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## The Metamorphosis: Expected Changes in the Brazilian Debt-for-Nature Swap Process and Policy Implications

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# The Metamorphosis: Expected Changes in the Brazilian Debt-for-Nature Swap Process and Policy Implications

Antonio N. Piccirillo

## Abstract

This Note argues that the new Brazilian debt-for-nature swap legislation, if passed in its current form, will make debt-for-nature swaps in Brazil more financially attractive to international and Brazilian non-governmental organizations (“NGOs”). Part I provides a description of a typical debt-for-nature swap, the purposes of a debt-for-nature swap, and the interests of the U.S. government and U.S. NGOs in debt-for-nature swaps. Part I also discusses the grounds for the initially adamant Brazilian opposition to debt-for-nature swaps and the recent moderation of this opposition. Part II reviews the changes in the policies of the Brazilian government toward debt-for-nature swaps, from the pragmatic but modest measures taken by the Collor administration (1990 to 1992) to the outright approval of debt-for-nature swaps by the Franco administration (1992 to present). Part III analyzes the differences between the current Brazilian debt-for-nature swap regulations and the proposed legislation, highlighting the benefits of the latter. Part III also sets forth several policy recommendations directed at the U.S. government and U.S. NGOs. Finally, this Note concludes that, if complemented by the policy recommendations presented in Part III, the proposed Brazilian legislation will weaken the lingering Brazilian opposition to debt-for-nature swaps and ensure that the interests of the U.S. government and U.S. NGOs in these transactions are preserved.

## NOTES

### THE METAMORPHOSIS: EXPECTED CHANGES IN THE BRAZILIAN DEBT-FOR-NATURE SWAP PROCESS AND POLICY IMPLICATIONS\*

#### INTRODUCTION

The debt-for-nature swap process in Brazil is undergoing a striking metamorphosis. As little as four years ago, the Brazilian government forcefully rejected the idea of debt-for-nature swaps<sup>1</sup> as an affront to Brazilian national sovereignty.<sup>2</sup> The government based its opposition on the theory that debt-for-nature swaps were a form of external control over the country's natural resources and domestic policy.<sup>3</sup> In addition, many Brazilians believed that debt-for-nature swaps would legitimize the country's large and controversial external debt.<sup>4</sup> Today, in contrast, the

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1. See J. Eugene Gibson & Randall K. Curtis, *A Debt-for-Nature Blueprint*, 28 COLUM. J. TRANSNAT'L L. 331, 335-36 (1990). In essence, a debt-for-nature swap allows a developing country with a large external debt to obtain some debt relief by having an international conservation organization buy shares of the developing country's external debt. *Id.* at 333. The international conservation group then donates its shares to a conservation group in the developing country, which converts the shares into local currency or interest-bearing bonds that ultimately finance an environmental project in the developing country. Marianne Lachman, *Debt-for-Nature Swaps: A Case Study in Transactional Negotiation*, 2 J. CONTEMP. LEGAL ISSUES 139, 143 (1989).

2. James Brooke, *Brazil Announces Plan to Protect the Amazon*, N.Y. TIMES, Apr. 7, 1989, at A5; Eugene Robinson, *Brazil Angrily Unveils Plan for the Amazon*, WASH. POST, Apr. 7, 1989, at A1. The rejection came in a speech by former President Sarney announcing a domestic plan, entitled "Our Nature," to protect the Amazon. Brooke, *supra*, at A5; Robinson, *supra*, at A1. The President explicitly ruled out debt-for-nature swaps due to sovereignty concerns. Brooke, *supra*, at A5; Robinson, *supra*, at A1.

3. See Priya Alagiri, Comment, *Give Us Sovereignty or Give Us Debt: Debtor Countries' Perspective on Debt-for-Nature Swaps*, 41 AM. U. L. REV. 485, 496-503 (1992) (discussing debt-for-nature swaps and sovereignty infringement on developing countries' governments and indigenous groups).

4. CONSÓRCIO DE ONGS BRASILEIRAS, ASPECTOS POLÍTICO-ECONÔMICOS E EXPERIÊNCIAS INTERNACIONAIS RELACIONADAS À CONVERSÃO DA DÍVIDA EXTERNA PARA PROJETOS DE MEIO AMBIENTE [CONSORTIUM OF BRAZILIAN NGOS, POLITICAL-ECONOMIC ASPECTS AND INTERNATIONAL EXPERIENCES RELATED TO DEBT-FOR-NATURE SWAPS] 2-3 (on file with Fundação Brasileira para a Conservação da Natureza, Rio de Janeiro, Brazil) [hereinafter CONSÓRCIO].

Brazilian government is poised to enact advanced debt-for-nature swap legislation that could significantly improve conditions for the implementation of ecologically and financially successful debt-for-nature swaps in Brazil.<sup>5</sup>

This Note argues that the new Brazilian debt-for-nature swap legislation, if passed in its current form, will make debt-for-nature swaps in Brazil more financially attractive to international and Brazilian non-governmental organizations ("NGOs").<sup>6</sup> Part I provides a description of a typical debt-for-nature swap, the purposes of a debt-for-nature swap, and the interests of the U.S. government and U.S. NGOs in debt-for-nature swaps. Part I also discusses the grounds for the initially adamant Brazilian opposition to debt-for-nature swaps<sup>7</sup> and the recent moderation of this

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As of 1990, Brazil's external debt totaled U.S.\$116 billion. WORLD BANK DEBT TABLES 38 (1991). At the end of 1992, the external debt was estimated to be U.S.\$123 billion. Kirsteen Macleod, *Putting Brazil's Political, Economic House in Order: Finance Minister Cardoso to Sign Bank Deals in Canada*, FIN. POST, Nov. 26, 1993, at 8. Approximately U.S.\$52 billion is in commercial loans. *Review of 1992: An Extraordinary Year*, International Reports - Brazil Service, Dec. 9, 1992, available in LEXIS, Nexis Library, NSAMER File. Many Brazilians question the legitimacy of this external commercial debt because past loans were not accompanied by proper measures on the part of creditors to ensure that the loans did not finance ill-conceived projects or disappear through corruption. Maurício Borges Lemos & Fernando Damata Pimentel, *Conversão da Dívida Externa em Projetos Ecológicos: Uma Breve Nota 2-3* (July 1990) (on file with the *Fordham International Law Journal*).

5. Interview with Dr. Dagoberto Koehntopp, Secretaria de Planejamento, Orçamento e Coordenação, Secretaria de Assuntos Internacionais [Bureau of Planning, Budgeting, and Coordination, Division of International Affairs (Brazilian Government)], in Brasília, Brazil (July 28, 1993). A draft of the new legislation was completed in August of this year and is currently awaiting approval by the Brazilian National Congress. *Brazil Seeks to Facilitate Debt-for-Nature Swaps*, Environment Watch Latin America, Sept. 1993, available in LEXIS, Nexis Library, CURRNT File; see Antonio Piccirillo, *Alleviating Sovereignty Concerns in Debt-for-Nature Swaps: The Case of Brazil 4* (Aug. 1993) (on file with the *Fordham International Law Journal*) (outlining new legislation).

6. See Paula Rhodes & Eileen McCarthy-Arnolds, *Expanding NGO Participation in International Decision-Making*, in WORLD DEBT AND THE HUMAN CONDITION 153, 158 (Ved P. Nanda et al., eds. 1993). An NGO is any actor in the international system which is not a government. *Id.* NGOs can exist for humanitarian, commercial, or political purposes. *Id.* NGOs can be multinational corporations, banks, churches, and even terrorists. *Id.* Humanitarian or development NGOs are private organizations that seek to relieve suffering, alleviate poverty, protect the environment, provide basic social services, or promote community development. *Id.*; see Gibson & Curtis, *supra* note 1, at 340-45 (discussing relationship between local and international NGOs in debt-for-nature swaps).

7. See *supra* notes 3-4 and accompanying text (discussing suspicions of foreign control over Brazilian natural resources and domestic policy, and widespread belief that Brazilian external debt is illegitimate).

opposition. Part II reviews the changes in the policies of the Brazilian government toward debt-for-nature swaps, from the pragmatic but modest measures taken by the Collor administration (1990 to 1992) to the outright approval of debt-for-nature swaps by the Franco administration (1992 to present). Part III analyzes the differences between the current Brazilian debt-for-nature swap regulations and the proposed legislation, highlighting the benefits of the latter. Part III also sets forth several policy recommendations directed at the U.S. government and U.S. NGOs. Finally, this Note concludes that, if complemented by the policy recommendations presented in Part III, the proposed Brazilian legislation will weaken the lingering Brazilian opposition to debt-for-nature swaps and ensure that the interests of the U.S. government and U.S. NGOs in these transactions are preserved.

### I. DEBT-FOR-NATURE SWAPS AND BRAZILIAN DISAPPROVAL: AN OVERVIEW

Debt-for-nature swaps can be classified as either private sector debt-for-nature swaps<sup>8</sup> or public sector debt-for-nature swaps.<sup>9</sup> The purposes of a debt-for-nature swap reflect the interests of the different parties involved in the transaction, including the local and international NGOs, the creditor bank or government, and the debtor government. In Brazil, questions of external interference with natural resources and domestic policy<sup>10</sup> and the legitimacy of the Brazilian external debt<sup>11</sup> caused the Brazilian government to oppose initially debt-for-nature swaps.<sup>12</sup> Today, opposition based on external interference is weaken-

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8. See Gibson & Curtis, *supra* note 1, at 335-54. In a private sector debt-for-nature swap, an international NGO purchases a debtor country's commercial bank debt and donates the debt to a local NGO. *Id.* at 335-36. The local NGO then converts the debt into local currency and uses the funds to implement an environmental program. *Id.*

9. See J. Eugene Gibson & William J. Schrenk, *The Enterprise for the Americas Initiative: A Second Generation of Debt-for-Nature Exchanges—With an Overview of Other Recent Exchange Initiatives*, 25 GEO. WASH. J. INT'L L. & ECON. 1, 16-18 (1991). In a public sector debt-for-nature swap, a creditor government, such as the United States, forgives portions of its bilateral aid to a debtor country in exchange for the debtor country's commitment to fund certain environmental projects. *Id.*

10. See *supra* note 3 and accompanying text (discussing suspicions of foreign control over Brazilian natural resources and domestic policy).

11. See *supra* note 4 and accompanying text (discussing widespread belief that Brazilian external debt is illegitimate).

12. Brooke, *supra* note 2, at A5.

ing,<sup>13</sup> but questions concerning the legitimacy of the external debt remain.<sup>14</sup>

#### A. *Description of a Debt-for-Nature Swap*

Although all debt-for-nature swaps vary to some extent, most private sector debt-for-nature swaps follow a common scheme. Normally, an international NGO acquires title to a portion of a debtor country's external debt either by a donation from a commercial bank or, more likely, by purchasing the debt at a discount on the secondary market.<sup>15</sup> The international NGO then donates the debt titles to an NGO in the debtor country (the "local NGO"),<sup>16</sup> which then converts the debt titles into local currency or interest-bearing bonds.<sup>17</sup> The local NGO uses the proceeds to administer an environmental program in that country.<sup>18</sup>

In other private sector debt-for-nature swaps, the international NGO agrees to cancel the debt it purchased in return for the debtor country's commitment to create a conservation fund

13. FUNDAÇÃO BRASILEIRA PARA A CONSERVAÇÃO DA NATUREZA, SEMINÁRIO SOBRE RECURSOS EXTERNOS EM PROJETOS DE MEIO AMBIENTE [BRAZILIAN FOUNDATION FOR THE CONSERVATION OF NATURE, SEMINAR CONCERNING EXTERNAL FUNDS FOR ENVIRONMENTAL PROJECTS] 7 (1989) (on file with Fundação Brasileira para a Conservação da Natureza, Rio de Janeiro, Brazil) [hereinafter FBCN SEMINÁRIO].

14. CONSÓRCIO, *supra* note 4, at 2-3. An indication of the current feelings against the external debt is the party platform of the leading candidate in the polls for Brazil's October 1994 presidential election, which platform calls for the suspension of external debt payments. James Brooke, *Lula's Progress: From Peasant Boy to President?*, N.Y. TIMES, Dec. 27, 1993, at A4. However, the candidate himself, Luis Inácio Lula da Silva, of the Partido Trabalhista [Workers' Party] ("PT"), may prove to be more flexible than his party platform. *Id.*

15. Gibson & Schrenk, *supra* note 9, at 3. The secondary market is the market in which public and private external debt is traded. UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, DEBT EQUITY CONVERSIONS 17 (1990). The debt on the secondary market sells at a discount reflecting the market's perception of the creditworthiness of the debtor country and the ultimate probability that the debt will be paid according to the loan agreements. *Id.* Commercial banks are willing to sell the debts of many developing countries on the secondary market because full payment of these debts is considered unlikely. Gibson & Schrenk, *supra* note 9, at 3. For example, in 1987 Citibank, determining that full payment of Brazilian loans was improbable, reserved U.S.\$3 billion dollars for anticipated losses on Brazilian loans. Lachman, *supra* note 1, at 141.

16. See Gibson & Curtis, *supra* note 1, at 341. The international and local NGO may or may not have had prior cooperative relationships. *Id.*

17. Lachman, *supra* note 1, at 143, 146.

18. *Id.* at 143.

to protect certain areas.<sup>19</sup> At least one debt-for-nature swap has also provided for the cancellation of trade credits.<sup>20</sup> Whether the debt-for-nature swap affects external debt or trade credits, the debtor country's government negotiates each phase of the transaction with the local and international NGOs, from the financial terms of the debt conversion to the details of the environmental program.<sup>21</sup> Ultimate approval of any debt-for-nature swap, therefore, rests with the local government.<sup>22</sup>

A recent development has been the emergence of public sector debt-for-nature swaps.<sup>23</sup> Unlike a private sector debt-for-nature swap, in which an international NGO acquires and converts a country's commercial bank debt,<sup>24</sup> in a public sector debt-for-nature swap a creditor government<sup>25</sup> directly reduces its bilateral debt<sup>26</sup> to a debtor country in return for a commitment by

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19. Gibson & Schrenk, *supra* note 9, at 7-9, 14-15. Such swaps took place in Bolivia and Mexico, for example. *Id.* In the Bolivian swap, Conservation International, a U.S. NGO, purchased U.S.\$650,000 worth of Bolivia's commercial bank debt for U.S.\$100,000. *Id.* at 7. Conservation International agreed to cancel this debt in return for the Bolivian government's commitment to create a U.S.\$250,000 fund to finance the management of the Beni Biosphere Reserve. *Id.* In the Mexican swap, Conservation International agreed to purchase up to U.S.\$4 million of Mexico's commercial bank debt. *Id.* at 14-15. In return for the cancellation of this amount, the Mexican government agreed to establish a conservation fund equivalent to 35% of the face value of the cancelled debt. *Id.* For an overview of past debt-for-nature swaps in several countries, see *id.* at 7-15, and Derek Asiedu-Akrofi, *Debt-for-Nature Swaps: Extending the Frontiers of Innovative Financing in Support of the Global Environment*, 25 INT'L LAW. 557, 565-71 (1991).

20. Gibson & Schrenk, *supra* note 9, at 14. Such a swap took place in Madagascar. *Id.* The government of Madagascar and Conservation International agreed to convert a total of U.S.\$1 million worth of Madagascar's commercial bank debt and trade credits per year for five years. *Id.*

21. *Id.* at 4-5.

22. Gibson & Curtis, *supra* note 1, at 344.

23. Daniel H. Cole, *Debt-Equity Conversions, Debt-for-Nature Swaps, and the Continuing World Debt Crisis*, 30 COLUM. J. TRANSNAT'L L. 57, 80 (1992).

24. See *supra* note 15 and accompanying text (discussing acquisition of commercial bank debt for private sector debt-for-nature swaps).

25. See Cole, *supra* note 23, at 80. In 1990, the Paris Club, a group of Western creditors including the United States, Great Britain, France, Germany, and Japan, agreed to sell or donate their government-to-government loans to developing countries. *Id.*

26. See MALCOLM GILLIS ET AL., *ECONOMICS OF DEVELOPMENT* 364 (2d ed. 1987). Bilateral aid is aid given directly by one government to another. *Id.* Bilateral aid donors normally disburse such aid through official aid agencies, such as the United States Agency for International Development and Britain's Overseas Development Ministry. *Id.* at 370.

that country to fund environmental projects.<sup>27</sup> The United States has taken a step in the advancement of public sector debt-for-nature swaps with the Enterprise for the Americas Initiative (the "Initiative").<sup>28</sup> The Initiative aims to strengthen growth in Latin America through increased trade, investment, and reduction of official debt owed to the United States.<sup>29</sup> The Initiative allows a reduction of concessional debt<sup>30</sup> owed by Latin American or Caribbean countries to the U.S. government under U.S. international economic assistance programs.<sup>31</sup> Such a reduction would allow the eligible debtor country<sup>32</sup> to pay a reduced prin-

27. Gibson & Schrenk, *supra* note 9, at 16-18.

28. Enterprise for the Americas Act of 1992, Pub. L. No. 102-549, tit. VI, § 602, 106 Stat. 3664 (1992) (to be codified at 22 U.S.C. §§ 2430-2430h and 22 U.S.C. § 2077); see *Enterprise for the Americas Initiative: Hearing Before the Subcommittees on Human Rights and International Organizations, Western Hemisphere Affairs, and International Economic Policy and Trade of the House Foreign Affairs Committee*, 101st Cong., 2d Sess. (1990) (giving overview of Initiative); Walt Schaffer, *Enterprise for the Americas Initiative Offers New Trade, Investment Opportunities*, Bus. AM., Mar. 23, 1992, at 2 (discussing economic benefits of Initiative); Gibson & Schrenk, *supra* note 9 (discussing new generation of debt-for-nature swaps brought about by Initiative).

29. Schaffer, *supra* note 28, at 2.

30. Gibson & Schrenk, *supra* note 9, at 16. Concessional debt is debt that carries interest rates that are lower than market rates and that may also include other terms favorable to the borrower. *Id.* n.81.

31. 22 U.S.C. § 2430c. The Initiative authorized the reduction of loans under the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1954) (codified as amended in scattered sections of 22 U.S.C., 7 U.S.C., and 42 U.S.C.), and as food assistance credits under the Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454 (1954) (codified as amended in scattered sections of 7 U.S.C.) (commonly known as "P.L. 480"). 22 U.S.C. § 2430c.

