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A Really Big Button That Doesn't Do Anything? The Anti-NME Clause in US Trade Agreements Between Law and Geoeconomics

Geraldo Vidigal*

ABSTRACT

The United States-Mexico-Canada Agreement (USMCA) features a clause, dubbed 'anti-China', which sets out legal consequences in case one of the parties negotiates or enters into a free trade agreement (FTA) with a nonmarket economy (NME). A similarly worded objective appears among the negotiating objectives of the US for FTAs with the European Union, Japan, and the United Kingdom. This article examines the anti-NME clause, arguing that its concrete legal consequences are less relevant than its symbolic effects. The USMCA clause itself is difficult to replicate in bilateral agreements, since it depends on cooperation between the two nonsigning parties. Its operation is nonetheless similar to that of two unilateral remedies available under the law of treaties, permitting a reasonable assessment that the clause, if it follows its original design, will aim to permit termination of bilateral US FTAs in response to the other party entering into an NME FTA. While such a clause would offer little in terms of concrete effects if added to agreements that already permit unilateral withdrawal, its greatest value may not be in its legal effects but in its legitimating and signaling properties, which push USMCA parties to establish a common front in the 'geoeconomic' dispute between the United States and China.

I. INTRODUCTION

In a corner of the World Wide Web lies the internet's self-declared 'most unusual artifact': The Really Big Button that Doesn't Do Anything.¹ A large button colored red appears on the screen to be pressed at will, to no noticeable effect. While its creators assure readers that pushing it is 'in vain', others dispute this claim. One analysis of the Really Big Button advances the theory that 'the universe is completely different after The Button [i]s pressed', not due to anything the button 'does' but because 'the very act of pressing The Button alters the entirety of space and time in a fundamental way'.²

When the United States-Canada-Mexico Trade Agreement (USMCA) was signed on 30 November 2018 to replace the North American Free Trade Agreement

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1 See <http://krystalrose.com/rosewood/library/BigButton.htm> (visited 1 July 2019).

2 Uncyclopedia Contributors, 'The Really Big Button That Doesn't Do Anything', *Uncyclopedia* (visited 1 July 2019).

(NAFTA), there was widespread surprise at the inclusion in the new agreement of a so-called 'anti-China clause',³ which establishes legal consequences in case a USMCA party seeks to enter into a free trade agreement (FTA) with 'a non-market country'.⁴ In its negotiating objectives for future FTAs with Japan, the European Union and the United Kingdom, the United States Trade Representative (USTR) has included a similarly formulated objective: to '[p]rovide a mechanism to ensure transparency and take appropriate action if [the other party] negotiates a free trade agreement with a non-market country'.⁵

This article analyzes this anti-nonmarket country—or nonmarket economy (NME)—clause, arguing that it operates in a manner similar to The Really Big Button: while actually invoking the clause changes virtually nothing in the rights and obligations of the parties under USMCA, its very presence alters the collective perception with respect to the permissibility of negotiating an FTA with an NME, on the one hand, and of adopting a harsh response to such an agreement being concluded, on the other.

In other words, despite the absence of concrete effects, the clause produces significant symbolic and legitimating effects. By agreeing to the clause, FTA parties sign up to a core 'geoeconomic' objective of the US administration: to prevent NMEs, and in particular one country the US considers an NME (China), from expanding their influence through FTAs unless they adhere, to the US's satisfaction, to market principles in the operation of their economies. Where, in the absence of this clause, a unilateral US response to an FTA by a trade partner could appear as an undue interference in the latter's economic sovereignty and right to conduct its own international relations, once the clause is in place this unilateral response is legitimized as a reaction to that party's undermining of the bargain it concluded with the United States.

Following this Introduction, the article proceeds in four parts. Part 2 examines the anti-NME clause in the USMCA, concluding that the right it creates to react to an NME FTA is difficult to exercise and adds little in practice to the general entitlement of the parties to withdraw from the agreement. Part 3 compares the wording and operation of the clause to unilateral remedies available in exceptional circumstances under the law of treaties, demonstrating that the clause equates a party entering into an NME FTA to a fundamental change of circumstances or a repudiation of the US FTA, legitimating a severe response, and predicts its probable design in future bilateral agreements. Part 4 argues that the practical value of this clause lies less in its concrete legal effects than in its signaling or legitimating value, precluding a severe response to an NME FTA from being perceived as unilateral strong-arming and signaling that the US is ready to adopt damaging measures in case the other party enters into an NME FTA. Ultimately, the clause is part of what has been termed a 'geoeconomic' approach to

3 Chad Bown, 'The five surprising things about the new USMCA trade agreement', VoxEU.org, <https://voxeu.org/content/five-surprising-things-about-new-usmca-trade-agreement> (visited 17 October 2018).

4 United States-Canada-Mexico Trade Agreement, signed 30 November 2018 (not in force), Art. 32.10(5).

5 United States Trade Representative, *United States-Japan Trade Agreement (USJTA) Negotiations—Summary of Specific Negotiating Objectives* (2018), 14; United States Trade Representative, *United States-European Union Negotiations—Summary of Specific Negotiating Objectives* (2019), 14; United States Trade Representative, *United States-United Kingdom Negotiations—Summary of Specific Negotiating Objectives* (2019), 15.

economic foreign policy, employing economic instruments with a view not to enhance welfare and attain mutual gains but to pursue geopolitical goals.⁶ It seeks to establish a 'block of market-oriented countries', including not only USMCA parties but also the traditional parties to the Western economic and political alliance, preventing them from negotiating individually economic integration agreements with the United States' perceived geoeconomic rival. Part 5 concludes.

II. The ANTI-NME CLAUSE IN THE UNITED STATES-CANADA-MEXICO TRADE AGREEMENT

A. The anti-NME clause: content and interpretation

The anti-NME clause in the USMCA, titled 'Non-Market Country FTA', applies to the negotiation and conclusion of FTAs by USMCA parties with nonmarket countries. It defines a nonmarket country as every country that a USMCA party 'has determined to be a non-market economy for purposes of its trade remedy laws', except for those countries with which a USMCA party already has an FTA.⁷

On the date of signature, neither Mexico nor Canada maintained a list of NMEs.⁸ The United States Department of Commerce classified 11 countries as nonmarket economies, including China, Vietnam, and most former Soviet states (all minus Kazakhstan, Russia, Ukraine, and current Member States of the European Union).⁹ Vietnam has entered into an FTA with Mexico and Canada, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP).¹⁰ With respect to prospective US FTA partners, Japan is a party to CPTPP as well, and the European Union has FTAs with Georgia¹¹ and Moldova¹² and is concluding one with Vietnam.¹³ While the application of this rule to the United Kingdom may result in more countries being affected (the UK's withdrawal from the EU may mean its existing FTAs cease to apply), a reasonable conclusion from an analysis of the list is that the main 'non-market country' it targets is China. This conclusion was confirmed by the Director of the White House's National Economic Council, Larry Kudlow, who in an interview noted that the signing of the

6 Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'The Geoeconomic World Order', *Lawfare*, 19 November 2018; Sergio Puig, 'The United States-Mexico-Canada Agreement: A Glimpse into The Geoeconomic World Order', 113 *AJIL Unbound* (2019) 56.

