

Analytical perspectives in the study of regulatory policies

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The discussion of regulatory capture is not recent in state studies. However, the criteria to identify capture and the definition of the research protocols to demonstrate and measure the phenomenon have still not reached a consensus. This article carries out a non-exhaustive literature review to identify the main regulatory capture strategies and their respective measurement methods. We organize the regulation studies in four axes of regulatory capture strategies: capture by material incentives, capture by immaterial incentives, capture by threat, and capture by information asymmetry. Furthermore, the study examines the Brazilian case and discusses the contradictory results of recent research on the case of the National Supplementary Health Agency (ANS). We identified that, in general, Brazilian literature starts from a broad approach to understanding regulatory capture. Also, the studies adopt a restrictive approach mainly to explore the “revolving door” mechanism, following a trend in international literature but ignoring other mechanisms with explanatory potential. These findings have implications for research designs in studies of regulation in order to advance analyses beyond initial impressions and toward robust empirical research.

Keywords: regulatory capture; regulatory agency; regulatory policy; revolving doors.

Captura ou não captura? Perspectivas analíticas no estudo de políticas regulatórias

A discussão de captura regulatória não é uma agenda recente em estudos do Estado, mas o estabelecimento de critérios para identificação de captura, bem como a definição de protocolos para demonstração e mensuração do fenômeno estão longe de um consenso. O presente artigo tem por objetivo, por meio de uma revisão sistematizada não exaustiva da literatura, identificar as principais estratégias de captura e suas respectivas formas de mensuração. Propõe-se a organização dos estudos de regulação em quatro eixos de estratégias de captura: por incentivos materiais, por incentivos imateriais, por ameaça e por assimetria de informação. Ademais, busca-se examinar a produção sobre o caso brasileiro e discutir os resultados contraditórios de pesquisas recentes sobre o caso da Agência Nacional de Saúde Suplementar (ANS). Identificou-se que, em geral, a literatura brasileira parte de uma abordagem ampla de compreensão de captura e que os trabalhos que se orientam por uma abordagem restritiva exploram, principalmente, o mecanismo de “porta giratória”, seguindo uma tendência da literatura internacional, porém ignorando outros mecanismos com potencial explicativo. Esses achados têm implicações para desenhos de pesquisa em estudos sobre regulação, de forma a avançar as análises além das impressões iniciais e em direção a demonstrações empíricas robustas.

Palavras-chave: captura; agência reguladora; política regulatória; porta giratória.

¿Captura o no captura? Perspectivas analíticas en el estudio de políticas regulatorias


La discusión sobre la captura regulatoria no es una agenda reciente en los estudios del Estado, pero el establecimiento de criterios para la identificación de la captura, así como la definición de protocolos para demostrar y medir el fenómeno están lejos de un consenso. Este artículo tiene como objetivo, a través de una revisión bibliográfica no exhaustiva, identificar las principales estrategias de captura y sus respectivas formas de medición. Se propone organizar los estudios de regulación en cuatro ejes de estrategias de captura: por incentivos materiales, por incentivos inmateriales, por amenaza y por asimetría de información. Además, se busca examinar la producción sobre el caso brasileño y discutir los resultados contradictorios de investigaciones recientes sobre el caso de la Agencia Nacional de Salud Suplementaria (ANS). Se identificó que, en general, la literatura brasileña parte de un enfoque amplio para comprender la captura y que las obras guiadas por un enfoque restrictivo exploran principalmente el mecanismo de “puerta giratoria”, siguiendo una tendencia en la literatura internacional, sin tener en cuenta otros mecanismos con potencial explicativo. Estos resultados tienen implicaciones para diseños de investigación en estudios de regulación, con el fin de avanzar en los análisis más allá de las impresiones iniciales y hacia demostraciones empíricas sólidas.

Palabras clave: captura; agencia reguladora; política regulatoria; puerta giratoria.

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1. INTRODUCTION

How can it be shown that a given regulatory policy outcome is a direct result of capture? How is it possible to assert that the influence potential of an interest group has actually resulted in regulatory capture? What is capture? These questions have prompted researchers in the field of regulation for decades and the debate is not limited to the theoretical dimension of the problem, but extends to include the methodological dimension also.

In his seminal study of regulatory agency capture, Stigler (1971) initiated the discussion about State actions being directed towards interest groups. Marking a paradigm shift in regulation studies, Stigler was opposed to the figure of the benevolent public agent – the premise of the public interest framing – and put forward his theory of demand for regulation, indicating that regulation is both “acquired” by industry and driven by it for its own benefit.

Stigler's pioneering spirit (1971), which was followed by Peltzman (1976), is recognized as being the foundation of the agenda of regulatory capture, although subsequent research pointed out some gaps in his methodological approach. Criticisms of Stigler's work – and that of other researchers who tackled the issue using econometric models – is that there was generally little discussion about how capture mechanisms were observed in practice.

In relation to this problem, Carpenter and Moss (2013) reviewed not only Stigler's publication, but the production that derived from his work, and pointed out that, generally speaking, capture was not being correctly diagnosed. In a detailed conceptual refinement, the authors maintain that in order to allege that capture exists, there needs to be an effort on three main fronts: 1 present a “falsifiable” model of public interest; 2 demonstrate political change that is favorable to a specific sector, but detrimental to public interest; and 3 demonstrate intention and sufficient action by the sector to justify the causal relationship.

