

# THE TRANSNATIONAL INSTITUTIONAL DIALOGUE IN BELO MONTE CASE

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**SUMMARY:** 1 The Belo Monte Dam; 2 The Inter-American Commission on Human Rights Position in the Belo Monte Case; 3 The Supreme Court of Brazil Position in the Belo Monte Case; 4 Principle of State

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Sovereignty and the International Cooperation; 5  
The Institutional Dialogue Between the Supreme  
Court of Brazil and Inter-American Commission on  
Human Rights in Belo Monte Case; 7 Conclusion;  
7 Abbreviations; References.

**ABSTRACT:** This article aims to discuss the relationship between the Supreme Court of Brazil and the Inter-American Commission on Human Rights, especially in Belo Monte Dam Case, bearing in mind that when disagreements occur States must cooperate to avoid transboundary or global environmental problems. The classic concepts of nation-state sovereignty resulted from the Peace of Westphalia in 1648 and the permanent Sovereignty over Natural Resources based on territorial integrity and the right to self-determination and non-intervention of the States is guaranteed by the main international instruments. Similarly, the International Environmental Law, structured on the unquestionable right of an ecological balance, is a standard to be followed by the international community to guarantee that environmental damages do not cause harm to areas beyond the limits of the State. Thus the States have the sovereign right over it owns resources, but have also the responsibility to ensure the environment protection. Therefore, this essay intends to demonstrate, particularly under the influence of Jeremy Waldron<sup>2</sup>, Rosalind Dixon<sup>4</sup>, John Rawls<sup>5</sup> and Jürgen Habermas<sup>6</sup> conceptions, that in the Belo Monte Dam Case, the dialogue between Domestic and International institutions according to the international cooperation is mandatory to guarantee coherence and unity to the new millennium international system.

**KEYWORDS:** Belo Monte Dam. Institutional Dialogue. Environment. State Sovereignty. Cooperation.

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- 2 WALDRON, Jeremy, *Teaching Cosmopolitan Right*, in Kevin McDonough and Walter Feinberg (eds.) EDUCATION AND CITIZENSHIP IN LIBERALDEMOCRATIC SOCIETIES: COSMOPOLITAN VALUES AND CULTURAL IDENTITIES (Oxford University Press, 2003).
  - 3 WALDRON, Jeremy, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751 (1991-1992) at 778.
  - 4 DIXON, Rosalind, *Transnational Constitutionalism and Unconstitutional Constitutional Amendments*, Chicago Public Law and Legal Theory Working Paper n° 349, May 2011.
  - 5 RAWLS, John. *The Law of Peoples*. Cambridge: Harvard UP, 1999.
  - 6 HABERMAS, Jürgen. *Teoria de La Accion Comunicativa*. Madrid: Taurus Ediciones, 1987.

## 1 THE BELO MONTE DAM

The Belo Monte is a proposed hydroelectric dam complex on the Xingu River in the state of Pará, Brazil, which would make it the second-largest hydroelectric dam complex in Brazil and the world's third-largest in installed capacity that could guarantee electricity to the main Brazilian power grid and which would distribute it throughout the country<sup>7</sup>.

The project of the Belo Monte Dam Complex dates back to 1975 during Brazil's military dictatorship when a hydrographic study to locate potential sites for a hydroelectric project on the Xingu River was realized. This study was completed in 1979 and identified the possibility of constructing dams on the Xingu River<sup>8</sup>.

After many years of discussion and legal issues, the Brazilian National Congress promulgated the Legislative Decree 788/2005 authorizing the implementation of Belo Monte Dam as follow: "article 1. Is authorized the implementation of Belo Monte Dan in the Xingu River, located in Para State, to be developed after economic, environmental and others technical studies. article 2. The studies refer.red to in art. 1 of this Legislative Decree shall include, among others, the following: I - Environmental Impact Assessment - EIA; II - Environmental Impact Report - EIR; III - Integrated Environmental Assessment - IAA of the Xingu River basin, and IV - a study of an anthropological nature, relating to indigenous communities in areas within the influence of the project, and pursuant to § 3 of art. 231 of the Constitution, the affected communities must be heard. Sole Paragraph. The studies mentioned in the main article, with the participation of the State of Para. article 3 The studies mentioned in art. 1 of this Legislative Decree will be crucial to allow the measures in the legislation aimed at implementing the Belo Monte Dan."

Subsequent to the Legislative Decree 788/2005, the Brazilian environmental agency IBAMA had granted a provisional environmental license in February 2010, one of three licenses required by Brazilian legislation for development projects. A partial installation license was granted on the 26<sup>th</sup> of January 2011, authorizing the beginning of the construction activities, including forest clearing, the construction of easement areas, and the improvement of existing roads for the transport of equipment and machinery. The license to construct the dam was issued on

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7 Belo Monte- Eletrobras, <http://www.eletronbras.com>, (27 July 2011).

8 Belo Monte, <http://topicos.estadao.com.br/belo-monte>(27 July 2011).

the 1<sup>st</sup> of June 2011, after the Environmental Impact Assessment and the opportunity of the public access to Information and public participation<sup>9</sup>.

However, besides the economic advantage, the project of the Belo Monte Dam has a strong opposition in domestic and international community, especially bearing in mind the impacts in the ecosystems and the biodiversity and to the indigenous and local communities.

## 2 THE INTER-AMERICAN COMISSION ON HUMAN RIGHTS POSITION IN THE BELO MONTE CASE

The Inter-American Commission on Human Rights (IACHR) was created in 1959 as one of two bodies in the inter-American system for the promotion and protection of human rights. The IACHR is an autonomous organ and a permanent body of the Organization of American States (OAS) which mandate is found in the Organization of American States (OAS) Charter<sup>10</sup> and the American Convention on Human Rights<sup>11 12</sup>.

Particularly, the Organization of American State (OAS) aims at the coordination of the member States allowing the integration process based on the reciprocal rights and obligations of the States. Since its inception<sup>13</sup>, the Organization of American States has set the

9 Belo Monte, <http://topicos.estadao.com.br/belo-monte> (27 July 2011).

10 OAS Charter, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm), (27 August 2011).

11 AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA", <http://www.oas.org/juridico/english/treaties/b-32.html>, (27 August 2011).

12 It's important to stress that the inter-American human rights system was born with the adoption of the American Declaration of the Rights and Duties of Man in Bogotá, Colombia in April of 1948 and was the first international human rights instrument of a general nature. In 1969, the American Convention on Human Rights was adopted and in 1978 the Convention entered into force. As of August of 1997, it has been ratified by 25 countries: Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. The Convention defines the human rights which the ratifying States have agreed to respect and ensure. The Convention also creates the Inter-American Court of Human Rights.

13 The origins of Organization of American State dates back to the 1826 in Congress of Panama, when Simon Bolívar proposed the creation of a league of American republics. Thus in 1889/1890, at the First International Conference of American States in Washington-D.C., the International Union of American Republics was founded. Subsequently, at the Fourth International Conference of American States (Buenos Aires, 1910), the name of the organization was changed to the "Union of American Republics". Later, the experience of World War II convinced the States to adopt a system of collective security by the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) signed in 1947 in Rio de Janeiro.

tone for the structure to support democratic processes in the region. In this framework an important point is the discussion concerning the Inter-American Democratic Charter (IADC)<sup>14 15</sup>, which requires that “peoples of the Americas have a right to democracy and their governments have an obligation to promote it and defend it”. Thus, the Inter-American Democratic Charter is the affirmation that democracy is and should be the common form of government for all countries of the Americas, and it represents a collective commitment to maintaining and strengthening the democratic system in the region, increasing and upholding of democratic institutions throughout the nations of the Americas.

