



Seeking Escape: The Use of Escape Clauses in International Trade Agreements

KRZYSZTOF J. PELC

Georgetown University

In agreements that include flexibility enhancing mechanisms such as escape clauses, how do institutions realize the benefits of flexibility while preventing its abuse? The conventional wisdom is that escape clauses must be made costly, but I show this claim to be at odds with empirical observation. In the GATT/WTO, the institution where escape clauses are most prevalent, compensation following escape was only widespread in the 1950s. Since then, it has been progressively abandoned, in favor of appeals to exception. This alternative mechanism relies on an institution's ability to verify the severity and exogeneity of the domestic circumstances of states seeking temporary escape. Relying heavily on GATT archives, I show how early on in the institution, members had made the link between costless escape and increased monitoring, and pursued reforms to achieve both objectives. The success of members' ability to verify escapees' domestic circumstances is observed in the record of safeguard disputes throughout the GATT/WTO's history. Finally, I use the hypothesized link between verifiable information and the chosen escape mechanism to explain an otherwise puzzling GATT incident, that of French emergency trade measures in 1968.

Escape clauses are a regular feature of international agreements. They provide a degree of "flexibility" for dealing with the unpredictable events that sometimes face an institution's members. This article asks how institutions succeed in realizing the benefits of flexibility while preventing its abuse? In other words, if an agreement's flexibility increases its effectiveness up to a point, and negatively affects it past that point, how is this equilibrium attained?

Escape clauses, or "pressure valves," allow members of an agreement to temporarily suspend their obligations under that agreement following an exogenous shock, while assuring other state members a return to compliance in the following period. A sudden surge in imports that threatens a domestic industry, for instance, might make it politically unfeasible for a country to keep its borders fully open to trade as dictated by the terms of an international agreement. By containing the breach within a single period, escape clauses provide governments with a means of addressing domestic-level exigencies without forsaking the future benefits derived from international cooperation.

The existence of escape clauses introduces a trade-off that goes to the center of the institutional design question. On the one hand, an overly rigid agreement

Author's Note: I thank Marc L. Busch, Andrew Bennett, Luis Felipe Mantilla, George Shambaugh, and the participants of the Mortara Center's International Trade Working Group for very helpful comments; all remaining errors are naturally my own. I gratefully acknowledge support from the Canadian Social Science and Humanities Research Council (Grant No. 752 2007 0569).

sets high barriers to entry for new members, and risks the abrogation of the agreement at the first exogenous shock. On the other hand, an overly flexible agreement, while immune to exogenous shocks, is prone to abuse by its members, to the point where it loses its credibility and becomes irrelevant.

The conventional answer to the puzzle is that “for escape clauses to be useful and efficient they must impose some kind of a cost,” to be paid by the escapee to other members (Rosendorff and Milner 2001, 831; see also Downs and Rocke 1995; Herzing 2005; Rosendorff 2005). This cost acts as a form of compensation, from the steel importer putting up an emergency tariff, for example, to the affected steel exporter. According to this view, there exists an equilibrium, achieved through bargaining among members, at which the cost of escape is counterbalanced by the prospect of future cooperation. Moreover, compensation mechanisms are said to be self-enforcing, since costs are paid voluntarily by members eager to signal their intent to comply in the next period. Institutions, then, need only confirm the payment of compensation. The literature’s claims, however, come up short against empirical evidence. Indeed, the very institutions examined by the literature, primarily the General Agreement on Tariffs and Trade and the World Trade Organization (GATT/WTO), are not bargaining over optimal levels of compensation: they are avoiding compensation in the first place.

This article makes two sets of claims. First, an alternative institutional means of providing flexibility without leading to its abuse is through “appeals to exception.” Institutions cannot prescribe behavior for all possible states of the world, but they can create criteria that capture the type of circumstances that should warrant temporary breach. States appeal to exception by demonstrating how the domestic circumstances they face meet those criteria. Other members can challenge these appeals, which raises the informational standard for valid escape. Under such a scheme, gate-keeping no longer occurs through cost and the escapee’s willingness to pay it, but through the nature of circumstances leading to escape, and the institution’s ability to verify them. Secondly, I argue that within the international institution where escape clauses are most prevalent, the GATT/WTO, the escape mechanism has shifted from a compensation scheme, on which it relied early in its history, to appeals to exception. I show that GATT/WTO members consciously pursued reforms that allowed for this shift: they clarified the criteria of escape, increased the level of information required of potential escapees, and provided means for other members to challenge escapees’ claims. The reasoning for these reforms can be traced to discussions occurring 20 years prior to the Uruguay Round, and further observed in a series of pivotal Appellate Body rulings in the wake of the WTO’s inception. Moreover, the institution’s success in restraining abuse of the escape clause under appeals to exception is apparent when one compares the record of relevant disputes in the GATT to that of the WTO. In sum, when GATT/WTO members had the choice of one mechanism or the other, they opted for appeals to exception. I outline some of the reasons for this choice, and suggest how it may also apply to other institutions.

I begin in Part I by defining and listing some characteristics of escape clauses. Part II argues that the literature’s claims come up short against available evidence. Part III presents the logic of the argument. Part IV tests my claims against the evolution of the GATT/WTO. Here I rely heavily on recently declassified GATT archives to trace the shift from compensation and retaliation to appeals to exception. In Part IV, the reasoning I lay out allows me to explain a well-known “anomalous case” under GATT: in the wake of the 1968 strikes, France escaped the agreement for 6 months, yet the remaining contracting parties did not retaliate, compensation was neither sought nor offered, and the agreement survived unscathed, all of which runs counter to the literature’s predictions.

Characteristics of Escape Clauses

The term “escape clause” is used loosely to refer to a wide range of different institutional devices. Here, I narrow down the definition for the purposes of this article. In their seminal paper on the subject, Rosendorff and Milner (2001, 830) define an escape clause as “any provision of an international agreement that allows a country to suspend the concession it previously negotiated without violating or abrogating the terms of the agreement.”¹ Implicit in this definition is the notion that escape clauses must be temporary, a point which warrants emphasis.

Another characteristic of escape clauses is that they are indiscriminate: their effect is felt across the agreement as a whole.² The same goes for all provisions that allow for the renegotiation of completed agreements, so called sunset clauses, or duration provisions.³ Escape clauses rely precisely on the high cost of renegotiation of the terms of an agreement, as they serve to *preserve* the legitimacy of those terms. In this way, not only do they benefit states facing exigency, but they also serve as insulation of the agreement as a whole against exogenous shocks affecting individual members.

Escape clauses straddle the delimitation between soft law and hard law (Abbott and Snidal 2000). On the one hand, they lower an agreement’s barriers to entry for governments wary of external constraints over their domestic affairs, a typical characteristic of soft law instruments. On the other hand, they further the degree of “legalization” of an agreement.⁴ An internal limit suggests an outer one: escape clauses have little meaning within a vague informal agreement; they only gain meaning within “hard law” type institutions. Inclusion of escape clauses also suggests significant costs of (re)negotiation. An ad-hoc agreement, or one that is (re)negotiated at no cost, has less use for an escape clause; it can be iteratively adjusted to suit changing circumstances.⁵ Ironically, if escape clauses serve their purpose, an agreement gains in stability and credibility the more precisely it can define the set of circumstances under which it can be violated. When actors avail themselves of an escape clause, they fall into *de facto* noncompliance, yet are still under the agreement’s rules, and thus remain *de jure* compliant. In this sense, the exception really does confirm the rule: an escape clause says something (covered, not covered) about all states of the world. As a result, the inclusion of escape clauses does not necessarily decrease obligation, as some scholars have claimed (Koremenos 2004; Koremenos, Lipson, and Snidal 2001). Reduced obligation within the area under exception might be balanced out by an increased degree of obligation in the areas *not* covered by exception.⁶

Escape clauses matter, because they lead us to examine the behavior of players in circumstances that constitute a hardest test for international agreements. An institution’s ability to weather “involuntary defection” (Putnam 1988) by its members (when the pressure to forgo an agreement’s obligations reaches a peak level) while retaining its credibility is a good indicator of its effectiveness in ensuring cooperation.

The Conventional Wisdom

Escape clauses are not new. As Kravis (1954) observed early on, “some kind of escape provision is, therefore, almost an inevitable feature of any durable

¹ An earlier far-reaching treatment of escape clauses is found in Downs and Rocke (1995).

