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Is Free Trade "Free?" Is It Even "Trade?" Oppression and Consent in Hemispheric Trade Agreements[*]

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Abstract

In order for free trade as a policy to deliver fully on its social promise, it must be both "free" and "trade." In fact, it must be free, in the sense of voluntary, to be trade at all. In other words, for normative and practical reasons, free trade requires that global economic relations be structured through agreements which reflect the consent of those subject to them. The neoliberal trading system today only imperfectly lives up to this obligation. In this essay, I will examine the role of consent in trade agreements, drawing on examples from CAFTA as representative of important trends in multilateral and hemispheric integration systems. I will argue 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. This has normative implications for the justification of the neoliberal trading system, and practical implications for the analysis and structure of trade agreements and the stability and security of our foreign relations.

"…where there is voluntary agreement, there…is justice."
Plato, *Symposium* (Jowett)

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

I Introduction

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. The second, less obvious meaning is that free trade involves

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consensual exchange – it has the consent of those involved in the trade. This is true at the level of private exchange, and at the institutional level, involving the structure and negotiation of the agreements framing trade relations.

In this essay, I will argue that for free trade to be both free and trade, it must be free in the second sense as well: it must be consensual. Trade must involve the consent of both the participants and the states involved. Otherwise, it is not trade in the fullest sense, but partakes of some form of oppression: predation, exploitation, or coercion.

In this essay I will focus on the public level 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 will draw illustrations from private exchange. Through an examination of CAFTA's negotiation process and select substantive provisions, I hope to tease out elements of trade agreements which represent dynamics other than trade – 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.

II 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.

A. Sampling the Many Dimensions of Trade

1. Trade as Exchange

To begin with, we can see trade as involving transactions. When we trade, we engage in a transaction – something changes hands, so to speak. I exchange this with you, for that which you have that I want. In this sense, trade is a basic everyday experience among people.[2]

We also speak of trade in a specifically international sense, as exchanges involving the crossing of geographic and political boundaries. This evokes other dimensions, 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?[3]

2. Trade as Encounter

The desire to exchange brings us into contact with another; historically as we cross boundaries to trade, it has meant encounter with the Other.[4] Thus trade is one of the prime forces bringing peoples in contact with other peoples, on terms which might result in a mutually beneficial exchange. In this way, trade is a primal form of communication: this is 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 what Stanley

[2] 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…" DEVELOPMENT AS FREEDOM 6 (2000).

[3] For example, 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. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE. It has been suggested that this play shadows all our inquiries into trade, markets, and capitalism itself. *See* Sebastiano Maffetone, "Is Capitalism Morally Acceptable?" (unpublished manuscript on file with the author).

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

Cavell calls "acknowledgement"- the recognition that the Other exists as a separate, recognizable human person, even if we cannot directly or fully know their mind.[5]

Of course, encounters with the Other are not always beneficent.[6] 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: offering to sell one another the Brooklyn Bridge, or the fable about Manhattan being "purchased" from indigenous Americans for a "handful of beads."[7]

3. Trade as Domination

This raises another, more serious aspect of trade, trade as conquest. Obviously, we 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.[8] Anthony Anghie chronicles the way in which trading companies were used to assert sovereignty and extend dominion of colonizing states over vast territories that European states were not yet ready to administer directly.[9] Similarly, James Gaathi documents the role of free trade concepts in legitimating Belgium's monopoly on

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

[6] 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. SHAKESPEARE, *supra* note 3. The most memorable speeches of the play are calls for acknowledgement. I am indebted to Kim Garcia for pointing this out.

[7] See Peter Francis, Jr., *Beads and Manhattan*, http://www.hartford-hwp.com/archives/41/415.html, last visited January 2, 2007.

[8] *See, e.g.*, ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (CAMBRIDGE UNIVERSITY PRESS 2005); Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millennium*, 15 AM. U. INT'L L. REV. 527, 554-6 (2000) (documenting commercial exploitation, lack of reciprocity and legacy of bitterness arising from unequal treaties); EDUARDO GALEANO, THE 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.").