7 USMCA, Art. 32.10(1).

8 Amrita Bahri, 'Treatment of Non Market Economies in Anti-Dumping Proceedings: The Mexican Approach', in James J. Nedumpara and Weihuan Zhou (eds), *Non-market Economies in the Global Trading System—The Special Case of China* (Springer, 2018), 259–280; Canada, Special Import Measures Act, R.S.C., 1985, c. S-15, Art 16.2(c).

9 The list currently includes Belarus, Georgia, the Kyrgyz Republic, the People's Republic of China, the Republic of Armenia, the Republic of Azerbaijan, the Republic of Moldova, the Republic of Tajikistan, the Republic of Uzbekistan, the Socialist Republic of Vietnam, and Turkmenistan (US Congressional Research Service, 'China's Status as a Nonmarket Economy (NME)', *In Focus*, 10 January 2019 (IF10385)).

10 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018, entered into force 30 December 2018.

11 EU—Georgia Association Agreement, signed 27 June 2014, entered into force 1 July 2016.

12 EU—Moldova Association Agreement, signed 27 June 2014, entered into force 1 July 2016.

13 EU—Vietnam Trade Agreement, signed 30 June 2019.

USMCA meant that the 'continent as a whole' had agreed to counter 'unfair trading practices by you know who. Starts with "C" and ends with an "A".¹⁴

Pursuant to the clause, a USMCA party that so much as considers entering into an NME FTA incurs transparency obligations. The party must inform its USMCA partners of its intention to negotiate an FTA 'at least three months prior to commencing negotiations' and must provide them with as much information as possible regarding its objectives for these negotiations.¹⁵ If the party intends to proceed to sign the NME FTA, other USMCA parties should have 'an opportunity to review the full text' of the envisaged FTA at the latest 30 days before it is signed to 'review the agreement and assess its potential impact' on the USMCA.¹⁶

If the NME FTA is consummated, the USMCA establishes a second set of legal consequences. Article 32.10 provides the following:

5. Entry by a Party into a free trade agreement with a non-market country will allow the other Parties to terminate this Agreement on six months' notice and replace this Agreement with an agreement as between them (bilateral agreement).
6. The bilateral agreement shall be comprised of all the provisions of this Agreement, except those provisions that the relevant Parties agree are not applicable as between them.
7. The relevant Parties shall utilize the six months' notice period to review this Agreement and determine whether any amendments should be made in order to ensure the proper operation of the bilateral agreement.
8. The bilateral agreement enters into force 60 days after the date on which the last party to the bilateral agreement has notified the other party that it has completed its applicable legal procedures.

There is an ambiguity in Article 32.10(5). One possible reading of this paragraph is that it empowers each of 'the other Parties' acting unilaterally to terminate the USMCA for all three parties, in response to another party entering into an NME FTA. The other reading is that activating this provision requires 'the other Parties' to act jointly. While the former reading appears to have been the basis for some of the media coverage of the provision,¹⁷ the latter is the most credible one when this sentence is read in light of its context.

The first relevant contextual element is the second sentence of paragraph 5, which provides that terminating parties may replace the USMCA 'with an agreement as between them (bilateral agreement)': Both grammatically and logically, such a bilateral agreement can only be entered into 'between' two parties. Since the first and the second sentences of paragraph 5 refer to a single subject ('the other Parties'), the only internally consistent reading of this sentence is that activating this provision requires the two other

14 Larry Kudlow, 'Interview', <http://www.aparchive.com/metadata/youtube/84fa900a4006d21696403a5ec1b4740f> (visited 2 October 2018), at 0:18. Kudlow rejected the suggestion that he might be referring to Canada (Ibid, at 0:32).

15 USMCA, Art. 32.10(2-3).

16 USMCA, Art. 32.10(4).

17 Sean Higgins, 'US-Mexico-Canada deal targets China with "poison pill" provision', *Washington Examiner*, (2018).

parties to act jointly.¹⁸ Additionally, the obligation in paragraph 7 for the terminating parties to use the 6 months' notice period, provided to the terminating parties in paragraph 5, to 'review [the USMCA] and determine whether any amendments should be made in order to ensure the proper operation of the bilateral agreement' cannot logically apply to a single party.

Thus, under the most plausible reading of Article 32.10(5),¹⁹ in case a party enters into an FTA with an NME, the other two USMCA parties are allowed to terminate the USMCA, on 6 months' notice, and replace it with a bilateral agreement between them. The new bilateral agreement is to be 'comprised of all the provisions of [the USMCA] except those provisions the relevant Parties agree are not applicable as between them', plus any amendments agreed between them 'to ensure the proper operation of the bilateral agreement'. The bilateral agreement remains subject to the applicable domestic legal procedures in both parties, entering into force 60 days after completion of these procedures.²⁰

B. The limited legal effects of the anti-NME clause

While the anti-NME clause can in principle be triggered by any two USMCA parties, it would make little sense for Mexico and Canada to apply it to exclude the United States from the USMCA. Annual bilateral trade between Canada and Mexico is not insignificant (17.4 billion USD), but is dwarfed by the bilateral trade between the US and Canada (601 billion USD) and between the US and Mexico (571 billion USD),²¹ making facilitated access to the US market a key objective of the other two countries. While it is open to question whether hampering these bilateral relations would be in the US's objective interests, both declarations by US officials with respect to the USMCA²² and the insertion of the clause among the US's negotiating objectives for other FTAs make it reasonably clear that the clause's objectives are to allow the United States to oversee the negotiations of FTAs between their trade partners and China and to provide it with a means of reacting severely to the conclusion of any such agreements.

Evaluated in light of this objective, the clause may appear unsatisfactory. While the clause appears well-suited to ensure transparency at the stage of negotiations, the legal

18 If one eliminated the middle sentence and kept the 'unilateral termination' reading, the paragraph would provide, illogically and ungrammatically, that an NME FTA would 'allow [any of] the other Parties to . . . replace this Agreement with an agreement as between them (bilateral agreement)'. Additionally, the USMCA text makes a clear distinction between 'a Party' (e.g. Articles 32.10(2), 34.6) and 'the other Parties' (e.g. Articles 32.10(5), 34.10).

19 One cannot exclude that a party seeking to apply this paragraph will advance the less plausible reading that it can invoke it single-handedly to terminate the treaty. Since this termination can be carried out without prior adjudication or authorization, the ambiguity in paragraph 5 could be used by a party to act unilaterally, on the basis of its unilateral interpretation, and leave it to other parties to seek adjudication. In this case, however, the outcome would be puzzling: the right for a party to terminate the USMCA, including between the two other parties, and to replace the USMCA with a bilateral agreement with a party with whom it just unilaterally terminated a virtually identical agreement. In any case, as discussed in Section 3 below, even a unilateral termination clause would not add significantly to the possibilities available to the parties.

