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Trade and Inequality: Economic Justice and the Developing World

Frank J. Garcia

Florida State University College of Law

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TRADE AND INEQUALITY: ECONOMIC JUSTICE AND THE DEVELOPING WORLD

Frank J. Garcia*

*"We turn now to the most obvious problematic of distributive justice: the income disparity between rich and poor nations, and all its social, political and cultural consequences."*¹

I. THE PROBLEM OF INEQUALITY	976
A. <i>Trade and Inequality: A Brief History of the Problem</i>	981
B. <i>Trade, Inequality and the Problem of "Size"</i>	984
1. Defining the "Small" Economy	986
2. Trade and the Small Economy	987
C. <i>Trade Policy Tools for the Inequality Problem</i>	988
1. Special and Differential Treatment	989
2. Assistance Programs	994
II. JUSTICE AND TRADE AMONG UNEQUAL ECONOMIES	995
A. <i>Liberalism as a Theory of Justice</i>	996
B. <i>Egalitarian Liberalism: Rawls' Theory of Justice</i>	997
1. Rawls and Inequality	997
C. <i>Inequality and the Debate Within Liberalism</i>	1002
1. Utilitarianism	1002
2. Libertarianism	1007
III. JUSTICE AS FAIRNESS IN INTERNATIONAL ECONOMIC RELATIONS	1010
A. <i>Justice as Fairness Across Boundaries</i>	1011

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1. Thomas Franck, *FAIRNESS IN INTERNATIONAL LAW* 413 (1995) (hereinafter "Fairness").

B.	<i>Generating an International Difference Principle</i>	1014
1.	Inequality in Natural Endowments and Social Goods	1015
2.	The International Choice Problem	1017
3.	Principles of International Justice as Fairness	1018
C.	<i>The Difference Principle and Trade With Smaller Economies</i>	1023
1.	Justifying Inequalities Through Special and Differential Treatment	1024
2.	Technical Assistance and Unjustified Inequality	1028
3.	The Framework of Just Trade Through Special and Differential Treatment	1029
IV.	ADDRESSING INEQUALITY THROUGH BILATERAL, REGIONAL AND MULTILATERAL TRADE POLICY	1030
A.	<i>U.S. Preferential Trade Practice</i>	1031
1.	Justifying Unilateral Trade Preferences	1031
2.	The Problems of Unilateralism	1038
B.	<i>Implementing Formal Commitments: WTO and FTAA Agreements</i>	1039
1.	Negotiating Market Protection in the WTO	1040
2.	Paying for Technical Assistance: The FTAA Regional Integration Fund	1045
CONCLUSION		1047

I. THE PROBLEM OF INEQUALITY

Economic inequality among states continues to be a challenge for international trade law in the closing days of the 20th century and the opening of a new millennium. At the WTO's Third Ministerial Meeting in Seattle, Washington in the last month of 1999, developed country hopes for the grand inauguration of a multilateral "Millennium Round" were dashed by, among other protests, concerted resistance by developing countries to certain elements of the developed world's trade agenda.² Representatives of the developing world voiced the sense that their con-

2. Daniel Pruzin, Mark Felsenthal & Gary Yerkey, *WTO Seattle Ministerial Fails; Talks to Resume at a Later Date*, 16 INT'L TRADE REP. (BNA) 1990 (Dec. 9, 1999) (EC Commissioner Lamy cites the vigorous new role of developing countries and the Commission's failure to include developing countries that form a majority of WTO membership as causes of the failure of the talks); Mark Felsenthal & Gary Yerkey, *U.S. Pursuit of Labor Working Group Meets Strong Resistance From Others*, 16 INT'L TRADE REP. (BNA) 1995 (Dec. 9, 1999) (developing world strongly opposed formal trade-labor link). See generally David A. Gantz, "Failed Efforts to Initiate the 'Millennium Round' in Seattle" 17 ARIZ. J. INT'L & COMP. L. 349 (2000).

cerns and participation were being marginalized, and that those already holding an unequal share of the world's natural and social resources continue to receive an unequal share of the gains from trade.³ Such opposition should have come as no surprise. Since the Uruguay Round was concluded in 1994, commentators have been evaluating the effects on developing countries of the Round and its progeny, the World Trade Organization (WTO), with mixed conclusions.⁴ Some argue that the WTO's dispute resolution system reflects a victory for the developing world because the system more fully subjects powerful developed countries to the rule of law in their international economic relations.⁵ Unfortunately, other aspects of the WTO agreements reveal costly concessions by developing countries, in areas such as agriculture, intellectual property and investment, in the hopes of securing compensating benefits in other areas.⁶ It is not clear that the gamble has paid off.

The same concerns hold true at a regional level. In our hemisphere, the neoliberal economic paradigm has resulted in profound trade-oriented domestic reforms by developing countries.⁷ U.S. hemispheric

3. *Id.* at 351–52 (need for meaningful inclusion of developing countries in decision-making process); OAU *Unhappy With Status of WTO Negotiations*, INSIDE U.S. TRADE SPECIAL REPORT, 12/4/99, <www.insidetrade.com/secure/seattle_archive.asp>, (“African Countries are being marginalized and generally excluded on issues of vital importance for our peoples and their future.”); *Message of the Ministers of the Group of 77 to the Third WTO Ministerial Conference*, ¶ 3, at <www.g77.org/Docs/message_wto.html> [hereinafter “G-77 Ministers”] (“The benefits of the existing multilateral trading system continue to elude developing countries”).

4. See generally T. N. Srinivasan, *Developing Countries and the Multilateral Trading System* (1998); Note, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development*, 108 HARV. L. REV. 1715 (1995); Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347 (1994); Michael Rom, *Some Early Reflections on the Uruguay Round Agreement as Seen from the Viewpoint of a Developing Country*, 28 J. WORLD TRADE 5 (1994).

5. Srinivasan, *supra* note 4, at 57; Kofi Oteng Kufuor, *From GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes*, 31 J. WORLD TRADE 117, 132–140 (1997). However, it has been argued that differences in economic power will still play a role in the structure and operation of WTO dispute resolution. See Note, *supra* note 4, at 1723–27. In this sense, the dramatic increase in cases against developing countries may be a cause for concern. See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 24–25 (1999).

6. Ethan B. Kapstein, *Distributive Justice and International Trade*, in 13 ETHICS AND INT'L AFFAIRS 175 (1999) (in advancing their interests, developing countries accepted that major concessions in areas such as agriculture and intellectual property would have to be made); see generally Srinivasan, *supra* note 4, at chapters 5–6.

7. See generally AFTER NEOLIBERALISM: WHAT NEXT FOR LATIN AMERICA? 1–15 (Lance Taylor ed., 1999) (summarizing move towards market-oriented approach to economic and development policy in Latin America in recent decades).

policy mirrors this "trade not aid" philosophy,⁸ both bilaterally and in the Free Trade Area of the Americas (FTAA) negotiations,⁹ thus placing trade, for good or ill, at the center of Latin America's development plans for the next several decades.¹⁰

8. The U.S. Enterprise for the Americas Initiative, which inaugurated the U.S. move towards NAFTA and the FTAA, crafted an approach to hemispheric development centered on hemispheric free trade. *See generally* THE ENTERPRISE FOR THE AMERICAS INITIATIVE: ISSUES AND PROSPECTS FOR A FREE TRADE AGREEMENT IN THE WESTERN HEMISPHERE (Roy E. Green ed., 1993); *Bush Hails Possibility of Hemispheric Free Trade Zone During South American Trip*, 7 INT'L TRADE REP. (BNA) 1824 (Dec 5, 1990). The FTAA continues this approach; despite a wide-ranging Declaration, the real agenda continues to be trade, an emphasis that has been viewed in different lights by commentators. *See, e.g.*, Stephen Lande & Nellis Crigler, *Consensus in the Americas: Free Trade by 2005*, 5 BUS. MEX. 70 (1995) ("Hemispheric leaders succeeded in ensuring a meaningful Summit of the Americas by making trade the centerpiece of the historic December meeting"). *But see Summit of the Americas Questioned by Critics for 'Over-Emphasis' on Free Trade*, NOTISUR-LATIN AM. POL. AFF., Dec. 16, 1994 available at 1994 WL 2244236 (reporting criticism of Summit countries for emphasis on free trade over other pressing issues facing the hemisphere and raised in the Summit documents).

9. The FTAA is the centerpiece of the hemispheric agenda announced at the Miami Summit of the Americas. *See generally* Andres Oppenheimer & Christopher Marquis, *Free Trade Giant Set in Motion*, MIAMI HERALD, Dec. 11, 1994, at 34A; John M. Goshko & Peter Behr, *Western Hemisphere Leaders Agree to Form Free Trade Zone*, WASH. POST, Dec. 11, 1994, at A1; David E. Sanger, *Chile is Admitted as North American Free Trade Partner*, N.Y. TIMES, Dec. 12, 1994, at A8. At the Miami Summit of the Americas in December of 1994, all thirty-four of the Summit participants signed the Declaration of Principles and Plan of Action. *See Declaration of Principles and Plan of Action*, 34 I.L.M. 808, 810-11 (1995), available at <http://www.ftaa-alca.org/EnglishVersion/miami_e.htm>. The Summit countries pledged, "to begin immediately to construct the 'Free Trade Area of the Americas' (FTAA), in which barriers to trade and investment will be progressively eliminated," with negotiations to conclude, "no later than 2005," and featuring "concrete progress toward the attainment of this objective . . . by the end of this century." *Id.* at 811.

10. The link between trade and development in Latin America is not new. Free trade and economic integration, at least in the southern hemisphere, have been cornerstones of Latin America's political ideology for over a century. Victor L. Urquidí, *Free Trade Experience in Latin America*, 526 ANNALS AM. ACAD. POL. & SOC. SCI. 58, 59 (arguing that integration attempts began soon after independence). Post-war integration systems were, however, designed around an import-substitution model of trade and development, heavily influenced by the *dependencia* theories of the UN Economic Commission for Latin America. *See* Peter F. Klaren, *Lost Promise: Explaining Latin American Underdevelopment*, THE PROMISE OF DEVELOPMENT: THEORIES OF CHANGE IN LATIN AMERICA 3, 14-26 (Peter F. Klaren & Thomas J. Bossert, eds., 1986) (reviewing the development of dependency theory and its role in Latin American trade policy); Joseph Grunwald et al., LATIN AMERICAN ECONOMIC INTEGRATION AND U.S. POLICY 26 (1972) (surveying economic rationale for import-substitution based economic integration); Albert O. Hirschman, *Ideologies of Economic Development in Latin America*, LATIN AMERICAN ISSUES (Albert O. Hirschman, ed. 1961) (reviewing role of ECLA, its chief writings, and its leading figure, Dr. Raul Prebisch, in formation of Latin American trade and integration policies). This approach to trade and development failed to generate much intra-regional trade, or deliver on its promise of an industrialized and economically independent Latin America ready for open international competition. *See* Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT'L L. 539, 544 n.17 (1995). It remains to be seen whether the current neoliberal or "Washington

The problem of inequality between states is a problem in moral philosophy as well as trade law. Moral and political philosophy are concerned with the order we bring to our social relations, both on the level of individual decisions and relationships, and in terms of the basic structure of our social institutions.¹¹ The problem of inequality in the distribution of wealth and resources is a basic, yet troublesome, aspect of social life which theorists have struggled with since the beginning of political thought.¹² The problem can be analyzed in terms of the distribution of resources *within* states, or the distribution of resources *between* states. Within even quite wealthy states, the problem of distributive justice remains as pressing now as it ever was, with a continuing, pronounced gap between rich and poor persons.¹³

The problem of inequality acquires an even greater significance across borders, because the gap between rich and poor *states* is far, far wider.¹⁴ Moreover, the sort of remedial programs implemented domestically by states to address inequality problems within their borders are quite underdeveloped at the international level.¹⁵ Finally, and perhaps most ominously, the impact of international trade on the fact of

Consensus" approach centered around macroeconomic stabilization, privatization, and liberal trade policies will fare better in the long run. For a critical review of the neoliberal paradigm, see Tamara Lothian, *The Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy*, 28 CORNELL INT'L L. J. 169 (1995). This Article argues that the success of such an approach will depend in no small part on the full implementation of special and differential treatment policies.

11. The distinction, never very clear, between moral and political philosophy can be expressed as follows: moral philosophy concerns questions of right action, and political philosophy concerns that subset of questions involving right action when state power and authority are involved. See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 6 (1990).

12. See, e.g., Aristotle, *Nichomachean Ethics*, in *INTRODUCTION TO ARISTOTLE*, 397–400 (Richard McKeon ed., 1947); see also Alan Ryan, *Introduction to JUSTICE* (Alan Ryan ed. 1993) (defining the influence of classical treatment of distributive justice on all subsequent political philosophy).

13. With regard to developed states, Thomas Franck cites Department of Commerce figures from the last census indicating that in the U.S. for example, approximately 14% of the country lives below the poverty line. FAIRNESS, *supra* note 1, at 413. Looking at developing countries, the situation is even worse. See, e.g., John Sheahan and Enrique V. Iglesias, *Kinds and Causes of Inequality in Latin America*, *BEYOND TRADEOFFS: MARKET REFORMS AND EQUITABLE GROWTH IN LATIN AMERICA*, 29–61 (Nancy Birdsall, et. al. eds., 1998) (documenting persistence and extent of marked inequality in Latin America and reviewing possible explanations).

14. Franck cites statistics demonstrating that in fact the ratio of rich to poor is especially large, with 23% of the world's inhabitants absorbing a whopping 82% of the world's wealth as measured by GDP, leaving 77% of the world to divide the remaining 18%. FAIRNESS, *supra* note 1, at 413–14. For this reason, Brian Barry argues that the international inequality problem "dwarfs into relative insignificance" the domestic distributive problem. Brian Barry, *THE LIBERAL THEORY OF JUSTICE* 129–30 (1973).

15. *Fairness*, *supra* note 1, at 414–15.

inequality is not neutral: the smaller economies characteristic of developing countries are uniquely vulnerable in trade because of such inequalities.¹⁶ In other words, international trade exacerbates existing problems in the distribution of resources, and creates new ones—the rich can get richer, and the poor poorer.

Since international trade seems destined to serve as the cornerstone of global economic and social policy, then developed and developing countries alike must be prepared to evaluate the structure and effects of international economic law¹⁷ in terms of its basic justice. If the developed world's economic relationship to the developing world is in fact governed by moral obligation, and not simply by the instrumental calculations of the moment, then there must be a normative framework within which to articulate the implications of this inequality. Within such a framework, basic doctrines and policies of international economic law can be designed and evaluated in terms of their effectiveness in discharging basic obligations of justice, thereby serving both the normative and pragmatic interests of the developed and the developing world alike.

This Article attempts to lay the foundation for such a framework in the area of international trade law. More specifically, this Article develops the argument that the principle of special and differential treatment,¹⁸ a key element of the developing world's trade agenda, plays a central role in satisfying the moral obligations that wealthier states owe poorer states as a matter of distributive justice. Seen in this light, the principle of special and differential treatment is more than just a political accommodation: it reflects a moral obligation stemming from the economic inequality among states.

This Article thus differs from other approaches that ground developing country trade concerns in the discourse of human rights, such as the right to development.¹⁹ In so differing, this Article argues that

16. As will be explained below, the unique challenges facing developing countries in international trade are best captured by analysis of their status as "smaller economies." See *infra* notes 36–53 and accompanying text. For this reason, the terms "small" or "smaller economies" and "developing countries" shall be used interchangeably in this Article.

17. International economic law is a branch of public international law concerned with the rules governing the economic relations among states and, where relevant, among international non-state actors. See Ignaz Seidl-Hohenveldern, *INTERNATIONAL ECONOMIC LAW* 1 (2nd ed. 1992). International economic law thus includes the law of international trade, international private investment, international public investment, international currency exchange, etc.

18. See *infra* notes 54–77 and accompanying text.

19. See, e.g., Kele Onyejekwe, *International Law of Trade Preferences: Emanations from the European Union and the United States*, 26 ST. MARY'S L.J. 425, 431–46 (1995) (discussing trade preferences as part of the right to development); see generally Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. J. INT'L L. & POL'Y 1425 (2000).

wealthy states that consider themselves to be "liberal" societies are, by virtue of that commitment, already obligated to respond to the problem of inequality through mechanisms such as special and differential treatment. Further, wealthy "liberal" states incur these obligations regardless of whether they acknowledge controversial international legal rights such as the right to development. The argument is thus one of moral duty on the part of the developed world, rather than of legal right on the part of the developing world.

The leading contemporary liberal analysis of the problem of inequality is John Rawls' *A Theory of Justice*, in which he attempts to work out a justification for inequalities in the distribution of domestic social goods such as wealth, rights and opportunities. Despite Rawls' own reticence in this regard, commentators have applied Rawls' theory of justice to international distributive problems as well, with compelling results.²⁰ This Article will therefore examine the problem of inequality in trade as a Rawlsian problem of justified and unjustified inequalities, and explore the implications of such an approach for the structure of trade relationships among developed and developing states. In particular, this Article seeks to go beyond existing treatments of the problem by constructing a Rawlsian argument for the principle of special and differential treatment. When viewed as a vehicle for discharging distributive obligations, the principle of special and differential treatment becomes central for the justification of inequalities in the international distribution of socioeconomic resources. Seen in this light, current multilateral, hemispheric and U.S. practice with regard to special and differential treatment must be reformed in order to bring the practice more fully in line with its moral underpinnings.

A. Trade and Inequality: A Brief History of the Problem

Trade has always been about inequality among states. In the early days of trade theory, David Ricardo noted that the principle of comparative advantage depends upon efficient use of "the *peculiar* powers bestowed by nature" on a particular state.²¹ It is this inequality in

20. See, e.g., Jon Mandle, *Globalization and Justice*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 126 (2000); Thomas W. Pogge, *REALIZING RAWLS* (1989); David A. J. Richards, *International Distributive Justice*, in NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW 275 (J. Roland Pennock & John W. Chapman eds., 1982); Charles R. Beitz, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979). Barry *supra* note 14, at 128–33. For an excellent survey of a variety of theoretical approaches to international distributive justice, and the problems they raise, see Onora O'Neill, "Transnational Justice," in *Political Theory Today*, 276–304 (David Held ed., 1991).

21. See David Ricardo, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 93 (1819) (emphasis supplied).

resource distribution that offers trading states the key opportunity to specialize in goods and services utilizing their unique blend of factor endowments. In theory, this should lead to welfare gains for all concerned, as new wealth is created through economic cooperation.²²

Inequality, however, is not always either benign or beneficent in trade. In practice, these welfare gains are not equitably distributed: the rich can get richer, and the poor poorer. This dynamic is amply illustrated by the history of trade and colonization between the Old World and the New, as described by the noted moral philosopher Adam Smith:

Folly and injustice seem to have been the principles which presided over and directed the first project of establishing [the American] colonies; the folly of hunting after gold and silver mines, and the injustice of coveting the possession of a country whose harmless natives, far from having ever injured the people of Europe, had received the first adventurers with every mark of kindness and hospitality. . . . [I]t was not the wisdom and policy, but the disorder and injustice of the European governments which peopled and cultivated America.

When [the North and South American colonies] were effectuated, and had become so considerable as to attract the attention of the mother country, the first regulations which she made with regard to them had always in view to secure to herself the monopoly of their commerce; to confine their market, and to enlarge her own at their expense, and, consequently, rather to damp and discourage, than to quicken and forward the course of their prosperity.²³

Europe, richer and more highly-developed, was presented with numerous opportunities for outright predation and conquest, and the pursuit of other inherently self-serving policies such as mercantilism, in its economic relations with the Americas.

The economic vulnerability in which inequality places developing countries did not end with colonization. In this century, largely as a

22. See Paul A. Samuelson, *ECONOMICS* 627 (11th ed. 1980) (noting that the starting point for comparative advantage is diversity in conditions of production between different countries).

23. Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 350-52 (Kathryn Sutherland ed., 1993).

result of post-war decolonization,²⁴ the role of inequality in economic relations has become a focus of international economic law.²⁵ In the early days of post-war decolonization, developing countries found themselves facing increasingly unacceptable terms of trade for their primary product exports²⁶ and high tariff barriers to their manufactured goods.²⁷ However, the immediate post-war period presented developing countries with few alternatives. They could either work through systems such as the GATT,²⁸ which they feared would only exacerbate the problem,²⁹ and whose rules were largely written by the advanced industrialized countries;³⁰ or attempt to develop other effective economic fora for their concerns.

Despite initial attempts by developing countries to influence world trade rules through the Havana Charter negotiations, the resulting GATT system's domination by industrialized countries and the GATT's slow rate of change frustrated these efforts. Thus, many developing countries minimized their involvement in the GATT and embarked upon

24. See Onyejekwe, *supra* note 19, at 429 ("As developing countries emerged from colonialism, they called for a new world economic order, complaining that the international economic order had effectively undermined their development efforts.").

25. See generally *id.* (surveying the history of the international economic law of development, built around the concept of trade preferences); see also Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67 (1992).

26. See John Madeley, *TRADE AND THE POOR* 34 (1992) (arguing that real prices for major commodity exports have fallen steadily since 1960, with an acceleration in the rate of decline in the 1980s).

27. See *id.* at 57 (citing relatively higher tariffs against developing country manufactured goods).

28. *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

29. See Kufuor, *supra* note 5, at 120:

"[M]ost of the developing countries joined the GATT at a time in their history when they were largely suspicious of being integrated into the world economy. Most of them saw liberalization, and the subsequent opening up of their economies to capital and goods from the developed world, as a move that would heighten the inequalities that already existed in their international economic relations."

30. See, e.g., Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trade System*, 18 CAL. W. INT'L L.J. 291, 294-95 (1987-88):

"For the last four decades GATT has provided the legal framework within which most international trade between [developing countries] and [industrialized countries] has occurred. Throughout this period [developing countries] have consistently voiced their disaffection with the GATT system of world trade. This perception of GATT as being unresponsive to the economic needs of [developing countries] is symptomatic of a more general dissatisfaction with traditional international law which the [developing countries] view as the normative product of Eurocentric civilization and which, for most of its existence, has served as the 'white man's law' and not as the Law of Nations." (footnotes omitted)."

large-scale multilateral attempts at systemic reform through institutions such as the U.N. Conference on Trade and Development³¹ under the umbrella concept of a New International Economic Order (NIEO).³² Attempts to restructure large-small economy trade relationships through framework treaties or initiatives taken as part of the NIEO, however, were largely ineffective in addressing developing country concerns.³³ As a result, developing countries again shifted their focus, away from the U.N. system and towards the GATT/WTO system,³⁴ with uneven results.³⁵

B. Trade, Inequality and the Problem of "Size"

Countries are classified according to a variety of categories by various international organizations for various purposes, with typical classifications focusing on per capita income levels, indicators of development status, and some set of indicators grouped according to the

31. See John H. Jackson, *THE WORLD TRADING SYSTEM* 275 (1989) (noting that "a number of developing countries, dismayed with rules that had evolved [at the Havana conference], opted to stay out of the GATT system for years."); see also Onyejekwe, *supra* note 19, at 446 ("Developing countries, frustrated with the gradualism of the GATT, looked elsewhere for progress. They turned to the UNCTAD."). Developing countries continued to use the principle of special and differential treatment to maintain some pressure in GATT for increased recognition of their needs. See Hudec, *supra* note 25.

32. The New International Economic Order (NIEO) was a movement among developing countries within the United Nations to force a shift in international economic relations away from structurally disadvantageous policies towards a more equitable relationship between developed and developing countries. See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715; see generally Seidl-Hohenveldern, *supra* note 17, at 9; Brown, *supra* note 4.

33. Despite the adoption of the founding resolution and the *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 7th Sess., Supp. No. 1, at 50, U.N. Doc. A/9631 (1975), the movement and its parent organization, the UNCTAD, have been widely acknowledged as a failure. Madeley notes that "[t]he story of UNCTAD between 1964 and 1992 has been captioned by its initials," which also stand for "until the next conference try and delay" or "under no circumstances take any decisions . . . Both sum up this trade and development organization sadly, but brilliantly." MADELEY, *supra* note 26, at 148. See also SEIDL-HOHENVELDERN, *supra* note 17, at 9 (noting that the NIEO cannot yet be said to be part of international economic law).

34. "Along with this shift [towards open economies], developing countries have taken another step toward what developed countries have long demanded: active participation in trade negotiations in the [GATT]. Trade reforms have heightened the need for market access in a new range of products and increased their stakes in the system. To further these interests, developing countries have committed themselves, both individually and as members of coalitions, to the round of negotiations that began in Punta del Este in 1986, the Uruguay Round."

David Glover & Diana Tussie, *Introduction to THE DEVELOPING COUNTRIES IN WORLD TRADE*, 2 (Diana Tussie & David Glover eds., 1993).

35. See *supra* notes 4-6 and materials cited therein.

rubric "size."³⁶ While inequalities among trading partners can be of many different sorts, with different implications for their economic relationships, one way to begin analyzing the problem is to look at trade and inequality as a problem of differences in economic "size." While there is no necessary correlation between the size of an economy, however measured, and its level of development, it can be said that many developing and least-developed countries exhibit the characteristics of a small economy. It can also be said that small size is an additional complicating factor affecting a country's growth, policy options and development potential.³⁷ Moreover, the most recent international body to address the problem of inequality as it affects trade law, the FTAA's Working Group on Smaller Economies,³⁸ adopted economic size as the most relevant measure with regard to the impact of inequality on negotiation of the FTAA.³⁹ Although the Working Group has been superseded by a consultative forum as part of the transition to the negotiation phase of the FTAA, its approach and work product have been adopted by the negotiating parties.⁴⁰ Therefore, although development status may be more common or familiar, this Article will follow the Working Group and adopt "size" as the most relevant measure with regard to the problem of inequality and trade law.

36. Organization of American States Trade Unit, *OBSERVATIONS ON SMALL ECONOMIES AND WESTERN HEMISPHERE ECONOMIC INTEGRATION 1* (1995) [hereinafter OAS Report on Small Economies].

37. *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 Richard L. Bernal, *The Integration of Small Economies in the Free Trade Area of the Americas*, 9 CSIS POLICY PAPERS ON THE AMERICAS, vol. IX no. 1, 6–10 (1998).

38. Prior to the inauguration of the formal negotiation phase, the FTAA process was supported by seven working groups, including the Working Group on Smaller Economies. Latin American Institute, *Trade Ministers' Conference Reinforces Commitment to Construct Hemispheric Free Trade Zone*, CHRON. OF LATIN AM. ECON. AFF., July 6, 1995, at 1, available in 1995 WL 2297474. The groups were charged with developing actual proposals for FTAA negotiations in each of their areas and presenting these proposals at the Cartagena Ministerial. See *Officials Urge Work Groups to Name Areas for First FTAA Results*, 2 INSIDE NAFTA, Dec. 27, 1995, at 1, 19.

39. *Report of the Working Group on Smaller Economies to the Vice Ministers*, (April 14–17, 1997), reprinted in 4 AMERICAS TRADE, May 1, 1997, at 3 [hereinafter Interim Report on Smaller Economies].

40. The Summit countries initiated the negotiation stage of the FTAA at the Santiago Summit of April, 1998. See *Second Summit of the Americas, Santiago Declaration*, April 19, 1998, at <http://www.ftaa-alca.org/English Version/chile_e.htm>. This involved a transition from a working group system to a negotiating group system. See *Ministerial Declaration of San Jose, Fourth Trade Ministerial Meeting, San Jose, Costa Rica*, Mar. 19, 1998, [hereinafter Costa Rican Ministerial Declaration], reprinted in *Americas Trade—Special Report*, ¶ 6–8, at Mar. 23, 1998 <http://www.ftaa-alca.org/English Version/costa_e.htm>. As part of that process, the Working Group's recommendations were adopted, and the group was dissolved. See *infra* notes 271–272 and accompanying text.

1. Defining the "Small" Economy

A unique definition or concept of a small country does not exist.⁴¹ When considered from a variety of perspectives such as population or territory, most of the world's countries are small. Looking at population alone, eighty-seven of the world's 193 states have a population of less than 5 million, fifty-eight states have under 2.5 million, and thirty-five states have less than 500,000 inhabitants.⁴²

The smallness of states entails a variety of political and economic consequences for the global order. When considering trade, the most important form of "smallness" is economic. In other words, trade is concerned with small economies. There is no absolute definition of a "small" economy; rather, the definition is relative. In other words, the smallness of an economy will always be determined in comparison with other economies. A wide variety of indicators, both quantitative and qualitative, have been employed in the attempt to develop appropriate criteria for such comparisons. Leading indicators are population, GNP or GDP, per capita GDP and per capita income, land area, or some combination of factors.⁴³

The Working Group has adopted self-selection as the appropriate principle to follow in identifying smaller economies.⁴⁴ Therefore, there is no hard and fast set of criteria for identification of a small economy: a country can self-designate, and that designation will be deemed conclusive. Nevertheless, in its analysis of the status of smaller economies, the Working Group did identify population, land size, and GDP as rough indicators of an economy's human, land and capital resources.⁴⁵ No one factor alone determines the small economy; the factors must be analyzed in combination.⁴⁶ Therefore, this Article will also focus on those factors and their inter-relation in its analysis of inequality as it relates to trade.

41. See *OAS Report on Small Economies*, *supra* note 36, at 1.

42. Bernal, *supra* note 37, at 1 (citing *Small but Perfectly Formed*, *ECONOMIST*, Jan. 3, 1998, at 65).

43. See Bernal, *supra* note 37, at 2-8; see generally International Economic Assn. *ECONOMIC CONSEQUENCES OF THE SIZE OF NATIONS* (E.A.G. ROBINSON ed., 1960).

44. This is consistent with the approach taken in the GATT/WTO system, in which countries are allowed to self-select their own appropriate development status, with LDC status available only to countries with a per capita income of under 1000 U.S. dollars. Bernal, *supra* note 37, at 3.

45. Interim Report on Smaller Economies, *supra* note 39, at 3.

46. High GDP alone, for example, would not give an accurate picture of the size of an economy absent population figures. Together these figures yield a GDP per capita measure which is more accurate than either population or GDP alone.

2. Trade and the Small Economy

Smaller economies share certain characteristics that make their participation in the international trading system riskier and more problematic. The Working Group has compiled a list of economic factors describing the special circumstances adversely affecting smaller economies as they participate in the global trading system.⁴⁷ These factors are: small size of population and territory; small size of GDP and GDP per capita; high dependence on external trade; high level of imports; high degree of vulnerability to fluctuation in world prices and demand for their exports; high dependence on trade taxes for government revenues; limited human resources and technical expertise; high unit costs for infrastructure and public administration; relatively undiversified economic base; small size of domestic markets; heavy reliance on primary commodities; extreme vulnerability to external shocks; and vulnerability to natural disasters.⁴⁸ Together, these characteristics render smaller economies 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.

When compared to larger economies, smaller economies are generally more open, i.e., external transactions are large in relation to the total economic activity.⁴⁹ Openness is one response to the fact that smaller economies have fewer resources and smaller markets. Smaller economies rely more heavily on external trade than do larger economies, in part to compensate for problems of scale, such as a narrow range of national resources and the absence of certain types of production owing to the small size of the market. The size and strength of the market thus both restrict the range of consumer choices which smaller economies can independently satisfy, and hamper their efforts to industrialize, expand, and compete in the global export marketplace.

A high degree of openness by itself is not detrimental; however, one must consider this openness in connection with other factors common to smaller economies, such as a relatively undiversified economic base, a heavy reliance on primary product exports, and a public revenue system geared towards trade taxes. Collectively, these factors create an acute vulnerability in smaller economies to fluctuations in world prices for

47. See Interim Report on Smaller Economies, *supra* note 39, at 18, pt. I, § 2.

48. See *id.*

49. In this hemisphere three of the largest countries in terms of territory (United States, Argentina, Brazil) are the least trade-dependent, while the largest in terms of territory, Canada, is one of the least open. In contrast, the Caribbean and Central American states are almost uniformly high in terms of trade openness. Bernal, *supra* note 37, at 5.

their principal exports and imports, and to changes in levels of protection maintained by important target markets for smaller economy exports.

This vulnerability is further reinforced as large economies take advantage of their size to target smaller economy markets for larger economy exports. The fundamental asymmetry in economic and other forms of power between large and small economies leads to the distortion of trade flows, as the dominant partner succeeds in exporting more high-end goods to the smaller economies, and the smaller economy specializes further in resource extraction and sub-assembly work.⁵⁰ The adjustment burdens of restructuring numerous industrial sectors with varying degrees of competitiveness and over-employment, a difficult challenge in any trading system,⁵¹ are particularly acute for the smaller economies, whose industries are generally not internationally competitive. Those industries that survive do so with outside investment and technology and significant downsizing, leading to tremendous social pressures on domestic governments.⁵²

Overall, there is the real risk that the distribution of benefits and burdens within the trading system will be skewed in favor of the dominant party.⁵³ Unable to compete in their own domestic markets against developed country exports, the domestic industries of developing countries will shrivel, producing irreparable harm to the developing country.

C. Trade Policy Tools for the Inequality Problem

The primary legal and policy techniques utilized to address smaller economy trade concerns are the principle of special and differential treatment and the provision of financial and technical assistance. Together these techniques can be understood as a partial response to the challenge of developing an adequate trade law in light of the problem of inequality outlined above. This Article will emphasize special and differential treatment, treating assistance programs only in their subsidiary

50. See Daniel Drache, *Triple 'A' Trade: Asymmetry, Access and Adjustment, the Inflexible Limits of Trade Blocs*, ECONOMIC INTEGRATION BETWEEN UNEQUAL PARTNERS 171, 176 (Theodore Georgakopoulos et al. eds., 1994).

51. *Id.* at 175.

52. *Id.* at 178-79. One result is that smaller economies are forced to alter their wage and price structures to match the interests of the dominant partners. Trade systems are at the forefront of efforts to substitute an efficiency-oriented, high employment model for the social welfare-oriented, full employment model, which has often guided the domestic policy of smaller and developing economies. *Id.* at 178-80. Without some sort of compensating regulatory and redistributive mechanism, trade systems cannot deliver on their promises of increased employment, less expensive goods, and higher standards of well-being. *Id.* at 183.

53. See *id.* at 174. See also Garcia, *supra* note 10, at 539 (analyzing trade and investment distorting effects of certain integration patterns among unequal partners).

capacity as facilitating effective use of the opportunities afforded by special and differential treatment. Before turning to an evaluation of the normative status and role of these mechanisms, they will first be introduced below.

1. Special and Differential Treatment

The principle of “special and differential treatment” has been a cornerstone of trade between unequal partners since the late 1940s, when developing countries began pressing their case for more favorable trade rules.⁵⁴ From an instrumental point of view, the principle of special and differential treatment can be understood as recognition of the fact that while trade theory suggests that the prosperity and development of smaller economies depends ultimately on trade openness, smaller economy industries are uniquely vulnerable to competition from older, more established and technologically advanced developed country industries. As discussed above, unrestricted competition in an unprotected developing country market would have severe effects on developing country employment and industrialization, ultimately working to the disadvantage even of export-oriented developed country industries, which need new markets for high-end consumer goods and capital goods. Therefore, in appropriate cases certain exceptions to trade liberalization principles, such as the reciprocity of tariff obligations, can play an important role in responding to these asymmetry problems by eliminating trade barriers to smaller economy manufactured exports while retaining some protection for the smaller economy’s domestic market.

Under the concept of special and differential treatment, developing countries benefit from two broad categories of measures: market access measures providing preferential access to developed country markets for developing country exports, and market protection measures providing special protection for developing country markets from domination by developed country exports. Preferential access mechanisms include unilateral preference programs, treaty-based preference agreements, and preferential mechanisms built into free trade agreements. Specific market protection mechanisms include the non-reciprocity of tariff obligations, different levels of liberalization commitments, longer periods for implementing liberalization obligations, expanded application of the infant industry exception, and exceptions permitting broad application of quantitative restrictions. Both market protection and preferential

54. See generally John H. Jackson, *WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE*, ch. 25 (1969); Kofele-Kale, *supra* note 30.

access mechanisms can be found at the multilateral and regional trade levels.

a. Market Access

The core of market access measures is the preferential access which lower tariff levels afford for exports from developing countries. Such preferential treatment can be accorded in a variety of ways, generally involving limitations on eligible exports and eligible beneficiary countries.

• UNILATERAL PREFERENCE PROGRAMS

Unilateral preference programs are preferences that are not based on mutual treaty obligations, but on the largesse of the country offering the trade preference. These programs generally take the form of mutual negotiations enacted through a statute of the country offering the benefit. They are preference programs, not free trade programs, because they generally offer duty-free or reduced duty treatment to only a subset of a beneficiary's exports, and these concessions are not reciprocal.

By far the best-known unilateral preference program is the Generalized System of Preferences (GSP). This program has been established under the auspices and oversight of the GATT/WTO,⁵⁵ but the preferences are implemented at the state level. The U.S. Generalized System of Preferences, for example, provides the Executive branch with discretion to award duty-free treatment to certain developing country exports, but subject to controversial program criteria including a "competitive needs" exclusion for the most competitive products.⁵⁶

The U.S. and Canada administer several other unilateral preference programs relevant to hemispheric trade. U.S. programs include the Caribbean Basin Initiative (CBI) and the Andean Trade Preference Act (ATPA), which together provide the best access into the U.S. market short of NAFTA membership.⁵⁷ Treatment under the CBI and ATPA

55. See generally Onyejekwe, *supra* note 19, at 446-67; Kofele-Kale, *supra* note 30, at 299-04.

56. See Trade Act of 1974, 19 U.S.C. § 2461 (1999), and *infra* notes 212-236; see generally U.S. INT'L TRADE COMM'N, *The Year in Trade: Operation of the Trade Agreements Program, 1997*, Pub. No. 3103, at 141 (1998).

57. Caribbean Basin Initiative provides preferential trade status through its trade component, the Caribbean Basin Economic Recovery Act, 19 U.S.C.A. §§ 2701-2707 (1999). The Andean Trade Preferences Act, 19 U.S.C.A. §§ 3202-3206 (1999), creates trade preferences for Bolivia, Colombia, Ecuador and Peru. In 1994, 18.3 percent of total CBI imports and 11.6 percent of total ATPA imports enjoyed duty-free treatment under their respective programs,

programs is more favorable than GSP because more products qualify for preferential treatment than under the GSP program, and these programs do not contain "competitive needs" exclusions.⁵⁸ However, although the CBI and ATPA may lack competitive needs exclusions, many of the most competitive products of beneficiary states are automatically ineligible for preferential treatment. Similarly, Canada's CARIBCAN program eliminates duties on all beneficiary products except the most competitive, including leather goods, textiles and apparel, and footwear.⁵⁹ Excluded goods are eligible for reduced tariff rates under Canada's GSP-equivalent.⁶⁰

• PREFERENCE AGREEMENTS

Treaty-based unilateral preference agreements are essentially unilateral preference programs that become the subject of a bilateral treaty rather than a unilateral program. For this reason, unilateral preference agreements are more stable and conducive to long-term investment because they are not as easily revoked by the granting state as unilateral programs.

Historically, one of the earliest and most important systems of treaty-based preference agreements is the Latin American Integration Association (LAIA),⁶¹ which includes a basic framework of regional concessions and the infrastructure for negotiation of FTAs among its members. LAIA establishes three types of tariff concessions among its members: an across-the-board regional tariff preference scheme giving percentage reductions in national tariffs graduated by the grantor and grantee's level of development, special non-reciprocal preferences for LDCs, and the negotiation of special concession agreements, which are

as compared to 3 percent of all U.S. imports under the GSP program. *The Year in Trade: Operation of the Trade Agreements Program, 1997*, at 126-29, tables 5-2, 5-4, 5-5.

