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International Paretianism: A Defense

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Abstract

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I. Introduction

In *Climate Change Justice?* we argued that a viable climate treaty must comply with International Paretianism (IP), the principle that at least one state must benefit from the treaty and no state party will be made worse off by the treaty. A number of critics of our arguments appear to assume that we intended IP as an ethical principle.² In fact, IP is not an ethical principle but a feasibility constraint. Our claim is that it is idle to argue for a climate treaty on ethical grounds if the ethically required climate treaty will surely be rejected. The challenge for commentators and scholars ought to be to propose a climate treaty that is both ethically acceptable and politically feasible. However, there has been very little discussion of political feasibility. The focus on ethics alone has resulted in numerous proposals that have little chance of being accepted. Pursuit of these proposals has resulted in little progress in reducing emissions. The world would be better served, and a more ethical outcome achieved, if the focus were instead on feasible treaties that actually reduce emissions.

In *Climate Change Justice* we did not provide a full defense of IP. That lacuna may account for some of the criticisms we have received. Some commentators argue that IP is indefensible because it blocks ethically obligatory treaties and favors rich countries like the US. Accordingly, our use of IP confuses the "is" with the "ought." Another criticism is that IP, as we define it, is incoherent because it defines a state's interest to include a state's moral obligations, in which case IP cannot serve as an independent constraint. A third criticism, which we have not (yet) heard but which we believe should be addressed, is that IP, if taken to its logical conclusion, implies that states never act ethically, in which case debate about the ethics of climate change is idle.

In this Article, we respond to these criticisms. After explaining what IP means, we make three major points. First, participants in the climate debate should advocate treaties that are not only ethical but also feasible. Second, IP is a reasonable approximation of feasibility, although there may be other principles that better capture what is feasible. Third, IP does not necessarily imply that states never act ethically, but instead helps focus the ethical debate on realistic alternatives.

II. What Is IP and Why Adopt It?

The Pareto principle in economics is an ethical standard that provides that a project is socially desirable if it makes at least one person better off than in the status quo and makes no person worse off. Most economists and, as far as we know, philosophers, believe that the Pareto principle is a sufficient condition for social desirability, at least if one accepts the broadly welfarist assumptions of economics and modern public policy, and defines well-being properly. However, nearly everyone agrees that the Pareto principle is too strong: it bars projects that may be socially desirable, like a vaccine that will help thousands but cause minor injuries to a few people who cannot be adequately compensated (perhaps because they cannot be identified).

Although we borrow Vilfredo Pareto's name for IP, we do not classify it as an ethical principle. IP is satisfied for an international project, such as a treaty, that makes at least one state that joins the project better off than in the status quo, while harming no other states. Buried in this definition are a number of assumptions. First, states will act so as to advance their self-interest. Second, a state's self-interest is its perceived self-interest, not an "objective" self-interest.⁴ Third, a state's self-interest can include ethical interests, but whether it does is an empirical question and ethical interests may vary by state.⁵

IP differs from the Pareto principle because a project that makes a state better off might make some citizens of the state worse off. If a state defines its national interest in a way that takes account of the well-being of few of its citizens, it may enter a treaty that complies with IP but that has extremely bad consequences for many people. That is why IP is not even a weak ethical principle, unlike the Pareto principle.

What is the point of IP if it is not an ethical principle? It is a feasibility constraint. It is a device to discipline our thinking to ensure that our recommendations can actually be implemented.

Another term one could use to describe IP is "participation constraint." This term is frequently used in the economics literature as a condition of a "mechanism" that is designed to elicit information from people for (usually) socially desirable ends.⁶ The economics literature focuses a great deal of energy discussing "second-best" projects that make people better off than in the status quo but are not first-best in the sense that without constraints people could be even better off. These projects are desirable, but not perfect, because the theoretically perfect projects are inconsistent with people's incentives; that is, people will not participate in them and hence (in our words) they are not feasible.