In addition to these three aspects, the authors point to a lack of conceptual accuracy in several works that deal with different mechanisms of influence, corruption or regulatory failure as capture. In this particular sense, it is also important to be careful with regard to the definition of capture that is used.

Although the debate on regulatory capture is nothing new, the way in which the concept has been operationalized in empirical work is still very much open for debate. This issue is identified in the literature as the “capture paradox”, a widely recognized phenomenon, but one for which empirical evidence is limited (Agrell & Gautier, 2012, 2017). The paradox lies in the fact that while there is widespread theoretical recognition of the capture phenomenon, there is an empirical failure to observe the channels by which capture takes place: for example, publicity about bribery agreements, or positions being offered to the regulators by those that are regulated, and vice versa.¹

¹ For a more in-depth debate on this point, see the Introduction of Carpenter and Moss (2013).

With specific reference to regulation research in Brazil, the scenario is no different. In addition to the fact that there are few works on the subject, there is no agreement as to how the concept of capture should be defined or operationalized. Recent publications about the National [Brazilian] Supplementary Health Agency (ANS), for example, reach contradictory conclusions with regard to agency capture (Baird, 2017, 2019; Ocké-Reis, Fiuza & Coimbra, 2019).

The aim of this paper is to advance this research agenda based on a review of recent production on regulatory capture. Following a review of international literature, the initial idea was to identify the main capture mechanisms used and the operationalization practices of the concept.

The intention was to analyze production in the case of Brazil and identify which analytical aspects have been guiding researchers in the country, what choices they adopted for measuring capture, and how these choices can lead to different results when studying the phenomenon.

We intend, therefore, to contribute towards refining the concept of regulatory capture by organizing the theoretical and methodological repertoire that is at the disposal of researchers, and thus help consolidate the agenda in regulatory policy studies in Brazil.

The article is organized as follows: the next section indicates the procedures that were adopted for selecting the academic articles that we reviewed. International literature will then be discussed to better situate the panorama in which production in Brazil is found. The article next discusses the case of Brazil, and by which analytical perspectives the country's regulatory agencies have been analyzed. Finally, we resume the article's main contributions and indications for future research that explores the capture phenomenon in developing countries.

2. NOTES ON REVIEW PROCEDURES

Although the article proposes to undertake a non-exhaustive review of the literature, some of the points about the way in which the academic articles were selected are worth discussing. The three main databases we used in the research were: Web of Science, Scielo and Google Scholar.

Searches in the Web of Science database were filtered using the keywords "captura regulatória" and "regulatory capture", but limited to the last five years. The results were restricted to the "Article" format in the following areas of knowledge: Economics, Political Science, Management, Business, Public Administration, International Relations, Health Policy Services and Interdisciplinary Social Sciences. On this basis, only articles that had been cited five or more times were selected, which returned a total of 72 articles.

Based on this initial selection, a qualitative analysis of the article abstracts was carried out to select only those whose specific objective was to discuss regulatory capture in theoretical terms, or those that presented empirical analyses of capture. This resulted in a total of 19 articles.

We used the Scielo and Google Scholar databases as a complement to this survey. Searches were carried out for the keywords "captura regulatória", "capture", "regulatory capture", "regulatory policy" and "regulatory agencies", all limited to the last five years. In the search on Google Scholar, since the volume of production is small this particular criterion was relaxed to include research with regard to Brazil that included some older publications.

In the survey involving the Google Scholar database, we decided to use only the "relevance" filter to avoid making the search very restrictive. In Scielo, the search was restricted to the following areas:

Applied Social Sciences, Human Sciences, Health Sciences and Multidisciplinary Studies. The abstracts were also analyzed qualitatively to filter out works in which the focus was on regulatory capture.

We also selected publications by cross-referencing articles that had been initially selected. We included articles that had mobilized many previously selected authors and that were the basis of their discussions. This is how we selected classic texts and those from other works that are basic points of reference for the discussion and that were, perhaps, not included in the initial screening – like Stigler (1971), Peltzman (1976) and Dal Bó (2003, 2006). We also included suggestions from anonymous reviewers. In the end, we reviewed 54 publications.

3. CAPTURE OR NON-CAPTURE?

The regulation agenda is dominated by two main explanatory streams: the public interest theory of regulation and the economic or regulatory capture theory (Levine & Forrence, 1990; Melo, 2000). Despite the limitations of the capture theory that are discussed in the literature (Croley, 2011), the phenomenon has been frequently identified in case studies in a wide variety of markets and still remains a current topic of discussion. The public interest theory of regulation suggests that the objective of regulation is to defend public interest against the actions of private interests, particularly of companies (Balla, 2011; Mueller, 2001). This approach assumes that regulators are the maximizers of social welfare. Regulating the electricity sector, for example, is justified because it is an activity whose characteristic is that of a natural monopoly.

On the other hand, the economic theory of regulation, to which Stigler-Peltzman made their influential contributions, suggests that, as in any market relationship, politicians and the regulatory elites offer regulation and organized interests demand it (Mueller, 2001). One of the seminal concepts of this literature is regulatory capture; regulation tends to favor those producers that are economically homogeneous and organized in smaller groups rather than diffuse, larger groups (consumers, for example).

