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Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions

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REPUTATIONAL FALLACIES IN INTERNATIONAL LAW: A COMPARATIVE REVIEW OF UNITED STATES AND CANADIAN TRADE ACTIONS

Colin B. Picker[*]

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Character was like a tree and reputation like its shadow. The shadow is what we think of it; the tree was the real thing.[2]

I. INTRODUCTION

Reputation is an important and complex issue for individuals, communities and nations. Like a shadow, reputation reflects the characteristics of an individual with varying degrees of precision. Reputation rarely provides a mirror image, rather, like a shadow, it is something that varies through time and the changing position of the world. As an initial matter, reputation is defined as "the common or general estimate of a person with respect to character or other qualities; the relative estimation or esteem in which a person or thing is held."[3] The notion behind reputation is that individuals receive information about the behavior of others from third parties; this information is then used to decide whether or not to behave in a similar manner, and how to interact with the other person.[4] Positive reputational information results in increased willingness to act cooperatively with the other person.[5] As would be expected, the opposite reaction occurs when individuals are provided negative reputational information.[6]

Reputation is not a phenomenon confined to individuals; states have reputations as well. Yet, the importance of a state's reputation goes beyond the "shadow" cast, for a state's reputation has the potential to undermine the "tree" itself. The potential harm of reputation derives from the fact that state reputa-

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2. Abraham Lincoln, *quoted in* ANTHONY GROSS, LINCOLN'S OWN STORIES 109 (1912).

3. THE OXFORD ENGLISH DICTIONARY 678 (2d ed. 1980). It is noteworthy that reputation is defined as an "estimate." This concession within the definition of reputation—that it is not something that can be identified precisely—presents a fundamental problem for reliance on reputation as a compliance mechanism of international law: reputation, by its very definition, is imprecise. This imprecision can, and often does, lead to inaccuracies due to overestimation of positive or negative attributes.

4. Vincent Buskens, Social Networks and the Effect of Reputation on Cooperation, Address for the Sixth International Conference on Social Dilemmas (March 30, 1998), *available at* http://www.fss.uu.nl/soc/iscore/papers/paper042.pdf.

5. *Id. See also* Manfred Milinski et al., *Reputation Helps Solve the "Tragedy of the Commons,"* 415 NATURE 424, 424 (2002).

6. *See* Buskens, *supra* note 4.

tion is an important and vital component in the smooth operation of international law. With few traditional legal mechanisms to ensure that states comply with international law, it is arguable that reputation is an important, even crucial, mechanism for securing state compliance.[7]

Similar to the reputations of individuals, state reputations can be highly inaccurate. State reputations may be flawed or bear little resemblance to the actions of the states themselves, creating "reputational fallacies." In addition to concerns about accuracy, issues specific to states exist that are not present when examining the reputation of individuals. These state-specific issues tend to exacerbate reputational fallacies. A fundamental difference concerns the notion of state sovereignty. Sovereignty presupposes that states are "masters of their own domain" in all aspects—from governance to culture.[8] Policies based entirely on self-interest are not only permitted within the world of state sovereignty, but are expected.[9] Consequently, the

7. *See, e.g.*, George W. Downs & Michael A. Jones, *Reputation, Compliance and International Law*, 31 J. LEGAL STUD. 95 (2002); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1849 (2002); Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 592 (2004); Steven R. Ratner, *Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint*, 5 THEORETICAL INQUIRIES L. 81, 93–94 (2004). Note that while there are many articles that discuss reputation within the context of state compliance, few other articles, if any, explore actual states' reputations and the lessons that the international community may learn from increased scrutiny of state reputation.

8. *See* Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 178 (2001). While this postulate of international law has slowly changed in the post-WWII era as a result of developments in areas like human rights and modern communication technologies, sovereignty is still a fundamental basis of the international system. *Id*. at 179–82.

9. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002). Thus, Canadian action pursuing a World Trade Organization (WTO) case in order to force Europe to accept shipments of asbestos, while considered reprehensible by the Europeans, and a blow to Canada's reputation, was considered a sound action by the Canadians as it attempted to serve Canada's interests. *See* Report of the WTO Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar.12, 2001) (Doc# 01-1157), 40 I.L.M. 1193 (2001), *available at* http://www.worldtradelaw.net/reports/wtoab/ec-asbestos(ab).pdf [hereinafter WTO Asbestos Report].

nature of state sovereignty makes any examination of state reputation more complex than that of individuals. Another issue is that reputation is inherently subjective and normative. State reputations reflect the aggregate of individual subjective perceptions of behavior via culturally-anchored criteria that differ from state to state with varying societal goals, cultures, values, and characteristics.[10] This heightened level of subjectivity presents a problem when attempting to characterize behavior for determinations of whether or not a state is a good international actor. Each of these issues increases the complexity of information used to inform reputational assessments and, therefore, may exacerbate reputation's inherent imprecision.

Reputational fallacies raise important issues for international law. In particular, the utility of reputation as a compliance mechanism, when reputation does not accurately reflect state behavior, may impact the effectiveness of international law. This Article will examine the problem of reputational fallacies through a comparative examination of two states with very different reputations in the international trade arena: the United States and Canada.[11] The ensuing examination of U.S. and Canadian trade actions explores whether each state's reputation is logically connected to its actual behavior in the international trade arena. This Article ultimately concludes that there is little substantive support for each state's reputational difference.[12] While this Article's examination is confined to the trade actions of the United States and Canada, it nonetheless suggests that reputation—as a means of enforcing state compliance with international obligations—is, at best, an inaccurate tool of inter-

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10. *See, e.g.*, Doris Weidemann, *Learning About "Face" – "Subjective Theories" as a Construct in Analysing Intercultural Learning Processes of Germans in Taiwan*, 2(3) F. QUALITATIVE SOC. RES. par. 4 (2001) ("[c]ulture standards…are inherently and inextricably *relative*…."), *at* http://www.qualitative-research.net/fqs-texte/3-01/3-01weidemann-e.pdf (last visited Oct. 2, 2004).

11. An examination of U.S. and Canadian behavior in the entire realm of international law or international relations would be a substantial undertaking and is better left for development within a book.

12. This Article assumes Canada's positive reputation, *but see* note 40 and accompanying text, then compares Canadian trade actions with those of the United States—a state routinely vilified for its trade actions. This Article does not seek to muddy the reputation of Canada, nor to improve that of the United States, but, rather, it seeks to show that reputation is, at best, a difficult and intrinsically inaccurate tool of international law.

national law. In fact, this Article suggests that reputation, at its worst, is harmful to international law compliance because it introduces fallacies and inefficiencies, as well as a whole host of other problems associated with its inherent inaccuracy.

Part II of this Article will briefly examine the concept of reputation and how it interacts with international law and international trade. It will also discuss some of the underlying problems associated with a comparative examination of reputation. Part III of the Article will engage in an in-depth examination of the reputations of two states, the United States and Canada, in an effort to determine whether their international trade reputations have any basis in reality. The Article will then, in Part IV, examine the utility of reputation in light of its likely inaccuracies, as well as seek to identify the actual sources of those reputations. Finally, the Article will consider the consequences of exposing reputational fallacies for the states involved as well as for the international legal system.

II. REPUTATION

A. Reputation and International Law

Reputation, as a tool of international law compliance, remains one of the most intriguing concepts in international law. Despite Professor Louis Henkin's modern maxim that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,"[13] international law compliance is not clearly understood. Henkin's maxim, after all, begs the question of why states tend to comply with international law.[14] The traditional view is that state com-

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13. *See* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979); *see also* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599 n.2 (1997) (collecting sources of empirical research suggesting that Henkin's maxim is correct).

14. Indeed, while it is common to claim that U.S. behavior within the international legal system shows that the United States does not respect or comply with international law, the truth is that the United States, through its officials, diplomats, soldiers, citizens and so on, obeys international law thousands of times each day — from customs compliance with international standards to the rules of engagement of soldiers in combat zones. A few high profile examples of non-compliance should not mar the otherwise stellar U.S. record of international law compliance — this despite the fact that world attention will likely focus on the occasional example of U.S. conflict with inter-

pliance results from a combination of factors—part carrot, part stick.[15]

The carrots and sticks of state compliance, however, are directly linked to reputation. Specifically, several factors increase state compliance with international law: fear of retaliation, concern that next time no one will want to "play" with the state, a self-serving or altruistic interest in the successful operation and legitimacy of the international legal system, and a desire to avoid rogue-state status.[16] Many of these factors have state reputation at their core.[17] States' fears that others will not "play" with them in the future is related to the fear that word will get out that they are "rule breakers." Similarly, concern for a state's image is, of course, a concern about reputation. The interest of states, guided either by self-interest or idealism, in the continuing vitality and legitimacy of the international legal system is also related to reputation. Indeed, the existence of a consistently disreputable state will naturally lead to questions concerning the legitimacy of a legal system that allows such flagrant rule-breaking and may cast doubt on the viability of international law.

In addition to the traditional carrots and sticks, other features of international law can be directly linked to reputation. New mechanisms to assist in the enforcement of international law, such as the employment of binding adjudication and related authorized retaliations, are directly related to reputation.[18] An offending state's reputation likely influences other

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national law and draw the inaccurate conclusion that the United States is regularly non-compliant.

15. There is much debate as to why international law is followed, with many reasons advanced. Examination of those reasons suggests that they can, for the most part, be considered either as "carrots" (such as sharing in the benefits of an effective international legal system) or as sticks (such as the employment of sanctions by other parties against rule-breakers). *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 173 (4th ed. 2002) (lists several of the reasons advanced for international law compliance).

16. *See generally* Hongju Koh, *supra* note 13 (providing a broad overview and critique of the historical and modern theories of state compliance with international law).

17. *See* Downs & Jones, *supra* note 7, at 99–100.

18. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE

states or international organizations when they decide to take the extreme step of instituting procedures that lead to retaliation. Resorting to international proceedings, an unusual step in the generally diplomatic world of international law, may be thought necessary to force a disreputable state with a reputation for showing disregard for its obligations under international legal system into compliance.[19] Hence, both traditional factors and modern enforcement mechanisms that ensure state compliance with international law are related, in some respects, to reputation.

Just as reputation is a vital component of international law enforcement, inaccurate reputation may cause significant harm to the efficient operation of the international legal system. For example, state reputation can impact international adjudication and negotiations.[20] With respect to international adjudication, inaccurate reputation may cloud the integrity of claims and of evidence and testimony. It may undermine a state's ability to rely on good faith and equitable defenses.[21] Inaccuracy may also reduce the incidence of support from other states, and could encourage other states to join the opposition either directly or

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URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999), 1869 U.N.T.S. 354, 33 I.L.M. 1226 [hereinafter WTO Dispute Settlement Understanding].

19. Thus, when creating the WTO, the world trade system purposely moved away from the traditional diplomatic dispute resolution employed in the GATT in order to enforce compliance where the previous diplomatic system had frequently failed. *See, e.g.,* Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 CHI. J. INT'L L. 403, 407 (2001). There may also be a feeling that it is time to teach such a disreputable state a "lesson" so as to encourage future compliance of its other international legal obligations. *See* John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831, 835–38 (1994).

20. *See infra* Part III.A.–B.

21. *Cf.* Reena Sengupta, *A Contest of Reputations: Media Strategy: Public Relations Can Be as Important as a Sound Legal Case*, FIN. TIMES (London), Feb. 16, 2004, at 11 (negative impressions created by a lawsuit against corporate entities have significant impact upon corporate reputation and shareholder value; according to University of Chicago study, winning the case will do little to reverse the damage to reputation); Peter Nicolas, *American–Style Justice in No Man's Land*, 36 GA. L. REV. 896, 955 (2002) ("If tribes earn a reputation for dishonoring contracts and then invoking the defense of sovereign immunity when sued in contract, it will impact their business reputation, and those contracting with them will either demand a contractual waiver of sovereign immunity or a higher contract price.").

through some form of *amicus curiae* briefs.[22] This issue is accentuated when two opposing states represent different ends of the reputational continuum.[23] Detrimental reputational inaccuracies may be reflected in international negotiation as an inability of a state to have its negotiation positions accepted or supported.[24] A state's offers of concessions are mistrusted and/or discounted and may be rejected absent some form of guaranty or binding adjudication.[25] Put simply, states operating under a

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22. This claim is hard to prove, for rarely do states claim such activities as a consequence of reputation. However, the recent World Court Advisory case concerning Israel provides some support for this assertion. Forty-seven non-party states made submissions in the case; it is reasonable to assume that Israel's reputation was part of the motivation for the overwhelming international response. *See* International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004, 43 I.L.M. 1009 (2004), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/. Additionally, and perhaps a bit cynically, it would not be surprising if reputation affects arbitrators or judges, hence impacting their decisions to some extent—they are, after all, human. While this Article makes no pronouncement on the merit of the claim, World Court Judge Schwebel's vigorous dissent in *Nicaragua v. United States* could be interpreted to suggest that perhaps such phenomena was present in the minds of the judges in the majority opinion. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 266 (June 27). Thus, a state with a negative reputation will be operating under a handicap and will have a tougher time prevailing during adjudication. In contrast, a state with a good reputation will more likely have each of the factors above working to their benefit: having their testimony and evidence accorded greater weight, enjoying the support of other states in their adjudications, and receiving the benefit of the doubt from judges and arbitrators.

