

# INVESTMENT COOPERATION AND FACILITATION AGREEMENT BETWEEN THE FEDERATIVE REPUBLIC OF BRAZIL AND THE REPUBLIC OF MALAWI

The Federative Republic of Brazil and

The Republic of Malawi

(hereinafter designated as the Parties or individually as Party),

Desiring to strengthen and to enhance the bonds of friendship and the spirit of continuous cooperation between the Parties;

Seeking to stimulate, streamline and support bilateral investment, boosting the trade agenda and opening new integration initiatives between the Parties;

Recognizing the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development;

Understanding that the establishment of a strategic partnership between the Parties in the area of investment will bring wide-ranging and mutual benefits;

Recognizing the importance of fostering a transparent, agile and friendly environment for Parties' investment;

Reassuring their regulatory autonomy and policy space;

Desiring to encourage and strengthen contacts between private sector and the Governments of the two countries; and

Seeking to create a mechanism for technical dialogue and government initiatives that may contribute to a significant increase of mutual investment;

Agree, in good faith, to the following Investment Cooperation and Facilitation Agreement, hereinafter referred to as Agreement, as follows:

## Article 1. Objective

1. The objective of this Agreement is to promote co-operation between the Parties in order to facilitate and encourage mutual investment.

2. This objective shall be achieved through institutional governance, as provided in this Agreement, by the establishment of an agenda on investment cooperation and facilitation and by the development of mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed on by the Parties.

## Article 2. Definitions

1. For the purpose of this Agreement,

Host State means the Party where the investment is located.

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

a) shares, stocks, and other equity and debt instruments of the enterprise or another enterprise;

- b) loans to an enterprise;
- c) movable or real estate property and other property rights such as mortgages, liens or pledges;
- d) claims to money or to any performance under contract having a financial value; and
- e) the value of investment under a concession contract or administrative decision, including licenses to cultivate, extract or exploit natural resources.

For greater certainty, Investment does not include:

- a) debt securities issued by a government or loans to a government;
- b) portfolio investments; and
- c) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in sub-paragraphs (i)-(v) above.

Investor means:

- a) any individual who is a national or a permanent resident of a Party, according to its laws, that makes an investment in the other Party;
- b) any legal entity:
  - i) established in accordance with the laws of a Party;
  - ii) having its headquarters and the center of its economic activities in the territory of that Party;
  - iii) whose property or effective control belongs, directly or indirectly, to nationals or permanent residents of the Parties, according to the corresponding legislation; and
  - iv) That invests in the other Party.

Territory means:

- a) in the case of the Federative Republic of Brazil: Its territory, including exclusive economic zone, territorial sea, seabed and subsoil under its sovereign rights or jurisdiction, in accordance with international law and with its respective legislation.
- b) In the case of the Republic of Malawi: The national territory of the Republic of Malawi consisting of all the territory, including airspace, waters and islands which comprise the territory of Malawi in accordance with its laws including any territory lawfully acquired thereafter by adjustment of boundaries or otherwise.

Freely convertible currency means a currency that is widely used to make payments for international transactions and widely exchanged in principal international exchange markets.

## **Part I. Institutional Governance**

### **Article 3. Joint Committee for the Administration of the Agreement**

1. For the purpose of this Agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred as Joint Committee). 2
2. This Joint Committee shall be composed of government representatives of both parties designated by their respective Governments.
3. The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held at least once a year, with alternating chairs between the Parties.
4. The Joint Committee shall have the following functions and responsibilities:
  - a) Monitor the implementation and execution of this Agreement;
  - b) Discuss and share opportunities for the expansion of mutual investment;

- c) Coordinate the implementation of the mutually agreed cooperation and facilitation agendas;
  - d) Consult the private sector and civil society, when applicable, on their views on specific issues related to the work of the Joint Committee; and
  - e) Resolve any issues or disputes concerning Parties investment in an amicable manner.
5. The Parties may establish ad hoc working groups, which shall meet jointly or separately from the Joint Committee.
  6. The private sector may be invited to participate in the ad hoc working groups, whenever authorized by the Joint Committee.
  7. The Joint Committee shall establish its own rules of procedure.

