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Debt-for-Nature Swaps: Environmental Investments Using Taxpayer Funds Without Adequate Remedies for Expropriation

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Debt-for-Nature Swaps: Environmental Investments Using Taxpayer Funds Without Adequate Remedies for Expropriation

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As in much of the tropics, the people living in the Ranomafana rainforest of Southeastern Madagascar are the forest's worst enemy, slashing and burning huge swaths of trees to clear land for crops. . . .

. . . At the turn of the century, at least a quarter of Madagascar was forested; now half that is gone, most of the countryside exposed to the baking sun and gouging rain.¹

I. INTRODUCTION

One hundred sixty-five million years ago, the world's fourth largest island, Madagascar, was separated from eastern Africa.² The island became a "living laboratory" for the evolution of species of

1. Knox, *No Man an Island*, SIERRA, May-June 1989, at 81.

2. Jolly, *Madagascar: A World Apart*, NAT'L GEOGRAPHIC, Feb. 1987, at 149, 160.

plants and animals that existed nowhere else.³ As a result, Madagascar, a country slightly smaller than the State of Texas, contains twelve thousand plant species, over sixty percent of which are endemic.⁴ Only twelve of its four hundred species of amphibians and reptiles exist elsewhere.⁵ Yet, the present flora represents just a small portion of the flora that existed on the island before almost four-fifths of the forest cover was destroyed.⁶ The forest along the eastern ridges of the island once may have covered at least sixty-two thousand square kilometers and now, because of farming pressures, it has been reduced to about twenty-four thousand square kilometers.⁷ By the end of this decade, if the pressures are not relieved, little of Madagascar's primary forest will remain intact.⁸ Dozens of endemic plants are now becoming extinct and hundreds or perhaps thousands of other plants will be reduced to just a few sparse populations.⁹

Madagascar's forests and their inhabitants are no match for the force of Madagascar's economic pressures. With a per capita income of less than three hundred dollars,¹⁰ an average annual inflation rate of more than twenty percent,¹¹ an external debt of more than three billion dollars,¹² and a population that depends on agriculture for its income,¹³ there are insurmountable pressures on the government and the population to resort to the forest for income. Four-fifths of Madagascar stands barren, burned by subsistence farmers and cattle herders.¹⁴ Peasants slash and burn trees to plant rice and corn in land that will soon be infertile.¹⁵ The government encourages peasants to burn the forest to clear it for their crops.¹⁶

To counteract the destructive effects of the economy and poor agricultural management on the forests of Madagascar and other threatened forests in Latin America, Asia, and Africa, environmental

3. *Id.* at 149.

4. *Id.* at 160.

5. *Id.*

6. N. MYERS, *THE PRIMARY SOURCE* 54-55 (1984).

7. *Id.* at 55.

8. *Id.*

9. *Id.*

10. WORLD WILDLIFE FUND, *A DEBT-FOR-NATURE PROGRAM FOR MADAGASCAR: A PROPOSAL SUBMITTED TO: UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, BUREAU FOR AFRICA* 4 (1989) [hereinafter *WWF PROPOSAL TO USAID*].

11. EUROPA PUBLICATIONS LTD., *EUROPA WORLD Y.B.* 1990, at 1659 (1990).

12. *Id.*

13. AMERICAN EMBASSY ANTANANARIVO, U.S. DEP'T OF COMMERCE, *FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE UNITED STATES* 3, 4 (1987).

14. *Id.* at 162.

15. *Id.* at 163.

16. *Id.* at 176.

organizations have pioneered debt-for-nature swaps.¹⁷ Such swaps involve "an exchange or cancellation of a foreign country's debt in return for the debtor country's commitment to use a given amount of local currency funds to protect national parks, establish environmental education programs or train people in natural resource conservation or management."¹⁸ In a debt-for-nature swap, a non-governmental organization ("NGO")¹⁹ seeks out threatened environmental resources and proposes a swap transaction to the government and central bank of a debtor country ("debtor country" or "host country") that has the environmental resources.²⁰ Once the debtor country government and central bank approve the proposal, the NGO purchases foreign-currency denominated debt of the debtor country in the international debt market at a substantial discount.²¹ The NGO presents the debt to the central bank of the debtor country for redemption in local currency.²² The debt is officially retired and the NGO uses the local currency proceeds to fund environmental projects in the debtor country.²³

Debt-for-nature swaps are analogous to debt-for-equity swaps. In a debt-for-equity swap, "an investor buys a portion of a debtor country's debt and exchanges the debt for an equity interest in a local firm or another local asset, instead of collecting the hard currency originally borrowed."²⁴ Unlike debt-for-equity swaps, the purchaser of the debt in a debt-for-nature swap (the NGO) does not take title to an asset in the debtor country. Rather, the NGO obtains a commitment from the debtor-country government to protect an endangered habitat²⁵ or to train people in natural resource conservation and sustainable development.²⁶ In addition, debt-for-equity swaps are of a

17. Debt-for-nature swaps involve the acquisition of debt by a conservation organization and its redemption in local currency to be used for conservation purposes. See Cody, *Debt for Nature Swaps in Developing Countries: An Overview of Recent Conservation Efforts*, 88-647 ENR Cong. Res. Serv. 1 (Sept. 26, 1989). Bolivia, Costa Rica, Ecuador, Zambia, Madagascar, and the Philippines each concluded debt-for-nature swaps between December, 1987, and April, 1989. Comment, *Debt-for-Nature Swaps: Assessing the Future*, 6 J. CONTEMP. HEALTH L. & POL'Y 319, 326-34 (1990).

18. Cody, *supra* note 17, at 1.

19. Among the NGO's that have completed debt-for-nature swaps are Conservation International, the World Wildlife Fund, and the Nature Conservancy. Comment, *supra* note 17, at 326-34.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Intrados Group, *Debt for Nature: The Second Year*, 2 SWAPS: NEWSL. NEW FIN. INSTRUMENTS, Nov. 1988, at 1, 4.

26. WORLD COMM'N ON ENV'T & DEV., FROM ONE EARTH TO ONE WORLD 43 (1987).

pecuniary nature: the investor puts hard currency into an investment from which she expects a return. The pecuniary nature of equity investments makes compensation an appropriate remedy in the event of expropriation by a host country. On the other hand, debt-for-nature swaps are non-pecuniary: the NGO invests in the host country's environment, with no expectation of financial return. This makes compensation an inadequate remedy in the event of host country expropriation.

If a host country interferes with the environmental investor's rights to "protect and administer"²⁷ the swap territory, customary international law provides that this interference constitutes expropriation, although the swap investor does not possess title to the swap property.²⁸ Furthermore, assuming the agreement between the environmental investor, the NGO, and the host country government is contractual, if the host country prohibits performance of the contract, an expropriation also occurs, because contract rights are considered to be property under international law.²⁹

Not all developing countries are good candidates for debt-for-nature swaps. The ideal circumstances for a debt-for-nature swap involve a debtor country with a low debt rating, so creditor banks are willing to discount the debt,³⁰ and with debt that is not easily convertible, so the creditor bank does not have as many opportunities to sell

"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." *Id.* In practical terms, sustainable development requires a government to make effective use of renewable resources so that "exploitation rates stay within the limits of sustainable yields and so that finances are available to regenerate resources and deal with all linked environmental effects." *Id.* at 82. As for non-renewable resources such as minerals, governments must ensure that: 1) leaseholders engaged in exploration add to proven reserves at least the amount of the substance extracted; 2) the ratio of production to proven reserves remains below a pre-approved limit; 3) funds generated by royalties are used in a way that compensates for the nation's declining income when the resource deposit is exhausted; and 4) the leaseholder is responsible for land restoration and other environmental control measures in the mined area. *Id.* at 82-83.

27. See WWF Proposal to USAID *supra* note 10, at 9-16.

28. Verwey & Schrijver, *The Taking of Foreign Property Under International Law: A New Legal Perspective?*, 1984 NETH. Y.B. INT'L L. 5.

29. See Christie, *What Constitutes a Taking of Property Under International Law*, 1962 BRIT. Y.B. INT'L L. 307, 309, 316-18 & 321. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 1 (May 25), and Norwegian Claims Case (Nor. v. U.S.), Hague Ct. Rep. 2d (Scott) 39 (1922). The international forum held that states expropriated contract rights by seizing the contract's related physical assets. The expropriation made the contract rights essentially useless without the physical assets themselves. Christie, *supra*, at 311, 316. Other cases have involved such a subtle interference with contract rights that there was no clear seizure of property. *Id.* at 316. Where the state "irremediably interfere[d]" with contract rights, however, there was an expropriation that required compensation. *Id.* at 317.

30. Comment, *supra* note 17, at 323, 336.

the debt on the secondary market to other for-profit financial institutions.³¹

The swap's success may turn on whether the debtor country has sufficient motivation to pursue environmental goals.³² The pressures to use the land in a more short-term, economically advantageous and environmentally destructive way are severe. Although developing countries that permit swaps are concerned about protecting their forests, they often lack the funds for such protection. Debt-for-nature swaps provide developing countries with a way to protect their ecosystems and to reduce their debt burdens.³³ Even so, developing countries must choose debt-for-nature swaps from among many competing interests, including using those environmental resources to respond to poverty, rapid population growth, and inflation. These economic difficulties work against the long-term success of the swap and increase the possibility of host country expropriation.³⁴ Without strong motivation to comply with a debt-for-nature swap agreement, a debtor country may surrender to economic and political pressure to allow destruction of the protected area in furtherance of short-term economic goals. As one commentator has observed, "Conservation always takes a back seat in times of economic distress."³⁵

Unfortunately, NGO's fail to account adequately for economic and developmental pressures when drafting debt-for-nature swap agreements.³⁶ The agreements do not address the possibility of expro-

31. The international secondary debt market "developed originally so that banks could swap loans among themselves thereby avoiding overexposure to any singled troubled economy." B. Bramble, *How Debt Can Be Swapped for Trees 2* (May 1988) (unpublished report prepared by and available from National Wildlife Federation, Washington, D.C.).

32. Mushkat, *International Environmental Law in the Asia-Pacific Region: Recent Developments*, 20 CAL. W. INT'L L. REV. 21, 38 (1989).

33. *Debt-for-Nature Swaps: A New Means of Funding Conservation in Developing Nations*, 11 Env't Rep. (BNA) 301 (May 11, 1988).

34. Leonard & Morell, *Emergence of Environmental Concern in Developing Countries: A Political Perspective*, 17 STAN. J. INT'L L. 281, 306-07 (1981). Madagascar's protected areas are "threatened by rapid deforestation due to slash-and-burn cultivation, illegal logging, poaching, drainage of wetlands, or overgrazing by cattle and goats." Comment, *supra* note 17, at 334. The motivation for these activities is economic survival. The destructive effects of domestic pressures on environmental protection is also evident in the lack of success countries have had in implementing environmental protection laws. Mushkat, *supra* note 32, at 38 (discussing Asia); see also WORLD COMM. ON ENV. & DEV., *supra* note 9, at 68-70, 73-75; World Wildlife Fund, *Madagascar Fact Sheet 2* (Aug. 1989) (unpublished report prepared by and available from World Wildlife Fund, Washington, D.C.). For a thorough description of the domestic pressures that confronted the Bolivian debt-for-nature swap with Conservation International, see Page, *Debt-for-Nature Swaps: Experience Gained, Lessons Learned*, 1 INT'L ENV. AFF. 275, 277-80 (1989); and Comment, *supra* note 17, at 319.

35. WORLD COMM'N ON ENV'T & DEV., *supra* note 26, at 70.

36. The typical debt-for-nature swap is a five-step process. First, the investing NGO must seek approval from the debtor country; second, the NGO must acquire the debt instrument;

priation, a significant omission because debt-for-nature swaps are investments in the environment with expectations for environmental, not pecuniary, returns. The failure to address expropriation risk becomes even more compelling when one realizes that the United States government is presently committing *taxpayer funds* to NGO's to fund the debt-for-nature swaps.³⁷ Thus, NGO's that once were merely risking their *own* funds are now risking taxpayer funds without properly evaluating either the possibility of host country expropriation or the available remedies in the event of such expropriation. In contrast, a debt-for-equity investor or any foreign investor that uses private funds always analyzes critically the risk of expropriation when structuring an investment's form.³⁸ Debt-for-nature swap "investors"

third, it must transfer title to the debt; and fourth, the debt must be converted into a local currency instrument. Comment, *supra* note 17, at 334. The final step implements the NGO's environmental investment, the conservation program.

[T]he creditor country or sponsoring ECO [NGO] may have the most at stake, since it is required to not only relinquish effective control of the funds, thereby placing them at risk, but must also assure donors and tax authorities that these funds will be used properly and in accordance with the agreement.

Id. at 323. At present, debt-for-nature swap agreements do not include enforcement mechanisms. Telephone interview with Kurt Low, Program Assistant, Conservation Finance Department (Jan. 30, 1990) [hereinafter Telephone Interview]. This is true even though one U.S. NGO has written that such transactions are "probably neither less nor more inherently vulnerable to political risks than any other conservation investment in a foreign country, unless the exchange requires a long-term financial commitment [on the part] of the host government." CONSERVATION INT'L, THE DEBT-FOR-NATURE EXCHANGE: A TOOL FOR INTERNATIONAL CONSERVATION 29 (1989).

37. See *infra* notes 41-42.

38. See Shubin & 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. 69, 75, 88-91 (1988). In typical investments in foreign states, the host state compensates the investor for assuming the risk of default by providing him with specified privileges and guarantees over a period of time. Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73, 94 (1984). Such privileges may include the promise of investment over a period long enough that if the project proves successful, the privileges assure the investor of profits sufficient to recompense him for the associated risk. *Id.* at 94. See generally Stansbury, *Planning Against Expropriation*, 24 INT'L L. 677 (1990).

An associate with the World Resources Institute compares the negotiations for debt-for-nature swaps to the broad category of foreign aid, rather than just confining it to debt-for-equity swaps. Page, *supra* note 34, at 276. The associate argues that both non-profit organizations and foreign assistance agencies demand assurances that host countries will abide by their programs. *Id.* For both swaps and foreign aid, "[a] country's designated program managers make commitments under terms established by the government's monetary authorities." *Id.* Though the negotiations may be the same, the assurances that secure the foreign aid programs are insufficient for debt-for-nature swaps because of the swaps' distinctive goals. For example, if the United States, through the United States Agency for International Development ("USAID"), donates foreign aid to Madagascar to train forest rangers, USAID meets its goal once the rangers complete their training program, even if some trained rangers decide not to use their new skills. However, investments in environmental preservation through debt-for-nature swaps are more vulnerable to the whims of the host government. If

who use public funds must similarly analyze the risks of their "investments."

The use of taxpayer funds in debt-for-nature swaps should compel more risk analysis and higher scrutiny. As history reflects, expropriation is more than a trivial risk for long-term foreign investment.³⁹ It is entirely foreseeable that a host country in a debt-for-nature swap will decide after the swap has transpired and the environmental projects are underway that it needs to use the swap territory in a manner inconsistent with the swap's goals of conservation or sustainable development.⁴⁰ Then the NGO, as debt purchaser in the debt-for-nature swap, will need relief from such expropriation that is consistent with the swap's objectives so it can continue to effectuate the swap's goals. The NGO's remedies lie in the domestic law of the host country, its own domestic law, or international law, none of which offers appropriate relief. This Comment demonstrates that these existing remedies are inadequate because they fail to protect the NGO's investment. Section II defines and describes "funnel swaps," which involve the investment of taxpayer funds, in the name of an NGO, and which cause problems of accountability and enforcement due to their basic structure. This Comment uses a debt-for-nature swap in the Democratic Republic of Madagascar as a case study because it is the first swap to be financed primarily⁴¹ with United

the host government decides to expropriate the NGO's rights to protect the targeted swap land, then it unilaterally subverts the program's goals.

