RESPONSE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REGARDING MOSSVILLE ENVIRONMENTAL ACTION NOW, PETITION NO 242-05, PRECAUTIONARY MEASURE NO 25-05

The Government of the United States appreciates the opportunity to provide the following response to your request of March 8, 2006, regarding the above referenced petition of Mossville Environmental Action Now and the request for precautionary measures contained therein[1].

I. The Inter-American Commission on Human Rights does not have the authority to request the adoption of precautionary measures by non-States Parties to the American Convention.

The United States Government once again respectfully submits that the Inter-American Commission on Human Rights ("Commission") does not have authority to request that the United States adopt precautionary measures. The practice of requesting precautionary measures is based on Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights ("Commission Rules" or "Rules"), which states:

> In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

These Rules, however, were not adopted by the Member States of the Organization of American States ("OAS"). They were approved only by the Commission itself. The Statute of the Inter-American Commission on Human Rights ("Commission Statue" or "Statute"), which was adopted by OAS Member States, refers to precautionary measures only in the context of States Parties to the American Convention on Human Rights ("American Convention"). With regard to those States Parties, the Statute states, at Article 19(c), that the Commission shall have the power:

> To request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not

[1] We note that the Petitioners' responses to Commission Inquiries #1 and #2, which were included along with Petitioners' March 7, 2005 petition in the Inter-American Commission on Human Rights' March 8, 2006 correspondence, reference "Petitioners' First Amended & Superceding Petition Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America, Petition No. P-242-05... (March 22, 2005)" and "Petitioners' Second Amended & Superceding Petition Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America." The United States has requested from the Commission but has not received a copy of either of these referenced documents. Therefore, our comments herein respond only to the March 7, 2005 petition and supporting documentation forwarded to the United States on March 8, 2006.

> been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons.

For non-States Parties to the American Convention, there is no parallel provision either in the Commission's organic document, the American Convention or the Commission Statute which provides specific authority for the Commission to request precautionary measures. Rather, Article 20(b) of the Commission Statute provides for the Commission to have the power:

> [T]o make *recommendations* to [non-parties to the American Convention], when it finds this appropriate, in order to bring about more effective observance of fundamental human rights;

(emphasis added).

Where member States of the OAS have thought it appropriate for one of its bodies to be authorized to request provisional or precautionary measures, they have expressly created such authority. For instance, article 63(2) of the American Convention explicitly gives the Inter-American Court of Human Rights ("Inter-American Court") the power to "adopt such provisional measures as it deems pertinent" in cases of "extreme gravity and urgency, and when deemed necessary to avoid irreparable damage to persons." The American Convention also gives the Commission the authority to request that the Inter-American Court take such measures. See American Convention, Art 63(2) ("With respect to a case not yet submitted to the Court, it may act at the request of the Commission.")

While authority to request the Inter-American Court to take provisional measures is also explicitly delineated in the Commission Statute for States Parties to the American Convention, similar authority is not provided with respect to Non-Parties to the American Convention. Compare, e.g., Commission Statute, Article 19 (authorizing the Commission to request the Inter-American Court to take such provisional measures as it deems necessary with respect to States Parties of the American Convention) with Commission Statute, Article 20 (which authorizes the Commission to make recommendations with respect to Non-Parties to the American Convention, but which contains no authorization of provisional measures).

Neither the Commission Statute nor the American Convention vests the authority to request precautionary measures in the Commission itself, nor does either provide a basis for the Commission to request the Inter-American Court to take such measures with respect to non-States Parties to the American Convention. Therefore, while Member States of the OAS expressly gave the Commission the authority to request that the Inter-American Court take provisional measures vis-à-vis States Parties to the American Convention (and States then enjoyed the right to determine for themselves if such procedures would apply to them by virtue of deciding to become parties to the American Convention), the Commission has not been given the same such authority vis-à-vis a State which is not a party to the American Convention.

The United States is not party to the American Convention or to any other Convention that would confer upon the Commission the authority to request that precautionary measures be taken by the United States. Because the United States is not party to the American Convention, the Commission has only the authority "to make recommendations...to bring about more effective observance of fundamental human rights." Commission Statute, Art. 20(b). Nothing in the Commission Statute provides the Commission with the authority to request precautionary measures of the United States. Lacking the requisite authority to request precautionary measures of the United States, any such an action would constitute *ultra vires* action by the Commission.