When it comes to regulatory capture, academic production is generally divided into two forms of interpretation: broad and restrictive (Dal Bó, 2006). Broad interpretation not only concerns regulatory agencies, but deals with capture as a generic process in which external interests affect the State's intervention in the economy; in other words, it has to do with the special interests that affect State intervention in all its forms, and may include areas such as taxes, the choice of foreign or monetary policy, or even the legislation that affects research and development. Restrictive interpretation, on the other hand, understands regulatory capture as being specifically those processes by which regulated agents manipulate the agencies that should exercise control over them.

Starting from this first separation of the literature, it is clear that the definition adopted by Carpenter and Moss (2013)², and the criticisms resulting from their understanding of capture, come from a restrictive view of regulatory capture, and raise demands for really demonstrating capture and its mechanisms.

² According to the authors, regulatory capture is a result or the process by which regulation is consistent and repeatedly moved away from public interest towards the interests of those that are regulated by the deliberate action of these same regulated bodies (p. 15).

For these authors, the definition of capture involves not only providing evidence about diverting public interest, but also demonstrating that there is manipulation by the regulators. Although the production dealing with capture defines the concept as the exchange of favors between the regulator and the regulated (Agrell & Gautier, 2017), the requirements in Carpenter and Moss (2013) for confirmation of the phenomenon is much more rigorous than normally appears in the literature.

It is important to emphasize that independent agencies are subject to pressure from both regulated private sectors and from political party groups interested in implementing a short-term agenda that is contrary to public interest (Stiglitz, 1998): in this case, capture by regulated entities, which may occur either legislatively or administratively. Legislative capture by the private sector occurs indirectly, since these actors are not directly involved in the regulatory process. This action path involves the intermediate capture of legislators by way of private favors or benefits so that they represent the interests of the sector in the legislative process of structuring regulation, or defining the agency control mechanisms (McCubbins, Noll & Weingast, 1989). Administrative capture, in turn, occurs directly between those that are regulated and the regulators, in which the latter resort to multiple strategies to ensure mastery over the regulatory process within the agencies. This form of capture is the main object of analysis in this article and will be further developed in the following sections.

As the focus of this article is essentially a way of demonstrating capture, the production was organized on the basis of the two axes that Dal Bó (2006) identified; broad interpretation and restrictive interpretation. Using this separation, we prepared a comparative box of how each of these approaches copes with the phenomenon based on three main aspects: explaining capture risk, demonstrating capture, and the capture mechanisms used. Details are shown in Box 1.

BOX 1 DIFFERENCES BETWEEN BROAD AND RESTRICTIVE APPROACHES WHEN STUDYING CAPTURE

	BROAD INTERPRETATION	RESTRICTIVE INTERPRETATION
Explaining capture risk	<p>Focuses mainly on:</p> <ul style="list-style-type: none"> • mapping out interests; • identifying results that favor those regulated; • providing evidence of the determinants of supply and demand by regulation. 	<p>Description of the risk scenarios as an illustrative tool and justification of the work.</p>
Demonstrating capture	<p>Does not focus on revealing the “black box” of capture relationships.</p>	<p>Focuses mainly on:</p> <ul style="list-style-type: none"> • presenting a “falsifiable” model of public interest; • demonstrating political change to the detriment of public interest and in favor of a specific actor; • showing intention and sufficient action from the sector to justify a causal relationship; • explaining processes of information asymmetry –principal-agent theories.

Continue

	BROAD INTERPRETATION	RESTRICTIVE INTERPRETATION
Capture mechanisms	<p>They assume:</p> <ul style="list-style-type: none"> • political gains in exchange for regulation that favors those regulated; • benefits for the regulated coming from regulatory activity – or the absence of it – is the result of capture. 	<p>Explores:</p> <ul style="list-style-type: none"> • bribery; • legal or political retaliation; • campaign funding; • revolving door; • information lobby; • identity and networks.
Examples	Stigler (1971).	Carpenter and Moss (2013).

Source: Elaborated by the authors.

3.1 Capture strategy

Capture can be classified both by the way it occurs – the influence strategy adopted by the regulator – and by the dimension of the negative impact it has on public interest.

Regarding the way this occurs, the literature was organized into four capture mechanism niches: material incentives (Tabakovic & Wollmann, 2018), information asymmetry (Agrell & Gautier, 2012, 2017; Wagner, 2009), threats (Dal Bó, Dal Bó & Di Tella, 2006; Dal Bó & Di Tella, 2003) and immaterial incentives (Kwak, 2013).

Material incentives refer specifically to capture strategies that involve bribery, the exchange of favors, and the offer of positions and benefits, among others. Perhaps because of the inherent difficulty that exists in uncovering evidence of irregular payments or the exchange of favors, the literature essentially focuses on analyzing campaign financing strategies when dealing with legislative capture, or the occupation of positions involving the “revolving door” phenomenon when there is administrative capture.

The literature that points out the risks arising from information asymmetry evolves in four ways: the supply of biased information; deliberately excessive amounts of information; making the information that is provided complex; and technology capture. With regard to the first aspect, the main incentive for capture is the pressure the principal brings to bear on the agents. According to these authors, regulators agree to receive biased information from those regulated because of bribery incentives, or because of threats, as shown in Box 2.

Concerned that they might fail in its activities – not delivering new regulations – and dealing with a scenario of limited resources – especially the time needed to check all the information coming from the regulated sector – the regulator accepts distorted information from the sector in order to streamline the regulatory process (Agrell & Gautier, 2012, 2017).

