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CIVIL SOCIETY CONSULTATION FOR US COUNTRY VISIT OF UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS¹

THE DUTY TO PROTECT AND THE UNITED STATES: A FAILURE OF COMPLIANCE

A number of United Nations (UN) mechanisms, including treaty monitoring bodies and other UN processes, have underscored the failure of States and other parties to respect Indigenous rights to self-determination and the principle of Free, Prior and Informed Consent (FPIC), resulting in a range of pervasive human rights violations. Implementation of the UN Guiding Principles on Business and Human rights are grounded in the recognition that human rights and the obligation of states to protect human rights must be matched with effective remedies when human rights are abused or violated.

THE HUMAN RIGHTS FRAMEWORK TO WHICH THE UNITED STATES IS COMMITTED

“... treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States”

--- Preamble, *United Nations Declaration on the Rights of Indigenous Peoples*

The US federal government entered into and ratified more than 400 treaties with Indian Nations from 1778 to 1871. These Treaties recognized and affirmed a broad range of rights and relationships. These include, among others, mutual recognition of sovereignty and consent, self-determination, peace and friendship, land and resource rights, rights related to health, housing, education and subsistence (hunting, fishing and gathering), and in some cases a right of non-Indigenous transit though Treaty lands. Even though Congress decided to end US Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally binding upon the US today. The US Constitution’s reference to Treaties as “the Supreme Law of the Land” includes and encompasses the US obligations in accordance with Treaties entered into in good faith with the original Indigenous Nations of this land. The US government, either facilitating or collaborating with private corporate and business interests, continues to access Indigenous Peoples’ lands for mineral development resulting in the illegal acquisition and appropriation of Treaty Lands in the US and elsewhere. One of many examples was the US response to the discovery of gold in the sacred Black Hills only 6 years after they were recognized by the 1868 Fort Laramie Treaty between the US and Sioux Nation as belonging to the Lakota (Sioux) in

¹ We would like to acknowledge and thank *Advocates for Environmental Human Rights* and *Alaska Community Action on Toxics* for their invaluable and substantive contributions to this submission. We also thank *International Corporate Accountability Roundtable* for facilitating our participation in this Civil Society Consultation.

perpetuity.² Gold mining, panning and related tours in this sacred place continues to this day. **Today, the same site is being considered for uranium mining.**³ In these and other proceedings affecting Treaty rights, the US Treaty party has continued to assert that they have sole jurisdiction to determine, decide and control the process for redress of Treaty violations or to unilaterally abrogate legally binding Treaties based on the “plenary power of congress.” They continue to make unilateral decisions to extract resources (gold, uranium, coal, timber, water, etc.), and to carry out development projects - such as the proposed the Keystone XL Pipeline and mining projects - that are opposed by a number of Indigenous Treaty Nations, as such developments may constitute violations of rights held pursuant to Treaty, affirmed by the US *Constitution* and described as human rights under international law. This denial of due process has been addressed by the Committee on the Elimination of Racial Discrimination (CERD), the treaty monitoring body of the *International Convention on the Elimination of All Forms of Racial Discrimination*. The 2006 recommendations to the US (in response to a submission under the Early Warning and Urgent Action Procedure⁴ by the Western Shoshone National Council et al.), stated that the Indian Claims Commission processes had denied due process and did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result of “gradual encroachment” and that the offer to provide monetary compensation to the Western Shoshone, although never accepted, constituted a final settlement of their claims.

The International Indian Treaty Council is particularly interested in any responses which can be provided to the Working Group by the US regarding steps towards implementation of the Concluding Observations of the CERD addressing the impacts of corporate activities, including mining impacting Indigenous Peoples’ sacred and culturally significant areas in its 2008 review of the US, especially the recommendations in paragraphs 19 and 29 as follows:

19. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision 1(68) of 2006 (CERD/C/USA/DEC/1). (Article 5).⁵

The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.

29. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the

² Treaty With The Sioux (Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, And Santee) and Arapaho 15 Stat., 635. Ratified, Feb. 16, 1869. Proclaimed, Feb. 24, 1869 Art.16: “The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or **without the consent of the Indians first had and obtained**, to pass through the same;”

³ <http://www.powertechuranium.com/s/deweyburdock.asp> The Dewey Burdock Project, Powertech Uranium Corp..

