A Human Rights Approach to Consumer Safety and Well-being: the Balance between Deterring Violations of Consumer Rights and Promoting Free Trade

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Abstract

As the global demand for free trade continues to expand, the matter of consumer safety and well-being must no longer be regarded as a 'luxury' but to be essential to maintain human dignity. Since an overwhelming majority of people, in essence, become consumers from time to time, their rights must be protected regardless of where they live or what their socioeconomic status may be. In that respect, this paper aims to stress the need for recognising consumer safety and its relevant rights as human rights. In establishing this argument, the detailed discussion of Korea's humidifier disinfectant products case ("HD case") is essential. In addressing the HD case in detail, this paper has attempted to demonstrate how the discrepancies in domestic laws may create a system-generated risk that can eventually lead to compromise the safety of consumers. That is to say, if the Korean legal system could have successfully eliminated such risks by implementing adequate product-safety-proving requirements like the EU's, the result of the HD case may have turned out to be different. Likewise, under the current New Zealand law, it is evident that even in a situation where a company's failure to protect consumers can be established, it is often difficult to hold a company liable. In enforcing consumer protection as a matter of international human rights law, this paper shows that there is a clear need for controlling or regulating multinational actors by implementing appropriate non-voluntary legal mechanisms.

The discussion on the possible balancing act between deterring violations of consumer rights and promoting free trade is another primary focus of this paper. Based on the relevant discussions and analyses, a conclusion was reached that as a way of balancing the protection of consumer rights and the promotion of the free trade relationships, it is conceivable to choose a 'soft-law-based' approach by applying Hopkins and McNeill's cultural filter theory. Alternatively, Benöhr's capability approach suggests that taking a method of enhancing the necessary capabilities of consumers could also make it possible to find a sensible balance between protecting consumer rights and promoting free trade. Yet, in order for such a 'soft-law-based' approach to be pragmatic, the chosen approach must be accompanied by an obligation to implement controlling or regulating mechanisms. In other words, trading parties must also commit to play their part in securing consumer safety on the 'harder' side of the law. On that basis, the relevant recommendations may include introducing a social clause and establishing a Joint Committee in the appropriate chapter of an international trade agreement.

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Attestation of Authorship

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

Eun Hae Choi

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I. Introduction

A. Outline

Consumers, by definition, include almost all people around the globe. Consumers are "the largest economic group in the economy, affecting and affected by almost every public and private economic decision", and "two-thirds of all spending in the economy is by consumers".[1] The recognition of *consumers* has become more imperative today due to the expansion of free trade worldwide. This thesis is specifically concerned with arguing the need for recognising and enforcing consumer rights to *safety* under the International Bill of Human Rights.[2] Yet, instead of using a narrow approach, it takes a more holistic approach by considering the overall well-being of consumers along with the specific issue of safety. The study goes further by arguing the importance of finding a sensible balance between protecting consumers and promoting free trade.

In elaborating the relevant arguments, this thesis uses the term *borderless*, *free-trade-based* or *free movement of goods* very often. They are the key terms as this paper is written on the basis of a concern that a territorial boundary has become *seamless* in today's international trade environment. For example, under a Free Trade Agreement ("FTA"), it is often the case that two or more countries reach an agreement to liberalise the trade in goods by removing or simplifying procedures or restrictions as a way of prioritising the efficiency and profitability of the trade.

As former United States President Kennedy noted, it is true that consumer safety must be protected against all marketable goods and services or technologies that are "hazardous to health or life".[3] However, this thesis limits its scope to *consumer products* in order to concentrate on *product-related* concerns only.[4]

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[1] John F Kennedy, President of the United States "Special Message to the Congress on Protecting the Consumer Interest" (speech to the US Congress, Washington DC, 15 March 1962).

[2] The International Bill of Human Rights consists of the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the International Covenant on Civil and Political Rights ("ICCPR"). These instruments will be discussed as the relevant arguments proceed throughout this thesis.

[3] Kennedy, above n 1.

[4] Due to the set space limit for this thesis, it is difficult to cover all international bodies (organisations) or laws (rules) related to achieving human rights objectives. Where applicable, it intends to expand its discussions only on some selective bodies or laws for the purpose of providing more in-depth analyses.

Based on the above background, Chapter II opens the discussion by introducing a case from the Republic of Korea ("Korea"). For more than a decade, humidifier disinfectant ("HD") products were a staple in many Korean households up until 2011, when they were found to be fatal.[5] The use of HD products resulted in over a thousand deaths and more than four thousand consumer injuries.[6] Yet, the total number of injuries and deaths is still rising as of 2020.[7] Based on the products' nationwide popularity, the HD case was eventually named the first social (or societal) "disaster" of its kind.[8] However, this thesis does not intend to go further to discuss the details around Korean law or its legal system. The law in this area is still in the developing (and some at the refining) stage in Korea. Therefore, they must be studied as a separate topic later in time. Here, the discussion of the HD case only intends to lead the readers to feel the *need* for recognising consumer rights as *human rights* by providing a cautionary tale. The relevant implications of that elevation would be further elaborated in the later chapters.

Chapter III turns to evaluate New Zealand's approach based on the above cautionary tale. So far, New Zealand has been utilising its efforts to enforce both the legislative and quasi-legislative measures in protecting consumers. They include the Accident Compensation Act 2001, the Fair Trading Act 1986, and the Consumer Guarantees Act 1993. Furthermore, the general corporate liability principles allow the imposition of criminal sanctions if any binding party fails to comply with the law. Still, this chapter demonstrates that there are notable deficiencies in the current consumer protection regime in relation to product safety in particular.

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[5] Korean Centre for Disease Control "Aerozolization of humidifier disinfectants" (press release, 11 November 2011).

[6] *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on its mission to the Republic of Korea* UN Doc A/HRC/33/41/Add.1 (3 August 2016) (UN Doc A/HRC/33/41/Add.1).

[7] Rosyn Park "New Study Estimates 14,000 Deaths Linked To Toxic Humidifier Sanitizers" *TBS eFM News* (online ed, Seoul, 27 July 2020). According to this article, a new study released (dated on 27 July 2020) estimates some 14,000 people in South Korea have died as a result of using the HD products. The study also refined the total number of usage by finding out that around 6.3 million people, ranging between 5.7 million and 6.8 million (the total number may differ depending on a number of factors considered), used the HD products between 1994 and 2011. Local authorities launched their analysis into the case and concluded that polyhexamethylene guanidine, an anti-bacterial agent used in the HD products that can be fatal when inhaled in the form of droplets, had caused the deaths.

[8] Ye-yong Choi "Didn't manufacturers even check product safety?" *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017) at 94.

Chapter IV then moves on to discuss the efforts made to protect consumer safety within the international community. This chapter points out how consumer protection measures must no longer be handled by each country's individual discretions. This is particularly important as it is not always possible to track the relevant safety details of a product that was made or marketed overseas.[9] The lessening of the current discrepancies (or gaps) in-between the domestic laws in this way would enable each country to minimise system-generated risks ("systems risk").[10]

Based on the above considerations, Chapters V and VI further elaborates the mentioned need for recognising consumer rights as human rights. Chapter V introduces this argument by explaining the difficulties of handling the product safety issues on a *transnational* basis.[11] Under the current general rules of trade, it can be almost impossible to provide consumer protection up to the adequate level.[12] Chapter VI, therefore, brings out the necessity for protecting consumers by the *state parties* in the same way as a country protects its citizens' fundamental rights. This chapter focuses on discussing the rights to have an adequate standard of living;[13] the right to life, liberty and security of a person ("right to life");[14] and the right to have personal autonomy under the right to privacy,[15] and the right not to be subjected to torture cruel, inhuman or degrading treatment or punishment ("right not to be tortured").[16] These standards provide sensible grounds to commit each state party to protect *consumers* on the basis of *inherited human dignity*.[17]

Furthermore, Chapter VII emphasises that it is not only for every state party to fulfil its duty but also for *private actors* to take responsibility to protect consumers.[18] A *private*

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[9] Christopher Placitella and Justin Klein "The Civil Justice System Bridges the Great Divide in Consumer Protection" (2005) 43 Duq L Rev 219 at 220.

[10] Dinesh Mohan "People's Right to Safety" (2003) 6(2) Health Hum Rights 161 at 164.

[11] Placitella and Klein, above n 9, at 219.

[12] Iris Benöhr "Consumer Law Between Market Integration and Human Rights Protection" (LLD, European University Institute, 2009) at 78-79.

[13] *Universal Declaration of Human Rights* GA Res 217A (1948), art 25(1).

[14] Article 3.

[15] Article 12.

[16] Article 5.

[17] Iris Benöhr and Hans-W Micklitz "Consumer protection and human rights" in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds) *Handbook of research on international consumer law* (Edward Elgar, Cheltenham, 2010) 18.

[18] Sinai Deutch "Are Consumer Rights Human Rights" (1994) 32 OHLJ 537 at 561.

actor means to include any *multinational* actor such as an international corporation as a whole, or a manufacturer or supplier that acts on a *multinational* (or *transnational*) basis. As the global demand for free trade continues to expand, involving such borderless actors means putting consumers at risk beyond their national market boundaries.[19] Again, Korea's HD products serves as a notable cautionary tale.[20] The reality is, not every country has the capacity or willingness to regulate those borderless actors.[21] The relevant arguments would be further elaborated by analysing the traditional corporate social responsibility theory, and the recent efforts made by Professor John Ruggie in restoring the relationship between business and human rights.[22]

In suggesting the possible mechanisms in *enhancing* and *enforcing* consumer rights, this thesis assumes that consumer rights have already been recognised as human rights. Here, the relevant chapters are designed to limit their discussions only to the international context in order to prioritise the need for generating the international consensus over any domestic discretions. That is, providing the adequate protection to every consumer on the basis of his or her fundamental rights as a human-being.

In enforcing consumer rights as a matter of international human rights law, Chapters VIII and IX intend to highlight the importance of having *pragmatic* mechanisms. Chapter VIII presents a case study from the European Union ("EU"). Given that the EU can be seen as a significant version of the global trade bloc, this chapter considers international court-based enforcement as one of the possible mechanisms. This part focuses on analysing whether an approach like the European Court of Justice ("ECJ") can be applied on a transnational basis to protect consumers beyond its geographical closeness. Based on the discussions thus far, this chapter suggests a number of possible approaches in enhancing consumer safety including the *cultural filter* and *capability* approaches in Chapter IX.

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[19] Christian Joerges "Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government" (EUI Working Paper LAW No. 2006/5, European University Institute, 2006) at 11.

[20] Kyung-moo Lee "How big is the injury rate of this humidifier disinfectant case?" *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017) at 129.

[21] John Ruggie *Just business: Multinational corporations and human rights* (1st ed, Norton & Company, New York, 2013) at 142-143.

[22] John Ruggie *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* UN Doc A/HRC/8/5 (7 April 2008).

Chapter X provides recommendations. The focus here is to suggest possible ways to *integrate* the enforcement of consumer rights and the promotion of international free trade relationships in finding the right balance (or a *sensible* balance) between them. These recommendations include considering a hard-law-based approach and incorporating a well-negotiated enforcement clause into various forms of international trade agreements, including the FTA.

Chapter XI delivers a conclusion to this thesis.

B. Terminology

The term "**consumer rights**" or "**consumer rights to safety**" refers to those rights closely related to product safety. Consumers must be able to consume *safe* products as a *right*. Moreover, in using this terminology, this thesis takes a more holistic approach in discussing the safety-related concerns by including the protection of the overall *well-being* of consumers in its scope. In other words, the use of a product must not compromise the overall well-being of consumers.

The above definition is applied to emphasise that 1) consumers must be protected from any product-related threats regardless of the severity of the harm from a minor injury to death; and 2) consumer safety and well-being must be protected at the most fundamental level as an essential to maintain human dignity.

The term "**consumer protection**" refers to the above-defined "consumer rights" or "consumer rights to safety", unless the context explicitly suggests it as a generic term.

The term "**systems risk**" refers explicitly to the risks generated or imposed on consumers as a result of an individual country's failure to 1) implement the adequate consumer safety mechanisms or 2) regulate multinational actors within its own legal and administrative *system*.

The overall scope of discussion and application of the above terminologies intend to exclude those countries that are not participating in free trade (or a similar form of economic partnership for the purpose of bringing a wider choice of consumer products). On that basis, the Democratic People's Republic of Korea (North Korea) is excluded.

II. Identifying Consumer Rights: Korea's Humidifier Disinfectant Case as a Cautionary Tale

A large population in Korea live in apartment buildings, and it is often difficult to maintain a comfortable level of indoor humidity. As such, humidifiers and HD products were a staple in many Korean households for approximately 8 million people.[23] It was advertised that by adding the HD product in the water tank of a humidifier, it could assist in 'sanitising' the water tank while operating and allowing the humidifier to produce 'bacteria-free' droplets out in the air.[24]

The first HD product was presented in the Korean domestic market in 1994 by a Korean company called Oxy Company Limited ("Oxy"). With its 'improved' version, a re-formulation of the product with the key biocidal active ingredient polyhexamethylene guanidine ("PHMG"), was introduced in 2000. Shortly after, Reckitt Benckiser Group ("RB"), a British multinational consumer products company, purchased Oxy in 2001.[25] Between 2000 and 2001, not only RB but several other companies were also supplying around 20 varieties of the PHMG-based (or by forming a structure alike to PHMG) HD products to retailers including Costco Wholesale Korea, one of the biggest supermarket chains operating in Korea.[26]

Although many other brands have produced HD products by using almost identical ingredients including PHMG, the actual presence of a well-known multinational actor like RB would have helped for all HD products in obtaining such high level of consumer trust at the time.[27] For that reason, RB is to be considered the representative company in discussing the HD case hereafter.

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[23] Krishnendu Mukherjee "The Korean Disinfectant Humidifier Tragedy - A Legal Analysis" (2016) 16 Environmental Law and Policy (Institute of Comparative Legal Studies, Kangwon National University) 57 at 58.

[24] Seung-Hun Ryu and others "Humidifier disinfectant and use characteristics associated with lung injury in Korea" (2019) 29(5) Indoor Air 735 at 735-736.

[25] Reckitt Benckiser Group plc. "HY Results 2016" (press release, 29 July 2016) at 9.

[26] Heung-gyu Lim "Costco, Daiso, GS Mart also sold humidifier disinfectant products" *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017) at 50-52.

[27] Lee, above n 20, at 129.

A. The Significance of the HD Products to Korean Consumers

The HD products were truly successful in gaining trust from the public largely due to advertising which claimed that they provided a 'safe' solution to creating a healthier home environment.[28] In other words, they were falsely regarded to be an essential home-care product for the well-being of the whole family from a new-born to the elderly.[29]

The consequences of misleading consumers through false advertising were devastating. Between 2011 and June 2017, it was found that "1,136 people died, and 4,305 were suffering ill-health in Korea".[30] In particular:[31]

> … hundreds of mainly women and children have suffered from respiratory failure, acute pneumonia and other lung diseases as a result of using [HD products] manufactured and sold by several business entities, including … Costco Wholesale Korea, … RB Korea and SK chemicals.

The relevant health risks involved with the HD products were not revealed to the public for more than a decade until the Korean Centre for Disease Control ("KCDC") released the outcome of its investigation that HD products were highly toxic to human health.[32]

B. The Likely Causes of Consumer Injuries and Deaths

The KCDC formally announced in 2011 that exposure by inhalation of PHMG was likely to be the cause of the reported injuries and deaths. Therefore, the KCDC ordered to immediately recall all remaining six kinds of HD products (as of November 2011) from the market.[33]

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[28] Ji Hye Kim "Corporate Social Responsibility and Human Rights in International Business: A Systematic Literature Review" (MPhil Thesis, University of Manchester, 2016) at 30-31.

[29] Choi, above, n 8, at 94.

[30] *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea* UN Doc A/HRC/35/32/Add.1 (1 May 2017) at 6.

[31] At 6.

[32] Korean Centre for Disease Control, above n 5.

[33] Korean Centre for Disease Control "Six kinds of humidifier disinfectant recalled (final)" (press release, 11 November 2011).

1. The toxicity of the relevant substances and the issue of the testing requirement

The announced toxic substance, PHMG, was identified as the primary component of the HD products since the early 2000s.[34] PHMG is structurally akin to Polyhexamethylene Biguanide ("PHMB"), a 'synthetic polymer' which has a broad spectrum of antimicrobial activity.[35] Although PHMB-based substances have been commonly used in many external-use consumer products, including cosmetics,[36] not many studies were there to indicate inhalation toxicity at the time of the HD case.

One notable test is the 28-day inhalation test ("Carney Test") which was carried out in 1976.[37] Although it was carried out before any formal adoption of testing guidelines, the Carney Test notably found that inhaling PHMB for four hours resulted in the death of animal subjects.[38] Moreover, the validity of the risks involved in inhaling PHMB was supported by other tests done in 1979[39] and 2006.[40] At the least, the Carney Test brought out (as early as 1976) the need for carrying out a proper evaluation of risks of inhaling PHMB via respiratory route before it started being used in making an inhalable consumer product.

The strong need for developing an *official structure* to evaluate the risks of chemicals used in consumer products was recognised in the EU as early as 1993.[41] In addition to

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[34] Reckitt Benckiser Group plc, above n 25, at 9.

[35] Stephen Wessels and Hanne Ingmer "Modes of action of three disinfectant active substances: A review" (2013) 67(3) Regul Toxicol Pharmacol 456 at 463.

[36] Scientific Committee on Consumer Safety (SCCS) and Ulrike Bernauer "Opinion of the scientific committee on consumer safety (SCCS) – 2nd Revision of the safety of the use of poly(hexamethylene) biguanide hydrochloride or polyaminopropyl biguanide (PHMB) in cosmetic products" (2015) 73(3) Regul Toxicol Pharmacol 885 at 885.

[37] *Committee for Risk Assessment RAC Opinion proposing harmonised classification and labelling at EU level of Polyhexamethylene biguanide or Poly(hexamethylene) biguanide hydrochloride or PHMB* (European Chemicals Agency, CLH-O-0000003799-56-03/F, March 2014) at 3-4.

[38] At 3 (the interpretation of this test may have been limited due to poor reporting).

[39] Qasim Chaudhry and others, Opinion on Polyaminopropyl Biguanide (PHMB) - Submission III - (Scientific Committee on Consumer Safety, SCCS/1581/16 Preliminary version, December 2016) at 15-16.

[40] *Committee for Risk Assessment RAC Annex 1 Background Document to the Opinion proposing harmonised classification and labelling at Community level of Polyhexamethylene biguanide or Poly(hexamethylene) biguanide hydrochloride or PHMB* (European Chemicals Agency, ECHA/RAC/CLH-O-0000001973-68-01/A1, September 2011) at 35-36.

[41] Council Regulation 793/93 on the evaluation and control of the risks of existing substances [1993] OJ L 84/1.

this, according to the United Nations ("UN") directive concerning the placing of biocidal products to sell, potential hazards to human health arising from using certain substances were to be *adequately tested* before putting them out in the market.[42] These requirements involve providing the "core data set"[43] which contains the relevant details regarding the chemical properties used and the measures necessary to protect humans in consuming the product. In other words, unless the products have fulfilled these (or equivalent) test requirements, it is most unlikely for RB (or any other companies) to hold an official ground to advertise that their HD products are *safe* to use.

On the other hand, Mukherjee, a United Kingdom ("UK") based barrister,[44] pointed out that there is sufficient evidence on the *toxicity* (danger) of PHMB particularly when inhaled "including one dating back till 2002".[45] He further commented that:[46]

> There appears to be no good reason why the potential risks of using the [HD products] were not informed to its users. Neither does there appear any good reason why further testing could not have been done to ascertain the effect of prolonged or confined use.

It is also evident that shortly after RB purchased Oxy, the Technical Guidance Document ("TGD") became available. The TGD was there to assist manufacturers and non-governmental organisations (inside and outside of the EU) in understanding the general principles for risk assessment of new and existing substances including "substances of concern present in a biocidal product".[47]

The TGD required that inhalation toxicity levels must be tested where an active substance was volatile in a specific vapour pressure range when generating inhalable

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[42] Directive 98/8/EC concerning the placing of biocidal products on the market [1998] OJ L 123/1.

[43] At 123/24.

[44] Mukherjee has experience in taking claims to court regarding the unsafe use of toxic substances to a human body in the UK and India.

[45] Mukherjee, above n 23, at 59.

[46] At 68.

[47] European Commission, *Technical Guidance Document on Risk Assessment in support of Commission Directive 93/67/EEC on Risk Assessment for new notified substances, Commission Regulation (EC) No 1488/94 on Risk Assessment for existing substances, Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market Part I* (European Commission Joint Research Centre, EUR 20418 EN/1, April 2003) (EUR 20418 EN/1) at 6.

aerosols, particles or droplets.[48] Based on such data provision and testing requirements, it is evident that HD products would have been tested and notified 'if they were to be placed' in the EU market.[49] In other words, if they had been required to follow the EU law instead of the Korean law, such a tragic product injury case could have been prevented in the first place. None of such fatal HD products would have been passed the test requirements.

2. A consumer injury caused by the systems risk

A *system* of a country is required to incorporate all the core duties and responsibilities in deterring its citizens from facing any risk which may endanger their safety. As a state, it is crucial to understand the fact that:[50]

> Systems that ensure a life safe from injury cannot be put in place without a societal and political understanding of the ethical and moral responsibilities of the state and civil society to ensure all individuals a right to life, …

Considering the above-discussed discrepancies between the Korean and the EU laws, it is evident to say that the HD case involves a notable *systems risk*. Unlike the EU, due to a 'lack of understanding'[51] of the possible health risks involved with toxic substances such as PHMG, Korea did not have the capacity (or willingness) to implement relevant safety mechanisms within its systems to regulate the HD products. Here, the term *systems risk* explicitly refers to the risk imposed on Korean consumers as a result of a failure to regulate the HD products. In this regard, having a systems risk can be translated in the context of product-related injury to mean that:

1) there is no guarantee of receiving a comprehensive enough protection and/or compensation in relation to an individual's injury or death by being exposed to a failure of protecting product safety; and

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[48] At 109-110.

[49] Jong-Hyeon Lee and others "Fatal Misuse of Humidifier Disinfectants in Korea: Importance of Screening Risk Assessment and Implications for Management of Chemicals in Consumer Products" (2012) 46 Environ Sci Technol 2498 at 2498-2499.

[50] Mohan, above n 10, at 163.

[51] At 163-164.

2) any safety-related concerns involved in some products could be hidden or invisible to consumers. There could be issues of not having enough expertise to discern those risks until it ultimately breaks out as a form of injury.

The relevant concerns on discrepancies (or deficiencies) in consumer protection laws between countries can eventually align to Kilcommins, Leahy and Spain's thoughts on protecting the public from regulatory crime.[52] They stated that:[53]

> What is striking is the ongoing perception that regulatory crime does not threaten our security in the same way that street crime does. […] Our security can be affected by such matters as workplace injuries, loss of jobs, loss of reputation, and the consequent devaluation of share prices and pension funds, threats to the environment, increased taxation, and increased costs for consumers.

Furthermore, they emphasised the importance of a country moving towards "system relations" instead of relying on "personal references" in protecting its citizens from a threat.[54] Otherwise, the initial level of understanding of what constitutes a threat to an individual's security would be significantly narrowed.[55] Even in a situation where no one is physically being attacked like how a person faces an attack on the street, a person's safety can still be *attacked* due to a consumer injury caused by the *systems risk*.

To put it differently, the failure to prevent selling such fatal HD products to consumers reveals that Korea's legal (and administrative) *systems* were holding the *risk* which could eventually *attack* its citizens' physical safety. Indeed, at the time of the HD case, by abandoning (or ignoring) the possibility of that systems risk, the safety of consumers was devastatingly compromised when those risks eventually turned into a reality. If the Korean legal system had successfully eliminated such risks by implementing adequate product-safety-proving requirements like that of the EU's, the result of this case may have turned out to be different. Most likely, the HD products would not have been present in the market in the first place.

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[52] Shane Kilcommins, Susan Leahy and Eimear Spain "The absence of regulatory crime from the criminal law curriculum" in Kris Gledhill and Ben Livings (eds) *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, London, 2017) 216 at 217.

[53] At 217.

[54] At 217.

[55] At 217-218.

3. Failure to eliminate systems risk resulted in RB's ignorance of its responsibility

When the UN Special Rapporteur made a mandated visit to Korea in 2015, he raised an issue with RB's (and the manufacturer of the chemicals used by RB's) corporate responsibility in regard to the HD case. Despite the allegation made by RB that the change of ingredient to PHMG was made before RB's acquisition of Oxy, the UN Special Rapporteur ("Rapporteur") stressed that:[56]

> Reckitt Benckiser, a manufacturer of pharmaceutical, health-care and pesticide products, with considerable expertise on the interaction of chemicals and human health, explained that it had examined whether relevant substances were categorized as chemicals of concern, but did not investigate whether health and safety information was actually available about the hazards of the substance. SK Chemical, a manufacturer of chemicals used by Reckitt Benckiser, would not comment about whether it knew the chemicals were being used in humidifiers without adequate information about their potential health risks. The companies did not test potential health impacts, despite the fact that inhalation and dermal exposure could be reasonably foreseen for the chemical added and dispersed indoors through a humidifier.

At this mandated visit,[57] the Korean government explained that under Korean law at the time, there was no legal obligation for RB to conduct an "additional hazard review" when there was a change in formula.[58] If that were the case, would RB have acted in the same way if it were to supply the same HD products under any other stricter laws – perhaps under a different law or a different jurisdiction?

As the Rapporteur noted:[59]

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[56] UN Doc A/HRC/33/41/Add.1, above n 6, at 9.

[57] According to the note by the secretariat, this report has been submitted pursuant to United Nations Human Rights Council resolution 27/23, dated 3 August 2016. The Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes conducted an official visit to Korea from 12 to 23 October 2015. The purpose of the visit was to monitor and assess steps taken by that country to protect human rights implicated by the management of hazardous substances and wastes throughout their life cycle. "Protecting consumers from hazardous substances in products" was one of its issues in focus. The relevant discussions start on page 8.

[58] At 9.

[59] At 10.

> Reckitt Benckiser would not have resorted to this method of identifying risks for one of its pharmaceutical products, yet it did so for a consumer product that obviously would be inhaled by people, including young children and pregnant women, through normal use.

In this sense, the answer is, not likely.

As discussed above, in the EU, the law on the inhalation testing requirements have been in place as early as 2003.[60] Therefore, RB, being a manufacturer of pharmaceutical and biocidal products for many years, ought to have foreseen the potential risks of inhaling PHMG or PHMB-based chemicals at the time of the HD case.[61] For instance, the introduction of the TGD could be viewed as one of the significant *signposts* in foreseeing such risks. Thus, it is at least arguable that RB would have been capable to spot the *need* for carrying out due diligence on the risks involved in the HD products.

Despite such evidence that RB should have been aware of the potential risks, RB alleged its 'blameless' position in July 2016 as follows:[62]

> In March 2001 RB purchased a South Korean company called Oxy Co. Ltd, which sold a [disinfectant] product for humidifiers called Humidifier Guard. We believe that Oxy had changed the active ingredient of Humidifier Guard to Polyhexamethyleneguanidine Phosphate ("PHMG") in 2000.
>
> Oxy RB sold Humidifier Guard in the South Korean market from the acquisition until 2011. We believe that the product accounted for less than 0.5% of OXY RB's sales in the local market in all years.

However, in relation to RB's way of handling the issue, Kim noted that:[63]

> Apart from the number of victims, what is probably more shocking about the incident is that [RB] sold humidifier sterilizer with toxic chemical only in South Korean market, which has comparatively weak [regulations]. Although the company's headquarter is located in [the] UK, due to strong restriction, it fails to pass the examination to sell the toxic sanitizer in European market.

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[60] EUR 20418 EN/1, above n 47.

[61] UN Doc A/HRC/33/41/Add.1, above n 6, at 9.

[62] Reckitt Benckiser Group plc, above n 25, at 9.

[63] Kim, above n 28, at 30-31.

Furthermore, the Rapporteur added that:[64]

> … [RB and others] that sold humidifier [disinfectants] failed to conduct a reasonable degree of human rights due diligence about the safety of the chemicals in humidifier disinfectants it sold to consumers. For any company, particularly a pharmaceutical company well versed in the complex interactions of chemicals with the human body, to only resort to examining whether relevant substances are on lists of chemicals of concern is completely insufficient and unreasonable.

As seen in this chapter (and as underlined by Kim and the Rapporteur above), the HD case provides a notable cautionary tale. It shows that the systems risk created by a country's insufficient regulation technically permits a multinational (or transnational) corporation like RB to compromise consumers' safety. Moreover, it is important to note that such compromise in consumer safety can occur either *intendedly* or *unintendedly*. In other words, the need for *prevention* must be stressed here.

III. Protecting Consumer Rights: the New Zealand Framework

How is New Zealand doing in preventing the above-addressed risks or protecting its consumers? New Zealand has been utilising the relevant efforts by enforcing both legislative and quasi-legislative measures, including the Accident Compensation Act 2001, the Fair Trading Act 1986, and the Consumer Guarantees Act 1993. Furthermore, general corporate liability principles allow the imposition of criminal sanctions if any binding party fails to provide the relevant protection. Yet, are they viable enough to protect consumers from any product-related injuries?

A. Under the Unique ACC Scheme – A Novel Social Contract

In New Zealand, there is a novel approach to compensating personal injuries (which includes some instances of product-related injuries)[65] as long as the alleged injury falls under the Accident Compensation Act 2001 ("AC Act"). The *Accident Compensation Corporation Scheme* ("ACC scheme") was initially designed to accept responsibility

[64] UN Doc A/HRC/33/41/Add.1, above n 6, at 10.

[65] Accident Compensation Act 2001, s 8.

"as a matter of national obligation"[66] under the no-fault principle. Moreover, when it comes to *who* or *what* can be covered, it does not depend on how much in levies a person or an organisation pays, but on whether or not a person's injury falls under the pre-defined parameters of the AC Act.[67]

1. Does the novel no-fault scheme do enough to protect the safety of its people?

In July 2000, Dugdale of the Law Commission expressed his concern that the current no-fault scheme does not do enough to protect the safety of its people. For instance, he saw that putting 'an end to fault' as a foundation for civil liability in the context of the accident compensation creates a shortfall in *protecting* people from accidental injury and deaths.[68] Dugdale viewed that the rationale behind the no-fault scheme was:[69]

> … the ability to prove fault (in the context of a road accident at high speed for example) was too much a matter of chance and partly that the very great cost of establishing or resisting allegations of fault would be better applied in compensating and rehabilitating victims. So civil liability for causing injury or death was done away with, and instead all injured persons are entitled to periodic compensation calculated according to a scale.

It is still controversial whether putting all injured persons on the same scale instead of providing the ability to prove fault was a better choice. Moreover, Dugdale noted that a lack of effective disincentives to acting carelessly and the *absence of a criminal penalty regime* had to "round out the scheme".[70] As an example, in the context of consumer injury, such the concerns could be said to be:[71]

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[66] *Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand* (December 1967) at 39.

[67] Alice Coppard "Manufacturing a Better System: ACC and International Product liability" (LLB(Hons) Dissertation, Victoria University of Wellington, 2017) at 11.

[68] D F Dugdale "Protection from Accident" [2000] NZLJ 389 at 389.

[69] At 389.

[70] At 389.

[71] Trish O'Sullivan and Kate Tokeley "Consumer Product Failure Causing Personal Injury Under the No-Fault Accident Compensation Scheme in New Zealand—a Let-off for Manufacturers?" (2018) 41 J Consum Policy 211 at 217.

> … a manufacturer who produces a trampoline with defective paintwork, that is merely cosmetic, may be liable to pay out a similar amount of compensation as a manufacturer who produces a trampoline with faulty springs that cause an injury or death that the trampoline causes.

