

Ideas and economy in the policy reforms of the Brazilian oil sector: 1995 to 2010

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This paper examines changes in oil revenue management in the period from the market-oriented reforms of the 1990s to the new oil sector regulatory framework introduced in 2010. Grounded on a combination of the long-term view afforded by historical institutionalism and the tools for modelling agents' behaviour offered by rational choice institutionalism, it stresses the importance of ideas and associated interests in the policy outcome, considering stakeholder interaction in the process, the institutional framework, the new critical juncture, and the new domestic and international setting. The result indicates that the Brazilian oil policy follows the ideas path during the 1990s and 2000s, reflecting the dominant interests in each phase. As well, the domestic economic outlook was critical to determine the extent to which the government had to follow international agencies policy recommendations.

Keywords: public policy; political economy; institutionalism; oil; Brazil; Petrobras.

Ideias e economia nas reformas das políticas públicas do setor de petróleo brasileiro: 1995 a 2010

Este trabalho examina as mudanças no gerenciamento das receitas petrolíferas desde os anos 1990, período das reformas orientadas para o mercado, até o novo marco regulatório do petróleo aprovado em 2010. Baseado na combinação da perspectiva de longo-prazo do institucionalismo histórico e nas ferramentas para modelar o comportamento dos agentes do institucionalismo da escolha racional, o estudo sublinha a importância das ideias e dos interesses no resultado da política pública, considerando a interação dos atores no processo, o marco institucional, novas conjunturas críticas e configurações nacionais e internacionais. Os resultados indicam que a política pública de petróleo no Brasil segue uma trajetória calcada nas ideias vigentes durante o período, refletindo os interesses dominantes em cada fase. Além disso, a situação econômica doméstica teve papel-chave ao determinar a necessidade de seguir as recomendações de políticas econômicas das organizações financeiras internacionais.

Palavras-chave: política pública, economia política, institucionalismo, petróleo, Brasil e Petrobras.

Ideas y economía en las reformas de las políticas públicas del sector de petróleo brasileño: 1995 a 2010

Este trabajo examina los cambios en la gestión de los ingresos petroleros desde el período de las reformas orientadas al mercado de los años 1990 hasta el nuevo marco regulatorio del petróleo aprobado en 2010. Basado en la combinación de la perspectiva a largo plazo del institucionalismo histórico y en las herramientas del institucionalismo de la elección racional para modelar el comportamiento de los agentes, el estudio subraya la importancia de las ideas e intereses en el resultado de la política pública, considerando la interacción de los actores en el proceso, el marco institucional, nuevas coyunturas críticas y configuraciones nacionales e internacionales. Los resultados indican que la política pública de petróleo en Brasil siguió la trayectoria de las ideas durante el período, reflejando los intereses dominantes en cada fase. Además, la situación económica doméstica desempeñó un papel clave al determinar la necesidad de seguir las recomendaciones de políticas económicas de las organizaciones financieras internacionales.

Palabras clave: política pública; economía política; institucionalismo; petróleo; Brasil; Petrobras.

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1. INTRODUCTION

In her inaugural speech, President Dilma Rousseff referred to Brazil's pre-salt oil deposits¹ as a source of revenue for improving public services, reducing poverty and conserving the environment:

My government will have the responsibility of turning the enormous wealth obtained in the pre-salt beds into long-term saving able to provide present and future generations with the better part of that wealth, converted over time into effective investments in quality public services, poverty reduction and environmental value enhancement. We will shun hasty spending, which reserves only debts and despair to future generations. [Brazil, 2011]

This discourse clearly leans towards social democracy, premised as it is on the social distribution of outcomes from economic growth (Przeworski, 1991). By no coincidence it echoes elements of the regulatory framework introduced in 2010, given that Dilma Rousseff, as a highly influential minister of the Lula government, was the main architect of the new policy. Meanwhile, both the speech and the new regulatory framework contrast with the essence of the previous regulatory framework approved in 1997, which was more liberal.

This paper examines changes in Brazil's oil revenue management model in the period from 1995, when the Constitution was amended to permit passage of the 1997 Oil Law, to 2010, when new laws reshaping the sector's new regulatory framework were enacted. It aims at explaining the pathway between these two legal frameworks, considering that each represents a different regulatory model.

In order to explain this pathway, it will be shown that ideas are central to explaining these changes, not only because they offered novel solutions to existing problems, but also because of how they were adapted to interests (Hall, 1993). The economic context is also a constraint on public policy outcomes: a key element in the government's remaining in power was its ability to generate economic success in order to provide social spending. To achieve that in a globalized economy, however, it depended on international actors for investment (Sola, 2011). Considering the institutional framework, the new critical juncture and the new domestic economic and political settings, this study seeks to show the process in which those variables interacted to generate the two new regulatory frameworks.

From an empirical standpoint, this analysis is interesting for at least three reasons. The first relates to oil sector processes. The Brazilian case is an example of movement towards sector deregulation in the 1990s and then increasing State intervention in the 2000s, indicating reform processes that can serve as parameters for understanding changes in other countries. In addition, after oil was discovered in ultra-deep waters on Brazil's Continental Shelf, the oil sector became increasingly important to the future of Brazilian industry and to the national economy. In that respect, this study contributes to an improved understanding of Brazil's development prospects. Lastly, the study makes it possible to

¹ 'Geological location of rocks and oil reservoirs beneath the Earth's crust under the salt layer with ocean subsoil depths ranging from 4,000 to 6,000 meters and water depths of 1,000 to 2,000 meters' (Lucas, 2013:126). In 2006 oil and natural gas reserves were discovered that would make Brazil one of the world's top producers. Extraction of the hydrocarbons located there demanded advanced technology.

understand and situate a leading Brazilian corporation — Petrobras, Brazil's national oil enterprise — in the present scenario, in terms of its role and influence on the new legislation and of how it is influenced by related outcomes.

This last point needs some qualification as Petrobras turned the center of an extensive corruption scandal, that created a disorder in the Brazilian political system. Thus, the study objective is both historical and analytical. Historical in the sense that it provides a public policy perspective into a subject that is generally approached through technical or economic lenses, modelling the agenda setting and policy formulation in a different way. This leads to the analytical realm, as the study offers a perspective that organizes the oil policy path in Brazil in a way that can only be achieved with time-distanced perspective. In this regard, the study is an update in Brazil oil policy only to the extent that consistent policy analysis can afford. However, as there are important updates on this sector since 2010, this work's conclusion will point to the post-2010 changes, in order to indicate how fortune reversals affected the 2010 Oil Act elements.

From the theoretical standpoint, this analysis illustrates the dynamic in which the comprehensive view of new historical institutionalism is combined with the tools of rational choice institutionalism, which make it possible to understand moments of change.