Nevertheless, the IACHR main function is to promote the observance and the defense of human rights<sup>16</sup>. Thus, in carrying out its mandate, the Commission, especially in the Belo Monte case, the Inter-American Commission on Human Rights adopted a Precautionary

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Finally, in March and May 1948 in the Ninth International Conference of American States held in Bogota was created the Organization of American States

- 14 Inter-American Democratic Charter – OAS, [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm), (27 August 2011).
- 15 The Inter-American Democratic Charter dates back to the Declaration of Quebec City (April 2001) that affirms the commitment to democracy to reinforce OAS instruments already in place for the defense of representative democracy, which were: the OAS Charter (1948); the Protocol of Cartagena (1985); General Assembly resolution AG/RES. 1080 (XXI-O/91) adopted in Santiago, Chile, in 1991; and the Protocol of Washington (1997).
- 16 IACHR main functions are: a) Receives, analyzes and investigates individual petitions which allege human rights violations, pursuant to Articles 44 to 51 of the Convention. This procedure will be discussed in greater detail below; b) Observes the general human rights situation in the member States and publishes special reports regarding the situation in a specific State, when it considers it appropriate; c) Carries out on-site visits to countries to engage in more in-depth analysis of the general situation and/or to investigate a specific situation. These visits usually result in the preparation of a report regarding the human rights situation observed, which is published and sent to the General Assembly; d) Stimulates public consciousness regarding human rights in the Americas. To that end, carries out and publishes studies on specific subjects, such as: measures to be taken to ensure greater independence of the judiciary; the activities of irregular armed groups; the human rights situation of minors and women, and; the human rights of indigenous peoples; e) Organizes and carries out conferences, seminars and meetings with representatives of Governments, academic institutions, non-governmental groups, etc... in order to disseminate information and to increase knowledge regarding issues relating to the inter-American human rights system. f) Recommends to the member States of the OAS the adoption of measures which would contribute to human rights protection; g) Requests States to adopt specific “precautionary measures” to avoid serious and irreparable harm to human rights in urgent cases. The Commission may also request that the Court order “provisional measures” in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court; h) Submits cases to the Inter-American Court and appears before the Court in the litigation of cases; i) Requests advisory opinions from the Inter-American Court regarding questions of interpretation of the American Convention.

Measure to prevent an irreparable damage in the environment and the indigenous communities. The mechanism for precautionary measures is established in Article 25 of the Rules of Procedure of the IACHR that establish that, in serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case, as well as to persons under the jurisdiction of the State concerned, independently of any pending petition or case. The measures may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members. Moreover, the Rules of Procedure establish that the granting of such measures and their adoption by the State shall not constitute a prejudgment on the violation of the rights protected by the American Convention on Human Rights or other applicable instruments<sup>17</sup>.

Thus, on April 1, 2011, the IACHR granted the Precautionary Measures 382/10 for the members of the indigenous communities of the Xingu River Basin in Pará, Brazil: the Arara of Volta Grande do Xingu; the Juruna of Paquiçamba; the Juruna of “Kilómetro 17”; the Xikrin of Trincheira Bacajá; the Asurini of Koatinemo; the Kararaô and Kayapó of the Kararaô indigenous lands; the Parakanã of Apyterewa; the Araweté of the Igarapé Ipixuna; the Arara of the Arara indigenous lands; the Arara of Cachoeira Seca; and the Xingu Basin indigenous communities in voluntary isolation. The request for precautionary measure alleges that the life and physical integrity of the beneficiaries is at risk due to the impact of the construction of the Belo Monte hydroelectric power plant. The Inter-American Commission requested that the State of Brazil immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until certain minimum conditions are met. The State must (1) conduct consultation processes, in fulfillment of its international obligations- meaning prior consultations that are free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement- in relation to each of the affected indigenous communities that are beneficiaries of these precautionary measures; (2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to the Social and Environmental Impact Study project’s, in an accessible

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17 Precautionary measures 2010– CIDH, <http://www.cidh.oas.org/medidas/2011.eng.htm>, (30 July 2011).

format, including translation into the respective indigenous languages; (3) adopt measures to protect the life and physical integrity of the members of the indigenous peoples in voluntary isolation of the Xingu Basin, and to prevent the spread of diseases and epidemics among the indigenous communities being granted the precautionary measures as a consequence of the construction of the Belo Monte hydropower plant. This includes any diseases derived from the massive influx of people into the region as well as the exacerbation of transmission vectors of water-related diseases such as malaria<sup>18</sup>.

After, on July 29, 2011, during its 142nd regular session, the IACHR evaluated Precautionary Measure 382/10, based on information submitted by the Brazil State and the petitioners, and modified the aim of the measure. The IACHR requested that Brazil: 1) Adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous communities in voluntary isolation and to protect the cultural integrity of those communities, including effective actions to implement and execute the legal/formal measures that already exist, as well as to design and implement specific measures to mitigate the effects the construction of the Belo Monte dam will have on the territory and life of these communities in isolation; 2) Adopt measures to protect the health of the members of the Xingu Basin indigenous communities affected by the Belo Monte project, including (a) accelerating the finalization and implementation of the Integrated Program on Indigenous Health for the UHE Belo Monte region, and (b) designing and effectively implementing the recently stated plans and programs that had been specifically ordered by the National Indian Foundation, FUNAI, in Technical Opinion 21/09; and 3) Guarantee that the processes still pending to regularize the ancestral lands of the Xingu Basin indigenous peoples will be finalized soon, and adopt effective measures to protect those ancestral lands against intrusion and occupation by non-indigenous people and against the exploitation or deterioration of their natural resources. Moreover, the IACHR decided that the debate between the parties on prior consultation and informed consent with regard to the Belo Monte project has turned into a discussion on the merits of the matter, which goes beyond the scope of precautionary measures<sup>19</sup>.

Thus, the original position of IACHR was to recommend that the Brazilian government immediately suspend its licensing process

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18 Precautionary measures 2010– CIDH, <http://www.cidh.oas.org/medidas/2011.eng.htm>, (30 July 2011).

19 Precautionary measures 2010– CIDH, <http://www.cidh.oas.org/medidas/2011.eng.htm>, (30 July 2011).

for the Belo Monte Dam, recommending that the Brazilian government consult with the affected groups before proceeding with the project, undertake measures to protect local tribes, and make environmental and social impact statements available in local indigenous languages. Even with the new position of IACHR during its 142nd regular session, the aim of the measure still has a significant importance and is a step further in the defense of the environment and the indigenous communities.

### **3 THE SUPREME COURT OF BRAZIL POSITION IN THE BELO MONTE CASE**

The Supreme Court of Brazil is the highest court of law in Brazil for constitutional issues and its decisions cannot be appealed. The court was founded during the colonial era in 1808 and was originally called the House of Appeals of Brazil. The Imperial Constitution in 1824 preceded the establishment of the Supreme Court of Justice in 1829. In 1891 with the first Constitution of the Republic the Supreme Court of Brazil was established. Currently, the Court has a small range of cases of original jurisdiction disposed in the article 102 of the Constitution of the Federative Republic of Brazil, including the power of judicial review and constitutional appeal. The judges of the court are appointed by the President and approved by the Senate<sup>20</sup>.

