

# Latin America cross-border investigation: Eletrobras case study

In March 2014, the Brazilian Federal Police obtained judicial authorization to investigate the bank accounts of an otherwise non-descript gas station called Posto da Torre, located in Brasília, Brazil’s capital. Codenamed “Operation Car Wash” (“Operação Lava Jato”) and run out of the Curitiba Public Prosecutor’s office, the investigation initially related to the use of fuel shipments to launder illicit funds. One of the targets of the investigation was a known money launderer named Alberto Youssef. Once arrested, Youssef—who already had talked his way out of prior investigations by turning in other money launderers and fellow criminals—once again provided information about ongoing criminal activity, but this time the information he provided to the Federal Police and Public Prosecutors would permanently change Brazil’s political, legal, and social landscape and reverberate across Latin America.

Youssef provided authorities with information relating to a far-reaching bribery scheme involving Brazil’s state-owned oil company, Petrobras, and a cartel of construction companies. In essence, Petrobras officials caused the company to award lucrative public works contracts to the cartel of construction companies in exchange for massive bribes that were used for the personal benefit of several Petrobras directors as well as to fill the coffers of certain Brazilian political parties. Now in its fifth year, according to Public Prosecutors, Operation Car Wash has had 66 “phases,” led to 244 successful prosecutions, including that of a former Brazilian president, indirectly caused the impeachment of another Brazilian president, and identified a total of BRL \$6.4 billion in bribes paid. <http://www.mpf.mp.br/grandes-casos/caso-lava-jato/atuacao-na-1a-instancia/parana/resultado>. Outside of Brazil, the repercussions include the impeachment of a Peruvian president and implication of scores of politicians and others in Argentina, Colombia, Mexico, Panama, and Venezuela.

In July 2015, Hogan Lovells became involved in the 16th “phase” of Operation Car Wash, codenamed “Radioactivity.” On 28 July 2015, Brazilian Federal Police arrested Othon Pinheiro da Silva, President of

Eletronuclear, a subsidiary of Brazil’s state-owned energy company, Eletrobras. The allegations were that Pinheiro da Silva received kickbacks from construction companies in exchange for facilitating contracts relating to Eletronuclear’s Angra 3 nuclear power plant. One year later, a related investigation codenamed Operation Pripyat was initiated, targeting Pinheiro da Silva and five other Eletronuclear directors for having had received bribes from one of the major Angra 3 contractors.

Due to the nature of the allegations and the far reach of Operation Car Wash, a special committee set up by Eletrobras engaged Hogan Lovells to conduct an internal investigation of the Angra 3 project and eight other projects in which Eletrobras had an interest. Culminating in a December 2018 settlement with the U.S. Securities and Exchange Commission (SEC), our internal investigation included collecting over 2500 computers and other devices, reviewing over 35 million pages of documents, conducting over 600 interviews, and providing information to Brazilian authorities that would assist in the successful prosecution of Pinheiro da Silva and four Eletronuclear directors. Throughout this expansive investigation, our team confronted many of the issues discussed in this Latin America Investigations Guide. We discuss several of them below.

## Interactions with Special Committee

Recognizing that the allegations involved members of the company’s management, and in light of its responsibilities and obligations as a company that had American Depository Receipts (ADR’s) traded in the New York Stock Exchange (NYSE) and shares traded on the Bovespa (the Brazilian Stock Exchange), Eletrobras created an independent special committee to supervise Hogan Lovells’ investigation. Comprised of a former Brazilian Supreme Court Justice, a former member of the Brazilian equivalent of the SEC, and a representative of company minority shareholders (later to be substituted by a former president of a Big Four accounting firm), Hogan Lovells worked closely with the special committee to ensure that its

preliminary findings remained confidential and were not widely disseminated within the company and its subsidiaries.