32. 22 U.S.C. § 2430b. Section 2430b states in pertinent part as follows:

(a) REQUIREMENTS.—To be eligible for benefits . . . a country must be a Latin American or Caribbean country—

- (1) whose government is democratically elected;
- (2) whose government has not repeatedly provided support for acts of international terrorism;
- (3) whose government is not failing to cooperate on international narcotics control matters;
- (4) whose government (including its military or other security forces) does not engage in a consistent pattern of gross violations of internationally recognized human rights;
- (5) that has in effect, has received approval for, or, as appropriate in exceptional circumstances, is making significant progress toward—

(A) an International Monetary Fund standby arrangement, extended Fund arrangement, or an arrangement under the . . . [Enterprise for the Americas] facility, or in exceptional circumstances, [an IMF] monitored program or its equivalent, unless the President determines . . . that such an arrangement or program (or its



cipal in dollars while paying the interest in local currency into an Enterprise for the Americas Fund<sup>33</sup> created by an Environmental Framework Agreement<sup>34</sup> between that country and the United States.<sup>35</sup> The Initiative also allows for the sale of nonconcessional debt owed under programs administered by the Commodity Credit Corporation<sup>36</sup> and the Export-Import Bank.<sup>37</sup> The purchaser of this nonconcessional debt must use it to finance

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equivalent) could reasonably be expected to have significant adverse social or environmental effects; and

(B) as appropriate, structural or sectoral adjustment loans from the International Bank for Reconstruction and Development or the International Development Association, unless the President determines . . . that the resulting adjustment requirements could reasonably be expected to have significant adverse social or environmental effects;

(6) has put in place major investment reforms in conjunction with an Inter-American Development Bank loan or otherwise is implementing, or making significant progress toward, an open investment regime; and

(7) if appropriate, has agreed with its commercial bank lenders on a satisfactory financing program, including, as appropriate, debt or debt service reduction.

*Id.*

33. 22 U.S.C. § 2430f. The fund must be used to finance, inter alia, "activities that link the conservation and sustainable use of natural resources with local community development." 22 U.S.C. § 2430g(d)(1). The fund shall be governed by an administering body composed of members of the U.S. government, individuals appointed by the host country, and other individuals with broad ranges of experience. 22 U.S.C. § 2430g(c)(2)(A)-(C).

34. 22 U.S.C. § 2430g. A framework agreement governs the operation and use of an Enterprise for the Americas Fund. 22 U.S.C. § 2430g(a); see *supra* note 33 (discussing Enterprise for Americas Fund).

35. 22 U.S.C. § 2430g.

36. 7 U.S.C. § 1738o-r (1988 & Supp. IV 1992). The Commodity Credit Corporation ("CCC") is a federally-owned corporation through which the federal government implements its policies to protect farm income and commodity prices. Ralph A. Linden, *An Overview of the Commodity Credit Corporation and the Procedures and Risks of Litigating Against It*, 11 J. AGRIC. TAX'N & L. 305, 305-09 (1990). Its policies and actions affect domestic and foreign aspects of U.S. agriculture. *Id.* The CCC has traditionally provided support to "middle-tier" developing countries, guaranteeing repayment terms of up to three years on commodities consumed within a year. John A. Bohn, Jr., *Governmental Response to Third World Debt: The Role of the Export-Import Bank*, 21 STAN. J. INT'L L. 461, 468 (1985).

37. 12 U.S.C. § 635i-6 (1988 & Supp. IV 1992). The Export-Import Bank ("Eximbank") is a federally-owned bank whose purpose is to promote U.S. exports by making direct loans to foreign buyers of U.S. exports. Bohn, *supra* note 36, at 468-69. Eximbank can also issue credit insurance and guarantee loans to developing countries by other lenders. *Id.*

debt-for-nature swaps,<sup>38</sup> debt-for-equity swaps,<sup>39</sup> debt-for-development swaps,<sup>40</sup> or debt buy-backs.<sup>41</sup>

### B. Purposes of a Debt-for-Nature Swap

International and local NGOs enter into debt-for-nature swaps because the leveraging effect of the debt-for-nature transaction allows these groups to increase the effectiveness of their conservation dollars.<sup>42</sup> This leveraging or magnification effect occurs when the debt titles, purchased from a creditor bank at a steep discount, are converted into local currency near or at face value.<sup>43</sup> This increase in funds improves the ability of environmental NGOs to achieve their goals of preserving biological diversity<sup>44</sup> and promoting sustainable development.<sup>45</sup> These two principles were the cornerstones, respectively, of the Biodiversity

38. 12 U.S.C. § 635i-6(c)(1)(A); see *supra* notes 15-22 and accompanying text (discussing traditional private sector debt-for-nature swaps).

39. 12 U.S.C. § 635i-6(c)(1)(A). A debt-for-equity swap functions much like a debt-for-nature swap, with the exception that in a debt-for-equity swap the purchaser of discounted shares of a developing country's debt does not donate the debt for environmental purposes, but rather converts the debt into foreign equity in a domestic firm in the developing country, thereby actually acquiring ownership of assets in the developing country. DEBT EQUITY CONVERSIONS, *supra* note 15, at 5-6.

40. 12 U.S.C. § 635i-6(c)(1)(A). Debt-for-development swaps function in the same manner as debt-for-nature swaps, with the exception that the international organization purchasing or receiving as a donation a developing country's debt uses the funds to operate a development program, instead of an exclusively environmental one, in the developing country. Eve Burton, *Debt for Development: A New Opportunity for Nonprofits, Commercial Banks, and Developing States*, 31 HARV. INT'L L. J. 233, 245-46 (1990).

41. 12 U.S.C. § 635i-6(c)(1)(B). In a debt buy-back, a debtor government purchases its debt at a discount from its creditor banks. Anthony Flint, *When Nations Try to Swap Their Way Out of Debt; Practices are Innovative, but Skeptics Say They're No Answer for Empty Pockets*, BOSTON GLOBE, Aug. 19, 1990, at A14.

42. Gibson & Curtis, *supra* note 1, at 335-36.

43. *Id.* For example, if an international NGO purchases for U.S.\$25 a debt note with a face value of U.S.\$100 and redeems it with the local government for U.S.\$75, the NGO will have multiplied its original U.S.\$25 by a factor of three. *Id.* Without the debt swap transaction, the NGO could have purchased only U.S.\$25 in local currency at the market rate of exchange. *Id.* at 336.

44. See Robert Fischman, *Biological Diversity and Environmental Protection: Authority to Reduce Risk*, 22 ENVTL. L. 435 (1992), reprinted in part in WILLIAM WEINER ET AL., INTERNATIONAL ENVIRONMENTAL LAW 10-1 (1993). Biological diversity is defined as "'the variety and variability among living organisms and the ecological complexes in which they occur' . . . in essence, a framework for sorting out what we know about nature." *Id.*

45. See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 24 (1987). Sustainable development is a model of economic development that meets present needs without compromising the ability of future generations to meet their own needs. *Id.*

Treaty<sup>46</sup> and Agenda 21,<sup>47</sup> both signed at the United Nations Conference on Environment and Development (the "Earth Summit")<sup>48</sup> in Rio de Janeiro in 1992. Environmental NGOs are eager to promote biological diversity and sustainable development practices in Brazil because Brazil contains roughly thirty percent of the world's tropical forests<sup>49</sup> and is the most biologi-

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46. 1992 United Nations Framework Convention on Biological Diversity, *opened for signature* June 5, 1992, U.N. Doc. DPI/1307 (1992), *reprinted in* 31 I.L.M. 818 (1992) (not yet in force) [hereinafter Biodiversity Treaty]. The Biodiversity treaty will set "common requirements, definitions and procedures for ecosystem conservation and economic utilization of the worlds' [sic] genetic resources." John Fitzgerald & David Favre, *A Summary of the Biological Diversity Treaty and Its Development*, 9 ENDANGERED SPECIES UPDATE 9 & 10 (July/Aug. 1992), *reprinted in part in* WEINER ET AL., *supra* note 44, at 10-10. The treaty has the potential to become the foundation for national policies and international cooperation in protecting biodiversity. *Id.*

47. *Report of the United Nations Conference on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev. 1 (1993) [hereinafter *Agenda 21*]. Agenda 21 was designed to be the blueprint for the worldwide adoption of sustainable development practices. WEINER ET AL., *supra* note 44, at 10-5 to 10-6. An 800-page document, Agenda 21 makes recommendations dealing with: the socio-economic dimension of global environmental problems; conservation and resource management; strengthening the role of non-governmental organizations and other social groups; and the means of implementing sustainable development practices (i.e., financing, institutions, etc.). *Id.* at 10-6.

Furthermore, sustainable development is recognized by the 1992 United Nations Framework Convention on Climate Change as an important component in combatting global warming. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, U.N. Doc. A/AC.237/18 (Part II)/Add. 1 and Corr.1, *reprinted in* 31 I.L.M. 849 (1992) (not yet in force) [hereinafter *Convention on Climate Change*].

48. See Edith Brown Weiss, *Introductory Note*, 31 I.L.M. 814 (1992) (giving overview of Earth Summit). Officially entitled the United Nations Conference on Environment and Development, the Earth Summit was attended by representatives of over 170 countries. *Id.* The Earth Summit attempted to deal with the global challenge of achieving decent living conditions for all people without destroying the natural foundations of life on Earth. Benjamin A. Goldman, *Equity and the 1992 Rio Earth Summit*, 4 FORDHAM ENV'T L. REP. 1, 1 (1992). The Summit's underlying theme was the link between the environment and development. *Id.* Documents negotiated and signed at the conference were *Agenda 21*, *supra* note 47, and the Non-Legally Binding Authoritative Statement of Principles for a Global Concensus on the Management, Conservation, and Sustainable Development of All Types of Forests, U.N. Doc. A/CONF.151/26/Rev. 1 (1993), *reprinted in* 31 I.L.M. 881 (1992). Documents negotiated prior to the conference but opened for signature at the conference were the Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev. 1 (1993), *reprinted in* 31 I.L.M. 874 (1992), the Biodiversity Treaty, *supra* note 46, 31 I.L.M. at 818, and the Convention on Climate Change, *supra* note 47, 31 I.L.M. at 849; see Goldman, *supra* (concluding that although Earth Summit represented advancement of ideals set forth in United Nations Conference on Human Environment twenty years earlier in Stockholm, agreements in Earth Summit provide few guarantees that future global decision-making will be more equitable).

49. Asiedu-Akrofi, *supra* note 19, at 577; see Michael S. Giomo, Comment, *Deforestation in Brazil: Domestic Political Imperative—Global Ecological Disaster*, 18 ENV'T L. 537, 538

cally diverse country on Earth.<sup>50</sup>

Debtor countries' governments enter into debt-for-nature swaps because through such swaps they are able to repay an external loan with local currency instead of scarce external currency.<sup>51</sup> These external debts and the requirement that they be repaid in external currency have produced serious consequences to the environment in debtor countries.<sup>52</sup> To repay these debts, debtor countries have intensified activities aimed at producing exports, which in turn produce external currency.<sup>53</sup> Export-producing activities include the leveling of forests for timber and pasture lands and the destruction of woodlands, which in turn lead to soil erosion, reduced water supplies, loss of fisheries, and the extinction of species of flora and fauna.<sup>54</sup> Commentators have criticized Brazil and other Latin American countries for engaging in these activities in order to service their large external debts.<sup>55</sup> Others have noted that it may be more

(1988) (noting that area in Brazil known as "classic Amazon" covers 3.5 million square kilometers and, by itself, would constitute ninth largest country in world).

50. See Henry W. McGee, Jr. & Kurt Zimmerman, *The Deforestation of the Brazilian Amazon: Law, Politics, and International Cooperation*, 21 U. MIAMI INTER-AM. L. REV. 513, 516 (1990) (noting that Amazon contains perhaps half of world's species); Paul A. Colinvaux, *The Past and Future Amazon*, SCI. AM., May 1989, at 102 (estimating that Amazon rain forest contains up to 80,000 plant and 30 million animal species).

51. See Cole, *supra* note 23, at 64 (explaining that once debtor country is relieved of having to pay external loan in hard currency, debtor country can then dedicate hard currency reserves to capital investment and economic growth).

52. See NATIONAL WILDLIFE FEDERATION, *THIRD WORLD DEBT AND NATURAL RESOURCES CONSERVATION* 1-2 (Mar. 1986) (noting that environmental damage in debtor nations has been caused not only by promotion of exports but also by lending conditions that force debtor nations to enact domestic spending limits, ultimately resulting in elimination of environmental protection programs).

53. Asiedu-Akrofi, *supra* note 19, at 577.

54. Nancy Knupfer, *Debt-for-Nature Swaps: Innovation or Intrusion?*, 4 N.Y. INT'L L. REV. 86, 86 (1991). Tropical forests are also important to rural populations in developing countries, as these populations rely on forests for food, fodder, and fuel. Asiedu-Akrofi, *supra* note 19, at 577. Industrialized countries, meanwhile, can use tropical forests for medicinal and industrial products. *Id.* Furthermore, the clearing of forests has been thought to increase the effects of global warming by not only reducing the Earth's capacity to consume carbon dioxide, the most prominent greenhouse gas, but also by releasing carbon dioxide into the atmosphere as the trees are burned. McGee & Zimmerman, *supra* note 50, at 519.

55. See, e.g., Nina M. Dillon, Comment, *The Feasibility of Debt-for-Nature Swaps*, 16 N.C. J. INT'L L. & COM. REG. 127, 127 (1991) ("Tragically, the rate of tropical deforestation in Latin America has paralleled the region's astronomical borrowing patterns."); *Brazilian Environmentalist Urges U.S. to Halt Threats on Amazonian Deforestation*, 12 Int'l Env. Rep. (BNA) 180 (Apr. 12, 1989) (explaining that U.S. Congress was threatening sanctions against Brazil to force Brazil to stop cutting and burning of Amazon forest);

profitable for these countries to leave their forests intact and adopt sustainable development practices than to clear the forests for timber or cattle grazing.<sup>56</sup>

The advent of public sector debt-for-nature swaps<sup>57</sup> indicates that creditor governments also have an interest in debt-for-nature swaps. In the case of the United States, the Initiative<sup>58</sup> makes clear that debt-for-nature swaps are an important component of a strategy of debt relief for Latin American countries.<sup>59</sup> Debt relief, along with increased trade and investment between the United States and Latin America, comprises the U.S. economic policy of promoting economic growth in Latin American countries.<sup>60</sup> Stronger Latin American economies, in turn, serve U.S. interests by expanding the market for U.S. goods, services, and investment capital.<sup>61</sup>

Finally, commercial banks enter into debt-for-nature swaps because the swaps are a vehicle for the banks to remove unproductive sovereign debt<sup>62</sup> from their balance sheets while receiv-

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Brooke, *supra* note 2, at A5 (noting that Brazil announced domestic environmental protection program in response to worldwide criticism of Amazonian development).

The current external debt owed by Brazil is estimated at U.S.\$123 billion. MacLeod, *supra* note 4, at 8.

56. *Rain Forest Worth More if Uncut, Study Says*, N.Y. TIMES, July 4, 1989, § 1 at 18; Emily T. Smith, *Growth vs. Environment*, BUS. WEEK, May 11, 1992, at 66.

57. See *supra* notes 23-27 and accompanying text (describing public sector debt-for-nature swaps).

58. See *supra* notes 28-41 and accompanying text (describing Initiative).

59. Gibson & Schrenk, *supra* note 9, at 16.

60. Shaffer, *supra* note 28, at 2. Although the Enterprise for the Americas Initiative was a product of the Bush administration, the Clinton administration has announced that it will also promote the Initiative. Peter Hakim, *Opportunity for the Americas*, CHRISTIAN SCI. MONITOR, May 27, 1993, at 18. The United States has also promoted increased trade and investment with Latin America through the North American Free Trade Agreement ("NAFTA"), ratified by Congress in November 1993. Helen Dewar, *NAFTA Wins Final Congressional Test*, WASH. POST, Nov. 21, 1993, at A1. NAFTA created a free trade zone throughout North America. *Id.* Although Mexico is the only Latin American country included in NAFTA, both the Bush and Clinton administrations have expressed a willingness to allow Chile and Argentina to join the free trade zone in the near future. Don Podesta, *South Americans Bank on NAFTA; Trade Pact's Passage Viewed as Crucial for U.S. Ties in Region*, WASH. POST, Nov. 13, 1993, at A20. For a more comprehensive overview of the U.S. national interest in NAFTA, see *NAFTA and the National Interest*, N.Y. TIMES, Nov. 17, 1993, at A26, and Henry Kissinger, *NAFTA: Clinton's Defining Task*, WASH. POST, July 20, 1993, at A17.

61. Hakim, *supra* note 60, at 18.

62. See GILLIS ET AL., *supra* note 26, at 398. Sovereign debt is debt that is contracted by a sovereign government as an obligation of an entire country. *Id.* Unlike ordinary debt between private parties, sovereign debt is above the law and is not subject

ing a modest return on the loans.<sup>63</sup> This improvement in short-term liquidity allows the bank to enter into new, and presumably safer, lending arrangements.<sup>64</sup> Thus, one commentator described debt-for-nature swaps as a link between the two problems of non-performing debt and environmental destruction over the bridge of sustainable development.<sup>65</sup>

C. *Brazilian Opposition to Debt-for-Nature Swaps: Questions of Sovereignty and the Legitimacy of the Brazilian External Debt*

The Brazilian government initially opposed debt-for-nature swaps.<sup>66</sup> In a speech delivered in April 1989, former Brazilian President José Sarney announced a domestic environmental protection program, entitled "Nossa Natureza"<sup>67</sup> ("Our Nature"), while rejecting debt-for-nature swaps on Brazilian soil.<sup>68</sup> This op-

to external enforcement. *Id.* Sovereign debt is backed only by the good faith and credit of the debtor government. *Id.*

63. Gibson & Curtis, *supra* note 1, at 335-36. In addition, the removal of insecure debts relieves banks of the burden of carrying and restructuring these debts, which burden hinders the ability of banks to attract new capital. Cole, *supra* note 23, at 67.

So far, however, commercial banks, especially larger ones, have not been induced to donate developing countries' debts due to uncertain tax consequences. See Ronny Jay Halperin, Comment, *Revenue Ruling 87-124: Treasury's Flawed Interpretation of Debt-for-Nature Swaps*, 43 U. MIAMI L. REV. 721 (1989). The Treasury Department has tried to encourage banks to donate external debt by allowing banks to claim a deductible charitable donation equal to the fair market value of the loan donation and a deductible loss for the difference between the face value and the market value of the loan. *Id.* at 727-28. A lender bank which donates debt to an international NGO would therefore receive the same net tax savings as if it had sold the debt on secondary market. *Id.* at 732. This liberal treatment, however, may compromise future IRS positions in lieu of taxpayers seeking similar treatment of "losses, bad debts, and charitable contributions outside the context of debt-for-nature swaps." *Id.* at 737.