² For this reason, the use of antidumping within the WTO, which is targeted toward exports of a given country member, cannot be considered an escape clause.

³ For a discussion of sunset clauses, see Koremenos (2001, 2005).

⁴ I use the term “legalization” in accordance with Goldstein and Martin (2000).

⁵ On the simultaneous inclusion of escape clauses and renegotiation clauses, see Koremenos (2005).

⁶ This trade-off is also apparent in human rights treaties, where escape clauses based on exceptional circumstances may prevent the inclusion of a greater number of specific limitations of individual rights (Gross 1998, fn. 46).

international agreement to reduce trade barriers.” And flexibility-enhancing devices have existed alongside political and economic agreements for a much longer time. In the *Discourses on Livy*, Machiavelli ([1531] 1998, 1.38) praised the Roman Senate for temporarily going against custom and law in allowing people to take arms and defend themselves during an attack. The Senate understood that given this necessity, legislation had to be adapted to circumstance, since the reverse could not be done. It determined that “what they [the citizens] had to do, they should do with its consent, in order that they should not, by disobeying through necessity, get accustomed to disobeying through choice.” The Senate was effectively insulating the legitimacy of its law from the negative effects of a temporary crisis.

More recently, Rosendorff and Milner (2001) found that trade agreements with escape clauses Pareto dominate rigid agreements under uncertainty. Their second claim is that “for escape clauses to be useful and efficient they must impose some kind of a cost” (Rosendorff and Milner 2001, 831). Just as all members have an incentive to cheat on their obligations under the agreement, all members equally have an incentive to abuse the escape clause. The “cost of escape” must then be set by the architects of an agreement in such a way as to make it beneficial to escape temporarily when forced to do so, but costly enough to prevent abuse. States will resort to the escape clause whenever the domestic benefit from escaping rises above the cost of the escape clause.

The necessity of a penalty has been echoed by economists who have sought to derive “optimal levels of compensation” to ensure the possibility of recourse to escape while preventing its abuse (Herzing 2005). Much of this research draws on Rosendorff and Milner’s (2001) two-stage model, which separates the agreement bargaining phase from an infinitely repeated trade cooperation game between countries (for a recent overview of the modeling of incomplete contracts, see Tirole 1999; Tirole and Maskin 1999). Importantly, the “escape and compensate” scheme is said to be self-enforcing. Escaping members themselves have the strongest incentive to offer compensation, since they are looking to make their future return to compliance credible. As such, delegation of authority is minimal: the central institution needs only record and publicize instances of escape and compensation (Rosendorff and Milner 2001, 853).

Where Is the Compensation?

Comparing the findings of the literature on flexibility with existing institutions—the very trade and monetary institutions examined by this literature—we are left with a series of puzzles. Empirical observation does not match up with the implications of prevalent theory.

First, whereas the literature predicts that escape clauses must be costly to prevent abuse, and that states exercising escape clauses will therefore voluntarily offer compensation, we observe no such compensation—much less *voluntary* compensation—in trade agreements such as the WTO, or monetary institutions such as Bretton Woods.⁷ In fact, the trend in the GATT–WTO is *away* from compensation: as I demonstrate in the subsequent section, GATT members gradually

⁷ Rosendorff and Milner (2001, 845) argue that the IMF did impose a cost on states that defected by devaluing the currency: “Devaluation was therefore frequently associated with fiscal and monetary contraction and policy liberalization and reform, all of which come at a domestic political price.” While the link is correct, it is not a causal one: there is no stipulation within the 1944 IMF agreement—in the Article IV escape clause or otherwise—that would indicate that devaluation was to be followed by any type of readjustment. Adjustments that were imposed were introduced to avoid the balance-of-payments problems that led to escape in the first place, *not* as a means of imposing a cost on escape. When Canada breached in the 1950s by floating its currency, it faced no sanctions, reputational or otherwise, and was in fact met with accommodation (Simmons 2000).

abandoned compensation, and the WTO has formally proscribed it during the first 3 years of any safeguard, the maximum period of which is 4 years.⁸

Secondly, whatever the cause behind the absence of compensation, it is not having the predicted effect: member-states are not abusing the escape clause. In the case of the GATT-WTO, the escape clause is still thought to be underused, even as it was made much less “costly” following the Uruguay Round and the introduction of the Agreement on Safeguards, which limits the possibility of compensation (Bown 2002). We thus observe no compensation, and yet no resulting abuse: something else, then, must be causing the observed level of restraint in the exercise of escape.

Finally, the limited role of the institution predicted by the literature is at odds with the expanding role of existing institutions (Keohane and Martin 2003). Far from being limited to observing and publicizing the voluntary payment of compensation, institutions today are investing heavily in setting up sophisticated dispute settlement mechanisms and independent bodies that monitor the use of escape clauses and that play a far greater role in respect to escape clauses than predicted by the literature.

A subsequent article by Rosendorff (2005) directly tackles this last point, and attempts to ground the “escape and compensate scheme” in empirical observation by applying it to the WTO. Rosendorff (2005) construes the Dispute Settlement Procedure (DSP) of the WTO as a compensation mechanism in itself, which allows breaches, so long as they are compensated: “The use of the DSP therefore allows a contracting partner to violate the agreement, compensate the losers, and still remain within the community of cooperating nations” (Rosendorff 2005, 390). Here, it is not the threat of having to compensate, as much as the cost of compensation itself that leads to an equilibrium use of the escape clause. In Rosendorff’s model, compensation is expected to occur every time the escape clause is used. The DSP becomes the device that sets the equilibrium penalty, as per the reciprocity principle of GATT. Implicitly, the possibility of escape resides not only in the escape clause *per se*, but in the very existence of the dispute settlement body.

Rosendorff’s approach overlooks a number of key features of the DSP. First, the onus of retaliation is on the complainant, not the DSP.⁹ As a result, retaliation is exceedingly rare, having been employed only three times in the history of the WTO. The DSP’s effectiveness relies on the publicization of fault, not on retaliation (Busch and Reinhardt 2001). Its objective is explicitly *settlement*, not the offer of equivalent suspension of concessions (Jackson 2004). Moreover, the sophistication of the DSP does not support the self-enforcing nature of the compensation scheme as set out in Rosendorff and Milner (2001). If countries were eager to signal their desire to comply in the next period, would they not simply offer compensation voluntarily?

Logic of the Argument

As presented in the previous section, the existing literature describes a model that allows for institutional flexibility and restrains abuse through the provision of an optimal level of compensation by the escapee. As I have shown, however, this is not what we observe in existing institutions. Here, I outline what I see as an alternative equilibrium—one that I argue the GATT-WTO has shifted to—and I explain some of the reasons why I believe this shift has occurred.

⁸ Agreement on Safeguards, Article 7:1. An extension may be sought, however, in which case the safeguard measure, in principle, may be in place for up to 8 years (WTO AS, Article 7:1–3).

⁹ Proposals made to reverse this onus have been met with great opposition in the WTO membership and have all been rejected as a result. See fn 39, *infra*.

An alternative means allowing for flexibility while preventing its abuse consists of appeals to exception. States are said to appeal to exception whenever they suspend their obligations under an agreement by using an escape clause, without providing any compensation or paying any penalty, but by insisting instead on the justificatory circumstances motivating escape.

International agreements inevitably take the form of incomplete contracts: members cannot prescribe behavior for all possible states of the world, but they *can* formulate criteria that capture the type of circumstances that should warrant temporary breach. Members may then appeal to the institution by conveying how the domestic circumstances they face correspond to these “criteria of escape.” Such criteria are by no means arbitrary; in GATT as in other trade institutions, they consistently aim to impose two key requirements on would-be escapees. First, they proxy for some measure of severity. Members are allowed to escape only if not doing so would result in some significant amount of injury. Secondly, and perhaps more importantly, the criteria of escape screen for the *exogeneity* of overwhelming domestic circumstances. Indeed, appeals to exception relate to events that are statistically independent—that is, equiprobable for all members, and the occurrence of which conveys no information about their re-occurrence.¹⁰ Such events, by definition, cannot lead to a “spiral of defection,” since they do not affect the probability of future similar events: appeals to exception specifically target one-offs, events that do not incite other members to defect in turn, and that belong to the circumstances “not planned for” by the agreement’s designers.¹¹ These two criteria—severity and exogeneity—are readily observable in the escape clauses of regional trade agreements and the GATT–WTO texts. While the level of enforcement and clarity of GATT’s escape criteria have changed over time—and this change, as I argue below, was instrumental in allowing for a shift from compensation to appeals to exception—their content has remained much the same. I go into more detail in the next section. Under appeals to exception, then, gate-keeping no longer occurs through cost and a country’s willingness to incur it, but through the nature of circumstances leading to escape, and the institution’s ability to verify those circumstances.