23. As an example, were North Korea (generally considered to be a rogue state) to be involved in a dispute with Finland (generally considered to be a law-abiding state) it would be surprising if their respective reputations did not play a role in the process. Intuitively, I believe this occurs in Canadian–U.S. trade adjudication, at least to some extent; however, proving such an assertion would be very difficult.

24. This is also hard to show as states will rarely characterize rejection of a position due to reputation, but it is likely that the position of the United States in international negotiations suffers as a consequence of its reputation.

25. *Cf.* Nicolas, *supra* note 21, at 955 (describing how reputation for claiming immunity from contractual obligations via a sovereign immunity defense may result in other parties being unwilling to contract with Native Americans).

reputational cloud will simply have a harder time achieving their negotiation goals.[26]

Accordingly, there are significant costs to reputation. Where state reputation is not accurate, as with the international trade reputations of the United States and Canada, reputational costs are borne without legitimate reason.[27] Invalid reputational costs, at best, are an inefficient tool of international relations, and, at worst, a powerfully destructive element in the development and maintenance of the international legal system. However, despite this danger, it must be re-emphasized that reputation is integral to the operation of international law. Thus, disavowing reputation as a compliance mechanism would likely have dramatic consequences for the continuing viability of international law. Therefore, this Article posits that reputation be examined within the context of international law and state behavior and resultant problems be resolved so that reputation may continue to be employed in international law. Reputation should be exposed for what it often is—an inaccurate and harmful tool of international law—and corrected through examination and exposure. Accordingly, this Article's attempt to make the issue of reputation more transparent should contribute to a greater understanding and more accurate use of reputation in international law, thereby contributing to the continuing viability and development of the international system.

B. Comparative Reputational Analysis

A brief discussion of the pitfalls of comparative analysis in the international reputation context is merited before beginning the process of comparing the United States and Canada. Comparative analysis is always fraught with difficulties.[28] The variables and differences among states can simply be too qualitatively and quantitatively difficult to allow for accurate comparison. Most notably, failure to take both legal and societal cul-

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26. The special trade rules applied to China as a condition of its membership in the WTO may be described as of this variety, particularly the dumping and subsidies rules. *See* Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1514 (2000).

27. *See infra* Part IV.B.2.

28. *See* John H. Langbein, *Judging Foreign Judges Badly: Nose-Counting Isn't Enough*, 18 JUDGES J. 4, 50 (1979).

ture into account can result in a discontinuity between the asserted comparisons and the realities of the states and areas of study.[29] With respect to reputation, where legal and societal cultures play such prominent roles, a comparative analysis may be especially vulnerable.[30]

As an initial point, certain differences between the two countries are apparent.[31] Indeed, the Canadian economy is radically

29. *Id.*

30. When there is an effort to draw broad international law lessons from an examination of a specific subset of international law, one would be remiss not to take into account the problems inherent in a comparative analysis across legal disciplines. Accordingly, it should be pointed out that this is a comparative analysis within the world of international trade. While international trade is a vital and highly dynamic part of the international legal system, it is also significantly different from many of the other fields within international law. This dynamism can clearly be seen in the vast scope and number of international economic law agreements negotiated in recent decades, including hundreds of regional trade agreements, bilateral investment treaties, and multilateral agreements such as the WTO. Indeed, WTO membership is starting to rival that of the United Nations—the WTO has gained 147 members and 31 observer/applicant members since it was created almost 10 years ago, compared with the 191 members of the UN. *See* WTO website *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm; UN website *at* http://www.un.org/Overview/unmember.html. Furthermore, resort to the WTO's dispute settlement body has produced a significant volume of decisions, easily rivaling that of the International Court of Justice. Over 300 cases have been filed with the WTO since 1995; comparatively, just over 100 contentious cases and 25 advisory opinions have come before the World Court since 1947. *See* WTO website *at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; World Court website *at* http://www.icj-cij.org/icjwww/idecisions.htm. Additionally, international economic law has strong institutions, including unusually strong (for international law) mechanisms to encourage state compliance. *See, e.g.*, WTO Dispute Settlement Understanding, *supra* note 18, arts. 16, 17.14. Flowing through international trade—and in constant tension with the public international law component of international trade—is economic theory and its emphasis on market forces. Potentially, the role of economics in the field of international trade law could result in the reduction of the role of traditional norms of international law for international trade law, and their continuing replacement with economic values applied to state-to-state interactions. This difference between international trade/economic law and traditional public international law should be kept in mind throughout the Article.

31. This is a case of comparing apples and oranges. But like apples and oranges, while certain external appearances may suggest radical differences between them, they are in fact essentially the same thing — two pieces of fruit. *See* Scott A. Sanford, *Apples and Oranges: A Comparison*, *in* THE BEST OF ANNALS OF IMPROBABLE RESEARCH 93 (Marc Abrahams ed., 1998) (finding

different from that of the United States. For example, Canada imports and exports the vast bulk of its trade with just one country—the United States.[32] Additionally, Canada has a continuous history of being heavily resource-dependent in its trade.[33] In contrast, U.S. trade is more widely diversified.[34] In addition, each state's constitutional framework includes significant differences which impact their trade regimes and actions.[35] Thus, this Article will not seek to show that these two states are identical. Rather, this Article simply illustrates that there are important similarities between the United States and Canada, without endeavoring to ascertain the reasons for those similarities or to engage in a highly detailed comparative examination of subtle underlying differences. A broad and general finding of comparability between the two states is sufficient for the purpose of this Article's thesis.[36] Having laid out the pitfalls and problems inherent in a comparative analysis, there is still a tremendous benefit to such examinations derived from lessons and problems highlighted in context rather than in isolation. Therefore, while the conclusions that flow from comparative analysis may be susceptible to attack, the benefits will frequently outweigh otherwise valid concerns.

III. AN EXAMPLE OF DISPARATE REPUTATIONS: CANADA, THE UNITED STATES, AND INTERNATIONAL TRADE

This section of the Article will compare the trade actions of Canada and the United States against the backdrop of their reputations in international trade.[37] To begin, Canada is ad-

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that in fact when scientifically compared, "apples and oranges are very similar."), *available at* http://www.improbable.com/airchives/paperair/volume 1/v1i3/air-1-3-apples.html

32. THE ECONOMIST, POCKET WORLD IN FIGURES 121 (2003).

33. *Id.* at 120–21. *See infra* Part III.B.1.

34. *See* THE ECONOMIST, *supra* note 32, at 223. *See infra* Part III.B.1.

35. *See infra* Part III.A.

36. But such a finding must nonetheless be grounded on an understanding of the problems inherent in comparative analysis, or the findings will themselves be less persuasive.

37. Before starting what may be viewed as an attack on Canada, which it certainly is not, I feel compelled to note that I admire and respect Canada. I have enjoyed frequent visits to Canada and have traveled all over the country, from Nova Scotia to Whitehorse in the Yukon Territory. I believe Canada, like the United States, to be a wonderful country.

mired the world over.[38] Indeed, Canada's reputation among other states is as positive as the United States' is negative.[39] This is as true in international law as in all other areas of their foreign policies. The question, then, is whether this reputational disparity accurately reflects the behavior and policies of the two neighbors. Comparative examination of such a complex question for all aspects of international law would be too complex and lengthy for this Article; hence, this Article will narrow its focus to the reputational disparity between the United States and Canada within international trade.[40] Accordingly, as the initial step in showing that reputation is a problematic device for controlling states, this Article will show the absence of a legitimate basis for the difference in these two states' international trade reputations.

This Article does not endeavor to show that the United States is a good actor or that Canada is a bad actor. Rather, the aim of this analysis is to show that Canada has engaged in behavior markedly similar to that of the United States—employing a healthy mixture of altruistic measures contrasted with some negative actions best explained as part of the routine behavior of states in protecting their self-interest.[41] Thus, Canada's and the United States's disparate reputations will be shown as having little foundation in reality.

The following analysis will identify several aspects of U.S. trade policy that are heavily criticized, and then identify similar

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38. *See, e.g.,* Michael Doyon, Letter, *Stop Playing Games with Iran,* TORONTO STAR, Aug. 2, 2004, at A19; Bill Redekop, *International Trade Group Optimistic on Prairie Berry*, WINNIPEG FREE PRESS, July 21, 2004, at A5; Robert Colapinto, *The Clean-Up Act*, CA MAG., May 1, 2004, at 20; *compare with* Press Release, Bob Menendez Calls on State Department, Federal Document Clearing House (Aug. 20, 2004), *available at* 2004 WL 62027829; Robert Robb, *Kerry Can Imagine But He's Just a Dreamer*, ARIZONA REPUBLIC, Aug. 1, 2004, at V1.

39. *See infra* Part III.

40. As noted before, reputation is hard to measure and prove empirically. My "gut reaction" is that Canada's reputation is better. However, the impression of one academic does not prove much. Accordingly, I interviewed international trade practitioners from the various states' trade bars, academia, and from the trade offices of Canada and the United States. Their impressions substantially accorded with mine.

41. *See, e.g.*, WTO Asbestos Report, *supra* note 9 (complaint by Canada, with Brazil and the United States as Third Party Participants, attempting to force the sale of asbestos onto the European market).

or comparable Canadian actions. For U.S. trade policy, the primary issues examined are:

a. International Trade Negotiations[42]
b. Trade Dispute Adjudication[43]
c. Protectionism [44]
d. Trade Distorting Regional Agreements[45]
e. Contentious Trade Issues[46]
f. Sanctions and Embargoes[47]

Although there are other concerns integral to the examination of U.S. trade policy, these six are generally considered of primary importance.

After reviewing U.S. trade policy, the analysis focuses upon Canadian trade policy in an effort to discern whether Canada has engaged in similar or comparable behavior without incurring a reputational impact equivalent to that of the United States. Indeed, an examination of the trade policy issues in the previous paragraph will show that while Canada's actions may not be as "egregious" as the United States in some areas,[48] Canada is just as culpable in several others.[49] Beyond some level of culpability, Canada also exemplifies behaviors that are directly comparable to U.S. policy, yet all without the large reputational cost borne by the United States.[50] The following section explores each trade policy issue in detail and identifies behaviors

42. For example, the United States is considered a difficult state with which to negotiate trade agreements. *See infra* Part III.A.

43. Including what issues the United States considers worth fighting over, how often the U.S. is labeled a "rule-breaker," and the aggressiveness of the U.S. in pursuing trade adjudication with other states. *See infra* Part III.B.

44. For example, the United States is thought to employ excessive domestic protectionism—ranging from agricultural subsidies and application of dumping and countervailing duty laws to the aggressive use of unilateral trade sanctions. *See infra* Part III.C.

45. *See infra* notes 79–81 and accompanying text.

46. In particular, the use of international trade law to advance U.S. self-interests in such fields as genetically modified food, hormone additives, and widespread use of antibiotics in its livestock. *See infra* Part III.D.

47. The United States has used international trade law to further such "non-trade" issues as national security, labor rights, the environment, and human rights. *See infra* Part III.D.

48. *See infra* Part III.C.–D.

49. *See infra* Part III.C.–D.

50. *See infra* Part III.D.

and actions by Canada that are often comparable to the United States.

A. International Trade Negotiation

International trade agreements tend to follow a pattern. Stage one is trade negotiations. Negotiations are then followed by formal agreements with which states are expected to comply, with non-compliance resulting in interstate disputes which may be concluded through various dispute resolution mechanisms.[51] Thus, it is only fitting that the comparison between the United States and Canada begin where trade law begins, with an examination of the states' negotiating characteristics.

