

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

Joint IISD–UNCTAD workshops

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DRAFT CHECKLIST OF ISSUES SUPPORTING THE IMPLEMENTATION OF BEST PRACTICES IN PPPs FOR INFRASTRUCTURE AND PUBLIC SERVICES

INVESTOR–STATE CONTRACTS

- ✓ Draft the **force majeure** clause, if included, in a balanced manner, so that it reflects the prevailing understanding of the definition of the concept under customary international law, without committing the host state to take on a greater burden of risk for unforeseeable events than is required under international law.
- ✓ Avoid **change in law** provisions that improperly restrain legitimate exercises of the host state's regulatory powers in matters such as public and occupational health and safety, labor standards and the environment and its ability to meet international legal obligations concerning the environment (including climate change) and human rights.
- ✓ Carefully consider whether to include **stabilization clauses** in contracts and, if so, how to draft them, in view of their detrimental effects on governments' regulatory powers.
- ✓ Provide for **feasibility study and impact assessment** of socioeconomic and environmental risks and impacts, and establish appropriate plans to address them, in close consultation with affected communities and subject to government approval.
- ✓ Ensure that the project leads to **economic co-benefits** beyond those directly generated by the infrastructure to be built or public service to be provided, through a contribution to broader sustainable development of the beneficiary community and country.

- ✓ State the **social co-benefits** expected of the project, objectively quantifying them by indicators amenable to monitoring and enforcement.
- ✓ Include clauses on **environmental obligations** to specify, complement and strengthen the applicable domestic environmental standards and to empower the regulatory and oversight powers of the host government.
- ✓ Carefully consider whether to include **periodic review and renegotiation** provisions, which may lead to increased benefits to investors and potential detriments to the government and the country's population.
- ✓ Include **grievance mechanisms** for the investor to address concerns of affected individuals and communities as well as mechanisms of forums for the **settlement of disputes** between the investor and the government, in either case with the possibility of community participation and assurances against intimidation or retribution.
- ✓ Provide for **domestic law** as the contract governing law or offer domestic law as a credible option for the parties.
- ✓ Provide for **transparency** in the operation of the investment and meaningful opportunities for **public participation**.
- ✓ Include **penalties** to encourage investors' compliance with their obligations and a way to remediate the consequences of non-compliance, including the **termination** of the contract in the most serious cases.

INTERNATIONAL INVESTMENT AGREEMENTS (IIAs)

- ✓ Carefully assess whether to adopt an **enterprise-based or asset-based definition of investment** and how to phrase the definition. The broader the definition of investment, the more easily investments based on PPP contracts qualify as protected investment and the greater is the potential exposure of host states to ISDS claims in relation to PPPs.
- ✓ “**In accordance with host state law**” clauses can help ensure that PPPs comply with domestic laws of the host state. “**Anti-corruption**” clauses can help foster the investor responsibility dimension of PPPs.
- ✓ If **investor-state dispute settlement (ISDS) clauses** are included, ensure that they are narrowly framed to help limit host states’ exposure to PPP-related ISDS claims.
- ✓ Carefully consider whether to include a **fair and equitable treatment (FET)** clause and, if so, how to phrase it. Vague and unqualified FET clauses have given rise to

expansive and diverging interpretations of what can be considered a breach. Narrowly drafted ones—for example, those listing explicitly the type of treatment that constitutes a breach of FET—can help reduce host states' exposure to ISDS claims based on PPPs.

- ✓ Avoid the inclusion of **umbrella clauses**—typically included in older-generation treaties but typically excluded from new-generation treaties—to help reduce host states' exposure to PPP-related, contract-based ISDS claims.

REFERENCES AND FURTHER GUIDANCE

Brauch, M. D., “Contracts for Sustainable Infrastructure: ensuring the economic, social and environmental co-benefits of infrastructure investment projects”, IISD Report (2017), available at: <http://www.iisd.org/sites/default/files/publications/contracts-sustainable-infrastructure.pdf>

Foley Hoag LLP., “Summary comments on the World Bank Group’s 2017 Guidance on PPP Contractual Provisions”(2017), available at: <https://us.boell.org/2017/09/15/summary-comments-world-bank-groups-2017-guidance-ppp-contractual-provisions-o>

United Nations Conference on Trade and Development (UNCTAD), “Mobilizing investment and channeling it into SDG sectors: the case of public-private partnerships (PPPs): Mapping of IIA clauses”, UNCTAD, available at:

<http://investmentpolicyhub.unctad.org/Pages/mapping-of-iiia-clauses>