



# TranState Working Papers

DEVELOPING A NORMATIVE  
CRITIQUE OF INTERNATIONAL  
TRADE LAW:  
SPECIAL & DIFFERENTIAL  
TREATMENT

Frank J. Garcia

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Staatlichkeit im Wandel • Transformations of the State  
Sonderforschungsbereich 597 • Collaborative Research Center 597



*Frank J. Garcia*

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## ***Developing a Normative Critique of International Trade Law: Special & Differential Treatment***

### **ABSTRACT**

Although the problem of trade and inequality is central to the resolution of the WTO Doha Round and to contemporary trade policy in general, it is currently undertheorized from a normative perspective. In this paper I develop a normative critique of WTO special and differential treatment law, as a case study of how normative political theory can be applied to international economic law. Using Rawls' theory of Justice as Fairness, I argue both that special and differential treatment can play an important role in justifying economic inequalities according to the difference principle, and that special and differential treatment as currently structured fails abysmally to do so. In doing so, I will also identify conceptual issues which need to be addressed in order to develop such a critique, and illustrate how I address such issues in my own work.

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## **Developing a Normative Critique of International Trade Law: Special & Differential Treatment\***

### **I INTRODUCTION**

In this paper I develop a normative critique of WTO special and differential treatment (special and differential treatment), as a case study of how normative political theory can be applied to international economic law. I will rely on John Rawls' theory of Justice as Fairness, arguing in the process that the present structure of international trade does allow for the application of Rawls' account of justice as fairness, including a modified version of the difference principle. Using Justice as Fairness, I will argue both that special and differential treatment can play an important role in justifying economic inequalities according to the difference principle, and that special and differential treatment as currently structured fails abysmally to do so. Along the way, I will be identifying conceptual issues which need to be addressed in order to carry off such a critique, and suggesting how I resolve such issues in my own work.

### **II PRELIMINARY MATTERS: WHAT IS INVOLVED IN DEVELOPING A NORMATIVE THEORY OF INTERNATIONAL LAW?**

In order to develop a normative critique of trade law, one must first offer a general account of the relationship between trade law and political theory. At first glance, it should seem obvious that trade law raises normative issues and should itself be subject to normative critique by political and moral philosophy. However, it is not in fact so obvious, at least not in mainstream Anglo-American trade scholarship.<sup>1</sup> Therefore, the first step is to develop a general account of the relationship between trade law and political theory.

#### **A. Trade and Justice Generally**

One approach to the relationship between international law and political theory is Lea Brilmayer's "vertical thesis," which treats this as a question of the legitimacy of state action. For Brilmayer, "governmental coercion that extends across international borders

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<sup>1</sup> See Joost Pauwelyn, *Book Review: Just Trade*, 37 GEO. WASH. INT'L L. REV 101 (2005)(current scholarly orthodoxy eschews any normative analysis of international economic law).

is governmental coercion nonetheless,”<sup>2</sup> and must be justified normatively by reference to some form of political theory, or it will lack legitimacy as a foreign policy. Thus, the authority for transboundary state action is ultimately derived from its justification in political morality.<sup>3</sup> Such justification is “vertical,” in that it is drawn “upwards” from the political norms regulating the underlying relationship between the individual and the relevant political institution. This is in contrast to the traditional “horizontal” approach to state morality which analyzes the ethics between co-equal state actors.<sup>4</sup> In other words, justification comes out of the political morality governing the state’s relationship with its own citizens, rather than any notion of the morality of a state’s relationship to other states.<sup>5</sup>

Brilmayer’s theory is a powerful argument for the view that states act within a coherent moral universe, in which the legitimacy of *all* their acts, both domestic and international, derives from their observance of the same set of core political principles. The justification of a state’s international acts “must be analyzed by reference to the constituting political theory that grants it authority to act domestically.”<sup>6</sup>

Brilmayer’s theory operates at a sufficient level of generality to ground a basic relationship between international law and political theory, without arguing for a specific theory of political justification:

*“The vertical thesis itself does not supply such a domestic theory of political justification. It merely asserts that whatever theory is used domestically is relevant also internationally.”*<sup>7</sup>

Instead, Brilmayer offers a meta-analysis of the relationship between international acts and political justification. Thus, for the governments of liberal states, this entails that they act as liberal states in their dealings abroad, in the same way we, their citizens, expect them to act as liberal states domestically.

An alternative approach, followed by both Rawls and Charles Beitz, is to base the relationship between political theory and trade law on the functional characteristics of trade law as a social institution. The primary impetus towards justice, according to Rawls, is the fact that social cooperation gives rise to certain benefits and burdens,

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<sup>2</sup> Lea Brilmayer, *Justifying International Acts* 11 (1989).

<sup>3</sup> *Id.* at 16-17.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 16. In this way Brilmayer’s theory is part of a general shift away from a “society of states” model of international law, and towards a global public law and a global society of persons. See *infra* notes 10-11 and accompanying text.

<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.*

which need to be allocated. For that cooperative social scheme to be just, those benefits and burdens should be allocated according to some relevant idea of what is ‘right.’<sup>8</sup> In Beitz’ words, “the requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place.”<sup>9</sup>

International economic relations satisfy this condition, because they lead to increases in individual and national wealth through the operation of comparative advantage and principles of efficiency in general. It is through international trade law that the terms of such cooperation are established. Justice is therefore relevant to the operation of the social institutions which effectuate the international allocation of the benefits and burdens of international economic cooperation, principally international trade law.

Brilmayer and Rawls/Beitz offer two distinct ways in which one can articulate a general account of the relationship between trade law and normative political theory. Other alternatives could include a cosmopolitan approach emphasizing trade law’s impact on individuals’ life prospects, or a human rights approach emphasizing trade law’s impact on fundamental rights. All of these alternatives perform the same conceptual function, namely to articulate the relationship between trade law and normative political theory as a general matter, before proceeding to apply a particular theory to trade law.

## **B Level of Obligation: Duties between States versus Duties between Individuals**

A second preliminary issue involves determining at which level to locate the claims and duties of justice: the state or the individual. In other words, does international justice create claims on individuals, or on states?

Traditionally, international law has followed the society of states model, in which the level of analysis would be the state, instead of the individual. Thus moral duties, if they exist at the international level, exist between states as moral actors. While more consistent with orthodox international legal theory, this approach is no longer adequate given

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<sup>8</sup> JOHN RAWLS, A THEORY OF JUSTICE 4-5 (1971).