Regarding environmental issues, the position of the Supreme Court of Brazil, in general, is to recognize the value of environmental diversity and its components exposed in the Constitution of the Federative Republic of Brazil<sup>21</sup> and in a number of agreements, recommendations, declarations, instruments and regulations adopted within the United Nations system and other international and regional organizations. Thus, Supreme Court of Brazil, as a rule, recognize the importance of environment and local communities protection, and the need to take the necessary measures to safeguard the essential ecological processes and life-supporting systems for the benefit of present and future generations of mankind. For example,

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20 Histórico: STF - Supremo Tribunal Federal, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=so breStfConhecaStfHistorico>, (30 July 2011).

21 Constituição, [http://www.planalto.gov.br/ccivil\\_03/Leis/L8617.htm](http://www.planalto.gov.br/ccivil_03/Leis/L8617.htm), (27 July 2010).



Supreme Court of Brazil in a constitutional case (AC- 1255)<sup>22 23</sup> decided that the environment is a basic right of the citizenship and reflects a political and legal obligation. Moreover, the Court proclaimed that the environment is a typical right of third generation and an international obligation that represents the essence of the fundamental rights to the preservation of the environment for the benefit of present and future generations.

However, at least in one opportunity, the Supreme Court of Brazil, judging an Appeal in the Belo Monte Dan Case (125/PA SL)<sup>24 25</sup>, did not recognize the importance of the biological diversity conservation and the close and traditional dependence of indigenous and local communities on biological resources, authorizing the implementation of “Belo Monte Dan” in the Xingu River to be developed after economic, environmental and others necessary studies and after the consultation of indigenous communities. The studies, according to the Supreme Court of Brazil, shall include, among others, the following: Environmental Impact Assessment (EIA); Environmental Impact Report (EIR); Integrated Environmental Assessment (IAA) of the Xingu River basin, and a study of an anthropological nature, relating to indigenous communities in areas within the influence of the project, and pursuant to article 231, 3<sup>rd</sup>

22 In the original: “[...]a preservação da integridade do meio ambiente – além de representar direito fundamental que assiste à generalidade das pessoas – traduz obrigação político-jurídica indeclinável que se impõe a todas as esferas de poder, como esta Suprema Corte já teve o ensejo de reconhecer e proclamar: “- Todos têm direito ao meio ambiente ecologicamente equilibrado. Trata-se de um típico direito de terceira geração (ou de novíssima dimensão), que assiste a todo o gênero humano (RTJ 158/205-206). Incumbe, ao Estado e à própria coletividade, a especial obrigação de defender e preservar, em benefício das presentes e futuras gerações, esse direito de titularidade coletiva e de caráter transindividual (RTJ 164/158-161). O adimplemento desse encargo, que é irrenunciável, representa a garantia de que não se instaurarão, no seio da coletividade, os graves conflitos intergeracionais marcados pelo desrespeito ao dever de solidariedade, que a todos se impõe, na proteção desse bem essencial de uso comum das pessoas em geral. Doutrina. O princípio do desenvolvimento sustentável, além de impregnado de caráter eminentemente constitucional, encontra suporte legitimador em compromissos internacionais assumidos pelo Estado brasileiro e representa fator de obtenção do justo equilíbrio entre as exigências da economia e as da ecologia, subordinada, no entanto, a invocação desse postulado, quando ocorrente situação de conflito entre valores constitucionais relevantes, a uma condição inafastável, cuja observância não comprometa nem esvazie o conteúdo essencial de um dos mais significativos direitos fundamentais: o direito à preservação do meio ambiente, que traduz bem de uso comum da generalidade das pessoas, a ser resguardado em favor das presentes e futuras gerações.[...]”

23 AC- 1255, <http://www.stf.jus.br/portal/informativo>, (30 July 2011).

24 In the original: “[...] defiro o pedido para suspender, em parte, a execução do acórdão proferido pela 5ª Turma do Tribunal Regional Federal da 1ª Região, nos autos do AI 2006.01.00.017736-8/PA (fls. 527-544), para permitir ao Ibama que proceda à oitiva das comunidades indígenas interessadas. Fica mantida a determinação de realização do EIA e do laudo antropológico, objeto da alínea “c” do dispositivo do voto-condutor [...].”

25 125/PA SL, <http://www.stf.jus.br/portal/informativo>, (30 July 2011).

paragraph, of the Federal Constitution, the affected communities must be heard.

Consequently, besides the traditional position of Supreme Court of Brazil to recognize the Constitution duty and the international obligation to avoid the adverse environmental impact, in the case above, regarding the Belo Monte Dan, the Court unobserved the State responsibility to take all necessary measures to prevent the environment and to prohibit activities that could cause significant harm to the environment, especially the side duties arising from this obligations, allowing the Dan construction.

#### 4 PRINCIPLE OF STATE SOVEREIGNTY AND THE INTERNATIONAL COOPERATION

The classic concept of nation-state sovereignty and the Principle of State Sovereignty as well, resulted from the Peace of Westphalia in 1648 (treaties of Osnabrück and Münster) after the end of the Thirty Year War<sup>26</sup>. Therefore, the Principle of State Sovereignty is a Principle of International Law<sup>27</sup> based on territorial integrity and states as the primary actors in international relations<sup>28</sup>. The Peace of Westphalia has also some key points such as the Principle of the Sovereignty of States, equality among states, and non-intervention of one state in the internal affairs of another state<sup>29</sup>.

Followed by the Treaties of Osnabrück and Münster, many other international instruments stressed the importance of the State Sovereignty Principle. The Charter of the United Nations for example declares that “Article 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 1. The Organization is based on the principle of the sovereign equality of all its Members. [...] 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this

26 RIBEIRO, Marilda Rosado de Sá. Parecer sobre a Oitava Rodada de Licitações da ANP. In: *Novos rumos do Direito do Petróleo*. Renovar, 2009.

27 PECEQUILLO, Cristina Soreanu. *Introdução às Relações Internacionais: temas, atores e visões*. Petrópolis: Vozes, 2004. 248 p. ISBN: 85-3262-958-X.

28 RIBEIRO, Marilda Rosado de Sá. *Direito do Petróleo. As joint ventures na indústria do petróleo*. 2. ed. Rio de Janeiro: Renovar, 2003.

29 NOGUEIRA, João Pontes; MESSARI, Nizar. *Teoria das Relações Internacionais: correntes e debates*. Rio de Janeiro: Elsevier, 2005.

principle shall not prejudice the application of enforcement measures under Chapter VII. [...] Article 78. The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.”<sup>30</sup>

Additionally, the Charter of the Organization of American States<sup>31</sup> recognizes the principle of nonintervention and the right of every State to choose its political, economic and social system without any outside interference. Furthermore, Resolution CJI/RES.I-3/95 stated that: “The principle of non-intervention and the right of each State in the Inter-American System to elect its political, economic and social system with no outside intervention and to organize itself in the manner most convenient thereto may not include any violation of the obligation to effectively exercise Representative Democracy in the above-mentioned system and organization”<sup>32</sup>.

As well as, the International Jurisprudence of the Permanent Court of Arbitration, the oldest institution regarded for international dispute resolution among states, state entities, intergovernmental organizations, and private parties, also point out the significance of nation-state sovereignty, such as in *Timor Frontiers* (1914); *Sovereignty over the Island of Palmas* (1928); *Eritrea and Yemen on questions of territorial sovereignty and maritime delimitation* (1998 and 1999); and *Ireland and the United Kingdom under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) cases*<sup>33</sup>.

The same point of view about the Sovereignty Principle has been reproduced over Natural Resources in some International Law instruments. The General Assembly Resolution 1803 (XVII) from December 14th, 1962 of the United Nations, bearing in mind the Resolution 1314 (XIII) and Resolution 1515 (XV) of the United Nations, recognized the inalienable

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30 Charter of the United Nations, <http://www.un.org/en/documents/charter/index.shtml>, (27 July 2010).

