

PROMOTING SUSTAINABLE DEVELOPMENT AND
DEMOCRACY IN CENTRAL AND EASTERN EUROPE:
THE ROLE OF THE EUROPEAN BANK FOR
RECONSTRUCTION & DEVELOPMENT

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INTRODUCTION

To bankroll the rebirth of Central and Eastern Europe, forty countries and two European Community institutions joined together on May 29, 1990, to create the European Bank for Reconstruction and Development (the Bank or EBRD).¹ The parties envisioned the Bank as playing a decisive role in solving three major problems that have relegated Central and Eastern European countries to the status of second-tier world players: environmental degradation on an order seen nowhere else in the developed world; undemocratic political systems that vested power in elite bureaucracies insulated from the demands of their citizens; and centrally planned economies that could not compete with those of the free market world.

The environmental community in Central and Eastern Europe, and throughout the world, viewed the announcement of the new Bank with hope and optimism, and urged the Bank's founders to make sustainable development one of its fundamental goals, in addition to the development of market-based economies and the promotion of democracy. Upon the Bank's creation, the institution became the first multilateral development bank with an environmental mandate, providing a poten-

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1. Agreement Establishing the European Bank for Reconstruction and Development, May 20, 1990, *reprinted* in 29 I.L.M. 1077 (1990) [hereinafter the Articles of Agreement] (for the complete text of the Articles of Agreement see appendix A); see also Richard A. Melchner *et al.*, *Bankrolling the Rebirth of the East*, BUSINESS WEEK, Apr. 29, 1991, at 45 (describing role of Bank in rebuilding the region).

tial model for the eventual reform of the World Bank and other regional development banks.²

The environmental mandate in the Bank's Articles of Agreement commit it to promoting three broad goals: environmentally sound and sustainable development; democracy; and market economies.³ Unfortunately, as the rhetoric of its infancy moves into the actions of its youth, the Bank has yet to live up to either the hopes surrounding its inception or its own mandate. Despite its progressive goals, the Bank risks becoming nothing more than the progeny of pre-existing development banks.

In an effort to formulate a cohesive environmental policy, the Bank produced several draft environmental policies and responded to comments made by nongovernmental organizations (NGOs). The final environmental policy, however, fails in many respects to meet the mandate its Articles of Agreement imposes on the Bank. The policy's more egregious deficits arise in its procedures for environmental assessment, public participation and access to information. Specifically, the environmental assessment policies exempt certain categories of activities from preparation of any environmental assessment and allow loan proponents to prepare their own assessments. The public participation procedures fail to provide mechanisms, such as required public hearings, which would insure that citizens and nongovernmental organizations play a significant role in the environmental assessment process. The Bank's public access to information procedures fail to require that critical information be made available to the public.

This Article analyzes the development of the Bank's environmental policies, from their genesis in the Bank's Articles of Agreement up to, and including, the Bank's actual environmental policy statements. This article also provides suggestions for improving these policies and for actions that can be taken by interested citizens, NGOs, and governments to encourage these improvements. Part I of this Article discusses the state of the environment in the Central and Eastern European Countries as a backdrop to the need for sustainable development and environmental recovery in the region. Part II discusses the development

2. See Articles of Agreement, *supra* note 1, at preamble and art. 1 (describing the principles and purpose of the Bank).

3. *Id.* The Articles of Agreement commit the Bank to promoting "in the full range of its activities environmentally sound and sustainable development[.]" promoting democracy and human rights; conditioning eligibility for investment funds on progress towards market economies and democracy in the countries of operation. *See id.*, preamble (mandating democracy), art. 1 at 1084 (describing the Bank's purpose), art. 2(1)(iii), at 1084 (mandating the promotion of sound and sustainable development), and art. 5, at 1086 (conditioning investments on democracy and market economies).

of the Bank's environmental policies and outlines the final version of these policies. This part emphasizes the evolution of these policies over the course of the Bank's attempts at a coherent environmental policy and discusses the role that the Center for International Environmental Law-U.S. (CIEL-U.S.)⁴ and other NGOs played in the process. Part III of the article addresses the Bank's mandates of sustainable development and democracy as set forth in the Articles of Agreement. Part III also seeks to provide substantive guidance to the Bank, NGOs and others in moving from these broad proclamations to their practical application. Part IV establishes a framework for and discusses actions the Bank must take to transform its environmental policies into an environmental program that meaningfully implements the Bank's mandates of sustainable development and democratic principles. Part IV of the article also provides suggestions to aid NGOs and concerned citizens in encouraging the Bank to meet its goals.

I. STATE OF THE ENVIRONMENT IN CENTRAL AND EASTERN EUROPE: THE NEED FOR SUSTAINABLE DEVELOPMENT

The state of the environment in Central and Eastern Europe is the epitaph of centrally planned economies which gave production targets precedence over human health and ecological concerns.⁵ In their current state, the region's most basic natural resources — air, water and soil — are so severely despoiled that the transition to market economies cannot succeed without environmental restoration and protection. A brief overview of the region's environmental condition clearly indicates the need for sustainable development, as many of the region's leaders have emphasized. For example, the Czech and Slovak Federal Republic's (CSFR) revolution grew out of economic and environmental deterioration and the possibility of substantially improving "the quality of

4. The Center for International Environmental Law-U.S. is a public interest, inter-parative and international environmental law to protect the global environment. CIEL-U.S. Press Release 1 (Oct. 31, 1991).

5. See INTERNATIONAL WORKSHOP ON INST'L DESIGN, HUBERT H. HUMPHREY INST. OF PUB. AFF., U. MINN., ENVIRONMENT AND DEVELOPMENT FOR POLAND: DECLARATION OF SUSTAINABLE DEVELOPMENT VI (1990) [hereinafter ENVIRONMENT AND DEVELOPMENT FOR POLAND] (including among the legacies of the former government a devastated economy and environmental crisis); J. VAVROUSEK, CZECH. FED. COMM. FOR THE ENVIRONMENT, THE ENVIRONMENT IN CZECHOSLOVAKIA 89-90 (1990) (attributing the destruction of the environment to the control system of the Czechoslovakian national economy) (on file with *American University Journal of International Law & Policy*).

the living environment through a permanently sustainable development."⁶ Polish experts have concluded that sustainable development could solve its country's ecological crisis and that Poland's challenge is "to invent those institutions that promote a sustainable society: a society that effectively blends economic development, environmental protection and political freedom for the present population and future generations."⁷

A. AIR POLLUTION

Measured by either per dollar GNP or emissions per capita, the region pollutes the air more than any other in the world.⁸ Regional air pollution consists largely of sulfur dioxide and nitrogen oxide emissions. The CSFR and Poland rank first and second in nitrogen oxide emissions per unit of GNP.⁹

Much of the sulfur dioxide and nitrogen oxide emissions result primarily from the region's heavy reliance on lignite (brown coal) for energy, a coal that is low in energy yet high in pollution-causing sulfur. Despite its inefficiencies, lignite accounts for seventy-two percent of energy consumption in former East Germany and forty-one percent in the CSFR.¹⁰ Moreover, most of the region's coal burning plants have no pollution control equipment.¹¹ In Poland, for example, ninety-one percent of major industrial facilities have no emissions control equipment.¹² In the CSFR only one coal plant has a de-sulfurization unit, and that unit is currently ineffective.¹³

Throughout Eastern Europe, the environmental and public health consequences of inefficient industrial practices and lack of pollution control equipment are staggering. For example, average sulfur dioxide concentrations in Northern Bohemia, CSFR, are two to three times the permissible level set by the World Health Organization, with peak

6. VAVROUSEK, *supra* note 5, at 7.

7. ENVIRONMENT AND DEVELOPMENT FOR POLAND, *supra* note 5, at vi.

8. H.F. FRENCH, GREEN REVOLUTIONS: ENVIRONMENTAL RECONSTRUCTION IN EASTERN EUROPE AND THE SOVIET UNION 13 (1990) (Worldwatch Paper No. 99).

9. See *id.* at 13-15 (citing M. WALSH, THE WORLD BANK, MOTOR VEHICLE POLLUTION IN HUNGARY: A STRATEGY FOR PROGRESS (1990)).

10. *Id.* at 11 (citing figures from the UNITED NATIONS, ENERGY STATISTICS YEARBOOK, 1988 (1990) that together these two countries burned almost one-third of the world's lignite).

11. *Id.* at 11 (adding that the plants possessing such equipment employ inferior controls compared to Western technology).

12. ENVIRONMENT AND DEVELOPMENT FOR POLAND, *supra* note 5, app. at 29.

13. Interview with Tomas Jirsa, Energoprojekt, in Most, Czech and Slovak Federal Republic (Nov. 26, 1990).

emissions up to twenty-five times the permissible level.¹⁴ In the former East Germany, average annual sulfur dioxide emissions are five times the applicable United States' standard and particulate levels are thirteen times that of the United States.¹⁵ Hungary's air pollution results in annual losses of \$15 billion Forints (\$214 million),¹⁶ as children in highly polluted areas of Hungary are four times more susceptible to disease than in other areas of Hungary.¹⁷ In the area around Copsa Mica, Romania, a black powder used in rubber manufacturing has turned even the sheep a dingy black.¹⁸

Cities are often hardest hit. Airborne lead levels in Budapest are thirty times the Hungarian standards.¹⁹ In the former Soviet Union, 103 cities exceed health based standards by a factor of ten, and sixteen cities by a factor of fifty.²⁰ With monitoring equipment widely unavailable or out-dated, the worst air pollution problems may not even be documented.

B. WATER POLLUTION

Water contamination poses an equally serious threat to the continued economic and social vitality of the region. The drinking water of one-third of the rural household wells in Poland violates existing standards.²¹ One-half of the CFSR's drinking water falls below health standards,²² and arsenic laces the water supply in seventy-six Hungarian towns.²³ In Slovakia, one-half of the rivers no longer support aquatic life; they are effectively dead.²⁴ One-third of Bohemia's rivers have also

14. See VAVROUSEK, *supra* note 5, at 13-18 (presenting graphs of pollution levels during specified periods); see also FRENCH, *supra* note 8, at 13 (noting that in Prague the WHO standard for sulfur dioxide concentration is exceeded 128 days each year).
15. FRENCH, *supra* note 8, at 11 (citing Linoff, *Eastern Europe: Restoring a Damaged Environment*, EPA JOURNAL (July-August 1990)).
16. INSTITUTE FOR ENVIRONMENTAL DEVELOPMENT, STATE OF THE ENVIRONMENT IN HUNGARY AND ENVIRONMENTAL POLICY 33 (Miklós Bulla ed. 1989) [hereinafter *Environment in Hungary*].
17. *Id.*
18. FRENCH, *supra* note 8, at 16 (citing Bohlen, *Through a Thick Veil of Soot, Romanian City Faces Future*, N.Y. Times, Mar. 5, 1990, at A1).
19. *Id.* at 14-15 (noting also that formaldehyde, ozone, and carbon monoxide frequently exceed standard levels).
20. *Id.* at 11 (citing 1988 figures from USSR STATE COMMITTEE FOR THE PROTECTION OF NATURE, REPORT ON THE STATE OF THE ENVIRONMENT (1989)).
21. ENVIRONMENT AND DEVELOPMENT FOR POLAND, *supra* note 5, app. at 29.
22. VAVROUSEK, *supra* note 5, at 33.
23. FRENCH, *supra* note 8, at 18 (citing B. Hock & L. SOMLYÓDY, *Freshwater Resources and Water Quality*, in STATE OF THE HUNGARIAN ENVIRONMENT (Himrichson & Enyedi eds. 1990) [hereinafter Hock & Somlyódy]).
24. *Id.* at 17 (citing J. Pehe, *A Record of Catastrophe and Environmental Damage*, reprinted in REPORT ON EASTERN EUROPE (Radio Free Europe, Mar. 23, 1990)).

died from unsustainable development. In the former East Germany, the aquatic death toll stands at one-third of the rivers and 9,000 lakes.²⁵ In Romania, eighty percent of river water is not potable.²⁶

Much of the water pollution is the result of industry and household sewage systems which use surface waters as waste dumps. In Hungary alone, 1.3 billion tons of untreated sewage is dumped into rivers and lakes.²⁷ One-half of Poland's cities, including Warsaw, and thirty-five percent of its industries fail to treat their waste waters.²⁸ Over one-half of Bratislava's industrial and household waste flows untreated into the Danube River.²⁹ In the end, much of this waste flows with the rivers into the Black Sea, ninety percent of which is already lifeless.³⁰

C. HEALTH AND ECONOMIC COSTS

The health and economic cost of the region's environmental pollution is enormous. In actual human terms, Czechoslovaks have a life span of five to seven years less than people in the West.³¹ In Upper Silesia, people die three to four years earlier than in other areas of Poland; in the most polluted part of former East Germany, life expectancies are five years less than in other parts of the country.³² In some areas of Northern Bohemia, people are paid a "funeral" premium to compensate them for their lower life expectancy.³³ According to one report, each year pesticides kill 14,000 people and cause 700,000 illnesses in the former Soviet Union.³⁴ Estimates of health care costs from pollution reached eleven percent of GNP in the former Soviet Union in 1987 (\$330 billion); pollution is costing Poland ten to twenty percent of its

25. *Id.* (citing Dr. V. Beer, East German environmentalist (unpublished data 1990)).
26. *Id.* (citing U.K. FOREIGN AND COMMONWEALTH OFFICE, ENVIRONMENTAL POLLUTION IN THE USSR AND EASTERN EUROPE (background brief Oct. 1989)).
27. *Id.* (citing Hock & Somlyódy, *supra* note 23).
28. Tye, *Poland is Left Choking on its Wastes*, Boston Globe, Dec. 18, 1989, at 1.
29. Stansky, *Pollution: The Tale of Bratislava*, East European Reporter (1985) (J. Budaj trans.).
30. FRENCH, *supra* note 8, at 19.
31. REPORT OF THE FEDERAL COMMITTEE FOR THE ENVIRONMENT, MINISTRY OF ENVIRONMENT OF THE CZECH REPUBLIC, AND THE SLOVAK COMMISSION FOR ENVIRONMENT, CONCEPT OF STATE ECOLOGICAL POLICY 2 (undated).
32. FRENCH, *supra* note 8, at 22 (citing J. Gedmin, *Polluted East Germany*, CHRISTIAN SCIENCE MONITOR, Mar. 16, 1990, at 19).
33. Interview with Tomas Jirsa, *supra* note 13.
34. FRENCH, *supra* note 8, at 27 (citing USSR to Raise Domestic Aghem Production, AGRON., Aug. 11, 1989).

