DEPARTMENT OF JUSTICE

INTERNATIONAL COMPETITION POLICY AND PRACTICE: NEW PERSPECTIVES?

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I. Introduction

It is a great privilege to be here with you today as part of the King's College lunchtime lecture series. I am deeply honored to be following in the footsteps of so many highly esteemed previous speakers.

My topic today is international competition policy and practice, and I would like to share with you some new perspectives in light of today's global economy and multi-polar world.

But first, because Margaret Bloom has asked me to, and because I am very glad to do so, let me explain my role at the U.S. Department of Justice. Since the start of the year, I have been serving as the Antitrust Division's Special Advisor on international matters. The appointment demonstrates the high priority that Assistant Attorney General for Antitrust Christine Varney places on the international aspects of competition law enforcement, as well as her recognition of the increasing significance international relationships and fora will play in the future. I could not agree more.

In very broad terms, my overarching goal is to more fully integrate the consideration of international issues into the day-to-day, practical work of the Antitrust Division, as well as in its policy work.

More concretely – and as my title implies – my primary duty is to advise AAG Christine Varney directly on the international dimensions of all aspects of the Antitrust Division's work. I also work closely with the Antitrust Division's investigative staffs, coordinating the frequent interactions with our non-U.S. counterparts during the course of our investigations. In this role, my aim is to intensify the Antitrust Division's cooperative relationships with other competition

agencies and to encourage our staffs to be mindful of the international implications of our actions right from the very start of an investigation through to the remedial phase.

To encourage this type of thinking, I recently conducted training sessions on non-U.S. procedures for each of the Antitrust Division's litigation sections in order to provide our investigative staffs with a deeper understanding of how differences in processes across jurisdictions may affect the Antitrust Division's investigations.

On the policy side, the Antitrust Division works actively on a bilateral and multilateral basis with its many counterparts around the world in order to bring about improved inter-agency cooperation and greater dialogue and convergence in thinking about competition rules and policies. I work with the AAG to oversee all these initiatives together with the Antitrust Division's Foreign Commerce staff. In that connection, I would like publicly to acknowledge the invaluable support I have had from Anne Purcell White and Nancy Olson of our Foreign Commerce section in preparing my lecture today.

On the multilateral front, I also work with the AAG to oversee the Antitrust Division's work in multilateral organizations such as the Organisation for Economic Cooperation and Development (OECD), the International Competition Network (ICN), the Asia-Pacific Economic Cooperation (APEC), and the United Nations Conference on Trade and Development (UNCTAD).

One of the more fascinating and gratifying aspects of my job so far has been my involvement in the Antitrust Division's work with emerging competition regimes, such as those in China and India. The Antitrust Division's engagement with the three Chinese competition

agencies is very active. For example, over the past year, the Antitrust Division (with the Federal Trade Commission (FTC)) has hosted senior officials from all three Chinese agencies, had many exchanges on their proposed regulations and guidelines, arranged a training program for 80 Chinese judges, and participated as instructors in workshops in China on merger enforcement, cartels, remedies, intellectual property, and other topics. The Antitrust Division also participates in the Obama Administration's initiatives in China, including the U.S.-China Strategic and Economic Dialogue and the Investment Forum.

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With that brief introduction about my role, I will now turn to the main reason why I am here today – to share with you some of my thoughts on international competition policy and practice and to offer some perspectives for how the global competition community might meet the challenges that lie ahead.

Although I identified a number of those challenges when I spoke in May at the St. Gallen International Competition Law Forum,[1] and again last month, in the merger context, at the Global Competition Review's conference in honor of the 20th Anniversary of the EU Merger Regulation, my focus up until now has largely been on transatlantic competition policy and cooperation. Today, I would like to broaden my geographic focus, move beyond mergers, and offer a more global and forward-looking vision.

[1] Rachel Brandenburger, Special Advisor, International, U.S Dep't of Justice, *Transatlantic Antitrust: Past and Present*, Remarks as Prepared for the St. Gallen International Competition Law Forum (May 21, 2010), *available at* http://www.justice.gov/atr/public/speeches/260273.pdf.

At the outset, I wish to emphasize that neither I nor, as AAG Varney has made a point of emphasizing, the Antitrust Division has all the answers. I also fully recognize that I am not the first person to observe that we will face challenges in a world of many enforcers. But what I can tell you, based on my recent experience in private practice and my even more recent work with the Antitrust Division, is that multiple competition agencies increasingly *are* reviewing the same transaction and conduct, and cooperation *is* taking place among more agencies than ever before. This world of multiple enforcers is no longer theoretical; it is real. And so, now more than ever, we need to think in very practical terms about this new situation in which we find ourselves.

My new role is certainly giving me valuable new perspectives – in that I am now looking at these issues from the other side of the Atlantic, and the other side of the table from where I spent my career until this year. But today's competition world is a big place, and we need to hear all voices, from all perspectives, as we prepare for the future. I therefore hope that my observations today will help to promote a truly global discussion of the future of international competition policy and practice – a dialogue that AAG Varney called for at Georgetown University Law School last month.[2] And so today, I invite your thoughts and input on the way ahead for international competition policy and practice.

[2] Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *International Cooperation: Preparing for the Future*, Remarks as Prepared for the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010), available at http://www.justice.gov/atr/public/speeches/262606.pdf.

II. Challenges for International Competition Policy and Practice in Today's Multi-Polar World

The many challenges and opportunities raised by today's world of multiple enforcers make it critically necessary to consider, and discuss, where global competition ought to be headed.[3] Let me elaborate.

Roughly 120 competition agencies now enforce competition laws, including new agencies in China and India. All of us – competition agency officials, merging parties, subjects of conduct or cartel investigations, and their advisors – must now pay serious attention to the rules in many jurisdictions.

