



# Mining and Indigenous Peoples Issues Roundtable:

## Continuing a Dialogue between Indigenous Peoples and Mining Companies

Convened through the IUCN-ICMM  
Dialogue on Mining and Biodiversity

Sydney, Australia  
30-31 January 2008



This report was prepared following the Roundtable on Mining and Indigenous Peoples Issues as a record of the discussions of participants who were acting in their individual capacities and is not, nor should any of its contents be interpreted as, the policy of either IUCN or ICMM.

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Cover photographs (from left):

1. Getty images, dump trucks in Quarry 2. Operation in Limpopo Province provides financial and other support to the Seroko Vegetable project. One of the beneficiaries of the project, which teaches a range of vegetable-growing skills to members of the surrounding communities, is Ezekiel Makuwa. 3. Rustplaats - In March 2002, ownership of the land in Piet Retief was handed over to the community for development. Here community representative Themba Mafiyeka raises the silver-plated shovel in celebration Mondi Piet Retief.

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### **Abstract**

The second IUCN-ICMM Roundtable on Mining and Indigenous Peoples Issues held in Sydney Australia, January 29<sup>th</sup> and 30<sup>th</sup> 2008 built upon the dialogue and relationships established during an initial Roundtable in November 2005 which identified, discussed and scoped out the issues related to mining and Indigenous Peoples. Both Roundtables were undertaken under the Terms of Reference governing the Dialogue on Mining and Biodiversity between the World Conservation Union (IUCN) and The International Council on Mining and Metals (ICMM).

This Roundtable was convened specifically to address the related issue identified in the TOR of the Dialogue of Prior Informed Consent. Key issues that were addressed in this forum included: the evolving context for Free, Prior and Informed Consent (FPIC) as reflected in international standards; consultation, engagement and the meaning of broad community support; generating and defining net social benefits; and the challenges of operationalizing FPIC. The Roundtable also highlighted the need for progress in addressing these issues, through relevant fora or processes at either the global, regional or national levels, and suggested areas and opportunities for future activity.

## **1. Background to and participation in the January 2008 Roundtable**

At the World Summit on Sustainable Development (WSSD) in Johannesburg, August 2002, IUCN and ICMM launched a Dialogue on mining and biodiversity. The idea was to provide a platform for communities, corporations, non-governmental organizations (NGOs) and governments to discuss and seek the best balance between the protection of important ecosystems and the recognition of the social and economic importance of mining. IUCN and ICMM have committed themselves to discussing a full range of issues with the objective of enhancing the contribution of the mining industry to biodiversity conservation. The overarching aims of the Dialogue are:

- To improve the performance of mining industries in the area of biodiversity conservation with a focus on reducing the negative impacts of the industry's operations and enhancing the industry's positive contribution to biodiversity conservation.
- To raise mutual awareness and understanding between the conservation community and the mining industry, so that both can contribute to improved outcomes for conservation and development in areas where they interact.

While mining and biodiversity is the key focus of the Dialogue, the Terms of Reference for the Dialogue<sup>1</sup> and associated work program (under Annex D – Related issues) call for IUCN and ICMM to provide a platform to discuss the related issues of:

- Effective involvement of Indigenous Peoples and local communities in making conservation and development decisions that affect them (the subject of the November 2005 Roundtable);
- Free, Prior and Informed Consent (FPIC)<sup>2</sup>, the focus of the January 2008 Roundtable; and
- Restoration of legacy sites (to be discussed at a forthcoming Roundtable in March 2008).

The January 2008 Roundtable on Mining and Indigenous Peoples Issues was attended by 27 individuals (see Annex I for Participants List) from diverse backgrounds and geographies. This included international Indigenous Peoples' organizations, national aboriginal and Indigenous organizations, IUCN Secretariat, mining companies, NGOs, industry associations and ten Indigenous representatives from nine countries in Africa, Australia, Europe, Latin America, North America and Oceania. Participants were invited based on their individual experience, expertise and knowledge about the issues involved in the relationship between mining and Indigenous Peoples.

## **2. Objectives of the Roundtable**

The main objectives of the Roundtable, with particular emphasis on implementation aspects and improving the interactions between mining companies and Indigenous Peoples in the field, were to:

- Increase mutual understanding by sharing individual perspectives, needs, expectations and limitations;
- Discuss implementation issues relating to: consultation and engagement; achieving broad community support; operationalizing Free, Prior and Informed Consent (FPIC); and seeking agreement on programs to achieve net social benefits; and

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<sup>1</sup> For further information on the Dialogue, please refer to "Terms of Reference (TOR) for the Dialogue between IUCN and ICMM" (10 June 2004), available at [www.iucn.org/themes/business/mining/](http://www.iucn.org/themes/business/mining/) and other documents on the history of this effort at [www.iucn.org/themes/business/mining/history\\_dialogue.htm](http://www.iucn.org/themes/business/mining/history_dialogue.htm).

<sup>2</sup> Originally referred to in the TOR for the Dialogue as 'Prior Informed Consent'.

- Explore appropriate ideas and forums for continuing the dialogue beyond the ICMM-IUCN framework

The expected outcomes from the Roundtable were: more constructive engagement between the mining industry and Indigenous Peoples on operational issues of mutual concern; and building of consensus on fora/processes through which the issues discussed could be further pursued.

### **3. Structure of the Roundtable**

The Roundtable comprised four main sections, which were intended to provide an opportunity for substantive discussion. These were as follows:

- The evolving context for FPIC;
- Consultation, engagement and the meaning of broad community support;
- Generating net social benefits; and
- The challenges of operationalizing FPIC.

The main sessions were preceded by an introductory session on day one, and a discussion of possible next steps, as the last session of the Roundtable.

For each of the four main Roundtable sessions, brief introductory remarks were provided by an Indigenous representative and a mining representative, to illustrate some of the practical challenges relating to the topic under discussion and/or to provide examples of implementation experiences. Participants were then split into four discussion groups which were asked to share ideas concerning:

- Experiences in relation to the topic presented.
- Areas of:
  - Common ground or broad agreement;
  - Disconnect or divergence between Indigenous and corporate perspectives;
- Practical ways to bridge any differences identified and find a way forward.

This discussion took place with reference to various country examples, which were used to illustrate examples of good or weak practice. For a full list of these, refer to Annex II.

Discussions were held under the Chatham House Rule<sup>3</sup>, which requires that any written records and subsequent discussions not attribute comments to individual participants or institutions.

### **4. Welcome, Introductions and Overview**

Participants were welcomed to the Roundtable by the Chairman and by an Aboriginal Elder, who extended greetings to participants on behalf of the Traditional Landowners of the area where the Roundtable was being held, the Gadigal Clan of the Eora Nation.

#### **4.1 The Minerals Council of Australia (MCA)**

Participants were welcomed to the Roundtable by the MCA and provided with some background on Australia's experience of mining and Indigenous Peoples. The Australian minerals industry was characterized as contributing to a 'whole new paradigm' of relations between minerals companies and Indigenous Peoples where the industry's attitude to Indigenous relations has moved from a confrontational stance to a platform of mutual respect and engagement.

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<sup>3</sup> The Chatham House Rule is as follows: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed".

The MCA representative explained that today's minerals industry is committed to respecting Indigenous Peoples' rights and interests and their special connection to Australia's lands and waters. They confirmed that the Australian minerals industry has shifted from an adversarial, litigious approach to native title rights, to building mutually beneficial agreements for land access and use and to building sustainable Indigenous communities.

Examples were provided to illustrate how earning and maintaining a social license to operate with host or local communities is far more enduring than a regulatory license in sustaining operations. Examples included the development of over 350 mutually beneficial agreements across 200 minerals operations in Australia, none of which contests native title; the establishment of an Indigenous Leaders Dialogue with the MCA Board of Directors; the consensus on technical amendments to the Native Title Act, and collaborative work in lobbying for better resourcing of Native Title Representative Bodies and Prescribed Bodies Corporate to improve the native title system.

A five year Memorandum of Understanding (MOU), between the MCA and the Australian Government, for Indigenous employment and enterprise development has been established to provide a strategic platform for the minerals industry and governments to work in partnership with Indigenous communities to build sustainable communities.

The MCA noted the advances that can be made through mutual respect, dialogue, engagement and mutual agreement. However, the MCA also acknowledged the legal processes of the native title system and the Aboriginal Land Rights Act in the Northern Territory that define the extent of Native Title claims, resolve any dispute over claimed boundaries, identifies those parties with which to negotiate and, establishes dignity and autonomy for those who wish to establish rights defined under the Native Title system.

