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GLOBAL JUSTICE AND THE BRETTON WOODS INSTITUTIONS

*Frank J. Garcia**

ABSTRACT

Together with the WTO, the Bretton Woods Institutions are 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. This essay explores how justice criteria might apply to the ideology and operations of the World Bank and the International Monetary Fund. Using the Rawlsian model of egalitarian justice adapted to international institutions by the author in connection with the WTO, this essay asks what difference it would make for the Bank and Fund if an explicit justice framework informed their international lending activities.

INTRODUCTION

Global social policy is currently managed through a variety of institutions including in particular the WTO and what are popularly called the Bretton Woods Institutions (BWIs): the International Monetary Fund (IMF or the Fund) and the World Bank (Bank).¹ In this essay, I propose to use the normative analysis I developed for the WTO² as a model for exploring

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¹ By global social policy, I mean (broadly speaking) policies designed and/or implemented at the trans-national 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 global social policy, see Bob Deacon, 'Social Policy in a Global Context', in Andrew Hurrell & Ngaire Woods (eds), *Inequality, Globalization and World Politics* (Oxford, UK:Oxford University Press, 1999) 211–47.

² Frank J. Garcia, *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade* (Transnational Publishers, Ardsley, N.Y. 2003); Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 Michigan Journal of International Law 925

the relationship between justice and the work of the BWIs. Insofar as the Bank and Fund are social institutions, charged with making decisions involving the allocation of 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. In particular, I want to consider the role of the Bank and Fund as institutions which form part of the 'basic structure', those institutions which discharge a fundamental allocative role in society and are therefore part of the larger inquiry into justice.³

The Bank began when one of its two primary lending organs, the International Bank for Reconstruction and Development (IBRD), was created in 1945 to help finance European reconstruction. Its mission soon 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 Bank's second lending institution, the International Development Association (IDA), was created in 1960 to assist the Bank's poorest clients through concessional (zero-interest) lending and outright grants.⁴

The IMF was created to bring stability to the exchange rate system and facilitate cooperation on international monetary matters in the aftermath of the Great Depression.⁵ Following the demise in the 1970s of the so-called Bretton Woods system of gold-pegged exchange rates, the Fund's role has shifted more towards that of an international financial institution.⁶ The IMF engages in short- and medium-term lending of hard or 'trade' currencies⁷ in response to balance of payments difficulties, with accompanying IMF 'conditions' involving domestic policy reforms.⁸ The IMF carries out

(2000); reprinted in *International Law Today* (Anthony D'Amato and Jennifer Abbassi, eds) (West, 2006); *Heights of Justice*, Lawrence A and Cunningham (eds), (Carolina Academic Press, Durham, N.C. 2006).

³ Both the Bank and the Fund were conceived at the Bretton Woods Conference to serve complementary roles in the post-war economy. Bahram Ghazi, *The IMF, the World Bank and the Question of Human Rights* (Ardsley, NY, Transnational Publishers, 2005) at 19–37. For an overview of the concept of a global basic structure and its role in the global justice debate, see Simon Caney, *The Global Basic Structure: Its Nature and Moral Relevance* (Paper presented at the annual meeting of the American Political Science Association, 2 September 2004, http://www.allacademic.com/meta/p58933_index.html).

⁴ See Ghazi, above n 3, at 19–37.

⁵ See generally Ghazi, above n 3, at 1–17.

⁶ See R.M. Lastra, 'The International Monetary Fund in Historical Perspective', 3 *Journal of International Economic Law* 507 (2000) at 512 (upon demise of exchange rate system, Fund shifted to broader international financial role).

⁷ See *ibid.*

⁸ The IMF also continues to monitor and investigate member states' exchange rate policies, and work to encourage members to remove any exchange controls, though I will not focus on those activities here. See generally Remarks by Sean Hagan, IMF General Counsel, *Proceedings of the 93rd Annual Meeting, American Society of International Law (ASIL)*, 24–27 March 1999, 115–116.

