THE ROLE OF THE WORLD BANK GROUP IN ADDRESSING ENFORCEMENT ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW

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Abstract: *the article deals with the question of an effective enforcement mechanism in International Environmental Law. The aim of the paper is to resolve major environmental challenges through the involvement of the World Bank Group. Due to its huge mandate as the international development bank as well as due to the inherent connection with environmental problems, we can argue that the Bank has a capability to resolve the issue of ineffective enforcement in International Environmental Law. In this paper, we will consider four major challenges to the effective enforcement in International Environmental Law: (1) Westphalian paradigm; (2) Tragedy of Commons; and (3) Absence of non-compliance mechanisms; As a solution for these challenges, the paper proposes the enforcement mechanisms such as the Bank's hard laws (agreements of loan, grants and credits), soft laws (good offices, financial encouragement) and through subsidiary bodies (ICSID, GEF and IP).*
Keywords: *international environmental law, enforcement, World Bank Group, Westphalian paradigm, state responsibility, non-compliance mechanisms.*

РОЛЬ ГРУППЫ ВСЕМИРНОГО БАНКА В РЕШЕНИИ ВОПРОСОВ ПРАВОПРИМЕНЕНИЯ В МЕЖДУНАРОДНОМ ЭКОЛОГИЧЕСКОМ ПРАВЕ

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Аннотация: *в статье рассматривается вопрос об эффективном правоприменительном механизме в международном экологическом праве. Целью данной статьи является решение основных экологических проблем за счет участия Группы Всемирного банка. У Банка имеются все возможности для решения проблемы неэффективного правоприменения в международном экологическом праве из-за неотъемлемой связи с экологическими проблемами и огромной значимости банка в качестве международного финансового гиганта. В этой статье мы рассмотрим четыре основные проблемы, которые препятствуют эффективному решению проблем окружающей среды в международном экологическом праве: (1) Вестфальская парадигма; (2) Трагедия общин и (3) Отсутствие механизмов неподчинения. В качестве решения этих проблем в статье предлагаются правоприменительные механизмы, такие как договорные практики Банка, мягкое право и через вспомогательные органы Банка (МЦУИС, ГЭФ и ИК).*
Ключевые слова: *международное экологическое право, правоприменение, Группа Всемирного банка, государственная ответственность, Вестфальская парадигма.*

Nowadays, the world is facing various global environmental concerns that needs to be resolved under international environmental law. Unfortunately, there is no mutual consent between states about how to address those global environmental challenges. Most of the initiatives are getting failed at the stage of negotiations, because states are not willing to cooperate. Even in cases when the states have reached the consensus, most of the signed international environmental agreements are not properly executed and no control is exerted upon contracting parties. The aim of this paper is to identify the major enforcement issues in international environmental law as well as to introduce a World Bank Group (the Bank) as a potential solution for these problems. First of all, the paper will briefly mention about the relationship between the Bank and the international environmental law. Secondly, the paper will list the major problems in international environmental law connected to the enforcement. Finally, the paper will propose several solutions with the Bank's involvement.

The International Bank for Reconstruction and Development (known as the World Bank Group) was established after Bretton Woods conference held in 1944. According to Art. VII of the Articles of Agreement, the Bank possesses *"full juridical personality, and, in particular, the capacity: (1) to contract; (2) to acquire and dispose of immovable and movable property; (3) to institute legal proceedings;"* [12]. The United Nations (UN) has granted an exceptional privilege and immunity to the Bank, because it is a *"specialized agency of the UN"* [4]. The Bank consists from five separate bodies such as the "International Bank for

Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID)" [1]. Each body of the Bank is governed by their founding Articles of Agreement as well as by the Bank's internal documents. In general, the Bank has a contractual liability over internal documents, Articles of Agreements, UN incorporated documents and conventions where the Bank is a party. The ultimate aim of the Bank is to eradicate an *"extreme poverty"* and to encourage a *"shared prosperity"* in the world [1]. All in all, the Bank performs many functions and affects the international law in many different ways. Firstly, it can be seen as a 'knowledge hub' and it can share its knowledge to the countries by providing technical assistance and expertise in reforming internal legal systems of the states. Moreover, the Bank can act as 'law maker'. It can incorporate new trends in international law as well as it can directly influence countries to incorporate that same law. Lastly, the Bank can offer good offices, mediation mechanisms and other forums for the settlement of disputes.

