



Regulatory capture by default: Offshore exploratory drilling for oil and gas



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HIGHLIGHTS

- Regulatory capture occurs when ambiguity exists about environmental protection standards for new types of activities in the marine environment.
- A typology is developed from theories of regulatory capture (RC) and applied to cases of offshore exploratory drilling.
- The typology is applied to offshore natural gas reserves discovered in 2010 offshore of Israel in the Mediterranean Sea.
- Temporal aspects (anachronistic laws and regulations) and spatial aspects (jurisdictional ambiguity) have created regulatory vacuums leading to RC.
- Comprehensive marine spatial planning would result in less capture and the development of more capture-resistant regulations.

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ABSTRACT

This article examines a form of regulatory capture that occurs when significant ambiguity exists regarding the environmental protection standards for new types of activities in the marine environment. To begin with, there is little research that categorizes the typologies of regulatory capture despite the ubiquity of the phenomenon. After a discussion of theoretical approaches to regulatory capture, I describe the operative definition and theory appropriate to the situation related to authorization of oil and natural gas production in Israel following the discovery of large offshore reserves in 2010. This approach, embodying several facets of existing typologies, is applied to decisions made authorizing construction of the Gabriella offshore exploratory drilling platform. The analysis highlights the nature of capture in the absence of clear agency jurisdiction over new activities located in offshore environs organized as temporal and spatial “vacuums”. I conclude that comprehensive marine spatial planning would result in less capture and the development of more capture-resistant regulations.

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“If the government is to tell big business men how to run their business, then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order to not be restrained too much by it?” – President Woodrow Wilson, 1913¹

1. Introduction

The popular adage of Moses taking a wrong turn when he allegedly led the Israelites out of Egypt was debunked with the recent discovery of very large deposits of natural gas off the coast of Israel in 2010. Despite the exaltation of these discoveries in the public eye, environmentalists are concerned about damage these new drilling activities

could cause to marine and shore resources. Sensitivities are heightened by uncertainty about the ability of the Israeli authorities to respond to accidents, especially in the wake of recent US experience with British Petroleum's catastrophic Deepwater Horizon blowout that began in the Gulf of Mexico in April of 2010.

Israel has a reasonably advanced set of environmental policies and perhaps due to its small size (approximately 21,000 km²), a centralized legal regime with a strong centralized regulatory planning structure (Tal, 2002). Yet the country's environmental establishment has been faced with unexpected challenges due to commencement of offshore oil and natural gas extraction following sanctioned exploration. Much of the activity is slated to occur within Israel's exclusive economic zone – in an area between 40 and 70 nautical miles from the shoreline – which is outside its official legal jurisdiction (Hason et al., 2011). However, even within the country's territorial waters² statutory requirements are

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¹ Wikisource.com.http://en.wikisource.org/wiki/The_New_Freedom:_A_Call_for_the_Emancipation_of_the_Generous_Energies_of_a_People (accessed August 29, 2013).

² Territorial waters, or territorial sea, is a boundary limitation stipulated by the United Nations Convention on the Law of the Sea (UNCLOS) indicating a belt of coastal water area regarded as sovereign territory of the adjacent coastal nation. It

underdeveloped. Laws and regulations pertaining to environmental standards for the development of infrastructure leading to and from the shore have been characterized as outdated, redundant, unenforced or contradictory (Hason et al., 2011; Tabachnik et al., 2012). In addition to these shortcomings, there are few professionals in the country to address the technical and policy aspects of the drilling. Foreign experts and consultants face a steep learning curve *vis a vis* local physical conditions and local legal and political institutions.

Regulatory capture occurs when the clientele of a public agency comes to control the agency, thereby deflecting its behavior from its mandated mission (Fortmann, 1990; Thomas et al., 2010; Grant, 2011). Regulatory capture in the energy sector (Sabatier, 1975; Gormley, 1983; Dal-Bó, 2006; Kraft, 2007) and in the marine resources sector (e.g., Thomas et al., 2010), is common and has been described both in academic literature and in the general media (e.g., Frank, 2009). Yet, despite its ubiquity, it is not always clear when institutions have been captured. This is where typologies and case studies can help.

Understanding common situations under which capture occurs, can help policy makers and watchdogs groups alike identify the phenomena. In an article entitled “*What can we Learn from the 2010 BP Oil Spill?*” Grant (2011) asks if regulatory capture was partially to blame for the BP oil spill. He answers in the affirmative proving that the Minerals Management Service, the government agency charged with regulating the U.S. oil and gas industry, failed to enforce the safety concerns that the agency itself raised with the industry and left drilling site operators to define the steps they would take to ensure safety largely on their own. This brought about some of the conditions leading to the catastrophic BP oil spill of 2010 (Grant, 2011).