GNP each year,³⁵ and the CFSSR five to seven percent of its GNP (\$192 million annually on crop damage alone).³⁶

In order to rectify these health problems, factories that cause serious environmental problems are being closed. In the former Soviet Union in 1989, 240 plants closed for environmental reasons,³⁷ and in former East Germany, 65,000 factories may be closed because they do not meet West German standards.³⁸ Such closings will aggravate massive unemployment, as nearly fifty percent of those residing in the former East Germany are already unemployed.³⁹ Unemployment, in turn, causes impoverishment, diminished standards of living, and increased infant mortality and malnutrition rates, which are incompatible with sustainable development.⁴⁰ Finally, pollution from Eastern and Central Europe causes significant damage to neighboring countries at considerable cost, including the cost imposed by the influx of "environmental refugees."

As a short-term solution, the closing of certain factories may be necessary. Such measures, however, are no substitute for a long-term strategy of environmentally benign development. Simply put, the region must implement strategies for sustainable development.

II. DEVELOPMENT OF THE BANK'S "SUSTAINABLE DEVELOPMENT" POLICIES

Once the region's economic and environmental destruction became apparent, the Bank was created to help rectify the ills left by centrally planned economies. The Bank is to do this by promoting the three goals

35. *Id.* at 10 (citing Feshbach & Rubin, *Why Ivan Can't Breathe*, Wash. Post, Jan. 28, 1990, at C2, and A. Kassenberg, ENVIRONMENT SITUATION IN POLAND (unpublished paper 1989)).

36. J. VAYROUSEK, *supra* note 5, at 69.

37. FRENCH, *supra* note 8, at 36 (citing WORLD CONSERVATION MONITORING CENTER, INT'L UNION FOR CONSERVATION AND NATURAL RESOURCES (IUCN), THE ENVIRONMENT IN EASTERN EUROPE, 1990: A SUMMARY (draft report 1990)).

38. *See id.* at 37 (noting that existing plants have until the end of the decade to conform to West German standards or shut down).

39. Fisher, *Germans in East Press Economic Complaints*, Wash. Post, Apr. 9, 1991, at A15.

40. *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 28-31 (1987) [hereinafter *Our Common Future*]. The World Commission noted eloquently:

[P]overty itself pollutes the environment, creating environmental stress in a different way. Those who are poor and hungry will often destroy their immediate environment to survive; they will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge.

Id. at 28. *See also* Mathews, *Redefining Security*, 28 FOREIGN AFF. 162, 166 (1989) (discussing how poverty and unemployment harm the environment).

of a market economy, democracy and sustainable development. Although developing a market economy will be important for the region's environmental protection, the latter two goals — democracy and sustainable development — form the cornerstone of what ultimately should be the environmental policies of the Bank.

This section of the article analyzes the on-going development of the Bank's environmental policies, including the role NGOs have played in their creation. The analysis begins with the Agreement Establishing the European Bank for Reconstruction and Development (the "Articles of Agreement") and describes the final environmental policy and its preceding draft environmental policies.

A. THE AGREEMENT ESTABLISHING THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

The Articles of Agreement incorporate the two tenets of sustainable development and democratic principles of governance. They commit the EBRD to promoting environmentally sound and sustainable development in the full range of its activities,⁴¹ the first time that a multilateral development bank has formally recognized the need for sustainable development in its articles of agreement. The second mandate which the Articles of Agreement impose on the EBRD is a commitment to democratic principles. The Agreement specifically requires the EBRD to promote democracy,⁴² observe democratic principles in its internal governance,⁴³ and to condition eligibility for investment funds on progress toward market economies and democracy in the countries of operation.⁴⁴

41. Articles of Agreement, *supra* note 1, art. 2, para. 1(vii), at 1084. *See also* Draft Chairman's Report on Articles of the European Bank for Reconstruction and Development, at 2 (Apr. 9, 1990) [hereinafter *Chairman's Report*] (providing explanatory notes that summarize the general understandings that led to the formulation of the Articles) (on file with *American University Journal of International Law & Policy*). The Chairman's Report notes:

Delegates recognized the serious environmental problems in Central and Eastern Europe, and emphasized that principles of environmentally sound development must be integrated into the full range of the Bank's operations. Thus Delegates intended "in the full range of its activities" to include all of the Bank's activities, including technical assistance and all special operations, and not merely that the Bank should be able to provide support directly for specific environmental projects.

Id. at art. 2, para. 2(iii).

42. Articles of Agreement, *supra* note 1, preamble, at 1083.

43. *Id.* art. 11, at 1087.

44. *Id.* art. 1, at 1084 (art. 8), 1086.

This dual commitment to sustainable development and democratic principles presents the EBRD with the unique opportunity, and responsibility, to change the manner in which development occurs in Central and Eastern Europe. If it fulfills these mandates, the EBRD will serve as a model for other multinational institutions throughout the world in their adoption of sustainable development principles.

Although the Articles of Agreement set the boundaries for the EBRD's environmental policies, the policies themselves will guide the Bank in meeting its goals. After more than one year of internal Bank discussions and ongoing dialogue with environmental NGOs, the Bank finally has adopted its final environmental policy. A detailed review of this dialogue shows how NGOs, were able to influence the policy and the future role NGOs must play in ensuring that the Bank fulfills its sustainable development mandate.

B. THE EBRD DRAFT POLICY'S APPROACH TO ENVIRONMENTAL MANAGEMENT

On February 13, 1992, the EBRD's Board of Directors adopted its *Environmental Procedures*,⁴⁵ including *Environment Management: The Bank's Policy Approach*⁴⁶ (the "Environmental Policy") which contains the guidelines by which the EBRD and project proponents will evaluate loans for environmental impacts. The Bank adopted the Procedures and Environmental Policy after more than a year of dialogue with NGOs, including visits by EBRD President Jacques Attali and top Environmental Department staff to NGO meetings in Central and Eastern Europe.⁴⁷ Despite this dialogue, as well as the Bank's commitment to "plac[ing] environmental issues at the forefront of its efforts to promote sustainable economic growth at the national and regional level,"⁴⁸ the policies fall far short of the requirements necessary to achieve sustainable development in a culture promoting democratic principles.

As a statement of general policy, the Environmental Policy offers useful guidance on how the Bank should invest its funds in order to

45. EBRD, ENVIRONMENTAL PROCEDURES (Feb. 13, 1992) (on file with *American University Journal of International Law & Policy*).

46. EBRD, ENVIRONMENTAL MANAGEMENT: THE BANK'S POLICY APPROACH (Feb. 13, 1992) [hereinafter the FIRST ENVIRONMENTAL POLICY] (on file with *American University Journal of International Law & Policy*).

47. Friends of the Earth has organized several meetings of NGOs from Central and Eastern Europe as well as from the "West" at various sites in Central and Eastern Europe. Each meeting has been attended by a member of the EBRD.

48. FIRST ENVIRONMENTAL POLICY, *supra* note 46, at para. 1.

assist the transition toward market economies in an environmentally sound and sustainable manner. To guide its investment, the Bank identified six "policy priorities":

- (1) to assist the countries of operations in establishing environmental policies, laws, rules, regulations, and developing the institutional and human resources capacity to monitor and enforce them;
- (2) to promote market-based incentives to address the underlying causes of environmental degradation;
- (3) to encourage the development of environmental goods and service industries in the countries of operations;
- (4) to initiate, and support, special studies and programs to address regional environmental problems;
- (5) to adopt adequate environmental assessment and monitoring procedures to be applied to the Bank's activities; and
- (6) to promote adoption and implementation of access to information and public participation provisions.⁴⁹

As a practical tool, however, the *Environmental Procedures* and Environmental Policy are insufficient to implement these priorities in a manner which actually promotes environmentally sound and sustainable development as well as principles of democracy. In particular, the failure of the EBRD to incorporate meaningful public participation tools has been disappointing to NGOs, including CIEL-US, Friends of the Earth⁵⁰ and Greenpeace,⁵¹ who identified inadequacies in earlier drafts of the Environmental Policy and presented the EBRD with alternatives that would achieve its mandates.

Yet, NGOs were able to influence the Bank's Environmental Policy, and the Bank demonstrated some willingness to respond and accept the criticism of NGOs, although not to the satisfaction of NGOs. For example, when the Bank issued its First Draft Environmental Policy, NGOs were particularly concerned that public participation procedures

49. *Id.* at para. 3. The January 6, 1991 and March 13, 1991 drafts contained only four priorities; the second and sixth priorities emerging only in the December 19, 1991 draft. See EBRD, ENVIRONMENTAL MANAGEMENT: THE BANK'S POLICY APPROACH, para. 2 (Jan. 6, 1991) [hereinafter FIRST DRAFT ENVIRONMENTAL POLICY] (on file with *American University Journal of International Law & Policy*); EBRD, ENVIRONMENTAL MANAGEMENT: THE BANK'S POLICY APPROACH, para. 3 (March 13, 1991) [hereinafter SECOND DRAFT ENVIRONMENTAL POLICY] (on file with *American University Journal of International Law & Policy*); EBRD, ENVIRONMENTAL MANAGEMENT: THE BANK'S POLICY APPROACH, para. 3 (December 19, 1991) [hereinafter THIRD DRAFT ENVIRONMENTAL POLICY] (on file with *American University Journal of International Law & Policy*).

50. Friends of the Earth is an independent global advocacy group dedicated to preserving biological, cultural and ethnic diversity and has offices in 40 countries. NATIONAL WILDLIFE FEDERATION, CONSERVATION DIRECTORY 1992, at 77 (1992).

51. Greenpeace is a worldwide nonprofit organization dedicated to preserving the earth and the life it supports. *Id.* at 81.

were virtually nonexistent, and certainly not mandatory. CIEL-US, however, beginning with the principle that-meaningful public participation is the *sine qua non* for ensuring sustainable development and instilling principles of democracy, argued that citizens and NGOs must have adequate access to information and a meaningful process for submitting written comments during the EA process.⁵²

Slowly, and only after additional commenting by NGOs,⁵³ including Central and Eastern Europeans,⁵⁴ public participation provisions were strengthened.⁵⁵ Whereas the First Draft Environmental Policy did not even consider citizens to be a target audience for the Environmental

52. Specifically, CIEL-US argued that the EBRD and its loan recipients must:

- (1) begin with the premise that all information, regardless of the project type, must be accessible;
- (2) disseminate such information in all cases, except where such dissemination would jeopardize national security or, in certain extreme cases, commercial or industrial secrecy;
- (3) notify citizens, involved governments, and NGOs of any lending activity as soon as the EBRD undertakes a proposal for such activity;
- (4) invite comments from citizens, governments and NGOs as to significant issues concerning a proposed action and alternatives to such proposed action;
- (5) provide a two month period, prior to the completion of the EA, for submission of written comments;
- (6) provide for a public hearing, prior to the completion of the EA, at which interested citizens, governments and NGOs are given an opportunity to present oral testimony on the proposed action;
- (7) incorporate comments received from citizens, governments and NGOs in the final EA, and provide meaningful responses to these comments.

See Letter from Durwood Zaelke, President of CIEL-U.S., to Jacques Attali, President of EBRD, and accompanying "Recommendations to Improve the EBRD's Environmental Policy and Ensure an Effective Environmental Assessment Process" 2-6 (Jan. 25, 1991) [hereinafter Zaelke Recommendations] (on file with *American University Journal of International Law & Policy*).

53. See, e.g., Letter from Chris Wold, CIEL-US, to Sara Paulson and Nelson Coar, United States Department of Treasury (March 20, 1991) (on file with *American University Journal of International Law & Policy*); Letter from Andrew Lees, Friends of the Earth-U.K. to Jacques Attali, President of EBRD (Apr. 11, 1991) (on file with *American University Journal of International Law & Policy*).