39. Hannon & Haugen, *Latin American Debt Conversion Proliferates*, BUS. AM., June 22, 1987, at 2, 6; Shubin & Gibby, *supra* note 38, at 70.

40. One commentator insists that swap agreements are secure because they "are the product of mutual negotiations, the 'swap' concerns control of local currency not land, and the funds remain wholly in the [developing country] for use by local [NGO's] for the conservation and sustainable development of 'national' natural resources, such as parks, forests or wetlands." Comment, *supra* note 17, at 335. Therefore, there is a "large measure of security, trust and accountability, given the [developing country's] vested interest in the implementation of the agreement." *Id.*

41. Although USAID participated in the Bolivian and the Philippine swaps, its role was minor. In the Bolivian swap, USAID merely donated \$150,000 in pesos from its local currency funds, which was only a fraction of the total swap investment. World Wildlife Fund, *The Bolivian Case* (n.d.) (unpublished brochure printed by the World Wildlife Fund, Washington, D.C. 20037). For the Philippine swap, USAID granted the World Wildlife Fund ("WWF") \$45,000, again, also a fraction of the total investment. World Wildlife Fund, *The Philippines Case* (n.d.) (unpublished brochure printed by the World Wildlife Fund, Washington, D.C. 20037); *Debt-for-Nature Bill Moving to Senate Floor*, INSTITUTIONAL INVESTOR, June 19, 1989, at 4. In the Malagasy swap, USAID granted \$1,000,000 while the WWF-U.S. promised "at least" \$250,000 for a total investment of \$1,250,000. WWF PROPOSAL TO USAID, *supra* note 10, at 22; Letter from Jean Hacken, USAID Grant Officer, Overseas Division—Africa, to Kathryn Fuller, President, World Wildlife Fund, attachment I (Sept. 20, 1989) [hereinafter Letter] (accepting the proposal and authorizing grant No. AFR-0112-G-55-9095-00). This is USAID's largest investment and its first majority share in a debt-

States taxpayer funds.⁴² Section III demonstrates that if the host government expropriates the swap territory, the NGO's only "realistic" remedy is compensation. In truth, however, compensation is insufficient because the purpose of debt-for-nature swaps is environmental conservation and management. Compensation, even if available to the NGO, does not address this purpose; it simply allows the host country to resume destruction of protected resources. Further, if NGO's, the named parties to the swap agreement, have no effective remedy, the United States agency that has pledged taxpayer funds has even less protection; under the funnel swap, the United States is not a party to the agreement and thus has no standing. Section IV suggests that because debt-for-nature swaps involve international participants with important objectives, namely, the trade flows between developing and developed nations and the preservation of the world's unique species,⁴³ a real need exists for a treaty that provides more effective remedies. This Section discusses several treaties or agreements that could be used as models. Finally, Section V concludes that because the promise of reciprocal benefit provides the parties to a swap agreement with a long-term incentive to abide by its terms, NGO's and other debt-for-nature investors should explore mandated negotiation and conciliation options as dispute resolution mechanisms in treaties. It is only when innovative international environmental agreements *work* that we can begin to safeguard global resources for future generations.

II. THE NEW TREND IN DEBT-FOR-NATURE SWAPS: TAXPAYER FUNDING

What is new is the possible addition of vast quantities of Government money to the pot—and the prospect of a systematic, well-financed defense of tropical forests that serve as a natural sink for greenhouse gases and shelter the lion's share of the world's plant and animal species.⁴⁴

The magnitude of the problems host-country expropriation will cause for debt-for-nature investors is best understood through an example involving the latest trend in debt-for-nature swaps—taxpayer-financed funnel swaps. Because the investor uses taxpayer

for-nature swap. United States Agency for Int'l Dev. News Release No. 41 (Aug. 3, 1989) [hereinafter USAID News Release].

42. President Bush recently announced plans to fund debt-for-nature swaps using taxpayer funds on a large-scale to reduce bilateral debt between Latin America and the United States. President's address on the Enterprise for Americas (June 27, 1990) (may be requested from the Office of the White House Press Secretary) [hereinafter President's Address].

43. Intrados Group, *supra* note 25, at 1.

44. N.Y. Times, Jan. 22, 1991, at B5, col. 4.

funds to effectuate a debt-for nature swap, the investor should place a higher priority issue on non-compliance remedies than it might for privately funded swaps. At the very least, politics force the government, if not the NGO, to account to the public for the manner in which it invests taxpayer funds. This Section discusses funnel swaps using the example of the Malagasy funnel swap, and explains the significance of expropriation in the taxpayer-funded funnel swap.

A. *Description of Funnel Swaps*

The change from private NGO to taxpayer financing of debt-for-nature swaps accentuates the need for a treaty to address expropriation remedies. Although the recent debt-for-nature swaps executed in Costa Rica,⁴⁵ Zambia,⁴⁶ and Ecuador⁴⁷ involved private investor NGO funds, the new trend, illustrated by the debt-for-nature swaps in Madagascar,⁴⁸ Bolivia,⁴⁹ and the Philippines,⁵⁰ is to fund debt-for-nature swaps at least partially with taxpayer money. A United States governmental agency grants the funds to the NGO and then uses the NGO as a funnel.⁵¹ Under the current funnel-swap plan the governmental agency, generally the United States Agency for International Development ("USAID"),⁵² has no direct agreement with the foreign host government. USAID simply funnels the taxpayer funds to the foreign host government through the NGO, which makes its own

45. The debt-for-nature swap conducted in Costa Rica in 1987 used private funds. CONSERVATION INT'L, *supra* note 36, at 15; *see also* INSTITUTIONAL INVESTOR, *supra* note 41, at 4.

46. Comment, *supra* note 17, at 334.

47. *Id.* at 327; *see also* Debt-for-Nature Ad Hoc Working Group, A Brief Summary of Debt-for-Nature Swaps (unpublished summary available from the Nature Conservancy, Arlington, Va.) (describing the Ecuadorian swap); CONSERVATION INT'L, *supra* note 36, at 15 (monograph describing the history and future of debt-for-nature swaps).

48. Letter, *supra* note 41, attachment I.

49. The Bolivian Case, *supra* note 41.

50. CONSERVATION INT'L, *supra* note 36, at 1 (providing the amount of private funds committed to the swap); INSTITUTIONAL INVESTOR, *supra* note 41, at 4 (providing the amount of public funds committed to the Philippine swap).

51. UNITED STATES AGENCY FOR INT'L DEVELOPMENT, USAID DEBT FOR DEVELOPMENT INITIATIVE 2-4 (Aug. 3, 1989) [hereinafter USAID DEBT FOR DEVELOPMENT INITIATIVE].

52. USAID implements economic assistance programs to help developing countries "develop their human and economic resources; increase their productive capacities, and improve the quality of human life as well as promote economic and political stability in friendly countries." OFFICE OF THE FED. REGISTER, THE UNITED STATES GOVERNMENT MANUAL 731 (1990-1991).

agreement with the foreign host government.⁵³ The Malagasy⁵⁴ debt-for-nature swap is a model of such a funnel swap.

B. *The Malagasy Example*

World Wildlife Fund-United States ("WWF-U.S."),⁵⁵ an American NGO, the government of Madagascar,⁵⁶ and USAID coordinated a funnel swap in August 1989.⁵⁷ WWF-U.S. chose Madagascar because of the endangered state of its unique tropical forest habitats,⁵⁸

53. When a United States governmental agency grants funds to an NGO, the NGO must return the funds if it does not use them according to the grant's specifications. 22 U.S.C. § 2399b (1988). However, in the funnel-swap situation where an NGO, and not the United States government, independently makes an agreement with the foreign government, the United States government lacks direct control over the funds. Although the United States government may bring an action against the NGO for return of the funds, if the NGO used the funds appropriately, and the foreign government recipient did not, the United States government's link to the recipient is impaired by the lack of privity between the United States and the recipient government.

54. "The Malagasy" is the collective noun for the people of the Democratic Republic of Madagascar. Malagasy is an adjective describing attributes of Madagascar, such as Malagasy forests or the Malagasy Government.

55. The parties completed the Malagasy debt-for-nature swap in August 1989. See WWF PROPOSAL TO USAID, *supra* note 10, app. A; see also Letter, *supra* note 41 (describing financial arrangements for the swap and giving USAID authorization for the swap); World Wildlife Fund, News Release (Aug. 3, 1989) [hereinafter WWF News Release] (announcing and detailing the Malagasy debt-for-nature swap).

56. The World Wildlife Fund-U.S. describes itself as "the leading U.S. organization working to save endangered wildlife and habitats around the world and to protect the biological resources on which human well-being depends." WORLD WILDLIFE FUND, LETTER No. 1, at 2 (1988). There are World Wildlife Fund organizations in twenty-three countries. *Id.*

57. WWF News Release, *supra* note 5.

58. "[P]revailing socio-economic conditions . . . have promoted inappropriate, wasteful or inefficient land use patterns" such as slash and burn agriculture, commercial agriculture in fragile or forested lands, uncontrolled ranging of livestock, and timber exploitation. *Id.* at 4. These methods effectively deplete non-renewable resources. *Id.* at 5. Poverty, and the government's promotion of economic development through investments in commercial agriculture and natural resource exploitation, place obvious pressures on the ecosystem. WWF PROPOSAL TO USAID, *supra* note 10, at 4. If left unchecked, these forces will increase with Madagascar's population, which is growing at three percent annually, placing an extreme burden on the eighty-eight percent of its population that depends on the agricultural sector for employment. AMERICAN EMBASSY ANTANANARIVO, *supra* note 13, at 3, 4; see also WWF PROPOSAL TO USAID, *supra* note 10, at 4-5 (describing socio-economic pressures causing inefficient land use patterns); Voss, 31 INT'L & COMP. L.Q. 686, 699 (1982) (describing the intense need for developing countries to use their natural resources to break out of poverty). Despite these pressures, the current Malagasy government has recognized that without the tropical forests, Madagascar's chances of economic recovery are slim. Jolly, *supra* note 2, at 177, 179, 181. Joseph Randrianasolo, the Minister of Livestock, Fisheries, and Forests, exclaimed, "If there is no more forest, then no more water, and no more rice!" *Id.* at 181. Madagascar's decision to host the 1985 International Conference on Conservation and

which contain 150,000 species unique to Madagascar.⁵⁹ USAID granted one million dollars to “increase the financial and technical resources available in Madagascar for the protection of natural resources and to reduce Madagascar’s external debt service burden.”⁶⁰ World Wildlife Fund-International (“WWF-Int’l”) of Gland, Switzerland, a Swiss NGO, promised to donate at least \$250,000⁶¹ toward the total cost of the swap.⁶² WWF-U.S. acted as a “funnel”

Development also demonstrated its commitment to economic survival through environmental awareness. *Id.* at 177.

Degradation of the forests will eradicate irreplaceable and potentially useful plants, diminish the island’s hydroelectric potential, and weaken industries dependent on forestry and agriculture. AMERICAN EMBASSY ANTANANARIVO, *supra* note 13, at 7. This in turn reduces future potential of the island’s natural resources, further impoverishing the island’s population. With a \$1,000 annual parks budget for 36 parks, the government is financially incapable of preventing this downward spiral of environmental and economic pressures. Jolly, *supra*, at 162. This dilemma created the impetus for the swap agreement with WWF. *See generally* Jolly, *supra*. During the past ten years, WWF has supplemented Madagascar’s limited budget with financial support in excess of \$2.6 billion for conservation projects. WWF PROPOSAL TO USAID, *supra* note 10, at 7. The swap is intended to “increase the amount of financial support for conservation in the country, as well as to help reduce Madagascar’s debt burden.” *Id.*

59. World Wildlife Fund, *supra* note 34. The isolation of the island has fostered this biological diversity.

60. Bollinger, Action Memorandum for the Acting Administrator 1 (Aug. 2, 1989) (unpublished USAID memorandum pertaining to the Madagascar Debt-for-Nature Swap Project No. 6870112); *see also* Letter, *supra* note 41, at 1, 3.

61. WWF-U.S. agreed to Madagascar’s request not to publicly release detailed information regarding the financial terms of the swap. Telephone Interview, *supra* note 36. However, USAID and WWF-U.S. have released general information concerning the financial arrangements. USAID News Release, *supra* note 41, at 1-2. Seven commercial banks participated in the swap. WWF News Release, *supra* note 54. “WWF will use \$950,000 to redeem approximately \$2.1 million of eligible Malagasy debt, at a price of 45 cents on the dollar.” *Id.* WWF-Int’l “has agreed to redeem eligible debt at 100 percent of its face value for exchange into Malagasy francs in the form of cash.” WWF PROPOSAL TO USAID, *supra* note 10, at 8. The parties then agreed to hold the proceeds in an interest-bearing account and to remit all interest earned on the account to USAID. WWF PROPOSAL TO USAID, *supra* note 10, at 8. WWF agreed to convert the remainder of the debt that it could acquire under the \$3 million ceiling over the following two years. *Id.* The parties targeted \$250,000 of USAID funds to pay for hard currency expenditures associated with the deal. *Id.* Despite the statement in the press release that WWF would acquire portions of the debt over the next two years, WWF-U.S. stated in a telephone interview that it converted all of the Malagasy debt at once. Telephone Interview, *supra* note 36. That action is another factor that makes this swap vulnerable to non-compliance.

WWF has stated that it will contribute a minimum of \$250,000 of its own resources toward the project. WWF PROPOSAL TO USAID, *supra* note 10, at 22; Letter, *supra* note 41. In the grant agreement budget, WWF is obligated to purchase \$250,000 of the Malagasy debt, while USAID is obligated to purchase \$700,000 of such debt and contribute \$300,000 to other costs. Letter, *supra* note 41. Thus, USAID is the principal source of funds for the project, in contrast to the Bolivian and Philippine swaps, in which WWF-U.S. was the principal donor.

Hereinafter WWF refers to WWF-U.S., which is assumed to be the NGO that negotiated and signed the swap agreement. This Comment will only draw a distinction between WWF-U.S. and WWF-Int’l when such a distinction is critical.

62. United States Agency for International Development, Press Release (Feb. 15, 1989)

between the Malagasy and United States governments. The Malagasy government's agreement with WWF-U.S. details WWF-U.S.'s obligation to administer, protect, and plan rural development in parks and reserves and their buffer zones.⁶³ The swap added a unique feature to the standard funnel-swap structure: WWF-Int'l was the named party and signatory to the swap agreement with the Malagasy government even though WWF-U.S. orchestrated the swap.⁶⁴ Thus, a Swiss NGO is the official party to a swap that used United States taxpayer funds to help solve environmental and economic problems in Madagascar.⁶⁵

The United States government's majority investment in the Malagasy funnel swap is a move toward national ratification of the international importance of conserving tropical forest habitats.⁶⁶ The

(Drafted: EHonnold: GS/LP: x78371: 2/15/89: doc# 6440J) [hereinafter USAID Press Release] (discussing USAID's Debt for Development Initiative). The U.S. government inaugurated the Debt For Development Initiative in February, 1989. *Id.* at 1. "Through this new initiative, AID will support certain programs of nongovernmental organizations in developing countries through debt exchange transactions." *Id.* at 1. The legislative authority for USAID's participation in swaps comes from the International Development and Finance Act of 1989, Pub. L. No. 101-240, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat) 2492, which authorizes USAID to make grants to NGO's for swaps.

