

Developments in Brazil-United States Tax and Anti-Corruption Enforcement Cooperation

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This article discusses two selected areas of Brazil-United States enforcement cooperation: taxation and anti-corruption. The two governments have made significant progress in strengthening enforcement cooperation in both areas. However, they need to do much more to keep pace with the amount of gaps that exist and will continue to increase as a result of globalization. The Internet, free trade, and the easy movement of people have made it possible to move money, contraband, ideas, and persons over boundaries and sovereignty at incredible speeds. Similarly, environmental issues, such as climate control and pandemics, become global issues on a regular basis. Hence, governments and law enforcement are challenged to be innovative in increasing cooperation while still adhering to international human rights and due process.

1. Taxation

Cooperation in tax enforcement is important. Both countries have very complex tax systems. In both countries persons have to worry about federal, state, and municipal taxes, especially if one resides or spends time in large cities, such as New York, Sao Paulo, Rio, and Los Angeles. The tax situation is especially challenging because the U.S. taxes citizens, permanent residents, and persons resident for roughly 183 days on a worldwide basis.

One of the biggest problems in the U.S. is the enormous complexity of the U.S. tax system and the growing duplicative reports required of taxpayers having offshore assets and income, such as the FBAR and the Statement of Specified Foreign Financial Assets (IRS 8938).

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Average taxpayers, especially ones who are not highly educated professionals, have difficulty understanding let alone complying with the byzantine reporting requirements.

Starting in 2008, the U.S. Department of Justice (DOJ) and IRS have boasted proactive campaigns to bring criminal and civil actions against persons with unreported foreign bank accounts who had not declared and paid taxes on the worldwide income. The U.S. penalties are draconian. For instance, the U.S. imposes a potential penalty of 50 percent of the values of the assets held in unreported foreign bank accounts. In 2010, the U.S. enacted a law requiring a report when a taxpayer makes his or her annual return of foreign financial assets (IRS Form 8938).

In 2009, the IRS started an Offshore Voluntary Disclosure Program (OVDP). It required taxpayers who had not reported and paid taxes on their foreign assets to file their returns and FBARs for the last six years. Many Brazilians were caught unaware by the sudden enforcement of these laws. Until approximately 2008, the IRS and DOJ had not strictly enforced the FBAR requirements and did not have a campaign against unreported foreign income. Brazilians found themselves paying enormous penalties on their unreported “foreign income and assets” even though they had already been paying taxes in Brazil. In fact, Brazil normally taxes gains on mutual funds and bank deposits by withholding. Because of the incongruences of Brazilian and U.S. tax systems and the absence of an income tax treaty, individuals found themselves paying tax on the same income to both countries. U.S. foreign tax credit does not give credit for some of the Brazilian taxes.

Brazilians found themselves paying attorneys and accounts significant fees to represent them in these OVDPs. In the end, they paid large income tax, interest, and penalties on both their tax returns and penalties for FBARs. Not unsurprisingly, many Brazilians characterized the ordeal as “a holdup.” They quickly expatriated if they were citizens or surrendered their green card if they were permanent residents.

U.S. individuals and companies find Brazilian tax equally complex. In addition to the taxes enacted by the federal government, each state and municipality has authority to enact its own laws and regulations for the collection of the state and municipal taxes, respectively. Hence, there are more than ten federal taxes imposed by the central government, two state taxes imposed by each of the 26 states (and one federal district) and two municipal taxes imposed by each of the 5,570 municipalities. Brazilian companies spend an average of 2,038 hours to

comply with the tax system and tax rules. As a result, Brazil is the 181st position of the 190 countries ranked by the World Bank in the matter of paying taxes .¹

Since the 1960s, the U.S. and Brazil have tried unsuccessfully to negotiate an income tax treaty. The significant volume of trade and investment, as well as the amount of intermarrying and individuals who spend a lot of time in each country, mean the absence of a treaty creates substantial compliance and enforcement problems, which would be obviated or mitigated by an income tax treaty. If I were to become President, I would do what Ronald Reagan did before he visited China. He called his Secretary of the Treasury and said I'm visiting China in a few weeks, and I want to have some tangible results of my long trip. I've decided an income tax treaty is one of the things I want to accomplish. Horrified, the Treasury Department told him it takes years to conclude such a treaty. Being a pragmatist, President Reagan responded that Treasury should carry out his orders. President Reagan succeeded.² Without discussing all the substantive, procedural, and political issues that have prevented the agreement, the leaders of each country should just make it a priority and accomplish an income tax treaty. It would help resolve unnecessary compliance and enforcement disputes. Persons who love both countries would start spending more time in each country.

On March 30, 2007, the U.S. Treasury Department announced the signing on March 20, 2007 of a tax information exchange agreement (TIEA) with Brazil. The agreement is a standard TIEA. Most importantly, the two signatories issued a joint statement saying that, while policies diverge on a number of important areas of tax treaty policy and make concluding a mutually acceptable tax treaty difficult, they hope that the TIEA will be the first step to developing a deeper bilateral tax relationship between the U.S. and Brazil.³

Notwithstanding the policy differences, the U.S. Treasury Department and the Brazilian Secretaria de Receita Federal do Brasil started informal discussions in 2006 to exchange views on a number of aspects of tax treaty policy, including transfer pricing, permanent establish, the

¹ Clarissa Machado and Ana Carolina Utimati, *The challenges of tax compliance in Brazil*, Sept. 15, 2017 <https://www.internationaltaxreview.com/article/b1f7n98fwrn4lj/the-challenges-of-tax-compliance-in-brazi>.

² Christopher Wren, *Regan Initials Treaty with China on Taxes*, N.Y. TIMES, March 22, 1984 (Treasury Secretary Regan said he was not sure whether an investment treaty would be ready in time for President Reagan's visit, from April 26 to May 1).

³ Joint Declaration by the Government of the United States of America and the Government of the Federative Republic of Brazil on the Occasion of the Signing on 20 March 2007 of the Agreement for the Exchange of Information Relating to Taxes Between Both Governments, Mar. 20, 2007. For additional background see Bruce Zagaris, *U.S., Brazil Sign Tax Information Exchange Agreement*, 23 INT'L ENFORCEMENT L. REP. 226 (June 2007).

taxation of income from services, and mutual agreement with the hope that they can eventually reconcile the tax policy differences that have prevented the conclusion of a bilateral tax treaty in the past.

The TIEA requires the signatories to help in exchanging information that may be relevant to the administration and enforcement of the domestic laws of the parties concerning the taxes covered by the agreement, including information that may be relevant to their determination, assessment, enforcement or collection of tax with respect to persons subject to such taxes, or to the investigation or prosecution of criminal tax matters.⁴

The signatories must exchange information without regard to whether the person to whom the information relates is or whether the information is held by, a resident or national of a party.⁵

The TIEA is broad in its coverage of taxes. In the U.S. it covers federal income taxes, federal taxes on self-employment income, federal estate and gift taxes, and federal excise taxes. In Brazil, it includes individual and corporate income tax, industrialized products tax, financial transactions tax, rural property tax, contribution for the program of social integration, social contribution for the financing of the social security, and social contribution on net profits.

The TIEA will also apply to substantially similar taxes. The TIEA will not apply to the extent that an action or proceeding concerning taxes covered is barred by the requesting party's statute of limitations. The agreement does not apply to taxes imposed by states, municipalities or other political subdivisions, or possessions of party, even though both countries have many state taxes.⁶ In contrast, the U.S.-Mexican TIEA applies to states.

The TIEA requires a requested party to provide information to the requesting party for the purposes covered by the TIEA 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 its territory. The requesting party will only make a request for information pursuant to the Article when it cannot acquire the requested information by other means, except where recourse to such means would give rise to disproportionate difficulty.⁷

⁴ U.S.-Brazil TIEA, Art. I.

⁵ *Id.*, Art. II.

⁶ *Id.*, Art. III.

⁷ *Id.*, Art. V(1).

