



# Cooperation and Facilitation Investment Agreement - CFIA

Ministério do  
Desenvolvimento, Indústria  
e Comércio Exterior

GOVERNO FEDERAL  
**BRASIL**  
PAÍS RICO É PAÍS SEM POBREZA



# COOPERATION AND FACILITATION INVESTMENT AGREEMENT

## INTERNATIONAL INVESTMENT AGREEMENTS

1. Overview
2. Brazilian context

## BRAZILIAN PROPOSAL OF CFIA

3. Benchmarking to the CFIA
4. Content of the proposal
5. Main pillars

# COOPERATION AND FACILITATION INVESTMENT AGREEMENT

## 1. OVERVIEW

- International regulatory framework for FDI: **lack of consensus** between exporters and importers of capital about their rights and obligations;
- Many **Protection and Promotion Investment Agreements** currently in force were conceived by the Multilateral Investment Guarantee Agency (*MIGA*) - 1980/90
- However Promotion Clauses practically inexistent in the majority of Bilateral Investment Agreements (**BITs**)
- **Focus on protection:** Investor-State dispute settlement; indirect expropriation, etc

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## 1. OVERVIEW

- **1990's:** proliferation of BITs (currently around 3,000 BITs)
- Increase in the number of investor-State dispute settlement
- **Main criticisms:**
  - ✓ Lack of legal consistency of decisions (vague concepts)
  - ✓ High financial cost of arbitration procedures and compensations
  - ✓ Restriction to the regulatory discretion of States
  - ✓ Little effective protection and high political costs
- **Agreements are being reviewed in** developing and developed countries (e.g.: South Africa, Australia, E.U, Indonesia, etc)
- Increasing litigation **hinders the development of harmonious long term relationships** between foreign investors and host countries
- Companies want consistency and predictability. Governments, policy space.



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## 2. BRAZILIAN CONTEXT

- 14 BITS signed – none approved by Congress (no balance between investors and State rights and obligations – focus only on protection)
- Even though Brazil remains the first recipient of FDI in South America (USD 63 billion, 2013)
- **Increasing Brazilian investment outflow:** greater presence in Latin America and many opportunities in Africa, Asia, Europe and North America.
- International expansion of Brazilian companies: governmental incentive and support

### ⇒ **New model of Cooperation and Facilitation Investment Agreement (CFIA) – Goals:**

- ✓ Overcoming legal difficulties and failures of traditional IPPAs
- ✓ Attending the needs of investors in a concrete and pragmatic manner
- ✓ Attention to the development strategy of host countries

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## 3. BENCHMARKING TO THE CFIA

### ■ International Organizations

- ✓ UNCTAD: strengthening the promotion clauses in several areas, etc
- ✓ OECD: one-stop-shop services, improvement of communication channels, etc

### ■ Recommendations from the Brazilian private sector (long consultations)

- ✓ CNI: support to the international expansion of Brazilian companies, mitigate specific problems, access to information in countries that receive the investment, etc.
- ✓ FIESP: cooperation and investment facilitation. Thematic and business agendas.
- ✓ Investors: differentiation between Brazilian investment and other competitors. Goals, barriers and obstacles to overcome. Strengthen institutional dialogue.

### ■ International Experiences

- ✓ South Korea: Ombudsman - supports investors in resolving peacefully conflicts and improving the business environment => successful cooperation and investment facilitation
- ✓ USA, Chile, South Africa, etc

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## 4. CONTENT OF THE PROPOSAL

- **Brazilian model: risk mitigation and positive agenda**

**=> Focus on (pragmatic) Facilitation rather than (expensive) Litigation**

- Proposal is dynamic and adaptable to each partner

➤ **Objective:** to promote cooperation between Parties and to facilitate and encourage mutual investment

➤ **Main pillars:**

- 1) Improving institutional governance
- 2) Mechanisms for risk mitigation and prevention of disputes
- 3) Thematic agendas of cooperation and investment facilitation



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## 5. MAIN PILLARS

### 1) Improvement of institutional governance

- ✓ Ombudsman or Focal Point in each country
- ✓ Institutional cooperation between governments
- ✓ Joint Committee – Agreement monitoring and agendas implementation
- ✓ Continuous and prominent participation of the private sector (WGs)

### 2) Mechanisms for risk mitigation and dispute prevention

- ✓ National Treatment and Most Favoured Nation
- ✓ Direct expropriation
- ✓ Mechanisms of transparency and access to information
- ✓ Corporate social responsibility
- ✓ Transfer of funds and currencies
- ✓ Detailed system of dispute prevention (phases, time frame, etc)



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## 5. MAIN PILLARS

### 3) Thematic agendas of cooperation and investment facilitation

- ✓ Business Visa facilitation
- ✓ Payment and currency transfers cooperation
- ✓ Regulatory and institutional exchanges of expertise
- ✓ Technical and environmental regulations
- ✓ Professional and labour trainings
- ✓ Logistics and transportations understandings
- ✓ Others

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## Five paths towards reform of the investment dispute settlement