The above also shows how a lack of disincentives let careless actors to "completely escape from liability for the cost of harms resulting from risks they take".[72] In both examples, they are not putting enough focus on *protecting* the safety of a person. Furthermore, some cases could be put on a fine line between a cover and a non-cover. It is up to the judiciary to decide either on a "question of fact"[73] or a specific outcome. For instance, in *Sellwood v ACC*, the Court stated that (*emphasis added*):[74]

> … authorities relating to risk in causation context which confirm that *the legislation is "focuses on outcomes" and, accordingly, that "risk or potentiality of injury is not enough to attract cover."* […] *"physical injury" is not defined as (and cannot sensibly be interpreted to mean) the risk of physical injury.*

On the above basis, the Court saw that the case "simply does not fall" [75] under the Act-defined meaning of a personal injury. This conclusively exemplifies how the decisions of 1) the choice of compensation and 2) whether or not it is an injury are made by strictly following the *pre-defined* parameters.

Does this ACC scheme do enough to protect its people? The answer is, not enough.

2. An injury covered by ACC cannot proceed to a legal proceeding

Once personal injuries get covered by the ACC scheme, an injured consumer cannot bring legal proceedings against a manufacturer or a supplier in relation to the covered injury.[76] Moreover, considering the current structure of the AC Act, it is clear that Parliament's primary concern is not about making manufacturers or suppliers responsible for personal injuries (or even deaths) caused by them taking risks that result

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[72] At 213.

[73] *Adlam v Accident Compensation Corporation* [2017] NZCA 457 at [42].

[74] *Sellwood v Accident Compensation Corporation* [2017] NZHC 2604 at [14].

[75] At [14].

[76] Accident Compensation Act, s 317(1).

in product failure.[77] Hence, it is reasonable to say that under the current ACC scheme, its applicable scope of manufacturer liability is exceptionally narrow, or "entirely escapable" as O'Sullivan and Tokeley put it.[78]

O'Sullivan and Tokeley claimed that for any national compensation scheme to fulfil its objectives, it must demand "fairness" so that a responsible party – the manufacturers in this particular context – must not be excused from taking responsibility or be allowed to "escape" from their liability.[79]

To put it differently:[80]

> … more is required to make manufacturers accountable for making products which cause injury or death. The current legal framework fails to apportion fairly the cost of the harm suffered by unsafe products. It is contrary to the principles of justice and fairness to allow manufacturers of defective products which cause injury or death to routinely escape all the costs of that harm. Moreover, manufacturers currently also escape any investigation in respect of unsafe products by an independent body such as Worksafe.

In 2010, DePuy International ("DePuy") issued a worldwide recall of its metal hip implants. The recall was urged by a study that showed "the implants had a recorded rate of failure within five years of 13 per cent".[81] As summarised by Coppard:[82]

> … the metal components of the implant were disintegrating. This metal debris went on to erode the surrounding tissue and bone, and enter the bloodstream causing metal poisoning. […] Even after replacement, patients have experienced ongoing physical, financial and emotional suffering from the damage to their hip and the long-term effects of metal poisoning. Prior to DePuy's issuing of the recall, approximately 93,000 patients, including 507 New Zealanders, had received the implant.

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[77] Coppard, above n 67, at 15-16.

[78] O'Sullivan and Tokeley, above n 71, at 214.

[79] At 213.

[80] At 214-215.

[81] Coppard, above n 67, at 4.

[82] At 4.

Based on the above product failure, the affected patients (injured consumers) pursued to bring DePuy to court under negligence and failure to warn.[83] However, since the patients were entitled to be covered by the ACC scheme, DePuy *did not need to face* (was *permitted to escape* from facing) any further legal proceedings under the statutory bar placed by the AC Act.[84]

3. Manufacturers or suppliers face little to no liability under the ACC scheme

Based on the above analyses, it is acceptable to say that the current ACC scheme does not hold enough deterrence effect in securing the safety of its people. On this particular point, Tokeley argued that (*emphasis added*):[85]

> Without an accident compensation scheme, consumers would have the potential to succeed in suing for large sums of money to compensate for injuries caused by a faulty product. *This possibility might act as an incentive to manufacturers to be especially safety conscious* in the design and manufacture of their products.

For instance, manufacturers in the United States can be sued by consumers,[86] and insurance companies can also require the organisations to pay increased premiums to recover the relevant defence costs. Hence, the manufacturers or suppliers are 'obliged' to take all the protective steps under their insurance policies.[87] It would be a separate question to ask whether the above approach is the best option to take, considering the possibility of 'overkilling'.[88] Yet, from the perspective of deterrence, using this approach may help to give manufacturers or suppliers a strong message about what consequences they could face if they do not take protective steps seriously or choose to act carelessly.

In contrast, under the current New Zealand ACC scheme, it is reasonable to say that there is no need for manufacturers or suppliers to put optimal efforts into preserving

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[83] At 4.

[84] Accident Compensation Act, s 317(1).

[85] Kate Tokeley *Consumer Law in New Zealand* (2nd ed, Lexis Nexis, Wellington, 2014) at 33.

[86] Craig Brown "Deterrence and Accident Compensation Schemes" (1978-1979) 17 U W Ontario L Rev 111 at 143-146.

[87] At 143.

[88] At 144.

consumer safety by providing a *safer* product to New Zealand. Additionally, in a case where they do not reside or have a permanent establishment in New Zealand, "it appears that overseas manufacturers are entitled to the benefits of the [ACC] scheme, by way of protection from liability, without having made contributions to it".[89]

Therefore, it is evident that there is no Act-defined basis for manufacturers (domestic or international) to take responsibility or to contribute in any form of levies based on the 'goods' they provide.[90] In this respect, the current ACC scheme involves an apparent concern. There is no legal basis of holding manufacturers (or suppliers) responsible for an ACC-covered personal injury (or death) caused by them taking risks that could result in product failure.[91] This thesis does not intend to go further to study whether the current *compensation* scheme itself is adequate from an injured person's perspective.

B. Protecting Consumer Rights Under the Fair Trading Act 1986

Based on the highlighted importance of deterring consumer injuries, this section considers the role of the Fair Trading Act 1986 ("FT Act") in protecting consumer safety and other relevant interests. The FT Act is designed to enhance:[92]

1) the protection of the interests of consumers;
2) the effective competition of businesses; and
3) the confidence and participation of consumers and businesses.

To achieve the above goals in relation to trade, the FT Act further takes its role to:[93]

1) prohibit certain unfair conduct and practices;
2) promote fair conduct and practices;
3) provide for the disclosure of consumer information relating to the supply of goods and services; and
4) promote safety in respect of goods and services.

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89 Coppard, above n 67, at 7.
90 Brown, above n 86, at 145.
91 O'Sullivan and Tokeley above n 71, at 217.
92 Fair Trading Act 1986, s 1A(1).
93 Section 1A(2).

1. The role of the Commerce Commission under the FT Act

The Commerce Commission ("Commission"), the regulatory body responsible for enforcing the FT Act,[94] plays an important role in protecting consumers. Not only under the FT Act, the Commission also takes a range of enforcement actions against businesses' (and individuals') breaches on other relevant laws or policies.[95] In order to do so, the Commission gathers information from its own market monitoring and investigations, or acts upon the receipt of a claim concerning product safety or any other issues that are relevant to the Act-based consumer interests.[96]

On a broad basis, this suggests that the Commission takes its role to protect consumers from any product-related harm, and from their interests being compromised, for example, as a result of relying on misleading information.[97] Furthermore, the Commission can take action on a product safety issue under a relevant product safety standard ("PS standard").

The FT Act allows making a regulation (or a PS standard) "on the recommendation of the Minister, by Order in Council" [98] in order to prevent or reduce the risk of causing any injury to a person. A PS standard must be related to all or any of the following matters:[99]

> (a) the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods:
> (b) the testing of the goods during or after manufacture or processing:
> (c) the form and content of markings, warnings, or instructions to accompany the goods.

The Commission takes its role in *enforcing* these regulations or PS standards. This will be elaborated further in the course of discussing the relevant case studies below.

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[94] Commerce Act 1986, ss 8 and 52.

[95] *Consumer and Commercial Regulatory System* (Ministry of Business, Innovation and Employment, Regulatory Charter, December 2017) at 13 and 17-18.

[96] Commerce Act, ss 8 and 52.

[97] Sections 52A and 52B.

[98] Fair Trading Act, s 29(1).

[99] Section 29(1).

2. The FT Act as a deterrence factor

As a way of dealing with an unsafe product, the FT Act enables the Minister to declare, for instance:[100]

> … by notice in the *Gazette*, declare goods of any description or any class or classes of goods to be unsafe goods if it appears to the Minister that a reasonably foreseeable use (including misuse) of the goods will, or may, cause injury to any person.

However, such declarations are likely to be limited to apparent risks only. That means, the notice may help to reduce the apparent risks of injuries (such as by knowing that using fireworks is unsafe), but not necessarily prevent those risks which are most likely to be *unapparent* (such as causing product failure by acting carelessly or depriving consumer interests by misrepresenting a product).[101] Although the FT Act states that:[102]

> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods,

the question of whether this statement *can* encourage manufacturers or suppliers to take protective steps or deter them from breaching the law is another issue.

Another RB case (different to the one discussed in the HD case) is to be analysed below to address the shortfall of the FT Act in both acting as a deterrence factor and in leading the manufacturers and suppliers to take protective steps in protecting consumers. Similar to the position of RB in Korea, Reckitt Benckiser (New Zealand) Limited ("RBNZ") has been a *dominant distributor* of no-prescription-required pain relief products in the New Zealand market.[103] Along with its Australian counterpart, Reckitt Benckiser Healthcare Australia Pty Ltd ("RBA"), RBNZ is also "part of the [multinational] Reckitt Benckiser Group plc which has its head offices in the [UK]".[104]

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[100] Section 31.

[101] Section 29(1).

[102] Section 10.

[103] Commerce Commission New Zealand "$1m penalty for misleading Nurofen specific pain range claims" (press release, 03 February 2017).

[104] *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd* [2017] NZDC 1956 at [3].

In *Commerce Commission v RBNZ* ("RBNZ case"), RBNZ entered guilty pleas to "ten representative charges"[105] in relation to its well-known *Nurofen* branded products. Between February 2006 and March 2008, RBNZ launched four new products alleging to relive targeted pains regarding migraines, periods, tension-headaches, and back pain ("Targeted-pain product").[106] These specific targets were directly identified in the name of each product.[107] Likewise, each Targeted-pain product had its own colour on the packaging to identify the different 'pain target', and they were frequently displayed side by side, readily available in supermarkets and pharmacies.[108] RBNZ also used a Nurofen website (nurofen.co.nz) with the heading, "Specific Pain Relief".[109]

The relevant charges effectively represented that the Commission could find evidence that RBNZ had created a *misleading (false) impression* that these products were "specifically formulated" [110] for targeting a certain type of pain. In reality, all Targeted-pain products had no different formula (operative ingredients) or dosage. Rather, they operated exactly the same way as the standard Nurofen product, covering a wide range of pain.[111]

Based on the above facts, the Court agreed with the Commission's submission that RBNZ's marketing claims were "grossly misleading".[112] That is to say, there was absolutely no reason for the consumer to purchase a Targeted-pain product that was priced higher than the standard Nurofen product.[113] Without such misleading representations, "the very reason for the products existence" disappears.[114] For RBNZ, however, the higher pricing structure of the Targeted-pain products are suspected to have been a "significant motivating factor",[115] since such marketing strategies would eventually increase RBNZ's profit figure in the end.

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105 At [1]-[2].

106 At [5].

107 Amelia Wade "Nurofen fined $1.08 million for 'misleading' public" *The New Zealand Herald* Online ed, Auckland, 3 February 2017).

108 *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, above n 104, at [5].

109 At [7]-[8].

110 At [12].

111 At [13]-[14].

112 At [21].

113 At [25].

114 At [20]-[21].

115 At [21]-[22].

Since 2011, RBNZ has been criticised by the media in relation to the misleading representations involving the Targeted-pain products.[116] In 2013, RBA also faced civil lawsuits brought by the Australian Competition and Consumer Commission in regards to the same product range, particularly with focus on RBA's misleading representations on its website.[117] Even after this, however, RBNZ made no protective steps when severe criticisms arose by the media in both countries respectively.[118]

Based on the above, the Court in the RBNZ case noted that such ignorance has prejudiced consumers since it resulted in the 'unwarranted expenditure' in two ways:[119]

> First, as a result of the consumer paying more for the specific pain product, in reliance of the misleading statements that sold for a greater retail value than the functionally equivalent standard Nurofen product. Second, consumers may have also incurred unnecessary expenditure through the purchase of additional unnecessary pain specific products as a result of the misleading statements that each product was specifically designed to treat a particular pain type.

Following this, the Court highlighted that consumers are "entitled to"[120] (which can be effectively translated to *consumers have their rights to*) accurate product information on the packaging and marketing of a product.[121] Without being provided with accurate product information, the majority of consumers "would not have known how to make the detailed product comparisons"[122] and may not have obtained critical safety-related information. Moreover, a high level of trust is often gained solely based on a 'catchy' marketing statement, regardless of their accuracy.[123] Similarly, in the HD case example, such statements falsely assured that HD products were "harmless to humans" in the packaging as well as in their TV advertisements.[124] As a consequence, in both cases, consumer interests and safety were compromised.

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116 At [27].

117 Commerce Commission New Zealand, above n 103.

118 *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, above n 104, at [28].

119 At [31].

120 At [23]-[24].

121 At [24].

122 At [24].

123 At [24]-[25].

124 "The germ of an idea" *The economist* (online ed, Seoul, 9 June 2016).

On RBNZ's continuation with its misleading representations, Jelas J underlined that RBNZ would have been aware of the criticising instances, and therefore, it is "blatantly apparent that [RBNZ] was in breach of its lawful obligations to the New Zealand consumer".[125] The Court clearly rewrote the purpose of the FT Act as:[126]

> Its statutory purpose includes contributing to a trading environment in which consumer interests are protected. To that end [,] the Act prohibits unfair conduct and practices in relation to trade. Unfair conduct includes misleading and deceptive conduct, unsubstantiated claims and false representation.

Based on the purpose of the FT Act and the discussed reasons, the Court stressed that it is even "trite to reiterate the need to deter and denounce"[127] such grossly misleading statements. However, it is often difficult to detect breaches[128] and take enforcement actions against businesses (especially when it involves a multinational actor) as:[129]

> … the resources and capacity of enforcement agencies are stretched thin in most areas of business regulation. The policy lesson is that governments need to be politically committed to treating seriously the business misconduct that they outlaw by giving resources to enforcement or establishing formal "watchdogs".

Hence, the above analyses conceivably suggest that the current FT Act may not be competent enough to accomplish the identified goals or objectives of the Act *unless* a case like RBNZ (or the HD case) can be successfully detected *after* the wrongdoing has occurred.

3. Silence can amount to misrepresentation – May it be broadened?

The recent case of *James Hardie Industries Plc v White* involves an allegedly defective product provided by a multinational corporation.[130] On this, the overseas (Irish) parent company (James Hardie Industries Plc ("JHI")) is being questioned for its potential

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[125] *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, above n 104, at [37].

[126] At [20] (on the basis of the Fair Trading Act, s 10).

[127] At [39].

[128] C Parker and V Nielsen "Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation" (2011) 56(2) Antitrust Bull 377 at 412.

[129] At 414.

[130] *James Hardie Industries Plc v White* [2018] NZCA 580 at [1]-[2] and [70].

liability "in connection with the acts or omissions of their [New Zealand] operating subsidiaries".[131] This decision has been noted to be the first New Zealand case of its kind where:[132]

> A number of owners of buildings clad with James Hardie's products have brought class actions against the James Hardie group. They allege, among other things, that the group companies (1) were negligent in making, supplying and promoting the products; (2) breached their duty to warn consumers that the products were defective, or to withdraw the defective products; and (3) made negligent misstatements about the products.

Based on the FT Act, the Court of Appeal has conclusively confirmed that the scope of misrepresentation can include *silence* in a specific context.[133] Here, the Court of Appeal made a clear point that it is essential to consider whether the alleged silence "affirmatively conveyed a meaning which was misleading or deceptive" in the marketing and supply of the product.[134] On this, the Court of Appeal accepted that:[135]

> … if the statements were those of JHI then a failure to correct untrue or misleading statements could well amount to conduct falling within s 9. Moreover, if JHI had lent its reputation to the product claims (which it is arguable it had) it could be expected to correct any misrepresentation. We therefore see no reason to differ from the view of Peters J that this aspect of the [FT Act] cause of action raises a serious issue to be tried.
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> […]
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> … we consider there is a serious issue to be tried as to the involvement of JHI directors, servants and agents in the James Hardie Products Statements and James Hardie Product Information.

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131 Simone Cooper, Jesse Wilson and Tim Smith "Parent company liability for subsidiary's negligence" *Bell Gully Publications* (online ed, Auckland, Friday 21 December 2018).

132 Cooper, Wilson and Smith, above n 131.

133 *James Hardie Industries Plc v White,* above n 130, at [99]-[100].

134 At [100].

135 At [100] and [102].

As underlined by the Court of Appeal, s 9 reads "no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."[136] Based on the evidence presented to the Court,[137] the claimants' cross-appeal in respect of the FT-Act-based cause of action relating to "failure to warn the claimants of deficiencies in the product or to take reasonable steps to withdraw the products" was allowed.[138] In that regard, this decision holds significance in opening the gate for the first time to put an ultimate (overseas) parent company into trial for its subsidiary's actions (or omissions).

The matter will now proceed to determine "whether the holding companies are in fact liable"[139] for being silent on its subsidiary's failure to take the protective steps regarding their product failure as alleged by the claimants (consumers).[140] At this stage, it is yet to be decided whether the FT Act can be interpreted to protect New Zealand consumers' interests in a *broader* basis where applicable. If JHI is found to be liable, this case will again hold significance in widening the applicable scope of the FT Act for the purpose of protecting consumers from product failure caused (misrepresented) by a multinational actor.

4. Securing product safety under the FT Act – the PS Standards

In securing product safety, s 29 of the FT Act enables to make regulations on "… goods of any description or any class or classes of goods, prescribing for the purpose of preventing or reducing the risk of injury to any person" by declaring an official standard.[141] As the Commission stresses to every business operating in New Zealand,[142] failure to comply with these standards is illegal.[143] A product safety regulation or a PS Standard is there to describe:[144]

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136 Fair Trading Act, s 9.

137 *James Hardie Industries Plc v White,* above n 130, at [101]-[102].

138 At [17], [99], and [103].

139 Cooper, Wilson and Smith, above n 131.

140 *James Hardie Industries Plc v White,* above n 130, at [128].

141 Fair Trading Act, s 29(1).

142 The Commission provides the relevant guide (or any other documents as needed) in many different languages including Chinese, Korean and Hindi in order to assist better understanding for those non-English speaking traders that are operating here in New Zealand.

143 Fair Trading Act, s 40.

144 *Product safety standards Know your responsibilities as a trader* (Commerce Commission New Zealand, 13 September 2017).

> … how some products must be designed, made, packaged and tested. Some also describe warnings and instructions that must be included when some products are sold. […] Product safety regulations currently in force set product safety standards by identifying all, or parts, of an official safety standard that must be complied with. Official safety standards are set by Standards New Zealand or equivalent overseas agencies.

On the above basis, *Commerce Commission v Insight Infotech Ltd* ("Babywalker case") is notable here. In this case, the Court held a company liable for failing to comply with a PS Standard which was produced by an overseas agency. The Court stated that:[145]

> [s 29] clearly provides for the making of regulations under the [FT Act] by two routes. The first is to prescribe a product safety standard which I take to mean the fact of setting it out in detail, it being the subject of the regulation. The alternative route referred to in s 29(2) is by declaring an official standard to be a product safety standard. In my view the international use of the word *declaring* means parliament has given authority for the Governor-General to adopt a standard published or produced elsewhere as long as it qualifies as being an official standard as I have held above the American Standard for baby walkers does.

In other words, the FT Act permits a PS standard to be 'declared' by adopting a relevant standard used overseas like the United States ("Incorporated Document"), as long as all of the Act-specified elements are proved beyond reasonable doubt.[146] An Incorporated Document must:

1) be qualified as an "official standard";[147]
2) contain no ambiguity in its own terms; and[148]
3) be reasonably accessible to any New Zealand resident or citizen.[149]

In coming to the decision that the Commission "proved" the offence "beyond reasonable doubt",[150] the Court discussed the relevant sub-clauses in the schedule to the

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[145] *Commerce Commission v Insight Infotech Ltd* DC Christchurch CRI-2006-009-10421, 19 March 2007 at [21] per Callaghan J.

[146] Fair Trading Act, s 29.

[147] *Commerce Commission v Insight Infotech Ltd,* above n 145 at [21].

[148] At [25].

[149] At [27].

Baby Walkers Regulations 2001 by referring to the American Standard Consumer Safety Specification for Infant Walkers.[151] Moreover, the Court added:[152]

> In respect of whether or not an incorporation by reference is an appropriate regulatory tool, it is now a common and almost accepted practice, particularly for making technical standards for products part of law. Indeed, *Regulations Review Committee Report "Inquiry into material incorporated by reference"* (referred by both counsel) indeed recognise this.

Hence, the suggested rule in this case is clear. Based on the above analyses, it could be arguably seen that the applicable rule under the FT Act is reasonably competent. That is to say, even if no New Zealand made safety standard is available, every manufacturer, designer, or supplier must realise that an 'adopted' standard from elsewhere can act as a binding standard here in New Zealand under the FT Act. When an applicable foreign PS standard exists and fulfils the above three elements, it is an offence to advertise or supply products which do not comply with that particular PS standard.[153]

5. The case-by-case rule and its shortfall in protecting consumers under the FT Act

Based on the above discussions, it is reasonable to say that the FT Act holds a number of compelling grounds in protecting consumer safety, especially as seen in the Babywalker case. Nevertheless, it is still apparent that such results can only be expected when there is an applicable standard to rely upon. In other words, the case-by-case rule applies unless there is a specific rule to go to. Here, it is crucial to note that in a case where there is yet no rule to rely upon, taking actions to deter consumer injury is still largely dependent on a business' voluntary due diligence. Moreover, the law remains uncertain when it involves a multinational company like JHI or RB. This suggests how challenging it is to prevent (or minimise) potential harm unless any illegal act is ultimately *detected* either by going through a tragic event (like Korea) or by being sued (like Australia). Then, the question here is, would it not be necessary to protect consumers more rigorously on a more *fundamental* basis?

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150 At [30].

151 At [8]-[9].

152 At [14] per Callaghan J.

153 Fair Trading Act, s 40.

C. Protecting Consumer Rights Under the Consumer Guarantees Act 1993

Alongside the FT Act, another fundamental legislation that governs New Zealand's trade-related regulatory system (in relation to consumer protection) is the Consumer Guarantees Act 1993 ("CG Act"). It is designed to enhance:[154]

1) the protection of the interests of consumers;
2) the effective competition between businesses; and
3) the overall confidence for consumers and businesses in participating in the trading environment.

To this end, the CG Act expressly states that consumers are entitled to have:[155]

> (a) certain guarantees when acquiring goods … from a supplier, including—
>
> (i) that the goods are reasonably safe and fit for purpose and are otherwise of an acceptable quality; and …
>
> (b) certain rights of redress against suppliers and manufacturers if goods … fail to comply with a guarantee.

1. The applicable scope of the CG Act relating to consumer safety

Ever since the CG Act was enacted, the courts have been filling the gap between the rights and obligations of consumers and traders. Here, the considering factors include:

1) the term "goods" used in the CG Act includes personal property of every kind (tangible or intangible) other than money and choses in action;[156]

2) no supplier is allowed to contract out of the Act[157] in respect of a consumer who "acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption";[158]

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[154] Consumer Guarantees Act 1993, s 1A(1).
[155] Section 1A(2).
[156] Section 2(1).
[157] Section 43.
[158] Section 2(1).

3) a consumer does not include a "trader"[159] and

4) there are appropriate circumstances (or exceptions) where a consumer can have his or her right of redress against suppliers or manufacturers.[160] As an example, there is a "guarantee as to acceptable quality".[161] In cases where the goods supplied fail to comply with this guarantee, the consumer may have a right of redress against both the supplier[162] and the manufacturer.[163]

Nevertheless, the existing body of case law is not yet extensive since the majority of cases are decided in the Disputes Tribunals, and only a few cases reach the superior courts.[164] What is more, the Act's intention to enhance consumer protection can be disturbed (which means consumers may lose their right to compensation)[165] in some instances as the Act has not explicitly expressed what should (or should not) be done.

2. The Act tries to cover the 'safety' issues, but ambiguity remains

Under the current CG Act, a consumer is entitled to reject goods if he or she believes they are not of acceptable quality "because they are unsafe".[166] However, for this to happen, the following requirements must be satisfied. These are determining 1) whether the alleged product failure fits into the Act-defined parameters of a failure;[167] and 2) whether the consumer who is alleging the product failure can be regarded as a reasonable consumer for the purpose of the Act.[168] However, there are two problems here. Firstly, the term "unsafe goods"[169] means to fail the substantial character test under the Act. Yet, the CG Act does not define the term *unsafe* itself clearly. Secondly, the Act does not provide a direct definition of what *reasonable consumer* should mean in the context of securing consumer protection.

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159 Sections 2(1)(b) and 41(1).

160 Parts 2 and 3.

161 Section 6.

162 Section 6(2)(a).

163 Section 6(2)(b).

164 Cynthia Hawes "Consumer Guarantees: Remedies for Defective Goods" (2016) 16(2) NZBLQ 127 at 127-128.

165 At 143-144.

166 Consumer Guarantees Act, s 21(d).

167 Sections 7 and 21.

168 Hawes, above n 164, at 138.

169 Consumer Guarantees Act, s 21(d).

In *Cooper v Ashley & Johnson Motors Ltd*, the Court viewed that in reaching a conclusion of what a reasonable consumer would do in the context of the CG Act, "it is not necessary to determine whether [or not] the vehicle [a defective product] departed in one or more significant respects from the description…" [170] but would wholly depend on what a consumer would decide if he or she 'knew' all the defects.[171]

Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd is another case (although it mainly deals with the issue of misrepresentation) which suggested a notable *boundary* in determining who could be seen as a reasonable consumer for the purpose of protecting consumer interests. The Court of Appeal in this case stated that:[172]

> … "the consumer" comprises all the consumers in the class targeted except the outliers. The 'outliers' encompass consumers who are unusually stupid or ill equipped, or those whose reactions are extreme or fanciful.

The Court went further to address that the reasonable consumer can also be a hypothetical individual if necessary.[173] However, the characteristics of that hypothetical consumer must not be within the definition of an "outlier".[174] On this, the Court elaborated further on the applicable standard in defining the relevant terms to add clarity. In order for a person (either for a real or hypothetical person) to be defined as a reasonable consumer (and not an outlier), he or she must be able to:[175]

> … exercise a degree of care which is reasonable having regard to all the circumstances including the characteristics of the target group of consumers. By "characteristics" we refer to the consumers' level of knowledge, acumen, ability and the like.

In that sense, this case could be regarded as a notable example of the court *filling the gap*. However, such gap-filling activities must rely upon the court's discretion which could still be too flexible to protect the safety of consumers on a fundamental basis.

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[170] *Cooper v Ashley & Johnson Motors Ltd* (1996) 7 TCLR 407 at 415 per Hubble J.

[171] At 414-415.

[172] *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418 at [20].

[173] At [49].

[174] At [21], [50], and [53].

[175] At [51].

The definition of a *defect* for the purpose of the CG Act is also ambiguous. The Court of Appeal in *Nesbit v Porter* contemplated this point and inferred the applicable definition. Based on s 7(5) of the CG Act, the Court of Appeal confirmed that it could include *any failure* of goods in complying with the guarantee of acceptable quality.[176]

For the purpose of raising the importance of defining the relevant terms clearly, it is worthwhile to discuss *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission* decision. Although it is an Australian case, it holds a valuable point to consider. In this case, the Court found that a product was unsafe not because it had a physical defect in itself, but because it carried inadequate safety instructions on its packaging. On this, the Court explained that:[177]

> … the instruction about safety glasses was inadequate to bring home to an ordinary reader the risk of being injured in the way in which Mr Barnes was injured. The instruction said "Always wear rubber gloves and safety glasses when handling caustic soda". We think the conjunction of rubber gloves and safety glasses, especially when limited by the words "when handling", would cause the average reader to understand that the relevant risk was … coming into contact with the handler's skin; [but] would not alert a reader to the extreme inadvisability of allowing any part of the body to be in the vicinity of hot water to which caustic soda had been added. The lack of such a warning was a "defect" in the Product …

It was a case where a consumer tried to use the caustic soda solution to the drainpipe, but the solution exploded, causing severe burns to this consumer's face and eyes.[178] In *defining a product to be defective* in this context, the fact that whether or not the consumer has suffered any loss or damage was immaterial. The cause of an injury *as a result of having incomplete instructions on the packaging* was key.[179] Therefore, it is arguable that this decision holds significance by suggesting how a court can *stretch* a definition when there is no direct statutory definition available in interpreting a term that is material to the case.

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[176] *Nesbit v Porter* [2000] 2 NZLR 465 at [33].

[177] *Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission* (1998) 90 FCR 40 at 48.

[178] At 43.

[179] At 46-48.

Similarly, under the current CG Act, it is not clearly defined whether or not the Act is intended to mean absolutely free from risk or the like in interpreting the relevant terms. It is thus unclear whether it could be said that somebody is going *too far* if anyone interprets any ambiguous word (or phrase) in an "absolute" manner.[180] For these reasons, unless a certain amount of precedent gets established, the ambiguity would remain both in defining the scope as well as in prioritising consumer interests as intended by the Act. In this respect, it is evident that the efforts made to cover consumer safety protection under the CG Act are not as pragmatic as they should be.

3. The statutory definition of manufacturer under the CG Act

The claimants (consumers) in *James Hardie Industries Plc v White* alleged that all the defendant companies (including JHI) should be regarded as manufacturers under the CG Act. Thus, they must guarantee that "the products were fit for the purpose for which they were marketed, corresponded with the description with which they were supplied and were of an acceptable quality".[181] In regards to this allegation, the Court saw that the claimants had an arguable case.[182] The Court stated that (*emphasis added*):[183]

> … the marketing material in connection with the New Zealand business presents it as part of the overall Group. That material makes no distinction between the parent and its subsidiaries as to which is the manufacturer. *The statutory definition of manufacturer captures those who hold themselves out as manufacturer, even if not involved in the physical manufacturing process.* It seems to us that there is a serious issue whether, by allowing its own reputation to be attached to the New Zealand product to the extent that it did, JHI held itself out to the public as manufacturer of the product.

Based on the above position, the Court concluded that "JHI's liability as a manufacturer flowed from the affixing of its brand".[184] Moreover, since JHI represented itself as a manufacturer based on its direct involvement in the process of testing, producing or

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[180] Hawes, above n 164, at 139.

[181] *James Hardie Industries Plc v White*, above n 130, at [12].

[182] Consumer Guarantees Act, s 2(1)(b).

[183] *James Hardie Industries Plc v White*, above n 130, at [110].

[184] At [114].

processing of the allegedly defective goods,[185] the statutory exceptions to the right of redress against manufacturers would not be available to JHI.[186] Likewise, the claimants' cross-appeal on the CG-Act-based cause of action against JHI was allowed.[187] The decisions around the relevant claims are yet to be made.

Although the courts are trying to move forward to consider a multinational actor in a particular context, it is yet uncertain whether the current CG Act is comprehensive enough to fulfil its intended "strong consumer protection focus".[188] In other words, unless the Act can *spell out who* can be defined as liable for *what* (or until a certain amount of case law around that question can be established), the safety of consumers is unlikely to be *guaranteed* as the name of the Act suggests.

4. The CG Act allows to 'decrease' protection if consumers do not do their part

It is true that the CG Act expresses a clear purpose of protecting consumer safety and interests. On the other hand, the Act uses the word "reasonable" 47 times in describing the ways of fulfilling that purpose. This raises a concern of creating areas of doubt in applying the CG Act.[189] Moreover, it has also been drafted in "apparently absolute terms but leaves doubt as to what degree of flexibility might be available to a decision maker"[190] in several different areas of the CG Act.

