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## Culture Clashes: Indigenous Populations and Globalization—The Case of Belo Monte

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Berta Esperanza Hernández-Truyol

### I. INTRODUCTION

This work utilizes the example of a current concern—the construction of the Belo Monte dam in Brazil—to show the potentially devastating impact on Indigenous populations of globalization or *mondialisation*. The dam's construction will be financed mostly with public funds and will be built by a consortium of public and private actors.<sup>1</sup> Belo Monte will be Brazil's second largest dam and the third largest in the world.<sup>2</sup> As such, the project's allure to the State is the potential to develop a major source of much-needed “green” energy. Such a source of energy is welcome in a large, populous country that is seeking the best way to achieve economic development for the well-being of its inhabitants.<sup>3</sup>

On the other hand, “[t]he construction of the hydroelectric dam in Belo Monte would directly affect the indigenous peoples located in the Xingu river basin.”<sup>4</sup> Moreover, the construction of the Belo Monte dam would not

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<sup>1</sup> Ken Rapoza, *The Tug of War over Brazil's Belo Monte Dam*, INT'L RIVERS (Jan. 26, 2011), <http://www.internationalrivers.org/resources/the-tug-of-war-over-brazil-s-belo-monte-dam-2745>.

<sup>2</sup> *Brazil Judge Halts Work on Belo Monte Amazon Dam*, BBC (Sept. 28, 2011), <http://www.bbc.co.uk/news/world-latin-america-15102520>.

<sup>3</sup> Rapoza, *supra* note 1.

<sup>4</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, U.N. Doc. A/HRC/15/37/Add.1 (Sept. 15, 2010) (by James Anaya), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf>. The effect would reach “the following communities: Kaiapo, Xavante, Juruna, Kaiabi, Suia, Kamaiura, Kuikuro, Ikpeng, Panara, Nafukua, Tapayuna, Yawalapiti, Waura, Mehinaku and Trumai (in total, some 13,000 persons).” *Id.* at ¶49(a).

only affect Indigenous communities, but also affect non-Indigenous Riverine peoples: persons who are not Indigenous but live by the river and depend on the river for their livelihood. The project would displace many of these inhabitants, cause permanent drought in parts of the region resulting in the loss of animal and plant life (including some species), and flood other surrounding communities. Beyond creating physical displacement, the erection of the dam would also deprive nearby inhabitants of their livelihood by removing food and water sources, eliminating the river as a means of transportation, and possibly causing catastrophic environmental damage.<sup>5</sup>

The Belo Monte dam is an example of how Indigenous persons are affected by globalization, a phenomenon that, since the latter part of the 20<sup>th</sup> century, has dramatically transformed internationalism. Globalization—a powerful and dynamic force—is understood primarily as an economic phenomenon that includes the international movement of commodities, money, and information. Because of globalization’s impact on persons—workers, children, families, communities to name a few—it is appropriate to extend the concept to include the movement of people too: both within nations and across nations, as well as the infrastructures that allow, generate, and govern those movements.<sup>6</sup>

In the current cycle of globalization, technology has revolutionized the underlying human interactions.<sup>7</sup> Formerly remote and inaccessible locations are now cyberspace neighbors, reachable by the click of a mouse. Although at one time overnight mail was a huge advance, today it takes mere seconds

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<sup>5</sup> *Id.* at ¶ 49(b).

<sup>6</sup> Berta Esperanza Hernández-Truyol, *Human Rights, Globalization and Culture—Centering Personhood in International Narrative*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 353 (Berta Esperanza Hernández-Truyol ed., 2002).

<sup>7</sup> Other cycles of globalization can be deemed to have existed. For one, the discovery/conquest moves that resulted in colonialism can be seen as an early form of globalization. Before that, the design of ships that facilitated commerce also can be viewed as a form of globalization.

to communicate with someone on the other side of the globe. Complex and time-consuming planning (including translations) to exchange information between distant locales is reduced to typing on a keyboard.

These new circumstances result in increased knowledge about, but not necessarily acceptance or understanding of or respect for, cultures, customs, and religions not long ago deemed obscure. The virtual proximity of peoples and vast information available about different cultures has failed to translate into an understanding or embracing of differences. Rather, the global exposure rendered possible by globalization (perhaps unintentionally) has inflamed religious, national, ethnic, and racial hatreds and strife—as well as sex and gender subordination and marginalization.

Moreover, not everyone shares the anticipated economic and consequent social benefits of globalization. Although coexistent with claimed economic progress, social advancement has stagnated. Currently, the world is experiencing the stubborn persistence of poverty, disease, hunger, illiteracy, disempowerment, and war. Indigenous communities are some of the vulnerable groups that often experience the deleterious impacts of globalization, a modern-day form of colonization with its attendant land grabs, assimilationist moves, and cultural wipe. The article *Kofi Annan's Astonishing Facts*<sup>8</sup> starkly reveals the disparate levels of human existence and provides a glimpse into the impact of globalization on personhood. The richest fifth of the world's population consumes 86 percent of all goods and services, while the poorest fifth consume just 1.3 percent; the three richest people in the world have assets that exceed the combined gross domestic product of the 48 least developed countries; and the world's 225 richest individuals have a combined wealth equal to the annual income of the poorest 47 percent of the world's population. In the United States, people

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<sup>8</sup> Barbara Crossette, *Kofi Annan's Astonishing Facts*, N.Y. TIMES, Sept. 27, 1998, available at [http://www.nytimes.com/learning/general/featured\\_articles/980928monday.html](http://www.nytimes.com/learning/general/featured_articles/980928monday.html).

spend two billion (USD) more per year (eight billion total) on cosmetics than the estimated total needed to provide a basic education for everyone in the world.<sup>9</sup> *Estadounidenses* and Europeans together spend 17 billion a year on pet food—four billion more than the estimated annual additional total needed to provide basic health and nutrition for everyone in the world.<sup>10</sup> Of the 4.4 billion people in developing countries, nearly three-fifths lack access to safe sewers, a third have no access to clean water,<sup>11</sup> “a quarter do not have adequate housing, and a fifth have no access to modern health services of any kind.”<sup>12</sup>

More recently, in 2007 while the richest 20 percent of the world’s people enjoyed approximately 83 percent of the global income, the poorest 20 percent claimed only one percent, with the poorest 40 percent having increased its share by less than a single percent between 1990 and 2007.<sup>13</sup> That year, the richest one percent of the global population had the same income as the poorest 56 percent.<sup>14</sup>

Many in the global community—racial and ethnic minorities and women (particularly when they are also, as the figures confirm, racial and ethnic minorities) in first world states, most people in third world states, and

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; See also Release, UNICEF & World Health Org., *Millennium Development Goal Drinking Water Target Met, Sanitation Target Still Lagging Far Behind*, WORLD HEALTH ORGANIZATION (Mar. 6, 2012), [www.who.int/mediacentre/news/releases/2012/drinking\\_water\\_20120306/en/](http://www.who.int/mediacentre/news/releases/2012/drinking_water_20120306/en/) (announcement by the World Bank that the Millennium Development Goal (MDG) goal regarding clean water was met years in advance). “The world has met the Millennium Development Goal (MDG) target of having the proportion of people without sustainable access to safe drinking water, well in advance of the MDG 2015 deadline.” *Id.*

<sup>12</sup> Crosette, *supra* note 8.

<sup>13</sup> Isabel Ortiz & Matthew Cummins, *Global Inequality: Beyond the Bottom Billion: A Rapid Review of Income Distribution in 141 Countries VII* (UNICEF, Working Paper 2011), 13, available at [http://www.unicef.org/socialpolicy/files/Global\\_Inequality.pdf](http://www.unicef.org/socialpolicy/files/Global_Inequality.pdf)

<sup>14</sup> *Id.* at 20.

Indigenous people in all states—North and South, East and West alike—live in conditions that are far from those minimally necessary for human thriving.<sup>15</sup> Many are experiencing a widespread pattern of inequality in access to education, health, nutrition, and participation in the political and economic sphere.

While international integration presents considerable opportunities for developing countries, it also contains significant risks, as demonstrated by the case of the Belo Monte. Associated with international integration are considerations about increasing inequality, shifting power, and cultural uniformity. These consequences of globalization explain much of the basis of the burgeoning backlash against it, represented by massive protests by environmental, labor, and development advocates during the various World Trade Organization (“WTO”) ministerial meetings. Perhaps the September 2003 collapse of negotiations at the biennial meeting of WTO trade ministers in Cancun marked the beginning of a paradigm shift that embraces the linkage of trade and human rights, recognizing that the values elevated by the trade economics of two centuries ago cannot accurately reflect today’s values.

There is a structural explanation for the disjointedness of current reality. For economic and social development to occur, it is necessary to focus on both economic advancement and social justice.<sup>16</sup> The disciplines that largely regulate both these spheres are the trade regime and the human rights system. Significantly and explicatory of the disconnect between the ability to progress in both of these ambits is that these key, interrelated fields have existed in “splendid isolation.”<sup>17</sup>

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<sup>15</sup> However, there have been huge advances in the attainment of the Millennium Development Goals. See *UNICEF & World Health Org., supra* note 11.

<sup>16</sup> See generally, BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, *JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS* 8 (2009).

<sup>17</sup> *Id.* at 7. The phrase “splendid isolation” was first used by Robert Howse and Dean Makau Mutua. See Robert Howse & Dean Makau Mutua, *Protecting Human Rights in a*

International trade, and its promise of economic well-being, is central to the push for globalization. For trade's promise of fiscal prosperity to benefit not just the elite but also everyone around the world, a necessary first step is the recognition that the fields of trade and human rights operate interdependently. Indeed, trade and human rights are interconnected pieces of the larger construct of international law.

As this article will show, there exists a significant schism between the world of Indigenous persons and the process of globalization. To resolve conflicts at the intersection of these divergent worlds, it is imperative to develop a paradigm that recognizes the trade and human rights discourses are intertwined parts of the larger legal and human universe. Such a framework will enable a bridge between the spheres that will benefit humanity so the world will be not only a richer place, but also a better place.

Exemplary of the fissure between the worlds of trade and human rights are trade's "mantra" and the trade critics' version. On the one hand, trade's mantra provides that "a rising tide lifts all ships." This reflects trade's goal to make the world a better place by making it a more prosperous place. On the other hand, consider the trade critics' version: "a rising tide lifts all ships, sinks all rafts and drowns the people treading water." This version does not contradict the trade premise *in toto*. Rather, the critics' version acknowledges that trade can and does indeed help some: those who are similarly situated—those in navigable, sea-worthy ships. But it also recognizes that those at the margins—outsiders or vulnerable populations—are in dramatically different positions and may not be in locations where they are able to benefit from the economic prosperity promised by the trade regime. Those in rafts and those treading water face a very different

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*Global Economy: Challenges for the World Trade Organization*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1999/2000 51–82 (Hugo Stokke & Arne Tostensen eds., 2001).

outcome. The Indigenous people affected by the Belo Monte dam are one such vulnerable population.

