JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW IN RESPONSE TO THE REQUEST FOR COMMENTS BY THE CANADIAN COMPETITION POLICY REVIEW PANEL

JANUARY 2008

The Section of Antitrust Law and the Section of International Law (the "Sections") of the American Bar Association ("ABA") appreciate the opportunity to respond to the request for comments by the Competition Policy Review Panel (the "Panel") as set out in its consultation paper entitled *Sharpening Canada's Competitive Edge* (the "Consultation Paper").[1] The views expressed in these comments are those of the Sections and have been approved by the Sections' Councils. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

A. INTRODUCTION

The Sections commend the Canadian Government for establishing the Panel to review Canada's competition and investment policies and legislation. The Sections support the Canadian Government's objective of ensuring that these policies and laws foster an economic environment in which Canada can reach its true potential in the global marketplace.

At the outset, the Sections commend Canada for being in the forefront of international competition enforcement and policy development. By virtue of the efforts of the Competition Bureau (the "Bureau") in particular, Canada has assumed a leadership role on the international stage, actively participating in competition policy development in multi-jurisdictional bodies such as the Organization for Economic Cooperation and Development ("OECD"), the International Competition Network ("ICN") and the World Trade Organization ("WTO"). Sheridan Scott, Canada's Commissioner of Competition (the "Commissioner"), is currently Chair of the ICN, a position which was also held by former Commissioner Konrad von Finckenstein. During their tenures, both Commissioners contributed significantly to the ICN's success in becoming a pre-eminent vehicle for international dialogue on competition issues.

Because of Canada's importance in competition enforcement, the Sections have always welcomed the opportunity to offer comments on the various proposals that have been made over the years to amend and enhance Canadian competition laws and policies. For example, the Sections have jointly or individually provided comments on issues such as: abuse of dominance

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[1] Competition Policy Review Panel, *Sharpening Canada's Competitive Edge* (October 30, 2007), www.competitionreview.ca

in the telecommunications industry;[2] the Bureau's immunity program;[3] the communication and treatment of confidential information under the *Competition Act*;[4] merger remedies;[5] and certain proposed amendments to the *Competition Act*.[6]

In offering their comments on Canadian competition law issues in the past, the Sections have sought to provide a helpful perspective based on the experience of antitrust/competition lawyers in the United States and internationally, while recognizing that there may be differences across jurisdictions due to economic, historical and other factors. The Sections offer the comments contained herein in response to the Panel's Consultation Paper in the same spirit and with the same objective.

B. SUMMARY OF COMMENTS

The Sections' comments respond to several of the questions posed by the Panel in the Consultation Paper, specifically focussing on four key areas:

1. Incorporation of Competition Considerations in Economic Regulation

The Sections believe that the role of competition policy extends beyond legislation that specifically addresses restrictive trade practices and merger review. Rather, competition considerations should be incorporated into a nation's general economic policies and regulatory regimes at all levels of government. The Sections believe that taking account of competition considerations in this way can contribute to increases in productivity, aggregate economic activity, international competitiveness and foreign direct investment.

2. Possible Reform of Section 45 (the *Competition Act's* Cartel Provision)

The Sections support the adoption of a "dual track" approach to enforcement policy combating anticompetitive agreements, with *per se* criminal liability for hard-core cartel conduct (to replace

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2 American Bar Association Sections of Antitrust Law and International Law, Joint Comments in Response to the Canadian Competition Bureau's Request for Public Comment on Abuse of Dominance Provisions as Applied to the Telecommunications Industry (December 2006), http://www.abanet.org/antitrust/at-comments/2006/12-06/Comm-Telecom-Industry.pdf.

3 American Bar Association Section of Antitrust Law, Comments in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review (May 2006), http://www.abanet.org/antitrust/at-comments/2006/05-06/com-canadian-lieniency.pdf.

4 American Bar Association Sections of Antitrust Law and International Law, Joint Comments on the Competition Bureau (Canada) Information Bulletin on the Communication and Treatment of Information under the Competition Act (Draft for Consultation August 2005) (April 2006), http://www.abanet.org/antitrust/at-comments/2006/04-06/comm-treatment-info-com.pdf.