We tend to attribute the proliferation of competition regimes to "globalization." I think that it is helpful to step back for a moment and think about what we really mean when we use that term in this particular context. It is, of course, true that the past decade has been marked by significant global economic changes. Total U.S. international trade, for example, more than doubled between 1998 and 2008.[4] (There was some decline in 2009 in the wake of the global economic downturn.) And, although the EU and Canada remain the United States' most significant trading partners, China is now a close third and has become the world's top exporter.[5] This is a major change from a decade ago, when China was only the world's eighth largest

[3] *See, e.g.*, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, 2008/09 PRESIDENTIAL TRANSITION REPORT, at 16 ("The importance of international cooperation between antitrust agencies in ensuring the effective and coherent enforcement of antitrust laws around the world has never been greater or more complex to achieve."), *available at* http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf.

[4] *See* http://www.bea.gov/newsreleases/international/trade/trad_time_series.xls.

[5] *See* EU-China trade in facts and figures, April 2010, *available at* http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144591.pdf.

exporter.[6] But globalization is about more than just trade flow statistics. Globalization also includes technological innovations that enable there to be many more connections among our various economies than even 10 years ago. For example, even if a product is made largely for U.S. consumption, it may have been assembled in another jurisdiction and its key components may have been made in yet other jurisdictions.

When you think about globalization in this way, it becomes clear that the competition law issues we evaluate will increasingly have implications in multiple jurisdictions – at both the investigation stage and the remedy stage. These developments have profound implications for the future of international competition policy and practice.

We are fortunate to have made good progress in international competition policy and practice over the last decade, and to have in place many of the building blocks we will need for the future. Our cooperation arsenal now includes a number of well-developed bilateral relationships covering both policy matters and investigations. For the future, though, it will not always be sufficient for competition agencies to cooperate on investigations or policy matters with only one or two other jurisdictions. As AAG Varney aptly and succinctly put it recently, "In today's world, competition agencies can no longer cooperate on investigations with only one or two other jurisdictions and call it a day."[7] The challenge will be adapting today's cooperation protocols to a world of multiple enforcers. In this respect, it is useful to reflect on how far we have come; where we are today; and where the future challenges lie in the three core areas of competition enforcement: mergers, cartels, and unilateral conduct.

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[6] Data from http://databank.worldbank.org.

[7] Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *International Cooperation: Preparing for the Future*, remarks at the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010).

III. Progress on Convergence, Cooperation and Transparency in Mergers, Cartels and Unilateral Conduct

In looking at these three principal areas of competition enforcement, it is helpful to consider the recommendations that were made more than a decade ago by the U.S. International Competition Policy Advisory Committee (ICPAC) – a blue-ribbon advisory committee established by the U.S. Department of Justice in 1997 to consider international competition issues. ICPAC's groundbreaking report identified the most pressing international competition policy issues facing the United States, as well as principles to guide the U.S. Department of Justice, and the U.S. government in general, in dealing with these challenges.[8] ICPAC recommended (1) increased transparency and accountability of government actions; (2) expanded and deeper cooperation between U.S. and overseas competition enforcement authorities; and (3) greater soft harmonization and convergence of systems.[9]

The principles of *transparency*, *cooperation*, and *convergence* have been the core of our international competition policy efforts over the past 10 years. As I will discuss in a few moments, while we might add to them and refine them, they certainly will remain important in the years to come. Let us look now at what we have achieved to date with respect to these three principles in each of the main areas of competition policy and enforcement, beginning with mergers.

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[8] INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST (Feb. 28, 2000) (hereinafter "ICPAC Report"), *available at* http://www.justice.gov/atr/icpac/finalreport htm. In October 2000, former Acting AAG Doug Melamed summarized the ICPAC report's overall thrust this way: "Our goal should be to achieve a reasonable degree of analytical and operational coherence in antitrust enforcement across a wide range of economies, antitrust laws, and legal cultures." A. Douglas Melamed, Acting Assistant Attorney Gen., *Promoting Sound Antitrust Enforcement in the Global Economy*, Address Before the Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy, at 7 (Oct. 19, 2000), *available at* http://www.justice.gov/atr/public/speeches/6785.pdf.

[9] ICPAC Report, *supra* note 7, at 2.

A. Merger Enforcement

To date, we have made a great deal of progress on convergence, cooperation, and transparency in international merger enforcement. As for *convergence*, we now have agreement on many of the fundamentals of merger review. Indeed, this has been a success story. One need only compare the newly revised U.S. Merger Guidelines[10] with other merger guidelines around the world – or look to the ICN's recommended practices on merger procedures[11] and substantive merger review,[12] and the scores of jurisdictions that have changed their laws and policies and now conform with them – to see how far the convergence of merger analysis has come in the last decade (although its application can, of course, result in differing outcomes, depending on the markets at issue).

Of course, convergence and cooperation tend to go hand in hand. Greater convergence has been driven by greater *cooperation* between competition agencies – in particular, through their interactions with each other in the course of their investigations, but also through technical assistance and international bodies like OECD and ICN . Equally, as agencies' policy views on

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[10] U.S. Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[11] *See* INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. The ICN recently reported that more than half of ICN's member jurisdictions with merger laws have implemented or were planning revisions to bring their merger regimes into greater conformity with these Recommended Practices. *See* INTERNATIONAL COMPETITION NETWORK, A STATEMENT OF ACHIEVEMENTS THROUGH APRIL 2010, at 3 *available at* http://www.icn-istanbul.org/Upload/Materials/Others/StatementOfAchievements.pdf.

[12] *See* INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER ANALYSIS, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf. Consistent with these Recommended Practices, while different jurisdictions may use different wording to describe their substantive standards, the overwhelming majority focus on whether a merger will substantially lessen competition. The Recommended Practices contain consensus principles reached in the analysis of competitive effects, market definition, use of market shares, entry and expansion, failing firm/exiting assets, and the legal framework for competition merger analysis.

mergers have converged over the years, the robustness of cooperation among competition agencies on actual investigations correspondingly has increased. It is important to keep in mind, however, that achieving agreement on general merger pronouncements on procedures and substantive review, while reducing the likelihood of divergent analyses and outcomes, does not necessarily guarantee that we will arrive at the same results in the context of a particular case.

