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INTERNATIONAL LAW AND PRACTICE SYMPOSIUM: FAIRNESS IN INTERNATIONAL ENVIRONMENTAL LAW

Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice

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Abstract
International environmental law (IEL) as a discipline has failed to respond to problems of fairness in a meaningful and systematic fashion. Whilst IEL has long acknowledged the existence of competing claims regarding the fair distribution of costs, resources, and responsibilities, fairness remains at the periphery of the disciplinary discourse. The present essay considers some possible explanations for this neglect. The first part of the essay examines a set of implicit assumptions and beliefs in which IEL is embedded, which somewhat prevent genuine and critical engagement with fairness issues. The second part of the essay considers normative and policy arguments recently developed in the law and economics literature that explicitly argue *against* the notion that fairness should play a role in the design and implementation of environmental regimes. The essay concludes by calling for a more robust engagement with fairness issues and by considering some of the implications this project may have for IEL.

Key words
disciplinary bias; fairness; international environmental law; law and economics; North–South divide

1. Introduction

International environmental law (IEL) has always been a contested project. Since its emergence as an autonomous discipline, IEL has been perceived – perhaps more so than any other branch of international law – as a political move intended to 'fix' the mistakes of industrialized nations at the expense of developing countries.[1] Fifty years on, the Copenhagen and Durban summits provided visible and vivid reminders of the conflicting attitudes of the North and the South towards international

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1 See, e.g., A. Agarwal and S. Narain, 'Global Warming in an Unequal World: A Case of Environmental Colonialism', (1991) *Earth Island Journal* 39.

environmental regimes. Although interdependence creates the incentive to co-operate, international environmental politics continue to be riddled with controversies regarding the fair distribution of costs, resources, and responsibilities.[2]

However, whilst IEL has long acknowledged the reality of these competing claims, fairness tends to remain a somewhat incidental concern, secondary to what are often perceived as the more pressing issues of effectiveness and enforcement.[3] Many in the field may reject this idea, pointing to the various ways in which IEL has sought to address considerations of fairness and equity, including differential treatment, financial assistance mechanisms, and technology transfers. Yet, IEL as a discipline has failed to respond to problems of fairness in a meaningful and systematic fashion, instead merely recognizing the existence of these problems at the margins.[4] The prevailing disciplinary wisdom is that IEL has finally reached a degree of normative maturity, which now requires more obedience and better compliance. As might be expected, criticism of IEL remains. But there is little suggestion, if any, that the normative blueprint itself is unfair and needs rethinking or reforming.

In the autumn of 2010, the European Society of International Law's Interest Group on International Environmental Law held its inaugural conference in Cambridge (UK) on the theme of 'fairness in international environmental law'. The purpose of the conference was to interrogate IEL's traditional neglect or unmindfulness of considerations of fairness and explore some of its root causes and manifestations. It also intended to consider how our understanding of fairness might be diversified and complicated, especially by moving beyond the traditional North–South divide.[5]

The present symposium includes a selection of three papers presented at the Cambridge conference, all taking a fresh look at issues of fairness in IEL. Against convention, this introduction shall resist the temptation to merely paraphrase each paper. Instead, the discussion shall be contextualized by considering some of the ways in which fairness is habitually set aside and maintained at the periphery of IEL discourse. In section 2, Mario Prost examines some of the implicit assumptions and beliefs in which IEL is embedded, which somewhat prevent genuine and critical engagement with fairness issues. In section 3, Alejandra Torres Camprubí moves on to consider some of the normative and policy arguments that have recently been developed, most notably in the law and economics literature, which explicitly argue *against* the notion that fairness-related questions should be addressed in the context

2 The North–South divide should not be overstated. Neither the North nor the South is homogeneous. Tensions exist within each group and climate talks have seen alliances form across the dividing line. That said, the North–South divide remains a living reality for many people in the world and a powerful structuring logic in environmental negotiations.

3 We use the term 'fairness' as defined by Thomas Franck in his *Fairness in International Law and Institutions* (1997). Fairness thus defined includes both substantive (i.e., distributive) justice and procedural legitimacy: 'the fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process' (at 7).

4 K. Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers', (2000) 11 *Yearbook of International Environmental Law* 52.

5 We thank all participants in the inaugural workshop for their support and fruitful collaboration. The full program of the workshop as well as a conference report can be found on the group's website at http://esiligiel.wordpress.com.

of international environmental regimes. We conclude by reflecting on what a more robust engagement with fairness issues might imply for the IEL discipline.

2. Tacit disciplinary mindsets

IEL's traditional neglect of fairness concerns can first be explained by a series of basic assumptions, which most professionals in the field share, regarding the role, function, and development of international environmental law, as well as the world around it. For the purpose of the present discussion, we shall focus our attention on three sets of shared beliefs about the discipline itself (subsection 2.1), the South (subsection 2.2), and the notion that IEL might already have resolved fairness issues (subsection 2.3).

2.1. Visions of ourselves

One remarkable aspect of IEL as an intellectual field is the somewhat heroic vision that the discipline has of itself. This is, of course, not exclusive to IEL. The discipline of international law at large tends to regard itself as a discipline of progress, which pursues a reformist agenda.[6] But this is perhaps truer of IEL than of other branches of international law. The core texts in the discipline reveal a shared belief that IEL represents far more than a formal instrument of diplomacy and dispute resolution in the environmental sphere. IEL is generally celebrated as an instrument for the realization of 'new social values',[7] as a normative system designed to create a 'just and sustainable society' or a 'new world order'[8] whose mission is nothing short of human survival.[9] IEL, in this narrative, is not simply a tool of sovereign states. It represents a true societal project – a 'normative program for the world community'.[10]