The methodology and theoretical frame of reference applied in this study are described in the next section. In the analysis section, the theoretical model is used as a guide in identifying the components to be included in the study. The section begins by describing the development of the economic ideas, given that they were fundamental in determining oil policy outcomes. Then, drawing on the independent variables indicated by the chosen theoretical framework, it gives an account of the factors influencing the formulation of the 1997 and 2010 regulatory frameworks. Lastly, the conclusion sets out some implications of the study results.

2. METHODS

This study adopts a within-case methodology, nourished by process-tracing analysis. Information is based both on primary and secondary sources — the in-depth interviewees list is in the Appendix.

The within-case methodology as the analysis strategy is due to its advantages for dealing with processes that includes critical-junctures, as it allows a detailed and holistic process evaluation which helps understanding how causal mechanisms operates in specific contexts. This is more accurate for the case studies that adopts process tracing analysis in order to explain unique events, uncovering variables that are not evident (George and Bennett, 2005). Moreover, within-case studies are better indicated for research objectives that include hypothesis formulation, searching for internal validity, and where the causality is based on mechanisms (Gerring, 2007).

In the other hand, process tracing is indicated to identify intervenient mechanisms (Mahoney et al., 2007), being crucial for small samples analysis (Tilly, 1997), because it highlights differences between causal mechanisms correlations (Mahoney, 2003).

In connection to the methodological choices, in the theoretical realm, New historical institutionalism (NHI) has great explanatory power when used to examine long periods (in excess of 10 years), because it uses explanations that address institutional formation at 'critical junctures' that steer the situation into long-term trajectories that are hard to reverse, making it 'path dependent', because they

yield increasing returns ('positive feedbacks'). These concepts relating to the establishment of long-term trajectories offer the possibility of including the impacts that institutions cause long in advance of the moment under analysis, as well as the processes that institutions set in motion. However, one relevant criticism is that NIH fails to explain the choice of actors, because it deals with 'critical juncture' periods, such as moments of contingency, when choices taken have momentous, but almost completely unpredictable, impacts on the future (Mahoney, 2005).²

One solution for explaining moments of heightened contingency would be to use the new Rational Choice Institutionalism (RCI), which offers tools for modelling actors' choices at critical junctures. In that regard, actors' choices are instrumental decisions consciously taken on the basis of existing institutional arrays, making it possible to explain options, potential payoffs and actors' preferences. RCI theories suited to this kind of use would meet certain requirements. First, they should operate in terms of bounded rationality, but they should not exclude the use of inductive method in determining actors' goals. Second, they should make it possible to understand situations of critical juncture and the concept of path dependence, as perceived by NHI theories (Mahoney, 2005). That is, it is necessary to use rational choice theories that are not at odds with a historical understanding of the situation, and admit the use of inductive method, but also allow moments of change to be understood as periods when decisions taken tend to be difficult to alter, as well as having relatively greater future impacts.

To summarise, the theoretical pathway combines the complementarity between RCI and NIH. While NIH identifies critical junctures at which actors' choices entail embarking on long-term trajectories that are difficult to modify, RCI makes it possible to analyse strategic decisions taken in times of change. The combination of the two approaches gives a more complete understanding of long-term processes, including mechanisms by which actors make choices at decisive moments. In this way, RCI is used to complement NIH in order to model actors' behaviour at critical junctures.

Specifically, the Institutional Analysis and Development Framework (IAD), an analytical tool developed by Ostrom (2007), will be used for the RCI analysis in keeping with two principles. Firstly, it is the actors' proclivity that decides which of the available behavioural options will be taken. In addition, decisions are understood using the actor's subjective view at the moment the decision is taken. This recommendation, assumes that values which the actor attributes to the elements of the model do not reflect any objective reality, but rather the actor's own subjective view (Mahoney, 2005).

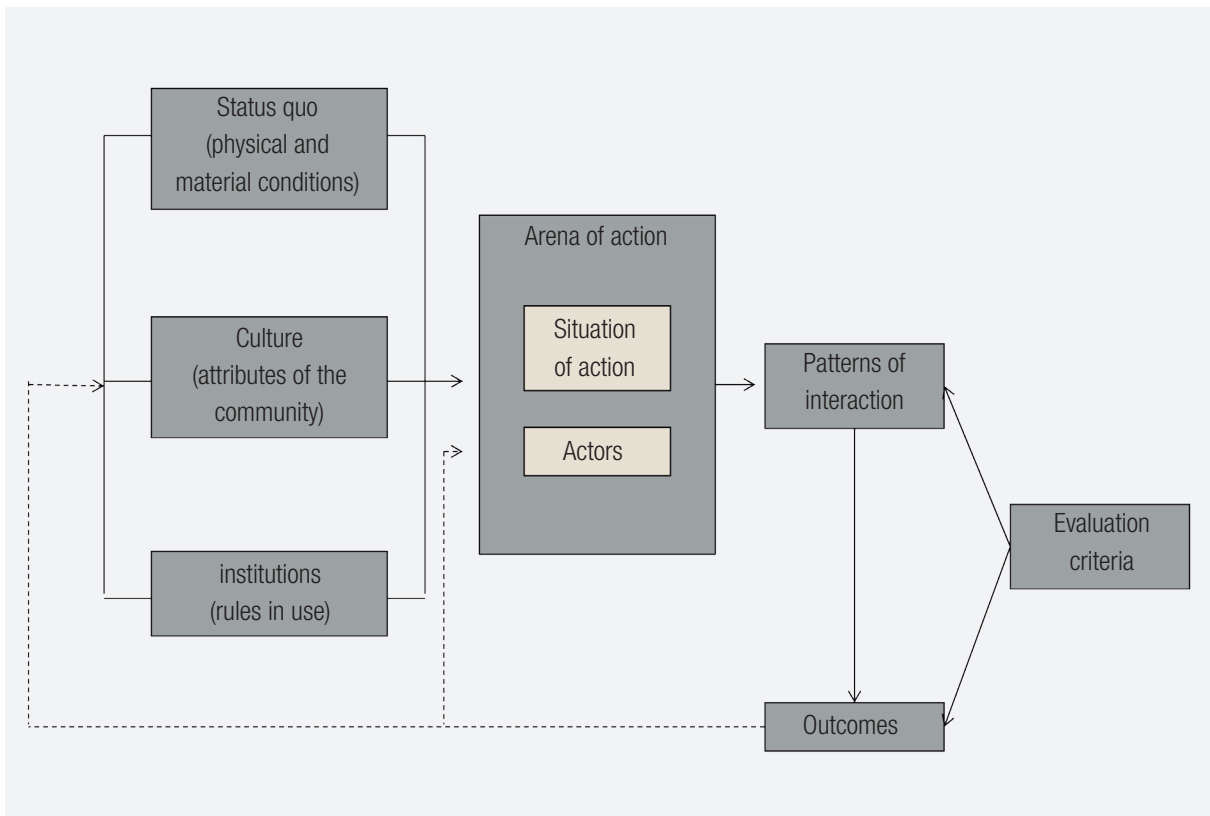
IAD is a theoretical framework within the RCI field, developed in order to study how political science paradigms affected the way public administration and metropolitan organisations were conceptualised (Ostrom, 2007:46), and was used to study common-pool resources, in areas relating to irrigation, forest resources and, more recently, ecological systems, biodiversity preservation, cooperatives, fisheries and others.

