

# THE OIL IS THEIRS

By Roberto Kaz, Revista Piauí

Translated From the Original Portuguese

Lawyer André de Almeida recalls the cold day that was in New York; it was a Monday, December 8, 2014: "It was gray and windy, one of those days in which is better to stay at home drinking tea." In that morning he made a quick visit to Wolf Popper, an American law firm to which he had joined. "The idea was to file the case in the previous week, but we had to set some details." He had lunch in a bistro and decided to wait at the hotel until four o'clock in the afternoon, when the trading day on the New York Stock Exchange ends. "We did not want to file it before so not to scare the market."

Half an hour later he arrived at the 27 floor building where the court for the Southern District of New York is located. In the hall, he took off his wool suit jacket, presented his passport to the security guard and was stopped in the metal detector because of the spiral coil in his notebook. When the problem was solved, he entered into the hall that houses a statue of Justice, and went to the division of new lawsuits. "It was a waiting room with a window where lawyers were called in the order they arrived", he said. He carried in his briefcase a 38 page complaint against Petrobras. "The petition had already been filed minutes early via internet", he added.

"Anyone could have gone there to take the certificate of filing, but I wanted to be there. It was an important event in the legal history of the country - and in my professional life."

Almeida delivered the complaint, got the certificate of filing and took the subway to Grand Central - A jaunty train station in the center of Manhattan. From there he walked for fifteen minutes back to hotel he was staying. "I was trembling, checking the phone to every minute because I knew the news would explode as soon as it was released." He said he called his wife and told: "It started; now buckle-up." Soon after the phone started ringing.

Case number 14-cv-9662, which runs in the court of New York, is a sheaf over a thousand pages in which Petrobras is accused of making up reports to conceal a "billionaire scheme of money laundering." The original pleading, in English, was written from July to December 2014 by Almeida's staff and the American law firm Wolf Popper. It points out, based on plea agreements of Paulo Roberto Costa and Renato Duque, former directors of Petrobras, that the contracts of the state-owned company were inflated - and that 3% of the amount were passed on to politicians aligned with the federal government. Until 2015,

this practice was never brought up in the reports of the Board of Directors of the company.

"Petrobras, directly or indirectly, has engaged into a scheme of acts that, intentionally or carelessly, committed fraudulent transactions," explains the pleading. "The company made several false claims [...] and employed deceptive and manipulative methods regarding the purchase and sale of ADSs", the document continues, referring to, with the acronym, the company's shares traded on the New York Stock Exchange. The unveiling of the scheme by the task force Lava Jato Operation - plus the high dollar, the control over the price of gasoline and the fall of the oil barrel - caused the market value of company to drop from 300 billion to 100 billion dollars between 2010 and 2015. Thousands of shareholders were harmed

Founded in 1953 by Getúlio Vargas, Petrobras was one thoroughbred state-owned company until 1957, when it began to have part of its shares traded on the market. The massive capital opening, however, only occurred during the government of Fernando Henrique Cardoso: first in 1997 when 180 million shares were sold in the São Paulo Stock Exchange -, and then in 2000 when the company began to negotiate shares

on the New York Stock Exchange. For that, the company had to issue American Depositary Shares, ADSs - the name given to shares of foreign companies traded in the U.S. "The idea of Fernando Henrique was to make Petrobras an international company", said the economist Adriano Pires, director of the Brazilian Center of Infrastructure, a consulting firm specializing in oil and gas market. Today, more than twenty Brazilian companies - among them Vale, Ambev and Bradesco - sell ADSs. Petrobras represents 41% of the shares traded on the stock exchange.

The ADSs market works as follows: first the company issues a specific number of shares in its country, but leaves them frozen in its own treasury. Then hired banks that are responsible for distributing the receipts of these papers in the United States. It is like a mirror of the share", said André de Almeida. For being negotiated abroad, receipts end up subjecting the company to the rules of the SEC, the Securities and Exchange Commission, which oversees the U.S. capital market. The company becomes chargeable in the United States.

The trading session that marked the entrance of Petrobras on the New York Stock Exchange in August 2000 was attended by Pelé, who was hired for two years to promote the brand abroad. "Petrobras is Brazil that worked out, Pelé also", said the player at the time, justifying his hiring. The first sales day attracted 13,000 investors who paid U\$ 2.6 billion for the American shares. The internationalization plan had worked.

But the turning point in the international market would occur in

2010. Four years before, already in the government of Lula, Petrobras announced the discovery of oil in layer of the pre-salt. The extraction, much more complex and expensive due to its depth, required a heavy investment. To raise funds, a new offering of 4 billion shares was scheduled. On September 24, Lula, the Vice-President José Alencar, the Finance Minister Guido Mantega and Petrobras' president José Sergio Gabrielli wore orange coats and white helmets - the company's uniform - to open the session of the São Paulo Stock Exchange. At that time, part of the new shares already were traded on the New York Stock Exchange.