54. See CIEL-U.S. WORKSHOP ON ENVIRONMENTAL PROTECTION AND CITIZEN'S PARTICIPATION IN THE EBRD'S LENDING PRACTICES (Budapest Hungary, March 26-27, 1991) (statement of 30 environmental professionals and attorneys from Central and Eastern Europe) [hereinafter WORKSHOP STATEMENT] (on file with *American University Journal of International Law & Policy*); Letter from Mikulas Huba, President, Slovak Union of Landscape and Nature Protectors, to Jacques Attali of EBRD (undated) (summary on file with *American University Journal of International Law & Policy*).

55. The Bank even issued a set of responses to the NGO community's comments on the EBRD's Second Draft Environmental Policy. EBRD, Responses to Comments (May 14, 1991) [hereinafter Response to Comments] (on file with *American University Journal of International Law & Policy*). The Response to Comments clarify, interpret and, in certain instances, revise the text of the Bank's Second Draft Environmental Policy.

Assessment (EA),⁵⁶ citizens now are entitled access to EAs⁵⁷ and their comments must be "taken into account" by the Bank in making a decision on whether to fund a project.⁵⁸

Still, the *Environmental Procedures* and Environmental Policy fail to provide adequate assurances that the EBRD can, in fact, live up to the two principle goals of sustainable development and democratic principles, largely because of the inadequacies that remain in the public participation and EA process. Most notably, the EBRD relies upon the project sponsor to prepare the EA, therein clouding the entire EA mechanism with bias.⁵⁹ As a result, the Bank considers environmental information to be the property of the project sponsor, information to which citizens are not entitled as a matter of course for any EBRD-funded project, including those which potentially may have significant environmental impacts.⁶⁰

In addition, citizens have no voice in the screening process employed by the Bank to determine whether, or to what extent, a project needs an EA. NGOs had argued that the Bank should require an EA for all projects, and that alternatively, citizens should be involved in the screening of all projects - the process by which the EBRD would determine whether an EA should be prepared.⁶¹ The Bank ultimately adopted a policy which precludes public participation - and even notification of a proposed project - in the screening process. In addition, the Bank requires a full EA only for those projects classified as "Category A" - those projects which potentially may have significant environmental impacts. The lack of participation in the screening process already

56. Compare FIRST DRAFT ENVIRONMENTAL POLICY, *supra* note 49, Appendix 2, at 11 (stating that "[t]he target audiences of the EA are the project designers and sponsors, the implementing agencies and enterprises, and the Bank's staff"), with SECOND DRAFT ENVIRONMENTAL POLICY, *supra* note 49, Appendix 2, at 11 (stating that "[t]he target audiences of the EA are the project designers and sponsors, the affected community, the implementing agencies and enterprises, and the Bank's staff").

57. FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 25.

58. *Id.* at para. 23.

59. *Id.* at para. 14.

60. The essential public participation section provides only that "[t]he Bank will ensure that project sponsors provide adequate information to governments at all levels and to the general public, especially potentially affected parties, and that the comments and opinions expressed by these parties will be taken into account in the project approval procedures of the Bank." *Id.* at para. 23. This language is very similar to the World Bank provisions which have failed to yield meaningful citizen participation or an adequate citizen access to information. See WORLD BANK, OPERATIONAL DIRECTIVE 4.01: ENVIRONMENTAL ASSESSMENT, para. 19 (Oct. 1991) (observing that "[t]he Bank expects the borrower to take the views of affected groups and local NGOs fully into account in project design and implementation, and in particular in the preparation of EAs") (on file with *American University Journal of International Law & Policy*).

61. See Zaelke Recommendations, *supra* note 52, at 2-3.

has caused concern because the Bank has not included any projects in Category A, including an ECU 61.4 million (\$75.5 million) loan to General Motors to build an engine manufacturing and car assembly facility.⁶²

The lack of participation in the screening process is an important drawback for citizens, because the categorization of a project defines the level of public participation in later phases of the project cycle. For Category A projects, the project sponsor must notify citizens immediately after the project has been categorized so that citizens can participate in the scoping process.⁶³ Although citizens can raise issues that should be addressed in the EA during the scoping process,⁶⁴ they must do so without the benefit of any environmental information submitted by the project sponsor to the Bank and without knowledge of the reasons for categorizing the project.⁶⁵ Public participation thus is largely ineffective because citizens do not have access to the information necessary to make informed comments. For Category B and C projects,⁶⁶ no scoping is required and citizens are not entitled to any information or notification. The only information to which citizens are entitled is the completed EA, a requirement that emerged only in the final Environmental Policy and after constant prodding from NGOs as well as the United States Environmental Protection Agency.⁶⁷ Inconsistent with its

62. The EBRD had invested ECU 603.78 million (\$743 million) through February 1992. The bulk of this financing, ECU 379.20 million (62.8%), has gone into telecommunications. EBRD Fact Sheet (undated) (on file with *American University Journal of International Law & Policy*).

63. ENVIRONMENTAL PROCEDURES, *supra* note 45, at Annex 4. The "scoping process" refers to the process of defining the issues which will be given priority in the EA. Early drafts of the Environmental Policy did not require scoping. After NGO comments, however, the Bank incorporated a scoping process as well as citizen involvement in the process. Zaetke Recommendations, *supra* note 52, at 1-3.

64. ENVIRONMENTAL PROCEDURES, *supra* note 45, at Annex 4.

65. FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 14 (providing that "the project sponsors will prepare and submit to the [Bank's] Project Leader environmental information deemed necessary during screening and Initial Review. This information will be the property of the project sponsor").

66. Category B projects are defined as those whose significant potential impacts can be readily identified and for which remedial measures can be prescribed without much difficulty. *Id.* at Appendix 1, pp. 11-12. For these projects, a partial EA is required. *Id.* Category C projects are those with insignificant potential impacts and do not require EAs. *Id.*

67. See, e.g., Memorandum from Christopher Herman, United States EPA, to Priscilla Coburn, Department of Treasury, para. 5 (Jan. 8, 1992) (on file with *American University Journal of International Law & Policy*); Letter from Chris Wold, CIEL-US, to Priscilla Coburn, Department of Treasury 2 (Jan. 19, 1992) (on file with *American University Journal of International Law & Policy*). The First Draft Environmental Policy originally stated that the Bank would "encourage" loan proponents to make EAs publicly available. WORKSHOP SUMMARY, *supra* note 54, at paras. 7-16. The Bank responded to NGO criticism that this provision fell far short of granting citizens

policy regarding EAs, the Bank will not provide access to environmental audits.⁶⁸

The Bank has taken other steps that partially respond to concerns of NGOs. For example, NGOs thought the information gathered in the environmental assessment process should be obtained by an independent third-party or by an internal entity within the Bank itself and not by the project sponsor as the Environmental Policy provides.⁶⁹ To alleviate these concerns regarding objectivity, the Bank will establish an independent panel of experts to review a project or assist in its implementation where the potential environmental impacts are particularly complex.⁷⁰

Also, in response to NGO concerns,⁷¹ the Bank has created an environmental veto which allows the Bank to reject a project that will cause major environmental problems, or when a project sponsor unsatisfactorily addresses environmental issues.⁷² While these standards are ambiguous, they do represent a mechanism by which the Bank can reject a project on environmental grounds, a power it did not grant to itself in earlier drafts. In addition, the Environmental Policy states that the Bank will monitor the compliance of ongoing projects with their EAs and the Bank will investigate concerns on specific projects brought to the Bank's attention by governments and NGOs.⁷³

the right to information by stating that "[t]he text has been revised to use the stronger term 'expect' rather than 'encourage.'" Response to Comments, *supra* note 55, at 6. However, the change was not reflected in any subsequent drafts, the original language being retained. See, e.g., THIRD DRAFT ENVIRONMENTAL POLICY, *supra* note 49, at para. 25.

68. The project sponsor is responsible for preparing the environmental audits to determine whether past use of a facility has resulted in significant environmental impacts. ENVIRONMENTAL PROCEDURES, *supra* note 45, at Annex 4. In these circumstances, the Bank will consider citizens comments only to the extent that citizens have registered complaints regarding the property prior to the performance of the audit. *Id.* The audit is "strictly the property of the Project Sponsor" and "will not be made public by the Bank." *Id.*

69. See Zaetke Recommendations, *supra* note 52, at 2 (suggesting that "[t]o create an objective EA process, the EA should be prepared internally by the Bank or by an independent contractor selected solely by the Bank").

70. FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 14. The provision first appeared as a response to NGO criticism in the Bank's Responses to Comments. Response to Comments, *supra* note 55, at 6; THIRD DRAFT ENVIRONMENTAL POLICY, *supra* note 49, at para. 15.

71. See Zaetke Recommendations, *supra* note 52, at 5 (suggesting that "[t]here should be a threshold ceiling set for significant environmental impact, above which the Board [of Directors] is not entitled to approve a project in the same way that it would reject a project, that was not economically viable").

72. FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 16.

73. The Bank will evaluate the environmental impact of a project at project completion and will continue environmental monitoring on a regular basis thereafter. *Id.* at paras. 19-20. In addition, it has the authority to sanction project sponsors, including

These improvements, however, do not remedy the deficiencies in the public participation and EA provisions of the Environmental Policy. In addition to the failings in the EA process and public participation provisions discussed above, the final Environmental Policy fails to: 1) adopt a unified overall policy which incorporates a definition of sustainable development consistent with contemporary international jurisprudence and with the EBRD's sustainable development mandate; 2) require release to the public of all environmental information gathered prior to commencement of a project and that the public be given the opportunity to comment on this information and to have their comments addressed prior to the commencement of the project; 3) establish either an independent quasi-judicial tribunal or grant jurisdiction to an existing judicial body to review the actions of the Bank to ensure that these actions comply with both the Bank's internal procedures and its Articles of Agreement; 4) commit in writing, despite a pre-existing oral commitment by the EBRD's President, to establish a special fund for environmental education and training in Central and Eastern Europe; and 5) require that a set of minimum environmental standards, such as those of the European Community, be met in all its activities.

The continued failure of the EBRD to recognize the need for these policy improvements calls into serious question the ability of the EBRD to meet its twin goals of promoting democratic principles, and sound and sustainable development. Whether or not the EBRD will become the world's first "sustainable development bank" is now dependent on how the EBRD, its stockholders, and its loan proponents, interpret and apply the requirements of the Articles of Agreement and the Bank's policy directives, as well as the ability of affected citizens, legal practitioners and NGOs to keep the Bank and its stockholders focussed on the twin goals of democracy and sustainable development.

freezing disbursements, where the Bank finds that the project sponsor is not in compliance with agreed environmental standards and performance. *Id.* at para. 18. *See also* Response to Comments, *supra* note 55, at 7 (stating that "[t]he Bank will monitor compliance with environmental provisions of loans as part of the normal project supervision process. If concerns on a specific project are raised either by governmental or nongovernmental organizations they will be investigated by Bank environmental staff").

III. DEFINING AND APPLYING SUSTAINABLE DEVELOPMENT WITHIN THE ARTICLES OF AGREEMENT

A. DEFINING SUSTAINABLE DEVELOPMENT

The Bank's Articles of Agreement require it to promote environmentally sound and sustainable development throughout the full range of its activities.⁷⁴ In *Our Common Future*, the Brundtland Commission popularized the term sustainable development, defining it as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."⁷⁵ Under the Articles of Agreement, the Bank must meet this standard in selecting development investments throughout Eastern and Central Europe.

Because sustainable development recognizes that the economy and the environment are interrelated, economists and environmentalists alike are rethinking their approach to development and environmental protection. Economic growth is the measure traditionally used to judge the health of an economy.⁷⁶ Economic growth, however, is too narrow a concept, because it reflects only rising consumption.⁷⁷ Sustainable development is a broader concept and one that includes considerations of quality of life — the health of the population, educational standards, the degree of poverty, and general social well-being.⁷⁸ It considers the individual as a "person-in-community" rather than as dictated only by private-personal preferences.⁷⁹ Historically, such characteristics fell outside the bounds of economic calculations because they required non-market value judgments. Today it is clear that the development potential of a country, including its opportunities and limits, is significantly determined by environmental quality.⁸⁰

Environmentalists are also rethinking the role a strong economy plays in protecting the environment. They increasingly appreciate the potential for sustainable development to help alleviate environmental

74. Articles of Agreement, *supra* note 1, art. 2(1)(vii) at 1084; Chairman's Report, *supra* note 41, at 3.

75. *OUR COMMON FUTURE*, *supra* note 40, at 8.

76. *Id.* at 18.

77. J. PEZZEY, *ECONOMIC ANALYSIS OF SUSTAINABLE GROWTH AND SUSTAINABLE DEVELOPMENT VI* (1989) (World Bank Environment Department Working Paper No. 15).

