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Give Us Sovereignty or Give Us Debt: Debtor Countries' Perspective on Debt-for-Nature Swaps

Keywords

Swaps (Finance), Developing countries, International environmental law

COMMENTS

GIVE US SOVEREIGNTY OR GIVE US DEBT: DEBTOR COUNTRIES' PERSPECTIVE ON DEBT-FOR- NATURE SWAPS

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INTRODUCTION

It is clearly recognized that developing countries (DCs) are experiencing a debt crisis.¹ Beginning in the mid-1970s, bad lending and

1. See Meissner, *Crisis as an Opportunity for Change: A Comment on the Debt Restructuring Process*, 17 N.Y.U. J. INT'L L. & POL. 613, 614 (1985) (stating that Mexico's "standstill announcement" of August 1982, declaring that it could not meet quarterly debt interest payment to its creditor bank, was signal to world that crisis had begun); Bramble, *Third World Debt & Natural Resource Conservation: Tragedy & Opportunity* (available from National Wildlife Federation, Washington, D.C.), June 15, 1989, at 2 [hereinafter Bramble, *Third World Debt*] (explaining that debt was quietly building for years before it became crisis in 1982). Mexico, Brazil, Argentina, Venezuela, South Korea, Indonesia, and the Philippines account for the majority of debt owed to the United States. Moran, *Debt-for-Nature Swaps: U.S. Policy Issues and Options*, RENEWABLE RESOURCES J., Spring 1991, at 20-22, reprinted in 102d Cong., 1st Sess., 137 CONG. REC. E1264 (daily ed. Apr. 16, 1991). Latin America, however, is the most indebted of all debtor regions. Potier, *Swapping Debt for Nature*, OECD OBSERVER, Aug.-Sept. 1990, at 17; Bramble, *Third World Debt and Natural Resources Conservation* (available from National Wildlife Federation, Washington, D.C.), Mar. 1986, at 1 (stating Latin America owes majority of all developing country (DC) debt). See generally S.J. Res. 101, 101st Cong., 1st Sess., 135 CONG. REC. S3776 (daily ed. Apr. 12, 1989) (introduced by Sen. Chafee) (stating Brazil is burdened with \$130 billion debt and consequently its citizens are facing squalid living conditions).

A debt crisis results when DC governments have an insufficient reserve of foreign currency to make foreign currency payments to creditors. See Buchheit, *The Capitalization of Sovereign Debt: An Introduction*, 1988 U. ILL. L. REV. 401, 401 (stating that sovereign debt crisis results when inflow of foreign exchange into DC is insufficient to cover country's payments in foreign currency). DCs must pay creditors in the creditor country's currency. Comment, *The Debt-for-Nature Swap: A Long-Term Investment for the Economic Stability of Less Developed Countries*, 24 INT'L L. 1071, 1073 n.14 (1990). Therefore, a DC government cannot pay its foreign debt unless it has an inflow of foreign currency, which usually comes from the sale of DC exports. *Id.* If countries could pay their debt in local currency, however, the debt crisis would most likely disappear. Buchheit, *supra*, at 401.

Debtor countries, for the purpose of debt-for-nature swaps, are the countries having large outstanding debts or having greatly discounted debts in the debt market. See Comment, *Debt-for-Nature Swaps: Assessing the Future*, 6 J. CONTEMP. HEALTH L. & POL'Y 319, 340 (1990) (stating debt-for-nature swaps only take place with heavily indebted countries); *infra* notes 16-24 and

borrowing decisions, skyrocketing interest rates, and deteriorating terms of trade for their chief exports engendered a dramatic increase in the external debt of DCs.² Today, in an attempt to settle the debt, DCs "borrow" from their natural resources by employing indiscriminate short-term solutions designed to increase export profits.³ Unfortunately, quick-fix solutions, such as clearing forests for farming, mining, and lumber, pillage tropical rainforests, wetlands, and grasslands, and produce emasculating effects on this ecologically vital corner of the world.⁴ In fact, DCs are depleting

accompanying text (describing discounted debt market and entitled secondary market, which are used for debt exchange programs).

2. See Bramble, *External Debt, Democratization, and Natural Resources in Developing Countries: The Case of Brazil* (available from National Wildlife Federation, Washington, D.C.), 1989, at 1 [hereinafter Bramble, *External Debt*] (discussing causes of debt and economic burdens related to servicing debt); Bogdanowicz, *Third World Debt: An Analysis* (available from World Wildlife Fund, Washington, D.C.), 1988, at 1 (discussing causes of external debt); Bramble, *U.S. Congressional Summit on an Economic Agenda for the 1990's* (available from National Wildlife Federation, Washington, D.C.), 1987, at 1 [hereinafter Bramble, *U.S. Congressional Summit*] (noting DCs' debt service requirements).

Skyrocketing oil prices and interest rates of the late 1970s, combined with a recession in most industrialized nations in the early 1980s, precipitated the international debt crisis. Bramble, *Third World Debt*, *supra* note 1, at 2. In 1973, the Organization of Petroleum Exporting Countries (OPEC) raised its prices by 400%. Comment, *supra* note 1, at 1072 (discussing history of debt crisis). Because of the price increase, DCs could only pay for oil with the assistance of foreign loans. *Id.* The money loaned to DCs were OPEC profits deposited in commercial banks. *Id.* The banks benefitted by charging greater interest rates to poorer countries. *Id.* In 1979, OPEC again raised its oil prices and DCs consequently needed to take out larger loans having greater interest rates. *Id.* Because the debt became insurmountable for DCs, banks restructured the debt with increased interest rates. *Id.* DCs could not, however, produce enough exports to meet the payments. *Id.* Banks finally accepted the reality that DCs may not ever service all of their debt. *Id.* Consequently, alternative measures for reducing debt emerged as banks searched for ways to minimize their debt losses. *Id.*

The origins of the 1982 crisis in developing countries are consequently attributable to four factors: (1) the first oil price shock in 1973 and its aftermath; (2) the second oil price shock in 1979; (3) the protracted global recession of 1981-83, distinguished by unprecedented high interest rates and growing protectionism in industrialized countries' raw material exports; and (4) the repercussions caused by the response of international credit markets to the Mexican liquidity crisis of August 1982. Note, *Experimenting With Orthodox Economics in Brazil: An Analysis of the Socioeconomic Effects of Adjustment During 1982-1984*, 17 N.Y.U. J. INT'L L. & POL. 651, 653 (1985).

For a description of how DCs view their debt problem, see generally, Amaral, *The Debt Crisis from the Point of View of a Debtor Country*, 17 N.Y.U. J. INT'L L. & POL. 633 (1985) (describing DCs' debt readjustment processes, debt characteristics, and medium-term prospects of debt crisis).

3. See Bramble, *Third World Debt*, *supra* note 1, at 4 (stating that debt crisis and need to increase short-term economic productivity forces DCs to accelerate exploitation of natural resources); Note, *Debt-for-Nature Swaps: Effective But Not Enforceable*, 22 CASE W. RES. J. INT'L L. 141, 151 (1990) (explaining most countries take on short-term development projects to try to alleviate some economic problems); Comment, *supra* note 1, at 1071 (stating DCs indiscriminately cut down trees to increase export revenue and borrow from lending institutions and natural resources to service their debts). But see Shabecoff, *Bolivia To Protect Lands in Swap for Lower Debt*, N.Y. Times, July 14, 1987, at C2, col. 2 (reporting Bolivia's agreement not to develop millions of acres of rain forest in exchange for debt reduction).

4. See Comment, *Debt-for-Nature Swaps: A New Strategy for Protecting Environmental Interests in Developing Nations*, 16 ECOLOGY L.Q. 1065, 1066 (1989) (discussing result of unrestrained development of natural resources in DCs). The threats of these quick-fix solutions include

tropical rain forests at a rate of one and one-half acres per second.⁵ If this rate of destruction continues, in twenty years DCs will largely strip their tropical forests bare.⁶

This consequence would be calamitous. Deforestation threatens one-half of the earth's life forms, including thousands of indigenous groups living off the forests.⁷ These groups depend on the forest for fuel, cooking, energy, and medicine.⁸ Deforestation would consequently impoverish approximately one billion people.⁹ Deforestation also influences global climate patterns by raising temperatures and lowering rainfall in areas once richly forested.¹⁰ Furthermore, deforestation causes increased emissions of carbon dioxide, a leading contributor to the greenhouse effect.¹¹ Unless alternate measures to reduce debt emerge, deforestation and the resulting dire consequences will continue because servicing debt with "environmental loans," rather than high-interest commercial loans, is more economical for DCs.¹²

Debt-for-nature swaps arose as a dignified solution to developing countries' debt and environmental problems.¹³ The global commu-

massive deforestation, extinction of valuable species of plants and animals, erosion of soil, deterioration of downstream water supplies, reduction of fishery potential, and destruction of valuable wetlands. Bramble, *External Debt*, *supra* note 2, at 1.

5. See Comment, *supra* note 1, at 1075 (noting World Resources Institute report that tropical rain forests equal in size to State of Washington are destroyed annually).

6. See Copeland, *Buying Debt, Saving Nature*, NEWSWEEK, Aug. 31, 1987, at 45 (stating countless species of plants and animals will die in "the greatest extinction since the end of the age of the dinosaurs") (quoting Harvard Biologist E.O. Wilson). Loss of tropical forests may lead to extinction of millions of plants and animals not yet identified or studied for their potential use for agriculture, medicine, or industry. NATIONAL WILDLIFE FEDERATION, INTERNATIONAL PROGRAM 1 (undated). The tropical forest is a "[g]enetic library for all our future expectations of biotechnology, storehouse of half the overall species of plants and animals, moderator of regional climate, [and a] sponge that holds more than twenty-five percent of world's fresh water supply." Bramble, *U.S. Congressional Summit*, *supra* note 2, at 1.

7. Dawkins, *Debt-for-Nature Swaps* (available from Dep't of Urban Studies and Planning, Massachusetts Institute of Technology, Boston, Mass.) (undated), at 1.

8. Moran, *supra* note 1, at 20-22, *reprinted in* 137 CONG. REC. E1264 (discussing social and environmental impacts of debt and deforestation); Fuller & Williamson, *Debt-for-Nature Swaps: A New Means of Funding Conservation in Developing Nations*, Int'l Env't Rep. (BNA) No. 149, at 301 (May 11, 1988) (discussing DCs' dependence on tropical forests for everyday needs).

9. Moran, *supra* note 1, at 20-22, *reprinted in* 137 CONG. REC. E1264.

10. Comment, *supra* note 4, at 1066 (discussing spectrum of consequences of deforestation).

11. See *New President Appoints Ecologist to Head Environmental Secretariat*, 13 Int'l Env't Rep. (BNA) No. 4, at 152 (Apr. 11, 1990) (discussing carbon dioxide problem in Brazil); Dawkins, *supra* note 7, at 1 (stating that in 1980, tropical deforestation accounted for 26% of world carbon dioxide emissions, leading greenhouse gas).

12. Comment, *supra* note 1, at 1071 (stating environmental loans are more attractive than bank loans because environmental loans come interest-free).

13. See Note, *supra* note 3, at 154 (claiming debt-for-nature swaps are more appealing than political concessions for resolution of debt crisis). Dr. Thomas Lovejoy first proposed debt-for-nature swaps. Fuller & Williamson, *supra* note 8, at 301. In 1984, he proposed converting international debt into support for conservation because programs to manage natural

nity has received the concept with enthusiasm. Positive reaction will dissipate, however, if inherent problems, particularly negative perceptions of debt-for-nature swaps within DCs themselves, are not remedied.¹⁴ This Comment examines whether debt-for-nature swaps, in their present form, provide a viable solution to the steadily deteriorating economic and environmental conditions in DCs.¹⁵ This Comment particularly illustrates how DC governments and their indigenous people perceive debt-for-nature swaps as encroachments upon their sovereignty. Sovereignty anxieties exist on the forefront of debt-for-nature transactions, and if future transactions are to succeed, debt-for-nature swaps must alleviate these anxieties.

