

A THEORY OF INTERNATIONALLY REGULATED GOODS

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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 World Trade Organization (“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’ choices to join the world trading system and remove 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. *Whereas world trade in general has indeed become more liberalized in recent decades, trade in specific goods has become more controlled and significantly less free.* Through a set of international regulatory agreements, governments have increasingly controlled a growing list of goods, from drugs to antiquities to diamonds to small arms. The purpose of these regulatory agreements is to reduce the *negative externalities* for society resulting from uncontrolled trade in these

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1. See 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 Judith Goldstein et al., *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT’L ORG. 37 (2007).

3. See, e.g., 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 JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006); MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE (3rd ed. 2005); Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT’L L.J. 303 (2004).

goods, such as crime associated with widespread drug abuse, archaeological destruction caused by the plunder of antiquities, the financing of rebel military campaigns through the sale of diamonds, and fatalities resulting from the proliferation of small arms.

This Article examines the overlooked countertrend of international trade regulation. It offers a theory of internationally regulated goods (“IRGs”)⁴ that explains why certain goods are regulated internationally, how governments form their preferences on international regulation, and how they establish cooperation. This Article argues that international regulation allows governments to make up for the deficiencies of national regulation by inducing the externalities-generating countries to establish proper controls. Two groups of governments, therefore, support international regulation: governments facing the trade’s negative externalities upon their own countries (primary externalities) and governments concerned about the trade’s negative effects on foreign countries (secondary externalities). The latter may 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, or drug exporters. With little shared interest among governments, the political conflict ends in weaker regulation if the governments *resisting* regulation are more powerful, and in stronger regulation if the governments *favoring* regulation are more powerful.

Beyond identifying and analyzing the trend of internationally regulated goods, this Article makes several additional contributions. Most importantly, the theoretical model bridges rationalist and nonrationalist accounts of international law by combining self-interest calculations with morally-inspired motivations. In my theory, governments respond to material influences, such as interest group pressure, yet they may also harbor value-in-

4. I use the abbreviation IRGs (internationally regulated goods) to denote the set of goods that this Article examines. These goods become regulated only at the end of a political process. For the sake of convenience, however, I employ this abbreviation throughout the analysis.

spired concerns for the welfare of foreign countries. The theory can therefore answer puzzling questions such as: Why did the United States launch a worldwide campaign against human trafficking in 2000? Why has the United States accepted the international regulation of antiquities, to the benefit of foreign countries facing archaeological plunder and to the detriment of the American art market? The theory developed in this Article also sheds light on international cooperation against small arms proliferation and misuse, money laundering, counterfeiting, and a host of other problems that threaten international security, the international economy, and human welfare.⁵

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 accounts for their considerable variation. Part IV examines how cooperation is established in light of the conflicting preferences of governments. Part V concludes with implications for policy and for international law scholarship.

II. *WHY INTERNATIONAL 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.⁶ 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.⁷ A large body of political economy literature explores the origins of trade liberalization and offers various explanations for the lowering of trade barriers.⁸ A similar focus has also characterized international le-

5. See, e.g., MOISÉS NAÍM, *ILLCIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* (2005); CAROLYN NORDSTROM, *GLOBAL OUTLAWS: CRIME, MONEY, AND POWER IN THE CONTEMPORARY WORLD* (2007); TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL? (Mats Berdal & Mónica Serrano eds., 2002).

6. See Arcelia Quintana-Adriano, *Legal Mercantile Evolution from the Twentieth Century to the Dawning of the Twenty-first Century*, 42 *TEX. INT'L L.J.* 831, 832-36 (2007).

7. See Milner & Kubota, *supra* note 3, at 111-15; Beth Simmons et al., *Introduction: The International Diffusion of Liberalism*, 60 *INT'L ORG.* 781, 781-83 (2006).

8. See, e.g., JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLIT-*

gal scholarship. Trade law scholars have written extensively on trade liberalization, especially through the General Agreement on Tariffs and Trade (“GATT”), WTO, and the North American Free Trade Agreement (“NAFTA”).⁹ Both the political economy literature and legal scholarship have emphasized a growing trend of freer trade.

I argue that the scholarly focus on the reduction of trade barriers has overlooked a countertrend.¹⁰ Contrary to the general trend of trade liberalization, the trade in specific goods 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 through a set of international regulatory agreements:

The international drug regime was established prior to World War I, was bolstered after World War II, and controls the trade in drugs to this day.¹¹

Beginning in 1995, the United Nations (“U.N.”) has been leading a process intended to regulate the trade in small arms and light weapons, producing the Program of Action on Small Arms.¹²

International efforts against the trade in persons for sexual exploitation (human trafficking) originated in the early twentieth century and received a boost in recent years under U.S. lead-

ICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO (2006); Judith Goldstein, *Ideas, Institutions, and American Trade Policy*, 42 INT’L ORG. 179 (1988); Goldstein et al., *supra* note 2; 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); Milner & Kubota, *supra* note 3.

9. See, e.g., ROBERT HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993); JOHN JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (2000); JOSEPH WEILER, *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* (2000).

10. 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).

11. See Kal Raustiala, *Law, Liberalization and International Narcotics Trafficking*, 32 N.Y.U. J. INT’L L. & POL. 89, 93-114 (1999); Thomas, *supra* note 10, at 559-63; see generally WILLIAM B. McALLISTER, *DRUG DIPLOMACY IN THE TWENTIETH CENTURY: AN INTERNATIONAL HISTORY* (2000).

12. See DENISE GARCIA, *SMALL ARMS AND SECURITY: NEW EMERGING INTERNATIONAL NORMS* (2006); GRADUATE INST. INT’L STUDIES, *SMALL ARMS SURVEY 2002: COUNTING THE HUMAN COST* 203-22 (2002).

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The 1989 Basel Convention controls the trade in hazardous wastes.¹⁴

A 1970 convention of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and a 1995 convention of the International Institute for the Unification of Private Law (“UNIDROIT”) regulate the international trade in antiquities.¹⁵

Starting in the 1980s, the international campaign against money laundering has imposed various controls on financial transactions.¹⁶

The trade in wildlife is conducted in accordance with the Convention on International Trade in Endangered Species (“CITES”), adopted in 1973.¹⁷

Since 2003, the Kimberley Process Certification Scheme has attempted to ensure the legitimacy of the diamond trade and to stop the trade in conflict diamonds.¹⁸

13. See Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 2 (2004); Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437 (2006). See generally Linda Smith & Mohamed Mattar, *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).

14. See KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES (1995); 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); 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. REV. 477 (2000).

15. See PAUL BATOR, THE INTERNATIONAL TRADE IN ART (1983); PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC (2000); LYNDAL PROTTE, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS 1005 (1997).

16. See WILLIAM GILMORE, DIRTY MONEY: THE EVOLUTION OF INTERNATIONAL 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 LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL (2000).

17. See 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).

18. See 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*

The World Health Organization (“WHO”) Framework Convention on Tobacco Control, signed in 2003, aims at significantly reducing the prevalence of tobacco consumption.¹⁹

The 1997 Landmine Convention bans the production, use, and transfer of anti-personnel landmines.²⁰

An optional protocol to the Convention on the Rights of the Child bans the sale of child pornography.²¹

Combating the trade in counterfeit and pirated goods is among the purposes of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).²²

As of 2008, twelve goods²³ have become IRGs—they have been subjected to international regulation through a set of twenty-two global agreements. Table 1 lists all global IRG agreements in force today.²⁴ Note that while most of these agreements take the form of legally-binding instruments, some do 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

Smuggling 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).

19. See Benjamin M. 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).

20. See Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of 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).

21. See 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).

22. See generally CARLOS M. CORREA, *TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT* (2007); INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998); KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000).

23. See *supra* notes 11-22 and accompanying text. Money laundering is, in fact, a service, rather than a good, as is human trafficking, the purpose of which is sexual or labor exploitation. These services share many similarities with internationally regulated goods, and I therefore include them in the analysis. Note also that a regulated good can be, in fact, a *category* of objects. For example, “small arms” are weapons designed for personal use, such as pistols, rifles, and shotguns, and “counterfeits” may be any type of counterfeit goods.

