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Excerpt

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## 1

## Fairness in International Climate Law and Policy

Those of us who live on small specks of land, . . . in the Caribbean, have not agreed to be sacrificial lambs on the altar of success of industrial civilization.<sup>1</sup>

The economy is a wholly owned subsidiary of the environment.<sup>2</sup>

Science is about truth and should be wholly indifferent to fairness or political expediency.<sup>3</sup>

## 1.1. INTRODUCTION

Climate change is forcing decision makers at national and international levels to make difficult choices. Confronted with competing demands and interests, countries are faced with committing significant resources to avoid consequences that, while beginning to be felt now, will only manifest themselves decades and, in some cases, centuries from now. Decisions will need to be taken under conditions of considerable uncertainty as to the exact scope and timing of harm. Moreover, the adverse impacts of climate change will be unevenly distributed, with the countries least responsible for the historical buildup of greenhouse gases (GHGs) bearing the brunt. Under such conditions, values and principles carry added weight in decision making. Science provides information on the status of the climate system and projections of future changes. Economics attempts to present the costs and

<sup>1</sup>Statement by Ambassador Lionel Hurst of Antigua and Barbuda, at the International Red Cross Conference on Climate Change and Natural Disasters, the Hague, June 28, 2002, quoted in BENITO MÜLLER, *EQUITY IN CLIMATE CHANGE: THE GREAT DIVIDE* 45 (2002).

<sup>2</sup>Forward, Robert F. Kennedy Jr., in GAYLORD NELSON, *BEYOND EARTH DAY: FULFILLING THE PROMISE* xvi (2002).

<sup>3</sup>JAMES LOVELOCK, *THE VANISHING FACE OF GAIA: A FINAL WARNING* 11 (2009).

benefits of alternative courses of action. Yet observing the global effort to combat climate change reveals that a key part of the discussion revolves around the contested concept of fairness. A juridical analysis of options to combat climate change will benefit from a critical engagement with the principle of fairness.

Fairness claims and discourse are a major part of the climate change regime. The United Nations Framework Convention on Climate Change (UNFCCC), which is the multilateral basis for action to combat climate change, itself assigns a prominent place to equity. Equity and fairness are deep-rooted concepts in human relations, and it is not surprising to find them invoked in a setting where decisions with far-reaching social, economic, and environmental consequences are made. Therefore it is desirable to improve our understanding of the dimensions and application of fairness concepts in climate negotiations. Understanding fairness in climate change is all the more important as negotiators, policy makers, and advocates turn to consider deepening and broadening the climate change regime after the end of the first commitment period of the Kyoto Protocol in 2012.<sup>4</sup> As the science points out, the emission reductions that will result from the Protocol are a very modest first step in the face of the much more extensive reductions that will be required in the coming decades. And fairness can be expected to come to the fore even more because the future stages of the international effort to combat climate change will require some form of GHG control for all countries, not only the group of industrialized countries covered under the Kyoto Protocol.

Questions of fairness are central to the challenge of tackling global climate change. The complexity of the question arises from the global and long-term nature of the problem. At the same time, the impacts are localized and differentiated so that states least able to respond are those that will be hardest hit. Policies and measures to abate – mitigate – GHG emissions demand decision making under conditions of uncertainty and a commitment of resources beyond the time horizon of politics-as-usual. And while international environmental law has achieved notable successes, it has arguably not confronted a challenge with so many dimensions, including lifestyles, energy policies, and inequality in the global community. Some observers

<sup>4</sup> Joseph E. Aldy et al., *Addressing Costs: The Political Economy of Climate Change*, in *BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE* (2003).

have argued that questions of fairness are of secondary, largely rhetorical significance: willingness to pay is what matters.<sup>5</sup> Such views grow from a realist perspective on the relations between states and skepticism about international law. The argument presented in this book is that a fair distribution of benefits and burdens is at the heart of the matter. Individual and collective responses to the climate change problem are shaped and determined as much by social and political factors as by technical and scientific ones. Normative analysis has a role to play in analyzing the problem of climate change and identifying solutions.

