

easyBrasil

WELCOMING FOREIGN DIRECT INVESTMENT

Protection, Facilitation,
and Cooperation

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ApexBrasil
BRASILIAN TRADE AND INVESTMENT
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MINISTRY OF
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MINISTRY OF
**PLANNING, DEVELOPMENT
AND MANAGEMENT**



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in UNCTAD's Investment Policy Framework for Sustainable Development (available online) and of the Investment Committee of the Organization for Economic Development Cooperation (OECD), as well as specialized think tanks and scholars such as the South Centre and the International Institute for Sustainable Development (IISD).

At the World Trade Organization (WTO), investment facilitation has also been gaining momentum. On the occasion of the 11th Ministerial Conference held in December 2017 in Buenos Aires, 70 countries joined

CFIA is fully in line with current international trends

a ministerial declaration calling for a "structured discussion" on the matter in Geneva. The issue has also become relevant in the G20, whose Trade Ministers adopted the G20 Guiding Principles for Global Investment Policymaking, in July 2016, in Shanghai.

The continued global interest and activity in investment facilitation demonstrates that the CFIA is fully in line with current international trends and makes it likely that this investment agreement model will be increasingly perceived as an effective and enhanced alternative to the IPPAs. ■

easyBrasil

A series of reports covering the Brazilian business environment, **easyBrasil** provides official, transparent, reliable information for those oriented toward investment and trade, and for those simply looking to learn more about the country and its economy. Each report addresses specific topics and opportunities in Brazil's diverse economic spheres, providing macro- and micro-economic information, information on regulation and policy, and forecasts, all affirmed and acknowledged by the Brazilian federal government. The series' individual reports are published as booklets in both digital and print editions.

WELCOMING FOREIGN DIRECT INVESTMENT Protection, Facilitation, and Cooperation

Attracting Foreign Direct Investment is a core, permanent, objective of Brazil's International Political Economy. Since 2016, the new Brazilian government has been firmly committed to improve, strengthen, and implement legislation and regulatory procedures designed to provide investors with a friendly business environment in the country.

Since 2013, the Brazilian government created an innovative model of investment agreement that protects foreign investors against discrimination, by means of national treatment and most-favoured country clauses (foreign investors will be treated in terms as favourable as those applicable to Brazilian investors and investments; and as favourably as other foreign investors), among other relevant provisions. This new model – the Cooperation and Facilitation Investment Agreement (CFIA) – is the basis for bilateral and/or regional agreements already signed or initialled with countries in three continents so far.

The CFIA offer investors legally-binding international protection for their investments; facilitation of their investments during their entire life-cycle; and structured and dynamic cooperation between the signatory governments.

This report answers, in very practical and transparent terms, two most relevant questions regarding current and future foreign investors in Brazil: what do CFIA offer to foreign investors? And how do CFIA compare to current Investment and Promotion Agreements?

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4. CFIA's with specific countries

To date, Brazil has signed CFIA's with all the countries that form the Pacific Alliance (Mexico, Colombia, Chile and Peru), with MERCOSUR (Argentina, Paraguay and Uruguay) and with three African countries (Angola, Malawi and Mozambique).

The agreements with Chile, Malawi, Mexico and Mozambique have already been approved by the Congress and the one with Angola is already in force.

The CFIA's already signed cover a significant part of Brazilian direct investment abroad

2016, comprising all the countries highlighted in the map – and Africa.

Negotiations with other countries in Africa (Morocco and Ethiopia), and Asia (India) have been concluded, and the signing of the agreements is expected to take place in the first semester of 2018. Talks are currently under

The CFIA's already signed cover a significant part of Brazilian direct investment abroad, in particular those made in Latin America – more than 15

billion dollars of investment in the base year of way or being prepared with several other partners.

5. CFIA's and the current discussions on international investment policy

The Brazilian pioneering initiative of combining protection, facilitation, and cooperation in its investment agreements has been duly recognized and greatly enriched the current debate on several aspects of international investment policy.

The investment facilitation component of the CFIA has increasingly caught the attention of the United Nations Conference on Trade and Development (UNCTAD), in particular as indicated

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International Investment Agreements (IIAs) are a tool frequently used by governments all over the world to attract foreign direct investment (FDI) to their countries. Currently, there are approximately 3,300 such agreements in force.

