

**The Impact of Trade Liberalisation on Access to Water and Medicines in
Ghana**

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Abstract

This research examines access to water and medicines in Ghana in the context of two World Trade Organisation (WTO) agreements: the General Agreement on Trade in Services (GATS) and the Trade Related Aspects of Intellectual Property Rights (TRIPS). The key argument is that while the GATS and TRIPS agreements aim to promote economic and social development through trade liberalisation, developing countries such as Ghana lacks the negotiation, technical and financial capacity to take full advantage of such potential benefits that the WTO agreements offer. In addition, the World Bank (WB) and the International Monetary Fund (IMF) play influential roles in the context of access to water and medicines by prescribing various strategies to help Ghana target the socio-economic development of the people. However, this research shows that the Structural Adjustment Programmes (SAPs) do not promote Ghana's human right obligations and fail to effectively benefit the poor people. Also, this study shows that due to limited resources and infrastructures, Ghana is unable to negotiate favourable loan agreements to transform her home-grown water and medicines industries. The other relevant actor in the water and medicines sector is the multinational companies which operate several investment projects in Ghana. This study shows that the profit- oriented focus of these companies fail to effectively promote the socio-economic wellbeing of Ghanaians.

In conclusion, this research offered three key suggestions. First, constitutional right to water and medicines along with strong procedural rights is likely to improve access to water and medicines in Ghana. Second, Public-Private Partnership (PPP)

has been proposed as an alternative strategy to help promote effective access to water and medicines. Third, human dignity in respect of access to water and medicines can be promoted in Ghana if the government shows the political will to initiate legislative reforms in consonance with its international obligations, and supported by a judiciary system that is sensitive to the values of human rights by eschewing corrupt practices.

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Abbreviations and Acronyms

ACHR	African Charter on Human and peoples' Right
AGOA	African Growth and opportunity Act
African	African Union Convention on Preventing and combating Corruption
AIDS	Acquired Immune Deficiency Syndrome
ARIPO	African Organisation for the Intellectual Property Rights
ART	Anti-Retro-Viral Therapy
ARVs	Anti-Retro-virals
ASDR	African Security Dialogue and Research
AU	African Union
BIFD	British International Development Fund
BNI	Ballast Nedam International
CDD	Center for Democracy and Development
CEDAW	Convention of Elimination of Racism against women
CHRAJ	Commission for Human Rights and Administrative Justice
CHRI	Commonwealth Human Rights Initiative
CIDA	Canadian International Development Agency
CPA	Center for Policy Analysis
CSPF	Continental Social Policy Framework
DFID	Department for International Development
D-G	Director General
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EDIF	Economic Development Investment Fund
EPA	Environmental Protection Agency
EPN	Ecumenical Pharmaceutical Network
ERP	Economic Recovery Programme
ESAF	Enhanced Structural Adjustment Facility

EU	European Union
FDI	Foreign Direct Investment
FGL	Farmapine Ghana Limited
FHI	Finance Health International
FTAs	Free Trade Agreements
GAC	Ghana Aids Commission
GATS	General Agreement in Trade and Services
GATT	General Agreement in Trade and Tariffs
GAVI	Global Alliance for Vaccination and Immunisation
GBA	Ghana Bar Association
GDP	Gross Domestic Product
GEF	Global Environmental Facility
GFDB	Ghana's Food and Drug Board
GHS	Ghana Health Services
GIHOC	Ghana Industrial Holding Corporations
GLAB	Ghana Legal Aid Board
GLAXO	GlaxoSmithKline Pharmaceutical Corporation
GOG	Government of Ghana
GPRPSII	Growth and Poverty Reduction Strategy II
GWCL	Ghana Water Corporation Limited
GWP	Global Water Project
GWSC	Ghana Water and Sewerage Corporation
HIPC	Heavily/Highly Indebted Poor Countries
HIV	Human Immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and Communication Technology
IEA	Institute for Economic Affairs
IEIs	International Economic Institutions

IF	Integrated Framework
IFC	International Finance Corporation
IMF	International Monetary Fund
IOs	International Organisations
IPR	Intellectual Property Rights
IWAN	Integrated Water Resources Management
LDCs	Least Developing Countries
MDGs	Millennium Development Goals
MEST	Ministry of Environment, Science and Technology
MeTA	Medicine Transparency Alliance
MLGRDE	Ministry for Local Government, Rural Development & Environment
MNCs	Multinational Corporations
MOH	Ministry of Health
MoWCA	Ministry of Women & Children's Affair
MSF	Medicins San Frontieres/Doctors without Borders
MoWWH	Ministry of Water Works and Housing
NEPAD	New Partnership for Africa's Development
NGOs	Non-Governmental Organisations
NHC	National House of Chiefs
NHIA	National Health Insurance Authority
NIC	National Insurance Commission
NICs	Newly Industrialised Countries
NIRP	National Institutional Reform
NORIPP	Northern Region and Integrated Project
PHLA	Populations with Highest Level of Aids
PRSP	Poverty Reduction Strategy Paper
PURC	Public Utility Regulatory Commission
PWD	Public Works Department
QUAD	US, EU, Japan and Canada

RBA	Regional Bureau for Africa
SADA	Savannah Accelerated Development Agency
SADAC	South African Community Development
SAPs	Structural Adjustment Programmes
SD	Sustainable Development
SDGs	Sustainable Development Goals
SIDA	Swedish International Development Agency
SWAP	Sector-Wide Approaches to Project
TIM	Trade Integration and Mechanism
TNCs	Transnational Corporations
TRIPS	Trade Related Aspects of Intellectual Property Rights
TWN	Third World Network
UDHR	Universal Declaration of Human Rights
UHS	United Health System
UN	United Nations
UNCED	United Nations Convention on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCRC	United Nation's Convention of the Rights of the Child
UNCTAD	United Nations Conference on Trade and Development
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	UN General Assembly
UNICEF	United Nations Children Fund
UNITAR	United Nations Institute for Training and Research
UNITAR	United Nations Institute for Training and Research
UNSC	UN Security Council
US	United Sates of America
USAID	US Agency for International Development

USTR	United States Trade Representative
VERs	Voluntary Export Restraints
WACII	Water for African Cities Phase II
WAJU	Women and Juvenile Unit of Ghana Police Service
WB	World Bank
WHO	World Health Organization
WIPO	World Intellectual Property Organisation
WRC	Water Resources Commission
WSSD	World Summit and Sustainable Development
WTO	World Trade organisation
WWII	Second World War

Chapter 1: INTRODUCTION

1.1. Rationale of the Study

One principal objective of the establishment of the World Trade Organisation (WTO) is to improve the social and economic wellbeing of people by creating and distributing wealth evenly among the world's population through free trade.¹ As a developing country with the aspiration to build a prosperous economy to promote the economic, social and political stability of her people, Ghana signed and ratified the WTO Agreement in 1995.² The key aim of this research is to examine WTO's trade liberalisation agenda on access to water and medicines in Ghana.

Ghana is chosen for this research because there is very little scholarship dealing with problems associated with the trade liberalisation of water and medicines sector in Ghana. First, on the social front, Ghana continues to struggle under the WTO regime in providing clean drinking water to the majority of Ghanaians. This is because the privatisation of the water sector has increased water prices beyond the means of the ordinary Ghanaians.³ The result is that for the majority of the unemployed, poor and the elderly in the country, accessing water for domestic and sanitation purposes becomes a problem.⁴ Equally, there is the danger of increased health problems facing a large section of people living in cities and towns where access to water is purely determined

¹ Joseph Stiglitz, *Making Globalization Work*, (Allen Lane, London 2006)65-68

² Osei-Ntiri K et al , "Trade Regimes and Domestic Industrial Policies: Their Impact on the Development of Textile & Apparel Industry in Ghana" (2013) the International Journal of Business & Management, 10

³ Discussed further in the chapter on access to water (chapter 3)

⁴ Sarah Grusky, 'Privatisation Tidal-Wave IMF/World Bank Water Policies and the Price paid by the Poor' in *The Multinational Monitor*, (2002) 22 (9) THE MULTINATIONAL MONITOR < <http://multinationalmonitor.org/mm2002/01/.september/sep01corp.html>, > accessed 26th August 2013.

by one's ability to pay for the resource.⁵ Thus, the trade liberalisation schemes effectively placed water beyond the means of majority of Ghanaians as water management was entrusted into the hands of private foreign contractors.⁶

Second, medicines is equally a crucial resource in promoting the health and wellbeing of people. However, under the WTO's TRIPS Agreement coupled with the outbreak of life threatening disease, such as HIV/AIDS, most Ghanaians especially women and children are being denied access to antiretroviral medicines. The result is that thousands of human lives are wasted daily in Ghana.⁷ This study examines some of the legal reforms which have occurred in Ghana's legal system in respect of the WTO's TRIPs agreement. For example, the 2004 Patent Act which integrates the commitments under the TRIPS Agreement in Ghana is explored against the backdrop of problems relating to access to medicines in the case of patients infected with HIV/AIDS.⁸

Although the WTO's free trade agenda has brought some benefits to developing countries in respect of granting them access to the markets of developed states, this study will show that TRIPS and GATS are two agreements⁹ that have not yet fully managed to promote the social and economic developments of Ghana and her people.

⁵ Marieke Adank et al, "Towards integrated urban water management in the Greater Accra Metropolitan Area" (2011) SWICTH, < <http://switchurbanwater.lboro.ac.uk/outpout>, > accessed 20th May 2016.

⁶ Franklin Obeng-Odoom, "The Informal Sector in Ghana under Siege" (2011) *Journal of Development Studies*, 27 (3-4) 378-380

⁷ K. Oppong Asante, "Social support and the psychological wellbeing of people living with HIV/AIDS in Ghana" (2012), < www.ajol.info/index.php/article/viewFile/1820/71963 > accessed 20th November 2016

⁸ Discussed further in the chapter on access to health/medicine (chapter 4).

⁹ The TRIPS and GATS agreements constitute a major part of discussions in chapters two and three if this study.

Moreover, this thesis assesses the crucial role played by the World Bank (WB) and the International Monetary Fund (IMF) in supporting privatisation activities in most developing states. The WTO works in close cooperation with the WB and IMF as these institutions formulate and implement the different elements of global economic policy with impacts on the developing world.¹⁰ Some scholars¹¹ argued that the WB and IMF support is provided by pushing through unfavourable economic programmes in those developing states.¹² For example, the Structural Adjustment Programme (SAPs) and privatisation of national industries in Ghana and other African states in the early 1990s did little to improve the wellbeing of those citizens.¹³ Ghana came under severe pressure from the WB and IMF to privatise most of her indigenous industries despite the fact that these industries play very crucial role in the country's growth.¹⁴ Similarly, Ghana privatised her water industry as a conditionality prescribed by the WB and IMF in order to have her international loans renewed.¹⁵

The other negative impact felt in most developing countries is that infant domestic industries are being crowded out and local expertise, innovation and skills are lost to

¹⁰ Article 3 of the Agreement establishing the WTO; See generally: The Agreement between the WTO, IMF and the World Bank (November 1996) < https://www.wto.org/english/thewto_e/coher_e/wto_wb_e.htm > accessed 20th March 2005

¹¹ Robert O Keohane, "Accountability in World Politics" (2006) Scandinavian Political Studies. see also e.g. Romain Wacziarg and Karen Horn Welch, the World Bank Economic Review, (2008) < www.oecd-library/docs/dowloads/51gsjhvj78nv.pdf >; and John W. Head, *Losing the Global Development War: A Contemporary Critique of the IMF, the World Bank and the WTO*, (Martinus Nijhoff Publishers, Leiden-Netherlands (2008)

¹² John Nellis, "Privatisation in Africa: What has happened? What is to be done?" (2005) Privatisation, Regulation, Corporation Governance (PRCG) < www.ageconsearch.umn.edu/bitstream/12200/1/wp050127.pdf > accessed 15th February 2016
Nellis argues that developed countries' determination to reap commercial profits through the TRIPS agreement creates disadvantage in the health delivery among developing countries.

¹³ Shareen Hertel and Lanse Minkler, *Economic Rights: Conceptual Measurement, and Policy Issues* (Cambridge University Press Cambridge, 2007) 325-340

¹⁴ Ibid.

¹⁵ Ann-Christin Sjolander Holland, *The Water Business: Corporations versus People* (Zed Books, London, 2005); see also e.g. K. Agyeman, "Privatisation of water in Ghana: Stopped in its Tracks or a Strategic Pause?" (2007) 64 (5) *International Journal of Environmental Studies*, 67

foreign MNCs.¹⁶ To many critics of the WTO,¹⁷ this is because Article 3 of the Agreement establishing the WTO (Most Favoured Nation principle), a foreign investor should be treated equally as the domestic industry irrespective of wealth and resources.¹⁸ This provision plays a major role in decimating most of the local Ghanaian industries which are vital to the growth of the national economy by way of generating local employment and capacity for productivity.¹⁹

2. Background of the Research

Prior to signing and ratifying the WTO agreement, Ghana's economy had been predominantly centralised by successive military regimes, particularly during the 1979-1981 revolutionary era of Flt. Lt. Jerry John Rawlings. However, between 1983 and 1991, the government's efforts to improve the infrastructural developments of social and economic activities of the country led it to implement the WB/ IMF's sponsored SAPs.²⁰

The SAPs were being imposed upon Ghana by the WB and IMF which collaborate with the WTO to press Ghana to implement liberalisation in water services.²¹ The effects of the privatisation of the water sector played a significant role in limiting access to water among the majority of Ghanaians. The privatisation of water services in Ghana as well

¹⁶ Ellis Osabutey, Karen Williams and Yaw A. Debrah, "The Potential for Technology and Knowledge Transfer between Foreign and Local Firms: A Study of the Construction Industry in Ghana"(2014) *Journal of World Business*, 11

¹⁷ Joseph Stiglitz, *Making Globalization Work*, (n 1); see also Juanaid Subhan, "Scrutinized: The TRIPS Agreement and Public Health" (2006) *MJM*, 25; see also: Thomas Pogge, "Growth and Inequality: Understanding Recent Trends in and Political Choices" (2008) 55(1) *Dissent Magazine*, 66-75; James Smith, "Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement" (2004) 11 (3) *Review of International Political Economy*, 542-573

¹⁸ Article II of the WTO, *the Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, Cambridge, 1994)

¹⁹ John Blewitt, *Undermining Sustainable Development* (2nd edn Earthscan, London 2015) 21

²⁰ Richard Sandbrook, *The Politics of Africa's Economic Recovery* (Cambridge University Press, Cambridge 1993) 14-16

²¹ Nancy Alexander, "the Role of IMF, the World Bank and the WTO liberalization and Privatization of Water Services Sector" (2005) *the Citizens Network on Essential Services*, 25

as the enactment of the 2004 Patent Act of Ghana which was in compliance of the WTO's TRIPS Agreement further contributed to undermining access to HIV/AIDS medicines in Ghana.

Economically, there have been many job losses with little job creation in Ghana since the country joined the WTO in opening her markets to foreign enterprises.²² Although there was initial access being granted to Ghanaian products into the markets of the developed countries, Ghana's economy is still underperforming as it has been controlled by the privatisation and macro-economic policies prescribed by the IMF/WB.²³ According to Stiglitz, the IMF/WB policy of not consulting with a respective country on its economic needs but rather imposing macro-economic solutions is harmful to most economies around the world including Ghana.²⁴ Stiglitz likened it to a driving instructor not allowing the learner driver to have control of the steering wheel.²⁵

Furthermore, with the privatisation of the Ghana Water and Sewerage Corporation (GWSC), Ghana Industrial Holding Corporation (GIHOC) and many other public institutions, ownership of essential services (e.g., water and medicines) was transferred to MNCs and a few individual affiliates of the government.²⁶ The privatisation of the above public institutions meant that many Ghanaians lost their jobs and livelihoods,

²² Silke Trommer, *Transformations in Trade Politics: Participatory Trade in West Africa* (Routledge Abingdon-Oxford 2014) 143- 56

²³ Mayur Patel, "Economic Partnership Agreements between the EU and African Countries: Potential Development Implications for Ghana" (2007) *The Ethical Globalization Initiative*, 18

²⁴ Joseph E. Stiglitz, Justine Yifu Lin and Celestin Monga, "The Rejuvenation of Industrial Policy" (2013) Policy Research Working Paper No.6628 < [www.documents.worldbank.org>WPS6628](http://www.documents.worldbank.org/WPS6628)> accessed 14th June 2014

²⁵ Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton & Company, London 2013) 1-65

²⁶ C. Conteh, F.L.K. Ohemeng, "The Politics of of Decision-making in Developing Countries: A Comparative Analysis of Privatization decisions in Botswana and Ghana" (2009) *Public Management Review*, 57-77

thereby increasing poverty among the majority of Ghanaians.²⁷ Without effective government control mechanisms to monitor the activities of the privatised institutions in Ghana, many jobs were lost through redundancies; whilst access to water was priced beyond the means of the ordinary Ghanaian.²⁸ Most water services to the rural areas of the country were discontinued because they were regarded unprofitable.²⁹

According to Sandbrook:

“Contrary to the expectations of the IMF and Rawlings government, foreign investors have shown no interest in Ghana despite its extensive economic restructuring. The enormous debt load will constrain further growth. Many Ghanaians seem not to have benefited from the improvement aggregate indicators.”³⁰

This suggests that ordinary Ghanaians have not seen any significant development in their lives in light of the various IMF/WB economic policies as well as the WTO Agreements signed by Ghana. Moreover, this also means that the dynamics of multinational treaty-making has in some ways empowered international organisations to implement policies which are capable of undercutting the wellbeing of citizens in developing countries, especially Ghana.³¹ Sanbrook’s statement above further reflects the economic and social gaps which have been created among Ghanaians and the role played by the powerful member states of the WTO. As an example, the powerful states – US, European Union, Canada and Japan (Quad states) – continue to play crucial roles in determining the venue and issues to be negotiated at WTO Rounds just as transpired

²⁷ *ibid*

²⁸ *ibid*

²⁹ Kafui Afi Ocloo, “Harnessing Local potentials for Peri-Urban Water Supply in Ghana – Prospects and Challenges” (A PhD Thesis, University of Dortmund, Germany, 2011) < www.eldorado.tu-dortmund.de, > accessed 20th May 2016.

³⁰ Richard Sandbrook, (n 20) 21

³¹ Jose E. Alvarez, *International Organizations as Law-makers*, (University Press Oxford, Oxford 2005) 283

at the Uruguay Round.³² The ability of those WTO's powerful countries to negotiate trade deals to their advantage has further added to the plight of most Ghanaians.³³ The negotiation of the Uruguay Round was principally sponsored by the Quad states to produce the TRIPS and GATS Agreements among others.³⁴ However, in spite of the purported benefits of TRIPS and GATS to developing countries and Ghana, this research will show (chapters 3 and 4) that most Ghanaians living in the rural areas have limited access to water and medicines.

With Ghana's social and economic status being stifled in respect of the economic policies of the IMF, WB and the WTO, the following sections explore the role of the United Nations (UN) in the context of human rights and sustainable development in Ghana. It also discusses the role of International Economic Institutions (WTO, WB and IMF) in Ghana. This discussion is necessary as it highlights Ghana's human rights obligations as well as economic and sustainability commitments at various international platforms.

2.1 The United Nations and Ghana

Ghana joined the UN on 8th March 1957 in order to protect and promote the social, economic and cultural wellbeing of Ghanaians in line with the organization's objectives and values.³⁵ There is no doubt that the UN's objective of promoting human dignity through peaceful resolution of inter-states conflicts after the Second World War needed a proactive social and economic strategy. In order to fulfil this objective, the UN devoted

³² Jose E .Alvarez (n.31)286

³³ This issue is further discussed in chapter 2

³⁴ P. Drahos, "Negotiating Intellectual Property Rights: between Coercion and Dialogue" (2002) Global Intellectual Property Rights, 161-181

³⁵ The UN Member States, < www.un.org/en/members/index.shtml,> accessed 1st January 2016.

an aspect of its operations towards advancing human wellbeing,³⁶ as shown in the subsequent discussion.

Firstly, the UN realised that promoting peaceful co-existence among human beings in the world is realisable through social and economic mechanism. In this regard, the UN was determined to restore human dignity with a commitment to prevent the recurrence of the misery and atrocities which characterised the Second World War.³⁷

Secondly, to affirm its commitment in light of the above objective, the UN has moved a step further to ensure that the social, economic and cultural wellbeing of humanity is protected through the agency of the Committee on Economic, Social and Cultural Rights (CESCR).³⁸ This Agency has the responsibility of coordinating and managing with international organisations and national governments, policies and programmes to promote the practical realisation of such benefits among human populations over the world. This commitment is also consolidated further by Article 55 of the UN Charter in proposing that “higher standard of living”,³⁹ solutions for social, economic, health⁴⁰ and universal respect of human rights⁴¹ should be a priority of member States. Thus, Ghana’s membership to the UN requires her to adopt social and economic policies and programmes which will advance the wellbeing of Ghanaians.

³⁶ Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds) *The Charter of the United Nations: A Commentary* (3rd edn, vol.1 Oxford University Press, Oxford,2012) 62

³⁷ Article 1(3) of the UN Charter, (United Nations Geneva,1997) 5

³⁸ Article 1 (3) (4) of the UN Charter, *ibid.*

³⁹ Article 55(a) of the UN Charter, *ibid*

⁴⁰ Article 55(b) of the UN Charter, *ibid*

⁴¹ Article 55(c) of the Un Charter , *ibid*

Third, to further promote the attainment of the above objectives of the UN, a specialised Agency - the Economic and Social Council (ECOSOC) was established to help member States protect the dignity of their citizens in some of the following ways.

The ECOSOC has a responsibility to initiate and make recommendations in social, economic and cultural spheres while member States are expected to implement programmes to advance the social and economic wellbeing of their citizens.⁴² For example, Ghana's participation in the UN Millennium Development Goals (MDGs) programme. However, it has achieved mixed results in the country.⁴³ Also, it must be pointed out that the UN's recommendations are not mandatory and therefore member States are not compelled to abide by it.

Another function of the ECOSOC is to ensure that human rights are protected in all member states.⁴⁴ To promote the inalienable rights of humanity, the ECOSOC has been given the responsibility to make recommendations by proposing strategies and measures which can be adopted in member states to advance the protection of human rights.⁴⁵ Although these recommendations are not obligatory, yet the ECOSOC insists that no individual should be discriminated against on grounds of sex, race, colour or religion in light of human rights. ⁴⁶Thus, there are several Resolutions of the UNSC and

⁴² Article 62 (1) of the UN Charter, *ibid.*

⁴³ Andrew D. Oxman and Alle Fretheim, "Can Paying for Results help to achieve the Millennium Development Goals? Overview of the effectiveness of results-based financing" (2009) 2 *Journal of Evidenced-Based Medicine*, 76

⁴⁴ Article 62(3) of the UN Charter (n.37)

⁴⁵ UNGA A/HRC/RES 1714-Human Rights and Transnational Corporations and other Business Enterprise, <www.business-humanrights.org/sites/default/files/.../rights-transnational-corps.eng-6-juli-2011.pdf,>accessed 13th February 2016

This above UN Resolutions called upon member-States governments and Transnational Corporations to work together to protect and promote human rights through legislative reforms and human-centred business strategies.

⁴⁶ Article 62, (n37)

the UNGA to protect human rights as well as social, economic and cultural rights.⁴⁷ Examples of such Resolutions had been discussed throughout this thesis, especially in chapters 3 and 4 where detailed examination of access to water and medicines are explored.

As a strategy to maintain peace and security in line with its cardinal objective, the UN delegates responsibilities to some of its specialised agencies to work with member states and offer specialised assistance to respective member States to protect the welfare of their citizens.⁴⁸ For example, as chapter 4 will show, the United Nations International Children's Fund (UNICEF) and World Intellectual Property Organisation (WIPO) had offered Ghana specialist assistance in drafting the 2004 Patent Act to help meet her international obligation in light of the WTO's TRIPS' Agreement. Also, the UNICEF had played an active role in helping Ghana to implement the Child Convention,⁴⁹ which is purported to promote the welfare of children with respect to access to health and medicines.⁵⁰

2.2 Role of Human Rights in Ghana

The UN has been instrumental in the promotion and protection of human rights after the Second World War. Although several academic views have been expressed in respect of the genesis of human rights, it is believed that the late President Franklin D.

⁴⁷ UN Documents and Resolutions-Ohchr, < www.ohchr.org/en/hrbodies/hrcindex.aspx, > accessed 13th February 2016

⁴⁸ Article 66 (2) of the UN Charter (n.37)

⁴⁹ The UN Convention on the Right of the Child (1989)

⁵⁰ UNICEF Ghana-Health and Nutrition, < www.unicef.org/Ghana/health_nutrition_7522.html > accessed 13th February 2016

Roosevelt's speech in 1941 served as the foundation block for human rights.⁵¹ According to Buergenthal et al, the four freedoms are: 'freedom of speech and expression', 'freedom of everyone to worship God in his own way', 'freedom from want' and 'freedom from fear'.⁵²

Every member of the UN has an obligation to respect international law by adopting measures to ensure the well-being of their members in accordance with UN legal requirements.⁵³ Impliedly, the above provisions of the UN Charter enjoin member States to accord the highest deference to the Charter over and above individual municipal laws in the event of a conflict.⁵⁴ This way, it is hoped that the effort to promote the wellbeing of humanity, security, peace and stability would be achieved in the world.⁵⁵ Thus, Ghana has a responsibility to ensure that her domestic Constitution, by-laws and other political policies are espoused in a way that fulfils the values that the UN stands for. Moreover, it requires Ghana not to enter into international agreements which might undermine the human rights of Ghanaians with respect to accessing water and medicines. Tomuschat states that one principal objective of the UN is to protect and promote human rights.⁵⁶ Thus, as member States of the UN, each country has an obligation in respect of the UN Charter to adopt measures domestically in protecting human dignity with respect to social and economic means of livelihood.

⁵¹ Thomas Buergenthal, Dinah Shelton and David Stewart, *International Human Rights* (3rd edn West Publishing Co USA 2004) 27-28

⁵² Thomas Buergenthal et al *ibid*.

⁵³ The United Nations Charter, Article 2 (2) (n.37)

⁵⁴ Anthony Aust, *Handbook of International Law*, (2nd edn Cambridge University Press Cambridge 2010) 196-197

⁵⁵ Article 103 of the UN Charter, (n37)

⁵⁶ Christian Tomuschat, *Human Rights: Between Idealism and realism* (3rd edn Oxford University Press: Oxford 2014) 183

This also suggests that social and economic rights are as equally important as civil and political rights. Thus, the view that social and economic rights are aspirational or expensive to implement are superfluously deployed by some governments or organisations to shirk their obligation to protect their people.⁵⁷ In this light, the government of Ghana has to meet her social and economic obligations to protect and promote the wellbeing of Ghanaians. Ostergard and Sweeney argue that human beings cannot engage in any effective political and civil liberty system or enjoy their human rights if they cannot access health, water, food, shelter or peace.⁵⁸ Hence, governments and organisations which frame arguments in an attempt to restrict their citizens' access to water, food and medicines are violating the basic human rights of people in their respective countries.

Governments have an obligation to ensure that human rights are protected, respected and promoted in accordance with the Universal Declaration of Human Rights.⁵⁹ Oloka-Onyango points out that human rights can be effective in the lives of ordinary citizens when individual governments adopt constitutional and legal mechanisms to guard and advance social, economic and cultural needs of all citizens.⁶⁰ Indeed, Ghana has an obligation as a UN member State to protect the dignity of her citizens through human rights. Ghana appears to be responding to this obligation with

⁵⁷ Ibid.

⁵⁸ Robert L. Ostergard, Jr. and Shawna E. Sweeney, "Intellectual Property Rights, the Right to Health, and the UNDHR: Is Reconciliation Possible?" in Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights: six Decades after the UNDHR and Beyond* (MPG Books UK Britain, 2011) 186

⁵⁹ The Universal Declaration of Human Rights, < www.un.org/Overview/rights.html > accessed 20th May, 2016.

⁶⁰ J. Oloka-Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn or Retreating Horizon" (2000) *Buff. Hum. Rts. L. Rev.* 556

the establishment of the Commission for Human Rights and Administrative Justice (CHRAJ)⁶¹ which is explored in chapter 5.

2.3 The Role of Sustainable Development in Ghana

The significance of discussing sustainable development in light of this thesis are twofold: first, as mentioned above, paragraph 1 of the agreement establishing the WTO accords prominent deference to sustainable development by urging its member countries to adopt measures to promote the wellbeing of their respective citizens.⁶² Second, Kuhlman and Farrington argue that irrespective of the contradictory views expressed by scholars, policy-makers and practitioners, sustainable development primarily seeks to advance the welfare of humanity.⁶³ Thus, the interrelationship of promoting human wellbeing under the aegis of free global trade and sustainable development are complementary towards safeguarding human wellbeing.

The concept of sustainable development is featured in many development and socio-economic projects.⁶⁴ In this study, principle 4 of the Rio Declaration (1992) is of particular relevance. Principle 4 states that: “in order to achieve sustainable development, environmental protection shall constitute integral part of the development process and cannot be considered in isolation from it.”⁶⁵ The importance of sustainable

⁶¹ The CHRAJ’s role towards the promotion of human rights in Ghana has been examined in chapter 5 of this thesis.

⁶² The Agreement establishing the WTO < http://www.wto.org/English/dcos_e/legal_04-wto.pdf > accessed 20th October 2016,

⁶³ Tom Kuhlman and John Farrington, “What is Sustainability” (2010) *Sustainability*, 33436-3438; see also: Giles Atkinson (ed), *A Handbook of Sustainable Development* (2nd edn, Edward Elgar, Cheltenham, 2014)1

⁶⁴ Some examples of the SDG projects are: promotion of access of potable water to all by the year 2020; universal access to health, and efforts to combat hunger with the provision of schools feeding programmes.

⁶⁵ The UN Rio Declaration, < www.jus.uio.no/Im/environmental.development.rio.declaration.1992/portrait4.pdf > accessed 20th January 2016

development from the perspective of Ghana would mean that the country, institutions and in whichever capacity they operate must adopt measures in light of the Rio Declaration's principle 4 to promote the wellbeing of her peoples by protecting access to resources like water and medicines. Fitzmaurice contends that the Aarhus Convention empowers NGOs to initiate legal action in respect of preserving the environment, which is the bedrock of sustainable development; without showing any specific interest.⁶⁶ This offers a novel and transformative means of preserving the environment with the view to achieve sustainable development.

Puvimanasinghe argues that the WB and other international banks have embedded the three pillars (environment, social and economic) of sustainable development as part of their lending policy.⁶⁷ In addition, Grear and Kotze suggest that sustainable development requires public engagement and participation which draws on all citizens in a bottom-up strategy to achieve effective outcome.⁶⁸ This statement suggests that sustainable development will produce a better result where organisations and the people in a community collaborate with a common objective to protect the wellbeing of society. However, there are criticisms regarding the weak nature of such integration. For example, Lehtonen explains that the social element of the sustainable development constitutes a weakness in sustainable development because it does not provide

⁶⁶ Malgosia Fitzmaurice, "Environmental Justice through International Complaint Procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation" in Malgosia Fitzmaurice (ed) *Research Handbook on International Environmental Law* (Edward Elgar Cheltenham-UK 2010) 213

⁶⁷ Shyami Fernando Puvimanasinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law*, (Martinus Nijhoff Publishers, Leiden 2007) p. 108

⁶⁸ Anna Grear and Louis J. Kotze, (eds) *Research Handbook on Human Rights and the Environment*, (Edward Elgar, Cheltenham- UK, 2015)

adequate analysis towards improving the environment.⁶⁹ Waas et al argue that sustainable development still remains an elusive concept because it is harder to integrate the three pillars effectively since one pillar cannot be achieved without the others.⁷⁰ Thus, sustainable development as a concept is not devoid of controversies. In addition, Humphreys notes that: “international law is a voluntary system, so a corporation which does not wish to be bound by the new convention can usually ignore it, and there is no reason to believe that corporations which routinely breach national environmental law would agree to a new international environmental law.”⁷¹ In this regard, one can also see the force with which some corporations work to undermine the prosperity of sustainable development.⁷²

The preamble to the Agreement establishing the WTO⁷³ echoes sustainable development by urging its member states, especially developing countries, to embark upon activities aimed at developing their respective economies and social policies with great deference toward protecting the wellbeing of humanity.⁷⁴ At the Doha Ministerial Conference, for example, developed countries members of the WTO made commitments to transfer technology into developing countries so as to promote sustainable development through environmental protection, which will advance the

⁶⁹ Markku Lehtonen, “the Environment- Social interface of Sustainable Development: Capabilities, Social capital, institutions, (2004) 49 (2) Science-ct, 43

⁷⁰ Tom Waas, Jean Huges, Aviel Verbruggen and Tarah Wright, “Sustainable Development: A Bird’s Eye View”, (2010) 3 (10) Sustainability, 1637-1661

⁷¹ David Humphreys, “Logjam: Deforestation and the Crisis of Global Governance” (2007) 34 Environmental Conservation (2007) 63

⁷² David Graham and Ngaire Woods, “Making Corporate Self-Regulation Effective in Developing Countries” (2006) 34 (5) World Development, 869

⁷³ The Marrakesh Agreement establishing the WTO <http://www.wto.org/English/dcos_e/legal_e/04_wto.pdf> accessed 20th January 2016

⁷⁴ The Marrakesh Agreement establishing the WTO, <http://www.wto.org/english/docs_e/legal_e/04_wto.pdf, > accessed on 20th January 2016.

prosperity of their peoples.⁷⁵ Thus, Ghana aims to incorporate the Sustainable Development Goals (SDGs)⁷⁶ in her New Partnership for Africa's Development (NEPAD) Documents 1 and 2 respectively.⁷⁷ Notwithstanding international commitments⁷⁸ on sustainable development, most developing countries⁷⁹ especially Ghana has made little progress.⁸⁰ This may be partly due to the fact that developed countries have failed to fulfil commitments made at negotiations (Doha Ministerial), TRIPS and GATS negotiations as well as at other international forums to assist developing countries to achieve sustainable development. According to Islam: "limited sway of influence among developing countries in comparison with developed countries with respect to implementing international law hampers their capacity to deliver a just, participatory, and inclusive world order to collectively address the pressing global issues of common interest, such as environmental degradation, of the twenty-first century."⁸¹ Faced with limited prospects to grow economically, most developing countries (including Ghana) attempt to exploit their natural resources without adopting appropriate measures and care in protecting the wellbeing of their peoples.⁸²

⁷⁵ The Doha Ministerial Conference < www.wto.org/english/thewto.e/minist.e/minsdecl.e.htm, > accessed on 20th February 2016

⁷⁶ UN Sustainable Development Goals (SDGs) adopted 25th September 2015 < www.un.org/sustainabledevelopment > accessed 13th December 2016

⁷⁷ NEPAD Document 1 & 2 < www.nepad.org, > accessed 20th May 2016

⁷⁸ United Nations Millennium Development Goals (MDG) (2000) < www.un.org/millenniumgoals: > the eight MDG spans halving extreme poverty rates to preventing the spread of HIV/AIDS.

The Sustainable Development Goals, < <http://sustainabledevelopment/sustainable-development-goals>, > the sustainable goals begins with: "end poverty – global partnership for sustainable development.

⁷⁹ NEPAD documents, supra note 70.

⁸⁰ Gavin Hilson, Sadia Mohammed Banchirigah, "Are Alternative Livelihood Projects Alleviating Poverty in Mining Communities? Experiences from Ghana" (2010) *Journal of Development Studies*, 24-25

⁸¹ M. Rafiqul Islam, "History of the North-South Divide in International Law" in Shawakat Alam et al (eds), *International Environmental Law and the Global South* (Cambridge University Press, Cambridge 2015) 49; see also: Ruth Cordon, "Unsustainable Development" in Shawakat Alam et al (eds), *International Environmental Law and the Global South*, (Cambridge University Press, Cambridge 2015) 70

⁸² M. Rafiqul Islam, (n 81)37

As the discussion in chapter 2 shows, the intended goals of sustainable development have been far from encouraging in Ghana and the government, agencies of government as well as the MNCs who operate in Ghana are less receptive to promoting sustainable development. For example, most MNCs operating in Ghana are responsible for pollution to farmlands and rivers bodies and fail to promote sustainable development.⁸³

⁸³ AY Karikari, OD Ansa-Asare, “ Physico-chemical and microbial water quality assessment of Densu River in Ghana” (2006) 10 (1) African Journal of Applied Ecology, 2-10

2.4 The International Economic Institutions, Developing Countries and Ghana

The aim here is to assess the impact of the economic policy recommendations given by the IMF/WB and WTO in developing countries, and the use of privatisation as a conditionality for loans in Ghana. Several differing views have been expressed by academics and critics in light of the social and economic policy recommendations which were prescribed to many developing countries by the IEs, particularly the IMF and the WB. The majority of these views emphasised the point that the IMF and the WB often have good intentions to promote the wellbeing of developing countries.⁸⁴ However, the implementation of such policies coupled with political interferences in the sovereign affairs of those countries have brought about unhealthy social and economic crises upon the peoples in developing countries.⁸⁵

Likewise, in the case of Ghana, the IMF and WB introduced economic policies of Structural Adjustment and liberalisation of service sectors from the latter part of 1980s to the latter part of 1990s.⁸⁶ These policies did more harm than good in protecting and promoting the social and economic prosperity of Ghanaians.⁸⁷

Stiglitz argues that although trade liberalisation holds sway to improve the lives of humanity without measures to safeguard the vulnerable economies in developing countries, it creates hardship. Unfortunately, the one-size- fits all approach adopted by

⁸⁴ Marc Aubion, "Fulfilling the Marrakesh Mandate on Coherence: Ten Years of Cooperation between the WTO" (2007) IMF and World Bank, Discussion Paper No.13, < <http://2012books.lardbuckets.org/.../s10-02-what-is-the-role-of-the-imf-an-html>, > accessed 13th February 2016

⁸⁵ Joseph E. Stiglitz, "What I learned at the World Economic Forum" in William J. Dricoll and Julie Clark (eds) *Globalization and the Poor Exploitation or Equalizer*, (IDEA: 2003)

⁸⁶ Darko-Kwabena Opoku "From a success story to a highly indebted poor country: Ghana and Neoliberal reforms" (2010) 28 (2) *Journal of Contemporary African Studies*, 155-175

⁸⁷ Kwame A. Ninsin, *Ghana's Political Transition- -1990-1993: Selected Documents*, (Freedom Publications: Accra 1991) 131-139

the IMF and WB had been responsible for large scales of unemployment in most developing countries.⁸⁸ In addition, Donnelly points out that human rights can be enjoyed by citizens through the agency of states, therefore, states have an obligation to work in concert with international economic institutions to protect and promote human wellbeing in the spheres of social and economic rights.⁸⁹

Moreover, Stiglitz has suggested once more that the economic policies of the IMF and the WB in collaboration with the WTO have betrayed developing countries because such strategies are purely underpinned by financial greed.⁹⁰ However, greed and the desire to maximise profits at the expense of human development has resulted in unfavourable economic strategies being imposed on developing countries.⁹¹

Alluding to article 103 of the UN Charter, Ssenyonjo explains that the IMF and the WB have a responsibility to respect the dignity of humanity in saying that: “the IMF and the World Bank (through their credit arrangements and policies) must refrain from undermining the ESCR for all persons, especially the disadvantaged and marginalised individuals and groups.”⁹² The poor state in which majority of Ghanaians lived post – Structural Adjustment- continues to worsen and it indicates that most Ghanaians struggle economically and socially in respect of the restructured economic policies.

