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Governing Guns, Opposing Opium: A Theory of Internationally Regulated Goods

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Abstract. The paper examines a significant phenomenon overlooked by the trade literature: internationally regulated goods. Contrary to the general trend of trade liberalization, specific goods, such as drugs, small arms, and antiquities, have come under increasing international control in recent decades through a set of global regulatory agreements. I argue that these goods are unique in that they involve transnational negative externalities. Whereas certain countries benefit from the trade in these goods, the trade inflicts negative effects on other countries. Examples of such negative externalities include fatalities and refugee flows resulting from rampant gun violence, high crime rates associated with widespread drug abuse, and archaeological destruction caused by antiquities looting. The paper develops a theory that first explains why national regulation is insufficient and why international regulation is necessary for curbing these negative externalities. The theory then analyzes why certain governments are strongly in favor of international regulation while others wish to maintain the trade uncontrolled. My analysis locates the sources of governments' conflicting preferences in the domestic political arena and considers how exporters, consumers, and civil society shape governments' views. The final part of the theory examines how the distribution of state power affects the establishment of the regulatory agreements. The paper makes several theoretical contributions by bridging rationalist and non-rationalist accounts of international law and by focusing on international cooperation in the absence of shared interest.

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I. INTRODUCTION

One of the most significant developments in international law in recent decades has been the proliferation of agreements on trade liberalization.[1] Through the various agreements, most notably those constituting the WTO, governments have dramatically lowered trade barriers and thereby encouraged and facilitated trade.[2] Scholars of International law and political economy have focused much attention on the move to freer trade. They have carefully examined the origins and implications of countries' choice to "integrate their economies into a global one by

[1] See, for example, Edward Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements*, 57 INT'L ORG. 829 (2003).

[2] See, for example, Judith Goldstein et al., *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on International Trade*, 61 INT'L ORG. 37 (2007).

dismantling protectionist barriers."[3] Indeed, the literature suggests that world trade has been moving invariably in one direction, toward greater liberalization and openness. I argue, however, that this conventional wisdom has overlooked a distinct trend that runs in the opposite direction. *While world trade in general has indeed become more free in recent decades, trade in specific goods has become more controlled and significantly less free.* From drugs to antiquities to diamonds and small arms, states have increasingly restricted and regulated commercial transactions involving a rapidly growing list of goods. They have done so through a set of global regulatory agreements, which established – rather than dismantled – obstacles to trade. The purpose of these agreements is to reduce the *negative externalities* for society resulting from free trade in these goods, such as crime associated with widespread drug abuse; archaeological destruction caused by antiquities looting; the financing of rebel military campaigns through the sale of diamonds; and rampant gun violence caused by the proliferation of small arms.

This paper examines the overlooked counter-trend of international trade regulation. It offers a theory of internationally regulated goods (IRGs) that explains why certain goods are regulated internationally; how governments form their preferences on international regulation; and how they establish cooperation. The paper argues that international regulation allows governments to make up for the deficiencies of national regulation by imposing controls on the externalities-generating countries. Two groups of governments therefore support international regulation: governments facing the trade's negative externalities upon their own countries and governments concerned about the trade's negative effects on foreign countries. The latter may

[3] Helen Milner & Keiko Kubota, *Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries*, 59 INT'L ORG. 107 (2005). On the world trading system see generally MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNTIONAL TRADE (3rd ed., 2005); Andrew Guzman, *Global Governance and the WTO*, 45 HARV. INT''L L.J. 303; JOHN JACKSON, SOVEREIGNTY, THE WTO, AND THE CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006).

come to support regulation under pressure from value-motivated groups committed to worldwide suppression of trade that they deem harmful. Pro-regulation governments, however, meet with resistance from governments that wish to maintain the trade uncontrolled. Those anti-regulation governments act in the interest of domestic actors who benefit from unregulated trade, such as arms manufacturers, antiquities dealers and museums, or drug exporters. With little shared interest among governments, the political conflict over regulation ends in non-cooperation (when the governments *resisting* regulation are powerful) or coerced cooperation (when the governments *favoring* regulation are powerful).

Beyond identifying and analyzing the overlooked trend of internationally regulated goods, this paper makes several additional contributions. First, my theoretical model bridges rationalist and non-rationalist accounts of international law by combining self-interest calculations with morally-inspired motivations. Governments in my theory respond to material influences, such as interest group pressure, yet they may also harbor humanitarian-inspired concerns for the welfare of foreign countries. I introduce the concept of *secondary negative externalities* to denote such value-based motivations. This concept allows me to answer puzzling questions such as: Why did the United States launch a worldwide campaign against human trafficking? Why did the United States and Britain accept international regulation of antiquities over the objections of antiquities dealers and museums?

Second, the theory challenges core assumptions of the literature on international law and cooperation. Going back to Keohane's *After Hegemony*,[4] cooperation scholars have typically taken the existence of mutual gains (or shared interest) as the premise of their analyses. They first assumed that states can benefit from and have an interest in cooperation; they then proceeded to examine the conditions under which common interests may lead to cooperation.

[4] ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

This paper, by contrast, does not take shared interest as given; instead, it focuses on cooperation *in the absence of shared interest*. Rather than assume partial convergence of government preferences, the paper examines how large variation in government preferences can hinder international cooperation. Moreover, the paper challenges the view of international agreements as providers of public goods that benefit all. It highlights situations in which international agreements are detrimental – rather than beneficial – for certain governments.

Third, the theory addresses highly important issue-areas that have received little attention from scholars of international law and international relations. Consider small arms, for example. Small arms kill many more people than any other weapon, including WMDs. Small arms are the weapons of choice in the vast majority of contemporary conflicts and are often used in crime and terrorism.[5] Nevertheless, international regulation of small arms has been merely a footnote in the literature on arms control.[6] My theory sheds lights on international cooperation against small arms proliferation and misuse; it also illuminates the efforts to curb various other problems including drug- and human trafficking, conflict diamonds, money laundering and counterfeiting. All those constitute major threats to international security, the international economy and human welfare.[7]

The article is organized as follows. Part II documents the trend of internationally regulated goods and explains its causes. Part III theorizes government preferences on international regulation and explains why they vary considerably. Part IV examines how cooperation is

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[5] On the effects of small arms proliferation see WENDY CUKIER & VICROR SIDEL, THE GLOBAL GUN EPIDEMIC: FROM SATURDAY NIGHT SPECIALS TO AK-47S (2006).

[6] David Kinsella, *The Black Market in Small Arms: Examining a Social Network*, 27 CONTEMP. SECURITY POL'Y 100 (2006).

[7] See, for example, MOISÉS NAÍM, ILLICT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY (2006); TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL? (Mats Berdal & Monica Serrano eds., 2002); CAROLYN NORDSTROM, GLOBAL OUTLAWS: CRIME, MONEY, AND POWER IN THE CONTEMPORARY WORLD (2007).

established in light of the conflicting preferences of governments. Part V concludes with implications for policy and for international law scholarship.

II. WHY INTERNTIONAL REGULATION?

A. Documenting the Trend

The liberalization of markets and world trade is considered one of the most important economic trends of the twentieth century. In the aftermath of World War II, trade regimes in most countries were marked by extensive and often prohibitive trade restrictions. The years since have seen a growing integration of ever more countries into the world trading system and a dramatic reduction of barriers to trade. [8] A large body of political economy literature explores the origins of trade liberalization and advances various explanations for the removal of trade barriers. Some of these explanations focus on the trade-promoting effects of the GATT/WTO through the principles of reciprocity and nondiscrimination or through information provision and dispute settlement.[9] Other lines of research emphasize the contributions to trade liberalization of liberal policy ideas, US leadership, and the worldwide spread of democracy.[10] Whatever the underlying cause, the political economy literature has emphasized a unidirectional trend of trade liberalization. In recent decades "countries across the globe have decided to dramatically reduce their trade barriers and move toward freer trade."[11] A similar focus has also characterized the

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[8] Milner and Kubota, *supra* note 3; Beth Simmons et al., *Introduction: The International Diffusion of Liberalism*, 60 INT'L ORG. 781 (2006).

[9] On the GATT/WTO see, Goldstein et al., *supra* note 2;. JOHN BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME (2006).

[10] See, for example, Judith Goldstein, *Ideas, Institutions, and American Trade Policy*, 42 INT'L ORG. 179 (1988); Anne Krueger, *Trade Policy and Economic Development: How We Learn*, 87 AM. ECON. REV. 1 (1997); Edward Mansfield et al., *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477 (2002).

[11] Milner and Kubota, *supra* note 3, at 112.

international legal scholarship. Trade law scholars have written extensively on trade liberalization, especially through GATT/WTO and NAFTA.[12]

I argue that the focus of the literature on the reduction of trade barriers has missed a counter-trend.[13] Contrary to the general trend of trade liberalization, the trade in specific goods – such as drugs, small arms, and antiquities – has come under increasing international control in recent decades. Rather than liberalizing the trade in these goods, governments have chosen to subject them to various rules and restrictions. They have done so through a set of cooperative arrangements, which established – rather than dismantled – obstacles to trade:

- The international drug regime was established prior to World War I, bolstered after World War II, and controls the trade in drugs to this day.[14]
- Beginning in 1995, the UN has been leading a process intended to regulate the trade in small arms and light weapons, producing the Program of Action on Small Arms.[15]
- International efforts against the trade in persons for sexual exploitation (human trafficking) originated in the early 20th century and received a boost in recent years under US leadership.[16]

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[12] See, for example, ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); JOHN JACKSON, THE JURISPRUDENCE OF THE GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS (2000); JOSEPH H. H. WEILER (ED.), THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE (2000).

[13] For a notable exception see Chantal Thomas, *Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics*, 24 MICH J. INT'L L. 549 (2003).

[14] See Kal Raustiala, *Law, Liberalization and International Narcotics Trafficking*, 32 N.Y.U J. INT'L L. & POL. 89 (1999); Thomas, *supra* note 13; WILLIAM MCALLISTER, DRUG DIPLOMACY IN THE TWENTIETH CENTURY: AN INTERNATIONAL HISTORY (2000).

[15] *Reaching Consensus in New York: The UN 2001 Small Arms Conference*, SMALL ARMS SURVEY 2002 203; DENISE GARCIA, SMALL ARMS AND SECURITY: NEW EMEMGING INTERNATIONAL NORMS (2006).

[16] Linda Smith and Mohamed Mater, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 FLETCHER F. WORLD AFF. 155 (2004); Janie Chuang, *The United States As Global Sheriff:*

- The 1989 Basel Convention controls the trade in hazardous wastes.[17]
- The 1970 UNESCO Convention and the 1995 UNIDROIT Convention regulate the international trade in antiquities.[18]
- Starting in the 1980s, the international campaign against money laundering has imposed various controls on financial transactions.[19]
- The trade in wildlife is conducted in accordance with the Convention on International Trade in Endangered Species (CITES), adopted in 1973.[20]
- Since 2002, The Kimberley Process Certification Scheme has attempted to ensure the legitimacy of the diamond trade and stop the trade in conflict diamonds.[21]

Using Unilateral Sanctions to Combat Human Trafficking, 27 MICH. J. INT'L L. 437 (2006); Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1 (2004).

[17] KATHATINA KUMMER, INTERNTIONAL MANAGEMEENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES (1995); Theodore Waugh, *Where Do We Go from Here: Legal Controls and Future Strategies for Addressing the Transportation of Hazardous Wastes Across International Borders*, 11 FORDHAM ENVTL. L.J. 477 (2000); Kimberly K. Gregory, *The Basel Convention and The International Trade of Hazardous Waste: The Road to the Destruction of Public Health and the Environment is Paved with Good Intentions*, 10 CURRENTS: INT'L TRADE L.J. 80 (2001).

[18] PAUL BATOR, THE INTENRTIONAL TRADE IN ART (1982); LYNDEL PROTT, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS 1995 (1997); PATRICK J. O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVNETION ON ILLICIT TRAFFIC (2000).

[19] Money laundering is a service, rather than a good, but exhibits very similar characteristics to IRGs. Therefore, I include it in my analysis. WILLIAM GILMORE, THE EVOLUTION OF INTERNTIONAL MEASURES TO COUNTER MONEY LAUNDERING AND THE FINANCING OF TERRORISM (2004); Beth Simmons, *International Efforts against Money Laundering*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 244 (Dinah Shelton ed., 2000); GUY STESSENS, MONEY LAUDEING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL (2000).

[20] ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE (2002): John L. Garrison, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use*, 12 PACE ENVTL. L. REV 301(1994).

[21] Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT'L ECON. L. 835 (2003); Julie L. Fishman, *Is Diamond Smuggling*

- The WHO Framework Convention on Tobacco Control, signed in 2003, aims at reducing significantly the prevalence of tobacco consumption.[22]
- The 1997 Ottawa Convention bans the production, use, and transfer of anti-personnel landmines.[23]
- An optional protocol to the Convention on the Rights of the Child bans the sale of child pornography.[24]
- Combating the trade in counterfeit and pirated goods is among the purposes of the TRIPS agreement.[25]

As of 2008, twelve goods[26] have become IRGs – they are subject to international regulation through a set of 22 global agreements. Table 1 lists all global IRG agreements in force today.[27] Note that while most of these agreements take the form of legally-binding instruments, some do

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Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem, 13 U. MIAMI BUS. L. REV. 217 (2005).

[22] Benjamin Mason Meier, *Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health*, 5 Yale J. HEALTH POL'Y L. & ETHICS 137 (2005).

[23] Kenneth Anderson, *The Ottawa Convention Banning Landmines, the International Non-Governmental Organizations and the Idea of International Civil Society*, 11. EUR. J. INT'L L. 91 (2000); Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561 (2003).

[24] Cris R. Revaz, *The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers*, 9 Hum. Rts. Br. 13 (2001).

[25] INTELLECTUAL PROERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT (Carlos Correa and Abdulgawi Yusuf eds., 1998); KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000); CARLOS CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT (2007).

[26] Human beings are not a "good" in the strict sense, but are treated as such by those involved in human trafficking, who buy and sell them. In some cases, a regulated good is, in fact, a *category* of objects. "Small Arms" are weapons designed for personal use, such as pistols, rifles, and shotguns. "Counterfeits" may be bags, shoes, shirts, etc.

[27] For identifying IRGs I relied primarily on PETER ANDREAS & ETHAN NADELMANN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS (2006).

not (for example, the Program of Action on Small Arms and the Kimberley Process Certification Scheme). What unifies these agreements, however, is their purpose: imposing controls on specific goods and restricting commercial transactions involving these goods, thereby making the trade in them more difficult to carry out. Such purpose is the *exact opposite* of the goal underlying the WTO and other trade liberalization agreements, which is to lower trade barriers and facilitate commerce.