The IAD model, as outlined in figure 1, is made up of three parts. The first comprises the model's three independent variables: status quo, culture and institutions. The second is the dependent variable, comprising three interrelated components: 'action arenas', through which 'patterns of interactions' lead to 'outcomes'. Finally, the model also includes the possibility of using 'evaluative criteria' on both the 'patterns of interactions' and the 'outcomes'.

² The theory used to support this work is detailed in Trojiciz (2016).

It should be outlined that culture, as an independent variable, encompasses ample visions of reality that condition the way ideas evolve, and shape public policy pattern in the long run. In this regard, as explicit in figure 2 and 3, culture includes ideas and ideology, but is not limited to it.

FIGURE 1 INSTITUTIONAL ANALYSIS AND DEVELOPMENT FRAMEWORK



Source: Ostrom (2007).

Rather briefly, IAD is a multi-level conceptual map, in which the core of the analysis consists in ‘action arenas’, which indicate the social space where the individuals interact, exchange goods and services, solve problems, dominate one another or fight (Ostrom, 2007:28). Action arenas are conditioned by the existing status quo, culture and institutions and, in the action arena, patterns of interactions are generated which lead to outcomes. IAD proposes applying evaluative criteria to both patterns of interactions and outcomes. The evaluative criteria highlight the components that guide actors’ decisions. Lastly, the outcomes affect both the action arena and its conditioning factors: status quo, culture and institution.

The ‘outcome’ in the model shows how public policy formulation indicates a new practice. Therefore, some clarification regarding ideas and practices is needed. For Ostrom (2007), policies are institutions, that are influenced in its genesis by ideas, but once in place, has effect on reshaping ideas as well. This shows IAD circularity, but as the model aim is to explain agenda setting and pol-

icy formulation, it starts with culture (or ideas) as the independent variable. However, it does not preclude the inverse causality.

3. ANALYSIS

3.1 ECONOMIC IDEAS IN BRAZIL

As this study argues for the importance of ideas in oil policymaking in Brazil, that will be the starting point of the analysis. As is well known, between 1930 and 1980, Brazil pursued a development policy that included substantial State intervention in markets. That period ended with the debt crisis of 1982, a milestone in contemporary Latin American history, because it interrupted a period of economic prosperity based on a model where the State played a key role in promoting development. Highly-indebted countries that, like Brazil, had heavily borrowed from commercial banks during the 1970s were the most hard-hit, as the recession reduced their capacity to generate foreign exchange, while higher interest rates increased the strain of debt service (Almeida, 2001; Arienti, 2010; Portela, 1994).

In contrast with the multilateral institutions' orthodox recommendations for tackling the crisis, the guidelines that prevailed in Brazil's 1988 Federal Constitution included a number of national-developmental provisions. These constitution features became stumbling blocks to the process of market-oriented reforms initiated by the Fernando Henrique Cardoso (FHC) government and raised calls for constitutional amendments. It was not until the Real Plan³ had assured monetary stability that structural reforms were introduced to reshape relations between State and society. Those reforms — including market deregulation, privatisation of State assets and economic openness — were carried out during the first FHC administration (1994-98) (Couto and Abrucio, 2003:277).

From the 2000s, a slow decline in neoliberal hegemony initiated, evidenced by the failure of the 1990s neoliberal reforms, greater economic growth in countries that — like China and India — had taken different paths, and the rise of progressive or centre-left governments in Latin American countries. Moreover, there was now mounting evidence of the need for the State to regulate the market, especially in the light of the 2008 financial crisis and China's growing importance in the world economy: its increasing demand for commodities galvanised a number of countries (especially Brazil) and afforded greater latitude in adopting novel ideas of how the economy was to be conducted (Miguel, 2011; Gaitán, 2011; Evans, 1993; Rodrik, 2007; Diniz, 2011; Boschi, 2011; Loureiro, 2012:17; Barros de Castro, 2008).

Ideas do not materialise from the void; instead, they appear as solutions to existing problems and are anchored in concrete, material political interests. Peter Hall (1993:275-276) illustrates this dynamic in the United Kingdom, where in the late 1970s Margaret Thatcher reoriented the nation's macroeconomic policy in line with the monetarist paradigm. By advocating a different economic

³ The Real Plan was a successful stabilisation plan introduced in Brazil in 1994, that was able to end an era of very high inflation. The plan was drawn up by Fernando Henrique Cardoso while Minister of the Economy. The plan's success was decisive in Cardoso's election as president that same year.

paradigm, she managed — besides accommodating pressure from interest groups — to transfer to herself, in political terms, what the monetarist model promised economically. One example was curbing the power of the trade unions, a prior condition for maintaining the Conservative Party in power (Hall, 1993): the demise of the preceding Labour and Conservative governments was regarded as having resulted from their lack of control over union-led strikes (Gourevitch, 1986). In addition, the new canon was supported by the English media and by the financial sector, its main direct beneficiary (Hall, 1993:286-290). In short, this example shows how the process in which these ideas gained legitimacy was linked to the demand for solutions, but also to party political preferences (reducing the power of the trade unions), political interests (electoral victory), economic benefits (financial sector) and support from sectors of society that would benefit from the changes (media and financial sector). This attests to the fact that ideas do not flourish to the detriment of interests, but rather in combination with them.

French economic policy of the early 1980s is particularly useful to illustrate the Brazilian case. Unlike other advanced capitalist countries, France actually turned away from the post-war social democratic consensus to adhere to a more leftist economic programme. The departure from the norm attempted in the first year of Mitterrand's administration represented an escalation of the trend. However, recessive world conditions stemming from the United States' restrictive macro-economic policy adopted in 1981 prevented the continuity of this movement, as France's international economic integration made it dependent on foreign capital for its exports and investments (Gourevitch, 1986).

