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Recommended Citation

Zvobgo, Tendai. "Free, Prior, and Informed Consent: Implications for Transnational Enterprises." *Sustainable Development Law & Policy* 13, no. 1 (2012): 37-40, 67.

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FREE, PRIOR, AND INFORMED CONSENT:

IMPLICATIONS FOR TRANSNATIONAL ENTERPRISES

by Tendai Zvobgo*

INTRODUCTION

Inward foreign direct investment by multinational enterprises has been instrumental for the development of extractive industries and manufacturing exports in developing countries.¹ In some instances, however, large-scale industrial and economic development has occurred without regard for the rights of indigenous peoples' and their ownership and usage of land.² During the past two decades, the protection of indigenous peoples' has increased under international law as a result of the free, prior, and informed consent principle ("FPIC").³ This paper examines the scope of FPIC as an aspect of environmental justice and a tool for poverty alleviation. It also explains some of the difficulties encountered by transnational enterprises when they attempt to utilize FPIC and the benefits that accrue to indigenous communities and transnational enterprises when the principle is properly applied.

FREE, PRIOR, AND INFORMED CONSENT IN INTERNATIONAL LAW

FPIC empowers indigenous communities by providing them access to environmental justice. The concept of "environmental justice" mandates that all people, regardless of their race, origin or income, have the ability to "enjoy equally high levels of environmental protection."⁴ At the core of FPIC, is the right to self-determination as enshrined in Article 1 of the International Covenant on Civil and Political Rights.⁵ FPIC enables indigenous peoples to "assert that their territories should be recognized by government and that their free, prior, and informed consent is necessary before development activities can take place on their territories."⁶ FPIC is also significant in the development context because, as noted by Amartya Sen, development is related to freedom and freedom is undermined when people are restricted from exercising their civil and political rights.⁷ Therefore, FPIC gives the most vulnerable members of society a platform from which they can express their rights.

The most significant instruments that recognize FPIC are the International Labor Convention 169 of 1989 and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") passed in 2007. The former is a binding treaty and has been ratified by 23 countries, most of which are in South America.⁸ Although most states are not parties to the Convention, it is still important as a "persuasive authority for the global community regarding FPIC."⁹ The UNDRIP, on the

other hand, is not a treaty and therefore not binding authority. One hundred and forty three countries voted in favor of the UNDRIP while eleven abstained. The United States, New Zealand, Canada and Australia voted against it.¹⁰ These four countries later abandoned their initial position and endorsed the UNDRIP.¹¹

Although international law does not impose an obligation on transnational enterprises to respect FPIC, states will still be affected by the principle's

evolution within international law.¹² The language utilized in the International Labor Convention and UNDRIP makes it apparent that states bear the primary responsibility for respecting FPIC.¹³ Article 32, section 2 of The United Nations Declaration on the Rights of Indigenous Peoples explicitly refers to the notion of free, prior, and informed consent and the process that states should undertake in order to obtain it.¹⁴ As a result, national and regional legal systems have begun to adopt the FPIC principle as a guideline when making decisions that would impact the development of indigenous populations.¹⁵ At times, this has culminated in the modification or denial of concessions that states had offered multinational companies.¹⁶ Furthermore, international institutions, such as the Inter-American Development Bank and

large-scale industrial and economic development has occurred without regard for the rights of indigenous peoples' and their ownership and usage of land

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the Roundtable on Sustainable Palm Oil (“RSPO”), have adopted the principle of FPIC.¹⁷ The World Bank modified its safeguard policies in 2006 to include free, prior, and informed consultation as a requirement for its supported projects.¹⁸

THE SOCIAL LICENSE

FPIC requires that consent must be freely given and that the decision must be made after indigenous peoples have been educated about the project.¹⁹ Therefore, a neutral agent should obtain FPIC before a transnational enterprise may proceed with a development project and any agreement reached between the indigenous peoples and the agent must not be influenced by coercion.²⁰ Furthermore, it is imperative during the negotiation process that indigenous groups are made aware of their rights over their ancestral lands, the risks associated with the project, and the relationship between their rights and their access to natural resources, which the community may be dependent upon for sustenance.²¹