64. John K. Shubin & Daniel J. Gibby, *The Promotion of Debt-Equity Swaps in Latin America: A Survey of the Regulatory Regimes and the International Policy Framework*, 20 U. MIAMI INTER-AM. L. REV. 31, 41 (1988).

65. Lachman, *supra* note 1, at 142. "[D]ebt-for-nature swaps link the twin problems of non-performing debt and environmental destruction over the bridge of sustainable development, by attaching economic health to ecological health." *Id.*

66. Brooke, *supra* note 2, at A5; Robinson, *supra* note 2, at A1.

67. Julia Michaels, *Brazil Amazon Plan Faces Stiff Odds*, CHRISTIAN SCI. MONITOR, Apr. 11, 1989, at 3. "Our Nature" was designed to improve the government's environmental policing measures, create ecological and economic zones and national parks, regulate the use of mercury in gold mining, fund ecology training and research, and establish a National Environmental Fund. *Id.* The program was criticized as an unambitious and underfunded response to international criticism of Brazil's controversial environmental record, including the large-scale burning of the Amazon and the murder of environmentalist Francisco Mendes. *Id.*

68. Brooke, *supra* note 2, at A5; Robinson, *supra* note 2, at A1. President Sarney

position stemmed from several arguments that together precluded the prospect of debt-for-nature swaps in Brazil. Many Brazilians contended that debt-for-nature swaps infringed Brazilian national sovereignty by limiting Brazil's use of its natural resources and controlling Brazil's internal affairs. This contention was strengthened by the debt-for-nature swap's association with the related debt-for-equity swap,<sup>69</sup> which allowed non-Brazilians to gain control of assets in the Brazilian economy. Furthermore, many Brazilians believed that debt-for-nature swaps would legitimize the controversial Brazilian external commercial debt.

### 1. The Sovereignty Issue: Control Over Natural Resources and Internal Affairs

Critics of debt-for-nature swaps in developing countries<sup>70</sup> have long asserted that debt-for-nature swaps violate the permanent sovereignty<sup>71</sup> of developing countries because they interfere with developing countries' internal affairs and constitute a

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declared a willingness to accept international aid to protect Brazil's environment, but rejected any aid accompanied by conditions such as debt-for-nature swaps. Brooke, *supra* note 2, at A5; Robinson, *supra* note 2, at A1. The President's language mirrored that of the Amazon Declaration, issued less than two months earlier, in which the Amazon countries expressed a willingness to accept international aid only if such aid was unencumbered by "external impositions." The Amazon Declaration, May 6, 1989, art. 4, U.N. Doc. A/44/275, E/1989/79, Annex (1989), *reprinted in* 28 I.L.M. 1303, 1304 (1989).

69. See *supra* note 39 (describing debt-for-equity swaps).

70. See L.K. JHA, NORTH SOUTH DEBATE 22 (1982). Developing countries are those that are in the early stages of development and that provide low standards of living for their people. *Id.* Also known as countries of the "South," developing countries are characterized by high levels of illiteracy, malnutrition, and child mortality, as well as low life expectancies. THE INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES, NORTH-SOUTH: A PROGRAM FOR SURVIVAL 31-32 (1980) [hereinafter PROGRAM FOR SURVIVAL]. Developing countries account for three-quarters of the world's population but only one-fifth of the world's income. *Id.* at 32. There are at least four groups of developing countries: OPEC nations with large financial surpluses; newly industrializing countries that are expanding rapidly; middle income countries whose economies are expanding but still depend on exports of primary products; and low income countries with per capita income of less than U.S.\$350 per year. Robert Cassen et al., *Overview, in* RICH COUNTRY INTERESTS AND THIRD WORLD DEVELOPMENT 1, 5 (Robert Cassen et al. eds., 1982). For a discussion of developing countries' concerns over the growing international environmental movement, see Patrick Low, *Afterword: Trade and the Environment: What Worries the Developing Countries?*, 23 ENVTL. L. 705 (1992).

71. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 95 (9th ed. 1984). "Normally a state is deemed to possess independence and 'sovereignty' over its subjects and affairs, and within its territorial limits." *Id.* A state possessing sovereignty has the authority to control exclusively its own domestic affairs. *Id.* at 96.

form of external control over developing countries' natural resources.<sup>72</sup> Specifically, the interference and control allegedly occur when an international organization is allowed to supervise the environmental program and use of funds generated by the debt-for-nature swap.<sup>73</sup> Consequently, debt-for-nature swaps violate developing countries' sovereign rights to exploit their natural resources as expressed in United Nations Resolution 523 ("Resolution 523")<sup>74</sup> and United Nations Resolution 626 ("Resolution 626").<sup>75</sup> Resolution 523 recognized that developing countries have the right to determine by their own accord the use of their natural resources in order to further their national policies of economic development.<sup>76</sup> Resolution 626 recommended that all member states respect the sovereignty that each state possesses over its natural resources.<sup>77</sup> These resolutions were followed by others that strengthened the concept of permanent sovereignty over natural resources.<sup>78</sup>

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72. Alagiri, *supra* note 3, at 496-503. Brazilian critics also assailed debt-for-nature swaps on these grounds. See, e.g., Wilson Matheus, *Amazônia x Dívida Externa*, in FUNDAÇÃO BRASILEIRA PARA A CONSERVAÇÃO DA NATUREZA, DÍVIDA EXTERNA, CONVERSÃO E MEIO AMBIENTE [BRAZILIAN FOUNDATION FOR THE CONSERVATION OF NATURE, EXTERNAL DEBT, CONVERSION, AND THE ENVIRONMENT] 3 (on file with the Fundação Brasileira para a Conservação da Natureza, Rio de Janeiro, Brazil) [hereinafter DÍVIDA EXTERNA] (arguing that Brazil's sovereignty allows it to use Amazon as it wishes, according to Brazilian national prerogatives); João Amazonas, *Nuvens Negras na Amazônia*, in DÍVIDA EXTERNA, *supra*, at 9 (denouncing debt-for-nature swaps as indiscreet intervention in Brazil's internal affairs); Marcelo Miranda Soares, *Ecologia com Soberania*, in DÍVIDA EXTERNA, *supra*, at 5 (equating debt-for-nature swaps with indentured servitude).

73. Alagiri, *supra* note 3, at 497.

74. G.A. Res. 523, U.N. GAOR, 6th Sess., Supp. No. 20, at 20, U.N. Doc. A/2119 (1952). General Assembly resolutions are not a form of international legislation. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 50 (2d ed. 1993). Such resolutions, however, are "not infrequently invoked" as evidence of customary international law. *Id.*

75. G.A. Res. 626, U.N. GAOR, 7th Sess., Supp. No. 20, at 18, U.N. Doc. A/2361 (1952).

76. G.A. Res. 523, *supra* note 74, at 20. The resolution states that developing countries have "the right to determine freely the use of their natural resources and that they must utilize such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests." *Id.*

77. G.A. Res. 626, *supra* note 75, at 18. The resolution recommends that all member states "refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources." *Id.*

78. Alagiri, *supra* note 3, at 498 n.74. Resolution 1803 declared that the right of each state to permanent sovereignty over its natural wealth and resources must be exercised in the interests of that state's development and welfare. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). Each state therefore has the right to establish rules and conditions for the exploitation of such resources and the import of foreign capital for that purpose. *Id.* Resolution 3202 asserted that the



These arguments form part of a larger perception by developing countries of an environmental double standard on the part of developed countries.<sup>79</sup> This "hypocrisy" allegedly occurs when developed nations, having exploited their natural resources to develop economically, call on developing nations to preserve their natural resources and thereby forego their own development.<sup>80</sup> Developing countries contend, therefore, that it is unfair that they should have to pay for the world's environmental ills when the principle causes of the degradation of the world's environment are, arguably, the patterns of industrialization, consumption, and waste in developed countries.<sup>81</sup> Accordingly, Mohammad Nawaz Sharif, Prime Minister of Pakistan and Chairman of the Group of 77,<sup>82</sup> made clear at the Earth Sum-

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new international economic social order should be based upon each state's permanent sovereignty over its natural resources. G.A. Res. 3202, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 9, U.N. Doc A/9559 (1974). Furthermore, the Charter of Economic Rights and Duties of States (Resolution 3281) declared that "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources, and economic activities." G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, 52, U.N. Doc. A/9631 (1974).

79. See John Vidal, *Good Intentions Doomed by Gulf Between Rich and Poor*, THE GUARDIAN, June 15, 1992, at 6 (discussing "winners" and "losers" of Earth Summit and noting that "rich nations' calls for sustainable development and ecological restraint were matched by developing countries' accusations of hypocrisy and attempts to control their development"); PROGRAM FOR SURVIVAL, *supra* note 70, at 31-32. Developed countries, also known as countries of the "North," are those countries that have industrialized market economies. *Id.* at 31. This definition includes Australia and New Zealand, two industrialized countries south of the equator. *Id.* Developed countries have a quarter of the world's population but control four-fifths of the world's income. *Id.* at 32.

80. See Vidal, *supra* note 79, at 6 (noting that developing countries accused developed countries of hypocrisy at Earth Summit); *North/South Conflict Will Hamper Environmental Cooperation*, *Lawyer Says*, 16 Int'l Envtl. Rep. (BNA) No. 4 at 131 (Feb. 24, 1993) (discussing North-South conflict's hampering of agreements reached at Earth Summit).

81. The Amazon Declaration, *supra* note 68, art. 8, 28 I.L.M. at 1305; see Soares, *supra* note 72, at 5 ("[Os] países de origem [da idéia de conversão da dívida externa em projetos ambientais] puderam se desenvolver a base dos próprios recursos naturais e dos oriundos de países [menos desenvolvidos] como o nosso. Não é justo, portanto, pretender que deixemos de utilizar nossas potencialidades naturais: não é justo querer impedir o nosso progresso.") ["(Those countries proposing debt-for-nature swaps) were able to develop themselves through the use of their own natural resources and those of (less developed) countries like ours. It is not fair, therefore, to suppose that we now decline to utilize our natural potentialities: it is not fair to impede our progress."] (translation by Note Author).

82. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 501-02 (1991). The Group of 77 is a coalition of more than 120 developing countries in Africa, Asia, and Latin America. *Id.* at 501. The Group of 77 was created in order to coordinate the international policies of developing countries, thereby giving developing countries a greater equality in affairs with developed countries. *Id.* Although an expression of

mit<sup>83</sup> that developing countries recognize the importance of the principle of sustainable development,<sup>84</sup> but do not want developed nations to use sustainable development as a justification with which to deprive developing countries of their right to choose their own growth strategies.<sup>85</sup>

Brazilians in particular have been sensitive to any international attention on their natural resources, especially the Amazon rain forest.<sup>86</sup> As early as the late 1940's, the Brazilian military<sup>87</sup> challenged a United Nations Educational, Scientific, and

unity among developing countries, the Group of 77 does not espouse a common ideology. *Id.* Rather, it functions as a caucus for the economic and political concerns of developing countries before various U.N. bodies. *Id.*

83. See *supra* note 48 (discussing Earth Summit).

84. See *supra* note 45 and accompanying text (describing the concept of sustainable development).

85. WEINER ET AL., *supra* note 44, at 10-8.

86. See Brooke, *supra* note 2, at A5 (noting that in speech announcing domestic environmental protection program, President Sarney invoked Brazil's "centuries-old battle cry 'A Amazônia é Nossa!'" or "The Amazon is Ours!"); *supra* notes 49-50 (describing geographic features of Amazon); McGee & Zimmerman, *supra* note 50, at 515 (noting that Amazon contains deposits of manganese, aluminum, copper, tin, nickel, iron, gold, and natural gas).

87. See E. BRADFORD BURNS, A HISTORY OF BRAZIL 505-38 (2d ed. 1980). In the twentieth century prior to 1964, Brazilian military officers frequently intervened in politics by changing the civilian chief executive. *Id.* at 506. The military viewed itself as the "poder moderador," or fourth branch of government, whose function it was to oversee the three other branches. *Id.* at 549. In 1964, however, the military removed the civilian president but did not return to its barracks, keeping power to itself instead. *Id.* at 508. Successive military governments strengthened the powers of the general-presidents at the expense of the judiciary, legislature, and state and local governments. *Id.* at 516. The first military government's objectives were achieving economic stability and combatting communism. *Id.* at 509. Later governments stressed economic growth above all other concerns, including environmental ones. See Giamo, *supra* note 49, at 541-51 (discussing military governments' Amazonian development plans). In attempting to achieve rapid economic growth through import-substitution industrialization and the encouragement of settlement in the Amazon, the military government offered numerous financial incentives, such as tax breaks and easy credit, designed to attract capital and settlers from Brazil and abroad. *Id.* at 541. Initial military governments oversaw a period of impressive economic growth, which the military lauded as an "economic miracle." BURNS, *supra*, at 533. Later, when it became clear that the economic growth had been short-lived and had benefited relatively few, *id.* at 534, military rule came under increasing criticism and the military finally ceded the government to civilian rule in 1985. See, e.g., Alan Riding, *Pragmatic Brazil Changes Course*, N.Y. TIMES, Jan. 20, 1985, § 4, at 1 (describing undramatic transition of power). Even today, however, as the civilian government fails to control inflation of 2,500% per year and is embroiled in continuous corruption scandals, the spectre of military rule looms over the civilian government. James Brooke, *A Vast New Scandal is Shaking Brazilians' Faith in Democracy*, N.Y. TIMES, Jan. 4, 1994, at A1. Civilian and military leaders reportedly planned a military-

Cultural Organization ("UNESCO")<sup>88</sup> plan to create an international institution for the Amazon region, entitled "Hiléia Amazônica," as an international conspiracy to deprive Brazil of nearly half its national territory.<sup>89</sup> Other regional governments supported the proposed institution, but due to the Brazilian military's opposition, the Brazilian Congress never approved it.<sup>90</sup> Thereafter, the government embarked on a series of development projects in the Amazon for the purposes, among others, of increasing population in the region and securing Brazil's claims to its Amazon territory.<sup>91</sup> The Brazilian development plans emphasized highway construction, colonization, large-scale ranching and agribusiness, lumbering, mining, and hydroelectric projects.<sup>92</sup>

In response to international criticism of the Amazonian development plans,<sup>93</sup> in 1978 Brazil joined Bolivia, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela in signing the Brasília Treaty for Amazonian Cooperation (the "Amazon Treaty").<sup>94</sup> The Amazon Treaty sought to promote harmonious

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style coup in the fall of 1993, but backed down when the plan was rejected by President Franco. *Brazilian Official Tells of '93 Plot*, N.Y. TIMES, Jan. 7, 1994, at A8.

88. See ROGER A. COATE, UNILATERALISM, IDEOLOGY, & U.S. FOREIGN POLICY 35-36 (1988). Founded in 1945, UNESCO is a functional agency of the United Nations mandated to promote worldwide collaboration in education, science, culture, and communications. *Id.* at 36. Critics have recently accused UNESCO of becoming increasingly politicized and departing from its original mandate. See generally CLARE WELLS, THE UN, UNESCO AND THE POLITICS OF KNOWLEDGE (1987) (discussing politicization of UNESCO).

89. Otto Lara Resende, *O Controvertido Verde de Nossas Matas*, in *DÍVIDA EXTERNA*, *supra* note 72, at 13.

90. *Id.*

91. Giamo, *supra* note 49, at 542. The Brazilian government felt compelled to secure this territory in part because the other Amazon countries, in particular Peru and Venezuela, were also strengthening their shares of the Amazon by occupying their own territories. *Id.*

92. *Id.* at 541-53; see McGee & Zimmerman, *supra* note 50, at 524-28. The Amazonian development plans "probably helped to integrate the historically remote Amazon into the Brazilian nation state and led to economic development in the region." *Id.* at 527. However, the development of the Amazon may have also led to "extensive and potentially catastrophic deforestation." *Id.*

93. See *supra* notes 91-92 and accompanying text (discussing Amazonian development plans).

94. Brasília Treaty for Amazonian Cooperation, July 3, 1978, reprinted in 17 I.L.M. 1045 (1978) [hereinafter Amazon Treaty]; see *Military, Other Groups Press Their Claims for Amazon's Future*, Lagniappe Letter, Oct. 18, 1991, available in LEXIS, Nexis Library, NSAMER File (stating that Brazil signed Amazon Treaty in response to international criticism of Amazonian development plans).

development in the Amazon region in a manner that would raise the standard of living of the region's peoples and incorporate the Amazon into the respective national economies of the parties to the treaty.<sup>95</sup> In Article I of the Amazon Treaty the parties agreed to undertake joint actions to achieve such harmonious development while preserving the environment and conserving natural resources.<sup>96</sup> This commitment to the environment was conditioned, however, upon equitable and profitable results for all parties.<sup>97</sup> Furthermore, Article IV echoed the 1952 United Nations resolutions<sup>98</sup> in affirming that the sovereignty of each country allows it the inherent right to determine the exclusive use of the natural resources within its territory.<sup>99</sup>

The Amazon Treaty had little effect on the environmental and developmental practices in the Amazon region because the treaty focused predominantly on national sovereignty and lacked substantive provisions to implement its objectives.<sup>100</sup> A decade later, however, the parties to the Amazon Treaty signed the Amazon Declaration,<sup>101</sup> a non-binding statement in which the parties to the Amazon Treaty called for the promotion of sustainable development practices in the region.<sup>102</sup> The parties recognized the importance of the rational use of the resources in the Amazon region<sup>103</sup> while reaffirming the sovereign right of each country to manage freely its natural resources.<sup>104</sup> In declaring this freedom to manage natural resources, however, the parties observed the need for the economic and social development of the region's people and the adequate conservation of the environment.<sup>105</sup> In addition, the parties expressed a willingness to accept cooperation from other countries and international organizations as long as such cooperation did not include external impositions and was in accordance with the priorities of the parties'

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95. Amazon Treaty, *supra* note 94, pmbi., 17 I.L.M. at 1045.

96. *Id.* art. 1, 17 I.L.M. at 1046.

97. *Id.*

98. See *supra* notes 74-77 and accompanying text (discussing U.N. resolutions declaring right of permanent sovereignty over natural resources).

99. Amazon Treaty, *supra* note 94, art. 4, 17 I.L.M. at 1046-47.

100. Giamo, *supra* note 49, at 560. Indeed, destruction of the Amazon continued unabated in the years following the signing of the Amazon Treaty. *Id.*

101. The Amazon Declaration, *supra* note 68, 28 I.L.M. at 1303.

102. *Id.* art. 1, 28 I.L.M. at 1304.