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 need.⁹

In this essay I seek to be ‘normative’ without being ‘prescriptive’. In other words, my primary aim is to employ a normative framework drawn from domestic political theory and first adapted to international trade, to suggest one approach to analyzing the work of the Bank and Fund with respect to global distributive justice.¹⁰ The theoretical challenge is to articulate for the Bank and Fund specific normative criteria that should inform their policy choices and operational decisions. In this essay I employ a version of Rawls’ Difference Principle, which I call the International Difference Principle, to derive initial versions of such normative criteria for the Bank and for the Fund. I conclude by illustrating the application of such criteria in one area of Bank and Fund operations, their involvement with the domestic policy of borrowing states. By doing so, I hope to suggest how introducing justice explicitly into the ongoing conversation concerning Bank and Fund reform, alters the nature of the questions asked and offers some guidance as to where appropriate solutions might lie.

I. INTERNATIONAL JUSTICE AND INTERNATIONAL ECONOMIC INSTITUTIONS

Elsewhere I have summarized my approach to the generation of an international normative application of domestic political theory,¹¹ based on my work applying Rawls’ theory of Justice as Fairness to international trade law.¹² Here I will only outline the minimum necessary in order to explain how this approach forms the basis for the specific application of the theory to the Bank and Fund in the sections which follow.

⁹ See Ghazi above n 3, at 10–11.

¹⁰ I have initially couched this discussion 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 Frank J. Garcia, ‘Globalization and the Theory of International Law’, 11 *International Legal 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 believe the substantive conclusions would be quite similar either way.

¹¹ Frank J. Garcia, *Developing a Normative Critique of International Trade Law: Special & Differential Treatment*, Working Paper Series No, University of Bremen Transformations of the State Research Centre, <http://www.sfb597.uni-bremen.de/pages/pubAp.php?SPRACHE=en> (forthcoming).

¹² Garcia, above n 2.

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 rhetorical reasons I think liberalism is the best normative language for modern secular international law.¹³ Within liberalism, I have chosen Rawls' 'Justice as Fairness', despite its complex relationship to international justice,¹⁴ because of its approach to the problem of inequality.

Rawls is particularly concerned with inequalities that arise in the distribution of social primary goods. The fundamental problem of distributive justice is that inequalities in natural primary goods (such as intelligence, health and imagination) often lead, through the operation of social institutions, to inequalities in the social distribution of social primary goods, such as rights, privileges, wealth, income, status, opportunities, etc. Such inequalities in social primary goods are not deserved, since they are deeply influenced by an underlying natural inequality which is morally arbitrary.

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'.¹⁵ Rawls develops this view into the theory of Justice as Fairness, in particular 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. Satisfying this criterion at the domestic level 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.¹⁶

There are many ways to catalogue similar inequalities in international economic relations, although the natural inequalities in this case are not

¹³ Liberalism is the normative tradition of many of the most wealthy and powerful states which control the BWIs, which are primarily western or western-style liberal democracies. 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. Moreover, the BWIs themselves have roots in the same tradition of liberalism, in particular liberal internationalism. On the intertwined roots of political liberalism, liberal internationalism, international law and the modern state system, see Anne Marie Slaughter, 'International Law in a World of Liberal States', 6 *European Journal of International Law* 1 (1995) at 5–10; Deacon, above n 1, at 223 (acknowledging liberal internationalist roots of IMF).

¹⁴ In *A Theory of Justice* Rawls limits his theoretical enterprise to principles of justice for what he assumes to be a closed domestic society, which by 1979 was already a questionable assumption. See Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979) 143–49. Globalization, and other developments in international relations generally and in international economic relations in particular, have rendered such assumptions untenable today. See Thomas Franck, *Fairness in International Law and Institutions* (New York, USA, NY: Oxford University Press, 1995) 12–13 (the requisite level of community has emerged at the international level to sustain a fairness analysis).

¹⁵ See John Rawls, *A Theory of Justice* (Belknap Press: Cambridge, 1971) at 102.