<sup>9</sup> CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 131 (1979) [hereinafter BEITZ, POLITICAL THEORY]. Barry objects to the extension of justice as fairness obligations to international society on the basis of such economic relations, questioning whether such relations are in fact sufficiently reciprocal and dependent. See Brian Barry, *Humanity and Justice in Global Perspective*, in NOMOS XXIV 219, at 232-34 (J. Roland Pennock & John W. Chapman eds., 1982). As Beitz has since clarified, however, he is not arguing for the necessity of such obligations on the grounds of such relations, but merely for their relevance. See Charles Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591 (1983) [hereinafter Beitz, *Cosmopolitan Ideals*].

the post-war human rights revolution, and leads to problems raised by critics such as Beitz.<sup>10</sup>

The leading contemporary alternative is cosmopolitanism, which locates all international moral obligations at the level of the individual. However, cosmopolitanism depends upon a view of international society as composed of persons, not states, which strikes many as empirically unjustifiable, given the many deep political and social divisions among the world's people.<sup>11</sup>

I have attempted to follow something of a compromise approach, in which the role of justice in international economic relations is a function of our *individual* moral commitments, carried out in the international arena through the state as our moral agent.<sup>12</sup> The obligation to do justice applies to the government of State X as *the agent* of its citizens, stemming from the moral obligations of its citizens, the nature of justice, and the functions and powers of the state. Where individuals cannot effectively act to address moral questions, the moral obligations create a case for moral agency at the collective level: the state.<sup>13</sup> In other words, when the state acts on our behalf through the institutions we create and sustain, it acts as our agent. We as principals have a duty to instruct and monitor our agent, and bear ultimate responsibility for its conduct. The moral responsibility remains ultimately our own, even if the acts are taken at the collective agency level.<sup>14</sup>

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<sup>10</sup> The state-moral person equation leads among other things to some of the abuses associated with an absolute sovereignty doctrine. See BEITZ, *POLITICAL THEORY*, *supra* note 9, 71-83; see also FERNANDO TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 40-41 (1998).

<sup>11</sup> This is the standard communitarian objection to the possibility of global justice. However, in my view, globalization is changing the nature of global social relations such that the cosmopolitan view of global social relations is increasingly tenable; indeed, in some areas and to some degree, global social relations may even meet more stringent communitarian requirements for justice. See Frank J. Garcia, *Globalization and the Theory of International Law*, 11 *INT'L LEG. THEORY* 9, 12-21 (2005).

<sup>12</sup> Another approach which seeks to resist this dualism is that taken by Christine Chwaszcza and others, in which both normative relations among individuals as individuals, and normative responsibilities of associations as associations, are considered. See *Normative Theory and Transnational Economic Justice* (this volume).

<sup>13</sup> See e.g. ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* 28-44 (1995) (discussing the state's responsibility to act as our moral agent, in particular where individual action is barred or inadequate).

<sup>14</sup> *Id.* at 34-35. Pogge characterizes this as a second-order responsibility, insofar as the principles of justice apply to institutions and not directly to the conduct of persons. Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 *ETHICS* 48, 50 (1992). Nevertheless, he acknowledges that we still retain responsibility, albeit indirect, for the justice of institutional practices we participate in. *Id.*

This agency relationship is unaffected by whether the acts are domestic or international: our institutions are our agents whenever and wherever they act, as a function of the vertical social contract and not the territoriality of the actions. Internationally, this means that we as the citizens of State X have an obligation as human persons to ensure that the policies of the government of State X, our agent in international relations, are just vis-à-vis other human beings in State Y. Otherwise, we as the citizens of state X risk being in violation of our own duty to the citizens of State Y.<sup>15</sup>

### **III. INTERNATIONALIZING A THEORY OF JUSTICE**

#### **A Choosing a Particular Theory**

With these preliminary matters addressed, the way is clear to choose a particular political theory with which to develop a normative analysis of the justice of the trading system. I have chosen Rawls' "Justice as Fairness," despite its problematic relationship to international justice, because of its particularly fruitful approach to the problem of inequality.<sup>16</sup>

I am going to assume familiarity with the outlines of Rawls basic theory, and only note a few issues of significance to international trade law. Rawls is particularly concerned with inequalities that arise in the distribution of social primary goods. Inequalities in the natural distribution of natural primary goods, 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 the social distribution of social primary goods. 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.

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."<sup>17</sup> The distribution of natural talents is to be considered a common asset, and society structured so that this asset

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<sup>15</sup> I say "risk," because the intervening dynamics of representative government allow our state to pursue a given policy over our own, and even everyone's, objection. Thus the individual's duty to act may only be an imperfect one, given the practical or institutional limits on individual action, whereas those same limits mean that collectively the duty is a strong, perfect one. GOODIN, *supra* note 12, at 32-33.

<sup>16</sup> Other liberal theories of justice such as utilitarianism and libertarianism founder in one way or another on the problem of inequality. See FRANK J. GARCIA, TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 110-18 (TRANSNATIONAL 2003).

<sup>17</sup> RAWLS, *supra* note 8, at 102.

works for the good of the least well-off. 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 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 found in income tax codes, 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.<sup>18</sup>

## **B Adapting the Theory for International Application**

Having selected a body of normative political theory to work with, the next step involves adapting the theory for use in an international context involving trade law. Such adaptation may involve further preliminary matters, such as addressing any theoretical issues raised by the application of the theory across national boundaries. Applying Justice as Fairness internationally poses such an issue, namely Rawls’ own refusal to extend the argument of *A Theory of Justice* to international distributive problems.

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.<sup>19</sup> Globalization and other developments in international relations, particularly international economic relations, have rendered such an assumption untenable today.<sup>20</sup> The fact of economic interdependence among the world's societies is a key element in establishing the possibility of international distributive obligations.<sup>21</sup> As the international trade regulatory system has grown in scope and institutional capacity with the creation of the WTO, the gains from such social cooperation increase, as does the institutional capacity for allocative decision-making and enforcement of resulting norms. The need to allocate such benefits raises precisely the

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<sup>18</sup> *Id.*, at 179.

<sup>19</sup> See BEITZ, POLITICAL THEORY, *supra* note 9, at 143-49.

<sup>20</sup> 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. THOMAS W. POGGE, REALIZING RAWLS 255-56, (1989).