Paths	Description	CFIA
<b>1. Promoting alternative dispute-resolutions methods.</b>	<ul style="list-style-type: none"> <li>- Fostering alternative dispute resolution methods</li> <li>- Promoting dispute prevention policies</li> <li>- Emphasizing mutually acceptable solutions and preventing escalation disputes</li> <li>- Implementing at the domestic level, with or without reference in IIA</li> </ul>	<p>To improve institutional governance and prevent the escalation of dispute the following provisions have been adopted: <b>1) An <u>Ombudsman</u></b> in each country, responsible for continuous dispute prevention throughout the investment process. Functions include: technical communication channel between investors and the host country and presentation of proposals for improvements in the business environment; <b>2) A <u>Joint Committee</u></b> composed of government representatives of both countries. Functions include: the Agreement implementation and monitoring; solving potential controversies through a dispute prevention mechanism (compulsory before entering in a SSDS procedure). <b>3) <u>Open dialogue with the private sector</u></b>: continuous contact with Ombudsmen and eventual participation in the Joint Committee hearings and ad hoc working groups. <b>4) <u>Institutional cooperation</u></b> in order to improve business environment: exchange of relevant information and transparency measures.</p>
<b>2. Tailoring the existing system</b>	<ul style="list-style-type: none"> <li>- Setting time limits for bringing claims</li> <li>- Expanding the contracting parties role in interpreting treaty</li> <li>- Providing for more transparency in ISDS</li> <li>- Including a Mechanism for early discharge of frivolous claims</li> </ul>	<p>Although <b>CFIA only includes SSDS</b> procedures, some recommendations have been incorporated to the Agreement: <b>1)</b> The Joint Committee, composed by representatives of the contracting Parties, is responsible for the interpretation of the Agreement; <b>2)</b> Open dialogue and transparency: the private sector is encouraged to participate in ad hoc working groups and may be consulted in the dispute prevention mechanism.</p>
<b>3. Limiting investors access to ISDS</b>	<ul style="list-style-type: none"> <li>- Reducing the subject-matter scope for ISDS claims</li> <li>- Denying protection to investors that engage “nationality planning”</li> <li>- Introducing the requirement to exhaust local remedies before resorting to ISDS</li> </ul>	<p>Provisions on ISDS are considered as non-compliant with the Brazilian Constitution as they may impose restrictions on the adoption of public policies which are critical to the country’s development. Disputes concerning the interpretation and application of the CFIA may be submitted to a State-State arbitration procedure, in case no agreement is reached through the dispute prevention mechanism.</p>
<b>4. Introducing appeals facility</b>	<ul style="list-style-type: none"> <li>- Allowing for the substantive review of awards rendered by tribunals</li> <li>- Creating a standing body, for example made up of member appointed by states</li> <li>- Requiring subsequent tribunals to follow</li> </ul>	<p>In case no agreement is reached through the dispute prevention mechanism, parties may resort to SSDS procedures, or to domestic tribunals. In Brazil, fair and equal access to court and national treatment are fully guaranteed as well as the right of appeal.</p>



# COOPERATION AND FACILITATION INVESTMENT AGREEMENT

## Four Paths of Action for reforming the international investment agreement regime

Paths	Description	CFIA
1. Status quo	Not pursuing any substantive change to IIA clauses or investment-related international commitments	n/a
2. Disengagement	Withdrawing from investment-related international commitments	n/a
3. Selective Adjustments	<p>Pursuing selective changes in a non-binding manner:</p> <ul style="list-style-type: none"> <li>To add a sustainable development dimension to IIAs (e.g. sustainable development in preamble)</li> <li>To move towards rebalancing rights and obligations (e.g. non-binding corporate social responsibility in preamble)</li> <li>To change specific aspects of ISDS (e.g. early discharge of frivolous claims)</li> <li>To address policy interaction selectively (e.g. not lowering standards clauses)</li> </ul>	<p><b>1) Sustainable development dimension:</b> The preamble expressly recognizes the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation; <b>2) Corporate Social Responsibility:</b> Investors are encouraged to achieve the highest possible level of contribution to the sustainable development of the Host Party and local community. The Agreement includes a list of voluntary principles and standards for a responsible business conduct; <b>3) Rebalancing rights and obligations:</b> The Agreement expressly mentions the Parties' regulatory autonomy and policy space; <b>4) Accommodation of particular economic relationship in a step-by-step approach:</b> The agreement has been formulated as a living and dynamic document. Parties will define agendas for further cooperation and facilitation on relevant topics for the promotion and enhancement of bilateral investments. Considering the horizontal aspect of investment facilitation, agendas may concern a wide range of topics in which there is common interest. The results of negotiations shall constitute additional protocols to this Agreement or specific legal instruments. Indeed, facilitation of investment is considered one of the main elements of CFIA as it reflects a pragmatic approach directed towards investor's interests and common development strategies.</p>

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## *In conclusion:*

- > CFIA is an innovative, pragmatic, dynamic and flexible alternative to traditional investment agreements;*
- > Aimed at long term and strategic business partnership, as an important mechanism to support Brazilian investments abroad, considering an increasingly competitive environment.*





# Thank you

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