

First in the World: The FTC International Program at 100

BY DINA KALLAY AND MARC WINERMAN

WHEN THE FEDERAL TRADE Commission Act was passed in 1914, many observers were already concerned with the United States' ability to compete in global markets. Reflecting that concern, the FTC's charter and early work addressed international issues from the start.

In celebration of the agency's centennial, this article provides a window into international aspects of the agency's charter and early work, details some highlights (and lower lights) of the agency's international activities over the following decades, and describes the FTC's current international program and activities. Our analysis shows a progression: At first, the world around the Commission was replete with cartels and only a few jurisdictions outside the United States had antitrust enforcement regimes in place to address them. As a result, the main thrust of the FTC's early international work was to promote and protect domestic firms as they competed with foreign businesses that were themselves often cartelized.

In more recent decades, the growth of competition enforcement regimes around the world, coupled with the transitioning of planned national markets to market-based economies, has transformed the international antitrust landscape. Today, as a result of a trend that has taken off over the past 20 years, most foreign jurisdictions have now adopted competition-based and consumer welfare focused regimes. Concurrently, the consumer protection landscape has evolved as well. Reflecting the technological changes in the world around it, a growing proportion of the FTC's international consumer protection work now involves New Age plagues that result from the growth of e-commerce, such as Internet fraud and privacy concerns.

As a result, the FTC's international work now focuses on case-specific cooperation, as well as the promotion of con-

vergence toward best practices in sound antitrust and consumer protection enforcement and policy. Moreover, as more and more commerce and fraudulent activities cross national borders, particularly in the era of e-commerce, the FTC also is engaged in more and more law enforcement cooperation with foreign counterparts, including mutual investigative assistance, policy coordination, and technical assistance to countries with newer consumer protection and competition regimes.

But, first, back to the beginning.

International Concerns at the Outset¹

From the start, Congress contemplated an international role for the FTC. Section 6(h) of the FTC Act authorized the Commission in 1914, and continues to authorize it today, "[t]o investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States."²

The fact that the FTC's mission included a component addressing foreign trade should hardly be a surprise. Many participants in the debates leading to an FTC Act had long had an eye on global markets. As early as 1901, the U.S. Industrial Commission published its *Report of the Industrial Commission on Industrial Combinations in Europe*.³ Among other things, the report found little precedent or enthusiasm in Europe for antitrust models.⁴ Europeans apparently did not share the "anti-trust" sentiments that were strong in some U.S. quarters.

Even more importantly, perhaps the most influential American opponent of the antitrust tradition in favor of foreign models was the so-called trustbuster himself, Theodore Roosevelt (TR). TR, who sought a trade commission to implement his program, had been President from 1901 to 1909. Despite the handful of cases that earned him the "trustbuster" sobriquet, he had scorned the antitrust endeavor while (and even before) he held office.⁵ TR presented his evolved views most forcefully when he sought to return to the White House in 1912, first in the Republican primaries and then, after failing to displace President William Howard Taft, as a third-party candidate.⁶

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The antitrust enforcement debate was highlighted in that election cycle by the Supreme Court's 1911 decision in *Standard Oil Co. of New Jersey v. United States*.⁷ Even though the Court ordered Standard Oil's dissolution, the case enraged many "anti-trust" advocates because it announced the "rule of reason." TR, who now mocked the Sherman Act as "rural torism,"⁸ wrote admiringly about a judicially supervised German cartel.⁹ For TR, this cartel contributed to German efficiency that served as both a potential model and a threat to spur the United States to seek greater efficiency than, he believed, the antitrust laws allowed. And for this, TR wanted a commission.

Drawing together all these connections when he accepted the Progressive Party's nomination, TR quoted Charles Van Hise (then-President of the University of Wisconsin) to the effect that "[w]e cannot adopt an economic system less efficient than our great competitors, Germany, England, France, and Austria."¹⁰ He added that "[a]ny one who has had the opportunity to study and observe first-hand Germany's course in this respect must realize that their policy of co-operation between government and business has in comparatively few years made them a leading competitor for the commerce of the world." In TR's view, the Democrats' excessive concern with protecting small businesses was "utterly out of keeping with the progress of the times and gives our great commercial rivals in Europe—hungry for international markets—golden opportunities of which they are rapidly taking advantage."¹¹ The United States had to follow Europe's example, and could do so via a commission.

Woodrow Wilson, of course, won the following election (though TR outpolled Taft), and Wilson helped orchestrate the FTC's creation. But Wilson was more tentative, and even defensive, in promoting a commission. In 1912, he was "not afraid" of a commission.¹² When he backed a commission in 1914, he initially proposed a purely investigatory agency, only later embracing a provision (which became Section 5 of the FTC Act)¹³ that gave the Commission enforcement powers. That embrace, though, may also have reflected in part an attempt to pre-empt TR, who seemed likely to challenge Wilson again in 1916.¹⁴

Wilson actually had a far more dynamic understanding of the economy than did TR. He anticipated that smaller and more innovative competitors, protected by the antitrust laws, might effectively compete with their larger rivals, and thus envisioned a commission as more of an antitrust enforcer than did TR.¹⁵ Still, though TR and Wilson had different expectations for a commission, without TR's advocacy, inspired in part by global concerns, there would likely have been no commission of any stripe.

