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JUDICIALIZATION OF ENERGY REGULATION

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Context

- ❖ Independent regulatory agency, responsible for the assessment of the rights and obligations of the regulated agents
- ❖ Board of Directors decision-making procedure is based on the majority rule and held on public meetings, broadcasted in real-time on the internet and open to stakeholder engagement.
- ❖ Regulated agents may challenge in court all actions of the agency prior and despite of the administrative decision-making process - judicial review is not limited to final agency action.

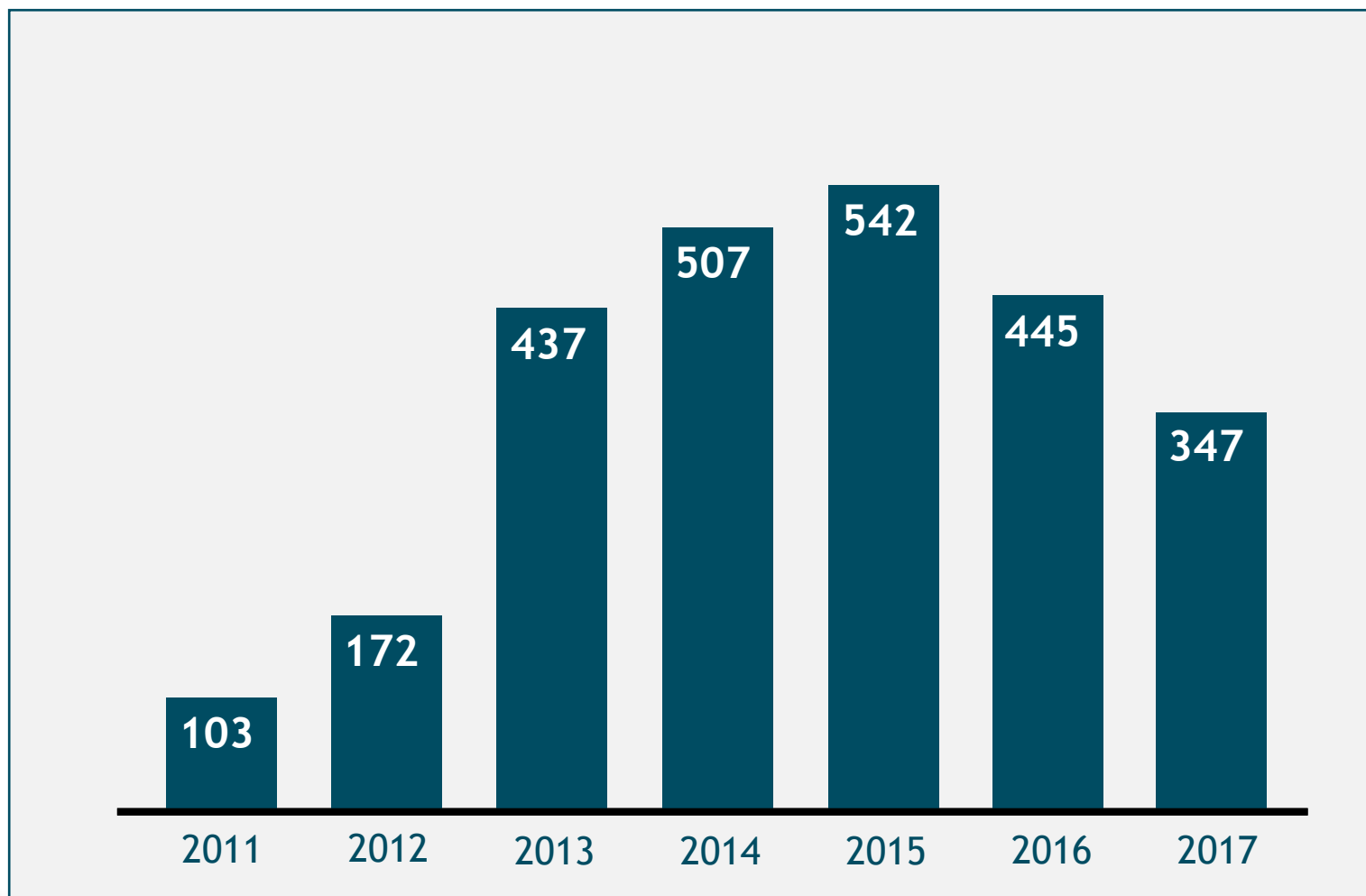


Problem Definition

Perception of a growing judicialization

- ❖ Second-guess on the merits of complex and technical regulatory actions - from a past of focusing on the agency's compliance with legal statutes.
- ❖ Preliminary injunctions issued against the agency - by both district courts and courts of appeals - became a commonplace, in contrast to the slow pace to reach a final decision in the four-tiered court system.