There exists an interdependence between the Bank and the environment. The Bank could not be able to achieve its main goals without properly addressing environmental issues in the world as well as the problems in international environmental law could not be resolved without an interruption of the giant development banks such as World Bank Group. Firstly, the Bank's goal 'to end poverty' could not be realized, if the Bank will not solve environmental problems in developing countries, because both issues are interrelated. Secondly, the Bank's goal 'to share sustainable economic development' could not be achieved, if the Bank will not address environmental issues first. It is due to the fact that the word 'sustainable' will not hold, if the Bank continues to disrespect environmental concerns. As it was noted by a *"WCED"* known as the Brundtland Commission, a sustainable economic development is a *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs"* [18]. The Bank started to address environmental issues in investment projects starting from early 1950s, but the understanding that the environmental issues should be incorporated into the project planning phases came to the Bank only in 1970s [18]. The major speech by the President of the Bank, Robert McNamara was the first step towards it. Moreover, the Commission in Stockholm Conference (1972) openly acknowledged that *"protection of the environment could no longer be seen as an obstacle to development but rather needed to be considered as an essential aspect of it"* [18]. The Bank was one of the pioneers in this field. It has modified its internal rules, processes and trained its staff, in order to raise environmental awareness in the Bank. It issued operational manual statement (OMS) which was treated as a guideline for the Bank regarding the

issues connected to the environment [18]. Nowadays, the Bank is actively sharing its experience in addressing environmental concerns as well as it is encouraging borrowing states to implement environmentally friendly laws. In 2018, the Bank has issued its latest manual called as *"Environmental and Social Framework"* (ESF). It was designed to help the Bank and borrowers *"to better manage environmental and social risks of projects and to improve development outcomes"* [10]. To sum up, we can argue that the Bank is interested in resolving environmental issues due to its aim and goal. Taking into consideration the role of the Bank in the international arena, we can argue that the Bank has a capability to address the enforcement gaps in international environmental law. But before, we will try to identify the major challenges to the effective enforcement in international environmental law.

The international legal system is designed to regulate mainly inter-state relations through international agreements and other types of binding and non-binding sources of international law [9]. The failure of this system in regard to international environmental law could be explained by a Westphalian paradigm. The paradigm lies on the fact that each state enjoys the sovereignty and no state wants to give up it for a common good. The notion of Westphalian sovereignty takes root from *"Peace of Westphalia (1648)"* which ended thirty years' war. Every state has a sovereignty over its territories, all states are equal and sovereign regardless of its size, economic or military capabilities [7]. Moreover, every state is free to decide its own internal affairs as it wishes, and no state has a legitimate authority to intervene into those affairs [7]. It is important to note that the principle is one of the cornerstones of modern international law and it is highlighted in many international treaties and major agreements. For instance, this principle is imbedded into *"Charter of Economic Rights and Duties of States (1974)"*. According to Art. 1 of the General Assembly resolution, *"every State has the sovereign and inalienable right to choose its economic system as well as it political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever"* [6]. The concept is also portrayed in *"Art. 2 (4) of the Charter of the United Nations (1945)"*. Any international treaty or convention requires certain piece of sovereignty to be sacrificed in order to achieve treaty goals and aims. Usually, goals of the treaty are desired by states and once a treaty is in force, states could enjoy the benefits of the international treaty immediately. In other words, states bear costs equal to the benefits that they will get from entering to the international treaty. Unfortunately, it is not the case with international environmental agreements. States often bear costs in current period for benefits that they will get or could possibly get in the future. So, the aim of international environmental agreements is to limit or restrict states from doing certain things now without