Most of them are the so-called Investment Protection and Promotion Agreements (IPPAs), which can take the form of a bilateral investment agreement (BIT) or, as it is most often the case these days, an investment chapter in a trade agreement. The basic assumption of the IPPAs is that by taking up the international legal obligation to protect foreign investment in their territories and agreeing to submit to arbitration that may determine the compensation to investors for damages or losses unduly suffered, governments help mitigate the political risks involved in investment-making and therefore stimulate foreign investment.

More recently, an innovative agreement model has been offered to Brazilian trade and investment counterparts: the Cooperation and Facilitation Investment Agreement (CFIA). It was created by the Brazilian government in 2013, after extensive consultations with the Brazilian private sector and discussions with International Organizations. It is the basis for bilateral and/or regional agreements already signed or initialled with countries in three continents so far (Latin America, Asia and Africa). The model received the necessary political endorsement by the Brazilian Congress, which has already approved some of these instruments and sends investors a powerful message of stability and predictability of international investment policy-making in Brazil.

1. What do CFIA's offer to foreign investors?

In general terms, CFIA's offer investors three important benefits: a) legally-binding international protection for their investments; b) facilitation of their investments during their entire life-cycle; and c) structured and dynamic cooperation between the governments, in particular through the implementation of a Facilitation Agenda agreed by the Parties, for the continued improvement of the investment environment.

The core protection rule in the CFIA is non-discrimination of foreign investors, which is embodied in the national treatment and most-favoured nation clauses: foreign investors are treated in terms as favourable as those applicable to Brazilian investors and investments; and foreign investors will be treated as favourably as other foreign investors. A very important detail: these key commitments apply to the establishment of investments, which, in practice, means guaranteeing foreign investors the right to invest in Brazil just like Brazilians, without prejudice to foregoing exceptions provided for under the applicable legislation on the date the agreement with a specific country enters into force.

Still on the protection field, the CFIA also contains provisions on direct expropriation and losses/damages related to national security/public order situations, with clear rules for financial compensation to investors. In addition, the agreement guarantees the free transfer of funds, with limited and clearly defined exceptions, as well as significant transparency in investment-related policies and measures. The respect for the due process of law in dealing with foreign investors and their investments is also guaranteed.

Facilitation of investments is a cornerstone of the CFIA, as it includes mechanisms and services through which governments, in a very practical manner, assist investors in making their investments a success from establishment onwards. Among the several ways in which facilitation is supposed to help investors, two are of particular importance: a)

provision of information, especially on legislation, requirements, procedures and authorities related to investment, and b) assistance to investors in resolving difficulties they may face in their dealings with government agencies on which they may depend to make their investments work (such as granting of permits or licenses, for example). Not surprisingly, facilitation has been referred to as "hand-holding".

Under the CFIA, facilitation is mandatory to governments, which must appoint/establish an authority to act as "Ombudsperson" of FDI or National Focal Point to perform the facilitation functions mentioned above and others described in the agreement. In Brazil, an Ombudsperson of Direct Investment (OID) has been established within the Foreign Trade Board (CAMEX), an interagency body under the Office of the President. In coordination with dozens of public agencies relevant to investment, the OID will facilitate the investment of investors that are nationals or permanent residents of countries that sign CFIA's with Brazil.

The third main benefit brought to investors by the CFIA's is cooperation between the Parties through the Joint Committees. They may discuss problems or difficulties faced by specific investors, and through the so-called Agendas for Further Cooperation and Facilitation. The Agendas are a work program that identifies issues where action (changes in legislation, procedures, requirements, practices, information-dissemination etc.) is needed in order to stimulate mutual investment. The Agendas, always specific

This set of responsibilities and mechanisms make it clear that, under the CFIA, the Joint Committee is much more than the administration commissions or committees usually found in IPPA's. It is a key tool for the continued strengthening of the investment relationship of the Parties and an instance where the needs and interests of the investors may be addressed.

