

6-11-2008

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Recommended Citation

Frank J. Garcia. "Justice, the Bretton Woods Institutions and the Problem of Inequality." In *Transcending the Ostensible: Developing Countries in the WTO Legal System*. Chantal Thomas, Joel P. Trachtman, eds., Oxford: Oxford University Press, 2008.

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Justice, the Bretton Woods Institutions and the Problem of Inequality

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“He who lends, commands.”²

Abstract

The Bretton Woods Institutions are, together with the WTO, the preeminent international institutions devoted to managing international economic relations. This mandate puts them squarely in the center of the debate concerning development, inequality and global justice. While the normative analysis of the WTO is gaining momentum, the systematic normative evaluation of the World Bank and the International Monetary Fund is comparatively less developed. This essay aims to contribute to that nascent inquiry. How might global justice criteria apply to the ideology and operations of the Bank and Fund? Political theory offers an abundance of perspectives from which to conduct such an analysis; this essay will focus on Rawls’ theory of Justice as Fairness adapted to international institutions by the author in connection with the WTO, and extend it to the remaining “legs” of the Bretton Woods “stool.” This essay will ask what difference it would make for the Bank and Fund if an explicit global justice framework informed their international lending activities.

¹ Professor, Boston College Law School. I want to thank the participants in a 2003 World Bank legal staff workshop for their generous and insightful comments on an early draft of this paper. The author would also like to thank the editors, Joel P. Trachtman and Chantal Thomas, as well as Jeffrey Dunoff, John Linarelli, and participants in the University of Minnesota Conference on WTO Law and Developing Countries, for their comments. Thanks also to Daniel Blanchard, Matthew Hoisington and Michael Garcia for exceptional research assistance.

² E Galeano, *Open Veins of Latin America* (1973) 299.

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I. Introduction

It need hardly be pointed out that we live in a world marked by profound inequalities. Both within countries and between countries, the distribution of natural and social resources is dramatically skewed.³ Taking income alone, the World Bank's web site declares that

[w]e live in a world so rich that global income is more than \$31 trillion a year. In this world, the average person in some countries earns more than \$40,000 a year. But in this same world, 2.8 billion people—more than half the people in developing countries—live on less than \$700 a year. Of these, 1.2 billion earn less than \$1 a day.⁴

Many studies suggest as well that the degree of inequality is in fact worsening.⁵

These facts and trends led me in 1997 to begin considering the role of the WTO, and trade law generally, in relation to the problem of inequality.⁶ Elsewhere I have written about how liberal theories of justice might apply to international trade law.⁷ This sort of normative inquiry is also urgently needed in other areas of international economic relations. Global social policy⁸ is currently managed through a variety of institutions in

³ United Nations Development Programme, <http://www.undp.org> (last visited May 29, 2008).

⁴ The World Bank, 'About Us – What is the World Bank?'

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:34542~piPK:36600,00.html> (last visited May 29, 2008).

⁵ See, e.g., 'In the Shadow of Prosperity,' http://www.economist.com/displaystory.cfm?story_id=8548661 (Jan. 1, 2007) ("A host of big economic shifts, such as rising income inequality, are blamed on global integration.").

⁶ See FJ Garcia, 'Trade and Justice: Linking the Trade Linkage Debates' (1998) 19 U. Pa. J. Int'l Econ. L. 391; FJ Garcia, 'Trade and Inequality: Economic Justice and the Developing World' (2000) 21 Mich. J. Int'l L. 925; reprinted in A D'Amato and J Abbassi (eds.), *International Law Today* (2006); reprinted in LA Cunningham (ed.), *Heights of Justice* (2006).

⁷ FJ Garcia, *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade* (2003).

⁸ By global social policy, I mean (broadly speaking) policies designed and/or implemented at the transnational level which affect the creation and allocation of social primary goods (such as wealth, income rights, opportunities, privileges, status, legal standing, etc.), and the elaboration of secondary social goods (such as education, employment, health care, sustenance, security, etc.). In this essay I am focusing on social primary goods and the institutions which influence their allocation through their policy decisions. Such policies are obviously formulated and affected by domestic institutions, but also, increasingly, by global institutions as well. For a comprehensive and insightful overview of the institutions which manage

addition to the WTO, including in particular what are popularly called the Bretton Woods Institutions (BWIs): the International Monetary Fund (IMF or the Fund) and the World Bank Group (WBG).⁹

In this essay, I propose to use the normative analysis I developed for trade law as a model for beginning a different inquiry, into the relationship between justice and the work of the BWIs. Specifically, I want to consider the role of the WBG and the Fund as institutions which form part of the ‘basic structure,’ those institutions which discharge a fundamental allocative role in society and are therefore subject to the constraints and obligations of justice.¹⁰

The WBG consists of several interrelated institutions and affiliates. The WBG began when the International Bank for Reconstruction and Development (IBRD), one of the WBG’s two lending institutions, was created in 1945 to help finance the reconstruction of Europe. Its mission quickly broadened into supporting development investment on a global scale, and the IBRD continues to carry out what is often considered the Bank’s core activity, development lending at preferential (but near-commercial) rates. The second lending institution, the International Development Association (IDA), was created in 1960 to focus on assisting the WBG’s poorest clients

global social policy, see B Deacon, ‘Social Policy in a Global Context,’ in A Hurrell and N Woods (eds.), *Inequality, Globalization and World Politics* (1999) 211-47.

⁹ Both the World Bank and the International Monetary Fund were conceived at the Bretton Woods Conference in 1944 to serve complementary roles in the post-war economy, together with the International Trade Organization, which did not come into existence except in limited form as the GATT. Considering the WTO as in some sense its successor, these three institutions together are the pre-eminent institutions for international economic relations today. See generally GRD Underhill, ‘Global Issues in Historical Perspective,’ in R Stubbs and GRD Underhill (eds.) *Political Economy and the Changing Global Order* (2000).

¹⁰ The global “basic structure” consists of those “major social institutions” which at the global level “distribute fundamental rights and duties and determine the division of advantages from social cooperation.” J Rawls, *A Theory of Justice* (1979) 7. For an overview of the concept of a global basic structure and its role in the global justice debate, see S Caney, ‘The Global Basic Structure: Its Nature and Moral Relevance’ (Sep. 2, 2004) http://www.allacademic.com/meta/p58933_index.html (paper presented at the annual meeting of the American Political Science Association).

through concessional (zero-interest) lending and outright grants, and shares the same office, staff and project evaluation standards as the IBRD.¹¹ However, the two institutions differ in important ways when it comes to their source of funds. The IBRD finances its lending activities primarily through sales of bonds on the international capital market, whereas the IDA is funded primarily through donations from member states.¹²

The work of these two institutions is complemented by three affiliates which focus on private sector investment: the International Finance Corporation (IFC), which invests in emerging markets; the Multilateral Investment Guarantee Agency (MIGA), which offers investment guarantees for private transactions; and the International Centre for the Settlement of Investment Disputes (ICSID), which offers investment-related dispute resolution.¹³ In this essay, I will focus on IBRD and IDA, and refer to both collectively as the Bank, except where I focus specifically on one or the other institution.

The IMF was created to bring stability to the exchange rate system and in general to facilitate cooperation on international monetary matters in the wake of the Great Depression. The exchange rate aspects of its operation changed significantly in the 1970's when first the U.S. and then other states abandoned the so-called Bretton Woods system of gold-pegged exchange rates. Today, the most active and publicly known facet of its operations involves monitoring and intervening in the global distribution of hard or 'trade' currencies. The IMF engages in short- and medium-term lending in response to balance of payments difficulties (with accompanying IMF 'conditions' involving domestic policy reforms), although the IMF continues to monitor and investigate member

¹¹ B Ghazi, *The IMF, the World Bank Group and the Question of Human Rights* (2005) 24.

¹² Ibid 26. This distinction will be significant as will be discussed below.

¹³ For a discussion of the WBG, see generally I Shihata, *The World Bank in a Changing World: Selected Essays* (2000).

states' exchange rate policies, and work to encourage members to remove any exchange controls.¹⁴ The IMF carries out this lending through a variety of distinct lending programs or 'facilities,' each with different terms and conditions suited to different categories of borrowers in different types of needs.¹⁵ The IMF's activities are funded from both member states' quota subscriptions, and from the IMF's own line of credit with banks and governments.

The primary task of this essay is to develop a normative framework through which to analyze the work of the BWIs with respect to global distributive justice.¹⁶ In normative terms, I will argue that, as part of the basic structure, the mission of the BWIs is to deliver justice. Now, what do I mean by justice? Justice is a structural matter, involving an inquiry as to what principles social institutions should follow in their decision-making in order to reach normatively defensible outcomes. In the case of the BWIs as institutions which allocate social resources, the relevant field is distributive justice. The question becomes: what normative principles should guide the BWIs in their allocation of international development capital and international hard currency resources?

I am going to suggest a framework for evaluating the Bank and Fund based on principles of distributive justice drawn from the western tradition of political and moral theory, specifically liberalism. By liberalism I mean that tradition of political and moral

¹⁴ S Hagan, IMF General Counsel, Proceedings of the 93rd Annual Meeting, ASIL (March 24 – 27, 1999)

¹⁵ Ghazi (n 11 above).

¹⁶ I have couched this inquiry in terms of global justice, although I believe a true theory of global justice requires either cosmopolitan or communitarian grounding, or both, and I offer neither here, relying instead on a more traditional international law/"society of states" model of justice. See FJ Garcia, 'Globalization and the Theory of International Law,' 11 Int'l Leg. Theory 9 (2005) (surveying arguments regarding normative basis of global justice in globalizing social relations). Thus what I am actually engaging in here is more properly an international justice argument, or justice between states and with their citizens, although I will continue to speak in global justice terms, both because that is the generally accepted term for this entire line of inquiry, and because in this case I believe the substantive conclusions would largely be the same.

theory which maintains that the individual is the ultimate unit of value. However, as I will discuss below, by grounding my approach in liberalism, I do not mean to suggest that all BWI member states necessarily adhere to liberalism, nor that these principles are limited to the liberal tradition, or relevant only if one adheres to this tradition.

What are liberal principles of justice? How do they apply internationally? And to the point, how would liberal principles of justice relate to the work of the BWIs? These questions form the substance of the present inquiry, but let me briefly summarize them at the outset. Insofar as the Bank and Fund are social institutions, charged with making decisions involving the allocation social resources, their activities are the direct subject of justice theory. The fact that the Bank and Fund are international organizations does not alter this fundamental point. International liberal justice would dictate that in their policies and operations, the Bank and Fund respect and promote the welfare of all affected individuals. It then becomes a political question for the community of states as to whether the Bank and the Fund will explicitly embrace their tasks from this normative perspective, and adopt the framework of justice as their explicit ideology, policy goal and operational guide.