offering any immediate benefits. For states, such offer is not attractive, so, they choose not to enter into those agreements and continue to enjoy their full sovereignty guaranteed under the Westphalian system. For example, U.S refused to sign Kyoto Protocol (1997) aimed at reducing the greenhouse emissions to the environment [8]. President Bush said that he cannot sign this international environmental agreement, because it would *"harm our economy and hurt our workers"* meaning that it would harm the state's sovereignty [8]. All in all, we can conclude that lack of the effective enforcement mechanism was partially caused by Westphalian paradigm and the aim of this paper is to resolve it through incorporation of World Bank Group.

The failure of the system to effectively enforce international environmental laws could be further explained by an economic theory of Tragedy of Commons or a free-rider problem. It is a well-known situation in economics, where no player has an incentive to contribute to a public good, at the same time, no player hesitates to maximize their utility out of it [17]. As the result, the common good gets highly overwhelmed and depleted as a result. Let us frame this concept to a real-life example from international environmental law. For instance, let us refer to *"the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)"*. From the first glance, it seems that states have agreed to sacrifice some portion of their sovereignty for the common good, but still there are some ambiguities with this convention that no state is eager to resolve. To be more precise, the Basel Convention was signed to ensure that states are in compliance with hazardous waste management as well as to control transboundary movements of e-waste between countries [14]. By e-waste we mean wastes from any electrical and electronic equipment that are very harmful for the environment and so popular nowadays. Initially, it was aimed to totally ban the movement of e-waste across countries, but as a result, it was agreed to limit and control the movement of e-waste between signed states [14]. Moreover, the treaty clearly defines new and used e-wastes. New e-wastes are considered as hazardous and should be strictly controlled, whereas used e-wastes are considered as non-hazardous and no control is provisioned under this treaty (see Annex IX of the Basel Convention) [14]. The biggest problem of the Basel Convention lies on the fact that countries do not distinguish these two categories and new e-wastes are usually imported/exported under Annex IX and no control is imposed to it [14]. Countries are enjoying this exemption and actively exploiting it. No state is eager to propose amendments to the Basel Convention, because changes to the Basel Convention will restrict their sovereignty and states do not want it. So, this is the bright example of Westphalian paradigm as well as the tragedy of commons. States as players in tragedy of commons are maximizing their utility under Annex IX of the Basel Convention. Designed controls of the convention are not working, and e-

wastes are getting accumulated by importing states and there is no control over the hazardous waste movement across countries. Tragedy of commons is not a new theory in economics and many scholars has already offered several economic solutions for it, but for international environmental law most of these solutions are inapplicable. Our aim is to address this problem through involvement of the World Bank Group.

