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On May 16, 2013, the Brazilian government published a decree in the country’s official registry declaring the ratification of a recently approved tax information exchange agreement with the United States. After almost six years, Brazil finally ratified the TIEA with the United States.† On March 20, 2007, the TIEA was signed in Brasília.‡

Although the TIEA is a standard one for the U.S., it has significance because of the large size of the two countries and their close interaction. The TIEA is also significant because it illustrates a trend for countries in the Americas and the world to conclude TIEAs. Brazil is the eighth largest goods trading partner with the U.S., and U.S. goods and services exports to Brazil totaled $63 billion in 2011, supporting about 300,000 U.S. jobs. Another important element of the TIEA is that Brazil is an emerging global player and economic powerhouse. With a 2011 gross domestic product of nearly $2.5 trillion, Brazil is the sixth largest economy in the world and accounts for more than 60 percent of South America’s total GDP.¶

Background to the TIEA

The Brazilian government proposed the TIEA after a meeting of the Estrategia Nacional Contra Corrupção e Lavagem de Dinheiro (ENCCLA) (National Strategy Against Corruption and Money Laundering) in December 2005 in Vitória decided that the TIEA was a mechanism to more effectively prevent as well as investigate and prosecute tax crimes, since the United States is one of the main sources for Brazilian black money. As the keynote speaker at ENCCLA, one of my principal recommendations was for the two governments to sign a TIEA.†

On March 30-31, 2006, Brazilian President Luiz Inacio Lula da Silva raised the idea of a TIEA during a working visit when he met with President George W. Bush at Camp David, Maryland. The TIEA was signed during a visit by President Bush to Brasilia.


‡For more information, see Ed Taylor, “U.S.-Brazil TIEA Accord Takes Effect After Approval by Brazil’s Senate; the FATCA Factor,” Daily Rep. for Exec., Mar. 15, 2013, at 1-2.


In the U.S., the TIEA is an executive agreement that does not require ratification. However, it required ratification in Brazil, meaning approval by both the House of Representatives and Senate.

On October 28, 2009, the Brazilian Chamber of Deputies’ Commission of Constitution and Justice approved the TIEA with the U.S. and allowed it to move forward in the ratification process required by Brazilian law.6

The TIEA encountered problems in the Brazilian House when the House Committee of Constitution and Justice raised questions concerning the constitutionality of the agreement and the impact on Brazilian companies. In particular, some legislators questioned the practical consequences the agreement may bring to Brazilian companies with business in the U.S. They were concerned that the IRS may use or abuse Brazilian tax information in order to audit Brazilian businesses and transactions in the U.S.

On July 8, 2008, Representative Regis de Oliveira argued that the House Committee should reject the agreement based on its unconstitutionality, illegality, and poor wording. He said that because the Brazil-U.S. TIEA is not just an agreement of minor importance, but a true treaty with major implications to Brazil’s legal system, it should have been signed by President Lula da Silva under article 84, Item VIII of the Brazilian Federal Constitution. Instead, Brazilian Federal Revenue Department Chief Commissioner Jorge Rachid signed the agreement. Hence, Oliveira stated it would be formally unconstitutional.7

Oliveira also argued that the TIEA is unconstitutional because it violates article 37, Item XXII of the constitution. The article states that tax administration is an activity essential to the operation of Brazil and can be exercised only by Brazilian tax agents. Since the TIEA permits several tax activities to be conducted by U.S. tax agents on Brazilian territory, the TIEA would violate article 37 and would be materially unconstitutional.8

Oliveira also argued that the TIEA permits cooperation regardless of whether the requested party does not require that information for its own tax purposes. Article V(2) of the agreement states:

The requested party shall take all relevant information gathering measures to provide the requesting party with the information requested, notwithstanding that the requested party may not, at that time, need such information for its own tax purposes.

Oliveira argued that such a provision is unreasonable since Brazilian laws allow a request for information only in special, exceptional circumstances and not as a general rule.8 Yet the provisions of article 21(3) of the 2011 OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (convention on MAATM), which both the U.S. and Brazil have signed, are virtually the same.