The U.S. constitutional structure makes it difficult for the United States to negotiate trade agreements. The constitutional requirement of separation of powers gives Congress certain powers over international trade, while giving other powers to the Executive branch.[52] The problems inherent in dividing power over international trade are exacerbated by the constant congressional and presidential election cycles.[53] Furthermore, Congressional participation in the development of trade agreements has historically been fraught with difficulty. The last time Congress engaged in detailed trade legislation, resulting in the Smoot-Hawley Tariff Act of 1930, the log-rolling and pork barrel politics encompassed within the legislation had devastat-

51. *See, e.g.*, WTO Dispute Settlement Understanding, *supra* note 18; Convention on the Law of the Sea, Dec. 10, 1982, art. 118, 1883 U.N.T.S. 3, 65–66; *see generally* UN Office of Legal Affairs, Division for Ocean Affairs and Law of the Sea, Oceans and Law of the Sea (providing a brief synopsis of bodies established by the convention and alternatives for settlement of disputes), *at* http://www.un.org/Depts/los/ (last visited Oct. 12, 2004).

52. Congress has the power to "regulate Commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3, and to "pass bills for raising revenue," U.S. CONST. art. I, § 7, cl. 1, while that of the President is to "make treaties," U.S. CONST. art. II, § 2, cl. 2, and generally take charge of foreign affairs. *See generally* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936) (stating that decisions regarding international affairs are vested in the President).

53. *See, e.g.*, John H. Knox, *NAFTA's Environmental Provisions: What Problems Were They Intended to Address?*, 23 CAN.–U.S. L.J. 403 (1997); C. O'Neal–Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 10 n.35 (1994).

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ing effects upon the world trading system during the 1930s.[54] Compounding the problem, Congressional action sometimes suggests mistrust of the Executive branch, including Congress's refusal to fully support executive deals negotiated without its approval.[55] This lack of trust necessitated Fast Track and the later Trade Promotion Authority,[56] itself a political "hot potato."[57] Understandably, states are loath to negotiate with the United States under these circumstances. Despite these problems, states do nonetheless negotiate with the United States. Indeed, given the role of the U.S. economy in the world, it would be nearly impossible for states to avoid dealing with the United States.[58] Hence, despite the impediments, the United States has been a major player in the development of the world trading system.

Just as the United States has been integral to the development of the international trade regime, Canada has also played

54. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930) (enumerating a very lengthy list of materials and goods subject to tariffs); Brady P. Priest, *Steel Tariffs: A Shining Example of the Tension Between Politics and Economics in the United States Today*, 28 BROOK. J. INT'L L. 1025, 1035 (2003).

55. As exemplified in the confrontation over the results of the Kennedy Round (Final Act Embodying the Results of the 1964-67 Trade Conference, B.I.S.D. (15th Supp.) at 4 (1968) (consisting of multilateral negotiations against dumping practices)). *See* Renegotiations Amendment Act of 1968, Pub. L. No. 90-634, § 201, 82 Stat. 1345, 1347 (1968) (declaring that the Antidumping Act of 1921 still retains primacy over agreements entered into by the President during the Kennedy Round); S. REP. NO. 89-1341, at 3 (2d Sess. 1966) (expressing the Finance Committee's concern that the Executive Branch has not been vested with authority to engage in international trade agreements within the Kennedy Round of negotiations, especially as the unfair trade practices involved have effects in the domestic economy, an area within legislative control).

56. *See* Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §3801 (2002); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended in scattered sections of 19 U.S.C.).

57. *See generally* Laura L. Wright, Note, *Trade Promotion Authority: Fast Track for the Twenty-First Century?*, 12 WM. & MARY BILL RTS. J. 979 (2004) (describing the history of Fast Track and the continuing legislative restrictions of the Executive's ability to unilaterally make trade agreements).

58. *See* THE ECONOMIST, *supra* note 32, at 24, 32 (the United States has the largest GDP in the world and ranks first for total world exports (accounting for just over 15% of all global exports)).

a significant role in international trade negotiations.[59] The formation of the ground-breaking Canada-U.S. Free Trade Agreement[60] (CUSFTA) was crucial in the development of the World Trade Organization (WTO).[61] Thus, it was no surprise that Canada played a key role during the Uruguay Round negotiations that resulted in the international community adopting a new trade system to replace the General Agreement on Tariffs and Trade (GATT).[62] While receiving help, it was Canadian trade negotiators who developed the contours of the system that was to become the WTO, including being the first to coin the name.[63] In other words, even though anti-globalization protesters often describe the WTO as a U.S.-created monster, fair attribution, for whatever one believes about the WTO, should also go to Canada.

Regardless of these negotiation successes, Canada, like the United States, can be a difficult negotiating party.[64] Just as with the United States, Canada's constitutional structure makes international trade negotiations difficult. Canada's Constitution provides the provinces with a joint role in certain foreign relations issues, including trade.[65] Specifically, Canadian

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59. George Anderson, *Canadian Federalism and Foreign Policy*, 27 CAN-U.S. L.J. 45, 46 (2001); *see also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 45 (2d ed. 1997).

60. MICHAEL HART, A TRADING NATION 372–93 (2002).

61. *See*, *e.g.*, *id.* at 411. The negotiation and development of the CUSFTA, with its broad coverage and binding dispute settlement mechanisms, showed that international trade agreements could provide greater coverage than that provided by the GATT. *Id.*

62. Canada, along with the European Union, was instrumental in the proposal and acceptance of the idea of using the Uruguay Round to establish a new trade system to replace GATT. *Id*. *See also* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1125 (1994).

63. JACKSON, *supra* note 59, at 45.

64. *See* HART, *supra* note 60, at 193, 447 (presenting the view that Canadian negotiators were "chiselers" who would "seek[ ] much and giv[e] little" in GATT negotiations).

65. Carl Grenier, *States, Provinces, and Cross-Border International Trade*, 26 CAN.-U.S. L.J. 175 (2000). This is a consequence of the fact that the Canadian constitutional grant of trade authority to the Canadian federal government was originally interpreted narrowly by the Privy Council in London, and later by the Canadian Supreme Court. *See* Att'y Gen. of Can. v. Att'y Gen. of Ontario (Labour Conventions Case), [1937] 1 D.L.R. 673, 682; *see also* Patrick

provinces have significant authority over internal trade issues. Consequently, where international trade rules have an impact domestically, the federal government must work with the provincial government to assure provincial assent via provincial legislation.[66] This was an issue in the implementation of the CUSFTA[67] and the North American Free Trade Agreement (NAFTA),[68] and could be problematic in the future if public or provincial attitudes move away from supporting free trade.[69] Thus, constitutional federalism issues play a major role in Canada's participation in the world trade environment.[70]

Constitutional divisions are not the only problem facing negotiators on both sides of the border; ratification and implementation of trade agreements are also problematic. Difficulties ratifying and implementing international trade agreements are well known. U.S. Congressional battles over NAFTA and the WTO and Trade Promotion Authority (previously known as Fast Track)[71] received considerable world attention.[72] Yet, Canada has had problems delivering ratification and implementation of international trade agreements as well. For example, the Mulroney government's[73] successful and arduous negotiation

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Monahan, *Canadian Federalism and its Impact on Cross-Border Trade*, 27 CAN.-U.S. L.J. 19 (2001).

66. Att'y Gen. of Can., [1937] 1 D.L.R. at 683.

67. HART, *supra* note 60, at 388–90.

68. North American Free Trade Agreement, Dec. 17 1992, U.S.-Mex.-Can., 107 Stat. 2057, 32 I.L.M. 605 (1993), *available at* http://www.worldtradelaw.net/dsc/searchmain/searchreports.htm [hereinafter NAFTA].

69. Anderson, *supra* note 59, at 49–50.

70. A related problem arises when the federal government uses international trade regulation for actions that would not be allowed under domestic regulation in that such actions may be perceived as discrimination against foreign parties. The result is inadvertent protectionism, but in truth the government's actions are a consequence of the Canadian constitutional division of powers between the federal and provincial governments. For an example of inadvertent protectionism, see *Ethyl Corp. v. Can.* (Award on Jurisdiction), 38 I.L.M. 708 (NAFTA Art. 11 Arbitral Tribunal 1999).

71. Bipartisan Trade Promotion Authority Act § 2101.

72. *See generally* O'Neal–Taylor, *supra* note 53, at 18 n. 67 (Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (repealed 1975)). *See also* Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 220 (1995).

73. Brian Mulroney served as Canada's prime minister between September 17, 1984 and June 13, 1993. For a description of Mulroney's government's

of the CUSFTA was followed by a very tempestuous and uncertain implementation battle.[74] The contentious implementation threatened to change the balance of power in the Canadian Parliament as well as endanger the Prime Minister's position.[75] Therefore, despite international focus upon U.S. ratification and implementation battles, both states have struggled with the issue.

Finally, the United States has been increasingly criticized for moving away from the multilateral trade development policy exemplified by the WTO and focusing too much energy on bilateral or regional trade agreements.[76] The time, energy and resources expended by the United States on bilateral free trade agreements also detract from the ability and focus of the United States in multilateral negotiations, to the detriment of the WTO's present round of negotiations.[77] Additionally, while these agreements are beneficial to the parties involved, they have received tremendous criticism as trade-distorting meas-

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policies after he took office, especially in relation to the United States, see HART, *supra* note 60, at 372–75.

74. *Id.* at 389.

75. Following the signing of the Agreement and introduction and implementation of legislation in 1988, the Mulroney government was forced by the Liberal opposition in the Canadian Senate to call an election, the main issue being the implementation of the trade agreement. *Id*. Nor was it assured that Mulroney would emerge victorious, and, indeed, the popular vote was split on the issue. *Id.* However, with its "first past the post" election system, the Conservatives actually won the majority needed to force the bill through and the trade agreement with the United States received the Canadian implementing legislation it needed. *Id.*

76. *See* Colin B. Picker, *A Time to Fight Back: Ending the Abuse of Article XXIV* (paper accepted for delivery at International Conference: The WTO at a Crossroads (13-14 December 2004, Faculty of Law, Bar Ilan University, Israel)), *available at* http://www.biu.ac.il/LAW/wto_conference_draft.htm (last visited Oct. 9, 2004). The United States currently has bilateral or regional trade agreements with Israel, Jordan, Canada, Mexico, Singapore, and Chile. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REGIONAL TRADE AGREEMENTS, *at* http://www.ustr.gov/Trade_Agreements/Regional/Section_Index.html. In addition, there are ongoing negotiations with the rest of the Americas as part of the Free Trade Area of the Americas (FTAA), as well as with Australia, Morocco, Panama, Central America and the Southern African Customs Union. *Id.*

77. *See* Picker, *supra* note 76 (citing comparative ease of negotiating regional trade agreements as a factor in states' preference over more time-consuming multilateral agreements).

ures. For example, it is more likely that a product will trade between two states when there is a free trade agreement, even if the most efficient supplier would be another state outside of the agreement.[78]

Canada has similarly placed substantial focus upon development of numerous bilateral and regional trade agreements.[79] Specifically, Canada is involved with NAFTA and bilateral agreements with Israel, Chile and Costa Rica.[80] In addition, like the United States, there are also ongoing Canadian negotiations with Singapore, the European Free Trade Association, the Central America Four, and as part of the FTAA.[81]

Furthermore, the proliferation of regional trade agreements can result in a different sort of harm to the international trade system — an institutional harm.[82] Institutional harm occurs when countries resort to bilateral or regional agreements rather than multilateral agreements, resulting in the expenditure of significantly more of a country's limited negotiating resources on regional agreements than on the ongoing WTO negotiations. Specifically, without strong commitment to the multilateral trade system—such as that provided in the early nineties by Canada in the development of the WTO—the WTO's development will likely stagnate as countries achieve their trade goals through regional trade agreements.[83] Canada's expenditure of its limited resources and time on bilateral and regional negotiations has an increased potential to hamper continuing develop-

78. *See* Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419, 432 (2001) (discussing the effects on trade regionalism when an economically superior country enters into a bilateral agreement with an economically inferior one).

79. *See* WTO Secretariat, World Trade Organization, *WTO Trade Policy Review of Canada,* WT/TPR/S/112/Rev.1 (March 19, 2003), at 21–25, *available at* http://docsonline.wto.org [hereinafter *WTO Trade Policy Review*].

80. *See* NAFTA, *supra* note 68, pmbl. (regarding Canadian involvement); *See* Alberta Government*, Free Trade and the World Trade Organization (WTO)* (regarding Canadian bilateral agreements), *available at* http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/psc5097?opendocument (last visited Oct. 6, 2004).

81. International Trade Canada, Regional and Bilateral Initiatives, *at* http://www.dfait-maeci.gc.ca/tna-nac/reg-en.asp (last visited Oct. 15, 2004).