63. WWF PROPOSAL TO USAID, *supra* note 10, at 9-16. Generally, WWF responsibilities are divided into three categories: 1) protected area establishment and management; 2) identification of key areas for biodiversity protection outside parks and reserves; and 3) institutional strengthening of the Department of Waters and Forests of the Ministry of Animal Production, Water, and Forests ("MPAEF"). *Id.* at 6, 10, 14, 15. WWF activities under the first category include "boundary demarcation, development of management plans, physical infrastructure and buffer zone projects, nature interpretation, environmental education, training and research." *Id.* at 10. In the second category of responsibilities, WWF will augment a team of specialists to "identify natural habitat conservation management priorities outside parks and reserves." *Id.* at 15. In addition, a specialist hired by WWF will "administer the disbursement of local currency funds generated by the swap, monitor the activities supported by the swap and develop proposals for new conservation projects in currently unprotected areas." *Id.* The third category of responsibilities requires allocation of swap-generated funds to enhance the MPAEF's technical capacity, pay salaries, train personnel, and purchase materials and equipment to strengthen management of the protected forests. *Id.* at 16.

64. Telephone Interview, *supra* note 36.

65. Letter, *supra* note 41, at 3.

66. In addition to the tropical forest's contribution to consumer goods (a plant grown in the tropical forest is present in one out of four over-the-counter pharmaceutical products), tropical forests provide global environmental services such as helping to stabilize the climate at the global level. N. MYERS, *supra* note 6, at 7-8, 10. Tropical forests absorb solar radiation, but when cleared they reflect, thereby contributing to an increase in "shininess" of the plant's surface, or an "albedo effect." *Id.* at 10. The increase in albedo disrupts wind currents and convection patterns, leading to a decrease in moisture in areas far from the forests, such as North America's grain growing regions. *Id.* In addition, the burning of the forests is causing a 75% percent increase in carbon dioxide emissions that contribute to the controversial "green house effect." Daily Telegraph, Dec. 15, 1989, at 11, available in LEXIS, Nexis Library, Omni File. The tropical forest also is a "primary source" of new animals and plants. N. Myers, *supra* note 6, at 12. Scientists discover more new types of organisms in tropical forests than in

Malagasy swap is a result of the United States government's Debt for Development Initiative,⁶⁷ which is part of the International Development and Finance Act of 1989.⁶⁸ The Debt for Development Initiative formalizes funnel-swap structures and contributes taxpayer funds to finance them.⁶⁹ Several signs suggest an increase in governmental funding of debt-for-nature swaps. At the Paris Summit of the Arch, a meeting of several heads-of-state organized to resolve international economic problems, President Bush signed the Economic Declaration of July 16, 1989, acknowledging debt-for-nature swaps as a useful tool for environmental protection;⁷⁰ the Brady Plan to reduce the foreign debt of developing nations calls for more creative debt solutions;⁷¹ the Internal Revenue Code now makes banks' donation of debt to conservation organizations more economically viable;⁷² the Senate recently passed a Debt-for-Nature Bill;⁷³ President Bush recently acknowl-

all the other areas of the planet combined. *Id.* In fact, if one stood in the tropical forest for a few hours with a net, one would probably discover an insect unknown to science. *Id.*; Daily Telegraph, *supra*.

In Madagascar, the tropical forest deforestation contributes to the Malagasy fuelwood crisis, watershed soil erosion, and dam and stream sedimentation. It also reduces agricultural productivity and decreases the general level of human welfare. Xinhua Gen. Overseas News Serv., No. 1201083 (Dec. 1, 1989), available in LEXIS, Nexis Library, Omni File.

67. USAID Press Release, *supra* note 62, at 1.

68. Pub. L. No. 101-240, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 2492.

69. USAID DEBT FOR DEVELOPMENT INITIATIVE, *supra* note 51, at 1-2.

70. *Summit of the Arch*, 89 DEP'T ST. BULL. 15 (1989).

71. Treasury Secretary Nicholas Brady "urged the parties to be creative in implementing his strategy, saying, 'there is no one right way' to craft a debt reduction and new money package given the differing needs of countries." Wash. Post, Sept. 27, 1989, at A28, col. 5. The Brady plan is an "acknowledgment that the earlier strategy, developed in 1985 by James A. Baker III . . . had failed." N.Y. Times, Jan. 9, 1990, at A1, col. 5. Mr. Baker's plan called for additional bank lending to countries engaging in full-scale economic overhaul. *Id.* The new Brady Plan represents the first government recognition that third world debt, amounting to \$1.3 trillion dollars, must be diminished. *Id.*

72. Comment, *Revenue Ruling 87-124: Treasury's Flawed Interpretation of Debt-for-Nature Swaps*, 43 U. MIAMI L. REV. 721 (1989). To encourage debt-for-nature swaps, the United States Department of the Treasury announced that it intends to 'construe liberally' Rev. Rul. 87-124 1987-2 C.B. 205. *Id.* at 724. This interpretation was a significant change from the Internal Revenue Service's traditional interpretation because it allows lenders who donate debt to conservation organizations to obtain a deduction equal to their full cost basis in the debt. *Id.* at 725. In the past, banks would receive a deductible loss for the difference between the value and sale of the debt. Now the bank receives a deduction for a loss on a bad debt and a deduction for a charitable contribution. *Id.*; see also Cody, *supra* note 17, at 27 (describing Rev. Rul. 87-124, 1987-2 C.B. 205); Hyde, *U.S. Taxes: The Issues 2* (unpublished brochure available from World Wildlife Fund, Washington, D.C. 20037) (outlining tax treatment of swaps); Wall St. J., Nov. 19, 1987, at 44, col. 23; Letter from M. Peter McPherson, Deputy Secretary of the Treasury, to Senator John Chafee (Jan. 13, 1988).

73. International Development and Finance Act of 1989, Pub. L. No. 101-240, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 2492. This Act recognizes that for swaps to be truly effective, they will have to be negotiated by governments, because non-government debt accounts for merely 1/10 of one percent of the \$1.3 trillion foreign debt. San Francisco

edged that the United States government will fund more debt-for-nature swaps to reduce Latin American debt;⁷⁴ and, in October 1990, Congress authorized swaps for approximately \$1.7 billion in debts incurred in the purchase of subsidized food.⁷⁵ Furthermore, the United States government finally appears to be acknowledging the intertwining significance of the environment and economic health for development: The debt-for-nature swap concept "turns a debt burden into an opportunity for creative development programs, in this case for conservation of tropical forests and biodiversity."⁷⁶

C. *The Significance of Investment Risk and Expropriation for Funnel Swaps*

Although debt-for-nature swaps do not provide pecuniary returns, they are still "investments" in the host country. In the Debt for Development Initiative funnel-swap structure, the NGO acts like a corporation that has negotiated a concession agreement with a foreign host government to extract natural resources, such as oil or minerals, from the foreign host government's territory.⁷⁷ Although many similarities exist between the concession agreement and funnel swap, an important distinction between them is that in the funnel swap, the NGO "investor" uses *taxpayer* funds to finance a majority of its

Chron., Apr. 24, 1990, at A23, col. 1. Thus the Act "directs the Treasury Secretary and United States representatives to the World Bank and International Monetary Fund to 'actively promote, coordinate, and facilitate debt-for-nature exchanges.'" *Id.*; *Nature Swap Bill Faces Uncertain Future*, INSTITUTIONAL INVESTOR, July 31, 1989, at 5; INSTITUTIONAL INVESTOR, *supra* note 41, at 4. Senator Joseph Biden (D-Del.) and Senate Committee on Foreign Relations Chairpersons, Claiborne Pell (D-R.I.) and Richard Lugar (R-Ind.), sponsored the Bill, which essentially gives Congressional approval for grants made by the Agency for International Development to environmental groups for the purchase of commercial bank debt. INSTITUTIONAL INVESTOR, *supra*, at 5.

74. President's Address, *supra* note 42, at 4. "The White House is backing a bold program to channel billions of dollars that Latin American governments owe Washington into local conservation projects." N.Y. Times, Jan. 22, 1991, at B5, col. 4.

75. *Id.* at B5, col. 4. Furthermore, Washington insiders expect President Bush to ask that the government fund the swaps with loans that USAID, the Export-Import Bank, and the Commodity Credit Corporation made to subsidize United States exports. *Id.*

76. USAID News Release, *supra* note 41; see also *Summit of the Arch*, *supra* note 70, at 13, 16. The July 16, 1989 declaration that President Bush signed also recognizes that deforestation damages the atmosphere. It calls for sustainable forest management practices, and the preservation of the forests and its species. It also gives strong support to the Tropical Forest Action Plan, designed in 1988 by the United Nations Food and Agriculture Organization, The World Bank, The United Nations Development, and the World Resources Institute to halt deforestation by promoting sustainable development. Saule, *Environment: Increase in Deforestation Rate Sparks Harm*, Inter Press Service, Sept. 11, 1990, available in LEXIS, Nexis Library, Omni File.

77. Voss, *supra* note 58, at 686-87.

investment.⁷⁸

The risks associated with the mineral extraction concession agreement, such as the risk of expropriation⁷⁹ inherent in any investment abroad, especially investments in developing countries,⁸⁰ are significant in the funnel swap as well. Both concession agreements and funnel swaps are especially vulnerable to losses from expropriation because of their long-term involvement with the host country's natural resources.⁸¹

The Malagasy government is no stranger to expropriation. During the 1970's, it authorized large-scale expropriations, including Caltex and Exxon Oil refining and distribution facilities and a Hilton Hotel.⁸² None of the corporations received compensation from the Malagasy government.⁸³ Compensation would have been an appropriate remedy, because it would have returned the funds that the investor had committed to the project for appropriate reinvestment elsewhere.⁸⁴ As to the host territory, although the project's operations remain the same, the host government becomes the new owner and thus entitled to all future revenues. From an equitable standpoint, it should be required to pay for this benefit.

However, even if Madagascar agreed to compensate WWF in the

78. USAID Press Release, *supra* note 62, at 3.

79. Shubin & Gibby, *supra* note 38, at 70. Participation by a foreign investor in foreign investment activities increases exposure to political and economic risks. *Id.* "Investors expose themselves to the transfer risk related to the remittance of capital dividends . . . and to political risks normally associated with an investment for ten years or more in a developing country." *Id.*

Debt-for-equity swap risks and environmental threats magnify the vulnerability of the firm. Nationalist sentiments, rampant inflation partially fueled by other swaps, currency swings, and uncertainty about how the host government will manage its economy in the future are a few of the risks to be evaluated by decision makers before any swap is approved.

Ganitsky & Lema, *Foreign Investment Through Debt-Equity Swaps*, SLOAN MGMT. REV, Winter 1988, at 21, 27-28.

80. Voss, *supra* note 58, at 688.

81. *Id.* at 695.

82. U.S. Dep't of State, Investment Climate Statement for Madagascar 4 (1988) (unpublished report available from Overseas Private Investment Corporation, Washington, D.C.).

83. *Id.*

84. Just compensation is defined as an "amount equivalent to the value of the property taken" and requires that it "be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 712 (1987). Recent international decisions provide a more precise definition of "adequate compensation." See *International Group v. Islamic Republic of Iran*, 4 Iran-U.S. C.T.R. 96, 105 (1983) (adopting the traditional norm that aliens are entitled to "the value of the property taken" and that going concern or fair market value must be considered in making the determination).

event of an expropriation of WWF's rights under the debt-for-nature swap, the remedy would be ineffective.⁸⁵ Debt-for-nature swaps have two purposes: to reduce foreign debt and to protect endangered habitats.⁸⁶ The economic purpose is short term; the environmental purpose is long term.⁸⁷ Although the WWF agreement with USAID specifies only a three-year period within which the USAID-funded WWF projects are to be completed,⁸⁸ the swap investor's environmental management projects in the fragile tropical forest habitats are to continue indefinitely.⁸⁹ Moreover, WWF itself intends to continue privately funding and administering the project indefinitely.⁹⁰ The NGO's investment is effective only in Madagascar. Furthermore, money alone will not address the environmental purpose of the swap—the halt of deforestation in Madagascar's tropical forest. If Madagascar, in an effort to relieve domestic economic pressures,⁹¹ expropriates WWF's rights to protect and administer⁹² the swap territory, it is unlikely that Madagascar would continue the preservation activities. In that event the parties would be where they started, with Madagascar's tropical forest at risk of depletion and exploitation for agriculture, mining, or other profitable commercial projects.⁹³

Two characteristics of the Malagasy funnel swap indicate that it is more susceptible to expropriation than traditional debt-for-nature swap agreements. First, no Malagasy NGO participant coordinates this swap in Madagascar because NGO's are incompatible with the Malagasy form of government.⁹⁴ In most debt-for-nature swaps, a

85. Although WWF-Int'l signed the debt-for-nature swap agreement this Comment assumes that WWF-U.S. would be the proper party to receive compensation. See *supra* note 41.

86. Letter, *supra* note 41, at 3.

87. See generally WWF PROPOSAL TO USAID, *supra* note 10, at 22. Jean Hacken's letter incorporates the proposal into the grant agreement. Letter, *supra* note 41.

88. WWF PROPOSAL TO USAID, *supra* note 10, at 8; Letter, *supra* note 41, at 1, 3.

89. WWF PROPOSAL TO USAID, *supra* note 10, at 21.

90. *Id.* at 22.

91. Madagascar is one of the poorest countries in Africa and Asia and is even poorer than Haiti, the poorest country in the Western Hemisphere. *Id.* at 4. For information regarding Madagascar's domestic economic pressures, see *supra* notes 9-12 and accompanying text.

92. WWF PROPOSAL TO USAID, *supra* note 10.

93. "[P]resident Ratsiraka is under pressure to put lucre ahead of lemurs." Knox, *No Nation*, 74 SIERRA 80-81 (1989). A titanium deposit in one of Madagascar's last virgin forests is attracting the attention of a British Petroleum subsidiary. *Id.* The deposit "could erase the nation's \$30 million annual trade deficit." *Id.* Madagascar is rich in mica, graphite, and chromite and has "potential for" bauxite, ilmenite, uranium, iron ore and coal production. U.S. DEP'T OF ST. BUREAU PUB. AFFAIRS., BACKGROUND NOTES: MADAGASCAR (1987). Amoco and Occidental Petroleum already are undertaking extensive exploratory drilling efforts. Petro-Canada also has expressed an interest in tar sands exploration. *Id.* at 6.

94. Telephone Interview, *supra* note 36. One commentator stated that "[o]ne of the most important limitations in concluding a successful transaction would seem to be the presence of

local NGO coordinates the transaction to alleviate a perceived potential threat to host country sovereignty.⁹⁵ Without a Malagasy NGO's management assistance, the conservation activities are more susceptible to nationalistic threats. Second, for political reasons, Madagascar's socialist government⁹⁶ required WWF-Int'l rather than WWF-U.S. to be the named NGO party.⁹⁷ Madagascar's leadership is thus already politically uncomfortable, at least publicly, with United States involvement in its natural resource management.