The very same reasons that drive institutions to include escape clauses in the first place also impel members to recognize appeals to exception. Countries devise escape clauses behind a veil of ignorance, not knowing which country might need to exercise it in the future, but sharing a common interest in the availability of the option. Similarly, since all states are equally likely to encounter the need for escape, all members face symmetrical incentives to *withhold* countermeasures in those circumstances. These incentives form a separate game of cooperation: Foreign withholds countermeasures against (or demands no compensation from) Home, in view of Home’s credible domestic exigency, with the expectation that when Foreign faces similar circumstances in the future, Home will withhold countermeasures in turn. Under a cooperative equilibrium, only the minimum trade barriers are raised to deal with domestic exigency, since countermeasures are withheld when a valid exception is communicated.

To illustrate through an analogy, there are at least two ways of “getting away” with speeding on the highway: with sufficient funds, one can pay the ticket (provide compensation) and speed off; or in the case of a husband driving his

¹⁰ Much as in insurance contracts, whatever makes an actor more or less likely to resort to escape will likely be expressed through higher or lower premiums, or in the case of international institutions, the distribution of gains from cooperation in the negotiated agreement. What is not included in the contract is expected to be equiprobable. If country A is more likely to violate an agreement than country B, this difference is not handled through the creation of an escape clause; rather, it is dealt with within the terms of the negotiated agreement. Foreign may insist on better terms to reflect its greater uncertainty about Home’s ability to deliver, or on some guarantee to that effect.

¹¹ An analogy can be drawn between the treatment of exogenous events by the designers of international agreements and the behavior of creditors of sovereign debt: “Analysts [of countries’ credit worthiness] [take] pains to distinguish excusable defaults from voluntary repudiation” (Tomz 2007, 81).

pregnant wife to the delivery room, one can appeal to exceptional circumstances to justify the violation. Cases such as these were not planned for by the designers of the traffic code, and benefit from the use of a tacit escape clause. Moreover, pregnant couples are exogenous: they do not affect the probability of another pregnant couple taking to the road. A pregnant couple that can credibly convey its exceptional circumstance will most likely face no sanctions resulting from the speeding violation, and need not offer to pay any cost.

It may be true that given the benefit of quickly getting one's pregnant wife to the hospital, one is ready to pay any penalty amount, but that is also a defining feature of the type of circumstances covered by escape clauses. A penalty under true exigency becomes largely meaningless, since it serves no deterrence function: the threat of a ticket would likely not dissuade a pregnant couple from speeding. The penalty is rendered superfluous. As in Machiavelli's account, when actors cannot be made to obey the law under some specific circumstances, then the law should be adjusted to fit those circumstances. And as per deterrence theory, not only need superfluous threats not be made, but they also *ought* not be made, as threats that go unheeded may result in a loss of credibility on the part of the threat's sender—in this case, the institution. Indeed, in designing an escape clause, state actors are pursuing not only their immediate interests, should they face domestic exigency; they are also acting to preserve the legitimacy of the *agreement* from inevitable temporary violations by other members.

But how do escape clauses that function through appeals to exception curb the risk of abuse? Indeed, criteria of escape can be manipulated, and thus are not sufficient by themselves. All members have a strategic incentive to portray any instance where they face some domestic pressure for protection as constituting true exigency arising from severe and unforeseeable circumstances. Every state has as its dominant strategy to stretch the boundaries of exceptionality, to the detriment of every other state.

It is to forestall this incentive to misrepresent, and the ensuing reduction in overall cooperation, that institutions relying on appeals to exception must allow for the verification of the claims made by escapees. The credibility of appeals to exception—in other words, the degree to which they convey the severity and exogeneity of the circumstances that motivate them—is garnered by making them in a forum where they are open to verification by members. Any exercise of the escape clause in the WTO is liable to be challenged by the rest of the membership through the dispute settlement understanding (DSU). As I show in the next section, members can challenge either the severity of circumstances—whether increased imports caused or threatened to cause “serious injury” to domestic producers; or their exogeneity—whether increased imports resulted from “unforeseen developments.” Because of the existence of such decentralized enforcement, it becomes in the interest of a valid escapee to provide as much information as possible to demonstrate that it meets the criteria of escape. The existence of such an incentive for valid escapees in turn makes it more difficult for nonvalid escapees to misrepresent their domestic circumstances. The informational standard, in other words, is heightened by putting the onus on escaping states to justify their escape, and by providing other members with the means of challenging this account.

To be clear, appeals to exception do not entail a truly “costless” system of escape. The ability to verify states' claims implies considerable investments in monitoring mechanisms and the creation of legal bodies to settle disputes. Appeals to exception are costless only in the sense that they do not rely on back and forth payments in the exercise of escape clauses as a guarantee between states.

This reliance on the ability to disseminate and verify information also suggests when an institution can have an escape clause that relies on appeals to exception, and when it cannot. In this way, one can formulate expectations about what type of escape mechanism institutions will choose by looking at the level of

information they can disseminate and verify. These expectations can be stated succinctly in the following hypothesis:

Hypothesis 1: *If an institution is (unable) able to gather and verify information about the domestic circumstances of escaping members, it is more likely to rely on (compensation) appeals to exception in allowing flexibility.*

This hypothesis is further complicated by the fact that the ability to exchange information and verify it is endogenous, being itself the result of successful interaction among state actors. And while predicting when states will succeed in the creation of functioning monitoring mechanisms is somewhat outside the scope of this article, I argue that in the case of the GATT, part of the incentive behind the creation of such a monitoring capacity was precisely to allow for escape that does not rely on compensation.

The assumption behind my main hypothesis is that if states have the monitoring capacity necessary for an appeals to exception scheme, then they will choose it over a compensation model. Here I identify some general reasons for such a preference, and then outline some further reasons why this preference existed specifically in the GATT.

First, the reliance on compensation to regulate escape re-inserts power into an institutional context that aims for the opposite. While institutions are created in part precisely to counterbalance power relations, compensation schemes provide countries enjoying greater relative economic power with a means to “breach and pay” to assuage domestic pressure for protection by interest groups. WTO scholars have similarly argued that the goal of redressing asymmetries of power is a characteristic of dispute settlement, and one “essential to the credibility, and therefore to the efficiency of any DS [dispute settlement] system... To allow a “buy-out” possibility favors the rich countries in a way that undercuts some of these goals” (Jackson 2004, 118).

Secondly, a breach and pay scheme goes against a primary goal of trade institutions in general, and the GATT-WTO in particular, namely that of assuring “security and predictability” to the institution’s members.¹² Markets tend to react poorly to uncertainty, and disruptions caused by unpredictable escape by members who can afford it can have a lasting negative impact on trade growth.

Finally, in the specific context of the GATT-WTO, a significant factor for the preference of one mechanism over the other is that making escape costly for escapees is impractical. The preferred means of doing so, by having the escapee compensate aggrieved members through lowered barriers on other products, is often unfeasible, since finding products on which to further decrease tariffs has additional domestic political consequences (Bown 2003, 51). As a result, compensation is usually offered by allowing states affected by the escape clause to suspend equivalent concessions. This, however, turns out to be an economically disastrous solution. As Hudec (2000, 22) writes:

In economic terms, the balancing rationale for retaliation is a fiction. The aggrieved country does not gain anything by raising trade barriers. That act usually inflicts a net loss upon its own citizens.

In other words, while compensation limits the abuse of flexibility, as per the literature, it does not in fact allow aggrieved members to recover their losses, since the process of recovery often imposes more costs on states than the total amount recovered. In the next section, I examine the evolution of the

¹² See DSU Article 3.2. John Jackson argues that this objective is “the most important ‘central element’ of the policy purposes of the [DSU]” (Jackson 2004, 112, 117).