20 USMCA, Art. 32.10(5-8).

21 Author's calculations based on data from World Trade Organization, WTO Data Portal, <http://data.wto.org/> (2017).

22 See Kudlow, above n 13.

consequences of the conclusion of the NME FTA make it of limited use as a unilateral threat. Reports that it would be a 'poison pill'²³ and would prevent Mexico, Canada, and future US trade partners from entering into an FTA with China²⁴ are contradicted by cold legal analysis of its design and expected operation.

First, the clause does not clarify the meaning of the terms it employs. Presumably '[e]ntry by a Party' into the NME FTA covers the whole spectrum of formal acts leading to the entry into force of an agreement, including signature of a bilateral agreement but also accession to an existing agreement that includes a covered nonmarket economy. But does 'a free trade agreement' mean solely a fully-fledged free trade area covering 'substantially all the trade' in the sense of Article XXIV of the General Agreement on Tariffs and Trade? Or does it also include a sectoral agreement under the WTO's Enabling Clause, which China and Mexico as developing countries are permitted to sign?²⁵

Second, under its most plausible reading, the clause can only be triggered by agreement between the two nonsigning USMCA parties. These two parties are not required or even expected but simply 'allow[ed]' to terminate the USMCA in response to the NME FTA.²⁶ A single party that is dissatisfied, e.g. the US, cannot single-handedly trigger the clause. While it seems unlikely that Canada and Mexico would take advantage of this requirement to render the clause inoperable (e.g. by entering into NME FTAs at the same time), both are likely to ponder the consequences of agreeing to trigger the clause, both for their trade relations and for their strategic situation.

Under Article 32.10, triggering the clause does not simply terminate the USMCA with respect to the FTA-signing party. Instead, it appears to lead to the termination of the USMCA as a whole and to open a phase of negotiations between the two nonsigning parties, which must enter into a new bilateral agreement, subject to all the domestic procedures that would normally apply were the parties to be concluding a new trade agreement.²⁷ And the conduct of Canada and Mexico in USMCA negotiations suggests

23 See Higgins, above n 16.

24 Tom Nellist, 'Trump could force the UK to CHOOSE between China and US Brexit trade deal amid trade war', *Express*, 18 October 2018. In corporate law, 'poison pills' is a catch-all term that refers to legal mechanisms inserted into a company's constitutive instrument to discourage takeover bids.

25 Some have already been considering this workaround. See Lilia González, 'México y China diseñan asociación estratégica: SE', *El Economista*, <https://www.eleconomista.com.mx/empresas/Mexico-y-China-disenan-asociacion-estrategica-SE-20190326-0159.html> (visited 27 March 2019).

26 USMCA, Article 32.10(5).

27 A right of unilateral full termination could be a major issue in an agreement involving many different states—for example, the 11-party CPTPP—if a single party could determine the termination of the agreement for all the parties, requiring the others to reconstruct the agreement from the ground. In the trilateral setting of the USMCA, besides the disproportion between the bilateral Canada-Mexico trade and the trade each party has with the US, it is unlikely that the two other parties would be unable to agree to extend the agreement between them should the US be able to terminate the whole agreement. Thus, whether one interprets the clause as permitting unilateral termination or as requiring joint action, the focus for Canada and Mexico will be their relation with the United States.

that both perceive the trilateral setting as an advantage²⁸ and could be concerned about their diminished ability to resist US pressures in a bilateral negotiation setting.

Perhaps to assuage these concerns, the clause limits the scope of post-USMCA bilateral negotiations, which should aim merely to: (i) exclude portions of the agreement that the parties 'agree are not applicable' as between them and (ii) make amendments to 'ensure the proper operation' of the bilateral agreement.²⁹ This formulation seeks to reassure the parties that the clause will not be used as an opportunity for substantive renegotiation, providing that, for a portion of the USMCA to be excluded from the bilateral FTA, the agreement of both remaining parties is required.

At the same time, the clause is not free of ambiguity. The nonsigning parties are 'allow[ed]' to terminate the trilateral agreement 'and' replace it with a bilateral agreement between them. In case they fulfill the first part of the clause, are they then under an obligation to enter into the bilateral agreement? Or is this second step merely 'allow[ed]' as well? Paragraphs 6 and 7 are cast in obligatory language ('shall'), but also require the two withdrawing parties to come to an agreement with respect to the content of the bilateral agreement. This agreement must then pass muster with the two countries' legislative bodies, opening an even broader window for demands for substantive renegotiation. Given this design and their experience with the US's blocking of the roster of panelists under Chapter 20 of NAFTA³⁰ and (successfully) seeking review of the already-signed USMCA due to demands made by the US Congress,³¹ Mexico, and Canada would be excused for pondering whether they have concrete guarantees that the seemingly straightforward procedure for bilateral reconstruction of the trilateral agreement would not lead to demands for substantive renegotiation of its terms.

Third and most importantly, USMCA offers a far more easily accessible alternative to Article 32.10: unilateral withdrawal. Its Article 34.6 provides the following:

A Party may withdraw from this Agreement by providing written notice of withdrawal to the other Parties. A withdrawal shall take effect 6 months after a Party provides written notice to the other Parties. If a Party withdraws, this Agreement shall remain in force for the remaining Parties.

Like its equivalent in NAFTA, the USMCA's unilateral withdrawal clause does not require the party invoking it to provide any justification, establishing the same 6-month notice period as the anti-NME clause. Voluntary agreement by Mexico or Canada to trigger the anti-NME clause could come from a high degree of trust in, or political alignment with, the United States' administration. In the absence of this political trust

28 David Lawder and Anthony Esposito, 'Mexican president-elect insists on trilateral NAFTA as U.S.-Mexico text awaited', *The Globe and Mail*, 28 September 2018; Anthony Harrup, 'Mexico and Canada Are Committed to a Trilateral Nafta Deal', *The Wall Street Journal*, 25 July 2018.

29 USMCA, Art. 32.10(6-7).

30 NAFTA Article 2009 provides: 'The Parties shall establish by 1 January 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists'. See Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking', 9 JIEL 197 (2006), at 198.

31 James Politi and Jude Webber, 'Deal reached on revised USMCA trade pact', *Financial Times*, 10 December 2019.

or alignment, the United States might have to exert pressure on the other nonsigning country to convince it to trigger the clause. One means of exerting pressure would be the one employed by US President Donald Trump when seeking renegotiation of NAFTA: threatening unilateral withdrawal.³²

While one may discuss the effectiveness and credibility of the threat of unilateral withdrawal when the relevant economies are heavily intertwined,³³ the key point for the purposes of this article is that the so-called 'poison pill' clause does not establish any specific mechanism that would allow a party to prevent the other parties from entering into an FTA with an NME. Instead, it sets up a mechanism for joint termination that may itself depend for its operation on a threat of unilateral withdrawal.