58. See John H. Jackson et al., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 1131 (3d ed., 1995).

59. *ORGANIZATION OF AMERICAN STATES TRADE UNIT, TOWARD FREE TRADE IN THE AMERICAS* 29 (1995) [*hereinafter* Toward Free Trade].

60. *Id.*

61. Members include Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and Uruguay, plus Colombia, Ecuador, Venezuela, and Bolivia. LAIA, formed in 1980 to succeed the LAFTA as the "umbrella" association for Latin American integration, was designed to foster the regional development and creation of a Latin American customs union. LAIA does not itself seek to become a FTA or CU, however. Lorin S. Weisenfeld, *Introduction to Treaty of Montevideo Establishing the LAIA*, in 2 *BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW* 543 (Stephen Zamora & Ronald A. Brand eds., 1990); GARY CLYDE HUFBAUER & JEFFREY SCHOTT, *WESTERN HEMISPHERE ECONOMIC INTEGRATION* 3 (1994).

limited preferences granted to another country or set of countries.⁶² These arrangements are supported by "complementation agreements," creating sectoral free trade to benefit intra-industry specialization within regions and a special intra-regional import credit arrangement to reduce need for foreign capital in intra-regional trade.⁶³

Outside of the LAIA framework, preference agreements have not been widely employed in this hemisphere. The United States has generally followed a policy emphasizing unilateral programs over mutually binding commitments.⁶⁴ Other states and integration systems that have negotiated preference agreements include CARICOM's preference agreements with Venezuela⁶⁵ and with Colombia.⁶⁶

- FTAs

Finally, the preferential access component of the principle of special and differential treatment can be found to a limited extent in free trade agreements, despite the fact that such agreements envision some form of preferential access to all members of the integration scheme.

For smaller economies that become members, access is preferential in comparison to non-members that are beneficiaries of unilateral preference programs. The FTA will usually grant even better treatment across a wider spectrum of exports and, most importantly, will be in the form of a binding treaty obligation and not a discretionary program.⁶⁷

With respect to fellow FTA members, treatment is still "preferential" in the sense that, despite the general expectation of mutuality in trade liberalization, the smaller economy member will often be granted longer

62. See G. Pope Atkins, *LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM* 188 (3d ed. 1995); Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: "A Work in Progress,"* 14 NW. J. INT'L L. & BUS. 493, 497-98 (1994).

63. See generally Daniel M. Ferrere, *New Trends in Latin American Foreign Trade: The LAIA and Its Work*, 19 INT'L LAW. 933 (1985).

64. James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531, 565 (1993).

65. See *Toward Free Trade*, *supra* note 59, at 29. After five years the parties will begin negotiations to make the agreement reciprocal, at which point it will become an FTA. The Agreement with Venezuela, signed October, 1992, provides duty-free access for some CARICOM exports into Venezuela.

66. The Agreement with Colombia, signed in July 1994, provides immediate duty-free treatment for eighty-six percent of Colombia's CARICOM imports. See *id.* The percentage will increase to ninety by January, 1998. See *id.* The parties will negotiate over further preferences and reciprocal concessions from the largest Caribbean countries. See *id.*

67. This is one reason why Caribbean countries have continued to push for an agreement giving them NAFTA parity. See, e.g., *Central American Leaders Push CBI Enhancement Bill*, 16 INT'L TRADE REP. (BNA) 1574 (Sept. 29, 1999); *Caribbean, Central American Countries Should Push for Parity*, *Official Says*, 9 INT'L TRADE REP. (BNA) 2050 (Dec. 2, 1992).

periods in which to implement equivalent levels of liberalization obligations. However, this is more properly a form of market protection, discussed below.

b. Market Protection

The WTO agreements as a whole⁶⁸ incorporate numerous provisions based on the principle of special and differential treatment.⁶⁹ In the GATT, the market protection principle is found primarily in Article XVIII, and in Part IV of the treaty,⁷⁰ appended to the GATT in response to developing country initiatives in the mid 1960s.⁷¹

Under GATT Article XVIII, developing countries meeting the criteria set out in the article can take advantage of a number of market protection mechanisms. Part A of Article XVIII permits developing countries to negotiate an increase in bound tariff rates in order to protect an infant industry.⁷² Developing countries are also granted an exception from the general prohibition in GATT Article XI against quantitative restrictions. Under Part B of Article XVIII, qualifying developing countries are permitted to more liberally employ quantitative restrictions in cases of balance of payments difficulties.⁷³

In Part IV, Article XXXVI.8 incorporates the principle of non-reciprocity of tariff commitments, stating clearly that developed countries do not expect reciprocity for their tariff/NTB reduction commitments to developing countries.⁷⁴ The non-reciprocity principle can be found in other WTO agreements as well.⁷⁵

68. *Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND Vol. 1, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreements].

69. These provisions are well-summarized in the GATT Committee on Trade and Development in *A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments, and Ministerial Decisions* (COM.TD/W/510, Nov.2 1994); see also Organization of American States Trade Unit, *Special and Differential Treatment in International Trade* 7-18 (1996) [hereinafter *OAS Report on Special and Differential Treatment*]; see also Catherine Curtiss & Kathryn C. Atkinson, *United States-Latin American Trade Laws*, 21 N.C. J. INT'L L. & COM. REG. 111, 119-20 (1995).

70. GATT, *supra* note 28.

71. Jackson, *supra* note 54, at 640-648.

72. GATT, *supra* note 28.

73. GATT, *supra* note 28.

74. "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." GATT, *supra* note 28, Article XXXVI:8. Kenneth W. Dam has stated that "many would regard [this] as the key provision of Part IV [of the GATT]." THE GATT 59 (1970).

75. The WTO Agreement on Agriculture, for example, envisages less severe cuts in subsidy levels by developing states and does not require cuts by the least developed countries. WTO Agreements, *supra* note 68, Annex 1A.

Contemporary FTAs and other regional integration agreements, although premised on reciprocal trade liberalization, also often include similar market protection mechanisms. Smaller economies are either permitted to undertake lower liberalization burdens, or are granted an extended transition period in which to implement mutual liberalization commitments.⁷⁶ In the NAFTA,⁷⁷ for example, there is no express differentiation of Parties according to levels of development, and liberalization is premised on reciprocity of obligations. Nevertheless, Mexico was granted longer time periods for implementing its liberalization commitments over more sectors and with regard to more products.

2. Assistance Programs

Economic and technical assistance together form the second critical component in strategies to deal with inequality in trade. Economic assistance programs can involve both direct and indirect wealth transfers.⁷⁸ Direct wealth transfers typically involve public funds, which can be granted directly to the beneficiary state or transferred to, and disbursed by, a regional development bank. Indirect wealth transfers can be accomplished through the facilitation of private transfers in the form of foreign direct and portfolio investment.

Given the significant adjustment problems facing smaller economies in connection with trade liberalization, one often finds some combination of these forms of economic assistance in tandem with trade agreements, supported by the positive transition delays effected by the market protection aspects of special and differential treatment. However, such wealth transfers, while undeniably a part of developed-developing country relationships, are not as central to international trade law *per se* as other forms of assistance such as technical assistance, and shall not be the primary subject of this Article.⁷⁹

Assistance programs can also focus on the provision of technical assistance and financial support for technical assistance, rather than on general monetary transfers. The field of technical assistance encompasses a wide variety of types of knowledge required by smaller

76. See OAS Report on Special and Differential Treatment, *supra* note 69, at 19–56 (summarizing incorporation of special and differential treatment in western hemisphere regional trade agreements).

77. See American Society of International Law, *North American Free Trade Agreement*, 32 I.L.M. 605 (1993) [hereinafter *NAFTA*].

78. See generally Anne O. Krueger, ECONOMIC POLICIES AT CROSS PURPOSES: THE UNITED STATES AND DEVELOPING COUNTRIES 64–67 (1993) (discussing categorization of foreign aid) (reviewed in *Book Notes*, 27 GEO. WASH. J. INT'L L. & ECON. 281,288 (1993)).

79. On aid-based redistributive policies, as opposed to trade-based redistribution, see generally Franck, *supra* note 1, at 415–25.

economies to take full advantage of the opportunities afforded them by trade in general, and special and differential treatment in particular.⁸⁰ Smaller economies need specialized expertise in order to negotiate sophisticated trade agreements, understand and implement trade obligations, harmonize trade-related and other bodies of law, and to modernize their trade laws and regulatory systems in general. As a rule, larger and more developed economies are rich in this sort of knowledge, but both sides need it for trade liberalization agreements to function properly. Therefore, some type of technical assistance involving transfers of such knowledge, and the funds to pay for expertise, is a recognized component of North-South economic integration, and has for example been widely employed in European integration.⁸¹

II. JUSTICE AND TRADE AMONG UNEQUAL ECONOMIES

The problem of trade and inequality is a paradigmatic case of the link between trade and justice. The distribution of social goods among the richer and the poorer members of a society is a central concern of domestic theories of justice. One of course finds rich and poor individuals outside of one's own society, and one can speak in aggregate terms of richer and poorer states as well. Following Brilmayer, this Article takes the "vertical" approach to the moral issues these facts raise, namely that transnational relations involving inequality, indeed all aspects of transnational relations, require justification in terms of "domestic" political theory.⁸² Thus we look to what has been considered traditionally as *simply* domestic political theory, for the normative justification of distributive patterns in which the richer and the poorer are individuals considered together as states, and not individuals within a state.

Despite political philosophy's longstanding concern with such matters, the normative implications of inequality are controversial within the field. Because this Article is aimed at clarifying the moral obligations of wealthier states, and the preponderance of such states

80. For a representative overview of the field of action, see CTD Secretariat *Report on Technical Cooperation and Training 1998*, WT/COMTD/W/62 (May 6, 1999).

81. See Helen E. Hartnell, *Central/Eastern Europe: The Long and Winding Road Toward European Union*, 15 COMP. L. Y.B. OF INT'L BUS. 179, 212 (1993); Frank J. Garcia, "Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas, 35 COLUM. J. TRANSNAT'L L. 65, 103 (1997).

82. See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989); see also Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT'L ECON. L. 391 (1998) (suggesting international relations raise problems which, by their very nature, are within the scope of the concept of justice as classically defined by domestic political theory).

consider themselves Western-style liberal democracies, this Article will work within the general framework of liberalism, the dominant philosophical approach to matters of government and society in the West since the Enlightenment, if not the Protestant Reformation.⁸³

A. *Liberalism as a Theory of Justice*

Liberalism is a notoriously difficult term to define.⁸⁴ This article adopts the approach suggested by Michael Sandel and Jeremy Waldron and focuses on liberalism as a theory of justice, a view about the justification of social arrangements.⁸⁵ What is most characteristically "liberal" about liberalism as a form of justification is its assertion that the consent of each individual under a system of political order is necessary for that order to have legitimacy.⁸⁶ This insight can be said to unite the disparate liberalisms of theorists such as Kant, Mill and Nozick.⁸⁷ The form which that consent takes, and the principles consented to, differ according to the particular strand of liberalism to be considered. This Article considers three: egalitarianism, and to a lesser extent utilitarianism and libertarianism.

A further unifying theme in the discussion of liberalism is the liberal commitment to "equality," to treating people as equals.⁸⁸ Following Dworkin, Waldron has argued that liberalism is more deeply committed to the ideal of equality than of liberty, rejecting the common view that liberalism is characterized by an attempt to strike a balance between these competing ideals.⁸⁹ Kymlicka further develops this point into an approach to liberal theories of justice as attempts to work out, in different ways and to different conclusions, the precise content of the term "equal treatment." If Waldron, Dworkin and Kymlicka are right, then

83. See John Rawls, *POLITICAL LIBERALISM* xxiv (1993).

84. Alan Ryan, in the opening paragraph of his essay on liberalism, laments as follows: "Anyone trying to give a brief account of liberalism is immediately faced with an embarrassing question: are we dealing with liberalism or with liberalisms?" Alan Ryan, *Liberalism*, in Goodin and Pettit, *COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 291 (1993).

85. Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *PHIL. Q.* 127, 128 (1987); Michael J. Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE* 1 (1998) ("[L]iberalism is above all a theory about justice . . .").

86. Waldron, *supra* note 85, at 140.

87. See Ryan, *supra* note 84, at 304. This normative priority of the individual is also central to liberal theories of international law. See, e.g., FERNANDO TESON, *A PHILOSOPHY OF INTERNATIONAL LAW* (1998). While this Article develops a liberal theory of trade law based on traditional domestic political theory, it arrives at a sort of international liberal theory of trade compatible with the positions taken by liberal internationalists generally.

88. See Kymlicka, *supra* note 11, at 4-5.

89. See Waldron, *supra* note 85, at 129, citing Ronald Dworkin's *Liberalism in A MATTER OF PRINCIPLE* (1985).

liberalism can also be analyzed comprehensively as a theory of justice as equality, and any individual liberal theory can be critiqued on the basis of how well it achieves this equality.

B. Egalitarian Liberalism: Rawls' Theory of Justice

If equality is central to liberalism, then the natural starting point in considering liberal theories of justice is the leading egalitarian theory of justice: John Rawls' "Justice as Fairness."⁹⁰ The problem of inequality is at the heart of Rawls' theoretical enterprise. The principal work in which Rawls sets forth his response to inequality, the theory of Justice as Fairness, is *A Theory of Justice*,⁹¹ and it is the theory as set forth in that seminal work which shall be the basis for the treatment which follows.⁹²

1. Rawls and Inequality

Rawls is concerned with the inequalities that arise with respect to the distribution of primary goods, or goods "that every rational man [sic] is presumed to want," goods that "normally have a use whatever a person's rational plan of life."⁹³ Primary goods come in two basic varieties. Social primary goods, such as "rights and liberties, powers and opportunities, income and wealth,"⁹⁴ are distributed by "the basic structure of society,"⁹⁵ namely its principal social institutions.⁹⁶ In contrast, natural primary goods, such as "health and vigor, intelligence and imagination," are by definition not subject to

90. Perhaps the leading alternative account of egalitarian justice is Ronald Dworkin's theory of justice as equality of concern, set out primarily in *What is Equality? Part I: Equality of Welfare*, and *Part II: Equality of Resources*, in 10 PHIL. & PUB. AFFAIRS 185-246 and 283-345 (1981); see generally Kymlicka, *supra* note 11, at 50-55.

91. John Rawls, *A THEORY OF JUSTICE* (Harvard Univ. Press 1972) (*hereinafter* "THEORY OF JUSTICE")

92. Rawls updates and expands aspects of this work in *POLITICAL LIBERALISM*, chiefly as it relates to the structure of political liberty and discourse. Because the distributive aspects of justice as fairness are not as central to the latter work, it shall not be directly addressed here. See *supra* note 83, at 6-7 (arguing that justice as fairness is the background but not the preoccupation of *POLITICAL LIBERALISM*). Rawls discusses the applicability of Justice as Fairness to international relations in *THE LAW OF PEOPLES* (1999 [*hereinafter* *LAW OF PEOPLES*]), a work developing the basic argument presented in an earlier essay by the same name. 20 *CRITICAL INQUIRY* 36 (1993). Rawls' position in this most recent work is central to the project of this Article, and will be addressed below in section III.

93. *THEORY OF JUSTICE*, *supra* note 91, at 62.

94. *Id.*

95. *Id.*

96. *Id.* at 7. Recent critics of Rawls have sought to extend criteria of distributive justice beyond "the basic structure" to social conventions and personal choices, but Thomas Pogge maintains that Rawls' limitation remains coherent. Thomas W Pogge, *On the Side of Distributive Justice: Reflections on Cohen and Murphy*, 29 PHIL. & PUB. AFFAIRS 137 (2000).

distribution by the basic structure—they are, in other words, “natural”—although their possession is “influenced by the basic structure.”⁹⁷

In particular, Rawls is 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 central problematic of 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.⁹⁸

The central moral intuition underlying Rawls’ treatment of inequality is that the inequalities in social primary goods that result from such social operations are not deserved, since they are deeply influenced by an underlying natural inequality untouchable by categories of moral responsibility and entitlement.⁹⁹ Rawls’ primary concern is, therefore, to elaborate a theory which “nullifies the accidents of natural endowment.”¹⁰⁰ Put another way, Rawls requires that a liberal theory of justice be “endowment-insensitive,” in order to capture our intuition that we do not deserve in any meaningful moral sense the advantages or disadvantages that we enjoy as a consequence of the physical and social circumstances of our birth.

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.”¹⁰¹ The distribution of natural talents is to be considered a common asset, and society structured so that this asset works for the

97. THEORY OF JUSTICE, *supra* note 91, at 62.

98. Inequalities in the distribution of social goods can also result from the degree of effort and ambition we apply to our level of natural resources. This is the problem of ambition, and Rawls’ failure to take adequate account of the role of ambition in distributive justice is one of the main criticisms raised by Dworkin and others. See *supra* note 90. Dworkin maintains that it would be unjust to redistribute wealth in accordance with inequalities resulting from differences in ambition—in other words, that a theory of justice must be “ambition-sensitive.” See *id.*

99. To the extent that inequalities in social primary goods also result from differences in ambition, and not from differences in natural endowments, such inequalities might be said to be “deserved.” See *supra* note 98. However, I believe it is fair to read Rawls as referring here more narrowly to the social advantages which attach to the particular circumstances of our birth, and not those which we develop in life. In any event, this Article accepts the validity of Rawls’ assumption that arbitrary inequalities in natural primary goods render the unequal distribution of social primary goods undeserved. It is this assumption, of course, which is the chief point of contention for libertarian critics. See *infra* notes 139–143 and accompanying text.

100. THEORY OF JUSTICE, *supra* note 91, at 15.

101. *Id.* at 102.

good of the least well off.¹⁰² In so doing, Rawls considers this society to meet the basic Kantian obligation of mutual respect, to treat each other as ends and not as means.¹⁰³ Elaborating and defending this view is the chief task of *A Theory of Justice*.

ii. Justice as Fairness

The basic structure and conclusions of Justice as Fairness are quite well-known,¹⁰⁴ so I shall outline them here. In *A Theory of Justice*, Rawls articulates the principles that would be chosen by "free and rational persons concerned to further their own interests" in an "initial position of equality" to define the fundamental terms of their association.¹⁰⁵ The "general conception" of justice as fairness consists of a single central idea: "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."¹⁰⁶

Justice is therefore tied to the notion of an equal share in social goods. People are treated as equals, however, not by removing all inequalities in social distribution, but by removing only "unjust" inequalities, those inequalities that cannot be justified in terms of their benefit to the least advantaged.¹⁰⁷ Rawls contends that a given inequality, in income distribution for example, is nevertheless just if it can serve the interests of the least advantaged by, for example, drawing out a socially useful talent such as entrepreneurial ability, such that jobs and other opportunities are created for the least favored. Such an allocative scheme,

102. *Id.* at 179. It can be objected that while Rawls may have established that these talents do not belong to those born with them, he has not really established that they belong to everyone. To this it can be replied that, as life involves the exercise of such talents, such exercise must necessarily involve an act of appropriation. Thus, the appropriation will either be for the benefit of the one exercising the talents (as libertarians would have it) or for the good of others. There is really no other choice. It could still be objected that the relevant community of others could, for example, be plausibly restricted to one's family or immediate social group, as communitarians might argue. See SANDEL, *supra* note 85, at 30–31; see generally Kymlicka, *supra* note 11, at 160–237. This raises the issue of the boundaries of political community, a key issue for any contractarian theory. It can be argued in reply that the social group should be construed to be as large as the cooperative reach of the society creating the social primary goods and the jurisdictional scope of the social institutions allocating such goods. See *infra* notes 165–172 and accompanying text. For the purposes of international economic relations, therefore, the relevant community would be the world.

103. THEORY OF JUSTICE, *supra* note 91, at 179.

104. For a useful and critical overview see Barry, *supra* note 14; see also Robert P. Wolff, UNDERSTANDING RAWLS (1977); see also Robert P. Wolff, READING RAWLS (Norman Daniels ed., 1975).

