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The "Architectural Challenge" of International Rules

"Boundless intemperance
In nature is a tyranny."
— Macbeth, Act IV

1.1 INTRODUCTION

Rules are undone by unexpected events. In the realm of international politics, droughts, floods, coups, wars, epidemics, price shocks, financial crises, and surges of imports are as many events that can upset the laws governing the behavior of states. There is broad agreement that in the midst of unexpected circumstances, the same rules that normally bind countries may need to be temporarily suspended, to allow governments to deal with exigency.

In fact, one of the constants running through all types of agreements is the inclusion of formal clauses that specify just how signatories will be allowed to break the very rules they have agreed on. Such escape clauses are prevalent in international trade, the regime this book examines most closely. But they are also found in the investment regime, the human rights regime, ancient Roman law, early canon law, religious rules of every stripe, and in the precepts of just war theory. Even absolute laws and moral rules recognize the need for their own suspension in some circumstances. These different sets of rules are a testament to the first paradox I examine in this book: rules become more effective by being imperfect. Entirely rigid agreements break apart at the first hurdle.

In the international realm, in particular, one would be hard pressed to think of a treaty that does not address uncertainty through the insertion of

formal escape provisions of one form or another. In fact, the international treaty governing international treaties, the Vienna Convention on the Law of Treaties, includes a notorious flexibility clause addressing changes of circumstances.

In the Vienna Convention, as in other agreements, the inclusion of provisions that allow participants to legally breach an agreement's primary rules leads to a tricky theoretical question. We know that some measure of wiggle-room can be highly beneficial to treaties, to the point of becoming an essential condition for their existence. The ability to temporarily escape an agreement's obligations in hard times renders it less vulnerable to unforeseeable events. Flexibility allows for deeper commitments by the treaty's signatories, by providing a form of insurance that comes into effect if the costs of adjustment suddenly run too high. It also lowers barriers to entry, enlarging the membership, and with it, the gains from cooperation. Yet build in too much flexibility, and the agreement can be rendered ineffective, like a boiler with too many pressure-release valves.

States thus face conflicting incentives over flexibility provisions: they value the option of relying on them in unexpected hard times, yet they also have a constant incentive to abuse this option, and they fear that other states will do the same. The ways in which international rules seek to allow for some flexibility, while limiting its abuse, is the subject of this book.

The debate over the design of flexibility is the very stuff of politics. It mirrors the dilemma which underlies both the national and the international political process: there are gains to be had from delegating power; yet delegate too much power, and the risk is tyranny. This fundamental compromise animates political thought from classical philosophy to the Federalist papers. In each case, the designers of rules seek to negotiate a similar compact, one where power is delegated to a national or international body, and bound by its rules – but not unconditionally. Addressing the design of flexibility in the specific context of one international regime leads me to grapple with this foundational problem. How to design effective constraints on power that can stand up to the events of the real world?

Wherever flexibility provisions allow participants to suspend the rules during unexpected hard times, they lead to similar fears. Negotiators of the Vienna Convention in the 1960s thus warned against abuse of its flexibility clause, contained in Article 62, claiming the provision was too vague, and insufficiently constrained. So did the negotiators of the General Agreement on Tariffs and Trade (GATT), in July 1947, as they agreed to insert a national security exception into what was then the world's most

ambitious trade agreement. As the representative of the United States, which had written the first draft of the provision, declared to the assembly:

> We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.[1]

Countless negotiators and designers of rules have contemplated the tradeoff at the center of this book. If the agreement is too tight, it will be undone by events. If it is too flexible, it will be undone by abuse. In the case of the GATT security exception, despite being so clearly conscious of the challenge before them, by all accounts the negotiators failed at their task. The national security exception, which is applicable to this day and allows countries to be the sole judges of whether there exists a threat to their security, is considered far too loose and insufficiently constrained. One of the foremost theorists of the GATT, John Jackson, has denounced it as a "catch-all clause" that is "so broad, self-judging, and ambiguous that it obviously can be abused."[2]