In this disciplinary vision, IEL is not only beneficial to the planet and mankind. It is also valuable for international law itself. One of the most widely accepted views upon IEL is that it has served to redefine the traditional concepts and categories of public international law. Many hold the view, for instance, that IEL has led to a profound transformation of the doctrine of sovereignty as 'responsibility' rather than as unchecked power.[11] Others insist that the development of IEL has shifted international law from self-interest and bilateralism towards common concerns and multilateralism.[12] According to Alexandre Kiss, these transformations in our conceptions of international law are so deep and fundamental that they can be

6 See, generally, T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).
7 O. Mazaudoux, *Droit international public et droit international de l'environnement* (2008), 15.
8 S. Bhatt, *International Environmental Law* (2007), 33.
9 R. Falk, *This Endangered Planet: Prospects and Proposals for Human Survival* (1972).
10 P.-M. Dupuy, 'Soft Law and the International Law of the Environment', (1991) 12 Mich. JIL 420, at 422.
11 P. Birnie, 'International Environmental Law: Its Adequacy for Present and Future Generations', in A. Hurrell and B. Kingsbury (eds.), *The International Politics of the Environment* (1992), 51, at 84: 'the sovereignty doctrine is still alive but in the case of the protection of the environment, it no longer manifests itself in the shape of an albatross; its wings have been clipped by a growing number of widely accepted regulations . . . that are now widely regarded as being indispensable to preservation of life on our planet . . .. A creature of new shape is emerging perhaps best renamed . . . as "responsible sovereignty".'
12 See, e.g., M. Fitzmaurice, 'International Protection of the Environment', (2002) *Collected Courses of the Academy of International Law* 9, at 21; D. Bodansky, *The Art and Craft of International Environmental Law* (2010), 18.

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compared to the Copernican revolution. Copernicus proclaimed that the centre of the universe was not the Earth, but the Sun. Similarly, Kiss notes, IEL has changed our perception of the world, in that 'states are less and less the centre of legal relations, the focus becoming more humanity and its individual representatives, both living now and in the future'.[13]

These visions of IEL as a heroic and transformative project are sustained and supported by particular discursive strategies. For example, as noted by Mickelson, there is a tendency among IEL scholars to provide ahistorical accounts of IEL's development. The vast majority of introductory texts, for instance, situate the emergence of 'modern' IEL in the 1970s, pointing to the advent of a 'global environmental consciousness', whilst conveniently omitting the long history of colonial exploitation of natural resources in the Third World (and the role that international law has played in its justification).[14] Mickelson's point, however, requires some qualification. Whilst it is certainly true that the description of IEL's beginnings is generally ahistorical, that of its subsequent development is, on the contrary, hyper-historicized. The type of history at stake here is not the 'objective' history of IEL, but rather a reconstructed and ritualized history based on a careful selection of facts and events. Nearly all IEL treaties tell the same story, with the same chapters presented in the same order: from early developments to Stockholm, from Stockholm to Rio, from Rio to Johannesburg, and so on. Each conference is praised as more extraordinary than the preceding one, in size, importance, representativeness, and openness. And each chapter closes with a list of achievements, from new treaties and declarations to new principles and road maps. The ambiguities of these summits – the intense corporate lobbying, the closed-door meetings, the dominance of Western governments and Western non-governmental organizations (NGOs) – are seldom mentioned in this conventional story. Instead, the sequential narrative structure conveys the image of a discipline in constant movement and progression, and of a system that is becoming increasingly inclusive and universal.

It barely needs saying that these stories and narratives are open to question. Our point is rather that this disciplinary 'mythology' serves to manufacture consent to IEL or, at the very least, makes dissent less likely to occur. For how can one raise grievance against a young, progressive, and innovative discipline whose aim is to save the planet? The implicit injunction seems to be that, although imperfect, IEL is a positive force in the world that we need more, not less, of.

The disciplinary bias described above is reinforced by a further two narratives that, although not specifically designed to foster support for IEL, have had the effect of reducing the intellectual space available for critical thinking about fairness. The first narrative is that of IEL's 'softness'. Scholars of IEL have long accepted that large parts of international environmental law are best described as 'soft' rather than 'hard' law, from non-binding programmatic declarations to framework conventions and non-compulsory compliance mechanisms.[15] IEL's softness is at times criticized as an

13 Cited by E. Brown-Weiss (ed.), *Environmental Change and International Law* (1992), 13.
14 Mickelson, *supra* note 4, at 55–60.
15 See, generally, Dupuy, *supra* note 10.

intrinsic weakness. More often than not, however, this special feature is celebrated as a symbol of distinctiveness from other branches of international law.[16] Softness is frequently associated with informality, adaptiveness, and creativity. And scholars often consider that softness makes IEL a particularly well-suited instrument to deal with issues that are global and controversial by nature.[17] Although this may very well be correct, IEL's perceived softness might simultaneously explain to some degree why considerations of fairness and legitimacy have remained so marginal. Issues of legitimacy typically arise in relation to institutions that are perceived as powerful. As noted by Bodansky, only when institutions gain greater authority does their consensual underpinning erode and are questions about their legitimacy voiced.[18] From this point of view, the perception that international environmental law is mostly a weak institution (i.e., that it is soft) might constitute one of the reasons why its legitimacy has not previously been a bigger issue.

What was said about softness also applies to narratives of crisis and emergency. IEL texts characteristically begin with references to catastrophic events – past, present, or future – and with descriptions of a planet on the brink of disaster.[19] This is not to say that environmental lawyers are doomsayers. History shows that their predictions are often too accurate and references to catastrophic events are there to signal the importance of the issue. Yet, at the same time, this pervasive sense of urgency might have the unintended effect of encouraging disregard for claims of fairness or justice as unaffordable luxuries or, worse, as dangerous utopian thinking that compromises our chances of concluding much-needed environmental agreements. Emergency demands realism and pragmatism. There is no room, in times of crisis, for idealism and pursuance of a perfect regime. Necessity commands that we act now, even at the price of justice or equity, for even an unfair agreement will be beneficial to most, whilst no agreement whatsoever will cause injury to all. This type of reasoning is not only found in the writings of scholars such as Eric Posner, who, as discussed below, argues that ideas of justice should play no role in the design of environmental agreements. It is also increasingly finding its way into the work of authors who have traditionally argued in favour of a more robust engagement with questions of

16 See, e.g., P. Birnie and A. Boyle, *International Law and the Environment* (2002), 23; S. Maljean-Dubois, 'La "fabrication" du droit international au défi de la protection de l'environnement', in SFDI (ed.), *Le droit international face aux enjeux environnementaux* (2010).

