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By e-mail to: telecominvestment@ic.gc.ca

Re: **Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform**

1. On behalf of AT&T Enterprises Canada Co. and AT&T Global Services Canada Co. (collectively "AT&T"), I am pleased to submit these comments on Industry Canada's public consultation reviewing Canada's current foreign investment policy, *Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform* (the "Proceeding").

2. AT&T commends Industry Canada for taking concrete steps toward liberalizing Canada's restrictive foreign ownership regulations and welcomes the opportunity to communicate the well-established benefits of open foreign ownership policies for Industry Canada's consideration. The removal of Canada's market entry barriers will provide non-Canadian controlled carriers with greater operating flexibility and the ability to compete on a level playing field and thereby create a more efficient, dynamic, and technologically-advanced marketplace, including that for businesses operating in Canada and for employees supporting the Canadian telecom industry.

Introduction

3. Despite its solid position among the world's most advanced and liberalized countries, Canada maintains stringent foreign ownership limits in telecommunications, for which it has been extensively and persistently criticised since the restrictions were first announced in 1987 and enacted in 1993. Recognizing the largely negative impact such restrictions have on the telecom market, as well as the broader Canadian economy, many parties have called for change. Indeed, for the better part of a decade there has been a continual push from the Government of Canada, the Organisation for Economic Co-operation and Development ("OECD"), the World Trade Organization ("WTO"), and the Office of the United States Trade Representative[1] ("USTR"), among others, for foreign investment policy

[1] The USTR is responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries. The USTR is part of the Executive Office of the President.

liberalization. These authorities express what empirical evidence shows: open foreign investment policies promote competition and economic growth, and provide investment opportunities for established providers and new entrants alike. Moreover, as the government continues its deregulation of the telecommunications industry, that same hands-off approach to regulation should apply to the regulation of foreign investment practices. That is to say, market forces should be relied upon to the maximum extent feasible and therefore AT&T submits that regulations restricting foreign investment in telecommunications should be removed completely.[2]

Restrictive Foreign Ownership and Control Policies Stifle Market Development

4. Government policies that restrict either foreign ownership and control or foreign direct investment ("FDI") cause significant financial and strategic inefficiencies and stifle telecom market growth. Based on tracking market liberalization trends over the past decade, the World Bank observes that "[g]overnments have realized that any restrictions they place on investment (be it foreign or domestic) raises the cost of financing (and ultimately of services), thus making investment less likely."[3] In another study, the World Bank concludes that "FDI restrictions not only place a maximum limit on potential foreign private investment, they can also deter such investments altogether."[4] Furthermore, the World Bank finds that limits on FDI restrict efficient management, noting that "foreign ownership restrictions limit takeover risk and hence management accountability, and reduce investment incentives, thereby inhibiting effective, profit-oriented management"[5] and that complex ownership arrangements distance management from investor risks and reduce foreign investor incentives for transfer of management expertise to the firm.[6]

5. Foreign ownership and control restrictions also lead to further inefficiencies. According to one observer, "[r]estrictions on foreign investment . . . limit the abilities of local companies to be effective participants in global telecommunications alliances. This in turn limits the ability for strategic equity

[2] In its comments to the *Proposed Order under Section 8 of the Telecommunications Act—Policy Direction to the Canadian Radio-television and Telecommunications Commission (2006)*, AT&T urged the simultaneous adoption of the proposed Policy Direction, encouraging more reliance on market forces and less on regulation, coupled with the implementation of the Telecommunications Policy Review Panel (the "TPRP") recommendation concerning relaxation of FDI restrictions. *See* Telecommunications Policy Review Panel, *Final Report (2006)*, Afterward at 11-26 ("there should be a presumption that investments in any new start-up telecommunications investment or in any telecommunications common carrier with less than 10 percent of the revenues in any telecommunications service market are in the public interest.") AT&T, however, supports the 10 percent recommendation as the phased-in approach to the eventual removal of foreign investment restrictions on all telecommunications carriers, suggested by the TPRP and later by the Competiton Policy Review Panel, as an alternative to a 49-percent direct limit for broadcasting and telecommunications (one of the Proceeding's three options) or maintaining the current restrictions.

[3] World Bank, *Information and Communications for Development 2006: Global Trends and Policies*, at 30.