⁸⁸ Joseph Stiglitz, “An Agenda for the Development of Trade Negotiations in the Aftermath of Cancun” (2004) IPD Working paper , 1 May 2004 57-119

⁸⁹ Jack Donnelly “In Defense of the Universal Declaration Model” in Gene M. Lyons and James Mayall (eds) *International Human Rights in the 21st Century: Protecting the Rights of Groups* (Rowman & Littlefield Publishers, USA 2003) 49

⁹⁰ Joseph Stiglitz, *Making Globalization Works* (n1)54 -56

⁹¹ Alasdair I. Macbean, *Export Instability and Economic Development*, (Routledge: Abingdon 2011) 31

⁹² Manisuli Ssenyonjo, “The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural rights?” in Manisuli Ssenyenjo (ed) *Economic, Social and Cultural Rights* (Ashgate Publishing, Farnham, UK 2011) 93

Moreover, Schrijver and Weiss argue that sustainable development is unattainable where social and economic lives of ordinary citizens had been undermined by economic policies such as trade liberalisation.⁹³ They explain that in the spheres of commerce and trade, human well-being ought to be developed and protected.⁹⁴ However, the WTO's trade liberalisation agenda plays a key role in undermining the social safeguards of people.⁹⁵

Hertel and Minkler also criticised the IMF and the WB by explaining that although the SAPs brought some social and economic benefits into the lives of Ghanaians by improving access to some essential commodities (milk, soaps, sugar rice and oil); the strategy had several failures too.⁹⁶ They argue that the strategies proposed by the IMF and WB appear to have been a one-sided economic policy aimed at promoting the interests of MNCs, the USA, Canada, EU and Japan (Quad states).⁹⁷ Hertel and Minkler further suggest that the IMF and WB's economic policy recommendations imposed upon Ghana lacked traces of liberalisation or any growth oriented strategy. Rather, the military ruler of the era had the policies imposed on the country in an exchange for financial loans in order to build some infrastructures of the country.⁹⁸ Thus, domestically, most Ghanaians struggled to make ends meet in their social and economic lives.

⁹³ Nico Schrijver and Friedl Weiss (eds) *International Law and Sustainable development: Principles and Practices* (Martinus Nijhoff Publisher, Leiden-Netherlands 2004)

⁹⁴ Nico Schrijver and Friedl Weiss *ibid.*

⁹⁵ *Ibid.*

⁹⁶ Shareen Hertel and Lanse Minkler (eds) (n13) 325-340

⁹⁷ *Ibid.*

⁹⁸ *ibid*

3. Methodology and Method

This research extends across socio-legal spheres of studies by dwelling on a wider spectrum of social, economic, political disciplines as well as upon writings of the social science scholars. However, primarily, the nature of this research is doctrinal. The doctrinal method of investigation means that this research examined legal texts, laws and case reports in order to make legal normative judgment or suggestion in light of this study.⁹⁹ Manderson and Mor have suggested by explaining that doctrinal research is an attempt to find “cases and statutes relevant to a particular situation.”¹⁰⁰ This view finds significance in light of this methodology because several statutes and case laws have been identified, discussed and analysed in making the point that access to water and medicines should be promoted as human right to save human lives in Ghana.

Furthermore, Hutchinson and Duncan have also proposed in saying that: “doctrinal research provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predict future developments.”¹⁰¹ In light of the above statement, one can say that this research exists within the ambit of international economic law, especially WTO law, where states relate with other states, international institutions and NGOs under the

⁹⁹ A. Austin, *The Empire Strikes Back: Outsiders and the struggle over Legal Education* (New York University Press, New York 1998) 97-102

¹⁰⁰ Desmond Manderson and Richard Mor, “From Oxymoron to Intersection Epidemiology to Legal Research” (2002) *Law Text Culture*, 2

¹⁰¹ Terry Hutchinson and Nigel Duncan, “Defining and Describing What we Do: Doctrinal Legal Research” (2012) 83 (17) *Deakin Law Review*, 101

auspices of international law to achieve the economic, social and political wellbeing of one's country and peoples.¹⁰²

As a method of this research, a secondary/desk-top approach is adopted. This is explored in the subsequent paragraphs by synthesising the various data sources which constituted this study

First, this study has examined several primary and secondary materials. The primary materials include United Nations Treaties e.g., UDHR, ICESCR, UNCRC, ICEDAW as well as WTO materials ranging from the Agreement establishing the WTO, TRIPS and GATS and the Doha Ministerial Conference. In addition, this research has benefited from Constitutional materials from several countries; in particular: Brazil, Bolivia Columbia, Gambia, Ghana India and South Africa. These materials have been discussed and analysed to support several arguments in this thesis. For example, in chapters 3, 4 and 5, the discussions on access to water, medicines and justice as a human right have relied on the constitutional materials in the above countries to advance the arguments in those respective chapters. Similarly, this research has depended on UN Resolutions, Declarations and reports prepared by UN Rapporteurs to frame arguments covering access to water, medicines and justice.

Second, with respect to secondary materials, this research has relied on extensive literature covering academic text books, journal articles, case reports, and jurisprudence/commentaries from countries; such as: Brazil, Ghana, India and South Africa. These materials have played significant role in structuring critical thoughts and

¹⁰² Helene Ruiz Fabri, "Regulating Trade, Investment and Money" in James Crawford and Martti Kosekenniemi (eds) *the Cambridge Companion to International law* (Cambridge University Press, Cambridge, 2012) 370-371

discussions to recommend that Ghana can promote the dignity of Ghanaians by way of adopting legal and political policies as transpired in the above mentioned countries.

Moreover, extensive materials have also been accessed from useful websites during this study. For example, most of the materials are obtained from the websites of: South-Center, WTO, UN and WHO. In particular, the South-Center is a website which is owned by a non-governmental academic organisation devoted to researching on trade-related issues in developing countries.

4. Contribution of this Research

This research is framed within the context of trade liberalisation with particular reference towards access to water and medicines within the purview of the GATS and TRIPS Agreements of the WTO. This research concentrates on Ghana by examining UN institutions and MNCs whose policies and activities impact Ghana and, most especially the poor majority living in the rural parts of the country. The focus of this research, from the onset, is centred upon the impact of trade liberalisation on Ghana. However, as the research advanced, I realised that the issues of access to water and medicines are acute and need to be addressed through constitutional and international human rights instruments.

With respect to contribution to legal scholarship, there is no denying the fact that there exists a growing body of academic scholarship¹⁰³ on human rights to water and medicines with an attempt to situate these rights as universally enforceable. However, a chasm exists in these scholarships that address the right of access to water and medicines from perspective of GATS and TRIPS specifically. As a consequence, this thesis aims to explore the issue of access to water and medicines, and examine responses from the government of Ghana, judiciary, MNCs and the public.

5. Research questions and outline of chapters

The thesis aims to answer the following research question: To what extent have the GATS and TRIPS agreements of the WTO promoted the Human rights of access to water and medicines in Ghana?

In order to achieve the overall research objective, the following questions will be examined in each of the chapter:

Chapter 2: What is the position of developing countries' with respect to their negotiation capacity at the International Economic Institutions (IEIs), and how has Ghana promoted the social and economic welfare of Ghanaians under the WTO and IEIs?

¹⁰³ Melina Williams, "Privatization and the Human Right to Water: Challenges for the New Century" (2007) 28 (2) Michigan Journal of International Law, 469-504; Joo Young Lee and Paul Hunt, "Human Rights Responsibilities of Pharmaceutical Companies in Relation to Access to Medicines" (2012) 40 (2) The Journal of Law, Medicines and Ethics, 3-14

Chapter 3: How has the GATS Agreement promoted technical capability and access to water in Ghana; and how can Public-Private Partnership (PPP) be adopted as strategy in providing affordable means of accessing water in Ghana?

Chapter 4: To what extent has the TRIPS agreement promoted access to medicines in Ghana?

Chapter 5: how can the judicial and non-judicial institutions protect and promote access to justice in water and medicines in Ghana; and what measures can be adopted by the government to promote justice for poor Ghanaians in the spheres of social and economic rights?

The remaining part of this chapter gives an outline of the various chapters.

Chapter 2 explores the weakened position of developing countries in comparison with developed countries in the realm of international free trade and macro-economic policies introduced by the IEIS. This chapter proposes that the poor social and economic status of developing countries have impacted adversely on their negotiations skills at the international plane, especially at the WTO. With these poor economic and negotiation stance, developing countries are forced to accept and implement neoliberal economic policies recommended by the WB and IMF. The result is that majority of the citizens in developing countries suffer depravity in economic and social spheres. In addition, this chapter argues that Ghana's ambition to provide her people with a lasting and sustainable economic and social prosperity in accordance with the IMF/WB's economic reform policies have failed. This is due to Ghana's weakened economic and negotiation

powers which are inadequate to compete with the rich resources of the developed countries at the international plane.

Chapter 3 examines the WTO' GATS Agreement in light of its objective of promoting liberalisation in the services sector as a catalyst to improve the wellbeing of developing countries through transfer of technical assistance and provision of access to affordable services (water) at competitive prices in developing countries. This chapters opines that the privatisation of water services in Ghana has not only undermined the dignity of majority of Ghanaians but also enhanced the financial interests of the few Ghanaians elites and their corrupt counterparts working for the MNCs.

Chapter 4 considers access to medicines with respect the WTO's TRIPS Agreement and allied international agreements entered into by Ghana to promote the health of Ghanaians. Health is defined as a "state of complete physical, mental and social well-being."¹⁰⁴ This chapter argues that access to medicines is a recognised human right, which requires that the government of Ghana, private institutions as well as MNCs operating in the country should respect their obligations to protect the health of Ghanaians without comprise. This chapter concludes that, although human rights can work in collaboration with Patent law to advance the wellbeing of humanity by granting access to medicines; unfortunately majority of Ghanaians infected with deadly diseases have no hope of survival due to the provisions of the TRIPS Agreement.

Chapter 5 considers access to justice in the context of water and medicines under the judicial systems of the Ghana. The view is that whereas both judicial and non-judicial

¹⁰⁴ Holger Hestermeyer, *Human Rights and the WTO: the Case of Patents and Access to Medicines*, (Oxford University Press, Oxford 2007) 235

avenues exist for Ghanaians to make claims for their human rights to access water or medicines; the judiciary's indifference towards international law and human rights coupled with the limited powers to issue penal sanctions against violators of such rights, restrict access to the justice. This chapter further suggests that access to justice in respect of the above rights remain a challenge because there is limited provision of legal aid and pro bono activities to protect human rights in Ghana.

Chapter 6 concludes this research by summarising the arguments, lessons learnt along with the proposed recommendations to protect and promote access to water and medicines in Ghana.

CHAPTER 2: The International Economic Institutions, Developing Countries and Ghana

1. INTRODUCTION

The International Economic Institutions' (IEIs) policy of liberalising trade was promoted with a view to bring social and economic prosperity to the world's peoples especially those living in the developing countries.¹⁰⁵ The International Economic Institutions comprise: the World Bank (WB), the International Monetary Fund (IMF) and the World Trade Organisation (WTO), which were created after the Second World War. These institutions have the responsibility to improve human wellbeing through the activities of efficient economic planning and promoting free world trade among nations.¹⁰⁶

The WB was established after the Second World War (WW II), in 1949, to help undertake reconstruction of Germany and also to extend financial assistance to those developing countries which had acquired new international status as independent nations.¹⁰⁷ Lewis Preston, the World Bank's president in 1992, stated that: "sustainable poverty reduction is the overarching objective of the World Bank. It is the benchmark by which our performance as development institution will be measured."¹⁰⁸ Poverty reduction is not the only objective underlying the operations of the WB. It aims to help economics of nations around the world grow to promote wellbeing of the world's citizens in respect of

¹⁰⁵ John Williamson, "What Should the Bank Think About the Washington Consensus?", The World Bank Research Observer, (2000) < www.scienzpolitiche.unipg.it > accessed 30th July 2016

¹⁰⁶ Stephen A. Silard, "Recent Developments in International Organisations" (1989) American University International Law Review, 68

¹⁰⁷ Asad Ismi, "Impoverishing a Continent: The World Bank and the IMF in Africa" (2004) < www.asadismi.ws > accessed 5th February 2014, 7

¹⁰⁸ As cited by Oxfam Policy Department. Oxfam Policy department, *A case for Reform: fifty Years of the IMF and the World Bank* (Oxfam Publication, UK, 1996).

generating employment, education, health and sustainable environmental protection with benefits spreading to all parts of the world.¹⁰⁹

The IMF is one of the Bretton Woods institutions founded in 1944, and charged with the “responsibility of supervising international monetary system to ensure exchange rate and stability of member countries’ economy; so as to eliminate exchange restrictions that hinder international trade. It played a crucial role in shaping the global economy after the end of World War II.”¹¹⁰ Just as the WB played significant roles in Ghana’s economy with respect to granting it loans to build some of its infrastructures, the IMF contributed to Ghana’s economy too. It combined consultation with macro-economic policy advisory activities as well as the provision of loans to the economy of Ghana.

Silard suggests that the General Agreement on Trade and Tariff (GATT), which later transformed into the WTO, was established in the 1945s as part of the IELs. He pointed out that the IELs believed that free and liberalised trade hold the key to advancing human development and progress in the international arena, and therefore cannot be separated.¹¹¹ In other words, trade should constitute a major aspect of relations among nations on the international plane so as to ensure a better social and economic welfare of humanity, globally.

The discussion on the above IELs is significant in this thesis because they have one common objective to promote human wellbeing by institutionalising economic and social policies in developing countries as well as Ghana. Thus, Wood and Narlikar have

¹⁰⁹ Asad Ismi, “Impoverishing a Continent” (2004) (n 107)

¹¹⁰ The history about the IMF < <http://www.imf.org/external/about/history.htm>

¹¹¹ Stephen A. Silard (n.106)

underlined the relationship among the IEIS to suggest that: “there is symbiotic relationship between the WTO, WB and the IMF by intruding in the internal affairs of countries with the promotion of trade liberalisation.”¹¹² Also, Amenga-Etego has shed further light on the same relationship among the IEIs with respect to the privatisation of water supply services in Ghana.¹¹³ In addition, Breus has argued that: “This relationship has been officially recognised by the WTO through a special declaration in 2001, at the Doha Conference.”¹¹⁴ In this regard, the WTO’s agenda of promoting global free trade with the view to promote the welfare of developing states shares a common goal with the WB and IMF.

The general standard of living among Ghanaians is one of the criteria against which the policies of the IEIs are to be measured in order to establish whether the free trade policies introduced in Ghana have improved the lives of the ordinary Ghanaian. In light of this, the question being investigated here is: with respect to trade liberalisation, what is the position of developing countries’ with respect to their negotiation capacity at the IEIs and how effective is Ghana’s role at the WTO?

To answer the above question,

section 2.1 provides a summary of the policies of the WTO; section 2.2 explores the economic status of developing countries; section 2.3 examines negotiation capacity of developing countries; section 3 discusses transfers of technical assistance by developed countries to developing countries under the WTO’s GATS and TRIPS

¹¹² Ngaire Woods and Amrita Narlikar, *Governance and the limits of accountability: the WTO. The IMF and the World Bank* (Blackwell Publishers Oxford, 2001) 570

¹¹³ Rudolf Amenga-Etego, “Water Privatization in Ghana: Women’s Rights under Siege” available at <http://www.bscw.ihe.ul/pub/bscw.cgi/d2221893/AmenaEtego-WaterPrivatisationinGhana> accessed 20 November 2013.

¹¹⁴ Fritz Breus, “Does the ‘Development Round’ foster Development?” in Stefan Giller (ed) *At the Crossroads: The World Trading System and the Doha Round* (Spring Wien, New York, 2008) 231

Agreements; section 4 engages with the implementation of sustainable development by developing countries under the WTO; and section 5 focuses upon the role of the WB in Ghana's economy with particular reference to water supply and health services. To introduce the role played by the IEs in Ghana, this chapter also briefly examines the IMF's activities in the health and water privatisation in Ghana (section 6). Section 7 provides general conclusions.

1.1 THE FREE TRADE POLICIES OF THE WTO

In this section, the key policies of the WTO are summarised in respect of the Declaration establishing the Uruguay Agreement of 1994, which was titled: the 'Decision on the Contribution of the WTO towards Achieving Greater Coherence in Global Economic Policy-making.'¹¹⁵ First, the Uruguay Agreement recognises the importance of free trade as a vehicle of economic development as agreed among all participating member countries, with their commitment to remove barriers in order to boost a healthy global economic growth.¹¹⁶ This agreement suggests that free trade provides an opportunity for member countries to expand their economies so as to improve the lives of their people.¹¹⁷ However, developing countries hold the view that trade liberalisation has been promoted by the WTO to satisfy the self-interest of developed countries since most of their products hardly gain access to the markets of these countries.¹¹⁸ Stiglitz also argues that trade liberalisation has been imposed as a condition upon (privatisation of

¹¹⁵ T.N. Srinivasan, "Developing Countries and the Multilateral Trading System after Doha" (2002) Discussion Paper NO. 82, Economic Growth Center, University of Yale, < <http://www.econ.yale.edu/-egcenter/research.htm>, > accessed 20 November 2013.

¹¹⁶ The Uruguay Agreement establishing the WTO <http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#agreement, > Accessed 20 November 2013.

¹¹⁷ *ibid*

¹¹⁸ Joseph E. Stiglitz, *Two Principles for the Next Round or, how to Bring Developing Countries in from the Cold*, (Blackwell Publishers Ltd, Oxford 2000) 439

public sectors), on the East Asian countries during the oil crisis through the rescue packages which had nothing to do with the crisis as it was purely done with the aim of gaining access to those countries' market.¹¹⁹ Stiglitz further points out that poorly developed economic infrastructures, coupled with poor technical resources in developing countries, have played a role in undermining their ability to benefit from the WTO's free trade agenda.¹²⁰

Second, trade liberalisation should be recognised as an essential component in the pursuit of the Structural Adjustment Programme (SAP). Therefore, developing countries should accept SAP as a conditionality in order to receive IMF/WB loan to restructure their economies.¹²¹

Third, that free trade will promote coherence in the global economy by extending economic progress to developing countries if developing countries respect the principles underlying the Uruguay Rounds.¹²² Many developing countries are of the view that trade liberalisation has the potential to benefit their peoples socially and economically because they may be able to sell their raw goods on the markets of the developed countries thereby reducing poverty among their citizens.¹²³

Fourth, global free trade policy 'alone cannot resolve the difficulties associated with the world economic order', therefore, efforts must be made to establish relations with the

¹¹⁹ Joseph E. Stiglitz, *ibid*

¹²⁰ Joseph E. Stiglitz *ibid*, p 440.

¹²¹ The term 'conditionality' is a set of obligations which are imposed by the World Bank and the IMF and must be accepted and complied with by a developing country in order to be considered for a financial loan from such institutions. For example, in the case of Ghana, it had to privatise its water corporation in the 1990s and 2000s, under the IMF/WB structural adjustment scheme.

¹²² *Ibid*.

¹²³ Kym Anderson and Will Martin "Why developing countries need agricultural policy reform to succeed under Doha" in Gary Simon and W.Bradnee Chambers (eds) *Developing Countries and the WTO: Policy Approaches*, (United Nation University Press, 2008) 19

world economic institutions - IMF and WB - with an objective to improve the wellbeing of all humanity.¹²⁴ As mentioned above, the WTO has since its inception established a working partnership with IMF, the World Bank and other multilateral institutions to formulate policies that aimed at protecting the interests of developed countries.¹²⁵ It was therefore not surprising that the WTO has impressed upon developing countries to accept SAP from the IMF/WB in order to restructure their economies.

Thus, there is a suggestion that the WTO has failed to help developing countries realise their economic and social wellbeing in respect of the promises given them at the Uruguay and Doha negotiations.¹²⁶ It is also interesting to note that the WTO played a significant role in urging its developing countries members to embrace the macro-economic policies (structural adjustment programmes)¹²⁷ of the IMF and the WB, though some argue that the WTO was aware of the dire social and economic consequences that such programmes would bring to developing countries and their populations.¹²⁸ The view is that, within the WTO, the developing countries was serve as markets and sources of raw materials for the benefit of developed countries and their multinational corporations (MNCs).¹²⁹ Thus, one is inclined to suggest that the WTO's policy hardly improves the social and economic wellbeing of developing countries as outlined in WTO Agreement in 1994.¹³⁰

¹²⁴ Ibid.

¹²⁵ Margot E. Salomon "From Nieu to Now and the Unfinishable Story of Economic Justice" (2013) *International and Comparative Law Quarterly*, 46

¹²⁶ Sonia E. Rolland, "The Doha Round: Chronicle of Death Foretold?" in *Development at the World Trade Organisation*, (Oxford University Press, Oxford, 2012) 263

¹²⁷ Ngaire Woods and Amrita Narlikar *Governance and the limits of Accountability: the WTO, the IMF, and the World Bank* (Blackwell Publishers, Oxford 2001) 569

¹²⁸ *ibid*

¹²⁹ Sonia E. Rolland, *The Multiple Meanings of Development in Development at the World Trade Organisation*, (Oxford University Press, Oxford) 46

¹³⁰ Wilhelmina Quaye, "Food Sovereignty and Combating Poverty and Hunger in Ghana" (2007) *Tailoring Biotechnol*, 73

Fifth, the next policy is that the Director-General of the WTO should work with the Bretton Woods institutions to “ensure that conditionalities imposed upon member countries are geared to promote equitable global welfare distribution through efficient world economy.”¹³¹ Rodrik has opined that trade liberalisation should create an enabling environment for developing countries to devise their own “divergent solution within international community with a possibility of alleviating poverty from their countries and among their peoples.”¹³² At the moment, such an opportunity is not given to developing countries. Thus, the purported benefits of trade liberalisation are not being felt among developing countries.

Sixth, the next policy is transparency – i.e., keeping the public informed – as a way of fulfilling WTO’s obligation to keep its members and the general public duly and accurately informed about new developments and programmes of the organisation. The WTO claims it has published nearly 150,000 of its documents on its website.¹³³ It also suggests further that these documents are readily accompanied with background information and explanations which will help its members and the public to understand its operations. On 14 May 2002, the General Council decided to publish more documents to the public.¹³⁴ The WTO says that this is done in line with its social policy of maintaining transparency as agreed on 18 July 1996.¹³⁵ Although the WTO claims in respect of the above policy that it operates transparently, it has failed to release documents containing deliberations among the quad member states of the WTO

¹³¹ Ibid.

¹³² Dani Rodrik “The Global Governance of Trade as if Development Mattered” - Research Work–presented John F. Kennedy School of Government-(Cambridge Massachusetts 2001) 22

¹³³ www: News and Events, < <http://www.wto.org>, > accessed 4th May 2012

¹³⁴ T. Collins-Williams, “Transparency as Trade Policy Tool: the WTO Cloudy Windows” (2010) World Trade Review, 16

¹³⁵ *ibid*

pertaining deliberations in the so called “green room.”¹³⁶ Kurtz has confirmed a common view held by developing countries in saying that: “trade liberalisation has marginalised developing countries by creating comparative advantage for developed countries’ services industry through the GATS Agreements; without promoting foreign direct investment (FDI).”¹³⁷

The policies of the WTO, as briefly outlined above, appear to hold some potential to promote social and economic wellbeing of developing countries. However, as will be seen in chapters 3 and 4 of this thesis, developing countries, particularly in the case of Ghana, access to water and medicines have been compromised.

Furthermore, Kurtz has pointed out that developing countries have been disadvantaged by WTO’s free trade policy. He cites the example of TRIPS Agreement where the Office of the United States Trade Representative (USTR) refused to discuss the option of generic medicine manufacturing for developing countries;¹³⁸ and, adds that developed countries (e.g., US) stand to benefit much more with their superiority in innovation.¹³⁹ Also, Kurtz suggests that the issue of FDI at the WTO, which was proposed as a critical means of enabling developing countries to receive technical capacity, is so politicised that little capacity has been built in developing countries.¹⁴⁰ Moreover, Kurtz argues that the benefits obtained by developing countries at the Uruguay Round in light of the

¹³⁶ J. Michael Finger and Julio J. Ngoues *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations* (Blackwell Publishers Ltd, Oxford 2002) 335

¹³⁷ Jurgen Kurtz “Developing Countries and their Emergence in the World Trade Organization: An Assessment of the Cancun Ministerial” (2004) 5 *Melbourne Journal of International Law*, 282

¹³⁸ Rodern Wilkinson, *Perpetuating Asymmetry-the collapse of ministerial meetings and the Doha Development Agenda in the WTO Crisis and the governance of global trade*, (Routledge Taylor & Francis Group, London 2006) 114.

¹³⁹ Jurgen Kurtz (n137).283

¹⁴⁰ Jurgen Kurtz, *ibid.* 287.

Textile Agreement ¹⁴¹ which granted them access to the markets of developed countries with garments, textiles and raw products, have been implemented slowly. During the Doha Ministerial Declaration, the developed countries claimed that developing countries have gained economic benefits from the trade agreements.¹⁴² However, these claims can be challenged. Discussions in chapters 3 and 4 will show that the wellbeing of developing countries and Ghana have not improved under the GATS and TRIPS Agreements.

1.2 The Economic Status of Developing Countries within the WTO

This section briefly discusses the economic status of developing countries in the WTO with a view to assess whether these countries' economies have matured enough to take advantage of the policies of the WTO, so as to improve the social and economic standards of their populations. Since the 1970s, there has been an increase in the growth and expansion of economic development. Largely, most of these economic growths benefited the developed states, especially the US, and partly, in the Newly Industrialised Countries (NICs).¹⁴³ In contrast, not all countries benefited from such economic and industrial boom as distribution of the economic prosperity has been unequally shared among the world's population.¹⁴⁴ Those living in the developed countries acquired the largest of the gains, while peoples living in the developing countries received very little gains.¹⁴⁵ Several attempts such as the African Growth and

¹⁴¹ The WTO Agreement on Textile and Clothing available at: http://www.wto.org/legal_e/16-textile, accessed 2nd April 2013

¹⁴² Jurgen Kurtz (n.137) note p. 283.

¹⁴³ Evelyn Su, "The Winners and the Losers: The Agreement on Trade-Related Aspect of Intellectual Property Rights and its Effects on Developing Countries" (2001) *Houston Journal of International Law*, 195-7.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

Opportunity Act (AGOA) and the Free zone project¹⁴⁶ implemented by the developing countries to prop up their economies and industrial bases have made little progress.¹⁴⁷ International organisations and economists¹⁴⁸ have tried to understand why such a wide gap continues to exist between the developed and the developing countries despite economic and industrial boom being witnessed in recent years. It was reported that between the years 1950 – 1980, growth per capita income in developing countries was paltry US\$81 compared with US\$5, 807 in the developed countries.¹⁴⁹ At its plenary session in 2011, the Country Development Partnership (CDP) defines least developing country (LDCs) “as low income countries suffering from the most severe structural impediments to sustainable development.”¹⁵⁰ Whereas developing country is “a term used to describe a nation with a low level of material well-being.”¹⁵¹

In the early years of 1990s, the World Bank Report produced the following economic indicators for the developed and developing countries, and stated that: “majority of the 950 million peoples living in developing countries suffer from chronic malnutrition.¹⁵² Similarly, in the developed countries, there is a ratio of one doctor to 450 people whereas

¹⁴⁶ Kaushalesh Lal and Pierre A. Mohen “Introduction” in *Innovation Policies and international Trade Rules* (eds) (Palgrave Macmillan, UK 2009) 7. The Agoa was an initiative by the US Government with an objective to promote the economies of developing countries by allowing them to export raw materials/unprocessed goods to the markets of the US. The Free Zone project was a country specific initiative by Ghana to attract foreign investors into the country to enhance the wellbeing of its people under trade liberalisation.

¹⁴⁷ Ibid

¹⁴⁸ Tim Buthe and Helen V. Milner “The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreement?” (2008) 52 (4) *American Journal of Political Science*, 741-762; see also; Charles Gore, “The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries” (2000)28 (5) *World Development*, 789-804; M. Obstfeld, 2*International Finance and Growth in Developing Countries: What Have We Learned?*” (2009) 56 (63) *IMF Econ Rev*.

¹⁴⁹ Ibid

¹⁵⁰ Kim, Jim Young, Speech by World Bank Group President (2015) “Jim Yong Kim at the global launch of poverty in a rising Africa report, Presidential speech, Washington, D.C.,: World Bank Group, <<http://documents.worldbank.org/curated/en/36880146819011928Speech-by-World-Bank-Group-President-Jim-Yong-Kim-at-the-global-launch-of-poverty-in-a-rising-Africa-report>, >accessed 20th December 2016

¹⁵¹ Ibid

¹⁵² World Bank, *World Development Report 2000/2001: Attacking Poverty*, World Development Report, World Bank (2001) > <http://openknowledge.worldbank.org/handle/10986/11856License:CCBY3.IGO>,> accessed 30th July 2016.

4,900 is the ratio of a doctor to people in developing countries. Also, there is a difference in the organisation of the economic structure between the developed and the developing countries with 19% of the Gross Domestic Product (GDP) stemming from agriculture in the developing countries, 3% is the case in the developed countries.¹⁵³

The above view portrays a status of unequal relationship between developing and the developed countries. Dunoff suggests that the exclusion of labour intensive industries which offer developing countries an opportunity to grow and benefit from the world trade, coupled with the exclusion of products such as Tuna and Footwear from such countries in entering the markets of the US and EU contribute to creating inequality between developed and developing countries.¹⁵⁴ Also, Lee argues in saying that “developing countries are struggling to integrate into the world free trade, especially in the agricultural sector, which is critical to their economies, yet developed countries keep protecting their markets.”¹⁵⁵ This is because the economic and social structure of living standards between developing and developed countries is different. Whereas, those living in the developed countries have vibrant economic standard supported by an industrial activity with a positive impact on medical facilities, people in the developing countries continue to struggle with poor economic standard driven largely by outdated agricultural farming practices.

¹⁵³ Ibid.

¹⁵⁴ Jeffrey L. Dunoff, “Dysfunction, Diversion, and the Debate over Preferences: (How) do Preferential Trade Policies Work?” in Chantal Thomas and Joel P. Trachtman (eds) *Developing Countries in the WTO Legal System*, (Oxford University Press, Oxford 2009) 51-2.

¹⁵⁵ Yong –Shik Lee, “Economic Development and the World Trade Organisation: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in WTO” in Chantal Thomas and Joel P. Trachtman (eds) *Developing Countries in WTO Legal System*, (Oxford University Press, Oxford 2009) 325

Hoehn provides an example to say that, “one-third of the world’s population resident in developing countries lacked access to most essential medicines because the medicines are unaffordable.”¹⁵⁶ Using the levels of purchasing power of citizens of Britain and Uganda as an analogy, Buckman has suggested that “the Ugandan, who has less money, is unlikely to meet basic necessities of life than the British; who may be poor but has access to some guaranteed social and economic benefits.”¹⁵⁷ Therefore, the poor economic standing of developing countries in WTO have a corresponding effect on the marginalised positions in which they find themselves during the negotiation rounds of the WTO. Developing countries who are able to produce and manufacture goods and services for exports are equally confronted with the problem of gaining access to market their products on markets of developed countries.¹⁵⁸ In contrast, least developing countries are persistently relying upon agricultural farming as the mainstay of their livelihood¹⁵⁹ and dependent largely upon foreign donors and developed countries’ support for livelihood.¹⁶⁰ Their poor economic status has left them weakened and they are unable to assert themselves on the world stage, especially at the WTO. Hence, under the WTO’s trade liberalisation agenda coupled with the IMF/WB’s SAP policy, developing countries become recipients of agreements which may deny them the prospects of advancing the social and economic wellbeing of their citizens.¹⁶¹

¹⁵⁶ Ellen‘t Hoehn “Trips, Pharmaceutical Patents, and Access to Essential Medicines: A long Way from Seattle to Doha” (2002) *Chicago Journal of International Law*, 28

¹⁵⁷ Greg Buckman, *Global Trade: Past Mistakes, Future Choices*, (Zed Books UK 2005) 154

¹⁵⁸ *ibid*

¹⁵⁹ *Ibid.*

¹⁶⁰ Ailberto Zezza, “Urban Agriculture, Poverty, and food Security: Empirical evidence from a Sample of developing countries”, (2010) 35 *Food Policy*, 265-273

¹⁶¹ K. Konadu Agyemang, “the Best of Times and the Worst of Times: Structural Adjustment Programs and uneven development in Africa: the case of Ghana”, (200) *the Professional Geographer*, 68

2. Developing States and their Negotiating capacity under the WTO

Having explored the weakened economic position of developing countries under the IELs, this section examines the negotiating capacity and resources of developing states during the GATS and TRIPS Agreements.¹⁶²

Trade negotiations play a critical role in framing policies that eventually lead to trade agreements at the WTO.¹⁶³ The structure of negotiations at the WTO in Geneva is influenced and characterised by experienced technocrats and negotiators from developed countries, who pitch their skills against representatives/diplomats from developing countries.¹⁶⁴ This means that opportunities exist for developed countries with adequate resources to secure favourable trade deals supporting their economies.¹⁶⁵ Mbekeani uses the case of the South African Development Community (SADC)¹⁶⁶ to argue the point that weaker negotiation capacity can limit a country's participation as did happen at the Uruguay Round. Here, the SADC countries could participate through a coalition's representative rather than having direct engagement with other participants. This may have restricted their access to gain maximum benefits.¹⁶⁷ Blouin summarises the adverse position of a weaker country in negotiation by saying that: "...the asymmetrical outcome of the Uruguay round was predictable:

¹⁶² GATS Agreement deals with water services (discussed in chapter 3) and TRIPS agreements deals with access to medicines (discussed in chapter 4)

¹⁶³ Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn, *The World Trade Organization: Law, Practice and Policy*, (3rd edn Oxford University Press, Oxford, 2015) 8

¹⁶⁴ Sylvia Ostry, "Asymmetry in the Uruguay Round and in the Doha Round" in Chantel Thomas and Joel L. Trachtman (eds), *Developing Countries in the WTO Legal System*, (3rd edn Oxford University Press, 2009) 106-7.

¹⁶⁵ Susan Prowse, *The Role of International and National Agencies in Trade-related Capacity Building* (Blackwell Publishers, Ltd, Oxford 2002) 1248

¹⁶⁶ SADC is available at www.Sadac.intmedia-centre/frequently-asked-questions, accessed 26th February 2014

¹⁶⁷ Kennedy K. Mbekeani "Implementation of WTO Agreements in Southern Africa" in *The Reality of Trade: The WTO and Developing Countries*, (the North-South Institute, Canada 2001) 88

Americans, with their Quad allies were able to convince developing countries through bilateral pressures to sign agreements that involve high costs and relatively little benefits to them.”¹⁶⁸ Simply, the stronger negotiation capacity a country wields, the more advantage it stands to gain at trade agreements.

The following discussion highlights the factors that exacerbate the weak negotiating capacity of developing countries.

2. 1 The Deliberations by the Quad states in the Green Room in Geneva

In furtherance of the above development, Thomas has explained that the quad states (US, Japan, EU and Canada), have the singular objective of promoting the economic interest of transnational corporations located in their countries, including the social protection of their citizens to the neglect of developing countries.¹⁶⁹

Steinberg affirms the above argument to explain that:

“Green Room” as caucuses consisting of twenty-to- thirty-five that are interested in a particular text being discussed and may include the most senior members of the Secretariat, diplomats from the most powerful members of the organization, and diplomats from a roughly representative subset of the GATT/WTO membership. Its aim is to “set and discuss the agenda for most important formal meetings, rounds, ministerial, mid-term reviews and round closing materials. They aim to produce such materials weeks preceding WTO plenary sessions; which are presented to the general WTO members for formal acceptance without, often, any further deliberations negotiations.”¹⁷⁰

¹⁶⁸ Chantal Blouin, “Lessons for the Doha Round” in *the Reality of Trade: The WTO and Developing Countries*, (the North-South Institute, Canada 2001) 99

¹⁶⁹ Caroline Thomas, “where is the Third World now?” (1999) *Review of International Studies Association*, 239

The Quad refers to countries such as the US, Japan, Canada and the EU, which play a dominant role in the WTO in formulating policies that promote their interests.

¹⁷⁰ Richard H. Steinberg, “In the Shadow of Law or Power? Consensus-based Bargaining and the Outcomes in the GATT? WTO” (2005) *International Organisation*, 355

The implication is that the most powerful members of the WTO, which includes the quad states/countries influence negotiations in order to promote their economic interests.

Also, Jones explains that the Green Room conferences are “concentric circles” of negotiations employed by the Director- General (D-G) on very crucial subject matters and usually attended by 25-30 WTO members, with occasional invitation to Brazil and India representing developing states. Buckman says that developing countries are “tactically excluded from pivotal green room negotiation.”¹⁷¹ This suggests that the Green Room scheme helps in reaching consensus on very important trade issues more efficiently and speedily, at which multilateral deliberations involving the entire 153 member states cannot achieve.¹⁷² A global trading system, in which decision making is solely centred in the hands of nearly 25-30 states with the US and the European Union always represented, signals a system aimed at protecting the interests of the elite members.¹⁷³ This encourages biases against other member states of the organisation especially developing states who are inadequately represented at those conferences.¹⁷⁴

2.1.2 Financial resources

Narlikar pointed out that by the end of 1997, some twenty-three developing countries, which had not paid their fees to the WTO, were denied technical support by way of not being provided some critical training skills in negotiations.¹⁷⁵ Most developing countries

¹⁷¹ Greg Buckman, *Global Trade: Past Mistakes, Future Choices*, (n157) p 69

¹⁷² Kent Jones, *The Doha Blues*, (Oxford University Press, UK, 2010) 85-90

¹⁷³ Vicente Navarro, “Neoliberalism as a Class Ideology: Or, the Political Causes of the Growth of

Inequalities” (2007) *International Journal of Healthy Services*, 55

¹⁷⁴ Ibid.

¹⁷⁵ Amrita Narlikar, *International Trade and Developing Countries: Bargaining Coalitions in the GATT & WTO*, (Routledge, London 2003) 15

are financially constrained not only in paying their fees to the WTO, but also find it harder to employ the necessary experts with the requisite knowledge and skills to represent them at the negotiations of the WTO.¹⁷⁶ This is in sharp contrast to the developed countries, which often have significant financial resources, with approximately nearly thirty to forty representatives in Geneva. Thus, the agreements which emerged from such negotiations hold the potential of creating imbalanced relationships that favour developed countries at the expense of developing countries which are financially constrained.

2.1.3 The power of economics and politics of negotiations at the WTO

The view that developed countries control the world's economy coupled with their political influence in the global arena translates into a favourable economic and trade negotiations at the WTO in Geneva. Kapoor alludes to this in saying that: "the west has much greater trading and economic leverage than the rest of the world. The large internal markets and trading capacities of the US and EU, in particular, make it possible for them to engage in arm twisting."¹⁷⁷ Kapoor's position affirms the above view that huge economic resources and large market capacity give developed countries leverage at negotiating market deals, and often this advantage results in arm-twisting as did happen during the TRIPs agreement.¹⁷⁸ Kapoor further related to USA's threat at the end of the Uruguay Round in saying that: "where developing countries showed reluctance to sign the final agreement covering Intellectual property, that, it would

¹⁷⁶ Sylvia Ostry "Asymmetry in the Uruguay Round and in the Doha Round" in Chantal Thomas and Joel P. Trachtman (eds), (n.164) 105

¹⁷⁷ Iian Kapoor, "Deliberative democracy and the WTO" Review of International Political Economy" (Routledge, UK 2004) 533

¹⁷⁸ David Hindman, "The Effect of intellectual property Regime on Foreign Direct investment in Developing economies" (2006) 23 Arizona Journal of international and Comparative Law, 168

withdraw from the Round and cancel all its bilateral agreements to countries, refusing to sign the agreement.”¹⁷⁹ This suggests that not only are developing countries lacking in economic power/strength with which to negotiate at the WTO Rounds; but they are constantly being coerced by the economic powers of a superpower country, like the US, to accept such unfavourable agreements.

Similarly, power politics is one resource upon which developed countries at economic negotiations employ to their advantage. Ha-Joon Chang used the heavy weight and light boxer analogy to explain that most of the rules underlying negotiations at the WTO are mainly written by the developed countries favouring them and their multinational corporations.¹⁸⁰ Steinberg says the use of raw power led to the conclusion of the Uruguay round, with the less powerful countries unable to provide any alternative.¹⁸¹ Clearly, economic power and political influence wielded by the developed countries create a favourable position for them to secure beneficial trade deals.

