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"…where there is voluntary agreement, there…is justice."

Plato, *Symposium*[2]

"The United States seems destined by Providence to plague Latin America with misery in the name of liberty."

Simon Bolivar[3]

"[T]hat trade which, without force or constraint, is naturally and regularly carried on between any two places, is always advantageous, though not equally so, to both."

Adam Smith[4]

In order for free trade as a policy to deliver fully on its social promise, it must be both "free" and "trade." The phrase "free trade" invokes the idea of freedom in two ways. The conventional meaning of the phrase is that trade is free if it is not subject to distorting governmental regulation.[5] The second, less obvious, meaning is that free trade involves consensual exchange—it has the consent of those involved in the trade. This is true at the level of private exchange and also at the institutional level, involving the structure and negotiation of the agreements framing trade relations.

In this essay, I argue that for free trade to be both free and trade, it must be free in the second sense as well as the first: it must be consensual. In

fact, it must be free, in the sense of voluntary, to be trade at all. If trade does not involve the consent of both the participants and the states involved, it is not trade in the fullest sense, but partakes of some form of oppression: predation, exploitation, or coercion. For both normative and practical reasons, free trade requires that global economic relations be structured through agreements that reflect the consent of those subject to them. Today, the neoliberal trading system only imperfectly lives up to this obligation.

To illustrate this, I examine the role of consent in trade agreements, drawing on examples from the recent trade agreement among the United States, Central America, and the Dominican Republic (CAFTA) as representative of important trends in multilateral and hemispheric integration systems. This exploration has normative implications for the justification of the neoliberal trading system, as well as practical implications for the analysis and structure of trade agreements and for the stability and security of our foreign relations.

This essay focuses on the social aspect of trade—involving trade as a set of economic relations and as a system for governing such relations—rather than on the private level of individual transactions (although I utilize examples from private exchange). In Part I, I look at some aspects of our language, concepts, and cultural experiences of trade as a human phenomenon, suggesting a preliminary definition of trade related to consensual exchange. In Part II, through an examination of CAFTA's negotiation process and select substantive provisions, I hope to tease out the elements of trade agreements that represent dynamics other than trade, such as predation, exploitation, or coercion. Such an argument cannot hope to be definitive, but I hope it is suggestive—reliably so—of subtle but important forces at work in contemporary trade relations, particularly as they involve substantial inequalities in power among participating states. If I am correct that an investigation into the nature of trade as a human experience reveals that many aspects of current trade law and policy mix what is ostensibly

free trade with something else—exploitation, coercion, or predation—then this has important normative and pragmatic implications for trade policy and our own security, as I suggest in Part III. A short conclusion follows.

I. INVESTIGATION OF TRADE AS A HUMAN EXPERIENCE

Both our language and our collective experience of trade suggest many possible aspects or dimensions of the experience that merit further inquiry as we try to understand just what trade is.[6]

A. The Many Dimensions of Trade

1. Trade as Exchange

To begin, trade can be seen as involving transactions. When we trade, we engage in a transaction—something changes hands, so to speak. I exchange a good with you for the good you have that I want. In this sense, trade is a basic everyday experience among people.[7]

We also speak of trade, in a specifically international sense, as exchanges involving the crossing of geographic and political boundaries. This evokes other dimensions of trade, such as trade as exploration, where economic need rouses us out of the known into the unknown; and trade as adventure: Will this gamble pay off? Will the merchant ships arrive? Will my fortune grow or be lost?[8]

2. Trade as Encounter

The desire to exchange brings us into contact with one another; historically, we have crossed boundaries to engage in trade and it has meant encounters with the "Other."[9] Thus, trade is one of the prime forces in bringing peoples in contact with other peoples on terms that might result in a mutually beneficial exchange. In this way, trade is a primal form of communication, expressing who we are, what we make, what we want, and how we exchange.

One of the marvelous aspects of trade is that it can involve communication and exchange with the Other where there is no shared language, culture, or history—only the mutual desire to exchange. In this way, we can see that trade involves a form of what Stanley Cavell calls "acknowledgement"—the recognition that the Other exists as a separate, recognizable human person, even if we cannot directly or fully know the person's mind.[10]

Of course, encounters with the Other are not always beneficent.[11] We can try to profit from the lack of shared language, or other information asymmetries, to engage in sharp dealing—trade as trickery or deceit. We have many colloquial examples of this, including offers to sell one another the Brooklyn Bridge, or the fable about Manhattan being "purchased" from indigenous Americans for a "handful of beads."[12]

3. Trade as Domination

This raises another, more serious aspect of trade: trade as conquest. Obviously, I cannot mean this literally: conquest is conquest. However, if we consider the "trade" relations of the East India Company, for example, or the notorious "Unequal Treaties" between China and the West, we can see an aspect of trade as domination under the guise of trading.[13] Anthony Anghie chronicles the way in which trading companies were used to assert sovereignty and extend the colonizing states' dominion over vast territories that the European states were not yet ready to administer directly.[14] Similarly, James Gathii documents the role of free trade concepts in legitimating Belgium's monopoly on exploitation of the Congo under the "freedom of commerce" principles agreed upon at the Berlin Conference.[15] By arguing that trade should be free, the colonial powers effectively left the stage open for unregulated exploitation of the Congo.[16] These examples illustrate how trade can function as a form of dominance over the Other.[17]

B. Investigating Trade as a Transaction

I would now like to take a few of these aspects of trade and further explore them in order to construct a preliminary picture of trade as a human experience.

1. Trade as an Exchange of Value

I will begin with the notion of trade as a transaction. We engage in many types of transactions throughout our lives, involving money, sentiment, goods, ideas, services, affinity, or information. But if we think of what distinguishes trade from the many other exchanges we experience, it is that trade involves a transfer of economic value.

2. Trade as a *Bilateral* Exchange of Value

There are many different types of transactions involving a transfer of value. Gifts, for example, are transactions involving a transfer of value, but one of their distinguishing characteristics is their unilateral nature: the gift giver transfers something of value for nothing in return.[18] This helps us see that trade transactions are bilateral, or mutual, in nature. They involve a *bilateral* exchange of economic value.

3. Trade as a *Voluntary* Bilateral Exchange for Value

There is another type of unilateral transaction helpful in clarifying the nature of trade: theft. A theft involves a transfer of value, but it is not voluntary. It could be said that theft is not trade because it is unilateral, but it is easy to see that this is not the essence of the distinction; the thief could give you a cheap watch in return for your wallet, but it would still be a theft despite its bilateral quality. Thus, trade must also be voluntary—both parties must consent to the transaction or there is some element of theft.