II. International Justice and International Economic Institutions

In this section I will present in summary form my approach to the generation of an international normative application of domestic political theory, based on my work

applying Rawls' theory of Justice as Fairness to international trade law.¹⁷ This will form the basis for the specific application of the theory to the Bank and the Fund in the sections which follow.

A. International Justice as Fairness

The initial task is to choose a particular body of normative political theory through which to develop the analysis of the obligations of justice as they apply to the BWIs. For a variety of substantive and strategic reasons I think liberalism is the best normative language for modern secular international law. Within liberalism, I have chosen Rawls' "Justice as Fairness," despite its complex relationship to international justice, because of its approach to the problem of inequality.

1. Liberal Theory and Multilateral Institutions

For reasons I have expanded upon elsewhere, liberalism, in particular liberal egalitarianism, is a powerful vehicle through which to examine inequality problems.¹⁸ To begin with, liberalism is the normative tradition of many of the most wealthy and powerful states, which are primarily western or western-style liberal democracies.¹⁹ Moreover, the BWIs themselves have roots in the same tradition of liberalism, in particular liberal internationalism. To begin with, they are creatures of international law, which grew out of the same tradition that gave us political liberalism, namely that of western European states.²⁰ Moreover, the genesis of the BWIs reflects the post-war

¹⁷ FJ Garcia, 'Developing a Normative Critique of International Trade Law: Special & Differential Treatment,' Working Paper Series, University of Bremen Transformations of the State Research Centre, <http://www.sfb597.uni-bremen.de/pages/pubAp.php?SPRACHE=en> (forthcoming); Garcia (n 7 above).

¹⁸ Garcia (n 7 above).

¹⁹ J Rawls, *Political Liberalism* (1995) XXIV.

²⁰ On the intertwined roots of political liberalism, liberal internationalism, international law and the modern state system, see AM Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 1, 5-10.

tradition of liberal internationalism.²¹ Finally, in political terms the BWIs are controlled by states which consider themselves part of the liberal political tradition. This further reinforces the compliance pull, if you will, of liberal theories of justice in this arena.²² This is important on topics of international justice, since if you develop arguments for justice in this language, it is harder for such states to ignore them.

2. *Rawls and Domestic Justice as Fairness*

Rawls is the leading liberal political theorist, and a natural place to begin considering liberal international justice. I am going to assume familiarity with the outlines of Rawls' basic theory, and only note a few issues of significance for international economic law. Rawls is particularly concerned with inequalities that arise in the distribution of social primary goods, such as rights, privileges, wealth, income, status, opportunities, etc. Inequalities in the natural distribution of natural primary goods (such as, for individuals, intelligence, health and imagination), while they deeply affect people's life chances, are not themselves the subject of justice; rather, it is how a society responds to such inequalities that forms the basic subject of justice.

The fundamental problematic of distributive justice is that inequalities in natural primary goods often lead, through the operation of social institutions, to inequalities in

²¹ See eg Deacon (n 8 above) 223 (acknowledging liberal internationalist roots of IMF).

²² The fact that we are talking about international justice does raise the problem of cultural relativism, since both participating states and client states of the BWIs come from other traditions. Some could object that we are forcing a particular system, or by choosing one system, confining our conclusions to a narrow set of states. On the contrary, I am concerned with the obligations which liberal states, and liberal institutions, have towards others, *not* in trying to force others to be liberal. I also think one can find support for the principles of liberal justice in all the major religious traditions of the world (Islam, Buddhism, Christianity and Hinduism share doctrines of mercy, compassion, and almsgiving). See R. Bhala, 'Theological Categories for Special and Differential Treatment,' 50 Kansas L. Rev. 635-93 (2002). The fact that there are different value systems in the world does suggest, however, a potential role for human rights as a sort of consensus normative basis for international justice.

the social distribution of social primary goods.²³ Such inequalities in social primary goods are not deserved, since they are deeply influenced by an underlying natural inequality untouchable by categories of moral responsibility and entitlement.²⁴

Rawls argues that as a result, the basic structure of society must be arranged ‘so that these contingencies work for the good of the least fortunate.’²⁵ The distribution of natural talents is to be considered a common asset, and society structured so that this asset works for the good of the least well-off. Rawls develops this view into the theory of Justice as Fairness, which includes the ‘Difference Principle,’ which states that inequalities in the distribution of social primary goods are justifiable only to the extent they benefit the least advantaged.²⁶ Satisfying this criterion could entail a variety of social measures, ranging from altering the structure of incentives to reward actions which benefit the least advantaged, such as the charitable gifts deduction of the tax code, to the outright redistribution of private wealth through progressive tax and welfare legislation. Rawls contends that a society so organized would meet the basic Kantian obligation of mutual respect, to treat each other as ends and not as means.²⁷

3. *Adapting the Theory for International Application*

²³ Inequalities in the distribution of social goods can also result from the degree of effort and ambition we apply to our level of natural resources. This is the problem of ambition, and Rawls’ failure to take adequate account of the role of ambition in distributive justice is one of the main criticisms raised by Dworkin and others. Dworkin maintains that it would be unjust to redistribute wealth in accordance with inequalities resulting from differences in ambition—in other words, that a theory of justice must be “ambition-sensitive.” See Garcia (n 7 above) 61.

²⁴ To the extent that inequalities in social primary goods also result from differences in ambition, and not from differences in natural endowments, such inequalities might be said to be “deserved.” However, I believe it is fair to read Rawls as referring here more narrowly to the social advantages which attach to the particular circumstances of our birth, and not those which we develop in life. In any event, my approach here accepts the validity of Rawls’ assumption that arbitrary inequalities in natural primary goods render the unequal distribution of social primary goods undeserved. It is this assumption, of course, which is the chief point of contention for libertarian critics.

²⁵ Rawls (n 10 above).

²⁶ Ibid. 303.

²⁷ Ibid 179. On the Kantian aims of Rawls’ project, see Garcia (n 7 above) 77-84.

Having identified an appropriate body of normative political theory to work with, the next step involves adapting the theory for use in an international context involving economic law. This involves as a further preliminary matter that one address any theoretical issues raised by the application of the theory across national boundaries. Applying Justice as Fairness internationally poses one such issue, namely Rawls' own refusal to extend the argument of *A Theory of Justice* to international distributive problems.²⁸ For reasons I expand upon elsewhere,²⁹ I am going to proceed, as many other commentators have,³⁰ to nevertheless apply Rawls' theory internationally.

B. Mapping the Theory to International Economic Law

A Rawlsian theory of international distributive justice will require three elements: establishing the facts of inequality, an examination of the choice problem faced by those in the original position, and identification of the principles of justice which result.

As mentioned above, there are many forms of inequality at work in the world today. The key normative assumption underlying a Rawlsian account of inequality is that differences in natural endowments, and consequent differences in the allocation of social goods, are unmerited. In Rawls' terms, they are morally arbitrary.³¹ Setting aside the issues of migration and conquest, states and their citizens must in general accept the

²⁸ In *A Theory of Justice* Rawls limits his theoretical enterprise to principles of justice for what he assumes to be a closed domestic society. Even by 1979 the validity of this assumption was being seriously questioned. See C Beitz, *Political Theory and International Relations* (1979) 143-49.

²⁹ See Garcia (n 7 above) 133-44.

³⁰ Globalization and other developments in international relations generally and in international economic relations in particular, have in the view of many commentators rendered such assumptions untenable today. For example, in his study of the concept of fairness in international law, Franck concludes that the requisite level of community has emerged at the international level to sustain a fairness analysis. See T Franck, *Fairness in International Law and Institutions* (1998) 12-13. For similar reasons, Pogge argues that Rawls' bifurcation of the choice problems into separate domestic and international ones is untenable, because the international environment in which states actually operate will significantly affect the nature of domestic societies, something representatives should know in the original position if they are to ratify their choices post-veil of ignorance. TW Pogge, *Realizing Rawls* (1989) 255-56. C Beitz, *Justice and International Relations, in International Ethics* (1985) 282-311.

³¹ *Ibid* 72.

extent of resources to be found within their territories.³² At the individual level, people are simply born into existing states, the resource levels of which they could neither choose in advance nor influence. These national boundaries and the resource endowments they encompass have a profound distributional impact on individuals' life prospects.³³

This is precisely the pattern of natural and social advantage which, at the individual level, requires justification according to principles of justice. The fact that a particular state should be favorably situated with respect to natural resources, and that this fact results in advantages in the acquisition of social goods through the operation of domestic and international social institutions, does not by itself justify that state's claim to the benefits arising from that happy fact of geography. To accept the status quo without further justification, would be to endorse a system of natural liberty as one's principle of justice, which Rawls rejects as unjust precisely because it allows arbitrary advantages too much sway in determining life prospects.

Together, these natural inequalities, the arbitrariness of their distribution, and their social consequences, form the subject of international justice. The task of international justice is to furnish principles that will serve both as a standard for evaluating the social response to natural inequalities, and as a guide to social institutions for making distributive allocations that will justify social inequalities.

In a Rawlsian approach to international justice, those principles are to be chosen through a heuristic device he calls the original position, in which representative

³² Migration and conquest could be envisioned as individual and collective responses to the arbitrariness of international borders and the particular resource "bundles" they circumscribe, but this notion is destabilizing and could easily be manipulated.

³³ TW Pogge, 'An Egalitarian Law of Peoples' (1994) 23 Phil. & Pub. Affairs 195, 198 [hereinafter *An Egalitarian Law of Peoples*] (borders have tremendous distributive impact which requires justification).

individuals must choose principles that will govern their future social relations under conditions of limited knowledge of the general human condition, and ignorance as to their particular future socioeconomic situation. When the choice problem is one involving the choice of principles governing states, then the representatives are present on behalf of states whose future intercourse will be governed by the principles chosen by that assembly.³⁴ Representatives of states know only that natural and social goods are necessary for the realization of domestic cooperative schemes, that inequalities exist between states, and that such inequalities are highly correlated with resulting differences in wealth and other social advantages enjoyed among states.

