



**U.S. Department of Justice**

Antitrust Division

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**INTERNATIONAL COOPERATION: WHERE NEXT?**

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I am delighted to be back in Brussels this evening and deeply honored to have the opportunity to speak to the Women's Competition Network. It is a true pleasure to see so many familiar faces, former colleagues, and friends in the audience this evening.

This evening, my topic is international cooperation in the enforcement of competition law, and specifically, I would like to focus on the future and ask: where next? I am very fortunate to have had a career that has afforded me a prime vantage point from which to see competition law evolve over the past 20 years or so – and my current appointment gives me an even more privileged vantage point.

Indeed, I would never have imagined that I would be standing here this evening, speaking to you as a representative of the Assistant Attorney General for Antitrust of the United States Department of Justice. It is a very great privilege; and also an illustration of how one never really knows what twists and turns one's career may take – and how one should, I believe, seize an opportunity if it presents itself.

### **Today's Competition World**

Over my career, I have seen profound changes in the competition law world and the legal sector generally – especially the impact of globalization. But it's the future that I want to concentrate on this evening, rather than the past.

Today, as you all know, there are almost 120 different competition agencies around the world, including newer agencies in countries like China and India. Corporate citizens must consider all of these jurisdictions as they go about their daily business. Conduct is increasingly subject to investigations across multiple jurisdictions. This brings both opportunities and challenges, not only for businesses and their advisors, but also for competition agencies.

My appointment as Special Advisor on international matters demonstrates the high priority that Assistant Attorney General Christine Varney places on the international aspects of competition law enforcement, as well as her recognition of the increasing significance that international relationships will play in the future. In that context, I would like to specifically thank my colleagues (as I am now privileged to call them) at the European Commission. I am delighted to see some of you here this evening. Your support and kindness since I took up my appointment at the Department of Justice has been invaluable.

### **My Role in the Antitrust Division**

So, what do I actually do at the Department of Justice and how does that tie into the next generation of international cooperation? In very broad terms, Assistant Attorney General Christine Varney's overarching goal is to further integrate the consideration of international

issues into the day-to-day, practical work of the Antitrust Division, as well as into the Division's policy work.<sup>1</sup>

On the policy side, the Antitrust Division works actively with its many counterparts around the world to bring about improved inter-agency cooperation and greater dialogue and convergence in competition rules, policies and enforcement.

In that context, the Antitrust Division is an active member of International Competition Network (ICN).<sup>2</sup> Last week, I led the Division's delegation to The Hague to attend the 10<sup>th</sup> Annual Meeting of the ICN.<sup>3</sup> At the meeting, senior competition officials from around the world and non-governmental advisors from the private sector met and discussed key competition issues. When it was established in 2001, the ICN comprised 14 jurisdictions. Ten years later, the ICN consists of 117 member agencies from 103 jurisdictions. The opportunities and challenges represented by such a burgeoning of the competition ethic around the world are enormous.

The US is also a leading member of the Organization for Economic Cooperation and Development (OECD).<sup>4</sup> This month, OECD celebrates its 50<sup>th</sup> anniversary. Next month, Assistant Attorney General Christine Varney will lead our delegation to the meetings in Paris of the Competition Committee and Working Party 3 which she chairs. I will accompany her. The meetings will address a range of matters, including merger remedies, merger retrospectives, and compliance with competition laws.

On the bilateral side, two weeks ago, we welcomed a group of Chinese judges to Washington, DC and, together with our sister agency, the Federal Trade Commission (FTC), and a Federal judge, led a week's worth of technical assistance for the judges on a broad array of competition law topics. We routinely conduct technical assistance workshops in Washington, DC and around the world, including in China, India and elsewhere, often in conjunction with the FTC.

As my primary duty is to advise the Assistant Attorney General directly on the international dimensions of *all* aspects of the Antitrust Division's work, a significant amount of my time is also spent working closely with the Division's investigative staffs in Washington, DC (where I am based) – coordinating the frequent interactions with our non-US counterparts during the course of our investigations.