GATT–WTO to test the hypothesized link between institutions’ ability to verify information and their choice of one escape mechanism over another.

Escape in the GATT–WTO

While the story told thus far is a generalizable one, it is no coincidence that the literature on escape clauses has focused almost exclusively on trade agreements, and specifically on the GATT–WTO. The latter is undoubtedly the institution with the most observable cases of formal escape of any international agreement today. In this section, I demonstrate GATT members’ preference for moving away from compensation-based escape, and I link this preference to reforms allowing verification of the domestic circumstances faced by would-be escapees. Throughout this section I benefit from the recently declassified GATT archives at Stanford, that offer a wealth of information about early discussions among states on all issues faced by the membership, including the question of flexibility.¹³

Formal trade safeguards were originally an American initiative. In February 1947, the U.S. president signed an executive order requiring that an escape clause be included in all future trade agreements.¹⁴ The GATT was signed later that same year with the objective of lowering trade barriers globally, and accordingly contained a similar escape clause, chiefly at the insistence of the United States, in the form of Article XIX.

Article XIX indicated that members affected by “unforeseen developments” that led to “serious injury” as a result of their GATT obligations could suspend those obligations “to the extent and for such time as may be necessary to prevent or remedy such injury” (GATT Article XIX: 1a). Article XIX had a compensation and retaliation clause, which allowed members affected by the escape clause to suspend the application of “substantially equivalent concessions” (GATT Article XIX: 3a). From 1947 to 1994, the duration of GATT, members exercised Article XIX measures 150 times.¹⁵

Looking at the exercise of the escape clause, one notes that in the GATT’s first years, compensation was provided in an almost automatic fashion following every Article XIX measure. Starting in the 1960s and early 1970s, however, there was a striking decrease in the popularity of compensation and retaliation following escape. Indeed, only in the first decade of the GATT was a majority of Article XIX measures (57.9 percent) met with some form of compensation. While the total number of Article XIX measures increased with time, the use of compensation and retaliation declined further. This trend continued through GATT’s history, until compensation and retaliation came to play a trivial role, being relied on in only 5.3 percent of escape clauses during the 1980s (Table 1).

TABLE 1. The Use of Compensation and Retaliation in GATT, Following Article XIX Measures

	1950–1959	1960–1969	1970–1979	1980–1989	Total
Number of Article XIX measures	19	35	47	38	139
Of which were compensated or retaliated	11	8	2	2	23
Percentage	57.9	22.9	4.3	5.3	16.5

Source: GATT and WTO Secretariat.

¹³ The GATT archives are digitized and fully searchable online, at <http://gatt.stanford.edu/bin/search/simple> (March 4, 2008).

¹⁴ Executive Order No. 9832, 624–5. Later, “[t]he Trade Agreements Extensions Act of 1951 made the inclusion of an escape clause in new trade agreements a statutory requirement” (Kravis 1954). Previously, escape clauses had only been used in bilateral trade agreements. The first formal escape clause in a trade agreement was in the Reciprocal Trade Agreement between the United States and Mexico, in 1942. Article XIX of the GATT was modeled on that provision (GATT 1987).

¹⁵ GATT and WTO Secretariat.

Many of the reasons for such a shift away from compensation can be surmised from GATT discussions of the time. For instance, it appears that compensation was thought to increase the average period of escape: as the U.S. representative observed in 1976, “compensatory withdrawal of concessions tends to encourage the permanence of safeguard actions.”¹⁶ Indeed, if paying compensation is perceived as “resolving” the imbalance caused by the escape clause, it may also alleviate the pressure on the escaping member to reintegrate compliance, thus increasing the average level of protection at any given time. Moreover, it was often difficult to find products on which a country could provide further compensatory concessions or foreign products on which to raise barriers as retaliation. As the French representative declared during the same discussion, “...it has become increasingly clear that for the majority of countries—even for the most powerful—retaliatory action is very often a possibility which is more theoretical than actual given the practical problems of finding measures that are appropriate.”¹⁷ These difficulties were exacerbated in the case of asymmetric trading partners, when it often proved impossible to balance the injury caused by raising tariffs on a single vital export product.¹⁸ In short, escape through compensation was seen as problematic.

Notwithstanding the open abandonment of compensation and retaliation over time, members remained unable to rely on appeals to exception formally, since it proved difficult to credibly communicate the severity and exogeneity of domestic circumstances, given that states’ claims could not be effectively verified by the membership. The reasons for this inability were twofold. First, the GATT’s criteria of escape were overly vague: “The degree of loss, the list of acceptable causes of the loss... were purposefully left underdefined in the original legal text” (Barton et al. 2006, 110). More generally, the weakness of GATT dispute settlement kept countries negatively affected by escape from effectively challenging it. Indeed, in what has been referred to as the GATT’s “birth defects,” respondents could block proceedings at any stage of a dispute, including the adoption of a panel report.¹⁹

GATT members’ inability to strike down invalid measures can be gleaned from the results of dispute settlement. The first three Article XIX measures ever used, in the early 1950s, resulted in two disputes, *Fur Hats and Hat Bodies* in 1951, and *Dried Figs* in 1952. The first dispute became muddled in discussions over the criterion of “unforeseen developments,” and was ruled in favor of the respondent.²⁰ The second dispute never made it to a formal ruling, but here again, the complainant, Turkey, was unable to prove that the U.S. misused the escape clause, and the “unforeseen developments” clause again constituted a legal hurdle.²¹ These two initial disputes set a precedent. During the remainder of GATT’s 50-year history, *not a single* other dispute was launched in regards to the Article XIX escape clause. Moreover, it became common knowledge that the

¹⁶ GATT 1976, MTN/SG/W/14, 2. Though GATT escape periods may have been longer than under the WTO, GATT also had no formal limit on the maximum length of Article XIX measures, a want which was remedied in the WTO’s Agreement on Safeguards. As I show, recent discussions over “easier compensation” showed similar fears over compensation undermining prompt compliance. See TN/DS/W/5.

¹⁷ GATT 1976, MTN/SG/W/18.

¹⁸ As the Greek representative noted during discussions over one of the very first Article XIX measures, in 1952, “The United States had been almost the only market for Greek exports and it was difficult to envisage any new concession which could compensate for the losses suffered by the producers and exporters of figs” (GATT, SR. 7/7, 5). Tellingly, only one developing country took part in either retaliation or compensation during GATT’s history (GATT, MTN.GNG/NG9/W/7, 5).

¹⁹ That is, until 1989, when the general right to a panel was granted through the Dispute Settlement Procedures Improvements (Castel 1989).

²⁰ GATT, 1951. “Report on the Withdrawal By the U.S. of a Tariff Concession Under Article XIX of the GATT, March 27, 1951” (CP/106).

²¹ GATT, 1952. “Increase in the U.S. Duty on Dried Figs, Decision of November 8, 1952” (SR.7/15 – 1S/28).

“unforeseen developments” clause, the main criterion of escape, was left un-enforced.²²

The situation in GATT contrasts markedly with that observed following the WTO's entrance in 1995. Article XIX was replaced by the current Agreement on Safeguards (AS) during the Uruguay Round reforms. Crucially, the AS does not allow compensation or countermeasures for the first 3 years of the safeguard,²³ the maximum duration of which is 4 years.²⁴ By limiting compensation, the AS made WTO escape clauses “more attractive than their predecessor” (Bown 2002, 51). As Rosendorff and Milner (2001) point out, the very procedure of filing an escape clause investigation may be costly in and of itself, and may serve as a barrier to the exercise of escape. In the case of safeguards, however, those costs are limited: safeguard investigations are easier than antidumping investigations, for example, since they do not require calculations of dumping using foreign market assessments (Global Trade Protection Report 2004, 7). As Bown (2002, 58) observes, it is difficult to imagine by what means the AS could make the escape clause any more attractive to WTO members, short of actually *paying* members for the exercise of safeguards. Crucially, the AS features far better defined criteria of escape, as it explicitly clarifies the meaning of “serious injury,” “threat of serious injury,” “domestic industry”; it provides clear criteria for identifying an increase in imports, and stipulates a required “causal link” between this increase and demonstrated injury (AS, Article 4).