As an example, the Court in *Cooper v Ashley & Johnson Motors Ltd* held that even in a case where a breach of guarantee can be established, a consumer could be denied getting a remedy and that a consumer must carry out the specific procedures required in order to make a claim against suppliers[191] or manufacturers of goods.[192] On this, the Court stated that (*emphasis added*):[193]

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185 At [112].

186 Consumer Guarantees Act, s 26.

187 *James Hardie Industries Plc v White,* above n 130, at [114]-[115].

188 Hawes, above n 164, at 144.

189 At 128.

190 At 139.

191 Consumer Guarantees Act, s 18.

192 Section 27.

193 *Cooper v Ashley & Johnson Motors Ltd*, above n 170, at 419 per Hubble J.

> … it is clear that the election to have the work done oneself and pay for it oneself only arises if the dealer has refused to carry out the repairs at its cost within a reasonable time. In this case *the plaintiff acknowledged that he did not give the dealer that opportunity* and accordingly the dealer has lost the chance of possibly having the repairs done at a much lesser cost. In my view therefore *the plaintiff having made the election to do the repairs himself without following the prerequisites of s 18(2) he cannot pursue the claim* in respect of those two items under the Consumer Guarantees Act 1993.

Furthermore, based on the above position, the Court in *Acquired Holdings Ltd v Turvey* also saw that there are good reasons why the supplier must be given a chance under the CG Act. This is because the Act enables the supplier to evaluate whether "the goods have been subjected to unreasonable use" or whether "the defect has caused the problem, and, in particular, to control the quality of the remedy,…"[194] What is more, the Court viewed the underlying policy of the CG Act as (*emphasis added*):[195]

> … that suppliers of goods are liable *not because of their own default, but because businesses and not consumers, should bear the risk* where the goods and services they supply fail to comply with consumers' reasonable expectations.

Arguably, the above view is not only centred on businesses making up for the risks imposed on consumers, but it can also act as a tool for blaming or creating an Act-based burden for consumers for not giving manufacturers or suppliers such a chance.[196]

In some cases, courts saw that such default (or fault) should not be absolutely irrelevant.[197] However, even in such contexts, the default (or fault) is only perceived to be one of the many factors used in setting a reasonable consumer's expectations,[198] instead of examining it to determine *who* should be responsible for *what*. More importantly, if the CG Act involves such an *absolute* process which could bring consumers to lose their guarantees if they fail to follow, it is essential to let consumers

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[194] *Acquired Holdings Ltd v Turvey* HC Auckland CIV 2006-404-7284, 29 October 2007 at [13] per Winkelmann J.

[195] At [14].

[196] Hawes, above n 164, at 141.

[197] *Contact Energy Ltd v Moreau* [2018] NZHC 2884 at [61].

[198] At [61]-[62].

know.[199] In other words, when the Act is intended to be "self-policing" in such a way,[200] consumers must be able to understand (*emphasis added*):[201]

> … *not only their rights, but also their responsibilities.* Consumers should be aware that they risk losing any right to compensation if they fail to give suppliers the opportunity to remedy defects.

Furthermore, as Hawes put it:[202]

> Although it is arguable that the Act need not be interpreted in this restrictive way, it is suggested that s 18(2) of the Act should be amended to provide for exceptions to the rule that the consumer loses any right to compensation for remedying a defect if the consumer has not, before effecting the remedy, first required the supplier to do so.

Indeed, the above point is worthwhile to consider since a consumer may not have a chance to be aware of the fact that such an Act-based requirement must be fulfilled before his or her rights can be enforced. Likewise, no other guidance has been made in relevant case laws (such as in *Acquired Holdings Ltd v Turvey*[203]) describing a consumer's position in this area of law.[204] If consumers can *lose* the guarantee of their rights, the CG Act may no longer be able to put consumer protection at its priority. Instead, consumers could face another systems risk.

To put it differently, this means:[205]

> … the burden on consumers will be heavier than in cases where suppliers have more control over the quality of goods and minimisation of damage. Suppliers will also have an interest in explaining to consumers, in appropriate cases, how they might themselves take reasonable steps to ensure that the guarantees are not breached and how, if they are, resulting loss or damage might be reasonably kept to a minimum.

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199 Hawes, above n 164, at 139 and 143.

200 At 144.

201 At 144.

202 At 144.

203 *Acquired Holdings Ltd v Turvey,* above n 194.

204 Hawes, above n 164, at 143.

205 At 140-141.

Therefore, giving a chance for a supplier or a manufacturer to remedy in this way must not be prioritised over protecting consumer safety.[206] It is evident to conclude that the current CG Act technically allows a 'decrease' in consumer protection[207] by requiring consumers to do their part in safeguarding Act-based guarantees.[208]

D. Holding a Company Criminally Liable Under the Corporate Liability Principles

With no doubt, it is the manufacturers and suppliers who provide products to the market. In specific contexts, however, the principle of separate legal personality[209] may let them "escape" from being accountable for their wrongdoings or omissions.[210] In this respect, it would be useful to examine the punishment side of the law. Is it worthwhile to make the law harsher (as a way of holding more companies liable) to prevent manufacturers and suppliers from taking risks of causing consumer injuries or deaths? To put this more generally:[211]

> Questions as to how the law should respond when deaths, injuries or other wrongs are caused through corporate activity have recently received greater attention … [along with the] accompanying realisation as to the impact corporations can have on our everyday lives.

Yet, the initial problem with prosecuting a company arises due to the dissimilarities between a natural person and a legal entity. Traditionally, criminal law was not developed to punish a *company* since it is perceived to be "incapable of physical action, knowledge or intention…".[212] Smith, a practising lawyer at Bell Gully, has attempted to make a comparison of the various theories or doctrines which can hold a company liable. Based on that comparison, Smith makes a strong argument about the need for introducing corporate manslaughter in New Zealand.[213]

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[206] At 139 and 143.

[207] At 143.

[208] At 140.

[209] Companies Act 1993, s 15.

[210] O'Sullivan and Tokeley, above n 71, at 214.

[211] Meaghan Wilkinson "Corporate Criminal Liability – The Move towards Recognising genuine Corporate Fault" (2003) 9 Canterbury L Rev 142 at 142.

[212] At 142.

[213] Maxwell Smith "Corporate Manslaughter in New Zealand: Waiting for a disaster?" (2016) 20(2) NZULR 402 at 437.

However, this section is not intended to analyse further on the details of corporate manslaughter or a particular criminal offence. Instead, this section aims to focus more on contemplating the issues around *separate legal personality*[214] in order to find the theoretical possibilities of holding a company liable under corporate liability principles. Based on Smith's attempt, this section focuses on discussing the following principles: 1) the doctrine of identification; 2) attribution theory; 3) organisational fault and 4) the aggregation doctrine. By doing so, it is aimed to provide an opportunity of evaluating whether applying these principles would be functional to put pressure on multinational actors to take their corporate responsibility more seriously.

1. The punishment side of the law – under the doctrine of identification

The doctrine of identification is known as the traditional common law method based upon the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattrass.*[215] In this case, it was held that only the senior officers who were actively involved in controlling the day-to-day operation must be regarded as the embodiment of the company. In other words, the "guilt of the company" can only be found when these embodied senior officers were proved to have "guilty" minds.[216] As a result:[217]

> Tesco could escape liability by claiming that the person at fault was someone who did not represent the directing mind and will of the corporation, provided they could show that they as a corporation had taken all reasonable precautions and exercised all due diligence.

On the above basis, the common law jurisdiction could often solely focus on the acts or omissions of the senior officers *per se* under the identification doctrine.[218] Similarly, in accordance with s 2 of the FT Act, the Court in *Progressive Enterprises Limited v Commerce Commission* highlighted that:[219]

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[214] Companies Act, s 15.

[215] Peter Cartwright "Corporate Fault and Consumer Protection: A New Approach for the UK" (2016) 21 J Consum Policy 71 at 75.

[216] *Tesco Supermarkets Ltd v Nattrass* [1971] 2 WLR 1166 (HL) at 1176-1177.

[217] Cartwright, above n 215, at 76.

[218] Eilís Ferran "Corporate Attribution and the Directing Mind and Will" (2011) 127 L Q Rev 239 at 241.

[219] *Progressive Enterprises Limited v Commerce Commission* HC Auckland CRI-2008-404-0165, 23 December 2008 at [60]-[61] per Asher J.

> A "person" is defined in s 2 of the Act as including any association of persons whether incorporated or not. There is no doubt that an incorporated company is a person capable of committing an offence under s 17. As a legal person it exists independently of its constituent elements, such as its directors and servants. However, it can only act and think through those natural persons who are its servants or agents.
>
> […]
>
> Thus, a distinction has traditionally been made between directors and senior officers of the company, whose acts and mental states are viewed for certain legal purposes as being those of the company itself, and those servants who are of a lesser status, whose acts and mental states are not.

That is to say, in order for a company to be held liable for causing death or injury of someone, the court must be able to *pinpoint* who was left with the power to make the relevant decisions.

This doctrine has long been criticised since it is difficult for the court to accurately identify one's position until all pieces of the puzzle can be put together. In other words, it is not easy to take into account modern companies' "intricate management layers"[220] or detect the lines of the delegation which may have been designed to avoid being held liable by taking advantage of the doctrine. In this regard, as Smith underlined, unless a *sole trader* runs a *company*,[221] the identification doctrine is not adequate to recognise such modern company structures. Therefore, it is evident to say that this doctrine would not effectively put *pressure* on companies to deter consumer injuries or deaths.

2. The punishment side of the law – under the attribution theory

Following the above criticisms, there is a notable case where the court departed from the identification doctrine. That is, *Meridian Global Funds Management Asia Ltd v Securities Commissio*n ("*Meridian*"). The view of the Privy Council confirmed that:[222]

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[220] Smith, above n 213, at 404.

[221] In general, a sole trader cannot run a company as they are two separate legal entities.

[222] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413 (PC) at 418 and 423.

> Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually a statute) which says that a persona ficta shall be deemed to exist and to have certain of powers, rights and duties of a natural person. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called the 'rules of attribution'.
>
> […]
>
> But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.
>
> […]
>
> There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.

Based on the above, it appears possible for a company to be held liable if the company had known about the employee's action given that the employee had the capacity to commit the act.[223] In such a case, the Privy Council saw that an employee is not necessarily required to be the above-mentioned "directing mind and will".[224] This suggests every case must be analysed on a case-by-case basis in respect of the relevant rules of the company.

Likewise, the Court of Appeal in *Linework Ltd v Department of Labour* agreed to uphold the judgment of the Privy Council in *Meridian*. The Court stated that:[225]

> The fact that Mr Mazur [the employee] was personally under a duty and may have [breached] that duty does not exculpate Lineworks from its own breach of duty … Mr Mazur was the embodiment of the employer – its designated authority

[223] At 423-424.

[224] *Tesco Supermarkets Ltd v Nattrass,* above n 216, at 1176.

[225] *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 at [38]-[39].

> – for on-site safety purposes. His acts or omissions as Linework's foreman or site supervisor are properly attributable to the company.
>
> […]
>
> Mr Mazur's supervisory duties are treated as those of Linework but if an accident or dangerous situation had occurred despite the taking by Mr Mazur's of all practicable steps to ensure safety, the Linework would not have been in breach of [of its duty]. On the present facts, however, not all practicable steps were taken.

In applying the rules of attribution, the Court of Appeal in *Linework Ltd v Department of Labour* examined the existence of the designated authority or the "intricate management layers"[226] in asking "a question of construction".[227] On this, the Court concluded that this employee must be regarded as the "embodiment of the employer".[228] As quoted above, the Privy Council in *Meridian* stated that *there is no inconsistency* in asking a question of construction,[229] that is, asking on a case-by-case basis.[230] However, it may not be the case since it is still possible for companies to create an 'escape route' by articulating their terms or rules to suit themselves since:[231]

> It has become clear in the years since *Meridian* that the identification principle, narrowly interpreted as referring only to top management, remains the judicially preferred basis for corporate attribution in relation to serious crimes involving mens rea. The narrow identification doctrine can be viewed, in effect, as the "default" contextual rule for serious crimes, which the courts have been rather unwilling to move beyond.

Hence, it is still arguable that despite the intention of the Privy Council, this decision may not have succeeded in resolving the issue of inconsistency as it believed so. Instead, it may have allowed an excessive level of flexibility for companies to escape from being attributed.

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[226] Smith, above n 213, at 404.

[227] *Meridian Global Funds Management Asia Ltd v Securities Commission,* above n 222, at 423.

[228] *Linework Ltd v Department of Labour,* above n 225, at [38].

[229] *Meridian Global Funds Management Asia Ltd v Securities Commission,* above n 222, at 423.

[230] At 423.

[231] Ferran, above n 218, at 246.

The aforementioned New Zealand case *James Hardie Plc v White* is also noteworthy in this context.[232] Although it is not a criminal case, it is instructive when assessing legal personality. Here, the Court of Appeal held that holding "groups of companies"[233] could not be immunised under the separate legal personality principle. However, this does not automatically mean that a subsidiary company always "acts as the agent of its parent", even when the parent company has extended its control or exercise over the affairs of its subsidiary.[234] As the Court of Appeal put it, "a wholly-owned subsidiary is not, by that reason alone, the agent of the parent company, even where they have directors in common".[235] Hence, this principle does not place an automatic bar in imposing a duty upon a parent company or in holding a parent company liable.[236]

Yet, when it comes to whether the Court can hold a parent company liable in respect of a defective product manufactured and supplied by its subsidiary company:[237]

> … [this is] a largely untouched area of law in this jurisdiction. Therefore, in New Zealand at least, the claimants can fairly be said to be arguing for the imposition of a novel duty of care upon the holding companies.

Nonetheless, based on various authorities from Australia, Canada and the UK, the Court viewed that the law in this area does not mean to shield a company from facing the legal consequences of entering into a contract in supporting the operations of its subsidiaries.[238] That is to say:[239]

> It is not clear to us why the law should shield the parent from the consequences of actions taken to support a subsidiary that bring it into such proximity with a claimant so as to justify the imposition of a duty of care. The principles of liability for a parent company are not therefore inconsistent with New Zealand company law.

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232 Cooper, Wilson and Smith, above n 131.

233 *James Hardie Industries Plc v White,* above n 130, at [30].

234 At [30].

235 At [31].

236 At [31]-[33].

237 At [34].

238 At [63]-[64].

239 At [63]-[64].

Although these authorities still reflect that the law in this area is "far from settled",[240] the Court helpfully extracted a number of potential grounds in which it may hold a parent company liable in specific contexts including (*emphasis added*):[241]

1) the parent company *takes over the running of the relevant part* of its subsidiary's business;

2) the parent company *has superior knowledge* in regards to the relevant aspects of its subsidiary's business thus the subsidiary had to rely upon that knowledge, and the parent company *knew or ought to have foreseen the alleged deficiency* in process or product and

3) the parent company *takes responsibility in general (irrespective of superior knowledge or skill)* for the policy or advice that is associated to the wrongful act or omission.

As a result of considering the above contexts, the Court of Appeal was satisfied that:[242]

> … this evidential narrative is sufficient to raise a serious issue that conduct of JHI [the ultimate parent company] brings it within those categories described above in which a duty to warn may be imposed upon parent companies in connection with the activities of their subsidiaries.
>
> […]
>
> … on the evidence available at this interlocutory stage, it is arguable that through its senior executive team JHI was responsible for and involved in the setting of standards…, including the necessary testing or directing the testing of products.
>
> […]
>
> … the New Zealand business is presented as just part of the international James Hardie business, rather than as a separate entity. And even if this material is properly construed as issued by James Hardie New Zealand, on the evidence we

[240] At [62].
[241] At [65].
[242] At [96]-[98].

> have seen it remains arguable that JHI had a duty of care in respect of that material. This is on the basis that JHI was responsible for the content of the material or because it had superior knowledge about the content, *and* knew that James Hardie New Zealand was relying upon it for the accuracy and adequacy of that content.

On the above basis, the Court of Appeal held that the relevant legal consequences were possible to be attributed to JHI, the overseas parent company.[243]

In April 2019, the Supreme Court dismissed JHI's application for leave to remove its name from class action proceedings. The application was made based on allegation that the use of a group management structure did not make the parent liable for the acts of a subsidiary and that it was not "in the interests of justice for the proposed appeals to be heard before the determination of the substantive proceedings".[244]

Although the Supreme Court accepted that the case involves "considerable difficulty and importance",[245] the Court saw that the operating companies were properly joined as defendants and so there was "no issue as to the arguability of the claims against them".[246] In assessing the arguability of the claims, the Court noted further that "[as] against JHI at least, the claimants are at something of a disadvantage because the facts bearing on its role in respect of the operating companies lie largely in its control".[247]

Based on these *James Hardie Plc v White* decisions, it is evident that both the Court of Appeal and the Supreme Court gave a clear message. That is, the principle of separate legal personality *does not extricate* a parent company from facing liability solely because it is a separate legal entity to its subsidiary company. However, since the final answer to this case is yet to come, it is still unclear whether or not the attribution theory would be applicable in holding a parent company (multinational actor) liable in respect of a defective product manufactured and supplied by its subsidiary.

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[243] At [58] and [64].

[244] *James Hardie Industries Plc v White* [2019] NZSC 39 at [4], [9], and [10].

[245] At [9].

[246] At [9].

[247] At [6].

3. The punishment side of the law – under the organisational fault model

Unlike the above two doctrines, the organisational fault model focuses on the particular organisational environment in which corporate liability takes place. Under this model, a company will be liable if there is any failure in the system of the organisation.[248] Here, the context in question must contribute to a person's act or omission within the company which has caused, for instance, harm or death. Accordingly, the company can be seen as an "independent moral agent instead of an abstract legal entity".[249]

The organisational structure under this model seeks to reflect its own culture and personality, irrespective of an employee's intention. For instance, corporate culture can be created by following organisational goals or structure.[250] In that respect, a particular 'culture' may survive independently from an individual employee or an officer, and thus it may continue to exist despite the changes in its human resources.[251] Hence, under this model, the existing corporate culture directly affects the actions (or omissions) of individuals who carry out various activities within the corporation. The affecting culture can be controlled by those who manage the organisation.[252]

Considering the above context, Clough argued the need for applying the element of "choice" to this culture-based organisational structure. That is (*emphasis added*):[253]

> In determining the ways in which the corporation is organised and structured, they may increase the level of compliance within the organisation or, alternatively, encourage a tendency toward negligent behaviour and even toward deliberate delinquency. This element of choice adds legitimacy to organisational fault as a basis of liability. *The corporation is punished for its choices, and through its choices may avoid future sanction.*

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[248] Smith, above n 213, at 406.

[249] At 406.

[250] Jonathan Clough "Bridging the theoretical gap: the search for a realist model of corporate criminal liability" (2007) 18 Criminal Law Forum 267 at 275-276.

[251] At 276.

[252] At 275.

[253] At 276.

By adding this element of choice to the organisational fault model, Clough argued that it would enhance the effectiveness of the overall corporate liability regime. Clough's view was that the element of choice would enable companies to have an *opportunity* to decide whether to carry out or to avoid action on their own free will. Then, that opportunity would eventually "[add] legitimacy to organisational fault as a basis of liability."[254] In other words, the corporation can also be *punished* for its own choices.

Fisse and Braithwaite argued along the same line as Clough's view by stating that:[255]

> Although it is often said that corporations cannot possess an intention, this is true only in the obvious sense that a corporate entity lacks the capacity to entertain a cerebral mental state. Corporations exhibit their own special kind of intentionality, namely corporate policy. … the concept of corporate policy does not express merely the intentionality of a company's directors, officers or employees but projects the idea of a distinctly corporate strategy.

Although a corporation cannot act in the same way as a living person with his or her intention,[256] a corporation can equivalently reflect its own intention to act by making these choices in developing its internal policies.[257] For instance, if the organisational culture put production before safety of its workers, or arguably, of its consumers, this means the organisation bears *fault* which can be punished under the relevant law.[258]

However, it is often difficult to identify an enforceable ground based on a company statute, culture or its choice of policies. For example, no corporate culture or policy would have been designed with an intent to produce a defective product in the first place. Even if a type of fault can be detected, the link to a particular organisational policy or choice may remain unclear when it comes to imposing liability on a company for its wrongdoing or omission.[259] Hence, such difficulties must be considered before this model can be utilised as a method for holding a company liable.

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[254] At 275-277.

[255] Brent Fisse and John Braithwaite "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988)11 Sydney L Rev 468 at 483.

[256] Smith, above n 213, at 403.

[257] At 484-485.

[258] At 406-407, and see also Genevieve Taylor "Corporate Homicide" (2013) NZLJ 277 at 278.

[259] Wilkinson, above n 211, at 164.

4. The punishment side of the law – under the aggregation doctrine

The argument for this doctrine comes from the view that, instead of taking a wholly individualistic approach, the prosecution should be able to establish an offence by aggregating the actual conduct or the state of mind of two or more individuals since:[260]

> … it is often impossible to identify a single directing mind and will in modern corporations. The attribution theory offers greater flexibility but is likely to produce uncertain outcomes. The aggregation and organisational fault models are significant improvements on this position, …

Based on the above view, Smith argued that this aggregation-theory-based model could be regarded as an improved version.[261] Similarly, Dixon expressed her view by stating that:[262]

> … where no individual had sufficient information necessary to meet the required *mens rea* of [the offence], if multiple individuals within the organisation possess the elements of such knowledge collectively, their aggregate knowledge can be attributed to the corporation.

As Dixon pointed out, this aggregation theory takes into account "the multilevel decision making structure of many corporations"[263] by "aggregating the *mens rea* of one individual with the *actus reus* of another individual".[264] In that sense, it could be seen to improve the limitations of the identification doctrine.

However, this approach still requires the prosecution to face the same "evidentiary difficulties"[265] in having to identify the person(s) who contributed to the relevant injuries or deaths. For this reason, it is arguable that the distinctiveness (or merits) of this aggregation doctrine is still in question, particularly in a practical sense.

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[260] Smith, above n 213, at 407.

[261] At 407.

[262] Olivia Dixon "Corporate Criminal Liability: The Influence of Corporate Culture" (Research Paper No 17/14, Sydney Law School, 2017), at 4.

[263] At 6.

[264] At 6.

[265] Smith, above n 213, at 407.

Likewise, if this theory is to be applied at a multinational level, it would create ambiguities for corporations to predict the scope of their liabilities. Hence, this would be problematic, especially in the context of imposing liability to a multinational actor.[266] For this reason, the aggregation theory should be further tested before it can be used as an applicable mechanism in holding a company liable.

5. The efficacy of holding a company liable under these principles remains unclear

Based on the above analyses, there is not enough evidence that holding a company liable under the above-discussed principles would lead to more robust consumer protection. Most of the determinations either heavily rely on a case-by-case approach or have to face the difficulties in establishing an offence in order to prove a *company* is liable. Hence, none of these doctrines or theories yet hold sufficient evidence in their ability to lead multinational actors to put more efforts into enhancing consumer safety.

IV. Protecting Consumers Rights: the International Legal Framework

What if the same HD products were sold in the cross-border context? For instance, as seen in Chapter III, despite New Zealand's current efforts to secure consumer safety and well-being, none of the discussed measures are proved to be viable to protect its consumers. Not only for New Zealand but also for other countries, today's free-trade-based global relationships make it even harder for an individual country to regulate products like the above-discussed HD products. As a result, consumers are more likely to be exposed to hundreds of substances with known and unknown hazardous properties *wherever* they live. As Williams and others have notably mentioned:[267]

> Although thousands of toxicology studies that assessed the hazards of chemicals have been conducted over the past 50 years, a large number of chemicals have not been sufficiently evaluated to quantitatively characterize their possible toxicity. It is the public's belief that there is an inadequate database on the adverse health effects of chemicals. The perceived general lack of information about substances in the marketplace has placed pressure on regional, national, and international regulatory authorities to gather data.

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[266] Clough, above n 250, at 274.

[267] E Spencer Williams and others "The European Union's REACH regulation: a review of its history and requirements" (2009) 39(7) Crit Rev Toxicol 553 at 554.

In this respect, Placitella and Klein also commented that:[268]

> One of the first lessons we are taught is that it's not a good idea to touch something if we don't know where it's been. This fundamental lesson protects us from the time we are children, and while we remain inexperienced or vulnerable members of society, unknowingly at risk of endangering ourselves. When we are adults, however, most of us appear to forget this sensible precept entirely, and to violate it every day. We swallow pills and capsules filled with mysterious substances, we cover our bodies with clothing and accessories we find hanging in retail stores, and we fill our homes with products that were manufactured far away in conditions utterly unknown to us.

The markets have crossed over the national boundaries and are putting consumers at *borderless* risk. If a consumer product is imported into a country and another instance of the HD case breaks out, it can be far more complex in assessing the responsibility of companies and the breach of the state duty. For consumers, this means that they are being forced to take the most vulnerable position.[269] In recognition of this, the UN has also stressed that the lesson learned from the HD case must be shared worldwide.[270] Yet, it often remains that "globally operating firms are not regulated globally".[271]

A. Not Every Country is Capable of Taking Action in Securing Consumer Rights

Even if a country can effectively deter a particular health risk under its own products liability law regime, this does not solve the problem entirely. The reality is that not every country has the capacity or willingness to secure consumer safety and well-being.[272] Thus, not all countries are applying the extensive mechanisms required to protect its citizens from the various "consumer hazards".[273] In this sense, it has become much easier for some countries to "subordinate the public good for private gain".[274]

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[268] Placitella and Klein, above n 9, at 219.

[269] Benöhr, above n 12, at 120.

[270] UN Doc A/HRC/33/41/Add.1, above n 6, at 23.

[271] Ruggie, above n 21, at 17.

[272] B Castleman and V Navarro "International mobility of hazardous products, industries, and wastes" (1987) 8 Ann Rev Public Health 1 at 14.

[273] At 1-2.

[274] Ruggie, above n 21, at 16-17.

While some countries have already developed the protection mechanisms and are trying to fill their gaps by 'rewinding' them to deregulation,[275] others have not even been able to start developing them. As a result:[276]

> The disparities [or discrepancies] in national regulation and other factors controlling hazardous products, processes, and wastes have had some undesirable consequences. Pesticides, drugs, and consumer products banned in some countries have been exported to others.

In consideration of such unwanted consequences, it is now vital to pursue a new way of taking balancing efforts together under one international community.

B. Recognising Consumer Rights in General as a Matter of International Law

In being part of one international community, all members of the UN including New Zealand have become parties to at least one of the core international treaties that are relevant to the Economic, Social and Cultural Rights ("ESC rights"). 80 per cent of state parties have already ratified four or more.[277] The two core covenants are known to be the International Covenant on Economic, Social and Cultural Rights 1966 ("ICESCR"),[278] and the International Covenant on Civil and Political Rights 1966 ("ICCPR").[279] Each covenant has been signed by 164 parties and 168 parties, respectively.[280] Although consumer rights have not yet elevated to human rights level, both the ICESCR and ICCPR cover the rights of consumers in one form or another.[281]

The unanimous adoption of the UN Guidelines on Consumer Protection ("UNGCP") also supports the need for recognising consumer rights as a matter of international law rather than leaving the matter solely to the discretion of each individual country.[282] However, it is also vital to acknowledge that a *soft* characteristic (instead of it being hard law) of an international guideline is not necessarily intended to "abolish the

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[275] Castleman and Navarro, above n 272, at 1-2.

[276] At 1-2.

[277] Hilary Charlesworth "A regulatory perspective on the international human rights system" in Peter Drahos (ed) *Regulatory theory: foundations and applications* (ANU Press, Acton, 2017) 357 at 358.

[278] *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A (XXI) (1966).

[279] *International Covenant on Civil and Political Rights* GA Res 2200A (XXI) (1966).

[280] Charlesworth, above n 277, at 358.

[281] Benöhr, above n 12, at 81-82.

[282] At 79-81.

obstacles to cross-border trade".[283] It is rather designed to protect consumers more effectively by allowing some level of flexibility. The UNGCP stresses the importance of securing consumer safety by stating that:[284]

> Member States should adopt or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use.

Nonetheless, as it is only a soft-law-based *guideline*, if a country is reluctant to put these efforts to the best of its ability, there can be little impact in securing consumer safety. Most of the current protection instruments like the UNGCP let each country decide how to merge its international obligations (such as regulating company practices to protect consumers) without compromising the desire to make a profit in the global market. Indeed, the UNGCP is aimed to establish "minimum benchmarks"[285] for international consumer protection along with the expansion of global free trade. In other words, soft-law based guidelines are designed to focus on setting up the solid ground on which national laws should be further developed in their own way. Yet, at the same time, they are not intended to go any further from that end. Hence, these guidelines (including the UNGCP) do not practically assist the *enforcement* of consumer rights.[286]

The international community has also agreed to put a sharper focus on enforcing the protection of consumers globally. For instance, the UN has designed a special body to deal with the UNGCP (alongside other market-related regulations). This body is called the UN Conference for Trade and Development ("UNCTAD"). The UNCTAD has been designed to provide technical assistance to developing countries, by providing a forum for intergovernmental discussions and undertaking research and analyses to inform the relevant considerations. Accordingly, it was the UNCTAD's role to revise the initial version of the UNGCP in 2015.[287]

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[283] Mateja Durovic "International Consumer Law: What Is It All About?" (2020) 43 J Consum Policy 125 at 130.

[284] *United Nations Guidelines for Consumer Protection* GA Res 70/186 (2015) (UNGCP (2015)) at 7.

[285] Durovic, above n 283, at 131.

[286] At 129-130.

[287] At 134-135.

However, as there has yet been a proper study completed regarding the actual impact of the UNGCP itself or the influence of its enforcement, its effectiveness remains unclear.[288] For instance, according to the implementation report on the UN Guidelines on Consumer Protection (1985–2013), most UNCTAD Member States have adopted the relevant product safety laws and implemented the appropriate physical safety protection mechanisms.[289] Nonetheless, significant discrepancies exist in applying the relevant guidelines in practice:[290]

> … in some countries, such as Canada, this topic is entirely assigned to the health authority while others, such as the United States of America, have created an autonomous body for consumer product safety. Some jurisdictions, such as the [EU], Peru and Portugal, have implemented records to ensure that products are safe for intended or foreseeable use.

That is to say, protecting consumers on the basis of a UN Guideline such as the UNGCP (which is still vague in terms of its effectiveness) is not yet evident that it would assist in reducing the existing discrepancies or gaps in-between countries at this stage.

V. Elevating Consumer Rights to Human Rights: the International Human Rights Framework

It is commonly accepted that the above-discussed problems or discrepancies are caused by "economic globalisation"[291] and by the opening up of borders for corporations to go beyond their national boundaries to trade. As discussed in the last two chapters, it is no longer uncommon for consumers to encounter products that are designed, manufactured and traded on a *borderless* basis. This also implies that it is not always easy (or possible) to track down the safety details or issues behind such consumer products distributed on a *transnational* basis.[292] Although there have been some efforts made to protect consumers by establishing a number of soft-law based-mechanisms such as the UNGCP

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[288] At 129.

[289] *Implementation report on the United Nations Guidelines on Consumer Protection (1985–2013)* UN Doc TD/B/C.I/CLP/23 (29 April 2013) at 6.

[290] At 6.

[291] Sally Wu "Catching Corporate Human Rights Abuse Abroad: A Wider Net of Extraterritorial Laws" (2017) 4 PILJNZ 174 at 177.

[292] Placitella and Klein, above n 9, at 219.

alongside its supporting body (the UNCTAD), the efficacy of such non-legally binding instruments remain questionable.[293]

A. Recognising Consumer Rights as a Way of Maintaining Human Dignity

Almost every person in this world, in essence, is a consumer.[294] Nonetheless, as discussed thus far, consumer rights to safety and well-being are often compromised, mainly due to the unique characteristics of today's free-trade-based relationships. Therefore, it is now vital to protect consumers on a more *fundamental* ground rather than as a part of general rule in the market.[295] It is also important to remember that the philosophy behind consumer protection lies under a mixture of private and public law.[296] This means it is essential to protect consumers under the *state dut*y as well as *corporate responsibility*, both of which should be based on the recognition of a consumer's rights as a way of maintaining his or her inherited human dignity.