78. D. PEARCE, A. MARKANDYA, & E. BARBIER, *BLUEPRINT FOR A GREEN ECONOMY I* (1989) [hereinafter *GREEN ECONOMY*].

79. H. DALY & J. COBB JR., *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* (1989).

80. *ENVIRONMENT AND DEVELOPMENT FOR POLAND*, *supra* note 5, App. para. 1.

degradation,⁸¹ particularly in Central and Eastern Europe where the weakened economies cannot afford the capital expenses necessary for upgrading their polluting factories.

Defining sustainable development in practical terms has proven more difficult than finding support for the concept. Fundamentally, it recognizes that the scale of human population has grown far too large and that continued growth "is overwhelmingly likely to increase costs more rapidly than it increases benefits, thus ushering in an era of 'uneconomic growth' that impoverishes rather than enriches."⁸² While definitions of sustainable development abound, three principles have emerged which most aptly describe it: the value of the environment, the need to consider effects long into the future, and the need for both intra- and inter-generational equity.⁸³ The manner in which accounting mechanisms and project appraisal methods incorporate these three values also plays an integral role in shaping a working definition of sustainable development.

1. Value of the Environment

Recognizing that the economy and the environment in which we live are wholly interrelated is of fundamental importance; they cannot be considered apart from one another. "There is an interdependence both because the way we manage the economy impacts the environment, and because environmental quality impacts on the performance of the economy."⁸⁴ One has only to look at Central and Eastern Europe to see the devastating consequences — environmental, economic, social — of neglecting the environment. Quality of life indicators derived from natural, man-made and cultural environments therefore deserve greater emphasis than they are given in traditional economic approaches.⁸⁵

To understand the connections between development and the environment, it is useful to discuss environmental quality criteria in eco-

nomic terms. Although placing monetary values on the environment is not a perfect approach, and may offend some, it is the best way to demonstrate that environmental services are not free.⁸⁶ By placing economic values on environmental services, the full social cost of development can be considered along with traditional market costs; in other words, these costs can be "internalized" into the market. As noted previously, pollution is costing Central and Eastern European countries hundreds of millions of dollars, and in the case of the former Soviet Union, over \$300 billion.⁸⁷ In contrast, estimates suggest the United States avoided \$26.5 billion in pollution damage (sixty-four percent of which was attributed to human health benefits) through implementation of environmental legislation.⁸⁸ Finally, placing dollar values on environmental criteria also demonstrates that people generally assign environmental criteria positive net worth; people value greatly clean air and water, human health, wilderness areas, and other environmental services. Reflecting these values in economic terms can in some cases lead to greater environmental protection.

Traditional feasibility studies fail to take into account environmental values. Yet, once a monetary value is attached to a given environmental service or environmental quality, such as human health or wilderness areas, the full cost of development can be better approximated when determining whether to proceed with a project. Simply stated, development should not proceed if the benefits of development are less than the costs of development plus the benefits of preserving the environment.⁸⁹

Although various methods now exist for measuring benefits of environmental quality,⁹⁰ caution should still be used in assigning precise numerical values to the environment. Arbitrarily assigned numbers masquerading as precise values can appear more sophisticated and reli-

86. *Id.* at 80-81.

87. *See supra* notes 31-40 and accompanying text.

88. GREEN ECONOMY, *supra* note 78, at 59 (citing M. FREEMAN, AIR AND WATER POLLUTION CONTROL: A BENEFIT-COST ASSESSMENT (1982)).

89. *Id.* at 63.

90. *See id.* at 64-74 (providing a complete discussion of the different methods used to measure benefits of environmental quality). The contingency value method measures a person's willingness to pay for a benefit. Surveys are used to derive the average price citizens are willing to pay for an environmental value, such as protecting whales. *Id.* at 69-71. The hedonistic price method measures the effect of pollution on property values. It determines, for example, the difference in property values before and after an industrial facility emitting sulfur dioxide (SO₂) is constructed. *Id.* at 64-69. A third method, called a travel-cost model, measures the opportunity cost in time and money the average individual will bear to use an environmental amenity. For example, it evaluates how much salary a person is willing to sacrifice in order to visit a national park. *Id.* at 71-74.

81. *See* Mathews, *The New Dogma of Environmentalism*, Wash. Post, Jan. 3, 1991, at A21 (stating that sustainable development "leaves behind sterile growth/no growth debates" and acknowledges that some types of development and technology can improve the quality of life).

82. DALY & COBB, *supra* note 79, at 2. Daly and Cobb describe this reality as "the fundamental wild fact that so far has not found expression in words sufficiently feral to assault successfully the civil stupor of economic discourse." *Id.*

83. GREEN ECONOMY, *supra* note 78, at 2; *see also* E.B. WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1990) (describing the problems of intergenerational equity).

84. GREEN ECONOMY, *supra* note 78, at 4.

85. *Id.* at 1.

able than they truly are. Such numbers can be used to beguile the uninformed into believing a project is of value; when in fact it produces no net environmental benefit. For example, it may be difficult to assign a meaningful value to an event such as a nuclear meltdown, which has a low probability of occurrence but catastrophic consequences. Global threats to life-sustaining systems such as the atmosphere are equally difficult to quantify in economic terms.

Numerical values and improved accounting methods may enable us to internalize environmental concerns into decisions implicating the "development" side of "sustainable development." In order to realize the "sustainable" side of the equation, however, we must also consider principles of futurity and equity.

2. *Futurity*

The very notion of sustainability implies extending forecasts far into the future and providing more wealth, not less, to future generations.⁹¹ The short-sightedness which traditionally has dominated economic thinking must be overcome. Sustainable development evaluates advantages and disadvantages of a project in the short term, measured in periods of years, as well as the long term, measured by the passing of generations.⁹²

3. *Equity*

Sustainable development is concerned with balancing two goals: diminishing and eliminating poverty for present generations (intragenerational equity) and leaving future generations with at least an equivalent quality of life (intergenerational equity). It requires that present generations provide future generations with the same amount of "wealth" as they inherited.

There are, however, two different types of wealth: capital wealth and natural wealth. Capital wealth includes all wealth created or produced by man's efforts, such as industrial complexes and the fruits of human intelligence. Natural wealth includes all environmental assets such as

91. *Id.* at 3.

92. ARDEN & WALL, WISDOMKEEPERS: MEETINGS WITH NATIVE AMERICAN SPIRITUAL ELDERS 68 (1990) (citing Oren Lyons, Faithkeeper of the Turtle Clan of the Onondaga Nation and spokesman for the Six Nations Iroquois Confederacy) (on file with *American University Journal of International Law & Policy*). Oren Lyons stated, "In our way of life, in our government, with every decision we make, we always keep in mind the Seventh Generation to come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours — and hopefully better." *Id.*

air, water, soil, flora and fauna. This distinction is of the utmost importance to an understanding of sustainable development.

Principles of intergenerational equity require present generations to provide future generations with at least as much natural wealth as the present generation enjoyed at its inception. Capital wealth is no compensation for natural wealth, as natural wealth supports life.⁹³ Capital wealth consumes natural wealth, and thus depletes the earth's ability to sustain life.⁹⁴ Further, natural wealth suffers irreversibilities — numerous natural resources cannot be replaced or restored. A lost species, for example, cannot be recovered. In contrast, manmade wealth is generally replaceable or repairable. The owner of a damaged automobile can choose to buy a new car or can repair the harm done to the old car.⁹⁵ Similarly, natural wealth often cannot be increased (nonrenewable resources), whereas manmade wealth can be increased and decreased.⁹⁶ Finally, preservation of natural wealth for millions of people means preserving their sustainable livelihoods. Where people are living in harmony with nature, principles of both intra- and inter-generational equity require the protection of their natural resource base and their way of life.⁹⁷

A growing body of international law reflects these principles of equity, and suggests that present generations have a legal obligation to preserve natural wealth for future generations. The Preamble to the 1972 United Nations Declaration on the Human Environment⁹⁸ states: "To defend and improve the human environment for present and future generations has become an imperative goal for mankind." The text of the UN Declaration makes clear that the Preamble seeks to "defend and improve the human environment" by protecting natural wealth.

93. PEZZEY, *supra* note 77, at 42.

94. *Id.* at 42-43.

95. As with any generality, there are exceptions to this paradigm. In this case, these exceptions include edifices of architectural heritage and ancient monuments. Over the course of time both architectural heritage and ancient monuments take on intrinsic values which are irreplaceable, making them more like natural than manmade wealth.

96. PEZZEY, *supra* note 77, at 20 (citing D. PEARCE, E. BARBIER & A. MARIKANDIA, SUSTAINABLE DEVELOPMENT AND THE COST-BENEFIT ANALYSIS, CANADIAN ENVIRONMENTAL ASSESSMENT RESEARCH COUNCIL WORKSHOP ON INTEGRATING ECONOMIC AND ENVIRONMENTAL ASSESSMENTS (Vancouver, Canada, Nov. 17-18, 1988)).

97. In this regard, the EBRD should fund projects which promote subsistence farming and alternative small-scale agriculture. Many of the problems associated with farming in the United States are a result of machinery and fertilizer intensive farming. Farming in the United States is the most energy inefficient in the world, has led to massive soil erosion, and contaminated water supplies.

98. *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf.48/14 (Stockholm, Sweden June 5-16, 1972), reprinted in 11 I.L.M. 1416 (1972) [hereinafter U.N. Declaration].

Principle 2 heralds the protection of the air, land, flora and fauna.⁹⁹ In addition, principle 5 declares that non-renewable resources should not be exhausted,¹⁰⁰ and principle 6 protects the soil against any substance, including heat, which is discharged in excess of the environment's assimilative capacity to neutralize that substance.

Other international agreements ensure that specific aspects of the environment are protected for future generations. These include, for example, agreements protecting marine waters,¹⁰¹ wildlife,¹⁰² and particular marine species.¹⁰³ Others provide protection for unique habitats or regions.

International organizations have asserted the right of future generations to natural wealth. The United Nations Economic Commission for Europe issued a draft Charter on Environmental Rights and Obligations proclaiming that present generations have a fundamental responsibility "to protect and conserve the environment for the benefit of present and future generations."¹⁰⁴ The Experts Group on Environmental Law of the World Commission on Environment and Development prepared a report assessing existing international law and proposing new international law for environmental protection and sustainable development.¹⁰⁵ Article 2 of the report, premised largely on principles 1, 5, and

99. Principle 2 states:

The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

100. *Id.* at principle 5. This principle perhaps states a paradox. Non-renewable resources may never be exhausted, because as they grow more scarce, the price increases and substitutes are found. Certain renewable resources, such as fish, can and have been exhausted by "over-fishing." See Matthews, *supra* note 40, at 164.

101. United Nations Convention on the Law of the Sea, *done* at Montego Bay, Jamaica, Dec. 10, 1982, U.N. Doc. A/Conf.62/122 (1982), *reprinted* in 21 I.L.M. 1261 (1982); Convention for the Protection of the Natural Resources and Environment of the South Pacific region, *done* at Noumea, New Caledonia, Nov. 25, 1986, *reprinted* in 26 I.L.N. 38 (1987); Convention for the Protection of the Mediterranean Sea Against Pollution, *done* at Barcelona, Spain, Feb. 10, 1976, *reprinted* in 15 I.L.M. 290 (1976).

102. Convention on International Trade in Endangered Species, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243.

103. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 74.

104. UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, DRAFT CHARTER ON ENVIRONMENTAL RIGHTS AND OBLIGATIONS, para. 2 (adopted at the Experts meeting in Oslo, Norway, 29-31 October 1990) [hereinafter ECE Draft Charter].

105. EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT (1986) [hereinafter EXPERTS] (on file with American University Journal of International Law & Policy).

6 of the UN Declaration, obliges countries to "conserve natural resources for future generations and prevent and abate pollution and natural resource destruction."¹⁰⁶ Article 3, meanwhile, makes clear that the duty extends beyond individual resources or species. It requires countries to protect ecosystems, ecological processes and maximum biological diversity.¹⁰⁷

4. *Accounting Mechanisms*¹⁰⁸

Managing the environment for sustainable development cannot occur without accounting for existing stocks of resources. Decision-makers cannot develop environmental policies that husband environmental resources now and into the future, without knowing how much of a given resource exists. Comparable and reliable data are needed, and the EBRD must use its resources to help develop and gather this data. Such an accounting would serve three purposes: to determine the level of any given resource available at any given time; to determine the uses of the natural resource, where the resource is located, and how it is transformed over time; and to provide a mechanism so that a physical inventory is needed only once. After the initial inventory, present resource stocks can be calculated from the previous year's stocks.

Although the task of accounting for the natural resources within a given country seems daunting (and at the regional level even more difficult), two systems of accounting have been developed and implemented in several countries. The "monetary" approach requires measurement of national income to reflect the costs associated with depletion of natural resources and other environmental losses.¹⁰⁹ The "physical" or Norwegian approach counts natural resources in a separate accounting framework; existing stocks are recorded and balanced each year against the amount used or exported and the amount imported.¹¹⁰

5. *Project Appraisal*

Strict application of sustainable development principles to each project could, admittedly, make significant development infeasible.¹¹¹ It

106. *Id.* at 43. The text of Article 3 reads: "States shall ensure that the environment and natural resources are conserved and used for the benefit of present and future generations." *Id.* at 42.