In view of these varied and disparate impacts of globalization, how can peoples and cultures be protected to take advantage of globalization's positive outcomes while avoiding its deleterious consequences? I suggest we can use the tool of human rights norms<sup>18</sup> as an instrument of justice—to move away from a purely economic notion of globalization and to adopt a version that puts a human face on it, that focuses on human flourishing and promotes the thriving of individuals and members of larger communities. The human rights ideal provides a framework from which to craft dialogues that link the protection of humanity to the desire for prosperity.

After a brief introduction, this work proceeds in four parts. The first part, *The Social Framework: Indigenous Peoples, Water and Dams*, presents pertinent information on dams and Indigenous peoples and explores the tensions effected by the Belo Monte project. The second part, *General Legal Framework*, presents the international legal context for the protection of human rights generally and Indigenous persons in particular. This part also presents the pertinent Brazilian constitutional provisions and relevant international case law for the protection of Indigenous peoples. The third part, *The Case of Belo Monte*, details the long trajectory of the project and the legal processes involved, including the environmental licensing, constitutional considerations, and legal proceedings and reports—both in Brazil and in international bodies.

The fourth part, *Critical Analysis*, further examines the future ramifications and implications of Belo Monte. The article concludes with the idea that

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<sup>18</sup> In this context, a globalization for the personhood project, rather than a purely economic/trade meaning, should be viewed as a process by which movements of capital, information, and persons within and across national borders serve to influence local norms, traditions, processes of learning, the exchange of information, and goods and lifestyles.



human rights ideals and trade must work together to put a human face on globalization.

## II. THE SOCIAL FRAMEWORK: INDIGENOUS PEOPLES, WATER, AND DAMS

Indigenous peoples have a dramatically different relationship with the world around them than non-Indigenous persons from the West/North have—whether it is the relationship with other human beings, animals, plants, the land, rivers and seas, the sky, or, indeed, any aspect of nature.<sup>19</sup> Pictures of Indigenous women breastfeeding a baby monkey or other orphaned baby animals confirm the depth of that reality.<sup>20</sup> And it is important to keep this relational concept of a seamless connection between human and animal, human and land, human and rivers, etc., in mind as one analyzes the Belo Monte project. This Indigenous world view is diametrically divergent from many in Western/Northern societies who often eschew breastfeeding human babies notwithstanding the proven health

<sup>19</sup> Special Rapporteur on Indigenous People, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities*, Econ. & Soc. Council, U.N. Doc. E/CN.4/Sub.2/2001/21, ¶13 (June 11, 2001) (by Erica-Irene A. Daes) (explaining, among other things, Indigenous peoples' unique cultural and religious relationship with land), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/Sub.2/2001/21&Lang=E>.

<sup>20</sup> See, e.g. *Rare Amazon Tribe Nearly Extinct from Deforestation*, TREEHUGGER, (Feb. 16, 2011) [www.treehugger.com/natural-sciences/rare-amazon-tribe-nearly-extinct-from-deforestation.html](http://www.treehugger.com/natural-sciences/rare-amazon-tribe-nearly-extinct-from-deforestation.html) (depicting a woman from Awa-Guajá tribe breastfeeding a young, orphaned monkey); Wesley Coll, *Their Very Breast: Brazilian Indians Share Milk with Their Babies & Animals*, COLLTALES (Jan. 18, 2011), [www.colltales.com/2011/01/18/their-very-breast/](http://www.colltales.com/2011/01/18/their-very-breast/) (woman breastfeeding small animal—an agoutis—along with breastfeeding her child); *Awa-Guajá: The Indigenous Women Who Breastfeed Animals*, BRAZ. WEIRD NEWS (JAN. 22, 2011), [www.brazilweirdnews.blogspot.com/2011/01/awa-guaja-indigenous-women-who.html](http://www.brazilweirdnews.blogspot.com/2011/01/awa-guaja-indigenous-women-who.html).

<sup>21</sup> Lindsey Tanner, *Breast-Feeding Study on Benefits, Cost: 900 Lives and Billions of Dollars Could Be Saved Annually*, HUFFINGTON POST (Apr. 5, 2010, 2:53 PM), [http://www.huffingtonpost.com/2010/04/05/breastfeeding-study-on-be\\_n\\_525180.html](http://www.huffingtonpost.com/2010/04/05/breastfeeding-study-on-be_n_525180.html); *Breastfeeding*, WORLD HEALTH ORG., <http://www.who.int/topics/breastfeeding/en/> (last visited Nov. 16, 2012).

benefits,<sup>21</sup> and treat the earth and its natural and animal resources solely as a commodity to be exploited for financial gain. It is instructive to keep these basic world view differences foremost in mind as we travel the globalization journey that brings Indigenous peoples into direct conflict with trade-inspired projects.

Generally speaking, Indigenous persons are those who inhabit a country or area within a country at the time of conquest, colonization, or establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions.<sup>22</sup>

Because of the impact on Indigenous peoples by the building of dams generally and by Belo Monte specifically, it is important to consider, briefly, the location of such peoples and groups in society and in the international field.

Indigenous or First Peoples were present around the world before Western explorations led to massive conquests and colonization. Present day descendants of these original inhabitants continue to live with their own unique traditions, customs, laws, and cultural values even if they now do so within the new structure of the state.

Dating back to colonization, First Peoples suffered at the hand of the *conquistadores*.<sup>23</sup> They endured killings, seizing of their ancestral lands, exploitation of their natural resources and cultural knowledges, raping of women, decimation of their cultures, and diseases and illnesses unknown prior to the arrival of the conquerors. Sometimes mass suicide was the only form they had left to show resistance to the uninvited aggressors.<sup>24</sup>

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<sup>22</sup> HERNÁNDEZ-TRUYOL & POWELL, *supra* note 16, at 206–07. *But see infra* p. 10 and note 27 (noting that there is not a single definition of Indigenous persons).

<sup>23</sup> Berta Esperanza Hernández-Truyol, *The Latindia and Mestizajes: Of Cultures, Conquests, and LatCritical Feminism*, 3 J. GENDER RACE & JUST. 63 (1999).

<sup>24</sup> *Id.*

Perhaps to deploy the pretext of a civilizing mission, the peaceful, resourceful, wise native peoples were often designated as savage, uneducated heathens.<sup>25</sup> The *conquistadores* resolved that they needed to humanize, enlighten, educate, and Christianize the natives—make them more European and assimilate them into civilization. We can view this move as a first stage of globalization, although it is not the common paradigm, as I show below.

Colonization privileged the colonizer over the Native—the colonized; the conqueror over the conquered; the “civilized” over the savage.<sup>26</sup> For example, Spanish colonizers had detailed structures of racial and class hierarchies that accompanied the systems of social, economic, and educational segregation and stratification that they imposed upon those they conquered. In places such as Mexico, Spaniards prohibited persons with a “taint of Indian, Arabic, or Jewish blood” from holding public office and from entering schools and universities.<sup>27</sup>

Because of the history of colonization and subordination, Indigenous peoples and other vulnerable populations such as children, racial minorities, and women, have received particular attention in the international legal sphere.<sup>28</sup> Beyond this history, Indigenous populations around the world still suffer discrimination and exclusion, as will be shown in this article with respect to their participation in the process for approval of the Belo Monte construction. Moreover, they often find huge roadblocks to maintaining their distinct way of life—their culture, language, traditions, social and political institutions, even their relationship to the land, as the Belo Monte

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<sup>25</sup> For instance, the US Supreme Court referred to Indians as “fierce savages” in *Johnson v. M’Intosh*, 21 U.S. 543, 590 (1823).

<sup>26</sup> Hernández-Truyol, *supra* note 23, at 79.

<sup>27</sup> David E. Hayes-Bautista, *Identifying “Hispanic” Populations: The Influence of Research Methodology upon Public Policy*, 70 AM. J. PUB. HEALTH 353, 354 (1980).

<sup>28</sup> These documents will be discussed in the *General Legal Framework* section of this work. See *infra* notes 53-55, 60, 63, 67, 69-75.

example will show. Consequently, it is significant that international entities have intervened, especially in the last 25 years, to meet the needs and desires of Indigenous populations.<sup>29</sup> Such interventions are particularly important because of the impact of globalization on Indigenous populations.

There is, appropriately, no universal definition of the term Indigenous peoples, as the designation embraces a diverse group. One early study articulated a working definition as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>30</sup>

In light of this working definition, and the reality that there is no universal definition of the term, various official documents have sought to provide a general description of the characteristics of Indigenous peoples. The common elements include (a) self-identification as belonging to the group; (b) relationship and attachment to ancestral lands and natural resources; (c) distinct social, economic, political, and cultural institutions; (d) descent

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<sup>29</sup> U.N. Dev. Grp., *Guidelines on Indigenous Peoples' Issues* 7, U.N. Doc. HR/P/PT/16 (2008) [hereinafter Guidelines], available at <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>. Some of the positive actions "include the adoption of ILO Convention No. 169 on Indigenous and Tribal Peoples in 1989, the 2005 Heads of State World Summit, in which governments committed to making progress in advancing the human rights of Indigenous peoples, the proclamation by the General Assembly of the Second International Decade of the World's Indigenous People (2005 - 2014) and, most recently, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly in September 2007." *Id.* at 7 (internal citations omitted).

<sup>30</sup> *Id.* at 9 (citing U.N. Subcomm. on the Prevention of Discrimination and the Protection of Minorities, U.N. Comm'n on Human Rights, *Study of The Problem of Discrimination Against Indigenous Populations*, ¶379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986)).

from pre-colonial/pre-conquest occupants of land; (e) experience of conquest or colonization; and (f) a separate language.<sup>31</sup>

The evolving jurisprudential and philosophical schools at the time of conquest reveal a tension between thinking humanely about Indigenous populations and the perception that they were “less than” the “civilized” Western Europeans.<sup>32</sup> The rise of the modern nation-state created a further problem with respect to the integrity and sovereignty of Native peoples whose organizational systems were not like the European structures upon which the new statist model was constituted.<sup>33</sup> The Western model differentiates between civilized (stationary) groupings and nomadic ones. The United States’ early court decisions as to Indian land rights, for example, reflect the tension created by a narrow definition of state.<sup>34</sup>

Descendants of these Indigenous populations still live the repercussions from the colonization and conquest of 500 years ago. While the trials faced

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<sup>31</sup> *Id.* at 9; WORLD COMM’N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 219 (2000), available at [http://www.internationalrivers.org/files/attached-files/world\\_commission\\_on\\_dams\\_final\\_report.pdf](http://www.internationalrivers.org/files/attached-files/world_commission_on_dams_final_report.pdf); International Labour Organization, Indigenous and Tribal Peoples Convention, June 27, 1989, I.L.O. No. 169, art. 1, available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::N O::P12100\\_ILO\\_CODE:C169;G.A.Res.61/295,U.N.GAOR,61stSess.,Supp.No.68,U.N.Doc.A/61/L.67\(Sep.13,2007\),availableathttp://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::N O::P12100_ILO_CODE:C169;G.A.Res.61/295,U.N.GAOR,61stSess.,Supp.No.68,U.N.Doc.A/61/L.67(Sep.13,2007),availableathttp://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf); WORLD BANK GROUP, DRAFT OPERATIONAL POLICIES: OPERATIONAL POLICY 4.10, (Mar. 23, 2001), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (see ¶4).