## **Article 4. Focal Points or Ombudsmen (1)**

1. Each party shall designate a National Focal Point, or Ombudsman, which shall have as its main responsibility the support for investor from the other Party in its territory.

2. In Brazil, the Ombudsman shall be in the Chamber of Foreign Trade - CAMEX (2).

3. In the Republic of Malawi, the National Focal Point shall be the Malawi Investment and Trade Centre (3).

4. The National Focal Point, among other responsibilities, shall:

a) Comply with the guidelines of the Joint Committee and interact with the National Focal Point of the other Party, in accordance with this Agreement;

b) Interact with the relevant government authorities to assess and recommend, when appropriate, referrals for the suggestions and complaints received from the Government and investors of the other Party, providing information to the Government or interested investors about any undertakings resulting from such suggestions and complaints;

c) Mitigate conflicts and facilitate their resolutions in coordination with relevant Government authorities and in partnership with pertinent private bodies;

d) Provide timely and useful information on regulatory issues on general investment or on specific projects; and

e) Report activities and milestones to the Joint Committee, when appropriate.

5. Each Party shall draw up rules of procedure for the operation of its National Focal Point, expressly stipulating, when appropriate, time limits for the implementation of each of its functions and responsibilities.

6. Each Party shall designate only one agency or authority as its National Focal Point, which shall give prompt replies to notifications and requests by the Government and investors from the other Party.

7. The Parties shall provide the means and resources for the National Focal Point to perform its functions, as well as ensure its institutional access to other government bodies responsible for the terms of this Agreement.

(1) For the purpose of this Agreement, "Ombudsman"/"Ombudsmen" are terms only applicable to Brazil, and are an exact synonym for "Focal Point"/"Focal Points".

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

(3) The MITC is a government agency responsible for investment and trade promotion operating under the INVESTMENT AND EXPORT PROMOTION ACT.

## **Article 5. Exchange of Information between Parties**

1. The Parties shall exchange information, whenever possible and relevant to reciprocal investments, concerning business opportunities, procedures, and requirements for investment, particularly through the Joint Committee and its National Focal Points. 2

2. For this purpose, the Party shall provide, when requested, with celerity and respect for the level of protection granted, information related, in particular, to the following items:

- a) Regulatory conditions for investment;
  - b) Specific incentives and related governmental programs;
  - c) Public policies and legal landmarks that may affect investment;
  - d) Legal framework for investment, including legislation on the establishment of companies and joint ventures;
  - e) Related international treaties;
  - f) Customs procedures and tax regimes;
  - g) Statistical information on the market for goods and services;
  - h) Available infrastructure and public services;
  - i) Governmental procurement and public concessions;
  - j) Social and labor requirements;
  - k) Information on specific economic sectors or segments previously identified by the Parties; and
  - l) Regional projects and understandings on investment.
3. The Parties shall also exchange information on Public-Private Partnerships (PPPs).
4. The Parties shall fully respect the level of protection granted to such information, as requested by the submitting Party.

## **Article 6. Interaction with the Private Sector**

1. Recognizing the key role played by the private sector, the Parties shall disseminate among the relevant business sectors general information on investment, regulatory frameworks and business opportunities in the territory of the other Party.

