

ESTABLISHING AN INDEPENDENT REVIEW BOARD AT THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT: A MODEL FOR IMPROVING MDB DECISIONMAKING

Chris Wold and Durwood Zaelke

I. INTRODUCTION

The European Bank for Reconstruction and Development ("EBRD") was created in 1990 by multilateral agreement for the nations of Central and Eastern Europe, to ease the transition from centrally dominated economies to private market systems. As the newest multilateral development bank ("MDB"), the EBRD presents a great opportunity to challenge existing lending practices of MDBs and to develop a new model for MDBs. The EBRD immediately set itself apart from other MDBs by establishing in its Articles of Agreement two unique goals. First, the EBRD will limit its role as the facilitator of market economy transition to those member states "committed to and applying the principles of multiparty democracy, pluralism, and market economies."¹ The EBRD itself is committed to principles of democracy in its own banking activities.² Second, unlike any other bank charter, the EBRD agreement expressly promotes environmentally sound and sustainable development.³

Other multilateral development banks have been criticized for supporting projects with destructive environmental, cultural, and even economic impacts. Until recently, the World Bank rationalized its practices by claiming that it is solely a financial institution and therefore not accountable for the destructive impacts of its investments.⁴

By contrast, the EBRD expressly mandates that it will involve itself in environmental and political issues.⁵ Despite its laudable goals, with investments in full swing, the EBRD's present institutions do not provide the mechanisms necessary to achieve its goals.⁶ To effectively insert itself into a democratic process and achieve environmentally sound and sustainable development, the EBRD must create a mechanism which empowers citizens to review projects for consistency with the EBRD's functions and purposes, thereby enabling them to protect their environment against ill-advised projects.

This article suggests that the EBRD can best meet the demands of promoting environmentally sound projects in a democratic system through the creation of an independent review board. The history of other MDBs and the present environmental problems in Central and Eastern Europe demonstrate the need for an institution that grants individuals, particularly local residents, a means to challenge environmentally harmful projects. Not only have many prior MDB projects devastated the environment and indigenous populations, but bank policies designed to remedy these problems remain unenforced or ignored.⁷

The extent of the environmental degradation in Central and Eastern Europe

CHRIS WOLD is a Law Associate at the Center for International Environmental Law-US (CIEL-US).

DURWOOD ZAEKE is President of the Center for International Environmental Law-US (CIEL-US) and is Adjunct Professor and Scholar-in-Residence at Washington College of Law, The American University.

The authors greatly appreciate the assistance and comments of Chris Murgatroyd, Law Fellow, and David Hunter, Staff Attorney, of CIEL-US. They are especially grateful to Rafal Kasprzyk, a Polish attorney and academic who likely won the first "public interest" case in Poland challenging bus emissions in Łódź, and to Anca Păduraru, a lawyer in private practice in Bucharest, Romania.

requires no further elaboration. The environmental crises in some areas, such as Poland's Upper Silesia, Czechoslovakia's Northern Bohemia, and Romania's Copsa Mica, are particularly acute; these areas constitute some of the most polluted in the world.⁸ This devastation serves as the backdrop for future activities of the EBRD.

The causes of the environmental crisis in this region are many and include the lack of pollution control and effluent treatment technologies for heavy industry and power plants, energy inefficiency in domestic and industrial uses, chemical-intensive agriculture, soil mismanagement, and lack of vehicular pollution control.⁹ Although the causes emanate from all sectors of the economy and population, they are systemic, resulting fundamentally from a lack of democracy.¹⁰ For over forty years, the former governments of Central and Eastern Europe imposed their will on the people. The people lacked the basic information necessary to assess their condition and lacked recourse to an institution capable of fairly addressing their concerns and protecting their environment.¹¹

The EBRD, in assisting the transition toward market-oriented economies and democratic forms of government, and in promoting sustainable development, must ensure that the problems it seeks to resolve are not inadvertently perpetuated by its own institutional framework. The founders recognized this responsibility in drafting its Articles, mandating that the EBRD carry out its operations in furtherance of democratic principles and that its activities promote environmentally sound practices and sustainable development.¹²

The EBRD must translate recognition of its responsibility to ensure democracy into meaningful procedures within its own institutional framework as well as in

its investment choices. First and foremost, democracy is a method by which to derive political decisions.¹³ That is, decision-making must be under the domination of the people¹⁴ — domination in the sense that all people have freedom of choice, are politically equal, and participate in making decisions. Participation preserves fundamental human rights and develops political competency. Participation, in its broadest sense, is a force capable of advancing the interests of the individual.¹⁵

II. AN INDEPENDENT REVIEW BOARD AND PRINCIPLES OF DEMOCRACY

Although majority rule is at the heart of democracy,¹⁶ it also protects the rights of minorities.¹⁷ Thus, democracy must be defined by participation which grants every citizen the opportunity to discuss actions in an open and public manner so that such actions can be taken for the benefit of the entire community, not just the majority.¹⁸ Implicit within these precepts are reviewability of decisions and access to information. To participate effectively and maintain one's freedom of choice, one must be able to pose questions and offer informed and articulate answers.¹⁹ Access to information provides individuals with the means to ask the proper questions.

Independent review, both administrative and judicial, ensures citizens that their rights to information and participation are enforced and that their concerns are considered in the decision-making process. The judicial process becomes a vehicle for self government — the very notion of a democracy.²⁰ Citizen participation, which includes access to information and the courts, defines democracy as much as does majority rule.²¹ Citizen participation also safeguards minority

interests. Judicial review, which guarantees citizens a participatory role, "is thoroughly consistent with the primacy of majority rule" and principles of democracy.²²

From a practical perspective, an independent review board, willing to defend individual rights against abuse by those in power, is critical to democracy.²³ One cannot justify granting authority to a group of officials without some mechanism which assures that they remain accountable to those they serve.²⁴

Government officials should not view citizen participation, citizen suits, and independent review of decisions with hostility. Rather, they should view these events as part of the total decision-making process.²⁵ This process of review simply determines whether or not unelected bureaucrats, who are not directly accountable to the legislature and not directly supervised by the President, make decisions consistent with legislative intent. Thus, independent review merely compensates for these limitations placed upon agencies and the legislature.²⁶ When viewed in this manner, the focus of a court's decision is not confined to one particular case. Rather, it encompasses the ability of the judiciary and citizens to modify the agency decision-making process and agency decisions.²⁷ In fact, commentators have suggested that civil actions brought by citizens significantly contributed to achieving the National Environmental Policy Act's²⁸ goal of improved agency decision-making.²⁹

