*Department of Foreign Affairs and International Trade*

# *Statement*

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**NOTES FOR AN ADDRESS BY**

**THE HONOURABLE RAYMOND CHAN,**

**SECRETARY OF STATE (ASIA-PACIFIC),**

**TO THE NEW YORK STATE BAR ASSOCIATION**

**INTERNATIONAL LAW AND PRACTICE SECTION, FALL MEETING**

**"LEGAL ISSUES OF ASIA-PACIFIC TRADE"**

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Government of Canada   Gouvernement du Canada

Canada

I would like to thank you for inviting me to address your Association on the occasion of your visit to Vancouver. It is a particular pleasure for me to welcome you here. I'm sure that you will agree with me that the Vancouver area has some of North America's most beautiful scenery, along with a rich and diverse cultural fabric.

The topic that I have been asked to speak on is "Legal Issues of Asia-Pacific Trade." The focus on Asia-Pacific should surprise no one, given the current economic boom in that region, which shows no sign of abating. As countries, companies and individuals increase their ties across the Pacific, there will inevitably be an increase in commercial disputes. How are such conflicts to be resolved, given the clear differences between Western and Asian cultures towards the resolution of disputes? What role will international trade rules, and lawyers, play in the process? I would propose to consider this topic with you this afternoon. More specifically, I will:

- consider the differences in approach hitherto taken by Western and Asian countries towards the resolution of trade disputes at the government-to-government level in the General Agreement on Tariffs and Trade [GATT];

- consider how the establishment of new rules under the World Trade Organization Agreement, or WTO, may help to integrate Asian countries more fully into the international trading system;

- discuss the changes taking place in the rules applicable to the resolution of trade disputes;

- describe a recent initiative taken within the Asia-Pacific Economic Co-operation forum, or APEC, to promote the resolution of disputes through conciliation and mediation, rather than litigation; and

- offer some thoughts in conclusion on what this all means for you. How will the growth of Asia-Pacific trade and investment — and the disputes that will come with it — impact upon North American lawyers who must advise their clients on the most appropriate means to resolve disputes?

As you know, the Asia-Pacific is, and will remain, the world's most dynamic economic region. Economic growth in the region will average 7 per cent this year, compared with about 3.5 per cent for the largely Western countries of the OECD, the Organization for Economic Co-operation and Development. By the year 2020, it is estimated that the Asia-Pacific region will account for 40 per cent of global trade, and will be home to seven of the top 10 economies in the world. Asia will also have the world's largest and most affluent middle class, with tremendous spending power for consumer items, travel, education and training abroad. Economists have projected that Asia will need $US1 trillion in

infrastructure investment in the next decade alone just to sustain its continued growth.

Trade ties across the Pacific will expand enormously in the coming years, in part due to a decision made in November by APEC leaders to establish free trade and investment in the region by no later than the year 2020. As my colleague, International Trade Minister Roy MacLaren, noted to the Vancouver Board of Trade in January, the implications of this are nothing short of revolutionary: free trade between Canada and Japan in 15 years; free trade between Canada and China in 25.

With this rapid growth in trade and investment, it has been necessary to take some initial steps toward reconciling the different ways that legal and diplomatic issues in our commercial relations are handled in the West and in the East. For example, you will be well aware that in Western societies when commercial disputes arise between private businesses or between countries, they tend to be resolved through litigation or through other formal processes such as arbitration. I am sure, in fact, that commercial disputes have provided an enviable livelihood for many of you.

By contrast, among many of the Asian economies of this region, there is a tradition of resolving disputes in as non-litigious a manner as possible. This fundamental difference is reflected in the frequency with which the various Asia-Pacific countries have made use of the formal dispute settlement mechanisms of the GATT. I find the following statistics very revealing:

- from the founding of the GATT in 1947 to the end of 1993, the United States, Canada, Australia and New Zealand — four Asia-Pacific countries with Western cultures — initiated GATT dispute settlement procedures (formal dispute settlement consultations, plus dispute settlement panels) on 204 occasions;

- during the same 47-year period, all of the Asian countries in this region, taken together, used the GATT dispute settlement procedures only six times.

It is evident from these statistics that the Asian members of the region have shown a strong disinclination to make use of GATT dispute settlement procedures. Some have argued that this says something about the failure of the Western countries to integrate the Asian societies fully into the multilateral trading system of the GATT.