<sup>21</sup> For example, in his study of the concept of fairness in international law, Thomas Franck concludes that the requisite level of community has emerged at the international level to sustain a fairness analysis. See THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW 12-13 (1995).

same sort of issues that are raised in domestic society when such benefits stand to be allocated.<sup>22</sup>

If international economic relations establish the necessary predicate for contractarian obligations, then there is no theoretical bar to international distributive obligations patterned along Rawlsian principles.<sup>23</sup> This means that in principal, there is no objection to developing a Rawlsian account of international justice.<sup>24</sup>

## **C Mapping the Theory to Trade Law**

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

### **1. *Inequality in Natural Endowments and Social Goods***

There are many ways to catalogue inequalities in international economic relations. Contemporary analyses usually adopt economic “size” as the most relevant concept by which to evaluate and measure the impact of inequality on trade liberalization. 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.

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.<sup>25</sup> Small size is also an additional complicating factor affect-

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<sup>22</sup> In a similar sense, Pogge argues that the emergence of a single global institutional scheme involving both international law and territorial states, has made all human rights violations “at least potentially everyone’s concern.” Pogge, *supra* note 14, at 51. *But see* Samuel Freeman, *Distributive Justice and The Law of Peoples*, in RAWLS’ LAW OF PEOPLES: A REALISTIC UTOPIA? 243, 247 (REX MARTIN & DAVID A. REIDY EDS. 2006) (characterizing these institutions as ‘secondary’ in nature and not a global basic structure).

<sup>23</sup> *See* ONORA O’NEILL, BOUNDS OF JUSTICE 121 (2000) (given the nature of contemporary international economic relations, “[q]uestions of transnational economic justice cannot now be ruled out of order.”).

<sup>24</sup> *But see* David Miller, *Collective Responsibility and International Inequality*, in RAWLS’ LAW OF PEOPLES: A REALISTIC UTOPIA? 191 (REX MARTIN & DAVID A. REIDY EDS. 2006) (defending Rawls’ rejection of transnational extensions of Justice as Fairness by Beitz, Pogge and others).

<sup>25</sup> *See, e.g.*, Dermot McCann, *Small States in Globalizing Markets: The End of National Economic Sovereignty*, 34 N.Y.U. J. INT’L L. & POL. 281 (2001) (citing broad consensus as to factors leading to smaller economies’ overdependence on exports, and consequent vulnerability).

ing a country's growth, policy options and development potential.<sup>26</sup> 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. Larger economies take advantage of their size to target smaller economy markets for larger economy exports. 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.

These contingencies form the essential context in which any normative 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, or those which at the individual level we are “born” with, are strongly reflected in smaller economy characteristics such as smallness in population, smallness in territory, and heavy reliance upon commodities exports, which can reflect both differences in climate and the narrow range of readily exploitable resources such economies may have been naturally granted.<sup>27</sup>

In contrast, social inequalities are those inequalities essentially connected to social institutions. Social institutions, including the smaller economy's political and economic systems, and international economic law and diplomacy, 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."<sup>28</sup> Such allocations are heavily influenced by underlying natural inequalities, and by non-economic factors such as racial, religious or nationalistic prejudice.

Smaller economy characteristics that reflect social inequalities include their limited human and technological resources, which reflect both small populations and the effects

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<sup>26</sup> 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* McCann, *supra* note 23 (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 Int'l Studies, Policy Papers on the Americas, vol. IX study 1, 1998).

<sup>27</sup> It can be argued that these inequalities also reflect social factors such as population policies, the international law of boundaries, and colonial patterns of economic specialization. No classification between natural and social inequalities will be pure, even at the individual level (strength and intelligence can depend as much on prenatal nutrition, which is influenced by social factors, as by inherited genetic traits) – the distinction must be based on predominance and emphasis.

<sup>28</sup> RAWLS, *supra* note 8, at 7.

of social allocations resulting in inadequate educational and research institutions.<sup>29</sup> The small size of the domestic market reflects both small populations and the effects of employment, colonial economic policies, and domestic wage and industrialization patterns, including patterns of international demand, market access and the terms of trade. Low GDP and/or low GDP per capita are complex indicators reflecting the interaction of many of the natural and social inequalities already discussed. Finally, the small size of the domestic market creates a high dependence on international trade for both export markets and domestic goods, resulting in a high degree of vulnerability to fluctuation in world prices and demand for primary product exports, and changes in market access and the terms of trade.

The key normative assumption underlying a Rawlsian account of inequality is that differences in natural endowments, and any differences in the allocation of social goods stemming from these natural inequalities, are unmerited. In Rawls' terms, they are morally arbitrary.<sup>30</sup> Setting aside the issues of migration and conquest, states must in general accept the extent of resources to be found within their territories.<sup>31</sup> 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.<sup>32</sup>

This is precisely the pattern of naturally-influenced social advantage which, at the individual level, requires justification according to principles of justice. The fact that a

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<sup>29</sup> Disaggregating the inequality effects of social allocations *between* states, from the inequality effects of social policies *within* states, is a complex problem analogous to the debate at the domestic level over the degree of ambition- versus endowment - sensitivity of distributive theories of justice. I don't have an answer for this problem – simply an emphasis here on the allocations between states. On the related domestic issue, see Ronald Dworkin, *What is Equality? Part I: Equality of Welfare, and Part II: Equality of Resources*, in 10 PHIL. & PUB. AFF. 185-246, 283-345 (1981).

<sup>30</sup> *Id.* at 72.

<sup>31</sup> I do not propose to address in this work the issues of migration and conquest as individual and collective responses to the arbitrariness of international borders and the particular resource “bundles” they circumscribe, though this is a key issue in global social policy today. See generally FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY (Brian Barry & Robert E. Goodin eds.) (Pennsylvania State University Press 1992).

<sup>32</sup> Accord Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFFAIRS 195, 198 (1994) (borders have tremendous distributive impact). Pogge, however, is engaged in a different normative task, demanding justification for any distributive functions borders would be assigned in an ideal world, whereas Rawls focuses on the justification of distributive effects which borders have in the world as it is.

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.<sup>33</sup> 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.

## **2. *The International Choice Problem***

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. 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.<sup>34</sup>

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<sup>33</sup> Strictly speaking, Rawls would disagree, viewing material inequalities as the subject of domestic justice. However, for the reasons mentioned above, Rawls' position on the exclusively domestic nature of material inequality is problematic. See *supra* notes 18-23 and accompanying text. But see Mathias Risse, *How does the Global Order Harm the Poor?*, 33 PHIL. & PUB. AFFAIRS 349 (2005) (offering a thoughtful defense of Rawls' position in THE LAW OF PEOPLES that domestic institutions are the chief determinant of material inequality).

