



International Indian Treaty Council
Consejo Internacional de Tratados Indios

100 E. Ajo Way
Tucson, AZ 85713
Phone: (520) 833-9797
Fax: (520) 833-9799
Email: info@treatycouncil.org
www.treatycouncil.org

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Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneve 10, Switzerland
Email: expertmechanism@ohchr.org

Re: Submission by the International Indian Treaty Council (IITC) for EMRIP's Study on Treaties, Agreements and Other Constructive Arrangements Between Indigenous Peoples and States, Including Peace Accords and Reconciliation Initiatives, and Their Constitutional Recognition

For more information, please contact Andrea Carmen, IITC Executive Director, at +(520) 273-6003, or via email: andrea@treatycouncil.org; Summer Blaze Aubrey, IITC Staff Attorney for Human Rights, at +(509) 823-6951, or via email at summer@treatycouncil.org

A. Introduction and Background

IITC welcomes the opportunity to have input into this current EMRIP Study and hopes that its outcomes and final recommendations will renew the United Nations (UN) Human Rights system's attention to the vital issue of Treaties, Agreements and Constructive Arrangements. The UN Declaration on the Rights of Indigenous Peoples (the UN Declaration) preamble recognized "*the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States.*" This vital recognition has, unfortunately, not been implemented to date by either States or the UN System.

IITC was founded in June 1974 at a gathering on the Standing Rock reservation in South Dakota United States (US) attended by over 5000 delegates representing 99 Indigenous Nations from throughout the Americas. A primary focus was the lack of redress, justice or remedy for Indigenous Peoples experiencing violations of their Treaty rights within the legal systems of the existing States. *The Declaration of Continuing Independence of the Sovereign Native American Indian Nations*", IITC's founding document called upon "*the people of the world to support this struggle for our sovereign rights and our treaty rights...Treaties between sovereign nations explicitly entail agreements which represent "the supreme law of the land" binding each party to an inviolate international relationship...*". The elders and headsmen charged the newly formed International Indian Treaty Council with seeking redress for Treaty violations at the United Nations, starting with violations of the 1868 Ft. Laramie Treaty, presented in some detail below.

A major achievement by IITC and other Indigenous Peoples organizations was the initiation by the UN Working Group on Indigenous Populations of the *United Nations Study on Treaties*,

Agreements and Other Constructive Arrangements between States and indigenous populations. In his final report published in 1999, Special Rapporteur Dr. Miguel Alfonso Martinez concluded that such Treaties are international agreements that continue to be in force to this day.¹

This core conclusion as well as the UN Declaration on the Rights of Indigenous Peoples' preambular paragraphs addressing Treaties and Article 37 which affirms that "*Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements*" provide the context and framework for this submission and its recommendations.

In this submission, IITC presents four key issues and several illustrative examples that are at the core, in our view, of State failures to honor Treaties and the "*relationship they represent*" in the words of the UN Declaration's preamble. These shortfalls have resulted in egregious violations of the rights of Indigenous Peoples as well as ongoing, historic and unresolved sources of conflict between Indigenous and State Treaty Parties.

1. Continued lack of bilateral, just, transparent, fully participatory mechanisms to redress and halt Treaty violations, provide remedies and restitution, and resolve related conflicts

There is an urgent and ongoing need for bilateral, just and transparent mechanisms for conflict resolution, redress and remedy regarding violations of the Treaties concluded between Indigenous Nations and States. Domestic courts represent processes controlled and established unilaterally by one Treaty party (the State) and do not meet the minimum standard required for redress and conflict resolution in this regard. Neither do Commissions or other processes whose outcomes are controlled by the State Treaty party, either in total or in the final decision-making authority regarding the existence and extent of violations as well as the appropriate redress or restitution measures.

The Indian Claims Commission in the United States was an example of a unilateral, non-participatory and unjust process which utterly failed to effectively redress violations or provide for restitution based on the spirit and intent of Nation-to-Nation Treaties as understood by the Indigenous Treaty Parties. As noted by the CERD in 2006 in response to the Early Warning/Urgent Action submission by the Western Shoshone, it also failed to implement due process or "comply with contemporary international human rights norms, principles and standards." There was no consideration of Consent in either the process or the results. The same party which had violated the Treaties under review was the sole arbitrator of the resulting

¹ M. Alfonso Martinez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations* E/CN.4/Sub.2/1999/20, i paragraph 271: *This leads to the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations currently continue to be instruments with international status in light of international law; 271: The Special Rapporteur is of the opinion that said instruments indeed continue to maintain their original status, and to be fully in effect and consequently, are sources of rights and obligations for all the original parties to them (or their successors), who shall fulfill their provisions in good faith; and 272: The legal reasoning supporting the above Conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to it decide to terminate them, unless otherwise established in the text of the instrument itself, or unless, its invalidity is declared.*

claims. This had disastrous impacts for Indigenous Treaty Nations, whose rights to FPIC were doubly violated by this process.