105. THEORY OF JUSTICE, *supra* note 91, at 11.

106. *Id.* at 303.

107. *Id.* at 62.

however, entails making a myriad of difficult decisions involving competing principles of distribution, such as efficiency, merit and need.

This general conception is further developed into a system of principles and priorities intended to help resolve such conflicts. The resulting "special conception" of justice consists of two principles:

First Principle: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle: Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.¹⁰⁸

It is Rawls' contention that the application of these two principles would be adequate to assure the implementation of a just overall system of allocation of social primary goods.¹⁰⁹

Rawls' argument for justice as fairness depends on a key procedural device, the so-called "original position."¹¹⁰ As Rawls intends it, the original position is a hypothetical, carefully defined state in which people with certain stipulated attributes make a single, joint decision regarding the principles of justice for their future association. The resulting theory of justice is fair, so the argument goes, because the conditions under which the original choice is made are "fair." The constitution of the original position, therefore, becomes of the first importance for the cogency of the resulting theory.

108. *Id.* at 302-03. These principles are supplemented by two "Priority Rules." First, the "Priority of Liberty" states that the principles of justice are to be ranked in lexical order, requiring that liberty can be restricted only for the sake of liberty). Second, the "Priority of Justice over Efficiency and Welfare" states that the second principle of justice is lexically prior to both the principle of efficiency and maximization of the sum of advantages. The second principle also specifies that fair opportunity is prior to the difference principle). *Id.*

109. When supplemented by the two "Priority Rules", these principles form a system of lexical priority. This priority scheme creates a framework for resolving intuitionist stalemates between principles of justice. The scheme also ensures that, contra utilitarianism, individual rights can never be traded away on the basis of the principle of efficiency, which is lexically inferior both to the principle of equal liberties and the difference principle.

110. Sandel, *supra* note 85, at 47: "The original position is the fulcrum of the justificatory process in that replace it is the device through which all justification must pass, the place at which all arguments must arrive and from which they must depart." Rawls' argument also depends upon his notion of "reflective equilibrium" whereby putative principles of justice are determined to match our considered moral judgments. See *THEORY OF JUSTICE*, *supra* note 91, at 48-53. Since the construction of the original position is quite relevant for international justice and that the process of reflective equilibrium remains the same in the original position, this Article will focus on the former.

Key elements of the original position are, first, that it is hypothetical—Rawls is not positing an actual state of nature, nor is he positing an actual, quasi-Edenic pre-constitutional convention.¹¹¹ Second, the principles are chosen behind a veil of ignorance; that is, the parties in the original position are ignorant as to the contingent social facts that, afterwards, will determine their relative position in society, with its attendant advantages and disadvantages. They do not know, for example, their social status, wealth, natural endowments, or even their individual conception of the good. Third, those in the original position possess certain qualities. They are moral, in the narrow sense that they have ends that they value; they are rational, i.e., capable of reasoning in the narrow sense of judging the means which best suit their ends;¹¹² they are mutually disinterested, in that they do not take an interest in each other's interests (or, put another way, they are not moved by empathy or altruism),¹¹³ and they have a sense of justice. Any decision reached under these circumstances is fair, according to Rawls, because all are similarly situated and none can design principles that will favor his or her situation beyond the original position.¹¹⁴

Out of this original position comes the choice of the two basic principles of justice which form the bedrock of Rawls' theory. Since, in attempting to work out a system of basic liberties, each person in the original position does not know under what circumstances they will find themselves beyond the veil of ignorance, it would be irrational to choose a system of liberty that gave some a permanent advantage in liberty at the risk of a permanent loss of liberty, or permitted some to increase their wealth, for example, at the risk of less liberty. Each person will therefore choose the maximum degree of liberty consistent with an equal system of liberty for all, i.e., Rawls' First Principle of Justice, and a priority rule that does not permit liberty to be sacrificed for other social goods.

Similarly, when faced with a risk of unknown probability that they will find themselves the most disadvantaged in the natural lottery, those in the Original Position will maximize the minimum share allocated under the system of primary social goods. The resulting difference principle, argues Rawls, best expresses this "maximin" strategy, in that

111. Rawls, *supra* note 91, at 12.

112. *Id.*, at 14.

113. *Id.*, at 13.

114. *Id.*, at 18: "It seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles."

any justifiable inequality must therefore work to the advantage of the least well-endowed.

C. Inequality and the Debate Within Liberalism

Liberalism offers at least two other basic approaches to the problem of inequality: utilitarian and libertarian theories of justice. While utilitarianism and libertarianism are both liberal theories, they differ fundamentally from egalitarianism in their approach to the problem of inequality. For the reasons set forth below, this Article suggests that when contrasted to egalitarianism, both positions fall short of developing an adequate justification for the economic inequalities that plague developing countries.

1. Utilitarianism

Utilitarianism is a particular form of consequentialism or, as it is also known, the teleological approach to ethical theory. In general terms, utilitarianism determines the morality of an act according to its consequences for the aggregate of individual utility.¹¹⁵ Utilitarianisms can be distinguished on the basis of their particular theory of utility, or value. Historically, utility was defined generally in terms of individual happiness.¹¹⁶ In classical utilitarian theory, human happiness is identified as the good to be sought in all actions. If morality consists of exhortations to do good for people, then an essential characteristic of moral acts is that they in fact do good for people. The greatest good for people, to paraphrase Bentham, is to be happy.

"Happiness" has since been generalized into the concept of "welfare" or "utility," variously conceived of as hedonic satisfaction, desirable mental states, simple preference satisfaction, or rational preference satisfaction.¹¹⁷ Modern utilitarians are more likely to define utility

115. This is classical or act-utilitarianism. In rule-utilitarianism, a particular rule is justified by a utilitarian calculus, which rule then in turn constrains particular acts. While the two approaches differ in important respects, this Article treats them together for the purposes of the following critique.

116. Jeremy Bentham writes:

"By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or oppose that happiness."

An Introduction to the Principles of Morals and Legislation, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 791-92 (Edwin A. Burt ed., 1967).

117. See generally KYMLICKA, *supra* note 11, at 12-18.

in terms of the satisfaction of interests or "preferences,"¹¹⁸ which are understood to include a wide range of desired activities, objects and states.¹¹⁹ For economists, preference satisfaction generally takes the form of welfarism, in which the sum or average of resulting individual welfare levels determines the correctness of an act, principle or policy.¹²⁰ Essentially, utilitarianism claims that the principle of utility maximization follows naturally and compellingly from the simple fact that people have such preferences, and will thus be happier to the extent to which such preferences are satisfied.

Historically utilitarian theory was concerned with the problem of inequality.¹²¹ Both Bentham and Mill considered utilitarian theory to be a liberal theory precisely because it distributes public voice equally across social and economic inequalities—each counts for one, and no one for more than one. Utilitarianism as a theory of justice directs that social ordering acts and decisions be arranged so as to satisfy as many rational preferences as possible. Because resources are limited, however, not everyone's preferences will be satisfied. Utilitarianism therefore counsels that the just social ordering is one in which utility, however defined, is maximized. Moreover, in determining the utility effects of particular arrangements, each person's preferences count equally. As reformers, both Mill and Bentham therefore expected utilitarianism to justify

118. See Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 705 (1993). ("[N]o prominent theorist now defends a hedonistic conception of utility. All of the other specifically utilitarian theorists . . . join economists in taking utility not as an object of reference, but as an index of preference satisfaction.").

119. See R.G. Frey, *Introduction: Utilitarianism and Persons*, in UTILITY AND RIGHTS 3, 5 (R.G. Frey ed., 1984) (modern utilitarians tend to adopt "an interest-satisfaction view, in which 'interests' is a generic term covering a multiplicity of desires or preferences."); See generally Kymlicka, *supra* note 11, at 14–15.

120. See Hausman & McPherson, *supra* note 118, at 704. Utilitarian theorists have further refined preference-satisfaction utility to comprise "rational" or "informed" preferences, responding to the criticism that not everything we want is of value simply because we want it—we might, for example, be mistaken or misinformed. Kymlicka, *supra* note 11, at 14–15. Nevertheless, preference-satisfaction utilitarianism remains classical utilitarianism, albeit with an expanded theory of value. Frey, *supra* note 119, at 5.

121. Mill writes passionately on the problem of inequality:

No longer enslaved or made dependent by force of law, the great majority are so by force of poverty; they are still chained to a place, to an occupation, and to conformity with the will of an employer, and debarred by the accident of birth both from the enjoyments, and from the mental and moral advantages, which other inherit without exertion and independently of desert. That this is an evil equal to almost any of those against which mankind have hitherto struggled, the poor are not wrong in believing.

John Stuart Mill, *Chapters on Socialism*, in 5 COLLECTED WORKS OF J.S. MILL, 705, 710 (1967).

changes to the existing social, political and economic systems that would favor the least well-off.¹²²

At first blush, therefore, a utilitarian approach to the problem of inequality would seem well-suited to the socioeconomic claims of the developing world.¹²³ When one considers the levels and distribution of wealth across both the developing and the developed world, it seems quite likely that utility maximization will require wealth-transfers to developing countries. There are, after all, many more people in developing countries than in developed countries, and differences in marginal utility will weigh in heavily in such a calculation.¹²⁴

As a theory of international distributive justice, however, utilitarianism runs into trouble.¹²⁵ The central problem for a utilitarian theory of international distributive justice is the problem of standing. When determining the utility effects of a given act, whose utility counts? This problem has both a formal and a political dimension. Formally, it has been argued in the cost-benefit literature that the choice of whose preferences to count is underdetermined by utilitarian economic theory, leaving the matter open to the discretion of the analyst.¹²⁶ In such cases, cost-benefit decisions involving cross-border externalities may be analyzed without taking into consideration the preferences of those outside

122. With regard to social inequalities, for example, Mill writes that the principle of utility would clarify the injustice of social inequalities far more than simple consideration of their social expediency: "So it has been with the distinctions of slaves and freemen, nobles and serfs, patricians and plebeians; and so it will be, and in part already is, with the aristocracies of color, race and sex." John Stuart Mill, *UTILITARIANISM*, 62.

123. O'Neill cites two other advantages to consequentialist theories of international distributive justice: their sensitivity to harms, and their focus on results. *Supra* note 20, at 282.

124. O'Neill, *supra* note 20, at 283 ("Marginalist considerations suggest that any given unit of resources will be more valued by the poor than by the rich, and so that transfers would have to go a long way towards an equal distribution of resources before justice was achieved.")

125. Utilitarian theory encounters several problems as a general liberal theory of justice, in particular with regard to its consequentialist approach to moral reasoning, the status of individual rights, and the possibility of incommensurable values. *See generally* Frey, *supra* note 119. These difficulties resurface in international applications of utilitarianism as well. *See* Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 *Brook. J. Int'l L.* 51, 70-76 (1999). Other shortcomings to consequential approaches to international distributive justice include "overly pliant instruments of calculation" leading to multiple inconsistent prescriptions, and their insensitivity to deontological considerations such as the prohibition against treating people as means to the happiness of others, and the need to prioritize preferences according to a theory of human needs. O'Neill, *supra* note 20, at 284.

126. Dale Whittington and Duncan MacRae, Jr., *The Issue of Standing in Cost-Benefit Analysis*, 6 *J. POL'Y ANAL. & MGMT.* 665, 666 (1986) I am indebted to D. Don Welch, Jr. for drawing this literature to my attention.

the social unit of the decision-makers,¹²⁷ since the basis for any right on their part to have their preferences counted may be unclear.¹²⁸ While there may be arguments against this view on a theoretical level,¹²⁹ there are strong political reasons why the restricted preference approach may be favored in practice. Utilitarian economists and philosophers are free to adopt a global point of view with regard to utility maximization, but national decision-makers are not likely to do so.¹³⁰ If decision-makers in developed countries consider wealth redistribution policies along utilitarian lines, they are far more likely to restrict their analysis to the utility effects on their national constituency.¹³¹ After all, in a system of nation-states and representative government, national constituencies are the party to whom such leaders are accountable.¹³²

This restriction dramatically alters the utility calculus and makes it far less likely that any wealth redistribution will occur, despite the overwhelming numerical superiority of the world's poor and the undeniably welfare-enhancing effects of such redistribution. The same social facts supporting redistribution on global utility grounds drastically undercut the argument for redistribution when standing is limited to the national sphere. The theory of comparative advantage does suggest that not all transfers from developed to developing countries will constitute a zero-sum game. Nevertheless, there will almost certainly be a relative, if not absolute, decrease in the welfare of developed countries in order that the welfare of all states may increase. In such a scenario it is unlikely that national decision-makers will argue for policies resulting in decreases in national welfare, whether absolute or relative, by appealing to the

127. William N. Trumbull, *Who Has Standing in Cost-Benefit Analysis?* 9 J. POL'Y ANAL. & MGMT 201 (1990).

128. Anthony Zerbe, Jr. argues that the standing debate reflects the extent to which utilitarian cost-benefit analyses depend on legal rights determined outside the theory. *Comment: Does Benefit-Cost Analysis Stand Alone? Rights and Standing*, 10 J. POL'Y ANAL. & MGMT. 96 (1991). Where the rights of affected parties are unclear, as in the case of foreigners, then the standing of affected parties cannot be resolved by the theory alone. *Id.* at 101. Regardless of which way the standing issue is resolved, the analysis requires recourse to principles outside of utilitarian theory itself, suggesting that utilitarian theory by itself is inadequate for international distributive problems.

129. Trumbull argues that the Pareto principle requires that the preferences of any affected party be included in the cost-benefit analysis. *See supra* note 127, at 207-16. However, Whittington and MacRae question whether this really resolves the issue. Dale Whittington & Duncan MacRae, Jr., *Comment: Judgements About Who Has Standing in Cost-Benefit Analysis*, 9 J. POL'Y ANAL. & MGMT 536, 544-46 (1990).

130. Whittington & MacRae, *supra* note 129, at 544 ("Such a saintly standard is, however, impossibly difficult to achieve for both politicians and other mortals.").

131. Turnbull argues that this is precisely the move that the utility maximization approach leaves open. *Supra* note 127, at 213-14.

132. Kapstein, *supra* note 6, at 185.

welfare increases in poorer states and the resulting overall welfare increase.¹³³

In such cases, utilitarians would have to marshal a variety of domestic utility-based justifications for various types of assistance to poorer states in order for individuals in richer states to find utilitarian-based redistribution compelling. Such justifications might include an appeal to increased stability in international relations or to the creation of larger and stronger markets of consumers for developed country exports.¹³⁴ While these arguments may have merit in their own right, the degree of redistribution they justify is likely to fall short of the redistribution justifiable on global utility lines. Moreover, the moral rationale for addressing the problem of inequality now smacks of egoism, a questionable moral philosophy even among individuals, let alone among nations.¹³⁵

The utilitarian approach to the problem of inequality is also hampered by the fact that inequality for utilitarians is not a special or unique problem.¹³⁶ Inequality is a social fact among many other social facts. In contrast, the problem of inequality is a central, if not paradigmatic concern for egalitarian liberalism. The goal and standard for any egalitarian theory of distributive justice will be a principle of justice by which social organization can be adequately justified in the face of inequality, even if this involves the redistribution of wealth towards, if not absolute equality of outcomes, then justifiable inequality.

133. For similar reasons Rawls considers it unlikely, as a matter of ideal theory, that utilitarianism would be chosen as a principle of justice in the original position:

Offhand it hardly seems likely that persons who view themselves as equals, entitled top press their claims upon one another, would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by others. Since each desires to protect his interests . . . no one has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction. In the absence of strong and lasting benevolent impulses, a rational man would not accept a basic structure merely because it maximized the algebraic sum of advantages irrespective of his own basic rights and interests. Thus it seems that the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage.

THEORY OF JUSTICE, *supra* note 91, at 14.

134. See SMITH, *supra* note 23, at 308–09.

135. See Hausman and McPherson, *supra* note 118, at 686–88. An egalitarian liberal approach would in any event reject such utilitarian reasoning, despite any apparent agreement in outcomes, and argue instead for the existence of an obligation towards the less fortunate based on moral principles justified deontologically, rather than on an outcome contingent on the calculation of utility and social facts.

136. See BEITZ, *supra* note 20, at 127.

2. Libertarianism

As with egalitarianism, the problem of inequality is central to libertarians—however, they draw opposite moral conclusions from the same social facts. The classic libertarian-egalitarian conflict involves a fundamental disagreement over the moral legitimacy of state-effected wealth redistribution, based on a contrary view of the moral implications of natural inequality. While egalitarians see in the arbitrariness of natural inequality a justification for the difference principle as a condition of moral equality, libertarians see moral equality as equality of *rights*, in particular rights to unequal endowments and their fruits. For libertarians, this results in a system of social inequalities that, while perhaps regrettable, can justly be addressed only by some minimal notion of procedural fairness or fairness of opportunity on the part of the less advantaged.

Libertarian theory asserts the fundamental primacy of individual rights, in particular rights to property broadly conceived. Taking Nozick as an example, the starting point of his theory, strongly stated at the very outset of *Anarchy, State and Utopia*, is that “individuals have rights, and there are things no person or group may do to them without violating their rights.”¹³⁷ For Nozick, the central core of a property right in X is the right to determine what shall be done with X, constrained only by the negative rights of others.¹³⁸ Each person has ownership rights over themselves and their abilities. Therefore, each person has the right to freely dispose of themselves and their abilities.

This strong Lockean statement of the priority of individual rights leads libertarians such as Nozick to approach the problem of distributive justice in negative terms: “So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?”¹³⁹ Nozick concludes that in fact there is very little room for anything beyond a minimal state enforcing negative rights: “any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified.”¹⁴⁰ In particular, there is no room for the sort of distributive project Rawls sees as central to the role of the state: “the state may not use its coercive apparatus for the purpose of getting some citizens to aid others.”¹⁴¹

137. See Robert Nozick, *ANARCHY, STATE, AND UTOPIA ix* (1974).

138. *Id.* at 171.

139. *Id.* at ix.

140. *Id.*

141. *Id.*

The basis of Nozick's theory of [no-]distributive justice is his entitlement theory, which is a theory about "justice in holdings."¹⁴² A just society is one in which everyone is entitled to the holdings they possess. Nozick divides the question of justice in holdings into three major topics: justice in the original acquisition of holdings, justice in the transfer of holdings from one person to another, and the rectification of injustice in holdings.¹⁴³ Justice in acquisition is a theory of how unheld things come to be held.¹⁴⁴ Justice in transfer is a theory of the permissible and impermissible manners of transferring our holdings to others, and thereby acquiring the previously held holdings of another.¹⁴⁵ Distributive justice, for Nozick, therefore, is "simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution."¹⁴⁶

The entitlement theory is fairly open and underdeveloped. In fact, the operative core of Nozick's theory is not the general theory of entitlement, but the assumptions underlying the outlines of his theory of justice in acquisition. Key to Nozick's theory of justice is that natural endowments are not, in contrast to Rawls, morally arbitrary.¹⁴⁷ Natural endowments are, in fact, morally significant, in that each person acquires rights in their natural endowments and in the fruits of those endowments. In other words, the theory of justice in acquisition includes acquisition through natural endowment as a form of just acquisition.

As a theory of liberal justice, libertarianism runs into several difficulties.¹⁴⁸ One can object, as does Rawls, on the ground that our intuitions run counter to the entitlement theory on the key issue of the moral significance of our endowments. Libertarianism depends on an individual's moral claim to their talents and the fruits of such talents—if this claim indeed runs counter to our intuitions, then libertarianism is in deep trouble. Rawls in effect makes such an argument by asserting that

142. *Id.* at 150.

143. *Id.*

144. We come to hold property rights in ourselves and our abilities by virtue of being born with such rights. Nozick chooses not to elaborate a theory of justice in acquisition for property we are not born with. However, the indications he does give suggest that he would follow some variation of the Lockean notion of acquisition through labor. *Id.* at 178.

145. Nozick's model here is that of the market, or a system of freely bargained exchanges between holders. The principle is historical, in that the transfer must have in fact come about according to the theory of justice in transfer—it is not enough that it could have. *Id.* at 151–52.