17 See, e.g., M. Fitzmaurice, 'International Environmental Law as a Special Field', (1994) 25 NYIL 181, at 199–201.

18 D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', (1999) 93 AJIL 596, at 597.

19 See, e.g., U. Beyerlin and T. Marauhn, *International Environmental Law* (2011), v: 'mankind has recently experienced devastating natural catastrophes – the tsunamis in the Indian Ocean and off the Japanese coast, the Hurricane Katrina and the Pakistan floods . . .. The effects of natural catastrophes have often been exacerbated by human-induced incidents, such as the explosion of the oil platform *Deepwater Horizon* in the Mexican Gulf . . .. Apart from such "headline" disasters, a myriad of simultaneously occurring multifaceted processes of environmental degradation are presenting unprecedented ecological challenges for the international community and global civil society. It is not just the responsibility of politicians but also of scholars, including those skilled in international law, to actively engage in the global discourse on finding new ways and means to address these threats and to enhance global environmental governance in order to preserve the Earth from its worst environmental threats. Indeed, the potential contribution of international environmental law to cope with this growing global environmental crisis is more than just an added value, it is a matter of urgency.'

fairness and have been critical of IEL's ethical foundations. Gillespie, for instance, recently wrote that:

> the luxury of only pursuing the absolute, correct, philosophically pure and defensible ethics is one which is simply not in accordance with the amount of work that needs to be done, and the time available for the task. At this point in history, I am of the belief that necessity should govern efforts in international environmental protection.[20]

The point seems to be that, however important ethics might be from a theoretical or philosophical point of view, environmentalists should somehow 'get real' and look at what can realistically be achieved in the world in which we live.

2.2. Visions of the South

Perhaps as important as the manner in which the discipline perceives itself are the views that IEL holds of the South and of its (lack of) engagement with environmental issues. The problem was, once again, identified by Mickelson. She pointed to the fact that, although much attention has been paid to the concerns of the South in the literature, the South has typically been portrayed as a 'grudging participant in environmental regimes rather than as an active partner in an ongoing discussion'.[21] Consider the following excerpts from two leading IEL treatises:

> environmental concerns have been on the national agendas of many industrialised countries for several decades. The North typically has a well-organised civil society, including successful and effective environmental organisations . . .. In contrast, the global South, or the developing countries . . . have large populations that are poor, barely surviving at or below the poverty level . . .. In international environmental negotiations, the North's sense of urgency to solve global environmental problems is counterbalanced by the South's sense of urgency to redirect the global economy to overcome the cycle of poverty. Environmental protection is a luxury to be addressed later, and thus viewed primarily as a potential drag on the engine of growth. Southern countries question whether environmental protection or natural resource exploitation issues should be addressed at all at the international level.[22]

> because of the urgent problems that many developing countries face, they have been slow to adopt stringent environmental laws or have been reluctant, once they adopt such laws, actually to enforce them. Lack of enforcement in developing countries is indicative of both the lack of capacity but also a certain lack of will, as many developing countries are content to sacrifice more of their environmental protection in the pursuit of their development goals.[23]

What transpires from such work is an artificial dichotomy between the North – with its robust environmental consciousness and effective environmental institutions – and the South – an overpopulated, illiterate, and disorganized mass of suffering, with little appetite for environmental issues, concerned only with its own development and the reform of the international economic order. Implicit in this is also the

20 A. Gillespie, 'An Introduction to Ethical Considerations in International Environmental Law', in M. Fitzmaurice, D. Ong, and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (2011), 117.

21 Mickelson, *supra* note 4, at 60.

22 D. Hunter, J. Salzman, and D. Zaelke, *International Environmental Law and Policy*, 2nd edn (2001), 27.

23 E. Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (2007), 29.

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notion that the North is a positive, constructive force, approaching environmental negotiations from a forward-looking and pragmatic perspective and seeking to find solutions to global problems for the sake of future generations. The South, on the other hand, is portrayed as treating environmental negotiations from a backward-looking perspective, obsessing over the legacy of colonialism and making unrealistic claims about the distribution of wealth across nations.[24]

It would be wrong, of course, to say that all IEL scholars hold onto these stereotypical representations of the South. Yet, these visions are widespread across the discipline. In fact, some of the recent IEL literature suggests that such prejudice might be worsening. It is not rare, for example, to find references to the South, not merely as a reluctant and hesitant participant in multilateral negotiations, but as one that is *perverting* environmental diplomacy. Again, consider the following excerpt from a recently published textbook:

> since the late 1980s, developing countries have attempted to usurp the environmental arena and use it as a forum to present environmental problems as essentially development problems – a classical case of forum shopping . . .. Environmental law has been used as a subterfuge to bring distributive issues in the international debate.[25]

The suggestion here is that the claims of the South – particularly distributive demands – are somewhat alien to the environmental field and that developing countries are subverting environmental negotiations and abusing their leverage to achieve their own political agenda.

