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THE AMAZON ABLAZE: ARE THE ENVIRONMENTAL POLICIES OF THE BOLSONARO ADMINISTRATION IN CONTRAVENTION OF BRAZIL'S COMMITMENT TO THE CONVENTION ON BIOLOGICAL DIVERSITY?

INTRODUCTION

In June of 1992, members of the United Nations (UN) gathered in Rio de Janeiro, Brazil, to address the growing international concern over the effects that economic development has upon the earth's natural environment.¹ The international agreements produced from this conference—aptly named the Earth Summit—marked a sea change in international environmental protection laws.² A great number of the treaties signed during the Earth Summit contained provisions that promote the use of environmentally sustainable development practices.³ One such treaty signed was the multilateral Convention on Biological Diversity (CBD), which commits its signatory members to the preservation and conservation of the biologically diverse ecosystems located within the territorial jurisdiction of each contracting party.⁴ The CBD requires each contracting party to establish and maintain legislation for the protection of those ecosystems identified as biologically diverse.⁵

1. *United Nations Conference on Environment and Development*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/event/United-Nations-Conference-on-Environment-and-Development> (last visited Oct. 3, 2019).

2. *Id.*

3. *Id.*

4. *See* Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

5. *Id.* Article 12 of the treaty requires that the contracting parties “establish and maintain programmes for scientific and technical education and training in measures for the *identification*, conservation and sustainable use of biological diversity and its components. . . .” (emphasis added) *Id.* at 8. Thus, it is the responsibility of each contracting party to individually create a system for the identification of biological diversity within its own territorial borders.

Brazil, the Earth Summit's host nation, committed itself to the CBD by signing it during the conference.⁶

It should come as no surprise that Brazil was selected as the host nation for the Earth Summit; the Amazonian Rainforest comprises approximately 40% of Brazil's total landmass and is the world's largest river basin and most biologically diverse ecosystem.⁷ Teeming with an abundance of life, the Amazon is home to millions of plant and animal species; this unique biome has produced tremendous strides in the areas of medical research and pharmacology.⁸ Moreover, the Amazon is truly international in nature as its ecosystem spans far beyond the geographical boundaries of Brazil and into the territorial jurisdiction of eight other countries.⁹

Recently, however, the biological diversity of the Amazon has been threatened by a rampage of fires that have razed portions of the rainforest; *Reuters* reported in August of 2019 that the Brazilian Amazonian Rainforest had experienced over seventy-eight-thousand forest fires in the year of 2019 alone.¹⁰ Im-

6. *Status of Treaties*, U. N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXV II-8&chapter=27&clang=_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXV+II-8&chapter=27&clang=_en) (last visited June 23, 2020).

7. *Amazon Rainforest*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Amazon-Rainforest> (last visited Sept. 4, 2019); see also Henry McGee & Kurt Zimmerman, *The Deforestation of the Brazilian Amazon: Law, Politics, and International Cooperation*, 21 U. MIAMI INTER-AM. L. REV. 513, 513–17 (1990).

8. See *Amazon Rainforest*, *supra* note 7. Scientists estimate that roughly half of the world's species inhabit the Amazon Rainforest, and it is approximated that there are 80,000 different plant and 30,000,000 different animal species living in the Rainforest. McGee & Zimmerman, *supra* note 7, at 516. Furthermore, scientist studying the chemical properties of Amazonian flora and fauna have discovered a plethora of medicinal uses for the chemicals originating from this biologically diverse region. *Id.* For example, the chemicals necessary for the medicine quinine were discovered in, and derived from, the Amazonian Rainforest. *Id.*

9. Those countries are: Brazil, Bolivia, Colombia, Ecuador, French Guiana, Guyana, Peru, Suriname, and Venezuela. Benjamin Elisha Sawe, *Countries Sharing the Amazon Rainforest*, WORLD ATLAS, <https://www.worldatlas.com/articles/countries-sharing-the-amazon-rainforest.html> (last visited June 23, 2020).

10. Jake Spring, *Explainer: Why are the Amazon fires sparking a crisis for Brazil – and the world?*, REUTERS (Aug. 25, 2019), www.reuters.com/article/us-brazil-environment-amazon-explainer/explainer-why-are-the-amazon-fires-sparking-a-crisis-for-brazil-and-the-world-idUSKCN1VF0TX.

portantly, these forest fires, if not effectively quelled, have the potential to devastate the entire Amazonian Rainforest ecosystem.¹¹ Environmental officials and scientists alike believe that the increase of forest fires is attributable to the dramatic uptick in illegal deforestation of the Brazilian Amazonian Rainforest.¹² Brazil's President Jair Bolsonaro, since taking office in January 2019, has publicly endorsed and encouraged deforestation of the Amazon as a means to spur economic development.¹³ Given that Brazil's environmental protection laws prohibit deforestation of the Amazon, the Bolsonaro administration has taken an anti-enforcement policy by refusing to criminally pursue those engaged in this illegal activity.¹⁴ Many believe that this lack of enforcement has emboldened individuals to engage in illegal deforestation practices, which led to the barrage of forest fires within the Amazonian Rainforest of Brazil.¹⁵

This Note will argue that Jairo Bolsonaro's rise to power coincided with a significant increase in the illegal deforestation of the Amazon Rainforest and the manmade forest fires that ensued as a consequence.¹⁶ Moreover, this Note will demonstrate that the forest fires resulting from persistent illegal deforestation have the potential for triggering "dieback," which occurs when an ecosystem has been so irreparably damaged and

11. Max Fisher, *'It's Really Close': How the Amazon Rainforest Could Self-Destruct*, N.Y. TIMES (Aug. 30, 2019), www.nytimes.com/2019/08/30/world/americas/amazon-rainforest-fires-climate.html.

12. Ernesto Londoño & Leticia Casado, *With Amazon on Fire, Environmental Officials in Open Revolt Against Bolsonaro*, N.Y. TIMES (Aug. 28, 2019), www.nytimes.com/2019/08/28/world/americas/amazon-fires-brazil.html.

13. Leticia Casado & Ernesto Londoño, *Under Brazil's Far-Right Leader, Amazon Protections Slashed and Forests Fall*, N.Y. TIMES (July 28, 2019), www.nytimes.com/2019/07/28/world/americas/brazil-deforestation-amazon-bolsonaro.html?module=inline.

14. *Id.*; see also Jake Spring & Stephen Eisenhammer, *Exclusive: As fires race through Amazon, Brazil's Bolsonaro weakens environmental agency*, REUTERS (Aug. 28, 2019), <https://www.reuters.com/article/us-brazil-environment-ibama-exclusive/exclusive-as-fires-race-through-amazon-brazils-bolsonaro-weakens-environment-agency-idUSKCN1VI14L>.