<sup>34</sup> 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 INT'L LEGAL THEORY 36 (2000); TESÓN, *supra* note 10, ch. 4. This second original position could be modified to include, for example, representatives of significant NGOs and international institutions; or, as Beitz and Pogge suggest, collapsed into the first, thus forming a single cosmopolitan original position. Pogge, *supra* note 19, at 246-7; BEITZ, POLITICAL THEORY, *supra* note 9, at 150-151. 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 Pogge, *supra* note 30, at 197 (international egalitarian concerns can "easily" be accommodated within Rawls' own two-step format).

The international choice problem these representatives face is, *mutatis mutandis*, identical to that faced in the domestic variant of the original position as Rawls sets it forth in *A Theory of Justice*:

“Following out the conception of the initial situation, I assume that these representatives are deprived of various kinds of information. While they know that they represent different nations each living under the normal circumstances of human life, they know nothing about the particular circumstances of their own society. . . . Once again the contracting parties, in this case representatives of states, are allowed only enough knowledge to make a rational choice to protect their interest but not so much that the more fortunate among them can take advantage of their special situation.”<sup>35</sup>

Drawing further on Rawls’ description in *A Theory of Justice* of the knowledge and rationality of representatives in the domestic original position, we can also conclude that representatives of states know only that natural and social goods are necessary for the realization of domestic cooperative schemes, that inequalities of the sort discussed above exist between states, and that such inequalities are highly correlated with resulting differences in wealth and other social advantages enjoyed among states.

### **3. Principles of International Justice as Fairness**

#### *a. An International Difference Principle*

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.<sup>36</sup> In the domestic original position, the representatives choose two principles, a principle of equal liberty and a principle of distributive justice.

In Rawls’ account of the international choice problem, representatives of states do not in fact choose a principle of distributive justice.<sup>37</sup> However, as has been discussed above, the problem of inequality and the choice problem faced by representatives of the international community are present internationally just as they are in the case of domestic society. Given the similarity in social facts and their consequences as well as the identical constraints inherent in the original position, the most logical conclusion is that

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<sup>35</sup> RAWLS, *supra* note 8, at 378.

<sup>36</sup> *Id.* at 152-57.

<sup>37</sup> Frank J. Garcia, *The Law of Peoples*, 23 Hous. J. Int’l L. 659, 660 (2001) (book review) (Rather than applying principles of distributive justice to international law Rawls instead discusses the foreign policy of a liberal people).

the same principles would be chosen.<sup>38</sup> 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.<sup>39</sup> As has been argued by Beitz, Barry and others, there is no compelling reason to assume that the content of the principles would change as a result of enlarging the scope of the original position.<sup>40</sup>

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 all states, and in particular for the least advantaged states.

The predicates are identical: natural inequalities, social inequalities, their interrelationship, and the effect of both on life chances. The structure of the original position is identical, in terms of what the representatives both know and don't know about their future social environment.<sup>41</sup> Moreover, we can make the same assumptions about the rationality of the representatives.<sup>42</sup> Therefore, Rawls' argument should lead to the same conclusion: international social inequalities are justifiable only if they satisfy the difference principle.

## **D Developing a Normative Critique of Trade Law**

Having determined that international economic relations are subject to the difference principle, it remains to develop a normative critique of trade law in terms of the theory. If we accept Justice as Fairness, then given the nature of international trade, it follows that international trade is subject to a suitably modified form of the difference principle.

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<sup>38</sup> This conclusion is consistent with the positions taken by the leading proponents of a Rawlsian theory of international distributive justice. See, e.g., BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* 131 (1973) ("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."); BEITZ, *POLITICAL THEORY*, *supra* note 9, at 138 (logic of original position would by analogy lead to choice of a global resource redistribution principle); POGGE, *supra* note 19, at 245 (parties in original position would favor a global economic order sensitive to distributional concerns).

<sup>39</sup> Accord BEITZ, *POLITICAL THEORY*, *supra* note 9, at 137; POGGE, *supra* note 19, at 247.

<sup>40</sup> See, e.g., Pogge, *supra* note 30, at 197; BEITZ, *POLITICAL THEORY*, *supra* note 9, at 151; BARRY, *supra* note 35, at 128-32; David A. J. Richards, *International Distributive Justice*, in *NOMOS XXIV*, at 292.

<sup>41</sup> See BEITZ, *POLITICAL THEORY*, *supra* note 9, at 141 (reviewing analogous natural and social facts known in an international original position).

<sup>42</sup> Accord BARRY, *supra* note 35, at 133 (would be just as rational to pursue a maximin strategy in a second original position and choose the difference principle, as it would be in the domestic original position).

## ***1 Just Trade Involves Free Trade***

The core commitment of contemporary trade law is to free trade: international economic relations are to be free (or as free as possible) from governmental restrictions in the form of tariff and non-tariff barriers, and nondiscriminatory with respect to country of origin (the most-favored-nation rule) and domestic origin (the national treatment rule). The starting point, therefore, in the elaboration of a normative theory of trade is to examine whether, from a normative point of view, this commitment to free trade is justifiable.

One can deduce from the principle of Justice as Fairness that a well-ordered society requires free trade as a policy.<sup>43</sup> Justice as Fairness consists of two principles: the principle of equal liberty, and the difference principle. Free trade follows from the implications of both principles. First, we can argue from the first principle of justice that the freedom to make economic decisions as purchaser and consumer would be best protected by a system in which all had equal liberty with respect to such decisions, without interference from government-imposed restrictions and distortions.<sup>44</sup> Tariff and non-tariff barriers interfere with such liberty because the market effects of such public interventions distort purchasing and producing decisions.

Free trade can therefore be expressed as a basic commitment to protect such freedom on the part of producers and consumers, by reducing or eliminating such interference. To this extent, a Rawlsian view of just trade is consistent with other liberal theories, such as libertarianism. In Rawlsian terms, free trade guarantees with respect to international economic activity “an equal right to the most extensive basic liberty compatible with a similar liberty for others.”<sup>45</sup> Most-favored-nation status and national treatment function as corollary doctrines guaranteeing that such liberty is equal with respect to producers and consumers in all countries.<sup>46</sup>

But adherence to the full extent of the principles of Justice as Fairness also requires evaluation of free trade in distributive terms. Rawls’ second principle of justice, 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.

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<sup>43</sup> For an alternative approach justifying free trade as an actual principle of justice chosen in a Rawlsian original position, see Ethan B. Kapstein, *Distributive Justice and International Trade*, 13 *ETHICS & INT’L. AFFAIRS* 175, 175-82 (1999).

<sup>44</sup> This is consistent with the requirements of Rawls’ first principle of justice.

<sup>45</sup> See RAWLS, *supra* note 8, at 60-61.

