

REEXAMINING FREE, PRIOR AND INFORMED CONSENT (FPIC)

INSIDE BURMA: A CASE STUDY

by

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Abstract

Throughout history, indigenous peoples have figured among those groups who have been most systematically denied and violated of their right to give or withhold consent (FPIC) for resource development, most notably when there are *large-scale development projects*. This thesis examines the principle and application of FPIC in Burma, the barriers and opportunities concerning implementation, how it may be interpreted in different situations or by different stakeholders, and why the need for new collaborative forms of governance. I posit my study on the notion, and theory by John Owen that it has been clear for some time that the market system is unable to account for and regulate the kind of dynamic social and human rights risk associated with large scale development projects, and that new deliberate efforts are required to ensure that social risk is identified, understood and responded to by those parties involved in the natural resource sector. Often these development projects target lands governed by customary rights that are not adequately recognized under both under international human rights law and protected under national laws, or sites where governments lack the capacity or will to enforce the law. I show in my study, although Burma's government obligations with regard to consultation and FPIC are minimal at best in national law and policy, and the debate regarding the legal status of FPIC under international law continues unabated, I argue in my paper how indigenous communities, the Government of Burma and investors might benefit by applying 'the spirit of FPIC' as part of their CSR (self-regulating) policy. Additionally, I show in the case of Burma's judicial system a legal and compliance driven definition of FPIC alone cannot resolve indigenous peoples' multiple claims, and assert that legal mobilization is only one aspect of indigenous peoples' broader political strategies. I explore the current socio-political context in Burma and argue that evolving *informal protest movement, complaint, non-compliance and negotiation must remain part of the solution, and bottom-up policy option to advancing land* and resource rights in natural resource-affected communities in the context of operationalizing FPIC in response to the violent dispossession by transnational extractive companies in Burma.

Lay Summary

This paper adds to the literature by using a social movement theory lens to examine the efficacy of Informal rights claiming strategies as a bottom up (regulatory) policy option in the context of operationalizing FPIC and to advancing indigenous peoples (IP's) resource rights in natural resources affected communities in response to the violent dispossession by transnational natural resource corporations in Burma. I use Burma to argue my case and point out under Burma's current investment policy of prioritized *large-scale natural resource exploitation and infrastructure projects*- ethnic nationalities (EN's) have not benefited, and have often been left in a worst condition as a result of the displacement, environmental degradation and resource-driven armed conflict. The overall analysis and findings in the paper point to a self-regulating response from MNC's and investors and social movement actors in connection with these large-scale development projects, and *their associated accelerated social risks and costs (non-technical)*, and *a recognition on the part of investors to the potential social and economic benefits of front-loading community investments as a risk management strategy* as a way to reduce conflict, establish trust and develop a social contract.

Preface

This thesis is an original product, and research study of the author Dana McCartney. The anthropological research based on fieldwork, analysis and findings reported in the Appendix under Empirical Findings was covered by UBC Ethics Certificate number H16-00878 (Ethnic Agency). The original purpose of my field study was to examine the political agency of ethnic nationalities (EN's), primarily women from mining affected communities in Burma. The key goal of my research study was to further our understand of the role ethnic nationalities (EN's) play at the local level (eg. *nature and scope of informal rights claiming strategies*) to effectively access both judicial and non-judicial remedy, to include local-level dispute resolution mechanisms, and to influence policy-makers to affect policy change. While the findings from my field research were useful and relevant to my overall analysis, the data was only indirectly related to the subject of FPIC, and it's application in Burma. The premise of my thesis examined the application of FPIC in Burma, and the barriers and opportunities concerning its implementation, and how it may be interpreted in different situations or by different stakeholders, and the need for new collaborative forms of governance. Therefore, based on this determination, I have reserved my above field study findings for possible areas of further research in Burma. (see Appendix / Empirical Findings).

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Lastly, I want to thank all of my friends and informants in Burma (see interviewees) who gave of their time and kind support for the writing of this paper. Yet without the financial support of the Dr. Lakhbir K. Jassal Graduate Travel Awards in Arts my fieldwork would not have been possible, and want to extent my heartfelt gratitude for their contribution to my continued research. This fieldwork in Burma has inspired me to consider the prospect of further graduate study. This would thus seem to have been the perfect moment thanks to Dr. Lakhbir K. Jassal- it was on this field study I decided to commit my time and energy to helping women in Burma working in the informal economy. In 2017, I registered a start-up NGO in support of human development in Burma, primarily focusing on women's education and livelihoods in conflict-affected areas of the country.

Dedication

To my family Camille, Jackson and Cuba

Chapter 1: Introduction

1.1 Research question

Some analysts suggest the extractive industries could help fund Burma's transition if managed properly, and for the benefit of the country and its people. But given the many structural and institutional challenges, and the broader context of political contestation between various social and state forces in the country this has presented many problems for the incoming administration. How will the new NLD administration, the military, ethnic leaders and smallholder farmers, as well as international bodies respond to the continued social, economic and political pressures in Burma, particularly with regard to economic governance and natural resource management? I argue, given this scenario in Burma, protest, complaint and violence will likely continue, and increase at a significant cost to the government, businesses, and the communities- and ultimately to any sustained effort for growth and durable peace in the country. The ultimate question, however, may be why those who have benefitted from the old arrangements in Burma, to include the military, government, local leaders, and investors in the extractive sector, and foreign governments may want to change the rules of the game. Will industry and the military regime respect indigenous peoples (IP's) rights in practice ? I argue and show in my paper that if FPIC is to be (the) regulatory standard it raising important questions about whose vision of development ought to prevail and who gets to decide.

I focus in my paper on two broad research questions to guide my thesis 1) *What does the application of FPIC mean for indigenous communities in Burma given the standards legal status under international law, and minimal support under national law (to include case law)*. In other words, will deploying FPIC in Burma, under its current social, legal and political structure serves the state, big capital or the indigenous communities ? Are the conditions right to implement an Indigenous-led FPIC, and if so, what should be the requirements to guarantee its success? The right to free, prior, and informed consent (FPIC) in relation to development projects in land and resource development within the territory of indigenous peoples' is currently being debated within international law. While it is clear that before implementing

development projects on these lands, states must consult the indigenous peoples concerned, doubts remain as to whether they also have a legal obligation to obtain their consent before taking any such action. 1 Determining the actual meaning of the principle of free, prior and informed consent (FPIC) is crucial to answer this question. While the Philippines, Columbia and Peru are the only three that have incorporated strong FPIC rights for indigenous communities in the national laws, Australia, Bolivia, South Africa, South Sudan and Tanzania have also made some progress by incorporating a skeleton form of FPIC as part of negotiations between the government and the indigenous groups. 9; and 2) *How might indigenous communities, and other non-state actors in Burma exploit the FPIC process into opportunities for shared value, related to land and resource development reform?*

While FPIC requirements in law represent one critical tool to promote meaningful engagement with indigenous communities in decision-making pertaining to natural resource development, a host of other issues must be considered in order to ensure that States and project sponsors respect the ‘ spirit of FPIC ‘ in practice. 2 For example, governance conditions must be strong enough that there is space for active citizen engagement in policy-making both at the national and local level. Are we now entering a new paradigm where the significance of company-community conflict cost could become a possible model for transformational change in the natural resource sector? Is FPIC the standard all stakeholders can agree on ? What policies are needed to reduce the distrust and hostility between stakeholders, and increase responsible and mutually beneficially investments in Burma to benefit reciprocal countries? What are clear from the research *are social movements, protests and complaints are making a tangible difference, and Chinese diplomats and companies are re-thinking their strategy.*

1 Barelli Mauro, (2012). Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead, *The International Journal of Human Rights*, Volume 16, pp, 1

2 www.iwgia.org/en/myanmar 3 OXFAM, (2013). September, Free Prior and Informed Consent in the Philippines: Regulations and Realities, *America Briefing Paper*, pp, 19

1.2 Introduction

Transactions of any kind are reliant in some fundamental way upon relationships with others (if only to complete the transaction).
The Great Transaction/ Karl Polanyi

The story of Myanmar is a complex one, as we might find in many transitional economies around the world today. But at its basic core it is a human story, a story about local ethnic smallholder farmers like daughters of Aye Net and Thwe Thwe Win. Together they led thousands of villagers in protest against what was the *unlawful seizure of thousands of acres of land* to make way for a \$ 1 billion copper mine expansion run by the military junta and a large Chinese arms manufacturer. Both were arrested and thrown in jail but have refused to back down. The international media has yet to inform the world of this injustice. In Kachin State, the Burmese poet Ant Maung writes:

“The struggle made these daughters into iron ladies...this is life and death for them-they will defend it at the cost of everything.” ³

According to case work conducted by Namati, an international NGO assisting communities with land-rights issues, communities in Burma receive on average about US\$ 4000 per acre- in a country where a more recent boom in investment is pushing some land prices north of \$ 200,000 per acre. ⁴ The numbers, and increases, however seem troubling not knowing for sure who may be benefitting or, impacted by these land deals, as the data is unclear and unreliable and we have yet to develop a framework for a better understanding of how these deals are being shaped, and by whom.

³ <https://www.nytimes.com/2012/09/27/world/asia/27iht-myanmar27.html>

⁴ Pierce J. Caitlin, (2015). 22 December, For Myanmar Farmers, land rights still stuck in past, *Myanmar Times*, p. 6

It's all the more difficult in a country like Burma, where transparency and reliable data is often unavailable, and all contracts remain secret. Moreover, smallholder farmers have few resources (i.e. credit), fewer political connections and lack access fair and impartial courts. But on the positive side one thing that has changed radically is farmers and farmers groups are challenging the status quo, and having some influence on decision makers among various stakeholders, but have yet to develop *formal* programming strategies to change the ' rules of the game '. 5

It is worth noting Burma is one of the most culturally diverse countries in Asia, encompassing over 135 different ethnic groups. Much of the ethnic nationality population lives in remote areas, with few services provided by the Government or private sector. 6 The country is divided into seven mainly Burman-dominated divisions and seven ethnic states. The 2008 Constitution makes no reference to ethnic minorities (lu-neh-zu) or indigenous peoples (hta-nay tain-yin-thar); instead it uses tain-yin-thar lu-myo-mya, translated into English officially as ' national races '. 7 While the majority of Burmans consider themselves to be indigenous, it is the marginalized indigenous groups referred to as " ethnic nationalities " including the Shan, Karen, Rakhine, Karenni, Chin, Kachin and Mon, which are commonly considered to be indigenous. However there are more ethnic groups that consider themselves indigenous, for example the Akha, the Lisu, the Lahu, the Mru, and many others. 8 The Rohingya people, Muslims who live in Rakhine State in western Burma, however, are excluded from this list. The numerical breakdown for each ethnic group is not yet know (due to political reason), but Myanmar non-Bamar ethnic nationalities are estimated at 30-40 % of the population, and the seven ethnic States occupy some 57% of the total land area.