Table 1. *Global IRG Agreements in Force*

Good	Agreement	Year Adopted
Drugs	Single Convention on Narcotic Drugs[28]	1961[29]
Drugs	Convention on Psychotropic Substances[30]	1971
Drugs	Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[31]	1988
Small Arms	Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects[32]	2001
Small Arms	Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime[33]	2001
Antiquities	First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict[34]	1954
Antiquities	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of	1970

[28] Mar. 30, 1961, U.S.T. 1407, 520 U.N.T.S. 204 (amended by 1972 Protocol).
[29]The Single Convention on Narcotic Drugs is a consolidation and expansion of several pre-World War II agreements. For the purpose of Figure 1 below I consider 1945 as the year of adoption.
[30] Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.
[31] Dec. 20, 1988, 1582 U.N.T.S. 164, U.N. Doc. E/CONF.82/14 (1988), reprinted in 28 I.L.M. 493.
[32] UN Doc No A/CONF/192/15 (2001).
[33] G.A. Res. 383, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383/Add.2 (2001).
[34] May 14, 1954, 249 U.N.T.S. 358.

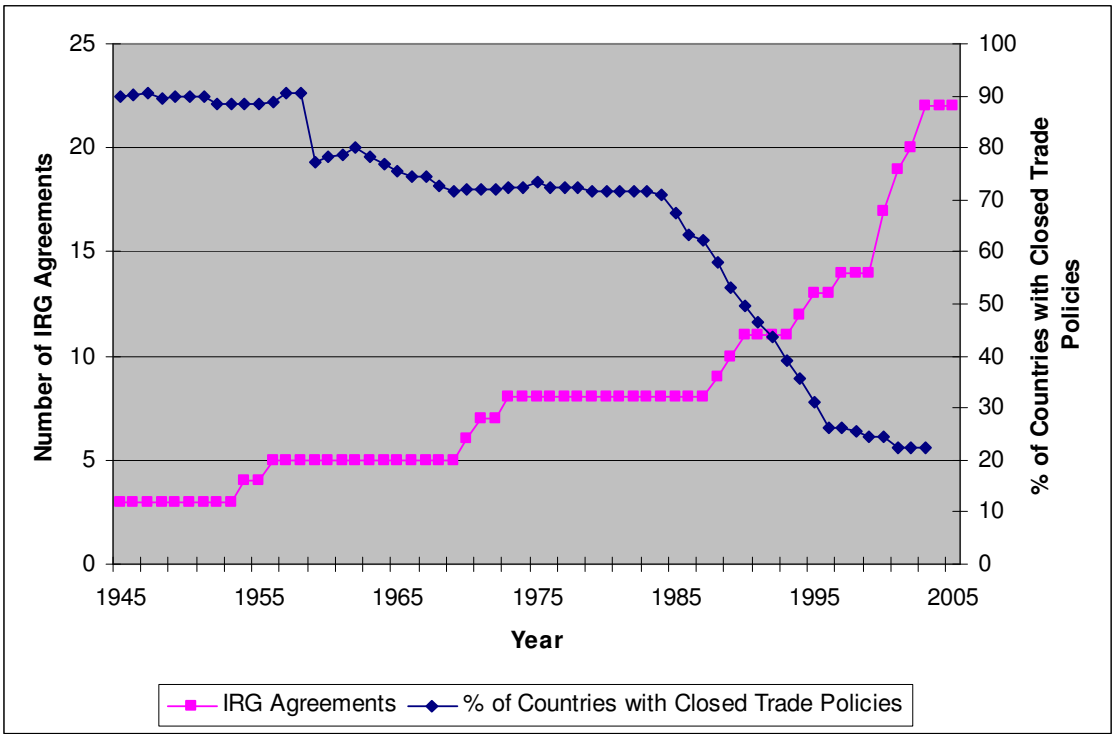
	Ownership of Cultural Property (UNESCO Convention)[35]	
Antiquities	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[36]	1995
Human Beings	Slavery Convention[37]	1926
Human Beings	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[38]	1956
Human Beings	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[39]	1949[40]
Human Beings	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime[41]	2000
Money Laundering	The Forty Recommendations[42]	1990
Money Laundering	United Nations Convention against Transnational Organized Crime[43]	2000
Money Laundering	United Nations Convention against Corruption[44]	2003
Counterfeit and Pirated Goods	Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[45]	1994
Hazardous Wastes	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[46]	1989
Diamonds	Kimberley Process Certification Scheme[47]	2002
Endangered	Convention on International Trade in Endangered	1973

[35] Nov. 14, 1970, 823 U.N.T.S. 231.
[36] June 24, 1995, 34 ILM 1322 (1995).
[37] Sept. 25, 1926, T.S. No. 778, 212 U.N.T.S. 17, amended by Protocol Amending the Slavery Convention**,** Dec. 7, 1953, T.I.A.S. No. 3532, 182 U.N.T.S. 51.
[38] Sept. 7, 1956, T.I.A.S. No. 6418, 266 U.N.T.S. 3.
[39] Dec. 29, 1949, 96 U.N.T.S. 271.
[40] The 1949 Convention on the Suppression of the Traffic in Persons is a consolidation and expansion of several pre-World War II agreements. For the purpose of Figure 1 below I consider 1945 as the year of adoption.
[41] G.A. Res. 55/25, U.N. Doc. A/55/383 (Nov. 15, 2000).
[42] Available at http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html (last accessed Feb. 26, 2008).
[43] Nov. 2, 2000, 40 I.L.M. 335 (2001).
[44] U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (Dec. 11, 2003).
[45] Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125 (1994).
[46] March 22, 1989, 1673 U.N.T.S. 125, 28 I.L.M. 657.
[47] Available at http://www.kimberleyprocess.com/.

Wildlife and Plants	Species of Wild Fauna and Flora (CITES)[48]	
Landmines	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction[49]	1997
Child Pornography	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[50]	2000
Tobacco	WHO Framework Convention on Tobacco Control[51]	2003

Figure 1 contrasts the well-familiar trend of trade liberalization with the overlooked counter-trend of trade regulation.

Figure 1. *Trade Liberalization and Trade Regulation*



Note: IRG agreements are plotted by year of adoption.

[48] Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.
[49] Sept. 18, 1997, 36 ILM 1507 (1997).
[50] G.A. Res. 54/263, U.N. GAOR, 54th Sess., Annex II, U.N. Doc. A/RES/54/263 (Jan. 18, 2002).
[51] WHA Res. 56.1 (May 21, 2003).

The downward-sloping line represents the trend that trade scholars have been focusing on: trade liberalization. The percentage of countries with closed trade policies has dropped from about 90% of all countries back in 1945 to about 20% in 2001.[52] Yet at the same time that governments have liberalized their trade policies, they have also increasingly regulated specific goods through global international agreements. As the upward-sloping line shows, the number of IRG agreements has grown steadily since 1945, and has increased precipitously since the mid-1980s.

In addition to the global agreements, some of the goods are also regulated through regional agreements (for example, OAS Firearms Convention,[53] Council of Europe Convention on Action against Trafficking in Human Beings,[54] Bamako Convention on Hazardous Wastes[55]); sub-regional agreements (for example, Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa[56]); and bilateral agreements (such as US-Mali and US-Nicaragua agreements concerning the imposition of import restrictions on archaeological material).[57] In some cases those agreements preceded the

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[52] Data on trade policy openness is from KAREN HORN WELCH & ROMAIN WACZIARG, TRADE LIBERALIZATION AND GROWTH: NEW EVIDENCE (Nat'l Bureau of Econ. Research, Working Paper No. 10152, 2003). Their data updates that of Jeffrey Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration,* 1:1995 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1 (1995). A country was classified as closed if it displayed at least one of the following characteristics: 1. Average tariff rate of 40% or more. 2. Nontariff barriers covering 40% or more of trade. 3. A black market exchange rate that is depreciated by 20% or more relative to the official exchange rate, on average, during the 1970s or 1908s. 4. A state monopoly on major exports. 5. A socialist economic system.

[53] Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials, Nov. 11, 1997, S. Treaty Doc. No. 105-49 (1998).

[54] May 16, 2006, 45 I.L.M. 12.

[55] Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 30 I.L.M. 773 (1991).

[56] Apr. 21, 2004, available at http://www.armsnetafrica.org/eng/resources/pubs/africa/saaf12.pdf (last accessed Feb. 26, 2008).

[57] Agreement Between the Government of the United States of American and the Government of the Republic of Mali Concerning the Imposition of Import Restrictions on Archaeological Material from Mali from the Paleolithic Era (Stone Age) to Approximately the mid-Eighteenth

global ones. For example, regional agreements on small arms in Africa, Latin America, and Europe led up to the two global agreements. In other cases, the non-global agreements followed the global ones. For instance, the United States implements the 1970 UNESCO Convention through bilateral agreements with countries facing archaeological pillage.[58] The theoretical analysis in this paper focuses on the *global* regulatory agreements.

The post-WWII trend of growing trade regulation runs counter to the general trend of trade liberalization, which took place simultaneously. While trade scholars have studied the latter trend, they have not detected the former. I now turn to an in-depth examination of international trade regulation and its causes.

B. The Causes of International Regulation

International regulation should be distinguished from *national* regulation. Governments regulate many goods on health, safety, and environmental grounds. Such national regulation, however, is a matter of national discretion and may vary from country to country. In contrast, my focus is on *intergovernmental arrangements* that coordinate regulatory practices and set international standards for controlling certain goods. What does international regulation entail? The regulatory arrangements vary in the scope of controls they establish. Some of them, such as CITES, focus on the export and import of IRGs. Yet in others the production of the goods – as well as their distribution, possession, and use – may be the subject of regulation. The Single Convention on

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Century, signed Sep. 19, 1997; Agreement Between the Government of the United States of American and the Government of the Republic of Nicaragua Concerning the Imposition of Import Restrictions on Archaeological Material from Mali from the Pre-Hispanic Cultures of the Republic of Nicaragua, signed June 16, 1999. Agreements are available respectively at http://exchanges.state.gov/culprop/ml97agr.html and http://exchanges.state.gov/culprop/nifact.html (last accessed Feb. 26, 2008).

[58] See Article 9 of the 1970 UNESCO Convention.

Narcotic Drugs is a case in point. Several arrangements have additional dimensions, such as raising public awareness and fostering cooperation between law enforcement agencies.[59]

The stringency of controls exhibits significant variation as well. At the extreme, international regulation amounts to a total prohibition on the production, trade, or use of the good. This is the case with human trafficking, child pornography, counterfeits, and landmines.[60] For most goods, however, regulation involves a set of rules, guidelines, and requirements for proper conduct of the trade, rather than a complete ban. The Single Convention on Narcotic Drugs requires the Parties to allow the manufacture, trade, and distribution of drugs only under license and to permit the export of drugs to any country only in accordance with the laws of that country.[61] The Convention also empowers the International Narcotics Control Board to oversee the international drug trade in order to "limit the cultivation, production, manufacture and use of drugs to an adequate amount required by medical and scientific purposes … and to prevent illicit cultivation, production … and use of, drugs."[62] CITES distinguishes between three categories of animal and plant species according to the severity of threat of extinction and it establishes corresponding requirements for export and import permits.[63] The Kimberley Process is based on

[59] For example, the Program of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, provisions II.20, II.41, and III.18 address the raising of awareness to the problems associated with small arms. Article II.27 encourages states to establish trans-border customs cooperation and networks for information-sharing among law enforcement, border and customs control agencies.

[60] See, for example, Article 3.1(c) to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Article requires states to criminalize "Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography… ."

[61] Single Convention on Narcotic Drugs, Articles 29, 30.

[62] Single Convention on Narcotic Drugs, Article 9(4).

[63] The species covered by CITES are listed in three Appendices, according to the degree of protection they need. Appendix I includes species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.

standardized certificates that must accompany any international shipment of diamonds, detailing the identity of the exporter and importer, value of the shipment, and so on. Whether they involve import and export guidelines, procedures for tracing and recovery, or any other regulatory measure, the purpose of IRG agreements is to establish uniform standards for the treatment of the goods. These regulatory arrangements subject the goods to internationally-coordinated rules and practices and set barriers to their cross-border movement.

Why have governments targeted certain goods with international regulation? I argue that the motivation for international regulation of goods such as guns and drugs is entirely different from the typical motivation for trade restrictions: Protection. Typically, the purpose of trade barriers such as tariffs and quotas is to protect the income of certain sectors or industries that are harmed by trade liberalization. By contrast, I study international regulation aimed at curbing the *negative externalities* of uncontrolled trade in specific goods.

While uncontrolled trade in these goods benefits exporters and consumers, the trade also generates negative externalities, that is harmful effects on society.[64] In some cases, society in the *importing* countries bears the negative externalities. Free trade in small arms leads to gun proliferation and higher levels of gun violence in gun-importing countries. Gun violence, in turn, causes loss of life and injuries; increased costs of medical treatment, policing, and care to displaced people; destruction of physical infrastructure; refugee flows; disruption of health care and schooling; and reduction in productivity, tourist streams, and foreign investment.[65] Free trade in drugs could lead to widespread drug abuse in drug-importing countries, resulting in

[64] See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (introducing the concept of externalities). Externality describes a situation in which "individual's actions have effects on others which he does not take into account in making his decisions. " Coase, *ibid*, p. 23.

[65] *A Common Tool: Firearms, Violence and Crime*, SMALL ARMS SURVEY 2004 173; *Behind the Numbers: Small Arms and Conflict Deaths*, SMALL ARMS SURVEY 2005 229; *The Instrument Matters: Assessing the Costs of Small Arms Violence*, SMALL ARMS SURVEY 2006 189; Cukier & Sidel, *supra* note 5, ch. 2.

crime, higher health care costs, and lower workforce productivity.[66] Certain actors may indeed welcome the availability of guns and drugs. Illicit drug-users may "benefit" from abundance of drugs; criminals as well as law-abiding citizens may welcome easy access to guns. But the cost for society of readily-available drugs and guns is enormous.

Whereas importing countries face the harmful effects of free trade in guns and drugs, in other cases the *exporting* countries bear the negative externalities of IRGs. Uncontrolled trade in antiquities causes looting and destruction of archeological sites in the source countries.[67] By allowing the sale of "conflict diamonds", unregulated diamond trade fuels conflict in diamond-exporting countries.[68] As in the cases of guns and drugs, certain actors benefit from uncontrolled movement of antiquities and diamonds. Subsistence looters – typically poor peasants – receive small financial compensation for the antiquities they dig up, and the middlemen who move those antiquities out of the country and sell them abroad make much larger financial gains. When the diamond trade is free from control, rebel groups manage to sell diamonds and thereby finance their military campaigns. For society, however, free trade in diamonds and antiquities means net loss due to civil wars and archaeological destruction.

Third countries, neither the exporting nor importing countries, may also face the negative externalities of trade. Uncontrolled trade in small arms threatens not only those countries that are awash in guns. Neighboring countries feel the effects of gun proliferation as well through refugee flows and obstruction of commerce, to name just two. Counterfeits are another case in

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[66] UNITED NATIONS DRUG CONTROL PROGRAMME, ECONOMIC AND SOCIAL CONSEQUENCES OF DRUG ABUSE AND ILLICIT TRAFFICKING (1998), http://www.unodc.org/pdf/technical_series_1998-01-01_1.pdf (last visited Feb. 18, 2008).

[67] TRADE IN ILLICIT ANTIQUITES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE (Neil Brodie et al. eds., 2001), ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY (Neil Brodie & Kathryn Walker Tubb eds., 2002).

