Department of Foreign Affairs and International Trade

Statement

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NOTES FOR AN ADDRESS BY

THE HONOURABLE ROY MACLAREN,

MINISTER FOR INTERNATIONAL TRADE,

AT THE

CLOSING PLENARY OF THE ANNUAL MEETING

OF THE CANADIAN BAR ASSOCIATION

"TRADE RULES AND LAWYERS: REGULATING INTERNATIONAL TRADE CURRENTS"

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Thomas Jefferson observed that "it is the trade of lawyers to question everything, yield nothing, and to talk by the hour." Although we politicians share some of the same basic training, having been taught to question the status quo and not to yield in debate, you will be relieved to know that I do not intend to talk by the hour. Instead, and drawing on some of the comments I made last month to the Canadian Institute of Advanced Legal Studies at Cambridge, I would like to discuss briefly the remarkable reform in international trade relations that is unfolding before us.

Permit me to state three propositions. First, international trade rules are increasingly replacing power politics. Rules are providing the transparency and predictability so essential to business in a global economy. And you, as lawyers, can appreciate the significance of such a trend: more rules, by necessary implication, mean more interpretation, which in turn means more work for you. 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 too has implications for the legal profession through the interplay of domestic and international authority. Third, while these two propositions mean that you in the legal community have 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 you will benefit by this new system as freer trade in legal services comes to pass.

To begin, let's go back a little in time. The 1948 General Agreement on Tariffs and Trade, the GATT, was designed to address high tariffs, discriminatory quotas and other measures employed by Messrs. Smoot, Hawley and their benighted brethren in the U.S. Congress to "beggar thy neighbour" at the border. The GATT's rules did not reach, for the most part, beyond national frontiers and measures directly targeting imports and exports. Rather, they called for the reduction of tariffs and national treatment. They allowed countries to adjust prices at the border in various ways, for example, through temporary surcharges to protect domestic industry from import surges, or through antidumping or countervailing duties. GATT rules served as a transformer, a mechanism for reconciling the trade currents of exporting nations with those of importing nations. This role can be seen in the concept of "nullification and impairment," and the maintenance of a balance of advantages, which is at the root of the GATT dispute settlement procedure. Rather than emphasizing harmonization or addressing domestic policies, they ensured communication and conversion from one national electrical current to another, thereby making economic co-operation that much more efficient, avoiding blowouts and blackouts due to incompatible power grids. But they most emphatically did not reach into the domestic sphere to change the current, in the belief that by regulating what happened at the border alone, trade could be increased. This was not hospitable territory for lawyers but was virtually the exclusive beat of politicians, policy makers and economists.

It must be said, however, that through successive rounds of GATT tariff reduction negotiations since 1947, these rules have proven to be remarkably successful. Although some tariff peaks remain, particularly in the agricultural sector, industrial tariffs in most sectors are now low. And as a result, trade has grown at a rate nearly double that of the growth in production.

But through the 1980s, several things changed. First, trade ministers, ingenious bureaucrats and domestic regulators, who no longer had the tariff at their disposal, devised increasingly disguised non-tariff barriers in their stead. Powerful industries in powerful countries demanded new ways to prevent competing products from crossing the border. And once again, the international community faced the prospect that economic leverage, rather than the rule of law, would govern trade relations.

Second, something fundamental changed in the international trading system. Technological innovations, such as semiconductors, fibre optics and satellite communications, increasingly fuelled the globalization of business by facilitating the globalization of production — one in which firms are increasingly free to assemble inputs from around the world and to service an equally global marketplace. This in turn has accelerated the globalization of investment, as firms learned that the best way to achieve a comparative advantage in production, in sourcing and in technology was to establish a direct presence in foreign markets. Trade has become much more about the movement of components, services and technology within global firms operating in global markets.

Where once foreign investment was seen as a way of substituting for trade — a way of jumping over national barriers — it is now seen by many firms as a necessary precondition for trade, to the point where trade and investment have become virtually indistinguishable. In fact, production by foreign affiliates has now overtaken exports as the primary means for delivery of goods and services to foreign markets.