2.1.4 Divergent interests of developing countries

The divergence of interest and choices among developing countries at WTO negotiation rounds has also undermined their positions during such rounds. For example, whereas some developing countries prefer technical capacity, others want access to the markets of developed countries. According to Rolland: “some developing countries individually sought quotas for exports on bilateral basis to secure market access for their products in developed countries ... The return to separate bilateral agreements was not

¹⁷⁹ Kapoor (177) 528

¹⁸⁰ Ha-Joon Chang, “Policy Space in Historical Perspective, with special reference to Trade and industrial Policies” in Ashwin Deshpande (ed) *Globalization and Development: A Handbook of New Perspectives*, (Oxford University Press, Oxford 2010) 19

¹⁸¹ Richard H. Steinberg, (n170) 342

conducive to coalition building and was even a divisive factor among developing countries that were competing against each other to secure market shares in large developed countries.”¹⁸² Although developed countries constantly deploy legal and political strategies at WTO negotiations, the fact that some developing countries (Hong Kong, South Korea, India and Mexico) are often vying for bilateral deals to secure market access for their goods, undermines the coalition attempt to secure a general agreement beneficial to them all.¹⁸³

2.1.5 The WTO secretariat and developing countries.

There is also a view that the WTO Secretariat favours the interests of developed countries at its negotiations rounds and in Geneva at the expense of developing countries. Steinberg in sharp contrast to Rolland suggests that the WTO Secretariat is partly responsible for the weakened position of the developing countries at WTO negotiations through its flagrant biases displayed towards them.¹⁸⁴ Steinberg has explained that:

“The Secretariat’s bias in favour of the great powers has been largely a result of who staffs it and the shadow of powers under which it works. From its founding until 1999, every GATT and Director-General was from Canada, Europe or the United States, and most of the senior staff of the GATT/WTO secretariat have been nationals of powerful countries. Secretariat may promote and set meetings, table formal or informal negotiating texts, and present their view of the consensus of meeting.”¹⁸⁵

¹⁸² Sonia E. Rolland, “Developing Country Coalitions at the WTO: In Search of Legal Support” (2007) Harvard International Law Journal, 489

¹⁸³ Amrita Narlikar, “Bargaining over the Doha Development: Coalitions in the World Trade Organisation” (Latin American Trade network of IDRC Series LATN papers NA 34, 2005) P 8
According to Narlikar, the Coalition was a group of 77 developing countries with three principal aims: push for majority representation at the WTO negotiations; exchange of information among developing countries to form strategy and to cultivate allies in presenting a unified position at the WTO negotiations against the Quad countries.

¹⁸⁴ Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, (Oxford University Press, Oxford 2009) 131

¹⁸⁵ Richard H. Steinberg, “In the Shadow of Law or Power? Consensus-Based Bargaining and Outcome in the GATT/WTO” (2003) International Organisation, 356

The dominant role played at the WTO secretariat by members of the Quad states, such as Director-Generals from the GATT /WTO between the years 1986-1994, suggests that they usually promote an agenda, which satisfy the interests of their respective countries.¹⁸⁶

These roles have contributed significantly to undermine the progressive aspirations of developing countries in the area of securing market access for their products.¹⁸⁷

2.1.6 Historical / colonial factors weakening negotiation capacity of developing countries.

Colonialism has played a contributory role in weakening the negotiation capacity of the developing countries in many international agreements, especially with respect to WTO agreements. Narlikar has identified weaknesses and limited negotiating capacity of developing countries at trade rounds by explaining, that: “decolonialisation and problems of forming statehood, internal conflicts and regional borders drawn by colonial powers; have in no small way, contributed to weaken developing states’ bargaining and negotiating powers, not only at the level of international politics but also at international trade, especially at the WTO.”¹⁸⁸ The impact of colonisation in the 1940s has been responsible for the underdeveloped state of most developing countries in the areas of technology, education, health and economics.¹⁸⁹ Because colonialism did not allow

¹⁸⁶ John S. Odell, “Chairing a WTO Negotiation” (2005) 8 (2) *Journal of International Economic Law*, 425-448

¹⁸⁷ Andrew Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order*, (Oxford University Press, Oxford 2011) 175-6.

¹⁸⁸ Amrita Nalika (n.183)

¹⁸⁹ Deborah A. Brautigam and Stephen Knack, “Foreign Aid, Institutions, and Governance in Sub-Saharan Africa”, (2004) *Economic Development and Cultural Change*, 259- 260

them the autonomy to develop their system of education to meet their own needs, this has affected their negotiating capacity at the WTO.¹⁹⁰

2.1.7 Effort by the WTO to help developing countries gain negotiating capacity

Despite criticisms as discussed above, the WTO has attempted to develop the negotiating capacity of developing countries' personnel, through the provisions of skills and knowledge in negotiations. A course, organised in Geneva in July 2003, was titled- "WTO specialised Course for Negotiating Agreements: from Theory to Practice."¹⁹¹ Ghana was one of the developing countries invited to attend the course. On 16 January 2006, the WTO once again organised a course in Geneva with an objective of broadening developing countries trade representatives' understanding in the knowledge of policy making, multilateral trading system and international law. Ghana was on this occasion represented by Mr Ebenezer Padu Adjirackor.¹⁹²

The Director-General of the WTO, Lamy, in a speech titled: "the WTO is working to mitigate impact of social crisis on Trade" said, that: '... the multilateral trading system as it exists today contains within it rules and disciplines and imbalances that continue to penalise developing states.'¹⁹³ Lamy's view of the imbalances which exists within the WTO suggests the fact that, though the Secretariat has endeavoured to bridge the gap of inequality between the developed and developing countries through the provision of training programmes, the gains for developing countries in light of improving their

¹⁹⁰ D R. Fisher and Jessica F. Green, "Understanding Disenfranchisement: Civil Society and Developing Countries' Influence and Participation in Global Governance for Sustainable Development" (2004) *Global Environmental Politics*, 70

¹⁹¹ WTO News July 2003

¹⁹² WTO: News item, January 16, 2006, Trade Policy Course

¹⁹³ Pascal Lamy, WTO News January 2009

negotiation skills are very insignificant. Conversely, developed countries continue to obtain the highest margins of benefits for their citizens and transnational corporations, whose interests are represented in WTO negotiation rounds, for example, the TRIPS and GATS Agreement.

2.1. 8 the consequences of lack of negotiation capacity for Ghana

It follows therefore that, Ghana, a developing country with limited resources and personnel to represent her in Geneva, would not be able to participate in trade negotiations to secure favourable trade deals, especially in the spheres of the TRIPS and GATS Agreements. Although Ghana benefited from the negotiation skills and policy formulation training organised by the WTO; and was represented on the Working Transfer Group on Trade and Transfer of Technology and other courses;¹⁹⁴ the training of representative over two weeks is not enough to secure effective trade deals from the developed states who have many competent and skilful negotiators. This discussion highlights that Ghana, with its weak negotiating capacity, continues to be displaced at the prominent “green room” negotiations.

¹⁹⁴ WTO- 32nd and 36th Trade and Policy courses held in Geneva (January 16 2006) designed to broaden participants understanding of trade policy, multilateral trading system, functions of the WTO and international law (January 2006)

WTO- Specialised Course in Negotiating Agreements (Geneva): “From Theory to Practice” designed to promote/ strengthen negotiating skills of the Member-Countries, (July 2003)

Working Transfer Group on Trade and Transfer of Technology, designed to enhance the Member-Country Representatives’ understanding of the Agreement on transfer of technology, (June 2000).

In conclusion, it can be said that, there continues to be a chasm between developing and developed countries with respect to WTO trade negotiating rounds. This is because developing countries lack the resources, personnel and political power with which to engage in effective negotiations in order to benefit from trade rounds; whereas developed countries, especially the Quad states, have extensive and abundant resources (legal experts and diplomats and high skilful negotiators) to secure favourable agreements.

It has been said that the economic and social wellbeing of developing countries risk being underdeveloped unless proactive responses are provided by developed countries through trade measures to help developing countries.¹⁹⁵

3. Developing Countries and Transfer of Technical Capacity under the WTO

3.1 Introduction

The transfer of technical capacity is one area in which developing countries in the WTO have hoped to benefit from their developed country counterparts. The technical assistance is to enable developing countries to transform their various raw materials into manufactured goods, and to be exported into the markets of developed countries in order to earn competitive prices, which will facilitate the development of their economies. In respect of the above, this section examines the following: first, transfer of technical

¹⁹⁵ Bernard Hoekman and Aaditya Mattoo, “Services Trade and Growth” in Juan A. Marchetti and Martin Roy (eds) *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Organisations*, (Cambridge University Press, Cambridge 2008) 52

assistance by developed countries to developing countries and second, how Ghana has benefited from transfer of technical assistance since joining the WTO.

This discussion seeks to examine whether Ghana's manufacturing and technical capacity bases have improved with respect to promoting access to affordable and clean water and access to cheaper and essential medicines.¹⁹⁶

The issue of technical assistance as a measure of promoting the social and economic fortunes of developing countries has been given recognition in the preamble establishing the WTO Agreement.¹⁹⁷ Constitutionally, preambles occupy limited position with respect to enforcing or interpreting legislation, however, the emerging position is that preambles can be relied upon to give effect to human wellbeing as will be discussed below.

3.1.2 Preamble to Agreement establishing the WTO

Some scholars, especially Twomey,¹⁹⁸ Orgad¹⁹⁹ and Ginsburg, Foti and Rockmore,²⁰⁰ have made the claim that preambles are merely narratives which recount the events leading to the drafting of a constitutional for a country or an organisation. Thus, preambles are nothing more than rhetorical expositions without substantive enforcement power. In that sense, the preamble to the WTO Agreement²⁰¹ cannot be relied upon by

¹⁹⁶ The issues of access to clean water and affordable medicines are discussed in chapters 3 and 4 of this thesis.

¹⁹⁷ The Marrakesh Declaration establishing the WTO >http://www.wto.org/English/doc/e/legal_e04-wto/Marrakesh.pdf, < accessed 10th October 2015.

¹⁹⁸ Anne Twomey "The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians" (2013) *International and Comparative Law Quarterly*, 326

¹⁹⁹ Liav Orgad "The Preamble in Constitutional Interpretation" Oxford University Press, Oxford, (2010) 722

²⁰⁰ Tom Ginsburg, Nick Foti and Daniel Rockmore "We The Peoples": The Global Origins of Constitutional Preambles >www.plosone.org/article/fetchSingleRepresentation.action?uri=nfo:doi/10.1371/journal.pone.00267.s001, accessed 20th January 2014

²⁰¹ The Marrakesh Declaration establishing the WTO, (n197)

developing countries to press for transfer of technology. On the contrary, there is a view among some judges and academics that preambles are emerging as an important tool to interpret constitutional provisions which can be relied upon in a court of law to advance the wellbeing of society. The following examples affirm the above position. First, In the case of *Queensland v Commonwealth*, Berwick CJ, affirmed the significance of constitutional preamble as an aid to interpretation.²⁰² And asserted that constitutional preambles are of vital importance as a substantive legal instrument aiding judicial effectiveness.²⁰³ In the case of *R v Hugh*, Kirby J, underscored the importance of constitutional preambles to interpret legislative provisions.²⁰⁴ It may also be possible to argue the significance of the preamble of the WTO to advance the needs of developing countries.²⁰⁵ One of the promises in the preamble states that: “measures will be adopted to eliminate all forms of discrimination in the multilateral trading system to ensure that developing countries benefit in the international trade in gaining equally and fairly all the benefits that trade liberalisation brings.”²⁰⁶ These provisions of the preamble may be interpreted as an obligation, although non-binding, on the part of developed countries to extend technical assistance to promote the social and economic wellbeing of developing countries.

²⁰² *The Case of Queensland v Commonwealth (second Territory senators case)* (1977) 139 CLR, 585, 592

²⁰³ Peter W. Hogg, “Canada: from Privy Council to Supreme Court” in Jeffrey Goldsworthy (ed) *Interpreting Constitutionalism*, (Oxford University Press, Oxford 2006) 98

²⁰⁴ *The case of R v Hugh* (2000) 171 ALR 155

²⁰⁵ The Agreement establishing the World Trade Organization, <: http://www.wto.org/legal_e/04-wto> accessed 20th November 2015

²⁰⁶ The Marrakesh Declaration establishing the WTO, (n197)

3.1.3 GATS and Technical Capacity to Developing Countries

Article IV of the GATS Agreement “deals with increasing participation of developing countries in the world trade system through specific negotiated commitments”²⁰⁷ whereas sub-section (a) deals with: “the strengthening of their domestic capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis; and (b) also deals with: “improvement of their distribution channels and information networks.”²⁰⁸ Provisionally, the GATS appears to promote the interests of developing countries within the WTO to build a sound technical capacity in order to establish some industrial and manufacturing capacities with which they can transform their goods and services to earn competitive foreign price on the markets of developing countries.

However, there are no legally binding substantive provisions in the GATS Agreement to pressurise developed countries to respect such commitment. This therefore means that promotion and respect of such an agreement depends largely upon the good-will of the country in possession of the technology.

Also, article XXV (2) of GATS states that “developing countries shall benefit from technical assistance at the multilateral level, which will be provided by the secretariat and shall be decided upon by the council of Trade in services.”²⁰⁹ Here, the responsibility

²⁰⁷ GATS article 4 < <http://www.wto.org/english/docs e/legal/e/26-gats.pdf> > accessed 20th October 2013

²⁰⁸ GATS Article IV (a) and (b) *ibid.*

²⁰⁹ GATS Article XXV (2) *ibid.*

to transfer technology has been delegated to the WTO Secretariat and the Council for Trade in services to ensure that developing countries gained access to the requisite technical capacity to lift their economies to competent level in order to promote the social and economic needs of their peoples. These provisions suggest that the GATS is an agreement with the aspiration to promote not only wealth creation in the economies of the developing countries, but also to enhance their general standing in the global economy.

Conversely, the absence of any enforcement mechanism in the GATS to force those technology holders to transfer it to developing countries means that the provisions are theoretically attractive, but contributes nothing to advance the course of developing countries. Developed countries have been urged to provide “aid for trade initiative” to strengthen the technical capacity base of developing countries in order to make the relevance of the GATS meaningful to the needs of their economies and social lives.²¹⁰ Though, developed countries agreed theoretically to promote technical capacity of developing countries, little has been done to achieve this strategy in practice. Bunn has also underscored the need to promote developmental needs of developing countries by urging the WTO to put into practice the provisions of the Doha Development Round.²¹¹

Similarly, the TRIPS Agreement in its Article 66(1) states that, “flexible and viable technical transfer shall be accorded to least developing countries in order to help them build a sound technological base.”²¹² It must be pointed out, that the TRIPS’s

²¹⁰ Bernard M. Hoekman and Miche M.I Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, (3rd Oxford University Press, Oxford, 2009) 366-7.

²¹¹ Isabella D. Bunn, *The Right to Development and the International Economic Law: Legal and Moral Dimensions*, (Hart Publishing, Oxford, 2012) 151

²¹² TRIPS Article 66 < http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm >accessed 4th January 2013.

technological transfer is aimed at encouraging least developing countries to establish an industrial base. Again, Article 67 of the TRIPS Agreement mentions technical cooperation by proposing to build technical capacity in the form of helping to strengthen the laws and intellectual property rights (IPR) enforcement regimes in developing countries.²¹³ This provision appears to be focusing on protecting the IPRs of developed countries, rather than promoting industrial development of developing countries.²¹⁴

3.1.4 The Doha's Ministerial commitment to provide technical capacity to developing countries

The Fourth Ministerial Conference of Doha has as its main agenda to help developing countries obtain a sustainable economic and social development through the contribution of financial and technical assistance by developed countries to developing countries. The preamble to the declaration adopted at the Doha Ministerial Conference reads as follows:

“We shall continue to make positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in growth and of world trade consummate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well-targeted sustainably financed technical assistance and capacity building programmes have important roles to play.”²¹⁵

The preamble recognises the urgent need to boost the technical capability among developing countries so as to transform their extensive raw materials into finished goods in order to export them to gain the right prices on the markets of developed countries. That way, the commitment made by developed countries to promote economic and social welfare of developing countries at the Uruguay negotiation may be respected. This

²¹³ TRIPS article 67 *ibid*.

²¹⁴ Isabella Bunn, *supra*107 (n211) p. 212

²¹⁵ The Fourth Ministerial Conference of Doha, Qatar – (November 2001) <http://www.wto.org/english/tratop_e/dda_e.htm> accessed 4th January 2013.

is also because the WTO promises: “to eradicate poverty among developing countries; through the provision of technical assistance to enable them realise their economic and social wellbeing.”²¹⁶ Thus, it is imperative that the WTO protects and promotes its principles and values so as to remain credible as an international economic institution.

3.1.5 Implications of Technical Assistance to Developing Countries

Lamy, the previous Director General of the WTO, has pointed out the significant role that technical assistance can bring to improve the economic and social wellbeing of developing countries and their peoples through the building of a “supply-side capacity” in developing countries to enable them to derive a fairer share of the opportunities available in global trade.

Lamy summarised this point by saying that:

“Opening up markets must translate into real benefits to all people in their everyday lives. For this to happen it is clear those developing countries will need technical and financial assistance, if they are to build the supply-side capacity to benefit fully from the opportunities that Doha Round will provide. ‘Aid for trade’ will therefore need to accompany the results of the rounds to assist developing countries increase their capacity to participate in the multilateral trading system.”²¹⁷

Importantly, the Doha Conference and its agenda of strengthening the manufacturing and technical capacity of the developing countries resonate with the aspirations and ambitions of most developing countries whose key objective to join the WTO is to promote the sustenance of their peoples’ lives.

²¹⁶ The Uruguay Agreements: 1. Marrakesh Agreement Establishing the World Trade Organisation, 1867 U.N.T.S

²¹⁷ Pascal Lamy’s speech at the Doha Ministerial Conference (2005) < http://www.wto.org/english/news_e/news05_e/stat/lamy_28nov05_e.htm > accessed 20 August 2012

Lamy's view echoes one of the objectives for which the WTO was established, i.e. to improve the economic and social standard of living among peoples everywhere through the medium of trade liberalisation. Buckley also supports the transfer of technical capacity to developing countries in saying that: "foreign investment brings capital, advanced technology and access to the international markets. The domestic partners become part of the global economy network ...multinationals play a crucial role in research and development, technology transfer and generating new technologies."²¹⁸ Undoubtedly, the transformative power of technical assistance to improve the lives and economies of developing countries can be realised through the medium of a fairer international free trade, backed by technical capability.

However, the current system of the WTO's operation in respect of technical development and transfer is failing developing countries.²¹⁹ This is because little has been achieved in respect of the Doha Round since most developed countries, especially the Quad, have thwarted efforts to transfer technical assistance to developing countries.²²⁰ For example, the UNCTAD report²²¹ has affirmed that the GATS Agreement, which was promoted by the developed countries with an understanding of transferring technology to developing countries, has led to 10 per cent decline in foreign direct investment (FDI) in Sub-Saharan Africa.²²² Wade argues that without transfer of technology by the developed countries to developing countries, there is little chance that developing countries can improve their economic and social standing through the

²¹⁸ Ross P. Buckley (ed) *The WTO and the Doha Round: The Changing Face of World Trade*, (London, Kluwer 2003) 276-284

²¹⁹ Jan Wouters and Bart De Meester, *The World Trade Organisation: A legal Analysis*, (Oxford University Press, Oxford 2007) 207

²²⁰ Roland Weinrauch, *Competition Law in the WTO: The Rationale for Framework Agreement*, (Intersentia, Wien, 2004) 44

²²¹ UNCTAD Report- World Investment Report (2015) 4

²²² *ibid*

existing multilateral trading system. Wade explains in the following: "... it is very vague what actions developing states may take against developed states when they failed to transfer technology."²²³ Lamenting the inequalities existing between developed and developing countries in respect of the TRIPS Agreement, it has been suggested that developing countries are constrained by limited capacity to seek redress against developed countries, as negotiations at TRIPS Rounds favour the interests of developed states and their industries.²²⁴ This means the position of developing countries remain unimproved given the stagnant technical level of their economies which results from unchanged position of developed countries to transfer technology.²²⁵

Conversely, developed countries contend that their economies depend upon innovation and inventiveness, which are guaranteed through protective measures under the TRIPS agreement.²²⁶ Also, developed countries say the TRIPS agreement helps to prevent the manufacturing of counterfeit goods.²²⁷

Recognising the continuous decline of developing countries' technological capacity, Stiglitz and Charlton have proposed that "institutions such as Integrated Framework for Trade Related assistance (IF) and the IMF's Trade Integration Mechanism (TIM) and bilateral and multilateral assistance Banks should increase their trade –related investments to help developing countries to build their capacity."²²⁸ The IMF can do so

²²³ Robert Hunter Wade, "What Strategies are viable for Developing Countries today? World Trade Organisation and the Shrinking of Development Space" (2003) *Review of International Political Economy*, 624-625

²²⁴ Valbona Muzaka, *The Politics of Intellectual Property Rights and Access to Medicines*, (Palgrave Macmillan, London 2011) 56

²²⁵ Sonia E. Rolland, *Development at the WTO*, (Oxford University Press, Oxford 2011) 103

²²⁶ Ester Ferrara, "Access to Medicines: Price Regulation and Prizes", (2005) *ILSP Law Journal* 17

²²⁷ Mohammad Towhidul Islam, *TRIPS Agreement of the WTO: Implications and Challenges for Bangladesh*, (Cambridge Scholars Publishing, Cambridge 2013) 38-9

²²⁸ Joseph Stieglitz and Andrew Charlton, "Aid for Trade: A Report for the Commonwealth Secretariat" (March 2006) 22

in accord with one of its purposes (Article 1(ii): to provide credit or financial resource to developing countries to procure the requisite technical equipment in order to build an industrial capacity.”²²⁹ The importance of technical capacity and assistance cannot be overstated as an effective way of promoting the industrial drive and this is eagerly required by developing countries in order to achieve a sustainable level of growth and development.

Prowse has suggested that developing countries can improve their position in the WTO trading system with respect to technical assistance through the implementation of the following measures: (i) viable mechanism must be instituted at the country and national level; and (ii) ensuring that global trade rules/agreements- especially capacity building needs- are available and appropriately sequenced into developmental needs of developing countries.”²³⁰ Although these options appear to be effective and promising, it is quite impossible for these options to be realised, given that developed countries are bent on promoting their trade interests through the agreements such as TRIPS and GATS.

The discussion above shows, first, that developing countries need critical technical capacity to develop so as to promote their social and economic wellbeing. Second, developing countries’ risk achieving growth in their technical capacity building because developed countries keep renegading on their commitment to transfer technical assistance. Third, it makes it difficult for the developing countries to achieve sustainable development, discussed below, because developing countries are not provided with the

²²⁹ John W. Head, *The Future of the Global Economic Organisations: An Evaluation of Criticisms Levelled at the IMF, the Multilateral Development Banks, and the WTO*, (Transnational Publishers, USA, 2005) 258

²³⁰ Susan Prowse, “The Role of International and National Agencies in Trade Related Capacity building” (2008) International Organisation,1248

adequate technical assistance. Shaffer has labelled technical assistance under the WTO's agenda as "unsustainable" in explaining that: "WTO technical assistance has remained merely 'dissemination of information, rather than real skills development and capacity building.'²³¹ The failure by the WTO secretariat coupled with the lukewarm attitude among developed countries to assist developing countries with the needed financial resources and training, undermine sustainable development. Thus, it can be surmised that developing countries' technological and manufacturing capabilities have not improved as agreed in light of the Doha conference as well as under the TRIPS and GATS Agreements.²³²

3.2 GHANA'S TECHNICAL CAPACITY UNDER THE WTO

Since joining the WTO, Ghana has received limited support in the area of building her technical capacity from the developed country members.²³³ This has led significantly to the decline in the growth of her local manufacturing bases.²³⁴ The result is that currently access to water is privately controlled with water prices being tripled, whilst access to medicines particularly in the case of those Ghanaians suffering from HIV/AIDS is beyond affordability.²³⁵ Berry argues that technical capacity building in the Ghanaian economy has been a failure.²³⁶ The following discussion will show first that Ghana's technical capacity has not improved much under the WTO because there is a decline in the

²³¹ Gregory Shaffer, "Can WTO Technical Assistance and Capacity- Building Serve Developing Countries?" (2005) *Wisconsin International Law Journal*, 669.

²³² Kevin P. Gallagher, "Understanding Developing Countries Country Resistance to the Doha Round" (2008) *15:1 Review of International Political Economy*, 73

²³³ Bernard Hoekman, Constantine Michalopoulos and L. Alan winters, "Special and Differential Treatment for Developing Countries: Towards a New Approach in the WTO", (2004) *The World Economy*, 10

²³⁴ *ibid*

²³⁵ *ibid*

²³⁶ Sara Berry, "Tomatoes, Land, Hearsay: Property and History in Asante in the Time of Structural Adjustment" (1997) *28 World Development*, 1232

allocation of budget to the WTO in respect of training assistance to developing countries; secondly, lack of the necessary support from developed countries towards developing countries had meant that sustainable development remains a mirage.

Blackhurst, Lyakurwa and Oyejide have affirmed that developing countries including Ghana have limited technical capacity because of financial constraints. According to Blackhurst et al: “the bottom line is that there was no increase in WTO staff or the budgeted funding for technical cooperation in response to doubling the number of countries needing technical assistance.”²³⁷ Although this argument was made in respect of Sub Saharan Africa, Ghana is one of the countries in this sub region and the indication is that it has received limited technical assistance under the WTO’s agenda.

Moreover, Smeets argues that “the recent financial crisis has made it even harder to obtain funds. The WTO has thus been obliged to reduce its level of spending in line with revenues.”²³⁸ The impact of a reduced budgetary allocation at the WTO on Ghana’s technical capacity building is expected to remain low. With respect to technical assistance in manufacturing, the situation has not improved much because Ghana continues to export majority of her raw materials to the markets of the developed markets without processing them.²³⁹ Thus Ghana’s technical assistance under the WTO has seen little improvement and her objective to improve affordable access to water and a capacity to manufacture medicines to treat its HIV/AIDS sufferers appears elusive. As discussed above, financial constraint and the WTO’s inability to devise a coherent

²³⁷ Richard Blackhurst, Bill Lyakurwa and Ademola Oyejide, *Options for Improving Africa’s Participation in the WTO*, (Blackwell Publishers Ltd, Oxford, 2000) 505

²³⁸ Martin Smeets “*Trade Capacity Building in the WTO: Main Achievements Since Doha and Key Challenges*” *Journal of World Trade* (Kluwer Law International, Netherlands, 2013) 1079

²³⁹ *ibid*

strategy to improve the technical capacity of developing countries have undermined the commitments of the Doha Declaration.

4. WTO AND SUSTAINABLE DEVELOPMENT

This section aims to explore the sustainable development agenda in light of the WTO policies in relationship with developing countries. It further seeks to explore Ghana's sustainable programme with a view to assess the extent to which access to water and medicines have been safeguarded under the WTO regime. On 1 January 2016, Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development, was formerly adopted at a UN Summit, New York, on November 2015, came into force.²⁴⁰ The objective is to enable world leaders to extend the social and economic wellbeing of their peoples and SDGs replace the Millennium Development Goals (MDGs).²⁴¹

The concept of sustainable development aims to integrate economic and social wellbeing of the present generation without undermining the ability of future generation to meet their needs.²⁴² The Brundtland Report which inaugurated the Rio Conference (1992) affirms sustainable development.²⁴³ The idea of sustainable development received global recognition with support by world leaders as well as transnational institutions.²⁴⁴ The Rio Conference urged governments and institutions to use the

²⁴⁰ World Leaders adopt Sustainable Development Goals/UNDP < www.undp.org/presscenter/2015/05/24> accessed 20th August 2016

²⁴¹ Ibid.

²⁴² The Concept of Sustainable Development: Definitions and Defining Principles< <http://Sustainabledevelopment.un.org/5> > accessed 20th September 2016

²⁴³ The UN Conference on Environment and Development- Sustainable Development (1992), <<http://sustainabledevelopment.un.org> > accessed 30th July 2016

²⁴⁴ The following are examples of countries and Institutions which support the Sustainable Development Goals(SDGs): Japan, US, the EU, Australia, AU, Ghana; the World Bank, IMF, WTO, OCED,

environment and its multitude of resources in such a way as not to compromise the needs of future generations.²⁴⁵

Cameron suggests that “sustainable development should enable trade and trade rules to complement other policies to help optimise individual and collective behaviour to promote human, social, economic development and to protect the environment with an emphasis of meeting the needs of the present generation without compromising on the future generation needs.”²⁴⁶ The issue of sustainable development is crucial in the context of free trade and, particularly in this research because it highlights ‘good health and wellbeing’ (SDG goal 3) and ‘clean water and sanitation’ (SDG goal 6)²⁴⁷ which are examined in respect of promoting access to affordable water (chapter 3 and medicines (chapter 4). In this respect, the sections below attempt to explore how the WTO is implementing the SDGs to protect the wellbeing of developing countries and access to water and medicines.

4.1 WTO, SUSTAINABLE DEVELOPMENT AND DEVELOPING COUNTRIES

In line with the above discussion, the WTO has resolved to implement the SDGs through the medium of trade among its member states to ensure that human development is protected by committing to five main principles of the SDGs.²⁴⁸

²⁴⁵ The Rio de Janeiro Conference “Our Common World” (1992) available at: www.un-documents.net/our-common-future.org, accessed 28th October 2016

²⁴⁶ James Cameron, “Trade and environment in the context of Sustainable Development” in Markus W. Gehring, and Marie-Claire Cordonier (eds) *Sustainable Development in World Trade Law*, (Kluwer Law International, Netherlands, 2005) 29

²⁴⁷ Principles for Framing Sustainable Development Goals, available at: www.unsdsn.org/goals/2014/principles, accessed on 20th September, 2016

²⁴⁸ The WTO and Sustainable Development Goals, available at: http://www.wto.org/english/cohert/sdgs_e.htm, accessed 24th October 2016; the five principles which the WTO has committed to, are as follow: SDG 2 on hunger, food, security, nutrition, and sustainable agriculture; SDG 3, on healthy lives and wellbeing; SDG 8 on economic growth, employment and work; SDG 10 on inequalities within and among countries and SDG 14 on oceans, seas, and marine resources.

Similarly, human development is focused upon in the WTO's preamble which states that:

“recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising the standards of living, ensuring full employment of a large and steady growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for optimal use of the world's resources in accordance with the objective of sustainability, seeking both to protect and preserve the environment and enhance the means of doing so in manner consistent with their respective needs and concerns at different levels of economic development.”²⁴⁹

As discussed in section 3.1.2 of this chapter regarding the importance of preamble, the WTO should endeavour to protect human development especially in the spheres of access to water and medicines in developing countries, particularly in Ghana.

Goyal observes that sustainable development requires that exploitation of natural resources ought to be done in manner that safeguards resources for the needs of future generations, without damaging the environment for generations yet to come.²⁵⁰ In effect, sustainable development is a responsibility of each member country of the WTO and also demands that developing and developed countries undertake trade and services activities in the global environment with a sense and purpose of guarding the wholeness of the environment. In this regard, Macmillan has also explained that Article XX (b) and (g) of WTO provisions enjoin member countries to adopt restrictive or discriminatory measures: to either protect the environment so as to enhance sustainable development; protect human health in order to protect public health; or guard against public morality with a view to promote societal wellbeing.²⁵¹ The premise is that sustainable development is one area in which member state are allowed to adopt

²⁴⁹ Ibid.

²⁵⁰ Anupam Goyal, *the WTO and International Environmental Law*, (Oxford, University Press, Oxford 2006) 44

²⁵¹ Fiona Macmillan, *WTO and the Environment* (Sweet & Maxwell, London 2001) 24

discriminatory rules so as to protect the health, social and economic wellbeing . However, in accepting the challenge of SDGs under the WTO, developing countries are confronted by the following constraints.

Firstly, it has been argued that the USA's political stance during the TRIPS agreement did affect developing countries' ability to secure favourable deals in respect of technical transfer which is crucial to promote their economies as well as sustainable development.²⁵² Wade cited the example of TRIPS to explain that: "but today, the reverse engineering, imitation and many strategies of innovation to develop technology are outlawed or made significantly more difficult by high levels of patent copy rights protection mandated by TRIPs. Thus TRIPS raises significant development obstacles for many countries that earlier developers did not face."²⁵³ Simply, developing countries cannot realise sustainable development without the opportunity of gaining the requisite technological capabilities which WTO promised them. Also, the failure among developed countries to reform aspects of WTO legislative instruments (TRIPS/GATS) to spur growth of technical capacity in developing countries potentially undermines sustainable development.

Secondly, poverty is one factor which militates against developing countries' effort to achieve sustainable development. In this regard, Lehtonen expressed the view that:

"Poverty may result in undermining the protection of the environment. Although developing countries face the hardest of challenges in achieving sustainable development, it is suggested that significant freedom be given to each developing country in formulating sustainable trade policy."²⁵⁴

²⁵² James Harrison, *The Human Rights Impact of the World Trade Organisation*, (Hart Publishing, Oxford, 2007) 160

²⁵³ Robert Hunter Wade "What Strategies are Viable for Developing Countries Today? the WTO and the Shrinking of Development Space" (2003) *Review of International political Economy*, 13

²⁵⁴ Markku Lehtonen, "the Environment- Social interface of Sustainable Development: Capabilities, Social capital Institutions" (2004) 49 *Ecological Economic*, 199-204

Sustainable development will yield the best results if developing countries are allowed a free-hand in devising policies which are peculiar, unique and relevant to meeting their national economic needs. There is a view, that by signing the multilateral trade agreement, developing countries' freedom to formulate peculiar national economies policies and strategies have been curtailed. They ought to amend their national laws to comply with the WTO trade agreement, such as TRIPS and GATS agreements.

The above discussion suggests that sustainable development occupies a central part of the WTO's free global trade agenda because it is inculcated within most WTO agreements and policies with an obligation upon member countries to implement them.

4.1.2. GHANA, FREE TRADE AND SUSTAINABLE DEVELOPMENT

The aim of this section is not to provide a general discussion on sustainable development in Ghana. Rather, the focus will be on how trade policies in Ghana reflect sustainable development commitment in the country. With this, this section also examines Ghana's sustainable programme at the regional and national levels.

Ghana is a signatory to the United Nations Convention on Environment and Development (UNCED).²⁵⁵ The UNCED, a non-binding instrument, urges Member-states in light of principle 2, to undertake developmental programmes without compromising on protecting human life and the environment.²⁵⁶ Under Rio+20 (2012), various policies²⁵⁷ were adopted. However, one key policy that may advance the

²⁵⁵ A/CONF.151/126 (Vol. IV) Report of the United Nations Conference on Environment, <www.un.org/documents/aconf15126-4, > accessed 30th July 2016

²⁵⁶ *ibid*

²⁵⁷ Some of the policies adopted at the UN Rio+20 Summit are: Sustainable Development Financing Strategy; Follow-up Framework by the UN system; Establish high level political forum; 10-year framework of SCP.

wellbeing of the people in Africa is the transfer of technology.²⁵⁸ With transfer of technology to developing countries, it is expected that these countries would be able to organise their economies effectively so as to harness water and medicinal resources to achieve human development. Also, Principle 4 of the UNCED states that “sustainable development should form an integral part of all operational chain and should not be considered in isolation in an effort to safeguard the environment.”²⁵⁹

4.1.3 The African Commission’s Role in promoting Sustainable Development at the Regional Level

The African Charter on Human and Peoples’ Rights (ACHR) promotes sustainable development with a focus to safeguard human wellbeing.²⁶⁰ In respect of Article 24²⁶¹ of the ACHR, Linde and Louw argue that polluting activities caused by the government of Nigeria in the district of Ogoni was a breach of the ACHR which undermines the concept of a healthy environment that favours access to health and clean water.²⁶² The Ogoni decision, though, delivered in the context of environmental protection, the Commission explained that member states have a duty to ensure that their citizens have access to good health and clean water. Indirectly, this judgment seems to protect access to medicines which is constitutive of health delivery.²⁶³

²⁵⁸ United Nations Conference on Sustainable Development, Rio+20, available at: <http://sustainabledevelopment.un.org>Rio+20>, accessed on 20th October 2016

²⁵⁹ Principle 4 of the 27 Principles of the Rio Declaration, available at <http://sustainabledevelopment.un.org/content/document>, accessed 20th January 2014

²⁶⁰ The African Charter on Human and Peoples’ Right (1981), available at: <http://au.int/en/treaties>, accessed on 30th July 2016

²⁶¹ Article 24 of the ACHR/Banjul Charter requires of member to promote and protect satisfactory environment for the people.

²⁶² Morne Van der Linde and Lirette Louw, “Considering the Interpretation and Implementation of the African Charter on Human and Peoples’ Right in light of the SERAC Communication”, (2003) 3 African Human Rights Law Journal, 168-170

²⁶³ The Commission stated that: “the right to health is recognised in Article 16 and it implies a concrete obligations for Sates, namely to take the necessary measures to protect the health of their people.” The right to a general satisfactory environment, laid down in Article 24, includes the right to a healthy environment,

4.1 4 Ghana's effort to promote Sustainable Development with respect to Water and Medicines

At the national level, Ghana signed the ACHR on 31st October 2003 July 2004 and ratified it on 13th June, 2007.²⁶⁴ Ghana's attempt to protect the environment has resulted in the establishment of the Environmental Protection Agency (EPA) in 1974. The EPA²⁶⁵ was entrusted with the duty to formulate policies and make recommendations to the government, agencies of the state and private institutions on how best to promote sustainable development which advances the wellbeing in the spheres of water and human health.²⁶⁶ Kufour explains that Ghana's commitment under the UNCED has made little impact in promoting sustainable development because individuals have been excluded from participating in decision-making processes that affect water resources and other means of livelihood.²⁶⁷ Although Kufour argues that in respect of the UNCED and in conformity with the Brundtland report,²⁶⁸ Ghanaians may have the right to make legal claims in respect of destructions to the environment. However, the government has initiated only a few social or economic programmes in order to promote access to

which means a clean and safe environment. In the view of the Commission, these provisions obligate governments to desist from directly threatening the health of and the environment of their citizens. In addition, the State must take measures to prevent pollution and ecological degradation. Instead, the Nigerian government was actively involved in the pollution, the contamination of the environment and related health problems of the Ogoni people, by condoning and facilitating the activities of the oil companies through the placing the legal and military powers of the state at the disposal of the oil companies.”

²⁶⁴ Ratification Table: Protocol to the African Charter on Human Peoples' Rights on the Rights of Women, < <http://www.achpr.org/instruments/womens-protocol/ratification>, > accessed 16th February 2014

²⁶⁵ Ghana's Environmental Protection, Act (1994), < [www.http://ghanaoil.org/ibdex.php/ghan-oil-and-gas](http://ghanaoil.org/ibdex.php/ghan-oil-and-gas), > accessed 25th February 2014.

²⁶⁶ Ibid.

²⁶⁷ Kofi Oteng Kufor, “The Evolution and Structure of popular Participation in Environmental Decision-Making: The Case of Ghana” in B. Chaytor and K.R. Gray (eds), *International Environmental Law and Policy in Africa*, (Springer Science, New York 2003) 255

²⁶⁸ The UN Conference on Environment and Development - Sustainable Development (Brundtland Report) (1992), < <http://sustainabledevelopment.un.org>, > accessed 20th October 2016

water and medicines.²⁶⁹ Furthermore, Ghana's partnership with other stakeholders²⁷⁰ to develop sustainable water policies and strategies has failed because of poor implementation measures.²⁷¹ Oppong has also suggested that Ghana's Parliament has not passed any specific legislation implementing the ACHR. Yet, the courts are expected to adjudicate cases in recognition of the Charter provisions.²⁷² As Ghana is a dualist country and it needs an act of Parliament/ legislative instruments to give effect to her international treaty obligations. This issue is examined in detail in chapter five of this thesis.

Notwithstanding these setbacks, there is renewed effort on the part of the Ghanaian government under the Savannah Accelerated Development Agency (SADA) created on 17th September 2010,²⁷³ to bridge the developmental gap between northern and southern regions of the country. The focus of the SADA is to promote sustainable development and improve access to water and health among the people.²⁷⁴ This example indicates that, to some extent, Ghana is striving to achieve the SDGs on water and health.

²⁶⁹ Kofi Oteng Kufour, (n.267) 260-261.

²⁷⁰ Some of the institutions with which Ghana is working to promote SDGs are: New Partnership for African Development (NEPAD); Africa water Commission and Ghana Water Commission. This partnership led to the promulgation of Ghana Water Resources Act

²⁷¹ Republic of Ghana- National Assessment Report of Sustainable Development Goals and Targets for Rio20+ Conference, Ministry of Environment, Science and Technology, (Accra, March,2012) p. 21, < <http://sustainabledevelopment.un.org>>1.pdf, > accessed 20th October 2016.

