1.1 Transnationalization and the International Dimension of Consumer Law

Economic globalization, a state of flux, can be understood as transnational circulation of goods, services, essential factors of production and information. Economic activities are no longer confined to national borders but are underway in global sphere.\(^1\) Nowadays, with the constant reduction of barriers for international trade in goods and services, digital economy, and mass tourism, a global citizen is also a global consumer.\(^2\)

The benefits brought by trade liberalization and new technologies since 1990s are both numerous and stimulating. Consumers are able to use the abundant information on the Internet to make better-informed decisions. Transactions become cheaper, quicker, easier, and more convenient. There are more avenues for shopping, more options in terms of price and services, and more access to an endless collection of products.

In an era of transnationalization, consumers are also facing more challenges. Due to the diversity of selling methods and new technology, the changing way of business practices, and the phenomenon of mass tourism, consumers are being exposed to new risks and fraudulent, deceptive, and unfair practices. Products and services (financial products in particular) are becoming progressively sophisticated and are difficult to assess even for experts. Subprime lending to lower-income consumers is considered the root cause of recent global financial crisis. In many

\(^1\)This study is a part of research project “Global Governance and International Protection of Consumers” (MYRG2015-00100-FLL) sponsored by the University of Macau. See Wei (2002), p. 64.


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occasions, consumers are provided with misleading information and advertisement. The disputes arising from cross-border consumption often turn out to be burdensome with low efficiency for consumers.

Originally, consumer protection has been envisaged at a national level. Today, economic globalization increases the need to have universal standards to protect consumers both nationally and internationally and consumer law requires incorporating the international dimension. As an autonomous discipline, consumer law is distinct from traditional legal branches like civil law and commercial law by giving priority to the consumer rather than the transaction itself. Just as Thierry Bourgoignie has put it, consumer law offers a subjective understanding (instead of an objective conception) of the phenomenon of consumption as consumption is not a neutral process of technical destruction and the consumer plays a vital role on the market.\(^3\) The specificity of consumer law stands the recognition of the principle of vulnerability of the consumer in terms of information, choice, and negotiation capacity. In cross-border consumption relationships, the vulnerability of the consumer still remains and in most cases turns out to be much more obvious than the one reflected in internal transactions. Claudia Lima Marques pointed out some peculiar characteristics of international consumer transactions, namely, international consumer contracts are not long-lasting and repetitive, the cost for upholding rights are much higher, the consumer, in addition to language barriers, is not familiar with foreign laws and jurisdictions and has more difficulty in having access to justice.\(^4\)

In the global context, consumer law has to develop to “a truly international discipline.”\(^5\) The international community needs to develop common principles as well as concrete instruments to implement the goals or objectives of “consumer protection” listed in international treaties or legal documents. Taking into account the internationalization of consumer transactions, the international dimension of consumer law has to contain a number of themes.

First, since the consumer and the trader are located in different jurisdictions, there is a need to elaborate rules of private international law, which are specifically targeted at cross-border consumption relationships. Currently, different approaches have been adopted by different jurisdictions, for example, the approach of “excluding party choice of law,” the approach of “limiting party choice of law,” and the approach of “curtailing party choice of law.”\(^6\) Private international lawyers have proposed “the most favorable law approach” in order to provide a better protection to the consumer.\(^7\) However, there does not yet exist a consensus so far about essential philosophies of conflict of laws and conflict of jurisdiction rules applicable to transnational consumption relations.

Second, although economic integration sets sight on the creation of a single global market, the reality is that the world market is still legally fragmented. Consumer protection legal standards and substantive rules are different across different countries. Empirical studies show that differences in national consumer law have impacts on the development of cross-border consumption. Producers, service providers, and traders adapt sales practices to suit each country’s legal setting. On one hand, the international consumer law necessitates efforts and impetus toward increased harmonization and standardization; on the other hand, problems related to cross-border transactions call for transnational responses and solutions.

Third, there is also a need to establish regional and international institutional frameworks or regulatory networks. International consumer protection will never turn out to be effective without coordinated enforcement and a well-functioning network among national regulators and agencies. Given the fact that the judicial redress as doctrinal solutions to consumer law issues is always troublesome and arduous for consumers, moreover, anticonsumer jurisprudence has emerged in some jurisdictions; alternative mechanisms such as regulatory initiatives and administrative measures can facilitate the rights to access to justice of the consumer. Therefore, there is a need to assume ex ante approach to avoid individual and collective damages in consumer society, and perhaps some global agencies that centralize such functions may offer some innovative contributions.