Also, he questioned the provisions in Article V(3)(b), which enable the requesting party to place an individual under oath. Oliveira maintained that the provision is illegal because in Brazil, an individual can be put under oath only in a judicial procedure and not in a tax administrative procedure.9 Yet article 21(3) of the convention on MAATM provides for tax examinations abroad.

Even after the House approved the TIEA, it was stuck in the Senate Foreign Relations Committee due to the opposition of Senator Francisco Dornelles, a former commissioner of the Internal Revenue in Brazil. Dornelles claimed that furnishing tax information to the U.S. was unconstitutional because it violated Brazil’s sovereignty and the rights of Brazilian citizens.

On March 7, 2013, the committee approved the TIEA, followed by full Senate approval. The deciding factor was the push by the Brazilian financial sector, the Brazilian Central Bank, and Brazil’s Internal Revenue Service to approve it in order to facilitate the negotiation of a Foreign Account Tax Compliance Act intergovernmental agreement.10

**Substance of the TIEA**

The Brazil-U.S. TIEA covers the following taxes in the U.S.: federal income taxes, federal taxes on self-employment income, federal estate and gift taxes, and federal excise taxes.

In the case of Brazil, the agreement covers individual income tax (IRPF) and corporate income tax (IRPJ); industrialized products taxes (federal excise tax, or IP); financial transactions tax (IOF); rural property tax (ITR); the Program for Social Integration contribution (PI.S.); the contribution for the Financing of Social Security (COFINS); and the social contribution on net income (CSL).11

The ratification of the TIEA and conclusion of a FATCA IGA may facilitate an income tax treaty, which the two governments have negotiated periodically since the 1960s.

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8Id.

9Id.

10Taylor, supra note 2.

11Brazil-U.S. TIEA, Article III.
The agreement covers exchange of information on request. The requesting party can only make a request for information when it is not able to obtain the requested information by other means, except when recourse to such means would give rise to disproportionate difficulty. The information requested must be exchanged without regard to whether the requested party requires such information for its own tax purposes or the conduct being investigated would constitute a crime under the laws of the requested party if it had occurred in the territory of the requested state.\textsuperscript{12}

If the information in the possession of the competent authority of the requested party is not sufficient to enable it to comply with the request for information, the requested party must take all relevant information-gathering measures to provide the requesting party the information requested, even if the requested party may not, at that time, need such information for its own tax purposes. If matters concerning privileges under the laws and practices of the requesting party are raised, they must be reserved for resolution by the requesting party.\textsuperscript{13}

If the requesting party specifically requests, the requested party must, to the extent allowable under its domestic laws:

- specify the time and place to take testimony or the production of books, papers, records, and other tangible property;
- place the individual giving testimony or producing books, papers, records, and other tangible property under oath;
- allow representatives of the requesting party (government officials) to be present in the offices of the requested party’s tax administration during the pertinent part of a tax examination and to verify documents, registers, and other relevant data regarding such examination;
- provide officials allowed to be present an opportunity to question, through the executing authority, the individual giving testimony or producing books, papers, records, and other tangible property;
- obtain original and unedited books, papers, records, and other tangible property, including, but not limited to, information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;
- obtain original and unedited books, papers, records, and other tangible property, including, but not limited to, information held by banks, other information in financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;
- obtain or produce true and correct copies of original and unedited books, papers, and records;
- determine the authenticity of books, papers, records, and other tangible property produced, and provide authenticated copies of original records;
- examine the individual producing books, papers, records, and other tangible property regarding the purpose for which and the manner in which the item produced is or was maintained;
- allow the requesting party to prepare written questions to which the individual producing books, papers, records, and other tangible property is to respond regarding the item produced;
- obtain information regarding the ownership of companies, partnerships, trusts, foundations, and other persons, and ownership information on all such persons in an ownership chain;
- perform any other act not in violation of the laws or at variance with the administrative practice of the requested party; and
- certify either that procedures requested by the competent authority of the requesting party were followed or that the procedures requested could not be followed, with an explanation of the deviation and the reason therefore.\textsuperscript{14}

Article VI(1) allows a requesting party to send officials into the territory of the requested party to the extent allowed under its domestic laws to interview individuals and examine records with the prior written consent of the individuals concerned. The requesting party must notify the requested party of the time and place of the intended meeting with the individuals concerned. Clearly, it will be easier and more effective for a requesting party to visit them where their headquarters and records are kept, especially in the case of multinational companies. Article VI(2) provides that at the request of the requesting party, the requested party may allow representatives of the competent authority of the requesting party to attend a tax examination in the territory of the requested party. Similarly, in the case of transfer pricing and other actions when the parent took decisions, the tax authority may find it most efficient to conduct an examination where most of the financial records and officials of the parent are located.