[9] Anghie, supra note 8, at 68.

exploitation of the Congo under the "freedom of commerce" principles agreed at the Berlin Conference.[10] By arguing that trade should be free, the U.S. in effect left the stage open for unregulated exploitation of the Congo.[11] This suggests how trade can function as a form of dominance over the Other.[12]

B. Investigating Trade as a Transaction

I would now like to take a few of these aspects of trade that seem most essential, and explore them further 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, information, etc. 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

[10] 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, HISTORICAL AND EMPIRICAL PERSPECTIVES 97, 97 (PADIDEH ALA'I ET AL. EDS., 2006).
[11] *Id.*
[12] *Id.* (citing SAID, supra note 4 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, *supra* note 3. Shakespeare makes the point that there is no marriage if she is a commodity, just as there is no trade if it involves domination. *Id.* 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 id.* 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.

of value for nothing in return.[13] 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, and 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 also fits our intuitions as reflected in our language. We can speak of good trades versus bad trades in terms of meeting our goals, and yet we also distinguish even 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. Thus trade involves bilateral *voluntary* exchanges.

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

There is a further particular aspect to this voluntariness, which we can express in 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. Where either of the parties is not able to bargain freely, the resulting transaction may still be

[13] 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.

voluntary in a basic sense, but something has been lost. This is more like coercion than trade, and I will say more about this 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 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, fraud – we can see that they reflect the absence of a meeting of minds, an absence of bargained-for consent.

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 – "like me."[14] 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 Others' consent.[15]

To summarize, 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, i.e., 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 be relying primarily on the work of Simone Weil, the "philosopher of

[14] In a similar sense, Joseph Vining writes that law presupposes the presence of human minds. THE AUTHORITATIVE AND THE AUTHORITARIAN (UNIVERSITY OF CHICAGO PRESS 1986).
[15] I am indebted to Kim Garcia for pointing this out.

oppression,"[16] for her frank examination of the role of consent and its absence in distinguishing between economic transactions and economic oppression

1. Predation

In the discussion above 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. Simone Weil writes that one cannot seek consent where there is no power of refusal.[17] Thus where there is no power to refuse, there is no trade, because there can be no consent.

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

In economic terms, the equivalent to theft, or transactions which are not mutual and where consent is not in fact present, can be called extraction or predation; add a political element, and we call it economic dominance, colonialism, etc. In these cases, an economic benefit is flowing from one party to the other, but it is not mutual in a meaningful sense, and most importantly it is not consensual. It is achieved through inequalities in power as expressed in economic or military force. Such transactions are

[16] Adrienne Rich, *For a Friend in Travail*, in AN ATLAS OF THE DIFFICULT WORLD: POEMS 1988—1991 (W.W. NORTON 1991) ("*What are you going through?* she said, is the great question. / Philosopher of oppression, theorist/ of the victories of force." ('she' being Weil, who says on page 115 of WAITING FOR GOD: "The love of our neighbor in all its fullness simply means being able to say to him: "What are you going through?"))

[17] *Justice and Human Society*, in SIMONE WEIL 123 (ERIC O. SPRINGSTED ED.) (ORBIS 1998) ("*Justice and Human Society*").

not consistent with our concept of trade as I have outlined it above: they are 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.[18] 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. This usually involves restricting 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.

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 consumers cannot negotiate, then courts will look more carefully before assuming consent by the consumer to adverse terms of the contract thus formed, despite the fact that in all other material respects it looks as if a contract was voluntarily entered into. They will not automatically void a contract as would be the case with duress, but they will pay careful attention and they may not enforce all of its provisions.

[18] 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. *Justice and Human Society*, *supra* note 17 at 122.

Put into the terms of this essay, coercion can result in trade, in that there is mutuality of exchange and some form of consent, but not *free* trade, because one of the two parties was not fully free to bargain.[19] 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.[20] In addition to the requirements that trade be both a bilateral exchange and voluntary, he adds a third element, namely that the two transfers be of roughly equal value.[21] Where two transfers are not of equal value, yet the exchange is voluntary, Steiner characterizes this as evidence of exploitation.

Exploitation can have many causes, but the classical illustration he offers is of a market for services in which the top bid, which the service provider accepts, does not reflect the maximum possible value of the services, but only the top bid in that market. Steiner does not rely, however, on any objective theory of value to characterize the bid as

[19] 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. Therefore, there is a sound basis in economic rationality for promoting free trade in its fullest consensual form.

[20] *Exploitation Among Nations* (unpublished manuscript on file with author); see generally Hillel Steiner, *A Liberal Theory of Exploitation*, 94 ETHICS 225 (1983-4) (exploitation analyzed in terms of prior rights violations).