One final note about the agency's pre-history: Not all foreign models were antithetical to the U.S. antitrust tradition. In anticipation of debates over new legislation, a 1912 volume by the Senate Judiciary Committee included laws from Australia, Canada, and New Zealand, which included prohibitions on such conduct as "restraint of trade."¹⁶ The fol-

lowing year, the House Commerce Committee published a compilation of federal, state, and foreign laws. In addition to statutes from Australia, Canada, and New Zealand, the House volume added laws from the Cape of Good Hope and Japan; and for Britain, it discussed common law precedents regarding restraint of trade.¹⁷ It is not clear if or how these foreign laws influenced the form of the new U.S. laws—there were numerous federal and state laws on which Congress could also draw—but there were several references to foreign laws during the legislative debates.¹⁸

The Commission's Early International Work

With this backdrop, the Commission did substantial international work from the start. For example, it prepared several reports addressing promotional or protectionist concerns in its first decade, including a 1916 study of South American trade and tariffs, a 1923 report on the international petroleum trade, and a 1925 report addressing, in response to a Senate resolution, whether British efforts to expand cotton production in Egypt threatened U.S. interests.¹⁹ It also prepared a 1924 report on "cooperation" in foreign countries,²⁰ in which, taking quite a different approach, it sought to draw lessons from foreign experiences. The "cooperation" to which the title referred included a range of organizations, such as farmers' cooperative sales societies, rural credit societies, and retail consumers' cooperative societies. The study was undertaken "with a view to their application in the United States, so far as they may be compatible with the economic and social conditions of this country."²¹

But the Commission's most significant early report, which did deal with protectionist and promotional concerns, was its 1916 *Report on Cooperation in American Export Trade*.²² That report had been anticipated during the Senate debates on the FTC Act,²³ and drew on public hearings in more than a dozen U.S. cities and travel by an FTC staff member to South America.²⁴ It declared that the United States had been the world's leading exporter from 1901 to 1903 but had since been overtaken by Britain and could also be overtaken by Germany.²⁵ The Commission recommended that Congress create a limited antitrust exemption for export activities by properly registered export trade associations,²⁶ i.e., the report was overtly aimed at improving the competitive posture of U.S. firms abroad.

Two years later, Congress created the requested exemption in the Webb-Pomerene Act,²⁷ which also designated the Commission to administer the registration process for export trade associations.²⁸ The FTC was also empowered to oversee these associations to determine if they exceeded the statutory exemption; if it found that they had, it could refer a matter to the Department of Justice.²⁹ Moreover, in 1924, the Commission pressed the promotional goals of the Act even further when it issued, by a 3-2 vote, the so-called Silver Letter, which appeared to allow associations to participate in international cartels in ways from which the Commission eventually retreated in a 1955 "reappraisal."³⁰

Many Commission activities associated with the Webb-Pomerene Act thus had a promotional nature that differs from the contemporary international work of the FTC that will be described below. Further, while its work under the Webb-Pomerene Act is still mandated by statute—and while it still receives a few Webb-Pomerene filings annually³¹—these registration functions are very much peripheral to the core of the Commission’s current, and vastly expanded, international mission.

Since 1918, however, the Webb-Pomerene Act has had another provision more consistent with the FTC’s current international work: Section 4 of the Act gave the Commission enforcement powers to challenge firms that engaged in “unfair methods of competition” in the context of export trade.³² This “unfair methods” standard is of course the same standard that the FTC enforces domestically under Section 5,³³ and the FTC used its international “unfair methods” authority as early as a 1919 case challenging deceptive representations by Nestle’s Food Co.³⁴ Further, the FTC handled many early foreign complaints about U.S. businesses without resort to litigation. When it received complaints that originated in other countries, generally from foreign businesses complaining about U.S. firms, it first sought to resolve the complaints informally.³⁵

The Webb-Pomerene Act also had another by-product. As first noted in the FTC’s 1918 Annual Report, the Commission created an international division, the Export Trade Division, which was charged with administering the Act.³⁶ The Commission described that division’s work in subsequent annual reports, and those descriptions focused primarily on Webb-Pomerene work. But there were also hints of the agency’s later international work in passages describing its work under Section 4 of the Act, as well as in brief descriptions of foreign developments relating to antitrust or to industrial policy. These passages were obviously limited; the Commission could hardly summarize all global developments promoting or hindering competition in a few pages. Even more importantly, the passages gave no indication that the Commission sought to influence foreign authorities.

In a curious sidelight, the 1918 Annual Report described a *second* international division that helped administer the Commission’s work under the Trading with the Enemy Act.³⁷ The Commission administered provisions of this wartime enactment, which addressed the use in enemy countries and their allies of patents, trademarks, and copyrights held by U.S. firms, and the use in this country of patents, trademarks, and copyrights held in enemy countries and their allies. The President, for example, could authorize U.S. citizens or corporations to protect their intellectual property in an enemy country or its allies, and President Wilson delegated this authority to the Commission—although he soon revoked the authority in response to the FTC’s concern that any such efforts by U.S. businesses were inherently problematic in wartime.