1. What is consumed by consumers must not undermine their health and well-being

Ever since contracts became a key element to the consumer transactions, it has almost become routine for virtually every person to face the same problems.[297] Indeed, it has become common practice for traders to have "the upper hand in setting contract terms and by pre-formulating non-negotiable standard terms"[298] as a way of structuring the relationship in their favour over consumers.

However, under current human rights instruments, it is evident that such *standard terms* must not result in compromising the safety of a consumer. According to the ICESCR, for instance, it is clearly stated that everyone has a right to "the enjoyment of the highest attainable standard of physical and mental health".[299] This effectively suggests that what is consumed by consumers must not compromise or undermine their health and

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[293] Durovic, above n 283, at 129.

[294] Benöhr and Micklitz, above n 17, at 20.

[295] At 21-22.

[296] Geraint Howells, Iain Ramsay and Thomas Wilhelmsson "Consumer law in its international dimension" in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds) *Handbook of research on international consumer law* (Edward Elgar, Cheltenham, 2010) 1 at 7.

[297] At 1.

[298] At 7.

[299] *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A (XXI) (1966), art 12.1.

well-being. At the same time, it is essential to deter such undermining activities by recognising consumer entitlements as a set of *rights*.[300]

2. Consumer safety must be regarded to be essential to maintain human dignity

Many international law scholars including Howells and Benöhr claim that the ICESCR implicitly protects consumers since (*emphasis added*):[301]

> … the preamble to the ICESCR declares that its principles derive from the inherent dignity of the human person. Human dignity means that every human being is worthy of respect, due to the fact that he or she is a member of the human family. As consumer law protects the individual because of his or her human nature, notwithstanding economic interests, *dignity is also a source of consumer protection*. Thus, although consumer protection was not yet mentioned in the ICESCR, it is a method by which the above consumer interests can be enhanced.

Furthermore, it has long been observed that in maintaining human dignity, every individual must be protected not only by state parties but also by private actors. Therefore, an emphasis on *human dignity* can eventually serve as the basis for elevating consumer rights to human rights[302] since an overwhelming majority of people, in essence, become consumers.[303] However, it is true that certain rights are still being positioned at varying degrees of importance around the world, mainly based on global political influence.[304] Even so, consumer safety must no longer be regarded as a *luxury* that is only allowed for developed countries. For instance:[305]

> The freedom from hunger is of great import in underdeveloped societies, where it is of more importance than certain civil liberties. A similar hierarchy also applies to consumer rights. The right to safe drinking water and to product safety are afforded greater weight than the right to a fair contract. This proves that seemingly less significant rights, in context, can be identified as human rights.

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300 Howells, Ramsay and Wilhelmsson, above n 296, at 4.

301 Benöhr and Micklitz, above n 17, at 21-22.

302 Deutch, above n 18, at 552 and 554.

303 Benöhr and Micklitz, above n 17, at 20.

304 Deutch, above n 18, at 543.

305 At 561.

Indeed, such challenges involved in protecting consumers are also apparent for *developed* countries, but in a somewhat different format. Here, consumer-related policy debates are often "distorted by too much emphasis" on economic poverty[306] due to not giving enough consideration relating to consumers' non-economic rights. In that sense, it is crucial that, as phrased by Benöhr, "consumer rights to fair trade, safe products and access to justice are granted to maintain human dignity and well-being, notwithstanding the impact of the economic market".[307] Therefore, it is not only political or economic rights but also consumer rights be part of fundamental rights as a matter of international human rights law.

VI. Taking a Human Rights Approach: Imposing Duty to State Parties

Based on the shared understanding of how international law works, "it is only the act of ratification or accession which binds a state, provided that the treaty has entered into force".[308] However, considering the current free-trade-based relationships, (for instance, prioritising the free movement of goods principle),[309] it is no longer sufficient for a state party to bear its duties based on the narrow range of conduct-based participation. State parties must also consider that "business conduct is directly shaped by areas of law and policy that are largely silent".[310]

For some countries, such 'silent' areas often include subjects relating to the protection of fundamental human rights.[311] Thus, it is crucial to reduce the existing gap in governing the discrepancies in domestic laws ("governance gap"), particularly in this free trade era. Such gap-lessening efforts can be started by making clear *who protects what* in "an instance of governance in the absence of government".[312]

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306 Iain Ramsay "Consumer Law, Regulatory Capitalism and the New Learning in Regulation" (2006) 28 Sydney L Rev 9 at 29-30.

307 Benöhr, above n 12, at 78-79.

308 Natalie Baird "The International Human Rights Framework" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters New Zealand, Wellington, 2017) 149 at 174.

309 Joerges, above n 19, at 4.

310 Ruggie, above n 21, at 143 and 161-162.

311 Deutch, above n 18, at 562.

312 John Ruggie "Global Governance and "New Governance Theory": Lessons from Business and Human Rights" (2014) 20 Glob Gov 5 at 5-6.

A. Each State Party Must Fulfil its Duty to Protect the Rights of its Citizens

John Ruggie, the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises,[313] has stressed that the state duty to protect is generally focused on "a standard of conduct, not result".[314] In taking this point further, Ruggie argued that the term 'protection' here must include protection by the state party against business enterprises. However, he also noted that this does not automatically mean that state parties are *per se* responsible when a business enterprise abuses human rights.[315]

1. Ruggie's Guiding Principles for state parties and businesses to protect human rights

According to Ruggie's theory based on the Guiding Principles for Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework ("Guiding Principles"),[316] there are two broad instances for state parties to be responsible. These instances arise when 1) a state party fails to take appropriate steps to prevent, investigate, punish and/or redress the violation of human rights; or when 2) the violation (or abuse) has been carried out directly by state-owned enterprises.[317] However, such confined parameters still produce enough room for controversy. Such broadly given discretion[318] could give a chance either for a state or a private actor to avoid fulfilling their obligations.[319]

Since most international law standards encompass only a narrow and a highly generalised range of conducts, each state party's position in enforcing its rights-based obligations is likely to vary country by country.[320] That is to say:[321]

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[313] *Human rights and transnational corporations and other business enterprises SRSG mandate* UN Doc E/CN.4/2005/91 (20 April 2005).

[314] Ruggie, above n 21, at 137.

[315] At 136.

[316] *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc A/HRC/17/31 (21 March 2011) The Human Rights Council endorsed the Guiding Principles in its resolution (HRC Res 17/4 (2011)) of 16 June 2011.

[317] Ruggie, above n 21, at 137.

[318] At 138.

[319] At 137.

[320] At 142-143.

[321] At 26-27.

> In relation to business and human rights, two features stood out on this transformed economic landscape: it became clear that many governments were unable or unwilling to enforce their domestic laws in relation to business and human rights, where such laws existed at all; and multinational firms were unprepared for the need to manage the risks of their causing or contributing to human rights harm through their own activities and business relationships.

One of the main reasons why a country is *unable* to fulfil its international-law-based obligations could be due to a lack of resources to guide their private actors in comparison to other countries.[322] Such discrepancies (or varied resources) are likely to have an impact when a country comes to fulfil the duty of protecting its citizens.

2. *The state duty based upon Wu's idea of giving extraterritorial effect to a home state's domestic human rights regulations*

Even though consumer rights become human rights, the majority of international-law-based instruments would simply *create* binding obligations for the relevant state parties to take.[323] Traditionally, it is often perceived that only the state parties are legally obliged to deliver these functions or rights to the right-holders but no one else.[324] Despite that perception, it is often observed that:[325]

> … [a state party's] actual capacities to implement and enforce the respective legislation are often limited. This is especially the case in states with structurally weak legal and administrative systems which are often not able to effectively control transnational business activities, or are unwilling to do so because of the fear of discouraging foreign investors.

As discussed above (and also in Chapter II), a state party's *lack of capacity* issue (or *willingness* issue for some countries) would be a likely reason why the international community is having difficulties in lessening the current governance gap.

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[322] At 140-141.

[323] Wu, above n 291, at at 175.

[324] Margaret Bedggood and Kris Gledhill "Essentials of Life: The Right to an Adequate Standard of Living in New Zealand" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters New Zealand, Wellington, 2017) 683 at 690.

[325] Markus Krajewski "The State Duty to Protect against Human Rights Violations through Transnational Business Activities" (2018) 23 Deakin L Rev 13 at 20.

On the other hand, Wu saw that the state parties' dependence on protecting human rights "within the confines of its own territory"[326] consequently resulted in a real governance gap.[327] This means that even though the state duty to protect consumers is fully recognised, it cannot be guaranteed once it goes beyond the territorial boundary. Wu described her view as:[328]

> The problem is not the state-centric system, but the lack of obligation on home States to police their corporations abroad. As such, profit-seeking corporations will inevitably take advantage of conditions favourable to them in foreign markets. A failure by developed States to control their players on the field does not mean that the game is broken; it means that greater pressure should be applied to ensure the game is fair.

Based on this viewpoint, Wu noted that it is crucial for the international community to "shape an environment in which it is unacceptable for corporations to abuse or facilitate the abuse of human rights".[329] Similarly, the Committee on Economic, Social and Cultural Rights ("CESCR") stated that (*emphasis added*):[330]

> … States parties *must take the necessary steps* in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment. *States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States* in which they operate to fully realize the Covenant rights.

Although it is possible for international law to place some form of non-voluntary duty on private actors directly, again, unless the existing governance gap can be lessened, this would eventually lose its practicality.[331] Wu alleged that, in order to reduce the existing governance gap, domestic mechanisms must first be 'put into gear' before any international law principle can intervene as:[332]

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[326] Wu, above n 291, at 174.

[327] At 204.

[328] At 180.

[329] At 202.

[330] *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* UN Doc E/C.12/GC/24 (10 August 2017) (UN Doc E/C.12/GC/24) at 11.

[331] Wu, above n 291, at 192.

[332] At 202.

> … host States are not in a position unilaterally protect human rights so long as transnational corporations exert power and influence in their region. [The failure] to recognise this issue has caused fundamental dissonance between those who welcome the Guiding Principles [as a method of controlling the private actors] as a complete solution to the problem, and those who claim they are not enough.

Wu argued that the Guiding Principles are unable to achieve their objectives if 'unequipped' host states are forced to follow a comprehensive human rights protection regime.[333] Based on that argument, she suggested to:[334]

> … extend the reach of existing human rights frameworks from home States to bind their corporations abroad, and make redress mechanisms available for foreign victims of abuse.
>
> […]
>
> States are generally not required to legislate extraterritorially; but doing so is also not generally prohibited by international law, as long as there is a recognised jurisdictional basis. One basis relates to conflict-affected areas: States must ensure their corporations are not involved in human rights abuses because the host State has lost effective control and will be unable to protect against abuses.

In general, extraterritorial legislation may enable a state party, as a home state, to set its own standards requiring compliance with their domestic regulations.[335] Nevertheless, a mere development of extraterritorial legislation may still not be enough to reduce the governance gap in practice. In discussing this point, Wu referred to a view that:[336]

> Where a State fails to complete its obligations under human rights instruments to protect its people, corporations can take advantage of the relaxed human rights laws. For this reason, many blame the state-centric human rights regime, claiming it to be one dimensional and ineffective, or that it cannot keep up with the realities of global politics and business. It is argued that the state-to-state system of obligations fails to govern corporations that operate internationally, in areas where local human rights protections are weak.

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[333] At 192.

[334] At 192.

[335] At 192-193.

[336] At 178.

Wu observed that the above-stated perspective focuses "too much on the lack of protection in host States" and that it is the "dilemma of host States".[337] Conversely, a question which could be asked here is, what if the *home state itself* fails to implement or enforce comprehensive regulations in comparison to another country?

Based on a more theoretical approach to extraterritorial human rights obligations, Augenstein and Kinley expressed their opinion as:[338]

> … what is decisive for the determination of extra-territorial human rights obligations to protect against corporate violations is not the state's exercise of *de jure* authority, but its assertion of *de facto* power over the individual rights holder. More specifically, it is an act or omission of the state in relation to a corporate actor that brings the individual under the power of the state and triggers corresponding obligations to protect his or her human rights against corporate violations.

Based on the above opinion, it is arguable that such a dilemma is not only the "dilemma of host States" as Wu put it.[339] However, it is not impossible to apply Wu's idea by adding some level of certainty to the rule.[340] For example, within the domestic law of New Zealand, it is reasonably clear that:[341]

> … corporations are bound by legislation such as the Human Rights Act 1993, which forms part of the network of human rights obligations they must manage, as a business operating in New Zealand. There are monitoring mechanisms and complaints processes through the Human Rights Commission, ombudsmen, judicial appeals and the possibility of civil litigation, should any rights be breached.

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337 At 178-179.

338 Daniel Augenstein and David Kinley "When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations" (Legal Studies Research Paper No. 12/71, Sydney Law School, 2012) at 17.

339 Wu, above n 291, at 178.

340 Sally Garrett "New Zealand: Last Bastion of Laissez-faire - Comparative Perspectives on Consumer Protection" (1986) 5 Auckland U L Rev 277 at 278.

341 Wu, above n 291, at 191.

Yet, in a context where a private actor's efforts on enhancing its competitiveness in the global market battle a state party's duty to regulate, it is still likely to create considerable conflict. Generally, domestic laws themselves are often inadequate to motivate corporations to put their best efforts in upholding consumer protection.[342]

By taking a slightly different angle to Wu's idea, Krajewski argued that international human rights law needs to be reconstructed "as a relational and not as a territorial concept".[343] According to Krajewski, where appropriate regulatory action is required, regulating a specific activity of foreign private entities (for example, in preventing violations of fundamental rights in multinational corporations) domiciled in the host state is "not an exercise of extraterritorial sovereignty".[344] To clarify, Krajewski stressed that the point here is not *where* do human rights apply but *whom* do human rights protect. He explained that (*emphasis added*):[345]

> … as early as 1981, the Human Rights Committee held in the famous Lopez Burgos case that the reference to jurisdiction in the [ICCPR] is *'not to the place where the violation occurred, but rather to the relationship between the individual and the State'*. Jurisdiction could then be construed on the basis of the effectiveness of human rights protection. In other words, the state on whose territory a human rights violation occurs would have jurisdiction *not due to the principle of territoriality, but because its activities would be the most effective way to mitigate or prevent human rights violations.*

Similarly, the CESCR also noted that (*emphasis added*):[346]

> … [State parties] should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (*including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State*) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights.
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> […]

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342 S Garrett, above n 340, at 277-278.

343 Krajewski, above n 325, at 26.

344 At 28.

345 At 26-27.

346 UN Doc E/C.12/GC/24, above n 330, at 10-11.

> … although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, *this does not imply the exercise of extraterritorial jurisdiction by the States concerned. Appropriate monitoring and accountability procedures must be put in place to ensure effective prevention and enforcement.* Such procedures may include *imposing a duty on companies to report on their policies and procedures to ensure respect for human rights, and providing effective means of accountability and redress for abuses of [rights]*.

Moreover, the traditional principle of non-intervention does not contain an "absolute prohibition" of any influence exercised by one country over another unless it relates to "a matter that concerns solely the domestic affairs of the target State".[347] Here, as Krajewski noted, only the 'domestic' matters are meant to be isolated from being covered by international treaties or customary international law.[348]

Based on the above analyses, Wu's idea of bringing a territorial certainty is yet to be further evaluated for its effectiveness if it were to be applied in practice. At the same time, it is also evident that especially with today's expansion of the cross-border trade, the violations of consumer rights must not be regarded as part of domestic affairs which are covered solely on a territorial basis. It is yet unclear which concept or idea (discussed above) would work better in practice. Nevertheless, both Wu and Krajewski's arguments are notable since they highlight the *importance* of reducing the existing discrepancies or governance gap in the context of securing consumer rights.

B. The Rights-based Grounds to Impose State Duty to Secure Consumer Rights

At the current stage, consumer rights are commonly classified under ESC rights.[349] Although ESC rights are not officially recognised as human rights, they are intertwined to the current fundamental rights standards.[350] Even so, they are often described only in general terms and do not get enforced practically in protecting the health and safety of the public.[351] For this reason, the topic of consumer protection must now be placed at

[347] Krajewski, above n 325, at 29.

[348] At 29-30.

[349] Benöhr and Micklitz, above n 17, at 21-22.

[350] Bedggood and Gledhill, above n 324, at 685.

[351] Benöhr and Micklitz, above n 17, at 24-26.

the forefront of international trade, and this can be started by the enshrining of consumer rights based on the relevant human rights grounds.

1. *An individual consumer has his or her right to have an adequate standard of living under the UDHR*

How do human rights relate to consumer protection? The basic or fundamental rights were formally introduced in the UN Universal Declaration of Human Rights 1948 ("UDHR"). The right to an adequate standard of living and its constituents are closely linked to consumers – the art 25(1) of the UDHR reads that:[352]

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The above article is highly relevant to consumers since it conclusively shows that *everyone* (or at least an overwhelming majority of the population) must become a consumer "from time to time"[353] in order to maintain an adequate standard of living.

2. *Every consumer must be protected from health risks and threats under the right to life, liberty and security of a person ("right to life")*

Under the UDHR, it is clearly stated that "everyone has the right to life, liberty and security of person".[354] On that basis, the ICCPR has also incorporated these rights[355] and such incorporation effectively upholds inherent human dignity by recognising that:[356]

> … in accordance with the [UDHR], the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights [ESC rights].

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[352] *Universal Declaration of Human Rights,* art 25(1).

[353] Benöhr, above n 12, at 78-79.

[354] *Universal Declaration of Human Rights*, art 3.

[355] *International Covenant on Civil and Political Rights*, art 6.

[356] Preamble.

In interpreting the phrase, 'right to life', the General Comment of the UN added that (*emphasis added*):[357]

> It concerns the entitlement of individuals to be *free from acts and omissions* that are intended or may be *expected to cause their unnatural or premature death, as* well as to *enjoy a life with dignity.*

Based on the above, the General Comment directly stated that the right to life should not be "interpreted narrowly."[358]

Furthermore, it stressed that under the right to life, state parties must take their duty to exercise due diligence in regard to human rights. Here, the aim of this due diligence must be on protecting the lives of individuals "against deprivations caused by persons or entities, whose conduct is not attributable to the State".[359] That is to say, the 'state duty to protect' has to be extended to reasonably foreseeable threats (or life-threatening situations) caused by a private actor other than the country itself.[360]

Based on the above-discussed need for a *wider* interpretation, the Human Rights Commission of New Zealand added that:[361]

> The term 'life' has been interpreted widely by courts internationally to include the right to livelihood, health, education, environment and dignity. The State has a duty to protect human life against unwarranted actions by public authorities as well as by private persons.

Therefore, the above analyses conclusively suggests that the 'right to life' imposes corresponding responsibilities on both the state parties and private actors to protect consumer safety and well-being as human rights.[362]

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[357] *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* UN Doc CCPR/C/GC/36 (30 October 2018) at [3].

[358] At [3].

[359] At [7].

[360] At [6]-[7].

[361] *Human Rights in New Zealand Ngä Tika Tangata O Aotearoa* (Human Rights Commission, 2010) at 107.

Furthermore, starting with the UDHR, the adoption of subsequent instruments including the ICCPR and ICESCR should mean to enable every person to expect or "demand safer products, safer working and living conditions, and a safer environment in which to live".[363] Nonetheless, when it comes to product safety, the efforts made to promote safer products often become 'corrective' measures rather than 'preventative'.[364] As a result, consumers are forced to face a situation where:[365]

> … [we] live in homes that are designed and built by others and use technologies manufactured by powerful organizations not necessarily under our control. And we dare not guess the hazards found in chemicals and other products we purchase.

The point above notably suggests that in order to uphold the right to life for the purpose of protecting consumer rights, the relationship between the consumers (users) and traders (providers) must be clarified first. Here, it is crucial to bear in mind that:[366]

> It is this right to life that is translated into a right to live free from debilitating injury. Similarly, when a private corporation sells goods or services, the buyer assumes that no harm will come from using those products.

The above-suggested interpretation of the 'right to life' effectively implies that every consumer is entitled to be protected from any product-related risks (threats).[367] In other words, both the state parties and private actors are obliged to provide that protection.

3. Every consumer must be able to exercise personal autonomy as part of his or her right to privacy

As international free trade expands, there are increasing concerns about hazardous or unsafe products (including those inferior-quality products produced to offer a lower price). Due to their "destructive potential"[368] trading of these goods could be viewed as a violation of internationally accepted rights.

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362 Marilyn Helms and Betty Hutchins "Poor Quality Products: Is their Production Unethical?" (1992) 30 Manag Decis 35 at 38.

363 Mohan, above n 10, at 161-162.

364 At 162

365 At 163

366 At 165.

367 *Universal Declaration of Human Rights*, art 3.

368 Dana Jacob "Hazardous Exports from a Human Rights Perspective" (1983) 14 Sw U L Rev 81 at 93.

However, based on the principle of personal autonomy, some scholars argue that it is all about the freedom of choice which should *prima facie* be respected.[369] As an example, Ausness argued that:[370]

> … personal autonomy also guides the law's treatment of inherently dangerous products. Many of these products such as cigarettes, … trampolines, … are not essential to human welfare. Nevertheless, despite their dangerous character, the principle of personal autonomy suggests that people should be free to purchase them and manufacturers should not held liable for placing these products into the stream of commerce. Clearly, society values, or at least tolerates, the public's right to consume or utilize inherently dangerous products …

Indeed, if a particular choice involves a *personal preference* issue, such a 'danger-is-my-business' type of claim could be justified on the above basis. However, in a case where *unexpected* product failure is attached to a choice, that decision may unexpectedly affect one's autonomy. If this were the case, it would become a completely different situation to Ausness' argument. In that respect, therefore, failing to maintain product safety is closely linked to a violation of personal autonomy.

The *Ford Pinto* case[371] is a notable example of resulting in violating individuals of personal autonomy by its defective product. The design of Ford Pinto's fuel tank was "prone to rupture in collisions above 20 mph, sometimes resulting in burn deaths".[372] However, this problem could have been fixed in a few inexpensive ways,[373] including the installation of a shield costing around US$10.[374] Despite Ford's knowledge of this defect, the company did not do anything to remedy the defect, and the need for installation of the shield was never announced.[375] As a consequence of this:[376]

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[369] Helena Sipi and Susanne Uusitalo "Consumer Autonomy and Sufficiency of GMF Labeling" (2008) 21 J Agric Environ Ethics 353 at 357.

[370] Richard Ausness "Danger Is My Business: The Right to Manufacture Unsafe Products" (2014) 67 Ark L Rev 827 at 863.

[371] *Grimshaw v Ford Motor Company* 119 Cal App 3d 757 (1981).

[372] Eugene Schlossberger "The Right to an Unsafe Car? Consumer Choice and Three Types of Autonomy" (2013) 5 J Appl Philos 1 at 1.

[373] *Grimshaw v Ford Motor Company*, above n 371, at 775.

[374] At 791.

[375] At 775.

[376] At 771.

> Mrs. Lilly Gray, the driver of the Pinto, suffered fatal burns and 13-year-old Richard Grimshaw, a passenger in the Pinto, suffered severe and permanently disfiguring burns on his face and entire body.

Here, Schlossberger asks, "should Ford have installed the shield holding public safety paramount, or, respecting consumer autonomy, have made the shield an option?"[377] With no doubt, this case must not be placed under Ausness' argument. The underlying philosophy behind the UDHR is to underpin that every life must have freedom from fear.[378] That could be broadly interpreted to mean that every consumer is to be free from fear about being injured due to any unwarned product failure like the *Ford Pinto*.

In that sense, protecting one's autonomy has to be part of the state duty since it is "the right of everyone to the highest attainable standard of physical and mental health".[379] Moreover, fundamental human rights are eventually "the rights necessary for the development and exercise of autonomy".[380] Hence, the protection of personal autonomy should include protecting consumers from a product-related injury.[381]

Likewise, the right to privacy[382] can also be interpreted to include the right to have an "autonomous area of life".[383] Under the right to privacy, this could be expressed as "an unconscionable invasion of the person".[384] There is no exhaustive list of activities defining the limits to privacy or the area of freedom. For this reason, such fear or unwanted interference may include not compromising the health (including safety) and well-being of consumers. On this basis, the exercising of a person's autonomy could be effectively linked to the right to privacy since:[385]

> Autonomy derives from privacy in terms of a privileged condition firstly guaranteeing a minimum capacity of behaviour, physical welfare sustenance, and

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377 Schlossberger, above n 372, at 1.

378 *Universal Declaration of Human Rights*, introduction.

379 *International Covenant on Economic, Social and Cultural Rights*, art 12.

380 Jaunius Gumbis, Vytaute Bacianskaite and Jurgita Randakeviciute "Do Human Rights Guarantee Autonomy?" (Publication named Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol, University of Vilnius, 2008) at 81.

381 Jacob, above n 368, at 95.

382 *Universal Declaration of Human Rights*, art 12.

383 Gumbis, Bacianskaite and Randakeviciute, above n 380, at 78.

384 Jacob, above n 368, at 95.

385 Gumbis, Bacianskaite and Randakeviciute, above n 380, at 82.

> a balancing of core needs and rights. Such privacy, irrespective of the legal right to private life, builds the framework for personhood – the foundation of autonomy.

This also suggests that state duty arises in taking responsibility for *deterring* "defects in [personal] autonomy [that] has unjustly [been] fostered and to which, in the balance of considerations of justice, it must give appropriate weight".[386]

Therefore, on the basis of the right to privacy, a consumer's right to his or her physical (or mental) autonomy must *not* be violated as a result of a product-related injury.

4. *Every consumer's health and well-being (safety and autonomy) must be protected as part of upholding his or her right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment ("right not to be tortured")*

The right not to be tortured[387] can be another supporting ground in imposing state duty to protect consumers (particularly in securing consumer health and well-being[388]). On this, Jacob notably mentioned that:[389]

> … [human rights] has been emphasized with respect to violations of political rights such as freedom from torture and unwarranted [human rights violations]. *If the same principle of international concern is extended to the right to be protected from the health related problems caused by hazardous products, universal jurisdiction could apply*.

In assessing the elements attached to the right not to be tortured,[390] the Supreme Court in *Taunoa v Attorney-General* affirmed that it is preferable to accept the link between inherited human dignity and the right not to be tortured. According to this Supreme Court's decision, the right not to be tortured may involve "*any form (emphasis added)* of treatment or punishment, which is incompatible with the dignity and worth of the human person".[391]

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386 At 83.

387 *Universal Declaration of Human Rights*, art 5.

388 Gumbis, Bacianskaite, and Randakeviciute, above n 380, at 83-84.

389 Jacob, above n 368, at 95.

390 New Zealand Bill of Rights Act 1990, ss 9 and 25(5).

391 *Taunoa v Attorney-General* [2008] 1 NZLR 429 at [77]-[79] and [83].

Further, based on the UDHR, art 7 of the ICCPR also recognised the right not to be tortured. Although it does not contain (or define) any specific scope to be covered, it is viewed that (*emphasis added*):[392]

> … as no legal consequences derive from the precise qualification of a particular practice, the Human Rights Committee *does not consider it necessary to draw sharp distinctions* between the various prohibited forms of treatment or punishment.

Likewise, in supporting the above position, the Supreme Court made it clear that it would not dwell on "precise classification of treatment as cruel or disregarding or disproportionately severe".[393] This can be effectively interpreted as: if a consumer's health and well-being (including safety and personal autonomy) are compromised due to a product-related injury, the relevant product failure or inferiority can become an acceptable cause of suffering that is incompatible with his or her dignity. In other words, it is arguable that if a product's failure or its low quality forces a consumer to suffer an unwanted product-related injury, this can be perceived as a form of torture.

Therefore, based on the above analyses, there could be an arguable case where, if a state party fails to regulate product safety, then a product-related injury caused to a consumer may become the evidence of human rights violations. Here, the state party could be seen to have violated a consumer's autonomy (as part of his or her right to privacy) as well as his or her right not to be tortured (due to the suffering from the injury). Since the current definitions or scope of these two rights are not sharply limited, it is conceivable that an injury could be used as evidence in establishing the violations, irrespective of its severity, from a minor to a critical injury.

VII. Taking a Human Rights Approach: Regulating Private Actors

As today's trade become borderless worldwide, corporations have more opportunity to expand their scale to maximise their profit. At the same time, however, it has become more important than ever to bear in mind that:[394]

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[392] Manfred Nowa "What Practices Constitute Torture?: US and UN Standards" (2006) 28(4) Hum Rights Q 809 at 829.

[393] *Taunoa v Attorney-General*, above n 391, at [83].

[394] Benöhr and Micklitz, above n 17, at 21-22.

> … 'the big business organization should be considered less like an individual, who bargains on equal terms, and more like governments, who control the private consumer' […] As the trade has become increasingly international, the problem of hazardous goods and defective products is no longer merely a national concern and consumer protection rules have to be regulated at the international level.

Indeed, based on the above analyses thus far, it is evident that an individual country's efforts in regulating corporations are likely to hold significant limitations in protecting consumer safety from product-related injuries or deaths. Moreover, the individual country's discretion to regulate would, again, create a governance gap.[395] While the UN is "home" to the global guidelines,[396] based on the current state-to-state system, there exists a considerable gap (or discrepancies) between the set-norms or standards given by the UN and the actual protection of the rights within the participating country.[397]

Even though consumer rights eventually become human rights, it is likely to be claimed that consumer rights (which are the international-law-based rights) could act like a "smoke detector" that breaks once the fire becomes too large – usually with no time to fulfil its purpose.[398] That is mainly because state parties gain much legitimacy from treaty ratification but "lose little by failure to implement".[399] Therefore, it is vital to note that the *guarantee* element concerning the protection of rights must not be confined to the ratifications of any international covenant (or other relevant instruments). To put it differently, it must be ensured that:[400]

> … ratification alone is not the endpoint of state action on human rights. Ratification of a human rights treaty is only a small step towards improving human rights in the state concerned. The more important step for realising human rights, and actually making a difference on the ground, is implementation of treaty obligations.

Considering the above, there is a clear need for guiding (and regulating) corporations in order to secure consumer rights as a matter of human rights law.

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395 Ruggie, above n 312, at 5-6.

396 Charlesworth, above n 277, at 358.

397 At 358-359.

398 At 359-360.

399 At 359.

400 Baird, above n 308, at 187.

More generally, the role of Ruggie's Guiding Principles can be viewed to provide "a solid and practical foundation on which more learning and good practice can be built".[401] Ruggie stressed the need to take care of that smoke-detector-like problem by introducing the *Corporate Responsibility to Respect Human Rights* as part of his Guiding Principles. Here, Ruggie specifically noted that business enterprises should also be *obliged* to put their efforts into avoiding violating the rights of others.[402] In elaborating this, Ruggie commented that:[403]

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

In this respect, although Ruggie's theory of involving corporations does not explicitly deal with consumer rights, it is still necessary to consider this theory for the purpose of enhancing consumer rights as human rights.

A. Ruggie's Effort on Restoring the Relationship between Business and Human Rights

According to Ruggie, his Guiding Principles can provide practical guidance in restoring the relationship between business and human rights, including the provision of "remediation through legitimate processes".[404] Further, the Guiding Principles are closely related to what he called, the "New Governance Theory" ("NGT"). He sees that the NGT demonstrates the possibility of achieving "a significant degree of convergence of norms, policies, and practices even in a highly controversial issue area".[405] In this sense, it is evident that *product safety* can also be a significant issue in the context of the Guiding Principles since it directly concerns the health and well-being of a person.

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401 *The corporate responsibility to respect human rights: An Interpretive Guide* UN Doc HR/PUB/12/02 (June 2012) at 2.