III. AN INDEPENDENT REVIEW BOARD AND THE EBRD

In the context of the EBRD, effective environmental policy likely will involve establishment of regulatory and monitoring processes both in the borrower countries and within the EBRD

itself. Successful implementation of an EBRD environmental policy is dependent upon a mechanism to review those regulatory and monitoring processes. First, without such a mechanism, neither the public nor the EBRD itself can be assured that the EBRD's procedures are successfully implementing its stated policy. Second, reviewability provides a means to ensure that the EBRD fulfills its mandate to promote environmentally sound and sustainable development. Third, as has been shown, a review board provides citizens with a means to effectively participate in a democratic process.

Establishing an independent review board and permitting access to bank information are policies which, although foreign to MDBs, are commonplace in democratic nations. In addition, administrative review boards are common to many national legal systems and throughout international institutions.³⁰ Furthermore, the EBRD charter makes clear that its objective is not only to foster market-oriented economies but also democratic governments. The charter explicitly states that where a member state implements policies inconsistent with multiparty democracy and market economies, the EBRD can suspend bank resources or take other action it deems appropriate.³¹ Thus, by adopting an independent review board, the EBRD would merely be adhering to the democratic values it has chosen to follow, requiring of itself the same democratic processes it requires of its members.

The political intentions of the EBRD stand in stark contrast to those of the World Bank, which has stated unequivocally that only economic considerations shall be relevant to its lending decisions and that it shall not interfere with the political affairs of any "member state."³² The contrast is instructive. Until recently, the World Bank seemingly felt justified in denying

review of its decisions because its decisions were made purely on economic grounds. Distinctions between politics and economics, however, are not static and are often blurred. Recognition of this interrelationship has apparently inspired the World Bank to allow its practices to be made public and establish links with indigenous groups and nongovernmental organizations. Even so, access to World Bank information seems more a privilege than a right.³³

By contrast, the EBRD has clearly defined its objective of promoting democracy in Central and Eastern Europe, in addition to its commitment to environmentally sound and sustainable development. It has placed itself in a position where its activities must be viewed as part of a political process. The EBRD has chosen to make loans for the purpose of promoting initiatives committed to democratic principles. Consequently, citizens affected by the EBRD's lending activities should have the right to challenge investment decisions. To provide loans without granting review rights to citizens is a denial of the very rights the EBRD seeks to promote.

In spite of its clearly stated commitment to democratic processes, to date the EBRD has refused to include provisions for citizen review of its decisions. The EBRD argues, as other MDBs have, that it is a private financial institution, with no obligation to the general public. This argument fails as applied to MDBs³⁴ generally and to the EBRD specifically. MDBs are described more accurately as public institutions, not private. The international community has established MDBs to better public welfare worldwide. The World Bank's mission is to promote the "development of productive facilities and resources" to improve the general welfare of the citizens of borrowing countries.³⁵ Similarly, the EBRD seeks to promote market economies and democracy among

the ruins of Central and Eastern Europe's economy and environment. Thus, the EBRD, like the World Bank, has an essentially public function.

Further, MDBs are publicly funded, receiving billions of dollars from taxpayers around the world for project lending. These taxpayers also provide the capital necessary for MDBs to borrow billions more to finance lending.³⁶ Given these two factors, lending decisions by MDBs are indisputably *public* decisions, and the MDBs are *public servants*.³⁷

The EBRD Articles themselves demonstrate that the EBRD considers itself to be much more than a typical financial institution by stating its dual commitments to promoting both democracy and environmentally sound and sustainable development.³⁸ If the popular protests which shook Central and Eastern Europe are to be given any meaning, citizens must be granted the right to participate in the decision-making process for which they fought. In promoting democratic processes and citizen participation within member nations, the EBRD should make a commitment to democratic processes within its own structure by implementing an independent review board.

The reticence of the EBRD and other MDBs to include citizens in the decision-making process remains a mystery, particularly in light of the rise of democracy around the globe. This proposal for independent review and increased participatory democracy in the EBRD is less an extension of this trend than a basic tenet. Independent review simply emphasizes that for full effectiveness in carrying out the EBRD's goals, citizens must have the ability to challenge bank decisions through a democratic process. More specifically, once the charter is ratified and in force, any person who feels aggrieved by an

action of the EBRD must be able to challenge that action in accordance with the principles of democracy, respect for human rights, and the rule of law.

IV. INDEPENDENT REVIEW AND THE ENVIRONMENT

Commentators and lawmakers alike see public participation as a means to protect environmental concerns from administrative arbitrariness.³⁹ In particular, judicial review of administrative actions is a necessary component of the public participation process to "ensure that the administrative process itself will confine and control the exercise of discretion."⁴⁰ The proliferation of citizen suits⁴¹ and judicial review⁴² in the United States can be attributed in large part to the access to courts created by environmental statutes aimed at remedying the historic underrepresentation and dismissal of environmental concerns in the administrative process.⁴³ Before citizen suits and judicial review were statutorily authorized, agencies were granted broad regulatory discretion,⁴⁴ were insufficiently accountable for decisions negatively affecting the environment, and were "captured" by the private interests, such as polluting industries, that they regulated.⁴⁵

As recently adopted, the EBRD procedures regulating public participation in the decision-making process⁴⁶ allow the same discretion to ignore citizens' environmental concerns as the US system once did.⁴⁷ Further, the language of the EBRD's draft Environmental Policy presents the same dangers that have enabled other MDBs to undervalue or dismiss local environmental concerns: citizens do not have a right even to read the environmental assessment before a development or funding decision is made.⁴⁸ Thus, while EBRD lending decisions will, as a

matter of course, involve all those with a financial interest at stake, the same cannot be said for those with environmental interests that may be affected.⁴⁹

Given the existing state of the environment in Central and Eastern Europe and the EBRD's commitment to the environment, the importance of public participation and the ability to challenge actions of the Bank must be recognized. By involving those people affected by the physical manifestation of a project in the decision-making process, the EBRD will be directly promoting environmentally sound projects as well as demonstrating a commitment to and the application of democracy. Democracy, founded on the principles of freedom of choice, political equality, and participation, demands that those whose rights are threatened by environmental degradation have recourse to a forum in which they may voice their grievances.

