



Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi

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1.0 Introduction

Unlike traditional bilateral investment treaties (BITs), which are geared toward investor protection, Brazil's Cooperation and Investment Facilitation Agreements (CIFAs—or ACFIs in their Portuguese acronym) focus primarily on cooperation and investment facilitation. They promote amicable ways to prevent and settle disputes and propose state–state dispute settlement as a backup; notably, they do not include provisions on investor–state arbitration. The Brazilian approach therefore offers an alternative to governments that wish to reduce unintended risks of arbitration while finding ways to settle disagreements that may arise with investors.

Brazil had signed 14 traditional-type BITs in the 1990s, but these were not ratified by its National Congress. Since that refusal, Brazil has determined that it would only negotiate investment agreements that expressly safeguard the right to regulate, exclude coverage of portfolio investments and indirect expropriation, and provide for state–state dispute settlement.¹ Given that Brazil never ratified the traditional BITs with investor–state dispute settlement, the country has not faced any investment arbitration claims.

¹ Report of the 4th Annual Forum of Developing Country Investment Negotiators, retrieved from https://www.iisd.org/pdf/2011/dci_2010_report.pdf.

The Brazilian Ministry of Development, Industry and Commerce (MDIC) led the preparation of the model, collaborating with the Ministry of Foreign Relations, the Ministry of Labour and Employment, the Central Bank of Brazil, the National Confederation of Industries (*Confederação Nacional da Indústria* [CNI]) and the Federation of Industries of the State of São Paulo (*Federação das Indústrias do Estado de São Paulo* [FIESP]). Consultations were also held with private sector representatives.² This process lasted several years. In 2013, Brazil shared the table of contents of the new model and some insights about its content.³

Negotiations of the first agreements based on Brazil's new model BIT were initiated in 2013. Brazil and Mozambique signed the first CIFA on March 30, 2015. Similar agreements were signed with Angola on April 1, 2015, with Mexico on May 26, 2015, and with Malawi on June 25, 2015. Brazil is also negotiating with Algeria, Chile, Colombia, Morocco, Peru, South Africa and Tunisia.⁴

² Brazilian Ministry of Development, Industry and Commerce. (2015, April 1). *Brasil e Angola assinam Acordo de Cooperação e Facilitação de Investimentos (ACFI)*. Retrieved from <http://www.mdic.gov.br/portaldmdic/sitio/interna/noticia.php?area=5¬icia=13688>

³ Report of the 7th Annual Forum of Developing Country Investment Negotiators, retrieved from https://www.iisd.org/pdf/2013/7th_annual_forum_report.pdf.

⁴ Presidency of the Federative Republic of Brazil. (2015, January). Mensagem ao Congresso 2015, p. 44. Retrieved from <http://www.casacivil.gov.br/acesso-a-informacao/mensagem-presidencial/mensagem-ao-congresso-2015.pdf/@download/file/Mensagem%20ao%20Congresso%202015.pdf>



While Brazil has not published its template, the texts of the CIFAs concluded allow us to understand the main components of the new model.⁵ At the same time, however, there are important differences among the concluded CIFAs, suggesting that Brazil is somewhat flexible in the approach it adopts with different countries. Building on an earlier descriptive overview,⁶ this note compares the agreements concluded and provides an overview and a critical legal commentary of their texts, followed by suggestions and recommendations for existing and future CIFAs.

2.0 Overview and Critical Legal Commentary

2.1 PREAMBLE

All CIFAs have similar preambular text. The parties express their wish to deepen the bonds of friendship and the spirit of cooperation as well as to stimulate investment, while broadly reaffirming their legislative autonomy and public policy space. They recognize the importance of a transparent and friendly investment environment.

The parties also acknowledge the “essential role of investment in the promotion of sustainable development” and other public policy objectives, and express their understanding that a strategic partnership on investment will bring broad benefits to both parties.

Unlike the treaties with Angola, Mozambique, and Malawi, the treaty with Mexico explicitly acknowledges “the need to promote and protect

⁵ The text of the Brazil–Mozambique CIFA is available at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR; the text of the Brazil–Angola CIFA, at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-acfi-luanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280. For a side-by-side English translation of the two first agreements, see International Institute for Sustainable Development (IISD). (2015, June 16). *Side-by-side comparison of the Brazil–Mozambique and Brazil–Angola Cooperation and Investment Facilitation Agreements*. Retrieved from <http://www.iisd.org/publications/side-side-comparison-brazil-mozambique-and-brazil-angola-cooperation-and-investment>. The texts of the Brazil–Mexico and Brazil–Malawi CIFAs are available upon request to MDIC.

⁶ Brauch, M. D. (2015, May). The Brazil–Mozambique and Brazil–Angola Cooperation and Investment Facilitation Agreements (CIFAs): A descriptive overview. *Investment Treaty News*, 6(2). Geneva: IISD. Retrieved from <http://www.iisd.org/itn/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview>.

investments due to their essential role in the promotion of sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development.” This is likely an element that Mexico insisted on including based on its more traditional approach to investment treaties.

While all CIFAs reaffirm their legislative autonomy and public policy space, the CIFA with Mexico incorporates additional language on the sovereign right to regulate investment in pursuit of national policy objectives:

Acknowledging the right of the Parties to legislate on matters of investment and to adopt new regulations about the topic, with the purpose of fulfilling the objectives of their national policies; [...].

Finally, all CIFAs express the desire of the parties “to encourage and tighten the contacts between the private sector and the governments of the two countries.” Given that the CIFAs give some space to other stakeholders, such as local communities, in other parts of the text, their importance could also be referred to here, by recognizing that the interests of all stakeholders should be considered in investment operations, including those of the investor, the government, and local communities.

2.2 OBJECTIVE

The objective of the Angola CIFA is “to facilitate and foster investments,” with a view to intensifying and increasing business opportunities and activities between the parties. Different phrasing is found in the Mozambique, Mexico, and Malawi CIFAs, the object of which is “the cooperation” between the Parties to facilitate and foster investments.