402 John Ruggie "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (2011) 29(2) Neth Q Hum Rts 224 at 236.

403 At 236.

404 At 68.

405 Ruggie, above n 312, at 6.

Similarly, the UNGCP has also supported this view by pointing out that:[406]

> … consumers often face imbalances in economic terms, educational levels and bargaining power and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic[,] social development and environmental protection …

In Ruggie's view, both the Guiding Principles and the NGT can be utilised in achieving the above-suggested restructuring of the relationship between business and human rights. Although there cannot be one form of *government* for the international community to rely on, an integrated form of *governance* can be established.[407] Such governance can be achieved by not only imposing duties to state parties but by also "requiring businesses" to take their responsibilities.[408] Here, Ruggie stressed that these responsibilities could be divided into two major parts: 1) to obtain and sustain their legal licence to operate; and 2) to obtain and sustain their social licence.[409]

1. Ruggie's 'social licence' theory

For further clarification, Ruggie explained that his use of the term "responsibility" in this corporate-related context was to be considered in isolation of any legal duty.[410]

Under this *social licence* theory, Ruggie highlighted that the specification of corporate responsibility under the Guiding Principles should begin with the recognition of the pre-existing "social norms".[411] They are noteworthy since some of these social norms often exist regardless of a country's initial ability or willingness to legislate for them. Instead, they naturally become legal norms or laws over time. One of the most common examples of this would be, *not to smoke in restaurants*. Although it has become binding law in most countries, it was a well-established social norm well-before a law expressly prohibited the practice.[412]

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406 UNGCP (2015), above n 284, at 4.

407 Ruggie, above n 312, at 6

408 At 13.

409 Ruggie, above n 21, at 62-63 and 142-143.

410 At 143.

411 At 143-144.

412 At 143-144.

Based on the above, Ruggie stated that in the case of multinational corporations, non-compliance with social norms could affect a company's *social licence* to operate in the territory that they operate,[413] possibly decades-before the government's legal licence gets revoked.[414] In other words, because most well-known multinational businesses hold "high visibility",[415] even a small scandal reported by the media can easily lead a company to face boycotts from consumers. If a business faces "consumer avoidance",[416] this means the company has lost its *social licence.* Thus, consumers no longer require the business to operate regardless of the fact of whether or not the company has a valid legal licence to operate. Therefore, it is crucial to acknowledge that:[417]

> … greater respect for human rights by companies leads to greater sustainability in emerging markets and better business performance. […] Moreover, consumers have demonstrated that they are willing to pay attention to standards and practices used by a business that observes human rights and may even boycott products that are produced in violation of human rights standards. […] All in all, business enterprises have increased their power in the world. International, national, state, and local lawmakers are realizing that this power must be confronted, and that the human rights obligations of business enterprises, in particular, must be addressed.

Considering the HD case here, several consumer advocacy groups in Korea have been regularly holding a rally in central Seoul joined by the injured consumers[418] in order to ask the public, as well as the local pharmacists to boycott RB's products. In July 2018, Ms Kim, one of the consumers who lost her mother as a result of using RB's HD product was interviewed by a reporter. Ms Kim told that:[419]

> "When my mother was in [the hospital], doctors said they couldn't tell what exactly caused her lung damage. When I finally found out it was linked with the

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413 At 144.

414 At 144-145.

415 Kim, above n 28, at 41.

416 Jan Wouters and Leen Chanet "Corporate Human Rights Responsibility: A European Perspective" (2008) 6(2) Nw J Int'l Hum Rts 262 at 267.

417 David Weissbrodt and Muria Kruger "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97(4) Am J Int'l L 901 at 902.

418 Eun-sook Moon "Being too generous on corporate crimes: it is none of society's nor the government's business" *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017) at 125-127.

419 Claire Lee "Korean victims of toxic disinfectant ask public to boycott Strepsils" *The Korea Herald* (Korea, 19 June 2018).

> [RB's HD product], my heart broke down. I don't know why it's still the victims' responsibility to prove that they were affected by the product; it should be the other way around. Oxy [RB] should be the one to prove that all the allegations made by the victims are true or not (by conducting an internal investigation and their past products)."

Based on such public-driven movements, the Korean government and the national assembly responded by legislating the "Special Act on Investigating the Truth of Social Disasters and Building a Safe Society".[420] At this stage, this new legislation (and the relevant enforcement measures) remains everyone's *hope* in securing consumer protection as part of building a safer society for every person in Korea.

2. How could the Guiding Principles help in sustaining both their legal and social licences together?

As a way of guiding multinational corporations to meet their human rights responsibilities, Ruggie asked the following two questions to businesses:[421]

1) Do you have systems (including the long-conducted "due diligence") in place which enable you to support the claim with any degree of confidence?

2) Can you demonstrate to yourselves that you do, let alone to anyone else?

By answering *yes* to both questions, businesses can "discharge"[422] their responsibility to respect human rights. To answer *yes* to these questions, however, businesses must develop their institutional capacity to demonstrate that they are performing the adequate level of human rights due diligence.

The notion of 'human rights due diligence' should be understood that:[423]

1) it must go beyond addressing the material risks to the company itself, but also to include those risks which may pose to the associated relationships including individuals and communities;

2) it must not be regarded as a one-off task but to be conducted regularly; and

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[420] Special Act on Investigating the Truth of Social Disasters and Building a Safe Society 2017 (Korea).
[421] Ruggie, above n 21, at 151-152.
[422] At 152.
[423] At 152-153.

3) it must not only be considered as a matter of calculating possibilities of depriving human rights but also to be able to engage the actual rights-holders or others who are directly relevant.

Here, Ruggie stressed that this *due diligence* must be understood as existing "independently of and yet complements the state duty to protect".[424] At the same time, he further explained that the phrase 'corporate responsibility to respect' should mean no broader than the "classic" meaning of respecting human rights: the "noninfringement on the rights of others and addressing harms that do occur".[425] On that basis, Ruggie considers the corporate responsibility under the Guiding Principles should indicate:[426]

> … actual or potential adverse human rights impacts by an enterprise's own activities or through the business relationships connected to those activities. This formulation provides greater clarity and predictability … than using either the general idea of human rights as moral claims, companies own "homemade" human rights standards, or an elusive and elastic notion of corporate "influence" as the basis for attributing human rights responsibilities to business enterprises".

However, such a formulation may become *meaningless* unless the leading multinational corporations voluntarily participate in taking on these responsibilities. For that reason, Wu viewed that:[427]

> … Guiding Principles are voluntary, and built on the premise that each State is responsible for protecting its own pocket of territory. […] [Ruggie] conflates extraterritorial measures with lesser initiatives, such as soft-law instruments … for parent companies […]. Accordingly, States have somewhat missed the point. National action plans developed by governments for implementing the Guiding Principles make no real commitments to bridging the governance gap in human rights policing with real laws and enforcement measures.

Indeed, as Wu pointed out, when Ruggie's theory involves no mandatory nature, can it ever be differentiated from the traditional Corporate Social Responsibility ("CSR")?

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[424] At 153.

[425] At 153.

[426] At 153-154.

[427] Wu, above n 291, at 201-202.

B. Social Licence Theory Under Ruggie's Human Rights Framework vs Corporate Social Responsibility Under the Business Domain

There has been a considerable amount of studies conducted by both legal and business scholars in relation to the boundaries of human rights and CSR. Yet, these remain vague or mixed-up.[428] Despite both CSR and human rights initiatives involving the same social impact *per se*, a violation of human rights is generally caused by a state party, primarily based on international law.[429] On the other hand, the CSR-related initiatives are largely being emphasised to businesses by governments at the national level.[430]

1. The traditional concept of CSR and its expansion as an 'umbrella term'

Traditionally, the idea of CSR has been commonly discussed based on the "Social Contract Theory" ("SCT") in isolation from a legal contract since:[431]

> [the] social contract between business and society has always been an evolving one, rooted in changing relationships between the corporation, the community, people, and the natural environment.

Moreover, the notion of CSR today has been stretched out from profit maximisation to the "improvement of social welfare".[432] The SCT asks how businesses can create value and "re-engage" [433] people under the notion of CSR outside legal and contractual relationships. Such re-engagements are often generated by "caring for something", or by reaching out "in socially active and mutually beneficial ways to a broader community".[434] In that sense, CSR is the "umbrella term"[435] which deals with respecting business ethics. Still, it is true that the field of business ethics has not yet settled due to its inherited ambiguity. For this reason, most social-welfare-related business ethics are often referred to as a "discretionary responsibility".[436]

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[428] Kim, above n 28, at 10.

[429] At 25-26.

[430] At 27-28.

[431] Robin Byerly "The social contract, social enterprise, and business model innovation" (2014) 4(4) Social Business 325 at 330.

[432] Kim, above n 28, at 25.

[433] Byerly, above n 431, at 327.

[434] At 327.

[435] Kim, above n 28, at 25.

[436] At 26.

2. Traditional cases where the human rights obligations are fulfilled by using CSR

Each state party's ability and willingness to enforce human rights obligations varies in what they have accepted to undertake[437] and this is where "the independent corporate responsibility to respect human rights" comes into play.[438] Likewise, based on the notion of CSR, it is well-accepted for businesses to play their part in enhancing a community's well-being alongside carrying out their business activities.

In practice, businesses can play their part by utilising their own business resources that are available.[439] For instance, under its company policy, TOMS Shoes ("TOMS") donates new pairs of shoes and eyeglasses for children in need as the company makes its sales. This is commonly known as the *One for One Movement*, putting its slogan as: "With every product you purchase, TOMS will help a person in need. One for One.®"[440] The company simultaneously carries out its profit-making business, whilst also dedicating its contribution towards improving the adequate standard of living for those in need.[441] Hence, every consumer who purchases a TOMS product participates in this movement through paying the value-added price of its products.[442]

More generally, the TOMS-like approach is believed to be a good way of generating "consumer confidence".[443] With a higher level of consumer confidence, consumers are likely to participate more actively in the market. In return, it is more likely to increase profits for businesses like TOMS.[444] Such corporate strategies can be described as something of a "corporate spring" or a "new business model."[445] This also suggests that such movements may eventually enable more multinational corporations to join in upholding international human rights issues by way of being "corporate citizens".[446]

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437 Ruggie, above n 21, at 142-143.

438 At 143.

439 Ram Kesavan, Michael Bernacchi and Oswald Mascarenhas "Word of Mouse: CSR Communication and the Social Media" (2013) 9(1) Int J Manag Rev 59 at 60.

440 *[Y]OUR IMPACT* (TOMS® , Global Impact Report, 2019) at 11.

441 Byerly, above n 431, at 336.

442 Kesavan, Bernacchi and Mascarenhas, above n 439, at 60.

443 Cassandre Bailloux "The Average Consumer in European Consumer Law" (2017) 44 Exeter L Rev 158 at 160-161.

444 At 161.

445 Byerly, above n 431, at 337.

446 Kim, above n 28, at 28.

3. Should CSR practices cover consumer rights in terms of business ethics instead?

Similarly, numerous attempts have been made to define or characterise the notion of human rights within the context of business. Based on the UDHR, in any context, human rights are to be regarded as the "universal moral rights, of paramount importance and of which no one may be deprived without a grave affront to justice".[447] On that basis, some business scholars claim that the concept of human rights can be "encompassed by CSR practices in terms of business ethics, which goes beyond financial concerns".[448]

The relevant enforcement measures could still be *entirely absent* in such a case unless there are mandatory requirements in place at the national level.[449] That is to say, even though businesses can ideally merge human rights concepts into their CSR practices, this would not change its fundamental nature of being voluntary. Businesses or private actors can still "destroy environment, violate human rights and weaken local living conditions" if they do not put their interests in protecting them.[450] In other words, the absence of enforcing mechanisms or agencies can eventually permit a multinational corporation like RB to take advantage of that absence. For instance, as discussed in Chapter II, the HD case effectively demonstrates that:[451]

> [RB] sold humidifier sterilizer with toxic chemical only in South Korean market, which has comparatively weak [regulations]. […] This incident obviously has revealed that the level of [restriction] in host countries can significantly affect business operations, which can ultimately affect people's lives.

Therefore, based on the above analyses, both a CSR-based method and a Human rights-based method may still be too generous for businesses either way. Therefore, even if consumer safety and relevant rights can become human rights, it must not end at merely recognising them as human rights, but they must be practically enforced.

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447 Benöhr and Micklitz, above n 17, at 19-21.

448 Kim, above n 28, at 26.

449 Ruggie, above n 21, at 144-145.

450 Kim, above n 28, at 30.

451 At 31.

VIII. Enforcing Consumer Rights: the Tension between Protecting Consumer Rights and Promoting Free Trade

Once a *right* is recognised as a matter of international human rights law, the UN Human Rights Council ("UNHRC") takes its role to promote and protect human rights to the highest standard among its Member States as a form of enforcing the recognised human rights. For instance, the Member States will be monitored under the Universal Periodic Review on a regular basis.[452] They must not commit "gross and systematic violations"[453] in upholding the relevant standards during their term of membership to the UNHRC. Yet, such monitoring or enforcement system is only recognised among its Member States, and they cannot be enforced as a form of hard law.

More generally, these rights expressed as a matter of international human rights law are only described at a "very high level of generality"[454] so that they can be consistent with the "preservation of sovereignty"[455] relating to any relevant domestic matters. Although it is true that the protection is primarily based on the international human rights law, it is still left for each country's discretion to decide how its domestic legal measures are being enforced in delivering the recognised rights at the national level.[456] In this sense, not only generating a consensus on designing the actual instruments protecting consumer rights, but it is also essential to contemplate the enforcement part together under one international community.

However, with the rapid expansion of free trade and borderless consumer transactions, the enforcement of any rights-based protection mechanism has become more challenging.[457] In order to overcome this challenge, it is crucial to note that, in today's free trade era, any consumer product can easily move beyond its national border. This happens regardless of whether or not a country holds membership to an international monitoring body like the UNHRC.

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[452] Baird, above n 308, at 157 and 166-169.

[453] At 165.

[454] Kris Gledhill "The Obligation to Implement and Enforce Human Rights" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters New Zealand, Wellington, 2017) 233 at 241.

[455] At 242.

[456] At 242.

[457] Durovic, above n 283, at 135.

On the other hand, it is commonly accepted that blocking or limiting such free movement of goods is almost impossible (unless it holds an apparent reason to do so). This means it is even more critical to find a *sensible balance* between protecting consumer rights and promoting free trade on a *transnational* basis.

A. The Viability of the International Consumer Protection and Enforcement Network

There are a number of existing instruments dealing with the international enforcement of consumer law. Alongside the above-discussed UNCTAD, the World Trade Organisation ("WTO") is also expected to take a leadership role for the international community in providing measures for global consumer protection. However, the relevant activities of the WTO have been insignificant or minimal so far.[458] Yet, bringing a form of network or a channel of cooperation in-between the private actors and the relevant authorities is *imperative* to enhance the enforcement of consumer rights. On that basis, however, a question of *how* remains.

Although this thesis does not intend to go into the detail of *how*, the International Consumer Protection and Enforcement Network ("ICPEN") can be considered briefly as a notable example. The ICPEN is known as the only international body wholly focused on promoting consumer rights globally. It takes its role as a "network of consumer law authorities" involving more than 60 countries as of 2019.[459]

Along with organising consumer-rights-based education campaigns, and best-practice workshops,[460] the main aim of ICPEN is to encourage the relevant authorities to take actions against "cross-border-marketing misconduct".[461] In particular, it uses its unique "name-and-shame" approach by utilising its own online-based measures, including its case database and website. The website is used to receive consumer complaints and share the collected information (where possible) for the purpose of protecting consumers globally.[462]

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458 At 129.

459 At 136.

460 Ramsay, above n 306, at 15.

461 Durovic, above n 283, at 136-137.

462 At 137-138.

Nevertheless, the ICPEN holds its apparent limitations. It is currently operating on the basis of member authorities "funding their own participation",[463] and it handles consumer complaints concerning "scams operated by traders" only.[464] Moreover, it focuses on sharing information for the purpose of the relevant authorities to "spot trader tendencies" that breach consumer law.[465] Hence, it is not designed to resolve individual cases. Likewise, enforcement is often strictly limited to cover specific regions and handles only a few particular topics such as e-commerce and data protection.[466]

In that sense, although having these measures under a form of network can be helpful at the primary level, (gathering of information, for example,) the viability of using such a network-based format as an *actual enforcing mechanism* remains uncertain.

B. Incorporating Consumer rights into Each Domestic Regime as Human Rights

Once consumer rights are recognised as human rights, they will be regarded as a new set of *international human rights*. In order to enforce consumer rights pragmatically, it would be crucial to focus more on ensuring that they are genuinely being incorporated into a country's domestic legal regime before establishing (or utilising) a multilateral *network*. For instance, according to the New Zealand Human Right Commission:[467]

> When the Commission undertook its review of human rights in New Zealand in 2004, it recorded New Zealand's engagement in the development of the international human rights standards and ratification of the six major human rights treaties.

Accordingly, the International Bill of Human Rights − which include the UDHR, the ICCPR, and the ICESCR – have effectively become *binding* laws of New Zealand.[468] Furthermore, in stressing the importance of enforcement, state parties are required to *guarantee*:[469]

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[463] Robin Brown "The UN Guidelines For Consumer Protection: Making Them Work in Developing Countries" in Jeremy Malcolm (ed) *Consumers in the Information Society: Access, Fairness and Representation* (Consumers International, Kuala Lumpur, 2012) 113 at 129.

[464] Durovic, above n 283, at 138.

[465] At 138.

[466] At 132 and 137.

[467] *Human Rights in New Zealand Ngä Tika Tangata O Aotearoa*, above n 361, at 13.

[468] Gledhill, above n 454, at 234.

[469] *Universal Declaration of Human Rights*, art 8.

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Once a state party ratifies a human rights treaty:[470]

> … it is expected that full realisation of these rights will be progressively implemented, to the maximum of a country's available resources. In general, the [UN] recommends action plans, targets, monitoring and other strategies to ensure that the most vulnerable and disadvantaged receive assistance as a priority.

In achieving the "full realisation" of the international-law-based rights at a domestic level, they must be guaranteed in a practically enforceable manner.[471] That is to say, for instance:[472]

> Article 2(2) of the ICESCR also requires economic, social and cultural rights (ESC rights) to be "exercised without discrimination of any kind" of status. The obligation of enforcement in art 2(1) is to use "all appropriate means, including particularly the adoption of legislative measures" for the purpose of "achieving progressively the full realization of the rights". This resource-dependence does not equate to discretion, as the state must use "the maximum of its available resources". Moreover, the appropriate steps have to be taken "individually and through international assistance and co-operation, especially economic and technical".

In other words, if "varied importance"[473] can be placed on those rights based on the availability of economic resources or any other means, it is likely for "discrimination of any kind" to occur.[474] Hence, when it comes to enforcing consumer rights as human rights, it is important to ensure that they are not "theoretical and illusory".[475] At the same time, it is also critical to find an effective solution to several deep-rooted challenges in order to deter any of these rights to become theoretical.[476] These challenges include:

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[470] *Human Rights in New Zealand Ngä Tika Tangata O Aotearoa*, above n 361, at 224.
[471] Bedggood and Gledhill, above n 324, at 724.
[472] Gledhill, above n 454, at 235.
[473] Deutch, above n 18, at 577.
[474] Gledhill, above n 454, at 235.
[475] At 240.
[476] At 240.

1) a common perception that putting the human rights agenda in the frontline may disturb or compromise the economic rights of corporations;[477]

2) some governments being reluctant to allow international legal instruments to bind corporations directly. Instead, they wish to maintain a 'state-centric system' so that each state party may maintain the 'controlling power'; and[478]

3) some governments arguing that imposing the higher liability on corporations would let state parties to 'downplay or ignore' their own obligations due to the lessened pressure.[479]

Not only limited to the above three challenges, some scholars, including Joerges and Benöhr, argue that such deep-rooted conflict arises based on the dilemma about *which to prioritise* between the promotion of free trade and consumer rights protection.[480] In consideration of this dilemma, it is further stressed that relying solely on a domestic regulatory system is insufficient to protect consumers in today's global free trade era.

As an example, one of the reasons why the inequality for bargaining power arises is due to the lack of providing accurate or adequate product information for consumers. The problem here is, the standard of being 'adequate' in providing product information differs county by country.[481] Since a large number of consumer products are currently being made outside the border, such adequacy or consistency is essential, especially for products which require a specific type of precaution for consumers to use.[482]

More generally, as Tokeley highlighted that:[483]

> Although it is true that a free market can often does work in consumers' favour, it is debatable whether a free market is always capable of catering to consumer interests. The argument that consumer is always sovereign in a free trade market is based on the false assumption that the consumer is always in a position of equal bargaining power with the supplier and manufacturer. [Moreover, in today's]

[477] Benöhr, above n 12, at 82-83.
[478] Wu, above n 291, at 180.
[479] At 180-181.
[480] Joerges, above n 19, at 1-2 and 11.
[481] At 4 and 10-11.
[482] Tokeley, above n 85, at 21-23.
[483] At 21.

> marketplace of … widespread use of standard form contracts, large multi-national corporations and increasingly complex products [,] the idea that the consumer is in an equal bargaining position has become even more nonsensical.

Based on the above analyses, it is evident to say that it would be insufficient to enforce consumer rights solely on each individual country's discretion. Consumer rights *must* be enforced on a borderless basis as human rights.

C. The Tension Caused by Solely Focusing on the Free Movement of Goods

As one of the well-known international trade blocs, the case of the EU would be worthwhile to discuss here. In enforcing consumer protection measures within the legal system of the EU, the Commission of European Communities ("CEC") stressed that it is essential to recognise consumer interests on the basis of economic efficiency including the principle of free movement of goods. At the same time, as the CEC stressed, it must also enable citizens (consumers) to expect the relevant policies to deliver 'socially acceptable' outcomes.[484]

That is to say, in the context of EU, both the free movement of goods principle[485] and the requirement for bringing a socially acceptable outcome must be considered together in handling any policies in question concerning consumer interests. In discussing the consumer interests in detail, the CEC added that:[486]

> The concept of 'market malfunctioning' should therefore be understood … as covering both inefficient allocation of resources and a failure to deliver these [essential goods and services vital for economic and social inclusion of a person].

In theory, consumer protection and the prevention of the inefficient allocation of resources (arguably as part of protecting consumer safety and well-being) must be regarded as the EU's shared competence. Nonetheless, in practice, the national policies and their interpretations are often quite diverse between the Member States.[487]

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[484] Joerges, above n 19, at 4.

[485] At 2, see also Howells, Ramsay and Wilhelmsson, above n 296, at 3-4.

[486] Communication from the Commission Monitoring consumer outcomes in the single market: the Consumer Markets Scoreboard {SEC (2008) 87} (Commission of the European Communities, COM (2008) 31 final, 29 January 2008) at 2.

[487] Bailloux, above n 443, at 160.

The above-mentioned *diversity* may consequently lead to jurisdictional limitations as:[488]

> … we have become accustomed to under the roof of constitutional democracy. Hence, we argue that the particular form and degree of legitimate governing within constitutional democracies cannot be achieved in transnational constellations. This reveals the limitations for strategies of 'juridification' at the international level, applied by law and politics.

This suggests that despite the existence of the current *trade bloc*, The EU is still required to find a *justiciable* way of keeping the balance between the governing laws and promoting the greater freedom of trade in-between countries.

D. The Role of the European Court of Justice in Enforcing Consumer Rights

Although it is not without controversy, the European Court of Justice ("ECJ") is presumed to find the above-discussed balance by integrating different legal policies and deterring "political tampering".[489] This means the ECJ is expected to take both roles as a "mask" and "shield"[490] in protecting the interests of the citizens of the EU. Yet, in practice, the ECJ often gets criticised by ordering the "nonapplication of national regulations that hinder economic integration".[491] Considering the current position of the ECJ, can a *court-based* rights enforcement mechanism be a practical option?

What does the *Cassis de Dijon* decision suggest?

1. Facing the challenge – the Cassis de Dijon decision

The *Cassis de Dijon* ("*Cassis*") case[492] is well-known for the ECJ's attempt to identify the role of the Court in creating a "new approach" to harmonisation as Alter and Meunier put it.[493] Indeed, the *Cassis* case is important to note since it creates arguments around the principle of free movement of goods, which conclusively suggests that:[494]

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[488] Joerges, above n 19, at 3.

[489] At 171.

[490] Geoffrey Garrett "The Politics of Legal Integration in the European Union" (1995) 49(1) International Organization 171 at 171.

[491] Karen Alter and Sophie Meunier "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision" (1994) 26(4) Comp Political Stud 535 at 536.

[492] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 651-665.

[493] Alter and Meunier, above n 491, at 537.

[494] Joerges, above n 19, at 4.

> … the principle of free movement of goods stood not in the way of national regulations protecting consumers' health and their right to information [in this particular case.] [Y]et, generally, regulations by different Member States had to be treated as equal and worth of mutual recognition. In the case of conflict, regulatory differences have to be balanced in accordance with the principle of free movement of goods.

As Garrett described, the phrase *mutual recognition* is purported to mean that "products that can be sold in one Member State should be freely available in all others – as the basic principle for trade liberalization in Europe".[495]

Indeed, the ECJ ruled[496] that it is an "illegal restriction of trade"[497] as Germany tried to forego "one of the fundamental rules" of the Community (the free movement of goods) by blocking the sale of French liqueur.[498] Here, a question to ask is, would it be ideal to apply this principle as the 'fundamental rule' in protecting the safety and well-being of its *people*?[499] Or as a *tool* in balancing such regulatory differences?[500] It is likely that the influence of that 'fundamental rule' would become more apparent if the "market-correcting regulatory policies" *loses* its role.[501] Suppose there is a dispute over a more complicated or hazardous product instead of a simple bottle of drink with a lower alcohol content. In that case, the actual influence of this fundamental rule will become far more significant for the ECJ in making its decision.

2. Extracting policies from a ECJ decision – free trade vs consumer protection

Soon after the *Cassis* decision, the CEC laid down its guidelines by stating that "any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State".[502] Moreover, the CEC used this

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[495] Garrett, above n 490, at 174-175.

[496] Joerges, above n 19, at 4. (According to his summary, the ECJ declared that "a German ban on the sale of a French liqueur - the alcohol content of which was lower than its German counterparts - was incompatible with the principle of free movement of goods").

[497] Garrett, above n 490, at 175.

[498] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, above n 492, at 664.

[499] At 664.

[500] Joerges, above n 19, at 4.

[501] At 4.

[502] European Commission "Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')" (1980) OJ C 256 at 256/3.

decision as a way of justifying its new harmonisation policy by guiding the Member States not to take "an exclusively national viewpoint".[503] On that particular basis, the *Cassis* decision is known to be *politically significant* as this was the first time that the CEC tried to "extract from a Court decision by issuing an interpretive communication … and a bold assertion of new policy".[504]

More importantly, as Joerges stressed that (*emphasis added*):[505]

> Where conflicts can be resolved by dint of conflict norms, the law is in so far a 'strong' one as it *guides* decisions, it, however, is in so far an 'imperfect' one as it does not prescribe any *substantial norm* with the claim to supranational validity.

Based on Joerges' view, it is arguable that the CEC's extraction of the new policy does not point toward any substantial standard for a Member State to refer to. In other words, such an extracted policy lacks guidance as to how actual discrepancies in law should be balanced. Since it asks Member States not to prioritise any other value over the mutual recognition based on the free movement of goods principle, this may lead each Member State to lose its mindfulness in controlling actual product safety or the process overall.

Yet, Alter and Meunier pointed out that (*emphasis added*):[506]

> … the Court did not continue to develop its principle of mutual recognition, at least in part because of the negative political response the verdict generated. Furthermore, any attempt by the ECJ to enforce a policy through law would have been greatly impeded by the limitations of judge-made law, which in the EC context are greatly exacerbated. *Indeed, it is misleading to assume that Court decisions necessarily have policy effects.*

In that case, the idea of mutual recognition may have simply been used to *redirect* the goal of having greater freedom in trade instead of using it to *minimise* deregulatory effects or to have policy effects.[507] This suggests it is not always the case that a court decision can generate a *solution* in reducing the gap or discrepancies between two (or more) governing laws.

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503 Alter and Meunier, above n 491, at 542.

504 At 541-542.

505 Joerges, above n 19, at 4.

506 Alter and Meunier, above n 491, at 549.

507 At 553-554.

Whichever view it takes, it is evident to say that the initial purpose of extracting this new policy (or the ECJ's decision itself) did not question the "legal audacity".[508] Instead, it was more likely the case of satisfying a political agenda of finding an 'acceptable' solution for both legal systems.[509] However, if this was the case, whenever a safety regulation is alleged to disturb the free movement of goods, such *Cassis*-like policy extraction may be used (or further-developed) as a method of discouraging a country from prioritising the safety and well-being of its people.

It is also noteworthy that consumer groups were split into two minds of welcoming and rejecting the CEC's interpretation of the *Cassis* decision or the new approach. Indeed, Consumer groups expressed their views that they are looking forward to having "greater diversity" and "lower prices of products" available in the market. Nonetheless, at the same time, they were worried that trade liberalisation could negatively affect consumer safety and "jeopardi[s]e the gains previously made in consumer legislation on the national front".[510]

Alter and Meunier added their explanation to the view of the consumer group by stating that (*emphasis added*):[511]

> ... it is 'necessary to maintain a balance between the securing of free trade, which should afford consumers a broad range of products, and the need to protect the health, safety and economic interest of consumers.' We are concerned that *the Commission interpretation of the* Cassis *ruling may jeopardize that balance* …

On the above bases, it is arguable that there has been an undeniable nexus between law and politics which does not necessarily uphold the protection of consumer rights but more enhances the liberalisation of trade.[512] According to Purnhagen's study in 2014, such principles or "lessons" drawn from the *Cassis* decision "still remain the yardstick for the evaluation of internal market law" in the EU today.[513]

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[508] At 541.

[509] Garrett, above n 490, at 178.

[510] At 543-544.

[511] At 544.

[512] Joerges, above n 19, at 14.

[513] Kai Purnhagen "The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny" in Kai Purnhagen and Peter Rott (eds) *Varieties of European Economic Law and Regulation Liber Amicorum for Hans Micklitz* (Springer International Publishing, Cham, 2014) 315 at 315 and 334-339.

3. The role of the ECJ and the Cassis de Dijon decision

The *Cassis* decision is particularly noteworthy for the fact that the ECJ assigned itself to function as a constitutional court[514] and to have "the competence to review the legitimacy of national legislation".[515] Indeed, some scholars including Joerges view that this was "of principle theoretical importance and had far-reaching practical ramifications".[516] In contrast, other scholars, including Burley and Mattli, cite this case to argue that state parties tend to "accept the Court's position and regard the path chosen as inevitable".[517] More strongly, Garrett saw that the German government's choice not to oppose the ECJ decision 'technically implies' the precise cost-and-benefit calculation based on their "rational self-interest".[518] That is to say:[519]

> … this does not mean that governments invariably want to ignore ECJ rulings once they are made. Rather, governments must weigh the costs of accepting the court's decision against the benefits derived from having an effective legal system in the EU (in terms of enhancing the efficacy of the internal market).

On the other hand, some may view that based on the mutual recognition, the ECJ's position in this case was to find the "better law"[520] through competition of legal systems.

In whichever way the ECJ's position is viewed, it is evident to say that the ECJ was expected to carry out a *balancing act* with "prudent self-restraint and in a manner consonant with and inherent in the integration project".[521] Yet, the ECJ's alleged role of such stimulation of the positive integration was not about integrating any competing policies or resolving a regulatory concern. Instead, it was all about asking the Member States to provide their 'justifications' for (*emphasis added*):[522]

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514 Christian Joerges "Integration through de-regulation? An irritated heckler" (European Governance Papers, No. N-07-03, 17 July 2007) at 10.

515 Joerges, above n 19, at 4.

516 At 4.

517 Anne-Marie Burley and Walter Mattli "Europe before the Court: A Political Theory of Legal Integration" (1993) 47(1) International Organization 41 at 51.