⁴ CERD/C/USA/DEC/1 11 April 2006

⁵ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008) at para. 19.

enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).

The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.

The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.⁶

The International Covenant on Civil and Political Rights also upholds rights impacted by corporate activities (such as mining, drilling and toxic waste dumping) including the right to culture and freedom of religion, in particular affecting sacred sites and religious practices (Article 27) and well as the right to subsistence (Article 1). The adoption of the **UN Declaration on the Rights of Indigenous Peoples** (The "UN Declaration")⁷ by the UN General Assembly on September 13th, 2007, represented a historic step forward for Indigenous Peoples. Its numerous provisions affirming the right to FPIC for Indigenous Peoples provides a now-internationally accepted framework for the implementation. These include a just and participatory framework for redress, restitution, settlement, repatriation and dispute resolution affecting lands and resources, subsistence, environment and cultural heritage among others. Many of the relevant provisions of the UN Declaration directly refer to FPIC in relation to rights affirmed in Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples as well as other rights. For example, Article 19, addressing the adoption of legislative and administrative measures and Article 32, which addresses development activities affecting Indigenous Peoples lands and natural resources, contain some of the broadest affirmations in the UN Declaration of the right to FPIC for Indigenous Peoples. Article 10, which affirms that Indigenous Peoples shall not be forcibly removed or relocated from their lands or territories without FPIC, is also of direct relevance to land as the central issue in most rights violations being carried out around the world. These provisions, as well as others in the UN Declaration affirm the fundamental nature of the relationship between State and Indigenous parties enshrined and recognized in Treaties. They also highlight some of the most critical ways that Treaty Rights as well as the related right to FPIC are systematically violated, not only historically but in the present day.

⁶ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008) at para. 29.

⁷ The US became the last country to support the UN Declaration on December 16th, 2010 and reiterated its support on November 1, 2012. A number of preambular paragraphs and Articles of the *UN Declaration on the Rights of Indigenous Peoples* directly address the rights of Indigenous Peoples, and Indigenous women, as well as State obligations to take both preventative and restorative action. These include: Articles 3,7,8,13,19-22, 24-26,31,32, 37 & 42. Article 29 (2)(3) is of particular relevance in affirming the rights of Indigenous Peoples and the related obligations of the US as a supporter of the UN Declaration.

UN AND INTERNATIONAL MECHANISMS CALLING ON THE US TO TAKE MEASURES TO PROTECT THE HUMAN RIGHTS
OF INDIGENOUS PEOPLES FROM EXTRATERRITORIAL CORPORATE ACTIVITIES

In 2001, the Special Rapporteur on Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Ms. Fatma-Zohra Ouhachi-Vesely visited the United States. She found that the United States allowed the manufacture and exportation of pesticides that were banned for use in the United States to other, primarily developing, countries. Mme. Vesely, reported that "US officials told me that pesticides banned in the United States but exported cannot be regulated if there is a demand overseas, because of free-trade agreements."⁸ Ms. Vesely stated that in her view this US policy is based upon "... an untenable premise that pesticides deemed unacceptable for the residents and environment of the United States are somehow acceptable in other countries." She expressed concern that that countries such as the US often choose to offer their citizens a higher degree of protection than they insure for others in other countries and fail to monitor the human rights impacts of this practice by US corporations. A report based on US Government Custom Service Records, "*Pesticide Exports from U.S. Ports, 2001–2003*" states that:

*Analysis of U.S. Custom Service records for 2001-2003 indicates that nearly 1.7 billion pounds of pesticide products were exported from U.S. ports, a rate >32 tons/hour. Exports included >27 million pounds of pesticides whose use is forbidden in the United States. WHO Class 1a and 1b pesticides were exported at an average rate of >16 tons/day. Pesticide exports included >500,000 pounds of known or suspected carcinogens, with most going to developing countries; pesticides associated with endocrine disruption were exported at an average rate of >100 tons/day.*⁹

Export of banned and dangerous toxics from the US to "developing" countries continues, with impacted Indigenous and other communities at the bottom end - uniformed, sickened and killed. Human rights impacted include the rights to health, life, subsistence, and FPIC among others. Extensive detail of the documented impacts, including community testimonies and scientific data were included in IITC's recent submission to the Working Group titled: *Suggestions of International Indian Treaty Council 2013 Forum on Business and Human Rights* (April 12, 2013). It should be noted by the Working Group that the production and export of banned pesticides by the US is permitted under federal law (the *Federal Insecticide, Fungicide, and Rodenticide Act, FIFRA*) as long as the receiving country is informed of this status. Unfortunately no one informs the Indigenous communities "on the ground" who suffer grave and often deadly human rights consequences. There are equally important domestic impacts of such practices.