To use a standard example from economics, a government policy in which people are told to voluntarily reveal their income and asked to pay taxes on the basis of it, while not being subject to audits or sanctions if they fail to do so, violates the participation constraint because people would have no incentive to comply with the policy. They would instead conceal their income. A tax policy that complies with participation constraints must make people at least as well off if they comply with the policy as if they cheat. Such a policy is the ethically preferred policy even though it is inferior to the policy of voluntary compliance in a world in which participation constraints were assumed away. Thus, the economic literature focuses on the set of feasible policies, and attempts to determine the best policy within that feasible set.

Philosophers also use feasibility constraints in considering the appropriate structure of political institutions. For example, John Rawls, in *Political Liberalism*, argues that a conception of justice must be realistic in that it must be capable of forming the basis of a stable society.⁷ A stable society is one that is "willingly and freely supported by at least a substantial majority of its politically active citizens."⁸ Similarly, Thomas Nagel argues that "the motivations that are morally required of us must be practically and psychologically possible, otherwise our political theory will be Utopian in the bad sense."⁹ How tight these constraints are assumed to be - how

much of human nature and which political institutions are taken as given - varies widely in the philosophical literature.¹⁰

A recent book by Elizabeth Anderson on racial discrimination provides another example of the use of feasibility constraints by philosophers. She points out that ideal theory can blind one to proposals that improve society when those proposals would not lead to an ideal outcome.¹¹ Suppose, for example, that ideal theory dictates that society be color-blind, meaning that government may never condition legal duties and benefits on race. Ideal theory would then block affirmative action programs. But, Anderson argues, if we start with the world as it is, and observe that African-Americans experience various disabilities caused by racism not embodied in the law, we may conclude that affirmative action is morally justifiable. It violates ideal theory, but is justified as a means for achieving better outcomes in the non-ideal world.

A similar point can be made about the climate debate. Indeed, proponents of aggressive climate treaties accept feasibility constraints, but these constraints are usually implicit and unacknowledged. Consider, for example, the claim that the right to emissions should be allocated on a per capita basis. The claim is justified on the intuition that common resources belong equally to everyone. Proponents of this view do not argue that all resources (such as natural resources within the territory of a state) should be distributed, even though the logic of their argument does not limit equal sharing to resources that happen to lie outside of states' territories. We suspect the reason they do not make this argument is that they accept an implicit feasibility constraint that states would not agree to share resources located on their territory, whatever the ethical merits of sharing. But proponents of an equal per capita emissions allocation do not explain why their proposal is feasible when equal per capita allocation of all resources is not.¹² In fact, equal per capita allocation of emissions is no more feasible than equal allocation of other resources, which is why it is not fruitful to spend time advocating either proposal. Explicit acknowledgement of feasibility constraints would make this evident.

Failure to acknowledge and defend feasibility assumptions is a common problem in writing about international relations. While commentators frequently rule out world government as an institutional solution to problems they identify, presumably on feasibility grounds, they endorse laws and institutional arrangements that are hardly less ambitious without explaining how they are feasible if world government is not, or in any way clarifying their assumptions about what is possible. These proposals include international federations, a democratic United Nations, strong permanent courts with the power to compel nations to comply with their judgments, rights to democratic participation that would apply to all countries in the world, other strong rights such as rights to welfare and health care, which are respected in virtually no country outside Europe, and massive transfers of wealth from rich countries to poor countries.¹³

This is not to deny that states have created some important international institutions that have done some good, that aspirational statements may have value, or that norms of behavior may change. There is room for imaginative scholarship that considers these possibilities. But discussions aimed at creating institutions in the immediate future, such as an international climate regime, need to be particularly sensitive to feasibility. Far-reaching aspirations will have little effect and may in fact reduce the likelihood of reaching agreement to the extent energy is wasted on efforts to reach a goal that is not within the bounds of feasibility.¹⁴ Focus on ethically appealing but infeasible proposals is, we believe, one of the reasons for the failure of climate negotiations so far. Given the urgency of reducing emissions, this is troubling. It is more ethical to have hard-headed negotiators focused on reaching an agreement that is enforceable and actually reduces emissions than to spend time trying to reach impossible goals while emissions continue to increase.

The challenge is to develop criteria to distinguish the institutions that are feasible from those that are not, and then to limit serious policy discussion to the former. The balance is not easy. An approach that included no limits, such as an approach that denied the existence of states or assumed transfers from wealthy states to poor states orders of magnitude larger than we have ever seen, is not helpful. An approach that includes no room for ethical considerations leaves nothing to discuss. We propose IP as an appropriate criterion that is located on

middle ground.

