

BILATERAL INVESTMENT TREATY BETWEEN BRAZIL AND MOZAMBIQUE

On 30 March 2015, Brazil and Mozambique entered into a treaty, which they call the **Agreement for Cooperation and Investment Facilitation**. On 1 April, Brazil and Angola entered into **an agreement of the same nature**. Bilateral investment treaties or “BITs” are agreements between two countries for the reciprocal promotion and protection of investment by nationals of one signatory into the other. That is also the case with the Brazil-Mozambique and the Brazil-Angola BITs (the “new Brazilian BITs”). Such treaties may increase protection for investments on both sides of the Atlantic, in case they come into force upon ratification by the signatory parties.

During the 1990’s Brazil signed—but never ratified—14 BITs. Since then, the largest economy in South America refrained from seeking bilateral initiatives, and its most recent governments appeared to doubt the BITs effectiveness as a means of inciting investment flows. Yet, an increasing level of awareness regarding investment protection is rekindling the debate in Brazil, partly due to the demands of the Brazilian investment exporters currently devoid of treaty protection.

Both the new Brazilian BITs provide for protection against expropriation, limiting the conditions on which the host country may lawfully expropriate an investment from nationals of the other country. The new treaties require the state to pay fair compensation in case of expropriation, which must be calculated in accordance with the fair market value of the investment. The new Brazilian BITs also grant national treatment to foreign investors, establishing that they cannot be treated in a “less favorable manner” than how national governments would treat local outfits. In addition, the new Brazilian BITs also promote transparency and call for disclosure of local laws and regulations. They also allow the transfer of funds - inbound and outbound - without prejudice to the states’ prerogative to enact regulations coping with crisis that may affect their balance of payments.

Conversely, the new Brazilian BITs also require investors to exert best efforts to promote certain public values in the conduct of their businesses such as protecting the environment, respecting human rights, providing training to local communities and observing local health requirements. The new Brazilian BITs diverge from the widespread reliance on investor-state arbitration or the arbitration proceedings that allow a private investor to bring claims against a state that breached its treaty obligations. Hence, the new Brazilian BITs do not allow access to the protective framework of the International Centre for Settlement of Investment Disputes – ICSID or

to similar arrangements, which certain commentators deem incompatible with the Brazilian legal framework. This questions the effectiveness of the protections granted by such treaties. Would they amount to no more than a toothless lion that looks promising, but fails to deliver the heralded protections?

The new Brazilian BITs do not provide for effective enforcement tools. In case of treaty violations, the new Brazilian BITs do not allow the investor to directly bring arbitration. Those treaties rather foresee the establishment of a joint committee to steer investment cooperation and the nomination of ombudsmen within each country's administration in order to provide official support to investment. The dispute resolution provisions included in the new Brazilian BITs provide only state-to-state arbitration, which can be brought by the signatory states in case an investment dispute cannot be resolved through the intergovernmental channels. Nonetheless, there is no regulation on the procedure for such arbitration. Hence, the new Brazilian BITs appear to replicate the traditional rule of diplomatic protection, whereby an investor can only bring a claim against a sovereign host state in case its own state of origin decides to raise that claim on a governmental level. This has been much criticized, to the point that some authors believe that the new Brazilian BITs might become "toothless lions", without proper enforcement mechanisms by the private parties if the state does not bring the claim.

After successful negotiations in Mozambique and Angola, Brazil may have renewed its interest in bilateral investment promotion with other countries. In this sense, the Brazilian Foreign Affairs Ministry announced that the new Brazilian BITs follow a new model that may be replicated in other ongoing negotiations.

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The following is a free translation of the Brazil-Mozambique Agreement for Cooperation and Investment Facilitation (available in Portuguese at the website of [Brazilian Ministry of Foreign Affairs](#)).

