The "Poison Pill" in the USMCA: The Erosion of WTO Principles and its Implications under a US–China Trade War

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ABSTRACT

The United States, Canada, and Mexico have ratified a multilateral trade agreement (the "USMCA") that contains a highly unusual provision. This provision (referred to as the "Poison Pill") is intended to deter the signatories from entering into a free trade agreement (FTA) with any "non-market country." The Poison Pill was introduced by the United States in the wake of the US–China trade war and was most likely directed at deterring Canada from entering into an FTA with China.

This Article argues that the Poison Pill is functionally an expulsion clause (as opposed to a withdrawal clause) which violates the USMCA parties' preexisting obligations under the WTO Agreement regarding FTAs. This is because the Poison Pill raises barriers to trade and is unnecessary for the formation of an FTA. Paradoxically the Poison Pill also depends on the WTO Agreement's Most Favored Nation (MFN) provision to more effectively limit a nation's ability to enter into FTAs with a "non-market country."

It is troubling that the United States used the coercive and unjustified imposition of tariffs, under the guise of national security, as negotiating leverage in USMCA negotiations. The United States has also indicated that it may include Poison Pills in future FTAs. This Article proposes two strategies for minimizing the impact of the Poison Pill on nations who may be coerced into accepting it: entering into overlapping multilateral FTAs and forging economic relationships outside of the "FTA-box." If the United States cannot credibly commit to WTO rules then non-US nations will have to turn to other superpowers (e.g., China and the EU) and large trading blocs to counterbalance an overreaching United States. These strategies align with a broader

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imperative: dealing with a United States that will not commit itself to a rules-based trading order with even its long-standing allies.

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I. INTRODUCTION

The United States, Canada, and Mexico have now each ratified a multilateral trade agreement (the USMCA)[1] that contains a highly unusual provision—a clause intended to deter any of the signatories from entering into a free trade agreement with any non-market country. Article 32.10 of the USMCA[2] (Poison Pill) states that if any signatory enters into a free trade agreement with a non-market country, then the remaining signatories may terminate the USMCA (upon provision of 6 months' notice) and carry on a bilateral agreement between themselves on substantially the same terms as the USMCA. This unusual provision quickly became known as the "poison pill"—a term which was used by U.S. Commerce Secretary Wilbur Ross himself.[3]

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1. Agreement between the United States of America, the United Mexican States, and Canada, Dec. 13, 2019, OFFICE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [http://perma.cc/C4SH-TNSW] (archived July 18, 2020) [hereinafter USMCA]; *see also* David Ljunggren, *Canadian Parliament rushes through ratification of USMCA trade pact*, REUTERS (Mar. 13, 2020, 11:53 AM), https://ca.reuters.com/article/idCAKBN2102I5 [http://perma.cc/C63R-NAQJ] (archived July 18, 2020] ("Canada was the last of the three signatories to formally adopt the pact, prompting congratulations from the United States and Mexico.").

2. USMCA, *supra* note 1, art. 32.10, ¶¶ 5–6.

3. David Lawder & Karen Freifeld, *Exclusive: U.S. Commerce's Ross eyes anti-China 'poison pill' for new trade deals*, REUTERS (Oct. 5, 2018, 4:17 PM), https://www.reuters.com/article/us-usa-trade-ross-exclusive/exclusive-u-s-commerces-ross-eyes-anti-china-poison-pill-for-new-trade-deals-idUSKCN1MF2HJ [https://perma.cc/HTZ9-37DS] (archived July 18, 2020) (quoting Ross as saying, "It's logical, it's a kind of poison pill," with regard to the Poison Pill provision). It is worth noting that the term "poison pill" is often associated with US corporate law. In this context, the corporate "poison pill" refers to technique for defending a corporation against a hostile takeover. *See* Julian Velasco, *The Enduring Illegitimacy of the Poison Pill*, 27 J. CORP. L. 381, 382–83 (2002) (describing how corporate law "poison pill" works); *see also* Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 147–52 (2016) (summarizing the case law on the corporate law "poison pill"). The term "poison pill" was probably intended to convey the idea that the USMCA uses a triggering event (i.e. entering into an FTA with a non-market economy country) to allow the other parties some type of recourse – such that the clause deters others from engaging in the triggering event.

Although the Poison Pill does not explicitly single out any country as being a non-market country,[4] it is generally viewed as being directed at China[5] and was introduced into the USMCA by the United States. In an interview with Reuters, Ross confirmed that the provision was intended to counter China's trade practices.[6] This is unsurprising in light of the trade war between the United States and China, which started in 2018 with an "opening salvo"[7] of tariffs imposed by the United States on China. Moreover, the clause did not go unnoticed in Canada or China. One Canadian perspective was that the Poison Pill was an affront to Canada's sovereignty.[8] In Canada, the Chinese Embassy directly denounced the Poison Pill as "hegemonic action"

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4. USMCA, *supra* note 1, art. 32.10, ¶ 1. The USMCA defines a "non-market economy" as any country, as of the date of signing the USMCA, any party has so designated as a non-market economy provided that no party has a free trade agreement with that country. *See id.*

5. *See* Sergio Puig, *The United States-Mexico-Canada Agreement: A Glimpse into the Geoeconomic World Order*, 113 AM. J. INT'L L. UNBOUND 56, 59 (2019) (discussing the Poison Pill and stating "[b]ut if there were any doubt as to the new approach behind the USMCA, two clauses aimed at China discourage partners from establishing free trade agreements with a 'non-market economy' or granting similar enforceable investment benefits to that economy's investors"); *see also* Chad P. Brown, *The 5 Surprising things about the new USMCA trade agreement*, WASH. POST (Oct. 9, 2018, 6:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/09/the-5-surprising-things-about-the-new-usmca-trade-agreement/?noredirect=on [https://perma.cc/UL7C-2MAN] (archived July 18, 2020) ("Finally, Article 32.10 signals the consequences of negotiating a potential free-trade agreement with any nonmarket economies — that is a code word for 'China.'"); Bhavan Jaipragas, *US-China trade war: Trump gets his (USMCA) clause out in Asia*, SOUTH CHINA MORNING POST (Oct. 21, 2018, 1:00 PM), https://www.scmp.com/week-asia/geopolitics/article/2169443/us-china-trade-war-trump-gets-his-usmca-clause-out-asia [https://perma.cc/5WHK-SK7P] (archived July 18, 2020) ("Washington's anti-China poison pill in its trade deal with Mexico and Canada – the 32.10 clause – could be copied in agreements with Asian countries to ratchet up the pressure on Beijing[.]"); Josh Wingrove, *Nafta's China Clause Is Latest Blow to Trudeau's Asia Ambitions*, BLOOMBERG (Oct. 5, 2018, 11:08 AM EDT) https://www.bloomberg.com/news/articles/2018-10-04/nafta-s-china-clause-is-latest-blow-to-trudeau-s-asia-ambitions [https://perma.cc/FR4M-P2UW] (archived July 18, 2020) (referring to the Poison Pill as "essentially a China clause, with the Trump administration gearing up for trade war with Beijing.").

6. *See* Lawder & Freifeld, *supra* note 3 ("Ross said in an interview that the provision was "another move to try to close loopholes" in trade deals that have served to "legitimize" China's trade, intellectual property and industrial subsidy practices.").

7. Thomas J. Schoenbaum & Daniel C.K. Chow, *The Peril of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115, 168 (2019).

8. Wenran Jiang, a senior fellow at the Institute of Asian Research, School of Public Policy and Global Affairs, University of British Columbia stated that the Poison Pill amounted to Canada surrendering a "crucial sovereign right." *See* Wenran Jiang, Opinion, *Under USMCA, Canada is neither strong nor free,* GLOBE & MAIL (Oct. 4, 2018), https://www.theglobeandmail.com/opinion/article-under-usmca-canada-is-neither-strong-nor-free/ [https://perma.cc/YRP2-42SA] (archived July 18, 2020); *see generally* Neil Macdonald, Opinion, *With its new trade deal, Canada surrenders sovereignty to a bully: Neil Macdonald*, CBC NEWS (Oct. 1, 2018, 4:08 PM), https://www.cbc.ca/news/opinion/canada-usmca-1.4845494 [https://perma.cc/3X2T-SLQN] (archived July 18, 2020).

which "blatantly interferes with other country's sovereignty."[9] Editorial opinion pieces on several Chinese media websites also expressed displeasure with the Poison Pill. The Poison Pill was viewed as a desperate attempt by the United States to maintain global dominance[10] by sabotaging China's attempts to build an array of FTAs.[11] As one commentator noted: "Unmistakably it is an attempt to isolate China."[12]

The United States, Canada, and Mexico are each members of the World Trade Organization (WTO).[13] As members of the WTO, they are also subject to the trade-liberalizing regime established under the General Agreement on Tariffs and Trade (GATT).[14] Since the Poison Pill is directed at deterring USMCA members from entering into a FTA[15] with China (the second largest economy in the world in terms of

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9. Press Release, Yang Yundong, Spokesperson, Chinese Embassy in Canada, USMCA Section 32.1 (Oct. 5, 2018), http://ca.chineseembassy.org/eng/sgxw/t1602081.htm [https://perma.cc/AQU3-VDT7] (archived July 18, 2020).

10. *See* Wang Li, Opinion, *Poison pill terms will kill fair trade*, CHINA DAILY, (Oct. 25, 2018), http://europe.chinadaily.com.cn/a/201810/25/WS5bd0f705a310eff3032845de.html [https://perma.cc/AS45-RJWK] (archived July 18, 2020) ("The Trump administration is worried that China's rise as a great power will undermine its advantages. The US is attempting to use the poison pill terms in its trade agreements in order to prevail in what it regards as competition with a rival, and so control the rule-making power of foreign trade rules in the long term to sustain its preeminence.").

11. *See* Dong Yan & Bai Jie, Opinion, *China and Canada eye more mutually beneficial trade deal*, CHINA DAILY, (Nov. 21, 2018), http://www.chinadaily.com.cn/a/201811/21/WS5bf491e6a310eff303289f50.html [https://perma.cc/G8QN-YEW5] (archived July 18, 2020) (characterizing the Poison Pill as a US "strategy . . . to prevent the advancement of bilateral FTAs between countries such as Mexico and Canada and China, and disrupt China's goal of building an FTA network.").

12. Li Yong, Opinion, *U.S. "Poison Pill" Is Poisoning the World*, BEIJING REV., (Oct.12, 2018), http://www.bjreview.com/Opinion/201810/t20181016_800144242.html [https://perma.cc/M5Q9-MV3D] (archived July 18, 2020).

13. As of July 29, 2016, the WTO consists of 164 members including Canada, Mexico and the United States. For more information, *see Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 15, 2020) [https://perma.cc/8TLB-2SQ6] (archived July 18, 2020) [Hereinafter WORLD TRADE ORG. Members and Observers]. The WTO was established pursuant to the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm [https://perma.cc/M6HD-VWXR] (archived July 18, 2020) [hereinafter Marrakesh Agreement].

14. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm [https://perma.cc/5QCJ-UJ2R] (archived July 18, 2020) [hereinafter GATT]. For a general overview of the GATT *see The GATT years: from Havana to Marrakesh*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Aug. 17, 2020) [https://perma.cc/ED4G-A9B6] (archived July 18, 2020).

15. There are two other popular terms for these type of agreements – including "regional trade agreement" abbreviated as "RTA" and "preferential trade agreement" abbreviated as "PTA."

GDP[16] and a WTO member itself), it represents a significant attempt to restrict international trade. Thus, the USMCA brings into sharp focus an important but relatively unexplored issue in international trade law literature—the permissible extent, if any, of trade-restrictive clauses in regional and multilateral trade agreements under the WTO.[17]

In an article on a related theme, Daniela Caruso comments that there is a developing body of scholarship that focuses on the harm suffered by nations who are not party to a trade agreement.[18] Caruso's article advances this body of scholarship by demonstrating the limitation of private law doctrines in addressing the plight of those excluded "from deals struck by other parties"[19] (i.e., FTAs), particularly developing nations.[20] The Poison Pill intensifies that theme in two important ways. First, like all FTAs, the USMCA excludes nonmembers from the benefits of membership (e.g., preferential tariff rate). However, the Poison Pill expands the exclusionary nature of the USMCA by requiring that all its members refrain from entering into an FTA with "non-market economy" nations. Second, the Poison Pill can affect relatively powerful or wealthy countries (as opposed to Caruso's concern with less affluent nations). The primary excluded nonparty is China—a formidable economic power. The other affected parties are Canada and Mexico—both of whom are relatively wealthy though not nearly as powerful as the United States.

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16. According to the World Bank, in 2018, China had the world's second largest economy measured in GDP while the United States ranked first. China's GDP was 13,608,151.86 (millions of US dollars) and the US GDP was 20,494,099.85 (millions of US dollars). *See The World Bank Data*, WORLD BANK https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=IN&most_recent_value_desc=true (last visited Aug.29, 2019) [https://perma.cc/M7H2-UEX4] (archived July 18, 2020).

17. This article analyzes trade-restrictive or anti-competitive agreements *between* nations. This is distinct from the literature dealing with attempts to harmonize the *domestic* competition law of different nations. That literature deals with harmonizing competition laws regulating private actors, not regulating the anti-competitive conduct of nations. *See, e.g.,* Andrew Guzman*, The Case for International Antitrust,* 22 BERKELEY J. INT'L L. 355, 355 (2004) (arguing that countries should strive for a consensus on international competition policy); D. Daniel Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 37–38 (2007) (stating that the best institutional body to address international antitrust issues is the International Competition Network); Thanh Phan, *Realism and International Cooperation in Competition Law*, 40 HOUS. J. INT'L L. 297, 298–99 (2017) (reviewing the obstacles in coordinating international competition law).

18. *See* Daniela Caruso, *Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective*, 59 HARV. INT'L L.J. 389, 391–93 (2018).

19. *Id.* at 389.

20. *See id.* at 391 ("…developing countries have much skin in the game of regional trade agreements ("RTAs") concluded by other nations and many reasons to worry about their implementation.").

The core claim of this Article is that the Poison Pill is a trade-restrictive expulsion clause that violates the WTO Agreement. Regardless of the Poison Pill's immediate impact, if any, on Canada, the most troubling concern is the coercive manner in which it was imposed by the United States. This Article's secondary claim is that, under the current US-led erosion of the WTO, the Poison Pill incentivizes middle-power nations (like Canada) and developing nations to craft international trade strategies to counterbalance the unilateral use of trade sanctions by the United States. These strategies include forming an overlapping network of multilateral and bilateral FTAs and entering into non-FTA economic relationships with other nations. The result is a trend towards alienation of the United States while nations turn to China, the EU, and multilateral relationships to counterbalance a United States that does not credibly commit itself to a rules-based trade order with even its long-standing allies.

This Article proceeds in three parts. Part II submits that the Poison Pill is a trade-restrictive expulsion clause. It may appear that the Poison Pill is irrelevant because there is a separate general withdrawal clause under the USMCA which allows any party to unilaterally withdraw from the USMCA upon six months' notice (the same length of notice period as the Poison Pill). The Article analyzes the USMCA's provision to draw attention to an important distinction—functionally, the Poison Pill expels the member that enters into an FTA with a non-market economy nation. This is significantly different because it preserves the status quo in favor of the party (e.g., the United States) objecting to the non-market country free trade agreement—thus saving that party from the costs of renegotiating trade agreements with the remaining party (e.g., Mexico). The Article then reviews the literature on withdrawal clauses, particularly the work of Laurence Helfer, to conclude that the Poison Pill's power exceeds that of a general withdrawal clause and truly turns an FTA into what FTA critics term a "private club."

From a Canadian perspective, it is fortunate that Canada and Mexico already have a free trade relationship in another multilateral treaty—the newly formed Comprehensive and Progressive Agreement for Trans-Pacific Partnership[21] (CPTPP). This may appear to render the Poison Pill a partially moot point for Canada. Even if Canada were expelled from the USMCA, Canada would still at least have an FTA with Mexico. This Article argues that this does not render the Poison Pill irrelevant. It simply reinforces why it is important for middle powers and developing nations to participate in overlapping

21. *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, GOV'T CANADA, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng (last visited Aug. 17, 2020) [https://perma.cc/AL7X-A3BC] (archived July 18, 2020) [hereinafter CPTPP] (ratified by Canada on October 29, 2018).

multilateral FTAs to counter aggressive, non-WTO compliant US trade sanctions. If there were no CPTPP or other overlapping multilateral FTA, then Canada's position would be markedly different. Therefore, the analysis continues as if there were no CPTPP (or other overlapping multilateral FTA) to protect Canada in order to draw out the implications for nations where there may not be any overlapping multilateral FTA to insure against an expulsion provision like the Poison Pill. Moreover, the United States has already indicated that it may well attempt to insert clauses like the Poison Pill into its other trade agreements.[22] For example, in the recent negotiation of a trade agreement between the United States and United Kingdom, it has been reported that the United States seeks to have a clause like the Poison Pill inserted into the agreement.[23] Therefore, an analysis of the Poison Pill is relevant to all nations who may enter into trade agreements with the United States, as well as the WTO, because of the American threat of proliferating such restrictive trade clauses.

Part III asserts that the Poison Pill violates the USMCA parties' obligations under the WTO Agreement. This violation is demonstrated through an examination of the relevant provisions under the WTO Agreement (GATT Article XXIV). This Article applies the principles from WTO jurisprudence to the Poison Pill to conclude that the Poison Pill contravenes GATT Article XXIV. This Article also suggests that the WTO cannot take a neutral position on the Poison Pill. To illustrate this point, this Article draws upon the work of American Legal Realist—Robert Lee Hale.[24] Hale's writings serve as a theoretical foundation for the proposition that normative baselines can endow parties with coercive market power—despite the illusion that authorities appear to have not intervened at all. Similarly, the Poison Pill paradoxically derives much of its coercive force from the normative parameters established by the WTO Agreement—in particular—the baseline of Most Favored Nation (MFN) treatment (which states that WTO members must treat each other equally with respect to trade

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22. *See* Mimi Lau, *US ready to squeeze China partners with 'poison pill' trade deals*, SOUTH CHINA MORNING POST, (Oct. 6, 2018, 12:45 PM), https://www.scmp.com/news/china/diplomacy/article/2167268/us-ready-squeeze-china-partners-poison-pill-trade-deals [https://perma.cc/4WUB-WYU9] (archived July 18, 2020) ("Ross said the "poison pill" provision in the recently completed pact with Canada and Mexico could be replicated with additional trading partners to pressure China to open its markets."); *see also* Lawder & Freifeld, *supra* note 3 ("U.S. Commerce Secretary Wilbur Ross signaled on Friday that Washington may flex its muscle with additional trading partners in order to exert pressure on China to open its markets, saying that a "poison pill" provision in the recently completed pact with Canada and Mexico could be replicated.").

23. *See Trade Talks between UK and US set to get under way*, BBC NEWS (May 4, 2020), https://www.bbc.com/news/uk-politics-52528821 [https://perma.cc/3788-Q5E4] (archived July 18, 2020).

24. *See infra* note 188; *see generally* Part III.B.2.

matters) and the establishment of FTAs as an exception to MFN treatment.

Part IV situates the Poison Pill in the broader context of the global trade order. The Poison Pill makes its appearance into the USMCA at a time when the WTO faces a growing challenge to its relevance. This challenge has been slowly growing over the last 30 years with the proliferation of FTAs—to the extent that FTAs appear to be the norm rather than the exception. A lead criticism of FTAs is that they may divert trade from the most efficient producers. Since the Poison Pill explicitly attempts to deter its members from an FTA with China (a potentially efficient producer), the Poison Pill represents an unprecedented and direct form of trade diversion.