The UN Study on Treaties, Agreements and Constructive Arrangements between States and Indigenous Populations called for states to establish new processes to address Treaty violations and resolve related conflicts based on full participation. In his Final Report, [E/CN.4/Sub.2/1999/20] Dr. Miguel Alfonso Martinez presented a number of Conclusions and Recommendations under the heading "Looking Ahead". He recommended that "in the light of the situation endured by indigenous peoples today, the existing mechanisms, either administrative or judicial, within non-indigenous spheres of government have been incapable of solving their difficult predicament" there was a need to establish an "entirely new, special jurisdiction independent of existing governmental (central or otherwise) structures, although financed by public funds, that will gradually replace the existing bureaucratic/administrative government branches now in charge of those issues." The Special Rapporteur stressed the importance of the full and effective participation of Indigenous Peoples "preferably on a basis of equality with non-indigenous people" in their establishment and functioning.

The State and Indigenous Peoples delegates as well as UN experts who attended the first UN Treaty Seminar in 2003, following up on the Treaty Study's final report, recommended that the UN Working Group on Indigenous Populations (which was replaced by the Expert Mechanism on the Rights of Indigenous Peoples -EMRIP- in 2006) "formulate guiding principles on the elaboration, negotiation and implementation of Treaties, agreements and other constructive arrangements,"² and to "develop a working paper to follow up on mechanisms for resolving conflicts arising from Treaties, agreements and other constructive arrangements."³

The UN Declaration provides key elements for participatory mechanisms for redress, remedy, restitution, conflict resolution, and land rights adjudication in the following articles:

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. The process be fair independent, impartial, open and transparent, be established and implemented in conjunction with the indigenous peoples concerned and give due recognition to indigenous peoples' laws, traditions, customs and land tenure systems

Article 28: 1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which

² Report of the Economic and Social Council on Indigenous Issues to the General Assembly, U.N. Doc. E/CN.4/2004/111 P. 5 ¶11, (Jan. 2, 2004).

³ Report of the Economic and Social Council on Indigenous Issues to the General Assembly, U.N. Doc. E/CN.4/2004/111 P. 5 ¶12, (Jan. 2, 2004).

they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources
Article 40: *Indigenous peoples have the right to access to and prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.*

The foundation for any processes and decision-making in which Treaties and Treaty rights are involved or affected must be Article 37 of the UN Declaration. Also of significance for this process are State obligations for the legal recognition and demarcation of Indigenous lands as stated in Article 26 of the Declaration.

To date, no State Treaty Party has implemented such a mechanism with equal authority in decision-making by State and Indigenous Treaty Parties. The related human rights violations have been noted by UN bodies including the CERD and UN Special Procedures. For example on December 15th 2020, UN Special Rapporteurs on the Rights of Indigenous Peoples, the situation of human rights defenders, freedom of peaceful assembly and of association, contemporary forms of racism, and cultural rights reiterated this need in a UN press statement responding to IITC's urgent action submission addressing the case of a Lakota Human and Treaty Rights Defender Nick Tilsen who was facing 17 years in prison for peacefully asserting Lakota rights to FPIC under the Ft. Laramie Treaty, with a "call on [US] authorities to initiate dialogue with the Great Sioux Nation for the resolution of treaty violations."

Effective, just, bi-lateral processes for redressing, resolving and providing restitution for Treaty violations, established bi-laterally with equal participation and decision-making authority by both State and Indigenous Treaty Parties, will be, in the words of the UN Declaration's preamble "*the basis for a strengthened partnership between indigenous peoples and States,*"

There are far too many egregious examples of ongoing Treaty violations, further underscoring the urgent need for a participatory processes to resolve and redress such violations. The following examples are indicative of many other such cases impacting Indigenous Peoples and Nations in countries around the world.