At the end of the operation, Petrobras would raise 70 billion dollars, becoming the second largest company in the American continent, behind only of ExxonMobil in market value. The lawsuit started by André de Almeida in the United States begins its inventory of losses to shareholders exactly in 2010.

**A**ndré de Almeida is a 42 year-old tall man who speaks calmly and was born in Minas Gerais. He graduated in law from the Pontifícia Universidade Católica and concluded extension studies in same area at Georgetown University, in Washington. He stayed there for four years, at the beginning he worked at the Organization of American States, and after in a law firm that specializes in corporate law.

In 2001, already back to Brazil, he founded his own law firm, Almeida Advogados. Today the firm counts with 120 professionals spread out in São Paulo, Rio, Brasília and Belo Horizonte. The headquarters in São

Paulo capital occupies a high floor of a dark building on Avenida Brigadeiro Faria Lima. Almeida's office overlooks the Jockey Club and the Ibirapuera Park. His shelf displays a Civil Code and the book Oil: Money, Politics and Power in the 21st Century, on the history of British Petroleum. In the fridge there are two bottles of Chandon and on the wall, two frames: an illustration of Romero Britto and a poster of the 1991 Championship Cycling. "I was champion twice before I became a lawyer", he said.

Almeida said he started thinking in the case in March 2014, when Lava Jato Operation erupted. He flirted with the idea for a few months, until the plea agreement of Petrobras' Downstream former director Paulo Roberto Costa. "Until then, there was information about corruption and loss of the company's value, but those involved, as Pedro Barusco, occupied management levels. It was discussed whether Petrobras was victim or a complicit. "With the testimony of Costa, the suspicion changed its terms. "He was an executive officer. He was part of corporate governance. That gave me assurance of our arguments."

By knowing the American Justice, he thought that the case would have more chance to succeed in the United States. "In Brazil there is not a good way to sue collectively. A civil public action could only be filed by an existing association. It would be necessary to create this association, which would make the process time consuming, expensive and unsuccessful", he explained. "In addition, by the Law on Public Traded Corporations, we would have to sue the controlling shareholder of the company, which

is the Federal Government. The political character of case would be transmitted to the courts. "It was chosen to file a class action in New York." "I had never done one on my own, but I had worked with it for many years, when I lived there."

The class action is a collective action available in the American system in which an individual, feeling aggrieved, files a case on behalf of a group with which shares an interest - in the case of a company, a shareholder who aggrieved may file an action on behalf of himself and all other minority shareholders. With regard to procedural costs, the mechanism is beneficial for both plaintiffs and defendants: what otherwise would be dozens, hundreds, or thousands of independent cases, these are condensate in only one action. As regards the indemnity amount, however, the nightmare is at the corporate level.

"The class judgment is a value geometrically powerful, according with the number of members in the group", as stated by the Brazilian jurist Antonio Gidi, professor at the University of Houston, in the book *The Class Action as an Instrument of Protection on Collective Rights*. "The disproportion between the low cost of the process and the high value of the sentence makes even a case with a small chance of victory be economically feasible for the group, and extremely dangerous for the defendant. The situation of inequality among the parties persists, but now inverted; the defendant company will be at a disadvantage: no longer oppressing to be oppressed." Such equation (that unites a low cost to the possibility of an exponential return) makes a class action to drive an

industry - to the point that the accusation expenses are totally paid by the law firm. "The client represented has a figurative character", as Professor Gidi told me by phone. "The owner of the case is the lawyer, who in the United States has a power of almost life or death." In other words, the class action, besides being a defense instrument, is also a financial investment - where firms spend millions of dollars on hope that this value comes back multiplied. From the client, it is only required that he splits any eventual gains with the lawyers, in case of settlement or victory. In case of defeat in the court, the costs fall on to the law firm.

In 2015, 189 companies with papers on the New York Stock Exchange were sued; almost 100 cases in the first half of 2016. The cases always end before the trial, with a settlement between the parties. Of over 4,000 class actions relating to share equity losses filed in the last twenty years, none was tried. Still, shareholders recovered 87 billion dollars in extrajudicial settlements.

To file the case before the American court, André de Almeida needed a local partner. In several trips to New York, he presented the case to six law firms. "As I was president Inter-American Bar Association, it was easy to be received", he said. "But most laughed at my face at the beginning, saying it would be impossible to sue Petrobras. They did not believe that the testimony would be validated or that the actions would go ahead." After several meetings, he says that five of the six firms ended up interested. He opted for Wolf

Popper, a medium-size law firm. "I had worked with two partners from there".