While the text makes clear that the immediate objective of the CIFA is to facilitate and foster investment, the parties surely did not envision this to be the end goal. To be more precise, the goal would have been better formulated as facilitating a particular type of investment, that is, investment that ultimately supports the sustainable development of contracting states. It is unfortunate that this is not explicitly and simply stated, as it would be more in line with the rest of the treaty text, including the preamble.



2.3 DEFINITIONS OF INVESTMENT AND INVESTOR

The CIFAs vary significantly in how they define investment and investor. These differences are important since they determine the scope of the agreements and the various obligations. On the other hand, the differences would play a more important role in the more traditional investment treaties because they are more legalistic and subject to investor-state arbitration. In arbitrations under those treaties, there have been surprising interpretative approaches regarding the meaning of the terms “investment” and “investor” and the related jurisdictional decisions. Even though the CIFAs do not provide for investor-state arbitration, we discuss below the various approaches taken in the agreements.

Under the Angola CIFA, the definitions of investment and investor—among others—are left to be regulated by the respective domestic laws of the parties:

For the purposes of this Agreement, the definitions of investment, investor and other definitions inherent to this subject matter will be regulated by the respective laws of the Parties.

While in principle the idea of linking the definition of investment to domestic law is interesting, because it ensures that there is no contradiction or conflict between international and domestic law, the approach also raises several issues. First, it is not clear what domestic law is referred to here. Most likely, the parties had in mind the law of the host state, that is, the country where the investment is made. This would mean that the definitions will vary, and if the definition of investment varies, the scope of coverage of the agreements and the extent of their obligations may also vary. Second, even within domestic law, there may not be one single definition of investment, which makes it difficult to determine the point of reference. Similar issues arise with respect to the definition of investor. Which domestic law is meant? Is there even a definition of investor in domestic law?

In turn, the Mozambique CIFA defines investment as follows:

1. “Investment” means any type of asset or right owned or controlled directly or indirectly by an investor of one of the Parties in the territory of the other Party, with the purpose of establishing long-lasting economic relations and aimed at the production of goods and services, in particular: [...].

The first part of the definition is similar to other models, such as the 2012 U.S. Model BIT in which an investment is “any type of asset or right owned or controlled directly or indirectly by an investor of one of the Parties in the territory of the other Party.” The CIFA differs, however, in that it qualifies investment as having “the purpose of establishing long-lasting economic relations” and being “aimed at the production of goods and services.” Therefore, for an asset to qualify as an investment, it must be linked to economic activities. Minority shareholdings would be covered by this definition, as long as the “purpose of establishing long-lasting economic relations” is present.

This is followed by a non-exhaustive list of assets, including partnerships, enterprises, equity in partnerships or enterprises, movable or immovable property, and amounts invested in business concession rights. The definition seems to strive to clarify that there is a need for duration and actual business activity in the form of production of goods and services, and that the asset alone is not sufficient. However, the contours of the definition are not entirely clear.

Particularly worthy of note in the assets listed is “the amount invested in business concession rights granted by law, by administrative decisions or by contract, including concessions for the exploitation, development, extraction or exploration of natural resources.” Similar language appears in the definition of investment under the Malawi CIFA, which refers to “the value of investment under a concession contract or administrative decision, including licenses to cultivate, extract or exploit natural resources.” The language of both items appears to indicate that the investment is not the asset itself—the concession right—but the amount invested in the asset. While it may be an attempt at predetermining how the investment in concessions is to be valued (by limiting its value to the amount originally spent on or invested in the concession),

this language is unusual and would be worth clarifying.

The Malawi CIFA is similar, varying slightly from the definition in the Mozambique CIFA. Its definition of investment reads:

Investment means any type of property or right owned or controlled directly or indirectly by an investor from one of the Parties in the territory of the other Party for the purpose of establishing an enterprise with long-lasting economic relation with a view to producing goods and services [...].

Under this definition, for an asset to be considered an investment, it must be linked to the purpose of establishing an “enterprise,” in addition to the purpose of establishing long-lasting economic relations to produce goods and services. It is unclear why the definition covers only assets owned or controlled “for the purpose of *establishing an enterprise*.” Is it not the parties’ intent to qualify an asset with the purpose of acquiring, maintaining, operating or expanding an enterprise also as an investment? This language should be clarified. In this respect, the Mozambique and Mexico texts, which refer to the purpose or objective of *establishing long-lasting economic relations*, avoid the confusion with the term “establishment of an investment,” although the same question could be asked: would the asset not qualify as an investment if the purpose of its acquisition is to *Maintain or expand* (rather than establish) long-lasting economic relations?

The definition is followed by a non-exhaustive list that differs from the list in the Mozambique CIFA and is followed by a clarification of what is not included in the definition:

For greater certainty, Investment does not include:

- a) debt securities issued by a government or loans to a government;
- b) portfolio investments; and
- c) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension

of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in sub-paragraphs (i)-(v) above.

The Mexico CIFA defines investment as:

any type of asset or right owned or controlled directly or indirectly by an investor of a Party, established or acquired in accordance with the laws and regulations of the other Party in the territory of the latter Party, linked to the production of goods or the rendering of services in the host State by the investor of the other Party, with the objective of establishing long-term economic relations [...].

This is followed by a non-exhaustive list and a list of exclusions “for greater certainty,” like the one in the Mozambique CIFA. Other model texts—such as the SADC and Indian models—suggest other assets that could be added to the list of exclusions in the CIFAs:

- Pre-operational expenditures relating to admission, establishment, acquisition or expansion of the enterprise that is incurred before the commencement of substantial and real business operations of the enterprise in the host state;
- Goodwill, brand value, market share or similar intangible rights;
- A bank letter of credit; and
- An order or judgment sought or entered in any judicial, regulatory, administrative, or arbitral proceeding.

An important difference in the Mozambique CIFA from the other definitions lies in the fact that the Mexico CIFA defines investment “established or acquired in accordance with the laws and regulations of the other Party in the territory of the latter Party.” This is an important clarification as it excludes from the definition investments established based on corruption, fraud or other illegal acts.