31 OAS Charter, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm), (27 August 2011).

32 Material de Referencia, [http://www.oas.org/dil/esp/XXXVIII\\_Curso\\_de\\_Derecho\\_Internacional\\_info\\_general\\_material.htm](http://www.oas.org/dil/esp/XXXVIII_Curso_de_Derecho_Internacional_info_general_material.htm), (27 August 2011).

33 History | International Court of Justice, <http://www.icj-cij.org/court/index.php?p1=1&p2=1>, (27 July 2010).

right of all States to dispose of their natural wealth and resources in accordance with their national interests<sup>34</sup>.

It's important to stress that the Resolution 1314 (XIII) of the United Nations, established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination. Then, on December 15th of 1960, the Resolution 1515 (XV) of the United Nations also recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected<sup>35</sup>.

As a result, as mentioned, the General Assembly Resolution 1803 (XVII) of United Nations from December 14th, 1962, disposes that "1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

The same framework was observed in the Constitution of the Federative Republic of Brazil that declares the Sovereignty Principle as Fundamental Principle of the Federative Republic of Brazil (article 1º, I). Likewise, Federative Republic of Brazil reproduce on local legal instruments concepts established by the United Nations about Sovereignty Principle over Natural Resources, as noticed in the law nº 8617 (1993) that provides definition over territorial sea, contiguous zone, exclusive economic zone and continental shelf of Brazil, like the United Nations Convention on the Law of the Sea<sup>36</sup>.

However, the traditional concept of State Sovereignty is taking new formats in the current international agenda. The emergence of a new "global justice" form, based on the concept of globally ordered world governed by a de-territorialized system, rather than the sovereignty of states, is the inevitable consequence of the internationalization phenomenon<sup>37</sup>. In this conception, the nation state and its notions of sovereignty will

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34 General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources", <http://www2.ohchr.org/english/law/resources.htm>, (27 July 2010).

35 General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources", <http://www2.ohchr.org/english/law/resources.htm>, (27 July 2010).

36 Constituição, [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm), (27 July 2010).

37 SANTOS, Boaventura de Sousa. Para além do Pensamento Abissal: Das linhas globais a uma ecologia de saberes. *Revista Crítica de Ciências Sociais*, 78, 3-46. 2008.

be replaced by a more complex interdependent cosmopolitan society in which the notion of sovereignty has been rewritten to endorse the concept of a fully integrated and harmonious interconnected society. This new system will be considered as reflecting the idea of “pluralism”, based on principles of tolerance and mutual recognition in a distributed network of international ordering<sup>38</sup>.

This new concept of Sovereignty was identified in a supranational level by the European Court of Justice (ECJ)<sup>39 40</sup>, the highest court of the European Union, in the landmark case *Van Gend en Loos* in 1963, that decided that the European Community “constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights albeit within limited fields.”<sup>41 42 43</sup>

John Rawls, one of the most prominent American philosophers, in “The Law of the people”, observed this new perspective as a political

38 HABERMAS, Jürgen. *Teoría de La Acción Comunicativa*. Madrid: Taurus Ediciones, 1987.

39 The court was established in 1952 by the Treaty of Paris (1951) and ratified in 1993 by the Maastricht Treaty. The European Court of Justice is the highest court of the European Union in matters of Community law. It's the responsibility of the Court to ensure that the law is observed in the interpretation and application of the Treaties of the European Union and the provisions lay down by the competent Community institution. It has jurisdiction in various specific matters conferred on it by the Treaties.

40 The European Court of Justice (ECJ) plays an essential role in this configuration, developing the European Union law by the establishment of a number of principles of European Law, which bind European Union institutions and member States, including the principles of direct effect (the principle of direct effect means that provisions of Community law may confer rights and impose obligations on individuals. There were two varieties of direct effect: vertical direct effect and horizontal direct effect. Vertical direct effect concerns the State obligation to ensure national law observance and compatibility with European Union law, enabling citizens to rely on it for actions against the State. Horizontal direct effect concerns the relationship between individuals, allowing that private Citizens to sue one another on the basis of a European Union law), the supremacy of European Union law over Member States (it has been also ruled many times by the European Court of Justice that European Community Law is superior to national laws. Where a conflict arises between European Community Law and the Law of a Member State, European Community Law takes precedence and the law of a Member State must be misapplied. The Supremacy of European Community Law emerged from the European Court of Justice in *Costa v ENEL* in 1964) and the Subsidiarity (Under the Principle of Subsidiarity the European Union may act where action of States are insufficient. The principle was established in the 1992 Treaty of Maastricht and allowing that the European Union act if the objectives of the proposed action cannot be achieved by the States).

41 EUR-Lex - 61962J0026 - EN, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:HTML>, (30 July 2010).

42 RAMÍREZ-ESCUADERO, Daniel Sarmiento. *Responsabilidad de Los Tribunales Nacionales Y Derecho Comunitario*. La responsabilidad de los Estados miembros por infracción del Derecho comunitario en vía judicial, a partir de la sentencia Köbler (C-224/01) del Tribunal de Justicia. Revista del Poder Judicial, núm. 70, 2004.

43 EU Facts: European Union Law, <http://www.civitas.org.uk/eufacts/OS/OS6.htm>, (30 July 2010).

conception of rights and justice applying to the principles and norms of international law, sketching that “We must reformulate the powers of sovereignty in light of a reasonable law of people and get rid of the right to war and the right to internal autonomy, which have been part of the (positive) international law for the two and a half centuries following the Third Years War, as a part of the classical states system.”<sup>44</sup>

Rosalind Dixon Professor of the University of Chicago also follows the same point of view drawing that is possible for transnational norms to play a role of limiting domestic judicial discretion on a logical posture of non-divergence, drafting that for global practices transnational sources can help the Courts to engage in a comprehensive process of reasoned deliberation and justification.”<sup>45</sup>

The philosophy drafted by Richard Rorty in “Human Rights, Rationality, and Sentimentality”<sup>46</sup> in the same sense, has an important role in the understanding that of is necessary to guide our practices by a “planetary culture” or a “communitarian morality”.

Or as exposed in the argument of Jeremy Waldron, Professor of the Victoria University in New Zealand, that the peoples of the world have constituted themselves as a single community<sup>47 48</sup>.

Thus, while the sovereignty remains as a central issue, it is undeniable that the old doctrine of State Sovereignty has been rethought, emphasizing the dimension of a Universal Sovereignty. So, the theoretical construction of an international justice demands a new concept of sovereignty, no longer dissociated from the international cooperation and always driving towards

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44 RAWLS, John. *The Law of Peoples*. Cambridge: Harvard UP, 1999.

45 DIXON, Rosalind, *Transnational Constitutionalism and Unconstitutional Constitutional Amendments*, Chicago Public Law and Legal Theory Working Paper n° 349, May 2011.

46 RORTY, Richard. “*Human Rights, Rationality, and Sentimentality*.” In *On Human Rights: The 1993 Oxford Amnesty Lectures*, ed. Susan Hurley and Stephen Shute, 112–134. New York: Basic Books, 1993.

47 WALDRON, Jeremy. *Teaching Cosmopolitan Right*. In Kevin McDonough and Walter Feinberg (eds.) *EDUCATION AND CITIZENSHIP IN LIBERALDEMOCRATIC SOCIETIES: COSMOPOLITAN VALUES AND CULTURAL IDENTITIES* (Oxford University Press, 2003).