The Sacred Black Hills, Očhéthi Šakówiŋ Treaty Territory: The Black Hills (Pahá Sápa in Lakota) are unceded Treaty territory. The 1851 Fort Laramie Treaties between the United States and the "Great Sioux Nation" (the Lakota, Dakota and Nakota of the Očhéthi Šakówiŋ Oyáte) recognized an Indigenous land base of over 50 million acres. Nevertheless, the Tribal Nations of the Očhéthi Šakówiŋ Oyáte are currently confined to much smaller "federally recognized" reservations such as the Oglala Lakota Pine Ridge Reservation originally established under the authority of the U.S. Secretary of War as "Prisoner of War Camp No. 344." It now consists of 2,220,160 acres, and is considered to be the poorest county in the United States with a life expectancy lower than in many "developing" countries.

The 1868 Ft. Laramie Treaty stipulated that Treaty lands could never be ceded unless there were signatures of three-quarters of the adult male members of the Oyáte. It also stipulated in Article 16 that consent would be required for any non-Indigenous person to enter or pass through these lands, let alone settle, appropriate lands or impose developments such as mining.⁴

Nevertheless, beginning soon after the Treaty's legal ratification by the U.S Senate, mining interests, particularly gold mining using mercury for ore extraction, was allowed to begin in the sacred Black Hills without such consent ever being sought or obtained. Gold and uranium mining, along with other mineral extraction, has continued to this day in violation of these Treaties, causing high levels of contamination of rivers and water tables, with devastating impacts to the health of the Lakota.

There have been a total of 1368 gold and uranium mines in the Black Hills, all established in violation of the 1851 and 1868 Treaties and all lacking the stipulated consent of the Indigenous Treaty parties. Recent data set shows that only 4% of those mines have been reclaimed whereas the remaining 96% are left unclaimed and continue to be sources of toxic contamination. Currently there are 13 pending permits for new mining sites (both gold and uranium) and the Northern part of Black Hills is claimed by gold mining companies. Mining is expected to rise within the next few years with pending mining sites further contaminating and limiting access to Treaty lands, waters, sacred sites and safe drinking water.

In 1871, the US Congress unilaterally legislated an end to Treaty making with Indigenous Nations. However, in 1877, the US Congress ratified a treaty obtained in violation of the three-quarters signatures provision of the 1868 Ft. Laramie Treaty. The 1877 treaty purportedly ceded the western one-half of Oyáte territory in South Dakota, roughly 7.3 million acres which included the Black Hills. In 1980, the US Supreme Court admitted that the 1877 treaty was fraudulent and authorized monetary compensation as redress. The respective Tribal Nation governments refused to accept the monetary award, maintaining to this day the united position that "the Black Hills area not for sale."

In their decision, the Supreme Court described the situation as with the following words, which were also cited by Special Rapporteur Miguel Alfonso Martinez in the final report of the UN Treaty Study in 1999: "*... a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation*" and considered that "*...President Ulysses S. Grant was guilty of duplicity in breaching the Government's treaty obligations with the Sioux*

⁴ "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;", Article 16, 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, emphasis added

relative to ... the Nation's 1868 Fort Laramie Treaty commitments to the Sioux". The Court also concluded that the US Government was guilty of "... a pattern of duress ... in starving the Sioux to get them to agree to the sale of the Black Hills." ⁵ Despite this clear acknowledgement of wrongdoing by the US Supreme Court over 40 years ago, to this day none of these illegally-confiscated Treaty Lands have been returned, no participatory process for restitution, redress and remedy has been established, and gold mining continues in the Black Hills.

B. Hawai'i: The United States continues to assert control, with no redress, over the citizens of the Hawai'ian Kingdom (Kānaka Maoli) despite issuing a formal apology acknowledging that the United States overthrew the Hawai'ian Kingdom and stole the Hawai'ian Peoples' lands in 1893. This was carried out in violation of the 1849 Peace, Friendship and Navigation Treaty with the Hawaiian Kingdom ratified by the US Congress.

Hawai'i was forcibly annexed by the United States in 1898 and becomes a U.S. territory in 1900. In 1959, the Hawai'ian Kingdom became the 50th state of the United States in a process which violated the provisions for decolonization stipulated in article 73 of the UN Charter. Since then, the Kingdom of Hawai'i has been used as a major US military base and a global tourist destination. Native Hawai'ians have been pushed off their ancestral lands by encroachment and gentrification, and account for 51% of homelessness on the island of Oahu even though they only make up 10% of the population.