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

these goods, thereby making the trade in them more difficult to carry out. Such purpose is the 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 ^a	1961 ^b
Drugs	Convention on Psychotropic Substances ^c	1971
Drugs	Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ^d	1988
Small arms	Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects ^e (Program of Action on Small Arms)	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 ^f	2001
Antiquities	First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict ^g	1954
Antiquities	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention") ^h	1970
Antiquities	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("UNIDROIT Convention") ⁱ	1995
Human beings	Slavery Convention ^j	1926
Human beings	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ^k	1956
Human beings	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ^l	1949 ^m
Human beings	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime ⁿ	2000
Money laundering	The Forty Recommendations ^o	1990
Money laundering	U.N. Convention Against Transnational Organized Crime ^p	2000
Money laundering	U.N. Convention Against Corruption ^q	2003
Counterfeit and pirated goods	Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") ^r	1994
Hazardous wastes	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ^s ("Basel Convention")	1989
Diamonds	Kimberley Process Certification Scheme ^t	2002

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Good	Agreement	Year Adopted
Endangered wildlife and plants	Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") ^u	1973
Landmines	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction ("Landmine Convention") ^v	1997
Child pornography	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography ^w	2000
Tobacco	WHO Framework Convention on Tobacco Control ^x	2003

^uSingle Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (amended by 1972 Protocol).

^bThe Single Convention on Narcotic Drugs is a consolidation and expansion of several pre-World War II agreements. For the purpose of Figure 1, I consider 1945 as the year of adoption.

^cConvention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.

^dConvention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 493.

^eProgram of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. No. A/CONF.192/15 (July 20, 2001).

^fProtocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (June 8, 2001).

^gFirst Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358.

^hConvention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

ⁱUNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322.

^jConvention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, amended by Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51.

^kSupplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

^lConvention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 29, 1949, 96 U.N.T.S. 271.

^mThe 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, I consider 1945 as the year of adoption.

ⁿProtocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, annex II, U.N. Doc. A/55/383 (Nov. 15, 2000) (supplementing the U.N. Convention Against Transnational Organized Crime).

^oFinancial Action Task Force on Money Laundering [FATF], *The Forty Recommendations* (June 20, 2003), <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF>.

^pU.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/55/383 (Nov. 15, 2000).

^qU.N. Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Dec. 11, 2003).

¹Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

²Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125, 28 I.L.M. 657.

³Kimberley Process Certification Scheme, *available at* http://www.kimberleyprocess.com/documents/basic_core_documents_en.html.

⁴Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

⁵Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211, 36 I.L.M. 1507.

⁶Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000).

⁷WHO Framework Convention on Tobacco Control, WHA Res. 56.1 (May 21, 2003).

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

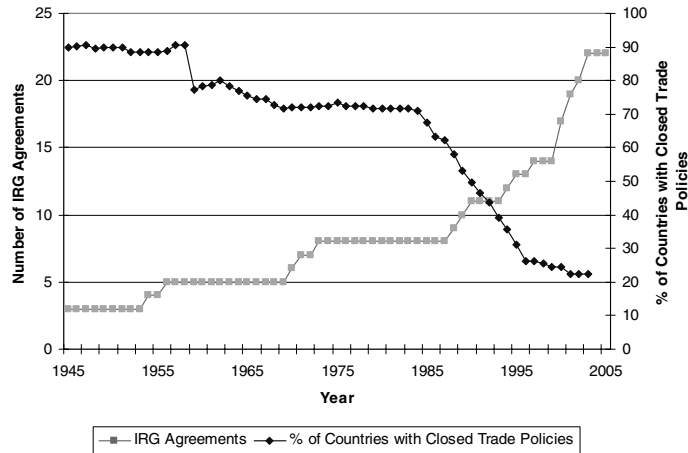


Figure 1. Trade liberalization and trade regulation

Note: IRG agreements are plotted by year of adoption

The downward-sloping line represents the trend that the literature has 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 2001.²⁵

25. Data on trade policy openness are 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 update that of Jeffrey Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration*, 26 *BROOKINGS PAPERS ON ECON. ACTIVITY* 1 (1995). A country was classified as closed if it displayed at

Yet at the same time that governments have liberalized their trade policies, they have also increasingly regulated specific goods through cooperative international agreements. As the upward-sloping line shows, the number of global 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, Organization of American States (“OAS”) Firearms Convention,²⁶ Council of Europe Convention on Action Against Trafficking in Human Beings,²⁷ Bamako Convention on Hazardous Wastes²⁸), 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 Africa²⁹), or bilateral agreements (such as U.S.-Mali and U.S.-Nicaragua agreements concerning the imposition of import restrictions on archaeological material³⁰). In some cases, those non-global agreements preceded the global ones. For example, regional agreements on small arms in Africa, Latin America, and Europe

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 1980s; (4) a state monopoly on major exports; or (5) a socialist economic system. See Wacziarg & Welch, *supra*, at 190.

26. 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).

27. Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, 45 I.L.M. 14.

28. Bamako Convention on the Ban of 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.

29. Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, Apr. 21, 2004, <http://www.saferfrica.org/DocumentsCentre/Books/NairobiProtocol/nairobiProtocolEng.php>.

30. See Agreement Between the Government of the United States of America 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 Century, Sept. 19, 1997 (amended on September 17, 2007), *available at* <http://www.culturalheritage.state.gov/Mali2007Mou.pdf> [hereinafter U.S.-Mali Agreement]; Agreement Between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures of the Republic of Nicaragua, June 16, 1999, *available at* <http://www.culturalheritage.state.gov/ni99agr.html> [hereinafter U.S.-Nicar. Agreement].

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.³¹ The theoretical analysis in this Article focuses on the *global* regulatory agreements.

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 largely a matter of national discretion and may vary from country to country. In contrast, this Article focuses on *intergovernmental agreements* 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 the goods,³² while in others, the production, distribution, possession, or use of the goods may be the subject of regulation. The Single Convention on Narcotic Drugs is an example.³³ Several agreements have additional dimensions, such as raising public awareness or fostering cooperation between law enforcement agencies.³⁴

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 child pornography, counterfeits/pirated goods, and landmines.³⁵ For most goods, however, regulation involves a

31. See Asif Efrat, *Governing Guns, Opposing Opium: The Politics of Internationally Regulated Goods*, 234-35 (2008) (unpublished Ph.D. Dissertation, Harvard University) (on file with author). For examples see U.S.-Mali Agreement and U.S.-Nicar. Agreement, *supra* note 30.

32. See generally CITES, *supra* Table 1 note u.

33. Single Convention on Narcotic Drugs, *supra* Table 1 note a.

34. See, e.g., Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *supra* Table 1 note e. Sections II.20, II.41, and III.18 address the raising of awareness to the problems associated with small arms. See *id.* §§ II.20, II.41, III.18. Section II.27 encourages states to establish trans-border customs cooperation and networks for information-sharing among law enforcement, border and customs control agencies. See *id.* § II.27.

35. See, e.g., Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* Table 1 note w. Arti-

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.³⁶ 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 for medical and scientific purposes . . . and to prevent illicit cultivation, production . . . and use of, drugs.”³⁷ 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.³⁸ The Kimberley Process Certification Scheme involves standardized certificates that must accompany international shipments of rough diamonds, detailing the identity of the exporter and importer, value of the shipment, and so on.³⁹ Whether they involve import and export guidelines, procedures for tracing and recovery, or any other regulatory measure, the purpose of the regulatory agreements is to establish uniform standards for the treatment of the goods. They 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 small arms and drugs differs in important ways from the typical motivation for trade restrictions—protection. Typically, the purpose of trade barriers, such as tar-

cle 3.1(c) requires states to criminalize “Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography” *See id.* art. 3.1(c).

36. *See* Single Convention on Narcotic Drugs, *supra* Table 1 note a, arts. 29, 30.

37. *See id.* art. 9(4).

38. *See generally* CITES, *supra* Table 1 note u. The species covered by CITES are listed in three Appendices. Appendix I includes species threatened with extinction. *See id.* app. I. Trade in specimens of these species is permitted only in exceptional circumstances. *See id.* 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. *See id.* app. II. Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade. *See id.* app. III.

39. *See* Kimberley Process Certification Scheme, *supra* Table 1 note t.

iffs and quotas, is to protect the income of certain sectors or industries that are harmed by trade liberalization.⁴⁰ By contrast, this Article examines 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.⁴¹ In some cases, societies in the *importing* countries bear 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 education; and reduction in productivity, tourist streams, and foreign investment.⁴² Free trade in drugs could lead to widespread drug abuse in drug-importing countries, resulting in crime, higher health care costs, and lower workforce productivity.⁴³ Certain actors may indeed welcome the availability of guns and drugs. Illicit drug-users may “benefit” from an abundance of drugs, and both criminals and 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 small arms and drugs, in other cases, the *exporting* countries bear the negative externalities of the trade. For example, uncontrolled trade in antiquities causes looting and destruction of archeological sites in archaeologically-rich countries,⁴⁴

40. See, e.g., 25 C.J.S. *Customs Duties* § 4 (explaining that one reason the U.S. government enacts customs laws is to protect American industries).