However, the process of obtaining FPIC may contain complicated obstacles, making the procurement of FPIC an arduous task for transnational enterprises.²² For example, the process of identifying the indigenous population that may be greatly impacted by a development project could prove to be laborious and time consuming and, even after the group is identified, the negotiation process may be riddled with difficulties.²³ The challenges encountered during the negotiation process can stem from cultural beliefs that indigenous peoples maintain about their territory. These beliefs may influence their perception of foreseeable consequences. For example, the experience of indigenous inhabitants may hinder them from comprehending that a river can run dry or that an industry’s activities could result in the annihilation of a river, particularly if the rivers on their land have always flowed generously for generations.²⁴ Therefore, it may be impossible to attain FPIC in contexts in which indigenous groups have never seen an example of a proposed project or lack awareness of the potential consequences.

One proposed solution to this problem has been to utilize videos to enable the group to envision what is proposed. However, videos may also be insufficient, as they may not capture the scale of the project adequately.²⁵ Even if the group has seen a road, it cannot be concluded that they understand the scale and the implications of a proposed highway.²⁶ Under such circumstances, it may be necessary to provide transportation for the indigenous group so that they can be taken to an area where a similar project has been executed.²⁷ They should also be granted

an opportunity to converse with the inhabitants within that area, so that they can receive information about their personal experiences concerning the completed project.²⁸

Considering the obstacles that transnational enterprises must contend with, it is essential to contemplate the benefits that accrue when enterprises practice FPIC with fidelity. Businesses are motivated by profits after all, whereas FPIC is most concerned with empowering and protecting the poor and vulnerable from exploitation.²⁹ The application of the FPIC principle by transnational enterprises has beneficial ramifications for the companies—the states, and indigenous populaces.

In 2001, the Business and Industry Advisory Board to the Organisation for Economic Co-operation and Development stated that “companies cannot be required to resolve all the world’s problems . . . they have neither the mandate nor the

organization to do so.”³⁰

While there is some truth to this statement, transnational enterprises and corporations are expected to respect human rights.³¹ The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights was approved unanimously by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003.³² When read together with the interpretive guide of the sub-commission, these norms constitute an authoritative

FPIC requires that consent must be freely given and that the decision must be made after indigenous peoples have been educated about the project.

guide regarding corporate social responsibility.³³ In fact, they represent the first set of “comprehensive human rights norms specifically aimed at and applying to transnational enterprises and other business entities.”³⁴ The preamble of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights stipulates that, although states are primarily responsible for respecting, protecting, and fulfilling human rights, “transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.”³⁵ Therefore, transnational corporations and enterprises participating in extractive industries must be sensitive to human rights issues, particularly when dealing with indigenous peoples and local communities.³⁶

The responsibilities of transnational enterprises to respect human rights should not merely be regarded as an altruistic obstacle to be overcome when establishing business operations in another state. Rather, transnational enterprises’ adherence to the FPIC principle benefits companies through the social license to operate within or in proximity to indigenous communities.

The value of a social license must not be understated; its absence can result in human and fiscal loss to the enterprise as well as reputational damage.³⁷

The Niger Delta in Nigeria is a consummate example of mayhem in the absence of a social license. Political repression, marginalization, land dispossession, and degradation of the environment have incited a number of indigenous peoples of the Niger Delta to join militant groups and to attack the workers of oil companies.³⁸ In 2006, one of the groups, known as the Movement for the Emancipation of the Nigeria Delta (“MEND”), gained international notoriety when it claimed responsibility for the kidnapping of four foreign oil workers.³⁹ MEND members have even occasionally kidnapped the family members of oil workers.⁴⁰ The group claims its actions constitute an attempt to obtain rights for local communities to participate in the oil industry.⁴¹ The militants insist that they represent marginalized communities that have been “alienated from the wealth of their lands.”⁴² In addition, the Council on Foreign Relations has noted that since 2006, MEND’s “attacks on oil pipelines and kidnappings have reduced oil output in the Niger Delta by roughly one third.”⁴³ Nigeria is the fifth largest oil supplier to the United States and, understandably, the U.S. government has expressed concern about MEND’s capacity to unsettle global oil supply.⁴⁴