Jackson is in good company. Political scientists and economists agree that when flexibility rules are too loose, they inevitably lead to abuse. The standard account has long been that unless reliance on a flexibility provision is made difficult, states will exploit it. As the seminal account of escape clauses in international politics has it, unless there are formal constraints on flexibility, states "will invoke it all the time, thus vitiating the agreement."[3] The associated assumption is that given the choice, countries will always opt for the least constrained and cheapest available option for escaping their obligations. As a recent book length treatment of flexibility provisions concludes, "it is thus evident that an injuring country will always go for the escape instrument which promises 'most mileage', i.e. the fewest enactment costs, the lowest compensation, and the largest scope of application."[4]

In this book, I argue that even this "evident" premise is wrong. The reason is that governments' choices over escape do not take place in a vacuum, and governments know it. Policymakers often speak of wanting to avoid a "dangerous precedent." They do not mean this in the strict legal sense. What they mean is that by exercising an ill-defined, unconstrained

[1] E/PC/T/A/PV/33, p. 20-21, in: "Analytical Index of the GATT," Article XXI Security Exceptions, p.600, available at www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf
[2] Jackson (1997*a*, 230). [3] Rosendorff and Milner (2001). [4] Schropp (2009).

exception, countries risk normalizing its exercise, making it more likely that others will exercise it in turn. Governments are perpetually trying to manage one another's expectations of what constitutes acceptable behavior, and the formal rules are but one part of this. Practice gains prominence wherever the rules are ambiguous. This leads me to the second paradox of flexibility: countries turn to flexibility provisions not *in spite* of their constraints, but *because* of them. I describe this as governments "seeking paperwork"; we observe it in the human rights regime as much as in international trade. States seek to credibly convey to their audiences that the current instance of escape does not increase the odds of escape recurring. They do this by demonstrating that the event that precipitated escape, the source of necessity – the drought, the country-wide strikes, the surge of imports – is not only genuine, but that it could not have been willfully manufactured. The function of escape clauses is to allow escapees to demonstrate this one key point: escape today does not make escape tomorrow more likely. Otherwise, the audience – made up of voters, investors, trade partners, or foreign governments – will update its expectations, to the detriment of the escaping country, about the odds of seeing further violations justified by similar events. When this happens, risk premia rise, investment drops, trade flows decrease, and governments get ousted.

Accordingly, in the absence of constraints on the use of flexibility provisions, the outcome is not widespread misuse; it is *disuse*: governments progressively abandon policies that do not benefit from credible constraints, and that do not allow them to manage their audiences' expectations. Such has been the fate of the Vienna Convention's escape clause, and of the GATT's security exception. In fact, I show that countries have at times preferred to be found in formal violation, rather than to have to rely on the security exception, even when the circumstances would have justified doing so. More striking still, given the choice between a less constrained and a more constrained flexibility clause, countries frequently turn to the latter. In the book's empirical analysis, I show that we can reliably account for this choice by considering states' incentives.

Countries' behavior with respect to unconstrained flexibility constitutes one of the greatest demonstrations of global cooperation between states, and one that has been largely overlooked. The success of international cooperation is traditionally assessed by asking whether countries comply with, or break, the rules they have imposed on one another. Hence the oft-repeated phrase according to which most countries obey most rules most of the time. The argument in this book implies that an

equally important, and potentially more telling measure of international cooperation lies in the *legally allowed* actions that countries *don't* take, when those actions can precipitate socially undesirable outcomes. Such is the case when states choose not to exercise an ill-defined exception even as they are legally entitled to do so, out of fear of setting a "dangerous precedent" and making its use by everyone else more likely. In this, countries are driven by a concern over reciprocity that is more fundamental than the constraints of formal rules. Invoking an unconstrained flexibility provision may be the best option in the short term, but governments realize that it may carry negative long term effects.