[21] 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).

inadequate.[22] Instead, he suggests we look at other parties who might have bid, and bid more, but for various reasons did not.

Among the reasons they did not bid which amount to exploitation, we can look at the possibility that earlier rights violations mean 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. 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 we would consider exploitative. In other words, the transaction is both consensual and mutual, yet exploitative, for the reason that a potentially higher-paying third party was not able to enter the auction.[23]

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

[22] For this he has been criticized, though in my view unpersuasively. See *id*. at 180.
[23] *Accord id*. at 177, 186 (it is in the nature of exploitation that exploited party is unable to consider alternative, more attractive hypothetical transactions due to 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. *Id*. at 181-2.

coercion, exploitation can result in trade, in that 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: trade consists of voluntary mutual bargained-for exchanges 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 introduce other dynamics of concern for normative and pragmatic reasons. Participants in any of these three will see economic value exchange hands, and society may reap some economic benefit, but under conditions involving the absence of either basic consent, or the fullness of consent.

III Application to Trade Agreements

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 must themselves be the fruit of such a bargain. If the rules of the game are not themselves mutually agreed-to, then any bargains struck under those rules will also not be fully free, as 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 independence of states, the formal legitimacy of governments, and the formalities of ratification. It must extend to difficult questions such as 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 it has an adequate alternative to a negotiated outcome.[24] Otherwise, we risk mistaking a mere form of consent for actual consent.[25]

In this essay, I am focusing on the structural level of analysis, inquiring to what extent trade agreements preserve or undercut consent, and hence are or are not truly or fully agreements about "trade." In order to do so and to illustrate how this model works, I will examine some key aspects of CAFTA,[26] a recent trade agreement between the United States and six Central American states, for evidence of inequality in power between parties, and how that 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 extraction (no consent).

A Review of Trade Agreements: CAFTA

If we are looking for aspects of trade agreements that preserve or jeopardize consent, or reveal the degree of consent that went into their formation, there are two basic

[24] 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. ROGER FISHER AND WILLIAM URY, GETTING TO YES 104 (PENGUIN 1981) (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.").

[25] 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. *Justice and Human Society*, *supra* note 17 at 126.

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

areas to examine. 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 under-represented groups. Second, we must look at the terms of the agreement, what was substantively agreed between the parties. Key substantive areas to examine include the treaty's dispute resolution mechanism, the structure and timing of market access, the extent and nature of domestic law reform mandated by the treaty, and what provision there is, if any, for special & 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 Nature of the Negotiations

a. Theft and Lack of Representation

We cannot assume even in the U.S., 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.[27]

Lack of representation is particularly serious when fundamental economic decisions are being made, as in the CAFTA negotiations. In Nicaragua, for example, despite a recent history of social revolution, there was concern on the part of many sectors of society that the new government only spoke for and negotiated on behalf of the

[27] See THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA 46 (6th ed. 2005) (exercise of political power by or for elites endemic to region).

monied interests.[28] There was widespread ignorance among most affected groups of what CAFTA would in fact do, and allegations of a campaign of disinformation on the part of the government.[29]

These allegations, if true, undercut the legitimacy of the treaty, even as they streamline for the U.S. the process of securing concessions sought on behalf of U.S. economic interests. This means 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 a form of theft or extraction. For such parties, the treaty and its resulting economic activity are neither mutual nor voluntary; they are not trading - something is being taken from them.

b. Exploitation and Lack of Real Alternatives

Even if CAFTA were to prove to be both mutual and voluntary, we must still consider if it represents the full consent of the parties. During the CAFTA negotiations, for example, it was often mentioned by the government in Nicaragua that the country did not have a real alternative to the treaty, since the US plays such a dominant role in their

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

[29] Interviews conducted by the author with civic leaders and NGO activists, Managua, Nicaragua, May 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 (Guatemalan Legislators Approve CAFTA on Emergency Basis),* PRENSA LIBRE (MARCH 11, 2005), *available at http://www.prensalibre.com/pl/2005/marzo/11/109623.html.* There have also been suggestions that the U.S. 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); President George W. Bush, Address at the signing of CAFTA-DR (August 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.").

economy as the principal source of capital and markets.[30] Put in the terms of this essay, this raises the possibility that the treaty may be exploitative.