The EBRD also has pledged itself to finance only those projects which promote sustainable development. Sustainable development is "a matter of responsible, informed behavior by individuals and groups . . . behavior [which] is likely only when people have full control over their lives and access to the resources required," including information.⁵⁰ Information and the ability to employ that information before an independent review board are essential for defense against practices which may adversely impact sustainable development. Global sustainability originates at and can only be assured at the community level.⁵¹ The EBRD, therefore, has the responsibility to ensure that local communities have access to information and a means to use this information to protect themselves.

V. COORDINATING THE PROPOSED EBRD REVIEW WITH OTHER EUROPEAN INSTITUTIONS

In addition to the democratic and environmental considerations set out above, the unstable political situation and lack of environmental legislation in Central and Eastern Europe may necessitate the establishment of an independent review board to facilitate citizen challenges to EBRD-funded projects. Although the governments of Central and Eastern Europe recognize the need for national environmental legislation, they generally lack the technical competence and institutional capacity to implement it. Without comprehensive national environmental laws and effective enforcement, citizens have no mechanism for challenging EBRD-funded projects within their countries. An independent review board within the EBRD could provide the necessary mechanism.

Two years have passed since democratic reforms began, yet Romania and Hungary still have not passed any environmental legislation and Bulgaria has passed only one general environmental law. Although Czechoslovakia has enacted three statutes, the split between the Czech and Slovak republics leaves effective enforcement in doubt, especially as concern over the Gabcikovo Dam Project continues to divide politicians in the two republics.⁵² Romania has gone through two governments within the past year, is expecting a third in May 1992, and recently restructured its entire judicial system. Moreover, courts in Central and Eastern Europe have never dealt with citizen suits before. Under these unstable political conditions, the ability of citizens to challenge EBRD-funded projects through their own judicial processes and for consistency with their own laws is extremely limited.

Thus, there is a need for another mechanism by which they may challenge EBRD-funded projects.

The EBRD is a well-financed institution with technical experts from around the world and a commitment to democratizing Central and Eastern Europe; it should create its own independent review board without awaiting the final outcome of legislative and political events in the region. A review process within the EBRD would assure citizens a means of redress against EBRD-funded projects until comprehensive national environmental legislation is implemented.

Even after these countries enact effective environmental laws, the continued presence of the EBRD's review board would not be problematic. The great disadvantage of relying on states to implement their own legislation is the likelihood of inconsistent rules governing review. The EBRD could offer a uniform review process to adjudicate the procedural and substantive rights granted to citizens by the EBRD, and in addition make findings based upon the law of member states. A uniform process would make citizens, as well as investors, secure in the knowledge that one institution will interpret those rights and obligations.

Ultimately, if the EBRD agrees to be or otherwise becomes bound by European Community law, decisions of the review board could be made appealable. Some member nations of the EEC hear appeals by those aggrieved by administrative decisions. A similar provision relative to the EBRD would therefore not be inconsistent.

VI. ADVANTAGES OF AN INDEPENDENT REVIEW BOARD

There are many possible forms a

review process could take. One alternative is review of all aspects, environmental and otherwise, of a project by staff members within the department preparing the loan. The obvious advantage of this method is that the reviewing staff has intimate knowledge of the proposed project. The experience of the World Bank, which uses this type of review, however, has shown that such a mechanism inadequately protects environmental interests. Staff become personally interested in the financial aspects of the loan because the amount of capital they transfer is the basis upon which their performance is evaluated and promotions are granted.⁵³ When decision-making is premised solely on the financial aspects of a loan, a lack of objectivity is inevitable. The World Bank had an opportunity to remedy this situation when it created its Environment Department. Unfortunately, the Environment Department does not influence or monitor development projects on a day-to-day basis.⁵⁴

Review by senior management offers another alternative. Again, the experience of the World Bank is instructive. Within the World Bank, twenty-two Executive Directors represent the 152 member states. Although the Executive Directors must approve all loans and major policy changes, approval occurs so late in the project cycle that projects are very difficult to modify or stop.⁵⁵ In addition, senior management often lacks the time necessary to properly evaluate environmental concerns. Moreover, senior management is populated largely by administrators unfamiliar with technical issues.

Review by an independent board avoids problems associated with other forms of review. First, an independent board would have the ability to consider the entire lending process free from concerns about job security or pressures from Bank staff, members, investors, and environmental advocates. Unbiased and

objective analysis of potential projects is, if not assured, certainly more likely. Ideally, the board should include highly qualified individuals from diverse disciplines so that its composition could enhance objectivity and technical competence. Thus, the board would be capable of resolving complex environmental and financial matters with technical and other specialized input.

An independent review board would also be able to work quickly without concern for other MDB-related duties. The board could devote all its energies to the challenged action. Although the process appears retroactive, initiated only after the decisions have been made, enforceable rights and obligations should affect behavioral change earlier in the official decision-making process and result in better final decisions. Moreover, a common review board applicable to all EBRD member states, as well as investors and citizens, eliminates complicated jurisdictional issues which may arise due to the international nature of the EBRD, provided all member states consent to its jurisdiction.

Perhaps the greatest advantage, however, is that the people affected by a project inherit a monitoring and enforcement role and can affect the decision-making process from its inception, because their rights, and the EBRD's substantive obligations, can be enforced. Therefore, they will not be alienated from those who make and implement the decisions. Instead, they will be a part of a society in which all individuals participate in the decisions which affect their lives.