Though MEND has garnered international attention recently, protests in the Niger Delta are hardly a new occurrence. Demonstrations commenced in the 1990s, initiated by members of the Ogoni ethnic group, who were indigenous inhabitants of the delta.⁴⁵ The Ogoni people were vexed by the environmental degradation of the delta as a result of oil operations and the lack of economic development in their communities.⁴⁶ The Movement for the Survival of the Ogoni People (“MOSOP”) was the first militant group in the delta to gain international attention.⁴⁷ Led by Ken Saro-Wiwa, they campaigned in a non-violent manner against the operations of Royal Dutch/Shell that contributed to the deterioration of their environment whilst their community derived no monetary benefit.⁴⁸

The efforts of MOSOP led Shell to cease operations in Ogoni in 1993.⁴⁹ However, allegations abounded that the Nigerian government, backed with monetary support from Shell, utilized deadly force against the Ogoni people throughout the 1990s.⁵⁰ Furthermore, Saro Wiwa and eight other MOSOP members were executed in 1995 by Nigeria’s military regime.⁵¹ The relatives of the executed MOSOP members filed a lawsuit against Shell in 1996, suing Shell for their wrongful deaths. After over a decade of litigation and reputational damage, Shell agreed to pay \$15.5 million to the families of the victims in 2009.⁵² When the African Commission on Human Rights delivered its judgment concerning the Ogoni case in 2002, it highlighted the importance of FPIC.⁵³ The Commission noted that throughout its dealings with oil consortiums, the Nigerian government failed to involve the people of Ogoni in matters that were critical to their region, Ogoniland.⁵⁴ Additionally, the Nigerian government had infringed upon the right of the Ogoni people to freely dispose of their natural wealth and resources by issuing oil concessions on Ogoni lands without consulting them.⁵⁵

The conflict within the Niger Delta demonstrates that when states do not esteem human rights and allocate rights to companies which operate in those indigenous territories, companies can share the burden of quelling the resulting social unrest. In addition, this political and social climate may serve to undermine the investments made by an enterprise in a particular territory.⁵⁶

Adherence to FPIC, particularly in countries that voted for the UN Declaration on Indigenous Peoples, lowers legal and reputational risks in the long term for transnational enterprises.⁵⁷ In fact, analysts have found the long term benefits derived from the utilization of FPIC—such as the social license—outweigh the obstacles oil and gas companies may encounter when seeking public approval.⁵⁸

FREE, PRIOR, AND INFORMED CONSENT AND PROPERTY RIGHTS

Article 1 of the Indigenous and Tribal Peoples Convention, 1989, expresses the concept of indigenous and tribal peoples. According to the convention, the former constitutes:

“[P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”⁵⁹

Available data reveals that approximately three quarters (900 million) of the world’s poorest populations (1.2 billion) inhabit rural areas; about one third of those living in rural areas are indigenous peoples, inhabiting at least 70 countries.⁶⁰ In most cases, the level of poverty in indigenous communities is exceptionally high.⁶¹ To illustrate, 86.6 percent of the indigenous peoples in Guatemala and 80.6 percent of indigenous peoples in Mexico are impoverished.⁶² Therefore, this relationship suggests that assisting indigenous peoples in overcoming poverty will also significantly reduce the number of the world’s rural poor.⁶³

The material vulnerability of indigenous peoples can be attributed to their tendency to inhabit areas where property rights are ill defined.⁶⁴ Indigenously owned territories often offer sources of power generation, water, minerals and resources that may not be available elsewhere within the state.⁶⁵ Their territories may also present investment opportunities in ecotourism and lumbering.⁶⁶ When these resources are exploited in a manner that degrades the environment of the territories they rely on for sustenance their vulnerability is heightened.⁶⁷