The definition of investor also varies from CIFA to CIFA, ranging from a rather broad definition (Mozambique) to a narrower one (Malawi).



Under the Mozambique CIFA, investors may be: (i) natural persons who are nationals of the parties; (ii) legal persons structured under the law of the host state; (iii) legal persons controlled by an investor under (i) or (ii); (iv) legal persons having their headquarters and the centre of their economic activities in the territory of a party; (v) natural or legal persons making an investment and authorized to do so when required by the law of a party. This unusually broad definition seems to admit as an investor any natural or legal person that fulfills any of the listed criteria, including merely qualifying as a legal entity under host state law.

In the Mexico CIFA, the definition of investor includes both natural and legal persons who are nationals of one state (including permanent residents, in the case of Brazil) who make an investment in the other state. Legal persons must both be structured in accordance with home state law and have the centre of their economic activities in home state territory. Legal persons established in a third state can also qualify if they are controlled by a natural or legal person of the host state.

The definition of investor in the Malawi CIFA encompasses individuals who are nationals or permanent residents of one state and who make an investment in the other state. For a legal person to qualify as an investor, it must be established according to the laws of one of the states, its headquarters and the centre of its economic activities must be in the territory of that state, its property or effective control must directly or indirectly belong to nationals or permanent residents of the states, and it must invest in the other party.

2.4 JOINT COMMITTEE

Each CIFA creates a Joint Committee of government representatives of both parties, responsible for monitoring the implementation of the CIFA, discussing and sharing investment opportunities, and coordinating the implementation of the cooperation and facilitation agendas. The mandate of the Joint Committees established under the CIFAs is similar to that of the Joint Committees established in U.S. free trade agreements (FTAs), which are also responsible for supervising the

implementation of the FTA.⁷

Although not formulated in a very strong manner, it is most welcome that the text in all CIFAs explicitly states that the Joint Committee may invite the private sector and civil society to participate when appropriate. Consultation with both the private sector and civil society could be important in many instances, and it is hoped that the governments will make frequent use of this provision. It will be important, however, that consultations be truly inclusive, extending to a broad range of stakeholders. The provisions on participation in the work of the Joint Committee contrast with the participation of the ad hoc working groups the Joint Committee may create. Here, the CIFAs only state that, with the Joint Committee's permission, the private sector may participate, but not civil society. It is to be hoped that, in practice, not only the private sector but also civil society will be allowed to participate.

The Angola CIFA expressly allows the Joint Committee to invite non-governmental organizations (NGOs) to deliver presentations on certain matters. This is an interesting idea and can be further developed and explored. For example, could this be used as a process to bring to the attention of the Joint Committee certain types of investor behaviour or concerns of local communities about a specific investment?

Another important function of the Joint Committee is to seek consensus and amicably resolve investment questions or conflicts. This could be an important process to introduce new types of mediation that could include a multistakeholder process allowing for the participation of all stakeholders involved in a conflict, not only investors and host states.

The Angola CIFA also directs the Joint Committee to "define or elaborate a standard dispute procedure for the settlement of disputes by arbitration between States." While the other CIFAs do not have such an explicit provision in the provision on the Joint Committee, it is nevertheless clear from the provisions in the section on disputes in the CIFA with Mozambique that

⁷ See, for example, the U.S.-Korea FTA, Article 22.2, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file973_12721.pdf



the Joint Committee is responsible to set up such a mechanism (see below). By contrast, the CIFA with Mexico sets out the rules to apply to state–state dispute settlement and does not simply delegate this to the Joint Committee.

Overall, the Joint Committee, which is to meet at least once a year, can play an important role for real cooperation on investment between the countries and for finding positive solutions. Although it is also the role of the Joint Committee in two of the CIFAs to set up the rules for state–state dispute settlement, the Joint Committee generally seems more focused on seeking consensus and amicably resolving potential conflicts regarding the investments. This could lead to more constructive solutions, especially if the search for solutions is implemented more broadly, extending to a range of stakeholders. Including the private sector and civil society in certain areas of work can potentially also lead to new opportunities to cooperate on investment as well as reach solutions that are acceptable to all. Currently, the text suggests that only the private sector may participate in ad hoc working groups of the Committee. This possibility should also be extended to civil society, including, as appropriate, labour, environmental and human rights groups. Finally, similarly to the Joint Committee under the U.S.–Korea FTA and other U.S. FTAs, future CIFA Joint Committees could also be empowered to issue binding interpretations, so that states could clarify the meaning of certain provisions of the treaties without the need for formal amendment negotiations.

2.5 FOCAL POINTS OR OMBUDSMEN

Pursuant to each CIFA, the contracting party is under an obligation to establish a Focal Point—also referred to as an Ombudsman—with the government to provide support to the foreign investors. On the Brazilian side, these ombudsmen are to be housed with the Foreign Commerce Chamber (CAMEX).⁸ It seems that this Focal Point or Ombudsman approach attempts to combine two different functions in one.

⁸ The Foreign Commerce Chamber (CAMEX) is a Government Council of the Presidency of the Federative Republic of Brazil. Its main body is the Council of Ministers, which is an interministerial body.

On the one hand, the functions of a Focal Point pertain more to receiving or providing information or assistance. Those of an Ombudsman, on the other hand, typically pertain to investigating complaints and attempting to resolve conflicts. For example, South Korea’s Foreign Investment Promotion Act allows the Korean President to appoint ombudsmen for foreign investment. These ombudsmen must have knowledge and experience on foreign investment and are commissioned to support the settlement of disputes involving foreign investors.⁹ As explained by Korea’s current Foreign Investment ombudsman, the task of his office is “to help improve the investment climate and promote the success of foreign-invested companies in Korea by resolving difficulties they face both in business activities and in day-to-day management.”¹⁰

The two types of functions—Focal Point and Ombudsman—combined in the institutional governance of the CIFAs require different types of attention and degrees of independence. It will be important to ensure that the designated office within CAMEX and the corresponding agencies of the partner states be as independent as possible, and broadly represented in terms of interests and relevant agencies depending on the type of issue brought to the Ombudsmen.