5 American Bar Association Sections of Antitrust Law and International Law, Joint Comments on the Competition Bureau (Canada) Draft Information Bulletin on Merger Remedies in Canada (February 2006), http://www.abanet.org/antitrust/at-comments/2006/03-06/ABAcanadamergerremediescomments.pdf.

6 American Bar Association Section of Antitrust Law, Submission to the Public Policy Forum on the Proposed Amendments to the Competition Act (September 2003), http://www.abanet.org/antitrust/at-comments/2003/09-03/Canadiancomp.pdf.

the competitive effects test in the current law) and civil liability for agreements that lessen competition, but have some plausible connection to legitimate joint commercial activity. These comments build on comments on Section 45 reform submitted to the Canadian government by the Section of Antitrust Law in 2003.

3. Merger Review and "National Champions"

The Sections note that, to date, Canada's approach in reviewing mergers has been to focus on a transaction's impact on competition and consumer welfare rather than on the "nationality" of the firms involved. The Sections strongly encourage the retention of this approach and recommend against laws that favor domestic firms over foreign firms (e.g., that promote "national champions").

4. Investment Policies

The Sections suggest a re-evaluation of the role and impact of the *Investment Canada Act.* In particular, the Sections suggest that consideration be given to limiting the criteria for foreign investment review to competition principles, specific sectoral considerations and/or legitimate national security interests, as applicable.

C. DETAILED COMMENTS ON COMPETITION ISSUES

1. How does Canada's competition policy affect Canadian competitiveness in an environment of globalization and free trade?

The Sections applaud the Panel for recognizing that Canada's competition policy "should not … insulate Canada from global competition" and that "the opening of borders and increasingly vigorous competition spur innovation and an accompanying increase in productivity". As the Consultation Paper notes, "[t]his results in greater economic efficiency and generally higher-quality products available at lower prices". Conversely, protected markets tend to result in higher costs for consumers and businesses. As Professor Michael Porter has demonstrated, the adverse consequences that protectionism has for overall domestic productivity and growth are exacerbated by the fact that protected firms have greater difficulty competing abroad.[7]

The Sections also applaud the Government of Canada for recognizing the importance of competition for the nation's overall economic policy and for committing to review Canada's competition policies "to ensure that they provide competitive marketplaces."[8]

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[7] Michael E. Porter, *The Competitive Advantage of Nations*, (The Free Press, Macmillan, Inc., 1990), at 665. Michael Porter is the Bishop William Lawrence University Professor at Harvard Business School. In a 1991 study of Canada, Porter and Monitor Company observed: "Weak domestic rivalry in many industries in Canada … will tend to diminish the odds of achieving sustained international success". See Michael E. Porter and Monitor Company, *Canada At The Crossroads – The Reality of a New Competitive Environment*, (October 1991), at 29.

[8] Department of Finance, *Advantage Canada – Building a Strong Economy for Canadians*, (2006), at 81.

A nation's competition policy is generally considered to extend beyond legislation that narrowly addresses restrictive trade practices and merger review to include the manner in which competition considerations are incorporated more broadly into the nation's general economic policy.

The objectives of Canadian competition policy that were described in the OECD's 2002 report entitled *The Role of Competition Policy in Regulatory Reform* resonate with the Sections. After observing that "[c]ompetition policy has been integrated inconsistently into the general policy framework in Canada", that report noted that economic policy in Canada has "sometimes tolerated local market power, entry controls, industry co-operation, and protection of national firms at the expense of national consumers".[9]

Based on experience with regulatory reform in the U.S. and elsewhere, the Sections believe that the significant distortions of competition that result from a broad range of federal, provincial and municipal legislation, regulation and other measures (collectively "Regulation") are likely having a material adverse impact on Canada's international competitiveness in the current environment of increased global competition.[10] The Sections are optimistic that the situation may improve somewhat as a result of the recent *Cabinet Directive on Streamlining Regulation*,[11] which requires government departments and agencies to "ensure that [any] regulatory restriction is fair, limited, and proportionate to what is necessary to achieve intended policy objectives", and to "prevent or mitigate any adverse impacts and enhance the positive impacts of regulation on … competitiveness, trade and investment". However, the Sections believe that Canadian competitiveness would be further strengthened by the adoption of the approach described in our response to question 2 immediately below.