The MCA acknowledged those who wished to pursue a rights-based agenda to community engagement, but considered this to be a matter for dialogue and negotiation with governments. Any formal determination to confer a power of veto or consent (in this case, land access and use) to a local community is the prerogative of government. Should the sovereign government make that determination, only then does the MCA consider to be joined in the manner of its operationalization.

#### **4.2 The World Conservation Union (IUCN)**

IUCN added their thanks to the Gadigal Clan, the Chair and facilitator of the Roundtable and the Roundtable Advisory Group. Some background and history on IUCN was provided. IUCN is a conservation organization founded 60 years ago with a primary focus on environmental conservation through the lens of sustainable development, encompassing environmental, economic and social policy. IUCN is a union of members that includes governments, government agencies and NGOs. It has a network of more than 10,000 experts which contribute to six commissions that address a wide range of issues such as protected areas, species conservation, ecosystem management, environmental law, education and communication, and environmental, economic and social policy.

IUCN's mission is to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable. While biodiversity remains the focus of IUCN's work and of the Dialogue, the membership of IUCN raised several issues which were considered to be related to the Dialogue and important for IUCN and ICMM to address. These issues include:

- Indigenous Peoples issues;

- Free Prior Informed Consent; and
- The Restoration of Legacy Sites

IUCN and ICMM agreed to address these related issues through a series of Roundtables – one on each topic. The first Roundtable was held on Indigenous Peoples issues in November 2005 and made a good start at creating greater mutual understanding of the issues<sup>4</sup>. This Roundtable was related to and drew on those discussions, but was focused on operationalizing FPIC. A third Roundtable is scheduled to take place in March 2008 on the issue of the restoration of legacy sites.

IUCN drew attention to the review currently taking place of the Dialogue on Mining and Biodiversity between IUCN and ICMM. Five years from the launch of the Dialogue, IUCN and ICMM have commissioned an independent review to address fundamental questions about whether the Dialogue has been a useful process and if it has accomplished its objectives in terms of achieving better practice and conservation outcomes from the industry.

#### **4.3 The International Council on Mining and Metals (ICMM)**

Participants were welcomed by the ICMM and thanked for making the effort to attend the Roundtable. ICMM highlighted the need to raise the bar on performance in the mining industry on Indigenous Peoples issues, while also understanding the complexities of each operational context. ICMM acknowledged the importance of the first Roundtable as providing a basis for the ICMM membership to clarify its commitments to Indigenous Peoples. Attention was drawn to the Mining and Indigenous Peoples Issues Review, which was produced by ICMM in 2005 and ICMM's Draft Position Statement on Mining and Indigenous Peoples Issues of 2006.

In support of finalizing the Position Statement, a legal review of FPIC had been conducted and updated following the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the UN General Assembly in September 2007. ICMM's Position Statement on Indigenous Peoples aims to move beyond the high-level commitment to respecting human rights and cultures embodied in ICMM's Sustainable Development Principles, to give greater clarity and specificity. The final version is based on feedback received on the Draft version of the Statement (publicly disclosed in a 2007 report) and attempts to reconcile the sometimes competing perspectives of sovereign governments, Indigenous communities and the mining industry.

The current version of the Position Statement is largely complete, though it was agreed not to finalize it before the Roundtable in order to identify if what was proposed was operationally practicable. The Position Statement does not accept FPIC unconditionally in all situations, as there will be countries where FPIC is not recognized by governments – in such circumstances, FPIC is not something companies can unilaterally grant. As rights are progressively realized, FPIC may eventually become a principle of customary law and the wording of the Position Statement provides for this to be recognized.

#### **4.4 Participants Expectations**

Participants were asked to consider their expectations for the Roundtable. A summary of these can be found in Annex III. Overall, participants expected the following issues to be addressed:

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<sup>4</sup> The report from the 2005 Roundtable is available at:  
<http://www.icmm.com/publications/1438RoundtableReport-Final.pdf>

- How best to respond to the global pressure driving more mineral exploration and quicker development opportunities, which may be adding to the pressures for lower standards of industry behavior;
- Opportunities for mutual governance;
- Practical implementation of concepts;
- The examination of best practices;
- Obtaining a social license to operate;
- An understanding of mutual benefits; how wealth is created and shared, recognizing and defining where damage is beyond compensation;
- How to do business in a better way;
- The difficulties of working with governments in post-conflict countries and emerging democracies;
- The differences between the full realization of FPIC and broad community support;
- How new and evolving international standards and related State obligations addressing FPIC will impact practices “on the ground”.

## **5. Topic I: Overview of FPIC Developments and Experiences since the last Roundtable**

### **5.1 An Indigenous Perspective**

For Indigenous Peoples, the right of Free, Prior and Informed Consent (FPIC) is a requirement, prerequisite and manifestation of the exercise of their fundamental right to self-determination. Under international law, Self Determination is the right of all Peoples to freely determine their political status and to freely pursue their economic, social and cultural development. For Indigenous Peoples it includes the right to define “development” in accordance with their own cultures, needs and circumstances.

“Consultation”, which is an exchange and sharing of views and opinions on an issue, may be part of the process for implementing FPIC. That said these two terms are neither synonymous nor interchangeable. A number of United Nations bodies have underscored that the failure of States and other parties to respect the right to Self-Determination and Free, Prior and Informed Consent of Indigenous Peoples is a principle cause of a wide range of human rights violations.

In 2007, two major developments occurred: 1) the adoption of the United Nations Declaration for the Right of Indigenous Peoples by the UN General Assembly on September 13<sup>th</sup> 2007; and 2) the recommendations of the UN Committee on the Elimination of Racial Discrimination (CERD) addressing the Government of Canada, which held that the state party is responsible for monitoring compliance with international human rights standards by the corporations it licenses.

The right to Free, Prior and Informed Consent is a broad and comprehensive right that is clearly distinct from the commonly used term “Consultation” which implies an exchange of views devoid of any decision making role. FPIC for Indigenous Peoples must by definition include the right to say “no” to mining or other forms of development which they consider incompatible with their needs and way of life.

Free, Prior and Informed Consent as both a right of Indigenous Peoples and as an essential principle upon which the exercise of a range of other rights depends has been acknowledged and affirmed on many occasions in international human rights law and instruments, as well as in the conclusions of a wide range of UN experts and expert bodies.

## **5.2 A Mining Perspective**

The most notable of the significant developments since the November 2005 Roundtable, was the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in September 2007. Discussions in ICMM need to focus on what the Declaration means for the members of ICMM. There is still a lack of suitable global fora for discussion of the implications of FPIC, though there are several international documents that address it. The ICMM Position Statement, developed since the first Roundtable, focuses on how relationships with Indigenous Peoples can be improved and operationalized.

Other significant developments include the publication of the International Finance Corporation (IFC) Performance Standards on Social and Environmental Sustainability. Performance Standard 7 defines the roles and responsibilities of companies for managing projects which have an impact on Indigenous Peoples. More recently, John Ruggie (the UN Special Representative to the Secretary General on Business and Human Rights) is producing a report outlining what the business sector could be doing to advance human rights. ICMM has made three submissions to Ruggie in this regard and has been encouraged to focus on Indigenous Peoples rights. Whether Ruggie's final report (due in June 2008) will refer to Indigenous Peoples is unclear at this stage.

The Global Reporting Initiative (GRI) is also important for ICMM members who have committed to measuring corporate performance against a set of 10 Principles for Sustainable Development Performance. In order to demonstrate how these Principles are being implemented effectively, the GRI's Mining and Metals Sector Supplement (MMSS) provides guidance to mining and metal companies to track performance against the Principles and supplements the GRI G3 Sustainability Reporting guidelines. Aspects of the MMSS address the interests of Indigenous Peoples including indicator MM11 which requires that companies report on issues related to incidents with Indigenous Peoples. Companies are also expected to discuss processes to include Indigenous Peoples and grievance mechanisms.

Though the focus of the Roundtable is on FPIC, the challenge is working in a context where mineral rights are historically (and in many cases legally) seen to be held by the state. Where there are legislative frameworks in place, it is easier for companies to abide by a consent process when it is dictated by national law. Industry is often in a difficult position in situations where there are no such recognized legal frameworks or where there may be a weak sovereign or state power. That said, in certain situations existing legal frameworks do not provide a practical basis for land use and access based on FPIC and may actually constrain relations between companies and communities. In such circumstances, direct agreements between companies and communities are often more beneficial.