IP is a more complex idea than the participation constraint used in economics. In standard economic models, authors assume that people want to satisfy their preferences, and typically this assumption boils down to a tractable claim that people want more money rather than less money. The assumption is obviously simplistic, but it may be serviceable enough in many policy contexts, for example, regarding payment of taxes or contributions to public goods.

State interests are far more complex because they are constructed from some aggregation of the interests of the people who control the state. Common experience tells us that states frequently seek to increase national wealth, but that they do not always do so. For example, states may adopt trade policies that favor certain groups (say, firms that compete with importers) to other groups (consumers and exporters), which reduce national wealth or well-being, as measured by GDP or other more sophisticated measures. In addition, states will often adopt policy goals that are, or at least appear to be, based on ethical considerations. For example, Western nations rejected the international slave trade in the nineteenth century. Today, many countries claim that human rights constrain their policy choices.¹⁵

Still, any reasonable survey of international law and institutions suggests that a relatively straightforward account of states' interests goes a long way to explaining what we observe and what we do not observe.¹⁶ The vast majority of treaties involve humdrum day-to-day things: extradition, taxation, maintaining embassies, and protecting foreigners and their property. A number of multilateral treaties set communication standards, provide for trade, and establish fisheries. There are also arms control agreements, base agreements, overflight agreements, and much else. All of these treaties are the result of negotiations between governments trying to obtain particular benefits for their citizens through mutual exchange. While no doubt some governments make mistakes and end up with treaties that harm rather than benefit them, even these treaties can be easily renegotiated, so it would be surprising if the vast majority of treaties did not comply with IP.

The closest analogy to a climate treaty is the Montreal Protocol.¹⁷ The US and other major countries agreed to cut back on chlorofluorocarbons in order to reduce the size of the ozone hole. But the US approached Europe for treaty negotiations after the US had concluded that even unilateral action would serve its interest; a treaty would help share the burdens.¹⁸ The Montreal Protocol almost certainly satisfied IP. The US, in particular, then under the administration of President Reagan, who was skeptical of environmental activism, pushed for the Montreal Protocol after concluding that it satisfied a strict cost-benefit analysis taking account of national interests.¹⁹

Then there are the human rights treaties, which might seem inconsistent with IP. But the empirical literature on human rights treaties suggests that even they comply with IP. The treaties did not require liberal democracies to change their practices in most cases, and where they did, the liberal democracies issued reservations that excused them from those obligations. Authoritarian states entered the treaties in return for bribes or in response to threats, and, according to the empirical research, mostly ignored them. Transitional states seem to be the only states that have changed their behavior, if the empirical research is to be believed; but in any event these states entered the treaties because transitional liberal governments hoped to lock in liberal rights.²⁰ Thus, the human rights treaties comply with IP.

Finally, consider the range of international institutions. Most such institutions are set up to serve certain interests of states - to maintain peace or enhance trade, for example - while at the same time they are designed so that states have significant opportunities to protect their interests in case they find themselves in a minority. For nearly all major international institutions, one or more of the following propositions is correct: (1) they make policy through consensus or subject to strict supermajority rules, so nearly all states possess vetoes (the United Nations,²¹ the WTO, the Law of the Sea Authority); (2) states can and do undercut these institutions' powers by stipulating that the states will be immune to certain of those powers (the International Court of Justice); (3) the institutions do not possess formal legal authority and so cannot issue binding rules or orders (the International

Labor Standards Organization, the World Health Organization, the UN Human Rights Council, and other human rights committees and commissions); (4) they lack enforcement power (all international institutions); (5) states can opt out of the institution at any time (virtually all international institutions); (6) states may avail themselves of the benefits provided by an institution if they wish but are not obliged to (the IMF, the World Bank); (7) the institution may issue binding orders but states must rely on self-help for a remedy (the WTO dispute resolution system); and (8) an institution with apparently strong powers in practice never uses them, uses them only with the consent of the affected state, or uses them against only the very weakest states (the International Criminal Court). Thus, nearly all of the decisions made by these institutions will roughly satisfy IP, as states that object to them can block them, opt out of them, or otherwise avoid their force.²²

It is this historical experience, and not some a priori axiom, which underlies the assumption of IP. Philosophers and others who argue for a climate treaty that rights past injustices, redistributes to the poor, and achieves other goals that violate IP bear the burden of explaining why the world's countries would suddenly change their behavior in such a radical way. They have not carried that burden.