This Article then considers the geopolitical implications of the Poison Pill—focusing on how the United States unjustly used national security exceptions to impose steel and aluminum tariffs upon several nations. In part, those tariffs were used as negotiating leverage in USMCA negotiations with Canada as well as to extract prohibited "voluntary" trade concessions from Argentina, Brazil, and South Korea. This Article suggests why it may not be practical for any nation to challenge the United States on the Poison Pill at the WTO.

This Article does not address the normative question of whether any nation (such as Canada) ought to engage in an FTA or other trade relations with any other nation (such as China)—this is a complex decision for each nation to consider exercising its sovereignty. Rather, it considers how middle powers and developing nations who have already decided to engage in deeper trade relations with another country (designated as a non-market country by the United States) may do so while operating under the constraints of a US Poison Pill provision. This Article outlines two strategies: participation in overlapping multilaterals to neutralize expulsion provisions and thinking outside of the "FTA-box" to foster relationships with other nations. Part V concludes by observing how the United States is alienating itself from the global trade order while incentivizing other nations to form alliances with other superpowers such as China and the EU as well as multilaterals to counterbalance an overreaching US approach to international trade.

II. THE USMCA POISON PILL—A TROUBLING TRADE-RESTRICTIVE EXPULSION CLAUSE

The Poison Pill appears to be a withdrawal clause—a clause which would allow two members of the USMCA to withdraw from the USMCA upon the third country entering into an FTA with a non-market economy. This Part argues that the Poison Pill is (1) functionally similar to an expulsion clause (in comparison to a withdrawal clause) and (2) a trade-restrictive provision whose power

exceeds a withdrawal clause. This Part demonstrates that the Poison Pill converts an FTA into what critics have termed a "private club."[25] It then considers how the Poison Pill has been used to entrench the American threat of economic exclusion within the architecture of an FTA. This Part ends with a discussion of why middle powers and developing nations should be concerned about the United States' conduct.

A. *Functionally an Expulsion Clause—Not an Exit Clause*

The USMCA is intended to be a successor to the North American Free Trade Agreement (NAFTA)[26] which was the previously existing FTA between the United States, Canada, and Mexico. There was no provision analogous to the Poison Pill in NAFTA. The Poison Pill is found in a section of the USMCA which is generally entitled "Exceptions and General Provisions."[27] The Poison Pill is formally entitled "Non-Market Country FTA"[28] and the key provision is found in paragraph 5 which states that: "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)*."[29]

Note that the USMCA also contains a general withdrawal clause which states that: "A Party may withdraw from this Agreement by providing written notice of withdrawal to the other Parties. A withdrawal shall take effect six 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*."[30] Under NAFTA there is a similar withdrawal provision.[31]

Since any party can withdraw on six months' notice (for any reason) under the general withdrawal clause, it may appear that the Poison Pill makes little difference to the position of the parties. However, there is one significant difference which may be illustrated through a hypothetical. Imagine that Canada was about to enter into an FTA with China, against the wishes of the United States. If the United States were to use the general withdrawal provision, the United States would exit the USMCA but the USMCA would still be

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25. *See* Chris Brummer, *Regional Integration and Incomplete Club Goods: A Trade Perspective*, 8 CHI. J. INT'L L. 535, 536 (2008).

26. *See* North American Free Trade Agreement, Dec. 17,1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. For a general overview of NAFTA, *see* Robert A. Blecker, *NAFTA*, *in* HANDBOOK OF INTERNATIONAL TRADE AGREEMENTS 147, 147 (Robert L. Looney ed., 2019).

27. USMCA, *supra* note 1, art. 32.

28. *Id.* art. 32.10, ¶ 5.

29. *Id.* (emphasis added).

30. *Id.* art. 34.6 (emphasis added).

31. NAFTA, *supra* note 26, art. 2205.

valid between Canada and Mexico and the United States is the country that has been isolated (by its own choosing).

On the other hand, if the United States invokes the Poison Pill, then it terminates the USMCA and replaces the USMCA with a bilateral agreement between the United States and Mexico. According to the Poison Pill, the bilateral agreement shall be the same as the USMCA except those provisions which the United States and Mexico agree are not applicable as between them.[32] In this case, Canada is the one left out and the United States and Mexico remain together in a bilateral FTA.

Functionally, the Poison Pill is an expulsion clause. Despite the procedural mechanics, the net effect is that the United States and Mexico would be carrying on the USMCA as if Canada had been expelled. In reality, Canada's membership in the CPTPP helps to mitigate the consequences of this potential occurrence because Mexico is also part of the CPTPP (along with Australia, Brunei, Chile, Japan, Malaysia, New Zealand, and Peru).[33] This allows Canada to preserve an FTA with Mexico outside of the USMCA.[34] While this may be a comfort for Canada (the CPTPP only entered into effect on December 30, 2018[35]—just slightly less than one year before the USMCA was signed), it is still troubling from a broader international trade perspective. If the United States does insert provisions like the Poison Pill in multilateral agreements with other nations (as it has indicated it might[36]), particularly developing nations who may not have a well-developed FTA network, then the provision would retain its power. Therefore, this Article proceeds in its analysis as if the CPTPP did not exist in order to fully explore the ramifications of the Poison Pill under these circumstances. Part IV flips this perspective to argue for the importance of an overlapping multilateral strategy for middle powers and developing nations.

Even if one accounts for the CPTPP as a buffer for Canada against expulsion, the Poison Pill still provides a significant advantage to the

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32. USMCA, *supra* note 1, art. 32.10, ¶ 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."). The USMCA does not specifically mention what would constitute terms that are not applicable between the parties. A review of the USMCA reveal certain Canada-specific portions that would not apply in the new bilateral agreement between the US and Mexico. These include these include the Canadian tariff Schedule Appendix in USMCA art. 2 (national treatment) as well as the USMCA Agreement Annexes which carve out specific provisions for each country. *See, e.g., id.* Annex I Investment and Services Non-Conforming Measures – Canada (note that Annex II and III have similar Canada-specific provisions), Annex IV – SOEs Non-Conforming Activities (prescribing specific exceptions for state-owned enterprises including Canadian ones).

33. *See* CPTPP, *supra* note 21.

34. *See id.*

35. *Id.*

36. *See* Lau, *supra* note 22.

United States. In this case, it is the preservation of the status quo—an already negotiated agreement between the United States and Mexico.[37] Imagine if there was no Poison Pill—only a mutual agreement between the United States and Mexico to withdraw simultaneously according to the general withdrawal provision. Both countries would have to negotiate a new bilateral agreement—leaving the door open to either country to renegotiate substantive terms. This is a noteworthy risk for either country in light of a study that indicates that, on average, the negotiation time for an FTA is twenty-eight months.[38] In contrast, under the Poison Pill, the bilateral agreement has already been authorized and the USMCA mandates that the "bilateral agreement shall be comprised of all of the provisions of [the USMCA] except those provisions that the relevant Parties agree are not applicable as between them."[39] Aside from protecting the status quo from renegotiation by Mexico, it also protects the USMCA from being renegotiated or opposed internally by opposing parties within the United States' government who may seize the opportunity to renegotiate the USMCA in accordance with their own political agendas.

B. *Poison Pill Compared to Withdrawal Clauses*

The significance of the Poison Pill is apparent once situated in the context of the scholarship on treaty withdrawal clauses (also referred to as "exit clauses"). This topic received relatively little attention until Laurence Helfer published a seminal article in 2005.[40] He observes:

> Exit clauses create discomfort for scholars and practitioners of international law. To a profession anxious to prove that nations obey international legal obligations, a state's right to unilaterally abrogate its treaty obligations—often without substantive restraint or meaningful sanction—is not something to be advertised. In fact, major public international law treatises (and even most specialized studies of treaty law and practice) all but ignore exit or give the issue

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37. The USMCA contemplates a relatively fast process for the implementation of the bilateral agreement. Pursuant to USMCA art. 32.10, ¶ 7, the remaining parties are to use the Poison Pill 6-month notice period to review the USMCA to determine if any amendments are required to ensure its "proper operation" (implying that that the amendments relate to procedure rather than substance). *See* USMCA, *supra* note 1, 32.10(7); *see also id.* art. 32.10, ¶ 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.").

38. Christopher Moser & Andrew Rose, *Why do trade negotiations take so long?*, VOX EUR. UNION, (June 8, 2012), https://voxeu.org/article/why-do-trade-negotiations-take-so-long [https://perma.cc/7WRD-BEHJ] (archived July 18, 2020) (noting that "[o]ur data sample covers 88 regional trade agreements from 1988 to 2009. On average, trade negotiations take 28 months, but there is large variation in the length of negotiations.").

39. USMCA, *supra* note 1, art. 32.10, ¶ 6.

40. *See* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1579 (2005).

> only passing attention. This short shrift given to exit glosses over many consequential issues of treaty design and practice.[41]

He noted that a withdrawal clause is an "internationally lawful act"[42] and therefore allows a nation to exit a treaty while preserving its international reputation.[43] Withdrawal clauses can act as an "insurance policy"[44] and provide a country with a lawful exit if it later decides that remaining a party is no longer in its interests.[45]

Furthermore, a withdrawal clause confers power onto the nation that can afford to exit a treaty. During the term of the treaty, a credible threat of exit can provide the threatening nation the ability to renegotiate the terms of the treaty,[46] thus prompting Helfer to state "[e]xit thus sits at a critical intersection of law and power in international relations."[47] Timothy Meyer has argued that withdrawal clauses not only affect the parties' rights during the term of the treaty but also influence the parties bargaining positions during treaty negotiation.[48] According to Meyer, a nation confident its future economic and political power will be in position to require either (or both) of two conditions. It can either ask for relaxed exit conditions (allowing it to easily withdraw and negotiate a new treaty with better terms) or it can ask that the treaty contain other terms that it prefers.[49] How does one attempt to lessen the potential impact of a withdrawal provision? One method of partially neutralizing the power of a withdrawal clause is to require a longer notice period.[50] Alternatively, a nation could concede an easy exit withdrawal provision

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41. *Id.* at 1592 (footnote omitted).

42. *Id.* at 1589 (footnote omitted).

43. *See id.* at 1621 ("The choice to denounce, therefore, together with any explanation the state offers to justify its decision, may signal an intent to "play by the rules" of future treaties as well. As a result, the harm to the withdrawing state's reputation as a law abiding nation may be minimal.").

44. *Id.* at 1591.

45. *See id.*

46. *See id.* at 1588.

47. *Id.* Furthermore, the issue of exit exists in many legal relationships other than treaties including in the regulatory sphere. *See* J.B. Ruhl & James Salzman, *Regulatory Exit,* 68 VAND. L. REV. 1295, 1295 (2015).

48. *See* Timothy Meyer, *Power, Exit, Costs and Renegotiation in International Law*, 51 HARV. INT'L L.J., 379, 382 (2010) (arguing that a "credible threat to exit" is a source of negotiating leverage).

49. *Id.* at 382–83.

50. Barbara Koremenos & Allison Nau, *Exit, No Exit*, 21 DUKE J. COMP. & INT'L L. 81, 82–83 (2010) (suggesting that longer notice periods promote other nations to enter into a treaty since there would be less opportunity for strategic withdrawal).

in exchange for greater voice within the treaty structure[51] or a substantive provision that favors its interests.[52]

Does a nation that frequently invokes withdrawal clauses incur any consequences? Although reliance upon a withdrawal clause would be lawful under the treaty, its recurrent usage could have a negative impact on the nation's reputation for credible long-term commitment.[53] However, a low occurrence of withdrawal may not heavily impact a nation's reputation. Under these circumstances, Helfer suggests that a withdrawal more closely resembles a nation that chooses to not ratify a treaty[54] but cautions that frequent withdrawals can be perceived as the reputational equivalent of breaching a treaty.[55]

Beyond reputational consequences there is also opportunity cost—a critical point for assessing the power of the Poison Pill. Under an FTA, the benefits of that treaty are only available to the signatories of that treaty. A nation that withdraws from an FTA foregoes all of the benefits that membership might have conferred upon it.[56] Therefore, treaty withdrawal also implies an opportunity cost. If the opportunity cost is high enough, it may serve as a significant disincentive to withdrawing from the FTA.

However, since the Poison Pill (with its "double withdrawal and reconstitution of the USMCA in bilateral format" mechanism) functions as an expulsion clause, nations invoking the Poison Pill do not face the same disincentives as under a withdrawal clause. If the United States and Mexico were to invoke this clause, they would only be losing benefits granted by Canada. In contrast, if there was no Poison Pill, the United States and Mexico would lose the benefits granted by Canada *and also* face the risk that a bilateral agreement between the two of them may require heavy renegotiation (or even

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51. Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 369 (2014) (noting how finding the right balance in treaties can be addressed by "a relaxing of the burden of exiting, an increase in opportunities for voice, or some combination of the two."). Katselas' work is an innovative application of insights from organizational behavior scholarship, and she draws upon the well-known work of Albert O. Hirschman. *Id.* at 318 (citing ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970)).

52. *See* Meyer, *supra* note 48, at 382–83.

53. *See* Helfer, *supra* note 40, at 1622–23.

54. *See id.*

55. *See id.* While a nation can choose whether or not to include a withdrawal clause in a treaty, an interesting question explored in the literature is whether a nation may withdraw from customary international law. For an informative discussion see Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. 1, 1 (2010).

56. *See* Helfer, *supra* note 40, at 1636–37 ("The ability to exclude non-members means that a state which unilaterally withdraws from a trade agreement cannot surrender the burdens of membership without also relinquishing its benefits. The prospect of losing these benefits is sufficient to deter states from leaving, even where the treaty provides an unfettered right to withdraw.").

worse, the bilateral agreement might fail to materialize if domestic interests rally against its ratification).

C. *Poison Pill Converts the USMCA into a True "Private Club"*

Since FTAs confer benefits between their signatory nations, FTAs have been likened to a "private club" with nations representing the members of this exclusive club and the benefits representing the "private goods" enjoyed by the members.[57] Yet, Christopher Brummer has correctly argued that this analogy is not entirely accurate based on his study of the legal literature on clubs and regional groupings like FTAs.[58] He astutely observes that:

> [F]ree trade treaties like NAFTA and CAFTA impose no legal restrictions as to their relationships on member states as to their relationships with third party countries. Signatories to free trade treaties can (and do) offer access to third-party countries on terms equal to those available to members. As a result, these "open" RIAs create nonexcludable "impure" public goods.[59]

In short, FTAs are not truly like private clubs because member nations are free to provide similar benefits to non-member nations by entering into other bilateral agreements or FTAs with non-member nations.

Yet, the Poison Pill is an unprecedented twist in the world of FTAs. Unlike the generic FTAs described by Brummer, the USMCA, via the Poison Pill, does impose a restriction upon dealing with third-party countries (i.e., non-market economy countries).[60] This unique trade-restrictive feature aligns the USMCA more closely with being a private club. The USMCA functions like a private club which places trade restrictions on its members and a breach of those restrictions can result in expulsion from the club.

Therefore, the Poison Pill does provide a strategic advantage to the parties invoking it and it is significantly different from the general withdrawal provision. In addition, there are three more points worth considering in evaluating the Poison Pill's degree of coerciveness in this private club.

First, the term "non-market economy" is not defined specifically. Instead, the Poison Pill states that a "non-market economy" is any country which a signatory has (as of the date of signing the USMCA) "determined to be a non-market economy for the purposes of its trade remedy laws."[61] Second, the term "free trade agreement" is not

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57. *See* Brummer, *supra* note 25.
58. *Id.*
59. *Id.* at 546.
60. USMCA, *supra* note 1, art. 32.10, ¶ 5.
61. *Id.* art. 32.10, ¶ 1(a). However, this does not apply if a USMCA already has an existing FTA with that country. *See id.* art. 32.10, ¶ 1(b).

specifically defined for the purposes of the Poison Pill which brings into question the exact extent to which parties may trade with a non-market economy.[62] Third, the Poison Pill does not provide any time limit for its invocation.[63] Theoretically, it could be invoked years after one of the parties entered into a FTA with a non-market economy.

D. *Poison Pill as an Instrument of US Coercion*

The Poison Pill can be understood as an instrument of political coercion implemented within the architecture of an FTA. An examination of the political context surrounding USMCA negotiations reveals how the United States effectively used unjustified trade sanctions and a "divide and conquer" strategy to coerce Canada into accepting the USMCA and Poison Pill. Canada is an affluent country, but its weakness is its overdependency on US trade. Canada's unpleasant experience serves as a warning beacon to other nations—especially developing nations without overlapping FTA networks.

1. Political Context: The US–China Trade War

The United States' insistence that the Poison Pill be included in the USMCA can be understood in the context of its current trade war with China. US President Trump's "America First" platform includes a perception that the United States is being exploited in international trade.[64] Trump claims that the United States has been exploited in

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62. Although there is no definition of a free trade agreement, USMCA Article 1.1 references the GATT stating: "The Parties, consistent with Article XXIV of the GATT 1994 and Article V of the GATS, hereby establish a free trade area." *Id.* art. 1.1. This could be interpreted to mean that anything that would constitute an agreement similar to the USMCA would constitute a "free trade agreement" under the Poison Pill.

63. Although USMCA Article 32.10, paragraph 5 states that parties invoking the Poison Pill must provide 6 months' notice to the party that entered into an FTA with a non-market country, there is no explicit time limit for the invocation that right. *See id.* art. 32.10, ¶ 5.

64. Jill Colvin & Jonathan Lemire, *Donald Trump says U.S. will no longer 'be taken advantage of' when it comes to trade*, GLOBAL NEWS (Nov. 10, 2017, 11:24 AM), https://globalnews.ca/news/3854071/donald-trump-trade-taken-advantage-of/ [https://perma.cc/5HHE-J7ZF] (archived July 18, 2020) (quoting President Trump as saying "[w]e are not going to let the United States be taken advantage of anymore. I am always going to put America first.").

trade deals by Canada,[65] Mexico,[66] the EU,[67] and China.[68] Moreover, the United States claims that China has engaged in unfair trade practices including violations of China's WTO obligations[69] and forced technology transfers imposed on US businesses.[70] Based on these claims, on July 6, 2018, the United States commenced imposing a tariff[71] of 25 percent on approximately $34 billion worth of Chinese goods.[72] In response, China strongly contested these claims, publishing a white paper that replied to and denied these US allegations.[73] In addition, China has criticized the United States' international trade practices—comparing the "America First" approach to "unilateralism

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65. Meredith McGraw & John Parkinson, *Trump's leaked 'off-record' comments complicate trade deal with Canada*, ABC NEWS (Sep. 1, 2018, 7:32 AM), https://abcnews.go.com/Politics/trumps-leaked-off-record-comments-complicate-trade-deal/story?id=57528243 [https://perma.cc/9RXG-2QLG] (archived July 18, 2020) (quoting Trump as saying "I gave an interview yesterday to Bloomberg Business, and I said 'off the record,' and I made a statement about Canada, which is fine because I love Canada but they have taken advantage of our country for many years[.]").

66. *See* Andres Villareal, Christopher Sherman & Peter Orsi, *Trump tariff threat alarm Mexico growers, economists*, ASSOCIATED PRESS, (June 1, 2019), https://www.apnews.com/6aca0c83523d411ca78d9c6e9ca50ab4 [https://perma.cc/VBQ2-G4CD] (archived July 18, 2020) (reporting that Trump had tweeted "Mexico has taken advantage of the United States for decades.").

67. *See* Don Pittis, *Latest Trump attack on EU's Airbus could hit Canada, too: Don Pittis*, CBC NEWS (Apr. 10, 2019 4:00 AM), https://www.cbc.ca/news/business/trump-trade-eu-canada-1.5090650 [https://perma.cc/G2PX-CLPX] (archived July 18, 2020) (reporting that Trump tweeted "The EU has taken advantage of the U.S. on trade for many years. It will soon stop!").