According to Kellenberg and Levinson, the ratification of Basel Convention (1989) did not slow down toxic trade between signed countries [13]. Moreover, there was no decrease in ozone layer depleting substances after Montreal Protocol (1987) as well as no decrease in sulfur emissions after the ratification of Oslo (1994) or Helsinki Protocols (1985) [13]. The reason for such negative trends could be explained by the absence of an adequate enforcement mechanisms in international environmental law. One of the most effective mechanism such as adjudication is often not preferable by states in signing international environmental agreements [19]. There are two major reasons for that. Firstly, due to the ineffectiveness of 'state responsibility' principle in international environmental law, victim states cannot prove the guiltiness of another state, thus, cannot sue. Secondly, environmental cases are very time-consuming and cumbersome, and states usually abstain from involving into such cases directly. Usually, states prefer to use non-compliance mechanism as a tool to enforce international environmental agreements. The main aim of these mechanisms is to ensure that all clauses of an international environmental agreement is fully followed by all signed states and any deviations are punished. Nevertheless, the statistics above as well as real life practices below shows that non-compliance mechanisms do not work. For instance, refer to Brazil – UK case. The case happened in 2009, when Brazil found that containers with *"recyclable plastic"* label had hazardous substances instead [5]. These containers were from UK and it violated *"Art. 19 of the Basel Convention (1989)"* [19]. Brazil asked formal consultations under specifically designed non-compliance body of the Basel Convention, but UK was silent [19]. Then, Brazil decided to file a request in WTO [19]. UK used its right under Art. 9 (2) of the Basel Convention to settle the case with Brazil by themselves [19]. Finally, containers were shipped back to UK and no non-compliance measures were taken against UK. Similar situation happened with Trafigura case, where shipped hazardous goods from Amsterdam harmed the environment and caused loss of human life near Ivory Coast [19]. It was again the violation of the Basel Convention, but non-compliance mechanism of the Basel Convention was not triggered. The case was finally resolved when Netherlands agreed to repair the harm, but still the State was considered as not guilty. Lastly, according to Salzmann, "*a former chairperson of its Compliance Committee has expressed his personal opinion according to which parties may actually prefer to resort to the*

WTO dispute settlement system, rather than to the Protocol's NCP", which means that non-compliance mechanism of Cartagena Protocol is weaker and ineffective comparing to WTO system [19]. To sum up, it appears that there is no effective enforcement mechanism in place in international environmental agreements and the aim is to present a World Bank Group as a potential enforcer of international environmental agreements.

The Bank has a variety of instruments that it can employ to influence the enforcement mechanism in international environmental law. In this paragraph, we will analyze the Bank's hard laws such as agreements of loans, grants and credits between the Bank and borrowers as well as the Bank's internal legal documents such as operational directives, bank procedures and so on. Bank procedures and operational directives regarding the environmental concerns are all combined under *"Environmental and Social Framework"* (ESF) which was issued in 2018. The document is designed to ensure compliance in the Bank financed projects. It is a binding law to both, the Bank and a borrower. Precisely, ESF is directly binding to the Bank, because it is its internal legal document. At the same time, ESF is indirectly binding to borrowers, because ESF policies are reflected in agreements of loan, grants, guarantees or credits between the Bank and a borrower. For instance, whenever the Bank enters into agreement with the project execution bodies (either states or private companies), a borrower gives a commitment that *"to the objectives of the project, to carry out the project with due diligence and efficiency and in conformity with appropriate practices"* [1]. It means that a borrower commits to follow all internal laws and adequate practices of the Bank including ESF framework. According to Bekhechi, this general clause in loan agreements are too vague, thus, has no binding force to the borrowers in reality [1]. The clause is designed to portray ceremonial role rather than a practical one. In addition to this general clause, the Bank can also impose specific actions in the loan agreements. For instance, the loan agreement between the Bank and the Government Congo clearly stated that the country must reform its laws regarding the prolongation and issuance of certain licenses, because those licenses had an adverse effect to the environment of Congo [1]. It is without doubts that such statements in loan agreements have a full binding power over the signing country. Moreover, it is important to note that the non-compliance with this requirement has a sanction from the Bank provisioned in the loan agreements. At the same time, the Bank has committed that it *"will not finance any project that conflicts with an international environmental agreement or a treaty to which the concerned country is a party"* [16]. To sum up, we can conclude that the Bank's loan agreements and imposed environmental actions in those agreements has a capability to enforce international environmental agreements as well as work as remedy against

Westphalian paradigm and in cases of severe violations work as an alternative for non-compliance mechanisms.