5 www.dassk.org/index.php?topic=111261144.0;wap2

6 Myanmar Centre for Responsible Business (MCRB), (2016). February, *Briefing Paper, Indigenous Peoples' Rights and Business in Myanmar*, pp, 14

7 *ibid*, pp, 14

8 *ibid*, pp, 14

Whether the communities of ethnic people in Burma meet the definition of indigenous peoples will depend on individual cases and expert consideration including consideration of how each community self-identify, but the 2008 Constitution does grant *specific rights* to ethnic minorities (EN's). Since 2013, some ethnic minority organizations in Burma have adopted the global indigenous peoples' (IP's) label and discourse according to the UN framework. 9 Those advocating for the adoption of the IP discourse in Burma are proposing a combined consociational and federalist approach to national integration. 10 But while the Government of Burma has maintained an official position of non-recognition with respect to IP's, certain reforms in policy and law suggest that in actuality the state has recognized some of their rights as enshrined in the UNDRIP. (See National Law section). Against this backdrop, the IP network in Burma continues to support IPs' rights more broadly in the critical areas of land tenure, participatory development and cultural identity. 11 It remains to be seen, however, as to whether or not these generally pro IP-policy and legislative reforms will be carried through in the form of actual legislation and practice. 12

What does this mean for Burma's indigenous communities? The country continues to attract foreign investment, but as we have seen in other countries economic growth through FDI flows does not automatically lead to greater promotion and protection of human rights. Many of the natural resources deposits are located in indigenous areas of the country

9 Morton, F. Micah, (2017). 22 May, Indigenous Peoples Work to Raise Their Status in a Reforming Myanmar, *Yusuf Ishak Institute*, pp, 3

10 *ibid*, pp, 9

11 *ibid*, pp, 9

12 *ibid*, pp, 9

where long-running ethnic conflicts have been generating war economies to sustain decades of armed resistance against the central government. 13 Global Witness provides a glimpse into the complex web in its report ‘ *Jade: A Global Witness Investigation into Myanmar’s Big State Secret* ’, of shadowy proxies, business fronts and companies connected to the military, and names a coterie of others involved in the trade, including the country’s largest and best financed army, the United Wa State Army, as well as several politicians and US-sanctioned individuals. 14 However, this comes at a time when the rule of law and regulatory framework remain undeveloped. More important, Burma’s policies have resulted in weak enforcement of property rights, which have driven many indigenous people into the informal sector. 15 Burma also continues to demonstrate some of the worse development indicators in the world. Burma ranks near the bottom of the United Nations Human Development Index. Concerns about corruption remain high as can be seen in the Transparency International Corruption Perception Index, which ranks the country third from the bottom in the world. 16 Burma’s current reform process could have drastic consequences for the rural ethnic (indigenous) peoples.

As of March 2017, the main foreign investors in Burma continued to come from China (143 companies with investments of USD 18.39 billion) and Singapore (196 companies- including Singapore incorporated companies held by shareholders from other countries- with investments totaling USD 16.12 billion), followed by Hong Kong (includes Hong Kong incorporated companies with businesses primarily in China), Thailand, Republic of

13 Allan, David, 2013, 11 December, Myanmar’s Natural Resources: Blessing or Curse?, *Heinrich Boll Stiftung*, The Green Political Foundation, pp, 7

14 www.globalwitness.org/jade-story/

15 Hiebert Murray, (2013). 8 November, Land Reform: A Critical Test for Myanmar’s Government, *CSIS*, pp, 12

16 Ruggie, John, (2012). 19 June, Aung Sui Kyi: Signals change in Burma but investors should proceed with caution, *The Christian Science Monitor*, pp, 2

Korea and the UK (including the British Virgin Islands and Bermuda Islands). 17 According to official data, recent foreign direct investment (FDI) in Burma has been concentrated in oil and gas, hydropower sector, and mining coming in third position by value. 18 In Burma, one should also note several companies have incurred significant costs for hydroelectric dam projects which may never materialize, particularly as a consequence of a failure to build a positive and respectful relationship with local indigenous peoples.

Sectors which potentially have significant land and cultural impacts on indigenous peoples in Burma include: the extractive industries (oil and gas, mining); agriculture (plantations, contract farming); infrastructure projects (industrial zone, telecommunications); transportation (roads, rail and airports); energy (hydropower, power plants); and tourism. 19 Burma is replete with examples of how failure to respect indigenous people's rights have led to conflicts, costly project delays, litigation and the loss of the legal as well as the social license to operate. 20 New research by the UN, for instance has recently revealed an important correlation between natural resource exploitation and violent civil conflict, with estimates indicating that 40% of interstate conflicts are related to or fuelled by natural resources. 21 Opposition parties and civil society organizations, however, are increasingly expanding their right to assemble and protest and increasingly exert influence in public policy. What does protest mobilization mean for Burma, *now that stakeholder response (including the military) to resistance is changing?*

17 OECD Investment Policy Reviews, Myanmar 2014, pp, 3

18 Allan, David, (2013). 11 December, Myanmar's Natural Resources: Blessing or Curse ?, *Heinrich Boll Stiftung*, The Green Political Foundation, pp, 3

19 MCRB, (2016), February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 4

20 *ibid*, pp, 4

21 Kubba Juman, (2014). 12 March, Curses or riches: What can oil, gas and mining offer Myanmar, *Global Witness*.

1.3 Method and Theory

In order to develop a general framework of analysis the study will connect social movement theory, and political opportunity theory applied to the concept of FPIC in the context of Burma. I analyze social movement theory, and apply qualitative text (discourse) analysis to better understand and explore discourses, coalitions, networks and persuasive strategies by social movements used to influence specific events. The study uses the Myitsone dam as a qualitative case study inside Burma to support my claim. To argue this case, I focus on in the empirical findings sections of the study why some social movements and protest movements are a success, and examine ways in which social movement theory reveals and highlights important facets of indigenous peoples struggle.

I begin with a literature review of past scholarly work relevant to my analysis to include social theory, social movement theory, and political process theory in an effort to explore political opportunity structure, and the extent to which exogenous factors may have enhanced or inhibited prospects for mobilization for protest, for particular sorts of claims to be advanced rather than others, for particular strategies of influence to be exercised, and for movements to affect mainstream institutional politics and policy (eg. transitional rule of law). I ask the question ' do protestors in Burma have influence over other stakeholders, and if so what mechanisms might be used to affect policy change? I argue that *both* law and power have an integral meaning in empowering and mobilizing indigenous claims against the government and elites, as well as to each other.

I examine applicable social movement theory concerning oppositional consciousness, *power*, law, and the importance of a transnational (institutional) approach. To further understand these relationships of power and law underpinning the study I will use Foucault's social theory of discourse to analyze the findings from the study. I show that power is exercised socially through discourse, and use (Foucault's) 22 explanation that ' discourse transmits and produces

power at the same time as it undermines and exposes it, renders it fragile and makes it possible to thwart it '.

In order to develop an analytical framework I begin in Chapter One by outlining my research questions, theories and methodologies used to test my hypotheses. The predicted outcome of the theories will be examined through qualitative case study analysis and in the Chapter Five Empirical Findings section. The remainder of the introductory chapter provides a historical background contextualizing the thesis. In Chapter Two I then move into a literature review to include a brief description international instruments requiring FPIC, and an interpretation of Burma's international obligations and national law governing the rights of it's ethnic nationalities (EN's), and argue that although law has an integral meaning in constituting and mobilizing indigenous claims against the government, one could argue there has been a failure of law. Chapter Three describes the business case for FPIC (consent) and general hypotheses that investors may find economic benefit by applying the spirit of FPIC as part of their CSR policy (and front load their company investment in community relations).

By performing a qualitative case study of the Myitsone dam in Chapter Four an overview will arise of the current research that has been performed on the status of FPIC between, investors, MNC's and communities, and the range of factors (e.g. social movements; constitutional limitations; etc.) that are likely to influence the extent to which companies pay attention to FPIC and the individual/institutional constraints and challenges specific to our research study. In Chapter Four I analyze the Myitsone dam as a case study, and examine the Philippines Indigenous Peoples Act as a supporting case study to argue my case. This will help to identify the gaps in the existing literature by applying it our recent case study in Burma, and cross-country comparison in the Philippines. Chapter Five describes the empirical field research data, analysis and results. This step is important as it examines the many actors, networks and coalitions, and the emergence of legal frames and informal rights claiming strategies utilized by indigenous groups and their allies in the context of Burma. I finish by examining policy implications and present areas for further research.

The research for my paper was formulated from a three-stage data collection method. The research consisted of three-main stages:

Stage 1 Desktop research of literature review, including empirical case-study analysis.

Stage 2 Field research in Burma, to include naturalistic observational methods, and 9 confidential semi-structured interviews to test emerging findings.

Stage 3: Refinement of FPIC, to include synthesis and analysis of further data.

I choose research using empirical research methods that may have potential to inform development policy and decision-making. This paper adds to the literature by using a social movement theory lens to examine the efficacy of Informal rights claiming strategies as a bottom up (regulatory) policy option in the context of operationalizing FPIC and to advancing IP's resource rights in natural resources affected communities in response to the violent dispossession by transnational natural resource corporations in Burma. I ask the question: Do these informal groups hope to create new institutions that will help push policy-makers to produce fairer outcomes or are their grievances being better met from outside institutional support? Is Burma uniformly adopting international standards, or are the indigenous people using strategies adapted to local norms and cultural values? That said, there has been significant and ongoing debate on the issue of FPIC, but the literature points out it would be a mistake to simple attempt to adopt FPIC as the new standard. 23. This would require best practice methods, and in the case of Burma my policy recommendation would be for an Indigenous-led model. (see Further Research section).

In fall 2016 I traveled to Yangon initially to begin my research and conduct three weeks of exploratory research. The empirical findings section later in the study will describe in more detail the nature of my research, analysis and results, but for the purpose of this

23 http://www.idees-ideas.ca/sites/default/files/sites/default/uploads/general/2016/2016_sshrc-ksg-rice_roberta.pdf

section I will provide a brief overview of the methods employed in my study. The methodological framework used for my fieldwork include direct (naturalistic) observation techniques, as well as interviews conducted with informants and to include: 11 semi-structured interviews consisting of questions appropriate to each group. The informants included primarily NGO's/ CSO's, other organizations working in support of EN's, government officials, as well as community members specifically affected by the environmental impacts of development projects to include contaminating local water sources.

Several interviews had been confirmed prior to my 2016 visit, including notes/data collected on-line, and over Skype, and during my previous trip to Burma in July 2015. Questions were formulated based on previous research and prior studies examining the impact of investment and development project on ethnic nationalities (EN's) within my targeted population. For the purpose of anonymity, all participants' names and identities have also been changed. The important advantage of conducting qualitative research (eg. observational) in my study, however, rather than quantitative data collection methods was it allowed me access to individuals who might be otherwise unwilling, or unable to respond in more structured formats. Furthermore, I decided given the more political subject matter of the natural resource sector, and perceived associated risk, the naturalistic informal observational method provided an appropriate " lens " from which to conduct my analysis. The targeted sites for my fieldwork were southern Burma known as the Dawei and Merqui District, Tennasserim Hills. During the course of the research, several friends and contacts provided institutional support, and assisted me in gaining the necessary 'access to the local Karen communities ' affected by land and resource development.

1.4 Theoretical Background

‘ We want to pay respect to the law, but unless we hold a plowing protest the government doesn’t pay attention. We have to teach people about the law, but on the other hand, we have to break the law. *Is the law itself unjust?* ‘
(*Kachin Farmer*)

Godwin defines social movements as a ‘ collective, organized, sustained and non-institutional challenge to authorities, power-holders, or cultural beliefs and practices ‘. 24 Social movements or protest movements are usually defined as collective action of relatively less powerful social groups that cannot take part in formal decision-making mechanisms at the public level in order to voice their demands to public opinion and to influence decision-makers. 25 In their seminal work, McAdam, Tarrow, and Tilley focus on the dynamics of ‘ contentious (negotiations) politics ‘ that determine political opportunities.

I argue and embed Tarrow’s theory for my study that offers a succinct and helpful definition: consistent- but not necessarily formal or permanent- dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure. 26 This branch of traditional social movement theory argues that the success or failure of a social movement will be determined by the “politics of opportunities “whereby political elites control the process and so cause change, thereby giving political space that allows social movements to affect change. 27 Political opportunity theory promises a means to predict variance in the periodicity, style and content of activist’s claims over time and variance across institutional context. 28 I use data from the informal rights claiming strategies in the empirical findings section, in analyzing the relationship between political opportunities and protest, related to social movements and local performance in determining how this

24 MacLeod, D. Jason, *The Belo Monte Dam: Social Movements, Law and State Repression*, p. 3

25 Ozen, Sukru, (2010). June, *Public Policies and Social Movement: The Influences of Protest Movements on Mining Policy in Turkey*, *Izmir Ministry of Economics*, pp, 33

26 Meyer S. David & Minkoff C. Debra, (2004). June, *Conceptualizing Political Opportunity*, *Project MUSE*, pp. 1459

27 Strefford, Patrick, (2014-15). Myanmar’s Transition and its Protest Movements, *Asia Journal of Global Studies*, Vol.6, No. 1, 04-15.