The consideration of whether to ratify the TIEA is unfolding in the context of efforts to conclude an income tax treaty that have been ongoing since the 1960s. In 1967, Brazil and the U.S. signed an income tax treaty. However, disagreements arose on methods used to eliminate double taxation, and especially tax sparing provisions for Brazil. The disagreements proved troublesome in the U.S. Congress and prevented the treaty from taking effect.⁸ Throughout the negotiations of the income tax treaty, Brazilian legislators and policymakers have viewed as controversial the tax information exchange provisions in the double tax treaty.

The politics of the ratification of TIEA were important. Until the signing of the TIEA on March 20, 2007, the Brazilian government had not signed a TIEA. In contrast, the U.S. government had prioritized the conclusion of TIEAs since 1983 as an important tax enforcement mechanism. As the keynote speaker at the December 2005 retreat of ENCLA (Estratégia Nacional para Combater Lavagem de Capital) (National Strategy against Money Laundering), I mentioned that Brazilian flight capital tends to head primarily to two countries – the U.S. and Switzerland. At the time, Brazil was attempting to prioritize tax compliance and enforcement, especially against flight capital. In this regard, the newly created Office of International Affairs and Asset Recovery in Brazil's Ministry of Justice took the lead in organizing the retreat. I contrasted the U.S. approach as a recipient country of flight capital with that of Switzerland. While the Swiss government had legal limits to tax enforcement cooperation (it cooperates only with respect to tax fraud and not tax evasion), the United States was and remains quite willing to cooperate on a broad range of criminal and civil tax matters. Hence, my first recommendation to the ENCLA group was to sign a TIEA with the U.S. I observed that negotiations would be easy, because the U.S. had a regular program and would welcome a TIEA with Brazil.⁹

Some members of the Brazil Congress, including Representative Regis de Oliveira (PSC-SP), opposed ratification because the treaty was not signed by President Luiz Inácio Lula da Silva (hereafter Lula da Sliva), but rather by the Secretary of the Federal Tax Authority, Jorge Rachid. According to the opponents, Article 84, Item VIII of the 1988 Constitution requires the Brazilian President to sign treaties. The chief executive can delegate this power to

⁸ Nélio Weiss and Philippe Jeffrey, *Brazil/US Double Tax Treaty makes progress*, Reserve-Bank.com-Banking Forum, June 2, 2008 (<http://forum.reserve-bank.com>).

⁹ For additional background on which this section is based, see Bruce Zagaris, *Brazil-U.S. TIEA Scrutinized During Brazil's Ratification Process*, 52 TAX NOTES INT'L 57-61 (Oct. 6, 2008).

ministers or ambassadors, but not to the secretary of the Federal Tax Authority. They argued Secretary Rachid did not have the authority to sign the TIEA, and there had been an illegal delegation of authority.

The Federal Tax Authority responded that three customs agreements - the same as the tax agreement - signed with the Netherlands, Russia, and the U.S. - are examples of how the Secretary has the power to sign international agreements.

Rep. Oliveira also opposed ratification because the TIEA permits the exchange of tax information regardless of whether the requesting party needs such information for its own tax purposes. He notes that Article V(2) states as follows, “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.” Rep. Oliveira believes such a provision is unreasonable because under Brazilian laws, a request for information should be permitted only in special, exceptional circumstances, not as a general rule. He also questioned that provisions in Article V(3)(b) that require a requested party, such as Brazil, to place the individual giving testimony or producing books, papers, records, and other tangible property under oath. Such a provision, says Oliveira, is illegal, because Brazilian law would require this only for an individual under a judicial procedure, not a tax administrative procedure.¹⁰

An interesting element of the debate in the Brazilian House Committee of Constitution and Justice was the absence of discussion on the utility of the TIEA in helping Brazilian tax authorities to obtain assistance from the U.S. vis-a-vis Brazilian taxpayers and money in the U.S.

The major event that resulted in Brazil’s ratification of the TIEA was that in March 2010, the U.S. Congress enacted the Hiring Incentives to Restore Employment (HIRE) Act, which includes the Foreign Account Taxpayer Compliance Act. Under FATCA, certain U.S. taxpayers holding financial assets outside the United States must report those assets to the IRS. In addition, FATCA required foreign financial institutions to report directly to the IRS certain information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.

¹⁰ Id.

FATCA also required foreign financial institutions (“FFIs”) to report directly to the IRS certain information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. To properly comply with these new reporting requirements, a FFI will have to enter into a special agreement with the IRS. Under this agreement a “participating” FFI will be obligated to: (1) undertake certain identification and due diligence procedures with respect to its accountholders; (2) report annually to the IRS on its accountholders who are U.S. persons or foreign entities with substantial U.S. ownership; and (3) withhold and pay over to the IRS 30 percent of any payments of U.S. source income, as well as gross proceeds from the sale of securities that generate U.S. source income, made to (a) non-participating FFIs, (b) individual accountholders failing to provide sufficient information to determine whether or not they are a U.S. person, or (c) foreign entity accountholders failing to provide sufficient information about the identity of its substantial U.S. owners.

The HIRE Act requires certain U.S. taxpayers holding foreign financial assets with an aggregate value exceeding \$50,000 to report certain information about those assets on a new form (Form 8938) that must be attached to the taxpayer’s annual tax return. Reporting applies for assets held in taxable years beginning after March 18, 2010. Failure to report foreign financial assets on Form 8938 will result in a penalty of \$10,000 (and a penalty up to \$50,000 for continued failure after IRS notification). Furthermore, underpayments of tax attributable to non-disclosed foreign financial assets will be subject to an additional substantial understatement penalty of 40 percent.

FATCA has led to the negotiation of FATCA Intergovernmental Agreements, whereby foreign governments agree to help the U.S. enforce FATCA in exchange for reciprocity by the U.S. and more certainty of excluding some of the financial institutions in the FATCA partners that pose a low risk of tax evasion. On April 11, 2013, the Obama budget for 2014 gave Treasury broad discretion to issue regulations to reciprocate.

After the enactment of FATCA, domestic financial institutions pressured the Treasury and Foreign Affairs Ministries of foreign countries to allow them to provide taxpayer information to the U.S. government (IRS) so that they would not be subject to 30 percent taxation on all payments from U.S. sources. The enactment of FATCA accelerated both the ratification of the TIEA in Brazil and the conclusion of the FATCA Intergovernmental Agreement (IFA) to implement FATCA in Brazil. Decree 8,506, published on August 24, 2015,

contains the text of the Agreement, which aims to improve tax compliance and implementation of FATCA in Brazil.¹¹

FATCA has also led more countries and even the OECD to emulate automatic exchange of information as a solution to minimizing tax evasion.

As a result of the FATCA IGA, in 2015, Brazilian tax authorities announced that they obtained information concerning 25,000 accounts held by Brazilian residents in the U.S. and were reviewing them with an eye to undertaking audits.

Simultaneous with the signing of the FATCA IGA, the Brazilian government had its own offshore voluntary disclosure program. Until October 31, 2016, Brazilian residents could voluntarily declare assets held abroad that they had not previously reported to Brazilian tax authorities and to the Brazilian Central Bank. They had to pay a total charge of 30 percent and would not be prosecuted criminally. Brazil treats failure to report assets as tax evasion and also "evasion of funds."

[After 2017, persons with undeclared accounts in the U.S. are subject to a tax assessment if they did not participate in the offshore voluntary disclosure, which can result in significant tax, interest, and penalties that may reach 84 percent of undeclared assets.¹²]

Article 6(1) of the FATCA IGA states "(t)he Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with Brazil. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with Brazil by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange."¹³

The acknowledgment reflects the fact that, in 2013 and still today, FATCA is unbalanced with regards to its technical matter, comprehensive requirements, and burdens. In terms of human and financial resources required of FFIs, Brazil and its financial institutions have many more responsibilities, burdens, and costs than their counterparts in the U.S. A U.S. problem has been that a number of bank associations and their representatives in Congress have

¹¹ Ana Cláudia Akie Utumi, Brazil: Tax Treaty Series: Tax Information Exchange Agreement And Intergovernmental Agreement Between Brazil And The United States, Mondaq, June 17, 2016.