<sup>32</sup> Hernández-Truyol, *supra* note 23, at 88.

<sup>33</sup> See, e.g. Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VAND. J. TRANSNAT’L L. 785, 802 (2012) (discussing problems of natural resources allocation between states and Indigenous populations that pre-date the state) (“Debates today focus on how to account for state permanent sovereignty over natural resources with respect to the claims and rights of vulnerable and historically marginalized communities, such as Indigenous peoples—particularly because these communities are often situated at the site of state natural resource development projects”).

<sup>34</sup> See *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

by other minority groups around the world to obtain their freedom and equality are well known, the story of the injustices done to those who are of Indigenous origin, particularly of *mestizas/os*, have gone largely untold.<sup>35</sup>

One trade-inspired project that is the subject of much controversy because of the impact on Indigenous populations is the construction of the Belo Monte Dam. Water plays a particularly significant role in the history of humankind. Throughout time, rivers have been critical to sustaining life by providing not only water, but also food and a means of reaching distant places. Because of rivers' central roles in human existence, they play a central role in religions and cultures. Indeed, riverbanks are a geography in which evidence of ancient cultures can be found.<sup>36</sup> Still today, Indigenous groups' special relationship to rivers continues.

On the opposite end of the spectrum from the river as holy and a source of water, sustenance, and navigation, is the river as a commodity to be exploited and a resource that can provide water to dry regions and produce hydroelectric power through the use of dams. Thus, dams are projects that have both strong supporters and strident opponents.

In the 20th century there was a dam-building boom, with large dams viewed as a positive and important tool for managing water resources. Dams have been utilized to bring water where it is lacking, protect against flooding, generate energy, and enable food production.<sup>37</sup> The World Commission on Dams ("WCD") has estimated that "some 30–40 [percent]

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<sup>35</sup> See Hernández-Truyol, *supra* note 23.

<sup>36</sup> PATRICK MCCULLY, *SILENCED RIVERS: THE ECOLOGY AND POLITICS OF LARGE DAMS* (2001).

<sup>37</sup> WORLD COMM'N ON DAMS, *supra* note 31, at xxix; Christine A. Klein, *On Dams and Democracy*, 78 OR. L. REV. 641, 647 (1999) ("Undoubtedly, dams have brought many critical benefits to society. They have made the desert bloom, providing irrigation water to the most arid portions of the nation. They have tamed mighty rivers, shielding communities from rushing floodwaters and storing spring torrents to provide a dependable year-round supply of water. They have generated inexpensive electricity, bringing warmth and light to impoverished, rural areas" (internal citations omitted)).

of irrigated land worldwide now relies on dams and that dams generate 19 [percent] of world electricity.”<sup>38</sup> Because of the perceived direct positive benefits and effects of dams, as well as additional consequential benefits—““food security considerations, local employment and skills development, rural electrification and the expansion of physical and social infrastructure such as roads and schools”—the wisdom of investments of over two trillion USD for the building of dams had been deemed justified.<sup>39</sup>

Thus, the positive aspects of dams, notwithstanding their enormous start-up costs, are their ability to irrigate land, provide inexpensive electricity to individuals and businesses, and even make remote places accessible by navigation. Consequently, if one considers only the economic aspect of dam creation, they are beneficial structures.<sup>40</sup>

However, there are also myriad negative narratives about dams. Indeed, after the passage of time from the dam-construction frenzy days, some of the deleterious impacts of dams became more evident and growing opposition to their erection developed.<sup>41</sup> Today, even if one considers both the failure and the cost of upkeep of dams utilizing a cost-benefit analysis, their beneficial nature can be increasingly interrogated.

From a human rights perspective, there are significant and noteworthy drawbacks to dams. One is that, while the advantages dams do offer inure to the benefit of the population at large, the downsides of dams come at the expense of local and Indigenous populations whose relationship with and their dependence upon the river for food, navigation, water, and religious practices is decimated. Further, dam construction has resulted in the

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<sup>38</sup> WORLD COMM’N ON DAMS, *supra* note 31, at xxix.

<sup>39</sup> *Id.*

<sup>40</sup> Michael P. Lawrence, *Damming Rivers, Damning Cultures*, 30 AM. INDIAN L. REV. 247, 249 (2005).

<sup>41</sup> Klein, *supra* note 37, at 648–53.

displacement of 40 to 80 million people. Significantly, 60 percent of the world's rivers have been affected by dams and diversions in some way.<sup>42</sup>

The WCD made some noteworthy findings about the negative aspects of large dams. For instance, irrigation dams do not perform as anticipated, and thus these dams "have been less profitable in economic terms than expected."<sup>43</sup> Hydropower dams, on the other hand, generally perform as expected, but some are still plagued by underperformance. Of note, the WCD found that the impact on "rivers, watersheds and aquatic ecosystems . . . are more negative than positive and, in many cases, have led to irreversible loss of species and ecosystems."<sup>44</sup> Because of the inadequate assessment of the negative impacts of dams, no plans were generated to "implement adequate mitigation, resettlement and development programmes for the displaced, and the failure to account for the consequences of large dams for downstream livelihoods have led to the impoverishment and suffering of millions, giving rise to growing opposition to dams by affected communities worldwide."<sup>45</sup>

Noteworthy in connection with the Belo Monte analysis, dams have had a negative effect on the life, life-style, and livelihood of Indigenous peoples. Dam building has devastated these populations' and societies' "access to natural resources and cultural heritage."<sup>46</sup> The flooding caused by dams has devastated sacred ancestral sites and burial grounds, has changed the ecosystem affecting fish and other water life, and thus has disrupted cultures without providing the populations so affected many, if any, of the benefits the dams provide. Indeed, seldom is there compensation for the losses.<sup>47</sup>

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<sup>42</sup> WORLD COMM'N ON DAMS, *supra* note 31, at xxx.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at xxxi.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 16.

<sup>47</sup> *Id.* at 17.



The WCD has confirmed both the positive and negative impact of dams, reporting that “[d]ams have made an important and significant contribution to human development and the benefits derived from them have been considerable.”<sup>48</sup> However, the report also concluded that “[l]arge dams generally have a range of extensive impacts on rivers, watersheds and aquatic ecosystems – these impacts are more negative than positive and, in many cases, have led to irreversible loss of species and ecosystems.”<sup>49</sup>

Beyond the general negative impacts of dams, there is specific damage that has been identified vis-à-vis Indigenous cultures due to loss of cultural heritage, including “[a]rcheological resources,” agricultural “landscapes,” and “cultural practices and resources of current populations.”<sup>50</sup> In addition to these losses, millions of people have had to resettle because of dam construction, including Indigenous persons who have been removed from their ancestral lands.

Thus, at present, it is accepted that dams, considering their benefits as well as their deleterious aspects—taking into account not only economic, but also social and environmental costs—are not desirable structures. Indeed, even in the context of cost-benefit analyses that ignore the social costs, it is questionable that dams are an efficient source of benefits when their damages and structural failures are taken into account. Consequently, it appears that building dams is a bad idea, and Belo Monte is no exception as it will indubitably have deleterious local effects, cause displacements, disrupt the ecosystem, and produce some benefits for only a few.

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<sup>48</sup> *Id.* at 310.

<sup>49</sup> *Id.* at xxxi; See INTERAMERICAN ASS’N FOR ENVTL. DEF., LARGE DAMS IN THE AMERICAS: IS THE CURE WORSE THAN THE DISEASE? (2010), available at [http://www.aida-americas.org/sites/default/files/DAMSREPORTExecsum\\_0.pdf](http://www.aida-americas.org/sites/default/files/DAMSREPORTExecsum_0.pdf).

Negative impacts of dams include: “[d]ecreases in the water quality and sanitation upstream and downstream from the artificial modification of river systems,” “[d]egradation of aquatic ecosystems,” “[l]oss of biodiversity,” “[c]limate change,” and “[s]eismic impacts.” *Id.* at 2.

<sup>50</sup> WORLD COMM’N ON DAMS, *supra* note 31, at 285.

### III. GENERAL LEGAL FRAMEWORK

The Social Framework presented above provides context to the legal framework within which we need to analyze globalization activities and Indigenous rights generally and specifically with respect to Belo Monte. Article 38 of the Statute of the International Court of Justice lists the sources of international law.<sup>51</sup> Treaties,<sup>52</sup> the first listed source, are the most frequently used tool for international law making.

Treaties are pertinent for two major reasons. First, trade is central to globalization and the WTO's constitutive document, the General Agreement of Tariffs and Trade ("GATT"),<sup>53</sup> which sets out trade rules, is a treaty. In addition, the numerous agreements aimed at protecting human rights and, as such, the rights of Indigenous peoples, are treaties. As treaties, these documents are part of the governing body of international law and constitute a significant part of the relevant legal framework.

Numerous human rights principles are relevant to the trade intersection because they define those conditions of humanity necessary for human thriving. The two foundational human rights agreements are the International Covenant on Civil and Political Rights ("ICCPR")<sup>54</sup> and the

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<sup>51</sup> Statute of the International Court of Justice art. 38, Apr. 18, 1946, 33 U.N.T.S. 993 available at <http://prawo.uni.wroc.pl/pliki/15958> (the sources of international law are (a) international conventions; (b) custom; (c) general principles of law recognized by civilized nations; and (d) judicial decisions and teachings of highly qualified publicists).

<sup>52</sup> See generally, Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331, available at <http://www.worldtradelaw.net/misc/viennaconvention.pdf> (The Vienna Convention on the Law of Treaties is viewed as a codification of customary norms of international law, and Article 2(1)(a) defines the four requirements for an instrument to be a treaty: (1) it must be an "international agreement," (2) "concluded between [s]tates," (3) "in written form," and (4) "governed by international law").

<sup>53</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT 1994] (available in WORLD TRADE ORG., THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999)).

<sup>54</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 ILM 368. [hereinafter ICCPR].