VII. INTRODUCTION TO THE MODEL PROVISIONS FOR AN EBRD INDEPENDENT REVIEW BOARD

The Model Provisions of the EBRD
Independent Review Board drafted by

CIEL-US can serve as a model for any MDB. (See Appendix to this article.) The intent of the provisions is to create a process by which the EBRD's actions can be reviewed in an atmosphere where the EBRD, project proponents, the Board and citizens constitute a "partnership in furtherance of the public interest."⁵⁶ The Model Provisions were first drafted prior to meeting attorneys, law professors, and other environmental professionals from Central and Eastern Europe. The Model Provisions which follow were redrafted after several consultations with these experts in Central and Eastern Europe. In particular, these provisions are based heavily upon a workshop organized by the authors and held in Budapest, Hungary in March 1991. The *Workshop on Environmental Protection and Citizen Participation in the Lending Practices of the European Bank for Reconstruction and Development* brought together thirty-two "public interest" minded attorneys, law school professors, and other environmental professionals from Bulgaria, Czechoslovakia, Hungary, Poland, the Soviet Union and Yugoslavia.⁵⁷

VIII. CONCLUSION

The nations of Central and Eastern Europe have undergone unprecedented change over the past two years as citizens demanded their freedom and a voice in the matters that concern them. Having gained their freedom, they must now turn their attention to how it is to be distributed, for without proper distribution, freedom remains a mirage.⁵⁸

The EBRD has established itself as a vehicle to promote the rights and freedoms associated with democracy: freedom of choice, the right to participate in decision-making processes, and the right to maintain political equality. Creation of an independent review board

which provides individuals and groups with access to relevant financial and environmental information regarding proposed development projects will help ensure protection of these rights.

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1. Agreement Establishing the European Bank for Reconstruction and Development, Art 1, in 29 ILM 1083, 1084 (1990) ("The Agreement").
 2. *Id* at Art 11(1), in 29 ILM at 1087-88.
 3. *Id* at Art 2(1)(vii), in 29 ILM at 1084.
 4. The Articles of Agreement of the International Bank for Reconstruction and Development ("IBRD" or "World Bank") provide that only economic considerations may influence an investment decision. Articles of Agreement of the International Bank for Reconstruction and Development, Art 4 (as amended) (Feb 16, 1989) (available from the World Bank) ("IBRD Articles"). Under pressure from nongovernmental groups in member states and in the United States, the World Bank developed procedures for environmental impact assessment in 1989. These procedures were recently amended. The World Bank also promulgated extensive guidelines on how environmental considerations should be taken into account. World Bank Operational Directive 4.00, Annex A: Environmental Assessment, Technical Paper No 149, in 1 *Environmental Assessment Sourcebook: Policies, Procedures & Cross-Sectoral Issues* 27 (World Bank, 1991).
 5. See The Agreement (cited in note 1). See also text accompanying notes 1-3.
 6. The environmental problems currently existing in Central and Eastern Europe are as much a result of a totalitarian political process as of a distorted economic system. Yet, the EBRD recognizes only that the economic system is responsible for the region's widespread environmental problems. EBRD Environmental Policy ¶ 2 (draft) (Dec 19, 1991) (approved by the Board of Directors on Jan 21, 1992; final text not yet available). As a result, the EBRD does not guarantee that

citizens will have access to information necessary to meaningfully evaluate and comment on investment projects. Further, citizens do not have the right to participate in private sector projects requiring only a limited environmental analysis. See generally *id* at ¶¶ 10-27.

7. Eric Christensen, *Green Appeal: A Proposal for an Environmental Commission of Enquiry at the World Bank 1* (Sept 1990) (paper prepared for NRDC).

8. See Hilary French, *Green Revolutions: Environmental Reconstruction in Eastern Europe and the Soviet Union*, Worldwatch Paper No 99 at 5-28 (1990); J. Vavrousek, et al, *Concept of State Ecological Policy 2* (May, 1990) (report of the Federal Committee for the Environment, Prague, Czechoslovakia); *Environment and Development for Poland: Declaration of Sustainable Development 29-31* (Sept 17-20, 1990) (blueprint for International Workshop on Institutional Design, Białowieża, Poland); Miklós Bulla, ed, *State of the Environment in Hungary and Environmental Policy* (1990) (prepared by the Ministry of Environment).

9. See David Reed, *The Eastern European Bank for Reconstruction and Development: An Environmental Opportunity 6* (1990) (prepared for World Wildlife Fund for Nature-Intl MDB Program).

10. Industrial development and environmental degradation in Western countries and in Central and Eastern Europe proceeded on a parallel course until roughly the 1960s. At that time, Western governments, particularly the United States, enacted a plethora of new environmental legislation, most of which included provisions for citizens to participate in both the decision-making process (through, for example, rulemaking and environmental assessment) and the enforcement of those decisions (through, for example, administrative review and citizen suits).

11. The centrally planned economies of Central and Eastern Europe gave production targets precedence over human health and ecological concerns. See *Environment and Development for Poland, Executive Summary* ¶¶ 6 & 44 (cited in note 8). In fact,

environmental concerns gave rise to the revolutions in Czechoslovakia and Bulgaria, and played a large role in those of Hungary and Poland. Compare Vavrousek, *Concept of State Ecological Policy* at 6 & 12 (cited in note 8). Romania's "revolution" is seen more as a military coup.

Even with governments committed to democratic reform, the concept of citizen participation is slow to take hold. In Romania, for example, the draft environmental protection law grants citizens the right to information only when the *purposes* of the project will have negative impacts. Thus, citizens will not be entitled to information when a new school is built even if its construction will have negative impacts because the purposes of the school, e.g., education, are not negative. Environmental Protection Law (Romania), Art 6(c) (draft) (Dec 1991) (expected to pass in March or April, 1992) (on file with DELPF). The decision is a pragmatic one, because Romania's government, like the other governments in Central and Eastern Europe, does not have any experience with open government or provision of information to citizens.

12. See *The Agreement* (cited in note 1). See also text accompanying notes 1-3.

13. Reginald Bassett, *Essentials of Parliamentary Democracy* 100 & 102 (Barnes & Noble, 1935).

14. Compare Nicholas O. Berry, *The Conflict Between United States Intervention and Promoting Democracy in the Third World*, 60 Temple L Q 1015 (1987).

15. W.J. Stankiewicz, *Approaches to Democracy* 170 (Edward Arnold, 1980).

16. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U Pa L Rev 1033, 1038 (1968).

17. *Id.* Majority rule alone leaves minorities in no better position than if they were ruled by an autocrat. Moreover, mere consent is not enough because consent may be secured under conditions in which political freedom is drastically curtailed and in which there is little or no real power of choice. Bassett,

Essentials of Parliamentary Democracy at 112 (cited in note 13).