48 WALDRON, Jeremy. *A Right-Based Critique of Constitutional Rights*, OXFORD JOURNAL OF LEGAL STUDIES, 13 (1993), 18, at \_\_; JEREMY WALDRON, *LAW AND DISAGREEMENT* (OUP1999), Chs. 10-11.

common goals, vital to the balance of an international community that does not respect boundaries<sup>49</sup>.

In consequence, a number of international judicial decisions recognize the necessity of States cooperation to ensure an international justice. The International Court of Justice, established by the Charter of the United Nations as the principal judicial organ of the United Nations with global jurisdiction, in 1949 held that no state may utilize its territory contrary to the rights of other states in the Corfu Channel Case<sup>50</sup>, affirming that Albania in the interest of navigation in general, had a duty to make known the existence of a mine field in its territorial waters and to alert warships of the British navy the moment they approached imminent danger from the mines. In 1996, in an advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice recognized the existence of a general obligation of states to ensure that activities within their jurisdiction and control respect other states or areas beyond national control<sup>51</sup>. As well as, in the Trail Smelter Arbitration was declared that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is establish by clear and convincing evidence.”<sup>52</sup>

Additionally, many international instruments support this spirit of mutual assistance. For example, the Resolution 1803 declares that is desirable the promotion of international co-operation for the economic development of developing countries, as well as that economic and financial agreement between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination<sup>53</sup>.

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49 WALDRON, Jeremy. *Minority Cultures and the Cosmopolitan Alternative*. 25 U. MICH. J.L. REFORM 751 (1991-1992) at 778.

50 Corfu Channel Case (U.K v. Albania), *Merits, International Court of Justice Reports*, 1949. p. 4.

51 Legality of the Threat or Use of Nuclear Weapons, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>, (30 July 2010).

52 International Decisions, [http://www.unep.org/padeli/publications/Jud.dec.%20pre\(Int%20.pdf](http://www.unep.org/padeli/publications/Jud.dec.%20pre(Int%20.pdf), (05 January 2011).

53 General Assembly resolution 1803 (XVII) of 14 December 1962, “Permanent sovereignty over natural resources”, <http://www2.ohchr.org/english/law/resources.htm>, (27 July 2010).

The Declaration of the United Nations Conference on the Human Environment (Stockholm 1972) follows the same idea, and proclaims that<sup>54</sup> “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 limits of national jurisdiction.” (Principle 21); “States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.” (Principle 22) and “International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states” (Principle 24).

Alike, the United Nations Conference on Environment and Development (1992)- the Rio Declaration on Environment and Development- reaffirmed the Declaration of the United Nations Conference on the Human Environment, with the goal of a new and equitable global partnership among States, key sectors of societies and people, working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system. Thus, the Rio Declaration recognizes that<sup>55</sup> “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 and developmental 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 limits of national jurisdiction.” (Principle 2); “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to

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54 Stockholm 1972 - Declaration of the United Nations Conference on the Human Environment - United Nations Environment Programme (UNEP), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>, (27 July 2010).

55 Rio Declaration - Rio Declaration on Environment and Development - United Nations Environment Programme (UNEP), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>, (27 July 2010).



global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”.(Principle 7) and “States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.” (Principle 14).

The World Charter for Nature<sup>56</sup> also states that “11. Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used, In particular: (a) Activities which are likely to cause irreversible damage to nature shall be avoided; [...] 12. Discharge of pollutants into natural systems shall be avoided and: (a) Where this is not feasible, such pollutants shall be treated at the source, using the best practicable means available;”

In America’s regional level the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere<sup>57</sup> agreed by the Governments of the American Republics, wishing to protect and reserve in their natural habitat, representatives of all species and genera of their native flora and fauna, declares that “Article VI. The Contracting Governments agree to cooperate among themselves in promoting the objectives of the present Convention. To this end they will lend proper assistance, consistent with national laws, to scientists of the American Republics engaged in research and field study; they may, when circumstances warrant, enter into agreements with one another or with scientific institutions of the Americas in order to increase the effectiveness of this collaboration; and they shall make available to all the American Republics equally through publication or otherwise the scientific knowledge resulting from such cooperative effort.”

The same idea was exposed in the Amazon Cooperation Treaty<sup>58</sup>, signed by the Republics of Bolivia, Brazil, Colombia, Ecuador, Guyana,

56 WORLD CHARTER FOR NATURE, <http://www.unep.org/law/.../UNEPEnv-LawGuide&PrincN05.pdf>, (20 September 2010).

57 CONVENTION ON NATURE PROTECTION AND WILD LIFE - OAS, <http://www.oas.org/juridico/english/treaties/c-8.html>, (27 August 2011).

58 Amazon Cooperation Treaty - OTCA, <http://www.otca.org.br/en/institucional/index.php?id=29>, (27 August 2011).

Peru, Suriname and Venezuela, recognizes the importance to each one of the States of their respective Amazonian regions as an integral part of their respective territories and that both socio-economic development and conservation of the environment are responsibilities inherent to the sovereignty of each State, and that cooperation among the States shall facilitate fulfillment of these responsibilities by continuing and expanding the joint efforts being made for the ecological conservation of the Amazon region, state the following: ARTICLE IV. The Contracting Parties declare that the exclusive use and utilization of natural resources within their respective territories is a right inherent to the sovereignty of each state and that the exercise of this right shall not be subject to any restrictions other than those arising from International Law.

Moreover, the Charter of the Organization of American States<sup>59</sup> recognizes that solidarity among and cooperation among American states require the political organization of those states based on the effective exercise of representative democracy, and that economic growth and social development based on justice and equity, and democracy are interdependent and mutually reinforcing.

The Inter-American Democratic Charter<sup>60 61</sup> also recognizes that a safe environment is essential to the integral development of the human being, which contributes to democracy and political stability. Thus, the respect of the Environment avoiding the transboundary environmental damage is vital to the sustainable development environment, giving physical sustenance and the opportunity for intellectual, moral, social and spiritual growth of the mankind. Moreover, the member states of OAS expressed their firm belief that democracy, peace, and development are inseparable and indivisible parts of a renewed and integral vision of solidarity in the Americas and that the ability of the Organization to help preserve and strengthen democratic structures in the region will depend on the implementation of a strategy based on the interdependence and complementarity of those values. Particularly, the article 15 of the Inter-

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59 OAS Charter, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm), (27 August 2011).

60 Inter-American Democratic Charter – OAS, [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm), (27 August 2011).

61 The Inter-American Democratic Charter dates back to the Declaration of Quebec City (April 2001) that affirms the commitment to democracy to reinforce OAS instruments already in place for the defense of representative democracy, which were: the OAS Charter (1948); the Protocol of Cartagena (1985); General Assembly resolution AG/RES. 1080 (XXI-O/91) adopted in Santiago, Chile, in 1991; and the Protocol of Washington (1997).

American Democratic Charter declares that “The exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the states of the Hemisphere implement policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations”. Thus, by the Inter-American Democratic Charter, a safe environment is essential to the integral development of the human being, guaranteed by the international community according to the International Law, which contributes to democracy and political stability<sup>62</sup>.

Therefore, all these international instruments recognize the State Sovereignty Principle in balance with Principles of Environmental Law, supporting a spirit of mutual understanding and cooperation<sup>63 64</sup>.

Nevertheless, the same framework was observed in the Constitution of the Federative Republic of Brazil that stressing the duty of the State and the society with the environment preservation from the present and next generation (article 225). As well as, in its international relationship the Federative Republic of Brazil aims at the economic, political, social and cultural integration of Latin American people, leading to a Latin American community of nations (article 4<sup>o</sup>, single paragraph), reinforcing also the need of cooperation among the States for the progress of mankind (article 4<sup>o</sup>, IX)<sup>65</sup>.