The FPIC principle provides indigenous peoples with a measure of protection from imposed development and environmental degradation. However, the protection and material empowerment of indigenous peoples is dependent upon government and corporations’ adherence to FPIC, the attainment of collective land ownership, the characterization by participatory mapping of territorial boundaries, and the legal demarcation of land.⁶⁸ In particular, the lack of legal ownership often causes

indigenous communities to lose control over their ancestral territories because it permits governments to utilize those lands for development projects and to grant the property rights to foreign companies. The Endorois indigenous community in Kenya⁶⁹ is an example of the former while the Saramaka, a tribal community in Suriname, provides a point of reference concerning the latter point.⁷⁰

The Endorois community occupied their territory for over 300 years while the Saramaka have exercised control over their territory since the 17th century.⁷¹ Notwithstanding, neither community petitioned their respective governments for formal recognition of the groups' land ownership until they lost control of their properties and their way of life was disrupted, prompting legal recourse. However, when transnational enterprises adhere to FPIC, they have the potential to catalyze the attainment of formal property rights by indigenous peoples and this could potentially strengthen property rights within the state.

The term "property rights" has been defined in a number of ways.⁷² A definition proffered by Armen, Alchian and Harold Demsetz in 1972 will suffice for the purpose of this discussion. Their definition is comprised of three components the right to control, to derive income from, and to transfer the resources located on one's property.⁷³ It is difficult for indigenous communities to strive to attain these rights because in most instances the exact parameters of their territories are not known.⁷⁴ Government maps "often do not reflect the precise traditional land usage of indigenous peoples."⁷⁵ Therefore, before embarking on the exploration stage, prudent enterprises that intend to adhere to FPIC should retain the services of a social geographer or other professionals that have intimate knowledge of land use by indigenous groups.⁷⁶ This will enable the transnational enterprise to determine the precise indigenous group it ought to consult.

The efforts of enterprises to determine property boundaries could produce the evidence indigenous groups need to legally claim and subsequently establish property rights.⁷⁷ For example, Western Mining Corp Ltd. in the Philippines utilized the services of archeological and ethnographic teams for the purpose of

ascertaining the land that belonged to indigenous peoples.⁷⁸ The corporation's determinations assisted the indigenous populace when they sought title to their land because the results provided clarity regarding the area's parameters.⁷⁹ Additionally, the benefits for the enterprises of undertaking this process are twofold; not only do adherents earn the trust of the community, but they also create a legally unambiguous climate of operation for the duration of their tenure in that state.⁸⁰

CONCLUSION

Amartya Sen argued, "[t]he regions of the world are more interlinked now than at any other time in history."⁸¹ As a result, land development is not solely influenced by governments, but also by transnational enterprises, as they are among the significant drivers of globalization.⁸² However, at the heart of the concept of free, prior, and informed consent is the idea of self-determination. The principle has far reaching implications in the context of environmental justice while also enabling indigenous communities to attain property rights and to overcome economic marginalization and poverty.

The application of FPIC is beneficial for states, transnational enterprises, and indigenous peoples. Shell's involvement in the Niger Delta exemplifies the burdens and consequences incurred when corporations fail to adhere to the FPIC. Transnational enterprises employing FPIC will be protected from the ire of indigenous peoples constantly exposed to the dichotomy of mineral wealth, environmental degradation and human poverty. Further, by acquiring a social license, transnational enterprises preserve their reputation and avoid their entanglement in human rights abuses.

When properly applied, the FPIC principle plays a role in reducing the effects emanating from forced relocation, such as poverty and economic marginalization, and provides vital support to the fight for environmental justice. The increasing prominence of FPIC and the examples herein highlight the wealth of factors that impact human development, such as local governance, environmental protection, justice, trade, and human rights while also illustrating the principle's importance as an essential mechanism in a highly globalized world. 

Endnotes: Free, Prior, and Informed Consent: Implications for Transnational Enterprises

¹ See Kathryn Gordon, OECD, *Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses* 3 (May 2002), <http://www.oecd.org/dataoecd/46/31/2757771.pdf>; see also IAN GOLDIN & KENNETH REINERT, *GLOBALIZATION FOR DEVELOPMENT* 59 (2006).