Part I of this Comment examines the general nature of debt exchanges. Part II explains the debt-for-nature swap concept and de-

resources were the first slashed by governments struggling to pay off debts. *Id.* As a result, Lovejoy proposed using the debt crisis positively to help solve environmental problems. *Id.*; see also *infra* notes 44-45 and accompanying text (defining debt-for-nature swaps as those transactions where environmental organizations exchange DC debt for DC conservation measures).

Prior to implementing debt-for-nature swaps, creditors utilized debt management techniques which quickly became antiquated. See Buchheit, *Alternative Techniques in Sovereign Debt Restructuring*, 1988 U. ILL. L. REV. 371, 371 (stating debt management techniques, soon after implementation, became labeled as conventional and obsolete). These conventional techniques followed similar frameworks which commentators describe as over-simplified. *Id.* at 371-72. Buchheit lists the major features found in Latin American debt restructuring techniques. *Id.* at 372. First, the principal amount owed is rescheduled over a specific term because DCs are unable to pay due to a standstill on the payment of foreign currency. Second, interest is paid on a timely basis. Finally, the interest rate is often raised due to overall restructuring. *Id.* at 373. Banks repeat these measures as often as necessary to improve the situation. *Id.* One of the reasons debt-for-nature swaps arose was because these conventional techniques were ineffective in combating the debt problem. *Id.* at 373.

14. See Bramble, *Third World Debt*, *supra* note 1, at 6-7 (stating DCs must resolve question of whether debt-for-nature swaps represent unnecessary intrusion on sovereign rights); Comment, *supra* note 1, at 340 (stating there are many factors working against debt-for-nature swaps, such as resistance from banks and DC governments); 136 CONG. REC. E2857 (daily ed. Sept. 14, 1990) (reprinting Caldwell, *Debt-for-Nature Swaps: Are They Really a Viable Solution* [hereinafter Caldwell]) (stating that issue of national sovereignty is often raised in debt-for-nature swap transactions); Cody, *Debt-for-Nature Swaps in Developing Countries: An Overview of Recent Conservation Efforts*, Rep. No. 88-647 ENR (available from Congressional Research Service, Washington, D.C.), Sept. 26, 1988, at 22-23 (arguing both sides of whether debt-for-nature swaps infringe on DC sovereignty); Barton, *Debt Swaps: New Game in Town*, CHRISTIANITY & CRISIS, Mar. 7, 1988, at 62 (renouncing debt-for-nature swaps because it places DC sovereignty at stake); Fuller & Williamson, *supra* note 8, at 301 (stating that environmental community greeted these swaps with skepticism); see also Note, *supra* note 3, at 154 (stating that amount of debt canceled in Bolivian debt-for-nature swap is relatively small and could be considered insignificant in overall debt picture); Aeppel, *Environmental Groups Pioneer "Debt-for-Nature" Swaps*, CHRISTIAN SCI. MONITOR, Oct. 1, 1987, at 1 (stating that in terms of overall debt, deals like this will not make dent). But see Fuller, *Debt-for-Nature Swaps*, 23 ENVTL. SCI. TECH. 1450, 1451 (1989) (stating debt-for-nature swaps represent best way to stretch buying power of all those involved in promoting sustainable use of natural resources and ultimately results in everyone benefitting).

15. See 136 CONG. REC. E2856-57 (daily ed. Sept. 14, 1990) (statement of Rep. McHugh) (stating debt-for-nature swaps require further examination to determine feasibility).

scribes paradigmatic swaps in Bolivia, Costa Rica, and Ecuador. Part III focuses on the sovereignty infringement aspects of debt-for-nature swaps, utilizing Bolivia and Brazil as examples. Part IV discusses DCs' general aversion to restrictions on the use of natural resources imposed by debt-for-nature swaps. Part V proposes that environmental organizations modify future debt-for-nature swaps to alleviate the concerns of those affected most directly by these transactions — the indigenous population. Part V also proposes that future debt-for-nature swap agreements include sovereignty protection clauses, developed from the international law concept of nationalization, to provide a remedy for DC governments' sovereignty concerns. This Comment concludes that debt-for-nature swaps can be an effective solution to the dual debt and environmental crises provided the sovereignty concerns of all parties are resolved.

I. THE DEBT EXCHANGE CONCEPT

In response to stagnating economies in DCs and resulting unpayable debt, financial institutions developed secondary markets in which foreign parties could trade DC debt owed to private banks at a discount.¹⁶ These markets developed to allow banks to trade loans among themselves and thereby avoid financially unstable countries.¹⁷ Today, banks use secondary markets primarily to sell debt to international organizations for use in debt exchange programs with DCs.¹⁸

16. Gibson & Curtis, *A Debt-for-Nature Blueprint*, 28 COLUM. J. TRANSNAT'L L. 331, 335 (1990) (noting that former President of *Fundacion Natura*, large conservationist group in Ecuador, originally developed system); see Burton, *Debt-for-Development: A New Opportunity for Non-profits, Commercial Banks, and Developing States*, 31 HARV. INT'L L.J. 233, 235 (1990) (stating high levels of unpaid debt resulted in secondary market's development).

Bankers realized that the cost of allowing DCs to resolve their own debt problems was greater than the cost to the banks to attempt the same. *Id.* But see Von Moltke, *Debt-for-Nature: An Overview* (available from National Wildlife Federation, Washington, D.C.) (undated), at 1-2 (claiming secondary market is imperfect because covenants ensuring that creditors do not dispose of debt without other creditors' approval impedes banks from freely selling debt).

The secondary market's growth is steady. In 1986, the World Bank counted approximately \$7 billion in discounted debt sales; by 1987, banks traded \$12 billion; and in 1988, the figure rose to approximately \$20 billion. Burton, *supra*, at 235.

17. See Comment, *supra* note 1, at 320 n.9 (stating banks developed secondary market to avoid overexposure to any single unstable economy); Burand & Barton, *Debt-for-Nature Swaps Are Counterproductive*, DEV. F., July-Aug. 1989, at 13 (explaining private banks promoted secondary market to cut their losses on bad debts).

18. Comment, *supra* note 1, at 320 n.9; see Buchheit, *supra* note 1, at 401 (stating active secondary market must exist for sovereign debt trading); Chamberlin, Gruson & Weltchek, *Sovereign Debt Exchanges*, 1988 U. ILL. L. REV. 415, 417 (stating most Latin American and several other debtor countries such as Argentina, Bolivia, Chile, Jamaica, Philippines, and Poland use market to adopt debt exchange programs).

Most debt exchange programs utilize secondary markets.¹⁹ Typically, foreign institutions buy DC debt below face value in the secondary market and then sell this discounted debt to DCs at near face value for DC currency.²⁰ For example, if the debt's face value is \$200, persons or organizations interested in establishing a debt exchange program in a DC would purchase this debt for \$50 in the secondary market.²¹ Then, these persons or organizations would sell the debt to the DC for \$100 in local currency.²² International organizations earn a profit from these transactions because the price at which they sell the debt is greater than the price they pay for the debt.²³ Also, when international organizations buy DC debt, the amount of outstanding debt on which DCs have to pay interest to banks is reduced.²⁴ International organizations use the DC currency they receive from these transactions to establish businesses or environmental projects in DCs.²⁵

One practical application of the debt exchange concept is the "debt-equity" swap.²⁶ In this type of transaction, investors buy DC debt from the secondary market and sell it to the DC in exchange for local currency.²⁷ The proceeds are then used to finance business ventures in DCs.²⁸ For example, Ford Motor Company (Ford)

19. See *supra* notes 16-18 & *infra* notes 20-25 and accompanying text (outlining debt exchange mechanism).

20. Evans, *Secondary Markets: Anomalous But Profitable*, EUROMONEY (SPECIAL SUPPLEMENT), Jan. 1988, at 25; see Chamberlin, *supra* note 18, at 418-19 (explaining debt exchange concept); Gibson, *supra* note 16, at 335-36 (detailing hypothetical purchase of debt by financial institution); Comment, *supra* note 1, at 1077 (discussing how investors purchase DC debt in secondary market). Creditors can purchase Colombian and Chilean debt at approximately 65% of face value; Venezuelan and Mexican debt at 40%; Brazilian debt at 21%; and Argentinian debt at 18%. *Id.* at 1077; see also Buchheit, *Legal Issues in Trading Sovereign Debt*, INT'L FIN. L. REV., Feb. 1986, at 17 (discussing various legal issues that may arise in connection with purchase and sale of sovereign debt, such as amount of time DC will be given to pay off debt and price which will be paid for debt).

21. Gibson, *supra* note 16, at 335 (describing similar example explaining debt-for-nature mechanism).

22. *Id.*; see *supra* notes 16-21 & *infra* notes 23-36 and accompanying text (describing debt exchange mechanism where institutions sell debt to DCs).

23. See Gibson, *supra* note 16, at 336 (explaining that if foreign organization directly donated \$25 to DC government, they would only have \$25 in local currency at current market exchange rate to use for environmental programs, as opposed to approximately three times that amount when debt is purchased on secondary market).

24. See Comment, *supra* note 1, at 320 (stating that reducing debt through secondary market allows DCs to pay organizations in local currency rather than banks in hard currency).

25. Chamberlin, *supra* note 18, at 418.

26. Bramble, *How Debt Can Be Swapped for Trees* (available from National Wildlife Federation, Washington, D.C.) May, 1990, at 2 (stating debt-equity swaps are often used in secondary market); see *infra* notes 28-36 and accompanying text (defining debt-equity swaps). Chile adopted the first legal framework for debt-equity conversions. Note, *International Debt: Debt-To-Equity Swaps*, 28 HARV. INT'L L.J. 507, 508 (1987). Mexico and the Philippines have also adopted official debt-equity conversion programs. *Id.* at 507.

27. Note, *supra* note 26, at 507.

28. Note, *supra* note 26, at 507; Burton, *supra* note 16, at 236; see Comment, *supra* note 1,

bought \$50 million worth of Mexican debt from the secondary market for only \$29 million.²⁹ Ford subsequently sold the debt to the Mexican government for \$43.5 million in local currency.³⁰ With the local currency, Ford established an assembly plant in Mexico across the border from Texas to build low cost automobiles for export into the United States.³¹ Debt-equity swaps, as illustrated by the Ford transaction, work to increase foreign ownership of DCs' productive assets, which ultimately results in the removal of profits from the DCs.³²

Although efficient and creative, these transactions are problematic.³³ One of the most significant problems is that DCs fear the foreign control of local assets.³⁴ DCs believe that foreign investors who own the assets may eventually dictate policies within their countries.³⁵ One critic likened these swaps to automobile repossession; just as banks repossess cars for late payments, investors appropriate DC land for late debt payments.³⁶ From a DC's perspective,

at 320 (stating that DCs have exchanged debt for equity holdings in DC); Comment, *supra* note 1, at 1077-78 (positing that debt-equity swaps create new capital, thereby expanding corporate growth and resulting in increase of exports).

29. Barton, *supra* note 14, at 62.

30. Barton, *supra* note 14, at 62.

31. Barton, *supra* note 14, at 62 (using examples of debt-equity swaps, such as Bankers Trust purchase of Chilean debt to obtain controlling interest in two large financial organizations).

32. Barton, *supra* note 14, at 63 (stating DCs trade loan debt for equity debt, defined as foreign-owned assets, which provide foreign parties with profits); Bramble, *supra* note 26, at 2 (discussing negative effects of debt-equity swaps and further stating that debt-holders exchange debt for ownership of DCs' production assets, eventually taking any subsequent profits out of DCs).

33. See Burton, *supra* note 16, at 236 (stating that these transactions are especially problematic for debtor governments). They, however, do possess some advantages. For example, because debt-equity swaps enable DCs to retire long-term debt, the transactions provide incentive for new investment in DCs, leading to better export earnings. *Id.*

34. Note, *supra* note 3, at 152 (stating that dissention in participating countries results from process of giving assets to third parties); Comment, *supra* note 1, at 1079 (citing Note, *The Federal Reserve Board's "Liberalization" of Restrictions on LDC Debt-Equity Swaps*, 20 LAW & POL. INT'L BUS. 163, 166 (1988) (suggesting antagonism results from foreign control over country's "most lucrative investment opportunities")); see Note, *supra* note 26, at 513 (stating that considerable domestic political opposition exists to foreign ownership of assets).