The prudent response to this risk, especially when taxpayer funds are being used, is for NGO investors to factor the likelihood of expropriation into their investment decisions. This has been the practice of foreign investors undertaking debt-for-equity swaps in Latin America and Caribbean countries⁹⁸ experiencing the same type of political⁹⁹ and economic¹⁰⁰ instability as Madagascar. Like the debt-for-equity investor, the debt-for-nature investor has made an extremely valuable investment—the conservation of a unique habitat. Yet, unlike expropriated debt-for-equity investments, compensation is an ineffective remedy when the host government decides not to comply with the agreement.¹⁰¹ It is even less effective when the United States govern-

an effective partner [an NGO] in the debtor [developing country]." Comment, *supra* note 17, at 335. A National Wildlife Federation official has stated that the primary problem concerning debt donations in developing countries with no effective conservation organizations is the assurance of the proper use of the funds. Therefore donations in such countries should be viewed with "extreme caution." *Id.* at 335.

95. B. Bramble & B. Millikan, *External Debt, Democratization, and Natural Resources in Developing Countries: The Case of Brazil* 9 n.4 (June 27, 1989) (unpublished report available from the National Wildlife Federation, Washington, D.C. 20036)

96. This refusal was the result of political concerns. Telephone Interview, *supra* note 36.

97. *Id.*

98. Shubin & Gibby, *supra* note 38, at 42-43. Argentina, Bolivia, Brazil, Chile, Jamaica, Uruguay, Venezuela, Costa Rica, Ecuador, and Mexico have official debt-for-equity programs. *Id.* at 49-61.

99. U.S. Dep't of State, *supra* note 82, at 3-4 ("Madagascar is still developing politically."). Admiral Didier Ratsiraka, came to power following a revolution in 1972 which ended with the assassination of Col. Rasimandrava. EUROPA PUBLICATIONS LTD., *supra* note 11, at 1675. In January 1989, a constitutional amendment enabled Ratsiraka to reschedule the next presidential election from November to March. *Id.* at 1676. In February, restrictions on the Freedom of the Press were ended, and in March the President announced the permanent abolition of press censorship. *Id.* In May 1990, a coup attempt was staged against President Ratsiraka. *Madagascar Coup Attempt Mobilizes the Masses Via Radio*, DEF. & FOR. AFF. WEEKLY, May 21, 1990, at 6.

100. See generally EUROPA PUBLICATIONS LTD., *supra* note 11, at 1676-77 (providing figures detailing Madagascar's tenuous economic situation); U.S. Dep't of State, *supra* note 82, at 4 (describing Madagascar's economic problems).

101. Economic pressures result in the failure of host governments to comply with debt-for-nature agreements. For example, Ecuador has bowed to the plans of a subsidiary of Dupont, Conoco Ecuador Ltd., to pump oil from the tropical rain forests. *Action Access*, GREENPEACE, Jan.-Feb. 1990, at 22. Conoco's plans threaten Huarani Indian homelands and the Yasuni

mental agency, the source of the investment funds, is not the proper party to receive the remedy.

III. EXISTING REMEDIES

If one's goal is to preserve precious natural resources, compensation for an expropriation of conservation rights is simply ineffective. Nevertheless, compensation may be the NGO's *only* remedy for an expropriation of those rights. Moreover, if compensation is ineffective for the normal debt-for-nature swap, it is absolutely worthless in a funnel swap. The majority financier, the funding state, is not even a party to the swap. It has no rights to assert against the expropriating host state. Rather, the NGO, who is the actual party to the agreement, is the only one who can bring the compensation action. Thus, the funding state's taxpayers have no adequate remedy. This reality is vividly borne out of the Malagasy swap, discussed below. This Section analyzes possible remedies under the domestic law of both Madagascar and the United States, as well as international relief. As might be expected, none currently provides an adequate remedy.¹⁰²

A. *Malagasy Law: Domestic Law of the Swap's Host Country*

In establishing the right to expropriate¹⁰³ the Malagasy Constitution addresses the issue of the state's right to intervene in commercial activities.¹⁰⁴ It contains "escape clauses"¹⁰⁵ giving the state the right to intervene in commercial activities when the state judges any commercial activity to be inconsistent with the best interests of the people.¹⁰⁶ Based on this provision, the Malagasy government could argue that the funnel swap is a commercial activity because it is based on

National Park, because part of the plan includes cutting a new road into the park which will bring pollution, logging, and colonists into the area. *Id.* Ironically, the World Bank, an institution that could choose to be a supporter of sustainable long-term development, and of global environmental interests, might give a \$100 million dollar loan for oil development in the Ecuadorian Amazon. *Id.*

In Mexico, the 1,278-square-mile Montes Azules Biosphere Reserve, which the Mexican government established more than ten years ago as a protected area, is now threatened. N.Y. Times, July 10, 1990, at B7, col. 4. It is part of the largest tropical rain forest in North America, the Lacandona. *Id.* The destruction of the region accelerated in the early 1980's with the construction of a road that parallels the Guatemalan border. *Id.* The road has brought settlers, some of whom burn the jungle to plant crops. *Id.*

102. Although choice-of-law and choice-of-forum issues are also important and related, the discussion of these issues is beyond the scope of this Comment.

103. WWF PROPOSAL TO USAID, *supra* note 10, at 9-16.

104. CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DE MADAGASCAR (DEUXIÈME RÉPUBLIQUE) tit. II, art. 30.

105. *Id.*

106. *Id.*

the commercial swap of debt held by a private commercial bank. If the Malagasy government considers a swap to be a "commercial activity," it easily could determine that the domestic economic pressures¹⁰⁷ require the government to permit commercial use of the tropical forests at a rate exceeding the limits WWF established in the agreement.¹⁰⁸ Accordingly, WWF's right to protect and administer¹⁰⁹ swap territory would violate the Malagasy Constitution because these rights are "inconsistent with the best interests of the people," and the government legally could suspend the long-term habitat protection goals of the swap. Under the Malagasy Constitution, the state is not required to compensate WWF. Thus, WWF would have to argue either that the swap is a development, rather than a "commercial activity," so that the Constitution's escape clauses would not apply, or that a commercial activity must have a pecuniary, rather than an environmental protection, motive. Of course, once the government is facing mounting political pressure to use its natural resources for economic development, a reading of the Malagasy Constitution favorable to WWF is unlikely.

After it nationalized foreign investment in the 1970's,¹¹⁰ Madagascar could not attract desperately needed foreign investment. In 1985, the government of President Didier Ratsiraka, in an effort to lessen foreigners' fears about the safety of investing in Madagascar, instituted the Code of Investments.¹¹¹ The Code provides that if the government nationalizes property, the investor receives compensation based on the value of invested capital.¹¹² Furthermore, the Code specifically states that Malagasy law is the exclusive source of law governing investments performed in Madagascar.¹¹³ WWF could argue that, under the Code, debt-for-nature swaps qualify as "investments"

107. American Embassy Antananarivo, *supra* note 13, at 3, 4; *see also supra* note 91.

108. *See* WWF PROPOSAL TO USAID, *supra* note 10, at 17-19. Such a decision is hardly hypothetical when the Malagasy government is faced with friction between its environmental conservation goals and its bleak domestic economic situation, including a growing poverty-stricken population. For example, Costa Rica has faced the choice between maintaining the boundaries of a national reserve or reforming them to permit oil drilling. Curtis, Director of the Latin American Division of the Nature Conservancy, Remarks at Smithsonian Institution Conference, Debt-for-Nature: Overdrawn Natural Resources (June 27, 1990) (available from The Smithsonian Institution). Initially Costa Rica preserved the reserve's boundaries; however, its next decision may be different. *Id.*

109. WWF PROPOSAL TO USAID, *supra* note 10, at 9-16.

110. U.S. Dep't of State, *supra* note 82, at 6.

111. CODE OF INVESTMENTS, L. No. 85.001 (Madag.) (translation available from Overseas Private Investment Corporation, Washington, D.C.).

112. *Id.* art. 8.

113. *Id.* art. 28. In addition, article 39 of the Code states that if the terms of the agreement require arbitration, Malagasy law will apply. *Id.* art. 39. But "[s]hould there be no appropriate [Malagasy] legislation, the ad hoc arbitral committee shall refer to general

that merit the Code's protection and relief.¹¹⁴

Using the Code as applicable law, however, is problematic. First, the swap is not a typical investment. Second, there are two possible governmental "intervention" strategies. Madagascar could refuse to comply with the swap agreement within or following the three-year funding period, which is somewhat of a limitations period. If it fails to comply within the three-year period, and the Code applies because the swap is deemed an environmental "investment," then Madagascar would be required to compensate WWF; however, the Code does not specify time limits for Madagascar's payments.¹¹⁵ In any event, USAID may not have rights to any compensation that WWF receives because the agreement does not require WWF to reimburse USAID in the event of compensation.¹¹⁶

On the other hand, the Malagasy government could comply with the agreement for the entire three-year period and then expropriate WWF's management plan rights. As long as WWF has utilized the grant funds properly, it is unclear whether WWF would be entitled to compensation even if the swap is deemed an "investment" under the Code. If so, USAID would not be entitled to any of these funds

principles, custom, and appropriate general jurisprudence." *Id.* Arguably, this phrase incorporates customary international law.

The effect of the imposition of Malagasy law under article 39 is similar to the use of a Calvo Clause in Latin America. Calvo Clauses have long been used in concession agreements between Latin American governments and aliens "under which the alien agrees not to seek the diplomatic protection of his own state and submits matters arising from the contract to the local jurisdiction." I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 546-47 (1979). Thus, a debt-for-nature swap agreement between a United States NGO and a Latin American government would probably also provide for the application of local law.

114. Article 1 of the Code states, "[The Code] is applicable under identical conditions to private-sector companies, public-sector companies, and to those companies in the private sector called upon to act on behalf of the State." *CODE OF INVESTMENTS* art. 1 (Madag.). It further states that "[p]rivate investors can operate in all sectors of economic activity" with the exception of certain activities "in which the State has the exclusive right to act." *Id.* Among the activities reserved to the State are "activities potentially affecting national security or law and order." *Id.* But even in the reserved sectors, "the State can call upon private sector operators." *Id.* Thus, one can argue that debt-for-nature swaps are covered by the Code. The contrary argument would assert that law relating to debt-for-nature swaps is *sui generis*, that is, unique. If *sui generis*, the Code would not apply, and the Malagasy Constitution would permit state intervention if the swap is inconsistent with the best interest of the people. *CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DE MADAGASCAR (DEUXIÈME RÉPUBLIQUE)* tit. II, art. 30.

115. U.S. Dep't of State, *supra* note 82, at 6.

116. Letter, *supra* note 41, at 3-5. This letter states that the AID grant "be administered in accordance with the terms and conditions as set forth in the Schedule, the Program Description, and the Standard Provisions, and that uncommitted funds must be returned to AID." *Id.* at 1. However, the agreement does not require WWF to reimburse AID for the grant if WWF receives compensation from Madagascar because of government interference that expropriates WWF's rights.

because the three-year grant period would have expired. Finally, WWF may want to distance itself from relying upon the "investments" rationale by searching for legal rights of foreign parties to protect natural resources. Madagascar's civil code, however, does not address these rights. In a civil law jurisdiction, in the absence of such a Code provision, WWF would lack standing to sue the government. Therefore, WWF would likely have no remedy. Emerging from this analysis is the realization that USAID granted taxpayer funds to WWF for a project that received no guarantees, and WWF's only possible remedy against Madagascar under Malagasy law, pecuniary compensation, would not compensate it adequately for a project intended to save endangered tropical forest habitats.¹¹⁷ Even in the best of all worlds, if WWF received compensation and reimbursed USAID, the tropical forests would still disappear. Hence, the Malagasy Code does not provide either a reliable or an effective remedy for expropriation of debt-for-nature swaps.

B. *Applicable United States Law and Its Remedies*

The following subsections detail possible United States remedies for an expropriation of a debt-for-nature swap. The remedies are weak, at best. Even they would not apply to the Malagasy funnel-swap agreement because the United States is not a party to it. An examination of United States law may be helpful, however, in the event of expropriations of other debt-for-nature swaps to which the United States is a party.¹¹⁸

1. THE FOREIGN SOVEREIGN IMMUNITIES ACT

Because the sovereign government of Madagascar would be the defendant in an expropriation action, WWF first would have to surmount the requirements of the Foreign Sovereign Immunities Act ("FSIA")¹¹⁹ to institute an action against the Republic of Madagascar in United States courts. The FSIA ensures that sovereign immunity decisions are made on legal, rather than political, grounds.¹²⁰ The FSIA confers immunity on a defendant foreign state, its agencies, or its political subdivisions.¹²¹ The FSIA, however, does have important exceptions, such as the "commercial activities" and "expropriation" exceptions, which permit the jurisdiction of the United States

117. Letter, *supra* note 41, attachment 2 (program description).

118. See CONSERVATION INT'L, *supra* note 36, at 13-18.

119. 28 U.S.C. §§ 1602-1611 (1988).

120. *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 428 F. Supp. 1035, 1037 (S.D.N.Y. 1977).

121. 28 U.S.C. §§ 1602-1604 (1988).

courts¹²² in certain circumstances.¹²³ Unfortunately, the exceptions do not apply to the Malagasy funnel swap.¹²⁴

The threshold issue in deciding whether a United States court

122. The plaintiff must prove that the court has personal jurisdiction over the defendant. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), the Court of Appeals for the Second Circuit evaluated the personal jurisdiction requirement of the Act: "[E]ach finding of personal jurisdiction under the FSIA requires . . . a due process scrutiny of the court's power to exercise its authority over a particular defendant."

123. 28 U.S.C. § 1605 (1988).

124. The FSIA states that foreign states are not immune from the jurisdiction of United States courts:

[In any case] in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect on the United States.

Id. § 1605(a)(2).

Although the contracts between Madagascar and WWF to convert the debt might fall into the commercial activities exception of the FSIA, contracts between WWF and Madagascar to preserve the tropical forests would not because they are not for profit. Activities carried on for profit, or those in which a private party may engage, usually fall into the "commercial activities" definition. *Id.* § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). The FSIA further states that "[t]he commercial character of the activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* If the activity is one in which only a government could participate, then the foreign government receives immunity. *Brazosport Towing Co., Inc. v. 3,838 Tons of Sorghum Laden*, 607 F. Supp. 11 (S.D. Tex. 1984), *aff'd*, 790 F.2d 891 (5th Cir. 1986).

The agreement between WWF and the government of Madagascar was a development contract, neither one for profit nor one in which a private party could have participated on behalf of the Malagasy government. Furthermore, "establishing terms and conditions for removal of natural resources from . . . [a foreign government's] territory . . . is a 'governmental activity' for purpose of the FSIA. 28 U.S.C. §§ 1604-1605(a)(2); see also *Int'l Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553, 567-68 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

The theory behind the "direct effect" clause of § 1605(2) would not allow a finding of jurisdiction for a commercial activity. To determine whether a court should hear the case, one must ask whether the effect was sufficiently direct and in the United States' interests that Congress would have wanted an American court to hear the case. In the Malagasy funnel swap, Congress would not have wanted an American court to hear a dispute. If the funnel swap is not a commercial activity, presumably then the agreement for WWF to conserve and manage sovereign territory would not fall into the commercial activities exception. Ignoring the fact that WWF-Int'l. was party to the agreement, the effect of the breach is felt in Madagascar. Consider that WWF-Int'l. of Gland, Switzerland, was party to the agreement, Congress has even less interest in having an American court hear the case.