Why does this matter and what is lost in these representations of the South? The first point here concerns the essentialist construction of the South by the discipline. The South, in these narratives, is represented as a uniform and unchanging whole lacking complexity. The South is either 'against' the environment or is using it dishonestly as a vehicle for its distributive demands. Very little of the density, the diversity, and the evolving attitudes of the South has entered IEL's disciplinary worldview.[26] What we have instead is a series of caricatural stories that are presented in such a way as to make it easy (or easier) for the discipline to ignore the legitimate claims of developing countries. The positive role that they have played in designing and setting up certain environmental regimes is also largely overlooked.

Likewise, these stories suppress the very real and significant praxis of environmental resistance in the developing world, particularly by subaltern communities directly affected by transnational environmental problems. Local communities all over the global South – from the 30 000 indigenous peoples of the Ecuadorean rainforest suing Chevron for its oil contamination of the Amazon[27] to social movements

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24 This argument is made explicitly by Posner and Weisbach in *Climate Justice* (2010), 5: 'Many people treat climate negotiations as an opportunity to solve . . . the admittedly unfair distribution of wealth across northern and southern countries, the lingering harms of the legacy of colonialism, and so forth'; see section 3, *infra*.

25 Louka, *supra* note 23, at 69–70.

26 On the changing attitudes of the South regarding international environmental law and politics, see A. Najam, 'Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement', (2005) 5 *International Environmental Agreements* 303.

27 See G. Valdivia, 'The Amazonian Trial of the Century: Indigenous Identities, Transnational Networks, and Petroleum in Ecuador', (2007) 32 *Alternatives: Global, Local, Political* 41; A. Bernal, 'Power, Powerlessness and

in Burma successfully campaigning against the construction of a colossal Chinese dam on the Irrawaddy river[28] – have long demonstrated that they are not content to sacrifice their environment in the name of development imperatives. The notion that the North enjoys a robust environmental consciousness whilst the South is largely indifferent to environmental problems may seem intuitively correct. It is, however, contradicted by experience. Reality presents a picture that is different from the prevailing IEL story. Many people in the North are largely apathetic and unwilling to change their patterns of production and consumption, whilst many people in the South are actively engaged in shaping their communities and are *already* responding to environmental threats. This is perhaps not the type of environmentalism that Western scholars are accustomed to. But this is environmentalism all the same.[29] Yet, the IEL script disregards this practice of local resistance to environmental threats either as something that does not exist or as a practice that is 'inadequate' to tackle today's global environmental problems.[30]

This brings us to our final point. Arguably the most troublesome aspect of IEL's traditional vision of the South is its failure to see the claims of the South as genuine environmental claims or, as Mickelson puts it, its 'unwillingness to acknowledge that environmentalism is open to varying interpretations'.[31] The conventional view, as noted above, is that the North's sense of urgency about the environment is matched by the South's sense of urgency about development. The two objectives are treated as mutually exclusive. Missing from this is the possibility that the South, instead of objecting to the environment in the name of development, might simply be engaging in 'strategic framing', namely in an effort to transform the existing disposition and direction of international environmental law and to articulate new policy frames that engender support for their aspirations.[32] From this point of view, the South's engagement with international environmental law could be reinterpreted not as an *obstruction*, but as an attempt to assign a *different meaning* to IEL – one that focuses on the interrelationships between environmental and developmental problems. Yet, this interpretation is largely absent from the IEL discipline. The South continues to be perceived as pursuing its own, non-environmental interests. The possibility of an environmentalism of the South is never really acknowledged, let alone seriously considered as an alternative to the dominant approach to IEL. Under these

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Petroleum: Indigenous Environmental Claims and the Limits of Transnational Law', (2011) 33 *New Political Science* 143.

28 See J. Watts, 'Victory for Burma Reformers over Dam Project', *The Guardian*, 30 September 2011.

29 Some interesting developments are taking place as part of UNDP's community-based adaptation project. This project looks at local communities as frontline actors in the response to climate change and seeks to build their resilience and resistance capacity. For more information on the project, see www.undp-adaptation.org/projects/websites/index.php?option=com_content&task=view&id=203.

30 See P. Sands (ed.), *Greening International Law* (1993), xv: 'the realization that ad hoc, disparate and reactive policy responses by individual states or local communities will be wholly inadequate to address the growing environmental problems faced by the international community has been critical to the development of international environmental law.'

31 Mickelson, *supra* note 4, at 65.

32 The concept of 'strategic framing' is borrowed from R. Morgan, 'Advancing Indigenous Rights at the United Nations: Strategic Framing and Its Impact on the Normative Development of International Law', (2004) 13 *Social and Legal Studies* 481.

circumstances, the claims of developing countries are easier to dismiss as claims that are somewhat alien or exogenous to IEL.

2.3. Problem solved? Sustainable development and CBDRs (common but differentiated responsibilities)

The disciplinary visions examined above go a long way in explaining the marginal treatment traditionally given to fairness issues in IEL. One last point deserves brief mention here. It may be that problems of fairness are overlooked by some IEL scholars, not so much because they regard them as irrelevant or unimportant, but because of a belief that they have somewhat *already been solved*. The attention paid in the literature to the concept of sustainable development and the principle of CBDRs, for instance, may have created a sense that IEL has already addressed fairness issues and has taken stock, in particular, of the claims of the South.

To some extent, of course, this is accurate. The concept of sustainable development, for instance, speaks to the demands of the South by providing that environmental protection cannot be considered without due regard to economic and social development. Likewise, CBDRs acknowledge the historical responsibility that the North bears in many of today's environmental problems and provide that the special needs, interests, and capabilities of developing countries must be taken into account in the design and implementation of environmental regimes.