²⁷² Richard Frimpong Oppong "Re-imaging International Law: An Examination of Recent Trends in International Law into National Legal Systems in Africa" (2006) Fordham International Law Journal, 314

²⁷³ The Savannah Accelerated Development Agency (SADA), created 17 September 2010 by an ACT of Parliament (805) as an independent agency entrusted with the responsibility of coordinating the northern ecological zones in Ghana. Its aim is to focus on the three northern regions of Ghana: Upper East, Upper West and the Northern region by adopting SDGs through the medium of forested green zone to improve quality lives of the vulnerable citizens in those regions, <www.mofa.gov.gh, > accessed on 20th October 2016

²⁷⁴ Crentsil Kofi Agyekum, Huang Haifeng and Amma Ayeiwaa, "Ghana's Efforts towards the Emergence of Green Economy" (2016) International Journal of Ecosystem 6(2) 43-46

4.1.5 Ghana's effort to reduce pollution in order to promote access to Water and Health

There is not a single consolidated legislation in Ghana that aims to protect the various forms²⁷⁵ of pollution which adversely impact on access to clean water and health.²⁷⁶ However, the Environmental Protection (EPA) Act of Ghana established the National Environmental Agency with a mandate to initiate policies/frameworks and programmes to stem pollution in the country.²⁷⁷ Article 2 (h) of the EPA Act states among others, that the EPA shall set “standards” and “guidelines” to ensure that pollution activities relating to air, water, land including other forms of toxic and waste disposal are prevented.²⁷⁸ Article 2(h) is the only provision of the EPA Act where protection of water as a source of health to Ghanaians is mentioned. This gives the impression that access to clean water including health was not a major concern of the Ghanaian government and policy-makers during the enactment of the EPA (1994) Act.

Notwithstanding the above, the government of Ghana has collaborated with some foreign institutions; namely the International Development Agency, OPEC Fund, the Bank for Economic Development in Africa (BEDA) and the Kuwait Fund for Arab Development to build a sewage treatment plant with a capacity of 1,300m³ to stem the pollution of Odaw- Korle lagoon.²⁷⁹ In addition, this collaborative project has as its strategy to embark on dredging of the Odaw- Korle Lagoon in Accra (Ghana) in order

²⁷⁵ The various forms of pollution in Ghana are found in: sources of water, air, land and environment.

²⁷⁶ Benjamin N.A. Aryee, Bernard K.Ntibery and Evans Atorkui, “Trends in the Small –Scale Mining of Precious Minerals in Ghana: A Perspective on its Environmental impact” (2003) *Journal of Cleaner Production*, Elsevier, 137

²⁷⁷ Ghana's Environmental Protection Act, (1994), Act 490, available at: <http://ghanaoil.org/ibdex.php/ghan-oil-and-gas>, accessed 25th February 2014.

²⁷⁸ Ghana's Environmental Act, (1994), Act 490, *ibid*.

²⁷⁹ Kwasi Owusu Boadi and Markku Kuitunen, “Economies of Waste: Rethinking Waste Along the Korle Lagoon” (2002) *22 the Environmentalist*, 301-309

to improve human health by reducing pollution- induced diseases (malaria and typhoid).²⁸⁰ With these projects, the government has hoped to increase water supply for domestic and sanitation purposes.²⁸¹ The government of Ghana's strategic partnership with the above institutions to extend the supply of water in communities around the Korle Lagoon sounded ambitious but achieved little. This is because most of the funds were mismanaged by the Ghanaian authorities who showed little interest of sustaining the project.²⁸²

Similarly, between 2005 –08, the EPA entered into an agreement with some international organisations²⁸³ in order to establish a comprehensive air quality monitoring programme in Accra. Also, the objective was to reduce roadside pollutants including Carbon Monoxide (Co₂), Particular Matter 10 (PM) and Sulphur Dioxide (So₂).²⁸⁴ The rationale behind this project was to measure the impact of pollution on the health of Ghanaians living in the city of Accra.²⁸⁵ Ghana has also joined the Trans ECOWAS Highway Project which links all the member states by road in order to reduce pollution thereby improving the people's health.²⁸⁶ These projects show that the government of Ghana is promoting better access to clean water and air at the national level through collaborative projects.

²⁸⁰ Kwasi Owusu Boadi and Markku Kuitunen, *ibid* p. 307

²⁸¹ *Ibid*.

²⁸² *Ibid*.

²⁸³ The EPA entered into partnership with the United Nations Environmental Programme (UNEP), United States Environmental Protection Agency (USEPA) with the objective of promoting air quality in Ghana.

²⁸⁴ Frederick A. Armah, David O. Yawson and Alex A.N.M.Pappoe, "A Systems Dynamic Approach to Explore Traffic Congestion and Air Pollution link in the City of Accra, Ghana", (2010) 2 Sustainability, 252-265

²⁸⁵ Frederick A. Armah, David O. Yawson, *ibid*

²⁸⁶ *Ibid*.

5. THE ROLE OF WORLD BANK IN THE ECONOMY OF GHANA

This section examines the role of the WB in promoting the economic, social and health standards of Ghanaians in light of the trade liberalisation, privatisation and structural adjustment programmes implemented in the country. In order to achieve this objective, firstly, this section explores some economic initiatives undertaken by the WB to promote economic wellbeing of Ghanaians; secondly, this section discusses the WB's role in the provision of water facilities and, thirdly, the contribution of the WB towards improving the wellbeing of Ghanaians in the health sector is examined.

The WB has currently helped Ghana to reduce her fiscal deficit from 10.2 per cent of GDP in 2014.²⁸⁷ This initiative by the WB is to enable Ghana promote the creation of jobs and provisions of social infrastructures, in order to achieve a middle-incomes status by 2030.²⁸⁸ The WB's and its private arm, International Finance Corporation (IFC), contributed as part-financiers in providing loans as well as consultants in setting up the oil extraction industry in Ghana; with a view to boost the social and economic prosperity of Ghanaians.²⁸⁹ These projects were announced by the WB's vice President, Obiageli Ezekwesili, in Accra, Ghana in 2009.²⁹⁰ Although these loans and projects finances appear huge and promising, there are still large sections of the Ghanaian populations struggling with abject poverty as most of the WB's loans are directed towards oil and gas projects and the private sector; which not only exploit the masses to meet their greed for profits, but also undertake privatisation activities, geared towards

²⁸⁷ The World Bank's Group aims to help "Ghana sustain her economic by halving poverty by 2015" World Bank Report (2015)

<<http://www.worldbank.org/WEBSITE/EXTERNAL/NEWS/0,,contentMDK:22098564,>> accessed 15th September 2014

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

satisfying minority interests in the economy.²⁹¹ This indicates that the WB is only interested in developing the oil and gas to satisfy the energy needs of the developed states to the detriment of health and social needs of majority of Ghanaians.

Under Ghana's poverty reduction strategy in 2002, the WB committed US\$450 million towards the country's efforts to reduce poverty by developing local knowledge in the area of information technology.²⁹² According to Paul Wolfowitz, president of the WB, part of the US\$450 million grant resulted in the establishment of a private Internet shops in part of Accra, called Busy Internet. This facility makes it possible for private businesses in the city to access information speedily and efficiently on business opportunities around the world, so as to help them take business decisions.²⁹³ The above WB's loans scheme to Ghana appears to achieve very little because the focus has primarily been to motivate the private sector as an engine of propelling the Ghanaian economy. However, the failure to build a public internet facility with the capacity to improve the information technology and business knowledge of a majority of Ghanaians not only reflects the limited approach of the WB's strategy, but also denies most Ghanaians an opportunity to be trained in the same field.

With respect to building Ghana's capacity so as to deliver quality social and economic needs of the Ghanaians, the WB has provided a total loan of US\$1.04 billion between the years 1994-2004. This loan aimed to strengthen the following areas of government sectors: (i) government department; (ii) institutional sector and (iii) human

²⁹¹ World Bank –Ghana- “Economy-wide impact of oil discovery in Ghana” (2009) Washington, D.C: World Bank, <: <http://documents.worldbank.org/curated/en/752921468030343049/Ghana-Economy-wide-impact-of-oil-discovery-in-Ghana>,> accessed 20th December 2016

²⁹² World Bank funds to Reduce Poverty in Ghana, < <http://web.worldbank.org/WEBSITE/EXTERNAL/NEWS,.O.,print:Y-conte>, > accessed 30th July 2016

²⁹³ Ibid.

resources.²⁹⁴ The following provides brief description of the WB's contributions in the respective sectors:

- (i) Organizational capacity: the project aimed to reform the services delivery sector by creating automated services delivery points at: Ghana Health Services, the Ghana Education service and the Ghana Highway Authority as well as the National Institutional Reform Program (NIRP) to be given the responsibility to streamline or privatize up to 50 government agencies.²⁹⁵
- (ii) Institutional capacity: the goal here was to improve policy formulation and procedures to include decentralization of government authority to the District level, introduction of performance - based budgeting, improvement of civil service human resource management information system, new public service pay and income policy, and reform of public procurement.²⁹⁶
- (iii) Human resource development: this was to ensure that education and health services are expanded including professional development for doctors, nurses, managers, engineers, and skills development for more than 100,000 for civil servants, especially teachers.²⁹⁷

²⁹⁴ An Independent Review of the World Bank Support to Capacity Building in Africa: The Case of Ghana, Word Bank Report, (2007) available at http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/01/02/000020953_2008, accessed on 15/09/2013

²⁹⁵ Ibid.

²⁹⁶ ibid

²⁹⁷ ibid

The WB's contribution towards revolutionising Ghana's capacity building recognises the fact that vibrant government agencies can bring prosperity to the economy through the provision of skilful workforce and efficient technical capacity. This project could have benefited the country to convert her numerous raw materials/produces into finished goods. However, the WB's project contributed nothing by way of building industrial and manufacturing plants.²⁹⁸

A success story could be the example of the Farmapine Ghana Limited (FGL) which was established with assistance from the Government of Ghana and the WB. This assistance was provided in the form of distributing agrochemicals to the pineapple farmers along with advice on how to grow and harvest the produce so as to ensure their export quality.²⁹⁹ Here, the WB has contributed towards promoting the wellbeing of Ghanaians economically. However, such contributions do not go far enough to improve the economic prosperity of majority of Ghanaians.

5.1 THE ROLE OF THE WORLD BANK IN WATER SERVICES IN GHANA

This section examines briefly the WB's role in the provision of water supply in Ghana through the imposition and implementation of SAP. Through SAP, the WB requested Ghana to privatise her national water corporation as conditionality for the WB loan.³⁰⁰ This section will highlight some of the criticisms against the WB's role in respect of the

²⁹⁸ George B.N. Ayittey "The Failure of World Bank Policies in Africa" (September 2002) Testimony before The Economic Affairs Subcommittee of the Senate Foreign Relations Committee, The US Congress, Washington, D.C. 6

²⁹⁹ Tsutomu Takane, "Smallholders and Non-traditional Exports Economic Liberalization: The Case of Pineapple in Ghana" (2004) African Study Monographs, 30-31 and 39

³⁰⁰ Kwabena Donkor, *Structural Adjustment and Mass Poverty in Ghana: Making of Morden Africa*, (Ashgate, UK 1997) 192

above. Chapter 3 of the thesis will offer a detailed discussion in respect of the WB's activities regarding water privatisation in Ghana.

In the early years of 1990s, Donkor has explained that the then leader of Ghana, Flt. Lt. Jerry John Rawlings succumbed to pressures from the WB to privatise Ghana Water and Sewerage Corporation (GWSC) as a conditionality to receive WB loan to improve the country's water infrastructure.³⁰¹ Grusky also suggested that the WB, IMF and other multilateral institutions collaborated to privatise water supply and added:

"But U.S. and other rich country representatives on the boards of the IMF, World Bank and other multilateral development banks often push contrary policies in developing countries, forcing them to accept reduction in water subsidies for water and sanitation, increased consumer fees for water, and corporate privatisation of water utilities."³⁰²

The collaboration among the WB and its allies to secure privatisation of water in Ghana has been interpreted as a flagrant violation of the governmental constitutional obligation to promote the wellbeing of Ghanaians.³⁰³ The fact that these foreign multinational corporations pushed Ghana to accept and implement SAP's policy as a conditionality for loans suggests that these institutions were seeking financial interests at the expense of ordinary Ghanaians who are unable to afford the new high cost of accessing water for their existence.

³⁰¹ Ibid.

³⁰² Sara Grusky, "Bearing the Burden of IMF and World Bank Policies" (2002) <<http://multinationalmonitor.org/mm2001/01september/sep01corp2.html>, > accessed 25/04/12

³⁰³ Rudolf Amenga-Etago, "Water Privatisation in Ghana: Women's Right Under Siege" (2003) <<http://www.bscw.ihe.ul/pub/bscw.cgi/d2221893/AmengaEtago-WaterPrivatisationinGhana> > accessed 24th November 2013

With the WB's role in water privatisation in Ghana, the section below explores some of the criticisms levelled against the WB in this respect.

First, Shiva has also suggested that WB and IMF have worked to pressure Ghana into increasing water prices to the rate of 50%. This rise in price has undermined both the supply of water and also contributed to deny poor Ghanaians the supply of vital human resource, i.e., water.³⁰⁴ The WB and IMF's policy of water privatisation has meant that the majority of the Ghanaian population, who barely live on less than two dollars per day, would have no access to water except to spend more than half of their income per day on water purchases.

Second, Hunt has argued that the WB's policy of promoting corporate involvement in water supply in developing countries is to ensure competition and quality water supply needs are challenged legally to protect humanity.³⁰⁵ Contrary to the WB's view of promoting quality water supply and competition to enable constant water supply in Ghana, water supply in Ghana has currently not improved nor water supply been affordable. Private sector participation in water supply has been confined to the metropolitan centres, with private water tankers selling water at exorbitant price to the private residential areas, denying access to water to the masses.³⁰⁶

Third, Fitzmaurice has opined that: "The price of water greatly exceeded the possibility of the average person in Ghana and the real beneficiaries of the scheme were the new water company, World Bank lenders and the political elite in Ghana, which are all on good terms

³⁰⁴ Vandana Shiva, *Water Wars: Privatisation, Pollution and Profits*, (Pluto Press, London, 2002) 92

³⁰⁵ Constance Elizabeth Hunt, "Thirsty Planet: Strategies for Sustainable Water Management", (Zed Books, London 2004) 285

³⁰⁶ Private Sector Participation is the introduction of the private sector into a particular area of an economy with a view to improve efficiency to benefit the people, (2009) available at <http://rru.worldbank/toolkits/labor>, accessed 3rd February, 2014

with the international lending institutions.”³⁰⁷ Fitzmaurice’s statement has two implications: (i) that most Ghanaians are confronted with high water prices which are beyond their means because nearly 50% of Ghanaians spend their meagre resources on water supply; (ii) that most of the benefits of the WB’s privatisation agenda suit not only multinational corporations, but also some Ghanaian elites who have joined forces with the WB to exploit the financial benefits of the privatisation agenda., Thus, water supply in Ghana in respect of WB’s privatisation policy has failed the people of Ghana.

In addition, the Halifax Initiative Coalition³⁰⁸ has suggested that in addition to the misery and social hardship that the WB’s water privatisation policy has inflicted upon Ghanaians, it has also encouraged corruption and bribery among some Ghanaian elites.³⁰⁹ It has explained as follows: “the water privatisation process in Ghana has been dogged by accusations of bribery and secrecy.”³¹⁰ Corruption has played a pivotal role in the WB’s water privatisation process in Ghana as water supply contracts were given to cronies of the Bank.³¹¹ The result is that some Ghanaian elites worked in concert with the WB to promote their self-interests in privatising the water supply.³¹²

³⁰⁷ Malgosia Fitzmaurice, “The Human Right to Water” (2006-7) 18 *Fordham Environmental Law Review* 537, 564

³⁰⁸ The Halifax Initiative Coalition is Canadian Coalition for Global Economic and Democracy, (2006) available at www.halifaxinitiative.org, accessed on 3rd February 2014

³⁰⁹ *ibid*

³¹⁰ Halifax Initiative Coalition, “Water, Land and Labour: the Impacts of Forced Privatization in Vulnerable communities” (2003) available at: www.halifaxinitiative.org, accessed 12/05/2012.

³¹¹ *ibid*

³¹² *ibid*

5.1. 2 THE ROLE OF THE WORLD BANK IN GHANA'S HEALTH SECTOR

This section focuses on the role of WB in Ghana's Health delivery system with a view to assess whether access to medicines have been affordable to improve the lives of the Ghanaians, especially those suffering from HIV/AIDS. Also, it attempts to assess how effective the health delivery system has been improved in order to promote human dignity in line with the WB's policy.

According to Ruger, the "WB is now the world's funder of health, committing more than US\$1 billion annually in health lending to improve the health, nutrition and populations, in developing countries."³¹³ The WB's contribution to promote health in developing countries reflects its strategy to protect human dignity in the health sector.

Karima has explained that the WB has initiated a partnership project with the government of Ghana under the E Transform Project. This project prioritises the use of information and communication technology (ICT) as an instrument of helping Ghana to meet her policy of making health accessible to all Ghanaians by 2030.³¹⁴ One objective of programme aims to educate and update the skills and knowledge of health sector workers to understand current health related innovations which can be adopted in treating common illnesses in the country. Although this is an encouraging sign of the WB's support to Ghana's health sector, Ruger has criticised the WB by stating that its privatisation scheme has undermined health delivery systems in most countries, especially a developing country like Ghana. The fact is that, as a result of the

³¹³ Jennifer Prah Ruger, "The Changing Role of the World Bank in Global Health" (2005) (95) (1) American Journal of Public Health, 60

³¹⁴ Saleh Karima, "The Health Sector in Ghana: A comprehensive Measurement" World Bank Report (2008), < <http://www.openknowledge.worldbank.org/handle/10986/12297> > (49) accessed 31 October 2013

programme, most government health centres became privatised, thereby increasing and doubling charges of medical expenses for the ordinary Ghanaian.³¹⁵ Oxfam has also criticised the WB for praising Ghana to implement the National Health Insurance Authority (NHIA). This is because the NHIA forces majority of Ghanaians to pay to access the health service from their limited means of livelihood.³¹⁶ The issue of access to medicines is explored further in chapter 4.

6. INTERNATIONAL MONETARY FUND'S ROLE IN GHANA'S ECONOMY

This section explores the IMF's contribution to the economy of Ghana and offers a brief overview of its role in the water and medicine sector.

The IMF has proposed a strategy which was prepared by its Advisory Strategy Group on Ghana to help reduce poverty by propelling Ghana to attain a middle-income status by 2015.³¹⁷ The report also pointed out that there has been an improvement in macroeconomic policies of Ghana with a growth rate of 5.6%, while inflation has halved from 24.3 to 14.3. Also, the IMF aims to stabilise "Ghana's currency by introducing debt sustainability through sustained fiscal consolidation by expanding capital growth."³¹⁸ The above economic objective will be realised in the pursuance of three pillars: (i) "restraining and prioritizing public expenditure with a transparent budget process; (ii) increasing tax collection; and (iii) strengthening the effectiveness of central bank monetary policy."³¹⁹ The Report further explained that poverty would be reduced

³¹⁵ Kojo Senah, "In Sickness and in Health: Globalization and Health Care Delivery in Ghana" (2001) NS 171 Research Review, 86

³¹⁶ Sarah Boseley, 'World Bank Wrong to Praise Ghana's Healthcare scheme, says Oxfam'(London 10 March 2011) Health 23

³¹⁷ Ghana; Joint Staff Advisory Note of the Poverty Reduction Strategy paper (2010) < <http://www.org/external/pubs/cat/longres.aspx?sk=2618>, > accessed 20th December 2016

³¹⁸ IMF- Press Release: "IMF Mission Reaches Staff –Level Agreement with Ghana on an Extended Credit Facility Agreement"< <http://imf.org> > accessed 20th December 2016

³¹⁹ Ibid.

because job creation is most likely to be achieved thereby stemming migration from the rural areas to the urban centres for non-existing jobs.³²⁰

The IMF has also contributed to Ghana's economy by helping her to service debt relief under the Heavily Indebted Poor Countries (HIPC) scheme.³²¹ According to the IMF, it has advised Ghana in drafting the Poverty Reduction Strategy Paper (PRSP) which enabled Ghana to receive nearly US \$100 million dollar of grant on annually basis with an objective of stabilising her macroeconomic programme.³²² Thus, it has been argued by the IMF that the PRSP has a wider appeal among the Ghanaian population because this strategy was discussed and accepted by a wider section of the Ghanaian population unlike the SAP's policy.³²³

Conversely, there is criticism in Ghana against such economic achievement as claimed by the IMF. It has been suggested in the same report that Ghana's "economic structure remains virtually stagnant with the share of agriculture, industry, and exports in the economy significantly unchanged. In addition, the relative skills of the labour force have not improved."³²⁴ However, in 2013, the IMF advised that Ghana should minimise the level of wages to her working population in order to avoid incurring severe financial problems. The IMF reported that: "... overall, GDP growth is close to 8% due to the oil sector with the non-oil sector decreasing."³²⁵

³²⁰ Ibid.

³²¹ The HIPC was initiated by the IMF and WB as a response to public demand to address the debt crisis of poor countries through debt relief. The PRSP began by the IMF and WB in 2000 was an attempt to address failures of the SAPs as promoted in developing countries.

³²² Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF, IMF Report, (2000) < <http://www.imf.org/external/np/exr/ib/2000/120100.htm>, > accessed 20th November 2014

³²³ Ibid.

³²⁴ Ghana: 2013 Article IV Consultation; IMF Country Report No. 13/187 (May, 29, 2013)< <http://www.imf.org/external/pubs/ft/scr/2013/cr/13187.pdf>,> accessed 20th November 2014

³²⁵ ibid

Biersteker has explained one social dilemma which confronted the Ghanaian Government during the IMF/WB structural reform by saying that: "... Ghana was applauded by a former World Bank president –A.W. Clausen- for laying off 18,000 employees from government sector jobs in order to satisfy the IMF to be granted loans."³²⁶ This neoliberal economic policy recommendation by the IMF to the government has worked not only to undermine social cohesion, but also failed to satisfy the objective of introducing efficiency to spur the economy for development.³²⁷ This explains that the 8% growth, mentioned above, came about because the government heeded to the IMF's policy by removing energy subsidy from the economy and urged the people to pay high tariff as a means of investing in hydro-electricity energy. In this regard, the IMF has earmarked US\$ 800 million towards completing the hydro – electricity project in Ghana.³²⁸

With respect to promoting technical capacity in developing countries, the IMF has promised to work to ensure that developing countries including Ghana is given substantive help in this sphere. The deputy managing director of the IMF, Mr Takatoshi Kato, explained that: "I emphasized that the IMF is committed to working ... through policy advice, capacity-building and technical assistance. I also underlined the importance of the developed world to deliver on their commitments on bilateral aids as well as for improved market for African countries and expanded trade."³²⁹ Indeed, most

³²⁶ Thomas J. Biersteker "Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions" (1990) *International Studies Quarterly*, 484

³²⁷ Nancy Bruce, Geoffrey Garret and Bruce Kogut, "The International Monetary Fund and the Global Spread of Privatization", (2004) IMF Staff papers,(New York Springer), 11-12

³²⁸ Theresa Garvin, Tara K. McGee, Karen E. Smoyer-Tomic and Emmanuel Ato Aubynn, "Community-company relations in gold mining in Ghana" (2009) 90 (1) *Journal of Environmental Management*, 579 -582

³²⁹ Statement by IMF Deputy Managing Director Takatoshi Kato at the Conclusion of his visit to Ghana (personal statement 2007) < <http://www.imf.org/external/np/sec/pr/2007/pr07152.htm>,> accessed 20th November 2014.

of the economic policies being currently pursued by the Government of Ghana are proposed and implemented in the country under the country representatives of the IMF.³³⁰

It is argued that IMF's policy recommendation has not improved the economic status of the majority of the Ghanaians. For instance, due to the wage reduction formula suggested by the IMF, the Tema Oil Refinery (TOR) of Ghana had to be shut down with the employees being sent home.³³¹ This oil refinery was one of the major sources of employment in Ghana, and the policy of wage reduction coupled with closing down of industries, is not a sign of economic development.

6.1. The IMF's Role of Water Supply in Ghana

This section discusses the IMF's role in water privatisation in Ghana with a view to assess whether cheaper, affordable and easy access as stipulated under the SAPs agenda has been realised.

One example is relevant here. In order to fulfil the IMF's water privatisation conditionality, Ghana signed an agreement with Ballast Nedam International (BNI) to secure a \$22 million loan in 1998.³³² The loan was to help rehabilitate and expand the Adam Clark Water treatment plant near Weija (Ghana) and to improve the distribution of water in the Western Accra Area.³³³ This project resulted in the construction of a water treatment facility of 63,000mm with an installation of new water treatment

³³⁰ Ibid.

³³¹ Mali Chivakul and Robert C. York, "Implications of Quasi-Fiscal Activities in Ghana" (2006) IMF working Paper (WP/06/24) (International Monetary Fund, Washington 2006) 34-35

³³² Adam Clark Water Treatment, Weijan Ghana-Water Technology < [www.water-technology.net>project>adam.clark.htm](http://www.water-technology.net/project/adam.clark.htm), > accessed 26th August 2016

³³³ Adam Clark Water Treatment, *ibid*.

equipment.³³⁴ This indicates that the IMF's involvement in the water sector of Ghana has contributed, to a limited extent, towards upgrading technical infrastructures in the country. However, these successes have their criticisms as outlined below.

First, Toussaint has explained that Ghana faces a country-wide social problem which emerged out of the implementation of IMF's SAP implementation in the country, in saying that:

“Ghana has been complying with the conditions imposed by the IMF. One of these conditions- a significant one – concerned the water sector, for which the IMF demanded total cost recovery. In other words, households must bear the total cost of access to water without government providing the benefit of state subsidies. The price of a cubic of water had to be sufficient to recover total operating and management costs.”³³⁵

Adams, Gupta and Mengisteab added that the IMF policy has been unfavourable to the working class in developing countries especially those in sub-Saharan Africa. Here, majority of the people have lost the jobs which provide their means of livelihood through the SAPs recommended to their governments by the IMF.³³⁶ This loss of jobs means that majority of Ghanaians cannot afford water supply which are mostly run by private individuals.

Also, Feust and Haffner argued that privatising Ghana Water and Sewerage Corporation (GWSC), under the IMF's SAP appears to signify a serious strategic failure with adverse social consequences for the people of Ghana and its government, too.³³⁷ Moreover, the IMF was also criticised for pressuring the government of Ghana to “proceed with

³³⁴ Adam Clark Water Treatment, *ibid*.

³³⁵ Eric Toussaint, *The World Bank: A Critical Premier*, (Pluto Press, London 2008) 216

³³⁶ Francis Adams, Satya Dev Gupta and Kidane Mengisteab (eds) “Globalisation and the Developing World: An Introduction” in *Globalisation and the Dilemmas of the State in the South* (Macmillan Press, UK 1999) 6.

³³⁷ Veronica Feust and Stefan A. Haffner, “PPP-Policies, Practices and Problems in Ghana's Urban Water Supply” (2005) (9) *Water Policy*, 169

privatisation of a number of state corporations including the Ghana Water Company” so as to benefit from international loans under the Enhanced Structural Adjustment Facility (ESAF).³³⁸ The impact of privatising water in Ghana has seriously affected majority of people, especially women and children in Ghana because they bear the responsibility of walking long distances to fetch water as well as being the population among whom poverty is very high.³³⁹ Juxtaposing the IMF’s contributions in light of the criticisms above, it can be said that economic and social standard of the majority of Ghanaians did not improve as expected.

6.1.2 THE IMF ’S ROLE IN GHANA’S HEALTH SECTOR

In this section, a brief assessment of the IMF’s role in the health delivery system of Ghana is explored in order to judge the efficiency of its policies promoted in light of the SAPs. Access to medicines in Ghana is further assessed in chapter 4 of this thesis.

One significant contribution made by the IMF to help the social structure of Ghana is through a joint funded scheme, the Global Alliance for Vaccination and Immunisation (GAVI), to organise vaccinations in preventing HIV/AIDS, Tuberculosis and Malaria.³⁴⁰ This project was undertaken upon a realisation that most developing and low-income countries were left behind in meeting their MDGs target to provide health for all by the year 2020³⁴¹ Also, the IMF helped the government of Ghana to institute a subsidy scheme aimed at providing financial grants to families in poorest parts of the country.³⁴²

³³⁸ Rudolf Amenga-Etego “Water Privatisation in Ghana: Women’s Rights Under Siege” (2004) < <http://www.bscw.ihe.ul/pub/bscw.cgi/d2221893/AmengaEtego-WaterPrivatisationinGhana.pdf>, > accessed on

³³⁹ Rudolf Amenga-Etego, *ibid* 152.

³⁴⁰ Robert Fryatt, Anne Mills and Anders Nordstrom, “Financing Health System to Achieve the Health Millennium Development Goals in Low-income Countries”- (January 2010) Health Policy- < www.thelancet.com,> accessed 29 October 2013

³⁴¹ *Ibid*.

³⁴² *Ibid*.

In Ghana, free fees schools schemes were instituted in respect of children of primary and junior school ages among the poorer communities including free primary health care delivery to boost standards of living. This suggests that the IMF's policy in this sphere targets improving the health of Ghanaians so as to advance their economic and social wellbeing.

Finally, there is no denying the fact that the IMF has made contributions towards the uplifting of social and economic prosperity of Ghana as explored in the above discussion. However, those contributions fall short of translating Ghana into viable economy with the aim of attaining a middle income status by the year 2030. This is because the implementation of the IMF's policies of SAP's and privatisation have failed to successfully promote the much needed industrial bases of the country where millions of the people are still struggling to achieve the basic necessities of life.

7. CONCLUSIONS

In conclusion, it can be said that the IEI's SAP, privatisation and trade liberalisation agenda have the potential to improve social and economic prosperity of developing countries.

This chapter has suggested that developing countries' weaker economic status in the world economy coupled with the strong economic position of the developed world, especially the quad countries, have contributed in limiting their negotiating capacity in Geneva and at WTO rounds (section 2).

Section 3 has examined transfer of technical capacity from developed countries to developing countries as enshrined in the provisions of TRIPS and GATS agreements. It is argued that, under trade liberalisation, the current position of developing countries has not improved to enable them gain the necessary benefits of manufacturing and exporting their products to attract the right markets.

Section 4 dealt with sustainable development under WTO in developing countries and in Ghana. It pointed out that though sustainable development is accepted and embraced at all levels, developing countries lacked the requisite resources with which to promote it to an appreciable level. With Ghana, the situation is less encouraging because the government's commitment to sustainable development has been undermined by its lukewarm attitude to apply rigorous laws to control environmental pollution. As a result, the country and its people continue to face and contract pollution related diseases.

Section 5 has discussed the role of the WB in promoting social and economic developments, for example, by granting several loans to Ghana in order to improve her water and health sector. However, the conditions such as SAPs and privatisation have undermined the social and economic fabric of the country with limited access to water and health among most poor Ghanaians.

Lastly, section 6 assessed the roles of the IMF with respect to the provision of water and health care in Ghana through loans schemes. It posited that the current policies of the IMF have not achieved their projected goals as the conditions attached to the loans undermined the social and economic aspirations of Ghanaians.

CHAPTER 3: Access to Water in Ghana under the GATS Agreement

1. Introduction

This chapter examines the World Trade Organisation (WTO)'s GATS Agreement in relation to the IMF / World Bank's economic policies of SAP, privatisation and liberalisation in services in Ghana. These policies forced Ghana into accepting privatisation of her water corporation as a conditionality of receiving international loan to promote her economic, social and infrastructural developments.³⁴³ The period between 1998 -2002 witnessed vigorous activities of the IMF, WB and the WTO working together to promote privatisation, liberalisation and economic adjustment in most developing countries.³⁴⁴ Their hope was to eliminate poverty through free market economic agenda. Ghana's desire to improve the economic and social infrastructural needs of the country led her to receive unfavourable loans from the above institutions with huge debts as a consequence.³⁴⁵ With the privatisation of Ghana Water and Sewerage Corporation (GWSC) under the IMF/WB and WTO agenda, the role of Ghana's government in the provision of water supply and management was vested in the hands of private investors. In respect of this development, this chapter further explores the Ghana government's responsibility to protect access to potable water among the poor majority of Ghanaians under the privatisation scheme. Also, the activities of the IMF/WB, WTO and the MNCs are considered to assess the impact of

³⁴³ Michael Goldman, how "Water for All" Policy became hegemonic: The Power of the World Bank and its transnational Policy Network" (2008) *Geoforum*, 790

³⁴⁴ Nancy Alexander, "The Role of the IMF, World Bank and the WTO's liberalization and Privatization of Water Service Sector", *Citizens*" (2005) *Network on Essential Services*, 18

³⁴⁵ Rashad Cassim, Ian Steuart, "Public Services and the GATS", *ICTSD Policy Paper on Trade in Services and Sustainable*, (University of the Witwatersrand, Johannesburg 2008) 6

those policies on Ghanaians and the country as whole. Moreover, the issue of justice with respect to access to water is briefly explained but access to justice has been dealt with in much detail in chapter 5 of this thesis.

Chapter 3 aims to assess the following question: To what extent has the GATS Agreement promoted access to water in Ghana?

This chapter is divided into six sections. Section 1 traces the history of water services from 1928 to 1998/2002s when Ghana reluctantly accepted privatisation as a conditionality to secure loans to improve her economy. Also, this section deals with explicit and implicit rights of access to water under international agreements and UN Declarations to which Ghana is a party.

Section 2 examines the key institutions responsible for water regulation and its management in Ghana. These institutions comprise: The Water Resources Commission (WRC), Ghana Water and Sewerage Corporation (GWSC), Ghana Water Company Limited (GWCL), the Ministry for Local Government, Rural Development and Environment (MLGRDE) and the Public Utilities Regulatory Commission (PURC). The discussion in this section focuses upon roles and responsibilities of these institutions with respect to their strengths and weaknesses in promoting access to water in Ghana. Here, suggestions are being offered on various ways to improve the above institutions' activities to promote access to water in Ghana.

Section 3 explores the GATS Agreement in relation to liberalisation in services in developing countries and Ghana. This examines the impacts of GATS on developing countries in light of the Uruguay Negotiations.

Section 4 examines developmental issues in Ghana (e.g., GPRSII, NEPAD, MDGs, and SDGs) in light of the National Water Policy of Ghana. The aim here is to assess how the GPRSII, NEPAD, MDGs and SDGs' strategies have been implemented within Ghana's water policy to promote and protect access to water as a human right.

Section 5 discusses some of the reasons as well as the processes of privatisation in Ghana and assesses whether the privatisation agenda is fair and transparent. In addition, the roles and influences of the IMF/WB and the MNCs with respect to the privatisation of Water Corporation in Ghana are explored.

Section 6 considers the roles of Ghana government in protecting access to water as well as protecting Ghanaians against arbitrarily exploitation by private water investors. It explores the level of participation by people in the negotiation of the privatisation of the water corporation. The provision of water facilities under the privatisation scheme, issues of affordability, and the violation of the right to water are also explored.

2. The History of Water Services in Ghana

Potable water production and its distribution started in 1928 predating the country's independence of 1957.³⁴⁶ The then Colonial Administration (the British Colonialist) occupying residences in the former capital, Cape-Coast undertook a pilot system managed by the Hydraulic Branch of the Public Works Department (PWD).³⁴⁷ The above water scheme was meant to provide potable water for the colonialists and their local administrators. Thereafter, access to water was extended to the public in the form of

³⁴⁶ Al-hassan Adam 'Water Privatisation in Ghana' (2003) <
www.waterjustice.org/casestudy.php?component,> accessed 19 May 2012

³⁴⁷ Ibid.

“stand pipes.” Public stand pipes are out-door taps scattered in the neighbourhood with an average spacing of 2km apart.³⁴⁸

After independence and during the reign of Kwame Nkrumah’s nationalist government in the 1960s, a national scheme was formulated to provide potable drinking water to all peoples of Ghana. In order to achieve this vision, Nkrumah enacted in 1965 an Act of Parliament (Act 310) creating the Ghana Water and Sewerage Corporation (GWSC), and assigned it with the responsibility to provide portable water and sanitation services for the people.³⁴⁹ It is worth mentioning here that the GWSC became an autonomous body in 1958 working under the Ministry of Works and Housing, and by 1965 it had become a public entity providing and managing water resources for domestic and industrial purposes.³⁵⁰

However, during the military reign of ex-President J.J. Rawlings of the PNDC era, and between the years 1981-1992, the GWSC was decentralised.³⁵¹ The decentralisation was in response to accepting the macro-economic policies of the World Bank and IMF’s loan conditionality. The macro-economic policies in this respect included: SAP, and down-sizing and trade liberalisation in services which form part of the Economic Recovery Programme (ERP) paradigm.³⁵² The result was that the GWSC was restructured with the help of Thames Utility (UK) which led to 1,400 and 600 employees of the Corporation being sacked in the first and subsequent years of implementing the SAP and ERP policies.³⁵³ The Thames Utility (UK) was contracted by the government

³⁴⁸ Ibid.

³⁴⁹ Act 310, Ghana Water and Sewerage Corporation (1965), the Act entered into force in 1966.

³⁵⁰ Ibid.

³⁵¹ The World Bank Document (2008) < www-worldbank.org/external/default/WDScontentserver/WDS/IB/2008> accessed 15th July 2012.

³⁵² *ibid*

³⁵³ Ibid.

of Ghana to offer consultancy advice on the prospects of privatising water resources to foreign corporations.³⁵⁴

3. The Right to Water: Ghana's International Obligations

The right of access to water as a human right features extensively in both international and regional documents³⁵⁵ with states in the developed and developing world struggling to translate such rights into their substantive laws.³⁵⁶ Ghana has signed most international agreements³⁵⁷ which explicitly and impliedly recognise access to water. Also, the chapter five of the 1992 Constitution of Ghana contains a list of human rights with a view to protect the social and economic wellbeing of Ghanaians.³⁵⁸ While right to water is not expressly mentioned in the Constitution, Article 13 (1) of the 1992 Constitution of Ghana affirms the protection of human life by giving assurances that the executive, legislative judiciary and all law enforcement agencies must respect this obligation.³⁵⁹ The following discussion will argue that the right to life includes right to water.

The Universal Declaration of Human Rights (UDHR) recognises the 'right to life' of each and every individual irrespective of race, colour, creed or religion.³⁶⁰

³⁵⁴ Rudolf N. Amenga-Etego "The Private Sector in Ghana's water- a Strategy to serve or steal?" (2004) Bretton Woods project, < www.brettonwoodsprojects.org/art-84227,> accessed 20th December 2016

³⁵⁵ Melina Williams "Privatization and the Human Right to Water: Challenges for the New Century" (2007) 28 Mich. J. Int' L 469

Some examples of international and regional documents promoting access to water are: International Decade for Action 'Water for Life' 2005-2015; 6th World water Forum; Promoting Transboundary Water Security in the Aral Sea Basin

³⁵⁶ Amanda Cahill Ripley, *The Human Right to Water and its Application in the Occupied Palestinian Territories* (Routledge, Oxford 2011) 8

³⁵⁷ The International Covenant on Economic, Social and Cultural Rights (ICESCR), the Geneva Convention Relative to Treatment of Prisoners of War (1949); the UN Convention on the Right of the Child

³⁵⁸ The 1992 Constitution of Ghana, (Tema, Ghana 1995)

³⁵⁹ Ibid.

³⁶⁰ See the Universal Declaration of Human Rights, G.A. Res 217A (III), at 72, U. N. GAOR, 3rd Sess., 1st Plen. Mtg., U.N. Doc., A/8/10 (Dec. 12, 1948)

Primarily, the right to life was not extended to human necessities such as water.³⁶¹ However, early proponents of the right to water argued that right to water is implied within the sphere of the right to life.³⁶² According to Hardberger, the right to water is implied in article 25 of the UDHR where it is stated that: “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”³⁶³ This view suggests the importance of water as a human right which is derived from the right to life.

In addition, the substantive content of the right to water is provided by the General Comment No.15 of the UN Committee on Economic, Social and Cultural Rights.³⁶⁴ General Comments are authoritative interpretative documents but they are non-binding. According to the General Comment No.15, right to water is implied in Article 11(1) that deals with right to an adequate standard of living and article 12 (2) (b) that deals with right to health of the International Covenant for Economic, Social and Cultural Rights (ICESCR) (1966).