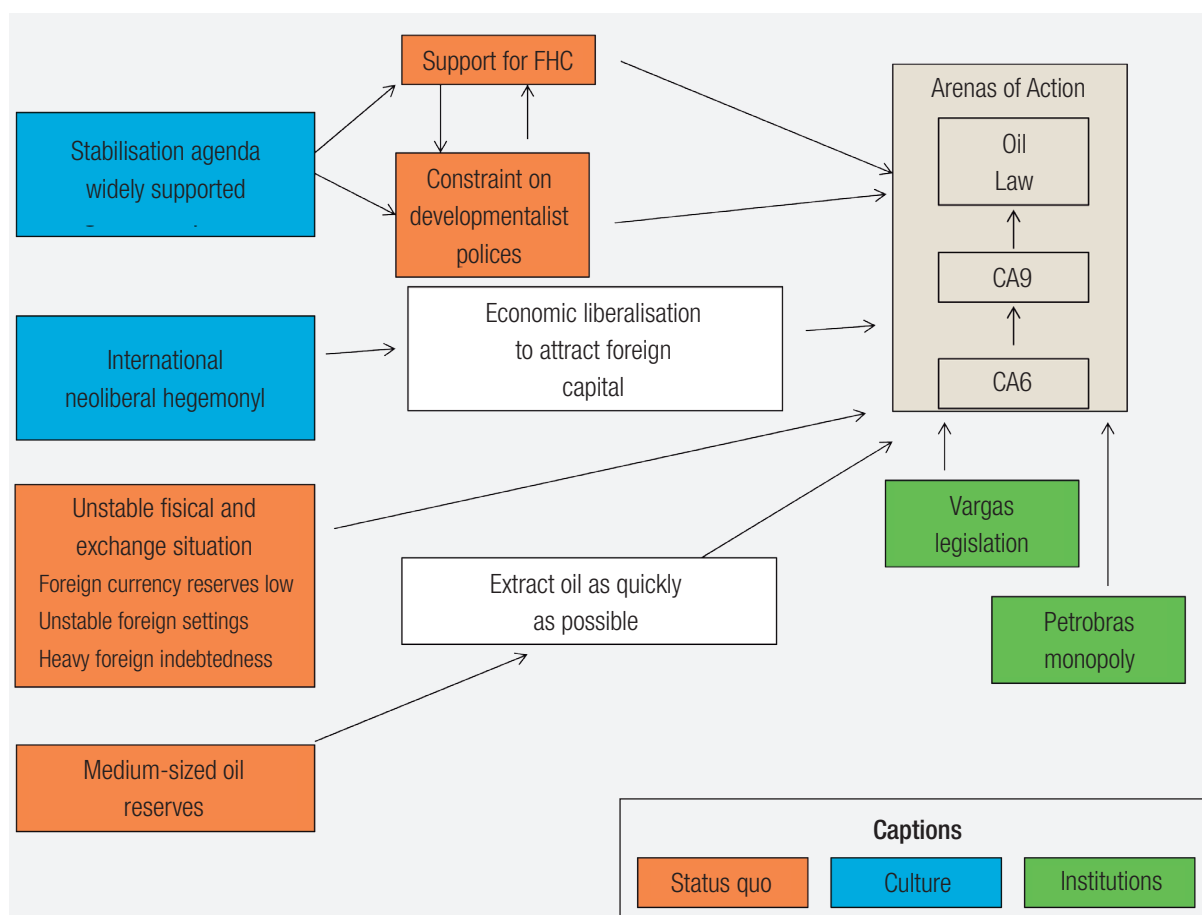
The similarities between this and the Brazilian case rest on how important the country's international placement was to its policymaking. As the 1997 Oil Act analysis will show, during the Cardoso administration, Brazil endured a barely satisfactory economic situation and depended on validation by multilateral bodies to gain the confidence of foreign investors. Thus, its international position significantly influenced the government's receptiveness to ideas advanced by multilateral bodies (Loureiro, 2012; Oliveira and Turolla, 2003, Kugelmas, 2011).

The intention here is to underscore that Brazil's vulnerable economic situation during the 1990s made it dependent on foreign investment to generate growth and, accordingly, dependent on the international organisations' approval in order to increase the capital flow into the country. The constraints that globalisation imposed on the economic dimension, their influence reflected in the government's potential to meet public demands and in its approval ratings, pointed to the need to apply measures aligned with the international organisations' recommendations not just as economic imperatives, but also as a strategy for maintaining the incumbent government in power, as will be shown below.

3.2 EMERGENCE OF THE 1997 OIL LAW

In this section, the oil policy's formulation will be analysed, considering the independent variables in order of importance: ideas are pivotal, followed by the economic context, politics and oil reserves. The institutional setting will be described in order to introduce the constitutional reforms that made it possible for the 1997 Oil Law to be approved in Congress. The main features of the new bill follow, and then its consequences. Figure 2 illustrates the factors at work in the emergence of the 1997 Oil Law, and may be used as a summary of this section.

FIGURE 2 EMERGENCE OF 1997 OIL LAW



Source: Elaborated by the authors.

The rise of neoliberal ideology had great influence on Brazilian public oil policy outcomes in the 1990s: this was the period when the liberalisation then ongoing was structured substantially in Brazil and succeeded in removing constitutional hurdles, which had never been achieved before (Couto and Abrucio, 2003).

This structuring is connected with the international position Brazil came to assume after the 1982 debt crisis, when it became more vulnerable to pressure from the multilateral bodies, which in turn were dominated by the interests of the central capitalist countries, especially the United States and its financial sector (Portella, 1994; Arienti, 2010).

Since the debt issue was not settled until the early 1990s, throughout the 1980s Brazil was a debtor to the multilateral bodies and, as a result, had very little public and foreign investment. Actually, this was the key factor accounting for its low economic growth rates, which affected the government's capacity to provide well-being to the population, in addition to contaminating the government's popularity ratings (Sola, 2011).

The introduction of market-oriented reforms was made possible in Brazil partly by a majority coalition supporting the government, which prevented the federal legislature from raising insur-

mountable barriers. For most of the FHC administration, relations between the government and the legislature were not based on the Executive's isolation or autonomy, as is evidenced by its need to negotiate to approve the new legal framework. Thus, even though the Executive did play a pivotal role in setting the agenda of reforms to align State and market (Almeida, 1999:2), the Legislative managed to impose its preferences (Souza and Pereira, 2013:50).

Still in the realm of ideas, it is worth stressing that, for Brazil, the Real Plan represented a change in cognitive framework, in that the stabilisation it achieved was almost unanimously viewed as a public good to be preserved. Under that influence, the government was unable to introduce developmentalist goals onto its agenda. By the same token, the popularity of the stabilisation agenda accounted for a substantial part of the support for President FHC, both in electoral terms and as regards his ability to retain the support of a broad coalition in Congress (Couto and Abrucio, 2003).