¹⁶ *Ibid* at 179.

individual attributes such as intelligence but national ‘attributes’ such as geography and climate. With respect to trade, contemporary analyses usually adopt economic ‘size’ as the most relevant concept by which to evaluate and measure the impact of inequality on trade liberalization.¹⁷ The central insight from the literature on smaller economies and trade is that smaller economies share certain characteristics that make their participation in the international trading system problematic.¹⁸ Small size is also an additional complicating factor affecting a country’s growth, policy options and development potential.¹⁹

These contingencies form the essential context in which any normative international political theory must operate. Translated into Rawlsian terms, the characteristics of smaller economies are a complex blend of both natural and social inequalities. Natural inequalities are strongly reflected in smaller economy characteristics such as smallness in population, smallness in territory, and heavy reliance upon commodities exports. Social inequalities are essentially connected to social institutions, including the smaller economy’s political and economic systems, prior geopolitical arrangements, and international economic law and diplomacy, all of which together establish patterns of distribution of social goods such as wealth, knowledge, rights and privileges within and between states, which ‘define men’s [sic] rights and duties and influence their life prospects’.²⁰ Smaller economy characteristics that reflect social inequalities include their limited human and technological resources, which reflect both small populations and the effects of social allocations resulting in inadequate educational and research institutions. Such allocations are heavily influenced by underlying natural inequalities, and by non-economic factors such as racial, religious or nationalistic prejudice.

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’

¹⁷ The smallness of an economy will always be determined in comparison with other economies, usually in terms of per capita GDP, supplemented by population and land size, as rough indicators of an economy’s human, land and capital resources.

¹⁸ Smaller economies are vulnerable when they participate in trade for two reasons: the relative openness of smaller economies, and the asymmetry between larger and smaller economies in resources and economic strength. Overall, smaller economies face the risk that the distribution of benefits and burdens within the trading system will be skewed in favor of the dominant party. See, e.g. Dermot McCann, ‘Small States in Globalizing Markets: The End of National Economic Sovereignty’, 34 *New York University Journal of International Law & Policy* 281 (2001) (citing broad consensus as to factors leading to smaller economies’ overdependence on exports, and consequent vulnerability).

¹⁹ *Overcoming Obstacles and Maximizing Opportunities: A Report by the Independent Group of Experts on Smaller Economies and Western Hemispheric Integration*, March 1998, at 2; see *ibid* (intensity of pressures facing smaller economies raises question as to their continued effective sovereignty); Richard L. Bernal, ‘The Integration of Small Economies in the Free Trade Area of the Americas’ 9 (Ctr. for Strategic and International Studies, Policy Papers on the Americas, vol. IX no. 1, 6–10, 1998).

²⁰ *Theory of Justice*, above n 15, at 7.

terms, they are morally arbitrary.²¹ 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 in the original position.²² Rawls argues in *A Theory of Justice* that the representatives would choose principles of justice which maximize the minimum bundle of social goods they are likely to receive in the face of life's inequalities.²³ In the domestic original position, the representatives chose two principles, a principle of equal liberty and a principle of distributive justice. In Rawls' account of the second international choice problem, representatives of states do not in fact choose a principle of distributive justice.²⁴ However, as has been argued by Beitz, Barry and others, 'there is no reason to think that the content of the principles would change as a result of enlarging the scope of the original position'.²⁵

1. *An international difference principle*

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

(I). 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.

²¹ Ibid at 72.

²² For Rawls, the problem of choice of principles is articulated in terms of the original position, in which representative 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. Ibid at 152–57.

²³ Ibid.

²⁴ 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 Lea Brilmayer, 'What Use is Rawls' Theory of Justice to Public International Law?' 6 *International Legal Theory* 36 (2000); Fernando Tesón, *A Philosophy of International Law*, Ch. 4. (Boulder, CO: Westview Press, 1998).

²⁵ Garcia, above n 2, at 134 note 8 and sources cited therein (quoting Christopher Stone).

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.²⁶ Therefore, Rawls' argument should lead to the same conclusion: international social inequalities are justifiable only if they satisfy the difference principle.

B. International economic institutions and international justice as fairness

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'.²⁷ In the case of international trade, we already have the equivalent of a constitution and a legislature, though imperfect ones, in the GATT/WTO system and its attendant rounds of international economic negotiation and diplomacy.²⁸

1. Operationalizing international justice as fairness: the example of trade law

The difference principle requires that inequalities in the distribution of social primary goods be justified by their contribution to the well-being of the least advantaged. At the international level, the doctrine of free trade is key to the justification of such inequalities. By allowing the principle of comparative advantage to operate, liberalized 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, merely liberalizing trade, which establishes a libertarian system of equality of opportunity (reciprocal free trade rules), is not adequate to make the system work to the benefit of the least advantaged, since the reality of gross inequalities in international endowments undercuts the possibility of effective equality of rights among states (sovereignty).²⁹ For this reason, the difference principle suggests that just trade cannot consist only of free trade. Trade law needs justification according to the difference principle: it should make inequalities work to benefit least advantaged.