In short, the 'poison pill' clause in the USMCA cannot be used unilaterally by a USMCA party either to withdraw from the USMCA or to force another USMCA party to join it in withdrawing. Even if it could be used unilaterally, as per the less plausible reading of the provision, it would not provide a means of reacting to an NME FTA that would add significantly to the threat of unilateral withdrawal. Its most significant effect seems to be to provide assurances to the non-US terminating party that the US will, subject to an ostensibly purely procedural negotiation, preserve their bilateral trade relation under the terms agreed in the USMCA. Even this assurance is open to doubt, since the ensuing bilateral agreement must undergo all the international and domestic procedures that a new agreement would need to undergo before becoming effective, opening a window for substantive renegotiation—which, as a matter of logic, will usually favor the larger partner.

III. THE ANTI-NME CLAUSE AND THE LAW OF TREATIES: BETWEEN FUNDAMENTAL CHANGE OF CIRCUMSTANCES AND MATERIAL BREACH

In order to understand the function of the anti-NME clause and to predict its expected operation in other agreements, it is useful to place it into the context of general international law. The first point to note in this regard is that the clause stops short of making entering into an NME FTA a *violation* of the USMCA. Entering into such an agreement does not engage the responsibility of a party, which must not provide any reparation to its USMCA partners. Rather, the effects of the clause operate entirely within the law of treaties, permitting the adoption of a unilateral (or 'joint unilateral') remedy by the nonsigning parties. Accordingly, this section analyses the clause in light of unilateral remedies available in specific cases to parties to a treaty (as largely codified in the Vienna Convention on the Law of Treaties (VCLT))³⁴ extracting from this analysis both the underlying logic of the clause and its likely design in a bilateral context.

32 Shawn Donnan, 'Donald Trump revives threat to pull US out of NAFTA', *Financial Times*, 23 August 2017.

33 See Raj Bhala, 'Lessons about NAFTA Renegotiations from Shakespeare's Othello: From the Three Amigos to America as Iago', 33 *Maryland Journal of International Law* (2018), 38.

34 On the customary status of VCLT Article 62, see *Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)*, ICJ Reports (1973), paras 3, 18; ICJ Reports, paras 49, 63 ('Article 62 . . . may

In its operation, the USMCA's anti-NME clause is similar to two unilateral remedies available under the law of treaties: the termination of a treaty in case of fundamental change of circumstances and the termination or suspension of the treaty as a response to a repudiation of the treaty by another party, or to a breach of one of its essential provisions.

A. The NME FTA as analogous to a fundamental change of circumstance

Parties to a treaty are allowed to terminate the treaty or withdraw from it in case of a fundamental change of circumstances. A fundamental change of circumstances, however, is an exceptional occurrence. In *Fisheries Jurisdiction*, the International Court of Justice noted that in order to be 'fundamental', a change of circumstances must result in a 'radical transformation of the extent of the obligations still to be performed . . . increas[ing] the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken.'³⁵ To highlight this exceptional character, the VCLT provision which codifies this possibility—Article 62(1)—is formulated in the negative. Rather than establishing the conditions for a state to adopt the unilateral remedy of 'terminating or withdrawing from the treaty' in response to a change of circumstances, it provides that the remedy is generally unavailable even in the case of a change of circumstances, 'unless':

- (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and
- (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

To be clear, the signature of an NME FTA would not be a fundamental change of circumstance under the law for treaties. In Article 62(1) it is clear that the circumstances invoked must be compared with those 'that existed at the time of the conclusion' of the treaty and that the change must not have been 'foreseen by the parties'. The very fact that the circumstance of a possible NME FTA is provided for in the treaty makes it

in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances'. See also Court of Justice of the European Union (CJEU), *A Racke GmbH & Co v Hauptzollamt Mainz* (Case C-162/96) (1998) ECR I-3655, paras 24, 53 (finding that VCLT Article 62 reflects customary international law). On the customary status of Article 60, see *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports (1997), paras 7, 38, and the jurisprudence cited therein (finding that Article 60 codified 'in many respects' customary international law); CJEU, *Opinion 2/15* (Full Court) (2017) ECLI:EU:C:2017:376, para 161 (finding that Article 60(1) codifies a 'rule of customary international law'). The treatment of the issue by WTO adjudicators is not particularly helpful. See Panel Report, *US—Certain EC Products*, (WT/DS165/R), adopted 10 January 2001, footnote 170; Panel Report, *EC—Commercial Vessels*, (WT/DS301/R), adopted 20 June 2005, para 7.205; Decision by the Arbitrators (Article 22.6), *Brazil—Aircraft*, (WT/DS46/ARB), adopted 28 August 2000, paras 3.6–3.10.

35 *Fisheries Jurisdiction Cases*, above n 33, paras 21 (*United Kingdom v Iceland*), 65 (*Federal Republic of Germany v Iceland*). See also *Gabčíkovo-Nagymaros Project*, Judgment, ICJ Reports (1997), paras 7, 65. Note that it matters little for the analogy drawn here whether the VCLT remedies indeed reflect customary international law.

'foreseen' at the time of the conclusion of the treaty, precluding parties from invoking a fundamental change of circumstances under the law of treaties.³⁶

The effect of the anti-NME clause, however, is not to permit the invocation of a fundamental change of circumstances under the law of treaties as codified in the VCLT. It is to single out and inscribe into the text of the treaty a *foreseen* circumstance (in fact, a conduct) that would permit other parties to adopt a response equivalent to that which would ordinarily be available in case of a fundamental change of circumstances. In other words, by agreeing to the anti-NME clause, USMCA parties appear to accept that entering into an NME FTA is equivalent to a change that would touch upon an 'essential basis of the consent of the parties to be bound' by the USMCA and 'radically [] transform the extent of obligations still to be performed', enabling other parties to terminate or withdraw from the treaty in response.

B. The NME FTA as analogous to a repudiation of the treaty

While, as a matter of the conditions for its triggering, the anti-NME clause makes entering into an NME a circumstance akin to a fundamental change of circumstances, with respect to the consequences it establishes the anti-NME clause resembles more closely the entitlement of states to react to material breaches of a multilateral treaty by terminating the treaty with respect to the violator, maintaining it in force among themselves. This entitlement is provided for in VCLT Article 60, a provision which, in its *Namibia* Advisory Opinion, the ICJ found codifies 'in many respects . . . existing customary law on the subject.'³⁷ Article 60(2) provides the following:

2. A material breach of a multilateral treaty by one of the parties entitles:
 - (a) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in relations between themselves and the defaulting state or (ii) as between all the parties;
 - (b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state;
 - (c) Any party other than the defaulting state to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

³⁶ The ICJ in *Fisheries Jurisdiction* noted that a fundamental change of circumstances cannot arise out of a dispute that is 'exactly of the character anticipated' in a treaty (Ibid).

³⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), ICJ Reports (1971), paras 16, 47.

The USMCA's anti-NME clause is similar in operation to Article 60(2)(a), permitting the other parties to the agreement to terminate the agreement entirely (as in Article 60(2)(a)(ii)), while also allowing them to enter into a new agreement among themselves that reproduces the previous one (as in Article 60(2)(a)(i)).³⁸ Under the most plausible reading of the provision, it is the 'unanimous agreement' between the two nonsigning parties that allows them to trigger the clause, providing the party that signs the NME FTA with a degree of protection from purely unilateral responses.³⁹

Here again, the USMCA's anti-NME clause is different from the right of response codified by VCLT Article 60. The latter applies to breaches of treaty, and not to any breaches but solely to particularly serious breaches. In the *Namibia* opinion, the ICJ noted that the 'right to terminate a relationship' exists only 'in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship.'⁴⁰ VCLT Article 60(3) defines material breaches similarly restrictively, limiting them to:

- (a) A repudiation of the treaty not sanctioned by the [VCLT] or
- (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

With respect to Article 60(3)(a), the arbitral tribunal in *Croatia v Slovenia* has described a repudiation of a treaty as 'the rejection of a treaty as a whole by the defaulting party', amounting to a refusal to apply the treaty or an assertion by a party that it is no longer bound by its obligations under the treaty.⁴¹ With respect to Article 60(3)(b), in *Nicaragua (Contras)*, the International Court of Justice referred to material breaches as violations that 'undermine the whole spirit of the agreement' or are 'calculated to defeat the object and purpose of the Treaty.'⁴²

Given that entering into an NME FTA is not a breach of the USMCA, it logically cannot constitute a material breach of the same treaty. A repudiation of the treaty should not in principle be caused by an act that is not incompatible with the treaty. Nonetheless, the very object and purpose of the anti-NME clause appear to be to allow USMCA parties to react to this event in the same way that they would be empowered to react to

38 USMCA, Article 32.10(5-8).

39 Under the less plausible, fully unilateral reading, the clause would permit unilateral reaction not just by '[a] party specially affected by the breach' (VCLT, Article 60(2)(b)), which could terminate or suspend the operation of the treaty between itself and the defaulting state only, but by any party other than the defaulting state. Besides the interpretation issues discussed above, the less plausible reading thus likens the USMCA to a disarmament treaty, a treaty 'of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty', permitting every party to react to a breach by any other party by terminating the treaty with respect to itself (VCLT, Article 60(2)(c)).

40 Above n 36. See also *Arbitration between the Republic of Croatia and the Republic of Slovenia (Croatia v Slovenia)*, PCA Case No 2012-04, Partial Award, 30 June 2016, para 218.

41 *Croatia v Slovenia* (n 39), para 214.

42 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports (1986), paras 14, 135–138.

an unlawful repudiation of the USMCA or to a violation calculated to defeat the treaty's object and purpose.

C. The anti-NME clause in bilateral treaties: extrapolating design from purpose

With respect to the anti-NME clause, there is at this point no official text of the clause proposed for planned bilateral agreements. The sectoral agreement between the US and Japan⁴³ does not include any corresponding provision. However, the wording used in the Negotiating Objectives for FTAs with the EU, Japan and the UK, the declarations given by US officials, and the parallels between the USMCA clause and the unilateral remedies available under the VCLT permit a reasonable assessment of what type of clause the US will seek to include in these agreements.

The US's negotiating objectives for free trade agreements with the European Union, Japan, and the United Kingdom all establish as an objective that the agreements should '[p]rovide a mechanism to ensure transparency and take appropriate action if [the other party] negotiates a free trade agreement with a nonmarket country'.⁴⁴ Declarations by the US Trade Representative Robert Lighthizer, speaking of its intentions for the now concluded 'phase one' US agreement with China, clarified that, in that context, the US aimed to avoid a requirement to bring proceedings and instead sought 'the ability to take proportional action unilaterally'.⁴⁵ Indeed, the US-China Agreement Chapter on 'Bilateral Evaluation and Dispute Resolution' is drafted as a codified process of consultations and self-judging retaliation. It permits on the one hand symbolic escalation of disputes (performed by bringing concerns before ever higher officials of the other party), and on the other hand suspension by the complaining party of obligations under the agreement or other unilateral remedial measures in a manner that it deems 'proportionate' and 'appropriate'. The party complained against must choose between not responding at all or withdrawing from the agreement entirely.⁴⁶ While the negotiating objectives do not clarify whether the same unilateralism would apply to the US's planned FTAs, the design of the USMCA clause and the similarities with unilateral remedies under the VCLT suggest that—for the anti-NME clause at least—this would be the US's objective.

The 'joint action' USMCA clause would not be easy to replicate in bilateral agreements. It depends for its operation on there being three parties to the agreement and provides each party with a degree of assurance that its rights will be preserved, arising out of the requirement that the two other parties reach an agreement before employing

43 Trade Agreement between the United States of America and Japan, signed 7 October 2019 (not in force), <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text> (visited 11 January 2020).

44 See above n 5.

45 Robert Lighthizer, Hearing before the House Ways and Means Committee, 27 February 2019, <https://www.c-span.org/video/?458285-1/us-china-trade-relations>, (visited 11 January 2020), at 23:30. Here, 'agreement', does not refer to a US-China FTA but to an agreement to suspend or terminate additional tariffs imposed by the US and China on each other's products.

46 Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, signed 15 January 2020, Article 7.4(4)(b).

the remedy. In a bilateral agreement, the equivalent to the USMCA clause would be a 'unilateral action' clause, stating that any party may terminate the treaty in case the other party enters into an NME FTA.

Designing the clause in this way, however, poses two interrelated problems. The first is that of its utility. The entitlement to terminate a treaty in response to an NME FTA does not add anything to the usual provision permitting parties to trade agreements to withdraw from them without providing a justification.⁴⁷ While the VCLT does not permit denunciation or withdrawal unless this right is agreed upon between the parties to the treaty,⁴⁸ among the US objectives for its bilateral FTAs are both to '[p]rovide mechanisms for terminating the Agreement under appropriate circumstances' and to '[p]rovide a mechanism for ensuring that the Parties assess the benefits of the Agreement on a periodic basis.'⁴⁹ If, like in the USMCA, this results in a provision permitting unilateral withdrawal on 6 months' notice, it is unclear what an additional clause providing for unilateral withdrawal as a response to an NME FTA would add to this entitlement as a matter of its concrete legal effects. If the periodic assessment of the rights and obligations can lead to the termination of the treaty in case one of the parties fails to affirmatively express its desire to maintain the treaty in operation (a mechanism that exists in the USMCA),⁵⁰ this would seem to be a much more serious source of uncertainty for the parties (and for private entities conducting business on the basis of the agreement) than a clause establishing a right of unilateral termination that merely reproduces, in its concrete effects, the already existing entitlement to withdraw from the agreement.