<sup>46</sup> Kapstein, *supra* note 40, at 188-89.

## **2 *Just Trade is More Than Merely Free Trade***

I suggested above in my review of small economies in trade that there are many inequalities affecting global economic relations. Free trade is key 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. Moreover, in a contingent sense, since free trade can lead to welfare growth, it is a precondition to a more just distribution of wealth and an improved standard of living for the least advantaged, both of which fulfill one's moral duty to others. Both justifications are also consistent with a utilitarian view of trade, which is the dominant theory of trade justice today.

By introducing the difference principle into just trade theory, however, Rawls requires us to go beyond both utilitarian and libertarian views of trade, by making the distribution of trade-created wealth, and in particular the plight of the least advantaged, central to any theory of just trade. This has far-reaching implications, given the fact that trade economics suggests that smaller economies face difficult challenges successfully participating in the free trade system. Moreover, trade economists suggest that free trade by itself has mixed effects on the welfare of individuals in smaller economies.

For this reason, free trade alone, which is essentially 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. There is an inconsistency in the relationship between inequality in resources and effective equality of liberty and moral status. The central distributive mechanism for libertarians is the market, since it is in the market that self-owning individuals can parlay their talents and abilities into title over other resources. However, even if one grants that the free market is the best mechanism for basic distribution questions, the moral basis for this approach when applied to all distributive questions is substantially undermined by the reality of inequality in natural endowments. Access to social resources, which enable one to effectively exercise one's liberty and realize one's life plans, will be skewed by natural endowments, whose distribution the individual had no control over.

This same difficulty arises in the international distributive context: libertarianism fails to adequately confront the problem of inequality of resources in the international economic plane.<sup>47</sup> A system of purely formal equality between states, equivalent in the

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<sup>47</sup> See POGGE, *supra* note 19, at 248 (inequalities in information and bargaining power may preclude possibility of freely negotiated international bargains). For a review of other problems with a libertarian theory of international justice, see O'NEILL, *supra* note 22, at 289-90.

trade context to a system consisting exclusively of the core doctrines of free trade and nondiscrimination, undercuts the possibility of substantive equality between states:

*“There are several reasons for thinking that [global economic] interdependence widens the income gap between rich and poor countries even though it produces absolute gains for almost all of them. Because states have differing factor endowments and varying access to technology, even “free” trade can lead to increasing international distributive inequalities (and, on some views, to absolute as well as relative declines in the well-being of the poorest classes) in the absence of continuing transfers to those least advantaged by international trade.”<sup>48</sup>*

If according to Brilmayer’s vertical thesis, liberal states are to under a duty to organize their international economic relations according to liberal principles, then a free trade system consisting merely of “natural liberty” among states, a purely formal equality of opportunity, will be inadequate to achieve liberal justice absent some mechanism for addressing the problem of inequality in resources.<sup>49</sup> The reality of gross inequalities in international endowments undercuts the possibility of effective equality of rights among states (sovereignty), which is the centerpiece of libertarianism.<sup>50</sup> At the individual level, such a system will not guarantee satisfaction of even that minimal degree of basic needs necessary to make liberty rights meaningful.<sup>51</sup>

For this reason, the difference principle suggests that the trading system will not be fully just, even if fully free, until it operates so as to render social inequalities beneficial to the least advantaged. In other words, the difference principle suggests that just trade cannot consist only of free trade, but must also deviate from a system of pure reciprocity of opportunity. This is where special and differential treatment comes in, so it is to this set of doctrines that we now turn.

#### **IV APPLIED POLITICAL THEORY: SPECIAL AND DIFFERENTIAL TREATMENT AS JUSTIFYING INEQUALITIES**

As I have discussed above, the global inequality in natural resources leads, through a complex variety of domestic and international private and public actions and institutions, to social inequalities: inequalities in wealth, privileges, rights and opportunities.

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<sup>48</sup> BEITZ, POLITICAL THEORY, *supra* note 9, at 145-46 (citing RONALD FINDLAY, TRADE AND SPECIALIZATION 118-22 (1970)). *See also* FRANCK, *supra* note 20, at 58 (GSP program adopted out of recognition that simple MFN-based trade “would produce further erosion of the developing world’s share of world trade....”).

<sup>49</sup> *Accord* BEITZ, POLITICAL THEORY, *supra* note 9, at 163 (objections to justice of a domestic system of natural liberty apply with equal force to an international version as well).

<sup>50</sup> Franck also points out that the current pattern of international holdings is so dependent on prior colonial abuses that it may even fail the libertarian test of justice in acquisition. FRANCK, *supra* note 20, at 20.

<sup>51</sup> O’NEILL *supra* note 22, at 134.

Empirical studies suggest that these inequalities are not on the whole working for the benefit of the least advantaged - quite the reverse. Smaller economies are the most vulnerable to adverse changes in their trade, in the global economy, and in the international economic law system. Thus, they face the most obstacles to economic development and effective competition.

In view of these facts, applying Justice as Fairness to international trade leads to a very basic question which liberal states must address in their international economic relations: given the fact of inequality and its adverse effects for 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?<sup>52</sup>

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."<sup>53</sup> In the case of international economic relations, 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.<sup>54</sup> Moreover, through special and differential treatment, the international economic law system already incorporates laws and policies that can function as redistributive mechanisms and that, in normative terms, can therefore serve as the basis for a just international trade law.

## **A. Justifying Inequalities through Special and Differential Treatment**

In this section, I will argue that special and differential treatment can be understood normatively as an attempt to justify economic inequalities along Rawlsian lines. Understanding special and differential treatment as a Rawlsian principle has important consequences for the evaluation of its current iteration in unilateral, multilateral and regional trade policy.

### ***1. Inequality and the Role of the Market***

The key to understanding special and differential treatment as a Rawlsian tool for justice lies in understanding the way many of the natural and social inequalities among states translate into the relative strength of consumer markets and producer groups. States that are rich in natural resources and have developed significant social resources such as

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<sup>52</sup> Put another way, I am arguing that as an element of a just foreign policy, liberal states must pursue institutional policies which satisfy the difference principle.

<sup>53</sup> RAWLS, *supra* note 8, at 13.

<sup>54</sup> 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 NW. J. INT'L L. & BUS. 398 (1997).

wealth, industrial capacity and technology, will as a result generally have 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.