These situations are identified as soft capture. The incentive here would be, essentially, the fear of being punished by the principal, which would be constantly demanding regulatory policies. In this sense, although the ambition to maintain one’s position and advancement in one’s career is, in a way, material, it is essentially different from the direct material rewards discussed previously.

Another form of capture related to the disparity that exists in accessing information is capture by information excess, in which the regulated sector offers the regulator excessive volumes of

information in order to unbalance and disorient the regulatory activity. This happens, mainly, because of an administrative failure in filtering information, which renders the regulatory process inefficient (Wagner, 2009).

A central element of this form of capture is that the cost of providing a large volume of information is lower for one of the parties affected by the regulatory activity; generally, a company and service provider. The other parties involved – perhaps the beneficiaries or consumers – find it difficult to compete with the same level of information and this allows the other party to become dominant in guiding the regulatory activity.

Imbalance in providing the regulator with information can also occur because of the way the information is presented. When Hakenes and Shnabel (2014), for example, examined capture in the financial sector in the United States, they pointed to the existence of capture by sophistication, which is the supply of extremely complex information that the regulator would have difficulty understanding. Imbalance is also caused by other players in the sector, especially the smaller ones, which have less potential for resorting to this strategy.

Another type of capture resulting from information asymmetry is technology capture, which occurs in sectors where the industry is complex, such as the chemical industry. The concept of technology capture, a term that was initially coined to define the supremacy of a market based on domination by a particular technology (Gagnon, 2016), was also expanded to include regulatory interactions. In markets of this nature, the regulated sector has mastered the technology that allows it to innovate or make incremental changes in its products that partially answer the demands of the regulator, while at the same time supplying new information about the characteristics of the product, which allows it to bargain with the agencies.

Based on a case study of the chemical industry, Finch, Geiger and Reid (2017) define this relationship as an interactive and incremental process. In this process, the applied science of these industries prepares technological alternatives for facing up to regulatory demands, while producing fresh and exclusive information about new products, which allows regulation to be negotiated within the terms of the industry that is being regulated.

In cases of capture because of information asymmetry, there is no particular incentive for the regulator to benefit those being regulated, but there are incentives of another nature, be it pressure from the principal, administrative failure or little specialization.

There is also a capture scenario in which the regulator is not willing to cooperate, but ends up giving in to the regulated sector because of threats. In this case, the threats may be of a different nature, but they generally aim to damage the regulator's reputation. Dal Bó (2003) presents this mechanism in a legislative capture situation, but the concept can be applied to other areas that also deals with administrative capture.

Immaterial incentives are related to cognitive mechanisms, such as a shared identity between the regulator and those regulated. This type of capture, which is not related to material reward, is identified in the literature as “cultural capture” (Kwak, 2013). Derived from discussions about cognitive capture, cultural capture occurs when the regulator personally identifies with the group of those that are regulated.

James Kwak identifies three main mechanisms by which this form of capture occurs: group identity; status and relationship networks (Kwak, 2013, p. 80). According to the author, this capture strategy may or may not happen because of deliberate action by the regulated companies. In this sense, this

form of capture does not necessarily meet the third criterion established by Carpenter and Moss (2013) with regard to the intentional action of those regulated, despite leading to the same result. The types of capture discussed so far are set out in Box 2, as are the main mechanisms involved in the process and the incentives of the regulators.

BOX 2 **CATEGORIZATION OF CAPTURE TYPES AND MECHANISMS**

NATURE OF THE CAPTURE	TYPE OF CAPTURE	CAPTURE MECHANISMS	INCENTIVES OF THE REGULATOR	EXAMPLES
<i>Threat</i>	Capture by threat	Defamation campaign; Detracting rumors; Biased media cover; Threat of legal proceedings.	Maintaining own reputation.	(Dal Bó et al., 2006; Dal Bó & Di Tella, 2003)
<i>Material incentives</i>	Capture by private benefits	Bribery; Campaign financing; Positions (revolving door).	Receiving personal benefits.	(Peci, Santos & Araújo, 2020; Stigler, 1971; Tabakovic & Wollmann, 2018)
<i>Immaterial incentives</i>	Cultural capture	Shared identity between the regulator and those regulated.	Feeling of belonging; Status; Maintaining personal and professional networks.	(Kwak, 2013)
<i>Information asymmetry</i>	Soft capture	Biased information supplied by those regulated that may modify definitions of the regulatory policy.	Limited resources for seeking information and pressure from the principal to present new regulation.	(Agrell & Gautier, 2012, 2017)
	Excessive information capture	Regulated sector takes advantage of the inefficiency of information filter (filter failure), thus overloading the regulator with information, leading to communication imbalance in favor of the sector.	There are no private incentives; Occurs because of an administrative failure.	(Wagner, 2009)
	Sophistication capture	The biggest players in the sector present excessively complex information that the regulator finds difficult to understand.	There are no private incentives; Occurs because the regulator is less specialized.	(Hakenes & Schnabel, 2014)
	Technology capture	The technical specifics of some industries ensure exclusive information from those regulated with regard to products and innovations. This exclusive and extremely technical information functions like a bargaining tool vis-à-vis the regulator.	There are no private incentives; Occurs because the regulator is less specialized.	(Finch et al., 2017; Gagnon, 2016)

Source: Elaborated by the authors.