107. *Id.* at 45.

108. This section is a summary adapted from GREEN ECONOMY, *supra* note 78, at 93-119.

109. *Id.* at 104-13.

110. *Id.* at 95-104.

111. *Id.* at 127.

may not be acceptable to decrease development opportunities (which can increase the quality of life) when people must stand in lines overnight to acquire basic human needs. Development which continues the environmental degradation of past policies, however, is equally unacceptable and economically inviable.

This tension makes certain trade-offs, which can occur in two ways, compelling. One method mitigates the unacceptable loss of one natural resource by creating the same or a related resource elsewhere. Where a project maximizes short-term benefits but negatively impacts future generations' needs, some portion of the benefits could be held in trust for future generations.¹¹²

Another method defines sustainable development at the program level rather than the project level. To meet sustainable development requirements at the program level, total program benefits must, at a minimum, equal total program costs.¹¹³ Thus, for example, if one area's economic conditions warrant less-than-sustainable development, other projects within the same overall program must be built that compensate for the loss of sustainability.

B. DEFINING DEMOCRATIC PRINCIPLES

In addition to promoting sustainable development, the Bank's Articles of Agreement require it to promote multiparty democracy, to observe democratic principles in its internal governance,¹¹⁴ and to condition investment funds on progress towards democracy in the countries of operation.¹¹⁵ First, and foremost, such democratic principles describe a method for making political decisions under the guidance of the people¹¹⁶ — where all citizens have the opportunity to participate equally in decisions affecting their well-being.

Open and free citizen participation advances the interest of both the individual and society;¹¹⁷ it develops political competency and safe-

112. J. PEZZEY, *supra* note 77, at 58 (citing T. TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 432 (1984)). For example, a United States electric utility is planting trees in Central America to absorb an equivalent amount of carbon dioxide (CO₂) emitted from its new power station in the northeastern United States. The United States also has a policy which allows a developer to destroy wetlands under certain circumstances provided it creates wetlands elsewhere.

113. GREEN ECONOMY, *supra* note 78, at 127-30; J. PEZZEY, *supra* note 77, at 58-59.

114. Articles of Agreement, *supra* note 1, art. 11, at 1087.

115. *Id.*, art. 1, at 1084, art. 8 at 1086.

116. R. BASSETT, ESSENTIALS TO PARLIAMENTARY DEMOCRACY 100, 102 (1935).
117. W. J. STANKIEWICZ, APPROACHES TO DEMOCRACY: PHILOSOPHY OF GOVERNMENT AT THE CLOSE OF THE TWENTIETH CENTURY, 170 (1980); See Jaffe, *The Citizen as Litigant in Public Actions: The Non-Holifieldian or Ideological Plaintiff*, 116 U. PA.

guards fundamental human rights. It has also proven to be one of the key forces for protecting the environment in the United States and other Western countries. Effective citizen participation, however, requires access to information, the ability to influence the decision-making process, and the opportunity for independent review of the government's decisions. These aspects of citizen participation are interdependent parts of democracy.

Access to information provides citizens with the ability to participate effectively in the environmental decision-making process.¹¹⁸ Citizens should be able to ask informed questions about proposed projects and offer informed and articulate criticism.¹¹⁹ This can be done only if they have complete and timely information about proposed projects.¹²⁰ The right to such information has been a long-standing cornerstone of Western environmentalism, activism and democracy.¹²¹

The right of citizens to challenge and reverse arbitrary exercises of power accompanies this right to information. Citizens should be able to check decisions of a run-away official that could otherwise undermine the collective will of the people or the democratic process itself. Independent judicial review is the most effective guardian against arbitrary government decisions, as it ensures that citizen concerns are adequately considered and addressed in the decision-making process. These procedures promote self-government — the very essence of democracy.¹²²

Self-government, in turn, provides an environment in which sustainable development is more likely to flourish. Under self-government principles, decisions emanate from the citizenry and are expressed through their leaders. Decisions are made by more than just the relative few who stand to benefit from exploitation of the Earth's resource. Instead, power rests with all of us to decide our collective fate.

C. APPLYING DEMOCRATIC PRINCIPLES TO SECURE SUSTAINABLE GROWTH IN THE EBRD'S POLICIES

Neither of the Bank's primary goals — sound and sustainable development and the promotion of democratic principles — exist in a vac-

L. REV. 1033, 1044 (1968) (delineating various arguments for encouraging citizen participation); and R. BASSETT, *supra* note 116, at 113 (same).

118. Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1022 (1975).

119. Duncanson, *Law, Democracy and the Individual*, 8 LEGAL STUD. 303 (1988).

120. ENVIRONMENT AND DEVELOPMENT FOR POLAND, *supra* note 5, at 8, para. 39.

121. Freedom of Information Act, 5 U.S.C. § 552 (1988) (providing such rights to United States citizens).

122. Jaffe, *supra* note 117, at 1045; ECE Draft Charter, *supra* note 104.

uum. Each must exist in concert with the other. Although the Environmental Policy does not formally embrace open citizen participation and self-government in its efforts to achieve sustainable development, effort must be made in future policy directives to unify these two goals or to revise existing EBRD policy.

Where such revisions are not forthcoming, however, citizens and NGOs must ensure that the Bank conforms its policies in its day-to-day practice. Recognizing that existing Bank policies do not meaningfully implement its mandates to promote sustainable development and principles of democracy, the next section offers a framework which the Bank should implement to do so.

IV. INTERPRETING THE EBRD'S POLICIES: ESTABLISHING COMPLIANCE WITH THE UNIFIED GOALS OF DEMOCRATIC PARTICIPATION AND SUSTAINABLE DEVELOPMENT

A. PROJECT SELECTION

The EBRD's operating principles for selecting projects to be funded should be carefully tailored towards achieving sustainable development. The operating principles must require consideration of the long-term environmental effects of development and a respect for natural resources, particularly those held as common resources. The principles should be prospective and risk averse — recognizing that future generations' needs may be destroyed if development proceeds where great scientific uncertainty remains.

At the March 1991 Workshop on Environmental Protection and Citizen Participation in the EBRD's Lending Practices, held in Budapest, attorneys and environmental professionals called on the Bank to take its sustainable development mandate seriously and "to make sound and well-considered ecologically-based investment decisions which prevent harm to the environment and improve or restore the severely damaged environments of Central and Eastern Europe."¹²³ A policy adopting appropriate substantive and procedural mechanisms is one method to ensure sustainable development and to protect future generations' natural resource wealth. Each project funded by the EBRD, including intermediary lending operations, should meet the substantive criteria described below. If the EBRD approves a loan which fails to meet one of these criteria, the reasons for the exception should be fully explained and made available to the public.

First, energy efficiency is one of the most important factors in determining whether a project is sustainable.¹²⁴ The Bank must consider both the type of energy used and a project's energy efficiency.¹²⁵ Although use of energy efficient technology may increase a project's initial cost, energy efficiency will frequently increase profits.¹²⁶

The Bank should finance and create incentives for projects which use natural resources in the most environmentally efficient manner, including keeping wastes to a minimum.¹²⁷ As with energy efficiency, resource-efficient technologies and processes, waste reduction, and pollution prevention can increase profits and reduce future environmental liabilities.¹²⁸

Second, the Bank should encourage diversification of production. Diversification removes a country's reliance on "exports of nonrenewable resources, over-reliance on monocultures, or activities that make extreme demands on the environmental assimilative capacity of the region."¹²⁹ Diversification also improves a country's economic base.

Third, the Bank should avoid financing projects dependent on environmentally damaging government policies. Certain governmental policies, for example energy subsidies, can cause huge market distortion leading to great environmental damage. The potential damage of such projects is illustrated by Norsk Hydro's (a Norwegian company) recent investment in Slovakia's ZSNP Ziar Nad Hronom aluminum plant. Norsk Hydro conditioned the investment on Slovakia's promise to continue electrical subsidies to the Ziar plant, which is the single largest consumer of electricity in the country. Rather than continue the electricity-intensive process of primary aluminum smelting, the Ziar plant

¹²⁴ *Criteria for Sustainable Development Management*, U.N. Centre on Transnational Corporations, 16 Sess., at 4, U.N. Doc. E/C/1.10/1990/10 (1990) (as submitted to the Commission on Transnational Corporations).

¹²⁵ *See generally* ENVIRONMENT AND DEVELOPMENT FOR POLAND, *supra* note 5, at para. 95 (recommending that Poland switch to more efficient and less environmentally damaging energy sources).

¹²⁶ *FRENCH, supra* note 8, at 41-42. The Bank should strictly avoid investments such as OPEC's (United States Overseas Private Investment Corporation) financing of General Electric's \$150 million refurbishment of thirteen incandescent lightbulb factories in Hungary. *Id.* Had that same amount of money been invested in compact-fluorescent lightbulb factories, the Hungarian government would have been able to defer the \$10 billion spent constructing new, polluting, coal-fired power plants. *Id.*

¹²⁷ *See generally* ENVIRONMENT AND DEVELOPMENT FOR POLAND, *supra* note 5, at para. 95-96 (discussing recommendations for the reform of Polish energy policies).
¹²⁸ INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE AND NATURAL RESOURCES, U.N. ENVIRONMENTAL PROGRAMME & WORLD WIDE FUND FOR NATURE, *CARING FOR THE WORLD: A STRATEGY FOR SUSTAINABILITY* 77 (second draft 1990) (on file with *American University Journal of International Law & Policy*).
¹²⁹ *Id.*

easily could have switched to secondary aluminum manufacturing. Discounting for the subsidies, secondary manufacturing makes more commercial sense and would significantly reduce the demand for coal-fired electricity in Slovakia.¹³⁰ Avoiding projects dependent on such government policies would further the Bank's goal of promoting free markets as well as the goal of sustainable development.

Fourth, the Bank should invest in projects that develop and use human resources.¹³¹ Sustainable development does not reject the use of technology. It does, however, promote the use of labor intensive projects rather than capital intensive projects.

B. ENVIRONMENTAL ASSESSMENT POLICIES

The EBRD should tailor its project selection procedures to choose only environmentally sound and sustainable projects, and its environmental assessment (EA) policies should ensure the identification and incorporation of these projects. The EA process is the principle mechanism for evaluating a project's environmental consequences and for implementing the goals of sustainable development and democracy in the assessment process. The EBRD's environmental assessment policies are perhaps the area of Bank policy which most desperately needs to be corrected by the Bank either through an amended policy or as a matter of practice.

1. Objective Environmental Assessment Preparation

Under the EBRD's environmental assessment policy, the project sponsor is responsible for preparing the environmental assessment. The lack of objectivity in this policy is readily apparent. The purpose of the environmental assessment is to ensure that the decision-maker obtains all necessary and available information regarding any "reasonably foreseeable, significant adverse effects" before making decision on the implementation of a project.¹³² A project sponsor, the person with the

130. See Mikulas Huba, Slovak Parliament Member and Chairman of its Environmental Committee, speech to the Slovak Parliament, May 22, 1991; Open letter from Juraj Mesik, Vice-President, Slovak Union of Landscape and Nature Protectors to the Honorable Gro Brundtland, Prime Minister of Norway, June 7, 1991 (commenting on the situation involving coal-fired electricity in Slovakia).

131. Batic, *Sustainable Development: Challenges to the Profession of Agricultural Economics*, 71 AMER. J. AGRIC. ECON. 1083, 1087 (1989).

132. See 40 C.F.R. § 1502.22 (1991) (detailing the situations in which United States federal agencies must consider an environmental impact statement as incomplete). The government reinforces the importance of the information acquisition period by proscribing the applicant from acting on its project during the process. See 40 C.F.R. § 1506.1 (1991) (describing limitations on actions during the assessment pro-

greatest financial and personal interest in the adoption of the project, is incapable of objectively reviewing its own project. Project sponsor will be reluctant to develop and release information that diminishes potential for financing, and will limit the participation of concerned citizens and NGOs who seek to develop such information. Sponsor-prepared assessments will fall far short of objective presentations of all necessary and available information on the project. They will, instead, serve as mere justifications for the viability of the proposed project.

The experiences of the World Bank's environmental assessment program exposes the failure of sponsor-prepared environmental assessments to achieve either sustainable development or democratic principles. The World Bank program, like the EBRD policy, permits project sponsors to prepare environmental assessments. The World Bank environmental assessments have failed to identify projects which, due to adverse environmental impacts, should be stopped. This deficiency in the assessment process caused the World Bank to fund a significant number of loan projects which resulted in large-scale environmental degradation, and brought significant criticism to bear on the World Bank.¹³³

To right the course of the EBRD's environmental assessment program, either an independent third-party, answering only to the Bank's staff, or a division of the Bank's environmental staff, must prepare the

cess). Environmental assessment programs, such as the one envisioned by the EBRD, have their ultimate genesis in the concepts and requirements developed under the United States' National Environmental Policy Act (NEPA) — the first statute to require a comprehensive analysis of proposed projects prior to commencement. National Environmental Policy Act of 1969, as amended, Pub. L. No. 91-190, 83 Stat. 852 (1970) as amended by Pub. L. No. 94-52, §§ 2, 3, 89 Stat. 258; Pub. L. No. 94-83, 89 Stat. 424 (1975) (codified as amended at 42 U.S.C. §§ 4321-4370(a) (1988)). NEPA, and its international progeny, have been instrumental in democratizing environmental decision-making processes in countries which have adopted such laws. Generally, such laws have two components: an information gathering requirement, and an information access and comment provision.