Under those conditions, Rawls' argument in *A Theory of Justice* dictates that the representatives of states should choose principles of justice which maximize the minimum bundle of social goods they are likely to receive in the face of life's inequalities.³⁵ In the domestic original position, the representatives chose two principles, a principle of equal liberty and a principle of distributive justice, the Difference Principle. In Rawls' account of the international choice problem, representatives of states do not in fact choose a principle of distributive justice.³⁶ However, as has been argued by Beitz, Barry and others, "there is no reason to think that the content of the principles would

³⁴ Rawls has been criticized for bifurcating the original position into a second, separate choice problem for interstate principles of cooperation, and for failing to take into account the evolution of contemporary international law to recognize non-state actors, including individuals. See L Brilmayer, 'What Use is Rawls' Theory of Justice to Public International Law?' (2000) 6 *Int'l Legal Theory* 36; F Tesón, *A Philosophy of International Law* (1998) ch. 4. This second original position could be modified to include, for example, representatives of significant NGO's and international institutions; or, as Beitz and Pogge suggest, collapsed into the first, thus forming a single cosmopolitan original position. Pogge (n 39 above) 246-47; Beitz (n 28 above) 150-51. I will proceed along Rawlsian lines and argue in terms of a second "statist" original position, in order to illustrate that, even closely following Rawls' original approach, one is led to an international difference principle. Accord *An Egalitarian Law of Peoples* (n 33 above) 197 (international egalitarian concerns can "easily" be accommodated within Rawls' own two-step format).

³⁵ *Ibid* 152-57.

³⁶ See FJ Garcia, 'Review: *The Law of Peoples*,' (2001) 23 *Houston. J. Int'l L.* 659, 671-76 (reviewing Rawls' arguments and conclusions regarding international principles of justice).

change as a result of enlarging the scope of the original position."³⁷ Parties to this international original position would view the distribution of resources in the same manner that parties in the domestic original position viewed the distribution of natural talents: as morally arbitrary.³⁸

I therefore follow these theorists and suggest an international difference principle drawn directly from Rawls' own domestic elaboration:

International social and economic inequalities are just only if they result in compensating benefits for the least advantaged states.

C. Bretton Woods Institutions and International Justice as Fairness

1. *Operationalizing Justice as Fairness: Trade Law*

Having sketched out how in Rawlsian terms it can be argued that international economic relations are subject to the Difference Principle, it remains to develop a normative critique of specific aspects of international economic relations law in terms of the theory. Once the basic principles of justice have been identified, the next step according to Rawls is 'to choose a constitution and a legislature to enact laws, and so on, all in accordance with the principles of justice initially agreed upon.'³⁹ In the case of international trade, we already have the equivalent of a constitution and a legislature, albeit imperfect ones, in the GATT/WTO system and its attendant rounds of international economic negotiation and diplomacy.⁴⁰

³⁷ *An Egalitarian Law of Peoples* (n 33 above) ; Beitz (n 28 above) 151; B Barry, *The Liberal Theory of Justice* (1973) 131 ("I can see no reason why within Rawls' theory the representatives of different countries should not, meeting under the conditions specified, agree on some sort of international maximin."); D Richards, 'International Distributive Justice', in J. Roland Pennock & John W. Chapman (eds.), *Nomos XXIV* 288 – 92.

³⁸ Beitz (n 28 above) 137; Pogge (n 33 above) 247.

³⁹ Rawls (n 10 above) 13.

⁴⁰ On the constitutional and law-making function of trade institutions and their shortcomings in this regard, see EU Petersmann, 'Constitutionalism and International Organizations' (1997) 17 *Nw. J. Int'l L. & Bus.*

Turning to such a system's regulatory output, I have argued that as with any other allocative social institution, trade law is subject to justice theory.⁴¹ Using Rawls, I have further argued that in order for trade law to be just, it needs justification according to the Difference Principle: it should make inequalities work to benefit least advantaged. Liberalizing trade is essential to the justification of such inequalities. By allowing the principle of comparative advantage to operate, free trade moves the trading system in the direction of operating to the benefit of the least advantaged, by affording them the opportunity for welfare increases through specialization.

However, the Difference Principle also suggests that just trade cannot consist only of free trade. Normatively, free trade alone is essentially a libertarian system of equality of opportunity (reciprocal free trade rules), and subject to the same shortcomings as libertarian theory.⁴² Empirically, we see many places in which a system of liberalized trade does not seem to be working—despite free trade theory—to the benefit of the least advantaged states.⁴³

The key lies in understanding the way many of the natural and social inequalities among states translate into the relative strengths of different states' markets.⁴⁴ With respect to trade, states that are rich in natural resources and have developed significant social resources such as wealth, industrial capacity and technology, will generally have as a result a strong consumer market, as manifested in per capita income, and a strong

398; but see JL Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law,' (2005) 17 *Eur. J. Int'l L.* 647 (arguing that Petersmann's account is descriptively inaccurate and normatively undesirable).

⁴¹ I think it is most consistent with Rawls' view of institutions as cooperative schemes for mutual benefit, to examine the justice of each institution's operations.

⁴² The reality of gross inequalities in international endowments undercuts the possibility of effective equality of rights among states (sovereignty). See Garcia (n 7 above).

⁴³ See Robert Hudec, *Developing Countries in the GATT Legal System* (1987) 40-1 (GATT seen as failing to promote export growth for developing countries).

⁴⁴ Garcia (n 7 above) 149.

production base, as manifested in per capita GDP. States that are poor in resources will generally have a weak consumer market, manifested in low per capita income, and a weak production base, manifested in low per capita GDP.

This means that market access becomes a key variable in any attempt to address inequalities through trade law. The International Difference Principle applied to trade requires that market access be organized in such a way that it benefits the least advantaged. This is where the trade doctrine of special and differential treatment comes in. At its core, special and differential treatment is the practice of asymmetric trade liberalization, to secure the benefit of developed country wealth and resources for the least advantaged states through non-reciprocal market access. By opening their markets to developing country exports on a preferential basis, developed countries in effect place the consumption power of their larger, richer consumer market at the service of the developing country, which can increase its exports and thereby strengthen its economic base. Such policies can, if properly designed, can help justify inequalities with respect to trade by making sure they benefit the least advantaged states.⁴⁵

2. *The Bank, the Fund and Global Inequality*

In order to apply Justice as Fairness to the work of the BWI's, a similar process must be undertaken. After mapping domestic theory onto the international subject and generating an international form of the Difference Principle, one must examine the specific nexus between the policy context and the normative system (i.e., what is the

⁴⁵ S&D as constituted is very imperfect, and there is much debate as to whether it makes any contribution to smaller economy well being. See Garcia (n 7 above) 156-92; Hudec (n 43 above) 208-24; Dunoff chapter. However, the very fact that S&D as implemented is so flawed means that the empirical literature questioning its effectiveness may well be documenting the effects of a flawed instrument, and not resolving the larger question as to the promise of S&D. Elsewhere I suggest reforms which are suggested by the normative analysis, which might also lead to different empirical results. Garcia (n 7 above).

institution allocating?). As allocative social institutions, the Bank and Fund makes distributive decisions about social primary goods, in this case about the way international development capital and hard currencies will be distributed.⁴⁶ Their core operational commitment, and therefore the appropriate policy nexus, is lending - development lending in the case of the Bank, and balance of payments lending in the case of the Fund. Therefore, generating a normative theory of international development and balance of payments lending will involve analyzing the lending activities, terms and policies of the Bank and the Fund with reference to distributive justice criteria.⁴⁷ I will develop this analysis for the Bank in Part III below, and for the Fund in Part IV.

⁴⁶ As mentioned at note 8 above, there are other important social primary goods subject to institutional allocation; and there are many public and private entities and institutions at both the national and international levels which make decisions influencing the allocation of these two specific examples of social primary goods, development capital and hard currencies. The Bank and the Fund stand at the confluence of these two factors, as the principal international institutions allocating these two kinds of social primary goods; hence my focus on them here.

⁴⁷ I want to emphasize that in this analysis, I am taking as a given that these two institutions exist, and arguing that given their allocative roles, their operations are subject to the International Difference Principle. I am not arguing that the International Difference Principle *requires* the existence of these two institutions, nor am I arguing that these institutions are the only, or even best, mechanism through which to address the inequality in distribution of development capital and hard currencies. Rather, given that states have created (for rational reasons, as I suggest below) global markets for development capital and currency exchange, and these institutions in particular, the appropriate next question is how justice might influence their operations.

III. International Justice and the Work of the Bank

The first step in critically analyzing an international institution from the perspective of political theory is to develop an international normative theory, by mapping domestic normative theory onto the international subject. That step was accomplished in section II above. To restate, we arrived at an international difference principle:

International social and economic inequalities are just only if they result in compensating benefits for all states, and in particular for the least advantaged states.

The second step is to articulate how this basic principle of international justice applies to the work of the institution, by examining the specific policy nexus between normative theory and the work of the institution. In the case of the Bank, this is development capital lending, in the same way that trade liberalization was for the WTO. This is the task of the following section.

A. The Bank's Role in International Justice

The starting point is to recall that the Bank is a social institution, whose core activity is to allocate a primary social good: wealth, specifically development capital, and the terms of access to such capital, which terms are themselves a social good.

Development capital is a socially produced resource. A country's supply of development capital reflects a complex blend of natural and social factors. It reflects the country's natural resource endowment, and the complex blend of its history, policies, institutions and trade relations, all of which affect the capacity of the system to generate surplus capital for development, and the amounts of such capital.

Given these factors, it is no surprise that the distribution of development capital is unequal, since states' original resource allocations are unequal and their socioeconomic histories varied. In this sense, the distribution of development capital reflects a complex interaction among natural and social inequalities. Moreover, under natural conditions, states will be in a state of dynamic instability with respect to the supply of development capital: at a given point in time they will either have too much, too little, or just enough. It is unlikely that any state can safely assume that it can be entirely self-sufficient in the matter of development capital.

All of the foregoing leads to a rational policy choice for states: it is useful to create an international market for development capital. Through such a market, development capital can be made available, in the form of investment capital and lending capital from private banks, at rates set by the market. Such a market serves the self-interests of borrowers and lenders alike. Lending states put their surplus capital to work, generating interest and future economic opportunities for themselves, as well as contributing to stability in foreign relations through support for other states' development aspirations. Borrowing states have access to levels of development capital they could not develop domestically.