[68] GREG CAMPBELL, CONFLICT DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES (2002).

point. When country A exports counterfeit goods to country B, the results are lost revenue for the producer of the original good in country C and the inhibition of future innovation.[69]

Uncontrolled trade in IRGs can therefore inflict harmful – even devastating – externalities on society. *The purpose of international regulation is to curb the negative externalities that these goods generate and to minimize any harmful effects from their production, sale, or use.* By regulating the trade in small arms, governments attempt to deny guns to criminals, rebels, and terrorists while allowing gun possession and use by security forces and law-abiding citizens. Regulation of the drug trade aims at restricting the use of drugs to medical and scientific purposes. Controlling the diamond trade enables consumers to purchase and enjoy the precious stones without inadvertently financing conflicts in Africa. The efforts against money laundering intend to allow the use of money for any purpose other than crime or terrorism. For conventional trade, governmental interference through trade barriers causes net loss, whereas trade liberalization enhances national welfare.[70] The reverse is true for IRGs. Free trade in these goods could be harmful for some societies, and the purpose of international regulation is to reduce such harm.

C. Why Is National Regulation Insufficient?

If indeed IRGs involve significant negative externalities, governments should combat those externalities through national regulation. Why is there any need for international regulation? National regulation is typically the first step in addressing the harmful effects of IRGs, but it often proves ineffective. Countries in Africa and Latin America impose restrictions on the import

[69] See WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRCTURE OF INTELLECTUAL PROPERTY LAW (2003); SUZANNE SCOTCHMER, INNOVATION AND INCETIVES (2006).
[70] On the economic case for free trade and against protection see THOMAS OATLEY, INTERNATIONAL POLITICAL ECONOMY: INTERESTS AND INSTITUTNS IN THE GLOBAL ECONOMY 43-49 (2d ed. 2006).

and possession of firearms,[71] and yet they suffer from high rates of gun violence. Many antiquities-rich countries have laws that make all antiquities – including those still unexcavated – the property of the state. Such laws often prohibit any unauthorized removal and export of antiquities.[72] Nevertheless, export of antiquities continues uninterrupted, notwithstanding the prohibiting legislation.

Why are national controls insufficient? There are several causes. First, controls on the import or export of the goods do not suppress demand. Demand for guns persists despite restrictions on import and possession; limitations on the export of antiquities do not lessen the interest of museums and collectors in obtaining them. As long as demand exists, suppliers will profit from meeting it. Buyers and sellers will therefore attempt to carry on the trade, regardless of restrictions. The incentives of suppliers to flout national regulation are especially great, since many of the relevant commercial activities – such as antiquities looting, drug export, and human trafficking – promise high yield with relatively low-cost investment.[73]

Second, countries cannot seal their borders completely to prevent the movement of these goods. Border control, customs, and police forces are never fully effective even in developed countries, let alone in developing countries where trained and equipped law enforcement personnel is a scarce resource. Large territory or difficult terrain may also compromise national control efforts. The larger the territory and the longer the borders, the harder it is to enforce the law and restrict inflows and outflows of goods. Moreover, restrictions on the trade drive the prohibited transactions underground. Clandestine commercial activity is, of course, much harder to trace and suppress. Once drug use or antiquities export are banned, drugs users and antiquities

[71] CUKIER AND SIDEL, *supra* note 5, ch. 7.
[72] LYNDEL PROTT & PATRICK O'KEEFE, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (1988).
[73] Information on the volume and value of the trade in IRGs is often anecdotal and unreliable. For gross estimates of he volume of trade in some IRGs and the profits derived from them see NAÍM, *supra* note 7.

looters attempt to hide from the law and are therefore difficult to control.

Third, national regulation has become increasingly difficult in recent years because of the growing openness of the global economy.[74] Financial and trade liberalization, improvements in communication and transportation, and the easing of restrictions on cross-border transactions significantly hamper the ability of states to enforce trade controls and provide greater opportunities to those who trade in IRGs. For example, the improvement of transportation infrastructure and distribution networks has facilitated the trade in conventional goods, but has also eased the cross-border movement of guns. Similarly, the large increase in the volume of international trade has unintentionally resulted in more places to hide drugs and antiquities and has lowered the probability of interdiction and seizure.[75]

What, then, is the purpose of international regulation and how does it augment national control? The key for understanding international regulation is the variation in the negative externalities of IRGs and the transnational nature of the externalities, that is, the incongruence between the countries generating the externalities and the countries bearing the externalities.

I asserted above that IRGs inflict significant negative externalities. However, such negative externalities differ considerably across countries. While gun violence exists in virtually any country, the magnitude of the problem varies, from extremely rare incidents in some countries to everyday occurrences in others. In 2002, Colombia's gun homicide rate was 51.8 (per 100,000); the equivalent rate for Egypt in 2000 was merely 0.02.[76] Rates of drug abuse also vary cross-nationally. 2.8 percent of the population aged 15-64 in the United States abuse cocaine – seven times the cocaine abuse rate in Mexico (0.4 percent). The

[74] TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL?, supra note 7.
[75] Raustiala, *supra* note 14, 115-123.
[76] CUKIER & SIDEL, supra note 5, at 36, 42.

rate of opiates abuse in Iran is 2.8 percent; in Japan – only 0.06 percent.[77] In other cases, the externalities are heavy for some countries and nearly non-existent for others. Primarily industrialized countries bear the costs of trading in counterfeits. Through flows of "conflict diamonds", the unregulated trade in diamonds has contributed to civil conflicts in diamond-exporting countries such as Angola, Cote d'Ivoire, Democratic Republic of Congo, and Sierra Leone. Uncontrolled trade in antiquities has caused major losses in antiquities-rich countries, among them Mexico, Italy, India, and Mali.[78] Developing countries – the dumping ground for hazardous wastes – are the main victims of uncontrolled waste movement.[79]

The negative externalities of the trade in IRGs are therefore borne disproportionately by a subset of countries. Other countries, however, generate these externalities and may actually *gain* from the free movement of the goods. Whereas small arms wreak havoc in Africa and Latin America, China profits from exporting small arms, with annual sales estimated at one hundred million dollars.[80] Britain – the second largest art market in the world – has benefited handsomely by selling antiquities looted from their countries of origin.[81] Pirated and counterfeit goods have been a source of revenue for countries worldwide, including Russia, Vietnam, and Turkey among

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[77] UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2007, https://www.unodc.org/unodc/en/data-and-analysis/WDR-2007.html (last visited Feb 18, 2008). US data is for 2005; Mexico data is for 2002; Iran data is for 1999; Japan data is for 2003. Abuse level is measured as annual prevalence rate: the percentage of people who have consumed an illicit drug at least once in the twelve months preceding the assessment.

[78] PERNILLE ASKERUD & ETIENNE CLÉMENT, PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY (1997).

[79] The UN Secretary-General has asserted that the "foremost characteristic of illegal traffic in toxic and dangerous products and wastes is the dominant movement of these substances from the industrial to the developing world." Quoted in Sean Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 A.J.I.L. 24, 31. (1994).

[80] *An Uphill Battle: Understanding Small Arms Transfers*, SMALL ARMS SURVEY 2006 65, 69.

[81] For an estimate of the financial value of the trade in illicit antiquities in Britain see NEIL BRODIE ET AL., STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL 23-25 (2000), http://www.mcdonald.cam.ac.uk/projects/iarc/research/illicit_trade.pdf (last visited Feb. 18, 2008). On the involvement of the well known auction house Sotheby's in selling looted antiquities see PETER WATSON, SOTHEBY'S: INSIDE STORY (1997).

others.[82] The negative externalities of IRGs are therefore *transnational*: the countries generating the externalities are different from those bearing the externalities. To put it differently, the source of the externalities is outside the boundaries of those countries that bear the externalities.

The transnational nature of the externalities results in variation of national regulation. Countries that generate the negative externalities and gain from free trade in these goods take a permissive approach and establish loose national controls. On the other hand, countries facing large negative externalities impose strict national control on the goods' production, possession, import, or export, as appropriate. As explained above, however, national controls are rarely fully effective, and at times their impact is no more than marginal. Cross-national variation in the stringency of regulation between countries of origin and destination abets the trade and compromises even further the effectiveness of one-sided national controls. Despite its strict drug laws, the United States is unable to stem the flow of drugs from Mexico if Mexican authorities do not suppress drug export from their territory. Mexico's attempts to limit gun inflows cannot fully succeed due to the ease of gun purchase in the United States.

As negatively-affected countries on their own cannot fully control the trade and address its externalities, they seek to augment national efforts by strengthening control *at the other end* and tackling the externalities at their source. Curbing import of guns is much easier if the source countries regulate gun export. Outflows of antiquities are less likely to occur if the market countries control the entry of antiquities. Coordination of national controls – through international regulation – is therefore a means to overcome the limited utility of national efforts. International regulation seeks to reduce the trade's externalities by narrowing the gaps in national regulation and moving the more permissive countries toward

[82] For a list of countries where violation of intellectual property rights is rampant see UNITED STATES TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf (last visited Feb. 18, 2008).

stricter control. Through international regulation, the externalities-bearing countries attempt to induce the establishment of restraints by those countries that generate the externalities. The goal of regulating the international trade in drugs and small arms is to restrain the drug- and arms-exporting countries and make them reduce the negative externalities of their exports. The purpose of regulating the antiquities trade is to put curbs on market countries, so as to reduce the archeological damage caused by demand from the consumers: art dealers and major auction houses, museums, and private collectors.

In short, the purpose of international regulation is to fill the gaps in national control and to converge regulatory practices on the stringent side of the spectrum. By requiring that *all* states establish adequate controls, in particular those who generate the externalities, international regulation aligns state practices in order to curb the negative effects of the goods.

D. Why Not a Coasian Bargaining Solution?

In many contexts, governments address negative externalities by imposing regulation on their source, such as an air-polluting factory. As explained above, the transnational nature of the externalities renders this solution inapplicable to IRGs. For IRGs, the source of the externalities is outside the boundaries of those countries that bear the externalities, and the latter therefore cannot control the externalities at their source. International regulation augments the national controls of the externalities-bearing countries by inducing the externalities-generating countries to establish proper controls.

The Coase Theorem [83] suggests another possible solution to the problem of trade externalities, which does not involve international regulation. According to Coase, actors facing negative externalities can reduce or eliminate them by paying off those generating the

[83] Coase, *supra* note 64.

externalities. In the absence of transaction costs, the parties should be able to strike a mutually advantageous bargain. Is this a viable solution for addressing the externalities of the trade in small arms, drugs, or antiquities? For a variety of reasons, the answer is negative.

At the most general level, some of the conditions essential for Coase's conclusions to hold, such as perfect information and zero transaction costs, are not met in world politics.[84] Additionally, the Theorem may not hold in situations that involve many participants.[85] In addition to these general problems, IRGs raise more specific difficulties that preclude the type of contracting proposed by Coase. First, financial compensation is simply irrelevant in some cases. Museums and art collectors are unlikely to accept money as a substitute for antiquities they would like to purchase. Payment is unlikely to convince governments to eliminate landmines, if those are considered a military necessity. Second, paying off the actors that generate the externalities may not be financially feasible. When those bearing the externalities are poor countries, they may not have the required financial means. For example, African countries that suffer from rampant gun violence cannot afford to pay off arms-exporting countries to restrict gun exports. Given the lucrative nature of the drug trade, even rich countries will find an international regulatory framework cheaper than paying off all illicit drug producers worldwide. Third, externalities-bearing countries will likely refuse to pay off those who benefit from illegal acts. Paying off banks to stop laundering the proceeds of crime is not a morally satisfying solution. Paying off those who export drugs to countries where those drugs are banned is another bargain likely to be viewed as unjust. Since national regulation is ineffective and a Coasian contract unlikely, international regulation has become the preferred method for addressing the negative externalities of trade.

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[84] KEOHANE, *supr*a note 4, at 85-88.
[85] Aivazian, Varouj, and Jeffrey Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175 (1981).

E. International Regulation in Time

Turning back to Figure 1, why has the number of IRG agreements increased dramatically over time, particularly since the mid-1980s? I hinted at the answer earlier. The set of processes known as "Globalization" has to a large extent fueled the trend of growing international regulation. As Andreas explains,[86] overall trade liberalization has provided an effective cover for illicit cargo. Due to the increase in the volume of international trade, illegal exports and imports have become harder to detect. With more and more people and goods moving across countries, effective inspection at borders and ports of entry has become a near impossible task.[87] Privatization, financial liberalization, and eased restrictions on foreign investment have also had an unintended impact. Aimed at attracting legitimate foreign capital, these reforms also allow for easier laundering of crime proceeds.

Transportation improvements have had a dual effect as well. The innovation of containerization – packaging of goods in sealed, standardized containers – has facilitated the movement of legal cargo as well as the transport of illicit goods. Drug smugglers into the United States have indeed exploited the container revolution, which allows them to ship larger amounts of drugs at a lower cost and lower risk of arrest than alternative methods, such as private planes or speedboats.[88] More generally, the increasing number of transportation routes and the lowering of transportation prices, while overall a positive development, have made illegal trafficking

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[86] Peter Andreas, *Transnational Crime and Economic Globalization*, *in* TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL?, *supra* note 7, at 37-52.

[87] As Raustiala explains, increased trade volume often entails streamlined custom procedures, which lower the probability of seizures. Moreover, the large volume of trade has created overwhelming workload for customs agents, leading to less intensive and less effective inspections. Raustiala, *supra* note 14, at 119-120.

[88] Andreas, *supra* note 86, at 40-41.

cheaper and easier.[89]

Finally, economic and political reforms in the 1990s have facilitated illegal cross-border flows in yet another way. The social and economic disruption resulting from these reforms has encouraged individuals to turn to the clandestine economy. Agricultural reforms in Mexico and the drop in farm incomes forced farmers to turn to illicit crops such as marijuana and opium poppy. Economic hardship in Eastern Europe after the fall of Communism forced young women to become prostitutes abroad, where they fell victim to human trafficking.[90]

The past twenty years have seen an increase in imports and exports and hence a rise in the negative externalities of trade. At the same time, states' abilities to curb these externalities through national means were diminished. The accumulation of these changes explains the growing turn to international regulation since the mid-1980s. It is also interesting to note that the first IRG agreements were adopted at the end of the previous era of globalization. Booming trade, unprecedented capital flows, and mass migration characterized the period of 1850-1914.[91] These trends led to the signing of the first agreement on human trafficking in 1904 and the conclusion of the first drug control treaty in 1912.[92]

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[89] Raustiala, *supra* note 14, at 117-119.

[90] Andreas, *supra* note 86, at 43-44; NOMI LEVENKRON & YOSSI DAHAN, WOMEN AS COMMODITIES: TRAFFICKING IN WOMEN IN ISRAEL 2003 (2003), http://www.hotline.org.il/english/pdf/Women_as_Commodities_Trafficking_in_women_in_Israel_2003_Eng.pdf (last visited Feb. 18, 2008).

[91] KEVIN O'ROURKE & JEFFREY WILLIAMSON, GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY (1999).