15. Casado & Londoño, *supra* note 13.

16. Spring, *supra* note 10; see also Casado & Londoño, *supra* note 13; Scott Wallace, *Inside the faltering fight against illegal Amazon logging*, NAT'L GEOGRAPHIC (Aug. 28, 2019), www.nationalgeographic.com/environment/2019/08/brazil-logging/.

fragmented that it can no longer survive.¹⁷ Thus, if dieback were to occur, the very existence of the Amazon Rainforest would be jeopardized.¹⁸ As such, all of the countries in which the Amazon Rainforest extends would be harmed by the loss of this biologically diverse ecosystem if the Rainforest were to succumb to dieback.¹⁹ This Note will examine whether President Bolsonaro's shift in policy, which not only contradicts Brazil's existing environmental protection laws but also conflicts with the conservation mandates of the CBD, places Brazil in violation of its treaty commitment.²⁰ Ultimately, this Note will explore the potential for a CBD party member to bring a cognizable cause of action against Brazil, either before an arbitral tribunal or the International Court of Justice (ICJ), and whether the party will be able to effectively claim that Brazil has breached its obligations as set forth in the CBD.²¹

I. A BRIEF HISTORY OF BRAZILIAN ENVIRONMENTAL PROTECTION LAWS

In the decades running up to the Earth Summit, the federal government of Brazil took strides towards establishing a vast regulatory system to protect and preserve the country's unique ecosystems.²² This expansion of environmental protection laws came at a time of rampant deforestation of the Amazon.²³ Between 1966 and 1975, the Brazilian Amazonian Rainforest lost over 11,000,000 hectares of forest.²⁴ As a means to legally combat the degradation of the environment, in August of 1981, the Brazilian government enacted Law 6.938, "Law of the National

17. Fisher, *supra* note 11.

18. *Id.*; see generally William F. Laurance, Heraldo L. Vasconcelos & Thomas E. Lovejoy, *Forest Loss and Fragmentation in the Amazon: Implications for Wildlife Conservation*, 34 ORYX 39 (2000).

19. Fisher, *supra* note 11.

20. Alejandra Borunda, *See how much of the Amazon is burning, how it compares to other years*, NAT'L GEOGRAPHIC (Aug. 29, 2019), www.nationalgeographic.com/environment/2019/08/amazon-fires-cause-deforestation-graphic-map/; see also Londoño & Casado, *supra* note 12; see Convention on Biological Diversity, *supra* note 4, art. 8.

21. Convention on Biological Diversity, *supra* note 4, art. 27.

22. See generally José Drummond & Ana Flávia Barros-Platiau, *Brazilian Environmental Laws and Policies, 1934–2002: A Critical Overview*, 28 L. & POL'Y 83 (2006).

23. McGee & Zimmerman, *supra* note 7, at 521.

24. *Id.*

Environmental Policy,” which proved to be a watershed development in Brazilian environmental protection law.²⁵ This legislation created a federal environmental management agency, the National Environmental System (SISNAMA), under which the country’s environmental protection enforcement agencies function.²⁶

The importance of Law 6.938 is punctuated by the fact that it was enacted during a time of significant economic growth.²⁷ The Brazilian Amazonian Rainforest is brimming with an abundance of valuable raw materials, both flora and fauna, ripe for harvesting.²⁸ Nevertheless, there were those in the Brazilian government who realized that unrestrained development of the Amazon could lead to collateral, negative environmental consequences.²⁹ As a result, the Brazilian government, in the mid-1980s, began to shift away from the economic policy of unbounded “developmentalist” growth in favor of a federal policy that embraced environmentally sustainable social and economic growth.³⁰ The Brazilian government took an affirmative step towards ensuring the environmentally sustainable economic growth of the country by creating an executive oversight agency.³¹ In February of 1989, Brazil enacted Law 7.735, which created the Institute of the Environment and Renewable Natural Resources (IBAMA).³² This agency was created for the purpose of promulgating and enforcing environmental protection regulations, as well as for monitoring and controlling the conservation and preservation of Brazil’s natural environments.³³

Within a mere seven years, the Brazilian government had established a framework for an environmental regulatory and enforcement agency.³⁴ Thus was the pro-environmental political climate of Brazil in the year 1992, when Rio de Janeiro

25. Drummond & Barros-Platiau, *supra* note 22, at 92.

26. *Id.* at 92–94; *see also* MINISTRY OF THE ENVIRONMENT, NATIONAL BIODIVERSITY STRATEGY AND ACTION PLAN 22 (2017).

27. Drummond & Barros-Platiau, *supra* note 22, at 83–84.

28. *See* McGee & Zimmerman, *supra* note 7, at 516.

29. Drummond & Barros-Platiau, *supra* note 22, at 83–84.

30. *Id.*

31. *Id.* at 95–96.

32. *Id.*

33. *Id.*

34. *Id.*

hosted the Earth Summit and the CBD was proposed.³⁵ As one of the original signatories to the CBD, Brazil ratified the multilateral treaty on February 28, 1994.³⁶ Pursuant to the convention's requirement of establishing a plan for the protection of biologically diverse ecosystems, Brazil enacted Decree 4.339 in 2002, which set forth the objectives and principles for the preservation of biological diversity through the implementation of a National Plan.³⁷ Among the various objectives stated in the Decree, Article 2 explicitly states that the *sovereign*—i.e., Brazil—has the right to “exploit” its own biological resources “pursuant to [its] own environment and development policies.”³⁸ Thus, a plain reading of the text indicates that if Brazil were to avail itself of the biological materials produced in the Amazon, it must do so in accordance with Brazil's existing environmental policies.³⁹ Directly after preserving Brazil's sovereign rights, Article 3 charges Brazil with the responsibility of preserving and conserving the biological diversity within its own territorial jurisdiction, as well as ensuring that those activities that take place within the country of Brazil do not affect the biological diversity of other territories.⁴⁰ Pursuant to the objectives stated in Decree 4.339, in April of 2006, the federal government of Brazil passed Decree 5.758, which created the National Strategic Plan for Protected Areas (PNAP).⁴¹ To implement the PNAP, Decree 5.758 stated that the Ministry of Environment must develop environmental protection regulations for the protected, biologically diverse areas identified in Brazil; the Decree also specified that implementation of the PNAP must be evaluated every five years.⁴²

35. *United Nations Conference on Environment and Development*, *supra* note 1.

36. *Status of Treaties*, *supra* note 6.