103. *Id.* art. 2, 28 I.L.M. at 1304.

104. *Id.* art. 4, 28 I.L.M. at 1304.

105. *Id.*

governments.<sup>106</sup> One such "external imposition" was the "nature" aspect of the debt-for-nature swap.<sup>107</sup>

## 2. The Association with Debt-for-Equity Swaps

Brazilian opposition to debt-for-nature swaps increased because of the debt-for-nature swap's association with its older cousin, the debt-for-equity swap.<sup>108</sup> Brazil's debt-for-equity swap experience produced some unfortunate consequences,<sup>109</sup> as transnational corporations forewent foreign direct investment<sup>110</sup> in favor of cheaper reinvestment through debt-for-equity swaps.<sup>111</sup> Furthermore, the debt-for-equity program contributed to higher rates of inflation,<sup>112</sup> an increasing public deficit,<sup>113</sup> a widening gap between the official and parallel rates of exchange,<sup>114</sup> and a palpable rise in speculative

106. *Id.*

107. See Brooke, *supra* note 2, at A5 (noting that when ruling out debt-for-nature swaps, former President Sarney announced that Brazil would accept international assistance to protect its environment, but would not accept conditions to such assistance).

108. See *supra* note 39 (describing debt-for-equity swaps).

109. DEBT EQUITY CONVERSIONS, *supra* note 15, at 72.

110. See GILLIS ET AL., *supra* note 26, at 364. Foreign direct investment is that made by nonresidents, usually multinational corporations, in enterprises located in the host country. *Id.* Until Brazil's economic troubles in the 1980's, foreign investors were attracted by Brazil's vast size, growing population, market strength, natural resources, inexpensive labor supply, tax and credit subsidies, as well as the Brazilian "Law of Similars," which called for placing tariff barriers on any product similar to a domestic manufacture. KEITH ROSENN, FOREIGN INVESTMENT IN BRAZIL I (1991).

111. DEBT EQUITY CONVERSIONS, *supra* note 15, at 79. Investment through debt-for-equity swaps is cheaper than traditional direct investment because the investor engaging in debt-for-equity swaps purchases the host country's debt at market value, which is less than face value, and then exchanges the debt at a rate somewhere between market value and face value, thereby increasing the value of the original investment. *Id.* at 6.

The Brazilian government placed strict limits on its debt-for-equity swap program in 1984 after a U.S.\$200 million conversion by Volkswagen do Brasil of discounted Deutsche Bank debt. *Id.* at 74. It had been known that Volkswagen would have made the investment regardless of the debt-for-equity swap program. *Id.* at 39.

112. *Id.* at 79. Debt-for-equity swaps contribute to inflation because when the local government exchanges the debt paper into local currency, it increases the money supply, which in turn produces inflation. *Id.* at 42.

113. *Id.* at 79. A debt-for-equity swap increases a debtor government's public deficit when the debtor government exchanges local currency bonds to protect against inflation. Cole, *supra* note 23, at 64. By doing so, the debtor government is in effect trading international debt for internal debt, which may be more expensive due to higher local interest rates. *Id.*

114. DEBT EQUITY CONVERSIONS, *supra* note 15, at 79. The gap between exchange rates occurs because the foreign investor, by engaging in a debt-for-equity swap, converts a foreign obligation which was purchased at a discount. *Id.* at 43. This conver-

practices.<sup>115</sup> These factors together resulted in a loss of national economic policy-making.<sup>116</sup>

Unlike debt-for-equity swaps, debt-for-nature swaps do not grant ownership of any assets in the debtor country to an international institution.<sup>117</sup> However, the belief that debt-for-nature swaps would, by analogy to debt-for-equity swaps, grant ownership of Brazilian territory to non-Brazilians as well as weaken Brazil's internal policy-making led critics to portray debt-for-nature swaps as part of an international conspiracy<sup>118</sup> to *exchange* the Amazon for Brazil's external debt.<sup>119</sup> One commentator described this alleged attempt to expropriate the Amazon's natural resources as a naked intervention in Brazil's internal affairs, wounding the dignity and sovereignty of the Brazilian people.<sup>120</sup> Brazilian military leaders took note and developed a "war hypothesis"<sup>121</sup> to resist any attempts to internationalize the Amazon.<sup>122</sup> Meanwhile, economists warned that the Brazilian economy did not have the productive capacity to offset the monetary

sion, in effect, allows the foreign investor to acquire local assets at a preferential exchange rate. *Id.*

115. *Id.* at 79. Speculation occurs when individuals and corporations earning foreign exchange withhold such exchange until they utilize debt-for-equity swaps to obtain local currency at the preferential rate. *Id.*; see *supra* note 114 (discussing preferential exchange rate resulting from debt-for-equity swaps).

116. DEBT EQUITY CONVERSIONS, *supra* note 15, at 79. This loss of policy-making prompted the Brazilian government to suspend its debt-for-equity program in 1989. *Id.* at 72.

117. See *supra* notes 15-22 and accompanying text (describing the mechanics of a private sector debt-for-nature swap).

118. Amazonas, *supra* note 72, at 9 ("A Amazônia volta a ser alvo de conspiração internacional. . . . Por trás dessa campanha . . . está o antigo plano dos imperialistas de ocupar a Amazônia para apoderar-se das imensas riquezas ali existentes.") ["The Amazon is once again the target of an international conspiracy. . . . Behind this campaign . . . is the old imperialist plan to occupy the Amazon in order to seize the immense riches therein."] (translation by Note Author).

119. Soares, *supra* note 72, at 5 ("Algumas instituições internacionais . . . chegam a propor a troca da Amazônia pela dívida externa . . .") ["Some international institutions . . . are even proposing the *exchange* of the Amazon for our external debt . . ."] (emphasis added) (translation by Note Author).

120. Amazonas, *supra* note 72, at 9.

121. *Military, Other Groups Press Their Claims for Amazon's Future*, *supra* note 94. The war hypothesis is a full-fledged war plan comprised of invasion scenarios and response tactics. *Id.* The response tactics rely heavily on techniques of guerilla warfare. *Id.*

122. *Id.* One general was quoted as saying, "If these 'fools' try to enter here, we will drive them out like enemy guerillas," in reference to environmentalists. *Environmentalists in Amazon Field Threats from Local Military Officers, Politicians*, 14 Int'l Env'tl. Rep. (BNA) No. 19 at 502 (Sept. 25, 1991).

emissions involved in debt-for-nature swaps,<sup>123</sup> suggesting that debt-for-nature swaps, like debt-for-equity swaps, would be inflationary.<sup>124</sup>

### 3. The Legitimacy of the Brazilian External Commercial Debt

Finally, critics in Brazil opposed debt-for-nature swaps on the grounds that debt-for-nature swaps would legitimize the Brazilian external debt.<sup>125</sup> These critics contend that the external debt is illegitimate because the loans were incurred by illegitimate military dictatorships,<sup>126</sup> disappeared through corruption,<sup>127</sup> or were used for ill-conceived development schemes which did not benefit the majority of the country's population.<sup>128</sup> Furthermore, some blame commercial banks for being

123. Lemos & Pimentel, *supra* note 4, at 2. The authors, both economists, argued that the Brazilian economy was incapable of increasing production to neutralize sufficiently the effects on prices of the emission of local currency or local currency bonds that would be necessary in a debt conversion. *Id.* at 1-2.

124. *Id.* at 2; *see supra* note 112 (discussing inflationary effects of debt-for-equity swaps).

125. Fabio Feldman, Member of the Brazilian Chamber of Deputies, Statement Before the Smithsonian Institution/Natural Resources Defense Council Conference "Debt-for-Nature Swaps Progress and Prospects" 9 (Apr. 17, 1991) (transcript on file with Natural Resources Defense Council, Wash., D.C.) [hereinafter Smithsonian/NRDC Conference]; *see* CONSÓRCIO, *supra* note 4, at 2 (stating that part of Brazilian external debt is illegitimate).

Brazil, like many other developing nations, ran up large debts in the 1970's and early 1980's from commercial banks eager to find borrowers for growing deposits from oil exporting states. GILLIS ET AL., *supra* note 26, at 398. Global economic shocks exacerbated the debt crisis. *Id.* Notable were the rise in oil prices from 1979-81, the resulting worldwide depression, and the rise in world interest rates from 1979-83. *Id.* at 398-99.

126. Gibson & Schrenk, *supra* note 9, at 9 ("[M]any progressives . . . in Brazil believe that participation in [debt-for-nature] exchanges undercuts their argument that the debt is illegitimate and should not be honored [because] the debt was incurred by military dictatorships that did not represent the people . . ."); *see* Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 774 (1990) (describing legitimacy of Brazil's 1969 Constitution, promulgated by military pursuant to authority conferred upon itself, as dubious); *see also supra* note 87 (discussing role of military governments in Brazilian economic development).

127. Lemos & Pimentel, *supra* note 4, at 2 ("Uma série de projetos financiados com empréstimos externos incorreram em erros técnicos graves . . . quando não foram alvo de corrupção e desvio de verbas . . .") ["A series of projects financed through external loans encountered serious technical errors . . . when not the objects of corruption and diversion of funds . . ."] (translation by Note Author).

128. *Id.* The Açominas and Angra dos Reis projects are noteworthy examples of poorly-applied loan projects. *Id.* Each operation is worth considerably less than the

overeager to lend to developing countries without properly evaluating the prospects for repayment.<sup>129</sup> Others claim commercial banks surpassed legal lending limits<sup>130</sup> in order to obtain higher profits on external loans, which carried higher interest rates than domestic loans.<sup>131</sup> Others feel that because of these higher interest rates, the loans have already been repaid.<sup>132</sup>

D. *Changing Attitudes: Brazilian Acceptance of Debt-for-Nature Swaps*

Arguments against debt-for-nature swaps in Brazil are losing momentum.<sup>133</sup> In a 1988 newspaper article, Brazilian Congressman and environmentalist Fabio Feldman<sup>134</sup> denounced the international conspiracy theorists as constituting an alliance between the "backwards sectors" of Brazilian society and the principal beneficiaries of the status quo in the Amazon.<sup>135</sup> Feldman

respective amount borrowed to fund it, and neither has the capacity to produce revenues to repay its respective amount. *Id.*

129. GILLIS ET AL., *supra* note 26, at 398. Under the false assumption that sovereign debt always gets repaid, many commercial banks extended loans to developing countries without properly assessing the debtor countries' export earnings capabilities or the effectiveness of these countries' fiscal, monetary, and foreign trade policies. *Id.*

130. Knupfer, *supra* note 54, at 86. Commercial banks advised individual foreign entities to borrow in their own names, thereby creating more borrowers per country and bypassing lending limits. *Id.*

131. *Id.*

132. Gibson & Schrenk, *supra* note 9, at 9.

133. FBCN SEMINÁRIO, *supra* note 13, at 2 ("[A questão da utilização de recursos externos para projetos ambientais não se trata [ ] de forma coercitiva [ ] nem alienante [ ] da soberania nacional, mas de cooperação internacional com entidades brasileiras empenhadas em preservar o meio ambiente.") ["The utilization of external resources for environmental projects) is not a matter of coercion or breaches upon our national sovereignty, but rather of international cooperation with Brazilian entities dedicated to the preservation of the environment."] (translation by Note Author); *id.* at 16 ("A utilização de recursos externos não fere a soberania nacional porque não envolve a negociação e internacionalização de áreas em território brasileiro . . .") ["The utilization of external resources does not infringe upon national sovereignty because it does not involve the negotiation or internationalization of areas within Brazilian territory . . ."] (translation by Note Author).

134. See Biography of Fabio Feldman in Smithsonian/NRDC Conference, *supra* note 125, at 37. Mr. Feldman is a member of the Brazilian Chamber of Deputies who, as the leader of a pro-environment block of Brazilian congressmen, is credited with the inclusion of advanced environmental provisions in Brazil's Constitution. *Id.* Mr. Feldman is also a founding member of several Brazilian environmental NGOs. *Id.* at 38.

135. Fabio Feldman, *A Preservação da Amazônia*, FOLHA DE SÃO PAULO, Mar. 8, 1989, at A3, reprinted in *DÍVIDA EXTERNA*, *supra* note 72, at 8. Feldman was apparently referring to pro-development politicians in the Amazon and the region's military leaders, who some feel are looking for a new threat to justify military funding in light of the fall



asserted that the international concern over the destruction of the Amazon was valid in light of the complex nature of national sovereignty in modern times,<sup>136</sup> an allusion to Principal 21 of the Stockholm Declaration<sup>137</sup> ("Principal 21"). Principal 21 recognized that every state has the sovereign right to exploit its own resources.<sup>138</sup> This sovereign right, however, is subject to the state's responsibility to ensure that activities within its jurisdiction or control are not harmful to the environment of other states or areas beyond the limits of its national jurisdiction.<sup>139</sup> Feldman also pointed out that Brazil stood to benefit from the sustainable use of the Amazon, whose biological diversity could turn Brazil into a key provider of new foodstuffs and medicines in light of worldwide advances in biotechnology.<sup>140</sup>

Meanwhile, the strength and number of conservation groups in Brazil flourished with the advent of democracy in 1985<sup>141</sup> and a new Constitution in 1988<sup>142</sup> that accorded national endowment status to the Amazon<sup>143</sup> and granted each individual

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of communism and Brazil's rapprochement with Argentina. See *Environmentalists in Amazon Field Threats from Local Military Officers, Politicians*, *supra* note 122, at 502 (discussing views of Amazonian politicians and military leaders).

136. Feldman, *supra* note 135, at 8.

137. Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14 and Corr. 1, at 3-5 (1972), reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]. The Stockholm Declaration is a non-binding statement of principles meant to guide global policies to protect the human environment. Roseann Eshbach, *A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interests*, 4 TEMPLE INT'L & COMP. L. J. 271, 296 (1990).

138. Stockholm Declaration, *supra* note 137, prin. 21, 11 I.L.M. at 1420. Principle 21 was echoed nearly verbatim 20 years later in Principle 2 of the Rio Declaration on Environment and Development, *supra* note 48, prin. 2, 31 I.L.M. at 876.

139. Stockholm Declaration, *supra* note 137, prin. 21, 11 I.L.M. at 1420.

140. Feldman, *supra* note 135, at 8. For example, converting an acre of Brazilian forest into pasture will produce 220 pounds of meat per year, but left intact that same acre can produce 2,750 pounds of food per year. Smith, *supra* note 56, at 66. Furthermore, the one-time value of logging the forest can be worth as little as one half the value of fruits, nuts, and other products collected each year. *Id.*

141. See, e.g., Elizabeth Heilman Brooke, *As Forests Fall, Environmental Movement Rises in Brazil*, N.Y. TIMES, June 2, 1992, at C4 (discussing rise of "an impressive domestic environmental movement"); see also *supra* note 87 (discussing Brazilian transition to democracy).

142. CONSTITUIÇÃO BRASILEIRA [Brazilian Constitution] (1988). See Rosenn, *supra* note 126 (discussing constitution's excessive length, detail, and convoluted).

143. CONSTITUIÇÃO BRASILEIRA [Brazilian Constitution] (1988), tit. VIII, ch. VI, art. 225, § 4. National endowment status forbids the Brazilian government from permitting the utilization of the Amazon or its natural resources without first assuring the preserva-

the right to an ecologically balanced environment.<sup>144</sup> These conservation groups were particularly influential with the administration of President Fernando Collor de Mello (1990-92), which, as Brazil's first democratically-elected administration in three decades,<sup>145</sup> showed itself to be more sensitive to popular environmental issues than previous administrations.<sup>146</sup> Indeed, it was the Collor administration that issued Brazil's first debt-for-nature swap regulations in June 1991,<sup>147</sup> one year prior to Brazil's hosting of the Earth Summit.<sup>148</sup>

In addition to these developments, the spread of information concerning debt-for-nature swaps in other countries, such as Bolivia, Costa Rica, and the Philippines, helped to mitigate opposition to debt-for-nature swaps in Brazil.<sup>149</sup> For example,

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tion of the environment. *Id.*; see *supra* notes 91-92 and accompanying text (describing past government development plans in Amazon).

144. CONSTITUIÇÃO BRASILEIRA [Brazilian Constitution] (1988), tit. VIII, ch. VI, art. 225.

145. See Rosenn, *supra* note 126, at 773. Collor, however, was not the first civilian president after military rule. *Id.* at n.1. That honor went to José Sarney, who as Vice-President-elect, assumed the presidency upon the pre-inauguration death of President-elect Tancredo Neves. *Id.* Neves had been elected indirectly by an electoral college vote in January 1985. *Id.*

146. James Brooke, *Collor Receptive to Criticism of Brazil's Policy in Amazon*, N.Y. TIMES, Feb. 12, 1990, at A8; see James Brooke, *Brazilian Leader Acts to Protect the Amazon*, N.Y. TIMES, June 26, 1991, at A9 (describing some of President Collor's environmental initiatives, such as demarcation of indian homelands and acceptance of debt-for-nature swaps); *Brazil Beefs Up Efforts Aimed at Slowing Amazon Deforestation*, 13 Int'l Envtl. Rep. (BNA) No. 14 at 483 (Nov. 21, 1990) (noting that Collor government was increasing its effectiveness in stopping deforestation with such measures as stiff fines, limited number of permits for clearing or burning, and total suspension of tax incentives for farmers and ranchers in Amazon).

147. Banco Central do Brasil, Resolução No. 1840 de 16 de Julho de 1991 [Central Bank of Brazil, Resolution No. 1840 of July 16, 1991], Diário Oficial [D.O.], July 17, 1991, at 14,153 (establishing Brazil's first debt-for-nature swap regulations) [hereinafter Resolution 1840]; see *Brazil: Government Allows Pioneer Debt-for-Nature Swap*, Reuter Textline - Euroweek, May 15, 1992, at 7, available in LEXIS, Nexis Library, CURRNT File (discussing in general first debt-for-nature swap).

148. See *supra* note 48 (discussing the Earth Summit); see also Julia Michaels, *Brazil Hopes to Strengthen Image as World Focuses on Rio Summit*, CHRISTIAN SCI. MONITOR, June 3, 1992, at 1 ("Many Brazilians are hoping that after a decade of failed economic plans, the summit will be a chance to display an improved environmental record and attract foreign funding." For example, "in the weeks leading up to the conference, Brazil created a series of national parks and announced the country's first debt-for-nature swap.").