There are other problems as well. First, debt-equity swaps place complex restrictions on foreign enterprises. Buchheit, *supra* note 13, at 398. Second, exchanging local currency for debt may result in inflation for the debtor country. *Id.* Third, DC governments may believe that they are foregoing fresh foreign investments in the DC that would have occurred even without a debt renegotiating scheme. *Id.* Fourth, DC governments may prefer fresh money investments over converted money. Comment, *supra* note 1, at 1078-79. Finally, DC governments also fear local currency devaluation because they may need to produce more local currency in order to purchase foreign debt. *Id.*

35. Barton, *supra* note 14, at 62-63; see Burton, *supra* note 16, at 237 (stating that debt-equity's biggest drawback is increased foreign control of DCs' economies).

36. Barton, *supra* note 14, at 63 (stating debt-for-nature swaps differ from automobile repossession only by type of domination which occurs).

therefore, a debt-equity swap would not provide a legitimate solution to its debtor status.

II. DEBT-FOR-NATURE SWAPS

Due to the problems with debt-equity swaps, debt-for-nature swaps evolved as a popular alternative.³⁷ Indeed, in response to years of economic crisis in Latin America, on September 14, 1990, the President of the United States introduced to Congress the Enterprise for the Americas Initiative Act of 1990 (Initiative Act), a proposal which largely relies upon debt-for-nature swaps.³⁸ Key provisions of the bill permit (DCs) to reduce outstanding debt through investments in environmental reform.³⁹ The plan provides for the establishment of an environmental fund into which organizations dedicated to DC environmental preservation place local currency payments.⁴⁰ These payments, in turn are used as grants for environmental projects and programs.⁴¹ Pursuant to the Initiative

37. Comment, *Deforestation in Brazil: Domestic Political Imperative-Global Ecological Disaster*, 18 ENVTL. L. 537, 565 (1988) (stating that debt-for-nature swaps are frequently proposed and encouraged); see Letter from Barbara Bramble to Members of the National Wildlife Federation (available from National Wildlife Federation, Washington, D.C.), Sept. 9, 1990 (stating that since controversy over debt-equity swaps continues, nature organizations should heavily endorse debt-for-nature swaps); see also *infra* note 43 (discussing positive congressional response to debt-for-nature swaps).

Debt-for-nature opportunities evolved from the debt-equity concept as DCs and private lenders became frustrated by conventional mechanisms and, as a result, began to consider unconventional solutions. Fuller & Williamson, *supra* note 8, at 301; see *supra* note 13 (describing previous mechanisms used to reduce debt).

38. S. 3064, 101st Cong., 2d Sess., 136 CONG. REC. S13258 (daily ed. Sept. 17, 1990) (introduced by Sen. Pell).

39. The debt initiative component of the proposal allows banks to sell debts owed to the United States Commodity Credit Corporation and Export Import Bank on the secondary market in order to fund environmental programs. *Id.*

The Initiative Act also proposes trade and investment initiatives. *Id.* The trade initiative part of the plan proposes to reach agreements with Latin American countries to promote free trade. *Id.* The investment initiative proposes to ease restrictions on foreign investment and promote privatization of government-owned industry. *Id.*

40. *Regional Plan on Debt-for-Nature Swaps to be Presented to United States in March*, Int'l Env't Rep. (BNA) No. 3, at 80 (Feb. 13, 1991) (discussing debt-for-nature programs in Enterprise for Americas Initiative Act).

41. *Id.* Before any debt-for-nature transactions occur, the Initiative Act requires countries to meet strict economic reform guidelines that are set and monitored by international lending institutions. Moran, *supra* note 1, at 19, 23, *reprinted in* 137 CONG. REC. E1265 (discussing financial incentives for DCs to participate in Enterprise for Americas Initiative Act). The guidelines state that a country must already have plans to satisfy (1) economic reforms through the World Bank; (2) economic reforms through the International Monetary Fund; (3) investment reforms through the Inter-American Development Bank; and (4) debt reduction programs with commercial bank lenders. *Id.* If the conditions are met, the United States will substantially reduce the DC's principal. *Id.* One criticism of the Initiative Act is that the conditions required for countries to be eligible for debt restructuring are so stringent that they undermine the credibility of the proposal. See *Environmentalists Criticize Aspects of Latin America Environment-Economic Plan*, Int'l Env't Rep. (BNA) No. 11, at 422 (Oct. 10, 1990) (noting objections by environmental groups to eligibility requirements). There is also criticism that the

Act, the President boldly proposed to cancel a portion of the \$12 billion debt owed to the United States Government by Latin America.⁴² This proposal evidences the growing popularity of so-called "debt-for-nature swap" programs.⁴³

Debt-for-nature swaps are mechanisms requiring DC governments, through their own environmental organizations, to set aside conservation easements to be used only for sustainable development projects.⁴⁴ In exchange, portions of DC governments' debt

legislation is not sensitive to the work of environmental agencies. *See id.* (ruling for increased environmental sensitivity in International Monetary Fund and World Bank policies).

42. 136 CONG. REC. E2856-57 (daily ed. Sept. 14, 1990) (statement of Rep. McHugh) (noting President Bush's Initiative Act proposes to cut \$12 billion public debt owed to United States).

43. *See infra* notes 56-58 and accompanying text (discussing implementation of first debt-for-nature swap in 1987). Members of Congress continue to introduce proposals that support debt-for-nature swaps. *See* S. 3064, 101st Cong., 2d Sess., 136 CONG. REC. S13258 (daily ed. Sept. 17, 1990) (introduced by Sen. Pell) (urging sale, reduction, or cancellation of certain debts owed by eligible countries in order to facilitate debt-for-nature swaps); S. 2364, 101st Cong., 2d Sess., 136 CONG. REC. H3058 (daily ed. May 24, 1990) (introduced by Rep. Fascell) (supporting emergency supplemental assistance for Panama and Nicaragua through use of debt-for-nature swaps); H.R. 2939, 101st Cong., 1st Sess., 135 CONG. REC. H8526 (daily ed. Nov. 11, 1989) (introduced by Rep. Armeij) (seeking active implementation of World Bank pilot debt-for-nature swap programs).

Congress has enacted legislation promoting debt-for-nature swaps. *See* International Development and Finance Act of 1989, Pub. L. No. 101-240, 103 Stat. 2492 (codified as amended at 22 U.S.C.A. § 262p-4i (West 1990)) (requiring each multilateral development bank to create department that will promote and coordinate debt-for-nature swaps); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991, Pub. L. No. 101-513, 104 Stat. 2013 (1990) (codified as amended at 22 U.S.C.A. § 2621 (West 1991)) (containing language directing Treasury Department to promote environmentally sustainable economic growth through use of multilateral development banks).

The United States Department of Treasury provided further impetus for undertaking debt-for-nature transactions by issuing Revenue Ruling 87-124. Rev. Rul. 87-124, 1987-2 C.B. 205. The Ruling permits debt lenders to take a tax deduction equal to their cost basis in the debt. *Id.*

44. *See* Note, *supra* note 3, at 141-42 (defining debt-for-nature swaps). Conservation easements restrict land usage in order to protect or preserve the "natural, agricultural, scenic, or open-space value of the property." Comment, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1187 (1989). An "increasing concern" about the environment has engendered a proliferation of conservation easements in the last twenty years. *Id.* at 1188.

Sustainable development is a means for achieving economic development for the global economy by meeting the needs of the present generation without compromising the needs of the future generation. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 143 (1987). In other words, the present population should satisfy their needs without destroying the potential of future generations to satisfy their own needs. *Id.* For example, the present population should not acquire fuel by cutting down all trees in the rainforests, thereby precluding future generations from utilizing the rainforests. *Id.*

Three types of debt may be canceled through debt-for-nature exchanges. One type is United States commercial bank debt, which the first generation of debt-for-nature swaps used. Moran, *supra* note 1, at 20-22, *reprinted in* 137 CONG. REC. E1264. Commercial bank debt is sold or donated to environmental organizations on the secondary market to be used for debt-for-nature swaps. *Id.* at 21, *reprinted in* 137 CONG. REC. E1264. Another type of debt is Multilateral Development Bank Debt, which is owed to creditor countries. *Id.* at 22, *reprinted in* 137 CONG. REC. E1265. The World Bank and similar multilateral development banks may allow a country to convert part of its debt into local currency for environmental activities. *Id.* The

are canceled.⁴⁵ By protecting land for the benefit of current and future generations, the swaps promote long-term solutions to DCs' debilitating environmental and economic problems.⁴⁶

There are five steps to debt-for-nature swaps. Initially, an international environmental organization must obtain DC approval to establish a conservation project in the DC.⁴⁷ Negotiating parties typically include the DC government, the central bank, and, most importantly, a private conservation organization in the DC that will receive the funds and manage the agreed upon program.⁴⁸ The international organization confers with the DC environmental organization to determine whether a debt-for-nature swap is suitable within that DC.⁴⁹ Second, the international organization obtains the debt instrument from the secondary market.⁵⁰ The third step involves the transfer of the debt title to the purchaser of the debt.⁵¹ Next, the debt is converted into DC currency in accordance with the negotiated debt-for-nature agreement.⁵² The final step is to execute the agreed upon conservation program.⁵³ To date, international

most recent type of debt is bilateral debt owed specifically to the United States. *Id.* The Enterprise for the Americas Initiative Act deals with this type of debt and works by reducing a Latin American country's debt if that country takes action toward economic, trade, and investment reform. *Id.*

45. See Note, *supra* note 3, at 141-42 (explaining how debt-for-nature swaps function).

46. See generally WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 44, at 43 (discussing sustainable development in long-term perspective).

47. Von Moltke, *supra* note 16, at 1.

48. *Id.* Negotiations cover such issues as the applicable exchange rate for conversion of the debt to local currency, the conditions of payment, and how DC organizations should spend the proceeds. Comment, *supra* note 1, at 1080-81.

49. See Gibson, *supra* note 16, at 335 (outlining debt-for-nature swap mechanism).

50. Comment, *supra* note 1, at 1081 (explaining that secondary markets allow purchase and sale of debt agreements). International organizations obtain the debt instrument from the secondary market, which establishes the base price for the debt of each country. *Id.* Market prices for the debt vary depending on the country. *Id.* A lower price may reflect greater risks. *Id.* The prices, however, quoted by the secondary market, only represent an estimate as the prices are subject to fluctuation. Von Moltke, *supra* note 16, at 2.

International organizations usually receive money to buy debt from fund raising projects. *Id.* For example, Conservation International obtained funds from the Frank Weeden Foundation to purchase \$650,000 in discounted Bolivian debt. *Financing Conservation*, IV TROPICUS, Fall 1988, at 1.

51. Comment, *supra* note 1, at 1081. This is a complex transaction. Von Moltke, *supra* note 16, at 2. The primary question is which environmental organization will purchase the debt. *Id.* Ultimately, the debt may be acquired in one of three ways: (1) the international organization may buy the debt from the secondary market and simply donate it to the DC government's environmental organization; (2) the international organization may donate resources to the DC environmental organization to allow it to directly acquire the debt; or (3) the bank may directly donate the debt to the DC environmental organization, who then acts as agent for the international organization. *Id.*

52. Von Moltke, *supra* note 16, at 2. The debt may be converted to local currency, exchanged for local currency bonds, or canceled in exchange for legislative measures to protect particular areas. *Id.*

53. *Id.* (stating that reputation of international organizations can be affected by success or failure of implementation). These debt-for-nature swaps serve three main purposes: (1)

environmental organizations have purchased nearly \$100 million of DC debt for only \$16 million, and have completed sixteen debt-for-nature transactions.⁵⁴ This Comment summarizes the first three transactions, which serve as precedent for the other debt-for-nature swaps.⁵⁵

A. Bolivia

In July 1987, Conservation International (CI), an international nonprofit conservation group, bought \$650,000 of Bolivia's bank debt from the secondary market at approximately eighty-five percent of its face value.⁵⁶ In return, the agreement requires the Bolivian government to: (1) protect, through legislative initiative, the 334,200-acre Beni Biosphere Reserve, the adjoining 877,205-acre Yacuma Regional Park and Cordebeni Water Basin, and an additional 2,870,561-acre Chimanes Forest Reserve, as a buffer zone for sustained development and use; and (2) establish an operational fund of an amount equivalent to \$250,000 for the management and protection of the biosphere reserve.⁵⁷ The agreement designates CI to provide continuing technical, financial, and management assistance to Bolivia in connection with these protected areas.⁵⁸

B. Costa Rica

The Costa Rican swap involved the conversion of \$5.4 million of

conservation and sustainable management of biosphere reserves; (2) debt reduction; and (3) portfolio improvement for creditors through partial loan repayment. Note, *supra* note 3, at 152.