With the deal sealed, Almeida returned to Brazil to build the case. He started to write down the facts by relevance in black cover notebooks, with A4 size sheets. On September 6, he wrote in a Portuguese - English mixed note "Conference call com [with] Emily [Madoff, lawyer of Wolf Popper]. Several acts of corruption and Arrests of 2 VPs [referring to the arrests Paulo Roberto Costa and Renato Duque in Lava Jato Operation]. Pricewaterhouse [Coopers, the auditing firm for Petrobras] refuses to sign the balance sheet.

He went over the month gathering news, reports and transcripts of testimonies collected by the Petrobras Parliamentary Investigation Committee [CPI]. On October 6, he wrote: "I worked with Natalie [Yoshida, from her office] in reading newspapers to do the class action. Do not use the word 'corruption' to not be sued. I left the office two in the morning." At the same time he started to look for investors in Brazil that had been harmed by the purchase of Petrobras' American papers (the acquisition of shares of the same company here and there is a common practice for shareholders hedging on the exchange rate fluctuation). At the end of the month he wrote: "I am preparing my trip to New York for next week. We have closed with six clients, with losses of more than 20 million dollars. It is still little for a class action".

In the past, two Brazilian companies faced class actions in the United States. In 2011, Sadia

signed an agreement of 27 million dollars with shareholders to get rid of an accusation exchange rate fraud. In the following year, Aracruz paid 37.5 million. Both had been sued for hiding risks associated with investment in the derivative market (such investments had resulted in losses of hundreds of millions of dollars years earlier).

With Petrobras, it is complicated calculating the value lost by the company. The difficulty lies in discriminating, on one hand, what was lost due to corruption against those from interference, devaluation of the real and fall of the oil barrel. Whatever it is, the second page of Almeida's complaint in the class action states that "the bribery and money laundering scheme is estimated by the authorities in an embezzlement of up to 28 billion dollars".

"Petrobras case is more severe", told me the lawyer Érica Gorga, law professor at Fundação Getúlio Vargas in São Paulo, who published a study of cases of Sadia and Aracruz, and worked on a legal opinion for prosecution in Petrobras. "Aracruz, for example, was the Brazilian company who paid the highest value in a settlement. But the damage it had generated was 2.5 billion dollars whereas Petrobras was ten times higher."

Gorga noted that actions against Sadia and Aracruz were just civil. "But Petrobras is also being investigated in other actions that can yield millions in fines." She refers to two investigations: a criminal one before the Department of Justice of the United States, and an administrative one, conducted by the American Securities and Exchange

Commission, the dreaded SEC, which in 2008 fined the German Siemens in \$ 800 million dollars.

But the big risk in terms of financial loss is the class action. Eight years ago, Enron, the American giant of energy, paid 7.2 billion dollars to shareholders to end one class action (at the turn of the century, its President and top executives had decided not to count financial losses, generating financial statements absolutely unreal).

"The Petrobras case is worse than Enron in terms of injury", said Érica Gorga. Consultant Adriano Pires added: "Enron did a phenomenal damage, but Petrobras still has many imponderables beyond money. Think about what it could cause in terms of image."

**R**etired Accountant Peter Kaltman, who lives in New York, is a specialist in the strange art of filing class actions. In 2001 he handled Scientific Atlanta, which manufactures television equipment. In 2004 he turned to Key Energy Services, who provided services for the petroleum industry. Two years later he filed against Sunterra, a hotel business company. All three cases ended in settlement. "He has roles in various companies", Andre de Almeida told me.

Kaltman was ground zero for the class action against Petrobras. In October 2013 - when Operation Lava Jato was already running -, the investor purchased one thousand shares of the company, for 11 thousand dollars. Two months later, he was being represented by Almeida, at the start of the case. "The ideal [situation] is to start the case with a small scope, to not

expose funds", the attorney explained to me. "You look for any stockholder that has very few shares. It acts as a lure for the market."

From there, a period of sixty days starts in which investors in similar situations present themselves to the court to discuss the leadership of the case. Attorneys then go on to argue about individuals and funds, eager to find who has suffered monumental losses. In general, the greater the damage to the shareholder, the greater the chance that he and his respective attorney be chosen, by the judge, to lead the class action. The winning firm goes on to define the prosecution strategy in the name of all shareholders - even for those who just lost the fight.

Almeida has hope that the large Brazilian funds with American shares in Petrobras become a part of the case. "In these sixty days there were many meetings", he told me. But on December 12 - four days after the start of the process - he wrote, discontented, in his diary: "My partner went to BTG and said that no one in Brazil has the spine to go in on the case." Nonetheless, he scheduled a meeting with Amec, the Association of Capital Market Investors, that represented banks and insurers with more than 400 billion reais invested in the stock market. He noted: "One of the banks present, Santander, liked the case, but believed that it would result in nothing. The investors were skeptical and none were even a little sympathetic. I left there disheartened."

