

MACUNAÍMA LOOKING FOR A PLACE IN THE AFRICAN SAVANAS:

What lies behind Brazil-Angola investment regulation?<sup>1</sup>

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**Abstract:** Brazil and Angola economic flows have quadruplicated in the last ten years, turning Angola into one of Brazil’s major trade and investment partners in Africa and one with which Brazil has mostly increased its overall economic flows in recent times. Critics have qualified Brazil’s approach to Africa as “just another BRICS country seeking resources” and unwarrantedly labeled it as neo-imperialism *à la Sud*. In this Article, we rely on Brazil and Angola relations to argue that the existing explanations oversimplify the nature of Brazil-Africa relations, downplay centuries of Brazil-Africa socio-economic and cultural ties, and just too soon attempt to analogize Brazil-Africa economic relations to the categories created to explain North-South interactions. The Article is divided into two major parts. Section 1 explores the historical track record of Brazil-Angola relations, which dates back to the 15<sup>th</sup> Century, when massive waves of transatlantic slave trade defined the early relations of these two Portuguese colonies, but most importantly shaped the Brazilian *mestizo* identity, with long-lasting impacts on their bilateral relations. In Section II, we put these relations to the test in the context of the recently drafted Brazil-Angola investment promotion and facilitation agreement. Traditionally conceptualized as an asymmetrical regime, the Brazil-Angola agreement contests the basis of the international investment legal system by designing regulation that is rooted in cooperation and symmetry, in line with their centennial history. The research is based on empirical research methods - including analysis of aggregated data, primary and secondary documents, and interviews with government officials and private sector representatives in Brazil and Angola.

**Keywords:** South-South relations, colonialism, imperialism, ACFI, investment regulation, Brazil, Angola.

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## **Introduction**

Angola-Brazil trade and investment flows have been one of the most dynamic for the economies of both countries in the last years. In the context of the contemporary South-South trade and investment relations, we argued in a previous paper that the legal tools supporting the increase of such economic flows differ from the models of trade and investment agreements – known as Regional Trade Agreements (RTAs) and Bilateral Investment Treaties (BITs).<sup>4</sup> These legal tools were construed firstly to overcome Brazil and Angola’s specific limitations within the international economic system, such as limited financing capacity. And, secondly, the hybrid public and private dimensions of the agreements Brazil and Angola put in place may be also in line with the constituent and operational particularities of their own capitalist system and peripheral economies.

The academic debates that emerged from that first paper provoked us to further explore: (i) the impact of the common colonial roots in the current relations between Angola and Brazil; (ii) the risk of a new type of imperialism of Brazil towards Angola;<sup>5</sup>

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<sup>5</sup> For a sense of this criticism, see <https://www.chathamhouse.org/publications/papers/view/186957>.

and, (iii) the drivers of the newly signed Brazil-Angola investment agreement<sup>6</sup>. Although these topics are not patently interconnected, for the purposes of this working paper we believe that they are complementary. Under this conceptual framework, this paper is divided into two main sections.

As both Angola and Brazil were artificially created states, after the European expansion under the colonialist period, we describe in the first section the roots of economic relations between these countries since the 15<sup>th</sup> Century, and how a shared identity was developed. This will set the backgrounds for the analysis of the current investment relations between Angola and Brazil. We argue that although asymmetric, these relations have been horizontally coordinated, due to historic and contemporary, intrinsic and external, limitations to this bilateral relationship. In Section II, we then analyze the regulatory models for foreign direct investment developed by both countries, and the current bilateral agreement on investment they have recently signed. Finally, the conclusion addresses new considerations to the regulation of the economic relations between Brazil and Angola.

This piece should be read a preliminary version for one or more articles, considering that the first Agreements on Cooperation and Facilitation of Investment (ACFI) were signed and published by the end of March 2015, and that we are currently conducting interviews with public officials and representatives of the private sector in Brazil and Angola.

## **Section I – What comes from the clash of colonialism, development and imperialism in Brazil-Angola relations?**

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<sup>6</sup> We are indebted to the debates of our previous paper that led us to further explore the history of Angola, and its ties to Brazil, as well as the process of consolidation of a foreign policy towards Africa in Brazil. These debates took place within our research groups, at the 2014 Encontro de Pesquisa Empírica em Direito, the 2014 Global Hauser Colloquium, the 2014 American Society of International Law/ International Economic Law Interest Group, in the University of Denver's Sturtevant College of Law, the International Trade and Investment Law Workshop, of the Center on Globalization, Law and Society/ UC-Irvine School of Law, and informal communication with high-minded colleagues. Our special thanks to André Rodrigues Corrêa, Marcus Faro de Castro, Carmen Pons Vieira, Greg Shaffer, Arnulf Lorca, Anupam Chander, David Trubek, Sonia Rolland, Sérgio Puig, Fabiano Mielniczuk and Michael Farki. Previous version of this current draft have been presented at the 2015 Law and Society Conference, in Seattle; and at the 2015 Institute for Global Law and Policy Annual Conference, at Harvard Law School; and at the Annual Conference of the Brazilian International Relations Association, at PUC-Minas Gerais. We are thankful for the participants of these meetings for their helpful comments.

We argue in this section that the invention and reinvention of the state, and their constituencies, are common topics in the Angolan and the Brazilian history, and in their international relations – including its economic facet. This brings important nuances to their bilateral relationship, influenced by the tragedies of historical colonialism and post colonialism, the search for autonomy and development, and new waves of imperialism<sup>7</sup>.

### **A. The colonial legacy: alternative trade routes, elite connections, and cultural kinship**

Scholars in the context of development assistance programs have analyzed the increase in economic flows between third world countries<sup>8</sup> in the last fifteen years and have indicated a new type of imperialism, considering the asymmetrical relation between different third world countries<sup>9</sup>. Most part of these analyses considers economic developmental indicators<sup>10</sup>, but disregard or underestimate the cultural background supporting their relationship. The risk is then to reproduce the categories and narratives that have driven North-South types of domination – in what Mamdani precisely conceptual-

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<sup>7</sup> A critical reading by Loomba (2005, p. 11-2) of such domination processes distinguishes imperialism from colonialism based on a spatial perspective rather than temporal: “imperialism, colonialism and the differences between them are defined differently depending on their historical mutations. One useful way of distinguishing between them might be to separate them not in temporal but in spatial terms and to think of imperialism or neo-imperialism as the phenomenon that originates in the metropolis, the process which leads to domination and control.” Additionally, the author concludes “(...) it is more helpful to think of postcolonial-ism not just as coming literally after colonialism and signifying its demise, but more flexibly as the contestation of colonial domination and the legacies of colonialism.” (Loomba 2005, p. 16). These are the semantics adopted by this paper. While noting conceptual differences, other scholars use colonialism and imperialism interchangeably: “‘Colonialism’ refers, generally to the practice of settling territories, while ‘imperialism’ refers to the practices of an empire.” Anthony Anghie, *Imperialism, Sovereignty and International Law* 11 (2004).

<sup>8</sup> We use Third World as an analytical category, based on the TWAIL movement. As stated by Chimni, “once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries in Asia, Africa and Latin America is attached sufficient significance, the category “third world” assumes life.” B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, *International Community Law Review* 8: 3-27, 2006.

<sup>9</sup> Fahimul Quadir, *Rising Donors and the New Narrative of ‘South–South’ Cooperation: what prospects for changing the landscape of development assistance programmes*. *Third World Quarterly*, 34:2, 321-338 (2013).

<sup>10</sup> Angola domestic disparities has justified its classification by the UN as least developed country ([http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_list.pdf](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf)): a country that occupies one of the lowest human development positions, and that enhanced its position in 2012 from a lower middle-income country to an upper middle-income country, according to the World Bank (<http://data.worldbank.org/country/angola>). For the World Bank classification criteria since 2012, see <http://data.worldbank.org/news/newest-country-classifications-released>. Brazil, although still known as developing country, is classified as an upper middle income by the World Bank

ized as “history by analogy” – loosing other narratives more authentically connected to the history of those territories.<sup>11</sup> In this section, we then explore points in the history of both countries that promoted their cultural, economic and political relations and “interdependences”, focusing on relevant points of contact, and the language that has sustained the legal forms promoting those economic flows at the macro level.<sup>12</sup>

Angola and Brazil have been described as part of the South Atlantic center of commerce, established by the European expansion process in the 15<sup>th</sup> century (ALENCASTRO, 2000; COSTA, 2006; INIKORI, 2010; SARAIVA, 2012). Slave trade from Africa to the Americas was the key component of that economic flow<sup>13</sup>, and this determined not only the position of Angola and Brazil in the world economy, but the economic interconnectedness of their elites<sup>14</sup> and common origins for an important part of their population.

Although both Angola and Brazil were Portuguese colonies, their histories of domination were based on different drivers and different temporalities. If Angola was effectively politically dominated in the 19<sup>th</sup> century after the Berlin Conference in 1855<sup>15,16</sup> and it became independent in the late 20<sup>th</sup> century (1975), Brazil was under

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(<http://data.worldbank.org/country/brazil>), with a high human development index. For UNDP data, see <http://hdr.undp.org/en/countries>.

<sup>11</sup> See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) (Chapter 1).