Smaller economies covet access to the wealthy consumer markets of larger economies, even as they fear opening their markets to the powerful export capabilities of larger economies. This means that market access becomes a key variable in any attempt to address inequalities through trade law. 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 market access that is both preferential, in that it is on better terms than those received by larger economies, and non-reciprocal, in that larger economies do not expect equivalent concessions from smaller economies in return. 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.<sup>55</sup>

Market access is a central component of trade theory under any scenario, because it is in open markets that the principle of comparative advantage can operate. However, in a redistributive context, open markets take on additional significance. By opening their markets to smaller economy exports on a preferential basis, large economies in effect place the consumption power of their larger, richer consumer market at the service of the smaller economy, which can increase its exports and thereby strengthen its economic base. Thus preferential market 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.

Applying the difference principle to trade law with an understanding of the role of the market as a manifestation of economic inequalities, suggests that in a liberal theory of just trade, market access would need to be established on terms that benefit the least advantaged. This conclusion can be restated in normative terms as follows:

Liberal states must ensure that market access is structured so as to benefit the least advantaged.

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<sup>55</sup> Market access is managed through the two principal components of special and differential treatment: market access preferences and market protection mechanisms. In this essay, I will focus on the market access branch of special and differential treatment. I refer interested readers to my evaluation elsewhere of market protection mechanisms, as well as the wealth transfer aspects of special and differential treatment. GARCIA, , *supra* note 15, ch. 4.

Since preferential market access is managed through special and differential treatment rules, this imperative can also be understood as a normative criterion placed upon special and differential treatment law as a condition of the difference principle.

## **B Evaluating Special and Differential Treatment in Practice**

Implementation of a special and differential treatment regime consistent with Justice as Fairness brings us out from the world of ideal theory to the non-ideal world of trade law and economic inequalities as we find them. 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. This will allow us to accomplish two goals: to more fully specify what special and differential treatment should look like in a liberal system of just trade; and, second, to critically evaluate whether in fact special and differential treatment as currently constituted is capable of playing such a role, or must be reformed.

Under current law, application of special and differential treatment is essentially bifurcated. Preferential market access is primarily handled unilaterally through GSP, or Generalized System of Preferences, programs in which WTO members grant market access preferences in their trade relations with one another, whereas market protection is handled through the WTO treaties themselves.

Current applications of the market access branch of special and differential treatment have been subject to a variety of political constraints and conditions. As part of a liberal theory of just trade, we must consider whether such conditions are justifiable or acceptable from a normative perspective. In other words, at what point do the vagaries of implementation of the principle of special and differential treatment imperil the justice of the trading system? Examination of contemporary U.S. GSP programs suggests that the unilateralism which pervades current trade preference practice undercuts the effectiveness, and justice, of the entire market access regime.

### ***1. U.S. GSP Practice: Unilateralism in Action***

U.S. GSP programs have several key features, found to some extent in all large economy GSP programs, which are suspect from the perspective of an international theory of Justice as Fairness: they are unilateral in nature, they exclude the most competitive exports, and they impose a variety of conditions on the beneficiary country.

First, GSP-style preference programs are not based on mutual treaty obligations, but are discretionary programs. That is, they are offered by the granting state on a concessional basis, and can be withdrawn at will. Moreover, their periodic extension is often the subject of intense political negotiations between the granting and beneficiary states.

Instrumentally, extending trade preferences through unilateral programs is questionable on several grounds. First, this renders them inherently unstable, because as pro-

grams they are subject to periodic renewal, and within each program the beneficiaries must continually re-qualify for the preferences. This creates problems for business and investment planners on both sides of the preference.<sup>56</sup> In addition, the uncertainty surrounding both periodic qualification decisions and decisions concerning continuation of the program, has understandably led to criticism on the part of beneficiary countries that they remain in dependent relationships subject to the whim of the granting state.<sup>57</sup>

The difference principle as applied to international trade suggests that the unilateralism of existing trade preference programs must also be reconsidered as a matter of justice. Policies or practices now considered to be discretionary on the part of the implementing state should more properly be seen as obligatory, when understood as the consequence of a moral obligation of the granting state to its trading partners. If a state has an obligation to justify its own social advantages by placing the strength of its consumer market at the service of the least advantaged states, then it is difficult to justify the view that such an obligation should be effectuated through a discretionary mechanism at the sole will of the advantaged state. Moreover, the difference principle would imply that in no event should special and differential treatment simply be terminated, or its termination threatened or subject to threat, for political reasons having to do with the interests of the granting state.<sup>58</sup>

Second, preference programs also tend to exclude exports of manufactured goods that are directly competitive with the manufactured goods of developed states.<sup>59</sup> Such

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<sup>56</sup> See, e.g., *Colombian Exporters Fear Loss of Tariff Benefits in War on Drugs*, 13 Int'l Trade Rep. (BNA) 204 (1996) (Colombian private sector concerned that, given U.S. political climate, narcotics allegations against Samper government could force Clinton to suspend preferences, raising tariffs with disastrous consequences for legitimate export-dependent businesses).

<sup>57</sup> See *Argentina, Peru Presidents to Press for Trade Liberalization, Integration*, 13 Int'l Trade Rep. (BNA) 206, 207 (1996) (Peru's President Fujimori considers the system of U.S. certification tied to narcotics record a 'sword of Damocles,' citing fear that U.S. misperceptions will deny certification despite good faith efforts); see also *Colombian Exporters Fear Loss of Tariff Benefits in War on Drugs*, *supra* note 52 (legitimate Colombian businesses fear increased tariffs due to U.S. presidential politics would be 'cutting off your nose to spite your face;' U.S. is Colombia's major trade partner and holds largest share of Colombian foreign investment).

<sup>58</sup> See Note, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development*, 108 HARV. L. REV. 1715, 1725 (1995) (unilateral non-binding nature of preference programs serves interests of granting, not beneficiary states).

<sup>59</sup> One reason that the GSP effort is widely judged a failure is that most often the exports of greatest interest to developing countries are not covered. See generally Bartram Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 362-63 (1994).

restrictions significantly undercut the expected economic benefits of such programs.<sup>60</sup> The U.S. GSP statute, for example, explicitly limits the range of articles that may be designated as eligible for GSP treatment by excluding those articles deemed “import sensitive.”<sup>61</sup> Import sensitivity is determined according to the effects that the category of articles might have on U.S. industry if granted duty-free access.<sup>62</sup>

The import sensitivity exclusion is troubling from a variety of perspectives. To begin with, this form of exclusion is flawed from the perspective of economic theory, in that it is trade-diverting. Trade theory suggests that, where developed and developing country exports compete against one another under duty-free conditions, the one that is the most efficiently produced emerges as the most competitive, and production shifts in its favor are welfare-enhancing. Rather than encourage such shifts, which would also of course aid the exporting developing country, the import-sensitivity exclusion obstructs such shifts by re-subjecting the developing country export to the artificial competitive disadvantage of the tariff, thus refusing to permit competition on equal terms and favoring the less-efficient domestic producer.