"In that room there was 40 billion reais in losses", Almeida told me, in his office, remembering the scene, which happened at the Amec

headquarters, in December 2014. "Itau, Safra, BTG, Bradesco, and HSBC were there. If they went in [and led the case], they would have autonomy to decide the movements of the case", he shouted. "But they took a cowardly position, for fear of retaliation. Dilma had just been reelected." He said that was "the worst day" of his professional life.

On January 15, in a confessional tone, Almeida noted in his diary that he still had hopes of leading the case: "Not for an economic reason. I spent my entire life preparing for this moment." Two weeks later, however, he wrote that he was pessimistic: "My highest loss is 20 million [dollars], we don't think that it will be sufficient." He says that in that period his office in Rio was invaded by a Petrobras employee. "He screamed for my name." [His office] in Sao Paolo already had the telephone disconnected. "They sabotaged the wires, which are on the ground floor of the building. I went ten days without telephone." He filed two police reports. "I also hired personal security."

On February 6 - at the end of the sixty day period for the appearance of shareholders - various requests to lead the case were filed. One of them came from the Swiss bank Handelbanken, that estimated its losses at 21 million dollars. Another came from the German holding company Union Asset Management, that alleged having losses of 29 million. The retired civil servants fund from the state of Ohio declared a loss to the order of 50 million dollars. But the British fund Universities Superannuation Scheme estimated [its loss] at 84 million. The biggest loss came from

Skagen-Danske Group, a conglomerate formed by three banks, from Norway and Denmark, that affirm having a loss between 222 million and 268 million dollars.

Almeida entered the match representing two Brazilians - the investors Robert Gomes de Melo and Jacob Licht - whose losses, added together, amounted to a little over 2 million dollars. He wrote in his diary: "Day D. I have the sensation of defeat. I don't think it will be [us]. Or maybe it will?" When they found the difference with respect to the losses of other investors, him and the attorneys from Wolf Popper, submitted a document to the judge, announcing that they would be withdrawing from the match. "The dream ended. We agreed with other offices. We are out. *Game over*" the diary showed.

In April of this year, I stayed at a friend's house, in New York, where I was to interview a few attorneys. One day he received a letter - possibly sent to all residents at the time - telling him of a newly closed class action. "If you purchased supplements manufactured by Rexall Sundown, you qualify to receive money from a *class action* settlement", the text said. The company, who sells vitamins and diabetic products, just paid 9 million dollars to end a case about false advertising. Even those who had never heard of the case were able to be indemnified, by completing a form.

"In a class action, everyone is represented, unless they express the desire to be out," Erica Gorga explained to me. Therein lies the enormous firepower of that legal mechanism: it covers not only those that joined the case (and

those that stayed with the sole purpose of disputing the leadership of the class action). It covers, in truth, any and all individual that was harmed by the defendant during the specific period. The attorney that conducts the proceedings, thus, represents millions of clients - and not only that one who hired him. He covers the costs, looking towards the amount that will be received in the end. In the case of Enron, the firm Coughlin Stoia Geller Rudman & Robbins, that headed the case, received almost 10% of the amount set in the agreement - or 688 million dollars (normally the office gets 25% of the agreement amount, but the percentage goes down when the settlement is large).

Hence from February 6, 2015 - the end of the period stipulated by the judge for attorneys to join the case against Petrobras - , the subscribers began to argue openly to see who would bear the leadership of the litigation. The attorney Jeremy Lieberman, from Pomerantz - who represents the British fund Universities Superannuation Scheme - , wrote a motion to technically disqualify the European group Skagen-Danske and the fund of retired pensioners from Ohio - who, in terms of loss, were its principal rivals.

The result was made known on March 4th. In a two page document, judge Jed Rakoff determined that the British fund represented by Lieberman would lead the case. The choice was based on legal arguments (such as the fact that the firm has already led class actions in the past) and monetary arguments (the percentage charged - not revealed in the document - was lower than the other firms).

Lieberman learned of the choice from a call that he received from his secretary. "I thought she was mistaken", he told me. "We were the underdogs. The Danish had lost much more money. And furthermore I left earlier, on the day of oral arguments, because it was *shabbat*." Confirming that he was leading the case, he celebrated: "I felt great."

Jeremy Lieberman is an orthodox Jew with a stocky build, black hair and a wispy beard. He is 42, [has] seven children and lives in the Queens region, where his synagogue also is. He is part of the firm Pomerantz since 2004, in which he has advocated for more than 50 class action suits. The largest of them, against a technology company called Comverse, resulted in, six years prior, an agreement for 225 million dollars. He became partner from home.