28 Meyer S. David & Minkoff C. Debra, (2004). June, *Conceptualizing Political Opportunity*, *Project MUSE*, p. 1464

conceptualization might demonstrate FPIC model specification for *all* actors and stakeholders given the current political context inside Burma. Kurt Schock (2004) for example in his comparative analysis of the people power movements in the Philippines, used political process theory to explain how “ political opportunity “ resulted from the emergence of elite divisions and influential allies, from variations in spells of violent flows, facilitating the emergence and continuation of the protest movement, and determined its eventual success or failure. 29 Scholars will argued that Burma’s social movement, (working with and through indigenous peoples movements and networks) influenced political actors and alter the boundaries of the political discourse.

For example, the research points out the pro-democracy movement, from an early stage in its development, consciously transformed itself into a transnational social movement. 30 The transnational networks stimulated a “ boomerang pattern “ of influence, whereby the domestic NGO/ action groups bypass their state and reached out to international partners to pressure the state from outside. 31 I show this was the clearly the case during the Myitsone dam. The constant interplay between social movements and sites of power occurs as changing circumstances provide movements and sites of domination (eg Myitsone Dam) with openings and closings.

The changing actors, and dramatic accidents, are political opportunities that state and non-state actors will mobilize for their benefit. Social movements, the state and elite actors all take advantage of these conditions when possible. _In other words, Schock, would suggest it was the action, or the absence of concerted action by elites that created the perception of political opportunities that the protestors then used to create the space for collective action. Although analysts point out that the Tatmadaw have been the sole architects and implementers of the transition to democracy in Burma, it would be incongruent to

29 Strefford, Patrick, (2014-15). Myanmar’s Transition and its Protest Movements, *Asia Journal of Global Studies*, Vol.6, No. 1, 04-15.

30 *ibid*, pp, 04-15

31 *ibid*, pp, 04-15

conclude that protest movement played no part. 32 Up until 2010, the global media in Burma focused on the popular protests that regularly erupted and the states reaction that invariably involved soldiers shooting down citizens. 33 However, much has changed in Burma since general elections were held in 2010 with regard to protest movements, reforms and the protection now afforded to its citizens.

I show in my findings a number of these sweeping reforms instigated by the previous Thein Sein government, particularly with respect to freedoms, protection laws, a notable number of political prisoners released, the establishment of the National Human Rights Commission, a noticeable number of independent Trade Union Laws passed, press censorship dramatically reduced, and in the words of Burma scholar Robert Taylor, a ' more open approach to government '. 34 In support of my claim, I agree with the writing of Eisinger's (1973) who focuses on the openness of government as the key factor in opportunity (also see Koopmans 1996) who explores different visions and components of political opportunities, and concludes weak governance structure, state capacity and corruption. But how the new administration will respond to the social movement and protest for future Chinese investment projects, and plans for future economic liberalization of the country, is less clear. Are investors, in fact, rational actors ?

Domination and state influence occur on every scale and often are expressed through codification of national and international law. 35 To be effective, scholars conclude

32 Strefford, Patrick, (2014-15). Myanmar's Transition and its Protest Movements, *Asia Journal of Global Studies*, Vol.6, No.1, 04-15.

33 *ibid*, pp, 04-15

34 *ibid*, pp, 04-15

35 MacLeod, D. Jason, *The Belo Monte Dam: Social Movements, Law and State Repression*, pp, 6

‘resistance must occur upon the contested terrains of law ‘. 36 Therefore, social movements would be well served to base their claims not only in law, but also culture and the classification system that distributes costs and benefits. 37 Author Armstrong makes a strong point in arguing “a challenge to the system of cultural classification is often a precondition to the reallocation of resources. 38 Meaning, individuals, groups and movements through this type of challenge, can begin to make claims demanding more economic or social capital. More than this, they want to point out that if movements only look to the state for solutions it “ fails to capture the ways that power is distributed in society and cannot capture the range of activity designed to challenge the way that power operates. 39

36 MacLeod, D. Jason, The Belo Monte Dam: Social Movements, Law and State Repression, pp, 6

37 ibid, pp, 8

38 https://opencommons.uconn.edu/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1563&context=gs_theses

39 MacLeod, D. Jason, The Belo Monte Dam: Social Movements, Law and State Repression, 8

Chapter 2: Seeing the Subject: Diagnosing the Vital Signs

2.1 Human Rights Standards

‘ However, we must resist the belief that laws are designed to protect the interest and rights of citizens and instead realize that law reproduces and enforces social control through moral and legal discourse ‘.
(Fernandez, 2009)

International law and norms regarding indigenous peoples have continued to evolve over the years. The right to the principle of free, prior and informed consent (FPIC) flows from and is intended to protect a number of human rights embodied in treaties and other international law. 40 In other words, free, prior and informed consent is considered not an end in itself, but rather a process that in turn protects a broad spectrum of internationally recognized human rights. The FPIC principle is enshrined in international hard and soft law, notably the legally binding international Labour Organization Convention 169 on Indigenous and Tribal Peoples (1989) (ILO 169), adopted by 22 countries to-date, the non-legally binding but influentially supported UN Declaration on the Rights of Indigenous Peoples (2007) (UNDRIP), and the updated version of International Finance Corporation (IFC) Performance Standard 7 (PS7) and the associated Guidance Note 7 (GN7). 41

By understanding these frameworks stakeholders including indigenous peoples, government and companies will be able to better manage expectations and develop best practices in the application of FPIC. It is a right that can be claimed by indigenous peoples where a project impacts on their lives, livelihood, or land and territories. Indigenous peoples continue to fight for the recognition by their national governments, the international community and *by companies* of their right to give or withhold consent for land or resource development.

40 Lehr K. Amy, (2014). February, Indigenous Peoples’ Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labor Working Group, *United Nations Global Compact*, pp, 4

41 Campbell Jasmine, (2012). 19 June, Engaging with Free, Prior and Informed Consent, BSR, *Workshop for Extractive Companies* held in London, p, 6

In addition to the United Nations and ILO, several international institutions have embraced the FPIC principle. For example, the Inter-American Court of Human Rights has ruled on several instances that states failed to meet the FPIC obligation⁴², and the International Finance Corporation (the private sector lending arm of the World Bank Group) endorsed FPIC as best practices when it issued a new FPIC requirement for clients with projects that stand to impact indigenous peoples under certain circumstances.⁴²

In 2011, the former UN Special Rapporteur James Anaya (2011, p.15)⁴³ observed that:

‘The lack of minimum common ground for understanding the key issues by all actors concerned entails a major barrier for the effective protection and realization of indigenous peoples’ rights in the context of extractive development projects. (This) coupled with the existence of numerous grey conceptual and legal areas, has invariably proved to be a source of social conflict ‘.

FPIC is at once the subject of community protest where it is thought to have been denied or manipulated; mandated by law by a small but increasing number of states; required by a range of standard-setting organizations such as the International Finance Corporation (2011) through its influential Environmental and Social Performance Standard 7 on Indigenous Peoples; and being voluntarily endorsed by industry as a matter of CSR policy.⁴⁴

⁴² Voss Marianne and Greenspan Emily, Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC), *OXFAM America*, pp, 12

⁴³ https://www.researchgate.net/publication/315550652_What_is_FPIC

⁴⁴ Owen R. John and Kemp Deanna, (2014). September, ‘ Free prior and informed consent ‘, social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 3

The former UN Special Rapporteur on the rights of indigenous peoples goes on to provide a useful context for the implementation to free prior and informed consent. Presently, there is no functional clarity on what constitutes consent. This is because FPIC is neither self-interpreting nor self-implementing. FPIC also contains no requirement for unanimity. He states that neither consultation nor consent is an end in itself, nor are consultation and consent stand-alone rights. 45 The consultation and consent standard that applies specifically to indigenous people is a means of effectuating indigenous people's rights. Moreover, consultation and consent are not the only means to safeguard indigenous people's rights. Other safeguards include for other safeguards to *include prior impact assessments* (see Further Research section), the establishments of mitigation measures to avoid or minimize impacts on the exercise of these rights (e.g. negotiation), benefit sharing and compensation for impacts in accordance with relevant international standards. 46

This legal mobilization framework within the context of FPIC would require an understanding of law as 'a complex repertoire of discursive strategies and symbolic frameworks that structure ongoing social intercourse and meaning-making activity among citizens'. 47 Rather, like any regulatory measure, *FPIC will be interpreted and implemented in specific historical-Institutional contexts by an array of state and social actors whose perceptions and purpose, power resources and political strategies may vary considerably, if not clash completely.* 48 The legal sources above are generally understood to address the role of governments, not companies, when engaging with indigenous communities. While legal recognition of FPIC is a big achievement for

45 MCRB, (2016). February, *Indigenous Peoples' Rights and Business in Myanmar*, Briefing Paper, pp, 7

46 *ibid*, pp. 7

47 MacLeod, D. Jason, *The Belo Monte Dam: Social Movements, Law and State Repression*, pp, 7

48 Franco, Jennifer, (2014). *Reclaiming Free Prior and Informed Consent (FPIC) in the context of global land grabs*, *Transnational Institute*, pp, 5

indigenous groups, not all countries, to include Burma, have enshrined it in their national law.

Moreover, enshrining FPIC in law doesn't guarantee, as we will find out later on in our case study of the Philippines, *effective implementation or positive outcomes*. In the case of Burma, as is often the case in other repressive states, companies should seek to avoid complicity in violation of human rights, including the rights of indigenous peoples. 49 While the state has the duty to protect against human rights abuses by third parties, including business- through appropriate policies, regulation and adjudication- companies have the responsibility to respect human rights, which means to act with due diligence to avoid infringing on others and address adverse impacts. 50 Companies are expected to respect international human rights, a responsibility underscored by the UN Guiding Principles and Human Rights. The UN Guiding Principles on Business and Human Rights call on companies to adhere to international standards when national requirements lag (as in the case of Burma). While the UN Guiding Principles *do not, however make an explicit reference to FPIC*, these principles establish expectations of both government and industry in the sphere of business and human rights. 51

One nebulous area, however, in particular, involves the legal regime that should govern the implementation of development projects on indigenous lands. I ask the question if companies apply the FPIC standard, will a concept of ' collaborative consent ' help them to better understand how to engage with the (IP's) communities for shared value ? I explore in the next section on the business case for FPIC how social risk could be exacerbated by natural resource companies that fail to comprehensively account for social context and conditionalities. I argue, that by applying FPIC as part of the ' spirit of FPIC ' companies can be protected from a

49 Lehr K. Amy, (2014). February, Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A *Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labor Working Group*, United Nations Global Compact, p, 5

50 Voss Marianne and Greenspan Emily, *Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC)*, OXFAM America, pp, 7

51 *ibid*, pp, 13

variety of social risks and costs while preventing human rights impacts. In the section under conditional imperatives I look at the risks and challenges associated with implementing FPIC (e.g. undermining state authority), difficulty in identifying indigenous peoples', and knowing when consent has been achieved. For now, however, I agree with Lehr and Smith (2010, 37) 52 who argue that if a company secures community consent through a formal documented process (Indigenous-led model), this may result in a stronger license to operate than a regular engagement process (when there may not be unanimity), while the possibility of a veto may not even arise.