[92] International Agreement for the Suppression of the White Slave Traffic Mar. 18, 1904, 1 L.N.T.S. 83; International Opium Convention signed at the Hague, Jan. 23, 1912.

III. GOVERNMENT PREFERENCES ON INTERNATIONAL REGUALTION

Inspired by the Liberal school of International Relations,[93] I argue that governments vary widely in their preferences on international regulation and that the sharp divergence of government preferences is the greatest obstacle to international regulation. The key question, then, is how governments form their preferences on international regulation. Which governments push for strong international regulation and which prefer weak controls? I begin my analysis with conventional political economy approaches to trade policy. In trade models,[94] the main actors are industries or sectors, and the principal dimension of political conflict is between exporting industries and import-competing industries. Exporters, interested in gaining access to foreign markets, support trade liberalization. Consumers, interested in cheap and available goods, favor free trade as well. A collective action problem typically prevents consumers from organizing politically, yet they may influence the government as voters.[95] By contrast, industries facing import-competition suffer from trade liberalization and support protectionism. Often better-organized and more politically effective than those who benefit from free trade, import-competing industries lobby the government to establish trade barriers and protect their incomes.[96]

I argue that this understanding of trade policy, while a useful starting point, does not adequately capture the forming of government preferences on international regulation. The pro-liberalization side of trade models – influence of exporters and consumers – applies to IRGs as

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[93] See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).
[94] My analysis refers to specific factors models, according to which trade politics is driven by competition among industries. See OATLEY, *supra* note 70, 74-77.
[95] See, for example, Mansfield et al., *supra* note 10.
[96] See, for example, Gene Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994). On trade policy models in general, see OATLEY, *supra* note 70, ch. 4.

well, albeit with some important modifications. But the fundamental difference lies in the anti-liberalization side. As Grossman and Helpman indicate by titling their trade policy model "Protection for Sale",[97] conventional political economy analysis considers Protection as the primary purpose of governmental restrictions on trade. Tariffs and non-tariff barriers intend, first and foremost, to shield import-competing sectors from loss of income due to free trade. With protection as the cornerstone, existing models do poorly when goods such as guns or drugs are considered. For these goods, the primary driver of trade restrictions is not protectionist demands from local industries facing competition; rather, it is the negative externalities of uncontrolled trade. Centered on protection, existing trade models are therefore unable to capture and explain IRGs. Conventional models would take into account the interests of exporters and consumers, who benefit from the trade, but not the broader negative ramifications of the goods for society. Therefore, their prediction would be free trade in these goods rather than regulation. Understanding international regulation requires the replacement of protection with negative externalities as the main impetus for trade restrictions and control.

My analysis first examines the anti-regulation influence of exporters and consumers, who favor uncontrolled trade. I then consider the pro-regulation influence of the trade's negative externalities. My theory distinguishes between primary externalities (the trade's negative effect on one's own country) and secondary externalities (concern about the trade's effects on foreign countries).

A. Exporters

In trade policy models, a simple commercial logic guides exporters' preferences. Exporters are interested in open markets abroad and oppose any impediments to selling their products. Their

[97] Grossman & Helpman, *supra* note 96.

goal is to lower barriers to their goods in foreign markets, whether tariffs, non-tariff barriers such as quotas, or other types of protection, such as health and safety requirements. This leads governments, which are interested in exporters' support, to pursue foreign markets opening and enhance export opportunities. Securing foreign market access for exporters has therefore been one of the chief drivers of the move to freer trade. For example, Bailey, et al., as well as Gilligan,[98] conclude that rising exports and increased lobbying by exporters played a major role in the liberalization of American trade policy after World War II. Exporters' interests have also been among the underlying motivations for the GATT/WTO. Bagwell and Staiger argue that "the WTO is driven by exporter interests" and that "[t]he GATT member governments saw agreements to reduce tariffs as the most expedient way to increase the access that their exporters could enjoy to the markets of their trading partners."[99]

To what extent does this logic apply to exporters of IRGs? IRG exporters constitute a diverse group. They represent various economic sectors and industries: agriculture (narcotic drugs), services (banking, sex industry), manufacturing (pharmaceuticals, small arms, hazardous wastes) and natural resources (diamonds). In addition, the exporters vary in their degree of domestic legality. Exporters are typically legal and legitimate actors at home in cases where the negative externalities of the trade fall on the importing country (for example, banks in the case of money laundering; the small arms industry). However, where IRGs impose externalities on the country of origin, exporters may be illegal actors. Two types of illegality should be distinguished. Certain exporters are illegal since their IRG-related activity has been banned by national

[98] Michael Bailey et al., *The Origins of American Trade Policy: Rules, Coalitions, and International Politics*, 49 WORLD POL. 309 (1997); MICHAEL GILLIGAN, EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION, AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY (1997).

[99] Kyle Bagwell & Robert Staiger, *The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues*, 15 J. ECON. PERSPECTIVES 69, 70-72 (2001).

legislation.[100] Antiquities looters are a case in point. Illegality comes from their violation of national laws prohibiting unauthorized removal and export of archaeological material. Other exporters are illegal regardless of their engagement in prohibited trade. Rebels' illegal status comes from their desire to overthrow the government rather than from the sale of conflict diamonds.

How does international regulation affect IRG exporters? On the one hand, regulation may benefit certain exporters through its anti-competitive effects. By limiting the availability of the goods, regulation may raise their price and allow exporters to reap a regulation premium.[101] Various safety and quality regulations can work to the advantage of those exporters already in compliance, while driving out of the market those unable to comply. Regulation can also be useful for public image or reputational purposes.[102] Exporters wishing to demonstrate their social responsibility may welcome humanitarian-inspired trade guidelines. More generally, meeting regulatory requirements may be a certification of product quality.

I argue, however, that for exporters the costs of regulation are likely to outweigh the benefits. International regulation could result in total prohibition on the trade or ban on certain transactions; could slow the export process under administrative requirements; and could increase the costs of production and transfer of the goods. Many countries, for example, would like to establish international transfer controls for small arms, which would impose restrictions on arms transfers. Examples include a prohibition on small arms sales to unauthorized non-state

[100] As explained above, such national legislation precedes the efforts for international regulation. States resort to international regulation when they find their national legislation ineffective.
[101] On the anti-competitive effects of regulation see, for example, Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001) (arguing that attorney regulation has resulted in inhibited competition and inflated prices).
[102] On the use of regulation for public relations see, for example, Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977 (2003).

actors or a prohibition on selling arms if those might be used for human rights violations.[103] From the exporter's point of view, transfer controls discontinue the practice of selling arms to any buyer without screening and reduce the likelihood of receiving an export authorization. Transfer controls, in other words, mean lost income. So does the establishment of a transparency mechanism for small arms transfers. Certain potential buyers may not be interested in purchasing arms if the transaction is made public. Moreover, transparency could result in a more careful scrutiny of requests for license exports and lower rate of approvals by the authorities of the exporting country.[104] Regulation thus imposes a burden on exporters, which is likely to be larger than the possible benefits they may reap both in magnitude and certainty. I therefore expect exporters to regard international regulatory efforts as a threat to their commercial interests, which trumps any concerns about the negative externalities of the goods. Interested in maintaining freedom of trade, exporters will likely try to steer the government away from supporting international regulation. To what extent will they manage to shape the government's preference?

Typical impediments to the political involvement of exporters have a smaller effect on the exporters of the goods addressed here. Exporters, generally speaking, may not always be interested or willing to act politically due to the uncertainty of economic gain. Exporters may judge that there are limited gains from new markets or that the costs of lobbying overwhelm the benefits of trade liberalization. The need to counter pressures from import-competing groups

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[103] On transfer controls for small arms see *Back to Basics: Transfer Controls in Global Perspective,* SMALL ARMS SURVEY 2007 117.

[104] Some countries release public data on their arms exports, either through a national arms export report or through customs data reported to UN Comtrade. See *Back to the Sources: International Small Arms Transfers,* SMALL ARMS SURVEY 2004 99, 115-16; *Reaching for the Big Picture: An Update on Small Arms Transfers,* SMALL ARMS SURVEY 2005 97, 110-113. Such channels, however, do not constitute a formal transparency device. Certain countries are therefore interested in a formal transparency mechanism by expanding the UN Register of Conventional Arms to include small arms transfers.

may also lessen exporters' enthusiasm to organize politically.[105] Such considerations, however, are less likely to affect the calculations of IRG exporters. International regulation involves a high certainty of significant loss for exporters that serves as a strong motivation for political action. Moreover, IRG exporters typically do not need to overcome resistance from import-competing sectors. As I explain below, opposition to the free-trade preference of exporters may indeed come from value-motivated actors, such as the NGO-based International Action Network on Small Arms or environmental groups in the case of hazardous wastes. However, the limited financial resources and electoral insignificance of these groups make them easier to overcome than politically influential import-competing industries.

Exporters are therefore likely to lobby the government against international regulation, yet their ability to shape policy may vary considerably across countries as well as across sectors and industries. When exporters are few, they are better able to overcome the collective action problem and organize for political action.[106] Some exporters can provide more political contributions than others and "buy" the government's support. The government may cater to the interests of exporters that provide many jobs or are otherwise important to the economy. Illegal exporters – such as antiquities looters – do not have standing to influence policy. They may not be able to lobby the government or may have to resort to illegal means, such as threats.

Another determinant of exporters' influence is ownership structure, particularly whether the exporter is state-owned or in private hands. In existing trade policy models, the government is a target for demands from interest groups and responds to such demands so as to maximize its chances of staying in power. The government, however, is not an active market actor and has no commercial interests of its own.[107] This is not the case for certain IRGs whose exporters are

[105] BARTON ET AL., *supra* note 9, 30-31.
[106] GILLIGAN, *supra* note 98.
[107] One exception is the foreign direct investment model offered by Lee Branstetter & Robert

state-owned. When this is the case, the government does not merely respond to industry lobbying. Rather, the government has a direct stake in the trade as a source of revenue. State-owned arms manufacturers in India, Pakistan, Egypt, and France generate income for their governments. The sale of opium in China by the East India Company in the 18th and 19th centuries benefited the British government.[108] The Chinese government benefits from the fees charged by state-owned employment agencies; those fees impose a heavy burden on Chinese migrant workers abroad and facilitate trafficking in workers.[109]

Since state-owned exporters are a source of income, governments may be particularly protective of their interests and hence averse to international regulation. But there may be other reasons as well. The management of state-owned enterprises is part of the state apparatus. As "Bureaucrats in Business",[110] state-owned exporters can therefore influence government policy from within. They often enjoy easy access to, and even close personal ties with, key decision makers, all making lobbying easier and more effective, compared to privately-owned exporters. Furthermore, a government's inclination to support state-owned exporters may come from their association with goals greater than financial profit, such as national development or security. For example, state-owned arms exporters are often considered strategic assets with a key role in their countries' foreign and security policy.[111] State-owned banks in Iran have played an important

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Feenstra, *Trade and Foreign Direct Investment in China: A Political Economy Approach*, 58 J. INT'L ECON. 335 (2002). In their model, the profits earned by state-owned firms in China receive extra weight in the government's objective function.

[108] On the relationship between the British government and the East India Company see H. V. BOWEN, THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY AND IMPERIAL BRITAIN, 1756-1833 (2006).

[109] HOTLINE FOR MIGRANT WORKERS, "FOR YOU WERE STRANGERS": MODERN SLAVERY AND TRAFFICKING IN HUMAN BEINGS IN ISRAEL 5-6 (2003), http://www.hotline.org.il/english/pdf/For_you_were_strangers_2nd_edition_Eng.pdf (last visited Feb. 19, 2008).

[110] WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP (1995).

[111] See, for example, AHARON KLIEMAN, DOUBLE-EDGED SWORD: ISRAEL DEFENSE EXPORTS

part in the regime's missile procurement and nuclear programs as well as in funding terrorism.[112] Contemporary governments are unlikely to follow the example of Britain, who waged war twice in the 19th century over its right to sell opium in China. However, I expect governments to show greater resistance to international regulation when the interests of state-owned exporters are under threat.

B. Consumers

The political economy literature typically claims that consumers prefer free trade, which allows them to enjoy cheap imports and raises their real incomes. However, consumers do not shape trade policy through lobbying. The costs of protectionist trade policy are diffuse, and the severity of the collective action problem facing consumers makes their lobbying efforts negligible compared with producers.[113] Rather, consumers affect trade policy as voters. Governments lower trade barriers in order to garner voters' support in future elections.[114]

What about IRG consumers? Like exporters, IRG consumers constitute a diverse group. In some cases, consumers are numerous (recreational drug users and gun owners, for example). In other cases, their number is relatively small (for instance, museums and private collectors in the antiquities market). The consumer may be the government itself (small arms)[115] or an industry using the import to produce the final good (diamonds, wildlife). As with exporters, consumers may be legitimate actors who engage in overall legal activity (museums, diamond industry) but

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AS AN INSTRUMENT OF FOREIGN POLICY (1992). On political motivation for arms production in general see Michael Brzoska, *The Impact of Arms Production in the Third World*, 15 ARMED FORCES AND SOCIETY 507 (1989).

[112] Press Release, Remarks by Treasury Secretary Paulson on Targeted Financial Measures to Protect Our National Security (June 14, 2007), http://www.ustreas.gov/press/releases/hp457.htm (last visited Feb. 18, 2008).

[113] OATLEY, *supra* note 70, at 78-79.

[114] Milner & Kubota, *supra* note 3.

[115] For data on government-owned small arms, see *Trickle and Torrent: State Stockpiles*, SMALL ARMS SURVEY 2006 37.

also illegal actors. For some consumers, such as drug users, the illegal status results from national restrictions on the possession or consumption of the goods. In other cases, however, the illegal status is independent from the consumption of the goods. Criminals and terrorists are illegitimate actors regardless of their involvement in money laundering or gun purchasing.

Consumers of IRGs may be interested in the goods for various reasons. Collectors purchase antiquities because of their aesthetic or historical value; rebels obtain arms to overthrow the government; counterfeits are cheaper than the original. Whatever the source of interest in the goods, I assume that most consumers care only about their own welfare and are not concerned about the negative externalities of the trade. They are interested in unrestricted access to the goods and oppose international regulation, which would make the goods more expensive, restrict their availability, or eliminate them completely. A minority of consumers, however, do take into account the damage caused by uncontrolled trade and may therefore welcome regulation. Museums in Britain are a case in point. As museums of archaeology, Britain's museums are concerned about the destruction of archeological record due to antiquities looting. Moreover, endowed with few resources, these museums hardly acquire new items and therefore have no difficulty supporting restrictions on the antiquities trade. By contrast, major US museums acquire new items on a regular basis, and as museums of art they are less concerned about archaeological destruction to begin with. Those US museums thus favor antiquities trade that is not stringently controlled.[116] The split within the museum community demonstrates my

[116] See Robert Hallman, *Museums and Cultural Property: A Retreat from the Internationalist Approach*, 12 INT'L J. CULT. PROP. 201 (2005). As Hallman explains, the American "museum community … stands apart from others in its high proportion of private funding and in the independence and sizeable acquisition budgets that sometimes follows" (*ibid*, p.207). Whereas the British Museum announced as early as 1972 that it would not acquire illegally exported antiquities, the Metropolitan Museum of Art has not accepted an unequivocal ban on acquiring illegally exported objects (*ibid,* pp. 209-210). The code of ethics for museums in Britain requires museums to reject illegally exported objects (Museums Association *Code of Ethics for Museums*, Section 5.10); by contrast, the *Code of Ethics for Museums* of the American Association of

point. Whereas some consumers may support international regulation, most consumers oppose regulation.