## **5.3 Topic I: Group Discussions on Experiences of FPIC**

### ***Legal Frameworks and the Role of the State***

Most discussion groups were characterized by varying perceptions of the role of government versus the role of companies in relation to mining projects and the protection of Indigenous rights. The 'sphere of influence' of companies was discussed and several participants agreed that companies should be wary of involving themselves in political debates when entering into consultations or consent processes. Companies are often seen to have disproportionate influence over governments. In situations where Indigenous Peoples rights (in particular the recognition of traditional land title) have not been recognized by the state, several participants believed that it was the company's duty to use its influence with governments to advocate for the protection of rights. There were differing views about how this could be done, as industry sees itself as being in a weak position to dictate terms to governments.

Some participants viewed governments as a barrier to FPIC, where states support mining projects but communities do not. Several examples of African states were presented where the biggest challenge to FPIC is the disinterest of the state in Indigenous Peoples rights and concerns. This presents challenges for mining companies as a tenant of the state and a number of participants felt that companies diverted this challenge by avoiding engaging in the rights debate. Governments were viewed as entities to not only promote development, but also to police it, based in part on their obligations under international law. Examples were provided where this did not happen. In countries where legal frameworks do make provisions for land and resource rights as well as FPIC for Indigenous Peoples, states need to monitor the implementation of such laws. Some participants viewed the laws themselves as obstacles to companies fostering positive relations with Indigenous Peoples. The legal limitations of rights were expressed with reference to the culture of legislative compliance where companies do only what the law requires in instances where the law does not protect rights.

Moving beyond mere legal compliance by companies was viewed as necessary for all involved, which suggested the merits of maintaining a broader emphasis on interests as opposed to a narrower focus on rights. This approach of course should not be seen as an excuse for states not to comply with international legal standards and their obligations under them. Arguments were also made that rights are inalienable and therefore do not require “recognition” by a state to exist. Thus, companies should recognize rights regardless of the state’s position.

Many of the case studies discussed highlighted the inconsistency of consultations between governments and affected communities in the consent process. In certain instances, communities were consulted by the Government though were under no obligation to abide by the wishes expressed by the community. Many participants believed that there was almost always a bias towards that which benefits the economy as a whole and powerful economic and political interests, as opposed to the affected community.

### ***FPIC and Land Rights***

Various examples were provided where there were differing perspectives between the corporate and indigenous recognition of land rights. One country which was discussed in positive terms acknowledges the legal recognition of Indigenous Peoples rights to the land as well as the fact that there are different ways to engage affected communities. The 1976 Aboriginal Land Rights (Northern Territory) Act in Australia was a specific example cited where communities have a right to say ‘no’, though if agreement is granted at the exploration stage it cannot be retracted later. Under this Act, the Federal Government is entitled to override a ‘no’ decision by traditional land owners if they believe it is in the national interest to do so.

In other countries, property owners have surface rights only. One group raised the difficulty for companies to resolve conflicts where the state recognizes Indigenous rights but government subsurface rights prevail within the generally-accepted legal framework.

Various participants recognized the uneven acknowledgement of cultural rights. Mining still occurs in areas of cultural and spiritual importance where activities have been opposed by traditional authorities. In one instance, a project went ahead in matrilineal lands where the traditional ownership of land was vested in women, but women were not included in negotiations and received no direct benefits.

Some participants emphasized the responsibility of companies to consider Indigenous groups within a community that may not be the traditional land owners and thus may not have any land rights. Others believed that social conventions between members of the

community would resolve these differences. Participants recognized that many of the major mining companies in Australia work with all land claimants even those that have rights which may never be recognized under the Native Title Act.

### **Capacity Building**

The capacity of Indigenous Peoples to clearly understand their rights *vis a vis* the state's legal requirements and obligations, and to effectively engage in processes affecting them, was deemed vital by all participants. Many Indigenous Peoples cannot access their legal rights (for example registering as a native title claimant is necessary first in Australia) or do not have the resources to be effectively engaged. Likewise, Indigenous Peoples often lack the capacity to take action to stop breaches of laws or engage in discussions. As one participant put it, *"how do you talk to people about FPIC if they don't have the resources to come to the table?"* Frequently communities have to rely on representative bodies that are funded by the Government and as a result often lack adequate knowledge about a project and its potential risks and benefits.

One group noted that discussions about capacity often have more to do with a lack of political will rather than a lack of resources. In one country example, engagement with local communities was a legal requirement before a mining project could proceed, although no funding was provided by the Government to ensure that this happened. As this illustrates, laws must be backed up by the capacity as well as the commitment to ensure that they are fully implemented and upheld.

### **Consultation and Engagement**

All groups agreed that engagement with communities should take place from the outset of any potential project, beginning with the planning phase. Consultation to obtain consent was viewed as an ongoing process of interaction. There was general agreement on a 'principle', expressed by one participant, of *"not to consult with us after the decision has been made"*. One mining representative emphasized that their company identifies and engages with relevant people prior to setting foot on the land and they follow strict cultural protocols assessing the interests of all those involved.

Several examples raised in the groups illustrated how a community's lack of knowledge about the implications of a project proceeding were exploited. In one instance, illiterate elders were bribed into signing contracts which were then presented as legal by the company and authorities. Another case was discussed where communities were initially given only two weeks to analyze thousands of pages of documents detailing the social and environmental implications of a potential mining project in a foreign language. Mining companies have, at times, provided sparse or vague information at the exploration phase, claiming that it was too early to outline the scope and scale of any possible development.

### **Legacy issues and applying FPIC to existing operations**

Legacy issues were touched upon by some groups and the difficulty of applying FPIC in situations where mines have been in operation for decades was raised. The need to acknowledge problems of the past and re-affirm common goals for the future with local communities was highlighted. The process of enabling the re-negotiation of agreements in areas where mines have been operating for decades was raised where outdated agreements should be adapted to take into account today's sustainability standards.

### **Areas of common ground/agreement**

Much common ground was discussed with the sharing of case studies. Many groups highlighted the progress made by mining companies in recent years and there was broad agreement that companies now define success in terms of social, environmental *and* financial dividends. Several groups highlighted the importance of organizations like ICMM

and IUCN providing guidance to its members and to the industry as a whole. The sharing of best practices at a global level was also considered essential.

There was broad agreement on the importance of ensuring adequate capacity for all Indigenous Peoples to actively and effectively engage in processes affecting them, and that this engagement must start as early as practical in the development of projects, and certainly prior to their implementation. Participants agreed that consultation was not the same as consent, which includes the right to say “no” to a project and that the legitimacy of how consent was given was seen as problematic in places. It was further agreed that the collapse of consent processes was often driven by the failure of parties (communities, industry and governments) to engage with each other in a meaningful and transparent way.

The different perceptions of value were also discussed in terms of what various actors believed in or deemed important. While most participants agreed that engagement should be ‘Free, Prior and Informed’ there was a perceived disconnect between a commitment to consultation or consideration of interests on the part of the industry, as opposed to a commitment to consent (see below).

### **Areas of disconnect/divergence**

There was some disconnect between the importance of having an exclusive focus on FPIC. Some participants believed that the question is not ‘should there be FPIC?’ but rather how should FPIC be operationalized. Others believed that it was not practical to view FPIC as the only option, as there are many countries that are still a long way from embracing FPIC as a concept or right. Mining companies were unanimous in stating that consent was not something that they had the authority to grant or recognize for Indigenous Peoples, as they felt it is embodied in the sovereignty of the state. Companies do however; consult closely with Indigenous Peoples to the point where if there is not a majority of support from the community it is unlikely that they would undertake any activities on the land.

The largest area of divergence related to the interpretation of various definitions and concepts. A possible disconnect between an interest-based and a rights-based approach was raised at various points throughout the Roundtable. Several participants viewed companies as taking an exclusively interest-based approach in their pursuit of community support. While respecting rights as necessary according to national legislation as well as international law, some companies were seen to view the adoption of an Indigenous rights focus as a potentially contentious and less productive approach. Discussions took place surrounding who defines various interests and by what standards. One participant expressed that rights are clearly defined by broad consensus and interests, which are often competing, are not. Thus there is a concern that an interest-based approach creates the possibility for an arbitrary standard to be applied by companies with a preference for some groups of “interest holders” over others, including Indigenous Peoples. Others acknowledged that a focus on interests could accommodate a wider range of Indigenous (and other) peoples affected by mining activities, including those whose land rights may not have been recognized by the state.