133. For example, the World Bank continues to provide a financing package of over \$450 million to the Sadar Sadoxar dam project in India. WORLDWIDE NEWS, Nov.-Dec. 1989, at 1 (on file with *American University Journal of International Law & Policy*). When completed this project will displace well over 80,000 people and will wreck environmental havoc upon a once pristine river. *Id.* at 8. Opposition has become so great that in 1991 the World Bank decided to commission an independent review panel to investigate this environmental nightmare. Narmada Review Panel Due, WORLD BANK WATCH, Feb. 25, 1991 at 7. See also FUNDING, ECOLOGICAL AND SOCIAL DESTRUCTION: THE WORLD BANK AND INTERNATIONAL MONETARY FUND (Bank Information Center ed. 1990) (discussing case studies of World Bank and IMF funded projects in eight countries that have had devastating ecological and social impacts) [hereinafter Bank Information Center] (on file with *American University Journal of International Law & Policy*); Rich, 12 *Envtl. L.Q.* 675 (1985) (describing a litany of World Bank projects that have been socially and environmentally destructive).

environmental assessment on all projects.¹³⁴ The project sponsor's involvement should be limited solely to providing information and commentary to the assessment preparer. Such a program of independent review will result in more objective assessments that more fully evaluate the environmental impact of all projects.

If the Bank declines to adapt its policy to require independently prepared assessments, then the Bank should, through operational directives, require its environmental staff to thoroughly review all assessments prepared by loan proponents. This review should verify the accuracy and veracity of the contents of the assessment, and ensure that the assessment fully develops and addresses all areas of environmental concern attendant to the proposed project. At the conclusion of such a review, the Bank should adopt the assessment in writing and assume full responsibility for its scope and content.¹³⁵

To overcome the inherent structural defects of proponent-prepared environmental assessments, NGOs and citizens should develop their own shadow programs to monitor the information made available to them and to develop independent information both to ensure the veracity of the proponent's information and to fill the void where the proponent's information is not released to the public. Essential to this shadow structure will be a network of educated and informed persons, ranging from lawyers to geologists, who will be able to review loan projects for interested citizens and NGOs.

134. Such a requirement is analogous to the requirement in the United States under the NEPA, which requires that a government agency, or a contractor with no interest in a project, prepare an environmental assessment of projects undertaken by an agency or in which the government has a certain degree of direct or indirect involvement. 40 C.F.R. § 1506.5(c) (1990).

135. Essentially, the review should resemble the requirements imposed on United States government agencies when an independent contractor prepares an environmental assessment for an agency. 40 C.F.R. § 1505.1 (1990) (The minimum standards established in Section 1505.1 include: (1) requiring that relevant environmental documents, comments and responses are incorporated into the record; (2) requiring that these documents, comments and responses accompany the proposal through the agency review; (3) requiring that the alternatives considered by the decision-maker are incorporated in the record; and (4) requiring that the procedures followed meet the policies and purposes of developing and making public environmental information concerning a proposed project).

2. Substantive and Procedural Environmental Assessment Requirements

a. The Requirement of an Environmental Assessment

The Environmental Policy states that an environmental assessment should be an integral part of every aspect of its activities, and that certain lending operations require programmatic assessments.¹³⁶ Initially, the Bank proposed a screening process similar to the much criticized World Bank process — a process which can be used to shield much of the Bank's lending activity from environmental scrutiny. The Bank subsequently clarified its policy so that all proposed projects will be individually screened. The screening categories will merely be used to determine the level of environmental scrutiny to be given to each project.¹³⁷ Individual scrutiny of projects prior to the decision to require an environmental assessment is comparable to the processes utilized in Bulgaria,¹³⁸ the EA law proposed in Czechoslovakia¹³⁹ and the National Environmental Policy Act (NEPA) in the United States.¹⁴⁰

Whether the EBRD will in fact meaningfully screen each project to determine whether an EA is necessary, is impossible to determine. Continued vigilance by NGOs will be required to ensure that the Bank meets its environmental responsibilities.

b. Timing

The EA should be prepared at the earliest stage in the Bank's decision-making process. In the United States, for example, an agency is required to prepare an environmental impact statement as early as possible in the decision-making process, generally at the time the agency is developing or is presented with an initial proposal or application for funding.¹⁴¹ "Proposal" is defined as that stage in the decision-making

136. ENVIRONMENTAL PROCEDURES, *supra* note 45, at Annex 5. A programmatic EA is one which assesses not only the environmental impacts of a single project, but also examines the project's interrelation with related or cumulative projects, and assesses the impacts of the overall program which the project is part.

137. Response to Comments, *supra* note 55, at 5. The Bank notes that its screening program is intended to be similar to that used by the United States for bilaterally funded lending projects. *Id.* See 22 C.F.R. § 216 (1990) (setting out the United States Agency for International Development's environmental screening procedures).

138. WORKSHOP STATEMENTS, *supra* note 54 (Statement of Stephan Kyutchukov and Professor Mario Pascaley).

139. *Id.* (statement of Jiri Plaminek, Hungarian Federal Committee for the Environment).

140. 42 U.S.C. § 4332(c) (1988).

141. 40 C.F.R. § 1502.5 (1990).

process where the agency has a goal and is actively deciding on a means to accomplish that goal.¹⁴² Similarly, the United Nations Economic Commission for Europe Draft Transboundary EIA Convention explicitly provides for an EA at an early stage in the decision-making process.¹⁴³ These requirements ensure that agencies develop the environmental assessment when it will be of the most value to the decision-maker. If the EA process is to be of any assistance in evaluating development proposals, the EBRD should provide for an EA process which begins immediately after a loan application is received.

c. Scoping Process

A scoping process should be required prior to preparing an EA for all projects, not only Category A projects. A scoping process investigates all factors relevant to a particular project and discusses the nature, aims, methods, geographical boundaries and purpose of the project. In addition, scoping should include a description of the project site's existing environmental condition and its development potential, if the project is not approved.¹⁴⁴ Threshold requirements established at the beginning of the process are necessary to ensure that the environmental review is thorough, complete, and accurate.

d. Information Required

It is unclear whether the information requirements of the EBRD's EA process are mandatory. The EBRD's Environmental Policy declares that the "Bank will expect the environmental assessment to forecast the potential environmental effects of a project. . . ."¹⁴⁵ In order to ensure

142. 40 C.F.R. § 1508.23 (1990).

143. *Draft Convention on Environmental Impact Assessment in a Transboundary Context*, U.N. Economic Commission for Europe, preamble, U.N. Doc. ENV/WA/AC.3/10 reprinted in 30 I.L.M. 800, 802 (1991) [hereinafter ECE Draft Transboundary EIA Convention] (prepared by a Working Group of the Senior Advisors to ECE Governments on Environmental and Water Problems).

144. See 40 C.F.R. § 1508.25 (1990) (describing the scoping process under NEPA). The scoping process establishes the range of actions, alternatives and impacts to be considered in the EA. *Id.* To determine the scope of the EA at least three types of actions should be reviewed: connected actions; cumulative actions; and similar actions. *Id.* at § 1508.25(a)(1),(2),(3). Scoping should also examine three types of alternatives: a no action alternative; other reasonable courses of action; and mitigation measures. *Id.* at § 1508.25(b)(1),(2),(3). Finally, scoping should review three types of impacts: direct; indirect; and cumulative. *Id.* at § 1508.25(c),(1),(2),(3).

145. FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 14. In addition, the Environmental Procedures, Annex 5, which lists the information "expected" in the EA, begins: "The EA should include . . ." ENVIRONMENTAL PROCEDURES, *supra* note 45 (emphasis added).

sustainable development, the information requirements should be mandatory and the Bank should make this explicit in its policy statement. The provisions of the EC Council Directive¹⁴⁶ and NEPA¹⁴⁷ should serve as a model for the modification of the EBRD's information requirements of the EBRD's Environmental Policy Report, to ensure the EBRD has a mechanism capable of ensuring sustainable development. The following information, included in the EA provisions of other international institutions and countries, should be incorporated in an EBRD EA: an in-depth discussion of direct and indirect, short and long-term consequences;¹⁴⁸ cumulative effects;¹⁴⁹ transfrontier and global effects;¹⁵⁰ and the relationships between the short- and long-term use of resources and between short-term environmental enhancement and long-term productivity. At a minimum, an EBRD EA should include the potential impact on the following factors: the biophysical environment, including energy resources, soil, water, air, climate, landscape, flora, fauna, and their habitats; architectural, historic and cultural resources; ecological balance; the interrelationships between each of these factors;¹⁵¹ and the socio-economic environment when it is interrelated with environmental effects.¹⁵²

146. Commission of European Communities, *Council Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment*, art. 3, 1985 O.J. (L175) 40, 41 [hereinafter EC Directive].

147. 42 U.S.C. §§ 4321-4370a (1988).

148. EC Directive, *supra* note 146; 42 U.S.C. § 4332 (1988). See 40 C.F.R. § 1508.8 (1990) (defining environmental effects to include both direct and indirect, reasonably foreseeable effects).

149. See 40 C.F.R. § 1508.7 (1990) (stating that all cumulative impacts include the effects on the environment of the proposed project of "past, present, and reasonably foreseeable future actions" regardless of whether such actions are public or private).

150. EC Directive, *supra* note 146, art. 3; 42 U.S.C. 4332(F) (1988); see generally, ECE Draft Transboundary EIA Convention, *supra* note 143 (discussing environmental assessments at the international level). Investigation of long-term effects, and transfrontier and global effects is implicit in sustainable development. See also WORKSHOP STATEMENTS, *supra* note 54, at para. 10(c) (requiring an EA to address transboundary pollution prevention).

151. EC Directive, *supra* note 146, art. 3; 42 U.S.C. § 4332 (1988); ECE Draft Transboundary EIA Convention, *supra* note 143, at art. 1(vii).

152. See EC Directive, *supra* note 146, art. 4 (limiting the definition of "effects" to natural and physical manifestations of a project). NEPA, however, extends "effects" to include direct and indirect social and economic impacts when they are interrelated with natural and physical environmental impacts. 40 C.F.R. §§ 1508.8, 1508.14 (1990). The NEPA requirement more accurately reflects the reality of environmental disturbances and sustainable development because environmental problems most often are inseparable from social and economic considerations. See Section I.C. HEALTH AND ECONOMIC COSTS, *supra* notes 31 - 40 and accompanying text (detailing the health and economic effects of environmental issues).

e. Alternatives and Mitigation Measures

The Bank, in failing to mandate exploration of alternatives or mitigation measures, omits the heart of the EA process and permits project proponents to focus on very narrowly conceived projects. A discussion of a broad, but reasonable, range of alternatives (including a "no-action" alternative where appropriate) and measures to mitigate adverse environmental impacts of the proposed project inevitably broadens the range of options available and may lead to the discovery of alternatives that are more sustainable and environmentally sound. Frequently these alternatives also identify and create a more cost-effective project. Such an analysis provides decision-makers with the information necessary to evaluate the advantages and disadvantages of each alternative and make informed and knowledgeable choices regarding the allocation of resources. Similar provisions exist under NEPA and the ECE Draft Transboundary EIA Convention.¹⁵³

f. Incomplete Information

If information necessary to evaluate "reasonably foreseeable" significant adverse impacts in an EA is incomplete or unavailable, but is available without exorbitant cost, the EBRD should require that this information be included in the EA. If the information entails an exorbitant cost, the EA should summarize relevant and credible scientific evidence which does exist, analyze the relevance of not having all necessary information, and evaluate the reasonably foreseeable significant adverse impacts based upon accepted scientific methods.¹⁵⁴

g. Decision on the Project

To ensure that the EA process and citizen participation are meaningful, the EA should be an integral factor in the Board of Directors' final decision as to whether or not to approve funding for a particular project. The final decision should incorporate several important conditions. First, the final decision should be in writing and discuss the results of the EA, explain why the project was chosen above all other alternatives, and provide reasons for making other choices, such as require-

ments for mitigating unavoidable adverse environmental effects.¹⁵⁵ Second, the final decision should explain how the project will further the Bank's goals of environmentally sound and sustainable development, democracy, and market economies.¹⁵⁶ Third, a threshold ceiling set for significant environmental impact should be set above which the Board is not entitled to approve a project, in the same way that it would not approve a project that was not economically viable. And fourth, mitigation measures, if any, should be incorporated into the loan covenants along with procedures for monitoring and enforcement.

h. Limitations on Actions

No action concerning the loan proposal should be taken which would adversely affect the environment or limit the choice of reasonable alternatives until the EBRD issues its final decision after reviewing the EA.¹⁵⁷

i. Access to Environmental Information¹⁵⁸

The Bank will require the public availability of the environmental assessment developed in conjunction with a project.¹⁵⁹ It refuses, however, to require that information be made available, prior to disclosure of the EA, stating only that an operative right to access to such information should be determined as a matter of national law in the country of operation.¹⁶⁰

Reliance on national law to effectuate access to information is insufficient and the Bank should not rely on the implementation of national laws to achieve policies which the Bank itself should be committed to

153. The ECE Draft Transboundary EIA Convention requires that the final decision take "due account" of the EA. ECE Draft Transboundary EIA Convention, *supra* note 143, at art. 6; The EC Directive states that the EA "must be taken under consideration in the development process." EC Directive, *supra* note 146, at art. 8. The United States requires the decision to be explained in a Record of Decision. 40 C.F.R. § 1505.2 (1990). The agency involved must state its reasons for selecting the alternative chosen and identify those alternatives which are environmentally preferable. *Id.*

154. Workshop Statement, *supra* note 54, at para. 10a.
155. Under the provisions of NEPA, United States government agencies are prohibited from undertaking any action concerning a project which would (1) have an adverse environmental impact, or (2) limit the choices of reasonable actions. 40 C.F.R. § 1506.1 (1990).