From the perspective of Justice as Fairness, the import sensitivity exclusion is truly perverse, in that it turns the moral justification of the trading system on its head. Under the difference principle, inequalities are to be justified by their working to the advantage of the least favored. If special and differential treatment is to accomplish this justification, then preferential treatment must be structured to further the interests of developing country exporters, not developed country competitors. Instead, the import sensitivity exclusion deliberately structures the relationship in favor of the less-competitive domestic industry.<sup>63</sup> Thus rather than making the trade relationship more just, the import sensitivity exclusion operates to make it less just, by creating a further inequality in social primary goods through the selective retention of tariff barriers.

A third troubling aspect of the current form of preferential access policies is their conditionality. In addition to subjecting the general availability of these preferences to the discretion of the granting state, actual availability of the preferences at any given time is often subject to conditions imposed by the granting state. Taken as a whole, the U.S. program of unilateral preferences for the Western Hemisphere (the GSP, the Car-

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<sup>60</sup> Robert Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 72.

<sup>61</sup> 19 U.S.C. § 2463 (c)(1) (2003).

<sup>62</sup> See, e.g., 19 U.S.C. § 2463 (b)(1)(B) (exempting from import-sensitivity watches deemed not to cause material injury to the U.S. watch industry).

<sup>63</sup> In fact, the structure of the exclusionary waiver suggests the sort of policy which might be arrived at under a “restricted-utility” analysis excluding the utility of foreigners, further underscoring the inadequacies of utilitarianism as a theory of international justice.

ibbean Basin Initiative (CBI), and the Andean Trade Preferences Act (ATPA)) imposes certain questionable conditions.<sup>64</sup> First, all three programs require that the beneficiary not be a communist country. Second, all three programs condition the preferences on assurances by the beneficiary that it will provide the U.S. “equitable and reasonable access to the markets and basic commodity resources” of the beneficiary,<sup>65</sup> and by requiring that the beneficiary will not grant preferences to other developed countries which are found to hurt US commerce. Third, all three programs require the beneficiary to adhere to a variety of international legal standards. Examples include international expropriation and compensation standards; international intellectual property standards; workers rights; and extradition treaty requirements.

The normative justification for this grab bag of conditions is seriously open to question. If inequalities must be justified according to the difference principle, and trade preferences are the mechanism to do so, then any conditions to those preferences must themselves be consistent with Justice as Fairness. This means that conditions must contribute to the benefit of the least advantaged state, i.e., the recipient, and not to the benefit of the most advantaged, or granting, state. Instead, such conditions are offensive to developing country recipients,<sup>66</sup> and have nothing to do with the moral predicate for such measures in the first place, namely the needs of the recipient.

The nature of these conditions suggests that the policy actually protects the interests of the granting state (its capital, intellectual property, competing workers and arbitral awards). Moreover, the morality of using benefit programs for coercion, even if in service of laudable goals, is questionable. Conditions such as cooperation with US narcotics efforts, extradition commitments, and eschewal of communism do not ensure that the benefits of inequality flow to the least advantaged. Rather, they clearly relate to the domestic and foreign policy agendas of the granting state. To refuse preferences on the basis of a failure to meet such conditions is to directly subvert the principle of justice which can legitimate the international trading system for liberal states.

Thus conditionality as currently employed by the U.S. is not justifiable under a theory of Justice as Fairness. Such conditions entirely reverse the normative thrust of the policy away from the benefits to the developing country and towards the effects on the

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<sup>64</sup> The citations which follow are to the GSP, 19 U.S.C. § 2462 et seq.; the CBI, 19 U.S.C § 2702 et seq.; and the ATPA, 19 U.S.C. § 3202 et seq..

<sup>65</sup> E.g., GSP, 19 U.S.C. § 2462 (c)(4).

<sup>66</sup> *Message of the Ministers of the Group of 77 to the Third WTO Ministerial Conference*, ¶ 12, at [www.g77.org/Docs/message.wto.html](http://www.g77.org/Docs/message.wto.html) [hereinafter G-77 Ministers] (“The preferential trade access granted to some of our countries continues to be tied to conditions not related to trade. We believe that these harmful practices, which conflict with WTO rules, should be eliminated.”).

developed country. In this sense, special and differential treatment becomes an instrument of economic coercion, rather than an instrument of distributive justice.

### **C Reforming Special and Differential Treatment along Normative Lines**

Taken together, the shortcomings in preferential trade practice described above suggest more than simply a policy in need of tinkering: they suggest a fundamental failure on the part of the U.S. and other large economies to pay serious attention to the justice implications of international economic inequality, and the normative role of special and differential treatment. One finds at almost every key point that the provisions of special and differential treatment as implemented limit or subvert the basic principle of Justice as Fairness, i.e., justification by virtue of benefit to the least advantaged. Instead, one sees that, despite the undeniable fact that some developing country exports do benefit from preferential access, the policy casts preferential access in an unstable and coercive form, limits access where it might do the most good, and manipulates access to further unrelated grantor goals.

If, as I have argued in this paper, a liberal theory of just trade entails that international inequalities be justified according to the difference principle, and if market access is the key to such justification, then liberal states cannot legitimately implement special and differential treatment in its current form. Establishing the principle of special and differential treatment on discretionary grounds has the effect of casting an obligation of justice as an offering of charity. Similarly, excluding the most competitive goods and tying preferences to domestic policy goals of the grantor are not justifiable. Instead, the difference principle would require that a just trading system maintain special and differential treatment on a permanent, nonexclusive and unconditional basis, until the underlying facts of inequality change, or an even more effective justificatory mechanism is found.

Incorporating the preceding normative and doctrinal analyses, these restrictions can be expressed as follows:

*Implementing a liberal theory of just trade through special and differential treatment requires binding, unconditional and non-exclusionary preferential market access.*

To the extent that the principle of special and differential treatment is a necessary response to the moral obligations of wealthier states, then it must be implemented through a special and differential treatment policy that fully recognizes the implications of the liberal theory of justice outlined above. A normative overhaul of preferential trade practice, in accordance with the difference principle, would create a more effective aid policy that would also greatly enhance the justice of the trade relationships involved.