¹² Id.

¹³ See Art. 6(1) of Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil to Improve International Tax Compliance and to Implement FATCA <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Brazil-9-23-2014.pdf>.

opposed reciprocity. For instance, they filed a number of lawsuits to block the regulations of Treasury to implement part of the U.S. obligations¹⁴ and Senator Rand Paul sued and unsuccessfully requested an injunction against the implementation of IGAs as unconstitutional.¹⁵

Article 6(3) commits the Parties to working with other government partners, the OECD and EU, on adapting the terms of the Agreement to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions. On July 15, 2014, the OECD Council adopted the Common Reporting Standard (CRS), in response to the G20 request.¹⁶ As of December 10, 2020, 107 countries, including Brazil, were signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information.¹⁷

Because of the refusal of the U.S. to sign the CRS, foreign investors utilize structures in the U.S. to try to protect their anonymity, knowing that the U.S. and individual U.S. states, especially Delaware, Wyoming, South Dakota, and Nevada, will continue to use confidentiality as regulatory arbitrage. The investors know that, as the U.S. is a superpower, especially in the OECD, the OECD is not likely to penalize the U.S. for not adhering to the provisions in its FATCA IGAs and to the commitments made by the U.S. with respect to joining the CRS when it was trying to find ways for countries to support its FATCA initiative. Hence, at present, notwithstanding all of the efforts of the Brazil government to change its laws to accommodate the U.S. in implementing FATCA, many years later the U.S. has still failed to reciprocate and has failed to even try to reciprocate, making the agreement mostly one-sided.

On January 6, 2020, Brazilian President Jair Bolsonaro announced that his country is "broke" and he "can't do anything about it," attributing the crisis to "the press-fueled" coronavirus.¹⁸ Federal and state budgets are unbalanced. As the Brazilian public sector is huge,

¹⁴ *Florida Bankers Association, et al v United States Department of Treasury, et al*, 19 F Supp 3d 111 (DDC 2014), Memorandum Opinion, July 13, 2014 (District Court Judge Boasberg grants the Treasury motion for summary judgment in support of the income-reporting requirements issued in 2012 by the IRS, requiring U.S. banks to report the amount of interest earned by accountholders residing in foreign countries).

¹⁵ Alex Newman, Senator Paul Sues Obama IRS Over Privacy-killing Pseudo-treaties, *The New American*, July 2, 2015

¹⁶ OECD, *What is the CRS?* <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> (undated), accessed Jan. 10, 2020.

¹⁷ For a list of signatories, see <https://www.oecd.org/ctp/exchange-of-tax-information/crs-mcaa-signatories.pdf>.

¹⁸ Brazilian President Jair Bolsonaro says his country is 'broke' and he 'can't do anything' WION, Jan 6, 2021.

budget deficits persist irrespective of the very significant social security reforms enacted since 2019.¹⁹

When I have given talks in Brazil about the DOJ's prosecution of banks, Brazilian prosecutors seemed surprised and simultaneously envious of the power to prosecute banks and the positive subsequent compliance arising out of prosecutions. Much of this is due to the differences in legal systems and culture. Until Operation Car Wash, Brazil only rarely prosecuted corporations and entities for environmental crimes.

Brazil has brought criminal cases against U.S. multinational corporations for Value Added Tax (VAT) (better known in Brazil as (EFD ICMS/IPI)) violations. The cases have involved multinational corporations which have falsely issued invoices, showing the products made in the Amazon or Northeast of Brazil where the government allowed reduced VAT as an investment incentive.

One potential opportunity for strengthening the integrity of its tax system, raising revenue, and motivating U.S. enablers to stop helping Brazilian tax evaders to invest their undeclared assets in and through the U.S. would be for the Receita Federal to initiate an offshore voluntary disclosure program for enablers. It could emulate the U.S. OVDP for Swiss banks to some extent.

The Swiss Bank Program, which was announced on August 29, 2013, provided a path for Swiss banks to resolve potential criminal liabilities in the United States. Swiss banks eligible to enter the program were required to advise the Department of Justice by December 31, 2013 that they had reason to believe that they had committed tax-related criminal offenses in connection with undeclared U.S.-related accounts. Banks already under criminal investigation related to their Swiss-banking activities and all individuals were expressly excluded from the program.

Under the program, banks were required to:

- a. Make a complete disclosure of their cross-border activities;
- b. Provide detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest;

¹⁹ Romero J. S. Tavares, *Foreword: Assessing Brazil's tax landscape in 2020*, <https://www.internationaltaxreview.com/article/b1ky4qkvpyc4pd/foreword-assessing-brazils-tax-landscape-in-2020>, March 30 2020.

- c. Cooperate in treaty requests for account information;
- d. Provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed;
- e. Agree to close accounts of accountholders who fail to come into compliance with U.S. reporting obligations; and
- f. Pay appropriate penalties.

Swiss banks meeting all of the above requirements were eligible for a non-prosecution agreement.

The Brazilian Tax Authority may want to consider starting its own Offshore Voluntary Disclosure Program for foreign intermediaries.

The Department of Justice announcement of the OVDP for Swiss banks featured a joint statement between the Department and the Swiss Federal Department of Finance.²⁰ The fact that the Swiss government endorsed the program facilitated the participation by Swiss banks. Between March 2015 and January 2016, the DOJ executed non-prosecution agreements with 80 Category 2 banks and collected more than \$1.36 billion in penalties. It appears that more may have been collected by the DOJ.

The United States has had settlements with two of the largest Israeli banks and is in settlement negotiations with a third.

On March 12, 2019, the U.S. Department of Justice announced that Mizrahi-Tefahot Bank Ltd. (Mizrahi-Tefahot) and its subsidiaries, United Mizrahi Bank (Switzerland) Ltd. (UMBS) and Mizrahi Tefahot Trust Company Ltd. (Mizrahi Trust Company), agreed to pay \$195 million to the United States and enter into a deferred prosecution agreement.²¹

Mizrahi-Tefahot is the third-largest bank in Israel. During the relevant period, Mizrahi-Tefahot had branches in Los Angeles, California, the Cayman Islands, and London, England. In 2014, the Cayman Islands branch surrendered its license and closed. UMBS, a subsidiary of Mizrahi-Tefahot, had one branch in Zurich, Switzerland. Mizrahi Trust Company, a fully owned subsidiary of Mizrahi-Tefahot, operated under the Bank of Israel's regulatory authority. Mizrahi-Tefahot, UMBS, and Mizrahi Trust Company provided private banking, wealth

²⁰ Joint Statement between the U.S. Department of Justice and the Swiss Federal Department of Finance <https://www.justice.gov/tax/file/631356/download>.

²¹ U.S. Department of Justice, Mizrahi-Tefahot Bank Ltd. Admits Its Employees Helped U.S. Taxpayers Conceal Income and Assets, Press Rel. 19-215, Mar. 12, 2019.

management, and financial services to high-net-worth individuals and entities world-wide, including U.S. citizens, resident aliens, and permanent residents.

In the Deferred Prosecution Agreement (“DPA”) and related court documents, Mizrahi-Tefahot admitted that, from 2002 until 2012, the conduct of its employees and agents defrauded the United States with respect to taxes by conspiring with U.S. taxpayer-customers and others. The conduct of Mizrahi-Tefahot employees enabled U.S. taxpayers to hide income and assets from the IRS.²²

The DPA requires Mizrahi-Tefahot to ensure that all of its related entities that provide financial services to customers covered by the FATCA continue to implement and maintain an effective program of internal controls with respect to compliance with FATCA in their affiliates and subsidiaries. Under the DPA, Mizrahi-Tefahot and its subsidiaries must affirmatively disclose certain material information it may later uncover concerning U.S.-related accounts and disclose certain information consistent with the Department’s Swiss Bank Program with respect accounts closed between January 1, 2009, and October 2017. Under the DPA, prosecution against the bank for conspiracy will be deferred for an initial period of two years to permit Mizrahi-Tefahot, UMBS, and Mizrahi Trust Company to comply with the DPA’s terms.