18. *Id.* at 113.

19. Ian Ducanson, *Law, Democracy and the Individual*, 8 *L Studies* 303, 315 (1988).

20. Jaffe, 116 *U Pa L Rev* at 1045 (cited in note 16).

21. *Id.*

22. *Id.*

23. Compare Louis M. Seidman, *Ambivalence and Accountability*, 61 *S Cal L Rev* 1571, 1571 (1988).

24. *Id.* at 1574.

25. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 *U Pa L Rev* 509, 512 (1974).

26. Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 *Duke L J* 819, 864-865.

27. Leventhal, 122 *U Pa L Rev* at 526 (cited in note 25).

28. 42 USC §§ 4321-4337 (1988). NEPA established the environmental impact assessment process by which federal agencies are compelled to prepare an environmental impact statement for "major Federal actions which significantly affect the quality of the human environment." 42 USC § 4332(C). See *Environmental Impact Assessment and the European Bank for Reconstruction and Development* (draft) (CIEL-US working paper) (Mar 1991) (on file with the authors).

29. Michael C. Blumm & Stephan R. Brown, *Pluralism and the Environment: The Role of Commenting Agencies in NEPA Litigation*, 14 *Harv Envir L Rev* 277, 280 (1990).

30. For example, the United Nations, International Labour Organization, World Bank, and Inter-American Development Bank all have administrative review tribunals. These

tribunals generally restrict themselves to employment issues, however.

31. The Agreement at Arts 8(1)-(3), in 29 *ILM* at 1086 (cited in note 1).

32. IBRD Articles, Art 4 (cited in note 4). The World Bank's General Counsel has emphasized that the Bank's Executive Directors are legally obligated to consider only economic factors:

[M]ember [states] of the Bank are under an obligation not to influence the Bank's President and staff in the discharge of their duties, and the Executive Directors are under the duty not to act as the instrumentality of member [states] to exert such prohibited influence.

J.B. Piater, *Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process: The Example of the Third World Dam-Building Projects*, 9 *BC Third World L J* 169, 210 (1989) (quoting memorandum from Dr. Ibrahim Shihata, Vice President & General Counsel, World Bank, to World Bank Board of Governors Zygmunt).

33. *Environment, Economic Development and Human Rights: A Triangular Relationship?* 49 (Apr 21, 1988) (proceedings of the 82d Annual Meeting of the American Society of Intl Law) (remarks of David Wirth, Senior Attorney, NRDC). Because indigenous and nongovernmental groups are entirely dissatisfied with the World Bank's implementation of its public participation provisions, they have requested that the Bank conduct a workshop to assess the validity of those public participation provisions. The World Bank agreed to hold a workshop during 1992.

34. Letter from David R. Downes, Law Fellow, CIEL-US, to George Folsom, Deputy Asst Secretary for Intl Development & Debt Policy, US Dept of the Treasury (Jan 21, 1992) (on file with the authors).

35. IBRD Articles, Art 1 (cited in note 4).

36. See Letter from D. Downes to G. Folsom at 2 (cited in note 34).

37. *Id.*
38. The Agreement at Art 11, in 29 ILM at 1087-88 (cited in note 1).
39. See, for example, Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U Chi L Rev 976 (1982); *EDF v Ruckelshaus*, 439 F2d 584, 597-98 (DC Cir 1971).
40. *Ruckelshaus*, 439 F2d at 598.
41. See, for example, Clean Air Act, 42 USC § 7604 (1988); Clean Water Act, 33 USC § 1365 (1988); Endangered Species Act, 16 USC § 1540(g) (1988); Toxic Substances Control Act, 15 USC § 2619 (1988); Resource Conservation and Recovery Act, 42 USC § 6972 (1988); Safe Drinking Water Act, 42 USC § 300j-8 (1988).
42. Many early environmental lawsuits were responsible for relaxing standing requirements by expanding the recognized categories of interests creating standing to sue. Thus, groups demonstrating aesthetic, environmental and recreational interests may now bring claims in federal courts. See, for example, *US v Students Challenging Regulatory Agency Procedures*, 412 US 669, 685 (1973); *Sierra Club v Morton*, 405 US 727, 734 (1972).
43. During the development of United States environmental law, the "courts . . . changed the focus of judicial review . . . so that its dominant purpose [became] . . . the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies" or to other institutions. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1667, 1712 (1975). Environmental concerns have risen to a preferred status because they involve fundamental interests of life and health, which "have always had a special claim to judicial protection." William Rogers, *Handbook on Environmental Law* § 1.5 (West, 1977) (quoting *Ruckelshaus*, 439 F2d at 598). See Louis L. Jaffe, *Standing Again*, 84 Harv L Rev 633, 633 (1971).
44. See Clean Air Act, 42 USC § 7409(b)(1) (EPA given authority to "protect the public health"). Congress believed that environmental regulation required analysis of many subtle, complex relationships. Thus it broadly delegated environmental regulatory responsibility to administrative agencies. James L. Oakes, *The Judicial Role in Environmental Law*, 52 NYU L Rev 498, 502-03 (1977).
45. See, for example, Sunstein, 49 U Chi L Rev at 977 & 985 (cited in note 39); Stewart, 88 Harv L Rev at 1682-83 (cited in note 43).
46. See The Agreement at Arts 11 & 22-30, in 29 ILM at 1087-88 & 1092-94 (cited in note 1).
47. *Id.*
48. The language pertaining to the environmental impact assessment and citizen participation in that process is modeled after the provisions of the World Bank. The EBRD's policy "expects" the loan proponents to make Environmental Assessments available to the public. EBRD Environmental Policy 6 (draft) (Mar 13, 1991).
49. The first draft of the EBRD's environmental policy did not even consider the public as a target audience for environmental assessment. EBRD Environmental Policy, Appendix 1 (draft) (Jan 6, 1991). Only after public interest groups criticized the EBRD for its narrow approach to environmental decision-making did it include citizens as part of the "target audience." See Letter from Durwood Zaelke, President, CIEL-US to Jacques Attali, EBRD President (Jan 25, 1991) (on file with authors).
50. *Caring for the World: A Strategy for Sustainability* 31 (prepared by the Intl Union for the Conservation of Nature ("IUCN"), the UN Environment Programme ("UNEP"), & the World Wide Fund for Nature) (draft) (June 1990) (on file with authors).
51. *Id.*
52. Alston Chase, *The Monster That Will Drink the Danube*, Condé Nast Traveler 118, 194-95 (Mar 1992).
53. Christensen, *Green Appeal* at 4 (cited in

note 7).