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<sup>1</sup> For more details on the Antitrust Division's international efforts, see U.S. Dep't of Justice, Antitrust Div., *The Antitrust Division's International Program* (Oct. 2010), available at <http://www.justice.gov/atr/public/international/program.pdf>.

<sup>2</sup> Additional information on ICN is available at <http://www.internationalcompetitionnetwork.org/>.

<sup>3</sup> See, Press Release, U.S. Dep't of Justice, *Justice Department Antitrust Officials to Participate in 10<sup>th</sup> Annual International Competition Network Conference in The Hague, The Netherlands* (May 17, 2011) available at [http://www.justice.gov/atr/public/press\\_releases/2011/271313.htm](http://www.justice.gov/atr/public/press_releases/2011/271313.htm).

<sup>4</sup> Additional information on the OECD Competition Committee is available at [http://www.oecd.org/departement/0,3355,en\\_2649\\_34685\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,3355,en_2649_34685_1_1_1_1_1,00.html).

Our aim is to further intensify the Division’s cooperative relationships with other competition agencies around the world, 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. How do we do this? By making sure we communicate with our counterparts around the world and by making sure it is an open, two-way communication. Hardly a day goes by when we are not on the phone or on a video conference with other agencies looking into same matters as we are. We are working hard to establish “pick-up-the-phone” relationships with the increasing number of agencies around the world. Building existing relationships and creating new ones is key to our vision for the future of competition policy and enforcement.

## Where Next?

This brings me to the question posed in the title of my talk – Where Next? We have made a point of emphasizing that the Antitrust Division does not have all the answers.<sup>5</sup> What we are seeking to do is to stimulate and encourage a dialogue about the future. The world of multiple enforcers is no longer theoretical; it is real. So, now more than ever, we need to think, in very practical terms, about how best to meet the challenges, and seize the opportunities, presented by this new situation.

We have made good progress in international competition policy and practice over the last decade, and we have in place many of the building blocks we will need for the future. The challenge will be adapting today’s cooperation protocols to a world of multiple enforcers. In thinking about ways to meet this challenge, I would suggest that it is useful to reflect on the three core areas of competition enforcement: mergers, cartels, and unilateral conduct/abuse of dominance.

In looking at these three core areas enforcement, I would also suggest that 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). ICPAC was a blue-ribbon advisory committee established by the U.S. Department of Justice in 1997 to consider international competition issues. ICPAC’s groundbreaking report 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.<sup>6</sup> These three principles of *transparency*, *cooperation*, and *convergence*

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<sup>5</sup> See, e.g., Christine A. Varney, Assistant Attorney Gen., 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 12 (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.pdf>; and 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>;

<sup>6</sup> INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, at 2 (Feb. 28, 2000), available at <http://www.justice.gov/atr/icpac/finalreport.htm>.

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 in the future, they certainly will remain important in the years to come.

## Reflecting on 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 around the world on many of the fundamentals of merger review. Protecting competition and consumers is the generally accepted touchstone, and approaches to merger analysis are also increasingly similar. It is important not to forget though, that the application of even convergent rules can, of course, still result in differing outcomes, depending on the markets at issue in a particular case.

Turning to *transparency*, there seems to be more transparency about merger review process and analysis than in other areas of enforcement. This has been spurred in large part by initiatives of the OECD and the ICN.

There have also been successful examples of *cooperation* in the merger arena. Let me mention some recent examples. Last year, in its investigation of the *Cisco/Tandberg* merger, the Antitrust Division took into account the commitments that the parties gave to the European Commission regarding interoperability in concluding that the proposed merger was not likely to be anticompetitive. We and the European Commission worked together very closely on our investigations and, indeed, we closed our investigations on the same day.<sup>7</sup> Both Assistant Attorney General Christine Varney and Vice-President Almunia highlighted this investigation as a model for future cooperation and also a blueprint for how parties – both merging parties and third parties in that case – can facilitate cooperation with waivers.