What of the ability to verify those circumstances? As per the expectations laid out above, the requirement to provide information has been drastically reformed in parallel with the escape clause. The AS spells out a requirement for would-be escapees to notify the WTO before the fact, as well as inform the Committee on Safeguards, present evidence satisfying AS criteria, and hold public notice for hearings. None of these clauses were present in Article XIX. Most importantly, perhaps, the GATT's “unforeseen developments” clause has been called back into service—though it does not feature in the AS—and stringently enforced by the Appellate Body in a way that it never was under GATT. The way in which the shift from compensation-based escape to appeals to exception resulted in an institutional rebalancing with regards to the enforcement of escape criteria emerges most clearly from the examination of disputes over safeguards. Indeed, while in the GATT, the two only attempts at challenging a member's use of escape were thwarted in the institution's initial years and never again repeated, a very different picture emerges in the WTO.

As can be seen in Table 2, the shift to compensation-less escape was accompanied by an institutional adjustment in the enforceability of criteria of escape. Indeed, the shift away from compensation in the AS is explicitly contingent on a fulfillment of the criteria of escape, as spelt out in Article 8; in the alternative, invalid use of the escape clause is treated as any other violation of a country's obligations. This adjustment was driven primarily by the WTO's Appellate Body (AB) in a series of pivotal rulings in the first safeguard cases brought to the WTO. When the panel in *Korea—Dairy*, the WTO's first safeguard dispute, ruled against the complainant, dismissing the latter's claim on “unforeseen developments,”

²² “It would be unrealistic to assume that the practice of non-enforcement of the unforeseen developments condition was unknown when the new Safeguards Agreement was negotiated during the Uruguay Round” (Panel Report, *Argentina Footwear*, WT/DS121/R, para 8.66). Hudec (1980, fn 44) himself notes: “An early GATT decision [Fur Hats] essentially read the “unforeseen development” out of existence.”

²³ “The right of suspension [countermeasures] referred to in paragraph 2 shall not be exercised for the first 3 years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement” (AS, Article 8:3, emphasis added).

²⁴ An extension may be sought, however, in which case the safeguard measure may be in place for up to 8 years (AS, Article 7:1–3).

TABLE 2. Disputes over Exercise of Escape Clause in the GATT/WTO, 1947–2006

<i>Dispute Title</i>	<i>Year</i>	<i>Institution</i>	<i>Panel</i>	<i>Appellate Body</i>
Fur Hats	1951	GATT	Pro-respondent, complainant's "unforeseen developments" claim dismissed by the panel.	NA
Dried Figs	1952	GATT	No ruling, no compliance.	NA
Korea Dairy	1997	WTO	Claims under Article XIX rejected: minimal reading of "unforeseen developments" clause.	AB overturns panel's ruling on Article XIX. Rules pro-complainant.
Argentina Footwear	1999	WTO	Claims under Article XIX rejected: minimal reading of "unforeseen developments" clause.	AB overturns panel's ruling on Article XIX. Rules pro-complainant.
U.S. Wheat Gluten	1999	WTO	"Judicial economy" exercised with regards to "unforeseen developments," which the U.S. ITC report makes no mention of. Pro-complainant ruling.	No appeal
U.S. Lamb	1999	WTO	Finds against the U.S. on "unforeseen circumstances," specifying the need for a "logical connection" between conditions set forth in Article XIX; pro-complainant ruling.	AB upholds the finding, and emphasizes the need for "logical connection."
U.S. Line Pipe	2000	WTO	Finds against the U.S. on "unforeseen circumstances." Pro-complainant ruling.	No appeal
Chile Agricultural Products	2000	WTO	Finds against Chile on "unforeseen circumstances." Pro-complainant ruling.	Panel's "unforeseen circumstances" finding not appealed, AB finds in favor of complainant.
Argentina Peaches	2001	WTO	Finds against Argentina on "unforeseen circumstances"; Specifies that injury and unforeseen developments must be logically connected, but distinct events. Pro-complainant ruling.	No appeal
U.S. Steel	2001	WTO	Finds against the U.S. on "unforeseen circumstances." Pro-complainant ruling.	AB upholds all findings with regards to "unforeseen circumstances"; pro-complainant ruling.

Source: 1. GATT and WTO Secretariats. 2. On the subject of judicial economy in *U.S. Wheat Gluten*, see Busch and Pelc (2010). 3. The International Trade Commission (ITC) is the Federal U.S. agency that initially assesses whether to exercise a safeguard, and provides its recommendations to the President.

the AB forcefully overturned the panel's reasoning on appeal. It emphasized that safeguards are considered "emergency actions," and that such actions are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation."²⁵ The AB's reading of GATT's Article XIX effectively enforced the unforeseen developments clause, and with it, the exogeneity of domestic circumstances, more literally than

²⁵ AB Report, *Korea Dairy Safeguards*, WT/DS98/AB, para 86.

it ever was under the GATT.²⁶ The dispute was finally ruled against the escapee, Korea.

The situation is repeated in the very next dispute on safeguards, *Argentina—Footwear*. Here again, the panel provides a minimal reading of the “unforeseen circumstances” clause, and here again the AB forcefully overturns it, arguing: “the ... clause describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.”²⁷ The dispute is again ruled against the respondent, Argentina.

The panels in all six cases that followed *Argentina—Footwear* begin to apply the precedent set by the AB, and in all six cases, the ruling is against the escapee. More interestingly, in all cases but one, the unforeseen developments clause is pivotal in the panel’s reasoning. In *U.S.—Line Pipe*, the panel cites all four preceding safeguard cases and declares: “the requirement to demonstrate the existence of unforeseen developments in order to apply a safeguard measure under Article XIX is an issue that is well established in WTO law.”²⁸ Further, “In this case, the ITC report does not contain any demonstration of the existence of unforeseen developments.”²⁹

The most notorious WTO dispute over safeguards, *U.S.—Steel*, was also its most conclusive, resulting in a ruling against all safeguard measures at issue. Among other findings, the panel ruled that despite the mention by the United States of “extraordinary circumstances” (Zoellick 2003), the measures “are inconsistent with the requirements” of GATT Article XIX:1(a) and AS Article 3.1 with regard to the demonstration of unforeseen developments.³⁰ The U.S. appealed, and the AB upheld the panel’s findings with regards to unforeseen developments. The ruling seems to have a lasting effect on American use of safeguards: while it had initiated at least one safeguard investigation every year since the inception by the AS in 1995, for a total of ten initiations over 7 years, the U.S. has not initiated a single safeguard investigation following the steel safeguards, from 2002 to 2006.

All eight WTO rulings on safeguards show a determination by the AB to enforce not only the new criteria of escape introduced by the AS, but also the existing Article XIX criteria that had gone unenforced under the GATT, such as the unforeseen developments clause. The occurrence of disputes on safeguards that make it past consultations to a ruling (rather than end with early settlement, as a majority of disputes do) shows governments attempting to stretch the post-Uruguay Round rules in their favor, before adjusting to the new level and scope of enforcement. The chronological record of these disputes displays increasing internal coherence, as panels from *U.S.—Lamb* onwards reference the AB’s literal reading of the unforeseen developments clause, and apply the criteria of escape with progressively greater consistency. In other words, in the WTO, the gate-keeping mechanism of the AS is not an optimal cost imposed on escapees; it is, rather, the nature of the domestic circumstances motivating escape. Accordingly, the institution’s ability to verify those circumstances has been reformed alongside the shift away from compensation, and the product of this reform can be gleaned from the success that complainants have had in challenging invalid use of the escape clause, and how this record differs from that of the GATT.

One could argue, however, that the ability to disseminate and verify information and the resulting successful challenges to would-be escapees happened to

²⁶ “Although governments [under the GATT] still appeared to respect the central requirement of “serious injury,” many of the lesser criteria of Article XIX had virtually been forgotten (Hudec 1980, 161).

²⁷ AB Report, *Argentina Footwear*, WT/DS121/AB/R, para 90–92.

²⁸ Panel Report, *U.S. Line Pipe*, WT/DS202/R, para 7.295.

²⁹ Panel Report, *U.S. Line Pipe*, WT/DS202/R, para 7.296.