And third, as the recent automotive dispute between the United States and Japan illustrated, differences in national approaches to trade policy making have become apparent. The differences during the Uruguay Round in the United States, Europe and Japan have been described as the diffusion of power and private sector activism in the United States, the bureaucratic balancing of member-state interests in the European Union and the bureaucratic balancing among several government departments in Japan. Differences in how governments approach regulating competition, the environment, or technical standards, although not necessarily intended to impede trade, may be discriminatory in their effect or provide an unfair advantage not apparent before the retreat of

the tariff. These differences all contribute to "system friction."

These developments over the past decade or so drew together countries of the world in a concerted effort to update the rules, and thereby to check the unilateral exercise of power. The seven-year trade negotiation marathon known as the Uruguay Round of the GATT proved arduous. Issues previously viewed as relating solely to the domestic sphere had been raised to the international level. No longer were countries only concerned about measures imposed at the border. Now, domestic measures affecting competition, for example, were also on the table.

The member countries of the GATT responded admirably to these challenges in the Uruguay Round. The Uruguay Round Agreement demonstrates a qualitatively different and novel role for the institutions it has created and the subagreements it incorporates. This is evident when one compares the new World Trade Organization (WTO) with the limited and passive list of tasks assigned in 1948 to the proposed International Trade Organization and subsequently to the GATT.

Trade lawyers have moved from dealing with a 70-page GATT Agreement to a 560-page World Trade Organization Agreement. Although Sir Winston Churchill once said that "if you have ten thousand regulations, you destroy all respect for the law," our expectations remain high nevertheless. We are calling on the World Trade Organization to resolve far more complex issues. Over the coming months, dispute settlement panels could address such questions as the extent to which a country may regulate internal competition and involve itself in a domestic market. We now accept this as a matter for international scrutiny. The rules of the WTO represent a paradigm shift, a far cry from the transformer and shock absorber of yesterday. Today, the WTO's rules have become a regulator, increasingly dictating the permissible power currents in trade.

These international trade rules, like all forms of regulation, are not static in nature; rather, they foster progress and direct the course it may follow. They provide an orderly means for peaceful, and profitable, change.

Trade rules will also serve as a benchmark — the WTO as regulator must also have a performance meter. Through devices such as the new Trade Policy Review Mechanism, we can observe how far each of us has come and what work remains to be done. We need to measure our performance, just as we measure trade flows themselves.

As governments have increasingly demonstrated their willingness to accept the disciplines of agreed trade rules, so have these rules become more precise, covering more areas of activity. The zone of government action free from international disciplines is

increasingly circumscribed. We have designed an international institution that can regulate these issues, rather than serve more passively as a transformer that merely explains and absorbs the differences between trading partners.

At the recent G-7 Summit in Halifax, leaders of the major industrialized nations confirmed their commitment to implementing the Uruguay Round agreements, to consolidating the WTO as an effective institution, to ensuring a well-functioning and respected dispute settlement mechanism, and to ensuring that participation in regional trade initiatives continues to be a positive force for the multilateral system. As we stand at the Summit's peak, we can survey with some pride the WTO Agreement and all that we have accomplished in various regions lying just behind us. The successful conclusion of the Uruguay Round is surely one of the great achievements of the latter part of the 20th century, crowning almost eight years of negotiations, and signalling the fundamental changes occurring within the international trading system. We are right to regard this achievement with satisfaction.

But this achievement of a flourishing rules-based system brings with it other implications of particular relevance to a body such as the Canadian Bar Association. We are currently witnessing a new, concomitant trend: lawyers are now required in much greater numbers and with greater expertise in order to maintain the rules-based system. This necessarily means more and different work for lawyers in interpreting and applying the rules. During the negotiation of both the NAFTA [North American Free Trade Agreement] and the WTO, lawyers were involved earlier on in the process and more extensively than before. The consultations between government and private sector representatives, formalized as the International Trade Advisory Committee and the Sectoral Advisory Group on International Trade, have an increasingly juridical dimension. Industry representatives now seek legal counsel more often, both at home and abroad, in consulting with government on trade issues. Now, more than ever, there is a role for lawyers in the international trading system.