## V CONCLUSION

The foregoing account of special and differential treatment and its place in a liberal theory of just trade can be subjected to two types of criticisms. One type of objection which can be raised is whether special and differential treatment is, in empirical terms, of much use in promoting justice.<sup>67</sup> Insofar as the multilateral trading system is moving towards the progressive elimination of tariffs, quotas and other non-tariff barriers, the substance of preferential access is constantly eroding. Economists already speak of the declining marginal utility of preferences in an ever-liberalizing regime.<sup>68</sup> Another criticism of a more theoretical nature begins in the problem of relativism: should a theory of just trade build on consensual human rights norms instead? It has been argued that human rights offers a more promising basis for a normative theory of trade law, given its cross-cultural consensus, at least at the level of positive law.<sup>69</sup>

While accepting the validity of these concerns, I have chosen a different route, as outlined above. First, with respect to the empirical objection, I have chosen to focus on trade law as we find it today, fully recognizing that global circumstances and policy obsolescence could mean that in ten years trade law offers up a different set of doctrinal tools for normative analysis. Second, at the theoretical level, not all states agree on the extent of consensual human rights, particularly in economic areas. Rather than seek to ground the claims of justice in the contentious language of such controversial rights (just talking about trade and justice is controversial enough), I have instead chosen to examine the normative implications that flow from the political commitments liberal states have *already* made by virtue of their liberalism, as the starting point for considering questions of justice as they involve international economic relations. While this may necessarily restrict the normative reach of the theory, it may have the virtue of grounding controversial claims about international justice where there is least disagreement: one's own domestic political commitments.

Nevertheless, both criticisms raise valid concerns for this theory and any theory of trade justice. Put more generally, at the theoretical level one must recognize the epistemic limitations inherent in working with any theory from a particular normative tradition, and continue to search for a theoretical basis for trade justice with the broadest

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<sup>67</sup> Pauwelyn, *supra* note 1 at 110-11.

<sup>68</sup> Bonapas Onguglo, *Developing Countries and Unilateral Trade Preferences in the New International Trading System*, in *TRADE RULES IN THE MAKING* (Mendoza, et al. eds., 1999). For this reason Joel Trachtman refers to market access preferences in particular as a “wasting asset.”

<sup>69</sup> Pauwelyn, *supra* note 1 at 112-14; Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 *LOY. L.A. L. REV.* 407 (2003); Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 *AM. U. J. INT'L L. & POL'Y* 1425 (2000).

possible normative appeal. Empirically, one must endeavor to ascertain whether one's prescriptions actually work at the doctrinal level: armchair empiricism is not enough.

Both criticisms, and the theory's own implications, point to additional areas for future work. For example, it is worth considering the next horizon for trade law if all normatively deficient aspects of special and differential treatment were miraculously addressed, by a WTO Round or some other mechanism. As a starting point, there are serious questions involving the trading system's procedural justice, or the justice of the institutional procedures it establishes and operates by. One such procedure is the basic norm-creating process itself, which is built on a bargaining model in which political and economic power, as manifested in negotiating options, tactics and leverage, are allowed relatively free reign to set future law.<sup>70</sup> While this model raises obvious issues with respect to the WTO's ability to deliver fair, distribution-sensitive outcomes, changing this process is not feasible as an immediate or mid-term goal.<sup>71</sup>

A second, more incremental step, and no less important, is to focus on the procedural justice of the existing dispute resolution mechanism. For example, any rights, preferences and safeguards which developing countries secure for themselves will ultimately have to be adjudicated through the Dispute Settlement Body (DSB), and developing countries face serious obstacles to effective participation in the DSB.<sup>72</sup>

The sort of normative critique of trade law developed here is also urgently needed in other areas of international economic relations. Global social policy is currently set and managed through a variety of institutions in addition to the WTO, including the International Monetary Fund, the World Bank, the International Labor Organization, and specialized UN agencies such as UNICEF and UNDP to name a few.<sup>73</sup> The rules and operations of each of these organizations should be evaluated with respect to their consistency with the tenets of liberal justice, as they apply to the substantive issues each agency manages.

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<sup>70</sup> Vicente Yu, Participation of Developing Countries in the WTO Decision-Making Process, (October 8, 2005)(unpublished paper on file with author); Peter M. Gerhart, Slow Transformations: The WTO as a Distributive Organization, 17 *Am. U. Int'l L. Rev.* 1045 (2002).

<sup>71</sup> It may be that a long-term effect of constitutionalizing the WTO will be to develop constraints on the bargaining process itself.

<sup>72</sup> Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 *WORLD TRADE REV.* 177 (2006) (summarizing developing country challenges).

<sup>73</sup> For a comprehensive and insightful overview of the institutions which set global social policy, see Bob Deacon, *Social Policy in a Global Context*, in *INEQUALITY, GLOBALIZATION AND WORLD POLITICS* 211-47 (Andrew Hurrell & Ngaire Woods eds., 1999).

Finally, at the theoretical level there is much work to be done deepening and extending our approach to global justice within and beyond a predominantly Rawlsian/Kantian liberalism. Political theorists such as Christian Barry,<sup>74</sup> Hillel Steiner,<sup>75</sup> Simon Caney,<sup>76</sup> Luis Cabrera<sup>77</sup> and others are engaged in broadening the array of tools available within normative political theory for addressing questions of global justice. Within the legal academy, there is a growing literature applying alternative principles of justice to economic law institutions, such as John Linarelli's use of Scanlon's contractarian theory of fairness,<sup>78</sup> or James Gathii's argument that procedural fairness - making the WTO fully responsive to all its members - is a condition precedent to substantive fairness.<sup>79</sup>

The process of creating a more just international economic order will require many such efforts by many scholars. It is the author's hope that by engaging in this exercise of developing a normative critique of trade law, such future projects have been facilitated.

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<sup>74</sup> *Applying the Contribution Principle, in* GLOBAL INSTITUTIONS AND RESPONSIBILITIES: ACHIEVING GLOBAL JUSTICE 280 (Christian Barry & Thomas W. Pogge eds.) (Blackwell 2005)

<sup>75</sup> *Exploitation Among Nation*, (manuscript on file with the author) (or cite to symposium).

<sup>76</sup> JUSTICE BEYOND BORDERS (OXFORD 2005).

<sup>77</sup> POLITICAL THEORY OF GLOBAL JUSTICE (ROUTLEDGE 2004).

<sup>78</sup> *Principles of Fairness for International Economic Treaties*, in TRADE AS GUARANTOR OF PEACE, LIBERTY & SECURITY? (Padideh Ala'i et al., eds.) (ASIL Studies in Transnational Legal Policy Spring 2006).

<sup>79</sup> *Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members*, 97 ASIL PROC. 157 (2003).

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