The CIFAs clarify what needs to be done with “suggestions and complaints received by the governments and investors of the other Party,” suggesting that the only two stakeholders able to bring complaints are governments and investors. It would be useful to expand the ability for bringing complaints to local communities or civil society more generally, given the importance of these stakeholders for the local acceptance of foreign investment projects and the investor’s social licence to operate. Easing tension among stakeholders early on in an investment project can avoid their escalation to a legal dispute. The Focal Points or Ombudsmen are also called to “act directly to prevent disputes and to facilitate their resolution in coordination with the competent government authorities and in collaboration with the appropriate private entities.” Again,

⁹ Republic of Korea, Act No. 5559, Foreign Investment Promotion Act, Article 15-2(1). Retrieved from http://legal.un.org/avl/pdf/ls/Shin_RelDocs.pdf

¹⁰ Kim, J. I. (2015). *Ombudsman’s message*. Retrieved from <http://www.i-ombudsman.or.kr/eng/au/index.jsp>



particularly in instances where the investment has major impacts on surrounding communities, the success of conflict prevention or resolution will require broader stakeholder involvement—not just government authorities and appropriate private entities.

The Focal Points or Ombudsmen are directed to follow the guidance or recommendations of the appropriate Joint Committee and to report to it on measures taken to address suggestions and complaints received. So while the obligation to set up the bodies is at the national level, these are governed—at least to some extent—at the international level through the Joint Committee. This governance structure will have to be thought through and managed carefully at the domestic level, particularly in the case of Brazil. Even though Brazil's Focal Points or Ombudsmen under the different CIFAs will all be housed with CAMEX, they would be following guidance from and reporting to the different Joint Committees set up under the different treaties. This might lead to contradictory opinions and guidance, and could lead to further difficulties if the same person or institution serves as a Focal Point or Ombudsman under different CIFAs.

2.6 EXCHANGE OF INFORMATION

The parties commit to exchange relevant information on business opportunities and procedures and conditions for investment, particularly by means of the Joint Committee and the Focal Points. To this end, the parties commit to sharing information that may create favourable investment conditions, such as treaties, laws and policies on various matters (investment, foreign exchange, labour, immigration), specific incentives, customs and tax regimes, statistical information on markets, available infrastructure and public services, and regional investment projects. They also agree to discuss how to strengthen investment in public-private partnerships through greater transparency and swifter access to regulations. All information sharing is subject to the level of protection requested by the supplying state.

2.7 RELATIONSHIP WITH THE PRIVATE SECTOR

In the Mozambique and Angola CIFAs, the parties agree to disseminate among the pertinent business sectors information on investment, laws in force and business opportunities in the territory of the other party. They also encourage the engagement of the private sector, “as a fundamental intervener.” The Mexico and Malawi CIFAs include similar language, but avoid the latter term, while acknowledging the fundamental role of the private sector.

2.8 THEMATIC AGENDAS OF COOPERATION AND INVESTMENT FACILITATION

The Joint Committee has a mandate to develop thematic agendas of cooperation and facilitation in areas relevant to promote and increase bilateral investments and to coordinate their implementation through specific commitments. In each of the CIFAs, Annex I presents initial lists of topics and objectives, which the states will discuss with a view to achieving common understandings and entering into additional protocols or agreements. The lists provided indicate the practical relevance the treaty can have for the facilitation of investment in the area of transfers and payments, visas, and environmental and technical regulations. The language suggests that it is not about agreeing on common standards, but ensuring a better mutual understanding and swift application of each other's respective laws and regulations. The focus is more on fostering cooperation than on being prescriptive. Annex I also identifies specific areas for cooperation, such as technological, scientific and cultural cooperation, transfer of technology, training of workers, increased logistical and transport integration, energy development and planning, environmental preservation models, and carbon and water management. Putting these areas of cooperation into practice has the potential to contribute significantly to the sustainable development of the bilateral partner countries.

2.9 EXPROPRIATION, NATIONALIZATION AND COMPENSATION

The CIFAs include an article on expropriation that resembles many of the expropriation articles in more traditional BITs. Overlooking some small differences in wording, the first paragraph of the article in each of the four treaties prohibits expropriations or nationalizations of foreign investments, except (i) for purposes and by reasons of public interest or utility, (ii) in a non-discriminatory manner, (iii) on payment of fair, adequate and effective compensation and (iv) in accordance with the principle of due process or with due process of law.

The wording in the four treaties refers only to “expropriation” and does not explicitly refer to direct and indirect expropriation, as do many other treaties. While Brazil has clarified in the past that it wishes to cover only direct expropriation in its treaties, this formulation could be interpreted to include and extend to indirect expropriation. Most recent treaties that cover indirect expropriation clarify what the term covers and what not. The fact that Brazil is silent as to the meaning of “indirect” expropriation is a further indication that there was no intention for it to be covered. Nevertheless, it might be useful to say this explicitly in a footnote or in some other way.

The expropriation provision in Brazil’s CIFAs generally requires compensation without delay and be equivalent to the fair market value and fully realizable and freely transferable. The CIFA is therefore similar to other expropriation provisions in BITs, such as the U.S. Model BIT, to the exception of a qualification added to both paragraphs of the CIFA: “in accordance with the law of the host Party.” What this means in practice is difficult to predict. By comparison, the 2015 Indian model BIT takes a different approach. It states that compensation “shall be adequate and reflect the fair market value of the expropriated Investment” only “as reduced after application of relevant Mitigating Factors.” It then goes on to define these mitigating factors to include (5.7):

- (a) current and past use of the Investment, including the history of its acquisition and

purpose; (b) the duration of the Investment and previous profits made by the Investment; (c) compensation or insurance payouts received by the Investor or Investment from other sources; (d) the value of property that remains subject to the Investor or Investment’s disposition or control, (e) options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any; (f) conduct of the Investor that contributed to its damage; (g) any obligation the Investor or its Investment is relieved of due to the expropriation, (h) liabilities owed in the Host State to the government as a result of the Investment’s activities, (i) any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment, and (j) any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.