82. Picker, *supra* note 76. This novel concept is developed in a presentation by the author with likely publication.

83. JACKSON, *supra* note 59, at 45.

ment of the WTO because these negotiations divert a large portion of the country's limited negotiation resources away from the multilateral trade system. In comparison, the United States' much larger office of the United States Trade Representative (USTR) affords the United States the ability to engage in regional trade agreement negotiations to a significantly greater extent than smaller or less populated states like Canada.[84]

As shown, the relative harm of regional trade agreement negotiations on the world's multilateral trading system, the WTO, is therefore likely to be greater when a state like Canada expends its limited negotiating resources on them. In the end, while the United States is castigated as a problematic negotiating partner, examination of Canada's negotiating characteristics shows it also has problems negotiating and delivering domestic assent to international trade agreements and with squandering scarce negotiating resources.

B. International Trade Adjudication

A state's reputation is often shaped by its participation in international adjudication, either through the defense of state actions and legislation or through the aggressiveness with which a state seeks to have its international rights protected. Despite the fact that state-to-state dispute resolution is still the exception in foreign affairs, sometimes states choose to bring a case against another state.[85] Diplomatic resolutions are the preferred state-to-state dispute resolution mechanism.[86] Regardless, the modern international trade regimes of the WTO and NAFTA, in contrast to the prior GATT regime, provide for binding state-to-state adjudication.[87] Most revolutionary of all, adjudication under modern trade regimes permits sanctions to

84. The actual discretionary appropriation of the Office of the U.S. Trade Representative in 2002 was $30 million; the estimated appropriation for 2004 was $37 million. U.S. GOV'T PRINTING OFFICE, EXECUTIVE OFFICE OF THE PRESIDENT: FED. FUNDS, *available at* http://www.gpoaccess.gov/usbudget/fy04/sheets/fpaa_21.xls (last visited Aug. 26, 2004).

85. Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 411 (2003).

86. *See id.*

87. WTO Dispute Settlement Understanding, *supra* note 18; NAFTA, *supra* note 68, ch. 20.

bring states into compliance.[88] Hence, these disputes provide a prime opportunity for formation of state reputations. The reputations resulting from trade adjudication can reflect (i) a state's aggressiveness, (ii) how often its behavior either violates or appears to violate trade rules and, (iii) those actions a state is willing to go to "court" to defend. Accordingly, a comparison of U.S. and Canadian adjudications, from all three perspectives, may help identify similarities and differences that explain the differences and inaccuracies in reputations or help show that their reputations are inaccurate.

1. Aggressiveness

The frequency with which states resort to litigation reveals much about their aggressiveness. Traditionally, countries resolve issues behind closed doors through diplomatic channels.[89] Taking the unusual step of filing a case against another country is a particularly aggressive action for a state. An examination of the number of cases filed by each country can be used to ascertain a state's aggressiveness. Using the number of cases filed by individual states may be an imperfect measurement of aggressiveness,[90] yet it provides a useful tool in comparing the United States and Canada and assessing whether they deserve their respective reputations.

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88. *See, e.g.,* WTO Dispute Settlement Understanding, *supra* note 18.

89. Alvarez, *supra* note 85, at 411.

90. Examination of the number of cases filed by a country can be a troubling and crude indicator because it involves a "moving target"—i.e., cases and disputes are not static. Furthermore, there may be plenty of disputes that go unreported in which other aggressive pressures are brought to bear but where a complaint is ultimately not filed. *See* Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. ON DISP. RESOL. 141, 156 (2003). However, those details are not publicly available and hence will not have as large an impact on the reputation of a state as those that are more widely known to the public. A further problem with examining cases filed in an effort to get at reputation is that the filing of complaints may be limited by the capacity of the legal staff responsible for such cases. Neither the USTR nor the Canadian Department of Foreign Affairs and International Trade have unlimited resources to take on cases. *See, e.g., supra* text accompanying note 84. However, staff size in itself reflects the aggressiveness of the state, and so the limitation is itself a component in the formation of the reputation.

It is unsurprising that the United States has filed more cases than Canada, as its economy is greater and more diversified. In 2000, the Canadian GDP was $688 billion, while the U.S. GDP was nearly ten trillion dollars.[91] The U.S. economy is over fourteen times the size of Canada's.[92] This alone suggests that the United States would have to file fourteen times more cases than Canada for the two to be comparable. Examining the actual number of the cases is quite revealing. As of January, 2004, the United States had filed seventy-three complaints with the WTO,[93] while Canada had filed twenty-five.[94] The United States has filed only three times as many cases as Canada. Thus, the United States has filed considerably fewer cases than would be expected considering the size of its economy.

Perhaps, however, a more relevant economic measurement for the purposes of this Article is the relative international trade figures. As an initial matter, it is important to note that Canada's economy is heavily weighted to trade with the United States.[95] With respect to trade in goods, Canada exports over 85% to and imports almost 74% of its trade from the United States; the United States exports approximately 23% of its trade to and imports 19% from Canada.[96] However, looking at the total world trade figures is merely a starting point. In 2000, the United States had 15.44% of the total world exports, while Canada had 3.81%.[97] In the same year, the United States imported $1.2 trillion and exported $781.9 billion (approximately $2 trillion in total trade), while Canada imported $244.6 billion and exported $284.6 billion ($529.2 billion in total trade).[98]

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91. THE ECONOMIST, *supra* note 32, at 121,122.

92. *Id.*

93. *See* World Trade Organization, Dispute Settlements: The Disputes, Disputes Chronologically, *at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2004 (last visited Oct. 6, 2004) [hereinafter WTO Dispute Settlement website]; *See also* UNITED STATES TRADE REPRESENTATIVE, SNAPSHOT OF WTO CASES INVOLVING THE UNITED STATES (updated Sept. 2, 2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file84_5696.pdf (last visited Oct. 12, 2004) [hereinafter SNAPSHOT OF WTO CASES].

94. *See* WTO Dispute Settlement website, *supra* note 93.

95. THE ECONOMIST, *supra* note 32, at 121.

96. *Id*. at 121, 223.

97. *Id*. at 32.

98. *Id*. at 121, 223.

Thus, the U.S. aggregate international trade in goods is about four times greater than Canada's. However, given that the WTO's Dispute Settlement Understanding covers trade in services as well as goods, inclusion of trade in services is pertinent to the analysis. Canada's trade in services in 2003 was $87 billion.[99] The United States traded $500 billion worth of services in 2003.[100] Thus, total trade in goods and services for the United States is approximately $2.5 trillion and for Canada is $616.2 billion. Therefore, we should expect the United States to have filed roughly four times the number of cases as Canada. However, despite Canada's reputation, the analysis below shows that reality is at variance with expectation.

As previously noted, the United States has filed seventy-three complaints with the WTO[101] and Canada has filed twenty-five.[102] The United States has filed fewer than three times the cases Canada has filed. These figures are essentially consistent with the differing sizes of the two economies. Yet, an even greater differential between the number of WTO cases brought by Canada versus the United States should be expected. This is because the bulk of Canada's trade is with one state and takes place under the auspices of NAFTA rather than the WTO. Accordingly, many of the disputes will not make it to the WTO's dispute settlement institutions but, rather, will be resolved under NAFTA's dispute mechanisms.[103] Furthermore, because

99. *See* Trade and Trade Policy Development, Recent Trends in International Trade and Policy Developments, *in* WORLD TRADE REPORT 2004, at 20 (2004), *available at* http://www.wto.org/english/news_e/pres04_e/press378_annex_e.pdf ($39 billion in exports, $48 billion in imports).

100. *Id*. ($282 billion in exports, $218 billion in imports).

101. *See* SNAPSHOT OF WTO CASES, *supra* note 93.

102. *See* International Trade Canada, Trade Negotiations and Agreement, Dispute Settlement, *at* http://www.dfait-maeci.gc.ca/tna-nac/dispute-en.asp (last visited Oct. 12, 2004) [hereinafter Canada Dispute Settlement].

103. The NAFTA dispute settlement mechanism comprises a sequence of government-to-government consultations, meetings of the NAFTA Free-Trade Commission, establishment of an arbitral panel under Chapter 20, arbitral measures governed by Chapter 11, binding panel reviews of final antidumping and countervailing duty determinations, and an Extraordinary Challenge Committee procedure under Chapter 19. For a summary of the dispute settlement mechanisms, see NAFTA SECRETARIAT, OVERVIEW OF THE DISPUTE SETTLEMENT PROVISIONS OF NAFTA, *at* http://nafta-sec-alena.org/DefaultSite/dispute/index_e.aspx?ArticleID=8 (last modified May 10, 2004). *See* NAFTA, *supra* note 68.

Canada has a single primary trade destination, it would seem likely that trade tensions would be reduced due to familiarity and alternative avenues for dispute resolution (such as lobbying).[104]

When these factors are taken into account, one would expect Canada to have filed fewer cases with the WTO than it has. With the relative information in mind, the WTO figures support the view that both states are similarly litigious and, accordingly, similarly aggressive. Indeed, one could argue that Canada is the more aggressive state because its reputation suggests it would file fewer cases.[105] This strongly supports the view that the reputations of the United States and Canada are not consistent with reality.

2. Rule-Breaking

While complaints filed by the United States and Canada may reflect how aggressively each state protects its interests, being named as a defendant in an international trade dispute may reflect perceptions of rule-breaking.[106] To date, eighty-two complaints have been filed against the United States.[107] Of the thirty-eight concluded so far, the United States has prevailed in four,[108] twelve were resolved without adjudication, and the rest are in process.[109] Canada, in contrast, has only been a defen-

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104. *See generally* GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) (describing the relationship of government and industry lobbyists in instituting, prosecuting and derailing trade cases and tensions with foreign companies and countries).

105. The perception that Canada is less aggressively litigious is based upon my interviews of trade practitioners and policymakers, *see supra* text accompanying note 40.

106. *Cf.* Sengupta, *supra* note 21 (describing the potentially irrecoverable reputational impact upon corporations when they are named as defendants in lawsuits).

107. SNAPSHOT OF WTO CASES, *supra* note 93.

108. *Id.* The United States has won on core issues in the following ten cases: Sections 301-310 of Trade Act of 1974 (EU); "Shrimp–Turtle" law (India, et al.) (compliance proceedings); CVD regulations (Canada); AD–steel plate (India); CVD–German steel (EU); Section 129(c)(1) URAA (Canada); Rules of origin–textiles and apparel products (India); AD–sunset review (Japan); CVD–softwood lumber (final) (Canada); AD–softwood lumber (final) (Canada). *Id.*

109. *Id.*

dant in seven cases.[110] This is significantly less than one would expect given the relative sizes of the economies. Yet, when interstate disputes under NAFTA and CUSFTA are included, the numbers change. The U.S. numbers increase from eighty-two to eighty-seven, while Canada's increase from seven to ten.[111] Respectively, this represents an increase of 6.1% for the United States, and 43% for Canada—showing the significance of NAFTA/CUSFTA dispute settlement for Canada as compared with the United States.[112] The ratio of cases in which each state is a defendant also changes, with the United States appearing as a defendant less often. This expanded ratio compares more favorably with the size of each country's economy and takes into account the less diversified Canadian economy.[113] While these numbers will change over time, they are sufficient to show that U.S. and Canadian behavior does not significantly differ with respect to perceived rule-breaking. Certainly, existing differences between the two countries are not sufficient to explain their disparate reputations.

3. Pivotal Cases

While empirical analysis helps compare U.S. and Canadian trade behaviors, NAFTA and the WTO's relatively short time of operation suggests that reliance upon this analysis alone may be problematic.[114] Perhaps a better measure would be to exam-

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110. *See* Canada Dispute Settlement, *supra* note 102.

111. For details of NAFTA cases, see NAFTA SECRETARIAT, DISPUTE SETTLEMENT, PANEL DECISIONS AND REPORTS, *at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?ArticleID=76 (last visited Oct. 12, 2004).

112. *Id.*

113. A comparison of Canadian economic figures, with its reliance on limited sectors of its economy for a significant share of its export trade, supports the idea that the Canadian economy is relatively less diversified than the U.S. economy. *See, e.g.*, THE ECONOMIST, *supra* note 32, at 120, 222 (e.g., for Canada—of $284.6 billion in exports—energy, forest, agricultural and vehicle exports, at $147.8 billion, take 52% of that total export figure; whereas for the United States it does not appear so easy to isolate specific sectors as constituting a large portion of the export economy).

114. The World Trade Organization was established in 1994, pursuant to the Marrakesh Agreement. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. The establishment of NAFTA dates to 1992. NAFTA, *supra* note 68.

ine the cases themselves, with a focus on the particularly high-profile disputes. The following section shows that both states may have expended resources on cases viewed with significant revulsion by other parts of the world, yet their reputations have not changed as a result.