Consultation is an important element in the consent-seeking process, but is not in itself sufficient to demonstrate that the right of communities to give or withhold their consent has been respected. More important, in the case of a company-led FPIC, this exercise should not be a linear tick-the-box process, but a process that respects their wider rights with the possibility for *collaborative consent, participatory monitoring* if the FPIC process is to be upheld. Basically, this agreed upon consent process *may mitigate the risk of future opposition that in extreme cases could shut down the project*- which would equate to a de facto veto that companies are in no position to resist. 53 Thus, companies should not focus on consent for its own sake, but rather understand it is a process that provides special protection for indigenous peoples in order to safeguard a number of human rights that historically have been harmed by corporate and governmental activity. Do we know how much of international customary law and these human rights instruments will challenge and guide the Government of Burma's State future policy decisions? How meaningful would it be to further develop standards being applied by the Inter-American System with regard to the safeguards as developed in the *Saramaka People vs Suriname case*?

52 Buxton Abbi and Wilson Emma, 2013, FPIC and The Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industry projects, *IIED*, pp, 37

53 *ibid*, pp, 37

Table 1 Corporate references to international treaties and standards, which call for FPIC

International standard	Relevant language	Company references
United Nations Declaration on the Rights of Indigenous Peoples	Calls on states to consult with indigenous peoples in order to secure their FPIC prior to the approval of projects affecting their lands or resources and in relation to “adopting and implementing legislative or administrative measures that may affect them”. ⁶⁵	Angkor Gold Anglo American ConocoPhillips ExxonMobil First Quantum Minerals MMG Rio Tinto Total
International Labor Organization Convention 169 on Indigenous and Tribal Peoples, 1989	Calls on states to consult with indigenous and tribal peoples for legislative and administrative measures, which may affect them directly (including with regard to sub-surface natural resources), with the objective of achieving agreement or consent. Requires FPIC for relocation, and when not obtained stipulates that relocation must entail appropriate procedures established by law providing effective representation for affected peoples (Articles 6, 15, 16). ⁶⁶	Areva BG Group BHP Billiton** ConocoPhillips Eni Goldcorp Gold Fields Repsol Rio Tinto Teck Total
International Finance Corporation Performance Standards on Environmental and Social Sustainability	Requires clients to obtain the FPIC of affected communities of indigenous peoples when projects will generate adverse impacts on lands and natural resources subject to traditional ownership or under customary use, entail relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use, or may significantly impact critical cultural heritage. ⁶⁷	Anadarko Angkor Gold Anglo American AngloGold Ashanti BG Group BHP Billiton* Chevron* ExxonMobil First Quantum Minerals Glencore* Goldcorp* Gold Fields Iamgold Newmont* PanAust Pluspetrol Rio Tinto* Statoil* Total Tullow Vale

2.2 Burma's International Obligations and National Laws: governing the rights of ethnic nationalities

The Government of Burma 2008 Constitution grants some rights to ethnic nationalities. That said, while the Government of Burma has *no national legal requirement or framework for free, prior and informed consent (FPIC), and/or limited progress in law and policy with respect to indigenous peoples*, indigenous peoples and civil society organizations working with them are increasingly aware of the concept. 54 While some countries may have national laws meant to ensure just processes of, for example, land transfer, consistent to comply with a requirement to obtain FPIC, few have adopted national laws with an explicitly mention of an FPIC obligation. (e.g. the Philippines)

Moreover, the Government of Burma *also does not recognize the term indigenous peoples in law, policy or practice* nor have they taken a position concerning whether there are indigenous peoples in Burma. 55 Furthermore, the 2008 Constitution states that “the Union is the ultimate owner of the lands and all the natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union “, and therefore sets the approach by the Government’s management of extractive industries resources. 56 As various CSO’s have pointed out, the Constitution does not grant citizen’s the right to a clean and healthy environment, nor are there any clauses grating freedom of information. More important, there is also *no obligation for the revenue from the natural resources to be subject to equitable among the citizens, including the indigenous peoples*. 57

The question we might want to ask is if, however, Burma were to recognize its indigenous peoples within the country according to the UN framework, could it be held accountable to provisions of indigenous peoples’ IP-relevant international legal instruments ? Intended or otherwise, Burma has a relatively low level of accessions of international human rights treaties. At the same time, the Government reportedly has also *not conducted any assessment of the*

54 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples’ Rights and Business in Myanmar*, pp. 9

55 *ibid*, pp, 9

56 <http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/04-Gov-Structure-Legal.pdf>

57 *ibid*, pp, 12

compatibility of its existing laws with its obligations under international law. 58 That said, domestic courts cannot directly invoke the provisions of global or regional human rights instruments to interpret norms unless such norms are incorporated into national legislation. 59 The former Special Rapporteur on the situation of human rights in Myanmar, Thomas Ojea Quintana cautioned that ‘addressing the impunity for human rights violations in Rakhine State together with the marginalization and discrimination against the Rohingya community remains the two fundamental challenges that the Government seems unwilling to address. 87 (OHCHR...) 60

For the purpose of my analysis, while it is not unusual for international law not to be automatically incorporated into domestic laws, one implication of this is that Myanmar’s judiciary cannot have recourse to international human rights law to circumscribe the *wide discretionary power that Myanmar’s laws confer on the executive branch.* 61

On March 2015, the self-declared ‘Coalition of Indigenous Peoples in Myanmar/Burma’, an umbrella organization representing 24 ethnic minorities NGO’s submitted a report to the UN Universal Periodic Review session of the Human Rights Council on Myanmar. 62 In this report, the organizations highlighted to the government lack of constitutional recognition of indigenous peoples (IP), and the continued violations of their rights as enshrined in the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Burma voted in favor of UNDRIP in 2007, one of the most significant IP-relevant instruments is the UN Declaration of the Rights of Indigenous Peoples.

58 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples’ Rights and Business in Myanmar*, pp, 13

59 *ibid*, pp, 13

60 <http://www.wipo.int/edocs/lexdocs/laws/en/mm/mm009en.pdf>

61 <http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/04-Gov-Structure-Legal.pdf>

62 Morton, F. Micah, (2017). 22 May, Indigenous Peoples Work to Raise Their Status in a Reforming Myanmar, *Yusof Ishak Institute*, pp, 2

The Government has stated that although it has voting in favor of UNDRIP, as did other countries, it would, however ‘ *seek to implement it with flexibility* ’. However, these protections, and the exercise of these rights are circumscribed, as they must be in accordance with the law, which is itself restrictive, and must avoid any act *detrimental to national solidarity*. 63 The Government of Burma has also not ratified ILO Convention 169, an international legal instrument dealing specifically with the rights of indigenous and tribal peoples.

The mention of FPIC, however has been made in government documents related to REDD+ (Reducing Emissions from Deforestation and Forest Degradation), and extractives. 64 Having said that, there is no evidence of implementation of FPIC in REDD+ in Burma. The statement from the US-Myanmar Joint Statement on Good Governance and Transparency in the Energy Sector emphasizes that transparency also *helps companies to operate with the free prior and informed consent* of affected communities. 65 **Myanmar’s Environmental Impact Assessment Procedures (Article 7), dated 29 December 2015 54**, also sets out definitions of environmental impacts (which importantly include social impacts) consultation and disclosure of project information in **large-scale infrastructure and development projects** and *makes specific mention of ‘ indigenous peoples ’*. 66

Therefore, adherence to international standards is a requirement for projects requiring an EIA, not just an option. 67 Burma’s legal framework on EIA’s and IP’s has developed since pre-2012 (when it non-existed). Prior to 2012, there was no legal framework requirement for EIA. The new legal framework for the protection of IP’s in Burma includes the new EIA Procedures and the 2015 Law on the Protection of the Rights of Ethnic Nationalities. However, a definition of IP’s was omitted from the law, and IP’s are only mentioned in Article 5 of the Protection of the Rights of Ethnic Nationalities Races Law (2015).

63 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples’ Rights and Business in Myanmar*, pp. 17

64 *ibid*, pp, 17

65 *ibid*, pp, 18

66 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples’ Rights and Business in Myanmar*, pp. 17

67 *ibid*, pp, 18

However, one should note, EIA Procedures (29 Dec 2015) which implemented 2012 Environmental Conservation Law includes a definition of IP's. 68 Although poorly articulated, poorly understood and poorly implemented and enforced, it nonetheless creates legal obligations. Since the framework refers to World Bank/ IFC Performance Standards (still consultation/ not consent) where Burma law is lacking, any company would be advised to plan to operate to those standards. More important, as mentioned earlier in the paper, although *Article 7 of the EIA now provides protection for IP's rights concerning major projects, Burma still needs to develop its own safeguards for IP rights ideally compliant with international standards such as UNDRIP.* 69 Whether or not a company has a policy commitment to strive to achieve the FPIC of indigenous peoples, every step a company takes towards understanding the concerns of indigenous peoples and respecting their rights will *reduce the chance of local opposition, project delays, significant social risk and costs and outright suspension.* 70

More recent policies and legislation coming out of Cabinet have in theory sought to address some of the above myriad of concerns as mandated under the new Ethnic Rights Protection Law (ERPL) protecting the Rights of National Races 2015, a Union level Ministry of Ethnic Affairs (UMEA) established more recently. However, according to the MCRB consultation with indigenous groups, there was no consultation with such groups during the drafting process. 71 Currently, it has two departments, the protection of ethnic rights, and ethnic literature and culture. The ERPL contains provisions for safeguarding the rights of IP's, albeit as EN's, to their distinct cultural identities, some degree of participatory development, and further political representation at the national level via the establishment of the Union Ministry of Ethnic Affairs. 72 The Ministry of Ethnic Affairs has continued to engage in capacity building programs with NGO's on the UNDRIP and consultations on a by-law for implementation of the Law Protecting the Rights of Ethnic Nationalities 2016.

69 *ibid*, pp, 23

70, *ibid*, pp, 4

71 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 16

72 *ibid*, pp, 16

What should be particularly noted, however, there is a *specific article within the ERPL (Article 5)* which not only recognizes IP's as a distinct group in Burma but also safeguards their right to 'free, prior and informed consent (FPIC) in the case of large scale development projects proposed in their localities of residence. 73

In spite of the aforementioned constitutional challenges, the indigenous peoples (IP's) network has expressed concern that the 2008 Constitution first, neither mentions IP's as a distinct group *nor recognizes their collective rights and customary land practices*, and second, stipulates that, ' the Union (of Myanmar) is the ultimate owner of all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union. 74 One should note however, finally in 2016 the Myanmar parliament adopted the 6th and final draft of the National Land Use Policy (NLUP), which includes a chapter on " Land Use Rights of Ethnic Nationalities " that refers to customary land tenure and land use mapping. Parliament issued the National Land Use Policy (NLUP) which calls for the protection of the customary land rights and practices of it's ethnic people, which is widely understood as a distinctly IP issue. An entire section of the policy was devoted to the ' Land Use Rights of Ethnic Nationalities '. One should further note that the drafting of the NLUP document involved a total of 79 public consultations, including 17 government-led consultations and 62 Civil Society Organization-led consultations held in 43 townships. 75 What is unclear, however, as in other policy documents as a practical means is how might FPIC be applied, as it has not been defined in the policy. This problem seems a recurring theme in my analysis of the law and policy in Burma, and supports my argument both in the interpretation and language of the law, and its complexity for the operationalization of FPIC.

73 *ibid*, pp, 16

74 *ibid*, pp, 19

75 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 20

It does appear from its policy directives, however that the Burmese government may be moving in the right direction on the protection of indigenous people, or at least to appease its detractors. While Burma's military and quasi-civilian government have maintained an official position of non-recognition of IP's as a distinct community of ethnic minorities within Burma and according to the UN framework, certain post 2008 and especially post-2010 reform policies and legislation suggest that regardless of the lack of recognition of IP's the state has in actuality recognized some of their rights according to UNDRIP, albeit not exclusively in a manner that is exclusively to IP's. 76 What is particularly relevant, is IP's in Burma have been afforded some *political bargaining power* (see Myitsone dam case study) in relation to the state, especially in comparison to the position of IP's in other parts of Asia. 77

Indeed, in support of my claim what may be *particularly interesting from a policy perspective* is ethnic organizations under Burma's present social and political structure, have strategically identified in what may be considered a ' politically strategic move ' that affords them the greatest amount of rights according to national laws.