<sup>12</sup> Similar endeavor, we notice in the creation of the new paradigms for a postcolonial sociology, according to Costa and Boatca (2010). The authors conclude their view on the development of such studies as: “En el nivel macrosociológico, los resultados de los análisis poscoloniales desembocan en una superación de la historia convencional de evolución lineal de las sociedades modernas, sin caer en el particularismo de modernidades infinitamente multiplicadas. Para ello, el concepto poscolonial de modernidad entrelazada así como el concepto de historias compartidas y conectadas apuntan hacia las interdependencias, pero también hacia las rupturas y asimetrías, en la constitución del mundo moderno y (pos)colonial. En el nivel mesoanalítico los estudios poscoloniales arrojan luz sobre las interpenetraciones entre actores y las estructuras de poder históricamente construidas atadas a los contextos de acción en diferentes niveles (local, regional, transnacional y transregional), con lo que contribuyen considerablemente a aumentar el potencial epistemológico. Estas posibilidades heurísticas ni son accesibles para la sociología política convencional, que se concentra en el espacio nacional y en los actores políticos establecidos, ni para el campo de las relaciones internacionales, el cual en buena medida ha desarrollado una ceguera ante las relaciones de poder. En el nivel microsociológico, la contribución de los estudios poscoloniales reside, sobre todo, en un concepto sociológico de cultura expandido y más dinámico. Consecuentemente, las piezas que importan de las interacciones sociales no son los repertorios culturales que se originan en culturas herméticamente cerradas y atadas a un determinado espacio geográfico, sino las diferencias culturales que se articulan espontáneamente. (...) Costa and Boatca (2010, p. 352-3).

<sup>13</sup> According to Rodrigues (1964, p. 17), based on historical documents in a century, until 1681, about one million slaves had been sent to Brazil from the territories of Angola.

<sup>14</sup> Lucy Corkin, *Uncovering African Agency: Angola’s management of China’s Credit Lines* (2015).

<sup>15</sup> The first Portuguese expedition in Angola dates back to 1482, when Diogo Cão arrived in the current territories of Angola. James Duffy (1959) reduces the first three centuries of Portuguese presence in that territory, though, to small local fights, expeditions to hinterlands, and the lucrative trade of slaves with

severe control of Portugal since the 16<sup>th</sup> century, becoming in 1808 – due to the Napoleonic expansion in Europe – the administrative center of Portugal and an independent sovereign country since 1822. In other words, Brazil was a colony of the first European colonial movement, and Angola of the neocolonialism of the 19th century. At the same time – and surprisingly – the constituencies of Angola and Brazil were in permanent interaction from the 16<sup>th</sup> century until late 19<sup>th</sup> century,<sup>17</sup> reestablishing closer bilateral interaction after Brazil's recognition of Angola's independency in 1975.

The Brazilian agrarian elites dependence on slavery provoked a local consciousness and the development of local interests in promoting a direct trade relation between Brazil and the Angolan territories during the 16<sup>th</sup> and 17<sup>th</sup> centuries<sup>18</sup>. Archives register such trade, under expressions applied by the colonial language:

“one trade flow of slaves which was licit, regulated and serviceable; and other illicit flow, that was harmful and condemned by the law, of imported textiles in Brazil in exchange for tobacco, by the Dutch in the Coast” (RODRIGUES, 1964, p. 27, free translation by the authors)

Therefore, the bilateral relations of Angola and Brazil during the 16<sup>th</sup> and 18<sup>th</sup> Centuries was determined by: i) the strengthening of the colonial structures in Brazil, ii) the organization of a unique South Atlantic space<sup>19</sup> for trade, mainly of slaves; iii) structures of domination and exclusiveness in their relationship operated directed by Ango-

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Brazil. James Duffy was professor of Spanish at Brandeis University (Massachusetts, USA), and he is considered one of the classics on the history of Portugal in Africa during the colonial period.

<sup>16</sup> The Berlin Conference of 1884–1885 sought to regulate the competition between the European colonial powers and new ones – such as the United States – by defining "effective occupation" as the criterion for international recognition of a territory claim, specifically in Africa. Due to the Portugal effective occupation, since then, the existing forms of local autonomy and self-governance in Angola were definitely eroded. The participation of the United States qualified the idea of a new imperialism, contrasting with the earlier wave of European colonization from the 15th to early 19th centuries. See UZOIGWE (2010).

<sup>17</sup> It is usual to have the reference that Angola could be considered as a province of Brazil, considered the magnitude of the trade of human beings as slaves from Angola to Rio de Janeiro, Bahia, and Pernambuco – provinces of Brazil. See Rodrigues (1964), p. 17 and ff.

<sup>18</sup> According to Rodrigues (1964, p. iii, and 27-29), the decline of the Portuguese domain on navigation and mercantilist trade since the beginning of the 18<sup>th</sup> century, Brazil could control with a certain autonomy the trade flows and shipping to Angola. Brazil was triangulating the trade flows coordinating its Portuguese local elite interest with those from Africa and Asia. So that, in 1761, a decree was issued prohibiting Indian cargo ships from docking and offloading any supplies in Brazil. On the same sense, Alencastro (2000, pp. 247 and ff) who entitles his analysis of “Angola brasílica”, meaning how Angola was influenced by its exchanges with Brazil.

<sup>19</sup> The concept of a South Atlantic space is argued as a triangular process, comprehending Angola-Brazil-Portugal, and mutually benefiting groups from all those territories. This concept mitigates the idea of a colonization process based on the exclusive domination and coordination by Portugal over its two largest colonies: Angola and Brazil. About the creation of the structures for this South Atlantic, see ALENCAS-TRO (2000); COSTA (2006); INIKORI (2010); SARAIVA (2012).

lan and Brazilian elites, but led by Portugal<sup>20</sup>. The fact that the elites in Brazil and Angola searched for autonomy from Portugal to advance their common agendas should be stressed as an additional element that creates a common identity between the colonies. These characteristics set the terms of the re-engagement of such countries in the late 20<sup>th</sup> century.

During the 19<sup>th</sup> century, due to international movements led by the economic industrial revolution and the English political campaign against slavery, slave traffic from Africa sinks; accompanied by a connected decline of Portugal's influence facilitates Brazilian independence in 1822. At this moment, certain organized groups in Luanda and Benguela claimed to break free from Portugal and integrate Angola to Brazil. (Rodrigues, 1964, p. 144). In 1823, however, in deference to the Portuguese crown, the Brazilian Emperor officially announces that Brazil would not claim any right with respect to the colonies in the west coast of Africa, which included Angola (Rodrigues, 1964, p. 145).

Two important theses emerged from Brazil-Angola bilateral relations developed after the 15<sup>th</sup> Century to the beginning of the 19<sup>th</sup> Century, under the idea of a South Atlantic region: (i) the historiographical thesis about the complementarity of the Angolan and Brazilian economic systems during colonial exploitation, as part of a unique strategy of the Portuguese Empire (ALENCASTRO 2000; SARAIVA, 2012); and (ii) the sociological postcolonial thesis about the shared historical roots of trans-regional chains of inequality (COSTA and BOATCA 2010; SARAIVA 2012). These two theses are based on the assumption that the economic, political and cultural relations between Angola and Brazil were part of one interdependent project. This period can also be identified as one that brings Brazil and Angola together in what could be qualified as the germ of their contestation movement – an imperfect antithesis - against the prevailing international economic system.

During the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, Angola and Brazil did not develop relevant economic and political relations, but their ties remained present in their nostalgic imaginary. Brazil was perceived by Angola as the example of a colony that had broken free from Portuguese domination despite Portugal's dependence on Brazil's economy. In that period, Angola had become the most im-

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<sup>20</sup> Alencastro suggests that the traffic of slave was not a forced result of the mercantilist capitalism, but a result of a combination of interests in Angola, Brazil and Portugal. Alencastro (2000).

portant colony under the domain of Portugal, which inspired Portugal to reinvent its connection to Angola. Partly driven by Portugal's intention to "whiten" Angola, it sent numerous poor white Portuguese people to Angola, altering Angola's social structure<sup>21</sup>. Angola and its indigenous culture, on the other hand, were invoked in many social movements in Brazil as core aspects of the Brazilian national identity<sup>22</sup>.

**B. The post-colonial quests: non-intervention, development, cooperation, local needs, and alternative trade and investment routes**

The first half of the 20<sup>th</sup> century was full of ideologies or merely ideas that nourished the process of creation and reinvention of previous colonies into new independent states. In this period the existence of mantras that continue to guide contestation movements in non-developed states is perceptible. Linhares (1993, p. 61) sustains that Marxist-Leninists, in 1917 Russia, were the protagonists in stating the right to self-determination, condemning the remaining dominance over colonies or attached territories. The anti-imperialism mantra influenced both countries like Angola, struggling for their independence, as well as others looking for alternatives to their economic integration into the global economy and a more autonomous development, such as Brazil.

An example of these movements, and their convergence, is the recognition of the Angola's independence by Brazil in 1975<sup>23</sup>. Angola's transition to independence was marked by violence, intellectual inspiration in other African countries, the decadence of both Portugal and the Salazar regime, and disputes within the Cold War context<sup>24</sup>. The independence of African and Asian countries during the 20<sup>th</sup> century brought

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<sup>21</sup> Linhares (1993) qualifies that in the 19<sup>th</sup> century there is a reinvention of the Portuguese empire, based on *i*) the migration of Portuguese miserable population to Africa ("From 1930 until 1960 the number of [Portuguese] white population [to its colonies] increased from 30 thousand to 200 thousand...", p. 99, free translation); *ii*) the progressive dismantlement of the tribal systems of government; *iii*) the export of labor force to mining activities of English companies in other regions in Africa; and *iv*) the implementation of a policy of discrimination based on skin color (pp.98-9). See also DIOP (2010, pp. 75-6).