In December 2014, the Bank Leumi Group agreed to a DPA with the Department “admitting that it conspired to aid and assist U.S. taxpayers to prepare and present false tax returns to the IRS by hiding income and assets in offshore bank accounts in Israel and elsewhere around the world.”²³ During the first week of March, Hapoalim, one of Israel’s two largest banks, announced it would set aside an additional \$246 million to cover a potential settlement of a U.S. investigation of its tax wrongdoing. As a result, it has now set aside \$611 million for the U.S. settlement.²⁴

The Department of Justice investigations have resulted in Israeli banks decreasing their activities abroad. According to the Bank of Israel, a dramatic fall in the number of deposits held by foreign residents in Israeli banks has occurred. In the past 10 years, Central Bank data

²² Id.

²³ Id.

²⁴ Makini Brice, Eric Breech, and Steven Scheer, *Israel’s Mizrahi Tefahot to pay \$195 million in U.S. tax case settlement*, Reuters, Mar. 12, 2019.

indicates that approximately \$19 billion worth of deposits by foreign residents have left Israel's banking system.²⁵

As a result of the Department investigations of the three largest Israeli banks, Israeli banks have called upon Israelis with business interests abroad to explain how they earned their money; those unable to provide satisfactory answers have had their bank account closed.

For many years Israeli banks have provided essentially the same services as Swiss banks, but without the banking secrecy.²⁶

The Mizrahi-Tefahot settlement, along with the Bank Leumi DPA and the pending bank Hapoalim, will mean that U.S. taxpayers who have used Israeli banks will need to come into compliance with their U.S. taxes or risk enforcement action, since Mizrahi-Tefahot and bank Hapoalim will have to disclose the accounts by U.S. taxpayers as part of the DPA.

The DPA also shows that, in the aftermath of the OVD for Swiss Banks, the Department is now extending its tax enforcement tentacles to other jurisdictions.

The U.S.-Swiss OVD for Swiss Banks and its action against Israeli banks proffer opportunities for Brazilian tax compliance and enforcement. The Brazilian-U.S. TIEA, FATCA IGA, Mutual Legal Assistance in Criminal Matters Treaty, and extradition treaties all provide support to implement such an initiative.

The U.S. is not alone in going after foreign enablers. Belgium, France, and Germany have prosecuted Swiss banks for tax and money laundering crimes relating to conspiring with taxpayers in the three countries to invest in Swiss banks in ways that conceal assets and evade taxes. The settlement between the Malaysia government and Goldman Sachs in the 1MDB case in connection with alleged diversion of money in connection with bond issues illustrates how Asian governments are prosecuting foreign FIs. In this case the U.S. and Switzerland took action against some of the intermediaries involved in embezzling assets from a sovereign wealth fund.²⁷

Hence, Brazil can and should increase its international tax enforcement in order to strengthen the integrity of its tax system, as it simultaneously raises revenue and develops better

²⁵ AP and Shoshanna Solomon, Major Israeli bank to pay \$195m penalty for US tax-avoidance scheme, THE TIMES OF ISRAEL, March 13, 2019.

²⁶ Simona Weinglass, Why are Israeli banks asking customers where their money comes from? THE TIMES OF ISRAEL, July 29, 2018.

²⁷ Bruce Zagaris, *Malaysia and Goldman Sachs Reach Settlement over 1MDB Scandal*, 36 INT'L ENFORCEMENT L. REP. 304 (Aug. 2020).

private-public partnerships with banks, trust companies, financial institutions and gatekeepers, all of which are key stakeholders in any tax regime. Key stakeholders in promoting increased bilateral relations should demand that their leaders conclude an income tax treaty. Since Brazil is about to join the OECD, OECD accession will necessarily bring many international tax reforms, including transfer pricing convergence, taxation of services and royalties, the adequacy of Brazil's tax treaty policy and administrative practices.²⁸

2. Anti-Corruption Cooperation

U.S.-Brazilian anti-corruption enforcement cooperation has led to a series of cases in which the two governments have cooperated informally and formally on evidence gathering, joint settlements, and sharing of assets recovery. In addition, some convergence of legal approaches has occurred, as illustrated in Brazil's Clean Company Act.²⁹

This section explores some of the successes and opportunities for additional advances in anti-corruption enforcement cooperation.

When the U.S. and Brazil governments seek to cooperate on corruption-based cases, they have various mechanisms. Most importantly, they can use the modern Mutual Assistance in Criminal Matters Treaty, an extradition treaty, Memoranda of Understandings, one involving securities and a second involving commodities future trading. If tax issues are involved, they have the above-mentioned TIEA and FATCA IGA on which to rely. Every transnational corruption case normally involves tax crimes. The payor of the bribe must mischaracterize the bribe payments in his or her books in order to avoid incriminating him or herself or the company. Hence, such payments are often falsely characterized as consulting or marketing fees or fees for professional services. In addition, the recipient of the bribe cannot accurately report the income or else the recipient also risks communicating to the tax authorities incriminating information. Hence, most corrupt payments trigger tax liability.

In cases where multiple parties are involved in the structuring or payment of bribes, and doctoring the accounting records, other crimes, such as money laundering often arise. The U.S. Department of Justice limits the ability of prosecutors to charge tax cases as money laundering and requires approval from a higher level official.

²⁸ Tavares, *supra*.

²⁹ For background in some of anti-corruption enforcement developments, see TEMAS DE ANTICORRUPÇÃO & COMPLIANCE (Alesandra DelDbbio, Buno Cameiro Maeda, and Carlos Henrique da Silva Ayres, eds.) (2013)

In many cases the U.S. and Brazilian law enforcement officials and prosecutors can also utilize multilateral anti-corruption conventions, such as the UN Convention against Corruption, the OECD Convention against Bribery of Foreign Officials, and the Inter-American Convention against Corruption, to make requests.

Especially since Brazil has established within its Ministry of Justice its Department of Assets Recovery and International Legal Cooperation, Brazil has developed a cadre of well trained professionals in international assistance and enforcement cooperation. As a result, Brazil knows how to utilize informal cooperation. A track record of successful cooperation has given the two governments confidence in each other's professionals.

The two governments have closely cooperated on transnational corruption cases between a developed country (usually on the “supply side” of transnational bribery cases) and a developing country (on the “demand side”). A criticism has been that in too many cases supply-side enforcers like the U.S. are overly dominant in transnational bribery cases, while very little investigation occurs with countries where the bribery occurs. Part of the problem has been that the supply-side enforcers do not share evidence or the assets recovered in cases.³⁰

Among the joint anti-corruption settlements are:

- *Embraer S.A.* On October 24, 2016, Brazilian aircraft manufacturer Embraer S.A. (Embraer) agreed to a resolution regarding criminal charges. In the resolution, Embraer agreed to pay a penalty of more than \$107 million relating to schemes involving the bribery of government officials in the Dominican Republic, Saudi Arabia, and Mozambique, and to pay millions more in falsely recorded payments in India via a sham agency agreement. The U.S. credited \$20 million that the company agreed to pay to Brazilian authorities.³¹

³⁰ Kees Thompson, *Brazil: A Model for International Cooperation in Foreign Bribery Prosecutions*, THE GLOBAL ANTI-CORRUPTION BLOG, June 21, 2018. For additional background, see Francesco De Simone and Bruce Zagaris, *Impact of foreign bribery legislation on developing countries and the role of donor agencies*, AntiCorruption Resource Centre (2014) <https://www.u4.no/publications/impact-of-foreign-bribery-legislation-on-developing-countries-and-the-role-of-donor-agencies.pdf>.