37. MINISTRY OF THE ENVIRONMENT, *supra* note 26, at 23, 72.

38. *Id.*

39. *Id.*

40. *Id.*

41. Decree No. 5.758, of April 13, 2006, OFFICIAL DIARY OF THE UNION OF 17/4/2006 (Braz.).

42. *Id.* In efforts to consolidate various plans arising out of the above mentioned, and other, environmental protection laws, the federal government of Brazil created the National Biodiversity Strategy and Action Plan. MINISTRY OF THE ENVIRONMENT, *supra* note 26, at 18. This comprehensive compilation contains all of the laws and implementation plans that have been created for

A. The Institute of the Environment and Renewable Natural Resources and the Fight Against Deforestation

Over the course of the early 2000's the IBAMA was immensely successful in enacting and enforcing environmental protection regulations, particularly with respect to prevention of illegal deforestation.⁴³ *Reuters* reported that, between the years of 2004–2012, the IBAMA was responsible for the reduction of deforestation in Brazil by a whopping 80%.⁴⁴ Despite IBAMA's successes, there has been a recent resurgence of illegal deforestation.⁴⁵ In fact, Brazil saw the highest levels of deforestation in the Amazonian Rainforest since 2010, with a 39% increase in deforestation during the first six months of 2019 as compared to the same time period in 2018.⁴⁶ One possible explanation for the recent uptick in deforestation was the January 2019 election that saw Jair Bolsonaro elected President of Brazil.⁴⁷ While campaigning, Bolsonaro ran upon a conservative platform which promoted deregulation and anti-enforcement of the environmental regulations that protect the Brazilian Amazonian Rainforest.⁴⁸

Since assuming office, President Bolsonaro has taken the IBAMA to task in attempt to thwart Brazil's environmental protection laws.⁴⁹ Within the first eight months of his presidency, Bolsonaro fired numerous high ranking IBAMA officials⁵⁰ and the head of the National Institute of Space Research (INPE), a SISNAMA agency charged with tracking illegal deforestation of the Amazon from outer space.⁵¹ Furthermore,

the purpose of furthering the treaty obligations set forth in the Convention on Biological Diversity. *Id.*

43. Casado & Londoño, *supra* note 13.

44. Spring & Eisenhammer, *supra* note 14.

45. Wallace, *supra* note 16.

46. Casado & Londoño, *supra* note 13.

47. *Id.*

48. *Id.*

49. Spring & Eisenhammer, *supra* note 14; *see also* Wallace, *supra* note 16.

50. Wallace, *supra* note 16. President Bolsonaro "dismissed 21 of IBAMA's 27 state superintendents," and many of those positions had not yet been filled by the time of the Note's publication. *Id.* There was no mention within the article as to whether President Bolsonaro intends to fill these vacancies or to leave the positions unfilled. *Id.*

51. Ernesto Londoño, *Bolsonaro Fires Head of Agency Tracking Amazon Deforestation in Brazil*, N.Y. TIMES (Aug. 2, 2019),

IBAMA employees reported that, in addition to cutting the agency's budget, President Bolsonaro curtailed the agency's ability to monitor and control illegal deforestation in remote areas of the Amazon due to reductions in IBAMA staffing.⁵² Whereas prior to the Bolsonaro administration, the IBAMA was able to pursue and prevent those illegally logging in the Amazon by destroying the logger's harvesting tools, President Bolsonaro has denounced such enforcement practices.⁵³ IBAMA officials claim that the increase in the deforestation of the Brazilian Amazon can be attributed, in part, to President Bolsonaro's rhetoric, which has emboldened illegal logging.⁵⁴ It is important to note that the words and actions of President Bolsonaro, with respect to deforestation of the Amazon, are seemingly direct contradictions of Brazil's existing environmental laws.⁵⁵ President Bolsonaro's rhetoric, which strongly calls for a return to a policy of unbounded economic development of the Amazon, is at odds with Decree 4.339's objectives of preservation and conservation of the Amazon's biological diversity.⁵⁶

B. Threats to Biological Diversity: Deforestation, Forest Fires, and Dieback

Over the course of the past thirty years, the Brazilian government has implemented a federal framework of environmental protection laws for the purpose of managing the unique biological resources found within its territorial jurisdiction.⁵⁷ As

www.nytimes.com/2019/08/02/world/americas/bolsonaro-amazon-deforestation-galvao.html.

52. Spring & Eisenhammer, *supra* note 14.

53. *Id.*; see also Wallace, *supra* note 16.

54. Spring, *supra* note 10; see also Spring & Eisenhammer, *supra* note 14.

55. MINISTRY OF THE ENVIRONMENT, *supra* note 26, at 72.

56. For example, Article 5 of Decree 4.339 states that: "An ecologically balanced environment is a universal right, as it is an asset of shared use and vital for the healthy quality of life, where the duty to defend it and preserve it for present and future generations falls to governments and the collective." *Id.* Furthermore, Article 14 requires that: "Ecosystem management shall seek the appropriate balance between conservation and sustainable use of biodiversity, and ecosystems shall be managed within their functional limits[;]." *Id.* Moreover, Article 17 asserts that: "Ecosystems shall be understood and managed under an economic context, with the following objectives: a) reduce market distortions that negatively affect biodiversity, b) promote incentives for biological conservation and sustainable use, and c) internalize as much as possible the costs and benefits within the same ecosystem." *Id.*

57. See generally MINISTRY OF THE ENVIRONMENT, *supra* note 26.

demonstrated in the 1960s and 1970s, a lack of federal management of the natural environment led to rampant deforestation of the Brazilian Amazonian Rainforest.⁵⁸ Since the mid-1980s, deforestation has been a genuine concern of the Brazilian government due to the disastrous effects that this practice has upon the natural environment of the Amazon.⁵⁹ The illegal removal of trees from the rainforest greatly disturbs the natural balance of the Amazon's natural ecosystem.⁶⁰ The fragile topsoil of the forest floor is eroded away by the removal of trees, and, as a result, the portion of the forest damaged by the logging is unable to generate new vegetative life.⁶¹ Additionally, as the logger's heavy equipment is mobilized through the forest, the soil of the forest floor is further eroded as the equipment is transported along the makeshift pathways created by the illegal logging.⁶² Reporting in August 2019 for *National Geographic*, journalist Scott Wallace detailed the surreptitious methods employed by the loggers who illegally harvest trees from the Amazon.⁶³ In his interviews with IBAMA officials, Wallace learned of how the loggers create narrow pathways under the canopy of the rainforest in order to obscure their movement so as to remain undetected, prolong their illegal activities, and gain access to valuable biological materials located in remote areas of the Amazon.⁶⁴

An ancillary problem of deforestation is fragmentation in the canopy of the Amazonian Rainforest.⁶⁵ Fragmentation occurs as trees are harvested from, and transportation pathways are carved out of, the rainforest's canopy; as a result, the loggers end up segmenting portions of the Amazonian Rainforest from itself.⁶⁶ This results in irreparable harm to the flora, fauna, and other biologically diverse organisms inhabiting the areas of for-

58. McGee & Zimmerman, *supra* note 7, at 521.

59. Drummond & Barros-Platiau, *supra* note 22, at 84.

60. McGee & Zimmerman, *supra* note 7, at 518.

61. *Id.*

62. Laurance, Vasconcelos & Lovejoy, *supra* note 18, at 39.

63. Wallace, *supra* note 16.

64. *Id.* Given the highly sophisticated tools utilized by the INPE in its monitoring of deforestation in the Amazon, the illegal loggers have had to engage in covert operations so that their logging practices remain undetected by the INPE. *Id.*; see also Borunda, *supra* note 20.

