

JOINT SUBMISSION

Inputs on the current draft of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures in relation to Indigenous Peoples' rights

We, the undersigned indigenous peoples' organizations, alliances and networks; and endorsing partner and allied organizations submit these *preliminary* comments on the OECD 'Consultation Draft: Targeted update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures' ("Consultation Draft"), as part of the public consultation (13 January – 10 February 2023).

We stress at the outset that indigenous peoples are disproportionately affected by the operations of Multinational Enterprises ("MNE"), including MNEs based in OECD countries, which often have negative and severe impacts on our rights, lives, and well-being, and even on our survival as peoples. These impacts include involuntary displacements and evictions; destruction of our environment, our livelihoods and sacred sites; disrespect for our indigenous governance systems; conflicts; violence against women; and criminalization of our indigenous leaders and communities when we assert and defend our rights. Further, these impacts are the result of systemic violations of our collective rights to our lands, territories, and resources, our right to self-determination and to our cultural integrity, and the requirement to obtain our free, prior and informed consent ("FPIC") in the exercise of our collective rights, which are affirmed by international human rights law.

These serious adverse impacts are widely acknowledged by United Nations and other human rights mechanisms and procedures, and the consensus is that intensified and meticulous attention to our rights is required by states and MNEs.ⁱ The Inter-American Court of Human Rights, for instance, explains that "businesses must respect the human rights of ... indigenous and tribal peoples, and pay special attention when such rights are violated."ⁱⁱ Therefore, the extent to which the process of updating the OECD Guidelines and their Implementation Procedures guarantees respect for our rights is an issue of great importance to indigenous peoples.

Direct Consultation with Indigenous Peoples is Needed

We are deeply concerned that there appears to be no plan to directly consult with indigenous peoples about updating the OECD Guidelines. We recall that the former UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, recommended that direct consultations take place in 2011, the last time the Guidelines were updated. He explained that "... multinational enterprises are affecting the lives of indigenous peoples in very significant ways, across the world, on a daily basis. ... Proper consultation with indigenous peoples in this process needs to be undertaken."ⁱⁱⁱ

We concur and reiterate this recommendation now, specifically calling on the OECD to directly consult with indigenous peoples on the updating process for the Guidelines as well as subsequently in relation to their implementation and in structured and mutually acceptable ways.^{iv} We also recommend that the Decision of the Council on the OECD Guidelines be amended to explicitly provide for direct and ongoing engagement with indigenous peoples (see Consultation Draft, Part II), especially in connection with implementation of the mandates and functions of National Contact Points ("NCP").

The OECD would learn about indigenous peoples' rights and realities through this direct engagement, which would greatly enhance the competences and capacities of the NCPs and the effectiveness of the Guidelines and their implementation.

The purpose of consultations with indigenous peoples is to safeguard our internationally recognized human rights. The limited opportunity to make this submission on the draft of potential updates to the Guidelines in no way constitutes adequate consultation with indigenous peoples. We emphasize that the members of the OECD would be obligated to undertake direct consultations with indigenous peoples if these matters were to be discussed at the national level and the same obligation should also apply to international cooperation measures,^v such as updating the Guidelines and the role of the NCPs that oversee them.^{vi}

Indigenous Peoples' Rights must be better Reflected in the Guidelines

We are gravely concerned that the requisite intensified attention to indigenous peoples' rights is, at best, opaque and, at worst, inadequate or lacking in the Consultation Draft. In this vein, various points raised by Professor Anaya in 2011 continue to be pertinent. We hereby incorporate by reference his prior comments into this submission, especially on the need for a more extensive treatment of the human rights of indigenous peoples and specific guidance on those rights in the Guidelines. He rightly observed that "companies will make significant missteps if they do not engage adequately with indigenous peoples' rights standards and issues." It is imperative that MNEs and NCPs have a firm grasp of the obligations and responsibilities that arise in relation to indigenous peoples' rights, and this is not adequately addressed by the bare assertion that those rights exist. Further and more detailed elaboration and guidance is required in the Guidelines as well as in the Implementation Procedures.

We acknowledge that the Consultation Draft states that "some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention."^{vii} It further explains that MNE's "may need to consider additional standards" in such instances.^{viii} Indigenous peoples are correctly identified as requiring increased attention. Also, noting that "the United Nations has elaborated further on the rights of indigenous peoples," the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") is *proposed* to be an 'additional standard'.^{ix} We fully endorse this proposal and add the following comments.