International Covenant on Economic, Social and Cultural Rights (“Economic Covenant”).<sup>55</sup> Article 2 of both of these covenants promotes equality and prohibits discrimination on the bases of race, color, sex, language, religion, political or other opinion, national or social origin, property, or birth or other status. In Article 1, they both provide for the right of self-determination, a concept that includes the right freely to pursue economic, social, and cultural development. The ICCPR also protects certain civil and political rights including the rights to life, to participate in government, and to culture,<sup>56</sup> while the Economic Covenant protects economic rights such as the rights to health, work, social security, and to form trade unions.<sup>57</sup> Critics of the trade regime rightfully view some of these protected rights, particularly the rights to non-discrimination, to work, and to a healthy environment—a point that is critical in Belo Monte—as being trampled by trade and globalization.<sup>58</sup>

There are other provisions in these foundational documents that are of particular importance in analyzing the rights of Indigenous persons. Article

<sup>55</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 368. [hereinafter ICESCR].

<sup>56</sup> ICCPR, *supra* note 54, at art. 6(1), 25(a), 27. Other rights include the right to life, which includes a general disapprobation of the death penalty and an outright prohibition against imposing the death penalty on pregnant women and minors; the prohibition against torture or cruel and inhumane degrading punishment; the prohibition against slavery and servitude; the right to liberty and security of the person; the inherent dignity of the human person; the right to liberty of movement, including freedom to choose residence; the right to personhood; the right to privacy; the right to freedom of thought, conscience and religion; the right to hold opinions without interference and freedom of expression; the right to peaceful assembly; the prohibition of war propaganda; the right to freedom of association; the right to protection of the family; the right of children not to be discriminated on any category as earlier listed; the right to take part in the conduct of public affairs of the state; and the right to protection of culture, as well as numerous provisions for protection of procedural rights. *Id.* at art. 6–27.

<sup>57</sup> ICESCR, *supra* note 55, at art. 6(1), 8(1)(a), 9, 12. Other rights include those to the protection of the family; adequate standard of living including adequate food, clothing, and housing; education; and to take part of cultural life. *Id.* at art. 10(1), 11, 13, 15(1)(a).

<sup>58</sup> *See, e.g.*, HERNÁNDEZ-TRUYOL & POWELL, *supra* note 16, at 201–04 (noting the gendered nature of trade).

27 of the ICCPR recognizes the human right of minorities to preserve their linguistic and religious cultures “in community with others.” However, each document as a whole is pertinent to the Belo Monte analysis because the Declaration on the Rights of Indigenous Peoples expressly provides that Indigenous peoples are entitled to the full panoply of human rights and fundamental freedoms.<sup>59</sup>

Other specific documents are relevant to the rights of Indigenous peoples. In fact, international legal conventions have elaborated on both what persons are entitled to claim as an Indigenous identification and also what those persons’ rights are. In this regard it is noteworthy that when the United Nations (“UN”) first dealt with Indigenous issues, it was in the context of labor rights that resulted in the relegation of the topic to the International Labor Organization (“ILO”). Two ILO conventions are particularly relevant to the theme. The first attempt to engage the Indigenous population issue was in the 1957 ILO Convention 107.<sup>60</sup> That Convention did not provide a definition of “Indigenous.” However, it assumed that Indigenous and tribal peoples’ societies were transitory societies that would disappear with the passage of time, and, thus, took the approach that integration of these populations into modern society was the appropriate route to solve the Indigenous populations’ problems.<sup>61</sup> The Convention had an assimilationist/integrationist orientation and incorporated assumptions of the desirability of modernity and of western tropes, legal systems, and social institutions over the conditions, practices,

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<sup>59</sup> G.A. Res 61/295, *supra* note 31, at art. 1, 46.

<sup>60</sup> International Labour Organization, Indigenous and Tribal Populations Convention, June 26, 1957, I.L.O. No. 107, *available at* [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312252:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312252:NO).

<sup>61</sup> *Id.* at art. 1(a), 2(c) (Article 1(a) provides that the persons to whom the 1957 ILO Convention No. 107 applies “are at a less advanced stage than the stage reached by the other sections of the national community;” Article 2(c) provides that the government is responsible for “creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these population”).

and social and legal structures that existed in pre-conquest, pre-colonial societies.

Almost three decades after Convention 107, Paragraph 379 of the UN Document “Study of the Problem of Discrimination Against Indigenous Populations” provided the first working definition of Indigenous persons.<sup>62</sup> Three years after that study, the 1989 ILO Convention 169<sup>63</sup> took a dramatically different approach from Convention 107. This divergence from Convention 107’s ideology reflected critical changes in the perceptions of Indigenous populations. Convention 169’s views aligned with the findings of the UN study and the *United Nations Development Group Guidelines on Indigenous Peoples’ Issues*.

ILO Convention 169 recognizes that, rather than transitory and underdeveloped, Indigenous populations are permanent societies. The Convention values cultural and ethnic diversity and mandates governments to respect and protect Indigenous identities and cultures. This Convention urges governments to honor the collective relationships that are a central part of the identity of these groups. Article 1 of Convention 169 provided a definition of who is Indigenous:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the

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<sup>62</sup> Special Rapporteur on the Prevention of Discrimination and the Protection of Minorities, *The Study of The Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, ¶ 379 (Mar. 1, 1987) (by José Martínez Cobo).

<sup>63</sup> International Labour Organization, *Indigenous and Tribal Peoples Convention, 1989* (No. 169), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>64</sup>

Article 2 also states that “[s]elf-identification as Indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”<sup>65</sup> Significant for this work, Convention 169 at Article 3.1 provides that “[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.”<sup>66</sup>

Almost 20 years after Convention 169, on September 13, 2007, the UN adopted the Declaration on the Rights of Indigenous Peoples (“The Declaration”) by General Assembly Resolution 61/295.<sup>67</sup> The Declaration embraces the non-assimilationist approach.<sup>68</sup> While the United States, Canada, Australia, and New Zealand, countries with large Indigenous populations, first voted against its adoption, they subsequently reversed their positions.

The Declaration, containing 41 articles, is comprehensive and provides for protecting rights often trammled by colonization. For example, the Declaration provides that Indigenous peoples have a right to human rights

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<sup>64</sup> *Id.* at art. 1.

<sup>65</sup> *Id.* at art. 2.

<sup>66</sup> *Id.* at art. 3(a).

<sup>67</sup> G.A. Res 61/295, *supra* note 31.

<sup>68</sup> *Id.* Drafted with rights-holders (Indigenous persons), the Declaration on the Rights of Indigenous Peoples embodies numerous rights significant to Indigenous populations such as the right to self-determination; to own and control lands, territories and resources; to be equal and be different (preamble); to culture (art. 11); to religion/spirituality (art. 12); to histories, languages and traditions (art. 13); to education (art. 14); to dignity and diversity of cultures, traditions and histories (art. 15); to protection of elders, women, youth and persons with disabilities (art. 22); to development (art. 23); to traditional medicine and health practices (art. 24); to heritage, traditional knowledge, tradition and cultural expression. *Id.* The declaration recognizes historical inequities, acknowledges that rights derive from political, economic, social and cultural structures (art. 5). *Id.* In addition, rights are recognized as collective and individual. *Id.* In Spanish it is called the “*Declaracion de las Naciones Unidas sobre los derechos de los pueblos indigenas.*”

and fundamental freedoms (art. 1); equality and non-discrimination (art. 2); and self-determination including autonomy and self-government (art. 3). Article 4 identifies the right of Indigenous peoples to maintain their distinct political, social, and cultural characteristics while retaining the right to participate fully, if they choose to, in the political legal life of the state. Moreover, they are entitled to have distinct political, legal, economic, social, and cultural institutions (art. 5); collectively and individually not to be subjected to “ethnocide and cultural genocide” (art.7); to be free from forced assimilation and destruction of their culture (art. 8); and not to be forcibly removed from their land or territory (art. 10). The Declaration further provides that Indigenous peoples have a right to their distinct cultural traditions and customs (art 11), as well as to their spiritual and religious traditions (art. 12); to revitalize their histories, languages, oral traditions, and philosophies (art. 13); and to their cultural heritage (art. 31). Article 30 confirms the right to self-determination and requires free and informed consent in the “development of their lands, territory and other resources.”

To be sure, many of the Declaration’s articles are significant with respect to the conflicts that exist concerning the Belo Monte project—both procedural rights and substantive rights are at issue. Specifically, Articles 7, 8, 10, and 30 are directly pertinent to the conflict between the government of Brazil and the Indigenous peoples affected by the building of the Belo Monte Dam.

Other specialized human rights agreements that are aimed at protecting vulnerable populations also are available to protect the rights of Indigenous persons. The Convention on the Elimination of all Forms of Discrimination against Women,<sup>69</sup> the Convention on the Elimination of all Forms of Racial

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<sup>69</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 2, 7, Sept. 3, 1981, 1249 U.N.T.S. 14. [hereinafter CEDAW] CEDAW prohibits sex discrimination in both the public and private sphere, recognizing that women’s

Discrimination,<sup>70</sup> and the Convention on the Rights of the Child<sup>71</sup> are relevant to the trade and human rights intersection as are treaties prohibiting torture,<sup>72</sup> genocide,<sup>73</sup> slavery,<sup>74</sup> and trafficking.<sup>75</sup> All these treaties form part of the international rule of law.

Internal Brazilian law is also significant in establishing the legal framework. There are two very significant provisions of the constitution of Brazil that are directly applicable to the construction of the Belo Monte dam. First, Article 176 of the Federal Constitution requires that the impact on Indigenous land of any project be considered.<sup>76</sup> In addition, Article 231(3) sets out particular requirements concerning the use of water that is on “Indian land” for purposes of development.<sup>77</sup> Specifically, the paragraph provides that “[h]ydric resources, including energetic potentials, may only be exploited ... with the authorization of the National Congress, after

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subordination—social, cultural, political, and economic—is the result of not only public, but also private acts. *Id.* It also denounces cultural tropes that result in the subordination of women and, particularly significantly, prohibits discrimination in labor. *Id.*

<sup>70</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1), Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). This treaty prohibits racial discrimination, defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.” *Id.* at art. 1.

<sup>71</sup> G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) (providing protections on myriad grounds, including protection from work (art. 32) and entitlement to an education (art. 28)).

<sup>72</sup> G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/46 (June 26, 1987).

<sup>73</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

<sup>74</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3.

<sup>75</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), Nov. 15, 2000, T.I.A.S. No. 13127.

<sup>76</sup> CONSTITUIÇÃO FEDERAL art. 176 (Braz.), available at <http://pdba.georgetown.edu/constitutions/brazil/english96.html>. Article 176(1) notes that the “law shall establish specific conditions,” when such resource exploitive activities “are to be conducted . . . on Indian lands.” *Id.* at art. 176(1).