1.2 Legal Scholarship and Reconceptualization of International Consumer Law

Generally speaking, legal scholarship focusing on international consumer law is falling behind the process of globalization of markets and internationalization of consumers. Compared with the blooming scholarship of international trade law and international commercial law, the research on international protection of consumers is largely marginalized and only represents concerns of minority of the jurists.

The International Association of Consumer Law (IACL) and the Committee of International Protection of Consumers of International Law Association (ILA) are two main global academic societies aimed at fostering the study and international understanding of consumer law and policy. IACL, initially composed by some

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10 See for example, Helveston (2015), p. 1739.
11 More information about the association can be found at http://www.iaclaw.org/association/association.html.
12 More information about the committee can be found at http://www.ila-hq.org/en/committees/index.cfm/cid/1030.
leading scholars such as Iain Ramsay, Sothi Rachagan, Thierry Bourgoignie, Antonio Benjamin, and so forth, grew from a number of successful international conferences on consumer law and now gathers scholars from all parts of the world and regularly proposes different themes for international dialog on consumer law. The Committee of International Protection of Consumers of the ILA was created in 2008, and among several objectives its mandate is to “...look at how national legislation on the conflict of laws and jurisdiction, as well as international treaties, model laws and regional legislation on consumer issues deal with the issue of consumer protection in a transboundary context. . .”  

The Committee has proposed five guiding principles in the Sofia Declaration, which had been adopted by the ILA as Resolution No. 4/2012. The Sofia Declaration is the very first international resolution on consumer protection made by the ILA in more than a hundred years and was approved by unanimity. The Sofia Declaration states five principles: principle of vulnerability, principle of more favorable protection to consumer, principle of contractual justice, principle of responsible lending, and principle of participation of consumer groups and associations.  


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14The text of the ILA’s Resolution reads as follows: “Consumer protection should be guided by the following general principles: 1. Consumers are the weaker party in situations of mass contracts or standard form contracts, in particular concerning information and bargaining power. 2. It is desirable to develop standards and to apply rules of private international law that would entitle consumers to take advantage of the most favorable consumer protection. 3. Regulation of consumer contracts should be effective and fair and ensure transparency. 4. Responsible lending is incumbent on all those involved in consumer credit transactions, including credit providers, brokers and advisors. 5. Consumer groups should participate actively in the development and regulation of consumer protection.”
16Micklitz and Twigg Flesner (2010), pp. 201–207.
Recently, the research of international consumer law has gone further by deepening specific issues such as financial services, e-commerce, online dispute resolution, tourism, food safety, and collective enforcement, in addition to traditional standpoints of private international law. As more and more global problems are increasing due to market distortions and failures of “efficient market hypotheses,” international trade lawyers now become more aware of collective public goods and optimal intervention; in this sense, competition laws and consumer protection laws offer alternative policy instruments and can be more efficient.

In the globalized world, the foundation and the development of international consumer law need reconceptualization and new philosophical formulations. All trade and services should be eventually to the benefit of consumers, and consumer confidence leads to constant economic growth and sustainable development. Consumers have a great impact on the economy, both nationally and internationally. In accordance with the report released by the World Bank, household consumption alone represents 60% of GDP as a global average.

The United Nations (UN) Summit in 2015 adopted the 2030 Agenda for Sustainable Development, which makes a list of five areas of critical importance for humanity and the planet, being people, planet, prosperity, peace, and partnership, and the Agenda sets out seventeen UN sustainable development goals. In order to make globalization socially sustainable, consumers have a dynamic role to play in all mentioned five areas. International legal instruments need an equitable balance between economic growth and social justice. In this context, international consumer law should develop toward a human-centered approach, a rights-centered approach, and social-value-centered approach.

The human-centered approach inspires a change of thinking pattern from a mercantilist one to a more humanitarian one and requires that consumers as individuals are enabled by “constitutional protection” and consumers’ fundamental rights (such as access to basic goods and services, health rights, dignity rights,

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20 See for example Corden (1974).
23 United Nations (2015), pp. 14–28. The 17 goals are poverty eradication, food security and nutrition, health and well-being, education, gender equality and women’s empowerment, water and sanitation, energy, inclusive and sustainable economic growth, employment and decent work, infrastructure and sustainable industrialization, reducing inequality, sustainable cities and settlements, sustainable consumption and production, peaceful and non-violent societies and capable institutions, implementation and global partnership.
25 Petersmann (2012), pp. 173–175. The author commented that the paradigm of “negative liberty” was successfully challenged by constitutional paradigms of “positive liberty.”
liberty rights, and equality rights) should be taken into full consideration at par with the objectives of economic dimension. Erik Jayme believes that the protection of the consumer, as a person and as a weaker party, is one new trend in international law. For nearly three decades, international trade and investment liberalization have facilitated multinational enterprises’ commercial expansion worldwide. The mercantilist thought and liberal proposals have dominated the rulemaking of international economic law, according to which consumer law might be an obstacle to free trade. While consumer rights and the concerns of consumer protection have been reflected in international law, the current legal framework still lacks a holistic machinery that effectively integrates patchy gaps. The reason behind this fact is that participation of rent-seeking interest groups (business lobbies) other than consumers is predominant in lawmaking process. There is a great disparity between consumers who do not have sufficient bargaining power and the organized business groups, which concentrate huge capitals and economic forces.