For trade, the key lies in understanding the way many of the natural and social inequalities among states translate into the relative strength of

²⁶ This conclusion is consistent with the positions taken by the leading proponents of a Rawlsian theory of international distributive justice. See *ibid.*, at 134 note 6 and sources cited therein.

²⁷ Theory of Justice, above n 15, at 13.

²⁸ On the constitutional and law-making function of trade institutions, and their shortcomings in this regard, see Ernst-Ulrich Petersmann, 'Constitutionalism and International Organizations', 17 *Northwestern Journal of International Law & Business* 398 (1997); but see Jeffrey L. Dunoff, 'Constitutional Concepts: The WTO's "Constitution" and the Discipline of International Law', 17 *European Journal of International Law* 647 (2005) (arguing that Petersmann's account is descriptively inaccurate and normatively undesirable).

²⁹ *Accord Beitz*, above n 14, at 163 (objections to justice of a domestic system of natural liberty apply with equal force to an international version as well).

consumer markets and producer groups. 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 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 states organize market access in such a way that it benefits the least advantaged. This can be stated in normative terms as follows:

(II). In order to justify inequalities in the size of markets, states must ensure that market access is structured so as to benefit the least advantaged.

Free trade is a principle of market access, but it is reciprocal market access: you open yours, and I will open mine. Something more than reciprocal trade liberalization is needed in order to ensure that market access benefit the least advantaged.

Trade law offers that something more in the form of special and differential treatment. At the core of 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. It is this asymmetry which enables special and differential treatment to play a key role in justifying inequalities in the international allocation of social goods. 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 preferential access for developing countries allows the inequalities that manifest themselves in the form of wealthy consumer markets to work to the benefit of the least advantaged, thereby meeting the central criteria for distributive justice.

This conclusion can be restated in normative terms as follows:

(III). In order to justify inequalities in the size of markets, states must offer preferential market access structured so as to benefit the least advantaged.

This can be understood as an obligation upon states with respect to how they structure trade law as a distributive mechanism, in particular how they structure special and differential treatment, as a condition of the difference principle.

In order to more fully determine the necessary contours of such a policy in practice, we must examine how in fact special and differential treatment operates in contemporary international trade relations. I will give only an abridged summary of this process here, in order to illustrate the approach before turning to the proper objects of inquiry here, the Bank and the Fund.³⁰

Current applications of the market access aspects of S&D have been subject to a variety of political constraints and conditions: they are unilateral, they exclude the most competitive goods, and they impose non-trade related conditions.³¹ The difference principle as applied to international trade suggests that these conditions are not normatively justifiable.³² First, as a matter of basic justice the unilateralism of existing trade preference programs must be reconsidered, since justice is not optional and unilateralism favors the more advantaged.³³ Second, the exclusion of the goods most competitive with the manufactured goods of developed states is truly perverse: instead of structuring the trading relationship for the benefit of the least advantaged partner, the import sensitivity exclusion deliberately structures the relationship in favor of the less-competitive domestic industry of the granting state. Third, by subjecting the actual availability of the preferences to conditions clearly related to the domestic and foreign policy agendas of the granting state, GSP programs again turn the normative justification of market inequalities on its head, benefitting the granting state and not the beneficiary.³⁴

By examining current special and differential treatment practice in view of the normative guideline developed above, I further distill policy-specific criteria with respect to market access programs:

(IV). In order to benefit the least advantaged, preferential market access (special & differential treatment) must be binding, non-exclusionary, and unconditional.

These criteria should be observed in the implementation of special and differential treatment today, if the goal is to implement it in a form that will reflect justice as fairness and contribute to the justification of the international trade system.

II. JUSTICE AND THE BRETTON WOODS INSTITUTIONS

In the foregoing section, I have outlined one approach to developing a normative theory of international economic law, in the area of trade.