[4] *Financing Information and Communication Infrastructure in the Developing World*, World Bank Working Paper No. 65 (2005), at 16.

[5] World Bank, *Information and Communications for Development 2006: Global Trends and Policies*, at 30.

[6] *Financing Information and Communication Infrastructure in the Developing World*, World Bank Working Paper No. 65 (2005), at 16.

investments, sharing of technologies and know-how, and the economic scope and scale that often accompanies these alliances."[7]

Canada's Restrictive Foreign Ownership and Control Policies Penalize Resellers and Harm Canadians

6. Foreign ownership and control restrictions do not serve the markets or industries they intend to protect, nor do they best serve the Canadian public. In fact, Canada's foreign ownership and control restrictions create market distortions by favouring one class of telecommunications service providers (Canadian carriers) over others (non-Canadian controlled carriers),[8] in contravention to policy promulgated by Industry Canada.[9] For example, in Canada AT&T is relegated to operate as a reseller, dependent on the incumbent local exchange carrier ("ILEC"), interexchange carrier ("IXC"), and competitive local exchange carrier ("CLEC") for critical services and upstream network component inputs. This reduces AT&T's flexibility in developing, managing, and delivering its telecommunications services because it cannot own or operate telecommunications transmission facilities. Instead, regulations dictate that AT&T must lease network infrastructure, thus preventing AT&T from making economically efficient build-versus-lease for resale decisions with respect to customer access and backbone facilities. Although resale of services has a critical and important role in creating a competitively healthy communications environment, it does not offer the longer term benefits to both suppliers and customers that facilities-based competition can offer, nor should it be the exclusive option to a specific class of service providers. Thus the removal of FDI restrictions would maximize the efficient use of existing Canadian telecommunications facilities and facilitate build-out of new infrastructure.

7. A salient example of the market-distorting effect foreign ownership restrictions impose on infrastructure development is the current debate[10] on what constitutes "operating a transmission facility."

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[7] Procter & Olivier, *Capital Flows and Cost of Capital: The Importance of Liberalized Investment Rules for a Competitive Telecommunications Sector* (2002), at 8.

[8] Notably, despite the asymmetrical treatment of resellers versus Canadian carriers, both are expected to contribute equally to Canadian telecommunications regulatory fees. Beginning in 2010, all telecommunications service providers, including resellers, with at least $10 million in Canadian telecommunications services revenues must pay regulatory fees. The Commission determined that it would be more equitable to levy telecommunications fees on all telecommunications service providers, rather than on just those that file tariffs. Resellers now have greater operating expense without any greater operating flexibility (*i.e.*, regulatory relief). AT&T does not inherently disagree with the requirement for resellers to contribute to such regulatory fees, but does disagree with resellers having fewer rights in how they chose to operate. *See* Telecom Order CRTC 2010-183, *Telecommunications Fees Regulations, 2010* (March 25, 2010), http://www.crtc.gc.ca/eng/archive/2010/2010-183.htm and Telecom Decision CRTC 2006-71, P*art VII application to revise the Telecommunications Fees Regulations, 1995* (November 6, 2006), http://www.crtc.gc.ca/eng/archive/2006/dt2006-71.htm.

[9] *See, Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, December 14,2006, SOR/2006-355, Canada Gazette Part II, Vol. 140, No. 26, December . 2006.II.2344, http://gazette.gc.ca/archives/p2/2006/2006-12-27/html/sor-dors355-eng.html, (". . . (*b*) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that . . . (iv) if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers;" [emphasis added]).

[10] TELUS filed an application with the Canadian Radio-television and Telecommunications Commission ("CRTC" or "Commission") opposing the registration of AboveNet Canada, a subsidiary of U.S.-headquartered