As a result of these Treaty violations, Native Hawai'ians have lost the ability to protect their ancestral homelands and watersheds. In December 2021, the US Navy spilled 14,000 gallons of jet fuel into an aquifer that provides 20% Honolulu's drinking water. The petroleum level was 350 times the safe drinking limit and gasoline range organics were 66 times the safe drinking level. The Navy also spilled 27,000 gallons of jet fuel, allowed to seep into groundwater, in 2014.

In 1993, the US Congress adopted a law (US Public Law 103-150), which was then signed by President Clinton, formally apologizing to the Hawai'ian People. It acknowledged that the overthrow of the Kingdom of Hawai'i was illegal and that its inherent sovereignty has been suppressed. The Resolution goes on to "commend efforts of reconciliation initiated by the State of Hawai[i] and the United Church of Christ with Native Hawai[i]ns." Further, the Resolution "expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai[i], in order to provide a proper foundation for reconciliation between the United States and the Native Hawai[i]an people;". It called on the "President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawai[i] and to support reconciliation efforts between the United States and the Native Hawai[i]an people."

Nevertheless, to date, the United States has failed to engage in any bilateral redress, reconciliation, or restitution process to initiate this healing process based on their Treaty recognizing the sovereign rights and jurisdiction of the Kingdom of Hawai'i.

⁵ *United States v. Sioux Nation*, 207 Ct. Cl. 234 at 241, 518 F.2d 1298 at 1302 (1975), cited in *United States v. Sioux Nation of Indians*, 448 U.S. 371 at 388 (1980).

It must also be noted that in addition to 4 Treaties with the United States, the Hawai'ian Kingdom also concluded over 25 international legally binding Treaties with other countries, including France, Spain, Japan, Great Brittan, Samoa, Tahiti, Sweden, Norway and Belgium among others. Unfortunately, none of those States have stepped forward to honor and affirm these Nation-to-Nation Treaties in response to the US abrogation.

2. Failure of States to recognize and uphold Free Prior and Informed Consent as a Treaty Right, including regarding the imposition of Extractive Industries as well as the creation of "Protected Areas"

It is essential to underscore that for both for non-sustainable development activities such as mining and projects undertaken in the name of conservation, States are required to implement FPIC in full and equal partnership with Indigenous Peoples, based on the legal recognition of ancestral territories and the rights recognized in Treaties, Agreements and other Constructive Arrangements.

State, Indigenous Peoples' and UN experts at the **1st United Nations Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples** which met in Geneva from December 15-17, 2003, underscored the vital importance of consent in paragraph 2 of their final conclusions and recommendations. They affirmed that "that treaties, agreements and other constructive arrangements constitute a means for the promotion of harmonious, just and more positive relations between States and indigenous peoples because of their *consensual basis* and because they provide mutual benefit to indigenous and non-indigenous peoples" (E/CN.4/2004/111, paragraph 3, emphasis added).

These conclusions highlight the consensual basis of Treaties and Agreements as an essential component upon which their original validity and ongoing viability is based. The failure of State parties to respect Indigenous Peoples' Treaty right to Free Prior Informed Consent (FPIC) is a primary cause of Treaty violations and abrogations, resulting in a wide range of pervasive human rights violations.

The full and unqualified Right to FPIC has continued to be challenged by States domestically and at times in international processes, impacting the rights of Indigenous Peoples including Treaty rights. However, significant advances have also been made internationally affirming the inextricable link between self-determination, consent and the rights in affirmed in Treaties, Agreements and Constructive Arrangements. Notably, the recommendations of the 10th session of the UN Permanent Forum on Indigenous Issues included the following:

36. As a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is also relevant to a wide range of circumstances in addition to those referred to in the Declaration. Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law, and recognized as a legally binding treaty obligation where States have concluded

treaties, agreements and other constructive arrangements with indigenous peoples. In this regard, the Permanent Forum emphatically rejects any attempt to undermine the right of indigenous peoples to free, prior and informed consent. Furthermore, the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of “consultation.”

In addition to continued imposition of unsustainable development activities such as mining, damming, deforestation and other extractive projects in Treaty Lands without consent, IITC is greatly concerned with a growing number of cases regarding the creation of so-called “**Protected Areas**” by States, supported in many cases by large-scale conservation NGOs for preservation/conservation of biodiversity and mediation of climate change. Many of the “Protected Areas” already in place, including National parks and wildlife preserves, as well as some that are being proposed are within the traditional and Treaty territories which Indigenous Peoples have safeguarded and used sustainably since time immemorial. In many cases, Indigenous Peoples are denied or have severely limited access to their traditional lands, foods, homes and water sources as well as ceremonial sites once these “Protected Areas” are established without the agreement, consent or even the advance knowledge of the Indigenous Peoples concerned.