This definition of voluntariness is reflected in our language. We can speak of good trades versus bad trades in terms of meeting our goals, and yet we also distinguish bad trades from "rip-offs" or thefts. We would not

refer to the experience of being robbed as a "bad trade," except in a deliberately ironic sense. And so, trade involves bilateral *voluntary* exchanges.

4. Trade as a Voluntary *Negotiated* Exchange for Value

There is a further aspect to the voluntariness of bilateral exchange, and that aspect can be expressed as the notion of bargain. Bargaining, or the process of reaching mutually agreeable terms, is a necessary element of reaching consent and presumes the freedom of both parties to consider and propose a variety of possibilities on the road to saying yes or no.[19] Where either of the parties is not able to bargain freely, the resulting transaction may still be voluntary in a basic sense, but something has been lost. That is more like coercion than trade (this concept will be more fully developed in a moment).

This notion of bargained-for consent is reflected in our law through the concept of a "meeting of minds." The "meeting of minds" in contract law, even as a constructive notion, is a key to the whole doctrinal armature for enforcing promises. For example, if we look at many of the key justifications for getting out of a contract—mistake, duress, or fraud—we can see that they reflect the absence of a meeting of minds, an absence of bargained-for consent.[20]

This brings us back to the aspect of trade as acknowledgement: the act of reaching a bargain presupposes the existence of another mind similar enough in its basic functions (consulting self-interest, evaluating, judging, bargaining) to be recognizably human—to be "like me."[21] The reaching of a bargain can be a moment of affirmation of the Other's humanity, of similarity to self. In fact, acknowledgement is a presupposition of consent—and therefore of trade—in that we have to acknowledge the Other's humanity before we can value the Other's consent.[22] In summary, trade can be understood as consisting of voluntary, bargained-for exchanges of value among persons for mutual economic benefit.

C. What is Not Trade and Why

Based on this preliminary inquiry, I would like to look more closely at several alternatives to trade; that is, to examine other forms of economic interaction that are not trade, or at least not *simply* trade, in order to paint a fuller picture of what trade is and what it is not. In doing so, I will rely primarily on the work of Simone Weil, the "philosopher of oppression," for her frank examination of the role of consent and its absence in distinguishing between economic transactions and economic oppression.[23]

1. Predation

In the previous discussion on the nature of exchange, I introduced the concept of theft as a contrast to trade. What is essential to this distinction is the absence of consent on the part of the one surrendering economic value. Weil writes that one cannot seek consent where there is no power of refusal.[24] Thus, where there is no power to refuse, there is no trade because there can be no consent.

At the private-party level, contract law recognizes this difference through the concept of duress as a defense to the finding of a contractual obligation.[25] In other words, where one party's consent to enter into a contract was not freely given, but is given under some form of pressure, the law will not recognize this as a meeting of minds and will not find a contract.[26]

In economic terms, the equivalent to theft—transactions which are not mutual and where consent is not present—can be called extraction or predation; add a political element and we call it economic dominance or colonialism. In these cases, an economic benefit flows from one party to the other, but it is not mutual in a meaningful sense, and most importantly, it is not consensual. Rather, the economic benefit in these cases is achieved through power inequalities as expressed in economic or military force. Such transactions are not consistent with our concept of trade as I have

outlined it above; they are, instead, a form of wealth extraction in the purest colonial sense.

2. Coercion

Short of extraction, we can recognize a more subtle weakening of consent, involving what I will call coercion.[27] Coercion occurs when a transaction is mutual and in some basic way consensual, but something weakens the fullness or freedom of the consent, short of outright theft or duress. This may still be a trade transaction in some meaningful sense, but something else is going on, usually involving a restriction on the range of possible bargains that the parties are free, or not free, to propose and consider. Thus, coercion presupposes an inequality in bargaining power, which one party has exercised on the other party to limit the range of possibilities "on the table," so to speak. [28]

As with duress, contract law also reflects this distinction. The law provides particular protections for consumers and others with weaker bargaining power when they deal in what contract law calls "adhesion contracts," or contracts with commercial parties or manufacturers with greater bargaining power. In such cases (where a dealer says "if you want this, these are the terms and the only terms," and a consumer cannot negotiate), courts will look carefully before assuming the consumer's consent to adverse terms of the contract, despite the fact that, in all other material respects, it looks as if a contract was voluntarily entered into. Courts will not automatically void such a contract, as would be the case with duress, but they will look closely at the contract and they may not enforce all of its provisions.

Put into the terms of this essay, coercion can result in trade—if there is mutuality of exchange and some form of consent—but not *free* trade, because one of the two parties is not fully free to bargain.[29] The element of coercion introduces normative, substantive, and practical considerations that will be discussed further below.

3. Exploitation

In some very interesting and suggestive recent work, Hillel Steiner extends his liberal theory of exploitation to consider international economic exchanges, contrasting free trade to exploitation.[30] In addition to the requirements that trade be both a bilateral exchange and voluntary, Steiner adds a third element—that the two transfers are of roughly equal value.[31] Where two transfers are not of equal value, yet the exchange is voluntary, Steiner characterizes this as evidence of exploitation.[32]

Exploitation can have many causes, but the classical illustration Steiner offers is of a market for services in which the top bid, the one the service provider ultimately accepts, does not reflect the maximum possible value of the services, but is simply the top bid in that market.[33] Steiner does not rely, however, on an objective theory of value to characterize the bid as inadequate.[34] Instead, he suggests we look at other parties who might have bid, and perhaps bid more, but for various reasons did not.[35]

Among the reasons other parties did not bid—reasons which may indicate exploitation—we include the possibility that earlier rights violations occurred, meaning that potential offerors lacked the capital to bid despite an interest in doing so, or the possibility that governmental interference on either side prevented them from participating in the auction.[36] In either case, the result for the service provider is that they accept a voluntary mutual exchange, but for less than they might otherwise have received under circumstances that we would consider exploitative. In other words, the transaction is consensual and mutual, yet exploitative, for the reason that a potentially higher-paying third party was not able to participate in the auction.[37]

Applied to trade, this proposition suggests that where certain third-party states and/or citizens are kept out of markets, or are economically unable to participate effectively in markets, an offeror suffers a detriment because he/she receives a lower bid from someone else. Therefore, the resulting trades between that offeror and the ultimate purchaser are not free trade but,

rather, exploitation.[38] This differs from coercion in that the force, pressure, or rights violation occurs with respect to the third party, not between the two primary parties to the transaction. Nevertheless, this affects our evaluation of the consensual nature of the resulting transaction in that the offeror's consent was granted among a restricted range of choices. In contrast to coercion, however, the restriction was not a function of the relative power of the parties, but of the oppression of a third party. Once again, as with coercion, exploitation can result in trade—there is mutuality of exchange and some form of consent—but not *free* trade since the parties were not free to consider all possible offers because of the rights violations of third-party potential offerors.