54. See generally THE NATURE CONSERVANCY, OFFICIALLY SANCTIONED DEBT-FOR-NATURE SWAPS TO DATE (1991) [hereinafter THE NATURE CONSERVANCY] (listing all debt-for-nature swaps as of January, 1991).

55. See Comment, *supra* note 37, at 565 (recognizing that Bolivia, Ecuador, and Costa Rica were among first to complete debt-for-nature swaps and that first swap with Bolivia served as model for swaps in Ecuador, Costa Rica, Madagascar, and Philippines).

56. Agreement between the Government of Bolivia and Conservation International (available from Conservation International, Washington, D.C.), July 13, 1987 [hereinafter Bolivia-CI Agreement]; *The Bolivia Case* (available from National Wildlife Federation, Washington, D.C.) (undated); THE NATURE CONSERVANCY, *supra* note 54.

Conservation International, the coordinator of the swap, is a nonprofit organization based in Washington, D.C., which is committed to global preservation of natural diversity. CONSERVATION INTERNATIONAL NEWS PRESS RELEASE (available from Conservation International, Washington, D.C.), July 13, 1987, at 1.

57. Bolivia-CI Agreement, *supra* note 56, at 4-5; *The Bolivia Case*, *supra* note 56.

58. See *Bolivia Sets Precedent with First Ever "Debt-for-Nature" Swap*, Conservation International News Release (available from Conservation International, Washington, D.C.), July 16, 1987, at 1 (stating Conservation International is official advisor to Bolivian government in design and planning of protected areas); Bolivia-CI Agreement, *supra* note 56, at 1 (explaining Conservation International is scientific and technical advisor to Bolivian government on conservation and resource management issues); Truell, *What Some Monkeys Have To Do with the Debt Crisis*, Wall St. J., Jan. 20, 1988, at A2, col. 1 (stating Conservation International will function as advisor on development in region).

Costa Rican debt.⁵⁹ In 1987, the National Parks Foundation purchased this debt for \$918,000 and exchanged it for Costa Rican currency bonds at seventy-five percent of the face value.⁶⁰ The proceeds established a Costa Rican National Resources Conservation Fund.⁶¹ The Guanacaste National Park project was of major importance to this swap.⁶² The project involved the purchase of land to which the government only received title after the park was fully completed and endowed.⁶³ Even though the Costa Rican government agreed to abide by the conditions of the swap, the land is kept from its control until all the conditions of the swap are met.⁶⁴

C. Ecuador

In a complex agreement signed on December 14, 1987, World Wildlife Fund arranged to purchase \$1 million in Ecuadoran debt for \$354,000.⁶⁵ The debt was converted to nine-year local currency bonds, with the interest payable to Fundacion Natura, a leading Ecuadoran conservation organization.⁶⁶ Fundacion Natura used the funds to finance a broad range of conservation activities in Ecuador's national parks.⁶⁷ In return, the Ecuadoran government agreed to preserve land and implement land management plans which include acquiring small nature preserves, training environmental personnel, and conducting broader environmental education activities.⁶⁸

III. DEBT-FOR-NATURE SWAPS AND SOVEREIGNTY INFRINGEMENT

Supporters argue that debt-for-nature swaps, by avoiding foreign ownership of land, provide a better alternative to debt-equity

59. Costa Rican Debt-for-Nature Agreement (available from World Wildlife Fund, Washington, D.C.), Oct. 27, 1987, at 2 (establishing Natural Resources Conservation Fund to administer proceeds from debt-for-nature swap); *The Costa Rican Case* (available from National Wildlife Fund, Washington, D.C.) (undated) (summarizing 1987 debt-for-nature swap in Costa Rica).

60. Costa Rican Debt-for-Nature Agreement, *supra* note 59, at 2; *The Costa Rican Case*, *supra* note 59; THE NATURE CONSERVANCY, *supra* note 54.

61. Costa Rican Debt-for-Nature Agreement, *supra* note 59, at 2; *The Costa Rican Case*, *supra* note 59.

62. See *The Costa Rican Case*, *supra* note 59 (discussing project).

63. *The Costa Rican Case*, *supra* note 59.

64. *The Costa Rican Case*, *supra* note 59.

65. Debt-for-Nature Agreement, World Wildlife Fund-U.S. and Fundacion Natura (available from World Wildlife Fund, Washington, D.C.), Dec. 14, 1987 [hereinafter Debt-for-Nature Agreement].

66. Debt-for-Nature Agreement, *supra* note 65.

67. Debt-for-Nature Agreement, *supra* note 65.

68. *Ecuadoran Debt-for-Nature Swap*, WORLD WILDLIFE FUND TERM SHEET (available from World Wildlife Fund, Washington, D.C.).

swaps.⁶⁹ Although debt-for-nature swaps do not directly result in external dominance through foreign ownership, the problem of foreign control remains.⁷⁰ For example, because international organizations supervise the use of funds and act as official advisors for environmental programs, they implicitly exert control over DC parties.⁷¹ Thus, it can be argued that debt-for-nature swaps do not avoid sovereignty problems; but simply mask them by avoiding express foreign land control.⁷²

In its most basic sense, sovereignty means independence from all authority except that imposed by international law.⁷³ Sovereignty rights may rest on legal grounds, but with respect to debt-for-nature swaps, sovereignty rights rest on moral grounds.⁷⁴ Indeed, DCs'

69. See Note, *supra* note 3, at 152 (contrasting debt-for-nature swaps and debt-equity swaps); *The Bolivia Case*, *supra* note 56 (stating that sovereignty issues and accusations of foreign intervention are essentially avoided with debt-for-nature swaps).

70. Comment, *supra* note 1, at 1080 (stating that advantages and disadvantages of debt-equity swaps should be kept in mind because debt-for-nature swaps and debt-equity swaps function similarly).

71. See Caldwell, *supra* note 14, at E2857 (explaining that even though nature organizations do not own preserved land, they are integrally involved in its preservation, "an issue that is perceived as an internal affair"); see also Note, *supra* note 3, at 156 (recognizing that Conservation International's role as advisor serves as controlling mechanism for enforcement); Barton, *supra* note 14, at 63 (stating outside agency established Bolivian debt-for-nature swap budget).

72. See, e.g., Bolivia-CI Agreement, *supra* note 56 (making no explicit reference to Conservation International's controlling preserved land); Debt-for-Nature Agreement, *supra* note 65 (making no explicit reference to World Wildlife Fund's control of preserved land); Costa Rican Debt-for-Nature Agreement, *supra* note 59 (making no reference to World Wildlife Fund control of preserved land).

73. See I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 81, 289 (3d ed. 1979) (stating sovereignty represents countries' legal personality within context of other countries).

74. See *infra* note 75 and accompanying text (discussing sovereignty on moral grounds, as opposed to legal grounds).

Two possible types of legal sovereignty could apply to debt-for-nature swaps: sovereignty over natural resources as expressed through United Nations resolutions, and sovereignty against industrialized countries' use of coercive action to influence DC action. A body of rules governing the exercise of national sovereignty over world legal regimes has developed from international law. Frownfelter, *The International Component of Texas Water Law*, 18 ST. MARY'S L.J. 481, 495-96 (1986) (describing framework and fundamentals of international law and its applicability to Texas' water resources). The starting point rests in the proposition that sovereignty is based on territorial rights. *Id.* at 496-97. International law utilizes the territorial sovereignty concept to afford a country the right to access its natural resources and to exercise jurisdiction over the development and utilization of these resources. *Id.*; see Comment, *Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law*, 26 HOW. L.J. 1547, 1560 (1983) (declaring countries have right to permanent sovereignty over their own natural resources). See generally Banerjee, *The Concept of Permanent Sovereignty over Natural Resources—An Analysis*, 8 INDIAN J. INT'L L. 515, 515-25 (1968) (discussing history and extent of country's sovereign right of control over natural resources).

Human rights debates at the United Nations in the 1950s first made reference to the concept of sovereignty of a country's natural resources. See *id.* at 515 (reporting that doctrine originated during Eighth Session of Human Rights Commission in 1952 while Commission was preparing International Covenants on Human Rights). A 1952 United Nations resolution first defined the permanent sovereignty concept, stating that DCs have the right to freely utilize their natural resources and that this utilization may occur to better their economic positions. G.A. Res. 523, 6 U.N. GAOR Supp. (No. 20) at para. 1, U.N. Doc. A/2119 (1952).

primary opposition to debt-for-nature swaps is based on moral principles.⁷⁵ Debt-for-nature swaps infringe on the sovereignty rights of

Another resolution in the same year recognized peoples' inherent sovereignty rights to freely use and exploit their natural wealth and resources. G.A. Res. 626, 7 U.N. GAOR Supp. (No. 20) at 18, U.N. Doc. A/2361 (1952).

Subsequent resolutions further recognized the permanent sovereignty concept. In 1966 the United Nations General Assembly adopted a resolution declaring that developing countries "should undertake themselves the exploitation and marketing of their natural resources so that they may exercise their freedom of choice in the various fields related to the utilization of natural resources. . . ." G.A. Res. 2158, 21 U.N. GAOR Supp. (No. 16) at para. 6, U.N. Doc. A/6316 (1966). The resolution reaffirms the "inalienable right of all countries to exercise permanent sovereignty over their natural resources." *Id.* at para. 7. In 1969 the U.N. General Assembly still recognized that the primary responsibility for DC development rests on the countries themselves. G.A. Res. 2571, 24 U.N. GAOR Supp. (No. 30) at para. 8, U.N. Doc. A/7630 (1969). On May 1, 1974, the U.N. General Assembly affirmed that the new international economic social order should be founded on full sovereignty of every country over its natural resources. G.A. Res. 3202, 6 U.N. GAOR (6th Spec. Sess.) Supp. (No. 1) at 9, U.N. Doc. A/9559 (1974). It further held that, to promote cooperation among DCs, each country must be given the right to protect its inalienable right to permanent sovereignty over its natural resources. *Id.* It also held that industrialized countries should make every effort to prevent encroachment on sovereignty over natural resources. *Id.* The 29th General Assembly meeting established that every state "has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources, and economic activities." G.A. Res. 3281, 29 U.N. GAOR Supp. (No.31) at art. 2, para. 1, U.N. Doc. A/9631 (1974).

Another possible type of legal sovereignty is a nation's right to be free from economic coercion. Industrialized countries often coerce DCs by threatening either to withdraw some economic benefit or to not provide some economic benefit. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405, 405 (1985) (discussing threats used in diplomatic relations). Carol Barton, a member of the Center for Concern, contends that coercion regarding debt-for-nature swaps is blatant because DCs have no choice but to participate in these swaps. Barton, *supra* note 14, at 64.

Coercion occurs because countries have no legal obligation to give economic aid to other countries and thus may choose not to provide such aid. Farer, *supra*, at 405. Consequently, many countries freely employ such threats in diplomatic relations. *Id.* at 406 (stating there are many situations whereby governments use coercive diplomacy). There is nothing, however, illegal about economic coercion. *Id.* at 406. Many situations exist in international relations where countries utilize economic threats that are never legally questioned. For example, the United States often coerces DCs to join agreements preventing competitive products from entering the United States by threatening to erect high tariffs for certain DC exports to the United States. *Id.* at 406. Also, organizations such as the International Monetary Fund only lend money to DCs if they agree to strict conditions inhibiting national discretion on matters important to the DC. *Id.* Economic coercion is a reality in today's international political system. *Id.* at 405. The legitimacy of this coercion is difficult to challenge, however, because DCs usually agree to coercive terms. Cody, *supra* note 14, at 22.

International organizations, of course, cannot arrange these swaps without the participation and consent of DC governments. *Id.* at 23. At a minimum, DC governments' finance ministers must approve the discounts at which DCs will redeem the debt, how much of the debt DCs will honor, and what financial instrument DCs will use. *Id.* Furthermore, the agreements require DC organizations to implement and monitor environmental programs. *Id.* Because control over natural resources explicitly remains within the DCs, it is also unlikely that international courts will find that international organizations infringe upon DCs' sovereignty over their natural resources.