2. What changes to Canada's competition regime would enhance the competitiveness of Canadian firms in the global economy? What international best practices, if any, would strengthen Canadian competitiveness as a destination for foreign investment if we were to adopt them?

Specific suggestions on ways in which Canadian competition law and policy can be enhanced in keeping with international best practices are outlined below.

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9 OECD, *The Role of Competition Policy in Regulatory Reform*, (Paris: 2002), prepared for *The OECD Review of Regulatory Reform in Canada*, at 6 (available at http://www.oecd.org/dataoecd/47/48/1960522.pdf).

10 This is consistent with the findings of Porter, *supra*, note [1], at 664, where the author reported that "[t]he nation in which competition itself was least regulated was often the international leader in the industries we studied". The Sections also note that the C. D. Howe Institute has estimated the direct costs of inter-provincial barriers to competition to be in the range of approximately 1% of Canada's Gross National Product ("GNP"). When indirect costs (such as the "discouragement" factor, where investment is lost because of the perception of barriers and excessive red tape) are considered, the cost of those barriers is estimated increase to at least 2% of GNP. See The Canadian Chamber of Commerce, Smart Regulation (2005) (citing the C.D. Howe's findings) (available at http://www.chamber.ca/cmslib/general/G051.pdf).

11 Government of Canada, *Cabinet Directive on Streamlining Regulation*, (April 1, 2007) (available at http://www.regulation.gc.ca/directive/directive00-eng.asp).

Greater Role for Competition Considerations

As reflected in the Sections' response to the immediately preceding question, the Sections believe that there is room for Canada to strengthen its competition policy and the international competitiveness of Canadian firms by providing a greater role for competition considerations in the development of new, and in the review of existing, Regulation at all levels of government.

The Australian experience demonstrates one possible approach. Briefly, governments at the federal, state and territorial level in Australia agreed in 1995 to review all existing legislation (as at June 1996) and to remove restrictions on competition unless it could be demonstrated that (i) the benefits of the restriction to the community as a whole outweighed the costs and (ii) the objectives of the legislation could only be achieved by restricting competition. [12] A study by Australia's Productivity Commission that was released in early 2005 estimated that the pro-competitive legislative reforms which resulted from this review process were a major contributor to an increase in domestic average household income and – significantly – in foreign direct investment.[13]

Another possible approach is to enhance the Commissioner's advocacy powers, which are currently limited in scope. For example, section 125 of the *Competition Act* empowers the Commissioner to make representations to and call evidence before any federal board, commission or other tribunal on her own initiative, at the request of such body, or on direction from the Minister, whenever such representations are, or evidence is, relevant to a matter before the body. Section 126 contains a similar power with respect to provincial boards, commissions or other Tribunals, but only at the request or consent of such body.

By contrast, other jurisdictions have reinforced their commitment to pro-competitive regulatory reform by providing their domestic competition agencies with strong advocacy powers. For example, Mexico's Federal Competition Commission has the authority to issue legally binding opinions to other government agencies regarding draft laws, regulations and administrative acts.[14] In South Korea, the Korean Federal Trade Commission must be consulted in advance regarding proposed enactments that may involve restrictions on competition.[15]

The Sections believe that affording a greater role for competition considerations in the legislative/regulatory process would allow other governmental bodies in Canada to better reconcile any proposed regulations with the goals of competition policy.

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12 The key aspects of these obligations are described at http://www.ncc.gov.au/pdf/AST5Ov-002.pdf and http://www.ncc.gov.au/pdf/AST5Ov-005.pdf.

13 Australian Productivity Commission, *Review of National Competition Policy Reforms*, Productivity Commission Inquiry Report No. 23, February 2005, at XVII and 40 (available at http://www.pc.gov.au/__data/assets/pdf_file/0016/46033/ncp.pdf).