**AGREEMENT FOR COOPERATION AND INVESTMENT FACILITATION
BETWEEN THE GOVERNMENT OF THE FEDERAL REPUBLIC OF
BRAZIL AND THE GOVERNMENT OF THE REPUBLIC OF
MOZAMBIQUE**

The Government of the Federative Republic of Brazil
and

The Government of the Republic of Mozambique (hereinafter referred to as "the Parties" or individually as "Party"),

Aiming at strengthening and enhancing the bonds of friendship and the spirit of continued cooperation between the Parties;
Attempting to stimulate, accelerate and support bilateral investments, and fostering new integration initiatives between the two countries;
Recognizing the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development;
Understanding that the establishment of a strategic partnership between the parties, in terms of investment, will bring large and reciprocal benefits;
Recognizing the importance of promoting a transparent, responsive and friendly environment for mutual investment of the Parties;
Reaffirming its legislative autonomy and the space for public policies;
Intending to encourage and strengthen contacts between the private sector and the governments of both countries; and
Seeking a technical dialogue mechanism and government initiatives that contribute to the increase of their mutual investments;
Execute, in good faith, the following Cooperation and Investment Facilitation Agreement, hereinafter “the Agreement,” containing the following provisions:

SECTION I – General Provisions

Article 1

Object

This Agreement aims at the cooperation between the Parties to facilitate and promote mutual investment.

Article 2

Delivery mechanisms

This Agreement shall be operated by the national institutions of the two Parties and the Joint Committee as provided in this Agreement through the establishment of thematic agendas of cooperation and investment facilitation and the development of mechanisms for risk mitigation and conflict prevention, among other mutually agreed instruments.

Article 3

Definitions

For the purposes of this Agreement:

1. “Investment” means any kind of asset or right that is owned or controlled directly or indirectly by an investor of a Party in the territory of the other Party for the purpose of establishing lasting economic relations and for the production of goods and services. Investments are, in particular, the following:
 - i. a company, an undertaking, an equity interest (“equity”) or other interest in a company or firm
 - ii. movable and immovable property and any other property rights such as mortgage, lien, pledge, usufruct and similar rights

iii. the amount invested in the rights of business concessions conferred by law, administrative decisions or under contract, including concessions to search, develop, extract or exploit natural resources

2. "Investor" of a Party means the following:

i. any natural person who is a national of either Party in accordance with its legislation

ii. any legal person or other organization structured in accordance with applicable law in a Party's territory in which the investment is established

iii. any entity not structured in accordance with the law of a Party but is controlled by an investor as defined in i. and ii.

iv. any legal entity that has its headquarters in the territory of a Party wherein it conducts the center of its economic activities

v. any person or entity as set out in the preceding paragraphs that carries out an investment in the other Party, which is duly authorized under the legislation of each Party's advice

3. "Income" means the values obtained by an investment and in particular, though not exclusively, include profit, interest, capital gains / added values, dividends, royalties or fees.

4. "Territory" means the territory of each Party and its exclusive economic zone, territorial sea and the underground on which the Party exercises sovereign rights or jurisdiction in accordance with international law.

5. "Institutional Governance" means the institutional framework established by this Agreement.

6. "Ombudsman" means the focal point performing the functions of a facilitator and a provider in accordance with the attributions listed in Article 5.

Section II – Institutional Governance

Article 4

Joint Committee

1. In order to fulfil the goals of this Agreement, the parties hereby establish a committee, henceforth referred to as "Joint Committee."

2. The Joint Committee shall be composed of governmental representatives of both Parties designated by their respective governments.

3. The Joint Committee will convene on the dates and places that the Parties agree to and will be alternatively presided by the Parties, with at least one meeting being held per year.

4. The Joint Committee shall have the following attributions and competencies:

i. monitoring the implementation and execution of this Agreement

ii. debating and sharing opportunities for the expansion of the mutual investments

iii. coordinating and implementing the mutually agreed agendas for

cooperation and facilitation

iv. requesting and welcoming the participation of the private sector and of the civil society when required, particularly in questions relating to the works of the Joint Committee

v. to reach for consensus and to resolve amicably any questions or disputes regarding investment from the Parties

5. The Parties may set up ad hoc working groups, which shall convene jointly or separately from the Joint Committee.

6. The private sector can be invited to join the ad hoc working groups, when so permitted by the Joint Committee.

7. The Joint Committee shall prepare its own regulations that address the procedures for its operation.

Article 5

Focal Points (“Ombudsmen”)

1. The Parties shall establish focal points (“Ombudsmen”), in the interest of ensuring government support for investments of the other Party held in his country.

2. In the case of the Federative Republic of Brazil, the Ombudsman will be established within the Foreign Trade Chamber – CAMEX.