This article analyzes policy aspects of the nascent offshore exploratory drilling operations in Israel from an environmental perspective using the framework of regulatory capture. While developing regulations to expedite the approval of drilling operations offshore of Israel, policy-makers have failed to develop clear environmental standards. Instead, they have relaxed existing requirements. Will such regulatory changes result in neglect of environmental standards for offshore drilling activities as they have in other areas of the world?

The first part of this article examines theories of regulatory capture and their relevance to various sectors involved in resource management. I continue by developing an approach to regulatory capture which might best fit the development of policy for the Israel offshore energy sector. This approach is then applied to a case study: the Gabriella offshore exploratory natural gas drilling site. My intent is to highlight a workable and realistic concept for which to understand regulatory capture and its implications. The analysis leads to theoretical contributions that highlight ways to reduce capture in the offshore energy sector.

2. Theories of regulatory capture

When regulatory capture (RC) occurs, government bureaucrats, regulators or generally public sector agencies fail to serve collective public interest. It is related to the distribution of the benefits and the burdens of economic life (Etzioni, 2009; Wexler, 2011). On what basis should resources be allocated and what are the responsibilities of those who use these resources? On the one hand, natural resources are public goods that should be held in the public trust. On the other, Adam Smith's theory of the value

of labor holds true in most capitalist societies. This theory embodies the idea that those who invest heavily in extraction and production activities should be able to reap the rewards of their labors (Rawls, 2005). Therefore, a delicate balance between regulatory burdens and production incentives must prevail (Wexler, 2011).

The earliest versions of capture theory were advanced by political scientists in the 1950s whose studies of the life-cycle of regulatory agencies disputed the classic “public interest” theory of regulation. These theories challenged previous New Deal and Progressive assumptions of government agencies as benevolent regulators. Earlier works on public administration, including Herrings (1936), Leiserson (1942) and Fesler (1942), provided in-depth discussions of the idea of regulatory – or “clientele” – capture and were accompanied by considerable disillusionment. Such texts related to the implementation of regulatory statutes, particularly those concerned with diffuse interests like consumer protection and environmental quality.

Most notably, Marver Bernstein in his book *Regulating Business*, took these ideas further, observing a “cycle of decay” whereas regulatory agencies become “captured” overtime by the very interests they are supposedly regulating (Bernstein, 1955). Today literature and the media often freely generalizes that regulated interests have been adept in capturing control of the regulators (Etzioni, 2009; Frank, 2009). However, remarkably little empirical work has been done to describe and analyze the contexts of various types of regulatory programs in terms of their susceptibility or resilience to capture.

A notable exception is Stigler's (1971) seminal study of goods transport in the US in the 1930s. In this study Stigler successfully modeled various factors affecting the demand for regulation of interstate truck traffic based on assumptions of regulatory capture by the railroad companies (Stigler, 1971). Theoretical propositions were confirmed by empirical evidence. The study was also striking because regulations were considered at the time to serve the public interest. Even today, much of the general debate on regulation addresses the extent to which the public is served (Etzioni, 2009).

More recent works on RC attempt to describe its different forms; these works range from presenting RC as an inevitable downside of government bureaucracy in the leftist-socialist view, to cause for celebration in the libertarian view. In any case, the RC paradigm posits that regulations serve the regulated entities as opposed to the greater public interest. This is particularly problematic when regulated entities gain from the exploitation of natural resources which are public goods, such as offshore oil and gas deposits.

Without using the term regulatory capture, Kraft (2010) points out that in the realm of environmental and resources policy, situations in which those regulated are the same people as those responsible for crafting regulation is quite common. He contends that few people have the time, the skills, or the inclination to follow the intricacies of certain environmental policies, such as the way that standards are set and scientific assessment are conducted for potential nuclear waste repository sites, or comparable aspects of clean air policy, drinking water policy, the handling of hazardous wastes or pesticide use (Kraft, 2010). This relates to Sabatier's (1975) description of a prevailing belief at the height of the era of the Progressives. At that time, resource management agencies were created with the belief that the use of good science by these agencies would solve the problems faced by government. This view did not foresee the loosening of aggressive regulations over time as constituencies lose interest in what were previously considered “hot” topics. It follows that regulation of the use of marine resources would be particularly susceptible to capture due to the public-at-large's distance and detachment from what goes on at sea (Steel et al., 2005).

In addition to these challenges to regulation in the marine environment (see Smith and Jepson (1993)), regulatory capture of

(footnote continued)

extends, in most cases, to 12 nautical miles (1.8 nautical mile=1 km) from the baseline, which is usually approximately at the mean low-water mark.

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