<sup>77</sup> *Id.* at art. 231(3).



hearing the communities involved.”<sup>78</sup> Moreover, Article 231 recognizes both cultural and territorial rights of Indigenous people based on traditional heritage. It establishes a right to permanently live on traditional territories, including the exclusive use of the natural resources necessary for securing their cultural integrity and welfare.<sup>79</sup> Indeed, significant with respect to Belo Monte, Paragraph 3 of Article 231 requires that the Government receive consent from the communities involved before constructing dams.<sup>80</sup>

Lastly, beyond the international conventions and declarations and Brazilian constitutional provisions that articulate Indigenous peoples’ rights in land, international and regional judicial decisions also shed light on such rights. A review of some of the key cases assists in the analysis of the tensions that exist with respect to the Belo Monte project.

A significant issue in cases concerning Indigenous land is whether Indigenous peoples have ownership of land or only access to and use of land. One regional decision provides that Indigenous peoples have ownership because mere access would not provide any assurance that the state or other actors would refrain from violating land rights.<sup>81</sup>

In the 2001 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*<sup>82</sup> case, the Inter-American Court of Human Rights ruled that the state violated the Indigenous peoples’ rights under the American Convention when it granted a license to a foreign corporation for logging on Indigenous territory. The court confirmed the unique relationship of Indigenous peoples to their land and noted that “their cultures, their spiritual life, their integrity

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at art. 231(1)-(6).

<sup>80</sup> *Id.* at art. 231(3).

<sup>81</sup> Centre for Minority Rights Dev. (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr. Comm’n on Hum. & Peoples’ Rts., Communication No. 276/2003, ¶ 204 (Feb. 2, 2010), available at <http://www.minorityrights.org/download.php?id=748>.

<sup>82</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001) (reprinted in 19 ARIZ. J. INT’L & COMP. L. 395 (2002)).

and their economic survival” depend on their ability to live free on their lands.<sup>83</sup>

Similarly, in 2007 in *Saramaka Peoples v. Suriname*,<sup>84</sup> the Inter-American Court concluded that the state ran afoul of the human rights of the Indigenous peoples when it granted foreign corporations mining and logging licenses to operate on Indigenous peoples’ land. It noted, as in *Awás Tingni*, the Indigenous peoples’ unique relationship to land and its meaning.<sup>85</sup> Thus, it held restrictions on Indigenous use of their land and resources could result in “a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.”<sup>86</sup>

The Inter-American Commission (“the Commission”) has also addressed the issue of the relationship of Indigenous people to their lands. In fact, in the application it submitted to the Inter-American Court in the *Kichwa Peoples of the Sarayaku Cmty. v. Ecuador*<sup>87</sup> case, the Commission emphasized the significant relation of land to the Indigenous culture and to their lives. In a 1985 case against Brazil, *Yanomami Peoples v. Brazil*,<sup>88</sup> the Commission starkly noted the tension between Indigenous claims to natural resources and state development projects. The Commission recognized that the development of Indigenous peoples’ lands could result in the loss of Indigenous cultural and identitarian resources. The Commission thus concluded that the state, here Brazil, violated the human rights of Indigenous peoples when it permitted a plan to develop ores and other

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<sup>83</sup> *Id.*

<sup>84</sup> *Saramaka Peoples v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 214 (Nov. 28, 2007).

<sup>85</sup> *Id.* at ¶ 122.

<sup>86</sup> *Id.* at ¶ 128.

<sup>87</sup> *Kichwa Peoples of the Sarayaku Community. v. Ecuador*, Application, Case 12.465, Inter-Am. Comm’n H.R., ¶ 1 (2010). The case considered whether the state violated Indigenous rights by permitting an oil company to explore in Indigenous land. *See generally id.*

<sup>88</sup> *Yanomami Peoples v. Brazil*, Case 7615, Inter-Am. Comm’n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc.10 rev. 1, ¶7 (1985).

metals in the Amazon that displaced the community from its ancestral lands.<sup>89</sup> Indeed, the Commission concluded that Indigenous “lives, security, health and cultural integrity” were compromised by the development project.<sup>90</sup>

Similarly, in *Maya Indigenous Community v. Belize*,<sup>91</sup> the Commission, basing its decision on the American Declaration, held Belize violated the human rights of Indigenous peoples when it granted concessions on Indigenous territories to corporations which would engage in logging and oil explorations. In reaching its decision, the Commission recognized the special and different relationship to land of Indigenous peoples and the importance of land to “their physical, cultural and spiritual” life.<sup>92</sup>

Thus, the Inter-American Court and the Inter-American Commission alike have recognized Indigenous rights in and to their lands based on the human rights to culture, life, health, and livelihood. The Brazilian constitution itself comports with these standards as it provides safeguards to Indigenous peoples and their lands. Thus, the legal framework provided presents the structure within which to analyze any possible violations of the Indigenous peoples’ human rights affected by intrusions into their lands.

With this international and domestic legal background providing the appropriate context, this article turns to the case of Belo Monte, a situation that is currently developing. It elucidates and underscores the tensions between trade and human rights in the Indigenous populations—tensions based on dramatically different world-views and values.

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<sup>89</sup> Additionally, the Inter-American Court concluded in *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006) that Paraguay violated the rights of Indigenous peoples by displacing the community from its traditional lands.

<sup>90</sup> *Yanomami Peoples*, Case 7615, at ¶10(d).

<sup>91</sup> *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Ct. H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 ¶¶ 192–96 (2004).

<sup>92</sup> *Id.* at ¶ 155.

#### IV. THE CASE OF BELO MONTE

This part of the article will detail the events surrounding the Belo Monte dam project. First, it provides specific information on the development and realities of the undertaking. Next, the article describes the legal course of action that has formed part of the development and progression of the construction, including the environmental licensing process, legal proceedings, and reports on the impact of the dam.

##### *A. The Realities of Belo Monte*

The Belo Monte dam will be the third largest in the world, following the Three Gorges Dam in China and the Itaipu Dam, which is a joint project of Brazil and Paraguay.<sup>93</sup> The state of Brazil claims the dam will provide a “green” source of energy and that building it is fundamental to the state’s continued economic growth and human development.<sup>94</sup> As might be anticipated, opponents cite not only to the general weaknesses of dams as sources of energy discussed above, but also to the specific human rights concerns that arise in the case of Belo Monte.<sup>95</sup>

Certainly, Brazil’s need to search for sources of energy is completely understandable. Brazil’s electricity demand is challenging. In 2001, it experienced an energy shortage that resulted in energy rationing from June 2001 until March 2002; 80 percent of Brazil’s energy comes from hydroelectric dams.<sup>96</sup> To meet its ever-increasing energy needs, Brazil plans to build 50 more dams in the next four years, one of which is Belo Monte.

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<sup>93</sup> Sara Diamond & Christian Poirier, *Brazil’s Native Peoples and the Belo Monte Dam: A Case Study*, 43 NACLA REP. ON THE AMERICAS 25, 25 (2010); Anthony Hall & Sue Branford, *Development, Dams and Dilma: The Saga of Belo Monte* 38 CRITICAL SOC. 851 (2012), available at <http://crs.sagepub.com/content/early/2012/07/03/0896920512440712>.

<sup>94</sup> Diamond & Poirier, *supra* note 93, at 26; Hall & Branford, *supra* note 93, at 853–5.

<sup>95</sup> See, e.g., *Belo Monte Hydroelectric Dam*, AIDA: Environmental Law for the Americas (Jul. 29, 2014, 8:36 AM), <http://www.aida-americas.org/en/project/belomonte>.

<sup>96</sup> Hall & Branford, *supra* note 93, at 853-4.

The Belo Monte dam project dates to 1975.<sup>97</sup> At that time, the anticipated massive environmental and social consequences resulted in widespread protests against the proposed project. The social movement efforts were successful in eliciting international condemnation of the project based upon not only its environmental harm, but also its impacts on the neighboring communities of Indigenous and Riverine people, including displacement and loss of livelihoods.<sup>98</sup>

Although much reduced in its present configuration, Belo Monte is still a massive project. The current version of the Belo Monte dam project is anticipated to cost 17 billion (USD) to build.<sup>99</sup> And, even in its modified form, it will wreak havoc with the environment, as well as with Indigenous (and Riverine) peoples' lives and livelihoods.

Notwithstanding major changes to the original plan and Brazil's positive claims regarding the project as a green source of energy crucial to its plan of development,<sup>100</sup> enormous concerns still loom, including concerns beyond the impact on Indigenous populations and the environment. The project is soundly criticized because it will be an inefficient project in terms of both finance and energy. As currently envisioned, Belo Monte will only work to one third of its capacity and, thus, will not do much to meet the energy demands of the country. Moreover, at the huge price tag, with financing at the expense of the Brazilian taxpayer,<sup>101</sup> it is not expected to reduce the current energy rate.<sup>102</sup>

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<sup>97</sup> Rapoza, *supra* note 1.

<sup>98</sup> Diamond & Poirier, *supra* note 93, at 29.

<sup>99</sup> Mariano Castillo, *Judge Halts Construction on Brazil's Belo Monte Dam*, CNN, <http://www.cnn.com/2012/08/15/world/americas/brazil-belo-monte-dam/index.html> (last updated Aug. 15, 2012).

<sup>100</sup> Diamond & Poirier, *supra* note 93, at 26.

<sup>101</sup> Tica Minami & Christian Poirier, *A Drop of Water: Beginning of an Energy Revolution in Brazil?*, AMAZON WATCH (Dec. 15, 2011), <http://amazonwatch.org/news/2011/1215-a-drop-of-water-beginning-of-an-energy-revolution-in-brazil> (noting that "80% of Belo Monte's enormous price tag will come

Beyond those fiscal<sup>103</sup> and energy efficiency issues, however, exist the major human rights concerns about the project: human displacement, environmental disasters, and cultural demise. First, the Belo Monte project will severely affect the Indigenous tribes who live there, as well as Indigenous and non-Indigenous persons in the vicinity.<sup>104</sup> These human rights problems are grounded in the reality that building the dam will displace anywhere between 25,000 to 40,000 Indigenous and Riverine persons.<sup>105</sup>

Next, the dam will wreak havoc on the environment. The dam will divert more than 80 percent of the Xingu—a word that means “house of God” to Indigenous communities—River’s flow, a flow of 2,736 km (1,700 mi.) through the heart of Brazil.<sup>106</sup> The diversion will result in flooding 668 km<sup>2</sup> (over 230 sq. mi.) and drying out 100 km (62 mi.) of the Big Bend, leaving that area in permanent drought conditions and causing substantial losses of aquatic and terrestrial animal life, as well as disruption to the lives of Indigenous peoples.<sup>107</sup> In fact, as a matter of ecological reality, the Xingu River is part of a complex ecological system with much biodiversity of

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from the pocket of the Brazilian taxpayer, while society has yet to be involved in this debate”).

<sup>102</sup> *Id.* (noting the “dam’s deplorable energy inefficiency, its unacceptable impacts on the environment and on Indigenous and local communities, and its astronomical cost which could surpass US \$17 billion”).

