



## World Investment Forum 2014: Investing in Sustainable Development

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Mr. M. Daniel Godinho  
Secretary of Foreign Trade  
Ministry of Development, Industry and Foreign Trade  
Brazil

#### **The Brazilian experience with IIAs**

Despite not having International Investment Agreements (IIAs) currently in force, Brazil follows closely the global discussions concerning these agreements and actively seeks to build an alternative approach to the traditional models.

During the 1990's Brazil signed 14 traditional Investment Promotion and Protection Agreements (IPPAs), six of which were sent to Congress and later rejected. Provisions on indirect expropriation and Investor-State Dispute Settlement were considered as non-compliant with the Brazilian Constitution. Moreover, those provisions were considered to impose restrictions on the adoption of public policies critical to the country's development.

Following the rejection of IPPAs by the Congress, the Brazilian government intensified work to define new guidelines for further negotiations on investment agreements. These guidelines included measures such as: expropriation restricted to direct expropriation (as provided in the Federal Constitution); State-to-State dispute settlement modality; free transfer of funds with balance of payments safeguard; definition of investment focused on foreign direct investment; admission and establishment restricted to "post-establishment"; and preservation of the regulatory autonomy of the state.

#### **Cooperation and Facilitation Investment Agreement (CFIA): forging a new model**

Building on these guidelines, in recent years Brazil has focused on drafting a new model of investment agreement based on thorough review of international organizations studies, consultations with the Brazilian private sector, and international benchmarking.

This process led to the elaboration of the Cooperation and Facilitation Investment Agreement (CFIA) that seeks a balanced outcome combining the promotion of an attractive environment for investors while preserving space for public policies. In this sense, the new model overcomes the limitations identified by the Brazilian Congress in traditional IPPAs and takes a positive approach towards investment agreements through institutional cooperation and facilitation of investment flows.

In 2013, CFIA was approved by the Council of Ministers of the Brazilian Chamber of Commerce (CAMEX)<sup>1</sup>, an interministerial governmental body on foreign trade. Its main pillars are: i) enhanced institutional governance; ii) thematic agendas for investment cooperation and facilitation; and iii) mechanisms for risk mitigation and disputes prevention.

The creation of Focal Points (Ombudsmen) in each party of the agreement and of a Joint Committee involving both of them can be considered the institutional core of CFIA. Focal Points are designed to serve as an important communication and support channel between investors and the host country and to improve investment conditions in the latter. The Joint Committee, which is composed of government representatives of both parties, is responsible for sharing opportunities for the expansion of mutual investment, monitoring the implementation of the Agreement, preventing disputes and solving possible disagreements in an amicable manner. Another important feature is that the private sector may be invited and will be encouraged to join *ad hoc* working groups established by the Joint Committee to discuss specific subjects. Focal Points and the Joint Committee shall also act in close collaboration towards implementing the commitments inscribed in the agreement improving the dialogue between the parties on investments matters.

CFIA also focuses on pursuing working agendas in areas that can potentially stimulate an attractive business environment. These agendas may cover a vast array of specific issues of interest to the parties and their investors regarding investment cooperation and facilitation, including, for example: cooperation on currency remittance, business visas, corporate social responsibility, technical and environmental regulation, and any other area in which there is common interest. Coordination of the mutual agreed agendas is carried out by the Joint Committee. New thematic agendas might be proposed, debated and eventually added to the Agreement. Therefore, CFIA constitutes a dynamic instrument that incentives its gradual expansion by continuous negotiations between the parties, with further commitments written in additional protocols or annexes to the Agreement.

CFIA contains relevant tools to mitigate investment risks and to avoid situations that may lead to formal disputes between the parties. The Agreement sets forth provisions on non-discrimination, such as National and Most Favored Nation treatment, transparency, as well as specific conditions for direct expropriation and compensation in cases of conflict and transfer of currency. While Investor-State Dispute Settlement is the backbone of traditional IIAs, the Brazilian model favors mechanisms to prevent disputes based on dialogue and bilateral consultation, prior to the initiation of State-State arbitration procedures. Such mechanisms call for the direct and continuous involvement of the above mentioned Focal Points and Joint Committee.

In conclusion, CFIA consists in an innovative alternative to traditional IIAs. It recognizes the role of governments in fostering a positive environment for investment, takes into full consideration the interests of private investors, retain policy space for pursuing the development needs of the parties, and adopts a constructive and proactive view aimed at bridging potential differences between investors and the host country.

### **What types of mechanisms and platforms are needed to facilitate the reform?**

An international platform for the exchange of information and good practices would certainly facilitate the process of reform of the IIA regime. It is important to have a clear perception of countries' experience and ambitions towards IIAs in order to identify issues and appropriate ways to address them. We believe that UNCTAD's inclusive, transparent and universal nature makes it an ideal candidate to play this role. In addition, the Investment Policy Hub provided by UNCTAD is a very useful platform providing users with an environment for discussion and information sharing. This mechanism should be continuously explored in order to address relevant issues identified by the WIF.

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<sup>1</sup> CAMEX is a public body member of the Governing Council of the Presidency of Brazil engaged in the formulation, adoption, implementation and coordination of policies, guidelines and actions relating to trade in goods and services. It is presided by the Minister of Development, Industry and Foreign Trade, and includes the Ministers of State Head of Civil Office; of Foreign Affairs; of Finance; of Agriculture, Livestock and Supply; Planning, Budget and Management; and Agrarian Development.