146. *Id.* at 151.

147. Nozick also states that the moral arbitrariness of endowments is at the center of Rawls' theory. *Id.* at 215.

148. It is not clear, for example, that the theory of self-ownership does in fact necessitate a theory of absolute property rights, or justify any particular distribution of resource ownership rights. See generally Kymlicka, *supra* note 11, at 95–159.

in the Original Position, libertarian principles would not be chosen, since they would not under the veil of ignorance be a rational choice.¹⁴⁹

One can also argue that this inconsistency is revealed 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.

For this reason egalitarians consider such endowments arbitrary, and therefore open to redistributive mechanisms.¹⁵⁰ Nozick's primary objection to egalitarian redistribution, however, is that it undercuts formal self-ownership. Libertarianism, however, fails to address the fact that purely formal self-ownership without adequate resources to realize one's life projects undercuts the substance of self-ownership, namely the ability to get on with one's life projects.¹⁵¹ In Nozick's world, only *some* individuals are substantively equal, in that they have a reasonably equal chance in fact of acting on their conceptions of themselves. Such a restriction is fundamentally illiberal.¹⁵²

This same difficulty arises in the international distributive context: libertarianism fails to adequately confront the problem of inequality of

149. Moreover, the very centrality of consent in the libertarian scheme underscores Rawls' arbitrariness assumption: in no way can those ill-favored by the natural lottery be said to have "consented" to that draw, or to the social institutions which exacerbate such natural inequalities.

150. As Rawls puts it in his critique of libertarian justice, "Intuitively the most obvious injustice of a system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view." *THEORY OF JUSTICE*, *supra* note 91, at 72.

151. Kymlicka, *supra* note 11, at 120–22. Nozick's commitment to the substance of self-ownership and not merely its formality seems clear, for example, in his treatment of Locke's state of nature. The difficulties which nominally free and equal individuals face in actually getting on with life in the state of nature become the motivating force for Nozick's theory. Nozick, *supra* note 137, at 10–12.

152. The objection that there can be no freedom where two sides are grossly unequal was already developed in nineteenth century liberal theory. See J. M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 306 (1992) (citing the work of T.H. Green and others). Therefore, the state has a role in setting the basic conditions for a meaningful exchange, a moral exchange. See *id.*

resources in the international economic plane.¹⁵³ 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.¹⁵⁴

A system of purely formal equality between states, equivalent in the trade context to a simple system of free open-market exchanges, will further undercut 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.¹⁵⁵

If liberalism is to be conceived as a theory of equality, then a libertarian system 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.

III. JUSTICE AS FAIRNESS IN INTERNATIONAL ECONOMIC RELATIONS

For the reasons discussed in the foregoing section, this Article will proceed to develop a normative framework for addressing inequality problems in trade based on a Rawlsian approach to distributive justice. As will be argued below, the socioeconomic predicate underlying the need for a domestic theory of justice (social cooperation yielding new benefits and burdens) is present in international economic relations. Moreover, as has been discussed above in section I, the problem of inequality in natural endowments is as present internationally between states as it is domestically between individuals, and leads in a similar

153. See *infra* notes 177–180. For a review of other problems with a libertarian theory of international justice, see O'Neill, *supra* note 20, at 289–90.

154. Franck also points out that the current pattern of international holdings is so dependent on prior colonial abuses that it may even fail Nozick's own test of justice in acquisition. Franck, *supra* note 1, at 20.

155. Beitz, *supra* note 20, at 145–46 (citing Ronald Findlay, TRADE AND SPECIALIZATION 118–22 (1970)). See also Franck, *supra* note 1, 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. . .").

fashion to inequalities in the distribution of resulting social goods such as wealth, knowledge and power. For these reasons, this Article argues that the international problem of inequality *should* be treated in the same manner as the domestic problem, and with similar results, despite Rawls' own reluctance to do so.

This Article is not the first work to argue that Rawls' theory of justice as fairness should be extended to international distributive matters.¹⁵⁶ Other commentators concerned with distributive justice issues in international economic relations, while acknowledging a debt to Rawls' basic theory, have not fully developed its application to international trade.¹⁵⁷ Where the role of international trade has been acknowledged, the critical role that the principle of special and differential treatment plays in justifying inequalities through the terms of market access has not been fully developed.¹⁵⁸

This section is an attempt, therefore, to suggest what such an elaboration might look like. First, I will respond to objections that might be raised to the extension of a Rawlsian theory of justice across national boundaries. Then I will proceed to sketch the contours of an account of the original position explicitly grounded in the problem of inequality as it affects international trade, responding in the process to Rawls' own account in *The Law of Peoples*. I will first argue that the most likely result of such a choice problem is an international version of the difference principle. Then I will proceed to analyze the principle of special and differential treatment as a response to this difference principle, emphasizing the significance of market access as a function of inequality. Finally, I will evaluate the principle of special and differential treatment as it is in fact applied in U.S. preferential trade practice, as well as certain aspects of its application in the WTO and in FTAA negotiations, in order to suggest how understanding the principle as a part of a just trade theory might affect both its form and its application.

A. Justice as Fairness Across Boundaries

As Justice as Fairness is a contractarian theory, it may be argued that obligations arising from such a theory cannot be extended outside of national boundaries, and that whatever international justice may be, it

156. See, e.g., Franck *supra* note 1, at 426–430; Beitz, *supra* note 20, at 169–76; Barry, *supra* note 20, at 128–33; Richards, *supra* note 20, at 288–93.

157. But see Kapstein, *supra* note 6.

158. While acknowledging the redistributive role played by GSP, Kapstein does not develop a Rawlsian account of differential market access as the key to the problem of inequality in trade law, focusing instead primarily on traditional transfer mechanisms. See Kapstein, *supra* note 6, at 190.

will not be justice as fairness. However, this argument presupposes that national boundaries are coterminous with the boundaries of the relevant social contract. Put another way, this argument relies on the assumption of self-sufficiency among states.

This objection gains momentum from the fact that Rawls himself has steadfastly refused to extend the argument of *A Theory of Justice* to international distributive problems, limiting that analysis to what he posits are closed domestic societies. As Rawls states, "I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies."¹⁵⁹ Where Rawls does undertake such an extension in *Political Liberalism*, it is for the limited purpose of justifying conscientious objection to armed service in times of international conflict.¹⁶⁰

This failure to extend Justice as Fairness as set out in *A Theory of Justice* to its logical transnational application has been criticized, most strenuously by parties sympathetic to the basic Rawlsian enterprise.¹⁶¹ Although Rawls continues to refuse such an extension in *The Law of Peoples*, his reasoning has shifted away from reliance on the assumption of self-sufficiency¹⁶² to an argument that a second, international original position would not result in a choice of the difference principle.¹⁶³ This Article maintains that both rationales are open to question, and both are wrong. It is the task of this section to question the first assumption, of self-sufficiency. A critical examination of his argument based on an international choice problem shall be postponed until section B.

In *A Theory of Justice* Rawls limits his theoretical enterprise to principles of justice for a closed domestic society. Although Rawls is clearly working at the level of ideal theory, one can question the degree to which an assumption of self-sufficiency on the part of domestic societies is realistic, or even justifiable, and consider the implications for his theory if it is not. Even by 1979 this assumption was being seriously questioned.¹⁶⁴ Economic globalization,¹⁶⁵ and other developments in international relations generally and in international economic relations in

159. THEORY OF JUSTICE, *supra* note 91, at 8.

160. See RAWLS, *supra* note 83, at 377–82.

161. See Christopher D. Stone, THE GNAT IS OLDER THAN MAN 253–62 (1993); Beitz, *supra* note 20; Barry, *supra* note 20; Richards, *supra* note 20.

162. Rawls does, however, continue both to assume closed societies, and to assume it is justifiable and useful to do so. See LAW OF PEOPLES, *supra* note 91, at 86.

163. See *infra* notes 184–192 and accompanying text.

164. See Beitz, *supra* note 20, at 143–49.

165. For an overview of recent globalization literature, see Garcia, *supra* note 125, at 52 n.4.

particular, have rendered Rawls' positing of domestic societies as closed societies, if perhaps understandable on the part of an academic philosopher in the early 1970's, certainly not tenable today.¹⁶⁶

The fact of economic interdependence among the world's societies is a key element in establishing the possibility of any contractarian argument for international distributive obligations. A primary motivating force behind the need for justice, according to Rawls, is that some mechanism is needed to allocate the advantages that arise from social cooperation. One can argue, therefore, that wherever social cooperation has created some wealth or advantage which otherwise would not exist, the social predicate exists for the application of justice.¹⁶⁷ As Charles Beitz puts it in his seminal study of political philosophy and international law: "[T]he 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."¹⁶⁸

Trade and 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. 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.¹⁶⁹ By controlling the terms of market access and the enforceability of rights with regard to investment and intellectual property, for example, contemporary international economic law can be said to create and allocate

166. In his study of the concept of fairness in international law, Franck concludes that the requisite level of community has emerged at the international level to sustain a fairness analysis. See FAIRNESS, *supra* note 1, at 12–13.

167. Put another way, people so cooperating and benefitting thereby, have the requisite "share in the constitution" for contractarian obligations. Aristotle, *supra* note 12, at bk. V, ch. 2.

168. Beitz, *supra* note 20, at 131. Beitz has subsequently limited the scope of this argument from the strong claim that such cooperation makes necessary a global difference principle (as in Beitz *supra* note 20), to a more limited claim that such relationships render such a principle feasible. *Cosmopolitan Ideals and National Sentiment* 80 J. PHIL 591, 595 (1983). In this Article, this argument is used in a similar restricted sense to address the contractarian objection to such a principle, and not to argue for the principle itself. Such an argument must, as Beitz points out (*Id.*), be rooted in the moral structure of the original position itself, as will be the case in section B *infra*.

169. This capacity for enforcement at the WTO level should meet Brilmayer's objection to Beitz' argument for global redistribution, namely that such obligations, while perhaps desirable, must await the formation of a "superstate" capable of carrying out and policing such policies. *Supra* note 82, at 125–26. To the extent that redistributive policies are confined to special and differential treatment, this Article argues that we need not await a global state—the WTO is perfectly capable of monitoring the implementation of such policies.

advantages that would not exist but for the cooperation which such elaborate treaties memorialize and establish.

In this sense, therefore, international economic relations and international economic law can be said to 'involve the creation of benefits from social cooperation. The need to allocate such benefits raises precisely the same sort of issues that are raised in domestic society when such benefits stand to be allocated. Therefore, even if there is a justifiable distinction between domestic and international society for some purposes, with regard to the applicability of justice theory the same basic predicate is present in both.¹⁷⁰

If there are in fact no closed societies in the Rawlsian sense, then Rawls' own reticence to extend his theory across social boundaries thus needs reconsideration, particularly in view of the manifest justice problems of the global economic system. In particular, Rawls' distinction between the choice problem for domestic justice and that for international justice, on which his theory of international justice depends, collapses.¹⁷¹ 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. Such obligations may indeed require some form of wealth redistribution across national boundaries, so that inequalities between states are limited to those which work to the benefit of the least advantaged.¹⁷²

B. Generating an International Difference Principle

A Rawlsian theory of international distributive justice will require three elements: establishing the facts of inequality, an examination of the

170. 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. Brian Barry, *Humanity and Justice in Global Perspective*, in NOMOS XXIV, *supra* note 20, at 232-34. However, in registering this objection, Barry is responding to the earlier stronger form of Beitz's argument. *Id.*; see *supra* note 168. In its more limited form, Beitz' argument, and the related argument made here, evade this objection, in that they do not in themselves argue for the necessity of such obligations on the grounds of such relations, but merely for their possibility. Barry himself notes the continued viability of arguments for an international difference principle in the face of such objections, but based on the original position (233-34), as is the case with the argument made in this Article (see *infra* section B).

171. Rawls' argument in THE LAW OF PEOPLES depends on two successive original positions, one domestic and one international, with different principles chosen in each case. See *infra* notes 184-192 and accompanying text.

172. See Anthony D'Amato & Kristen Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011, 1047 (1988); STONE, *supra* note 161, at 255-60.

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

As was discussed above, there are many ways to catalogue inequalities in international economic relations. This section will continue to rely upon the Working Group's list of characteristics of small economies. Taken together, these factors offer a way of capturing the trade-related inequalities in natural and social goods that will form the subject of the Rawlsian analysis.

The characteristics of smaller economies identified by the Working Group 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, which can reflect both differences in climate and the narrow range of readily exploitable resources such economies may have been naturally granted. These natural inequalities have a common feature, namely that they exist and develop largely independently of the allocative function of domestic social institutions and international social institutions such as international law and diplomacy.¹⁷³

In contrast, social inequalities are 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."¹⁷⁴ Such allocations can be deeply 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 population and the effects of social allocations resulting in inadequate educational and research institutions. 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

173. Although the third factor, reliance on primary product exports, also reflects patterns of trade and development which are not solely the result of natural endowment, the distinction, I believe, is fair.

174. *THEORY OF JUSTICE*, *supra* note 91, at 7.

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 consequent differences in the allocation of social goods, are unmerited. In Rawls' terms, they are morally arbitrary.¹⁷⁵ In connection with the distribution of natural talents among individuals, Rawls maintains that "[t]he natural distribution is neither just nor unjust; nor is it unjust that men [sic] are born into society at any particular position. What is just or unjust is the way that institutions deal with these facts."¹⁷⁶

This assumption holds with equal, if not greater force, with respect to the global distribution of resources.¹⁷⁷ Setting aside for the moment issues of migration and conquest,¹⁷⁸ states must in general accept the extent of resources to be found within their territories, and people are simply born into existing states, the resource levels of which they could neither choose in advance nor influence. Moreover, as Beitz points out, two objections commonly raised to Rawls' treatment of natural talents as arbitrary (that simple possession would seem, at least to the talented, as a sort of justification for use, and that the development of talents is central to development of the self), are not even relevant where the "talents" concerned are natural resources and the developing agent is the state.¹⁷⁹ 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.

175. *Id.* at 72.

176. *Id.* at 102.

177. As Lea Brilmayer, elsewhere a critic of Rawls (*see infra* note 181), puts it in connection with U.S. wealth: "But we must ask why it is 'our' wealth. The natural resources the United States enjoys are something of a stroke of good luck; why are we entitled to withhold them from those in need?" Brilmayer, *supra* note 82, at 123-24.

178. I would hesitate to conclude that conquest be equated with ambition in terms of seeking additional resources, and contemporary international law favors territorial sovereignty and the stability of boundaries in any event. Migration as a people is of course limited as well by the same principles. It is an interesting question whether or not individuals ought to be expected to individually migrate to more resource-rich states in connection with the ambition-sensitivity of any distributive theory of justice, but I suspect that due to ties of affinity, community, and ethnicity it would go to far to require such a move.

179. Beitz, *supra* note 20, at 138-39.

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.¹⁸⁰ 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 nations whose future intercourse will be governed by the principles chosen by that assembly.¹⁸¹ As Rawls puts it: "One may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states."¹⁸²

The choice problem they face is, *mutatis mutandis*, identical to that faced in the domestic variant of the original position:

180. I am setting aside the argument that, given the colonial history which has deeply influenced the economic development of smaller economies and the framework of international institutions, there are grounds to argue for a redistribution of resources under principles of corrective, as opposed to distributive, justice. This argument, while it merits serious attention, would be both fact-specific and limited to what redistribution might be characterizable as reparations, and thus would not yield a general duty. See Brilmayer, *supra* note 82, at 119–20.

181. Rawls has been criticized for this "statist" assumption, as 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?" *forthcoming in* 6 INT'L LEGAL THEORY (2000); Fernando Teson, A PHILOSOPHY OF INTERNATIONAL LAW (1998), at chapter 4. This second original position could be modified to include, for example, representatives of significant NGO's and international institutions, or, as Beitz and Pogge suggest, collapsed into the first, thus forming a single cosmopolitan original position. However, this Article will proceed along Rawlsian lines and argue in terms of a second "statist" original position, for it seeks to illustrate that, even closely following Rawls' original approach, one is led to an international difference principle. In order to argue that this degree of "statism" is not illiberal, however, as Pogge suggests that it is (*supra* note 20, at 252), I am assuming that advantages from the mutual cooperation of states pass through to the individuals in those states. This assumption is certainly questionable in the real world, but I believe it is defensible at the level of ideal theory. It does suggest, however, that the *actual* justice of the international economic order also depends upon "domestic" or "internal" distributive justice as a condition of its liberalism, but that is a project for another day.

182. THEORY OF JUSTICE, *supra* note 91, at 378.

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.¹⁸³

Uncertain as to which position they will occupy beyond the veil, the representatives 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

Under those conditions, following Rawls' logic in *A Theory of Justice*, the representatives will choose principles of justice which maximize the minimum bundle of social goods they are likely to receive in the face of life's inequalities.¹⁸⁴ In the domestic context, the representatives chose two principles, a principle of equal liberty and a principle of distributive justice. As our task in this Article is to analyze distributive problems, it is the choice of the second principle, the difference principle, that will concern us.

As has been set forth above, the problem of inequality and the choice problem faced by representatives of the international community are present internationally 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 the same principles would be chosen. 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

183. *Id.*

184. Rawls argues that the most rational course for the representatives to follow, given assumptions of moderate risk-aversion, is the so-called "maximin" strategy, in which they choose principles which will guarantee them the maximum social primary goods possible if they happen to be born with the minimum distribution of natural primary goods. *THEORY OF JUSTICE*, *supra* note 91, at 152-57.

of the original position.”¹⁸⁵ If it is to be argued that different principles are in fact more likely to be chosen, then the onus is on the one so arguing to justify that choice with reference either to differences in the social facts or differences in the reasoning which representatives would follow.

It is curious that although in *The Law of Peoples* Rawls does in fact conclude that the choice problem would not result in similar principles,¹⁸⁶ he fails to justify this conclusion with reference to either different social facts or different reasoning. Instead, he simply relies on the fact that he assumes as a starting point the existing content of international law, which does not include a difference principle, and casts his project as the development of a justification for these principles.¹⁸⁷ Now, this bears a superficial resemblance to his “rational reconstruction” in *A Theory of Justice* of our moral intuitions on liberty and equality, but the resemblance is only superficial. In arguing for the difference principle, Rawls advocates in the earlier work for the adoption of a principle of justice which, while it might reflect our moral intuitions, clearly goes beyond existing laws and policies in its redistributive implications.

In *The Law of Peoples*, Rawls fails to distinguish between the extent of a plausible set of current widely-recognized norms of international law, and the extent of our moral intuitions regarding international moral obligations. The two might be identical, but it cannot be assumed so.¹⁸⁸ Moreover, the extent of criticism Rawls has received and continues to

185. Stone, *supra* note 161. See also Beitz, *supra* note 20, at 151; Barry, *supra* note 20, at 128–32; Richards, *supra* note 20, at 292; D’Amato & Engel, *supra* note 118.

186. With particular reference to the difference principle, Rawls argues instead that states would choose a limited duty of assistance, obligating them to assist “burdened” states, states which lack the resources to establish basically just domestic institutions, with the resources and assistance necessary to establish such institutions. LAW OF PEOPLES, *supra* note 92, at 106. Once such institutions are established, Rawls concludes that the duty of assistance ends.

The role of the duty of assistance is to assist burdened societies to become full members of the Society of Peoples and to be able to determine the path of their own future for themselves. It is a principle of *transition* . . . for each burdened society the principle ceases to apply once the target is reached.

LAW OF PEOPLES, *supra* note 92, at 118–19.

187. “I consider the merits of only the eight principles of the LAW OF PEOPLES listed [earlier]. These familiar and largely traditional principles I take from the history and usages of international law and practice. The parties are not given a menu of alternative principles and ideals from which to select, as they are in POLITICAL LIBERALISM, or in A THEORY OF JUSTICE.”

LAW OF PEOPLES, *supra* note 92, at 41.