The expropriation exception would not provide for jurisdiction because this exception grants United States courts jurisdiction if rights in property are taken in violation of international law. The expropriation would violate international law if Madagascar were to expropriate by passing legislation outlawing the swap, or if the expropriation was not for a public purpose, was discriminatory, or had no provision for prompt, adequate, and effective compen-

may resolve a dispute under the FSIA is whether such court has personal jurisdiction. Under *International Shoe v. Washington*,¹²⁵ which established the "minimum contacts" test for determining personal jurisdiction, it is unclear whether a single transaction is sufficient to establish personal jurisdiction. Although some courts have held that a single transaction is insufficient to confer personal jurisdiction,¹²⁶ others have held that as long as a single contract has a substantial connection to the state in which the suit was brought, minimum contacts are established.¹²⁷ Even if a United States court found that the government of Madagascar has sufficient "minimum contacts" to render personal jurisdiction, it still could avoid hearing a case by invoking the doctrine of *forum non conveniens*.¹²⁸

Under the doctrine of *forum non conveniens*, a United States trial court facing a case of Malagasy expropriation of a funnel-swap agreement could find that because the issue involves a foreign govern-

sation. I. BROWNLIE, *supra* note 113, at 538, 548. The only property to meet the expropriation exception is that which is

exchanged for [expropriated] property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for [expropriated] property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3) (1988). However, no commercial activity *in the United States* is at issue here. Even if the funnel swap were a commercial activity, it does not meet the other qualifications for application of this exception. There is no "property exchanged for such property" present in the United States, or owned or operated by Madagascar that also is "engaged in commercial activity in the United States." *Id.* Madagascar exchanged debt for specified rights to tropical forest territory, and the Malagasy debt is not in the United States or "owned" or operated by Madagascar or its instrumentality. Therefore, United States courts would not have jurisdiction under the Act, and even if they did, the only practical remedy would be attachment under 28 U.S.C. § 1610 (1988), which would be as ineffective as compensation, because Madagascar does not have substantial assets in the United States and because compensation is an inappropriate remedy. See BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 53 (Aug. 1990) [hereinafter SURVEY OF CURRENT BUSINESS]; U.S. DEP'T OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, OPERATIONS OF U.S. AFFILIATES OF FOREIGN COMPANIES: PRELIMINARY 1988 ESTIMATES (1988) (table A-2) [hereinafter FOREIGN DIRECT INVESTMENT IN THE UNITED STATES] (detailing Malagasy investment in the United States).

125. 326 U.S. 310 (1945). The United States Supreme Court held that to subject a foreign corporation to a judgment in personam, due process requires only that the corporation have "certain minimum contacts with [the territory of the forum], such that the maintenance of the action does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

126. *Steinway v. Majestic Amusement*, 179 F.2d 681, 683 (10th Cir.), *cert. denied*, 339 U.S. 947 (1950).

127. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957).

128. See generally M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 254 (1988).

ment defendant and its territory, and because much of the evidence is located in that foreign country, a Malagasy court is a more convenient forum to decide the dispute. In *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India*,¹²⁹ the Court of Appeals for the Second Circuit affirmed the district court's dismissal on forum non conveniens grounds because most of the relevant evidence and events existed or occurred in India and the public interests of India were greater than those of the United States.¹³⁰ The same rationale would likely apply to the expropriation of the Malagasy funnel swap because the land and the evidence exist in Madagascar, the principal events occurred there, and Madagascar has strong public policy interests in the use of its territory. A United States court would hesitate to judge a foreign nation's use of its own territory even if United States taxpayer funds were at issue.

Even if a court found personal jurisdiction and did not invoke forum non conveniens, any resulting judgment probably would be unenforceable. The FSIA specifies the remedies that United States courts can award, such as damages or attachment.¹³¹ Attachment, like damages, does not provide effective relief where an investment is non-pecuniary. A United States court would be unable to enforce monetary attachment because Madagascar has limited United States resources to attach.¹³² In addition, if Madagascar were pressured into expropriating the funnel-swap rights because of severe economic distress, it probably could not afford to pay compensation.¹³³ Despite the granting of either remedy, the swap's environmental purposes would remain frustrated.

2. THE FOREIGN ASSISTANCE ACT

If, as anticipated, the FSIA provided a claimant such as WWF with no relief, the claimant could look for a United States forum under the Foreign Assistance Act of 1961.¹³⁴ Congress passed the Foreign Assistance Act partially to negate the act of state doctrine, which holds that "the courts of one country will not sit in judgment on the acts of the government of another done within its own terri-

129. 809 F.2d 195 (1987), *cert. denied*, 108 U.S. 871 (1987).

130. *Id.* at 199-201.

131. 28 U.S.C. §§ 1606, 1609, 1610 (1988).

132. See SURVEY OF CURRENT BUSINESS, *supra* note 124; FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, *supra* note 124.

133. U.S. Dep't of State, *supra* note 82, at 4.

134. Foreign Assistance Act of 1961, Pub. L. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 22 U.S.C.).

tory."¹³⁵ In other words, as reaffirmed in *Banco Nacional de Cuba v. Sabbatino*,¹³⁶ the Supreme Court believes that the executive branch is most able to review foreign affairs issues.¹³⁷

The Foreign Assistance Act, however, grants United States jurisdiction in cases in which "a claim of title or other right to property is asserted by any party including a foreign state . . . based upon a confiscation or other taking after January 1, 1959."¹³⁸ As expected, because the Act is addressed specifically to expropriation, it has minimized the importance of the act of state doctrine, and hence, has permitted United States citizens to assert expropriation claims against a foreign state in United States courts.¹³⁹ Unfortunately, the Foreign Assistance Act would offer little relief to the WWF or, ultimately, to the United States government, which funded the swap. It basically suffers from the same problems that Madagascar's domestic law presents.¹⁴⁰ The remedies available in United States courts, namely monetary or injunctive relief, are likely unenforceable against Madagascar because of its limited assets in the United States. More important, money damages, if enforceable, would be inadequate, because money does not sustain habitats. Precious natural resources would again be subject to mass destruction.

c. *International Law*

1. CONVENTIONAL INTERNATIONAL LAW: AGREEMENTS BETWEEN STATES

The United States is not a party to any agreement that governs debt-for-nature swaps,¹⁴¹ including the Malagasy debt-for-nature swap.¹⁴² Madagascar and the United States did enter into a bilateral

135. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

136. 376 U.S. 398 (1964).

137. *Id.* at 428-37.

138. Foreign Assistance Act, 22 U.S.C. § 2370(e)(2) (1988).

139. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1984), cert. dismissed 472 U.S. 934 (1985); *Timberland Lumber N.T. & S.A. Co. v. Bank of America*, 549 F.2d 597, 608 (9th Cir. 1976); *Bernstein v. Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir. 1947), cert. denied, 332 U.S. 772 (1947).

140. See *supra* notes 85-93 and accompanying text.

141. A survey of treaties to which the United States is a party reveals that the United States does not belong to any treaties governing debt-for-nature swaps in the countries in which it has participated in swaps. See U.S. DEP'T OF STATE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1990, at 21-24, 51-53, 64-66, 271-72, 195-200 (1990). For a summary of countries in which USAID has participated in swaps with American NGO's, see *supra* note 41.

142. U.S. DEP'T OF STATE, *supra* note 141, at 151-52.

investment guarantee agreement in 1963,¹⁴³ but it does not offer protection for environmental investments. Foreign investment agreements protect foreign investors, by both defining acceptable host-state behavior vis-a-vis foreign investors and providing remedies for host-state violations to foreign investors whose government is a party to the agreement. Even if WWF could persuasively argue that a debt-for-nature swap is an "investment" for the purposes of the agreement, WWF's only recourse would be to request the United States to negotiate and ultimately arbitrate the dispute.¹⁴⁴ Should the arbitrator prevail in this dispute, the arbitrator would be limited to the remedies under the applicable law, which, in the case of the Malagasy debt-for-nature swap, would be Malagasy law. As discussed earlier,¹⁴⁵ each of those remedies is ineffective for the debt-for-nature swap investment.

As an environmental investor, WWF also might look to the Overseas Private Investment Corporation ("OPIC")¹⁴⁶ for relief. OPIC provides investors with the opportunity to purchase insurance¹⁴⁷ on its investments in certain approved countries, of which Madagascar is one.¹⁴⁸ Once again, however, the obvious relief—compensation—is simply inadequate when one remembers that the purpose of the program is natural resource conservation and management.

2. CUSTOMARY INTERNATIONAL LAW

If no bilateral agreement provides a remedy for expropriation,

143. Agreement Relating to Investment Guarantees, Exchange of Notes at Tananarive, July 26, 1963, United States-The Malagasy Republic, 14 U.S.T. 1073, T.I.A.S. No. 5407.

144. *Id.* at 1074.

145. See *supra* text accompanying notes 91-97.

146. The Overseas Private Investment Corporation ("OPIC") is an "agency of the United States under the policy guidelines of the Secretary of State." 22 U.S.C. § 2191 (1988). Chief among its functions is the encouragement of private investment in developing countries that are "friendly with the United States by guaranteeing investments by United States citizens, corporations, partnerships or other associations, substantially beneficially owned by United States citizens." *Id.*

147. OPIC's three classes of investment insurance protect against: 1) the risk of inconvertibility of currency, 2) the risk of expropriation, and 3) political violence, including risk of war, revolution, or insurrection, or civil strife. 22 U.S.C. § 2194(1) (1988). The insurance against expropriation

includes, but is not limited to, any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project.

Id. § 2198(b).

148. U.S. DEP'T OF COMMERCE, *MARKETING IN MADAGASCAR* 25 (1988).

the claimant can look to customary international law.¹⁴⁹ Under customary international law, countries may expropriate but must pay compensation in return for the expropriated property.¹⁵⁰ Under the principles of economic self-determination¹⁵¹ and permanent sovereignty over natural resources,¹⁵² customary international law provides that a state has an absolute right to expropriate foreign property.¹⁵³ Thus, should Madagascar decide to expropriate WWF's rights to "protect and administer"¹⁵⁴ under the debt-for-nature swap, Madagascar would have support under customary international law to do so.

In that event, WWF could bring a dispute before either the International Court of Justice¹⁵⁵ or an arbitrator.¹⁵⁶ Should the court or arbitrator find that Madagascar, or any other debt-for-nature swap host state, has expropriated the debt-for-nature swap rights, customary international law provides three remedies: restitution (or specific performance), a declaration of rights, or a claim for compensation or damages.¹⁵⁷ Restitution is viewed as "largely impractical" where contracts require "continuing performance in the territory of the state party when the state has decided that the public good requires the variation or termination of the contract."¹⁵⁸ A claim for declaration of rights is often a disguised claim for restitution, so the only real

149. U.N. CHARTER art. 38 (prescribing the law of the International Court of Justice).

150. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 & reporters' notes 1, 2 (1986).

151. Award on the Merits in Dispute Between Texaco Overseas Petroleum Co. & Gov't of Libyan Arab Republic, 17 I.L.M. 1, 21 (1978) [hereinafter *Libya-Oil Cos. Arbitration*].

152. *Id.* at 27-29 (discussing *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974); *Permanent Sovereignty Over Natural Resources*, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962); *Permanent Sovereignty Over Natural Resources*, G.A. Res. 3171, 1 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9400 (1973); *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, 6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974). The principle of permanent sovereignty over natural resources includes the right to take privately owned property for the benefit of national development. Z. KRONFOL, PROTECTION OF FOREIGN INVESTMENT 22 (1972) (discussing G.A. Res. 626 (vii), 7 U.N. GAOR Supp. (No. 20) at 18, U.N. Doc. A/236 (1952)).

153. *Libya-Oil Cos. Arbitration*, *supra* note 151, at 21.

154. WWF PROPOSAL TO USAID, *supra* note 10, at 9-16.

155. The possibility of having the opportunity to present this case before the International Court of Justice is minimal because the Statute of the International Court of Justice does not provide for compulsory jurisdiction. STATUTE OF THE INT'L COURT OF JUSTICE art. 36, 86, 59 Stat. 1031. A state must consent to jurisdiction before it becomes a party to a case. Thus, unless Madagascar would have consented to open-ended jurisdiction, it would not agree to jurisdiction on the ground that there is no claim. *Id.*

156. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 204-15 (1982).

157. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law* 35 CATH. U. L. REV. 929, 937 (1986).

158. *Id.* at 938.

remedy available is a monetary award.¹⁵⁹ The result is that customary law, which essentially awards monetary compensation or damages,¹⁶⁰ also fails to provide adequate remedies in the debt-for-nature swap transaction. Thus, because debt-for-nature swaps are relatively innovative, each source of law leads to some inappropriate remedy, because those remedies arose as complements to *traditional* foreign investments.

Nonetheless, customary law does offer a glimmer of hope. Despite the impracticability of restitution and the inadequacy of compensation, a sole arbitrator in the Texaco Overseas Petroleum Company dispute with the Libya Arab Republic¹⁶¹ awarded specific performance (*restitutio in integrum*) for the expropriation of a long-term investment, a concession agreement.¹⁶² The arbitrator found that Libya's actions constituted breach of contract and an expropriation of the deeds of concession, despite United Nations General Assembly Resolutions concerning permanent sovereignty over natural resources.¹⁶³ In so holding, the arbitrator obliged Libya to perform its contractual obligations with private foreign investors by using its natural resources for the benefit of the foreign oil companies.¹⁶⁴ One wonders how a court or an arbitrator would apply *Libya Oil* to a debt-for-nature swap agreement, which like a concession agreement, is a long-term investment agreement.¹⁶⁵

Although not yet indicative of customary international law, the

159. *Id.* A plaintiff suing for a declaration of rights is often just seeking the authority to force the defendant expropriator to perform the obligations arising under the contract.

160. Compensation is the remedy for a *lawful* taking or termination of contract; a "damage award" is the remedy for an *unlawful* taking or termination. For information regarding methods for computing the amount due, see *id.* at 938-42.

161. Libya-Oil Cos. Arbitration, *supra* note 151, at 37.

162. *Id.* at 31-32, 34.

163. *Id.* at 37. The Arbitrator applied customary international law to a dispute arising from a concession agreement between Libya and several American Oil companies, although the concession agreement specified Saudi Arabian law in a choice-of-law clause in the agreement. *Id.* at 8-9.

164. *Id.* at 31-37.

165. *Id.* at 10-11.

[F]rom a formal point of view and *prima facie*, the Deeds of Concession in the dispute were of a contractual nature since they expressed an agreement of the wills of the conceding State and of the concession holders. . . .

....
 "From the international point of view, a concession, in particular, is simply a contract. . . . A concession, it is true, may not be a contract at all"; this is only true when it has been "conferred by and contained in a legislative instrument."

Id. (quoting Mann, *Contrats entre Etats et Personnes Privées Étrangères: The Theoretical Approach Towards the Law Governing Contracts Between States and Private Persons*, REV. BELGE D.I. 562, 564 (1975)).