UNDRIP was overwhelmingly endorsed by the international community and by all OECD members. It declares that the "rights recognized [t]herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (art. 43). Thus, international action and cooperation should not fall below these minimum standards without substantial justification. There is none in the present context; on the contrary, the evidence firmly supports a critical need to meet or exceed these minimum standards given the disproportionate impact of MNEs on indigenous peoples and our rights. This is particularly pressing considering the Guidelines' silence on those rights and the NCPs' inability to protect them, despite their recognition under international human rights law.

Indigenous peoples' rights are guaranteed under all the universal and regional human rights treaties, not only in those that have the term 'indigenous' in their titles, and these rights are prominent in the jurisprudence of the various supervisory bodies.^x These bodies consistently stress the applicability of the UNDRIP when interpreting the rights in the various treaties,^{xi} and the same is also sometimes true in judicial proceedings at the national level.^{xii} They are also increasingly elaborating norms in relation to MNEs,^{xiii} including on the extra-territorial obligations of state parties,^{xiv} that must be taken into account as part of assessing the overall human rights framework, which is not limited to or by the UN Guiding Principles on Business and Human Rights.^{xv}

Notwithstanding, the UN Guiding Principles and the UN Working Group on Business and Human Rights ("WGBHR") also specify the responsibilities of MNEs to respect indigenous peoples'

human rights and the obligation to provide access to remedies when these rights are violated. To ensure that the UN Guiding Principles are implemented in accordance with our rights, the WGBHR has repeatedly urged States to “fully implement the [UNDRIP], in particular ... home States of transnational corporations operating in territories used or inhabited by indigenous peoples.”^{xxvi} It has clarified that this necessitates that home states “[r]equire companies to conduct human rights due diligence to ensure respect for indigenous peoples’ ... rights in their supply chains” and to “[a]dopt and enforce regulations in relation to the human rights impacts overseas of companies domiciled in home States.”^{xxvii} It has also stressed the need for the NCPs of home states to have sufficient knowledge of indigenous peoples’ rights in order to be competent to address our complaints.^{xxviii}

The UNDRIP is thus part and parcel of understanding the binding standards set out in the various human rights treaties and formal interpretations thereof in relation to indigenous peoples. It is critically important that this body of interconnected human rights law is explicitly recognized in the updated Guidelines, and that it is the primary reference point in connection with states’ duty to protect and MNEs’ responsibility to respect human rights. This applies to all aspects of the six points presently set out in Ch. V, para. 35 of the Consultation Draft. Moreover, such recognition is a minimum condition to foster confidence that the OECD Guidelines could be responsive to the massive violations of indigenous peoples’ rights that are caused by MNE operations all over the world. As discussed below, ensuring that these standards are applied as part of the implementation of the Guidelines is another crucial aspect of fostering confidence.

It is also important to emphasize certain rights. Specific human rights that are vitally important to indigenous peoples’ survival, dignity and well-being must be highlighted in the Guidelines and not, as is the case now, left to a general statement (as in, e.g., IFC Performance Standard 7, which identifies rights that are especially relevant or that require special considerations). These include the interconnected set of rights that coalesces around indigenous peoples’ multifaceted relations to our traditionally owned lands, territories and resources.^{xxix} Likewise, indigenous peoples have a right to devolved authority over our internal affairs^{xxx} and to effective participation in external decision-making that may affect our rights,^{xxxi} which also requires compliance with the principle of FPIC.^{xxxii} The updated Guidelines also need to be clear that indigenous peoples have internationally recognized and applicable rights, irrespective of legal recognition by their national governments.^{xxxiii} We also have the right to a healthy environment.^{xxxiv}

The Consultation Draft presently proposes that “meaningful engagement with [affected] stakeholders,” such as indigenous peoples, “is important.” However, this language is inadequate and may be interpreted in a way that is incompatible with extant human rights guarantees. In common with other international authorities, the African Court of Human and Peoples’ Rights, for instance, has ruled that indigenous property rights entail “the right to control access to indigenous lands,” and “the right to give or withhold their [FPIC]...”^{xxxv} To support clear understanding, specificity on this and other issues is necessary, yet presently lacking.

These issues can be further discussed in a dedicated consultation process with indigenous peoples and, where agreed, via specific collaborative processes between the OECD and indigenous peoples.