This approach can arguably lead to a more nuanced and just result because it looks at how the investment was acquired, in what circumstances and for what purpose. This approach could be considered a clarification of Brazil’s expropriation provision.

The expropriation provision in the Malawi text begins with a paragraph stating that “the investment and investors of the Parties are subject to the legal system of the Host Party,” and that “therefore no provision of [the CIFA] shall be used for the purpose of not complying with local laws and regulations.” This paragraph, unique to the Malawi CIFA, is a binding obligation that takes one step further from the preamble in safeguarding the states’ right to regulate. Foreign investors and investments are reminded that the CIFA does not relieve them from the obligation to comply with the host state’s laws and regulations, which may impose on them obligations additional to the ones set forth in the treaty.

Another unique provision in the Malawi text obligates the states to “cooperate to improve their knowledge of their respective domestic legislations on expropriation of investment.” Since the domestic

law of the host state—and not only the CIFA—will be key in assessing situations of expropriation of foreign investments, the cooperation mandated by this provision will be useful for home states and investors to learn about the relevant laws of the host state.

2.10 CORPORATE SOCIAL RESPONSIBILITY AND INVESTOR OBLIGATIONS

According to this provision, foreign investors and investments “shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community.” It indicates that this can be done by means of adopting “a high degree of socially responsible practices” and indicates voluntary principles and standards as a reference. These principles and standards are included in Annex II to the Mozambique and Angola treaties; in the treaties with Mexico and Malawi, they were included in the main body of the text. In all four CIFAs, these principles and standards are the same: they guide businesses to engage in protecting the environment, promoting sustainable development, respecting human rights, and strengthening local capacities, among other concerns.

While voluntary approaches to business behaviour may be an important step for moving toward more sustainable business practices, some firm and mandatory language might strengthen the CIFAs, for example, through specific references to internationally recognized standards of responsible business conduct, such as the UN Guiding Principles on Business and Human Rights. An obligation to combat corruption could also be mentioned, and compliance with “laws relating to health, safety, environment and commercial or industrial labour standards” would be more appropriately mentioned in the context of a binding obligation. The Indian 2015 Model BIT, for instance, contains an article on compliance with the law, stating:

Article 12: Compliance With Law of Host State

12.1 Investors and their Investments shall be subject to and comply with the Law of the Host

State. This includes, but is not limited to, the following: [...].

12.2 Investors and their Investments shall strive, through their management policies and practices, to contribute to the development objectives of the Host State. In particular, Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.

The same model also contains a provision on corruption:

Article 9: Obligation Against Corruption

9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.

9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.

9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State’s Law.

9.4 Investors and their Investments shall not be complicit in any act described in this Article,

including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

2.11 TREATMENT OF INVESTORS AND INVESTMENTS

2.11.1 Market access and non-discrimination

The Mozambique and the Angola CIFAs both contain provisions on “the treatment of investors and investments.” The content of this article focuses primarily on non-discrimination, though there are some important differences to which we return further below. The CIFAs with Mexico and Malawi also contain a similar provision, though the heading explicitly refers to “non-discrimination.” In addition, the CIFA with Mexico has a separate provision on admission. All four CIFAs put some importance on admission and national treatment. At the same time, however, under all four CIFAs foreign investment remains subject to domestic law. So, for example, the CIFA with Mexico states:

1. Each Party shall admit and incentivize the investments of investors of the other Party, in accordance with its applicable laws and regulations.

Similarly, under the Mozambique and Malawi CIFAs, each party, in accordance with its domestic law, commits to allow and encourage investments of the other party and to create favourable conditions for such investments, and the equivalent provision in the Angola CIFA states that “each party shall promote and accept investments of investors of the other Party, and may restrict certain investments in accordance with its laws” (para. 1). The language provides grounds for the parties to discuss investment opportunities and market access, but refuses to lock in specific liberalization commitments in law.

In the same vein, the national treatment obligation in the CIFAs with Mozambique, Angola, and Malawi is subject to domestic law, and determines, to use the Malawi text as an example, that “each Party, subject to the exceptions established by law and to applicable legal requirements, shall allow investors of the other Party to invest and conduct business in conditions no less favorable than those available to other domestic investors.” Here, the CIFAs extend to the pre-establishment phase,

signalling a desire to liberalize, but without locking in any specific commitments.

In this respect, the CIFA with Mexico differs significantly. First, it is unclear whether the national treatment clause extends to the pre-establishment phase. It is simply silent in this respect, without specifying whether the treatment applies to the establishment of investments, to the conduct of business, or both. Second, the national treatment obligation is not subject to domestic laws. It grandfathered existing discriminatory laws and goes on to state that “each Party shall accord to the investors of the other Party and to their investments treatment no less favourable than that accorded to its own investors and their investments.” The article explicitly clarifies that new restrictions may be adopted “as long as they are not discriminatory.” It also clarifies that treatment “shall be deemed less favourable if it alters the conditions of competition in favour of [domestic] investors and their investments in comparison with the investors of the other Party and their investments.” This narrows down the instances in which discriminatory treatment can be defined as “less favourable” and therefore in violation of the national treatment clause, but does not seem to allow the taking into account of legitimate policy objectives, such as environmental protection. In such cases, discrimination should arguably be permitted even if the discrimination “alters the conditions of competition.”

All four CIFAs also contain a most-favoured-nation (MFN) obligation. Again, the Mozambique, Angola, and Malawi CIFAs explicitly extend to the establishment phase. However, in contrast to the national treatment provision, the MFN obligation is not subject to domestic law of the host state. The MFN provision in the Mexico BIT, again, does not state whether the obligation extends to the establishment phase. As with the national treatment clause, the existing discriminatory laws are grandfathered and “treatment less favourable” is narrowly pre-defined.

2.11.2 Exceptions

The four agreements ensure that the national treatment and MFN obligations are interpreted as an obligation to grant to investors of the other state



the benefit of any treatment, preference or privilege resulting from any existing or future free trade area, customs union, common market or double taxation agreement to which the host state is or becomes a party. These exceptions to national treatment and MFN are common in traditional-type BITs, but do not seem to cover benefits arising under investment treaties.