This leads me to the third paradox of flexibility. On their face, escape clauses are designed to deal with hard times and exceptional circumstances. Yet their true concern is with *normalcy*. Treaty negotiators know they can do little to affect behavior during emergencies. They internalize the old legal maxim according to which "necessity knows no law." Escape clauses are invoked in those instances where, by construction, the law would hold little sway over behavior. But escape clauses are nonetheless required to carve out and distinguish these instances from normal circumstances, and thus to preserve the rules' authority over the greater part, by far, of the circumstances states find themselves in. Without an explicit clause suspending the rules in hard times, necessary violations risk rendering similar violations during less-than-hard times more acceptable. In short, flexibility provisions exist to prevent behavior under extraordinary circumstances from spilling over onto normal times. They are not concerned with hard times *per se*, but with what comes after.

Three questions are at the heart of this book. Why are flexibility provisions required? How do the designers of rules guard against the abuse of flexibility? And given the abundance of unconstrained flexibility provisions, why do we see less abuse than we might expect? The book's argument addresses these questions, and in so doing puts forth three paradoxes: Rules gain from imperfection. States turn to flexibility provisions not in spite, but because of their constraints. And flexibility clauses are concerned not with necessity *per se*, over which they hold little sway, but with what comes after. Next, I briefly rehearse this argument in the setting of the international trade regime.

1.2 THE TRADE REGIME'S ARCHITECTURAL CHALLENGE

Treaties stand or fall by their flexibility provisions, and nowhere more so than in the international trade regime. When the Doha Round trade talks

collapsed in Geneva in July 2008, the disagreement at fault turned out to have been over the precise extent to which states could break the treaty if they faced hard times. Developing countries had asked for the creation of a clause that would have enabled them to suspend all their obligations in times of need, and developed countries objected to the terms of this clause. As a result, negotiators from 153 nations went home empty-handed.[5]

Insisting on such "license to breach" is not a peculiarity of developing countries. The 2008 talks were far from an isolated case. The failure in 1947 of what was to be the world's first multilateral trade agreement and the third pillar of the Bretton Woods institutions, the International Trade Organization (ITO), can be chalked up to another wrangle over flexibility. In that instance, the US Congress could not stomach what it saw as the overly broad balance-of-payments and full employment exceptions pushed for by Europe, and never ratified the treaty as a result (Diebold, 1952; Ruggie, 1982).[6]

This is not to say that the United States ever held any principled stance against flexibility provisions in trade, having all but invented them: the very first trade escape clause was included at the US' behest in a bilateral trade agreement with Argentina in 1941. By 1947, President Harry Truman had signed an executive order requiring that an escape clause be included in all future trade agreements to which the United States was a signatory. As long as there have been formal rules binding sovereign states, there have been additional rules put in place allowing states temporary breaches of their commitments.

How to allow flexibility, but prevent its abuse? This is the question that Pascal Lamy, the World Trade Organization (WTO) Director General until 2013, called the institution's "architectural challenge."[7] The term is apt. It conveys how international rules do not emerge fully formed, but are deliberately designed, much like buildings and bridges. Whereas bridges are devised to weather gusts of wind and the pull of gravity, international rules are designed to withstand members' often conflicting incentives, and the limited enforcement capabilities proper to an anarchic

5 See Wolfe (2009).

6 "It was rightly objected by many that the 'full employment exceptions' in the second part were so all-encompassing that a country could do whatever it wanted in the name of achieving full employment" (Krueger, 2009).

7 "The architectural challenge is to shape trade agreements that strike the right balance between flexibility and commitments. If contingency measures are too easy to use, the agreement will lack credibility. If they are too hard to use, the agreement may prove unstable as governments soften their resolve to abide by commitments." Foreword by the Director General. WTO World Trade Report 2009, xi.

global system. Poorly designed bridges will collapse. Similarly, rules that are not structurally sound will lead to the fracturing of the agreement. An added complication arises from the fact that international rules are the outcome of bargaining among states, rather than the product of a single designer, and the design of flexibility has a way of favoring some countries over others. Little wonder that flexibility is among the greatest points of contention in international treaties.