14 See Article 24 of Mexico's *Federal Law of Economic Competition.*

15 See Article 63 of South Korea's *Monopoly Regulation and Fair Trade Act.*

***Section 45 Reform*[16]**

Canadian competition law enforcement could be enhanced by clarifying the legal standards applicable to hard-core cartels.

There is a connection between a country's competitiveness and its effectiveness in combating hard-core cartel conduct, and especially international cartels. In general, the U.S. and Canada follow largely similar approaches to both the underlying principles and enforcement of competition laws and have cooperated extensively with respect to cartel enforcement. Nevertheless, Canada's anti-cartel law (Section 45 of the *Competition Act*) stands in contrast to the principal U.S. federal anti-cartel law (Sherman Act, Section 1), insofar as under U.S. law, hard-core cartel conduct is unlawful *per se*, whereas under Section 45 of the *Competition Act*, such conduct must be found to lessen competition "unduly" to constitute a violation of the law. The Sections understand that over the last several years discussions and proposals surrounding the possible reform of Section 45 (including the PPF proposal) focused on the adoption of *per se* criminal liability for hard-core cartel conduct while allowing for non-criminal administrative or civil remedies for agreements that might provide net benefit rather than harm to competition (such as commercial joint ventures or other forms of pro-competitive strategic alliance between or among competitors).

The Sections support the adoption of a "dual track" approach to competition law enforcement in respect of anticompetitive agreements. Such an approach is consistent with that followed under U.S. law. U.S. courts have long established that certain naked horizontal agreements not to compete are so unlikely to have redeeming benefits that they do not warrant individualized examination as to their net competitive effect and are appropriately subject to *per se* condemnation. Accordingly, criminal prosecution on the basis of *per se* liability is considered appropriate for unlawful horizontal agreements such as price fixing, bid rigging and horizontal customer and territorial allocations. Moreover, hard-core cartel activity that is prosecuted criminally in the U.S. often involves concealment or covert activity by the defendants. U.S. law and practice, however, (as reflected in the approach to enforcement taken by U.S. courts, the Antitrust Division of the U.S. Department of Justice, and the various state attorneys general) is to consider civil rather than criminal enforcement in respect of agreements such as integrative joint ventures and vertical agreements that may yield net benefit rather than harm to competition. The Sections recommend that the Canadian government follow a similar approach under the *Competition Act* and in the exercise of its prosecutorial discretion by limiting criminal sanctions to such hard-core, naked restraints among competitors that have no plausible connection to legitimate joint venture activity.

In the U.S., there has been over 100 years of jurisprudence to distinguish these different types of conduct. The distinction is not statutory. It will, of course, be for Canadian policy and lawmakers to determine what factors and criteria might warrant *per se* criminal prosecution on the one hand, and civil enforcement on the other. Drawing on U.S. experience, however, the Sections recommend that any revised Canadian statutory provision in this area should be

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[16] The ABA Section of Antitrust Law commented in September 2003 on possible reforms to Section 45 of the *Competition Act* submitted to the Public Policy Forum. See note 6, *supra*.

carefully drawn with sufficient flexibility to ensure that the law does not unnecessarily deter legitimate procompetitive joint venture activity, thereby potentially limiting rather than enhancing Canada's competitiveness. Moreover, the enforcement authorities should provide considerable guidance concerning the operation and application of the law's provisions. Where conduct may attract *per se* criminal liability, it is imperative that the circumstances that will attract such liability are clear.

To best avoid the unwanted "chilling effect" on procompetitive conduct, U.S. antitrust authorities do not criminally prosecute agreements among competitors that may have a plausible connection to legitimate joint venture activity, even if the competitors in questions could arguably have proceeded by using less restrictive means to achieve their objectives. In recent years, challenges to such agreements have been brought in civil proceedings. Thus, the Sections recommend that if Section 45 were to be amended to provide for *per se* criminal liability in some circumstances, it should nevertheless be made clear that criminal sanctions will not apply to agreements that have a plausible relationship to legitimate integrative joint venture activity. Rather, any such agreement would be reviewed, if at all, under civil provisions of the Act. The Sections are not aware of any criminal antitrust prosecution that has occurred in many years that had even an arguable connection to a legitimate joint venture. The Sections would welcome the opportunity to provide comments on any specific amendments to Section 45, if and when any such amendments are proposed.