76 Morton, F. Micah, (2017). 22 May, Indigenous Peoples Work to Raise Their Status in a Reforming Myanmar, *Yusof Ishak Institute*, pp, 10

77 *ibid*, pp, 6

Chapter 3: Business Case for FPIC

How long must indigenous people wait for the *law* to catch up to business transactions? But will law, in fact solve the problem and protect their rights?

Foreign direct investments (FDI) flows can improve economic growth, and improve livelihood and equity when managed responsibly within the context of an effective regulatory (FPIC) framework. However, due to the general social and economic marginalization, indigenous peoples are often at particular risk of adverse human rights risk impacts connected to business activities and are often excluded from decision-making activity. 78 These findings are seen in the absence of systematic identification of indigenous peoples in Burma's legal framework, and the recognition of their collective right as has been described above. The only reference to ' indigenous peoples ' are found in a handful of administrative documents, and ad hoc reference in Article 5 of the National Races Law, and Article 7 of the new Environmental Impact Assessment Procedures (see above). 79 Going hand in hand, our findings also conclude there is no legal requirement in Burma to seek FPIC.

However, even in the absence of clear State law, the UN Guiding Principles on Business and Human Rights specify that business enterprises have a responsibility to respect internationally recognized human rights, independent of States obligations. Businesses should not assume that compliance with State law meets international standards concerning the rights of indigenous peoples. 80 As stated earlier in our study, while international instruments such as UNDRIP mainly apply to States, it is an important starting point for companies seeking to understand indigenous peoples' rights, and is used as the basis for the IFC's Performance Standard 7.

78 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 6

79 *ibid*, pp, 23

They need to conduct due diligence, part of which may mean seeking free, prior and informed consent (FPIC) from indigenous communities. 81

Indigenous peoples are increasingly cognizant of international normative developments. As a result, some are aware of the UNDRIP, and might expect companies to obtain their consent.

However, both state-sponsored and corporate development projects have largely ignored international best practices regarding FPIC and internal policy designed to protect indigenous communities. While few extractive companies have public policies that incorporate consent, they will come under increasing pressure to adopt them in the future. 82 In fact, companies that fail to incorporate consent from the beginning of the relationship might find it challenging to gain a social license to operate because the community might feel that the company did not respect its human rights. 83 Indeed, companies will continue to face particular acute challenges when operating on or near traditional indigenous lands. This may also be problematic for many governments, and multinational corporations (MNC's) in resource rich countries, in future development projects as estimates ' *indicate that in 20 years around half of the gold and copper*

80 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 23

81 *ibid*, pp, 23

82 Voss Marianne and Greenspan Emily, Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC), OXFAM America, pp, 14

83 Lehr K. Amy, 2014, February, Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A *Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labor Working Group*, United Nations Global Compact, pp, 7

will be mined on land used or claimed by indigenous peoples ‘. 84

What we generally know from the empirical evidence is mineral and energy developments profoundly transform environments, communities and economies- and can often generate social conflict. What is less well known is the cost of this conflict to companies (and communities), and the range of factors that are likely to influence the extent to which companies pay attention to these costs, and invest in the underlying relationships with local communities. That said the research shows that most extractive companies do not currently identify, understand and aggregate the full range of costs of conflict with local communities. 85 Data suggests that company-community conflict is not given equivalent attention and resources.

Research also points out that the need for extractive companies to better understand the costs associated with social risk- in a sense of loss of value- that can arise from failing to build sustainable relationships with local communities. Companies are not as advanced at understanding the cost of conflict with local communities and often do not appear to analyze the costs that can arise at different stages in the project ‘s lifecycle, aggregate those costs over the full life of the project, and recognize the potential value that is at stake. In a 2010 report to the UN Human Rights Council, in a Goldman Sachs study of a 190 projects operated by the major international oil companies, one major shared its findings of a US \$6.5 billion value erosion over a two year period from stakeholder related risks. 86 In November last year, demonstrations outside the Letpadaung copper mine in Burma halted construction of the project as villagers protested meager land compensation and the project’s environment impact.

84 Buxton Abbi and Wilson Emma, 2013, FPIC and The Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industry projects, *IIED*.

85 Davis Rachel and Franks Daniel, 2014, Costs of Company-Community Conflict in the Extractive Sector, Harvard Kennedy School, *Corporate Social Responsibility Initiative*, pp, 8

86 *ibid*, pp, 11

Losses incurred by the company since then, Wanbao says, have been ‘ huge ‘ . 87

Stakeholder-related risks in the extractive sector have risen rapidly over the last two decades. Time and time again, companies have experienced how negative environmental impacts can generate significant negative social impacts as well, for example on local community health and livelihoods. This all too-familiar situation is a *significant cost – for the company of course, but also for communities themselves*. 88 I pose the question in my study and ask ‘ What value is at stake for all stakeholders from failing to mitigate or resolve conflict at the early stages ‘? *Are the metrics changing, and in favor of the protestors ?* What are the trends in Burma’s social movement, in terms of resistance and engagement and what has worked ? Can resistance be quantified and modeled ? In fact, what the empirical evidence has demonstrates is the current CSR policy framework is likely to reinforce the status quo rather than produce an industry wide solution as it does not address the main problem- *industry wide reputation risks posed by irresponsible companies*. Could companies operating on indigenous lands and the consequent protest and the attended social risks and costs, avoid reputational risks (as well as legal) by engaging in a FPIC Indigenous-led model as part of their CSR policy ?

Some companies operating on indigenous areas may face both reputational risk and shareholder suits. Companies have in fact lost access to their projects due to opposition of indigenous peoples, both temporary and permanently. 89 Moreover, governments have revoked concessions due to ongoing indigenous protest.

87 <https://www.mmtimes.com/business/20232-china-launches-local-charm-offensive.html>

88 Davis Rachel and Franks Daniel, Costs of Company-Community Conflict in the Extractive Sector, Harvard Kennedy School, Corporate Social Responsibility Initiative, 2014, pp, 8

89 Lehr K. Amy, 2014, February, Indigenous Peoples’ Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labor Working Group, United Nations Global Compact, pp, 7

Furthermore, companies increasingly face legal risk when they do not obtain FPIC, or even when the consultation process is insufficient. This is due to significant gaps between host government national laws and practice versus host government international commitment and constitutional requirements. 90 In the past, company's response to community opposition has been varied and often resulted in conflict. To respect those rights, companies must update their policy and procedures to engage with communities and work out how to reach agreements on issues if they are to achieve a social license to operate. Ultimately, as stated earlier the UN Guiding Principles, as well as the desire to mitigate risk, suggests that companies grappling with the legal gaps should adopt the higher standard. 91

More important, one should also note once companies are willing to change their behavior, NGO's (eg. Peace NGO's) might want to provide options on how they might contribute to conflict transformation while maintaining corporate objectives. Could these objectives not be achieved while *Indigenous communities have the opportunity to obtain economic and social benefits arising from responsibly managed private sector projects* ? Despite the fact that community involvement and consent may work best in settings where the host governments may recognize their indigenous peoples concerns as a matter of law or policy, I argue in my study that although accessing remedies in Burma is difficult, informal rights claiming strategies are being recognized as a (norm) diffusion of power, particularly in my case study as a struggle and campaign by ethnic nationalities (EN's) against Chinese State actors and other MNC's natural resource development projects at the local or company level, largely due to the fact that there are few other judicial or non-judicial outlets to resolve their concerns.

90 Lehr K. Amy, *Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note* endorsed by the United Nations Global Compact Human Rights and Labor Working Group on February 2014 1, United Nations Global Compact, pp, 10

91 *ibid*, pp, 11

That said, where they can EN's resort to local-level dispute resolution mechanisms they perceive to be more reliable, accessible and affordable. 92 However, *such local level dispute resolution opportunities may not be accessible where government or large corporation are involved, particularly where companies are believed to be well connected in the distant capital, Naypyidaw.* 93 Furthermore, *in some cases there is lack of organizations in indigenous communities with the experience and expertise to assist in moderating and mediating between the private sector and communities.* 94 Lack of effective community-company engagement and lack of access to effective judicial or non-judicial remedy for real or perceived damages to livelihood or other rights can increase the tension between communities and companies. There are empirical examples of this from both indigenous and non-indigenous groups throughout Burma who continue to campaign for their rights. (see Myitsone dam case study). What are the potential partnerships that could be forged, and what would these processes look like ? What does the concept of FPIC mean for Burma ? Under what circumstances and conditions in Burma might these outcomes generate value-added economic opportunities ?

3.1 Conductive Imperatives

The recent Oxfam report on FPIC and business suggest that the proper implementation of FPIC ' ultimately requires an application of FPIC principles that effectively balances the expectations of effected indigenous peoples, civil society, government, and companies. 95 The principle of FPIC is particularly relevant to business

92 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 23

93 *ibid*, pp, 22

94 *ibid*, pp, 22

95 Campbell Jasmine, (2012). 19 June, Engaging with Free, Prior and Informed Consent, BSR, *Workshop for Extractive Companies* held in London pp, 6

regardless of its precise legal status since lenders, indigenous peoples, civil society and other stakeholders increasingly expect companies to obtain consent. 96 The business case for companies to build respectful relationships with local communities and create shared value is increasingly understood, particularly for extractive companies who hope to stay for years in a community. By building social issues into strategy, business can recast the debate about its role in specific contexts and under certain circumstances. In the case of Burma, however, there is clear empirical evidence that investors and MNC's have in fact lost access to their projects (e.g. cancelled) due to the opposition of indigenous peoples, both temporary and permanently.

Moreover, the government of Burma has revoked concessions, or has seriously considering cancelling projects due to ongoing protests. 97 In this section I examine the conditional imperatives and practical challenges in operationalizing FPIC faced by companies wishing to operate on indigenous lands. I argue, however, that even in the case of a strongly incompatible scenario, where the articulation of indigenous or community consent or refusal is likely to be considered partial or void by political elites or the dominate class, and where modification to the FPIC framework could be such that the underlying principles are difficult, without some intervention, the business case for a Indigenous-led FPIC process (see Further Research) and consent could provide mutual benefits for its stakeholders.

3.1.1 Condition 1: Structural Compatibility

The operability of FPIC relies on a certain level of structural ' compatibility ' with the host context and culture. 98 Where incompatibilities are present, companies are

96 Campbell Jasmine, (2012). 19 June, Engaging with Free, Prior and Informed Consent, BSR, *Workshop for Extractive Companies* held in London pp, 14

97 Lehr K. Amy, (2014). February, Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labor Working Group, *United Nations Global Compact*, p,7

98 Owen R. John and Kemp Deanna, (2014). September, ' Free prior and informed consent ', social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 10

encouraged to take a cautious approach, and engage with states about the importance of consultation and consent processes. 99

This guidance seems to lead to the belief that FPIC is possible in nation states governed by authoritarian state or single party regimes. In Burma, for instance, neither indigenous or collective land rights are recognized, and the approach to remedy often oscillates between protest, and customary modes of conflict resolution and party controls of political dissent. What is unique, however about these customary modes of conflict resolution, or informal rights-claiming strategies in the context of Burma is they have been directing not only at states and political institutions but, *trans-nationally at corporate and even non-state actors with financial stakes in business*. 100 While we know companies are usually reticent to engage in host country politics, particularly where it may be perceived as a threat to state sovereignty, aside from when they are furthering their own commercial interest- might the FPIC proposition present such a value- added economic opportunity for investors ? Given the globalized nature of economic development, securing guarantees for indigenous peoples collective rights will require action not just within the nation-State but also internationally. One way or another, FPIC will matter but *may* require more industry-wide learning processes, and cross-sector collaboration for shared value.

Yet in contrast to other regions of the world, where although acceptance of the concept of “indigenous peoples “has been similarly problematic and contested, most countries have accepted the existence of their native populations, and have slowly come to accept- at least in theory- that they should exercise some degree of ‘ internal self-determination “ within the existing boundaries of the nation-State ‘. 100 Today, for instance Latin America is at the cutting edge of debates about the legal codification and guarantee of collective rights of indigenous peoples.