188. Rawls does rather categorically “contend that the eight principles of the Law of Peoples are superior to any others,” but he does not really evaluate this claim or argue for this superiority with reference to prior moral principles, nor does he even set out why these principles reflect our moral intuitions on the subject. LAW OF PEOPLES, *supra* note 92, at 41.

receive for rejecting the difference principle in international justice is at some level evidence of at least disagreement over the content of such international moral intuitions.¹⁸⁹

The compelling logic of the domestic original position and the similarity of its circumstances and constraints with the international original position are powerful arguments for the obvious conclusion: that some form of a difference principle would also be chosen in the international original position. Conclusions to the contrary demand a reasoned argument. However, in explaining his failure to do so in his earlier essay on the subject, Rawls states that the difference principle, and other aspects of justice as fairness not carried forward, "are not needed for the construction of a reasonable law of peoples, and by not assuming them our account has greater generality."¹⁹⁰ Given the centrality of the problem of inequality to domestic justice as fairness, this brief explanation has been justly criticized as leaving much to be desired.¹⁹¹

In *The Law of Peoples*, Rawls takes greater pains to respond to claims that the arguments for a domestic difference principle are just as cogent in an international original position, but his response continues to be dissatisfying. Rawls equates such arguments with a cosmopolitan vision of liberalism necessitating "global justice for all persons" rather than the "foreign policy of a reasonably just liberal people" towards other societies of liberal and non-liberal but decent peoples.¹⁹² Such a move, argues Rawls, would result in a duty on the part of liberal peoples to work to shape all non-liberal societies in a liberal direction, which assumes illegitimately that we know already that decent non-liberal societies are not acceptable. Thus, it would be better to proceed "from the international political world as we see it,"¹⁹³ and identify principles of toleration appropriate to a world including decent non-liberal states.

This argument reinforces the conclusion that in *The Law of Peoples* Rawls essentially *sidesteps* the problem of inequality at the international level, focusing instead on basic political rights and liberties, their prior-

189. In describing the task of the representatives in the second original position, Rawls states that they "simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives." *LAW OF PEOPLES*, *supra* note 92, at 41. While this may describe Rawls' own approach, the objections of Pogge, Beitz, Barry, Richards and others would suggest that the representative might not in fact be so sanguine about the status quo. See, e.g., Pogge, *supra* note 20, at 246 ("I am at a loss to explain Rawls' quick endorsement of a bygone status quo.").

190. Essay, *supra* note 93, at 43-44.

191. See Franck, *supra* note 1, at 18-19 (Rawls' objections to so extending his theory not "convincing.").

192. *LAW OF PEOPLES*, *supra* note 92, at 82-83.

193. *Id.* at 83.

ity, and their effective enjoyment as extended to international society.¹⁹⁴ It is important to note in this regard that Rawls' argument does not address the global inequality problem at all, but the problem of toleration for non-liberal societies. I would attribute this elision more to Rawls' preoccupation with the international implications of political liberalism with regard to human rights and the toleration of non-liberal societies, than with a considered conclusion that the problem of inequality is, beyond a limited duty of assistance, irrelevant to international liberal justice.¹⁹⁵ One can readily imagine an international original position yielding *both* principles of appropriate toleration for decent non-liberal societies *and* an international difference principle. Although such a view might be even more consistent with "the international political world as we see it", Rawls does not do take this step.

Rawls may be helped towards this position by his underdeveloped view of the international trading system.¹⁹⁶ Rawls argues that, "assuming fair background conditions," the principle of justice chosen by representatives in the original position to govern international economic relations would be free trade.¹⁹⁷ While this may in fact be so, Kapstein has argued persuasively that free trade alone is inadequate as a principle of justice for international trade, and that states would also choose a principle of diffuse reciprocity to address inequality problems.¹⁹⁸ Rawls makes a gesture in this direction in noting that free trade alone in the current world could result in "unjustified distributive effects," but he seems to fail to grasp the fundamental implications of this fact, namely that international economic relations and international trade law are social institutions creating and intensifying the same sorts of inequalities that such institutions affect domestically, with the same normative implications.

For these reasons, this Article will continue its argument with the assumption that an international difference principle is the logical outcome

194. See Pogge, *supra* note 20, at 244 ("Principles of international law which Rawls chooses to rely on are "wholly insensitive to distributional concerns."). While acknowledging the fact of inequality in international relations, Rawls attributes the inequality principally to the absence of just domestic institutions, advocating a limited duty of assistance enabling burdened societies to establish such institutions. See LAW OF PEOPLES, *supra* note 92, at 108–109.

195. It seems to me unlikely that Rawls would adopt such a position, and this Article can be understood as an argument that such a position would be a serious mistake.

196. As noted above, Rawls has been criticized in general for maintaining a view of international law which has been superceded by contemporary developments. Brilmayer, *supra* note 181.

197. LAW OF PEOPLES, *supra* note 92, at 42–43.

198. See Kapstein, *supra* note 6, at 189–90.

of an international original position, and turn towards the nature of such a principle and its effects.

The initial form of the resulting international principle of distributive justice might look something like this:

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.

So stated, this formulation paraphrases Rawls' earliest statement of the second principle of justice.¹⁹⁹ Such a principle is the logical outcome both of the fact of inequality and the condition of the original position. As Rawls puts it:

Once we decide to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstance as counters in quest for political and economic advantage, we are led to these principles. They express the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view.²⁰⁰

According to this difference principle, inequalities in economic and social goods, heavily influenced as they are by arbitrary natural inequalities, are unjust unless they work to the benefit of the least advantaged state. The social and economic consequences of the inequalities identified in the smaller economy studies are therefore not just, unless the international economic law system is designed to ensure that these inequalities work to the advantage of the smallest economies.²⁰¹

Where inequalities are not working to the benefit of the least advantaged, then the more favored states are under a duty to effect some form of reallocation of social goods until such inequalities are rendered justifiable. What might such a mechanism look like? It might involve wealth,

199. See Rawls, *supra* note 91, at 14. I am choosing this form of the principle because this extension to the international setting is at a similarly initial stage. Throughout *A THEORY OF JUSTICE* Rawls further refines the precise formulation of the second principle in relation to particular concerns; a similar elaboration of this formulation of the international difference principle will have to await a later day. For example, I am postponing an examination of the international equivalent of the notion of fair equality of opportunity, which is critical to Rawls' later formulations of the difference principle. I will also not attempt here to deal with the problem of differences in "ambition" as a factor in resulting differences in social goods which may *not* be morally arbitrary, though Dworkin seems right in maintaining that a principle of distributive justice should be both "endowment insensitive" and "ambition sensitive." See Dworkin, *supra* note 90.

200. Rawls, *supra* note 83, at 15.

201. Accord Pogge, *supra* note 20, at 242 ("Taken seriously, Rawls' conception of justice will make the social position of the globally least advantaged the touchstone for assessing our basic institutions.").

or it might involve the rights, privileges and obligations that create the basic framework of social institutions such as international economic law. It is the task of the next section to begin to work this out.

*C. The Difference Principle and Trade
With Smaller Economies*

As was discussed above, the global distribution of natural resources is manifestly unequal. This fact of 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. Together, these inequalities do not work for the benefit of the least advantaged states—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, Justice as Fairness presents a very basic question to states 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 reformed to ensure that such inequalities work to the benefit of the least advantaged?

Perhaps the most obvious and, on its face, simplest, answer may also be the most problematic: why not just redistribute the wealth outright? Certainly, wealth transfers must on their face be considered as potential elements in any international redistributive theory.²⁰² However, redistribution in the form of significant wealth transfers between richer and poorer states has a controversial and enigmatic history.²⁰³ Despite decades of active international development aid, it is not clear that such aid programs result in the increased welfare their architects envision. Moreover, there is a strong sentiment, at least in the US, in favor of the neoliberal “trade not aid” approach.

For these reasons, and because the present work is focused primarily on trade law and not development in general, the normative arguments for development aid as a form of redistribution will not be discussed in any detail, except as they relate to trade-related technical assistance. Instead, this Article will focus on international trade law itself as an avenue for the partial fulfillment of the redistributive obligations that

202. See Kapstein, *supra* note 6, at 190 (discussing centrality of transfer mechanisms for international distributive justice); Bernard Cullen, *Philosophical Theories of Justice*, in *JUSTICE: INTERDISCIPLINARY PERSPECTIVES* 28 (Klaus R. Scherer ed., 1992) (hypothesizing that justice might require a non-discretionary system of interstate development aid).

203. See, e.g., Krueger *supra* note 78, at 18–35 (surveying history of international aid).

Justice as Fairness dictates for wealthier states in response to inequality and its effects on the least advantaged states.

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."²⁰⁴ 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.²⁰⁵ Moreover, the international economic law system already incorporates principles 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: the principle of special and differential treatment, and the related practice of technical assistance.

The following section begins with an evaluation of the principle of special and differential treatment as a response to the problem of inequality. Specifically, the principle employs asymmetric trade liberalization to secure the benefit of developed country wealth and resources for the least advantaged states through non-reciprocal market access. In this way, special and differential treatment plays a key role in justifying inequalities in the international allocation of social goods. The section concludes with a brief examination of the role of technical assistance and technical assistance funding as part of a redistributive theory of international trade law.

1. Justifying Inequalities Through Special and Differential Treatment

As was discussed in section I, the principle of asymmetric or preferential treatment for developing countries (a practice as old as the GATT system) is a principal instrument in managing inequality problems.²⁰⁶ Normatively, the principle of special and differential treatment can be understood as a partial attempt to justify inequalities along Rawlsian lines. Historically, of course, it was not so situated, being rooted in post-colonial, even Marxist, rhetoric on the part of developing countries, and limited utilitarian arguments (system stability, future markets, etc.) on

204. THEORY OF JUSTICE, *supra* note 91, at 13.

205. 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 (1996-97).

206. The Havana Charter contained extensive provisions detailing preferential treatment for industrializing developing countries. See Brown, *supra* note 4, at 358-59. Unfortunately, the Havana Charter never went into force; the resulting GATT had a much weaker regime for developing countries. Further, the amendments adding part IV, in 1966, did not fully remedy the situation. See *id.* at 359.

the part of developed countries. Nevertheless, the principle is at its core a redistributivist one, and has an important role to play in any Rawlsian trade scheme. Moreover, understanding it as a Rawlsian principle has important consequences for the normative evaluation of its current iteration in U.S. trade policy, and for its future development in multilateral and regional trade policy.

a. Inequality and the Role of Market Access

The key to understanding special and differential treatment as a Rawlsian tool for justice is 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 wealth, industrial capacity and technology, will generally have as a result a strong consumer market, as manifested in per capita income, and a strong producing 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 producing 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. Market access is managed through the two principal components of special and differential treatment, market access preferences and market protection mechanisms. These two legal tools therefore play a key normative role in justifying inequalities.

i. Market access

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 developing country exports on a preferential basis, developed countries in effect place their larger, richer consumer market at the service of the developing country, which can increase its exports and thereby strengthen its economic base. Thus market access for developing countries allows the inequalities that manifest themselves in rich consumer markets to work to the benefit of the least advantaged, thereby meeting the central criteria for distributive justice.

However, preferential access will itself create a form of social inequality, as the goods from beneficiary countries will enjoy rights and privileges not similarly enjoyed by the goods from non-beneficiary countries. Put another way, preferential access violates the

most-favored nation principle (MFN), a cornerstone of international trade law. Third-party states and their producer groups could object, therefore, to the legality and fairness of such arrangements.

In terms of these arrangements' legality, this violation of MFN by GSP and related programs has been authorized by a GATT waiver.²⁰⁷ In terms of their fairness, which is a question of justice, this inequality is under Rawlsian principles a justified inequality. Recall that the difference principle requires that inequalities in the allocation of social goods, such as tariff preferences, work to the benefit of the least advantaged. Preferential access meets this requirement, in that the preference works to the benefit of the recipient country, in the manner outlined above. The inequality is, therefore, justified as fair.²⁰⁸

ii. Market Protection

Now, market access can work as a redistributive mechanism, but only if several conditions are met. Chief among these is the principle of asymmetry or non-reciprocity of obligations, or as it has been called, the principle of diffused reciprocity.²⁰⁹ If preferential access is a response to the inequality of consumer markets, then diffused reciprocity is a response to the inequality of industrial production capacity.

Full reciprocity of liberalization means that the inequalities that manifest themselves as differences in markets and in producing capacity will continue to operate to the detriment of the poorer state. As discussed above, the fundamental asymmetry in economic and other forms of power between large and small states leads to the distortion of trade flows, acute adjustment burdens, and an unequal distribution of benefits and burdens of trade.²¹⁰

Despite these effects, the principle of full reciprocity may be attractive to libertarians as a principle of justice, since it is most consistent with the libertarian formulation of equal liberty. As discussed above, however, libertarian theory does not so much address the problem of distributive inequality as perpetuate and justify it.²¹¹ Egalitarians argue that, while the fact of natural inequality may be morally neutral, resulting social inequalities are not; nor is the moral pull of social inequality

207. In 1971, the GATT Contracting Parties approved a waiver authorizing, but not requiring, developed states to extend preferential tariff rates to developing country exports on a non-reciprocal basis for ten years. In 1979, the waiver for the resulting GSP was made permanent. *See id.* at 362-63.

208. It is interesting to note, therefore, the normative role of the GATT waiver in formalizing the justice of the preferential access scheme.

209. Kapstein, *supra* note 6, at 189.

210. *See supra* notes 46-53 and accompanying text.

211. *See supra* notes 149-155 and accompanying text.

exhausted by a theory of just acquisition. Moreover, any theory of just acquisition would have to wrestle with problem of colonialism, mercantilism and related economic predations by developed countries, which are deeply embedded in the acquisition of property, wealth, and rights by the developed world. Since even libertarians accept a redistributive mechanism when it comes to correcting unjust acquisitions, such implication would inevitably enmesh the libertarian in the same messy sorts of redistribution that the egalitarian requires.

For this reason, market protection mechanisms must be a part of a redistributive approach to trade. In order for this to occur, there must be a deliberate inequality in the treatment of developing countries regarding market protection. Currently, the principle of non-reciprocity takes several forms. Developing countries may negotiate disparate obligations, i.e., their concessions need not mirror the concessions they receive from developed countries.²¹² Alternatively, the level of concessions may be identical, but developing countries need not liberalize as quickly, i.e., they are granted longer implementation periods. Currently, the U.S. follows the practice of negotiating, where possible, equivalent obligations with disparate time-tables, and where necessary negotiating equivalent obligations but permitting special, enumerated exceptions.²¹³

With regard to the debate over disparate obligations versus longer implementation periods, one can advance instrumental or normative arguments in support of either side. Advocates of equivalent obligations may have strong formal and instrumental reasons for this view. After all, there is something intuitively, even aesthetically, appealing about an agreement in which both sides undertake the same commitment, albeit at different rates. Such an agreement may be easier to sell politically, easier to police, and may guarantee eventual full reciprocity more readily than new negotiations aimed at more closely approximating mutual obligations.

However, advocates of this view should bear in mind the Aristotelian insight that treating unequals equally is just as fully an injustice as treating equal parties unequally. Resolution of this question may well depend on further economic and game theoretic analysis as to which method is superior in terms of achieving free trade. However, it is important that the issue be studied normatively as well, in case unequal

212. An example of this approach would be the NAFTA services agreement, in which the principle of full reciprocity of liberalization of trade in services is abandoned by use of exceptions, permitting Mexico to open its sensitive financial services sector only a little bit, and slowly.

213. Examples of the former in NAFTA would be manufactured goods liberalization, in which, as part of an FTA, both Mexico and Canada are committed to a zero tariff regime. However, Mexico has a longer implementation period for most of its commitments.

treatment in level of obligation might in fact work more to the benefit of the least advantaged than simply longer implementation periods. If so, then justice as fairness would require inequality of obligation as well.

As was the case with preferential access measures, market protection measures can be criticized as themselves a form of inequality. Here the source of the challenge is not third parties, but producers in the liberalizing state, which do not receive the same level of market access as their state has granted to producers of the beneficiary state. However, as with preferential access, the inequality is both legal and just. It is legal, because as was discussed above the principle of non-reciprocity is an established GATT rule in trade negotiations and relationships between developed and developing countries. It is just, because it is consistent with the difference principle: the inequality in allocation of social goods (here again market access) works to the benefit of the least advantaged state.

2. Technical Assistance and Unjustified Inequality

As discussed above, the key to understanding the principle of special and differential treatment as a policy for achieving distributive justice is to see market access as a significant factor in both inequality and its justification. In other words, by placing developed country markets at the service of small economy exports, and by protecting developing country markets from the superior competitiveness of large economy exports, special and differential treatment creates social inequalities that benefit the least advantaged.

Technical assistance and technical assistance-related financing address another aspect of inequality, namely that of trade-related knowledge and the resources needed to pay for such knowledge. States need sophisticated expertise to modernize their trade regulatory systems, comply with complex trade agreements, and in general capitalize on the opportunities which trade liberalization, and special and differential treatment in particular, make available. Absent some mechanism to assist in the acquisition of such knowledge, the principle of special and differential treatment by itself will be inadequate to ensure that inequalities work to the advantage of the least developed.

A libertarian response to this problem would not extend beyond determination that the knowledge was justly acquired—if so, then it would be the property of those in possession of it. However, the result would be that the inequality of knowledge would continue to hamper development of the smaller economies and their effective equality. Moreover, there are strong utilitarian arguments to be made for technical assistance. Where expertise is part of successfully implementing trade agreements,

and such trade agreements stand to benefit large economies as well, then it is in the interest of all parties to provide the technical assistance required for harmonization, implementation and modernization problems.

Whether for egalitarian or egoistic reasons, the obvious conclusion would seem to be that technical expertise must be shared on terms that make it economically possible for smaller economies to access such expertise. If this knowledge has an economic significance, as it does, then justice as fairness would require that such knowledge be shared in such a way that the least advantaged will benefit. The question then becomes one of means.

One approach would be to offer such assistance for free, as a form of wealth transfer. To the extent that such expertise exists within relevant branches of government, it can be made available on an intergovernmental basis. Development-oriented international organizations, such as the Inter-American Development bank, may also possess the requisite expertise and therefore can provide it as part of their mandate. It is often the case, however, that such expertise is in the private sector, including attorneys and industry groups. Government programs can be established to facilitate the exchange of technical expertise, and to pay the relevant private party provider directly.

Alternatively, funds can be made available for development loans through which smaller economies can themselves pay for the requisite expertise. This would require either establishing specialized institutions to facilitate both the transfers and the financing of such expertise, or creation of new loan facilities within existing development banks specially earmarked for technical assistance.

3. The Framework of Just Trade Through Special and Differential Treatment

In the foregoing sections, this Article has sought to argue several related propositions: first, that trade law must be just; second, that such justice requires liberal states to ensure that inequalities in social resources among states be justified according to some form of the difference principle; and third, that market access is the key to this justification, therefore giving the principle of special and differential treatment a central role in the justice of the international trading system.

But how should the principle of special and differential treatment in fact be implemented to achieve this normative goal? Current applications of the principle have been subject to a variety of political constraints and conditions, as will be discussed below. Are such conditions 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? These are the questions that the next section will explore, with reference to existing unilateral and multilateral applications.

IV. ADDRESSING INEQUALITY THROUGH BILATERAL, REGIONAL AND MULTILATERAL TRADE POLICY

Under current law, application of special and differential treatment is essentially bifurcated. Preferential market access is primarily handled unilaterally in GSP programs, through which WTO members grant market access preferences in their trade relations with one another. Second, market protection mechanisms are incorporated throughout regional and multilateral agreements such as the WTO agreements and the FTAA currently under negotiation, which also raise the issue of technical assistance. A full assessment of the operation of special and differential treatment must, therefore, evaluate its implementation at these two levels.

The difference principle is both a tool for the evaluation of existing distributions and a guide for constructing future distributive schemes. In this section, this Article applies the framework developed above to current U.S. preferential trade practice, as an example of the unilateral implementation of the key market access component of special and differential treatment. This section also notes two other issues raised in the WTO and in the emerging framework for hemispheric integration through the FTAA: the importance of effective asymmetry of implementation period, and adequate access to technical assistance.