The history of external domination in this hemisphere, both colonially and post-colonially, suggests that other states in the region and elsewhere which might have offered more attractive alternative markets and sources of capital, may not have been able to do so. The U.S., for example, exercised its role as regional hegemon during the last century to restrict regional and other states' opportunities in the hemisphere, which has continuing economic effects today.[31] Put in the framework Hillel Steiner has developed, this raises the risk that any trade agreements formed between the U.S. and states in the region are exploitative in nature. More specifically, the risk is that the U.S. will exploit the fact that in this trade negotiation "auction," its bid is the highest bid, either because other regional parties have been prevented from developing 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 and levels of commerce and investment to match the level of the U.S.

2 Substantive Provisions

In CAFTA's substantive provisions, we can see evidence that suggests the same dynamics at work, as the inequality in bargaining power and problem of legitimacy manifest themselves in treaty terms which reflect impaired consent, and which impair the consent of others.

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[30] Interviews conducted by author with Nicaraguan trade officials, May 2004; *see also Central American Trade: Five Get Anxious*, ECONOMIST, May 29, 2004 at The Americas (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 A (characterizing CAFTA nations "desperate to stay in the club.").

[31] SKIDMORE & SMITH, *supra* note 27, at 5 (historic external domination has both threatened sovereignty and restricted available policy choices).

a. Coercion, Exploitation and the Terms of Market Access

The terms and timing of market access can speak volumes about the weaker party's capacity to protect its markets from premature competition. Moreover, when we look at what sectors are excluded by whom and why, we get a fuller picture of the extent to which the weaker party was able 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,[32] exposing them to immediate competition from highly subsidized U.S. agricultural products.[33] However, the U.S. assiduously maintained protection of sugar,[34] one of its most sensitive sectors that had been of interest to Central American exporters.[35] 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.[36]

Such a one-sided bargain offers evidence of the disparity in bargaining power which plagues the treaty.[37] 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

[32] CAFTA, *supra* note 26, Annex 3.3.
[33] Carlos Galian, *CAFTA: The Nail in the Coffin of Central American Agriculture*, (Oxfam International 2004), *in* WHY WE SAY NO TO CAFTA (Alliance for Responsible Trade 2004).
[34] CAFTA, *supra* note 26, Annex 3.3, Tariff Schedule of the United States
[35] Galian, *supra* note 33*; see Costa Rica to be the Fifth Country in New Trade pact with U.S.* New York Times A6 January 26, 2004 (US won its demand for opening Central American agriculture market to its exports while maintaining protection for sugar industry, of interest to the region).
[36] Galian, *supra* note 33, at 6.
[37] Harvesting Poverty: A New Trade Deal, New York Times A30 December 22, 2003 (CAFTA's terms reflect asymmetry in negotiating power between U.S. and region). Such allegations have also been raised about the WTO agreements and the Uruguay Round. See J. MICHAEL FINGER & JULIO NOGUES, THE UNBALANCED URUGUAY ROUND OUTCOME: THE NEW AREAS IN FUTURE WTO NEGOTIATIONS 3-4 (World Bank, Pol'y Res. Working Paper Series No. 2732, 2001).

were agreed-to by Central American governments may suggest a coercive aspect to the negotiation, in which the U.S. relied on its inequality in power to keep certain options (such as sugar liberalization) off the table while pressing ahead for the concessions it wanted.[38] Alternatively or in tandem, Central American consent can be evidence of exploitation, insofar as the U.S. was relying on the absence in the "auction" of other states able to offer Central America more attractive terms. In either case, the one-sided nature of the market access provisions in agriculture suggest how the treaty may not reflect truly free trade.

Even those terms that may first appear as U.S. concessions may prove otherwise upon further inspection.[39] Textiles have been widely trumpeted as one of the premier benefits conferred on the Central American nations by CAFTA.[40] However, the CAFTA textile provisions include safeguard provisions allowing the U.S. to unilaterally impose tariffs if there has been a surge of textile imports that may hurt domestic manufacturing.[41] Such safeguard provisions are standard in trade agreements and by themselves do not suggest an absence of consent. However, the U.S. has already used the threat of invoking this safeguard in an attempt to renegotiate a term of CAFTA.[42] At the behest of the textile lobby, the US is currently demanding either the delay of duty-free importation of socks or

[38] See U.S. Trade Pact Divides the Central Americans, With Farmers and Others Fearful, New York Times August 21, 2005 A18? (2005 Westlaw 13154373) (Central American negotiators lacked sufficient leverage to extract needed concessions from U.S., 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. CATHOLIC RELIEF SERVICES, *Transparency and Participation in the CAFTA Negotiations*, *in* FAIR TRADE OR FREE TRADE? UNDERSTANDING CAFTA, available at http://www.citizen.org/documents/CAFTAbriefingpacket.pdf.