However, the facts of inequality mean that, just as in trade reciprocal market access could not in all cases benefit the least advantaged, in the case of development capital a private market would not be equally beneficial to all states. Due to the same kinds of natural and social inequalities which affect a state's capacity to generate development capital, not all states can afford to borrow sufficient development capital on commercial terms in the private market. For this sort of reason, states created the Bank,

which draws its capital from the same sources (in the case of the IBRD through bond sales to the private market), but is institutionally oriented to meet the specific development lending needs of less wealthy states, and can lend on other than commercial terms.⁴⁸

Since the Bank's core function with respect to these resources is to allocate them among states through its lending decisions and policies, this intimately involves the Bank in distributive justice concerns: by what principles and rules are these social goods allocated, and to whose benefit? To normatively evaluate this, we need a theory of Just International Development Lending. That is a book in itself, but I can suggest here what I think the core of such a theory would be, based on my work in trade law.

1. Toward a Theory of Just International Development Lending

The second step in the overall process of applying normative theory to international economic institutions is to derive from the International Difference Principle a set of "constitutional" principles regarding how the basic structure of a given area of institutional policy or practice should be oriented as a matter of ideal theory; from this we would proceed to develop policy-specific guidelines with a normative valence. Together, these two steps allow us to identify the core implications of the International Difference Principle for Bank activity.

As when with trade law we looked at the function of market access, here we look to the Bank's role as a lender, specifically a development lender, which suggests we focus on access to development capital.⁴⁹ As an initial matter, access to development

⁴⁸ For example, the conditions set out in Article 3 section 4 of the IBRD Articles of Agreement reflect the particular needs and available credit resources of states.

⁴⁹ Hockett suggests a further theoretical link between justice and lending, or as he puts it between justice theory and finance theory, on an insurance model, namely, that both involve risk allocation under

capital is a function of the private capital market. The Bank itself (here I am referring specifically to the IBRD) acquires its funds from this private market through the sale of bonds to private investors, and in turn makes the funds available to states which for one reason or another cannot meet their needs through the private sector of the capital market.

However, as a social institution governed by states, the Bank is subject to normative constraints and criteria in allocating these resources that would not necessarily apply to private sector financial institutions. Put another way, the Bank as an international institution has a unique role to play in seeing to it that the market for development capital effects a just allocation of the relevant social resources.⁵⁰

The key normative implication of Justice as Fairness for development lending is that states do not categorically deserve their relative supply of development capital, insofar as it is a product, in part, of natural inequalities which are morally arbitrary, compounded by social inequalities.⁵¹ This means that states cannot be presumed to be entitled to their particular supply of development capital, and that resulting inequalities in the distribution of development capital must be justified.

Applying this principle to the Bank's role as development capital lender, we can posit the following, as an application of our basic principle of global distributive justice to the work of the Bank:

In order to justify inequalities in the distribution of development capital, states must ensure that access to development capital is structured so as to benefit the least advantaged.

conditions of uncertainty. R Hockett, 'From 'Mission Creep' to Gestalt Switch: Justice, Finance, the IFIs, and Globalization's Intended Beneficiaries' (2005) 37 *Geo. Wash. Int'l L. Rev.* 167, 179-181.

⁵⁰ Ibid 194 (discussing the necessity of both markets, and justice, to the possibility for international financial institutions to deliver on their social promise).

⁵¹ In this respect, we do face the problem of how to account for the fact that good social policies contribute to an abundance of development capital, or the problem of ambition-sensitivity. See Garcia (n 7 above) 61. Hockett, for example, suggests in this regard that global distributive justice by BWI's should focus on what he calls "ethically exogenous" benefits and burdens only. Hockett (n 49 above) 193.

How does this square with the work of the Bank?

The very essence of the Bank's mission is to make wealthy states' abundance of development capital available to states with less development capital. As a first matter, this in itself is consistent with the International Difference Principle. By putting surplus capital to work on near-commercial terms in the economies of states without adequate indigenous supplies of capital, the Bank is conferring a benefit on less advantaged states. It is true that the Bank is not the sole source of development capital for under-capitalized states – today, it is increasingly easier for states to borrow development capital on attractive terms from commercial banks and the international capital markets.⁵²

However, whenever there is a general economic crisis or a country-specific crisis, it is much harder for certain states to borrow needed development capital. Moreover, the demand for development capital exceeds capital-poor states' ability to pay commercial rates, so if the only access to development capital was through private banks at commercial rates, their capital needs could go under-served.⁵³

This brings us to the issue of the *terms* on which the Bank makes development capital available. The terms of access to this development capital are themselves a social resource. In other words, the terms on which the IBRD makes its development capital available (preferential rates), and the terms on which the IDA makes its credits and grants available (concessionary rates) are themselves a further socially-produced, and socially allocated, resource.

In this sense, the Bank's IBRD lending is similar to the principle of free trade in WTO—helping to equalize opportunity to development capital in a manner consistent

⁵² Ghazi (n 11 above) 36.

⁵³ Ibid 24. This was one reason for the formation of the IDA.

with the basic requirements of Justice as Fairness. However, in the same manner that with respect to trade, a system of purely free trade was not enough due to the facts of inequality; so in development lending a system of pure private market commercial lending, or even a blended system of private bank commercial lending and Bank preferential lending, would not be enough. Recall that according to the International Difference Principle, the international economic system is only just, if the inequality in distribution of wealth operates to the benefit of the least advantaged. Because the least advantaged states have limited domestic capital formation capabilities and limited resources to borrow capital on the market, they cannot get enough through these avenues, meaning that the overall inequality in capital will not work to their advantage.

Continuing the analogy to free trade from the previous section, IBRD-style lending is therefore necessary, but not sufficient, for international justice. It is not enough that capital is made available, even at below-commercial terms – the International Difference Principle asks much more. It asks that capital be made available under such terms and in such a manner, that it benefits the *least* advantaged.

In this respect, it is significant that the Bank has bifurcated its roles between the IBRD and the IDA. The IDA's specific mission is to make development capital available to the least advantaged states on deeply preferential terms, involving concessional lending and outright grants. IDA credits are typically repaid on a very long term (35 – 40 years), with a ten-year grace period on any principal repayment.⁵⁴ Complementing IDA lending is the initiative for Heavily Indebted Poor Countries, or HIPC, about which more

⁵⁴ Ibid 26.

will be said later,⁵⁵ which consists of outright loan forgiveness for the most heavily indebted countries as their IDA credits become due.

IDA grants and credits constitute a further social resource allocated by the Bank, of particular interest to the least wealthy states: the concessionary access to capital. Moreover, HIPC loan forgiveness is itself a social resource as well. In distributive terms, the Bank's mission is to allocate these particular social resources, which by virtue of the nature of the international economy are those of greatest value to the least advantaged. Therefore, the IDA's programs have the most potential for justifying inequalities in development capital, by making them work for the benefit of the least advantaged.

In terms of the International Difference Principle, this suggests the following corollary:

In order that access to development capital benefit the least advantaged, states must offer concessional access to development capital.

In this sense, in the lending context the IDA's policies and programs are the structural analog to the WTO's special and differential treatment policies reviewed in the trade justice analysis set forth above – concessional access to capital as a tool for justifying inequality. It is that specific aspect of the Bank which directly addresses the inequality in development capital from the perspective of the least advantaged.

The normative importance of concessional lending raises a further question: why can't the Bank just give all the money away? Even assuming *arguendo* that this would in fact be in the best interests of the least advantaged (and it is not clear that it would be), this would ignore the fact that development capital is an exhaustible social resource. It is

⁵⁵ See note 65 below and accompanying text.

generated and regenerated by social activity but it is not limitless.⁵⁶ This means that it must be treated as an exhaustible resource, and must be renewed and conserved if it is to be available in the future.

This means, fundamentally, that it is normatively defensible for the Bank to be a bank and not a pure aid institution, i.e., to maintain a balance between development capital redistribution and sustainability and preservation of capital. In other words, it is legitimate for the Bank to expect its loaned funds to be repaid and to exercise that degree of oversight with respect to its concessional lending and grants consistent with a duty of prudence and the preservation of capital.

In summary then, the Bank's basic mission is consistent with the normative implications of the International Difference Principle: development lending on near-commercial terms is itself a benefit to those less-advantaged in terms of capital resources. However, in order to fully reflect the International Difference Principle, the Bank must go a step farther, and offer concessional lending programs that will benefit the *least* advantaged, which it currently does through the IDA. How this can best be carried out at the operational level, in a manner that *will* benefit the least advantaged, is the question for the next section.

B. Operational Implications of a Theory of Just International Development Lending

⁵⁶ This is particularly true with respect to funds used for HIPC loan forgiveness, since by definition these amounts represent funds which will not go back into IDA coffers for future loans, grants or HIPC loan forgiveness. This is even more significant as the Bank broadens out its debt relief efforts with sister institutions towards 100% debt forgiveness for eligible states through the Multilateral Debt Relief Initiative (MDRI), which will intensify the need for increased member contributions to the IDA. World Bank, 'The Multilateral Debt Relief Initiative,' <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20634753~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html> (last visited May 29, 2008).

Recall that the fourth step in developing a normative theory for the Bank is to apply the ‘constitutional’—level principle derived above to develop more specific guidelines that can be used to both structure and critique actual institutional practice. In other words we need a set of non-ideal criteria for how such practice should be structured in the real world, both refining the theory and developing a policy-specific normative critique. As discussed above, there are many aspects of the Bank’s operations which would seem to meet the injunction of the International Difference Principle, at least at a general level: there is the Bank’s very existence and basic mission, and the fact that the Bank operates exclusively on either preferential or concessionary terms.

However, a thorough evaluation of the justice of the Bank’s operations, and the full development of a theory of just international development lending, would require taking this general principle and deepening the analysis through a program by program evaluation of the Bank’s operation: are they actually structured to benefit the least advantaged, and do they in fact operate this way? And what does the way the Bank actually works, suggest in turn about how principles of just development lending operate in the real world?

This is of course a large undertaking; a definitive analysis of such a topic would require a book-length study.⁵⁷ As a preliminary matter I will introduce two areas of inquiry: (1) the Bank’s mission and priorities; and (2) how the Bank determines the nature and extent of its involvement in the domestic policies of borrowing state.⁵⁸ For

⁵⁷ This essay is intended as the beginning of such a project.