To summarize, the essence of free trade, as I am defining it, is consent to a voluntary, mutual, bargained-for exchange of roughly equal value. I have suggested three other types of transaction which, while they may look in some ways like free trade, do not in fact meet this definition: theft or predation, which may not be trade at all; coercion; and exploitation, which may be trade in some sense, but also introduces other dynamics of concern for normative and pragmatic reasons. Participants in any of these three transactions will see economic value exchange hands, and society may reap some economic benefit, but this occurs under conditions involving the absence of either basic consent, or the fullness of consent.

II. APPLICATION TO TRADE AGREEMENTS: A REVIEW OF CAFTA

If trade consists of voluntary bargained-for exchanges, then the rules governing trade must preserve the possibility of bargained-for exchanges among private parties, and the rules themselves must be the fruit of such a bargain. If the rules of the game are not mutually agreed-to, then any bargains struck under those rules are not fully free because they are not fully agreed-to. This means there is an essential role for consent in making trade agreements that are about free trade, or "trade" at all. Without

consent, agreements structuring economic exchange will be a form of oppression or, worse, predation.

This consent must go beyond mere recognition of the formal sovereign equality of states, the formal legitimacy of governments, and the formalities of ratification. Consent must extend to difficult questions: whether the states have anything resembling equal bargaining power; whether a negotiating government speaks for the full range of affected citizens (or whether it speaks for its people at all); and whether a government has an adequate alternative to a negotiated outcome.[39] Otherwise, we risk mistaking a mere form of consent for actual consent.[40]

In order to illustrate how this dynamic of consent works, I will examine some key aspects of CAFTA[41]—a recent trade agreement between the United States and five Central American states and the Dominican Republic—for evidence of inequality in power between parties and how this inequality was used to vitiate or weaken consent. In other words, I am looking for examples of what is ostensibly free trade, but in fact may be a form of coercion (no free bargaining), exploitation (no equivalent value), or predation (no consent).

A. Nature of the Negotiations

There are two basic areas to examine when looking for aspects of trade agreements that preserve or jeopardize consent or reveal the degree of consent that went into their formation. First, we must look at the nature of the negotiations. There are at least two issues here: the problem of unequal bargaining power between states, and the question of legitimacy stemming from the problem of underrepresented groups. Second, we must look at the terms of the agreement and what was substantively agreed to between the parties. Key substantive areas to examine include the following: the treaty's dispute resolution mechanism; the structure and timing of market access available to the parties; the extent and nature of domestic law reform mandated by the treaty; and what provisions exist, if any, for special or

differential treatment. The negotiation and substantive aspects of the inquiry are interrelated. For example, the more unequal the bargaining power, the more we would expect the substance to be one-sided as well.

1. Theft and Lack of Representation

We cannot assume even in the United States, let alone most developing countries, that the government speaks for all affected sectors of society. This issue is of special concern throughout the Central American region, where governments have a history of capture by elites.[42]

Lack of representation is particularly serious when fundamental economic decisions are being made, as in the CAFTA negotiations. In Nicaragua, for example, many sectors of society were concerned that the new government only spoke for and negotiated on behalf of the monied interests, despite a recent history of social revolution.[43] There was widespread ignorance among most affected groups regarding what CAFTA would in fact do, and there were allegations of a campaign of disinformation on the part of the government.[44]

To the extent that the government did negotiate only for the monied interests and conducted a disinformation campaign, the legitimacy of the treaty is undercut. As will be further discussed below,[45] this lack of legitimacy should concern the U.S. government, even though such tactics might seem beneficial in the short run, in that they streamline for the United States the process of securing concessions sought on behalf of U.S. interests by minimizing dissenting voices. The implication is that the treaty cannot be viewed as expressing the consent of many of the affected parties. In the terms of this essay, the treaty does not create free trade for them, but is instead a form of theft or extraction. For such parties, the treaty and its resulting economic activity are neither mutual nor voluntary; the parties are not trading—something is being taken from them.

2. Exploitation and Lack of Real Alternatives

Even if CAFTA were to prove to be both mutual and voluntary, we must still consider whether it represents the full consent of the parties. During the CAFTA negotiations, for example, it was often mentioned by the Nicaraguan government that the country did not have a real alternative to the treaty because the United States plays such a dominant role in the Nicaraguan economy as the principal source of capital and markets.[46] Put in the terms of this essay, this raises the possibility that the treaty may be exploitative.

Given the history of external domination of the southern hemisphere, both colonially and post-colonially, we must consider the possibility that other states in the region and elsewhere—states that might have offered more attractive alternative markets and sources of capital than the United States—may not have been able to do so. The United States, for example, exercised its role as the regional hegemon during the last century by restricting regional and other states' opportunities in the hemisphere, which has continuing economic effects today.[47] Put in the framework Hillel Steiner has developed, this raises the risk that any trade agreements formed between the United States and states in the region are exploitative in nature.[48] More specifically, the risk is that the United States will exploit the fact that in this trade negotiation "auction," its bid is the highest bid, either because other regional parties do not have the ability to effectively bid (due to the absence of sufficient economic development), or because other external parties have not been able to develop ties, levels of commerce, and investments to match the levels of the United States.

B. Substantive Provisions

There is evidence that suggests the same dynamics previously discussed are also at work in CAFTA's substantive provisions. Inequality in bargaining power and the problem of legitimacy manifest themselves in

treaty terms which reflect impaired consent, and which proceed to impair the consent of others.

1. Coercion, Exploitation, and the Terms of Market Access

The terms and timing of market access can speak volumes about a weaker party's capacity to protect its markets from external competition before local industry is ready. Moreover, when we look at which sectors are excluded by whom and why, we get a more complete picture of the weaker party's ability, or lack thereof, to bargain for what it wanted and needed.