99 Owen R. John and Kemp Deanna, (2014), September, ‘ Free prior and informed consent ‘, social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 10

100 <http://www.dvb.no/analysis/rights-claiming-in-a-rule-of-law-vacuum/26866>

This is due to a combination of factors, to include: the approval of multicultural “or plurinational”, constitutions in the 1990’s and 2000’s recognizing the existence and rights of Indigenous peoples; second, advances in jurisprudence within the Inter-American system of human rights; third the invocation of individual and collective rights by indigenous peoples social movements; and forth, the growing region-wide tendency towards the judicialization of social claims of all types. 101 The degree to which these factors and characteristics may begin to align with the indigenous peoples’ network, and movement strategies within Burma would be instructive for further research, but remain outside the scope of this paper.

3.1.2 Condition 2: Clear process and representation

Representation poses several problems for FPIC. In fact, FPIC is a poorly understood and contested term in Burma, as it is in many countries.¹⁰² However, how the FPIC process defines and qualifies communities and engages with representative leaders and/or bodies will be a major determinant of its overall success. That said, international standards suggest that representatives and levels of participation are best determined by communities themselves, according to their traditional decision-making processes. ¹⁰³ Challenges emerge, however, where these processes exclude sub-sections of the indigenous communities. FPIC is a collective right and as such the will of the majority of the community should prevail.

What this means, as referred to earlier in the paper, is although consultation is an important element in the consent-seeking process, it is not in itself sufficient to demonstrate that the right of the communities to give or withhold their consent has been respected.

101 <http://www.rachelsieder.com/wp-content/uploads/2014/04/Chapter-27-Indigenous-peoples-rights-and-the-law-in-LA.pdf>

102 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples’ Rights and Business in Myanmar*, pp, 24

103 Owen R. John and Kemp Deanna, (2014), September, ‘ Free prior and informed consent ’, social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 11

FPIC is not a right for individuals to ‘ veto ‘ the choices of their wider group. In the extractive industries, the negotiation of community development agreements (or benefit sharing) has raised similar sets of issues- on what basis should a community or individual representative be included or excluded, and what level of participation ? FPIC should not be seen as a linear tick-the-box process, but allow for the community to express their voice at every stage of the planning and implementation stage of the project that may affect their wider rights. In the later section on further research I look into the efficacy of *enhanced negotiation strategies and skills training for community members, and the expansive notion of indigenous peoples agency and space based on collaborative consent and community participation*. What should be the limits of the project and how should they be defined if parameters are not defined, or even ill defined by the state? At what points in the life of the project does consent need to be revisited? Are grants of consent reversible, and under what circumstances? With all this said, although there has not been an opportunity to test what FPIC means in practice in Burma, (no projects have applied FPIC) including which groups have the right to give or withhold consent; what the process should be; or appropriate populations and thresholds (104) ethnic nationalities (EN’s) in Burma are starting to consider how Article 5 under the Law Protecting the Rights of Ethnic Nationalities should be implemented.

3.1.3 Condition 3: Allocation of resources

In its optimistic form, FPIC assumes comprehensive protection of human rights by responsive and capable states; with citizens who understand the scope and content of their rights, *and who are willing and able to assert and exercise those rights*. 105

104 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples’ Rights and Business in Myanmar*, pp, 16

105 Owen R. John and Kemp Deanna, (2014). September, ‘ Free prior and informed consent ‘, social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 12

These assumptions are, in essence, pre-conditions for the full application of the FPIC framework. I argue, above, the framework has not found its ready fit in Burma, where, national legislation does not align entirely with international law and where we see the notion of informal rights claiming processes, and strategies for recognition of indigenous rights evident. Furthermore, in our study, although we found other states, such as Chile, Peru, Ecuador, Bolivia and the Philippines recognize both customary and/or indigenous rights to land and require processes of consultation and/or consent, the data concludes *implementation* continues to be problematic. 106

Where the legislative and political structure of the host country is less compatible with the principles and functional requirements of FPIC, as in the case of Burma, the workload, and indeed the resources to address power imbalances and social risk is far greater. 107 Where funds originate, who furnishes them, through what mechanisms, when and for what purposes are important points of agreement, quite aside from agreement about the nature of consent. 108 Resourcing decisions are also a critical condition *that will influence levels of trust* and determine the effectiveness and applicability of any FPIC process. It is also a philosophy of respectful community engagement. By applying the *spirit of FPIC* in all community engagement will help companies and government agencies to build trust and avoid conflict. The range of resources, however, required in any given context is likely to be significant, and may require for example, provision of support for dissenting groups, improvement of state-based or corporate processes, or the appointment of independent facilitators or monitors. 109 What might be the critical resources for IP's in an Indigenous-led process will be examined in the section on further research section.

106 Owen R. John and Kemp Deanna, (2014). September, ' Free prior and informed consent ', social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 13

107 *ibid*, pp, 13

108 *ibid*, pp, 13 109 *ibid*, pp, 13

3.1.4 Condition 4: Equitable distribution of risk and liability

Socio-political issues can hold up or shut down extractive industry projects. In fact, as previously pointed out recent research suggest that this now occurs at more than double the rate of technical delays.¹¹⁰ In our study thus far, we have demonstrated the significant cost of social risk to companies and determined that in the case of Burma there is (likely) the combination of not only incompatibility in context, but unclear and undetermined mechanisms for representation and participation, and unfair and inadequate allocation of shared resources relative to the complexities of parties who would be involved in pursuing and applying FPIC. In addressing the full range of these challenges, in addition to the equitable distribution of associated social risks and liabilities, the first question stakeholders might want to ask themselves are: what steps are needed, and who is (legally, and morally) responsible? *What role might other parties play in achieving FPIC in less than ideal circumstances?*

Anecdotal evidence suggests that most businesses consider political stability is often seen as the highest priority and a key consideration for attracting investors to a country. If the new NLD administration wants to attract foreign direct investment (FDI), responsible FDI, typically it will need to provide some sense of public order, elimination of corruption and some semblance of a “rule of law”.¹¹¹ In Burma, factors including uncertainty around a newly installed government, *protests of large-scale investments*, and widespread religious violence are risk management considerations. The critical factor, in the case of Burma is likely to be social instability, which is likely dependent on the degree of political instability, and how this might be being managed. How will investors perceive these potential threats in the market and related costs, due to ongoing conflict? And will the new NLD government work to eliminate the culture of corruption and work to achieve good governance ?

¹¹⁰ Owen R. John and Kemp Deanna, (2014). September, ‘ Free prior and informed consent ‘, social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 13

¹¹¹ <https://link.springer.com/article/10.1007%2Fs40803-016-0041-y>

In other words, what policies and laws will address this problem, and what systems will be put into place in which those who violate this norm pay some price ?

Lenders, insurers, and even international NGO's are a driving force behind the growth of many projects in the natural resource industry, and the ascendance of the FPIC agenda, few of which have the resources to spare on complex private sector implementation challenges. ¹¹² I show in my analysis investors and MNC's must begin to go further in their 'political analysis', particularly if they choose to deny communities good faith consultation (and consent), and conflict ensues after companies have sunk their capital (eg. Myitsone dam) and exited the field. In any contract, the businesses must acknowledge that in return for the ability to function (eg. access to resources) it is subject to rules and constraints' argue as a largely ' untested concept '. FPIC in the case of Burma, industry, government, indigenous peoples and civil society will need to agree on a *more equitable distribution of risk and liability* as a pre-condition of pursuing an FPIC process.

¹¹² Owen R. John and Kemp Deanna, (2014). September, ' Free prior and informed consent ', social complexity and the mining industry: Establishing a knowledge base, *Resource Policy*, Volume 41, pp, 14

Chapter 4: Case Studies

4.1 Myitsone and Its Actors

*‘After we did everything legally, why did we end up in a situation like this ? We have been reflecting on this. As we go overseas, our central state-owned enterprises are not used to dealing with NGO’s and with local people. ‘
Lu Qizhou, President, China Power Investment (CPI)*

A major dam development is underway in Burma. The country is currently planning to build as many as 45 dams (Brennan and Doring, 2014) 113 to provide energy for its economic development and export: 22 projects with a capacity over 10 MW are already operational according to an energy consultant. A database, maintained by a major NGO in Burma, indicates that 4 dams are currently under construction, *while 11 projects are suspended and 1 has been cancelled.* 114 *The suspensions and the cancellations have been attributed to massive public protest.* 115 The Myitsone Dam stands out as perhaps a watershed moment for the country.

The Myitsone dam in Kachin State is a key example of this opposition against dam projects. The dam is one of eight new hydroelectric power developments in process-with all affecting indigenous and conservation areas. In response to the resistance, former president Thein Sein temporarily suspended the project on September 30, 2011 as ethnic nationalities (EN’s) await a response from the ad hoc commission who submitted a preliminary report November 2016- but have yet to produce its final assessment. 116 Similar examples of contested dam projects in Burma are the Mong Ton Dam in Shan State, currently at

113 Kirchher, J. Charles, K. J., Walton, M. W., 2016. The interplay of activists and dam developers: the case of Myanmar’s mega-dams. *International Journal of Water Resources Development*, pp, 1

114 *ibid*, pp, 2

115 Burma River Network (2013) <http://burmariversnetwork.org/index.php/dam-projects/31-open-letter/open-letter/1006-appeal-to-stop-dams-construction-on-salween-river>

116 *ibid*, pp, 4

planning and design stage (Mang, 20, 2015) the Upper Paunlaung Dam in Shan State, currently under construction (Peel, 2014) as well as the Tamanthi Dam in Sagaing Region, currently suspended due to opposition from local groups (Burma Rivers Network, 2013). Is Beijing and the Government of Burma now including social costs in their political calculations and risk management strategy? Furthermore, is the potential legal cost to the Government of Burma under the terms of the contract, and further liability under the Investor Protection Agreement (IPA) justifiable, (e.g. US \$ 800M) and should the Government of Burma look to include policy space in future investment agreements for social and environment considerations? Are there also ways for strengthening the national safeguard for IP's, but also find a solution to the current suspension of the project, which would protect IP rights including the right to FPIC? (see Further Research section) In a move to gain greater acceptance of its investments in Burma, *China has improved its profit-sharing, environmental and corporate social responsibility programs in the country.* 117

The proposed \$ 3.6 billion 6,000 megawatt Myitsone hydroelectric dam project is located at the mouth of the Areyarwaddy/ Irrawaddy River in Kachin State. The Himalayan Mountains form a border between China to the north and Burma to the south. The mountains in this area are approximately 6 km high, and water from the glaciers is carried south by rivers in to state on Burma's most northern state of Kachin. 118 Before they reach Kachin's capital, the *rivers* N'Mai and Mali meet and form the all-important Ayeyarwady River (also called the Irrrawaddy) which runs through Burma from Kachin in the north to the Andaman Sea in the south. 119 Millions of people downstream depend on the river for their livelihood- including six indigenous tribes who consider themselves Kachin. Chinese state-owned corporation

117 https://www.researchgate.net/publication/316483951_From_public_relations_to_corporate_public_diplomacy

118 Mogensen, K. (2015). International trust and public diplomacy. International Communication gazette, 77(4), 315-336.

119 *ibid*, pp, 315-336.

CPI, in joint venture with Yunan International Power Investment Company (CPIYN), and Upstream Ayeyarwady Confluence Basin Hydropower Company (ACHC) hold 80% of the shares, the Myanmar Ministry of Electrical Power and Myanmar Asia World Company also hold 15% and 5% of the shares, respectively. 120 Lawmakers also grant their support to the Myitsone dam.