⁵⁸ Other promising areas of inquiry for future work includes criteria employed by the Bank in selecting projects, participation by the least advantaged in Bank decision-making and project design, and how the Bank evaluates success in terms of the least advantaged sectors of borrowers’ societies. See generally JW Head, *The Future of the Global Economic Organizations* (2005) 111-166 (reviewing and evaluating critiques of Bank practices).

each of these, I will suggest at least the initial formulation of a specific policy criterion based on the application of the basic principle derived above, to the particular aspect of the Bank's operations in question. In many cases it will be seen that the Bank is in fact doing much that is consistent with the mandate of the International Difference Principle, but that it could and should do more. More particularly, the International Difference Principle can offer normative guidance as to precisely what more the Bank should do.

1. The Bank's Mission and Priorities

Simply stated, the Bank's mission is development. Now, as is well known, there is in reality nothing simple about the term 'development.' The Bank's articles do not define 'development.' In fact, 'development' is an evolutionary term, and its definition, has evolved in international law and in Bank practice.

The current international consensus on the meaning of development, albeit somewhat tautological, can be expressed as follows: development means sustainable and equitable development. As the Copenhagen Declaration states it, development must incorporate democracy; social justice; economic development; environmental protection; transparent and accountable governance; and universal respect for human rights.⁵⁹

Bank officials have stated that the Bank agrees with this comprehensive statement of the international community's position.⁶⁰ This can be seen, for example, in the Bank's adoption of the Millennium Development Goals. The Millennium Development Goals explain what sustainable and equitable development means for Bank policy. They identify—and quantify—specific gains that can be made by 2015 to improve the lives of

⁵⁹ 'Copenhagen Declaration on Social Development,' in *Report of the U.N. World Summit for Social Development*, UN Doc A/CONF.166/9 (1995).

⁶⁰ D Bradlow, 'The World Bank, the IMF and Human Rights' (1996) 6 *Transnat'l L. & Contemp. Prob.* 47, 53-54 (citing remarks by Shihata and Wolfensohn).

the world's poor. Their overall aim is to reduce poverty while improving health, education, and the environment.⁶¹

As a function of its institutional commitment to the Millennium Goals, the Bank is already committed to addressing the problem of inequality through development and poverty eradication—what does a justice perspective add? A justice perspective can be a powerful tool for complementing any evaluation of the Bank's success on its own terms. Moreover, using the normative framework of global justice may itself be a subtle but significant change in emphasis—one commentator has called it a “Gestalt shift”⁶²—that may have valuable substantive and political benefits.

When viewed from the perspective of Justice as Fairness, many aspects of the Bank's operations seem like moves in the right direction: for example, the existence of the IDA, the ‘LICUS’ project for particularly fragile states,⁶³ and in particular the HIPC Initiative.⁶⁴ However, the International Difference Principle requires us to go a step further, and ask if these programs are in fact structured so as to operate to the benefit of the least advantaged.

Let me begin with just one example, debt forgiveness and least advantaged states.

⁶¹ ‘Millennium Development Goals,’ <http://ddp-ext.worldbank.org/ext/GMIS/home.do?siteId=2>. The MDGs were endorsed by 189 countries at the September 2000 UN Millennium General Assembly in New York. They provide a focus for the efforts of the World Bank Group, governments, and other partners in the development community.

⁶² Hockett (n 49 above) 169.

⁶³ Licus LDC,

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/EXTLICUS/0,,menuPK:511784~pagePK:64171540~piPK:64171528~theSitePK:511778,00.html>. (task force providing low income countries under stress with advice).

⁶⁴ HIPC,

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20260411~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html>. (Bank initiative providing debt relief to the world's poorest nations).

Since 1996 the Bank has begun to tackle debt relief through the HIPC Initiative. Through HIPC, 26 poor countries have received debt relief which the Bank estimates will save them \$41 billion over time.

The creation of HIPC represents a considerable achievement, but the inquiry cannot end there. Justice as Fairness requires that we ask ourselves whether the mere existence and current extent of this type of program is enough. Should it be expanded? Should it become a higher priority among the Bank's activities?

In terms of resource commitments, the Bank's current priorities can be summarized as follows:

1. IBRD lending on preferential terms.
2. IDA lending on concessional terms.
3. HIPC debt forgiveness.⁶⁵

Justice as Fairness requires us to evaluate this scheme with reference to our normative touchstone, namely, is this prioritization benefiting the least advantaged? In other words, what is the normative significance of, despite the evident inequality in the global distribution of development capital and in the borrowing power of states, the fact that most of the Bank's activities involve loans, not grants, and most of these loans are preferential and not concessional?

In this respect, let me suggest that the International Difference Principle could require a complete inversion of the Bank's priorities. Certainly, both the existence of such programs as the IDA and HIPC, and the level of resources committed demonstrate that the Bank is at some meaningful level committed to poverty reduction for the least

⁶⁵ According to the 2006 World Bank Annual Report, as of the end of fiscal year 2006, outstanding IBRD lending commitments totaled \$420.2 billion, IDA commitments totaled \$170 billion, and HIPC commitments totaled \$62 billion.
<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTANNREP/EXTANNREP2K6/0,,menuPK:2838586~pagePK:64168427~piPK:64168435~theSitePK:2838572,00.html>

well-off.⁶⁶ However, at the macro level, we must still look at the overall balance of Bank activities, and ask if more of the Bank's lending should be IDA lending instead of IBRD lending, and if more IDA lending should be grants instead of credits, and HIPC debt forgiveness instead of credit repayment.⁶⁷

Application of the International Difference Principle to the Bank's mission and priorities might therefore suggest the following:

The Bank should emphasize debt forgiveness and concessional lending as its primary mission, followed by IBRD lending.

This would suggest a reorientation of the Bank's programmatic priorities as follows:

1. Debt forgiveness – HIPC – as the Bank's primary mission
2. Concessional lending – IDA – as its second priority
3. IBRD lending – as the third priority

Such a reorientation must be compatible, of course, with sustainability and prudential considerations, in view of the Bank's stewardship role with respect to development capital.

Such a reprioritization would be consistent with the Bank's own efforts to reorient its activities in view of the increasingly liberal access to development capital from the private sector enjoyed by more and more states.⁶⁸ Embracing this would mean significantly increasing the amount of Bank resources devoted to non-renewing types of loans, meaning that donor countries would have to significantly increase their level of

⁶⁶ The creation of HIPC is part of an overall trend in Bank lending towards poverty reduction. Since the 1960's the Bank has shifted its resources more towards poverty reduction and the poorest countries (Ghazi estimates from 37% of total average commitments before 1968 to 61.3% in 1989-90). However, as Ghazi points out, during that time and since, inequality has increased as a function of globalization, so the policies are certainly not enough and may not be working. (n 11 above) 76.

⁶⁷ At the micro level, we should ask certain questions of the Bank's culture: what type of involvement does the Bank's internal culture reward? Are programs involving concessional lending, loan forgiveness and outright grants seen as the cutting edge of the Bank's work, and highly rewarded institutionally? Or is the action elsewhere for ambitious Bank employees?

⁶⁸ Ghazi (n 11 above) 36.

contributions to the IDA.⁶⁹ This would require a further political commitment on the part of the Bank's donors.

2. *The Bank's Role in the Domestic Social Policy of Borrowers*

This aspect of the inquiry concerns the Bank's involvement in the domestic social policy of borrowing states. Consistent with its prudential obligations, the Bank has a role in evaluating the degree to which the domestic social policies of borrowing states are themselves part of the problem of inadequate capital, and the degree to which such policies help or hinder the project goals and risk squandering development capital, which is after all an exhaustible social resource.⁷⁰

This has been one of the most controversial aspects of the Bank's operations, particularly with respect to its participation in Structural Adjustment Programs or SAPs, through which the Bank seeks in concert with the IMF to "improve resource allocation, increase economic efficiency, expand growth potential and increase resilience to shocks."⁷¹ This criticism is largely due to two factors: the leverage the Bank has by virtue of its role to insist on domestic policy reforms, and the controversy surrounding the soundness and ideological basis of the Bank's approach to domestic policy.⁷² The former will not change; it is in fact essential to the Bank's proper stewardship. However, the latter is, and should be, a constant source of inquiry and criticism both within and without

⁶⁹ As discussed above, the Bank's expansion of debt relief efforts through the MDRI will increase this demand for additional funds. World Bank, 'The Multilateral Debt Relief Initiative,' <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20634753~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html> (last visited May 29, 2008).

⁷⁰ Hockett refers to this as the "stick" aspect of Bank operations, or the ways in which the Bank and other BWI's implement their policies. Hockett (n 49 above) 195.

⁷¹ 1990 Bank paper cited in Ghazi (n 11 above) 47.

⁷² I am referring here most recently to the Bank's neoliberal approach, which has been the subject of much criticism. Ghazi (n 11 above) 47; see generally Head (n 58 above).

the Bank, as its experts search for the appropriate blend of policies for each borrowing state.⁷³

Taking HIPC as an example, in order to qualify for HIPC, countries have to be eligible for concessional assistance from the Bank and Fund, face an unsustainable debt burden beyond available debt relief mechanisms, and have established a record of reform and policies which the Bank and Fund judge as “sound.”⁷⁴ A justice perspective means we need to look carefully at these conditions for participation.

For example, Justice as Fairness requires us to inquire into what goes into a determination that a HIPC candidate’s economic policies are “sound.” What conditions are imposed on participants? Do these conditions bear a demonstrable relationship to the overall policy and normative goal of debt relief and benefit to the least advantaged? Or are there disguised preferences built in favoring other Bank constituencies?

In this respect, it is significant that civil society critics have argued that the structure and disbursement of HIPC lending in fact disproportionately benefits the wealthy elites within HICP borrowing countries, and multinational enterprises, thus furthering ‘the globalization agenda of the donor governments of the industrialized North.’⁷⁵ This raises the possibility that with respect to its actual operation, HIPC may not be fulfilling the requirements of either the Bank’s mission or of international distributive justice - the program is not in fact operating in a manner that meets our core normative criteria: benefiting the least advantaged. Instead, it may be further benefitting the already-advantaged.

⁷³ Naturally, the more demonstrably sound and ideologically-minimal the Bank’s policies are seen to be, the less its leverage will be resented.

⁷⁴ Ghazi (n 11 above) 78.

⁷⁵ Ibid 79 (citing report by CorpWatch).

As a general matter, in order to be consistent with both the International Difference Principle, which focuses on least advantaged states, and the domestic Difference principle, which focuses on the least advantaged *within* states, the Bank's domestic involvement should focus on the degree to which such policies affect the welfare of the poorest segments of a borrower's society.⁷⁶ Moreover, the Bank should exert its policy influence to redirect such policies towards ensuring that the poorest segments benefit from Bank's lending.⁷⁷ But does such a focus on the poorest segment within a society impermissibly intertwine the Bank in domestic politics? Mustn't the Bank stay out of basic political issues like a country's wealth distribution policies? Both the Millennium Development Goals and the principles of Justice as Fairness have something to say about this.