History of lawsuits against ANEEL



Possible Causes

- ❖ Regulatory quality - Complexity of the regulatory framework and the existence of incentives to litigation
- ❖ Economic situation - Crisis puts pressure on companies to challenge unfavorable administrative actions
- ❖ Judicial behaviour - Increase in judicial activism

Case Study

- ❖ Since 2004, Brazilian DISCOs have acquired electricity mainly through public auctions that lead to long-term contracts (PPAs) - all contractual clauses are subject to public consultation
- ❖ In accordance with the PPAs, the hydroelectric power plants (HPP) assume the risks related to underperformance - if electricity generation is below the promised amount, they must reimburse the DISCOs of the electricity purchase expenditures in the Spot Market

Case Study

Underperformance Risk Mitigation

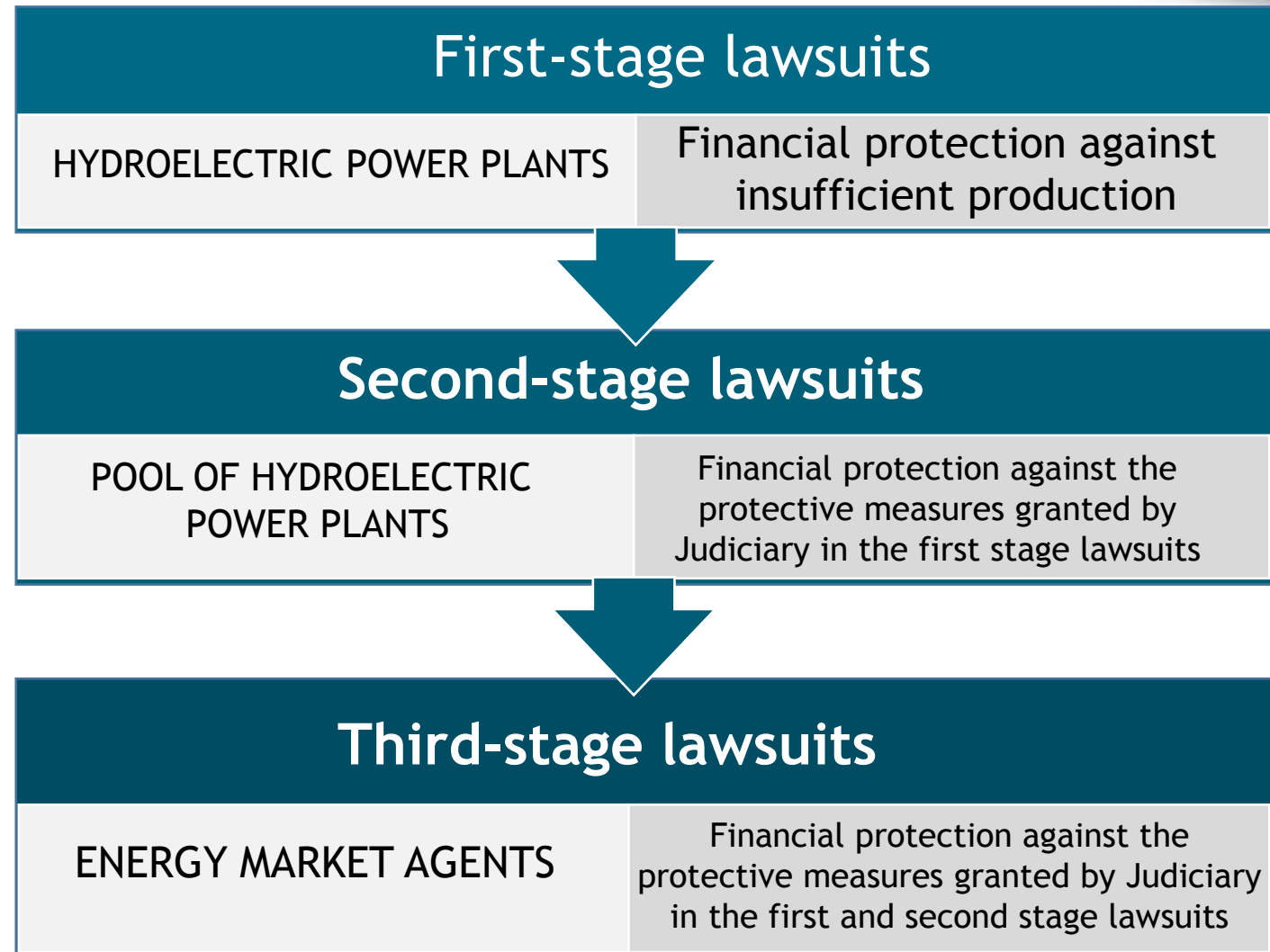
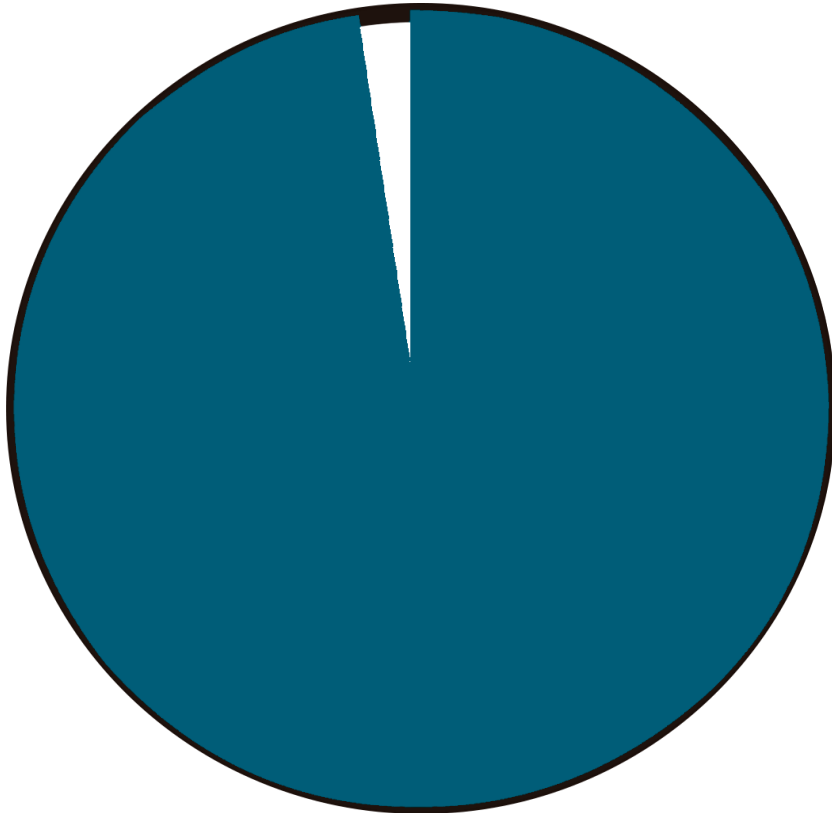
- ❖ The dispatch of HPPs is centralized (at the request of the independent system operator - ISO)
- ❖ A pool of HPPs with reservoirs in different regions of the country shares the contractual risk
- ❖ The Federal Government limits the amount of sale that each HPP can sell based on the generation expected under certain safety conditions
- ❖ HPPs decide the amount of energy that will be committed to the PPAs.