Wilson also delegated to the Commission his authority to license U.S. citizens or corporations to use (with appropriate provision for subsequent payment) intellectual property owned or controlled by a firm in a hostile country or its ally.³⁸ There was logic to delegating this authority to a competition agency because one aspect of the agency’s decision was whether such licenses should be exclusive. The Commission continued to exercise this authority for several years, and licensed such drugs and products as Salvarsan (used to treat syphilis), Novocain, and coal-tar dyes.³⁹ The Commission eventually closed out this work in early 1924, although its powers were severely circumscribed well before then.⁴⁰

The 1920s Through the 1970s

Although the Export Trade Division became part of the FTC Office of the General Counsel around 1944,⁴¹ it survived as an independent unit or a sub-unit for at least 50 years. As late as 1968, the Commission’s Annual Report mentioned the Division (as part of the General Counsel’s Office) and described its functions. According to that report, the Division performed functions under the Webb-Pomerene Act, investigative functions for reports under Section 6(h) of the FTC Act, and “coordinate[d] the Commission’s jurisdiction over foreign commerce, advise[d] other offices of the Commission on the problems of American business abroad in the field of restrictive trade practices and serve[d] as an advisory liaison to other governmental departments and agencies having complementary jurisdiction over international trade.”⁴² The 1969 Annual Report notes that the Webb-Pomerene Act was transferred to the “Bureau of Restraint of Trade,” essentially the current Bureau of Competition.⁴³ However, by the early 1970s, there was an Assistant to the General Counsel for International Affairs in the OGC,⁴⁴ suggesting that core international functions and dedicated staffing may well have resided continuously in the OGC from 1944 (when the Export Trade Division moved into the OGC) until, and even beyond, the creation, discussed below, of international shops in the bureaus.

Further, while we do not attempt comprehensively to explore all of the FTC’s efforts that involved international trade, a few instances highlight that the FTC did other significant international work (not necessarily within the Export Trade Division) over the years. For example, in the course of a case against the Aluminum Company of America, which the FTC brought in 1925 and dismissed in 1930, the agency sent investigators to Europe to determine whether the case might expand to challenge participation in an international cartel.⁴⁵ (Alcoa was not a Webb-Pomerene Association and, even had it been, its suspected activities might have fallen outside the Webb-Pomerene exemption.)

In 1939, the Commission began to look at Webb-Pomerene Associations with a more skeptical eye, although, with the start of war, the agency suspended these efforts until 1943.⁴⁶ The Commission would then publish eight reports on inter-

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national cartels.⁴⁷ According to a 1967 FTC staff report, its initial efforts led to 11 docketed cases exploring possible readjustments of association activities. Of these, eight apparently led the associations to change their practices and two were litigated by the DOJ.⁴⁸

The last and most prominent cartel report was the oil cartel report.⁴⁹ The report had an extraordinary pre-publication history. During the Truman Administration, the White House Intelligence Advisory Committee, with the backing of the National Security Council, the Central Intelligence Agency, and the Department of Defense, recommended against its publication. However, leverage shifted after the report was obtained by the Senate Committee on Small Business, and the Committee published a redacted version of the report as a committee print.⁵⁰ The report also led Truman to order a grand jury investigation.⁵¹ As the case raised continuing security concerns, Truman eventually directed that it be brought as a civil suit⁵² and, under later presidents, even that suit was scaled back further, eventually yielding only limited results.⁵³

Then, in 1955 (as noted earlier), the Commission “reappraised” the Silver Letter. As described in a staff bulletin issued the day after the 1955 Reappraisal, “The Committee reports and legislative debates show that the [Webb-Pomerene] Act was designed primarily to allow American exporters to *compete* more effectively with foreign combinations and cartels, not to join them.”⁵⁴ The FTC would no longer approve participation by Webb-Pomerene Associations in international cartels.

During this time, the FTC or persons affiliated with the FTC also participated in post-war decartelization efforts in Germany and Japan, albeit in an apparently subordinate role. In 1948, FTC Commissioner Garland Ferguson headed a committee, whose staff was largely from the FTC and the Antitrust Division, to evaluate the status of efforts to decartelize and deconcentrate German industry.⁵⁵ (There are also extensive but largely unexplored records in the files of

Roy Prewitt, an FTC specialist in cartels and decartelization, at the National Archives.)⁵⁶

The FTC also brought other cases involving foreign trade during these “middle” years. For example, in a 1944 case, the FTC successfully challenged, as an unfair method of competition as well as an unfair or deceptive act or practice, misrepresentations made by an American firm in South America.⁵⁷ In yet other cases based on international trade, the Commission in 1978 obtained a series of settlements in cases that challenged bribery of foreign officials under Section 5 of the FTC Act.⁵⁸

International Antitrust and Consumer Protection Work in the 1980s and 1990s

In the 1980s and 1990s a number of relevant trends emerged. First, markets became more and more global, a trend expedited with the 1994 successful conclusion of the World Trade Organization’s Uruguay Negotiation Round, to which 123 jurisdictions were signatories with additional ones added later. The FTC’s 1995 Annual Report reflects this trend in noting “dynamic changes in the economy such as . . . the internationalization of many markets.”⁵⁹ Second, with the fall of the former Soviet Union in 1989, a growing number of jurisdictions around the world began to adopt antitrust enforcement regimes as they transformed their market model from a planned one to a market-based model. More antitrust regimes meant a greater need for case and policy coordination with non-U.S. counterparts to ensure consistent outcomes, and prevent conflicting results of actions by agencies in different countries.⁶⁰ Further, the birth of many new antitrust agencies, especially in economies that lacked a competition culture, also meant these agencies were in need of training in order to successfully develop and implement a sound antitrust enforcement regime.

The resulting needs did not go unanswered. In 1982, an International Antitrust Program was established as a separate division within the FTC’s Bureau of Competition, known as the International Antitrust Division. The program included investigation and prosecution of antitrust violations that had international features, as well as international liaison activities with foreign antitrust officials.⁶¹ It was not until 1985 when the work of this division was first acknowledged in the Commission’s Annual Report, which reported its staff as having worked that year on 25 investigations that involved international aspects and having been “active in a variety of intervention matters and international liaison activities involving transnational competition and antitrust law enforcement issues impacting upon the domestic economy.”⁶²

With respect to the growing number of nascent antitrust regimes, the FTC stepped up to the challenges by establishing a robust technical assistance program that is described in greater detail below. The program was established by then-Chairman Janet Steiger, working closely with her counterpart then-Assistant Attorney General James F. Rill, and benefited from support by the U.S. Agency for International Develop-

ment (USAID). FTC oversight of the program resided in different offices over the years, and it was in the Office of the General Counsel immediately before the Office of International Affairs was established.