Despite their objection to international regulation, however, consumers may face difficulties in organizing for political action. One such difficulty is a collective action problem, the obstacle for consumer influence emphasized by the trade literature. Another possible impediment – unique to IRGs – is a pre-existing national ban on consuming the good. Gun owners and drug users in countries that prohibit civilian gun possession or recreational drug use may not be able to lobby in pursuit of free trade in small arms or drugs. Since consumption is already banned nationally, these consumers may find it difficult to shape the government's preference on international regulation. Similarly, criminals cannot openly lobby the government to allow money laundering.

But unlike consumers in trade models, which affect policy only as voters, some IRG consumers may enjoy political influence other than through voting. Such is the case, for example, when the government itself is among the consumers. Governments use small arms and landmines for national security purposes. Certain poor governments have "imported" hazardous wastes, i.e. consented to the dumping of wastes on their territory in return for hard currency.[117] Although economists have studied the issue of government procurement,[118] conventional trade policy models do not consider governments to be consumers. For understanding governments'

Museums falls short of advising members to comply with foreign laws regarding export or state ownership of antiquities (the Code requires museums to ensure that acquisition activities "discourage[] illicit trade," but does not define what constitutes illicit trade). The two Codes are available, respectively, at http://www.museumsassociation.org/asset_arena/text/cs/code_of_ethics.pdf and http://www.aam-us.org/museumresources/ethics/coe.cfm (last visited Feb. 18, 2008).

[117] JONATHAN KRUEGAR, INTERNATIONAL TRADE AND THE BASEL CONVENTION 83 (1999).

[118] For example, JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION (1993); Simon Evenett & Bernard Hoekman, *Government Procurement: Market Access, Transparency, and Multilateral Trade Rules*, 21 EUR. J. POL. ECON. 163 (2005).

preferences on international regulation, however, one must take into account situations where governments themselves consume the goods. By opposing international restrictions, those governments wish to maintain their ability to obtain the goods and use them.

Another category of politically-active consumers includes industries that use the goods in the process of production, such as the diamond industry; employers of trafficked migrant workers; and consumers of antiquities – art dealers, auction houses, and museums. In those cases, the number of consumers is sufficiently small and the impact of the trade sufficiently concentrated to overcome the collective action problem and allow consumers to organize in order to promote their interests. The diamond industry established the World Diamond Council to enhance its influence on the Kimberley Process and shape the regulatory outcome in line with the industry's interests.[119] The Association of Art Museum Directors, as well as individual art museum directors, advocate against stringent regulation of antiquities.[120]

C. Negative Externalities

Consumers and exporters of IRGs are interested in uncontrolled trade. Uncontrolled trade, however, generates negative externalities that drive governments' regulatory efforts. I distinguish between two types of negative externalities. Countries negatively affected by the trade bear *primary externalities*. Countries concerned about the trade's negative effects on foreign countries experience *secondary externalities*.

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[119] Carole Kantz, *The Power of Socialization: Engaging the Diamond Industry in the Kimberley Process*, 9 BUS. & POL., Art. 2 (2007).
[120] See, for example, JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE (2008).

1. Primary externalities

Primary externalities are the negative material effects on one's own country resulting from the trade. Examples include gun homicide victims, pollution from hazardous wastes, archaeological destruction caused by antiquities looting, and crime facilitated by money laundering. These negative effects are felt mainly by the countries of export or consumption, but third countries may face them as well. For example, gun violence in Africa triggers refugee flows that end up in Europe.[121] Whereas trade models typically equate consumers with the public, *in the case of IRGs the public has distinct preferences from the actual consumers of the goods*. As discussed above, consumers benefit from their use of the goods and favor uncontrolled trade. The public, however, bears the negative externalities of the goods and is interested in curbing the trade.

Why would the government care about the trade's negative effects? I assume that the government's goal is to survive in power.[122] This requires the government, first and foremost, to address externalities that threaten it directly and undermine its control of society, such as rampant gun violence or the financing of rebel campaigns through conflict diamonds. The government may also believe that its political survival depends on aggregate social welfare. Failure to solve pressing social problems such as gun violence or widespread drug addiction might result in loss of popular support. Another possibility is that actors negatively affected by the trade lobby their government to take action. These actors may affect the government's survival in power through campaign contributions, for example.[123] Governments therefore have

[121] In 2001 Western Europe hosted 1.7 million refugees from other regions. See TIMOTHY HATTON & JEFFREY WILIIAMSON, REFUGEES, ASYLUM SEEKERS AND POLICY IN EUROPE (Nat'l Bureau of Econ. Research, Working Paper No. 10680, 2004).

[122] This is a conventional assumption in the political science literature. See BRUCE BUENO DE MESQUITA ET AL. , THE LOGIC OF POLITICAL SURVIVAL (2003).

[123] A case in point is the initiation of TRIPS by the United States under influence from American corporations seeking to protect their intellectual property rights. SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003).

various incentives to try and control the trade in order to reduce its negative effects. I expect three influences on the government's level of support for international regulation:

1. Support for international regulation will increase with the magnitude of the negative externalities. For example, the higher the rate of gun violence or drug addiction, the greater should be the government's support for international restraints on the trade in small arms and drugs. The greater the scale of archaeological looting, the stronger the government's support for international control of the antiquities trade.

2. Support for international regulation will increase with the importance attached by the public to the negative externalities. Antiquities looting and human trafficking, for example, do not meet with uniform responses. Former colonies, such as India, care deeply about antiquities looting, which they view as a contemporary form of their exploitation by the West.[124] Israel, an antiquities-rich country without colonial past, pays far less attention to illicit antiquities. Publics committed to human rights find human trafficking an abhorrent phenomenon that must be uprooted; others find the trade in persons an acceptable practice. Different publics may therefore exhibit different levels of concern about the trade's externalities. The government's support for international regulation will vary accordingly.

3. Support for international regulation will decrease as the government's ability to curb the trade on its own increases. As noted earlier, fully controlling IRGs requires proper regulation by both the importing and the exporting countries. However, the greater the capacity of the importing (exporting) country to control the trade on its side, the less dependent it is on the control by the exporting (importing) country and the weaker its need for international regulation. By contrast, countries that cannot control the trade and curtail its negative effects by themselves, for example

[124] On the damage to archaeological sites in India and measures taken by the Indian government to address the problem, see Ajai Shankar, *The Threat to Cultural Sites in India from Illegal Excavation*, *in* TRADE IN ILLICIT ANTIQUITES, *supra* note 67, pp. 33-36.

due to porous borders or dysfunctional law enforcement agencies, are more likely to rely on international regulation in order to establish controls at the other end. International regulation allows them to make up for their own regulatory incapacity.

2. Secondary Externalities

For governments facing the negative externalities of the trade, support for international regulation should be positively correlated with the magnitude of the externalities and their importance for the public; support should be negatively correlated with the government's capacity to curb these externalities on its own. But concern about the negative impact of the trade is not limited to those governments who face primary externalities. Certain governments, motivated primarily by values and moral principles, may care about the trade's negative impact *on foreign countries*. I term such value-based concerns *secondary externalities,* that is, concern about the externalities borne by countries other than one's own. In most cases, such caring about the harm to others has its roots in the humanitarian implications of the goods. Gun proliferation and conflict diamonds cause large-scale killing and maiming; hazardous wastes spread disease. Other goods may raise non-humanitarian concerns, such as concern for the protection of cultural heritage and archaeological knowledge in the case of antiquities. Whatever the reason for concern, the focus of secondary externalities is the harm to *others*, rather than any tangible negative effects on one's own country.

What fuels secondary externalities? Why is the United States so passionate against human trafficking worldwide? [125] Why is Japan concerned about gun violence in Africa and

[125] See Letter from Secretary Condoleezza Rice in U.S. DEP'T OF STATE, 2005 TRAFFICKING IN PERSONS REPORT 1: "Yet for millions of people entrapped each year in vicious schemes of labor and sex trafficking, freedom is denied. These trafficking victims are deprived of their most basic human rights and fall into modern-day slavery. President Bush, the Congress, and the American people are united in efforts to eradicate trafficking in persons internationally and within national

elsewhere?[126] Certain governments have internationalist leaning, worldwide sympathies, and commitment to welfare abroad. Governments typically adopt such morally-inspired foreign policy when it has support among elites and mass publics.[127] Caring about others, however, is not entirely selfless. Governments may exhibit concern for foreign countries to improve relations with them or to gain a better image. For example, one of the motivations underlying the US support for international antiquities control in the early 1970s was to improve relations with Latin America[128]

In yet another set of cases, identifiable groups of principled actors[129] place the trade and its negative effects on the agenda and lobby governments to initiate or participate in an international regulatory campaign. These groups share a value-based commitment to worldwide suppression of trade that they deem harmful and repugnant. Such principled actors may be transnational networks of NGOs. The International Campaign to Ban Landmines (ICBL), initiated by a group of six NGOs, developed into a network of more than 1,400 groups in over 90 countries.[130] The International Action Network on Small Arms (IANSA) consists of 800 civil society

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borders because this global crime opposes the universal value of freedom," http://www.state.gov/documents/organization/47255.pdf (last visited Feb. 18, 2008).

[126] On Japan's efforts in the small arms area see DIRECTORATE GENERAL, ARMS CONTROL AND SCIENTIFIC AFFAIRS, MINISTRY OF FOREIGN AFFAIRS, JAPAN'S DISARMAMENT AND NON-PROLIFERATION POLICY 152-157 (2004). See also the sources on the Ministry of Foreign Affairs' website at http://www.mofa.go.jp/policy/un/disarmament/weapon/index.html (last visited Feb. 18, 2008).

[127] See the analysis of the motivations underlying foreign aid in DAVID LUMSDAINE, MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME, 1949-1989 (1993). Lumsdaine links the provision of foreign aid to humane and moral convictions held by domestic actors and the general public.

[128] LYNDEL PROTT & PATRICK O'KEEFE, 3 LAW AND THE CULTURAL HERITAGE: MOVEMENT 727 (1989); Ronald D. Abramson & Stephen B. Huttler, *The Legal Response to the Illicit Movement of Cultural Property*, 5 L. & POL'Y INT'L BUS. 932, 957 (1973).

[129] I use the term "principled actors" to denote actors motivated by principles and values rather than material incentives such as financial gain.

[130] See ICBL's website at http://www.icbl.org/.

organizations in over 100 countries.[131] A coalition of four European NGOs entitled "Fatal Transactions" launched the campaign against conflict diamonds.[132] However, principled actors could be domestic groups as well. American missionaries induced the United States to try and solve China's opium problem in the early 20th century.[133] A century later, diverse American interest groups convinced the US Government to initiate an international campaign against human trafficking.

What motivates the principled actors to care about other countries' problems? In a minority of cases, the principled actors have a direct stake in addressing these problems by curbing the harmful trade. For example, American missionaries considered the Chinese opium problem as an obstacle to their efforts to spread Christianity.[134] In most cases, however, principled actors are inspired by values and principles rather than by a direct stake. The source of such values may be religion. The 19th century anti-slavery movement in Britain relied mostly on a number of Protestant Dissenter sects. In their view, slavery was condemned since it kept the Africans from achieving salvation and might have resulted in a divine punishment for Britain.[135] Religious beliefs also inspire US Evangelical Christians to pursue action against human trafficking worldwide.[136] For other principled actors, motivation comes from a diverse set of values and goals such as human rights and humanitarianism, peace, development, environmental protection, and women's rights. The efforts of the archeological community to promote control

[131] See IANSA's website at http://www.iansa.org/.
[132] See Fatal Transactions' website at http://www.fataltransactions.org/.
[133] ARNOLD TAYLOR, AMERICAN DIPLOMACY AND THE NARCOTICS TRAFFIC, 1900-1939: A STUDY IN INTERNATIONAL HUMANITARIAN REFORM (1969).
[134] *Ibid*, at 30.
[135] Chaim Kaufmann & Robert Pape, *Explaining Costly International Moral Action: Britain's Sixty-year Campaign Against the Atlantic Slave Trade*, 53 INT'L ORG. 631 (1999).
[136] One of the principal Christian groups involved in the efforts against human trafficking is International Justice Mission. According to the group's website, its work "is founded on the Christian call to justice articulated in the Bible (Isaiah 1:17): *Seek justice, protect the oppressed, defend the orphan, plead for the widow,*" http://www.ijm.org/whoweare (last visited Feb. 18, 2008).

of antiquities are in the interest of knowledge and archaeological heritage.[137] In fact, regulatory campaigns may bring together quite different principled actors. The anti-human trafficking coalition in the United States, for example, includes feminist, human rights, democracy-building, and religious organizations.[138]

Principled actors campaign to make governments care about the welfare of foreign countries. They advocate the control or elimination of trade they consider reprehensible and harmful to other nations. Why would governments pay any attention? In a minority of cases, governments address the concerns of politically powerful principled actors. After the 1832 Great Reform, Dissenters composed about 21 percent of the British electorate. Often holding the balance of power between the two major parties, Dissenters brought the government to support the abolitionist cause and launch a worldwide anti-slavery campaign.[139] Similarly, the electoral power of Evangelical Christians makes their concern about human trafficking an issue of interest to American politicians. However, the main strategy that principled actors employ involves educating policy makers and raising their awareness about the trade and its negative consequences. Education and awareness raising may involve multiple techniques. Groups seeking to educate US policymakers about human trafficking created and disseminated educational materials, held conferences that policymakers attended, set up interchanges between

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[137] The core claim made by archaeologists is that coherent information about the past "comes only through the systematic study of **context** – of the association of things found within the ground where they were abandoned or deliberately buried." The looting of antiquities leads to the loss of their context and hence loss of our knowledge of the past. COLIN RENFREW, LOOT, LEGITIMACY, AND OWNERSHIP: THE ETHICAL CRISIS IN ARCHAEOLOGY 10 (1999). See also BRODIE ET AL., *supra* note 81, at 11 ("An ethnographic object without contextual information is an object stripped of meaning – it reflects back at us our own conceptions of beauty but tells us little of other people and other places. It leaves us ignorant of its original social value and purpose or, worse, puts us at risk of misunderstanding them".)

[138] Barbara Stolz, *Educating Policymakers and Setting the Criminal Justice Policymaking Agenda: Interest Groups and the 'Victims of Trafficking and Violence Act of 2000*, 5 CRIM. JUST. 405 (2005).