Article VII(1) provides that the requested party may decline to assist when:

- the request is not made in conformity with the TIEA;

\textsuperscript{12}Id. at Article V(1).
\textsuperscript{13}Id. at Article V(2).
\textsuperscript{14}Id. at Article V(3).
• the requesting party has not pursued all means available in its own territory to obtain the information, except when recourse to such means would give rise to disproportionate difficulty; or
• the disclosure of the information requested would be contrary to the public policy of the requested party.

Article VII(2) does not obligate a party to:
• provide information subject to legal privilege, or any trade, business, industrial, commercial, or professional secret or trade process, provided that information described in Article V(3)(c) (books and records, including those held by banks and financial institutions) must not by reason of that fact alone be treated as such a secret or trade process;
• carry out administrative measures at variance with its laws and administrative practices; or
• supply information requested by the requesting party to administer or enforce a provision of the tax law of the requesting party, or any requirement connected therewith, that would discriminate against a national of the requested party.

Article VII(3) provides that a requested state must not refuse a request for information on the ground that the tax liability giving rise to the request is disputed by the taxpayer. Indeed, in most litigation of TIEA requests, the taxpayer disputes the matter.\textsuperscript{15}

Under Article VII(4), the requested party need not obtain and provide information which the requesting party would be unable to obtain in similar circumstances under its own laws for the purpose of the administration or enforcement of its own tax laws or in response to a valid request from the requested party.

The grounds on which the requested party may decline are not large in scope. Most likely, at least when Brazil is the requested state, the taxpayer or interested party may well challenge the request on constitutional grounds, especially given the debates during the ratification process and in the context of recent Brazilian jurisprudence on individual rights. Although many taxpayers have challenged TIEA requests in the U.S., the law is more settled.

The execution of U.S. tax requests in Brazil may be interesting initially.\textsuperscript{16}

A recent judicial decision that affects the exchange of information is the decision of December 15, 2010, of the Federal Supreme Court (Supremo Tribunal Federal, or STF).\textsuperscript{17} It decided that tax authorities cannot obtain access to bank information of taxpayers without a prior court authorization. In accordance with decision RE 389.808/PR, the decision in LC no. 105/01, which permits access to tax authorities to bank accounts of taxpayers when there has been administrative proceedings or proceedings, should be interpreted in conformity with article 88 of the Federal Constitution, which protects bank secrecy.

The above-mentioned decision of the STF intended that in order to override the bank secrecy of a taxpayer, a court decision is required.

According to the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review report on Brazil (the peer review report), the scope of professional secrecy protected under article 197 of the National Tax Code and the attorney-client privilege protected by article 7 of Law 8.906/94 appears to be broader than the international standard. Nevertheless, the peer review report concludes this should not impede the effective exchange of information because the avenue to obtain such information directly from relevant entities, as well as an exception to the attorney-client privilege, remains available.\textsuperscript{18}

Exchange of information, according to the peer review report, should not be subject to unreasonable, disproportionate, or unduly restrictive conditions. There are no aspects of Brazilian domestic laws that appear to be incompatible with international standards.\textsuperscript{19}

Rights and safeguards (for example, notification or appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. The peer review report finds that this element is in place, but some aspects of the legal implementation of the element need improvement. It states that no exceptions exist to the prior summary procedure for accessing detailed bank account information. To require in all cases that the taxpayer be first approached, and hence notified, may unduly prevent or delay the effective exchange of information in urgent cases.\textsuperscript{20}

Hence the peer review report would sacrifice due process for efficiency.