This burgeoning sector of legal practice is also manifest in a perceptible change in the types of rules we have adopted to govern the international trading system and, more particularly, in the way in which we enforce these rules. This brings me to my second major proposition. The new, far-reaching and prescriptive rules of which I have been speaking have bred new challenges. These rules demand streamlined and effective dispute settlement, to equip us with timely procedures for expeditious and responsive rules enforcement and to prevent all-out trade wars – a sort of essential containment function. This too has implications for the legal community.

As I have noted, until the World Trade Organization came into being, dispute settlement within the GATT, as transformer, was concerned primarily with the maintenance of a balance of reciprocal rights and obligations, rather than illegality or breaches of treaty obligations. This mechanism was a strange and unwieldy beast for trade lawyers, very different from the legal systems in which they had received their initial training. As an illustration, no consensus ever emerged on the nature of a GATT panel ruling – whether it was binding on the parties to the dispute and whether it created legally binding interpretations of GATT rules for future disputes.

Within this difficult framework, there developed additional problems over the years. Delays of up to two years between initial requests for consultations and circulation of a panel report occurred. The quality of panel reports, while generally good, could vary. There were even, on occasion, shortages of qualified, available panelists. Moreover, the adoption of panel reports could be blocked by one of the parties to the dispute if it found it convenient to do so. Even if adopted, implementation of recommendations by the offending party could be delayed.

Now, with the creation of the World Trade Organization, a new era in dispute settlement has dawned. Practical and positive changes are being wrought. The creation of a dispute settlement body to manage all disputes, improved time limits, automatic establishment of panels, the creation of an appellate body and improvements in implementation and compliance procedures all mean that the new World Trade Organization, the regulator, has been given some bite.

The WTO dispute settlement system has been judicialized. Even before the conclusion of the Uruguay Round, the eminent GATT jurist Robert Hudec discerned a trend in the GATT panel decisions toward "bright line substantive rules" and strict construction of these rules. Building on the achievements of the North American Free Trade Agreement, the Uruguay Round recognized the importance of effective institutional arrangements for conducting trade on a non-discriminatory basis. It recognized that the best form of dispute settlement is dispute avoidance. The best way to avoid disputes is to let others know what you are planning to do, to hear the views of others, and to correct small mistakes before they fester and become political issues. Hence the emphasis on transparency. The WTO also points toward more permanence in institutions.

This judicialization is also reflected in the fact that there is an increasing role for domestic authorities, and consequently domestic 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 an

international treaty. Domestic and international rules and rule makers must work together, must learn from each other and reap the benefits of trade. As a concrete example, both the NAFTA and the WTO set out a range of enforcement procedures to be implemented domestically: bid challenge review procedures for procurement, civil remedies for trade-related intellectual property matters, and procedural requirements for the conduct of trade remedy proceedings, to name just a few. Domestic forums are, in effect, being asked to act as agents to enforce the international rules.

As Canadians, we are particularly well placed to assist in the construction of this new rules-based architecture. We have always been committed to the overarching ideal of the rule of law, both within and among nations. And, as a small country, open to the world through the tremendous percentage of our economy given over to trade, we are quite comfortable with interdependence and international regulation and have already taken steps toward strengthening the rule of international trade law. As an example, within the NAFTA, Canada participates in an investor-state dispute settlement mechanism, under which a foreign investor may invoke international arbitration directly against its host government to enforce the rules of the treaty. Final awards in such matters are given direct application in domestic law. The pending negotiations concerning the OECD's proposed Multilateral Agreement on Investment may well draw on this example, providing as it does a powerful counterweight to special-interest lobbying by obviating the need for companies to politicize disputes.