41. See PAUL SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* 208 (1947) (defining externality as a situation in which “individual’s actions have effects on others which he does not take into account in making his decision”); see also Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

42. See WENDY CUKIER & VICTOR SIDEL, *THE GLOBAL GUN EPIDEMIC: FROM SATURDAY NIGHT SPECIALS TO AK-47s* 12-47 (2006); GRADUATE INST. INT’L STUDIES, *SMALL ARMS SURVEY 2006: UNFINISHED BUSINESS* 189-213 (2006); GRADUATE INST. INT’L STUDIES, *SMALL ARMS SURVEY 2005: WEAPONS AT WAR* 229-65 (2005); GRADUATE INST. INT’L STUDIES, *SMALL ARMS SURVEY 2004: RIGHTS AT RISK* 173-211 (2004).

43. See U.N. INT’L 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.

44. See *ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY* (Neil Brodie & Kathryn Walker Tubb eds., 2002); *TRADE IN ILLICIT ANTIQUITIES*

and allowing the sale of “conflict diamonds” fuels conflict in diamond-exporting countries.⁴⁵ As in the cases of small arms 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. For example, uncontrolled trade in small arms threatens not only those countries that are awash with guns. Neighboring countries feel the effects of gun proliferation as well through refugee flows and obstruction of commerce, to name just two consequences. Pirated goods are another example: as country A exports pirated goods to country B, the results are lost revenue to the original author in country C and the inhibition of future innovation.⁴⁶

Uncontrolled trade in IRGs can impose harmful—even devastating—externalities on society. *The purpose of international regulation is to curb the negative externalities that these goods involve.* 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 to restrict the use of drugs to medical and scientific purposes. Controlling the diamond trade seeks to enable consumers to purchase and enjoy the precious stones without inadvertently financing conflicts in Africa. For conventional trade, governmental interference through trade barriers causes net loss, whereas trade liberalization enhances national

TIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE (Neil Brodie et al. eds., 2001).

45. See GREG CAMPBELL, *BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES* (2002).

46. Cf. Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1458-59 (2002) (discussing how intellectual property rights provide innovators the benefit of their investment and encourage future innovation).

welfare.⁴⁷ The reverse is true for IRGs. Uncontrolled trade in these goods could be harmful, 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 negative externalities of trade, but it often proves insufficient. In many cases, national regulation exists on the books without actual effectiveness. Countries in Africa and Latin America impose restrictions on the import and possession of small arms,⁴⁸ yet they suffer from high rates of gun violence. Many archaeologically-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.⁴⁹ Nevertheless, illegal 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, and limitations on the export of antiquities do not lessen the interest of museums and collectors in acquiring 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 for suppliers to flout national regulation are especially great because many of the relevant commercial activities—such as antiquities looting, drug export, and human trafficking—promise a high yield with a relatively low-cost investment.⁵⁰

Second, law enforcement agencies have limited capacities. Border control, customs, and police forces are never fully effec-

47. On the economic case for free trade and against protection, see THOMAS OATLEY, *INTERNATIONAL POLITICAL ECONOMY: INTERESTS AND INSTITUTIONS IN THE GLOBAL ECONOMY* 43-49 (2d ed. 2005).

48. See CUKIER & SIDEL, *supra* note 42, at 135-70.

49. See LYNDAL PROTTE & PATRICK O'KEEFE, *HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY* (1988).

50. Note that information on the volume and value of the trade in IRGs is often anecdotal and is, at best, a gross estimate. NAIM, *supra* note 5, at 11.

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tive, even in developed countries, let alone in developing countries where trained and equipped law enforcement personnel is a scarce resource. A large territory or difficult terrain may also compromise national control efforts. The larger the territory and the longer the borders, the more difficult 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. For example, once drug use or antiquities export is banned, drugs users or antiquities looters, respectively, attempt to hide from law enforcement authorities and are therefore difficult to control.

Third, national regulation has become increasingly difficult in recent years due to the growing openness of the global economy. Financial and overall trade liberalization, improvements in communication and transportation, and the easing of restrictions on cross-border transactions have significantly hampered the ability of states to enforce trade controls and have provided greater opportunities to those who trade in IRGs.⁵¹ 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.⁵² Similarly, the large increase in the volume of international trade has unintentionally resulted in greater ability to hide drugs and antiquities and has lowered the probability of interdiction and seizure.⁵³

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 the goods and the transnational nature of the externalities, that is, the incongruence between the countries generating the externalities and the countries bearing them.

I asserted above that IRGs involve significant negative externalities. However, such negative externalities vary considerably across countries. For example, while gun violence exists in virtu-

51. See Peter Andreas, *Transnational Crime and Economic Globalization*, in *TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL?*, *supra* note 5, at 37-40.

52. See CUKIER & SIDEL, *supra* note 42, at 88-108 (describing patterns and models of the illegal trade in small arms).

53. See Raustiala, *supra* note 11, at 115-23.

ally any country, the magnitude of the problem ranges 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 0.02.⁵⁴ Rates of drug abuse also vary cross-nationally. In the United States, 2.8% of the population aged 15-64 abuse cocaine—seven times the cocaine abuse rate in Mexico (0.4%); the rate of opiate abuse in Iran is 2.8%; in Japan, only 0.06%.⁵⁵ 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 counterfeit and pirated goods. 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. The trade in antiquities has caused major losses in antiquities-rich countries, among them Mexico, Italy, India, and Mali.⁵⁶ Developing countries—the dumping grounds for hazardous wastes—have been the main victims of uncontrolled waste movement.⁵⁷

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. For example, 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;⁵⁸ the British art market has benefited

54. See CUKIER & SIDEL, *supra* note 42, at 36, 42.

55. See U.N. OFFICE ON DRUGS AND CRIME, 2007 WORLD DRUG REPORT at 242-43, U.N. Sales No. E.07.XI.5 (2007), available at https://www.unodc.org/pdf/research/wdr07/WDR_2007.pdf. U.S. data is for 2005; Mexican data is for 2002; Iranian data is for 1999; Japanese 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. See *id.* at 264-65.

56. See PERNILLE ASKERUD & ETIENNE CLEMENT, PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY 10-11 (1997).

57. See Valentina O. Okaru, *The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries*, 4 FORDHAM ENVTL. L. REV. 137, 137-38 (1993). The U.N. Secretary-General 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." See Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 24, 31 (1994).

58. See GRADUATE INST. INT'L STUDIES, SMALL ARMS SURVEY 2006: UNFINISHED BUSINESS 65-69 (2006).

handsomely by selling antiquities looted from their countries of origin,⁵⁹ and pirated and counterfeit goods have been a source of revenue for countries worldwide, including Russia, Vietnam, and Turkey, among others.⁶⁰ IRGs' negative externalities are therefore *transnational*: the countries generating the externalities are different from those bearing 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 often take a permissive approach and establish loose national controls. Conversely, countries facing large negative externalities impose strict national control on the production, possession, import, or export of the goods, 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. For example, 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 or transfer through their territory. Mexico's attempts to limit gun inflows⁶¹ cannot fully succeed due to the ease of gun purchase in the United States.

As negatively-affected countries on their own cannot fully curb the trade's externalities, they seek to augment national efforts by strengthening control at the other end of the chain and tackling the externalities *at their source*. For example, restricting import of guns is easier if arms-exporting countries regulate gun export. Similarly, unauthorized removal and export of antiquities are less likely to occur if market countries control the entry

59. See, e.g., NEIL BRODIE ET AL., *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 23-25 (2000), available at http://www.mcdonald.cam.ac.uk/projects/iarc/research/illicit_trade.pdf (estimating the financial value of the trade in illicit antiquities in Britain). See generally PETER WATSON, *SOTHEBY'S: THE INSIDE STORY* (1997) (discussing the involvement of the well-known auction house Sotheby's in selling looted antiquities).

60. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT (2007), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf (listing countries in which violation of intellectual property rights is rampant).

61. See Marc Lacey, *Killings in Drug War in Mexico Double in '08*, N.Y. TIMES, Dec. 9, 2008, at A17. See generally James C. McKinley Jr., *U.S. Stymied as Guns Flow to Mexican Cartels*, N.Y. TIMES, Apr. 15, 2009.

of antiquities, as those countries' demand motivates the looting of antiquities. Coordination of national controls—through international regulation—is therefore a means to overcome the limited utility of national efforts. Through international regulation, externalities-bearing countries attempt to shift the burden of control and induce the establishment of adequate restraints by the externalities-generating countries. The international regulation of drugs and small arms seeks to restrain drug-exporting and arms-exporting countries and make them reduce their exports' negative externalities. The purpose of regulating the antiquities trade is to put curbs on market countries, so as to reduce the archeological plunder caused by demand from consumers of antiquities: art dealers and auctioneers, museums, and private collectors.

In short, international regulation aims to narrow 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 that are the source of the externalities, international regulation aligns state practices in order to curb the negative effects of uncontrolled trade.