[39] *See supra* note 36 and accompanying text.

[40] Central America Department and Office of the Chief Economist Latin America and Caribbean Region, World Bank, DR-CAFTA: Challenges and Opportunities for Central America, 4.

41 OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, CAFTA POLICY BRIEF MAY 2005 (2005), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file583_7185.pdf.

[42] PENSION BILL INCLUDING TRADE PROVISIONS FACES UNCERTAIN PATH IN SENATE, Inside US Trade, August 4, 2006.

alternatively the modification of their rule of origin requirements, in order to protect the U.S. sock manufacturing industry.[43] Given that the CAFTA nations have not been receptive to this demand, it appears likely the US will invoke this safeguard as retaliation.[44]

The manner in which the safeguard provisions have been invoked in this renegotiation illustrates aspects of U.S. trade negotiations which 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. Were this a case in private law, such modifications would most likely be held invalid under traditional contracts doctrine.[45]

b. Coercion and Law Reform

If we are investigating consent, we should also take a close look at those aspects of trade agreements which mandate law reform, to determine who in fact benefits from these reforms. To take just one example, the CAFTA services chapter requires Costa

[43] *Id.*
[44] *Id.*
[45] 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." 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.

Rica to undertake significant substantive revisions of its agency and distribution law.[46] These revisions can be seen as an end-run around the protections which such laws typically include for agents and distributors in the event of termination, to the benefit of foreign (here U.S.) principals.

The treaty requires Costa Rica to enact new laws which will not presume that such commercial relationships are exclusive,[47] 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.[48] Finally, all such contracts will now be deemed subject to private arbitration unless expressly subject to litigation.[49]

Although Costa Rican law may in some respects have been more protective than other developing country agency laws,[50] these changes go beyond simply conforming Costa Rican law to modern standards. These changes soften provisions found particularly onerous from the perspective of U.S. firms, such as restrictions on their freedom to terminate agreements without cost, and limit important rights previously enjoyed by Costa Rican citizens, such as the right to access the courts. This imposition of arbitration is particularly noteworthy for two reasons: first, given that the U.S. already

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[46] CAFTA, *supra* note 26, Annex 11.13, Schedule of Costa Rica, ¶¶ 1–6, mandating changes to Costa Rica's Law No. 6209, "Law for the Protection of the Representative of Foreign Companies."

[47] Under Law No. 6209, such contracts were impliedly exclusive. U.S. COMMERCIAL SERVICE, U.S DEPARTMENT OF COMMERCE, DOING BUSINESS IN COSTA RICA: A COUNTRY COMMERCIAL GUIDE FOR U.S. COMPANIES 2006, 10 (2006).

[48] Under the old law, Costa Rican representatives had been broadly protected against termination, subject only to narrow grounds for "just cause." David R. Martinez, *At Termination, Independent Sales Reps are Anything But*, 5/31/1999 LATIN AM. L. & BUS. REP.

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

[50] Interview by the author with Professor F.E. Guerra-Pujol; see also Salli A. Swartz, *International Sales Transactions: Agency, Distribution and Franchise Agreements*, in SECTION OF INT'L LAW AND PRACTICE AMERICAN BAR ASS'N, NEGOTIATING AND STRUCTURING INTERNATIONAL COMMERCIAL TRANSACTIONS 10, 17 (MARK R. SANDSTROM & DAVID N. GOLDSWEIG EDS. 2ND ED. 2003).

played an influential role in the 1997 overhaul of Costa Rica's arbitration system;[51] and, second, given that under U.S. domestic law, the imposition of arbitration in contracts of adhesion is one ground for their unenforceability.[52] 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 creates a coercive effect on private parties as well. CAFTA might be considered, in this sense, an adhesion treaty. Here CAFTA fails both aspects of free trade: it does not preserve the bargained-for exchanges among private parties, and it is not itself in this instance a voluntary bargained-for exchange among states.

c. 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. Thus while the WTO's binding dispute settlement process has been key to several victories by developing countries, in NAFTA

[51] Elizabeth Thomas, *Commercial Arbitration in Costa Rica* (unpublished paper on file with author). Thomas' analysis documents the U.S. role in reforming Costa Rican arbitration law to its own way of thinking, arguably giving U.S. parties an advantage.