# **Part II. Agenda for Further Investment Cooperation and Facilitation**

## **Article 7. Agenda for Further Investment Cooperation and Facilitation**

1. The Joint Committee shall develop and discuss an Agenda for further Cooperation and Facilitation on relevant topics for the promotion and enhancement of bilateral investment. The topics that shall be initially addressed and its objectives are listed in Annex I - Agenda for Further Investment Cooperation and Facilitation.
2. The agendas shall be discussed between the competent government authorities of both Parties. The Joint Committee shall co-opt when applicable additional competent government officials for both parties in the discussions of the agenda.
3. The results of such negotiations shall constitute additional protocols to this Agreement or specific legal instruments.
4. The Joint Committee shall coordinate schedules of the discussions for further investment cooperation and facilitation and the negotiation of specific commitments.
5. The Parties shall submit to the Joint Committee the names of government bodies and its official representatives involved in these negotiations.

# **Part III. Risk Mitigation and Disputes Prevention**

## **Article 8. Risk Mitigation and Disputes Prevention**

1. The investment and investors of the Parties are subject to the legal system of the Host Party, therefore no provision of this Agreement shall be used for the purpose of not complying with local laws and regulations.
2. Subject to its laws and regulations, a Party shall not directly nationalize or expropriate covered investments by this Agreement, except:
  - a) in the public purpose;

b) in a non-discriminatory manner;

c) on payment of effective compensation, according to paragraphs 4 to 6; and

d) in accordance with due process of law.

3. The Parties shall cooperate to improve their knowledge of their respective domestic legislations on expropriation of investment.

4. The compensation shall:

a) Be paid without undue delay, in accordance with the legal system of the Host Party;

b) Be equivalent to the fair market value of the expropriated investment, immediately before the effective expropriation (expropriation date);

c) Not reflect a negative change in the market value due to the knowledge of the intention to expropriate, before the expropriation date; and

d) Be completely payable and freely transferable, according to the article about transfers.

5. If the fair market value is denominated in an internationally convertible currency, the compensation to be paid shall not be inferior to the fair market value on the date of the expropriation, plus interests, accrued since the date of expropriation until the date of payment, according to the legislation of the Host Party.

6. If the fair market value is denominated in a currency that is not internationally convertible, the compensation to be paid shall not be inferior to the fair market value on the date of the expropriation, plus interests and, if applicable, adjustment to inflation, accrued since the date of the expropriation until the date of payment, according to the legislation of the Host Party.

## **Article 9. Corporate Social Responsibility**

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.

2. The investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment:

a) Stimulate the economic, social and environmental progress, aiming at achieving sustainable development;

b) Respect the human rights of those involved in the companies activities, consistent with the international obligations and commitments of the Host Party;

c) Encourage the strengthening of local capacities building through close cooperation with the local community;

d) Encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training;

e) Refrain from seeking or accepting exemptions that are not established in the legislation of the f)Host Party, relating to environment, health, security, work or financial incentives, or other issues;

f) Support and maintain good corporate governance principles, and develop and apply good practices of corporate governance;

g) Develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the society in which the operations are conducted;

h) Promote the knowledge of workers about the corporate policy, through appropriate dissemination of this policy, including programs for professional training;

i) Refrain from discriminatory or disciplinary action against the employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or violate the standards of corporate governance that the company is subject to

j) Encourage, whenever possible, the business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided in this Article; and

k) Respect local political activities and processes.

## **Article 10. Non Discrimination**

1. Each Party, in accordance with its legal system, shall enable and encourage investment from investors of the other Party in its territory and create favorable conditions for such investment.

2. Each Party, subject to the exceptions established by law and to applicable legal requirements, shall allow investors of the other Party to invest and conduct business in conditions no less favorable than those available to other domestic investors.

3. Each Party shall allow investors of the other Party to make an investment and conduct business in conditions no less favorable than those available for other foreign investors.

4. The right of administrative review of decisions shall be commensurated with the level of development and available resources at the disposal of Parties.

5. This article shall not be interpreted as an obligation of one Party to give to an investor from the other Party, concerning its investments, the benefit of any treatment, preference or privilege arising out of any free trade zone, tariff union or common market, current or future, of which each Party is member or adheres to in future.