To take the agriculture sector as an example, CAFTA eliminates the protections in place for regional small-scale farmers and agricultural workers in several key sectors such as rice and yellow corn,[49] exposing them to immediate competition from highly subsidized U.S. agricultural products.[50] However, the United States assiduously maintained protection of sugar,[51] one of its most sensitive sectors that had been of interest to Central American exporters.[52] Moreover, in many of the sectors where CAFTA governments announced victories, their exports had either already enjoyed privileged access under the U.S. trade preference programs, or are effectively blocked by sanitary or phytosanitary measures.[53]

Such one-sided bargains offer evidence of the disparity in bargaining power that plagues the treaty.[54] In order to understand the consent by Central American governments to such one-sided provisions, it may be helpful to employ the concepts of coercion and exploitation developed here. That such one-sided market access provisions were agreed to by Central American governments may suggest a coercive aspect to the negotiation, in which the United States relied on the Central American inequality in power to keep certain options (such as liberalization of the sugar market) off the table while pressing ahead for the concessions it wanted.[55] Alternatively, or in tandem, Central American consent can be evidence of exploitation, insofar as the United States relied on the absence of other states able to

offer Central America more attractive terms in the "auction." In either case, the one-sided nature of the market access provisions in agriculture suggests that the treaty may not truly reflect free trade.

Even those terms that may at first appear to be U.S. concessions tend to prove otherwise upon further inspection.[56] Concessions on textiles have been widely trumpeted as one of the premier benefits conferred on the Central American nations by CAFTA.[57] However, the CAFTA textile provisions include safeguard provisions allowing the United States to unilaterally impose tariffs if there is a surge of textile imports that have the potential to hurt domestic manufacturing.[58] Such safeguard provisions are standard in trade agreements and, by themselves, do not suggest an absence of consent. However, the United States has already used the threat of invoking this safeguard in an attempt to renegotiate a term of CAFTA.[59] At the behest of the textile lobby, the United States is currently demanding either the delay of duty-free importation of socks or, alternatively, the modification of their rule of origin requirements in order to protect the U.S. sock manufacturing industry.[60] Given that the CAFTA nations have not been receptive to this demand, it appears likely the United States will invoke this safeguard as retaliation.[61]

The manner in which the safeguard provisions have been invoked in this renegotiation illustrates the aspects of U.S. trade negotiations that jeopardize consent. In this case, under special-interest-based Congressional pressure, the Bush administration has invoked a lawful provision in an unlawful manner, as a threat in order to attempt to force a change in the terms of a previously negotiated trade agreement. Such an attempt to change a previously negotiated agreement is coercive. If this were a case in private law, such modifications would most likely be held invalid under traditional contracts doctrine.[62]

2. Coercion and Law Reform

If we are investigating consent, we should also take a close look at those aspects of trade agreements that mandate law reform in order to determine who benefits from these reforms. For example, the CAFTA services chapter requires Costa Rica to undertake significant substantive revisions of its agency and distribution law.[63] These revisions can be seen as an end-run around the protections that such laws typically include for agents and distributors in the event of termination, to the benefit of foreign—in this case United States—principals.

The treaty requires Costa Rica to enact new laws which will not presume that such commercial relationships are exclusive,[64] and which mandate that termination with notice—but absent any breach of obligation—is nevertheless to be considered termination for just cause, thus waiving all rights of the agent or distributor to indemnification.[65] Finally, all such contracts will now be deemed subject to private arbitration unless expressly subject to litigation.[66]

Although Costa Rican law may have been in some respects more protective than other developing-country agency laws,[67] these changes go beyond simply conforming Costa Rican law to modern standards. These changes soften provisions found particularly onerous by U.S. firms, such as restrictions on their freedom to terminate agreements without cost, and they limit important rights previously enjoyed by Costa Rican citizens, such as access to the courts. This imposition of arbitration is particularly noteworthy for two reasons: first, because it appears quite self-serving, given that the United States already influenced Costa Rica towards adopting U.S.-style arbitration through its influential role in the 1997 overhaul of Costa Rica's arbitration system;[68] and second, because it seems opportunistic, given that under U.S. domestic law, the imposition of arbitration through contracts of adhesion is one ground for their unenforceability.[69] In other words, one of the places where private firms

exercise their unequal bargaining power over consumers is by imposing arbitration instead of litigation.

When viewed in this light, the fact that the Costa Rican government would agree to strip protections from agents and distributors, and to impose U.S.-style arbitration on a class of private parties through treaty law, may be evidence of coercion at the state level, which also creates a coercive effect on private parties. In this sense, CAFTA might be considered an adhesion treaty.[70] Here, CAFTA fails both aspects of free trade: it does not preserve the bargained-for exchanges among private parties, and in this instance, it is not itself a voluntarily bargained-for exchange among states.

3. Coercion and Dispute Resolution

Another revealing aspect of trade agreements is the manner in which their dispute resolution provisions are structured. Informal nonbinding consultations, while apparently neutral, favor the more powerful party because the outcome is not determined by law but by power. Thus, while the WTO's binding dispute settlement process has been key to several victories by developing countries, in NAFTA and CAFTA the dispute resolution provisions allow disparities in economic power to influence outcomes.

CAFTA disputes involving the United States are subject to the wishes of the most powerful party: the United States. When the dispute resolution implementation provisions are examined closely, it is clear the provisions echo the NAFTA-style preference on the part of the United States for nonbinding dispute resolution.[71] In other words, the arbitral panel's final report is not implemented as a legal decision; rather, it is the basis for a settlement by the parties, which need not track or implement the panel report at all.[72] Moreover, should the losing party fail to honor its commitments, or the prevailing party refuse to accept a settlement short of full implementation, the prevailing party's only recourse would then be suspension of equivalent benefits.[73] However, it is well-documented that

such suspensions are particularly inadequate in agreements between states with great economic disparities, because the markets of small economies are simply too small for such measures to create any real economic incentive on the part of a country like the United States to change its policies.[74]

III. IMPLICATIONS AND APPLICATIONS

A. The Role of Trade Law and Institutions in Safeguarding Consent

If trade agreements do not facilitate consensual economic exchanges, and are not themselves the result of consensual negotiations, they become oppressive. One way to envision the role of trade institutions is that of a playground monitor charged with maintaining a beneficial process of interaction, but allowing a great deal of latitude to the participants in establishing their own relationships and conducting their own transactions. As with playground games, there will be transitory winners and losers, but the monitor's role is to watch out for bullying. In CAFTA, there is no playground monitor—the agreement principally reflects the interests of the more powerful party, the United States, and leaves it relatively free to achieve its goals once the agreement itself is implemented.[75] In this way, CAFTA represents a failure on the part of trade law to perform one of its key social functions.