Box 2 seeks to summarize and organize the main paths that are indicated by international literature for understanding the phenomenon of capture. It is worth emphasizing, however, that the works discussed previously – and other general production about capture – are restricted to national and state-level policies. In addition, only the relationship between two parties – the regulator and those regulated – is normally examined. But recent research indicates that regulatory activity often relies on the action of a third party, an intermediary (Abbott, Levi-Faur & Snidal, 2017; Marques, 2019).

The existence of an intermediary is mainly identified in transnational contexts, in which consultancy firms, auditors, NGOs, and others³ frequently collaborate with companies in order to adapt their actions to suit different local contexts. In this sense, there is a third party that should also be considered in any investigation of capture.

This analysis perspective is presented in the literature as the regulatory-intermediary-target (RIT) model, and it explores both the capture of intermediaries by companies and the capture of governments by intermediaries, and vice versa (Abbott et al., 2017). This stream in the literature claims that there is a level of meta-governance in commercial relationships and, in this context, capture strategies are even more diverse, such as capture by harmonization, a form of transnational regulatory convergence that results from the action of large companies (Fransen, 2015; Marques, 2019).

So far, what has been discussed are the various capture strategies identified in the literature, but as we pointed out earlier, capture can also be classified on the basis of the dimension of its effects. With regard to the second classification method – the impact of capture – the contribution of Carpenter and Moss (2013) stands out. In their attempt to nuance the concept of capture in terms of the level of commitment of the regulatory activity, they identify two degrees of capture: strong capture and weak capture. Strong capture is one that compromises the results of the policy in such a way that a better outcome would be for there to be no regulation, or that the policy – or even the agency – should be substituted in its entirety. This would be a Stiglerian-type capture, which identifies a substantial decrease in public interest.⁴

For Carpenter and Moss (2013), however, this is not the way that all capture actions develop. There are situations in which weak capture is observed, that is, the regulatory capability is compromised, but even so, the results are superior to those of a scenario in which there is no regulation.

In this sense, classification of the type of capture is a relative definition that depends on an assessment of the impact it has on the regulatory result; in other words, to identify whether a capture situation is strong or weak, we must look at the specific case and its consequences and not at the generic way in which capture took place.

³ The definition of regulatory intermediary is not restricted. It can be any public or private actor who interferes in the regulator-regulated relationship (Abbott et al., 2017, p. 15).

⁴ Public interest is a disputed concept, and the parameter for satisfactory regulatory results must take into consideration the socioeconomic differences of the countries being analyzed. This point will be referred to again in the conclusions when discussing contemporary relationships between the state of the private sector, especially in developing countries.

3.2. Measuring capture

As was discussed previously, the capture paradox reveals how fragile the empirical framework of academic research is for supporting the capture argument (Agrell & Gautier, 2012; Carpenter & Moss, 2013). While the theoretical models vary immensely, the possibilities for measuring influence and capture are restricted.

The capture research agenda is vast and investigates everything from the relationship between capture and regulatory results, and the impact of the “revolving door” on regulatory practices, to the effect of consumer pressure on regulation (Dal Bó, 2006). Identification of capture risks also ends up permeating various pieces of research, as does an assessment of the autonomy and transparency of regulatory processes.

Regardless of the problem that one might be seeking to confront, measuring capture is an essential step in any investigation. Most works, however, are not dedicated to demonstrating capture itself, but to mapping out the interests of those that are regulated, and the decisions that have been taken in their favor.

We can say that a large volume of production on capture is, in fact, generally geared towards identifying situations in which those that are regulated have influence potential, rather than identifying policy manipulation itself.

Among those who have attempted to identify capture empirically, the most frequent measurement strategies found in literature are: 1. Corruption measures; 2. Tracking campaign financing; and 3. Mapping out the career paths of directors/managers in order to assess the “revolving door” phenomenon – the latter being one of the most common approaches in recent studies (Dal Bó, 2006). Data collection methods generally involve interviews, the prosopography of regulatory agency directors, and documentary analysis of regulatory decisions.

4. CAPTURE IN BRAZILIAN REGULATORY AGENCIES

4.1. What is studied?

Despite their substantial contribution to the field, it is no easy task to demonstrate capture under the terms proposed by Carpenter and Moss (2013). Although there is very little production on this subject involving Brazil, some researchers have ventured to explore the vulnerabilities of agencies empirically, and starting from different perspectives.⁵

Vilarinho (2010), for example, does a remarkable job in mapping out the interests of the various actors involved in the field of supplementary health in Brazil. Although he did not develop a model of public interest, he tried to identify the interests of the consumers of supplementary health services.

Starting with a conceptual model of active and defensive capture tactics, Vilarinho (2010) presents a box that summarizes perceptions with regard to capture in the field of supplementary health. Despite discussing a possible change in policy in favor of private groups, such as promoting the group health

⁵ As the aim of the work is to explore production relating to regulatory capture, only publications dealing with relations between agencies and the regulated market were reviewed in the section. To analyze autonomy vis-a-vis government and political influence, see Correa, Melo, Mueller and Pereira (2019) and Vieira, Gomes and Guarido (2019).

plan model to the detriment of individual plans, the tactics he presented are generally only indications of the way health insurance companies work. The point raised by the author suggests the intention and political potential of the health insurance companies, but there is no strong evidence of their action, therefore it cannot be seen as a causal relationship.

