I

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

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
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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.
The Dirty Secret of the Trade Regime

The 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. 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

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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, 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.  

9 Milner (1991, 71)  
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
are independent, they carry no information about the likelihood of their re-occurrence, and cannot, by definition, be willfully generated by governments or domestic groups seeking protection. Making the legitimate invocation of flexibility contingent on the occurrence of such events achieves two objectives. First, it prevents the risk of contagion, whereby one instance of escape makes such behavior more acceptable, and more likely to be espoused by others – a constant concern for a diplomatic institution so deeply entrenched in the notion of precedent and reciprocity. Second, a design that makes escape contingent on exogenous events prevents opportunistic behavior, whereby domestic actors would try and exploit the option of escape by pushing governments to exercise it short of true necessity, simply to gain a competitive advantage. Institutions such as the WTO thus attempt to forestall the possibility of abuse of flexibility, and the likelihood of spirals of defection, by allowing only those instances of escape that arise from “unforeseen” events that threaten to cause injury.

As I show, this simple logic underlies much of the WTO treatment of flexibility. As with all rules, the design of flexibility does not emerge ex nihilo. It reflects existing incentives and underlying concerns – in this case, concerns about managing others’ expectations. One of the main functions of institutions is to reduce unpredictability in the behavior of member-states. Flexibility can amount to a step backwards in this regard: a given country reacting to hard times by raising barriers to protect its steel industry will make its trade partners wary that more protection will follow, unless there is some means of clearly circumscribing the exercise of flexibility to this single instance.

It is possible to assess state incentives in this regard by examining state behavior in the absence of constraints on flexibility. When I do so, a striking fact emerges. The cost of sowing unpredictability in one’s trade regime appears high enough to lead countries to be discriminating in their reliance on flexibility, according to the very logic underlying formal rules, even in cases where those formal rules fall short. The logic according to which observable exogenous shocks validate the use of flexibility provisions applies more widely than the rules that embody it. Ultimately, it is the desire to manage the expectations of trade partners, investors, and exporters that drives both the design of rules covering flexibility, and the behavior of states in the absence of such rules.

The modern trade regime affords us a rare opportunity to glimpse into countries’ incentives over flexibility. This book leads me to examine a number of different systems of rules across different time periods, but I return to the trade regime to empirically test my expectations. One reason for this is the sheer length of GATT/WTO history, and the wide availability of data this entails. Today, scholars have access to millions of observations covering both trade policy and trade flows for every member in the institution since its inception: we can examine Cameroon’s trade policy on unbleached cross twill woven cotton fabrics across time, compare it to that of its neighbors, and see how it impacts every trade partner’s exports of the same product over time. The wealth of these data is also, conversely, this book’s great methodological challenge. I also rely heavily on the rich archival records of trade negotiations between member-states from the 1940s onwards. These show country representatives explicitly debating some of the very questions I examine here.

The other factor that allows us to discern countries’ preferences over flexibility is largely the result of an accident of history. During the Uruguay Round, which began in 1986 and concluded with the inception of the WTO, new member-states, and especially developing countries, were allowed to bind their tariffs at very high rates in exchange of getting rid of import quotas and other non-tariff barriers. Such “tarification” is an established process by which countries convert all forms of trade protection into tariffs. This harmonization renders subsequent comparisons between states’ policies and further rounds of tariff abatement considerably easier. Yet in the case of the Uruguay Round, tarification created a new source of wiggle-room, in the form of a large gap between maximum bound duties, and the applied duties actually levied by governments at the border. This gap, called tariff “water,” or “binding overhang,” means that today, the average member could raise its duties by 18 percent overnight without falling foul of its commitments. This led some observers to refer to the process as “dirty tarification” (Ingco, 1996). A number of WTO members, as well as the WTO’s Secretariat, have since bemoaned the existence of this wide gap between obligations and behavior, and the unconstrained tariff flexibility it has entailed. As I demonstrate in the book’s empirical analysis, there is every reason to think that allowing such levels of binding overhang was an institutional mistake, an accident with considerable unintended consequences. There has been much backtracking in this respect by member-states since the WTO’s inception, in an effort to seal off the cracks in the bulwark.
Costly though it may turn out to be to the trade regime, the phenomenon of binding overhang is of great value to scholars. It represents an unprecedented opportunity to observe governments’ preferences. What happens when states within an otherwise highly legalized forum with sophisticated monitoring mechanisms have access to what is effectively “free” flexibility? The book’s empirical analysis capitalizes on this accident of history to better understand countries’ incentives over flexibility.

An examination of country behavior in this respect leads one to conclude that the true risks of unconstrained flexibility are not found where they are often thought to be. Given the considerable restraint observed during the worst crisis since the Great Depression, warnings against sudden increases of tariffs across the board are likely to prove unfounded, just as predictions that countries would turn wantonly to abuse the GATT’s national security exception have not been borne out. Instead, the true cost comes from the considerable uncertainty that unconstrained flexibility generates, exerting a daily cost in the form of a tax on trade. This cost is weathered disproportionately by agricultural sectors in developing and middle-income countries.