There already exists an answer to the architectural challenge. Building on the sensible premise that unless reliance on flexibility is made difficult, states will invoke it all the time, the solution envisioned by political scientists and economists alike is to render escape costly (Rosendorff and Milner, 2001; Rosendorff, 2005; Schropp, 2009). If countries that need to temporarily exit their commitments under an agreement were made to pay some "optimal cost," then the benefits of flexibility can be attained, all the while reassuring trade partners that the exercise of flexibility is temporary, and that escaping states will re-enter compliance as soon as it becomes feasible. This solution has been for some time a foregone conclusion. And the effort of the corresponding research program, which has grown rapidly in recent years, has turned to exactly how an institution would arrive at the "optimal cost" that would satisfy the double requirement of the architectural challenge: low enough to allow flexibility when needed, high enough to prevent abuse. This research program has led to parallel beliefs over country behavior. Scholars have assumed that given the choice, countries will always opt for the least constrained and cheapest available option for escaping their obligations.

1.3 THE DIRTY SECRET OF THE TRADE REGIME

The observation of state behavior should lead us to re-examine these common assumptions. The solutions to the architectural challenge proposed by theorists, such as making escape costly, are not the ones pursued by governments. Similarly, predictions that governments will invoke unconstrained flexibility provisions "all the time" have not come to pass. In fact, these common beliefs cannot contend with what I call the dirty secret of the trade regime.

The truth is that there is sufficient flexibility inserted into countries' commitments to sink the global trade system without breaking a single country obligation. Countries actually have at their disposal an arsenal of flexibility measures which, it turns out, are largely unconstrained. Member states are free to resort to these provisions at their whim.

These are not limited to the aforementioned security exception, which is found in GATT Article XXI. It is a small concern in comparison to a mostly overlooked fact about countries' tariff schedules, which looms large in this book's empirical analysis. As it turns out, there exists a large gap between countries' bound duties (the maximum tariffs they can levy), and their applied duties (the tariffs actually levied at the border). As a result, the average WTO member today can raise its average tariff by 18 percent overnight, without falling foul of any of its obligations. This is a striking fact in itself, given how the trade regime is traditionally represented as the most legalistic, binding, "hard law" regime in global governance. On the highway of international trade, the average car could be going at twice its current speed without actually breaking the speed limit.

Despite the absence of checks on their use, the existence of such flexibility has not led to the system's downfall. The unconstrained flexibility provisions of the trade regime have not been invoked abusively, and their respective agreements have not been vitiated. The Article XXI security exception has been invoked exactly once in the WTO era, and then, not formally. Meanwhile, its sister provision, the GATT General Exceptions (Article XX), did not see any use until it grew significantly constrained through rounds of litigation during the GATT era, and then again during the WTO period: the more restricted it became, the *more* governments turned to it. As for the gap between bound and applied tariffs that would allow members to raise the average tariff by 18 percent for "free," countries have actually relied on such "binding overhang" less than on trade remedies, their costlier, more complex, more constrained alternative.[8] And this, even during the worst economic crisis since the Great Depression. The "catch-all" exceptions through history have fared similarly, rarely leading to the abuse we might expect. Time and again, governments have confuted warnings of spirals of defection, and refrained from exercising loose exceptions. Norms have emerged against their invocation, until governments all but abandoned them.

In fact, states in the trade regime exercise restraint at every turn. They do not attempt to maximize their access to flexibility, and appear instead to act in accordance with findings I present in the book's analysis section, where I demonstrate that simply having access to unconstrained flexibility acts as a tax on trade. Even governments' domestic allocation of flexibility reflects similarly strategic behavior: governments minimize

[8] As I show in the analysis in Chapter 7, this holds even once we account for the country selection involved.

access to unconstrained sources flexibility precisely for those industries most likely to push for its use. States also rely on flexibility measures in a consistent fashion. When they *do* turn to unconstrained measures, it tends to be under observable hard times, where necessity is self-evident. In the absence of such observable necessity, countries seek not easy loopholes, but institutional checks and domestic investigations. These allow governments to convey credible information to trade partners and domestic audiences about the circumstances driving their invocation of an escape clause.