518 Garrett, above n 490, at 175.

519 At 172.

520 Joerges, above n 514, at 10.

521 At 10-11.

522 At 11.

> … their regulatory concerns and urged to ensure their compatibility with Community objectives as far as possible. Since this becomes clear, the debate on mutual recognition has become more intensive and more interesting. […] [the ECJ's] jurisprudence was – most of the time – *normatively convincing* because, spherically in the area of internal market policy, questions of *political sensitivity* that political system ought not simply to leave themselves continue to arise.

In a broader point of view, Joerges added that the ECJ's case laws like the *Cassis* decision conclusively require the national legislatures to "justify the reasonableness of their own laws in front of their own courts and the ECJ".[523] That is, the ECJ is technically burdening the Member States to take account of their neighbours' concerns. Indeed, the *Cassis* decision proved to be tricky in practice as it eventually "fleshed out product safety requirements" of Germany.[524] Yet, these requirements were private sets of standards which were already "no less integration-averse".[525] In that sense, such fleshing out of a private standard can be seen as a case of "programming" a new *de facto* safety requirements based on the ECJ's self-assigned "integrative power".[526]

By taking a slightly different angle, Garrett viewed that the ECJ can act as a "strategic rational actor" rather than simply being the "prime mover".[527] That is to say:[528]

> … the court's judicial activism is constrained by the reactions they anticipate from member governments to their decisions. From the court's perspective, the best decisions are those that both expand European law and enhance the court's reputation for constraining powerful member governments. [Hence,] one should expect cases similar to *Cassis* to be common, whereas the court is much less likely to take decisions it anticipates that powerful governments would not abide.

Likewise, in relation to international legal responses to non-tariff barriers to trade, the ECJ's ruling is often asked to *resolve* disputes or discrepancies between laws by drawing a 'meta-norm' in which "the interests of both jurisdictions can be satisfied".[529]

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[523] At 11.

[524] At 11.

[525] At 11.

[526] At 12-13.

[527] Garrett, above n 490, at 171.

[528] At 173.

[529] Joerges, above n 19, at 10.

4. The effectiveness of having an international court beyond the geographical advantage is yet unclear

Indeed, the EU is a notable example of an international trade bloc. At the same time, however, it is also inevitably true that its *harmonising* or *balancing* acts are mostly based upon its geographical closeness or its unique "integrative power".[530]

Would the *world court* be any better? Taking the International Court of Justice ("ICJ")'s example, Dupuy described the ICJ as the 'ultimate judicial body' that possesses the largest jurisdiction at the universal level.[531] Yet, similar to the ECJ, the ICJ 'prefers to avoid' a difficult question of law by:[532]

> ... referring to the specific features of the case. When the Court does deal with a difficult question of law, it does so not by concisely clarifying the state of the law through general formulations, but often through *obiter dicta*.

Moreover, Dupuy notably stressed the fact that (*emphasis added*):[533]

> The more evolved and sophisticated the legal system becomes, with competing or even conflicting sets of obligations, the more the subjects of international law need the help of an independent third-party. This perception of the judicial function does not mean that the Court should ignore the consensual basis of its jurisdiction. It only signifies that the Court probably has *no choice but to adopt* a more creative judicial policy if it wants to remain [as] the *world* court.

It is not conclusively evident that having a multinational-court-based enforcement mechanism such as the ECJ, or the ICJ would assist in enhancing consumer safety as a matter of international law. As Dupuy noted, in handling a wide range of issues, "the new and old" international bodies, tribunals, and courts do not relate under a *hierarchical* structure to one another.[534] This effectively means that there could be potential concerns of conflicts between these bodies and the ICJ. A conflict between the International Tribunal for the Law of the Sea and the ICJ could be one example here.[535]

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[530] Joerges, above n 514, at 13.

[531] Pierre-Marie Dupuy "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice" (1999) 31 NYU J Int'l L & Pol 791 at 791-792.

[532] At 804.

[533] At 806.

[534] At 797.

[535] At 797-798.

Therefore, the above discussions suggest that if it were to be developed as a 'specialised' international-court-based-mechanism to protect consumer rights,[536] the relevant studies should be preceded before it can be considered as a viable option.

IX. Finding the Right Balance: Using the Softer Side of the Law

In order to protect consumers in today's *borderless* market environment, it is crucial to reduce the discrepancies or gaps discussed thus far.[537] Otherwise, making consumer rights as human rights may not be 'hard enough' as consumers are often on the 'weaker side' of the power relationship.[538] Hence, it is not only vital to *recognise* but also to find a way to *enhance* consumer rights as human rights. In that respect, to find the right balance between promoting *freer* trade and *enhancing* consumer rights here, this section explicitly assumes that consumer rights have already been recognised as human rights.

Alongside the other official international bodies like the UN, the WTO is also expected to take a leadership role in supporting consumer protection relating to trade. However, in reality, instead of taking any balancing act, the WTO heavily leans on seeking to eliminate not only barriers of the traditional kind such as tariffs but also what it describes as *non-tariff barriers*.[539] They can include virtually any relevant rules that embody a prescription of safety or quality standards "that may have the effect of discriminating against goods of non-local origin". In giving a specific example, Goldring notably mentioned that:[540]

> … [the relevant] regulations that require smoked salmon imports to meet certain health standards can arguably be said to constitute non-tariff barriers, because some imported products do not meet the standards. Advocates of free trade often argue that prescription of health or technical standards, established ostensibly for the purpose of ensuring the safety or soundness of the products, in fact have a hidden purpose of creating a monopoly for locally produced products.

Likewise, the parallels between the EU and the WTO can be described as:[541]

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536 At 797-798.

537 See Chapters III and V of this thesis.

538 Ugo Mattei "Hard Code Now" (2002) 2(1) Global Jurist 1, at 13.

539 John Goldring "Globalisation and Consumer Protection Laws" (2008) 8 Macquarie LJ 79 at 80.

540 At 82.

541 Joerges, above n 19, at 8.

> Product regulation is [more closely] linked to the realization of free trade than 'process regulation': product-related mandatory requirements directly prevent the import of goods, whereas process regulations do not necessarily directly affect the production quality; they are hard to justify and implement: just think of an importing state demanding certain labour and environmental standards from an exporting state. This, however, does not qualify a categorical or normative difference [in enhancing the overall health and safety protection in the end].

As seen in the previous chapter, implementing an ECJ-like court system could rather *redirect* its goal merely to broaden the definition to suit everyone[542] instead of considering the actual discrepancies.[543] The ICJ may also choose to rely heavily on the specifics of a case in order to bypass answering a politically sensitive or "difficult" question.[544] Therefore, it is evident that none of the discussed international-court-based methods could be a solution to catch both the promotion of free trade relationships and lessening of the existing governance gap in enforcing consumer rights as human rights.

Could there any other possible ways to catching both of these aspects?

A. The Cultural Filter Approach – the 'Softer' Way of Reducing Discrepancies in Laws

Hopkins and McNeill notably examined more extensive, but 'softer' elements involved in the international law-making process by analysing the EU's example.[545] Here, it is important to note that "legal globalisation consists of more than the formal adoption of international legal norms into domestic legal orders".[546] On this basis, Hopkins and McNeill saw that international standards and regulations have their own technical nature, which often contradicts "a deeper economic and political reality".[547] Furthermore:[548]

> Standards provide a way to alleviate such issues but in doing so they raise questions about whose standards are being adopted. Such standards are rarely

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[542] Alter and Meunier, above n 491, at 553-554

[543] Garrett, above n 490, at 178.

[544] Dupuy, above n 531, at 804-806.

[545] John Hopkins and Henrietta McNeill "Exporting Hard Law Through Soft Norms: New Zealand's Reception of European Standards" in Annika Björkdahl and others (eds) *Importing EU Norms: Conceptual Framework and Empirical Findings* (Springer, New York, 2015) 115 at 115.

[546] Gledhill, above n 454, at 234.

[547] Hopkins and McNeill, above n 545, at 116-117.

[548] At 116.

> value neutral. They reflect the values of the systems in which they are created, whether intentionally or not.

This view can be linked to the position of the ECJ, where Garrett argued that the Court often considers the "political acceptability"[549] in deciding which standard or regulation should apply. However, by putting on a slightly different lens to Garrett, Hopkins and McNeill start by stressing the difficulty of interpreting the meaning of a national standard in the international law context. In practice, a 'standard' can arise from a variety of sources including the WTO, ranging from a soft guideline to hard law.[550]

In New Zealand, there are several ways for an international standard to be incorporated into the domestic legal system, including a formal adoption process under the Standards Act 1988. Under this process, the New Zealand Standards Council ("Standards Council") can function to examine:[551]

> … standards of other standards organisations and, if the Council considers it appropriate, to adopt and promulgate them (with or without modification) as New Zealand standards or to endorse them as suitable for use in New Zealand

In this context, the "other standards organisation" means "an international, national, or regional organisation with functions similar to those of the Standards Council".[552]

The above process technically enables New Zealand to either 'adopt' or 'adapt' a standard from overseas, where it is confirmed to be appropriate. On top of this, the relevant agencies or legislations can also create standards in particular fields, either through "explicit adoption" or "*de-facto* adaptation"[553] similar to how the American safety standard of a Babywalker was recognised in New Zealand.[554] The Court in the Babywalker case effectively confirmed that in this particular area of law (in relation to product safety), the EU has had reasonable experience in developing soft-law-based mechanisms as a community. In that respect, the practical influence of the EU in developing international standards is not regarded to be accidental.[555]

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549 Garrett, above n 490, at 178.

550 Hopkins and McNeill, above n 545, at 116.

551 The Standards Act 1988, s 10(2)(b).

552 Section 2.

553 Hopkins and McNeill, above n 545, at 117.

554 *Commerce Commission v Insight Infotech Ltd*, above n 145 at [21].

555 Hopkins and McNeill, above n 545, at 118.

It is commonly accepted that the EU effectively uses its role to develop a 'collective identity' of shared values or norms for its Member States.[556] If that is the case, why should not New Zealand utilise the EU's pre-evaluated (or pre-approved) standards? On this, Hopkins and McNeill agreed since:[557]

> Such off-the-shelf [transnational] standards are particularly attractive for a small jurisdiction such as New Zealand. […] The point here is that the New Zealand public and the relevant stakeholders will accept such evidence.

In practice, the decision of adopting or adapting ("reception") an international standard is made by evaluating the various factors involved, such as the political influence and the pressure from the market.[558] Here, the background culture plays an important role.[559] For instance, if the reception of a particular standard eventually acts as a "condition of entry to the market",[560] it effectively becomes a 'culture' for the exporters to follow. Hopkins and McNeill named it the "cultural filter" approach.[561] As an example, New Zealand decided to recognise the influence of the EU's mark of guaranteeing the product safety called, *Conformité Européenne* mark ("CE mark").[562]

With the CE mark attached, New Zealand products could quickly enter the EU market by obtaining the CE mark even before they left New Zealand. Moreover, the approved CE mark sends a *de facto* signal to EU consumers that these New-Zealand-made products have achieved the same level of quality assurance as that of the EU's.[563] This way, there is no need for New Zealand to allocate extra resources to create its own version of the CE mark. Similarly, there are several sectors where the reception of a standard has taken pragmatic effect in entering the EU market. These sectors include:[564]

1) *Toy sector*: upon the introduction of the new EU toy safety directive launched in 2011, together with Australia, New Zealand immediately pursued to align

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556 At 126.
557 At 121-122.
558 At 118.
559 At 116
560 At 119.
561 At 116.
562 At 119.
563 At 119.
564 At 120.

both standards. The EU's toy safety directive has become the default standard in both countries in New Zealand and Australia; and

2) *Wine sector*: New Zealand exporters were advised by the government to comply with the EU standard on wine labelling (since the EU is the largest wine export market for New Zealand) even though the relevant domestic regulations permit to apply lower standards in comparison to the EU's.

The above actions suggest that these particular EU standards (and their justifications) have passed "the cultural filter test" and thus each standard has been accepted as a "hard law through soft norms" in New Zealand.[565]

On the other hand, although the "cultural filter" effectively allows the EU standards to enter into the New Zealand's regulatory system at a relatively low cost, it does not necessarily guarantee that such reception is always the best option.[566] Since it is impossible to filter every single cultural aspect (or risk) of harm, heavy reliance upon an EU (or any other foreign) standard may ultimately lead New Zealand consumers to share the potential risks or flaws with the EU, for instance. In other words, New Zealand can face the 'direct transplantation of effects' from risk, danger, or a specific consequence as a result of using a flawed *per se* foreign standard.[567] Therefore, it is important for the Standards Council to take its role carefully and seriously in protecting New Zealand citizens from facing such potential risks or dangers.

B. The Capability Approach – Enhancing Consumer Rights Through Empowering Consumers Themselves

When implementing an enforcement mechanism to enhance consumer rights, it is vital to bear in mind that consumers have not enough power to defend themselves in the first place.[568] In considering this point, it is worthwhile to reiterate Benöhr's concerns around how today's international market operates:[569]

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565 At 122.

566 At 124.

567 At 123-124.

568 Charlesworth, above n 277, at 357-358.

569 Benöhr, above n 12, at 120.

> … [market] externalities in the international context are now more difficult to measure and compensate for, as they stretch across national boundaries and affect larger numbers of individuals. *This makes it increasingly difficult to assess the responsibility of specific companies, and thus consumers may have problems in enforcing their rights individually.* On the other hand, products have become technologically more complex, which renders *the proof of causal links between damage and product defects more challenging for consumer …*

As a way of overcoming the concerns mentioned above, Benöhr suggested building a new concept of consumer rights based on the capability approach developed by Nobel Prize winner, Amartya Sen, which will be referred as "Sen's capability approach" ("SCA") hereafter.[570] SCA was not originally designed to be used in the context of consumer protection. Nevertheless, Benöhr saw that SCA could provide a useful "analytical framework"[571] which may well be applicable in enhancing consumer rights.

Although Benöhr suggested this approach for the EU market, SCA is still worth considering in this section for two reasons. Firstly, if it works in the EU context as a way of enhancing consumer rights, it is worthwhile testing whether it could be useful in another trade bloc beyond the geographical closeness. Secondly, if SCA-based enforcing mechanism can assist consumers to contribute to deterring hazardous products being placed on the market, it would be valuable to analyse this approach.

1. A possible way to jointly achieve consumer protection and promote free trade by focusing on the capability of consumers

According to Benöhr, SCA holds its focal point on the importance of the consumers' ability to make "political participation" through their choices in the market.[572] By adapting SCA, Benöhr claimed that it would assist in achieving consumer empowerment in addition to the promotion of free trade "jointly".[573] In particular, she stressed that SCA holds significance in focusing on the capabilities of individuals which can also apply to consumers since (*emphasis added*):[574]

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[570] At 117.
[571] At 117.
[572] At 122.
[573] At 117.
[574] At 117-118.

> Capabilities are defined as *the opportunities to perform optimally the "functions" which reflect the objectives that an individual may value doing or being*. For consumers, well-being would depend not only on consumption itself, but also on the possibility of accomplishing a number of "functions" related to consumption.
>
> […]
>
> … therefore, the EU needs a common concept of social justice, *based upon the empowerment of consumers*, in order both to increase the legitimacy, and to safeguard the autonomy and welfare, of consumers.

How could this be done? This question applies not only for the EU but also for the global market. Here, it is commonly accepted that answering this question always concerns whether "the preferable instrument for developing consumer law is soft law or hard law" and the answer is often mixed-up. [575] For this reason, the EU-led market pressures have been "easy substitutes" for hard law interventions for so long.[576] These pressures for protection often rely heavily on the "proliferation"[577] of relevant soft laws such as guidelines and self-regulation. This effectively suggests (*emphasis added*):[578]

> … what we are witnessing is *a real change in the relationship* between the law and the market. The soft cultural attitude, typical of postmodernist scepticism, irony and loss of faith, is functional to a new legal and economic order *in which the market governs the law* rather than the other way around.

Indeed, if SCA is to be applied on a soft-law-basis, it is still possible to "diffuse interests of consumers"[579] by enabling corporations to have "more freedom and expertise to act in their own interests".[580] On this fact, some scholars, including Mattei, claim that soft laws should be replaced with "hard codes".[581] According to Mattei, if the law is soft for those "aggressive and opportunistic market actors", this would eventually allow them to "succeed in transferring costs to society rather than facing the

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[575] C Lima Marques "International Protection of Consumers as a Global or a Regional Policy" (2020) 43 J Consum Policy 57 at 58.

[576] Benöhr, above n 12, at 123.

[577] At 123.

[578] Mattei, above n 538, at 8.

[579] Benöhr, above n 12, at 121.

[580] At 123.

[581] Mattei, above n 538, at 1.

real social cost of their market activity".[582] It would be impossible to replace every law to *hard codes*. However, considering Mattei's view, it is now essential to empower consumers as a way of *hardening* the market rules. This can be done by requiring corporations to respect consumer rights on a hardened basis, as human rights.[583]

If consumers can take more opportunities to *have their say* on a more hardened basis of their rights, this may gradually empower consumers.[584]Then, these opportunities would enable consumers to "function"[585] as an influence on political decisions concerning consumer protection policies. Here, it is vital to suggest *practical* empowering actions[586] regarding the ways in which consumers could turn these opportunities into their ability to take part in enhancing their own safety and well-being.

2. Consumers can be empowered by making a value-oriented choice

Developing an empowering instrument to assist consumers to make *value-oriented choices*[587] can be one of the pragmatic ways for consumers to improve their capabilities and allowing them to tell what consumers think of how a particular company or a brand is doing. For instance, consumers boycotted:[588]

> … Johnson & Johnson [after testing on animals], and Nestle was the target of a boycott due to violations of labour and environmental rights. There was also a boycott against the world's biggest coffee distributor, Starbucks, because the firm made major profits by buying coffee beans from overseas farmers at low prices.

Based on their own values, some consumers decided to boycott products that were "obtained by production methods which they view to be immoral."[589] They utilised this opportunity (option to choose) to say that they cannot accept what is being done. In the TOMS example, some consumers decided to turn the opportunity to pay the value-added price[590] into their capability to participate in upholding the rights of others.

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582 At 11.

583 Benöhr, above n 12, at 124.

584 At 122-123.

585 At 117-118.

586 At 124.

587 At 119.

588 Kim, above n 28, at 40.

589 At 125.

590 Byerly, above n 431, at 336.

Consumers today have better means of gathering information. Consumers gain additional opportunities and capabilities to have their say in a more *direct* way without having to *shop* somewhere.[591] The New Zealand Anti-Vivisection Society ("NZAVS") is a good example. A group of consumers have decided to put their means in going against "animal experimentation and the harmful use of animals for research, testing or teaching purposes".[592] This non-profit organisation represents its supporters by:[593]

1. helping to draft relevant legislation:

> [NZAVS] worked directly with Mojo Mathers (Green MP) to create the second version of her supplementary order paper (SOP) as part of the Animal Welfare Act amendment …

2. lobbying political parties:

> [NZAVS] provided all political parties with information on the proposed ban and sent them all letters from a coalition of organisations from around the world, who wanted to advise NZ to accept the ban.
>
> […]

3. promoting cruelty-free brands of cosmetics:

> More than 500 cosmetics companies around the world are 100% cruelty free … Below are some of the products and companies that we promoted …

These activities can be seen as a "compensatory mechanism leading to new forms of political involvement"[594] where these efforts eventually lead consumers to make choices by prioritising humane values. Although such community-based efforts are valuable, concerns relating to their 'voluntary nature' remain unresolved.[595] Likewise, if no *practical* empowering instrument can be developed, consumer rights cannot be enhanced to make a notable change in securing consumer safety and well-being. Undeniably, consumers do not hold much power in the market to protect themselves.[596]

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[591] Benöhr, above n 12, at 126.

[592] NZ Anti-Vivisection Society Inc. "What We Do & Why" NZAVS: Ending Animal Experimentation <https://www.nzavs.org.nz/what-we-do-and-why>.

[593] NZ Anti-Vivisection Society Inc. "What we did to help this first stage of the cosmetics ban pass" NZAVS: Ending Animal Experimentation <https://www.nzavs.org.nz/bfc>.

[594] Benöhr, above n 12, at 126.

[595] Rutger Claassen and Anna Gerbrandy "Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach" (2016) 12 Utrecht L Rev 1 at 4.

[596] Mattei, above n 538, at 13.

3. Supporting Consumers to achieve their skills and opportunities to make choices

In addition to the above-discussed significance of consumer empowerment through *choices*, Benöhr further elaborated that SCA-based rights enforcement would allow:[597]

1) consumers to have *substantial freedoms* by developing his or her capabilities of making value-centred economic transactions or supporting a purpose-oriented organisation like NZAVS, for instance; and

2) lessening the *differences between consumers* in their capabilities to transform resources into making their political participation (or their abilities to utilise the resources that they have). Putting such efforts can lead society to pay more attention to the fair distribution of resources.

Fundamentally, SCA is centred on analysing "the choices" of consumers in the market and their "effects on the markets".[598] In order to uphold the above two benefits, an SCA-based approach must be developed from an understanding that every individual has "capabilities to function in a specific way".[599] This should mean for an individual (a consumer) to have his or her autonomy, for instance, of being healthy, making choices or taking actions based on his or her own free will.[600] For example:[601]

> I have the capability to be well-nourished if I have the opportunity (given my income and access to food markets) to consume a nutritious diet. I may decide not to use my capability; I may choose not to eat today but to fast.

That is to say, "a fasting person, but not a starving person, has the opportunity" to reach a specific outcome.[602] This person has the autonomy and freedom to choose how to *function* based on his or her personal capability set.

In addition, as Claassen and Gerbrandy pointed out, it is also essential to bear in mind that (*emphasis added*):[603]

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[597] Benöhr, above n 12, at 131.
[598] At 135.
[599] Claassen and Gerbrandy, above n 595, at 4.
[600] Benöhr, above n 12, at 119.
[601] Claassen and Gerbrandy, above n 595, at 4.
[602] At 4.
[603] At 5.

> … there is no one-to-one correspondence between a capability set and one's utility level. *Two persons with the same capability set can experience different levels of well-being*. If social policy focuses on utility levels, then it will be held hostage by persons who need champaign and caviar to reach the same level of well-being as their neighbours who are content to have fish and chips; ....

Similarly, Benöhr noted that (*emphasis added*):[604]

> *… similar resources do not lead to equal outcomes, because people have difficult abilities to convert the means at their disposal into functions.* This leads to the concept of different individuals having different "conversion sectors". These, in turn, depend on personality traits, on the environment in which an individual lives, and his or her education, which all together, determine his or her capacity to exercise certain functions with success.

Therefore, one of the key objectives of developing or implementing this SCA-based approach should be to enable every consumer to gain his or her *ability* (or opportunity) to make their own choices. That means, an economic, social and legal system should expand the capabilities of individuals (consumers) for the purpose of bringing a fair balance between preserving (enforcing) consumer rights and promoting free trade relationships.[605] In that respect, a SCA-based enforcement mechanism must pay attention to *what consumers can achieve* with their resources.[606]

4. Empowering consumers to turn the allocated resources into their capabilities

Even though two people can have a similar capability set, their "levels of well-being"[607] are not likely to be identical. Levels of well-being are being determined by many different factors, including an individual's personality or possibly on what his or her socioeconomic status may be.[608] Hence, the gap between each consumer's abilities to turn resources into capabilities ("Skills Gap") must be lessened. This is necessary to uphold the rights of consumers regardless of their individual status. Benöhr suggests utilising SCA in resolving the issue of Skills Gap.

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[604] Benöhr, above n 12, at 132.

[605] At 132-133.

[606] At 134.

[607] Claassen and Gerbrandy, above n 595, at 5.

[608] Benöhr and Micklitz, above n 17, at 21-22.

Benöhr underlined that there are five different "concepts of freedom"[609] which can arguably be seen as the underlying conditions to lessen the Skills Gap for all consumers worldwide. These can be translated into the context of lessening the consumer Skills Gap as:[610]

1) *Freedom to make political participation*: consumer participation in regulatory decision-making could be improved by consulting with consumer groups, and by including panels within the regulators who can reflect consumer interests where specific attention is required.[611]

2) *Freedom to have access to essential facilities for disabled consumers*: an individual's opportunity to function by utilising the given resources helps to enhance consumer access to essential facilities for living. Here, access for impaired consumers must also be included. For example, the UN Convention on the Rights of Persons with Disabilities 2006 ("CRPD")[612] requires both public and private actors to ensure that people with disabilities "can participate in society on an equal basis".[613] The CRPD also imposes the state duty to support decision-making for those with impaired capacity.[614]

3) *Freedom to have social opportunities and adequate level of knowledge*: consumers must be able to receive enough information or education where it may influence an individual's substantive ability to make the right choice. Although more consumer associations are being invited to consumer policy consultations today, they may not succeed in having their views adapted into real-world policies. A legal framework must support the activities of consumer associations so that they can participate more actively as a group and educate the public on various issues based on the current international market environment.[615]

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609 Benöhr, above n 12, at 135.

610 At 135-139.

611 At 135-136.

612 United Nations Convention on the Rights of Persons with Disabilities GA Res 61/10 (2006).

613 Gledhill, above n 454, at 239.

614 At 239.

615 Benöhr, above n 12, at 143.

4) *Freedom to have transparency guarantees:* associated with "the freedom to deal with one another under guarantees of disclosure and lucidity".[616] That is, to provide accurate product information (which must be provided to consumers worldwide). This is vital in today's borderless market. For instance, when consumers lack (or there exists hidden) product information (like the HD products' case), they could be forced to bear consequences by standing at the most vulnerable position.[617] To assist consumers in having transparency guarantees, the right of access to essential services (including electronic communication infrastructure) must also be guaranteed to ensure consumers have the tools for information (in order to make a comparison) of products.[618]

5) *Freedom to have protective security:* the initial SCA was designed to provide 'a safety-net' for individuals.[619] In the context of *developed* countries, it can be translated as bringing a better balance in power between corporations and consumers. Its focus is to ensure "the effective application of consumers' rights and to prevent health risks or financial fraud for consumers".[620] For instance, one of the significant roles of this 'safety-net' can be described as establishing an appropriate redress mechanism to guarantee access to justice, enabling consumers to defend their rights.

Moreover, if consumers can be educated more actively as part of improving the market constituting capabilities,[621] this may also assist in building a safer market worldwide.

5. Issues to be resolved in applying this approach in practice – the weighing process

Consumer interests cannot be weighed solely on economic values or prices. How should the relevant economic and non-economic interests be weighed? The below aspects must be taken into account in answering this question:[622]

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[616] Georges Enderle "Global competition and corporate responsibilities of small and medium-sized enterprises" (2004) 13(1) Bus Ethics Eur Rev 51 at 56.

[617] Benöhr, above n 12, at 125.

[618] At 136.

[619] At 136.

[620] At 136-137.

[621] Claassen and Gerbrandy, above n 595, at 5-6.

[622] At 6-7.

1) As seen in the TOMS example, some consumers may feel happy to pay the value-added price in putting their values first in helping the children in need, but some *cannot afford* to do so, or may *not be willing* to participate.

2) It is more important to focus on enabling every consumer to *have a sufficient level of necessary capabilities* rather than "maximising the total level [or number] of capabilities".[623] For instance, having the capability to make the right choice with a sufficient level of information would be far more vital than how many brands (or prices) there are for consumers to choose from.

3) For a non-economic value to be included as part of the fundamental rights of consumers, it must be standardised or quantified in some form. However, it is often challenging to standardise or quantify a non-economic interest. For instance, it is totally up to the consumers to decide to spend their resources on consuming alcohol. Nonetheless, 'binge drinking' is one of the social issues which must be regulated based on the need for protecting the capabilities of consumers to "be healthy"[624] as well as to protect the "capabilities for the security of inner-city inhabitants".[625] In a situation especially like this, SCA must be adequately utilised in *evaluating the differences*[626] between the valuing of health in itself (as one capability) and of the avoidance of quantified healthcare costs (as another capability).

Based on the above analyses, it is possible to utilise this SCA as a tool for developing an enforcing mechanism to uphold consumer rights as human rights. Moreover, this approach may help consumers in having better access to the market (including to have more detailed product information) as part of their fundamental rights.

X. Finding the Right Balance: Using the Harder Side of the Law

As seen in the above chapters, it is evident that the current limitations rooted in international human rights law are likely to remain unresolved. Likewise, the existing mechanisms cannot realistically deter businesses (private actors) from violating human

[623] At 7.
[624] At 5-6.
[625] At 10.
[626] At 11.

rights in the transnational context.[627] Hence, the international community now needs to look for a real-life-solution together.

In order to achieve a balance between promoting international free trade relationships and enforcing consumer rights, there is a clear need for controlling or regulating multinational actors. In other words, not only the state parties but the trading parties must also commit to play their part in securing consumer rights.[628] Here, an international trade agreement would play a key role in enforcing both consumer rights and promoting free trade relationships.

In analysing the current positions and exploring potential solutions, this section explicitly assumes that consumer rights have already been recognised as human rights.

A. Enforcement of Consumer Rights within an International Trade Agreement

In today's free trade era, international (or regional) trade agreements have ever more threatened the ability of state parties to introduce and implement public health or other protection policies.[629] These international trade agreements often provide a way of circumventing the democratically enacted economic and non-economic policies to prioritise the efficiency and profitability in trade.[630] Yet, as seen in the above chapters,[631] this can put consumer safety and well-being at risk.[632] Based on that background, it would be worthwhile to analyse a number of issues involved in the FTAs to find out whether they employ sufficient measures in securing consumer protection (or upholding consumer rights) in the international trade context.

The Korea-New Zealand Free Trade Agreement ("KNZFTA") is particularly noteworthy since its "Competition and Consumer Policy" chapter is known to take a similar principles-based approach to New Zealand's other FTAs.[633]

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627 Ruggie, above n 21, at 17.

628 See Chapter VII of this thesis.

629 Deborah Gleeson and Sharon Friel "Emerging threats to public health from regional trade agreements" (2013) 381 The Lancet 1507 at 1507.

630 Benöhr, above n 12, at 120.

631 See Chapters II and IV of this thesis.

632 Gleeson and Friel, above n 629, at 1507.

633 *New Zealand – Korea FTA Guide* (Ministry of Foreign Affairs and Trade New Zealand, January 2015) at 6.

1. Insufficient or far-too-broad consumer protection measures within the KNZFTA

The KNZFTA deals with the issue of competition and consumer policy together under Chapter 12. The objectives of this chapter read as (*emphasis added*):[634]

> 1. The Parties recognise the strategic importance of creating and maintaining open and *competitive markets* that promote economic efficiency and consumer welfare.
>
> 2. To this end each Party is *committed to reducing and removing impediments to trade* and investment including through:
>
> (a) application of *competition statutes* to all forms of business activity, including both private and public business activities; and
>
> (b) application of *competition statutes* in a manner that does not discriminate between or among economic entities, nor between origin and destination of the production.
>
> 3. The Parties recognise that *anti-competitive business conduct* may frustrate the benefits arising from this Agreement. The Parties undertake to apply their respective competition laws in a manner consistent … to avoid the benefits of … the liberalisation process in goods … being diminished …

As emphasised above, the KNZFTA is largely focused on the *competition* aspect of the policy rather than protection (consumer safety and well-being). That is, Chapter 12 explicitly addresses its focal point fairly broadly to involve those activities that "restrict or distort competition in the territory of a Party as a whole or in a substantial part there of".[635] When it comes to the cross-border consumer protection, however, its wording is narrowed down to a few specific areas (*emphasis added*):[636]

> The Parties have agreed to cooperate in the enforcement of their consumer protection laws and to provide protection in their territories from *deceptive practices* or the use of *false or misleading descriptions in trade*. Each Party is to

[634] *New Zealand – Korea Free Trade Agreement* (Ministry of Foreign Affairs and Trade New Zealand, March 2015), art 12.1.

[635] Article 12.2.

[636] *New Zealand – Korea FTA Guide*, at 6.

> provide the legal means to prevent the sale of products that are *labelled in a manner which is false, deceptive or misleading* or is likely to create an erroneous impression about the product.