3. Does Canada's approach to mergers strike the right balance between consumers' interest in vigorous competition and the creation of an environment from which Canadian firms can grow to become global competitors?

Canada's approach to consumer welfare and investment from a competition standpoint is generally consistent with that found in the United States. Moreover, Canadian competition law—as in the United States—correctly focuses on competition, not nationality, when reviewing mergers. Laws that favor "national champions" over foreign firms run the risk of creating companies that are less able in the long term to compete globally. For example, inconsistent treatment of national and foreign competitors can create an entry barrier that can restrict the flow of capital in key industrial sectors as well as distort the economy. Over the long term, such practices would potentially render Canadian firms less competitive in the global marketplace.

Distinguishing between foreign and domestic investors as part of the merger review process has been universally criticized and typically not found to occur with mature competition authorities. This is reflected, for example, in the International Competition Network's Guiding Principles for Merger Notification and Review Procedures that the ICN issued during its inaugural meeting in 2002. One of these "guiding principles" provides as follows:

> Non-discrimination on the basis of nationality. In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.

The Sections note that the U.S. competition authorities will not use their merger review process to support the creation of national champions. For example, former U.S. Assistant Attorney General Hew Pate has stated as follows:

> One of the most important elements of merger review is to focus the analysis exclusively on preserving competition in the relevant markets and not to be distracted by other considerations. There may be temptations, for example, to intervene (or not intervene) in a merger in order to protect individual competitors. . . . We will not seek to protect a company from competition because the company is headquartered in the United States. Our recent challenge to Oracle's attempt to take over PeopleSoft provides a good illustration. SAP, a German company, is the largest provider of enterprise software in the world. We would give no weight to an argument by Oracle that it should be permitted to acquire PeopleSoft to create a U.S. "national champion" that could ensure a U.S. counterpart to SAP. Rather, we look to preserve competition that will benefit consumers regardless of the source of that competition.[17]

Similarly, U.S. Assistant Attorney General Thomas O. Barnett told Congress during his confirmation hearings that he appreciates the global scope of modern markets and the role that strategic horizontal mergers can play in increasing the competitiveness of U.S. industry, to the benefit of both shareholders and consumers.[18]

To date, the Bureau has not considered a firm's foreign status to be a negative (or even relevant) factor in merger analysis. The Sections commend the Bureau's current approach and not recommend that it maintain its focus on promoting consumer welfare through competition rather than on the nationality of the firms in question.

D. DETAILED COMMENTS ON INVESTMENT ISSUES

One of the key observations of the Panel is that Canada benefits from the influx of foreign direct investment ("FDI"), which offers Canada new sources of capital, ideas, and know-how. Indeed, one of the goals of the *Investment Canada Act* ("ICA") is to encourage FDI. The Sections are concerned, however, that the review process under the ICA may actually impose transactional costs that discourage foreign investment in Canada.

One of the fundamental precepts of the rule of law is that legal rules should be transparent so that outcomes based upon such rules will be reasonably predictable. This enables conduct to be governed accordingly and any application of the law to be accepted by those affected as fair and reasonable, whether it occurs in connection with driving an automobile, developing and manufacturing a new pharmaceutical or making a major international investment.

Given the rapidity and volume of modern FDI, the dependability and clarity of a nation's legal system for regulating FDI are vital to investor confidence: the more certain the legal framework, the less that framework will intrude upon or override other market factors that ought

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[17] Assistant Attorney General R. Hewitt Pate, *Securing the Benefits of Global Competition* (Sept. 10, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205389.htm.