\textsuperscript{16}Much of the discussion of the prospective execution of U.S. TIEA requests is taken from Bruce Zagaris, “U.S.-Brazil and (Footnote continued in next column.)

\textsuperscript{15}See, e.g., Salomon Juan Marcos Villareal v. U.S., U.S. Court of App. for the 10th Cir., Order and Judgment, Apr. 22, 2013; Bruce Zagaris, “U.S. Appellate Court Affirms Subpoena in Support of Mexico’s TIEA Request,” 29 Int’l Enforcement L. Rep. 262 (July 2013) (appellate court affirms district court’s decision in favor of the IRS and against the taxpayer, even though taxpayer’s dispute with the Mexican tax authority and argument that irregularities in the process in Mexico had occurred).


\textsuperscript{19}Id. at 77.

\textsuperscript{20}Id. at 80.
If criminal matters are involved in a case, perhaps including nontax matters, the case may involve a mutual assistance request. When Brazil responds to requests for public records or serving documents, the liaison will be directly between the U.S. and Brazil central authorities. However, if the request requires measures impinging on fundamental rights in Brazil, such as transferring of persons, bank records, searches and seizures, or the evidence is for admission in a trial or similar proceeding, Brazilian law requires a court ruling before granting assistance.21

If the defendant or a third person makes the request, it would likely be made by means of letters rogatory, since the mutual legal assistance treaty (MLAT) states that it does not give rise to the use of MLATs by defendants or third parties. A letter rogatory request would go to the Superior Tribunal of Justice (STJ), which is a national court one level lower than Brazil’s Supreme Court. In 2005 the Supreme Court issued a resolution regulating the defendant’s rights during the execution of these requests. Brazilian law requires that interested persons receive notice of the letters rogatory request before or after its execution depending on the nature of the evidence to be obtained; the right to private or public counsel; and the right to challenge the request, but not the material content. Challenges must be limited to issues of sovereignty, jurisdiction, essential interests, and so forth. The president of the court adjudicates the challenges. There exists a right to appeal against the granting of the execution of the request.22

If the request is made under the MLAT, it will often be sent to the Brazilian competent authority, which is the attorney general, and then to a local prosecutor to make the request before a first instance judge. If the MLAT request involves a foreign court decision with a need to enforce it in Brazil, it must be sent to the STJ. These requests may occur in cases concerning evidence gathering that in Brazil depend on judicial interven-

21See Estellita, supra note 21, citing STJ on the HC92.726 (Dec. 13, 2007).
under Title 26 and the taxpayer can intervene and try to suppress all or part of the summons if he believes it is unfair, overbroad, or otherwise illegal.

Article VIII(1) requires that any information received by the requesting party under the TIEA must be treated as confidential and may be disclosed to persons or authorities (including courts and administrative bodies) in the jurisdiction of the requesting party concerned with the assessment or collection of, the enforcement or prosecution regarding, or the determination of appeals in relation to, the taxes covered by the TIEA, or to supervisory bodies, and only to the extent necessary for those persons, authorities, or supervisory bodies to perform their respective responsibilities. The persons or authorities in the requesting state must use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information must not be disclosed to any other person or entity or authority or another jurisdiction without the express written consent of the requested party.

Article VIII(2) provides that any liability under the domestic law of the requesting party arising from the requesting party's use of information provided under this agreement will be solely the responsibility of the requesting party.

An example of the way in which confidentiality may arise is when the state of California and/or the state of São Paulo may have tax disputes with a taxpayer. They may try to participate in the tax enforcement cooperation. However, the Brazil-U.S. TIEA does not extend to state or local governments, so neither California nor São Paulo would be able to benefit from the TIEA.

Article X(1) provides that the competent authorities will adopt and implement procedures that are necessary to facilitate the implementation of the TIEA, including such additional forms for the exchange of information as will promote the most effective use of the information. It is quite common that competent authorities develop forms to authenticate evidence transmitted so that it facilitates their admission into evidence in the requesting state.