To overcome this divide it was suggested that rights *and* interests should be considered, as interests are broader than (and inclusive of) rights. That said, the term interests was considered by some participants as a ‘watering down’ of the term rights and therefore should not replace ‘rights’.

The nature of rights was also considered with several participants highlighting their inherent nature, where they exist whether or not they are recognized as defined by international law. Other participants observed that the view of rights as ‘inherent’ was

problematic on a practical level, if governments failed to recognize such rights. In such situations, they expressed that an operational focus on interests coupled with vulnerability might be more practical as this would provide an entry point for protecting vulnerable Indigenous Peoples, irrespective of the extent to which their rights were recognized. Other participants expressed that the recognition of the inherent rights of Indigenous Peoples was now affirmed as the minimum standard through the adoption of the UN Declaration, and that what was needed now was to support and encourage states to 'catch up' via their national legal frameworks.

The difference between the terms 'lands' and 'territory' was also highlighted by several participants, especially in relation to nomadic people, specifically in cases where nomadic people inhabit large territorial areas which are currently owned by several states. Attention was drawn to International Labour Organization (ILO) 169, whereby the concept of territories covers the total environment of the areas which the peoples concerned occupies or otherwise uses. Many participants observed that despite mentioning FPIC, ILO 169 does not specify how it should be operationalized.

Policy inconsistencies within companies and globally was also raised where best practices are not implemented across the board. The discrepancy between small to medium and large enterprises was discussed. While certain large companies were seen as working to raise the bar and elevate standards of behavior, some smaller companies struggle to keep up and are often less accountable as they are less visible. Several participants viewed larger companies as, 'having the time to do it properly' and the question over how to raise the bar from the bottom end of the industry was considered.

### **Practical ways to move forward**

It was agreed that there are no universally accepted answers and that questions remain around who participates in the consent process, who provides consent and who abides by it. Despite this, all participants agreed that the focus should be on implementation and whether it is possible to develop policies and practices that are transferable across different contexts.

While it was agreed that the ultimate responsibility for monitoring laws lies with the state, the positive role that companies can play was also expressed. Many participants stressed the need for companies to communicate to states what is acceptable and what needs to change. One group also expressed that there are often credible mechanisms and institutions available and that it is a matter of identifying rather than establishing them. The option of an independent third party to oversee and monitor the consent process was also considered, though no agreement was reached on how this would work practically.

While some participants expressed that FPIC as a framework might have practical limitations for companies in its implementation in some cases, they agreed that it is necessary for companies to recognize those with interests in the land and seek to reach agreement based on these interests. More discussion is needed on whether an agreement approach based on interests, which is also inclusive of rights, might be a viable strategy in settings where governments have not embraced FPIC. Either way, direct partnerships between communities and mining companies, where companies clearly articulate their views on Indigenous rights, were seen as a viable option. Agreements reached in such situations should aim to be as comprehensive and inclusive as possible, to avoid those without formal land rights slipping through the cracks due to the absence of formal legal protections on a national level.

## **6. Topic II: Consultation, Engagement and the Meaning of Broad Community Support**

### **6.1 A Mining Perspective**

A case study was provided to highlight the challenges of mining in one country where a project spanned tribal boundaries. In this example, the state declared ownership of all mineral rights. Prior to the mine there were two main Indigenous groups in the concession area consisting of a highland tribe of 8,000 people and a lowland tribe of 15,000 people. As a result of the economic opportunities provided by the mine, other Indigenous groups migrated into the mine area leaving the original tribes in the minority. Seven tribes now inhabit the area and they all have a voice. The need to respect the beliefs and opinions of the traditional land owners/Indigenous Peoples and the immigrant tribes present a challenge.

While the company acknowledged that all Indigenous stakeholders should be recognized, it is faced with strong differences of opinions between the local Indigenous land owners and the immigrant Indigenous tribes. There are frequent conflicts between the tribes and gaining a unified consensus is difficult. The challenge is recognizing all beliefs and opinions in the multi-tribal society.

Two voluntary initiatives have been started. A Voluntary Land Rights Trust Fund recognizes the company's impact on the two land-owning tribes and has provided funds to be split between them. The fund has been used to buy shares in the mining company. A second Voluntary One Percent Fund contributes 1% of gross revenue towards social development in the area for all Indigenous tribes.

Other stakeholders deemed the voluntary initiatives as inappropriate as the buying of interests could be seen as creating elite groups. In addition, the process was criticized for lacking real participation from other relevant stakeholders. By recognizing the land rights of the community over government's interests, the company could be seen as interfering with legislative procedures.

The question remains of how to recognize all opinions in a multi-tribal society and whether or not voluntary initiatives are a viable alternative in such areas.

### **6.2 An Indigenous Perspective**

The communities surrounding two large mines in a North American state are divided. Indigenous Peoples in the area view the state as development-centric and believe this is underpinned by its constitution. The Native Corporations and Tribal Governments have, at times, served to split their native communities. As Native Corporations are 'for profit' corporations, their interest is to develop resources. There is concern among local communities that this development will be detrimental to their way of life. Large-scale industrial development is associated with a range of social, cultural, economic and environmental impacts, with profound implications for physical, emotional and spiritual well-being in Native communities. Environmental Impact Statements (EIS) evaluate the potential effects of proposed projects and disclose the results to the public and political decision-makers. While the EIS is part of the permitting process for projects it does not contain a comprehensive analysis of potential public health effects. This means that regulators are not clearly considering the potential impacts on local communities in making permitting decisions.

There is support in certain parts of the state for FPIC and as communities will be increasingly affected by mining activity, it is important to find common ground and broad community support. The state wants to develop resources regardless of the impact on the environment. The constitutional framework, established in 1958, was done without

consultation with local tribes despite the fact that tribal governments existed prior to the state. The elders of the community are concerned with the impacts that mining will have on their future and this has caused battles within communities.

Community members need to continue to be engaged throughout the process and life of the project. Baseline studies should be done in the local language with the participation of the local communities. Companies have expressed distrust in locally conducted assessments. The culture of engagement needs to be altered. Some progress has been made and Health Impact Assessments can now be done by locals.

### **6.3 Topic II: Group Discussions**

#### ***Experiences of Consultation and Engagement***

More country examples were discussed outlining good and bad examples of consultation and engagement. Cases were discussed where government processes have actually slowed down the consent process and negated the results of referendums and other processes for obtaining consent. Australia was brought up as a good practice example to illustrate what consultation means in practice. The Land Rights Act and the Native Title Act have changed the process and perception of community support. Although under the Northern Territory Land Rights Act the Federal Government is legally allowed to overturn any decision by Traditional Owners to withhold support for a project, it has never done so. Some participants believed that this illustrates how an effective consultation process often results in the granting of consent. If negotiations are undertaken in a respectful way they should result in a successful outcome for all parties involved.

An understanding of community dynamics was also deemed crucial for any meaningful process of consultation and engagement. Information provided to communities must be presented in a culturally appropriate manner that Indigenous Peoples can understand and must contain both the best and worst case scenarios to enable full consideration of potential benefits and risks. Consultations should be inclusive and not ignore key groups like women. One group observed that those who are eager to engage with mining companies in a community are often pro-development and less involved in traditional livelihoods and thus make alliances with non-Indigenous groups. As companies and governments tend to favor more modern forms of communication, the voices of many of those involved in traditional livelihoods are not heard. Capacity building on the part of the companies is needed to ensure this inclusive listening takes place.

Early engagement can serve to maintain broad community support beyond the life of a mine. Many participants agreed that often the process is more important than the outcome and mining companies should be willing to accept 'no' as an acceptable answer from informed communities.

#### ***Experiences of Broad Community Support***

Discussions surrounding broad community support raised several questions including, 'how do you know when you have achieved it?' While defining broad community support was difficult, as one participant put it, "*you know when you have obtained it*". Gaining broad community support was seen as a multi-stakeholder responsibility, involving more actors than the companies alone.

There was also some discussion about the significance of traditional knowledge and the need for companies to come to terms with such knowledge and accept its value. Many participants articulated the importance of respecting different forms and expressions of knowledge that were based not just on Western paradigms.

Applying traditional knowledge and integrating it into the planning, implementation, evaluation, rehabilitation and environmental monitoring processes was deemed important as well as developing indicators to assess impacts on traditional cultural values and subsistence practices, based on traditional uses of the land. Any rehabilitation must be done in a culturally appropriate way integrating traditional knowledge into the process.