<sup>22</sup> The contribution of the slavery to Brazil was not only economic, but in the formation of its cultural identity, based on the mixture of races. The book of José Honório Rodrigues sounds curious as a nationalist project, as far as it calls upon the importance of Africa to Brazil. In his words, "Africa also civilized us (...) because of this, we are a Mixed Republic, ethnic and culturally; we are neither Europeans nor "Latin-Americans", we were tupinized, Africanized, Orientalized, and Occidentalized. The synthesis of many antithesis is Brazil today, a unique achievement." (RODRIGUES, 1964, p. iii, free translation by the authors)

<sup>23</sup> We described this process in more detail at SANCHEZ-BADIN, MOROSINI (2014, p. 6, footnote 17), noting that Brazil was the first country to recognize Angola's independence.

<sup>24</sup> See about the violence and the libertarian movements in Angola, Mazrui (2010, p. 142) and M'Bokolo (2010, p. 248, 259-60); about the Salazar regime, its decadence and influence in the colonies, Linhares



to the scene new postcolonial debates. It was clear, at that point, that formal political independence could not be translated into full economic autonomy – Latin America was the notable case in point. Thus, a new agenda built under the concept of periphery and development became a priority to the former colonies. Such momentum favored the establishment of an alliance of newly independent countries, under the Third World rubric,<sup>25</sup> demanding acknowledgement of their inferior status in the international system and looking for international fora to voice their demands - the conference of Bandung in 1955 became, then, the symbol of such movement.

Although neither Angola nor Brazil directly joined that conference, the echoes of the Third World movement were incorporated into their agendas and policies. The Third World movement recognized the peripheral and dependent position of such ex-colonies in the world economic system, and it incorporated new claims for self-determination, and economic development<sup>26</sup>. Additionally, the Third World movement reaffirmed the possibility of complementarity – and cooperation – among their economies, instead of competition – a strong argument explored during the colonization period.

Angola's recognition of independence by Brazil in 1975 was an important decision under the pragmatic independent foreign policy (*known as Política Externa Independente* - PEI) launched in the 1960s in Brazil. According to San Tiago Dantas, one of the creators of this policy together with Afonso Arinos e João Augusto de Araújo Castro, PEI was based on the following principles: *i*) coexistence, as the main pillar for the peace among people; *ii*) non-intervention and self-determination; *iii*) Increased trade flows and number of the trade partners, including countries from the socialist bloc and especially with those from the Southern hemisphere; and, *iv*) political support to the independence of non-autonomous territories, regardless of the legal arrangements under which domination operated in these countries (DANTAS 1962, p. 6). Diplomatic relations of Brazil with African countries replicated historical components of their interaction, especially in relation to Angola. Saraiva, a leading Brazilian scholar on African

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(1993, p. 96 and ff.); about the international support, Mazrui (2010, p. 143-4), and more details about influence of the socialist bloc, see Ki-Zerbo, Mazrui and Wondji (2010, p. 583 and ff.).

<sup>25</sup> Chimini, TWAIL Manifesto

<sup>26</sup> According to AMIN (1974, p. 98), since the 19<sup>th</sup> century, all colonies, independent of their previous role become part of one periphery to the world capitalist system. He states that “The previous periphery – the American countries of the plantation – and its won peripheries – the African countries that supplied the slaves labor force – become part of a new periphery. The main attribute of this new periphery was the supply of products.

studies, argues that PEI redefined the South Atlantic area based on *i*) the signature of cooperation agreements; *ii*) the increase of trade flows; *iii*) the promotion of investment, linked to local development projects; and *iv*) the awareness of historical cultural ties (SARAIVA 2012, p. X).

In relation to PEI, Dantas adds that it was neither a doctrine nor a strategically and previously planned policy (DANTAS 1962, p. 5), which corroborates to the idea of a pragmatic foreign policy (SANCHEZ and MOROSINI 2014, p. \_). Pragmatism became then a new mantra for Brazilian policies, and it has been revived in the Labor Party's agenda after 2003 (SANCHEZ and MOROSINI 2014).<sup>27</sup>

### **C. Historical constraints for a Southern discourse by Brazil towards Angola and its impact in the legal framework for their bilateral relations**

The brief description of the Angolan and Brazilian state since their colonization by Portugal during the 15<sup>th</sup> century elucidates some historical imperatives that have structured their bilateral relations. Based on pre-structured interviews, this section attempts to identify the main concepts in the rhetoric of Brazilian officials, and to connect them to the historical framework described in the previous sections. We have interviewed ten Brazilian officials, holding positions in the key offices of the Brazilian bureaucracy in charge of bilateral relations with Angola, they are: *i*) the Ministry of Foreign Affairs; *ii*) the Ministry of Industry, Development and Commerce; *iii*) the Ministry of Finance; and *iv*) special advisors to the Presidency. In the Angolan side, we have interviewed the Angolan Ambassador to Brazil.

In this version of the paper, there is a preliminary exercise based on a more subjective analysis. In the future, we intend to combine this with objective methods, applying the codification process of the software Atlas.ti to all agreements signed between Angola and Brazil, as well as to the transcripts of the interviews.

## **Section II. Recent efforts on investment regulation between Angola and Brazil**

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<sup>27</sup> Javier Santiso (2007) analyzing the political economy in the last decades in Latin America uses the term “possibilism” (in lieu of pragmatism). We sustain that his analysis of the Latin American domestic policies may be replicated in the foreign policy context.

Since March 2015, Brazil signed five investment agreements with selected partners of the Global South. It started by Mozambique, followed by Angola, Mexico, Malawi and Colombia. Much attention has been directed to these agreements for their innovative aspects, which can be qualified as an alternative to mainstream investment regulation.

This section of the article, on the other hand, tries to contextualize the new Brazil and Angola investment agreement as a proxy for their horizontally coordinated relations and as an instrument to promote symmetry, cooperation and development in both sides of the Atlantic. We purposely chose to test Brazil and Angola contemporary bilateral investment relations given the historical asymmetrical characteristics of such regime.<sup>28</sup> We argue, therefore, that the recent Brazil-Angola investment agreement does not fit into the existing categories that emerged to explain North-South investment relations, of which bilateral investment treaties are one defining image.

In this section of the article we explore the drivers and mentors of the new wave of the Brazilian investment agreements, its defining features, and its relations to Brazil-Angola bilateral relations. We rely on 9 pre-structured interviews with Brazil's public officials and private sector representative and one interview with the ambassador of Angola to Brazil.

Alternatives to the current liberal international economic system and its framing rules have been rare in the last 40 years. The new Agreements on Investment Cooperation and Facilitation (ACFI) can be considered a pragmatic response to the system, based on Brazil's domestic needs and geo-economic position. The ACFI model was designed taking into consideration economic specificities of a developing country such as Brazil: a historical recipient of investment, a latecomer exporter of capital, and the current combination of both, favouring the triangulation of foreign investments abroad. In this context, the ACFIs have definitely brought new elements to the international investment scene.

Other scholars as well as policy-makers and practitioners have gone into well-done descriptions of the details and novelties of the ACFIs.<sup>29</sup> In this article, we explore

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<sup>28</sup> Sornarajah, *Resistance and Change in the International Law of Foreign Investment* (2015). See also Sornarajah, *Mutations of Neo-Liberalism in International Investment Law*, 3 *Trade, Law and Development* (2011).

<sup>29</sup> 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), 14–16. Re-

the sociolegal aspects, contextualizing the catalysts of these agreements, relating their new elements to the clauses and the legal language used in the Brazilian ACFI model. We also present our understanding of the Brazilian ACFIs as a product of cross-fertilizing narratives: host countries' contestation movements against unequal economic relations crystallized in traditional-type bilateral investment treaties (BITs), the search for alternatives to the hotly debated reengineering of the current international investment regime, and an attempt to create a genuinely Brazilian investment agreement that is sensitive to internal constitutional limitations and responsive to Brazil's aspirations as an emerging economy.

Part A details the historical and current context of the Brazilian model and Part B describes the main efforts employed by Brazil to design an agreement with clauses that are symmetrical in form and content. Part C contextualizes the ACFIs in the context of Angola's investment policies and BITs currently in force.

#### **A) The historical track record of the Brazilian ACFIs: domestic and international drivers**

It still comes as a surprise that, despite the size of the Brazilian market, Brazil has never ratified an investment agreement of any kind. For this reason alone, Brazil's move towards signing an ACFI with Angola and other developing countries would be worth of attention. On top of that, the negotiations of investment agreements in Brazil were at the spotlight in the 1990s, when the country signed 14 of them to never ratify any. To understand the move behind Brazil's new wave of investment agreements, it bears first understanding the investment agreements of the 1990s, the old wave, and how we got from there to here. What justifies such a radical policy change?

In the 1990s, Brazil signed 14 agreements on investment promotion and protection (hereinafter APPIs) with Germany (1995), Belgium-Luxemburg (1999), Chile (1994), South Korea (1995), Cuba (1997), Denmark (1995), Finland (1995), France (1995), Italy (1995), The Netherlands (1998), Portugal (1994), United Kingdom (1994),

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trieved from <https://www.iisd.org/sites/default/files/publications/iisd-itn-may-2015-en.pdf>; Hamilton, J. C., & Grando, M. (2015). Brazil and the future of investment protections. *Latin Arbitration Law*. Retrieved from <http://www.latinarbitrationlaw.com/brazil-and-the-future-of-investment-protections>; Roland, S., & Trubek, D. (2015). Brazil develops a new model BIT – A challenge to the US model? *International Trade Daily*, 108. Retrieved from <http://www.washingtontradedaily.com/index.html> (subscription only); Monebhurrin, N. (2014). Crônicas de Direito Internacional dos Investimentos. *Revista de Direito Internacional*, 12(2), 64–77.