156. See WOULD & ZAELKE, ACCESS TO INFORMATION AND THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (draft 1991) (offering more complete discussion of the merits and needs of access to information) (on file with *The American University Journal of International Law & Policy*).

157. Fiscal Environmental Policy, *supra* note 46, at para. 25.
160. Response to Comments, *supra* note 55, at 6.

153. 40 C.F.R. § 1502.14 (1990): ECE Draft Transboundary EIA Convention, *supra* note 143, at App. II(g).

154. Similar provisions exist under NEPA and the ECE Draft Transboundary EIA Convention. 40 C.F.R. § 1502.22 (1990): ECE Draft Transboundary EIA Convention, *supra* note 143, at App. II.

carrying out. While these projects may occur in the countries of operations and their laws should be binding on these activities, these activities are EBRD actions. It is the EBRD, through its loans, which is responsible for these projects and the Bank must bear the responsibility of ensuring that the public is made aware of what these projects entail. The Bank, rather than the country of operation, has the burden in its Articles of Agreement to promote democratic principles, including public access to information.¹⁶¹ The Bank has the ability, without political ramifications, simply to require as a condition to the loan that such information be made available to the public, just as they can require any other condition, such as the payment of interest.

The Bank should address its failure to require public access to information by amending its Environmental Policy to require that no action be taken unless the public is afforded full access to the information developed as soon as the information is received by the Bank.¹⁶² The proper policy course for the Bank to adopt begins with the rebuttable presumption that all information contained in, or forming the basis of, the environmental assessment is part of the public domain.¹⁶³ Only in cases where the dissemination of such information presents a threat to the security of the country of operation or a nation state participating in the loan project, or in very limited cases where the dissemination of the information would compromise a trade secret, should this presumption be overruled.

In addition, the Bank should condition the approval of any loan action upon the full access of the public to the information developed. Such an across-the-board procedural loan requirement is the best way to implement the policy.

If the Bank continues to resist its responsibility to provide the public with information, then affected citizens and NGOs should be prepared to constantly encourage the Bank to give real meaning to the term "expect" as used in its policies. Active participation by NGOs and citizens can be used to deter the Bank from granting loans which do not provide for public access to environmental information in the terms of the loan contract. Public pressure can also be brought to bear on loan proponents themselves to aid them in their decision to release their envi-

161. Article of Agreement, *supra* note 1, at preamble.

162. The Bank should use the information access procedures of NEPA as a model. See NEPA, 42 U.S.C. § 4332(c) (1988) (describing the informational requirements of NEPA).

163. Presently the Bank states only that it "will ensure that project sponsors will provide adequate information on the environmental impacts of projects to governments and citizens." FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 23.

ronmental information to the public. Further, United States law requires the U.S. director of the Bank to vote against any loan proposal for which an environmental assessment has not been presented to the Director and made public to affected groups and NGOs at least 120 days prior to the vote on the project.¹⁶⁴ NGOs may have to use this dissemination mechanism to ensure that local and regional groups and NGOs have access to project EAs. Finally, if the Bank truly intends to pass its responsibilities on to the national legislatures of the countries of operations, then NGOs and citizens should be prepared to persuade these bodies to pass such laws.

k. Environmental Veto

Bank policy provides that environmental concerns are weighed in loan decisions on an equal basis with other factors in the funding decision. Under the existing loan policy scheme, a loan can still be approved, even if the project will cause widespread environmental degradation, if countervailing factors such as profitability outweigh these environmental factors; the Environmental Policy states that a project "can be rejected on environmental grounds, when there are major environmental problems"¹⁶⁵ but does not require that the project be rejected in such circumstances. This policy fails to accord environmental factors the deference necessary to protect the region's already fragile environment¹⁶⁶ and to meet the Bank's goals of sustainable development.

The best method for ensuring environmental deference is to implement a mandatory environmental veto in the project funding determination. Using such a veto, if the projected net environmental outcome of a proposed project results in a loss of environmental quality then the project should not be funded. This is not to imply that absolutely no development can occur, but rather, a project resulting in an environmental loss should be redesigned to incorporate mitigation measures and offsetting environmental benefits sufficient to transform the environmental net loss into a net gain before the project is funded. Alternatively, the Bank could fund a "compensating" project somewhere else

164. 22 U.S.C. § 262m-7(a)-(f) (1988). At the time of this writing, the United States Executive Director was forced to abstain or vote no on every project because the Bank had failed to meet the requirements of this law, popularly known as the "Pelosi Amendment."

165. FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 16.

166. See *supra* notes 5-40 and accompanying text (discussing scope of region's environmental degradation).

that will provide the necessary offsetting environmental benefits.¹⁶⁷ At the very least, all cost-benefit analyses conducted to determine the profitability of any potential project should reflect the environmental and social costs to the extent possible.¹⁶⁸

Absent a mandatory environmental veto in the Bank's policies, NGOs and citizens groups may have no other recourse beyond diligence and hard work. Without an environmental veto it will be necessary to closely monitor all the Bank's projects and to bring pressure to bear upon the Bank, member states, the country of operation and the loan proponent when the Bank seeks to fund a project with a net environmental loss.

1. Public Participation

The importance of public participation in the decision-making process as a means to protect the environment cannot be overstated. The Brundtland Commission reported that sustainable development cannot be achieved without citizens' participation.¹⁶⁹ The Economic Commission of Europe considers public participation a fundamental right.¹⁷⁰ EBRD policy apparently recognizes the need for local public participation in the development of projects.¹⁷¹ The Bank states broadly that it will "ensure that project sponsors provide adequate information to local governments and local populations."¹⁷² If the Bank's goal is to ensure real public participation, however, the Bank should do more.

While the provision of information to local citizens and NGOs is a vital prelude to participation, by definition participation requires a more active role for the affected individuals and groups. At the least, this requires a structural process that empowers local citizens and groups with the ability to comment to the decision-maker on the information provided to them, to develop and present to the decision-maker

167. See *supra* notes 111-113 and accompanying text (discussing methods to obtain sustainable development including environmental trade-offs at the project and program level).

168. See *supra* notes 84-90 and accompanying text (discussing the economic value of environmental protection and methods for evaluating it).

169. OIKARINEN, FURTNER, *supra* note 40, at 65.

170. ECE Draft Charter, *supra* note 104, at 21.

171. See FINAL ENVIRONMENTAL POLICY, *supra* note 46, at para. 23 (providing that "[l]ocal participation in the economic transformation process will be essential for the success of the decentralization and democratization process in the countries of operation").

their own alternative information, and to have their comments and information reviewed and meaningfully addressed in the decision.¹⁷³

In short, the Bank should adopt a procedural framework that embodies a notification and commenting mechanism whereby interested parties can play a role in the Bank's decisions. The following form the integral components of such a system: notification, draft commenting period, public hearing, final commenting period and response to comments. The Bank or project proponent should notify citizens, involved governments and NGOs of any lending activity before the EA process begins, or if a project will not require an EA, a reasoned decision as to why an EA is not required.¹⁷⁴ As it stands, the Environmental Policy only requires notification to citizens of Category A projects - those which potentially may have significant environmental impacts - and citizens are not entitled to the reasons for categorizing a project.¹⁷⁵ The Bank or project sponsor should invite comments from affected citizens, governments and NGOs to identify the significant issues involved in the proposed action and any reasonable alternatives. In addition, the Bank should circulate a draft of the environmental assessment for comment by citizens, governments, and NGOs.¹⁷⁶ Under certain circumstances, including when a project generates public controversy, the Bank should provide a public hearing,¹⁷⁷ as well as at least a two-month period to submit written comments prior to completion of the final EA and final decision. The Bank or project proponent should respond meaningfully to comments and fully integrate comments and their responses into the final environmental assessment.¹⁷⁸ In addition, the final EA should ex-

173. See 40 C.F.R. §§ 1503.1-1503.4 (1990) (discussing the detailed commenting requirements of NEPA).

174. See WORKSHOP STATEMENTS, *supra* note 54, at paras. 12-13 (presenting the workshop's recommended procedural framework for notification and commentary). See also, NEPA, 42 U.S.C. § 4321-4370a (1988) and its implementing regulations at 40 C.F.R. § 1508.22 (1990) (mandating notification requirements for the Council on Environmental Quality). Notice is given in what is termed a "notice of intent" which has the force of law. 40 C.F.R. § 1508.22 (1990).

175. FINAL ENVIRONMENTAL POLICY, *supra* note 46, at paras. 11-14.

176. WORKSHOP STATEMENTS, *supra* note 54, at para. 13. See 40 C.F.R. §§ 1503.1-1503.4 (1990) (listing the notification and commenting requirements of the Council on Environmental Quality).

177. WORKSHOP STATEMENTS, *supra* note 54, at para. 14. The United States government requires such hearings for NEPA-related issues. See 40 C.F.R. § 1506.6(b) (1991) (requiring agencies to provide notice of NEPA-related hearings and public meetings in order to inform interested or affected parties). The agencies must also provide notice of the availability of environmental documents. *Id.*

178. WORKSHOP STATEMENTS, *supra* note 54, at para. 14. See 40 C.F.R. § 1503.4 (1990) (requiring that the Council on Environmental Quality respond meaningfully to and integrate the responses of the Bank or project proponent).

plain why a particular alternative was chosen before it is submitted to the Board for approval.

To provide more meaningful public participation, the Bank should change its public participation policy. As a matter of practice, it must also require as a loan condition that all development plans incorporate public participation procedures. In both instances the procedures must provide the public with a mechanism, such as the one outlined above, to voice their concerns.

If the EBRD is not forthcoming with such measures to facilitate public participation, citizens and NGOs will have to focus their efforts at influencing Bank lending in alternative arenas. The most notable venues for alternative public participation will include the written press, radio, and television, and the governments of both the country of operation and the shareholder countries.

m. Monitoring and Enforcement

The Bank's intent to monitor compliance after the project has begun operations as well as establishing sanctions for violating loan conditions is encouraging.¹⁷⁹ The Bank's provisions requiring an evaluation of a project's real environmental impact judged against the anticipated impacts predicted in the EA place the EBRD in the forefront of post project analysis.¹⁸⁰

C. JUDICIAL AND QUASI-JUDICIAL REVIEW¹⁸¹

EBRD policies lack an appeal process which would enable concerned individuals and groups to challenge Bank decisions to fund a project.¹⁸² The only way to cause the Bank to recant a decision to fund a project is to petition the decision-makers who approved the loan or the directors of the Bank.

179. Response to Comments, *supra* note 55, at 7, paras. 15, 19.

180. *Id.* at para. 19.

181. See Wold & Zaelke, *Establishing an Administrative Review Tribunal at the European Bank for Reconstruction and Development: A Model for Improving MBD Decisionmaking*. — DUKE ENVTL. L. & POL'Y FORUM ____ (forthcoming Spring 1992) (offering a more complete discussion of the needs and merits of an independent administrative review tribunal); CHRISTENSEN, GREEN APPEAL: A PROPOSAL FOR AN ENVIRONMENTAL COMMISSION OF ENQUIRY AT THE WORLD BANK (1990) (paper prepared for the Natural Resources Defense Council) (discussing the need for an independent administrative review tribunal) (on file with *American University Journal of International Law & Policy*).

182. See Response to Comments, *supra* note 55, at 7 (asserting that the Bank believes that a judicial review mechanism is "inconsistent with the legal status of the Bank and cannot be accepted").

Both courses of action provide inadequate assurance that any ill-conceived Bank decisions will be reversed. Appeals to the decision-maker who approved the project should not be relied upon because they put ill-placed faith in the ability of the decision-maker to review his own decision rationally. Simply put, even a once objective decision-maker is no longer wholly objective when his or her decision is called into question.

Review by the Bank's directors is equally unpalatable. The Bank's directors have a vested interest in supporting the staff of the Bank upon whom they rely to carry on the Bank's day-to-day operations. Furthermore, Bank directors, much like the directors of other large scale corporations, are generally not involved in the Bank's daily operations. Much of their information is filtered to them by the very staff which made the decision on an ill-conceived loan. Finally, the time demands placed on the Bank's directors will render them unable to review challenges to specific loans with anything more than a cursory examination. Such an examination is insufficient given the complexity of the environmental concerns raised by Bank loan projects.