Therefore, it is difficult to predict *to what extent* consumers could be protected in cases outside the above-specified areas. It would be, again, left to the domestic discretions on a case-by-case basis. Furthermore, with no recourse to any dispute settlement procedures,[637] the KNZFTA only mentions that it "promotes" consumer welfare.[638] This wording suggests that no one is able to predict *how or in what ways* the consumer welfare will be enforced under this Chapter at this stage.

The KNZFTA contains a range of exceptions to ensure that each Party retains decision-making powers in specific priority policy outcomes. Nonetheless, these powers cannot be used for trade protectionist purposes,[639] for example, "to champion regulations that provide protection from foreign competition".[640] More generally, Watson and James claimed that every regulation holds its own benefits and costs. That is to say:[641]

> [all regulations] can bring real benefits to some: by providing information to consumers, for example, the existence of and conformity to standards may ease commerce by encouraging people to buy and may increase competition if they make it easier to compare products. In that sense, they may facilitate trade, including across borders.

At the same time, they argued:[642]

> … "adverse selection" in a product market, which occurs when consumers, uncertain of a good's quality, are unwilling to pay a high price for it, thereby discouraging firms to produce high-quality goods and leaving only lower-quality goods in the market. The economy at large gains if the information-related technical standard benefits consumers more than it costs producers to comply with it.

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637 *New Zealand – Korea Free Trade Agreement*, art 12.10.

638 Article 12.3.

639 *New Zealand – Korea FTA Guide*, at 14.

640 K William Watson and Sallie James "Regulatory Protectionism: A Hidden Threat to Free Trade" (2013) 723 Cato Policy Analysis 1, at 2.

641 At 4.

642 At 4.

Yet, in the context of protecting the safety and well-being of consumers, the word "protectionism" should be used as such (*emphasis added*):[643]

> *Refusing to trade with countries engaging in human rights violations* is a statement of national policy … Protectionism preserves one's national identity, pride, domestic jobs, food supply, developing infant industry, and local culture.

However, this protection-focused interpretation has been criticised as it increases "the cost of products in order to benefit a few" and it does not raise "the standard of living for the masses".[644] Indeed, with the emergence of free trade, the meaning of the word "protectionism" has been altered as described below (*emphasis added*):[645]

> Trade protectionism involving the deliberate use of government regulations to limit the importation of goods and services from third countries has been a popular facet of international trade. … [However], as a result of [the General Agreement on Tariffs and Trade (GATT)], *this kind of protectionism lost its ground following a decrease in the use of tariffs and the consequent rise of non-tariff measures (NTMs)* by many countries which shifted towards using them as *trade barriers*.

Based on that altered meaning of protectionism, (viewing it as a trade barrier instead of a tool to protect consumers' health and well-being), Watson and James claimed that it is "unfortunate" to have plenty of examples of regulatory protectionism and its "damage to the economy".[646] As an example of those "unfortunate" cases,[647] Watson and James pointed out the tobacco proposal made by the US during negotiations for the Trans-Pacific Partnership ("TPP").[648]

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643 Susan Tiefenbrun "Free Trade and Protectionism: The Semiotics of Seattle" (2000) 17 Ariz J Int'l & Comp L 257 at 272-273.

644 Fatima Kareem, Inmaculada Martínez-Zarzoso and Bernhard Brümmer "Protecting health or protecting imports? Evidence from EU non-tariff measures" (2018) 53 Int Rev Econ Finance 185 at 185.

645 At 185.

646 Watson and James, above n 640, at 6.

647 At 11-12.

648 The TPP is a multilateral trade agreement consisting of 12 countries around the Pacific Rim, including New Zealand and Australia. See Gleeson and Friel, above n 629, at 1507.

Here, the US Trade Representative requested a special exemption from tobacco-related regulation to impose "origin-neutral, science-based restrictions on specific tobacco products or classes"[649] in safeguarding the public health. Watson and James criticised this action on the basis of the WTO Agreement on Technical Barriers to Trade. They claimed with an example that:[650]

> … no less trade-restrictive than necessary and may be deemed, as the clove cigarette ban was, to be discriminatory when disparate impact on imports does not stem from a legitimate regulatory distinction. The tobacco proposal would bypass the WTO requirement that regulations be applied in an "even-handed" manner.

Moreover, they alleged that the US Trade Representative was purported to:[651]

> … avoid bringing its laws in line with those disciplines, the United States was trying to use its significant bargaining power to impose ad hoc exemptions for pet policies. There does not seem to be any reason that tobacco-control regulation deserves special attention, other than that the United States is concerned about it.

Under the New Zealand-Korea FTA Guide ("KNZFTA Guide"), the FTA is not intended to block or prevent New Zealand (under 'General Exception') [652] from taking necessary measures in protecting human, animal or plant life or health. If that were the case, in contrary to Watson and James' view, tobacco must gain a "special attention".[653]

Accordingly, the KNZFTA Guide stated that:[654]

> The second part of the schedule (Annex II)[655] lists sectors and activities that are *exempted from* any or all of the market access, national treatment, MFN treatment, senior management and boards of directors, performance requirements and/or local presence obligations. The 'ratchet' clause does not apply to any measure captured by one of these reservations.

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649 Watson and James, above n 640, at 11.

650 At 11.

651 At 12.

652 *New Zealand – Korea FTA Guide*, at 14.

653 Watson and James, above n 640, at 12.

654 *New Zealand – Korea FTA Guide*, at 9.

655 Annex II is a specified exemption list, which includes tobacco and alcoholic beverages.

Still, other than giving such explicit exemption to some 'specific' group of products such as tobacco, and alcoholic beverages,[656] the KNZFTA provides far-too-broad wording. In other words, the given text generally falls short in explaining what it means when enforcing consumer rights (particularly in protecting consumer safety and well-being) as it insists in Chapter 12 of the KNZFTA.

Based on the above discussions, it is arguable that the relevant chapters of the KNZFTA currently puts far too less weight on putting in mutual efforts to protect consumers. This suggests that consumer protection measures under the KNZFTA are not competent enough to protect consumers from a potential product-related injury or death.

2. Consumer safety and well-being issues must be addressed – the tobacco example

It is well-accepted that an international trade agreement (such as the TPP or an FTA) is mainly designed to enhance economic relationships among countries.[657] Yet, as a result of putting such strong focus on strengthening the economic-profit-oriented relationship, it has become too common for an international agreement to prioritise the "rights of corporations"[658] over health or human rights issues.[659] However, others allege that such economic-focused approach will ultimately advance people's overall health and well-being in the long term since it could bring an improved welfare system as a result of the economic growth in the end.[660]

The example of *tobacco control* will be briefly analysed in order to contemplate the impact of international trade agreements on protecting consumer rights. It is particularly worthwhile to note since the issues around tobacco are directly related to the safety and well-being of consumers. In this regard, the current human rights instruments, including the UDHR[661] effectively implies that each state party must protect its citizens from the health risks imposed by consuming a consumer product like tobacco.[662]

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656 *New Zealand – Korea FTA Guide*, at 9.

657 Tiefenbrun, above n 643, at 271-272.

658 E Shaffer, J Brenner and T Houston "International trade agreements: a threat to tobacco control policy" (2005) 14 (Suppl II) Tob Control ii19 at ii20.

659 Gleeson and Friel, above n 629, at 1507.

660 Shaffer, Brenner and Houston, above n 658, at ii19

661 For example, *Universal Declaration of Human Rights*, art 25.

662 Carolyn Dresler and others "Human rights-based approach to tobacco control" (2012) 21 Tobacco Control 208 at 208.

On the above basis, some scholars argue that (*emphasis added*):[663]

> Besides the *right to health*, however, there are several other human rights equally important to respect, protect and fulfil. For example, the *right to a healthy environment* (consider secondhand smoke or protection from nicotine from green tobacco sickness, or exposure to pesticides during tobacco agriculture); *right to information* (consider knowledge relative to risks of nicotine addiction, risks from tobacco use such as lung cancer or vascular disease) …

On top of this, many advocates argue that tobacco should be treated as a "hazardous substance"[664] and not as an ordinary product which could be *chosen* to consume. Notably, research shows that "tobacco use is expected to kill over four million persons in 2005, a toll expected to grow to 10 million by 2030 globally".[665] This suggests that tobacco should not be an ordinary product, but a *controlled* product instead.

Despite the above concerns, the US-Singapore Free Trade Agreement ("USSFTA")[666] decided to eliminate tobacco tariffs for Singapore in order to:[667]

> … give investors, including tobacco companies, standing to challenge governmental regulations at the local, state, and national levels directly and seek compensation for profits lost due to rules that do not comply with strict investment obligations.

Such a clause under an international trade agreement means to give priority to investors and businesses (similar to how the USSFTA allowed). Corporations may then use the given priority as a tool to protect their 'economic rights'[668] without having to pay attention to the relevant measures that are designed to protect the well-being of the public.[669]

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[663] At 209-210.

[664] Shaffer, Brenner and Houston, above n 658, at ii23.

[665] At ii19.

[666] *United States – Singapore Free Trade Agreement* (The Office of the US Trade Representative, July 2003).

[667] Shaffer, Brenner and Houston, above n 658, at ii22.

[668] At ii20, see also Benöhr, above n 12, at 82-83.

[669] At ii20.

Not only cases of bilateral trade agreements such as the USSFTA but also multilateral agreements like the TPP hold enough capacity to create or worsen the various health-related issues.[670] As Gleeson and Friel noted:[671]

> The TPP could restrict the ability of governments to regulate industries that produce goods that contribute to the growing burden of non-communicable diseases, such as tobacco, alcohol, and highly processed foods. Governments need to be able to raise the prices of unhealthy goods, to restrict marketing and advertising as well as sale and distribution, …

From the perspective of human rights, there is no legitimate ground for an international trade agreement to restrict a government's ability to 'protect' its citizens.[672] Hence, it could be seen that such existing international trade agreements are challenging human rights (by challenging consumer rights). To this extent, the protection of consumer rights to safety and well-being must be reflected in an international trade agreement in order to prevent such challenges. To do so, it is crucial to attach the relevant enforcement tools to a trade agreement on a non-voluntary basis.

3. Using a Joint Commission option under an international trade agreement to enforce consumer rights

It is common for an FTA to establish a Joint Commission to implement what the participating parties have agreed. An FTA also provides sub-committees under specific chapters.[673] For instance, KNZFTA allows establishing a Joint Commission to consider the implementation of the KNZFTA in several different areas, including the protection of the environment[674] and labour rights.[675] Would it be worthwhile to consider this option in promoting free trade and enforcing consumer rights together under the KNZFTA?

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[670] Gleeson and Friel, above n 629, at 1597.

[671] At 1508.

[672] At 1508.

[673] Peter Gallagher and Ysé Serret *Implementing Regional Trade Agreements with Environmental Provisions: A Framework for Evaluation* (Organisation for Economic Co-operation and Development, OECD Trade and Environment Working Papers 2011/06: COM/TAD/ENV/JWPTE (2009) 4/FINAL, October 2011) at 8-9.

[674] *New Zealand – Korea Free Trade Agreement,* art 16.1.

[675] Article 15.1.

The KNZFTA Guide stated that:[676]

> The Joint Commission meetings are an opportunity for either Party to raise issues arising in relation to the FTA. The Joint Commission will also be responsible for establishing any additional committees or working groups as required, and for exploring measures for further expansion of trade and investment between the Parties.

For instance, under Chapter 16 of the KNZFTA, the Environment Committee is to have senior officials (or designates) from the ministry responsible (or other appropriate agencies) of each Party to take an agreed action. These actions include to establish, oversee, and review the activities of an agreed co-operation programme and to serve as a forum for discussing the environmental matters of mutual interest.[677] This chapter also allows the Environment Committee to consult the relevant stakeholders and experts on the issues affecting the implementation of the chapter. In doing so:[678]

> Each Party shall provide an opportunity for its domestic stakeholders to submit views or advice to it on matters relating to the operation of this Chapter, and may develop mechanisms to inform its public of activities undertaken pursuant to this Agreement in accordance with its laws, regulations, policies and practices.

Similarly, the EU-Korea FTA provides several dialogue mechanisms. They include establishing "Domestic Advisory Group(s)"[679] in enabling public consultation and discussion with independent representative organisations of civil society from both the EU and Korea.[680] The Group(s) of each Party are to meet at a Civil Society Forum in order to:[681]

> … conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties.
>
> […]

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676 New Zealand – Korea FTA Guide, at 14.

677 *New Zealand – Korea Free Trade Agreement*, art 16.7.

678 Article 16.7.

679 European Union "Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part" (2011) OJ L 127, art 13.12.

680 Gallagher and Serret, above n 673, at 11.

681 European Union, above n 679, art 13.13.

> … present an update on the implementation of this Chapter to the Civil Society Forum. The views, opinions or findings of the Civil Society Forum can be submitted to the Parties directly or through the Domestic Advisory Group(s).

Although the degree of public access seems to vary, international trade agreements generally provide an opportunity for the public to access the implementation processes for the relevant provisions. This opportunity allows the public to make submissions to joint committees on specific issues or disputes.[682]

Trading parties can utilise the FTA chapters in enhancing bilateral co-operation on trade and environmental matters (or other matters depending on the chapter) together based upon a specific framework.[683] For example (*emphasis added*):[684]

> … one aim of New Zealand's Framework for Integrating Environment Standards and Trade Agreements is *to establish a set of principles to guide and inform New Zealand's policy in multilateral trade and environment fora, and in bilateral negotiations*. These principles include, among others, the promotion of greater coherence between multilateral environment and trade agreements, including regional trade agreements.

Indeed, using this approach can provide the benefit of giving more detailed guidelines instead of creating somewhat vague obligations to co-operate and leave everything else on dialogue. Although it is still essential to resolve issues through communication, state parties can have an agreed *common ground* if the relevant principles can be backed up under an issue-specific framework. At the same time, trading parties could also be better-guided in protecting the environment together as they trade.

Therefore, it is worthwhile to contemplate further the option of utilising a Joint Committee provision in enforcing consumer rights, possibly implementing a similar process (or procedure) to Chapter 16 of the KNZFTA (or other relevant chapters in an international trade agreement). Here, it can be suggested to utilise the Joint Committee provision in two ways for the state parties to be better-equipped in enforcing consumer rights. Firstly, it could be used as a way of giving a more extensive opportunity for

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682 Gallagher and Serret, above n 673, at 10.

683 At 8.

684 At 8-9.

public participation. Secondly, it could also be employed to assist the state parties to develop (or adopt) an agreed set of principles or rules so that multinational actors can be better-guided in doing their part in protecting consumers.

Without a doubt, the international community uses its best efforts to preserve the environment as everyone must survive within it. Likewise, the majority of the global population must become consumers to survive. Therefore, consumers must be protected in the same way as the international community tries to preserve the environment.

B. Enforcing Consumer Rights as Human Rights by Introducing Social Clause into an International Trade Agreement

Ever since the emergence of the cross-border trade, the efforts made in introducing a "social clause" in international trade agreements have gained some ground.[685] The term "social clause" commonly refers to linking trade with the internationally accepted labour standards, including the prevention of child labour.[686] Yet, many developing countries "either do not have laws to protect these [human] rights or, when such are on the books, blatantly allow them to be violated" [687] due to the fact that:[688]

> The increasingly bilateral and regional 'competitive liberalization' outside the WTO of trade and investments reinforced … commercial focus on opening access to foreign markets and on harmonization, reciprocal recognition or 'equivalence' of diverse product, production and investment standards.

Based on this background, there has been a gradual recognition that international trade should not merely be "free", but should also be "fair".[689] For instance, in the context of the international labour law, being fair includes ensuring the provision of an adequate level of employment conditions, and minimum wages for workers particularly in the case of a multinational corporation operating in a developing country.[690] In this respect,

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[685] Rajib Sanyal "The Social Clause in Trade Treaties: Implications for International Firms" (2001) 29 J Bus Ethics 379 at 387 at 388.

[686] Anita Chan and Robert Ross "Racing to the bottom: international trade without a social clause" (2003) 24(6) Third World Q 1011 at 1011.

[687] At 1012.

[688] Ernst-Ulrich Petersmann "Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?" 18 J Int'l Econ L 579 at 591.

[689] Sanyal, above n 685, at 379.

[690] At 386-387.

the insertion of a precisely negotiated social clause in an international trade agreement can effectively require those countries with "less than acceptable" employment standards to make improvements towards the adequate level.[691]

1. Using social clause to enforce other human rights in the international trade context

It is commonly accepted that the social clause instrument has been used to administer core international labour standards as part of upholding human rights.[692] For this reason, it is still controversial to say that it is useful to utilise a social clause as a means of upholding any other type of human rights (other than labour rights) at this stage.[693] Conceptually, however, it is evident to say that a social clause can cover "any non-economic aspect of trade exchanges".[694] In other words, there is no reason why the social clause instrument cannot be used to enforce consumer rights as human rights.

On top of this, being *fair* in the international trade context must not only refer to ethical trading (in terms of seeking the better trading conditions) but also to the actual protection of human rights and promotion of social justice. In that regard, it is possible for the concept of promoting fair trade to involve not only ethical aspects but also other relevant values involving traders, workers, and consumers.[695] Moreover, the relevant protection measures are not necessarily to be introduced through voluntary codes or guidelines. That is to say, promoting such fair trade can also be achieved through mandatory or non-voluntary means. For instance:[696]

> The Clean Clothes Campaigns (CCCs) started in the Netherlands in 1990. In each country, the CCCs are coalitions of consumer organisations, trade unions, human rights and women rights organisations, researchers, solidarity groups and activists. [Focusing] on three objectives: guaranteeing consumers' right of information; holding liability of distributors and clothing companies at every stage of production; increasing adherence to the code among companies, … The first two are achieved through legal means, not voluntary codes.

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691 At 379-380.

692 Chan and Ross, above n 686, at 1011.

693 Carmen Valor "What if all trade was fair trade? The potential of a social clause to achieve the goals of fair trade" (2006) 14 J Strat Market 263 at 266.

694 At 263-264.

695 At 270-272.

696 At 273.

Indeed, international trade should not merely give more choices through free trade, but should also be fair for consumers as well. As an example, it can only be fair for consumers when they can be adequately protected from "misinformation"[697] (from any type of consumer harm).

Similarly, in the case of an overseas-made consumer product which was manufactured in a country where it does not yet have comprehensive safety standards, it should be labelled with the adequate level of information, based on some form of international law. In other words, before these products get imported into a third country, they should be able to signify sufficient details to assist consumers in making informed judgement and choices.[698] As Sanyal noted that:[699]

> This would be akin to the "dolphinfree" label now found on cans of tuna fish. Presumably, consumers who believe in higher workplace standards would prefer such labelled products. This would, of course, encourage firms that produce in "substandard" locations to put fraudulent labels on their products to dupe the customer. Because of this possibility, it would become necessary for the government to enact legislation to protect consumers from such fraud.

Hence, to some extent at least, the introduction of a social clause or making such values appear in the international trade agreements may help in creating an official link between the agreed duties (or responsibilities) and their enforcement based on the international human rights standards. In this sense, introducing a social clause could effectively act as a bridge in securing consumer rights as a matter of international human rights law.

However, at the same time, this social clause instrument is not yet a perfect solution. For instance, about including a social clause regarding international labour rights in trade agreements, it has been noted that:[700]

> … the inclusion of a social clause in trade agreements would not change current trade structures, since it does not challenge the objective of profit maximisation. At most, it will bring changes at the micro level.

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697 Joerges, above n 19, at 10.

698 Sanyal, above n 685, at 386.

699 At 387.

700 Valor, above n 693, at 271.

Likewise, both national governments and multinational corporations may focus heavily on "reducing costs and raising productivity"[701] based on the idea of putting the "greater freedom of trade" first.[702] Even though the idea of introducing a social clause has gained some ground, it is still encouraged to:[703]

> … rely on good faith and common sense to raise standards gradually to acceptable levels, given the economic level of development in that country. [This] requires extreme diligence and a commitment to a moral code of conduct.

When it comes to multilateral trade agreements such as the North American Free Trade Agreement ("NAFTA"), the state parties have been reluctant to include a social clause. Instead of attempting to harmonise or raise labour standards, the NAFTA decided to introduce a side agreement.[704] As a result, "trade sanctions [were] envisaged as a *last resort mechanism to enforce (emphasis added)* members' domestic regulation".[705]

Indeed, rapid globalisation has resulted in an apparent tension based on more 'intense' interdependence between the state parties and businesses.[706] Moreover, despite the lack of evidence, it is commonly believed by the state parties that "the fear of reputation damages" [707] would do enough to lead businesses in bringing out the required improvements with no need of intervention by the state.

Arguably, however, such tension or interdependence has subsequently resulted in two clear reasons why a social clause *should* be included in the international trade agreements. Firstly, it is evident that developing countries are not likely to have enough skills or resources to raise social standards by themselves "but only in conjunction with other countries".[708] For instance, if specific labour standards or consumer safety standards were enforced globally, no country would need to lose their comparative advantage.[709] In that sense, it is not impossible to adopt a social clause in multilateral

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[701] Sanyal, above n 685, at 381.
[702] European Commission, above n 502, at 256/3.
[703] Sanyal, above n 685, at 387.
[704] Valor, above n 693, at 268.
[705] At 268.
[706] Watson and James, above n 640, at 1.
[707] Valor, above n 693, at 268.
[708] At 268-269.
[709] At 265.

trade agreements. Secondly, even for developed countries, the enforcement for 'protection' is not always at its optimal level.[710]

Still, it can be difficult to enforce a social clause as a means of ensuring human rights protection. For instance, the Office of the US Trade Representative has stated on their official home page that:[711]

> U.S. trade preference programs such as the Generalized System of Preferences ("GSP") provide opportunities for many of the world's poorest countries to use trade to grow their economies and climb out of poverty. […] GSP promotes economic development by eliminating duties on thousands of products when imported from one of 119 designated beneficiary countries and territories.

Valor alleged that implementing a social clause under the US version of GSP has been misused when it comes to promoting the core international labour standards. Valor concluded based on a number of research results that:[712]

> [Due to] the lack of consistent implementation and the subordination to Foreign Policy and economic interests [,] [t]his misuse of the GSP has occurred not only when solving a complaint, but also when filing it. The largest complainer, the American trade union AFL-CIO, has been accused of being more interested in protecting American jobs than in enforcing workers' rights worldwide.

On that basis, Valor claimed that for standards that are recognised to be part of human rights, they must be considered based on a moral argument instead. That is to say, these rights deserve "utter protection", by imposing sanctions if possible.[713]

2. Application of the social clause instrument in enforcing consumer rights

Most of the discussions in this section have been based on the example of enforcing labour rights. Nonetheless, it is still worthwhile to consider the above points in the

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[710] At 269.

[711] The Office of the US Trade Representative "Generalized System of Preferences (GSP)" <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp>.

[712] Valor, above n 693, at 268.

[713] At 265.

context of enforcing consumer rights since human rights deserve "utter protection" as Valor put it.[714]

In order to utilise this social clause instrument in enforcing consumer rights as human rights, there must be some form of guidance in developing a social clause to fit into the consumer protection context first. As discussed previously, it is vital to find a realistic way to deter businesses in manufacturing or supplying the goods which could involve potential health risks causing injuries or deaths of consumers. In this respect, it is essential to reiterate the fact that mere encouragement to take voluntary actions is no longer proved to be effective. Hence, it is at least apparent to say that there must be some form of mandatory compliance requirements for multinational actors to protect consumer safety and well-being as human rights accordingly.

C. Re-emergence of the Need for Creating Hard-law-based Obligations in Regulating Business Activities

As a consequence of having such concerns relating to consumer safety and well-being discussed thus far, the need for formulating *hard rules* on regulating transnational economic activities have been highlighted over time. In response to this, the UNHRC established "an open-ended intergovernmental working group" ("OEIGWG") in 2014.[715] The primary purpose of the OEIGWG is to enforce business enterprises (including their activities of transnational character) to respect human rights.[716]

The UNHRC has given the OEIGWG a mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[717] In 2018, the Chair of the OEIGWG finally arrived at a point of publishing a "Zero draft", as a 'hardened version' of international law.[718] Can it be an effective option to use in enhancing the enforcement of consumer rights in the international trade context?

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[714] At 265.

[715] *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* UN Doc A/HRC/RES/26/9 (14 July 2014).

[716] Krajewski, above n 325, at 30.

[717] At 30.

[718] At 31.

1. The Zero draft suggests implementing a mandatory due diligence requirement to prevent businesses from violating human rights

It is noteworthy that certain provisions such as art 9 of the Zero draft can be read as a "codification of the state duty to regulate transnational business activities with respect to human rights".[719] For example, under the heading of "Prevention", art 9 imposes the due diligence obligation to "all persons with business activities of transnational character"[720] by codifying the state parties' obligation to implement and undertake (under each state party's jurisdiction or control) the *mandatory due diligence* requirements into their domestic legislation.[721]

Furthermore, it reads as follows (*emphasis added*):[722]

> State Parties shall ensure that *effective national procedures are in place to enforce compliance* with the obligations laid down under this article, and that those procedures are available to *all natural and legal persons* having a legitimate interest, in accordance with national law, in ensuring that the article is respected.

Nevertheless, such a mandatory compliance requirement in human rights law is more likely to create doubt in its effectiveness as it could turn out to be a "cosmetic compliance"[723] as Landau put it. In order to deter businesses from performing the mandatory due diligence "cosmetically" (pretending to comply with it only by face),[724] the question of how to design or implement this mandatory due diligence requirement has to be carefully answered through negotiations over time.

Landau highlighted the below four risk factors ("Landau's Four Factors") for implementing parties (or the OEIGWG itself in further-clarifying the terms or phrases) to consider. On that basis, it is crucial to do their (its) best to avoid:[725]

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[719] At 31.

[720] *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* Zero Draft (16 July 2018) (Zero draft (2018)), art 9.

[721] Krajewski, above n 325, at 31.

[722] Zero draft (2018), above n 720, art 9.

[723] Ingrid Landau "Human Rights Due Diligence and the Risk of Cosmetic Compliance" (2019) 20 Melb J Int'l L 1 at 3.

[724] At 12-13.

[725] At 15-19.

1) the use of vague or ambiguous terms: giving 'scope' for interpretation or lack of specification may result in a too-wide scope for corporate discretion;

2) the misguiding risks: sufficient certainty as to what is expected of the businesses to comply is key;

3) the lack of transparency: the formal disclosure relating to their compliance must be done by adopting official measures in order to *prove* that every business is performing the required due diligence promptly; and

4) the over-focus on the process rather than the outcome: when there is an extensive scope for managerial discretion whereas there is insufficient regulatory oversight, commercial objectives will always come first (instead of the human-rights-based objectives).

When it comes to product safety in particular, some form of mechanism is essential in guiding businesses on what *to do* and what *not to do*. In this regard, considering Landau's Four Factors stated above should be helpful for implementing parties to start acting. However, it is still clearly required for the OEIGWG to put its efforts into negotiating the relevant details carefully with time.[726]

2. The Zero draft suggests imposing a legally binding liability to businesses

According to art 10 of the Zero draft, under the heading of "legal liability", state parties are required to (*emphasis added*):[727]

> … ensure through their domestic law that natural and legal persons may be held *criminally, civil or administratively liable for violations of human rights* undertaken in the context of business activities of transnational character.
>
> […]
>
> Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for *universal jurisdiction over human rights violations that amount to crimes.*

[726] Krajewski, above n 325, at 31.

[727] Zero draft (2018), above n 720, art 10.

However, as Rivera pointed out, the idea of imposing 'criminal liability' to a multinational actor might have less support from some countries.[728] This would be the case especially for countries which do not anticipate or are not ready to introduce corporate criminal liability (including New Zealand, at this stage).[729] Likewise, after her research on introducing corporate criminal liability in a number of common law jurisdictions, Wong concluded that:[730]

> Each jurisdiction faced substantial pressure from the corporate sector, trade unions, the public and the media during the legislative process with similar arguments being raised worldwide. Unfortunately, the corporate sector wields significant power and has so far been able to stifle the development of corporate criminal liability. Overall, an effective organisational model of corporate criminal liability is unlikely to arise unless the political and economic environment substantially changes.

At its current version, the Zero draft, art 10 requires state parties not only to hold a transnational corporation to be criminally liable but also to be liable under civil or administrative liability. However, it is arguable that this could eventually create a loop-hole in failing to lessen the governance gap, unless it is possible to call for the development of a "transnational" liability regime altogether.[731]

Indeed, if everything is left to domestic regulations, such a loop-hole (in regards to the discrepancies in laws between countries) would remain unclosed. Then, the same discussions concerning the relevant shortfalls are required to be started all over again, including the predictability-related concerns, as discussed previously.[732] In that sense, the Zero draft is noteworthy, but it cannot be said that the current version of the Zero draft is flawless.

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[728] Humberto Cantú Rivera "Some remarks on the third sessions of the Business and Human Rights Treaty Process and the 'Zero Draft'" (2018) 15(2) Brazilian Journal of International Law 25 at 38 (and more generally, see V Khanna "Corporate Criminal Liability: What Purpose Does it Serve" (1996) 109 Harv L Rev 1477 at 1532-1534).

[729] Law commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014).

[730] Kristen Wong "Breaking the Cycle: The Development of Corporate Criminal Liability" (LLB (Hons) Dissertation, University of Otago, 2012) at 73-74.

[731] Rivera, above n 728, at 38.

[732] Clough, above n 250, at 274.

3. Not everyone supports the Zero draft

Some scholars argue against the Zero draft by stating that "if politics is the germ that spreads the costly disease of regulatory protection", then the law is the "cure".[733] That is to say, policy-makers should only be sceptical in making a regulatory proposal, and this regulatory proposal, including the Zero draft, must not be attached to any particular theory of market failure.[734] This suggests that some scholars are reluctant to support the current version of the Zero draft due to its issue-specific nature.

On top of this, others argue that it is equally important to note that the 'assurance of quality' would not always be preferred by consumers.[735] For instance, Watson and James claimed that allowing consumers to have a wider variety of goods can also benefit consumers in the end. Regardless of the issue of quality, having as many options as possible would eventually enable consumers to consider more attributes (including the price and design) in making their choices.[736] On that basis, Watson and James argued that imposing a regulatory measure should not be supported simply because a better assurance of product quality can be achieved.[737]

4. The Zero draft holds its potential if it can be carefully detailed through negotiations

As Fasciglione noted, the Zero draft represents a "key milestone" which "adopts realistic choices in some of its overarching aspects".[738] More specifically:[739]

> … strengths encompass, at the very least [the Zero draft has made] the attempt to close the *governance gaps* originated by the economic governance on the full enjoyment of human rights by fixing *shared responsibilities* of both States and corporate actors …

On top of this, the Zero draft has strengths "upon which the future sessions of the negotiating process should rely", but also has its weaknesses "that need to be addressed in order to reinforce the human rights framework of the future international governance

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733 Watson and James, above n 640, at 15.

734 At 1.

735 At 4-5.

736 At 4.

737 At 23.

738 Marco Fasciglione "Another step on the road? Remarks on the zero draft treaty on business and human rights" (2018) 12(3) Diritti umani e diritto internazionale 629 at 632-633.

739 At 659.

of business activities".[740] Given the evidence that the Zero draft holds potential to lessen the above-discussed governance gap,[741] it can be utilised as a guiding tool in leading businesses in what to do and what not to do for the purpose of upholding consumer rights worldwide.

Yet, for that to happen, the Zero draft must take a step further in moving away from the current concerns or weaknesses. Otherwise, the identified potentials or strengths would be nothing more than *a pie in the sky*. As an example of taking a step towards gaining practicality, the mandatory due diligence requirement should be further negotiated or detailed by starting to minimise the risks identified in Landau's Four Factors.[742] Once the Zero draft gains practicality by making such attempts through careful negotiations, it can also be used as a *scripted guide* in designing a consumer-focused social clause which could be inserted into international trade agreements.