[139] Kaufmann & Pape, *supra* note 135.

policymakers and victims of trafficking, organized Congressional delegations to other countries, met with Congress members and staff, testified at Congressional hearings, and voiced their concerns through the press and letters.[140] To raise awareness about China's opium problem, American missionaries met with State Department officials and sent cables and letters to the President, the State Department, and members of Congress.[141]

To promote their cause, principled actors may also attempt to educate the public and shape public opinion. Anti-slavery societies in Britain held public lectures, distributed literature, and organized several mass petition drives.[142] American missionaries fostered public opinion sympathetic to China's problems through missionary and religious journals and through reports to their churches.[143] The NGO coalition to eliminate conflict diamonds produced numerous posters and leaflets and called upon the public to ask governments and diamond companies to establish effective controls. Consumers were encouraged to ask jewelers about the exact source of the diamonds they were selling.[144]

What allows the principled actors to educate publics as well as policymakers is their expertise and knowledge about the trade and its consequences. The dissemination of information is therefore their key to gaining influence and shaping preferences. At times, information provision takes the form of a written or filmed report. A 1969 article by archaeologist Clemency Coggins focused public attention on antiquities looting in Latin America and the role of American museums in fueling the plunder.[145] This exposé, coupled with several media scandals involving museums, convinced US policymakers to join the international efforts against looting

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[140] Stolz, *supra* note 138, at 420-421.
[141] TAYLOR, *supra* note 133, at 29.
[142] Kaufmann & Pape, *supra* note 135, at 656.
[143] TAYLOR, *supra* note 133, at 29.
[144] Andrew Grant & Ian Taylor, *Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gem*s, 93 THE ROUND TABLE 385, 390 (2004).
[145] Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART JOURNAL 94 (1969).

despite the opposition of antiquities dealers and some members of the museums community. [146] In 2000 the McDonald Institute for Archaeological Research at the University of Cambridge published *Stealing History: The Illicit Trade in Cultural Material*. The report provided a comprehensive survey of the illicit antiquities trade, its effects, and the role played by Britain's art market.[147] The awareness it created contributed to Britain's decision to ratify the UNESCO Convention on cultural property in 2002. Global Witness's 1998 report *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict* exposed publics to the role of diamonds in funding the Angolan civil war. Two years later Global Witness released *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds*, which included practical suggestions for the regulation of the diamond trade. In the Kimberley Process, governments and the diamond industry implemented the suggestion of a certification scheme.[148]

Although my analysis distinguished between primary and secondary externalities, in certain situations governments may face both. They may care about the trade's negative effects upon their own countries as well as its impact on other countries. France and Germany are concerned about small arms in Africa that threaten their own soldiers on peacekeeping operations. At the same time, they worry about the devastating consequences of small arms proliferation for the African countries. [149] Principled actors may sometimes cast secondary externalities as primary externalities to bolster their case for action. American missionaries considered China's opium problem as a moral evil, but tried to appeal to policymakers by emphasizing the detrimental effect of opium on US-China trade. [150] Groups interested in

[146] BATOR, *supra* note 18.
[147] BRODIE ET AL., *supra* note 81.
[148] Grant and Taylor, *supra* note 144, at 390, 392-393.
[149] Asif Efrat, International Efforts against the Illicit Trade in Small Arms (September 2007) (unpublished manuscript, on file with the author).
[150] TAYLOR, *supra* note 133, at 29-31.

eliminating human trafficking on moral grounds conceptualized the problem as part of transnational crime and hence a threat to US national security.[151]

3. Negative Externalities: Conclusion

Negative externalities are the core distinction between my model of IRGs and conventional trade models. In conventional trade models, the motivation for regulation is to protect import-competing sectors; in my model, by contrast, regulation is driven by the negative externalities of the goods. My model further diverges from conventional trade models by incorporating *value-based* concerns – secondary negative externalities. Morally-inspired concerns have in fact occupied an increasing role in trade policymaking in recent years. The debate over developing countries' access to affordable AIDS medications is but one notable example.[152] Yet conventional trade policy models remain interest-based, failing to capture the growing weight of normative convictions, values, and moral beliefs in trade policy. Conventional trade models take into account only material factors such as exporters' foreign market access, loss of income due to import-competition, consumers' economic welfare, and politicians' pursuit of votes and political contributions; yet they do not address the influence of humanitarianism or human rights on trade policy. Conventional models therefore cannot explain why governments may choose to support international regulation when it brings them no material gains and, furthermore, when regulation undermines the interests of domestic actors to the benefit of foreign countries. Those puzzles are resolved by bringing into account value-based concerns, which motivate governments'

[151] Stolz, *supra* note 138, at 423-424.

[152] See, e.g., James Thuo Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers*, 53 FLA. L. REV. 727 (2001). On the balance between trade and human rights more generally see SUSAN ARIEL AARONSON & JANIE M. ZIMMERMAN, TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING (2008).

participation in international regulatory campaigns to promote welfare and address humanitarian problems abroad.

D. Predicted Variation in Government Preferences on International Regulation

My theoretical framework has introduced several influences on governments' preferences: on the one hand, the interests of exporters and consumers; and on the other hand, primary and secondary negative externalities of the trade. The weight of these influences will vary across governments as a function of different variables such as: exporters' and consumers' level of political activity; the magnitude of the trade's negative effects; and lobbying by principled actors. Combining the four influences (exporters, consumers, primary externalities, secondary externalities) along two dimensions, as shown in Figure 2, leads me to predict large variation in government preferences on international regulation.

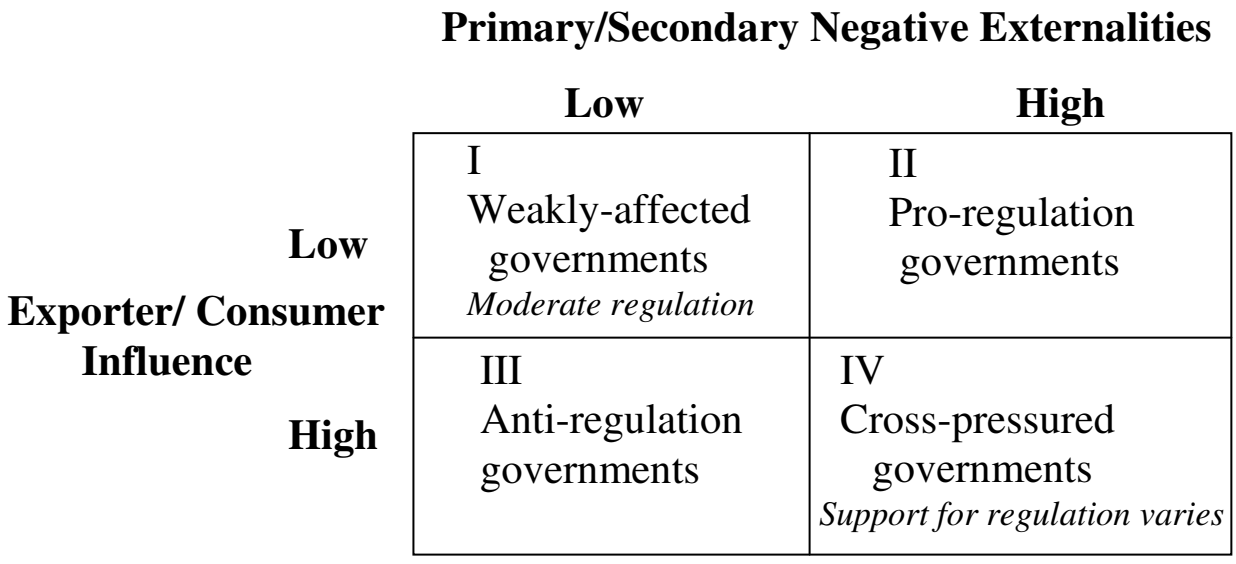

Figure 2. *Incentives affecting international regulation and expected government preferences*

At one extreme are governments facing large primary or secondary negative externalities and not facing considerable anti-regulation pressure from exporters or consumers (Quadrant II). These governments will likely support stringent international regulation, which offers them significant benefits – curbing the trade's negative externalities – with little cost. At the other extreme are governments that have little concern over the trade's negative effects on their own countries or on foreign countries, but are strongly influenced by exporters or consumers who push for uncontrolled trade (Quadrant III). Such governments are unlikely to support international regulation, which brings them very little benefits in exchange for heavy costs: damage to exporters or consumers as well as the price of increased law enforcement (for example, resources required for strengthening customs and border control). Rather than strengthening control, these governments would prefer its relaxation or elimination.

A third group includes those governments that face low primary or secondary externalities and no considerable anti-regulation pressure from exporters and consumers (Quadrant I). These weakly-affected governments have neither strong incentives to support international regulation nor reasons to oppose it. I expect them to adopt a middle position and support moderate international regulation. Finally, a fourth group includes cross-pressured governments (Quadrant IV). On the one hand, primary or secondary negative externalities push these governments toward supporting international regulation. On the other hand, exporters or consumers pull them toward unconstrained trade. I expect cross-pressured governments to vary in their preferences. Their support for international regulation will increase the heavier are the negative externalities. Support for regulation will decline the greater is the anti-regulation influence of exporters or consumers.

It is important to note that preferences on international regulation vary across governments for a particular good; but they may also vary for the same government across different goods. A

specific constellation of exporters' and consumers' influence, coupled with certain negative externalities, may lead a government to favor tight international regulation of the trade in good X. A different constellation will lead the same government to oppose regulation of the trade in good Y. For example, the United States has played a leading role in establishing the international drug and money laundering regimes. However, the United States has not joined the Basel Convention on hazardous wastes, nor does it endorse the international regulation of the trade in small arms.[153]

Going back to Figure 2, the sharp divergence of preferences predicted by my model is a major obstacle to an international regulatory agreement. International cooperation typically builds on joint gains and at least partial convergence of interests among governments. International regulation, however, involves highly conflicting preferences and little, if any, common ground. Certain governments benefit from international regulation, which allows them to address pressing social concerns without imposing significant costs. Other governments, however, find international regulation highly undesirable. Unconcerned about the trade's externalities, they have no need for international control. For them, international control would only restrict the ability of exporters to make financial gains and the ability of consumers to obtain the goods. The diametrically opposed preferences of pro-regulation and anti-regulation governments and the absence of shared interest are the primary obstacles to international regulation. I now turn to an in-depth examination of how cooperation is nonetheless established.

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[153] On the US efforts for international drug control see TAYLOR, *supra* note 133, DAVID BEWLEY-TAYLOR, THE UNITED STATES AND INTERNTIONAL DRUG CONTROL, 1909-1997 (1999); On the US efforts against money laundering see Simmons, *supra* note 19; On the US' failure to ratify the Basel Convention see Lisa Belenky, *Cradle to Border: US Hazardous Waste Export Regulations and International Law,* 17 BERKELEY J. INT'L L. 95 (1999). On the US approach to international small arms regulation see Asif Efrat, Regulating Rifles: International Control of the Small Arms Trade (February 2008) (unpublished manuscript, on file with the author).

IV. THE ESTABLISHMENT OF COOPERATION

A. The Cooperation Problem

Conventional analysis of trade cooperation is of limited relevance for the understanding of cooperation on IRGs. Most obviously, conventional trade agreements and IRG agreements have opposite goals. Whereas the former aim to lower or dismantle trade barriers and liberalize trade, the purpose of the latter is to impose restrictions and make trade less free. More fundamentally, conventional trade and IRGs are entirely different in terms of their underlying incentive structure and cooperation problem. [154]

Scholars have long conceived of trade cooperation as a Prisoners' Dilemma.[155] In a bilateral setting, both governments would prefer protection at home and liberalization abroad, but if the two governments choose protection, the resulting trade war will leave them worse off. By contrast, if both governments can agree to liberalize trade, both will reap gains. The problem, however, is the enforcement of such an agreement. Even when governments recognize that trade liberalization brings welfare gains, they may be tempted to "cheat" by providing protection contrary to their commitments. Trade agreements facilitate cooperation and assuage concerns about cheating through various means such as dispute settlement mechanisms and transparency.[156]

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[154] See Helfer's definition of a "problem structure" as including "the number of states involved, their incentives, the strategic interactions they generate, the level of uncertainty, and asymmetries of information and power. These factors help to predict the difficulty of establishing and sustaining collective action that improves states' individual and group welfare in comparison to the alternatives of unilateral action or no action at all." Lawrence Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 98 (2008).

[155] See, for example, John Conybeare, *Public Goods, Prisoners' Dilemmas, and the International Political Economy*, 28 INT'L STUD. Q. 5 (1984); JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 139-141 (2005); OATLEY, *supra* note 70, 56-58.

[156] OATLEY, *supra* note 70, 60-62.

Mutual gains motivate trade cooperation. The purpose of trade negotiations and agreements is to allow all states involved to enjoy the welfare gains of free trade. However, mutual gains as the rationale of cooperation do not apply to IRGs. As explained above, the major winners from international regulation are those governments facing negative externalities of the trade but not pressured by exporters or consumers. International regulation is clearly in the interest of those governments, helping them to curb the trade's externalities. Yet for governments pressured by exporters or consumers without experiencing negative externalities, regulation is not welfare-enhancing. Rather, international regulation would leave them worse off. As the trade does not adversely affect them, they do not benefit from international control. From their point of view, international control would only harm exporters and consumers, who favor uncontrolled trade. For those governments, the preferred outcome is the absence of international regulation – in other words, non-cooperation. Figure 3 depicts a payoff structure for the interaction between pro-regulation and anti-regulation governments.

I illustrate the payoff structure through two examples. Consider the preferences of Somalia (Government A) and China (Government B) on the regulation of the small arms trade. Somalia has experienced persistent instability, including civil war, since the 1980s. The Somali government, interested in preventing militias from obtaining arms, would gain the most from Regulate/Regulate, wherein the trade is controlled on both ends. Somalia regulates gun import, distribution, and possession, and China regulates gun export (for instance, avoiding gun sales if those might lead to instability and conflict). The worst outcome for Somalia is liberalization on both ends. With Liberalize/Liberalize, there are no restrictions on guns' import to Somalia or

Figure 3. *Payoff Structure for Pro-regulation and Anti-regulation Governments*

Government B (Anti-regulation)

Government A (Pro-regulation)	Liberalize	Regulate
Liberalize	**L,L**	**L,R**
Regulate	**R,L**	**R,R**

Preference Orders:

Government A: **R,R > R,L > L,R > L,L**

Government B: **L,L > R,L > L,R > R,R**

their export from China, resulting in massive gun proliferation in Somalia. The reverse is true for China. As a major exporter of small arms interested in market access, China gains the most from Liberalize/Liberalize. With Liberalize/Liberalize, China is free from restrictions on its exports and does not meet with import restrictions on Somalia's side. The worst outcome for China is Regulate/Regulate, wherein both Chinese export control and Somali import control restrict the trade. The equilibrium will therefore be R,L – Somalia regulates small arms import and circulation, whereas China liberalizes exports.

A similar conflict of preferences characterizes the antiquities market. Consider the preferences of Mexico (Government A) and Switzerland (Government B) on the regulation of the antiquities trade. As a country suffering significant loss of antiquities, Mexico gains the most from Regulate/Regulate, wherein Mexican authorities control outflows of antiquities and Swiss authorities control inflows. Liberalize/Liberalize – free trade in antiquities – is the worst outcome for Mexico, resulting in depletion of archaeological material. Whereas free movement of

antiquities is devastating for Mexico, Switzerland – a major art market – would benefit from unregulated trade. Liberalize/Liberalize would supply Switzerland's auction houses with abundance of antiquities, whereas regulation by both Mexico and Switzerland would seriously disrupt the flow of antiquities and cause financial loss. In equilibrium, Mexico regulates the exports of antiquities, whereas Switzerland liberalizes imports.