This year, we worked closely with the German Federal Cartel Office (*FCO*) on the acquisition of certain patents and patent applications from *Novell Inc.* by *CPTN Holdings LLC*. At our request and the FCO's, CPTN - a holding company owned originally by Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp. - made revisions to the transaction agreements.<sup>8</sup> These changes were necessary to protect competition and innovation in the open source software community. Our close cooperation with the FCO was aided by waivers from the parties that

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<sup>7</sup> See, Press Release, U.S. Dep't of Justice, *Justice Department Will Not Challenge Cisco's Acquisition of Tandberg* (March 29, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm) and Press Release, European Commission, *Mergers: Commission Clears Cisco's Proposed Acquisition of Tandberg Subject to Conditions* (March 29, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377>.

<sup>8</sup> See, Press Release, U.S. Dep't of Justice, *CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns* (April 20, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/270086.htm](http://www.justice.gov/atr/public/press_releases/2011/270086.htm) and Press Release, German Bundeskartellamt, *Bundeskartellamt Clears CPTN Joint Venture for Acquisition of Novell Patents* (April 20, 2011), available at [http://www.bundeskartellamt.de/wEnglisch/News/press/2011\\_04\\_20.php](http://www.bundeskartellamt.de/wEnglisch/News/press/2011_04_20.php).

allowed us to share information and assessments of likely competitive effects and coordinate on potential revisions to the parties' agreements.

Earlier this month, the Antitrust Division entered into a consent decree with *Unilever* and *Alberto-Culver* requiring the parties to divest two hair care brands in order to proceed with Unilever's \$3.7 billion acquisition of Alberto-Culver.<sup>9</sup> In this case, we had dialogue with the UK Office of Fair Trading, the Mexican Federal Competition Commission and the South African Competition Commission – although the differences in products and markets was such that the outcomes in the various jurisdictions were not identical. Both Unilever and Alberto-Culver provided waivers, in a timely way, to facilitate the international cooperation in this case.

While I cannot, of course, comment on other ongoing matters, what I can say is that there are more cases in the pipeline where international cooperation with the European Commission and other agencies around the world is playing an important part in the investigations.

### **Reflecting on Cartel Enforcement**

Lest you think our focus is on mergers alone, let me now turn to cartels and use the same *convergence-cooperation-transparency* paradigm. I think many of you would agree that one of the most, if not the most, significant achievement of the global competition community over the past decade or so has been the substantial *convergence* we have witnessed in relation to the recognition of the particularly pernicious nature of cartel activity and the importance of strong anti-cartel laws and vigorous enforcement.<sup>10</sup>

There are many examples of the *cooperation* between competition agencies in cartel enforcement these days – in, for example, the air transport sector; the liquid crystal display (LCD) industry; and, of course, the marine hose industry.<sup>11</sup> These are not isolated occurrences of cooperation. On the contrary, the Antitrust Division is currently cooperating with, or receiving cooperation from, our 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. We cannot, of course, make these individual investigations public.

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<sup>9</sup> See, Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Unilever's Acquisition of Alberto-Culver Company* (May 6, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/270854.htm](http://www.justice.gov/atr/public/press_releases/2011/270854.htm). All case filings, including the Complaint and Competitive Impact Statement, are also available at <http://www.justice.gov/atr/cases/unilever.html>.

<sup>10</sup> 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 CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (March 25, 1998), available at <http://www.oecd.org/dataoecd/39/4/2350130.pdf>.

<sup>11</sup> See, e.g., 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 24<sup>th</sup> Annual National Institute on White Collar Crime, at 15 (Feb. 25, 2010) (outlining role of international cooperation in investigation of cartel conduct in the air transportation and marine hose industries), available at <http://www.justice.gov/atr/public/speeches/255515.pdf>.