II. The petition fails to show a breach of a duty under the American Declaration.

According to Article 34 of the Commission Rules a petition must state facts that tend to establish a violation of the American Declaration on the Rights and Duties of Man ("American Declaration"), otherwise the Commission must determine the petition to be inadmissible. While the Commission may look to the obligations of a state under other sources of international law as relevant to interpreting and applying the state's commitments under the American Declaration, it may not, as Petitioners suggest, "apply international law outside of the Inter-American System." March 7, 2005 Petition at p.68. The Commission Statute explicitly provides that in relation to non-states parties to the American Convention, for purposes of the Statute, human rights are understood to be only the rights set forth in the American Declaration. Commission Statute, Article 1(2)(b).

Petitioners' reference to and reliance upon decisions and opinions of the Inter-American Court as binding upon the United States are factually and legally incorrect as the United States is not subject to the jurisdiction of that body. Likewise flawed is the Petitioners' reference to and reliance upon international instruments to which the United States is not a State Party, including the American Convention on Human Rights; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; the International Covenant on Economic, Social and Cultural Rights; the European Convention on the Protection of Human Rights, and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the African Charter on Human and People's Rights, the African Charter on the Rights and Welfare of the Child; and the Convention on the Rights of the Child. As a matter of U.S. treaty law and practice, the United States assumes treaty obligations only pursuant to operative language in treaties to which it becomes a party.

Although petitioners have alleged violations of Articles I, II, V, IX, XI, and XXIII of the America Declaration, their allegations are based on an extraordinarily and erroneously expansive interpretation of state commitments under those articles. These assertions are unsupported by the text of those articles and rely on a systematically flawed analysis of international law. Petitioners' claim that the United States has violated customary international law is equally unfounded. Evidence of a customary norm

requires indication of extensive and virtually uniform state practice that States undertake out of a sense of legal obligation (i.e., "opinion juris"). See North Continental Shelf Cases (W. Ger. v. Den; W. Ger. V. Neth.), 1969 I.C.J. 3, 42-43. It is not enough that certain international declarations espouse a general rule or that certain treaties include the obligation, for custom must derive from the actual repetition of acts by the community of states as a whole that are taken out of a sense of an international legal obligation apart from specific treaty obligations. To reach the level of a customary norm, state practice must "be such, or be carried out in such a way, as to be evidence that this practice is rendered obligatory by the existence of a rule of law requiring it." Id. at 44. As a prudential matter, when a party to a dispute asserts the existence of a rule of customary international law, the burden falls on that party to establish the clear existence of such rule. Thus in the Asylum Case (Colombia / Peru), the International Court of Justice imposed the burden on the party asserting a violation of customary international law to establish that such a rule existed and was binding on the other party:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.

Asylum Case (Colombia/Peru), 1950 I.C.J. 266, at 276-77 (November 20). In light of this burden, it is particularly significant that Petitioners have made no showing as to State practice or the existence of opinion juris in this regard.

The customary international law norms alleged by the petitioner simply do not exist as a matter of international law. Under the American Declaration there is no right to a healthy environment either directly or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination. Moreover, while the protection of human rights and the protection of the environment are both tremendously important subjects, there is no substantive right of individuals under international human rights law to a safe or healthy environment. The principal multilateral human rights treaties to which the United States is a party do not create such a right nor has customary international law developed to create such a right. While some countries as a matter of their domestic law may choose to create a right to a safe or healthy environment, and are free to do so as an exercise of their sovereignty, this does not create customary international law on the subject as it is not uniform international practice nor clearly done out of a sense of **international** legal obligation. Even if one were to ignore the non-existence of a constant or uniform practice of states and the required opinion juris and assert that customary international law somehow existed on these subjects, no such rule could bind the United States as it has never accepted such a rule and in fact objects to the creation of such norms. Under longstanding principles of international law, this would make the United States what is

known as a "persistent objector" to the creation of any such norm, and such norm would not apply to such persistent objector. See, e.g., Asylum Case, 1950 I.C.J. 266, at 278-79.

Apart from issues of law, the United States as a policy matter recognizes that there are important linkages between environmental protection and the enjoyment of civil and political rights. For example, the United States believes that it is important for States to protect the civil and political rights of individuals in their territory where such individuals are exercising such rights in their efforts to protect the environment. However, bodies entrusted with the responsibility to promote the observance and defense of specific rights should not attempt to elevate political goals and objectives onto a legal plane, by equating ideals with legal obligations. Such a dramatic expansion of the responsibilities of organs such as the Inter-American Commission would make literally tens of thousands of decisions governments in the hemisphere must take everyday in governing their societies through democratic processes subject to post hoc and essentially standardless review by this body. Rather, it is for the citizens of sovereign states to determine - through open, participatory debate and democratic processes - the policies and programs they consider to be the most effective use of their resources in areas of social concern such as health care and the environment. This dramatic expansion of issues potentially subject to Commission review, as requested by the Petitioners, would amount to a revolution in the practice and jurisprudence of the Commission, with the unfortunate consequence of diverting time and resources and thus undermining its ability to manage its responsibilities in addressing compliance with long-established human rights as set forth in the American Declaration.