The Myitsone dam project became an issue subject to much controversy when CPI went ahead with the dams construction despite its own EIA findings recommending otherwise, warning of the dams potential to “ heavily disturb “ and adversely impact the rich biodiversity of surrounding areas (eg *potentially large project footprint*). 121 Consequently, the opposition of civil society, and the *indigenous peoples network against big hydropower projects*, critical of flooding huge areas and forcing local communities to resettle led to a national-wide campaign against the Myitsone hydropower dam in Kachin State. From first observation it appears the Myitsone case study stands out due to its *size and significance*. China signed these investment agreements between December 2009 and June 2010, prior to the 2010 election to maximize its holdings of Myanmar’s natural resources.

The effects of the Myitsone dam project were due *partially to either incomplete or questionable environmental impact assessments; and social and environment consequences, which are often significant and long-term*. 122 Were the Chinese concerned about possible future policy direction, and competition from the West ?

Chinese corporations operating aboard, particularly those in the energy and resource sectors have shown little concern for fair-trading and international standards. But what does this say about Sino- Burma relations effective policy, and the ramifications of

120 https://www.researchgate.net/publication/316483951_From_public_relations_to_corporate_public_diplomacy

121 Yeophantong Pichamon, (2013). June, Going Global Responsibility ? China’s Strategies Towards “ Sustainable ‘ Overseas Investments, Pacific Affairs, Vol.86, No.2.

122 *ibid*, (2013).

Chinese resource investments in the region. *Is there policy space, and room for negotiation when these issues are handled poorly by the SOE's and the authorities through inadequate consultation* with local communities about how to meet their interests- when grievances can turn quickly to unrest, protest- and conflict ? Does the Chinese financiers of these projects, like China Exim Bank and the China Development Bank, who do not require onerous best practice standards, open up policy options for other development banks? Would the World Bank grant support to similar projects (on a smaller footprint), with their recent change in policy (consultation to consent)?

Stakeholder consultation and engagement in Burma are difficult for a number of (structural) reasons. Although the response to protest by the military and elite in the future is difficult to predict, the reforms in the country have resulted in some positive outcomes for the people. Since 2010, for instance, the government and businesses have *business in Burma are changing radically and responsible business has become the watchword*.¹²³ In a country long known for military monopolies and cronyism, the rules are changing fast, and businesses now are eager to be on the side of virtue, writes the Bangkok Post.¹²⁴ Many investors are delaying plans because of the government's apparent failure to prioritize economic development and the violence in Rakhine state.

While some of the foundations for reform were laid by the previous administration starting in 2010, the past year has been marked by a major drive to get the policies right and develop the legal infrastructure that will allow sustained economic growth and responsible businesses to flourish. This involves integrating international standards into business practices in Burma as the country enters a new phase. In all such cases, shareholder value, as in the case of Myitsone dam and the more recent Letpadaung project in Burma have been put at stake as the result of social movement issues that feed into fundamental drivers of corporate performance. Vicky Boman, director of the Myanmar Center for Responsible

¹²³ <http://www.myanmar-responsiblebusiness.org/news/myanmar-embraces-csr.html>

¹²⁴ *ibid*, pp, 2

Business (124), goes even farther stating ‘ the situation has reached a point where the government is so scared of civil society protests that it isn’t taking any decisions or simply suspending projects rather than addressing the cause of the concern ‘.

More importantly, which was not the case back in 2011, is that the public’s voice can now be heard- and it has power. 125 The government has become much more responsive to public opinion, civic society and local community concerns according to several activists. Their Sein’s suspension of the controversial Chinese-backed Myitsone dam has been a clear indication on this new shift both in response to social movements, and possible investment projects in the future. This might be despite the fact that freedom of speech and peaceful assembly was forcefully suppressed for decades. 126 The new NLD administration is perhaps even more responsive to local protest against dubious investment projects. 126 Furthermore, in the case of Burma if businesses do not improve the standard of living of local communities, conflict and violence could become more disaggregated, rather than centralized around large resource project flashpoints. 127_Self- regulating companies operating in countries with weak regulatory frameworks, will require more than voluntary guidelines and rules to change their behavior.

However, in other contents and under other circumstances (with proper political analysis), and from a risk management perspective in order to make investment decisions easier, companies could benefit and should actively engage with governments, and communities to decrease the risk exposure of their investment.

124 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples’ Rights and Business in Myanmar*, pp.115

125 https://chinadialogue.net/article/show/single/en/9220-China-faces-tougher-laws-in-Myanmar?utm_source=Chinadialogue+Update&utm_campaign=21ab925bdb-A+B+TEST+dam+rhino&utm_medium=email&utm_term=0_5db8c84b96-21ab925bdb-46412730

126 *ibid*, (2016).

127 Hickie, Scott, (2014). November, Stalled hope ? : The resource conflict risk to Myanmar’s political and economic transition, Open Briefing, pp, 7

What are the implications of Myitsone ? The Chinese State CPI will need to decide its long-term approach for investing in high-risk project and whether changes are needed in how it might better engage with the IP communities. Chinese investments in the region have risen considerably over the years owing to the wealth of unexplored resources in the Mekong countries. 128 The dominance of Chinese investment in Burma has, in part led to national political concerns and strong anti-Chinese sentiment within major power footprints. 129

Secondly, whether the nationality of the investor alters local reception of FDI or not, the particular terms, and type of the investment are also both important. 143 Problem with major projects, it is difficult to tell if opposition is over FDI generally, or Chinese FDI specifically. But increased FDI competition, since the removal of the international sanctions, is likely to temper Chinese investment flows into the future. The more critical question however, might be how should the Burmese government and policymakers respond to the *strength of the opposition*, beyond the cancellation after a year of construction on the dam? And will there likely be *further changes to the reform process under the new NLD administration, related to freedoms, and protection laws* for the ethnic people?

What has changed is the legal environment, and the people need to think about with these changes how they might further better their lives under the current conditions. Although difficult to predict with complete accuracy, Burma's legal framework has changed, and begun to recognize specific rights for its indigenous peoples, framework for environmental and social protection in Burma. The Myitsone dam project itself will need to become legally compliant with current Burmese law. Burma's legal framework on EIA's and IP's has developed since pre-2012. (when it was non-existent) 130 Prior to 2012, there was no legal framework requirement for EIA.

128 Yeophantong Pichamon, (2013). June, Going Global Responsibility ? China's Strategies Towards " Sustainable ' Overseas Investments, Pacific Affairs, Vol.86, No.2.

129 Hickie, Scott, (2014). November, Stalled hope ? : The resource conflict risk to Myanmar's political and economic transition, *Open Briefing*, pp, 2

130 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp.115

The new legal framework for the protection of IP's in Burma includes the new EIA Procedures and the 2015 Law on the Protection of the Rights of Ethnic Nationalities, mentioned earlier in the paper. One should note, EIA Procedures (29 Dec 2015) which implemented 2012 Environmental Conservation Law includes a definition of IP's. 131 The new EIA process requires discloser and public consultation. Since the framework refers to World Bank/ IFC Performance Standards where Burma law is lacking, any company would be advised to plan to operate to those standards. More important, as mentioned earlier in the paper, although *Article 7 of the EIA now provides protection for IP's rights concerning major projects, Burma still needs to develop its own safeguards for IP rights ideally compliant with international standards such as UNDRIP.* 132

Moreover, the political landscape on discloser and transparency has also changed. It remains to be seen, however, whether the new requirements for discloser of environmental impact assessments will lead to either government or business actually publishing more information. 133 In the meantime, civil society groups, and indigenous peoples' network are seeking to fill the gap. In the end, what we are seeing despite all efforts to achieve legal compliance, under the current social and political system if investors- and governments do not recognize the importance of IP's rights, and their contribution to overall peace and sustained growth in the country- *others will set the agenda.*

131 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 17

132 *ibid*, pp, 23

133 *ibid*, pp, 22

4.2 Case comparison: The Philippines, FPIC, and Legal Mobilization

Indigenous peoples (IP's) of the Philippines have made significant strides in their efforts to protect their ancestral domains and their identities. In 1997, the Philippines Congress enacted the Indigenous Peoples Act¹³⁴ (IPRA) which recognizes indigenous peoples rights to self-determination and provides mechanisms for the protection of indigenous ancestral domains and all resources therein. ¹³⁴ The IPRA adopted the concept of ' free, prior and informed consent ' (FPIC) as a means to protect indigenous rights and interests and give them a voice in matters that affect them. ¹³⁵ Many countries have national laws meant to ensure just processes of land transfer, for example, consistent to comply with a requirement to obtain FPIC, but few have adopted national laws, to include the Philippines that explicitly mention an FPIC obligation. Unfortunately, even with strong legislation in place, indigenous peoples in the Philippines have continued to face considerable challenges in realizing the right to give or withhold FPIC. Although FPIC is one of the most prominent features of the IPRA, and has a clear statutory basis in Philippine law, the jury is out whether it could have been implemented more strategically. This agenda became the government's *comprehensive framework towards poverty alleviation*. Are there lessons for Burma ?

The IPRA implemented constitutional provisions for the recognition of indigenous peoples' rights and interests over their ancestral domains. ¹³⁶ The land enactment of the IPRA signaled two paradigm shifts in the way the government regarded indigenous peoples. First, it challenged the notion that the state had a monopoly on the exercise of law. The IPRA *recognized indigenous legal systems*, which can be used for dispute

¹³⁴ Oxfam America, (2013). September, Free Prior and Informed Consent in the Philippines: Regulations and Realities, Briefing paper, pp, 1

¹³⁵ *ibid*, pp, 1

¹³⁶ *ibid*, pp, 5

resolution, identification of the extent of ancestral domains and decisions on the exploitations of resources, among others. 137 Second, it abandoned the perception that indigenous peoples' caused the degradation of forests. Before the IPRA, the notion that indigenous peoples destroyed forest through ' slash and burn ' farming systems prevailed. 138 Together, these two paradigm shifts for the protection of indigenous peoples in the Philippines was significant at the time, although, *not sufficient on its own even with strong legislation in place*, indigenous peoples in the Philippines continue to face considerable challenges in realizing their right to give or withhold FPIC. Criticism, and concerns have been raised about the way it simplifies and standardizes concepts like indigenous groups, customary laws, and conceptions of ancestral domains. 139

IPRA has also been undermined by other laws on natural resources like the Mining Act, which has resulted in confusion in its implementation. Indigenous communities have seen FPIC subverted as a result of inadequate implementation by both government and industry. Investors and companies have often exhibited a pattern of manipulation and misrepresentation in numerous projects. 140 Furthermore, in 2009, a consortium of indigenous peoples' provided a detailed outline of their concerns with regard to the operationalization of FPIC in a shadow report submitted to the United Nations Committee on the Elimination of all forms of Racial Discrimination (CERD). 141

137 Oxfam America, (2013). September, Free Prior and Informed Consent in the Philippines: Regulations and Realities, Briefing paper, pp, 5

138 *ibid*, pp, 5

139 *ibid*, pp, 8

140 *ibid*, pp, 9

141 *ibid*, pp, 11

Chapter 5: Conclusion

Free prior and informed consent (FPIC) has emerged as an influential theme in contemporary debates about natural resource extraction and *sustainable* development. The right to the principle of free, prior and informed consent (FPIC) flows from and is intended to protect a number of human rights embodied in treaties and other international law. However, much work still needs to be done to develop a common understanding of how to interpret and implement FPIC. The right to give or withhold consent is a recent development in international law gaining widespread support, although not always effectively implemented under international law or practice. In fact, given the debate on the meaning and definition of FPIC under international law, whether FPIC is good or bad will depend much on how it is interpreted in different situations or by different stakeholders. ¹⁴² Of course, despite these claims, we are likely to see International law and norms regarding indigenous peoples continued to evolve over the coming years. A final benefit and a potential application for future research special attention has been paid throughout the paper to indigenous peoples' perspective, and my proposed recommendations for policy research projects focused on Indigenous-led model and protocols.