Notably, the Mozambique, Angola, and Malawi CIFAs contain no explicit exception to national treatment or MFN in relation to substantive or procedural treatment granted under other investment treaties. To avoid unintended consequences and interpretations that allow the import of guarantees granted under other investment treaties, the parties to the CIFAs could set out explicit clarifications. The treaty with Mexico already clarifies that MFN does not extend to dispute settlement provisions contained in other investment-related agreements. This would allow the import of substantive provisions, however.

2.11.3 Other Provisions

A paragraph that appears only in the non-discrimination provision of the Malawi CIFA states that “the right of administrative review of decisions shall be commensurate with the level of development and available resources at the disposal of Parties” (para. 4). This appears to allow either state to deny the foreign investor’s right to review of administrative decisions under domestic law in certain circumstances. The provision would be worth clarifying.

The Angola CIFA contains a few additional paragraphs in the provision on “treatment of investors and investments,” three of which are particularly worth mentioning. The first is quite unclear, stating:

The host state may provide, under domestic law, special formalities relating to the investment activities of the investors of the other state, as long as that these formalities do not affect the substance of their rights and the principle of non-discrimination (para. 6).

This provision is worth clarifying to avoid future problems of interpretation.

A further paragraph states that the host state must grant the investors of the other state national treatment or MFN “with respect to the access to courts of law and administrative agencies, or, furthermore, to the defense of the rights of such investors” (para. 7). The final term, “[treatment] with respect to the defense of the rights of such investors,” could be interpreted to include investor-state arbitration tribunals. For example, even though the CIFA does not include an investor-state arbitration mechanism, a Brazilian investor in Angola could invoke this provision to initiate arbitration against Angola, arguing that Angola offers this possibility to German investors under the 2003 Angola–Germany BIT. It would be advisable for Angola and Brazil to clarify what is meant here and to issue a joint interpretation.

Finally, paragraph 8 states that “[e]ach Party shall comply with the obligations expressly assumed in relation to the investments of investors of the other Party.” This is an umbrella clause, which has the potential to elevate the breach of an investment contract between the host state and the investor to a treaty breach. This provision could potentially allow Angola to challenge Brazil for contract breach under the CIFA. It is surprising to see such a far-reaching provision in only one of the CIFAs. Again, it would be advisable that the parties clarify the intended meaning and scope of this provision.

2.12 COMPENSATION

The Mozambique, Angola, and Mexico CIFAs contain a typical provision for cases of armed conflict and similar situations. It provides that foreign investors who suffer losses of their investments in the territory of the other party due to war or other armed conflict, state of emergency, revolt, insurgency or disorders shall be granted—with respect to restitution, compensation or other solution—the most favourable of either national treatment or MFN. Payments must be promptly transferrable in freely usable currency. Foreign investors who suffer damages in the territory of the other party in any of the situations mentioned, whether as a result of requisitioning or destruction of their investor, receive prompt, adequate and effective restitution or compensation. This provision was not included in the Malawi CIFA.



2.13 TRANSPARENCY

The parties agree to ensure that measures affecting investments are administered in a reasonable, objective and impartial manner. They also guarantee that investment-related laws and regulations are published promptly and, whenever possible, in electronic format. In addition, they agree to a best-efforts commitment to give reasonable opportunity for relevant stakeholders to be heard on proposed investment-related measures. Finally, they commit to giving publicity to the CIFA.

2.14 TRANSFERS

Similarly to provisions on transfers in traditional BITs, the first paragraph of the article provides that each party will allow the transfer of funds related to the investment, subject to compliance registration and authorization procedures established under domestic law. Among the funds that may be transferred are contributions to capital, profits directly related to the investment, proceeds from its total or partial sale or liquidation, amortization of loans and the amount of compensation for expropriation or requisitioning of the investment.

The treaties safeguard the right to adopt non-discriminatory regulatory measures restricting transfers during balance-of-payment crises, the right to use exchange measures and other rights under the Articles of Agreement of the International Monetary Fund. The safeguard provisions of the Malawi also mention external financial difficulties as an event that could justify restrictions. The Malawi text adds that these restrictions must be non-discriminatory, adequate to deal with the circumstances, temporary, and progressively phased out; they must also avoid damaging the commercial, economic, and financial interests of the other state. The Mexico text adds language similar to the U.S. and other model BITs to allow the host state to prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to bankruptcy, creditor protections, among others.

Following the example of other treaties and models, future CIFAs could mention situations other than balance-of-payment crises when measures

restricting transfers could be adopted, such as where movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary or exchange rate policies.

2.15 PRUDENTIAL MEASURES AND SECURITY EXCEPTIONS

While the Brazil–Mexico CIFA includes an article on prudential measures as well as a security exception, the other CIFAs do not. The prudential measures provision provides that the parties may adopt measures for prudential reasons to protect investors and depositors or to ensure integrity and stability of the financial system. Similar language can be found in other BITs.

It also includes a security exception to safeguard the right of the parties to adopt measures to preserve national security or public order, or to apply their criminal law, and removes these measures from the scope of the dispute settlement mechanism. Brazil might want to consider whether it wishes to make these clauses a part of its model treaty.

2.16 DISPUTE PREVENTION AND RESOLUTION

The CIFAs mandate the Focal Points or Ombudsmen and the Joint Committee to prevent, manage and resolve disputes between the states. In particular, prior to the initiation of an arbitral proceeding, any dispute must be subject to assessment, by means of consultations and negotiations, and to a preliminary examination by the Joint Committee.

Only a state party may initiate a proceeding, by submitting “a specific question of interest of an investor to the Joint Committee.” The main lines of this process are the following:

- To initiate the proceeding, the home state of the investor presents a written request to the Joint Committee, specifying the name of the investor and the challenges or difficulties faced. The Mexico CIFA clarifies that at the same time the home state may summon a meeting of the Joint Committee within 30 days. While the other two CIFAs do not explicitly refer to the possibility of summoning a meeting, there

seems to be a tacit understanding that some dialogue will take place. The clarification in the Mexico agreement with ambitious timelines could be useful. Similar clarifications in the other agreements, even if somewhat more flexible, should also be considered.