68. *See* President Donald Trump, Remarks in Monaca, Pennsylvania: American Energy and Manufacturing, (Aug. 13, 2019) (transcript available at the White House) (quoting Trump as saying "NAFTA — one of the worst trade deals ever. By the way, World Trade Organization, it made China. China made themselves. They did a good job. But they ripped off our country for years, and with our money and World Trade Organization backing.").

69. OFFICE OF THE U.S. TRADE REP., 2018 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, at 3 (2018) [hereinafter OFFICE OF THE U.S. TRADE REP., 2018 REPORT] (stating that "(1) WTO membership comes with expectations that an acceding member not only will strictly adhere to WTO rules, but also will support and pursue open, market-oriented policies; (2) China has failed to comply with these expectations . . ..").

70. *Id.* ("Despite repeated commitments to refrain from forcible technology transfer from U.S. companies, China continues to do so through market access restrictions, the abuse of administrative processes, licensing regulations, asset purchases, and cyber and physical theft.").

71. Press Release, Robert Lighthizer, U.S. Trade Representative, Section 301 Action (July 10, 2018) (on file with the United States Trade Representative), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/statement-us-trade-representative [https://perma.cc/N5UK-B9QG] (archived July 18, 2020).

72. Details regarding this $34 Billion Trade Action (List 1) as well as the subsequent additional lists of goods in the escalating trade war can be found at *China Section 301 – Tariff Actions and Exclusion Process*, OFF. OF THE U.S. TRADE REP., https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions (last visited Mar. 15, 2020) [https://perma.cc/G6Z8-TFKE] (archived Aug. 13, 2020).

73. *The Facts and China's Position on China-U.S. Trade Friction*, INFO. OFF. STATE COUNCIL, CHINA (Sept. 24, 2018), http://www.xinhuanet.com/english/2018-09/24/c_137490176.htm [https://perma.cc/Q8CB-FVVT] (archived Aug. 18, 2020).

and economic hegemony"[74] and, ultimately, characterizes this US approach as a distinct form of US "trade bullyism."[75] The salient point raised by China, relevant to this Article's focus on the WTO, is that the tariffs imposed by the United States were not authorized by the WTO nor did the United States wait for the decision of any WTO dispute-settlement panel.[76] In reply to the US imposed tariffs, China imposed its own tariffs against $34 billion worth of US goods entering China.[77]

While the US–China trade war continued, the United States was engaged in trade negotiations on the North American front.[78] Even during his 2016 presidential campaign, President Trump had criticized NAFTA and promised that he would have the United States renegotiate the agreement with Canada and Mexico.[79] Between August 2017 and June 2018, the NAFTA negotiations went through seven rounds.[80] During this time, trade relations became increasingly strained as President Trump had the United States levy steel and aluminum tariffs against both Mexico and Canada.[81] President Trump cited national security grounds as the basis for the tariffs, even though such a claim is unjustified,[82] and one scholar has stated that this type of invocation (with respect to automobiles) "would further extend the

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74. *Id.* at 4.

75. *Id.* at 52.

76. *Id.*

77. OFFICE OF THE U.S. TRADE REP., 2018 REPORT, *supra* note 69, at 54 (noting also that China threatened to impose an additional tariff on $16 billion worth of U.S. goods).

78. *See* Emily Stephenson & Amanda Becker, *Trump vows to reopen, or toss, NAFTA pact with Canada and Mexico*, REUTERS (June 28, 2016, 5:07 AM), https://www.reuters.com/article/us-usa-election/trump-vows-to-reopen-or-toss-nafta-pact-with-canada-and-mexico-idUSKCN0ZE0Z0 [https://perma.cc/PW8W-ZZDE] (archived Aug. 18, 2020).

79. *See* Rich Miller, Andrew Mayeda, & Jenny Leonard, *Trump clears deck for China trade war by striking new NAFTA deal*, BLOOMBERG NEWS (Oct. 1, 2018), https://www.bnnbloomberg.ca/trump-clears-deck-for-china-trade-war-by-striking-new-nafta-deal-1.1145882 [https://perma.cc/5FF5-BE57] (archived Aug. 18, 2020). "President Donald Trump looks to be preparing for a potentially protracted economic war with China by clearing the decks of disputes with America's other trading competitors.… U.S. negotiators clearly had China in mind when they hammered out the new trade deal with Mexico and Canada to replace the 1994 North American Free Trade Agreement that Trump labeled a disaster." *Id.*

80. *See* Stephen Tapp, *How NAFTA negotiations have progressed – A timeline of events*, EXPORTWISE (Sept. 11, 2018), https://www.edc.ca/en/blog/nafta-negiotiations.html [https://perma.cc/45NX-GW2S] (archived Aug. 18, 2020).

81. *See* Gary Clyde Hufbauer & Euijin Jung, *The USMCA, Newly Jeopardized, Was Never a Free Trade Agreement*, PETERSON INST. FOR INT'L ECON., (June 4, 2019, 11:45 AM), https://www.piie.com/blogs/trade-investment-policy-watch/usmca-newly-jeopardized-was-never-free-trade-agreement [https://perma.cc/QV6W-PJ24] (archived Aug. 18, 2020) (noting that these tariffs were later removed by the US after Canada and Mexico entered into the USMCA).

82. *See supra* Part III.B.1 for a detailed discussion.

precedent for applying tariffs to industries with only tenuous national security ties but clear political ties."[83]

Moreover, it was clear that these tariffs were "leverage"[84] for the United States during USMCA (i.e., the new "NAFTA") negotiations. While referring to the decision to impose steel and aluminum tariffs on Canada and Mexico, U.S. Commerce Secretary Wilbur Ross stated:

> As to Canada, Mexico, you will recall the reason for the deferral (of tariffs) had been pending the outcome of the NAFTA talks . . . .There is no longer a very precise date when they may be concluded and therefore they were added into the list of those who will bear tariffs.[85]

It should be noted, even after the USMCA had been signed by all parties, the United States persisted in its imposition of the aluminum and steel tariffs against Canada.[86] Chrystia Freeland, Canada's Foreign Affairs Minister, referred to U.S. Commerce Secretary Wilbur Ross's comment that those tariffs were only imposed because the USMCA negotiations were pending.[87] Freeland then remarked that national security measures are not supposed to be used as "leverage"[88] even though the United States representatives "were quite explicit that that was the intention."[89] Furthermore, now that the USMCA had been signed, Freeland targeted Ross's original justification for imposing the tariffs (i.e., delayed negotiations): "How can that be relevant today when it comes to Canada? The deal is done. No more leverage is needed . . . we really think this is groundless."[90]

A critical point for Canada was on August 27, 2018, when the United States and Mexico reached a bilateral trade agreement in principle. This diminished Canada's bargaining position as it was now

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83. Rachel Brewster, *Analyzing the Trump Administration's International Trade Strategy*, 42 FORDHAM INT'L L.J., 1419, 1428 (2019).

84. *See* Janyce McGregor, *NAFTA talks forced Canada to pick a side in U.S. China trade war*, CBC NEWS (Oct. 13, 2018, 4:00 AM), https://www.cbc.ca/news/politics/usmca-canada-china-coalition-1.4855868 [https://perma.cc/5F79-MCJY] (archived Aug. 18, 2020).

85. Katiana Krawchenko, *Trump Administration imposes tariffs on steel and aluminum imports from Europe, Canada and Mexico*, CBS NEWS (May 31, 2018, 2:16 PM), https://www.cbsnews.com/news/trump-administration-imposes-tariffs-on-steel-aluminum-imports-from-europe-canada-mexico/ [https://perma.cc/Y4XM-XDMV] (archived Aug. 18, 2020).

86. Mike Blanchfield, *U.S. no longer needs 'improper' metal tariffs as negotiating tactic: Freeland*, THE STAR (Apr. 4, 2019), https://www.thestar.com/business/2019/04/04/us-no-longer-needs-improper-metal-tariffs-as-negotiating-tactic-freeland.html [https://perma.cc/5ENF-6C83] (archived Sept. 18, 2020).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

in danger of being left out of the trade deal.[91] Canada immediately entered into negotiations again[92] while President Trump implied the United States was willing to sign an agreement with Mexico without Canada. [93] Ultimately, Canada did sign the USMCA on November 30, 2018.[94]

The Canadian Government downplayed the significance of the Poison Pill. Chrystia Freeland, Canada's Foreign Affairs Minister, indicated that members of the USMCA could already withdraw from the USMCA regardless of the Poison Pill[95] while other perspectives included the view that the Poison Pill served to limit Canada's sovereignty.[96] Peter MacKay (who formerly served as Canada's Foreign Minister) poignantly commented that the United States had exerted a great deal of coercive pressure on Canada.[97] It was clear, to the Chinese Government, that the Poison Pill was directed specifically at China. Shortly after the Poison Pill became public knowledge, the Chinese Embassy in Canada released a statement in response to the United States' insistence for the inclusion of the Poison Pill. Although the statement did not specifically name the United States, it stated: "We deplore the hegemonic actions taken by some country, which blatantly interferes with other country's sovereignty."[98] The hard feelings have not been exclusively directed at the United States. When the USMCA was signed, it was Mexican President Enrique Pena Nieto's last day in office.[99] He was succeeded by Andres Manuel Lopez

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91. *See* Ana Swanson, Katie Rogers & Alan Rappeport, *Trump Reaches Revised Trade Deal with Mexico, Threatening to Leave Out Canada*, N.Y. TIMES (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/us/politics/us-mexico-nafta-deal.html [https://perma.cc/XE5F-YD46] (archived Aug. 18, 2020).

92. *See* Tapp, *supra* note 80.

93. *See* Swanson, Rogers & Rappeport, *supra* note 91.

94. *See* Kristy Kirkup, *Canada signs USMCA despite unresolved steel, aluminum tariffs issue,* GLOBE & MAIL (Nov. 30, 2018), https://www.theglobeandmail.com/business/article-trudeau-trump-and-pena-nieto-sign-usmca-on-sidelines-of-g20-summit/ [https://perma.cc/J5BB-GXXL] (archived Aug. 18, 2020).

95. *See* Elise von Sheel, *'They're wrong": Freeland rejects claim USMCA ties Canada's hands on trade*, CBC NEWS (Oct. 20, 2018, 4:00 AM), https://www.cbc.ca/news/politics/fr eeland-usmca-china-trump-1.4868736 [https://perma.cc/46HB-RBJ9] (archived Aug. 18, 2020) ("Freeland said that ability to trigger a six-month withdrawal period without cause is nothing new, since it was in the original NAFTA deal.").

96. *See id.*; *see also* Josh Wingrove, *supra* note 5.

97. *See id.* quoting Peter MacKay as saying "I don't think the gun was necessarily to our head – it was in our mouth, with the trigger cocked and a full chamber.").

98. Yundong, *supra* note 9.

99. *See* Mike Blanchfield, *Mexico threw Canada 'under the bus' with bilateral trade deal with U.S., Liberal MP tells Mexican minister*, FIN. POST (Feb. 28, 2019), https://business.financialpost.com/news/economy/mexico-threw-canada-under-the-bus-liberal-mp-tells-mexican-minister [https://perma.cc/KGE8-VE87] (archived Aug. 18, 2020).

Obrador.[100] When Canada sent a delegation to Mexico, Bob Nault (head of the Canadian ParlAmericas Chapter) expressed his dissatisfaction with Mexico's actions during the USMCA negotiations.[101] In particular, his comments indicated frustration with Mexico abandoning a trilateral agreement and negotiating a bilateral agreement with the United States—remarking "that Canada got thrown under the bus by Mexico."[102]

2. Poison Pill as Cautionary Tale to Other Nations

Canada is an economically affluent nation. According to the World Bank, Canada ranks tenth out of 184 countries in terms of GDP.[103] The fact that Canada felt great pressure to sign the USMCA is therefore significant. Despite Canada's high economic ranking, the pertinent issue is that it was negotiating with the United States (ranked first by the World Bank in terms of GDP).[104] In addition to the United States' wealth, the United States is Canada's largest trading partner with 75.02 percent of Canadian exports destined for the United States.[105]

Also note that Mexico (ranked fifteenth out of 184 countries in terms of GDP)[106] is also heavily reliant upon trade with the United States—with exports to the United States comprising 76.49 percent of Mexico's export market in 2018.[107] Although Canada and Mexico were the largest export markets for the United States, Canada represented only 18 percent of the US export market and Mexico represented 15.94 percent.[108] Thus, even when Canada and Mexico are combined, they collectively represent only about 34 percent of the United States' export market—while the United States represents approximately three-quarters of each of their respective markets.

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100. *See id.*

101. *See id.*

102. *Id.*

103. *GDP (current US$) – World Bank national accounts data, and OECD National Accounts data files*, WORLD DEV. INDICATORS, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true (last visited Mar. 7, 2020) [https://perma.cc/R64H-UTWR] (archived Aug. 18, 2020).

104. *Id.*

105. *Trade Summary for Canada 2018*, WORLD INTEGRATED TRADE SOL., https://wits.worldbank.org/countrysnapshot/en/CAN (last visited Mar. 7, 2020) [https://perma.cc/HJG2-WJU3] (archived Aug. 18, 2020) [hereinafter *Trade Summary for Canada*].

106. *Id.*

107. *Trade Summary for Mexico 2018*, WORLD INTEGRATED TRADE SOL., https://wits.worldbank.org/countrysnapshot/en/MEX (last visited Mar. 7, 2020) [https://perma.cc/3AB5-XHXN] (archived Aug. 18, 2020) [hereinafter *Trade Summary for Mexico*].

108. *Trade Summary for United States 2018*, WORLD INTEGRATED TRADE SOL., https://wits.worldbank.org/countrysnapshot/en/USA (last visited Mar. 7, 2020) [https://perma.cc/25EQ-4U73] (archived Aug. 18, 2020).

Canada could have obtained better negotiating leverage if the USMCA negotiations had proceeded in a truly multilateral fashion. This was curtailed when Mexico and the United States agreed in principle on a bilateral agreement. From a Mexican perspective, the Canadian export market represented only 3.12 percent of Mexican exports[109] so an agreement with Canada was not nearly as critical as an agreement with the United States. Despite Canada and Mexico being relatively affluent nations, what was ultimately decisive was their relative bargaining power compared to the United States.

During the USMCA negotiations, the hardline position taken by the United States did remind Canada about its overreliance on US trade and the need to diversify its trading relationships.[110] Even before the USMCA negotiations, the 2018 Canadian Federal Budget had already allocated $75 million (over five years) for the development of trade in China and Asia generally.[111] Canada's focus on China is not surprising given that China is Canada's second largest country trading partner, second only to the United States.[112] In addition, Canada has a vibrant Chinese-immigrant community. Chinese languages (including Mandarin and Cantonese) collectively are the third most spoken in Canada—surpassed only by English and French, the official languages of Canada.[113] Canada has a long history of good relations with China extending from the legacy of Dr. Norman Bethune (a Canadian surgeon regarded as a hero in China who died while saving

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109. *Trade Summary for Mexico*, *supra* note 107.

110. Stephen Tapp & Andrew DiCapua, *The drive to diversify*, EXPORTWISE, (Aug. 23, 2018), https://www.edc.ca/en/blog/the-drive-to-diversify.html [https://perma.cc/K45U-57U5] (archived Aug. 18, 2020) (commenting that "[e]conomists and politicians have long advocated the need to diversify Canada's international trade and investment to avoid overreliance on the U.S. market"); *see also* Tiff Macklem, *The urgent need for Canada to diversify its trade*, CONVERSATION (Nov. 13, 2018, 6:23 PM), http://theconversation.com/the-urgent-need-for-canada-to-diversify-its-trade-106244 [https://perma.cc/PM4Y-UN9Y] (archived Aug. 18, 2020); Glen Hodgson, *The difficult road to trade diversification*, GLOBE & MAIL, (Aug. 31, 2018), https://www.theglobeandmail.com/business/commentary/article-the-difficult-road-to-trade-diversification/ [https://perma.cc/V8Z2-SSCJ] (archived Aug. 18, 2020).

111. Government of Canada, *Equality & Growth: A Strong Middle Class* 67 (2018), https://www.budget.gc.ca/2018/docs/plan/budget-2018-en.pdf [https://perma.cc/RHL9-WM6V] (archived Aug. 18., 2020) (discussing Canada's plan to expand trade in China and Asia).

112. *Annual Merchandise Trade – Canada's Merchandise Exports*, GLOB. AFF. CAN., https://www.international.gc.ca/economist-economiste/statistics-statistiques/annual_merchandise_trade-commerce_des_marchandises_annuel.aspx?lang=eng (last visited Mar. 7, 2020) [https://perma.cc/49HZ-EBLY] (archived Aug. 18, 2020) (ranking China as the 2nd largest export country for Canadian merchandise).

113. *Population: Table 3 – Population by mother tongue selected languages*, STAT. CAN. 2018, (Mar. 27, 2018), https://www150.statcan.gc.ca/n1/pub/12-581-x/2018000/pop-eng.htm [https://perma.cc/MB4E-B94U] (archived Aug. 18, 2020).

Chinese lives during the Communist Revolution)[114] to Prime Minister Pierre Trudeau leading Canada to be the first Western nation (since before the Korean War) to officially recognize the People's Republic of China.[115]

Despite Canada's long-term aspirations of a Canada–China free trade agreement, the Poison Pill was an undesirable provision that Canada nevertheless had to accept. Mexico was already prepared to enter into an agreement without Canada, and Canada's discussions with China about a comprehensive free trade agreement were still in a very preliminary exploratory phase.[116] When the United States was able to negotiate a bilateral agreement in principle with Mexico, Canada faced the threat of being excluded from any trade deal. Given Canada's overdependency on US trade, in hindsight it seems a foregone conclusion that Canada would have to reluctantly accept the insertion of the Poison Pill into the USMCA.

The ability of the United States to impose the Poison Pill on Canada, a resource-rich nation, should worry less economically affluent nations about the types of trade restrictions that may be dictated to them by the United States in the future. This amplifies Caruso's concern about nations (particularly developing nations) suffering from the externalities of being excluded from important

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114. *See* Press Release, Parks Agency Canada,*:* The Government of Canada recognizes the national historic significance of Norman Bethune (1890-1939), (June 13, 2018) https://www.canada.ca/en/parks-canada/news/2018/06/the-government-of-canada-recognizes-the-national-historic-significance-of-norman-bethune-1890-1939.html [https://perma.cc/JXU3-GGAJ] (archived Sept. 30, 2020) ("Dr. Norman Bethune is revered by the Chinese …due to his courage and medical innovations is considered a role model by Chinese society."); *see also Chinese still cherish memory of Norman Bethune*, PEOPLE'S DAILY ONLINE (Dec. 23, 2004), http://en.people.cn/200412/23/eng20041223_168381.html [https://perma.cc/RB3J-SZF7] (archived Aug. 18, 2020) (discussing Dr. Norman Bethune's legacy in China).

115. *See* Jeremey Kinsman, *Why Canada matters to China*, IPOLITICS, (Aug. 20, 2016, 10:00 AM), https://ipolitics.ca/2016/08/20/why-canada-matters-to-china/ [https://perma.cc/4V8A-T3FP] (archived Aug. 18, 2020) ("Few Americans realize, however, that when President Richard Nixon went to China in the spring of 1972, he was following a trail blazed by a Canadian prime minister. Pierre Trudeau had already broken the ice in Beijing. Canada was the first Western country since before the Korean War to recognize the regime that won power in 1949 as the rightful government of China."); *see also* Nathan VanderKlippe, *Pierre Trudeau's China legacy looms large ahead of PM's first official visit*, GLOBE & MAIL (Aug. 29, 2016), https://www.theglobeandmail.com/news/world/pierre-trudeaus-china-legacy-looms-ahead-of-pms-first-official-visit/article31592099/ [https://perma.cc/4BPY-YX62] (archived Aug. 18, 2020).