[52] 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.

and CAFTA the dispute resolution provisions allow disparities in economic power to influence outcomes.

The CAFTA dispute settlement provisions look quite formal and legal. However, when the implementation provisions are examined closely, it is clear that they carry forward the NAFTA-style preference on the part of the US for nonbinding dispute resolution.[53] 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.[54] Moreover, should the prevailing party refuse to accept a settlement short of full implementation, its only recourse is suspension of equivalent benefits. However, it is well-document in the literature 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 US to change its policies.[55] In other words, all CAFTA disputes involving the U.S. are in the end subject to the wishes of the most powerful party, the U.S.

IV. Implications and Applications

A. 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

[53] See generally Frank J. Garcia, *Decision-making and Dispute Resolution in the FTAA: An Essay in Trade Governance*, 18 MICH. J. INTL. L. 357, 378-83 (1997) (analyzing NAFTA dispute resolution mechanism).
[54] CAFTA, *supra* note 26, Article 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.
[55] See Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177 (2006) (surveying challenges to developing countries).

envision the role of trade institutions is as that of 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 U.S., and leaves the U.S. relatively free to achieve its goals once the agreement itself is implemented.[56] 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 which 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 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, a higher cost than if the

[56] 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. Sydney M. Cone III, *The Promotion of FTAs Viewed in Terms of MFN Treatment and 'Imperial Preference,'* 26 MICH. J. INTL. L. 563 (2005).

system could count on willing participants. From a trade perspective, this also doesn't necessarily allow for the emergence of the best products and services.[57]

B. Liberalism and Trade Agreements

States which seek legitimacy must take care that their foreign policy does not violate their own founding principles.[58] Liberal states risk compromising their basic commitment to freedom when they fashion or accept trade agreements which vitiate the consent of the states or peoples they involve.

Simone Weil writes that justice has as its object the exercise of the faculty of consent in human relations. 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 as liberal states would understand that term.[59] Instead, in concluding such trade agreements, liberal states risk gratifying what Weil terms that "shameful, unacknowledged taste for conquests which enslave under the pretense of liberating."[60] For liberal states, trade agreements lose their moral justification when not free.

C. Trade and Security

Finally, trade agreements which are not consensual create conditions for blowback.[61] Perceptions of injustice are strong motivators, leading to civil conflict,

[57] See supra note 19.
[58] On the link between a state's foreign conduct and its own political legitimacy, see LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989).
[59] 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. INEQUALITY RE-EXAMINED 31-8 (1992).
[60] *Justice and Human Society, supra* note 17 at 126.
[61] Defined as unintended adverse policy consequences. See CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2004).

instability and violent counter-reaction.[62] One current manifestation of blowback for the U.S. is the resurgence of leftist authoritarian populism in Latin America. To many in the region, the unequal terms and social unrest caused by agreements such as CAFTA represent failures of democracy. Hence, for example, the rhetoric and appeal of Venezuelan President Hugo Chavez, his Bolivarian Revolution and his increasing influence in the region.[63]

The U.S. has currently avowed a policy of security through the spread of democracy. It may find that it is undermining this goal by infringing on consent and perpetuating inherent injustices in its current hemispheric trade policy.[64] 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 there is a mutually reinforcing relationship between consensual economic relations and our own security.

V. Conclusion

In order for trade to be truly free and fully trade, it must be mutual, consensual, bargained-for, and 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

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[62] *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).

[63] *The Return o f Populism*, ECONOMIST, April 15, 2006, at Latin America. 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* (unpublished paper on file with author) (alternatives to neoliberal trade agreements a cornerstone of Venezuelan foreign policy).

[64] See Cone, supra note 56 at 583-4 (imperial-style trade agreements create political ill will against hegemonic power).

some form of extraction. If it is not *fully* consensual, 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 continue as the pattern for U.S.-driven hemispheric integration, this does not bode well for regional development, our political ideals and our own security.