The extent to which sustainable development and CBDRs answer or solve problems of fairness must not be exaggerated, however. For one thing, these concepts are useful in highlighting the tensions between environmental and developmental demands, but provide very little by way of normative guidance on how best to address or resolve these tensions. This is most obvious in relation to sustainable development. Leaving aside the issue of its legal status, it will be recalled that sustainable development is, above all, an open-ended paradigm or, as Ellis puts it, a 'rhetorical commonplace'.[33] It is a bundle of shared ideas and common understandings about the environment and development, which identifies core needs and strategic imperatives in a vocabulary that is recognizable by both North and South. But the concept of sustainable development *reveals* the cleavages between the North and the South more than it resolves them. It contains no hierarchy of needs and imperatives. The need to preserve natural resources is placed on an equal footing with the need to revive and sustain economic growth; the need to eradicate poverty is on par with the need to create cost-effective, business-friendly environmental policies.

The intention here is not to criticize sustainable development for its open-endedness and its inherent contradictions, for the very purpose of the concept is to accommodate diverging and sometimes conflicting views of the environment and development.[34] Rather, the point is that it would be a mischaracterization to think of sustainable development as a concept or principle that somehow provides

33 See J. Ellis, 'Sustainable Development as a Legal Principle: A Rhetorical Analysis', in H. Ruiz-Fabri, R. Wolfrum, and J. Gogolin (eds.), *Select Proceedings of the European Society of International Law*, Vol. 2 (2010), 642.

34 For a classical critique of sustainable development's conceptual weaknesses and inherent contradictions, see S. Lélé, 'Sustainable Development: A Critical Review', (1991) 19 *World Development* 607.

answers or settles the tensions between North and South, environment and development. What sustainable development does, as noted by Barbara Stark, is to link 'the metanarratives of environmentalism and economic development in ongoing dynamic tension'.[35] But sustainable development provides no ready-made answers, nor a coherent 'solution' to this dynamic tension. Instead, sustainable development acts as a 'self-contained deconstruction in which one term endlessly undoes the other'.[36]

The problem with CBDRs is of a slightly different nature. CBDRs, it will be recalled, have already been legally implemented in the context of several environmental regimes, most notably the ozone, climate change, and biological diversity conventions.[37] However, and although they can be seen as expressing principles of equity and justice, it would again be wrong to consider that CBDRs settle fairness issues once and for all. This is so for four reasons. First, CBDRs have been implemented in some, but by no means all, environmental regimes. Second, CBDRs are subject to fundamentally different interpretations. Some regard them as a legal duty upon industrialized nations to provide reparations for past environmental injustices. Others, however, view them as merely reflecting the responsibility of wealthy and technologically advanced nations to play a leadership role in environmental regimes.[38] Third, the commitments undertaken in environmental treaties under CBDRs are often limited, heavily qualified, and dependent on further elaboration in additional agreements or protocols.[39] Lastly, and perhaps more fundamentally, the principle of CBDRs, which, for a time, seemed to enjoy near-universal support, has come under sustained attack in recent years. This has been most visible in the latest climate talks in Copenhagen and Durban, where major industrial powers – most notably the United States and the European Union – have made it clear that they would not commit to future emissions reductions unless developing countries were also bound to cuts. This progressive retreat from differential treatment suggests that CBDRs are perhaps best understood as an incentive temporarily assented to by the North to induce greater participation in environmental regimes. They are not, as one might be led to believe, a definitive or systematic response to problems of environmental justice. At any rate, and as with sustainable development, CBDRs can hardly be seen as a panacea for all problems of fairness in IEL.

3. Normative and policy arguments *against* fairness: the charge from law and economics

We have so far examined a series of tacit disciplinary assumptions that, in our view, have the effect of leaving fairness issues at the periphery of IEL discourse.

35 B. Stark, 'Sustainable Development and Postmodern International Law: Greener Globalization?', (2002) 27 *William and Mary Journal of Environmental Law and Policy* 137, at 152.

36 Ibid.

37 See, generally, P. Cullet, *Differential Treatment in International Environmental Law* (2003); L. Rajamani, *Differential Treatment in International Environmental Law* (2006).

38 On these various interpretations of CBDRs, see D. French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities', (2000) 49 ICLQ 35, at 37.

39 See Birnie and Boyle, *supra* note 16, at 100.

We now move on to consider some arguments recently laid out in the American literature that dispute the very notion that considerations of fairness should play a role in the design of environmental regimes. We will focus our attention on a book by Posner and Weisbach entitled *Climate Change Justice*[40] in which the authors expand on arguments made previously in a series of articles published by Posner and Sunstein.[41] In the book, Posner and Weisbach argue that what seems intuitively right about fairness claims – most notably the notion that rich countries should bear the principal economic burden of any climate change agreement – is in fact wrong from a principled and from a pragmatic point of view.

That challenge to fairness-based environmental law is rooted in law and economics – a tradition that Posner emphatically applied to the field of international law in *The Limits of International Law* and in *The Perils of Global Legalism*.[42] Posner and Weisbach's charge against 'climate fairness' can to some extent be seen as a continuation of that project. In what follows, we do not intend to provide a systematic rebuttal of their theses. Instead, we introduce three of their principal arguments and consider some of their limits and contradictions.

Before we do so, it may be useful to situate these arguments in their broader theoretical context. Posner and Weisbach describe their approach to ethical issues as 'broadly welfarist'.[43] Welfarism originates from the discipline of welfare economics, a branch of normative economics that evaluates social policies in terms of their effects on the well-being of individuals. It approves of acts that maximize the welfare of relevant individuals: 'an act that increases the welfare of one person without reducing the welfare of anyone else is a good act, and an act that increases the welfare of many people is a very good act.'[44] Welfarism is consequentialist, which implies that the value of an action or a regime derives only from its outcome, and not from the means used to achieve the outcome. It also considers the individual as the referent object of analysis and tends to disregard the institutional dimension of inter-state co-operation. Therefore, from a welfarist view, a climate treaty will be justified as long as it promotes the well-being of people around the world. Lastly, the authors set efficiency as the paramount criterion for normative evaluation and, for this reason, claim to be realists. That broad theoretical approach, however, is qualified by a pragmatic constraint: any agreement, to be feasible, must satisfy the principle of 'international Paretianism'. Paretianism is satisfied when a project makes at least one person better off without making anyone worse off.[45] One important

40 E. Posner and D. Weisbach, *Climate Change Justice* (2010).

41 E. Posner and C. Sunstein, 'Climate Change Justice', (2007–08) 96 GLJ 1565; E. Posner and C. Sunstein, 'Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?', (2009) 97 CLR 51. Sunstein was unable to take part in the book due to his nomination in the Obama administration.