#### 1.2. WHY FAIRNESS?

One straightforward reason for considering fairness and equity is that the language of the UNFCCC demands it. The Convention enjoins parties “to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>6</sup> Another principle states that the special needs and circumstances of those countries particularly vulnerable to the adverse impacts of climate change should be given full consideration.<sup>7</sup> It also states that in taking action in circumstances of scientific uncertainty, account should be taken of the need to ensure that measures and policies are cost-effective and achieve global benefits at the lowest possible cost.<sup>8</sup> The guiding principles of the Convention refer explicitly to an equitable and fair approach to the protection of the climate system, with a circumscribed mention of cost-effectiveness and no mention of efficiency. A plain reading of the Convention’s guiding principles, which are quite evenly balanced, points the reader in the direction of equity and fairness principles for burden sharing. Taking the language of the Convention seriously gives meaning and purpose to an effort to explore and delimit the meaning of equity and fairness in the climate change context. Because equity is not defined in the Convention, it makes sense to have recourse to background moral or ethical notions of fairness, as would be the case in a domestic

<sup>5</sup> See DAVID VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2001).

<sup>6</sup> United Nations Framework Convention on Climate Change, adopted on May 9, 1992, Art. 3(1), 1771 UNTS 164 Art. 3(1) (hereinafter referred to as UNFCCC).

<sup>7</sup> UNFCCC, Art. 3(2).

<sup>8</sup> UNFCCC, Art. 3(3).

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legal system when giving substance to concepts such as equality and due process.<sup>9</sup>

A substantial body of scholarship and policy advocacy has developed that discusses fairness in the climate change context.<sup>10</sup> References to fairness and equity also abound in intergovernmental forums dealing with climate change. Countries from opposite sides of the climate change divide implicitly or explicitly invoke fairness in their arguments. From one perspective, fairness requires that in addressing a problem, all major contributors should play their part, regardless of their historical contribution to the problem.<sup>11</sup> Another view sees a group of countries as the victims of another group of countries' unwillingness to take responsibility for the consequences of their

<sup>9</sup> Roger Shiner, *Law and Morality*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 438 (Dennis Patterson ed., 1996).

<sup>10</sup> For a selection, see ANIL AGARWAL & SUNITA NARAIN, *GLOBAL WARMING IN AN UNEQUAL WORLD: A CASE OF ENVIRONMENTAL COLONIALISM* (1991); Henry Shue, *The Unavoidability of Justice*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS* (Andrew Hurrell & Benedict Kingsbury eds., 1992); Henry Shue, *Subsistence Emissions and Luxury Emissions*, 15 *LAW & POLICY* 40 (1993); Henry Shue, *After You: May Action by the Rich Be Contingent upon Action by the Poor?* 1 *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES* 343 (1994); Adam Rose, *Equity Considerations of Tradeable Carbon Emission Entitlements*, in *COMBATING GLOBAL WARMING: STUDY ON A GLOBAL SYSTEM OF TRADEABLE CARBON EMISSION ENTITLEMENTS*, UN Doc. UNCTAD/RDP/DFP/1 55 (1992); Michael Grubb, *Seeking Fair Weather: Ethics and the International Debate on Climate Change*, 71 *INTERNATIONAL AFFAIRS* 463 (1995); Tariq Banuri et al., *Equity and Social Considerations*, in *CLIMATE CHANGE 1995: ECONOMIC AND SOCIAL DIMENSIONS OF CLIMATE CHANGE*, CONTRIBUTION OF WORKING GROUP III TO THE SECOND ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 83 (James P. Bruce et al. eds., 1996); Mathew Paterson, *International Justice and Global Warming*, in *THE ETHICAL DIMENSIONS OF GLOBAL CHANGE* (Barry Holden ed., 1996); Matthew Paterson, *Principles of Justice in the Context of Global Climate Change*, in *INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE* 119 (Urs Luterbacher & Detlef F. Sprinz eds., 2001); GLOBAL COMMONS INSTITUTE, *CONTRACTION AND CONVERGENCE: A GLOBAL SOLUTION TO A GLOBAL PROBLEM* (1997); Adam Rose et al., *International Equity and Differentiation in Global Warming Policy: An Application to Tradeable Emission Permits*, 12(1) *ENVIRONMENTAL AND RESOURCE ECONOMICS* 25 (1998); FERENC L. TÓTH ED., *FAIR WEATHER? EQUITY CONCERNS IN CLIMATE CHANGE* 193 (1999), which contains contributions from the fields of economics, social science, and law; MARINA CAZORLA & MICHAEL TOMAN, *INTERNATIONAL EQUITY AND CLIMATE CHANGE POLICY*, Climate Issue Brief 27, Resources for the Future (December 2000); PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* (2002); JAMES GARVEY, *THE ETHICS OF CLIMATE CHANGE: RIGHT AND WRONG IN A WARMING WORLD* (2008).