Libya Oil holding would provide specific performance to WWF¹⁶⁶ if Madagascar unlawfully expropriated WWF's rights under the debt-for-nature swap agreement.¹⁶⁷ Because not every expropriation amounts to breach, however, a trier of fact would have to determine whether Madagascar's expropriation was unlawful.¹⁶⁸ Madagascar could not successfully argue that the debt-for-nature swap is an administrative contract, which "can give rise to amendments or even abrogation on the part of the contracting state,"¹⁶⁹ because administrative contract theory does not exist in international law.¹⁷⁰ Madagascar could argue that its sovereignty entitles it to abrogate,¹⁷¹ or that the United Nations Resolution 1803 on Natural Resources,¹⁷² which acknowledges a country's sovereign claim to its resources, allows it to abrogate the agreement. These last two defenses may have merit. However, distinct characteristics of this swap agreement would make *Libya Oil*'s specific performance remedy a significant violation of Madagascar's sovereignty and also would contravene the intention of United Nations Resolution 1803. First, the *Libya Oil* deeds of concession had specific time limits,¹⁷³ unlike the Malagasy funnel-swap agreement. Second, the deeds of concession contained a non-aggravation clause which assured Texaco that Libya would not alter the contractual rights except by mutual agreement.¹⁷⁴ The swap agreement had no such clause. Third, the concessions were commercial, not environmental. Fourth, unlike Libya, which retained the functional exercise of its sovereignty in various obligations imposed on it as a contracting party,¹⁷⁵ Madagascar did not retain such mani-

166. Realistically, WWF-Int'l would be the party entitled to specific performance under the Malagasy funnel-swap. Thus, the award would not even compensate United States taxpayers for their environmental investment in Madagascar, assuming that the United States NGO did not sign the swap agreement.

167. There was no arbitration clause in the Malagasy debt-for-nature swap agreement. Thus, if a court were to apply *Libya Oil* to a Malagasy expropriation, Madagascar could argue that the decision of the arbitrator in *Libya Oil* does not apply to a non-arbitration case. WWF PROPOSAL TO USAID, *supra* note 10.

168. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 532-40 (1979).

169. *Libya-Oil Cos. Arbitration*, *supra* note 151, at 25. The theory of administrative contracts is of French origin. It gives the public authority the unilateral right to alter or abrogate public service concessions. *Id.* Madagascar could argue that because the swap's purpose is to provide a public service—namely, to preserve the tropical forest—so that the swap is a public service concession.

170. *Id.*

171. *See id.* at 21.

172. *Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962).

173. *Id.* at 24, 26.

174. *Id.* at 24.

175. *Id.* at 26.

festations of its sovereignty. Instead, Madagascar merely specified that the Malagasy Department of Water and Forests ("MPAEF") would retain "overall titular responsibility" of certain portions of the project.¹⁷⁶

Because of these significant differences, if a court or arbitrator were to order Madagascar either to conserve permanently, or to comply with a foreign entity's plan over management of its natural resources, the United Nations could find an infringement of Madagascar's sovereignty under Resolution 1803. Although a court may order a sovereign entity to meet its voluntary, time-limited, "commercial promises,"¹⁷⁷ it may not direct foreign management of the sovereign nation's territory and its natural resources indefinitely.¹⁷⁸ WWF's reply would be that United Nations Resolution 1803 requires foreign investment agreements "freely entered into by or between sovereign States [to be] observed in good faith".¹⁷⁹

The result is that a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract.¹⁸⁰

The problem with this argument is the same as that encountered in other possible remedies: WWF would have difficulty proving that United Nations Resolution 1803 includes debt-for-nature swap agreements in its definition of "investment agreement." Debt-for-nature swaps did not exist when the United Nations passed Resolution 1803.¹⁸¹ Moreover, some might argue that Madagascar did not "freely" enter into the swap agreement, because WWF used the nation's vulnerable foreign debt position to force Madagascar into

176. World Wildlife Fund & Matagasy Department of Water and Forests, Priority Protected Areas Management Plan, Aug. 15, 1988, at 19, *reprinted in* WWF PROPOSAL TO USAID, *supra* note 10, app. D.

177. Libya-Oil Cos. Arbitration, *supra* note 151, at 1. The concession agreements were to have a duration of at least fifty years. *Id.* at 24.

178. The concept of "self-determination," reflected in United Nations Resolution on Permanent Sovereignty Over Natural Resources, *supra* note 152, and The Charter of Economic Rights and Duties of States, G.A. Res. 3201, 6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc 9559 (1974), would not permit such interference in a state's decisions. *See* I. BROWNLIE, *supra* note 113, at 540, 542.

179. United Nations Resolution 1803, *supra* note 152, at 16. However, United Nations Resolutions are not normally considered binding law. Such resolutions are not a defense unless they codify, or have themselves become, customary international law. I. BROWNLIE, *supra* note 113, at 14-15.

180. Libya-Oil Cos. Arbitration, *supra* note 151, at 24.

181. The United Nations passed Resolution 1803 in 1962, long before the first debt-for-nature swap in Bolivia. *See Permanent Sovereignty Over Natural Resources*, *supra* note 172; Comment, *supra* note 17, at 326.

relinquishing some of its sovereignty.¹⁸² Further, because Madagascar has no domestic NGO's, a court or the United Nations may believe Madagascar's sovereignty is threatened when its territory is to be administered by a foreign NGO, WWF, and a mere "titular head," the MPAEF. WWF may also argue the theory of abuse of governmental power, under customary international law.¹⁸³ An abuse of governmental power would occur if Madagascar passed legislation expropriating the Malagasy debt-for-nature swap agreement, or provided inadequate remedies in its own courts for such an expropriation.¹⁸⁴ Considering the economic pressures in Madagascar and the historical instability of its government,¹⁸⁵ one can readily envision a repeal of the law permitting the debt-for-nature swaps.¹⁸⁶ If Madagascar repealed the law or failed to provide adequate remedies for its breach, a trier of fact, applying customary international law and *Libya Oil*, could choose from two remedies: specific performance (*restitutio in integrum*), and damages (*restitutio in pristinum*).¹⁸⁷ Reparation must, as far as possible, remove all consequences of an illegal act and reestablish the situation that would have existed.¹⁸⁸ Where the contract is a debt-for-nature transaction, however, only damages would maintain Madagascar's sovereignty.¹⁸⁹ Otherwise the debt-for-nature swap agreement, which places control of certain natural resources under either a foreign-funded local NGO or a foreign NGO, would allow a foreign entity to direct the host country's devel-

182. Brazilian Foreign Minister Roberto Costa de Abreu stated, "Brazil . . . will not see itself turned into a nature preserve for the rest of humanity. Our most important goal is economic development." *The World Puts Heat on Brazil*, *World Press Rev.*, May 1989, at 38. When French Prime Minister Michel Rocard made a debt-swap proposal to former Brazilian President Jose Sarney, President Sarney answered, "I am not in a position to present any proposal like this to the people of Brazil, who are jealous, like the French, of their sovereignty." *Brazil Being Bled*, *LATIN AM. REGIONAL REPS.: BRAZIL REP.*, Feb. 15, 1990, at 5.

183. M. AKEHURST, *supra* note 155, at 93.

184. *Id.* at 96.

185. U.S. Dep't of State, *supra* note 82, at 3.

186. Frequently, both parties will agree to amend concession agreements. See *Libya-Oil Cos. Arbitration*, *supra* note 151, at 4. Economic factors usually motivate the host country to renegotiate, and foreign concessionaires often are pressured into agreement because the concessionaires already have begun their project. See, e.g., *id.* (citing new Libyan legislation and regulations relating to petroleum forced concessionaires into a new agreement).

187. The arbitrator awarded specific performance in *Libya-Oil Cos. Arbitration*, although damages have been the traditional award for unlawful expropriation. *Id.* at 35.

188. *Libya-Oil Cos. Arbitration*, *supra* note 157, at 32 (quoting Chorzow Factory, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928)).

189. Bowett, *supra* note 157, at 937-42. For information on the calculation of compensation for lawful expropriation, see KRONFOL, *supra* note 152, at 95-118; O'Keefe, *The United Nations and Permanent Sovereignty over Natural Resources*, 8 *J. WORLD TRADE L.* 239, 262-75 (1974).

opment. Accordingly, the remedy of compensation is the only viable recourse, and it provides no natural resource protection.

D. Arbitration

The agreement between Madagascar and WWF did not contain a clause stating that the parties would submit to arbitration in case of dispute. Such an arbitration clause would nevertheless not have improved WWF's position, because the same ineffective remedies would be available once an arbitrator applied either United States, Malagasy, or international law. Compensation would have been the only available remedy, unless the arbitrator, applying customary international law, took the invasive and dubious step of analogizing the debt-for-nature swap to a concession agreement, applying *Libya Oil*,¹⁹⁰ and awarding specific performance. Regardless, a court would have uncertain success at enforcing either remedy against the foreign host state, Madagascar.

IV. LONG-TERM SOLUTIONS

Two long-term solutions currently exist, which nations have used in other areas of international cooperation. Several successful treaty models, described below, could be adapted to the debt-for-nature swap in order to attain the swap's ultimate purpose, environmental resource conservation and management. Further, the World Heritage List, a mechanism for designating and protecting sites as part of the "world's heritage,"¹⁹¹ is an existing convention that, with a little modification to the remedies, could be a model for debt-for-nature swaps. The main goal of either model is to provide an *effective* remedy, such as mandatory negotiation, without unduly infringing upon a nation's sovereignty.

A. Treaties

1. GENERAL ATTRIBUTES

Little can be accomplished in the absence of multilateral institutions that will eventually carry out whatever remedial environmental actions the world community can agree upon. In short, we need an international treaty . . . to coordinate and enforce international action on the environment.¹⁹²

190. See *Libya-Oil Cos. Arbitration*, *supra* note 151, at 1.

191. Convention Concerning the Protection of the World Cultural and Natural Heritage, *done at Paris* Nov. 23, 1972, 27 U.S.T. 37.

192. Richardson, *How to Fight Global Warming*, N.Y. Times, Feb. 7, 1990, at A19, col. 1. The lead United States delegate to the Law of the Sea Conference from 1977 to 1980, Elliot

There is a tremendous need of a remedy for host-country expropriation, more effective than compensation and more certain than a possible award of specific performance. An effective remedy must balance a host country's sovereignty against the debt-for-nature swap investor's goal of natural resource conservation and management.¹⁹³ Nations generally resolve competition between the right of sovereignty and the need for multinational safeguards by negotiating multilateral treaties to guide the parties' behavior.¹⁹⁴ The environmental domain requires the same treatment.¹⁹⁵ An effective treaty would respect sovereignty, provide satisfactory relief to the swap parties for their expropriated rights, and provide other inducements for nations to abide by the swap agreements.

Treaties are essentially contracts between states to define acceptable state behavior.¹⁹⁶ Treaties can either mandate specific state action in the international arena or provide regulations that govern independent agreements.¹⁹⁷ Investment guarantee agreements fall into the second category. In a treaty governing funnel swaps, even though an investor, such as WWF in the Malagasy swap, is not a party to the treaty, it can ask its government to invoke the treaty to protect its interest, because the treaty would specifically govern such swaps. Furthermore, a nation "may not invoke the provisions of its internal law as justification of [its] failure to perform a treaty,"¹⁹⁸ and

Richardson argues for a global Environmental Protection Agency with dispute resolution mechanisms. *Id.*

193. N.Y. Times, Feb. 27, 1990, at B5, col. 5. (reflecting Brazil's hesitancy in receiving foreign aid); Wash. Post, Oct. 20, 1989, at A4, col. 1 (discussing concerns of people "indigenous" to the Amazon); BRAZILIAN NATIONAL CONFERENCE ON THE FOREIGN DEBT, REPORT OF THE BRAZILIAN NATIONAL CONFERENCE ON THE FOREIGN DEBT 3 (1989). Brazil and other Latin American countries that desperately need environmental projects have opposed debt-for-nature swaps, however, because of the perceived threat they pose to sovereignty. *Brazil Being Bled*, LATIN AM. REG. REPS.: BRAZIL REP., Feb. 15, 1990, at 5 (stating that Brazil was "being bled by the international financial community").

194. M. JANIS, *supra* note 128, at 9-13.

195. Mushkat, *supra* note 32, at 38. Dr. Mushkat argues for the adoption of a comprehensive integrated regional strategy in Asia for environmental protection and the rational use of natural resources. She also recognizes the need for global efforts at environmental protection. *Id.*

196. I. BROWNLIE, *supra* note 113, at 630.

197. Some treaties, "dispositive of territory and rights to territory like conveyances in private law," are like contracts and mandate specific state action. *Id.* However, a multilateral treaty that sets rules like the Vienna Convention or forms an institution is lawmaking and may govern subsequent individual agreements. *Id.*

198. Vienna Convention on the Law of Treaties, signed at Vienna May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339 (not in force for the United States) [hereinafter Vienna Convention]. Even though the United States is not a party to the Vienna Convention, the United States Department of State recognizes it as an "authoritative guide to current treaty law and practice." S. EXEC. DOC. NO. L, 92nd Cong., 1st Sess., at 1 (1971).

it "cannot adduce as against another State [its] own Constitution with a view to evading obligations incumbent upon [it] under international law or treaties in force."¹⁹⁹ Thus, a nation often must incorporate an international agreement into its municipal law.²⁰⁰ Even though the treaty places limits on state behavior, it does not *infringe* upon sovereignty where a nation voluntarily accepts limitations on its sovereignty.²⁰¹

In promoting long-term compliance, treaties provide several advantages over domestic law or customary international law. First, the reciprocal benefits and voluntary negotiation and acceptance of a treaty's terms induce states to respect their treaty obligations.²⁰² Second, treaties offer stability, because they "are not normally terminated upon a change in the government of one of the parties."²⁰³ The third and most important benefit of a treaty governing debt-for-nature swap transactions would overcome the inappropriateness of domestic and customary international law remedies. A treaty could include a dispute resolution provision that mandates negotiation and conciliation as a "remedy" for expropriation. Such a provision could operate either prophylactically or as a post-expropriation remedy. If domestic pressures required Madagascar to renegotiate the terms of the swap, to avoid expropriation, it could call for negotiations with WWF under rules established under the treaty. Likewise, if Madagascar unilaterally decided to expropriate, WWF could demand mandatory negotiations with Madagascar.

The politics of negotiation and conciliation would be the first avenue of reaching an acceptable result. If the parties were unsuccessful, then the aggrieved party could request the appointment of an independent panel to adjudicate the dispute.²⁰⁴ Even though the panel's recommendations may not have a domestic court's force of law, its recommendations, which could include retaliation against the

199. Treatment of Polish Nationals in Danzig (Pol. v. Danzig), 1931 P.C.I.J. (ser. A/B), no. 44, at 24 (Feb. 4, 1932).

200. I. BROWNLIE, *supra* note 113, at 38.

201. Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 720 (1982).

202. M. JANIS, *supra* note 128, at 13, 16, 18. The Vienna Convention abides by the principle of customary international law, *pacta sunt servanda*, which states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 198, art. 27, at 339.

203. M. JANIS, *supra* note 128, at 32.

204. Provisions do exist for a dispute settlement system that requires negotiation, consultation, and the appointment of an independent panel. The General Agreement on Tariffs and Trade ("GATT") includes one such system that has been "reasonably successful in resolving recent trade disputes." Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L. L.J. 51, 52, 58-60 (1987).

expropriator, would motivate an offending state to attempt to negotiate a solution before reaching the panel state. Retaliation could include, for example, the termination of foreign assistance to the expropriator, and it would legitimize what would otherwise appear as rich developed states using their economic superiority to meddle in developing states' territories.