More than 90 States, including States that have legally binding Treaties with Indigenous Peoples, are already committed to launch such programs, known under the names “30X30” and the “Pledge for Nature” [<https://www.leaderspledgefornature.org/>].

For example, the Biden Administration of the United States has stated its plans to make the Black Hills National Forest, whose existence is itself a Treaty violation, a protected area under the “30x30 plan” to “conserve” 30% of U.S. lands and oceans by 2030 to meet the framework set forth under the UN Convention on Biodiversity. Implementation of this proposal, even under the pretense of “co-management,” would severely undermine the rightful legal jurisdiction of the Očhéthi Šakówiŋ Oyáte over their Treaty lands in Black Hills.

Treaty Rights Attorney Andy Reid reacted to this proposal in a letter submitted to the IITC on September 1, 2021: *The Black Hills National Forest is within the 1851 or 1868 Ft. Laramie Treaty territory which are claimed by the Očhéthi Šakówiŋ Oyáte. Until that claim is resolved, none of the lands within that territory, including Ĥe Sápa, should or can be considered or used by the United States for inclusion in US President Joseph Biden’s 30x30 plan under which he commits to a goal of conserving at least 30 percent of US lands and oceans by 2030⁶ to meet the framework proposal set forth in the United Nation’s Convention on Biological Diversity.⁷ That territory is that of the Očhéthi Šakówiŋ Oyáte, not the United States of America.”*

⁶ Executive Order No. 14008, Section 216 (January 27, 2021).

⁷ Open Ended Working Group on the Post-2020 Global Biodiversity Framework, *First Draft of the Post-2020 Global Biodiversity Framework* (July 5, 2021), CBD/WG2020/3/3, Part G.12.1, p. 6 (Target 3), <https://www.cbd.int/doc/c/abb5/591f/2e46096d3f0330b08ce87a45/wg2020-03-03-en.pdf>.

The proposed creation of a Protected Area in the Black Hills is another example of the historic failure by a State party, the United States, to respect the Treaty Right to FPIC, even when the Treaty in question specifically stipulates that consent must be sought and given before any entry or transit through the Treaty territories in question.

Following are additional examples of both extractive developments and the imposition of Protected Areas being carried out without FPIC in violation of State Treaty obligations:

Tar Sands Development in Alberta Canada: Most Treaty rights violations occurring around the world also involve violations of rights to lands, territories, natural resources and means of subsistence as affirmed in Articles 20, 25, 26 and 32 of the UN Declaration, among others. Tar Sands development in Northern Alberta and the pipelines being built to transport its product throughout North America continues to violate Treaty Rights, and rights to land, water, health, subsistence and FPIC of a number of impacted Treaty Nations in both Canada and the US.

The huge Tar Sands development has produced oil for the open market for the last 6 decades. Bitumen is the raw ore that is extracted. 1 barrel of bitumen requires approximately 4 barrels of fresh water to process using toxic chemicals including arsenic. The contaminated water is then stored in tailings ponds which to date total 1.4 trillion liters of water spread over 220 square kilometers or the size of 650 thousand Olympic size swimming pools. The ponds leach into the environment contaminating the Mackenzie water basin flowing north to the Arctic Ocean and into the circumpolar world.

Indigenous Treaty Nations downstream have had to cut back consumption of fish and game because of the contamination and high numbers of rare cancers have been reported. The continued contamination of fresh water and damage to the environment and the health of Indigenous Peoples downstream is a direct violation of First Nations Treaty rights, also enshrined in the Canadian Constitution Act 1982. US Treaty Nations in the states of Minnesota, Wisconsin, Michigan and North Dakota are also fighting the transport of this dirty oil which threatens their Treaty rights to water, fishing, gathering and hunting.

Treaties No. 6, 7 and 8 concluded between the Indigenous Nations in what is now Canada and the British Crown each affirm the right to consent as an underpinning of the Treaty relationship between States and Indigenous Nations downstream from the Tar Sands development.⁸ This issue was addressed as a Treaty Violation during the UN Committee on Elimination of Racial Discrimination's review of Canada at its 80th Session in Geneva in February 2012. Dené Nation

⁸ "And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence." [Treaty No. 6, paragraph 3, Treaty No. 6 concluded in 1876 between Her Majesty the Queen of Great Britain and Northern Ireland and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions, emphasis added].