Case Study

The plaintiffs' claims

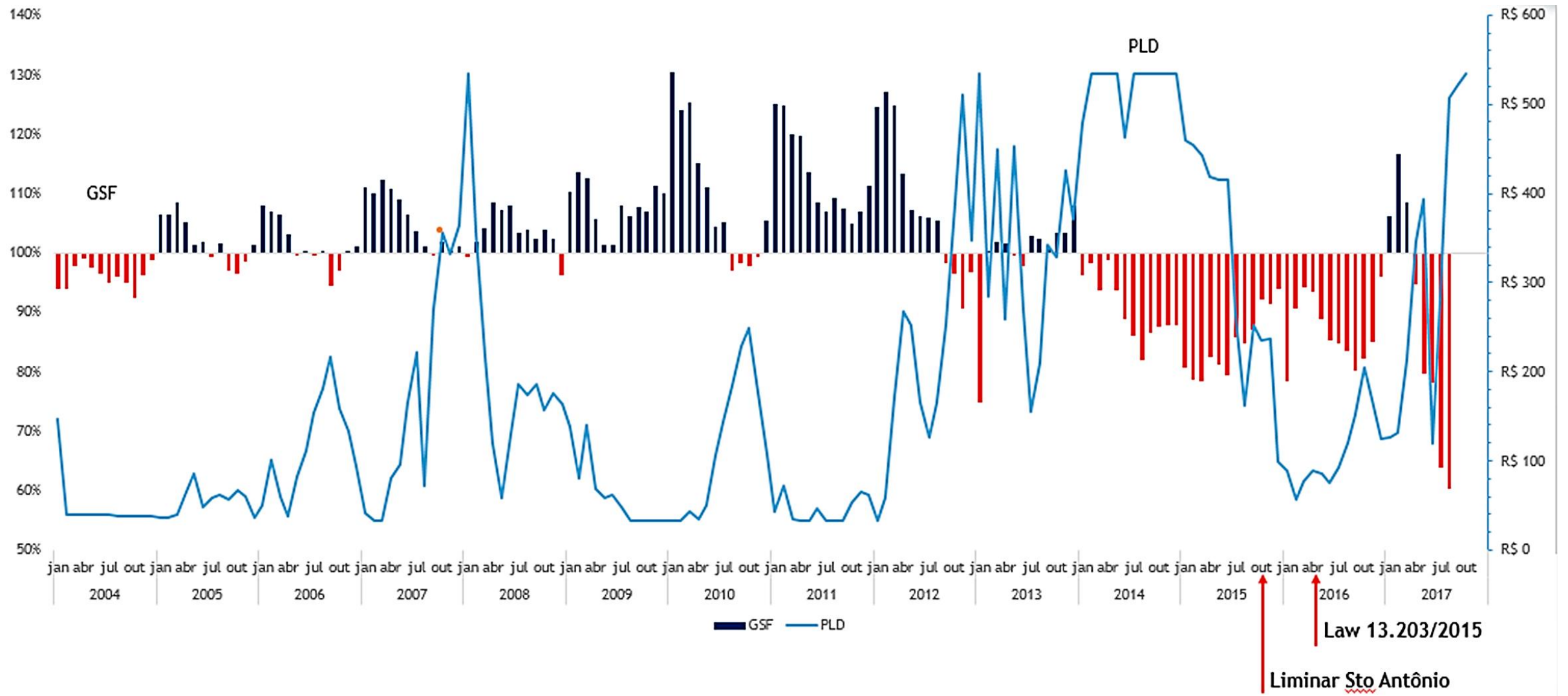
- ❖ HPPs cannot be held responsible for “extraordinary” hydrological risks.
- ❖ The underperformance of the hydroelectric plants pool was due to political actions, such as those related to renewable energy and blackout prevention.
- ❖ A third party rights cannot be affected by a lawsuit.