I believe that two developments will have a far-reaching effect on our relations with the Asian countries of the Pacific region in the field of trade law. The first matter that I would like to touch on is the creation of the WTO earlier this year, and the

second is the ambitious work program of APEC in the field of dispute mediation.

The WTO will improve the trade law environment of the Asia-Pacific in a number of respects. Among the advances that the WTO achieved over the GATT, I would like to point out the following:

- First, membership in the WTO will be considerably larger – a number of countries in the Asia-Pacific region that were not GATT Contracting Parties have become or are becoming members of the WTO.

- Second, important negotiations are currently taking place over the accession of the People's Republic of China to the WTO. Both of our countries will benefit from the integration of China into the world trading system and from the introduction of legal disciplines to China's trade relationships and to its domestic regulatory regime affecting trade and investment.

- Third, not only does the WTO have a more comprehensive membership and broader sectoral coverage than the GATT, but also all WTO members have to accept virtually the whole WTO Agreement and all of its disciplines. With very few exceptions, there is no opting out of the package of agreements established under the WTO.

- Fourth, the Asian economies are an important market for trade in services, which as you know is one of the fastest growing sectors of the global economy. The General Agreement on Trade in Services, or GATS, which is a part of the WTO, establishes global rules for the conduct of services trade for the first time.

- Fifth, we are all familiar with the reports of serious violations of intellectual property rights that have taken place in a number of Asian countries. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights commits each member government to protect and enforce intellectual property rights in accordance with global standards.

- Sixth, in the agri-food sector, the import bans that some countries have maintained on a number of products will simply not be possible any longer. Moreover, the WTO Agreement will prevent the misuse of health and sanitary measures as disguised barriers to trade while recognizing the right of members to take legitimate actions.

- Finally, the controls that developed countries maintain on imports of textiles and apparel have long been a sore point in our relations with the Asian countries. It was a key

objective of the Uruguay Round to reintegrate the textile and apparel sectors under the rules that apply to trade in goods generally. This will be done under the WTO Agreement over the next 10 years.

Thus, the real achievement of the WTO is the creation of a set of rules for international trade that will have a pervasive influence on how governments regulate their economies, and that accordingly will impact very directly on the domestic law-making process. This will affect the way in which all of the governments in the region operate. For example, Canada's implementing legislation for the WTO Agreement involved amendments to no less than 29 federal statutes, on matters ranging from banking licenses to entry visas for business people, and from trademarks, copyrights and patents to pest control products.

The rules for the settlement of trade disputes at the government-to-government level have also been improved and strengthened with the new WTO Dispute Settlement Understanding, or DSU. The DSU provides a unified dispute settlement system, applying to disputes under the range of WTO agreements, covering matters from trade in goods and services to investment, intellectual property, and technical barriers to trade. A new Dispute Settlement Body has been created to administer the dispute settlement process. A WTO panel report will be adopted automatically by the Dispute Settlement Body, unless there is a consensus among WTO members to reject it. This eliminates the problem that existed under the GATT, when a single country could block adoption of a panel report. A standing Appellate Body will hear appeals on questions of law, thereby hopefully establishing a degree of uniformity and consistency that did not always exist under the GATT.

One of the greatest benefits to Canada of the DSU is that is provides a defence against unilateral action by other countries. All WTO members must resolve their disputes using the WTO rules, and they are prohibited from taking unilateral measures without the specific authorization of the Dispute Settlement Body. This will make a significant contribution towards the consolidation of a rules-based instead of a power-based international trading system. We hope and expect that this new, streamlined system will be used and relied upon by all members of the WTO, including those from Asia.

There is similar progress in the Asia-Pacific region. Among the many activities currently under way within APEC, creating a more effective dispute settlement process, or a "Dispute Mediation Service" [DMS], is a priority.

The idea of creating a dispute mediation service within APEC arose in part from the unease felt by certain Asian cultures with the use of litigation to resolve disputes. As I discussed

earlier, few Asian governments invoked the panel process provided for under the GATT. Proponents of an APEC DMS argued that an emphasis on mediation rather than litigation would be culturally and politically preferable as a means to resolve trade disputes within the APEC region.