Two elements are thus worth highlighting as regards the effects of the Real Plan on public policymaking for the oil sector. In the first place, the Real Plan was widely supported by both public and politicians, and that support was transferred to FHC as the 'father' of the plan, allowing him greater room for political manoeuvring. Secondly, the very success of the Real Plan also limited the scope of the economic policies to be implemented, preventing growth targets from being introduced onto the agenda. In other words, the existing configuration constrained the action of the economic policymakers.

Inflation control was the predominant concern throughout the period: achieving single-digit inflation both met a basic, necessary condition for any strategy to advance the country and transferred legitimacy to the president, which was used to promote market-oriented reforms. Other concerns related to this basic core were fiscal adjustment, poor economic growth and the State's lack of investment capacity. The need for fiscal adjustment is related to a weakly performing balance of trade and poor economic growth, while the State's deficient investment capacity was the obverse of fiscal adjustment. These elements in combination made the policymakers' case for attracting private capital: the State was unable to invest enough to optimise outcomes in the various reformed sectors. In the specific case of oil, there were claimed to be no State or Petrobras funds available to invest adequately to meet the sector's demands (Couto and Abrucio, 2003; Diniz, 2011).

Another constraint worth noting is the size of Brazil's oil reserves at the time the Oil Law was enacted. This clarifies a point where opinions diverge as to whether or not it was appropriate to introduce the new regulatory framework after the discovery of the pre-salt oil deposits. One of the features of the 1997 regulatory framework was a fiscal regime based on concessionary license agreements.⁴ The 2010 regulatory framework introduced the possibility of adopting a fiscal regime based on production-sharing agreements⁵ in strategic exploration areas, which the pre-salt deposits were considered to be. To those advocating the production-sharing model, Brazil's new status as a holder of major oil reserves was a good reason to introduce the change (Bercovici, 2011).

The size of the deposits was an important factor in the 1997 legislation, which set the remuneration to be offered to concession holders. The Brazilian government's take⁶ from concession regime

⁴ Oil fiscal regime based on exploration concessions with taxes and royalty payments. The oil extracted belongs to the concession holder.

⁵ Oil fiscal regime where the concession holder shares the profits with the State after exploration costs are amortised. The oil is property of the State after extraction.

⁶ State appropriation of financial income from oil exploration.

agreements is among the lowest internationally. This reflects the high risk involved in exploration, that is, as exploration in a given territory may often result in dry wells, the exploration regime must offer returns attractive enough to encourage companies to incur such risk. In this way, Brazil's endowment with oil reserves affected the regulatory framework. Secondly, medium-sized deposits meant a situation where oil was not exactly strategic to Brazil. Hence, the government — given the prospect of a fall in oil prices at that time (Siqueira, 2013:249), exacerbated by the world's rising awareness of renewable energy source use — had designed a regulatory framework with a view to extracting the deposits as quickly as possible (Bercovici, 2011), so as to activate the economy and provide the State with revenues that were likely to result from increased exploration. Thirdly, in the concession regime, investment in exploration is wholly funded by the concession holder, while the State begins to appropriate mineral rents immediately after production; accordingly, that regulatory framework was consistent with a fiscal situation where the State lacked financing capacity. Supporting rapid oil extraction would also yield higher fiscal revenues from associated sectors, inflows of oil exploration venture capital would increase and Brazil's oil production chain would be strengthened, as ensured by minimum local content clauses. These components influenced policymakers, who — believing that oil extraction values would decline in future — provided higher incentives for immediate exploration than for keeping the reserves untapped underground (Bercovici, 2011; Siqueira, 2013).

The institutional framing for the oil industry consisted of legislation dating from 1938, which — despite amendments under a more liberal government (1946-1951) and during the military period (1967 Federal Constitution) — upheld the basic nationalistic features (Bercovici, 2011). In addition, detailed provisions regarding public policies entrenched in the Federal Constitution (Couto and Abrucio, 2003) meant that reform of the sector would require constitutional amendments (Bercovici, 2011). Two constitutional amendments are of interest here: Constitutional Amendment No. 6 (CA 6) and Constitutional Amendment No. 9 (CA 9), which were necessary for the reform goals to become law.

CA 6 changed the concept of 'national company', giving equal treatment to all national and foreign capital companies domiciled in Brazil. A second step toward the reform was to liberalise the Petrobras monopoly of oil-related operations written into the 1988 Federal Constitution. CA 9 withdrew the power granted to Petrobras of being the sole operator of the monopoly, though the Union still retained the monopoly over this natural resource (Bercovici, 2011:252).

CA 6 and CA 9 combined to allow foreign companies to participate in oil exploration in Brazil and ended Petrobras's monopoly over oil exploration. Constitutional ties had been thus removed to allow the sector to be liberalised and regulated by the Oil Law.

The 1997 Oil Law features four key components, with differing levels of impact and importance. The first component, relating to the 'downstream' portion of oil production,⁷ deregulated the prices of oil, oil by-products and natural gas. This move was considered critical to attracting investments in the sector and was a prerequisite for building an environment attractive to private investment. The process was conducted gradually, eliminating pricelists and equating with regional prices, bringing

⁷ The oil production chain is considered in two stages, downstream and upstream. Downstream comprises refining, transporting, distributing, and selling of oil by-products, while upstream consists of oil exploration, production, and transportation.

an end to subsidies and lowering barriers to companies' entering the distribution and selling arenas (Zylbersztajn and Agel, 2013:56).

The second component was the new dynamics of oil exploration and production, with Petrobras losing its monopoly and the regulatory National Oil Agency (*Agência Nacional do Petróleo, Gás Natural e Biocombustíveis*, ANP) taking on the role of public policy driver and regulator for the sector, in line with the prevailing model of State reform. Upstream actions were based on two political commitments. The first was to restructure the State's actions in the sector, with the ANP, the regulatory body, endowed with administrative and financial autonomy. The second was to keep Petrobras under State control and operating throughout the whole oil production chain (Pires et al., 2013:84-85).

The third component introduced the concession regime in Brazil. In this system, the concession holder/licensee acquires the right to explore an area specified by the ANP in a bidding process or 'bidding rounds'. It then invests in that area and, in case oil struck, pays royalties and special takes to the Brazilian State in accordance to the field's location and productivity. The concession holder is fully responsible for investment costs and is not eligible for any kind of reimbursement or indemnification should exploration fail. The Brazilian concession model also changed payment of government and third-party shares into oil exploration rents.⁸

Lastly, the National Energy Policy Council (*Conselho Nacional de Política Energética*, CNPE), a body reporting to the Brazilian Presidency, was set up to ensure that Brazil's energy resources are used rationally, specifically by setting national energy policy goals (Article 1). However, the CNPE was not regulated until 2000, which goes to show that its role was insignificant during the Cardoso administration, a situation that changed under the Lula government.