³⁰ Panel Report, *U.S. Steel*, EC (WT/DS248), Japan (WT/DS249), Korea (WT/DS251), China (WT/DS252), Switzerland (WT/DS253), Norway (WT/DS254), New Zealand (WT/DS258), and Brazil (WT/DS259).

coincide with the shift away from compensation, but that there was not a causal link. Indeed, increased legalization is often observed in maturing institutions, and might have happened without a shift away from compensation. To account for this possibility, I take a closer look at discussions between GATT members two decades prior to the conclusion of the Uruguay Round. By consulting the GATT's archives, it is possible to trace the ideas underlying the reform of the escape clause back in time. In this way, I show that very early on, members of the GATT understood not only that appeals to exception and compensation were substitute means of allowing some flexibility while preventing its abuse, but that appeals to exception required a number of parallel changes in the institution's monitoring ability and its information standards before being formally implemented.

The first important push for escape clause reform of the kind that occurred during the Uruguay Round took place in 1976. The U.S. proposed a new escape clause "international code" to remedy some of the "shortcomings in current practice" that were being voiced throughout the membership.³¹ In particular, the U.S. proposed increasing the specificity of criteria and conditions for escape, while retaliation and compensation would be waived: "...when governments apply safeguard measures that are in conformity with the agreed criteria and conditions of the [proposed] code, they would not be subject to retaliation, nor would there be any obligation for them to provide compensation. However, non-compliance with the agreed criteria and conditions could warrant retaliation."³² Increasing the precision of the criteria of escape was already then seen as the starting point of escape clause reform. Other parties endorsed the proposal, and further emphasized the link between an abandonment of compensation on the one hand, and increased monitoring on the other;³³ there was no opposition to the proposed changes. Members well understood that deterring abuse by making escape costly, in situations of true involuntary defection (that satisfied the criteria of escape), was ineffective. As the EC commentary on the U.S. proposal read, "[i]n particular, safeguard action which is based upon the application of well-defined criteria, of temporary duration, and clearly designed to ease the process of adjustment should not, we believe, lead to retaliation or to demands for compensation."³⁴

Rather than a loosening of the escape clause by making it "cheaper," members foresaw that tightening its criteria would allow for a rethinking of its application: "the removal of the compensation/retaliation burden in carefully defined situations should not be seen as a gift to would-be safeguarders, but rather as a new kind of contractual relationship."³⁵ This new contractual relationship was portrayed as relying on three changes to the institution: (i) better defined criteria of escape, (ii) the creation of an independent international body to monitor use of all safeguards, and (iii) the use of dispute settlement to consult with aggrieved parties and resolve perceived violations of the criteria and conditions of the escape clause.³⁶

I emphasize that these discussions took place 20 years ahead of the formal shift from the GATT Article XIX measures to the modern WTO safeguards. They not only show how early ideas about ways of remedying observed shortcomings of the Article XIX measures surfaced, but they also explain the decrease in

³¹ GATT 1976, MTN/SG/W/14, 1.

³² GATT 1976, MTN/SG/W/14, 2.

³³ The Canadian representative noted: "Because so much would hinge on determining whether or not a contracting party had met the criterion and conditions of the system, these elements would assume particular importance" (GATT 1976, MTN/SG/W/17).

³⁴ GATT 1976, MTN/SG/W/18.

³⁵ GATT 1976, MTN/SG/W/14.

³⁶ GATT 1976, MTN/SG/W/14.

popularity of compensation and retaliation following Article XIX measures in the later GATT years. The reforms of the Uruguay Round, rather than a drastic shift away from existing practice, simply served as the formalization of practice that had slowly set in, as ideas about the inadequacies of retaliation and compensation took hold.³⁷

These early discussions suggest, moreover, that the popular claim that the safeguard reforms were meant to decrease the relative attractiveness of antidumping, the least economically efficient measure of the two, (Bown 2002; Hoekman and Kostecki 1995) is only part of the story, at best.³⁸ Rather, reforms aimed for a tightening of the criteria and conditions for escape, as well as the means to enforce them.

The above evidence demonstrates that members foresaw the reforms that would be required before shifting to an appeals to exception scheme, but one might nonetheless counter that the diplomatic path taken by the GATT early on kept it from considering a scheme based purely on cost. As a result, a true compensation scheme, as illustrated by the literature on escape clauses, has never been fully envisaged for extraneous reasons, and it is impossible to foretell what might have happened if it had been.

As luck would have it, however, such a scheme was in fact submitted to the membership by the EC in 2002.³⁹ The proposal was not specifically aimed at the escape clause, but rather at providing a general solution for members' continued noncompliance past a DSU ruling. Despite this, it offers us a rare opportunity to observe members' preferences in regards to compensation in the WTO. Indeed the EC's proposal reflected much of the literature's recommendations by calling for "easier compensation."⁴⁰ Its premises were seemingly sound: if retaliation (suspension of concessions) is so costly for everyone involved (as per Hudec),⁴¹ why not make it easier for noncomplying states to compensate injured parties? The proposal allowed for the noncomplying state to take the initiative in establishing the amount of nullification and impairment that would determine the level of concessions.⁴²

Sensible though its premises may have been, the EC proposal was loudly criticized by the membership; it did not make it into the Chairman's Text (the product of the 2002 reform discussions)⁴³ and was, in short, unequivocally rejected. India claimed: "In fact if EC's proposal on making trade compensation more realistic is accepted, it could serve as an inducement for the losing party not to comply promptly with the DSB decision."⁴⁴ Chile echoed a similar sentiment, by saying it "was not particularly attracted to the proposals on compensation, as there was the tendency to see it as a substitute for compliance."⁴⁵ Why such a negative reaction to a seemingly sound proposal? Because the EC's proposal would

³⁷ This perception of inadequacy may have been driven by more than the rules themselves. With the intensification of trade, and intraindustry trade in particular, the costs of imposing retaliation may have progressively increased, making any alternative seem more appealing (I thank an anonymous referee for pointing this out).

³⁸ Moreover, if the Agreement on Safeguards reforms only had the objective identified by the literature, they would have been hardly successful, since antidumping continues to be the more popular instrument by far. In all, 2,743 antidumping investigations have been launched since the introduction of the AS, compared with 139 safeguards for the same period, from January 1, 1995 to June 30, 2005 (WTO Secretariat).

³⁹ Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, (WTO, TN/DS/W/1). The discussions' objective was "to carry out negotiations on improvements and clarifications" to the DSU.

⁴⁰ In this way, the EC proposal was in many ways an embodiment of the Rosendorff (2005) view of the DSU as a compensation-setting mechanism.

⁴¹ See fn 26, *supra*.

⁴² As it stands presently, "the main element for the negotiation of compensation can only be obtained in requesting the authorization to apply sanctions" (WTO TN/DS/W/1, 5).

⁴³ See *Report by the Chairman*, Annex, TN/DS/9.

⁴⁴ GATT 1968, TN/DS/W/5.

⁴⁵ GATT 1968, TN/DS/M/6.

have gone against an important aspect of the WTO: the onus of balancing injury (through retaliation *and* compensation) rests on the injured party. The alternative produces a two-tiered system, where some countries can afford to be a shirker state and compensate others at their will for their violations, and others cannot. In the case of the WTO, the membership was so reticent about such a prospect that it blocked a change to the admittedly inefficient mechanism of retaliation: given the chance to change the norm, members staunchly refused. The dismissal of the European proposal provides further evidence for definite unease with compensation-based schemes in the GATT-WTO, and goes some way in explaining members' incentives to shift away from compensation in the escape clause.

French Trade Measures of May-June 1968

The hypothesized substitution effect between verifiable information about domestic circumstances and compensation sheds light on a well-known anomalous case that runs counter to the literature's claims, that of French trade measures in 1968.

Both as a direct result of strikes, and as an indirect result of strikes in vital sectors such as transportation, power production and maintenance, post services, and telecommunication, the French economy as a whole came to a standstill in May 1968. In the end, the country had been brought to a nearly complete halt of production for a period of 5 weeks.⁴⁶ The strikes resulted in overnight wage increases of up to 35 percent in certain sectors, and production costs witnessed drastic increases as a result. Infrastructure suffered considerable damage as the result of lack of maintenance; heightened costs of production led to a risk of inflationary tension; taxes needed to be raised significantly to cope with the damage incurred, and the government faced serious difficulties with "decline of stocks, budget difficulties, [and] future investments."⁴⁷

The crisis left France and its industrial sector wide open to foreign competition. In an attempt to forestall the impending economic crisis, on June 27, 1968, the French government took unprecedented action on the foreign trade front. The French emergency measures imposed import quotas on private cars and industrial vehicles, electrical appliances, iron and steel products, as well as some textile products. Export subsidies were granted to exporting firms in order to offset the effects of drastic wage increases, heightened production costs, and higher taxes. All measures were temporary, designed for an average period of 6 months, from July 1, 1968 to December 31, 1969.⁴⁸ The measures met all the characteristics of escape: France temporarily violated GATT rules following a domestic exogenous shock that made full compliance unfeasible.