³¹ DOJ, *Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges*, October 24, 2016 <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

- *Odebrecht S.A. and Braskem.* On December 21, 2016, Odebrecht S.A. (Odebrecht), a global construction company based in Brazil, and Braskem S.A. (Braskem), a Brazilian petrochemical company, pleaded guilty to bribery. As part of the resolution, they agreed to pay a combined total penalty of at least \$3.5 billion to resolve charges with authorities in the U.S., Brazil, and Switzerland arising out of their conspiracies and activities to pay hundreds of millions of dollars in bribes to government officials around the world. The plea agreement, requires the U.S. to credit the amount that Odebrecht pays to Brazil and Switzerland over the full term of their respective agreements, with the U.S. and Switzerland receiving 10 percent each of the principal of the total criminal fine and Brazil receiving the remaining 80 percent.
- Under their respective plea agreements, Odebrecht and Braskem must continue their cooperation with law enforcement, including in connection with the investigations and prosecutions of individuals responsible for the criminal conduct. Odebrecht and Braskem must also develop enhanced compliance procedures and retain independent compliance monitors for three years.³²
- *Rolls-Royce plc.* On January 17, 2017, Rolls-Royce plc, the United Kingdom-based manufacturer and distributor of power systems for the aerospace, defense, marine, and energy sectors, agreed to pay the U.S. nearly \$170 million as part of an \$800 million global resolution to investigations by the DOJ, U.K., and Brazilian authorities into a scheme to bribe government officials in exchange for government contracts.

Rolls-Royce entered into a deferred prosecution agreement (DPA) in connection with a criminal information, filed on Dec. 20, 2016, in the Southern District of Ohio, charging the company with conspiring to violate the anti-bribery provisions of the FCPA.

In related proceedings, Rolls-Royce also settled with the United Kingdom's Serious Fraud Office (SFO) and the Brazilian Ministério Público Federal (MPF).

³² DOJ, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, December 21, 2016 <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

As part of its leniency agreement with the MPF, Rolls-Royce also agreed to pay a penalty of approximately \$25,579,170 for the company's role in a conspiracy to bribe foreign officials in Brazil between 2005 and 2008. The conduct underlying the MPF resolution overlaps with the conduct underlying part of the DOJ's resolution. Hence, the DOJ credited the \$25,579,170 that Rolls-Royce agreed to pay in Brazil against the total fine in the United States.³³

- *SBM Offshore N.V.* On November 29, 2017, SBM Offshore N.V. (SBM), a Netherlands-based company focusing on the manufacture and design of offshore oil drilling equipment, and its wholly owned U.S. subsidiary, SBM Offshore USA Inc. (SBM USA), agreed to resolve criminal charges and pay a criminal penalty of \$238 million in connection with schemes involving the bribery of foreign officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq in violation of the Foreign Corrupt Practices Act (FCPA).

In calculating its fine, the DOJ credited SBM's payment of penalties to the Openbaar Ministerie and the payment of penalties likely to be paid to the Brazilian Ministério Público Federal (MPF).³⁴

- *Keppel Offshore and Marine Ltd.* On December 22, 2017, Keppel Offshore & Marine Ltd. (KOM), a Singapore-based company engaged in operating shipyards and repairs and upgrading shipping vessels, and its wholly owned U.S. subsidiary, Keppel Offshore & Marine USA Inc. (KOM USA), agreed to pay a combined total penalty of more than \$422 million to resolve charges with authorities in the U.S., Brazil, and Singapore arising out of a decade-long scheme to pay millions of dollars in bribes to officials in Brazil. KOM USA pleaded guilty today in connection with the resolution. In addition, a guilty plea by a former senior member of KOM's legal department was unsealed.

³³ DOJ, *Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, January 17, 2017 <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

³⁴ DOJ, *SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries*, November 29, 2017 <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>.

KOM made a deferred prosecution agreement with the DOJ in connection with a criminal information filed today in the Eastern District of New York charging the company with conspiracy to violate the anti-bribery provisions of the FCPA.

In related proceedings, the company settled with the MPF in Brazil and the Attorney General's Chambers (AGC) in Singapore. The DOJ will credit the amount the company pays to Brazil and Singapore under their respective agreements, with Brazil receiving \$211,108,490, equal to 50 percent of the total criminal penalty, and Singapore receiving up to \$105,554,245, equal to 25 percent of the total criminal penalty.³⁵

- *TechnipFMC plc (TFMC)*. TFMC, a publicly traded company in the U.S. and a global provider of oil and gas services, and its wholly-owned U.S. subsidiary, Technip USA, Inc. (Technip USA) agreed to pay a combined total criminal fine of more than \$296 million to settle foreign bribery charges with authorities in the U.S. and Brazil. The charges arose out of two independent bribery schemes: a scheme by Technip to pay bribes to Brazilian officials and a scheme by FMC to pay bribes to officials in Iraq. Technip USA and Technip's former consultant pleaded guilty in connection with the resolution. In 2010, Technip resolved charges over bribes paid in Nigeria with a penalty of \$240 million.

In related proceedings, the company settled with the Advogado-Geral da União (AGU), the Controladoria-Geral da União (CGU) and the Ministério Público Federal (MPF) in Brazil over bribes paid in Brazil. The U.S. agreed to credit the amount the company pays to the Brazilian authorities under their respective agreements, with TechnipFMC paying Brazil approximately \$214 million in penalties.³⁶

³⁵ DOJ, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case, December 22, 2017 <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>.

³⁶ DOJ, *TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Penalties to Resolve Foreign Bribery Case*, <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>, June 25, 2019.

The settlements involve cases in which Brazil was both in supply-side (Embraer, Odebrecht) and demand-side (Odebrecht, Rolls-Royce, SBM, and Keppel) enforcement roles. The settlements reflect increased trust between the DOJ and the Brazilian counterparts (e.g., MOJ and MPF). As a result, the DOJ has credited fines paid to Brazilian authorities when calculating the penalties for liable companies. DOJ makes these offsets in its discretion on a case-by-case basis. DOJ scrutinizes the comparative victimization of the countries and the roles played by the prosecuting countries in the investigations. One commentator correctly notes that these settlements provide an incentive for other developing/demand-side countries to emulate Brazil so that they can show their countries' anti-corruption achievements and see tangible results in obtaining asset recovery.³⁷

The DOJ has cited the close relationship it has with Brazil and their informal cooperation. For example, in the SBM matter in 2017 after SBM settled with Dutch prosecutors, the DOJ announced that it had ended its own investigation without charges for lack of jurisdiction over SBM officials. However, Brazilian authorities later discovered bribery activity by SBM's U.S. subsidiary and shared it with the DOJ. As a result, the U.S. reopened the case and arrived at a final settlement.³⁸

Another element in U.S.-Brazil anti-corruption cooperation is that the DOJ has confidence in the Brazilian settlement regime. Prior to the enactment of Brazil's Clean Company Act in 2014 (CCA), Brazil could not subject its companies to liability for acts of corruption committed by their employees or agents. The CCA enables companies to enter into leniency agreements, akin to Deferred Prosecution Agreements, whereby companies can qualify for fine reduction by up to two-thirds and avoid certain sanctions by cooperating with investigators and undertaking to make full restitution. In August 2017, Brazil issued guidelines for negotiating such agreements. U.S. law enforcement, particularly the DOJ and Securities Exchange Commission, has enabled the U.S. to provide off-setting credit for the settlements in Brazil by entities subject to joint settlement.³⁹

One gap in joint settlements is that they apply only to companies. Although normally individuals have far less resources to pay for their defense and may even be detained for part of even the entire time before trial, the DOJ has no policies or guidelines for dealing with joint

³⁷ Thompson, *supra*.