54. *Id.*

55. *Id.* at 3.

56. See Leventhal, 122 U Pa L Rev at 511-12 (cited in note 25) (quoting his own opinion in *Greater Boston Television Corp. v FCC*, 444 F2d 841 (DC Cir 1970) (discussing relationship between review of government actions and the role of agencies, the courts, and the public interest)).

57. CIEL-US Workshop on Environmental Protection and Citizen Participation in the Lending Practices of the EBRD, Workshop Statement (Mar 26-27, 1991) (Budapest, Hungary) (on file with the authors) ("Workshop Statement"). The statement included principles which, according to the participants, should govern the EBRD's environmental and lending policies. The statement, which included the framework for an independent review board, as well as access to information, environmental assessment, and sustainable development, was submitted to Jacques Attali, EBRD President.

58. Raúl Alfonsín, *Building Democracy*, 12 Yale J Intl L 121, 125 (1987).

APPENDIX**MODEL PROVISIONS OF
THE EBRD
INDEPENDENT
REVIEW BOARD****Article I - Creation**

A tribunal is established by the present Statute to be known as the Independent Review Board of the European Bank for Reconstruction and Development (the "Board").

Article II - Jurisdiction¹

1. The Board shall be competent to hear and pass judgment upon final actions of the EBRD including, but not limited to, the non-observance of EBRD procedures and funding of environmentally destructive projects. The Board may decide issues relating to the adequacy of the environmental impact assessment including, but not limited to, the environmental impact assessment's discussion of significant impacts, cumulative impacts, indirect impacts, mitigation plans, alternatives, and impacts on another State. Moreover, the Board may determine whether the level of public participation and consultation with other relevant international and national agencies was adequate.²

2. The Board shall be open to:

- a. any person who is a citizen of a Member country;
- b. any nongovernmental organization which has an interest in the economic and environmental well-being of Eastern Europe;
- c. any community or political

- subdivision within the countries in which aid is to be distributed;
- d. any member country; and
- e. any member of the EBRD staff alleging non-observance of the contract of employment or terms of appointment of such staff member.³

3. The Board shall have competence to hear complaints as of the date of the Board's formation.

4. The Board has competence to resolve disputes concerning its jurisdiction, competence, or questions of procedure, subject to Article XI (appeals).

Article III - Composition

1. The Board shall be composed of nine members, no two of whom may be nationals of the same state.⁴

2. At least three members of the Board shall have particular competence in the biological sciences. At least one of these members shall sit on each panel.⁵

3. The members of the Board shall be appointed as follows: three members will be appointed by the Directors from the countries of operation; three members will be appointed by the Directors of the other EBRD Member countries. The Board members will sit for three years, and they may be reappointed; provided, however, that of the members initially appointed, the terms of the three members shall expire at the end of one year and the terms of three other members shall expire at the end of two years. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

4. The Board shall sit with a minimum of three members in a particular case.

5. No member of the presiding Board

shall be of the same nationality as the applicant.⁶

6. No member of the Board can be dismissed unless all other members are of the unanimous opinion that he or she is unsuited for further service.

Article IV - Oral Proceedings

1. The Board shall hold hearings at dates to be fixed by rules established pursuant to Article XV. Extraordinary hearings may be invoked by the President when necessary.

2. Oral proceedings shall normally be held.⁷ Upon written agreement of all parties, oral proceedings may be waived upon consent of the Board. The oral proceedings shall include the presentation and examination of witnesses or experts, and each party shall have the right to present oral arguments and to comment on the evidence given.

3. The Board may exclude evidence which is irrelevant or lacking in probative value. The Board may also limit the oral testimony where it considers the written documentation adequate.

4. The oral proceedings of the Board shall be held in public.⁸

5. Parties may be represented by an attorney entitled to practice before a court of a State party to the EBRD or a State whose environment is alleged to be adversely affected.

Article V - Organization

1. The Board shall elect a President and two Vice-Presidents from among its members.

2. The President shall make the administrative arrangements necessary

for the functioning of the Board, including naming an Executive Secretary.

3. The expenses of the Board shall be borne by the EBRD.

Article VI - Information Requests⁹

1. Upon the request of any party in a suit filed pursuant to this Statute, the EBRD, and any of its functioning organs, shall make available any information relating to the challenged action. Information includes, but is not limited to, any documents, records, papers, manuals, decisions, and any other relevant material which purports to be, or is in the nature of

- a. an environmental impact assessment and any draft or revision thereof;
- b. monitoring data;
- c. rules of procedure;
- d. staff manuals;
- e. statements of policy;
- f. any information from the applicant; or
- g. comments or other data from other governments.¹⁰

2. Paragraph One of this Article does not apply to documents, papers, manuals, decisions, and any other materials that are

- a. trade secrets (this term does not include information which may potentially place any person or corporation at a competitive disadvantage);¹¹
- b. personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;¹²
- c. memoranda created in preparation for trial; or
- d. not reasonably related to the protested project.

3. Any reasonably segregable portion of a record shall be provided to any party to an action under this Statute requesting such information after deletion or redaction of the portions which are exempt under this Article.¹³

4. Upon receipt of the request, the EBRD has ten days in which to respond in writing. A refusal to disclose information shall be accompanied by detailed, written reasons.

5. A party who believes that information has been improperly withheld may file a complaint with the Board, which shall rule on the complaint.

6. The costs of fulfilling requests under this Article shall be borne by the EBRD when the request is made by a citizen or nongovernmental organization without a financial interest in the project.

Article VII - Remedies

1. The Board shall order the cancellation of any EBRD action, findings, or conclusions found to be:

- a. in excess of authority;
- b. not supported by the facts or evidence; or
- c. contrary to EBRD's Articles of Agreement, including, for example, activities that are not sustainable.