It is notable that while the GATT had an "emergency action" escape clause in place in Article XIX, and an import restriction clause in Article XII contingent on "serious decline in its monetary reserves," France did not avail itself of either of them. Instead, the trade measures were taken unilaterally, and France informed the GATT Director-General after the fact.⁴⁹

Although the reaction within GATT has been portrayed in the international relations literature as amounting to "sympathy and understanding" (Kratochwil and Ruggie 1986; Ruggie 1982), initial reactions were actually mixed at best. As is evident from the minutes of GATT meetings that occurred on July 4, 1968,

⁴⁶ GATT 1968, C/M/48.

⁴⁷ GATT 1968, C/M/48, 1.

⁴⁸ GATT 1968, L/3035.

⁴⁹ On the other hand, a formal escape clause was exercised within the European Community, by resorting to Article 37 of the Treaty establishing the European Coal and Steel Community (ECSC). The correct Article 37 procedure was initiated, and the measures on steel and iron products were put in place only following the decision of the ECSC Commission, on July 8, 1968 (GATT 1968, L/3042).

shortly after the announcement of the French trade measures, members demonstrated "a definite uneasiness as to the repercussions that these measures could have on other contracting parties."⁵⁰

In accordance with the trade-off between allowing flexibility and restraining its abuse, GATT members were concerned that condoning the French trade measures might lead to a precedent that would increase flexibility to the point where it would undermine the institution.⁵¹ In this period of reduction of tariffs following the Kennedy Round cuts, the danger of a snowball effect was felt by all members, and developing countries especially.⁵² Members were concerned not about the economic consequences of the measures, but the *institutional* ones. In fact, the minutes of the first GATT meeting following the French trade measures show that 12 out of the 16 country representatives to speak out repeated their concerns over the risk of escalation or precedent setting.⁵³

The 1968 French trade measures demonstrate the great foresight of GATT members in their discussion of the fundamental questions of flexibility and stability within institutions. The U.S. representative, for example, warned how interpreting the spirit of the agreement too loosely could make GATT "infinitely flexible."⁵⁴ GATT members were effectively discussing the means of legislating necessity, the very same way the Roman Senate did in Machiavelli's account. Their concern was over how to allow France to temporarily violate GATT rules in order to let her recover from a dangerous exogenous shock, while maintaining the legitimacy of the agreement, and preventing the future abuse of flexibility.

According to the conventional wisdom, France could have offered to compensate affected GATT members for the effects of its emergency trade measures. Given the circumstances, compensatory concessions could have been moved forward in time to allow French industry to recover from the crisis. These concessions could have been exactly equivalent to the easily measurable losses incurred by France's trading partners. Such a cost would have impeded an escalation of escape by other members, and conveyed France's intent to return to compliance in the following period.

Yet, not once throughout the French declaration of actions taken, the GATT meetings held following the events, or the subsequent report of the specially created Working Party was the notion of penalty or the need for compensation invoked. Instead of justifying its actions through compensation, the French representative appealed to exception: "France's situation was exceptional, *it was not among those that had been envisaged* by the General Agreement [on Tariffs and Trade]."⁵⁵ GATT representatives then echoed the exceptional nature of the events in turn. In a typical statement, the representative of Portugal "stressed the exceptional character of the circumstances that had led France to take certain measures. Because the crisis had been exceptional those measures should not constitute a precedent."⁵⁶ In the first meeting, 11 of 16 representatives reiterated the exceptional nature of the circumstances.⁵⁷ Rather than recommending

⁵⁰ Conclusion of the Chairman of GATT emergency meeting, Mr. Somerfelt (GATT 1968, C/M/48).

⁵¹ The representative of Canada said that members should cooperate closely so as "to ensure that the action with which they were confronted would not become a precedent." Most of the representatives subsequently echoed this same idea. *Ibid.*

⁵² The May-June events coincided with a July 1 scheduled reduction both within the European Community, and the GATT. As a result, members in both agreements were sensitive to domestic pressure for protection, and were under considerable strain to meet the requirements for tariff abatement before the deadline.

⁵³ Twelve of sixteen country representative explicitly mentioned the risk of "precedent setting," "escalation," "[resulting] protectionist measures in other countries," "repercussions," "wave of restrictive actions," "a snowball effect," etc. (GATT 1968, C/M/48).

⁵⁴ GATT 1968, C/M/48, 9.

⁵⁵ As voiced by the French representative (GATT 1968, C/M/48, 4, emphasis added).

⁵⁶ GATT 1968, C/M/48, 10.

⁵⁷ GATT 1968, C/M/48, 10.

countermeasures or compensation, GATT members accepted France's appeal to exception as valid; they attested to both its severity and its exogeneity.

The solution they proposed was to "record clearly that the measures had been accepted as an altogether exceptional response to a unique situation."⁵⁸ By presenting an appeal to exception, France was insulating the agreement from the effects of its noncompliance. The Working Group report,⁵⁹ in turn, stressed that any justification of the French measures resided not in the difficulties faced *per se*, but rather in their *uniqueness*.⁶⁰ This restricted the escape area further: it was not the general strikes, nor the wage increases themselves that justified escape, but precisely their exceptional and unforeseeable character.

Why did France not avail itself of one of the formal escape clause procedures, and instead proceeded in an ad hoc manner? The severity and exogeneity of France's circumstances were plainly visible to all members. Moreover, given the GATT's inability to verify domestic circumstances, proceeding through formal channels would have added little credibility to France's appeal. It is precisely this ad hoc character that allows us to peer into the rule-making process and to observe the reasoning of GATT representatives through their discussions. What is striking is the extent to which the ad hoc proceedings mimicked the motions formally implemented in the WTO's AS 30 years later. Members worked to brand the French circumstances as belonging to a class of exceptional events, as a means of allowing for flexibility while curtailing the risk of future abuse.

The 1968 French case thus serves a heuristic function, as it identifies the requirements for the circumvention of compensation in cases of escape. Because of the absence of clear criteria of escape in 1968, GATT members can be observed constructing and verifying the very criteria that were later formalized in the AS. While the literature would see it as an anomalous case, its handling by GATT meets the expectations of the hypothesized substitution effect between verifiable information and cost.

Conclusion

This article challenges the existing literature by arguing that rendering escape costly is not the only means by which the use of escape clauses can be managed, and an equilibrium level of flexibility achieved. Another mechanism—one I argue the GATT-WTO has shifted to—allows members to appeal to exception, by justifying escape through the domestic circumstances they face. The possibility of appeals to exception relies on an institution's ability to verify the severity and exogeneity of the domestic circumstances of states seeking temporary escape.

As the evidence shows, compensation following escape was only widespread during the first decade of the GATT's inception, from 1950 to 1959. It was then rapidly abandoned, in view of its many perceived shortcomings. With the passage to the WTO, in 1995, reliance on compensation was formally reduced, and members' ability to verify escapees' claims, conversely, was greatly improved. As I show by examining the record of disputes over safeguards through the GATT/WTO and a series of recent AB rulings, it was precisely this ability to recognize and

⁵⁸ As voiced by the U.K. representative (GATT 1968, C/M/48, 8).

⁵⁹ The terms of the Working Group were: "to examine the trade measures taken by the Government of France and their implications, taking into account the discussion on the matter in the Council, to present a first report to the Council by July 19, 1968, and to continue to be available for consultations if necessary." Working Group Report, GATT 1968, L/3047.

⁶⁰ The Working Party report also stressed the "unprecedented combination of economic, social and political factors" and was of the view that "the present case cannot therefore constitute a precedent for the future." Working Group report GATT 1968, L/3047, par. 34. Adding that in the case of developing countries, "situations similar to this could not be regarded as unique; they had, on the contrary, a structural character." (From the second GATT meeting held on the subject of French Trade Measures, GATT 1968, C/M/49, 1).

strike down invalid use of the escape clause that allowed for the cancellation of compensation and retaliation, a causal link already identified by GATT members during discussions held in the 1970s.