In the face of the growing internationalization of commerce, in 1995 the FTC and the DOJ also updated their joint antitrust guidelines for companies engaged in international operations that affect U.S. commerce.⁶³ They were aimed at providing antitrust guidance to businesses engaged in international operations on questions that relate specifically to the agencies' international enforcement policy.

In the context of its consumer protection mission, globalization processes and better telecommunications channels also meant that a growing number of fraudulent activities began to involve cross-border elements. In response, the FTC's 1995 Annual Report mentions that the Marketing Practices division was involved in collaboration with Canadian authorities in an attempt to combat cross-border telemarketing fraud.⁶⁴ That report also mentions a Service Industry Practices program that sought to increase "law enforcement and consumer awareness in the burgeoning area of international fraud," noting that "U.S. consumers are increasingly being subjected to telemarketing fraud emanating from outside the country" and that "[t]he Commission has worked with both U.S. and foreign criminal and other law enforcement agencies to successfully prosecute individuals perpetrating cross-border fraud."⁶⁵ Subsequent reports reflect growing international enforcement cooperation as part of the agency's consumer protection mission.⁶⁶

The FTC's Bureau of Consumer Protection already identified an international function in the 1990s, at which point it resided in the Bureau Director's Office.⁶⁷ In 1998, the international consumer protection program moved into the FTC Division of Planning and Information (DPI), with four staff attorney positions allocated for its mission.⁶⁸ In 2002, under then-Chairman Timothy Muris, to reflect the growing importance of international consumer protection issues, the Bureau established a separate division devoted exclusively to international consumer protection. That division was called the International Division of Consumer Protection (IDCP); its task was to provide the FTC with necessary expertise to focus on this important area and to coordinate the broad range of law enforcement, policy, and outreach efforts in this area.⁶⁹

Finally, the passage of the International Antitrust Enforcement Assistance Act of 1994⁷⁰ is also noteworthy. The Act authorized the FTC and the DOJ to enter into mutual assistance agreements with foreign antitrust authorities, under which U.S. and foreign authorities could share evidence of antitrust violations, although not evidence from premerger filings, and could provide each other with investigatory assistance. In hindsight, the Act has regretfully not fulfilled its promise, since only one agreement was signed under its authority⁷¹ and actual exercise of that agreement to date has been scant.

FTC International Work in the Last Decade

The passage of the U.S. SAFE WEB Act (Safe WEB Act) in late 2006,⁷² and the establishment of the Office of International Affairs (OIA) soon after, are among the most significant milestones in the FTC's international work over the past decade.

Safe WEB Act. The FTC had successfully advocated for the passage of the Safe WEB Act⁷³ as a means to address the challenges posed by the increased globalization of fraudulent, deceptive, and unfair practices. Among the provisions of this statute, the Safe WEB Act advances this goal by allowing the Commission to share confidential information in consumer protection matters with foreign law enforcement agencies, subject to appropriate confidentiality assurances.⁷⁴ The Safe WEB Act also authorizes the Commission to conduct investigations and discovery to help foreign law enforcement agencies in appropriate consumer protection cases.⁷⁵ Finally, in a provision applicable to both the agency's competition mission and its consumer protection mission, the Safe WEB Act authorized the agency to carry out temporary staff exchanges with non-U.S. agencies,⁷⁶ an authority that paved the way for the International Fellows program that will be described below.

The OIA. Soon after the passage of the Safe WEB Act, then-Chairman Deborah Platt Majoras announced the establishment of a new FTC office, namely, the OIA. This office brought together the functions and personnel formerly found in the International Antitrust Division of the Bureau of Competition, the Division of International Consumer Protection of the Bureau of Consumer Protection, and the International Technical Assistance program at the OGC. The OIA Director reports directly to the FTC Chair, as opposed to the heads of the preceding divisions and program, who reported, respectively, to the Directors of the Bureaus of Competition and Consumer Protection and to the FTC General Counsel.

As of September 2014, the OIA employs 26 full-time employees, whose collective time is split about equally between the Office's antitrust and consumer protection missions. These employees are regularly joined by interns, many of whom are from countries outside the United States. They further assist the Office with its mission while learning sound antitrust enforcement and policy principles they then take with them to their home countries. International alumni interns, dozens to date, also extend the Office's international network.

The OIA's Mission.⁷⁷ The OIA's vast work falls roughly into five categories. First, it serves as an internal resource within the FTC, supporting the Bureaus of Consumer Protection and Competition on international issues that arise in the course of investigations and subsequent litigation. Its support focuses on such issues as obtaining evidence abroad and assisting bureau attorneys in understanding foreign law and procedures that may affect their cases. The Office also supports the FTC's advocacy work that involves international aspects, through such activities as speech writing, pub-

lications, and representation of the FTC in conferences and workshops that take place outside the United States.

Second, the OIA builds and maintains strong bilateral relationships with counterpart agencies around the world. Such relationships are important and useful because they facilitate cooperation with these agencies. As an ever-growing number of FTC cases involve foreign parties, evidence that is located outside the United States, non-U.S. competition and consumer protection laws, and even parallel investigations, cooperation helps inform legal analysis and promotes more consistent outcomes that are critical for multinational companies that do business on a global scale.