### **Areas of common ground/agreement**

Most groups agreed that FPIC is an ongoing process and not an end point or one-time event. While establishing broad community support/consent was viewed as necessary, the complexity of gaining it in practice was also recognized. The importance of companies using their initiative on a case by case basis to prevent or address problems before they became large was suggested as an effective alternative to grievance mechanisms. The need for companies to institutionalize international standards (e.g. ILO 169) through company policy was put forward as a best practice to raise the bar for the entire industry.

### **Areas of disconnect/divergence**

The difficulty of achieving developmental objectives without undermining the culture and lifestyle of Indigenous communities was discussed. Questions surrounding the compatibility of Indigenous cultures with the threat of assimilation were also raised.

### **Practical ways to move forward**

Thorough stakeholder surveys, Social Impact Assessments, Environmental Impact Assessments and health surveys for all impacted communities were seen as a vital step towards achieving broad community support. In addition, cultural impact assessments were suggested as a means of assessing the forms that appropriate engagement should take. Engagement of broad groups in initial baseline studies could lead to broad community support. Progressive consultation at the various levels is also important. Fora where various stakeholders can present their concerns were seen as constructive and one participant provided an example of a 'human rights watchdog' that had been set up to look at mining activities in the area. Their findings were then presented to the company who dealt with any problems addressed.

## **7. Topic III: Generating Net Social Benefits**

### **7.1 An Indigenous Perspective**

An Indigenous representative observed how net social benefits should be considered in terms of measurable as well as tangible benefits for the affected community and/or benefits that change people's lives for the better, according to a community's own criteria. Communities must be able to recognize the risks as well as the benefits, and consider their potential impacts. This must include recognition of the benefits of current and traditional uses of the land (subsistence hunting, farming, fishing, gathering, herding) as well as continued access to clean water, air, land and sacred sites. It also includes cultural values and social relationships. Some people in mining communities may not recognize or may take for granted, the benefits they currently derive from traditional uses of resources, which should be preserved as a priority.

The presentation noted how Indigenous Peoples as a whole need to be fully consulted and the communities need to identify the appropriate priorities for their community; this then gives communities a sense of ownership of potential benefits. Effective consultation will minimize project failures. If communities are given a chance to voice their concerns as part of a process to obtain consent, there is the potential that they will be satisfied.

The monitoring of benefits is important, as is defining them broadly to include cultural and traditional economic perspectives, and balancing short and long term outcomes and impacts. The importance of following the impact of benefits was presented including the difficulty of establishing the point at which communities are perceived to have benefited fully. There are currently mechanisms in place that may assist with monitoring benefits, including indicators on food security, environmental indicators and Millennium Development Goal indicators. Often communities remain uncertain if being resource rich is a blessing or a curse.

According to the Indigenous representative introducing this session, the sharing of case studies highlighted that even certain developed countries still have a long way to go in terms of inclusive engagement processes with communities. More examples of success stories where communities have benefited fully and an assessment of the elements that made them successful need to be available publicly. Likewise, projects which have resulted in irreparable harm to communities, including destruction of sacred sites, long-term contamination of lands and water ways, or inter-generational serious health affects, should be analyzed so similar mistakes will not be repeated. It may be possible and desirable to create an international instrument which clearly stipulates how benefits can be defined and shared by the community.

## **7.2 A Mining Perspective**

One Andean country was cited as an example of where positive engagement between a mining company and a community has resulted in substantial improvements to the community's way of life. Community programs were established around a small mine in an impoverished area of Bolivia. Prior to construction of the mine, 13 families remained in the village with no permanent income and were entirely dependent on subsistence farming. Many families had left the community (and sometimes the country) to find work. 47 families now reside in the village. Prior to the mine, school children as young as five walked five kilometers to and from school every day, where they were treated as second class citizens because of the high level of poverty prevalent in their community. The community lobbied hard for the establishment of the mining operation.

The company's strong community relations team in Bolivia was highly effective at engaging the community, working with them as a whole and not just the appointed leaders. Identifying what benefits the community wanted took time. In addition to jobs and training, they identified the building of a town plaza as important to them in terms of confidence, status and how they were perceived by outsiders. It was agreed to provide at least one job for every family, though at the time of the last review, 115 people were employed full time by the mine and 37 were employed as contractors.

A Community Service Centre was constructed to provide local residents with health services, small business and literacy training and provided a place to seek grants and loans. As a result of this training and loan scheme, two sisters have set up catering companies and six women established a sewing business. Micro-loans were provided to purchase equipment which have subsequently all been paid back.

As this is a short-term mine, sustainability will be a challenge, though the skills acquired through the training schemes will be transferable. Factors contributing to the success of this project include the early engagement by a skilled team including anthropologists to understand the cultural needs of the group. Engaging a broad representative group from the community, creating economic as well as social benefits and providing technical training for local people to take over and maintain things also substantially improved the lifestyle and opportunities for the locals.

### **7.3 Topic III: Group Discussions**

#### ***Experiences of Generating Net Social Benefits***

The importance of local community training for Indigenous Peoples to take over the management of initiatives was raised by several groups. In one community wind generators are used in the area and although basic training has taken place about their usage, the community wants to be a fundamental part of the process so that they are able to run the entire process. In another mine where a consultation process with the affected Indigenous population did not take place, damage was done to sacred ground. Taking account of lessons learned, future operations in the surrounding area attempted to balance long and short-term benefits for the community including health, environment, culture and economic impacts. The community provided the company with a list of expected benefits including training and the protection of traditional knowledge. Educational programs were set up to ensure that the youth were taught about their cultural roots. This was provided as a good illustration of learning from previous mistakes, communicating effectively, providing social cohesion and involving the youth in the process.

An example of the importance of a company using its initiative to increase the traditional cultural benefits for a tribe was provided in a community with strong carving skills. An external person was brought in to further develop these skills and road shows were then put on to exhibit some of the community's carvings. Another example was discussed where members of the community gave talks on the Indigenous plants in the area, ensuring the preservation of local knowledge.

The question of managing expectations was also raised in situations where there is an Indigenous and non-Indigenous population. In one example discussed, families were resettled and bought new farms on lands which the government also intended to use for the resettlement of outsiders. In order to avoid social jealousy, everyone received benefits from the mining company, not just those that had been relocated as a result of the mine. The importance of Indigenous Peoples *and* local communities having access to benefits was stressed.

The complex nature of net social benefits was discussed with monetary benefits seen as divisive at times and thus not always a positive benefit. If genuine engagement takes place, communities can ascertain and define their own social benefits and balance potential benefits with the risks and changes which could result from a project.

The business case for good social performance was also discussed as it now takes five times longer to get a project up and running. This time can be reduced substantially if a company has the capacity to engage effectively from the outset. One participant emphasized the importance of talking to communities when you want nothing from them. Two examples were discussed where a company walked away from projects because the Government would not let them consult directly with certain groups within local communities (or the community as a whole).

The need to balance and assess short term versus long-term benefits was also explored. While jobs created by the mine itself can sometimes address many of the immediate economic needs of communities, longer-term opportunities as well as addressing unanticipated impacts are more of a challenge. Training in natural resource management and regeneration was an example provided where benefits have the potential to outlive the life of the mine. In certain cases, participants felt that their demands could legitimately include land rights to new areas as compensation for their loss of lands. One participant expressed how measures to ensure and guarantee the protection of traditional food

sources for future generations is usually a very high priority for Indigenous communities and companies need to be very clear with communities as to whether this can be assured.

### **Areas of common ground/agreement**

Participants agreed that benefits should be more inclusive than just 'social', and include cultural, ecological, economic and other benefits. Indigenous communities should have the primary role in determining the nature and balance of benefits. Similarly, in situations where communities have been historically denied a basis for benefits which is subsequently agreed, the community should decide what the form of restitution for lost benefits should be.

Symbolic benefits (such as the town plaza example presented above) are often important for retaining a sense of identity for the community, and companies should recognize the wider potential importance of such benefits to communities.

Indigenous communities important connection to land was emphasized, where losing it would mean the destruction of part of their culture, identity and social structure. All development must be conducted in a way that is respectful of cultures and lifestyles.