Central to this issue is not simply whether service providers that operate exempt transmission apparatus, in conjunction with transmission facilities leased from Canadian operators, should be classified as telecommunications common carriers, but does such a classification require review of a non-Canadian carrier's ownership structure.[11] The latter clearly intends to prevent non-Canadian controlled carriers from participating in or entering certain telecom markets.[12] The lack of an absolute Commission ruling on the issue together with technological advances in optical electronics that obfuscate equipment categorization created this regulatory "grey area." Such ambiguity disturbs market equilibrium because of diverse operating approaches based on whether a service provider takes an aggressive or conservative view of the grey area—*i.e.*, whether or not to light leased dark fibre. Distortions, then, are placed on the market by the foreign ownership and control restrictions themselves, plus the interrelated effect of varying interpretations borne from technological capabilities vis-à-vis legislative intent. What is clear and undisputable, however, is that large backbone networks require cost-effective access to transport capacity and such capacity is best enabled by allowing carriers to implement their own optical transport equipment through a dark fibre arrangement with the owners of existing fibre networks in Canada. Such arrangements are common in the U.S. and Europe. Moreover, backbone growth for a network provider is a balance between customer demand and supplier delivery. Lack of highly scalable options enabled through dark fibre results in non-Canadian suppliers mostly engaging in growth based on demand as opposed to growing and developing the market proactively. If, for example, resellers had the clear authority to light leased dark fibre, AT&T might employ dense wavelength division multiplexing ("DWDM") technology to optimize the transport of significant amounts of data traffic; the use of DWDM technology combines cost-efficient transport with advanced functionality to effectively accommodate the bandwidth explosion from the access network. Specifically, DWDM technology allows an operator to allocate available bandwidth to different services—*i.e.*, it enables shared bandwidth. Essentially, the ability to employ DWDM means a carrier is able to design networks ahead of customer demand or to respond to non-standard bandwidth requirements more quickly. In contrast, today AT&T leases dedicated bandwidth for each service and that typically means longer lead times and greater costs. Additionally, DWDM technology provides operators with secondary benefits like better end-to-end performance, including control over provisioning and fault isolation – attributes desired by customers. And with more

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AboveNet, as a reseller because the operator planned to sell dark fibre and lit fibre optic services in Canada using facilities leased from TELUS. TELUS argued that once AboveNet attached electronics to light the fibre, AboveNet would be operating a transmission facility and therefore should be classified as a telecommunications common carrier, subject to demonstrating adherence to ownership and control requirements in section 16 of the *Telecommunications Act*. The Commission subsequently initiated a public proceeding on the matter, noting it never specifically ruled on the issue. *See* Telecom Public Notice CRTC 2010-165, *Classification of service providers that light leased dark fibre for subsequent sale* (March 19, 2010), http://www.crtc.gc.ca/eng/archive/2010/2010-165.htm.

[11] *See* TELUS letter to the CRTC *Re: AboveNet Canada Inc. Request for Registration as Reseller to Telecommunications Services* (December 7, 2009), at 4. ("To the extent that AboveNet Canada is providing lit fibre to the public, AboveNet is operating as a telecommunications common carrier, not as a reseller. Accordingly, AboveNet Canada must take steps to come into conformity with the requirements of the Act, including the ownership and control requirements in section 16 of the Act."), http://www.crtc.gc.ca/public/partvii/2010/8665/c12_201004853/1373196.PDF.

[12] "[T]he Commission should be wary of claims by the incumbent carriers when they seek to limit competition through invocation of the foreign ownership rules." Comments of Yak, Telecom Notice of Consultation CRTC 2010-165, *Classification of service providers that leased dark fibre for subsequent sale*, at 8 (April 28, 2010), http://www.crtc.gc.ca/public/partvii/2010/8665/c12_201004853/1383133.pdf.

specific knowledge about fibre routes and the ability to specify equipment and topology requirements, resellers could engineer to customer-specified performance levels with greater certainty. Clearly, the current restrictions, and the ambiguity relative to the reach of those restrictions, curb forward-looking planning and network optimization. Therefore, from whatever vantage point one observes the debate, foreign ownership restrictions and the attendant confused operational interpretations needlessly drain competiton from the market and therefore Canadian businesses and consumers of choice and innovation. Companies should be able to compete based on the strength of their operations and technical developments, and what they can bring to Canadians, not their nationality. Equally important, at a time when a top national priority is to promote investment in high-capacity broadband networks,[13] it is counterproductive to maintain policies such as the foreign ownership limits that can restrict, stifle or discourage the potential for such network infrastructure development and growth.