³⁶¹ Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, (Oxford University Press, North Carolina 2000) 734,

³⁶² John Scanlon et al, International Union for Conservation of Nature and Natural Resources (IUCN), (2004) *Envtl. Pol’y & L. Paper No.51*; see also: Joyeeta Gupta, Rhodante Ahlers and Lawal Ahmed, “the Human Right to Water: Moving Towards Consensus in a Fragmented World, (2010) 19 *RECIEL* .296-298; Oriol Miroso and Leila M. Harris, “Human Right to Water: Contemporary Challenges and Contours of a Global Debate” (2011) Vol. 44, Issue 3 pp.932-949; David R. Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011-2012) 57 *McGill L.J.* 81
Water as a Human Right 18-19 (2004) < <http://www.iucn.org/themes/law/pdffdocuments/EPL51EN.pdf>,> accessed 10th June 2016

³⁶³ Amy Hardberger, “Whose Job Is It Anyway? Governmental Obligations Created by the Human Right to Water” (2006) 41 *Tex. Int. L.* See also e.g. Inga Winkler, “Judicial enforcement of the Human Right to Water-Case Law from South Africa, Argentina and India” (2008) *Law, Society & Global Development Journal*; Benjamin Mason Meier, Georgia Lyn Kayser, Urooj Quezon Amjad and Jamie Bartram, “Implementing an Evolving Human Right Through Water and Sanitation Policy” (2013) 15 (1) *Water Policy* 116-133

³⁶⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 15, the Right to Water (Twenty-ninth session, 2013), U.N.Doc E/C.12/2002/11, < www.unhcr.org/refugees/pdf/15.pdf,> accessed 10th November 2016. General Comment 15 is discussed below in the context of Ghana.

In recent years, the right to water is being considered as a stand-alone right. Recognition has been given to the right to water by the UN through the adoption of Resolutions. For example, the General Assembly, in July 2010, adopted a Resolution to emphasise the importance of the right to water and stated that more than “0.9 of people which represents one-third of the world population have no access to sanitation whereas 2.6 billion people are burdened with access to quality water and sanitation.”³⁶⁵

The World Health Organization (WHO) has also affirmed that the right to water as a human right should be respected and protected to improve the social and economic wellbeing in the world, especially among girls in developing countries, who are often burdened with the responsibility of travelling long distances in search of water.³⁶⁶ In addition, the United Nations International Children Emergency Fund (UNICEF) plays an active role to improve the health, sanitation and water needs of children and vulnerable people in over 100 countries globally.³⁶⁷ In its commitment to ensure that water is made available to children and vulnerable people in developing countries including Ghana, the UNICEF opines that: “water is essential for the survival and development of all children. Without water, children simply cannot stay alive or thrive in a healthy environment. Water resources and the range of services they provide, strengthen poverty reduction, economic growth and environmental sustainability.”³⁶⁸

³⁶⁵ Resolution on Human Right to Water and Sanitation (UN General Assembly Resolution A/64/292, 28 July 2010) <<http://www.un.org/News/Press/docs/2010/ga10967.docs.htm> > accessed 10th June 2016

³⁶⁶ WHO- Evaluating the Costs and Benefits of Water and Sanitation Improvements on the Global Level (WHO:2004)

³⁶⁷ UNICEF: Water, Sanitation and Hygiene, < www.unicef.org,> accessed 20th October 2016

³⁶⁸ UNICEF, *ibid*

Thus, UNICEF's role in the provision of water not only accords with WHO's health policies but extends to recognise the protection of human life.

Ghana is a party to the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) (1979).³⁶⁹ The CEDAW specifically enjoins heads of states/governments to adopt and implement national strategies to ensure that adequate supply of water is provided to enable women organise their sanitation and consumption needs.³⁷⁰ The mention of women with respect to water does not however exclude other members of society. Rather, it is an attempt to sensitise policy-makers to give due recognition to women in circumstances where they are discriminated against in respect of water.³⁷¹ Thus, Ghana should endeavour to promote her obligation under the convention with respect to extending water supply to women and children.

Ghana is a party to the UN Convention on the Right of the Child (UNCRC) (1989)³⁷² Article 24, paragraph 2, of the Convention equally demands, that governments should double their effort to extend resources such as: "clean water, nutritious food and clean environment to protect the health of all children, universally."³⁷³

³⁶⁹ United Nations Convention on the Elimination of All Forms Discrimination against Women (New York, December 1979) < <http://www.un.org/womenwatch/daw>. > This Convention entered into force on 3 September 1981

³⁷⁰ Article 14 of the Convention on Elimination of all Forms of Discrimination against Women, *ibid*.

³⁷¹ William Schreiber, "Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations" (2008) 48 *Natural Resources Journal*, 474

³⁷² United Nations Convention on the Right of the Child (UNCRC) (New York, 20 November 1989) < <http://unchr.ch/html/menu3/k2crc.htm>. > This Convention entered into force on 2 September 1990.

³⁷³ The Convention on the Right of the Child, *ibid*.

The other international conferences which consider issues related to access to water include: The 1992 Dublin Statement on Water and Sustainable Development,³⁷⁴ Agenda 21, was adopted at the Rio Conference on Human Environment and Development in 1992 in Brazil,³⁷⁵ the 2000 Ministerial Document of the Second Water Conference,³⁷⁶ the World Summit on Sustainable Development (WSSD)³⁷⁷ and the Millennium Development Goals.³⁷⁸ These conferences offer non-binding policies, strategies and goals to guide the governments to promote access to water as a right.

3.1 Ghana water Policy

The Ghana Water Policy was prepared by the Ministry of Water Resources, Works and Housing (MWRWH), in consultation with the government under the guidance of then sector Minister Hackman Owusu-Agyemang in 2007.³⁷⁹ The policy recognises water as an indispensable element for human survival and other living organisms and stated that: “water is essential to the existence of man and all living things. Water is a cross-cutting element of the Growth and Poverty Reduction Strategy (GPRSII) of the Republic of Ghana and it is linked to all the eight principles of the Millennium Development Goals (MDGs).”³⁸⁰ Thus, the water policy has as one of its objectives to integrate the principles

³⁷⁴ International Conference on Water and the Environment (Dublin Statement) (1992) <<http://www.Wmo.ch/pages/prog/documents/English/icwedece.html> > accessed 20th June 2014

³⁷⁵ United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, Agenda 21, A/CONF.151/23

³⁷⁶ Second World Water Forum, The Hague, March 22, 2000, Ministerial Declaration of The Hague on Water Security in the Twenty-First Century, < <http://www.waternunc.com/gb/secwwf12.htm> > accessed 20th June 2014

³⁷⁷ World leaders adopt Sustainable Development Goals-UNDP (2015) < www.undp.org/presscenter/2015/09/24, > accessed 20th December 2016

³⁷⁸ U.N. Millennium Project 2005, investing in Development: A Practical Plan to Achieve the Millennium Development Goals, < <http://www.Unmillenniumproject/MainReportChapter1-lowres.pdf>, > accessed 20th June 2014

³⁷⁹ Ghana Water Resources Commission & Ministry of Water Resources, Works & Housing (WRC & MWRWH, 2007), “Ghana Water policy”, Water Resources Commission/Ministry of Water & Housing, Accra.

³⁸⁰ Ibid.

of Sustainable Development Summit in order to promote the social and economic well-being of Ghanaians by ensuring their access to water. Moreover, the policy aims to coordinate and collaborate with central government institutions, regional government agencies and crucially with district /local government Assemblies to provide effective access, affordable and quality potable water for the human needs of the people.³⁸¹ Furthermore, the policy aspires to protect other sources of water in Ghana, such as rivers, rain-water, ground water and streams through legislative and regulatory measures to ensure that access to water is readily provided to meet the human and sanitation needs of the people.³⁸²

In respect of the preceding discussion on Ghana's water policy, the following observations can be made.

First, the water policy document is well elaborated and formulated as it is linked with various developmental agendas. For example, Goal 1 of the MDGs 2000 promises to reduce poverty³⁸³ with Goal 7 aims to make water available to 75% of the population by 2020.³⁸⁴ Furthermore, the water policy is integrated with the NEPAD³⁸⁵ and GPRSII programmes.³⁸⁶ These programmes aim to initiate social and economic activities to

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ The Millennium Development Goals Report (2015), United Nations, < www.un.org.MDG2015.rev, > accessed 20th October 2016

³⁸⁴ *ibid*

³⁸⁵ The New Partnership for Africa's Development (NEPAD) is socio-economic programme of the Africa Union (AU) adopted by African Leaders at its 37th Summit of the Organization in Lusaka (Zambia) in July 2001, available at. www.nepad.org/resources/nepad-fram, accessed on 20th October 2016. Among the various objectives of the NEPAD, the following 3 objectives: poverty eradication, sustainable growth and development as well as human development are relevant to promoting access to water, which is crucial to the attainment of the overall programme.

³⁸⁶ The Growth and Poverty Reduction Strategy II (GPRSII) IMF Report No.09/237 (2009) < <http://www.imf.org/external/pubs/scr>.> accessed on 20th October 2016. The GPRSII is strategic document prepared by each member of the IMF/WB and reviewed every 3 years, in consultation with the IMF and World Bank to explain measures being adopted to reduce poverty in a given country thereby promoting

improve the economy and the living standards of the ordinary Ghanaian with access to water as a priority. This shows that the government is aware of its international obligations³⁸⁷ regarding sustainable management of water.

Second, nothing is mentioned in the water policy document which imposes a legal obligation on the government of Ghana. In other words, there is no reference to any binding obligation compelling the government to provide water for the people's needs. There is no express right to water in the Constitution of Ghana.

Third, the water policy of Ghana adopts an integrated approach to manage water resources (that is, by including surface and groundwater) in a sustainable manner.³⁸⁸ This suggests that the water policy aims to promote social, economic and environmental issues by delegating powers to the local assemblies to make laws with respect to managing their resources and the environment effectively.³⁸⁹

Fourth, although power has been given to the local District Assemblies to manage water resources within their communities, there is insufficient funding to advance the projects.³⁹⁰ The limitation of funds suggests that the government would accept unfavourable loans agreements to undertake the project.³⁹¹

socio-economic development of the people. In respect of this report, Ghana aims to promote access to potable water as parts of her commitment to improve the wellbeing of Ghanaians.

³⁸⁷ The ICESCR, CEDAW the UNCRC are some of the binding obligations which require Ghana to promote access to water; whilst, the SDGs and the MGS are non-binding obligations yet expect to revere their commitment to promoting access to water.

³⁸⁸ Section 1.1.1 of the Ghana Water Policy, (2007) <www.faolex.fao.org/dcos/pdf/gha147106.pdf, > accessed 14th November 2016

³⁸⁹ Section 2.4.2 of the Ghana Water Policy *ibid*

³⁹⁰ Eric Yeboah and Franklin Obeng-Odoom 'We are Not the Only Ones to blame' District Assemblies' Perspectives on the State of Planning in Ghana' (2010) 7 Commonwealth Journal of Local Governance 82

³⁹¹ Eric Yeboah and Franklin Obeng- Odoom, *ibid* 93

Fifth, the only reliable sources of water provisions in the communities and towns are boreholes and hand-dug wells with limited pipe-water systems provided in few towns.³⁹² These water facilities are provided mainly through the initiatives of non-governmental agencies and international charitable bodies.³⁹³ Although the Ghana water policy has a clearly defined objective to provide water to meet the needs of the people, very little has been done to achieve the objective outlined in the policy document. Thus, the water policy remains merely aspirational.

3.2 The Key Water Institutions in Ghana

In this section, the discussions centre on the major water institutions with respect to their roles in promoting and protecting access to water especially among the poor majority of Ghanaians living in the most remote parts of the country. This discussion also seeks to explore the limitations inherent in these institutions' effort to promote access to water in Ghana.

³⁹²David Hall and Emmanuelle Lobina, "Water Privatisation" (2008) PSIRU 53

³⁹³Edward T. Jackson and Sulley Gariba, "Complexity in Local Stakeholder Cooperation: Decentralization and Community Water Management in Northern Ghana" (2002) 22 (2) Public Administration and Development, 135-140

Some NGOs operating in the water sector in Ghana are: WaterAid (Ghana), WEDEC Water and CARE International

3.2.1 The Water Resources Commission

The Water Resources Commission (WRC) was founded in 1996 by an Act of Parliament³⁹⁴ and became operational in 1998.³⁹⁵ According to Edig et al, the WRC serves as an “umbrella institution in respect of the national water policy to coordinate different government agencies, their activities and management approaches including the private sector so as to extend water services to promote the domestic and sanitation needs of the people.”³⁹⁶ Besides coordinating with local, regional and international agencies to supply water to the public, the WRC plays the following roles in order to promote access to water in Ghana:

- Work towards the integration of all stakeholders in sectors, while respecting international norms and customs
- Guarantee access to safe drinking water and sanitation
- Supervise water quality, and
- Improve cooperation with the Public Utilities Regulatory Commission (PURC), which supervises water pricing.

The WRC failed to achieve the above objectives in Ghana because it was unable to coordinate and manage effectively the various agencies under its jurisdiction to establish water facilities to the rural communities in Ghana.³⁹⁷ There are primarily two reasons

³⁹⁴ Water Resources Commission Act 1996

³⁹⁵ Annette Van Edig, Stafanie Engel and Wolfram Laube, “Ghana’s Water Institutions in the process of Reform: from the International to the Local level”, (2003) Institute for Sustainable Water, Researchgate.net, .35

³⁹⁶ Annette Van Edig et al, *ibid* p. 35

³⁹⁷ Irit Eguavoen and Eva Youkhana, “Small Towns face big Challenge: The Management of Piped Systems after the Water Sector Reform in Ghana” (2008) ZEF Working Paper Series, Econstor No.26,

for such failure. First: the WRC was acutely under staffed while majority of the remaining staff sought external opportunities with foreign agencies or with lucrative NGOs. Second, the WRC struggled with the management of issuing permits in order to provide water supply to public institutions and agencies due to administrative constraints and bureaucracies.³⁹⁸

Providing hand-pumped water facilities and entrusting their management to the rural communities is an effective strategy with which the WRC can promote access to water among the rural people. In addition, the WRC can integrate Article 24 of the UNCRC³⁹⁹ as a policy strategy to urge all water agencies – private and public - to extend 50-60 litres of water supply to the vulnerable in poor areas of the country.

3.2.2 Ghana Water Supply Corporation (GWSC)

In 1965, the Government of Ghana transformed the Water Supply Division of the Ministry of Water Works and Housing (MWWH) into a para-state body.⁴⁰⁰ This body became known as Ghana Water and Sewerage Corporation (GWSC).⁴⁰¹ The GWSC, which was a predecessor to the GWCL, had the same functions as the GWCL except that GWSC was heavily subsidized by the government. Therefore access to water was almost freely provided to the majority of the people of Ghana.⁴⁰²

³⁹⁸ Annette Van Edig, (n.395)p. 36

³⁹⁹ Article 24 of the UNCRC, < www.unicef.org/crc/files/Rights,> accessed on 2nd November 2016

⁴⁰⁰ A para-statal body is an organisation established by the government and entrusted with the responsibility of performing some state function on behalf of government.

⁴⁰¹ Ghana Water and Sewerage Corporation Act 1965 ((Act 310)

⁴⁰² K Agyeman, “Privatization in Ghana: Stopped in its Tracks or a Strategic Pause” (2007) 64 (5) Journal of Environmental studies, 525-536

3.2.3 Ghana Water Company Limited (GWCL)

In 1999, the Ghana Water Company Limited (GWCL) was created to succeed the GWSC by the Government of Ghana in order to increase efficiency and effective water supply in urban areas and cities of the country.⁴⁰³ It is worth pointing out that the creation of the GWCL is the Ghana Government's response to accepting the IMF/WB's macro-economic policy of privatisation and structural adjustment as a conditionality to receive foreign loans to improve the country's infrastructural development.⁴⁰⁴ With respect to its jurisdiction, the GWCL falls under the authority of the MWWH with a responsibility to oversee sector policies regarding water supplies and sanitation.⁴⁰⁵ Moreover, the GWCL can contribute to promoting access to water by implementing the following policy objectives as outlined below:

- Planning and development of water supply systems in urban centres of Ghana
- Provide and maintain acceptable level of services to consumers with respect to quality and quantity
- Work in consultation with other authorities to plan a long term water supply for the country
- Undertake research activities relating water supply
- Send tariff proposal to PURC for review and approval and,

⁴⁰³ Kweku G. Ainuson, "Urban Water Politics and Water Security in Disadvantaged Urban Communities in Ghana", (2010) 11 (4) African Studies Quarterly, 62-63

⁴⁰⁴ Yaw Afriyie, "How the World Bank and the IMF Reinforces the Peripheral Status of Countries: the Implementation of the Structural Adjustment Program in Ghana" (2009) Glendon Journal of International Studies, 54-56

⁴⁰⁵ Ibid.

- Build and manage water works in urban centres.⁴⁰⁶

Although the GWCL continues to supply water especially in the cities and among rich communities of Ghana, criticisms have been levelled against GWCL for failing to realise the above objectives.

According to Ainuson, GWCL failed on several occasions to achieve the target levels of water production needed to meet the daily water needs of the people. In this respect, Ainuson, explained by saying that: “GWCL produced 737,000m³ litres of water per day but only 551, 451m³ of that quantity was supplied due to administrative and distributional inefficiencies. This is coupled with the fact that 939,070m³ of water was required on each day.”⁴⁰⁷ These figures indicate a shortfall in the production of water to the tune of 202,007m³ litres, which is equivalent to supplying the water needs of a community in Ghana. The fact that GWCL has been able unable to meet the target of water production suggests a shortfall in supply even in the urban areas of the country which is contrary to the objective of the privatisation agenda.

Again, the GWCL was confronted with a perennial shortage of funding so as to embark upon expansion works of improving infrastructures in order to produce adequate water supply. In the words of Ainuson: “ in 2005, Public Utilities Regulatory Commission (PURC) estimated that a total US\$891 million will be required to meet the Millennium Development Goals (MDGs) of 85% urban water coverage of 2015, while Water Aid

⁴⁰⁶ Kweku G. Ainuson, (n 403) 62-63

⁴⁰⁷ Kweku G. Ainuson, (n.403) 63

Ghana said that US\$85 million in annual investment is needed to reach the MDG. The current financial commitment of the Ghanaian Government and other donor partners to the water sector is woefully inadequate (US\$23.5 million).⁴⁰⁸ In light of the limited capacity and financial inadequacies, it is clear that access to water in respect of Ghana's MDG target (examined in section 3.4.2) cannot be realised.

3.2.4 The Public Utilities Regulatory Commission (PURC)

In order to ensure that majority of Ghanaians, especially the vulnerable and poor in society, are not denied access to water, the PURC was established in 1997 with the mandate to "examine and approve water and electricity rates, monitor the utility sectors by enforcing standard of performance."⁴⁰⁹ In addition, the PURC has the responsibility to ensure that water quality conforms to the standard set by the national agency (i.e., Ghana National Standard Board), which monitors standards relating to goods and services produced domestically or imported into the country by other businesses.⁴¹⁰ Thus, a mechanism exists under the water policy to protect Ghanaians against the consumption of unwholesome goods or services, including water supply.

Moreover, the PURC also performs the following functions in order to:

- Ensure the protection of consumers' interests
- Maintain balance between costs of utility services

⁴⁰⁸ Kweku G. Ainuson, (n403) 63

⁴⁰⁹ Veronica Fuest and Stefan A. Haffner, "PPP-Policies, Practices and Problems in Ghana's Urban Water Supply", (2007) (n.337) 183

⁴¹⁰ Veronica Fuest and Stefan A. Haffner, *ibid.* 183.

- Promote fairness and protect vulnerable people in society against exploitation by the utility services

Realising that privatisation of water supply in Ghana has the potential to undermine the livelihood of most Ghanaians, the government initiated a social policy under the PURC Act (1997) to “mitigate any hardships which poor consumers in both urban and rural parts of the country may be confronted with in accessing water.”⁴¹¹ The key elements of the social policy are as listed below:

- PURC adopt proactive measures to ensure that people living urban and rural communities of the country gain access to water
- Adopt measures to promote reliable supply of water by helping remote communities to be connected to water supply network
- PURC to encourage water utility companies to adopt pro-poor criteria in respect of water supply projects

Although the PURC was established to oversee the operations of the utility services with particular reference to water supply, Fuest and Haffner argue that the PURC never had the freedom to perform its role of protecting Ghanaians in relation to fair water prices. Fuest and Haffner explained by saying that: “as the IMF was set to micro-manage decision-making of the PURC, it introduced a tariff adjustment mechanism which interfered with the independent regulatory role of the PURC.”⁴¹² This suggests that PURC’s power to regulate the activities of the utilities especially the water sector has remained ineffective due to the external influences of IMF and WB which are determined

⁴¹¹ The Public Utility Regulatory Act (PURC) (Act 538) 1997.

⁴¹² Veronica Fuest and Stefan A. Haffner, (n 337)184

to secure high tariffs for water consumption at every cost. Thus, the PURC has remained a nominal body without adequate power to protect access to water.

As a way of protecting and promoting access to water among the poor Ghanaian communities, the PURC should lobby the government to introduce a Bill in the Parliament to be passed into a law which will promote access to water in Ghana legally. By this recommendation, it is hoped that the PURC will be able to promote access to water as prescribed under the PURC Act 1997.⁴¹³

3.3 GATS, Trade Liberalisation and Developing Countries

This section explores some of the provisions of the General Agreement on Trade in Services (GATS) which are interpreted to push liberalisation in water services by the developed countries and their Multinational Corporations (MNCs).

The GATS was one of the landmark achievements of the Uruguay trade negotiations which entered into force in January 1995.⁴¹⁴ The aim of GATS was to create a credible and reliable system of international trade rules which will promote a fairer and equitable treatment of all member-states within the WTO to realise trade deals beneficial to their peoples and countries within the free trade regime.⁴¹⁵ The GATS also raised the hope of member-states especially developing countries, that liberalisation in services would be promoted in a fashion “to stimulate economic growth in domestic countries so as to

⁴¹³ This issue is discussed further in chapter 6.

⁴¹⁴ GATS agreement <: www.wto.org/english/dcos-e/legal/e/26-gats-pdf, > accessed on 20th October 2016

⁴¹⁵ Ibid.

improve social and economic wellbeing of citizens of member-states through the provision of cheaper and affordable access to goods, especially water.”⁴¹⁶

GATS promised progressive trade liberalisation for developing countries with the assurance that developing countries would be given extra time to bring their national laws into compliance with the GATS Agreement as well as providing transfer of technology to help developing countries expand their economies in the services sector.⁴¹⁷ The promise by the developed countries to improve the industrial capacities of developing countries in the areas of water treatment and processing seems to have motivated them to open their countries and markets to MNCs without much caution.⁴¹⁸ Despite the fact that developing countries lacked adequate negotiation skills and resources to advance their interests at the WTO (as shown in chapter 2), they had expected that their core needs (e.g., access to the markets of developed states under more favourable terms without discrimination) would be respected and promoted by the developed countries.⁴¹⁹

The sponsors of the GATS Agreement held the view that services constitute nearly 60% of global ‘production’ and ‘employment.’⁴²⁰ This cuts across the length and breadth of nations in both the northern and southern hemispheres of the globe. Thus, developed countries were motivated to promote tougher trade-related regulations and rules in order to enhance the benefits and prosperity which international trade accrue to all member

⁴¹⁶ Ibid

⁴¹⁷ Rorden Wilkinson, *What’s Wrong with the WTO: And How to Fix It*, (Polity Press Cambridge 2014) 40

⁴¹⁸ Jane Knight “Higher Education Crossing Border: A Guide to the Implementation of the General Agreement on Trade in Services (GATS) for Cross-Border Education” (2006) *Commonwealth of Learning*, 5-65

⁴¹⁹ T. Ademola Oyejide , “Low-Income Developing Countries in the GATT/WTO Framework: The first fifty years and Beyond” in *From GATT to the WTO: The Multilateral Trading System in the New millennium*, World Trade organisation, (Kluwer-International, London 2000) 113 -115

⁴²⁰ www.wto.org/english/thewto_e/min0_e/mindecl.htm

states of the WTO.⁴²¹ For example, some of the areas affected by the GATS Agreement are, namely, new transmission technologies (e.g. electronic banking, tele-health or tele-education services), voice telephony and postal services. The size of trade and trade related services in this sector is estimated in the region of 1 trillion,⁴²² with the bulk of the reward and profits going to the MNCs who are resident in the developed worlds.⁴²³ According to Shiva, the World Bank has an outstanding commitment of about US\$20 billion in water projects, \$ 4.8 billion for water and sanitation projects in the urban centres while US\$ 1.7 billion is devoted to similar projects in the rural areas.⁴²⁴ These figures suggest that the water sector has a potential economic prosperity which would attract the attention of MNCs to enter the sector with the view to making profit. The desire therefore among developed countries and their MNCs to maximise profit from water contracts, through privatisation in developing countries, appears to have taken precedence over technological assistance to help developing countries gain local expertise to increase their economic growth.

Moreover, like the GATT, the GATS was negotiated and regulated along three main principles, namely: Most Favoured Nation (MFN); National Treatment and Market Access. First, the MFN principle states that 'members are held to extend immediately and unconditionally to services or services suppliers of all other members no less favourable than that accorded to like services and services suppliers of any other country.'⁴²⁵ This means, in principle, that there shall be no discrimination by any state

⁴²¹ Martin Roy, Juan Marchetti and Hoe Lim, "Services Liberalization in the New Generation of Preferential Trade Agreement (PTA): How Much Further than the GATS" (2007) 6 (2) World Trade Review, 155-192

⁴²² Vandana Shiva, *Water Wars: privatisation, pollution and profit*, (Pluto press London 2002) 89-90

⁴²³ Jean-Pierre Chauffour, Jean –Christophe Maur (eds) *Preferential Trade Agreement: Policies for Development- A HANDBOOK* (WORLD BANK WASHINGTON D.C. 2011) 8-10

⁴²⁴ Vandana Shiva (n.422)

⁴²⁵ GATS, Article II

in according its national services supplier a favourable treatment to the discrimination of a foreign supplier in like or identical services industry. Thus, they are to be treated by the host states equally in matters of access to the market, access to loans and equally with respect to rules and regulations in the host state.

Second, the principle of market access states that since market is a negotiated commitment, states are permitted to restrict access to their markets in certain aspect of the economy or in a given sector. In this respect, it is stated as follows: "... limitations may be imposed on a number of services suppliers, service operations, employees in the sector, value of transaction, the legal form of the service supplier or the participation of foreign capital."⁴²⁶ This clause suggests that certain aspects of services can be exempted from liberalisation to protect the interests of a country's special services industries in the areas of public health, social, economic as well as protection of the people.

Third, the National Treatment principle says as follows: 'a commitment to national treatment implies that the member concerned does not operate discriminatory measures benefiting domestic services or services suppliers. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of the Members' own service industry.'⁴²⁷ This clause emphasises the centrality of equal treatment of all member states with respect to promoting a fairer competition. However, developed country members to the GATS Agreement have superior advantages over their developing country members in relation to capital, negotiation and technology. Thus, the proposition

⁴²⁶ GATS, Article XVI (2) it is also worth mentioning that Article I (3) of GATS exempts services which are rendered in the exercise of governmental authority from the ambit of the GATS.

⁴²⁷ GATS, Article XVII

of fairness and equal treatment remains difficult to achieve in many developing countries.⁴²⁸

The GATS provisions contain exception clause which permits Members to derogate from the core obligations in matters of specified commitments. This exception clause allows respective governments or states to act in contravention of the GATS obligations so far as the country in question is acting to protect the health, moral issues, and protection of the environment or any emergencies detrimental to the effective governance of the country.⁴²⁹ Favourably, this exception clause has the potential to protect the interests of developing countries whose industries are in infant stage with poor economic circumstances to provide reliable access to social and economic development.

However, as some academics argue, GATS has indirectly promoted privatisation in the water sector, Labonte et al argue that some of the GATS provisions indirectly favour privatisation⁴³⁰ because once a country signs up to the agreement establishing the WTO, that country is accepting an obligation of unconditionally opening its domestic economy to foreign MNCs and privatisation including the water sector. Mehta and Madsen argue that “privatisation has led many poor people to be cut off water-supply due to their inability to pay for the resource.”⁴³¹

⁴²⁸ Raymond Saner and Laura Paez “Technical Assistance to Least-Developed Countries in the Context of the Doha Round: High Risk Of Failure” (2006) 40 (3) *Journal of World Trade*, 484-485

⁴²⁹ GATS, Article XIV

⁴³⁰ R. Labonte (ed) *Health for Some: Death, Disease and Disparity in Globalizing Era* (2006) 3 (Centre for Social Justice) 14

⁴³¹ Lyla Mehta and Birgit la Cour Madsen, “Is the WTO after your water? The General Agreement on Trade in Services (GATS) and poor people’s right to water, (2005) *Natural Resources Forum*, 157.

A critical examination of the core obligations of the GATS reveals unfairness and biases favouring the developed states. This is because the developed states have comparative advantage in the provision of services brought under the scope of GATS. The developed countries with advanced technology and negotiation resources are better equipped to maximise profits at the expense of infant industries in developing countries⁴³²

Also, the developed states are home to most MNCs which have advanced innovative strategies and procedures of delivering services more proficiently than home grown water companies in many developing countries. This further means that developing countries will not be able to compete with the developed states with respect to securing contracts under the liberalisation in the water services sector.⁴³³ Furthermore, the GATS Agreement has forced many developing states to implement privatisation of their water sectors because of WB and the IMF's pressure on those countries to accept and implement their macro-economic policies as a conditionality of renewing their loan agreements (discussed in chapter 2).⁴³⁴ Therefore, the view is that most developing countries including Ghana which require foreign loan to build national infrastructures so as to promote the social and economic wellbeing of her people accepted the conditions set out by the WB/IMF.⁴³⁵

According to the Marrakesh Agreement establishing the WTO, there exists an interlocking relationship between the WTO, the IMF and the WB to promote international

⁴³² Alex Loftus, "Rethinking Political Ecologies of water", (2009) 30 (5) Third World Quarterly, 964

⁴³³ Colin Kirkpatrick and David Parker, *Domestic Regulations and the WTO: The Case of Water Services in developing countries* (Blackwell Publishing, Oxford 2005) 1505.

⁴³⁴ Al-hassan Adam, 'Water Privatisation in Ghana' (2003) <
www.waterjustice.org/casestudy.php?component, > accessed 19th May 2012

⁴³⁵ Naren Prasad, "Privatisation Results: Private Sectors Participation in Water Services After 15 Years" (2006) 24 Development Policy Review, 685

trading regime favourable to all citizens of the world'⁴³⁶ In respect of the above relationship, the common strategy by the WTO, IMF and WB is to promote trade liberalisation in the services in most developing countries. Although Article V.1 (b) of GATS states that it is an objective of the WTO to promote a free trade liberalisation earmarked for the well-being of the world's peoples without discrimination.⁴³⁷ On the contrary, developing countries continue to face discrimination and marginalisation at major trade negotiations which affect their economic and social progresses.⁴³⁸ In addition, Finger and Lobina argue that “transnational corporations have become so powerful that they pick and choose which national laws and regulations to abide by in the course of rendering water services in various countries, where they operate.”⁴³⁹ This practice has not only made the MNCs insensitive to the needs of the communities in which they operate, but had also led to corrupt practices such as bribing government officials in the hope of maximising profit.⁴⁴⁰ Shiva contends that privatization of water resources across America has generated nearly US\$ 90 billion dollars in profit by the Vivendi Corporation.⁴⁴¹ Indeed, the trade liberalisation promoted by the WTO and privatisation encouraged by the WB/IMF in the water sector highlight that the multinational water corporations are directly involved in providing the water services in many developing countries.

⁴³⁶ GATT, Article III (V)

⁴³⁷ GATS, Article VII (b): *A Handbook on the GATS Agreement* (Cambridge University Press, Cambridge 2005) 62

⁴³⁸ Matthias Finger & Emmanuelle Lobina, in Annie Taylor and Caroline Thomas (eds) “*Managing Trade in Globalizing World*” *Global Trade and Social Issues* (Routledge, London 1999) 67

⁴³⁹ Ibid.

⁴⁴⁰ Roberto A. Ferdman, “How the World’s Biggest Companies bribe Foreign Governments – in 11 Charts” *Washington Post* (Washington D.C. December 3 2014)

⁴⁴¹ Vandana Shiva, *Water Wars: privatization, pollution and profit*, (n422) 98

3.4 GHANA'S DEVELOPMENT AGENDA AND THE WATER SECTOR: GPRSII, MDGs, NEPAD and SDGs

As discussed at section 3.1 of this chapter, the National Water Policy Document of Ghana has incorporated some strategic development policies in order to achieve a cross-sectoral growth. It states as follows:

“Ghana’s development agenda is driven by the Growth and Poverty Reduction Strategy (GPRSII), which is in itself informed by our commitment to Millennium Development Goals (MDGs), New Partnership for African Development (NEPAD) and above all by underlying obligations set out in the Constitution of the Republic of Ghana. Universally, Water management and its uses, are regarded as an essential component of human development and it is a cross-cutting factor in current development priorities of Ghana’ goal of achieving sustainable development.”⁴⁴²

In simplest terms, Ghana has a national strategic objective to ensure that access to water is provided to citizens of the country. However, with the MDGs elapsed, Ghana’s water policy is being promoted in the context of SDG 6.⁴⁴³

3.4.1 Ghana’s Growth and Poverty Reduction Strategy (GPRS II)

In November 2005, Ghana’s National Economic Planning Commission produced the country’s Growth and Poverty Reduction Strategy (GPRS II).⁴⁴⁴ It aims to “support social and political organisation in order to promote Ghana as a middle-income country by 2015.”⁴⁴⁵ Moreover, Ghana recognises the fact that no development can be realised on a sustainable level without access to life-enhancing resource like water. At paragraph

⁴⁴²Ghana Water Resources Commission and Ministry of Water Resources, Works and Housing (n 379)

⁴⁴³Sustainable Development Goal 6 < <http://www.unwater.org/sdg/en>, > accessed 20th December 2016; Goal 6 stands for the promotion, availability and management of access to water and sanitation for all.

⁴⁴⁴ The Republic of Ghana: Growth and Poverty Reduction Strategy (GPRSII) <www.Sitesresorces.worldbank.org, > accessed on 10th June 2016, p. 51

⁴⁴⁵ The Republic of Ghana’s GPRS II, *ibid* p. i

4.6 of the GPRS II document, access to water is given prominent recognition by stating that:

“Improving access to potable water is crucial to achieving a favourable health and sanitation, which has the effect of increasing economic growth so as to reduce poverty. Also, creating effective access to water would minimise the perennial burden confronting women in terms of travelling long distance to fetch water; whilst at the same time, promoting high school attendance among children.”⁴⁴⁶

The impression is that promoting effective access to water would impact favourably on the entire Ghanaian economy to reduce the burdens associated with women and children whose social and economic wellbeing have undermined by lack of access to water. Also, the GPRS II has outlined the following measures to ensure that access to potable water is protected in Ghana:

- Investments to rehabilitate and expand water systems for both rural and urban communities
- Accelerate the provision of safe water
- Provide new investment to eradicate guinea worm infestation in the rural areas
- Promote timely disbursement of recurrent to rural communities
- Strive for an enactment of code requiring all new building plans to include rain harvesting facility
- Provide checks on dug-out wells to provide water for agricultural usages, strengthen human resource capacity in water and to disseminate information on safe water.

⁴⁴⁶ The Republic of Ghana’s GPRS II, *ibid.* p 51

Although the GPRS II shows promising strategic objective with respect to promoting access to water, its implementation has been poorly affected because of limited funding which stem from huge fiscal deficit problem in Ghana.⁴⁴⁷ This means access to water under the GPRS II remains elusive.

3.4.2 Millennium Development Goals (MDGs)

In 2000, the UN launched the MDGs consisting of concrete objectives to achieve poverty reduction in developing and least developing states.⁴⁴⁸ The water policy of Ghana has endorsed the MDGs by outlining some objectives to protect and promote access to safe drinking water among urban and rural communities. It also aims to extend water supply to eighty-five (85) per cent of her population by the year 2015, while \$1.6 billion has been earmarked to achieve the country's MDGs programme.⁴⁴⁹

However, Pangaribowo has expressed doubt over Ghana's effort to achieve the above water supply target in saying that: "over 48% of surveyed households with access to improved drinking water in Ghana have their stored water contaminated with E. coli and are thus categorized as unsafe or at very high risk."⁴⁵⁰ This statement reveals two weaknesses in respect of Ghana's drive to promote access to water under the MDG. First, it shows that Ghana lags behind in her effort to extend water to eighty-five percent

⁴⁴⁷ Danso Sampson, "Ghana's Vision for Development: A Study of Ghana Vision 2020 and the GPRS I and II" (Mphil Thesis, University of Ghana October 2014, Legon-Accra) 97

⁴⁴⁸ The UN Millennium Development Goals, < www.un.org/report-2013-english.pdf, > accessed 10th June 2016.

⁴⁴⁹ S. Oduro-Kwarteng I. Monney and I. Braimah, "Human Resources Capacity in Ghana's Water, Sanitation and Hygiene Sector: Analysis of Capacity Gaps and Policy Implications" (2015) IWA Publishing, 503

⁴⁵⁰ Evita Hanie Pangaribowo, "Water quality matters: Celebration of achieving MDGs on safe drinking water premature" <www.zef.de/ZEF_news31_website_p6, > accessed on 10th June 2016

of the population. Second, provision of contaminated water to the people of Ghana undermines the core tenets of the MDGs.

Moreover, Osumanu et al, have opined that access to water remains a challenge to the government and people of Ghana because merely under thirty percent of the population have access to piped-water whilst majority struggled to access other forms of water, such as dug wells, boreholes and rainwater.⁴⁵¹ The MDGs has elapsed with majority of water supply being contaminated and water is being supplied to a limited section of the Ghanaian population. This suggests that the MDGs has not achieved its vision of promoting access to clean water for most Ghanaians. Thus, Ghana has renewed her effort under the SDGs (discussed below) to work towards promoting access to potable water.

3.4.3 The New Partnership for Africa Development (NEPAD)

In October 2001, African Leaders met in Abuja, Nigeria, were united in conviction with a shared vision to “eradicate poverty in order to promote the economic, social and political wellbeing of their peoples and continent sustainably.”⁴⁵² A number of programmes outlined to achieve this vision⁴⁵³ are based on the following aims:

⁴⁵¹ Osumanu I. Kanton, Lukman Abdul-Rahim, Jacob Songsore, Farouk R. Braimah and Martin Mulenga, “Urban water and sanitation in Ghana: How local action is making a difference” (2009) Human settlement Working Paper Series, Water and Sanitation 25, IIED < www.pubs.iied.org,> accessed 10th June 2016

⁴⁵² The New Partnership for Africa Development (2001) < www.un.org/ossa/pdf/nepad/nepad, > accessed 10th June 2016

⁴⁵³ Some examples of Ghana’s commitment to implement the SDGs goals are: employment for all; access to health and including water; environmental sustainability; slum upgrading, educational for all up to the secondary school level

- To extricate themselves and the continent from the malaise of underdevelopment and exclusion from the global world,
- To promote the continent's participation in global civil society so as to benefit the people,
- To promote Africa's accession into the institutions of the international community and to avoid incurring huge foreign debts contracted through unfavourable financial contracts as well as reduce the continent's debt level to the 1970s,
- To minimise high mortality rate among children under the age of 5 years, increase life-expectancy age beyond 51 years and, also extend access to water across the entire continent beyond 58%.

As a measure to reverse the poor social and economic situations and to establish a platform which engenders development, Africa has resolved to renew its image. The aim is to achieve the objectives of NEPAD⁴⁵⁴ such as the "development of their human populations as well as enhance the social and economic prosperity of the continent."