In so doing, two basic conclusions emerge. First, application of the principle of special and differential treatment at the national level is particularly vulnerable to instrumental manipulations by the granting state, and succumbing to such temptations undermines the basic character of the principle as an instrument of justice. In U.S. preferential trade practice, incorporation of the principle of special and differential treatment is so imperfect as to call into question whether one can say that, from a normative perspective, the principle is in fact operating at all.

Second, where special and differential treatment is applied in an international agreement, formal recognition of the principle is inadequate: the agreement must be structured so that the principle can in fact work, taking into account the actual needs and circumstances of smaller economies for adequate transition periods and technical assistance. Compared to U.S. trade practice, both the WTO agreements and the FTAA negotiations appear to more adequately incorporate relevant as-

pects of special and differential treatment at a formal level, but both fall short in key aspects of effective implementation in ways that threaten the normative justification of those trading systems.

A. U.S. Preferential Trade Practice

If the nature and extent of market access is understood as a key variable in discharging obligations of justice, then this has important consequences for the form that the principle of special and differential treatment takes. This is particularly evident if one examines the current form of unilateral trade preference programs in U.S. hemispheric trade policy. Until the FTAA is implemented, and for the foreseeable future if it fails, it is U.S. trade policy which will determine the justice of economic relations in this hemisphere. Thus, current U.S. practice with respect to special and differential treatment will need substantial modification if such policies are to achieve their normative aims.

1. Justifying Unilateral Trade Preferences

Much of the trade between developed and developing countries is conducted under some form of unilateral trade preference program. Most developed countries have some form of GSP program, including members of the European Community and the United States.²¹⁴ Preferential trade between larger and smaller economies in this hemisphere has also been conducted within regional preference programs such as the U.S. CBI and ATPA and Canada's CARIBCAN.²¹⁵ Such programs have several key features that are suspect from the perspective of a theory of international justice as fairness: unilateralism, the exclusion of the most competitive goods, and conditionality.

a. Unilateralism

Instrumentally, trade preferences extended through unilateral programs are questionable on several grounds. First, they are inherently unstable, because as programs they are subject to periodic renewal and the beneficiaries must continually re-qualify for the preferences. This creates problems for business and investment planners on both sides of the preference.²¹⁶ In addition, the uncertainty surrounding both periodic qualification decisions and decisions concerning continuation of the

214. See, e.g., 19 U.S.C. § 2461 (1999).

215. See *supra* notes 55–60 and accompanying text.

216. See, e.g., *Colombian Exporters Fear Loss of Tariff Benefits in War on Drugs*, 13 INT'L TRADE REP. 204 (BNA 1996) (Colombian private sector concerned that, given U.S. political climate, narcotics allegations against Samper government could force Clinton to raise tariffs, with disastrous consequences for legitimate export-dependent businesses).

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.²¹⁷

Even more significantly, the difference principle as applied to international trade suggests that as a matter of basic justice the unilateralism of existing trade preference programs must be reconsidered. Policies or practices now considered to be discretionary on the part of the implementing state may in fact be obligatory when understood as the consequence of a moral obligation of the granting state to its trading partners. If, as this Article has argued, there is a moral obligation that international inequalities be justified according to the difference principle, and if market access is the key to such justification in trade, then special and differential treatment is no longer optional. The difference principle would require that a just trading system maintain special and differential treatment on a permanent basis, unless of course the underlying facts of inequality change or an even more effective justificatory mechanism is found.²¹⁸

If a state has a moral obligation to place the strength of its consumer market at the service of the least advantaged states, then it is difficult to justify the view that such service should be discretionary at the sole will of the richer state. One can envision an instrumental argument to the effect that rendering such treatment discretionary creates useful leverage for moving the recipient towards other goals, some of them perhaps laudable in their own right.²¹⁹ Even aside from the morality of coercion

217. See *Argentina, Peru Presidents to Press for Trade Liberalization, Integration*, 13 INT'L TRADE REP. 206, 207 (1996) (Peru's President Fujimori considers 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*, 13 ITR 204 (BNA 1996) (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).

218. Kapstein goes so far as to argue that the principle of diffuse reciprocity is itself a principle of justice, and would be chosen in the original position to govern the distributive aspects of trade. Kapstein, *supra* note 6, at 189-90. This Article takes a slightly different approach to the same conclusion, arguing that the principle of special and differential treatment, while not itself a Rawlsian principle of justice in the way the difference principle is, nevertheless is required as a consequence of the difference principle, if economic inequalities among states are to be justifiable under a theory of justice as fairness, and market access functions in the manner suggested by this Article. This approach does leave open the possibility that the principle of special and differential treatment could be rendered superfluous if the facts of inequality change, or be superseded by another even more effective mechanism, should one be developed. In the latter case, however, it is important to remember that the effectiveness of such a mechanism must still be judged by the difference principle.

219. This argument comes up even more forcefully with respect to the conditionality aspects of trade preference programs. See *infra* notes 228-243 and accompanying text.

based on need,²²⁰ this argument maintains, in effect, that withholding or threatening to withhold performance of one's moral obligations is a legitimate means to influence behavior, which is certainly suspect from a moral point of view.²²¹ Moreover, the instrumental criticisms of the current practice, such as its uncertainty and the problems this creates for business, render the utility of the policy as an effective redistributive tool doubtful. Finally, 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.

Instead, justice as fairness requires that such discretionary unilateral preferences be transformed into nondiscretionary bilateral treaty commitments for preferential treatment. This echoes recent calls by developing countries for developed countries to broaden and strengthen special and differential treatment practices by committing to permanent duty-free access to essentially all exports from the least developed countries.²²² Unfortunately, recent U.S. initiatives in this regard do not go far enough because the proposed concessions would not be in the form of binding commitments, thus maintaining for the U.S. the option to rescind such preferences at any time.²²³ However, 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.²²⁴ Unilateral preference programs freely terminable by the donor state in this manner are not morally justifiable.

b. Exclusion of Competitive Goods

Preference programs tend to disfavor exports of manufactured goods that are directly competitive with the manufactured goods of developed

220. The coercive aspect of existing U.S. preferential trade practices will be discussed below. See *infra* note 239.

221. At a minimum this would seem to run directly counter to the categorical nature of the Kantian imperative underlying justice as fairness, if not liberalism itself. See *THEORY OF JUSTICE*, *supra* note 91, at 251–57.

222. G-77 Ministers, *supra* note 3, at para. 7; Tenth United Nations Conference on Trade and Development, *Plan of Action*, TD/386 (18 February 2000), paragraphs 58, 132.

223. "Clinton Announces General Commitment for More LLDC Initiative But Final Details Delayed," Inside U.S. Trade (December 2, 1999) (www.insidetrade.com/sec-cgi/as_web.exe?SEC_IT1999+D+496222).

224. See Note, *supra* note 4, at 1725 (unilateral non-binding nature of preference programs serves interests of granting, not beneficiary states). Circumstances surrounding the failure of the previously mentioned U.S. initiative and the subsequent scuttling by the Administration of equivalent World Bank and IMF proposals suggests that it is, in fact, domestic political considerations which underlie the continuing need for an easy exit. "U.S. Resists Bid to End Tariffs for 3rd World," *New York Times* (April 9, 2000) at A1; "Clinton Announces General Commitment for More LLDC Initiative But Final Details Delayed," *supra* note 222.

states to some degree.²²⁵ Such restrictions significantly undercut the expected economic benefits of such programs.²²⁶ Moreover, under the theory of justice as fairness, such exclusions would seem to run counter to a state's moral obligation to structure its trade preferences in the best interests of the recipient state.

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. The U.S. GSP program fails this requirement in two ways: first, by categorically excluding certain categories of goods as "import-sensitive", and second, by virtue of the so-called "competitive need" exclusion.

The U.S. GSP statute explicitly limits the range of articles that may be designated as eligible for GSP treatment by excluding those articles deemed "import sensitive."²²⁷ Import sensitivity is determined according to the effects that the category of articles might have on U.S. industry if granted duty-free access.²²⁸ To begin with, this form of exclusion is flawed from the perspective of economic theory, in that it is trade-diverting.²²⁹ 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.

225. Despite its widespread implementation, the GSP effort is widely judged a failure, as most often the exports of greatest interest to developing countries are not covered, and the complexity and discretionary nature of the program undermine its utility. *See generally* Brown, *supra* note 4, at 362-63. Sadly, the Seattle Ministerial confirmed that developed countries continue to be just as committed to such exclusions when considering further preferential access, potentially a great boon to smaller economies. *See* "Seattle Ministerial Fails," *supra* note 2; *WTO Members Bicker Over Seattle Initiative to Aid Poorest Countries, Win Their Support*, 16 INT'L TRADE REP. (BNA)(11/17/99) (reporting that industrialized countries continue to balk at full preferential access to LDC exports because of sensitive sectors such as textiles).

226. Hudec, *supra* note 25, at 72.

227. 19 USC § 2463 (c)(1).

228. *See, e.g.*, 19 USC § 2463 (b)(1)(B) (exempting from import-sensitivity watches deemed not to cause material injury to the U.S. watch industry).

229. For an overview of trade creation and trade diversion generally, *see* Garcia, *supra* note 10, at 553-57, n.68 (1995).

Moreover, 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. Rather than structure 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. Thus rather 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.

In contrast, on its face the competitive need exclusion could be argued to meet the requirements of the difference principle. The ostensible justification for excluding goods which reach a certain level of competitiveness²³⁰ is that the preference should be made available to the country most in need of it, and that once exports from one recipient reach a designated level of competitiveness, the preference should "shift" to another recipient.²³¹

On closer examination, however, this justification falls apart, as the exclusion is based on the competitive concerns of the granting state, and not the best interests of beneficiaries. There is, of course, a trade-diverting aspect to this exclusion as well, in that economic theory suggests that under terms of equal competition (here equal preferential treatment) production should shift in favor of the most competitive good, whereas the exclusion operates to restore the higher MFN tariff for that good. However, the most damaging aspect of the competitive need exclusion is that it in fact operates to protect developed country industries, which turns the moral justification of the trading system on its head. This rationale is revealed in the waiver provisions that apply to the exclusion: rather than condition a waiver on the effects that continued equal preferences would have on the market access of other developing country exports, the waiver in fact is conditioned on a finding that continued preferential access would not adversely affect U.S. interests.²³²

In moral terms, therefore, existing U.S. exclusionary practice runs counter to the requirements of justice as fairness. There is no justification under the difference principle for restricting preferential access in order to protect domestic industry from the most competitive developing country exports.²³³

230. Determined under 19 USC § 2463 (c)(2) with reference to shares in the U.S. market.

231. John Jackson & William Davey, *THE LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 1161 (1986).

232. 19 USC § 2463(d)(1)(B).

233. 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,

c. Conditionality

A third problem raised by the current form of preferential access policies is the problem of 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. Such conditions are offensive to developing country recipients²³⁴ and often have nothing to do with the moral predicate for such measures in the first place, namely the needs of the recipient. In this sense, special and differential treatment becomes an instrument of economic coercion, rather than an instrument of distributive justice.²³⁵

A case in point is the U.S. program of hemispheric unilateral preferences, administered under the GSP, ATPA and the CBI.²³⁶ Together these three programs share certain questionable conditions. First, all three programs require that the beneficiary not be a communist country.²³⁷ This is a U.S. geopolitical requirement wholly irrelevant to the moral obligation to grant preferential market access.

Second, all three programs undercut the principle of non-reciprocity by conditioning 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,²³⁸ and by requiring that the beneficiary will not grant preferences to other developed countries which are found to hurt US commerce.²³⁹ These conditions entirely reverse the normative thrust of the policy away from the benefits to the developing country and towards the effects on the developed country.

further underscoring the inadequacies of utilitarianism as a theory of international justice. *See supra* notes 126–135.

234. G-77 Ministers, *supra* note 3, at para. 12 ("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.").

235. Brilmayer suggests that one precondition to the existence of an affirmative duty of aid on the part of states is that the recipients of such aid be subject to its coercive power. *Supra* note 82, at 123. For this reason, she reaches the ironic conclusion that closer attention to domestic political theory may in fact undercut claims for transnational economic assistance. *Id.* at 134. While not agreeing with her conclusion, I would suggest that the coercive aspect of current special and differential treatment practice demonstrates that such aid itself can render its recipients subject to the coercive power of the donor, thus weakening the force of her conclusion.

236. *See supra* notes 46–49.

237. GSP, 19 U.S.C. § 2462 (b)(2)(A); CBI, 19 U.S.C. § 2702 (b)(1); ATPA, 19 U.S.C. § 3202 (c)(1).

238. GSP, 19 U.S.C. § 2462 (c)(4); CBI, 19 U.S.C. § 2702 (c)(3); ATPA, 19 U.S.C. § 3202 (d)(3).

239. GSP, 19 U.S.C. § 2462 (b)(2)(C); CBI, 19 U.S.C. § 2702 (b)(4); ATPA, 19 U.S.C. § 3202 (c)(4).

Third, all three programs require the beneficiary to adhere to WTO commitments or their equivalent;²⁴⁰ international expropriation and compensation standards;²⁴¹ international intellectual property standards;²⁴² and "internationally recognized workers rights;"²⁴³ and to recognize arbitral awards.²⁴⁴ Both the ATPA and CBI add extradition treaty requirements.²⁴⁵ Most egregiously, the ATPA conditions benefits on cooperation with US anti-narcotic efforts.²⁴⁶

In most respects, conditionality as currently employed by the U.S. is not justifiable under a theory of justice as fairness. 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. That 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.

Although one can frame arguments for certain conditions in terms of their benefit to the least advantaged, they remain problematic. One might argue, for example, that conditions involving recognition of workers' rights, protection of foreign investment and intellectual property, and recognition of arbitral awards, might be justifiable under rule of law considerations as contributing to a more well-ordered society on the part of the beneficiary, or to the more effective realization of the distributive goals of the policy. However, 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,

240. The CBI and the ATPA condition preferences on "the degree to which such country follows the accepted rules of international trade provided for under the WTO Agreement and the multilateral trade agreements." 19 U.S.C. § 2702 (c)(4); 19 U.S.C. § 3202 (d)(4). Since the GSP program is open in principle to countries which are not WTO members, there is no identical requirement, although the GSP statute achieves an equivalent effect by conditioning benefits on assurances of "equitable and reasonable" U.S. market access. Also, the GSP statute specifies that the beneficiary will refrain from unreasonable export practices (a la the GATT), provision of adequate and effective intellectual property protection (a la TRIPS), a reduction in trade-distorting investment practices (a la TRIMS), and a reduction or elimination of barriers to trade in services (a la the GATS). 19 U.S.C. § 2462 (c)(4-6).

241. GSP, 19 U.S.C. § 2462 (b)(4); CBI, 19 U.S.C § 2702 (b)(2); ATPA, 19 U.S.C. § 3202 (c)(2).

242. GSP, 19 U.S.C. § 2462 (c)(5); CBI, 19 U.S.C § 2702 (b)(5), (c)(9-10); ATPA, 19 U.S.C. § 3202 (c)(5), (d)(9-10).

243. GSP, 19 U.S.C. § 2462 (b)(2)(G); CBI, 19 U.S.C § 2702 (c)(8); ATPA, 19 U.S.C. § 3202 (c)(7).

244. GSP, 19 U.S.C. § 2462 (b)(2)(E); CBI, 19 U.S.C § 2702 (b)(3); ATPA, 19 U.S.C. § 3202 (c)(3).

245. CBI, 19 U.S.C. § 2702 (b)(6); ATPA, 19 U.S.C. § 3202 (c)(6).

246. 19 U.S.C. § 3202 (d)(11).

the morality of using benefit programs for coercion, even if in service of laudable goals, is questionable.²⁴⁷

However, with regard to other conditions it would be difficult even to frame a plausible argument that the policies are imposed with the recipient's benefit in mind. Conditions such as cooperation with US narcotics efforts, extradition commitments, and eschewal of communism do not further 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.²⁴⁸ To refuse preferences on the basis of a failure to meet such conditions is to directly subvert the moral principle which justifies the international trading system.

2. The Problems of Unilateralism

Taken together, the shortcomings in U.S. preferential trade practice described above suggest more than simply a policy in need of tinkering: they suggest a fundamental failure on the part of U.S. policy makers to grasp the moral implications of inequality and the normative role of special and differential treatment. One finds at almost every point a limitation or subversion of the basic principle of 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. Thus from a normative point of view, it can be said that the U.S. has not in fact implemented special and differential treatment in its preferential trade practice, and that U.S. trade relations are consequently unjust to that extent.²⁴⁹

247. See *supra* note 220.

248. As such, they are deeply resented by beneficiary states. See, e.g., *supra* notes 164–165, 171, and materials cited therein.

249. It can be objected that the difference principle is not an “end-state” principle, in the sense that any move in the direction of increasing benefits to the least advantaged increases the justice of the underlying relationships to that degree. It would therefore be unfair on this view to characterize U.S. GSP practice as unjust or a failure—every item that enters duty-free represents a step towards justice. While there is a core of pragmatic sense to this objection (something is better than nothing to the one receiving it), I believe this argument does not adequately address the underlying normative aspect of the problem. In justice as fairness, the criterion for evaluating a social structure has to be the consistency of that structure with the principles of justice, and not whether the structure in fact happens to confer some benefit upon the least advantaged. The features of U.S. preferential trade practice criticized above are not consistent with the difference principle because they are not designed to put the advantages of the richer state in service of the poorer one. In this sense, U.S. policy is not just, and this injustice is not ameliorated because the policy happens to do some good.

This suggests two things: first, that the acknowledged failure of GSP programs is at bottom a moral failure. Taking the U.S. as an example, the shortcomings of U.S. policy are traceable to failures to structure preferential access in accord with the appropriate normative criteria. A *moral* 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. The similarity between the normative critique and persistent developing country complaints about GSP suggests that the developing world *does* grasp both the moral basis of preferential trade, and the strictures that this moral basis places upon the acceptable contours of preferential trade practice.

The second implication of this analysis is that, because of its central role in justifying trade relationships, preferential trade should not be left to the vagaries of unilateral implementation. Many if not all of the shortcomings of U.S. preferential trade practice can be traced to the fact that the current form of GSP gives granting states virtually unlimited room to manipulate the granting of preferences and exposes GSP to the vagaries of domestic interest group politics.²⁵⁰ These shortcomings also suggest that the domestic pressure to manipulate the grant of preferences is too strong to resist. Put another way, the fact that preference programs are based on legislative decisions gives domestic economic and foreign policy interest groups and their representatives ample opportunity to skew resulting legislation towards protectionist or nationalistic ends.

This suggests that if, as this Article has argued, the principle of special and differential treatment is a necessary response to the moral obligations of wealthier states, then it must be implemented in the form of binding, essentially unconditional, treaty obligations. While this can be accomplished bilaterally, the more likely avenue for such a comprehensive structural modification would be regional or multilateral trade agreements, and it is to such agreements that we now turn.

B. Implementing Formal Commitments: WTO and FTAA Agreements

If special and differential treatment must be implemented at the treaty level to be fully effective, then current practice with respect to those aspects of special and differential treatment already in treaties

250. See, e.g., David E. Sanger, *U.S. Resists Bid to End Tariffs for 3rd World*, N.Y. TIMES, Apr. 9, 2000 at 1 (Clinton opposes World Bank call for permanent duty free status for LDC's for fear it would arouse political opposition to other trade measures, including the China PNTR bill).

raises two issues of concern: the challenge of *negotiating* appropriate implementation of normative commitments, and the need to be prepared to *pay* for the support needed for their successful implementation. A failure at either step hinders the effectiveness of the principle, thereby undermining the justice of the trading system.