Chief Bill Erasmus and IITC Board member from Beaver Lake Cree Nation, Treaty No. 6 Territory Ronald Lameman made the following statement addressing the devastating impacts:

“The area of north-eastern Alberta within the Treaty No. 6 and Treaty No. 8 territories known as the “Tar Sands” continues to be a national sacrifice area as it pertains to the Indigenous Peoples affected by this, the most destructive project on earth. Although the Chiefs of Treaty No. 6, Treaty No. 7 and Treaty No. 8 (Alberta) through their All Chiefs Assembly known as the AoTC (Assembly of Treaty Chiefs) called for a moratorium on any further expansion of this development, the government of Alberta continues to grant leases, licenses and permits to the extraction companies.

Our Treaty partner, the federal Crown, sits back and does nothing to support the actions and concerns of the Indigenous Treaty Nations of this part of Canada. ... At present there are numerous problems that have been attributed to continued unabated extraction activities of a majority of the oil companies that have converged on this sensitive ecosystem from all parts of the globe. A few examples include increased cancer rates amongst Indigenous peoples who are downstream from the project; huge toxic tailings ponds leaching poison, including arsenic, into the environment and water sources; the diversion of water from the Athabasca River on a daily basis with no thought about the short or long term effects on the health of one of the most pristine rivers in the world; destruction of wildlife habitat, pollution of lakes and streams by the ever expanding nature of the exploration and extraction activities of the oil companies, 24 hours a day, 7 days a week, 365 days a year; and total disregard for the Treaty Rights to fish, gather, hunt and trap of the Indigenous Treaty Peoples within the Tar Sands area as this activity is going ahead without the free, prior and informed consent of the Indigenous Treaty Nations concerned.”

On January 18, now honorary Chief Bill Erasmus confirmed that the situation has not improved regarding the impacts of the Tar Sands and the continued failure of the Canadian government to respect the Treaty Rights, including to FPIC of the Dene Nation which is located within the Treaties 8 and 11 Territories. He confirmed to IITC that *“When it comes to dealing with the tar sands, the Canadian and Alberta governments are continued offenders in regards to Treaties 8 and 11.”*

Guatemala: According to Francisco Cali Tzay, a Mayan Kaqchikel from Guatemala and the current UN Special Rapporteur on the Rights of Indigenous Peoples, at least 60 Mayan Indigenous communities in Guatemala concluded Treaties in the form of “land grants” or land titles issued by the government of Spain during the initial colonial period which began in the 1500’s. To cite one example, the Kaqchikel Mayan people of Santiago, Sacatepéquez, have a collective property title that dates back to the 1700s, constituting a legally binding Treaty with Spain that should also be recognized by Guatemala in their understanding. Nevertheless, their water sources including a river within the boundaries of their Treaty lands in la Ciénaga, were confiscated and declared a “Protected Area” by the Municipality of Guatemala City, whose mayor at the time was Mr. Alvaro Arzú Irigoyen. He also served as President of the Republic of Guatemala from 1996-2000.

According to the official publication of the National Council of Protected Areas of Guatemala, as of December 15, 2021, there are currently 348 protected areas in Guatemala that include both

municipal and private parks. Regardless of whether the protected areas are state-owned, there is a widely felt negative impact on the ways of life and cultures through restricted access to their sacred sites, lands, food sources and waters. No Protected Area in Guatemala has been established with FPIC as mandated by both International Labor Organization Convention 169, to which Guatemala is a party, and the UN Declaration of the Rights of Indigenous Peoples.

Chittagong Hill Tracts, Bangladesh: Such cases are not limited to the Americas. The ancestral lands of the Chakma Nation of the Chittagong Hill Tracts, now located in the State of Bangladesh, were recognized in the 1787 Peace Treaty they concluded with the British Crown. Today their ability to access their traditional food and water sources, and to assert sovereign jurisdiction over their ancestral lands are threatened and violated due to the existing and proposed Protected and Conservation Areas implemented without their consent by the government of Bangladesh. This is one of many other egregious and urgent examples.

3. Failure to implement the long-standing call for an International Repository on Treaties and Agreements with Indigenous Peoples at the United Nations

The UN Office of the High Commissioner on Human Rights held three Treaty Expert Seminars to follow up on the recommendations of the UN Study on Treaties Agreements and Constructive Arrangements, completed in 1999. The first was in 2003 in Geneva, the second in 2006 in Samson Cree Nation, Treaty 6 Territory (Alberta Canada), and the third in 2012, again in Geneva. These seminars were attended by Indigenous Peoples, States and UN Experts.