8. Canada's foreign ownership restrictions also prevent AT&T and other non-Canadian controlled service providers from becoming a CLEC in the Canadian market and having the advantages associated with such status (*e.g.*, access to ILEC operational support systems for the co-ordination of provisioning ILEC essential facilities, the ability to assign telephone numbers). Although limited non-Canadian investment in CLECs is permitted, foreign investors are prohibited from exercising control over the operations of a CLEC and are therefore precluded from obtaining operational, business and competitive synergies that may otherwise be realized from the substantial capital investment required to support such operations. Without these synergies, foreign investors such as AT&T are less likely or able to fully and competitively expand product portfolios, thereby keeping customers from experiencing the most optimized service innovations and price benefits that open competition delivers.

9. In addition, Canada's foreign ownership restrictions may risk constraining some reseller service reliability. To illustrate, large Canadian ILECs may be unwilling to offer wholesale customers any significant service reliability and repair time guarantees on leased facilities, even in exchange for additional services fees. A slight exception exists with Competitor Digital Network ("CDN") access facilities where the Commission mandated some moderate service quality metrics which often go unfulfilled or can even be manipulated.[14] AT&T has also observed that a number of Canadian contractors and fibre installation companies are willing to guarantee service response times with respect to the maintenance and repair of outside plant.[15] As a company always looking to improve our network

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[13] *See* Consultation Paper on a Digital Economy Strategy for Canada, *Improving Canada's Digital Advantage: Strategies for Sustainable Prosperity*, at 19, http://de-en.gc.ca/consultation-paper/. ("Ensuring a state-of-the art network infrastructure to promote innovation, attract investments and support world-class health care, research and education will be key to making Canada a leader in the global digital economy.")

[14] MTS Allstream filed an application (*Part VII Application Concerning Provisioning of Competitor Digital Network Services in Accordance with Competitor Quality of Service Standards)* (December 18, 2008**)** with the Commission alleging that ILECs were incorrectly claiming that facilities are not available when processing requests for CDN services. The Commission reviewed the matter and determined that to the extent ILECs are claiming there are no facilities in the circumstances identified by MTS Allstream, the Commission considered those circumstances to be inconsistent with established criteria and ordered the ILECs to immediately stop from claiming no facilities in such instances and to provision the requests in accordance with the relevant Quality of Service ("QoS") criteria. *See* http://www.crtc.gc.ca/eng/archive/2009/lt090115.htm.

[15] Fibre construction and maintenance companies operating in Canada will often agree to have repair personnel on-site relative to a fibre cut within 2-4 hours, but AT&T, as a reseller of another party's fibre arguably would have no legal right to bring its own contractor to repair the cut fibre.

reliability and redundant capabilities, AT&T should have latitude to buy these types of enhanced reliability services for its customers but cannot do so presently because AT&T is prohibited by FDI restrictions from owning or operating telecommunications facilities.

10. Finally – and critically – over the past several years the Canadian government has taken concrete steps toward deregulating telecommunications markets, further accentuating the operating imbalance in the telecommunications industry between ILECs and non-Canadian carriers. In 2006 the CRTC introduced regulatory forbearance policies to give ILECs greater retail pricing flexibility. And in 2008, the regulator initiated a new framework for wholesale services providing ILECs relief from certain wholesale service obligations.[16] Notably, this decision's impact grows in intensity over time as certain wholesale services are phased out. This has particular consequences for AT&T, and other similarly situated service providers, because resellers do not have a legal option to compensate for the deregulation by building or acquiring local infrastructure due to foreign ownership restrictions.

11. Without the additional option to build (versus lease for resale), the reduction of the wholesale services on which foreign-owned resellers depend could further handicap their ability to compete against a facilities-based "Canadian carrier" by increasing costs, reducing service capabilities, or a combination thereof. Therefore, the structural competitive disadvantage resellers face as a direct result of their inability to own facilities-based networks becomes increasingly acute as regulatory forbearance progresses. Although AT&T supports reform to encourage more market-based competition and reduced regulation, such changes should be made commensurate with the elimination of the regulation on foreign ownership restrictions. Until a non-Canadian-controlled service provider is free to determine whether it is more economically efficient to build or lease for resale network facilities, the Canadian telecommunications market will remain suppressed from its potential.