The second problem of an anti-NME clause modeled on the USMCA clause is its lack of flexibility. The VCLT provisions establishing unilateral remedies in case of fundamental change of circumstances and material breach both provide that an alternative remedy to termination is suspension of the treaty,⁵¹ which logically entails its possible restoration in the future. In the case of a material breach, the range of permissible unilateral responses includes 'terminating the treaty or suspending its operation in whole or in part',⁵² allowing the wronged party to suspend the operation of some provisions only. By comparison, the USMCA anti-NME provision is a blunt instrument: the nonsigning parties have a binary choice between maintaining the USMCA in force as is or terminating it entirely with respect to the signing party.

One way to address the two problems simultaneously would be to make the anti-NME clause more flexible, allowing the nonsigning party not only to terminate the treaty but also to suspend it in whole or in part. This would allow the nonsigning party to

47 The Comprehensive Economic and Trade Agreement between Canada and the European Union, for example, can be terminated upon 180 days' notice. Comprehensive Economic and Trade Agreement, Article 30.9, signed 30 October 2016, applied provisionally since 21 September 2017, OJEU L 011, 14 January 2017, para 23.

48 VCLT Article 56(1).

49 Note above n 5.

50 USMCA, Article 34.7 ('Review and Term Extension'). Analysing the operation of this clause is beyond the scope of this article.

51 VCLT Articles 62(3), 60(1).

52 VCLT Article 60(1).

modulate its response, achieving the goal of permitting a proportional (or 'appropriate') response while also providing the clause with practical utility besides reaffirming, in a specific circumstance, an entitlement to withdraw that exists with or without the clause. This suggestion, however, assumes that the purpose and utility of the clause is in its (potential) triggering and its consequences. It may well be, however, that its objective and function are entirely different and not tied to its triggering but to its mere existence. In this case, the conditions for, and the consequences of, triggering the clause could be beside the point.

IV. A REALLY BIG BUTTON THAT DOESN'T DO ANYTHING? THE ANTI-NME CLAUSE AND THE SYMBOLIC FUNCTION OF INTERNATIONAL LAW

The addition of the 'anti-China' clause in the USMCA and the announcement that the US wishes to add it to other FTAs have been reported as significant developments.⁵³ However, cold legal analysis of the clause demonstrates that it adds little to existing rights and obligations under the relevant agreements. Given the clause's absence of concrete effects, it is tempting to rule out its significance, likening it to the Really Big Button—a large and colorful artifact whose seemingly dramatic activation produces no discernible effect.⁵⁴

However, interpreting the clause as the product of a mismatch between political desire to limit party freedom and the actual additional rights it establishes overlooks the relevance that the 'mere' creation of a legal entitlement has. Like pressing the Really Big Button, merely adding such a clause to an international agreement 'alters the entirety of space and time in a fundamental way'.⁵⁵ Retrospectively, if the clause is invoked one day, it will legitimize a US decision to sanction the choice by a US trade partner to enter into an FTA with China, avoiding the reputational damage that could arise from this decision. It will do so even if the sanction is decided on unilaterally, rather than jointly with the other USMCA party, and takes a less severe form than full termination of the agreement. Prospectively, by spending political capital to add this clause to its FTAs, the US signals to China and its allies its determination to adopt a severe response to such an FTA. More broadly, the clause may be interpreted as a legal device enshrining agreement to a 'geoeconomic' objective, the establishment of a US-led bloc of 'market-oriented' (i.e. Western) countries determined not to be divided and forced to make concessions piecemeal by a large economy perceived as a destabilizing factor in the global economic order.

A. The anti-NME clause retrospectively: legitimation of reaction

The first symbolic function of the clause is to legitimize, within US relations with its FTA partners, any reaction by the United States to a partner entering into an FTA with China. Without the clause, such reaction could be perceived as an exercise in unwarranted unilateral sanctioning of a permissible sovereign agreement, much like the

⁵³ See above n 22 and 23.

⁵⁴ See above n 1.

⁵⁵ See above n 2.

recent US sanctions that followed the agreement between European states and Russia on building a gas pipeline connecting them.⁵⁶ With the clause in place, the reaction—whether or not it takes the form of withdrawal from the FTA—appears as a legitimate response to an act the parties had agreed was not a mere exercise of sovereign trade policy.

Seen in its own terms, international law appears as a system of norms that prohibits certain conducts, permits other conducts, and establishes procedures for decision-making. However, law's operation may equally be understood in terms of other systems of social interaction.⁵⁷ A politician making decisions on which course of action to adopt in a given situation, for example, is likely to see a treaty provision not as establishing obligations that must be complied with at all costs but as imposing political costs on action that contravenes these obligations. If an exception to these obligations is available, lawyers will usually seek to make an objective assessment of the scope of the rule, the scope of the exception, and the logical interaction between these two provisions. A politician is likely to see exceptions as argumentative tools that she may invoke in case she would prefer to act in ways that would ordinarily conflict with her state's commitments. From her perspective, the constraint imposed by legal norms does not hinge on whether, if objectively assessed, they require a certain conduct, but on whether her counterparts in other states would deem the conduct impermissible, leading to adverse consequences for her and her state.

Some theories on the role of law in international relations postulate that states are concerned not only with concrete consequences but also with the legitimacy of their actions: norms change states' and leaders' perception of what action is acceptable or legitimate.⁵⁸ Even theories that see states as self-interested actors, however, consider three ways in which legal norms translate into political consequences for states and those leading them.⁵⁹ First, violating a rule in a way that harms other states may lead to retaliation from their leaders, whether because they are concretely harmed or because they believe they must be seen as responding severely to the violations in order to uphold the agreed rule. Second, violating rules may lead to reciprocal disregard by other states of their own obligations in future interactions. Third, violating rules may lead to reputational injury, decreasing other leaders' trust in the violator's willingness or ability to follow through with commitments. A low reputation for trustworthiness may lead other states to give less credit to the violating state in future negotiations, increasing the costs for the violating state of obtaining concessions from them in future negotiations.

56 Bojan Pancevski and Laurence Norman, 'Germany Calls for European Firewall Against U.S. Sanctions', *Wall Street Journal* (2019).

57 See Niklas Luhmann, *Law as a Social System* (OUP, 2004); Gunther Teubner, *Law as an Autopoietic System* (Blackwell, 1993).

58 See Thomas M. Franck, *The Power of Legitimacy Among Nations* (OUP, 1990) 45–46; Harold Hongju Koh, 'Why Do Nations Obey International Law?' 106 *Yale Law Journal* (1997) 2599; Helen V. Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton University Press, 1997); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP, 2009).

59 See Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (OUP, 2008); Joel P. Trachtman, *The Economic Structure of International Law* (Harvard University Press, 2008).