A significant area of the US Government's regulation of business involves the environmental impacts of manufacturing, commercial transportation, and industrial waste disposal. Any implementation of the UN Guiding Principles on Business and Human Rights to be undertaken by the US Government and the business sector will necessarily involve the US environmental regulatory system. However, the success of such implementation is greatly challenged by the fact that the protection of human rights and the remedy of a human rights violation are omitted from the environmental regulatory system. The sobering fact is that businesses are routinely permitted by US environmental laws and regulations to abuse human rights. It is pursuant to the US environmental regulatory system that Indigenous Peoples,

⁸ U.N. Deems Export of Banned Pesticides Immoral, U.S. Newswire, 202-347-2770/ 12/17 16:09

⁹ Pesticide Exports from U.S. Ports, 2001–2003 Carl Smith, Kathleen Kerr, Md, Ava Sadripour, Esq. International Journal of Occupational and Environmental Health ,Vol. 14/No. 3, JUL/SEP 2008

people of color and poor communities are subjected to toxic and hazardous industrial operations which include exposure to:

- the daily release into the air, water, and land of industrial toxic chemicals, the amount and effects of which are ineffectively quantified and largely disregarded pursuant to environmental laws and regulations;
- the production of banned and severely restricted pesticides that are illegal for use in the United States but are exported for sale in foreign countries by 25 companies operating 28 facilities in 23 states pursuant to environmental laws and regulations;¹⁰ and
- the ever-present risk of lethal and injurious industrial facility accidents occurring in close proximity to homes, schools, recreational areas, and places of worship.

Compounding the failure of the US environmental regulatory system to protect human rights is the fact that the US legal system provides no remedy. In March 2010, the Inter-American Commission on Human Rights (“IACHR”) of the Organization of American States ruled that the US legal system does not afford a legal remedy for the violation of the human rights to racial equality and privacy arising from governmental permitting decisions that create discriminatory pollution burdens on an African American community.¹¹ This ruling was pivotal to the IACHR taking jurisdiction over its first case of environmental racism in the United States brought by African American residents of the historic community of Mossville, Louisiana, which is captioned as *Mossville Environmental Action Now v. United States of America*, Case No. 12.255.

Although the US Government has long recognized disproportionate toxic pollution burdens on Indigenous Peoples, African Americans, Latinos, Asian Americans, Pacific Islanders and the poor, it has not viewed these burdens as a violation of the legal duty of government to protect human rights.¹² However, diverse members of civil society have termed racially disproportionate toxic pollution burdens and the depletion of natural resources as environmental racism and environmental injustice, and define such injustice as a violation of fundamental human rights.¹³ In addition, the international legal community of human rights jurists recognizes that what constitutes environmental injustice and environmental racism also violates human rights.¹⁴

On December 3rd 2011, 27 years later after the Bhopal disaster caused by the release of toxic pesticides from the Union Carbide factory in Bhopal India killed over 25,000 people, the **Permanent Peoples Tribunal (PPT)** convened in Bangalore India with an international panel of 5 judges. Based on

¹⁰ IITC submitted a *Freedom of Information Act* Request with Advocates for Environmental Human Rights in March of 2012 and received a response from the US Environmental Protection Agency in July of 2012 that included this information. This includes the production and export of Endosulfan, which was added to the *Stockholm Convention on Persistent Organic Pollutants* list in 2011.

¹¹ Inter-American Commission, Report No. 43/10, Petition No. P-242-05, *Mossville Environmental Action Now* (United States) paragraphs 33 and 34.

¹² See Presidential Executive Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, February 11, 1994.

¹³ See First National People of Color Environmental Leadership Summit, *Principles of Environmental Justice*, Principle 10.