[18] *Antitrust Spin Cycle*, Wall Street Journal, March 13, 2006, *available at http://online.wsj.com/article/SB114221858091696305-search.html?*.

to determine whether a given investment will be made. Conversely, the more ambiguous the legal framework and the more subjective the criteria used by government reviewers, the more those legal constraints will add both costs and risks to the investing process, thereby diminishing the likelihood that an investment will be made.

The ICA is somewhat atypical in requiring that proposed FDI be submitted to examination under a general "net benefit to Canada" standard. Such a standard is inherently fraught with ambiguity and subjectivity on the part of the government officials who must apply it in reviewing proposed FDI in Canada. More common are standards based upon specific sectoral protection (e.g., communications, transport, utilities, etc.) or, more generally, protection of national security. The ICA also establishes thresholds for review that are relatively low, particularly when measured against the typical size of cross-border investments into Canada today.

The United States, which has historically been the largest single market in the world for FDI, does not have any generic FDI law that is comparable to the ICA. Instead, the U.S. approach has been to welcome foreign investments more broadly and to confine national government reviews of FDI in the United States to the three standards that are generally used by other OECD countries:

- Antitrust review: This review is based solely upon competition law principles, without concern for the "nationality" of the parties.
- Sectoral review: This review is limited to specific regulated industries where public policy considerations have led to a legal requirement that a specialized agency examine any foreign involvement in that industry. These include aviation, maritime shipping, mineral land leases, nuclear energy and telecommunications.[19].
- National security review: This review is conducted under the *Exon-Florio* statute (as recently amended by the *Foreign Investment and National Security Act of 2007*) and, in the post 9/11 environment, pursuant to homeland security reviews. The objective is to ensure that a proposed FDI transaction does not jeopardize U.S. national security.

The limited approach to foreign investment review adopted by the United States has, to a very large extent, been consistent with the principles of clarity and transparency discussed above. In that way, it has served to promote FDI's important contribution to productivity and competitiveness in the United States.

Because of the similarities between the U.S. and Canadian legal systems, and the linkages between the economies of the two countries, the Sections respectfully suggest that the Panel may wish to consider whether a similarly limited approach to foreign investment review would also enhance Canada's attractiveness as a destination for FDI.

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19 *See, e.g.,* Christopher F. Corr, *A Survey of United States Controls on Foreign Investments and Operations: How Much is Enough?*, 9 AMERICAN UNIV. J. INT'L LAW & POLICY 417 (1994) [older compilation of federal statutes, some of which have since been amended or re-codified]

Canadian law already provides for independent and rules-based antitrust review that does not concern itself with the nationality of acquirers. Similarly, Canada's existing sectoral investment regimes – covering industries such as telecommunications, culture, broadcasting, transportation services and uranium production – are broadly similar to American laws aimed at regulating FDI in specific U.S. industries. [20] Finally, the Sections understand that the Canadian Government is also already seriously studying the addition of a "national security" review that could be comparable to *Exon-Florio* review in the United States.

If Canada does decide to add "national security" review to its two other existing statutory regimes, the Sections believe that the Panel might usefully examine whether the ICA's incremental value would be worth its significant impact upon transactional costs for FDI in Canada. In short, the Sections believe that limiting foreign investment review to the three grounds of antitrust review, sectoral review and national security review would be sufficient, by itself, to protect Canada's legitimate national interests and would be preferable to the confusing and burdensome "net benefit" standard contained in the ICA.

Conclusion

The Sections commend the Canadian Government for establishing the Panel to review Canada's competition and investment policies and legislation. Such initiatives will support the Canadian Government's objective of ensuring that these policies and laws foster an economic environment in which Canada can reach its true potential in the global marketplace. We would also express our gratitude for permitting us to submit these comments and hope that you find them useful during your deliberations.

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[20] These industry-specific controls are, by definition, limited in scope and are designed to serve public interests, and, as such, tend not to inhibit overall FDI activity. That said, as with U.S. sectoral investment restrictions, the Sections urge that care be used in establishing sectoral restrictions, and in reviewing them. Since such restrictions inevitably create a trade-off against a potential for greater competitive benefits for the economy, such a trade-off should be expressly considered in the creation and review of sectoral investment restrictions.