65. Laurance, Vasconcelos & Lovejoy, *supra* note 18, at 39.

66. *Id.*

est that have been fragmented as a result of deforestation.⁶⁷ The illegal harvesting of trees not only destroys the organisms residing within that habitat but also leaves vulnerable the habitats located along the edges of the newly deforested, and now fragmented, areas.⁶⁸ Fragmentation disrupts the fragile nature of the Amazon's ecosystems, resulting in the displacement of wildlife from their natural habitats and hinders the regrowth of trees and other fauna.⁶⁹

Additionally, fragmentation creates openings within the canopy of the rainforest, directly exposing the forest floor to the sun.⁷⁰ Normally, one can find detritus from felled trees and animal remains, in various stages of decomposition, strewn about the rainforest floor.⁷¹ The contiguous coverage of the rainforest's canopy typically prevents this debris from direct sun exposure; however, when the canopy is fragmented, direct sunlight withers the debris and transforms it into an ideal accelerant for forest wildfires.⁷² Forest fires caused by deforestation are characterized by plumes of smoke that reach high above the earth's atmosphere, in contrast to naturally occurring forest fires, which rarely occur and are more subdued in nature.⁷³ Given that the smoke from the 2019 forest fires could be seen from outer space, the INPE has determined through its satellite imagery database that the forest fire smoke generated from locations in which illegal deforestation activities are known to

67. *Id.* at 40–41.

68. *Id.*

69. Authors Laurance, et al., show that forest fragmentation can cause “sharp increases in the rates of tree mortality, damages and canopy-gap formation as a result of greater desiccation and wind turbulence near forest edges.” *Id.* at 40. Additionally, forest fragmentation can disrupt the natural habitats of many wildlife. *Id.* at 41. For example, a species' migratory patterns may be drastically changed because of the species' biological aversion to crossing a clearing within the forest as a result of fragmentation. *Id.* Given that fragmentation creates an artificial forest edge, some species will be driven from their habitats as a result of fragmentation. *Id.* On the other hand, some species that need to flee their habitats, because it has been destroyed by deforestation, will be unable to do so because of the species biological aversion to crossing open forest clearings. *Id.* Given that forest fragmentation creates new clearings within the forest, the migratory paths and patterns of certain wildlife species will be disrupted as a result. *Id.*

70. *Id.*

71. *Id.*

72. Wallace, *supra* note 16.

73. Borunda, *supra* note 20.

have occurred.⁷⁴ Thus, scientists at the INPE and IBAMA believe that the recent increase in the unbridled deforestation and fragmentation of the Amazonian Rainforest was the catalyst for the fires that ravaged Brazil in the summer of 2019.⁷⁵

Moreover, environmental scientists Thomas Lovejoy and Carlos Nobre concluded that the Amazon Rainforest is dangerously close to triggering dieback, an irrevocable condition of “self-perpetuating deforestation.”⁷⁶ Once forest fragmentation and deforestation reaches a certain threshold, dieback will occur; the triggering of this condition will send the ecosystem of the Amazonian Rainforest into a state that would no longer be sustainable.⁷⁷ Thus, if these illegal practices persist and the conditions for dieback are met, scientists predict that the following positive feedback cycle will occur: (1) continued deforestation and fragmentation will create an opening within the forest’s canopy, reducing the forest’s ability to retain moisture; (2) the increased sunlight exposure will dry out the debris located on the forest floor and turn it into kindling for a forest fire, which the rainforest is unable to self-regulate due to its lack of moisture; and (3) as a result, the ensuing forest fire will create more openings within the canopy of the rainforest.⁷⁸ Lovejoy and Nobre have estimated that dieback will occur once 20–25% of the Amazonian Rainforest has been deforested.⁷⁹ *The New York Times* reported that, as of August 30, 2019, the Brazilian government estimates that approximately 19.3% of the Amazon has already been deforested.⁸⁰ Thus, if the tipping point is met, and the Amazon succumbs to dieback, it would mean that the world’s most biologically diverse rainforest ecosystem would no longer be environmentally sustainable.⁸¹

C. Reactions from the International Community and Potential Means for Recourse

Due to the sudden and intense resurgence of forest fires in the Amazon, and the genuine concern for the loss of this biolog-

74. *Id.*

75. *Id.*

76. Fisher, *supra* note 11.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*; see generally Laurance, Vasconcelos & Lovejoy, *supra* note 18.

ically diverse rainforest ecosystem, France offered Brazil \$22 million dollars in international aid to combat the Amazonian forest fires raging within the territorial jurisdiction of Brazil during the August 2019 Group of Seven (G7) summit.⁸² President Bolsonaro, however, rejected France's offer, shocking the international community.⁸³ Shortly thereafter, President Bolsonaro accepted twelve million dollars in aid from Great Britain.⁸⁴ Nevertheless, despite the acceptance of international aid, forest fires still consume swaths of the Amazonian Rainforest in Brazil—unfortunately, an unsurprising result.⁸⁵

Given the clear relationship between deforestation and forest fires, it follows that no amount of international aid would be able to dampen the flames when the forest fires are being fueled by the Bolsonaro administration's pro-deforestation policy.⁸⁶ It seems that the most effective method for quelling the forest fires in the Amazon would be to require that the Bolsonaro administration adhere to and enforce Brazil's existing environmental protection laws. Given that Brazil is party to the

82. Manuela Andreoni, *Brazil Angrily Rejects Millions in Amazon Aid Pledge at G7, Then Accepts British Aid*, N.Y. TIMES (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/world/americas/brazil-amazon-aid.html>. Moreover, as a signatory to the CBD, France was fulfilling its treaty obligations by offering to provide financial assistance to a fellow party member when there is a "grave and imminent danger to . . . biological diversity." See also Convention on Biological Diversity, *supra* note 4, art. 8 & 14.

83. Andreoni, *supra* note 82. Apparently, President Bolsonaro received President Macron's offer of financial assistance as a slight against Brazil's sovereignty over the Brazilian Amazonian Rainforest. *Id.* President Bolsonaro stated, in a series of successive twitter posts, that it is not for President Macron of France to determine how the Amazonian fires should be addressed, but rather, that a response plan should be created by the "majority of the countries that make up the Amazon." Jair Bolsonaro (@JairBolsonaro), TWITTER (Aug. 26, 2019, 5:52 AM), <https://twitter.com/jairbolsonaro/status/1165970378470150146>. Furthermore, President Bolsonaro stated that the adopted plan should "guarantee [the] sovereignty and natural wealth" of the Amazon. *Id.* The G7's offer of financial support to "save the Amazon" was understood by Bolsonaro as disrespectful and paternalistic. *Id.*

84. Andreoni, *supra* note 82.

85. See generally, Clifford Krauss, David Yaffe-Bellany & Mariana Simões, *Why Amazon Fire Keep Raging 10 Years After a Deal to End Them*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/world/americas/amazon-fires-brazil-cattle.html?searchResultPosition=2>.

86. Borunda, *supra* note 20; see also Andreoni, *supra* note 82.

CBD, other members of this multilateral treaty can bring a claim against Brazil by stating that the Bolsonaro administration has contravened its obligation to protect and promote the preservation and conservation of biologically diverse environments. Since the Amazonian Rainforest spans a total of nine countries, it follows that the remaining eight countries have a vested interest in the preservation and conservation of the Amazon.⁸⁷ As such, it would seem that one of these countries would be best situated to claim that it has been harmed by Brazil's derogation from its treaty obligations.