Interestingly, the United States and Canada have frequently been involved in the same controversial cases.[115] A classic example is the Beef Hormones case,[116] where the United States was, and continues to be, castigated for its involvement.[117] Depictions of the United States forcing hormone-laced beef on a health-conscious European community were widespread.[118] Yet Canada was an equal partner in the dispute, though it escaped

115. The United States was involved in the *Import Prohibition of Certain Shrimp and Shrimp Products* (Shrimp–Turtle case), the *Definitive Safeguard Measures on Imports of Certain Steel Products* (Steel Safeguards case), and many other cases that have received negative responses from around the world. Interestingly, Canada has also been involved in some of these cases. WTO Report of the Appellate Body, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999) [hereinafter Shrimp–Turtle Case]; WTO Report of the Appellate Body, *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Dec. 10, 2003); *see also,* Mike Dolan, *A Generation Takes a Stand*, TIME MAG., Mar. 31, 2003, at 72 (environmentalists from around the world have protested the U.S. position in the Shrimp-Turtle case).

116. WTO Report of the Appellate Body, *European Communities–Measures Affecting Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998) [hereinafter WTO Beef Hormones case]. In the Beef Hormones case, the Appellate Body considered two panel reports, composed of the same three panelists, following a merger of the panel established at the request of the United States in May 1996 and the Panel established in October 1996 at the request of Canada. *Id.* para. 1. The complaint concerned a prohibition by the European Communities of imports of meat and meat products derived from cattle administered natural or synthetic hormones to promote growth. *Id.* para. 2. The Appellate Body concluded that the prohibitions violated the Agreement on the Application of Sanitary and Phytosanitary Measures, as the prohibitions were not based on risk assessment under Article 5.1. of that agreement. *Id.* para. 253.

117. Shelley Emling, *U.S., European Union Toe-to-Toe Over Trade Issues*, ATLANTA J. CONST., Nov. 2, 2003, at D1.

118. Marc Victor, *Precaution or Protectionism? The Precautionary Principle, Genetically Modified Organisms, and Allowing Unfounded Fear to Undermine Free Trade*, 14 TRANSNAT'L LAW. 295, 309–10 (2001).

with its reputation unscathed.[119] Although the United States and Canada prevailed at the WTO, many Europeans remain very upset about the decision and have been slow to comply with the ruling.[120] The decision engendered much passion in Europe,[121] so much so that that the EU has suffered serious trade retaliation as a result.[122] The EU's reaction to the Beef Hormones decision reflects a widely-held belief that Americans' unhealthy lifestyle and an American culture is being foisted on the rest of the world—a culture rampant with large and noxious feedlots and concomitant use of hormones and antibiotics.[123] Yet, despite its involvement in the case, the negative view of the United States has not been extended to Canada.[124]

While Canada has been allied with the United States in many of the WTO's most contentious cases, it has also had its own contentious cases. Indeed, perhaps one of the most notorious cases in the WTO pantheon is the Asbestos case, where Canada was squarely in the line of fire.[125] The Asbestos case, described simply, was a case in which the EU defended against a Canadian challenge to a French import prohibition on asbestos products.[126] While there were valid arguments concerning which

119. WTO Beef Hormones case, *supra* note 116. Canada and the United States brought simultaneous cases on the same issues. *Id.*

120. Indeed, the Europeans recently announced that they would make permanent the ban on products containing at least one of the disputed hormones. *See* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, WTO/NAFTA DISPUTE SETTLEMENT UPDATE 2 (March 9, 2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file316_5697.pdf.

121. George H. Rountree, *Raging Hormones: A Discussion of the World Trade Organization's Decision in the European Union–United States Beef Dispute*, 27 GA. J. INT'L & COMP. L. 607, 609 (1999). Among European misgivings are fears of hormone-impacted baby food. *See* Kristen Mueller, Note, *Hormonal Imbalance: An Analysis of the Hormone-Treated Beef Trade Dispute Between the United States and the European Union*, 1 DRAKE J. AGRIC. L. 97, 102 (1996) (discussing other European concerns about beef from hormone-treated cattle).

122. *See* Daniel Wüger, *The Never-Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone-Treated Beef*, 33 LAW & POL'Y INT'L BUS. 777, 795 (2002).

123. *See* Rountree, *supra* note 121, at 609.

124. *Id*.

125. WTO Asbestos Report, *supra* note 9.

126. The regulation in question was French Decree No. 96-1133 Concerning Asbestos and Products Containing Asbestos (Decree), which entered into force

provisions of the WTO were applicable to the disputed regulation,[127] the case also challenged French attempts to protect themselves from what they considered harmful asbestos products.[128] The Canadians, in contrast, argued that the first WTO panel erred in finding that the asbestos at issue poses a risk to human health.[129]

Despite the fact that Canada approved the appointed experts, Canada challenged their findings that the asbestos was carcinogenic and could not be safely contained.[130] The WTO Appellate body ruled against Canada on this issue, with some stinging commentary from one of the judges.[131] It is hard to find a case less defensible. Yet, once again, international disdain for Canada's position does not appear to have lingered for a suffi-

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1 January 1997. Le Journal Officiel de la République Française [Official Journal of the French Republic] 1996, Décret no 96-1133 du 24 décembre 1996 relatif à l'interdiction de l'amiante, pris en application du code du travail et du code de la consummation [Decree No. 96-1133 of December 24, 1996 relative to the prohibition of asbestos, pursuant to the code of fair labor standards and the consumption act], *available at* http://droit.org/jo/19961226/TAST 9611675D.html (last visited Oct. 13, 2004). Article 1 set forth a general prohibition on asbestos or products containing asbestos fibers. *Id.* Article 2 set limited and temporary exceptions for materials containing chrysotile fiber. *Id.*

127. Canada maintained that the Decree fell within the scope of the Agreement on Technical Barriers to Trade (TBT Agreement), and that the Panel's refusal to consider its allegations under this agreement should be reversed as an error of law. WTO Asbestos Report, *supra* note 9, para. 10–14. Specifically, Canada argued that the Panel incorrectly considered the prohibitions and exceptions in the Decree to be separate measures in determining whether the Decree constituted a "technical regulation" under the TBT Agreement; that it misinterpreted the definition of "technical regulation;" and that it erred in concluding that the TBT Agreement did not apply to a general prohibition like the one in the Decree. *Id.*

128. *Id.* para. 16.

129. *Id*. para 158 (Canada argued that the panel erred "in finding that there is a risk to human health associated with the manipulation of chrysotile-cement [asbestos] products.").

130. *Id.* para. 19.

131. *Id*. para. 152. As stated in the opinon:

> It is difficult for me to imagine what evidence relating to economic competitive relationships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibers, compared with PCG fibers, when inhaled by humans, and thereby compel a characterization of "likeness" of chrysotile asbestos and PCG fibers.

Id.

cient period to influence Canada's reputation in the same way that more defensible American positions have sullied the reputation of the United States.[132]

Though Canada has been involved in significantly fewer cases before the WTO, it is nonetheless easy to show its involvement, either directly or in a supportive role, in some of the most criticized cases among the WTO and other trade regimes.[133] Were one to simply look at the details of international trade cases involving the United States and Canada, it is unlikely that there would be a sufficient basis to support the differences in their trade reputations.

C. Protectionism

Trade reputations are not solely forged battles before dispute resolution bodies. They are also formed with respect to states' internal actions. Within the world trade system, good players are states that employ protectionist measures sparingly and transparently.[134] The United States, however, has the reputa-

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132. Shrimp–Turtle Case, *supra* note 115; Report of the WTO Appellate Body, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (September 9, 1997), 37 I.L.M. 243 (1998). The United States' involvement in the Turtles and Bananas cases was far more defensible, yet it still faced widespread criticism. *See, e.g.*, Dolan, *supra* note 115. Additionally, I surveyed the law review articles available on the Westlaw database for articles comparing the Asbestos case to the Bananas case. This unscientific, yet telling, survey showed that significantly greater attention was provided to the American Bananas case than to the Canadian Asbestos case.

133. Similarly, there are other examples of contentious cases outside the WTO. For example, a particularly egregious case is the NAFTA case under CUSFTA regarding the U.S. lobster fisheries. NAFTA Arbitral Panel Report, *United States Regulations on Lobster*, USA-89-1807-01 (May 25, 1990) *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/FTA_Chapter_18/USA/uc89010e.pdf [hereinafter Lobsters Case]. In the Lobsters Case, Canada tried to have a U.S. conservation regulation on lobster catch sizes thrown out under the Free Trade Agreement. *Id.* (The United States enacted an amendment to the Magnuson-Stevens Fishery Conservation and Management Act to prohibit the sale, transport in or from the United States of whole live lobsters smaller than the minimum possession size in effect under U.S. federal law). The Panel, however, ruled in favor of the United States, finding that the United States conservation measure was not in violation of the obligations of the United States under CUSFTA. *Id.* para. 11.1.1–11.2.

134. *See generally* WTO Agreement, *supra* note 117, pmbl.

tion of aggressively employing its domestic trade remedies in a manner that results in protectionism.[135] Further, it has a reputation for providing subsidies for a range of products in order to protect domestic industries.[136] The United States is, consequently, not considered a good player with respect to protectionist trade policies.

In particular, the United States is criticized for its utilization and administration of safeguard, antidumping, and anti-subsidy (countervailing duty) remedies.[137] Employment of these mechanisms is viewed, rightly or wrongly, as essentially protectionist.[138] In part, as a direct response to the historical perception and criticism of the United States' protectionist practices, the WTO negotiations included specific agreements on anti-dumping, countervailing duties, and safeguards.[139] Indeed, antidumping and countervailing duty actions are almost synonymous with U.S. trade law.[140]

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135. *See, e.g.,* Rebecca Kanter, *United States v. Nippon Paper Industries: Price-Fixing Conspiracy or Trade Remedy?*, 8 UCLA J. INT'L L. & FOREIGN AFF. 165, 178 (2003).

136. *See, e.g.,* Randolph B. Persaud, *Shades of American Hegemony: The Primitive, the Enlightened, and the Benevolent*, 19 CONN. J. INT'L L. & FOREIGN AFF. 165, 178 (2003).

137. *See, e.g.,* Dr. Mario E. Carranza, *Mercosur, the Free Trade Area of the Americas, and the Future of the U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1063 (2004).

138. *See, e.g.*, Kelly Henry, *Is the United States the World's Dumping Ground for Steel? Recent Influxes in Steel Imports in the United States, the Effects, and the Possible Remedies*, 25 HOUS. J. INT'L L. 381, 383–84 (2003); E. Kwaku Andoh, *Countervailing Duties in a Not Quite Perfect World: An Economic Analysis*, 44 STAN. L. REV. 1515, 1516, 1525–27 (1992).

139. *See generally* Christopher F. Corr, *Trade Protection in the New Millennium: the Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. & BUS. 49, 54–55 (1997) (describing the history of antidumping rules and the increasing usage of antidumping measures); Peter D. Ehrenhaft, *Remedies Against Unfair International Trade Practices*, SE06 ALI-ABA 337 (1999) ("The Uruguay Round Agreements Act resulted in approximately 70 changes to United States antidumping and countervailing duty laws."); Paul C. Rosenthal & Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve its Objectives During the Uruguay Round?*, 31 LAW & POL'Y INT'L BUS. 871, 873–74 (2000) (describing the defensive policy objectives of U.S. negotiators during the Uruguay Round).

140. Recent statistics show that the U.S. is responsible for 72% of countervailing duties, whereas Canada is responsible for 6%. J.G. Castel & C.M. Gastle, *Deep Economic Integration Between Canada and the United States,*

Canada's actions in this sphere, however, are not much different than those of the United States. Canada, like the United States, engages in a fair amount of activity that should perturb the international trading community. Canada, like other advanced industrialized states, is a heavy user and innovator of these and other trade remedies.[141] Indeed, Canada had the first antidumping law in 1904, a full sixteen years before the first real U.S antidumping law in 1921.[142] Another particularly problematic form of protectionism, known as the voluntary restraint agreement (VRA), originated in Canada.[143] Just as the world trading community's response to U.S. protectionist mechanisms led to innovative agreements, the VRA was also explicitly prohibited in the WTO.[144] Similarly, it was prohibitive Canadian restrictions on foreign investments that led to the WTO's Agreement on Trade Related Investment Measures (TRIMs).[145]

Examples of such similarity are not confined to history. Canada, like the United States, continues to have protectionist problems. These issues are raised in the generally neutral WTO report on Canada.[146] For example, despite significant reductions in the majority of goods subject to tariffs, Canada still maintains significant tariffs on textiles, boats, footwear, clothing, wine, cider, sugar, vegetables (during their growing sea-

The Emergence of Strategic Innovation Policy and the Need for Trade Law Reform, 7 MINN. J. GLOBAL TRADE 1, 9 n.28 (1998).