D. *Why Not a Coasian Bargaining Solution?*

The Coase Theorem⁶² 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 actors generating the externalities. In the absence of transaction costs, the parties should be able to strike an efficient bargain. Is this a viable solution for addressing the externalities of the trade in small arms, drugs, and other IRGs?

I argue that IRGs raise various difficulties that preclude the type of contracting Coase proposes. 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 acquire. Payment is unlikely to convince governments to eliminate landmines, if those governments consider them to be a military necessity. Second, paying off the actors that generate the externalities may not be financially feasible. Poor countries bearing the externalities may not have the re-

62. See generally Coase, *supra* note 41.

quired 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. For example, 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 far from fully effective and a Coasian contract unlikely, international regulation has become an essential method for addressing trade's negative externalities.

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?⁶³ 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, overall trade liberalization has provided an effective cover for illicit cargo.⁶⁴ Due to the increase in the volume of international trade, illegal exports and imports have become more difficult to detect and seize. With more people and goods moving across countries, effective inspection at borders and ports of entry has become a near impossible task.⁶⁵ 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. For example, containerization—the packaging of goods in sealed, standardized containers—has facilitated the movement of legal cargo as well as the illegal export and import of goods.

63. See *supra* fig.1.

64. See Andreas, *supra* note 51, at 41.

65. See Raustiala, *supra* note 11, at 118-20. As Raustiala explains, increased trade volume often entails streamlined customs procedures, which lower the probability of seizures. Moreover, the large volume of trade has created an overwhelming workload for customs agents, leading to less intensive and less effective inspections. See *id.*

Criminals smuggling drugs into the United States have indeed exploited the container revolution, which has allowed them to ship larger amounts of drugs at a lower cost and a lower risk of arrest than alternative methods, such as private planes or speed-boats.⁶⁶ More generally, the increasing number of transportation routes and the lowering of transportation prices, while overall positive developments, have made illegal export and import cheaper and easier.⁶⁷

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. For example, agricultural reforms in Mexico and the drop in farm incomes made farmers turn to illicit crops such as marijuana and opium poppy.⁶⁸ Economic hardship in Eastern Europe after the fall of Communism forced young women to become prostitutes abroad, where they fell victim to human trafficking.⁶⁹

The past twenty years have seen an increase in imports and exports⁷⁰ accompanied by 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 1850-1914.⁷¹ 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 1912.⁷²

66. See Andreas, *supra* note 51, at 40-41.

67. See Raustiala, *supra* note 11, at 117-19.

68. See Andreas, *supra* note 51, at 43-44.

69. See NOMI LEVENKRON & YOSHI DAHAN, WOMEN AS COMMODITIES: TRAFFICKING IN WOMEN IN ISRAEL 2003 19-20 (2003), available at <http://www.hotline.org.il/english/publications.htm>.

70. See Milner & Kubota, *supra* note 3, at 107-08.

71. See generally KEVIN H. O'ROURKE & JEFFREY G. WILLIAMSON, GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY (1999).

72. International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 187; International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

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III. *GOVERNMENT PREFERENCES ON INTERNATIONAL REGULATION*

Inspired by the liberal school of international relations, 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. According to Moravcsik, preferences are “an ordering among underlying substantive outcomes that may result from international political interaction . . . a set of fundamental interests defined across ‘states of the world.’”⁷³ The key question, then, is how governments form their preferences on international regulation. Which governments push for stronger international regulation and which prefer weaker international control?

I begin the analysis with conventional political economy approaches to trade policy. In trade models,⁷⁴ 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 governments as voters.⁷⁵ 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 governments to establish trade barriers and protect their incomes.⁷⁶

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 well, albeit with some important modifications. But the fundamental difference lies in the anti-

73. Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *INT'L ORG.* 513, 519 (1997).

74. My analysis refers to specific factors models, according to which trade politics is driven by competition among industries. See OATLEY, *supra* note 47, at 74-77.

75. See, e.g., Mansfield et al., *supra* note 8.

76. See, e.g., Gene Grossman & Elhanan Helpman, *Protection for Sale*, 84 *AM. ECON. REV.* 833 (1994). On trade policy models in general, see OATLEY, *supra* note 47.

liberalization side. As Grossman and Helpman indicate by titling their trade policy model “Protection for Sale,”⁷⁷ 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 internationally regulated goods. 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.

The following analysis first considers the anti-regulation influence of exporters and consumers on government preferences. The pro-regulation influence of the trade’s negative externalities is then examined. This Article distinguishes between primary externalities (the trade’s negative effects on one’s own country) and secondary externalities (the trade’s negative 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 impediments to selling their products. They seek 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 the opening of foreign markets and enhance export opportunities. Securing foreign market access for exporters has therefore been one of the chief drivers of the move to freer trade.

77. Grossman & Helpman, *supra* note 76.

For example, Bailey et al.,⁷⁸ as well as Gilligan,⁷⁹ 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."⁸⁰

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 or the small arms industry). However, in cases where the goods 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 commercial activity has been banned by national legislation.⁸¹ Antiquities looters are an example: 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 the trade. Rebels' illegal status comes from their desire to overthrow the government, rather than from their sale of conflict diamonds.

How does international regulation affect exporters? On the one hand, regulation may benefit certain exporters through its

78. See Michael Bailey et al., *The Institutional Roots of American Trade Policy: Rules, Coalitions, and International Politics*, 49 *WORLD POL.* 309, 333-37 (1997).

79. See MICHAEL GILLIGAN, *EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION, AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY* 70-73 (1997).

80. 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).

81. As explained above, such national legislation precedes the efforts for international regulation. States resort to international regulation when they find their national legislation ineffective.

anti-competitive effects. By limiting the availability of the goods, regulation may raise their price and allow exporters to reap a regulation premium.⁸² 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.⁸³ 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 its benefits. International regulation could result in a total prohibition on the trade or a ban on certain transactions, could slow the export process under administrative requirements, and could increase the costs of production and transfer of the goods. For example, many countries 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 actors or a prohibition on selling arms if those might be used for human rights violations.⁸⁴ 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. International regulation could, thus, impose a burden on exporters, which is likely to be larger than the possible benefits 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 trade. 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?

82. 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, 433 (2001) (arguing that attorney regulation has resulted in inhibited competition and inflated prices).

83. 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, 978-79 (2003).

84. On transfer controls for small arms, see *GRADUATE INST. INT'L STUDIES, SMALL ARMS SURVEY 2007: GUNS AND THE CITY* 117 (2007).

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 industries may also lessen exporters' enthusiasm to organize politically.⁸⁵ Such considerations, however, are less likely to affect the calculations of IRG exporters. International regulation involves a high certainty of significant loss for exporters, which serves as a strong motivation for political action. Moreover, IRG exporters typically do not need to overcome resistance from import-competing sectors. As explained below, opposition to the free-trade preference of exporters may indeed come from principled actors,⁸⁶ 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.⁸⁷ Some exporters can provide more political contributions than others and "buy" the government's support. The government may guard 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 extra-legal means, such as threats.

Another determinant of the influence of exporters is ownership structure, particularly whether the exporter is state-owned or in private hands. In existing trade policy models, the govern-

85. BARTON ET AL., *supra* note 8, at 30-31.

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

87. GILLIGAN, *supra* note 79.

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ment is a target for demands from interest groups and responds to these 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.⁸⁸ This is not the case for certain IRGs whose exporters are 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. It may therefore be particularly protective of exporters' interests and averse to international regulation. But there may be other reasons for privileging state-owned exporters. The management of state-owned enterprises is part of the state apparatus. As "bureaucrats in business,"⁸⁹ state-owned exporters can therefore influence the government from within. They may enjoy easy access to, and even close personal ties with, policymakers, which makes 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.⁹⁰ State-owned banks in Iran have played an important part in the regime's missile procurement and nuclear programs, as well as in funding terrorism.⁹¹ Contemporary governments are unlikely to follow the example of Britain, who waged war twice in the nineteenth century over its right to sell opium in China.⁹² However, I expect governments to pursue uncontrolled or only weakly-controlled trade when international regulation threatens the interests of state-owned exporters.

88. One exception is the foreign direct investment model offered by Lee Branstetter & Robert Feenstra, *Trade and Foreign Direct Investment in China: A Political Economy Approach*, 58 J. INT'L ECON. 335, 343-47 (2002). In their model, the profits earned by state-owned firms in China receive extra weight in the government's objective function.

89. See generally WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP (1995).

90. See, e.g., AHARON KLIEMAN, DOUBLE-EDGED SWORD: ISRAEL DEFENSE EXPORTS AS AN INSTRUMENT OF FOREIGN POLICY (1992) (in Hebrew).