Effective Implementation is Fundamental

We are cognizant that the Guidelines are voluntary and recommendatory only and that NCPs engage in mediation solely as agreed to by both the complainant and the respondent MNEs. For this and other reasons, invoking the Guidelines, in our view, has not produced many positive results, more so considering the scale and seriousness of violations that frequently affect indigenous peoples and the

discernable lack of will on the part of some MNEs to address the same. This is a disincentive for indigenous peoples when considering whether to engage with the process governed by the Guidelines. Additionally, where indigenous peoples complain or protest, there is considerable evidence that persecution, criminalization and even killings characterize some of these situations.^{xxvi}

We recommend that both issues are addressed as part of updating the Guidelines and/or otherwise with respect to states' obligations to regulate the conduct of MNEs, at home and extra-territorially, and to provide effective remedies to affected persons, communities and peoples. MNEs do not have meaningful "responsibilities" if they are not held responsible for their acts and omissions, and NCPs are not effective grievance mechanisms if engagement with them does not lead to meaningful outcomes and protections for victims of rights violations.

With respect to the first issue, it is very important that OECD members link implementation of the Guidelines to specific domestic laws and procedures regarding, among other things, MNE due diligence responsibilities, providing a common and second level of implementation where mediation has been rejected or exhausted (e.g., where it has not produced an agreed outcome). This second level of implementation would apply in cases where recommendations in final statements are not implemented in a satisfactory manner for the concerned indigenous peoples. This would provide greater confidence that the process would be viable and effective. On the second point above, the Guidelines should clarify that such actions, where attributable to MNEs, are aggravating factors that should trigger some form of formal investigation and, where warranted, referral to the proposed second level of implementation. Also, while there are now general principles that address human rights defenders (e.g., Consultation Draft, Ch.II.A.10), there should also be specific attention in the Guidelines to the characteristics of indigenous rights' defenders, especially the collective dimensions and harm, and the disproportionate impacts on these defenders and their communities.^{xxvii}

To conclude, we reiterate our strong recommendation for the OECD to hold direct and meaningful consultations with indigenous peoples and ensure the inclusion of specific and appropriate language on respect and protection of indigenous peoples' rights in the OECD Guidelines for Multinational Enterprises and their Implementation Procedures. Towards this end, we extend our full cooperation for any effort towards strengthening respect for indigenous peoples' rights in business operations.

ⁱ See e.g., *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24 (2017), para. 8 ("Among the groups that are often disproportionately affected by the adverse impact of business activities are ... indigenous peoples, particularly in relation to the development, utilization or exploitation of lands and natural resources..."); *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/68/279 (2013), para. 1 (recalling that it has been "documented that indigenous peoples are among the groups most severely affected by the activities of the extractive, agro-industrial and energy sectors"); *Business and Human Rights: Inter American standards*, OEA/Ser.L/V/II (2019), para. 340 (where the Inter-American Commission on Human Rights explains that its first report on business and human rights focused on indigenous peoples because of "the extensive information and complaints concerning the differentiated and significant impact that this sector generates regarding these populations in the region... [These] ... impacts are multiple, complex, and intertwined with other situations of violations of rights...").

ⁱⁱ *Kaliña and Lokono Peoples v. Suriname*, Ser C No. 309 (2015), para. 224-5 (citing UN Guiding Principles on Business and Human Rights, Principle 1, and A/HRC/17/31, para. 18). See also *Buzos Miskitos Divers v. Honduras*, Ser C No. 432 (2021), para. 42 *et seq.*

ⁱⁱⁱ For a summary of his prior inputs see http://unsr.jamesanaya.org/wp-content/uploads/2011/01/2011_01_oecd-guidelines-hr-expert-meeting-summary-anaya.pdf.