As a result of the new model, oil went from 2.75% of Brazil's GDP in 1997 to 10.5% in 2005 (Felipe, 2010:91). Moreover, Petrobras was strengthened (to which its State-owned, vertical and integrated company status contributed) and was able to preserve its autonomy and influence, which were used to leverage its position in the new competitive setting (Felipe, 2010:275-276) and substantively increase its profitability in upstream activities, which in 2008 were worth in excess of 37 billion Brazilian reals (BRL). The ANP, responsible for regulating the oil industry, was a key building block in the new institutional framework. One major initial challenge it faced was to replace Petrobras as the State's agent in the sector, while at the same time regulating the national oil enterprise (Zylbersztajn and Agel, 2013:59-60).

The period following introduction of the new legislation was one of soaring oil prices, with most exporting countries managing to increase their share in oil rents. In Brazil that did not happen, however, because the concession model in place was regressive. Meanwhile, production was concentrated in Petrobras, enabling the company to appropriate a large part of the positive earnings from oil exploration in Brazil, accounting for its significantly higher earnings (Felipe, 2010:272). That is, one

⁸ Formerly, in addition to the taxes levied on production, royalty payments were limited to 5%. The rate now ranged from 5% to 10%, depending on geological risks, production estimates and other factors. New forms of payment were introduced, namely, Special Participations, Signature Bonus and Payment for Area Occupation or Retention. Special Participation is levied on highly productive fields at rates that vary in accordance with the volume of oil produced, the location of the exploration and years of production (Pires et al., 2013:85). Historically, the amounts collected as royalties and as Special Participations are similar, and together amount to about 90% of total government takes.

explanation for the company's increased value is premised on significant appropriation of the surplus generated by oil exploration in Brazil. However, the surplus it appropriated caused the appropriations by the Brazilian State to dwindle. The appreciation in the company's worth after enactment of the Oil Law can thus be said to have occurred to the detriment of Brazil's public appropriation of oil rents. Another important consequence of the new model was that the substantial increase in oil production also substantially boosted the amounts redistributed to subnational entities in royalties and special participation payments, ultimately leading to a federative war over appropriation of these revenues.

A last word is in order about Petrobras as an actor. Even though the company had been shorn of its political monopoly of oil exploration in Brazil, it actively took part in fashioning the new law and as a result managed to maintain an economic monopoly in the sector. This was because it continued vertically integrated after passage of the new law. In addition, according to sources interviewed for this study (complete list in the Appendix), Petrobras's dominance in training highly skilled personnel for the sector meant that the details of the law were drafted in the company's favour, as was reflected in its financial success after 1997.

3.3 THE 2010 PRE-SALT REGULATORY FRAMEWORK

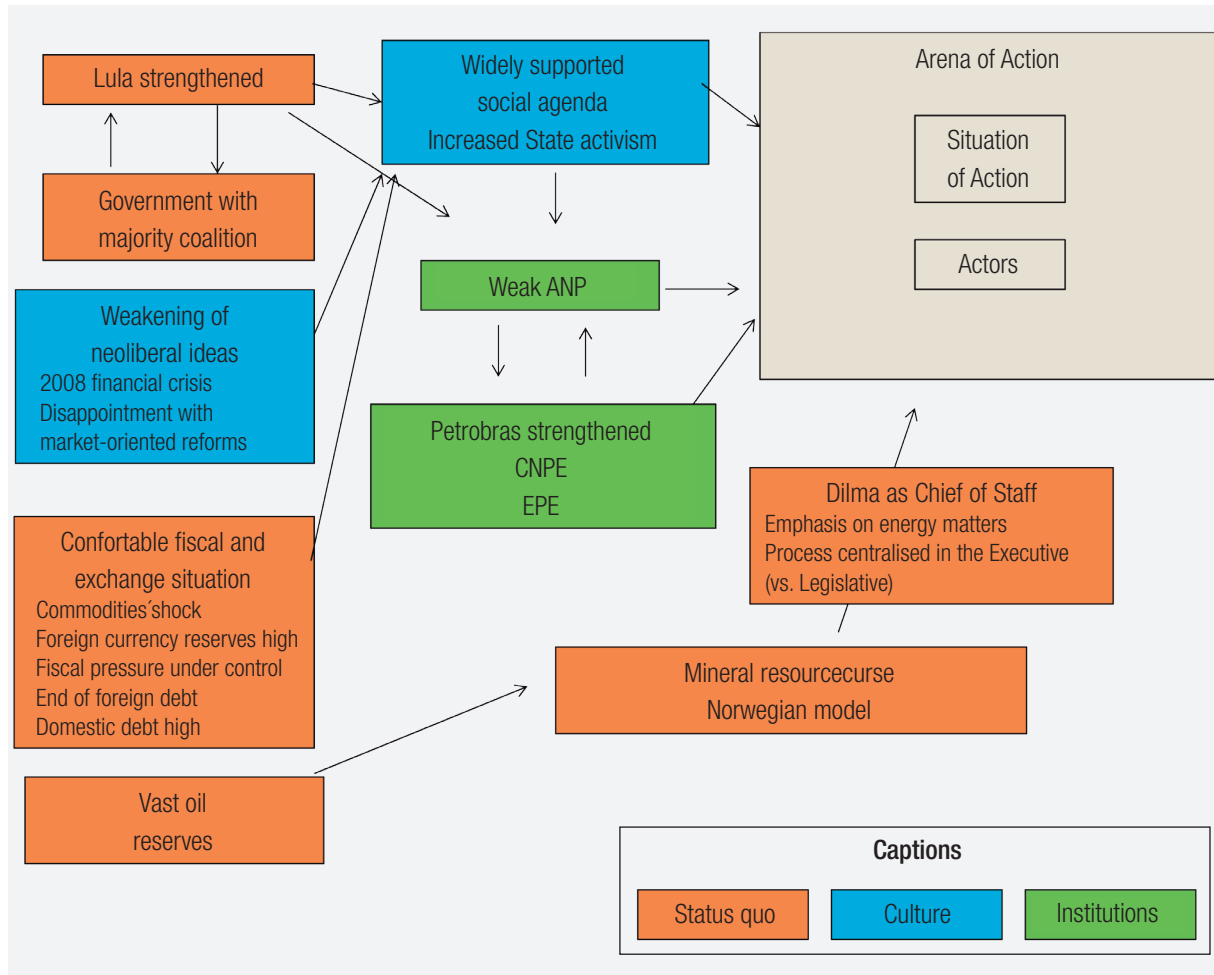
This section reports the genesis of the 2010 regulations, starting from discovery of the pre-salt deposits as a critical juncture that modified the industry, after which it considers the importance of the waning hegemony of neoliberal ideas, the favourable economic situation that Brazil was enjoying, as well as the institutional changes and the political context. It then points to the importance of the actions of President Lula and Minister Dilma Rousseff. Lastly, the main points of the new legislation are detailed. These items are outlined in figure 3, which offers a visual summary of the emergence of the 2010 oil regulatory framework.