Open Foreign Ownership and Control Policies Promote Competition and Investment

12. While restrictive foreign ownership and control policies limit market development, there is compelling evidence that open foreign ownership and control policies encourage broad economic growth in a country. The World Bank, for example, reports that information and communications technology ("ICT") has become critical to economic growth for countries at all levels of development and that there is broad consensus "among policymakers worldwide that information and communications provide key inputs for economic development, contribute to global integration while helping to retain the identity of

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[16] *See* Telecom Decision CRTC 2006-15, *Forbearance from the Regulation of Retail Local Exchange Services*, April 6, 2006 (as varied by Order in Council P.C. 2007-532). *See* Telecom Decision CRTC 2008-1, *Revised regulatory framework for wholesale services and definition of essential service* (March 3, 2008), http://www.crtc.gc.ca/eng/archive/2008/dt2008-17.htm. Generally AT&T has no objection to offering ILECs increased forbearance from retail regulation or regulation to provide resellers with network components so long as we have the right to build our own facilities. We believe that building infrastructure does the maximum to increase competition, and it should not be restrained by legislation.

traditional societies, and enhance the effectiveness, efficiency, and transparency of the public sector."[17] The World Economic Forum similarly finds that "[a]ccess to the global networked economy is becoming an important cornerstone of the development of economies and societies."[18]

13. Expert observers report that competition in the telecom sector brings innovation, network reliability, customer service and lower prices as well as significant manifold benefits to society and the wider economy, allowing demand-driven development among IT-enabled service industries, and improving the productivity of consumers at all levels of income and education. As one World Bank study emphasizes, "[h]igh quality, low-cost communications can be effectively provided only in competitive markets."[19] Moreover, without open competition, a local firm with significant market power may have a persistent incentive and ability to maximize profits by keeping prices higher (wholesale and retail) and producing lower quantities of services than that which would otherwise exist in an efficient market.[20] Competition produces more choice, better quality and lower costs to aid development in telecommunications markets. Accordingly, foreign ownership restrictions in telecom, an industry vital to the economy, should be eliminated because such limits reduce the "competitive discipline" that the threat of foreign entry can provide.[21] "The best way to help maximize the prosperity of our [Canada's] society is to protect competition and the competitive process, not competitors."[22] Indeed, "[t]he economic case for liberalization of FDI is so well established . . . that the main area of economic debate is not whether it boosts domestic competitiveness and productivity, but by how much."[23]

14. It is a paradox that Canada, an otherwise liberalized market, retains onerous foreign ownership and control restrictions, particularly because a critical component of a liberalized telecom market is an open investment policy. As the International Telecommunication Union ("ITU") observes, coincident with liberalization measures, many countries eased foreign ownership restrictions to attract investment, particularly as public sector financing began to shrink, to fund development in the ICT sector. The ITU states that "foreign investment has facilitated the growth and development of the telecommunications sector in many countries, increasing access to capital for network development and modernization, and allowing for the transfer of technology and know-how."[24] The World Bank similarly has highlighted the importance of encouraging foreign investment, noting that "[i]n an industry as capital-intensive as telecommunications, access to capital is key to ensuring the deployment and expansion of a robust

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17 World Bank, *Information and Communications for Development 2006: Global Trends and Policies*, at 42, http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1141851022286/TOC.pdf.

18 World Economic Forum, *The Global Information Technology Report 2006-2007*, Executive Summary at 1, http://www.weforum.org/pdf/gitr/summary2007.pdf.

19 World Bank, *Competition in International Voice Communications* (2004), at 16.

20 Telecom Policy Review Panel Report (2006), G. Sinclair, H. Intven, A. Tremblay, at 3-9.

21 Commissioner of Competition, Competition Bureau, Submission to the Competition Policy Review Panel, January 11, 2008, at 14, http://strategis.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/commissioner_competition_bureau.pdf/$FILE/commissioner_competition_bureau.pdf.

22 *Id.* at 2.