The rights-centered approach requires a balance between economic efficiency and social justice and, perhaps more importantly, a holistic mode of operation aiming to incorporate consumer rights into other areas of law (such as trade law, investment law, competition law, intellectual property law, and many more). Consumer interests comprise three levels: fundamental interests, economic interests, and societal interests. Fundamental interests refer to access to the market and rational and fair distribution of those goods that are vital for survival. Economic interests relate to classical consumer protection within the market. Societal interests are those that consumers have in wider social and ecological environment. All these need rights-oriented legal regulations to ensure that the interests need to be realized in practice. In international arena, neither substantive nor procedural rights of consumers in many areas decisive for economic development have been provided for. For example, the world trade impacts consumers extensively; however, there is still no reference to consumer rights in the WTO Agreements. Prior to the most recent revision of the UN Guidelines for Consumer Protection (referred to as UNGCP, adopted in 1985, revised in 1999 and 2015), the Guidelines did not use the term “rights”; instead of that, the wording “legitimate needs” was adopted. After nearly 30 years since the Guidelines were agreed, policy makers have realized

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26Consumer protection as a constitutional right has been incorporated in no less than 25 countries. See Rachagan (2010), p. 49.


29It should be noted that the General Agreement on Trade in Services (GATS) of the WTO defines the framework of cross-border services in Article 1, namely, cross-border supply, consumption abroad, overseas commercial presence and provision of services through presence of natural persons. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) has played an important role in harmonization of sanitary and phytosanitary measures among the members-states.
that the rights-centered approach is reasonable in order to better facilitate implementation.

The social-value-centered approach requests the awareness of social rights, as well as the implementation of corporate social responsibility through ethic management system. Iain Ramsay defends that consumer rights are “part of new range social rights” in modern society. Consumers’ right to satisfaction of basic needs, to safety, to be informed, to choose, to be represented, to redress, to a healthy environment, etc. are also public interest. Jagielska and Jagielski comment that the new generation of human/fundamental rights combines the idea of “social state concept,” which means that the function of the state is to direct the processes of social development and to guarantee fair and equitable distribution of benefits. To protect the interests of consumers is to serve the common good. National consumer agencies should fight against fraudulent and deceptive cross-border commercial practices, and the protection of consumers at an international level aims to offer a global public good. Consumers’ movement toward a better social well-being may act as agents of social change.

As far as its discipline contribution, international consumer law can help to bridge the gap between private law and public law and consequently to reach beyond the public–private divide. It might be seen as an example of a new form of global governance regimes. Market incentives should be harnessed aiming to guarantee the legitimacy and accountability to stakeholders, including consumers. Many times, global problems have surpassed national sovereignty’s capacity; they require nontraditional forms of deliberation with border-crossing regulatory reach. During the process of norm creation and lawmaking, international consumer law offers a new understanding about a methodological approach and the boundaries of law. For instance, private lawmaking employed in international commerce and Internet standards has become a robust component of commercial and consumer life. A number of soft law represented by G-20 High Level Principles on Financial Consumer Protection and World Bank 39 Generalized Good Practices for Consumer Financial Protection, etc. react to the financial crisis and proliferate and establish reformed regulatory structures for international financial consumer protection. In the evolving normative regimes of international consumer law, different legal cultures interact with each other, hard law and soft law coexist, official and unofficial rules are all encompassed, public, private, and hybrid norm-producing entities are all engaged in lawmaking. Perhaps the true theoretical and methodological values that international consumer law offer allow us to reconceptualize the future trends of consumer law in terms of development paths: if consumer law justifies a state-originated approach and how national states operate through soft law for transnational transactions.