Switzerland (1994), and Venezuela (1995).<sup>30</sup> Brazil’s participation in the creation of these agreements is marginal at best. The standardized type of agreements, modeled under the asymmetrical bilateral investment treaty (BIT) model and the choice of partners – mostly developed countries – is self-explanatory.<sup>31</sup> The 1990 agreements with Brazil were part of an agenda set by the IMF and the World Bank to respond to Northern countries’ demand for protection of their property in developing countries with high political risks.<sup>32</sup> At this point, one cannot speak of a Brazilian investment model, since Brazil was just another developing country, among several, abiding to a standardized and asymmetrical investment policy.

The Brazilian APPIs started being negotiated during Fernando Collor de Mello’s mandate, and negotiations survived 3 president mandates. In the context of privatizations,<sup>33</sup> APPIs were believed to reduce the political and regulatory risks for foreign investors. In this period, in addition, neighbor Argentina was negotiating similar treaties, having signed 57 of them between 1990 and 2001 (Lemos & Campello, p. 8-9).

The APPIs had a quite similar structure, which included: definition of investment, investor and territory; admission of investment; investment promotion; standards of treatment; nationalization, expropriation and compensation; transfers; investor-state arbitration, and; termination of treaties. Despite their similarities, the President only sent six of them to Congress for approval: Germany, Chile, France, Portugal, the United Kingdom and Switzerland.<sup>34</sup> As can be concluded from Table 1, economics only partially explains Brazil’s choice of countries:<sup>35</sup>

**Table 1 –Brazil’s FDI Inflows (in US\$ millions) in 1995 and 2000**

Country	1995		2000	
	\$	%	\$	%

<sup>30</sup> Insert citation to each document.

<sup>31</sup>

<sup>32</sup>

<sup>33</sup> United Kingdom-Ireland, Switzerland, Chile and Portugal agreements were negotiated under Collor de Mello, signed under Itamar Franco and sent to Congress by Cardoso, in 1995.

<sup>34</sup> It is not entirely clear the criteria adopted by the executive to choose which of the treaties would be sent to Congress for ratification. The option for Germany, France, the United Kingdom, and Switzerland can be explained in terms of investment presence in Brazil. However, the option of Portugal and Chile instead of countries such as Italy and The Netherlands could only be explained in non-economic terms. See Morosini and Xavier Júnior [forthcoming, 2015].

<sup>35</sup>

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<b>Germany</b>	<b>5828,04</b>	<b>13,98</b>	<b>5110,24</b>	<b>4,96</b>
Belgium/Luxemburg	966,28	2,32	1690,76	1,64
<b>Chile</b>	<b>238,37</b>	<b>0,57</b>	<b>228,13</b>	<b>0,22</b>
South Korea	3,81	0,01	179,64	0,17
Cuba	0,71	<0,01	0,08	<0,01
Denmark	84,91	0,20	478,10	0,46
Finland	123,30	0,30	180,62	0,18
<b>France</b>	<b>2031,46</b>	<b>4,87</b>	<b>6930,85</b>	<b>6,73</b>
Italy	1258,56	3,02	2507,17	2,43
The Netherlands	1545,80	3,71	11055,33	10,73
<b>Portugal</b>	<b>106,61</b>	<b>0,26</b>	<b>4512,10</b>	<b>4,38</b>
<b>UK</b>	<b>1862,61</b>	<b>4,47</b>	<b>1487,95</b>	<b>1,44</b>
<b>Switzerland</b>	<b>2851,30</b>	<b>6,75</b>	<b>2252,05</b>	<b>2,19</b>
Venezuela	1,02	<0,01	19,08	0,02
FDI stock	41695,62	100,00	103014,51	100,00

Source: Central Bank of Brazil. In bold, countries whose agreements the Executive submitted for Congress for approval.

All of the agreements faced resistance in Congress. During this period, left-wing Labor Party (PT) was the strongest opposing voice against the ruling parties and it related the APPIs with a right-oriented agenda concerned with liberalizing Brazil's economy. These agreements imprinted an economic imbalance between capital-importing and capital-exporting countries that Brazil's left wing was vigorously trying to combat. Apart from Chile, which traditionally plays a different regulatory card in relation to trade and investment in Latin America,<sup>36</sup> all other countries negotiating APPIs with Brazil were developed economies with an interest in protecting their investors in political unstable and economically risky countries. The developed/developing country divide was quite clear in these agreements.

Lemos and Campello explain that two factors contributed to the non-ratification of Brazilian APPIs. The first is attributed to concentrated but strong ideological opposition. This opposition came mostly from the Labor Party – PT, but not entirely.<sup>37</sup> In addition, multinational enterprises (MNEs) already operating in the country or state level

<sup>36</sup> Polanco, Rodrigo, The Chilean Experience in South-South Trade and Investment Agreements (July 29, 2014). Fourth Biennial Global Conference of the Society of International Economic Law (SIEL) Working Paper No. 2014-26. Available at SSRN: <http://ssrn.com/abstract=2474119>.

<sup>37</sup> There were instances where members of the ruling coalition did not support the APPIs either.

governors who could potentially benefit from more investment in their states were not involved in the negotiations (Lemos & Campello, 2013, p. 25).

The second factor that explains the non-ratification of APPIs is an unresolved executive, which addressed most investor's demands through alternative channels. The only real support for the agreements came from a few diplomats with the Ministry of Foreign Affairs, but none from ministries representing core areas to investment policy, such as Finance, Industry and Commerce, or Casa Civil (the center of the presidency's articulation and negotiation). At the same time, alternative avenues for the APPIs were created through domestic legislation.<sup>38</sup> (Lemos & Campello, 2013, p. 26).

The legislative history of the agreements confirms the resistance present in different committees before they could reach floor.<sup>39</sup> At the legislative stage, two clauses of the agreements came across as more problematic: compensation for expropriation and investor-State arbitration.

The APPIs stated that compensation for expropriation should be paid immediately, in convertible and freely transferable currency. This clause was challenged under constitutional grounds.<sup>40</sup> Even though the law in Brazil provides that compensation for expropriation is to be paid in usable currency, the Constitution admits that payment for expropriation of urban and rural properties may take the form of public debt securities or agrarian reform debt securities, respectively.

The APPIs provided that payment for expropriation of land for purposes of agrarian reform shall be made in convertible and freely transferable currency. The Brazilian Constitution, on the other hand, provides that it should be made through agrarian reform debt securities redeemable in up to 20 years. Therefore, the obligation imposed on Brazil to freely transfer payment to the investors, regardless of the country's funds availability, characterized a treatment more favorable to foreigners vis-à-vis nationals.<sup>41</sup>

Additionally, indirect expropriation clauses in the APPIs were perceived as problematic by Brazil. The inclusion of these clauses risks limiting the regulatory space of the host country, given their very open nature. Brazil was not willing to give up its

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<sup>38</sup> In 1997, liberalizing reforms in the Constitution and other laws advanced the regulation of the standards of treatment to investors and repatriation of profits. These were key provisions negotiated in the APPIs with Brazil. [Insert BACEN regulation].

<sup>39</sup> Morosini & Xavier Junior, *Brazilian Journal of International Law* (forthcoming 2015).

<sup>40</sup> Cite article of the Brazilian Constitution.

<sup>41</sup> ALVES, André Gustavo de Miranda Pineli. *As relações de investimento direto entre o Brasil e os países de seu entorno*. In: ALVES, André Gustavo de Miranda Pineli (Org.). *Os BRICS e seus vizinhos: investimento direto estrangeiro* Brasília: IPEA, 2014, p. 13-169, p. 31, nota 17.

policy space and submit the evaluation of the legitimacy of its public policies to the purview of private arbitrators.

Secondly, the investor-State arbitration clause of the APPIs was challenged before the Foreign Affairs and National Defense Committee on the grounds that “these norms contravene customary international law traditionally adopted by Brazil, the principle of exhaustion of local remedies.”<sup>42</sup> Direct access of foreign investor to international arbitration would place her in equal foot with the Brazilian sovereignty, and this would be equivalent to protecting the investor to the detriment of national interests.<sup>43</sup> Investor-state arbitration was then not an option for Brazil, given the country’s trust on its neutral and efficient judiciary and skepticism towards arbitration mechanisms generally during that period.<sup>44</sup>

As a result, in December 2002, just two weeks before the end of his mandate, President Cardoso withdrew the six APPIs from Congress, following recommendations of an Inter-Ministerial group instituted by CAMEX.<sup>45</sup> The other eight APPIs were never sent to Congress. (Lemos & Campello, 2013, p. 22).

Brazil then became known as one of the few top economies without BITs or an investment agreement model. Following that failure at the legislative branch, certain bodies of the executive branch, led by the Ministry of Industry, Development and Commerce (MDIC), kept the topic in their agenda, addressing alternative formats for the regulation of investments at the international level. Such efforts first considered external relations with MERCOSUR and other South American countries<sup>46</sup> and later became a broader policy concerning the global South: Africa, Asia, and Latin America.

But it was only in 2012 that the Brazilian Chamber of Foreign Trade (CAMEX) granted a formal mandate to a Technical Group for Strategic Studies on Foreign Trade (GTEX) to work on—among other topics—the drafting of a new investment agreement sensitive to Brazilian needs and concerns at the international economic scenario. In the context of Brazil–Africa relations, GTEX recommended the creation of a new type of

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<sup>42</sup> BRASIL. Parecer da Comissão de Relações Exteriores e Defesa Nacional [ao Projeto de Decreto Legislativo nº 367 de 1996]. Exposição do Deputado Luiz Gushiken. *Diário da Câmara dos Deputados*, Brasília, 4 mai. 2000, p. 21693.