In sum, the occurrence of the accident of history which has led to the existence of binding overhang is what has made a great part of the analysis in this book possible. It is what allows me to measure the cost of uncertainty flowing from unconstrained flexibility (Chapter 6); the way in which countries exercise restraint in negotiating for additional overhang if they have flexibility from other sources; and the way in which states choose when to use “free” flexibility vs. constrained flexibility (Chapter 7).

The existence of binding overhang represents a hard test for international cooperation. It is a legal vacuum where the very protectionism usually targeted by the trade regime is legally allowed. That countries do not avail themselves of this policy space nearly as much as one would expect holds considerable implications for our understanding of global governance.

1.6 Overview of Chapters

The remainder of this book proceeds as follows. In Chapter 2, I outline a theory of the design of international agreements and of the flexibility clauses within them, focusing on the trade regime. I use the building blocks outlined above to explain why states value the option of suspending the rules under some circumstances, but want to prevent its abuse.
The question is, how do they manage this balancing act? I also tackle the concept of efficient breach, which looms large in the debate over flexibility: should we expect trade agreements to allow countries to pay for the right to temporarily breach their obligations, if everyone else is left as well off as they would have been absent a breach? The common answer is yes; I argue that taking into account the domestic political underpinnings of trade agreements suggests the opposite. I also discuss how the notion of precedent holds the key to governments’ puzzling restraint with regards to vague, unconstrained, easy to invoke flexibility provisions. The outcome of Chapter 2 is a series of empirical expectations over both the design and the invocation of escape clauses which are then tested in subsequent chapters.

In Chapter 3, I draw a brief intellectual history of flexibility in law, tracing two of its central tenets through time: the notion of necessity, and the notion of changed circumstances. As I show, these two concepts turn up, again and again, in unexpected settings, from medieval ecclesiastical canon law to Machiavelli’s writings. My first objective in tracing the intellectual history of flexibility is to demonstrate that for nearly as long as there have been rules to constrain behavior, there have been additional rules put in place to sanction transgressions in specified circumstances. And these have systematically led to discussions about the “architectural challenge” underlying such exceptions. There is universal concern over the abuse of loosely defined exceptions. One solution that emerges with striking frequency is to make the validity of escape contingent on some exogenous necessity, that is, a state of overwhelming need that could not have been willfully created. Another lesson concerning the true aim of flexibility comes out of examining the intellectual history of flexibility in law. While we are used to thinking of exceptions and escape clauses as created for the benefit of their eventual users – the way tax loopholes are offered to the wealthy – an examination of rules of a normative character, like religious law, suggests a different reading. What comes across is that flexibility is included not to protect its users, but rather to protect the sanctity, or the normative pull, of the rules themselves from what designers realize is inevitable noncompliance under some circumstances. What Chapter 3 draws out are the limits of law – those cases where the rules must adapt to behavior, since the opposite is known to be unfeasible.

Chapter 4 jumps forward to the twentieth century, to consider the twin exceptions of the GATT: the national security exception of Article XXI and the general exceptions of Article XX. The argument with regards to these two provisions, which are similar in many respects but have
radically different histories, is one I make throughout the book. Countries seek constraints. And against all expectations, governments are loath to rely on unconstrained flexibility. The reason governments cite for this restraint? The fear of setting a dangerous precedent. Countries fear eroding the contours of the exception in a way that would normalize its usage, and might lead others to do the same. This is what explains the paucity of invocations of Article XXI in the face of alarmist warnings that its abuse would spell the end of the trade regime. Article XXI remains a failure; not because it has been abused, but because it has fallen into disuse. The contrast is made with Article XX, the general exceptions, which was also criticized as overly loose and prone to abuse at its creation, and which was also left largely unused by member-states, until the jurisprudence from a series of legal rulings began adding constraints on its invocation. Remarkably, as the general exceptions became progressively more constrained, governments became more likely to invoke them. What the stricter requirements on the use of Article XX accomplished was to reduce the risk that one invocation would engender another. Jurisprudence saved Article XX from desuetude.

Chapter 5 then fills out the menu of flexibility options policy-makers have at their disposal in the trade regime today. I first focus on the regime’s quintessential escape clause, the safeguard. There, I show how the evolution in the design of the safeguard from 1947 to the late 1990s, away from compensation and towards an examination of the circumstances leading up to escape, serves as an apt illustration for the regime’s treatment of flexibility writ large. Archival evidence of discussions by country representatives provides valuable evidence of the awareness with which negotiators undertook the reform of the safeguard. Today, countries cannot invoke the safeguard merely by promising to compensate affected countries: they must show that the safeguard is the result of an exogenous shock that was “unforeseen.”