Consequently, there is the necessity to understand this redefinition of the Sovereignty under a contemporary perspective, based on the construction of mechanisms of cooperation in a dynamic and deliberative dialogue fundamental for international order stability, especially because the realization of international justice involves the cooperation with the goal of a new and equitable global partnership among States.

62 ARAÚJO, Nádia de. A influência das opiniões consultivas da Corte Interamericana de Direitos Humanos no ordenamento jurídico brasileiro. In: DIREITO, Carlos Alberto Menezes; TRINDADE, Antônio Augusto Cançado; PEREIRA, Antonio Celso Alves, coord. *Novas perspectivas do direito internacional contemporâneo: estudos em homenagem ao professor Celso D. de Albuquerque Mello*. Rio de Janeiro: Renovar, 2008.

63 TIBÚRCIO, Carmen; BARROSO, Luís Roberto, org. *O direito Internacional contemporâneo: estudos em homenagem ao professor Jacob Dolinger*. Rio de Janeiro: Renovar, 2006.

64 BARROSO, Luís Roberto. Constituição e tratados internacionais: alguns aspectos da relação entre direito internacional e direito interno. In: DIREITO, Carlos Alberto Menezes; TRINDADE, Antônio Augusto Cançado; PEREIRA, Antonio Celso Alves, coord. *Novas perspectivas do direito internacional contemporâneo: estudos em homenagem ao professor Celso D. de Albuquerque Mello*. Rio de Janeiro: Renovar, 2008.

65 L8617, [http://www.planalto.gov.br/ccivil\\_03/Leis/L8617.htm](http://www.planalto.gov.br/ccivil_03/Leis/L8617.htm), (27 July 2010).

## 5 THE INSTITUTIONAL DIALOGUE BETWEEN THE SUPREME COURT OF BRAZIL AND INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN BELO MONTE CASE

The decision of the Supreme Court of Brazil and the jurisdiction itself is a manifestation of the Principle of State Sovereignty and extends its effect inside the boundaries of a State. However, a plenty of local and international instruments as well as international judicial decisions, recognize that States, based on international cooperation, must implement policies and strategies to protect the environment, including application of various treaties and conventions to achieve sustainable development for the benefit of present and future generations.

Particularly, as followed above, originally, the IACHR requested that the State of Brazil immediately suspend the licensing process for the Belo Monte Dam and stop any construction work<sup>66</sup>. After, the IACHR adjust its position during its 142nd regular session, requesting, among other measures, that Brazil protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous communities and to protect the cultural integrity of those communities<sup>67</sup>.

Thus, it is necessary to understand that the legitimacy of the local institutions decision, especially the Supreme Court of Brazil position, goes beyond the traditional principle of Sovereignty, operating from the construction of a deliberative procedure to the viability of institutional dialogues among international institutions. The construction of mechanisms of cooperation, in accordance with a dialogical deliberative sense, is fundamental for the stability of the global and regional order<sup>68</sup>. Thus, is imperative to adopt uniform criteria for deliberative procedures and institutional dialogues in societies under the democratic parameters and guidelines in a cooperative and dialogical agenda. Therefore, institutions can't be reduced to a formal division of sovereignties acting within the limits of their programmatic duties. Rather, they should act dialogically, seeking to achieve a resolution that meets the interests and values of the international community<sup>69</sup>.

66 Precautionary measures 2010– CIDH, <http://www.cidh.oas.org/medidas/2011.eng.htm>, (30 July 2011).

67 Precautionary measures 2010– CIDH, <http://www.cidh.oas.org/medidas/2011.eng.htm>, (30 July 2011).

68 WALDRON, “*Foreign Law and the Modern Ius Gentium*,” 119 Harvard Law Review 129 (2005).

69 PEREIRA, João Eduardo Alves. Geopolítica e direito internacional no Século XXI. In: DIREITO, Carlos Alberto Menezes; TRINDADE, Antônio Augusto Cançado; PEREIRA, Antonio Celso Alves, coord. *Novas perspectivas do direito internacional contemporâneo: estudos em homenagem ao professor Celso D. de Albuquerque Mello*. Rio de Janeiro: Renovar, 2008.

Cass R. Sunstein and Adrian Vermeule both former Professors of University of Chicago and currently Professors of Harvard Law School, in “Interpretation and Institutions”<sup>70</sup>, observed this point of view exposing that the issues of legal interpretation cannot be adequately resolved without attention to institutional dialog and dynamic effects of the judicial decision, in addition to the usual claims about legitimacy and constitutional authority, construction a better strategies for making a convergence on appropriate methods in interpretive questions.

Vicki C. Jackson sees this question by a similar view arguing that: “Comparison today is inevitable. It is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one’s own. These impressions, which may influence views of U.S. constitutionalism, could be incorrect or subject to interpretive challenge. Overt references to what judges believe about other countries will often provide helpful transparency.”<sup>71</sup>

Or, as Sunstein and Posner put it: “The question whether one state should consult the law of other states is large and interesting—much larger and more interesting than the question whether the U.S. Supreme Court, should construe the U.S. Constitution with reference to the constitutional rulings of other high courts.”<sup>72 73</sup>

Rosalind Dixon Professor of the University of Chicago also sketch this idea disposing that “[...]is in fact possible for transnational constitutional norms to play an even stronger, salutary role in limiting domestic judicial discretion [...]engagement by judges with transnational sources can help both “improve[ē] a justice’s distance on the interpretive problem before” them, and prompt them to engage in a more searching, comprehensive process of reasoned deliberation and justification. This can also help ensure more reasoned and appropriate uses of judicial interpretive discretion in a wide variety of constitutional contexts.”<sup>74</sup>

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70 SUNSTEIN, Cass R. and VERMEULE, Adrian, *Interpretation and Institutions*, Chicago Public Law and Legal Theory Working Paper n° 28.

71 VICKI C. JACKSON. *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 119-20, 2005.

72 POSNER, Eric A. and SUNSTEIN. Cass R., *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

73 POSNER, Eric A. and SUNSTEIN. Cass R., *Response—On Learning from Others*, 59 STAN. L. REV. 1309 (2007)

74 DIXON, Rosalind. *Transnational Constitutionalism and Unconstitutional Constitutional Amendments*, Chicago Public Law and Legal Theory Working Paper n° 349, may 2011.

Anne-Marie Slaughter goes further in this idea talking about the emergence of a “global community of courts.”<sup>75</sup> She says that “the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global legal system, but they certainly constitute a community.”

Thus, as observed in many precedents around the globe, transnational sources and international Court decisions must be taking into consideration by Courts in the context of local institutional practices.

For example, in Brazil, the Supreme Court decided that the American Convention on Human Rights has a superior status to domestic legal systems just below the Constitution<sup>76 77</sup>.