<sup>43</sup> ALVES, André Gustavo de Miranda Pineli. As relações de investimento direto entre o Brasil e os países de seu entorno. In: ALVES, André Gustavo de Miranda Pineli (Org.). *Os BRICS e seus vizinhos: investimento direto estrangeiro* Brasília: IPEA, 2014, p. 13-169, p. 31.

<sup>44</sup> Brazil’s arbitration act was passed in 1997, but it faced Strong opposition until 2004, when the Supreme Court ruled in favor of its constitutionality.

<sup>45</sup> CAMEX, Grupos Técnicos Interministeriais, Mensagem n. 1079, de 2002.

<sup>46</sup> Nicolás Perrone & \_\_, Columbia FDI Perspectives (2015).



investment agreement, under the leadership of MDIC's Foreign Trade Secretariat (SECEX). This gave a new push to the continuous but slow process that had started with the negotiation of the BITs in the 1990s. The GTEX mandate was the zenith of the process, and the result of the technical capacity of MDIC officials in a favourable political moment in Brazil—the right people at the right time.

At that point, Brazilian firms had almost doubled their investments abroad in five years, to a record US\$355 billion.<sup>47</sup> It was a time when national politics met the industry's private interest: firms were investing abroad—mainly in Latin America and Africa—while Brazil's external policy was also geared toward South–South relations, for reasons not limited to economic rationales. GTEX then initiated consultations with the private sector in Brazil<sup>48</sup> concerning the main challenges of the transnationalization of Brazilian companies.<sup>49</sup>

From the beginning of the negotiation process, Brazil envisioned a different agreement from those negotiated in the 1990s. In parallel to the contestation movement in developing country host states, even if at different paces and intensities, the drafting of the Brazilian model investment agreement was equally influenced by ongoing debates concerning the reform of the international investment regime, lessons learned from the failure of the approval of the investment agreements negotiated in the 1990s, and internal demands for market access. A template for the new agreement—addressing all those concerns—was ready as from 2013 when it was approved by CAMEX, and then proposed to states where Brazilian companies were more consistently investing. Mozambique, Angola, Mexico, Malawi and Colombia were the first countries to react positively to Brazil's negotiating push. Brazil is currently negotiating with several other developing countries.<sup>50</sup>

## **B. The Brazilian Agreement on Investment Cooperation and Facilitation as a Southern alternative to investment regulation**

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<sup>47</sup> This point should be stressed in the text!

<sup>48</sup> Private sector consultations were held with the Federation of Industries from the State of São Paulo (FIESP, in Portuguese) and the National Industry Confederation (CNI, in Portuguese).

<sup>49</sup> Cite CNI report.

<sup>50</sup> MRE.

The current investment regime faces structural challenges, which range from the increasing discomfort about the actual effects of IIAs in terms of promoting FDI or reducing policy and regulatory space to growing exposure to Investor State Dispute Settlement (ISDS) (UNCTAD, 2014, p. 126). The growing number of investor-state arbitrations and the broad range of policy issues raised in this context is turning ISDS into the most controversial issue in investment policymaking (UNCTAD, 2014, p. 126). Complaints against ISDS include: challenges to arbitrators legitimacy to assess the validity of States' acts, arbitrators independence and impartiality, the lack of transparency of the system, problems of inconsistency and erroneous arbitral decisions, and growing uneasiness with the notion that arbitration is low-cost and speedy method of dispute settlement (UNCTAD, 2013, p.3-4).<sup>51</sup>

In response to these debates, several countries are undergoing processes of re-viewing its investment agreements to diminish their impact on the host country's interest to regulate in the public interest - in areas such as environmental protection, health and labor standards (UNCTAD WIR 2014), and to find alternatives to ISDS.<sup>52</sup>

In the case of Brazil, the ACFI framework was built on the revision of previous agreements by Brazilian policy makers—considering the limits of domestic regulation—and on the inputs from the Brazilian private sector based on their recent experience as capital exporters.<sup>53 54</sup> The combination of those demands resulted in a model

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<sup>51</sup> According to Sornarajah, the international investment regime is undergoing a crisis of legitimacy, which finds its roots in the debatable success of neoliberal economic policies (Sornarajah, 2011, p. 203).

<sup>52</sup> The authors are currently coordinating a research project on Southern alternatives to investment regulation, which examines recent changes in investment law and policy in Brazil, Chile, South Africa, India, China and Australia.

<sup>53</sup> According to MDIC, in contrast to the traditional-type BIT experience, the Brazilian government's position was: 1) to restrict the expropriation concept only to direct expropriation, and its compensation in accordance with the Brazilian Constitution (Articles 5, 182 and 184 of Brazil's Federal Constitution of 1988 provide that expropriation of urban and rural real properties may be—among other possibilities—compensated with public and agrarian bonds, respectively); 2) to establish a dispute settlement mechanism limited to state–state disputes; 3) to admit exceptions to the free transfer obligation, aiming at safeguarding the host country's balance of payments; 4) to limit investor protection under the agreement to productive investments, according to the International Monetary Fund's definitions and under the conditions of the host country domestic rules; and 5) to welcome host countries' policy spaces in the definition of exceptions to National Treatment and Most-Favoured-Nation Treatment (MFN) obligations.

<sup>54</sup> In addition to that agenda, the Brazilian private sector voiced their position by answering a survey on investment facilitation. Based on the survey and on further studies conducted by GTEX, three additional elements were added: 1) a focal point where firms could go for advice and help throughout the investment relation; 2) provisions for risk mitigation and dispute prevention; and 3) a thematic work program for investment facilitation devoted mainly to visa and licencing proceedings, among others. D. Godinho, Head of the Brazilian Foreign Trade Secretariat (SECEX), Ministry of Development, Industry and Commerce, personal communication, April 28, 2015.

agreement that focuses on investment facilitation and risk mitigation. Although this structure is not new to international investment agreements, the ACFI brought new components to their content. Constant cooperation among governmental agencies, mediated by diplomatic action, and deference to domestic legislation can be considered the leading notions behind this model agreement, which offers a more symmetrical alternative to the current international investment regime.

## **1. Investment facilitation**

Investment facilitation provisions are mostly concerned with market access, and they prevail in the structure of the ACFIs signed to date. In this respect, simple measures such as visa policy and the regularity of flights were considered basic needs for the effective promotion of investment flows from Brazil into its counterparts (mainly other developing country economies). While those may be problems for an investor from any part of the world, such barriers are more costly for investors from developing countries, to the extent that they limit capital exports in the absence of alternatives. Brazil chose to address such problems through an investment agreement, including a thematic agenda for investment cooperation and facilitation as one of its core elements.

The thematic agendas comprise programs on money transfers, visa proceedings, technical and environmental licenses and certifications, as well as provisions for institutional cooperation.<sup>8</sup> Such agendas also revive developing country claims to technology transfer, capacity building, and other developmental gains from foreign investment. In addition, they express the understanding that the benefit to the home country must come not only from capital exports, but also from the overall impact that investment from the home country will have on the host country, such as employment of local labor. In this sense, the ACFI model aims at advancing symmetry beyond formal rules, and its design takes into account the domestic needs of both capital importing and exporting countries.

The ACFIs encourage the parties to negotiate special commitments, additional schedules, and other supplementary agreements as part of the main agreement, in order to expand or detail the thematic agendas.<sup>55</sup> In the opinion of Mr. Daniel Godinho, Sec-

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<sup>55</sup> In June 2014 Angola and Brazil had signed a Protocol about Visa Facilitation that was taken into account in the thematic agenda of the Brazil–Angola ACFI, Annex I, subparagraph 1.2(i).

retary of SECEX, the existence of such thematic agendas turn the ACFIs into dynamic agreements that may evolve along with the bilateral investment relations.

## **2. Risk mitigation**

The risk mitigation dimension of the agreement comprises typical rules for investment and investor protection,<sup>56</sup> and diplomatic and cooperative mechanisms for implementing, overseeing and enforcing the parties' obligations, including dispute settlement mechanisms. On this issue, we read the ACFI provisions mainly as a product of the international agenda for reforming the investment regime and of specific domestic concerns on the topic.

Each ACFI creates two types of institutions to govern the agreement: a Joint Committee and ombudsmen (Focal Points). The Joint Committee operates at the state-to-state level, while the Focal Points, inspired by the ombudsmen from the 2010 Korean Investment Act, provide government assistance to investors, dialoguing with government authorities to address the suggestions and complaints from the other party's government and investors. Influenced by multilateral organizations, such as the United Nations Conference on Trade and Development (UNCTAD),<sup>57</sup> and experiences from other countries, Brazil has strongly emphasized the prevention of disputes between the parties in its ACFI template. Therefore, the roles of both the Joint Committee and the Focal Point are, primarily, to promote regular exchange of information and prevent disputes and, if a dispute arises, to implement the dispute settlement mechanism, based on consultations, negotiations and mediation. This mechanism aims to deter investors from judicially challenging host government measures. Unlike traditional BIT-type agreements, the ACFIs do not allow investors to initiate arbitration against the state. Brazilian public officials note that, even though state-to-state arbitration is mentioned in the agreements, it shall not be the foremost mechanism for settling disputes.

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<sup>56</sup> The ACFIs include National Treatment and MFN provisions, but exclude Fair and Equitable Treatment and Full Protection and Security clauses. Indirect expropriation, one of the issues that faced resistance before Congress in the 1990s, is also not covered by the ACFIs.