The new regulatory framework introduced for pre-salt exploration responded to the mismatch between the existing framework and the new situation of abundant oil reserves (Bercovici, 2011; Gobetti, 2011). It also responded to party political interests, which included replacing the previous government's public policy, opposed by the Workers' Party (PT) government⁹ (Zylbersztajn and Agel, 2013; Lucas, 2013; Pires et al., 2013).

At the same time, the new regulatory framework was formulated at a time when neoliberal ideology was falling into disarray in Brazil. As mentioned earlier, this process had to do with disappointment at the uninspiring results of the institutional reforms of the 1990s (Miguel, 2011; Evans, 1993), which in Brazil was associated with the Cardoso government's poor economic growth record and loss of credibility on account of the 2001 energy crisis (Barros de Castro, 2008). These specific factors were influential in the PT's rise to the Presidency — a phenomenon paralleled in other countries that had implemented equally frustrating market-oriented reforms. Lastly, gestation of Brazil's new oil regulatory framework also proceeded under the influence of the 2008 financial crisis, which contributed further to the decline of neoliberal ideas (Boschi, 2011; Diniz, 2011).

⁹ The centre-left Workers' Party (PT) won the 2003 presidential elections, succeeding the Social Democratic Party (PSDB), which had been in power from 1995 to 2002.

FIGURE 3 EMERGENCE OF 2010 PRE-SALT REGULATORY FRAMEWORK



Source: Elaborated by the authors.

Brazil’s new status as a major holder of oil reserves reduced oil exploration risk to much lower levels than during drafting of the 1997 Oil Law, requiring a more modest range of benefits to attract investments. On the other hand, the extraction of ever-increasing volumes of oil is a major potential source of destabilisation (identified in the literature as the ‘resource curse’), something that Lula administration surely took into account when formulating the new oil policy.

The national economic context was benefitting from greater economic growth, largely due to major expansion in the volume and value of Brazil’s commodity exports, which in turn made it possible to ease fiscal pressure. Inflation had been under control for some time, allowing more room for measures to spur development. The State was thus better equipped in terms of investment capacity, which translated into greater leeway to adopt slightly more interventionist policies and to participate in investments (Barros de Castro, 2008; Filgueiras e Gonçalves, 2007; Miguel, 2011).

In contrast, during the Lula government, the movement was toward weakening the regulatory agencies, ANP included, while Petrobras, whose importance as a public policy tool had decreased

during the Cardoso government, regained influence and came to dominate the process leading to the drafting of the new legislation. Outcomes such as the agreement on onerous transfer of rights (*cessão onerosa*) and mandatory participation by Petrobras in all pre-salt exploration are seen by several sources interviewed for this study as evidence that the company was re-strengthened.

During the Lula administrations, two developments — besides the greater use being made of Petrobras as a public policy instrument — offset the relegation of the ANP: the CNPE gained in importance and an Energy Planning Company (*Empresa de Planejamento Energético*, EPE) was set up. The CNPE, which had been instituted by the Oil Law, was not regulated until 2000 (three years later), reflecting the lack of priority given to its role. Under the Lula government, the CNPE gained in importance and took over oil sector strategic planning, while the ANP was assigned operational activities only (Almeida, 2011). Along the same lines, the EPE — also operating in a space previously occupied by ANP — was set up in 2004 for the purpose of providing data on supply and demand in energy inputs on the domestic market (Almeida, 2011:126).

From the institutional point of view it is also imperative to consider the role of the private sector. The Oil Law succeeded in boosting the Brazilian oil chain, one highlight being the founding of national oil companies, including OGX and Queirós Galvão Exploração e Produção (QGEP). The foreign companies that entered the country after enactment of the Oil Law were not found to have influenced the new regulatory framework. The new policy does not offer them any advantages in comparison with the previous situation. On the contrary, in the pre-salt regulatory framework, only Petrobras can operate during the exploration phase, leaving private oil companies only a funding role in exploration.

The pre-salt regulatory framework was approved during President Lula's second term of office, when the government coalition was strengthened by the adhesion of the PMDB.¹⁰ President Lula relied on the resulting large majority in Congress to pass proposals, such as the new oil regulatory framework. The dynamics underlying approval of the Oil Law was largely determined by the federal Executive. The second Lula administration was characterised by the President's great popularity and, after the PMDB allied with the government, his personal intervention, often required to surmount the heterogeneity of the government's congressional support base. Coupled with the weakening of the political parties as a result of the electoral law, this further heightened the concentration of power (Sallum, 2008).

A key role was reserved to the then Presidential Chief of Staff, Dilma Rousseff, in drafting the new oil legislation. Having been Minister of Mines and Energy and with a public service track record in the energy sector, Minister Rousseff retained her influence over the Ministry of Mines and Energy after she was sworn in as Chief of Staff and even managed to elevate the importance of energy on the government's agenda.

Discovery of the pre-salt deposits prompted the Executive to draft four bills, which became three laws. Law No. 12,276, of June 30th, 2010, 'authorises the onerous transfer, from the Union to Petrobras, of rights to oil and natural gas surveying and exploration activities in non-licensed areas of the

¹⁰ Centre-right party, at the time with the largest number of representatives in the lower house of Congress.

pre-salt'. This led to an increase in the Union's capital share in Petrobras, substantially capitalised the company and enabled it to appropriate considerable rents.

Law No. 12,304, of August 2nd, 2010, authorised the Executive to set up the Brazilian Oil and Natural Gas Administration Enterprise (*Empresa Brasileira de Administração de Petróleo e Gás Natural — Pré-Sal Petróleo S.A.*, PPSA), a state-owned company reporting to the Ministry of Mines and Energy, whose duties are to engage in management and supervision and to represent the Union in all production-sharing contracts signed by the Ministry of Mines and Energy, but do not include operational functions. Lastly, Law No. 12,351, of December 22nd, 2010, instituted the Social Fund and stipulated that exploration and production of pre-salt deposits would be under the production-sharing regime (Bercovici, 2011).

Law No. 12,351 introduced the production-sharing regime for the exploration of the pre-salt deposits and provided establishment of an investment fund, to which part of mineral rents will be channelled. The Social Fund is intended to:

constitute a source of revenues for social and regional development in the form of programmes and projects to fight poverty and for development specifically in the areas of education, culture, sport, public health, science and technology, environment, and climate change mitigation and adaptation.