We should also be concerned when trade relations take on the properties of a monopoly, because of its stifling and possibly oppressive nature. Returning to the playground metaphor, one expects to see some turnover as to who plays which role, who is winning and losing—it is rare for the same child to always win, and if this happens, the rules or the teams are usually changed to return the game to the realm of healthy competition, or else the other children lose interest and the game stops.

The CAFTA treaty sets up a system that resembles the sort of playground in which the same child wins most of the time, and is perceived as continuously trying to formulate self-serving rules, with little effective

restraint and, importantly, with the leverage to force everyone else to play along—the other children cannot afford to stop playing. At the public level, such oppressive systems are usually maintained at significant cost to private citizens through bureaucracies and enforcement mechanisms; the result is a higher cost than if the system could count on willing participants. From a trade perspective, this does not necessarily allow for the emergence of the best products and services.[76]

B. Liberalism and Trade Agreements

States that seek legitimacy must take care that their foreign policy does not violate their own founding principles.[77] Liberal states risk compromising their basic commitment to freedom when they fashion or accept trade agreements that vitiate the consent of the states or peoples they involve.

Simone Weil writes that the objective of justice is the exercise of consent in human relations.[78] If trade agreements do not establish a framework for consensual transactions, and are not themselves the fruit of fully consensual negotiations, they are no longer just—not in the way that liberal states understand the concept of justice.[79] Instead, when concluding such trade agreements, liberal states risk gratifying what Weil terms that "shameful, unacknowledged taste for conquests which enslave under the pretense of liberating."[80] When trade agreements are not made freely, they lose their moral justification for liberal states.

C. Trade and Security

Finally, trade agreements that are not consensual create conditions for "blowback," or unintended adverse policy consequences.[81] Perceptions of injustice are strong motivators and can lead to civil conflict, instability, and violent counter-reaction.[82] One current manifestation of blowback for the United States is the resurgence of leftist authoritarian populism in Latin America.[83] To many in the region, the unequal terms and social unrest

caused by agreements such as CAFTA represent failures of democracy.[84] Hence, for example, the rhetoric and appeal of Venezuelan President Hugo Chavez, his Bolivarian Revolution and his increasing influence in the region, which taps into a long history of resentment at foreign intervention and at governance by local elites indebted to or enamored of foreign interests.[85]

The United States may find it is undermining its goal of spreading democracy and enhancing security for the country through its current hemispheric trade policies that infringe on consent and perpetuate inherent injustices.[86] Eschewing opportunities for coercive or exploitative trade agreements might allow the region's people to finally enjoy the gains of trade while simultaneously weakening the attractiveness of leftist authoritarianism. Thus, for the people of the United States, there is a mutually reinforcing relationship between consensual economic relations and our own security.

IV. CONCLUSION

In order for trade to be truly free and to be "trade" in the fullest sense, it must be mutual, consensual, bargained-for, and it must involve the exchange of equivalent value. Free trade must be consensual, in the sense that all parties are free to enter into the transactions, and perhaps even more importantly, that all parties have had a meaningful role in formulating the rules of play. If economic exchange is not consensual in both senses, it is not trade, but instead some form of extraction. If it is not *fully* consensual, then it involves some form of oppression, such as coercion or exploitation.

An examination of CAFTA suggests that the pattern of trade in this hemisphere is not truly free trade. Even a preliminary examination of CAFTA's substantive provisions and negotiation history reveals elements of coercion, exploitation, and predation. Should this pattern continue for U.S.-driven hemispheric integration, it does not bode well for regional development, or for U.S. political ideals and domestic security.

[1] I am indebted in particular to Kim Garcia, and to Jeffrey Dunoff, Kevin Kennedy, Sonia Roland, Hillel Steiner, Diane Suhm, and Judith Wise; to my colleagues at the 2006 South-North Exchange Conference on Hemispheric Integration; and to the diligent editorial staff of the *Journal*, for their helpful comments. All mistakes remain my own. Thanks also to Daniel Blanchard for his very able assistance and to Benjamin Weiner, and to the Boston College Law School Fund and the Francis J. Nicholson S.J. Fund for their support.

[2] PLATO, SYMPOSIUM 43 (Benjamin Jowett trans., Kessinger Pub. 2004).

[3] Attributed, 1829. Simón José Antonio de la Santísima Trinidad Bolívar y Palacios y Blanco (1783-1830) was a South American revolutionary leader. *See* Wikiquote, Simón Bolívar, http://en.wikiquote.org/wiki/Simon_Bolivar (last visited Apr. 6, 2007)..

[4] ADAM SMITH, THE WEALTH OF NATIONS, BOOKS IV-V at 70 (Andrew S. Skinner ed., Penguin Books 1999) (1776).

[5] *See, e.g.,* DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 5 (1996) (free trade generally defined as absence of artificial impediments to the exchange of goods across national markets); WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPALS AND POLICY 742-45 (3rd ed. 1985) (asserting that free trade challenges the background assumption that governments should impose regulations impeding trade).

[6] By speaking in the plural, I mean to invite the reader to consider whether they find what I say to be consistent with their own experience, rather than to presume I can speak for any of us or "all" of us in some definitive sense.

[7] It was none other than Adam Smith who noted "a certain propensity in human nature…to truck, barter, and exchange one thing for another." ADAM SMITH, THE WEALTH OF NATIONS, BOOKS I-III 121 (Andrew S. Skinner ed., Penguin Books 1999) (1776). I am indebted to Judith Wise for introducing me to this aspect of Smth's work. A more contemporary source, Amartya Sen, puts it this way: "The freedom to exchange words, or goods, or gifts does not need defensive justification…; they are part of the way human beings in society live and interact with each other…" AMARTYA SEN, DEVELOPMENT AS FREEDOM 6 (1999).

[8] *See, e.g.*,WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE (William J. Rolfe ed., Am. Book Co. 1903) (regarding international trade and its vicissitudes; the loss of Antonio's ships is one of the dramatic forces propelling the primary story of *The Merchant of Venice*, which is also about another aspect of trade, namely which kinds of exchanges we will and will not allow. It has been suggested that this play shadows all our inquiries into trade, markets, and capitalism itself). *See also* Sebastiano Maffettone, Is Capitalism Morally Acceptable? 1-2 (2005) (unpublished draft, on file with the author).