149. Lou Ann Dietz, *Oportunidades e Controvérsias: Conversão de Dívida por Natureza* [Opportunities and Controversies: Debt-for-Nature Swaps] 2-3 (Mar. 1990) (presented at Seminário sobre Conservação Ambiental e Desenvolvimento Florestal do Cono Sul [Seminar on Environmental Conservation and Florestal Development in the

Brazilians learned that no prior debt-for-nature swap involved the sale or transfer of national territory to international NGOs,<sup>150</sup> and that local governments and NGOs established the projects' priorities.<sup>151</sup> Brazilians also learned that the obligations of a developing country in a debt-for-nature swap agreement were unenforceable.<sup>152</sup> Furthermore, no country suffered inflationary side-effects as a result of the debt conversions.<sup>153</sup> The case of Costa Rica, a country much smaller than Brazil, which successfully converted approximately U.S.\$80 million through several debt-for-nature swaps between 1987 and 1990, was particularly noteworthy.<sup>154</sup>

Under the above circumstances, one commentator sug-

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Southern Cone] in Foz do Iguaçu, Brazil) (on file with Fundação Brasileira para a Conservação da Natureza, Rio de Janeiro, Brazil).

150. *Id.* at 6. Initial reports in Latin America concerning the first ever debt-for-nature swap in Bolivia, however, erroneously indicated that Conservation International, the donor NGO, had actually purchased the lands to be preserved. Laurie P. Greener, Comment, *Debt-for-Nature Swaps in Latin American Countries: The Enforcement Dilemma*, 7 *CONN. J. INT'L L.* 123, 166 (1991). The information generated much criticism, but the local NGO was eventually able to clarify the situation. *Id.*

151. Gibson & Curtis, *supra* note 1, at 344. "Debt-for-nature swaps do not and cannot take place unless approved and supported by the debtor country. All debt-for-nature swaps to date have been initiated by either the debtor government or a local NGO." *Id.* Complete local control of the debt-for-nature swap program may produce unfavorable tax consequences for a U.S. NGO, however, as U.S. tax law allows deductions for a domestic charity's contributions to a foreign charity only if the domestic charity exercises sufficient discretion and control over the use of the funds to ensure that the foreign charity spends them in a manner consistent with the domestic charity's functions and purposes. Rev. Rul. 66-79, 1966-1 C.B. 48. For a complete discussion of the tax considerations pertaining to debt-for-nature swaps, see Halperin, *supra* note 63.

152. See generally Greener, *supra* note 150 (discussing unenforceability of debt-for-nature swaps). Because debt-for-nature swap negotiations are complex and time-consuming transactions, insistence by an international NGO of strict enforcement mechanisms, such as choice-of-law, choice-of-forum, conflict resolution, or waiver of sovereign immunity provisions, could jeopardize the entire transaction as well as any future dealings with local government. *Id.* at 178-79; see also Tamara J. Hrynik, Note, *Debt-for-Nature Swaps: Effective But Not Enforceable*, 22 *CASE W. RES. J. INT'L L.* 141 (1990) (arguing that lack of enforcement in first debt-for-nature swap in Bolivia will not affect success of that swap but, as amount of money involved in debt-for-nature swaps rises, enforceability void will need to be addressed).

153. Dietz, *supra* note 149, at 6. According to Roque Sevilla, former president of the Equadorian NGO Fundación Natura, Brazil's economy in 1989 was capable of sustaining up to U.S.\$300 million in converted debt in the short term. FBCN SEMINÁRIO, *supra* note 13, at 11.

154. Dietz, *supra* note 149, at 2. The Costa Rican government agreed to pay amounts ranging from 30% to 75% of the face value of the converted amounts in the form of medium-term local currency "conservation bonds" that significantly reduced the swaps' inflationary risks. Gibson & Schrenk, *supra* note 9, at 11-12.

gested that debt-for-nature swaps actually strengthen a developing country's national sovereignty in two ways.<sup>155</sup> First, they transform an external debt into a local debt.<sup>156</sup> Second, they allow the local government to maintain more effective control over lands that it decides to preserve.<sup>157</sup> To illustrate the latter, the Brazilian government currently lacks the funds to maintain properly its system of federal, state, and local conservation areas.<sup>158</sup> Often squatters live, farm, and hunt in these areas, effectively destroying their ecological values.<sup>159</sup> According to the commentator, a potential debt-for-nature swap providing funding for their proper maintenance would strengthen the Brazilian domestic policy behind the formation of these conservation areas.<sup>160</sup> Whether or not most Brazilians would agree, the above commentator's viewpoint demonstrates the evolution in Brazilian attitudes towards debt-for-nature swaps. Opposition to debt-for-nature swaps based on suspicions of an international conspiracy to control Brazilian natural resources and domestic policy is today an extreme position.<sup>161</sup>

Much less radical, however, is the view that the Brazilian external debt is illegitimate. The party platform of the leading candidate for Brazil's October 1994 presidential election, for exam-

155. Dietz, *supra* note 149, at 6.

156. *Id.*

157. *Id.*

158. FBCN SEMINÁRIO, *supra* note 13, at 6. The conservation areas can be divided into those of direct use (National Forests, Hunting Parks, and Environmental Protection Areas) and indirect use (National Parks, Biological Reserves, and Ecological Zones). FUNDAÇÃO PRÓ-NATUREZA (FUNATURA), PROJETO PARA O ESTABELECIMENTO DE UM SISTEMA DE SANTUÁRIOS DE VIDA SILVESTRE A NÍVEL NACIONAL, A SER ADMINISTRADO PELA FUNATURA [PROJECT FOR THE ESTABLISHMENT OF A NATIONAL SYSTEM OF WILDLIFE SANCTUARIES, TO BE ADMINISTERED BY FUNATURA] 1 (May 1990) (on file with FUNATURA, Brasília, Brazil). These categories can be established at the federal, state, and municipal levels of government. *Id.* As of 1990, the federal system consisted of 33 National Parks and 21 Biological Reserves. *Id.*

159. Julia Michaels, *Brazil Opens Door to Environmental Funding*, CHRISTIAN SCI. MONITOR, May 12, 1992, at 4.

160. Dietz, *supra* note 149, at 6. Indeed, the first debt-for-nature swap in Brazil was directed at conservation activities in a national park. *Brazil: Government Allows Pioneer Debt-for-Nature Swap*, *supra* note 147, at 7.

161. FBCN SEMINÁRIO, *supra* note 13, at 7. "[A] questão da soberania é um arroubo nacionalista já superado . . ." *Id.* ["The sovereignty issue is an outdated nationalistic frenzy."] (translation by Note Author). See generally *id.* (declaring on several instances that debt-for-nature swaps do not infringe upon Brazil's national sovereignty).

ple, calls for the suspension of external debt payments.<sup>162</sup> Furthermore, the Consortium of Brazilian NGOs<sup>163</sup> (the "Consortium") believes that part of the current external debt, particularly that owed to commercial banks, is of questionable legitimacy.<sup>164</sup> The Consortium has stated, therefore, that debt-for-nature swaps are acceptable only if accompanied by bilateral agreements restructuring the Brazilian external debt.<sup>165</sup> The reason the Consortium required a restructuring is that a restructuring agreement lends legitimacy to the Brazilian external commercial debt by containing renegotiated repayment terms that are likely to be considered more just than original repayment terms.<sup>166</sup> Furthermore, legitimacy of the external debt increases

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162. Brooke, *supra* note 14, at A4. Current polls show Luis Inácio Lula da Silva leading his closest opponent by a two-to-one margin. *Id.*

163. See *Conservationists Form Consortium to Evaluate Country's Environmental Needs*, 13 Int'l Envtl. Rep. (BNA) No. 9 at 371 (Sept. 12, 1990). The Consortium was formed by 17 Brazilian environmental NGOs in order to "evaluate the country's massive environmental needs and to study future funding mechanisms such as debt-for-nature swaps." *Id.*

164. CONSÓRCIO, *supra* note 4, at 2-3.

165. *Id.* The Brazilian government reached a restructuring agreement with 96.2% of its external commercial creditors in December 1993. *Brazil's Bank Creditors Agree on \$52 Billion Debt Package*, BNA BANKING DAILY, Dec. 17, 1993, available in LEXIS, Nexis Library, CURRNT File; see Kenneth Gilpin, *Dart Clashes With Brazil Over Loans*, N.Y. TIMES, Oct. 23, 1993, § 1, at 37 (discussing refusal of Dart family, one of Brazil's major creditors, to sign restructuring agreement). The restructuring package was formulated along the model of the Brady Initiative, declared by U.S. Treasury Secretary Nicholas Brady in March 1989. *Twin Shadows Settle Over Brazilian Debt Deal*, LDC Debt Reports/Latin American Markets, Oct. 25, 1993, available in LEXIS, Nexis Library, CURRNT File. The Brady Initiative encourages commercial banks "to reduce voluntarily the debt and debt servicing obligations of debtor countries on a case-by-case basis." Alberto Gonzalo Santos, Note, *Beyond Baker and Brady: Deeper Debt Reduction for Latin American Sovereign Debtors*, 66 N.Y.U. L. REV. 66, 70 (1991). The plan envisioned comprehensive restructuring packages offering a "menu" of market-based debt and debt service reduction options. The main condition for this support was that the debtor be implementing a strong set of adjustment and reform policies that, combined with debt operations, would provide for substantial progress toward external viability." John Clark & Eliot Kalter, *Recent Innovations in Debt Restructuring*, 29 FIN. & DEV. 6 (Sept. 1992); see David Felix & John Caskey, *Baker to Brady to Chance? Tinkering with the Latin American Debt Crisis*, in UNITED STATES POLICIES AND THE LATIN AMERICAN ECONOMIES 5 (Werner Baer & Donald V. Coes eds., 1990) (arguing that it is doubtful that Brady Plan will suffice to revive economic growth in major Latin American debtor countries).

166. See Gilpin, *supra* note 165, § 1, at 37. Under the restructuring plan, creditors were able to choose one of several options in which to convert their debt. *Id.* One choice was to convert their securities into par bonds paying full face value but at a lower fixed interest rate. *Id.* Another option was to convert the debt into collateralized bonds converted at full face value at a four percent interest rate which will gradually rise to a fixed eight percent rate. *Id.* Brazil requested that banks convert at least 35%

because the current Brazilian government, unlike the former governments that incurred many of the loans, is democratically-elected.<sup>167</sup> Restructuring the Brazilian debt, however, may limit the ability of an international NGO to engage in debt-for-nature swaps.<sup>168</sup>

It should be noted, though, that Brazilians view the portions of their debt portfolio that are owed to multilateral development banks ("MDBS")<sup>169</sup> and bilateral credit agencies ("BCAs")<sup>170</sup> as

of their securities into a third option of deep discount bonds with a floating interest rate. *Id.* The request arose out of a concern by the Brazilian government that the debt package did little to reduce its debt. *Id.*

167. See *supra* notes 87, 145 and accompanying text (discussing transition from military dictatorship to democracy).

168. See *First Debt-for-Nature Swap for Brazil Lacks Startup Funds*, LDC Debt Report/Latin American Markets, May 25, 1992, available in LEXIS, Nexis Library, CURRNT File (stating that environmental NGOs try to engage in debt-for-nature swaps before restructuring packages drive up price of secondary market debt). Such a restructuring would mean that the price of the shares of the Brazilian external debt on the secondary market would rise because Brazil is theoretically capable of paying the restructured amount of its external debt. See Gibson & Schrenk, *supra* note 9, at 3 (explaining that secondary market discounts result from impaired credit rating of debtor country, which results from debtor country's failure to make full payments on original debt). This price increase will reduce the leveraging effect of the debt conversion and make it more expensive for an international NGO to engage in a debt-for-nature swap. See *supra* notes 15-18 and accompanying text (discussing mechanics of debt-for-nature swap transaction).

169. See John M. Updegraph, Note, *Large-Scale, Capital-Intensive Development Projects in the Third World: Congressional Influence Over Multilateral Development Bank Lending*, 13 B.C. THIRD WORLD L.J. 345, 348 (1993). MDBs are independent, autonomous organizations formed for the purpose of financing development in developing countries. *Id.* The four major MDBs are the International Bank for Reconstruction and Development (the World Bank), the Inter-American Development Bank, the Asian Development Bank, and the African Development Bank. *Id.*

Thus far MDBs have not actively promoted debt-for-nature swaps. Asiedu-Akrofi, *supra* note 19, at 583. The MDBs are concerned that the donation of these loans or their sale at a discount would violate their charters. Gibson & Curtis, *supra* note 1, at 386. Opponents of this view argue that the World Bank charter does allow the Bank some flexibility to reschedule or refinance developing country debt and accept payments in local currency. *Id.* Furthermore, MDBs worry that such donations may impair their credit rating on the international capital markets. *Id.* A lowered credit rating would raise the MDB's cost of money and the interest rates it would have to charge debtor countries. Dianne Dumanoski, *Plan Urges World Bank to Swap Conservation for Nations' Debts*, BOSTON GLOBE, July 29, 1987, at 8. The United States has encouraged MDB participation in debt-for-nature swaps by directing the U.S. Executive Directors of the MDBs to actively negotiate for MDB participation. International Development and Finance Act of 1989, Pub. L. No. 101-240, § 1614, 103 Stat. 2508 (1989) (codified at 22 U.S.C. § 262p-4i(a) (1988 & Supp. III 1991)). The most MDBs have done, however, is to begin evaluating the environmental impacts of their loan projects. Asiedu-Akrofi, *supra* note 19, at 583. For a negative view of the environmental assessment capabilities

more legitimate than their commercial bank debt.<sup>171</sup> The greater legitimacy of MDB and BCA debt is due to two reasons. First, interest rates on such debt are lower than those on commercial bank debt.<sup>172</sup> Second, these loans were accompanied by more rigorous verification procedures to ensure that the loans were not lost through corruption or misguided projects.<sup>173</sup>

## II. CHANGES IN BRAZILIAN POLICIES TOWARD DEBT-FOR-NATURE SWAPS

The Brazilian government issued its first debt-for-nature swap regulations on July 16, 1991.<sup>174</sup> These regulations allow Brazilian NGOs to accept donations of Brazilian external debt from international NGOs and to convert these donations into local currency bonds.<sup>175</sup> The local NGO then uses the interest on these bonds to fund environmental projects.<sup>176</sup> In an effort to streamline these regulations, the administration of Brazilian President Itamar Franco is preparing a legislative proposal that will revise the financial, dimensional, and procedural aspects of the current regulations.<sup>177</sup>

### A. The Current Regulatory Framework

In 1991, under the administration of President Fernando Collor de Mello,<sup>178</sup> the Central Bank of Brazil issued Resolution

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of the World Bank and the Inter-American Development Bank, *see* McGee & Zimmerman, *supra* note 50, at 544-47.

170. *See supra* note 26 and accompanying text (describing BCAs and discussing emerging role of bilateral debt in debt-for-nature swaps).

171. CONSÓRCIO, *supra* note 4, at 3; Lemos & Pimentel, *supra* note 4, at 3.

172. Lemos & Pimentel, *supra* note 4, at 3.

173. *Id.*

174. *Brazil: Government Allows Pioneer Debt-for-Nature Swap*, *supra* note 147, at 7.

175. Resolution 1840, *supra* note 147, art. 3, D.O., July 17, 1991, at 14,153.

176. *Id.*

177. Projeto de Lei, "Cria o Programa de Conversão da Dívida Externa Doada para Fins Ambientais, Sociais e Culturais, autoriza o Poder Executivo a emitir títulos de responsabilidade do Tesouro Nacional para os fins que especifica e dá outras [providências]." [Draft law creating the Program for the Conversion of External Debt for Environmental, Social, and Cultural purposes, authorizing the Executive Branch to emit notes under the responsibility of the National Treasury for the purposes herein stated, and announcing other measures] (translation by Note Author) (1993) (on file with the *Fordham International Law Journal*) [hereinafter Franco Proposal].

178. *See supra* notes 145-48 and accompanying text (describing increasing influence of Brazilian environmental movement on Collor administration).

1840 ("Resolution 1840"),<sup>179</sup> which established the Plano de Conversão da Dívida Externa para Fins Ambientais ("Plan for the Conversion of External Debt for Environmental Purposes"), authorizing Brazilian nonprofit groups (i.e., NGOs) to receive donations of external debt in order to engage in debt-for-nature swaps.<sup>180</sup> Under this plan, the Brazilian NGO must deposit all donated debt with the Central Bank in exchange for special non-transferable federal treasury notes.<sup>181</sup> The Brazilian NGO never receives the face value<sup>182</sup> of the notes. Instead, it receives interest of six percent per year, in local currency, payable monthly and adjusted for inflation.<sup>183</sup> Importantly, the NGO holds the notes only as long as it implements its approved environmental project.<sup>184</sup> Once the project is completed, the notes are either diverted to another approved project or simply revert to the National Treasury.<sup>185</sup> During the life of an approved project, the

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179. Resolution 1840, *supra* note 147, D.O., July 17, 1991, at 14,153. A resolution is an administrative act issued by a government authority, other than the Chief Executive, to carry out responsibilities accorded to it by law. MARIA SYLVIA ZANELLA DI PIETRO, *DIREITO ADMINISTRATIVO [ADMINISTRATIVE LAW]* 176 (2d ed. 1991). As an administrative act, a resolution must comply with the law in order to bear a presumption of validity. *Id.* at 150. An administrative act can be annulled or invalidated by the Executive or Judicial branches of government. *Id.* at 176. The Legislative branch can also determine the legality of administrative acts which result in the receipt or remittance of funds by the government or which create or extinguish financial rights and obligations. *Id.* at 427.

The Central Bank is authorized by law to regulate the conversion of registered loans, interests, or other due amounts into local investment. ROSENN, *supra* note 110, at 79 n.2.

180. Resolution 1840, *supra* note 147, art. 1, D.O., July 17, 1991, at 14,153. "[O Banco Central do Brasil resolveu i]nstituir o Plano de [C]onversão da Dívida Externa para fins Ambientais, com o objetivo de permitir o acolhimento, por parte de instituições ou fundos sem fins lucrativos, mediante doações, de recursos destinados à preservação do meio ambiente." *Id.* ["(The Central Bank of Brazil has resolved) to institute the Plan for the Conversion of External Debt for Environmental Purposes, with the objective of permitting non-profit institutions or funds to raise, through donations, resources directed at preserving the environment."] (translation by Note Author).

181. *Id.* art. 3, D.O., July 17, 1991, at 14,153.

182. BLACK'S LAW DICTIONARY 591 (6th ed. 1990). The face value of a note is the amount as given on the note, payable upon the note's maturity. *Id.* In addition, face value is the amount on which interest is calculated. *Id.*

183. Resolution 1840, *supra* note 147, art. 4, D.O., July 17, 1991, at 14,153.

184. *Id.* art. 5, D.O., July 17, 1991, at 14,153.