Today, we see agencies reviewing the same or substantially similar merger transactions increasingly cooperating and coordinating their investigations. Two recent examples of effective cooperation in merger review come immediately to mind. The first is the review by the Antitrust Division and the Canadian Competition Bureau of the merger between *Ticketmaster* and *Live Nation* announced last year. The Division coordinated closely with the Bureau at the investigative stage, and the two agencies worked closely together to obtain a remedy, announced the same day, that preserved competition across North America.[13]

A second example of effective international merger cooperation is the review of the *Cisco/Tandberg* merger by the Department of Justice and the European Commission earlier this year. Cisco, a U.S. firm, was the leading provider of high-end telepresence videoconferencing products, while Tandberg, headquartered in both Norway and New York, was the leading provider in the broader videoconferencing products space, with a strong and growing role in telepresence. With waivers and cooperation from the merging parties and third-party industry participants in place, the Antitrust Division and the European Commission were able to work closely together from the opening to the conclusion of their investigations. This cooperation

[13] Press Release, U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.* (Jan. 25, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/254540.pdf; Press Release, Canadian Competition Bureau, *Competition Bureau Requires Divestitures by Ticketmaster-Live Nation to Promote Competition* (Jan. 25, 2010), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html.

included numerous contacts between the investigative staffs, the exchange of documents, sharing one another's competitive effects analyses, and conducting joint meetings and interviews with the parties and third parties. It also included active involvement and discussions among both agencies' senior management. In deciding to conclude our investigation, the Antitrust Division took into account the commitments that the parties were giving to the European Commission to facilitate interoperability and determined that the proposed merger was not likely to be anticompetitive.

The announcement that the Department of Justice had closed its investigation was made on the same day that the European Commission announced its clearance decision. AAG Varney characterized the investigation as "a model of international cooperation between the United States and the European Commission," and she commended the parties for "making every effort to facilitate the close working relationship" between the two agencies.[14] Vice-President Almunia similarly expressed satisfaction with "the overall review process that was carried out in close co-operation with the U.S. Department of Justice."[15]

This is the type of extensive day-to-day cooperation and coordination among competition agencies that we must continue to strive for in the years to come – even where the resulting remedy may differ because of the markets at issues in each investigation.

[14] Press Release, U.S. Dep't of Justice, *Justice Department Will Not Challenge Cisco's Acquisition of Tandberg* (Mar. 29, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

[15] Press Release, European Comm'n, *Commission Clears Cisco's Proposed Acquisition of Tandberg Subject to Conditions* (Mar. 29, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377&format=HTML&aged=0&language=EN&guiLanguage=en .

Turning to *transparency*, there seems to be more transparency about merger review process and analysis than in other areas of enforcement. One early effort that significantly advanced transparency in the merger area was the development by the ICN of a comprehensive online collection of links to member agencies' merger laws and other information, as well as members' responses to a uniform template of questions on key features of their merger review systems.[16] In addition, numerous jurisdictions have introduced, or reviewed and updated, merger guidelines to provide businesses, the public, and other agencies around the world with greater insight into their merger analysis.[17]

B. Cartel Enforcement

Turning now to cartels and using the same convergence-cooperation-transparency paradigm, I think many of you would agree that one of the most – if not the most – significant achievements of the global competition community over the past decade or so has been the substantial *convergence* we have witnessed in relation to recognition of the particularly pernicious nature of cartel activity and the importance of strong anti-cartel laws and vigorous enforcement.[18] In today's world, agreements among competitors to fix prices, rig bids, allocate

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[16] *See* http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx.

[17] Notably, the recent revision and update of the U.S. horizontal guidelines was primarily an exercise in transparency – closing gaps that had grown between the Guidelines and actual agency practice since their last significant revision in 1992 – 18 years ago. The enhanced transparency – and modernization – that the new Guidelines have achieved will enable businesses and their advisors to make better informed judgments about enforcement intentions. The revised Guidelines will also eliminate uncertainty and unnecessary surprises and may also provide assistance to the courts. *See* Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *An Update on the Review of the Horizontal Merger Guidelines*, Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop (Jan. 26, 2010); U.S. Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES, *supra* note 10.

[18] In 1998, the OECD Council's recommendation on cartels helped spur convergence on the great consumer harm that cartel activity inflicts, as well as the surge in international anti-cartel enforcement and cooperation that we see today. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL

markets or reduce output are universally recognized by competition agencies as unambiguously harmful. Over the last decade, competition agencies also have begun to achieve substantial convergence in a number of other cartel-related areas, including the implementation of effective leniency programs, the use of stronger investigative powers to detect and prove cartel activity, and the imposition of more effective sanctions for cartel violations.[19]

Based on this shared view, competition enforcers have intensified their cartel enforcement efforts, and this common commitment to fighting international cartels has, in turn, led to the establishment of cooperative relationships among competition law enforcement authorities around the world. Great strides have been made both in terms of cooperating in the context of individual investigations affecting multiple jurisdictions and more broadly in sharing information on effective enforcement techniques and policy approaches. Coordination on cartel investigations among agencies on multiple continents has become commonplace, and reports of coordinated searches, for example, have become routine. In addition, the increased use of assistance agreements, including Mutual Legal Assistance Agreements Treaties (MLATs) that

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CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (March 25, 1998), *available at* http://www.oecd.org/dataoecd/39/4/2350130.pdf.

[19]*See* INTERNATIONAL COMPETITION NETWORK, TRENDS AND DEVELOPMENTS IN CARTEL ENFORCEMENT (April 29, 2010), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf. For example, more than 50 jurisdictions have implemented leniency programs, and many have refined their programs over the years to make them even more effective. *See* Scott D. Hammond, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks at the 24th Annual National Institute on White Collar Crime, at 1 (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf; INTERNATIONAL COMPETITION NETWORK, TRENDS AND DEVELOPMENTS IN CARTEL ENFORCEMENT, *supra*, at 7-8, 38-52 (reporting on changes in leniency programs over the past 10 years). Our collective experience has led to a substantial convergence in leniency programs across numerous jurisdictions, including the United States, the European Union, and Canada. This has made it much easier and more attractive for companies to simultaneously seek and obtain leniency in multiple jurisdictions. Enforcers can then coordinate investigative steps, and with the applicant's consent, share information provided by a mutual leniency applicant, facilitating effective cooperation among enforcers. Likewise, numerous jurisdictions have increased their penalties for cartel activity, and implemented expanded search powers and other new investigative tools to enhance the effectiveness of their anti-cartel enforcement. *Id.* at 5-8, 16-29. These developments have enhanced the deterrence and detection of cartel activity around the globe.

