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ATOMS VERSUS BITS: CONSUMER PROTECTION IN THE (CYBER) TRADE REGIME

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ATOMS VERSUS BITS: CONSUMER PROTECTION IN THE (CYBER) TRADE REGIME

By Sonia E. Rolland*

Building on Nicholas Negroponte’s now famous dichotomy, one can say that trade law was designed for the world of atoms but now undeniably has to deal with the digital world. One aspect of the relationship between trade law and electronic commerce is consumer protection. These remarks examine how consumer interests are affected by cross-border e-commerce, the ways in which trade law protects or hinders these interests, and the venues outside of trade law that may be better hosts for consumer protection laws.

E-commerce consumers, like all consumers, want more products. They want a broader range of goods and services and a greater differentiation of those goods and services. Consumers don’t just want the option of having a car or not having a car; consumers want the option of purchasing a Ford, Peugeot, or Volkswagen vehicle. Consumers want cheaper products and different pricing options, with an option to pay more for a better warranty or upgraded product specifications. Consumers also want products that are safe and they want truthful and accurate information about what they are buying. And if that product turns out to be defective, harmful, or not what was expected, consumers want to be made whole by reimbursement, replacement, and legal recourses for damages. Finally, consumers want protection over their personal data for both privacy and security reasons. Electronic commerce both increases consuming opportunities and raises particular challenges with respect to some aspects of consumer protection.

Producers, on the other hand, want to maximize profits by extracting the highest possible price, lowering their costs, and limiting their risk of liability. At times, this is accomplished by externalizing as much of their costs as possible. Producers aim to create a cost-effective supply chain and achieve low transaction costs when accessing global markets. Producers also want to make certain claims about the product, whether for advertising and promotion purposes or to differentiate themselves from competing brands and products. Ultimately, e-commerce producers want to sell their products to their target customers wherever these customers are and with the least amount of barriers.

CONSUMER INTERESTS IN CROSS-BORDER E-COMMERCE TRANSACTIONS AND DOMESTIC REGULATORY RESPONSES

E-commerce affects just about all consumer and producer interests outlined in the introduction, but it does so in unique ways compared to the traditional world of trade. In the atom world, consumers and producers are expecting to deal mostly within the consumer protection regulatory framework of their home state. Cross-border e-commerce, by relegating

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state boundaries to a more remote backdrop,¹ both resolves and exacerbates tensions between trade and consumer protection.

On the upside, electronic commerce allows consumers to be directly in contact with producers, which decreases the transaction costs for both sides. It also allows consumers to shop a global market place that provides consumers with greater access to a variety of products and services and greater ability to compare pricing options. Compared with the old world of atom trade wherein producers sought to segment the market and charge more to certain consumers than others, e-commerce makes it harder for producers to maintain these barriers. For example, access restrictions to movie and television content prevents consumers from downloading and streaming data in different geographic zones. Consumers are responding to these restrictions by illegally downloading content or using a virtual proxy network to access geographically restricted content.

On the downside, e-commerce decreases the state's ability to protect its consumers and to regulate the goods and services that cross its borders. Yahoo! Inc. v. La ligue contre le racisme et l’antisémitisme² provides an early illustration of such issues. The case involved the sale of Nazi memorabilia on Yahoo!'s auction site, accessible both through www.yahoo.com and www.yahoo.fr, the French subsidiary of the US parent company. The sites were accessible to French users but the offer for sale of Nazi items was prohibited under French law and punishable by criminal fines.³ Two French non-profit organizations initiated proceedings in French courts.⁴ The tribunal found the offer for sale to be illegal under French law in an interim judgment and appointed technical experts with a view to drafting suitable remedies in the final judgment. The interim judgment notes that Yahoo! has the technical capacity to identify most of its users operating from the French territory and hence required Yahoo! to “warn and dissuade” such users from accessing the auction items at stake, or face a daily fine. The final judgment found that Yahoo! had substantially complied. Yahoo! then sued the French plaintiffs in California to preemptively seek an order of non-recognition of the French judgment on the basis that it ran afoul of the First amendment. The French plaintiffs had no intention of seeking enforcement in the United States. Without any reference to technical experts, the 9th Circuit court found in favor of Yahoo!, and construed the First Amendment to allow Yahoo! to broadcast content in violation of French law to consumers located in France. More recently, the WTO case on online gambling that pitted Antigua against the United States also raised consumer protection issues in an e-commerce environment.⁵ The United States argued, with the support of experts, that the risk of pathological gambling for consumers was increased in the online environment when compared to “brick and mortar” gambling facilities. While recognizing that online gambling poses heightened risks of gambling addiction and particular vulnerabilities to youth, the Panel decided the case on alternative grounds, finding that the United States had liberalized that service sector (albeit inadvertently) and that the restrictive regulations were not excused.