116. Canada had only commenced seeking public consultation on a potential Canada – China FTA in 2017. *See Consulting Canadians on a possible Canada-China free trade agreement*, GOV'T CAN. (Mar. 10, 2017), https://www.international.gc.ca/trade-commerce/consultations/china-chine/index.aspx?lang=eng [https://perma.cc/9NVL-ZK36] (archived Aug. 18, 2020).

FTAs.[117] The Poison Pill could be used to coerce a developing nation into excluding itself from the possibility of entering into FTAs it would otherwise have desired. Even affluent nations such as the United Kingdom face the possibility of coercion. In the wake of Brexit, the United Kingdom has been discussing the possibility of a trade agreement with the United States.[118] Yet, it has been reported that the United States wishes to impose restrictions like the Poison Pill into the proposed US–UK trade agreement.[119] As expected, this has prompted scrutiny from the Labour Party (the official opposition party in the UK) about the United Kingdom maintaining "sovereignty"[120] over important decisions such as whether or not to engage in trade with China.

From a broader international trade perspective, the Poison Pill is also troubling because it violates the WTO Agreement (argued in Part III below) and contributes further to the US-led erosion of the WTO (argued in Part IV below).

III. POISON PILL—THE WTO CONTEXT

A. *The Poison Pill Violates the WTO Agreement*

A plain-reading analysis of the relevant provisions of the WTO Agreement reveals that the Poison Pill violates both the text and spirit of the WTO Agreement's provisions on equal treatment among members and the acceptable formation of FTAs. A review of the leading WTO case on customs unions and FTAs confirms that the Poison Pill violates the WTO Agreement.

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117. Caruso, *supra* note 18, at 430 ("A free-for-all, neoliberal embrace of bilateralism or regionalism might exacerbate global wealth asymmetries rather than cure them.").

118. *See Trade Talks between UK and US set to get under way*, BBC NEWS (May 4, 2020), https://www.bbc.com/news/uk-politics-52528821 [https://perma.cc/SR8E-S8XZ] (archived Aug. 18, 2020).

119. *See id.* ("Washington has also indicated that it wants to be able to veto the UK's ability to strike deals with 'non-market economies,' amid growing US tensions with China.").

120. *See* Lewis McKenzie, Sophie Morris, Elizabeth Arnold & George Ryan, *Labour warns US may try to block future trade deal with China*, (May 12, 2020, 11:55 AM), BELFAST TELEGRAPH, https://www.belfasttelegraph.co.uk/news/uk/labour-warns-us-may-try-to-block-future-trade-deal-with-china-39199896.html [https://perma.cc/W77F-CHRW] (archived Aug. 18, 2020).

1. Textual Analysis: MFN and the Exception for FTAs

Founded in 1995, the WTO is regarded as the preeminent international trade body.[121] Its legacy can be traced back to the 1948 inception of the General Agreement on Tariffs and Trade. The WTO's membership consists of 164 nations as of 2016 and it incorporates the GATT (as modified in 1994).[122] The WTO promotes trade through two key GATT provisions: (1) MFN[123] treatment and (2) National treatment.[124] Together these two provisions attempt to ensure that WTO members provide equality of treatment to each other. MFN treatment's importance is borne out of the fact that it is the very first provision of GATT. MFN treatment requires that any advantageous tariff or quota provided by a WTO member to any nation must also be provided to all WTO members on an equal basis.[125] Essentially MFN treatment prohibits WTO members from discriminating amongst each other with respect to trade barriers.[126] Once goods have entered a WTO member's country, National Treatment requires that a WTO member must treat the goods of other WTO members no differently than it treats domestic goods.[127]

At first glance, FTAs such as NAFTA appear to be a breach of MFN treatment. Under NAFTA, the United States, Canada, and Mexico provide each other preferential treatment (including with

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121. According to the WTO: "The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nation." *See What is the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited July 5, 2020) [https://perma.cc/P74J-Q3YS] (archived Aug. 18, 2020); *see also* Cathleen D. Cimino-Isaacs, Ian F. Fergusson & Rachel F. Fefer, *World Trade Organization: Overview and Future Direction*, CONG. RES. SERV., R45417 37 (2019) https://fas.org/sgp/crs/row/R45417.pdf [https://perma.cc/H6FX-8Z4N] (archived Aug. 18, 2020) (referring to the WTO as the "preeminent global trade institution"); Bryce Baschuk, *What's Next for the WTO After Sabotage by the U.S.*, WASH. POST (Dec. 11, 2019, 6:03 AM) https://www.washingtonpost.com/business/whats-next-for-the-wto-after-sabotage-by-the-us/2019/12/11/db45de8e-1bd3-11ea-977a-15a6710ed6da_story.html [https://perma.cc/D64L-VM6Y] (archived Aug. 18, 2020)(referring to the WTO appellate body as the "preeminent forum for settling worldwide trade disagreements").

122. *See* WORLD TRADE ORG. Members and Observers, *supra* note 13.

123. GATT, *supra* note 14, art. I.

124. *Id.* art. III.

125. *Id.* art. I.

126. *Id.* art. I, ¶ 1 (stating that "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.").

127. *Id.* art. III, ¶ 1 (stating that "[internal taxes and law affecting internal trade]…should not be applied to imported or domestic products so as to afford protection to domestic production."); *id.* art. III, ¶ 2 ("The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.").

respect to tariffs) that they do not provide to other WTO members.[128] However, there is an important exception to MFN treatment under GATT Article XXIV which permits the establishment of custom unions and FTAs.[129] An FTA refers to an agreement between two or more WTO members where trade restrictions such as tariffs have been eliminated on "substantially all the trade"[130] in goods between those WTO members. A customs union is much like an FTA except that it also applies a common tariff against all WTO members that are not part of the customs union.[131] Pursuant to GATT Article XXIV, the WTO allows this exception to MFN treatment under the belief that the formation of free trade areas and customs unions will benefit liberalized trade on the whole and may contribute to a future with truly free trade amongst all WTO members.[132] Therefore, Article XXIV (4) makes clear that promoting free trade is to be the purpose of the FTA or customs union and "not to raise barriers to the trade of other contracting parties with such territories."[133] This exception for FTAs requires that the "duties and other regulations of commerce"[134] applied to WTO members (who are not part of the FTA or customs union) shall not be higher or more restrictive than those existing prior to the

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128. See *North American Free Trade Agreement (NAFTA) – Rules of Origin*, GOV'T CAN. https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/tech-rect.aspx?lang=eng (last visited July 5, 2020) [https://perma.cc/68K3-623Z] (archived Aug. 18, 2020) ("Each NAFTA country retains its external tariffs vis-à-vis non-members' goods and levies a lower tariff on the goods "originating" from the other NAFTA members.").

129. GATT, *supra* note 14, art. XXIV.

130. *Id.* art. XXIV, ¶ 8(b) ("A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.").

131. *Id.* art. XXIV, ¶ 8(a)(iii) (stating that with respect custom unions "…substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.").

132. *See* Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). The preamble makes reference to free trade and customs unions stating "*Recognizing* the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements; Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded; Reaffirming the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members…." (emphasis in original). *Id.* pmbl.

133. *Id.* art. XXIV, ¶ 4.

134. *Id.* art. XXIV, ¶ 5(a).

formation of the FTA or customs union.[135] Assuming this condition is met, GATT does not prevent the formation of an FTA or customs union,[136] thus carving these territories out as exceptions to MFN treatment.

The Poison Pill contradicts Article XXIV's central premise because it may be used to deter USMCA signatories from entering into FTAs with other WTO members. The Poison Pill draws its power from the threat to withhold (via expulsion) preferential trading benefits from a USMCA member if that member engages in an FTA with a non-market country. Yet, those very same preferential benefits exist only due to an exception. That exception's foundational premise is that the FTA will only be used to promote trade among members and not raise barriers to other WTO members. Via the Poison Pill, the USMCA uses preferential trading benefits in a manner that directly contradicts the *raison d'etre* of the very provision it relies upon for the existence of those benefits.

2. Application of WTO Jurisprudence: The Turkey—Textiles Case

Although Article XXIV provides the foundation for the formation of the myriad FTAs (including bilateral trade agreements) around the world, there have been comparatively few WTO decisions dealing with Article XXIV.[137] The most relevant decision is Turkey—Textiles—a 1999 decision of the WTO Appellate Body.[138] In 1996, Turkey imposed quotas on Indian textiles shortly after Turkey entered into a customs union with the EC.[139] India argued that these quotas violated GATT article XIII (nondiscriminatory administration of quantitative restrictions) while Turkey replied that the quotas were justified under GATT Article XXIV (regarding FTAs and customs unions).[140] A WTO

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135. *Id.*

136. *Id.* art. XXIV, ¶ 5 (Assuming that the condition is met, this section states "…the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.").

137. See *WTO Analytical Index – GATT 1994 – Article XXIV (Jurisprudence)*, WORLD TRADE ORG,, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art24_jur.pdf (last visited Sept. 18, 2020) [https://perma.cc/UWW3-HVDZ] (archived Sept. 18, 2020). A review of the WTO Analytical Index on Article XXIV (current as of June, 2020) published by the WTO reveals that much of the discussion revolves around a single case between Turkey and India. *See infra* note 138.

138. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (adopted Oct. 22, 1999) [hereinafter Turkey—Textiles], appealing Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/R (adopted May 31, 1999) [hereinafter Turkey—Textiles Panel Report].

139. *See* Turkey—Textiles, *supra* note 138, ¶ 2.

140. *Id.* ¶ 3.

panel ruled in favor of India, and Turkey appealed the decision to the WTO Appellate Body.[141]

The WTO Appellate Body adjudicated the appeal.[142] Turkey stated that it was required to impose the quotas against India so that it would have "substantially the same commercial policy"[143] regarding textiles as the rest of the European Communities. According to Turkey, this brought its situation under the scope of Article XXIV as part of a customs union and justified derogation from GATT principles such as MFN treatment and Article XIII.[144] The Appellate Body rejected Turkey's argument, stating that Article XXIV did not permit Turkey to impose the quotas against India even though Turkey was part of a customs union.[145]

In coming to its ruling, the Appellate Body closely analyzed Article XXIV and made two important points that are relevant to the Poison Pill. First, the Appellate Body stated that Article XXIV must be interpreted in light of paragraph 4:

> According to paragraph 4, the purpose of a customs union is to "facilitate trade" between the constituent members and "not to raise barriers to trade" with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries . . . . Thus the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5 . . . . The chapeau cannot be interpreted correctly without constant reference to this purpose.[146]

In other words, Article XXIV permits the formation of FTAs and customs unions in order to facilitate trade internally among their members and may be used as a defense against the accusation that it has violated MFN treatment. However, Article XXIV is not permitted to be used offensively as a weapon—it may not be used to raise barriers to trade with third countries.

Second, the Appellate Body articulated two conditions that must be met if a nation is to effectively raise Article XXIV as a defense. The first condition is that both paragraphs 5(a) and 8(a) have been

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141. *See id.* ¶ 1.
142. *See id.*
143. *Id.* ¶ 2.
144. *Id.* ¶ 8.
145. *Id.* ¶ 64 (stating that the Appellate Body "…upholds the Panel's conclusion that Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions on imports of 19 categories of textile and clothing products which were found to be inconsistent with Articles XI and XIII of the GATT 1994….").
146. *Id.* ¶ 57.

satisfied.[147] Generally, under paragraph 5 the customs union or FTA's duties and regulations of commerce imposed on parties (who are not members of the customs union or FTA) shall not on the whole be higher or more restrictive than prior to the formation of the customs union or FTA.[148] Under paragraph 8(a) the customs union must eliminate substantially all duties and other restrictive regulations of commerce amongst its members.[149]

The second condition is that the "party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."[150] The Appellate Body emphasized: "Again, both these conditions must be met to have the benefit of the defence under Article XXIV."[151]

Upon applying these principles in Turkey—Textiles, the Appellate Body found that the second condition was not met, stating that Turkey did not have to impose quotas in order to form part of the customs union.[152] It reviewed paragraph 8 (a)(ii) meticulously and noted that:

> [S]ub-paragraph 8(a)(ii) does not require each constituent member of a customs union to apply the same duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead it requires that substantially the same duties and other regulations of commerce shall be applied.[153]

This interpretation of subparagraph 8(a)(ii) provides a certain degree of "flexibility" [154] in meeting the requirements of Article XXIV. It also buttressed the Appellate Body's reasoning—it concluded that Turkey did have alternatives that it could have used instead of imposing quotas on India.[155] Turkey could have established a system using rules of origin certificates which would allow members of the customs union to differentiate between textiles originating in India

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147. *Id.* ¶ 58 ("First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV.").

148. GATT, *supra* note 14, art. XXIV, ¶ 5.

149. *Id.* ¶ 8(a).

150. Turkey—Textiles, *supra* note 138, ¶ 58.

151. *Id.*

152. *Id.* ¶ 63 ("For this reason, we conclude that Turkey was not, in fact, required to apply the quantitative restrictions at issue in this appeal in order to form a customs union with the European Communities.").

153. *Id.* ¶49.

154. *Id.* ¶50. However, the Appellate Body did emphasize that this was qualified by the word "same" ensuring that the floodgates would not open too widely: "Here too we would caution that this 'flexibility' is limited. It must not be forgotten that the word 'substantially' qualifies the words 'the same.'" *See id.*

155. *Id.* ¶62.

from those originating in Turkey.[156] On this basis, the Appellate Body ruled that Turkey had not met the second condition of the test and, therefore, the imposed quotas were not saved under Article XXIV.[157]

Although Turkey—Textiles dealt specifically with a customs union, there are two overarching principles in that case which may be readily applied to an FTA such as the USMCA. The first principle is the general interpretive approach found in paragraph 4 that states the FTA must not create barriers to trade with third countries.[158] Paragraph 4 clearly states that it applies to both customs unions and FTAs.[159] Applying this principle to the Poison Pill suggests that the Poison Pill contradicts Article XXIV. The Poison Pill is clearly intended to deter or punish (with expulsion) any member that enters into an FTA with a non-market country (even another WTO member). This is a barrier to trade with third countries—founded on a threat of expulsion from an FTA. China, which is a WTO member, clearly understood this to be a barrier which is exactly why it denounced the Poison Pill shortly after its announcement.[160]

The second relevant principle from Turkey—Textiles is that the measure complained of must have been necessary for the formation of the customs union. This principle is also applicable to FTAs. It follows as a logical consequence of the general interpretive principle discussed immediately above. The goal of Article XXIV is to create a trade-liberalizing region which does not raise barriers to third countries.[161] Under GATT, deviation from MFN treatment is tolerated (under Article XXIV) on the premise that the FTA or customs union will on the whole liberalize trade in that region.[162] As part of that trade-off, any measure that may negatively affect trade with third countries,

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156. *Id.*

157. *Id.* ¶63 ("For this reason, we conclude that Turkey was not, in fact, required to apply the quantitative restrictions at issue in this appeal in order to form a customs union with the European Communities. Therefore, Turkey has not fulfilled the second of the two necessary conditions that must be fulfilled to be entitled to the benefit of the defence under Article XXIV.").

158. GATT, *supra* note 14, art. XXIV, ¶ 4.

159. *Id.* (referring to both a "customs union or a free-trade area").

160. *See* Yundong, *supra* note 9 (referring to the Poison Pill as "trade restricting actions against China").

161. See GATT, *supra* note 14, art. XXIV, ¶ 5(b) (stating "with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free–trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be….").

162. *See id.* art. XXIV, ¶ 4 ("The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.").

even if it complied with the first condition, must be shown to be necessary for the formation of the trade-liberalizing region.

The Poison Pill does not satisfy this second principle. There is no reason why the Poison Pill's inclusion into the USMCA was necessary for the USMCA's formation. Far from being a trade-liberalizing provision to solely promote trade, the Poison Pill's goal is to dissuade the formation of trade-liberalizing FTAs with select third countries. NAFTA, as the predecessor to the USMCA, has been in existence since 1994[163] and it contains nothing remotely similar to the Poison Pill. The USMCA is substantively similar to NAFTA[164] although there are some differences.[165] Therefore, NAFTA is solid evidence that the FTA contemplated by the USMCA does not functionally depend upon the Poison Pill's inclusion.

In summary, the Poison Pill is not permitted under Article XXIV. In order to be permitted under Article XXIV it must satisfy two conditions. It does not satisfy either condition because it raises trade barriers to third countries and is not necessary for the establishment of the FTA. Although the USMCA is an agreement between only three countries, the WTO Agreement is between 164 countries including not only the United States, Canada and Mexico but also parties that may be affected by the Poison Pill—most notably, China. While it is true that no country is entitled to have an FTA with the United States, it is also true that no country is entitled to be a WTO member on its own terms. Although the WTO does not require any country to form an FTA, the WTO it is entitled to require that the voluntary formation of an FTA be done solely in accordance with WTO terms as a condition of WTO membership. The three USMCA countries cannot unilaterally amend the WTO Agreement to their liking.[166]

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163. *See* NAFTA, *supra* note 26.

164. *See* Daniel Ikenson, *USMCA: A Marginal NAFTA Upgrade at a High Cost,* CATO INST. (Apr. 10, 2019), https://www.cato.org/publications/commentary/usmca-marginal-nafta-upgrade-high-cost [https://perma.cc/Q7V9-HVKR] (archived July 20, 2020) (stating "The USMCA is a marginal improvement over NAFTA—better in some areas, worse in others, about the same in most."); *see also* Gary Hufbauer and Steven Globerman, *The United States-Mexico-Canada Agreement: Overview and Outlook*, FRASER RES. BULLETIN 1 (Nov. 2018), https://www.fraserinstitute.org/sites/default/files/us-mexico-canada-agreement-overview.pdf [https://perma.cc/6RR3-4E7G] (archived Aug. 18, 2020) ("Notwithstanding President Trump's characterization of NAFTA as the worst trade deal ever signed by the USMCA, the USMCA doesn't create much change.").

165. *See* Terence Stewart & Shahrzad Noorbaloochi, *The USMCA & United States – Canada Trade Relations: The Perspective of a U.S. Trade Practitioner*, 43 CAN.-U.S. L.J. 280 (2019) (reviewing the differences between NAFTA and the USMCA).

166. *See* Marrakesh Agreement, *supra* note 13, art. X (generally outlining the procedure for amendments to the GATT with thresholds ranging from two-thirds to three-fourths and unanimous acceptance of members depending on the issue).

B. *How the Poison Pill Derives Its Power from the WTO Agreement*

The Poison Pill paradoxically derives a significant amount of its coercive strength from the WTO Agreement itself. This is an important observation when responding to an anticipated criticism that the WTO should not interfere in voluntarily negotiated agreements between sovereign nations. That criticism would implicitly assume that the state of negotiations between the countries is not already affected by the WTO. When WTO members voluntary negotiate an FTA, they do so under the shadow of the WTO Agreement. This normative baseline includes the MFN rule and the exception for FTAs which limits the range of options available to the parties. This Part demonstrates how this preexisting WTO normative baseline is critical in augmenting the efficacy of the Poison Pill as a trade-restrictive provision.