### **Practical ways to move forward**

Actual benefits for different stakeholders put forward by participants included the development of strong infrastructure, social services, economic benefits and capacity building/job training, as well as preservation and protection of local subsistence resources, social structures and cultural sites and practices. In addition, inclusive equity sharing, full participation in monitoring and assessing impacts, community joint ownership and management were seen as important.

Further suggestions included the creation of macro and micro loans from companies to communities to be used for local business development and funds where local groups input into the decision-making structure, but where governments have an oversight function. Many Indigenous representatives stated that they did not simply want to receive benefits, but wanted to be part of a process where they were involved in management decisions. Several participants also wanted to ensure that their traditional means of subsistence would not be negatively impacted in either the long or short term. If communities have access to long term employment and training, and do not need to relinquish their ability to practice their traditional economic activities, then business/employment/subsistence opportunities are sustainable post-closure.

Participants emphasized that mining companies must recognize the difference between impact mitigation and net benefits – mitigation was viewed as essential to offset or make restitution for losses or damages, whereas net benefits were seen as conferring additional gains on communities. It was also recognized that in some cases, the impacts are so severe that there is no mitigation or restitution possible, such as the total destruction of a sacred mountain as reported by one participant. In providing benefits for communities, mining companies must also be wary of creating a culture of dependence, where new social structures and economic systems are at risk of collapse after mine closure.

## **8. Topic IV: The Challenges of Operationalizing FPIC**

### **8.1 A Mining Perspective**

In the last ten years, mining companies have shifted their view of communities as beneficiaries to communities as business partners. FPIC should be a systematic approach

to community relations, where operations should be looked at universally yet in a culturally appropriate way. Admitting mistakes is necessary and communities are more likely to be accommodating if they see that companies are transparent in their operations. Without mutual respect and understanding, projects often will not take off. The notion of ‘listening, learning and engaging’ is essential, where the following steps should be taken:

- **Baseline studies** assessing the country context prior to the arrival of the company. These should include the pace, direction and threats of any social change. Many occurrences happen that are not necessarily related to mining.
- **Consultation plans** outlining who to consult, why, how and what benefits are plausible. The elements of what can be done together should be assessed and detailed in a structured plan. The affected community should be viewed as participants and not recipients. High quality information should be collected. Agreements should be flexible and revised constantly. Legal agreements are often too rigid and do not work as well as social agreements. Consensus is needed to ensure that there is equal understanding by both sides on the possible risks and benefits.
- **Engagement** must take place only after a thorough baseline study has been conducted. Promises must be delivered on, so expectations should not be raised about what can be feasibly delivered. Companies should ensure those they are engaging with have the capacity to understand the agreement. In some cases group representatives are not the correct people to be dealing with. Mutual understanding and respect is essential.

FPIC should be approached like a medical procedure. The consequence of any action must be examined by informed individuals. This has not always been done in the past. The business case for good community relations is strong- getting community relationships on good footing is necessary for getting a license to operate, can help speed the process of getting the mine up and running, and helps companies maintain good staff as good people do not want to work for a company that does the wrong thing.

## 8.2 An Indigenous Perspective

The difficulty of finding an example of where FPIC has been successfully operationalized was highlighted. In most cases there has not been full or even nominal engagement or consultation. Indigenous Peoples have been engaged in the consultation process and in many instances have been, “*consulted to death*”, though in most cases, their voices have not been heard. For example, in Australia, whilst the notion of ‘informed consent’ has been used in native title discourse for a few years, the negotiations entered into as Native Title Representative Bodies for reaching agreements on access and development of traditional lands, fall short of engaging in the true principles of ‘free prior and informed consent’.

The former Australian Government did not vote in favor of the UN Declaration on the Rights of Indigenous Peoples. There is hope that things will be different under the new Labor Government, though it is up to organizations like the Native Title Council to start putting the principles contained in the Declaration into place in practice, regardless of whether it has been ratified by the Government or not.

Many negotiations in the past between mining companies and Traditional Owners have not been entered into in a way that truly reflects the rights and interests of Indigenous Peoples. The Goldfields Land and Sea Council (GLSC) in Australia has recently undertaken an analysis of the benefits and operations of 20 agreements that they have brokered for traditional land owners in the Goldfields region. The key message from that analysis was that most of the agreements favoured the mining companies. In general, Goldfields

agreements are focused not so much on people's rights as they are on enabling the granting of project titles to mining companies.

In the agreements analyzed, there were clauses that placed obligations on native title claimants to undertake specific activities or actions. In some instances, there were obligations that required the native title claimants to consent and agree to the compulsory acquisition by Government of their native title rights.

Although native title claimants receive certain financial payments and other benefits, their long-term needs appear secondary to the immediate issue of getting a mine into production. A better approach is needed so that the interests of all parties receive balanced consideration. The situation is varied across Australia which is a benefit in some places where Land Councils can put in place a definite process of FPIC for new and innovative agreements for the long-term benefit of the local people.

Since the endorsement of the UN Declaration, the GLSC has embarked on a process of promoting the principles set out in the document to ensure that Traditional Owners and the wider community are made aware of their rights. International covenants are the way of the future for doing business on Aboriginal land, and the challenge now is to make sure that companies comply and act in good faith.

Operationalizing FPIC, however is not an easy task, for example recent events have highlighted the uncertainty of the global economic environment in which we operate. FPIC is about curbing the excesses of the past by injecting integrity into the equation so that outcomes with future agreements ensure that *both* parties get a fair share of the rewards, according to their own definition of what constitutes benefits and value. Several examples illustrate what the GLSC regards as reasonable expectations for Traditional Owners around Australia including the Mining Policy, 'Our Land is Our Future'. The examples illustrate the goals built around the principles of FPIC, but they can only be achieved if both parties conduct their negotiations in the true spirit of FPIC.

The challenge now is how to encourage mining companies to accept and to put into practice these principles. A large part of that is getting the companies to recognize that Traditional Owners are entitled to these rights as set out in many international declarations, treaties and covenants- Indigenous Peoples have the right to be properly and fully engaged in decisions affecting their land.

### **8.3 Topic IV: Group Discussions**

#### ***Challenges of Operationalizing FPIC***

This session provided participants with the opportunity to consolidate some of the challenges faced by companies and communities when operationalizing FPIC.

In general there was agreement that even in countries where FPIC has been operationalized relatively successfully because of government involvement and having FPIC enshrined in law, problems still exist.

One participant expressed how the UN Declaration encourages mining companies to pay serious and systematic attention to Indigenous legal systems since they underpin the whole concept of FPIC. One example already mentioned which excluded the involvement of women in a matrilineal society provided a powerful example of why it is important to take the Indigenous legal system into account.

Agreement was expressed over the core requirements for FPIC. Namely those rights must be recognized by national governments, in particular the provision of land title as companies look for the security of title. The state must then have the will and the capacity to protect and defend these rights. Indigenous Peoples must also have the capacity to assert their rights.

The tension between structures of the state and consent processes within the community was mentioned. At times state structures can have their own problems with transparency, democratic processes and human rights. Support for projects from the affected community was considered essential.

The importance of establishing international norms and standards for best practices was discussed. Certain countries that previously ignored the voices of Indigenous Peoples have created space for consultative strategies. The issue now is what standards are needed to carry out activities.

Discussions surrounding what this 'standard' may look like took place. ICMM's Position Statement outlines its standard for its members and the question is the extent to which a more detailed articulated position is needed. Participants agreed that there is room for ongoing discussion of tools and the practical application of current standards, including international standards, rather than the need to produce a new standard.

The Roundtable was seen as creating a space for sharing and understanding between corporate and Indigenous perspectives and through the work of ICMM and IUCN, standards should eventually become actualized.

The following areas of uncertainty continued to present difficulties:

1. Company-community engagement in situations where companies have made commitments to FPIC and governments have not;
2. When the law does not provide for adequate protection of rights and can be an obstacle to engagement using a "rights based" approach;
3. Determining who gives consent and acknowledges when it has been achieved;
4. Ensuring that all voices from the affected community are heard when some might not have the capacity to understand the information presented; and
5. The tension between the Western concept of social/economic progress and Indigenous cultures that place more value on traditional ways of life.