The new regulatory framework fosters a clear increase in the State's take from the oil sector, firstly by instituting PPSA, with mandatory participation in all exploration consortia and, secondly, by relying more heavily on Petrobras as a public policy tool. The latter became the operator of all the consortia, in which it must hold a minimum 30-percent share, and it is steadily capitalised through onerous transfer of rights and exempt from payments to the government on production originating in areas so transferred (Gobbeti et al., 2011:21).

Introduction of the new regulatory framework had a series of implications. The first was the ensuing impasse among the constituent units of the Brazilian federation on distribution of oil revenues. This issue was not addressed by the new legal framework, but nonetheless loomed on the political agenda due to its importance for the 2010 electoral debate. Secondly, the new regulatory framework established a minimum content requirement that, due to the magnitude of funding required for exploration, may entail sector shifts in Brazil's economy. Thirdly, and connected with the previous item, Petrobras's mandatory minimum 30-percent participation in pre-salt explorations entails that it must provide a significant part of exploration funding. Finally, the new regulatory framework makes for greater State activism, which is criticised by liberal-leaning groups on the argument that it will lead to contract insecurity and increased risk-taking by the Brazilian State. Figure 4 summarises the factors influencing the two oil regulatory frameworks.

FIGURE 4 CHANGE IN STUDY VARIABLES

		1997	2010
Dependent variable	Oil regulatory framework	End of Petrobras monopoly Concession ANP set up CNPE set up	Onerous transfer of rights Production sharing PPSA set up Social Fund
	International ideological context	Neoliberal hegemony	Financial crisis of 2008 and weakening of neoliberal tenets
Independent variables	National economic context	Fiscal adjustment Poor economic growth Recent inflation State cash-strapped No commodity boom	Absence of fiscal adjustment High economic growth Inflation under control State comfortable Height of commodity boom
	National political context	Coalition: PSDB + DEM + PTB; later, PMDB + PPB FHC	Coalition: PT + PMDB + PSD + left-wing parties Lula Dilma's role
	Institutional framework	Getulio Vargas's legislation Petrobras monopoly	Weak ANP Petrobras strengthened CNPE and EPE
	Importance of deposits	Moderate	Pre-Salt

Source: Elaborated by the authors.

4. CONCLUSION

This study sought to understand the recent history of oil sector public policy in Brazil, aiming both at clarifying how it evolved and shedding light on the controversial issues surrounding the process. The theoretical framework adopted combines the comprehensive view afforded by historical institu-

tionalism with the ability to examine actors from the perspective of rational choice institutionalism. This helped analysis of the actors' decision making in a long-term process. Meanwhile, the backdrop of theoretical debate was given by the discussion of relations between institutions and agency, i.e., how actors and institutions affect change.

Together with the interests they represent, ideas constitute a key variable in the change in legal framework at two turning points: the 1997 Oil Law and the 2010 pre-salt regulatory framework. In the first case, the hegemony of neoliberal ideology made market-oriented reforms central elements of government programmes during the 1990s. In the case of Brazil, that hegemony was further strengthened by the country's international position, its economy too weak to afford governments independence from the positions of multilateral bodies, the loci from which the hegemonic position radiated. At the same time, the stabilisation agenda had strong support, bolstering President Fernando Henrique Cardoso's authority and narrowing the space for potential public policy options. Finally, the volume of existing oil reserves and the outlook for the oil industry guided the legislation towards a structure of incentives that assumed the deposits would be quickly depleted.

Discovery of the pre-salt deposits was framed by an entirely different situation. In the realm of ideas, the hegemony of neoliberal ideology was in decline as a result of the meagre growth resulting from neoliberal economic reforms, assisting the centre-left political elites in their rise to power. Nonetheless, these elites were able to shift their administrations' ideological bias only because of the greater independence granted by the more favourable economic setting. This possibility translated into public policies, including the pre-salt regulatory framework, in which components providing for greater State intervention (production sharing and onerous transfer of rights, and the creation of *Pré-Sal Petróleo S.A.*) provided the basis for structuring the Pre-Salt Social Fund for the purpose of social sharing of oil revenues.

Lastly, some elements regarding the oil regulation evolution after the 2010 act are in order. Since 2013, strong waves of turbulence affected the Brazilian political system: in June 2013, massive street protests changed President Dilma high approval rates, starting a process that led to her impeachment. There are two changes that relate to the oil regulation worth underlying. The first one regards the distribution of public resources derived from oil exploration, enacted right on September 2013, under popular pressure for an increase on budget resources for Education and Health. Law No. 12,858, approved on September 9th, 2013 established that resources originated on oil royalties and special participation, should be directed to Education and Health budgets in a ratio of 75% and 25% respectively. This affected not only the Federal resources, but also State and Municipal ones, for all the fields that became commercial after December 3rd, 2012 (this date relates to prior presidential veto on a horizontal federal dispute around those resources).

The second one aims to change the Law No. 12,351, that introduced the production-sharing regime. According to this change, Petrobras will no longer be compelled to hold at least 30% of the exploration consortium, and the company will no longer be the only eligible to operate the pre-salt fields.

In fact, this change indicates a reversal on the interventionist nature of the 2010 act, aligned to a more pro-market direction of the government that succeeded Dilma and the Workers' Party.

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APPENDIX — LIST OF INTERVIEWEES

N. 1 — former employee of Petrobras, advisor to the lower house of Congress. Interviewed in January 2012.

N. 2 — research and planning specialist with Ipea and employee of the Ministry of Finance; oil specialist. Interviewed in January 2012.

N. 3 — advisor to the lower house of Congress. Interviewed in May 2014.

Adriano Pires — advisor to the general director of the ANP, oil import and export superintendent and ANP supply superintendent during the Fernando Henrique Cardoso government. Interviewed in January 2012.

Gilberto Bercovici — professor of Economic Law and Political Economy, São Paulo University Law School, oil specialist. Interviewed in December 2011.

Helio Tollini — budget consultant to the lower house of Congress and responsible for analysis of the bill that established the Social Fund. Interviewed in January 2012.

Ildo Sauer — former director of Petrobras, and now director of the São Paulo University Energy and Environment Institute (IEE-USP). Interviewed in December 2011.

Paulo Springer de Freitas — legislative consultant to the upper house of Congress, specialist in mines and energy. Interviewed in December 2011.

Philippe Henri Reischstul — president of Petrobras from March 1999 to December 2001; responsible for restructuring the enterprise. Interviewed in December 2012.

Reneu Silva — technician with the Energy Research Enterprise (EPE). Interviewed in January 2012.