III. IP AND A CLIMATE TREATY

The implications of IP for a climate treaty are straightforward: the treaty must be designed so that all states consider themselves better off than in the status quo. A requirement of IP should not be a barrier to the negotiation of a climate treaty. Scientific evidence strongly suggests that humanity will be worse off in the future if climate mitigation efforts are not made. Mitigating therefore creates a surplus relative to the status quo, and this surplus can be distributed among the states. The surplus will be large enough to compensate even those states that will not be harmed by climate change (if there are any) and thus would otherwise be net losers given their treaty obligations. IP has nothing to say about how this surplus should be distributed; on that question, other pragmatic or ethical concerns can be brought to bear.

This argument raises a few puzzles. IP rests on the self-interest of states. If states are self-interested, then they will seek to maximize their gain from a treaty. But this means that states will not be satisfied with being better off than in the status quo; rather, states will also seek the largest possible portion of the surplus. Accordingly, there is no room for any ethical discussion even about the distribution of the surplus, which will presumably reflect states' relative bargaining power.

This is a coherent objection to IP, and we do not know whether it is correct or not. One possible response is that as a matter of political psychology, voters and other constituents will object to a treaty that makes them worse off than the status quo, but not to a treaty that makes them less better off than a feasible alternative but still makes them better off than the status quo. Perhaps there is some agency slack, and so well-motivated leaders might do the right thing for the globe once they are satisfied that their own populations will not punish them. If the objection is correct, then there is little room for discussion about fairness. However, even if the objection is correct, a climate treaty will be desirable. Climate mitigation will occur, climate change will be reduced, and people around the world will be better off than they would otherwise. The outcome will not be as fair as other imaginable but infeasible treaties, but it will be better than the status quo.

A second puzzle is how we should consider the position of many developing states (including China) that they will not enter a treaty unless it redistributes wealth to them,²³ for the sake of distributive or corrective justice or some other conception of justice or fairness. One might argue that those states conceive their self-interest as requiring the type of redistribution that IP rules out. To put this more concretely, suppose that the governments are sincere, and that their populations will refuse to accept a treaty that does not redistribute wealth to them. Under our approach, the moral norms that influence the public must be cashed out in terms of the state's self-interest. And it turns out that there are only two possibilities. First, suppose the public of, say, India would force the government to reject any treaty that either imposed positive obligations on India or failed to fully compensate India for its burdens, or indeed that failed to redistribute wealth to India beyond any climate benefits.²⁴ If the amount that India demanded is greater than the surplus generated by the treaty, then a treaty becomes

impossible. It is conceptually little different from a hypothetical treaty between India and the US under which the US is obligated to pay India \$100 billion in return for nothing at all. We do not believe the US would enter such a treaty, nor, accordingly, a treaty that gave the US \$50 billion in climate benefits at a cost of \$150 billion.

Second, suppose that the Indian public would prevent India from ratifying a treaty that failed to give India a large portion of the surplus but did not fully deplete it. In that case, the US and other countries would have no choice but to give India a larger portion of the surplus than they would otherwise. This is consistent with IP.25

Note, however, that moral and political arguments that persuade Indians, Chinese, Brazilians, and other people that they are entitled to a large portion of the surplus generated by a climate treaty could derail such a treaty.

The reason is that the surplus is finite whereas the amount of money that people might think appropriate to compensate them for moral harms is potentially unlimited.