Behavior amounting to “sympathy and understanding” is rarely associated with states interacting at the international level. What this article suggests, however, is that governments find it in their interest to take credible information about other members’ domestic circumstances into account when analyzing those states’ actions. This finding can be further generalized: governments seeking to deter noncompliance should focus on those state violations that give an indication of potential violations to come. Insurance companies do not raise premiums of drivers whose car is damaged while parked, and international institutions should similarly avoid punishing behavior over which governments have limited agency. The challenge, of course, is to distinguish those instances from willful violations. In the cases examined in this article, states are shown to withhold countermeasures when they observe the severe and unforeseeable circumstances faced by another country, but only once the institution provides a monitoring system capable of differentiating between valid and invalid escape.

The observed shift from compensation to appeals to exception in the GATT/WTO also points to the prevailing uneasiness on the part of member states with regards to “buy-out” options, further evidenced by governments’ reactions to the EC’s 2002 proposed reforms.⁶¹ Much has been recently made of the possibility of “efficient breach” in international agreements (Bello 1996; Finger 1998; Schwartz and Sykes 2002; Sykes 1991, 2003). The article’s findings, however, offer support for the view that existing norms may generate considerable pressure against such efficient breach mechanisms (Jackson 1997, 2004).

Finally, one may be tempted to interpret the WTO’s move away from compensation and retaliation, both typical “hard law” mechanisms, as a sign of an increasingly “soft law” stance, implying perhaps as a reversion to the GATT’s diplomatic roots. Such a view is misguided: as GATT members foresaw in the 1970s, the abandonment of compensation in favor of appeals to exception is conditional on a tightening of the criteria and circumstances of escape, and effective legal means to strike down invalid safeguards. In the case of the WTO, the espousal of appeals to exception corresponds to an *increase* in the institution’s degree of legalization.

References

- ABBOTT, KENNETH, AND DUNCAN SNIDAL. 2000. “Hard and Soft Law in International Governance.” *International Organization* 54 (3): 421–456.
- BARTON, JOHN H., JUDITH L. GOLDSTEIN, TIMOTHY E. JOSLING, AND RICHARD H. STEINBERG. 2006. *The Evolution of the Trade Regime*. Princeton: Princeton University Press.
- BELLO, JUDITH HIPPLER. 1996. “The WTO Dispute Settlement Understanding: Less Is More.” *American Journal of International Law* 90 (3): 416–418.
- BOWN, CHAD. 2002. “Why Are Safeguards Under the WTO so Unpopular?” *World Trade Review* 1 (1): 47–62.
- BOWN, CHAD. 2003. “On the Economic Success of GATT/WTO Dispute Settlement.” *The Review of Economics and Statistics* 86 (3): 811–823.
- BUSCH, MARC, AND ERIC REINHARDT. 2001. “Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes.” *Fordham International Law Journal* 24 (1): 158–172.
- BUSCH, MARC L., AND KRZYSZTOF J. PELC. Forthcoming 2010. “The Politics of Judicial Economy at the WTO.” *International Organization*.
- CASTEL, JEAN-GABRIEL. 1989. “The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures.” *International and Comparative Law Quarterly* 38: 834–849.
- DOWNS, GEORGE, AND DAVID ROCKE. 1995. *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations*. Princeton: Princeton University Press.

⁶¹ See fn 39, *supra*.

- FINGER, J. MICHAEL. 1998. "GATT Experience with Safeguards: Making Economic and Political Sense of the Possibilities that the GATT Allows to Restrict Imports." *World Bank Policy Research Working Paper Series* 2000.
- GOLDSTEIN, JUDITH, AND LISA MARTIN. 2000. "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note." *International Organization* 54 (3): 603–632.
- GROSS, OREN. 1998. "Once More Unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies." *Yale Law Journal* 23 (47): 437–502.
- HERZING, MATHIAS. 2005. "Essays On Uncertainty and Escape in Trade Agreements." PhD Dissertation, Stockholm University.
- HOEKMAN, BERNARD, AND MICHAEL KOSTECKI. 1995. *The Political Economy of the World Trading System*. New York: Oxford University Press.
- HUDEC, ROBERT. 1980. "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business." *Cornell International Law Journal* 13 (2): 145–204.
- HUDEC, ROBERT. 2000. *Broadening the Scope of Remedies in the WTO Dispute Settlement, Issues and Lessons from the Practice of Other International Courts and Tribunals*. London: Cameron May.
- JACKSON, JOHN. 1997. "The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation." *American Journal of International Law* 91 (1): 60–64.
- JACKSON, JOHN. 2004. "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?" *The American Journal of International Law* 98 (1): 109–125.
- KEOHANE, ROBERT, AND LISA MARTIN. 2003. "Institutional Theory as a Research Program." In *Progress in International Relations Theory*, ed. Elman Colin, and Myriam Elman. Cambridge: MIT Press.
- KOREMENOS, BARBARA. 2001. "Loosening the Ties That Bind: A learning Model of Agreement Flexibility." *International Organization* 55 (2): 289–325.
- KOREMENOS, BARBARA. 2004. "Bringing More Precision to the Three Dimensions of Legalization." Paper presented at the European University Institute, Fiesole, Italy.
- KOREMENOS, BARBARA. 2005. "Contracting Around International Uncertainty." *American Political Science Review* 99 (4): 549–565.
- KOREMENOS, BARBARA, CHARLES LIPSON, AND DUNCAN SNIDAL. 2001. "The Rational Design of International Institutions." *International Organization* 55 (4): 761–799.
- KRATOCHWIL, FRIEDRICH, AND JOHN RUGGIE. 1986. "International Organization: A State of the Art on an Art of the State." *International Organization* 40 (4): 753–775.
- KRAVIS, IRVING. 1954. "The Trade Agreements Escape Clause." *The American Economic Review* 44 (3): 319–338.
- MACHIAVELLI, NICCOLÒ. [1531] 1998. *Discourses on Livy*, trans. Harvey C. Mansfield, Nathan Tarcov. Chicago: University of Chicago Press.
- MASKIN, ERIC, AND JEAN TIROLE. 1999. "Unforeseen Contingencies and Incomplete Contracts." *The Review of Economic Studies* 66 (1): 83–114.
- PUTNAM, ROBERT. 1988. "Diplomacy and Domestic Politics: The Logic of Two-level Games." *International Organization* 42 (3): 427–460.
- ROSENDORFF, PETER. 2005. "Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure." *American Political Science Review* 99 (3): 389–400.
- ROSENDORFF, PETER, AND HELEN MILNER. 2001. "The Optimal Design of International Trade Institutions: Uncertainty and Escape." *International Organization* 55 (4): 829–857.
- RUGGIE, JOHN. 1982. "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order." *International Organization* 36 (2): 379–415.
- SCHWARTZ, WARREN, AND ALLAN SYKES. 2002. "The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization." *Journal of Legal Studies* 31 (1): 179–204.
- SIMMONS, BETH. 2000. "The Legalization of International Monetary Affairs." *International Organization* 54 (3): 573–602.
- STEVENSON, CLIFF, AND ILARIA FILIPPI. 2006. *Global Trade Protection Report 2001–2005*. London: Mayer, Brown, Rowe and Maw.
- SYKES, ALAN. 1991. "Protection as 'Safeguard': A Positive Analysis of the GATT 'Escape Clause' with Normative Speculations." *The University of Chicago Law Review* 58 (1): 255–305.
- SYKES, ALAN. 2003. "The Safeguard Mess: A Critique of WTO Jurisprudence." *World Trade Review* 2 (2): 261–295.
- TIROLE, JEAN. 1999. "Incomplete Contracts: Where Do We Stand?" *Econometrica* 67 (4): 741–781.
- TOMZ, MICHAEL. 2007. *Sovereign Debt and International Cooperation: Reputational Reasons for Lending and Repayment*. Princeton: Princeton Press.
- ZOELLICK, ROBERT. 2003. United States Trade Representative Press Release, December 4.

Copyright of International Studies Quarterly is the property of Blackwell Publishing Limited and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.