185. *Id.* art. 5, ¶ 1, D.O., July 17, 1991, at 14,153. "Concluído o projeto a que inicialmente se destinaram os recursos, os títulos deverão ser alocados [a] outros projetos aprovados e indicados pela Comissão Técnica de Avaliação de Projetos Ambientais, ou retornados ao Tesouro Nacional." *Id.* ["Upon the conclusion of the project for which the funds were originally devoted, the notes will be allocated to other



Central Bank has the authority to enter into agreements with private or public Brazilian organizations, such as the Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (Brazilian Institute for the Environment and Renewable Natural Resources or "IBAMA"),<sup>186</sup> to audit the project to ensure that its funds are properly applied.<sup>187</sup> The Central Bank also has the authority to declare guidelines and measures for the execution of Resolution 1840.<sup>188</sup> One such measure was Circular 1988,<sup>189</sup> which established the limit of convertible external debt at U.S.\$100 million.<sup>190</sup> This limit, along with the above-mentioned financial elements of Resolution 1840, was designed to mitigate any inflationary impact that debt-for-nature swaps might have on

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projects approved and referred by the Technical Commission, or will revert to the National Treasury." (translation by Note Author).

186. See *Foundation for Nature's President Appointed to Head Environmental Agency*, 15 Int'l Env'tl. Rep. (BNA) No. 7 at 194 (Apr. 8, 1992). IBAMA is Brazil's national environmental agency. *Id.* It was created in 1989 and functions as an independent agency with ties to the executive branch's Secretariat for the Environment. THE NATURE CONSERVANCY, BRASIL VERDE CONSERVATION CAMPAIGN 7 [hereinafter BRASIL VERDE].

187. Resolution 1840, *supra* note 147, art. 7, D.O., July 17, 1991, at 14,153. Article 7 states as follows:

Poderá o Banco Central do Brasil, em articulação com a Comissão Técnica de Avaliação de Projetos Ambientais, firmar convênios com instituições públicas e privadas, em especial com o Instituto Brasileiro de Meio Ambiente e dos Recursos Renováveis (IBAMA) . . . [c]om a finalidade de fiscalizar e atestar a aplicação dos recursos nos projetos pertinentes. [The Central Bank may, in consultation with the Technical Commission, enter into agreements with public or private institutions, in particular with the Brazilian Institute for the Environment and Renewal Natural Resources (IBAMA), to audit and verify the application of funds of pertinent projects] (translation by Note Author).

*Id.*

188. *Id.* art. 9, D.O., July 17, 1991, at 14,153 ("O Banco Central do Brasil baixará as normas complementares e adotará as medidas necessárias à execução do disposto nest[a] Resolução."). *Id.* ["The Central Bank will declare the proper guidelines and enact the necessary measures for the execution of this Resolution."] (translation by Note Author).

189. Banco Central do Brasil, Circular No. 1988 [Central Bank of Brazil, Circular No. 1988], Diário Oficial [D.O.], July 18, 1991, at 14,258 [hereinafter Circular 1988]. A circular is an administrative act by which a government authority transmits internal orders to subordinate authorities. DI PIETRO, *supra* note 179, at 177. Circulars are utilized by superior authorities to guide subordinate authorities in the development of administrative activities. JOSÉ CRETTELLA JÚNIOR, CURSO DE DIREITO ADMINISTRATIVO [COURSE IN ADMINISTRATIVE LAW] 272 (6th ed. 1981); see *supra* note 179 (discussing legality of administrative acts).

190. Circular 1988, art. 1, D.O., July 18, 1991, at 14,258. The figure is set in dollars and not local currency because the external commercial loans being converted were to be repaid in external currency, most likely dollars; see THIRD WORLD DEBT AND NATURAL RESOURCES CONSERVATION, *supra* note 52, at 1-2 (discussing environmental impact in debtor countries of paying loans in external currency).

the national economy.<sup>191</sup>

Central to the procedures established by Resolution 1840 and Circular 1988 is the role of the Comissão Técnica de Avaliação de Projetos Ambientais ("Technical Commission for the Evaluation of Environmental Projects" or "Technical Commission"),<sup>192</sup> created by presidential decree shortly prior to the Central Bank regulations.<sup>193</sup> Resolution 1840 confers upon the Technical Commission broad powers to evaluate and approve appropriate debt-for-nature swap projects.<sup>194</sup> In doing so, the Technical Commission has the authority to determine which projects should be given higher priority in light of the maximum amount of convertible debt established by Circular 1988.<sup>195</sup> The Technical Commission also consults with the Central Bank on any audits of approved debt-for-nature swap projects.<sup>196</sup>

Circular 1988 reiterates that any party interested in a debt-for-nature swap must first obtain its project's approval by the Technical Commission before the Central Bank will take any action.<sup>197</sup> The Technical Commission evaluates debt-for-nature swaps according to a prescribed set of official eligibility requirements. First, the project must fall within one of the following subject areas ("áreas temáticas"): conservation of biological diversity; urban environment; energy; conservation and sustainable use of natural resources; environmental education; and insti-

191. *Brazil: Government Allows Pioneer Debt-for-Nature Swap*, *supra* note 147, at 7.

192. Resolution 1840, *supra* note 147, arts. 5-7, D.O., July 17, 1991, at 14,153. An interministerial group, the Technical Commission is chaired by a representative of the Department of International Affairs of the Ministry of Finance and includes representatives of the Ministry of Foreign Relations, the Secretariat of the Environment, and the Central Bank. Decreto de 29 de abril de 1992 [Presidential Decree of April 29, 1992], art. 1, § 1, Diário Oficial [D.O.], Apr. 30, 1992, at 5427.

193. Decreto de 28 de junho de 1991 [Presidential Decree of June 28, 1991], Diário Oficial [D.O.], July 1, 1991, at 12,671. The Technical Commission was reorganized pursuant to Decreto de 29 de abril de 1992 [Presidential Decree of April 29, 1992], *supra* note 192, D.O., Apr. 30, 1992, at 5427. Presidential decrees are administrative acts by which the President carries out his or her responsibilities pursuant to law. DI PIETRO, *supra* note 179, at 175; *see id.* (discussing legal effects of administrative acts).

194. Resolution 1840, *supra* note 147, art. 6, D.O., July 17, 1991, at 14,153.

195. Circular 1988, *supra* note 189, art. 1, D.O., July 18, 1991, at 14,258; Resolution 1840, *supra* note 147, art. 6, D.O., July 17, 1991, at 14,153; *see supra* note 190 and accompanying text (discussing U.S.\$100 million limit imposed by Circular 1988).

196. Resolution 1840, *supra* note 147, art. 7, D.O., July 17, 1991, at 14,153; *see supra* note 187 and accompanying text (discussing Central Bank's authority to audit debt-for-nature swap projects).

197. Circular 1988, *supra* note 189, arts. 3-5, D.O., July 18, 1991, at 14,258.

tutional development of environmentally-driven NGOs and research organizations<sup>198</sup> Second, the project must be implemented by a local nonprofit organization.<sup>199</sup> Third, the project must have a pre-identified international donor.<sup>200</sup> Next, the project must fall within the U.S.\$100 million maximum.<sup>201</sup> Finally, the proposal must comply with the Technical Commission's procedural regulations.<sup>202</sup> In addition to these five requirements, the Technical Commission's decisions account for the likelihood of the project's environmental and financial success,<sup>203</sup> and place significant weight on the qualifications of the international and Brazilian NGOs.<sup>204</sup>

To date the Technical Commission has approved only one debt-for-nature swap project.<sup>205</sup> This project is being implemented by the Brazilian NGO Fundação Pró-Natureza ("FUNATURA"),<sup>206</sup> in accordance with its agreements with IBAMA<sup>207</sup> and the American NGO (and donor) The Nature Conservancy.<sup>208</sup> The project funds conservation and management activities in the Grande Sertão Veredas National Park in

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198. Comissão Técnica de Avaliação de Projetos Ambientais, Edital No. 01/91 [Technical Commission for the Evaluation of Environmental Projects, Edict No. 01/91], Diário Oficial [D.O.], Dec. 18, 1991, at 29,472.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Interview with Paulo Roberto França, Primeiro Secretário, Ministério de Relações Exteriores [First Secretary, Ministry of Foreign Relations, Environmental Division (Brazilian Government)], in Brasília, Brazil (July 29, 1993).

204. *Id.*

205. Comissão Técnica de Avaliação de Projetos Ambientais, Resolução No. 01 de 11 de maio de 1992 [Technical Commission for the Evaluation of Environmental Projects, Resolution No. 1 of May 11, 1992], Diário Oficial [D.O.], May 15, 1992, at 6083.

206. BRASIL VERDE, *supra* note 186, at 13. Founded in 1986, FUNATURA is a Brazilian NGO dedicated to strengthening the role of the private sector in protecting Brazil's biological diversity and quality of human life. *Id.*

207. INSTITUTO BRASILEIRO DO MEIO AMBIENTE E DOS RECURSOS NATURAIS RENOVÁVEIS, CONVÊNIO QUE CELEBRAM O INSTITUTO BRASILEIRO DO MEIO AMBIENTE E DOS RECURSOS NATURAIS RENOVÁVEIS E A FUNDAÇÃO PRÓ-NATUREZA [BRAZILIAN INSTITUTE FOR THE ENVIRONMENT AND RENEWABLE NATURAL RESOURCES, ACCORD BETWEEN THE BRAZILIAN INSTITUTE FOR THE ENVIRONMENT AND RENEWABLE NATURAL RESOURCES AND FUNDAÇÃO PRÓ-NATUREZA] (Sept. 5, 1990) [hereinafter CONVÊNIO]; *see supra* note 186 (describing IBAMA); *supra* note 206 (describing FUNATURA).

208. THE NATURE CONSERVANCY, AGREEMENT OF COOPERATION BETWEEN THE NATURE CONSERVANCY AND FUNDAÇÃO PRÓ-NATUREZA (Nov. 5, 1990). The Nature Conservancy is an American NGO dedicated to the worldwide protection of biological diversity. BRASIL VERDE, *supra* note 186, at 19.

the interior state of Minas Gerais.<sup>209</sup> The project's activities include efforts to strengthen the park's infrastructure and surrounding community through educational programs and new income sources.<sup>210</sup> Other debt-for-nature swap proposals were either rejected by the Technical Commission or voluntarily withdrawn because the proposed project either did not meet the established criteria or lacked the appropriate funds to be financially successful.<sup>211</sup>

### B. *Expected Changes: A Statutory Framework*

A proposal to the Brazilian National Congress by the administration of President Itamar Franco<sup>212</sup> will modify the current debt-for-nature swap regulations.<sup>213</sup> Entitled "Programa de Conversão da Dívida Externa Doada para Fins Ambientais, Sociais e Culturais" ("Program for the Conversion of External Debt Donated for Environmental, Social, and Cultural Purposes" or "the Proposal"), the Proposal envisions the modification of the financial, dimensional, and procedural aspects of the current debt-for-nature swap regulations.<sup>214</sup> Unlike Resolution 1840, the Proposal was developed subsequent to discussions between governmental and nongovernmental organizations.<sup>215</sup>

Under the Proposal, the maximum amount of convertible

209. THE NATURE CONSERVANCY, GRANDE SERTÃO VEREDAS NATIONAL PARK DEBT CONVERSION PROPOSAL (Oct. 25, 1991). The approved plan calls for a two-phase swap of U.S.\$2,192,000 of Brazilian debt, which will generate U.S.\$131,520 annually under the financial scheme established by Resolution 1840. *Id.* at 12; see *Brazil: Government Allows Pioneer Debt-for-Nature Swap*, *supra* note 147, at 7 (discussing details of the swap).

210. *Id.*

211. Interview with Paulo Roberto França, *supra* note 203.

212. See *Lochinvar Goes West*, *THE ECONOMIST*, Oct. 3, 1992, at 41. Mr. Franco is the former vice-president who assumed the presidency when the Chamber of Deputies, the lower house of Brazil's Congress, voted on September 29, 1992 to impeach President Collor. *Id.* The impeachment vote was a result of the President Collor's participation in a high-level bribery ring which extracted millions of dollars from businessmen soliciting government contracts. *Id.*

213. Franco Proposal, *supra* note 177; see *supra* notes 179-204 and accompanying text (discussing current debt-for-nature swap regulations).

214. Franco Proposal, *supra* note 177.

215. SECRETARIA DE PLANEJAMENTO, ORÇAMENTO E COORDENAÇÃO, PROGRAMA DE CONVERSÃO DA DÍVIDA EXTERNA DOADA PARA FINS AMBIENTAIS, SOCIAIS E CULTURAIS [SECRETARIAT OF PLANNING, BUDGETING, AND COORDINATION, PROGRAM FOR THE CONVERSION OF EXTERNAL DEBT DONATED FOR ENVIRONMENTAL, SOCIAL, AND CULTURAL PURPOSES (OUTLINE)], art. 4 (July 1993) [hereinafter PROPOSAL OUTLINE]. Included in the discussions were several congressmen and the executive secretaries of the ministries of the Environment, Social Well-Being, and Culture. *Id.* Also included were representatives

debt would increase to U.S.\$200 million.<sup>216</sup> Furthermore, a local NGO that deposits donated debt into the Central Bank would receive federal treasury notes that pay a high percentage of face value instead of paying solely the interest on the face value.<sup>217</sup> Payments would be made to the NGO according to four different plans, each based on the expected duration of the proposed project.<sup>218</sup> Under a twenty-year project plan, the NGO would receive 15% of full face value up front and the balance in eighty trimestral payments.<sup>219</sup> The NGO would also receive annual interest of 4% on the remaining principal until the principal is exhausted.<sup>220</sup> A fifteen-year project plan would entitle the NGO to receive 15% of full face value up front and the balance in sixty trimestral payments.<sup>221</sup> The NGO would also receive annual interest of 2% on the remaining principal until the principal is exhausted.<sup>222</sup> Under a ten-year project plan, the NGO would receive 15% of 95% of face value up front and the balance in forty trimestral payments.<sup>223</sup> Finally, a five-year project plan would allow the NGO to receive 15% of 80% of face value up front and the balance in twenty trimestral payments.<sup>224</sup>

The proposal presents a shift of authority from the Technical Commission<sup>225</sup> to a more broadly worded Executive Branch.<sup>226</sup> The Technical Commission will continue to exist under the Proposal, although its wide discretionary powers will be curtailed.<sup>227</sup> Article Six, the only article in the Proposal to

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of several Brazilian NGOs, such as FUNATURA and the National Congress of Bishops.  
*Id.*

216. Franco Proposal, *supra* note 177, art. 1. Eligible debt includes not only commercial external debt, but bilateral credit agency debt as well. *Id.* art. 2; *see supra* notes 26, 170 and accompanying text (discussing bilateral credit agencies in context of debt-for-nature swaps).

217. Franco Proposal, *supra* note 177, art. 3; *cf. supra* notes 182-83 and accompanying text (explaining that Resolution 1840 does not allow local NGO to receive face value of notes, but instead allows for six percent annual return on face value).

218. Franco Proposal, *supra* note 177, art. 3.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *See supra* notes 192-211 and accompanying text (discussing current functions of Technical Commission for the Evaluation of Environmental Projects).

226. Franco Proposal, *supra* note 177, arts. 4 and 7.

227. *Id.* art. 6; *cf.* Resolution 1840, *supra* note 147, art. 6, D.O., July 17, 1991, at

mention the Technical Commission, states concisely that the Executive Branch will create a Commission to oversee the utilization of the funds allocated to the debt-for-nature swap program.<sup>228</sup> Article Four states that it is the responsibility of the Executive Branch to allocate these funds.<sup>229</sup> Article Seven, moreover, grants the Executive Branch, and not the Commission itself, the authority to establish the rules necessary to implement the program.<sup>230</sup> In establishing such rules, the Executive will observe such factors as the monetary impact of the debt conversions<sup>231</sup> and the program's compatibility with the country's environmental, social, and cultural policies.<sup>232</sup> In addition, the Executive will have the authority to define which local institutions may be the beneficiaries of donated debt.<sup>233</sup> Under the Proposal, these institutions should be national organizations with proven experience in the field of the proposed debt-for-nature swap project.<sup>234</sup>

The Proposal also widens the scope of debt-for-nature swap projects.<sup>235</sup> In addition to the environmental projects that fall under the categories currently defined by the Technical Commission, local NGOs will also be able to submit proposals for social and cultural projects.<sup>236</sup> Debt-for-nature swaps, therefore, would constitute only one type of debt swap under an umbrella program providing funds to projects in areas such as health, education, urban infrastructure, and the preservation of historical monuments.<sup>237</sup>

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14,153 (granting Technical Commission authority to evaluate and approve debt-for-nature swap projects as well as to decide which projects should have higher priority); Circular 1988, *supra* note 189, art. 3, D.O., July 18, 1991, at 14,258 (stating that any debt-for-nature swap project must first receive approval of Technical Commission before Central Bank will take any action).

228. Franco Proposal, *supra* note 177, art. 6. The Commission will be chaired by a representative of the Secretariat of Planning, Budgeting, and Coordination. *Id.*

229. *Id.* art. 4.

230. *Id.* art. 7. "Fica o Poder Executivo autorizado a baixar os atos necessários [à] implementação do Programa . . ." *Id.* ["The Executive Branch is authorized to declare the acts necessary for the implementation of the Program . . ."] (translation by Note Author).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. PROPOSAL OUTLINE, *supra* note 215, art. 3.

236. *Id.*

237. Interview with Dr. Dagoberto Koehntopp, *supra* note 5.

### III. COMPARATIVE ANALYSIS OF THE CURRENT AND PROPOSED PROCEDURES AND POLICY RECOMMENDATIONS

The new legislative proposal by the administration of Itamar Franco will improve the current debt-for-nature swap regulations by creating a more streamlined debt-for-nature swap process and offering more attractive financial terms to participating NGOs. These improvements will increase the prospect of successful debt-for-nature swap projects in Brazil. This watershed in Brazilian policies toward debt-for-nature swaps presents an opportune time to reexamine U.S. policies relative to debt-for-nature swaps. There are several steps that the U.S. government and U.S. NGOs can take to ensure the success of the new Brazilian legislation and the protection of the interests of the U.S. government<sup>238</sup> and U.S. NGOs<sup>239</sup> in these transactions. These steps include a revised description and presentation of debt-for-nature swaps,<sup>240</sup> the encouragement of the donation of multilateral development bank ("MDB") debt<sup>241</sup> and bilateral credit agency ("BCA") debt,<sup>242</sup> and the strengthening of relationships between Brazilian and U.S. NGOs.<sup>243</sup>

#### A. Comparative Analysis of the Current Regulations and the Proposed Regulations

The financial and procedural provisions of Resolution 1840 and Circular 1988,<sup>244</sup> combined with the regulations of the Technical Commission,<sup>245</sup> have caused debt-for-nature swaps in Brazil to be financially unattractive and time-consuming for in-

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238. See *supra* notes 58-61 and accompanying text (discussing interests of U.S. government in debt-for-nature swaps).