As they unfold, the judicialization of dispute settlement and the growing interplay between the domestic and the international must have a significant impact on your daily lives as legal professionals. New opportunities will arise in the practice of law. But there is also a professional responsibility to stay current with international legal developments. If the statute that you interpret or apply flows from international considerations or has international consequences, you must be aware of this international dimension. If enforcement of global trade rules in part takes place at the domestic level and is not limited to the government-to-government arena, your advice must include continuing analysis of these rules. If domestic courts and tribunals are becoming local agents for the enforcement of international rules, then the relationship between domestic law and international law must be recognized explicitly. The practice of law is thus at the epicentre of a developing rule of international trade law.

Governments are not leading the charge; we are simply trying to keep up with global trade patterns. We cannot achieve this without trade rules to back us. We need the rule of law, as

embodied in the WTO, to serve as regulator and transformer all at once.

Take the area of trade remedies. Under both the Canada-U.S. Free Trade Agreement and later the NAFTA, we created a unique system for binational panels to carry out judicial review of domestic antidumping and countervailing duty determinations. Although only an interim solution to the problem of harassment by special interests that has no permanent place in a free trade area, this system has worked remarkably well. Over 50 cases have been heard, decisions have been well reasoned and of a uniformly high quality, and the decisions have been implemented by domestic authorities in the majority of cases without criticism or complaint. But now, the same special interests in the United States that used and abused trade remedy laws before are claiming that international judicial review raises constitutional problems.

The recent automotive dispute between the United States and Japan is again instructive. Faced with a range of domestic regulations that prohibited foreign firms from selling into the Japanese automotive market, the United States' knee-jerk reaction was to threaten unilaterally to impose sanctions first, and only later to accept begrudgingly that the WTO dispute settlement procedures might provide an avenue for achieving greater market access — for enforcing the rules.

The knot of the problem is the question of sovereignty and national prerogatives. Canada's implementing legislation for the WTO Agreement involves amendments to no less than 29 federal statutes, on matters ranging from banking licences to entry visas for business people, and from trademarks, copyrights and patents to pest control products. The result is an ever-increasing interplay between domestic and international rules. As another noted GATT scholar, John Jackson, has observed, this necessarily affects the decisions policy leaders make about when and how to intervene in their national economies.

To the south of the 49th parallel, some are cringing at the expanded reach of the rules of the NAFTA and the WTO. For example, Senator Dole has proposed a WTO Dispute Settlement Review Commission, with a mandate to review whether WTO panel decisions should be accepted by the United States. Americans seem to be contemplating the establishment of their own transformer, to shield themselves from WTO currents should they become — some in the U.S. Congress have already characterized them as — "tyrannical and abusive." And I have already mentioned that arguments have been raised that query the constitutionality of giving antidumping and countervailing duty panel decisions binding effect in U.S. domestic law. Although the United States can rightfully claim to be a staunch defender of the international rule of law through such central institutions as

the International Court of Justice and other United Nations bodies, there are those in the United States who appear unwilling to accept such an international rule of law for international trade. Section 301 still looms large on the horizon, despite the panoply of international rules now at the disposal of the United States.

The new rules will become useless pronouncements without the backing of the proper incentives and mechanisms to ensure their enforcement. As we witness the growth pains of a new and more muscular institution, we must nourish it by making strengthened dispute settlement a high priority. Indeed, the credibility of the WTO will hang on the success of its dispute settlement mechanism.

Someday in the not-too-distant future, we may have to consider whether the WTO dispute settlement system, even with all the improvements over the GATT regime that preceded it, is up to the task of guaranteeing respect for the rule of international trade law. In Europe, the architects of what has become the European Union recognized that significant economic integration had to be accompanied by a system through which rules could be enforced effectively. And they concluded that only by creating a European Court of Justice with supranational authority, and by giving its rulings direct effect in the domestic law of its member states, could respect for an open trade and investment environment be assured.

The legal community is particularly well suited to address these considerations and is therefore poised to occupy a unique and important place in the new international trading system. You will accordingly play an increasingly central role, not only in helping to write and to enforce the rules, but also in thinking strategically about where we are headed and keeping pace with developments as they unfold. New issues, including trade and environment, trade and competition, employment and labour standards, will increasingly require our attention, whether in the World Trade Organization, within the various regional groupings or within each member state.