1.3 Mappings of International Efforts: The Present Status

In the absence of a universal instrument that contains specifically rules vis-à-vis international consumer protection, the UNGCP (adopted in 1985, revised in 1999 and 2015) is the most important reference. The UNGCP provide policy advice for member states and leave them enough flexibility when transposing principles into national laws. More than one hundred countries now have laws based on the Guidelines. The very recent revision of the UNGCP in 2015\(^{33}\) aimed to achieve an effective protection for consumers at the national, regional, and international levels while maintaining the balance between a high level of consumer protection and the competitiveness of businesses.\(^{34}\) Now, the Preamble of the UNGCP sets out expressively the Millennium Development Goals, and the areas covered by the UNGCP are much broader by adding new themes such as state-provided services, privacy, e-commerce,\(^{35}\) financial services,\(^{36}\) energy,\(^{37}\) public utilities,\(^{38}\) travel and tourism,\(^{39}\) and so forth. Moreover, in implementing one of the objectives of the Guidelines, which is to further international cooperation in the field of consumer protection, the revision of the Guidelines in 2015 encourages national enforcement agencies to coordinate and cooperate in cross-border cases, to utilize existing international networks, to enter into bilateral and multilateral arrangements, and to improve international judicial and interagency cooperation. Finally, the Guidelines also guarantee the establishment of international institutional machinery (an Intergovernmental Group of Experts on Consumer Protection Law and Policy) to provide capacity building and technical assistance to developing countries and economies in transition in formulating and enforcing consumer protection laws and


policies, among other mandates.\textsuperscript{40} In sum, compared with the previous version in 1999, the new UN Guidelines revised in 2015 has improved in building capacity through forming an expert group with the participation of consumer authorities, in building international cooperation with more interactions at the governmental level and in building an environment favorable for digital economy and many services.

Some United Nations’ agencies are also engaged in consumer protection at international level. The Agriculture and Consumer Protection Department of the Food and Agriculture Organizations (FAO) has established “Food Chain Crisis Management” (FCC) and “Emergency Prevention System for Food Safety” (EMPRES Food Safety), which assist FAO members in early warning, emergency prevention, and rapid response.\textsuperscript{41}

Codex Alimentarius Commission (CAC), jointly created by FAO and the World Health Organization (WHO) as the world’s most relevant food standard body covering 99\% of the earth’s population, has established more than 200 food standards and more than 100 guidelines and codes for food production and processing. The Food Code, or Codex Alimentarius,\textsuperscript{42} is now a global reference for both food industries and consumers. Top priority has been given to the protection and interest of consumers. It serves as an important basis for national food legislation and has far-reaching implications for resolving trade disputes among the WTO members.

The World Health Organization has launched numerous programs and initiatives related to consumer protection.\textsuperscript{43} For instance, in 2003, the WHO Framework Convention on Tobacco Control, as the first international treaty negotiated under the support of the WHO, was adopted and eight implementation guidelines covering nine articles of the Convention have been approved.\textsuperscript{44} Since 2004, the International Food Safety Authorities Network (INFOSAN) has facilitated information and data sharing regarding food safety issues.

The International Organization for Standardization (ISO) through the Committee on Consumer Policy (COPOLCO) develops standards together with the active participation of consumer organizations, a network called Priorities from a Consumer’s Point of View.\textsuperscript{45} According to the project overview dated January 2016, COPOLCO has advanced in total 29 key areas for consumers.\textsuperscript{46} In recent years,

\textsuperscript{41}More information can be found at http://www.fao.org/food/food-safety-quality/empres-food-safety/en/.
\textsuperscript{43}More information can be found at http://www.who.int/entity/en/.
\textsuperscript{45}http://www.iso.org/sites/ConsumersStandards/4_interests.html.
much progress has been achieved in the areas of customer satisfaction (the right to be informed and the right to redress of consumer), product safety (recall procedure, food safety, consumer safety guidance, child-resistant packaging, and cross-border trade), more vulnerable consumers (children, older people, persons with disabilities, etc.), services (energy and finances), and so forth.

The World Intellectual Property Organization (WIPO) adopted the WIPO Development Agenda in 2007, which contains 45 recommendations and aims to care for especially the rights of intellectual property users in developing countries, through a demand-driven approach.

The International Telecommunication Union (ITU) adopted in 2014 GSR14 Best Practice Guidelines on Consumer Protection in a Digital World, which highlights the need to redefine legitimate consumer rights and to establish effective mechanisms for cooperation with relevant bodies at the national, regional, and international levels; service providers; and consumer authorities. The Guidelines encourages effective systems to safeguard consumer privacy and data, consumer right to information, multiple channels for redress, as well as the particularly vulnerable consumers.

The UN World Tourism Organization created a working group on the protection of tourists/consumer and travel organizers in 2010. The mentioned working group proposed in 2013 a Draft Convention on the Protection of Tourist and Tourism Service Providers, which has a special focus on force majeure and emergencies such as disasters and bankruptcies of travel agencies. The UNWTO proposal purports to standardize national laws and to protect mainly *ex post* tourism services

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