<sup>57</sup> United Nations Conference on Trade and Development (UNCTAD). (2013, June 26). Reform of investor-state dispute settlement: In search of a roadmap. *IIA Issues Note No. 2*, p. 5. Retrieved from [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf) (stating that "ADR methods can help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties").

The transparency mechanisms in the ACFIs may also serve to mitigate risk. Instead of establishing transparency standards, however, the ACFIs provide that “each Party shall employ its best efforts to allow a reasonable opportunity for those interested to voice their opinion about proposed measures.”<sup>58</sup> This may still be considered a novelty to the current regime. The agreements also include corporate social responsibility (CSR) clauses, encouraging foreign investors to respect human rights and environmental laws in the host state, also in order to mitigate risk. Even though the agreements are ambiguous regarding the binding force of these CSR obligations and even more so regarding mechanisms to enforce them,<sup>59</sup> they do innovate by addressing the protection of interests of the host state and its citizens within an international investment regulation.

### **C. Contesting imperial-driven relations in the context of Brazil and Angola investment regulation**

Angola underwent a civil war beginning in 1975, right after its independence, and continuing until 2002. Although politically unstable and fragile institutionally, Angola continued to be approached by private investors interested in its abundant natural resources, and the country even signed BITs (Table 2).

Once the civil war was over Angola passed its first Private Investment Law (*Lei de Bases do Investimento Privado* – LIP 2003), on May 13, 2003.<sup>60</sup> This law set the basis for private investment in Angola, either national or foreign. The defining features of Angola’s investment policy included: investment definition (Article 1), reliance on private investment for the purpose of Angola’s social and economic development (Article 5), standards of treatment for private investors, which included fair and equitable treatment (FET), full protection and security (FPS), and national treatment (NT) clauses (Article 12), transfers (Article 13), private investors’ access to local courts, assurance that expropriation of private property might only occur for public purposes, in which case the investor will receive a just, prompt and effective compensation, and guarantees

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<sup>58</sup> See, for example, Article 13, paragraph 3, of the Brazil–Mozambique ACFI, available at [http://www.itamaraty.gov.br/index.php?option=com\\_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR](http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR)

<sup>59</sup> Brazilian human rights NGOs have complained about their low normativity, and the lack of international mechanisms to enforce the responsibility for violations in the field, see Borges, C. (2015, May 29). Acordos bilaterais à brasileira. *Valor Econômico*. Retrieved from <http://www.valor.com.br/opiniao/4072416/acordos-bilaterais-brasileira> (subscription only).

<sup>60</sup> Law N. 11/03, May 13, 2003.

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against nationalization of private property (Article 14), local capacity building and the progressive “angolanization” in boards of directors (Articles 18 and 54), recourse to arbitration in Angola and under Angola’s law.

To this date, Angola has signed 10 BITs, of which five have entered into force.<sup>61</sup> In general, we read these agreements as a product of the wave of asymmetrical treaties, conceptualized by the World Bank and the International Monetary Fund in the late 80s. In addition to the BITs, according to UNCTAD, Angola has signed thirteen other investment agreements, five of which have entered into force.<sup>62</sup> The Agreement on Investment Cooperation and Facilitation with Brazil was the last agreement signed by Angola, and is not yet in force.

**Table 2: Angola’s Bilateral Investment Treaties**

<b>Partner</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
<b>Cape Verde</b>	In force, text unavailable	09/30/1997	12/15/1997
<b>Germany</b>	In force	10/30/2003	03/01/2007
<b>Italy</b>	In force, only Italian version available	07/10/1997	05/21/2007
<b>Portugal</b>	Signed (not in force)	10/24/1997	--
<b>Portugal</b>	Signed (not in force), text unavailable	02/22/2008	--
<b>Cuba</b>	In force	?	04/14/2009
<b>Russian Federation</b>	In force	06/26/2009	01/12/2011
<b>South Africa</b>	Signed (not in force), text unavailable	02/17/2005	--
<b>Spain</b>	Signed (not in force), text unavailable	11/21/2007	--
<b>United Kingdom</b>	Signed (not in force)	07/04/2000	--

Source: Elaborated by authors based on UNCTAD’s International Investment Agreements database and additional research.

<sup>61</sup> Cape Verde (1997), Germany (2007), Italy (2007), Cuba (2009) and the Russian Federation (2009). <http://investmentpolicyhub.unctad.org/IIA> (last visited November 5th, 2015)

<sup>62</sup> Other investment agreements entered into force by Angola: Cotonou Agreement (2003), SADC Investment Protocol (2010), SADC Treaty (1994), and ECCAS Treaty (1984). Other investment agreements signed by Angola: Angola – Brazil CFIA (2015), Angola – US TIFA (2009), and Angola – SADC Interim Agreement (2009). See: <http://investmentpolicyhub.unctad.org/IIA> (last visited May 28th, 2015).

In this section, we argue that the ACFI signed with Brazil, if ratified, shall inaugurate a new pattern of investment relations in Angola. First and foremost, the agreement should be interpreted as part of a long-standing strategic and mutually beneficial partnership between these two countries. Differently from bilateral investment treaties signed by Angola to date, the Brazil-Angola ACFI sets out an alternative model that shall be read as symmetrical in form and content, and one that truly accommodates both countries' developmental agendas.

We reach this conclusion after comparing the main features of bilateral investment treaties in force between Angola with the 2014 Angola Model BIT (*Paradigma dos Acordos de Promoção e Proteção Recíproa de Investimentos*) and the 2015 Brazil-Angola ACFI. We make the case that Angola is gradually moving away from standardized BITs to develop a model that takes into account its search for regaining policy space in the investment domain without undermining the importance of private capital for Angola's industrialization and to diversify its oil-dependent economy.<sup>63</sup> We argue that the Brazil-Angola ACFI is to date the most ambitious step towards symmetrical investment relations in the history of both countries, which is coherent with Brazil-Angola historical narratives.

Out of the five BITs currently in force in Angola, the authors were able to analyze only four of them: Germany, Italy, Russia, and Cuba. The text of the BIT between Angola and Cape Verde is unavailable. We contrast the most important defining features of each BIT, against Angola's evolving investment policy (LIP 2011 and LIP 2015), the 2014 Model Investment Law and the 2015 Brazil-Angola ACFI (See Annex 1 for detailed comparison):

*1) Purpose of the treaty*

With the exception of the Cuba BIT, which does not provide what is the purpose of the treaty, all other BITs establish that their purpose is investment promotion and protection. In practical terms, it traditionally means promoting and protecting the capital exporting country against political instability in the place of the investment that may have a negative economic impact on the value of the investment.

By contrast, the 2014 model BIT stipulates that its purpose is reciprocal investment promotion and protection intended to increase and enhance business activities and

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<sup>63</sup> Interview x.

opportunities between the parties. The inclusion of the word “reciprocal” could be interpreted as reinforcing the idea that these agreements should generate advantages for both Parties.

The Brazil-Angola ACFI takes a step forward. It expressly takes out investment protection of the purpose of the treaty. Instead, the ACFI is about reciprocal investment facilitation and promotion between the Parties. Excluding investment protection of the purpose of the agreement has at least two major practical consequences for the investor: 1) Exclusion of fair and equitable treatment, and full protection and security from investors’ level of protection, and 2) Eliminating investor-State arbitration as a mechanism for dispute resolution.

The inclusion of investment facilitation as a purpose of the Brazil-Angola ACFI, by contrast, adds two important practical consequences to the Parties’ investment relations: 1) It introduces alternative institutional mechanisms to govern the Parties’ investments, such as the ombudsmen and the Joint Committee; and 2) It allows Angola to advance, through the thematic agendas, public policy goals such as local capacity building (mainly through employment of local labor force by private investors), which were left out of the existing BITs currently in force.

## 2) *Definition of investment*

There is a current tendency in international investment law to limit the definition of what constitutes investment. Host States learned the hard way that the broader the definition, the greater are their chances of getting sued for violating the terms of the treaty. That being said, Angola’s BITs with Germany, Italy, Russia and Cuba are examples of broad investment definitions and involve: Movable real estate property and other property rights; with the exception of the BIT with Russia, shares and other instruments of the enterprise; intellectual property rights; rights of economic nature conferred by law and contract; and other variations.

Both the 2014 Model BIT and the Brazil-Angola ACFI, on the other hand, limit the definition of investment by providing that the national laws of the contracting Parties shall define what constitutes investment. The domestic definition of investment in Brazil and Angola are narrower than the patterns established in Angola’s BITs.<sup>64</sup> In ad-

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<sup>64</sup> Cite.



dition, the interpretation of whether x or y falls under the definition of investment will also be according to the local law of the contracting Parties.

### 3) *Expropriation*

All the of analyzed BITs currently in force in Angola, the 2014 Model BIT and the Brazil-Angola ACFI provide that private property shall not be expropriated, unless for public purposes. With exception of the BIT with Germany, expropriation shall take place in a non-discriminatory manner. Both the 2014 Model BIT and the Brazil-Angola ACFI add that expropriation shall be conducted under due process of law.

Provisions on expropriation usually cover direct and indirect expropriation. Direct expropriation may be broadly defined as measures taken by a host State with the purpose of expropriating private property, whereas indirect expropriation covers measures that are taken not for the purpose of expropriating private property, but ends up devaluing the investment indirectly. The examples associated with indirect expropriation generally range from measures adopted by a host State to regulate the local environment or health and having an indirect effect on the investment.<sup>65</sup>

Traditional BITs usually include provisions on direct and indirect expropriation for purposes of compensation. This is the case of all of the analyzed BITs in force in Angola, including the 2014 Model BIT.