- ^{iv} See e.g., *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, (as amended 24/05/2011), Decides, II.2 (stating that “The Committee shall periodically invite ... (the ‘advisory bodies’), OECD Watch, as well as other international partners to express their views on matters covered by the Guidelines. In addition, exchanges of views with them on these matters may be held at their request”).
- ^v See e.g., *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24 (2017), para. 12 (“States parties and businesses should respect the principle of [FPIC] of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired”); and para. 24 (The “obligation [to fulfil] also requires directing the efforts of business entities towards the fulfilment of Covenant rights”); *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*, CRC/C/GC/16, para. 41 (“States have obligations to engage in international cooperation for the realization of children’s rights beyond their territorial boundaries.” In connection with, e.g., *CRC/C/CRI/CO/5-6 (2020)*, para. 44, recommending that the state “ensure that indigenous ... children are included in processes to seek [FPIC] of indigenous ... peoples, in connection with measures affecting their lives, and ensure that development projects, hydroelectric projects, business activities, and the implementation of legislative or administrative measures, such as the establishment of protected areas, are subject to consultations and adhere to the [UNDRIP]”).
- ^{vi} See e.g., *General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 45 (States should take steps through international assistance and cooperation aimed at progressively achieving rights relating to land. “Adequate safeguard policies shall be in place, and persons and groups affected by measures of international cooperation and assistance shall have access to independent complaint mechanisms”).
- ^{vii} Consultation Draft, Ch. V, p. 22, para. 40.
- ^{viii} *Id.*
- ^{ix} ‘Additional standards’ in this context are those beyond those listed in Ch. V, para. 39 (i.e., the international bill of rights), as framed by those listed in Ch. V., para. 36 (Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy). This list is incomplete and, to avoid doubt, reference is also required to all relevant and in force UN and regional human rights instruments, e.g., the Convention on the Rights of the Child, the Convention on the Elimination of all form of Racial Discrimination and the Convention on the Eradication of Discrimination against Women.
- ^x See e.g., *General Comment No. 11 (2009) on Indigenous children and their rights under the Convention*, CRC/C/GC/11 (2009); decisions of the Human Rights Committee; decisions and reports of the Inter-American Commission on Human Rights and judgments of the Inter-American Court of Human Rights; and decisions of the African Commission on Human and Peoples’ Rights and judgments of the African Court of Human and Peoples’ Rights.
- ^{xi} See e.g., *General recommendation No.39 (2022) on the rights of Indigenous Women and Girls*, CEDAW/C/GC/39, para. 13 (“The Committee considers UNDRIP an authoritative framework to interpret state party and core obligations under CEDAW”) and para. 16 (The prohibition of discrimination in articles 1 and 2 of the Convention applies to all rights of Indigenous Women and Girls under the Convention, including, by extension, those set out in UNDRIP, which is of fundamental importance to interpretation of the Convention...”); *General Comment No. 11 (2009) on Indigenous children and their rights under the Convention*, CRC/C/GC/11 (2009), para. 10 (the UNDRIP “provides important guidance on the rights of indigenous peoples, including specific reference to the rights of indigenous children in a number of areas”); *Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013 (2020), para. 1.5 (“... recalling that article 26(2) of the [UNDRIP] establishes the right for Indigenous Peoples to own, use, develop and control lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, and recalling that this definition has been endorsed by the Committee in its general recommendation No. 23 (1997)...”); and *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015 (2019), para. 6.8 (ICCPR, art. 27, “interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’”). Further information on these points can be provided if requested.
- ^{xii} See e.g., *Xanharu Digest. Upholding Indigenous Peoples’ Rights in Legislation and Jurisprudence: Global, Regional, and National Developments*, <https://www.iprights.org/index.php/en/en-resources/digest>.
- ^{xiii} See e.g., *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24 (2017).