91. U.S. Dep't of the Treasury, Remarks by Treasury Sec'y Paulson on Targeted Fin. Measures to Protect Our Nat'l Sec. (June 14, 2007), <http://www.ustreas.gov/press/releases/hp457.htm>.

92. See generally W. TRAVIS HANES III & FRANK SANELLO, THE OPIUM WARS (2004).

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.⁹³ Rather, consumers influence trade policy as voters. Governments lower trade barriers in order to garner voters' support in future elections.⁹⁴

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)⁹⁵ 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, the diamond industry) but 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 their possession of guns.

Consumers may be interested in the goods for various reasons. Collectors purchase antiquities because of their aesthetic or historical value or as a financial investment; rebels obtain arms to overthrow the government; counterfeits are simply 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 indifferent to 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

93. See OATLEY, *supra* note 47, at 78-79.

94. Milner & Kubota, *supra* note 3, at 115-17.

95. For data on government-owned small arms, see GRADUATE INST. INT'L STUDIES, SMALL ARMS SURVEY 2006: UNFINISHED BUSINESS 37-63 (2006).

them completely. A minority of consumers, however, does take into account not only their self-interest but also the damage caused by uncontrolled trade; these consumers may therefore welcome regulation. For example, museums are primary consumers of antiquities, but their public trust responsibilities require them to consider the archaeological looting fueled by their demand for antiquities. Certain museums and museum associations have therefore supported the international control of antiquities.⁹⁶ Such consumers, however, are an exception. For the most part, I expect consumers to favor uncontrolled trade.

Yet despite their objection to international regulation, 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 or 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 will 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, that is, consented to the dumping of wastes on their territory in return for hard currency.⁹⁷ Although economists have studied the issue of government procurement,⁹⁸ conventional

96. For example, the Code of Ethics for Museums of the Museums Association in Britain requires museums not to acquire an object if there is any suspicion that the object has been stolen, illegally excavated or illegally exported after 1970 (the year of adoption of the UNESCO Convention on the Illicit Trade in Cultural Property). See MUSEUM ASSOCIATION, CODE OF ETHICS FOR MUSEUMS § 5.10 (2002), available at http://www.museumsassociation.org/asset_arena/text/cs/code_of_ethics.pdf.

97. JONATHAN KRUEGER, INTERNATIONAL TRADE AND THE BASEL CONVENTION 88 (1999).

98. See, e.g., JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION (3d ed. 1998) (1993); Simon Evenett & Bernard Hoekman,

trade policy models do not consider governments to be consumers. For understanding governments' preferences on international regulation, however, one must take into account situations where governments themselves consume the goods. By opposing international control, 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 is sufficiently concentrated to overcome the collective action problem and allow consumers to organize in order to promote their interests. For example, 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.⁹⁹ The Association of Art Museum Directors, as well as individual art museum directors, advocate against stringent regulation of antiquities.¹⁰⁰

C. *Negative Externalities*

Consumers and exporters of IRGs are typically interested in uncontrolled trade. Uncontrolled trade, however, generates negative externalities that drive governments' regulatory efforts. I distinguish between two types of negative externalities: externalities borne by one's own country (primary externalities) and externalities borne by foreign countries (secondary externalities).

1. Primary Externalities

Primary externalities of trade are the negative material effects on one's own country resulting from the production, sale, or use of the goods. Examples include gun homicide and drug-user crime (externalities from use), financing rebel military cam-

Government Procurement: Market Access, Transparency, and Multilateral Trade Rules, 21 EUR. J. POL. ECON. 163 (2005).

99. Carola Kantz, *The Power of Socialization: Engaging the Diamond Industry in the Kimberley Process*, 9 BUS. & POL. issue 3, art. 2, at 11 (2007).

100. See, e.g., JAMES CUNO, *WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE* (2008).

paigns through proceeds from diamonds (externalities from sale), and archaeological destruction caused by unauthorized excavation of antiquities (externalities from production). 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.¹⁰¹ Whereas trade models typically equate consumers with the public, in the case of IRGs the public may have distinct preferences from the actual consumers of the goods. Criminals and drug users may favor uncontrolled trade in small arms and drugs, respectively. The public, however, bears the negative externalities associated with these goods and is interested in curbing the trade.

Why would governments care about the trade's negative effects? Governments will, first and foremost, address externalities that threaten them directly and undermine their control of society, such as rampant gun violence or the financing of rebel campaigns through conflict diamonds. Governments may also believe that their political survival depends on aggregate social welfare. Failure to solve pressing social problems such as gun violence or widespread drug abuse might result in loss of popular support. Another possibility is that actors negatively affected by the trade lobby their government to take action.¹⁰² It may also be the case that policymakers are genuinely concerned about public welfare out of a sense of duty and responsibility. Governments therefore have various incentives to try and control the trade in order to reduce its negative effects. I expect two influences on governments' 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 abuse, the greater should be the government's support for international restraints

101. See, e.g., U.N. Dev. Programme, *Armed Violence in Africa: Reflections on the Costs of Crime and Conflict* 4 (Oct. 2007) (written by Robert Muggah), available at www.undp.org/cpr/documents/armed_violence/AV_crime_conflict.pdf.

102. A case in point is the initiation of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") by the United States under influence from U.S. corporations seeking, among others, to combat counterfeit and pirated goods. See SUSAN SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003).

on the trade in small arms or drugs. The greater the scale of archaeological looting, the stronger should be the government's support for international control of the antiquities trade.

(2) Support for international regulation will decrease as the government's ability to curb the trade on its own increases. As noted earlier, the need for international regulation arises out of the insufficiency of control through national regulation. Governments that cannot control the trade and curb its negative effects by themselves, for example, due to the weakness of law enforcement agencies, are more likely to rely on international regulation in order to establish controls at the other end of the chain. International regulation allows those governments to make up for their own regulatory incapacity. 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.

2. Secondary Externalities

Concern about the negative effects of trade is not limited to those governments whose countries face those effects. Certain governments, motivated primarily by values and moral principles, may care about the trade's negative impact *on foreign countries*. I term such impact *secondary externalities*, that is, the externalities borne by countries other than one's own. In most cases, concern about secondary externalities stems from the humanitarian implications of the goods. Gun proliferation and conflict diamonds cause large-scale killing and maiming; hazardous wastes spread disease. Other goods 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 concern about secondary externalities? Why would governments hold other-regarding, morally-inspired concerns? Why is the United States so passionate against human trafficking worldwide?¹⁰³ Why is Japan concerned about gun vio-

103. See Letter from Secretary Condoleezza Rice, U.S. Dep't of State, to Reader *in* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1 (June 2005), *available at* <http://>

lence in Africa and elsewhere?¹⁰⁴ There may be several reasons. Some policymakers may genuinely care about suffering in foreign countries. The trade's externalities abroad may resonate with their own values and motivate them to take action. In other cases, policymakers may respond to the perceived interest of elites and mass publics in an ethical foreign policy that includes curbing the externalities of trade abroad.¹⁰⁵ 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 U.S. support for international antiquities control in the early 1970s was to improve relations with Latin America, a region that had suffered from archaeological plunder.¹⁰⁶

In yet another set of cases, identifiable groups of principled actors 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 as well as domestic groups. For example, the International Campaign to Ban Landmines ("ICBL"), initiated by a group of six NGOs, developed into a network of more than 1400 groups in over ninety countries.¹⁰⁷ The International Action Network on Small Arms ("IANSA") consists of 800 civil soci-

www.state.gov/documents/organization/47255.pdf. 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 people of the United States are united in efforts to eradicate trafficking in persons internationally and within national borders because this global crime opposes the universal value of freedom.

104. On Japan's efforts in the small arms area, see DIRECTORATE GEN., ARMS CONTROL AND SCIENTIFIC AFFAIRS, MINISTRY OF FOREIGN AFFAIRS, JAPAN'S DISARMAMENT AND NON-PROLIFERATION POLICY 152-57 (2004). See also MINISTRY OF FOREIGN AFFAIRS, JAPAN'S ACTION ON SMALL ARMS (2006), available at <http://www.mofa.go.jp/policy/un/disarmament/weapon/index.html>.

105. See DAVID LUMSDAINE, MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME 1949-1989 (1993) (linking the provision of foreign aid to humane and moral convictions held by domestic actors and the general public).

106. 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).