23 Telecom Policy Review Panel Report (2006), G. Sinclair, H. Intven, A. Tremblay, Afterward at 11-16.

24 ITU, *ICT Regulation Toolkit*, Module 6 (Legal and Institutional Framework), at Section 3.4.2 (Foreign Ownership), http://www.ictregulationtoolkit.org/en/Section.1695.html.

network."[25] Foreign investment has "typically been the driver of sector growth in liberalizing countries" and has brought "new management approaches, technology, and skills transfer to the host countries."[26] In fact, the World Bank reports that foreign direct investment is a major source of ICT financing[27] and that "over the past decade, the bulk of telecommunications FDI has . . . been directed to finance infrastructure roll-out, a trend that can be expected to continue in the future."[28] Significantly, the World Bank also notes that as markets become competitive, private domestic investment follows and often overtakes foreign investment.[29]

Repeated Calls for Removing and Modernizing Canada's Foreign Ownership and Control Restrictions

15. With the well-documented benefits of open foreign investment policy, many diverse authorities have urged Canada to relax or eliminate its stringent foreign ownership and control regulations. One of the most persistent voices comes from the OECD.[30] As early as 2002, in a regulatory reform review, the OECD called for Canada to eliminate foreign ownership restrictions, stating that "these restrictions have no place in an open competitive market framework." The review also concluded that foreign ownership restrictions "will harm the aim of government to obtain ubiquitous broadband access through the country."[31] The OECD continued its call for reform. In its flagship publication *Going for Growth,*[32] a yearly report that outlines structural policy development in OECD countries and issued since 2005, the OECD annually cites Canada's foreign ownership restrictions and calls on the government to reduce such barriers because they hamper investment and slow the diffusion of new technology and best management

25 World Bank, Information and Communications for Development 2006: Global Trends and Policies, at 15.
26 *Id.* at 16.
27 *Id.* at 7.
28 *Id.* at 23.
29 *Id.* at 16.
30 Notably, Canada is among a small minority of OECD member economies that have any foreign ownership restrictions in the telecom sector.
31 OECD, *Regulatory Reform in the Telecommunications Industry (2002)*, at 49, http://www.oecd.org/dataoecd/48/28/1960562.pdf .
32 OECD, Economic Policy Reforms: Going for Growth (2005, 2006, 2007, 2008, 2009, 2010), http://www.oecd.org/document/24/0,3343,en_2649_34117_41665624_1_1_1_1,00.html. Note: Recognizing the sensitivities with Canadian cultural issues, while maintaining its support for reduced barriers to foreign ownership, the OECD suggested in its 2005 report that the Canadian Government use content rules to safeguard Canadian culture. *See*, OECD, *Going for Growth (2005)*, Country Notes-Canada, at 64, http://www.oecd.org/dataoecd/40/6/34486969.pdf. Indeed, there are more practical approaches to protecting Canadian culture then foreign ownership restrictions. In April 2010, the Minister of Canadian Heritage, James Moore, approved under the *Investment Canada Act*, Amazon's request to establish a fulfillment center in Canada, based on commitments Amazon made to protect Canadian culture. This is notable in that it signals the Government of Canada can engage foreign investors to preserve Canadian heritage, while creating jobs, without restrictive foreign ownership regulation. In other words, there is a more pragmatic approach to protecting Canadian interests than onerous foreign ownership restrictions. *See* Canadian Heritage, *The Government of Canada Announces Results of Investment Canada Act Review of Amazon* (April 12, 2001), http://www.pch.gc.ca/pc-ch/infoCntr/cdm-mc/index-eng.cfm?action=doc&DocIDCd=CJM1000011. Moreover, on the eve of the G-8 and G-20 summits (June 22, 2010), Minister of International Trade, Peter Van Loan, said "Canada believes that lasting economic recovery . . . depends on free trade, not protectionism" [emphasis added], *See* http://g20.gc.ca/resisting-protectionism-promoting-free-trade-on-eve-of-g-8-and-g-20-summits/.

practices, adversely affecting productivity.[33] In its latest (2010) *Going for Growth* report, the OECD again references Canada's extreme foreign direct investment restrictions in the telecommunications sector. The OECD recommends that, in order to improve Canada's productivity, the government should "[r]educe restrictions on foreign direct investment, which remain higher than in the majority of OECD countries, particularly in telecommunications, broadcasting and transport."[34]