The firm, which occupied the 20th floor of a mirrored building in central Manhattan, has simple decor and bright walls. On a table, in the waiting room, there is a magazine that says that the "pioneering spirit" of the founder, Abraham L. Pomerantz, survives in proceedings like the Petrobras case, "one of the largest corruption and bribery scandals of the 21st century".

Lieberman works in a surprisingly small and disorganized office. When I visited, in April, there was an umbrella on the floor and a frame also on the floor, with the front facing the wall. And his table, made of dark wood, was buried by papers and journals, that almost obscured a plaque saying, in English, that "a messy table is the sign of a genius".

It was a Friday afternoon. I asked Lieberman if he heard talk of the Petrobras case before December 8, 2014, when the initial case was filed by Andre de Almeida. "No", he admitted. "It was the end of the year, Christmas Eve, things were slow here in the office. At that time I did not understand the depth of the fraud, and I didn't know until what point the Brazilian government was involved." He says he discussed the issue with attorneys from other firms, who asked him, surprised, "if the case was worth it". In any event, better safe than sorry, he thought it prudent to file a petition four days later (a common practice in *class actions*; for fear of losing on a lucrative opportunities, firms enter into proceedings without knowing for sure what it is about).

As such, on December 12 of that year, Lieberman submitted a request practically identical to the one from Almeida, with the difference that he represented a different shareholder, Jonathan Messing, who had 80 thousand dollars worth of Petrobras securities. "We sent e-mails to some clients that could have shares in the company, and Mr. Messing responded", he explained.

Once signed up, he began to study the case. Soon he realized that the fight would be a big one - and that, if he wanted to have a chance of victory, he would need to represent a sizable client. He then traveled to England to meet with the directors of Universities Superannuation Scheme, a university trust worth 65 billion dollars - the largest in the United Kingdom - ,that generates the pension of 300 thousand people. "They were already out clients on

past cases, but they had never before led a *class action*", he told me. The agreement was signed.

Months later, the pair made up of the trust and the firm would be chosen to lead the case. Lieberman says he has over forty people working on the case: "We have already spent millions of dollars."

When a law firm is appointed lead on a class action, it is charged with bringing a new, updated document to the court, representing the interest of all class members. From that moment, the initial complaint - in the case of Petrobras, the one filed by Andre de Almeida - becomes a kind of draft for the case.

Lieberman's document - five times larger than Almeida's - was presented on March 25 last year. It began by mentioning that in that month "approximately 1 million Brazilians" have taken to the streets of the country, "demanding the impeachment of President Dilma Rousseff". The protests, he explained, were triggered "by the enormous corruption scheme at Petrobras, where Rousseff served as board member between 2003 and 2010". It also mentioned that the scheme diluted the value of the company by almost ten times, "in 2009 it was the fifth largest in the world, with a market value of 310 billion dollars".

Afterwards, Lieberman described various cases of corruption revealed by Operation Lava Jato. It cited the arrests of PT treasurer, Joao Vaccari Neto, and the Petrobras executives Paulo Roberto Costa, Renato Duque, Pedro Barusco, and Nesto Cervero. It mentioned the overpriced purchase

of the Pasadena refinery and the similarly overpriced projects for the Abreu e Lima and Complexo Petroquimico do Rio de Janeiro projects. It spoke of a cartel formed by the companies Odebrecht, Camargo Correa and Querioz Galvao - that, according to the testimony of Paulo Roberto Costa, augmented the price of the projects by 20%, in order for 3% of that amount to be transferred to allied politicians.

In the complaint, with over 200 pages, Lieberman further mentions that "the executive board - including [*the former presidents of the company*] Jose Sergio Gabrielli and Graca Foster - were repeatedly notified of the fraud". To incriminate Gabrielli, he cited to the plea agreement of the money launderer Alberto Youssef - who says that he paid kickbacks "via direct order" of the former Petrobras president. To accuse Graca Foster, he mentioned the emails sent on 2011 by the former manager of the Supply Division, Venina Velosa da Fonseca - who said she warned Foster, when she was only the Director of Gas and Energy, of irregularities in the Communication sector of the state company.

The knowledge of such facts, Lieberman argues, led to a series of declarations and financial statements that were allegedly true, published by Petrobras between 2010 and 2015, containing deliberately false information (the word "false" appears 95 times in the text). To expand the scope of the action, Lieberman also decided to include PricewaterhouseCoopers, responsible, since 2012, for auditing the Petrobras accounts.

For the breach, he required that eighteen executives of the petroleum company respond as defendants - among them Gabrielli, Foster, Renato Duque and Paulo Roberto Costa (a US attorney tells me that Dilma Rouseff - who presided over the board of Petrobras - was not included in the list for fear that the process, thus, would fall outside of the civil scope, turning into a matter for the State Department).