42 J. Goldsmith and E. Posner, *The Limits of International Law* (2005); E. Posner, *The Perils of Global Legalism* (2009). For a critique from a rational-choice perspective, see A. Van Aeken, 'To Do Away with International Law? Some Limits to "The Limits of International Law"', (2006) 16 EJIL 289.

43 Posner and Weisbach, *supra* note 40, at 8. For an early application of welfarism to international law and human rights, see E. Posner, 'International Law: A Welfarist Approach', (2006) 73 *University of Chicago Law Review* 487; E. Posner, 'Human Welfare, Not Human Rights', (2008) 108 *Columbia Law Review* 1758.

44 Ibid.

45 Posner and Sunstein, 'Climate Change Justice', *supra* note 41, at 1569–70; Posner and Weisbach, *supra* note 40, at 6. For earlier uses of the Pareto principle in law, see R. Posner, *Economic Analysis of Law* (1992).

implication of Paretianism, for the authors, is that any treaty that places too large a burden on wealthy countries will almost certainly fail, even if it is justified on ethical grounds.

When applied to the climate change regime, the two requirements of welfarism and Paretianism lead the authors to a series of specific arguments against fairness-inspired approaches to climate change. Three of them are considered here: the 'two-track' argument (subsection 3.1), the 'indiscrimination' argument (subsection 3.2), and the argument according to which 'those who benefit the most should not pay the least' (subsection 3.3).

3.1. The two-track argument

Posner and Weisbach's central argument holds that climate and justice must be dealt with on two separate tracks. On one track, states should seek to address climate change, using science and economics to settle the optimal level of emissions reductions. On a separate track, states should continue to try and achieve redistributive or other justice-related goals, independently of climate-related issues.[46] The main justification for this two-track approach is that considerations of justice are an impediment to concerted action. In the authors' view, making unnecessary linkages between climate change and justice-related goals complicates and embitters the negotiations in a way that threatens to make a climate change agreement far less feasible. The result of this is that wealthy nations, who might otherwise have agreed to a climate deal, will cease to see the deal as being in their interest and will not consent to it: 'if [poor countries] demand too much from the rich world, the rich world will drag its feet.'[47] Ultimately, the consequences of linking climate and justice might be tragic, since the failure to agree on a global climate deal will create 'excessively serious risks to human welfare, above all in poor nations'.[48]

It is noteworthy that the authors claim to be in favour of redistribution as a matter of principle. What they oppose is the argument that it should take place within the climate regime.[49] Redistribution of wealth, the authors contend, should be negotiated as part of the separate 'justice track', taking the form of cash payments, aid flows, and other developmental projects.[50] This proposal is consistent with the second fundamental theorem of welfare economics, which provides that a desirable economic outcome may be achieved through lump-sum transfers.[51]

The two-track argument, however, does run into several problems. For one thing, it rests on stereotypical representations of the South and on very debatable distinctions between climate and justice. The South – here constructed as 'the poor' – is portrayed as simply refusing to join a climate treaty in order to free-ride off others.[52]

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46 Posner and Weisbach, *supra* note 40, at 192.
47 Ibid., at 5.
48 Ibid., at 192.
49 On that issue, the authors' position differs from the mainstream IEL proposition that distributive claims should be accommodated within environmental regimes.
50 Posner and Weisbach, *supra* note 40, at 84.
51 See, e.g., M. Blaug, 'The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated', (2007) 39 *History of Political Economy* 185, at 197.
52 Posner and Weisbach, *supra* note 40, at 170.

When the South is not free-riding, it is demanding that rich countries pay for abatement 'simply because they are rich'.[53] In other words, the South is depicted as an opportunistic negotiator that uses the climate regime as a 'Trojan horse' for its distributive agenda. Nowhere is it really regarded as a bona fide partner in climate negotiations, or even simply as an actor trying to make environmental space for its economic development. Instead, the South is portrayed as asking for a treaty that would 'reward states for being poor' and considers that 'countering climate change should be costless [for] people in developing countries because the costs will be paid by the North'.[54]

The rigid distinction between climate and justice is equally problematical. It assumes that climate-related questions and justice-related questions are of a fundamentally different nature and that there are no necessary linkages between the two. This assumption is, of course, largely open to question. Many will contend, for instance, that the North owes its privileged position in the international economic order to its overexploitation of a common resource – the atmosphere – and that the South is now being denied its fair share of that resource, reinforcing the gap between the developed and the developing world.[55] If this proposition is accepted, then considering climate questions in clinical isolation from justice questions loses much of its justification.

The main reason for rejecting the two-track approach, however, remains a pragmatic one. This approach assumes that a separate justice track exists and that developing countries will be in a position to successfully negotiate the redistribution of wealth within it. The notion that poor nations may achieve progress on a separate justice track in which they have none of the leverage they enjoy in the climate track is, however, deceptive. The justice track has been available for a long time and wealthy states can hardly be said to have been enthusiastic about making regular cash payments to poorer nations. As noted by Henry Shue, the rich have so far been unwilling to redistribute wealth voluntarily when there was not known to be an urgent and expensive global climatic crisis. There is, a fortiori, little reason to believe that 'they will – without exceptionally strong pressure – step forward to do justice in the midst of an ongoing crisis'.[56] Posner himself previously acknowledged that what he termed 'crossborder altruism' is in fact minimal.[57] The authors are aware that a climate change treaty may provide a unique opportunity to redistribute that is not otherwise available. Yet, their only response is that this does not have to be so. There is, they claim, growing attention to North–South differences, as exemplified by 'celebrities of various kinds travelling the world and arguing for debt relief; access

53 Ibid., at 73, 79, 80, 97.
54 Ibid., at 60, 95.
55 This notion is articulated in the concept of 'ecological debt'. See, on this point, K. Mickelson, 'Leading towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation', (2005) 43 *Osgoode Hall Law Journal* 137, at 150–8.
56 H. Shue, 'The Unavoidability of Justice', in A. Hurrell and B. Kingsbury (eds.), *The International Politics of the Environment* (1992), 376.
57 Posner, 'International Law', *supra* note 43, at 47.

to medical care such as AIDS vaccines and the like'.[58] Needless to say, the notion that celebrities may succeed where developing countries have failed is unconvincing.