III. Failure to exhaust domestic procedures and remedies.

Even if Petitioner had articulated a breach of a duty under the American Declaration, Article 31(1) of the Commission's Rules of Procedure provides that, in order for a petition to be admissible, the petitioning party must affirm that the remedies of the domestic law have been pursued and exhausted.[2] Petitioners admit that they have not sought remedies in U.S. courts for the violations they allege. Petitioners' Response to Commission Inquiry #1, p.1. Instead, Petitioners argue that they are exempted from the pursuit and exhaustion requirement because the U.S. does not afford due process of law for the protection of the rights they allege have been violated.

In making this argument, Petitioners erroneously equate non-self execution of international instruments under U.S. law with a failure to carry out commitment and obligations contained therein. While many international human rights commitments and obligations undertaken by the United States are, at the time they are undertaken, already recognized in our domestic law, when they are not, implementing legislation or regulations, as appropriate, are enacted to incorporate them.

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[2] We note that some of the documents referenced by Petitioners do not appear to be included in their appendices or otherwise freely publicly available. See, e.g. Petition at footnotes 337, 353-4. We, therefore, request that Petitioners be asked to provide copies of those documents.

In arguing that they are exempted, Petitioners also fail to acknowledge that they and others have successfully challenged environmental pollution regulations issued by the United States Environmental Protection Agency (EPA), resulting in their revision. See e.g. Mossville Environmental Action Now v. EPA, 370 F.3d 1232 (D.C. Cir. 2004) *reh'g denied* April 15, 2005 (holding that EPA failed to properly set emissions limits on hazardous air pollutants emitted during polyvinyl chloride production as required by the Clean Air Act). Petitioners also fail to address at all the possibility of actions under the laws of the state of Louisiana, or possible tort actions against, as well as previous settlements with, companies whose industrial actions have allegedly directly caused Petitioners' injuries. See e.g. Georgia Gulf Corporation Form 10-K filing with the United States Securities and Exchange Commission for the Fiscal Year Ending December 13, 1999 at pages 6-7 (discussing a 1998 settlement with Mossville residents affected by groundwater pollution and expenses expended for related environmental remediation).

Even if the specific deficiencies of U.S. constitutional and environmental law claimed by Petitioner were true, the claimed deficiencies are equally applicable to the American Declaration. As previously stated, there is no right to a healthy environment either directly or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination, express or implied, under the American Declaration. Nor is there an enforceable mandate under the American Declaration to:

- establish emission limits for all of the toxic chemical released by all industrial facilities,
- protect against the multiple, cumulative, and synergistic impacts of toxic pollution from existing and proposed industrial facilities, or
- reduce excessive air pollution occurring in small areas within designated air quality control regions.

Petitioners' Response to Commission Inquiry #1 at pp.7-10 (claiming a lack of a mandate in U.S. law in five areas exempts Petitioners from exhaustion requirement).

Likewise, there is no enforceable mandate under the American Declaration, nor could there be, absent a clear showing of intentional discrimination based on factors such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", to:

- prevent the siting of individual toxic and hazardous facilities or the clustering of such facilities in close geographic proximity to residential areas, or
- remedy practices that allegedly impose racially disproportionate pollution burdens.

Petitioners' Response to Commission Inquiry #1 at pp.7-10 (claiming a lack of a mandate in U.S. law in five areas exempts Petitioners from exhaustion requirement).

Therefore, rather than establishing their exemption from the exhaustion requirement, Petitioners' argument that the U.S. does not afford due process of law for the protection of the rights they allege have been violated only serves to show that their allegations are based on an overly broad and erroneous interpretation of state

commitments under the American Declaration. To the extent Petitioners do not have a remedy in U.S. courts, they seek to invoke rights that do not exist under the American Declaration or any other body of international law to which the United States is subject.

IV. Conclusion

The Commission does not have authority to request that the United States, as a non-States Parties to the American Convention on Human Rights, adopt precautionary measures. As to this Petition, it propounds standards well beyond those set forth in the American Declaration on the Rights and Duties of Man, relying upon international instruments to which the United States is not a State Party and the domestic laws of other sovereign nations to reach a conclusion that has no basis in international law. The Commission should declare this Petition to be inadmissible, because it fails to show a breach of a duty under the American Declaration, fails to establish that Petitioners are exempted from the exhaustion of domestic procedures and remedies requirement, and is wholly groundless.