"The facts in this case are better than in any other on which I have worked", Lieberman told me, with an air of victory, when I met him in New York. "The president is being blocked, the executives are going to jail, the Federal Court of Accounts has applied various fines. If Petrobras risks going to trial, its chances of defeat are enormous."

I asked him how he would feel if the case ended in driving the company into bankruptcy (something that is unlikely, in truth, seeing as how 28 billion dollars represents close to one fourth of the current Petrobras debt, of 130 billion dollars). "I will feel bad if it goes under, of course", he responded. "I want it to work out. But who are the victims in this story?" He paused, and he tried to respond to his own question: "It is the shareholders, the Brazilians, and the employees. We want to show that if you want to invest in the United States, you have to follow the rules. Mauro Cunha, for example, understood."

**M** Mauro Rodrigues da Cunha is president of the Association of Capital Market Investors. He was part of the board of directors for Petrobras from 2013 to 2015, as

representative of minority investors.

"My participation on that body gave me access to very important information", Cunha declared, in 2014, to the Parliamentary Inquiry Committee that investigated Petrobras in the Chamber of Deputies. He refers to the locked clash within the board at the start of 2013, when there was a meeting to approve the annual statement. "The financial statements for 2013 did not adequately represent the economic-financial reality of Petrobras", he explains, to the deputies, justifying why he would vote against the approval of the statements.

A month after, Guido Mantega - then President of the board - suggested, in a meeting recorded in minutes, that there be a "rotation among the participants of the committees". In that new design, Mauro Cunha was forced to leave the auditing committee to join the environmental [committee]. To the CPI, he said that "the [*auditing*] committee then came to be formed by Mr. Sergio Quintella [*vice-president of the Getulio Vargas Foundation*], Luciano Coutinho [*who led BNDES*], and Miriam Belchior [*then minister of Planning*] - that is, all appointed by the company, and, the majority, employees of the company". He alleged that such a nomination reduced "the independence of the organization exactly at the moment in which that independence was revealed to be most important to Petrobras". He concluded: "The committee was ready."

The complaint against Petrobras mentions Mauro Cunha on Page 62. Remember that in April 2014, not only him, but also board members

Jose Monforte and Silvio Sinedino contested the balance sheet from the previous year - which did not prevent that document from being approved and released to shareholders. In it, the company accounted for 6.2 billion reais in losses referred to "additional improperly capitalized expenses in the acquisition of fixed assets" - a euphemism found to refer to the Kickback scheme revealed by Operation Lava Jato. The calculation, supported by the deposition of Paulo Roberto Costa, was based on 3% of the value of contracts. In his vote, Cunha said he saw no point "in entering those amounts based on the plea agreements of inept individuals". He also stated that the balance sheet, of 319 pages, be distributed the same day of the vote, being approved "by PowerPoint presentations, without any board member being able to read the statements."

When I met with Mauro Cunha, the last month of May, at the headquarters of the Association, in Sao Paulo, he refused to talk about Petrobras, remembering that he lost "health and hair" during the period in which he was a board member. "My beard also wasn't white." He warned, however, that the uncontrolled stock market in Brazil - along with the lack of legal recourse to project investors, like a *class action* - could result in a capital exodus from the country. "People are finding ways to export our capital market, due to weakness in our courts. If we do not protect investors, they will go to acquire Brazilian assets abroad."

Today, beyond Petrobras, five other Brazilian companies - Braskem, Vale, Bradesco, Gerdau

and Eletrobras - face class actions in the United States. None of them are defendants in anything of the sort in Brazil.

**P**etrobras has taken internal measures with the intent of recovering their prestige in the market. In November 2014 it created the Division of Governance, Risk, and Compliance, under the leadership of executive Joao Elek Junior, who was charged with avoiding new irregularities. A month after, the state company also mounted a special committee - which counts on the support of three external law and auditing firms - to investigate suspicions of fraud. Led by Ellene Gracie, former Justice of the Federal Supreme Court, the committee has already spent 370 million reais.

In the American court [system], Petrobras is defended by the New York law firm Cleary Gottlieb Steen & Hamilton, which has branches in more than ten countries and is constantly cited among the most powerful [law firms] in the United States. The Cleary headquarters, in New York, occupies eleven floors with views of One World Trade Center, in the financial center for the city. At the entrance, there is a separate line for clients.

Roger Cooper is the lead attorney in the defense of Petrobras. On a Thursday, June 25 2015, him and Jeremy Lieberman met before Judge Jed Rakoff, in the US District Court for the Southern District of New York. Each was given close to twenty minutes for oral arguments. Cooper was accompanied by another attorney and two executives of the state company. He began with the defense of former-president Graca Foster.