If one takes a 'legitimacy' approach to the role of law, responding to another state entering into an FTA by exiting a treaty would appear as an illegitimate sanction for the exercise of the right to enter into international treaties, a right that the Permanent Court of International Justice once described as 'an attribute of State sovereignty'.⁶⁰ From a strategic interaction perspective, it could make the sanctioning state appear as an unreliable trade partner, seeking to use its economic clout to 'attempt to modify a previously bargained-for exchange'.⁶¹ As Laurence Helfer notes, even in the case of an entitlement to withdraw from an agreement that is provided for in the agreement itself (and is therefore, from a legal perspective, a perfectly permissible course of action), the 'reputational cost of such a maneuver will closely resemble a violation of the treaty if the exiting state is merely seeking to capture gains or redistribute losses whose allocation the parties had previously negotiated'.⁶²

Seen from this perspective, the inclusion of the 'anti-NME' clause legitimizes the adoption of a response that, though lawful, would ordinarily be perceived as an unwarranted exercise of power by the larger trade partner—in this case, the United States. The clause inserts into the agreement between the parties a condition that, if materialized, entitles the larger partner to adopt a response without being perceived as an unreliable negotiation partner. From a political perspective and therefore from the perspective of leaders making decisions, this may matter more than whether lawyers or an international court would characterize the conduct giving rise to the sanction as a legal violation.

B. The anti-NME clause prospectively: law as signaling

A related function of the anti-NME clause concerns not its effects on the relations between the FTA parties once it is invoked but the effects of its mere presence in the agreement. The clause does not simply operate as a justification for possible future sanctioning but produces effects already in the present, altering the parties' perception of their relations merely by having been agreed upon and inserted into a treaty. This prospective function can be explained as 'signaling', i.e. the adoption of a costly course of action in the present to convey willingness to adopt a more costly course of action in the future.

As James Morrow explains, signaling works within a setting within which various actors interact among themselves over a period of time. 'An actor makes its choices based, in part, on what other actors are likely to do in the future. Knowing other actors' motivations can help the former judge what its best responses are'.⁶³ Signaling is a means for an actor of conveying its motivation through more than words, which other actors could rule out as 'cheap talk'. In order to convey motivation, an actor willing to signal its intention to adopt a certain course of action must go beyond words and incur costs

60 *Case of the S.S. 'Wimbledon' (France vs Germany)* (1923) PCIJ Ser A No. 1, para 25 ('the right of entering into international engagements is an attribute of State sovereignty').

61 Laurence R. Helfer, 'Exiting Treaties', 91 *Virginia Law Review* (2005) 1579, 1626.

62 *Ibid.*, at 1627.

63 James D. Morrow, 'The Strategic Setting of Choices: Signalling, Commitment, and Negotiation in International Politics', in David A. Lake and Robert Powell, *Strategic Choice and International Relations* (Princeton University Press, 1999) 77–114, at 86.

that an actor similarly situated without the intention to follow through would not be willing to incur. Incurring costs allows an actor to ensure that a declaration is perceived as a 'credible signal of . . . intentions.'⁶⁴

The anti-NME clause demonstrates that legal arrangements, if they are costly to obtain, can have a signaling function. Were the United States simply to declare its intention to respond to NME FTAs by withdrawing from agreements, and were other partners to acquiesce to this with silence or a mere political declaration, this could be ruled out as 'cheap talk'. By inserting a clause explicitly permitting this withdrawal into an agreement, signed by the executive and approved by the legislative branch, both parties incur costs vis-à-vis others. The US incurs the cost of antagonizing China, on the one hand, and being perceived as imposing on its trade partners an otherwise inappropriate oversight over their exercise of their economic sovereignty, on the other. US trade partners acceding to the clause incur the costs of acceding to a US demand that will be perceived by the public as restricting their sovereignty (regardless of what lawyers might explain about concrete legal effects).

By incurring such costs, the US signals its resolve to follow through and respond to an NME FTA by adopting self-harming conduct and withdrawing from a mutually beneficial FTA; a future US leadership that did not respond severely to an NME FTA by a political partner could be perceived as adopting a weak stance toward China's commercial expansion. US trade partners signal their acceptance of this resolve and their willingness to submit to US scrutiny any decision to negotiate an FTA with an NME. While the US would not have a veto over their decision (which it would not have even if the decision formally violated the FTA), all are aware of the costs the US is willing to incur to sanction this decision if it is taken without its approval.

C. 'The continent as a whole': the anti-NME clause in the geoeconomic context

Finally, a key symbolic function of the clause is its role in the broader geopolitical, or 'geoeconomic', dispute between the United States and China⁶⁵—respectively the proponent and the declared target of the clause.⁶⁶ As Larry Kudlow put it, the clause marks the acceptance by 'the continent as whole'⁶⁷ of the particular status of China and the decision to form a common front in the three USMCA parties' dealings with it. While from the viewpoint of Mexico and Canada this decision is not so much made as accepted as a matter of political and economic necessity, it remains a decision nonetheless. The constraints on the parties' independent conduct of trade policy can be seen as the flip side of the political decision the clause enshrines.

The imposition of constraints on the independence of parties' economic policy is a common feature of economic integration agreements.⁶⁸ It operates almost invisibly

64 Ibid, at 87.

65 See note 6 above.

66 See above n 13.

67 Ibid.

68 This was noted by the Permanent Court of International Justice when it considered whether the 1931 Austro-German customs regime would result in Austria forfeiting its independence, which both Germany and Austria had agreed was 'inalienable' without the consent of the Council of the League of Nations. The Court

where it is most severe: in the case of customs unions, whose very nature requires parties to apply to third countries 'substantially the same duties and other regulations of commerce'.⁶⁹ Most acutely, membership of the European Union not only prevents EU member states from pursuing reciprocal trade liberalization with outside parties but requires them to delegate to EU organs the entirety of their commercial policy.⁷⁰ Even signing agreements with large extra-EU powers that do not contradict EU obligations tends to draw criticism, when these agreements are perceived as attempts by the extra-EU power to break the unity of the EU club.⁷¹

While other customs unions are rarely this demanding, they also require the parties, and most visibly the smaller ones, to decide whether to enjoy trade preferences from their larger partners or to accept lesser advantages in exchange for freedom to negotiate with the outside world. Uruguay, a small, highly-specialized economy which could benefit from reciprocal opening of markets around the world through a network of FTAs, has been vocal about the Mercosur customs union preventing it from concluding agreements outside Latin America—and not least with China.⁷² And the establishment in 2015 of the Eurasian Economic Union (EAEU) customs union⁷³ has required Caucasus and Eastern European countries to decide whether to join this bloc or align themselves with the European Union, which usually involves accepting the progressive application of EU regulations under the so-called deep and comprehensive free trade agreements (DCFTAs).