<sup>103</sup> Hall & Branford, *supra* note 93, at 853–54 (“Suspensions about the economic robustness of the project were aroused by the fact that major construction companies . . . decided to pull out of the project auction”).

<sup>104</sup> Diamond & Poirier, *supra* note 93, at 26–27; Hall & Branford, *supra* note 93, at 854–55.

<sup>105</sup> Diamond & Poirier *supra* note 93, at 27; INT’L RIVERS, BELO MONTE: MASSIVE DAM PROJECT STRIKES AT THE HEART OF THE AMAZON \*2 (2012), *available at* [http://www.internationalrivers.org/files/attached-files/Belo\\_Monte\\_FactSheet\\_May2012.pdf](http://www.internationalrivers.org/files/attached-files/Belo_Monte_FactSheet_May2012.pdf).

<sup>106</sup> Diamond & Poirier, *supra* note 93, at 25; AMAZON WATCH, *THE Xingu River and Its People*, <http://amazonwatch.org/work/xingu-river-and-its-people> (last visited Nov. 17, 2012).

<sup>107</sup> Diamond & Poirier, *supra* note 93, at 26; INT’L RIVERS, *supra* note 105, at 2.

plants and animals.<sup>108</sup> As a matter of cultural reality, the Big Bend “is considered to be the cradle of Xingu’s Indigenous civilizations.”<sup>109</sup> Indeed, in 1961, the Brazilian government acknowledged and accepted the deep cultural meaning of the Xingu to Indigenous peoples by recognizing the area as the Indigenous territory.<sup>110</sup>

Of course, the human displacement issue and the environmental degradation concerns intersect when one considers the effect of the dam on the environment and the consequences that flow to the people who live in the area. The dam threatens to devastate the surrounding rainforest ecosystem<sup>111</sup> with the consequences of destroying Indigenous and non-Indigenous, rural and urban persons’ lifestyles and livelihoods with little or no compensation.<sup>112</sup> For example, the inhabitants will lose their agricultural land, as more land will be moved to build the dam than was taken out to build the Panama Canal.<sup>113</sup> They also will lose fish from the river, the main source of animal protein in their diets.<sup>114</sup> The dam will cause constant flooding in the surrounding areas and neighborhoods, as well as the disruption in the water flow in the River resulting in the death of the animal life upon which the Indigenous rely for survival.<sup>115</sup>

In addition, the river is an essential part of the Indigenous peoples’ and other local persons’ transportation. That means of travel will be disrupted

<sup>108</sup> INT’L RIVERS, *supra* note 105, at 2–4.

<sup>109</sup> Minami & Poirier, *supra* note 101.

<sup>110</sup> Seth Garfield, *A Nationalist Environment: Indians, Nature, and the Construction of the Xingu National Park in Brazil*, 41 LUSO-BRAZILIAN REV. 139, 141 (2004) (“Between 1937 and 1961, twenty national parks and biological reserves were established in Brazil . . . [and] Xingu Park was unique in its inclusion of native peoples”).

<sup>111</sup> INT’L RIVERS, *supra* note 105, at 4.

<sup>112</sup> *Id.* at 2; Hall & Branford, *supra* note 93, at 854–55.

<sup>113</sup> INT’L RIVERS, *supra* note 105, at 2; AMAZON WATCH, *Brazil’s Belo Monte Dam*, <http://amazonwatch.org/work/belo-monte-dam> (last visited Nov. 17, 2012).

<sup>114</sup> Minami & Poirier, *supra* note 101.

<sup>115</sup> INT’L RIVERS, *supra* note 105, at 4.

by the construction of the dam.<sup>116</sup> There will be forced relocation of not only the Indigenous communities who live in the Xingu River Basin, but also 20,000 families who live in Altamira the city nearby.<sup>117</sup> In the end, 19,000 people, by official estimates, and twice that by independent estimates, will be forced to relocate. Homes will be completely or partially flooded in Altamira. The construction of Belo Monte will cause flooding, drought, and the loss of water and food. These side effects will have a lasting impact on the health of those in the area as the collection of stagnant water may well result in the proliferation of malaria and other water-borne diseases.<sup>118</sup>

In addition to the detrimental impact on surrounding areas, the construction of the Belo Monte dam threatens to harm the atmosphere and environment. The construction of Belo Monte may result in the release of significant quantities of methane, a potent greenhouse gas, into the atmosphere.<sup>119</sup> This will occur because the dam will flood parts of the Brazilian rainforest along the Xingu River and create a massive reservoir with rotting plant matter along its bottom. As it rots, the organic material will release the greenhouse gas, creating a “methane factory.”<sup>120</sup> The construction of the dam, as opposed to the dam’s operation, also poses problems. For one, the labor force needed to build the complex would increase migration to the area in question.<sup>121</sup> As of September 2012,

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<sup>116</sup> See Diamond & Poirier, *supra* note 93, at 27.

<sup>117</sup> Minami & Poirier, *supra* note 101.

<sup>118</sup> INT’L RIVERS, *supra* note 105, at 3; Hall & Branford, *supra* note 93, at 854–55.

<sup>119</sup> INT’L RIVERS, *supra* note 105, at 4; Hall & Branford, *supra* note 93, at 855.

<sup>120</sup> Prof. Philip Fearnside, *Belo Monte Dam: A Spearhead for Brazil’s Dam Building Attack on Amazonia?*, GLOBAL WATER FORUM (Mar. 19, 2012), <http://www.globalwaterforum.org/2012/03/19/belo-monte-dam-a-spearhead-for-brazils-dam-building-attack-on-amazonia/>.

<sup>121</sup> Hall & Branford, *supra* note 93, at 855.



approximately 13,000 workers had already migrated to the area,<sup>122</sup> with an expected total of 100,000 workers migrating to the area.<sup>123</sup> A recent article provides that already, even with the limited construction work that has taken place, the project has done damage as it has harmed water quality and devastated fisheries.<sup>124</sup> The Indigenous and Riverine people of Belo Monte will suffer greater loss from the damage to their land than the environmental damage Northern and Western societies typically recognize.

It is important to recall at this point that Indigenous peoples have a very different world view than non-Indigenous persons from the North/West. Like the pictures depicting women breast feeding baby animals, the movement to protect the River relies upon the unique relationship of Indigenous peoples to the Xingu River as the heart of their land, their source of life, and their means of communication.<sup>125</sup>

The Indigenous peoples affected by the Belo Monte Dam feel very strongly about protecting their land and their way of life. One tribal chief's

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<sup>122</sup> Interview by Inter-American Dialogue's Latin American Energy Advisor with Cláudio Frischtak, President of Inter. B Consultoria Internacional de Negócios de Rio de Janeiro (Aug. 27-31, 2012), available at <https://repository.unm.edu/bitstream/handle/1928/21172/Will%20Brazil%27s%20Belo%20Monte%20dam%20get%20the%20green%20light.pdf?sequence=1> (commenter Cláudio Frischtak further notes direct and indirect impacts on the population: "[l]iving conditions worsen; prices go up as demand for housing, services and goods explode; prostitution and drug abuse become rampant.").

<sup>123</sup> INT'L RIVERS, *supra* note 105, at 3.

<sup>124</sup> *Indigenous Authorities Detain Belo Monte Dam Engineers*, DAMOCRACY (July 26, 2012), <http://damocracy.org/?p=1181>.

<sup>125</sup> See *From the Xingu Alive Forever Movement: A Letter of Denouncement and Indignation Against The Approval of the Belo Monte Hydroelectric Dam's Provisional License*, "Our lives are organized around this river, which has always been our source of life and at many times our only link to surrounding communities. It is the main path to our lands, our schools, our cemeteries and our sacred sites. The river is our gate to the rest of the world." AMAZON WATCH, (Feb. 4, 2010), <http://amazonwatch.org/news/2010/0204-from-the-xingu-alive-forever-movement-a-letter-of-denouncement-and-indignation-against-the-approval-of-the-belo-monte-hydroelectric-dams-provisional-license>.

condemnation of the project went viral. In the much viewed clip, Chief Raoni, speaking for the Indigenous peoples, stated:

We, the indigenous people of Xingu, do not want Belo Monte. We, the indigenous people of Xingu, are fighting for our people, our land but also for the future of the planet. . . . When the Portuguese arrived in Brazil, we Indians, were already there; many have died, many have lost their vast territories, most of their rights, many have lost part of their culture and others have totally disappeared. The forest is our grocery store, the river our market. We do not want the Xingu rivers to be invaded and that our villages and our children, who will be raised according to our customs, be in danger. . . . We have already warned the government that if the dam project went through, the war would be declared and he would be made accountable. . . . We fight for our people, our lands, our forests, our rivers, for our children and the glory of our ancestors. We are also fighting for the future of the planet because we know that these forests are not only beneficial to the indigenous people but to the Brazilian society and the world as well. . . . All life is interconnected.<sup>126</sup>

This declaration came after the Indigenous peoples of Xingu were largely excluded from the legal process that approved the dam's construction.

## *B. Belo Monte – Legal Processes*

### **1. Environmental Licensing**

Despite these environmental and social concerns, the Brazilian government granted the Belo Monte project an environmental license, the issuance of which was riddled with irregularities. The project's public participation procedures, which require public hearings, were procedurally deficient. First, the number of public hearings was insufficient—there were

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<sup>126</sup> Cacique Bet Kamati Kayapo et al., *Indian Chief Raoni and Representatives of Indigenous Peoples of Xingu (Brazil) Request International Support Against the Proposed Belo Monte Dam Project*, RAONI.COM (Mar. 6, 2010), <http://www.raoni.com/news-47.php>.

only four—and affected communities had inadequate access to information to permit their genuine participation in the proceedings.<sup>127</sup> Second, the location of the hearings, which were held with the presence of the heavily armed Brazilian police, was inaccessible for most affected communities.<sup>128</sup> Third, the hearings were not culturally appropriate, as no interpreter was provided for Indigenous groups who do not speak Portuguese. Moreover, the Environmental Impact Assessment (EIA) did not contain sufficient information about all of the project’s potential impacts, nor did it contain information about mitigation measures for guaranteeing the rights of affected communities.

An international panel of independent experts, who in 2009 analyzed the EIA, concluded that the project had both procedural and substantive problems. Procedurally, the panel of experts found that “processes at public hearings were forced and accelerated while the little information made available to the public was both misleading and incomplete.”<sup>129</sup> Moreover, the panel opined that the EIA did not provide enough analysis of the Belo Monte Dam’s effect on “sedimentation and the water table, [and] failed to include [information about the] consequence on aquatic life or the likelihood of deforestation on the larger affected area.”<sup>130</sup> The public was not informed of the possible deleterious impacts of the dam on the environment and on economic opportunities of the local populations. Fish stocks would be depleted, and other species unique to the Big Bend would become extinct because the area would get less water than any time in history.<sup>131</sup> The drying of Big Bend would prevent the Indigenous communities from traveling to Altamira to sell goods or purchase necessary

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<sup>127</sup> See Diamond & Poirier, *supra* note 93, at 27–28.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 28.