2. The Board shall suspend any EBRD action, findings, or conclusions found to be in violation of procedures required by the Charter, by-laws, rules, or other governing instrument.¹⁴

3. The Board shall compel EBRD action unlawfully withheld or unreasonably delayed.

4. In making a determination pursuant to paragraphs 1, 2, and 3, the Board shall review the whole record. The whole

record is limited to that information published and made available to the public as part of the environmental impact assessment.

5. The Board may, in its discretion, assess against the EBRD attorney's fees and other costs reasonably related to a case brought under this Statute in which the applicant had reasonable grounds for the suit.¹⁵

Article VIII - Decision-making

1. The Board shall make all decisions by a majority vote. Separate and dissenting opinions may be submitted as well.

2. Subject to the provisions of Article XI, the decisions of the Board shall be final, binding, and res judicata on all parties.¹⁶

3. In the event of an equality of votes, the President or the member who acts in such place shall cast the determining vote.

4. The Board's judgments shall be in writing and shall include findings of fact and reasoning upon which the judgment is founded.

5. The judgments shall be drawn up in one of the official languages of the Board and shall be deposited in the EBRD's repository.

6. The Board shall deliver its judgment within three months from the filing of the application and within one month after the last oral proceeding. If, in the opinion of the Board, circumstances so justify, this time limit may be extended.

7. A certified copy of the judgment shall be communicated to each of the parties in the case. Copies shall be made available upon request to any interested persons free of charge.

Article IX - Applications

1. An application shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted all other available means of redress.

2. The complaint must be filed within sixty (60) days after a final action of the EBRD is made public.

3. An application may be filed as a class action in accordance with paragraphs (1) and (2) of this section.¹⁷

Article X - Effect of Application

When the Board finds that justice so requires, it may immediately enjoin the action or decision until final resolution of the application.¹⁸

Article XI - Appeals

1. If a member state, the EBRD, or the person in respect to whom a judgment has been rendered by the Board objects to the judgment on the ground that the Board exceeded its jurisdiction or competence; has failed to exercise jurisdiction vested in it; has erred on a question of law relating to the provisions of the Charter; or has committed a fundamental error in procedure which has occasioned a failure of justice, such member state or political subdivision thereof, the EBRD, or the person may, within thirty days from the date of the publication of the judgment, make a written application to the International Court of Justice asking the Committee¹⁹ to request an advisory opinion from the International Court of Justice on the matter.²⁰

2. Within thirty days from the receipt of an application under paragraph 1 of

this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that there is such a basis, it shall request the advisory opinion of the International Court of Justice. The Committee shall forward to the International Court of Justice the record from the original proceeding and the applicant's request for an advisory opinion.

3. If no application is made under Paragraph One of this Article, or if a request to appeal is denied by the Committee, the judgment of the Board shall become final.

Article XII - Revision of Judgment

1. An application for revision of a judgment may be made to the Board only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Board and to the party claiming the revision.

Article XIII - Intervention

1. Any party to whom the Board is open under Article II of the Statute may apply to intervene in a case at any stage thereof on the ground that he or she has a right which may be affected by the judgment to be given by the Board.²¹

2. The President of the EBRD or any other top ranking official of a department of the EBRD may, upon giving previous notice to the President of the Board, intervene at any stage, if that official considers that his or her respective department may be affected by the judgment of the Board.

3. Any party to whom the Board is open under Article II of the Statute may be affected by the judgment of the Board

may also be called to participate in the proceedings at the request of any of the parties or on the initiative of the Board.

4. The intervener must accept the case as it finds the case at the time of intervention. Applications to intervene shall be limited to supporting or requesting the rejection of the application of one of the parties.

Article XIV - Legal Aid²²

1. A party who is unable to meet the costs of the proceedings, wholly or in part, may at any time apply for legal aid. The application shall be accompanied by evidence of the applicant's need of assistance and, in particular, by a document from the competent authority certifying the asserted lack of means. The application need not be made through an attorney.

2. The Board shall review the application and, after considering written arguments from the opposing party, decide whether legal aid should be granted in full or in part, or whether it should be refused. This order shall be made without reasons and is not appealable.

3. The Board may at any time, either of its own motion or on application, withdraw legal aid if the circumstances which led to its being granted change during the proceedings.

4. When legal aid is granted, the EBRD shall bear the costs, and the EBRD shall advance funds necessary to meet the party's expenses.

Article XV - Rulemaking

Subject to the provisions of this Statute, the Board shall establish rules concerning:

a. election of the President and

Vice-Presidents;

- b. constitution of panels envisaged by Article III;
- c. presentation of applications and the procedure to be followed with respect to them; and
- d. other matters related to the functioning of the Board.

Article XVI - Amendments

This Statute may be amended only by the Board of Directors of the EBRD.

1. International administrative tribunals have limited jurisdiction. *Judgments of the ILO Administrative Tribunal, 1956 ICJ 77, 97*. The scope of a tribunal's jurisdiction is thus defined by its governing statutes and instruments. Consequently, the jurisdictional provision must be drafted carefully so as not to preclude particular causes of action.

2. See CIEL-US Workshop on Environmental Protection and Citizen Participation in the Lending Practices of the EBRD, Workshop Statement (Mar 27, 1991) (Budapest, Hungary) (on file with the authors) ("Workshop Statement"). The Workshop Statement is a set of recommendations to the EBRD and represents the views of the 32 attorneys and other environmental professionals from Bulgaria, Czechoslovakia, Hungary, Poland, Romania, the Soviet Union, Yugoslavia, and other countries.

3. This provision is included to allow the Board to hear contract disputes as well. The other administrative tribunals were created to resolve these disputes, which are the focus of their work. See, for example, The World Bank Administrative Tribunal, in C.F. Amerasinghe, ed, *Documents on International Administrative Tribunals* 44 (Oxford, 1988).

4. Most international administrative tribunals are composed of seven members who sit in panels of three. Others are composed of six and still others of three members. A larger number may be appropriate for this Board because its jurisdiction is broader and may entail more

suits.

5. Mandating that members have particular competence in a field of expertise is not novel. For example, the Appeals Board of the European Space Agency requires that members be "eminent persons with particular competence in labour legislation and in staff relations, preferably from the international field." Statute of the Appeals Board of the European Space Agency, Reg 34/1(iii), in Amerasinghe, *Documents* at 148-49 (cited in note 3).