The coercive effect of normative baselines upon apparently freely negotiated agreements between parties is a theme that resonates well with those familiar with American legal realism. Below is a discussion of two lines of case law from the early 1900s involving the concept of freedom of contract and resulting in either the courts or legislature imposing limits on contracts. This discussion is intended to provide historical context for the subsequent analysis of Robert Lee Hale's influential contribution to American legal realism and its relevance to the Poison Pill. Hale, educated as a lawyer and an economist, was a professor at Columbia Law School from 1919 to 1949.[167] He was a scholar in the Legal Realist tradition and he is well-known for his work on property rights and coercion, with a particular emphasis on how legal rules contribute to distribution in society.[168]

1. Limits to Freedom of Contract: Classic American Jurisprudence

Hale's insights were published during the early twentieth century when the limits of freedom of contract under a seemingly laissez-faire society were being debated in American courts and legislatures. The two lines of cases below exemplify this era's intellectual battle and situate Hale's relevancy to that debate.

The case of *Lochner v. New York*[169] remains a landmark case symbolizing this era's debates.[170] In *Lochner*, the Supreme Court ruled (in a 5-4 ruling) that a New York statute, which set the maximum

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167. BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 2–3 (2001).

168. *Id*. at 3.

169. Lochner v. New York, 198 U.S. 45 (1905).

170. *See* Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) ("But for more than a half-century, the most important of all defining cases has been *Lochner v. New York*. The spectre of *Lochner* has loomed over most important constitutional decisions, whether they uphold or invalidate governmental practices." (footnotes omitted)).

permissible work hours for bakery employees, was unconstitutional.[171] The Court's reasoning was that it was an unconstitutional interference with right to freedom of contract.[172]

However, in his now famous dissent, Justice Oliver Wendell Holmes accused the majority of deciding the case "upon an economic theory which a large part of the country does not entertain."[173] Holmes also demonstrated the inconsistency of the majority ruling by pointing out that there were plenty of instances where the law permitted interference with contractual liberty including laws prohibiting usury, lotteries, and working on Sundays.[174] Yet, the majority decision would persist for more than three decades. Finally, in *West Coast Hotel Co. v. Parrish*,[175] the Supreme Court held that a Washington State minimum-wage law was constitutional[176] implying that "the Court rejected the theoretical foundations of the Lochner period."[177]

A similarly themed issue is the "yellow-dog contract." Yellow-dog contracts referred to employment contracts which contained a clause where the worker agreed that he/she would not join a labor union.[178] Again, the issue was whether a prohibition against such a clause would be an unconstitutional restraint on the liberty to contract. If workers attempted to organize themselves against an employer, employers would rely on these clauses to obtain an injunction.[179] Moreover, when courts issued these injunctions, workers harbored resentment from "a feeling that the courts are not neutral . . . . To labor, this seems an alignment of government with the anti-union employers."[180] In 1915, the Supreme Court ruled that a Kansas law prohibiting yellow-dog contracts was unconstitutional.[181] However, by 1932, the Norris-LaGuardia Act was enacted and stated that yellow-dog contracts were

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171. *See id.* at 877.

172. *Id.*

173. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

174. *Id.* ("The other day, we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts,* 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States,* 193 U.S. 197. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker,* 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy,* 169 U.S. 366.").

175. West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937).

176. *See* Sunstein, *supra* note 170, at 876 (referring to *West Coast Hotel v. Parrish* as the "…case generally thought to spell the down fall of *Lochner*.").

177. *Id*. at 880.

178. For a critique of the yellow dog contract, see Cornelius Cochrane, *Why Organized Labor is Fighting Yellow Dog Contracts*, 15 AM. LAB. LEGIS. REV. 227, 232 (1925) ("It deems such a weapon unfair – a weapon that the employer has resorted to by subterfuge and has justified by the old rules of the common law – because he has no better justification . . . .").

179. Edwin E. Witte, *Yellow Dog Contracts*, 6 WIS. L. REV., 21, 22 (1930).

180. *Id.* at 28.

181. *See* Coppage v. Kansas, 236 U.S. 1 (1915).

unenforceable.[182] Similarly, the Wagner Act also prohibited yellow-dog contracts,[183] and the constitutionality of this statute was upheld by the Supreme Court in 1937.[184] Cushman has noted that "[t]he yellow-dog contract provoked something of a crisis in liberal discourse, because it brought into conflict two time-honored liberal values: liberty of contract and freedom of association."[185]

2. Robert Hale's Powerful Insight: Coercive Power and Normative Baselines

The two lines of cases discussed above spanned the early 1900s to the 1930s. It was during this time that Hale's work found intellectual traction. Lochner reflected the pervasive theme found in this era's laissez-faire ideology: that the government should not interfere with contracts made by consenting individuals.[186] Yet if it could be shown that the baseline bargaining position of individuals was already fashioned by the government and that this baseline would have an effect on the outcome of contractual negotiations, then the case for government intervention in the acceptable limits of freedom of contract would be much stronger.[187] It is exactly with respect to this point that Hale offers his insight.[188]

In his seminal article, "Coercion and Distribution in a Supposedly Non-Coercive State,"[189] Hale elegantly described how the law imbues

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182. 29 U.S.C. § 103 (1932).

183. 29 U.S.C § 158 (1974) (stating that it is prohibited to "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

184. NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).

185. Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, SUP. CT. REV. 235, 236 (1992).

186. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain…a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.").

187. AMERICAN LEGAL REALISM, 99–100 (William W. Fisher III, Morton J. Horwitz & Thomas A. Redd eds., 1993) ("All economic and social activity is organized by an elaborate network of legal rules. Those rules confer advantages on certain parties and disadvantages on others. Social reform statutes—such as consumer protection laws, guarantees of collective bargaining rights, or laws limiting the number of hours employees can be required to work—thus represent adjustment of the legal ground rules, designed in part to alter the relative advantages of different groups of actors rather than intrusions into a sphere in which formerly it had no role.").

188. FRIED, *supra* note 167, at 205 (noting that Hale focused on "coercion, property rights and public utility regulation" and that "His argument in all three areas is best read as an elaborated response to the particular version of laissez fair ascendant in turn-of-the century politics and briefly enshrined in constitutional law by the *Lochner*-era Court.").

189. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

individuals with the ability to exert coercive force on each other through the law's enforcement of property rights.[190] He hypothesizes the plight of a worker who has no food.[191] Those who own food are under no legal obligation to provide the worker food and the law of property prohibits the worker from simply taking food-owner's food.[192] Hale states: "Unless the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behest of some employer."[193] In addition, this worker cannot grow food unless the worker can use land.[194] If worker owns no land, then the worker won't be able to use the land unless the worker pays the land owner.[195] The worker could try to produce goods and sell the goods but the worker cannot do so if the worker does not own the machinery for making goods.[196]

Note that in each case, the worker's dilemma is related to property law—the worker does not own food, does not own property to grow food, nor does the worker own the machinery to allow the worker to produce goods to sell for money (in order to buy food). [197] What the worker does have is the worker's own capacity for labor. Thus, Hale concludes: "It is the law of property which coerces people into working for factory owners—though, as we shall see shortly, the workers can as a rule exert sufficient counter-coercion to limit materially the governing power of owners."[198]

Hale's insight into this seemingly simple situation is powerful. He demonstrated that voluntary contracts involving the exchange of property (including trading property for labor as in an employment contract), involved the coercive force of the government. This is because property rights (including the right to exclude others from the property) are creations of the government and often form the basis of the bargaining between parties.[199] It is important to note that Hale was not suggesting that property rights or coercive power were

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190. FRIED, *supra* note 167, at 17 ("Moreover, such private coercion derived its force from public power in the form of a legally created right to withhold property or services from exchange entirely, and the lesser included right to retain whatever price one could extract for agreeing to relinquish that right.").

191. Hale, *supra* note 189, at 472. In this particular case, he hypothesizes a worker who wants to eat a bag of peanuts. *Id.*

192. *Id.*

193. *Id.* at 473.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 472–73.

198. *See id.*

199. *See* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) ("The character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain…there is actually little freedom to bargain on the part of the steel worker or miner who needs a job.").

necessarily undesirable.[200] He was simply reminding us that what appeared to be a purely private agreement between two individuals actually took place under normative regime of property law created and enforced by the government. Therefore, to say that contracts involving property between individuals were an exclusively private matter and should not involve the government is inaccurate. Government is already involved through its creation of property law.[201] The real question is the extent that government should involve itself—a normative question based on values rather than classical legal reasoning.

Fried summarizes the implications of Hale's reasoning regarding these transactions: "That situation meant that when government intervened in private market relations to curb the use of certain private bargaining power, *it did not inject coercion for the first time into those relations; it merely changed the relative distribution of coercive power*."[202] Duncan Kennedy expresses a similar view where he refers to the normative baseline of rules as "ground rules." He states:

> A basic reason for the invisibility of the distributional consequences of law is that we don't think of ground rules of permission as ground rules at all, by contrast with ground rules of prohibition . . . . The invisibility of legal ground rules comes from the fact that when lawmakers do nothing, they appear to have nothing to do with the outcome.[203]

3. Applying Hale's Insights to the Poison Pill

Hale's insights can be applied to an analysis of the Poison Pill within the broader context of the WTO Agreement. While WTO members cannot call upon the coercive power of the state as in the case of a civil dispute under domestic law of a nation, Hale's insights are still useful because the WTO Agreement is a system of normative rules which its members acknowledge as being legitimate through their acquiescence to its terms. All 164 member nations of the WTO engage in international trade under the normative umbrella of the WTO

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200. *See* Neil Duxbury, *Robert Hale and the Economy of Legal Force*, MOD. L. REV. 421, 435 (1990)*; see also* Cohen, *supra* note 199, at 14 ("…the recognition of private property as a form of sovereignty is not itself an argument against it. Some form of government we must always have.").

201. Robert L. Hale, *Rate making and the Revision of the Property Concept*, COLUM. L. REV. 209, 214 (1922) (With respect to the property owner, Hale stated that: "The law has delegated to him a discretionary power over the rights and duties of others.").

202. FRIED, *supra* note 167, at 18 (emphasis added).

203. Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, LEGAL STUD. F. 327, 333 (1999); *see also* Sunstein, *supra* note 170, at 917 (stating that in *West Coast Hotel*, the Court adopted "an alternative baseline and rejected *Lochner* era understandings of neutrality.").

Agreement. More importantly, any FTA voluntarily agreed upon by WTO members takes place in the shadow of MFN treatment as being a default normative baseline.

Consider the position of Canada under the USMCA. Under the Poison Pill, Canada faces the unsavory prospect of being expelled from the USMCA if it enters into an FTA with China.[204] One alternative would be for Canada to enter into preferential sectoral trade agreements with China. Canada could reduce or eliminate all tariffs or quotas on selected Chinese imports. As long as these preferential, sectoral agreements did not cover "substantially all the trade" between Canada and China, they would not be considered to be a free trade agreement under the WTO.[205] Since these would not be an FTA, they would not trigger the Poison Pill.

Yet, Canada is prohibited from pursuing this option due to its MFN treatment obligations under the WTO Agreement.[206] In a world without MFN Treatment, Canada could offer China many different types of preferential tariff treatment in exchange for trade concessions from China. Under the current WTO regime, it is either all or nothing. The "all" is to enter into an FTA under GATT Article XXIV such that the FTA covers substantially all the trade while the "nothing" means dealing merely on MFN terms. There is no middle ground where WTO nations can give each other preferential tariff treatment on less than "substantially all the trade between the two nations" terms. By threatening Canada with expulsion from the USMCA, the Poison Pill coerces Canada from the "all" of an FTA with China and leaves it to the WTO MFN rule to exclude the vast middle ground—effectively leaving Canada with the "nothing" of dealing with China on solely MFN terms. It is in this manner that the Poison Pill draws its power from the WTO Agreement to further its trade-restrictive purpose. This key observation provides the WTO a normatively justified reason for curtailing the use of clauses such as the Poison Pill.

IV. THE POISON PILL: EROSION OF WTO PRINCIPLES AND IMPLICATIONS

This Part suggests that the Poison Pill exacerbates the existing concerns that FTAs may divert trade inefficiently. Moreover, regardless of the Poison Pill's immediate impact on Canada, what is most concerning are the coercive tactics that the United States used to

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204. *See* USMCA, *supra* note 1, art. 32.10, ¶ 5.

205. *See* GATT, *supra* note 14, art. XXIV, ¶ 8(i) (states that in order to qualify as a free trade area the agreement must eliminate tariffs and duties "with respect to substantially all the trade between the constituent territories in products originating in such territories.").

206. *See generally* GATT, *supra* note 14, art. I (titled "General Most-Favoured-Nation Treatment.").

ensure that Canada accepted the USMCA (including the Poison Pill). These tactics were also used to coerce Argentina, Brazil, and South Korea into providing trade concessions to the United States on an allegedly voluntary basis even though such voluntary agreements are prohibited by the WTO. Finally, this Part contemplates two strategies that middle powers and developing nations can use to mitigate the effects of trade restrictions like the Poison Pill. It concludes with observing that the United States, through aggressive trade actions like the Poison Pill, incentivizes nations to form coalitions with superpowers like China and the EU to counterbalance an increasingly overreaching United States.

A. *Poison Pill as a Trade Diverter*

Since MFN treatment is one of the cornerstones of the GATT, it is remarkable that FTAs (and customs unions) are permitted under the WTO. FTAs directly contradict the principle of nondiscrimination because they discriminate between WTO members. Members of an FTA provide each other with preferential tariff treatment but do not make this treatment available to WTO members who are not members of that FTA.[207] This is the reason why Bhagwati prefers the term "preferential trade area" (PTA).[208] The word "preferential" in the term PTA reminds us that the members of the PTA are giving each other preferential treatment—implying that this treatment is to the exclusion of others.[209]

FTAs have been permitted under GATT Article XXIV ever since GATT was established in 1947.[210] Kerry Chase studied the origins of GATT Article XXIV, a clause that he states has been problematic right from the very beginning.[211] He notes that according to the prevailing view, the US government allowed FTAs during negotiations of GATT because "they worried that Britain and developing nations would abandon the talks, and they wished to remove obstacles for European integration."[212] Surprisingly, Chase's investigation of archival records uncovered another reason why US officials might have tolerated FTAs. According to him, the United States wanted to carve an FTA exception

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207. Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 L. & POL'Y INT'L BUS. 865, 865 (1996).

208. *Id.*

209. *Id.*

210. Robert Howse & Joanna Langille, *Spheres of Commerce: The WTO Legal System and Regional Trading Blocs – A reconsideration*, 46 GA. J. INT'L & COMP. L. 649, 650 (2018) ("The tension between the between the WTO and PTAs has dogged the international trading system since its inception in the General Agreement on Tariffs and Trade (GATT) 1947 and through its institutional transformation in the WTO in 1995.").

211. Kerry Chase, *Multilateralism compromised: the mysterious origins of GATT Article XXIV*, 5 WORLD TRADE REV. 1, 1 (2006) (remarking that the GATT "…has been a source of vexation and puzzlement since the treaty's inception in 1947.").

212. *Id.* at 2.

to MFN (i.e., GATT Article XXIV) in order "to accommodate a trade treaty they had secretly reached with Canada."[213]

Regardless of the origins of Article XXIV, FTAs have proliferated greatly in the last 25 years. When the United States, Canada, and Mexico entered into NAFTA in 1994, there were a cumulative total of 46 RTA notifications to the WTO and a cumulative total of 39 FTAs in force.[214] As of 2019, there were a cumulative total of 480 FTA notifications to the WTO and a cumulative total of 301 RTAs in force.[215] Given that there are currently 164 WTO members, a total of 301 FTAs (in force) is a high number considering that Article XXIV is supposed to be a mere exception to the general rule of MFN. The prevalence of FTAs suggests that we ought to better understand what influence FTAs might have on international trade, a topic that continues to be one of the "most enduring debates in international trade law."[216]

It is unclear whether FTAs lead to an overall increase in economic welfare for WTO members. Bhagwati notes that there may be some officials (as well as the general public) who view "any trade liberalization as good"[217] and believe that "even discriminatory lowering of trade barriers must surely be good as long as trade barriers were being dismantled."[218] Yet he notes that "increasingly the sophisticated international economists realized that free trade areas . . . were a mix of free trade and protection."[219] Although trade within the FTA was liberalized by the elimination of trade barriers, the continued maintenance of those trade barriers (tariffs at MFN rates for example) represents discrimination or protectionism against the WTO nations that are not members of the FTA.[220] The overall benefits of FTAs depend on how trade is ultimately directed. If FTAs tend to divert trade from the most efficient producers, then this will result in a negative effect on overall trade. On the other hand, if there is no diversion from the most efficient producers then there may be a positive effect.[221]

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213. *Id.* at 1.

214. *RTA Tracker*, WORLD TRADE ORG. REG'L TRADE AGREEMENTS DATABASE, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last visited Mar. 8, 2020) [https://perma.cc/4E9Z-L7WQ] (archived July 11, 2020).

215. *Id.*

216. Howse & Langille, *supra* note 210, at 650.

217. JAGDISH BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE 16 (2008).

218. *Id.*

219. *Id.*

220. *See id.* at 17 ("So FTAs are two-faced: they free trade among members, but they increase protection against non-members. This means they are fundamentally different from free trade.").

221. *See* Kimberly Ann Elliot, *The WTO and regional/bilateral trade agreements, in* HANDBOOK OF INTERNATIONAL TRADE AGREEMENTS 17, 22 (Robert E. Looney ed., 2019) ("The net welfare effects of RTAs are only positive if the trade created among the

Whether or not FTAs result in inefficient trade diversion has not been conclusively answered. In its 2011 World Trade Report, the WTO specifically examined preferential trade agreements and their effects on international trade.[222] In that report, the WTO reviewed the literature regarding trade diversion and trade creation (trade creation referring to trade that is not rerouted to less efficient producers as a result of an FTA).[223] The report categorizes the literature into three broad categories but acknowledges that the "literature is not conclusive."[224] It refers to the work of Freund and Ornelas to only modestly note that the literature "suggests that trade diversion may play a role in some agreements and some sectors, but it does not emerge as a key effect of preferential agreements."[225]

Given the multitude of variables involved with measuring world trade on a macro-level, researchers would be hard-pressed to draw any definitive conclusions about trade diversion. In addition, an evaluation of any purported FTA trade diversion is based on the premise that one can confidently estimate the flow of trade in the absence of the FTA. Therefore, all research on trade diversion is necessarily based on estimations or presumptions of what a non-FTA counterfactual would be like—thus leaving any conclusions only as strong as the underlying assumptions.[226] Therefore, as one might expect, the literature continues to remain inconclusive.[227]

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parties is not primarily diverted from more efficient external producers."); *see also* BHAGWATI, *supra* note 217, at 17 (citing the work of Jacob Viner and noting that Viner directed attention to how FTAs could re-route trade).

222. *See* World Trade Org. Secretariat, *World Trade Report 2011 The WTO and preferential trade agreements: From co-existence to coherence* 105 (2011), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf [https://perma.cc/34XU-URNJ] (archived Aug. 18, 2020).

223. *See id.*

224. *Id.*

225. *Id.* (citing Caroline L. Freund & Emanuel Ornelas, *Regional Trade Agreements*, 2 ANN. REV. OF ECON. 139 (2010)). A second version of this paper exists as Caroline L. Freund & Emanuel Ornelas, *Regional Trade Agreements*, (World Bank Policy Research, Working Paper No. 5314, 2010), http://documents1.worldbank.org/curated/en/367221468337914543/pdf/WPS5314.pdf [https://perma.cc/74WA-PM48] (archived Aug. 18, 2020).