6. This article shall not be interpreted as an obligation of one Party to give to an investor from the other Party, concerning its investments, the benefit of any treatment, preference or privilege arising out of any agreement to avoid double taxation, current or future, of which a Party of this Agreement is a party or becomes a part.

7. No provision of this Agreement shall be interpreted in a way that prevents the adoption or execution of any measure aimed at ensuring the equitable or effective imposition or collection of taxes as provided in the Party legislation.

## **Article 11. Transparency**

1. In line with the principles of this Agreement, each Party shall ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with its legal system.

2. Each Party shall ensure that its laws and regulations related to any matter covered by this Agreement, in particular regarding qualification, licensing and certification, are published without delay and, when possible, in electronic format.

3. Each Party shall endeavor to allow reasonable opportunity to those interested stakeholders in the private sector and civil society in expressing their opinions on the proposed measures.

4. The Parties shall give due publicity of this Agreement to their respective public and private financial agents, responsible for the technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment of the territory of the other Party.

## **Article 12. Transfers**

1. Each Party shall allow the free transfer of funds related to an investment, namely:

a) initial contribution to capital or any addition thereof related to the maintenance or expansion of such investment;

b) income directly related to the investment;

c) the proceeds of sale or total or partial liquidation of the investment;

d) the repayments of any loan, including interests thereon, relating directly to the investment; and

e) the amount of compensation, in case of expropriation or temporary use of the investment of an investor of the other Party by the Public Authority of the Host Party. When such compensation is paid in bonds of the public debt the investor of the other Party will be able to transfer the value of the proceeds from the sale of such bonds in the market.

2. Each Party shall allow transfers in paragraph 1 of this article to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory and good faith application of its law relating to:

- a) Bankruptcy, insolvency, or the protection of the rights of creditors;
- b) Criminal or penal offences and the recovery of the proceeds of crime; and
- c) Ensuring compliance with orders or judgments in judicial or administrative proceedings.

4. Safeguard provisions:

- a) In the event of serious balance-of-payment and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on payments and transfers for transactions related to commitments undertaken under this Agreement;
- b) The restrictions referred to in sub-paragraph (i) shall not be discriminatory, shall be consistent with the articles of the Agreement of the International Monetary Fund and shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party. Restrictions shall be adequate to deal with the circumstances described in sub-paragraph (i), shall be temporary and shall be phased out progressively as the situation specified in sub-paragraph (i) improves; and
- c) Nothing in the foregoing shall affect a Party's right to take regulatory measures related to balance of payments during balance of payment crisis, nor affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement.

### **Article 13. Disputes Prevention**

1. The National Focal Points, or Ombudsmen, shall act in coordination with each other and with the Joint Committee in order to resolve any disputes between the Parties.

2. Before initiating an arbitration procedure, any dispute between the Parties shall be assessed through consultations and negotiations between the Parties and previously examined by the Joint Committee.

3. A Party may submit a specific question of interest of an investor to the Joint Committee:

- a) To initiate the procedure, the Party of the interested investor shall submit, in writing, its request to the Joint Committee, specifying the name of the interested investor and the encountered challenges and difficulties;
- b) The Joint Committee shall have 60 days, extendable by mutual agreement by 60 additional days, upon justification, to submit relevant information about the presented case;
- c) In order to facilitate the search for a solution between the Parties, whenever possible, the following shall participate in the bilateral meeting:
  - i) Representatives of the interested investor;
  - ii) Representatives of the governmental or non-governmental entities involved in the measure or situation under consultation.
- d) The procedure for dialogue and bilateral consultation ends by the initiative of any Party upon presentation of a summarized report in the subsequent Joint Committee meeting, that shall include:
  - i) Identification of the Party;
  - ii) Identification of the interested investors;
  - iii) Description of the measure under consultation; and
  - iv) Position of the Parties concerning the measure.

e) The Joint Committee shall, whenever possible, call for special meetings to review the submitted matters.