141. *See WTO Trade Policy Review*, *supra* note 79, at 41–48. E.g., more than thirty-five countries are subject to Canada's antidumping measures. *Id.* at 44.

142. HART, *supra* note 60, at 182.

143. *Id.* at 193.

144. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 11(1)(b), THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999), 1869 U.N.T.S 275, *available at* http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf.

145. *See* Foreign Investment Review Act, Act of Dec. 12, 1973, Ch. 46, 1973-74 F.C. 619 (Can.), as amended (repealed 1985). This Canadian law led to a GATT panel decision, which in turn lead to the WTO's TRIMS Agreement. *See* Canada Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140, 143–44 (1984). *See also* JACKSON, *supra* note 59, at 1137.

146. *See WTO Trade Policy Review*, *supra* note 79, at 33. *See also,* William Watson, Editorial, *Why Does a Tiger Need Tariffs?*, NAT'L POST, Mar. 19, 2003, at 19 (addressing the WTO Trade Policy Review of Canada from March 14, 2003).

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son), and on cut flowers.[147] Another problematic area concerns the numerous State Trading Enterprises[148] that cover such sectors as alcoholic beverages, dairy products, fish, and wheat.[149]

A specific area of recent concern is the steel industry. The United States received tremendous criticism recently over the protection of its steel industry. The close ties between the U.S. and Canadian steel industries suggested that there was a serious possibility that Canada may have joined in this protectionism.[150] Ottawa has managed, however, to avoid applying the same steel safeguards imposed by President Bush. Indeed, the Canadian International Trade Tribunal determined that tariffs should be imposed, although Ottawa ultimately rejected the recommendation.[151] Nonetheless, Ottawa considered working closely with the United States on joint efforts to deal with this "problem" and in formation of the North American Steel Trade Committee to work out a joint response.[152] Canada's continuing protectionist practices reinforce the similarities between the two states' trade behaviors.

This discussion should not be read as equating Canadian protectionist measures with the United States in all instances. For example, there is no Canadian equivalent to the globally unpopular U.S. section 301 of the Trade Act of 1974.[153] Internationally, section 301 is perhaps the most despised domestic

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147. *See WTO Trade Policy Review*, *supra* note 79, at 33.

148. *See, e.g.,* Michael T. Roberts, *The Unique Role of State Trading Enterprises in World Agriculture Trade: Sifting Through Rhetoric*, 6 DRAKE J. AGRIC. L. 287, 290 (2001) ("Loosely defined, STEs are enterprises authorized to engage in trade and owned, sanctioned, or otherwise supported by the government. Special or exclusive privileges granted by their governments allow STEs to influence through their purchases or sales the level or direction of trade in their commodities.").

149. *WTO Trade Policy Review*, *supra* note 79, at 75; *see also* Roberts, *supra* note 148, at 294.

150. Indeed, steel is a primary focus of recent Canadian domestic trade measures. *See*, *e.g.*, *WTO Trade Policy Review*, *supra* note 79, at 44–45.

151. David Pannon, *Steelworkers Union Wants Provinces to Push Ottawa to Penalize Cheap Imports*, CAN. PRESS, October 6, 2003, *available at* 2003 WL 65007279.

152. *Id.*

153. Trade Act § 310 (The Act allows the President to take action against any country which has acted against the trade interests of the United States).

trade law.[154] Indeed, the United States employment of section 301 provided the stimulus at the Uruguay Round for the creation of binding dispute settlement procedures to wean the United States from employment of its unilateral Section 301 actions.[155] Alternatively, Canada has historically used globally unpopular protective devices, such as cultural protections, not available in the United States.[156] At times these protective devices have fallen afoul of Canadian international trade commitments.[157] A salient example of cultural protectionism can be found in the WTO Magazines case.[158] In that case, Canada attempted to protect Canadian magazines by restricting foreign advertising in Canadian versions of foreign magazines.[159] The WTO found Canadian measures to be a violation of Canada's national treatment obligations under the WTO.[160]

In addition to trade remedies, protections may also take the form of assistance to industry or other sectors of the economy. Indeed, large subsidies provided to agriculture have caused the United States' reputation to suffer tremendously in recent years.[161] Despite talk by the U.S. government of its commitment to trade liberalization and reducing barriers around the world, the farm subsidies in the Farm Security and Rural Investment

154. Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn From Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 575 n. 37 (2002).

155. *See*, *e.g.*, Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 13–14 (1999).

156. *Id. See generally* Ronald G. Atkey, *Canadian Cultural Industries Exemption From NAFTA – Its Parameters*, 23 CAN.-U.S. L.J. 177, 184 (1997) (providing examples of other cultural industries and protection issues in Canada).

157. *See* Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203, 210–21 (1998).

158. Report of the WTO Appellate Body, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, at 449 (June 30, 1997) (WTO Doc # 97-2653).

159. *Id.*

160. *Id*. at 479–80.

161. *See, e.g.*, *World Digest: Mexican and U.S. Lawmakers Talk Trade*, ST. LOUIS POST-DISPATCH, May 16, 2004, at A15; *What U.S. Can Do Before 2005*, Jan. 18, 2004, S. FLA. SUN-SENTINEL, at 4H.

Act of 2002 (2002 Farm Act)[162] shocked the global trading community.[163] The 2002 Farm Act reversed the move towards liberalization of U.S. agriculture that started in the 1996 farm bill.[164] The 2002 Farm Act authorized the expenditure of tens of billions of dollars in subsidies over a ten-year period.[165] The international trading community was stunned and dismayed by this change of direction.[166] The subsidies continue to impinge upon the United States' reputation as a champion of free trade.[167]

Canada has no shortage of domestic subsidies either, including significant protections for its vast agricultural sector.[168] Historically, while Canada has pushed agricultural trade reform, it was politically unable to dispense with protections for some of its agricultural sectors.[169] For example, Canada's dairy and poultry sectors are protected from international competition.[170] These sectors are regulated under a "supply management" framework.[171] The dairy sector has received over a third of the government's subsidy monies and has its production strictly controlled through the Canadian Milk Supply Management Committee.[172] Other agricultural recipients of economic support include those sectors taking part in the Spring Credit Advance Program, which allows them to receive interest-free, govern-

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162. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

163. Clete D. Johnson, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 GA. J. INT'L & COMP. L. 437, 442 (2004).

164. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, AGRICULTURAL POLICIES IN OECD COUNTRIES 205 (2003), *available at* http://www1.oecd.org/publications/e-book/5103081E.PDF (last visited Oct. 13, 2004) [hereinafter OECD AGRICULTURAL POLICIES].

165. *See, e.g.*, Tom Carter, *U.S. Farm Policy Sows Ire in Africa*, WASH. TIMES, July 3, 2003, at A16.

166. Johnson, *supra* note 163, at 442.

167. *Id.*

168. *See WTO Trade Policy Review*, *supra* note 79, at 94–105.

169. *See* HART, *supra* note 60, at 446. Canada accomplished this by eliminating subsidies, rationalizing protectionist measures and generally moving the sector to be more in tune with the advances in other economic sectors. *Id*.

170. *Id*. *See WTO Trade Policy Review*, *supra* note 79, at ix, para. 17.

171. Dale E. McNiel, *The NAFTA Panel Decision on Canadian Tariff–Rate Quotas: Imagining A Tariffying Bargain*, 22 YALE J. INT'L L. 345, 349 (1997).

172. OECD AGRICULTURAL POLICIES, *supra* note 164, at 121.

ment-guaranteed loans to assist in planting.[173] Additional subsidies are supplied through the Crop Insurance Program, which has made record payments in recent years because of ongoing drought conditions.[174] Admittedly, Canada has recently embarked on a New Agricultural Policy Framework.[175] However, it remains unclear what impact this Framework will have on Canadian agricultural subsidies and protections.

As evidence of the impact these protections should have on Canada's reputation, Canada's agricultural protections have repeatedly been the subject of dispute settlement proceedings at the WTO and NAFTA.[176] For example, the Canadian dairy and poultry supply management system was challenged in the first state-to-state settlement proceedings before the NAFTA.[177] Thus, Canada, like the United States, has gone to great lengths to protect its agricultural sector.

To the extent agricultural protections influence world reputation, the similarity between Canadian and U.S. agricultural protections suggests that the reputations of the two should be comparable. Furthermore, agriculture is merely one example of the similarities between the two states in engaging in protectionist measures to safeguard domestic industries and interests.[178] While there are differences in their protectionist styles,

173. *Id.*

174. *Id*. at 122.

175. *Id.*

176. *See*, *e.g.*, Report of the WTO Appellate Body, *Canada–Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW2 (Dec. 20, 2002), WT/DS103/AB/R/Corr.1 (Oct. 18, 1999), WT/DS103/AB/R (Oct. 13, 1999), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm; FTA Ch. 18 Arbitral Panel Report, *The Interpretation of and Canada's Compliance With Article 701.3 With Respect to Durum Wheat Sales*, CDA-92-1807-01 (Feb. 8, 1993) [CUSFTA Case], *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/FTA_Chapter_18/Canada/cc92010e.pdf.

177. NAFTA Ch. 20 Arbitral Panel Report, *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01 (Dec. 2, 1996), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute%5Cenglish%5CNAFTA_Chapter_20%5CCanada%5Ccb95010e.pdf.

178. Compare the Canadian attempts to protect its aviation sector with that of the United States. *Compare* Report of the WTO Appellate Body, *Canada–Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999) (Doc # 99-3221), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/70ABR.DOC, *and* Helena D. Sullivan, *Regional Jet Trade Wars: Politics and Compliance in WTO Dispute Resolution,* 12 MINN. J. GLOBAL

these differences do not justify the significant differences in reputation.

D. Additional Evidence of Reputational Differences Between the United States and Canada

In addition to the previously mentioned trade irritants practiced by the United States, there are a host of peripheral issues that contribute to the U.S. position in the world trading system. Some of these issues will be discussed below; however, it should be noted that there are too many to be covered within the scope of this Article. Like the previous section, this section will compare U.S. actions and equivalent or comparable Canadian actions.

One of the most contentious international trade issues is the use of WTO commitments to open markets to new and troubling technological and scientific developments.[179] Examples include the use of beef hormones, genetically–modified food, and widespread use of antibiotics in livestock.[180] The United States is heavily criticized for pushing the technological envelope despite concerns about the harmful effects of these new technologies.[181] Yet, in almost all of these areas the United States is not alone. Canada also pushes the envelope with respect to these same areas—no doubt a reflection of their similar economies.[182]

Another divisive area in international trade is the inclusion of allegedly "non-trade"-related issues such as environmental, labor, and human rights into trade agreements.[183] The United States has periodically pushed for the inclusion of environ-

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TRADE 71 (2003), *with* Daniel I. Fisher, *"Super Jumbo" Problem: Boeing, Airbus, and the Battle for the Geopolitical Future*, 35 VAND. J. TRANSNAT'L L. 865 (2002), *and European Commission Offers to Review Aircraft Subsidies Pact*, INSIDE U.S. TRADE, Aug. 20, 2004, *at* http://www.insidetrade.com/secure/wto_iust.asp.

179. Daniel Kalderimis, *Problems of WTO Harmonization and the Virtues of Shields Over Swords,* 13 MINN. J. GLOBAL TRADE 305, 323–26 (2004).

180. *Id*.

181. Joe Garofali, *Genetically Altered Food at Heart of Controversy / Activists Protest Sacramento Meeting of Ag Ministers*, S.F. CHRON., June 23, 2003, at A1.

182. *See, e.g.*, *WTO Trade Policy Review*, *supra* note 79, at 17.

183. *See generally* Steve Charnovitz, *Linking Topics in Treaties,* 19 U. PA. J. INT'L ECON. L. 329 (1998) (describing the trend of U.S. negotiators to link trade agreements and labor and environmental side agreements).

mental safeguards and labor rights in trade agreements.[184] Their inclusion in NAFTA was at the United States's instigation.[185] These "non-trade"-related commitments are highly unpopular in much of the world.[186] They are often considered unrelated to traditional notions of international trade and, instead, are thought of as attempts by interest groups in the developed world, such as organized labor, to provide hidden protectionist benefits.[187] It is argued that enforcement of labor, environmental, and human rights provisions would erode the comparative advantage of developing states where, for example, labor inputs are cheap and environmental regulations are either unenforced or nonexistent.[188] Perceptions of states' human rights enforcement, conversely, are often viewed as easily manipulated by outside states for their own political goals. Furthermore, the content and coverage of human rights provisions can reflect the requesting party's cultural biases.[189] Due in part to concerns, for example, that environmental issues will come back to haunt it, Canada has not been as assertive as the United States on these issues. Still, Canada has continued to argue for the inclusion of

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184. *See, e.g.,* Mohammad Nsour, *Fundamental Facets of the United States-Jordan Free Trade Agreement: E-Commerce, Dispute Resolution, and Beyond,* 27 FORDHAM INT'L L.J. 742, 779-80 (2004).