provide for assistance in criminal law enforcement among jurisdictions in which cartel activity is a criminal offense, as well as bilateral antitrust cooperation agreements, have helped agencies to obtain relevant evidence from one another, share information, and cooperate effectively.[20]

There are many examples of the sophisticated nature of *cooperation* in cartel enforcement these days. Just to take a few – the Antitrust Division has cooperated with authorities on five continents on its ongoing investigation of cartel activity in the air transportation industry,[21] and similar cooperation has taken place in the Division's continuing investigation of a global conspiracy in the liquid crystal display (LCD) industry.[22] Another relatively recent high-profile example that has been made public is the Antitrust Division's coordination with the U.K.'s Office of Fair Trading and the European Commission in investigating cartel conduct in the marine hose industry. Those investigations led to multiple enforcement actions, including the first criminal cartel offenses sentenced under the U.K. Enterprise Act since coming into force in 2003.[23] These are not isolated occurrences of cooperation. To the contrary, the Antitrust Division is currently cooperating with – or receiving cooperation from –competition agency counterparts and other law enforcement agencies in Europe, Asia, North America, South America, Africa and Australia in a number of important cartel investigations.

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[20] For examples of U.S. antitrust cooperation agreements, *see* http://www.justice.gov/atr/public/international/int_arrangements.htm.

[21] *See* Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, *supra* note 19, at 15.

[22] *See* Press Release, U.S. Dep't of Justice, *Remarks Prepared for Delivery by Assistant Attorney General Thomas O. Barnett at a Press Conference Regarding LG, Sharp and Chunghwa's Agreements to Plead Guilty in LCD Price-Fixing Conspiracies* (Nov. 12, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/239396.pdf.

[23] *See* Concluded prosecutions – Marine Hose, *available at* http://www.oft.gov.uk/about-the-oft/legal-powers/enforcement_regulation/prosecutions/marine-hose.

At both the bilateral and multilateral levels, competition agencies increasingly are advancing their cartel enforcement programs by sharing effective policy approaches and investigative techniques. On the multilateral front, OECD's Competition Committee has issued *Guidelines for Fighting Bid Rigging in Public Procurement*,[24] which include checklists for detecting bid rigging and designing the public procurement process to reduce the risks of bid rigging. The Guidelines are now available in 23 languages and represent a distillation of the best practices of OECD member countries and observers. OECD also has produced a series of cartel reports, and has held workshops bringing together competition agencies and public prosecutors to discuss the harms associated with anticompetitive conduct and the evidentiary and proof burdens faced by prosecutors. Similarly, a main focus of ICN work in the cartel arena is sharing effective enforcement policies and techniques through workshops and conference calls, and assisting agencies in honing their operational and practical skills through the development of practical materials such as the ICN Anti-Cartel Enforcement Manual.[25]

Convergence on the inherently anticompetitive nature of cartel activity, and the corresponding increase in cooperation, also has been accompanied by greater *transparency*. Competition agencies are intensifying their efforts against cartels, making it widely known that cartel activity will not be tolerated. Other transparency initiatives include promoting the reporting of cartel activity through complaints and leniency applications, as well as extensive outreach efforts with the

[24] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT (2009), *available at* http://www.oecd.org/dataoecd/27/19/42851044.pdf.

[25] INTERNATIONAL COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT MANUAL, *available at* http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx.

business community, the competition bar, procurement officials, public prosecutors and other government entities, and the public.[26]

Outreach includes publishing brochures and other materials to educate the public and procurement officials about cartels, interacting with the business community to promote awareness of prohibited activity, and establishing a "National Anti-Cartel Day" in Brazil.[27] The United States is also pioneering new territory in its efforts to reach at-risk public sectors. By way of example, the Antitrust Division has launched the Antitrust Division Recovery Initiative, a program developed in response to the enactment of the American Recovery and Reinvestment Act ("ARRA"), an Act that provides for significant appropriations to stimulate the country's economic recovery. Recognizing the substantial risk that ARRA funded agencies will be vulnerable to collusion and other fraudulent activity, the Antitrust Division has provided training to over 20,000 agents, auditors, grant recipients, and other procurement professionals. Through this initiative, the Antitrust Division hopes to make a significant impact on the overall prevention of cartel activity and fraud, waste, and abuse relating to the use of ARRA funds.[28]

C. Unilateral Conduct Enforcement

To round out our analysis of the progress we have made to date, I would like to close with unilateral conduct – perhaps the most challenging area to tackle. The convergence-

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[26] *See* INTERNATIONAL COMPETITION NETWORK, TRENDS AND DEVELOPMENTS IN CARTEL ENFORCEMENT, *supra* note 19, at 11, 53-65.

[27] *Id.* at 53-65.

[28] *See* Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in This Challenging Era*, Remarks as Prepared for the Center of American Progress, at 15-16 (May 11, 2009), *available at* http://www.justice.gov/atr/public/speeches/245711.pdf; Scott D. Hammond, Deputy Assistant Attorney Gen., *Follow the Money: An Update on Stimulus Spending, Transparency and Fraud Prevention*, Statement Before the U.S. Senate Committee on Homeland Security and Governmental Affairs at 5-11 (Sept. 10, 2009), *available at* http://www.justice.gov/atr/public/testimony/250274.pdf.

cooperation-transparency story for unilateral conduct is still very much a work in progress. As for *convergence*, ICN has developed recommended practices on the assessment of dominance or substantial market power, [29] and the ICN's Unilateral Conduct Working Group continues to explore the potential for further substantive convergence.[30] Over the years, there have been other initiatives aimed at encouraging convergence in this area. For example, the Antitrust Division has had working groups with the European Commission, Canada and Mexico on a wide range of issues, including unilateral conduct, and the OECD's work program has included a number of roundtables on unilateral conduct issues.