As indicated earlier, the Ombudsperson is the other main institutional innovation brought about by the CFIA. Its main responsibility is to facilitate the provision of information and the relationship between investors and the host country's government agencies, both in terms of dialogue with the relevant authorities and of assistance in resolving practical difficulties investors may face. Some of its other responsibilities are:

- assess suggestions and complaints received from the other party and recommend actions to improve the investment environment, if needed;
- help to prevent litigation in investment matters, in collaboration with government authorities and relevant private representatives.

As it was also explained before, in Brazil the Ombudsperson for Direct Investment (OID) will be available to investors that are nationals or permanent residents of countries that sign ACFI's with Brazil.

Part III of the CFIA also regulates dispute prevention, which is a central feature of the model, in line with the understanding that investors are primarily interested in overcoming difficulties and making their investments a success rather than entering into costly litigation.

In order to provide the Parties all the possible opportunities to avoid a dispute, a short but detailed prevention procedure must be followed before arbitration takes place. The procedure is conducted by the Joint Committee.

Should there be no solution following such procedure, a State may initiate a formal dispute, which will be settled by an ad hoc tribunal formed of three independent arbitrators whose decision is final and binding on the Parties and must be implemented without delay.

The objective of the arbitration is to examine a given measure that one of the Parties believes violates the agreement and, should it be so, direct the respondent State to bring such measure into conformity with the CFIA.

The expected outcome of this dispute settlement system, inspired by the WTO Dispute Settlement Understanding, is to stimulate States to abide by the agreement and therefore provide investors – current and potential – with legal security and predictability.

The adoption of prudential measures by the State is guaranteed, but subject to such measures not being used as a means of circumventing the commitments established in the agreement.

The transfer of funds related to an investment will be made freely and without undue delay, to and from the territory of the CFIA Parties. Such transfers include: a) the initial capital contribution or any addition thereof in relation to the maintenance or expansion of the investment; b) income directly related to the investment, such as profits, interests, capital gains, dividends or "royalties"; c) the proceeds of sale or total or partial liquidation of the investment; d) the repayments of any loan, including interests thereon, relating directly to the investment; e) the amount of a compensation. As in IPPAs, there are clearly defined exceptions to such freedom.

Part II also features a corporate social responsibility article, according to which investors shall strive to achieve the highest possible level of contribution to the sustainable development of the host State and the local community, through the adoption of a high degree of socially responsible practices.

Moreover, the CFIA calls on States to combat corruption and illegality and establishes that attracting investment cannot be to the detriment of labour standards, environment protection or health provisions in the Parties.

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PART III: INSTITUTIONAL GOVERNANCE AND DISPUTE PREVENTION AND SETTLEMENT

The core of the institutional innovations proposed by the CFIA is found in Part III: the Joint Committee and the Ombudsperson or National Focal Point.

The Standard CFIA text establishes that the Joint Committee will be composed by Government officials and will have the following functions and responsibilities:

- oversee the implementation and execution of the CFIA;
- discuss and promote opportunities of mutual investment;
- coordinate the implementation of the mutually agreed cooperation and facilitation agendas;
- consult with the private sector and civil society, when applicable, on their views on specific issues related to the work of the Joint Committee;
- seek to prevent disputes concerning investments of a Party in an amicable manner.

One interesting aspect of the Joint Committee is that it can invite the private sector to participate in ad hoc working groups that the body may establish to examine specific issues on its agenda.

to the needs and realities of a given flow and stock of bilateral investments, are, therefore, a unique factor of dynamism in the investment relationship of countries, in favour of investments and investors.

The CFIA is also an incentive to socially and environmentally responsible investors, as it fully incorporates social corporate responsibility commitments. These help investors ensure that they will generate the sustainable development

The Cooperation and Facilitation Investment Agreement (CFIA) guarantees foreign investors the right to invest in Brazil just like Brazilians

benefits that States and societies legitimately expect to obtain from investment. The CFIA has an important, extensive section on the relation between investments and environment, labour affairs and health. In addition to helping investments work for both investors and society, these features of the agreement can have a branding effect, as investors and their investments become associated with best practices of social and environmental management.

2. How do CFIA's compare to Investment Protection and Promotion Agreements (IPPAs)?

There are common features and very important conceptual differences between CFIA's and IPPAs. Among the former, it is particularly worth mentioning that both models provide for similar legally-binding international protection of direct investment.