Cooperation is not only a goal in the investigative phase. As Deputy Assistant Attorney General for Criminal Enforcement, Scott Hammond, has explained, where a punishment by a non-US enforcer satisfies the United States' deterrent interests, prosecutorial discretion may counsel against embarking on a separate action, or perhaps in favor of a reduced penalty, in the US.

*Transparency* initiatives in the cartel area include promoting the reporting of cartel activity through complaints and leniency applications, as well as extensive outreach efforts with the business community, the competition bar, procurement officials, public prosecutors and other government entities, as well as the public.<sup>12</sup>

## **Reflecting on Unilateral Conduct Enforcement**

To round out our analysis of the progress we have made to date, I would like to close with unilateral conduct or abuse of dominance. This is perhaps the most challenging area to tackle. The *convergence-cooperation-transparency* story for unilateral conduct is still very much a work in progress, notwithstanding the efforts of the OECD, ICN and others.

To date, we have had fewer cases involving more than one agency investigating the same conduct at issue at the same time. Also, the laws on unilateral conduct or abuse of dominance around the world still differ to a greater extent than in other enforcement areas. And the theories of harm and underlying economic theories are also still evolving to a greater extent.

## **Toward a Framework for the Future – Seven Principles for Effective Global Competition Enforcement**

As useful as the principles of *convergence*, *cooperation* and *transparency* have been in the past and will continue to be in the future, I believe that we also need some new ideas to meet the competition challenges ahead. So today, I would like to reiterate the seven principles that we believe might guide international competition policy in the years ahead:

- (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 policy and enforcement;
- (6) *cooperation*; and

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<sup>12</sup> See, INTERNATIONAL COMPETITION NETWORK, TRENDS AND DEVELOPMENTS IN CARTEL ENFORCEMENT, at 11, 53-65 (Apr. 29, 2010), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf>.

(7) *convergence*.<sup>13</sup>

While none of these factors is completely new to international competition policy, we believe that it will be increasingly important to place a high priority on *each* of them in the future.

## 1. Transparency

One key ingredient for effective international competition policy in the future will be 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 being able to understand each others’ approaches.

Likewise, it is very important for businesses to be able to develop 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.

## 2. Mindfulness

Once competition agencies can understand the ways in which their colleagues in other jurisdictions operate, they can begin to be *mindful* (on a day-to-day basis) of the impact of their actions and approaches outside of their own jurisdiction, and also of 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 Assistant Attorney General Christine Varney has observed, “divergent outcomes should occur, if they do, for well-founded reasons, and not arbitrarily or unexpectedly.”<sup>14</sup>

This is particularly the case in the area of remedies. In our multi-polar world, competition agencies need to remain mindful of the impact of their remedial options outside of their jurisdiction (as the European Commission, for example, was in the Microsoft browser case).<sup>15</sup> Agencies should also be mindful of the impact of remedies that other agencies have

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<sup>13</sup> See, e.g., Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, *supra* note 5, at 12; Varney, *International Cooperation: Preparing for the Future*, *supra* note 5; and, Rachel Brandenburger, Special Advisor, International, U.S Dep’t of Justice, *International Competition Policy and Practice: New Perspectives?*, Remarks as Prepared for the Centre of European Law, King’s College (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>.

<sup>14</sup> Varney, *Coordinated Remedies*, *supra* note 5, at 6.

<sup>15</sup> See, Press Release, European Commission, *Antitrust: Commission Accepts Microsoft Commitments to Give Users Browser Choice* (December 16, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1941>.

imposed or are considering in the same or similar matters (as the Antitrust Division was when it took account of the European Commission's remedy in the *Cisco/Tandberg* case last year in deciding to close its own investigation).<sup>16</sup>

### **3. Respect**

*Respect* involves two critical components: (1) openness to the ideas of others, and (2) respect for our differences. In terms of openness to one another's ideas, greater cooperation and convergence will not be possible if any of us comes to the table with the notion that our agency has all the right answers and other jurisdictions must therefore adopt our standards or processes wholesale.