#### **Practical ways to move forward [numbers correlate to difficulties above]**

As possible solutions to the challenging areas addressed above, the following suggestions were outlined:

1. Engagement with Indigenous and non-Indigenous communities must take place at the start of planning for any mining project, and be ongoing from that time. Companies have a duty to educate communities on their rights and what international and national legal frameworks are in place in their country. Companies assume the responsibility to uphold and support Indigenous Rights even if a state does not.
2. Looking to the limits of the law for defense against inappropriate behavior should not be acceptable and the industry should use its soft powers of persuasion to challenge poor behavior among peers.
3. If communities are mixed then mixed approaches must be applied. It is important to ensure that it is only the Indigenous communities that are involved in negotiations over issues relating to their interests. Others should be included in the consultation process but only where there are issues that are common to both

Indigenous and non-Indigenous stakeholders. As there is the potential for conflict between the two groups, careful consultation and negotiations must take place.

4. Information must be provided in a culturally appropriate and transparent way. Best and worst case scenarios should be presented outlining all economic, environmental, social and cultural risks.
5. Tension exists even within communities and between generations. Embracing a changing future does not necessarily mean denying or rejecting one's cultural past. Many Indigenous Peoples have taken significant steps to reclaim and strengthen their traditional cultures including revitalizing the fluency of their language as an essential component of their identity.

In addition, while recognizing the challenges of operationalizing FPIC, the following suggestions were put forward over the course of the Roundtable and were supported by most participants:

- Agreements must be flexible, iterative and monitored and reviewed constantly with full participation by the affected Indigenous Peoples and input from a wide range of informed stakeholders;
- Benefits that are stipulated in any agreement must be reviewed in terms of their impact on all parties concerned and must also undergo constant revision as the situation and/or needs of a community changes;
- International events similar to the Roundtable should take place in countries and regions to 'export the dialogue'. This will promote intelligent debate at a level where issues can be comfortably discussed;
- Best practice must be institutionalized;
- Companies must be able to demonstrate the consent of the community;
- Social licenses should aim to be as comprehensive and inclusive as possible to avoid those without formal land rights slipping through the cracks; and
- International standards should be applied through corporate policies – socially responsible companies need to follow international standards as well as national laws.

## **9. Topic V: Next steps for dialogue**

ICMM reiterated its commitment to finalizing its Position Statement on Mining and Indigenous Peoples Issues in order to live up to its member's commitment to moving forward in a practical and tangible way. Also in this regard, ICMM noted that providing concrete guidance to help implement the commitments embodied in the Position Statement would be a priority.

IUCN reminded participants about the review of the Dialogue and asked participants to consider what future discussions should look like if the Dialogue in its current format expires. Participants agreed that the Roundtable was useful and expressed interest in discussions continuing to provide ongoing clarity on key issues. Several expressed how, 'refreshing and enriching' it was to be part of the discussions, particularly when reflecting on how far the Dialogue has progressed.

Several Indigenous representatives expressed their desire to use the Roundtable as a model that can be adapted for regional discussions. The possibility of the Dialogue continuing on this regional basis was discussed as a means of examining how FPIC is handled in different parts of the world. While some participants agreed that this would be useful, others highlighted the global issues of relevance and believed that the current international forum is also needed. The overall impression of participants was that another Roundtable was needed within two years and ICMM and IUCN should explore how this could be achieved. The need to learn from the process of the Dialogue was highlighted as

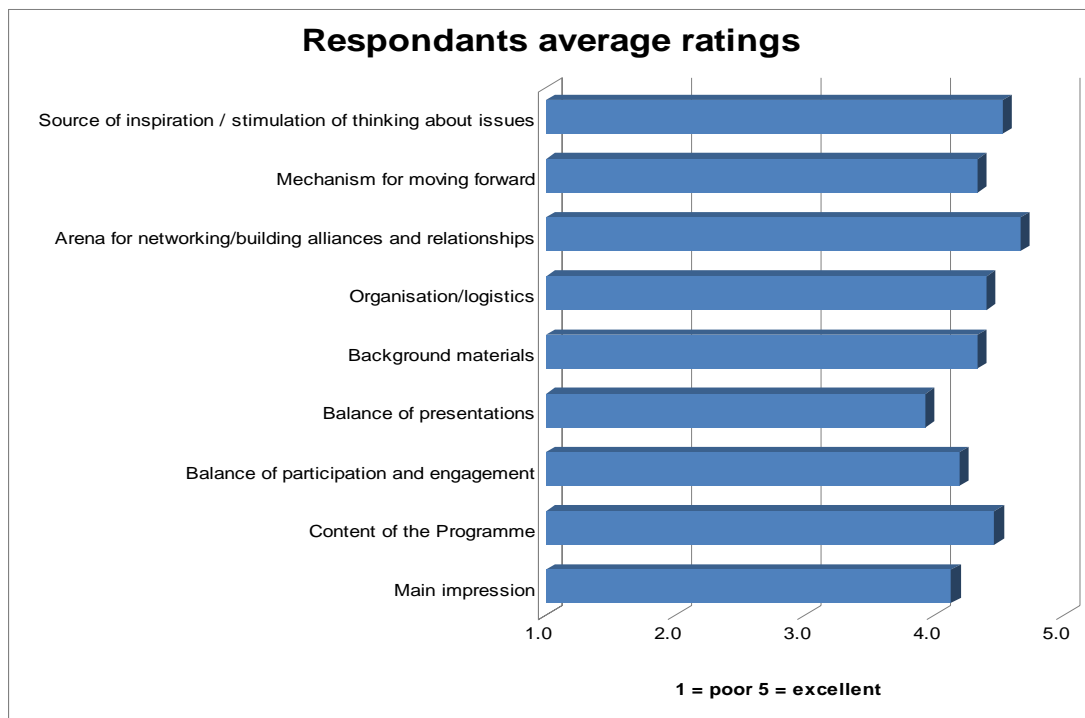
the building of confidence happens over time. The importance of continuing the conversation, even if there is no immediate endpoint in sight was reaffirmed.

Despite the great efforts to secure participation from governments they were under-represented. This was unfortunate considering the vital role that states play in relation to Indigenous People’s rights. The potential to gain government buy-in through the IUCN membership was expressed.

In this regard, IUCN’s next World Conservation Congress will be held in Barcelona 5 to 14 October 2008 and consists of a unique global environmental parliament of governments and NGOs. The Members Business Assembly portion of the Congress provides IUCN members with the opportunity to propose, discuss and vote on policy statements (Resolutions and Recommendations) to take notice and action specific conservation related issues. Members participating in this process are able to submit motions which could be considered by the Membership throughout this process. Additionally a workshop on mining and Indigenous Peoples will take place at the World Conservation Forum immediately before the Members Business Assembly and could provide the opportunity for further discussion of key issues.

**10. General Feedback**

In response to surveys handed out on the last day of the Roundtable, feedback received was very positive. The results of the 15 surveys returned are summarized in the table below.<sup>5</sup>



<sup>5</sup> Additional unedited comments included on feedback forms by participants are provided in Annex IV.

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## **Annex II: Country Examples included in Discussions**

Alaska  
Australia  
Belize  
Bolivia  
Finland  
Indonesia  
Mexico  
New Caledonia  
New Zealand  
Papua New Guinea  
Peru  
Philippines  
Solomon Islands  
Tanzania  
United States  
Zimbabwe

## **Annex III: Participant's Expectations at the outset of the meeting**

- share hopes for the meeting as set out in the “purpose and scope of the workshop” provided to participants
- to explore practical implementation issues and how we can keep the dialogue between industry and interested stakeholders alive post the roundtable
- to give guidance on the way forward in dealings with vulnerable populations; what is the best way forward in engagement and better consultative practices in how mining can bring benefits
- to discuss the situation of an indigenous people in a Non-Self Governing Territory where neither national legislation on the rights of indigenous peoples' nor mining law have been adopted and consequently leaving doors wide open for mining companies to breach indigenous law and act forget their ethics
- to seek actions from IUCN and ICMM to bring mining companies to negotiate with the adhoc indigenous peoples' institutions/authorities and to ask the non-self governing territories' administering powers to fulfil their duty to consult the indigenous peoples and recognise their rights to participate
- to ask administering powers to take appropriate measures for adoption in the territories they administer all appropriate mining legislations that include norms from the international customary law and norms from indigenous traditional law as well
- to call on the United Nations Special Representative on the situation of human rights and fundamental freedoms of indigenous people, to visit indigenous peoples being impacted by mining in New Caledonia and in every other country/territory where indigenous rights are violated and indigenous people laws breached
- to learn and share experiences about the possibilities for Mining industry to create standards for culturally sensitive/ appropriate approaches to indigenous communities and true dialogue