- The Joint Committee has 60 days, extendable by mutual agreement and upon justification for another 60 days, to “present information” pertinent to the case. The Mexico CIFA makes clear that this is also the time limit for the Joint Committee to issue its summary report on the issue at stake. This seems clearer than the reference to just “information.”
- Representatives of the investor, of government entities and NGOs involved may participate in the meetings. This broad approach is extremely useful and should, as the provision itself stipulates, contribute “to the objective of facilitating the search for a solution.”
- The proceeding of bilateral dialogue and consultations is concluded by the initiative of either state with the presentation of a summary report in the subsequent meeting of the Joint Committee. The Mexico text clarifies that the final meeting will be summoned on the final date of the Joint Committee’s period to present information and prepare the summary report.
- The summary report must include the identification of the state and of the investors involved, the description of the challenged measure and the position of the states regarding the measure. It is unclear whether the Joint Committee can issue recommendations. The Angola CIFA does mention that arbitration is possible if the matter cannot be resolved by recommendation (para. 6), but the other CIFAs are silent. In fact, all CIFAs explicitly list only four elements that need to be addressed at a minimum: state, investor, measure at issue, and position of the states.
- The Joint Committee “shall, whenever possible, hold extraordinary meetings” to consider the issues before it. While “shall” indicates that the Joint Committee must hold extraordinary meetings for proceedings of this kind, “whenever possible” suggests that these

meetings are not mandatory, but subject to the Joint Committee’s discretion. It would be useful to clarify this point.

- The two parties may resort to state-state arbitration only if the dispute is not resolved.
- Except for the summary report, all documents and meetings of the proceedings are confidential.

The Mozambique, Angola, and Malawi treaties indicate that, if the dispute is not resolved as a result of the Joint Committee proceedings, the two parties may resort to state-state arbitration; the Malawi text stresses that this prerogative is available only to the state parties: “the Parties[,] to the exclusion of the investors[,] may resort to arbitration mechanisms between States.” The Mexico text is the only one so far to take a step further and include a stand-alone article on dispute settlement.

In sum, the CIFAs formalize Brazil’s promise of a swift and friendly mechanism for preventing and resolving disputes. While this process remains to be tested in practice, several of its strengths and potential improvements can already be noted.

First, the CIFAs conclude define the above procedure to settle “questions of interest to an investor” in general terms. This is useful because it allows for a discussion that is not necessarily about a breach of a specific obligation. It could be just about a worry or a challenge faced by an investor. For the investor to initiate the procedure, a formal legal dispute does not need to exist; the objective of the procedure is precisely to prevent it from arising.

Second, given that the discussion is initiated by the home state, the investor needs to know where to go to make its difficulties heard by the home state government. This is not resolved in the CIFA itself and needs to be done at the national level.

Third, it is extremely useful that all CIFAs explicitly state that not only the investor but also relevant government agencies (as well as civil society organizations) could participate “partially or totally” in the meeting. The role of these actors could be further clarified. It is clear that the investor will be aware of the process, but not, however, civil society organizations or the local community at issue. Will the Joint Committee summon these



on its own initiative or does some process need to be set up to clarify this? Also, the CIFAs could have taken the opportunity to allow for the host state to bring concerns about an investment or the behaviour of an investor of the other party by the general population or a local community to the Joint Committee as well. Unfortunately, the requests are one-sided and, as currently stated, can only be brought by the home state.

Fourth, the timelines set out in all CIFAs are extremely tight. If a process is to be inclusive, then the short deadlines may not allow all stakeholders to come together to find a solution.

Fifth, the resolution of matters involving the interests of foreign investors in confidential proceedings, in which only the investor concerned and government officials of the two states are required to participate, could raise concerns that the procedure does not allow for a high enough level of public participation and accountability necessary to prevent corruption opportunities. Brazil and its counterparts could help mitigate these concerns by clarifying, as suggested above, how other stakeholders may participate in the proceedings, as well as by adopting simplified rules to encourage their participation. The CIFAs could provide for the publicity of certain meetings and documents other than the final report, and for a greater level of detail of the final reports. Ideally, the logic of the CIFAs could be reversed to further enhance the transparency of the proceedings: instead of providing for the confidentiality of all documents and meetings other than the summary report, the CIFAs could determine that all documents and proceedings will be public as a rule, and establish a procedure for restricting publicity in circumstances where there is a proven need for confidentiality.

Finally, it is likely that the Joint Committees might be able to prevent disputes to some extent, but it will be more difficult for them to resolve disputes, since they are composed of government officials of the parties. A third-party mediator might be more effective in some cases. Mediation is currently not provided for in the CIFAs.

2.17 SETTLEMENT OF DISPUTES BETWEEN THE PARTIES (STATE–STATE ARBITRATION)

In all four CIFAs, if the Joint Committee proceedings do not lead to a resolution of the dispute, either state may resort to arbitration against the other state. So far only the Mexico CIFA sets out the process to follow for state–state arbitration. It clarifies that the objective of the arbitration is to bring any non-conforming measures into conformity with the treaty. Only upon specific agreement of the parties may the tribunal assess whether the non-conforming measures caused damages and grant compensation. If granted, the state must transfer compensation to the investor after deducting arbitration costs. Arbitration may not be invoked regarding disputes arisen or measures adopted before the CIFA entered into force. This approach is more strongly inspired by the approach of the World Trade Organization (WTO), which focuses on compliance but then brings in the compensation element, similar to more traditional investment arbitration.