A debt-for-nature swap treaty could be either multilateral or bilateral. There are advantages and disadvantages to both. Bilateral treaties can be drafted quickly, because of the limited number of state parties, and tailored to a particular developing country's needs. The environmental promise of a bilateral treaty is limited, however, to the two states that are its parties. On the other hand, a multilateral treaty would provide a long-term global solution because it binds many actors.²⁰⁵ Yet multilateral treaties often take longer to negotiate and execute, and are more general in their approach. Nevertheless, considering the motivation behind debt-for-nature swaps—responding to worldwide environmental distress that ignores man-made national boundaries—a multilateral treaty is clearly preferable.²⁰⁶ A multilateral treaty concerning debt-for-nature swaps would not only respect sovereignty, but provide effective relief as well. Such a treaty would stabilize the swaps' long term goal of preservation of the tropical forests.

2. EXISTING MODELS FOR A TREATY SOLUTION

Several existing multilateral treaties and agreements can be used as models for a debt-for-nature swap treaty. This Section discusses four treaties, namely, the Treaty on the Non-Proliferation of Nuclear Weapons,²⁰⁷ the International Seabed Authority of the United

205. Mushkat, *supra* note 32, at 38. "The challenges in the environmental domain cannot be handled effectively by individual countries, and the advantage of a collective approach is that it allows economies of scale and makes use of the institutional machinery that is already in place." *Id.*

206. Competing needs for and inequitable access to water in Egypt, Jordan, Turkey, Ethiopia, and Israel illustrate the effect of the lack of a treaty in the face of international environmental problems. See Cowell, *Water Rights: Plenty of Mud to Sling*, N.Y. Times, Feb. 7, 1990, at A4, col. 1. Earlier this year, Egypt temporarily blocked a loan to Ethiopia, the upstream source of the Blue Nile, from the African Development Bank. *Id.* Egypt believed that the loan was earmarked for a project that would consume too much Nile water. *Id.*

There was also a dispute concerning the supply of water emanating from the Turkish portion of the Euphrates. *Id.* Countries downstream disputed Turkey's diversion of the Euphrates to fill a new reservoir, which reduced the amount of Euphrates water reaching downstream Syria by approximately three quarters. *Id.* at col. 2. According to Syrian officials, many farmers lost their winter crops, and supplies of hydroelectric power and drinking water dwindled, forcing rationing. *Id.* at col. 3.

207. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1,

Nations Convention on the Law of the Sea,²⁰⁸ the Inter-American System for Nature Conservation,²⁰⁹ and the "World Park" model,²¹⁰ that countries negotiating debt-for-nature swaps should consider. Although each of these models limits sovereignty to some degree, they also manage to respect the fundamental importance of sovereignty and encourage compliance, and some offer potent remedies for expropriation. These models could be adapted to meet the needs of the swaps' specific long-term goals.

a. Nuclear Non-Proliferation Treaty

The Treaty on the Non-Proliferation of Nuclear Weapons ("Non-Proliferation Treaty")²¹¹ has been called "the cornerstone of the global effort to contain the growth of the 'nuclear club.'"²¹² It requires each of its 140 nation parties²¹³ to conclude a safeguards agreement with the International Atomic Energy Agency ("IAEA"),²¹⁴ a United Nations agency. Pursuant to the safeguards agreement, the parties to the Non-Proliferation Treaty agree to accept IAEA safeguards on all nuclear material used in peaceful nuclear activities.²¹⁵ The purpose of the agreement is to verify that nuclear material is not diverted from peaceful purposes to nuclear explosive

1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (entered into force March 5, 1970) [hereinafter Non-Proliferation Treaty].

208. United Nations Convention on the Law of the Sea, w/Annexes and Index, *opened for signature* Dec. 10, 1982, arts. 133-191, Annexes III, IV, U.N. Sales No. E.83.V.5 (1983) [hereinafter Law of the Sea Convention].

209. Creation of an Inter-American System for Nature Conservation, O.A.S. OEA Doc. G/CP/2036/89 (1989).

210. See GREENPEACE INTERNATIONAL, THE FUTURE OF THE ANTARCTIC: BACKGROUND FOR A UN DEBATE 1, 18 (1985).

211. Non-Proliferation Treaty, *supra* note 207, at 483, T.I.A.S. No. 6839 at 4, 729 U.N.T.S. at 161.

212. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229, 251 (1988).

213. EUROPA PUBLICATIONS LTD., *supra* note 11, at 60. Madagascar is a party to the Non-Proliferation Treaty and a member of the International Atomic Energy Agency. *Id.* at 52; U.S. DEP'T OF STATE, *supra* note 142, at 357; Leventhal, *The Nonproliferation Hoax*, N.Y. Times, Aug. 20, 1990, at A15, col. 3.

214. Non-Proliferation Treaty, *supra* note 207, art. III, at 487, T.I.A.S. No. 6839, at 5-6, 729 U.N.T.S. at 172; see also EUROPA PUBLICATIONS LTD., *supra* note 11, at 59, 60; Koplow, *supra* note 212, at 252. The IAEA is an autonomous intergovernmental organization that the United Nations formed in 1957. EUROPA PUBLICATIONS LTD., *supra* note 11, at 59. It is a member of the U.N. system and annually reports on its activities to the U.N. *Id.* Its principal objectives are "to enlarge the contribution of atomic energy to peace, health and prosperity throughout the world and to ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose." *Id.*

215. Non-Proliferation Treaty, *supra* note 207, art. III, at 487-88, T.I.A.S. No. 6839, at 5-6, 729 U.N.T.S. at 172.

devices.²¹⁶ The IAEA safeguards require the parties to keep detailed records and to allow IAEA personnel to conduct on-site inspections.²¹⁷ Each party to the Non-Proliferation Treaty also agrees not to seek, manufacture, or receive nuclear explosive devices.²¹⁸ The Treaty resolves sovereignty concerns by negotiating the necessary safeguards and by having a neutral third party, the IAEA, conclude negotiations.²¹⁹

Some critics have argued that the Non-Proliferation Treaty enforcement and auditing provisions are not strong enough.²²⁰ However, the Treaty was not designed as a "police force,"²²¹ and so far enforcement has not been much of a problem. States generally have adhered to the Non-Proliferation Treaty because they voluntarily agreed to do so, and sanctions include the suspension and return of IAEA-provided nuclear material and equipment.²²² The Non-Proliferation Treaty is an important document because it represents the outer limits of restrictions on sovereignty that most states would be willing to accept.

b. The United Nations and the International Seabed Authority

The United Nations has attempted to resolve global development problems by becoming a "clearinghouse" for the legal rules of industrialized countries' development programs in the Third World.²²³

216. *Id.*; see also EUROPA PUBLICATIONS LTD., *supra* note 11, at 59; Koplw, *supra* note 212, at 252 n.122.

217. Statute of the International Atomic Energy Agency, done Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3; see also Koplw, *supra* note 212, at 252-53.

218. Non-Proliferation Treaty, *supra* note 207, art. II, at 487, T.I.A.S. No. 6839, at 5, 729 U.N.T.S. at 171.

219. *Id.* art. III, at 487-89, T.I.A.S. No. 6839, at 507, 727 U.N.T.S. at 172; see also Koplw, *supra* note 212, at 252.

220. Koplw, *supra* note 212, at 253 n.122. While the Non-Proliferation Treaty's limitations are well known, support for it is extremely widespread. Nevertheless, there are a few detractors. Paul Leventhal, the President of the Nuclear Control Institute, argues that the Non-Proliferation Treaty needs to be revised because member countries are taking actions that proliferate nuclear weapons without violating the Treaty. Leventhal, *supra* note 213, at A15, col. 3. He does not argue that the treaty lacks police power; he merely contends that the treaty's provisions do not address contemporary state behavior. *Id.* at col. 6.

221. Koplw, *supra* note 212, at 252 n.122.

222. P. SZASZ, THE LAW AND PRACTICES OF THE INTERNATIONAL ATOMIC ENERGY AGENCY 333, 601-05, 632-33 (1970). The IAEA may suspend members that persistently violate any provisions of the Statute of the IAEA or any agreement entered into pursuant to the statute. *Id.* at 602. In certain circumstances, the IAEA may impose additional sanctions, such as the return of materials and equipment that the IAEA provided to the state, or the suspension of all assistance to the state. *Id.*

223. In this role as "clearing house" the United Nations has adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, G.A. Res. 35/63, 35 U.N. GAOR Supp. (No. 48) at 123, U.N. Doc. A/35/48

"The most spectacular initiative . . . is the idea of supranational authorities equipped with binding administrative powers,"²²⁴ such as the International Seabed Authority that was provided for by the Third United Nations Conference on the Law of the Sea.²²⁵ Under the Conference's regimes, states are prohibited from exercising sovereignty over the seabed, ocean floor, and related subsoil beyond the limits of national jurisdiction, and they may only extract from these areas in accordance with the terms of the Conference. The Conference established an international authority to exploit the seabed commercially and to distribute the economic benefits to parties.²²⁶ Like the Non-Proliferation Treaty, the Conference provides for a neutral third-party negotiator.²²⁷

Some commentators promote a modified view of the global approach to treaties, suggesting multilateral treaties organized by economic region.²²⁸ They reject the United Nations Conference on the Law of the Sea model as too "ethnocentric" because of its efforts to form supranational authorities acting under United Nations auspices.²²⁹ The critics argue that the Conference model assumes that nations with divergent economic systems, whether developed or developing, have the same purposes.²³⁰ They claim that "[i]nternational cooperation and adjustment of national rules and administrative activities for exercising public control over economic behavior with extraterritorial repercussions [should] not be conceived of as worldwide or UN-wide."²³¹ A treaty regime that has a large number of parties may be inefficient and unproductive. In addition,

(1980). In addition, the United Nations has written The United Nations Proposed Text of the Draft Code of Conduct on Transnational Corporations, Doc. E/1988139/Add. 1.d (1988).

224. M. JANIS, *supra* note 128, at 157. The United States has refused to sign the Law of the Sea Treaty and specifically refuses to establish an international seabed authority with any real power. *Id.*

225. Law of the Sea Convention, *supra* note 208; see also Fikentscher, *Third World Trade Partnership: Supranational Authority vs. National Extraterritorial Antitrust: A Plea for "Harmonized" Regionalism*, 82 MICH. L. REV. 1489 (1984) (as of August 25, 1986, only 31 nations, not including the United States, of the 60 required for the treaty to enter into force had ratified the treaty).

226. Law of the Sea Convention, *supra* note 208, arts. 140(2), 153, 157, 158(2), 160(2)(F)(i), 170.

227. *Id.* art. 287.

228. See generally Fikentscher, *supra* note 225 (arguing for "mini-treaty" approach).

229. *Id.* at 1490-92, 1507. The worldwide model may not be ideal because of ideological clashes between the "three-group" system of the United Nations. *Id.* at 1490. This system divides the member-states into the "B-Group" of western industrialized nations, the "D-Group" of socialist countries, and the "Group of 77" of developing nations. *Id.* at 1507. Each group has different interests in the sea, as well as different goals for a law of the sea. *Id.* at 1491.

230. *Id.* at 1507.

231. *Id.*

the global approach often requires years of negotiation to yield agreement.

An alternative is a treaty organization using the United Nations "three group" classification system that groups nations in similar development stages and with similar economic systems.²³² Although the three-group model represents an alternative to the global approach, it is not ideal for debt-for-nature swaps, which require cooperation between *developed* and *developing* nations. Therefore, a treaty just for developing nations would not be as useful in facilitating a long-term debt-for-nature swap effort between developed and developing states. Such a treaty regime would only structure the goals of one of the swap investment's partners.

Other multilateral treaties are organized by geographic region.²³³ This model may function adequately despite the fact that, thus far, the majority of the funds worldwide for the debt-for-nature swaps have come from one source, NGO's in the United States.²³⁴ United States NGO's invest swap funds in many geographic regions. When NGO's in other nations become debt-for-nature swap investors,²³⁵ they will also probably choose potential host countries using political and economic rather than geographic rationales. A regional effort could emanate from the debtor countries themselves. A regional coalition of countries could negotiate a treaty under which each country would agree to place its debt-for-nature swap territory. This arrangement would offer the added benefit of providing more regional and less creditor-nation control over the land. For example, several coun-

232. *Id.*

233. Dr. Mushkat supports cooperation in stages in Asia. Mushkat, *supra* note 32, at 38. First, regional organs would "harmonize" national laws, and then the regional organs would codify these laws through treaties. *Id.*

234. Comment, *supra* note 17, at 326-35.

235. Japan has the necessary financial capability and ideological propensity to fund swaps. "Worried about mounting hostility to Japan's huge investments in the United States, the Japanese government has offered Japanese companies a large tax deduction if they give money to hospitals, schools and philanthropic activities in the United States." N.Y. Times, Feb. 22, 1990, at A1, col. 1. Japan is discovering, and trying to emulate, the American tradition of voluntarism that in part motivates our foreign aid activities. N.Y. Times, Mar. 12, 1990, at A16, col. 6. The "reshuffling" of outstanding foreign aid loans to Latin America to fund debt-for-nature swaps could "serve as a model for European and Japanese governments, which carry another \$38 billion in Latin American debt." N.Y. Times, January 22, 1991, at B5, col. 4. Furthermore, John Sewell, the President of the Overseas Development Council, remarked that because the United States is likely to be surpassed by Japan as the largest provider of development assistance, the United States "is no longer in a position where it can set the agenda for development cooperation by the sheer size of its programs. Rather it must lead by example and seek to influence how a large number of other donors allocate their resources." *Debt Swaps Called a Source of Financing for Third World Environmental Projects*, Banking Rep. (BNA), at 1390 (June 26, 1989).

tries in Central America could, as a region, negotiate a treaty under which they would perform debt-for-nature swaps. Such swaps might be more stable and less vulnerable to criticism by those who fear creditor-nation hegemony.²³⁶ Furthermore, the signatory states, neighbors possibly deriving economic benefits from one another, would pressure each other to adhere to the debt-for-nature swap treaty. This pressure would not exist as strongly in a global multilateral treaty, in which the parties have less in common. Nations may accept intrusive roles from regional organizations that they might reject from the rest of the world.²³⁷

c. The Inter-American System for Nature Conservation

The Organization of American States ("OAS") has suggested the formation of an Inter-American System for Nature Conservation ("ISNC")²³⁸ because of the ineffectiveness of the Western Hemisphere Convention of 1942,²³⁹ and of various sub-regional multilateral conservation agreements.²⁴⁰ The OAS is now suggesting the need for an

236. *Brazil Being Bled*, *supra* note 182, at 5.