<sup>11</sup> See, e.g., the statement of President G.W. Bush: "I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy . . . the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns." Letter to Members of the Senate on the Kyoto Protocol on Climate Change, 37(11) *WEEKLY COMP. OF PRES. DOC.* 444 (March 13, 2001).

actions. Cost is often raised as an objection, but it is evident that cost per se is not the crux of the objection – even if large developing countries participated in the mitigation effort, developed countries would still have to incur potentially substantial costs. Burden sharing is thus the issue. Opposite sides in the debate evidently believe that they derive some advantage by articulating their position in terms of fairness. Unless one believes that statements that countries make mean nothing at all, it is worthwhile examining the language countries use and the context in which they do so.

Combating climate change requires global action based on a consensus among sovereign nations that are more likely to adopt and faithfully implement an agreement that is perceived to be fair and equitable.<sup>12</sup> This is a straightforward notion, clearly applicable in the conduct between persons, and scholars have argued that it also applies to agreements between states.<sup>13</sup>

Global environmental problems bring to the fore the need to arrive at some degree of consensus about the meaning of fairness. A primary reason is that, unlike in other cases, such as international trade, developed countries cannot rely on their unequal power and influence to determine a solution, but rather require the voluntary cooperation of developing countries, particularly those that are rapidly industrializing. This opens the possibility for developed countries to deal on fair and equitable terms with developing countries, taking into account the imperative of poorer countries to pursue economic and social development, while at the same time maintaining the stability of the climate system.<sup>14</sup>

### 1.3. INTERNATIONAL POLITICAL CONTEXT OF FAIRNESS

The UNFCCC, which was adopted in 1992 and came into force three years later, is the foundation of the global response to climate change.<sup>15</sup> The ultimate objective of the Convention is the stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous human interference with the climate system. It does not contain binding emission targets. For this reason, countries initiated a negotiating process that culminated

<sup>12</sup>Marco Grosso, *A Normative Ethical Framework in Climate Change*, 81(3–4) CLIMATIC CHANGE 223 (2007).

<sup>13</sup>THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

<sup>14</sup>Henry Shue, *Global Environment and International Inequality*, 75(3) INTERNATIONAL AFFAIRS 531 (1999).

<sup>15</sup>UNFCCC, Art. 3(1).

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in the adoption of the Kyoto Protocol in 1997.<sup>16</sup> The Protocol, which entered into force in February 2005, commits industrialized countries – so-called Annex I parties to the UNFCCC – to reduce their GHG emissions by an average of 5.2 percent from 1990 levels during the first commitment period from 2008 to 2012. However, this binding target applies only to some 36 countries, representing about 30 percent of global GHG emissions. The nonparticipation of the United States, coupled with various compromises made in the process of bringing the Protocol into operation, means that the real reduction will be well below 5.2 percent. The Protocol is thus only a modest first step in the direction of stabilizing global emissions.