3. In the case of the Republic of Mozambique, the Ombudsman will be established within the Board of Investment.

4. The Ombudsmen shall perform the following tasks:

i. meet the Joint Committee’s guidelines and interact with the Ombudsman of the other Party, observing the terms of this Agreement

ii. interact with the relevant government authorities to evaluate and recommend, where appropriate, referrals to the suggestions and complaints received from governments and investors of the other Party, informing the government or interested investor of the result of actions taken

iii. directly act, in conjunction with the relevant government authorities and in cooperation with relevant private entities, to prevent disputes and facilitate their resolution

iv. provide timely and useful information to the Parties on regulatory issues related to investments in general or to specific projects agreed upon

v. report to the Joint Committee its activities and actions

5. Each Party shall draw up the terms of reference to guide the overall operation of the Ombudsmen by expressly providing, when appropriate, the deadlines for the implementation of each of its duties and responsibilities.

6. Each Party shall designate only one body or authority as its focal point to be responsible for: monitoring the implementation of this Agreement; having his official contacts available; and responding with speed and attention to communications and requests of the other Party.

7. The Parties shall provide the means and resources to the Ombudsman to perform his duties and ensure his institutional access to other government agencies that address the issues set out in this Agreement.

Article 6

Exchange of information between the Parties

1. The Parties shall exchange information on business opportunities, procedures and requirements for investments, whenever possible and relevant for reciprocal investment, particularly through the Joint Committee and its Ombudsmen.

2. For this purpose, the Parties, on request, shall provide data promptly and to the level of protection granted to the information, especially regarding the following items:

- i. legislation relating to investment
- ii. currency exchange legislation
- iii. specific incentives
- iv. public policies that affect investments as well as the establishment of companies and joint ventures
- v. relevant international treaties
- vi. customs and tax regimes
- vii. statistical information on goods and services markets
- viii. infrastructure and public services
- ix. labor law
- x. immigration laws
- xi. information on legislation of specific economic sectors or areas previously identified by the Parties
- xii. regional investment projects

3. The Parties will also discuss initiatives to strengthen the role of investors in public-private partnerships (PPP), especially through greater transparency and faster access to regulatory information.

4. The Parties shall fully respect the level of protection afforded to such information as requested by the Party providing the information.

Article 7

Relationship with the Private Sector

1. The Parties shall encourage the involvement of the private sector as fundamental participants that are directly interested in the best results arising from this Agreement.

2. The Parties shall disseminate in the relevant business sectors the general investment information, current legislation and business opportunities in the territory of the other Party.

SECTION III – Thematic Agendas for Cooperation and Investment Facilitation

Article 8

Thematic Agendas

The Joint Committee will develop thematic agendas for cooperation and facilitation issues relevant to the promotion and enhancement of bilateral investments. Topics to be initially treated and objectives are listed in Annex I – “Thematic Agendas for Cooperation and Facilitation.”

2. For the purposes of paragraph 1, the agendas will be discussed between the relevant government authorities of both Parties and may give rise to discussions in order to reach common understanding on the matter.

3. The results of the discussions will be the subject of additional protocols to this Agreement or will give rise to specific legal instruments.

4. The Joint Committee will coordinate the implementation of timetables for discussions involving such thematic agendas of cooperation and facilitation and discussion of specific commitments.

5. The Parties shall submit to the Joint Committee the names of government agencies and their officials involved in these discussions.

SECTION IV – Risk Mitigation and Dispute Prevention

Article 9

Expropriation, Nationalization and Indemnity

1. No Party, in accordance with its legal system, will expropriate or nationalize an investment protected by this Agreement unless it is under any of the following situations:

i. it is due to reasons of utility use or interest.

ii. it is done in a nondiscriminatory manner.

iii. it is against adequate and effective compensation as set out in paragraphs 2 to 4 of this article.

iv. it is in accordance with the principle of due process of law.

2. The indemnity shall be treated as follows:

i. be paid without delay in accordance with the law of the host Party

ii. be equivalent to the fair market value that has the expropriated investment immediately before the expropriation performed (“date of expropriation”)

iii. shall not reflect a negative change in market value in function of the advance knowledge of the intention to expropriate prior to the date of expropriation

iv. be completely calculable and freely transferable in accordance with the article of Transfers

3. If the fair market value is denominated in an internationally convertible currency, the compensation paid shall not be lower than the fair market value on the date of expropriation, plus the interest accrued from the date of expropriation until the date of payment, in accordance with the laws of the Host Party.