³⁸ *Id.*

³⁹ *Id.*

settlements by individuals.⁴⁰ The lack of policy is exacerbated by the provisions in the Brazil-U.S. MLAT that states the MLAT is only between the two governments and does not give rise to access by having defendants or third parties. Hence, a defendant detained is denied equality of arms in litigating the case. S/he must rely on letters rogatory to try to obtain evidence. Arguably the inability of the defendant to utilize the MLAT and the imbalance in foreign evidence-gathering power violates the Compulsory Process Clause of the Sixth Amendment of the U.S. Constitution (the right in all criminal prosecutions to have compulsory process for obtaining witnesses in his or her favor) and the Due Process Clause of the Fifth Amendment of the U.S. Constitution (requirement of fair process).⁴¹

In terms of future investigations Brazilian counsel have discussed the need for adequate anti-corruption due diligence.⁴² Adequate due diligence includes the ability to conduct internal investigations when a company discovers apparent wrongdoing concerning corruption.⁴³

One mechanism that may be useful for Brazilian lawyers engaged in anti-corruption due diligence is the Independent Private Sector Inspector General (IPSIG). The IPSIG's role is analogous to a monitor. The Independent Private Sector Inspector General (IPSIG) is a proactive organizational change agent as well as a proactive investigator.⁴⁴

The federal Inspector General Act of 1978 inspired the idea.⁴⁵ The law centralized audit and investigative activities in a single 'independent and objective' office within each of the major federal departments and agencies. It authorized each Inspector General to report to the agency head and to Congress on the extent of waste, abuse and fraud within its jurisdiction, propose remedial action, and deter future violations. The law required the Inspectors General to promote economy, efficiency and effectiveness of the host department and its programs.⁴⁶

⁴⁰ For additional discussion of the need for a joint settlement policy for individual defendants, see Bruce Zagaris, *The Need for Cooperation Policies In Individual Cross-Border Tax Settlements*, 93 TAX NOTES INT'L 319 (Jan. 21, 2019).

⁴¹ Bruce Zagaris, U.S.-Brazil and International Evidence Gathering: The Need for better Procedural Due Process, 99 REV. BRASILEIRA DE CIÊNCIAS CRIMINAIS 241, 254-258 (2012).

⁴² Bruno Carneiro Maeda, *Programas de Compliance Anticorrupção: importância e elementos essenciais*, TEMAS DE ANTICORRUPÇÃO & COMPLIANCE, supra, at 167-202.

⁴³ Paul J. McNutty and Thomas A. Doyle, *Best practices for investigations in Brazil*, TEMAS DE ANTICORRUPÇÃO & COMPLIANCE, supra, at 269-284,

⁴⁴ This section is taken in part from Bruce Zagaris, *Prosecutors and Judges as Corporate Monitors? The US Experience*, in CHALLENGES IN THE FIELD OF ECONOMIC AND FINANCIAL CRIME IN EUROPE AND THE US (Katalin Ligeti and Vanessa Franssen, eds.) 19, 26-27 (2017); J B Jacobs and R Goldstock, *Monitors & IPSIGs: Emergence of a New Criminal Justice Role*, (2007) 43 CRIMINAL LAW BULLETIN 217, 217.

⁴⁵ (PL 95-452), codified in 5. United States Code app § 1 et seq.

⁴⁶ R Goldstock, 'On the Origins of the Independent Private Sector Inspector General Program, (2003), available at <http://www.iaipsig.org/media/article_11.html> accessed on 27 February 2015.

The IG's most important task is to uncover past and present wrongdoing and prevent future wrongdoing. The agency head may reject the IG's warning or recommendation, but that does not occur often or lightly, as a result of the career consequences of a corruption scandal and the inevitable scrutiny by the relevant oversight committee once the IG notifies Congress of that rejection, as the law requires.⁴⁷

The New York State Organized Crime Task Force (OCTF) pioneered IPSIGs. The OCTF in some cases required companies involved in violations to employ an IPSIG as one condition of a cooperation agreement. Under the agreements the IPSIG had to comprehensively examine the cooperating firm's books and records, interview its employees and scrutinize its operations. The IPSIG worked with the corporation's officers to design and implement internal controls, compliance procedures, and an ethics code. The IPSIG regularly reported to the OCTF on the monitored-company's cooperation and progress. The IPSIG had to report any evidence of company violations and, if the company's wrongdoing caused losses to third parties, the IPSIG had to determine the extent of the loss and ensure appropriate restitution.⁴⁸

In the early 1990s, the DOJ took hold of the IPSIG concept and issued comprehensive standards covering (1) the contractor's responsibility for cooperating with an IPSIG and (2) the IPSIG's role as investigator and implementer of corruption prevention initiatives.⁴⁹

An IPSIG is an independent, private sector firm. It has legal, auditing, investigative, and loss prevention skills. An organization (voluntarily or by compulsory process) hires an IPSIG to ensure compliance with relevant law and regulations and to deter, prevent, uncover, and report unethical and illegal conduct by, within, and against the organization.⁵⁰

To ensure the IPSIG's integrity and credibility as an independent agent, it must have dual reporting responsibilities – to the highest levels of the host organization and to an

⁴⁷ J B Jacobs and R Goldstock, 'Monitors & IPSIGs: Emergence of a New Criminal Justice Role', (2007) 43 Criminal Law Bulletin 217, 218.

⁴⁸ J B Jacobs and R Goldstock, 'Monitors & IPSIGs: Emergence of a New Criminal Justice Role', (2007) 43 Criminal Law Bulletin 217, 223, explaining that these cooperation agreements were confidential when signed and mostly remain under seal.

⁴⁹ J B Jacobs and R Goldstock, 'Monitors & IPSIGs: Emergence of a New Criminal Justice Role', (2007) 43 Criminal Law Bulletin 217, 224, citing Department of Justice, 'Monitoring Agreement' and City Bar for Continuing Legal Education 'What Every Criminal and Corporate Lawyer Needs to Know about Monitors', , 6 December 2005, 45-63.

⁵⁰ L A Skillen, R Goldstock, B DeFoe and W Hess, The Independent Private Sector Inspector General, Report of the New York State Bar Association Commercial and Federal Litigation Section, (1994). , <<http://www.apps.americanbar.org/criminjustice/calendar/independent>> accessed on 27 February 2015.

independent body (generally, a government agency) – and be free to report violations of the law as appropriate.

In some cases, the DOJ has required an IPSIG as a condition of plea agreements. Plea agreements and IPSIGs help prevent future wrongdoing in and by the corporation by means of a multi-year monitor authorized to conduct investigations and recommend organizational reform. The DOJ retains the right to return to court (*i.e.* criminal prosecution, contempt, other remedies) if the IPSIG reports the corporation's lack of cooperation or continued violations.⁵¹ Prosecutors have used IPSIGs against airlines in the wake of serious drug trafficking prosecutions involving employees of airlines, an international accounting firm in the wake of marketing abusive and illegal tax shelters, and a non-profit association franchised by New York State to conduct horse racing and pari-mutuel betting at the state's three major thoroughbred race tracks.⁵²

An organization can utilize IPSIGs to determine the appropriate restitution or forfeiture in cases where guilt or liability has been established, but the amount of loss by the victim(s) or gain by the perpetrator is not known or is in dispute. In many cases, the government has neither the specific skills nor resources, or may be inappropriately partisan, to determine such amounts accurately and objectively.⁵³

IPSIGs can be useful in the international arena. IPSIGs not only protect the host organization from illegalities by their employees, other corporations, and extortive demands by corrupt public officials, but also show the government of the country in which they operate that the organization is actually free from organized crime ownership and influence, and that it has proper safeguards so that its operation will adhere to local laws and regulations.⁵⁴

Normally, the corporation or organization will appoint an IPSIG during prejudgment and sometimes before criminal charges are even brought. The IPSIG is responsible to the corporation and its mission may last until the sentence or until the internal controls and compliance regime have been properly reformed.⁵⁵

⁵¹ J B Jacobs and R Goldstock, 'Monitors & IPSIGs: Emergence of a New Criminal Justice Role', (2007) 43 Criminal Law Bulletin 217, 230-231.

⁵² J B Jacobs and R Goldstock, 'Monitors & IPSIGs: Emergence of a New Criminal Justice Role', (2007) 43 Criminal Law Bulletin 217, 231-235.