Many countries have begun to question such broad definition of expropriation because it limits their right to regulate in sometimes crucial policy areas that may impact negatively on the investment. To respond to such claims, the Brazil-Angola ACFI limited its jurisdiction to direct expropriation and guaranteed a more symmetrical relationship between investor and host State.

### 4) *Compensation*

All analyzed BITs in force in Angola deal with the issue of compensation as a direct result of expropriation. They establish similar patterns for compensation, with minor variations.

They present some important variations that speak to the level of confidence an investor might be expected to have on the courts/ tribunals where the investment took place. In the BIT with Germany and Italy, the agreement provides that the investor shall

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<sup>65</sup> Cite jurisprudence.

have a right to review, according to the principles of international law, the legality of the expropriation, nationalization or equivalent measure and the amount of compensation awarded by the court/ tribunal of the place of the investment.

The language employed in the BIT with Cuba and the Model 2014 BIT is at least deferential to local law. In the BIT with Cuba, the text provides that the investor shall have the right to review the case, according to the BIT and to the laws of the place of the investment, though a judicial process or other, conducted by a judicial authority or other. The 2014 Model BIT goes in similar lines, but limits the review process to a judicial or administrative authority.

The Brazil-Angola ACFI does not say whether the decision on compensation might be reviewed...

#### 5) *Standards of treatment*

Standards of treatment in an investment treaty speak directly to expropriation, which in turn brings back the debate on the right to regulate of the host State into question. Traditional BITs provide for the usual standards of protection: Fair and Equitable Treatment (FET), Full Security and Protection (FSP), National Treatment (NT), Most-Favored-Nation (MFN), and Umbrella Clause (UC). Together, these standards guarantee non-discriminatory treatment to the foreign investment and investor, and define the major categories under which an investor may claim violation to its property rights. Angola's BITs provide for all such standards of treatment, including its 2014 Model Investment Agreement.

The FET clause has been controversially interpreted in the context of investor-State arbitration.<sup>66</sup> On the side of the investor, this is probably the broader protection she can expect to get against host State changes in local laws with an impact on the investment. To the host State, this clause typically (and unduly) restricts its policy space.

In response to such asymmetrical patterns of investment regulation, where the investor is entitled to several rights that protect her from political and economic instability in the host State at the expense of a weaker State with limited policy space, some countries are considering alternative language to bring symmetry to the investor-State equation. In the 2015 Brazil-Angola ACFI, FET, FSP and UC excluded. Investors are

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<sup>66</sup> Cite jurisprudence.

protected through MFN and NT clauses – similarly to the trade regime where the Northern v. Southern interests are conceptualized more diffusedly.

Interestingly, the ACFI seemed to have echoed at the Angolan domestic level. In August 2015, only four months after the signature of the ACFI with Brazil, Angola reformed its Private Investment Law (LIP), to replicate the standards of protection of the ACFI, eliminating FET, FPS and UC from its national investment policy.<sup>67</sup> To our understanding, this political move at the Angola domestic level shall contribute to the country's desire to greater autonomy and symmetry in their investment relations. It remains to be seen how this change will be received in future BIT negotiations with Angola.

#### 6) *Transfers*

In the context of transfers, the rule in BITs is free transfers without undue delay or restrictions. Clearly again this meets the interests of the investor, who is entitled to transfer funds out of the host State regardless of the socio-economic conditions prevailing in the host country. In the case of Angola, this is very much the rule in its BITs with Germany, Italy<sup>68</sup> and Russia. In the BIT with Cuba, which is also later in time compared to the other BITs, safeguard provisions to transfers of funds are included. Article 8 of the Angola-Cuba BIT expressly provides for a six-month exception to free transfers for balance of payment problems at the host country.

The 2014 Model Investment Agreement empowers Angola to limit free transfers for different reasons: 1) Legal determinations of each country's Central Banks;<sup>69</sup> 2) Balance-of-payment difficulties;<sup>70</sup> 3) When transfer of capital shall cause or threat to cause difficulties in the country's macroeconomic governance;<sup>71</sup> 4) To adopt measures related to financial services for prudential reasons.<sup>72</sup> The Brazil-Angola ACFI, in line with Angola's investment model, allows exceptions to free transfer of funds, based on serious balance-of-payment and external financial difficulties or threat thereof, to the extent that the measures are consistent with the Articles of the Agreement of the Inter-

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<sup>67</sup> Art. 19 of LIP 2015.

<sup>68</sup> Note, however, that the Italy-Angola BIT makes reference to the Exchange rate regulation of the place of the investment (Article 6).

<sup>69</sup> Article 7 2014 Model Investment Agreement.

<sup>70</sup> Article 8 2014 Model Investment Agreement.

<sup>71</sup> Article 8 2014 Model Investment Agreement.

<sup>72</sup> Article 9 2014 Model Investment Agreement.

national Monetary Fund. Safeguard provisions, such as the ones provided in the 2014 Model Investment Agreement and the Brazil-Angola ACFI guarantee symmetry in the investor-State relations.

7) *Dispute settlement*

One of the most heated debates in international investment law today concerns investor-State arbitration.<sup>73</sup> Investor-State arbitration turned out to be the preferred dispute settlement mechanism in BITs even if other alternatives are provided in those agreements. Preference for investor-State arbitration was justified, *inter alia*, on the following grounds: 1) arbitrators, differently from judges, are unbiased; 2) the notion that arbitration is low-cost and a speedy method of dispute settlement (UNCTAD, 2013, p.3-4) and; 3) the idea that investor-State arbitration depoliticizes the dispute. All of these justifications have been under attack, and it is beyond the goal of this Article to evaluate these claims. What is important to retain is the notion that investor-State arbitration may be an avenue for asymmetrical investment relations, because of the nature of the BIT substantive provisions or the internal problems linked to investor-State arbitration (lack of transparency, biased in favor of investors, etc).

Angola's investment agreements present an interesting variation in the way dispute settlement came to be regulated, which can be divided into three phases:

- Phase 1: State-State arbitration + National tribunals + Ad hoc arbitral tribunals, under UNCITRAL rules + ICSID arbitration. The BITs between Angola and Germany, Italy, Russia and Cuba are representatives of this phase.
  
- Phase 2: State-State arbitration + Recourse to Angolan law in relation to private investment contracts. The 2014 Model Investment Agreement illustrates this tendency, which shall be read as Angola's attempt to regain control over the way investment disputes are to be settled, where the reference to Angola's law is a key feature of that policy. It should not go without saying that this has been Angola's policy since the country firstly issued its Private Investment Law in 2003. Article 33 of Law N. 11/2003 reads: "... arbitration shall be conducted in Ango-

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la and Angolan law shall be applicable to the contract.” This policy is reproduced consistently in Angola’s 2011 and 2015 Private Investment Law.<sup>74</sup>

- Phase 3: Risk mitigation and dispute prevention mechanisms + State-State arbitration. The Brazil-Angola ACFI responds to this phase. Although disputes shall be settled by State-State arbitration, this is clearly not the focus of the agreement,<sup>75</sup> which focuses on investment mediation. Moving away from investor-State arbitration and empowering focal points (ombudsmen) and Joint Committees may be read as Brazil and Angola search for cooperation and symmetrical investment relations...

### **Final remarks - Macunaíma: the synthesis of a postcolonial language<sup>76</sup>**

Macunaína is one of the most popular characters of the Brazilian magical realism literature. Macunaína became the icon of the Brazilian identity, representing the mixture of races and cultures, but a rule-breaker searching for his identity and most valuable gifts<sup>77</sup>. The narrative of this book matters not only for its story, but for Mario de Andrade’s writing style, all in the context of the critical background of the Modern Art Week in 1922 in Brazil. This should explain why we look at this piece of art for inspiration. In this book, Macunaína, Brazilians were looking for a local language and other forms of expression, but it depicts the colonized subjects as imperfect combinations - thus the reference to Macunaíma as the imperfect hero or anti-hero.

It can be said that the literature is one of the areas of most intensive influence and contribution between Angola and Brazil today. The creation of that *mestizo* literature in Brazil, became later a reference and inspiration to Angola’s literature<sup>78</sup>. Our epic

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<sup>74</sup> Cite.

<sup>75</sup> Cottrell & Trubek.

<sup>76</sup> Here we employ the postcolonial as Loomba (2005, p. 16), see footnote 7.

<sup>77</sup> DE ANDRADE, Mario. *Macunaíma*. London: Random House, 1984. See also Coleman, Alexander, “A hero of enormous appetites”, *The New York Times*, March 3, 1985, available at <<http://www.nytimes.com/1985/03/03/books/a-hero-of-enormous-appetites.html>> (last access: 18 May 2015).

<sup>78</sup> CITE Pepetela, ref. Camões x Drummond. Camões as the archaic epic poems about the glories of Portugal. Glories that had no reference for the new identity in formation of such dominated society. Drummond as the Brazilian poet celebrating the everyday life, the poem that communicates with the ordinary people. This is the image of his mains sculptures in Porto Alegre and Rio de Janeiro, at the same level of people, and in an adult human size: so, everyone can talk to Drummond.

narratives are full of setbacks, of frustrated efforts, and the recognition of the limitation of our ambitions<sup>79</sup>. These ideas seem also to be behind Brazil-Angola bilateral relations.