<sup>130</sup> *Id.*

<sup>131</sup> INT’L RIVERS, *supra* note 105, at 3.

amenities<sup>132</sup> The decline in water also would affect farmers, Indigenous and non-Indigenous alike, with a negative impact on agricultural production.<sup>133</sup>

Significantly, the impact assessment “blatantly omitted any analysis of the cultural, social, or economic impacts on communities downstream.”<sup>134</sup> Upstream communities would not have access to migratory fish, a central part of their diet.<sup>135</sup> The project would result in the creation of pockets of stagnant water that could result in rises in malaria and other diseases.<sup>136</sup> It is likely that the rainforests in the region would not survive the construction of the dam.<sup>137</sup>

Moreover, the independent analysts noted that the EIA had “quantitative inaccuracies and methodological inconsistencies, including overestimations of energy generation, underestimations of the size of the affected rural population, and severe negligence in the overall evaluation of health and environmental risks and water security.”<sup>138</sup> Finally, the study concluded that the construction of the dam would affect two additional Indigenous areas not included in the EIA and, as a result, these should be added to the list of affected populations.<sup>139</sup> Thus, the process by which the Belo Monte Dam was granted an environmental license denied the affected communities any meaningful opportunity to participate and precluded realistic evaluation of the advantages and disadvantages of the project.

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Diamond & Poirier, *supra* note 93, at 28.

<sup>135</sup> INT’L RIVERS, *supra* note 105, at 3.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Diamond & Poirier, *supra* note 93, at 28.

<sup>139</sup> *Id.*

## 2. Legal Proceedings and Reports

### *a) Brazil*

Currently there are approximately 13 lawsuits pending in Brazilian courts concerning the Belo Monte project. Some of the lawsuits, as well as the independent expert's report, show that the constitutional mandate of Article 176 was not followed. Moreover, on October 17, 2011, a court heard a 2006 lawsuit by the federal public minister of the state of Pará that challenged a law passed by Congress, Act 788/2005, which authorized the dam project to continue without prior consultation of the Indigenous peoples affected in violation of Article 231 of the Brazilian Constitution.<sup>140</sup>

In August 2012 in the latest court battle, a panel of judges from the Regional Federal Tribunal (TRF-1) in Brazil upheld the decision declaring the 2005 congressional authorization of the Belo Monte project to be illegal both under the Constitution of Brazil and under ILO Convention 169. The panel ruled that the requirements of the EIA had not been satisfied; moreover, constitutional and conventional requirements of consultation with the affected Indigenous peoples had not been met.<sup>141</sup> Noting that business interests cannot eclipse concern for the environment, the judge ordered construction stopped and imposed a daily fine of R\$500,000 (approximately \$250,000 USD) for non-compliance. However, on August 27, 2012, the chief justice of the Supreme Court overturned the construction stoppage.<sup>142</sup> The attorney general of Brazil requested the reversal claiming

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<sup>140</sup> João Miguel D. de A. Lima, *Brazil: Belo Monte Dam Case Comes to Court*, GLOBAL VOICES, (Oct. 21, 2012, 9:32 AM), <http://globalvoicesonline.org/2011/10/21/brazil-belo-monte-court/>.

<sup>141</sup> INT'L RIVERS ET AL., *Belo Monte Dam Suspended by Brazilian Appeals Court*, INT'L RIVERS, (Aug. 15, 2012), <http://www.internationalrivers.org/resources/belo-monte-dam-suspended-by-brazilian-appeals-court-7631>.

<sup>142</sup> *Backtrack on Stoppage at Belo Monte*, LATIN AMERICAN PRESS (Aug. 31, 2012), <http://www.lapress.org/articles.asp?art=6698>; *Supreme Court Judge Overturns Suspension of Belo Monte Dam: Brazilian Supreme Court Caves to Executive Pressure*, AMAZON WATCH & INT'L RIVERS, AMAZON WATCH (Aug. 29, 2012),

that the previous decision to stop construction was contrary to a 2007 Supreme Court decision<sup>143</sup> and that the project stoppage “would hurt public assets as well as the economy and energy policies in Brazil,” including the layoff of 14,000 workers.<sup>144</sup> Significantly, while the decision overturns the ruling that suspended construction of the dam, it does not alter the TRF-1 decision concerning the unconstitutionality of the process. It is anticipated that the federal public prosecutor will appeal the decision and have the case heard by the entire Supreme Court.<sup>145</sup>

The latest Supreme Court ruling has been broadly criticized. For one, although it took into account the economic interests of the laid-off workers, it was silent regarding the potential social, economic, and environmental harms of the project on Indigenous and Riverine populations.<sup>146</sup> Moreover, critics have questioned the *bona fides* of the decision as it was made following many ministerial visits while denying access to Indigenous populations. Indeed, one critic has utilized the decision as an indictment of the legal system, charging that the courts are subject to political and bureaucratic influence at the expense of human rights observance.<sup>147</sup> It is patent that there is an urgent need for Brazil to apply and follow the rule of

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<http://amazonwatch.org/news/2012/0829-supreme-court-judge-overturms-suspension-of-belo-monte-dam>.

<sup>143</sup> INT’L RIVERS: BANK TRACK, *Supreme Court Judge Overturms Suspension of Belo Monte Dam: Brazilian Supreme Court Caves to Executive Pressure* (Aug. 29, 2012), [http://www.banktrack.org/show/news/supreme\\_court\\_judge\\_overturms\\_suspension\\_of\\_belo\\_monte\\_dam](http://www.banktrack.org/show/news/supreme_court_judge_overturms_suspension_of_belo_monte_dam). The prior Supreme Court decision, however, did not, in fact, conflict with the TRF-1 judgment as the prior decision accepted that the Congressional authorization to build the dam was defective because of the failure to consult with the Indigenous people affected. *Id.* The remedy in that case was different than the TRF-1 imposed, mandating an EIA and consultation with Indigenous people before Congress could decide whether to move forward. *Id.*

<sup>144</sup> LATIN AMERICAN PRESS, *supra* note 142.

<sup>145</sup> INT’L RIVERS: BANK TRACK, *supra* note 143.

<sup>146</sup> *Id.*; LATIN AMERICAN PRESS, *supra* note 142.

<sup>147</sup> INT’L RIVERS: BANK TRACK, *supra* note 143. Brent Millikan, Amazon Program Director at International Rivers, noted that “[t]his case is emblematic of a seriously flawed legal system, where bureaucracy and political interventions allow for systematic violations of human rights and environmental law.” *Id.*

law by hearing and resolving the pending cases related to the Belo Monte construction.<sup>148</sup>

***b) Inter-American Commission on Human Rights***

Local courts, however, have not been the only site of legal challenges to the Belo Monte Dam. On November 11, 2010, international and Brazilian human rights organizations submitted a formal petition to the Inter-American Commission on Human Rights (IACHR), denouncing the grave and imminent violations of the rights of Indigenous and Riverine communities that will be affected by the construction of the Belo Monte Dam. The IACHR heard the case and, on April 1, 2011, issued precautionary measures protecting the rights of 12 Indigenous communities.<sup>149</sup> These measures ordered the suspension of the licensing process for the dam until Brazil meets certain conditions. First, Brazil was ordered to engage in consultation with the Indigenous persons impacted by the project as required by the American Convention on Human Rights “and the jurisprudence of the Inter-American system.”<sup>150</sup> Second, for the prior consultation process to be an informed one, the Indigenous communities needed to receive an EIA that is “accessible” in terms of length and availability in the appropriate Indigenous languages. Third, Brazil must take steps to protect the Indigenous communities that exist “in voluntary isolation” in the affected region and “the cultural integrity at those

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<sup>148</sup> Myriad infirmities also exist with respect to the structural and administrative framework that is supposed to protect the interests of Indigenous populations at the state level. However, that extensive discussion is beyond the purview of this article.

<sup>149</sup> Comunidades Indígenas da Bacia do Rio Xingu, Pará, Brasil, MC 382/10, Inter-Am. Comm’n H.R. (2011), *available at* <http://www.cidh.oas.org/medidas/2011.port.htm> [hereinafter Precautionary Measure] (referred to as PM 382/10 in English).

<sup>150</sup> *Id.* (noting that this requires “consultations that are free, prior, informed, in good faith and culturally appropriate, with the goal of reaching an agreement and in compliance with all other requirements set out above in relation to each of the affected indigenous communities, which are beneficiaries of these protective measures”).

communities.”<sup>151</sup> Lastly, Brazil must “[a]dopt vigorous and comprehensive measures to prevent the spread of diseases and epidemics among Indigenous communities to be benefited from these precautionary measures, as a result of the implementation of the Belo Monte hydroelectric project, as well as with regard to those illnesses caused by a massive population influx.”<sup>152</sup>

Brazil’s response to the Commission’s ruling was not warm. The government has refused to comply with the resolution. It denied any deleterious effects on the Indigenous peoples due to flooding and rejected the resolution as being “unjustifiable and rash.” Brazil recalled its ambassador to the Organization of American States (“OAS”) refused to disburse its annual contribution to the OAS – about six percent of OAS’s total budget (\$800,000) and refused to appear before the IACHR in a working group meeting.<sup>153</sup>

Later in the year, the IACHR reevaluated and modified the Precautionary Measure 382/10, based on additional information submitted by Brazil. The IACHR asked Brazil to adopt measures to protect the lives, health, and physical and cultural integrity of the Indigenous communities in voluntary isolation; to take steps to mitigate the impact of the dam; and to protect ancestral lands against intrusion, occupation, and exploitation by non-Indigenous persons.<sup>154</sup> The IACHR also concluded that the disagreement concerning the requisite prior consultation and informed consent with respect to the Belo Monte Dam project requires a decision on the merits of

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Mari Hayman, *Brazil Breaks Relations with Human Rights Commission over Belo Monte Dam*, LATIN AMERICA NEWS DISPATCH (May 3, 2011, 7:30 AM), <http://latindispatch.com/2011/05/03/brazil-breaks-relations-with-human-rights-commission-over-belo-monte-dam/>.

<sup>154</sup> Precautionary Measure, *supra* note 149.



the case, which is beyond the purview of a request for precautionary measures.