Also touching only on capture potential, Ianoni (2017) presents a case study of the Brazilian Central Bank, the National Treasury Department and the investment agency, Best Brazil, to discuss the possible capture of macroeconomic policy. The author argues that the institutionalization of relationship initiatives with investors has intensified communication between the financial market and the state. Despite drawing attention to this new channel of influence, the author's aim is not to demonstrate actual capture.

The institutionalization of instruments that favor the regulated sector is also the subject of analysis by Milanez and Santos (2020) in the mining sector. Based on a case study of mining company Anglo American, in Minas Gerais, the authors highlight the following as being the main evidence of capture: tax exemptions; facilitating and reducing the costs of expropriating areas; the revolving door; and fractionalizing the environmental licensing process. Their work is not dedicated to exploring the motives of the agents, or to demonstrating the action of those that are regulated, but it suggests that there is an alignment between the State and the market in terms of corporate interests, which could be classified as cultural capture.

From another viewpoint, focusing on the mechanisms of social participation in the decision-making process of the agencies, Mariana Batista (2012) identifies the fact that those regulated are over-represented in public hearings of the [Brazilian] National Energy Agency (Aneel). Despite this, the difference between the proportion of commentaries accepted by way of demands in public hearings is not very large between producers and consumers⁶; 26.7% for the former and 19.9% for the latter.

Therefore, despite questioning the initial hypothesis, that those that are regulated would benefit much more than consumers, Batista (2012) concentrates on discussing the agency's vulnerability to social participation mechanisms, which could be classified as capture by information.

Other studies have chosen to explore the perspective of the agents in the agencies, and their connections with interest groups. To this end, Vieira (2015) analyzes the careers of directors and board members of ten Brazilian regulatory agencies in an attempt to explore aspects of specialization and capture by political parties. Along these same lines, De Bonis (2016) and Peci et al. (2020) make valuable contributions to the study of the careers of regulators, but because they focus on recruitment processes and careers, their works make no attempt to look in more depth at capture demonstrations per se.

With an equal focus on individuals who held director positions at ANS, Marcello Baird (2017, 2019) has recently made use of documentary analysis and a network approach to map out the channels of external influence on the ANS. Baird tried to reconstitute the main disputes in the agency since it was set up, and in doing so he explored billing data, campaign financing and the structure of relationship networks. The work's conclusions also question the growing argument about the unrestricted favoring of regulated groups, pointing to the resistance role of the specialized bureaucracy in containing external influences.

⁶ The absolute number of proposals presented by the producers is much larger than the number of consumers, which the author discusses as being a problem of collective action.

Conversely, research conducted by Carlos Ocké-Reis on ANS (Ocké-Reis et al., 2019; Ocké-Reis & Cardoso, 2011) points out that agency capture by those that are regulated is evident, especially when the organization's inability to contain health plan premium increases is observed.⁷ The aim of these authors, however, was not to demonstrate capture actions, but to point out the clear benefits enjoyed by regulated groups. The specific case of ANS will be discussed later when the strategies of each study will be compared in more depth.

In this brief summary of the production that deals with capture in Brazilian agencies, it is clear that there is a diversity of results and that the scope of the research varies substantially. It is possible to note, however, that most of this research focuses on identifying potential capture risk scenarios and their possible effects (such as an increase in health insurance premiums, and participation asymmetry in regulatory activity, among others).

Production dealing with the case of Brazil has generally made no effort to examine the mechanisms by which capture may have happened in the agencies. It is clear, therefore, that there is a vast unexplored field involving the relationships that exist between the State and the market in regulatory agencies. While the revolving door is the most recurrent capture mechanism, cultural capture and threat dimensions and multiple forms of information asymmetry remain little explored in the Brazilian context.

We can say, therefore, that this literature largely starts with a broad approach to capture, in which a detailed demonstration of mechanisms is not at the heart of the matter. The establishment of more restrictive criteria for establishing capture can, however, lead to variations in the interpretation of the phenomenon. An example of this is the case of ANS, which will be discussed in the following subsection.

4.2 The case of the ANS: where do differences in the results come from?

Brazil has one of the largest public health systems in the world. Despite this, approximately 25% of the Brazilian population has private health insurance cover, particularly by way of collective agreements (i.e., as part of a package of benefits provided by employers). The main regulations relating to the supplementary health sector are Law No. 9656/98, which establishes the rules for the sector's operations, and Law No. 9961/2000, which instituted the Brazilian Supplementary Health Agency (ANS) that has powers to regulate and supervise health insurance companies, including with regard to premium adjustments and the minimum right to care of the beneficiaries of health plans, and the list of health procedures and events covered (Costa, 2008).

The growth of the supplementary health sector is usually attributed to a growing demand from a population that is dissatisfied with the services of the SUS [Unified Health System – Brazilian public health care system], a concept known as exclusionary universalization, or the “unwanted child” of the Health Reform bill that instituted the Public Health System (Favaret & Oliveira, 1990). The demands of consumers – both in the media and in the judiciary – dissatisfied with the decisions taken by insurance companies and health plans to increase premiums and impose cover restrictions, prompted the federal executive to expand and propose new regulatory bases for the sector. According to Pereira (2003), choosing an independent regulatory agency model was a form of organizational innovation

⁷ Retrieved from <https://www.valor.com.br/empresas/6244647/em-18-anos-preco-de-plano-de-saude-sobe-quase-o-dobro-da-inflacao>

for regulating a sector that, until then, had been responsible for generating increasing political “wear and tear” on the federal executive. It was also a way of transferring responsibilities for any potential new problems to this autonomous bureaucratic body.