Even in States that the historical jurisprudence denies the transnational sources influence in Domestic Courts<sup>78 79</sup>, there are some precedents recognizing the *ius gentium* importance. In *Roper v Simmons*<sup>80</sup>,

75 SLAUGHTER, Anne-Marie. *A Global Community of Courts* 44 *HARV. INT'L L.J.* 191 (2003)

76 HC-87585.

77 In the original: “a circunstância de o Brasil haver subscrito o Pacto de São José da Costa Rica (Convenção Americana de Direitos Humanos), que restringe a prisão civil por dívida ao descumprimento inescusável de prestação alimentícia (art. 7º, 7), conduz à inexistência de balizas visando à eficácia do que previsto no art. 5º, LXVII, da CF (“não haverá prisão civil por dívida, salvo a do responsável pelo inadimplemento voluntário e inescusável de obrigação alimentícia e a do depositário infiel.”). Concluiu-se, assim, que, com a introdução do aludido Pacto no ordenamento jurídico nacional, restaram derogadas as normas estritamente legais definidoras da custódia do depositário infiel. Prevaleceu, no julgamento, por fim, a tese do status de supralegalidade da referida Convenção”

78 The Constitution Restoration Act, s. 201 declares that: “In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.”

79 However within the United States, state courts frequently refer to the decisions of other state courts, even when construing state constitutions.

80 Christopher Simmons was 17 in 1993, a junior in High School, when he and some friends murdered a Missouri woman. After bragging about the murder to his friends, Simmons was arrested and confessed to the police. A few months later, once he was eighteen, he was tried as an adult, convicted, and sentenced to death. He appealed on the ground that execution for a crime committed when he was a minor would be cruel and unusual punishment. His argument was that since minors are, on the whole, less mature than adults, they are less culpable for the offenses they commit; and since Eighth Amendment jurisprudence requires the states to reserve the death penalty for their most heinous

for example, the U.S. Supreme Court decided that a state could not execute a man for a crime committed when he was a child<sup>81</sup> base on the opinion of the world community. The U.S. Supreme Court in *Trop v Dulles* (1958)<sup>82 83</sup> and the New York Court of Appeals in *Riggs v. Palmer*<sup>84 85</sup> also held the importance of the Universal Law of the civilized nations.

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offenders, it should not be applied to people in this category. The Missouri Supreme Court accepted that argument and overturned the death penalty, substituting life imprisonment without parole. Then the state appealed to the Supreme Court of the United States. The Court split 5-4, with a bare majority ruling that the imposition of the death penalty for a crime committed when the offender was a juvenile was cruel and unusual punishment. In reaching that decision, Justice Kennedy, who wrote for the Court, noted that the juvenile death penalty was already unusual in the United States; only three states had executed people in this category in the last ten years and eighteen death penalty states explicitly forbade it. Moreover he said it was also highly unusual by world standards and that “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. ... [O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. [And] Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.” Justice Kennedy acknowledged that “the task of interpreting the Eighth Amendment remains our responsibility”. But he said that American courts needed to take the foreign consensus into account for this case. It is proper, said Justice Kennedy, “that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty ... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions”.

81 *Roper v. Simmons*, 543 U.S. 551 (2005)

82 In *Trop v Dulles* (1958), the Supreme Court ruled that depriving an individual of his citizenship was an impermissible punishment and one of their grounds for thinking this was that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”. So we mustn’t move too quickly in supposing that just because different states are involved, there is nothing remotely like a common agent.

83 356 U.S. 86 (1958).

84 In *Riggs v. Palmer* a young man poisoned his grandfather and was sent to prison. Under the terms of the grandfather’s will, the killer stood to inherit a great deal of property. This result struck many people as offensive, most notably the residual beneficiaries. The New York Court of Appeals held (by a majority) that the killer was not entitled to inherit. “[A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes”. In the majority opinion, Judge Earl cited a case from federal insurance law, where a similar principle applied. But he also cited foreign materials, from the Civil Code of Lower Canada, the Code Napoléon, civil law in general, and the principles of Roman law. Judge Earl seemed to be agreeing with Justinian that “every law-governed community ... uses partly its own law, partly laws common to all mankind.” It uses not only its statute of wills but these general principles of universal law

85 115 N.Y. 506, 511-2, 22 N.E. 188, 189-90 (1889).

In Europe, the framework is a bit little different due the concept of community law and shared sovereignty<sup>86</sup> developed in the European Union during the last Century<sup>87 88 89</sup>. The European Union is not a federation, nor a simple organization for co-operation among governments taking

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86 The shared sovereignty European Union means that the member States delegate some of their decision-making powers to institutions created by the States. The European Union decision-making process involves three main institutions: the European Parliament (EP), which represents the EU's citizens and is directly elected by them; the Council of the European Union, which represents the member States; and the European Commission, which seeks to uphold the interests of the Union as a whole. The Parliament does not have legislative initiative, it is the European Commission that has a monopoly over legislative initiative but it is the Parliament and Council that request the legislation to the Commission. Although, the co-decision procedure is the most common, and means that both the Council and Parliament must give their assent. Once it is approved and signed by both chambers it becomes law. The Commission's duty is to ensure it is implemented by the States and taking to the European Court of Justice (see below) if they fail to comply. Two other institutions have a vital part to play: the European Court of Justice (see below) and the European Court of Auditors. European Court of Auditors checks the financing of the Union's activities, ensuring that taxpayer's funds from the budget of the European Union have been correctly spent. It provides an audit report for each financial year to the Council and Parliament and gives opinions and proposals on financial legislation and anti-fraud actions. The powers, responsibilities and rules of procedures of these institutions are laid down in the Treaties.

87 The European Union process dates back to the end of World War II (1939-1945). The Second War shows the necessity of integration among European States to guarantee peace. Thus, on September 19th 1946 the former British Prime Minister Winston Churchill pronounced a celebrated speech at Zurich University (Switzerland) that was considered the first step towards European integration in the postwar period, calling for a United States of Europe and the creation of a Council of Europe. On May 5th 1949 the Council of Europe was founded by the Treaty of London, aiming the unity among its members to reinforce the integration process. On May 9th 1950, the French Foreign Minister Robert Schuman made the first step in the process of the European Community foundation proposing a common market in coal and steel resources. Then, on April 18th 1951 the Treaty of Paris established the European Coal and Steel Community (ECSC) among six founding countries (Belgium, The Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands). On March 25th 1957 the Treaty of Rome was signed establishing the European Atomic Energy Community (EAEC) and the European Economic Community (EEC). In 1986 the Single European Act (SEA) revised the Treaty of Rome leading to the creation of a Single Market within the Europe Union. Thus, on February 7th 1992, the European Union was created by Treaty of Maastricht, signed by the members of the European Community. The Treaty of Amsterdam on 1997 amends the provisions of the Treaty of Maastricht and the European Coal and Steel Community Treaty (which expired in 2002), dealing with themes such as security and immigration. The Treaty lay down new principles and responsibilities in the field of the common foreign and security policy. The Treaty of Nice was signed on 2001 amending the Maastricht Treaty and the Treaty of Rome. The Treaty reformed the institutional structure of the European Union, providing new rules on closer co-operation and provisions to deal with the financial consequences of the expiry of the European Coal and Steel Community (ECSC). Finally, on December 13th 2007 the Treaty of Lisbon was signed (entered into force on December 1th 2009). It amended the Maastricht Treaty and the Treaty of Rome aiming at a more powerful European Parliament and consolidating legal personality for the European Union.

88 SAND, Peter H. *The Role of International Organizations in the Evolution of Environmental Law*. Unitar, Geneva, 1997. p. 2-3.

89 In fact it's true that over the centuries International Law has been implemented not only by sovereign States but also by global or regional organizations, and that since 1949 these International Organizations had their legal status recognized as Intergovernmental Organizations by the advisory opinion of the International Court of Justice on the question of Reparation for Injuries Suffered in the



in consideration that the States remain independent Sovereign Nations, but they share their sovereignty. Consequently, the European Union plays a distinctive role in this framework, highlighting its power to adopt legally binding texts in a quasi-federal structure<sup>90 91 92</sup>. Nevertheless, the European Court of Justice (ECJ), as exposed before in *Van Gend en Loos* (1963) and in *Costa v ENEL* (1964), decided that the European Community legal order limit States sovereign<sup>93 94 95</sup>. Similarly, the European Court of Human Rights (ECHR)<sup>96</sup> in *Al-Adsani v. United Kingdom*<sup>97</sup> and in *Soering v. United Kingdom*<sup>98</sup> decided that the prohibition of torture and the death penalty are international jus cogens and a superior norm to domestic legal systems.