Despite these efforts, which the Antitrust Division has supported, I think it is fair to say there is less convergence in this area than in any other area of competition law. Speaking generally, firms with significant market power are not condemned under U.S. antitrust law without evidence that their power was obtained through illegal means, or maintained through exclusive arrangements or other types of activity that do not have overriding procompetitive justifications. Other jurisdictions have taken a somewhat different approach; and differences remain among jurisdictions on some of the fundamental attitudes and underlying assumptions in this area and what it means to protect the competitive process. Those divergent approaches reflect, in part, different economic histories and traditions.[31]

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[29] *See, e.g.*, INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf.

[30] *See* ICN Unilateral Conduct Working Group 2010-2011 Work Plan, at 2 (noting that "[t]he Working Group aspires ultimately to propose Recommended Practices for the analysis of unilateral conduct, but recognizes that different views may make achieving consensus difficult. The Group will discuss when it would be most promising to begin this work, whether to start with a general analytic framework or specific types of conduct, and if the latter, which conduct"), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc620.pdf.

[31] *See* Varney, *International Cooperation: Preparing for the Future*, *supra* note 2, at 16.

Likewise, *cooperation* in the unilateral conduct area is less developed. Cooperation among agencies examining the same or substantially similar unilateral conduct is not yet nearly as common as it is in the merger and cartel enforcement arenas. I believe there are several underlying factors contributing to this. For starters, there have not been as many unilateral conduct investigations with international overlap as merger or cartel investigations. Hence, there have been fewer opportunities to develop cooperative relationships between competition agencies in this area. With a relative paucity of matters on which to cooperate, the agencies, in turn, do not have a reserve of practical experience to draw upon and learn from. Relatedly, waivers from the parties that would enable agencies to exchange otherwise confidential information and thus cooperate more closely are less common in unilateral conduct investigations than in merger investigations. And, finally, there are additional practical hurdles to meaningful cooperation when some agencies investigate conduct that would not trigger an investigation elsewhere. This is a different framework than for mergers, where much of the cooperation takes place against the backdrop of mandatory premerger notification regimes, or cartels, where there is more agreement on the type of conduct that warrants investigation.

Perhaps the most significant achievements in the unilateral conduct area over the last decade have involved greater *transparency* – in particular, an increased understanding of the similarities and differences in various agencies' approaches. This has been the result of an ongoing and sustained dialogue among competition agencies on both a bilateral and multilateral basis. As I have mentioned, the Antitrust Division has participated in working groups with a number of jurisdictions on these issues. Additionally, on a multilateral basis, both OECD and ICN have undertaken a number of comparative reports and policy roundtables to shed further light on agency approaches to issues including tying, loyalty discounts, bundled discounts,

exclusive dealing, refusals to deal, margin squeeze, monopsony, predatory pricing, evidentiary issues in proving dominance, remedies, sanctions, and providing guidance to business on unilateral conduct issues.[32] These efforts have resulted in a deeper appreciation of the nature and reasons for our similarities and differences, but there is still work to be done in this area.

IV. New Challenges Requiring New Perspectives

The three core principles of cooperation, convergence and transparency identified in the ICPAC report have served us well over the past 10 years in addressing some of the challenges we have faced. Indeed, if you step back and re-read the ICPAC report, which I highly recommend, it is remarkably prescient in anticipating the challenges of the last decade. Our marks for implementing many of the report's recommendations are similarly impressive. Nevertheless, the world does not stand still, and the challenges faced by competition policymakers and enforcers continue to evolve and change. As useful as the principles of

[32] *See, e.g.*, INTERNATIONAL COMPETITION NETWORK, REPORT ON TYING AND BUNDLED DISCOUNTING (2009), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf.; INTERNATIONAL COMPETITION NETWORK, REPORT ON THE ANALYSIS OF LOYALTY DISCOUNTS AND REBATES UNDER UNILATERAL CONDUCT LAWS (2009), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc357.pdf; OECD Policy Roundtable on Fidelity and Bundled Rebates and Discounts (2008), available at http://www.oecd.org/dataoecd/41/22/41772877.pdf; OECD Policy Roundtable on Loyalty and Fidelity Discounts and Rebates (2002), available at http://www.oecd.org/dataoecd/18/27/2493106.pdf.; INTERNATIONAL COMPETITION NETWORK, REPORT ON SINGLE BRANDING/EXCLUSIVE DEALING (2008), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc355.pdf; OECD Policy Roundtable on Refusals to Deal (2007), available at http://www.oecd.org/dataoecd/44/35/43644518.pdf; INTERNATIONAL COMPETITION NETWORK, REPORT ON THE ANALYSIS OF REFUSAL TO DEAL WITH A RIVAL UNDER UNILATERAL CONDUCT LAWS (2010), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf; OECD Policy Roundtable on Margin Squeeze (2009), available at http://www.oecd.org/dataoecd/30/17/46048803.pdf; OECD Policy Roundtable on Monopsony and Buyer Power (2008), available at http://www.oecd.org/dataoecd/38/63/44445750.pdf; OECD Policy Roundtable on Predatory Foreclosure (2004), available at http://www.oecd.org/dataoecd/26/53/34646189.pdf; INTERNATIONAL COMPETITION NETWORK, REPORT ON PREDATORY PRICING (2008), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf; OECD Policy Roundtable on Evidentiary Issues in Proving Dominance (2006), available at http://www.oecd.org/dataoecd/42/8/41651328.pdf; OECD Policy Roundtable on Remedies and Sanctions in Abuse of Dominance Cases (2006), available at http://www.oecd.org/dataoecd/20/17/38623413.pdf; OECD Policy Roundtable on Guidance to Business on Monopolisation and Abuse of Dominance (2007), available at http://www.oecd.org/dataoecd/50/33/40880976.pdf.

convergence, cooperation and transparency have been in the past – and will continue to be in the future – I believe that we will need some new perspectives and ideas to meet the competition challenges ahead.