OIA cooperation with counterpart agencies is carried out both through cooperation agreements as well as outside such agreements. In the antitrust area, since 1976 the United States has signed bilateral cooperation agreements with nine jurisdictions. Alongside these government-to-government agreements, over the past five years the U.S. antitrust agencies have entered into memoranda of understandings (MOUs) and agreements with counterpart agencies in four jurisdictions. In the consumer protection area, since 1996 the FTC has entered into 17 MOUs with eight jurisdictions.

In addition to these bilateral agreements, a number of multilateral agreements also facilitate cooperation. In the consumer protection area, these include the London Action Plan on International Spam Enforcement Cooperation, the consumer.gov Agreement, the Sentinel Agreement, and the Asia-Pacific Economic Cooperation (APEC) Agreement for Cross-Border Privacy Enforcement. In the antitrust area, the OECD Recommendation on Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade functions as a cooperation agreement.⁷⁸

The scope and depth of FTC case cooperation with its counterparts continuously grows, as reflected by the growing number of press releases about such cooperation. Thus, for example, in the 2014 Thermo Fisher Scientific acquisition of Life Technologies, the FTC has reported cooperation with nine antitrust agencies outside the United States that involved such issues as market definition, theories of harm, and analysis of competitive effects.⁷⁹ Such cooperation is often enabled by confidentiality waivers from the parties.

Alongside such case-specific cooperation, the FTC also works bilaterally with counterpart agencies to promote policy convergence. Thus, for example, together with the European Commission it has created working groups to discuss substantive and procedural issues that arise in antitrust investigations. A similar merger policy working group was created with Canada's Competition Bureau. The FTC also holds annual consultation meetings with counterparts from certain jurisdictions, such as the European Union, China, and Japan, to discuss similar issues.

Third, the OIA serves as the FTC's liaison with other U.S. government agencies working on international issues in which the FTC claims a stake. This work involves regular participation in inter-agency consultations and working groups

that address competition and consumer protection issues, as well as representing the U.S. Government in outward-facing multi-agency efforts, such as dialogues involving counterpart agencies in other countries and playing an active role in work on competition chapters of U.S. Free Trade Agreements. Work on the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership are two recent examples of such efforts.

Fourth, the OIA leads the FTC's work in multilateral competition and consumer protection fora that promote convergence towards best practices in these areas. In the antitrust area, such organizations include the International Competition Network (ICN), the Organization of Economic Cooperation and Development (OECD) Competition Committee, the United Nations Conference on Trade and Development (UNCTAD), the APEC Competition Law and Policy Group, and others. In the consumer protection area, such organizations include multiple committees of the OECD, the International Consumer Protection and Enforcement Network (ICPEN), the London Action Plan, and the APEC Forum. In addition, the OIA staff also participates in several multilateral privacy networks, such as the Global Privacy Enforcement Network (GPEN), the International Conference of Data Protection and Privacy Commissioners (ICDPPC), the Asia Pacific Privacy Authorities (APPA) Forum, and the APEC Cross Border Privacy Enforcement Arrangement (CPEA). The consumer protection fora list reflects the growing importance of issues involving e-commerce, privacy, and identity theft in the OIA's consumer protection work.

Finally, the OIA focuses on technical assistance work. Together with the DOJ, the FTC has developed an impressive technical assistance program, the breadth and vigor of which were displayed in a 2008 technical assistance workshop and a 2009 report on the future of technical assistance at the FTC.⁸⁰ The term technical assistance describes various forms of substantive assistance to newer competition and consumer protection agencies as they attempt to get up and running and build up to sound enforcement and advocacy regimes. It can include, for example, drafting comments on contemplated guidelines and bills or sending long-term resident advisors. By 2009, the FTC and the DOJ have conducted more than 400 technical assistance missions to antitrust enforcement counterparts in more than 50 countries. Such missions included legal and economic staff training as well as programs on the investigative techniques needed for a successful consumer protection and competition law enforcement regime. The FTC has also engaged in dozens of technical assistance missions in the area of consumer protection. In the five years since the report was published, the FTC has completed about 50 additional technical assistance missions.

The FTC's International Fellows and Interns Program is an important complement to the agency's technical assistance mission. The Safe WEB Act enables the FTC to host

staff from foreign competition and consumer protection agencies and, under certain circumstances, provide them access to non-public materials. Participants gain valuable antitrust and consumer protection experience as they work closely with FTC teams on enforcement matters. The fellows then return to their home agencies with practical experience that they can put to work, while expanding the FTC's international network. Established in late 2007, the program has enjoyed remarkable success. According to the currently published numbers, thus far the FTC has hosted over 65 international attorneys, economists, and investigators from 31 jurisdictions; it continues to take new applications on a rolling basis. Under the staff exchange program, a number of FTC attorneys and economists have also worked in the competition agencies of Canada, the European Union, Mexico, and the United Kingdom.