In contrast to conventional trade, the root of the cooperative problem with IRGs is not incentives to defect; rather, it is the absence of incentives to cooperate in the first place. Cooperation on IRGs simply does not promise mutual gains. Whereas for some governments international regulation is very beneficial, for others it is highly undesirable. As the examples above show, certain governments consider absence of any controls (mutual defection) their preferred outcome, whereas control on both sides (mutual cooperation) is their worst outcome. Those governments would choose liberalization regardless of what other governments do. Such ranking of preferences and the absence of mutual gains from cooperation are very different from the Prisoners' Dilemma typical of conventional trade.

IRGs thus involve a more intense conflict than conventional trade. The cornerstone of conventional trade cooperation is the realization that free trade involves joint gains and could make all actors better off. The absence of such shared interest is the primary obstacle to international regulation. Far from reaping gains, cooperation on IRGs may leave certain countries worse off. To be sure, conventional trade negotiations may be difficult and acrimonious as well. The unfortunate state of the Doha Round is but one example.[157] Yet at their core, conventional trade talks build on partial convergence of interests, mutual benefits, and at least a rough consensus on the goal – trade liberalization. These are often absent when international regulation is on the agenda. In that case, certain governments would favor the non-

[157] On the Doha Round see Sungjoon Cho, *Doha's Development*, 25 BERKELEY J. INT'L L. 165 (2007).

cooperative status quo over cooperation. Rather than strengthening control, their preference would be its relaxation or elimination.

My theory contrasts with much of the literature on international law and cooperation. First, the above analysis implies that IRG agreements do *not* provide international public goods. [158] Scholars often view the function of international law as providing public goods at the regional or global level. International agreements to curb global warming or control pollutants; alliance treaties and arms control agreements – such agreements and others yield benefits that all states can enjoy. It is quite tempting to view IRG agreements in a similar fashion and assume that *all* states would benefit from such agreements. For example, it seems quite plausible to see major problems like gun violence, drug addiction, and antiquities looting as public bads which all states would like to address. Controlling these goods and curbing their negative effects through international regulation should therefore, presumably, create a public good beneficial to all. Such view, however, would be entirely erroneous. My analysis suggests that uncontrolled trade in guns, drugs and antiquities indeed harms certain countries, yet it benefits others. Controlling these goods internationally would mean welfare gains for those countries bearing the trade's externalities; by contrast, control would inflict losses on the countries generating the externalities. Given that the latter have little to gain and much to lose from international regulation, IRG agreements do *not* provide public goods.

At a more general level, absence of mutual gains as an obstacle to cooperation cuts against the focus of the political science literature on mutually-beneficial cooperation. This focus goes back to the most seminal work in the early cooperation literature – Keohane's *After Hegemony*: "The difficulties of cooperating are illustrated best not by … purely conflictual games (in which

[158] See, for example, Eric Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 491 (2006); Todd Sandler, *Treaties: Strategic Considerations*, 2008 U. ILL. L. REV. 155 (2008).

discord appears to be determined by the structure of interests) … but by what Thomas Schelling has called "mixed-motive games": … both players can benefit from mutual cooperation, but each can gain more from … 'defection'."[159] In accordance with this logic, cooperation scholars have tended to downplay any fundamental conflict in states' preferences and have usually taken mutual interest in cooperation as their point of departure.[160] The cooperation literature has therefore focused on situations where problems of enforcement and monitoring, distributional issues, or uncertainty impede the realization of mutual gains.[161] Many studies have explored the means that allow states to overcome incentives to cheat or less-than-full information, establish cooperation, and make themselves better off. Situations that promise no joint gains and involve no shared interest have received much less attention.[162] I now turn to examine how cooperation is established when the main obstacle is lack of shared interest. I first consider those cases where weak governments favor cooperation and then the instances where powerful governments favor cooperation.

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[159] KEOHANE, *supra* note 4, at 67.

[160] *Ibid* at 6 ("[*After Hegemony*] is about how cooperation has been, and can be, organized … when common interests exist. … The theory that I develop takes the existence of mutual interests as given and examines the conditions under which they will lead to cooperation.")

[161] See, for example, GEORGE DOWNS AND DAVID ROCKE, OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995); James Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269 (1998); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005).

[162] But see George Downs et al., *Arms Races and Cooperation*, 38 WORLD POL. 118, 123 (1985), raising "the possibility that Deadlock is far more prevalent than is usually thought to be the case." See also Thomas Oately & Robert Nabors, *Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord*, 52 INT'L ORG. 35 (1998).

B. Weak Governments Favor Cooperation

IRG agreements do not meet the Pareto condition.[163] While they offer benefits to some governments, they make others worse off. When those made worse off are powerful governments, they may simply refuse to join the agreement. Since the weak governments favoring cooperation have no leverage vis-à-vis the powerful governments that are reluctant to cooperate, the latter remain outside the agreement.

The governments of China, Russia, India, and Pakistan, have sided with their militaries' assessments that landmines are a necessity. Considering landmines essential for national security, they have refused to support a comprehensive ban on landmines.[164] The United States has also recoiled from accepting the landmine prohibition. It recently stated its goal to reduce the humanitarian risk posed by landmines, but stopped short of accepting the total ban "which would have required [the United States] to give up a needed military capability."[165] All five countries have not joined the Ottawa Convention on the prohibition of landmines.

The major market countries for antiquities have shown little enthusiasm about the 1970 UNESCO Convention, which asks them to strengthen their control over the movement of archaeological material and establishes a channel for recovery and return of stolen objects. Among other market countries, Britain, Germany, and Japan took more than 30 years to ratify the Convention.[166] None of the three have ratified a second – and more comprehensive – agreement on antiquities: the 1995 UNIDROIT Convention.

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[163] An outcome is Pareto optimal when no single actor can be made better off without at the same time making another actor worse off. See OATLEY, *supra* note 70, at 58.

[164] Richard Price*, Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613 (1998).

[165] Fact Sheet, Bureau of Political-Military Affairs, U.S. Department of State, New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers (February 27, 2004), http://www.state.gov/t/pm/rls/fs/30044.htm (last visited Feb. 18, 2008).

[166] On the British approach toward the UNESCO Convention see HOUSE OF COMMONS

The 1989 Basel Convention was a response to the growing shipment of hazardous wastes to developing countries, turning them into dumping grounds. This Convention would have required the United States, the world's largest exporter of hazardous wastes, to tighten its restrictions on the export of hazardous waste and broaden the class of wastes subject to control. The Convention ultimately failed to achieve ratification by the Senate.[167]

In all three cases above, governments of powerful countries have simply refused to join agreements that not only offered no gains, but threatened to impose costs on militaries, art dealers and museums, or industries generating hazardous wastes. In other cases, the conflict of preferences over regulation was somewhat tempered, as powerful governments identified modest benefits alongside the large costs of cooperation. In those cases, powerful governments were slightly cooperative, agreeing to make only small changes to their behavior. They lent their support to weak international regulation, which was a far cry from the wishes of the pro-regulation governments. For example, the United States could gain from international small arms regulation by reducing the risk that gun proliferation poses to American soldiers overseas. At the same time, international regulation could be harmful to American gun manufacturers; restrict the ability of the US government to provide arms to its allies; and jeopardize the interests of civilian gun owners as well. Going back to Figure 2, the United States is therefore a cross-pressured government with respect to small arms regulation, facing modest pro-regulation incentives and strong anti-regulation incentives. The United States therefore insisted on an international regulatory framework for small arms that is not legally binding; includes a very weak enforcement mechanism; and excludes major issues: regulation of ammunition, restrictions on arms transfers to non-state actors, and limitations on civilian possession of small arms. This

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CULTURE, MEDIA AND SPORT COMMITTEE, 1 CULTURAL PROERTY: RETURN AND ILLICIT TRADE, xx-xxiii (2000).

[167] Belenky, *supra* note 153.

weak framework – the Program of Action on Small Arms – may bring the United States small gains without posing a serious threat to its interests.[168] This document, however, does not effectively address the devastating problem of gun violence in Africa.

In summary, when international regulation benefits weak governments, powerful governments are either completely uncooperative (if they have nothing to gain) or only slightly cooperative (if they do identify modest gains). They either do not join the regulatory agreements or join significantly weakened agreements. In either case, the utility of international regulation is seriously compromised.

C. Powerful Governments Favor Cooperation

In some cases, international regulation benefits powerful governments to the detriment of weak governments. In those situations, powerful governments use coercion to make reluctant weak governments cooperate. Through coercion, "[p]owerful countries can explicitly or implicitly influence the probability that weaker nations adopt the policy they prefer by manipulating the opportunities and constraints encountered by target countries… [Coercion] involves power asymmetries that the strong exploit to impose their policy preferences on weaker countries."[169] In a small number of cases, IRG-motivated coercion involved the use of military force. Prior to World War I, Germany and Turkey – both drug exporters – refused to join the international drug regime. After their military defeat, however, they had to join and implement the Hague Opium Convention as part of the postwar peace agreements.[170] A more contemporary case of military

[168] Efrat, *supra* note 153.
[169] Simmons et al., *supra* note 8, 790.
[170] Taylor, *supra* note 133, 141-144. See The Versailles Treaty, June 28, 1919, Art. 295; Treaty of Lausanne, 24 July 1923, Art. 100.

coercion is the US invasion of Panama and the overthrow of Manuel Noriega. Panama's involvement in drug trafficking was among the chief reasons for the invasion.[171]

While the use of military force to coerce IRG cooperation is rare, the American operation in Panama is very typical in another respect: the United States as the coercing state. US power and influence have been necessary for achieving cooperation on some IRGs, since international regulation requires significant altering of the costs and benefits that anti-regulation governments face. Anti-regulation governments have little to gain from international regulation, which hurts exporters and consumers, requires allocation of resources for law enforcement, and does not yield benefits in return. To overcome the resistance of anti-regulation governments and stimulate cooperative behavior, non-cooperation has to become very painful. Only powerful external incentives can compel governments to act against the interests of politically influential domestic actors and accept international regulation. In the post-World War II era, and even more so after the Cold War, the United States has had the resources necessary for manipulating governments' incentives so as to coerce cooperation on IRGs. The United States exerts IRG-motivated coercion bilaterally and through international institutions. Coercion takes two forms: the first, economic coercion, is a well established tool of statecraft;[172] the second and more innovative tool is reputational coercion – the intentional tarnishing of countries' reputation through blacklisting.

1. Economic Coercion

To force acceptance of international regulation, the United States exerts economic coercion through withholding of aid, trade measures, and other financial tools. Such means affect

[171] A Transcript of President Bush's Address on the Decision to Use Force in Panama, N.Y. Times, Dec. 21, 1989.

[172] See, for example, DAVID BALDWIN, ECONOMIC STATECRAFT (1985); LISA MARTIN, COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS (1992); Daniel Drezner, *The Hidden Hand of Economic Coercion*, 57 INT'L ORG. 643 (2003).

governments' calculations by escalating the economic costs of non-cooperation or the benefits of cooperation. Once governments realize they gain more from cooperation than from non-cooperation, they have an economic motivation to join the international regulatory efforts.

The use of economic coercion has been an integral part of the US War on Drugs. In 1969 President Nixon forced Mexico to tackle marijuana and heroin production through a two-week closure of the US-Mexico border (Operation Intercept). The resulting massive disruption to trade convinced Mexican authorities to confront the drug issue.[173] In the mid-1980s the United States formalized and systematized the use of economic coercion with the introduction of the Narcotics Certification Process. This Process involves the submission of an annual presidential report to Congress. In the report, known as the "Majors List", the President identifies all major illicit drug producing countries and major drug-transit countries; certifies those countries that have taken appropriate anti-drug measures, especially those required by the 1988 UN Convention against Illicit Traffic in Narcotic Drugs; and designates those countries that have "failed demonstrably" to make substantial efforts toward taking the required measures. Countries found to have "failed demonstrably" face a series of penalties, among them withholding of fifty percent of non-humanitarian aid and a mandatory "no" vote by the United States on loans from six multilateral development banks.[174] US coercion proved effective for the Andean strategy in the early 1990s. Colombia, Bolivia, and Peru – at first reluctant to embrace increased US military involvement in their anti-drug efforts – succumbed to American demands under the threat of aid withdrawal.[175]

The use of economic coercion to compel IRG cooperation is not limited to drugs. Annual blacklists also identify non-cooperative countries on money laundering, human trafficking, and

[173] BEWLEY-TAYLOR, *supra* note153, at 199-200.
[174] See Foreign Assistance Act of 1961, 22 U.S.C. §§ 2291h-2291j. The President's determination of the Majors List is based on the annual State Department's International Narcotics Control Strategy Report (INCSR). Volume I of the INCSR addresses drug and chemical control activities. The Reports are available at http://www.state.gov/p/inl/rls/nrcrpt/ (last visited Feb. 18, 2008).
[175] BEWLEY-TAYLOR, *supra* note153, at 192-193.

intellectual property, resulting in possible penalties. Countries designated by the Financial Action Task Force (FATF) as non-cooperative on money laundering could face counter-measures with serious financial consequences.[176] The USA PATRIOT ACT authorizes the Secretary of the Treasury to take similar measures against countries considered "of primary money laundering concern."[177] The Victims of Trafficking and Violence Protection Act requires governments to meet minimum standards for the elimination of human trafficking and threatens to withhold US aid from governments that do not comply with those standards or make significant efforts to bring themselves into compliance.[178] Countries that fail to provide adequate protection of intellectual property rights may face US trade sanctions under Section 301 of the Trade Act.[179]

2. Reputational Coercion

Governments feel the impact of being blacklisted through their pocket. Penalties resulting from inclusion on a blacklist, such as aid withdrawal or trade sanctions, impose direct material costs.

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[176] Key among those counter-measures is a recommendation to financial institutions to "give special attention to business relationships and transactions with … countries which do not or insufficiently apply the FATF Recommendations." FATF Recommendation 21, http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html#40recs (last visited Feb. 18, 2008). The first Report on Non-Cooperative Countries and Territories, 14 February 2000 and annual reviews thereafter are available at http://www.fatf-gafi.org/pages/0,3417,en_32250379_32237267_1_1_1_1_1,00.html (last visited Feb. 18, 2008). See also Benjamin R. Hartman, *Coercing Cooperation from Offshore Financial Centers: Identity and Coincidence of International Obligations Against Money Laundering and Harmful Tax Competition*, 24 B.C. INT'L & COMP. L. REV. 253 (2001).

[177] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 311, 115 Stat. 272, 298-304 (2001).

[178] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 108-110, 114 Stat. 1464, 1480-84 (2000). The annual State Department Trafficking in Persons Reports determine whether governments have made the required efforts to combat human trafficking. Trafficking in Persons Reports are available at http://www.state.gov/g/tip/rls/tiprpt/ (last visited Feb. 18, 2008).