⁵³ L A Skillen, R Goldstock, B DeFoe and W Hess, The Independent Private Sector Inspector General, Report of the New York State Bar Association Commercial and Federal Litigation Section, (1994)

⁵⁴ L A Skillen, R Goldstock, B DeFoe and W Hess, The Independent Private Sector Inspector General, Report of the New York State Bar Association Commercial and Federal Litigation Section, (1994).

⁵⁵ Zagaris, Prosecutors and Judges as Corporate Monitors? The US Experience, *supra*.

Hence, if a multinational corporation learns of apparent wrongdoing, especially serious wrongdoing or wrongdoing that has occurred over a long period of time, the corporation may want to hire an IPSIG, so that the prosecutor and court will take into account that the IPSIG will have done its part for the preceding months by the time the case reaches this point. In fact, when a corporation makes a voluntary disclosure, it may tell the prosecutor that it has hired an IPSIG. The prosecutor may want the IPSIG to make reports pending the resolution of the case.

On October 19, 2020, after seven months of negotiations,⁵⁶ officials from the United States and Brazil announced the conclusion of a protocol on a limited trade deal that will facilitate commerce between the countries, strengthen regulatory practices, and strengthen anti-corruption measures. The new Protocol concerns Trade Rules and Transparency.⁵⁷ The Protocol updates the 2011 Agreement on Trade and Economic Cooperation (ATEC) with three new annexes consisting of state-of-the-art provisions on Customs Administration and Trade Facilitation, Good Regulatory Practices, and Anticorruption.⁵⁸ This article discusses Annex III on anti-corruption and some of its implications in the U.S. and Brazil.

The joint statement claims the Protocol “further expands both countries’ frameworks to include provisions addressing money laundering, the recovery of proceeds of corruption, the denial of a safe haven for foreign public officials that engage in corruption and additional protections for whistleblowers.”⁵⁹

The Anticorruption commitments include: affirming the obligations to adopt and maintain measures to prevent and combat bribery and corruption, especially the obligations in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the United Nations Convention against Corruption; and the Inter-

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⁵⁶ Ana Swanson, *U.S. to Sign Limited Trade Deal With Brazil*, N.Y. TIMES, Oct. 19, 2020.

⁵⁷ This section is a revised version of the article by Bruce Zagaris and Carlos Ayres, *U.S. and Brazil Sign Anti-Corruption Provisions in Trade Facilitation Protocol*, 36 INT’L ENFORCEMENT L. REP. 347-50 (Dec. 2020).

⁵⁸ Office of the U.S> Trade Representative, *United States and Brazil Update Agreement on Trade and Economic Cooperation with New Protocol on Trade Rules and Transparency*, Oct. 19, 2020 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules>.

⁵⁹ *United States and Brazil Sign New Protocol on Trade Rules and Transparency*, Oct.19, 2020 <https://ustr.gov/sites/default/files/files/Press/Releases/ATEC%20Brazil%20Joint%20Statement%20-%2010.19.20.pdf>.

American Convention Against Corruption.⁶⁰ The parties agree to adopt and/or maintain measures to establish as criminal, civil, or administrative offenses under its law, in matters affecting international trade and investment, when committed intentionally, by any person subject to its jurisdiction. The measures include those against the promise, offering, or giving of bribes to a public official; the solicitation or acceptance by a public official of bribes; the promise, offering, or giving of bribes to a foreign public official or an official of a public international organization. The measures include complicity, including incitement, aiding and abetting, or conspiracy to commit these offenses.⁶¹ The parties agree to requirements regarding the maintenance of books and records and internal controls, financial statement disclosures, and accounting and auditing standards.⁶² Each party must adopt measures to disallow the tax deductibility of bribes.⁶³ Each party must adopt or maintain measures enabling the identification, tracing, freezing, seizure, and confiscation in criminal, civil, or administrative proceedings of: (a) proceeds, including any property, derived from the corruption offenses; and (b) property, equipment, or other instrumentalities used in or destined for use in such offenses.⁶⁴ Each party must have measures allowing visa restrictions on any foreign public official.⁶⁵

Each party must have procedures to report corrupt acts, and protection for persons who report corruption (whistleblowers).⁶⁶

The Annex requires the adoption of policies and procedures to promote accountability of public officials. In particular, there must be adequate procedures for the selection and training of public officials for public positions considered by the Party to be especially vulnerable to bribery and corruption. Senior officials and other public officials must make “declarations regarding, among other things, their outside activities, employment, investments, assets, and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.” Each party must have appropriate policies and procedures to prevent or act against actual or potential conflicts of interest of public officials.⁶⁷

⁶⁰ Annex III, Art. 1.

⁶¹ *Id.*, Art. 2(1).

⁶² *Id.*, Art. 2(2).

⁶³ *Id.*, Art. 2(5).

⁶⁴ *Id.*, Art. 2(6).

⁶⁵ *Id.*, Art. 2(7).

⁶⁶ *Id.*, Art. 3.

⁶⁷ *Id.*, Art. 4.

The Annex requires the parties facilitate the participation of the public sector and civil society in the effort to prevent and combat bribery and corruption. Each party must encourage businesses to (a) have adequate internal accounting controls, compliance programs, or monitoring bodies, independent of management of boards of directors or of supervisory boards, to assist in preventing and detecting offenses that violate measures.⁶⁸

Each party commits to increase the effectiveness of anti-corruption law enforcement actions.⁶⁹

Analysis on the Annex

The obligations in the Annex are mostly already required both by legislation and membership in the three above-mentioned anti-corruption conventions.

The protocol does not require U.S. congressional approval, but the Brazilian Congress must approve it prior to its entry into force. A report by the Congressional Research Service states that, while some Members of Congress view the trade deal as a way to increase U.S. investment and promote U.S. values in the Hemisphere, others oppose an expanded economic partnership under the Bolsonaro Administration “due to human rights, environmental and other concerns.”⁷⁰

Trade facilitation agreements do not usually include anti-corruption provisions. For instance, the Trade Facilitation Agreement (TFA) discussed during the 2013 World Trade Organization (WTO) meeting in Bali, Indonesia, looks at mechanisms to expedite the movement, release, and clearance of goods, including those in transit. The TFA also provides means for effective cooperation between customs and relevant authorities on trade facilitation and customs compliance.⁷¹ The Brazilian approach to such agreements does not include anti-corruption and governance.⁷²

Nevertheless, a report by the US-Brazil Trade Council calls for “a commitment built on international agreements to eliminate bribery and corruption in trade, business, and investment

⁶⁸ *Id.*, Art. 5.

⁶⁹ *Id.*, Art. 6.

⁷⁰ M. Angeles Villarreal and Andres B. Schwarzenberg, *U.S.-Brazil Trade Relations*, CONGRESSIONAL RESEARCH SERVICE 2, Oct. 23, 2020 <https://crsreports.congress.gov/product/pdf/IF/IF10447>.

⁷¹ Trade Facilitation Efforts Around the Globe, World Economic Forum (undated) http://reports.weforum.org/enabling-trade-catalysing-trade-facilitation-agreement-implementation-in-brazil/trade-facilitation-efforts-around-the-globe/?doing_wp_cron=1605296569.0514481067657470703125

⁷² Brazil’s Approach to Facilitating Trade, World Economic Forum (undated), *id.*

operations through strengthened enforcement and enhanced criminal and civil liability for convicted parties.”⁷³

A recent scholarly article has complained about the recent growth of strategic corruption in the U.S., whereby the U.S. private sector and federal government have groomed kleptocratic networks abroad to obtain profits and political leverage.⁷⁴ A response to that article sees more fundamental corruption issues in the U.S. and calls for strengthening regulations on limited liability corporations, the Foreign Agents Registration Act, preventing the abuse of libel actions, and increasing counterintelligence efforts.⁷⁵ Sarah Chayes calls for steps for the U.S. to protect itself from both foreign and domestic corruption. She joins the call for a constitutional amendment or a Supreme Court ruling reversing the effect of the U.S. Supreme Court’s 2010 *Citizens United* decision, which enables corporations to make unlimited campaign contributions.⁷⁶ She joins the calls to abolish the tax exemptions and nondisclosure provisions nonprofits have to promote candidates on their platforms. She calls for Congress to bar lobbyists from making large campaign contributions and imposing an annual tax on lobbying at a rate equal to 100 percent of what a company or special interest organization spends on it.