¹ See, e.g., Joel Reidenberg, Technology and Internet Jurisdiction, 156 UNIV. PENN. L. REV. 1951 (2005).
² Yahoo! Inc. v. La ligue contre le racisme et l’antisémitisme; l’Union des étudiants juifs de France, 433 F.3d 119 (9th Cir. 2006).
³ Article R645-1 of the French Criminal Code (Code pénal)
⁴ l’Union des étudiants juifs de France et La ligue contre le racisme et l’antisémitisme contre Yahoo! Inc. et Yahoo France, Tribunal de grande instance de Paris (May 22, 2000).
A survey of domestic legislation affecting electronic commerce notes the limited response by state to cross border e-commerce. Overall, many countries have regulation specific to e-commerce regarding the protection of personal information and digital signature, but very few regulate online advertising, an important aspect of consumer protection. With respect to legal remedies, e-commerce creates a complex conflict of law and jurisdictional landscape for consumers.

LEGAL TREATMENT OF CONSUMER INTERESTS AT THE WTO AND IN INTERNATIONAL TRADE LAW

A survey of the WTO and trade instruments shows that consumers generally are not a regulatory object or subject, but rather are more akin to third party beneficiaries. Trade rules affect consumers in a number of different ways.

First, a number of WTO rules benefit consumers as a trickle-down effect of better market access for producers and providers. For e-commerce, the most relevant rules come from the General Agreement on Trade in Services (GATS), which creates a framework for states to liberalize access to their market by foreign service providers and sets certain non-discrimination disciplines to provide a level playing fields between domestic and foreign service operators. Online purchase of physical goods across borders also triggers disciplines under the General Agreement on Tariffs and Trade (GATT) in unforeseen ways. In particular, individual cross-border purchases are treated differently by domestic customs authorities than commercial imports, but the potential for larger scale trading from the aggregate volume of individual trades increasingly challenges these different import categorizations.

A second category of WTO disciplines creates an enabling framework for states to regulate consumer protection as they see fit. However, e-commerce, by allowing consumers to participate directly in the trade transaction largely beyond the state’s ability to police individual transactions or transactions that are significantly extra-territorial, erodes states’ regulatory autonomy and effectiveness in protecting their own consumers.

Finally, in a number of cases, WTO disciplines hinder the consideration of consumer interests when those clash with producer interests. This tension plays out in a number of WTO disputes, though not (yet) in disputes involving e-commerce, with the exception of the US-Gambling case. Generally, WTO Panels and the AB have not been receptive to arguments for consumer protection. In most cases, these arguments are ignored or sidestepped in large part because WTO agreements lack explicit legal bases for specific claims.

The legal and policy battle surrounding Netflix’s attempt to penetrate the French market illustrates the complex tensions between producer and consumer interests in trade liberalization. France’s longstanding policy to support the French movie industry includes production subsidies

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6 Generación de Confianza en el Comercio Electrónico (Building Trust in E-Commerce) (Estudio Jurídico Altmark & Brenna), at 62.
(funded in part by taxes on movie distribution) and a mandatory 36-month waiting period before a movie can be realized in media other than movie theaters. By contrast, Netflix, acting as a service provider, seeks to release new content to consumers in a shorter time frame and also objects to paying the tax that subsidizes the French movie production. Although Netflix’s strategy may prove successful by making available French movies to consumers faster (in France and elsewhere), viewers might then wait for the Netflix release rather than to pay more money to see the movies in the theater. The strategy may also reduce the ability for the French government to subsidize new productions and undermine the creation of future content. The French policy therefore protects certain producers (the movie production industry), imposes costs on other producers (content distributors), which are likely passed on to consumers, but also caters to consumer interests in having access to more products (movies), to more diverse products, and being able to consume these products at various price points (expensive movie tickets with a higher quality viewing experience or cheaper home entertainment delivery). It is unclear how well-equipped WTO rules are to consider the separate and combined impacts of these interests – and the regulatory responses – on trade liberalization.