[179] USTR Special 301 Report is an annual review of the global state of intellectual property rights protection and enforcement. Countries found to have provided inadequate IPR protection may face sanctions. See *supra* note 82.

If those costs overwhelm the benefits of non-cooperation, reluctant governments will likely accept international regulation. However, direct economic penalties are not the only outcome of blacklisting. Countries designated as non-cooperative by the United States (or FATF) may suffer a serious blow to their reputation as well.[180] Tier 3 Countries in the State Department Trafficking in Persons Report (countries whose governments do not fully comply with the minimum standards for the elimination of human trafficking and are not making significant efforts to do so); Priority Foreign Countries in the USTR Special 301 Report on intellectual property (countries with "the most onerous and egregious acts, policies, and practices which have the greatest adverse impact … on the relevant U.S. products [and are] not engaged in good faith negotiations … to address these problems"); "Countries of Primary Concern" in the State Department report on money laundering;[181] and countries identified by the President to have "failed demonstrably" in meeting their counter-narcotics obligations; all receive bad labels that tarnish their reputation.

"Naming and Shaming" those who violate standards of appropriate behavior is not a unique American tactic, of course. Shaming is also one of the popular means in the arsenal of the NGO community. NGOs often attempt to exert pressure on violators of human rights through negative media publicity.[182] Shaming by NGOs, however, fails to achieve the desired effect on state practice in most cases. As Hafner-Burton shows, bad publicity by itself involves low costs,

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[180] I use the term reputation in the sense of global standing or popular perception of the state with a global audience, rather than reputation for compliance. On the distinction between the two see Rachel Brewster, Unpacking the State's Reputation (November 2007) (unpublished manuscript, on file with author).

[181] Money laundering is the subject of Volume II of the International Narcotics Control Strategy Reports, *supra* note 174.

[182] See, for example, MARGARET KECK & KATHRYN SIKKINK, ACTIVISITS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); Price, *supra* note 164; Wexler, supra note 23.

and rarely hurts enough to stimulate reforms.[183] I argue that shaming through US blacklisting is more coercive in nature and more likely to be effective than NGO shaming through negative media publicity. US (and FATF) blacklists have greater coercive impact due to their authoritativeness, institutionalization, and conditionality.

Blacklists carry significant weight since their source – the US Government or an international organization (FATF) – is widely considered to be authoritative. Unlike NGO-criticized governments, blacklisted governments cannot simply brush off the United States rebuke as coming from a marginal or extremist source. The status of the United States as the sole superpower reflects on the condemnations it issues against governments failing to meet standards of appropriate behavior. Since their source is the US Government, such condemnations are more likely to receive attention and serious consideration. They are more likely to be seen by audiences worldwide as credible judgments of governments' conduct.

The institutionalization of US (and FATF) blacklists is another factor contributing to their reputational impact. Blacklists are prepared and published annually. They are the result of systematic review processes with worldwide coverage, relying on multiple sources of information. The comprehensiveness and thoroughness of the review processes endows blacklists with legitimacy. With global coverage and the inclusion of US allies on the lists, criticized governments cannot simply denounce blacklists as ill-motivated targeting of US foes. As they are backed by detailed evidence, blacklists are difficult to dismiss as unfounded accusations. Moreover, continuous monitoring on an annual basis raises the pressure by constantly reminding audiences about the failure of non-cooperative governments to improve their conduct. An institutionalized process is therefore much more harmful to governments' reputation than occasional negative press coverage.

[183] Emilie, M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, INT'L ORG. (forthcoming).

Finally, the conditional nature of blacklists magnifies incentives for cooperation by rewarding improved behavior and penalizing deteriorating behavior. US blacklists are based on clear and explicit standards of good conduct. They identify particular faults in governments' behavior and make specific demands for addressing them. Governments are aware that meeting those demands will result in a better ranking, whereas continued failure to meet the requirements could diminish their standing. For instance, the State Department rewards Tier 2 countries that make progress in combating human trafficking by moving them up to Tier 1. Persistent lack of progress or worsening record, on the other hand, could move Tier 2 countries down to Tier 2 Watch List and even Tier 3. The implied threat and promise combined with clear and specific requirements offer governments more powerful incentives than critical media coverage. Governments who know precisely what is expected of them and can see immediate results to their efforts through better ranking have stronger motivation for cooperation.

Similar to economic coercion, tarnished reputation may influence governments through negative material consequences. For example, Colombia's decertification in 1997 due to insufficient efforts to control drug traffickers unsettled the economy and deterred much needed foreign investment.[184] Reputational coercion, however, may also affect governments through various mechanisms that do not involve a direct manipulation of cost/benefit calculations. Policymakers may be psychologically motivated "to avoid the sense of shame or social disgrace that commonly befalls those who break widely accepted rules."[185] The opprobrium associated with norm breaking may cause them cognitive discomfort and a blow to self-esteem. Governments interested in maintaining their international status and prestige may wish to avoid

[184] BEWLEY-TAYLOR, *supra* note 153, at 203.
[185] Oran Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS, 160, 177 (James Rosenau and Ernst-Otto Czempiel eds., 1992).

being blacklisted; the same for governments concerned about the impact of negative reputation on their domestic legitimacy.[186]

As explained earlier, the magnitude of such non-material effects, and hence their coercive impact, are larger for US blacklists than for other forms of shaming. In fact, governments may be more concerned about the reputational effects of blacklists than about their immediate material implications. Although the United States threatens to withdraw aid from countries ranked as Tier 3 by the State Department Trafficking in Persons Report, Israeli officials have considered aid withdrawal unlikely. For them, the primary consequence of Israel's Tier 3 ranking in the 2001 Report was reputational. The US blacklist seriously hindered Israel's efforts to foster the positive image of a country that respects human rights. In an attempt to rehabilitate its good name, Israel stepped up the efforts against human trafficking and advanced to Tier 2 the following year.[187]

D. Cooperation in Time

The use of coercion to establish cooperation involves "manipulating the opportunities and constraints encountered by target countries."[188] If anti-regulation governments find that the costs of non-cooperation exceed its benefits, they will cooperate. Coercion, however, does not change their underlying preference. Free from coercion, they would still oppose international regulation.

Unlike coercion, time may bring about actual change in preferences on international regulation. First, government change may lead to preference change. Government's preference is the result of balancing the negative externalities of the trade with pressure from exporters and consumers. A new government in power may weigh the competing influences differently than the previous one and strike a different balance. For example, the Labor government that assumed

[186] For a review of the microprocesses of social influence see Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487 (2001).
[187] See Asif Efrat, Governing Guns, Opposing Opium: The Politics of Internationally Regulated Goods (2008) (Ph.D. Dissertation, Harvard university) (on file with author).
[188] Simmons et al., *supra* note 8, at 790.

office in Britain in 1997 adopted a more morally-inspired foreign policy than its predecessor. Whereas the damage caused by the antiquities trade to developing countries was not a concern for the Conservative government, the Labor government found the looting of antiquities more troubling. In other words, antiquities became a source of secondary negative externalities for the Labor government. Additionally, the Labor government was less protective of the interests of the art market than the previous government. Caring about the negative externalities of antiquities and less committed to consumers, the Labor government was willing to accept international regulation of the antiquities trade and ratified the 1970 UNESCO Convention on cultural property in 2002.[189]

Preferences may also shift as a result of changes in the external environment. Negative externalities that were initially small may increase enough to overwhelm the anti-regulation influence of exporters and consumers. Governments that previously faced only pressure from exporters or consumers without negative externalities, may become cross-pressured. The Chinese government favored weak protection of intellectual property rights as long as China had only benefits to reap from the sale of pirated and counterfeit goods. Yet with the modernization of recent years, Chinese companies started suffering losses from trademark and copyright infringement. Accordingly, China has become more cooperative on IPRs and has been undertaking a significant reform of its intellectual property laws.[190]

Another change in time that may affect non-cooperative governments is broad international acceptance of regulation. Once a large number of countries have come to embrace international regulation, it becomes difficult to maintain an uncompromising anti-regulation position. Why is this the case? Finnemore and Sikkink focus on international socialization

[189] Efrat, *supra* note 187.
[190] Keith Maskus et al., *Intellectual Property Rights and Economic Development in China*, *in* INTELLECTUAL PROERTY AND DEVELOPEMTN: LESSONS FROM RECENT ECONOMIC RESEARCH 295 (Carsten Fink & Keith Maskus eds., 2005)

processes that result from wide endorsement of a new norm. They argue that widespread norm adoption exerts peer pressure that affects the legitimation, conformity, and esteem of norm violators.[191] I suggest that broad acceptance of international regulation can also translate to *domestic* pressures on governments to cooperate. International antiquities regulation is a case in point. By the late 1990s, the 1970 UNESCO Convention achieved about 90 ratifications. The growing adherence to the Convention and efforts of source countries to promote further acceptance raised awareness in market countries to the problem of looted antiquities. As a result, media exposure of unscrupulous conduct by art market actors in Britain generated public outcry. This, in turn, contributed to the British government's willingness to adopt a more cooperative position and join the Convention.[192]

V. CONCLUSION

Free trade is one of the most important principles of the world economy. Accordingly, the trade literature has been focusing on the lowering of trade barriers and facilitation of commerce. This paper, in turn, emphasizes the exact opposite: restrictions and prohibitions on potentially harmful trade. My theory brings under one framework cooperative arrangements from different issue-areas and emphasizes the underlying political conflict that they share. This conflict originates from the wide preference gap between anti-regulation governments that benefit from uncontrolled trade and pro-regulation governments interested in curbing the trade's externalities. As I explained above, the source of these conflicting preferences is in the domestic political arena, where the public, exporters, consumers, and civil society all shape governments' positions. Another important aspect of my theory is the integration of rationalist and non-rationalist

[191] Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).
[192] Efrat, *supra* note 187.

approaches to international law. Governments in my theory respond to material influences, such as exporters' and consumers' pressure, yet they may also have value-based concerns for the welfare of foreign countries.

My analysis has focused on the sharp divergence of government preferences as the primary obstacle to international regulation. Preference divergence, however, is not the only obstacle to the international efforts against problems like gun violence or antiquities looting. Lack of capacity may also hinder these efforts. Many developing countries simply do not have enough resources to enforce their laws fully, guard their borders effectively, or detect and seize the relevant goods. Even in developed countries those goods often elude customs inspection. Another impediment is uncertainty. Information about smuggling routes or the operations of traffickers, for example, is difficult to gather. Finally, international cooperation between law enforcement agencies faces multiple obstacles, such as incompatibility of national databases and inadequate information exchange. And yet the key problems are the large variation in national preferences over international regulation and the reluctance of certain governments to address the trade's externalities. When common interest exists, governments can work together to enhance capacity and overcome uncertainty. Yet if certain governments identify only costs and no gains from international regulation; if the linchpin of cooperation – shared interest – is absent; joint international action becomes infinitely more difficult to establish.

What are the policy implications of the theory? As I have explained above, powerful governments interested in regulation can overcome the problem of preference divergence through coercion. Employing coercion, however, is not an option for weak governments wishing to promote international regulation. Those governments may find that the global regulatory agreement fails to meet their needs, either because the powerful governments generating the externalities have not joined it or because the agreement has been watered down considerably to

allow the powerful governments to join. When this is the case, weak governments can focus on bolstering national controls as well as strengthening regional cooperation, where consensus is more easily achieved than at the global level. Consider small arms, for example. National and regional regulation of small arms may be the only viable option for the African countries, given that the primary global framework – the Program of Action on Small Arms – fails to provide an adequate response to the scourge of gun violence. National and regional efforts, however, are only a second-best solution. An effective response to the problem of trade externalities must involve the externalities-generating countries and tackle the externalities at their source. National or regional efforts that do not address the source of the externalities cannot therefore fully substitute for global regulation. An alternative solution would entail awareness-raising activities intended to educate publics and policymakers about the harmful effects of uncontrolled trade. Fostering concern about the trade's impact abroad (secondary externalities) may ultimately lead anti-regulation governments to reverse their position.

In addition to policy implications, my study has theoretical implications for three bodies of literature. First, my analysis suggests that trade policy preferences are shaped by a larger variety of influences than the trade literature has acknowledged. Interest groups demands are at the heart of conventional trade policy models, and consumers' welfare figures into governments' calculations as well. My theoretical framework has introduced additional influences on trade policy: the negative effects of the trade on society, value-based concerns, and the government's own interest as exporter or consumer. These influences, in particular value-based motivations, should become an integral part of trade policy analysis. As human rights issues become closely linked with trade,[193] trade policy models can no longer be based solely on material factors, without taking into account values and moral views. Both dimensions – material and value-based

[193] AARONOSN AND ZIMMERMAN, *supra* note 152.

concerns – shape many of the contemporary debates over trade, and if our theoretical lens remains focused on the former and insensitive to the latter, we are bound to miss an important part of the picture.

Second, my analysis suggests that coercion plays an important role in stimulating normative change.[194] Constructivists acknowledge that coercion is indeed a mechanism of social influence and that spreading norms may require the use of punishments and rewards.[195] Yet Constructivist analysis privileges a different social mechanism: persuasion – "changing minds, opinions, and attitudes about causality and affect (identity) in the absence of overtly material or mental coercion."[196] As Johnston observes, the "focus on persuasion … [is] what really distinguishes [constructivists] from neorealists or contractual institutionalists."[197] My theoretical framework, however, demonstrated that coercion may play an important role in norm promotion. Backed by American power and influence, the norms against drugs, money laundering and counterfeiting/piracy have gained wide adherence. Norms that did not enjoy American support, such as those on small arms and landmines, have achieved far less success. Analysis of normative change must therefore take into account coercive – in addition to persuasive – mechanisms.

Finally, this paper has implications for the international law and cooperation literature at large. The explanation for the difficulties in cooperation on small arms, drugs, or antiquities is not any of those typically offered by the literature. The main obstacle in all these cases is not incentives to cheat, a collective action problem, or uncertainty; rather, it is the absence of shared

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[194] The key role of coercion in my theory is in line with Goldsmith and Posner's analysis. See GOLDSMITH & POSNER, *supra* note 155, at 12.
[195] See, for example, Ryan Godman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE. L. J. 621 (2004).
[196] Johnston, *supra* note 186, at 496.
[197] *Ibid*, at 495. See in general James Dillard & Michael Pfau, THE PERSUASION HADNBOOK: DEVELOPMENTS IN THEORY AND PRACTICE (2002).

interest. When certain governments face a massive gun or drug problem while others make profit by supplying these goods, there is little common ground. The primary difficulty is therefore the highly conflicting preferences of governments and the large gap between governments that benefit considerably from international regulation and those that stand to lose. We risk overlooking this major obstacle if we follow much of the literature and take the mutual gains assumption as the premise of our analysis. Assuming that a treaty benefits all governments would prevent us from realizing that for certain governments a treaty may mean costs and no gains. The general theoretical point is therefore that mutual gains and shared interest should be problematized, rather than assumed. Analysis of discord should not begin by asking why states failed to capture joint gains. Instead, the starting point should be: Are there any joint gains to capture? Collective action problems can impede cooperation and so can uncertainty, but at times the obstacle is more fundamental. Different states may simply want very different things.