16. The WTO also cites Canada's need for an improved foreign direct investment policy. In the last Trade Policy Review report for Canada (2007), the WTO states that Canada's trade regime has not changed significantly since the prior review (2003), noting the persistence of foreign investment restrictions in areas such as telecom. The WTO observes that although Canada maintained good economic performance for the period in question, productivity growth has been relatively slow and "could be accelerated by, among other things . . . removing restrictions on foreign investment."[35] In particular, the organization suggests that reform in telecom could "lower costs to Canadian taxpayers and consumers while increasing productivity and competition in the domestic market."[36] In addition to the organization's findings, during the review session individual Members issued statements specific to Canada's foreign investment policy relative to telecommunications.[37] <u>Chile</u> noted that although Canada's trade policy was generally open, there were some concerns including investment restrictions in telecommunications.[38] The <u>European Communities</u> appreciated the general openness of the Canadian services market, but voiced concern over Canada's foreign ownership cap for telecom services and encouraged Canada to consider the Telecom Policy Review Panel's recommendation to amend FDI restrictions in telecom.[39] <u>India</u>, which has a higher FDI limit than Canada, expressed concern about Canada's restrictions on FDI and emphasized the need for Canada to reduce barriers by eliminating ownership restrictions in telecommunications.[40] <u>Japan</u> voiced concern about Canada's restrictions on FDI, including in specific sectors such as telecommunications, and asked for information on the progress in reforming those sectors.[41] And <u>Malaysia</u>, speaking on behalf of the <u>ASEAN</u>[42] countries, noted sector-specific restrictions to foreign investment, including telecommunications.[43]

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[33] OECD, *Going for Growth* (2009), Section 1.3, Country Notes-Canada, at 60, http://www.oecd.org/dataoecd/24/20/42222328.pdf.

[34] OECD, *Going for Growth* (2010), Section 1.3, Country Notes-Canada, at 98, http://www.oecd.org/dataoecd/18/6/44651214.pdf.

[35] WTO, *Trade Policy Review: Canada*, WT/TPR/S/179, February 14, 2007, Summary Observations, at vii, http://www.wto.org/english/tratop_e/tpr_e/tp280_e.htm.

[36] *Id.*

[37] WTO, *Trade Policy Review: Canada*, WT/TPR/M/179, June 21, 2007, Minutes of Meeting, IV. Statements by Members.

[38] *Id.* at 12.

[39] WTO, *Trade Policy Review: Canada*, WT/TPR/M/179, June 21, 2007, Minutes of Meeting, IV. Statements by Members, at 11, and V. Replies by the Representative of Canada and Additional Comments, at 26.

[40] *Id.* at 16.

[41] *Id.* at 11.

[42] Association of Southeast Asian Nations, which comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

[43] WTO, *Trade Policy Review: Canada*, WT/TPR/M/179, June 21, 2007, Minutes of Meeting, IV. Statements by Members, at 9.

17. Another perennial call for loosening foreign ownership restrictions in Canada comes from the USTR. In its 2010 National Trade Estimate Report on Foreign Trade Barriers ("NTE"), the USTR identifies Canada's 46.7% foreign ownership limitation on suppliers of facilities-based telecom services as a trade barrier: "As a consequence of foreign ownership restrictions U.S. firms' presence in the Canadian market as wholly U.S.-owned operators is limited to that of a reseller, dependent on Canadian facilities-based operators for critical services and component parts . . . these restrictions deny foreign providers certain regulatory advantages only available to facilities-based carriers (*e.g.*, access to unbundled network elements and certain bottleneck facilities)."[44]

18. It is broadly recognized by international authorities, foreign governments, and even the Government of Canada that Canada's telecommunications market is not serving Canadians proportionate to its potential or to the degree necessary for Canada to keep pace with the digital economy. Canada's maintenance of obsolete foreign ownership and control legislation endangers the evolution of a more productive, competitive and technologically-advanced Canadian marketplace. And while the Government of Canada may not agree on the best approach to foreign ownership reform, there is general consensus that "the Canadian telecommunication industry is, on the whole, unsatisfactory," and that "foreign direct investment has, from a macro-economic perspective, benefits that could include increased productivity, increased competition and lower prices . . . the economic case in favour of the removal of foreign ownership restrictions is clear."[45]