[9] On the many ramifications of the Other, see EDWARD W. SAID, ORIENTALISM (1978).

[10] STANLEY CAVELL, THE CLAIM OF REASON 329-426 (1979).

[11] Returning to *The Merchant of Venice*, the proposed flesh trade in the play already shows several of the negative dynamics of trade to be examined in this essay: coercion; inequalities in social power; and the breakdown of acknowledgement along ethnic, religious, and gender lines. *See* SHAKESPEARE, *supra* note 8. The most memorable

speeches of the play are calls for acknowledgement. I am indebted to Kim Garcia for pointing this out.

[12] *See* Peter Francis, Jr., *Beads and Manhattan*, *at* http://www.hartford-hwp.com/archives/41/415.html, (last visited Apr. 6, 2007).

[13] *See, e.g.,* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millennium,* 15 AM. U. INT'L L. REV. 527, 554-56 (2000) (documenting commercial exploitation, lack of reciprocity, and legacy of bitterness arising from unequal treaties); EDUARDO GALEANO, OPEN VEINS OF LATIN AMERICA 197 (1973) ("Latin America's big ports, through which the wealth of its soil and subsoil passed en route to distant centers of power, were…built up as instruments of the conquest and domination of the countries to which they belonged, and as conduits through which to drain the nations' income."). On the fluid interrelationship between the concepts of commerce, conquest and confiscation, *see* James Thuo Gathii, *Commerce, Conquest and Wartime Confiscation,* 31 BROOKLYN J. INT'L L. 709 (2006).

[14] ANGHIE, *supra* note 13, at 68.

[15] James Thuo Gathii, *How American Support for Freedom of Commerce Legitimized King Leopold's Territorial Ambitions in the Congo*, *in* TRADE AS GUARANTOR OF PEACE, LIBERTY AND SECURITY? CRITICAL, EMPIRICAL AND HISTORICAL PERSPECTIVES 97 (Padideh Ala'i et al. eds., 2006).

[16] *Id.*

[17] Gathii, *supra*, note 15, at 98 (citing SAID, *supra* note 9, at 3). The secondary story in *The Merchant of Venice* is also about domination, about choosing a woman not as a commodity but as a person. Shakespeare makes the point that there is no marriage if she is a commodity, just as there is no trade if it involves domination. Viewed in this light, the play is also about the limits of the market place, as for example when Bassanio is given a ring he is not to give away. *See* SHAKESPEARE, *supra* note 8. Historically, we can read the play as responding to a contemporaneous wave of globalization and the European approach to the "New" World: Can we deny our own and others' humanity for economic gain, involving for example slavery, the mines and the *encomienda* system? Does this new world mean it is all up for grabs, that maybe the old rules won't apply in this new economic space? These questions are never far from the surface in international trade.

[18] One could characterize a gift as a mutual exchange if one considers the subjective moral or emotional good which the gift-giver experiences in return, or if there is an implicit expectation that one gift will lead to a reciprocal one. However, I think the unilateral analysis is closer to the essence of our concept of "gift" and clearer for our purposes.

[19] As Adam Smith notes, both parties must be free to consult their self interest when a bargain is proposed: "Give me that which I want, and you shall have this which you want." *Supra* note 7, at 118.

[20] 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §4.13 (Rev. ed. 1993) (describing mutual assent- "meeting of the minds." "If it is made clear that there has in fact been no such meeting of the minds, the court will not hold a party bound by a contract varying from the party's own understanding.").

[21] In a similar sense, Joseph Vining writes that law presupposes the presence of human minds. JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 9-15 (1986).
[22] I am indebted to Kim Garcia for pointing this out.
[23] ADRIENNE RICH, *For a Friend in Travail, in* AN ATLAS OF THE DIFFICULT WORLD: POEMS 1988-1991 at 51 (1991) ("*What are you going through?* she said, is the great question. / Philosopher of oppression, theorist/ of the victories of force."). 'She' being Simone Weil, who wrote, "The love of our neighbor in all its fullness simply means being able to say to him: "What are you going through?" SIMONE WEIL, WAITING FOR GOD 115 (1951). Many thanks to Kim Garcia for introducing me to the connection between Weil's thought and trade.
[24] SIMONE WEIL, *Justice and Human Society, in* SIMONE WEIL 116, 123 (Eric O. Springsted ed., 1998).
[25] *See* RESTATEMENT (SECOND) OF CONTRACTS, §176, cmt. f. (1981) ("where…a party has been induced to make a contract by some power exercised by the other for illegitimate ends, the transaction is suspect.").
[26] *See* RESTATEMENT (SECOND) OF CONTRACTS, ch. 7, intro. note (1981) (explaining improper pressure in the bargaining process renders a contract void or voidable).
[27] This can also be called oppression. Simone Weil writes that next to rape, "oppression is the second horror of human existence. It is a terrible caricature of obedience." What renders it so is the absence of consent. WEIL, *supra* note 24, at 122.
[28] On the general nature of coercion in market relations, see Robert L. Hale, *Coercion and Distrbution in a Supposedly Non-Coercive* State, 38 POL. SCI. Q. 470 (1923) (analyzing coercion as background constraints on the range of available choices involving disparities in bargaining power, resources, etc.). I am indebted to Jeffrey Dunoff for introducing me to this work.
[29] Such trade may still perform some socially useful function in the traditional sense of "free" trade, insofar as the transactions follow the logic of comparative advantage and therefore lead to aggregate welfare increases. However, if we believe in the free market as the best mechanism for deriving the full economic benefit from resources, then this sort of coerced trade will very likely result in the under-utilization of resources, since the parties are not free to bargain fully. Such bargaining is essential to the market's ability to set prices, which are "adjusted…not by any accurate measure but by the higgling and bargaining of the market, according to that sort of rough equality which, though not exact, is sufficient for carrying on the business of common life." SMITH, *supra* note 7, at 134. Therefore, there is a sound basis in economic rationality for promoting free trade in its fullest consensual form.
[30] Hillel Steiner, Exploitation Among Nations (2005) (unpublished manuscript, on file with author) (hereinafter Exploitation); *see generally* Hillel Steiner, *A Liberal Theory of Exploitation,* 94 ETHICS 225 (1983-84) (analyzing exploitation in terms of prior rights violations).
[31] By rough equality, I mean (and I take Steiner to mean) that both parties consider the exchange *fair*—there is an appropriate relation in their eyes between what they are giving and what they are receiving. This does not mean that the exchange is in any necessary sense between objects, etc. of equal or roughly equal value in the literal sense. *See* DAVID MILLER, MARKET, STATE AND COMMUNITY 175 (1989) (exploitation consists of

the use of special advantages to deflect markets away from equilibrium, defined as exchanges involving equivalent value.).