"The accusation is based on the allegation of a person called [Venina Velosa da] Fonseca who raises suspicions of irregularity with respect to certain payments to the Petrobras communication department", Cooper explained, emphasizing that said department had nothing to do with the cartel formed by companies. "In truth, the amount that is claimed with respect to those irregularities is simply 18.8 million dollars, which in no way approaches the type of amount that the accusation claims to have been employed in the bribery scheme." Cooper also stated that Fonseca's claims led then president of the state company, Jose Sergio Gabrielli, to assemble a committee to investigate such irregularities.

After, Cooper argued that the participation of certain individuals in the scheme, such as Paulo Roberto Costa, could not be generalized to the point in resulting to punishment for the entire company.

They were not involved in the production of the balance sheets and communications sent to the public," he explained. "They acted in their own interest, and against the interest of the company". He emphasized that Petrobras did not have any benefit from the cartel. "The effect of the balance sheet was worse for the company, who was forced to pay greater amounts for the assets. If the scheme did not occur, it would have paid 3% less."

Lieberman can then respond. He shared that Venina da Fonseca and Graca Foster had various conversations, between 2008 and 2014, regarding the fraud scheme. "The investigations with respect to the Abreu e Lima Refinery emerged based on her suspicions", he says,



referring to Fonseca. Remember that despite the committee assembled by Gabrielli having noted an increase from 4 to 8 billion dollars in the cost of the projects for the refinery, the Division continued to endorse them. "Again, your honor, that is fraud taken to the highest level of leadership. It does not deal with one or another rotten apple, but the entire roots of the company being eroded by fraud."

After, he responded to the argument that Petrobras did not benefit. "Your honor, 51% of the company belongs to the general government. The scheme certainly helped the government", he explained. "The interests of the corrupt politicians that governed the country at the time and the corrupt individuals leading the company were one in the same. [...] They had nothing to gain by remaining clean." He also rejected the calculation, done by Petrobras, that the losses with respect to the corruption scheme would be for 6.2 billion reais.

In his reply, Roger Cooper went on to say that the fiscal issue with respect to the Abreu e Lima Refinery resulted from interferences, "which does put it on the same level as securities fraud". He would use the same argument, citing a report from the Federal Court of Accounts [TCU], in order to describe a purchase overpriced by 792 million dollars for the Pasadena refinery. "Maybe they had paid a lot, but there are no allegations of bribery." Liberman counter-argued, citing the recommendation, made by the TCU, to freeze the assets of Gabrielli: "You only would freeze the assets of a person when there is something illegal." The session—

called so that the judge could make preliminary decisions about the case—was finished after an hour and a half. (In December 2015—therefore six months after the clash between the attorneys, Nestor Cervero admitted, in a plea agreement, that the purchase of Pasadena yielded 15 million dollars in bribes.)

On a Sunday morning last May, Roger Cooper met with me for a half hour in the office of Cleary Gottlieb, in New York. He was accompanied by Lewis Liman and Francesa Odell, two other lawyers involved in the case. In the meeting, set up a day before, Cooper repeated the theory that Petrobras is a victim—and not the wrongdoer—in this story. He said that no balance sheet of the company was contested in Brail by the Securities Commission [CVM] or by its equivalent in the United States, the SEC. He argued that some of the funds that made up the accusation continued to be invested in Petrobras even after the start of the process. And he stated that the company did not intend to settle.

Since the class action was filed, in December of 2014, Judge Jed Rakoff has made a series of decisions. He based them on the public data from the Petrobras balance sheets in order to delimit the exact period covered by the case—which came to include all shareholders who purchased American stock in the company between January 22, 2010 and July 28, 2015. He determined, also, that the process would be divided into two groups: damages from the devaluation of shares—which fell 80% during the period—and another, much less, damages from

the purchase of public debt securities. In August of 2015, Rakoff denied the request from Lieberman to include, in the action, anyone who was injured by the purchase of Petrobras shares on the Bovespa. In February of this year, he decided that PricewaterhouseCoopers did not act in bad faith when in approved the annual balance sheets. The auditor remains as a defendant, but only as a function of the decisions with respect to the sales of bonds.

As to the indictments, Rakoff issued letters rogatory—a legal instrument of cooperation between two countries—requesting that the Brazilian Court gather the depositions of the money-changer Alberto Youssef, the lobbyist Fernando Baiano, the ex-Senator Delcidio do Amaral and the ex-executives Paulo Roberto Costa, Renato Duque, Jorge Zelada, Pedro Barusco and Nestor Cervero. He also requested, by way of the letters, that they collect the documents from the contractors Andrade Gutierrez, Odebrecht, Galvao Engineering and Camargo Correa.

Petrobras made use of the same legal mechanism, requesting that Rakoff send letters rogatory to England—where the bank HSBC is headquartered—and Switzerland—where Credit Suisse is located. The idea—which seems like more of an attempt to reduce damages—is to decrease the size of the group of shareholders, excluding from the process those who had bought ADSs in those countries (American law permits shares from the New York Stock Exchange to be negotiated by banks and funds located elsewhere, but it does not

endorse those purchased outside the United States).