To protect against environmentally unsound Bank loans, EBRD must submit its decisions to some form of independent review. Affected citizens and NGOs should be able to petition an independent body to review the EBRD's decision to fund a project.

The importance of independent review for environmental protection is recognized throughout the world, including Central and Eastern Europe. For example, a workshop comprised of leading public interest lawyers from the region recently concluded that an effective enforcement mechanism for citizens is an essential element of their democratic right to protect their environment.¹⁸³ A report by the Czechoslovak Federal Committee on the Environment stated that independent administrative courts are necessary to help Czechoslovakia institute democratic reforms and repair the country's environmental damage.¹⁸⁴ The World Commission on Environment and Development considers access to independent judiciaries essential to attain sustainable development.¹⁸⁵

In addition, EIA laws frequently provide for independent review of agency actions. For example, the ECE Draft Transboundary EIA Con-

183. See WORKSHOP STATEMENTS, *supra* note 54, at para. 22 (stating that "the democratic rights of citizens in Central and Eastern Europe to protect their environment, have access to information, and participate in the decision-making process becomes meaningless without the corollary right to enforce these rights").

184. VAVRUSEK, *supra* note 5, at 104.

185. EXPERTS GROUP, *supra* note 105, at 63, 119-20.

vention guarantees access to administrative and judicial courts.¹⁸⁶ The most important reason for NEPA's success, meanwhile, has been the acceptance by United States courts of a citizen's right to bring legal actions to enforce the requirements of the statute. Such citizen suits quickly established a strict judicial review standard for procedural violations of NEPA. Significantly, the remedy for a violation is an injunction to maintain the *status quo* until the violation is corrected. Courts consider procedural violations of NEPA so serious that injunctions are almost always granted.¹⁸⁷ Some believe that in spite of NEPA's exhaustive procedures, its success in improving agency decisions is largely attributable to citizen enforcement.¹⁸⁸

An independent review board ensures that citizens can enforce their democratic rights to participate and have access to information. Moreover, an independent review board, unrestrained by the political aims of those in power and willing to defend individual rights against abuse, is critical to democracy: one cannot justify granting authority to a group of officials without some mechanism which assures that they remain accountable to those they serve.

In order to provide for such a review process the EBRD should either create an independent quasi-judicial tribunal or it should submit itself to the jurisdiction of a pre-existing recognized international tribunal. In either case the EBRD should not retain any immunity from the tribunal's jurisdiction, thereby ensuring that no Bank loan decision can remain insulated from this necessary check on the Bank's currently unfettered discretion.¹⁸⁹

186. ECE Draft Transboundary EIA Convention, *supra* note 143, at art. 3.

187. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987) (holding that although a presumption of a violation of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a)(3)(C) (1988), was contrary to traditional equitable principles, "the balance of harms will usually favor issuance of an injunction to protect the environment").

Since the Supreme Court decided *Village of Gambell*, two courts have abandoned presumptions in favor of injunctions. See *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988) (issuing an injunction on the basis of a balancing of competing interests rather than the traditional presumption in favor of an injunction); *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (refusing to apply a presumption in favor of injunctive relief following a violation of NEPA); see also *Sierra Club v. Marsh*, 872 F.2d 497, 502-04 (1st Cir. 1989) (holding that the failure to adequately consider environmental effects produces irreparable harm to NEPA's goal of producing informed decisions).

188. Blumm & Brown, *Pluralism and the Environment: The Role of Commenting Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277, 280 (1990).

189. See *WORKSHOP STATEMENTS*, *supra* note 54, at paras. 22-29 (recommending that the Bank create an independent review board). Regardless of whether the EBRD chooses to rectify this situation by creating an independent review board or by conced-

Two aspects of the Bank's decisions should be subject to review. First, whether the environmental assessment, as a matter of procedure, meets all the requirements of the environmental assessment process. Second, as a matter of substance, whether the decision is well founded, based upon the information contained in the environmental assessment, and consistent with the Bank's mandates.

The Bank should also vest the tribunal with the power to review ongoing projects to ensure that they do not violate the parameters established in the original environmental assessment or in the loan conditions. This program of ongoing independent review in conjunction with the Bank's proposed system of monitoring and enforcement is necessary to preclude the proverbial "runaway train" projects; projects that, once begun, take on a life of their own, acquire momentum, and make it difficult, if not impossible, for internal mechanisms to bring them to a halt.¹⁹⁰

The tribunal should be empowered with a wide range of remedies and sanctions which it can bring to bear on both the loan proponent and the Bank itself. Such remedies necessarily include: the power to grant injunctions to halt degenerative projects, the power to grant monetary damages, the power to order the reparation of harms already incurred and to prevent harms which are poised to occur, the power to allocate fees and costs to the challenging party so that the economically disadvantaged are not precluded from seeking review,¹⁹¹ and the power to alter the terms of the loan agreement so that they comply with the mandates of the EBRD.

ing jurisdiction, a number of provisions are necessary to create effective review. These provisions include:

- the right of citizens, NGOs, governments and their agencies to challenge final actions of the Bank, including the adequacy of the EA and public participation process, and all other procedural and substantive obligations of the Bank.
- the right of citizens to use class action suits to protect fragmented and diffuse populations.
- the right to oral proceedings and discovery of all information relevant to the case.
- written explanations of decisions at the request of the petitioner.

Id.

190. See *WORLDWIDE NEWS*, Nov.-Dec. 1989, at 1 (describing continuation of the World Bank funded Sardor Sarovar Dam in India's Narmada Valley despite intense local opposition to this project which will cause widespread environmental degradation and resettlement of hundreds of thousands of people) (on file with *American University Journal of International Law & Policy*); Bank Information Center, *supra* note 133, at 25-27 (also describing the World Bank funded Sardor Sarovar Dam).

191. See *Federal Water Pollution Control Act*, 33 U.S.C. § 1369(b)(3)(1988) (fee-shifting provision).

Absent a system of independent review, there will be no clear way for the public to protect their rights. Parties seeking review of EBRD decisions will have to find a "hook" in the project that allows them to obtain review of the project by other means. In this regard individuals and NGOs will have to review projects against the laws of the country of operation, other countries participating in the projects and of the shareholder nations, to determine whether the Bank's proposed or actual actions subject it to review by the judiciaries of these countries.

D. LIABILITY

Regardless of the number of safeguards imposed on Bank actions to prevent environmental harms, it is impossible to guarantee that the actions of the Bank will leave a land as pristine, or in most cases in the region, no worse off, than it was before the Bank acted. The dilemma that arises is how to ensure that, when a Bank action causes environmental harm, resources are available to rectify the harm caused. Most simply put, those who cause the harm should be required to provide the resources and monies to correct the harm. Two parties may be liable for harm caused by Bank action: the Bank and the loan proponent.

1. Lender Liability

The principle of lender liability has its genesis in the enforcement of the United States Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").¹⁹² While lender liability has evolved inconsistently, it generally applies when a lender participates in the day-to-day operations of a borrower, beyond the extent necessary to protect the lender's interest. By virtue of this participation, the lender can be held liable for all harm caused by the borrower's operations, even where the harm did not result directly from the lender's actions.¹⁹³

192. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified in relevant part at 42 U.S.C. §§ 9601-9675 (1988)), amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

193. See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 (11th Cir. 1990) (holding that the lender's CERCLA liability depends on whether its involvement was of a "degree indicating a capacity to influence the corporation's [behavior]"). Subsequent to the *Fleet Factors* decision, the Court of Appeals for the Ninth Circuit clarified that "there must be some actual management of the facility before a secured creditor will [be subject to liability]." *In re Bergsøe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990).

The formulation of the *Fleet Factors* capacity test has been the subject of great criticism for the broad sweep of liability it creates without the lender ever having acted in regard to a harm caused. See Note, *Limiting the Liability of the Passive Lender*

In keeping with contemporary practice, the EBRD should recognize that as a lender it will at certain times have the capacity to effect changes in the operations of its loan recipients. With this power comes the responsibility to utilize it conscientiously. In its policies or, alternatively, as a condition in its loan documents, the Bank should recognize the principle of lender liability and its responsibility to act both proactively, to head off any harm that it has the power to prevent, and remedially, when a harm nonetheless occurs. Two purposes are served by this recognition. First, it will cause the Bank to act with greater care to avoid liability. Second, it will ensure that the already strained economies of the region will not have to carry the added costs of the Bank's environmental mishaps.

2. Proponent and Personal Liability

At the heart of much of the successful recovery of environmental degradation in the United States has been one common principle: "the polluter pays."¹⁹⁴ Despite its simplicity, this principle is one of the most valuable tools for rectifying environmental harm. The principle merely

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 26 TULSA L.J. 75, 97 (1990) (proposing a CERCLA amendment which would allow "a lender to provide managerial assistance without risking exorbitant liability unless the assistance rises to the level of day to day participation or directly causes the [harm]"). In fact, the outcry from lending institutions has resulted in an unsuccessful attempt to legislate a blanket liability exemption for lenders. See H.R. 2085, 101st Cong., 1st Sess. (1989) (proposing to exempt all lenders from CERCLA liability).

In response to this outcry from lenders, the Environmental Protection Agency, the agency of the United States government assigned to administer CERCLA, is currently reformulating its policy on lender liability. See *EPA Draft Lays Out Lender Liability for Site Cleanup*, 59 U.S.L.W. 2225 (U.S. Oct. 16, 1990) (discussing the EPA's proposal to limit CERCLA liability). The EPA's proposed new rule details the extent to which a lender or other entity holding indicia of ownership can take action to protect their security interest without participating in the management of a facility sufficient to incur liability under CERCLA. 56 Fed. Reg. 28798, 28,806-07 (1991). This proposed rule, however, deals more with the rights of those who have come into possession of a facility for the sole purpose of protecting a security interest. The application of such a safe harbor to the EBRD must be questioned because, unlike the traditional lending institutions which a safe harbor is intended to protect, the EBRD is required to promote environmentally sound and sustainable development in each of its actions. Therefore, the mere inaction of the EBRD, creating the opportunity for environmental damage, would be in violation of this mandate and should be sufficient to give rise to liability.

Despite the self-interested protestations of the lending community and their ability to influence change on their behalf, the formulation of liability established in the *Fleet Factors* decision is the correct formulation. Only the "capacity to control" standard recognizes that those with the ability to prevent environmental degradation have a duty to do so.

194. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 742-45 (8th Cir. 1986) (holding that the Resource Conservation and Recovery

requires that the individual or entity which caused the harm, and which profited from the harm, be responsible for the cost of the harm. In application, the "polluter pays" principle extends not only to the responsible umbrella entity, usually a corporation or company, but also to the individuals within the company whose decisions created the harm.¹⁹⁵ This two pronged system of liability is a powerful deterrent to irresponsible environmental behavior. Individuals whose decisions cause widespread environmental damage are not sheltered from the costs of the damage by the umbrella organization. Instead, they, in their individual capacity and with their individual resources, are also responsible.¹⁹⁶

In order to prevent loan recipients from acting in an environmentally irresponsible manner, the Bank should extend liability for environmental harm to both the umbrella entity and its controlling individuals. The EBRD should require as a condition of each loan, either through Bank policy or loan terms, that the borrower and its controlling officers subject themselves explicitly to liability for the consequences of their actions. If the Bank is unwilling to require its loan recipients to act in accordance with common principles of responsibility, then action should be taken by the NGO community and by concerned individuals to bring about national legislation, applicable to the Bank's actions, which incorporates these principles of liability. In the absence of such legislation these nations will find that the general populace will constantly be called upon to answer for the environmental debts of the few.

CONCLUSION

While the European Bank for Reconstruction and Development has in many ways not lived up to the expectations that coincided with its creation, it would be short-sighted to dismiss the Bank as a failure. Despite the fact that the Bank's environmental policies have so far given little more than lip service to its mandates to promote sustainable development and democratic principles, these mandates still exist in the Articles of Agreement by which the Bank's operations are bound.

The challenge which lies ahead is to bring these mandates to bear in changing the Bank's environmental policies and affecting the lending decisions that the Bank makes. While the Bank's environmental poli-

cies do not provide adequate procedures to give citizens and NGOs established mechanisms for informed participation and review of Bank lending, these procedures do, nonetheless, provide certain opportunities that concerned citizens and NGOs can build upon to achieve their goals.

The limitations the Bank has placed upon citizens and NGOs seeking to affect Bank operations dictate that citizens and NGOs will simply have to try harder. They will have to become better organized, more informed, more involved, and better supported. They will have to work not only within the EBRD's procedures, but will have to apply themselves to other available alternatives, such as public information and national laws, which can be used to influence and constrain the Bank's activities.

Act. 42 U.S.C. §§ 6901-6992k (1988), could be applied to impose liability on off-site generators and transporters of hazardous waste without fault or negligence).

195. See *id.* at 742 (extending CERCLA liability to the owners and operators of corporations as well as the corporation itself).

196. See *id.* at 743-45 (discussing individual liability under CERCLA).