[32] Exploitation, *supra* note 30, at 2.

[33] Exploitation, *supra* note 30, at 3.

[34] For this he has been criticized, though in my view unpersuasively. *See, e.g., supra* note 31, at 180.

[35] Exploitation, *supra* note 30, at 3-4.

[36] Exploitation, *supra* note 30, at 6.

[37] *Accord* MILLER, *supra* note 31, at 177, 186 (it is in the nature of exploitation that the exploited party is unable to consider alternative, more attractive hypothetical transactions due to the exploiter's use of unfair advantage.). Miller considers the rights-violation theory of exploitation too narrow, but for my purposes here it is enough to note that such a case would be exploitation, even if as Miller argues, other cases should also qualify. *Supra* note 31, at 181-82.

[38] Exploitation, *supra* note 30, at 6.

[39] In negotiation theory, the latter is referred to as a party's BATNA, or Best Alternative To a Negotiated Agreement. If a party has no BATNA, it is in a very weak position. BATNA "is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept." ROGER FISHER & WILLIAM URY, GETTING TO YES 97 (1981).

[40] Similarly, Weil writes that in looking purely at the fact of voting, democratic theory mistakes true consent for a form of consent, which can easily, like any other form, be mere form. WEIL, *supra* note 24, at 126.

[41] Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA].

[42] *See* THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA 46 (2nd ed. 1989) (discussing exercise of political power by or for elites endemic to region).

[43] Ginger Thompson & Steven R. Weisman, *U.S. Suspends Military Aid to Nicaragua*, N.Y. TIMES, Mar. 21, 2005, at A3 (reporting U.S.-backed conservative governments have historically failed to address extreme poverty and been widely perceived as corrupt.).

[44] Interviews with civic leaders and NGO activists, in Managua, Nicar. (June 2, 2004). Lack of genuine social dialogue and political capture on the part of the wealthy elites have also been alleged in other CAFTA countries. *See Diputados aprueban de urgencia nacional el TLC*, PRENSA LIBRE (Guat.), Mar. 11, 2005, *available at* http://www.prensalibre.com/pl/2005/marzo/11/109623.html. There have also been suggestions that the United States has been publicly and privately involved in misrepresentations concerning CAFTA and regional politics. *See Nicaragua: Laboring with the Passage of CAFTA,* SISTER CITY NEWS, Winter 2005 (alleging U.S.-backed disinformation campaign). *See also* Press Release, The White House, President Signs CAFTA-DR (Aug. 2, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html (at signing, Bush implied CAFTA would help "eliminate the lawlessness and instability that terrorists and criminals and drug traffickers feed on.").

[45] *See infra* Part III(b).

[46] Interviews with Nicaraguan trade officials, in Managua, Nicar. (June 3, 2004); *see also Five Get Anxious; Central American Trade*, ECONOMIST, May 29, 2004, (explaining that CAFTA makes little allowance for power disparities between signatories but is nevertheless seen as necessary to "survive the next few years"); Christopher Marquis, *Latin Allies of the U.S.: Docile and Reliable No Longer*, N.Y. TIMES, Jan. 9, 2004, at A3 (quoting the president of the Center for Global Development characterizing CAFTA nations as "desperate to stay in the club").

[47] SKIDMORE & SMITH, *supra* note 42, at 5-7 (asserting that historic external domination has both threatened sovereignty and restricted available policy choices).

[48] *See supra* sec. II.C.3.

[49] CAFTA, *supra* note 41, Annex 3.3., Tariff Schedule of the United States.

[50] Carlos Galian, *CAFTA: The Nail in the Coffin of Central American Agriculture*, *in* WHY WE SAY NO TO CAFTA 4 (Alliance for Resp. Trade 2004).

[51] CAFTA, *supra* note 41, at 5; Annex 3.3, Tariff Schedule of the United States.

[52] *See* Galian, *supra* note 50; *see also* Elizabeth Becker, *Costa Rica to Be 5th Country In New Trade Pact With U.S.*, N.Y. TIMES, Jan. 26, 2004, at A6 (reporting that the United States won its demand for opening Central American agriculture market to its exports while maintaining protection for sugar industry, of interest to the region).

[53] Galian, *supra* note 50, at 6.

[54] Editorial, Harvesting Poverty: A New Trade Deal, N.Y. Times, Dec. 22, 2003, at A30 (asserting CAFTA's terms reflect asymmetry in negotiating power between the United States and the Central American region). Such allegations have also been raised about the WTO agreements and the Uruguay Round. *See* J. Michael Finger & Julio J. Nogués, *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations* 3-4 (World Bank Pol'y Res., Working Paper No. 2732, 2001).

[55] *See* James C. McKinley Jr.*, U.S. Trade Pact Divides the Central Americans, With Farmers and Others Fearful*, N.Y. TIMES, Aug. 21, 2005, sec. 1, at 18 (reporting Central American negotiators lacked sufficient leverage to extract needed concessions from the United States, and faced implicit threat of loss of trade preferences). We will not know the full details of the negotiations for some time, as all members of the CAFTA negotiations signed confidentiality agreements. *See* CATHOLIC RELIEF SERVICES, *Transparency and Participation in the Negotiations*, *in* FAIR TRADE OR FREE TRADE? UNDERSTANDING CAFTA, *available at* http://www.andrew.cmu.edu/user/mtoups/cafta_briefing_final_dec03.pdf (last visited Mar. 17, 2007).

[56] *See* CAFTA, *supra* note 41 and accompanying text.

[57] CENT. AM. DEP'T AND OFF. OF THE CHIEF ECONOMIST, LATIN AM. AND CARIBBEAN REGION, WORLD BANK, DR-CAFTA: CHALLENGES AND OPPORTUNITIES FOR CENTRAL AMERICA 4 (2005).

[58] *See* OFF. OF THE U.S. TRADE REP., CAFTA FACTS–TEXTILES IN CAFTA (2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/ Briefing_Book/asset_upload_file583_7185.pdf.