Enforcement of obligations is another common feature. In both cases, violations of the protection rules, as well as of other rules, may bring the host

State before independent and mandatory arbitration, the decisions of which must be complied with by such State.

The content of the protection rules is similar. For example, both the IPPAs and the CFIA provide for non-discrimination, including with regard to compensation for losses suffered from government actions required for the maintenance of national security or public order, protection against direct expropriation, free transfer of funds, and respect for the due process of law, among others.

CFIA offers protection and also establishes mechanisms and tools that will help foreign investors to thrive

These two sets of differences (dispute settlement and cooperation and facilitation provisions) point to the main conceptual difference between the two models. While, as mentioned before, IPPAs seek to promote investment through a combination of protection rules and dispute settlement (ISDS), the CFIA seeks to promote investment through a combination of protection, facilitation and cooperation, without prejudice to mandatory dispute settlement (if one Party so wishes and after

prevention has been exhausted) and bonding arbitral decisions. The IPPA focus on litigation whereas the CFIA lies on helping ensure the success of the investment – by building a long-term investment relationship between countries and investors and host States – as a manner to prevent disputes further on.

Based on the premise that investors are mainly interested in making their investments a success – a goal that is made more likely by facilitation and cooperation, rather than by costly and unpredictable litigation – Brazil believes that the CFIA offers foreign investors the protection IPPAs claim to give and, in addition, also establishes mechanisms and tools that will help them thrive.

One important difference lies in the dispute settlement mechanisms used. The IPPA uses the so-called Investor-State Dispute Settlement mechanism (ISDS), where the investor itself is a party to a dispute and the State may be required to pay damages to an investor. The CFIA uses the State-State Dispute Settlement mechanism (SSDS), where the parties to the dispute are the States signatories of the agreement. The State found to have violated the agreement may be required to eliminate or reform a measure considered inconsistent with the agreement.

IPPAs also differ from CFIA in that the former contain no facilitation provisions and normally limit the Joint Committee to oversight of the agreement.

3. The CFIA: Main Provisions

The standard CFIA text is divided into a preamble and five parts: (I) Scope and definitions; (II) Regulatory measures; (III) Institutional governance and dispute prevention and settlement; (IV) Agenda for Further Cooperation and Facilitation; and (V) Final provisions.

PART I: SCOPE AND DEFINITIONS

The objective of the CFIA is to facilitate and promote investments by means of:

- regulatory/protection provisions;
- an institutional governance designed to promote cooperation between the Parties – in particular through the Joint Committee, the Agendas for Further Cooperation and Facilitation, the Ombudsperson/National Focal Point – and facilitate investment;
- and dispute prevention and settlement.

The article on definitions brings a clear-cut description of what investment is and what it is not. The agreement applies to FDI, which is understood as: a) shares, stocks, participations and other equity types in an enterprise; b) movable or immovable property and other property rights; c) the rights of exploration, exploitation and use conferred by a license, permit or concession granted and ruled by the legislation of the host State and/or by a contract; d) loans to another company and instruments of debt of another company; and e) intellectual property rights, as defined by or referenced to in the TRIPS Agreement of the WTO.

PART II: REGULATORY MEASURES

Part II brings together the protection rules contained in the CFIA, the main one being non-discrimination. The article on National Treatment establishes that each Party shall accord to investors of another Party

treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. The Most-Favoured Nation article sets the obligation that each party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Under the provision on direct expropriation, Parties shall not nationalize or expropriate investments except for a public purpose or when justified as being of social interest. Such expropriation must be accompanied by payment of effective compensation. It must also be carried out in a non-discriminatory manner and in accordance with due process of law.

Other important rule in Part II establishes equal compensation for national and foreign investors in case of war or other armed conflict, revolution, state of emergency, insurrection, riot or any other similar events. The CFIA model brings an innovation that is important for investors: the obligation by the State to pay for damages incurred in those situations (whereas most IPPAs allow the State not to compensate investors if there was a necessity for measures that led to damages being caused to the investor).

Transparency is also a key feature of Part II. For example, the Parties must ensure that their laws, regulations, procedures and administrative resolutions related to investments of a general nature are published in the official gazette and, when possible, in electronic format.