239. See *supra* notes 42-50 and accompanying text (discussing interests of U.S. NGOs in debt-for-nature swaps).

240. See *supra* notes 15-22 and accompanying text (describing in general debt-for-nature swaps).

241. See *supra* note 169 and accompanying text (discussing MDB debt in context of debt-for-nature swaps).

242. See *supra* notes 26, 170 and accompanying text (discussing BCAs in context of debt-for-nature swaps).

243. See *supra* notes 15-18 and accompanying text (discussing role of international and local NGOs in debt-for-nature swaps).

244. See *supra* notes 180-97 and accompanying text (discussing financial and procedural elements of Resolution 1840 and Circular 1988).

245. See *supra* notes 192-211 and accompanying text (discussing current functions of Technical Commission for the Evaluation of Environmental Projects).

ternational and Brazilian NGOs.<sup>246</sup> The new legislative proposal, by contrast, will provide for a streamlined debt-for-nature swap process that will allow NGOs to receive a higher return on their investments.<sup>247</sup> As a result, there is an increased likelihood of successful debt-for-nature swap projects in Brazil. Furthermore, as a federal statute passed by the Brazilian National Congress, the new regulations will bring relative stability to the Brazilian debt-for-nature swap process,<sup>248</sup> which is currently governed solely by administrative acts of the Central Bank and other Executive branch organs of Brazil.<sup>249</sup>

### 1. Resolution 1840: A Hindrance to the Brazilian Debt-for-Nature Swap Process

The financial limitations and bureaucratic procedures established by Resolution 1840 have caused it to be characterized as "not user friendly"<sup>250</sup> and a hindrance to the debt-for-nature swap process in Brazil.<sup>251</sup> Conceived at a time when the Brazilian government was negotiating the restructuring of the Brazilian external debt with a view towards non-payment of that debt,<sup>252</sup> Resolution 1840 provides for a return of only 6% annually on any debt conversions.<sup>253</sup> This minimal amount has meant that a project of even small dimensions would require large sums of converted debt, thereby severely limiting the number of international NGOs that can raise such amounts, and placing a great strain on the resources of those that can.<sup>254</sup> Even if interna-

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246. Interview with Dr. Anthenor Navarro, Director Executivo, Fundação Brasileira para a Conservação da Natureza ("FBCN") [Executive Director, Brazilian Foundation for the Conservation of Nature], Rio de Janeiro, Brazil (July 6, 1993). FBCN, founded in 1958, is one of the oldest environmental NGOs in Latin America. BRASIL VERDE, *supra* note 186, at 15. FBCN is dedicated to the preservation of natural resources in a manner that promotes sustainable development. *Id.*

247. *See supra* notes 216-24 and accompanying text (discussing financial elements of Franco Proposal).

248. Interview with Dr. Dagoberto Koehntopp, *supra* note 5.

249. *See supra* notes 179-204 and accompanying text (discussing current debt-for-nature swap regulations).

250. Telephone Interview with Debra James, Associate, Shearman & Sterling, New York, New York (June 2, 1993).

251. Interview with Dr. Anthenor Navarro, *supra* note 246.

252. Lemos & Pimentel, *supra* note 4, at 3.

253. *See supra* note 183 and accompanying text (discussing amount payable to local NGOs per Resolution 1840).

254. *See First Debt For Nature Swap for Brazil Lacks Startup Funds, supra* note 168. For example, while The Nature Conservancy originally planned to raise U.S.\$850,000 to



tional NGOs can raise such amounts, international NGOs would be constrained by the U.S.\$100 million convertible debt limit imposed by Circular 1988.<sup>255</sup> This limit, which assures that at any given time all debt-for-nature swap projects in Brazil together cannot receive more than U.S.\$6 million per year, restricts the number and scope of otherwise viable debt-for-nature swap projects.<sup>256</sup>

Furthermore, the procedural requirements established by Resolution 1840, Circular 1988, and the Technical Commission's own regulations<sup>257</sup> have created a bureaucratic maze that frustrates the attempts of Brazilian and international NGOs to obtain approval of debt-for-nature swap projects.<sup>258</sup> Brazilian NGOs are particularly critical of the broad powers conferred upon the Technical Commission.<sup>259</sup> These powers, they claim, create a scenario conducive to arbitrariness and corruption.<sup>260</sup>

Finally, the fact that Resolution 1840 and Circular 1988 are administrative acts by the Brazilian Central Bank,<sup>261</sup> as opposed to federal statutes, is reason for consternation among advocates of debt-for-nature swaps.<sup>262</sup> As administrative acts, Resolution 1840 and Circular 1988 can be withdrawn if the present adminis-

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purchase the U.S.\$2.2 million it intended to donate to FUNATURA, it has since encountered problems raising the necessary funds. *Id.*

255. Circular 1988, *supra* note 189, art. 1, D.O., July 18, 1991, at 14,258; *see supra* notes 189-90 and accompanying text (discussing Circular 1988 in relation to Resolution 1840).

256. Interview with Dr. Anthenor Navarro, *supra* note 246.

257. *See supra* notes 180-204 and accompanying text (discussing procedures of current debt-for-nature swap regulations).

258. *Brazil Seeks to Facilitate Debt-for-Nature Swaps*, *supra* note 5. The article quotes a project coordinator at FUNATURA as complaining that a "bureaucratic maze" allowed the Central Bank to take two years to approve FUNATURA's debt-for-nature swap with The Nature Conservancy. *Id.*

259. *See supra* notes 192-211 and accompanying text (discussing current functions of Technical Commission for the Evaluation of Environmental Projects).

260. Interview with Ana Maria Fonseca, Fundação Brasileira Para a Conservação da Natureza ("FBCN") [Brazilian Foundation for the Conservation of Nature], Rio de Janeiro, Brazil (July 12, 1993); *see Brooke, supra* note 87, at A1. The Brazilian government is currently enmeshed in a fascinating web of corruption scandals. *Id.* The scandals range from the bribery ring run by ex-President Collor to a kickback scheme involving dozens of national congressmen. *Id.* When investigators questioned one congressman about his bank deposits of U.S.\$51 million relative to his U.S.\$84,000 annual salary, the congressman casually explained that he had won 24,000 lotteries. *Id.*

261. *See supra* note 179 (defining resolution and discussing legal effect of administrative acts); *supra* note 189 (defining circular).

262. Interview with Debra James, *supra* note 250.

tration sees fit, or if a new administration opposed to debt-for-nature swaps assumes power.<sup>263</sup> The latter scenario is especially plausible, as the leading candidate for Brazil's 1994 presidential elections is Luis Inácio Lula da Silva ("Lula").<sup>264</sup> Mr. da Silva is the leader of the Workers' Party, whose official platform is opposed to the payment of the Brazilian external debt.<sup>265</sup> The prospect that a "Lula" administration will suddenly revoke the current regulations, leaving the international and Brazilian NGOs with an unenforceable agreement,<sup>266</sup> has created a spectre of instability that causes international NGOs to be wary of investing their efforts and resources in the Brazilian debt-for-nature swap process.<sup>267</sup>

## 2. The Proposed Legislation: A Watershed in the Brazilian Debt-for-Nature Swap Process

The proposed legislation recognizes that Resolution 1840 has not succeeded in attracting international institutions interested in financing debt-for-nature swaps.<sup>268</sup> The proposed legislation will provide international and Brazilian NGOs with significantly more financially attractive debt-for-nature swap transactions.<sup>269</sup> Instead of receiving a meager six percent annual return, in most cases the Brazilian NGO will receive installment payments eventually equaling the full face value of the converted debt amount.<sup>270</sup> The increased leveraging effect<sup>271</sup> means that

263. See *supra* note 179 (defining resolution and discussing legal effect of administrative acts); *supra* note 189 (defining circular).

264. Brooke, *supra* note 14, at A4.

265. See *supra* notes 14, 162 and accompanying text (discussing Workers' Party's opposition to debt payments); *supra* notes 125-32 and accompanying text (discussing Brazilian opposition to debt-for-nature swaps based on alleged illegitimacy of external debt).

266. See *supra* note 152 and accompanying text (discussing unenforceability of host country's obligations in debt-for-nature swaps).

267. Interview with Debra James, *supra* note 250. Some feel, however, that once a "Lula" administration assumes power, it will moderate its nationalist views to reflect the new realities of international cooperation, and therefore allow debt-for-nature swaps to proceed. Interview with Paulo Roberto França, *supra* note 203.

268. PROPOSAL OUTLINE, *supra* note 215, art. 1.

269. See *supra* notes 216-24 and accompanying text (discussing financial elements of proposed legislation).

270. See *supra* notes 219-24 and accompanying text (discussing payment plans of proposed legislation).

271. See *supra* notes 42-45 and accompanying text (discussing debt-for-nature swaps' leveraging effect on international NGO's investment).

international NGOs will not need to raise as much money as is currently needed to sustain viable debt-for-nature swap projects.<sup>272</sup> As a result, the Brazilian NGOs that receive donations for debt-for-nature swaps will experience a substantial increase in their spending power. The prospect of this increased spending power, in turn, may cause some of the Brazilian NGOs that remain opposed to debt-for-nature swaps<sup>273</sup> to moderate their views once they perceive the swaps as a significant new source of funding.<sup>274</sup>

The more attractive financial provisions of the proposed legislation<sup>275</sup> will also make debt-for-nature swap transactions less vulnerable to a secondary market price increase resulting from the restructuring of the Brazilian commercial external debt.<sup>276</sup> Under the new provisions, the secondary market discount on the external debt does not have to be as steep as is currently required for the conversion to be financially viable.<sup>277</sup>

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272. See *supra* notes 15-18 and accompanying text (discussing mechanics of debt-for-nature swap transaction).

273. See FBCN SEMINÁRIO, *supra* note 13, at 12-13. Some Brazilian NGOs remain opposed to debt-for-nature swaps due to the traditional arguments concerning national sovereignty. *Id.* Other Brazilian NGOs, notably those of smaller scale, oppose debt-for-nature swaps because of the inherent disadvantages of small-scale NGOs relative to large-scale NGOs to attract international donors for debt-for-nature swap projects. *Id.* at 14.

274. Interview with Paulo Roberto França, *supra* note 203.

275. See *supra* notes 216-24 and accompanying text (discussing financial provisions of proposed legislation).

276. See *supra* note 168 and accompanying text (discussing impact of restructuring on secondary market price of external debt); see also *supra* note 165 and accompanying text (discussing completion of Brazil's commercial debt restructuring agreements).

277. See *supra* notes 216-24 and accompanying text (discussing financial provisions of proposed legislation, which give international NGOs high percentage of face value of donated debt).

Furthermore, a restructuring in practice does not guarantee that the debtor country will abide by its debt obligations. *Brazil: Debt - Brazil Gets Serious*, Reuter Textline - Euromoney Trade Finance and Banker Int'l, Aug. 26, 1991, available in LEXIS, Nexis Library, NSAMER File. Brazil, for example, has a reputation of not honoring its debt agreements, such as the 1988 restructuring agreement, on which Brazil defaulted within months. *Id.*; see ENCYCLOPAEDIA BRITANNICA, 1989 BRITANNICA BOOK OF THE YEAR 496 (1989) (stating that 1988 agreement rescheduled U.S.\$62.1 billion of commercial debt over 20 years, and provided for U.S.\$5.2 billion in new money from World Bank, a trade deposit facility, and bonds). This perpetual uncertainty concerning repayment will guarantee that a certain discount, no matter how small, will always be applied to shares of the Brazilian external debt on the secondary market. See *supra* note 15 (explaining that secondary market discount reflects impaired creditworthiness of debtor country in response to perception that country will not make full payments on its external debt).

Therefore, under the terms of the proposed legislation, the essential leveraging effect of the debt conversion should not be lost on account of the Brazilian external commercial debt restructuring agreement.

Furthermore, the fact that the proposed legislation will create a federal statute should reduce, if not eliminate, the air of instability surrounding the current Brazilian debt-for-nature swap process.<sup>278</sup> No longer will an administration be able to unilaterally revoke existing debt-for-nature swap regulations.<sup>279</sup> Any changes in the debt-for-nature swap regulations will also have to be approved by the National Congress.<sup>280</sup> An administration unfavorable to debt-for-nature swaps, however, may still be able to affect the debt-for-nature swap program under the Proposal, given the broad authority granted to the Executive Branch to allocate the funds for the program<sup>281</sup> and to implement guidelines for the evaluation of proposed projects.<sup>282</sup>

Furthermore, the proposed legislation attempts to streamline the bureaucratic procedures developed by Resolution 1840.<sup>283</sup> The proposed legislation provides stricter guidelines that the Commission must observe when it evaluates debt-for-nature swap project proposals.<sup>284</sup> By limiting the broad discretionary powers of the Commission, these guidelines should reduce the risks of arbitrariness and corruption in the evaluation process.<sup>285</sup>

Finally, the proposed legislation, drafted after consultations

278. Interview with Dr. Dagoberto Koehntopp, *supra* note 5; *see supra* notes 261-67 and accompanying text (discussing instability of current regulations).

279. *See supra* note 179 (discussing legal effect and revocation of administrative acts).

280. *See supra* note 179 (discussing power of law over administrative acts).

281. *See supra* note 229 and accompanying text (discussing Executive's authority to allocate funds for debt-for-nature swaps).

282. *See supra* notes 230-34 and accompanying text (discussing Executive's authority to declare guidelines for evaluation of debt-for-nature swap projects).

283. Resolution 1840, *supra* note 147, arts. 3-9, D.O., July 17, 1991, at 14,153; *Brazil Seeks to Facilitate Debt-for-Nature Swaps*, *supra* note 5 (noting that one objective of new legislation is to streamline prior regulations).

284. *See supra* notes 230-34 and accompanying text (discussing rules to be established by Executive for evaluating debt-for-nature swap projects).

285. Interview with Dr. Dagoberto Koehntopp, *supra* note 5; *see supra* note 260 and accompanying text (discussing corruption scandals in Brazilian government and NGOs' fears of corruption in debt-for-nature swap process).

with various sectors of Brazilian society,<sup>286</sup> provides for the useful expansion of debt swaps to social and cultural projects.<sup>287</sup> This expansion not only removes debt-for-nature swaps from the public limelight, but also includes in a larger debt swap process other Brazilian NGOs. These Brazilian NGOs may perceive themselves as having been unfairly deprived of the institutional benefits which come from debt swaps and relations with international NGOs.<sup>288</sup> The inclusion of these groups should help reduce further the opposition to debt-for-nature swaps as the debt swap umbrella grows and more people benefit from other debt swap transactions.

*B. Policy Recommendations for the United States Government  
and NGOs*

The shift in Brazilian policies towards debt-for-nature swaps presents some important implications for the policies of the U.S. government and U.S. NGOs. Even though the trend in Brazil is clearly towards supporting debt-for-nature swaps,<sup>289</sup> there are still several steps that the United States can take to mitigate the lingering Brazilian opposition to debt-for-nature swaps and to assure that future swaps are carried out efficiently and effectively. In this manner the interests of the U.S. government<sup>290</sup> and U.S. NGOs<sup>291</sup> in these swaps will be adequately protected.

1. Presentation of Debt-for-Nature Swaps: the Shift in Focus

Commentators currently depict debt-for-nature swaps as a transaction originating with an international NGO that acquires a developing country's debt titles in order to preserve an area of land in that country.<sup>292</sup> The point of reference for a debt-for-

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286. See *supra* note 215 and accompanying text (discussing consultation process of proposed legislation).

287. See *supra* notes 235-37 and accompanying text (discussing proposed legislation's increased scope of debt-for-nature swap projects).

288. Interview with Paulo Roberto França, *supra* note 203. The benefits of a debt-for-nature swap to a local NGO include increased funding and expertise in conservation activities. Dietz, *supra* note 149, at 7.

289. See *supra* notes 133-73 and accompanying text (discussing changes in Brazilian views of debt-for-nature swaps).

290. See *supra* notes 58-61 and accompanying text (discussing interests of U.S. government in debt-for-nature swaps).

291. See *supra* notes 42-50 and accompanying text (discussing interests of U.S. NGOs in debt-for-nature swaps).

292. See *supra* notes 15-22 and accompanying text (describing debt-for-nature

nature swap should switch, however, to the perspective of the local NGO. A debt-for-nature swap, therefore, is a transaction through which a local NGO interested in preserving an area of land seeks an international NGO to help plan a conservation strategy for the area financed through a debt conversion. In other words, one should depict a debt-for-nature swap solely as a financing mechanism for a pre-approved conservation plan originating in the developing country. In this manner no one can accuse the international NGO of attempting to control either the developing country's resources or the conservation plan's priorities.

Control of the debt-for-nature swap project's priorities is important to the Consortium of Brazilian NGOs.<sup>293</sup> The Consortium has made clear that only debt-for-nature swaps whose priorities are established by the Brazilian government or Brazilian NGOs are acceptable.<sup>294</sup> A U.S. NGO, however, may face undesirable tax consequences if it appears to grant complete control of a debt-for-nature swap project to a local NGO.<sup>295</sup> U.S. tax law allows deductions for the U.S. NGO's contribution to a local NGO only if the U.S. NGO exercises sufficient discretion and control over its contribution to ensure that the local NGO spends it in a manner consistent with the U.S. NGO's functions and purposes.<sup>296</sup>

This apparent conflict between U.S. tax law and NGO policy can be overcome by a carefully negotiated agreement between the Brazilian and U.S. NGOs. Such an agreement can convince the Technical Commission that the Brazilian NGO established the priorities of the project while simultaneously satisfying the U.S. tax law requirement that the U.S. NGO exert sufficient control over the use of its contributions to the project. A closer look

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swaps). For examples of the traditional description, see Lachman, *supra* note 1, at 143, and Alagiri, *supra* note 3, at 494.

293. See *supra* note 163 and accompanying text (describing Consortium of Brazilian NGOs).

294. CONSÓRCIO, *supra* note 4, at 5.

295. See *supra* note 151 and accompanying text (discussing tax consequences of ceding control of debt-for-nature swap project to local NGO).

296. Rev. Rul. 66-79, 1966-1 C.B. 48; see *supra* note 151 and accompanying text (discussing tax consequences of ceding control of debt-for-nature swap project to local NGO).

at Brazil's first debt-for-nature swap<sup>297</sup> demonstrates how this can be achieved.