5. The meeting of the Joint Committee and all documentation, as well as steps taken in the context of the mechanism established in this Article, shall remain confidential, except for the submitted reports.

6. If the dispute cannot be resolved, the Parties to the exclusion of the investors may resort to arbitration mechanisms between States, which are to be agreed upon by the Joint Committee, whenever the Parties find it appropriate

## **Part IV. General and Final Provisions**

### **Article 14. General Amendments and Final Provisions**

1. Considering the wide range of investment issues, the Parties agree that the ultimate purpose of the Joint Committee and Focal Points, or Ombudsmen, is the fostering of institutional governance, through the establishment of a specific forum and technical channels and by acting as facilitators between Governments and the private sector.

2. Neither the Joint Committee nor the Focal Points or Ombudsmen shall replace or impair, in any way, any other agreement or the diplomatic channels existing between the Parties.

3. Without prejudice to its regular meetings, after 10 (ten) years of entering into force of this Agreement the Joint Committee will undertake a general review of its implementation and make further recommendations if necessary.

4. This Agreement shall enter into force 90 (ninety) days after the date of the receipt of the second diplomatic note indicating that all necessary internal procedures with regard to the conclusion and the entering into force of international agreements have been completed by both Parties.

5. At any time, either of the Parties may terminate this Agreement by providing written notice of termination to the other Party. The termination shall take effect on a date the Parties agree on or, if the parties are unable to reach an agreement, 180 (a hundred and eighty) days after the date on which the termination notice is delivered

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at Maputo, on the 25 June 2015 in duplicate in the English and Portuguese languages, both texts being equally authentic. For the purpose of dispute resolution, the English version shall be used.

FOR THE FEDERATIVE REPUBLIC OF BRAZIL

FOR THE REPUBLIC OF MALAWI

The agenda listed below represents an initial effort to improve investment cooperation and facilitation between the Parties and may be expanded and modified at any time by the Joint Committee.

#### a. Payments and transfers

i. The cooperation between the financial authorities shall aim at facilitating capital and currency remittances between the Parties.

#### b. Visas

i. Each Party shall seek, whenever possible and convenient, to facilitate the free movement of managers, executives and skilled employees of economic agents, entities, businesses and investors of the other Party.

ii. Respecting national legislation, immigration and work authorities of each Party shall seek a common understanding in order to reduce time, requirements and costs to grant appropriate visas to investors of the other Party.

iii. The Parties will negotiate a mutually acceptable agreement to facilitate visas for investors with a view to extend its duration and stay.

#### c. Technical and environmental regulations

i. Subject to their national legislation, the Parties shall establish expeditious, transparent and agile procedures for the issuing of documents, licenses and certificates related to the prompt establishment and maintenance of the investment of the other Party.

ii. Any query from the Parties, or from their economic agents and investors concerning commercial registration, technical requirements and environmental standards shall receive diligent and timely treatment from the other Party.

d. Cooperation on Regulation and Institutional Exchange

i. The Parties shall promote institutional cooperation for the exchange of experiences on the development and management of regulatory frameworks.

ii. The Parties hereby undertake to promote technological, scientific and cultural cooperation through the implementation of actions, programs and projects for the exchange of knowledge and experience, in accordance with their mutual interests and development strategies.

The Parties agree that the access and the eventual technology transfer will be carried out, whenever possible, without charge and aimed at contributing with effective trade of goods, services and related investment.

iii. The parties hereby undertake to promote, foster, coordinate and implement cooperation for professional qualification through greater interaction between relevant national institutions.

iv. Forums for cooperation and exchange of experiences on solidarity economy shall be created, evaluating fostering mechanisms for cooperatives, family farms and other solidary economic enterprises related to current and future investment.

v. The parties shall also promote institutional cooperation for greater integration of logistics and transports in order to open new air routes and increase, whenever possible and appropriate, their connections and maritime merchant fleets.