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by Al Park and Mason Pan

# Don't panic: Conducting cross-border investigations in Latin America

- » Identify all relevant stakeholders to discuss strategy, roles, and information sharing protocols.
- » Consider forming a special investigation committee to oversee the internal investigation and serve as an independent review board.
- » Determine the necessary investigative work streams, including data analytics and due diligence checks.
- » Discuss and agree with the company's shadow investigation team on the investigation's plan and scope.
- » Establish an agile and scalable project management and communication plan with a dedicated central coordinator to facilitate status reporting, issue escalation, and administrative tasks.

**T**he corruption crackdown that is taking Latin America by storm does not appear to be going away any time soon. It has been more than two years since the catalyst that is Operation Lava



Park

Jato (aka, the Car Wash Scandal<sup>1</sup>) kicked off the most significant corruption crackdown in Brazil, ensnaring powerful politicians, influential CEOs, and a wide range of associates domestically and abroad. For multinational corporations, the implications of this crackdown transcend borders and trigger potential Foreign Corrupt Practices Act (FCPA) violations with damaging penalties. Each week, a new company is in the headlines as the latest target of federal authorities, so how can corporate counsel, compliance officers, and law firms prepare for



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and ready their company or client for the “new normal” in Latin America?

This article shares practical advice and lessons learned from seasoned investigators who have conducted complex cross-border investigations and how attorneys can use this knowledge to bring forth a sound investigation plan to best help their companies respond to corruption allegations.

## Corruption landscape

Corruption is being uncovered and investigated throughout Latin America. In Brazil, the Car Wash Scandal led indirectly to the impeachment of former President Dilma Rousseff; in Chile, President Michelle Bachelet's daughter-in-law was involved in a real estate corruption scandal; in Argentina, former president Cristina Fernández de Kirchner was indicted for meddling with the country's central bank;

and in Guatemala, former president Otto Pérez Molina will stand trial for bribing customs officials.

The Latin America-based companies that are dragged into these corruption investigations are usually multinationals with publicly listed shares on large exchanges, such as those in New York or London. Because of the global nature of their operations, these companies are often within the jurisdictional reach of regulatory agencies, such as the U.S. Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) or Britain's International Corruption Unit (ICU). Therefore, in most investigations, these multinational corporations have to deal with at least two sets of regulators from different countries, and because of different laws and regulations, they also have to retain two law firms (e.g., Brazilian and US counsel).

These international investigations take on a different flavor. What is unique and significant in these matters is the sheer complexity, the number of stakeholders, and the work streams involved. To demonstrate, in one single investigation in Brazil, there were more than 800 custodians of interest across a dozen companies; 200+ terabytes of data from 2,000+ in-scope data sources; an investigation team that included seven different law firms, two consulting firms, and four litigation support vendors; stakeholders that included five government agencies, a special investigation committee, and shadow investigators; and auditors that included all four of the "Big 4."

Depending on the scope of the investigation, stakeholders may include the Board, the chief compliance officer, internal and external counsel, auditors, and other individuals.

## 5 key considerations when ramping up for an investigation

For the general counsel of a company that just got raided by the federal police and the attorneys brought in to conduct the investigation, there are several actions to take at the outset to establish a solid foundation upon which the investigation will be conducted.

### 1. Stakeholders

First, identify all relevant stakeholders and bring them on board early on in the process to discuss strategy, roles, and information sharing protocols to ensure everyone is on the same page and that any potential complications or challenges are brought to light and discussed. Depending

on the scope of the investigation, stakeholders may include the Board, the chief compliance officer, internal and external counsel, auditors, and other individuals. The clock is ticking, so establishing an agreed upon strategy and investigation timeline are the most important pieces to get right at the outset, because they drive the overall strategy and directly impacts the scope and direction of downstream work streams.

### 2. Special investigation committee

Second, consider forming a special investigation committee to oversee the internal investigation and serve as an independent review board. In most corruption schemes, company executives are often implicated, so a special investigation committee is typically required to avoid conflicts of interest. For

example, in the Petrobras investigation, the responsibilities of the special investigation committee are to:

- (i) approve the investigation plan;
- (ii) receive and analyze the information addressed by the investigation firms;
- (iii) assure the investigation independency, assuring that it is not prevented or obstructed;
- (iv) analyze, approve and enable the implementation of the investigation firms recommendations;
- (v) communicate and/or authorize the communication between the investigation firms and competent authorities, including regulators, regarding the investigation status, its results, as well as measures taken by the Company;
- (vi) prepare the final report about the investigation results, as well as about the Committee's recommendations regarding internal policies and procedures.<sup>2</sup>

The formation of a special investigation committee is becoming the standard for complex and high-profile corruption investigations in Brazil and the rest of Latin America.

### 3. Work streams

Third, define the investigation scope as it pertains to the various relevant work streams (e.g., custodial collection, document review, data analytics, forensic accounting, and

background checks). The allegations of each case are different and so are the profiles of the companies being investigated. It is imperative for the lead attorneys to assess the needs and benefits of these work streams as they relate to the facts of the case, and bring on the right experts as necessary to perform each work stream.

When in doubt, have an initial scoping discussion with the outside experts to get a sense of timing, effort, and cost. Consider working with a consulting company or litigation support vendor who are capable of performing all the potentially relevant work streams, so even if they are currently retained for only one service, they

can quickly staff up the other work streams if the need arises in the future (e.g., going from early case assessment to full blown DOJ investigation). This ensures that the company doesn't have to introduce another third party to the investigation team, thus decreasing efficiency and increasing complexity and risk. Also, choose an international firm with local language capabilities and experienced in conducting investigations in Latin America. Many international consulting firms have offices in South America, but few have deep experience in investigatory matters and understand the local business culture.

### 4. External auditors

Fourth, meet with the company's external auditor early on to discuss and agree on the investigation plan and scope. In most corruption investigations, the company's

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external auditor (i.e., accounting firm) will act as a shadow investigator to ensure the integrity and credibility of the investigation process. Attorneys should be firm but respectful to the shadow investigator, because although they are not part of the investigation team, they have strong influence with the company and could alter the scope or create additional burden on the investigation team if they are not satisfied with the approach. Building a good rapport and getting the auditor on board early on in the investigation will minimize any potential tension and delays down the line that could impact critical deadlines with the regulators and potentially expose the company to harsher penalties.

## 5. Project management and communication plan

Fifth, establish an agile and scalable project management and communication plan from the outset, because a corruption investigation does not follow a simple linear path but rather is an iterative process. Due to the ever evolving nature of an investigation, it is critical to ensure that key findings from all work streams are shared with the entire project team in an efficient and effective manner to maximize the potential impact of each finding. Each work stream functions in conjunction with the

others to support and corroborate findings, so it is absolutely essential to properly manage this information when you have a complex investigation involving multiple moving parts, jurisdictions, and stakeholders. Depending on the complexity and size of the matter, consider establishing a dedicated Project Management Office (PMO) to act as a central coordinator to facilitate status reporting, issue escalation, and administrative tasks.

## Conclusion

These five considerations are all based on lessons learned from conducting some of the most high-profile and complex cross-border corruption investigations in Brazil and Latin America.

Each investigation is different in nature, but by aligning stakeholder expectations, creating a comprehensive plan, and bringing in the right people, companies can minimize headaches and chart a course to success. \*

1. Lise Alves: "Lava Jato Corruption Investigation Completes 3 Years in Brazil" *The Rio Times*, March 17, 2017. Available at <http://bit.ly/riottimes-rio>
2. Petrobras Investor Relations: "Formation of a Special Committee" December 23, 2014. Available at <http://bit.ly/spec-committee>

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