² Helen Tugendhat & Valerie Couillard, *Forest Peoples Programme*; Jeremie Gilbert & Cathal Doyle, MIDDLESEX UNIV. BUS. SCH., *Business, Human Rights and Indigenous Peoples: The Right to Free, Prior, and Informed Consent* 1 (2010), <http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/ukgovt-fpicsubmissionmay09eng.pdf>.

³ Robert Goodland, *Free Prior Informed Consent and the World Bank Group*, SUSTAINABLE DEV. L. & POL'Y, Summer 2004, at 66, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1381&context=sdlp>.

⁴ *Environmental Justice*, THE CAL. ENERGY COMM'N, http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html.

⁵ Tugendhat & Valerie Couillard, *supra* note 2, at 2; Article 1 International Covenant on Civil and Political Rights 1976 <http://www2.ohchr.org/english/law/ceschr.htm>.

⁶ Patrick Anderson, *Free Prior Informed Consent in REDD* 71 (Feb 2011) http://www.recoftc.org/site/uploads/content/pdf/FPICinREDDManual_127.pdf.

⁷ AMARTYA SEN, *DEVELOPMENT AND FREEDOM* 4 (1999).

⁸ Convention No. 169 <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

⁹ AMY K. LEHR & GARE A. SMITH, *IMPLEMENTING A CORPORATE FREE, PRIOR AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES* 11 (Foley Hoag 2010).

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¹⁰ United Nations Declaration on the Rights of Indigenous Peoples voting record <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=VM&term=ares61295>.

¹¹ United Nations Declaration on the Rights of Indigenous Peoples Adopted by the General Assembly 13 September 2007. <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

¹² LEHR & SMITH, *supra* note 9, at 14.

¹³ United Nations Declaration on the Rights of Indigenous Peoples, article 32 sec. 2 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

¹⁴ *Id.*

¹⁵ LEHR & SMITH, *supra* note 9, at 16.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 15.

¹⁹ Goodland, *supra* note 3, at 67.

²⁰ *Id.*

²¹ *Id.*

²² Lehr & Smith, *supra* note 9, at 7.

²³ *Id.*

²⁴ Goodland, *supra* note 3, at 67.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 68.

²⁸ *Id.*

²⁹ *Id.* at 72.

³⁰ DIR. FOR FIN., FISCAL, & ENTER. AFFAIRS, OECD, *Multinational Enterprise in Situations of Violent Conflict and Widespread Human Rights Abuses 4* (May 2002), <http://www.oecd.org/dataoecd/46/31/2757771.pdf>.

³¹ See Preamble, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

³² Carolin Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, GER. L.J. Vol. 4, 10 1065(2003), http://www.germanlawjournal.com/pdfs/Vol04No10/PDF_Vol_04_No_10_1065-1080_European_Hillemanns.pdf.

³³ *Id.*

³⁴ *Id.*

³⁵ See Preamble, *supra* note 31.

³⁶ Hillemanns, *supra* note 32, at 1075.

³⁷ LEHR & SMITH, *supra* note 9, at 21.

³⁸ Elias Courson, NORDISKA AFRIKAINSTUTET, *Movement for the Emancipation of the Niger Delta (MEND) 7* (2009), nai.diva-portal.org/smash/get/diva2:280470/FULLTEXT01.

³⁹ Stephanie Hanson, COUNCIL ON FOREIGN RELATIONS *MEND: The Niger Delta's Umbrella Group*, (March 22, 2007), <http://www.cfr.org/nigeria/mend-niger-deltas-umbrella-militant-group/p12920>.

⁴⁰ Courson, *supra* note 38, at 7.

⁴¹ *Id.* at 8.

⁴² *Id.*

⁴³ Hanson, *supra* note 39.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ed Pilkington, *Shell Pays Out \$15.5 Million over Saro-Wiwa Killing*, THE UK GUARDIAN (June 8, 2009), <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa>.