Mauro Cunha was not cited in any letter rogatory. Of the various board members mentioned in the lawsuit, he was the only one to be directly subpoenaed to be deposed in the United States. The request came from Lieberman, under the argument that Cunha held “critical information” about Petrobras. Gabrielli, Foster and some ex-directors of the state-run company attempted to block their depositions, arguing, in a letter to the judge, that the subpoena of a foreigner would defy the American Constitution: “The court must hesitate before ordering such an act.” Since Cunha was born in the United States, the argument was denied.

In March, Graca Foster and Jose Sergio Gabrielli also addressed letters to the court denying each paragraph of the complaint (similar documents were sent by ex-directors like Guilherme Estrella, who headed the area of Exploration, and Almir Barbassa, who was the head of Finance). In the response from Foster, some 88 pages, there were 592 repetitions of the phrase “Foster denies the allegations.” In Gabrielli’s, that phrase appears 579 times.

In addition to the class action, Petrobras also faces 29 individual lawsuits in the United States—open to whoever opted out of the class action, in the hope of negotiating their own settlement and guaranteeing, as such, a higher financial return. The plaintiffs, various, are from pension funds—like that of the city of New York—foundations—like Bill and Melinda Gates—and, of course, every sort of back. (The individual lawsuits, also

before Judge Rakoff, revolve around the class action, like small fish that swim around a shark to eat the leftovers; they will be adjudicated based on what is decided in the class action.)

There are, finally, two projected lawsuits, already announced, that are waiting in the wings. In Europe, ISAF (International Securities Associations and Foundations), that brings together investors from Spain and Holland, planning on suing Petrobras in a court in Rotterdam. In Brazil, the Association of Minority Investors announced that is going to open a public civil action in Rio de Janeiro (in May of this year, a similar lawsuit from the same association, against Eike Batista, was rejected in the first instance). “It would be absurd that American shareholders can be compensated but not the Brazilians,” argues the economist Aurelio Valporto, vice-president of the group. “The Brazilian shareholders were injured by the robbery that the company brought to the current state of penury, and they will be doubly injured when the company is devalued because of the American indemnification.” Valporto says he is waiting for the resolution of bureaucratic barriers in the association bylaws before beginning the suit. In some ways, he is also waiting on the decision from Judge Rakoff: “We did not do a survey of the losses. We are going to use the result from the class action as a parameter.”

**O**n a cold Friday, in mid-April, I met with Jeremy Lieberman for a second time, in his office in Manhattan. He was dressed in a black zip-up sweater and was wearing a yarmulke—which announced the

arrival of *shabat*. I asked why he hadn’t grown a full beard, as tends to be common in the orthodox community. “My wife wouldn’t allow it,” he answered, laughing.

In that month, the first letters rogatory had been sent to Brazil. “At some point they should arrive at their destinations, but maybe not before the case is resolved,” he said, alluding to the bureaucratic barriers. He also said that, in the case of a settlement, he imagined something in the order of tens of billions of dollars. “The scenarios are being considered.”

I told him that I heard, from the attorney Roger Cooper, that Petrobras would take the case to trial. “There wasn’t any discussion between you about a possible settlement?” I asked. The response from Lieberman was an opening of hands, with palms up, and a restrained smile, mouth closed. “Until the current balance sheets are false,” he said, then. “Even when they try to come clean it isn’t sufficient.”

Petrobras preferred not to meet with **piauì** for this report. It sent a note, through the company’s public relations arm, in which it described the claims in the action as “unfounded,” and in which it reiterated being “prepared for the trial scheduled for the second quarter of 2016.” (Nevertheless, the new president of the state-run company, Pedro Parente, stated in June to the *Wall Street Journal* that the history of class actions in the United States “shows that you settle”).

There are two principal issues to be decided in the case. The first is whether the company can be held responsible for the crime

committed by a group of individuals—individuals, it is worth remembering, who held staff positions. The second is to define the exact amount to be paid. “It is difficult to separate the part of the loss from the actions owing to corruption, and the part owing to the decrease in the price of oil,” emphasized the firm lawyer Robert Finkel, in the office Wolf Popper, when I met him in New York.

In the event that the plaintiffs succeed, the indemnification will be determined by Judge Jed Rakoff. “He does not have his tail attached to anyone; he’s like Sergio Moro here,” said Lieberman, confidently. If the decision finds corruption, Petrobras will be responsible for the entire debt. If it is found to have mismanaged, it is possible that it refers to amount to its insurers. In the event that the state-run company is victorious, it will not have pay for legal fees.

The trial is scheduled for September 19, a Monday, in New York.