The Millennium Goals are quite broad in their scope. This could mean that, in principle, all aspects of a borrowing country's social policy come within the Bank's purview. This cannot be the case. In fact, the issue of the proper scope of the Bank's operations has a long and fraught history. The Bank has in fact taken the opposite position, namely that as a specialized economic agency of the UN, it has a limited mandate, restricting its permissible activities to the economic aspects of the development process.

Support for this view can be found in the Articles, specifically the so-called 'political prohibition:'

⁷⁶ This form of a two-step obligation, both international ("statist") and domestic, is consistent with Rawls' own formulation. See *supra* note 34. Cosmopolitans would collapse the two and argue that the International Difference Principle focuses entirely on least advantaged individuals, whatever states they are found in. I will maintain the two-step formulation for the time being, and defer to another day a fuller treatment of the cosmopolitan model. I believe for our purposes they arrive at the same place.

⁷⁷ Current Bank practices have been criticized for failing to take into account the redistributive effects of Bank policies. Ghazi (n 11 above) 49.

The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant in their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.⁷⁸

Taken together, this prohibition, coupled with the Millennium Goals, establish a complex framework within which the Bank must pursue its mandate of promoting sustainable and equitable development. How does the Bank pursue this mandate when development involves so many issues that one could say are political in nature? How should the Bank determine which considerations are appropriately within its mandate?

At this juncture, it is useful to recall that the Bank has discretion to interpret the political prohibition selectively.⁷⁹ The issue becomes the Bank's determination of its own jurisdiction. What principles or criteria will guide its decisions? According to this analysis, it should be the International Difference Principle, restated for this specific issue as follows:

The Bank must ensure that its involvement in the domestic policy of borrowers operates to the benefit of the least advantaged states, and the least advantaged within states.

According to commentators, the Bank's position is that it will focus exclusively on economic considerations, and economic considerations are any factors having a 'direct and obvious' economic effect relevant to the Bank's work.⁸⁰ The literature suggests the Bank follows a three-part test for 'direct and obvious': clear and unequivocal, preponderant, and of such impact and relevance as to make it a Bank concern.⁸¹

⁷⁸ IBRD Articles, art. IV. sec. 10; IDA Articles, art. V. sec. 6.

⁷⁹ Bradlow (n 60 above) 54-55.

⁸⁰ Shihata (n 13 above) 53-97.

⁸¹ Bradlow (n 60 above) 61.

Most commentators consider this test inadequate by itself –it is underdetermined. In other words, it allows too much room for too many judgments: what counts as an economic effect? What makes it sufficiently strong and relevant to the Bank? For these reasons, commentators suggest application of the test is difficult and has been arbitrary.⁸²

This approach could be usefully supplemented by employing a normative principle such as the International Difference Principle to guide this discretion. The criteria for determining what makes up economic factors and considerations must be tied to the basic criteria for just international development lending: does it put development capital to work for the benefit of the least advantaged? I would offer the following definition of ‘economic considerations’:

‘Economic considerations’ include all social factors which influence the degree to which Bank projects will in fact operate to the benefit of the least advantaged.

This means the Bank must be prepared to address questions of domestic social responsibility as related to its projects, on issues such as privatization, the use of competition law, and the social responsibility of corporate and investor conduct.⁸³

I believe this approach is consistent with the Bank’s own responsibilities and Articles. The purpose of the prohibition is to ensure the Bank acts impartially: to prevent discrimination based on politics, and the application of leverage through the Bank by one Member against another.⁸⁴ So interpreted, the political prohibition means recognizing that inequalities of distribution of wealth within states are not internal political matters –

⁸² Ibid.

⁸³ If intervention by the BWIs through programs like Structural Adjustment is allowed to protect the international financial system, there is no principled reason not to allow intervention to protect the world’s least advantaged.

⁸⁴ Bradlow (n 60 above) 54 (citing legislative history of the political prohibition).

they are the essential basis for the Bank's existence.⁸⁵ To look at the way in which a country's social resources are distributed internally among its members is not to act with partiality. Internal inequalities in wealth are matters of economic justice, which are squarely within the Bank's mandate. Inequalities in wealth distribution affect stability, levels of education, life expectancy, levels of health care, job training, etc., in short, the factors which are already the subject of Bank activities.

These are the sorts of factors which have led the Bank to invest in governance projects, for example, on the argument that they impact the borrower's investment prospects.⁸⁶ These are also the reasons why the Bank has moved away from its traditional approach to SAPs, by collaborating with the Fund to create Poverty Reduction and Growth Facilities based on each borrowing country's Poverty Reduction Strategy Paper. Moreover, in 2001 the Bank and the Fund together began a program of "social impact analysis" (SIA) through which to "assess the consequences of policy interventions...on the well-being of different social groups, with a special focus on the vulnerable and the poor."⁸⁷ However, the Bank's efforts continue to be criticized as inadequate in this area,⁸⁸ and the International Difference Principle suggests avenues for possible reform.

⁸⁵ See Hockett (n 49 above) 202 (constitutive documents should be interpreted in the context of the broad global human rights constitution within which the BWI's operate).

⁸⁶ Bradlow (n 60 above) 61.

⁸⁷ Fact Sheet, Ghazi (n 11 above) 72.

⁸⁸ Ibid 49. Hockett argues that BWI's need to take a stronger public position on the normative justification of such social insurance programs. Hockett (n 49 above) 198.

IV. International Justice and the Work of the Fund

Having suggested what a normative analysis of Bank activities according to the International Difference Principle might look like, it remains to offer such an analysis of its sister institution, the Fund.

A. The Fund's Role in International Justice

As with the Bank, the Fund is a social institution, whose core activity is to allocate a primary social good, also a form of wealth: hard currency reserves, and the terms of access to such reserves. Hard or "trade" currencies are an exhaustible social resource.⁸⁹ As with market size in the case of trade and capital supply in the case of development, the socioeconomic factors which influence the market's determination of which currencies are hard and which are soft, reflect a complex blend of natural and social inequalities, including the arbitrary distribution of natural resources and good or bad luck, and contingent social factors such as sound or unsound policy choices, historic patterns of economic development, exploitation or oppression, etc.

The fact that certain currencies are considered hard and others are not, necessarily creates inequalities in the distribution of hard currencies. This inequality is in part a function of the fact that currencies are national in nature, and those countries whose economic policies and performance support the hardness of their currency have a built-in advantage in the supply of that currency.⁹⁰ This inequality also reflects broader

⁸⁹ Accord RM Lastra, 'The International Monetary Fund in Historical Perspective,' (2000) 3 J. Int'l Econ. L. 507, 516 (Fund resources are finite hence their use is subject to oversight). While it is true that countries whose currencies are hard could in theory print more money, it is in the very nature of hard currency countries that they not pursue such policies or risk the tradability of their currency. Therefore, hard currency is in essence exhaustible even for hard currency countries.

⁹⁰ The fact that in today's floating exchange rate environment most currencies are freely convertible does not itself alter the preference on the part of international firms and central banks for those currencies

contingent historic factors such as the colonial legacy of the global economic system, which contribute to the hard-currency attributes of some economies, and undercuts such attributes of others. Those states whose currencies are hard have an abundance and a capacity to self generate, whereas those states whose currencies are soft are always at risk of scarcity and cannot create this resource indigenously.⁹¹

This leads states to the rational decision that it is useful to create an international market for hard currencies, to supplement national economic mechanisms which influence a state's supply of hard currencies. Through such a market, hard currencies can be made available at rates set by the market. Such a market serves the self-interest of borrowers and lenders alike. Lending states put their hard currencies to work in the satisfaction of trade debt owed to their own producers, generating export volumes and future economic opportunities for themselves, as well as contributing to stability in foreign relations through support for other states' commercial activities. Borrowing states have access to needed goods and services through hard currency supplies they could not generate domestically.

However, the facts of inequality mean that, just as in trade it is the case that reciprocal market access could not in all cases benefit the least advantaged, so in the case of hard currencies a private market would not be equally beneficial to all states. Due to the same kinds of natural and social inequalities which affect a state's capacity to generate a supply of hard currency, not all states can afford to borrow needed hard currencies on commercial terms in the private market. For this sort of reason, it is

considered "hard" when seeking settlement of trade debts or reserve currencies. Thus the demand for such currencies, the genesis of balance of payments problems, and the advantage which those jurisdictions have in supplying their own demand for it.

⁹¹ I am setting aside for the moment the issue of whether by making better policy choices they could harden their currency. This would not in any case deal with natural inequalities or historical contingencies.

rational for states to create an institution such as the Fund, which draws from the same sources (ultimately from hard currency states themselves),⁹² but is institutionally oriented to meet the specific currency lending needs of less wealthy states, and can lend on other than commercial terms.

Since the Fund's core function with respect to these hard currency resources is to allocate them, this intimately involves the Fund in distributive justice concerns: by what principles and rules are these social goods allocated, and to whose benefit? To determine this, we need a theory of Just International Monetary Policy.

1. *Toward a Theory of Just International Monetary Policy*

As with trade law we looked at the function of market access, here we look to the Fund's role as a lender, specifically a balance of payments lender, which suggests we focus on access to hard currencies.⁹³ As an initial matter, access to hard currencies is a function of the private currency market. The Fund exists to make these currencies available to states which for one reason or another cannot meet their needs through the export operations of their private sector, their own central bank reserves, or through the private currency market.⁹⁴

The key normative implication of Justice as Fairness for hard currency lending is that states do not in a categorical sense deserve their relative supply of hard currency, insofar as it is a product, in part, of natural inequalities which are morally arbitrary,

⁹² The IMF's activities are funded from both member states' quota subscriptions, and from the IMF's own line of credit with banks and governments. See Head (n 58 above) 25 – 26 (discussing quota subscriptions); Ghazi (n 11 above) 8 (Fund is also authorized to obtain currency from private market sources but it has never done so).

⁹³ Hockett suggests a further theoretical link between justice and lending, or as he puts it between justice theory and finance theory, or an insurance model, namely, that both involve risk allocation under conditions of uncertainty. See Hockett (n 49 above) 179-181.