By some estimates, emissions from developing countries of carbon dioxide, the most important GHG, will in the next decade exceed the share from industrialized countries. Developed countries argue that reduction measures therefore are only meaningful if developing countries are prepared to trim their emissions. In turn, developing countries look forward, contending that they ought not bear the burden of abatement at this critical stage in their development. They point also to the historical responsibility of the developed countries, invoking the *polluter pays principle*. Small islands and other particularly vulnerable developing countries seek to emphasize global solidarity and fairness when pressing claims for assistance to adapt to the adverse impacts of climate change. These are only some of the issues entwined in the debate on climate change that lead, directly or indirectly, to the question of fairness.

Climate change stems from the activities at the very heart of our economies and way of life. Of world energy, around 85 percent is supplied from fossil fuels – coal, gas, and oil.<sup>17</sup> Altogether, carbon dioxide from the combustion of fossil fuels is responsible for much more than half of all GHG emissions; approximately another quarter come from carbon dioxide released in the process of deforestation and from various gases released from agricultural and other activities.<sup>18</sup> Many environmental problems stem from human activity, but none relate so directly to the driving force of modern economies. Stabilizing emissions at the level that would prevent large-scale, irreversible damage to the biosphere will require not merely an incremental adjustment of our energy system, but over time, a full-scale transition to new

<sup>16</sup> Kyoto Protocol to the UNFCCC, December 11, 1997, 37 ILM 22, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

<sup>17</sup> INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK (2006).

<sup>18</sup> WORLD RESOURCES INSTITUTE, NAVIGATING THE NUMBERS 5–7 (2005).

modes of low-carbon consumption and production. Studies suggest that depending on the stringency of the chosen target, global GHG reductions of 50 to 85 percent below 2000 levels may be necessary by 2050, while global emissions would have to peak in 2015 at the latest.

The discourse on fairness is woven into the political process of the climate change regime. It has been observed that international environmental negotiations among developing countries have frequently cast their arguments in terms of justice and fairness.<sup>19</sup> There are several possible reasons for this. First, arguments framed in terms of fairness or justice appear more binding and forceful than those appealing to charity.<sup>20</sup> Second, arguments appealing to moral and, if applicable, legal obligations possess a universal character. A violation of a right to refrain from conduct that injures another, or responsibility to provide compensation for consequent damages, applies objectively to all who fall within the scope of the rule or principle. For example, although a policy argument relating to economic efficiency in combating climate change may not have much to offer the representative of a small island state, claiming the violation of a right by those responsible for GHG emissions has more traction.

Developing countries have viewed climate change in the context of their economic and social development.<sup>21</sup> Imposing limits on their growth is regarded as unfair, given that they have not yet attained the level of development of industrialized countries. While not ruling out so-called cleaner forms of development, they do not wish to bear any additional cost, particularly when the developed countries achieved their status with few, if any, environmental constraints.<sup>22</sup> Developing countries do not want to be held responsible for remedying a problem largely not of their making. Accordingly, they emphasize industrialized countries' dominant share of cumulative carbon dioxide emissions (76 percent).<sup>23</sup> Developing countries

<sup>19</sup>Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Law*, 76 *TULANE LAW REVIEW* 843, 898 (2002).

<sup>20</sup>*Id.* at 897, citing ANDREW DOBSON, *JUSTICE AND THE ENVIRONMENT: CONCEPTIONS OF ENVIRONMENTAL SUSTAINABILITY AND THEORIES OF DISTRIBUTIVE JUSTICE* 95 (1995).

<sup>21</sup>MÜLLER, *supra* note 2, at 45. The following draws on the points made by Müller.

<sup>22</sup>See Delhi Ministerial Declaration on Climate Change and Sustainable Development, Decision 1/CP.8 UN Doc. FCCC/CP/2002/7/Add.1 ("Reaffirming that economic and social development and poverty eradication are the first and overriding priorities of developing country Parties," preambular para. 3; "Recognizing that climate change could endanger future well-being, ecosystems, and economic progress in all regions," preambular para. 6).