³⁰ For a fuller treatment, see above n 2 and n 14 and sources cited therein.

³¹ See generally Garcia, above n 2, at 155–168.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

To recap, it involves four steps: first mapping the domestic theory onto the international subject and generating an international form of the relevant normative principles, in this case the International Difference Principle; second, examining the specific nexus between the policy context and the normative system (i.e. what is the institution allocating?), which was market access and the terms of market access in the case of trade; third, formulating at the constitutional level the core distributive principle, derived from the International Difference Principle, that should guide the institution's allocative activity; and fourth, developing specific criteria for policy development at the operational levels by applying the international normative criteria to the specific allocative policies of the relevant institution, which are special and differential treatment in the case of trade.

What remains is to perform this same exercise for the Bank and Fund. As allocative social institutions created by states, the Bank and Fund make decisions which influence the distribution of social primary goods, in this case development capital and hard currencies.³⁵ Therefore, the appropriate policy nexus, is lending – development capital lending in the case of the Bank, and balance of payments lending in the case of the Fund. Generating a normative theory for the BWIs will involve analyzing the lending activities, terms and policies of the Bank and Fund with reference to distributive justice criteria stemming from states' obligation to implement justice in how they set up the basic structure.

This will involve application of the methodology of the previous section to the Bank and Fund.³⁶ The first step, derivation of an international normative principle, has already been taken, resulting in the International Difference Principle:

(I). 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.

³⁵ As mentioned above, (see above n 1), 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.

³⁶ This is of course a large undertaking—my aim in this essay is to offer a preliminary analysis and overview of what such an undertaking might involve and reveal. A more extensive but still preliminary discussion can be found in Frank J. Garcia, *Justice, Bretton Woods Institutions and the Problem of Inequality*, 'Developing Countries in the WTO Legal System' Conference, University of Minnesota Law School, May 25, 2007 (on file with author); a definitive discussion of these issues will involve a book-length treatment, in process.

Steps two through four will involve identifying the core implications of the International Difference Principle for Bank and Fund activity.³⁷ I will carry out this process in sections A and B, respectively.

A. International development lending: the bank and global inequality

1. *The bank's role in international justice*

The Bank is a social institution created and managed by states, whose core activity is to allocate primary social goods: development capital, and the terms of access to such capital, which 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, and trade relations, all of which affect the capacity of the system to generate surplus capital for development, and the amounts of such capital.

Since the Bank's core function with respect to these resources is to influence their allocation 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.

a. *Toward a theory of just international development lending*

As 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.³⁸ The key normative implication of Justice as Fairness for development lending is that states do not in a significant sense 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.³⁹ This means that states cannot be

³⁷ I want to emphasize that in this analysis, I am taking as 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 elsewhere (see above n 36)] global markets for development capital and currency exchange, and these institutions in particular, the next question is how justice might influence their operations.

³⁸ 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 conditions of uncertainty. See Robert Hockett, From "Mission Creep" to Gestalt Switch: Justice, Finance, the IFIs, and Globalization's Intended Beneficiaries', 37 *George Washington International Law Review*. 167 (2005) at 179–81.

³⁹ 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 the degree of ambition-sensitivity of a particular distributive theory. See Garcia, above n 2 at 61. Hockett, for

presumed to be entitled to their particular supply of development capital, and that resulting inequalities in the distribution of development capital must be justified. This has implications for how states structure the Bank's role as development capital lender. We can formulate the following, as an application of the International Difference Principle to the work of the Bank:

(II). 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.

How does this apply to the work of the Bank?

As an initial matter, access to development capital is a function of the private capital markets. Whenever there is a general or country-specific economic crisis, however, it is much harder for certain states to borrow needed development capital on the private market. Moreover, their 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 development capital needs would go under-supplied.⁴⁰ Therefore, 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.

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 of access to development capital 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, I want to suggest that 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. Because the least advantaged states have limited domestic capital formation capabilities and limited resources to borrow capital, they cannot get enough through these avenues, meaning that the overall inequality in capital will not work to

example, suggests in this regard that global distributive justice by BWIs should focus on what he calls 'ethically exogenous' benefits and burdens only. See. Hockett, above n 38, at 193.