3.2. The indiscrimination argument

The principle of differential treatment, it will be recalled, is based on two considerations of fairness. The first recognizes that different states have made different contributions to the problem of climate change and that the main emitters should bear the burden of mitigation and adaptation costs. This is the principle of historical responsibility. The second acknowledges that countries are not equal before the threat of climate change. Some countries have greater capacities to respond or adapt to the adverse effects of climate change. This is the principle of respective capabilities.

Posner and Weisbach's opposition to the distributive aspect of differential treatment has already been examined. They favour efforts to improve the lot of poor countries, but reject the notion that this objective should be part of a climate agreement (two-track argument). Their opposition to the corrective dimension of differential treatment (the principle of historical responsibility) is of a different nature. They accept that, as a matter of principle, rich countries should pay for climate abatement, or pay for most of climate abatement, because they are most responsible for the problem of climate change. This, they say, is simply an illustration of the polluter-pays principle.[59] When put into practice in a climate treaty, however, the authors consider that the principle of corrective justice runs into serious difficulties.

Their main objection against the principle of historical responsibility is that it would apply to people and generations indiscriminately. Present generations would be asked to pay for the wrongdoings of past generations. Compensation would go to people living today for a damage incurred mostly by people living in the future. Corrective justice, to finish, would fail to discriminate within countries between low and large emitters: people with a low carbon footprint would pay for the harm caused by highly polluting industries. The outcome, according to Posner and Weisbach, is that a corrective-justice model 'would force many people who have not acted wrongfully to provide a remedy to many people who have not been victimized'.[60] It would also be tantamount to introducing a form of collective responsibility that, they argue, exists nowhere else in domestic or international law.[61]

The indiscrimination argument can be refuted in several ways. First of all, the argument assumes that it is possible to maintain a strict separation between generations, and that people living today can in no way be accountable for the choices of previous generations:

> 54.5 percent of Americans were born after 1975. These individuals are not responsible for the more than half of the US emissions that occurred prior to this time. More than 27 percent of Americans are currently younger than twenty years old and are arguably

58 Posner and Weisbach, *supra* note 40, at 93.
59 Ibid., at 100.
60 Ibid., at 103.
61 Ibid.

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> not responsible at all for emissions – they do not get to choose where to live or what size house to buy.[62]

What is not reflected in this strict distinction is, of course, the notion that most people living today in rich nations directly benefit from past greenhouse gas (GHG) emissions. They may not all benefit in the same way. But nearly everyone in industrialized countries can be said to gain from past emissions, if only because they enjoy the technological advances and material wealth that those emissions made possible. Absent from this strict distinction between past and present generations is also the notion that present generations may hold a special responsibility by reason of the conscious choice they have made to perpetuate production and consumption patterns responsible for climate change, despite knowing about its causes and effects.

Two further points can be made about the indiscrimination argument. First, collective responsibility does exist in various forms both at the domestic level (corporate liability) and at the international level (state responsibility). States are commonly required to compensate for past wrongdoing. Every time the responsibility of a state is engaged, its citizens are in effect assuming collective responsibility for the behaviour of their government, whether or not they voted for that government or benefitted from its wrongful conduct. In 1993, Australia agreed to pay 107 million dollars as compensation for the environmental damage caused to Nauru during its colonial administration of the island. In this process, Australians took collective responsibility for the harm done to past generations of Nauruans by a previous government that, by and large, they had not elected. To say that collective responsibility does not exist in international law is thus to ignore the way state responsibility already operates on a routine basis.

Last but not least, the indiscrimination argument overlooks the way in which climate law itself operates in practice. As previously mentioned, Posner and Weisbach reject the compensation claim on the basis, inter alia, that it would require all individuals in wealthy countries to pay, irrespective of their actual contribution to climate change. All Americans, for instance, would be sanctioned for past emissions, including those who are already making sacrifices to reduce GHG emissions.[63] This would be true if a climate treaty were binding directly upon individuals and made no distinction between low and high emitters. But this is not how climate law, or indeed international law, works. International obligations – in our case emissions targets – are rarely, if ever, self-executing. They require domestic implementation by the state before they can operate at the national level. In this process of implementation, states choose whom the bulk of the effort – in our case the effort to reduce emissions – should go to. They will introduce, for instance, a system of cap and trade in which only the most polluting industries are included. The so-called indiscriminate nature of climate-corrective justice will thus be largely mitigated at the national level when states redistribute the burden of reduction targets domestically.

62 Ibid.
63 Ibid., at 104.

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3.3. Those who benefit the most should not pay the least

Posner and Weisbach's last argument against differential treatment concerns the notion of benefits from abatement. The authors' main claim in this regard essentially holds that 'those who benefit the most should not pay the least'. Since developing countries are likely to suffer the most from climate change's adverse effects, they are also the ones who have the most to gain from a climate deal. Therefore, the authors contend, allowing developing countries to take a free ride, namely to reap the benefits from other countries' abatements without themselves being bound by any reduction commitments, would be unethical.[64] This contention corresponds to the position adopted by many developed countries in recent negotiations on the future of the climate regime, particularly by the 'UMBRELLA' group, of which the United States is a part. It holds that a country's participation in a climate treaty and the level of its emissions reductions cannot be a function only of its contribution to climate change. Although contribution is certainly a determining factor, it must be balanced with a consideration of how much that country stands to gain from the entry into force of the climate treaty. The higher the benefits, the argument goes, the less justified it is for a country to claim exemption or differential treatment.