II. CONVENTION ON BIOLOGICAL DIVERSITY: OBLIGATIONS AND POTENTIAL LIABILITY FOR DEROGATION THEREFROM

This portion of the Note will examine the text of the CBD and provide an in depth exploration of the various legal obligations of the treaty signatories. Furthermore, the Bolsonaro administration's actions will be placed within the context of the obligations mandated under the CBD. This Note will then analyze whether those actions of the Bolsonaro administration directly violates any provision of the CBD and, if so, whether the CBD provides a remedy for those CBD members that might bring a claim against Brazil for breaching its treaty obligations.

A. Overview of Signatory Obligations Under the Convention on Biological Diversity

In order to determine whether signatory members of the CBD have a cognizable claim before the ICJ or an arbitral tribunal, one must turn to the text of the treaty so as to ascertain the obligations assumed by signatory members. Article 2 provides a list of defined terms necessary for the proper interpretation of the treaty.⁸⁸ Understandably so, "biological diversity" is the first term defined within the provision.⁸⁹ Given the prominence of this term, the definition in its entirety follows: " '*Biological Diversity*' means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species

87. *Countries Sharing the Amazon Rainforest*, *supra* note 9.

88. Convention on Biological Diversity, *supra* note 4, art. 2.

89. *Id.*

and ecosystems.”⁹⁰ As to the obligations set forth in the treaty, Article 1 of the CBD clearly states that the three overarching objectives of the convention are: (1) the conservation of biological diversity, (2) the sustainable use of biological resources, and (3) the fair and equitable sharing of those utilized biological resources.⁹¹ Article 3, which outlines the principle goal of the multilateral treaty, however, affirms the sovereignty of contracting parties by asserting that it is within the sovereign right of each contracting nation to exploit the resources found within its territorial jurisdiction, so long as the exploitation of those resources are “pursuant to their own environmental policies.”⁹² This caveat will become very crucial in the analysis as to whether the Bolsonaro administration’s endorsement of an anti-enforcement policy, with respect to Brazil’s environmental protection laws, qualifies as a derogation from its treaty obligations.

B. Potential for the Convention on Biological Diversity to Provide a Cause of Action, in Breach of Treaty Obligations, for Failure to Promote In Situ Conservation

Given the above established general framework of treaty obligations, the specific CBD provisions that allow contracting parties to bring a claim alleging a violation of a treaty provision may now be examined in depth. Article 27 governs the procedure by which disputes arising under the CBD are to be resolved as between contracting parties.⁹³ It is important to note that this provision provides for the resolution of disputes regarding the interpretation and application of provisions within the CBD.⁹⁴ When given a plain meaning interpretation to Article 27, it appears that a contracting party is able to bring any cause of action, either before an arbitral tribunal or the ICJ, with respect to another party member’s (mis)application of CBD treaty provisions.⁹⁵

Having established the adjudicative framework for claims arising under the CBD, it is essential to analyze the affirmative commands of those pertinent treaty provisions that govern

90. *Id.*

91. *Id.* art. 1.

92. *Id.* art. 3.

93. *Id.* art. 27.

94. *Id.*

95. *Id.*

the means and methods by which a contracting party is to effectuate the general principles and objectives of the CBD. Article 6 mandates that all contracting parties shall develop and implement national plans or programs that promote the conservation of biologically diverse ecosystems.⁹⁶ This command is central to a contracting party's effective implementation of its treaty obligations.⁹⁷ The World Conservation Union, which published a manual to aid in the interpretation of the CBD, highlights the significance of Article 6 by recognizing the integral role that the national plan or program has in forming the essential framework for the implementation of conservation practices.⁹⁸ The CBD also identifies the "regulat[ion] or manage[ment]" of biologically diverse resources as an essential element for the promotion of in situ conservation, and thus, a necessary component of any contracting party's national plan or program.⁹⁹ Requiring contracting parties to "regulate or manage" biological resources is an expansive command, and this provision could be broadly interpreted as mandating contracting parties to "regulate or manage" any and all environmental activities that could adversely impact the biological diversity of an ecosystem.¹⁰⁰

There is no doubt that Brazil implemented a national plan for the conservation of biological diversity.¹⁰¹ Furthermore, the National Biodiversity Strategy and Action Plan clearly vests the

96. *Id.* art. 6.

97. LYLE GLOWKA, FRANÇOISE BURHENNE-GUILMIN & HUGH SYNGE in collaboration with JEFFREY A. MCNEELY & LOTHAR GÜNDLING, A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY 29 (1994).

98. GLOWKA, *supra* note 97, at 29. Glowka states that the national plans and programs implemented by contracting parties are intended to involve multiple stakeholders during the planning process. *Id.* Various governmental agencies, departments, and regulators, as well as representatives of the private sector who would be affected by the implementation of the national plan or program, are all intended to participate in the planning development process. *Id.* Involving a multitude of stakeholders should, in theory, ensure that the plan or program that is developed, and later implemented, strikes an appropriate balance between the public and private interests with respect to the conservation and sustainable use of biologically diverse resources. *Id.* Ultimately, the goal of this deliberate and collaborative planning process is to yield a successful implementation of the generated national plan or program. *Id.*

99. Convention on Biological Diversity, *supra* note 4, art. 8(c).

100. GLOWKA, *supra* note 97, at 40.

101. *See generally* MINISTRY OF THE ENVIRONMENT, *supra* note 26.

power to regulate and manage the implementation of the national plan among numerous SISNAMA agencies, such as the IBAMA and the INPE, which are charged with the monitoring and enforcement of Brazil's environmental protection laws.¹⁰² The present issue, however, lies in the fact that the Bolsonaro administration has actively taken steps to weaken the IBAMA's and the INPE's ability to regulate or manage environmental activities with respect to the Amazon.¹⁰³ President Bolsonaro has curbed the IBAMA's ability to enforce environmental protection laws pursuant to the National Biodiversity Strategy and Action Plan, which has allowed for an increase in the illegal deforestation of the Amazon.¹⁰⁴ As a result, large swaths of the Amazon have been destroyed by forest fires and the destruction of these sensitive ecosystems threatens the biological diversity of the Amazonian rainforest.¹⁰⁵ President Bolsonaro, however, has not completely denuded the IBAMA and the INPE of its regulatory and management powers.¹⁰⁶ These federal environmental regulatory agencies are still functioning, albeit with far fewer resources and with more limited authority, since President Bolsonaro took office in January of 2019.¹⁰⁷

Nevertheless, President Bolsonaro's anti-enforcement rhetoric, which encourages private actors to boundlessly develop the

102. *Id.* at 21–23.