For the future, cooperation between agencies increasingly will need to take place not only with the U.S.'s long-standing trade and competition partners, such as Canada and the European Union, but also with newer and more distant jurisdictions. Those working relations will need to become as cooperative, deep, respectful, and trusting as are our relations with our existing partners.

With so many players involved—each with its own unique culture, legal regime, political structure, and economic situation—achieving further substantive convergence on certain issues may be difficult. Managing these areas is, I believe, likely to be our next big challenge, particularly with respect to the increasing number of matters that draw the simultaneous attention of multiple enforcement agencies.[33]

Going forward, we will need to focus on, and find ways to minimize and manage, our differences in a world in which the enforcement action of a single competition agency can affect consumers worldwide. With respect to unilateral conduct, global companies face uncertainty in making business decisions on pricing and product design when their conduct may be subject to scrutiny in some jurisdictions but not in others. On the cartel side, the growing interconnectedness among our economies poses challenges as well. For example, products made for U.S. consumption are increasingly assembled overseas, with the inputs for such products

[33] Varney, *International Cooperation: Preparing for the Future*, *supra* note 2, at 7.

often made elsewhere as well. These developments blur the traditional jurisdictional lines between us and deserve further attention and discussion among competition agencies worldwide.

Another related challenge involves how to bring about greater coherence in relation to competition remedies. Substantial divergence in remedial approaches among different competition agencies risks undermining one or more jurisdictions' enforcement powers as well complicating, or even frustrating, a firm's good faith efforts to comply with ordered relief. Competition agencies must each seek remedies sufficient to fulfill their respective obligations to protect their own consumers. In some cases, these may be remedies developed jointly with another agency or even a remedy developed by another agency that resolves the competition issues for both jurisdictions, as the recent *Ticketmaster/Live Nation*[34] and *Cisco/Tandberg*[35] merger investigations illustrate. At the same time, we should seek to avoid remedies that would have serious effects in other jurisdictions and on their agencies' independent enforcement efforts. As AAG Varney has said, "We need to strive for those most elusive of remedies: neither too narrow so as to fail to cover all the competitive concerns, nor too broad so as to interfere with other jurisdictions," though she recognizes that "it can be a tall order to devise a remedy confined to one jurisdiction for a product market that spans the globe, and the prevalence of such markets makes finding appropriate remedies not only more difficult but also more important."[36]

Going forward, we may also need to re-examine our tendency to think of merger, cartel, and unilateral conduct enforcement as discrete and separate categories and begin thinking of

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[34] *See supra* note 13 and accompanying text.

[35] *See supra* notes 14-15 and accompanying text.

[36] Christine A. Varney, Assistant Attorney General, U.S. Dep't of Justice, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference, at 3 (February 15, 2010), *available at* http://www.justice.gov/atr/public/speeches/255189.pdf.

them in a less compartmentalized and more holistic way.[37] If we expand our thinking in this way, we may find greater opportunities for cross-fertilization of ideas across the various enforcement areas or discover new synergies among them. For example, although the analysis of market definition in merger review and unilateral conduct contexts is not always identical, developments in market definition analysis in merger review may have implications for market definition issues in unilateral conduct cases, and vice versa.

V. Toward a Framework for the Future – Seven Principles for Effective Global Competition Enforcement

To meet the challenges of the future, I believe that we need to broaden our focus to emphasize a wider range of factors in a more holistic way. Today, I would like to propose seven critical ingredients that I believe might guide international competition policy and practice for the years to come: (1) transparency; (2) mindfulness of other jurisdictions' interests; (3) respect for other jurisdictions' legal, political and economic cultures; (4) trust in each other's actions; (5) ongoing dialogue on all aspects of international competition enforcement; (6) cooperation; and (7) convergence. While none of these factors is completely new to competition policy and practice, I believe that it will increasingly important to place a high priority on each of them in the years to come. Let me explain each of these principles in turn.

[37] This is an issue that Commissioner Bill Kovacic of the U.S. Federal Trade Commission has also raised.

A. Transparency

One key ingredient for effective international competition policy and practice in today's world is a familiar one –*transparency*, a core principle identified in the ICPAC report. I begin with transparency because it is impossible for competition agencies to communicate, cooperate, respect each other, or converge effectively with one another without understanding each others' approaches. Likewise, it is very important for businesses to be able to develop an understanding of the competition rules that apply to them generally, and – equally important – how these rules are likely to be applied to them in particular cases. This concern is amplified for global firms that are subject to many different sets of rules. By the same token, when firms are well informed about an agency's rules and thinking, it allows for a meaningful exchange of views leading to better quality agency decisions and a more efficient, effective, and fair competition enforcement system.

There are two facets of transparency that I believe are relevant here.[38] First, there should be openness between a competition agency and the party or parties under investigation about the conduct at issue, the nature of the potential violation at issue, the procedures that apply, and a willingness by the agency to engage the parties regarding the core issues and analysis throughout the investigative process. Second, there should be openness with other competition agencies and the rest of the world about an agency's policies, practices, and decisions, and a willingness to engage with other agencies throughout the investigative process. (Of course, transparency must operate consistently with legal, statutory, and prudential obligations to respect confidential information and the rights of the parties to make their case to each agency.) Going forward in

[38] Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, *supra* note 36, at 9.

today's multi-polar world, more and better information – that is, transparency – in both respects will be critical.

B. Mindfulness

Once competition agencies can understand the ways in which their colleagues in other jurisdictions operate, they must begin to be *mindful* (on a day-to-day basis) of the impact of their actions and approaches outside of their own jurisdiction, and the effects that other agencies' actions and approaches may have within their jurisdiction. Mindfulness of other competition authorities' jurisdiction, practices, and traditions allows agencies to work together to minimize inconsistent or conflicting approaches. As AAG Varney has observed, "divergent outcomes should occur, if they do, for well-founded reasons, and not arbitrarily or unexpectedly."[39] Mindfulness helps prevent arbitrary or unexpected differences.