But the role to be played by the legal community should not stop there. Lawyers should not be confined to a policing role with respect to the plethora of new rules in international trade — they should also benefit as new opportunities arise and new dimensions to their practice open up to them. The time has come for lawyers to catch the wave and to start exporting their services, alongside the goods and services offered by their clients. Freer trade in legal services should now be coming into full view.

For example, Canadian lawyers will soon be able to offer their clients a full range of international services in both the United

States and Mexico as Foreign Legal Consultants (FLCs). Under the aegis of an annex to the services chapter of the NAFTA, a trilateral Committee on Foreign Legal Consultants is close to reaching an agreement on a proposed framework for rules to govern FLCs. At the invitation of the Canadian delegation, ably led by the Federation of Law Societies of Canada, and with the active participation of a representative of the Canadian Bar Association, the Committee will next be meeting in Vancouver in the early fall to review draft joint recommendations. This surely heralds a new era in legal services. The legal profession has traditionally been a jurisdiction-specific profession, more so than others. However, with the birth of what we now know as the European Union with its revolutionary rules on professional mobility and the advent of the Canadian Charter of Rights and Freedoms, the borders between jurisdictions have gradually been eroded. Now the NAFTA Committee has taken this an essential step further: when the governments receive and implement the Committee's recommendations, Canadian lawyers will be able to go to Mexico City, for example, and, under their own firm name, or in association with Mexican lawyers or firms, provide legal services and advice with respect to Canadian law and international law, and the law of any other jurisdiction in which they are competent to practise. It is to the credit of the professional bodies involved that they have seized the opportunities offered by the NAFTA to put forward their recommendations.

In this context, you in the legal community should consider Canadian legal expertise as you would any one of the many excellent services that Canada exports. The CBA has already begun to do so. I salute its efforts and urge others to follow suit. In a series of ambitious projects, the CBA has undertaken to bring the Canadian legal experience to countries with a nascent independent bar. Thus, in Eastern Europe, in China and in South Africa, Canadian lawyers are providing guidance on continuing legal education and the establishment of governing bodies. As an example, since 1990, the CBA has provided legal internships in Canada for 75 lawyers and delivered in-country professional development seminars to 1400 participants in Eastern Europe alone. In collaboration with the National Judicial Institute and the Canadian Council of Judges, it also organized the training for the new Canadian Judges' Program and internships in Canada for 10 judges from the Czech Republic and Slovakia, following which Canadian judges conducted an evaluation of the court system in both countries. Now, focussing to a greater extent on the institutional aspects of legal practice, the CBA is launching a twinning project between bar associations in the Czech Republic, Hungary, Poland and Slovakia, and the law societies of Ontario, Nova Scotia, Quebec and Alberta. I understand that attendance at the CBA Annual Meeting was part of the agenda for the eight bar association representatives. To those involved in this initiative, I say that you are at the

vanguard of a tremendous initiative. Well-developed legal systems and institutional structures based on the rule of law are fundamental to the stability of democratic societies, and Canadian lawyers and judges and professional associations are ready to provide the relevant expertise. I wish you every success.

Canadian law firms have also been hired by countries such as Russia, Kazakhstan and Ukraine to advise on legal reform in areas ranging from constitutional law to insolvency law. This growing trend toward legal technical assistance is not unique to Canada – international financial institutions, most notably the World Bank, are also co-ordinating funding of legal expertise. My own department, for its part, is actively engaged in promoting services exports in general, and legal services exports in particular. These present invaluable opportunities for professional development and expansion that should not be ignored.

These are exciting times for the legal profession. The CBA's initiatives are giving Canadian lawyers new perspectives and opportunities, and we in government can only benefit from the insights you gain in the process. An ongoing dialogue among the legal community, business and government is essential to the development of an intelligent response to economic trends. I, for my part, shall try to ensure that our lines of communication remain open.

Thank you.