103. See generally Londoño & Casado, *supra* note 12; see also Wallace, *supra* note 16; Londoño, *supra* note 51.

104. *Id.*

105. See generally Laurance, Vasconcelos & Lovejoy, *supra* note 18; see also Fisher, *supra* note 11.

106. Wallace, *supra* note 16. An IBAMA employee stated in an interview with the *National Geographic* that they believe President Bolsonaro will not completely “dismantle” the IBAMA. *Id.* The employee further stated that, in order for President Bolsonaro to keep face with the international community, it is crucial that he keeps the IBAMA running—even if that means that the IBAMA is functioning on limited resources and authority. *Id.* According to this employee, President Bolsonaro is motivated by the need for the “IBAMA to show the world that Brazil is taking care of the Amazon.” *Id.* It could also be argued that President Bolsonaro is influenced by more than just mere concerns of public opinion and optics. *Id.* If, however, the Bolsonaro administration were to totally deconstruct the system of environmental protections established in pursuance of the *National Biodiversity Strategy and Action Plan*, and no subsequent regulatory or management system were implemented, then legal liability would attach for a direct violation of Article 6 of the CBD. Convention on Biological Diversity, *supra* note 4, art. 6.

107. Wallace, *supra* note 16.

Amazon,¹⁰⁸ directly contradicts existing Brazilian environmental protection laws and the mandate of Brazil's National Biodiversity Strategy and Action Plan.¹⁰⁹ This shift in the federal government's environmental policy is seemingly irreconcilable with the CBD's Article 11 requirement that each contracting party adopt social and economic policies that incentivize the conservation and preservation of biologically diverse resources.¹¹⁰ Moreover, this policy shift seems incongruent with Article 8 of the CBD, which governs the obligations of contracting parties with respect to in situ conservation.¹¹¹ That article states each party members shall, "as far as possible and as appropriate," establish a system of protected areas,¹¹² ensure the conservation and sustainable use,¹¹³ and development of biologically diverse resources located within, and outside of, protected areas.¹¹⁴ By weakening the IBAMA, the Bolsonaro administration is intentionally hamstringing the federal agencies vested with the power of ensuring that the biologically diverse resources located within, and surrounding, the Amazonian rainforest are sustainably developed and used.

It is important to note, however, that the CBD does not categorically bar contracting parties from using those biological resources; rather, one of the stated objectives of the CBD is that contracting states "sustainably use" the biological resources

108. See generally Casado & Londoño, *supra* note 13; see also McGee & Zimmerman, *supra* note 7; Drummond & Barros-Platiau, *supra* note 22.

109. See generally MINISTRY OF THE ENVIRONMENT, *supra* note 26.

110. Convention on Biological Diversity, *supra* note 4, art. 11.

111. The CBD defines "in situ conservation" as "the conservation of ecosystems and natural habitats and the maintenance and recovery of viable population of species in their natural surroundings and, in the case of domesticated or cultivate species, in the surroundings where they have developed their distinctive properties." *Id.* art. 2 & 8.

112. *Id.* art. 8(a) (Article 2 of the CBD defines "[p]rotected area" as a "geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.").

113. *Id.* art. 8(e) (Article 2 of the CBD defines "[s]ustainable use" as "the use of components of biological diversity in a way and at a rate that does not lead to long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.").

114. *Id.*, art. 8(e). Specifically, the CBD calls for each contracting party to "promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas." *Id.*

located within their territorial jurisdictions.¹¹⁵ With respect to the sustainable use of biologically diverse resources, Article 10 of the CBD states that the contracting parties must adopt resource procurement methods that would minimize the potential adverse effects that resource procurement could have on the environment.¹¹⁶ One way that contracting parties can work towards minimizing the potential adverse effects of resource use is by “encourag[ing] cooperation” between the government and the private sector, which would be engaged in the “sustainable use of biological resources.”¹¹⁷ President Bolsonaro, unfortunately, has not adopted the collaborative public-private approach. Instead of working with the private sector to develop sustainable methods of logging, for example, President Bolsonaro’s pro-deforestation policies have encouraged citizens to engage in illegal deforestation practices—in direct contravention of the laws promulgated by the Brazilian government and the CBD, which the Note will later address in further detail.¹¹⁸

Given the totality of the circumstances, it appears that the actions of the Bolsonaro administration may qualify as a derogation from a contracting party’s obligations under the CBD. There is a seemingly colorable legal argument that the Bolsonaro administration’s policies with respect to the Amazonian Rainforest actively undermines the stated conservation and sustainable use and development objectives of the CBD.¹¹⁹ Nevertheless, if a contracting party were to bring an action against Brazil, claiming violation of Articles 8 and 10 of the CBD, those colorable legal arguments would be challenged by a claim of national sovereignty on behalf of Brazil.¹²⁰ Brazil would likely argue that it is well within the right of a sovereign nation to change position with respect to domestic policy points. In fact, one would need to look no further than Article 3 of the CBD to find an affirmation of the contracting parties’ sovereignty rights.¹²¹ This affirmation, however, is not an unqualified assertion of absolute sovereignty; below Article 3, and its limiting provisions, is replicated in its entirety:

115. *Id.* art. 6(a).

116. *Id.* art. 10.

117. *Id.*

118. Casado & Londoño, *supra* note 13.

119. Convention on Biological Diversity, *supra* note 4, art. 1.

120. *Id.* art. 3, 8 & 10.

121. *Id.* art. 3.

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own *resources pursuant to their own environmental policies*, and *the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limit of national jurisdiction*.¹²²

While the provision above does expressly acknowledge the sovereignty of nations, this declaration is qualified by the statement that a state's exploitation of resources must be in accordance with the state's own environmental policies.¹²³ Unfortunately, Article 2 of the CBD does not define environmental policy. *Merriam-Webster*, on the other hand, defines policy as "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body."¹²⁴ This definition, unfortunately, brings one no closer to discerning whether the treaty drafters intended the phrase "pursuant to their own environmental policies" to mean that contracting parties must adhere to the environmental rules and regulations as promulgated by the government, or that the contracting parties must adhere to the environmental policies of the sitting administration.¹²⁵ Thus, one could argue that Brazil is exercising its sovereign right to exploit its own resources pursuant to the current administration's environmental policies with respect to development in the Amazonian Rainforest. This argument, however, is tempered when Article 3 is read in light of the CBD as a whole, especially when particular focus is placed upon Article 8.¹²⁶ In numerous instances throughout the CBD, the convention requires contracting parties to establish

122. *Id.* (emphasis added).

123. *Id.*

124. *Policy*, *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/policy> (last visited Nov. 17, 2019).

125. Convention on Biological Diversity, *supra* note 4, art. 3.

126. Article 8, which governs in situ conservation, commands contracting parties to take affirmative steps towards creating legislation for the protection of biologically diverse resources. *Id.* art. 8. For example, Clause K requires that contracting parties "develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations." *Id.* Furthermore, Clause J mandates contracting parties to act in accordance with existing legislation. *Id.* Thus, the CBD requires contracting parties to adhere to, and expound upon, existing environmental protection laws. *Id.*

and maintain legislation, national plans, programs, or policies, for the conservation and sustainable use of biologically diverse resources.¹²⁷ Thus, it would seem inapposite to find that a contracting party's derogation away from its own laws and programs, simply because there has been a change in political power, as acceptable behavior under the CBD.