⁹⁴ Ibid 194 (existing necessity of both markets, and justice, to the possibility for international financial institutions to deliver on their social promise).

compounded by social inequalities.⁹⁵ This means that states cannot be presumed to be entitled to their particular supply of hard currency, and that resulting inequalities in the distribution of hard currency must be justified.

Applying this principle to the Fund's role as manager of international currency reserves, we can derive the following as an application of our basic principle of global distributive justice to the work of the Fund:

In order to justify inequalities in the distribution of hard currencies, states must ensure that access to hard currencies is structured so as to benefit the least advantaged.

How does the Fund look from this perspective?

As was the case with the Bank, the very existence and mission of the Fund suggest that the Fund plays a normatively justifiable role, making wealthy states' abundance of hard currencies available to states with less access to trade currency. By putting hard currency to work on near-commercial terms in the economies of states without adequate indigenous supplies of such currencies, the Fund is conferring a benefit on less advantaged states.⁹⁶

However, whenever there is a general economic crisis or a country-specific crisis, it is much harder for certain states to generate or borrow needed hard currencies.

Moreover, the demand for hard currency exceeds currency-poor states' ability to pay

⁹⁵ As with development capital supplies, this raises the problem of ambition-sensitivity, namely how to account for the fact that good social policies contribute to both to the hardness of one's currency, and to an adequate supply of others' hard currencies. See note 51 above.

⁹⁶ Head (n 58 above) 95-96 (documenting the considerable wealth transfers which IMF facilities have effected for the benefit of the least developed members).

commercial rates, so if the only access to hard currency was through private banks at commercial rates, economic opportunities would go unrealized.⁹⁷

This brings us to the issue of the *terms* on which the Fund makes hard currency available. The Fund offers two basic types of facilities: “regular” or non-concessional facilities, which are not in fact loans but purchase and repurchase agreements;⁹⁸ and concessional facilities, which are truly trade currency loans to developing countries.⁹⁹ The Fund’s regular facilities consist of four main lending programs: Stand-By Arrangements, the Extended Fund Facility, the Supplemental Reserve Facility and the Compensatory Financing Facility.¹⁰⁰ All have varying eligibility criteria and repayment terms, and charge interest that is slightly below, but keyed to, market rates.¹⁰¹ The Fund’s concessional facilities consist of the Poverty Reduction and Growth Facilities (PRGFs), which replaced the earlier SAPs and Enhanced SAPs, and charge only 0.5% interest per year.¹⁰²

The terms of access to such currencies through each facility are themselves a social resource. In other words, the terms on which the Fund makes its currencies available through regular facilities (preferential rates), and the terms on which the Fund makes its currencies available through concessional facilities (concessional rates) are themselves a further socially-produced, and socially allocated, resource.

⁹⁷ Exporting states would lose sales, importing states much-needed goods and services, and less advantaged states would be tempted to employ currency controls, devaluations, etc., destabilizing the international monetary system to the detriment of all.

⁹⁸ See Head (n 58 above) 24 (describing operation of SBA and EFF purchase/repurchase obligations).

⁹⁹ See Lastra (n 90 above) 517-18.

¹⁰⁰ See generally Head (n 58 above) 24-25 (reviewing types of facilities).

¹⁰¹ See Ghazi (n 11 above) 13

¹⁰² *Ibid.* (One commentator suggests that the category of concessional facilities also includes special facilities such as the oil facility, accelerated procedures such as the emergency financing mechanism, and exceptional facilities such as the supplemental reserve facility and contingent credit line for sudden and disruptive events). See Lastra (n 90 above) 519-20. I will follow the narrower approach and restrict my attention to the PRGFs since the rest charge higher, near-market rates.

In this sense, the Fund's regular facilities lending is similar to the principle of free trade in WTO and to the Bank's preferential lending through the IBRD – helping to equalize opportunities to access hard currencies in a manner consistent with the basic requirements of Justice as Fairness. However, in the same manner that with respect to trade, a system of purely free trade was not enough due to the facts of inequality; so in hard currency lending a system of pure private market currency transactions, or even a blended system of private bank commercial currency transactions and Fund preferential lending, would not be enough. Because developing countries have limited domestically generated supplies of hard currency and limited resources to borrow such currencies, they cannot get enough through these avenues, meaning that the overall inequality in currency supplies will not work to their advantage.

Continuing the analogy to free trade from the previous section, private market and regular Fund facility lending is necessary, but not sufficient, for international justice. It is not enough that hard currencies be made available, even at below-commercial terms. The International Difference Principle asks that hard currencies be made available under such terms and in such a manner, that it benefits the *least* advantaged.

In terms of the International Difference Principle, this suggests the following corollary:

In order that access to hard currencies benefit the least advantaged, states must offer concessional access to development capital.

The PRGFs are, in the balance-of-payments lending context, the structural analog to the WTO's Special & Differential Treatment policies in trade, and the Bank's IDA lending: concessional access to hard currencies as a tool for justifying inequality. They represent that specific aspect of the Fund which directly addresses the inequality in the

distribution of hard currencies from the perspective of the least advantaged. It is the Fund's responsibility to see that this most valuable social good – concessional access to hard currencies – is in fact structured so as to benefit the least advantaged. How can this be carried out at the operational level?

B. Operational Implications of a Theory of Just Monetary Policy

There are many aspects of the Fund's operations which would seem to meet the basic thrust of the International Difference Principle, at least at a general level. To begin with, there is the Fund's very existence and basic mission. Moreover, there is the fact that the Fund operates through all of its facilities almost exclusively with countries that are in some stage of development.¹⁰³ Finally, there is the fact that the Fund does indeed offer concessional hard currency lending through its PRGFs.

However, a thorough evaluation of the justice of the Fund's operations, and the full development of a theory of just international monetary policy, would require taking this general principle, and deepening the analysis through a program by program evaluation of the Fund's operation: are they in fact structured to benefit the least advantaged, and do they in fact operate this way? And what does the way the Fund actually works, suggest about principles of just monetary policy in the real world?

As with the Bank, I am going to focus in this essay on two areas: the Fund's mission and priorities, and its involvement in domestic policies.¹⁰⁴

1. The Fund's Mission and Priorities

¹⁰³ It can also be said that the majority of the Fund's personnel budget is dedicated to pay for staff devoted to addressing developing country needs. Conversations with Fund executives, October 25, 2007.

¹⁰⁴ Other promising areas include the Fund's system for allocating SDRs, its decision making structure, and its system for choosing and evaluating projects. See generally Head (n 58 above) (summarizing critiques of IMF policies and practices in these areas).

As discussed above, the Fund's resources are made available under two types of arrangements: regular facilities and concessional facilities. The PRGF's specific purpose is to make hard currencies available to the least advantaged states on deeply preferential terms. PRGF loans are typically repaid on what is for the Fund a very long term (up to 10 years), with interest at 0.5% per year.¹⁰⁵ Moreover, PRGF funds come from a different source: a Trust Fund consisting of funds generated by prior sales of IMF gold assets; and loans and grants from wealthy members.¹⁰⁶

In terms of resource commitments the Fund currently emphasizes its regular facility lending, with PRGF lending a miniscule portion of its portfolio.¹⁰⁷ Justice as Fairness requires us to evaluate this scheme with reference to our normative touchstone, namely, is this prioritization benefiting the least advantaged? The PRGF program has the most potential for justifying inequalities in hard currencies, by making them work for the benefit of the least advantaged. However, despite the evident inequality in the global distribution of hard currencies and in the borrowing power of states, most of the Fund's activities nevertheless continue to involve preferential and not concessional lending.¹⁰⁸

In this respect, application of the International Difference Principle could in fact require a complete inversion of the Fund's priorities, along the following lines:

The Fund should prioritize those activities which most benefit the least advantaged. This means, in particular, that the Fund should emphasize its PRGF concessional lending as its primary mission, followed by its regular facility lending programs.

¹⁰⁵ See Ghazi (n 11 above) 10-13.

¹⁰⁶ See Head (n 58 above) 24 (discussing Trust Fund and PRGF funding sources in general).

¹⁰⁷ In 2006 PRGF lending represented 1.5% of total IMF lending. IMF, 'IMF Annual Report 2006,' (2006) <http://www.imf.org/external/pubs/ft/ar/2006/eng/index.htm>.

¹⁰⁸ See C Abugre, 'Still SAPping the Poor: A Critique of IMF Poverty Reduction Strategies' (2000) <http://www.wdm.org.uk/resources/reports/debt/stillsappingthepoor01062000.pdf> (citing declining economic conditions and increasingly inequitable distribution of wealth in numerous countries despite IMF activity).

Such a reorientation would put the PRGF, that aspect of the Fund's activities which most benefits the least advantaged, at the center of the Fund's priorities. This would need, of course, to be consistent with sustainability and prudential considerations in view of the Fund's stewardship role with respect to currency resources.

2. *Conditionality*

This second aspect of our inquiry concerns the Fund's involvement in the domestic social policy of borrowing states. Consistent with its prudential obligations, the Fund has a role in evaluating the degree to which the domestic social policies of borrowing states are themselves part of the balance of payments problem, and the degree to which such policies risk squandering Fund currency reserves, which are an exhaustible social resource.¹⁰⁹ The Fund exercises this role through what it calls "conditionality," which it defines as the link between "the approval or continuation of the Fund's financing and the implementation of specified elements of economic policy by the country receiving this financing."¹¹⁰

Conditionality functions in IMF lending as a substitute for collateral, through the imposition of policy restrictions on borrowing states as a condition of releasing credit tranches.¹¹¹ When a Fund member needs to draw on the Fund for hard currencies in excess of its own reserve account, such draws are subject to conditions negotiated between the Fund and the drawing country. Such conditions can include such sensitive domestic issues as wage rates, levels of public expenditures, budget deficits and export

¹⁰⁹ This is the "coercive" aspect of Fund operations. See Ghazi (n 11 above) 5; Hockett (n 49 above) 195.

¹¹⁰ IMF, 'Conditionality in Fund-Supported Programs – Overview' (June 8, 2007) <http://www.imf.org/external/np/pdr/cond/2001/eng/overview/index.htm>

¹¹¹ Lastra (n 90 above) 517.

levels.¹¹² Similar conditions are also imposed as a function of a borrower's participation in the Bank's HIPC program, through the link between HIPC and participation in the Fund's PRGF.¹¹³

Conditionality has been one of the most controversial aspects of the Fund's operations. The conditions the Fund imposes as a cost of its intervention have a tremendous impact on the domestic policies and development strategies of recipient countries.¹¹⁴ Criticism has been particularly strong with respect to the Fund's Structural Adjustment Programs or SAPs, and the successor Enhanced Structural Adjustment Facility.¹¹⁵ Such criticism is largely due to two factors: the leverage the Fund has by virtue of its role to insist on domestic policy reforms,¹¹⁶ and the controversy surrounding the soundness and ideological basis of the Fund's approach to domestic policy.¹¹⁷

Although the Fund has begun to acknowledge shortcomings in its conditionality and structural adjustment programs,¹¹⁸ Justice as Fairness requires more than a recognition of problems in the implementation of the Fund's policies – it requires a radical re-examination of the Fund's conditionality program.