226. *See* Caroline Freund & Emanuel Ornelas, *Regional trade agreements: Blessing or Burden?,* VOX EUR. UNION (June 2, 2010), https://voxeu.org/article/regional-trade-agreements-blessing-or-burden [https://perma.cc/G6CV-ARBP] (archived Aug. 18, 2020) ("Unfortunately, estimating trade creation and trade diversion is no easy task – it requires knowledge of the counterfactual, i.e. what would have happened to trade if there were no trade agreement. As this is unknown, assumptions must be made.").

227. For an example of a study confirming trade creation rather than trade diversion, see Mamit Deme & Estrella R. Ndrianasy, *Trade-Creation and trade-diversifications effects of regional trade arrangements: low-income countries*, 49 APPLIED ECON. 2188, 2188 (2017) (concluding that "Accounting for heterogeneity in third countries reveals that an RTA among low-income countries has a particularly robust trade-creation effect."). However, there are findings which suggest conclusions to the

In summary, FTAs are an exception to the foundational principle of MFN and nondiscrimination among WTO members. FTAs have proliferated greatly in the last twenty-five years, yet it is still unclear whether they increase net economic welfare for the world trading system as a whole.

How does the Poison Pill relate to the debate about trade diversion? The Poison Pill is an overt attempt to deter trade with China through the threat of expulsion from the USMCA. If China is the most efficient producer of goods (e.g., manufactured goods such as electronics)[228] that Canadians desire, then it may well make sense for Canada to enter into an FTA with China. Conversely, to the extent that Canada is the most efficient producer of goods (e.g., natural resources)[229] that China desires, it also makes sense for China to enter into an FTA with Canada. China is already Canada's second largest country trading partner and Canada has long had a potential Canada–China FTA in mind, both of which suggest that an FTA may well be efficient for both countries.

If that is case, then the Poison Pill would be a provision that amplifies the concern that FTAs can be trade diverting. FTAs already allow WTO members to discriminate against other WTO members by excluding them from the preferential treatment afforded to FTA parties. Now the Poison Pill exacerbates that tension by further discriminating against select, targeted WTO members (any nation deemed to be a non-market economy). If FTAs "entrench the very discrimination that the WTO rules seek to eliminate"[230] then the Poison Pill is a weaponized version of this entrenchment—one that specifically targets its discrimination and intensifies trade-diversion concerns.

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contrary, for example, *see* Shujiro Urata & Misa Okabe, *Trade Creation and Diversion Effects of Regional Trade Agreements: A Product-level Analysis*, 37 WORLD ECON. 267, 287 (2014) ("RTAs among developing countries give rise to trade diversion for many more products compared with the RTAs among developed countries."). *See also* Zakaria Sorgho, *RTAs' Proliferation and Trade-diversion Effects: Evidence of the 'Spaghetti Bowl' Phenomenon*, 39 (2) WORLD ECON. 285, 297 (2015).

228. *See, e.g.*, Pascal Tremblay, *Trade and Investment: Canada-China*, PARLIAMENTARY INFO. & RES. SERV. 2 (2014). https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/TradeAndInvestment/PDF/2014/2014-54-e.pdf [https://perma.cc/TNX3-DT3J] (archived Aug. 18, 2020) ("Canada's highest-valued imports from China in 2013 were laptop computers, cellular telephones, and telephonic switching apparatus and modems, which together accounted for 15.7% of the value of Canada's imports from the country.").

229. *See id.* ("Canada's highest valued exports to China in 2013 were canola seeds, iron ore and concentrates, and wood pulp, which together accounted for 24.7% of the value of Canada's exports to the country.").

230. Andrew D. Mitchell & Nicolas J.S. Lockhart, *Legal requirements for PTAs under the WTO*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS COMMENTARY AND ANALYSIS 81, 81 (Simon Lester, Bryan Mercurio & Lorand Bartels eds., 2nd ed. 2015).

B. *Coercion in FTAs: National Security and Abuse of "Voluntarism"*

Below, this Part analyzes how the United States unjustly invoked national security exceptions under GATT to obtain leverage during USMCA negotiations. This Article suggests that such coercive tactics violate the WTO Agreement by later focusing on the WTO's prohibition of "voluntary restraint agreements."

1. Coercive Use of National Security Grounds in USMCA Negotiations

The recent use of national security grounds as a trade-negotiating tool against weaker nations is a reason for concern about the future of international trade. On March 8, 2018, the United States announced that it was imposing tariffs on aluminum[231] and steel.[232] The Trump Administration announced that this was justified on national security grounds.[233] GATT Article XXI allows WTO members to take whatever actions necessary to protect their security interests, even if those actions would have otherwise breached GATT.[234] However, the legitimacy of the Unites States' invocation of national security grounds was highly questionable.

The purported rationale for invoking steel and aluminum tariffs would be that these materials are essential for military defense and the United States cannot be dependent on foreign suppliers for these materials. Although U.S. Defense Secretary, James Mattis, supported the Trump Administration's tariffs, he expressed concern about the effect these tariffs would have on US allies.[235] Furthermore he had acknowledged in an internal memo that even 3 percent of the total steel and aluminum produced domestically in the United States would be enough to satisfy the needs of the US military.[236] Such an excess

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231. *See generally* Proclamation 9758, 83 Fed. Reg. 25849 (May 31, 2018).

232. *See generally* Proclamation 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018).

233. *See id.* ¶ 2; *see also* Proclamation 9758 ¶ 2.

234. *See* GATT, *supra* note 14, art. XXI: "Nothing in this Agreement shall be construed…(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . .."

235. *See* David Lawder & David Chance, *U.S. defense department says prefers targeted steel, aluminum tariffs*, REUTERS (Feb. 22, 2018), https://www.reuters.com/article/us-usa-trade-steel/u-s-defense-department-says-prefers-targeted-steel-aluminum-tariffs-idUSKCN1G706A [https://perma.cc/2KK2-XG6W] (archived Aug. 18, 2020) ("U.S. Defense Secretary James Mattis said he was concerned about the potential impact of the proposed measures on U.S. allies, adding that was the reason he preferred targeted tariffs.").

236. *See* Adam Behsudi, *Memo shows Mattis backed Commerce findings on steel, aluminum*, POLITICO (Feb. 23, 2018), https://www.politico.com/newsletters/morning-trade/2018/02/23/memo-shows-mattis-backed-commerce-findings-on-steel-aluminum-113498 [https://perma.cc/4SNH-Y5UN] (archived Aug. 18, 2020) ("However, because U.S. military requirements for steel and aluminum represent only about 3 percent of U.S. production, DoD does not believe the import threat is so grave that it will not be

capacity likely made it clear to US trading partners that the United States' invocation of national security grounds was merely an excuse to impose what would otherwise be prohibited tariffs under GATT. Even Jennifer Hillman, former general counsel to the United States Trade Representative, referred to the US tariffs as "reckless"[237] and stated that the Trump Administration was "making overly broad interpretations of national security"[238] and that these "actions undermine international law and threaten the rules-based global trading system."[239]

These tariffs were negotiating leverage for the United States as it negotiated the USMCA with Canada during this time period.[240] However, the United States continued to impose these tariffs even after it had signed the USMCA with Canada and Mexico. It was only about year later that the United States agreed to remove the tariffs in exchange for Canada and Mexico removing their respective retaliatory tariffs against the United States.[241] The tariffs were viewed as being an obstacle to the ratification of the USMCA[242] and their removal was required if the United States wanted to see Canada and Mexico ratify the USMCA.[243]

If national security, rather than trade, was truly the motivation behind the US imposition of tariffs, then it is remarkable that the United States would remove those tariffs in order to facilitate a trade deal. Did the United States really exchange its national security for a trade deal with Canada and Mexico? More likely, as the critics of the tariffs have surmised—there never really was a national security issue

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able to acquire the steel and aluminum it needs for national defense requirements, Mattis said.").

237. Jennifer Hillman, *Trump Tariffs Threaten National Security*, N.Y. TIMES (June 1, 2018), https://www.nytimes.com/2018/06/01/opinion/trump-national-security-tariffs.html [https://perma.cc/KJ7A-E7QL] (archived Aug. 18, 2020).

238. *Id.*

239. *Id.*

240. *See* Krawchenko, *supra* note 85.

241. *See Joint Statement by Canada and the United States on Section 232 Duties on Steel and Aluminum*, GLOB. AFF. CAN. (May 17, 2019), https://www.canada.ca/en/global-affairs/news/2019/05/joint-statement-by-the-united-states-and-canada-on-section-232-duties-on-steel-and-aluminum.html [https://perma.cc/XP5C-74DB] (archived Aug. 18, 2020).

242. *See* Jenny Leonard, Joe Deaux & Josh Wingrove, *Trump removes Steel, Aluminum Tariffs on Canada and Mexico*, BLOOMBERG (May 17, 2019), https://www.bloomberg.com/news/articles/2019-05-17/u-s-poised-to-remove-steel-aluminum-tariffs-on-canada-mexico [https://perma.cc/43JV-TP95] (archived Aug. 18, 2020).

243. *See* Mike Blanchfield & James McCarten, *U.S. agrees to lift steel and aluminum tariffs from Canada*, Mexico, FIN. POST (May 17, 2019), https://business.financialpost.com/news/economy/update-1-u-s-nears-removal-of-tariffs-on-canada-mexico-metals-media [https://perma.cc/5VMU-MGEY] (archived Aug. 18, 2020).

to begin with. It was just a bargaining tool.[244] In an opinion for the New York Times (entitled "America the Cowardly Bully"), Professor Paul Krugman (winner of a Nobel Prize in economics for his work on international trade) provided his frank assessment of the situation:

> On US unreliability, consider the way the current administration has treated Canada, probably the friendliest neighbor and firmest ally any nation has ever had. Despite generations of good relations and a free-trade agreement, Trump imposed large tariffs on Canadian aluminum and steel, invoking national security as a justification. This was obviously specious—in fact, Trump himself basically conceded this point, justifying the tariffs instead as retaliation for Canadian dairy policy (which was also specious). The lesson for the world is that America can't be trusted. Why bother making deals with a country that's willing to slap sanctions on the best of allies, and clearly lie about the reasons, whenever it feels like it?[245]

2. Poison Pill as Newly Incarnated Type of "Voluntary Restraint" Agreement

Are countries permitted to use the threat of trade sanctions to coerce other countries to "voluntarily" restrain themselves from selling goods? This very question was explored in the mid-to-late 1980s by the WTO in its consideration of voluntary export restraints.[246] A voluntary export restraint (VER) refers to a country that voluntarily agrees to limit its exports of a certain product to another country.[247] Technically, one might argue that this does not violate GATT because it is not a quota being imposed by the importing country.[248] The question of VERs (also referred to as "grey area" measures) was considered in 1988 by a GATT Panel in the case of Japan–Semiconductors.[249] The issue was whether Japan had violated GATT Article XI:1 through its voluntary restriction of its own semiconductors.[250] This VER was part of an agreement between the United States and Japan that was

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244. *See* Hillman, *supra* note 237 ("At the same time, Congress must ensure that genuine concerns are not traded away for limited economic gains. Cavalier use of rarely invoked laws will only undermine their purpose and put the trading system at risk.").

245. Paul Krugman, *America the Cowardly Bully*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/opinion/trump-trade-war.html [https://perma.cc/9WLY-A6KG] (archived Aug. 18, 2020).

246. *See* Panel Report, *Japan—Trade in Semi-Conductors*, ¶¶ 1–8, WTO Doc. L/6309 - 35S/116 (adopted May 4, 1988) [hereinafter *Japan—Semiconductors*].

247. *See* Daniel C. K. Chow, *United States Unilateralism and the World Trade Organization*, 37 B.U. INT'L L. J. 1, 26–27 (2019).

248. *See id.* ("The reasoning was that if the exporting country voluntarily agreed to limit the volume of its exports, then a quota was not involved . . ..").

249. *See Japan—Semiconductors*, *supra* note 246, ¶¶ 1–8.

250. *See* Geraldo Vidigal, *The Return of Voluntary Export Restraints? How WTO Law Regulates (And Doesn't Regulate) Bilateral Trade-Restrictive Agreements*, 53 J. WORLD TRADE 187, 197 (2019).

entered into on September 2, 1988.[251] In its decision, the GATT Panel considered GATT Article XI:1 carefully. Article XI:1 states that members shall not impose prohibitions or restrictions on the import or export of products destined to other members (other than duties, taxes or other charges).[252] The Panel stated that a violation of Article XI:1 could be found if it could be shown that (1) nonmandatory measures (i.e., restraint of exports) were supported by "sufficient incentives or disincentives"[253] and (2) the trade restrictive measures were "essentially dependent on Government action or intervention."[254] Ultimately, the Panel concluded that both criteria were met and that the voluntary restraints violated Article XI:1.[255]

A significant aspect of the Japan–Semiconductors case is that the Panel was willing to look beyond legal formality to the actual substance of the relationship between the Japanese Government and exporters, even in the absence of formal binding legal provisions.[256] After considering the *de facto* existence of incentives and disincentives and how the Japanese Government interacted with exporters,[257] the Panel held that the Japanese government had created an administrative structure designed to "exert maximum possible pressure on the private sector"[258] in enforcing the export restraints and thus violated Article XI:1.[259]

Another interesting facet of this case is that the complainant was the European Economic Community (i.e., a party who was not privy to the arrangement between the United States and Japan),[260] which serves as a reminder that GATT is multilateral agreement—

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251. *See Japan—Semiconductors*, *supra* note 246, ¶ 12.

252. *See* GATT, *supra* note 14, art. XI:1 (titled "General Elimination of Quantitative Restrictions").

253. *Japan – Semiconductors*, *supra* note 246, ¶ 109.

254. *Id.*

255. *See id.* ¶ 130 ("The Japanese measures relating to exports of semi-conductors to third country markets had been found to be inconsistent with Article XI:1. They were therefore, according to GATT practice, presumed to have nullified or impaired the benefits accruing to the EEC under the General Agreement (BISD 26S/216).").

256. *See id.* ¶ 111 (noting that "the Japanese Government's measures did not need to be legally binding to take effect, as there were reasonable grounds to believe that there were sufficient incentives or disincentives for Japanese producers and exporters to conform.").

257. *See id.* ¶¶ 112–14 (discussing the Panel analysis of the Japanese government's system of administrative guidance, information that Japanese producers had to submit and the use of supply and demand forecasts).

258. *Id.* ¶ 117.

259. *See id.* ("The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other that [sic] the United States, inconsistent with Article XI.1.").

260. *See id.* ¶ 1; *see also* William J. Long, *The U.S. – Japan Semiconductor Dispute: Implications for U.S. Trade Policy*, 13 MD. J. INT'L L. & TRADE 1, 35 (1988) (commenting that "[t]he EC was the uninvited guest to the dispute. It viewed the agreement as a threat to its trading interests." (footnote omitted)).

agreements between two members can affect other members' rights under GATT.[261] In this case, the US–Japan agreed-upon voluntary restraint would affect the economic interests of the EC regarding semiconductors.[262] Therefore, the decision is important because it affirms that affected GATT members, who are not party to a bilateral agreement between other members, may nevertheless challenge voluntary restraints under Article XI:2.[263] Additionally, there were other submissions by other countries (Australia, Canada, Hong Kong, Singapore, and Brazil) all of whom complained about the negative effects of Japan's VER.[264]

Moving past the Japan–Semiconductors case, as of 1994, the WTO Agreement now directly addresses VERs via the WTO's Agreement on Safeguards (Safeguard Agreement).[265] The Safeguard Agreement permits members to take temporary actions to protect their domestic industries from actual or threatened serious injury by a surge of imports.[266] More importantly, Article 11 of the Safeguard Agreement casts a wide net against VERs and prohibits "voluntary export restraints, orderly marketing arrangements or *any other similar measures* on the *export* or the *import* side"[267] and states that it is intended to apply against the actions of one or more members.[268] Encompassing the ruling in the Japan–Semiconductors case, Article 11 looks past formal legal agreements and states that it applies to "actions under agreements, arrangements and understandings entered into by two or more Members."[269] In his discussion about the background to the prohibition of VERs, Chow observes: "Of course, the WTO and other nations immediately recognized that VERs entered into under the

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261. *See* Vidigal, *supra* note 250, at 197.

262. *See* Amelia Porges, *Japan—Trade in Semi-Conductors No. L/6309*, 83 AM. J. INT'L L. 388, 390 ("Dependent on semiconductor imports for its electronics industry, the EC objected to the increase in prices; it also alleged that U.S. firms would receive privileged access to the Japanese market.").

263. *See* Vidigal, *supra* note 250, at 197 (observing that "[t]he Panel's finding confirms that GATT Article XI:1 prohibits grey area measures that negatively affect third parties, but does not touch upon the question whether the US–Japan arrangement itself (which was notified to the GATT Contracting Parties) was compatible with the GATT." (footnote omitted)).

264. *See Japan—Semiconductors*, *supra* note 246, ¶¶ 83–95.

265. *See* Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm [https://perma.cc/35K4-LH2U] (archived Aug. 18, 2020) [hereinafter Safeguard Agreement].

266. *See generally Agreement on Safeguards*, WORLD TRADE ORG., (last visited Mar. 8, 2020) https://www.wto.org/english/tratop_e/safeg_e/safeint.htm [https://perma.cc/43DJ-PSS2] [archived Aug. 18, 2020] (generally discussing the nature of the Safeguard Agreement).

267. Safeguard Agreement, *supra* note 265, art. 11, ¶ 1(b) (emphasis added).

268. *See id.*

269. *Id.*

threat of trade sanctions by the United States were not in fact 'voluntary' but the result of intimidation."[270]

Yet the explicit prohibition against VERs has not deterred the United States from using economic pressure to extract VERs from other countries. After the United States imposed its steel and aluminum tariffs in 2018 (under the questionable grounds of national security),[271] it lifted steel tariffs imposed against Argentina, Brazil, and South Korea after each country agreed to a VER.[272] With respect to South Korea, the US President's executive proclamation is even bold enough to refer to the measures as including a "quota."[273] The dubious invocation of national security followed by the acceptance of voluntary quotas by all these countries contradicts not only GATT Article XI:1 but also the Safeguards Agreement which addresses this exact circumstance.

Yong-Shik Lee specifically examined the VERs of Argentina, Brazil, and South Korea and concluded that they were "inconsistent"[274] with the Safeguards Agreement and WTO principles. Lee also noted that these VERs represent a "danger to the trading system" worthy of the concern of the WTO Council.[275] Daniel Chow's observations are even more direct—he states that the South Korean VER is a "contravention"[276] of the Safeguards Agreement and that:

> [The] United States intimidated South Korea into accepting a quota in violation of GATT Article XI. As for U.S. claims that its threats of sanctions are merely a negotiation tactic and are not coercive, the EU summed up the view of many countries when it stated there is no negotiation when "it is with a gun to our head."[277]

The prohibition of VERs and the recent plight of Argentina, Brazil, and South Korea demonstrates that restrictions on so-called "voluntary agreements" are not a novelty—particularly under

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270. Chow, *supra* note 247, at 27.

271. *See* Rachel Brewster, *WTO Dispute Settlement: Can We Go Back Again*, 113 AM. J. INT'L L. UNBOUND 61, 64 (2019) [hereinafter Brewster, *WTO Dispute Settlement*] (referring to the US tariffs on aluminum and steel imports and remarking "The American claims of national security justifications for these goods strain credulity . . ..").

272. *See generally* Proclamation 9740, 83 Fed. Reg. 20683 (Apr. 30, 2018).

273. *Id.* ¶ 4 (President Trump refers to the measures agreed upon by the US and South Korea as "…including a quota that restricts the quantity of steel articles imported into the United States from South Korea.").

274. Yong-Shik Lee, *The Steel and Aluminum Quota Agreements: A Question of Compatibility with WTO Disciplines and Their Impact on the World Trading System*, 53 J. WORLD TRADE 811, 831 (2019).