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The protocol comes as significant problems in U.S. anti-corruption, accountability, and governance issues come to a head. In a six week period in April – May 2020, former President Trump removed or replaced five inspectors general, including the inspector general who handled the whistleblower complaint that led to Trump’s impeachment.⁷⁸

After losing the presidential election in November 2020, former President Trump characterized the election as fraudulent and tried to intimidate the Secretary of State in Georgia to “find” the precise number of votes that would enable him to win. On January 6, 2021, after

⁷³ Brazil-US Trade Council, U.S. Chamber of Commerce, USAMBCHAM, BRAZIL AND THE U.S.: A ROADMAP TO A TRADE AGREEMENT 17 (Mar. 2019).

⁷⁴ Philip Zelikow, Eric Edelman, Kristofer Harrison, and Celeste Ward Gventer, *The Rise of Strategic Corruption* FOREIGN AFFAIRS (July/Aug. 2020).

⁷⁵ Sarah Chayes, The Strategies Are Foreign, but the Corruption Is American, FOREIGN AFFAIRS 167 (Nov./Dec. 2020).

⁷⁶ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) <https://www.supremecourt.gov/opinions/09pdf/08-205.pdf> The controversial decision reversed century-old campaign finance restrictions and enabled corporations and other outside groups to spend unlimited funds on elections. Tim Lau, *Citizens United Explained*, Brennan Center for Justice, December 12, 2019 <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>.

⁷⁷ Chayes, *supra*.

⁷⁸ Bill McCarthy, Trump has pushed out 5 inspectors general since April. Here’s who they are, POLITIFACT, May 19, 2020.

summoning the alternative right wing, including domestic terrorists, to a rally, he incited them to invade the U.S. Capitol to stop the certification of the Presidential election.⁷⁹ As a result, Trump has been impeached for the second time, each time for interfering with an election.⁸⁰

In Brazil, the anticorruption obligations set forth by the Annex III are generally covered in existing laws and regulations such as the Criminal Code, the Clean Companies Act (Law 12.846/13), and other legislation in place. Annex III is not expected to change that framework. While Brazil has made tremendous progress in the fight against corruption in the last decade with increased enforcement of anti-bribery laws, transparency, implementation of new legislation, and exchange of information with local and foreign authorities,⁸¹ civil society currently warns about possible setbacks in the legal and institutional anti-corruptions frameworks.⁸² It remains to be seen how the international community will assess Brazil's efforts to fight corruption. The next evaluation of Brazil by the OECD Working Group on Bribery in International Business Transactions is currently scheduled to take place in March 2023.

3. Summary and Conclusion

In the areas of taxation and anti-corruption, the governments of Brazil and the United States have increasingly cooperated and collaborated. The interactions of their governments, private sector, and academicians have enabled the countries to view each other's legal systems and culture and borrow aspects to strengthen their own legal framework and laws.

The two governments can and should achieve much more in the tax area. They badly need an income tax treaty in order to minimize the incidence of double taxation and facilitate the ability of people to live part-time in both countries and businesses to more easily invest and trade. In addition, the absence of the U.S.'s full reciprocity in automatic exchange of information, both in terms the FATCA IGA and the failure of the U.S. to join the CRS, gives Brazilians the temptation to move their money to the U.S. to circumvent automatic exchange

⁷⁹ Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg and Michael S. Schmidt, *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES, Jan. 31, 2021 <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

⁸⁰ *In pictures: Trump impeached for second time*, CNN, Jan. 14, 2021 <https://www.cnn.com/2021/01/13/politics/gallery/trump-second-impeachment/index.htm>.

⁸¹ Carlos Ayres. *How Brazil is Fighting Corruption* <https://fcpamericas.com/english/anti-money-laundering/brazil-fighting-corruption/> (accessed Nov. 22, 2020).

⁸² Transparency International. *Brazil: Setbacks in the Legal and Institutional Anti-Corruption Frameworks – 2020 Update*. <https://comunidade.transparenciainternacional.org.br/asset/113:2020-brazil-setbacks-in-the-anti-corruption-legal-and-institutional-frameworks> (accessed Nov. 22, 2020).

of information and invest in a large economy. In addition, the Brazilian government loses significant revenue to flight capital in the U.S. when it does not obtain reciprocity in automatic exchange of tax information and receive closer tax enforcement cooperation from the U.S. Similarly, closer tax enforcement cooperation, including joining Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC), will enable Brazil to strengthen its tax enforcement cooperation with the U.S.

The JITSIC comprises 42 of the world's national tax administrations that have pledged to more effective and efficient ways to deal with tax avoidance. It enables its members to actively collaborate within the legal framework of effective bilateral and multilateral conventions and tax information exchange agreements – sharing their experience, resources, and expertise to tackle the issues they face in common.⁸³

Already the two countries have achieved significant progress in anti-corruption. In particular, Brazil has learned and applied some of the lessons from the U.S. in terms of corporate criminal liability, deferred prosecutions, the use of monitors, and requirements for corporate corruption prevention programs. The two governments have cooperated well in simultaneous investments, prosecutions and joint settlements.

Because some of the structuring of tax evasion and avoidance and schemes to pay transnational bribes go through the Caribbean, both governments should, as part of their development aid and rule of law, cooperate more to strengthen the law and culture of the Caribbean in the areas of tax transparency, anti-corruption, and transparency. The Caribbean is important for both the U.S. and Brazil from a national security and foreign policy standpoint.

In the area of transnational corruption, the two countries should continue to collaborate on the issues of transnational corruption and transparency. They should do so as part of the anti-corruption conventions, in which they participate, including the U.N. Convention against Corruption, the Inter-American Convention against Corruption (OAS), and the OECD. The two governments will need to find creative ways to implement the anti-corruption annex to the Protocol to the 2011 Agreement on Trade and Economic Cooperation (ATEC). In particular, the governments will need to find ways to give standing to civil society groups to actually bring accountability to the many lofty goals and statements. As mentioned above, the agreement on the anti-corruption annex coincides with attacks on transparency, good governance, and

⁸³ OECD, *Joint International Taskforce on Shared Intelligence and Collaboration* <https://www.oecd.org/tax/forum-on-tax-administration/jitsic/> (visited Feb. 3, 2021).

democratic principles. Hence, both the public sector and civil society must utilize the principles of the anti-corruption annex to actually meet the goals.

The two governments should start an exchange program in universities and law schools, involving students engaging in studies of anti-corruption, transparency, good governance, and democracy. The program should emulate the Erasmus program in Europe, where a huge number of universities, in 36 different European countries, are signed up as members in the scheme.⁸⁴ Universities in each country should explore entering cooperative agreements to facilitate these studies.

The very detailed and mature model of U.S. rules for dealing corporate criminality and some of the unique common law mechanisms, such as the above-mentioned IPSIG, may provide models for Brazil in its future anti-corruption policies. Developing formal rules on joint settlements for individuals and giving defendants and third parties the right to utilize mutual assistance in criminal matters treaties would enhance due process and international human rights aspects of bilateral international enforcement cooperation, thereby making such cooperation sustainable.

⁸⁴ See Europe's Erasmus Student Exchange Program, May 18, 2012 [https://www.topuniversities.com/student-info/studying-abroad/europes-erasmus-student-exchange-program#:~:text=The%20Erasmus%20program%20\(short%20for,country%20while%20completing%20a%20degree](https://www.topuniversities.com/student-info/studying-abroad/europes-erasmus-student-exchange-program#:~:text=The%20Erasmus%20program%20(short%20for,country%20while%20completing%20a%20degree).