What principles or criteria should guide this re-evaluation? According to this analysis, it should be the International Difference Principle. As was the case with the Bank, in order to be consistent with both the International Difference Principle, which

¹¹² See generally Ghazi (n 11 above) 16-17.

¹¹³ C Abugre, 'SAPping the Poor: Structural Adjustment – the Forgotten Issue' (1999) www.wdm.org.uk/resources/reports/debt/sappingthepoor01061999.pdf (citing link between HIPC participation and PRGF).

¹¹⁴ See generally Hurrell and Woods (n 8 above) 30-33 (surveying impact of IMF).

¹¹⁵ See Ghazi (n 11 above) 47 (1990 Bank paper).

¹¹⁶ But see Head (n 58 above) 75 (downplaying the leverage aspects of conditionality in view of borrowing countries' formal right to say no).

¹¹⁷ I am referring here to the Fund's ideological approach, which has been called "unrepentant neoliberalism." Deacon (n 8 above) 220; see generally J Stiglitz, *Globalization and Its Discontents* (2003). But see Head (n 58 above) 61-63, 69-75 (summarizing and rejecting the ideology, or what he calls the "bad medicine," critique).

¹¹⁸ See Head (n 58 above) 72-73 (discussing 2002 reforms to Fund conditionality policies).

focuses on least advantaged states, and the domestic Difference principle, which focuses on the least advantaged *within* states, the Fund's domestic involvement should focus on the degree to which such policies affect the welfare of the poorest segments of a borrower's society.¹¹⁹

Current Fund practices have been criticized for failing to adequately take into account the redistributive effects of Fund policies.¹²⁰ While the Fund has begun to publicly note the distributive impact of its policies,¹²¹ and develop new approaches to conditionality,¹²² such policies continue to be criticized,¹²³ and require a sustained normative reevaluation according to the International Difference Principle, so that the inequality in international currency resources can be effectively put in the service of the least advantaged.¹²⁴

This suggests that that the Fund consider reconfiguring its approach to conditionality along the following lines:

The Fund should ensure that its involvement in the domestic policy of borrowers operates to the benefit of the least advantaged. In particular, Fund conditionality

¹¹⁹ See supra note 77.

¹²⁰ See eg Head (n 58 above) 81-84 (summarizing and largely endorsing the distributive critique of Fund policies). Hockett, for example, argues that BWIs need to take a stronger public position on the normative justification of social insurance programs. Hockett (n 49 above) 198.

¹²¹ Hockett (n 49 above) 223.

¹²² The Fund now guides its PRGF lending through Poverty Strategy Reduction Papers, designed in consultation with borrowing states, and supplemented since 2001 by the "social impact analysis" (SIA) program, through which the Fund attempts to assess the consequences of its conditionality policies on the well-being of different social groups, with a special focus on the vulnerable and the poor. IMF, 'IMF Annual Report 2003,' <http://www.imf.org/external/pubs/ft/ar/2003/eng/index.htm>. However, these reforms do not specifically address the most critical issue highlighted by the International Difference Principle, namely that conditionality policies be specifically tailored to benefit the least advantaged. Even the SIA is intended more to mitigate adverse effects rather than to make the benefit of the least advantaged a policy priority.

¹²³ See eg Ghazi (n 11 above) 72; Abugre (n 108 above); but see Head (n 58 above) 82 (equity criticisms understate Fund efforts in this area).

¹²⁴ See eg N Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability' (2006) 12 U.C. Davis J. Int'l L. & Pol'y 331 (critical of conditionality from a human rights perspective); O Eldar, 'Reform of IMF Conditionality: A Proposal for Self-imposed Conditionality' (2005) 8 J. Int'l Econ. L. 509 (proposing that conditionality be entirely borrower-driven, with Fund approval).

must be tailored towards enhancing those domestic policies most likely to benefit the least advantaged states, and the least advantaged within borrowing states.

The Fund has attempted to address this issue by shifting away from its traditional approach to SAPs through creation in 1999 of the Poverty Reduction and Growth Facility, based on each borrowing country's Poverty Reduction Strategy Paper (PRSP).¹²⁵ A country's PRSP is supposedly developed primarily by the borrowing country, and involves input from all country stakeholders, presumably contributing to fuller consideration of distributive effects.¹²⁶ The PSRP process was supplemented in 2001 by the "social impact analysis" (SIA) program, through which the Fund attempts to "assess the consequences of policy interventions...on the well-being of different social groups, with a special focus on the vulnerable and the poor."

Most recently, in 2002 the Fund announced a new approach to conditionality, through which conditionality policies are to follow four principles: national ownership, parsimony, tailoring to member circumstances, and clarity or transparency.¹²⁷ Through the PRSPs and the SIA program, the Fund hopes to "assess the implications of key policy measures on the well-being of different social groups, especially the vulnerable and the poor."¹²⁸

While these laudable reforms seemingly address several of the most prominent critiques of IMF conditionality, criticisms of Fund efforts in this area continue.¹²⁹ In the words of one commentator largely sympathetic to the Fund, "the IMF still does not give

¹²⁵ PRSPs are intended to guide all Bank and Fund activity in the borrowing country, including both implementation of the PRGF and any other conditionality imposed as a function of Fund lending.

¹²⁶ But see Head (n 58 above) 78 (questioning the value of increased public input into what are highly technical IMF decisions).

¹²⁷ See IMF Guidelines on Conditionality, <http://www.imf.org/external/np/pdr/cond/2002/eng/guid/092302.pdf>; Head (n 58 above) 73).

¹²⁸ *IMF Annual Report 2003* (n 122 above) 44.

¹²⁹ See eg Ghazi (n 11 above) 72; Abugre, (n 108 above); but see Head (n 58 above) 82 (equity criticisms understate Fund efforts in this area).

enough attention to issues of distributional and social justice.”¹³⁰ In particular, with respect to the subject of this essay, these reforms do not specifically address the most critical issue highlighted by the International Difference Principle, namely that conditionality policies be specifically tailored to benefit the least advantaged. The Fund’s “social impact analysis” program does seem designed to at least assess impact on the least advantaged, but it is intended more to mitigate adverse effects rather than to make the benefit of the least advantaged a policy priority.¹³¹ Instead, following the International Difference Principle, the Fund should use its “enforcement” powers¹³² to pursue conditionality policies more specifically tied to the benefits of the least advantaged.¹³³

V. Conclusion

To review, this normative analysis of Bank and Fund lending activities began with the following statement of an international principle of justice drawn from Rawls’ Justice as Fairness:

International social and economic inequalities are just only if they result in compensating benefits for the least advantaged.

From this, we derived normative principles more closely tied to the institution’s responsibilities in international economic relations, as established by the states which

¹³⁰ See Head (n 58 above) 83.

¹³¹ Moreover, the Fund response to finding threats to the least advantaged include policies which have not worked particularly well even in wealthy societies, such as cash subsidies, price controls on essential commodities, and job retraining.

¹³² Bradlow (n 60 above) 728. Bradlow suggests that the Fund use its “implementation powers” through surveillance and technical assistance to collect information and offer expertise supporting such policies.

¹³³ Outgoing IMF Managing Director Michel Camdessus offered a broad vision for “social conditionality” shortly after leaving office in 2001. M Camdessus, ‘The IMF at the Beginning of the Twenty First Century: Can We Establish a Humanized Globalization?’ (2001) 7 *Global Governance* 363, 374 – 77.

founded and control them. With respect to the Bank's role in development capital lending, this means:

In order to justify inequalities in the distribution of development capital, states must ensure that access to development capital is structured so as to benefit the least advantaged.

With respect to the Fund's role in balance of payments lending, this means:

In order to justify inequalities in the distribution of hard currencies, states must ensure that access to hard currencies is structured so as to benefit the least advantaged.

The next step was to begin to consider how, given the facts of inequality, access to development capital and hard currencies might indeed benefit the least advantaged, which yielded the following suggested directions for policy reform. In terms of mission:

The Bank should prioritize those activities which most benefit the least advantaged. This means in particular, that the Bank should consider emphasizing IDA debt forgiveness and concessional lending as its primary mission, followed by IBRD lending.

The Fund should prioritize those activities which most benefit the least advantaged. This means, in particular, that the Fund should emphasize its PRGF concessional lending as its primary mission, followed by its regular facility lending programs.

In terms of conditionality:

The Bank should ensure that its involvement in the domestic policy of borrowers operates to the benefit of the least advantaged. This means, in particular, that "economic considerations" include all social factors which influence the degree to which Bank projects will in fact operate to the benefit of the least advantaged states, and the least advantaged within borrowing states.

The Fund should ensure that its involvement in the domestic policy of borrowers operates to the benefit of the least advantaged. In particular, Fund conditionality must be tailored towards enhancing those domestic policies most likely to benefit the least advantaged states, and the least advantaged within borrowing states.

Some may be quite uncomfortable with the breadth of the agenda outlined above, as casting the Bank and Fund in roles that looks suspiciously like governance, whereas

the Bank and Fund are not intended to be governments. There is a core of truth to this discomfort, but governance without government is the central characteristic of the challenge facing states and their institutions in the global era. Globalization can be understood as the triumph of market society at the global level, and markets need governance. Given the weaknesses of individual states in a globalizing environment, and the comparatively underdeveloped level of international institutions, this means there is a regulatory gap between global market and regulatory institutions. International organizations like the Bank and the Fund must step in.

Failure by the Bank and Fund to comprehensively organize their efforts according to the benefit to the least advantaged could result in projects which fail to achieve their original goal, or in fact put the least advantaged in a worse position. A justice framework allows us to understand that this is not just a technical failure, but an injustice which renders the entire international economic system that much less just. The Bank and Fund cannot simply lend on the assumption that eventually it will benefit the least advantaged, if it benefits everyone else. By virtue of their activities, the Bank and Fund have a responsibility to ensure that their projects do in fact benefit the least advantaged.