275. *Id.* at 832.

276. Chow, *supra* note 247, at 28.

277. *Id.* at 28–29 (quoting Richard Lough & Philip Blenkinsop, *EU Complains of "Gun to Our Head" Over Tariffs*, REUTERS (Mar. 23, 2018), https://www.reuters.com/article/us-usa-trade-eureax/eu-complains-of-trumps-gun-to-our-head-over-tariffs-idUSKBN 1 GZ1 4K [https://perma.cc/H H6Y-TK4B] (archived Aug. 18, 2020)).

circumstances of unequal bargaining power. The Poison Pill is similar to VERs in three important ways. First, both provisions limit trade—VERs are quotas on the export of goods while the Poison Pill restricts USMCA parties' choice of FTA partners. Second, both provisions are also allegedly voluntary agreements but, in both cases, they were actually agreed to under coercive circumstances. Third, both VERs and Poison Pills violate specific WTO principles. VERs violate GATT provisions on quotas and, more particularly, the Safeguard Agreements prohibition on VERs. As was argued in Part III, the Poison Pill contradicts GATT Article XXIV on FTAs by imposing unnecessary trade-restrictive measures that ironically derive a great deal of force from MFN obligations. Despite the WTO prohibition against VERs, the United States persisted in extracting VERs from Argentina, Brazil, and South Korea. Such actions suggest that the United States could persist in its use of the Poison Pill[278] even if the WTO rules that the Poison Pill contradicts the WTO Agreement.

C. Implications and Strategies for Middle Powers and Developing Nations

Although the Poison Pill violates the WTO Agreement, there are several practical obstacles towards an enforceable ruling against the inclusion of the Poison Pill in an FTA. In 1996, the WTO established the Committee on RTAs (CRTA) to oversee FTAs.[279] However, its role has been mainly to guide the system of notification (i.e., members must notify the WTO when an FTA is formed) and transparency established through a 2006 General Council Decision.[280] Although it is praiseworthy that the CRTA provides a forum for discussions on the impact of FTAs, there has never been a CRTA decision invalidating an FTA for noncompliance with GATT Article XXIV.[281]

Theoretically, any WTO member could bring a complaint about the Poison Pill. The argument would be the USMCA violates GATT Article XXIV because the Poison Pill raises a trade barrier against other WTO members. The most likely complainant would be China. However, any WTO member affected by the preferential treatment

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278. *Cf.* Lee, *supra* note 274, at 831. In the parallel universe of VERs, Lee worries that "more of the steel exporting countries might join the quota agreements with the United States." *Id.*

279. *See Regional trade agreements and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (last visited Mar. 8, 2020) [https://perma.cc/E73C-QPXL] (archived Aug. 18, 2020) (discussing the establishment of the CRTA).

280. *See The Committee on Regional Trade Agreements,* WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Mar. 8, 2020) [https://perma.cc/X4BY-79S6] (archived Aug. 18, 2020) (describing the responsibilities of the CRTA).

281. *See* Mitchell & Lockhart, *supra* note 230, at 112.

afforded by the USMCA signatories to each other would have an incentive to complain.[282] Any WTO member who trades with a USMCA country may complain that the preferential tariffs offered to USMCA members should be offered to all members on an MFN basis.

The most drastic ruling possible would be that the USMCA is void due to the Poison Pill negating its status as a valid FTA under WTO rules—in which case the signatories have to stop providing preferential treatment to each other or provide the same treatment to all other WTO members pursuant to MFN obligations. Alternatively, the WTO could rule that only the Poison Pill is void. This would mean that the United States could only invoke the withdrawal clause (if Canada entered into an FTA with China to the displeasure of the United States). The United States would have to renegotiate a bilateral FTA with Mexico while Canada would be in a bilateral FTA with Mexico—thus shifting the status-quo preservation away from the United States and to Canada (as well as Mexico). Finally, the WTO panel could rule that the Poison Pill does not offend any principle of the WTO Agreement. While closing its eyes to this matter might be the easiest route, for the reasons this Article presents, such a ruling would further erode the legitimacy of the WTO.

However, these theoretical possibilities may be moot within the context of the current US–China trade war and the recent actions of the United States. First, the United States has blocked all appointments to the WTO Appellate Body.[283] As of December 2019 the appointments of two of the last three WTO Appellate judges expired.[284] A minimum of three judges is required to adjudicate a dispute.[285] Even if a complaint is brought, there are no judges to hear the dispute.[286] Second, the questionable invocation of the GATT national security exception, the coercive imposition of VERs, as well as the non-WTO-sanctioned imposition of tariffs against China suggest that the United

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282. For example, both the cases of *Turkey—Textiles*, *supra* note 138, at ¶ 1, and *Japan—Semiconductors*, *supra* note 246, at ¶ 1, involved a third party challenging an arrangement between other countries.

283. *See* Andrea Shalal, *United States accuses WTO's Appellate Body of overreach in dispute handling*, REUTERS (Feb. 11, 2020), https://www.reuters.com/article/us-trade-wto-usa/united-states-accuses-wtos-appellate-body-of-overreach-in-dispute-handling-idUSKBN2052TR [https://perma.cc/2A5K-LEUH] (archived Aug. 18, 2020) (noting that the US veto "essentially shut down the Appellate Body in December").

284. *Members urge continued engagement on resolving Appellate Body issues,* WORLD TRADE ORG., https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm ("On 10 December the Appellate Body was reduced to one member after the second terms for two of the remaining three members expired. Normally composed of seven members, the Appellate Body no longer has the minimum three members needed to hear new appeals.").

285. *See* Rachel Brewster, *Analyzing the Trump Administration's International Trade Strategy*, 42 FORDHAM INT'L L.J. 1419, 1425 (2019).

286. *See* Brewster, *WTO Dispute Settlement*, *supra* note 271, at 64.

States would not comply with a WTO ruling against the Poison Pill.[287] In short, why even bother complaining at the WTO if the United States seems so intent on dismantling or ignoring the WTO?

This Article does not address the complex normative question of whether a nation ought to pursue a deeper economic relationship with China (or any other country). After careful analysis, some nations may find it in their interest to pursue it while others may choose to refrain. However, if a nation does decide to exercise its sovereign decision to engage economically with China (or any other country that the United States might unilaterally deem as a non-market country), this Article outlines how that nation might minimize the impact of a Poison Pill provision imposed by the United States. Although the discussion below relates to Canada and China, it can be applied to any nation that wishes to mitigate against the imposition of a Poison Pill type of provision.

1. Join or Create Overlapping Multilateral FTAs

As noted in Part II, the CPTPP mitigates the risk of expulsion for Canada by preserving a free trade relationship with Mexico outside of the USMCA.[288] Interestingly, the failed predecessor to the CPTPP was the Trans-Pacific Partnership (TPP) which included the United States. Although the United States had signed the TPP, under the Trump Administration the United States withdrew from the TPP,[289] leaving the remaining countries to form the CPTPP. From an American perspective, the TPP was supposed to be a method by which the United States could address some of its China-related trade grievances by increasing US influence in Asia[290] while also neutralizing some of China's competitive advantages.[291] Ironically, this abandoned project was reincarnated as the CPTPP and, instead of containing China, helps protect Canada against the consequences of ignoring the Poison Pill—a US provision that was meant to contain China's FTA aspirations. Further, now that the United States is not a member of the CPTPP, it has been argued that the United States has granted

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287. Daniel Chow states the US position directly: "In other words, if the United States disagrees with a WTO decision, the United States is not obliged to follow it." *See* Chow, *supra* note 247, at 9.

288. *See* discussion *supra* Part II.A.

289. *See* Daniel C.K. Chow, Ian Sheldon & William McGuire, *How the United States Withdrawal from the Trans-Pacific Partnership Benefits China*, U. PA. J.L. & PUB. AFF. 37, 37 (2018).

290. *See* Daniel C. K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHI. J. INT'L L. 370, 377 (2016) (stating that the TPP is directed at letting "China know in no uncertain terms that the U.S., not China, intends to write the rules of international trade for Asia and the rest of the world in the twenty-first century.").

291. *Id.* at 376 (arguing that the TPP's provisions on worker rights and environmental standards will be disadvantageous to China).

China a golden opportunity to take the lead in establishing the norm for Asian trade rules.[292]

Canada is fortunate to have the CPTPP as a partial insurance policy against the Poison Pill. This serves as a lesson to other nations contemplating future FTAs involving the United States. The threat of expulsion from a US-led FTA is greatly diminished if a nation already has overlapping agreements with all or most of the members of that US-led FTA. Returning to the "private club" analogy raised in Part II: expulsion from a US-led "private club" can be mitigated by membership in other "clubs" that consist of substantially the same members of the US-led "private club."[293]

Since 2012, a group of Asia-Pacific nations has been attempting to create a multilateral FTA—the Regional Comprehensive Economic Partnership ("RCEP").[294] The RCEP, if successfully formed as currently contemplated, would encompass almost one-third of the world population, spanning fifteen countries including China.[295] The other countries under RCEP include Australia, Japan, New Zealand, and South Korea, as well as all of the countries comprising the Association of Southeast Asian Nations ("ASEAN")—Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.[296]

Originally India was intended to be part of the RCEP and had participated in negotiations.[297] However, India withdrew from the RCEP negotiations in November 2019 citing concerns about safeguard provisions[298] and other issues such as trade deficits and the handling of private data.[299] Despite this setback, the fifteen nations at the negotiating table aspire to formally enter into the RCEP in 2020.[300] The nations who are both members of CPTPP and contemplated to be members of RCEP are: Australia, Japan, New Zealand, Brunei,

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292. *See* Chow, Sheldon & McGuire, *supra* note 289, at 37.

293. *See supra* Part II.

294. *See* Chow, Sheldon & McGuire, supra note 289, at 75.

295. Xianbai Ji, *RCEP's Economic Impact in Asia*, DIPLOMAT (Nov. 13, 2019), https://thediplomat.com/2019/11/rceps-economic-impact-in-asia/ [https://perma.cc/HGG8-E4EL] (archived Aug. 18, 2020).

296. *Id.*

297. *Id.*

298. Mie Oba, *The Implications of India's RCEP Withdrawal*, DIPLOMAT (Nov. 14, 2019), https://thediplomat.com/2019/11/the-implications-of-indias-rcep-withdrawal/ [https://perma.cc/U2QD-RA3N] (archived Aug. 18, 2020).

299. *See* William Alan Reinsch, Jack Caporal & Lydia Murray, *At Last, an RCEP Deal*, CTR. FOR STRATEGIC & INT'L STUD. (Dec. 3, 2019), https://www.csis.org/analysis/last-rcep-deal [https://perma.cc/LBP7-Y2UK] (archived Aug. 18, 2020).

300. *Id.*

Malaysia, Singapore, and Vietnam.[301] Through their dual CPTPP / RCEP membership, these nations would enjoy access to both Asian markets (including China) and parts of North and South America (Canada, Mexico, Peru, and Chile).

The disadvantage of numerous overlapping FTAs is the complexity of complying with the differing trade rules operating under each FTA—a phenomenon famously referred to by economist Jagdish Bhagwati as the "spaghetti bowl effect." [302] In order to determine what tariff (if any) to impose on a good, one must first determine where the good originated from.[303] This determination is done according to the "rules of origin" associated with an FTA.[304] However, Bhagwati states these differing rules force producers to undergo a complex analysis "with a view to minimizing the cost of manufacture plus transportation and the differential tariffs and charges levied by origin"[305] and results in trade inefficiencies.[306] According to a recent review of empirical studies by Zakaria Sorgho, the existence of overlapping FTAs (including differing rules) may result in the inefficient diversion of trade.[307] A nation could address this problem by joining larger, multilateral FTAs,[308] which would effectively consolidate the problem of having many bilateral FTAs into a more manageable agreement[309]—assuming that the multilateral rules prevail over any existing bilateral rules.[310] Sorgho contends both the TPP and RCEP are good examples of this type of solution to the "spaghetti bowl effect."[311]

Although Canada is not currently contemplated to be a member of the RCEP, it is worth noting that some countries (Australia, New Zealand, Japan Brunei, Malaysia, Singapore, and Vietnam) will have overlapping membership in both CPTPP and RCEP, if the RCEP comes to fruition.[312] The downside for nations that are members of both

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301. Yen Nee Lee, *The world's largest trade deal could be signed in 2020 – and the US isn't in it*, CNBC (Nov.11, 2019), https://www.cnbc.com/2019/11/12/what-is-rcep-asia-pacific-trade-deal-slated-to-be-worlds-largest-fta.html [https://perma.cc/9FKP-YG4J] (archived Aug. 18, 2020).

302. BHAGWATI, *supra* note 217, at 61.

303. *Id.* (". . . with PTAs, tariffs on specific commodities must depend on where a product is supposed to originate (requiring inherently arbitrary 'rules of origin').").

304. *Id.*

305. *Id.* at 69. ("The complexity that the spaghetti bowls create for international trade causes distortion in trade and investment.").

306. *Id.*

307. Zakaria Sorgho, *The Spread of International Trade Agreements – A Dynamics Toward the 'Spaghetti Bowl' Phenomenon?, in* HANDBOOK OF INTERNATIONAL TRADE AGREEMENTS, 41, 49 (Robert E. Looney ed., 2019).

308. *Id.* (suggesting that a nation can "minimize trade diversion by signing a new trade deal with a large bloc of partner countries . . . ").

309. Alternatively, Sorgho suggests "negotiating several bilateral agreements simultaneously." *See id.*

310. *Id.* at 50–51.

311. *Id.* at 51.

312. *See* Lee, *supra* note 301.

CPTPP and RCEP (if successfully created) is that they are still overlapping and possibly trade diverting to some extent. This would have to be balanced against the benefits of membership—access to more markets on an FTA basis. For any nation subject to a Poison Pill type provision with the United States, the added benefit is that overlapping FTAs may provide that nation a protective safety network of FTAs to minimize the consequences of expulsion (pursuant to a trade-restrictive clause like the Poison Pill). On the other hand, even strong nations like the United Kingdom may find themselves vulnerable to US requests for a Poison Pill if they have diminished multilateral support. Now that the United Kingdom has exited the EU, it seeks to have a trade agreement with the United States.[313] Yet, it has been reported that the United States is actively seeking to have a Poison Pill inserted in the proposed agreement.[314] If the United Kingdom were negotiating this agreement while still enjoying the benefits of EU membership, it likely would be in a much better position to resist US demands for a Poison Pill.

2. Develop Relationships Outside of an FTA: BRI and Alternate WTO Dispute Resolution

The Poison Pill is intended to deter Canada from entering into an FTA with China. Yet from Canada's perspective, an FTA is not an end in and of itself. If Canada exercised its sovereign decision to pursue an FTA with China—at least one of the goals would be potentially greater prosperity for Canadians through increased economic interaction with China. An FTA is not the only way to achieve that goal. Canadian participation in the China-led Belt and Road Initiative (BRI) may be an alternate means to shared economic prosperity with China while also allowing Canada to engage with other countries who also participate in BRI. In 2013, the BRI was proposed by Chinese President Xi Jinping as a means of creating an intercontinental trade route on a grand scale (composed of both a land and maritime route).[315] The word "belt" in the BRI is a reference to the Silk Road trade route that spanned Europe and Asia over 2000 years ago.[316] It is an

313. *See* Patrick Wintour, *US Message to Britain in Bilateral Trade Talks: It's Us – or China*, GUARDIAN (May 12, 2020), https://www.theguardian.com/politics/2020/may/12/us-message-to-britain-in-bilateral-trade-talks-its-us-or-china [https://perma.cc/BS4B-KBKS] (archived Aug. 18, 2020).

314. *Id.*

315. *See* Office of the Leading Group for Promoting the Belt and Road Initiative, *The Belt and Road Initiative Progress, Contributions and Prospects*, BELT & ROAD PORTAL (Mar. 22, 2019), https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm [https://perma.cc/EXC4-XVW5] (archived Aug. 18, 2020).

316. *Action Plan on the Belt and Road Initiative*, STATE COUNCIL CHINA (Mar. 30, 2015), http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm [https://perma.cc/4MME-QFLC] (archived Aug. 18, 2020).

ambitious project which according to the World Bank would link 71 economies[317] and in "2017 these economies received 35% of global foreign direct investments and accounted for 40% of global merchandise exports."[318]

A study by the World Bank Group estimates that BRI could "lift 7.6 million people from extreme poverty (those earning less than $1.90/day) and 32 million people from moderate poverty (those earning less than $3.20/day."[319] It is also predicted that nations along BRI routes will benefit from a 2.8–9.7 percent increase in trade.[320] Yet, such impressive growth is accompanied by risks—identified by the World Bank as including debt sustainability, governance risks, environmental risks, and social risks.[321] From a legal perspective, scholars have identified other challenges such as the need to have enforceable remedies for breach of obligations related to BRI[322] and establishing a reliable system of arbitration for BRI-related disputes.[323]

Accordingly, the extent (if any) to which Canada should participate in the BRI requires the Canadian government's assessment of the potential benefits and risks to Canada. It also requires evaluation of whether Canadian participation in specific BRI projects is consistent with Canadian values regarding workers, the environment, and other socially relevant issues. These evaluations may be complex and must be disentangled from narratives which may not be a complete account of the issue. One example of such an issue is the "debt-trap diplomacy" theory, which argues that China uses predatory lending practices against nations (particularly nations contemplated within BRI) in order to trap them into a situation where they must cede to the wishes of China in exchange for debt relief or forgiveness.[324]

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317. *Belt and Road Initiative*, WORLD BANK (Mar. 29, 2018), https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative#02 [https://perma.cc/9QUJ-TY8Q] (archived Aug. 18, 2020).

318. *Id.*

319. WORLD BANK GRP., BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS xiii (2019), https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors [https://perma.cc/2DD5-NX3L] (archived Aug. 18, 2020).

320. *Id.*

321. *Id.*

322. *See* Guiguo Wang, *Legal Challenges to the Belt and Road Initiative*, 4 J. INT'L & COMP. L. 309 (2017). Wang states: ". . . a sound enforcement mechanism is crucial to the success of the BR." *Id.* at 328.

323. *See* Patrick M. Norton, *China's Belt and Road Initiative: Challenges for Arbitration in Asia*, 13 U. PA. ASIAN L. REV. 72, 72 (2018).

324. *See* Deborah Brautigam, *A Critical Look at Chinese 'Debt-Trap Diplomacy': The Rise of a Meme*, 5 AREA DEV. POL. 1, 2 (2020) (referring to the term as "the claim that China deliberately seeks to entrap countries in a web of debt to secure some kind of strategic advantage or asset of some kind.").

The debt-trap diplomacy theory has been fueled by accusations from high-level US officials. Secretary of State Mike Pompeo has been quoted as condemning BRI as "bribe-fuelled debt-trap diplomacy"[325] by the Chinese government and Vice President Pence has expressed the same sentiment.[326] One news story that has fueled the debt-trap diplomacy theory has been the port of Hambantota in Sri Lanka. According to the New York Times, Sri Lanka had to turn over or "cough up"[327] the port of Hambantota to China because it was so laden with Chinese debt.[328] However, it is questionable whether this "oft-told tale,"[329] involving Sri Lanka leasing the port to China for 99 years,[330] is complete and accurate. According to Nilanthi Samaranayuke's report for the United States Institute of Peace, "Sri Lanka's debt to China is 5.5 percent of the country's total debt. In other words, 94.5 per cent of Sri Lanka's debt is not to China. When narrowing the scope to external debt listed ($32.565 billion), this proportion rises to 12 percent."[331] Two academics interviewed Sri Lankan officials and noted that Sri Lanka did not default on any loan obligations, Sri Lanka retains ownership of Hambantota Port, and the money from the Hambantota port lease were primarily applied to Western loans (which bore higher interest than Chinese loans).[332] In a recent article in the Diplomat, an economist concluded: "Leasing out Hambantota port is not evidence of the Chinese debt trap. Instead, it is more of a reflection of the external sector crisis Sri Lanka is facing."[333]

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325. Ben Blanchard, *China Says 'Fed Up' with Hearing U.S. Complaints on Belt and Road*, REUTERS (May 9, 2019), https://www.reuters.com/article/us-china-silkroad-usa/china-says-fed-up-with-hearing-u-s-complaints-on-belt-and-road-idUSKCN1SF0UY [https://perma.cc/DGJ9-MW34] (archived Aug. 18, 2020).