Conclusion

Although international elements were part of the FTC's mission since its establishment, the nature of these elements is

dramatically different today than it was a century ago. As the world around the FTC has changed, the focus of its international mission has shifted from a largely protectionist program to a program focusing on cooperation and convergence as a means to support its core competition and consumer protection missions. In other words, the international mission has shifted, from protecting the competitiveness of U.S. industry to safeguarding competition and consumer protection as a means to enhance consumer welfare and efficiency, while rejecting the consideration of any non-competition considerations.⁸¹

In its consumer protection mission, the FTC cooperates closely with foreign counterparts to protect U.S. consumers from fraud and protect their privacy. FTC staff also regularly engages in training of counterpart non-U.S. agency staff, both on site, through staff exchanges, and through meetings with foreign officials. As a result, on the eve of its second century, the FTC's extensive international program assists the agency in successfully carrying out its consumer protection and competition missions in a globalized dynamic world. ■

¹ The following sections draw on Marc Winerman, *International Issues in the FTC's First Decade (1915–1925)—and Before*, in 2 WILLIAM E. KOVACIC—AN ANTITRUST TRIBUTE 133 (Nicolas Charbit & Elisa Ramundo eds., 2014).

² 15 U.S.C. § 46(h).

³ U.S. INDUS. COMM'N, REPORT OF THE INDUSTRIAL COMMISSION ON INDUSTRIAL COMBINATIONS IN EUROPE, VOLUME XVIII OF THE COMMISSION'S REPORTS (1901). Congress created the Industrial Commission in 1898 to study a wide range of industrial conditions. See Act of June 18, 1898, ch. 466, 30 Stat. 476.

⁴ U.S. INDUS. COMM'N, *supra* note 3, at 13; see also MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933, at 20–23 (1990).

⁵ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 1–20 (2003).

⁶ *Id.* at 22–25. TR had left the White House in 1909 out of respect for the traditional two-term limit (not yet enshrined in the Constitution) and, at the time, hand-picked Taft as his successor.

⁷ 221 U.S. 1 (1911).

⁸ Theodore Roosevelt, Editorial, *The Trusts, the People, and the Square Deal*, 99 OUTLOOK 649, 653 (1911).

⁹ Theodore Roosevelt, Editorial, *Nationalism and Special Privilege*, 97 OUTLOOK 145, 147 (1911).

¹⁰ Theodore Roosevelt, A Confession of Faith, Address Before the National Convention of the Progressive Party (Aug. 6, 1912), in 17 THE WORKS OF THEODORE ROOSEVELT 254, 276 (Hermann Hagedorn ed., Nat'l ed. 1926).

¹¹ *Id.* at 283.

¹² Woodrow Wilson, Address in New Haven Opening the Connecticut State Campaign (Sept. 25, 1912), in 25 THE PAPERS OF WOODROW WILSON 245, 251 (Arthur S. Link ed., 1978).

¹³ 15 U.S.C. § 45.

¹⁴ SCOTT C. JAMES, PRESIDENTS, PARTIES, AND THE STATE: A PARTY SYSTEM PERSPECTIVE ON DEMOCRATIC REGULATORY CHOICE, 1884–1936, ch. 3 (2000).

¹⁵ JOHN MILTON COOPER, JR., THE WARRIOR AND THE PRIEST: WOODROW WILSON AND THEODORE ROOSEVELT 212–13 (1983).

¹⁶ S. COMM. ON INTERSTATE COMMERCE, TRUSTS IN FOREIGN COUNTRIES: LAWS AND REFERENCES CONCERNING INDUSTRIAL COMBINATIONS IN AUSTRALIA, CANADA, NEW ZEALAND, AND CONTINENTAL EUROPE (1912). One reference to restraint

of trade, in an Australian law, appears at page 10.

¹⁷ NATHAN B. WILLIAMS, H.R. COMM. ON THE JUDICIARY, LAWS ON TRUSTS AND MONOPOLIES: DOMESTIC AND FOREIGN, WITH AUTHORITIES (1913). The Japanese law, a curious inclusion, prohibited acts “contrary to the public welfare or to good morals.” *Id.* at 419.

¹⁸ See, e.g., 51 CONG. REC. 12,148–49 (1914) (statement of Sen. Hollis); *id.* at 12,650 (statement of Sen. Cummins). Senators Hollis and Cummins were both spokesmen for the bill.

¹⁹ See FED. TRADE COMM'N, REPORT ON TRADE AND TARIFFS IN BRAZIL, URUGUAY, ARGENTINA, CHILE, BOLIVIA, AND PERU (1916); FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON FOREIGN OWNERSHIP IN THE PETROLEUM INDUSTRY (1923); EMPIRE COTTON GROWING CORPORATION: LETTER FROM THE CHAIRMAN OF THE FEDERAL TRADE COMMISSION SUBMITTING IN RESPONSE TO SENATE RESOLUTION NO. 317, SIXTY-EIGHTH CONGRESS, SECOND SESSION, OF JANUARY 27, 1925, A REPORT REGARDING THE DEVELOPMENT, METHOD, AND ACTIVITIES OF THE EMPIRE COTTON GROWING CORPORATION, A BRITISH FIRM 12–13 (1925).

²⁰ COOPERATION IN FOREIGN COUNTRIES: LETTER FROM THE CHAIRMAN OF THE FEDERAL TRADE COMMISSION TRANSMITTING A REPORT OF THE FEDERAL TRADE COMMISSION ON COOPERATION IN FOREIGN COUNTRIES (1924).

²¹ *Id.* at xv (Letter of Submittal).

²² FED. TRADE COMM'N, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE (IN TWO PARTS) (1916) [hereinafter EXPORT TRADE REPORT].

²³ 51 CONG. REC. 11,083–84 (1914) (statement of Sen. Newlands).

²⁴ FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1916, at 19–20 (1916). The FTC's annual reports are available online at <http://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports>.

²⁵ 1 EXPORT TRADE REPORT, *supra* note 22, at 3.

²⁶ *Id.* at 10.