107. See generally ICBL, <http://www.icbl.org> (last visited Apr. 22, 2009).

ety organizations in over 100 countries.¹⁰⁸ A coalition of four European NGOs titled “Fatal Transactions” launched the campaign against conflict diamonds.¹⁰⁹ American missionaries induced the United States to try and solve China’s opium problem through international drug control in the early twentieth century.¹¹⁰

What motivates the principled actors to care about other countries’ problems? In some cases, the principled actors may have a stake in curbing the harmful trade. For example, American missionaries considered the Chinese opium problem as an obstacle to their efforts to spread Christianity.¹¹¹ For the most part, however, principled actors are inspired by values and principles without a direct stake in the matter. The source of such values may be religion. For example, the nineteenth 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.¹¹² Since the late 1990s, American evangelical Christians, motivated by religious beliefs, have advocated U.S. action against human trafficking worldwide.¹¹³ For other principled actors, motivation may come 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 of antiquities are in the interest of historical knowledge.¹¹⁴ In fact, regulatory campaigns may

108. See generally IANSA, <http://www.iansa.org> (last visited Apr. 22, 2009).

109. See generally Fatal Transactions, <http://www.fataltransactions.org> (last visited Apr. 20, 2009).

110. ARNOLD TAYLOR, AMERICAN DIPLOMACY AND THE NARCOTICS TRAFFIC, 1900-1939: A STUDY IN INTERNATIONAL HUMANITARIAN REFORM 30 (1969).

111. *Id.*

112. Chaim Kaufmann & Robert Pape, *Explaining Costly International Moral Action: Britain’s Sixty-Year Campaign Against the Atlantic Slave Trade*, 53 INT’L ORG. 631, 645-46 (1999).

113. 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.” *Int’l Justice Mission*, <http://www.ijm.org/whowere> (last visited Apr. 12, 2009); see also Efrat, *supra* note 31, at 304.

114. A key 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 loot-

bring together quite different principled actors. The anti-human trafficking coalition in the United States, for example, includes both women's rights groups and evangelicals, which are normally on opposite sides of the political spectrum.¹¹⁵

Principled actors campaign to make governments care about the welfare of foreign countries. They advocate the control or elimination of trade that they consider reprehensible and harmful to other nations. Why would governments pay any attention? Governments may address the concerns of politically powerful principled actors. After the 1832 Great Reform, Dissenters composed about twenty-one percent of the British electorate.¹¹⁶ 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.¹¹⁷ Similarly, the electoral power of evangelical Christians makes their concern about human trafficking an issue of interest to American politicians.¹¹⁸ Yet 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. For example, groups seeking to educate U.S. policymakers about human trafficking set up interchanges between policymakers and victims of trafficking, met with members of Congress and their staff, testified at Congressional hearings, and voiced their concerns through the press and letters.¹¹⁹ To raise awareness about China's opium problem, American missionaries met with State Department officials and sent cables and letters to the Pres-

ing 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 59, at 11. Brodie et al. state:

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.

See id.

115. *See* 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, 415, 420-21 (2005).

116. *See* Kaufmann & Pape, *supra* note 112, at 646.

117. *See generally* Kaufmann & Pape, *supra* note 112.

118. *See* Efrat, *supra* note 31, at 306-07.

119. *See* Stolz, *supra* note 115, at 420-21.

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ident, the State Department, and members of Congress.¹²⁰

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.¹²¹ American missionaries fostered public opinion sympathetic to China's problems through missionary and religious journals and through reports to their churches.¹²² 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.¹²³

What allows the principled actors to educate publics as well as policymakers is their expertise and knowledge about the trade and in some cases their first-hand experience with the trade's negative 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 on the role of American museums in fueling the plunder.¹²⁴ This exposé, coupled with several media scandals involving museums, convinced U.S. policymakers to join and implement the 1970 UNESCO Convention¹²⁵ over the opposition of antiquities dealers and some members of the museum community.¹²⁶ In 2000, the McDonald Institute for Archaeological Research at the University of Cambridge published *Stealing History: The Illicit Trade in Cultural Material*.¹²⁷ The report provided a comprehensive survey of the illicit antiquities trade, its effects,

120. See TAYLOR, *supra* note 110, at 29.

121. Kaufmann & Pape, *supra* note 112, at 655-56.

122. TAYLOR, *supra* note 110, at 29.

123. Andrew Grant & Ian Taylor, *Global Governance and Conflict Diamonds: The Kimberly Process and the Quest for Clean Gems*, 93 *THE ROUND TABLE: COMM. J. INT'L REL.* 385, 390 (2004).

124. See Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 *ART J.* 94 (1969).

125. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* Table 1 note h.

126. BATOR, *supra* note 15, at 1-4.

127. BRODIE ET AL., *supra* note 59.

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and the role played by Britain's art market.¹²⁸ The awareness it created contributed to Britain's decision to accede to the 1970 UNESCO Convention in 2002. Another notable example are Global Witness's reports which raised awareness about conflict diamonds and played an important role in the international campaign to control the diamond trade.¹²⁹

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. For example, 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.¹³⁰ Principled actors may sometimes cast secondary externalities as primary externalities to bolster their case for action. For example, American missionaries considered China's opium problem to be a moral evil, but tried to appeal to policymakers by emphasizing the detrimental effect of opium on U.S.-China trade.¹³¹

3. Negative Externalities: Conclusion

Negative externalities are the key distinction between my model of IRGs and conventional trade models. In conventional trade models, the motivation for regulation is to protect import-competing sectors;¹³² in my model, by contrast, regulation is driven by the negative externalities of the trade. My model further diverges from conventional trade models by incorporating *value-based* concerns about secondary 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 nota-

128. *Id.*

129. Global Witness published *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict* in 1998. In 2000 it released *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds*. Grant & Taylor, *supra* note 123, at 390, 392-93.

130. Asif Efrat, *Regulating Rifles: International Efforts against the Illicit Trade in Small Arms* (Sept. 2007) (unpublished manuscript, on file with the author).

131. TAYLOR, *supra* note 110, at 29-31.

132. *See supra* note 76 and accompanying text.

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ble example.¹³³ 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' participation in international regulatory campaigns to curb the externalities of trade abroad.

D. *Expected Variation in Government Preferences on International Regulation*

The theoretical framework has introduced four influences on government preferences: on the one hand, the interests of exporters and consumers; and on the other hand, primary and secondary negative externalities. 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 along two dimensions, as shown in Figure 2, leads to an expectation of large variation in government preferences on international regulation.

At one extreme are governments that are concerned about primary or secondary negative externalities and do not face considerable anti-regulation pressure from exporters or consumers (Quadrant II). These governments will likely support stringent international regulation, which offers them significant bene-

133. 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). For more on the balance between trade and human rights, see generally SUSAN ARIEL AARONSON & JANIE M. ZIMMERMAN, *TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING* (2008).

		Primary/Secondary Negative Externalities	
		Low	High
Exporter/Consumer Influence	Low	I. Weakly-affected governments <i>Moderate regulation</i>	II. Pro-regulation governments
	High	III. Anti-regulation governments	IV. Cross-pressured governments <i>Support for regulation varies</i>

Figure 2. Incentives affecting international regulation and expected government preferences

fits—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 and 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 costs to exporters or consumers. Furthermore, international regulation requires these governments to pay the price of improved law enforcement (for example, resources required for strengthening customs) to the benefit of foreign countries. Rather than strengthening control, these governments would prefer its relaxation or elimination.

A third group includes those governments that have little concern over primary or secondary externalities and face no considerable anti-regulation pressure from exporters or 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 favor 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.¹³⁴

It is also important to point out that government preferences may vary over time. First, government change may lead to a preference change. A government preference is the result of balancing the negative externalities of the trade with pressure from exporters or consumers. A new government in power may be attentive to interest groups different than those that its predecessor had privileged. A new government's ideological orientation may affect its concern about welfare abroad and make it more or less willing to tackle secondary externalities. A new government may therefore weigh the competing influences differently than the previous one and strike a different balance. Second, preferences may 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 or consumers. Governments that previously faced only pressure from exporters or consumers without negative ex-

134. On the U.S. efforts for international drug control see generally TAYLOR, *supra* note 110 and DAVID BEWLEY-TAYLOR, *THE UNITED STATES AND INTERNATIONAL DRUG CONTROL, 1909-1997* (1999). On the U.S. efforts against money laundering see generally Simmons, *supra* note 16. On the U.S. 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 U.S. approach to international small arms regulation see Asif Efrat, *Toward Internationally Regulated Goods: Controlling the Trade in Small Arms and Light Weapons*, INT'L ORG. (forthcoming).

ternalities may become cross-pressured. For example, the United States and Britain traditionally favored free trade in antiquities, which served the interests of their art markets. Yet the U.S. and UK governments became cross-pressured with respect to antiquities in the early 1970s and late 1990s, respectively. As a consequence of archaeologists' advocacy as well as scandals involving the art market, the governments of both countries became concerned about looting abroad, that is, the trade's secondary externalities. Following the changed incentive structure, both governments reversed their anti-regulation preference and came to support modest international regulation of antiquities.¹³⁵

A change in incentive structures that leads governments to change their preferences and become more cooperative is rare. In the more typical case, governments opposed to regulation maintain their non-cooperative preference. Going back to Figure 2, the expected sharp divergence of preferences is a major obstacle to an international regulatory agreement. International cooperation typically builds on joint gains and at least a partial convergence of interests among governments. International regulation, however, involves highly conflicting preferences and little, if any, common ground. I now turn to examine whether and how cooperation may be established when the underlying preferences remain unchanged and certain governments are reluctant to cooperate.