XI. Conclusion

In today's borderless, free trade era, it is no longer uncommon for consumers to be surrounded by products that were designed and manufactured overseas. Therefore, it is often difficult to track down the relevant details behind its production and distribution. In that respect, consumer protection today must be based from the perspective of fundamental human rights. Based on the analyses on the International Bill of Human Rights and other relevant authorities, a conclusion was reached that consumer rights must no longer be regarded as a *luxury* but to be essential to maintain human dignity.

In supporting the need for recognising and elevating consumer rights to human rights, the discussion of the HD case example was essential. In this case, a significant systems risk was caused by failing to regulate a multinational corporation like RB from compromising consumer safety. By first addressing the HD case in detail, this paper attempted to demonstrate how a country's failure to deter or eliminate such systems risk can put its citizens' safety in danger.

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740 At 659-660.

741 At 659, and Zero draft (2018), above n 720, art 9 and 10.

742 Landau, above n 723, at 14-19.

As a respectful member of the international community, New Zealand has been making efforts in delivering the rights of consumers by enforcing both legislative and quasi-legislative consumer protection measures, including the unique ACC scheme. However, none of the measures put in place involve a particular incentive (or a technical warning from the deterrence perspective) for overseas manufacturers or suppliers to put their best efforts in securing consumer safety by providing a safer product for New Zealand consumers. When it comes to taking practical action for deterrence or protective steps, a lot still depends upon an individual private actor's (such as a multinational corporation) voluntary due diligence, unless it gets caught through a tragic event such as in the HD case. Even in a situation where a company's fault or breach can be established in failing to protect consumers under a specific mean, it is still difficult to hold a company liable.

What is consumed by consumers must not compromise them of their health (safety) and well-being. Even if consumer safety and its relevant rights can become human rights, it must not end there. These rights must be delivered to consumers by enforcing them practically. In stressing the importance of enforcing consumer rights as human rights, this paper has explained how crucial it is to clarify the roles of the state parties and the private actors.

For those private actors, this paper has focused on highlighting the role of the multinational (transnational) corporations, which operate beyond their own territorial borders. Since safety should be secured to all consumers regardless of where they live or what their socioeconomic status may be, each state party must be obliged to implement its own domestic legal measures to enforce those expressed rights as a matter of international law. At the same time, there is a clear need for regulating private actors by implementing the appropriate non-voluntary legal mechanisms.

Based on an analysis of the cultural filter theory, it is conceivable to choose a *softer way* of reducing discrepancies in domestic laws instead of using the hard codes. It is also possible to reduce the gap between protecting consumer rights and promoting free trade relationships by empowering consumers themselves. The point here must be about providing consumers freedom of choice on the basis of a set of capabilities of each consumer as suggested by Benöhr. In other words, by enhancing the consumers' necessary capabilities overall, consumers can be empowered in making better choices based on their own value-oriented judgements. In that sense, such consumer choices can

also speak themselves in telling what consumers think of how a particular company or a brand is doing in securing consumer protection.

Based on a human rights approach to consumer protection, this paper has stressed that it is not only the state parties but also the trading parties who must play their part in securing consumer safety and well-being. Here, an international trade agreement would play a key role in enforcing both consumer rights and promoting free trade relationships. However, according to the relevant analysis on a form of an international trade agreement, mainly focusing on the KNZFTA, it effectively revealed that the KNZFTA uses far too broad wording in its consumer protection chapter.

On that basis, this paper has highlighted the need for implementing a controlling mechanism such as a social clause along with the establishment of a Joint Committee. Using the *harder* side of the law would be more ideal here for finding a better balance between the promotion of free trade and the enforcement of consumer rights as human rights.

Indeed, some consumer products, such as tobacco, clearly involve significant health risks for those who consume it. For any controlling mechanism to be practically utilised, there must be some form of guidance in developing them to fit into the current international trade context first. As an example, if the Zero draft can develop its specifics and practicality through careful negotiations at the international level, it could be utilised as a scripted guide in establishing the relevant mechanisms for businesses to adopt and uphold consumer rights. At the same time, it could also be used as an initial guideline in developing consumer-focused social clauses so that they can be inserted into various international trade agreements where applicable. In this way, these trade agreements would be able to assist the trading parties (private actors) to secure consumer safety in every course of their trading.

Nonetheless, these suggestions are not without challenges. For this reason, it is required to carry out more profound studies in the future. For instance, it is essential to evaluate the ways in which the Zero-draft-based approach can help to enforce consumer rights and to promote international trade in the long term. At the same time, it would be vital to bear in mind that the benefits or economic advantages of trading parties are not to take over the safety and well-being of consumers.

Bibliography

A. Cases

1. New Zealand

Acquired Holdings Ltd v Turvey HC Auckland CIV 2006-404-7284, 29 October 2007.

Adlam v Accident Compensation Corporation [2017] NZCA 457.

B v Waitemata District Health Board [2013] NZHC 1702.

Commerce Commission v Insight Infotech Ltd DC Christchurch CRI-2006-009-10421, 19 March 2007.

Commerce Commission v Reckitt Benckiser (New Zealand) Ltd [2017] NZDC 1956.

Contact Energy Ltd v Moreau [2018] NZHC 2884.

Cooper v Ashley & Johnson Motors Ltd (1996) 7 TCLR 407.

Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd [2014] NZCA 418.

Hewitt v Window World Franchise Ltd HC Whangarei CIV-2009-488-488, 4 March 2011.

James Hardie Industries Plc v White [2018] NZCA 580.

James Hardie Industries Plc v White [2019] NZSC 39.

Linework Ltd v Department of Labour [2001] 2 NZLR 639.

Nesbit v Porter [2000] 2 NZLR 465.

Progressive Enterprises Limited v Commerce Commission HC Auckland CRI-2008-404-0165, 23 December 2008.

Sellwood v Accident Compensation Corporation [2016] NZACC 207.

Sellwood v Accident Compensation Corporation [2017] NZHC 2604.

Taunoa v Attorney-General [2008] 1 NZLR 429.

2. Australia

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited [2014] FCA 634.

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181.

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54.

GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd [2016] FCA 1196.

Glendale Chemical Products Pty Ltd v Australian Competition and Consumer Commission (1998) 90 FCR 40.

Hardy v Reckitt Benckiser (Australia) Pty Ltd [2017] FCA 341.

Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 2) [2017] FCA 785.

Hardy v Reckitt Benckiser (Australia) Pty Limited (No 3) [2017] FCA 1165.

Johnson & Johnson Pacific Pty Ltd v Unilever Australia Ltd (No 2) [2006] FCA 1646.

Reckitt Benckiser (Australia) Pty Ltd v AFT Pharmaceuticals (AU) Pty Ltd [2018] FCA 1552.

Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc [1993] FCA 105.

3. European Union

Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 651-665.

4. United Kingdom

Abouzaid v Mothercare (UK) Limited [2000] EWCA Civ 348.

Donoghue v Stevenson [1932] AC 562 (HL).

Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited [1915] AC 705 (HL).

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 WLR 413 (PC).

Norris v Government of United States of America [2010] UKSC 9.

Tesco Supermarkets Ltd v Nattrass [1971] 2 WLR 1166 (HL).

Wilkes v Depuy International Ltd [2018] 2 WLR 531 (QB).

5. United States

Azzarello v Black Brothers Company Inc 391 A 2d 1020 (1978).

Barker v Lull Engineering Company 20 Cal 3d 413 (1978).

Cronin v JBE Olson Corporation 8 Cal 3d 121 (1972).

Escola v Coca Cola Bottling Company of Fresno 24 Cal 2d 453 (1944).

Greenman v Yuba Power Products, Inc 59 Cal 2d 57 (1963).

Grimshaw v Ford Motor Company 119 Cal App 3d 757 (1981).

Kim v Toyota Motor Corporation 424 P 3d 290 (2018).

Tincher v Omega Flex Inc 104 A 3d 328 (2014).

Titus v Bethlehem Steel Corporation 91 Cal App 3d 372 (1979).

B. Legislation

1. New Zealand

Accident Compensation Act 2001.

Commerce Act 1986.

Companies Act 1993.

Consumer Guarantees Act 1993.

Crimes Act 1961.

Criminal Procedure Act 2011.

Fair Trading Act 1986.

Human Rights Act 1993.

New Zealand Bill of Rights Act 1990.

Privacy Act 1993.

Product Safety Standards (Pedal Bicycles) Regulations 2000.

Product Safety Standards (Baby Walkers) Regulations 2001.

Product Safety Standards (Children's Toys) Regulations 2005.

Product Safety Standards (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2016.

Standards Act 1988.

2. Australia

Competition and Consumer Act 2010 (Cth).

Therapeutic Goods Act 1989 (Cth).

Trade Practices Act 1974 (Cth).

3. Korea

Monopoly Regulation and Fair Trade Act 1990.

Special Act on Investigating the Truth of Social Disasters and Building a Safe Society 2017.

4. UN Treaties and Regulations

Council Regulation 793/93 on the evaluation and control of the risks of existing substances [1993] OJ L 84/1.

International Covenant on Civil and Political Rights GA Res 2200A (XXI) (1966).

International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI) (1966).

Universal Declaration of Human Rights GA Res 217A (1948).

C. UN Conventions and Guidelines

United Nations Convention on the Rights of Persons with Disabilities GA Res 61/106 (2006).

United Nations Guidelines for Consumer Protection GA Res 39/248 (1985).

United Nations Guidelines for Consumer Protection ESC Res E/1999/INF/2/Add.2 (1999).

United Nations Guidelines for Consumer Protection GA Res 70/186 (2015).

D. Books and Chapters in Books

Natalie Baird "The International Human Rights Framework" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters New Zealand, Wellington, 2017) 149.

Margaret Bedggood and Kris Gledhill "Essentials of Life: The Right to an Adequate Standard of Living in New Zealand" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters New Zealand, Wellington, 2017) 683.

Iris Benöhr and Hans-W Micklitz "Consumer protection and human rights" in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds) *Handbook of research on international consumer law* (Edward Elgar, Cheltenham, 2010) 18.

Robin Brown "The UN Guidelines For Consumer Protection: Making Them Work in Developing Countries" in Jeremy Malcolm (ed) *Consumers in the Information Society: Access, Fairness and Representation* (Consumers International, Kuala Lumpur, 2012) 113.

Hilary Charlesworth "A regulatory perspective on the international human rights system" in Peter Drahos (ed) *Regulatory theory: foundations and applications* (ANU Press, Acton, 2017) 357.

Duncan Fairgrieve *Product Liability in Comparative Perspective* (1st ed, Cambridge University Press, Cambridge, 2005).

Kris Gledhill "The Obligation to Implement and Enforce Human Rights" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters New Zealand, Wellington, 2017).

John Hopkins and Henrietta McNeill "Exporting Hard Law Through Soft Norms: New Zealand's Reception of European Standards" in Annika Björkdahl and others (eds) *Importing EU Norms: Conceptual Framework and Empirical Findings* (Springer, New York, 2015) 115.

Geraint Howells, Iain Ramsay and Thomas Wilhelmsson "Consumer law in its international dimension" in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds) *Handbook of research on international consumer law* (Edward Elgar, Cheltenham, 2010) 1.

Shane Kilcommins, Susan Leahy and Eimear Spain "The absence of regulatory crime from the criminal law curriculum" in Kris Gledhill and Ben Livings (eds) *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, London, 2017) 216.

Valsamis Mitsilegas, Peter Alldridge and Leonidas Cheliotis *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives* (1st ed, Hart Publishing, Sydney, 2015).

Kai Purnhagen "The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny" in Kai Purnhagen and Peter Rott (eds) *Varieties of European Economic Law and Regulation Liber Amicorum for Hans Micklitz* (Springer International Publishing, Cham, 2014) 315.

John Ruggie *Just business: Multinational corporations and human rights* (1st ed, Norton & Company, New York, 2013).

Kate Tokeley *Consumer Law in New Zealand* (2nd ed, Lexis Nexis, Wellington, 2014).

Simon Whittaker *Liability for products: English law, French law, and European harmonization* (1st ed, Oxford University Press, New York, 2005).

E. Journal Articles

Karen Alter and Sophie Meunier "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision" (1994) 26(4) Comp Political Stud 535.

Richard Ausness "Danger Is My Business: The Right to Manufacture Unsafe Products" (2014) 67 Ark L Rev 827.

Cassandre Bailloux "The Average Consumer in European Consumer Law" (2017) 44 Exeter L Rev 158.

Nadia Bernaz "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" (2013) 117 J Bus Ethics 493.

Craig Brown "Deterrence and Accident Compensation Schemes" (1978-1979) 17 U W Ontario L Rev 111.

Anne-Marie Burley and Walter Mattli "Europe before the Court: A Political Theory of Legal Integration" (1993) 47(1) International Organization 41.

Robin Byerly "The social contract, social enterprise, and business model innovation" (2014) 4(4) Social Business 325.

Peter Cartwright "Corporate Fault and Consumer Protection: A New Approach for the UK" (2016) 21 J Consum Policy 71.

B Castleman and V Navarro "International mobility of hazardous products, industries, and wastes" (1987) 8 Ann Rev Public Health 1.

Anita Chan and Robert Ross "Racing to the bottom: international trade without a social clause" (2003) 24(6) Third World Q 1011.

Rutger Claassen and Anna Gerbrandy "Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach" (2016) 12 Utrecht L Rev 1.

Jonathan Clough "Bridging the theoretical gap: the search for a realist model of corporate criminal liability" (2007) 18 Criminal Law Forum 267.

Paulee Coughlin “The Movement of Consumer Protection in the European Community: A Vital Link in the Establishment of Free Trade and a Paradigm for North America” (1994) 5 Ind Int'l & Comp L Rev143.

Elspeth Deards and Christian Twigg-Flesner “The Consumer Protection Act 1987: Proof at Last That It Is Protecting Consumers” (2001) 10 Nottingham LJ 1.

Sinai Deutch “Are Consumer Rights Human Rights” (1994) 32 OHLJ 537.

Carolyn Dresler and others “Human rights-based approach to tobacco control” (2012) 21 Tobacco Control 208.

D F Dugdale “Protection from Accident” [2000] NZLJ 389.

Pierre-Marie Dupuy “The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice” (1999) 31 NYU J Int'l L & Pol 791.

Mateja Durovic “International Consumer Law: What Is It All About?” (2020) 43 J Consum Policy 125.

Georges Enderle “Global competition and corporate responsibilities of small and medium-sized enterprises” (2004) 13(1) Bus Ethics Eur Rev 51.

Marco Fasciglione “Another step on the road? Remarks on the zero draft treaty on business and human rights” (2018) 12(3) Diritti umani e diritto internazionale 629.

Eilís Ferran “Corporate Attribution and the Directing Mind and Will” (2011) 127 L Q Rev 239.

Brent Fisse and John Braithwaite “The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability” (1988) 11 Sydney L Rev 468.

Geoffrey Garrett “The Politics of Legal Integration in the European Union” (1995) 49(1) International Organization 171.

Sally Garrett “New Zealand: Last Bastion of Laissez-faire - Comparative Perspectives on Consumer Protection” (1986) 5 Auckland U L Rev 277.

Deborah Gleeson and Sharon Friel “Emerging threats to public health from regional trade agreements” (2013) 381 The Lancet 1507.

John Goldberg and Benjamin Zipursky “The Strict Liability in Fault and the Fault in Strict Liability” (2016) 85 Fordham L Rev 743.

John Goldring “Globalisation and Consumer Protection Laws” (2008) 8 Macquarie LJ 79.

Robert Harchut “Products Liability - Restatement (Second) of Torts - Section 402A - Uncertain Standards of Responsibility in Design Defect Cases - After Azzarello, Will Manufacturers be Absolutely Liable in Pennsylvania” (1979) 24 Vill L Rev 1035.

David Harland “Post-Sale Consumer Legislation for New Zealand - A Discussion of the Report to the Minister of Justice by Professor David H. Vernon” (1988) 3 Canterbury L Rev 410.

Cynthia Hawes “Consumer Guarantees: Remedies for Defective Goods” (2016) 16(2) NZBLQ 127 at 127.

Marilyn Helms and Betty Hutchins “Poor Quality Products: Is their Production Unethical?” (1992) 30 Manag Decis 35.

Sunki Hong and others “CCS in New Zealand Environmental Law and Its Implications for Korea” (2017) 39 Soongsil Law Review 267.

Dana Jacob “Hazardous Exports from a Human Rights Perspective” (1983) 14 Sw U L Rev 81.

Sangjin Kang “Competition Related Provisions (CRPs) of Bilateral Trade Agreements, Bilateral Competition Cooperation Agreements of Korea, and their Implications” (2015) 12 Manchester J Int'l Econ L 212.

Fatima Kareem, Inmaculada Martínez-Zarzoso and Bernhard Brümmer “Protecting health or protecting imports? Evidence from EU non-tariff measures” (2018) 53 Int Rev Econ Finance 185.

Ram Kesavan, Michael Bernacchi and Oswald Mascarenhas “Word of Mouse: CSR Communication and the Social Media” (2013) 9(1) Int J Manag Rev 59.

V Khanna “Corporate Criminal Liability: What Purpose Does it Serve” (1996) 109 Harv L Rev 1477.

Yong-Hwa Kim “Legal liability of the government on the humidifier disinfectant incidence of Korea from an environmental toxicological viewpoint - Focused on the exemption of data requirement for the registration of polymeric chemicals” (2016) 16 Environmental Law and Policy 83.

Katrina Knutson “Lead in their Shoes: The Impact of the Consumer Product Safety Improvement Act on Chinese/American Trade Negotiations” (2010) 31 Hamline J Pub L & Poly 705.

Markus Krajewski “The State Duty to Protect against Human Rights Violations through Transnational Business Activities” (2018) 23 Deakin L Rev 13.

Ingrid Landau “Human Rights Due Diligence and the Risk of Cosmetic Compliance” (2019) 20 Melb J Int'l L 1.

Lisa Laplante “Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention” (2004) 22 Neth Q Hum Rts 347.

Robert Lawrence and Robert Litan “Why protectionism doesn’t pay” (1987) 65(3) Harv Bus Rev 60.

Jong-Hyeon Lee and others “Fatal Misuse of Humidifier Disinfectants in Korea: Importance of Screening Risk Assessment and Implications for Management of Chemicals in Consumer Products” (2012) 46 Environ Sci Technol 2498.

Josephine Liu “Two Roads Diverged in a Yellow Wood: The Euorpean Community Stays on the Path to Strict Liability” (2004) 27 Fordham Int'l LJ 1940.

C Lima Marques “International Protection of Consumers as a Global or a Regional Policy” (2020) 43 J Consum Policy 57.

Joan Matheson “Compensation for Personal Injury in New Zealand: The Woodhouse Report” (1969) 18 ICLQ 191.

Ugo Mattei “Hard Code Now” (2002) 2(1) Global Jurist 1.

Dinesh Mohan “People’s Right to Safety” (2003) 6(2) Health Hum Rights 161.

Seongjea Moon “The Damage Caused by Humidifier Disinfectants and the National Liability for Risk Management” (2014) 45(1) Journal of Consumer Policy Studies 67.

Alexandra Muir “The Race to Safety: How Private Lawmaking and Voluntary-Standard Adoption Can Inspire a Global Regime That Strengthens and Harmonizes Product Safety Standards” (2016) 23 Ind J Global Legal Stud 323.

Krishnendu Mukherjee “The Korean Disinfectant Humidifier Tragedy - A Legal Analysis” (2016) 16 Environmental Law and Policy (Institute of Comparative Legal Studies, Kangwon National University) 57.

Dix Noel “Manufacturer’s Negligence of Design or Directions for Use of a Product” (1962) 71 Yale L J 816.

Manfred Nowa “What Practices Constitute Torture?: US and UN Standards” (2006) 28(4) Hum Rights Q 809.

Trish O’Sullivan and Kate Tokeley “Consumer Product Failure Causing Personal Injury Under the No-Fault Accident Compensation Scheme in New Zealand—a Let-off for Manufacturers?” (2018) 41 J Consum Policy 211.

Stephen Park “Talking the Talk and Walking the Walk: Reviving Global Trade and Development after Doha” (2013) 53 Va J Int'l L 365.

C Parker and V Nielsen “Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation” (2011) 56(2) Antitrust Bull 377.

Ernst-Ulrich Petersmann “Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?” 18 J Int'l Econ L 579.

Christopher Placitella and Justin Klein “The Civil Justice System Bridges the Great Divide in Consumer Protection” (2005) 43 Duq L Rev 219.

Iain Ramsay “Consumer Law, Regulatory Capitalism and the New Learning in Regulation” (2006) 28 Sydney L Rev 9.

Humberto Cantú Rivera “Some remarks on the third sessions of the Business and Human Rights Treaty Process and the ‘Zero Draft’” (2018) 15(2) Brazilian Journal of International Law 25.

John Ruggie “Global Governance and "New Governance Theory": Lessons from Business and Human Rights” (2014) 20 Glob Gov 5.

Seung-Hun Ryu and others “Humidifier disinfectant and use characteristics associated with lung injury in Korea” (2019) 29(5) Indoor Air 735.

Rajib Sanyal “The Social Clause in Trade Treaties: Implications for International Firms” (2001) 29 J Bus Ethics 379 at 387.

Anthony Sciascia “Safe or Sorry: How the Precautionary Principle is Changing Europe's Consumer Safety Regulation Regime and How the United States' Consumer Product Safety Commission Must Take Notice” (2006) 58 Admin L Rev 689.

Scientific Committee on Consumer Safety (SCCS) and Ulrike Bernauer “Opinion of the scientific committee on consumer safety (SCCS) – 2nd Revision of the safety of the use of poly(hexamethylene) biguanide hydrochloride or polyaminopropyl biguanide (PHMB) in cosmetic products” (2015) 73(3) Regul Toxicol Pharmacol 885.

Eugene Schlossberger “The Right to an Unsafe Car? Consumer Choice and Three Types of Autonomy” (2013) 5 J Appl Philos 1.

E Shaffer, J Brenner and T Houston “International trade agreements: a threat to tobacco control policy” (2005) 14 (Suppl II) Tob Control ii19.

Helena Sipi and Susanne Uusitalo “Consumer Autonomy and Sufficiency of GMF Labeling” (2008) 21 J Agric Environ Ethics 353.

Maxwell Smith “Corporate Manslaughter in New Zealand: Waiting for a disaster?” (2016) 20(2) NZULR 402.

Larry Stewart “Strict Liability for Defective Product Design - The Quest for a Well-Ordered Regime” (2009)74 Brook L Rev 1039.

Genevieve Taylor “Corporate Homicide” (2013) NZLJ 277.

Susan Tiefenbrun “Free Trade and Protectionism: The Semiotics of Seattle” (2000) 17 Ariz J Int'l & Comp L 257.

Carmen Valor “What if all trade was fair trade? The potential of a social clause to achieve the goals of fair trade” (2006) 14 J Strat Market 263.

Frank Vandall “Design Defect in Products Liability: Rethinking Negligence and Strict Liability” (1982) 43 Ohio St LJ 61.

K William Watson and Sallie James “Regulatory Protectionism: A Hidden Threat to Free Trade” (2013) 723 Cato Policy Analysis 1.

David Weissbrodt and Muria Kruger “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (2003) 97(4) Am J Int'l L 901.

Stephen Wessels and Hanne Ingmer "Modes of action of three disinfectant active substances: A review" (2013) 67(3) Regul Toxicol Pharmacol 456.

Meaghan Wilkinson "Corporate Criminal Liability – The Move towards Recognising genuine Corporate Fault" (2003) 9 Canterbury L Rev 142.

E Spencer Williams and others "The European Union's REACH regulation: a review of its history and requirements" (2009) 39(7) Crit Rev Toxicol 553.

Jan Wouters and Leen Chanet "Corporate Human Rights Responsibility: A European Perspective" (2008) 6(2) Nw J Int'l Hum Rts 262.

Sally Wu "Catching Corporate Human Rights Abuse Abroad: A Wider Net of Extraterritorial Laws" (2017) 4 PILJNZ 174.

F. Parliamentary and Government Materials

1. New Zealand

Consumer and Commercial Regulatory System (Ministry of Business, Innovation and Employment, Regulatory Charter, December 2017).

Human Rights in New Zealand Ngä Tika Tangata O Aotearoa (Human Rights Commission, 2010).

Law commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014).

New Zealand – Korea Free Trade Agreement (Ministry of Foreign Affairs and Trade New Zealand, March 2015).

New Zealand – Korea FTA Guide (Ministry of Foreign Affairs and Trade New Zealand, January 2015).

Product safety standards Know your responsibilities as a trader (Commerce Commission, September 2017).

Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand (December 1967).

Trans-Pacific Partnership Agreement (Ministry of Foreign Affairs and Trade New Zealand, February 2016).

2. EU

Committee for Risk Assessment RAC Annex 1 Background Document to the Opinion proposing harmonised classification and labelling at Community level of Polyhexamethylene biguanide or Poly(hexamethylene) biguanide hydrochloride or PHMB (European Chemicals Agency, ECHA/RAC/CLH-O-0000001973-68-01/A1, September 2011).

Committee for Risk Assessment RAC Opinion proposing harmonised classification and labelling at EU level of Polyhexamethylene biguanide or Poly(hexamethylene) biguanide hydrochloride or PHMB (European Chemicals Agency, CLH-O-0000003799-56-03/F, March 2014).

Communication from the Commission Monitoring consumer outcomes in the single market: the Consumer Markets Scoreboard {SEC (2008) 87} (Commission of the European Communities, COM (2008) 31 final, 29 January 2008).

Directive 98/8/EC concerning the placing of biocidal products on the market [1998] OJ L 123/1.

European Commission "Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')" (1980) OJ C 256.

European Commission, *Technical Guidance Document on Risk Assessment in support of Commission Directive 93/67/EEC on Risk Assessment for new notified substances, Commission Regulation (EC) No 1488/94 on Risk Assessment for existing substances, Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market Part I* (European Commission Joint Research Centre, EUR 20418 EN/1, April 2003).

European Union "Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part" (2011) OJ L 127.

3. Others

Mary Bolle *Overview of Labor Enforcement Issues in Free Trade Agreements* (Washington, DC: Congressional Research Service (CRS Report RS22823), February 2016).

John F Kennedy, President of the United States "Special Message to the Congress on Protecting the Consumer Interest" (speech to the US Congress, Washington DC, 15 March 1962).

Korea – EU Free Trade Agreement (Ministry of Foreign Affairs Republic of Korea, December 2015).

North American Free Trade Agreement (The Office of the US Trade Representative, January 1994).

United States – Singapore Free Trade Agreement (The Office of the US Trade Representative, July 2003).

G. Mandates and Reports

Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights UN Doc A/HRC/RES/26/9 (14 July 2014).

Human rights and transnational corporations and other business enterprises SRSG mandate UN Doc E/CN.4/2005/91 (20 April 2005).

Implementation report on the United Nations Guidelines on Consumer Protection (1985–2013) UN Doc TD/B/C.I/CLP/23 (29 April 2013).

Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises Zero Draft (16 July 2018).

Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises UN Doc A/HRC/8/5 (7 April 2008).

Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on its mission to the Republic of Korea UN Doc A/HRC/33/41/Add.1 (3 August 2016).

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises UN Doc A/HRC/8/5 (7 April 2008).

Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework UN Doc A/HRC/17/31 (21 March 2011). The Human Rights Council endorsed the Guiding Principles in its resolution (HRC Res 17/4 (2011)) of 16 June 2011.

John Ruggie "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (2011) 29(2) Neth Q Hum Rts 224.

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea UN Doc A/HRC/35/32/Add.1 (1 May 2017).

H. Dissertations, Theses, and Research Papers

Daniel Augenstein and David Kinley "When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations" (Legal Studies Research Paper No. 12/71, Sydney Law School, 2012).

Iris Benöhr "Consumer Law Between Market Integration and Human Rights Protection" (LLD, European University Institute, 2009).

Alice Coppard "Manufacturing a Better System: ACC and International Product liability" (LLB(Hons) Dissertation, Victoria University of Wellington, 2017).

Olivia Dixon "Corporate Criminal Liability: The Influence of Corporate Culture" (Research Paper No 17/14, Sydney Law School, 2017).

Peter Gallagher and Ysé Serret *Implementing Regional Trade Agreements with Environmental Provisions: A Framework for Evaluation* (Organisation for Economic Co-operation and Development, OECD Trade and Environment Working Papers 2011/06: COM/TAD/ENV/JWPTE (2009) 4/FINAL, October 2011).

Jaunius Gumbis, Vytaute Bacianskaite and Jurgita Randakeviciute "Do Human Rights Guarantee Autonomy?" (Publication named Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol, University of Vilnius, 2008).

Christian Joerges "Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government" (EUI Working Paper LAW No. 2006/5, European University Institute, 2006).

Christian Joerges "Integration through de-regulation? An irritated heckler" (European Governance Papers, No. N-07-03, 17 July 2007).

Ji Hye Kim "Corporate Social Responsibility and Human Rights in International Business: A Systematic Literature Review" (MPhil Thesis, University of Manchester, 2016).

Sungkyoon Kim and Domyung Paek "Humidifier Disinfectant Disaster, what do we know and what are left to be clarified?" (Research Paper, Seoul National University, 2016).

Kristen Wong "Breaking the Cycle: The Development of Corporate Criminal Liability" (LLB (Hons) Dissertation, University of Otago, 2012).

I. Press Releases and Newspapers

Australian Competition and Consumer Commission "ACCC appeals $1.7m penalty against Reckitt Benckiser for misleading Nurofen representations" (media release, 23 May 2016).

Commerce Commission New Zealand "$1m penalty for misleading Nurofen specific pain range claims" (press release, 03 February 2017).

Korean Centre for Disease Control "Aerozolization of humidifier disinfectants" (press release, 11 November 2011).

Korean Centre for Disease Control “Six kinds of humidifier disinfectant recalled (final)” (press release, 11 November 2011).

Claire Lee “Korean victims of toxic disinfectant ask public to boycott Strepsils” *The Korea Herald* (Korea, 19 June 2018).

Rosyn Park “New Study Estimates 14,000 Deaths Linked To Toxic Humidifier Sanitizers” *TBS eFM News* (online ed, Seoul, 27 July 2020).

Reckitt Benckiser Group plc. “HY Results 2016” (press release, 29 July 2016).

Amelia Wade “Nurofen fined $1.08 million for 'misleading' public” *The New Zealand Herald* Online ed, Auckland, 3 February 2017).

J. Internet Resources

NZ Anti-Vivisection Society Inc. “What we did to help this first stage of the cosmetics ban pass” NZAVS: Ending Animal Experimentation <https://www.nzavs.org.nz/bfc>.

NZ Anti-Vivisection Society Inc. “What We Do & Why” NZAVS: Ending Animal Experimentation <https://www.nzavs.org.nz/what-we-do-and-why>.

The Office of the US Trade Representative “Generalized System of Preferences (GSP)” <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp>.

K. Opinions, Comments, and Other Resources

Qasim Chaudhry and others, Opinion on Polyaminopropyl Biguanide (PHMB) - Submission III - (Scientific Committee on Consumer Safety, SCCS/1581/16 Preliminary version, December 2016).

Ye-yong Choi “Didn't manufacturers even check product safety?” *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017).

Simone Cooper, Jesse Wilson and Tim Smith “Parent company liability for subsidiary’s negligence” *Bell Gully Publications* (online ed, Auckland, Friday 21 December 2018).

General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 (10 August 2017).

General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life UN Doc CCPR/C/GC/36 (30 October 2018).

Kyung-moo Lee "How big is the injury rate of this humidifier disinfectant case?" *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017).

Heung-gyu Lim "Costco, Daiso, GS Mart also sold humidifier disinfectant products" *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017).

Eun-sook Moon "Being too generous on corporate crimes: it is none of society's nor the government's business" *Joogan Kyunghyang Series* (Korea, August 2016 – August 2017).

The corporate responsibility to respect human rights: An Interpretive Guide UN Doc HR/PUB/12/02 (June 2012).

"The germ of an idea" *The economist* (online ed, Seoul, 9 June 2016).

[Y]OUR IMPACT (TOMS® , Global Impact Report, 2019).