75. Cody, *supra* note 14, at 22 (stating that Center of Concern, Overseas Development Council, and Department of Crisis Network criticize debt-for-nature swaps on moral and ethical grounds). For example, DCs believe debt-for-nature swaps infringe upon their sovereignty because they interfere with DCs' internal affairs. Barton, *supra* note 14, at 64. DCs further believe that debt-for-nature swaps threaten local sovereignty because foreign organizations choose debt reduction options that satisfy foreign, not domestic, interests. *See id.*

two groups—DC indigenous groups and DC governments. Two swaps, the Bolivian and Brazilian transactions, epitomize, respectively, these sovereignty transgressions.⁷⁶

A. *Sovereignty Infringement on DC Indigenous Groups*

Negotiations for debt-for-nature swaps usually involve four major parties: the international conservation organization, the DC conservation organization, the DC government, and the creditor bank.⁷⁷ One interest group, however, is conspicuously ignored. Indigenous groups are not included in the debt-for-nature swap process.⁷⁸ Because the homelands and ways of life of indigenous groups are threatened by deforestation, they too have a stake in conservation efforts and are important parties to debt-for-nature swap transactions. The Bolivian debt-for-nature swap exemplifies indigenous peoples' discontent with debt-for-nature swaps.⁷⁹

Several sovereignty problems arose from the Bolivian transaction.⁸⁰ First, before consummating the debt-for-nature arrangement, CI did not consult local residents or organizations regarding the cultural ramifications of foreign involvement.⁸¹ At the time, Bolivia's indigenous population was struggling to obtain title to the land involved in the transaction. Title provided the only tangible evidence of their rights to the territory.⁸² This put the indigenous people in conflict with a conservation program which, in effect,

(stating debt swaps infringe on DC sovereignty because international organizations, rather than DC citizens, create development plans). They claim that debt swaps enable international organizations to set agendas that decide not only how to spend resources but also who may spend them. *Id.* Finally, DCs claim debt-for-nature swaps exploit their financial weaknesses and take needed financial resources away from other government programs. 2 SWAPS, THE NEWSLETTER OF FINANCIAL INSTRUMENTS (available from Intrados Group, Washington, D.C.), Nov. 1989, at 8.

76. See 4 BOLIVIA BULL. (available from Bolivian Embassy, Washington, D.C.), 1988, at 1 [hereinafter BOLIVIA BULL.] (reviewing CI debt-for-nature swap with Bolivia); 135 CONC. REC. S3776 (daily ed. Apr. 12, 1989) (statement of Sen. Chafee) (stating that Brazil perceives foreign intervention in Amazon as challenge to sovereignty).

77. Dawkins, *supra* note 7, at 6-7. Other parties to these swaps may include industrial companies and various nongovernmental organizations. *Id.* These nongovernmental organizations, however, play only a peripheral role in negotiations. *Id.* at 8.

78. Dawkins, *supra* note 7, at 8-10.

79. See *supra* notes 56-58 and accompanying text (reviewing details of Bolivian swap).

80. Burton, *supra* note 16, at 241.

81. BOLIVIA BULL., *supra* note 76, at 1; see Collett, *Bolivia Blazes a Trail . . . to Where?*, CHRISTIAN SCI. MONITOR, July 10, 1989, at 4 (stating that CI did not consult with estimated 25,000 Indians who lived in and around Chimanes forest before debt-for-nature swap took place). The Indians are concerned that roads built for loggers will attract settlers who in turn will raze the forest and use it for farmland. *Id.*

82. Barton & Burand, *supra* note 17, at 13; see Collett, *supra* note 81, at 4 (discussing Moxo Indians' desire to gain title to 500,000 acres of land). The Moxos believe gaining title is the only way they can protect their interest in the Chimanes. They perceive an inextricable link between the forests' survival and their own. *Id.*

divested them of their rights to the land. Second, the new environmental programs restricted the indigenous peoples' way of life because the programs condemned many indigenous activities as detrimental to forest preservation.⁸³ Consequently, CI's involvement created tensions between CI and local indigenous groups.⁸⁴

Despite the Bolivian government's consent to the arrangement, indigenous populations accused CI of interfering with Bolivia's right to control its land.⁸⁵ Local critics felt the conservation group treated the indigenous people as birds or trees—they were to be preserved, but nothing more.⁸⁶ Bolivia's indigenous people consistently expressed their view that sovereign nations should be allowed to solve their own problems.⁸⁷

Few environmentalists addressed the sovereignty problems attending the Bolivian debt-for-nature swap.⁸⁸ Indeed, many simply dismissed the indigenous peoples' sovereignty concerns.⁸⁹ As a result, one commentator concluded that the fatal political flaw in debt-

83. See Collett, *supra* note 81, at 4 (voicing concern that debt-for-nature swaps can alienate indigenous groups by restricting use of trees in preserved territories); see also Burton, *supra* note 16, at 241, 242 n.63 (recognizing that local indigenous groups depend on forest for fuel and food and that Chimanes' future is unsettled because debt-for-nature swap agreement threatens group's way of life); Allman, *The Preservation Paradox*, U.S. NEWS AND WORLD REP., Apr. 25, 1988, at 53 (imploping environmentalists not to ignore indigenous groups when implementing conservation programs). Those living off the land may face catastrophic food and housing shortages if their access to the forests is restricted or denied. *Id.*

Conservation International officials state they want to integrate the Indians into mainstream society, but they have yet to act toward this end. Collett, *supra* note 81, at 4. Indeed, measures for continuing subsidies for rangers are necessary to keep the indigenous people from scavenging for food on the reserves. Copeland, *supra* note 6, at 45.

84. Burton, *supra* note 16, at 241.

85. Burton, *supra* note 16, at 241-42. A sovereign's right to control its natural resources has long been established in international law. See *supra* note 74 (explaining that countries have right under principles of sovereignty to use their natural resources freely).

86. Burand & Barton, *supra* note 17, at 13 (stating that organizations ignore indigenous groups' complaints regarding debt-for-nature swaps). For example, organizations are insensitive to indigenous peoples' desires to claim legal title to preserved land. *Id.*

87. Beebe & Stroh, *Using Debt To Save Nature*, N.Y. Times, July 28, 1987, at A23, col. 2; see Collett, *supra* note 81, at 4 (quoting Moxo Indians as saying that because they live in forest, they can solve its ecological problems better than foreigners); Burand & Barton, *supra* note 17, at 13 (stating that local conservation movements for environmental improvements should be supported over foreign movements); Caldwell, *supra* note 14, at E2857 (explaining that land preservation is internal affair); cf. Comment, *supra* note 37, at 569 (indicating that government's concern over sovereignty infringement may eventually yield to demands for natural resources).

88. See Burton, *supra* note 16, at 242 (stating that despite problems associated with Bolivian debt-for-nature swap, environmentalists continue to ignore DC sovereignty concerns).

89. Burton, *supra* note 16, at 242. For example, one author states that commentators express little regard for traditional sovereign concerns when attempting to justify international interference in Brazil. *Id.* The author explains, for example, that one commentator implies that developing countries are unable to protect their own resources. *Id.* The commentator charged that Brazil's environmental organizations' assessment that Brazil can take care of its own problems is "optimistic." *Id.* The commentator not only ignores the sovereign concerns of prominent state environmentalists, but also treats national sovereignty as nothing more than an obstacle to the protection of the forest. *Id.*

for-nature swaps is that environmentalists attach greater significance to their own moral agendas than to the laws of other countries.⁹⁰

B. Sovereignty Infringement on DC Governments

Fears of "eco-colonialism," the fear that industrialized countries seek to control DCs politically, pervade DC governments.⁹¹ DCs fear that debt servicing techniques such as debt-for-nature swaps jeopardize their progress toward democracy.⁹² They argue that since industrialized countries exploit their own natural resources for economic gain, developing DCs' should not be precluded from doing the same.⁹³ Yet despite DCs' insistence on maintaining sovereign control over swapped land, recent swaps have not set aside any new territory for exclusive DC use.⁹⁴ Debt-for-nature negotiations with Brazil illustrate the politically controversial nature of these transactions.

Deforestation in the Amazon Basin is a problem of global proportion.⁹⁵ The Amazon forest is the world's largest tropical moist forest with more than one hundred inches of annual rain fall and more species of plants and animals than anywhere else on earth.⁹⁶ Humans, however, have destroyed more than forty percent of the Amazon.⁹⁷ At this rate, the Brazilian rain forest will most likely vanish by the end of the century.⁹⁸ In an attempt to save this vast resource, negotiations are currently taking place for a debt-for-nature swap between Brazil and CI.⁹⁹ Brazil's government, however, is extremely sensitive to foreign involvement in the Amazon and this

90. See Burton, *supra* note 16, at 242-43 (explaining that environmentalists inappropriately deemphasize sovereignty concerns).

91. Bramble, *External Debt*, *supra* note 2, at 2; see Note, *Promoting International Environmental Protections Through Foreign Debt Exchange Transactions*, 24 CORNELL INT'L L.J. 65, 66 (1991) (asserting that restrictions imposed upon DCs amount to "environmental imperialism" and arguing that treaties are best method of securing worldwide environmental protections).

92. Dawkins, *supra* note 7, at 16.

93. Dawkins, *supra* note 7, at 16.

94. Dawkins, *supra* note 7, at 11.

95. Bramble, *External Debt*, *supra* note 2, at 3; see 135 CONG. REC. S3776 (daily ed. Apr. 12, 1989) (statement of Sen. Chafee) (predicting deforestation in Amazon will have profound effects on entire world). The area known as the "Classic Amazon" is 3.5 million square kilometers and constitutes 40% of Brazil's territory. Comment, *supra* note 37, at 538.

96. Comment, *supra* note 37, at 539; see 135 CONG. REC. S3776 (daily ed. Apr. 12, 1989) (statement of Sen. Chafee) (recognizing that Brazil's rain forest produces 18% of world's fresh river water and is home for nearly one-third of all plant and animal species). One hectare of forest can contain up to 230 different species of trees, whereas a comparable area of temperate forest might contain only 10 or 15 species. Comment, *supra* note 37, at 539.

97. Comment, *supra* note 37, at 540 (estimating that deforestation in Brazil accounted for two-thirds of total tropical moist forest destruction in 1970s).

98. Comment, *supra* note 37, at 540.

99. Comment, *supra* note 1, at 339. Negotiations for debt-for-nature swaps have been initiated with several Latin American and Caribbean nations, including Peru and Jamaica. *Id.* Swaps have already been concluded in Zambia and Madagascar and potential exists for future

concern stands at the forefront of negotiations.¹⁰⁰ Former President of Brazil, Jose Sarney, while in office, forcefully rejected debt-for-nature swaps in Brazil, stating that such conditional aid is unacceptable.¹⁰¹ He vehemently guarded Brazil's sovereignty over the Amazon, stating, "[The] Amazon is ours . . . [a]fter all, it is situated in our territory."¹⁰²

The same concerns over national sovereignty also permeate the present Brazilian government. For example, Brazil's current consul-general in Vancouver stated that debt-for-nature swaps will not be accepted because they threaten national control over natural resources.¹⁰³ Additionally, the newly-elected Governor of Amazonas won on a platform of vehement opposition to foreign environmental protection schemes.¹⁰⁴

Also, prominent member of the Brazilian Congress, environ-

swaps with other African nations. *Id.*; see Copeland, *supra* note 6, at 45 (stating World Bank is considering lending Brazil \$100 million for forest conservation).

100. See 135 CONG. REC. S3776 (daily ed. Apr. 12, 1989) (statement by Sen. Chafee) (stating, in support of S.J. Res. 101, that Brazil perceives debt-for-nature swaps as infringement on sovereignty and is averse to foreign intrusion in Amazon); see also Comment, *supra* note 37, at 568 (explaining that Brazil's particular sensitivity to foreign influence requires some attention); *Brazilian Environmentalist Urges U.S. To Halt Threats On Amazonian Deforestation*, 12 Int'l Env't Rep. (BNA) No. 4, at 180 (Apr. 12, 1989) (stating that Brazil's sovereignty is "touchy issue"). *But see* 135 CONG. REC. S3776 (daily ed. Apr. 12, 1989) (statement of Sen. Chafee) (indicating that despite Brazil's perception that foreign intervention threatens its sovereignty, Brazilian authorities implicitly acknowledge that they need assistance solving country's economic and social problems).