185. *See* The North American Agreement on Environmental Cooperation (NAAEC), Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480; North American Agreement on Labor Cooperation (NAALC), Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499. *See also* Sarah Lowe, *The First American Case Under the North American Agreement for Labor Cooperation*, 51 U. MIAMI L. REV. 481, 487–88 (1997); Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 35 ENVTL. L. 31, 35–36 (1995).

186. Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary Observations,* 33 GEO. WASH. INT'L L. REV. 537, 551 (2001).

187. Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization,* 25 U. PA. J. INT'L ECON. L. 725, 752 (2004).

188. Arthur E. Appleton, *Telecommunications Trade: Reach Out and Touch Someone?*, 19 U. PA. J. INT'L ECON. L. 209, 215 (1998).

189. *See generally* Matthew A. Ritter, *"Human Rights": Would You Recognize One If You Saw One? A Philosophical Hearing of International Rights Talk*, 27 CAL. W. INT'L L.J. 265 (1997) (describing the internationalization of human rights talk and the difficulties inherent in these talks due to variations in language, culture and philosophy).

core labor standards and multilateral environmental agreements in the WTO.[190]

A related area of great international concern is the use of trade to further national security and foreign policies.[191] Of particular importance is use by the United States of unilateral export controls, sanctions, and embargoes to further its own foreign policy and national security goals.[192] Controls, such as the embargo on Cuba,[193] raise considerable ire around the world.[194] This is particularly true when controls are imposed extraterritorially on non-U.S. persons.[195] Sometimes, states even go so far as to enact laws specifically prohibiting their citizens from complying with U.S. laws.[196] These U.S. actions have done much to tarnish its reputation.[197]

190. *See* Center for International Developments at Harvard, Global Trade Negotiations Homepage: Canada Summary, *at* http://www.cid.harvard.edu/cidtrade/gov/canadagov.html (last visited Oct. 13, 2004); *see also WTO Trade Policy Review*, *supra* note 79, at 20.

191. *See, e.g.,* Andreas F. Lowenfeld, *Trade Controls for Political Ends: Four Perspectives,* 4 CHI. J. INT'L L. 355, 362 (2003) (opposition to U.S. Siberian pipeline policy); John W. Boscariol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 LAW & POL'Y INT'L BUS. 439 (1999) (U.S. trade policy with respect to Cuba).

192. *See*, *e.g.*, Iranian Assets Control Regulations, 31 C.F.R. Part 535.

193. Cuban Democracy Act of 1992, 22 U.S.C. § 6000-6010 (Supp. V. 1993) (prohibiting any person, corporation in the United States or any foreign subsidiary of a U.S. corporation, from trading with Cuba, except under specified circumstances).

194. *See generally* Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 25 U. PA. J. INT'L ECON. L. 455 (2004) (describing challenges to U.S. extraterritorial sanctions under international trade agreements); *see* George Kleinfeld & Deborah Wengel, *Foreign Investment*, 31 INT'L LAW. 403, 411 (1997).

195. *See, e.g.,* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) (imposing sanctions on any person making large investments of a type that would aid Iran or Libya in developing petroleum resources or weapons systems).

196. *See, e.g.,* "Ley de Proteccion al Comercio y la Inversion de Normas Extranjeras que Contravengan el Derecho Internacional," D.O., 23 de octubre de 1996 (Mex.), *translated in* Mexico: Act to Protect Trade and Investment From Foreign Norms That Contravene International Law, 36 I.L.M. 133 (1997) (Mexico's blocking statute against the Helms-Burton Act).

197. Natalie Maniaci, *The Helms-Burton Act: Is the U.S. Shooting Itself in the Foot?*, 35 SAN DIEGO L. REV. 897, 909 (1998).

Canada also has foreign policy and national security sanction laws. Yet, the bulk of Canada's sanctions are multilateral, pursuant to United Nations Security Council resolutions.[198] Nonetheless, Canada reserves the right to enact unilateral or multilateral sanctions that are not Security Council-authorized.[199] Still, this is a far cry from the sanctions and embargoes pursued by the United States. Trade behaviors that further national security and foreign policy goals provide an example of differences between the two states, though one which may simply reflect U.S. involvement in geopolitics to an extent not shared by Canada. Thus, these few examples generally show that even in peripheral areas of international trade there are insufficient differences to justify the two states' dissimilar reputations.

IV. REPUTATIONAL FALLACY AND INTERNATIONAL LAW

As discussed earlier, reputation is viewed as an important mechanism in the smooth operation of the international legal system.[200] Yet, as the previous section demonstrates, reputation may not reflect the reality of state behavior. The disparity between a state's reputation and its behavior leads to a few questions: (1) what is the source of this reputational disparity, (2) what is or should be the real role of reputation in international law, and (3) what are the consequences if state reputation is not reasonably related to state actions? In exploring possible answers to these questions, the following section will delve into potential factors outside the trade arena that may influence reputation. The discussion will then turn to the benefits for individual states and the international legal system when reputation is scrutinized and reputational fallacies are exposed.

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198. *See, e.g.,* United Nations Act, R.S.C., ch. U-2 (1985) (Can.); Special Economic Measures Act, S.C., ch. 17 (1992) (Can.); Export and Import Permits Act, R.S.C., ch. E-19 (1985) (Can.). *See also* International Trade Canada, Canadian Economic Sanctions, *at* http://www.dfait-maeci.gc.ca/trade/sanctions-en.asp (last visited Oct. 13, 2004).

199. *See, e.g.,* The Special Economic Measures Act, R.S.C., ch. 17 § 4(1) (1992) (Can.) (allowing the Governor in Council to order seizure or freeze any property held by foreign states of foreign nationals when s/he believes there has been a grave breach of international peace and security).

200. *See* Guzman, *supra* note 7 and accompanying text.

A. Non-Trade Action Sources of International Legal Reputations

The previous section of this Article showed that similarities in the behavior of Canada and the United States in international trade produced disparate international reputations for the two states. While there may be a whole host of reasons for this phenomenon, two possible causes stand out: reputational spill-over and differing levels of interaction among states. In other words, the general reputation of the United States or Canada in international affairs spills over into the trade arena and/or other states have radically different levels of interaction *vis-à-vis* the United States and Canada, with a concomitantly different impact upon each state's reputation.

States' reputations are not based solely on a state's activities within one specific field. Rather, their reputations reflect the whole gamut of their behavior across widely-dispersed fields. Reputation earned in one or more fields may "spill-over" into another field. Thus, isolating cause and effect in the creation of state reputation within one remote field can be difficult, if not impossible. While it is true that reputation can be established narrowly within a field by looking at a single action, when examining the field as a whole it is harder to isolate the cause of that reputation.[201] This is especially true for a state such as the United States, which is very active in many parts of the international environment and tends to have a profound impact on the world in many different arenas.

Unfortunately, and for reasons beyond the scope of this Article, the generalized world impression of the United States is strongly negative.[202] For example, the United States is the global symbol of negative market forces such as capitalism, globalization, and the spread of materialism—despite the fact that other states are equally involved in these movements.[203]

201. A narrow area for establishing reputation could be paying United Nations membership dues; however, expanding the analysis to a state's general relationship with the United Nations or other multilateral institutions makes determination of the exact factors influencing reputation extremely difficult. *But see* Downs & Jones, *supra* note 7, at 109–10 (claiming that states have multiple reputations in varying international arenas).

202. *See, e.g.,* Christopher Marquis, *Public Relations Chief Admits U.S. Has a Big Image Problem*, INT'L HERALD TRIB., Feb. 6, 2004, at 5.

203. *See* Elemer Hankiss, *Symbols of Destruction*, *in* SOCIAL SCIENCE RESEARCH COUNCIL: ESSAYS ON 9/11 (2001) (describing the U.S. position as the

With the widespread unpopularity of these movements at various times, anti-Americanism has become commonplace.[204] Indeed, there is now a visceral negative reaction by many around the world to anything American.[205] Anti-Americanism has itself become a part of the world's culture.[206] True, there are periods where negative responses to America are momentarily replaced with a more positive view, such as after the World Trade Center attack,[207] or in Eastern Europe for the brief period following the fall of Communism and the disintegration of the Soviet Union.[208] However, the default view is that America and its international activities reflect the wrong side of an issue.[209] Given the depth of feeling arrayed against the United States, it would not be surprising if some negative feelings were directed at the activities of the United States in international trade, regardless of actual U.S. trade activities.

Consequently, the world's negative view of U.S. trade activities, and its correspondingly more positive view of Canada's, is predictable in light of the "spill-over" effect. The "spill-over" effect appears to exist despite the fact that specialized state officials may come to know the reputation of a state in a specific field. This may occur because a state, while having different compliance rates within specific fields, will still have an overarching reputation driven by national strategies, domestic politics, constitutional concerns, traditional relationships, and so

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symbolic center of the world—albeit before 9/11), *at* http://www.ssrc.org/sept11/essays/hankiss.htm.

204. *See, e.g.*, Jonah Goldberg, *Europe on the Whine*, NAT'L REV. ONLINE, June 13, 2001, *at* http://www.nationalreview.com/goldberg/goldberg061301.shtml; *World Edition Quiz: How widespread is Anti-Americanism?*, BBC NEWS, Jan. 7, 2003, *at* http://news.bbc.co.uk/1/hi/uk/2635419.stm.

205. Goldberg, *supra* note 204; *World Edition Quiz*, *supra* note 204.

206. *See*, *e.g.*, Opinions, *What Did We Do Now? Our Stand: America Again Object of Hate, Obsession*, ARIZ. REPUBLIC, Feb. 29, 2004, at V4.

207. *See, e.g.,* Richard Bernstein, *Two Years Later: World Opinion; Foreign Views of U.S. Darken After Sept 11*, N.Y. TIMES, Sept. 11, 2003, at A1 (noting that while "world sympathy and support" for the United States was widespread immediately after September 11, such support has since declined).

208. *See, e.g.,* Gareth Harding, *EU Expansion Good for the U.S.*, UNITED PRESS INT'L, Dec. 24, 2002, at A1 (noting that many Central and Eastern Europeans were pro-American after the fall of communism, but that the "pro-American euphoria of the early '90s has worn off").

209. This is not to say such views are right or wrong, simply that they exist. *See, e.g.*, *supra* text accompanying note 40.

on.[210] The overarching reputation may spill over into the minds of practitioners and government officials. These individuals, normally focused on narrow parts of specific fields, may then be affected by the overarching reputation and believe that the overarching reputation represents a state better than their individual perceptions based on a limited level of interaction.[211]

Another possible explanation for the reputational difference between the United States and Canada is the radically different levels of interaction they have with other states. A different relative presence on the world stage is likely to produce different reputations. It is clear that most states interact with Canada far less frequently than with the United States. As noted earlier, Canada's economy is less diversified and smaller than the United States'.[212] Canada also trades almost exclusively with the United States.[213] Therefore, only a small portion of Canada's comparatively smaller volume of trade impacts other states. As a result, Canadian policies, trade, and governmental actions have less opportunity to upset other states. In contrast, the much larger U.S. economy trades a relatively small portion of its economy, roughly 22%, with Canada.[214] This leaves a considerable amount of U.S. trade for the rest of the world, thus providing significantly greater opportunity for conflict.

An economic data analysis supports the conclusion that increased contacts with other states may influence reputation. In 2000, Canadian exports and imports from non-U.S. economies accounted for just under $107 billion.[215] The United States, in contrast, exported and imported $1,589 billion from non-

210. *But see*, Downs & Jones, *supra* note 7, at 101–04 (arguing that reputation will be field-specific, and arguing against the "unitary" reputation theorists).

211. Perhaps more troubling than the infection of trade specialists with the overarching reputation, despite their perceptions to the contrary, is the corresponding inference that the generation of the overarching reputation may occur despite the respective trade activities of the United States and Canada. In other words, there is very little that could be done by each of these states within international trade to alter their reputations.