## Self-Disclosure to U.S. Authorities and Interactions with Brazilian Regulators

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Eletrobras, through Hogan Lovells, made initial disclosures to authorities in the United States and Brazil in July 2015. In August 2018, the U.S. Department of Justice informed Eletrobras that it would not continue its investigation of the company. Later that year, in December 2018, Eletrobras entered into a settlement with the SEC and agreed to pay a US\$2.5 million fine to resolve Foreign Corrupt Practices Act internal accounting controls violations. With the assistance of local counsel, Hogan Lovells also interacted on the company's behalf with Brazilian regulators and law enforcement agencies. Providing detailed and timely information relating to the investigation to these regulators was critical to achieving the favorable resolutions discussed above.

## Conducting Investigation in Parallel with Pending Class Action in U.S.

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In 2016, a putative securities class action was filed against Eletrobras and certain of its directors in the Southern District of New York alleging that they participated in a bribery and corruption scheme that affected the value of Eletrobras' ADR's. Although Eletrobras had separate representation in the class action lawsuit, Hogan Lovells conducted its investigation in a manner that minimized the risk of any claim of waiver of the attorney-client privilege or attorney work product protection. This included educating Brazilian authorities on the need for the company to maintain privilege over certain materials and information to prevent waiver as a result of a voluntary disclosure of privileged information to Brazilian authorities. Eletrobras ultimately settled the class action lawsuit in late June 2018.

## Interacting with External Auditor

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In the wake of the allegations involving Pinheiro da Silva, Eletrobras' external auditor required that the company provide it with sufficient assurances and information regarding the sufficiency of the investigation so as to allow the external auditor

to sign off on the company's financial disclosures, including its SEC Form 20-F. Throughout the internal investigation, Hogan Lovells regularly updated the external auditor on the progress of the investigation while attempting to minimize any risk of waiving the attorney-client privilege and attorney work product protections. Due to the breadth and scope of the investigation, the NYSE suspended trading of Eletrobras' ADRs for several months, but ultimately the external auditor signed off on the company's financial disclosures and trading was reinstated, averting a potentially catastrophic result for the company.

## Challenges in Investigating Special Purpose Entities

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Eletrobras' interests in several of the investigated projects were held via special purpose entities (SPEs), each of which was independently managed. Some of the other interest holders in these SPEs were the construction companies being investigated in Operation Car Wash, and there was resistance from some of these entities to authorize Hogan Lovells to conduct the investigation—in one instance, an SPE actually filed suit to prevent Eletrobras from requiring that it participate in the investigation, and in other instances the investigation team had to contend with hostile SPE management that only reluctantly allowed the investigation to proceed. Hogan Lovells was careful to conduct the investigation of these projects in a manner that minimized the risk of disseminating privileged information to potentially adverse parties (such as the construction companies).

## Conclusion

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The Eletrobras investigation was a massive effort that involved over a dozen outside law firms, forensic firms, and other external advisors, multiple agencies in both the United States and Brazil, ongoing class action litigation, and the largest power supplier for the world's ninth largest economy. The larger Lava Jato investigation riveted Brazil and Latin America, and new developments were reported in the media seemingly every day. Our involvement spanned four years and two continents, but the investigation was ultimately resolved favorably in a manner that freed Eletrobras to pursue a privatized structure to better serve the energy needs of Brazil.

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Peter Spivack is one of the most experienced members of the Investigations, White Collar and Fraud practice area and served as the global co-leader of the practice for six years. Peter has three decades of experience working with multijurisdictional investigations, including matters involving allegations of bribery and corruption under the FCPA, the UK Bribery Act, and other anti-bribery laws. He has represented companies and individuals in investigations brought by multilateral institutions such as the World Bank and Inter-American Development Bank. Peter also has considerable experience in representing entities and individuals in criminal and civil enforcement matters involving health care, government contracts, competition, and antitrust issues.

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Leveraging his experience abroad and his fluency in four languages, Rafael Ribeiro has significant experience conducting international internal investigations and representing clients in cross-border disputes.

As Latin American countries have begun cracking down on corruption and implementing anti-bribery legislation to target wrongdoers, Rafael has been at the forefront of this movement as part of the team that conducted two of the region's most high-profile anti-corruption investigations on behalf of energy sector clients. These investigations involved novel issues regarding the interplay between local anti-corruption legislation and the FCPA, privilege, data privacy, interactions with regulators from multiple jurisdictions, and parallel civil disputes in several countries.