4. If the fair market value is denominated in an internationally nonconvertible currency, the compensation paid shall not be lower than the fair market value on the date of expropriation, plus interest and

restatement, if any, which was accrued from the date of expropriation until the date of payment, in accordance with the laws of the Host Party.

Article 10

Corporate Social Responsibility

Investors and their investments should strive to achieve the highest possible level of contributions to the sustainable development of the host State and the local community, through the adoption of a high degree of socially responsible practices, with reference to the voluntary principles and standards set in Annex II – “Corporate Social Responsibility.”

Article 11

Treatment to Investors and Investments

1. Each Party, in accordance with its legal system, shall allow and encourage the investments of the other Party in its territory and create favorable conditions for such investments.
2. Each Party shall, subject to applicable law, permit investors of the other Party to establish investments and conduct business on terms that are no less favorable than those available to domestic investors.
3. Each Party shall permit investors of the other Party to establish investments and conduct business on terms that are not less favorable than those available to other foreign investors.
4. This Article shall not be construed as an obligation of a Party to grant investors of the other Party, with respect to their investments, the benefit of any treatment, preference or privilege resulting from any existing or future free trade areas, customs unions or common markets in which each Party is a member or may become a party.
5. This Article shall not be construed as an obligation of a Party to grant investors of the other Party, with respect to their investments, the benefit of any treatment, preference or privilege to the resulting investment of any existing or future agreements to avoid double taxation in which each Party to this Agreement is or may become a party.
6. Nothing in this Agreement shall be construed to prevent the adoption or enforcement of any measure to ensure the equitable or effective imposition or collection of taxes as provided for in each of the Party’s law.

Article 12

Compensation

1. Investors of both Parties suffering losses on their investments in the territory of the other Party due to war or other armed conflict, state of emergency, revolt, upheaval or disorders should be awarded restitution, indemnification, compensation or other remedy, in a treatment not less favorable than the treatment granted to its own investors or investors of any third State, whatever the most favorable. Payments resulting shall be transferable without delay in a freely convertible currency.
2. Without prejudice to the provisions of the preceding paragraph of this

article, investors of a Party that, in any of the situations referred to in paragraph 1, suffer losses in the territory of the other Party that resulted from:

- i. the acquisition of the investment or part thereof by the forces or authorities of the latter Party
- ii. the destruction of its investment or part thereof by forces or authorities of the latter Party shall promptly receive restitution, compensation or indemnity that, in one or another case, must be appropriate and effective.

Article 13

Transparency

1. In line with the principles of this Agreement, each Party shall ensure that all measures affecting investments are administered in a reasonable, objective and impartial form in accordance with its legal system.
2. Each Party shall ensure that its laws and regulations relating to any matter covered by this Agreement, with regard in particular to qualifications, licensing and certification, shall be published without delay and, where possible, in electronic format.
3. Each Party shall use its best efforts to give interested parties an opportunity to comment on the proposed measures.
4. The Parties shall give due publicity to this Agreement through their respective financial, public and private agents responsible for the technical risk assessment and approval of loans, credits, guarantees and insurances related to investments in the territory of the other Party.

Article 14

Transfers

1. Each Party shall permit the transfer of resources related to investment, provided that the procedures for records and the commitments established by the legislation of the Parties, which are as follows:
 - i. the initial capital or any additional capital for the maintenance or extension of the investment;
 - ii. the income directly related to investment;
 - iii. the proceeds from the sale or the total or partial liquidation of the investment;
 - iv. the loan repayments directly related to investment and interest thereon;
 - v. the amount of compensation in case of expropriation or temporary use of the investment of the other Party by the state of the host Party of that investment; when the compensation is paid in bonds, the investor of the other Party may transfer abroad the value that may derive from the sale of those bonds.
2. Nothing in this Agreement shall affect neither the right of a Party to adopt regulatory measures related to balance of payments during balance of payments crises nor the rights and obligations of members of the International Monetary Fund contained in the Establishing Agreement of

the Fund, particularly the use of exchange actions that are in conformity with the provisions of the Agreement.

3. The adoption of restrictive measures on transfers during the existence of serious balance of payments difficulties must be nondiscriminatory and consistent with the articles of the Establishing Agreement of the International Monetary Fund.

Article 15

Prevention and Resolution of Disputes

1. The Ombudsmen will liaise with each other and with the Joint Committee in order to prevent, manage and resolve any disputes between the Parties.