¹⁴ See *Mossville Environmental Action Now, Inc. et al, Amended Petition*, Petition No. P-242-05 June 23, 2008, pp. 85-88 (analyzing the observations and decisions rendered by UN treaty monitoring bodies and regional human rights systems pertaining to environmental racism).

testimonies and statements about health and other human rights violations caused by pesticides from communities around the world, including Indigenous communities from Alaska, Mexico, Peru and elsewhere, the Tribunal delivered a scathing indictment of the pesticide industry. It focused on the “Big 6” agrochemical giants, the Multi-national Corporations (MNC’s) Monsanto, Syngenta, Dow, DuPont, Bayer, and BASF (Dow bought Union Carbide in 2001). Blame for the agrochemical industry’s human rights abuses was also assigned to the three States where these corporations are headquartered—the United States, Switzerland, and Germany. As stated in the PPT’s findings, these countries “*failed to comply with their internationally accepted responsibility to promote and protect human rights, especially of vulnerable populations.*” At least two of these six companies, Bayer and Monsanto are on the list of companies provided to IITC and AEHR in response to their FOIA Request¹⁵ that are producing pesticides for export only in the US.

In 2008, for the periodic country review of United States by the CERD, the International Indian Treaty Council coordinated a joint Indigenous Peoples shadow report which included testimony and documentation addressing the human rights impact of the production and export of toxic pesticides, including tons of pesticides banned for use in the US due to ample proof of severe health impacts including cancers and birth defects. In response the CERD made the following recommendation to US (2008) regarding its duty to protect Indigenous Peoples outside the US against human rights abuses by companies it licenses:

30. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the right to land, health, living environment and the way of life of indigenous peoples living in these regions.

In light of article 2, paragraph 1 (d), and 5 (e) of the Convention and of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in the United States on indigenous peoples abroad and on any measures taken in this regard.¹⁶

RECOMMENDATIONS

The US should ensure that its own environmental and toxics regulatory laws as well as the actions of corporations its licenses are in compliance with International Human Rights standards including nation-to-nation Treaty obligations, recommendations of treaty monitoring bodies and the *UN Declaration on the Rights of Indigenous Peoples*.

¹⁵ Supra, footnote 10

¹⁶ Concluding Observations of the UN Committee on the Elimination of Racial Discrimination, United States of America [CERD/C/USA/CO/6 May 8th 2008]

The US should establish effective mechanisms for oversight, monitoring and prevention of human rights and Treaty violations carried out by US corporations affecting Indigenous Peoples in accordance with the framework of the UN *Declaration on the Rights of Indigenous Peoples*.

The US should implement effective measures to monitor corporate and business activities impacting the enjoyment of human rights of Indigenous Peoples both in and outside US to ensure that they are in compliance with human rights standards as per the CERD recommendations and *Concluding Observations* to the US in 2006 and 2008.

We urge the State Department to address the omission of human rights in the US Government's environmental regulatory system. The State Department's interest in implementing the UN Guiding Principles on Business and Human Rights provides an excellent opportunity to engage civil society in developing standards for preventing environmental injustice and racism in the United States and ensuring that these standards extend to the conduct of US businesses in other countries. The State Department should view this as a mission-critical undertaking that entails a transparent and public process for identifying the areas in the US environmental regulatory system that fail to protect human rights and promoting human rights-based reforms of the system.

We suggest that key staff in the State Department review the literature on environmental human rights law and environmental justice. We recommend that the review include the worldwide survey of environmental human rights law prepared by the US representative on the Inter-American Commission on Human Rights of the Organization of American States, Professor Dinah Shelton, and other legal experts.¹⁷ Additionally, the State Department staff should review the NGO report *Toxic Waste and Race at 20*, which provides a twenty-year assessment of environmental racism in the United States since 1987.¹⁸

¹⁷ Joint UN Environmental Programme and UN Office of the High Commissioner on Human Rights Expert Seminar on Human Rights and the Environment, Jan. 14-16, 2002, Geneva. See the six Background Papers available at: <http://www2.ohchr.org/english/issues/environment/ environ/index.htm>.

¹⁸ Robert Bullard, Paul Mohai et al, *Toxic Wastes and Race at Twenty, 1987-2007: Grassroots Struggles to Dismantle Environmental Racism* (United Church of Christ) 2007, available at: <http://www.ejrc.cau.edu/TWARTFinal.htm>.