Since then, the case of supplementary health care in Brazil has been emblematic and is the focus of most of the research into regulation in the country (Costa, 2008; Pereira, 2003; Pietrobon, Prado & Caetano, 2008; Salvatori & Ventura, 2012; Sestelo, Souza & Bahia, 2014). The findings of the studies that are interested in the political economics of supplementary health care regulation generally point to the capture risk and meeting the demands of the regulated sectors to the detriment of the user.

A recent technical note from the Institute for Applied Economic Research, (IPEA) (Ocké-Reis et al., 2019), ignited the debate about capture of the National Supplementary Health Agency (ANS) when it questioned the methodology used for calculating the way plans are adjusted. The researchers pointed out that the accumulated inflation of the plans was much higher than the general rate of inflation, and than the medical sector rate, specifically. Their conclusion, that the ANS is incapable of regulating the inflation in health care plans, supports the perception of capture. This analysis arouses the suspicion of capture that comes from previous works, which address everything from the price of the plans (Ocké-Reis & Cardoso, 2011), and the latent interests in dispute at the agency (Vilarinho, 2010), to the financing of electoral campaigns by health plan companies, which would suggest legislative capture (Scheffer & Bahia, 2011, 2013).

Nevertheless, when researching the networks of political influence in the ANS since its creation, Marcello Baird (2017, 2019) comes to differing conclusions about the agency’s capture. In a detailed analysis of the ANS’s actions between 2000 and 2014, mainly by way of network analysis, interviews and documentary analysis, the author found no evidence of targeted action by the regulators to manipulate the sector’s policies or force the deregulation of supplementary health care.

Conversely, he observed that the period when the agency’s executive board had a greater connection with the business community was when there was greater regulation of the health care sector (Baird, 2019, p. 23), with increased transparency for consumers, an expansion of waiting period portability, the implementation of the risk pool to stabilize adjustments for the beneficiaries of collective health plans, and the establishment of maximum periods of care cover, among others.

With regard to concentration in the industry, and specifically the sale of Amil in 2012 – the largest transaction in the sector – Baird points out that, despite the speed with which the ANS authorized the sale, the measure was not unprecedented and there was no change in any of the rules in the period that exclusively favored the companies involved (Baird, 2019, p. 21).

Understanding the weakness of this argument, Baird (2019) proposed an analysis of the “revolving door” phenomenon to examine whether members of the ANS’s executive board who were linked to the regulated sector had a distinct voting pattern. Yet again, no evidence was found to support the capture argument.

In examining the “revolving door” phenomenon, one of the relevant contributions of Baird (2019) was his effort to add nuances to his analyses of the possible effects of this exchange of positions. In examining the voting pattern of directors with regard to normative resolutions, Baird identified that there was little disagreement between the “public health specialists” and the “liberals” within the agency. This reveals the fragility of the explanatory potential of the revolving door analyses when conducted in a way that is disassociated from examining the political actions of the actors.

It is important to highlight that Baird's empirical findings (2017, 2019) are presented as influence potential and not capture. Since the work starts with a more restrictive view of capture and no process was identified that revealed the manipulation of those that are regulated, the use of the influence concept is appropriate.

In this sense, the research raised situations of conflict and recognized the existence of measures that favored the regulated sector but found no evidence of deliberate actions by companies. There is also no absence of measures favoring the beneficiaries that resulted in high costs for the health insurance companies.

At this point it is clear that one element that differentiates the research into ANS capture is the operationalization of the capture concept. As was previously discussed, the distinction between broad and restrictive approaches can be valuable for understanding the disagreements that exist in the conclusions reached regarding the case of supplementary health care in Brazil.

The findings that support the capture argument emphasize the benefits that have been enjoyed by the regulated sector in a broad scenario, especially with regard to the adjustment of plans (Ocké-Reis et al., 2019; Ocké-Reis & Cardoso, 2011). These works, however, tend to minimize the agency's decisions in favor of the beneficiaries and to the detriment of the health insurance companies, as in the case of the establishment of maximum period of care and other decisions that were very costly for the sector.

The results that were found using a broad approach do not analyze the process, reconstitute the decision history or seek to identify the causal mechanisms that justify the capture argument. Ocké-Reis (2019, 2011) and Vilarinho (2010) do not suggest or test an action model for those that are regulated, nor do they add any evidence about the agency's decision-making processes. Likewise, the works of Scheffer and Bahia (2011, 2013) make no connection between campaign financing for elected politicians with their actual performance in parliament and executive office. It is not generally the purpose of these works to examine capture mechanisms in detail. This is essentially the concern of the restrictive approach to the subject, to which Baird's work (2017, 2019) is linked.

Despite not proposing a model of public interest in the terms proposed by Carpenter and Moss (2013), Baird (2017, 2019) faces up to the process investigation that could reveal the actions of those that are regulated that are oriented towards altering the direction of regulatory policy. His conclusions do not examine the merit of judging whether plan adjustments are excessive or not, but he reveals the absence of any evidence to support identification of the capture phenomenon itself.