⁴⁹ Hanson, *supra* note 39.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Ed Pilkington, *supra* note 48.

⁵³ Antoanella-Iulia Motoc & Tebtebba Found, *Legal Commentary on the Concept of Free, Prior Informed Consent*, SUB-COMM. ON THE PROMOTION AND PROT. OF HUMAN RIGHTS 6 (July 2005), www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc.

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

⁵⁶ LEHR & SMITH, *supra* note 9.

⁵⁷ *Id.* at 6-7.

⁵⁸ *Id.* at 7.

⁵⁹ International Labour Organization, *Indigenous and Tribal Peoples Convention No. 169*, art. 1(b), June 27, 1989, 28 I.L.M. 1382, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314.

⁶⁰ *Indigenous Peoples and Sustainable Development*, Int'l Fund for Agric. Dev. 5 (Feb. 2003), <http://www.ifad.org/gbdocs/gc/26/e/ip.pdf>.

⁶¹ *Id.* at 5.

⁶² *Id.* at 5.

⁶³ *Id.* at 5.

⁶⁴ Jennifer Tobin, *Political Investments and Property Rights in Developing Countries*, YALE UNIVERSITY AND BROOKINGS INSTITUTION 2 (Oct. 3, 2005), http://www.people.fas.harvard.edu/~ces/conferences/cpeworkshop/tobin_CPE.pdf.

⁶⁵ *Indigenous Peoples and Sustainable Development*, *supra* note 61.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.*

⁶⁸ *Id.* at 8.

⁶⁹ *Ctr. for Minority Rights Dev. ex rel. Endorois Welfare Council v. Kenya*, A.C.H.P.R. 276/2003 (2009), available at http://www.hrw.org/sites/default/files/related_material/2010_africa_comm_ission_ruling_0.pdf.

⁷⁰ Fergus MacKay, *Suriname: Chinese Logging Companies and Tribal Rights*, FOREST PEOPLES PROGRAMME (Sept. 2002), <http://www.wtm.org.uy/bulletin/62/Suriname.html>.

⁷¹ *Id.* at 76.

⁷² Tobin, *supra* note 64, at 3.

⁷³ *Id.*

⁷⁴ LEHR & SMITH, *supra* note 9, at 22.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 21.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 71.

⁸¹ SEN, *supra* note 7, at 3.

⁸² John M. Kline & Ludger Odenthal, *The Social Responsibility of Transnational Corporations*, U.N. CONFERENCE ON TRADE AND DEV. 44 (1999), available at <http://www.unctad.org/en/docs/poiteitm21.en.pdf>.

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²³ Robert K. Whelan & Denise Strong, *Rebuilding Lives Post-Katrina: Choices and Challenges in New Orleans' Economic Development*, in RACE, PLACE, AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA: STRUGGLES TO RECLAIM, REBUILD, AND REVITALIZE NEW ORLEANS AND THE GULF COAST 183, 183 (Robert D. Bullard & Beverly Wright, eds., 2009) [hereinafter RACE, PLACE, AND ENVIRONMENTAL JUSTICE]. In the month following Hurricane Sandy, the New York area lost approximately 30,000 jobs due to the storm. See Patrick McGeehan, *Nearly 30,000 Jobs Lost Because of Hurricane Sandy*, THE NEW YORK TIMES (Dec. 20, 2012).

²⁴ See Seth B. Shonkoff et al., *The Climate Gap: Environmental Health and Equity Implications of Climate Change and Mitigation Policies in California – a Review of the Literature*, 109 CLIMATIC CHANGE S485, S491 (2011).

²⁵ See USGCRP REPORT, *supra* note 4, at 54-55 (explaining that warmer temperatures are projected to lead to a slight net increase in energy use because increases in air conditioning are likely to outpace decreases in energy use for heating).

²⁶ See, e.g., NAT'L RESEARCH COUNCIL, *supra* note 7, at 49 (describing increasing energy costs resulting from increasing focus on expensive renewable energy sources).

²⁷ See *id.* (assessing the cost of providing protection from three feet of sea level rise at roughly \$100 billion).