19. Given the historic call for Canada to remove restrictions on foreign ownership in telecommunications, plus the Government of Canada's new charter to improve the country's digital advantage by establishing a strategy for sustainable prosperity, the time to remove impediments to investment is now. This opinion is advanced by Industry Canada, which posited three options for foreign investment reform in its Proceeding.[46] The best choice for promoting a competitive telecom market in Canada is "Option three," which would remove foreign ownership restrictions entirely. Option one (increase direct limit for broadcasting and telecommunications to 49 percent) would deliver no material change to the current status of ownership and control, and therefore no significant benefits. We, therefore, discourage Industry Canada from adopting this option as it would create a false sense of accomplishment without delivering meaningful reform. Option two (exempt from existing restrictions on foreign investment in telecommunications those telecommunications common carriers with

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[44] USTR, *National Trade Estimate Report on Foreign Trade Barriers (NTE) (2010)*, Canada, at 50, http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/NTE_COMPLETE_WITH_APPENDnonameack.pdf.

[45] House of Commons Canada, Report of the Standing Committee on Industry, Science and Technology, *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector* (June 2010, 40th Parliament, 3rd Session), at 41, http://www2.parl.gc.ca/CommitteeBusiness/StudyActivityHome.aspx?Cmte=INDU&Language=E&Mode=1&Parl=40&Ses=3&Stac=3034550.

[46] Industry Canada developed three options, considering past proposals for change, to advance the commitment made in the March 2010 Speech from the Throne. The three options for reform include: Option 1: increase direct limit for broadcasting and telecommunications to 49 percent; Option 2: exempt from existing restrictions on foreign investment in telecommunications those telecommunications common carriers with telecommunications revenues of less than 10 percent of total telecommunications market revenues; and Option 3: remove telecommunications restrictions completely. *See*, Consultation Paper, *Opening Canada's Doors to Foreign Investment n Telecommunications: Options for Reform* (June 2010), at 9-10.

telecommunications revenues of less than 10 percent of total telecommunications market revenues) is an improvement from the current status, because it is more broad in its removal of foreign ownership restrictions, particularly allowing new entrants and smaller market players to operate without regulatory impediments to investment. Option two's greatest merit, however, would be as an interim step toward full relaxation. The most compelling choice to drive investment, innovation, and customer benefit is Option three, to "remove telecommunications restrictions completely." The more markets are open to investment, the greater the chance to achieve and sustain prosperity. In fact, during remarks to the G-20 Sherpa's meeting, Prime Minister Stephen Harper called on governments "to consider concrete actions that they can take — perhaps that we can all take — to open global markets and keep them open." He went on to say that "[o]pen global markets have been responsible for the growing worldwide prosperity of the past generation. If we lose our commitment to open markets, no matter how understandable the short-term political reasons may be, then we will lose that prosperity."[47]

Conclusion

20. Empirical evidence from Canada and around the world is clear and consistent: foreign ownership and control restrictions in the telecom sector of any type are generally unnecessary and harmful to the growth of telecom services and sector development, and impede Canada's leadership role in the global economy. Indeed, more than a decade after the WTO Agreement on Basic Telecommunications became effective, competitive telecommunications markets and pro-competitive telecommunications investment policies are known to stimulate telecom sector development and also broad economic growth in telecom-dependent industries. Such benefits, particularly those resulting from the removal of foreign investment restrictions in telecommunications, have been documented extensively.

21. Canada stands at the threshold of a profound policy change. It is time for Canada, as one of the world's leading economies, to demonstrate that leadership by more broadly opening its telecom market to foreign investment and allowing non-Canadian carriers greater operating flexibility. Such a move – deliberated and negotiated for years – would encourage investment in ICT, reduce costs and prices, improve service quality and choice, and promote greater efficiency and innovation in networks and services. By strengthening an environment supportive of competition and attractive to investment, the Government of Canada will take its rightful place among the world's most productive and competitive telecommunication markets and advance its digital economic agenda objectives.

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Respectfully submitted,

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[47] Statement by Prime Minister Stephen Harper at the G-20 Sherpas meeting in Ottawa (March 18, 2010), CTV.ca, *Harper calls for co-operation, open trade at G20 summit*, http://toronto.ctv.ca/servlet/an/local/CTVNews/20100318/g20_sherpas_100318/20100318?hub=TorontoNewHome and http://g20.gc.ca/statement-by-the-prime-minister-of-canada/