The first UN Expert Seminar's report recommended that the UN Economic and Social Council "request the United Nations Treaty Section of the Office of Legal Affairs be charged with locating, compiling, registering, numbering and publishing all Treaties concluded between Indigenous Peoples and States."⁹ Further, it recommended that the "United Nations library receive, catalogue and publish an inventory of materials relating to Treaties and agreements, including materials submitted to the Special Rapporteur on Treaties, agreements and other constructive arrangements between States and Indigenous Peoples."¹⁰

The report of the third UN Expert Seminar on Treaties, Agreements and Other Constructive Arrangements titled "Strengthening Partnership between Indigenous Peoples and States" held in Geneva July 16-17, 2012 (which unfortunately to this day has never received an official UN document number to site!), reiterated the recommendation "That an appropriate body be considered to register and publish copies of all treaties, taking into account the oral histories, between Indigenous Peoples and States, giving due attention to securing access to the indigenous oral version of the instruments in question;

⁹ Report of the Economic and Social Council on Indigenous Issues to the General Assembly, U.N. Doc. E/CN.4/2004/111 at P. 5 ¶9(e), (Jan. 2, 2004).

¹⁰ Report of the Economic and Social Council on Indigenous Issues to the General Assembly, U.N. Doc. E/CN.4/2004/111 P. 5 ¶9(g), (Jan. 2, 2004).

Treaties constitute legally binding nation-to-nation partnerships based on mutual recognition, good faith, respect and consent. Indigenous Peoples original “spirit and intent” based upon the oral histories and Indigenous laws surrounding Treaty making. They also affirm the understanding that Treaties are valid, enforceable and will endure “so long as the sun shines, the grass grows and the rivers flow”.

Treaty Nations maintain that original title over their traditional, ancestral lands, territories and natural resources as well as their inherent sovereignty and self-determination was never ceded or surrendered, and that it was never the intent of their intent to do so. The oral interpretation and understanding of the Treaties consecrated with ceremony and passed down through ceremony and oral traditions affirm this understanding. However, the written versions presented by the State Parties to a Treaty often present a contradictory interpretation and even different wording. The significant differences between the English text of the 1840 Treaty of Waitangi concluded in between the Māori of Aotearoa (now called New Zealand) and the Māori version of Te Tiriti o Waitangi (now also available in an English translation) is a blatant, but not a unique, example.

Many Treaties and Agreements were consecrated in ceremony by Indigenous Peoples and were considered to constitute sacred bonds. However, States often used fraudulent or coercive means to change the content of the original agreements. Therefore, the original spirit and intent, as Indigenous Peoples understood Treaties and Agreements, need to be documented and recognized as well. That will be an important aspect of the content held in the repository.

The UN has various mechanisms that oversee implementation by States of the rights of Indigenous Peoples. Treaties continue to provide a legally binding framework to ensure that the inherent rights of Indigenous Peoples are upheld, and that States adhere to their obligations. Rights affirmed in Treaties also underpin the rights recognized in current international standards. This includes rights such as self-determination, health, cultural rights and access to sacred areas, permanent sovereignty over lands and resources, and the right to free, prior and informed consent, among others.

The IITC considers that the United Nations Office of the High Commissioner on Human Rights (OHCHR), as the host of the three UN Expert Seminars, possesses the appropriate mandate and expertise to house this repository. The OHCHR can provide a neutral place to access Indigenous Treaties virtually or in person. And it already houses multi-lateral Treaty databases and it’s a central site for research to human rights scholars and advocates.

It will be important for the EMRIP to support and encourage the OHCHR to implement this long-recommended global Indigenous Treaty repository. The original documents if possible,

or scanned copies, as well as their digitalized content would be housed there. The repository should also house supporting documentation explaining the original spirit, history, content and intent of these Treaties and the rights and obligations they affirm from the point of view of the Indigenous Treaty Parties.

4. Lack of engagement by many Colonizing States to ensure that legal recognition and full implementation of the original Treaties and Agreements they concluded with Indigenous Peoples are recognized and upheld, either directly or via their successor States

Colonizing States such as Spain concluded Treaties and Agreements with Indigenous Peoples which were not transferred to or recognized by their successor States to ensure that they would be upheld into the future.