- ^{xiv} See e.g., *General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 42 (stating that states shall establish “regulatory mechanisms to ensure that business entities ... and other non-State actors that they are in a position to regulate, do not impair the enjoyment of Covenant rights in land-related contexts in other countries. Thus, States parties shall take the necessary steps to prevent human rights violations abroad in land-related contexts by non-State actors over which they can exercise influence...”).
- ^{xv} The preface to the Consultation Draft states that “The political, economic, environmental, social, physical and technological environment for international business has experienced is undergoing far-reaching structural and rapid change” (Preface, p. 5). The same can also be said to some extent in relation to the applicable human rights norms, which have evolved and strengthened since the last updating in 2011.
- ^{xvi} *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: “Business-related impacts on the rights of indigenous peoples”* A/68/279 (2013), para 55.
- ^{xvii} *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: “Addressing the human rights impacts of agro-industrial operations on indigenous and local communities: State duties and responsibilities of business enterprises”* A/71/291 (2016), para 115.
- ^{xviii} *Id.*
- ^{xix} See e.g., *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua’ẽ, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (2021), para. 8.6 (ruling that “Article 27 [of the ICCPR], interpreted in the light of the [UNDRIP], establishes the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence, food and cultural identity”); and *General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 26-7 (the “obligation to protect requires States parties to adopt measures to prevent any person or entity from interfering with the Covenant rights related to land, including the access to, use of and control of land.” This includes protecting “collective rights of access to, use of and control over lands, territories, and resources ... traditionally owned, occupied or otherwise used or acquired,” especially where material and spiritual relationships with traditional lands are “indispensable to their existence, well-being and full development” (cf. UNDRIP, Arts. 25 and 26)).
- ^{xx} See e.g., *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Ser C No. 400 (2020), para. 153 (“the adequate guarantee of communal property does not entail merely its nominal recognition, but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory”); *General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights*, E/C.12/GC/26, para. 11 (“land is also closely linked to the right to self-determination”) and para. 35 (states are required to “recognize the social, cultural, spiritual, economic, environmental, and political value of land for communities with customary tenure systems and shall respect existing forms of self-governance of land”); *Klemetti Käkkäläjärvi et al. v. Finland*, CCPR/C/124/D/2950/2017 (2019), para. 9.8 (ICCPR, art. 27, “interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’”); *Yaku Pérez Guartambel v. Ecuador*, CERD/C/106/D/61/2017 (2022), para. 4.6 (citing UNDRIP, arts. 3, 4, 5, 11, 33, and 34, and explaining that these rights correspond to “legal pluralism,” where the indigenous and non-indigenous state jurisdictions coexist and operate through different authorities), and para. 4.12 (referring to the “the necessary cooperation and coordination that should be at the core of the relationship between the [non-indigenous state] system and the indigenous system — the latter emanating ... also from the right of indigenous peoples to autonomy and self-government”).
- ^{xxi} See e.g., *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009), para. 7.6 (“... the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community”).
- ^{xxii} See e.g., *Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013 (2020), para. 6.16 (explaining that the Committee “adheres to the human rights-based approach of [FPIC] as a norm stemming from the prohibition of racial discrimination...”); *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua’ẽ, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (2021), para 8.7 (ruling that “it is of fundamental importance that measures that compromise or interfere with

the economic activities of cultural value of an indigenous community have been subjected to the [FPIC] of the members of the community..."); *General recommendation No.39 (2022) on the rights of Indigenous Women and Girls*, CEDAW/C/GC/39, para. 18 ("The failure to protect the rights to self-determination, collective security of tenure over ancestral lands and resources, and the effective participation and consent of Indigenous Women in all matters affecting them constitutes discrimination against them and their communities").

^{xxiii} See e.g., *Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/24/50, para. 23 (explaining that "To address instances of non-recognition, reference should be made to jurisprudence at all levels where there has been recognition of the collective legal personality of indigenous peoples and their communities"); and *Matson et al v. Canada*, CEDAW/C/81/D/68/2014 (2022), para. 18.4 (quoting and citing UNDRIP, arts. 8 and 9: "...indigenous peoples do have the fundamental right to be recognized as such, as a consequence of the fundamental self-identification criterion established in international law. ... [A]ccording to the Inter-American Court of Human Rights, the identification of an indigenous community, from its name to its membership, is a social and historical fact that is part of its autonomy, and therefore States must restrict themselves to respecting the corresponding decision made by the community, i.e., the way in which it identifies itself").

^{xxiv} See e.g., *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Ser C No. 400 (2020), para 207 ("... it should be pointed out that States not only have the obligation to respect [the right to a healthy environment].... This obligation extends to the "private sphere" in order to avoid 'third parties violating the protected rights'").

^{xxv} *African Commission on Human and Peoples' Rights (Mau Ogiek) v. Kenya, Reparations* (2022), para. 6-8. See also *Saramaka People v. Suriname*, Ser C No. 172 (2007) and *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua'ẽ, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (2021).

^{xxvi} See e.g., *Report of the Special Rapporteur on the rights of indigenous peoples*, A/HRC/39/17 (discussing attacks against and criminalization of indigenous peoples defending their rights) and *Report of the Special Rapporteur on Human Rights Defenders*, A/71/281.

^{xxvii} See e.g., *Chitay Nech et al. v. Guatemala*, Ser C No. 212 (2010), para. 115 (observing that its jurisprudence confirms that indigenous peoples have a right to direct participation in decisions that may affect their rights and development, the Inter-American Court of Human Rights explains that indigenous leaders "exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as the right of the community to be represented").