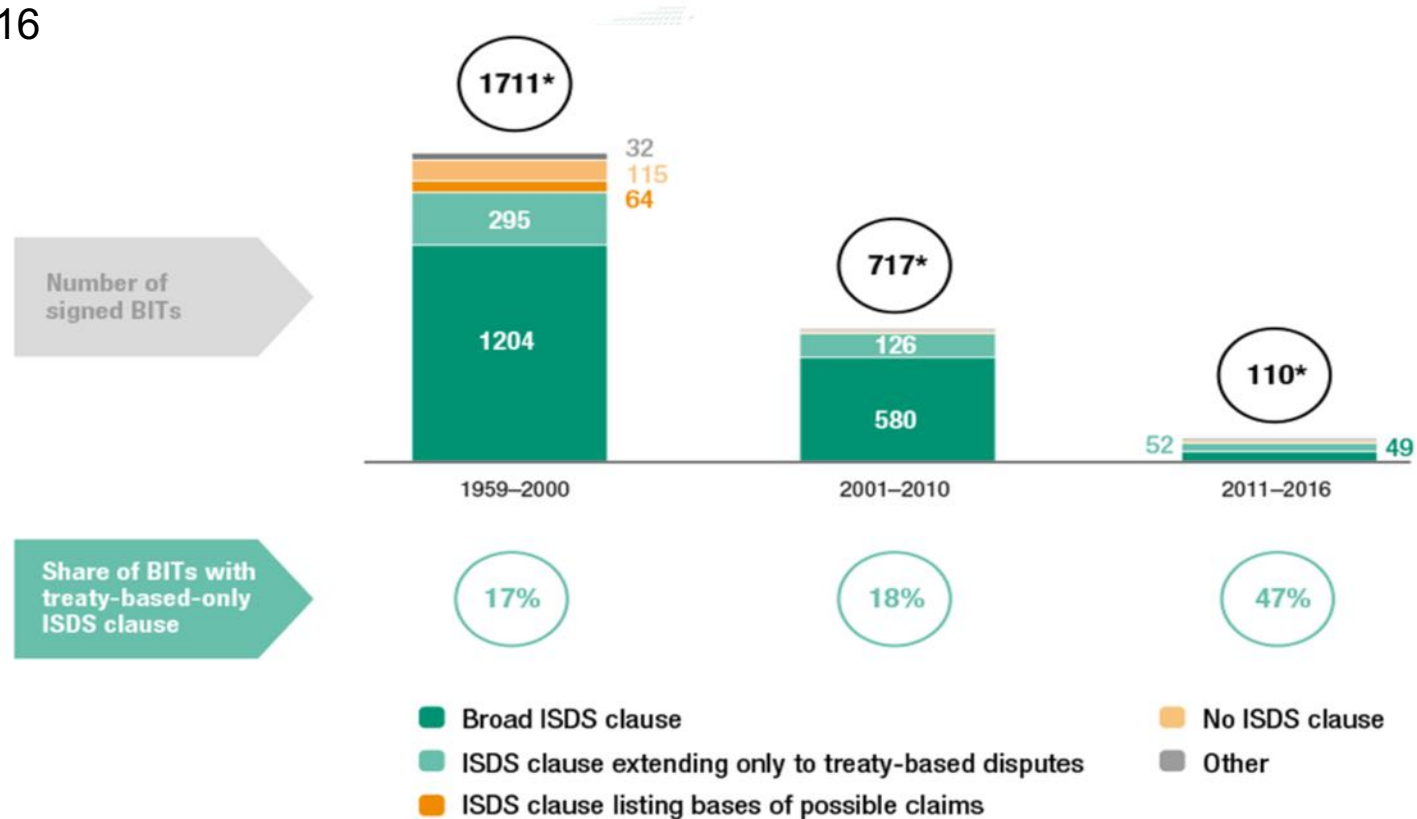


Source: © Forthcoming on UNCTAD's PPP Policy Hub.

Based on 2'538 mapped BITs signed between 1959 and 2016. The category "Other" refers to BITs that were mapped as "other", "inconclusive" or "not applicable".

The share of BITs containing narrow ISDS clauses, covering only treaty-based claims, is on the rise in new-generation BITs

Number and share of types of DS clauses in BIT, signed between 1959 and 2016



Source: © Forthcoming on UNCTAD's PPP Policy Hub.

Based on 2'538 mapped BITs signed between 1959 and 2016. * Total number of mapped BITs that were concluded by period. The category "Other" refers to DS clauses that were mapped as "other", "inconclusive" or "not applicable".

IIA clauses: Some new-generation IIAs now make explicit reference to PPPs for purposes of investment promotion/facilitation

- **Morocco-Nigeria BIT (2016), Article 5(3):**
- “The Parties shall also discuss initiatives to strengthen the role of investors in Public-Private Partnerships (PPPs), especially through greater transparency and early access to regulatory information”.
- **Brazil-Chile BIT (2015), Art. 20(2):**
- “Las Partes proporcionarán, cuando se les solicite, con celeridad, información, entre otros, sobre los siguientes puntos: ... (m) información pública sobre Alianzas Público-Privadas “

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Sustainable Development in Infrastructure and Investment Treaties

Jonathan Bonnitcha
6 February 2018



Investment treaties and PPPs

Relevant treaty provisions (I)

PPPs are “investments”

e.g. Kenya-Switzerland BIT – definition of “investment”

- ‘concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law’

Key provisions

e.g. Kenya-Switzerland BIT – fair and equitable treatment clause and “umbrella” clause

- ‘Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment’
- ‘Each Contracting Party shall observe any obligation it has assumed with regard to investments in *its* territory by investors of the other Contracting Party.’



Investment treaties and PPPs

Relevant treaty provisions (II)

Article 6

Prohibition of Performance Requirements

1. Neither Contracting Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with investment activities of an investor of a Contracting Party or of a non-Contracting Party in its Area:
 - (c) to purchase, use or accord a preference to goods produced or services provided in its Area, or to purchase goods or services from natural or legal persons or any other entity in its Area;
 - (g) to appoint, as executives, managers or members of boards of directors, individuals of any particular nationality;
 - (h) to transfer technology, a production process or other proprietary knowledge to a natural or legal person or any other entity in its Area ...
 - (j) to achieve a given level or value of research and development in its Area ...



Lessons from the cases (I)

Biwater v Tanzania

Facts:

- Water privatization in Dar es Salaam
- Multiple unsuccessful calls for tenders
- Foreign investor ultimately puts little of its own capital at risk
- Quickly clear that the investment is non-viable (from the investor's perspectives)
- Political challenges to government arising from Biwater's poor performance
- BIT proceedings as a way to bypass the contractually agreed dispute settlement mechanism



Lessons from the cases (II)

Walter Bau v Tanzania

Facts:

- Build, operate, transfer contract to build tollway.
- Challenges to project timeline, due to need for government approvals.
- Political challenges to government → pressure to reduce tolls
- Disputes between foreign and local consortium partners
- BIT proceedings as a way to bypass the contractually agreed dispute settlement mechanisms.



Lessons from the cases (III)

Government as regulator vs. government as purchaser

Questions to consider from the outset in negotiating PPPs

- What is the government actually buying: capital? expertise? risk-shifting?
- How do government agencies' ongoing regulatory role relate to this? What about the politics?
- What is the framework renegotiation? How to avoid the risk of future uncertainty being shift back onto the government?

In relation to investment treaties and dispute settlement

- Governments' dual role makes the outcome of ISDS cases uncertain.
- Should recourse to investment treaties be available?

Shifting action to improve lives.



THANK YOU!

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