In areas where we cannot yet agree, we must also learn to respect our differences. In today's, and even more, tomorrow's multi-polar competition world, respect must include a sense of both inclusiveness and diversity. No one competition agency has a monopoly of good ideas.

### **4. 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 develop coordinated investigative strategies, such as the simultaneous searches and arrests. As with any relationship, trust grows over time. For the future, this will mean not only improving the ways we work with the agencies we know well and are accustomed to cooperating with, but also establishing day-to-day working relationships with an increasing number of agencies around the world.

Building trust between competition agencies and the business community is also important as regards the treatment of confidential information, for example. 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.

### **5. Dialogue**

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

Dialogue also includes a willingness by competition agencies to revisit their own policies and practices over time to reflect new learning and the experiences of others. In the end, ensuring

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<sup>16</sup> See, *supra* note 7.

an ongoing, deep, and meaningful dialogue between competition agencies and with stakeholders, may be one of the most important things we can do in those areas where we have not yet converged or where convergence may not be easily achieved.

## 6. Cooperation

*Cooperation* will, of course, continue to be critical. 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.

The future also offers us the opportunity to dust off some “old” ideas and consider them in a new light. For instance, in re-reading the ICPAC report, I was struck by the fact that one recommendation in which we have not made much progress is the area of “work sharing” the report recommends in relation to multi-jurisdictional investigations.<sup>17</sup>

While we have seen progress on the joint negotiation of remedies in individual transactions (most recently in *Ticketmaster/Live Nation* where the Antitrust Division and the Canadian Competition Bureau worked together to impose the same remedy for the USA and Canada,<sup>18</sup> in *CPTN/Novell* where the Antitrust Division and the German FCO worked closely together,<sup>19</sup> and the *Cisco/Tandberg* investigation I have already mentioned<sup>20</sup>, the other forms of work sharing envisioned in the ICPAC report (e.g. limiting the number of jurisdictions conducting second-stage reviews or identifying one jurisdiction to coordinate a merger investigation) have yet to be deeply explored.

## 7. Convergence

Last though certainly not least, *convergence* will remain an important ingredient of international competition policy in the future. Attaining convergence among such a large number of competition agencies, each with its own unique legal culture, enforcement regime, political structure and economic situation, frankly is not always easy. We also need to recognize that it may be unrealistic to expect convergence on everything. Indeed, Assistant Attorney General Christine Varney has suggested that we may need to “untangle” the processes and procedures international competition agencies employ in investigations from the substantive

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<sup>17</sup> See, ICPAC Report, *supra* note 6, at 4, 7-9.

<sup>18</sup> See, 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](http://www.justice.gov/atr/public/press_releases/2010/254540.pdf); and 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>.

<sup>19</sup> See, *supra*, note 8

<sup>20</sup> See, *supra*, note 7.

legal and economic theories they apply, and that we should focus on the latter given the uncertainties of achieving further uniformity of processes and procedures across the world's many different legal traditions.<sup>21</sup>

## **Conclusion**

To conclude, the core principles of *convergence*, *cooperation* and *transparency* that have guided our international efforts so successfully up until now will continue to be important in the years to come. But to meet the challenges of the future, we will need to look at these core principles in a new light and complement them with the related goals of mindfulness, respect, trust and dialogue for the reasons, and with the objectives, I have explained this evening.

I certainly do not claim to have all of the answers. But I sincerely hope that my remarks this evening will contribute to an ongoing, productive dialogue on the best way forward for us all. Thank you very much for your attention. I would welcome your questions and comments.

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<sup>21</sup> See, Varney, *International Cooperation: Preparing for the Future*, *supra* note 5, at 15.