Thus, the point is that local precedents must be developed in a coherent way, following previous domestic and international sources and precedents<sup>99 100 101</sup> in a rational and well-informed dialog among Courts,

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service of the United Nations. See REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS in <http://www.icj-cij.org/docket/files/4/1837.pdf>, (30 July 2010).

90 EUROPA - The EU at a glance - The History of the European Union, [http://europa.eu/abc/history/index\\_en.htm](http://europa.eu/abc/history/index_en.htm), (30 July 2010).

91 RAMÍREZ-ESCUADERO, Daniel Sarmiento. Un paso más en la constitucionalización del tercer pilar en co-autoría con Leonor Moral Soriano. *Cuadernos de Derecho Local*, núm. 3, 2003.

92 RAMÍREZ-ESCUADERO, Daniel Sarmiento. O sistema normativo da União Européia e sua incorporação às ordens jurídicas dos estados-membros. In: AMBOS, Kai; PEREIRA, Ana Cristina Paulo (orgs.). *Mercosul e União Européia: perspectivas da integração regional*. Rio de Janeiro: Lumen Juris, 2006. p. 53-90.

93 EUR-Lex - 61962J0026 - EN, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:HTML>, (30 July 2010).

94 RAMÍREZ-ESCUADERO, Daniel Sarmiento. *Responsabilidad de Los Tribunales Nacionales Y Derecho Comunitario*. La responsabilidad de los Estados miembros por infracción del Derecho comunitario en vía judicial, a partir de la sentencia Köbler (C-224/01) del Tribunal de Justicia. *Revista del Poder Judicial*, núm. 70, 2004.

95 EU Facts: European Union Law, <http://www.civitas.org.uk/eufacts/OS/OS6.htm>, (30 July 2010).

96 The European Court of Human Rights (ECHR) has its jurisdiction in cases involving the European Convention on Human Rights (ECHR).

97 UNHCR | Refworld | *Al-Adsani v. The United Kingdom*, [http://www.unhcr.org/refworld/country,,EC\\_HR,,KWT,4562d8cf2,3fe6c7b54,0.html](http://www.unhcr.org/refworld/country,,EC_HR,,KWT,4562d8cf2,3fe6c7b54,0.html), (30 July 2011).

98 UNHCR | Refworld | *Soering v. The United Kingdom*, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6fec>, (30 July 2011).

99 DWORKIN, Ronald. *Hard Cases*, in *TAKING RIGHTS SERIOUSLY*, p. 113.

100 DWORKIN, Ronald. *O Império do Direito*. Tradução de Jefferson Luiz Camargo. São Paulo: Martins Fontes, 2003. p. 254.

101 DWORKIN, Ronald. *Freedom's Law. The moral reading of the American constitution*. Cambridge: Harvard University Press, 1996. p. 17.

accepting that any society must honor the basic human rights<sup>102 103</sup> to a balance environment. Particularly, in the Belo Monte case, the obligations to make environmental and social impact studies with it side duties are aware not just in the Constitution of the Federative Republic of Brazil<sup>104</sup>, but also in many international instruments.

For example, the Rio Declaration on Environment and Development<sup>105</sup> declares that “Principle 10. Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” and that “Principle 17: Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

Similarly, the World Charter for Nature<sup>106</sup> recognizes that “11. Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used, In particular: (c) Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects;”

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102 RAWLS, John. *O liberalismo Político*. 2. ed. São Paulo: Ática, 2000.

103 RAWLS, John. *Justiça e Democracia*. São Paulo: Martins Fontes, 2000.

104 The Federal Constitution of Brazil stresses the duty of the state and the society with the environment preservation from the present and next generation (article 225), reinforcing also the need of cooperation among the States to the humankind progress (article 4º, IX).

105 Rio Declaration - Rio Declaration on Environment and Development - United Nations Environment Programme (UNEP), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>, (27 July 2010).

106 WORLD CHARTER FOR NATURE, [www.unep.org/law/.../UNEPEnv-LawGuide&PrincN05.pdf](http://www.unep.org/law/.../UNEPEnv-LawGuide&PrincN05.pdf), (20 September 2010).

The Preamble to Chapter 23 of Agenda 21<sup>107</sup> endorses that “23.2. One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.”

Thus, different from the IACHR and beside the importance of the biological diversity in the Xingu River, the Supreme Court of Brazil did not give a step further in the defense of the environment and the indigenous communities authorizing the implementation of “Belo Monte Dan”. The Supreme Court of Brazil decision forgot that the international duties are not just to ensure the environmental impact assessment and the public consultation. It’s necessary at least keep informing the affected communities and provide the possibilities to make comments or objections on the proposed activity and for the transmittal of these comments or objections to the competent authority. Moreover, the impact on nature must be minimized and must promote national arrangements for emergency responses and joint contingency plans, including also restoration and compensation for damage to biological diversity, seeking also the nature preservation and the unquestionable right of an ecological balance essential to a healthy quality of the mankind.

## **6 CONCLUSION**

Currently, with the complexity of modern society the understanding of the Environment in a dialog with the sovereignty, based on the main treaties, international conventions and agreements are essential for the protection of human life on Planet Earth. Similarly, it is necessary for States to implement policies and strategies to protect the environment, to achieve sustainable development for the benefit of present and future generations.

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107 DSD::Resources-Publications-CorePublications, [http://www.un.org/esa/dsd/agenda21/res\\_agenda21\\_23.shtml](http://www.un.org/esa/dsd/agenda21/res_agenda21_23.shtml), (20 September 2010).

As a result that environment injures affects the ecosystems around the globe, the State Sovereignty Principle must be reviewed by International Law. Furthermore, States should cooperate with the spirit of global solidarity to preserve, protect and restore the health and integrity of the global ecosystem, providing protection from the global environment, which means the limitation of the Principle of State Sovereignty.

With this concept the notion of sovereignty and jurisdiction has been rewritten, stressing the idea that the domestic jurisdiction must be legitimately exercised bearing in mind the recognition of an international justice by the global cooperation with the goal of a new and equitable global partnership among States.

Thus, the Supreme Court of Brazil, besides its strong paper in the defense of the environment, forgot the necessity to observe an international dialog with other international institutions and transnational sources to preserve a good balance in the global scope.

Consequently, the Brazilian Supreme Court decision in Belo Monte Dan was not done on basis of mechanisms of institutional cooperation with IACHR in a dynamic and deliberative dialogue, fundamental for international order stability. Thus, this framework is a standard to be followed by the international community, especially the Supreme Court of Brazil, in the theoretical construction that the sovereignty must be exercised in balance with international obligations, structured on the unquestionable right of the ecological preservation and good stewardship of the environment.

## 7 ABBREVIATIONS

CBD	Convention on Biological Diversity
EIA	Environmental Impact Assessment
EIR	Environmental Impact Report
EJC	European Court of Justice
FUNAI	National Indian Foundation
IAA	Integrated Environmental Assessment
IACHR	Inter-American Commission on Human Rights
IADC	Inter-American Democratic Charter
IBAMA	Brazilian Environmental Agency
OAS	Organization of American States
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
UNEP	United Nations Environment Programme

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