The CBD places an additional limitation upon the absolute sovereignty of contracting parties by specifically prohibiting state action that would create a transboundary harm.¹²⁸ Article 3 of the CBD states that all contracting parties are required to ensure that any activity originating within its territorial jurisdiction does not cause damage to the environment of another contracting party.¹²⁹ This prohibition against the commission of transboundary environmental harms is central to the overall purpose of the CBD.¹³⁰ Even though Article 3 of the CBD affirms the sovereignty of all contracting parties, the preamble of the convention clearly states that the "conservation of biological diversity is a common concern of humankind."¹³¹ Thus, while the sovereignty of the nation is recognized, it is also understood that multiple stakeholders have an interest in the conservation of biological diversity within an environment.¹³² Given the interconnectedness of the Amazon's ecosystem, which transcends a number of territorial jurisdictions, the CBD acknowledges the effect that in situ conservation, or lack thereof, can have on the overall biodiversity of an ecosystem.¹³³ Thus, if a contracting party were to flout its treaty obligations with respect to the in situ conservation of its own biologically diverse environments, this lack of in situ conservation could result in damages to the biological diversity of an interconnected ecosystem which extends into the territorial jurisdiction of a neighboring nation.¹³⁴

127. *See generally id.* art. 6, 8, 10 & 19.

128. *Id.* art. 3.

129. *Id.*

130. GLOWKA, *supra* note 97, at 10.

131. *Id.*

132. Noting that protection of the environment is "not [an] exclusive national affair." *Id.*

133. *Id.*

134. *Id.*; *see also* Convention on Biological Diversity, *supra* note 4, art. 3.

C. Potential of a Party Member to Bring a Cause of Action Against Brazil Claiming that the Bolsonaro Administration has Facilitated a Transboundary Environmental Harm in Contravention of the Convention on Biological Diversity

Article 14 of the Convention defines the procedure by which a contracting party is obligated to notify other CBD party members of an adverse environmental event that could result in a transboundary harm, which would have a negative environmental impact on the environment of other contracting parties.¹³⁵ Clause D of this provision specifies that, if an activity or environmental condition within the territorial jurisdiction of a contracting party presents a threat of imminent environmental danger or damage, the contracting party must notify all other contracting parties that their environment could potentially be affected by this imminent damage or danger.¹³⁶ In addition to providing notice, the contracting party must take affirmative measures to prevent the adverse environmental impact from occurring.¹³⁷ Interestingly, however, the command that a contracting party member notify or take preventative steps when there is a grave or imminent danger to biological diversity is predicated on the qualification that “each contracting party, *as far as possible and appropriate, shall* [notify].”¹³⁸ Furthermore and most importantly, a contracting party’s obligation to notify and prevent further damage is only triggered if the environmental danger or damage transgresses the territorial bounda-

135. Convention on Biological Diversity, *supra* note 4, art. 14. Article 14 of the CBD states that:

Each Contracting Party, as far as possible and appropriate, shall: . . . (d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and (e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (emphasis added).

ries of another nation.¹³⁹ As such, contracting parties have great latitude with respect to when they are required to notify and engage in preventative measures, all of which is predicated on the distinction as to whether the impending environmental damage or danger is considered imminent.¹⁴⁰

Given the nature of the harm unfolding in Brazil, it is rather difficult to clearly articulate that there is an imminent threat of a transboundary harm, which would trigger the Article 14 obligation of notification and prevention. There is no doubt that illegal logging and deforestation of the Brazilian Amazonian Rainforest has been on the rise since President Bolsonaro took office in January 2019.¹⁴¹ As previously stated, Brazil has seen a 39% increase in deforestation within the first six months of President Bolsonaro's tenure.¹⁴² This drastic increase in deforestation and fragmentation of the rainforest canopy has subsequently led to the devastating, manmade forest fires that plagued the Brazilian Amazonian Rainforest throughout the Summer of 2019.¹⁴³ The INPE reported that, as of August of 2019, the Brazilian Amazon had experienced over 76,000 forest fires in that year alone.¹⁴⁴ To be sure, these forest fires are a direct threat to the in situ conservation of the biologically diverse resources indigenous to the Brazilian Amazon Rainforest.¹⁴⁵ As the rainforest ecosystem continues to be depleted by persistent deforestation and forest fragmentation, the areas that were once rich with biological diversity are now devoid of flora and fauna because these species have been eradicated from their natural habitats by fires and deforestation.¹⁴⁶ The concern of continued environmental degradation due to deforestation is not strictly a Brazilian issue, limited only to the consideration of in situ conservation.¹⁴⁷ Contrarily, this Brazilian environmental harm could transition into a transboundary

139. GLOWKA, *supra* note 97, at 74.

140. The author notes that these notification Clauses in the CBD are rather weak as compared to the notification provisions of other international agreements that were in existence at the time that the CBD was enacted. *Id.*

141. Casado & Londoño, *supra* note 13.

142. *Id.*; *see also* Borunda, *supra* note 20.

143. Borunda, *supra* note 20.

144. *Id.*

145. GLOWKA, *supra* note 97, at 11; *see generally* Laurance, Vasconcelos & Lovejoy, *supra* note 18.

146. *See generally* Laurance, Vasconcelos & Lovejoy, *supra* note 18.

147. GLOWKA, *supra* note 97, at 11.

harm in the sense that the Amazonian Rainforest as a whole will likely succumb to dieback, if this vicious cycle of deforestation, rainforest fragmentation, and resulting forest fires, is not stopped.¹⁴⁸ If the Amazonian Rainforest were to be totally lost as a result of dieback, it would seem as though the CBD would certainly qualify the loss of the world's most biologically diverse ecosystem as a transboundary harm.¹⁴⁹

The Amazonian Rainforest, however, has not yet succumbed to dieback.¹⁵⁰ Although the threat of dieback is quite severe, the question remains as to whether the threat of dieback is an *imminent danger or damage* as defined in the CBD.¹⁵¹ If so, the notification and prevention obligations as set forth in Clause D of Article 14 would be triggered, and the Bolsonaro administration would be required to take remedial actions to prevent the imminent danger or damage of dieback.¹⁵² If not, the CBD requires nothing more from the contracting parties than to “promote notification,” that is, the contracting party only has to “promote” the “notification” of a “significantly adverse” harm to those other nations that would be injured by the likely harm.¹⁵³

In order to make this determination as to the drafters' intentions with respect to whether an environmental danger or damage is considered imminent, the language of the treaty must be interpreted. Yet again, Article 2 does not provide a definition of the word imminent.¹⁵⁴ When Clauses C and D of Article 14 are read together, however, the sparse requirements of Clause C shed some light upon the intended application of the

148. Fisher, *supra* note 11.

149. Convention on Biological Diversity, *supra* note 4, art. 14(d); *see also Amazon Rainforest*, *supra* note 7.

150. Fisher, *supra* note 11.

151. Convention on Biological Diversity, *supra* note 4, art. 14(d) (emphasis added).

152. The thought of requiring the Bolsonaro administration to take preventative action, or ameliorative action, as to completely avoid or lessen the danger or damage that would be realized upon the imminence of the dieback threat is oxymoronic. Given the nature of this harm, the awful reality is that once the triggering conditions for dieback have been met, there is no way in which the harm can be reversed. Fisher, *supra* note 11; *see also* Laurance, Vasconcelos & Lovejoy, *supra* note 18.