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 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 cooperation problem.¹³⁶

135. Efrat, *supra* note 31, at 179-86, 261-67.

136. Helfer defines "problem structure" as including:

[T]he number of states involved, their incentives, the strategic interactions they generate, the level of uncertainty, and asymmetries of information and

Scholars have long conceived of trade cooperation as a prisoners' dilemma.¹³⁷ 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.¹³⁸

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 that are concerned about the negative externalities of the trade and are not pressured by exporters or consumers of the goods. International regulation addresses those governments' concerns without imposing significant costs. Yet for governments that are pressured by exporters or consumers while not concerned about the trade's externalities, regulation is not welfare-enhancing. Rather, international regulation would leave them worse off. As the trade does not adversely affect their own countries or other countries they care about, those governments have no interest in international control. From their point of view, international control would only restrict the ability of exporters to make profit or the ability of consumers to obtain the goods; it would also entail law enforcement costs. For those governments, the preferred outcome is thus the absence of international regulation—in other words, non-coop-

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).

137. See, e.g., JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 139-141 (2005); OATLEY, *supra* note 47, at 56-58; John Conybeare, *Public Goods, Prisoners' Dilemmas, and the International Political Economy*, 28 INT'L STUD. Q. 5 (1984).

138. OATLEY, *supra* note 47, at 60-62.

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eration. Figure 3 depicts a payoff structure for the interaction between pro-regulation and anti-regulation governments.

		Government B (Anti-regulation)	
		Liberalize	Regulate
Government A (Pro-regulation)	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

Figure 3. Payoff structure for 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 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/Lib-

eralize, 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 an 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 export of antiquities, whereas Switzerland liberalizes import.

In contrast to conventional trade, the root of the cooperation problem for 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 control (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 political 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 providing gains, cooperation on IRGs may leave certain

governments worse off. To be sure, conventional trade negotiations may be difficult and acrimonious as well. The controversies obstructing the Doha Round are but one example.¹³⁹ 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-cooperative status quo over cooperation. Rather than strengthening control, their preference would be its relaxation or elimination.

Given the irreconcilable differences among governments, the distribution of power plays a key role in shaping the cooperative outcome. Put differently, in the absence of shared interest the cooperative outcome likely reflects the preferences of the powerful actors. Weak governments favoring cooperation lack the means to bridge the preference gap and bring powerful governments to accept regulation inconsistent with those governments' preferences. The resulting international regulation is thus likely to be weak. By contrast, powerful governments favoring cooperation can establish stronger regulation, given their ability to impose their preferences on weak governments.

B. *Weak Governments Favor Cooperation*

IRG agreements do not meet the Pareto condition.¹⁴⁰ While they offer benefits to some governments, they make others worse off, in particular governments of externalities-generating countries. When those made worse off are powerful governments, they may simply decline 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 will 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

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

140. 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 47, at 58.

landmines.¹⁴¹ The United States has also recoiled from accepting the landmine prohibition. It did state 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.”¹⁴² All five countries have not joined the landmine convention.¹⁴³

The major market countries for antiquities have shown little enthusiasm about the 1970 UNESCO Convention, which asked them to strengthen their control over the movement of archaeological material. Among other art market countries, Britain, Germany, and Japan took more than thirty years to ratify the Convention.¹⁴⁴ None of the three have ratified a second—and more far-reaching—agreement on antiquities: the 1995 UNIDROIT Convention.

The 1989 Basel Convention was a response to the growing shipment of hazardous wastes to developing countries, which turned them into dumping grounds. This Convention would have required the United States, a major exporter of hazardous wastes, to tighten its restrictions on the export of hazardous wastes and to broaden the class of wastes subject to control. The Convention ultimately failed to achieve ratification by the Senate.¹⁴⁵

In all three cases above, governments of powerful countries have simply refused to join agreements that not only offered no gains, but also threatened to impose costs on militaries, art markets, or industries generating hazardous wastes. In other cases, however, the conflict of preferences may be tempered when powerful governments identify certain benefits from international regulation alongside the large costs it entails. In those

141. Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613, 635-36 (1998).

142. Fact Sheet, Bureau of Political-Military Affairs, U.S. Dep't of State, New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers (Feb. 27, 2004), available at http://www.fas.org/asmp/campaigns/landmines/FactSheet_NewUSPolicy_2-27-04.htm.

143. See U.N. Office at Geneva, Landmine Convention State Parties and Signatories, <http://www.unog.ch/> (follow “Disarmament” hyperlink; then follow “Anti-Personnel Landmines Convention” hyperlink; then follow “States Parties and Signatories” hyperlink) (last visited Apr. 20, 2009).

144. On the British approach to the UNESCO Convention, see HOUSE OF COMMONS CULTURE, MEDIA AND SPORT SELECT COMMITTEE, CULTURAL PROPERTY: RETURN AND ILLICIT TRADE, REPORT, Vol. 1, xx-xxiii (2000); Efrat, *supra* note 31, at 252-97.

145. Belenky, *supra* note 134, at 120-25.

cases, powerful governments are slightly cooperative, agreeing to make only small changes to their behavior. They may join the regulatory agreement after shaping it in a manner consistent with their preference for modest regulation. Given that their countries generate the externalities and hence their cooperation is essential, these governments enjoy superior bargaining power, allowing them to weaken the agreement in terms of its level of legalization and/or substantive obligations. For example, the United States could gain from international small arms regulation by reducing the risk that gun proliferation poses to American soldiers overseas. Yet at the same time, international regulation could be harmful to American gun manufacturers; could jeopardize the interests of civilian gun owners; and could restrict the ability of the U.S. government to provide arms to foreign non-state actors. Going back to Figure 2, the United States is 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; does not include a meaningful 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 weak framework—the 2001 Program of Action on Small Arms—may bring the United States small gains without posing a serious threat to its interests.¹⁴⁶ 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 are 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

When the governments seeking to curb the trade's externalities are powerful, they may exploit their power advantage to establish regulation contrary to the wishes of weaker governments

146. Efrat, *supra* note 130.

that would have preferred to maintain the trade uncontrolled; they may also use their power advantage to exert pressure for compliance with the regulatory agreement. How can power overcome the heterogeneity of preferences on international regulation?

One mechanism is issue linkage, by which “multiple issues are included in the final settlement in an effort to create a balance where both sides gain enough to accept the costs.”¹⁴⁷ In principle, there is nothing to inhibit weak governments from establishing an issue-linkage. Yet in practice, powerful governments are more likely to make use of issue-linkage as a means to bridge the preference gap obstructing international regulation. As Davis points out, “[o]ne challenge for successful linkage is finding complementary issues” to offset losses.¹⁴⁸ Powerful governments have a clear advantage in terms of possible complementary issues to offer to weaker governments. It is easier for them to combine issues so that all participants can gain from the agreement. Furthermore, a proposed linkage is likely to encounter vigorous resistance from governments influenced by domestic interest groups that oppose regulation. Powerful governments can use pressure or inducements to motivate reluctant governments to withstand the domestic opposition and accept the linkage. The same cannot be said about weaker governments attempting to create a linkage.

Given that powerful governments can more easily establish an issue-linkage, it is not surprising that the single most successful linkage in the context of international regulation was initiated by industrialized countries, led by the United States, as part of their efforts against counterfeit and pirated goods. To gain developing countries’ consent for TRIPS, industrialized countries embedded the agreement within the WTO, linking it to agricultural and textiles trade liberalization, which developing countries expected to benefit from.¹⁴⁹

A second mechanism that powerful governments may employ for overcoming preference heterogeneity is coercion. Through rewards and punishments, powerful governments can

147. Christina Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153, 156 (2004).

148. *Id.*

149. SELL, *supra* note 102, at 109-10.

increase the benefits of cooperation or the costs of non-cooperation and thereby induce weaker governments to accept and comply with stronger regulation than they would have preferred. In a small number of cases, coercion involved the use of military force. Prior to World War I, Germany and Turkey—both drug-exporting countries—refused to join the international drug regime. After their military defeat, however, they had to join and implement the 1912 International Opium Convention as part of the postwar peace agreements.¹⁵⁰ A more contemporary case of military coercion is the U.S. invasion of Panama and the overthrow of Manuel Noriega. Panama's involvement in drug trafficking was among the chief reasons for the invasion.¹⁵¹

While the use of military force to coerce IRG cooperation has been rare, the American operation in Panama is typical in another respect: the United States as the coercing state. U.S. 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 or 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 accept international regulation against the interests of politically influential domestic actors. In the post-World War II era, and in particular after the Cold War, the United States has had the ability to manipulate the incentives of reluctant governments, bringing them to accept and comply with international regulation. 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;¹⁵² the second and more innovative tool is reputational co-

150. TAYLOR, *supra* note 110, at 141-44; *see* Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne) art. 100, July 24, 1923, 28 L.N.T.S. 11; Treaty of Peace between the Allied and Associate Powers and Germany (Treaty of Versailles) art. 295, June 28, 1919, 225 Consol. T.S. 188.