This argument seems intuitively reasonable. It does, however, run into several difficulties. First, a noteworthy aspect of this claim is that it is, at its core, a fairness claim. It may be a questionable one. But it is a fairness claim all the same. If fairness claims are to be excluded from the climate change regime, as the authors argue, then the argument must cut both ways and should apply to developing and developed states alike. Therefore, there seems to be a contradiction between this claim and the author's assertion that considerations of fairness should play no role in the design of a climate regime.

Equally, the contention that those who benefit the most should not pay the least seems to contradict the indiscrimination argument examined above. As previously mentioned, this argument holds that a climate treaty is a poor mechanism of corrective justice because it makes present generations pay for the wrongs of past generations. Yet, Posner and Weisbach's argument that those who benefit the most should not pay the least is premised on the very intergenerational logic that they reject in their indiscrimination argument: the participation of poor, low-emitting countries in the climate regime is justified by reference to the benefits that future generations in those countries are likely to reap as a result of the climate deal.[65]

Posner and Weisbach's argument raises one last difficulty. It is premised on the notion that, as a general matter, those who will benefit the most from abatement are poor countries, since they are more vulnerable to climate change and its effects. Once again, this premise seems intuitively correct. Yet, an equally plausible argument can be made that those who stand to gain the most from a climate treaty are not the vulnerable, but those with the most to lose, namely rich nations. This is especially true if the question is examined from the point of view of law and economics. In economic terms:

64 Ibid., at 183.
65 Ibid., Chapter 7.

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> the destruction of a Hollywood beach house might count as millions of dollars while the destruction of a Bangladeshi family's home might count for a fraction of one percent of that amount. The same is true of the value of human life: the deaths of many Bangladeshis might be considered equal to that of a single American because the American is wealthier and willing to pay much more to reduce risks.[66]

The cost of climate change, from a law and economics point of view, might thus be significantly higher for rich than for poor nations. If this is the case, then Posner and Weisbach's argument fails on its own premise.

4. Conclusion

In this brief introductory essay, we have sought to map some of the reasons for IEL's neglect of fairness issues. We have also considered some of the arguments from law and economics against fairness-inspired approaches to environmental law and have argued that these are ultimately unpersuasive. In so doing, we attempted to make the case for a more robust and systematic engagement with fairness issues. More emphasis upon fairness requires an integration of Southern concerns in a more meaningful and less prejudicial way. Their environmental claims should be considered as legitimate claims and not merely as alien developmental demands that need to be 'accommodated'.[67] But it also means changing how we perceive ourselves and revisiting our disciplinary boundaries. This may imply, for instance, revisiting the 'international' as a category that no longer suppresses the experience and role of local communities in responding to environmental threats. The first symposium paper by Khoday and Natarajan speaks to this requirement by examining the struggle of social movements in India to defend their land rights and secure greater access to natural resources and environmental justice. Revisiting our disciplinary boundaries may also imply looking beyond the traditional sources and spaces of international law towards questions of fairness in places that we have not traditionally acknowledged. Ellis and Affolder engage in this type of project, by examining issues of fairness in the context of unilateral environmental measures and transnational conservation contracts, respectively.

By way of conclusion, we thought it important to make two final comments. First, our critique of IEL and of its disciplinary biases should not be read as a critique of international environmental lawyers. In our experience, most scholars, activists, and practitioners in the field are sophisticated intellectuals who, on a personal basis, care for the concerns of the South. Ours is solely a critique of the IEL discourse. This discourse borrows its concepts and categories from the discipline of international law and is therefore deeply rooted in its forms and structures. A lot of what has been said about the discipline's prejudice against the South can be explained by this origin. Asking new questions about fairness and revisiting our approach to the South might thus represent an opportunity to renew international-law discourse

66 D. Farber, 'Climate Justice', 10 July 2011, 6, available at SSRN: http://ssrn.com/abstract=1883186.
67 On the need to move beyond the 'accommodationist' approach, see Mickelson, *supra* note 4, at 77–81.

from within. As noted earlier in this paper, this is a renewal in which IEL scholars take great pride but which, regrettably, is often more apparent than real.

Second, the fairness focus that we advocate here does not have to be at the expense of effectiveness. Tom Franck, in his celebrated book on *Fairness in International Law and Institutions*, did not examine fairness for the sake of it. His was an argument about the 'utilitarian aspect of fairness': that which is perceived as fair will exercise a greater pull towards voluntary compliance.[68] We should resist, then, the temptation to label fairness talk as a mere theoretical exercise. Fairness considerations have real-life implications. A regime that is perceived as unfair, for good or bad reasons, will almost certainly fail to deliver its core objectives. What *is* theoretical, then, is the notion that IEL can dispense with fairness, or that fairness deficit is an acceptable price to pay for an efficiency surplus. The questions of fairness and effectiveness are one and the same question.[69] This question may not have been pressing when IEL was still an emerging and discrete discipline. But, if indeed IEL 'has come of age', as is now widely accepted, then the new maturity and complexity of the system, as Franck argued, call out for a critique of law's content and consequences.

68 Franck, *supra* note 3, at 22–4, 481–2.

69 For a recent attempt at mapping the sort of issues that arise at the intersection of fairness and effectiveness, see J. Viñuales, 'Balancing Effectiveness and Fairness in the Redesign of the Climate Change Regime', (2011) 24 LJIL 1.