153. Convention on Biological Diversity, *supra* note 4, art. 14(c).

154. *Id.* art. 2. *Merriam-Webster*, however, defines imminent as “ready to take place; happening soon.” *Imminent*, *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/imminent>. (last visited Nov. 18, 2019),

notification and prevention obligations as set forth in Clause D, which governs imminent danger or damage.¹⁵⁵ For instances in which an environmental harm is “likely” and “significantly” to occur, Article 14(c) states that contracting parties are merely obligated to “promote notification” to those parties that would be injured by the likely harm.¹⁵⁶ Clause D, however, states that when there is an instance of *imminent* danger or damage, contracting parties are obligated to immediately contact those parties that will be affected, and parties are additionally obligated to take preventative measure to stop the imminent harm from occurring.¹⁵⁷

When these definitions are applied to the current state of the deforestation and occurrences of forest fires in the Amazon, one can see that the Clause C definition of “likely” and “significantly” to occur is better suited to describe the impending threat of dieback. As previously stated by leading environmental scientists Carlos Nobre and Thomas Lovejoy, it is believed that the “tipping point” condition for the triggering of the dieback will occur when approximately 20–25% of the Amazonian Rainforest has been deforested.¹⁵⁸ Once dieback has been triggered, however, there is no means or methods currently available to stop or reverse the positive feedback cycle of self-destruction.¹⁵⁹ Lovejoy makes it quite clear that if the tipping point condition for dieback were triggered, the Amazonian Rainforest would no longer be subsistent, let alone able to generate new flora in support of the rainforest’s existing biologically diverse ecosystems.¹⁶⁰ Furthermore, Lovejoy believes that approximately 19.3% of the Amazonian Rainforest, in total, has suffered deforestation.¹⁶¹ Thus, the tipping point condition has not yet been met, though it is frightfully close.¹⁶²

Given that the tipping point has not yet occurred, it would seem that the impending threat of dieback does not arise to the level of imminent danger or damage, as described in the

155. Convention on Biological Diversity, *supra* note 4, art. 14(c) & (d).

156. *Id.* art. 14(c).

157. *Id.* art. 14(d) (emphasis added).

158. Fisher, *supra* note 11.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

CBD.¹⁶³ Article 14, Clause D, when read in light of Clause C, seems to suggest that the imminent danger or damage is in reference to a danger or damage the could occur at any moment.¹⁶⁴ Given the assurance of the environmental harm, the Convention thus requires contracting parties to notify others of the forthcoming injury.¹⁶⁵ Clause C, however, seems to envision a slightly longer timeframe before the environmental harm is realized.¹⁶⁶ Thus, the distinction between the two clauses appears to be one of degree with respect to the immediacy of when the environmental harm will be realized.¹⁶⁷ This may feel like splitting hairs, especially when it comes to the magnitude of harm to be realized in environmental injuries, particularly with respect to the threat of dieback in the Amazonian Rainforest. Nevertheless, given the fact that the dieback condition has not yet been triggered, it would seem as though the threat of dieback does not qualify as an imminent danger or damage in the form of a transboundary harm.¹⁶⁸

CONCLUSION

The ultimate inquiry in this analysis is: can the international community rely upon the provisions within the CBD as a mechanism for holding the Bolsonaro Administration accountable to its treaty obligations? Upon completion of the above analysis, the answer to this question is no. With respect to a claim of failure to promote in situ conservation, it would be hard to argue before the ICJ that Brazil is failing to meet the regulatory and management requirements set forth in Article 6 of the CBD since the IBAMA and the INPE are still active federal environmental regulation agencies.¹⁶⁹ Even though the agency's ability to regulate and manage environmental protection laws have been drastically curtailed due to budget cuts by the Bolsonaro administration, that does not mean that Brazil is in contravention of its treaty obligations because the agencies charged with regulating and managing the National Biodiver-

163. Convention on Biological Diversity, *supra* note 4, art. 14.

164. *Id.* art. 14(c) & (d).

165. *Id.* art. 14(c).

166. *Id.*

167. *Id.* art. 14(c) & (d).

168. *Id.*

169. *Id.* art. 6; see Londoño & Casado, *supra* note 12; see also Wallace, *supra* note 16; Londoño, *supra* note 51.

sity Strategy and Action Plan have not been completely dismantled.¹⁷⁰ Furthermore, the Bolsonaro Administration would heavily rely upon the CBD's affirmative recognitions of sovereignty as found in Article 3 of the Convention.¹⁷¹ This provision clearly states that contracting parties must adhere to their own environmental policies,¹⁷² and the Bolsonaro Administration would be able to defend its shift in environmental protection policies as a reflection of the political process and Brazil's recent shift towards the conservative party.¹⁷³ Moreover, contracting parties would struggle to bring a claim of transboundary harm against Brazil. Given that the Amazonian Rainforest fires of 2019 were confined to the territorial jurisdiction of Brazil, and the conditions for die-back have not yet been triggered,¹⁷⁴ no contracting party would be able to assert a claim of transboundary harm under Article 14 of the CBD.¹⁷⁵ Bearing in mind the fact that the CBD was created for the purpose of protecting the biological diversity of the world's most sensitive ecosystems, it is rather disheartening to come to the conclusion that the international community would likely be unable to rely upon the Convention for protecting the Brazilian Amazonian Rainforest against rampant deforestation and the ensuing forest fires.

Jordan Johnson *

170. Convention on Biological Diversity, *supra* note 4, art. 6; *see generally* MINISTRY OF THE ENVIRONMENT, *supra* note 26.

171. Convention on Biological Diversity, *supra* note 4, art. 3.

172. *Id.*

173. Casado & Londoño, *supra* note 13.

174. Fisher, *supra* note 11.

175. Convention on Biological Diversity, *supra* note 4, art. 14.

* B.A., Baylor University (2011); Master of Urban and Regional Planning, University of Florida (2016); J.D., Brooklyn Law School (2021). Notes Editor, *Brooklyn Journal of International Law* (Fall 2020). I would like to begin by thanking my Notes Editor, Elizabeth Fudge. Her continued faith in the value of this Note motivated me to just keep writing, even after an unfortunate technological glitch deleted the first draft of my Note. To that end, I would be remiss if I did not thank Lloyd Carew-Reid, of the Brooklyn Law School Information Technology Department, for his attempts to recover what had been lost. Although my first draft was ultimately unrecoverable, I am nevertheless grateful for his kindness and persistence. Thank you to Michael Cooper, Ernira Mehmetaj, and to all of the staff members who helped edit this Note. Most importantly, I would like to extend a special thank you to my

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