1. Negotiating Market Protection in the WTO

Developing countries continue to emphasize the importance of the WTO's recognition of special and differential treatment as a foundation for their successful participation in the multilateral trading system.²⁵¹ However, problems in the implementation of the principle in existing WTO agreements, and the specter of new negotiations in sensitive sectors such as agriculture,²⁵² have led developing countries to call for particular attention to the effectiveness of this principle in action.²⁵³ Existing WTO Agreements do incorporate the principle of special and differential treatment, primarily with regard to the various market-protection mechanisms necessary to ensure that economic inequalities do not turn trade liberalization into predation.²⁵⁴ Developing countries question, however, whether the market protection aspects of special and differential treatment have been adequately observed as applied.²⁵⁵

251. G-77 Ministers, *supra* note 3, at para. 10 ("We are convinced of the need for differential and more favorable treatment of developing countries.").

252. Developing countries have signaled that they will fight hard for adequate incorporation of special and differential treatment in the new negotiations on trade liberalization in agriculture. *Seattle Failure Threatens Concessions for Developing Countries*, www.insidetrade.com/secure/seattle_special28.asp, (December 10, 1999). Agriculture raises particular difficulties for predominantly agrarian and small island developing countries. G-77 Ministers, *supra* note 3, at para. 6. Continued commitment to extensive agricultural subsidies on the part of the EU, for example, has hurt developing countries, whose competitive advantage on key commodities exports is thereby nullified. See Cairns, *U.S. Agree on Agriculture; Some Developing Nations Also on Board*, 16 INT'L TRADE REP. (BNA) 1969 (Dec.1, 1999) (noting that Brazil blames EU subsidies for depressing commodity prices and creating global hardships for farmers).

253. *Seattle Failure Threatens Concessions for Developing Countries*, www.insidetrade.com/secure/seattle_special28.asp, (December 10, 1999) ("The principle of special and differential treatment should be reviewed and strengthened to take account of the changing realities of world trade and of globalized production . . .").

254. See generally OAS Trade Unit, "Special and Differential Treatment in International Trade," SG/TU/WG.SME/DOC.1/Rev. 1, 6-18 (Feb. 5, 1996) ("Special and Differential Treatment in the WTO"); see also GATT Committee on Trade and Development, "A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements," COM.TD/W/510 (Nov. 2, 1994).

255. "In particular, the special and differential provisions in the WTO [multilateral trade agreements], many of a "best endeavor" nature, which have largely remained unimplemented, must be operationalized if the developing countries are to derive the expected benefits." G-77 Ministers, *supra* note 3, at para. 5.

A critical issue of concern to developing countries in recent multilateral fora has been the inadequacy of current implementation periods in various WTO agreements, including agreements on trade-related investment measures,²⁵⁶ customs valuation,²⁵⁷ and intellectual property.²⁵⁸ In general these agreements follow the principle of reciprocity in mandating equal standards for both developed and developing countries alike.²⁵⁹ While reciprocity of obligations indicates a move away from special and differential treatment, differential implementation periods reestablish such treatment insofar as they protect smaller economies during the transition period by giving them adequate time to adjust for the fuller competition ahead. The WTO agreements in question follow the principle of non-reciprocity with regard to implementation periods, granting developing countries longer periods of time (in general, five more years) to fully realize the obligations established by the agreements.²⁶⁰ However, developing countries argue that the additional time granted has proven to be insufficient for implementation of the required domestic law reforms.

This problem raises an important issue for the political implementation of any principle of justice, namely the relationship between moral obligation and political accommodation. The fact that these agreements do incorporate the principle of non-reciprocity, in the form of longer implementation periods, is evidence of some commitment on the part of developed WTO members to the principle of special and differential treatment. However, concrete details such as the *duration* of the longer implementation period are resolved through some form of political bargaining, involving the usual range of cross-sectoral horse-trading characteristics of multilateral trade negotiations, creating difficult compromises between what is deemed morally necessary and what is found politically possible.

As a result, one cannot infer from the simple fact that additional time was allowed, nor from the extent of additional time established by

256. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement Annex 1A.

257. Agreement on Implementation of Article VII of the GATT 1994, Apr. 15, 1994, WTO Agreement Annex 1A [*hereinafter* "Customs Valuation Agreement"].

258. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C [*hereinafter* TRIPS Agreement].

259. See, e.g., TRIPS Agreement, Articles 3–4.

260. The TRIMS agreement gives developing countries five years to comply with the agreement, versus two years for other members. Agreement on Trade-Related Investment Measures, art. 5(2), (1994) [*hereinafter* TRIMS]. See also TRIPS, art. 65 (1994); Customs Valuation Agreement, art. 20 (1994).

negotiation,²⁶¹ that the resulting agreement incorporates that degree of market protection sufficient to justify the trade relationship. To the contrary, it should be inferred from developing country objections that the agreements in fact do not.

In response, the U.S. and others point out that several WTO agreements do contain provisions recognizing that the additional time granted developing countries for implementation of their commitments may prove inadequate.²⁶² Such provisions authorize individual countries to request additional time by petitions showing cause, and developing countries have in many cases done so. Developing country concerns, however, go farther than individual complaints by individual countries regarding individual provisions or agreements, asserting more generally that the principle of special and differential treatment was not in fact adequately incorporated into these agreements. To paraphrase in Aristotelian terms, the contention is that unequals have not been treated with sufficient inequality.²⁶³

This is not merely an argument about time—it goes to the heart of the justice of the agreements in question. If, as has been argued, the principle of special and differential treatment is key to the justification of inequality, then adequate *implementation* of the principle and its components, such as non-reciprocity, is equally important for the creation of a just trading system. The justice of the resulting international trading system is compromised when trade agreements fail *in practice* to sufficiently incorporate the mechanisms that justify underlying inequalities.

What should be done? For Seattle, the developed members of the WTO had assembled a package of concessions for developing countries designed to address these concerns,²⁶⁴ which failed to be enacted along with the rest of that ministerial's agenda. The Seattle Concessions do state as a general matter in the preamble that WTO members are committed to making all areas of special and differential treatment operational.²⁶⁵ However, developing country spokespersons have been

261. Developing countries had in fact sought much longer implementation periods, in some cases as long as 20 years. See Cherie Taylor, *Trade and Development in the WTO* (unpublished manuscript, on file with the author).

262. See, e.g., Customs Valuation Agreement, Annex III.1 (1994) ("The five-year delay in the application of the provisions of the Agreement by developing country members provided for in paragraph 1 of Article 20 may, in practice, be insufficient for certain developing country Members.")

263. See generally Aristotle, *supra* note 12, at 402–04.

264. *Seattle Failure Threatens Concessions for Developing Countries*, www.insidetrade.com/secure/seattle_special28.asp, at 4 (Dec. 10, 1999).

265. *Id.*

critical of this package of concessions for inadequately addressing issues of critical concern with regard to the effectiveness of special and differential treatment in existing agreements.

To begin with, the Seattle Concessions do not include additional time for the majority of agreements of concern to developing countries.²⁶⁶ The draft does suggest additional time for compliance with the Customs Agreement, as well as additional time for particular measures within other agreements.²⁶⁷ However, the Concessions do not include additional time for compliance with TRIPS, an area of vital concern for developing countries and one in which the problem of inequality has significant repercussions.²⁶⁸

Moreover, the Concessions reject the systemic approach to additional time advocated by developing members. It is of particular concern that the U.S. has gone on record as strongly opposed to any "blanket exemptions" for developing country implementation obligations.²⁶⁹ However, the case-by-case approach advocated by the U.S. at Seattle is inadequate both because it ignores the negotiating history of these provisions and because it fails to recognize the normative implications of the objections.

To begin with, the agreements already embody an across-the-board approach to non-reciprocity, granting in general five additional years for implementation. The original five year period can thus be understood as the result of an across-the-board negotiation, resulting in an across-the-board grant of such additional time *as was politically acceptable at that point*. Objecting now to an across-the-board extension ignores this history. In contrast, a single blanket extension of three additional years, for example, would represent a proposal to modify the treaty in a manner identical to the approach already represented by the agreements themselves.

Seen in this light, the U.S. counter-proposal to take an ad-hoc approach now appears to represent a deviation from the status quo represented by the agreements. Moreover, the case-by-case approach, considering additional time on a country by country, agreement by agreement, and provision by provision basis, puts developing countries

266. See *Seattle Failure Threatens Concessions for Developing Countries*, www.insidetrade.com/secure/seattle_special28.asp, at 2-4 (Dec. 10, 1999).

267. See *Seattle Failure Threatens Concessions for Developing Countries*, www.insidetrade.com/secure/seattle_special28.asp, at 2-4 (Dec. 10, 1999).

268. U.S. opposition to additional time for TRIPS implementation is particularly suspect, because of the significant self-interest at stake for U.S. and other intellectual property-exporting states.

269. *United States Wants Developing Countries to Live Up to WTO Commitments as Agreed*, 16 INT'L TRADE REP. (BNA) 1872 (Nov. 17, 1999).

at a maximum disadvantage, by isolating them in individual negotiations with powerful countries like the U.S., which bears an uncomfortable resemblance to the divide-and-conquer approach of colonial administration.

Instead, developed members should agree to grant additional time across the board for compliance as a matter of ensuring that WTO agreements that are just in principle remain just in implementation.²⁷⁰ Recalling the distinction between formal and substantive equality, developed members have an obligation to ensure that *in practice* developing members' inequalities have been considered in such a way that they can effectively meet their obligations. Developing countries have together declared that, *as a systemic problem*, they cannot adequately meet their obligations without further time. Their complaint should therefore be approached in the same spirit, as evidence that the agreements have proven, in practice, to inadequately incorporate the principle of special and differential treatment.²⁷¹

Failure to properly respond will mean that, as inadequate implementation periods expire, developing countries will find themselves subject to panel proceedings and possible trade sanctions that will not be justifiable and will therefore render the trading system more unjust. At a minimum, WTO members should agree on a moratorium on challenges against developing countries not in compliance until the issue is considered fully by the various committees involved.²⁷² Issues such as this, which call into question (at least for the developing world) the basic justice of the WTO system, merit full and serious consideration outside the shadow and constraint of pending dispute settlement proceedings.

270. It can of course be objected that such a deferential approach would invite protectionist abuses, an objection that must always be considered in structuring trade obligations. However, in this case there are good reasons why such an objection should not stand in the way of an across-the-board extension. First of all, it must be recalled that the non-reciprocity of implementation periods as a principle has already been accepted in the agreements, despite the risk that during such time protectionist interests would benefit by this non-reciprocity. Second, several agreements already accept the concept of extending additional time, and thus perforce any risks involved. Essentially this approach poses no new risks not already accepted by the parties themselves as worth taking in view of the needs and interests at stake both at the time of the agreement and the present.

271. Alternatively, where individual WTO agreements do provide for the grant of additional time, the requirement that cause be shown should be interpreted along the "self-declaration" lines under which developing country status itself is chosen. If self-designation is acceptable as a method for choosing development status in the WTO, it is not clear why that should not also be the case where additional time is sought on development grounds, particularly where the states in question have taken a united position on the problem.

272. *Seattle Failure Threatens Concessions for Developing Countries*, www.insidetrade.com/secure/seattle_special28.asp, at 2 (December 10, 1999).

Understanding special and differential treatment as key to establishing just trade relationships with developing countries should prompt developed WTO members to view such concerns as enhancing their own ability to more effectively discharge their moral obligations to developing members. As befits the leading international economic "constitution," it is critical that WTO practice be at the forefront of implementing a just trade law through incorporation and application of the principle of special and differential treatment throughout WTO agreements. Moreover, given that resistance to such requests on the part of developed members was a major factor in the failure to agree on the agenda for the Seattle Ministerial,²⁷³ it is clear that the failure to recognize the justice of developing country demands will remain a stumbling block to further development of the world trading system.

2. Paying for Technical Assistance: The FTAA Regional Integration Fund

In addition to the trade liberalization conducted at the multilateral level through the GATT/WTO system, regional trading systems continue to operate, often at a more advanced level of liberalization and integration, particularly with respect to developing countries and inequality problems. If the FTAA succeeds, then current U.S. trade preference programs for this hemisphere will phase out and FTAA obligations will take over. This means that the justice of the future hemispheric trade regime will depend on the strength of the FTAA's commitment to special and differential treatment. Given the early state of FTAA negotiations, any evaluation must perforce be tentative. Nevertheless, the recommendations of the Working Group²⁷⁴ give us some indication of strengths and problem areas in creating an FTAA capable of establishing just trade relationships in this hemisphere.

The Working Group's programmatic recommendations incorporate, albeit on a limited basis, the principles of special and differential treatment as a key components of a program to address the concerns of

273. "WTO Preparations Still Stalled Over Agriculture as Talks on Agenda Flounder," 16 INT'L TRADE REP. (BNA) (11/17/99) (reporting that agenda negotiations stalled on agriculture and implementation period extension issues).

274. The Working Group's interim and final reports adopt various reports and studies, and incorporate their findings, together with the deliberations of the Working Group, into an overall program to facilitate the integration of smaller economies into the FTAA. See generally *Summary of the Eighth Meeting of the Working Group on Smaller Economies*, Oct. 14-16, 1997, [hereinafter *Final Report on Smaller Economies*], reprinted in 4 AMERICAS TRADE, Oct. 30, 1997, at 5-6.

smaller economies participating in an eventual FTAA.²⁷⁵ In general, the Working Group adopts the principle of special and differential treatment with regard to longer implementation periods and not to different levels of obligation.²⁷⁶ For example, in the objectives for the Market Access Group, the market protection element of special and differential treatment is recognized in the provision for negotiation of different trade liberalization timetables.²⁷⁷ However, WTO experience cautions us to withhold final judgement until experience demonstrates whether or not the principle of special and differential treatment has in fact been adequately incorporated into the agreements.

Successful implementation of special and differential treatment in an eventual FTAA will depend in part on adequate provision for the necessary technical assistance. Unless smaller economies are given access to the specialized expertise necessary to implement trade commitments and exploit the opportunities afforded by special and differential treatment, then participation in the trading regime will continue to pose grave risks for smaller economies, making the justification afforded by special and differential treatment remain an abstraction.

In this respect, the FTAA experience suggests that smaller economies will encounter difficulties in securing access to technical assistance because of the reluctance on the part of wealthier states to help *pay* for it. The San Jose Declaration does affirm that the Negotiating Groups shall be guided by the general principles and objectives for negotiation of the FTAA listed in Annex I to the Declaration, which include a call for systemic inclusion of technical assistance needs in the work of all negotiating groups.²⁷⁸ However, the San Jose Declaration fails to include any mention of a Regional Integration Fund, a glaring omission in view

275. In general, suggested provisions include the following: technical assistance in areas such as intellectual property and technical standards; simple and transparent rules of origin and customs documents; longer implementation periods for trade liberalization commitments; the possibility of implementation of certain obligations, such as technical standards, at regional or subregional levels to save resources; and a general effort to reduce transition costs and minimize internal dislocation in smaller economies.

276. This is consistent with the trend in the WTO, in NAFTA, and in other contemporary North-South integration schemes towards full reciprocity of substantive obligations. See *supra* notes 64–65 and accompanying text.

277. *Costa Rican Ministerial Declaration*, *supra* note 40, at annex II. In contrast, the objectives of the Services Group are silent on the issue of special and differential treatment, no doubt because of the acute sensitivity of this sector for developed country services exporters, and smaller economies concerned over the loss of any nascent services industry. Nevertheless, this group's stated objectives do at least include that the Group ensure the integration of smaller economies into the FTAA process. The possibility is left open for some sort of non-reciprocity in the levels of services sector liberalization commitments as in the NAFTA.

278. *Id.* at annex I, General Principle (h), (i).

of the fact that the need for such a Fund was studied and vigorously debated by the Working Group. The importance of such a fund was raised quite directly by a World Bank report analyzing the need for funding sources for technical assistance and technical assistance-related adjustment measures.²⁷⁹ The Regional Integration Fund Report appears to have engendered some controversy, and the Working Group referred the matter to the vice-ministerial level for further work on the technical and "political" levels.²⁸⁰

When viewed as an element of justice, the fact that FTAA parties have not been able to agree on the need for a mechanism to fund technical assistance raises questions concerning their commitment to "deliver" on the promise of an agreement which in practice establishes a more just relationship between the hemisphere's wealthier and poorer states. This may simply be the result of the preliminary state of negotiations, and the tendency to defer more difficult issues until later in the negotiation process. Alternatively, it may signal an unwillingness to make the difficult political decisions involved in creating and paying for a fully just trade policy, despite the normative imperatives for doing so.

CONCLUSION

Understanding the problem of trade and inequality as a problem of justice has several implications for both discourse and policy. Whatever one's view as to the appropriate answer to these questions, simply understanding the trade and inequality link as a justice issue implies that we are not free to govern our economic relationships with developing countries solely with regard to the politics of the moment. It becomes incumbent on those seeking to establish an economic order that does not fully address the claims of less developed states, to articulate a normative basis for this position. In other words, they must explain why such an order would be just.

279. *A Regional Integration Fund of the Free Trade Area of the Americas*, U.N. Economic Commission for Latin American Countries, U.N. Doc. LC/R.1738 (1998). The report does not address a mechanism for development assistance outside of the technical assistance area, arguing that such aid should be funneled through established financial institutions. *Id.* at 7.

280. *Final Report on Smaller Economies*, *supra* note 274, at para. 6–10. Reference for further work at "an appropriate political level" reflects the controversy over direct aid programs, even where such aid is clearly tied to technical assistance. It appears likely that such work had simply not advanced to the consensus stage in time for inclusion in the San Jose Declaration. Moreover, there is no mention of a negotiating group or special committee to focus on the formation of such a fund.

Moreover, viewing the trade and inequality link as a justice matter renders it problematic to adopt the stance of an egalitarian liberal at home, and a libertarian or political realist abroad. If one is an egalitarian liberal on domestic issues of justice, then the logic of one's position would dictate that one commit to some form of distributive justice on an international plane as well. This conclusion is reinforced by the degree to which trade with poorer countries has in fact been part of the wealth-creation that sustains the domestic economy's success. As Beitz puts it,

[I]f participation in economic relations with the needy society has contributed to the wealth of the "nearly just" regime, its domestic "justice" seems to lose moral significance. In such situations, the principles of domestic "justice" will be genuine principles of justice only if they are consistent with principles of justice for the entire global scheme of social cooperation.²⁸¹

Finally, analyzing the problem of inequality as a problem of justice means that international trade law must continue to incorporate a robust form of the difference principle. The key to a Rawlsian justification of international trade law is to see the disparities in market power and expertise between states as manifestations of the problem of inequality. International trade law must therefore be structured so as to put the power of developed country markets and knowledge at the service of the least developed countries.

In fact, international trade law already includes elements that can be understood as redistributive mechanisms, therefore forming a key part of the normative justification of international economic law: the principle of special and differential treatment, and the related practice of trade-related technical assistance. Together these can be seen as mechanisms which, if fully implemented, can justify international economic inequalities according to a theory of justice as fairness.

However, an examination of U.S. preferential trade practice, which ostensibly reflects the principle of special and differential treatment, reveals serious problems in the model of implementation through unilateral GSP-type programs. A principal recommendation of this Article is that special and differential treatment be restructured so wealthy states commit themselves in a treaty context to complete, unconditional preferential access to all export products of smaller economies.

A brief examination of certain aspects of multilateral and regional special and differential treatment practice suggests, however, that formalizing the principle in the form of treaty commitments is not by itself

281. Beitz, *supra* note 20, at 150.

enough to guarantee a just trading system. Special and differential treatment commitments must be structured so that *in practice* they perform the market access and market protection functions necessary to the discharge of their normative role. This means careful attention to issues such as the length of differential implementation periods, and the manner in which such periods are negotiated and, if necessary, renegotiated. Moreover, there must be adequate provision for technical assistance, and technical assistance funding, such that smaller economies can develop the expertise necessary to take full advantage of these critical opportunities.

This Article has argued that current U.S. trade policy has severe shortcomings with regard to special and differential treatment, and WTO and FTAA efforts are problematic as well. The reforms to multilateral, regional and bilateral trade policy outlined above would more fully justify the existing international economic system, and ensure that international trade law serve as an effective vehicle for developing a just global order.