In November, 1994, APEC heads of government, meeting in Indonesia, agreed to examine the possibility of a DMS. APEC leaders made clear that any DMS would supplement, and not compete with, the WTO dispute settlement mechanism, which they affirmed would remain the primary channel for resolving disputes.

In June 1995, Canada hosted a meeting of experts here in Vancouver to consider whether a DMS might serve a useful purpose within APEC, and if so, to what extent. Under Canadian chairmanship, the Experts' Group examined a wide range of issues related to dispute mediation within APEC, including:

- disputes between APEC governments;
- disputes between private entities and APEC governments;
- disputes between private entities; and
- the reduction of trade disputes through increased transparency in the publication, notification and administration of laws affecting trade and investment in the region.

This meeting brought together experts on dispute mediation and arbitration from around the Asia-Pacific region. The Experts' Group made an initial examination of how a DMS could supplement the WTO, and asked APEC governments to provide considerably more information on domestic laws on arbitration, mediation and conciliation. Once this information has been received, the Experts' Group will reconvene to examine the material and, ultimately, to prepare recommendations for consideration by APEC leaders. Although the next meeting will likely be held in Thailand, Canada will continue to lead the process by serving as co-chair of the Experts' Group.

I want to stress that the work of the Experts' Group is rooted strongly in the practical, real needs of businesses. The Group is searching for ways to promote the resolution of disputes within APEC through mediation, arbitration and other types of alternative dispute resolution. Canadian and U.S. businesses are only too familiar with the great limitations of having to resolve commercial disputes through the expensive and cumbersome court systems in their own countries, let alone five thousand miles from home. Canada is thus contributing in a tangible way to a process intended to promote the resolution of disputes in the

Asia-Pacific region, an area of rapidly growing importance to North American businesses.

What does all of this mean for North American lawyers who advise clients involved in transpacific commercial transactions? I would offer a few concluding thoughts on this point.

In August of this year, Minister MacLaren addressed the annual meeting of the Canadian Bar Association. He set out the following three propositions concerning the changes that are taking place in international trade relations:

- First, international trade *rules* are more than ever replacing power politics. Rules are providing transparency and predictability so essential to business in a global economy.

- Second, the way we enforce these rules is also changing. Governments are now being forced to come to grips with the limits to their sovereign authority to shape domestic policy. This has implications for the legal profession through the interplay of domestic and international authority.

- Third, while these two propositions mean that the legal community has a special role to play in helping this new rules-based system respond to the needs of global traders and investors, they also mean that lawyers will benefit by this new system as freer trade in legal services comes to pass.

Minister MacLaren pointed out that with the expansion of the scope of international trade law under the WTO Agreement, there is an increasing role for domestic authorities, and consequently domestic legal practitioners, in the enforcement of trade rules. With more and more areas of domestic economic regulation now disciplined to some extent by international rules, so too more and more provisions of domestic statutes have their genesis in international treaties. Domestic and international rules and rule makers must work together, must learn from each other and reap the benefits of trade.

As trade and investment in the Asia-Pacific region continues to expand, we are certain to see a considerable increase in commercial disputes. Moreover, as we have seen in the context of Canada-U.S. trade, while such disputes may only represent a tiny fraction of total trade, they can generate an intense amount of industry and media interest, which may only compound the difficulties of settlement.

The resolution of such disputes should, in many cases, be structured with important cross-cultural differences in mind. At

the private commercial level, seeking to resolve disputes exclusively through the "hard" litigation option may very often destroy the underlying commercial relationship – a phenomenon certainly not unknown in the West. However, if "softer" mediation or conciliation options are pursued, it may be possible to isolate the individual dispute in question from the broader commercial relationship, permitting the parties to continue to build a long-term partnership. This principle has relevance as well for government-to-government trade disputes, since the request for a WTO panel may damage the bilateral political relationship in a manner not always fully understood in the West.

Obviously only you and your clients can determine, in individual cases, whether to proceed by way of mediation or through litigation. They need not necessarily be mutually exclusive. However, I would ask you to consider that dispute resolution involving Asian parties often requires an acute sensitivity to cultural differences if both parties want the commercial relationship to flourish in the long term.

I am grateful to have had the opportunity to speak to you today. Given the creation of substantive new disciplines applicable to international traders, I am sure that symposiums on legal issues related to Asia-Pacific trade will only proliferate in the future.

Thank you.