In the past, Brazil resisted domestic environmental movements. Comment, *supra* note 37, at 553. Environmental laws established in the 1940s lacked the support of organizations who were to implement them. *Id.* Further, with the advent of military rule and the increased pressure for rapid economic growth, laws to protect the environment were given very little backing. *Id.* at 554. For example, a March 1967 law created an environmental pollution control organization, but was revoked within months by a less environmentally protective law. *Id.* Brazil generally resists internationally sponsored conservation programs, perceiving them as plots by rich countries to keep poor countries from developing. *Id.* In short, Brazil is not likely to invest many financial or political resources to protect, from exploitation, the same rain forest that represents the country's greatest potential for development and economic enrichment. *Id.* at 559.

101. See Robinson, *Brazil Angrily Unveils Plan for the Amazon*, Wash. Post, Apr. 7, 1989, at A1, col. 1 (quoting Sarney as saying that restrictions on Brazil's use of Amazonian resources would only abet "that most abject of all pollutions, the pollution of poverty"). *But cf.* *Environmental Strings Justifiable As Condition for Foreign Aid, Senator Says*, 12 Int'l Env't Rep. (BNA) No. 6, at 320 (June 14, 1989) (stating that giving monetary aid pursuant to land use arrangements is appropriate tactic to influence environmental policies).

102. Robinson, *supra* note 101, at A1, col. 1.

103. *Id.*; see *Amazon Rainforest Problems Distorted by Exaggerated Reports, Official Says*, 13 Int'l Env't Rep. (BNA) No. 4, at 173 (Apr. 11, 1990) (stating opposition to debt-for-nature swap with Brazil is too strong to overcome).

104. See Brooke, *Ecologists' Foe to Become Amazon Governor*, N.Y. Times, Oct. 21, 1990, at 19, col. 1 (quoting Governor-elect as stating that 10 million people cannot die of hunger so that animals and trees may be saved). The Governor, who has been elected three times since 1959, has recently proposed a law that transfers control of the environment from the Brazilian government to the states and allows "all and any economic use of the Amazon's resources." Preston, *Amazon Resisting Environmentalists*, Wash. Post, Oct. 22, 1991, at A15, col. 5.

mentalist Fabio Feldman, stated that because of the sovereignty issue, DC governments will not accept debt-for-nature arrangements.¹⁰⁵ He urged countries to donate money to Brazil's internal environmental efforts instead.¹⁰⁶ Feldman stated that the United States, rather than imposing its own environmental agenda, should demonstrate support for Brazilians who are pushing for environmental policy changes.¹⁰⁷ According to Feldman, the United States' insistence on implementing debt-for-nature swaps threatens Brazil's sovereign right to decide how to use its own natural resources.¹⁰⁸ It is well established that Brazil strongly resists foreign encroachment upon the Amazon.¹⁰⁹ One commentator explained that most people in Brazil "were raised since babyhood to think the rest of the world is trying to steal the Amazon from Brazil."¹¹⁰ Consequently, if a future swap with Brazil is to occur, transactions must address and resolve such sensitive sovereignty issues.¹¹¹

IV. DC AVERSION TO RESTRICTIVE DEBT-FOR-NATURE SWAP TERMS

DCs frequently react negatively to debt-for-nature swaps and consistently respond adversely to restrictive measures. For example, CI and Bolivia did not include enforcement provisions in their debt-for-nature swap agreement, in part because of Bolivia's reluctance to accept such terms.¹¹² Had CI demanded enforcement terms, Bolivia might have rejected the agreement, thereby jeopardizing CI's environmental objectives.¹¹³ Instead, CI opted to employ indirect enforcement terms which allowed CI extensive involvement in

105. See Robinson, *supra* note 101, at A1, col. 1 (reporting that Brazil's government rebuked international community for attempting to implement debt-for-nature swaps as these swaps tell governments how to utilize their land).

106. See *Brazilian Environmentalist Urges U.S. To Halt Threats on Amazonian Deforestation*, *supra* note 100, at 180 (stating that if foreign organizations support Brazilian conservation efforts, then measures benefitting DCs are more likely to emerge).

107. See *Brazilian Environmentalist Urges U.S. To Halt Threats on Amazonian Deforestation*, *supra* note 100, at 180 (stating that United States Congress should stop threatening Brazil with environmental sanctions and instead should support Brazilian environmental policies).

108. *Brazilian Environmentalist Urges U.S. To Halt Threats on Amazonian Deforestation*, *supra* note 100, at 180; see *supra* notes 74-75 (discussing DCs' right to natural resources within their territories). But see *Environmental Strings Justifiable As Condition for Foreign Aid, Senator Says*, *supra* note 101, at 320 (stating that United States is spending own money in DCs and thus has absolute right to decide how funds will be used).

109. Robinson, *supra* note 101, at A1, col.1.

110. Preston, *supra* note 104, at A15, col. 4.

111. See *supra* note 14 and accompanying text (emphasizing that sovereignty issues serve as obstacles to future debt-for-nature swaps).

112. Note, *supra* note 3, at 156 (suggesting that enforcement provisions may have been intentionally overlooked or explicitly rejected).

113. Note, *supra* note 3, at 156.

structuring the debt-for-nature swap.¹¹⁴

DCs also resist stabilization clauses.¹¹⁵ These clauses work to protect agreements from unilateral modification or termination by contracting countries and are perceived by DCs as draconian limitations on contractual rights.¹¹⁶ Thus, because provisions such as stabilization clauses often make debt-for-nature swaps appear restrictive, DCs predictably perceive the swaps as threats to their national sovereignty.¹¹⁷

V. PROPOSAL

The United States Government encourages all international organizations to recognize the sovereign authority of DCs' indigenous groups and governments, and to convey in all debt-for-nature swap proceedings respect for this authority.¹¹⁸ In an effort to adhere to the United States Government's recommendations to resolve tensions, this Comment suggests integrating indigenous groups into the basic debt-for-nature swap scheme. This would attempt to alleviate perceptions of exploitation and neglect. Also in adherence to the Government's recommendations, this Comment further proposes including a sovereignty protection clause in debt-for-nature swap agreements. The clause would serve to allay DC governments' fears that debt-for-nature swaps result in their losing control over their land.

A. *Resolving Sovereignty Conflicts with Indigenous Groups*

Most indigenous groups are not well-organized and, consequently, do not have their interests effectively represented in debt-for-nature swap negotiations.¹¹⁹ As a result, they cannot negotiate

114. See Note, *supra* note 3, at 156 (stating that such subtle form of enforcement was probably most effective technique possible).

115. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 355-61 (1988); Aréchaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179, 192 (1978).

116. See Curtis, *supra* note 115, at 346-47 (stating stabilization clauses require both parties to execute contract in good faith, thereby precluding unilateral termination); *id.* at 347 (differentiating between various types of stabilization clauses and noting that these clauses infringe upon sovereignty by limiting actions to those stipulated in contract). DCs assert that the international legal principle of permanent sovereignty over natural resources also prevents use of stabilization clauses. *Id.* at 357.

117. See Curtis, *supra* note 115, at 359-60 (noting historical presumption of unfairness and unequal bargaining power between DCs and industrial nations). *But see id.* at 360 (stating that although DCs are clearly disadvantaged by stabilization clauses, this does not mean they should not be used).

118. See S.J. 101, 101st Cong., 1st Sess., 135 CONG. REC. S3777 (daily ed. Apr. 12, 1989) (proposing that United States' foreign policy should recognize Brazil's sovereign authority in Amazon Basin and condemn future international intervention in area).

119. See Dawkins, *supra* note 7, at 9-10 (stating that some indigenous groups are well-

for swaps that adequately address their interests and concerns. To resolve this problem, debt-for-nature agreements should integrate the interests of indigenous populations with the goals of environmental protection. Clearly, the successful implementation of debt-for-nature swaps depends on the integration of all interested parties.¹²⁰ Because indigenous people, whose interests are directly affected by conservation plans, can contribute significantly to program development, efforts to include them in debt-for-nature swaps should be made.¹²¹

The proposed swaps would be analogous to debt-for-development swaps, which use local currency obtained to improve the social welfare of developing countries.¹²² The proposed debt-for-nature swap, however, would direct funds to environmental research and education projects for indigenous groups, rather than to general social welfare programs. The mechanism would work as follows. The international organization would use its funds to buy DC debt from the secondary marketplace. It would then sell this debt to the DC for partial or full face value of the debt in local currency. The international organization would direct the local currency to local environmental aid programs involving the indigenous group, rather than directly to nature conservation efforts.¹²³

Similar programs currently exist. The United States Agency for International Development's (USAID) debt-for-nature swap with the Philippines uses indigenous people as park rangers in wildlife protection efforts.¹²⁴ USAID also signed a debt-for-nature swap agreement with Madagascar which directs funds toward education programs for the country's indigenous people.¹²⁵ Similarly, a debt-for-nature swap agreement between CI and Mexico has funds marked for conservation research stations and education

organized and interact well with white society, while others are not well-organized and have never had contact with white society).

120. Dawkins, *supra* note 7, at 10.

121. Dawkins, *supra* note 7, at 10.

122. See Note, *supra* note 91, at 67 (explaining that debt-for-development transactions restructure existing debt to ease capital flight and allow for reinvestment that benefits DCs and environment). In December 1988, Britain's Midland Bank pioneered debt-for-development swaps by donating its \$800 million Sudan debt to the United Nations Children's Fund (UNICEF). *West German Bank Swaps Sudanese Debt for Development*, The Reuter Library Report (NEXIS Omni file), June 14, 1989.

123. Burton, *supra* note 16, at 234-35. For example, UNICEF spends \$3 million annually in Mexico to run its debt-for-development program. *Id.* UNICEF buys \$3 million of Mexican debt at a discount from commercial creditor banks, then resells the debt notes to Mexico for a prearranged amount. *Id.*

124. USAID, *World Wildlife Fund Sign New Philippine Debt-for-Nature Swap*, PR Newswire Association, Apr. 23, 1991, at 1.

125. *U.S. Aid, Madagascar Complete Deal to Swap Debt Relief for Conservation*, 12 Int'l Env't Rep. (BNA) No. 8, at 407 (Aug. 9, 1989).

projects.¹²⁶

Predictably, the indigenous groups involved in these recent transactions have not expressed sovereignty concerns.¹²⁷ At the very least, swaps integrating indigenous people enhance the ability of organizations to operate programs that make those who are impacted most directly their primary concern.¹²⁸ Accordingly, if debt-for-nature swaps follow the proposed format of devoting funds to social and educational programs, then the complaint most often voiced by indigenous groups—that their interests are ignored in conservation programs—would be directly addressed and resolved. By training indigenous groups in environmental protection efforts and by capitalizing on the indigenous populations' knowledge of forest resources that they have accumulated over generations, the proposed debt-for-nature swap not only would fully involve indigenous populations but also would allow for more sustainable environmental development.¹²⁹

The sustainable development concept promotes methods of managing natural resources that preserve those resources for future generations, instead of utilizing methods that have only short-term value.¹³⁰ As debt-for-nature swaps currently stand, international environmental organizations simply form nature reserves while ignoring sustainable development ideas and, therefore, larger social concerns.¹³¹ These organizations do not address the roots of envi-

126. *Money Raised by Debt-for-Nature Swap to be Used to Preserve Mexican Rainforest*, 14 Int'l Env't Rep. (BNA) No. 4, at 107 (Feb. 27, 1991).

127. See Burton, *supra* note 16, at 255-56 (noting that DCs are concerned with inflation, loan financing, and interest rates, but did not mention sovereignty).