Beyond safeguards, Chapter 5 considers the two other trade remedies, antidumping and countervailing duties, which together form the most used flexibility provisions today. I then describe the emergence of binding overhang, and how WTO members have reacted to its availability. Rounding out the flexibility policy menu, I consider the way in which mechanisms outside of the trade regime, such as currency devaluations, can achieve the same results as flexibility regimes, which sets up parts of the empirical analysis. I also briefly review the option of renegotiations, and discuss whether it should be regarded as a flexibility provision alongside the aforementioned mechanisms.
I end Chapter 5 by comparing the flexibility provisions inserted into the WTO to those in preferential trade agreements (PTAs). This is an opportunity to ask what factors drive variation in the design of flexibility across the trade regime’s 600 PTAs. Finally, I spend the last part of the chapter comparing the design of flexibility provisions in trade to that of derogations in the human rights regime. There, I argue that the absence of reciprocity in human rights carries considerable implications for the design and use of flexibility. In this case, observers’ pessimism may be warranted.

Chapters 6 and 7 contain the bulk of the book’s quantitative analyses, and they serve as counterweights to one another: Chapter 6 delivers the bad news, Chapter 7 the good. In Chapter 6, I demonstrate that the trade regime includes more flexibility than is usually thought. In fact, countries have access to sufficient policy-space to sink the trade system without ever breaking a rule. And the mere availability of this high amount of flexibility, and especially of unconstrained flexibility, acts as a tax on trade, the magnitude of which has long been underestimated. This is of special concern given how the countries that have most access to unconstrained flexibility are developing countries. This lack of constraints on flexibility is usually seen as a concession granted to poor countries, yet in a pattern which will be familiar to students of international trade, developing countries may emerge as the net losers of such “special and differential treatment.” I also show that there is considerable evidence for flexibility provisions fueling the Law of Constant Protection, a phrase coined in Bhagwati (1989) that suggested that if one source of trade protection were eliminated, another would simply pop up elsewhere. Considering the case of India and then Ecuador, I demonstrate that this appears to be the case even within countries, at the industry level. I then exploit variation in tariff lines’ implementation to demonstrate that the same seems to hold across all WTO members. The demonstration that flexibility provisions impose a tax on trade, and that they allow countries to backtrack on their most ambitious commitments, is bad news for the trade regime.

Chapter 7 delivers the good news. Indeed, there is much to be sanguine about: the wide availability of unconstrained flexibility has not led to the regime’s collapse, even in the midst of the Great Recession. Even those countries that could significantly raise their tariff rates overnight without falling foul of their obligations have in most cases turned to contingent flexibility mechanisms instead. Why? The explanation offered in the book is that countries value escape clauses not in spite of, but because of, their constraints and requirements. Chapter 7 provides evidence for this belief. When countries have access to an alternate form of flexibility, as
with those states that have a freely floating currency that allows them to devalue in cases of need, they are shown to be systematically less likely to set aside large amounts of binding overhang, even after controlling for a battery of country characteristics. Moreover, countries’ allocation of wiggle-room across industries follows a similar story: countries are seen offering unconstrained flexibility precisely to the industries least able to abuse it. By contrast, the same flexibility is withheld from industries most likely to abuse it, even as, or precisely because, these industries tend to hold the most domestic political clout. Finally, patterns of use follow the same story: countries are loath to turn to free, unconstrained sources of flexibility, except when the circumstances they find themselves in show self-evident necessity.

Chapter 8 takes stock of these findings, and uses them to make some predictions about the likely evolution of flexibility in global governance in coming years. I pay special attention to the lessons of the 2008 financial crisis. A book about flexibility is necessarily also a book about hard times, since it is in view of such hard times that escape provisions are included in treaties in the first place. Here I ask, have the levees held? The answer appears to be yes. Looking at the entire WTO era, we have observed far less reliance on escape mechanisms than we might have expected during the Great Recession. More interesting still is that this is not an artifact of this most severe of crises, but a generalized phenomenon: the same domestic crisis leads to less reliance on flexibility mechanisms of all sorts if trade partners are also in the midst of similar hard times.

Following on the book’s main findings, the restraint witnessed during the global financial crisis cannot be said to have been strictly the result of binding rules. This is because multilateral trade rules contain far more policy space than is usually assumed. Taking full advantage of the flexibility legally allowed by the regime would have led to dire consequences. Formal legal rules have not done the heavy lifting; rather, informal cooperation appears to have driven restraint. During the crisis, the trade regime relied less on the hard law that stands as the hallmark of institutional strength, and performed instead more as the diplomatic institution that it is, providing information about, and a focal point for, state behavior. As one negotiator declared during the GATT negotiations in the late 1940s in a heated discussion about the risks of the vaguely worded national security exception, the “spirit” in which countries would invoke these provisions was the only true bulwark against abuse. And so it was during the Great Recession. Time and again, states presented with the option to escape their legal obligations “for free” turn away from it. The task of this book is to help explain why.