With regard to protecting access to water, NEPAD aims to extend potable water to all peoples throughout the continent. Its objective is to work with regional and national water agencies to realise this aim.⁴⁵⁵ Also, NEPAD regards potable water as a crucial resource which promotes human health, quality sanitation as well as human dignity. Failure to promote effective access of water to the peoples on the continent robs NEPAD of the

⁴⁵⁴ The New Partnership for Africa Development, *ibid*

⁴⁵⁵ The New Partnership for Africa Development, *ibid*

power to guard the interests and aspirations of the continent in the new millennium.⁴⁵⁶ Several views have been expressed about the successes of the implementation of the NEPAD programme. In particular, Landsberg has criticised the NEPAD to say that: “failure on the part of the OAU as a regional organisation to provide leadership by investing funds to promote the NEPAD initiative has meant that individual governments on the continents, have been apathetic to promote the wellbeing of their people through improved access to water.”⁴⁵⁷ This criticism reflects one of the major problems confronting Ghana and most developing countries on the African continent. That is, Ghana is quick to sign international agreements but has been less active with the implementation of the international obligations. Thus, access to water in respect of the NEPAD programme has been ineffective because there is a belief that NEPAD was deliberated upon and introduced in Africa by the industrialised world without allowing African leaders enough space and time to participate in its formulation.⁴⁵⁸ In addition, it has been argued that leaders in Africa lacked the ‘countervailing force’ to resist the influences and domineering role of the developed countries in the spheres of economies and politics. Moreover, majority of Africans have limited education to understand the intricacies of international politics so as to rally behind their governments to reject unfavourable external policies.⁴⁵⁹

⁴⁵⁶ Ibid.

⁴⁵⁷ Chris Landsberg ‘Criticism of NEPAD’ (2005) < www.sarpn.org/documents/.../503_landsberg.pdf-SouthAfrica, > accessed 20th May 2015

⁴⁵⁸ Jeggan Colley Senghor and Nana Poku (eds) *Towards Africa’s Renewal* (Ashgate Publishing Ltd ,Oxford 2007) 136-137

⁴⁵⁹ Jeggan G. Senghor and Nana K.Poku (eds) (2007) *ibid.* 73-74

3.4. 4 Sustainable Development Goals (SDGs)

On September 2015, World Leaders adopted the 2030 Agenda for Sustainable Development Goals (SDGs) which outlined 17 clearly established goals to replace the MDGs as well as assist member countries to adopt strategies to promote the social and economic wellbeing of their peoples.⁴⁶⁰ Under the auspices of the United Nations Development Programme (UNDP), the “MAPS Approach” which means: Mainstreaming, Acceleration and Policy Support is adopted to realise the SDGs.⁴⁶¹ In the respect of the “MAPS Approach”, the UNDP provides “support to individual governments to reflect and incorporate new global strategies in their plans and policies, to accelerate SDGs targets in providing experience to develop human capacity; as well as, supplying UN policy experts on SDG and governance to governments at the various stages of the project.”⁴⁶² Thus, as a member of the UN, Ghana stands to gain from the experience of the UNDP with respect to building her human and infrastructural capacities to promote the wellbeing of Ghanaians in the sphere of access to water.

Goal 6 of the SDGs sets out the obligation to extend clean water and sanitation for all by utilising resources of the nation and working in collaboration with the UN and other stakeholders.⁴⁶³ Regarding SDG goal 6, the UNDP suggests that failure to ensure that access to water is provided to the poor and vulnerable in society would lead to exploitation of water resources which may compromise the water needs of future

⁴⁶⁰ The United Nations Sustainable Development Agenda, < www.un.org/sustainabledevelopment, > accessed 20th December 2016

⁴⁶¹ UNDP-Mainstreaming, Acceleration and Policy Support-Strategy for the Post 2015 Implementation, < <http://undp.org/uploads/2015/07>, > accessed 20th December 2016

⁴⁶² Ibid.

⁴⁶³ The UN Sustainable Development –goal 6- < <http://sustainabledevelopment.un.org>, > accessed on 20th December 2016

generation, thus defeating the aims of sustainable development.⁴⁶⁴ Therefore, heads and leaders of governments have a responsibility to plan within their available budgetary and human resources to ensure that water is readily available to all citizens without discrimination.

In Ghana, the effort to promote access to water supply under the SDGs saw an increased participation among NGOs and private business organisations.⁴⁶⁵ WaterAid and Coalition of Non-Governmental Organisation (NGOs) in Water and Sanitation (COINWAS) are among the numerous NGOs helping deprived parts in city centres and rural areas of Ghana to gain access to water through the provisions of boreholes and hand-dug wells.⁴⁶⁶ However, there have been mixed results in promoting access to water. According to Montgomery et al, there has been an increased supply of water covering large populations in sub Saharan Africa especially among poor communities in Ghana, which has led to improvement in human sanitation.⁴⁶⁷ Also, the view has been expressed that access to water supply particularly in rural communities of Ghana has been encouraging. In this sense, Harvey and Reed pointed out in saying; that: “the extension of water supply in Ghana, which has been augmented by the activities of the NGOs increased access of water to nearly 86% among rural communities.”⁴⁶⁸ This

⁴⁶⁴ The UN Sustainable Development Goal 6, *ibid*

⁴⁶⁵ Charles Peprah, Eric Oduro-Ofori et. al “Analysis of Accessibility of Water Supply and Sanitation Services in the Awutu-Senya East Municipality, Ghana”, (2015) 8 (8) *Journal of Sustainable Development*, 318-319

⁴⁶⁶ NGOs in Water and Sanitation Strategies in assess Urban Water Supply” <
[www.ModernGhana.com>news>ngos-in-water](http://www.ModernGhana.com/news/ngos-in-water), > accessed 9th November 2016

⁴⁶⁷ Maggie A. Montgomery, Jamie Bartram and Menachem Elimelech, “Increasing Functional Sustainability of water and Sanitation Supplies in Rural Sub-Saharan Africa” (2008) 26 *Environmental Engineering Science*, 1018.

⁴⁶⁸ Peter A. Harvey and Robert A. Reed, “the Extension of Water Supply in Ghana” (2006) *Oxford Press and Community Development Journal*, 373

statement indicates that access to water in respect of the SDGs have achieved some positive results in Ghana.

On the contrary, access to water has been criticised as unsustainable in Ghana because of the high cost and poor quality of water supplied in parts the country.⁴⁶⁹ As a result of privatising Ghana's Water and Sewerage Corporation, water supply has become a lucrative business for private businesses which have hiked the price of water indiscriminately.⁴⁷⁰ Dada has explained one aspect of the problem affecting access to water in Ghana by saying that: "due to unreliable supply of water by the municipal authorities, most Ghanaians depend upon expensive sachet or bottled water for their domestic and sanitation needs."⁴⁷¹ Thus, access to water under this scheme has become the preserved right of the rich people in the country thereby denying the poor majority of Ghanaians with limited financial resources access to potable water. In addition to the above, Fisher and Christopher have argued that: "The peculiar situation of sachet water is that most of the producers are not registered hence monitoring becomes difficult. ... Most households in Ghana now rely on sachet water as their main source of drinking water hence if contaminated products are put on the market, the consequences could be fatal."⁴⁷² This health hazard which stems from the supply of unwholesome water in Ghana can be associated with the failure of the Ghanaian government to adopt measures to safeguard the health and wellbeing of the people prior

⁴⁶⁹ Edward Nketiah-Amponsah, Patricia Woedem Aidam and Bernadin Senadza, "Socio-economic Determinants of Drinking Water: Some Insights from Ghana" (Conference Paper –University of Hamburg October 6-8 2009) 1

⁴⁷⁰ Gordon McGranaham and David L.Owen, "Local water companies and the Urban Poor", Human Settlement Discussion Paper Series, IIED (2006) 5

⁴⁷¹ Ayokunle C. Dada, "Packaged Water –Recent Studies confirmed the persistence of this drinking water source in some parts of Ghana", (2011) Globalization and Health- Biomed Central, 37

⁴⁷² Brendan Fisher and Treg Christopher, "Poverty and biodiversity: Measuring the Overlap of human poverty and the biodiversity hotspots", (2006) ScienceDirect,- 8

to privatising the water corporation. In light of the above discussion, it can be argued that not only is access to potable water unsustainable but also the health of the majority of Ghanaians is at stake. Therefore, the objective of supplying affordable and clean water to the people is highly compromised.

Finally, the discussion in this section has shown that Ghana has incorporated GPRSII, MDGs, NEPAD and SDGs in her national water policy with the aim to extend water supply at an affordable rate and within reasonable distance from each household. However, access to water remains an elusive to the majority of the poor people

3.5 The Privatisation of Water Corporation in Ghana: the Reasons, the Processes and the Pricing System

In this section, the discussion aims to explore the reasons and processes of privatisation, including the mechanism of pricing water under the authority of the PURC in Ghana. The objective is to assess whether the privatisation of state water enterprises ensures affordable water to the poor community.

3.5.1 The Reasons for Water Privatisation in Ghana

Various factors have been attributed to the privatisation of Ghana's Water and Sewerage Corporation and some of these factors are outlined below:

First, the privatisation of water services in Ghana had been linked with the country's inability to pay off her huge international debt which had been explained by Afriyie:

“From 1980-1990, the total debt stock of Sub-Saharan Africa had risen from \$56, 825 million to 173, 737 million. In Latin America, and the Caribbean, it rose from 242,296 to 431, 091 and in south Asia, from 38, 178 to 115, 351. These mounting debts forced the third world countries to restructure their economies along the lines of the international monetary fund (IMF) and neo-classical economic orthodoxy. Thus, most third world governments are compelled to adopt the IMF and World Bank's structural adjustment programs, which meant that they had to reduce their public expenditures and open their markets to the global economy.”⁴⁷³

The debate is that Ghana's substantial foreign debt coupled with a drastic fall in prices of her principal foreign exported commodities (cocoa and gold) weakened her economic stability.⁴⁷⁴ The view was that Ghana could not secure external foreign loan to promote her infrastructural development except to accept the IMF/WB's conditionality of privatisation. Again, Goldman has stated: “As overwhelming debt burdens have put tremendous pressure on borrowing - country governments and created dire social conditions in their countries.”⁴⁷⁵ This gives the impression that Ghana, as many developing countries, acquiesced to privatisation of her water facility in order to receive foreign loan.

Second, privatisation of water system led MNCs to be directly involved in the management of water services in the host countries. MirafTAB has stated that: “the current neoliberal perspective expects the private sector to pursue, more effectively and efficiently, the development of infrastructure and the provision of public services

⁴⁷³ Yaw Afriyie, “How the World Bank and the IMF Reinforces the Peripheral Status of Countries: the Implementation of the Structural Adjustment Program in Ghana” (n 404) 54

⁴⁷⁴ Yaw Afriyie, *ibid.* P. 58.

⁴⁷⁵ Michael Goldman, How “Water for All!” Policy become Hegemonic: The Power of the World Bank and its Transnational Policy Networks” (2005) (n.343) 794

while the state monitors its activities.”⁴⁷⁶ The suggestion is that private sectors are better equipped to promote and manage effective access to water because they have the resources, the required technology and infrastructure to provide water at competitive and affordable prices.

Third, the desire among MNCs to enter the public sphere of developing countries in order to expand their organisational growth by maximising profit is another driving force towards water privatisation. As Hall and Lobina argue: “the growth had come by making inroads into the services provided by the public sector, and the great majority of public sector operators did not seek to compete with the private companies by expanding.”⁴⁷⁷ Thus, privatisation has become a strategic option through which MNCs seek to expand their businesses and profit margins at the expense of public institutions. In a similar vein, Petrova stated that: “proponents of privatisation argue from a market perspective that private sector involvement increase efficiency, attract more finance, and thus helps build new and much needed infrastructure, especially in developing countries.”⁴⁷⁸ Tellingly, privatisation seeks to promote competition by making access to water services in some cases more affordable, cheaper and readily accessible. However, the privatisation of state-owned water institutions in Ghana has failed to improve wellbeing of most Ghanaians as majority of them are priced out of an important resource like water. This is primarily due to the limited legal protection and social welfare schemes to support vulnerable people in the country.⁴⁷⁹

⁴⁷⁶ Faranak Miraftab, “Public-Private Partnerships: the Trojan horse of Neoliberal Development?” (2004) *Journal of Planning Education and Research*, 93

⁴⁷⁷ David Hall and Emmanuel Lobina, “Water Privatisation” (2008) PSIRU, 2

⁴⁷⁸ Violeta Petrova, “At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Rights to Water” (2006) 31 *Brooks J. Int’ L* 577 -587

⁴⁷⁹ Alfred G. Nhema, “Privatisation of Public Enterprises in Developing countries: An Overview” (2010) 9 *International Journal of Humanities and Social Science*, 248

3.5.2 The Processes of Water Privatisation in Ghana

The processes of privatising State Owned Enterprises (SOEs) in Ghana as a fulfilment of WB and IMF's loan conditionality were entrusted to the Divestiture Implementation Committee (DIC) in 1987.⁴⁸⁰ The DIC, which was principally responsible for planning and divestment policy, operated under the umbrella of State Enterprises Commission (SEC) that acted as the major government body in charge of SOEs operation.⁴⁸¹

As a way of guaranteeing its autonomy and independence, the government at the time passed the *Ghana Divestiture of States Interests (Implementation) Law*.⁴⁸² The passage of the Implementation law, in theory, suggests that the DIC became an independent body with the power to operate without reliance upon any external power or influences. A special Committee was established and placed under the chairmanship of a member of the then PNDC government to oversee the divestiture processes.⁴⁸³ One member each was appointed to the Committee from the following institutions: the Trade Union Congress, the Ghana Armed Forces, the Committee for the Defense of the Revolution, and other members chosen on the basis of their experience and knowledge.⁴⁸⁴ The following were some of the methods through which the privatisations were implemented in Ghana.

⁴⁸⁰ Allan Potter, "Privatisation in Ghana: Successes During Economic Collapse and Authoritarianism", Discussion Paper, (CUTS International, 2015) 5

⁴⁸¹ Allan Potter, *ibid.*, p. 5

⁴⁸² The Ghana Divestiture of States Interests (Implementation) Act, 1998

⁴⁸³ Allan Potter, (n 480) p. 5

⁴⁸⁴ Allan Potter, *ibid.* p. 5

First, in 1995 the Committee published its rules, general procedures and information regarding prospective assets to be divested in the media so as to ensure transparency regarding the privatisation programmes.⁴⁸⁵ Second, the prospective SoE is selected on the basis of non-performance. This means that the SoE is not producing or delivering the expected level of goods or service to meet the needs of the public. In other words, it is not economically profitable to the state and the public.⁴⁸⁶ Third, to ensure fairness during the privatisation, the government aims to give the first option to buy to the shareholders of the underperforming SoE, if that SoE has already got private shareholders.⁴⁸⁷ Fourth, the government may also terminate the employment contract between the SoE and the employees and guarantee to indemnify the new investor/s by agreeing to pay severance payment, end of service benefits, pension and other financial rewards. This is to enable the new investor/s to start its operations on a new clean sheet.⁴⁸⁸ Moreover, other strategies were adopted to achieve the divestment of privatisation in Ghana including sale of assets or shares, joint venture, lease, or liquidation.

One example is the management contract whereby the government passes the responsibility of providing service to a private provider. However, the financial obligations and the ownership remain with the state, while the performance contract is signed with the private contractor. Under this option, Ghana's urban water project was managerially contracted out.⁴⁸⁹ Ghana entered into a management contract with Aqua

⁴⁸⁵ Allan Potter, *ibid.* p 5

⁴⁸⁶ Charles Arthur Ntiri, "Can the Performance of State-Owned Enterprises improve when Privatized?": A Case study of Ghanaian based firms" (A Master's Thesis, Blekinge Institute of Technology School of Management, Sweden,2010) 14

⁴⁸⁷ Charles Arthur Ntiri, (n486) p. 14

⁴⁸⁸ Charles Arthur Ntiri, *ibid.* p. 15

⁴⁸⁹ Allan Potter, (n480) p. 7.

Vitens Rand Limited (AVRL)⁴⁹⁰ with the objective to expand water facilities in the country so as to increase access to water supply in the city-centres of the country through efficient and effective management. However, aspects of the terms of the management contract⁴⁹¹ state that AVRL would enter into “contract with Ghanaians on behalf of GWCL” and also “consumers who are unable to pay their water bills would be disconnected.” These terms underline one of the principal objectives of the MNCs which is to maximise profit at any cost.

According to Potter, the government of Ghana (GoG) offered shares on the stock market with respect to the privatisation of Ghana Commercial Bank and related financial institutions.⁴⁹² This was done to improve the development and profitability of the SoE. However, several criticisms were levelled against the government’s processes of privatisation with particular reference to the privatisation of water.⁴⁹³ One criticism is that the Ghanaian government’s insensitivity towards the social and economic wellbeing of the people pushed it to compromise on water services in the country. Critics pointed out that majority of the people in Ghana staged demonstrations to resist the corrupt process followed to privatise the water services and they also feared an increase water bills. As Goldman explains: “in Ghana, privatization ended abruptly when the World Bank withdrew funding because of public outcries about corruption on the part of the parent company Enron.”⁴⁹⁴

⁴⁹⁰ Ghana’s GWCL entered into a management contract with AVRL after the failure of the WB to provide the needed loan due to public opposition in light of corrupt activities associated with the bidding processes. In 2006, GWCL entered into contract with AVRL. The AVRL is Netherlands based subsidiary firm of Vitra Limited, operating under the name AVRL in Ghana.

⁴⁹¹ Allan Potter, *supra*, 480 p. 7

⁴⁹² Allan Potter, *ibid.* p. 9

⁴⁹³ Michael Goldman, (n 343) p. 797

⁴⁹⁴ Michael Goldman, *ibid.* p. 796

Indeed, the Ghanaian public's dissatisfaction with the WB/IMF's policies towards water privatisation led to national mobilization against those institutions. Nsorwie et al state that: "the TUC's outspoken opposition to the water privatisation proposal was important influence in the popular debate. In addition, 20 years of IMF/World Bank policies have created profound scepticism towards privatisation and trade liberalisation as a solution to the country's problems, particularly when large foreign multinationals are involved."⁴⁹⁵ The tripartite relationship among the IMF/WB together with the WTO manifest a common objective to promote economic policies which secure the profit interests of their MNCs, rather than protecting access to water in developing countries. Moreover, most Ghanaians were aggrieved because they did not get a fair opportunity to buy some of the SoEs being offered for sale under the privatisation agenda. Accordingly, a claim was filed against the DIC by Ampratwum Ltd as it felt it was not given the fair opportunity to purchase the divested SOE.⁴⁹⁶ The High Court in Kumasi (Ghana) gave judgment granting all the remedies sought by the plaintiff in 2006. However, the DIC (Respondent) appealed against the High Court's judgment and, in 2008, Justice Apaloo set aside the above decision and held that: "the DIC was not the proper person to be the defendant in the case."⁴⁹⁷ Furthermore, on further Appeal, the Court of Appeal affirmed that: "the Government of Ghana rather the DIC should have been sued."⁴⁹⁸ Regardless of the legal implications of the Court of Appeals' decision, there is reason to suggest that some Ghanaians who had the financial capital/resource

⁴⁹⁵ Rudolf Nsorwie, Amenga-Etago and Sarah Grusky, "the New Face of Conditionality: the World Bank and Water Privatisation" in David A. Macdonald and Greg Ruiters (eds) *The Age of Commodity: Water Privatisation in South Africa*, (Earthscan: London 2005) 284

⁴⁹⁶ *Ampratwum Manufacturing Co. Ltd v Divestiture Implementation Committee*, SCJ, AD 2009

⁴⁹⁷ *Ampratwum. Manufacturing Co. vpdf.jtighana.org>new<links>amp.* (2010)

⁴⁹⁸ *Ampratwum*, *ibid.*

to purchase some of the divested SoEs were not given a fair opportunity to do so. The indication is that the processes of privatisation were shrouded in secrecy as no response was given to Ampratwum Ltd till after nine months and the business was sold to an investor from the Czech Republic. Also, the Ghanaian judiciary, as examined in chapter 5 of this thesis, is not always able to protect individual's constitutional rights violated by the government.

3.5.3 The Pricing of Water Supply in Ghana

The sharp rises in water prices post-privatisation affirmed the concerns raised by most Ghanaians prior to the implementation of the privatisation policy.⁴⁹⁹ This is because not only are the prices beyond the means of majority of Ghanaians, but also the supply of water is rationed and confined to the rich urban areas where a few rich people can afford to pay for water.⁵⁰⁰

The tables below show the prices of water consumption in pre and –post water privatisation in Ghana:

⁴⁹⁹ Christian Aid, “Water Privatization in Ghana” WHO Press Release, 22/11/01<
<http://www.org.xianAidWater>, > accessed 4th October 2016

⁵⁰⁰ Yaw Afriyie, (n404) p. 59

Water Prices in Ghana before privatisation (1980- 1990s)

Year:1980-1995

Year	Water bills per house-holds/ Private domestic pipe users
1985-1990	Water bills estimated between 10- 12 GH cedis per each household quarterly; House-holds with private pipe water systems paid between 18- 25 GH cedis

Source: Coalition for water service (Ghana)

Approved End User Water Tariff effective 25th June 2014

Schedule

Category of Service	Monthly Consumption (1000 litres)	Approved rate in GHp/1000 litres Effective July 2015 Billing Cycle
Metered Domestic	0 - 20	178.3326
	21 and above	267.3313
Commercial/Industrial	Flat Rate	380.0075
Public Institutions/Govt. Departments	Flat Rate	298.212
Unmetered promises- Flat rate per house per month	Flat rate per house per month	1160.7090
Premises without connection (public stand pipes) per 1000 litres		176.3036
Special Commercial per 1000 litres		1080.6204

Source: Ghana Water Company Limited, available at gwcl.com.gh

The tables provided above show various charges levied in respect of water consumers in Ghana pre and post privatisation. The view is that access to water among the majority of Ghanaians is restricted through high water fees; thus most people living in the rural

parts of Ghana are forced resort to use surface water, thereby contracting diseases in the process.⁵⁰¹ As already mentioned at section 3.2.4 of this chapter, the PURC had little independence to regulate the public utility services in Ghana, especially the water sector to ensure that water is affordable among the poor majority. Prices of water are determined by the WRC and presented to the PURC for approval and implementation. Thus, PURC's core role to protect the public is restricted.⁵⁰²

Recent surveys conducted separately in respect of sixty-two (62) and forty-seven (47) communities in Ghana reveal that: "a bucket of water (18 L) drawn from boreholes and piped water is charged between 25-250 Cedis⁵⁰³ (£0.07) to £07m3 and 50-500 cedis (£0.07/m3 to £0.7/m3) respectively."⁵⁰⁴ The desperate state of most Ghanaians to access water in the face of exorbitant charges has been summarised by McCaskie, who explains that: "even where pipe-borne water is available, consumers claim it is too expensive to use, it is too unreliable and, now in a failing system contaminated."⁵⁰⁵ Undoubtedly, the IEI's policy of liberalisation in services backed by privatisation as loan conditionality in Ghana has restricted access to water and thus undermined the social and economic wellbeing of Ghanaians.

⁵⁰¹ Helfrid M. A. Rossiter, Peter A. Owusu Esi Awuah, Alan M. MacDonald and Andrea L. Schafer, "Chemical Drinking Water in Ghana: Water Cost and Scope for Advanced Treatment" (2010) *The Science of the Total Environment*, 10

⁵⁰² Public Utility Regulatory Commission Act 1997 (Act 583)

⁵⁰³ The 'Cedis' represents the Ghanaian currency which is currently in usage.

⁵⁰⁴ Helfrid M. A. Rossiter et al, (n501) 10

⁵⁰⁵ Tom C. McCaskie, "Water Wars in Kumasi, Ghana" in *African Cities: Competing Claims on Urban Spaces* in Francesca Locatelli and Paul Nugent (eds), (BRILL Boston 2009) 152

3.6 The Activities of WB, IMF and MNCs in Relation to Water Privatisation in Ghana

This section examines the roles played the WB, IMF and MNCs with an objective of assessing whether the water privatisation activities in Ghana have improved access to water among the majority of Ghanaians.

3.6.1 The World Bank's Activities in Relation to Water Privatisation in Ghana

As briefly shown in chapter 2, the WB has played a crucial part in influencing the policies of water privatisation agenda in Ghana through the use of conditionality. Singh has argued that: “the World Bank adapts itself to the global system of trade. This entails the removing of trade barriers and thereby making countries even more vulnerable to foreign interests.”⁵⁰⁶ The privatisation of water in Ghana was being funded through the provision of loan by the WB with the condition of cost recovery and private participation. Under the cost recovery approach proposed by the WB, Ghana was expected to increase water fees to about 50%; while under the private participation option, Ghana ought to privatise or give concessions to private water corporations to enter the sector to provide water service at increased fees in an attempt to redeem the costs of investment in the water project.⁵⁰⁷ The incessant pressure being plied by the WB against Ghana to follow the Bank's macro-economic policies was seen in the failed Azurix water deal in Ghana.⁵⁰⁸ Azurix⁵⁰⁹ paid a large sum of money to the Ghanaian Minister overseeing the privatisation of the Ghana Water Corporation Limited (GWCL) in order to win the bid to repair defunct

⁵⁰⁶ Nadita Singh, (ed) *The Human Right to Water: From Concept to Reality* (Springer, Switzerland 2016) 105-110

⁵⁰⁷ *ibid*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Azurix is a subsidiary firm of an American Company called Enron.

water facilities in the country. This corrupt practice embarrassed the WB as a financier of the project and consequently had to withdraw its funding from the project.⁵¹⁰ Unfortunately, there is no indication that the Inspection Panel of the World Bank was involved with this project.

Barlow and Clarke have stated that: “In Ghana, where the IMF and the World Bank have insisted on water privatisation as a condition for renewal of loans, a broad range of civil society organizations have formed a National Coalition against the privatisation of water.”⁵¹¹ The strategy of forcing states especially a developing state like Ghana to privatise her water supply company has the potential of undermining water as a human right. Although the WB has declared in its policy document that “water services – including sanitation- are essential to life and health, economic development, and human dignity”,⁵¹² the use of conditionality with respect to privatising Ghana’s water supply services occasionally fails to serve the WB water related objectives. According to the WB: “the greatest value of engaging a Private firm can be in transforming decision-making and accountability by better aligning the interests of all parties, governments and private, with the public interest”.⁵¹³ However, this statement by the WB has little positive impact on the Ghanaian society as the public was not consulted with respect to the privatisation of the water company.

⁵¹⁰ Sara Grusky, “Privatisation of Tidal Wave IMF/World Bank Water Policies and the Price paid by the Poor” (the Multinational Monitor, 2001) 13

⁵¹¹ Maude Barlow and Tony Clarke, *Blue Gold: The Battle Against Theft of the World’s Water*, (New Press, New York 2005)

⁵¹² The World Bank: Approaches to Private Participation in Water services – A Tool Kit (English) the World Bank, (2006) < www.documents.worldbank.org/2006/01,> accessed 20th May 2013

⁵¹³ Ibid.

Furthermore, Fitzmaurice has also explained the use of conditionality as the WB's strategy to force states to privatise their water resources in proposing that: "In 2001, the World Bank granted a US\$110 million loan to Ghana, which was conditioned on the performance of several actions, inter alia, and the increase of electricity and water tariffs by 96% and 95% respectively, to cover the operating costs."⁵¹⁴ The average income of the majority of Ghanaians is less than US\$1 dollar a day, and therefore increasing tariffs between 96% and 95%, indicates that a large population of the people would have no access to water supply for domestic and sanitation purposes. Thus, the possibility of people contracting contagious diseases with health risks undermining the dignity of humanity. This policy runs contrary to the World Bank's own policy statement of striving to increase access to water for all peoples in an attempt to combat diseases. In that respect, the WB states that: "the Bank's overarching objective is to reduce poverty by supporting the efforts of countries to promote equitable, efficient, and sustainable development."⁵¹⁵

Interestingly, this policy objective of the WB resonates with Ghana's attempt to improve the wellbeing of her citizen under the auspices of the MDGs and the NEPAD. However, according to Adam, the WB's strategic attempts to court the support of Paramount Chiefs⁵¹⁶ in Ghana is misplaced and fallen short of helping her to achieve the MDGs' vision of extending water supply to 70% of the population by the year 2015.⁵¹⁷ Adam

⁵¹⁴ Malgosia Fitzmaurice, "the Human Rights to Water" (2007) (n.307)537

⁵¹⁵ Approaches to Private Participation in Water Services: A Tool Kit, supra 409 note 155

⁵¹⁶ A Paramount Chief (s) is regional chief in Ghana, whose position can be equated to an absolutist King. They have sub-divisional chiefs under their jurisdiction and may offer advice to the national government on particular traditional issues. They wield some influence by way of settling disputes among their peoples with respect to land and farming issues.

⁵¹⁷ Paramount Chiefs in Ghana represent the population of a whole region. For example the Ashanti Region is the second biggest in Ghana; with enormous influence of power and authority over the people.

added that: “World Bank President Wolfensohn has pledged a \$30 million loan to an Ashanti chief to enable him to provide water and sanitation to some communities in the country. This is despite the fact that the chief has no previous expertise in water and sanitation and is not democratically accountable to the people.”⁵¹⁸ In this sense, Wolfensohn’s strategy not only appears illusory, but also can be perceived as a further attempt to institute the Bank’s policy of privatising water supply in the urban centres of the country at all cost. By granting loan to a Paramount Chief of one particular region of Ghana, the WB has failed to promote accessible and affordable water to the people in general.

3.6.2 The IMF’s Activities in Relation to Water Privatisation in Ghana

The IMF’s role in Ghana with respect to water privatisation is much similar to that of the World Bank as both institutions complement each other in prescribing macro-economic solutions to the developing economies of the world. According to Grusky, the IMF was instrumental in framing the policy of cost recovery and privatization of water supply in Ghana. Grusky opines that: “the Ghanaian case is representative of an increasingly common policy recommended of the World Bank, along with the International Monetary Fund to increase consumer fees for water and sanitation and to force privatization of water utilities.”⁵¹⁹ Although the IMF acts often in collaboration with the WB, the IMF appears to have a speciality in the prescription of policy issues. The IMF’s strategy of inducing the government to increase water fees in Ghana in conjunction with other utility

⁵¹⁸ Al-Hassan Adam “Against the Current: Community –Controlled Water Delivery in Savelugu, Ghana” in *Reclaiming Public Water Achievements, Struggles and Visions from Around the World*, (2005) Transnational Institute (TNI) & Corporate Europe Observatory (CEO) 76

⁵¹⁹ Sara Grusky, “ Privatisation Tidal Wave IMF/World Bank Water Policies and the Price Paid by the Poor” (2001) 13

services underscore the point that the health and sanitation needs or the right to water of Ghanaians were not considered a priority during the privatisation.

The Halifax Coalition⁵²⁰ has criticised the IMF's programme of SAPs and allied policies and stated that: "... on the negative side, privatization often leads to job losses, the social impact of which may need to be mitigated through retraining and job creation programs, and income support within well-defined social safety net."⁵²¹ The impact of SAPs on the government and people of Ghana had resulted in many job losses in the GWSC. Adams has estimated that nearly 2,000 workers were sacked between the periods 1990 -1993 when Ghana implemented the IMF's restructured policy in the water supply sector.⁵²² With job losses, majority of Ghanaians were unable to provide for the needs of their families especially with respect to water and sanitation requirements. In Ghana, there exists no social income support or job seekers neither allowance to provide support to families nor are there job retraining schemes as generally available in the developed world. In these circumstances, it is understandable that the workers who lost their jobs due to the IMF's policy faced extreme social and economic hardships including limited access to water.

3.6.3 The Influences of the MNCs in the Water Sector in Ghana

Gustafsson has argued that private enterprises which comprise MNC have managed in splitting Ghana's water services into two sections: "a profitable section in the urban cities that has been put out to be tendered by global water companies; and a sector covering

⁵²⁰ The Halifax Initiative Coalition is a labour movement based in Canada with the objective of fighting economic and social injustice around the world.

⁵²¹ Halifax Initiative Coalition "Water Land and labour: the Impacts of Forced Privatization in Vulnerable Communities" (2002) < www.halifaxinitiative.org/updir/Water_Land_Labour.pdf,> accessed 20th June 2012.

⁵²² Al-Hassan Adam, (n518) 80

the rural areas and many villages that must itself supply water.”⁵²³ This scenario, described by Gustafsson, implies that the MNCs are focused on huge profit maximisation rather than seeking to provide affordable and efficient water supply system congenial to needs of Ghanaians. This separation of water supply system discriminates against the majority of Ghanaians living in poor rural communities and violates their human right of access to water.

As the discussion in the chapter shows, the MNCs direct involvement in the management of water services have impacted on the social environment of Ghana. As Whiteford et al suggest: “resource allocation decisions are becoming the domain of private actors, who may or may not operate within the system’s framework. This often takes place in context of national deregulation and the privatisation of public function including the privatisation of water.”⁵²⁴ The result is that access to water in Ghana is limited to the rich people, whilst majority of the poor rely on polluted sources of water for their existence due to poverty.

In Ghana, the role of MNCs had serious repercussions of undermining Ghana’s efforts to increase access to water under the MDGs by 2015.⁵²⁵ This was compounded by the corruption charge brought against Azurix, a subsidiary firm of Enron, by disgruntled Ghanaians in a water project called BOOT. The BOOT project was aimed to repair defunct water facilities and equipment Ghana. According to Harrold, (as cited by Hall) a Financial Times reporter, stated that: “I concluded that the only way they thought they

⁵²³ Jan E. Gustafsson, “the European Water Policy: A new Phase? March 6-7, European Parliament, Brussels Seminar organised by the IERPE, (2008) 2 < www.ierpe.eu, > accessed 4th October 2015

⁵²⁴ Linda Whiteford and Scott Whiteford (eds) *Globalization, Water, & Health: Resource Management in Times of Scarcity*, (Maple-Vail Book Manufacturing Group 2005) 236-7.

⁵²⁵ K. Agyeman, “Privatisation of water in Ghana: Stopped in its tracks or strategic pause?” (2007) 64 (5) *International Journal of Environmental studies*, 532.

could get the contracts was through the back door, not through the front.”⁵²⁶ With corruption and bribery forming a strategic option for the MNCs to enter into Ghana’s water sector, it is not surprising that access to water supply continues to be a struggle for the majority of Ghanaians.

Equally, Transparency International has recently reported that about 37% of Ghanaians have paid a bribe in 2010, with 76% of Ghanaians suggesting that the government’s anti-corruption campaign is ineffective.⁵²⁷ This suggests that there is a high tendency among the government officials on one hand to take bribe, and the people on the other hand, to engage in corruption practices in Ghana. In this regard, the inference is that the contract awarded to Azurix was riddled with corruption. The fact that Azurix is prepared to offer bribes to some Ghanaians government officials suggests that access to water may be hindered because water prices will be priced beyond the means of ordinary Ghanaians in order to recoup the bribes paid by the MNC to Ghanaian officials.

Notwithstanding the above, the MNCs enjoy extensive access to legal protection under the investment agreement along with access to arbitration forum (e.g., UNCITRAL, ICSID).⁵²⁸ Ghana’s Investment Protection and Promotion Act⁵²⁹ is one example of legislative instrument which protects the interests of MNCs and their investments. Section 27 of the Act protects the investments of foreign corporations and individual businesses in respect of Ghana’s free trade policy to attract foreign investments.⁵³⁰ This

⁵²⁶ David hall (et al), “Water Privatisation in Africa” PSIRU for PSI (2002) ,available at www.psir.org

⁵²⁷ Transparency International < www.transparency.org/county#GHA_Public.Opinion, > accessed 24th July 2014

⁵²⁸ Paul W. Beamish, *Multinational Joint Ventures in Developing Countries*, (Routledge: London 2013) 5

⁵²⁹ Ghana Investment Protection and Promotion Act (1994/5)

⁵³⁰ Ghana Investment Protection and Promotion Act, (1994/5) section 27

legislative instrument protects foreign investor's access to the Ghanaian justice system to make a compensatory claim against the government where Ghana's policy is implemented to impede investments opportunities. Conversely, there is no corresponding legislative protection for the poor Ghanaians to seek redress directly against the companies when their human rights are breached.⁵³¹ Furthermore, Sections 28 and 29 of the same Act,⁵³² protect the rights of foreign companies in accordance with Ghana's obligation under the UNICTRAL Convention. Thus, Ghana is bound by the judgments of international commercial courts and arbitrations.⁵³³ The existence of such legal enforcement provisions at both domestic and international levels suggests that the rights of the investors are better protected than the rights of the poor people of Ghana who lack access to water.⁵³⁴

3.6.4 The Role of the Government

The Government of Ghana is the head of the Republic with executive and political powers to make decision affecting the social and economic well -being of the citizens. With respect to the 1992 Constitution of Ghana, Article 57 (1) states that: "the president shall be a President of the Republic of Ghana who shall be the head of State and head of government and Commander-in-Chief of the Armed Forces of Ghana."⁵³⁵ This provision of the Constitution grants executives powers to the head of government to

⁵³¹ Polo E. Chabane, "Enforcement Powers of National Human Rights Institutions: A Case of Ghana, South Africa and Uganda" (An LLM Thesis, Faculty of Law, University of Ghana 20 October 2007) 26

⁵³² Ghana Investment Protection and Promotion Act, (1994/5) section 28

⁵³³ Dominic N. Dagbanja "The Changing Pattern and Future of Foreign Investment Law and Policy in Ghana: the Role of International Investment Treaties" (2011) V 19 (1) African Yearbook of International Law, 253-292

⁵³⁴ Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, (Corporate Europe Observatory & Transnational Institute, Amsterdam 2012) 13

⁵³⁵ The Constitution of the Republic of Ghana (1992), Article 57 (1)

represent and seek prosperity of the people in all matters including social and economic. Similarly, section 73 of the Constitution declares that: “the government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in consistent with national interest.”⁵³⁶ The suggestion is that the government of Ghana would act in securing the full benefit of Ghanaians by signing favourable international financial agreements with institutions such as the WB and the IMF. The Constitutional powers of the government should be deployed to promote the efficient and effective right of access to water for domestic and sanitation purposes. Regardless of the protections accorded to Ghanaians in respect of the 1992 Constitution, the above discussion shows that the privatisation of water services adopted by the Government of Ghana has been influenced by the GATS Agreement and the WB and IMF policies and has, in effect, undermined access to water supply.

In Ghana, water is owned by the president of Ghana as a trustee to protect health of the people as well as the nation. Section 257 (6) of the Constitution of Ghana states that “every minerals in its natural state that lay, under or upon the land of Ghana, rivers, streams, water courses throughout Ghana ... shall be vested in the President on behalf of, and in trust for the people of Ghana”.⁵³⁷ Water resources in private/individual lands are owned by the individuals who owned the land. This means that private individuals can dig wells for water to cater for their domestic and sanitation requirements. However, the amount of water produced from such wells may not adequate to cater for the needs of the people because, in most cases, they have no means of treating or purifying such water sources. Blanco and Razzaque have argued that: “Governments as custodians or

⁵³⁶ Section 73 of the constitution

⁵³⁷ Constitution of Ghana, section 257 (6)

trustees of natural resources need to act for the common good of all in their respective country.”⁵³⁸ Thus, the role of governments as custodians and trustees of their countries’ resources demand that they should adopt proactive strategic measures to protect access to water for all the people including the vulnerable community.

Indeed, the UN General Assembly Resolution of 1952⁵³⁹ affirms that states have permanent sovereignty over natural resources. According to this Resolution, a state has a responsibility of managing the resources of the states in order to promote the economic and social prosperity of the people.⁵⁴⁰ Thus, Ghana as a member of the UN has a similar obligation of ensuring that the interest of its people are protected within the natural resources of the country especially with respect to the provision of water for domestic and sanitation purposes.