151. *Fighting in Panama: The President; A Transcript of Bush's Address on the Decision to Use Force in Panama*, N.Y. TIMES, Dec. 21, 1989, at A19.

152. *See, e.g.*, DAVID BALDWIN, *ECONOMIC STATECRAFT* (1985); LISA MARTIN, *COER-*

ercion—the intentional tarnishing of countries’ reputation through blacklisting.

1. Economic Coercion

To force acceptance of and compliance with international regulation, the United States exerts economic coercion through withholding of aid, punitive trade measures, and other financial tools. Such means affect 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 U.S. War on Drugs. In 1969, President Nixon forced Mexico to tackle marijuana and heroin production through a temporary closure of the U.S.-Mexico border (Operation Intercept). The resulting massive disruption to trade convinced Mexican authorities to confront the drug issue.¹⁵³ 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 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; 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.¹⁵⁴ U.S. coer-

CIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS (1992); Daniel Drezner, *The Hidden Hand of Economic Coercion*, 57 INT’L ORG. 643 (2003).

153. BEWLEY-TAYLOR, *supra* note 134, at 199-200.

154. See Foreign Assistance Act of 1961, 22 U.S.C. §§ 2291h-j. 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 Apr. 22, 2009).

cion proved effective for the Andean strategy in the early 1990s. Colombia, Bolivia, and Peru—at first reluctant to embrace increased U.S. military involvement in their anti-drug efforts—succumbed to the American demands under the threat of aid withdrawal.¹⁵⁵

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 counterfeiting/piracy, 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.¹⁵⁶ The USA Patriot Act authorizes the Secretary of the Treasury to take similar measures against countries considered “of primary money laundering concern.”¹⁵⁷ The Victims of Trafficking and Violence Protection Act requires governments to meet minimum standards for the elimination of human trafficking and threatens to withhold U.S. aid from governments that do not comply with those standards or make significant efforts to bring themselves into compliance.¹⁵⁸ Countries that fail to make efforts to protect intellectual property rights and eliminate counterfeit/pirated goods may face U.S. trade sanctions under Section 301 of the Trade Act.¹⁵⁹

155. BEWLEY-TAYLOR, *supra* note 134, at 192-93.

156. 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.fatfgafi.org> (follow “40 Recommendations” hyperlink) (last visited Apr. 12, 2009). The first Report on Non-Cooperative Countries and Territories, 14 February 2000 and annual reviews thereafter, are available at <http://www.fatfgafi.org> (follow “Publications” hyperlink; then follow “NCCT Reports” hyperlink); 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, 254-58 (2001).

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

158. VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION Act, Pub. L. No. 106-386, §§ 108-10, 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. U.S. Dep’t of State Trafficking in Persons Reports, <http://www.state.gov/g/tip/rls/tiprpt/>.

159. United States Trade Representative (“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 intellectual property rights protection may face sanctions. See *supra* note 60.

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2. Reputational Coercion

Governments feel the impact of being blacklisted through their pocket. Penalties resulting from inclusion on a blacklist, such as withholding of aid or trade sanctions, impose direct material costs. If those costs overwhelm the benefits of non-cooperation, reluctant governments will likely accept international regulation and comply with it. 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.¹⁶⁰ 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;¹⁶¹ and countries identified by the President as having “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 international publicity.¹⁶² Shaming by NGOs, however, fails to achieve the desired effect on state practice in many cases and is rarely followed by the cessation of political terror.¹⁶³ I argue that shaming through U.S. blacklist-

160. 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* (Nov. 2007) (unpublished manuscript) (on file with author).

161. Money laundering is the subject of Volume II of the International Narcotics Control Strategy Reports. See generally INCSR, *supra* note 154.

162. See, e.g., MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Price, *supra* note 141, at 635; Wexler, *supra* note 20.

163. Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689 (2008).

ing is more coercive in nature and more likely to be effective than shaming by NGOs. U.S. (and FATF) blacklists have greater coercive impact due to their authoritativeness, institutionalization, and conditionality.

Blacklists carry significant weight since their source—the U.S. Government or an international organization (FATF)—is widely considered to be authoritative. Unlike NGO-criticized governments, blacklisted governments cannot simply brush off the American 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 U.S. 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 U.S. (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 U.S. allies on the lists, criticized governments cannot simply denounce blacklists as ill-motivated targeting of U.S. 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.

Finally, the conditional nature of blacklists magnifies incentives for cooperation by rewarding improved behavior and penalizing deteriorating behavior. U.S. 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 for changed behavior 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.¹⁶⁴ 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"¹⁶⁵ international norms. 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 being blacklisted; the same for governments concerned about the impact of negative reputation on their domestic legitimacy.¹⁶⁶

As explained earlier, the magnitude of such non-material effects, and hence their coercive impact, are larger for U.S. 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 withhold aid from countries ranked as Tier 3 in the State Department Trafficking in Persons Report, Israeli officials have considered aid withholding unlikely. For them, the primary consequence of Israel's Tier 3

164. BEWLEY-TAYLOR, *supra* note 134, at 203.

165. 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 & Ernst-Otto Czempiel eds., 1992).

166. For a review of the micro-processes of social influence see for example Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487 (2001).

ranking in the 2001 Report was reputational. The U.S. 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.¹⁶⁷

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 Article, in turn, has examined the opposite trend: growing restrictions and prohibitions on potentially harmful trade. The Article has brought under one framework cooperative agreements from different issue-areas and has emphasized the underlying political conflict that they share. This conflict stems 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. The source of these conflicting preferences is in the domestic political arena, where the public, exporters, consumers, and civil society all shape governments' views. Another important aspect of the theory is the integration of rationalist and non-rationalist approaches. In forming their preferences on international regulation, governments respond to material influences, such as exporters' or consumers' pressure, yet they may also hold value-based concerns for the welfare of foreign countries.

The Article has focused on the large heterogeneity of government preferences as the primary obstacle to international regulation. Preference heterogeneity, however, is not the only obstacle to the international efforts against problems like gun violence, antiquities looting or counterfeiting. 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

167. Efrat, *supra* note 31, at 330-52.

as incompatibility of national databases and inadequate information exchange. And yet the key problems are those highlighted by this Article: 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 heterogeneity 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 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 abroad. Fostering concern about the trade's negative impact abroad (secondary externalities) may ultimately lead anti-regulation governments to reverse their position.

In addition to policy implications, this Article has theoretical implications for three bodies of literature. The Article speaks

most directly to the literature on illicit trade and international crime control.¹⁶⁸ This literature has addressed activities like the drug trade and human trafficking as issues of *crime*; efforts against them have thus been studied from a policing and law enforcement perspective. This study, by contrast, has examined these commercial activities through the lens of trade and regulation. This new theoretical perspective on the subject has enhanced our understanding of actors' motivations and of cooperative outcomes.

Second, the Article suggests that trade policy preferences are shaped by a larger variety of influences than those the trade literature has focused on. Interest groups demands are at the heart of conventional trade policy models, and consumers' welfare figures into governments' calculations as well. This study has introduced additional influences on trade policy: the negative effects of 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,¹⁶⁹ trade policy models can no longer be based solely on material factors, without taking into account values and moral views.

Finally, this Article has implications for the international law and cooperation literature at large. Much of this literature takes mutual interest in cooperation as its point of departure and examines how states establish cooperation given their shared interest.¹⁷⁰ Yet shared interest, as the foundation of cooperation, is absent in the case of international regulation. When certain governments face a massive gun or drug problem while other governments 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

168. See, for example, NAÏM, *supra* note 5; ANDREAS & NADELMANN, *supra* note 24; Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. (forthcoming 2009).

169. AARONSON & ZIMMERMAN, *supra* note 133.

170. For example, the Rational Design Project addressed the question, "If states want to promote a common interest, what kind of institutions might they design to aid their efforts?" Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 768 (2001).

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international regulation and those that stand to lose. We risk overlooking this major obstacle if we 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 could mean only 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 governments may simply want very different things.