Perhaps the most developed initiatives on trade, consumer protection, and e-commerce originate outside of the WTO. The current Transatlantic Trade and Investment Partnership (TTIP) negotiations between the United States and the European Union, as well as the Trans-Pacific Partnership (TPP) negotiations between twelve Pacific rim countries including the United States also aim to bridge regulatory processes and outcomes with the objective of reducing barriers to trade. Although producers are intended as the primary beneficiaries (as they are in WTO law), consumers could benefit through the increased economies of scale for producers of harmonized and decreased regulatory compliance requirements. Both contemplated agreements are said to include segments on electronic commerce. The “Digital Mercosur” initiative commissioned a study on the structure necessary for the MERCOSUR countries to trade in the digital economy. E-commerce expenses have grown by up to 30% year-on-year in Latin America over the past 10 years. The resulting study on “Generating Trust in Electronic Commerce” proposed a multi-year comprehensive plan for the development of public and private regulation. Additionally, the APEC has created numerous initiatives under the aegis of the Electronic Commerce Steering Group. Of particular note is the APEC Data Privacy Pathfinder, which was established by Ministers in 2007 to achieve accountable cross-border flow of personal information within the APEC region.

**Proposals for Consumer Protection Outside of Trade Law**

A number of proposals for protecting consumers in e-commerce transactions have emerged outside of the trade realm, with an emphasis on transnational coordination of domestic consumer protection agencies.9 Public choice theory predicts such difficulties, as various political actors want to preserve their role.10

Despite these difficulties, transnational cooperation between government agencies is possible. The International Consumer Protection and Enforcement Network (ICPEN), founded in

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1992 and now includes the U.S. Federal Trade Commission and agencies from twenty-eight other countries, has spearheaded an initiative of worldwide consumer protection agencies working together to combat cyberscams. This effort has proven difficult, however, as illustrated by ongoing United States-European Union data protection negotiations. Regulatory cooperation on e-commerce between the Federal Trade Commission and counterpart agencies abroad, for instance, is now explicitly authorized by the 2006 U.S. SAFEWEB Act.

Others efforts to protect consumer interests emphasize public-private partnerships, or voluntary industry self-regulation. The track record of such initiatives is often disappointing, but perhaps there is more hope in the e-commerce world as operators realize that offering protection to consumers is a way to attract customers. For instance, the World Trustmark Alliance brings together a number of prominent self-regulation organizations around the world. It works towards the development of codes of good conduct and the development of electronic dispute resolution systems.

Efforts by international organizations have been more or less successful. The UNCITRAL 1996 Model Law on Electronic Commerce arguably influenced the US Uniform Electronic Transactions Act, the Electronic Signatures in Global and National Commerce Act and the Canadian Uniform Electronic Commerce Act. The United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) may be a step towards harmonization but very few states have adopted it and no major trading power has ratified it. In addition, the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce contain general principles that members should aim to incorporate in their negotiations and agreements:

- transparent and effective protection
- fair business, advertising, and marketing practices
- online disclosures (information about the business, goods or services, and transaction)
- confirmation process; payment; dispute resolution and redress (applicable law and jurisdiction, alternative dispute resolution and redress)
- privacy, and
- education and awareness.

Finally, The Hague Conference on Private International Law works more generally on choice of law and jurisdiction rules harmonization.

CONCLUSION

The eclectic nature of consumer protection issues that arise in relation to cross-border e-commerce combined with the lack of a single forum or framework to parse out these issues raises considerable challenges on a global scale. Although most consumer protection advocates do not

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typically think of trade regimes as the appropriate forum for consumer protection, the fact remains that trade law has both positive and negative impacts on consumer protection, many of which remain unaddressed and under-researched. That is not to say that trade agreements should be the appropriate forum for protecting consumer interests, but it highlights the need to consider how trade disciplines affect consumer protection and how the trade regime relates to other regulatory authorities in this space. E-commerce consumers and providers alike have been at the forefront of creating new rules for the information age, and the innovation is likely to continue to come from these parties rather than merely from an attempt to simply project onto the digital world rules made by and for the world of atoms.