In the area of remedies, for example, the ability of competition agencies to fulfill their missions depends critically on agencies (and courts) being able to fashion appropriate and effective remedies. While in some cases, different remedies may be appropriate for different market conditions, the potential for multiple remedies imposed by multiple competition agencies carries the risk that the remedies imposed by one agency will undermine the enforcement options available to other agencies, complicate or frustrate the ability of the parties to comply with multiple forms of ordered relief, and potentially even harm consumers. In our multi-polar world, agencies need to remain mindful of the impact of their remedial options outside of their

[39] *Id.* at 6.

jurisdiction, as well as the impact of remedies other agencies have imposed or are considering in the same or similar matters.[40]

In this respect, competition agencies should explore the potential to work together to develop unified remedies that will address competition concerns in multiple jurisdictions. An example of this type of mindfulness is the cooperation I mentioned earlier that occurred this year between the Antitrust Division and the Canadian Competition Bureau in the *Live Nation/Ticketmaster* transaction, where the two agencies worked closely together to obtain a remedy that preserved competition across North America.[41] Competition agencies should also be mindful of, and seek to minimize, the effects that even jurisdiction-specific remedies may have on other jurisdictions. The European Commission did just that in its *Microsoft* browser case at the end of last year, where the remedy was limited to Microsoft products sold in the European Economic Area.[42] Likewise, competition agencies will need to be increasingly mindful of whether the remedies imposed by other agencies may resolve part or all of the competition issues in their own jurisdiction. The *Cisco/Tandberg* merger earlier this year that I have already mentioned is precisely what I have in mind here. In deciding to close its investigation, the Antitrust Division took into account the commitments that the parties offered

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[40] *See generally* Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, *supra* note 36.

[41] *See supra* note 13 and accompanying text.

[42] Neelie Kroes, European Commissioner for Competition Policy, *Your Internet, Your Choice: Microsoft Web Browsers Decision*, Opening Remarks at Press Conference in Brussels (Dec. 16, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/582&format=HTML&aged=0&language=EN&guiLanguage=en; Press Release, European Commission, *Antitrust: Commission Accepts Microsoft Commitments to Give Users Browser Choice* (Dec. 16, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1941&format=HTML&aged=0&language=EN&guiLanguage=en.

to the European Commission regarding interoperability, and thus concluded that the proposed deal was not likely to be anticompetitive.[43]

C. Respect

Respect involves two critical components: (1) openness to the ideas of others, and (2) respect for our differences. As I have said on a previous occasion, in today's multi-polar world, no one has a monopoly on good ideas.[44] In terms of openness to one another's ideas, greater cooperation and convergence will not be possible if any of us come to the table with the notion that our agency has all the right answers and other jurisdictions must therefore adopt that agency's standards or processes wholesale. As AAG Varney has explained:

> [W]e are all interested in protecting our consumers, and though we may not always agree on the best course, we all should listen to, learn from, and respect the various voices in the global enforcement community. It is only in this way that effective global antitrust enforcement can become truly a reality.[45]

In areas where we cannot yet agree, we must also learn to respect our differences. No one individual, or agency, or court has all the answers, and the diversity of backgrounds and viewpoints should be respected. In today's multi-polar antitrust world, respect must include a sense of both inclusiveness and diversity – goals that ICN Steering Group Chair John Fingleton

[43] *See supra* notes 14-15 and accompanying text.

[44] Brandenburger, *Transatlantic Antitrust: Past and Present*, *supra* note 1, at 15.

[45] Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, *supra* note 36, at 12.

is focusing on as he facilitates discussion of the path for ICN's second decade.[46] The Antitrust Division supports these efforts.

D. Trust

Trust is, of course, a fundamental element of effective cooperation. In the cartel enforcement arena, for example, trust is an essential element for agencies seeking to coordinate searches or develop coordinated investigative strategies, such as the simultaneous searches and arrests executed in the *Marine Hose* cartel investigation. Likewise, trust is a fundamental part of coordinating timing and other investigative steps in merger investigations like the *Cisco/Tandberg* merger.

As with any relationship, trust grows over time. Trust among competition agencies arises most often out of mutual respect born of working productively together, whether in negotiating consensus documents such as ICN recommended practices, having detailed discussions on particular substantive or procedural issues on a sustained basis, working closely together on individual investigations, or providing technical assistance. The more familiar we become with one other, the more we appreciate that we share a common purpose and the more we realize just how similar our approaches and challenges often are. For the future, this will mean not only improving the ways we work with the agencies we know well and are accustomed to dealing

[46] *See* John Fingleton, ICN Steering Group Chair, *The International Competition Network: Planning for the Second Decade*, Ninth Annual ICN Conference in Istanbul, Turkey (April 27, 2010) *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc617.pdf.

with, but also establishing day-to-day working relationships with an increasing number of agencies.

Building trust between competition agencies and the business community is also important. Effective cooperation among competition agencies is often not solely in their hands. Businesses need to have confidence that confidentiality waivers will not result in compromised corporate information. Prospective leniency applicants need to have confidence in the operation of agencies' leniency programs, and to be able to predict with a high degree of certainty how they will be treated if they seek leniency; otherwise, they will not come forward to report cartel activity in the first place.[47] By the same token, in order to achieve an effective global competition system, competition agencies need to have confidence that parties are not seeking to game the multi-jurisdictional system or play one agency off or against another.[48]

E. Dialogue

Ensuring an ongoing *dialogue* will similarly be essential for effective competition policy and practice in today's multi-polar world. This dialogue should occur not just among competition agencies, but also with the business community, consumers, practitioners, academics, and the public as well. Each can provide important insights and different perspectives on what is, and what is not, working well in the international world of competition law enforcement.

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[47] *See* Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, *supra* note 19, at 2-4.

[48] *See* Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, *supra* note 36, at 11 ("[W]e should use all the tools available to us to encourage the parties to work with the agencies in parallel, and to make clear to them that they have *nothing* to gain from trying to game the system.").

Whether with regard to specific matters or in a broader context, discussion with other competition agencies allows us to exchange insights regarding our experiences in competition law enforcement. Through bilateral meetings, technical assistance visits, informal staff-to-staff discussions, or public outreach, we all need to continue to share our expertise in particular areas, and at the same time explore approaches that have worked well for others. [49] Dialogue includes a willingness of competition agencies to revisit their own policies and practices over time to reflect new learning and the experiences of others.