It is difficult to reconcile countries' observable self-restraint with what we know about international relations. Under international anarchy, individual interests are not disciplined by a centralized authority and cooperation is deemed unlikely. In such a state of nature,[9] it is the function of institutions to credibly tie leaders' hands through hard, enforceable rules. In the absence of such hard rules, we expect every country to follow its individual incentives, and together to produce a socially suboptimal outcome.

Yet given the menu of unused flexibility provisions scattered across the trade regime, it is no exaggeration to say that the ties that bind states can be broken at any moment. The regime nonetheless achieves its objectives: in international trade, we observe none of the rampant protectionism witnessed in a world devoid of multilateral rules, such as in 1930, when the Smoot Hawley Tariff led to a protectionist wave that aggravated the Great Depression. If the high level of contemporary cooperation is not reducible to hard rules enforced by credible enforcement, nor to the reluctance to pay for escape made costly, how do we account for it?

What underlies the set of trade rules and exceptions is countries' continuous efforts to manage beliefs and expectations about one another. Abuse of exceptions is ultimately not held back by legal constraints alone, but by countries' continual willingness to *seek* such constraints, even as unconstrained mechanisms remain available. Straying from expectations, for instance by relying on loosely defined exceptions in the absence of true necessity, comes at a measurable cost to trade, *even as* such actions may remain entirely legal. The study of flexibility thus holds an important lesson for global governance as a whole. The country behavior we observe has far more to do with reciprocity and informal cooperation than the past decade's focus on legalization and binding rules would lead us to believe.[10]

[9] Milner (1991, 71)
[10] Abbott et al. (2000); Goldstein et al. (2000). Cf. Finnemore and Toope (2001).

1.4 THE DESIGN OF ESCAPE PROVISIONS

What leads countries to opt for constrained flexibility provisions, even as unrestricted alternatives are available, also serves to explain the specific design of these provisions. The conventional solution of rendering escape costly ignores a unique feature of the international trade regime, which is that the temptation to cheat on agreements comes not from the decision-maker *per se*, but rather from domestic groups that exert pressure on the decision-maker. The designers of trade agreements take this feature into account when deciding on the shape of flexibility rules. This leads them to opt for contingent flexibility over cost-based flexibility. Existing rules prompt countries to convey the validity of their escape not by compensating aggrieved parties, but by conveying the nature of the circumstances underlying escape.

Domestic politics are one major reason for which countries join trade agreements to begin with. Commitments at the international level increase governments' bargaining position vis-à-vis powerful import-competing domestic groups asking for trade protection. The domestic level is also, conversely, the main reason why countries include flexibility clauses in these agreements, to act as an insurance policy against unexpected events, when the political costs of compliance grow insurmountable. Domestic politics also account for the specific design of flexibility clauses: as I demonstrate, rendering escape costly rewards lobbying for protection. This is why governments opt instead for rules that make escape contingent on the presence of observable hard times.

Specifically, the rules of the trade regime, as in a host of other legal systems, have evolved to make escape contingent on the *exogeneity* of underlying circumstances. That is, on whether the circumstances motivating escape were unforeseeable, and whether they were, or could have been, willfully produced. Did the import surge in steel arise from unforeseen developments? Was the price shock the result of uncontrollable factors? If not, the invocation of the escape clause may be formally challenged as a violation. Such requirements, far from constituting an impediment to the use of the escape provision, are the very reason governments can turn to it. Whereas states formally commit to an institution once, at the moment of signing, they then continually recommit to it by shying away from unconstrained exceptions, and opting instead for contingent flexibility mechanisms, the better to reassure their trade partners and domestic audience. Ulysses is perpetually refastening his own ties.

The virtue of the contingent flexibility design that has emerged in the WTO is reducible to a simple logic: since exogenous events