⁴⁰ This was one reason for the formation of the IDA. See Ghazi above n 3, at 24.

their advantage. Continuing the analogy to free trade from the previous section, IBRD-style lending is 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 terms of the International Difference Principle, this suggests the following corollary:

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

In this sense, the IDA's policies and programs are the structural analog in lending 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 this specific aspect of the Bank's activities which most directly addresses the inequality in development capital from the perspective of the least advantaged.

This brings us to the third step in the process, which can be restated in normative terms as follows:

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

In order to fully reflect the International Difference Principle in its mission and operations, the Bank must ensure that its concessional lending programs will *actually* benefit the least advantaged.

2. Operational implications of a theory of just international development lending
How can this normative agenda be carried out at the operational level? In this essay, I will focus on only one area of inquiry: how the Bank determines the nature and extent of its involvement in the domestic policies of borrowing state.⁴¹

a. The bank's role in domestic social policy

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.⁴²

⁴¹ Other fruitful areas of inquiry include the Bank's mission and priorities, how the Bank selects and evaluates ongoing projects, and how the Bank determines success. See Garcia, above n 36.

⁴² 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. See Hockett above n 38, at 195.

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'.⁴³ This criticism is largely due to two factors: the Bank's leverage to insist on domestic policy reforms, and the controversy surrounding the soundness of the Bank's approach to domestic policy.⁴⁴ The former is 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 the Bank, as its experts search for the appropriate blend of policies for each borrowing state.⁴⁵

In order to be consistent with the International Difference Principle, 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.⁴⁶ This can be restated affirmatively as follows:

(IV). The Bank must ensure that its involvement in the domestic policy of borrowers operates to the benefit of the least advantaged.

Current Bank practices have been criticized for failing to take into account the redistributive effects of Bank policies.⁴⁷ Inequalities in wealth distribution affect economic 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. To look at the way in which a country's social

⁴³ The SAPs themselves have been actually replaced first by the Enhanced SAPs and most recently by the Poverty Reduction and Growth Facilities, although following Ghazi I will refer to all such programs collectively as SAPs. See Ghazi above n 3, at 47–9.

⁴⁴ I am referring here most recently to the Bank's neoliberal approach, which has been the subject of much criticism. See *ibid*; see generally John W. Head, *The Future of the Global Economic Organizations* (Ardley, NY: Transnational Publishers, 2005) at 11.

⁴⁵ Naturally, the more demonstrably sound and ideologically minimal the Bank's policies are seen to be, the less its leverage will be resented.

⁴⁶ I believe this approach is consistent with the Bank's own responsibilities and Articles and with the 'political prohibition'. 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. See Jonathon Bradlow, 'Should the IFIs play a Role in the Implementation and Enforcement of International Humanitarian Law?' 50 *University of Kansas Law Review* 695 (2002) at 728 (citing legislative history of the political prohibition); Garcia, above n 36 at 45–8.

⁴⁷ Although the Bank has moved away from its traditional approach to SAPs, by creating Poverty Reduction and Growth Facilities based on each borrowing country's Poverty Reduction Strategy Paper, and began together with the Fund in 2001 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', the Bank continues to be criticized on this front. See Ghazi above n 4, at 72. Hockett, for example, argues that BWIs need to take a stronger public position on the normative justification of such social insurance programs. See Hockett above n 38, at 198.

resources are distributed internally among its members is not to act with partiality. Internal inequalities in wealth are matters of economic policy that are squarely within the Bank's mandate.

B. International currency lending: the fund and global inequality

1. *The fund's role in international justice*

The starting point is to recall that the Fund is a social institution, whose core activity is to allocate primary social goods: access to currency reserves, and the cost of such access. Trade currencies are an exhaustible social resource.⁴⁸ 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, colonialism, etc.

The fact that certain currencies are considered hard and others are not, necessarily creates inequalities in the distribution of trade 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, and in part a function of the larger operation, inequality and 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.⁴⁹

Since states have established the Fund to play a central role in allocating these resources in view of such inequality, 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.

2. *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,

⁴⁸ *Accord Lastra*, above n 6, at 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.