2. Before starting any arbitration proceeding, any dispute between the parties should be assessed through consultations and negotiations and should have been preliminarily examined by the Joint Committee.

3. A Party may submit a specific issue of interest of an investor to the Joint Committee. The procedure to conduct an arbitration proceeding is as follows:

i. to initiate a proceeding, the interested investor Party shall submit in writing their request to the Joint Committee, specifying the name of the investor concerned and the challenges or difficulties.

ii. the Joint Committee shall have 60 days to present relevant information of the presented case. Such period may be extended to 60 additional days, provided that it is justified and agreed by the parties. In order to facilitate the development of a solution between the parties concerned, the following should, whenever possible, take part, fully or partially, in the bilateral meeting:

a) the representatives of the interested investor

b) the representatives of governmental and nongovernmental organizations involved in the measure

iii. the dialogue procedure and bilateral consultation is terminated upon the request of either of the Parties involved upon the service of the summarized report of the following meeting of the Joint Committee:

a) the Parties' identification

b) identification of the interested investors

c) the description of the measure object of the query

d) the position of the Parties concerning the measure

4. The Joint Committee shall, whenever possible, convene special meetings to assess the submitted questions.

5. All documentation and arrangements concerning the mechanism established in this article as well as the Joint Committee meetings shall be confidential, except the presented reports.

6. In cases where it is not possible to resolve the dispute, the Parties may opt to take a recourse to arbitration mechanisms between States to be

developed by the Joint Committee, when considered appropriate by the Parties

Article 16

Application of the Agreement

1. This Agreement shall apply to all investments made before or after its entry into force.
2. In cases where there is a protection of res judicata, this Agreement may not be invoked to question previously discussed and settled by domestic remedies, or any claims concerning an investment that has been resolved before its entry into force.
3. This Agreement can in no way restrict the rights and benefits that an investor of a Party enjoys under national or international law in the territory of the other Party.

Article 17

Final and Transitional Provisions

1. Considering the thematic breadth demanded by issues relating to investment, the Parties conclude that the main purpose of the creation of the aforementioned Joint Committee and Ombudsmen is the promotion of institutional governance in this area by establishing a specific forum and technical channels that would act as facilitators between governments and the private sector.
2. Neither the Joint Committee nor the focal points, formalized in this Agreement, shall replace or impair in any way the diplomatic performance established between countries or other arrangements entered into by the Parties.
3. This Agreement shall enter into force thirty (30) days after the date of receipt of the last notification, sent in writing through diplomatic channels, that the requirements of national law of the Parties to this effect have been met and shall remain in force for a period of 20 years, automatically renewable for successive periods, unless either of the Parties notifies the complaint to another with a minimum of 12 months.

This Agreement has been executed in 2015, in two copies, both of which being equally authentic.

BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF BRAZIL

BY THE GOVERNMENT OF THE REPUBLIC OF MOZAMBIQUE

ANNEX I

AGENDA FOR COOPERATION AND FACILITATION

1. Payments and Transfers

- i. The cooperation between the respective financial authorities will aim at facilitating the transfer of currency and capital between the parties, within the applicable legal framework.

ii. The cooperation between monetary authorities will address, among others, the issues previously identified by the Central Bank of Brazil (BCB), the Brazilian Cooperation Agency (ABC) and the Bank of Mozambique in the following areas: risk management; system of payments; financial inclusion; internal audit; document management of contracts and equity; strategic planning and human resources; or new topics to be agreed in the future.

2. Viewed

i. The Facilitation to Grant Business' Visas between the Government of the Republic of Mozambique and the Government of the Federative Republic of Brazil will be the subject of a specific protocol to be signed between the two States.

3. Environmental legislation and technical regulations

i. Subject to the domestic legislation, the Parties shall make more transparent and swift procedures for issuing documents, licenses and related certificates necessary for the prompt establishment and maintenance of the investments of the Parties.

ii. Any discussions of the Parties, as well as their economic agents and investors, on business registration, technical requirements and environmental standards shall receive diligent and timely treatment of the other Party.

4. Cooperation in sectorial legislation and institutional exchanges

i. The Parties shall promote institutional cooperation for the exchange of experiences in the development and implementation of sectorial legislation.

ii. The Parties shall seek to promote technological, scientific and cultural cooperation through the implementation of actions, prog