On our first paper, we received much criticism in relation to real interests behind Brazil's relations to Angola, in the sense that it could be read as part of a neo-imperialistic agenda towards Africa. The present paper aimed to respond to that criticism, demonstrating that the nature of the bilateral relations between Brazil and Angola does not support such claim. Their relations should be conceptualized from the perspective of horizontally based interdependence

These relations were put into test in the context of Brazil-Angola contemporary investment relations, particularly their new investment cooperation and facilitation agreement. Brazil chose to address its developing country and latecomer limitations to investment flows through an alternative model agreement, which can be seen as a first step toward more symmetry in investments agreements. The provisions on investor and investment protection are not the main focus of the ACFI. In terms of investment policy engineering, the ACFI stands for a regulatory tool that is alternative to investor and investment protection. It emphasizes constant coordination between the parties' agencies and investment facilitation under thematic agendas for cooperation, and deference to domestic legislation. Although we identify more innovation capacity in this part of the agreement, we also recognize that new elements were brought to the scene with respect to risk mitigation and dispute prevention.

Comparing the BITs currently in force in Angola with the 2014 Model Investment Agreement and the 2015 Brazil-Angola investment cooperation and facilitation agreement, we conclude that Angola is gradually regaining its autonomy in investment agreements and pushing for its developmental agenda (local capacity building, transfer of technology and employment of local labor) and symmetry. In this sense, it can be argued that in a regime where asymmetrical obligations seem to be the rule, the Brazil-Angola agreement is moving on the opposite direction, at least partially due to the nature of their historical relations.

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<sup>79</sup> On the same terms, Loomba (2005, p. 8): "The process of 'forming a community' in the new land necessarily meant *un-forming* or *re-forming* the communities that existed there already, and involved a wide range of practices including trade, plunder, negotiation, warfare, genocide, enslavement and rebellions. Such practices generated and were shaped by a variety of writings—public and private records, letters, trade documents, government papers, fiction and scientific literature. These practices and writings are what contemporary studies of colonialism and postcolonialism try to make sense of."

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However, the ACFI itself still needs to be further regulated—particularly as to the functioning of institutional mechanisms—, and its provisions must be given a breath of life. Brazil and Angola have homework to do in detailing the framework for the ACFIs and the investment relations under the agreements. Therefore, the ACFI model and its innovative contribution will be put to test in the regulation and implementation of the concluded agreements, a challenge that highly depends on the coordination and cooperation capacity of the parties' agencies.

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Annex 1: Comparison between Angola’s BITs, Angola’s Model Investment Agreement and Angola-Brazil ACFI

	Germany BIT	Italy BIT	Russia BIT	Cuba BIT	Model BIT	Brazil ACFI
<b>In force since</b>	03/01/2007	05/21/2007	01/12/2011 or 09/30/2009	04/14/2009	06/04/2014	No
<b>Purpose</b>	Investment promotion and protection	Id. BIT Germany	Id. BIT Germany	Does not provide	Reciprocal investment promotion and protection, to increase and intensify business activities and opportunities bet. the parties	Reciprocal investment facilitation and promotion to enhance and increase business opportunities bet. the Parties
<b>Operationalization of the agreement</b>						National institutions, Joint Committee, Cooperation and facilitation agendas, mechanisms for risk reduction
<b>Definition of</b>	(Art.1) - Movable real estate	(Art. 1) – Movable real estate	(Art. 1) – Movable real estate	(Art. 1) - Movable real estate	National laws of the contracting	National laws of the contracting

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<b>investment</b>	property and other property rights (mortgages and pledges) - Shares and other instruments of the enterprise - IP rights - Public law concessions (including research, exploration and extraction).	property and other property rights - Claims to money... - Shares and other instruments of the enterprise - IP rights - Rights of economic nature conferred by law or contract... - Whatever addition to the value of the original investment	property and other property rights (mortgages, pledges and others) - Claims to money or whatever rights with economic value and attached to investments - IP rights - Clientele - Rights of economic nature conferred by law or contract...	property and other property rights (mortgages, pledges and others) - Shares, stocks and other equity and debt instruments of the enterprise, and economic interests resulting activity... - ? - IP rights + clientele - Rights of economic nature conferred by law or contract - Assets that are made available for leasing in the territory of the other Party.	Parties	Parties
<b>Institutional governance –</b>						Joint committee and Ombudsmen (Focal Points)
<b>Exchange of information between the parties</b>						Yes

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<b>Interaction with the private sector</b>						Yes
<b>Agenda for further investment cooperation and facilitation</b>						Yes: Payment and transfers, visas, technical and environmental regulations, cooperation on regulation and institutional exchange
<b>Expropriation</b>	(Art. 5)- Public purpose  ** Direct and indirect expropriation	(Art. 5) - Public purpose - Non-discriminatory manner  ** Direct and indirect expropriation	(Art. 7) – - Public purpose - Non-discriminatory manner - According to the law of the place of expropriation  ** Direct and indirect expropriation	(Art. 7) – Public purpose - Non-discriminatory manner  ** Direct and indirect expropriation	(Art. 5) – Public purpose - Non-discriminatory manner - Due process of law  ** Direct and indirect expropriation	- Public purpose - non-discriminatory manner - Effective compensation - Due process of law
<b>Compensation</b>	(Art. 5)- Without delay (+ applicable interest reate) - Value of the invest-	(Art. 5): - Value of the investment immediately before the effective expropria-	(Art. 5) – Prompt, adequate and effective - Market value of the investment	(Art. 5) – Prompt, adequate and effective compensation - The inves-	(Art. 5) - Just, adequate and effective compensation - W/o delay - Equiva-	- Without undue delay, according to the law of the Party where the expropriation

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	<p>ment immediately before the effective expropriation</p> <ul style="list-style-type: none"> <li>- Be effectively realizable and freely transferable</li> <li>- The investor shall have a right to review, according to the principles of IL, the legality of the expropriation, nationalization or equivalent measure and the amount of compensation awarded by the tribunal where the investment took place.</li> </ul>	<p>tion</p> <ul style="list-style-type: none"> <li>- W/o undue delay</li> <li>- Be effectively realizable and freely transferable</li> <li>- The investor shall have a right to review, according to the principles of IL, the legality of the expropriation, nationalization or equivalent measure and the amount of compensation awarded by the tribunal where the investment took place.</li> </ul>	<p>(of the date the expropriation occurred or when expropriation becomes public domain)</p>	<p>tor shall have a right to review the case, according to this agr. And the laws of the territory where the expropriation took place, through a judicial process or other, conducted by a judicial authority or other</p> <p>- Fair market value...</p>	<p>lent to the fair market value, immediately before the effective expropriation</p> <ul style="list-style-type: none"> <li>- The investor shall have a right to review the case, according to this Agr. and the laws of the territory where the expropriation took place, to a judicial or administrative authority.</li> </ul>	<p>took place</p> <ul style="list-style-type: none"> <li>- Equivalent to the fair market value, immediately before the effective expropriation</li> <li>- Not reflect a negative change in the market value due to the knowledge of the intention to expropriate...</li> <li>- Payable and freely transferable</li> </ul>
<b>Corporate Social Responsibility</b>						Yes
<b>Standards of treatment</b>	<p>FET (Art. 3) NT and MFN (Art. 4) Full protection and security (Art. 5)</p>	<p>FET (Art. 2) NT and MFN (Art. 3) ** Could not find FPS clause</p>	<p>Full protection and security (Art. 4) FET (Art. 5) NT and MFN (Art. 5)</p>	<p>FET, FPS, NT, MFN (Art. 5)</p>	<p>FET, FPS, Umbrella clause, NT, MFN (Art.4)</p>	<p>National treatment MFN</p>

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<b>Transparency</b>						Yes
<b>Transfers</b>	(Art. 6) – Free transfers - W/o delay under fair market value of the day of the transfer	(Art. 6) - Free transfers - W/o undue delay, under fair market value of the day of the transfer - According to exchange rate legislation of the place of the investment	(Art. 8) – Free transfers - W/o undue restriction	(Art. 8) – Free transfers, in conformity with the laws of the place of the investment, w/o undue delay - Includes safeguard measures (including balance of payments)	(Art. 7) Free transfers (+ safeguard provisions – Arts. 8 and 9)	Free transfer of funds (+ safeguard provisions)
<b>Risk mitigation and Dispute prevention</b>	(Art. 11) – Consultations		(Art. 12) - Consultations	(Art. 21) - Consultations		Ombudsmen Joint Committee State-State arbitration
<b>Dispute settlement</b>	(Art. 8) – State-State arbitration+ (Art. 9) - National tribunals where the investment is located - Ad Hoc arbitral tribunal (UNCITRAL rules) - ICSID + Additional facility	(Art. 10) – State-State arbitration+ (Art. 9) - National tribunals where the investment is located - Ad Hoc arbitral tribunal (UNCITRAL rules) - ICSID	(Art. 10): Negotiation - State-State arbitration (Art. 11): - National tribunals where the investment is located - Ad Hoc arbitral tribunal (UNCITRAL rules) - ICSID +	(Art. 11) – State-State arbitration  (Art. 12) Investor-State (text unavailable) + Arts. 13 – 19 (well detailed rules)	(Art. 14) – State-State arbitration (ICJ) + Any dispute relating to the validity, interpretation, enforcement, change or existence of private investment contracts, as well as the inter-	Ombudsmen Joint Committee State-State arbitration

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	rules		Additional facility rules		pretation and enforcement of any laws, decrees, regulations or decision impacting on the contract, that emerges between the home State and the investor shall be resolved to their respective national laws.	
<b>IP rights</b>						
<b>Health, Safety, environmental, and national labor standards measures</b>					Art. 10 - The investment shall promote the recruitment of national labor force and capacity building to create the necessary competencies to implement the investment.	
<b>General amendments and final pro-</b>	Validity: 10 years, re-	Validity: 10	Validity: 10 years, re-	Validity: 10 years, re-	Validity: 5	Validity: 10 years, re-

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visions	newable	years + 5	newable	newable	years	newable
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