⁴⁹ 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.

which suggests we focus on access to hard currencies.⁵⁰ 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, and through the private currency market.⁵¹

The key normative implication of Justice as Fairness for hard currency lending is that states do not in a significant sense deserve their relative supply of hard currency, insofar as it is a product, in part, of natural inequalities which are morally arbitrary, compounded by social inequalities.⁵² 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.

This has implications for how states structure the Fund's operations. 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:

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

How does the Fund look from this perspective?

The very existence and mission of the Fund suggest that the Fund plays a normatively justifiable role, making wealthy states' abundance of trade 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.⁵³

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. 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

⁵⁰ 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, above n 38, at 179–181.

⁵¹ See *ibid.*, at 194 (existing necessity of both markets, and justice, to the possibility for international financial institutions to deliver on their social promise).

⁵² As with development capital supplies, we face the problem of ambition-sensitivity, namely how to account for the fact that good social policies contribute to an abundance of development capital. See above n 38 and sources cited therein.

⁵³ Head, above n 44, at 95–6 (documenting the considerable wealth transfers which IMF facilities have affected for the benefit of the least developed members).

exceeds currency-poor states' ability to pay commercial rates, so if the only access to hard currency was through private banks at commercial rates, economic opportunities would go unrealized.⁵⁴

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;⁵⁵ and concessional facilities, which are truly trade currency loans to developing countries.⁵⁶ The Fund's regular facilities consist of five main lending programs: Stand-By Arrangements, the Extended Fund Facility, the Supplemental Reserve Facility, Contingent Credit Lines, and the Compensatory Financing Facility.⁵⁷ All have varying eligibility criteria and repayment terms, and charge interest that is slightly below, but keyed to, market rates.⁵⁸ The Fund's concessional facilities consist of the Poverty Reduction and Growth Facilities (PRGF), which replaced the earlier SAPs and Enhanced SAPs, and charges only 0.5% interest per year.⁵⁹

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.

In this sense, the Fund's regular facilities lending is similar to the principle of free trade in WTO and the Bank's preferential lending through the IBRD – helping to equalize opportunity to 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

⁵⁴ 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.

⁵⁵ See Head, above n 44, at 24 (describing operation of SBA and EFF purchase/repurchase obligations).

⁵⁶ See Lastra, above n 6, at 517–518.

⁵⁷ See generally Head, above n 44, at 24–5 (reviewing types of facilities).

⁵⁸ See Ghazi, above n 3, at 13.

⁵⁹ See *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 above n 6 at 519–20. I will follow the narrower approach and restrict my attention to the PRGF since the rest charge higher, near-market rates.

borrow such currencies, they cannot satisfy their need for hard currency 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, 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:

(IIA). In order that access to trade 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 and 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.

This leads to the third step in the process, which can be restated as follows:

(III) In order to justify inequalities in the distribution of trade currencies, states must offer concessional access to trade currencies that is structured so as to benefit the least advantaged.

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

C. 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. Finally, there is the fact that the Fund does indeed offer concessional hard currency lending through its PRGF.

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 one area: the Fund's involvement in the domestic policies of borrowing states.⁶⁰

a. Conditionality

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.⁶¹ 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'.⁶²

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.⁶³ 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 levels.⁶⁴ 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.⁶⁵

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.⁶⁶ Criticism has been particularly strong with respect to the Fund's Structural Adjustment Programs or

⁶⁰ Other promising areas include the Fund's mission and priorities, its system for allocating SDRs, its decision making structure, and its system for choosing and evaluating projects. See Garcia, above n 36; see generally Head above n 44 (summarizing critiques).

⁶¹ This is the 'coercive' aspect of Fund operations. See Ghazi, above n 3, at 5; Hockett, above n 38, at 195.

⁶² IMF, 'Conditionality in Fund-Supported Programs – Overview', <http://www.imf.org/external/np/pdr/cond/2001/eng/overview/index.htm> (last visited 8 June, 2007).

⁶³ Lastra, above n 6, at 517.

⁶⁴ See generally Ghazi, above n 3, at 16–7.

⁶⁵ Charles Abugre, *SAPping the Poor: Structural Adjustment – the Forgotten Issue*, www.wdm.org.uk/resources/reports/debt/sapping_the_poor01061999.pdf (June 1999) (citing link between HIPC participation and PRGF).