For example, many Indigenous Peoples living in now independent States in Latin America are aware that their ancestors concluded Treaties and Agreements with Spain during the colonial era. These Treaties and Agreements are sometimes erroneously referred to as “land grants” although the land in question was already traditionally owned and used by the Indigenous Peoples in question and could therefore not be “granted” to them by the settler State. Nevertheless, these lands were recognized by Spain, but are no longer fully recognized by the successor States. The Indigenous Peoples Treaty parties may have difficulties accessing original copies of those Treaties and Agreements, and in many cases the successor States do not recognize these Treaties and Agreement including their obligations regarding Indigenous Peoples jurisdiction over the lands and territories they recognized.

Copies of the original Treaty or Agreement included the respective territorial demarcations, should be provided to both the Indigenous Parties and the successor State governments. Steps can then begin to legally recognize and restore the lands, territories and waters in question to the Indigenous Peoples with the direct participation of all parties involved.

To cite one of many examples in Latin America, Guatemala was a territory occupied 100% by the Maya and other Indigenous Peoples prior to the arrival of the first people from Europe in 1524. Beginning with its independence from Spain in 1821, Guatemala issued laws of expropriation and dispossession of many Indigenous communities, declaring them State property, a common practice. The delivery and donation of lands and territories of Indigenous Peoples to the Church, as well as for the construction of cities and towns and extractive activities such as mining increased, further diminishing Indigenous access and use.

Prior to this second wave of dispossession now carried out by the Guatemalan State, the Spanish crown had issued titles recognizing individual and collective property and land rights to many Pueblos in the 1600s and 1700s. These include such Treaties and Agreements with the Mayan Pueblos of Totonicapán, Santa Catarina Ixtahuacán, Concepción, Sololá; Santiago, Atitlán, Sololá; Chuarrancho, of the municipality of Guatemala; Santiago Sacatepéquez, and the department of Sacatepéquez.

Mayan Peoples continuing to face dispossession from their lands and appropriation of their waters are currently announcing their collective property titles in the form of Treaties with the Spanish crown. They assert that Guatemala has a duty to reaffirm and uphold Treaties and Agreements made with the Mayan and Indigenous Peoples and Spain and that those duties and obligations transferred with the transfer of power to the Republic of Guatemala.

There are a large number of Treaties and Agreements that were concluded by Spain with original Indigenous Nations from what is now South America, Central America, the Caribbean, Mexico and even extending to what is now the Southwestern United States. In many cases Indigenous Peoples only recall these Treaties as through oral histories and are unable to access the documents themselves. This issue involving Spain and other colonizing powers remains unresolved and is deserving of concerted attention by the EMRIP and the State parties involved.

In conclusion, the IITC respectfully recommends to the ERMIP the following actions including recommendations to the Human Rights Council:

1. To call upon all States Treaty Parties to reaffirm, honor and implement their legal responsibilities, including through constitutional recognition, for the Treaties and Agreements they concluded with Indigenous Peoples and Nations in accordance with their spirit and intent as Indigenous Peoples understand them.
2. To facilitate and promote the establishment of bi-lateral processes created by mutual consent and with full and equal participation of the Indigenous and State Treaty parties to provide effective redress and remedy for past, current, and ongoing Treaty violations, that can include restitution and/or recognition of jurisdiction over lands, resources and territories that were confiscated or annexed in violation of the Treaties and Agreements.
3. To implement and incorporate an ongoing component of the EMRIP's country engagement process focused on supporting the full and effective implementation of Treaties and Agreements and providing advice to State and Indigenous Treaty Parties for the resolution of related conflicts and based on the principles stated above.
4. To recommend to the Human Rights Council and other appropriate UN bodies the creation of an international oversight mechanism to ensure that Conservation and "Protected Areas" do not violate rights of Indigenous Peoples including to land and resources, Treaties, self-determination, free, FPIC, subsistence, cultural rights, access to water, and protection of human and Treaty rights defenders before, during and after the creation of Protected or Conservation Areas.
5. To encourage and facilitate the OHCHR to launch and host an international repository for Indigenous Treaties and Agreements to ensure effective, neutral access for all parties to original Treaty documents, as well as testimonies, oral histories, correspondence, maps, land features, boundary descriptions and other materials presenting their original spirit and intent as understood by the Indigenous Peoples concerned.
6. To recommend that all colonizing States which concluded Treaties or other Agreements with Indigenous Peoples and Nations now living in their successor States actively engage and assume responsibility to work with the successor state and the Indigenous Treaty parties to ensure that the legally binding commitments and obligations stipulated in these Treaties are carried out and fully implemented. EMRIP could initiate these historic dialogues in conjunction with recommendation #2, above.