Furthermore, General Comment No. 15⁵⁴¹ enjoins that parties to the ICESCR have specific duty to take active steps towards improving access to water. This interpretative document requires governments to devise water policy aimed at providing access to safe, affordable, sufficient and physical water facilities to meet the needs of the people. As outlined in the General Comment No 15, the governments are to adopt measures progressively and in consonance with each individual state’s resources and capacity which would allow them to provide water to their people.⁵⁴² In the case of Ghana, the

⁵³⁸ Elena Blanco and Joan Razzaque, *Globalization and Natural Resources Law: Challenges, Key issues and Perspectives*, (Edward Elgar Publishing Ltd UK 2011) 3

⁵³⁹ GA Resolution 523 (1952) < <http://www.worldlii.org/int/UNGARsn//1968/n>

⁵⁴⁰ Dinah Shelton, “Soft Law” in David Armstrong (ed) *Routledge Handbook of International Law*, (Routledge, London 2011) 79

⁵⁴¹ Committee on Economic, Social and Cultural Rights, General Comment No. 15, the Right to Water (Twenty-ninth session, 2013), U.N.Doc E/C.12/2002/11, < www.umn.edu/gencomm/escgencom15, > accessed 10th November 2016

⁵⁴² General Comment No 15

government must ensure that they are progressively realising the right to water by allocating the maximum of available resources to respect, protect and fulfil such right. Special attention should be given to the following vulnerable groups of people namely: women, children and indigenous people. It must be said that women and children face the most difficulty with access to water in Ghana. This is because women and children have traditional roles of hunting and fetching water for both domestic and sanitation purposes.⁵⁴³ The right also recognises that special attention should be given to older people and people with disabilities as well as those living in disaster - prone areas or on islands.⁵⁴⁴

Under the General Comment No.15, the state has to respect, to protect and fulfil the right to access water. The obligation to 'respect' restricts state parties from interfering directly or indirectly with the enjoyment of the right to safe drinking water. The obligation to 'protect' demands that state parties prevent third parties (individuals, corporations and other entities) from interfering with the enjoyment with the right to water. Applying paragraph 23 of General Comment No.15, it can be stated that the government of Ghana has an obligation to ensure that private corporations in Ghana do not affect negatively the consumption of the water by the people. The next obligation is that state parties should ensure that third parties operating or controlling water services and resources (e.g., piped water networks, water tanker operators and water vendors) do not threaten or compromise the sufficiency, safety and affordability or accessibility of this right.⁵⁴⁵

⁵⁴³ Nora Judith Amu, *The Role of Women in Ghana's Economy* (Elbert Frederick Stitung O' Mens Graphix 2004) 8

⁵⁴⁴ *ibid*

⁵⁴⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 15: the Right to Water (Articles 11 and 12) of the International Covenant on Economic, Social and Cultural Rights), Docs.EC12/2002/11 January 2003, <[www.inhchr.ch/tbs/docos.nsf/0/a548d1bdd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.inhchr.ch/tbs/docos.nsf/0/a548d1bdd713fc1256cc400389e94/$FILE/G0340229.pdf), >accessed 20th May 2013, Paragraph 24 of UN General Comment: the Right to Water, Articles 11 and 12 respectively,

Paragraph 35 of the General Comment No 15 states "... agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water."⁵⁴⁶ The obligation to 'fulfil' demands of state parties the adoption of measures aimed at devising a comprehensive national policy and programmes geared to provide sufficient and safe water for the current and future generations.⁵⁴⁷

Staddon, Appleby and Grant have expressed doubt with respect to the power of governments to promote effective access to water by explaining that "although UN GA Resolution 64/292 recognised the need to promote water as human right, neither the UN nor those supporting such movement has proposed any law to enforce such right on the international level."⁵⁴⁸ In this respect, they suggested that the 'right to water' ought to be treated with caution since this right would be interpreted differently in each jurisdiction depending on the aspirations of each jurisdiction.⁵⁴⁹ Indeed, the responsibility of the government of Ghana to 'respect, protect and fulfil' right to water is an enormous challenge.

3.6.5 Violation of the right to water

In order to comply with their general and specific obligations of protecting access to water, states are required to adopt practicable steps in promoting the rights under the General Comment no 15. Under the principles of international law, a failure to act in good faith is liable to violation of a right. According to Article 26 of the Vienna Convention of the Law of Treaties, 'every treaty in force is binding upon parties to the treaties and must be

⁵⁴⁶ Committee on Economic, Social and Cultural Rights, General Comments 15: the Right to Water (Articles 11 and 12) *ibid*

⁵⁴⁷ *Ibid.* see n 116

⁵⁴⁸ Chad Staddon, Thomas Appleby and Evadne Grant, *A Right to Water? Geographic-Legal Perspective* (Earthscan, London 2011) 9

⁵⁴⁹ Chad Staddon, Thomas Appleby and Evadne Grant, *ibid.* 11

performed by them in good faith.’⁵⁵⁰ Article 27 of the Vienna Convention also says that a ‘party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ In the light of the Vienna Convention, Ghana will be violating the right of access to water where it adopts a measure contrary to the provisions of ICSECR and General Comment No.15

Equally, General Comment No.15 also enjoins state parties to devise effective monitoring mechanism to ensure that the right to a safe drinking water is being achieved as a human right.⁵⁵¹ To this end, it is expected that individuals and groups would be drawn into the decision-making processes which affect the right to water, especially water privatisation agreements. As a strategy to protect and promote access to water in the future, NGOs, human rights advocate groups, religious groups and a cross-section of the Ghanaian civil society must be invited to future negotiations regarding water projects and investments or the privatisation of any public institution which has direct social and economic impact upon the wellbeing of the people.

3.6.6 The Role of the People

Ordinarily, the people of Ghana constitute the various social classes of the country. This means that they should be treated and accorded respect and dignity in accordance with their constitutional right.⁵⁵² Section 34 (6) (c) of Ghana’s 1992 Constitution declares that “the state shall actively provide adequate facilities for, and encourage free mobility of people, goods and services throughout Ghana.”⁵⁵³ Section 36 (1) of the Constitution

⁵⁵⁰ Vienna Convention on the Law of Treaties (Vienna, 22 May 1969), printed in 1155 UNTS (1969) 331, entered into force 27 January 1980, < <http://www.un.org/law/ilc/texts/treaties.htm>, > accessed 20 July 2014

⁵⁵¹ General Comment No.15, supra 442 note paragraph 13.

⁵⁵² Lydia Nkansah, “The Right of Resistance and the Defence of Ghana’s Fourth Republic” (2014) 6 KNUST Law Journal 129-158, SSRN:< <http://ssrn.com/abstract=2424227>, > accessed 20th December 2016

⁵⁵³ Constitution of Ghana, section 34 (6) (c)

adds that: “the state shall take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy.”⁵⁵⁴ On the one hand, these sections of the 1992 Constitution of Ghana bequeaths to Ghanaians a legal right for enjoying social and economic resources of the nation. On the other hand, the 1992 Constitution of Ghana imposes an obligation on the government to adopt measures to ensure that the welfare of Ghanaians is protected with adequate access to water. Furthermore, it requires that the government of Ghana consults with the people by offering them an opportunity to contribute their views and suggestions on issues of national economic and social projects prior to signing international contracts. However, this opportunity was not given to the people of Ghana in respect of the Azurix contract. The only role played by Ghanaians with respect to the privatisation of water services was the manifestation of public outcry and demonstrations against the government and Azurix when the media leaked corrupt activities associated with awarding the contract.⁵⁵⁵ This contravenes the government’s obligation under international law, especially in light of the General comment No. 15 which demands that governments should respect the people’s right to water by involving them in agreements relating water supply or distribution.⁵⁵⁶

3.7 The Arguments against Water Privatisation in Ghana

⁵⁵⁴ Constitution of Ghana, section 36 (1)

⁵⁵⁵ David Hall *supra* 289 note 67

⁵⁵⁶ General Comment No.15, *supra* 220 note paragraphs 23 and 24

The debates against water privatisation in Ghana share a common perspective with similar debates in other jurisdictions.

First, water privatisation promotes corporate monopoly. To avoid such monopoly in the water sector, there is a strong proposition that entrusting the management of water supply responsibilities to cooperatives in each region of a country may provide a lasting and effective solution to increasing access to water rather than privatisation. In this respect, Bakker has drawn upon on the roles of cooperatives in the Welsh community in the UK and stated that: “the successes of the Welsh cases⁵⁵⁷ by aligning the incentives of customers, reducing risks and thereby the cost of capital and consumer bills, cooperatives are better equipped to service the needs of their communities through the provision of uninterrupted water supply at affordable price.”⁵⁵⁸ The effectiveness of the provision of access to water in the Welsh community is a testament that with proper government initiative in Ghana, cooperatives can be established to extend water facilities throughout the country without a total reliance on foreign investors to provide water for the people in the country. However, UK is a developed country. Ghana, as a developing country may need funds from the foreign investor to develop her water infrastructure.

Second, there is also a view, that privatisation of water services limit access to water among the poor communities of developing countries. Zaki et al, have alluded to a criticism levelled against water privatisation in Thailand to say; that: “... the poor, due to

⁵⁵⁷ The Welsh case is an example which cooperatives can bring to bear on society in terms of access to water. The Welsh example is an established not for profit cooperative venture, where it is funded by debt rather than by equity with a lower risk profile given its commitment to remain a non-diversified company operating strictly as a regulated water business. Glas Cymru is prohibited from diversifying into other activities, both by its constitution and regulator. The lower risk profile was confirmed by Standard & Poor’s AAA rating of the Company’s bond issues.

⁵⁵⁸ Karen Bakker, “The Ambiguity of Community: Debating Alternatives to Private Sector Provision of Urban Water Supply” (2008) Institute for Resources, Environment and Sustainability, University of British Columbia, p. 241, <t www.water-alternative.org > accessed 10th June 2016

their inability to pay or the fringe location of their communities, are excluded from the privatised service.”⁵⁵⁹ The strategy of discriminating against the poor with respect to access water highlights one of the underlying reasons of opposition towards privatisation of water in Ghana. As discussed above, access to water has become the preserved right of the rich in Ghana.

Third, the Ghanaian public demonstrated against privatisation of water services because of the IEs policies of privatisation and liberalisation in services which aim solely to maximise profit at the expense of the poor. This view resonates with the debate of Spronik who argues that: “privatization has also put pressure on states to “unbundle” services, which create externalities, particularly for the environment. The dirty secret of the W&S sector is that water is the only profitable aspect of the service. Unlike the sanitary sewerage, water that is delivered to the home is regulated through a valve that can be shut off in the case of non-payment.”⁵⁶⁰ The fact that privatisation of water services in Ghana have been focused upon by the international economic institutions as a source of profit maximization venture rather than a service to protect human needs has engendered public outcry with antagonism swirling against those institutions.⁵⁶¹

3.8 The Provision of Inadequate Water Facilities under Privatisation in Ghana

According to the Water and Sanitation Sector Performance Report (2009), 58% rate of achievement was recorded by installing physical facilities in the cities and small towns of

⁵⁵⁹ Saeed Zaki, and A. T. M. Nurul Amin, “Does Basic Services Privatisation Benefit the Urban Poor? Some Evidence from Water Supply Privatisation in Thailand”, (2009) *Urban Studies*, 2304

⁵⁶⁰ Susan Spronik, “Water and Sanitation Utilities in the Global South: Re-centring the Debate on “Efficiency” (2010) *Review of Radical Political Economy*, 166

⁵⁶¹ E. Osei Kwadwo Prempeh, *Against Capitalism: African Social Movements Confronts Neoliberal Globalization*, (Ashgate Publishing Limited, England 2006) 131-135

Ghana with special attention given to the small community areas.⁵⁶² This report gave the breakdown of facilities in Annex 7 of the report as shown in the table below. On the basis of the water and sanitation report, there were 6, 827 hand-dug wells and boreholes provided in Ghana over the periods 2008-9. This is contrasted with the total of 401 pipe systems provided in Ghana post-water privatisation. Thus, more effort is directed towards providing boreholes and hand-dug wells as strategic option to increase access to water supply rather than conventional pipe-system under the privatisation agenda. The table below demonstrates that privatisation agenda in Ghana is failing to promote infrastructure development that is required for long term economic development and poverty reduction.

The table below provides a breakdown of water supply systems within the years 2008-2010 in Ghana.

Facility description	2008	2009	2010
water	1632	1493	-
Boreholes	1493	1228	
Pipe system (small community)	173	150	-
Pipe system (small town)	35	43	-

Source: This table is taken from the report of Ghana's Water and Sanitation Sector Performance Report (2009) p. 78

The massive demonstration against the WB and the government of Ghana's water privatisation policy underscores the dissatisfaction of the majority of the people.⁵⁶³ A more human- centred collaborative approach that draws upon all stakeholders in

⁵⁶² Ghana Water and Sanitation Performance Report (2009):< www.wsmp.org/downloads/48ca1a12.pdf > accessed 20th August 2014

⁵⁶³ E. Osei Kwadwo Prempeh, (n 561) 81

devising a comprehensive water strategy would promote sustainable management of water in Ghana. The wells and borehole, mentioned above, are dug by the communities themselves with NGOs providing the funding for the equipment.⁵⁶⁴ Thus, the ownership of such wells is rested with the communities who have the responsibility of repairing and maintaining the facilities throughout their life-span. This example highlights that community water initiative may offer sustainable access to water.⁵⁶⁵

3.9 The Affordability of Water Supply in Ghana

The General Comment No.15 in its paragraph 2 states that: “the human right to water must be affordable and accessible for personal and domestic uses.”⁵⁶⁶ However, the issue of access and price of water in Ghana runs contrary to the General comment No.15. One of the reasons raised by the developing states in the wake of privatisation of water supply and resources is the question of affordability. The argument has been made that privatisation of water resources was motivated by the business aspirations of the MNCs who are determined to maximise profits through high fee charges at the expense of the public.⁵⁶⁷ With profits as their main goal, there is no doubt that exorbitant fees would be instituted by the MNCs so as to promote their business interest.

⁵⁶⁴ Matilda Aberese Ako, Nana Akua Anyidoho and Gordon Crawford, “NGOs Rights-based Approaches and the Potential for Progressive Development in Local Contexts: Constraints and Challenges in Northern Ghana” (2013) 5 (1) *Journal of Human Rights Practice*, 50-51

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*

⁵⁶⁷ David Hall et al “water privatisation in Africa” (2002) :< www.psir.org/reports2001-12-wbsrat.doc,> accessed 16th July 2013

According to Amenga-Etago, high water fees deny access to water among majority of Ghanaians. He explains that: "... most people in Accra do not earn the minimum wage of less than US\$1 a day, while significant number have no regular employment."⁵⁶⁸ Thus, majority of Ghanaians are unable to afford water supply at exorbitant rate. Ironically, as discussed above, most Ghanaians became unemployed as a result of the WB and the IMF's structural adjustment policy.⁵⁶⁹ In this light, the majority of Ghanaians are unable to afford water supply for their domestic and sanitation purposes because most of them are unemployed and those employed earn about US\$ 1 dollar a day which is insufficient to meet the needs of their family including water supply.

3.10 Conclusion

This chapter has examined briefly the history of piped-water system in Ghana which began in the early 1920s in the former capital city of Ghana (Cape-Coast). The water system was then developed to serve the water needs of the British colonial masters. From 1966 onwards, Ghana Water and Sewerage Corporation (GWSC), a SOE, was created to supply water to the people. It is argued that, during the 1966 onwards, majority of Ghanaians had access to potable water at an affordable rate and within reasonable distance from their homes.

This chapter also discussed the right to water as an international obligation requiring the government of Ghana to implement laws and policies with requisite infrastructures that promote and protect access to water. However, access to water under Ghana's

⁵⁶⁸ Ibid

⁵⁶⁹ David E. Sahn & others, *Structural Adjustment Reconsidered: Economic policy and Poverty in Ghana* (Cambridge University Press, Cambridge 1997) 163.

international obligations remains a challenge with very little resources invested in infrastructure development.

As regards the water policy, it is argued that Ghana has a comprehensive policy which is integrated with other development programmes (e.g., MDGs, SDGs, GPRSII and NEPAD). The objective is to advance the social, economic, water and health needs of Ghanaians. However, this water policy and its accompanied development goals have little prospects to protect access to water due to limited funding and poor implementation strategies.

Furthermore, the roles of the WTO, WB, IMF and MNCs have been discussed as well as the negative impacts that these institutions' policies have on access to water in Ghana. It is argued that, in spite of all the promises made by the IELs to improve access to water, the majority of Ghanaians remain without affordable access to water. In addition, the chapter demonstrates the weaknesses in the Ghanaian legal system that prioritises the protection of foreign investments and offers less protection to the right to water of the Ghanaians. The management of water resources in Ghana has been entrusted to an independent body – the Water Resources Commission - to regulate water supply and related issues. Yet, the Commission has limited powers to enforce measures against people and organisations engaged in water-related offences. Furthermore, this chapter has explored the view that the President is a custodian of the water resources under the 1992 Constitution and has an obligation to protect water resource for the people. Also, it is stated that the Ghanaians have a constitutional right to be consulted as well as to participate in agreements affecting access to water and their wellbeing. Moreover, the discussion underscored the need to involve non-state actors who can play significant

roles in offering support to vulnerable communities who are without adequate access to water.

CHAPTER 4: Access to Medicine in Ghana: Challenges in relation to the TRIPS Agreement

1. Introduction

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)⁵⁷⁰ is one of the most comprehensive international agreements; which was negotiated at Uruguay and instituted under the WTO to promote minimum standards for the protection and enforcement of intellectual property rights. TRIPS entered into force on 1st January 1995⁵⁷¹ with the view to obliging WTO member states, especially developing countries, to implement TRIPS in their respective countries.⁵⁷²

Deere argues that TRIPS offers protection of ideas and technology and monetary incentive to the pharmaceutical industries;⁵⁷³ in order to embark upon extensive and innovative research activities in producing novel medicines to treat HIV/AIDS.⁵⁷⁴ Conversely, Abbot posits that TRIPS has been introduced into the WTO principally to protect the profit interests of the pharmaceutical industries of the developed countries- such as the US, Japan and the European Union (EU), with a view to satisfy the lobbying and business needs of their corporations.⁵⁷⁵ Therefore, the TRIPS Agreement has no objective of promoting the health interests and human rights needs of the developing

⁵⁷⁰ The WTO's Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement < www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm, > accessed 20th July 2016

⁵⁷¹ Peter Drahos, "Bits and Bips: Bilateralism in Intellectual Property" (2001) 4 (6) The Journal of World Intellectual Property, 791-808

⁵⁷² Peter K YU, "the Objectives and Principles of the TRIPS Agreement" (2009) Houston Law Review (2009) p. 980-981.

⁵⁷³ Carolyn Deere, *The Implementation Game: the TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, Oxford 2009) 1

⁵⁷⁴ Frederick M. Abbot, "the Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements" (2004) Issue 4 Quaker United Nations Office, (Geneva) (QUNO), 2-12

⁵⁷⁵ Carolyn Deere, *the Implementation Game: the TRIPS Agreement and the Global Politics of Intellectual Property Reform*, (n 573)7

countries.⁵⁷⁶ The consensus among developing states is, that the TRIPS Agreement aims to increase the prices of essential drugs beyond the means of HIV/AIDS victims in their respective countries.⁵⁷⁷ By adopting this strategy, developed countries intend to deny developing countries the opportunity to utilise the flexible provisions within TRIPS to promote access to medicines.⁵⁷⁸ This indicates that developing countries including Ghana are not benefiting from the TRIPS Agreement with respect to promoting the health of their citizens.

On another level, the issue of access to medicines is of significant importance to human survival universally. Ghana therefore signed up to the World Trade Organisation (WTO) in 1995,⁵⁷⁹ with the hope of sharing in the benefits of international trade.⁵⁸⁰ Today, deaths in Ghana caused by HIV/AIDS range between 40,900 and 89,000; malaria around 97,000 people, and tuberculosis approximately around 30, 000 each year.⁵⁸¹ Equally, among the ten causes of deaths in Ghana; malaria is singled out as the first, with HIV/AIDS as second, and tuberculosis as the third.⁵⁸² Moreover, the World Health Organisation (WHO) recognises HIV/AIDS as being the highest health burden facing Ghana in recent times.⁵⁸³

⁵⁷⁶ Haochen Sun, “The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health” (2004) 15 (.3) EJIL, 124

⁵⁷⁷ SK Sell, “TRIPS was never enough: Vertical forum shifting, FTAs, ACTA, and TPP” (2010-2011) 18 Journal of Intellectual Property Law, 448-475

⁵⁷⁸ Charles T. Collins-Chase, “The Case Against TRIPS-PLUS Protection in Developing Countries Facing AIDS Epidemics” (2008) 29 (3) U. Pa. J. Int’l L, 777

⁵⁷⁹ Ghana became a member of the World Trade Organisation on 1st January (1995) < www.wto.org/english/thewto_e/countries_/ghana_e.htm, > accessed 30th March 2015 -

⁵⁸⁰ Ibid.

⁵⁸¹ Ghana: WHO Statistical profile (2010) < <http://www.who.int/gho/countries/gha.pgf?ua=1> (2010) > accessed 30 March 2015

It must be pointed out that WHO’s Report on Ghana with respect to HIV/AIDS epidemic was conducted between 2005- 2007, thus differences exist between the WHO and Ghana’s National AIDS Commission’s Reports. Nevertheless, the situation of the HIV/AIDS epidemic in Ghana is alarming.

⁵⁸² Ibid.

⁵⁸³ Ghana: Tuberculosis Profile, (20009)

<http://extranet.who.int/sree/Reports?op=Replete&name=WHO_tuberculosis.pdf,> accessed on 30 March, 2015

Furthermore, in its 2013 report, the Ghana AIDS Commission (GAC) estimated that: “225, 478 persons are living with HIV; with 100,336 among them being males whereas 125,141 are females.”⁵⁸⁴ The Commission also provided that 12,077 is the new infection rate and 15,263 deaths occur, annually.⁵⁸⁵ In addition, there are 30,395 children living with HIV and 2080 deaths among them.⁵⁸⁶ By the end of 2011, 59,007 Ghanaians are estimated to have been on anti-retroviral (ARVs) medicine, which represents 57.9% of eligible persons who are made up of 56,050 adults with 2,957 being children.⁵⁸⁷ As an attempt to stop mother to child infection, Ghana has provided 630,000 ARVs to pregnant women out of an estimated one million, every year.⁵⁸⁸ Although there are differences in the figures produced by WHO and the GAC with respect to the infection rate, it is an undeniable fact that Ghana is burdened enormously with limited resources to cope with the treatment of the above diseases, especially in the area of access to medicines.

In light of the above discussion, this chapter aims to answer the following questions:

- (i) How the TRIPS Agreement promotes and protects access to affordable medicines for HIV/AIDS patients in Ghana in respect of Article 25 of the Universal Declaration of Human Rights?
- (ii) How effective are the government policies, institutions and other non-governmental organisations (NGOs) working to promote access to medicines in the treatment of HIV/AIDS in Ghana?

⁵⁸⁴ Ghana AIDS Commission on National HIV/AIDS Research, (2007)

<www.noguchimedres.org/.../NHARCON-%202013%20Call%20for%20...pdf> accessed 30th March 2015

⁵⁸⁵ Ibid

⁵⁸⁶ Ibid

⁵⁸⁷ Ibid

⁵⁸⁸ Ibid.

- (iii) Whether the flexible provisions of the TRIPS Agreement as confirmed in the Doha Declaration are respected by the developed countries and their Pharmaceutical Corporations to promote access to medicines in Ghana?

With respect to answering the above questions, this chapter has been divided into part A and B respectively.

Part A

In Part A, section 2 begins by discussing Ghana's international human rights obligations under the United Nations Universal Declaration of Human Rights (UDHR),⁵⁸⁹ in order to promote access to medicines. Also, these obligations include Ghana's responsibilities under: International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁹⁰ and the International Covenant on Civil and Political Rights (ICCPR),⁵⁹¹ the United Nations Convention on the Rights of the Child (UNCRC),⁵⁹² the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁵⁹³ and the Millennium Development Goals (MDG)⁵⁹⁴ as well as the Sustainable Development Goals (SDGs).⁵⁹⁵

⁵⁸⁹ The United Nations Universal Declaration of Human Rights (1948) UNGA Res 217 (III) entered into force 10th December (1948) < www.un.org/overview/rights.html, accessed 20th December 2016

⁵⁹⁰ The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966; entered into force 3 January, 1976.

⁵⁹¹ The International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966; entered into force on 25 June 1976.

⁵⁹² The United Nations Convention on the Rights of the Child (UNCRC), Res 44/25 adopted 20th November into force 2nd September 1990 < www.unicef.org/crc/files/rights, > accessed 20th November 2016

⁵⁹³ The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 21 December 1965, entered into force on 4 January 1969.

⁵⁹⁴ The Millennium Development Goals (MDGs) UNGA Res A/55/L2 adopted (2000) < www.un.org/millenniumgoals > accessed 20th November 2015

⁵⁹⁵ The UN Sustainable Development Summit (2015) UNGA Res/70/1 entered into force 1st January 2016 < www.un.org/sustainabledevelopment > accessed 2nd December 2016

Second, section 3 examines the human rights arguments on access to essential medicines. This discussion focuses on the premise that human rights and intellectual property rights can be harmonised to promote access to medicines, in the fight against HIV/AIDS, in Ghana and other developing countries. Therefore, pharmaceutical corporations should respect human rights and international law to promote access to ARVs

Third, section 4 explores the substantive provisions of the TRIPS Agreement and the Doha Declaration, with a view to assessing whether the objectives of Ghana in joining the WTO has been beneficial to the people, particularly with respect to building her manufacturing capacity to produce medicines locally. Also, the threatened legal battle between *GlaxoSmithKline v Ghana*⁵⁹⁶ will be discussed in light of the TRIPS provisions to determine Ghana's prospects of providing essential and anti-retroviral medicines to assist the affected HIV/AIDS population.

Part B

Fourth, under Part B, section 5 examines Ghana's policy on drugs in light of the roles of national institutions, non-governmental, and other international agencies' contributions to promote access to HIV/AIDS medicines in the country.

⁵⁹⁶ Treatment Action Group (TAG) "GLAXO Cuts Ghana's Import of Generic Combivir and Prepares for Battle" (December 2000) < www.treatmentactiongroup.org>december > accessed 20th January 2014.

2. Ghana's International Obligations under Human Rights Instruments

Ghana became independent on 6th March 1957⁵⁹⁷ and was subsequently admitted into the United Nations (UN) on 8th March 1957,⁵⁹⁸ with aspirations to be recognised as an independent country competent to conduct her own affairs among the international community. As a member of the UN, Ghana has several obligations including the UDHR⁵⁹⁹; which have been adopted legally to protect and promote the welfare of her citizens in all areas of human development, including access to medicines.

The significance of human life has been given prominence in the UDHR, in stating that “everyone has the right to life, liberty and security of person.”⁶⁰⁰ Since society has a role to play to enhance human wellbeing; it has been stated that: “everyone as a member of society, has the right to social security and is entitled to its realization, through national efforts and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and free development of his personality.”⁶⁰¹

With respect to health and access to medicines, Article 25 (1), UDHR provides that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing and medical care and necessary social services, and right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control;”⁶⁰²

⁵⁹⁷ Joe Ghartey, *Doing Business and Investing in Ghana: Legal and Institutional Framework*, (Janel Publications Limited, Ghana 2004) p. 1

⁵⁹⁸ Ghana joined the UN on 8th March 1957, see www.un.org/en/members> accessed 30th March 2015

⁵⁹⁹ Universal Declaration of Human Rights (UNDHR) (1948) (n20)

⁶⁰⁰ UDHR, Article 3

⁶⁰¹ UDHR, Article 22

⁶⁰² UDHR, Article 25 (1)

Furthermore, the UDHR recognises that human beings ought to enjoy the benefits of scientific development stating that: “everyone has the right to freely participate in the cultural life of the community, to enjoy the benefits as well as shares in the scientific advancement and its benefits.”⁶⁰³ Shelton suggests that the importance attached to the protection and fulfilment of these rights, among individuals in the international community, obliges UN member states to adopt effective measures to institute domestic legal and judicial systems; which seek to protect human welfare, especially in the sphere of health and access to medicines.⁶⁰⁴ In this regard, the government of Ghana and associated government agencies, have an obligation under the UDHR to ensure that legal, judicial and political measures are established to promote access to medicines, particularly for those afflicted by HIV/AIDS diseases.

The UN has also expressed concern regarding the ravaging impact of the HIV/AIDS pandemic on the lives of humanity through several resolutions.⁶⁰⁵ For example, a UN General Assembly Resolution (UNGA)⁶⁰⁶ declares that: “HIV/AIDS constitutes a global emergency and poses one of the most formidable challenges to the development, progress and stability of our respective societies and the world at large, and requires an exceptional comprehensive global response.”⁶⁰⁷

⁶⁰³ UDHR, Article 27 (1)

⁶⁰⁴ Dina Shelton, *Remedies in International Human Rights Law*(Oxford University Press, Oxford 2005) 117

⁶⁰⁵ UDHR (n 614) Article 27 (1)

⁶⁰⁶ General Assembly Resolution on HIV/AIDS (adopted 2nd June 2006) A/RES/60/262>
www.un.org/documents/instruments/docs_en.asp> accessed on 27th March 2015

⁶⁰⁷ Paragraph 3, General Assembly Resolution 60/262, *ibid.*

The prevalence of the HIV/AIDS pandemic is arguably an invitation to all UN member countries to collaborate with other states and institutions at the international, regional as well as at national levels to devise comprehensive measures to stem the spread of the disease. The RES 60/262 requires Ghana as a UN member country, to adopt programmes of actions within her resources to ensure that those infected by the HIV virus are provided with access to anti-viral medicines. Again, paragraph 43 of UN Resolution 60/262 says that:

“We reaffirm that WTO’s TRIPS Agreement does not and should not prevent members’ states from taking measures now and in the future to protect public health. Furthermore...the TRIPS Agreement should be interpreted flexibly to allow the provision of antiviral, service and other forms of medication as enshrined in the Doha Declaration and in Article 31 to promote health without undermining concerted global efforts to deal with HIV/AIDS.”⁶⁰⁸

This view echoes Hogerzeil, et al, that policy makers and international organisations should treat access to medicine in the treatment of HIV/AIDS, seriously.⁶⁰⁹ Oberg points out that UN Resolutions, while non-binding, plays a useful role in guiding the interpretation of international law and UN Charter provisions.⁶¹⁰ In this regard, Ghana as a UN member is expected to give effect to resolution 60/262, by providing essential medicines to Ghanaians suffering from HIV/AIDS; regardless of its commitment to the WTO TRIPS Agreement. Resolution 60/262 originates from the principle of human rights and fundamental freedoms, which has been argued, cannot be realised in the face of human misery and deaths resulting from the HIV/AIDS pandemic.⁶¹¹

⁶⁰⁸ General Assembly Resolution 60/262, *ibid*.

⁶⁰⁹ Hans V. Hogerzeil, Melanie, Samson, Jaume Vidal Casanovas, Ladan Rahman-Ocora, “Is Access to Essential Medicine as part of the fulfilment of the Right to Health enforceable through the Courts?” (2006) *Lancet*, 305.

⁶¹⁰ Marko Divac Oberg, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ” (2006) 16 (5) *EJIL*, 895

⁶¹¹ Simon Rushton, “Framing AIDS: Securitization, Developmenti-zation and Rights-ization” *Global Health Governance*, (2010) Vol. IV, No.10 4

The promotion of human dignity with the right of access to medicine is a requirement of every UN member state, including Ghana. The protection of UDHR finds prominence in the 1992 Constitution of Ghana⁶¹², especially in its chapter 5; Ghanaians are accorded protection of their human rights in the spheres of economic, social and political. Although access to medicines has not been specifically mentioned in this constitution, one would expect it to be respected as required of UN member states in light of Resolution 60/262. However, to a large extent, the government of Ghana has failed to respect, protect and promote access to medicines. This is a result of lack of political will on the part of government to promote laws and policies, which recognise access to medicines as a human right; therefore achieving human health in this respect, remain a distant reality. In addition, enforcing these rights through Ghana's judicial systems is problematic. The difficulties of seeking remedies and justice through the judiciary systems of Ghana; with respect to access to medicines is examined in Chapter 5 of this thesis.

2.1 Ghana's Obligation under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to promote Access to Medicines

The ICESCR,⁶¹³ aims to consolidate human rights obligations of States in order to ensure that human dignity in the specific areas of health, economic, social and cultural spheres are respected.⁶¹⁴ Ghana in her efforts to pursue such obligations; signed and ratified the Convention on 7 September 2007.⁶¹⁵ In Articles 12 (1) and 12 (2) (c) of the ICESCR, an obligation is placed on states parties to the Convention, to adopt measures to promote

⁶¹² The 1992 Constitution of the Republic of Ghana, (Ghana Publishing Corporation, Tema 1992)

⁶¹³ The UN's International Covenant on Social, Economic and Cultural Rights, which was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 > <http://www.ochr.org/Documents/professional/bodies/cescr.pdf> > accessed 4 April, 2015.

⁶¹⁴ The ICSCER, Articles 2 and 3, *ibid*

⁶¹⁵ The UN Treaty Collection (U.N.T.S. 1946) > <http://www.Treaties.un.org/pages/viewdetails.aspx/chapter> > 4 April 2015

sound health and mental wellbeing of people within respective states. It also mandates states to treat epidemics as well as preventing other forms of diseases.⁶¹⁶ There is, therefore, an implied responsibility or a duty on states parties to undertake medical and other health related measures; in order to provide treatment including medicines to HIV/AIDS patients. The fact that reference was made to epidemic and other diseases, is an implied indication that access to medicines is an integral part of States' responsibility, to provide treatment to those affected by the HIV/AIDS virus. In addition, the right to health in respect of the ICESCR⁶¹⁷ does incorporate access to medicine, as a duty of states and governments irrespective of their economic, financial and technological development.⁶¹⁸ So, measures must be put in place by the government of Ghana to treat those infected by HIV/AIDS.⁶¹⁹ The fulfilment of this obligation is in conformity with WHO's principle – that: "every individual must have access to medicines according to their health needs rather than one's ability to pay."⁶²⁰ This resonates with ICESCR's three obligations: namely; to respect, protect and fulfil.⁶²¹ These elements enjoin the government of Ghana to adopt proactive human-centred policies to ensure that all Ghanaians are granted access to essential means of livelihood including access to medicines, regardless of limited financial constraints.⁶²²

⁶¹⁶ The ICSECR article 12(1) states that: the states parties to the present Convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; whereas article 12(2) (2)(c) states that: the prevention, treatment, and control of epidemic, occupational and other diseases

⁶¹⁷ The ICSECR article 12 (d), *ibid*

⁶¹⁸ Stephen P. Marks, " Access to Essential Medicines as a Component of the Right to Health", (2012) p. 89 <: <http://cdn1.sph.harvard.edu.2012/10>, > accessed 26th August 2016

⁶¹⁹ Scott Leckie and Anne Gallagher(eds), *Economic, Social and Rights: A Legal Guide*, (Philadelphia, University of Pennsylvania Press, 2006) p. xviii

⁶²⁰ Stephen P. Marks, "Access to Essential Medicines as a Component of the Right to Health" (2012) <http://cdn1.sph.harvard.edu>2012/10> >accessed 20th June 2014

⁶²¹ The ICSECR, (n.613) Article 15(1)(b)

⁶²² Malcolm D. Evans, *International Law Documents*, (10th edn Oxford, Oxford University Press, 2011) 98

Furthermore, there is an obligation⁶²³ that inter-governmental organisations – e.g., World Bank, WTO, IMF, and even the Security Council – should respect access to medicines by ensuring that its policies and strategies help ordinary people to gain access to medicines.⁶²⁴ Principle 5 of UDHR states that: “all human rights are universal, indivisible, independent, interrelated and of equal importance.”⁶²⁵ This suggests the equal status of ICESCR, in comparison with other human rights instruments; thus obliging UN member countries to promote access to medicines, humanely. Similarly, the “right to life” provision in the ICCPR also affirms that every human being has the inherent right to life, and that no one should be deprived of such right arbitrarily.⁶²⁶ Joseph argues in favour of access to medicines in this respect; by stating that: “... all possible measures must be adopted to reduce infant mortality, increase life expectancy with measures to eliminate malnutrition and epidemics.”⁶²⁷ In addition, Joseph explains in light of General Comment No. 14,⁶²⁸ that governments, corporations including pharmaceutical organisations are required not to adopt measures which hamper access to life saving drugs.⁶²⁹

De Shutter et al, also argue that there should be no attempt to disrupt the provisions of the Covenant on Civil and political rights so as to protect access to social and economic rights.⁶³⁰ This suggests that access to medicine should be protected by the Government

⁶²³ Article 55 (a) – (c), United Nations Charter < www.un.org/aboutun/charter > accessed on 30 June 2015

⁶²⁴ Scott Leckie and Anne Gallagher, (eds) Economic, Social, and Cultural Rights: A Legal Resource Guide, (University of Pennsylvania press, 2016) p. xxiii-xxiv

⁶²⁵ UN’s Universal Declaration of Human Rights (UDHR) supra 20

⁶²⁶ Article 6(1), ICCPR

⁶²⁷ Sarah Joseph, Blame it on WTO? A Human Rights Critique (Oxford: Oxford University Press,2011) 218-219

⁶²⁸ UN General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art.12 of the Covenant) (adopted 11 August 2000) E/2001/22> www.un.org/documents/ecosoc/docs >accessed 20th December 2016

⁶²⁹ Ibid.

⁶³⁰ Olivier De Schutter, Asbjorn Eide, Ashfaq Khalfran, Marcos Orellana, Margot Salomon and Ian Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in Area of Economic, Social and Cultural Rights” (2012) Human Rights Quarterly, 1098

of Ghana and her judiciary in the spirit of UDHR; because Article 25 (1) of UDHR lends support to the right of access to medicines. This further explains that access to medical facilities in times of sickness is a critical human rights obligation for states to be held accountable.⁶³¹ It is noticeable that no explicit reference was made to access of medicines in the ICCPR, yet, one can infer in respect of illness and public health emergencies; that access to medicines is a crucial means to restore human wellbeing. Hence, Article 25 (1) places an obligation on Ghana's government and private institutions to promote the right. Furthermore, General Comment No. 14 is given recognition in the UDHR⁶³² to explain that there should be cooperation between developed and developed states in the areas of economic and technology so as to promote access to medicines in developing states. However, the realisation of this right in Ghana poses a real challenge. This is because, as mentioned above, successive governments have shown little commitment to sponsor legislative bills to promote social and economic rights on the same level as political rights. Similarly, the judiciary has failed to entertain claims regarding access to medicines as a right due to the following reasons: (a) that most of the above international human rights instruments have not been translated into national laws; and, (b) that most members of the judiciary are reluctant to give recognition to international human rights provisions at the national courts because of the dualist nature of Ghana's 1992 Constitution.⁶³³ Thus, it must be pointed out that Ghana government's lukewarm attitude to promoting access

⁶³¹ UNDHR article 25 (1) states that: everyone has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old or other lack of livelihood in circumstances beyond his control.

⁶³² Comment No 14 to the UNDHR, adopted by the General Assembly Resolution 217 A (III) 10 December 1998, GA Res.217 A (III) U.N. GAOR (Resolutions, part1) at 71 U.N. Doc A/80 (1948) available at <http://www.un.org/overview/rights.html>, accessed on 28 March 2015

⁶³³ Keir Starmer and Theodora A. Christou, Human Rights and Sourcebook for Africa in Kate Beatie, Theodora A. Christou and Juan Pablo Raymond (eds) *European Court of Human Rights: Remedies and Execution of Judgments* (BIICL, UK 2005) 676

to medicines as a human right; undermines her international human rights obligations to protect the health of Ghanaians.

2.2 Ghana's Obligation under the International Covenant on Elimination of All Forms of Discrimination against Women (CEDAW) to Promote Access to Medicines

One of the means through which Ghana can promote access to medicines in order to prevent the menace of the HIV/AIDS epidemic, is to rely on the International Convention on the Elimination of All forms of Discrimination against Women (CEDAW).⁶³⁴ Ghana signed CEDAW on 17th July 1980 and ratified it on 2nd January 1986,⁶³⁵ respectively.

Article 10 (h) of CEDAW stipulates that access to specific educational information should be made available to women in order to help them make crucial decisions affecting their wellbeing in specific areas of family and family planning.⁶³⁶ This article is significant in the case of Ghanaian women because, most women in the country have limited choices with respect to making decisions affecting their reproductive conditions, as most decisions in that respect are made on their behalf by men. Similarly, Article 12 (2) requires states parties to ensure that women have appropriate access to services in connection with pregnancy, confinement, the post-natal period, and free services where necessary regarding adequate nutrition during pregnancy and lactation.⁶³⁷ This provision suggests an implied duty, once again on the government of Ghana and allied agencies; to provide access to medicines as a priority to assist women with pregnancy, because they are often

⁶³⁴ UN General Assembly, Convention on the Elimination of All forms of Discrimination against Women (CEDAW) (adopted 18th December 1979) A/RES/34/180> <http://www2.ohchr.org/english/law/cedaw.htm> > accessed 5th April 2015

⁶³⁵ Ghana's signed and ratified the CEDAW on 17th July 1980 and 2nd January 1986, available at <http://www.refworld.org/pdfid/3ae6b397o.pdf>, accessed on 5th April, 2015

⁶³⁶ Article 10 (h), ICEDAW (n 647).