The Bank's certain subsidiary bodies can play a role of non-compliance mechanisms such that those organizations can force states to comply with the international environmental agreements. For instance, Global Environment Facility (GEF) which was established by the help of the Bank, "United Nations Development Program (UNDP)", and "United Nations Environment Program (UNEP)" [18]. The GEF finances environmental initiatives connected with four main concerns such as *"emissions of greenhouse gases"* (consistent with Kyoto Protocol), *"threats to biological diversity"* (consistent with Convention on Biological Diversity), *"degradation of international water resources"* and *"depletion of the ozone layer"* (consistent with Montreal Protocol) [11]. Therefore, GEF is designed to encourage the proper execution of international environmental agreements. Moreover, we can also refer to an Inspection Panel (IP). The IP is a semi-independent body that was instituted to address adverse effects from the Bank-financed projects. The IP can hear cases against the Bank (especially IBRD and IDA) as well as against borrower countries. Starting from 1993, The IP has investigated and resolved many cases. One of the bright examples can be *"Forest Concession Management and Control Program"* in Cambodia financed by the Bank. Local NGO in Cambodia has filed a case against the Bank for violating several operational directives regarding the environment and indigenous people. In fact, the Bank has committed to not finance any commercial logging of forests, because it was consistent with the Convention on Biological Diversity (1992). Nevertheless, the Bank has ended with financing the commercial logging of forests. The Management carefully reviewed the case and concluded that the commercial logging in Cambodia will shut down, the Government of Cambodia will be punished, and the Bank will tighten its policies regarding the forests [2]. In addition to the IP, we can also refer to ICSID as a forum to resolve environmental issues. ICSID cannot hear environmental cases directly, but still states can force investors (in most of the cases corporations) to comply with international environmental agreements through counterclaim mechanism in ICSID. For instance, the ICSID heard a case between Burlington Resources Inc. vs. Republic of Ecuador, where the latter raised an environmental counterclaim against Burlington for violation of Ecuadorian tort law by causing environmental harm [3]. The Tribunal awarded *"USD 39.2 million for environmental remediation"* [3]. All in all, above mentioned organizations can force countries and private companies to comply with international and domestic environmental agreements as well as they can act as non-compliance mechanisms. Moreover, those organizations can compensate absence of state responsibility principle by introducing state liability notion.

The Bank can also influence the enforcement mechanism in international environmental law through soft law instruments such as good offices, a financial encouragement as well as by being a role model. For example, the Bank positions itself as fully eco-friendly entity and argues that all internal processes as well as operational directives of the Bank are all consistent with international environmental treaties. The Bank is actively taking a participation in various conventions and treaties like *"Basel Convention (1989)"* [18]. Moreover, the Bank encourages projects connected with international environmental treaties. The Bank has sponsored Thailand Forestry Project which was in accordance with the Convention on Biological Diversity (1992) [16]. The Bank also supports the formation of new organizations such as Carbon Investment Fund that is designed to control carbon emissions as per Kyoto Protocol (1997) [16]. Most importantly, the Bank can enforce the international environmental agreements directly. For instance, the Bank is *"one of the four implementing, agencies of the Multilateral Fund for the Implementation of the Montreal Protocol"* [16]. To sum up, the Bank has a capability to enforce environmental agreements through active participation, encouragement and through the creation of new bodies.

All in all, the goal of the paper was to show the interdependence between the Bank and the environment as well as to highlight the importance of the Bank in resolving the enforcement challenges in international environmental law. In this paper, we have examined four major enforcement challenges in international environmental law. It was argued that international environmental treaties cannot be properly executed due to the Westphalian paradigm and the free-rider problem. Due to the absence of effective non-compliance mechanisms, international environmental agreements are not fully enforced. As a result, no control is imposed to the contracting states. After careful examination of challenges, it was proposed to overcome Westphalian paradigm and the free-rider problem through an incorporation of certain environmental requirements in loan agreements of the Bank with borrower states. In addition to this, it was highlighted that any incompliance with international environmental agreements can be further addressed through specific organizations such as ICSID and IP. The Bank can also enforce environmental treaties through the creation of organizations such as Carbon Investment Fund and GEF. Finally, it was mentioned that the Bank can directly enforce international environmental treaties through providing financial resources for the proper execution of those environmental conventions within the states.

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