In the end, ensuring an ongoing, deep, and meaningful dialogue may be one of the most important things we can do in those areas where we have not reached convergence. While it may not be easy to come to agreement on Recommended Practices in every enforcement area, I firmly believe that much benefit can come from competition agencies discussing an issue thoroughly and thoughtfully on a bilateral or multilateral basis. Officials involved in such discussions emerge better informed about what other agencies are doing, including what has worked well and not so well in the past, and are better equipped to think about their own practices with greater perspective in the future.

F. Cooperation

Cooperation will, of course, continue to be critical. We will not meet many of tomorrow's challenges unless competition agencies continue to work together. Cooperation

[49] For example, as was noted in a recent report issued by the Antitrust Division and FTC on technical cooperation and assistance, engagement between more established and emerging competition authorities is not merely a means to help emerging agencies; rather, the learning gained through such interactions is a two-way street. U.S. Department of Justice and Federal Trade Commission, *Charting the Future Course of International Technical Assistance at the Federal Trade Commission and U.S. Department of Justice*, at 7 (Oct. 2009), *available at* http://www.justice.gov/atr/public/reports/250908.pdf. Effective technical assistance efforts enable the providers of support to learn about the relevant local conditions and allow the recipients of support to benefit from the expertise of the longer-established jurisdiction, with the aim of creating trusted and long-term, mutually beneficial working relationships.

reduces uncertainty and unnecessary burdens on both the firms involved and the competition agencies. And it helps to avoid or manage differences. Even in the presence of legal or procedural differences, it is our experience that we have generally tended to reach the same conclusions when competition agencies are fully engaged with one another in analyzing the same matter.

While this type of cooperation among competition agencies on individual enforcement matters is becoming increasingly commonplace, those of us who are frequently involved in such matters know that each matter raises its own combination of issues, some familiar and others unusual or unprecedented. For the future, I think we will need to focus even more than we already do on the ways that we cooperate with one another in our day-to-day work on individual matters – because, as I have said, managing multi-jurisdictional competition issues with an increasing number of agencies around the world will become a more frequent issue, and because getting our cases right is what really matters at the end of day.

Our respective case teams need to be mindful of, and to act on, the international implications of our actions from the start of an investigation through the remedial phase. In today's multi-polar world, it is essential that competition agencies around the world think about cooperation in a holistic and very practical way, fully integrating it into the daily work that we all do.

Fortunately, so long as competition agencies are mindful of the need for frequent coordination and cooperation, technological developments in communications have made close cooperation and coordination readily achievable. In today's global, interdependent society,

where technology allows rapid and easy exchange of information, "no surprises" can be a basic goal among cooperating agencies.

As I have already said, the ability of competition agencies to cooperate on individual enforcement matters is not entirely in our own hands. In many cases, the actions and incentives of the parties under investigation also play a critical role. I believe that parties under investigation will increasingly need to consider their willingness to give waivers to the competition agencies to facilitate agency cooperation if we are to make real progress going forward.

We may also need to dust off some "old" ideas and consider them in a new light. For instance, in re-reading the ICPAC report for this lecture, I was struck by the fact that a multi-jurisdictional merger recommendation in which we have not made much progress is the area of "work sharing."[50] As outlined in the ICPAC report, "work sharing" would involve agencies working together to reduce duplication by, for example, jointly negotiating merger remedies, limiting the number of jurisdictions conducting second-stage reviews, or identifying one jurisdiction to coordinate particular merger investigations.[51] While we have seen progress on the joint negotiation of remedies in individual transactions (most recently in *Ticketmaster/Live Nation*), the other forms of work sharing envisioned in the ICPAC report have not yet been deeply explored. While certain aspects of work sharing can raise sensitive issues, it may perhaps be time to revisit our thinking on the concept of work sharing and how it might apply in meeting the challenges ahead.

[50] *See* ICPAC Report, *supra* note 8, at 4, 7-9.

[51] *Id.* at 8.

G. Convergence

Last though certainly not least, *convergence* will remain an important ingredient of our international competition policy and practice efforts. Convergence can take many forms, including substantive principles, remedies, or procedures, but convergence is fundamentally about enhancing the likelihood that agencies get to similar answers on similar questions in similar cases. Convergence also makes it easier for firms to do business efficiently on a global basis and for the benefits of competition to reach consumers. Convergence reinforces cooperation by allowing agencies to proceed from a common framework, and allows firms to conduct business globally at a lower cost. While convergence is not an end in itself and does not guarantee similar results in all cases, it is a means to a sound and sustainable international competition enforcement environment.[52]

In addition, while efforts to explore the potential for further convergence are important and should be pursued, convergence may have practical limits. Attaining convergence among such a large number of agencies, each with its own unique legal culture, enforcement regime, political structure and economic situation, is difficult, and we need to recognize that it may be unrealistic to expect convergence on everything.

Given these limits, I believe that we may need to refine our thinking on convergence. For example, AAG Varney recently has suggested that we may need to "untangle" the processes and procedures international competition authorities employ in investigations from the substantive legal and economic theories they apply, and focus on the latter, given the uncertainties of achieving further uniformity of processes and procedures across the world's many legal

[52] *See* Varney, *International Cooperation: Preparing for the Future*, *supra* note 2, at 7-8.

traditions.[53] While convergence is, and will continue to be, very important, we also need to focus on understanding and managing our differences effectively in those areas where convergence may not be reached.

VI. Conclusion

In sum, the core principles of convergence, cooperation and transparency that have so successfully guided our international efforts up until now will continue to be important in the years to come. To meet the challenges of the future, however, I suggest looking at the core principles in a new light, and complementing them with the related goals of mindfulness, respect, trust, and dialogue. There will be difficult issues to resolve as our multi-polar competition world continues expanding. These issues result from the tremendous success of the competition ideal across a great many countries with varied economies and traditions. I certainly do not claim to have all of the answers. But I sincerely hope that my remarks today will contribute to an ongoing productive dialogue on the best way forward for us all.

Thank you very much for your attention.

[53] *Id.* at 15.