Based on my overall analysis, the findings have shown that there is a strong case for both governments and industry to engage in FPIC processes with communities prior to making policy decisions or undertaking activities that will have a significant impact on indigenous peoples' way of life or their resource base. Based on the Government of Burma's minimal support for FPIC under national law I have attempted in my research study to demonstrate how businesses operating in Burma might seek a better understanding of how to respect indigenous peoples rights and how to apply relevant international standards (UNDRIP). Companies are expected to respect international human rights, a responsibility underscored by the *UN High Commissioner*

¹⁴² Franco, Jennifer, (2014). Reclaiming Free Prior and Informed Consent (FPIC) in the context of global land grabs, *Transnational Institute*, pp, 3

on Human Rights report, *Business and Human Rights* (2011). The UN Guiding Principles on Business and Human Rights call on companies to adhere to international standards when national requirements lag (as in the case of Burma) 143 As stated earlier in my study, while international instruments such as UNDRIP mainly apply to States, it is an important starting point for companies seeking to understand indigenous peoples' rights, and is used as the basis for the IFC's Performance Standard 7. While the UN Guiding Principles *do not, however make an explicit reference to FPIC*, these principles establish expectations of both government and industry in the sphere of business and human rights.

It is my hypotheses that given the current economic and political context in Burma related to the natural resource sector, and the opening up with respect to freedoms, and a 'more open approach to government ', concurrently with the *associated* rise in company-community conflicts, and the attended and accelerated costs associated with such increases, MNC's and investors may benefit economically by front-loading community investments (by applying a Indigenous-led FPIC). Based on the evidence, both the literature review and case study analysis it is clear states in transition, to include Burma, appear broadly speaking unable to govern and regulate in the new global era concerning human rights, social and environmental issues. The findings also pointed out as a significant parts of indigenous lands in Burma are conflict-affected, it is important for companies to be aware of conflict and post-conflict dynamics which could also affect development at the project level. Large-scale investments in land and resource development are often encouraged by rich resource nations, and are spreading faster than ever.

What stands out from my research is Burma's investment policy has prioritized large-scale natural resource exploitation and infrastructure projects. Moreover, the empirical evidence demonstrates clearly companies who fail to engage indigenous peoples (IP's)

143 MCRB, (2016). February, Briefing Paper, *Indigenous Peoples' Rights and Business in Myanmar*, pp, 115

communities from the start find it more challenging to gain a social license, and have lost access to project due to opposition and the resistance of indigenous peoples. The business risks of imposing a large-scale project, similar to the Myitsone dam, on a host community without its consent are multiple and profound. Community opposition can also cause the government to revoke permits, impose fines or even halt operations. Moreover, community resistance can have adverse impacts on corporate performance and operations beyond the scope of an individual project, including negative impacts on stock prices, brands and reputation, and greater difficulty in securing financing insurance, and community cooperation in future projects (see Myitsone dam case study section). If companies operating in such environments focus too narrowly on ill-defined local laws they face greater risk of protest, complaint and embroiled in political tension.

It does appear from its policy directives, however that the Burmese government may be moving in the right direction on the protection of indigenous people, or at least to appease its detractors. These findings are seen in the absence of systematic identification of indigenous peoples in Burma's legal framework, and the recognition of their collective right as has been described above. The only reference to 'indigenous peoples' are found in a handful of administrative documents, and ad hoc reference in Article 5 of the National Races Law, and Article 7 of the new Environmental Impact Assessment Procedures (see above). Going hand in hand, our findings also conclude there is no legal requirement in Burma to seek FPIC. Moreover, the findings also concluded the Government of Burma *does not recognize the term indigenous peoples in law, policy or practice* nor have they taken a position concerning whether there are indigenous peoples in Burma.

The Government of Burma has, however, despite its failings voted in favor in the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), one of the most significant IP relevant instruments but in a recent report indigenous networks in Burma have highlighted to the government lack of constitutional recognition of indigenous peoples (IP), and the continued violations of their rights as enshrined in the UNDRIP declaration.

If investors and foreign direct investments (FDI) flows want to improve economic growth, and improve livelihood and equity for indigenous peoples (IP's) within Burma's national legal framework within the context of an effective regulatory (FPIC) framework in the extractive sectors- they may want to focus on the aforementioned Article 5 and 7 above. What is also particularly relevant, is IP's in Burma have been afforded some *political bargaining power* (see Myitsone dam case study) in relation to the state, especially in comparison to the position of IP's in other parts of Asia.

Indeed, in support of my claim what may be *particularly interesting from a policy perspective* is ethnic organizations under Burma's present social and political structure, have strategically identified in what may be considered a 'politically strategic move' that affords them the greatest amount of rights according to national laws. In this regard, MNC's and investors should refer to the relevant and specific article within the ERPL (*Article 5*) which not only recognizes IP's as a distinct group in Burma but also safeguards their right to 'free, prior and informed consent (FPIC) in the case of large scale development projects proposed in their localities of residence. Moreover, Myanmar's Environmental Impact Assessment Procedures (*Article 7*), dated 29 December 2015 54, also sets out definitions of environmental impacts (which importantly include social impacts) consultation and disclosure of project information in large-scale infrastructure and development projects and makes specific mention of 'indigenous peoples'.

Resource conflict poses an ongoing challenge to Burma's reform process. *Proper governance of mega-projects*, including rules to bar investment in specific extractive areas that have historically been accompanied by large scale-displacement, land theft and militarization would be a giant step towards realizing corporate responsibility. MNC's looking to invest in Burma may want to consider the benefits of applying FPIC by building social issues into strategy in a way which reflects their actual business importance- answering the real question of whether it may make *more rational, moral, and economic sense to pay now or pay (more) later?*

5.1 Policy Implications and areas for further research

The Case for Governance and Collaborative Consent: Strengthening Negotiation for Indigenous Peoples (IP's) Communities in Burma at the Local/Project Level.

The above research study examined resource conflict case studies in Burma, at the exclusion of smaller-scale development projects, which were beyond the scope of this paper. Research concludes a proliferation in small and medium-sized hydropower dam projects and industrial agriculture is likely to dwarf the big name mega-projects as market accessibility for Burma's resource riches improves. 144 I argue, however at the same time smaller- scale natural resource sector activities could have positive economic distribution effects and provide policy options for further research study.

Moreover, based on the above research if businesses do not improve the standard of living of local communities, conflict and violence could become more disaggregated, rather than centralized around large resource project flashpoints. 145 That said, it is a challenge both for investors and governments to optimize the contribution of natural resource development for the sustainable development of the local communities and the national or international communities affected by the extractive projects. Might improved governance help us with the FPIC processes? What resources will Burma's ethnic nationalities (EN's) need to engage proactively with government and investors ? MNC's and others investors, particularly in the natural resource sector will need to *negotiate* a social license, production sharing agreements, and project-related community development agreement (CDA) to leverage the potential benefits from responsible natural resource development.

Based on our above findings, while FPIC requirements in law represent one critical tool to promote meaningful engagement with indigenous communities in decision-making

144 Hickie, Scott, (2014). November, Stalled hope? The resource conflict risk to Myanmar's political and economic transition, Open Briefing, pp, 3

145 *ibid*, pp, 3

pertaining to natural resource development, a host of other issues must be considered in order to ensure that States and project sponsors respect the 'spirit of FPIC' in practice. For example, governance conditions must be strong enough that there is space for active citizen engagement in policy-making both at the national and local level. Do the ethnic nationalities (EN's) networks and other informal groups hope to create new institutions that will help push policy-makers to produce fairer outcomes or are their grievances being better met from outside institutional support?

Again, what the findings show is with systematic corruption, and unfair courts although local level dispute mechanisms exist, (e.g. village leaders and local Government officials) can we help ethnic communities build capacity at the project (company) level? Who will define and control FPIC's operationalization? Will Burma's ethnic nationalities (EN's) network succeed in changing the status quo through enhanced negotiation? Can we move the bar in IP's informal rights claiming strategies from protest, complaint and non-compliance- *to focus on strengthening negotiation support and skills training for ethnic nationalities?* Is Burma uniformly adopting international standards, or are the ethnic nationalities (EN's) using strategies adapted to local norms and cultural values?

The data concludes that *investment contact negotiations* are one stage of the investment process that is relatively unexplored, and where current consultation and FPIC processes conducted by government and investors are always inadequate. 146

To-date the UN Special Rapporteur is not aware of representatives of indigenous peoples and/or officials from recognized indigenous self-governing structures being invited to participate in the formal negotiation and drafting of investment and free trade agreements that will have direct impact on them. 147 Scholars point out and argue that despite these provisions, only representatives from

160 Zandvliet Luc, (2011). Conflict Transformation and Corporate Agenda- Opportunities for Synergy, *The Berghof Handbook II*, pp, 32

161 <http://unsr.vtaulicorpuz.org/site/index.php/documents/annual-reports/93-report-ga-2015>

National Governments negotiate, draft and agree on investment agreements (IA) which are often conducted in strict confidence. 148 The application of those articles of investment and free trade agreements provide opportunities to integrate the needs and perspectives of indigenous peoples into the provisions of the agreements and prevent further abuses of their human rights. When such opportunities are lost, the chance for protest, conflicts, and discontinuation of projects and loss of profits increase. Beyond this, resource conflicts result in further potential social risk against the State potential financial liability for damages (often passed on to indigenous communities).

How might indigenous communities become more involved in the technical process of negotiations (e.g. strategic litigation)? What are the different options for how these standards could be met at the investment contract negotiation stage? What if in our research we could examine different international legal regimes, and provisions for the protection of indigenous rights, and find viable solutions for the protection of human rights outcomes at the project and contract level. How might we protect indigenous people's human rights, as in the case of the Myitsone dam, where the government under international investment law, e.g. IPA, faces legal liability due to a governance gap. How might we encourage and contribute to broader human rights standards from an investment perspective?

148 <http://unsr.vtaulicorpuz.org/site/index.php/documents/annual-reports/93-report-ga-2015>

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<https://link.springer.com/article/10.1007%2Fs40803-016-0041-y>

https://www.researchgate.net/publication/316483951_From_public_relations_to_corporate_public_diplomacy

<http://www.myanmar-responsiblebusiness.org/news/myanmar-embraces-csr.html>

Appendix A

Empirical Findings

The data from my field research, although indirectly related to my hypotheses, was not directed related to core argument of my thesis, and subject matter pertaining to free, prior and informed consent (FPIC), and the examination of such. It is for this reason that I have reserved my empirical findings for further research to be applied to policy research projects of a similar nature and scope.

Ethical Considerations

The respondents in the study were provided with a main consent document, as per Article 10.4 of the TCPS2 indicating interest in taking part in the study taken as evidence of consent. As stated earlier in my paper, for the purpose of anonymity, all names and identities have been changed. Similarly, claims or statements made by the informants that were felt to result in potential harm to any party in any way have been removed from the paper. Discretion and caution was used in all cases to protect the rights of the subjects.

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A.1 Government measures

[Administrative Measures for Approval and Record-filing of Overseas Investment Projects Revised](#)

The National Development and Reform Commission, 08 May 2014 [only available in Chinese]

[Guidance on Environmental Protection in Foreign Investment and Cooperation](#)

The Ministry of Commerce and the Ministry of Environmental Protection (MOFCOM), 18 February 2013

[Interim Measures for the Supervision and Administration of Overseas Investment by Central Enterprises](#)

The State-owned Assets Supervision and Administration Commission (SASAC) of the State Council, 01 May 2012

[Notice of the CBRC on Issuing the Green Credit Guidelines](#)

The China Banking Regulatory Commission, 24 February 2012

A.2 Industry initiatives

[Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains](#), China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, 2016

[Guidelines for Social Responsibility in Outbound Mining Investments](#)

China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, 2014

[Social Responsibility Guide for Chinese Electronic and Information Industry](#)

The Social Responsibility Committee of the Chinese Electronics Standardization Association (CESA), August 2012 [Unofficial title translation by Business & Human Rights Resource Centre, only available in Chinese]

[Implementation Measures of China International Contractors of Levels and Sectors Guiding Principles](#)

China International Contractors Association, 01 December 2012 [Unofficial title translation by Business & Human Rights Resource Centre, only available in Chinese]