<sup>23</sup>WORLD RESOURCES INSTITUTE, *supra* note 18, at 32.

also point out the difference in per capita emissions: some industrialized countries (Australia, Canada, the United States) have per capita emissions more than 6 times those of China, and 13 times those of India.<sup>24</sup> By some estimates, however, the developing country carbon dioxide emissions will exceed those of industrialized countries by 2012.<sup>25</sup> At the same time, some 140 countries, including small islands and the least developed countries, are responsible for only 10 percent of annual emissions.<sup>26</sup>

The argument from historical responsibility has obvious attractions in the international climate change discourse. At face value, basic notions of fairness seem to suggest that the main contributors to a problem should be the ones carrying out abatement.<sup>27</sup> In this context, Brazil, in 1997, put forward a proposal that would assign relative responsibilities to individual industrialized countries in accordance with their respective contributions to climate change, as measured by the induced change in temperature, based on historical emissions.<sup>28</sup> According to recent research, the average contributions to the global mean surface temperature increase in 2000 are around 40 percent from the Organisation for Economic Co-operation and Development group of industrialized countries, 14 percent from Eastern Europe and the former Soviet Union, 24 percent from Asia, and 22 percent from Africa and Latin America.<sup>29</sup>

Generalizing very broadly, the approach to the problem of climate change by industrialized nations, particularly those in Europe, has been from the perspective of correcting or managing an environmental imbalance. While

<sup>24</sup> *Id.* at 21 note 80.

<sup>25</sup> INTERNATIONAL ENERGY AGENCY, *supra* note 17, at 81.

<sup>26</sup> *Id.* at 11 note 80.

<sup>27</sup> A country's historical emissions can be presented in at least three ways: on the basis of simple cumulative emissions, the contribution to current concentrations of GHGs, or the contribution to increases in the global average temperature. *See id.* at 32 note 80 for a succinct explanation. The cumulative approach simply counts all emissions since a particular start date. In assessing a country's contributions to atmospheric concentrations, the second approach takes into account the decay of GHGs over time to give a country's share of emissions presently in the atmosphere.

<sup>28</sup> UN Doc. FCCC/AGBM/1997/MISC.1/Add.3, 3. Although not adopted, the Brazilian recommendation remains on the agenda of the Conference of the Parties to the Convention, whose Subsidiary Body for Technological and Scientific Advice (SBSTA) has sponsored continued research into contributions to climate change. *See* UN Doc. FCCC/SBSTA/2002/INF.14 for a summary of the research efforts carried out by various institutions, while up-to-date information is available at <http://www.match-info.net/>.

<sup>29</sup> Michel den Elzen et al., *Analysing Countries' Contributions to Climate Change: Scientific and Policy-Related Choices*, 8(6) ENVIRONMENTAL SCIENCE & POLICY 614 (2005).



catastrophic images may be summoned in support of policy, by and large, the adverse impacts of climate change will be less severe than in the sub-tropical countries, and the capacity to adapt is more developed than in poor countries.<sup>30</sup> Framing the problem in these terms may have contributed to the climate regime's focus on mitigating GHG emissions, epitomized in the emission limitations and reductions required by the Kyoto Protocol. From an environmental management perspective, informed by the scientific evidence of GHGs and public concern, the primacy of mitigation on the agenda of the international climate change regime made sense. Increased recognition of the economic and social dimensions of climate change meant greater emphasis on adaptation to the adverse effects of climate change – sea-level rise, potentially greater frequency and intensity of extreme weather events, and so on.<sup>31</sup> Even so, funding for adaptation falls well short of what is needed, while progress on the issue in the climate talks remained bogged down for a number of years.<sup>32</sup>