237. The European Community's environmental program uses supranational requirements that take precedence over domestic policy. For example, the Council of the Community adopted a directive in 1980 that set "limit values" and "guide values" for sulphur dioxide and suspended particulate matter that the member states could not exceed. S. JOHNSON & G. CORCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* 112 (1989). Certain provisions allowed exceptions, but even if a state fell into an exception it still had to inform the Commission of detailed plans for the progressive improvement of the quality of the environment in those zones. *Id.* The plans had to include concrete measures that the state promised to follow in order to meet the limit values by April 1, 1983. *Id.*

The council has also established air quality standards for lead. *Id.* at 117. On December 3, 1982, the Council adopted a directive establishing a "limit value" for lead in the air. *Id.* The aim of this limit value was specifically to help protect human beings against the effects of lead in the environment. *Id.* The Council set the limit value at two microgrammes of lead per cubic meters, with the understanding that member states may fix a more stringent value for their own territories. *Id.* Member states have a period of five years after notification to the Council in which to respect the set value of two microgrammes. *Id.* As with sulphur dioxide, if the member state cannot meet the deadline it must formulate a detailed plan for the progressive improvement of the quality of the air in its territory. *Id.*

As for species protection, the Council adopted a directive on the conservation of wild birds on April 2, 1979. *Id.* at 238. Member states must take measures to maintain the population of all species of birds living in the wild at a level that corresponds to ecological requirements or to adapt the population to that level by maintaining or re-establishing the necessary areas for habitation. *Id.* The directive set up different legal measures depending on the threat to each species. *Id.*

238. See *Creation of an Inter-American System for Nature Conservation*, *supra* note 209.

239. *Id.* at vii. The purpose of the Western Hemisphere Convention is to "conserve the wild flora, fauna and scenic areas of the Hemisphere." *Id.* at vi. To achieve this stated objective, the member states of the OAS agree to adopt measures of mutual cooperation to establish parks and protected areas, and to take all the necessary steps to administer and preserve wildlife and nature. *Id.*

240. The study lists 98 bilateral treaties on international rivers, oceans, fauna, air, nuclear

“intergovernmental mechanism . . . [that] would apply the Convention’s principles.”²⁴¹ An ISNC would have the following objectives:

- a. To help derive maximum advantage from sectoral international efforts by identifying conservation problems, and to make such conservation efforts compatible with those already underway for socio-economic development, using the institutional structure afforded by the OAS,
- b. To provide opportunities for furthering understanding of the advantages of an integrated conservation strategy,
- c. To provide a forum for debate and discussion of conservation as a vehicle for development,
- d. To facilitate communication between OAS member States on conservation issues, including the development of uniform terminology and implementation of common approaches for the management and control of resources,
- e. To sponsor and support pilot projects where conservation could constitute a major part of development efforts,
- f. To offer [advice] and technical support in cases where the States involved in a dispute related to conservation choose mediation as the most effective procedure for settling their differences,
- g. To organize the General Secretariat’s participation in, and response to, other regional and worldwide meetings and projects.²⁴²

The ISNC proposal admirably addresses the need for a forum for mediation in “conservation-related” disputes.²⁴³ The ISNC proposal only suggests, however, that the ISNC act as a support system to independent mediators; if “the nations involved in a controversy choose mediation procedures, the ISNC could [assist] by facilitating impartial technical experts or reliable witnesses.”²⁴⁴ Such a system is inadequate to provide long term support for Latin America’s environ-

matters, international rivers, regional seas, arms control, and natural resources management. *Id.* at vii, 21-26. In addition, since the Western Hemisphere Convention, there have been two other Inter-American meetings on the topic of conservation: the Inter-American Specialized Conference on Problems Related to the Conservation of Renewable Natural Resources of the Continent, convened in Mar Del Plata, Argentina in October 1965; and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, *opened for signature* Oct., 1940, 161 U.N.T.S. 194, 3 Bevens 630, T.S. 981. *Id.* at vii n.1. There also have been three regional “Declarations” between March 6 and May 30, 1989: The Declaration of San Francisco de Quito, which concerned the need for coordination of conservation policies; The Declaration of Brasilia, which sought to strengthen “cooperation in the area of conservation”; and The Amazon Declaration, which “endorsed future cooperation in the Amazon Region for the development and protection of natural resources.” *Id.* at vii n.2.

241. *Id.* at vii.

242. *Id.* at xii.

243. *Id.* at xv.

244. *Id.*

mental problems. Ideally, the ISNC should require parties to submit themselves to the specified dispute resolution mechanism that forces them to negotiate a satisfactory solution to the conflict.²⁴⁵ Because the ISNC countries have significant economic and environmental incentives to engage in debt-for-nature swaps,²⁴⁶ it is in their self-interest to create a swap framework that would secure a foreign NGO's "investments" and effectuate dispute resolution mechanisms in the event of expropriation. Similarly, any sovereignty concerns could be preempted by predetermining NGO activities that would constitute undue infringement. The ISNC framework could be invoked automatically once a country agrees to coordinate a debt-for-nature swap with a foreign NGO or a foreign government.

d. The "World Park" Model

A fourth possible model for a multilateral debt-for-nature swap treaty is the "World Park" model. In 1989, Australian Prime Minister R.J.L. Hawke and French President Francois Mitterand decided to withdraw their support for the Convention on the Regulation of Antarctic Mineral Resources Activities²⁴⁷ and instead support an environmental protection convention and the creation of a "World Park" for the Antarctic.²⁴⁸ The "World Park" solution could be applied to debt-for-nature swap territory if it were modified to respect territorial sovereignty. In its present form, the "World Park" model would severely curtail a host country's sovereignty by prohibiting the host country from acting in a manner that leaves the land in anything but a pristine state.²⁴⁹ Critics of the "World Park" model argue that its underlying theory, that all mankind has a legitimate economic

245. N.Y. Times, Feb. 16, 1990, at A1, col. 6. At the Barranquilla Conference on Drug-Trafficking, President Bush and the leaders of three Andean nations, Peru, Bolivia, and Columbia, "committed [them]selves to the first, common, cooperative drug control strategy . . . the first anti-drug cartel." *Id.* A similar cooperative arrangement could address environmental problems.

246. See generally Morna, *Interview, Bernard Chidzero: Toward a Durable Debt Strategy*, AFR. REP., Sept.-Oct. 1988, at 46. Even though many developing countries cannot pay their foreign debt, they can relieve some of their debt burden by making debt-for-nature swap agreements.

247. Convention on the Regulation of Antarctic Mineral Resource Activities, *opened for signature* Nov. 25, 1988, 27 I.L.M. 859 [hereinafter Antarctic Mineral Convention]; Larner, *The Great White Heap?*, SIERRA, Mar.-Apr. 1990, at 27, 27-29. The Antarctic Mineral Convention is a mineral development agreement originally negotiated in 1988 by the nations then operating research bases in Antarctica. Sixteen of the twenty original sponsors had to sign the accord before it could take effect. *Id.* at 27. The United States has signed the agreement, but the Senate has not yet ratified it. *Id.* Because of French and Australian opposition, the Convention's future is uncertain. *Id.*

248. Larner, *supra* note 247, at 27.

249. Vagts, *The Evolving Antarctic Legal Regime*, 83 AM. J. INT'L L. 605, 609 (1989).

interest in Antarctica's resources, is hard to substantiate.²⁵⁰ Critics also argue that Antarctica is entitled to territorial sovereignty because it is a continent.²⁵¹ The same argument applies to swap territory in a sovereign nation. A treaty could, however, have territorial sovereignty as its base.²⁵² If a nation voluntarily abrogated its sovereignty to form a treaty,²⁵³ then the protected environmentally sensitive areas in a host state could become a modified "world park" subject to prescribed negotiations between the parties in case of dispute.

Similar arrangements currently exist. The Spitzbergen Archipelago Treaty²⁵⁴ explicitly recognizes the sovereign rights of Norway, yet gives nationals of all parties to the treaty rights to hunt and fish, subject to conservation measures decreed by Norway.²⁵⁵ The Spitzbergen Treaty also has a dispute resolution mechanism²⁵⁶ and mining regulations that the host country cannot individually amend.²⁵⁷ Moreover, the non-Norwegian parties to the treaty may propose modifications to the Norwegian regulations if they are brought before a commission composed of representatives of all the treaty parties.²⁵⁸ The Spitzbergen Treaty is significant because it has been in force for more than seventy years and is an existing supranational solution that respects the host state's sovereignty.²⁵⁹

B. *World Heritage List*

The second model for long-term solution to debt-for-nature remedies involves the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") Convention for the Protection of

250. Rich, *A Minerals Regime for Antarctica*, 31 INT'L & COMP. L.Q. 709, 713 (1982).

251. *Id.*

252. *Id.* at 719-25.

253. *Id.* at 720-22.

254. Treaty Concerning the Archipelago of Spitzbergen, Feb. 9, 1920, 2 L.N.T.S. 8.

255. Rich, *supra* note 250, at 723 (discussing the Treaty Concerning the Archipelago of Spitzbergen).

256. *Id.* Disputes concerning claims to land must be heard before a tribunal whose president holds a deciding vote and is a member of the Danish judiciary. The Norwegian government must then execute the tribunal's decisions. *Id.*

257. *Id.*

258. Treaty Concerning the Archipelago of Spitzbergen, *supra* note 254.

259. *Id.* Although there are occasional conflicts concerning the correct interpretation of the Treaty, it has endured. Doughty, *Pioneer Spirit Lives on Lonely Arctic Islands of Spitzbergen*, REUTER LIB. REP., May 31, 1988, available in LEXIS, Nexis Library, Omni File; *Arctic Disputes Highlighted*, PLATT'S OILGRAM NEWS, Mar. 10, 1983, at 4. Of course, the factual situation that gave rise to this treaty differs from that of any of the debt-for-nature swap territories, because the Archipelago was *terra nullius* before it became subject to the Treaty. Goldie, *Title and Use (and Usufruct)—An Ancient Distinction Too Often Ignored*, 79 AM. J. INT'L L. 689, 705-08 (1985). However, a treaty based on the Treaty of Spitzbergen could expand host-state sovereignty, but still recognize the swap investor's right to manage.

World Cultural and National Heritage.²⁶⁰ UNESCO recognizes specific sites as part of the world's heritage,²⁶¹ and places these sites on its World Heritage List. A site on this list receives the assistance and protection of the organization so that it is "preserved as part of the world heritage of mankind as a whole."²⁶² Each site also is eligible for grants or loans from the World Heritage Fund, and for the help of experts and advisors.²⁶³ For example, the United Nations has made a "designation" through an American NGO, the Getty Trust, and the government of China to preserve the Mogao Grottoes, west of Beijing.²⁶⁴ This coordinated effort is structured like the Malagasy funnel-swap. The problem with applying this arrangement to the swap is that the NGO and the United Nations may not be able to enforce the Convention if a country breaches it.²⁶⁵ This difficulty, however, can be substantially challenged if the nations add an effective dispute resolution mechanism, such as a mandated negotiation process, to the Convention. A treaty with guidelines for negotiation would strengthen swaps in the long term by imposing international oversight and pressuring host states to comply with debt-for-nature swap agreements.

V. CONCLUSION

As the caretakers of the earth, we have an enormous responsibility to preserve worldwide resources for ourselves and future generations. Yet when NGO's swap debt for nature in an attempt to address global environmental problems, they often risk losing their "investment," the momentum to protect the specific resource. Expropriation is a risk for all types of foreign investment. The risk is more acute, however, for debt-for-nature swaps, and in particular funnel swaps, because the only remedy currently available is compensation, which is

260. Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 191.

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

262. *Id.* at 40.

263. *Id.* art. 22, at 47.

264. Christian Sci. Monitor, Mar. 23, 1989, at 10, *available in* LEXIS, Nexis Library, Omni File.

265. Anderson, *Jewish Group Complains to UNESCO on Auschwitz Convent*, UPI, Sept. 11, 1989, *available in* LEXIS, Nexis Library, Omni File. The World Jewish Congress filed a complaint with UNESCO charging that a Carmelite convent on the grounds of the Auschwitz death camp, a protected site on the World Heritage List, violates the 1972 Convention for the Protection of the World Cultural and National Heritage. *Id.* Should a violation have been found, the United Nation's options for enforcement of the Convention were not clear. *Id.* The issue of enforcement became moot when public pressure encouraged the Vatican to reconsider the site of the convent. Wash. Post, Dec. 8, 1990, at D11. Public pressure was sufficiently strong to prevail when domestic economic forces were not a factor.

inconsistent with a swap's goals and leaves the taxpayer investment unprotected. Thus, if we are to encourage other nations and NGO's to invest in debt-for-nature swaps, we must address the need for effective remedies now.²⁶⁶ Otherwise, without an effective legal duty to continue the swap agreement, the principal motivation for the developing country's adherence to the swap agreements stems from its fear of political and economic reprisal by creditor nations. This fear is an insufficient deterrent in the face of developing nations' tremendous domestic economic and political pressures. Some form of multilateral or regional treaty that establishes codes of behavior and creates a dispute settlement procedure requiring negotiation between the parties is the optimal solution.

The process of negotiating a volitional treaty and receiving the reciprocal benefits it provides enhances the parties' willingness to adhere to its terms. As long as the treaty defines acceptable limits of foreign investors' control over the development of management of a country's natural resources, it will mollify a nation's concerns about threats to territorial sovereignty. By mandating negotiation for any acts of expropriation that affect the NGO's ability to manage and conserve the natural resources, such a treaty would strike a balance between the NGO's need for adequate remedies and the nation's need for sovereignty.

In the short term, debt-for-nature swaps have proven successful. However, until swap participants treat them consistently with the

266. Interview with Alison Rosenberg, Deputy Assistant Secretary for African Affairs, State Department & Larry Saiers, Deputy Assistant, Administration for Africa, USAID (Aug. 23, 1989), available in LEXIS, Nexis Library, Omni File (also available from Federal Information Systems Corporation, Federal News Service). Mr. Saiers acknowledged the benefits of debt-for-nature swaps and also recognized the ad hoc approach that the United States government has used to initiate the swaps:

There is not an earmarked pot of money set aside for debt for nature swaps. . . . [I]t has been our own bilateral programs . . . in some cases, it's environmental groups such as the World Wildlife Fund that have instigated these. In some cases, it's been the African government itself that has expressed an interest in a debt for nature swap. . . . [T]here is no target that has been set up. . . . [A]s opportunities arise we are trying to respond to them, as I think other donors are interested in responding to them.

Id. Mr. Saiers then expressed once again that swaps are "a very important tool that is now in our arsenal to help." *Id.* Finally, he conceded that in the long term, debt swaps will probably not be that effective in reducing overall debt. He stated that government funds will probably not be large and that the United States will only conduit the swaps with a "few specialized countries." *Id.*

Mr. Saier's statements reveal a circular government policy. First, he claimed that swaps are beneficial to both the environment and third world economies. However, he also admitted that USAID is not promoting the swaps in a substantial, organized fashion and that the swap's long-term utility is minimal. It is precisely this failure to pursue a cohesive swap policy that renders swaps ineffective.

assumption that swaps are long-term environmental investments,²⁶⁷ neither the United States government nor the NGO's can confidently make substantial financial commitments to such swaps. Swap investors, whether they invest for "equity" or for "nature," seek a return. Debt-for-equity swaps offer a pecuniary return, while debt-for-nature swaps offer an environmental return. Remedies for expropriation of swap agreement rights must reflect this distinction in order to be effective. The international investment community recognizes that "security is necessary for investment."²⁶⁸ The international community also must recognize that security is necessary for *environmental* investment. Without some form of protection such as a treaty requiring negotiation and conciliation, debt-for-nature swaps will risk becoming a short-lived, albeit creative solution to debt and environmental problems. However, with such protection, swaps may help relieve debt and environmental problems, and in the process strengthen national sovereignty by improving the debtor countries' fiscal health.

ROSANNE MODEL

267. Diana Page, an associate with the World Resources Institute, writes that the principal objective of debt-for-nature swaps is to "provide funding for conservation and better uses of natural resources." Page, *supra* note 34, at 286.

268. Clagett, *supra* note 38, at 97.