Another question is the role that altruism may play in the design of a climate treaty. As we argue in *Climate Change Justice*, wealthy states display a positive but low degree of altruism toward other states.⁶ For convenience, let us define the "altruism fund" as the monetized value of the goods, services, or money that wealthy states are willing to give to poor states solely for the wellbeing of people in those poor states, and not in return for strategic benefits. If the altruism fund is fixed (in the sense of a percentage of GDP) - that is, it reflects the exogenous preferences of people living in the wealthy states - then an efficient climate treaty that mitigated climate effects at least cost, and that itself has no altruistic component, should nonetheless benefit poor countries both directly (by reducing climate change) and indirectly (by freeing up money in the rich states that can be used for altruistic purposes). This should help poor people more than a climate treaty that benefits poor countries by inefficiently limiting the obligations of poor countries, and we suspect that it would be fairer and easier to administer than a climate treaty that included negotiated monetary transfers from rich to poor, as these would be difficult to change in response to changing conditions (and may be offset by behavior not banned by the treaty). Accordingly, we remain convinced that a climate treaty is most likely not a good way to redistribute wealth.

What of the possibility that the state's interest is endogenous, and that the state's perceived self-interest could change in response to, for example, moral argument? This is probably the assumption of commentators who argue that IP is vacuous.²⁷ Suppose, for example, that American citizens were persuaded that the US has a moral obligation to bear the bulk of the climate burden because the US is wealthier than most other states, and because it is responsible for a large portion of the greenhouse gas emissions in the atmosphere. As noted above, our conception of IP rules out such a possibility because we believe that states (and not just the US) define their self-interest in narrower terms, oriented mainly toward wealth and security. And our conception is based on our reading of history. We do not expect Americans (or people in other countries) to define their national interest so capaciously because they never have in the past.

Still, it is possible that people's moral views will change, and that is why we devoted a fair amount of *Climate Change Justice* to examining the moral arguments in play. We concluded that most are not strong even on their own terms. The corrective justice arguments are not persuasive. Nor are the various equal sharing arguments grounded in fairness. While there are strong moral arguments for redistributing wealth to poor people in poor nations,²⁸ there are immense practical problems that suggest that foreign aid should be pursued outside of a climate treaty, if at all. Moreover, even if people accepted these arguments, a climate treaty that imposed emissions reduction burdens on some countries and not others based on ethical rather than economic considerations would likely vastly increase the cost of stabilizing the atmosphere. A treaty that allowed economic considerations to determine where emissions reductions take place but that imposed the monetary burdens on a limited set of countries would simply be a transfer of wealth, which would be unlikely to be accepted by many countries.

IV. CONCLUSION

Even if Americans were to take seriously the ethical arguments of philosophers, it seems unlikely that many of

them would be persuaded that a climate treaty should impose disproportionate burdens on the US, and likewise for people in other rich countries. All of this suggests that if we are to achieve a climate treaty in the near future, it is time to focus on the real objective of such a treaty, which is to reduce carbon emissions at an acceptable cost.

Footnote

1 Eric A. Posner and David Weisbach, *Climate Change Justice* (Princeton 2010).

2 See, for example, Dale Jamieson, *Consequentialism, Climate Change, and the Road Ahead*, 13 *Chi J Intl L* 439, 454-55 (2013).

3 IP could be defended as an ethical principle, based on a strong empirical assumption that moral progress would most likely occur in a world with a strong state system in which states enjoy complete autonomy, and even more so if national sovereignty has intrinsic value. We do not think this view is implausible, but we do not defend it here. For a discussion of the implications of the view that national sovereignty has intrinsic value, see Martha Nussbaum, *Climate Change: Why Theories of Justice Matter*, 13 *Chi J Intl L* 469, 479-82 (2013).

Footnote

4 Compare with Jamieson, 13 *Chi J Intl L* at 454-55 (cited in note 2) (asking whether we mean IP as subjective or objective).

5 *Id* at 456 (implying that we intended IP as an axiom, whereas in fact we treat it as an empirical assumption).

Footnote

6 See Jean-Jacques Laffont and David Marmor, *The Theory of Incentives: The Principal-Agent Model* 30 (Princeton 2002).

7 John Rawls, *Political Liberalism: Expanded Edition* 450-57 (Columbia 2d ed 2005).

8 *Id* at 38. Rawls also explained that an account of justice is realistic for democratic regimes only if "under the best of foreseeable conditions" it can be supported by an overlapping consensus without the use of oppressive state power. *Id* at xvii.

9 Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 *Phil & Pub Aff* 215, 218 (1987).