The Agreement of Cooperation Between The Nature Conservancy<sup>298</sup> and Fundação Pró-Natureza ("FUNATURA")<sup>299</sup> explicitly states that U.S. tax law<sup>300</sup> requires The Nature Conservancy to exercise sufficient control over its contributions to ensure that the contributions are used to fulfill The Nature Conservancy's objective of protecting biological diversity.<sup>301</sup> This contribution provision agreement appears in the context of other language in the agreement granting FUNATURA apparent control over the priorities of the debt-for-nature swap project, including the responsibility for preparing the implementation plan for the debt-for-nature swap project.<sup>302</sup> The agreement gives The Nature Conservancy the task of assisting and approving FUNATURA's implementation plan.<sup>303</sup> The fact that this agreement, in conjunction with FUNATURA's agreement with

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297. See *supra* notes 205-10 and accompanying text (discussing first Brazilian debt-for-nature swap).

298. See *supra* note 208 and accompanying text (describing The Nature Conservancy).

299. AGREEMENT OF COOPERATION BETWEEN THE NATURE CONSERVANCY AND FUNDAÇÃO PRÓ-NATUREZA, *supra* note 208; see *supra* note 206 and accompanying text (describing FUNATURA).

300. Rev. Rul. 66-79, 1966-1 C.B. 48; see *supra* note 151 and accompanying text (discussing control requirements of U.S. tax law).

301. AGREEMENT OF COOPERATION BETWEEN THE NATURE CONSERVANCY AND FUNDAÇÃO PRÓ-NATUREZA, *supra* note 208, art. 4(e).

302. *Id.* art. 3. FUNATURA was given the responsibility of: (a) hiring the project manager; (b) preparing the Park Project Plan (to be approved by The Nature Conservancy), including a preserve design, a land acquisition plan, a management plan, and a fundraising plan; (c) all fundraising activities for the support of the Park Project Plan; and (d) the actual implementation of the Park Project Plan. *Id.*

303. *Id.* art. 4. The Nature Conservancy's duties are limited to: (a) *assisting* FUNATURA in the selection of the project manager; (b) providing a short-term conservation fellowship for the project manager; (c) providing technical assistance in the preparation of the Park Project Plan, consisting of hiring an advisor to the project manager; (d) *helping* to make travel arrangements in the United States for the project manager and his staff to seek funding for the project; and (e) *accepting* contributions for the Park Project Plan subject to the requirements of U.S. tax law. *Id.* (emphasis added). Interestingly, The Nature Conservancy exercises control over the contributions it *accepts* on behalf of the Park Project Plan, *id.* (emphasis added), while FUNATURA is charged with actually procuring the contributions for the project. *Id.* art. 3. This description of the project's fundraising duties may seem curious given that the Nature Conservancy committed itself to raising the U.S.\$850,000 it estimated was necessary to purchase the U.S.\$2.2 million in Brazilian external debt needed to finance the project. THE NATURE CONSERVANCY, GRANDE SERTÃO VEREDAS NATIONAL PARK DEBT CONVERSION PROPOSAL, *supra* note 209, at 12.

the Brazilian Institute for the Environment and Renewable Natural Resources ("IBAMA"),<sup>304</sup> makes up the only debt-for-nature swap project approved by the Technical Commission to date is instructive. One can conclude that a provision allowing an international NGO to ensure that its contributions are being used for the fulfillment of its objectives, if included in a carefully-worded agreement, does not significantly offend the local control of the priorities of the debt-for-nature swap project.

## 2. Multilateral Development Bank Debt: A Potential New Source for Debt-for-Nature Swaps

The United States should encourage Multilateral Development Banks (MDBs),<sup>305</sup> such as the International Bank for Reconstruction and Development (the "World Bank"),<sup>306</sup> to donate or sell at a discount their shares of Brazilian external debt for debt-for-nature swaps. Brazilians view their MDB debt as more legitimate than commercial bank debt,<sup>307</sup> and would therefore raise less opposition to a debt-for-nature swap which converted MDB debt.<sup>308</sup> The MDB reluctance to donate or sell at a discount developing countries' debts<sup>309</sup> appears to neglect the fact that several developing countries owe so much to MDBs that it is unlikely that they will be able to repay their debts.<sup>310</sup> Rather than writing off such loans, as is often done,<sup>311</sup> these banks could either sell the loans on the secondary market or donate them with the caveat that the debtor country must repay a percentage of the loans in local currency towards a conservation or other

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304. CONVÊNIO, *supra* note 207; *see supra* note 186 and accompanying text (describing IBAMA).

305. *See supra* note 169 and accompanying text (defining MDBs and discussing their lack of participation in debt-for-nature swaps).

306. *See* JANIS, *supra* note 74, at 291. The World Bank, owned and operated by more than one hundred countries, promotes economic and social progress in developing countries by helping these countries raise their productivity and standards of living. *Id.*

307. *See supra* notes 169-73 and accompanying text (explaining why Brazilians see MDB debt as more legitimate than commercial debt).

308. CONSÓRCIO, *supra* note 4, at 3.

309. *See supra* note 169 (discussing MDB reluctance to sell or donate developing country debt due to possible violations of MDB charters and risk of impairing MDB credit rating on international capital markets).

310. Asiedu-Akrofi, *supra* note 19, at 583.

311. *Id.*



socially useful program.<sup>312</sup>

The United States has advocated a slightly different approach for the MDBs in the International Development and Finance Act of 1989.<sup>313</sup> The International Development and Finance Act requires the Secretary of the Treasury to direct the U.S. Executive Directors of the MDBs to negotiate for the creation of a department in each respective bank that will actively promote, coordinate, and facilitate debt-for-nature swaps.<sup>314</sup> The role of the MDB would be to assist debtor countries to reduce and restructure their debts by using a portion of a MDB loan to buy back their private commercial debt at a discount on the secondary market.<sup>315</sup> The U.S. directors would also encourage the MDBs to promote collaboration between debtor governments and local and international NGOs in the implementation of debt-for-nature swaps.<sup>316</sup> While the U.S. position concerning MDB participation in debt-for-nature swaps seems to be a useful compromise between the sale or donation of MDB debt and the MDB reluctance to do so, it is not a substitute for direct MDB participation through donations or sales. The U.S. policy risks failure because it does not address the Brazilian viewpoint that the Brazilian external commercial debt is illegiti-

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312. *Id.*

313. Pub. L. No. 101-240, § 1614, 103 Stat. 2508 (1989) (codified at 22 U.S.C. § 262p-4i(a) (1988 & Supp. III 1991)); *see supra* note 169 (discussing policy of International Development and Finance Act of 1989 in context of MDB reluctance to participate in debt-for-nature swaps).

314. 22 U.S.C. § 262p-4i(a). Section 262p-4i(a) states in pertinent part as follows: The Secretary of the Treasury shall direct the United States Executive Directors of the multilateral development banks to—

(1) negotiate for the creation in each respective multilateral development bank, except where the Secretary of the Treasury determines that the provisions of this subsection have previously been met, of a department that will—

(A) be responsible for environmental protection and resource conservation, including support for restoration, protection, and sustainable use policies;

(B) develop and monitor strict environmental guidelines to govern lending activities; and

(C) actively promote, coordinate and facilitate debt-for-nature exchanges and the restoration, protection, and sustainable use of tropical forests, renewable natural resources, endangered ecosystems and species in debtor countries . . . .

*Id.*; *see supra* note 169 (discussing MDB role in debt-for-nature swaps).

315. 22 U.S.C. § 262p-4i(a)(3).

316. 22 U.S.C. § 262p-4i(a)(4).

mate.<sup>317</sup> Furthermore, the policy may prove impracticable due to restrictions in commercial loan agreements that prevent debtor countries from repurchasing their own debt without the consent of the lending bank.<sup>318</sup>

### 3. Bilateral Credit Agency Debt: Encouraging Brazilian Participation in the Enterprise for the Americas Initiative

In addition to MDB debt, Brazilians consider bilateral credit agency debt,<sup>319</sup> such as loans incurred under Commodity Credit Corporation<sup>320</sup> or Export-Import Bank<sup>321</sup> programs, more legitimate than commercial bank debt.<sup>322</sup> The United States should therefore construe liberally the eligibility requirements for the debt-for-nature swap aspects of the Enterprise for the Americas Initiative (the "Initiative")<sup>323</sup> so as to allow Brazilian participation in that part of the Initiative. Current eligibility requirements for debt reduction under the Initiative require a Latin American or Caribbean country to meet certain conditions concerning macroeconomic policies, investment policies, and debt restructuring agreements, among other requirements.<sup>324</sup> Due to concerns that these strict requirements would effectively preclude the participation of a number of Latin American countries, including Brazil,<sup>325</sup> the U.S. Congress allowed the President considerable flexibility in applying them if a country is mak-

317. See *supra* note 315 and accompanying text (discussing MDB assistance in debtor countries' commercial debt buy-backs); *supra* notes 125-32 and accompanying text (discussing Brazilian view that Brazilian external commercial debt is illegitimate).

318. See Gibson & Schrenk, *supra* note 9, at 4 n.9. These provisions are intended to guard against the possibility of a debtor country causing the secondary market price of its own debt to decrease by defaulting or threatening to default, and then repurchasing its debt at discounted prices. *Id.*

319. See *supra* note 26 and accompanying text (describing bilateral credit agency debt in debt-for-nature swap context).

320. See *supra* note 36 and accompanying text (discussing Commodity Credit Corporation and its role in Enterprise for Americas Initiative).

321. See *supra* note 37 and accompanying text (discussing Export-Import Bank and its role in Enterprise for Americas Initiative).

322. See *supra* notes 170-73 and accompanying text (explaining reasons for perceived greater legitimacy of BCA debt).

323. See *supra* notes 28-41 and accompanying text (discussing Initiative).

324. Enterprise for the Americas Act of 1992, Pub. L. No. 102-549, tit. VI, § 703, 106 Stat. 3664-65 (1992) (to be codified at 22 U.S.C. § 2430b); see *supra* note 32 (discussing eligibility requirements for debt-for-nature swap provisions of Initiative).

325. Gibson & Schrenk, *supra* note 9, at 20; see Greener, *supra* note 150, at 146 (noting that Initiative's conditions may make it impossible for environmentally crucial developing countries such as Brazil and Peru to participate).

ing significant progress toward meeting the requirements.<sup>326</sup>

Brazil's participation in the Initiative's debt-for-nature provisions is still unclear. As mentioned above, Brazil has just completed commercial debt restructuring negotiations,<sup>327</sup> and has recently carried out some structural reforms designed to liberalize foreign investment.<sup>328</sup> The Franco administration is provisionally receptive to the Initiative,<sup>329</sup> but awaits a clarification of how strictly the demands for macroeconomic reform and an open investment regime will be interpreted by the U.S. administration.<sup>330</sup> Furthermore, the Franco administration will have to convince the Brazilian NGOs that the requirements do not amount to what other Latin American NGOs have denounced as "eco-imperialism."<sup>331</sup> A liberal interpretation of the eligibility requirements by the United States would therefore be the best manner of encouraging Brazilian participation in the debt-for-nature swap provisions of the Enterprise for the Americas Initiative.

#### 4. Strengthening Relationships with Brazilian NGOs

U.S. NGOs should continue to build relationships with Bra-

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326. 22 U.S.C. § 2430b(b). Section 2430b(b) gives the President the authority to determine, consistent with the Initiative's eligibility requirements, when a country is eligible for benefits under the Initiative. *Id.*; see *supra* note 32 (discussing eligibility requirements for participation in debt-for-nature swap provisions of Initiative).

327. See *supra* note 165 and accompanying text (discussing Brazilian commercial debt restructuring).

328. Carrie B. Clark, *The Enterprise for the Americas Initiative: Supporting a "Silent Revolution" in Latin America*, BUS. AM., Sept. 23, 1991, at 6. Brazil is currently reducing tariffs and other import barriers, beginning a privatization program, and developing a New Industrial Property Code designed to strengthen the protection of intellectual property rights and pharmaceutical patents. *Id.* Furthermore, Brazil is dismantling import barriers by abolishing its list of banned imports and lowering average import tariffs. James Brooke, *Brazil Opens Its Borders to Goods from Abroad*, N.Y. TIMES, Aug. 16, 1993, at D1.

329. Interview with Paulo Roberto França, *supra* note 203; see *supra* note 216 and accompanying text (noting that proposed Brazilian debt-for-nature swap legislation includes specific provision for donation of bilateral debt).

330. Interview with Paulo Roberto França, *supra* note 203.

331. Gibson & Schrenk, *supra* note 9, at 30 (citing INSTITUTO DE ECOLOGÍA POLÍTICA, CONSECUENCIAS POLÍTICAS Y AMBIENTALES DE LA "INICIATIVA DE LAS AMÉRICAS" PARA EL MOVIMIENTO ECOLÓGICO LATINOAMERICANO [INSTITUTE FOR POLITICAL ECOLOGY, ENVIRONMENTAL AND POLITICAL CONSEQUENCES OF THE 'INITIATIVE FOR THE AMERICAS' ON THE LATIN AMERICAN ENVIRONMENTAL MOVEMENT] (1990) and Manifesto from the Conference of Latin American NGOs meeting at Las Leñas, Argentina (Apr. 19, 1991) (both on file with *The George Washington Journal of International Law and Economics*)).

zilian NGOs, including those NGOs that currently oppose debt-for-nature swaps. Relationships among NGOs strengthen the debt-for-nature swap process because the relationship between the international NGO and the local NGO is perhaps the most important link in a debt-for-nature swap.<sup>332</sup> Such a relationship can assure a doubtful local NGO that the international NGO is not interested in controlling local territory or imposing its priorities upon the local NGO. This understanding, along with the scientific expertise and potential increase in funds that the local NGO may receive from a debt-for-nature swap,<sup>333</sup> may convince the local NGO to change its opposition to debt-for-nature swaps.<sup>334</sup>

Furthermore, the increased expertise and funding arising out of a relationship with an international NGO allows a local NGO to exert more influence in the environmental and development policies of its country.<sup>335</sup> A strong local NGO can therefore play a key role in confronting issues of sovereignty<sup>336</sup> and in educating the local public about sustainable development programs.<sup>337</sup> In addition, the strengthening of the local NGO is imperative to the international NGO's interests because the local NGO plays an essential role in the enforcement of a local government's obligations under a debt-for-nature swap agreement.<sup>338</sup> Local NGOs are in better positions than international NGOs to act as "watchdogs" to verify that the local government properly converts the donated debt according to the purposes of the debt-for-nature swap.<sup>339</sup> The proximity of local NGOs, along with their knowledge of local priorities and their stakes in the ultimate outcome of the debt-for-nature swap, makes local NGOs

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332. Greener, *supra* note 150, at 152; see Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 *GEO. L. J.* 675, 693-94 (1993) (discussing increasing importance of NGOs in "negotiation, ratification, implementation, and enforcement of international environmental agreements").

333. See *supra* note 274 and accompanying text (discussing financial rewards of debt-for-nature swaps to local NGO).

334. Interview with Paulo Roberto França, *supra* note 203.

335. Dietz, *supra* note 149, at 7. "NGOs try to influence national governments directly and indirectly by increasing public awareness and public pressures on national legislatures." Weiss, *supra* note 332, at 694.

336. Gibson & Curtis, *supra* note 1, at 344.

337. *Id.*

338. See *supra* note 152 and accompanying text (discussing unenforceability of debt-for-nature swaps).

339. Greener, *supra* note 150, at 153.

the focal point of political and legal action against the local government.<sup>340</sup> Indeed, the relationship between the two NGOs involved in Brazil's first debt-for-nature swap<sup>341</sup> demonstrates the local NGO's dominant enforcement role. For example, the agreement between The Nature Conservancy<sup>342</sup> and FUNATURA<sup>343</sup> does not include any enforcement provisions,<sup>344</sup> but the complementary agreement<sup>345</sup> between FUNATURA and IBAMA,<sup>346</sup> a government agency, does include a choice-of-forum provision.<sup>347</sup> Although legally such a provision may give a local NGO the requisite standing to enforce the agreement in court, in practice the local NGO may lack the financial resources and experience necessary to do so.<sup>348</sup> It is therefore in the international NGO's best interests that the local NGO have sufficient political clout to be capable of influencing government decision-making and, if influence is not effective, sufficient financial resources to bring a successful action against the government.<sup>349</sup> A strong relationship between the local and international NGOs is an effective way to ensure that the former will possess such influence and resources.

### CONCLUSION

The evolution of Brazilian perceptions of national sovereignty to include notions of international responsibility for domestic activities has attenuated the domestic opposition to debt-for-nature swaps. These vicissitudes in Brazilian attitudes will be-

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340. *Id.*

341. *See supra* notes 205-10 and accompanying text (discussing first Brazilian debt-for-nature swap).

342. *See supra* note 208 and accompanying text (describing The Nature Conservancy).

343. *See supra* note 206 and accompanying text (describing Fundação Pró-Natureza).

344. AGREEMENT OF COOPERATION BETWEEN THE NATURE CONSERVANCY AND FUNDAÇÃO PRÓ-NATUREZA, *supra* note 208.

345. CONVÊNIO, *supra* note 207.

346. *See supra* note 186 and accompanying text (describing IBAMA).

347. CONVÊNIO, *supra* note 207, cl. 9. The agreement selects the Federal District as the forum for the determination of any doubts or questions which cannot be resolved by the direct understanding of the parties. *Id.*

348. Gibson & Curtis, *supra* note 1, at 342.

349. *See Greener, supra* note 150, at 163 n.292 ("Although international [NGOs] may have no legal recourse if the agreement is not adhered to, they remain legally responsible to their donors and tax authorities for assuring that the agreement is not breached.").

come codified should the Brazilian Congress adopt the Franco administration's proposed debt-for-nature swap reforms. These reforms will turn what is now a restrictive debt-for-nature swap process into a promising framework providing for an increased number of financially and environmentally viable debt-for-nature swaps on Brazilian soil. The swaps and the relationships established through them will strengthen the already growing Brazilian environmental movement and promote sustainable development practices in a country where these practices were not observed in past development plans. Furthermore, the changing attitudes in Brazil present a propitious occasion for the U.S. government and NGOs to modify U.S. policies toward debt-for-nature swaps. By changing the focal point in the description of debt-for-nature swaps, encouraging multilateral development banks and bilateral credit agencies to enter the debt-for-nature swap forum, and continuing to build relationships with Brazilian NGOs, the United States will have taken important steps to ensure the success of the proposed reforms and the protection of U.S. interests in Brazilian debt-for-nature swaps.

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