***c) International Labor Organization Report***

The International Labor Organization's ("ILO") 2012 Report of the Committee of Experts on the Application of Conventions and Recommendations<sup>155</sup> reviewed the Belo Monte Dam project pursuant to ILO Convention 169 and concluded that Brazil's process, although quite extensive, failed to satisfy the requirements of Articles 6, 7, and 15 of ILO Convention 169. Article 6 requires that the government consult with representative institutions, not merely individuals; that consultations be in good faith and appropriate to the circumstances; and that consultations be carried out in such a manner that they can influence outcomes and lead to consensus.<sup>156</sup> The Committee also found that "there [wa]s no evidence that [the government] enabled the Indigenous peoples to take part effectively in determining their priorities, in accordance with Article 7 of the Convention."<sup>157</sup> Finally, the Committee observed that Article 15 requires consultation in advance of approval of a project that is going to affect Indigenous peoples' lands, and that beyond the flooding of Indigenous land and the displacement of Indigenous and Riverine people, the Belo Monte Dam could affect "the navigability of rivers, flora and fauna and climate."<sup>158</sup>

Based on these findings, the Committee directed the government to do three things. First, it asked the government to consult with Indigenous peoples as required by Articles 6 and 15 "before the harmful effects of the

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<sup>155</sup> INT'L LABOUR OFFICE, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS: REPORT III PART 1A, 101st Sess. (2012), available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—relconf/documents/meetingdocument/wcms\\_174843.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_174843.pdf).

<sup>156</sup> *Id.* at 942.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

plant may have become irreversible.” Second, it urged the government, in consultation with the Indigenous peoples, to ascertain whether the affected peoples’ desires were “respected” and whether and to what extent the project will have a negative impact on their interests in order to ascertain “appropriate mitigation and compensation measures.” Third, the Committee requested it be kept informed with respect to the proceedings pending before the Federal Court in Pará.<sup>159</sup>

The Belo Monte case appears to fall squarely within the legal paradigm set out in the prior section of this work. The Belo Monte Dam construction is proceeding without the Indigenous peoples’ consent and without the requisite prior consultations. It already is having, and will continue to have, deleterious repercussions on health, life, livelihood, physical, cultural, economic, and spiritual life. The building of the dam will destroy Indigenous peoples’ food supplies and means of transportation. Moreover, it will cause huge displacements, not only of the Indigenous groups in the area, but also of the Riverine people. Not insignificantly, it will also cause severe environmental devastation not only to the land itself, but also to the plant and animal life of the area.

## V. CRITICAL ANALYSIS

So what are the countervailing market values to eradicating a people, expelling them from their lands, destroying their livelihood, and hugely affecting the ecosystem in which they live? What is the expectation for this dam and the people of Brazil? We know that Brazil’s energy demands will swell in the next few years. Will this dam supply a solution for the energy needs?

Significantly, the energy generated by the dam will mostly provide power for mining operations in Rio de Janeiro and Sao Paulo operated by Vale, a

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<sup>159</sup> *Id.*

Brazilian multinational corporation that is the largest iron ore mining company in the world and also part owner (9.2 percent) of the consortium that is building the Belo Monte Dam).<sup>160</sup> The dam-generated energy will allow Vale to dedicate about 400 MW of the dam's guaranteed capacity for use in mining.<sup>161</sup> Although 400 MW may seem like a small amount, Belo Monte is actually just one of Vale's many investments in dams—it has investments in nine other dams in the Amazon.<sup>162</sup> It is worth reiterating at this juncture that the Brazilian government is planning to build 60 dams in the Amazon.<sup>163</sup> This data renders the future of dam-powered mining in the Amazon an enterprise which is potentially much more destructive of Indigenous peoples' interests. "According to Brazilian Mining Institute IBRAM, over \$40 billion[] of investment in mining is expected to cover the entire Brazilian Amazon through 2015."<sup>164</sup>

Of course, as a Brazilian company is going to use the energy to mine, one might conclude that ultimately benefits of the Dam will inure to Brazilians. However, although Brazilians have been hired to build the dams and to work the mines, mining giant Vale is going to use the energy to mine and export iron to China, a trading partner with whom business has increased greatly in the past decade. In 2009 trade between China and Brazil totaled \$3.2 billion, representing a twelve-fold increase since 2001 and making China Brazil's largest trading partner.<sup>165</sup> In April 2011 Brazilian President Dilma Rousseff, Chinese Trade Minister Chen Deming, and a delegation of

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<sup>160</sup> Zachary Hurwitz, *Mining Giant Joins Belo Monte Dam*, INT'L RIVERS (May 2, 2011, 2:23 PM), <http://www.internationalrivers.org/blogs/258/mining-giant-joins-belo-monte-dam>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Malcolm Moore, *China Overtakes the US as Brazil's Largest Trading Partner*, THE TELEGRAPH (May 9, 2009, 6:28 PM), <http://www.telegraph.co.uk/finance/economics/5296515/China-overtakes-the-US-as-Brazils-largest-trading-partner.html>.

more than 70 Chinese business leaders met with Brazilian counterparts to try to strengthen ties.<sup>166</sup> Discussion focused on mining, energy, agriculture, technology, and infrastructure.<sup>167</sup> The Chinese were interested in investments to secure access to vast quantities of raw materials such as oil, iron ore, and grains.<sup>168</sup> These deals would inevitably lead to more deals with top Brazilian companies, such as state-run oil companies Petroleo Brasileiro and Vale.

To be sure, a little energy will go to Rio de Janeiro and Sao Paolo. In the end, whether there nonetheless exists a huge problem depends on whether one believes that any cost-benefit analysis can justify the eradication of a people and its culture, languages, and subsistence way of life, as well as the taking and destruction of Indigenous lands. These concerns, I suggest, are market “inadmeasurables.” They are not measurable in market value, dollars, euros, or reais; they are priceless. And if we listen to the Indigenous voices, they are loud and clear as to their desires.

The Belo Monte Dam situation is a valuable and difficult example of the very complex nature of trade and human rights intersections. Can the state allow a private entity to exploit Indigenous lands for that private entity’s profit without the prior informed consent of the Indigenous peoples? The legal paradigm suggests not, but rather that there is a limit to trade.

It is noteworthy that in the international sphere, trade laws and human rights laws have existed in splendid isolation. That is anomalous given not only the interconnections, but also the origins of these fields. The idea of human rights and the idea of international trade both started to be

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<sup>166</sup> Gerald Jeffris, *Brazil Eyes China Trade Improvement*, DOW JONES (May 16, 2011 10:29 AM), [http://www.agriculture.com/markets/analysis/soybeans/brazil-eyes-china-trade-improvement\\_10-ar16596?print](http://www.agriculture.com/markets/analysis/soybeans/brazil-eyes-china-trade-improvement_10-ar16596?print).

<sup>167</sup> *Id.*

<sup>168</sup> Rocky Vega, *China to Be Brazil’s Number One Investor, Trading Partner*, DAILY RECKONING, (July 28, 2010), <http://dailyreckoning.com/china-to-be-brazils-number-one-investor-trading-partner/>.

formalized after World War I; the same atrocities of World War II inspired rapid evolution and concretization of both legal disciplines. The economic downturns and isolation that led to the unchecked nationalism and tribalism that resulted in unfathomable eradication of human life signaled the watershed moment for both rapid growth of the human rights movement and swift creation of global economic institutions such as the International Bank for Reconstruction and Development, known as the World Bank, and the International Monetary Fund. The UN's Declaration of Human Rights dates to 1948 and the GATT to 1947; they were created barely one year apart.

Evolution in these fields shows a total absence of any effort at coordination by the states negotiating both trade and human rights treaties to make the world not only a richer, but also a better place. The surprising part about this isolationist reality is that in the post-World War II universe the countries participating in both the development of the human rights ideas and the development of the trade ideas were the same. That actuality notwithstanding, the two regimes evolved wickedly isolated—with different formats, different structures, different goals, and even different languages.

In part because of this isolation, the world trade regime that has developed has been charged with working “a profound dehumanization and systematic banalization of civilization.” The case of Belo Monte could well be cited as proof of that claim. Many underscore that the economic growth presumptively generated by globalization is in stark contrast with the hundreds of millions of people who are still denied their basic human rights. Indigenous peoples, as we have seen, are some of those who are falling through the cracks.

There is a way to argue that the systems can and should work together. GATT sets out the rules for trade that are designed to allow states to make full use of their comparative advantages by removing impediments to the

free movement of goods, primarily through non-discrimination provisions.<sup>169</sup> These extensive rules, while promoting free trade, do not allow unfettered action. GATT Article XX<sup>170</sup> contains ten exceptions to the non-discrimination rules which expressly allow a state to discriminate to protect public morals; to conserve exhaustible natural resources; to protect human, animal, or plant life or health; and to preserve national treasures. I suggest—and this takes an integrationist approach—that Article XX(a)'s protection of public morals provides human rights norms an entrée into the trade regime. Over the years, states have restricted trade on the basis of the “immorality” of activities in other countries, from prohibitions of trade with countries practicing slavery to a ban on child pornography. Article XX's prohibitions should also reach immoral acts by a foreign government against its citizens. Thus, Article XX should be read to allow trade restrictions on countries that force or allow child labor; deny their citizens freedom of the press or the right to emigrate; engage in consistent patterns of gross violations of human rights; or deprive Indigenous peoples of their cultures, lands, languages, traditions, and livelihoods.

## VI. CONCLUSION

The trade regime has produced negative economic and cultural outcomes for Indigenous populations. In rewarding work that is inconsistent with the nature-sensitive ways of subsistence lifestyles through promoting unsustainable resource use and in diverting governments from long-range priorities with the promise of quick riches, international trade has despoiled and belittled Indigenous cultures and robbed native populations of their

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<sup>169</sup> See GATT article 1 (most favored nation clause), article 3 (national treatment clause). the Most Favored Nation Clause requires WTO Members to provide the same treatment to imports from all Members that it gives to its most favored trading partner. The National Treatment Clause requires that foreign goods face equal conditions of competition in the market as like domestic products. GATT 1994, *supra* note 53 at art. I.

<sup>170</sup> GATT 1994, *supra* note 53, at art. XX.

ability to hand down adequate natural resources to future generations. This intersection of trade with Indigenous populations would be balanced if we gave heed to the human rights policies that protect culture, the right to life, and the right to a healthy environment. The challenge of the Belo Monte Dam provides us with a platform from which to propose paradigmatic shifts to protect market “inadmeasurables.”

All these examples show one patent reality: unbridled trade and savage capitalism may enrich a few but impoverish many, not only economically but also socially and culturally. Recognizing the myriad intersections of trade and human rights that are evident in the Belo Monte case, such as the environment, equality, health, labor, culture, Indigenous populations, and poverty promotes searching for strategies that will make the world a better and better-off place. A framework that effects a fruitful integration of the trade and human rights disciplines as part of an integrated whole in the international legal structure will promote human well-being and prosperity. Such a framework would not have contemplated building the Belo Monte Dam, a project that negatively affects the environment including land, water, plant, and animal life; health; human life; and economic (including livelihood), social, and cultural rights; as well as effects forced displacements of Indigenous peoples and Riverine people.