²⁷ Ch. 50, 40 Stat. 516 (1918) (codified as amended at 15 U.S.C. §§ 61–66).

²⁸ *Id.* § 5, 40 Stat. at 517 (codified at 15 U.S.C. § 65).

²⁹ *Id.*

³⁰ See FED. TRADE COMM'N, ECONOMIC REPORT—WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 16 (1967) [hereinafter WEBB-POMERENE REPORT]. Appendix D of the report reprints key advisory opinions from 1924 (The Silver Letter), 1955 (Reappraisal of the Silver Letter), and 1966 (On

- Membership by Companies with Foreign Plants). See *id.* at 102–06, 106–07, 107–08.
- ³¹ See *Webb-Pomerene Act Filings*, FED. TRADE COMM’N, <http://www.ftc.gov/policy/reports/webb-pomerene-act-filings> (linking to six filings for 2010).
- ³² Section 4 provides: “The prohibition against ‘unfair methods of competition’ and the remedies provided for enforcing said prohibition contained in the Federal Trade Commission Act [15 U.S.C. 41 et seq.] shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.” 15 U.S.C. § 64.
- ³³ 15 U.S.C. § 45(b).
- ³⁴ See *Nestle’s Food Co.*, 2 F.T.C. 171 (1919). The FTC Act did not separately proscribe “unfair or deceptive acts or practices” until 1938. See Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111, 111 (amending 15 U.S.C. § 45). Before then, the FTC routinely—as it did in the *Nestle’s* case—challenged what would now be “consumer protection” cases under its “unfair methods” authority. See, e.g., *Circle Cilk Co.*, 1 F.T.C. 13 (1916) (the FTC’s first litigated decision).
- ³⁵ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1921, at 63–64 (1921) [hereinafter 1921 ANNUAL REPORT].
- ³⁶ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1918, at 37–41 (1918) [hereinafter 1918 ANNUAL REPORT].
- ³⁷ Ch. 106, 40 Stat. 411 (1917) (codified as amended in scattered sections of 50 U.S.C. app.).
- ³⁸ 1918 ANNUAL REPORT, *supra* note 36, at 42.
- ³⁹ *Id.* at 44–47; see also *Chemical and Engineering News*, AM. CHEM. SOC’Y, <http://pubs.acs.org/cen/coverstory/83/8325/8325salvarsan.html> (discussing Salvarsan).
- ⁴⁰ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1924, at 105 (1924) (noting office’s closure). The Trading with the Enemy Act had also created an Alien Property Custodian, a position first filled by future Attorney General A. Mitchell Palmer, and the Custodian eventually gained the authority to seize enemy patents. Pursuant to an executive order of December 4, 1918, the Commission lost authority over any patents demanded or seized by the Custodian, although it retained authority over licenses that it had previously granted. See FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1920, at 72 (1920); 1921 ANNUAL REPORT, *supra* note 35, at 66.
- ⁴¹ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1944, at 68 (1944).
- ⁴² FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1968, at 29 (1968).
- ⁴³ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1969, at 40–41 (1969).
- ⁴⁴ E-mail from Edward Glynn to authors, Sept. 28, 2014 (on file with authors). Glynn served as Assistant to the General Counsel for International Affairs from 1980 to 1982 and then was the first head of the international office in the Bureau of Competition.
- ⁴⁵ The FTC’s case is discussed in Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 164–65, 189–90 (2010); Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925–1929*, 77 ANTITRUST L.J. 701, 715–17, 734 (2011); and Marc Winerman & William E. Kovacic, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295, 298 (2013).
- ⁴⁶ WEBB-POMERENE REPORT, *supra* note 30, at 18.
- ⁴⁷ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1951, at 19 (1951) (listing seven reports already published and the petroleum cartel report “[n]ear completion”).
- ⁴⁸ WEBB-POMERENE REPORT, *supra* note 30, at 18. In the report, the cases are listed in Appendix E-1 and classified in Appendix E-2. See *id.* at 109–10.
- ⁴⁹ THE INTERNATIONAL PETROLEUM CARTEL, STAFF REPORT TO THE FEDERAL TRADE COMMISSION SUBMITTED TO THE SUBCOMMITTEE ON MONOPOLY OF THE SELECT COMMITTEE ON SMALL BUSINESS, UNITED STATES SENATE (1952). For discussions of this report and its findings, and of the controversy and litigation that it triggered, see BURTON I. KAUFMAN, *THE OIL CARTEL CASE: A DOCUMENTARY STUDY OF ANTITRUST ACTIVITY IN THE COLD WAR ERA* (1978); WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD 187–201* (2002); and James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577, 583–86 (2014).
- ⁵⁰ KAUFMAN, *supra* note 49, at 29–30; WELLS, *supra* note 49, at 197.
- ⁵¹ KAUFMAN, *supra* note 49, at 30.
- ⁵² *Id.* at 46.
- ⁵³ *Id.* chs. 3–6.
- ⁵⁴ FTC Export Trade Ass’n Bulletin #1-55, at 4 (July 15, 1955), in FTC, ANNUAL REPORT REQUIREMENTS OF THE WEBB-POMERENE ACT (1956) (on file with FTC library).
- ⁵⁵ WELLS, *supra* note 49, at 162–65.
- ⁵⁶ See *Records of the Federal Trade Commission*, U.S. NAT’L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/research/guide-fed-records/groups/122.html> (providing index to FTC records).
- ⁵⁷ *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944).
- ⁵⁸ *Lockheed Corp.*, 92 F.T.C. 968 (1978); *Boeing Co.*, 92 F.T.C. 972 (1978); *McDonnell Douglas Corp.*, 92 F.T.C. 976 (1978).
- ⁵⁹ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1995, at 5–6 (1995) [hereinafter 1995 ANNUAL REPORT].
- ⁶⁰ One instance of such a divergent result was the 2001 proposed \$42 billion GE/Honeywell merger that was allowed in the United States (with a divestiture) but prohibited in the European Union, and raised a firestorm of criticism. In addition, in what former Office of International Affairs attorney John Parisi called “the Dark Ages of Conflicts,” aggressive enforcement of U.S. antitrust laws against parties operating outside the country but aiming their activities at U.S. markets provoked a reaction whereby multiple jurisdictions, such as the United Kingdom, France, Belgium, Australia, and Canada, enacted “blocking statutes” in 1980 that prohibited their citizens from cooperating with foreign authorities, such as through the provision of evidence or consenting to judgments. See John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 43 CORNELL INT’L L.J. 55, 57–58 (2010).
- ⁶¹ It should, however, be noted that even prior to the formal establishment of this program within the Bureau of Competition, the FTC Office of the General Counsel employed a number of attorneys working full time on international issues.
- ⁶² FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1985, at 6–7 (1985).
- ⁶³ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Enforcement Guidelines for International Operations* (1995), available at <http://www.justice.gov/atr/public/guidelines/internat.htm>. These guidelines superseded the DOJ’s 1988 Antitrust Enforcement Guidelines for International Operations, which, themselves, superseded a 1977 version of same.
- ⁶⁴ See 1995 ANNUAL REPORT, *supra* note 59, at 156.
- ⁶⁵ *Id.* at 21.
- ⁶⁶ FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1998, at 14, 22 (1998).
- ⁶⁷ E-mail from Russell Damtoft, Associate Director of the FTC Office of International Affairs, to authors, Sept. 14, 2014 (on file with authors).
- ⁶⁸ E-mail from Hugh Stevenson, Deputy Director of the FTC Office of International Affairs, to authors, Oct. 6, 2014 (on file with authors). Mr. Stevenson served as the head of the International Division of Consumer Protection from its establishment until it was brought into the Office of International Affairs in January 2007.
- ⁶⁹ FED. TRADE COMM’N, *BUILDING ON A STRONG FOUNDATION: THE FTC YEAR IN REVIEW 20–21* (2002), available at http://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-2002/ftcyearreview_0.pdf.