The states may submit the dispute arbitration according to the rules set out in the CIFA. Alternatively, the states may specifically and jointly agree to resolve the dispute in “a permanent institution or mechanism” to settle investment-related disputes between states. Pursuant to the rules specifically provided in the CIFA, each state nominates an arbitrator, and the two arbitrators nominate a third-state national to serve as president of the tribunal, subject to approval by the disputing states. Failing any of the necessary nominations, the President of the International Court of Justice (ICJ), its Vice-President or its most senior judge are successively invited to make them. As usual in state–state arbitration mechanisms, the CIFA ensures that the appointing authority may not be a national of either of the disputing states.

The CIFA requires the arbitrators to be people of high moral level, with the necessary experience or specialization in public international law and recognized experience in the area of the dispute. They must also be independent and not connected to either party, to the other arbitrators or witnesses, and may not receive instructions from the disputing states. Arbitrators are bound by the WTO’s Rules

of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, or another standard of conduct established by the Joint Committee.

Arbitral tribunals are given the power to determine their own procedures and to issue a majority decision that is binding on both parties. They must issue their decision within six months of the nomination of the president of the tribunal, unless the parties agree otherwise.

2.18 SCOPE OF APPLICATION OF THE AGREEMENT

The Mozambique and Mexico CIFAs expressly apply to all investments, whether made before or after their entry into force. Since this provision does not appear in the Angola and Malawi CIFAs, their scope of application is unclear.

Common among the Mozambique, Angola, and Mexico CIFAs are the prohibition to invoke the agreements to question disputes finally resolved before their entry into force and the provision to the effect that the agreements do not restrict the rights of benefits of foreign investors under domestic law. The Malawi CIFA does not include these provisions.

In addition to the above, this article under the Angola CIFA has a denial-of-benefits clause: a party may deny the benefits of the CIFA to a natural person who is not a national or permanent resident of the other party. The party may also deny the application of the CIFA to a legal person which (a) is not constituted under the law of the other party, is not headquartered in the other party and does not carry out substantial activities there, or which (b) is not effectively owned or controlled, directly or indirectly, by nationals or permanent residents of the other party.

Finally, the Mexico CIFA establishes a “statute of limitations” (common law) or “prescription” (civil law) period of five years from the date on which the investor acquired or should have acquired knowledge of the facts leading to the dispute. After this period, the CIFA may not be invoked to resolve an investment dispute.

2.19 FINAL AND PROVISIONAL PROVISIONS

The Joint Committee and Focal Points do not replace diplomatic exchanges. Their main purpose is “the encouragement of institutional government of investment, by means of the establishment of a specific forum and of technical channels that act as facilitators between the governments and the private sector,” as outlined in the Mozambique and Angola texts.

The Mozambique and Angola CIFAs will enter into force 30 days, and the Mexico and Malawi CIFAs, 90 days after receipt of the last notice of ratification. The Mozambique CIFA will remain in force for 20 years, and the Angola CIFA, for 10 years; both treaties are automatically renewable for equal and successive periods. The Mexico and Malawi CIFAs will remain in force for an indefinite period, and provide for a general review of its implementation by the Joint Committee five years after its entry into force. Any of the treaties may be denounced with minimum advance notice of a year, with the exception of the Malawi CIFA, the denunciation of which is effective within 180 days of the notice of termination.

3.0 Conclusion and Recommendations

Brazil has introduced a new model investment treaty that marks a significant departure from conventional practice in international investment law. The first CIFAs concluded by Brazil and its counterparts focus heavily on cooperation and investment facilitation, rather than on investment protection and litigation. They rely on the activities of the Joint Committees of the bilateral partners and country-specific Focal Points in developing and implementing thematic agendas for cooperation and facilitation, risk reduction and dispute prevention mechanisms. Moreover, they encourage close cooperation with the private sector, and allow for participation of NGOs and civil society representatives in the Joint Committees. All CIFAs concluded include innovative preambular language, a best-efforts obligation on corporate social responsibility (CSR), and safeguards to restrict transfers.

In line with Brazil's long-standing policy not to include investor-state arbitration in its treaties, the CIFAs give both the Joint Committee and the Focal Points an important role in preventing investment disputes and facilitating their resolution on a state-state basis. While the highly anticipated dispute settlement mechanism is regulated in the CIFAs in general lines only, it promises to be swift and non-confrontational. Its effectiveness and insulation from corrupt practices will of course depend on how the Joint Committees regulate the procedure and handle specific proceedings. The CIFA with Mexico already evidences the approach that Brazil might take in respect of state-state dispute resolution: the focus is on ensuring compliance with the agreement; a tribunal may assess and grant damages, but only if the disputing states expressly agree to it; and the arbitrators are subjected to professional qualification requirements and to ethical standards.

In sum, Brazil's approach is innovative and, if adopted more broadly, would reshape global investment law frameworks. To further enhance this novel approach, we propose a number of selected issues for consideration for its future development. Based on the points we highlighted throughout the text, we suggest that (i) certain provisions and definitions, such as those relating to the overall objective and the definition of investment, be further clarified and streamlined; (ii) the text clarify certain aspects of the institutional structures, including the Joint Committee and the Focal Point or Ombudsman, in order to ensure that they be independent, inclusive and insulated against corruption; (iii) investment law concepts such as expropriation and MFN be further clarified to reflect parties' intent; and (iv) investor responsibilities and CSR be made more effective.

Significant parts of the clarifications and fine-tuning still needed could be achieved if the parties to each of the CIFAs adopted joint interpretive statements to guide the Joint Committees in implementing the agreements and conducting dispute settlement proceedings. As already shown in the evolution from the earlier Mozambique and Angola texts to the Mexico and Malawi texts, it is also likely that Brazil will further enhance its own approach and model in the course of negotiations of CIFAs with other partner states and, as the

first CIFAs start to be implemented, based on lessons learned and further input from relevant stakeholders.

Therefore, the potential for further development in the four first CIFAs should not be seen as cancelling the merits of the novel approach they bring into the realm of international investment law and policy. In the context of increasing criticism of the investor protection paradigm and the numerous flaws in investor-state arbitration, Brazil's CIFAs boldly divert from the traditional BIT-ISDS regime and remind host countries that, to promote foreign investment inflows that contribute to domestic sustainable development, they do not necessarily need "more of the same."

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