10 See Thomas Nagel, *Equality and Partiality* 4-24 (Oxford 1995); John Dunn, *Interpreting Political Responsibility: Essays 1981-1989* 193-215 (Princeton 1990); Brian Barry, *Justice as Impartiality* (Oxford 1996). See also Immanuel Kant, *On the Common Saying: This May Be True in Theory But It Does Not Apply in Practice*, in Maurice Cowling, et al, eds, *Kant's Political Writings* 61, 89 (Cambridge 1977); G.A. Cohen, *Facts and Principles*, 31 *Phil & Pub Aff* 211, 244 (2003).

Footnote

11 Elizabeth Anderson, *The Imperative of Integration* 3-7 (Princeton 2010).

12 See, for example, Anil Agarwal and Sunita Narain, *Global Warming in an Unequal World A Case of Environmental Colonialism* (Centre for Science and Environment 1991).

Footnote

13 See, for example, Peter Singer, *One World: The Ethics of Globalisation* (Yale 2002); Thomas W. Pogge, *World Poverty and Human Rights* (Polity 2d ed 2008); Larry May, *Global Justice and Due Process* (Cambridge 2011).

14 See Posner and Weisbach, *Climate Change Justice* at 71-72 (cited in note 1).

Footnote

15 See, for example, the International Covenant of Civil and Political Rights, 999 UN Treaty Ser 171 (1966).

16 One of us has written extensively on this topic. See Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford 2006); Eric A. Posner, *The Perils of Global Legalism* (Chicago 2011); Eric A. Posner and Alan O. Sykes, *Economic Foundations of International Law* (Belknap 2013).

17 See Montreal Protocol on Substances that Deplete the Ozone Layer (1987), 26 ILM 1550 (1989).

18 James Murdoch and Todd Sandler, *The Voluntary Provision of a Pure Public Good: The Case of Reduced*

CFC Emissions and the Montreal Protocol, 63 J Pub Econ 331, 347 (1997); Cass R. Sunstein, Of Montreal and Kyoto: A Tale of Two Protocols, 31 Harv Envir L Rev 1, 3 (2008).

19 See Sunstein, 31 Harv Envir L Rev at 5 (cited in note 18).

Footnote

20 See Beth Simmons, Mobilising for Human Rights: International Law in Domestic Politics 65 (Cambridge 2009).

21 The United Nations is the one quasi-exception, in which all countries aside from the five permanent members of the Security Council have nominally exposed themselves to the risk of being outvoted and legally bound to an outcome they disapprove of, but the United Nations lacks any enforcement power.

22 A key exception arises in zero-sum settings, for example, resolution of a trade dispute by the WTO dispute resolution body, but in these cases the system is plausibly viewed as consistent with states' ex ante interests.

Footnote

23 See the proposals collected in Daniel Bodansky, Climate Efforts Beyond 2012: A Survey of Approaches (Pew 2004).

24 As Henry Shue appears to suggest, see Henry Shue, Climate Hope: Implementing the Exit Strategy, 13 ChiJIntlL 381, 386 (2013).

25 And so it is theoretically possible that a treaty that satisfied IP would also be distributively fair, as suggested by Yoram Margalioth, Analysis of the US Case in Climate Change Negotiations, 13 Chi J Intl L 489, 495-96 (2013). But there is no reason to believe that this is true empirically.

Footnote

26 See Posner and Weisbach, Climate Change justice at 95 (cited in note 1) (claiming that rich nations already give aid to poor nations, and the amount of aid rendered may reflect a rich nation's altruistic limit).

27 See, for example, Paul Baer, Who Should Pay for Climate Change? "Not Me," 13 Chi J Intl L 507, 521 (2013). Baer also argues that IP assumes the normative legitimacy of the status quo. We disagree; it merely assumes that we will remain in the status quo unless states agree to change it.

Footnote

28 See, for example, Daniel A. Färber, The Case For Climate Compensation: Justice for Climate Change Victims in a Complex World, 2008 Utah L Rev 377 (2008) (arguing that developed nations and especially the US have a moral responsibility to compensate poorer nations); Daniel A. Färber, Climate Justice, 10 Mich L Rev 985 (2012) (arguing similarly).

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