212. *See* THE ECONOMIST, *supra* note 32, at 121–22, 222–23. *See infra*, Part III.B.1.

213. *See* THE ECONOMIST, *supra* note 32, at 122 (85% of Canada's trade is with the United States).

214. *Id*. at 223.

215. *Id*. at 121.

Canadian economies.[216] In other words, the United States has roughly fifteen times as much trade interaction with other states as Canada does, and, hence, roughly fifteen times as much opportunity to create a reputation with those states. It is therefore reasonably predictable that states will think more about their impression of the United States, whereas they will have little or no experience with Canada upon which to make a reputational determination. Furthermore, if one does not have experience with another state, it is difficult to form a negative view of that state. In contrast, interacting with the United States is bound to cause both negative and positive experiences—though the negative tends to be focused upon by individuals and the media.[217]

As with reputational spill-over, interaction between states is, in significant part, out of the hands of the states themselves. Neither the United States nor Canada is able to easily change its level of interaction with other states. Certainly, U.S. trade policy-makers will not be able to single-handedly change the global reputation of the United States that spills over into the trade field. This impotence is a significant issue for the utility of reputation in international law.

B. Reputational Fallacy: Problems and Solutions

The impact of state reputation can be significant, hence, reputation needs to be accurate and reflect the real behavior of states. Reputations will often be out of the control of the states themselves, therefore an international effort to correct or compensate for reputational fallacies is vital to the health of the international legal system.[218] Accordingly, states' reputations must be thoroughly examined. Discovery of inaccurate reputation must be exposed. Such exposure will produce tangible benefits for the individual states themselves and for the international law system as a whole.[219]

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216. *Id*. at 223.

217. *See e.g.*, Beverly Orndorff, *Automatic Viligance System: Thoughts Tend to the Negative*, RICH. TIMES–DISPATCH, Oct. 18, 1992, at A13; Maksim I. Shapir, *The Aesthetic Experience of the Twentieth Century: The Avant-Garde and Postmodernism*, 2 PHILILOGICA 137, 140 (1995), *available at* http://www.rvb.ru/philologica/02eng/02eng_postmodernism.htm.

218. *See infra* Part I, IV.B.2.

219. *See infra* Part IV.B.1.–B.2.

1. Exposure of the Fallacy and the Individual States

Correcting a reputational falsehood can have immediate impact upon states that act similarly but have different reputations, such as the United States and Canada. Exposure of the falsehood may, as an initial matter, serve to publicize the problem and therefore bring it to the attention of trade specialists, some of whom will hopefully be instrumental in the development of the world trading regime. Specialists may also find discussion of reputational fallacies helpful in understanding attitudes toward states during multilateral proceedings. Discussion of reputational fallacies may also serve broader goals than simply informing experienced negotiators. It may also provide specific benefits to the individual states that have lived under a false reputation—states that often believed the reputation to be accurate, even as to themselves. Thus, for example, exposure of the reputational fallacies associated with the United States and Canada may bring specific therapeutic and instrumental benefits to each country.

Discussion of reputational fallacies may prove to be of therapeutic benefit to Americans. Many Americans traveling overseas are embarrassed by perceptions of U.S. behavior—perceptions often shared by Americans themselves.[220] This perception is evinced by Americans who masquerade as Canadians while traveling in Europe by sporting a Canadian flag on their backpacks![221] While such a scenario is not a serious issue, it reflects the worldview of Americans when placed in international settings that may include more serious venues than the banter in a youth hostel lounge, including venues such as multilateral

220. *See, e.g.*, Allan M. Winkler, *World Is Wondering What We're Doing*, CINCINNATI POST, June 11, 2004, at A11; John Hind, *What's the Word?: Pretendanians: Americans Posing as Canadians*, OBSERVER MAG., Mar. 17, 2003, at 12 ("the trend is toward American travelers declaring themselves Canadian").

221. *See, e.g.*, Alice Thomas, *Water Bottles A Sure Sign of Yanks Abroad*, COLUMBUS DISPATCH, Aug. 12, 2004, at B8 ("feeling like moving targets, Americans abroad have adopted their own kind of camouflage…[some] have been known to attach Canadian flags to their backpacks"); Nicholas Stein, *Newsmen and Con Men: That Trustworthy Canadian Accent Works Very Well With American TV Audiences. But Trustworthiness Has an Evil Twin…*, FORTUNE, Feb. 23, 2004, at 56 ("when American teenagers travel abroad, many affix a Canadian flag to their backpacks — the maple leaf often gets a warmer reception than the Stars and Stripes.").

negotiations and other international law activities vital for the interests of the United States. As the comparative analysis of U.S. and Canadian reputation suggests, the United States is, in many ways, just another state, albeit one with greater presence and muscle. Accordingly, at least with respect to international trade, there is no reason for an American to hide behind a Canadian flag.[222] Therapeutically, it would do Americans good to know that the United States is just another state.

Canada could also benefit therapeutically from the discussion of reputational fallacies. Canada's national self-image, Anglo-Canada's at least, at times has been defined in terms of being unlike the United States.[223] Even if this is true only in small measure, understanding reputational fallacies associated with Canada and the United States may help purge this element of the Canadian national character. Perhaps the realization that Canada and the United States are similar in their external relations will free Canada from comparing itself with the United States when considering its own identity. Canada is sufficiently unique that it need not compare itself to the United States in order to fully realize its own identity. Canada's real identity does not lie within the fallacies propagated on the foreign stage, but, rather, on its own unique history and culture.

In addition to providing therapeutic benefits to both Canada and the United States, exposing their reputational fallacies should also produce tangible bilateral and multilateral benefits in the world trading system. Purging their reputational fallacies should impact the United States–Canada relationship, placing it on a more accurate footing. Increased understanding of the actual attributes of each nation would contribute to the

222. Ironically, in matters of trade law, if not in other areas as well, the masquerade is likely to be successful given the remarkable level of similarity between the two states.

223. *See, e.g.,* John Sullivan, *The Lessons of Madrid: Canadians Are in Mass Denial About Terrorism*, WINNIPEG FREE PRESS, March 21, 2004, at B6 (suggesting humorously, but nevertheless exposing something of Canadian's national self-image, that "[t]he United States' contributions to world culture are bourbon and the 12-bar blues; ours is anti-Americanism."). Atkey, *supra* note 156, at 179. This is not to suggest that Canadians are averse to engaging in scathing self criticism, see, e.g., Murray Dobbin, *Canada Is a World-Class Trade Bully*, NAT'L POST, Nov. 12, 2001, *available at* 2001 WL 29559593. Though, given their world reputation, they may be the only real critics of their own policies.

development of this important bilateral relationship, as well as provide a better basis for joint involvement at the multilateral stage.

A truer understanding of each state's behaviors and actions may serve to "normalize" the relationship between the United States and Canada. Canadians should benefit from a more balanced view of U.S. trade policy when they realize the substantial similarity of the two states in this field. Similarly, showing the United States that Canada has similar trade behaviors and is not a characterless "goody two-shoes" should help the United States appreciate Canada for its strength and independence on the world stage. Hopefully, this will encourage the United States not to take for granted its special relationship with Canada. Given the substantial integration of the two states economically, socially, and geographically, such normalization is long overdue.[224]

The multilateral trading system will also benefit from debunking U.S. and Canadian reputational fallacies. Canada will profit by being regarded in a truer light during negotiations. The United States will benefit from international recognition that it is not so different from the more favorably-viewed Canada. Clarification that Canadian behavior is substantially similar to that of the United States should result in a realization by other international actors that the United States is just like everybody else—though spotlighted more often than other nations—and, hence, should receive equal treatment regarding its trade actions. Increased honesty in assessment of states should allow increasingly transparent and honest negotiations, thus, allowing states and their negotiators to more accurately respond to specific proposals, rather than the reputation of the state advancing the proposal. This should serve to place Canada, the United States, and other states on a more level footing during negotiations and international interactions.

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224. *See, e.g.,* NAFTA, *supra* note 68 (a trade agreement that affects both the U.S. and Canadian economies). Remember the recent electrical blackouts throughout the Northeast of the continent were transnational. *See* CNN.com, *Power Returns to Most Areas Hit by Blackout*, Aug. 15, 2003 (the blackout affected areas from Michigan to New York in the United States, and as far north as Toronto, Canada), *available at* http://www.cnn.com/2003/US/08/15/power.outage/.

2. Exposure of the Fallacy and the International Legal System

In addition to helping states directly impacted by an inaccurate reputation, exposure of reputational fallacies will also positively impact the international legal system. As an initial matter, employment of inaccurate reputation disrupts the utility of reputation as an enforcement mechanism.[225] After all, it is difficult to shame a perceived rule-breaking state into compliance when that state's reputation of being a rule-breaker is inaccurate. Furthermore, it is questionable what a state can do to change its behavior, and hence its reputation, if it is already in compliance with relevant areas of international law. Additionally, as was shown in the trade context, a state may have little ability to change its reputation in a specific field. Thus, while the United States may make behavioral changes and modify some rules out of shame or fear of sullying its reputation, its reputation is unlikely to change.[226] This scenario exemplifies why it is crucial to ensure that reputation be accurate.

The consequences of these scenarios—that a state is the victim of inaccurate reputation and that other states can behave the same and be viewed more positively—may undermine respect for the international system and/or encourage unlawful activity by states. After all, a state may believe that compliance with international law is not beneficial if it will continue to be regarded as disreputable when compared with other similarly situated states, regardless of its actual behavior. Similarly, the legitimacy of the international legal system becomes questionable when states that behave similarly are not subject to the same sanctions—in this case, the sanction of a bad reputation and all the accompanying negative consequences.

In addition, inefficiencies will be introduced into the system. For example, if the world's view of America's employment of domestic trade mechanisms, such as antidumping actions, was inaccurate, then antidumping provisions of the WTO or the ongoing negotiations on dumping actions during the present negotiating round may consequently be unnecessary, inefficient, or out of touch with reality. This may not be the case, however, it

225. Downs & Jones, *supra* note 7, at 99–101.

226. Even if some modification of U.S. reputation resulted from behavioral changes, the United States is still likely to suffer a relatively worse reputation than states which exhibit substantially similar behavior.

provides an effective example of how reputational fallacies can impact the larger international legal system. Accordingly, exposure of reputational fallacies and recognition of the potential distortions and consequences for the international legal system are necessary to protect the system from illegitimacy, inefficiencies, and unjust results for specific states.

V. CONCLUSION

Reputation can play a useful role in international law. Among other things, it can inform other states of a state's behavioral propensities. Reputation may also serve to encourage state compliance with international law, as states attempt to shake off the effects of a negative reputation. However, as shown in the context of the international trade reputations of the United States and Canada, state reputations share much in common with individual reputation and village gossip—they can represent unsupported assumptions and reflect views derived from unrelated fields and activities. While it would not be proper to extrapolate the findings in this Article to states' reputations in all fields, nonetheless it concludes that concern regarding reputations and their accuracy is merited. Reputational fallacy is especially problematic considering the impact that reputation can have on interstate interactions — from international dispute adjudication to negotiations. Additionally, fallacies can have a negative impact within a state and contribute to an invalid self-image. They may also contribute to strained relations between neighboring states, as with the United States and Canada. Accordingly, it is important to establish the accuracy of reputations, or work to make them more accurate through increased transparency and information dissemination.

Understanding that reputational inaccuracies are commonplace is the first step in exposing reputational fallacies. Due to the normative foundations of reputation determinations, it may not be possible, or desirable, to establish whether a state is a good or bad actor. Therefore, at a minimum, accurate state reputations can and should be established comparatively. Thus, examination of different states' actions in international law fields will elucidate whether states should have different

reputations based on different behaviors.[227] Purging reputational fallacies from international law is entirely possible. Removal of reputational fallacies in the international system would mean that states with similar behaviors would have comparable reputations in each field. Additionally, field-specific reputation would not be impacted by reputations from other unrelated fields or by a state's level of interaction with other states. Achieving this goal will go a long way towards minimizing the negative impacts of fallacious reputations on states and the international legal system.

227. Indeed, such empirical research into reputation has occurred in the field of transnational corruption and bribery, where reputation is established through surveys of those directly involved in the transactions at issue. *See* TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTION INDEX 2003, *at* http://www.transparency.org/cpi/2003/cpi2003.en.html. Published annually, Transparency International's research is invariably surprising in its ability to show that the incidence of bribery among countries is not always what one would expect. *Id*. A perfect example is the relative position of the United States and Chile (positions: 18th and 20th least corrupt, respectively), or Italy and Kuwait (tied at 35th least corrupt) or that Hong Kong is considered less corrupt than the United States. *Id.*