Adaptation thus constitutes an important dimension of fairness in the context of international climate policy. Adaptation is increasingly being regarded as a twin priority with mitigation. Practically, this stems from the realization that the current concentration of GHGs already commits the planet to further warming, even if emissions were frozen at current levels.<sup>33</sup> (This is primarily due to the thermal inertia of the oceans, which have absorbed vast amounts of heat, which will be slowly released into the atmosphere.) Given their vulnerabilities – a combination of geographical location, reliance on sectors vulnerable to climate shocks (agriculture), and low levels of technology and capital accumulation – developing countries are much less able to cope with the impacts of climate change and climate

<sup>30</sup>But cf. the 2004 heat wave in Europe, which was responsible for some thirty thousand deaths. Again, remedial measures, such as air-conditioning and improved preparedness, can be taken relatively easily. Compare this with the impact of drought on countries in the Sahel or populations in low-lying areas such as Bangladesh or the Nile delta.

<sup>31</sup>While the UNFCCC did deal with the question of funding for adaptation at the first Conference of the Parties in 1995 (Decision 11/CP.1), it was only with the adoption of the Marrakech Accords in 2001 that adaptation was addressed as a key area of action.

<sup>32</sup>See slow progress on articulating the Buenos Aires Programme of Work on Adaptation and Response Measures, adopted at the 10th Conference of the Parties to the UNFCCC (COP-10) in 2004.

<sup>33</sup>INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 23 (Susan Solomon et al. eds., 2007).

variability. A drought in the United States may harm the prospects of farmers (many of whom will be cushioned by insurance), but loss of life is unlikely. For a country in a persistently drought-wracked region, such as Niger, where subsistence agriculture supports a large proportion of the population, the situation is quite different. A World Bank study concluded that progress in fighting poverty is under threat from increasingly severe weather events and climate variability.<sup>34</sup> The report goes on to note that 20 to 40 percent of official development assistance (ODA) and public concessional finance (i.e., US\$20 billion to US\$40 billion per year) is subject to climate risk and that very little ODA takes this risk into account.<sup>35</sup> There is a risk that climate change could impede the achievement of the United Nations Millennium Development Goals, including those on poverty eradication; child mortality; combating HIV/AIDS, malaria, and other diseases; and environmental sustainability.<sup>36</sup>

Some countries are more vulnerable and less able to take adaptive measures than others. The UNFCCC also addresses issues of equity and solidarity, providing that vulnerable countries, particularly small island developing states and least developed countries (LDCs), should be assisted in adapting to the adverse effects of climate change.<sup>37</sup> From the perspective of developing countries, the promise of these provisions has not been fulfilled.<sup>38</sup> The United Nations currently classifies 50 countries as LDCs. These countries are generally those lowest on the development rung – one criterion is an annual per capita gross national income of less than US\$750.<sup>39</sup> The individual and total GHG emissions of this group of countries are almost negligible. Due

<sup>34</sup> VICE PRESIDENCY FOR SUSTAINABLE DEVELOPMENT, THE WORLD BANK, AN INVESTMENT FRAMEWORK FOR CLEAN ENERGY AND DEVELOPMENT: A PROGRESS REPORT (2006).

<sup>35</sup> *Id.* at 38.

<sup>36</sup> WORLD BANK GROUP, MANAGING CLIMATE RISK: INTEGRATING ADAPTATION INTO WORLD BANK GROUP OPERATIONS 5 (2006). The Millennium Development Goals and related documents are available at <http://www.un.org/millenniumgoals/>.

<sup>37</sup> See UNFCCC, Art. 4(8)–(9).

<sup>38</sup> As further detailed in Chapter 5, several funds have been established to address the adaptation and technology needs of developing countries. The Least Developed Country Fund and the Special Climate Change Fund, both of which are voluntary funds, have supported studies, capacity building, and planning, but for actual adaptation projects, the Adaptation Fund, which was finally operationalized in 2007, should have greater resources at its disposal.

<sup>39</sup> The other two criteria are human resource weakness and economic vulnerability. See explanation on the Web site of the UN Representative for Least Developed Countries, Landlocked Countries, and Small Island Developing States, available at <http://www.un.org/special-ohrlls/lcd/lcd%20criteria.htm>.