Case Study



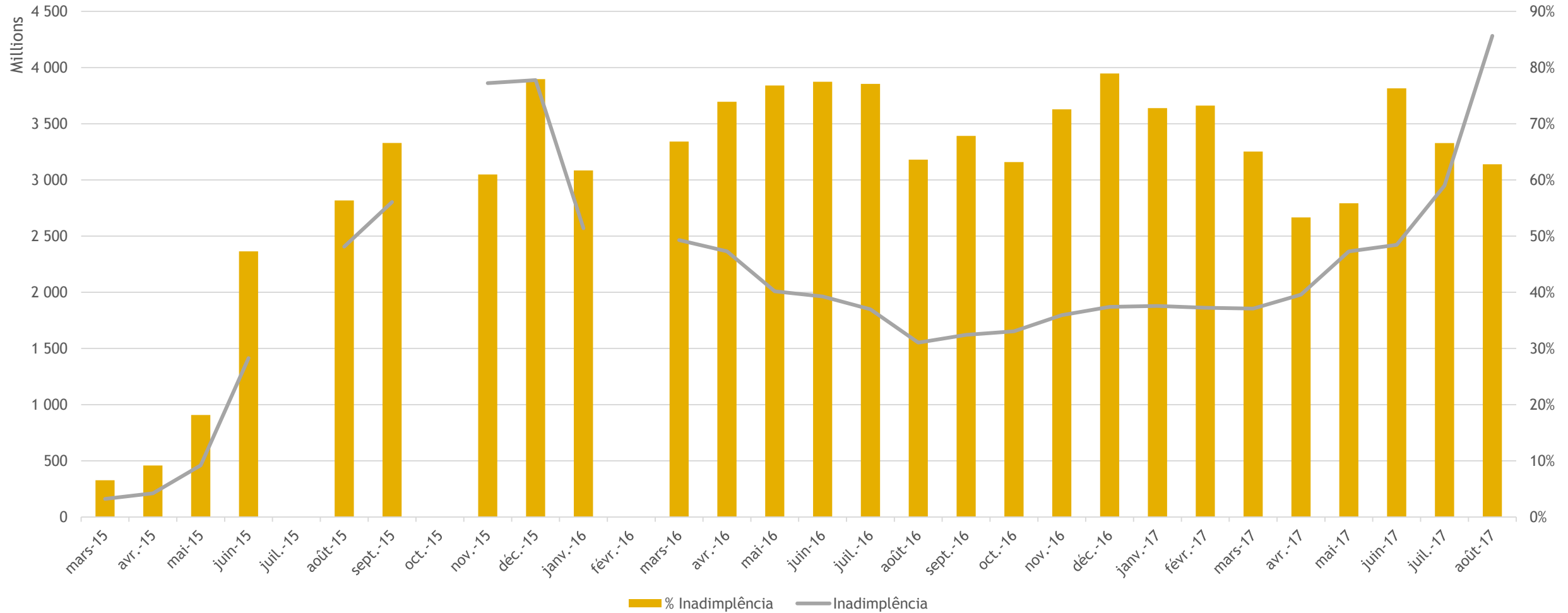
Case Study

Generation Scaling Factor x Spot Market Price



Case Study

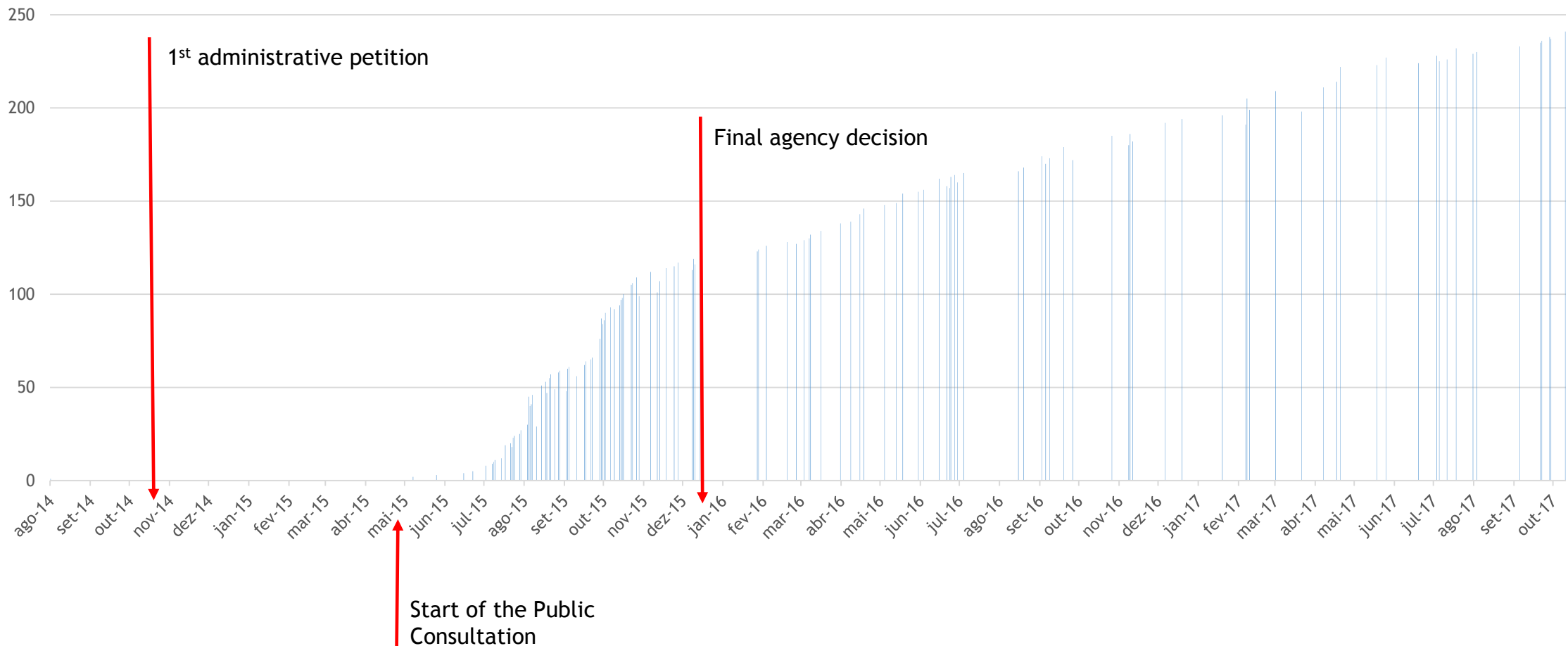
Spot Market Settlement



Case Study

Judicial interference in the administrative process

Administrative process stages x Aggregate amount of lawsuits



Reflections on the Case Study

- ❖ Several interruptions of the Market Settlements
- ❖ Default of the Spot Market surpassed 80%.
- ❖ The financial impact on the market creditors exceeded R\$3.815 bi.
- ❖ A congressional law was enacted to deal with the judiciary crisis

Reflections on the Case Study

- ❖ Loss of credibility of the regulatory body
- ❖ Fragility of regulatory incentives
- ❖ Delay in the execution of energy projects
- ❖ Perception of regulatory insecurity



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Energy made present.

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