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- ⁷⁰ Pub. L. No. 103-438, 108 Stat. 4597 (1994) (codified at 15 U.S.C. §§ 46, 57b-1, 1311, 1312, 6201, 6201 note, 6202–6212).
- ⁷¹ See Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance (1997), available at <http://www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement>; see also DOJ-FTC Protocol for Implementation of the US-Australia IAEEA Agreement (1999), available at <http://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/990525australiaiaeea.pdf>.
- ⁷² Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers Beyond Borders Act of 2006 (U.S. SAFE WEB Act), Pub. L. No. 109-455, 120 Stat. 3372 (codified as amended in scattered sections of 15 U.S.C. and at 12 U.S.C. § 3412(e)) (amending the FTC Act). The Safe WEB Act was enacted with a 7-year sunset provision, see *id.* § 13, 120 Stat. at 3382, and in late 2012 its application was extended another 7 years until September 30, 2020, see 15 U.S.C. § 44 note (Sunset Provision).
- ⁷³ FED. TRADE COMM’N, THE US SAFE WEB ACT: PROTECTING CONSUMERS FROM SPAM, SPYWARE AND FRAUD—A LEGISLATIVE RECOMMENDATION TO CONGRESS (2005), available at <http://www.ftc.gov/sites/default/files/documents/reports/us-safe-web-act-protecting-consumers-spam-spyware-and-fraud-legislative-recommendation-congress/ussafeweb.pdf>.
- ⁷⁴ 15 U.S.C. § 46(f).
- ⁷⁵ 15 U.S.C. § 46(j).
- ⁷⁶ 15 U.S.C. § 57c-1.
- ⁷⁷ For a fuller account of the OIA’s international antitrust work, see RANDOLPH TRITELL & ELIZABETH KRAUS, THE FEDERAL TRADE COMMISSION’S INTERNATIONAL ANTITRUST PROGRAM (2014), available at <http://www.ftc.gov/system/files/attachments/international-competition/ftcintantiprogram.pdf>.
- ⁷⁸ A full list of the agreements and memoranda of understanding is available at *International Competition and Consumer Protection Cooperation Agreements*, FED. TRADE COMM’N, <http://www.ftc.gov/policy/international/international-cooperation-agreements>.
- ⁷⁹ Press Release, Fed. Trade Comm’n, FTC Puts Conditions on Thermo Fisher Scientific Inc.’s Proposed Acquisition of Life Technologies Corporation (Jan. 31, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-thermo-fisher-scientific-incs-proposed>.
- ⁸⁰ FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, CHARTING THE FUTURE COURSE OF INTERNATIONAL TECHNICAL ASSISTANCE AT THE FEDERAL TRADE COMMISSION AND THE U.S. DEPARTMENT OF JUSTICE (2009), available at <http://www.ftc.gov/sites/default/files/attachments/international-assistance-program/exp.pdf>.
- ⁸¹ See Deborah Platt Majoras, National Champions: I Don’t Even Think It Sounds Good, Remarks Before the International Competition Conference/EU Competition Day (Mar. 26, 2007), available at http://www.ftc.gov/sites/default/files/documents/public_statements/national-champions-i-dont-even-think-it-sounds-good/070326munich.pdf.