In these cases, the geopolitical aspect of economic agreements becomes highly transparent. Beyond the impossibility for countries in the EAEU of agreeing individually on reciprocal preferential treatment with the EU, it has been reported that, for Ukraine, Moldova, and Georgia, entering into DCFTAs has led to 'punitive trade policy measures' by Russia.⁷⁴ Conversely, the announcement that Armenia would accede to the EAEU was labeled a 'surprise' for the EU,⁷⁵ leading to the shelving of the then already negotiated EU-Armenia DCFTA.⁷⁶ While subsequent political developments led to the signature of an EU-Armenia 'Comprehensive and Enhanced Partnership Agreement',⁷⁷ Armenia's choices remain constrained by the demands made by each of its large neighbors that it align itself with their own policies, and with them with their

concluded that, although 'legally Austria retains the possibility of exercising her independence . . . from the economic standpoint' the customs regime was plausibly 'calculated to threaten the economic independence of Austria' (*Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, Advisory Opinion, PCIJ Series A/B No 41, ICGJ 287 (PCIJ 1931), 52).

69 General Agreement on Tariffs and Trade, Article XXIV:8(a)(ii).

70 Treaty on the Functioning of the European Union, OJEU C 202, 7 June 2016, Articles, 3(e), 207.

71 Angela Giuffrida, 'Italy rattles US and EU with likely support for China's Belt and Road', *The Guardian* (20 March 2019); Antto Vihma and Mikael Wigell, 'Unclear and Present Danger: Russia's Geoeconomics and the Nord Stream II Pipeline' 2 *Global Affairs* (2016) 377.

72 Janaina Figueiredo and Eliane Oliveira, 'Negociação de Uruguai e China causa mal-estar no Mercosul', *O Globo* (21 October 2016).

73 Treaty of the Eurasian Economic Union, signed 24 May 2014, entered into force 1 January 2015, Article 25.

74 Denis Cenusă, Michael Emerson, Tamara Kovziridse and Veronika Movchan, 'Russia's Punitive Trade Policy Measures towards Ukraine, Moldova and Georgia', *CEPS Working Document No 400* (2014).

75 Andrew Rettman, 'Armenia to join Russia's Union, surprises EU', *EU Observer*, 3 September 2013.

76 European Commission, 'EU and Armenia Agree Trade Deal', *Press Release*, 24 July 2013.

77 Comprehensive and Enhanced Partnership Agreement, OJEU L-23/4, 26 January 2018.

broader institutional, economic, and political framework. The effect of the anti-NME clause can thus be described as to establish, through a self-standing rule, a limitation on negotiations with third parties that is often produced as a by-product of particularly deep trade integration.

A less severe but equally significant limitation can be found in the 'major trading economy' clauses in some of the EU's Economic Partnership Agreements (EPAs) with countries from Africa, the Caribbean, and the Pacific (ACP). These clauses appear within provisions that empower the EU's EPA partner to grant to third countries trade advantages without extending them to the EU. The 'major trading economy' clause provides that this exemption does not apply to benefits granted to major trading economies, a category that comprises developed countries as well as other countries (or groups of countries) that account for a large portion of world trade,⁷⁸ and in some cases extends to all non-ACP countries.⁷⁹ In a sense, the 'major trading economy' clauses also consolidate a geoeconomic arrangement: they allow a degree of flexibility to ACP countries in establishing mutual integration arrangements while ensuring that, should large economic competitors obtain preferential treatment, this treatment will be extended to the EU.

In a similar vein, the geoeconomic effect of the anti-NME clause is to constitute symbolically a bloc of countries that must remain aligned in their dealings with a perceived major geopolitical rival. From the US's perspective, it curtails the possibility for China to undermine the bases of the bloc by entering into individual FTAs with its Western partners and requires it to enter into a broad agreement with its leader, the United States.⁸⁰ The clause thus revives the 'club' aspect of trade cooperation that was lost in the shift from the limited-membership agreement that was the GATT 1947, dominated by the Western economies and pledged to free-market ideals, to the institution of global aspirations (and now of virtually universal membership) that is the WTO. It is perhaps not by accident, then, that the future targets of the clause are, with the addition of Mexico, the traditional members of the GATT 1947 'Quad': Canada, Japan, the European Union, and the now self-reliant United Kingdom, led by the United States.

78 EPA between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part, OJEU L/289/1/3, 30 October 2008, Articles 19(2-4); EPA Between the Eastern and Southern Africa States, of the One Part, and the European Community and Its Member States, of the Other Part, L/111/1, 24 April 2012, Article 16(2-6); EPA Between the European Union and its Member States, of the One Part, and the SADC EPA States, of the Other Part, OJEU L 250/3, 16 September 2016, Articles 26(5), 28(2-6); EPA Between the East African Community Partner States, of the One Part, and the European Union and Its Member States, of the Other Part, Article 14(5). Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, OJEU L/272/1, 13 July 2009, Article 16(2-6).

79 EPA Between the East African Community Partner States, of the One Part, and the European Union and Its Member States, of the Other Part, Article 15(4).

80 Note above n 45. The clause was inserted in the USMCA even as the United States was actively negotiating a (non-FTA) trade agreement with China, whose 'phase one' content was made public only after signature.

V. CONCLUSION

The USMCA's anti-NME clause equates entering into an FTA with a country the US designates as a nonmarket economy to a fundamental change of circumstances in the trade relations between USMCA parties, allowing the nonsigning parties to react to this FTA as if the signing party had repudiated the agreement or reached a provision essential to the accomplishment of the object or purpose of the USMCA. In terms of its legal effects, the clause adds little to the right to unilateral termination that USMCA parties enjoy without the need to justify its exercise.

It is likely that the explanation for the clause is to be sought in its symbolic value. By inscribing into its FTAs the entitlement to terminate the treaty in response to the other party signing an FTA with a nonmarket economy, the US legitimizes a future decision to adopt a severe response to the conclusion of such an agreement, preventing such a decision from being perceived as an illegitimate exercise of economic power. Simultaneously, the anti-NME clause signals that entering into such an agreement will, in itself, be perceived as disturbing the balance of rights and obligations the parties agreed under the US FTA, touching upon a matter essential to the consent of the parties to this treaty. Merely by being inserted into the agreement, the clause signals US resolve to sanction an FTA partner that does enter into an NME FTA without its approval.

It is likely that the entitlement to respond proportionally is not what the US seeks in inserting this provision into trade agreements. Rather, its aim seems to be to establish as the standard response an extreme consequence—termination of the treaty—so as to maximize the desired dissuasive effect of the clause on its trade partners. While this extreme consequence makes the concrete use of the remedy less likely (since termination of trade agreements would be disruptive for all the parties), it may be that the real significance of the clause is not in the concrete legal effects it establishes but in its symbolic value: signaling the constitution of a 'club of market-oriented economies' whose members will not be drawn into piecemeal agreements by a nonclub economy (i.e. China), but are required to negotiate with it *en bloc*, keeping each other informed of the outsider's diplomatic movements.