Under Article XI, if both competent authorities of the parties consider it appropriate to do so, they may agree to exchange technical know-how, develop new audit techniques, identify new areas of noncompliance, and jointly study noncompliance areas. Given the amount of trade and investment between the two countries, the tax gaps in both countries, and the amount of enforcement cooperation already between the two governments, it would not be surprising if the governments decided to cooperate. For instance, the U.S. is the headquarters for the Joint International Tax Shelter Information Centre (JITSIC), in which participating tax authorities supplement the ongoing work of tax administrations in identifying and curbing abusive tax avoidance transactions, arrangements, and schemes.25 The Brazilian tax authority may want to participate. The Treasury Office of Technical Tax Assistance and other parts of the U.S. government already provide know-how to tax and law enforcement authorities in Latin America. Article XI of the TIEA may result in discussions of such cooperation.

Analysis

The TIEA is a small but important step in the context of tax enforcement cooperation. Unlike the U.S. and Mexico, which already have a FATCA IGA, there is no automatic exchange of information. Unlike the U.S. and Mexico, there are no simultaneous criminal and/or civil examinations and no spontaneous exchanges of tax information. However, the demand by the Brazilian financial community for a FATCA IGA facilitated the ratification of the TIEA.

Given the size of the Brazilian and U.S. financial communities and the amount of business, the TIEA and FATCA together will generate a significant amount of regulatory and enforcement work. Inevitably, given the amount of cross-border investment and trade by all types of businesses and the complexities of the tax systems in both countries, there will be a lot of cross-border examinations and cases.26

Future

The absence of an income tax treaty is a major complication for many U.S. companies looking to establish operations in Brazil and for Brazilians with investments in the United States. The two countries have tried since the 1960s to negotiate a tax treaty.

A tax treaty would eliminate double taxation on investment. Brazil is the only country with a gross national product greater than $1 trillion that does not have a tax treaty with the United States. To encourage Brazilians to do business in the United States and vice versa, in 2011 the Council on Foreign Relations Independent Task Force on Brazil-U.S. relations recommended that both governments take steps to reduce or altogether eliminate double taxation by working toward


a bilateral tax treaty and to pursue reforms toward a fair climate for foreign investment.\footnote{Samuel W. Bodman and James D. Wolfensohn, chairs, Julia E. Sweig, project director Global Brazil and U.S.-Brazil Relations, Independent Task Force Report No. 66, 68-69 (2011).} The TIEA is a stepping stone not only to a FATCA IGA, but also to a tax treaty. Major companies such as Minneapolis-based Cargill and Brazilian airplane manufacturer Embraer have said the Brazil-U.S. TIEA is key to the two countries one day signing a tax treaty.\footnote{Reuters, “U.S.-Brazil tax deal advances anti-tax evasion dragnet -lawyers,” Mar. 21, 2013, available at http://www.reuters.com/article/2013/03/22/usa-tax-brazil-fatca-idUSL1N0CCDN120130322.}

The U.S.-Brazil Business Council and high-level officials in both countries have long clamored for a tax treaty.\footnote{Gabrielle Trebat, “Calling For a Brazil-U.S. Tax Treaty,” Mar. 13, 2009 (discussing the call of the U.S.-Brazil Business Council for a DTA as presidents Obama and Lula prepared to meet), available at http://www.freeenterprise.com/2009/03/calling-for-a-brazilus-tax-treaty.}

Regardless of whether the two governments conclude a tax treaty quickly, they are likely to conclude a FATCA Model 1a IGA, whereby financial institutions will send reporting information to the tax authority and then to the respective FATCA jurisdictions. Brazil has the same incentive as the U.S. to obtain automatic exchange of information to reduce evasion and avoidance by its own taxpayers.

Brazil and the U.S. have also signed the convention on MAATM. As a result, once the U.S. and Brazil ratify the convention and give notice, they will have even more robust tax enforcement cooperation arrangements. Brazil has signed 40 agreements (33 double tax conventions and seven TIEAs) providing for the exchange of information.\footnote{OECD Global Forum on Tax Transparency, available at http://oecd.org/ctp/treaties/MAATM/Agreements.htm.} As of May 24, 2013, the U.S. had 60 tax treaties and 31 TIEAs.\footnote{Id.}

In the short term, the FATCA IGA and the convention on MAATM will enable tax enforcement cooperation to take a major leap forward.