6. This paragraph may seem inconsistent with the independent nature of the Board. The International Court of Justice allows a party which does not have a judge of its nationality on the Court to nominate an ad hoc judge. However, no ad hoc judge has ever ruled against his or her country. D.W. Bowett, *The Law of International Institutions* 266-67 (Stevens & Sons, 4th ed 1982). In the context of the EBRD, it is unclear what ruling in favor of one's country would mean.

7. See Workshop Statement at ¶ 28 (cited in note 2).

8. The vast majority of tribunals hold oral proceedings in public with the stipulation that they may be held in private if so needed in exceptional circumstances. The term "exceptional circumstances" is not defined in a statute or rule of any administrative tribunal. Also, most tribunals do not provide for examination of the witnesses by the parties. Rather, the witness gives a statement and then the tribunal asks questions.

9. This provision is modeled after a section of the United States Freedom of Information Act, 5 USC § 552 (1988) ("FOIA").

10. See Workshop Statement at §§ 7-8 & 23 (cited in note 2).

11. FOIA also includes the phrase "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 USC § 552(b)(4). This section has been omitted here because any information, in a bank development project, has the potential to fall into a commercial or financial information

exception.

12. See 5 USC § 552(b)(6).

13. See 5 USC § 552(b).

14. Except for paragraph 1(b), paragraphs 1 and 2, while modeled after sections of the United States Administrative Procedure Act, 5 USC §§ 702 & 706 (1988), are similar to remedies provided in all other administrative tribunal statutes.

15. The Appeals Board of the Organization for Economic Cooperation and Development, Arts 8(e)-(f), in C.F. Amerasinghe, ed, 2 *Statutes and Rules of Procedure of International Administrative Tribunals* 116, 124 (World Bank, rev ed 1983) ("Statutes"), and the Appeals Board of the Institute for the Management of Technology, Art 8(d), in id at 144 & 148, provide for recovery of reasonable fees, including witness and expert costs, when the claimant had "good grounds" for bringing the suit. United States citizen suit provisions allow attorneys' fees for the "prevailing party." See, for example, Clean Air Act, 42 USCA § 7604(d) (West Supp 1991).

16. The idea of stare decisis does not exist in the international administrative tribunals. As the case law develops, however, the tribunals develop a "jurisprudence constante" to which reference is made in subsequent decisions. Bowett, *International Institutions* at 325 (cited in note 6). There exists a fundamental principle of the administration of justice that like cases should be decided alike. L. Neville Brown & Francis Jacobs, *The Court of Justice of the European Communities* 275 (Sweet & Maxwell, 2d ed 1983).

17. See Workshop Statement at ¶ 25 ("[T]he Bank should allow citizens to sue using class actions which more effectively protect fragmented and diffuse populations.") (cited in note 2).

18. While most statutes for international administrative review expressly provide otherwise, this power to enjoin an action and its use by US courts has been essential to the success of the US environmental assessment statute. See also id at ¶ 26 (calling for

injunctive relief to prevent further environmental degradation in Central and Eastern Europe).

19. The Committee could be a subset of the Board of Directors.

20. This appears to be the best choice for review of this Board's decisions. The Court of Justice of the European Communities sits in three capacities: as the Court of the European Coal and Steel Community of the European Economic Community, and of the European Atomic Energy Community. This court can apply international law but relies on the treaty provision of the three communities, the acts of the communities' institutions and general principles of law embodied within the municipal law of the member states. The right to challenge is available only to member states and the executive bodies of the communities. Thus, this court is inaccessible to many EBRD member nations.

The International Court of Justice may give an advisory opinion on "any legal question" to any body authorized in accordance with the Charter of the United Nations to make such a request. Statute of the International Court of Justice, Art 65. Requests for advisory opinions must be made through the United Nations General Assembly, the Security Council and such other United Nations organs as may be authorized by the General Assembly. Id, Art 96. The EBRD would thus have to request the General Assembly for authorization. As of 1987, four organs of the United Nations and fifteen specialized agencies were authorized to seek advisory opinions from the Court. Louis Henkin, et al, *International Law* 651 (West, 2d ed 1987).

The advisory jurisdiction of the Court is available to organizations but not to states. However, a State may request that an international organization make the request on its behalf.

Generally, advisory opinions of the Court are not binding. Bowett, *International Institutions* at 262-82 (cited in note 16). They can be made binding on the parties, however, if the parties so agree in a governing instrument. See, for example, the Administrative Tribunal of the International Labour Organization Statute, Art 12, in Amerasinghe, 2 *Statutes* (cited in note 15).

21. These provisions are generally found in the rules generated by the tribunals. Considering the importance of allowing nongovernmental organizations to participate, the Statute seems a better place to incorporate such provisions.

22. This Article is modeled after the Rules of Procedure for the Court of Justice for the European Communities, Art 76, in Amerasinghe, 2 *Statutes* at 38 & 57 (cited in note 15). See also Workshop Statement at ¶ 29 (cited in note 2).

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C.F. Amerasinghe, 1 & 2 *Statutes and Rules of Procedure of International Administrative Tribunals* (World Bank, rev ed 1983), which include:

1. Administrative Tribunal of the United Nations
2. Administrative Tribunal of the International Labour Organization
3. Administrative Tribunal of the World Bank
4. Administrative Tribunal of the Inter-American Development Bank
5. The Appeals Board of the Council of Europe
6. The Appeals Board of the North Atlantic Treaty Organization
7. The Appeals Board of the Western European Union
8. The Appeals Board of the European Space Agency
9. The Appeals Board of the Intergovernmental Committee for European Migration
10. The Administrative Tribunal of the Organization of American States
11. The Court of Justice of the European Communities
12. The Administrative Tribunal of Unidroit
13. The Appeals Board of the Organization for Economic Cooperation and Development

14. The Appeals Board of the Institute for the Management of Technology
15. The Judicial Tribunal of the Organization of Arab Petroleum Exporting Countries

C.F. Amerasinghe and D. Thorslund, *Claimants to Staff Membership Before International Administrative Tribunals*, 38 Intl & Comp L Q 653 (1989).

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