[59] *See Pension Bill Including Trade Provisions Faces Uncertain Path in Senate*, INSIDE U.S. TRADE, Aug. 4, 2006.

[60] *Id.*

[61] *Id.*

[62] Assuming that traditional contracts doctrine is a proxy for domestic notions of fairness, application of the Restatement is a useful exercise to measure how fair U.S. negotiation practice is by its own standards. The Restatement Second of Contracts states that "[a] promise modifying a duty under a contract not fully performed on either side is binding if the modification is fair and equitable in view of the circumstances not anticipated by the parties when the contract was made." RESTATEMENT (SECOND) OF CONTRACTS §89(a) (1981). In this case, a modification made under threat is hardly fair, and the circumstances invoked—that CAFTA would lead to an influx of imported socks—hardly unanticipated (indeed, that is the purpose of a safeguards clause in the first place). Therefore, any modification to CAFTA made on this premise is invalid and would not be sustained in court. Although this example does not directly map onto the case of an international treaty, it illustrates how U.S. trade policy is not always consistent with notions of justice inherent in domestic private law. Stated differently, the rules at home are not the same as the rules abroad. I am indebted to Daniel Blanchard for his elaboration of this point.

[63] See CAFTA, *supra* note 41, Annex 11.13, §A, pts. 1–6 (mandating changes to Costa Rica's Law No. 6209, "Law for the Protection of the Representative of Foreign Companies").

[64] Under Law No. 6209, such contracts were impliedly exclusive. U.S. COM. SERVICE, U.S DEP'T OF COM., DOING BUSINESS IN COSTA RICA: A COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 2006 at 10 (2006).

[65] Under the old law, Costa Rican representatives had been broadly protected against termination, subject only to narrow grounds for "just cause." *See* David R. Martinez, *At Termination, Independent Sales Reps are Anything But*, 7 LATIN AM. L. & BUS. REP. 19 (1999).

[66] Under Law No. 6209, access to Costa Rican courts could not be waived by contract, even with explicit arbitration clauses. *Id.*

[67] Interview with Prof. F.E. Guerra-Pujol, Catholic University of Puerto Rico, in Bogotá, Colom. (May 19, 2006); *see also* Salli A. Swartz, *International Sales Transactions: Agency, Distribution and Franchise Agreements*, *in* NEGOTIATING AND STRUCTURING INTERNATIONAL COMMERCIAL TRANSACTIONS 15-19 (MARK R. SANDSTROM & DAVID N. GOLDSWEIG eds., 2nd ed. 2003).

[68] Elizabeth Thomas, Commercial Arbitration in Costa Rica, (2005) (unpublished manuscript, on file with author) (documenting the U.S. role in reforming Costa Rican arbitration law to its own way of thinking, arguably giving U.S. parties an advantage).

[69] Although the Federal Arbitration Act favors the enforcement of arbitration agreements, they are still subject to challenges under state law principles of unconscionability. Generally, to be unenforceable a contract of adhesion must be both substantively and procedurally unconscionable. Given that under CAFTA arbitration may be implied by law, those agreements are arguably already procedurally unconscionable. Thus, if these were U.S. contracts, absent the unique imprimatur of federal law, their enforceability would depend solely on the ability of their substantive terms to withstand strict scrutiny. *See generally* Thomas H. Oehmke & Joan M. Brovins, *The Arbitration Contract- Making it and Breaking it,* 83 AM. JUR. PROOF OF FACTS 3D 1 (2007).

[70] *See* CORBIN, *supra* note 20, at §1.4 (noting the origin of term "adhesion contract" was international law term describing a treaty which states must accept or reject despite having no voice in formulating its provisions).

[71] *See generally* Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance,* 18 MICH. J. INT'L. L. 357, 378-83 (1997) (analyzing NAFTA dispute resolution mechanism).

[72] CAFTA, *supra* note 41, art. 20.15. It is true that the parties can elect to pursue a claim in the WTO instead, where they have overlapping rights, but this is of no help where the rights are unique to CAFTA, and in any event does not alter the essentially nonbinding nature of CAFTA dispute settlement *per se*.

[73] CAFTA, *supra* note 41, art. 20.16, pt. 2.

[74] *See generally* Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 1S77 (2006) (surveying challenges to developing countries).

[75] This is consistent with a larger pattern of hegemonic trade agreements discernable in U.S. regional trade policy, which one scholar has analogized to the "Imperial Preference" trade agreements employed by colonial powers. *See generally* Sydney M. Cone, III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and 'Imperial Preference,'* 26 MICH. J. INT'L. L. 563 (2005). I am indebted to Kim Garcia for the wonderful playground metaphor.

[76] *See* endnote text, *supra* note 29.

[77] On the link between a state's foreign conduct and its own political legitimacy, see LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989).

[78] WEIL, *supra* note 24, at 125.

[79] Weil's approach finds contemporary echoes in Sen's re-conceptualization of justice as freedom, more specifically in his focus on the actual extent of individuals' freedom of choice, as essential to the realization of any scheme of liberal distributive justice. AMARTYA SEN, INEQUALITY REEXAMINED 31-38 (1992).

[80] WEIL, *supra* note 24, at 126.

[81] *See* CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2000).

[82] *See* Frank J. Garcia, *Trade, Justice and Security, in* TRADE AS GUARANTOR OF PEACE, LIBERTY AND SECURITY? CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES 78 (Padideh Ala'i et al. eds., 2006).

[83] *See, e.g.*, Juan Forero, *Elections Could Tilt Latin America Further to the Left*, N.Y TIMES, Dec. 10, 2005, at A3.

[84] *See, e.g.,* Mark Engler, *CAFTA Deserves a Quiet Death*, www.democracyuprising.com (last visited Mar. 5, 2007) (asserting CAFTA not very democratic or free); John Lyons, *Costa Rica Balks at Free Trade Pact*, WALL ST. J., May 3, 2005 (reporting Central America's oldest democracy questions pact billed as 'pro-democracy').

[85] *The Return of Populism*, ECONOMIST, Apr. 15, 2006. I am indebted to Dan Blanchard for drawing this point to my attention. *See also* Stephen O'Neal, Hugo Chavez and the Bolivarian Alternative for the Americas, Dec. 8, 2006, (unpublished paper on file with author) (alternatives to neoliberal trade agreements a cornerstone of Venezuelan foreign policy).

[86] Cone, *supra* note 75, at 583-84 (discussing imperial-style trade agreements create political ill will against hegemonic power).