- standards to guarantee that an indigenous community has capacity to reach FPIC and how to engage in discussions concerning compensations to damages that are immeasurable
- to learn about possible processes where a contract between an indigenous community and a mining company has been renegotiated since the awareness of indigenous rights has increased
- advance strategies for meaningful involvement of Indigenous Peoples in governance roles for developments on their lands, both industrial development and conservation projects
- in fleshing out understanding of Free, Prior and Informed Consent, to deepen our response to the question, "prior to what," so that the input of Indigenous Peoples can be incorporated early in project design and scope when planning is still fluid
- advance strategies for corporations to support Indigenous Peoples self-determination, including issues of land tenure and management, using the corporations' political capital to support Indigenous Peoples objectives within the broader society
- gain a greater understanding of the opportunities and benefits companies can provide to Indigenous communities especially in the context of sustainable development
- understand the points of difference between resource companies and Indigenous communities and ways that these can be managed to everyone's benefit
- explore the possibility of establishing a process for ongoing dialogue whether at the international, regional or national level
- get some mandatory consultation measures with tribes that are affected by industrial development (oil, gas, mining, renewable resources, etc) in Alaska
- the Health Impact Assessments should be mandatory due to the impacts of development
- mental, social, spiritual and emotional affects should be examined and prevent those adverse affects of the development
- the affects on the housing, health impacts, environmental, which are lacking in Alaska at the moment

## Annex IV: Unedited Feedback from Participants

Additional Comments	Suggestions for next steps
<ul style="list-style-type: none"> <li>• More time needed for working on issues</li> <li>• Keep network alive, look at innovative ways to get governments involved and pass on issues raised</li> <li>• Significant step and shows good faith of both sides to look at solutions for the issues around mining and IPs</li> <li>• Focus on how to put forward concerns to 3rd party or govt</li> <li>• Well organised, impressive, rich programme</li> <li>• Ensure those funded IPs have financial capacity to fund things upfront (taxis)</li> <li>• Great arena for mutual understanding, great deal of discussion in a short period of time</li> <li>• Earlier start/finish</li> <li>• More NGO representation</li> <li>• Great speakers and need to continue dialogue forever</li> <li>• 3rd day needed to consolidate way forward and consider work programme</li> <li>• Important not only for looking at ways to improve our dialogue, important to comfortably discuss the issues</li> <li>• Pleased to see FPIC on the agenda for discussion, should be setting an agenda for ongoing dialogue and hopefully adopting such principles</li> <li>• Grateful for the opportunity to participate, specifically for the relationships formed with people from a variety of backgrounds from across the globe</li> <li>• On day one corporate voices drowned out IP voices, it was better on day 2</li> </ul>	<ul style="list-style-type: none"> <li>• Hold follow up in the next year</li> <li>• Use participation to peer review good practice guidance</li> <li>• Present results to the governments of home countries and to HR agencies or IP HR agencies so agreements and dialogue initiatives are known and not isolated</li> <li>• Hold regional dialogue initiatives</li> <li>• Broaden participation of IPs</li> <li>• Continue monitoring processes</li> <li>• Start building network and database for discussions, information on social benefit sharing at the community level to have a standard benefit requirement presented to companies- this should be incorporated into policies that govern mining operations worldwide in Indigenous land</li> <li>• Retaining traditional principles and customs that are practical must be incorporated in industrial policies</li> <li>• Find a new and better approach for consultation and engagement with communities, govt and companies</li> <li>• Need to take FPIC terminology off the table, need to gain greater understanding leading to meaningful agreements</li> <li>• Implement an international policy on mining and give information to multi national corporations</li> <li>• Further gathering needed much sooner than last meeting and this one to build on work rather than starting again- it would build stronger network</li> <li>• Encourage this process to continue with some targets for universal acceptance of FPIC in the mining industry</li> <li>• Refine ICMM policy and company policy to respect and secure areas of discussion, particularly acknowledge need to have IPs articulate cultural indicators that benefit them</li> <li>• Widen conversation and topics, especially around reconciliation issues, social development topics/mining footprint, need to now go beyond this 'choir'</li> </ul>

## Annex V: Agenda

### Day One:

Timing	Session title/aims	Format
<b>Welcome, Introductions and Overview</b> [Chair: Mick Dodson]		
8.45 – 9.00am	<i>Welcome to Country</i>	<i>Elder from the Gadigal Clan of the Eora Nation</i>
9.00 - 9.10am	<i>Welcome from Minerals Council of Australia</i>	Presentation
9.10 – 9.20am	<i>Why Are We Here?</i> History of the dialogue and the mandate for convening this meeting; what it is, and what it is not	Presentation
9.20 – 10.20am	<i>Introductions of Participants</i> Brief introduction to individuals and organizations	All [Chair to provide summary of any written responses to participants expectations of the Roundtable]
10.20 – 10.30am	<i>Review of the Agenda and Objectives of the Roundtable with a focus on implementation</i>	Chair to lead
<i>10.30 – 10.45am Coffee Break</i>		
<b>Topic I: Overview of FPIC Developments and Experiences since last Roundtable</b>		
10.45 - 11.15am	<i>Indigenous and corporate perspectives on the evolving context for FPIC</i> <ul style="list-style-type: none"> <li>▪ An Indigenous perspective</li> <li>▪ A corporate perspective</li> </ul>	Presentations
11.15 – 12.30pm	<i>Break into smaller discussion groups</i>	Facilitators
<i>Working Lunch: 12.30 – 1.30pm</i>		
1.30 – 3.00pm	<i>Small groups report back and general discussion</i>	Nominated representatives to provide feedback. Chair to lead discussion
<i>3.00 – 3.15pm Coffee Break</i>		
<b>Topic II: Consultation, Engagement, and the Meaning of Broad Community Support</b>		

3.15 – 3.45pm	<i>Indigenous and corporate perspectives on consultation, engagement and the meaning of Broad Community Support</i> <ul style="list-style-type: none"> <li>▪ An Indigenous perspective</li> <li>▪ A mining company perspective</li> </ul> (Both illustrated by case studies that speak to implementation challenges, etc.)	Presentations
3.45 – 4.45pm	<i>Break into small discussion groups</i>	Facilitators
4.45 – 5.30pm	<i>Small groups report back and general discussion</i>	Nominated representatives to provide feedback. Chair to lead discussion
5.30 – 5.45pm	Wrap up comments	Chair

**Day Two:**

<b>Timing</b>	<b>Session title/aims</b>	<b>Format/contributors</b>
<b><i>Welcome and Summary of Day One</i></b>		
9.15 - 9.30am	<i>Welcome back and review of the day's schedule</i>	Chair
<b><i>Topic III: Generating Net Social Benefits</i></b>		
9.30 - 10.00am	<i>Perspectives on what net social benefits might look like and how can they be measured</i> <ul style="list-style-type: none"> <li>▪ An Indigenous perspective</li> <li>▪ A mining company perspective</li> </ul> (Both illustrated by case studies that speak to implementation challenges, etc.)	Presentations
10.00 – 10.30am	<i>Break into small discussion groups</i>	Facilitators
<i>10.30 – 11.00am Working Coffee Break</i>		
11.00 – 12.00pm	<i>Small groups report back and general discussion</i>	Nominated representatives to provide feedback. Chair to lead discussion
<i>Lunch: 12.00 – 1.00pm</i>		

<b>Topic IV: The Challenges of Operationalizing FPIC</b>		
1.00 – 1.30pm	<p><i>Perspectives on where FPIC has been successfully operationalized and lessons learned</i></p> <ul style="list-style-type: none"> <li>▪ An Indigenous perspective</li> <li>▪ A corporate perspective</li> </ul> <p>(Both illustrated by case studies that speak to implementation challenges, etc.)</p>	Presentations
1.30 – 2.30pm	Break into small discussion groups	Facilitators
<i>2.30 – 2.45pm Coffee Break</i>		
2.45 – 3.45pm	Small groups report back and general discussion	Nominated representatives to provide feedback. Chair to lead discussion
<b>Topic V: Next steps for dialogue</b>		
3.45 – 4.30pm	<i>Where to next: possible options for continuing the dialogue (subject matter, fora, etc.?)</i>	Chair to lead
4.30 – 5.00pm	Closing remarks from ICMM, IUCN and chair	Presentations

This report was prepared under the overall direction and responsibility of the Chair of the Roundtable, Mick Dodson. Special thanks goes to Claire White who played a central role in preparing this report under the direction of Aidan Davy. Participants were invited to comment on earlier drafts and their comments have largely been reflected in the final version.