International Environmental and Socio-Economic Litigation: Lessons from the Cases and Prospects

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Market Consolidation and Environment

- Relevant evidence holds that big business is the main actor of environmental impact
  - The *Carbon Majors Report* (2017) indicated that 100 companies were responsible for 71% of global greenhouse gases (GHG) emissions since 1988. Moreover, 51% of global GHG emissions resulted from 25 companies alone during the same period
  - UNEP FI's *Universal Ownership* report (2011) showed that 35% (USD 2.15 trillion) of the global environmental costs in 2008 (6.6 trillion) resulted from 3,000 large listed corporations. Moreover, while their costs (USD 2.15 trillion) only accounted 7% of the revenue of those companies, the total environmental cost in 2008 represented 11% of global GDP
  - FAO's *Natural Capital Impacts in Agriculture* report (2015) indicated that, from the USD 3 trillion global environmental cost of food supply chains, USD 1.15 trillion came from agriculture, while USD 1.81 trillion came from livestock
  - The *Treading Water* report (2018) showed that agricultural supply chains were responsible for 70% of total water withdraws, while industries accounted for 19% of the total water withdraws
  - Specifically for the meat industry, the *Emissions Impossible* report (2021) indicated that the 15 largest companies of meat and dairy polluted more than Russia, Australia, Canada, France and Germany together, in terms of methane-related GHG emissions. Nearly half of these emissions came from JBS (37.5%) and Tyson Foods (12.3%).
- Studies also hold market consolidation negatively impacts the adoption of environmental governance structures (Flammer, 2015)
  - These studies indicate that the adoption of corporate social responsibility measures, including environmental ones, are a competitive differentiator, while a growing number of consumers are driven by ESG preferences (PwC, 2022)

Cases with Impacts in Brazil

- *Mariana dam disaster (BHP and Vale)*
  - Samarco's (joint venture among BHP and Vale) dam failure in 2015, which released a massive mudflow over several villages
  - Both BHP and Vale are among the biggest five global publicly traded mining companies, in terms of revenue and earnings. Also, Vale is by far the biggest Brazilian mining company.
- *Brumadinho dam disaster (Vale and TÜV SÜD)*
  - Another Vale's dam failure in 2019. TÜV SÜD was the company responsible for Brumadinho dam inspection
  - The main 12 companies (including TÜV SÜD) of the the testing, inspection and certification (TIC) sector acquired more than 370 rivals since 2017, where construction segment represented more than 15% of those acquisitions (EY, 2017)
- *Maceió disaster (Braskem)*
  - Braskem's salt mines caused cracks in the whole city of Maceió, threateneing the structural integrity of more than 9,000 homes
  - Braskem is the largest player in Brazilian petrochemicals market, with 66% of market share in 2018 (S&P GLOBAL, 2019).
- *Barcarena disaster (Norsk Hydro)*
  - Toxic waste spill contaminating the local waters in Bacarena, as result of Norsk Hydro's Alunorte facility in Northern Brazil
  - By 2019, Norsk Hydro held more than 50% of the Brazilian aluminum industry and Alunorte is the biggest alumina refining plant outside China in the world (ABAL, 2019)

LEGAL GOVERNANCE (STRUCTURAL) ALTERNATIVES

- International environmental litigation (IEL)
  - Domestic legal tools may present a limitation in dealing with the responsibilization of large global players in cross-border supply chains
  - New statutes providing undertakings in relation to those companies, aiming to create an international environmental responsibility for business conduct and enhancing IEL (SALOMÃO FILHO, 2019)
- Inclusion gains
  - “Inclusion gains” can be defined as the gains comming from the inclusion and organization of production factors, and not Only from saving or eliminating costs – traditionally framed within a Coasean perspective
  - Inclusion gains can replace or complement the Coasean transaction costs idea to analyse and improve both internal and external (market) organization of firms (SALOMÃO FILHO, 2019)
- Governing the commons
  - Common pool resources (CPR), such as the environment, are resources with high subtractability of use and high difficulty of exclusion – i.e., the individual exploration of the good diminishes the possibility of use by others while it is difficult (although not impossible) to simply exclude the access of other stakeholders from its usage
  - Different cooperative frameworks for organizing CPR ownership, based on the integration of stakeholders’ interests within their management and exploration (OSTROM, 2012)
  - Possible consideration of IP as a common – “open-access” + some kind of remuneration to the inventor

REFERENCES AND FURTHER READING

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* It is important to highlight that other studies refined Flammer findings, especially indicating the role of professional management, the relevance of country and industry specificities, and even the irrationality of firm decision-making in not perceiving ESG as a competitive differentiator. Overall, however, it still is possible to affirm a correlation between competition and environmental governance at the firm level.

See: GUPTA, Kartick; KRISHNAMURTI, Chandrasekhar. *Product Market Competition and Corporate Environmental Performance* (2016); MENG, X. H. et al. *The impact of product market competition on corporate environmental responsibility* (2016); TSENDSUREN, Chuluunbat et al. *Influence of product market competition and managerial competency on corporate environmental responsibility: Evidence from the US* (2021); AROURI, Mohamed; GHOUL, Sadok El; GOMES, Mathieu. *Greenwashing and product market competition* (2021)