128. Burton, *supra* note 16, at 243. The Agency for International Development's support of various debt exchange programs in its "Debt-for-Development Initiative" suggests the popularity of debt-for-development swaps. Meuchner, *US Funding LDC Debt Purchases on Secondary Market*, INSTITUTIONAL INVESTOR, Mar. 20, 1989, at 1. Mexico agreed to a debt-for-development swap although the country has usually resisted traditional debt-for-nature swaps due to territorial sovereignty concerns. Burton, *supra* note 16, at 234-35. Debt-for-development swaps appear to be more successful than debt-for-nature swaps. For example, of \$132 million converted in debt swaps, \$26 million went toward debt-for-nature swaps while \$106 million was allocated toward debt-for-development swaps. Kelash, *Development Swaps Said to Top \$132 Million*, AMERICAN BANKER, May 8, 1990, at 12.

129. See Moran, *supra* note 1, at 19, reprinted in 137 CONG. REC. E1264 (explaining that indigenous population suffers worst from deforestation because they lose homeland, but humanity also suffers because it loses valuable knowledge of indigenous people). The Organization for Economic Cooperation and Development (OECD) assists countries in achieving sustainable development by strengthening their aid institutions and by improving their own environmental protection and management programs. *OECD Officials Call for Integration of Environmental, Developmental Projects*, 14 Int'l Env't Rep. (BNA) No. 3, at 81 (Feb. 13, 1991). The OECD Directorate attempts to provide guidelines for aid agencies that focus on environmental problems, such as chemical management and population resettlement. *Id.*

130. See *supra* note 44 (defining sustainable development concept).

131. See Note, *supra* note 91, at 88 (suggesting that international organizations should focus on indigenous production activities, rather than site-specific nature reserves, to achieve sustainable development).

ronmental degradation, but merely attempt to employ immediate gratification-type measures.¹³² This undermines the very forces that can bring about environmentally sustainable development—the indigenous peoples themselves.¹³³ Under the proposed modified debt-for-nature swap, international environmental organizations would not simply educate indigenous populations regarding the monetary value of the environment or teach them agricultural methods that produce only short-term benefits. Instead, indigenous populations would be taught less environmentally destructive and more agriculturally productive subsistence techniques.¹³⁴ Rather than repressing environmental degradation through inspections or fines, conservation organizations would eliminate the motivations for this degradation.¹³⁵ By educating and training the indigenous people, the modified debt-for-nature swap considers the long-term effects of environmental development by promoting long-term behavioral modification.¹³⁶ In short, if environmental organizations were to use their funds to develop educational and environmentally-conscious social programs, indigenous people would learn to “take care and maintain the ecology because [they] know that it guarantees [their] existence.”¹³⁷

To aid in this process, the indigenous people of Brazil have developed an organization, the Coordinating Body of the Amazon Basin (COICA), which represents the interests of the indigenous population and attempts to integrate the indigenous people in all negotiations regarding the Amazon rain forest.¹³⁸ Pursuant to these efforts, COICA has offered to conduct research, train paralegals, and manage parks and reserves.¹³⁹ COICA maintains that because Brazil’s indigenous people reside in conservation areas, they can efficiently monitor debt-for-nature swap agreements and better assist in their

132. Burand & Barton, *supra* note 17, at 13.

133. Burand & Barton, *supra* note 17, at 13.

134. See Burand & Barton, *supra* note 17, at 13 (calling for education of indigenous people about debt perpetuation and environmental destruction).

135. *New President Appoints Ecologist to Head Environmental Secretariat*, 13 Int’l Env’t Rep. (BNA) No. 4, at 152 (Apr. 11, 1990) (arguing that ecological reform measures such as large taxes and fines do not repress deforestation activities).

136. Commentators criticize debt-for-nature swaps because they do not address the big picture, and thereby serve only as a “stopgap solution to larger, more fundamental problems.” Crosby, *Debt-for-Nature Swaps: An Eco-Panacea?*, *The Guardian*, Apr. 25, 1990, at 3, col. 1.

137. Collett, *supra* note 81, at 4 (quoting letter from Moxo leaders to minister of Indian affairs).

138. Dawkins, *supra* note 7, at 9. COICA believes that indigenous control of economic activities within their territories is integral to the security of indigenous peoples and the Amazonian forest. *Id.*

139. Dawkins, *supra* note 7, at 9.

implementation.¹⁴⁰

B. *Resolving Sovereignty Conflicts with DC Governments*

While efforts promoting participation of local indigenous groups is vital for the success and legitimacy of future debt-for-nature transactions, simultaneous efforts affording DC governments an increased degree of control in debt-for-nature swaps should also be made.¹⁴¹ Efforts providing DC governments with unfettered control over their natural resources is essential for the future success of debt-for-nature swaps.¹⁴² Accordingly, a sovereignty protection clause should be included in every debt-for-nature swap. The clause would permit a DC government to seek damages if an environmental organization infringes on its sovereign rights, thereby reinforcing DC national control over its natural resources. Through negotiations, both parties would previously agree on what acts would violate DC sovereignty rights.

The sovereignty protection clause concept is derived from the concept of nationalization.¹⁴³ This section of the Comment will discuss the concept of nationalization and the international legal doctrines that legitimize nationalization of privately-held land. Next, this section will address the issue of what damages should be owed to DCs when sovereignty protection clauses are breached. Although it is difficult to accurately measure the amount of money owed to a DC when a foreign entity exerts control over the DC's resources, the damages paid to property owners when a country nationalizes, or takes property, is an appropriate gauge. Finally, this section attempts to predict and counter criticisms of this sovereignty protection clause.

I. *Nationalization generally*

Nationalization is defined as a government's "taking" or reclaiming of its domestic natural resources for purposes of social or economic reform.¹⁴⁴ A government's right to nationalize an inves-

140. Dawkins, *supra* note 7, at 10.

141. See Dawkins, *supra* note 7, at 18 (stating that with regard to sovereignty there is increasing degree of national control exercised by DC governments).

142. See Comment, *Debt-for-Nature Swaps: A New Strategy for Protecting Environmental Interests in Developing Nations*, 16 *ECOLOGY L.Q.* 1065, 1080 (1989) (stating that tension between DCs' interest in control and environmental groups' interest in enforceable agreements must be resolved).

143. See *infra* notes 144-48 and accompanying text (discussing nationalization concept).

144. Rood, *Compensation for Takeovers in Africa*, 11 *J. INT'L L. & ECON.* 521, 524 n.5 (1977); see I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 517 (2d ed. 1973) (referring to expropriation as taking of foreign corporations' private property for certain public purposes and nationalization as expropriation of major national resources on a general program of

tor's property for some public purpose, in a nondiscriminatory manner, is generally recognized throughout the world.¹⁴⁵ The concept derives from a country's right to maintain permanent sovereignty over its natural resources.¹⁴⁶ Political resentment of foreign domination is a factor that DCs consider when determining whether to nationalize property.¹⁴⁷ Consequently, because DCs often nationalize to free themselves from foreign control, it is logical to base damages for sovereignty invasion on the damages standards of

social and economic reform); *cf.* Comment, *supra* note 74, at 1548 n.4 (quoting Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L COMP. L.Q. 263, 267 (1975) (defining "nationalization" as transfer of land by legislative act for assignment to private individuals to fulfill governmental interests)).

A nationalization only occurs for purposes of economic and social reform. *See Resolution on Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962) (providing that nationalization, expropriation, or requisitioning shall occur for reasons of public utility, security, or national domestic and foreign interests). Nationalization is different from expropriation. "Expropriation" is the taking of property by the government for its own private use while "nationalization" is the taking of natural resources by government as a part of social or economic reform. Rood, *supra*, at 524 n.5.

Although countries recognize nationalizations, controversy exists as to what constitutes an effective taking for purposes of awarding damages. Comment, *supra* note 74, at 1549. Fundamental differences in political ideologies and systems of property ownership and distribution foster conflicting views in this area of international law. *See id.* (contrasting Western society, which maintains privately and publicly held property and weighs individual rights against state's interest, with African states, which generally adhere to principles of communal land rights).

Takings can be of private property. *See id.* at 1547 (discussing takings of foreign-owned private property for social or economic purposes). Takings also can be of leased property. *See generally* D'Angelo v. Petroleos Mexicanos, 398 F. Supp. 72, 76 (D. Del. 1975) (stating that nationalization decree issued by government includes interests acquired or leased); Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1605 n.28 (1988) (discussing expropriation of leaseholds and estate of years in regulatory takings cases). Nationalizations can even be of slavery. When a slave was brought into a free state, the slave could be declared a free citizen by the state. *See generally* Note, *Let Us Go Back and Stand Upon The Constitution: Federal-State Relations In Scott v. Sanford*, 90 COLUM. L. REV. 192, 193-206 (1990) (discussing nationalization of slavery and the role of federalism).

145. *See* Comment, *supra* note 74, at 1548 (noting that United States and DCs recognize countries' rights to take property for public purpose); Rood, *supra* note 144, at 528 (recognizing that countries agree that nationalizations are lawful). The Argentinian, Mexican, and United States Constitutions provide clauses holding that no person may deprive another of property. Comment, *supra* note 74, at 1548 n.5. For example, article 17 of the Argentinian Constitution provides that "[p]roperty is inviolable, and no inhabitant of the Nation can be deprived thereof except by virtue of judgment founded in law." *See id.* at 1548 n.5 (quoting Argentinian Constitution).

146. *See* Banerjee, *supra* note 74, at 529 (stating that countries feel that sovereignty over their own resources is obvious); Comment, *supra* note 74, at 1560-68 (discussing legal concepts underlying nationalizations and detailing historical development of concept of permanent sovereignty over natural resources); *supra* notes 100-08 and accompanying text (reviewing struggle of DCs to achieve permanent sovereignty over their natural resources).

147. Rood, *supra* note 144, at 521-22. Professor Rood cites other factors such as DCs' need for greater wealth and power and their ability to obtain foreign property within their own borders. *Id.* at 521. Other reasons, however, may include a previous DC government's failure to appreciate fully the ramifications of a foreign project or investment until after its implementation. Comment, *supra* note 74, at 1553 n.23. In such circumstances, the agreement may prove unacceptable to a subsequent government having different economic and developmental aspirations. *Id.* Thus, the subsequent government will nationalize the land involved in the project. *Id.*

nationalization.¹⁴⁸

2. *Legal doctrines legitimizing nationalization*

One doctrine legitimizing nationalization is the act of state doctrine, a statement of respect for territorial sovereignty.¹⁴⁹ The leading case formulating the act of state doctrine is *Banco Nacional de Cuba v. Sabbatino*.¹⁵⁰ In *Sabbatino*, the Supreme Court of the United States held that countries must respect the independence of every other country and that courts of one country must not sit in judgment of another country's activities within its own territory.¹⁵¹ The rationale for this doctrine is that courts should abstain from actions which hinder the conduct of the United States executive branch in foreign relations and which imperil amicable relations between the United States and other foreign countries.¹⁵²

Another doctrine legitimizing nationalization is the Calvo doctrine.¹⁵³ This doctrine, originally adhered to by Latin American

148. See Comment, *supra* note 74, at 1553 (stating that majority of nationalization cases involve DCs' desire to be free from foreign control); *id.* at 1552 (discussing Canada's nationalization programs which reduced foreign ownership of oil and gas).

149. Harfield, Book Review, 18 N.Y.U. J. INT'L L. & POL. 1015, 1020 (1986).

150. 376 U.S. 398 (1964). The case arose out of the Cuban government's expropriation of a sugar corporation, a majority of whose shareholders resided in the United States. *Id.* at 401-06. The Supreme Court held that the judicial branch will not examine the validity of a foreign sovereign's actions, even if the actions violate international law, absent a treaty or other clear agreement concerning controlling legal principles. *Id.* at 428.

For other cases that address the act of state doctrine, see generally *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 466 (1936) (holding that decrees of foreign government are worthy of extraterritorial effect because such decrees are consistent with United States law and public policy); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) (stating that act of state doctrine is based on principles other than international comity); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (stating traditional formulation of act of state doctrine); *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 293-94 (1808) (declaring that country must recognize another country's act of sovereign power).

151. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

There are three instances where the act of state doctrine will not apply. The treaty exception requires United States courts to reject applying the act of state doctrine when foreign countries' challenged actions are the subject of a treaty between the United States and the acting foreign country. See *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 428 (6th Cir. 1984) (citing 1953 Treaty of Amity between United States and Ethiopia justifying rejection of act of state doctrine). Under the Bernstein exception, United States courts will reject the act of state doctrine when a clear expression of executive policy directs the courts to pass on the validity of acts of foreign sovereign states' officials. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (holding that clear expression of executive policy renders application of act of state doctrine unnecessary). The commercial activities exception rejects the act of state doctrine when foreign governments engage in activities in which any private citizen can engage. *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 704-06 (1976) (holding that activities of Cuban agents in operation of cigar business for profit was not act of state).

152. See *Dunhill*, 425 U.S. at 697 (rejecting argument that adjudication of foreign cases would not injure United States foreign relations).

153. Carlos Calvo, an Argentine diplomat and legal scholar, originally proposed the doc-

countries, is often found in clauses in DC constitutions, and in legislation and business contracts in DCs and the United States.¹⁵⁴ The Calvo doctrine provides that there is absolute equality between nationals and aliens and that determination of the rights of a country's people is left entirely to the territorial sovereign.¹⁵⁵ Because the act of state and Calvo doctrines legitimize the nationalization process under international law, DCs may rightfully appropriate their natural resources for their own benefit through sovereignty protection clauses.

3. Damages

The payment of damages for breach of a debt-for-nature sovereignty protection clause provides relief to a DC government when an international environmental organization infringes on its sovereignty rights.¹⁵⁶ The amount of damages paid should be agreed on during debt-for-nature swap negotiations.

Each debt-for-nature swap is different and thus each will require its own particular damages provision. The following guidelines, however, should be utilized when formulating such a provision. When addressing damages, the issues of requisite standard of payment and the time-span of payment must be determined.¹⁵⁷

In the event of a nationalization, several damages standards may be invoked. The first standard is the "fair market value" method of

trine in 1868. See generally C. CALVO, INTERNATIONAL LAW OF EUROPE AND AMERICA IN THEORY AND PRACTICE (1988).

154. Comment, *supra* note 74, at 1574-75.

155. Comment, *supra* note 74, at 1574. For example, Peru incorporated the Calvo doctrine in article 17 of its Constitution which states that all foreign or national companies are subject to Peruvian laws and all contracts must state that these companies will submit to Peruvian laws. Aréchaga, *supra* note 115, at 193 n.45 (citing CONSTITUCIÓN POLITICA (Constitution), art. 17 (Peru)).

156. Cf. Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUM. J. TRANS-NAT'L L. 35, 35 (1981) (stating nationalization compensation usually covers DCs' nationalization of foreign industries established within DCs); see *supra* note 44 and accompanying text (defining conservation easements).

157. Muller, *supra* note 156, at 39. Other factors to consider in determining compensation include the currency or modality (e.g., DC government bonds, the foreign countries' currency, or the DCs' currency) in which compensation is paid and the "deductions" claimed by DCs. *Id.* "Deductions" are claims made by DCs regarding special circumstances which justify reducing the compensation paid to the foreign country. *Id.* at 50. Special circumstances include excess profits incurred by the foreign investor, costs of building housing for company personnel, and disparities in value of minerals. *Id.* Another question may be whether or not there is an obligation to pay compensation at all for nationalizations. Comment, *supra* note 74, at 1555. Western industrialized states promote a standard of protection in which there is always a duty to compensate. *Id.* But see Rood, *supra* note 144, at 528-29 (stating that even though United States advocates compensation for all nationalizations, United States has not, in past, recompensed for nationalizations of enemy property during wartime, slaves during abolition period, property subject to police powers, securities through devaluation, and wealth by high taxation).

recovery.¹⁵⁸ Fair market value would be the amount at which the DC can sell the nature reserve in the open market.¹⁵⁹ The second measure is to value the property as a "going concern."¹⁶⁰ This is a profit-based standard calculated by multiplying either the past annual earnings, or estimated future earnings, by a capitalization factor.¹⁶¹ This measure is inapplicable to debt-for-nature swaps because there are no future profits to calculate. The third measure is to provide "replacement costs" of the forfeited project.¹⁶² This award would be equivalent to the price at which DCs must pay to reestablish a similar project elsewhere.¹⁶³ The final approach is to award the "book value" of the project.¹⁶⁴ This approach would measure the value of the land before conservation begins.¹⁶⁵

Once DCs and foreign organizations determine the appropriate damages standard, they must next determine the timing for payment of damages. Multinational corporations of the United States and other western countries promote "prompt" and "effective" compensation for a nationalization.¹⁶⁶ Generally, these corporations desire damages paid in stable currency within ten years of the breach.¹⁶⁷ DCs, however, prefer to pay foreign corporations based on their capacity to pay without detriment to their social or eco-

158. Note, *International Parties, Breach of Contract, and Recovery of Future Profits*, 15 HOFSTRA L. REV. 323, 327 (1987). For example, if a country nationalizes a United States corporation, the corporation's assets are assessed at fair market value and the corporation is made "whole" by receiving complete recovery. *Id.* at 327. The model Bilateral Investment Treaty provides that compensation should be equivalent to fair market value of the investment. Comment, *supra* note 74, at 1569.

159. Comment, *supra* note 74, at 1569 n.93 (defining fair market value as amount injured party would pay for property if selling in open market).

160. Comment, *supra* note 74, at 1569 n.93. For example, if a country nationalized a corporation, the going concern would be computed by multiplying a profit figure for an agreed upon year or number of years by another agreed upon figure to determine the corporation's investment value. *Id.* at 1569.

161. Comment, *supra* note 74, at 1569 n.93. This measure does not provide complete recovery like fair market value does, but it does provide recovery for loss of certain intangibles, such as future profits and good will. Muller, *supra* note 156, at 40.

162. Comment, *supra* note 74, at 1569. For example, if a country nationalized a corporation, the compensation cost is the amount the corporation would have to pay to replace its fixed assets. Muller, *supra* note 156, at 40.

163. Comment, *supra* note 74, at 1569 n.93. This amount would cover costs including new facilities and equipment. Note, *supra* note 158, at 327.

164. Comment, *supra* note 74, at 1569 n.93. "Book value" is computed by subtracting the total liabilities of a corporation from its total assets. Muller, *supra* note 156, at 40.

165. Comment, *supra* note 74, at 1569 n.94; Muller, *supra* note 156, at 42-45; Note, *supra* note 158, at 328.

166. Comment, *supra* note 74, at 1555; Muller, *supra* note 156, at 47. This standard is known as the Hull rule. Comment, *supra* note 74, at 1555 n.31. In 1938, Secretary of State Hull wrote a letter to the Mexican government requiring them to pay prompt, adequate, and effective compensation for nationalizing several American oil industries. See Note, *supra* note 158, at 329 (stating that Hull charged Mexico with deviating from international law insofar as this law requires prompt and effective compensation).

167. Muller, *supra* note 156, at 47.

conomic progress.¹⁶⁸

In an effort to resolve the issues of the damages standard, one commentator suggests that DC domestic law should govern since international environmental organizations voluntarily invest their environmental protection funds in that country.¹⁶⁹ There is, however, no controlling international legal norm for a damages standard and, therefore, any reasonable standard agreed on by the parties involved may prove legally acceptable.¹⁷⁰

4. *Criticisms of sovereignty protection clauses*

Several criticisms of sovereignty protection clauses can be postulated. One potential criticism is that the clauses allow DCs to bring a claim for damages by simply asserting that international environmental organizations are infringing on their sovereignty. As a result, these organizations may fear that DCs will make false accusations and, therefore, may be deterred from investing in DCs. International organizations and DCs, however, can negotiate and decide which acts will violate DCs' sovereign authority. Accordingly, such negotiation will foster mutually acceptable agreements and thereby ensure that future international investments in DCs will not suffer.¹⁷¹

Another possible criticism of sovereignty clauses emanates from international organizations' fear that the clauses lack international legal status, thereby enabling DCs to indiscriminately demand damages through application of their own domestic law.¹⁷² Article 2 of the Charter of Economic Rights and Duties of States, however, maintains that all countries have an obligation to fulfill, in good faith, any agreements freely entered into and to abide by all provisions contained in those agreements.¹⁷³ Any breach of this Charter

168. Comment, *supra* note 74, at 1555-56.

169. See Comment, *supra* note 74, at 1576-77 (stating multinational corporations voluntarily venturing abroad should be subject to DC laws since they are receiving benefits from those countries).

170. See Comment, *supra* note 74, at 1576 (noting there are fundamental differences between countries' opinions on compensation issue); Muller, *supra* note 156, at 35 (maintaining there is lack of mutual understanding between international investors and DCs); Note, *supra* note 158, at 328 (stating there is "clear dichotomy" on views of compensation).

171. See Note, *supra* note 158, at 329 n.44 (reasoning that negotiations will secure future international investments because communications between parties to contract increase likelihood that contractual terms will be honored, thereby satisfying reasonable expectation of parties).

172. See generally Aréchaga, *supra* note 115, at 189-95 (discussing controversial legal status of international investment agreements).

173. U.N.G.A. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 251 (1975). The proposition that all agreements between DCs and foreign countries must be implemented in good faith and that dispute settlement procedures must be respected was further supported by a United Nations Assembly resolution. See

would permit recovery by the international organization in accordance with article 2, paragraph 2(c) of the Charter.¹⁷⁴

Because carefully constructed agreements can remedy DCs' sovereignty concerns, debt-for-nature swap agreements should incorporate a sovereignty protection clause. The proposed clause would allay DCs' "ecological-imperialism" anxieties by providing DCs with some recourse if environmental organizations do not abide by the written debt-for-nature swap agreement.¹⁷⁵ Explicit provisions in debt-for-nature swap agreements addressing DC sovereignty concerns afford these issues the reverence they deserve.

CONCLUSION

In their present form, it is unlikely that debt-for-nature swaps will significantly alleviate the international debt and environmental crises. Debtor countries and their indigenous populations perceive debt-for-nature swaps as an affront to their sovereignty and therefore are reluctant to enter into such transactions. Accordingly, if future debt-for-nature swaps are to succeed, international organizations must address and allay these fears of sovereignty infringement. Even if these fears are misguided or unjustified, as Senator John Chafee has suggested, perception is often more powerful than reality and must be taken seriously—even if we disagree with that perception.¹⁷⁶

Debt-for-nature swaps are a noble effort to resolve the dual crises of massive environmental degradation and catastrophic debt burdens. It is well recognized that plans which attempt to remedy both crises, such as the Enterprise for the Americas Initiative Act of 1990, are a practical necessity not only to development of debtor countries but also to efforts to protect our planet's resources.¹⁷⁷ Debt-for-

G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962) (placing agreements between country and foreign company on essentially equal terms with intrastate agreements).

174. See Aréchaga, *supra* note 115, at 191 (characterizing breach as expropriation of international company's contractual rights which requires DCs to pay compensation). Article 2, paragraph 2(c) provides that controversies regarding compensation be settled not by domestic law, but by the means agreed upon by the DC and foreign country if the means are "freely and mutually agreed" upon. U.N.G.A. 3281 Res. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M., *supra* note 173, at 251.

175. See Bramble, *External Debt*, *supra* note 2, at 2 (noting DC concern that investor countries are more concerned with global warming and species extinction than with DCs' social and economic problems).

176. 135 CONG. REC. S3776 (daily ed. Apr. 12, 1989) (statement of Sen. Chafee) (discussing Brazil's perceived threat to sovereignty stemming from proposed debt-for-nature swap regarding Amazon).

177. Note, *supra* note 91, at 95; see Comment, *supra* note 37, at 537 (stating that because of Brazil's sensitivity to its sovereignty, financial incentives involving foreign funding devoted to

nature swaps benefit the debtor by reducing international debt. By promoting environmental programs, conservation groups and the entire world benefit as well. A plan addressing both the debt and environmental crises, however, must recognize and accommodate the interests of *all* parties involved. The sovereignty infringement problems which exist in present debt-for-nature swaps belie the ultimate goals of debt-for-nature swaps. Because DC sovereignty fears exist on the forefront of debt-for-nature swaps, the future development of successful transactions will depend on the resolution of these important sovereignty concerns. The world's future generations, whose existence and sustenance depends on the habitability of our global environment, deserve no less.

preserving and maintaining forest reserves, "appear to be the most appropriate mechanism for protecting the forest") (quoting Laurent Fabius, former Prime Minister of France).