5. FINAL CONSIDERATIONS

Sartori (1970) warned us about the importance of being careful when conceptualizing a social phenomenon a few decades ago. Correct definition of the concepts is the main guide for correctly applying the method and supporting the inferences.

With its focus on the concept of capture and its various mechanisms, this article is committed to this task. Throughout the article we sought to organize the main forms of regulatory capture identified by the literature, and the mechanisms that are associated with the phenomenon. Although there is great diversity in the capture strategies presented, we identified four major groups of capture: capture by material incentives; capture by immaterial incentives; capture by threat; and capture by asymmetric information.

With regard to the definition and operationalization of the concept of capture, we revisited Dal Bó's (2006) discussion of the existence of broad and restrictive approaches to the phenomenon. The main differences between the two views were detailed and, from analysis of the ANS case in Brazil, we concluded that the starting approach is an important element for explaining the contradictory results evidenced by the literature (Baird, 2017, 2019; Ocké-Reis et al., 2019; Ocké-Reis & Cardoso, 2011).

We also identified that most studies on Brazilian regulatory agencies start with a broad approach to capture, without any concern with regard to demonstrating the causal mechanisms that might explain the capture actions adopted by those that are regulated. This shows that there is an abundance of unexplored paths in the study of regulation in Brazil.

Finally, this study leaves an additional suggestion for researchers who are interested in the subject of regulatory capture; when studying this phenomenon they should prioritize alternative approaches that go beyond the economic theory of regulation. Capture literature is generally seen as being essentially a negative aspect of the relationship between markets and governments, which materializes as a risk to democratic legitimacy and institutional accountability (Thaw, 2014, p. 335). Despite the recurrent and contemporaneous nature of the agenda, however, this negative view and the very concept of capture are questioned by a stream that proposes alternative explanations of the relationship between State and market. This literature suggests two main interpretations of this relationship: 1. the State as a driver of corporate lobbying; and 2. the State acting cooperatively with regulated sectors.

Based on case studies in the telecommunications and aviation sectors, Cornelia Woll (2008) discusses the first interpretation – the opposite path to capture – in which the State motivates changes in the lobby of those that are regulated instead of the lobby changing public policy. Recognizing the limitations of economic theory, Woll (2008) suggests other explanatory variables for the change in the regulatory lobby. According to her, the new institutions created by the State altered the preference of companies and this redefinition particularly changed the ideas they had about their identity and the beliefs they had about their international operations.

Also with regard to the role of the private sector in convergence with public interest, and based on a case study in the cybersecurity area, Thaw (2014) discusses the process he identifies as enlightened regulatory capture, in which capture mechanisms are used by companies to achieve public and private objectives, even though this is costly for them.

In another influential work, Woll and Artigas (2007) point out that the State and the market interact in terms of regulatory policies – a discussion that initially appears in the literature with the normative proposal of “negotiated regulation” (Harter, 1983). To explore the issue, the authors suggest that the regulatory lobby is essentially different from the pressure lobby, because the former requires the constant building of company reputations and legitimacy vis-à-vis governments, and this is incompatible, therefore, with the predatory view of capture.

In this sense, Levi-Faur (2013) suggests the concept of a regulatory State for development, an attempt to reconcile regulatory studies with the literature about the developmental state, in which developing countries could benefit from the autonomy model in State–Society relations (Evans, 1995). In other words, particularly in the context of developing countries such as Brazil, the concept of regulatory capture is insufficient for explaining these contemporary capitalist relations.

The study by Shadlen and Fonseca (2013), for example, shows how the National Health Surveillance Agency acted in a “guardianship” process when it helped private actors acquire the capabilities needed to survive the new regulations, which were aimed at increasing competition in the pharmaceutical

market and, consequently, reducing the price of medicines. In acquiring these new skills, companies changed their preferences in relation to the regulation, which they were previously opposed to. Therefore, an important agenda in the regulatory literature is to reflect on this multidimensionality of public interest, and to foster greater dialogue between scholars of the regulatory and developmental states (Amann, 2006; Dubash & Morgan, 2012).

An important point about this alternative literature is that, despite offering robust explanations of cases that are not clarified by economic theory, its findings are not necessarily incompatible with findings of capture. It also allows an application that is more appropriate to the context of countries from the Global South, the scenarios of which differ from those in the United States and countries in the European Union in various political and economic aspects. In this sense, it is doubtful whether one can simply import theories into developing countries, such as the Capture Theory, that have been developed to explain phenomena that occur in developed countries (Amann, 2006; Dubash & Morgan, 2012).

Therefore, studies such as the one by Woll and Levi-Faur make room for a new agenda on relations between the State and the market and their applications in developing countries, which is also little explored. This could be an investigation into which factors lead to cooperation and which factors lead to regulatory capture. In this sense, we understand that identifying the mechanisms that materialize capture, and not just an analysis of the results of the regulatory process, is an important undertaking for connecting the discussion about the relational context of regulatory agencies and the economic development agenda.

Identifying these characteristics and the remarks about measuring capture that were discussed in this article, therefore, have not only theoretical implications, but practical ones also. There is a growing interest in the study of regulatory agencies in Brazil due to the environment of political dispute that has emerged in these organizations and the public policy implications of the relationships between the State and the market. Considering how relevant the agenda is to the academic community and for instructing the actions of public administration, the conceptual rigor and adequacy of its applications is what allows us, therefore, to move from mere impressions of the subject to a more robust demonstration of the phenomenon.

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