⁶⁶ See generally Ngaire Woods, *Order, Globalization, and Inequality in World Politics*, in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization and World Politics* (Oxford, U.K.: Oxford University Press, 1999) 30–33 (surveying impact of IMF).

SAPs, and the successor Enhanced Structural Adjustment Facility.⁶⁷ As with the Bank, such criticism is largely due to two factors: the leverage the Fund has by virtue of its role to insist on domestic policy reforms,⁶⁸ and the controversy surrounding the soundness and ideological basis of the Fund's approach to domestic policy.⁶⁹

Although the Fund has begun to acknowledge shortcomings in its conditionality and structural adjustment programs,⁷⁰ 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, restated as follows:

(IV). The Fund must ensure that its involvement in the domestic policy of borrowers operates to the benefit of the least advantaged.

Current Fund practices have been criticized for failing to adequately take into account the redistributive effects of Fund policies.⁷¹ While the Fund has begun to publicly note the distributive impact of its policies,⁷² and develop new approaches to conditionality,⁷³ such policies continue to be criticized,⁷⁴ and require a sustained normative reevaluation according to the international difference principle, so that the inequality in international

⁶⁷ See Ghazi, above n 3, at 47 (1990 Bank paper).

⁶⁸ But see Head, above n 44, at 75 (downplaying the leverage aspects of conditionality in view of borrowing countries' formal right to say no).

⁶⁹ I am referring here to the Fund's ideological approach, which has been called 'unrepentant neoliberalism'. Deacon, above n 1, at 220; see generally Joseph Stiglitz, *Globalization and its Discontents* (New York, NY: W.W. Norton, 2003). But see Head, above n 44, at 61–63, 69–75 (summarizing and rejecting the ideology, or what he calls the 'bad medicine', critique).

⁷⁰ See Head, above n 44, at 72–73 (discussing 2002 reforms to Fund conditionality policies).

⁷¹ See, e.g. Head, above n 44, at 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, above n 38, at 198.

⁷² Hockett, above n 38, at 223.

⁷³ 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 Annual Report 2003 at 44. 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.

⁷⁴ See, e.g. Ghazi above n 3, at 72; Abugre, above n 65; but see Head, above n 44, at 82 (equity criticisms understate Fund efforts in this area).

currency resources can be effectively put in the service of the least advantaged.⁷⁵

III. CONCLUSION

Justice as Fairness presents a very basic question to states in their international economic relations: given the facts of inequality, their arbitrary nature, and their adverse effects on the least advantaged, how can the international economic system be re-structured to ensure that such inequalities work to the benefit of the least advantaged? In general the Bank and Fund are in fact doing much that is consistent with international egalitarian justice, but they can and should do more. In this respect, the International Difference Principle can offer normative guidance as to precisely what more the Bank and Fund should do. I have sought in this essay to illustrate in one area of Bank and Fund activity – their involvement in borrowers’ domestic policies – the sort of normative guidance which such an analysis can offer, as the Bank and Fund seek to reform their policies in this area. Using the normative framework of justice is itself a subtle but significant change in emphasis – one commentator has likened it to a ‘Gestalt shift’⁷⁶ – that offers valuable substantive and political benefits. The states which set Bank and Fund policy should more explicitly embrace and articulate the redistributive aspect of the BWIs and couch their efforts in the language of justice. To refuse to do so is to court the danger that Bank and Fund policies will serve a particular hidden theory of justice, not, as claimed, to avoid entangling the Bank and Fund in such issues at all. If justice means ensuring that inequalities in the international distribution of social goods work to the benefit of the least advantaged, then states must ensure, among other things, that the Bank and Fund delve far enough into domestic social policy and with appropriate criteria, to reach and affect those structures that actually determine whether capital and currency inequalities will or will not work to the benefit of the least advantaged.

⁷⁵ See also, e.g. Namita Wahi, ‘Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability’, 12 U.C. Davis Journal of International Law & Policy 331 (2006) (critical of conditionality from a human rights perspective); Ofer Eldar, ‘Reform of IMF Conditionality: A Proposal for Self-imposed Conditionality’, 8 Journal of International Economic Law. 509 (2005) (proposing that conditionality be entirely borrower-driven, with Fund approval).

⁷⁶ See Hockett, above n 38 at 169.