326. *War of Words Between Mike Pence, Xi Jinping at APEC Summit: Here's What They Said*, NAT'L POST (Nov. 19, 2018), https://nationalpost.com/news/world/war-of-words-between-mike-pence-xi-jinping-derails-the-apec-summit-heres-what-was-said [https://perma.cc/JEK5-ZQE2] (archived Aug. 18, 2020).

327. Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html [https://perma.cc/PX85-W8BR] (archived Aug. 18, 2020).

328. Barry Sautman & Yan Hairong, *The Truth About Sri Lanka's Hambantota Port, Chinese 'Debt Traps' and 'Asset Seizures'*, SOUTH CHINA MORNING POST (May 6, 2019), https://www.scmp.com/comment/insight-opinion/article/3008799/truth-about-sri-lankas-hambantota-port-chinese-debt-traps [https://perma.cc/56VK-YFFT] (archived Aug. 18, 2020).

329. *Id.*

330. *Id.*

331. Nilanthi Samaranayake, *China's Engagement with Smaller South Asian Countries*, U.S. INST. PEACE SPECIAL REPORT NO. 446 4 (2019), https://www.usip.org/sites/default/files/2019-04/sr_446-chinas_engagement_with_smaller_south_asian_countries.pdf [https://perma.cc/7SJ4-BU4B] (archived Aug. 18, 2020).

332. *See* Sautman & Hairong, *supra* note 328.

333. Umesh Moramudali, *The Hambantota Port Deal: Myths and Realities*, DIPLOMAT (Jan. 1, 2020), https://thediplomat.com/2020/01/the-hambantota-port-deal-

While the BRI involves risks that include debt sustainability, the debt-trap diplomacy accusation is not supported by several recent studies. A report published by the Australia-based Lowy Institute in October 2019 stated that: "The evidence to date suggests that China has not been engaged in deliberate debt-trap diplomacy in the Pacific" but also acknowledged that it is a "nuanced picture"[334] and there remains a risk of debt sustainability regarding Chinese loans.[335] Regarding the African continent, a 2018 study from the China Africa research initiative (based out of the John Hopkins School of Advanced International Studies) found that "Chinese loans are not currently a major contributor to debt distress in Africa."[336] Under these circumstances, it would be better to engage in more empirical, detailed studies to rationally gauge what risks Chinese loans present and what can be done to address those risks. A recent study conducted through the US-based Center for Global Development[337] found that eight countries (out of sixty-eight countries studied) are at risk of BRI-related debt distress.[338] The study also found that China has provided debt relief to other nations including write-offs and restructuring.[339] The main criticism is that these debt-relief measures have been *ad hoc*, though the study acknowledges that China has been "moving to greater policy coherence and discipline when it comes to avoiding unsustainable debt."[340] The study concludes that: "It is unlikely that BRI will be plagued with widescale debt sustainability problems. But it is also unlikely that the initiative will avoid any instances of debt problems among its participating countries."[341] The study recommends

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myths-and-realities/ [https://perma.cc/VY36-AD45] (archived Aug. 18, 2020); *see also* Dushni Weerakoon, *Sri Lanka's debt problem isn't made in China*, EAST ASIA F. (Feb. 28, 2019), https://www.eastasiaforum.org/2019/02/28/sri-lankas-debt-problem-isnt-made-in-china/ [https://perma.cc/54CL-8AZW] (archived Aug. 18, 2020).

334. Roland Rajah, Alexandre Dayant & Jonathan Pryke, *Ocean of Debt? Belt and Road and Debt Diplomacy in the Pacific*, LOWY INST. (Oct. 21, 2019), https://www.lowyinstitute.org/publications/ocean-debt-belt-and-road-and-debt-diplomacy-pacific [https://perma.cc/4HUQ-6XJG] (archived Sept. 19, 2020).

335. *See id.*

336. Janet Eom, Deborah Brautigam & Lina Benabdallah, *The Path Ahead: The 7th Forum on China-Africa Cooperation*, 1 CHINA AFRICA RES. INITIATIVE 1 (2018) https://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/5c467754898583fc9a99131f/1548121941093/Briefing+Paper+1+-+August+2018+-+Final.pdf [https://perma.cc/L4H6-RFY2] (archived Aug. 18, 2020).

337. *See generally* John Hurley, Scott Morris & Gailyn Portelance, *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, 121 CTR. GLOB. DEV.POL'Y PAPER (March 2018), https://www.cgdev.org/sites/default/files/examining-debt-implications-belt-and-road-initiative-policy-perspective.pdf [https://perma.cc/92F9-9YU3] (archived Aug. 18, 2020).

338. *Id.* at 1.

339. *Id.* at 20.

340. *Id.*

341. *Id.* at 21.

that China multilateralize the BRI as a method of providing greater coherence and alignment with its partners.[342]

Therefore, Canada needs to evaluate the extent, if any, to which it would participate in the BRI—balancing the benefits of participation (which would include its ability to partially mitigate the Poison Pill's influence) against matters such as debt sustainability for borrower nations, the degree of influence or voice that Canada would have in BRI ventures, geopolitical implications, and consistency with Canadian values. In undertaking such an analysis, Canada should be wary of US government and media narratives which may overestimate the risks of BRI in comparison to expert findings. David Dollar of the Washington-based Brookings Institute sums it well: "Dial down the anti-China rhetoric; many of these projects will have net benefits, and unremitting hostility to Chinese lending makes the United States seem uninformed."[343] Expanding its opportunities in BRI allows Canada to at least nominally circumvent the Poison Pill and pursue increased trade with China outside of a formal FTA. China has indicated that participation in the BRI is open to all nations, not simply those directly on the BRI route—a sentiment recently reiterated by Lu Xu, (consul general for China in Calgary, Canada) who noted the benefits to Canada if it were to participate in the BRI.[344] In addition to allowing Canada the opportunity to work alongside Chinese businesses, the BRI is a pathway towards Canada working with other BRI nations on critical infrastructure projects.[345] The BRI integrates African nations[346] into its vision and harmonizes well with the strategy of overlapping multilaterals by promoting Canada's engagement with African countries.[347] As the Business Council of Canada's report states:

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342. *Id.*

343. David Dollar, *Understanding China's Belt and Road Infrastructure Projects in Africa*, BROOKINGS INST., 8 (Sep. 29, 2019), https://www.brookings.edu/wp-content/uploads/2019/09/FP_20190930_china_bri_dollar.pdf [https://perma.cc/Y3S4-QMGV] (archived Aug. 18, 2020).

344. *See* Lu Xu, Opinion, *What China's Belt and Road Initiative Could Mean to Alberta*, CALGARY HERALD (May 25, 2019), https://calgaryherald.com/opinion/columnists/opinion-what-chinas-belt-and-road-initiative-means-to-alberta-oil-and-gas [https://perma.cc/26MB-KRXG] (Archived Aug. 18, 2020); *see also* Eva Busza & Iris Jin, *Canada Cannot Afford to Miss the Boat on the Belt and Road,* ASIA PAC. FOUND. CAN. (May 31, 2017), https://www.asiapacific.ca/op-eds/canada-cannot-afford-miss-boat-belt-and-road [https://perma.cc/H3C5-L76B] (archived Aug. 18, 2020) ("China has also made it clear that the Initiative creates no boundaries, and that any country can join in its own way.").

345. Daniel Drache, A.T. Kingsmith & Duan Qi, *Canada is Missing the Boat on China's Belt and Road Initiative*, POL'Y OPTIONS (Jan. 22, 2020), https://policyoptions.irpp.org/magazines/january-2020/canada-is-missing-the-boat-on-chinas-belt-and-road-initiative/ [https://perma.cc/QL86-EKAA] (archived Aug. 18, 2020).

346. *See* Dollar, *supra* note 343.

347. *See* Mike Blanchfield & Mia Rabson, *Trudeau Urged to Scramble for African Business and Trade Opportunities*, NAT'L POST (Feb. 11, 2020),

"Meeting Canada's trade diversification target will simply not be possible without an Africa strategy. The opportunity for Canada in Africa is enormous."[348]

To be clear, this Article does not seek to make any prescriptive claims about whether Canada ought to participate in BRI. It submits that an assessment of BRI should informed by expert findings and empirical data. It also notes that the BRI can help Canada offset the Poison Pill's effects by allowing Canada to engage with China outside of an FTA and develop overlapping FTAs with African nations. Whether the benefits of such an offset outweigh any disadvantages of participation remains a complex normative question to be determined by Canada.

A Canadian strategy of developing international relationships may also include participating in innovative methods of addressing a US erosion of WTO principles. In response to the US blocking appellate judge appointments, the EU and Canada (in July 2019) agreed upon a trade dispute resolution system among themselves that would be binding.[349] On January 24, 2020, the EU announced that this alliance had added fifteen more nations (including Australia, Brazil, Chile, China, Colombia, Costa Rica, Guatemala, South Korea, Mexico, New Zealand, Panama, Singapore, Switzerland, and Uruguay)[350] with a view to "preserving a functioning and two-step dispute-settlement system at the WTO in disputes among them."[351] The statement issued by the Ministers of all participating nations alludes to the WTO appellate body crisis that was precipitated by the United States—stating that the arrangement is a temporary measure until a "fully

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https://nationalpost.com/pmn/news-pmn/canada-news-pmn/trudeau-urged-to-scramble-for-african-business-and-trade-opportunities [https://perma.cc/DEE8-DW36] (archived Aug. 18, 2020) (reporting on chief business executives urging Canada to promote business with African nations).

348. The Business Council of Canada, *Why Africa? Building Canada's Economic Ties to the World's Fastest-Growing Continent*, BUS. COUNCIL (Feb. 11, 2020), https://thebusinesscouncil.ca/publications/why-africa-building-canadas-economic-ties-to-the-worlds-fastest-growing-continent/ [https://perma.cc/9F35-5SML] (archived Aug. 18, 2020) (noting also that Canadian exports "to the region could reach USD 6.6 billion in 2030, representing a growth potential of about USD 4.1 billion over the coming decade.").

349. *See* Tom Miles, *EU, Canada agree first workaround to avoid U.S. block on WTO judges*, REUTERS (July 25, 2020), https://www.reuters.com/article/us-trade-wto-eu-canada/eu-canada-agree-first-workaround-to-avoid-u-s-block-on-wto-judges-idUSKCN1UK2QY [https://perma.cc/R5B2-BKKG] (archived Aug. 18, 2020).

350. European Commission Press Release IP/20/113, Trade: EU and 16 WTO Members Agree to Work Together on an Interim Appeal Arbitration Arrangement (Jan. 24, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113 [https://perma.cc/YX8V-Q2V4] (archived Sept. 30, 2020).

351. *Id.*

reformed WTO Appellate Body becomes fully operational"[352] and also notes that the Ministers have "taken notice of the recent engagement of President Trump on WTO reform."[353]

This dispute-settlement arrangement between the EU and sixteen nations is permitted under Article 25 of the WTO's Dispute Settlement Understanding.[354] Article 25 permits WTO members to resort to "expeditious arbitration"[355] instead of the formal WTO dispute-settlement procedures as long as the arbitration is mutually agreed upon (including procedures), the parties agree to be bound by the arbitration award, and notification is provided to all WTO members.[356]

This coalition is not only a solution to the US obstruction of the WTO dispute-settlement system—it has political significance. It consists of many economies forming an alliance on a critical trade issue—the orderly resolution of trade disputes. Most notably, this alliance includes China but not the United States.[357] China's participation indicates "that China is not opportunistically taking advantage of the fact that the U.S. is trying to destroy the system . . . . It is sending a message that for the time being it is committed to preserving a rules-based trading system."[358] Moreover, the members of this coalition have issued an open invitation to all other WTO members that they are welcome to join.[359] If a large number of nations eventually join the coalition (or at least the ones that regularly bring disputes to the WTO), they will implement the WTO Agreement among themselves—moving on without the United States.

In summary, the Poison Pill provides middle powers like Canada and developing nations an incentive to enter into large, overlapping FTAs like the CPTPP or the proposed RCEP. It is worth noting that the United States is not a member of the CPTPP or RCEP. An FTA-restrictive clause like the Poison Pill also encourages nations to think outside the "FTA-box." The BRI is one method for Canada to engage

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352. Statement by Ministers, Davos, Switzerland, EUROPA.EU (Jan. 24, 2020), https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf. [https://perma.cc/24DK-MC4C] (archived Aug. 18, 2020) [hereinafter Statement by Ministers].

353. *Id.*

354. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, app. 1 annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#25 [https://perma.cc/PGE4-6Q46] (archived Aug. 18, 2020).

355. *Id.*

356. *Id.*

357. See Naomi Powell, *U.S. 'Increasingly Isolated' as China Among 15 Nations Joining Canada-EU Trade Dispute Model*, FIN. POST (Jan.24, 2020), https://business.financialpost.com/news/economy/china-among-15-countries-to-create-new-appeals-system-based-on-canada-eu-deal [https://perma.cc/W6UP-FX3N] (archived Aug. 18, 2020).

358. *Id.* (quoting Nicholas Lamp, a Queen's University law professor).

359. *See* Statement by Ministers, *supra* note 352.

with China's powerful economy outside of a formal FTA arrangement. A BRI-driven strategy could also increase the opportunity for FTAs with African nations—this would synergize with the overlapping FTA strategy as well. Ultimately, Canada will have to assess whether these benefits are strong enough to outweigh any disadvantages of BRI participation. Finally, the formation of an alternate WTO court by the EU and sixteen nations demonstrates that strong coalitions of nations can indeed attempt to work around US-initiated trade obstacles. This works outside of the FTA-box by falling back to the rules of the WTO but with an innovative dispute-settlement mechanism.

V. CONCLUSION

The Poison Pill represents a troubling new occurrence in a world where WTO-principles are already being eroded by unilateral US trade actions. The Poison Pill is a paradoxical inclusion of a trade-restrictive clause in a purported free trade agreement. Although, the Poison Pill only appears to be a withdrawal clause—functionally, it is an expulsion clause that violates both the letter and the spirit of the WTO Agreement. As a clause that is not only unnecessary to the formation of an FTA but also one that actually raises barriers to trade (by discouraging the formation of FTAs with other WTO members), the Poison Pill is not permitted under GATT Article XXIV.

One interesting future question is whether the United States will ask for a Poison Pill in the FTAs it attempts to negotiate in the future. At this time, it appears that the United States is willing to even pressure the United Kingdom for a Poison Pill in their proposed trade agreement. An even more intriguing matter would be the US reaction if China—following US footsteps—tried to include a Poison Pill in its FTAs or make it a condition of loans.

As eloquently demonstrated by Hale almost a century ago, normative baselines affect the outcome of what may appear as freely negotiated contracts. This simple but powerful observation allows us to conclude that the Poison Pill derives its force from the normative baseline of MFN. The Poison Pill threatens Canada with expulsion from the USMCA if Canada enters into an FTA with China. If Canada wants to pursue increased economic engagement with China, the only other option would be to enter into partial preferential trade agreements—yet this is prohibited by GATT's MFN rule. If Canada is to play by the rules, its most significant option—other than to enter into a full-blown FTA with China—is prohibited by Canada's MFN obligations. This is a strong argument why the WTO should condemn the inclusion of the Poison Pill in any purported FTA. The Poison Pill represents an attempt to twist a WTO rule in a manner that contradicts the WTO's goal of free trade.

Both Canada and Mexico are members of the CPTPP—this mitigates the effect of any Poison Pill expulsion from the USMCA that may be invoked against either of them by the United States. While this is fortunate for both Canada and Mexico, it is still troubling for other middle powers and developing nations since the United States has indicated that it might consider using the clause in other FTAs. US willingness to use the Poison Pill again—as an anti-China weapon—is concerning under the present conditions of a persistent US–China economic rivalry.

The most troubling point about the Poison Pill is the coercive manner in which the United States obtained its inclusion. The United States' strong-armed inclusion of the Poison Pill is but one of several instances of unilateral US trade aggression that simply ignores the United States' preexisting obligations under the WTO Agreement. From the perspective of a middle power or developing nation, such aggression provokes a consideration of mitigating strategies—not just in this instance—but more generally as a response to a United States that no longer can be credibly relied upon to honor its WTO obligations. Since the Poison Pill is an example of progressively disturbing US overreaching, it follows that the strategies that can be used to mitigate the Poison Pill are also useful for hedging against future unrestrained US trade actions. Both strategies considered in this Article provide safety nets to the threat of expulsion by the United States by strengthening economic ties outside of the United States. Given China's status as a global economic superpower, those hedging strategies inevitably involve China as well. Overlapping multilaterals like the CPTPP protect Canada partially and may involve synergy with a China-led RCEP in Asia. Direct participation in the China-led BRI not only strengthens economic ties with China, outside of the FTA-box, but may also assist Canada in developing ties (and potentially FTAs) with other nations—particularly African nations. While Canada would still have to carefully consider whether the benefits of BRI participation outweigh any disadvantages to Canada, this Article submits that the Poison Pill—perhaps contrary to the desires of the United States—creates an incentive for countries like Canada to participate.

In the midst of the US–China trade war, the United States should consider how its actions may be critically viewed by its allies and trade partners. The United States imposed unjustified aluminum and steel tariffs in order to coerce not only Canada's agreement to the Poison Pill (a provision which violates the WTO Agreement, as argued in this Article) but also to extract WTO-prohibited VERs from Argentina, Brazil, and South Korea. In these instances, the United States was breaching the WTO Agreement in an aggressive, unilateral fashion against long-standing trade partners like Canada. The US-created WTO Appellate court crisis represents a significant turning point: coalitions of nations are attempting to carry on with the WTO

Agreement without the US—leaving China and the EU as the relevant superpowers.

If the United States will not credibly commit itself to a rules-based trading order, the world risks descending into a Hobbesian state where "might makes right."[360] In the wake of the US dismantling of the WTO, the Poison Pill—whatever its actual short-term effect may be—provokes non-US nations to think differently. Beyond any potential economic benefits of transacting with China, there now exists an arguably more important geopolitical question of checks and balances. If the United States will not check itself with the WTO Agreement, what will? The obvious answer is to turn to China, the EU, and large trading blocs—superpowers that may have the "might" to counterbalance an overreaching United States. Rather than deterring nations like Canada from engaging with China, a Poison Pill incentivizes middle powers and developing nations to find methods around a Poison Pill—engaging in overlapping multilaterals and engaging with China outside of FTAs. These two strategies align with a broader imperative: dealing with a United States that will not constrain itself to a rules-based trading order with even its long-standing allies and trading partners.

360. *See* Peter Van den Bossche, Appellate Body Member, World Trade Org., Farewell Speech (May 28, 2019) (transcript available at the World Trade Org.). Former WTO Appellate Body member Peter Van den Bossche stated in his farewell speech: "A return to some kind of pre-WTO dispute settlement system means a return to dispute settlement in which economic and other might trumps legal right."). He also remarked: "History will not judge kindly those responsible for the collapse of the WTO dispute settlement system." *See id.*