⁶³⁷ Article 12 (2), ICEDAW, ibid

discriminated against in this regard. Busia Jr. argues that “the 1992 Constitution of Ghana mandates the National House of Chiefs to formulate policies to promote the wellbeing of Ghanaian women, including access to medicines in respect of their reproductive needs. Yet, nothing has been done; whilst the present customary law of Ghana is inconsistent with the human rights provisions, found in chapter five of the Constitution.”⁶³⁸ Some traditional practices namely widowhood rites and Trokosi system⁶³⁹ – which subject women to undignified treatments, provide no means of securing access to the medicines. In practice, Ghana’s attempt to institutionalise women’s empowerment with respect to protecting their access to medicines has yielded limited results.⁶⁴⁰ The fact is that, although the Ministry of Women and Children’s Affairs (MoWC) has been created to promote the general welfare of women and children; successive governments and respective agencies, have failed to initiate action programmes geared at advancing the cause of women and children.⁶⁴¹ Thus, in light of CEDAW, the Ghanaian Government has not respected the right of access to medicines as a national responsibility to advance women’s wellbeing. The responsibility given to the National House of Chiefs (NHC), by the government and parliament to promote the well-being of women, is without legal

⁶³⁸ Nana K. Busia Jr, “Ghana Competing visions of Liberal Democracy and Socialism” in Abdullahi Ahmed Na’im (ed), *Human Rights under African Constitutions: Realizing the Promises for Ourselves* (Philadelphia, University of Pennsylvania Press, 2003) p. 75.

⁶³⁹ A widowhood rite in some communities of Ghana obliges women to shave their head and eat plain bread once a day under the supervision of someone, as way of mourning the dead husband.

The Trokosi system is prevalent in Volta region of Ghana This system obliges a family to send a girl who is a virgin, between ages of 7-25, to a fetish shrine, to pacify the gods of the community, for certain wrongs done by an ancestor of the girl, years gone by. Often, the fetish priest/s violates the girl’s virginity and subjects her to various degrading practices. Under such conditions, majority of girls and women have no access to orthodox medicines because of the rigid control exercised over them by the fetish priests.

⁶⁴⁰ The government of Ghana in collaboration with the Women’s Ministry, since the Beijing Conference – has attempted to provide women with education and business ventures, in order to make women less dependent on men. That way, it is hoped that women can gain the needed freedom to develop themselves as well as their children. But, the result has been disappointing due to lack of political will and limited funding. References this? Academic source?

⁶⁴¹ Ghana’s Ministry of Women and Children’s Affairs, was created in 2001, with Hon. Mrs Gladys Asmah as the first sector minister < <http://www.mhtf.org>organization>gh> > accessed on 5 August 2015

enforcement powers.⁶⁴² According to the Konrad Adenauer Foundation in Ghana, the NHC's primary role is to undertake: "progressive study of customary laws, interpretation of codification of customary laws, resolution of conflicts relating chieftaincy and land disputes; with an aim to create an appropriate system of customary laws."⁶⁴³

In addition, the Ghana's 1992 Constitution permits only an advisory role by the NHC to the government in matters relating chieftaincy disputes.⁶⁴⁴ The failure by the government of Ghana to adopt substantive and practical measures in light of her international obligations, suggests that the welfare of women and access to medicines are not regarded as priority by the government. Thus, it can be inferred, that although Ghana has a duty to promote the wellbeing of women with respect to access health care and medicines, the role of the NHC under the Constitution, offers little hope.

2.3 Ghana's Obligation under the UN Convention on the Rights of the Child (UNCRC) to Promote Access to Medicines

In 1989, the UN adopted the Convention on the Rights of the Child (UNCRC) with Ghana being one of the first twenty countries to adopt and ratify the Convention, in the same year.⁶⁴⁵ With respect to children, Ghana has an international obligation⁶⁴⁶ to ensure that children affected by HIV/AIDS through transmission from their mothers are protected.

⁶⁴² Janine M. Ubink and Julian F. Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana" (2008) Vol. 25 (2) ScienceDirect 198-213

⁶⁴³ The Konrad Adenauer –Stiftung- Ghana Office, 2010.

⁶⁴⁴ Article 272 (a), 1992 Constitution of Ghana

⁶⁴⁵ Amana Talala Mbise, "The diffusion of the United Nations Convention on the Rights of the Child (UNCRC) more on than the African Charter on the Rights and Welfare of the Child (ACRWC) in Africa: The Influence of coercion and emulation", International Social Work(2016) 1-2

⁶⁴⁶ The UN Convention on the Rights of the Child (1989) < www.unicef.org/crc/index_30229.html, > accessed on 4th April 2015. Ghana signed the CRC covenant on 5th February 1990.

UNCRC states that: “a State shall recognise the right of every child to the enjoyment of highest attainable health care and the facilities for the treatment of illness.”⁶⁴⁷

The significance of the UNCRC is more relevant in the present circumstances of Ghana because of the high incidence of HIV/AIDS, which has infected mothers and children and continues to affect most people in the country. The reference to “facilities of treatment” is no doubt expected to include medication, which is a critical element in the treatment of diseases. Equally, the UNCRC obliges states to reduce infant mortality⁶⁴⁸ by providing health care assistance to all children with medical facilities⁶⁴⁹ as well as adopting measures to prevent malnutrition, increase primary health care, and appropriate technology in a safe and congenial environment, without risks towards children.⁶⁵⁰ It can, therefore, be suggested that the UNCRC has as its focus, the protection and promotion of children’s right with respect to health care, backed by access to medicine. Thus, this responsibility is expected of the government of Ghana under this convention.

Although Ghana was one of the first countries in Africa to ratify the UNCRC, the implementation of the UNCRC in Ghana has produced mixed results. Kuyini and Mahama, in a joint study, have suggested that improvements have been made by the State to the lives of children in the Northern region of Ghana, especially in the social, economic and cultural spheres.⁶⁵¹

⁶⁴⁷ Article 24 (1), CRC Covenant.

⁶⁴⁸ Article 24 (2) (a), CRC Covenant.

⁶⁴⁹ Article 24 (2) (b), CRC Covenant.

⁶⁵⁰ Article 24 (2) (c), CRC Covenant.

⁶⁵¹ Ahmed Bawa Kuyini and Fati K. Mahama, “Implementing Children’s Rights and Protection in Ghana: Case Study” University of New England, Australia and CEVS- Ghana, (2007) 62

Yet, problems remain as there are limited resources to promote effectively and efficiently the implementation of UNCRC in other parts of the country, due to the following reasons.⁶⁵²

First, the suspension of Ghana's 1979 Constitution coupled with the prohibition of political parties during the third republic⁶⁵³ meant that there was hardly an effective Parliament to deliberate and direct the promotion of Children's rights from the legislative perspective.⁶⁵⁴ However, in 2008, the Education Act was passed which focuses on providing special assistance to girls' education as well as providing them with effective adolescent reproductive health facilities.⁶⁵⁵ Although the promotion of adolescent health for girls may include access to medicines, no reference was made to providing ARVs to treat children infected with HIV/AIDS. Second, Quashigah argues that the 1992 Constitution of Ghana recognises the rights of children.⁶⁵⁶ However, particular attention and adequate training have to be given to the law enforcement officers to understand the values of protecting Children's rights through prosecution. Without adequate training, vulnerable children, especially those in rural areas would remain unprotected.⁶⁵⁷ Third, Twum-Danso proposes that the UNCRC will achieve a desired impact on the Ghanaian society: "if the convention had adopted a multi-faceted approach in recognising the various cultural

⁶⁵² Ibid., 62

⁶⁵³ E. Gyimah-Boadi, "Notes on Ghana's Current Transition to Constitutional Rule" (1991) Vol. 38, Africa Today No.4, 5.

⁶⁵⁴ Estelle Matilda Appiah, "Protecting the Rights of Children in Ghana: the Legal Framework and Ancillary Matters", Ministry of Justice Report, (2008) < www.cepa.org.gh/researchpapers/professionals > accessed 20th May 2014

⁶⁵⁵ Ministry of Gender, Children and Social Protection: Ghana's Fourth Progress Report on the Implementation of the Africa and Beijing Platform of Action and Review Report for Beijing+20- June 2014, 45 < www.unwomen.org/-media/.../Sections/.../.../Ghana_review_beijing20.ashx > accessed 30 June 2015.

⁶⁵⁶ Kofi Quashigah, "Legislative Reform to the Convention on the Rights of the Child: the Case of Ghana" in Legislative Reform to the Convention on the Rights of the Child in Diverse Legal Systems and National case Studies: Armenia, Barbados and Ghana, Legal Reform Initiative (UNICEF, March 2008) 91

⁶⁵⁷ Ibid.

values representing the diverse communities, which form the Ghanaian society.”⁶⁵⁸ This is because, perhaps, various communities have a significant role to play towards the protection of the child, especially in the case of access to medicines in times of illness.⁶⁵⁹ Fourth, the police have been unable to prosecute those infringing the rights of children because there is no alternative care arrangement where victims can be placed, except left in the care of the very adults who are often their abusers.⁶⁶⁰

Finally, it can be said that efforts have been expended to promote the welfare of children by registering some successful prosecutions in cases of child abuses under the Women and Juvenile Unit of the Ghana police service (WAJU) scheme.⁶⁶¹ Also, it is explained that: “in line with Article 40 of the UNCRC, Juvenile Justice Act and Children Act of Ghana, punitive and retributive systems of custodial sentences administered against children, in previous years, has been replaced with correctional centres, so as to respect the human rights of children.”⁶⁶² Moreover, it is argued that “human rights are universal irrespective of what it means to peoples of diverse beliefs, religions and customs; harmful traditional practices –such as the Trokosi and widowhood rites- are criminalised in Ghana.”⁶⁶³ Although there is no records of prosecution regarding crimes in the spheres of widowhood rites and Trokosi; nevertheless, overall efforts are being made to promote criminal convictions in respect of the UNCRC at the expense of promoting access to

⁶⁵⁸ Afua Oppong Twum-Danso, “Searching for the Middleground in Children’s Rights: Implementing the Convention on the Rights on the Child in Ghana”, A PhD Thesis (University of Birmingham, 2008) 261

⁶⁵⁹ Ibid.

⁶⁶⁰ Esmeranda Manful and Patrick McCrystal “Ghana’s Children’s Act 560: A Rethink of its implementation?”, in Roberts Kwame Ame, De Brenna LaFa Abenyiga and Nana Araba Apt (eds), *Children’s Rights in Ghana: A Reality/Rhetoric* (London, Lexington Books, 2011) 109

⁶⁶¹ WAJU means Women’s and Juvenile Unit, and it is a branch of the Ghana Police Department- which specialises in protecting women and children against domestic and violence. It supports them through collaborative work with other agencies by counselling, education and prosecution, as a last resort.

⁶⁶² Esmeranda Manful and Patrick McCrystal, “Ghana’s Children’s Act 560: Robert Kwame Ame, Debrenna Lafa Agbenyiga and Nana Araba Apt, (eds) (n.660) 158

⁶⁶³ Ibid. 148

medicine to ensure the health of children affected by the HIV/AIDS virus in Ghana. However, the current system of protecting the rights of children in Ghana must be strengthened to ensure that children affected by the HIV/AIDS are given prompt medical attention with access to medicines as a priority.

2.4 Ghana's Obligation under the Millennium Development Goals (MDGs) to Promote Access to Medicine

The Millennium Development Goals (MDGs) project was initiated by heads of States and heads of government of 189 countries; in New York, on 8th September 2000.⁶⁶⁴ The aim was to promote human dignity with respect to halving world poverty, promoting universal primary education to all children in developing countries, reducing hunger and combating HIV/AIDS through the provisions of medicines, among other principles by 2015.⁶⁶⁵ In respect of this section and in line with the objective of this chapter, the focus here is on Goal 6 which aspires to: “combat HIV/AIDS, malaria and tuberculosis by granting access to medicine.”⁶⁶⁶ Ghana signed up to the project in September 2000. However, mixed views have been expressed by academics, politicians, members of civil society groups NGOs with respect to the success/failure of the MDGs, especially in the case of access to medicine; in developing countries generally and Ghana, specifically.

According to the Ghana AIDS COMMISSION, there has been an increase in the provision of antiretroviral therapy to “reduce the risk of mother to child transmission from 38.1% in 2008 to 70% in 2102.”⁶⁶⁷ Similarly, Ghana has adopted strategy to provide nutrition in HIV

⁶⁶⁴ The Millennium Development Goals was adopted by the UN General Assembly Resolution/A/RES/55/2, at the 8th Plenary Session, in September 2000 < www.un.org/millennium/declaration> accessed on 23 March 2015.

⁶⁶⁵ Ibid.

⁶⁶⁶ Goal 6 of the MDGs.

⁶⁶⁷ Country AIDS Response Progress Report-Ghana, January 2013-December (Ghana AIDs Commission, March 2015) < www.unaids.org/country/documents> accessed 20th December 2016

treatment and care to ensure that people living with or infected by HIV/AIDS regain wellbeing to pursue their social and economic activities while receiving medical attention.⁶⁶⁸ According to the Office of the United States Global Aids Coordinator, (OUSGAC), progress has been in supplying nearly eighty per cent of ARVs to majority of Ghanaians who are affected by the HIV epidemic through a collaborative effort between the United States and Ghana.⁶⁶⁹ Aizire et al have suggested that although some progress has been made by Ghana within the Sub Saharan region to increase access to ARVs so as to stem the threat of HV/AIDS among women and children; however, there remains a big gap to achieving goal 6 of the MDG because HIV/AIDS continues to ravage majority of the Ghanaian population, especially those with limited social and economic prospects.⁶⁷⁰

According to the UN MDGs Report, access to medicines in the treatment of malaria, tuberculosis and HIV/AIDs has been on the rise.⁶⁷¹ Also, an increase of life-saving ART has been provided to 1.6 million in 2012; whilst Sub-Saharan Africa which is the region with the highest population of people living with Aids (PHLA) – has received 9.5 million of ARVs.⁶⁷² However, the UN Millennium Development Report has explained that Sub – Sharan Africa including Ghana need to do more to increase access to antiretroviral therapy for children and women who are the population mostly affected by the HIV/AIDS epidemic.⁶⁷³ In Ghana, the decline of HIV/AIDS is mainly due to the concerted effort of

⁶⁶⁸ Country AIDs Responses Progress Report, *ibid* 88-89

⁶⁶⁹ Office of the United States Global AIDS Coordinator: Congressional Budget Justification Supplement Fiscal year 2016 (President’s Emergency Plan for Aids Relief (PEPFAR) (United States Department of States) 108-109 < <http://www.pepfar.gov>>*organisation*> accessed 20th December 2016

⁶⁷⁰ Jim Aizire et al “Operational Issues and Barriers to Implementation of Prevention of Mother-to-Child Transmission of HIV/AIDS (PMTCT) Interventions in Sub-Saharan Africa” (2013) Vol. 11 No. 2 *Current HIV Research*, 144-159 (16)

⁶⁷¹ The UN Millennium Development Goals Report (United Nations, New York 2014) 36-67

⁶⁷² The UN Millennium Development Goals Report (2014) *ibid* 36

⁶⁷³ The UN Millennium Development Goals Report, (2014) *ibid* 38-39

the various government agencies and private organisations' determination to work together to stem the disease.⁶⁷⁴ Another source says that there has been a positive collaboration between the UN and the government of Ghana to increase access of ART to PHLA; including efforts to double the number of nurses, doctors and para health workers in all regions of Ghana, especially Eastern and Ashanti regions of the country where HIV/AIDS is most prevalent.⁶⁷⁵

Moreover, the Ghana government's statistical report, alluded that efforts are being doubled to reduce the prevalence of malaria and HIV/AIDSs, but Goal 6 which stands for "combating HIV/AIDS, Malaria and other Diseases"- was omitted from the discussion in the report.⁶⁷⁶

Notwithstanding Ghana's successes under the MDGs 6, page 65 of the same report above says that: "with two years left to go, no intervention by government of Ghana and other stakeholders would suffice to achieve Ghana's MDGs aspiration by 2015."⁶⁷⁷ This candid expression of view, in respect of Ghana's overall performance towards achieving the MDGs; may be a reflection of the fact that access to anti-retroviral medicines, is far from a reality.⁶⁷⁸

⁶⁷⁴ The Millennium Development Goals Report (2014) ibid 39- 41

⁶⁷⁵ The United Nations in Ghana-8.HIV/AIDS<

http://www.unghana.org/sites/index.php?options=com_contact...article, accessed on 26 June 2015 - OSCOLA

⁶⁷⁶ The Government of Ghana's Report and Statistics: (2010) p.1<

><http://www.statsghana.gov.gh/docfiles/2010phc/MDG%20report%2824-10-13%29.pdf>, accessed 26th June 2015

⁶⁷⁷ Ibid., p.65

⁶⁷⁸ Jenna Dixon "Reproductive Health Issues and Women in Ghana: Has Global Attention made a Difference?" (2012) No.34, The Africa Portal www.africaportal.org > accessed 20th December 2016

It is also suggested that HIV/AIDS, malaria and tuberculosis diseases had reduced significantly by the end of 2011.⁶⁷⁹ Yet, access to essential antiviral drugs has been limited due to high costs and poor infrastructure in Ghana.⁶⁸⁰ A report by the Ghana National Commission on HIV/AIDS; has suggested that access to medicine in respect of stemming the threat and spread of the disease had decreased to 2.9 in the year 2008 because there has been a decline in donations from external sources, like the Global Fund to Fight HIV/AIDS.⁶⁸¹ Again, the Report has explained that incidences of tuberculosis are on the rise, whilst malaria remains the highest cause deaths in Ghana.⁶⁸² One commentator argues that the MDGs project has failed to deliver on the promises of access to medicines; because there are political interferences by senior leaders in the programmes whereas most of the principles are inadequately defined.⁶⁸³ In support of this view and in respect of access to medicines, another argument is that “broad reform has been off-track with a serious impact on human necessities such as an increase in HIV/AIDS, malaria, tuberculosis and food shortages, affecting large parts of sub-Saharan Africa.⁶⁸⁴ The mention of sub-Saharan Africa in light of the problems associated with realising access to medicines, suggests that Ghana, which is a country within the sub-Saharan Africa shares the problem of limited access to medicines in treating her

⁶⁷⁹ Adjei S, NazzarA, Seddoh A, Blok L, and Plummer D, *The Impact of HIV and AIDS Funding and Programming on Health System Strengthening in Ghana* (Pay-Bas KIT, Amsterdam 2011) 3

⁶⁸⁰ Natasha Krishnadas, “Global and Indigenous Health” (2009-10) Vol. 01, Issue 1 MSJA, 13-19

⁶⁸¹ A Civil Society Review of Progress Towards the Millennium Development Goals in Commonwealth Countries A National Report: Ghana (London, Commonwealth Foundation, 2013). The Civil Society is an umbrella non-governmental organisation, which embraces: Ghana Association of Private Voluntary Organisation Development (GAVPOD), Civicus, and World Alliance for Participation. This Organisation aims to promote good governance by advancing human welfare which makes recommendations to the government on economic and social issues.

⁶⁸² Isaac Addai, “Attaining the Millennium Development goals in Ghana by 2015: Myth or Reality? A Statistical Evidence from Kumasi” (2015) Vol.8 Journal of Poverty, Investment and Development 115-116

⁶⁸³ Sarah Zaidi, “Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary” (2010) Vol. 7 No. 12, 122-129

⁶⁸⁴ Jeffrey D. Sachs, *A Report to UN Secretary-General- Investing in Development: A Practical Guide to Achieve MDG*, (Earthscan, London 2005) 3

population. Moreover, De-Graft Aikens also argues that the MDGs has not promoted the well-being of Ghanaians, as there are gaps in the distributions of medical supplies and dire shortages of essential medicines to treat life-threatening diseases in the country.⁶⁸⁵ Furthermore, Nayyar is of the view that the MDGs has failed to protect the needs of people in developing countries, especially with right of access to medicine, because most leaders have failed to take their responsibility of governance seriously as they give in to the demands of the forces of the market.⁶⁸⁶ There is also a paradox in the view presented by the Ecumenical Pharmaceutical Network (EPN) relating to access of medicine. On one hand, it has suggested that 65% of paediatric medicines is readily available to children in light of the MDG 6, through church health institutions.⁶⁸⁷ On the other hand, it expresses the point that prices of medicines are exorbitantly expensive in public and private institutions; consequently denying children access to essential medicines required for their health.⁶⁸⁸

Thus, Ghana's obligation to adopt measures to promote effective access to medicines in collaboration with other partners of the MDGs project; has received modest success. Nelson argues that MDG 6 is inadequate to offer access to medicine in developing countries as well as Ghana, given the fact that TRIPS related rules have persistently

⁶⁸⁵ Ama de Graft Aiken, "Ghana's Neglected Chronic Disease Epidemic: A Developmental Challenge" (2007) *Ghana Medical Journal*, 154

⁶⁸⁶ Deepak Nayyar, "The MGD Beyond 2015: Old Frameworks and New Constructs" (2013) Vol. 13, Issue 3 *Journal of Human Development and Capabilities*, 17

⁶⁸⁷ Charles Kwarteng and Hannah Emma Acquaye "The Role of Ghanaian Churches in the Financial Rehabilitation of the Poor: Implications for revisiting the Social Mission of Religious Institutions" (2011) vol. 15, Issue 4, *Journal of Financial services Marketing*, 309-319

⁶⁸⁸ Ecumenical Pharmaceutical Network (EPN), "Children Medicines in Ghana: An Investigation into Availability and Factors impacting Access" <<http://www.epnetwork.org>> accessed on 30th April 2015. EPN is an independent Christian Membership Organisation, whose mission is to support Churches and Church Health Systems to provide and promote just and quality pharmaceutical services. EPN is headquartered in Kenya, with an active role in promoting access and rational use of medicines.

undermined the human rights to access to medicine.⁶⁸⁹ Whilst the MDGs project is now over, this discussion has shown that Ghana's efforts to promote access to medicines achieved little success.

The MDGs have been replaced by the Sustainable Development Goals (SDGs) which were introduced at the UN Summit on 1st January 2016 to run until 2030; in order to promote and protect human wellbeing by building upon the foundation of the MDGs.⁶⁹⁰

2.5 Ghana's Obligation under the African Charter on Human and Peoples' Rights (Banjul Charter) to promote access to medicines

The African Charter on Human Rights and Peoples' Rights (Banjul Charter)⁶⁹¹ was adopted and entered into force on 21st October 1986. Ghana signed and ratified the Banjul Charter on 24th January 1989 and 3rd July 2004 respectively.⁶⁹² The Organisation for African Unity, which is currently known as the African Union (AU), had formulated and instituted the Banjul Charter in line with UDHR principles; with the view to promoting the wellbeing of the African people thereby respecting their economic, social, cultural and political prosperity. Thus, the Banjul Charter, impliedly promotes the right of access to medicines.⁶⁹³ Article 16 of the Banjul Charter obliges its member states to adopt practical measures to realise the health needs of their peoples.⁶⁹⁴ Equally, to ensure that access to medicines and sound health care are delivered to the peoples; the family has been

⁶⁸⁹ Paul Nelson, "Human Rights, Millennium Development Goals, and the Future of Development Cooperation" (2007) World Development, 2049-2050

⁶⁹⁰ United Nations Sustainable Development Agenda (2016) < www.un.org/sustainabledevelopment > accessed 20th December 2016

⁶⁹¹ The African Charter on Human and Peoples' Rights, (adopted 27 June 1981, entered into force 21st October 1986) 1520 UNTS 363 > <http://au.int/en/treaties> > accessed 20th May 2015

⁶⁹² Ghana's signing and ratification of the Banjul Charter (24th January 1989 and 3rd July 2004) < <http://www.achpr.org/instruments/achpr/ratification.table> >, accessed 4th April 2015

⁶⁹³ Article 16 (1), Banjul Charter.

⁶⁹⁴ *ibid*

recognised as an important unit in the Charter, with a special role to advance the dignity of the peoples.⁶⁹⁵

In the preamble to the Banjul Charter, it is declared that member State Parties should “pay particular attention to the right to development which extends towards the promotion of social, economic and cultural rights as universally acceptable foundation in the realisation of social and economic and political rights.”⁶⁹⁶ Thus, it is required of Ghana under the Banjul Charter to adopt measures to enhance the social and economic need of her people; with access to medicine, constituting a part of promoting health care to the people. The emerging position is that preambles transcend the recounting of political aspiration, which led to drafting constitutions.

In this spirit, member States are expected to recognise the rights of their citizens especially with respect to medicines. This can be achieved by promoting domestic laws to give effect to the Charter.⁶⁹⁷ The implication is that Ghana owes a legal duty under the Banjul Charter to protect access to medicines through domestic legislative instruments. Similarly, there is a duty and expectation that the judiciary in each respective member country, would respect the human rights and dignity of the peoples by interpreting the provisions of Article 7(1) of the Banjul Charter to promote access to health care with access to medicines as a component.⁶⁹⁸

⁶⁹⁵ Article 18 (1), Banjul Charter.

⁶⁹⁶ Preamble, Banjul Charter.

⁶⁹⁷ Article 1 Banjul Charter.

⁶⁹⁸ Article 7(1), Banjul Charter.

In addition to the Banjul Charter, there is a responsibility on states under the Protocol on the Rights of Women in Africa (African Women's Protocol/Protocol).⁶⁹⁹ This protocol seeks to protect women against sexually transmitted diseases and HIV/AIDS with an aim of granting women the right to self-protection.⁷⁰⁰ Again, the importance of women in the development of humanity and society has been recognised in the above protocol. According to the protocol, every state has an obligation to ensure that affordable health care is readily made available to women especially those in the rural areas.⁷⁰¹ The particular reference to women in the rural areas in respect of this protocol is significant; because access to health services and essential medicine is hardly made available to those women in rural areas. Although Ghana has partly promoted women's health under the CEDAW; there is still a challenge facing most women especially those living in the rural areas; because these women are mainly subsistent farmers, thus they are unable to raise enough money to pay for essential medicines to promote their health needs.⁷⁰² Therefore, the Government has to re-double its efforts under this Convention to promote women's welfare with access to medicines as a priority.

⁶⁹⁹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the OAU Heads at its Thirty-first Ordinary Session in Addis-Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res 240 (xxx), which entered into force 25 November 2005.

⁷⁰⁰ Article 14 (d), African Women's Protocol.

⁷⁰¹ Article 14 (2) (a), African Women's Protocol.

⁷⁰² Eric Y. Tenkorang and Gertrude A. Owusu, "Correlates of HIV testing among Women in Ghana: Some Evidence from the Demographic and Health Surveys" (2010) 296- 307>

<http://dx.doi.org/10.1080/09540120903193716> > accessed 20th December 2016

3. The Human Rights Arguments and the Protection of Intellectual Property Rights

This section argues that human rights and intellectual property rights (IPR) can be harnessed to promote access to medicines in Ghana.

Human rights arguments have gained currency in light of IPR. One school of thought holds that IPR must be protected as an incentive to promote innovative drugs.⁷⁰³ One commentator who supports the premise that strong IPR leads to innovative and creativity in developing new drugs, has stated that: “without Patent protections, Companies with high research and development costs could be under-priced and driven out of the competition business by competitors who simply mimicked the already developed products. This unfair competition could significantly weaken incentives to invest and to develop new products.”⁷⁰⁴

Also, another patent activist shares the view that protection of patent rights is a legal and moral responsibility of every individual and governments, without which innovation in new products and processes and most especially new drugs would be impossible.⁷⁰⁵ Sykes argues that the prevalence of HIV/AIDS coupled with the proliferation of malaria and tuberculosis diseases in developing countries; is a motivational factor for developing countries to pay premium for medications, as a way of incentivising the pharmaceutical industries in the developed world to undertake research to find a cure.⁷⁰⁶

⁷⁰³ Anthony Taubman, “Rethinking TRIPS: ‘Adequate Remuneration for Non-Voluntary Patent Licensing’” (2008) *Journal of International Economic Law*, 935

⁷⁰⁴ Edwin C. Hettinger, “Justifying Intellectual Property” in Adam D. Moore(ed), *Intellectual Property: Moral, Legal, International Dilemmas* (Bowman & Littlefield. Oxford 1997) 29

⁷⁰⁵ Stephen Tully (ed), *International Documents on Corporate Responsibility* (Cheltenham, UK 2005) 68

⁷⁰⁶ Alan O. Sykes, 2TRIPS, Pharmaceuticals, Developing Countries, and the Doha Declaration “Solution” (2002) 3 *Chicago Journal of international Law*, 62

Conversely, some human rights activists and scholars have countered the above views to argue that human dignity can be improved through unrestricted access to health care with medicine as a priority.⁷⁰⁷ This requires “balancing the interest of the drug producer and its user with an objective of safeguarding human wellbeing.”⁷⁰⁸

Matthews in support for the above states that:

“those in positions of authority, power and influence, in both developing and developed countries, should assume a human rights responsibility to build technical capacity to help produce HIV/AIDS drugs locally; as well as cooperating with respective leaders of developing countries, to formulating policies which would not only promote access to medicines; but also create a medical system to treat the HIV/AIDS diseases.”⁷⁰⁹

This statement reiterates that human needs in light of access to medicines ought to be given prominence over patent protection, business and profit. Moreover, Ovetv suggests that humanity’s wellbeing in terms of health means that trade rules and policies should be framed by politicians and corporations, to be compliant with human rights principles.⁷¹⁰ The implication is that TRIPS provisions should be interpreted to give recognition and dignity to human beings by making access to medicines a priority, regardless of the expense to patent protection. Furthermore, policy-makers are urged to regard human needs, especially access to health and medicines, as a human rights.⁷¹¹

⁷⁰⁷ J. Elizabeth Cohen and Joseph J. Amon, “Health and Human Rights Concerns of Drug Users in Detention in Guangxi Province, China (2008) <<http://dx.doi.org/10.9371/journal.pmed.0050234>>, accessed 4th October 2016. See also: Paul Hunt, “The Human Rights to the Highest Attainable Standard of Health: New Opportunities and Challenges” (2006) 100 Transactions of the Royal Society of Tropical Medicine and Hygiene, 603-607 ; Robert C Bird, “Developing Nations and the Compulsory and the Compulsory Licensing: Maximizing Investment Side Effects” (2009) 37 J.L. Med. & Ethics 209 (

⁷⁰⁸ Alison Slade, “Good Faith and the TRIPS Agreement: Putting Flesh on the Bones of the TRIPS Objectives” (2014) Vol. 63 International and Comparative Law Quarterly, 354

⁷⁰⁹ Duncan Matthews, “Intellectual Property Rights, Human Rights and the Right to Health” in Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Cheltenham CIER 2010) 137

⁷¹⁰ Davinia Ovetv, “Making Trade More Accountable and Human Rights Consistent: A NGO Perspective of Using Human Rights in Case of Access to Medicines” in Wolfgang Benedek, Koen De Feyter and Fabrizio Marrella, (eds), *Economic Globalization and Human Rights* (Cambridge University Press, Cambridge 2007) 205

⁷¹¹ Hans V. Hogerzeil et al, “Access to Essential Medicines as part of Fulfilment of the Right to Health enforceable through the Courts” (2006) 368 Lancet 300- 311

Another view is that human rights arguments should be deployed as a cardinal principle in the deliberation and negotiation of IPRs and related treaties, so that the right of access to medicines is translated into international property laws.⁷¹² The premise that access to medicine is a human right with the prospect of over-riding IPRs, suggest that the protection of IPRs and the motivation to develop news drugs ought to be balanced in order to promote affordable access to medicines.⁷¹³

An additional argument is that the “protection of intellectual property rights and access to medicines; in light of respecting social and economic values; can be achieved where access to life-saving medicines, are given prominence under the right to health.”⁷¹⁴ Again, developing countries have been urged to control price mechanisms in order to prevent pharmaceutical industries from charging exorbitant prices for essential drugs.⁷¹⁵ In this respect, Hestermeyer proposes a collaborative approach to be adopted between the protection of human rights and protection of IPRs. Because on the one hand, developing countries have international law obligations to ensure that access to medicines is granted to their peoples and on the other hand, pharmaceutical corporations have an obligation to respect the human rights of access to medicines and not to jeopardise it.⁷¹⁶ Joseph also points out that human rights must be given recognition with respect to health needs, stating that:

⁷¹² Hannah Brennan, Rebecca Distler, Miriam Hinman and Alix Rogers, “A Human Rights Approach to Intellectual Property and Access to Medicine”, Global Health Justice Partnership Policy Paper 1 (GHJA) (Yale School of Public Health, 2013) 45

⁷¹³ Donald Harris, “TRIPS After Fifteen Years: Success or Failure, as Measured by Compulsory Licensing” (2010-2011) Vol. 367 18 J. Intell. Prop. L. 391

⁷¹⁴ Holger Hestermeyer, *Human Rights and the WTO: the Case of Patents and Access to Medicines* (Oxford University Press, Oxford2007) 116

⁷¹⁵ *Ibid.*, 136

⁷¹⁶ Sarah Joseph, () 220

“The recognition of a right to access medicines was endorsed by consensus in the UN Human Rights Council in 2009. The 53 Council members most of whom are WTO member states, recognised that access to medicines was a fundamental element of right to health; and called upon states to ensure that application of international agreements are supportive of public health policies that promote broad access to safe, effective and affordable medicines. Finally, it called states to ensure that intellectual property rights are implemented in a manner that did not restrict the legitimate trade in medicines.”⁷¹⁷

The above statement recognises not only access to health medicines as a human right but also encourages the international community as well as the pharmaceutical corporations to implement intellectual property regimes such as TRIPS with the objective of promoting human wellbeing rather than undermining it through exorbitant medicine prices.

Joseph makes an additional point that since developed countries paid little respect towards protecting IPRs in the course of developing their economies, it is unfair to place a heavy burden on developing countries by demanding stringent intellectual property protection.⁷¹⁸ In light of this, Joseph states: “in spite of all recent progress made with regard to improving access to medicines, in light of Doha Declaration and the 2003 waiver, there are attempts by developed countries through regional and bilateral agreements, to undermine the efficacy of promoting access to medicines.”⁷¹⁹ In addition, Ho, emphasises that a common ground exists between human rights and intellectual property protection with respect to protecting access to medicines. Ho notes that: “the use of compulsory license by Canada in respect of the famous anthrax attack post 9/11 ...”⁷²⁰, is a testament to the fact that dire health matters, can be given human rights

⁷¹⁷ Ibid., 328

⁷¹⁸ Ibid., 329

⁷¹⁹ Ibid., 244

⁷²⁰ Cynthia Ho, *Access to Medicines in the Global Economy: International Agreements on Patents*, (Oxford University Press, Oxford 2011) 339

protection; to override intellectual property rights so as to provide medicines to treat HIV/AIDS.

4. The Link between Intellectual Property Rights and Access to Medicines in Ghana

The TRIPS Agreement was negotiated to provide a minimum standard of protection to IPRs by states parties to the Uruguay round of the WTO. This Agreement aims to fundamentally protect patent rights, processes and formulas developed in light of novel drugs by pharmaceutical industries resident in developed countries.⁷²¹

First, this section explores briefly how IPRs was introduced into the trade negotiations of the WTO. Second, it examines Articles 7, 8 and 31 of the TRIPS Agreement with the view to assess the impact of those provisions on access to medicines in Ghana together with articles 5 and 27(1). Third, this section discusses the World Intellectual Property Organisation (WIPO), as well as the African Organisation for Intellectual Property Rights (ARIPO), so as to assess their contributions in promoting access to medicines in Ghana. Fourth, in respect of the Doha Declaration, this section investigates the case between GlaxoSmithKline and Ghana in order to analyse the impact of Glaxo's influence on promotion of access to HIV/AIDS medicines in Ghana.

The TRIPS Agreement was the first international trade agreement to extend patency to pharmaceutical products, though patent laws at the national levels had been in existence since the 1880s.⁷²² Lee explains that none of the 98 developing countries, which were

⁷²¹ Graeme B. Dinwoode and Rochelle C. Dreyfuss, *A Neofederalist Vision of the TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford University Press, Oxford 2012) vii

⁷²² Stacey B. Lee, "Can Incentive to Generic Manufacturers Save the Doha Declaration's Paragraph 6?" (2013) *Georgetown Journal of International Law*, 1392

members of the WTO during the Uruguay negotiations, had any patent protection laws.⁷²³ This means that developing countries had the flexibility in deciding which inventions would be accorded patent protection. Furthermore, Lee explains that the emergence of generic brands of medicines and allied pharmaceutical products, which emerged from some developing countries was regarded by the US as a threat to their branded medicines.⁷²⁴ As a result, the Pharmaceutical Research Company of America (Pharma) lobbied the American government and its law makers to push for patent law to be incorporated into trade agreements; and consequently in 1995, TRIPS became part of the WTO Uruguay Round of Negotiations.⁷²⁵ The above development suggests that pharmaceutical corporations resident in developed countries, especially in the US, collaborate with government institutions to promote international legislation (TRIPS) to restrict or undermine access to medicines in the face of life threatening disease such as HIV/AIDS. One objective of TRIPS is to offer a “minimum standard” of protection to enforce IPRs in the realm of global trade; which will spur “innovation and dissemination of technological advancement in a way supportive and beneficial not only to the inventors but also to all WTO members; who may have limited capacity to innovate.”⁷²⁶ Theoretically, there is an implied proposition that developing countries with low innovative capacity stand to benefit from the advanced technological prowess of the developed country members to this Agreement, favourably. In this sense, Ghana, as a WTO developing country member, has a good chance of benefiting from the TRIPS Agreement; by way of exploiting aspects of compulsory licence and parallel importation to help treat majority of her citizens infected

⁷²³ Ibid.

⁷²⁴ Ibid. 1393.

⁷²⁵ Ibid. 1393.

⁷²⁶ Article 5, TRIPS states that only products possessing inventive step may be accorded patent right.

with HIV/AIDS virus. Crook argues that: “States owe a specific legal duty to control the marketing of medical equipment and medicines by third parties and to ensure that third parties do not limit peoples’ access to health related services.”⁷²⁷ Thus, Ghana has a responsibility in respect of Article 5 of TRIPS⁷²⁸, to adopt health-centred measures to protect the medicinal needs of Ghanaians rather than acquiescing to the market demands of TRIPS.

Accordingly, member countries to the TRIPS Agreement, should undertake measures specifically framed within the purview of Articles 66 and 67 of TRIPS to advance the social and economic interests of their citizens, without undermining the spirit of the Agreement.⁷²⁹ In this respect, Article 66 of TRIPS is a commitment to provide technical assistance to boost the industrial capacities of developing and least developing countries;⁷³⁰ whilst Article 67 of TRIPS aims to equip developing countries’ people with expertise not only in legal enforcement of TRIPS provisions but also with a manufacturing capacity to help them benefit from the agreement with respect to promoting their economies, including access to medicines.⁷³¹

By way of strength, Blakeney notes that “this provision calls upon developed countries to help developing countries build their technical capacity, so as to make them self-reliant in line with the spirit of the UNCTAD principle, which advocates that developing countries

⁷²⁷ Jamie Crook, “Balancing Intellectual Property with the Human Right to Health” (2005) 23 Berkeley Journal of International Law, 536

⁷²⁸ Article 5, TRIPS states that: provisions of articles 3 and 4 of TRIPS will not apply in the case of developing states where WIPO has been instrumental in negotiation and implementation of TRIPS at the domestic levels. Therefore, Ghana is exempted from those provisions because WIPO was key in the formulation of her Patent Act of 2004, which made it compliant with TRIPS.

⁷²⁹ Article 7, TRIPS states that measures can be adopted to promote social and economic well-being of their citizens.

⁷³⁰ See Article 66, TTRIPS.

⁷³¹ Article 67, TRIPS.

ought to be given control over their social and economic welfare. This can assist in the production of social amenities- like medicines- to treat their HIV/AIDS populations.”⁷³² However, there is a gap in this provision, because very little has been done by developed countries to transfer knowledge or technical capacity to developing countries; so as to enable them realise their potential in the areas of social and economic progress.⁷³³ Furthermore, it is suggested that compulsory license is disadvantageous to developing countries, in their pursuit of securing a sustainable access to medicines/drugs in the treatment of HIV/AIDS, because most of them lack the necessary technical capacity to produce their local medicinal needs.⁷³⁴

The consideration of public interest is one area in which the TRIPS Agreement appears to promote access to medicines. In light of Article 8, members to TRIPS are urged to adopt measures which will promote public health including access to medicines.⁷³⁵ Also, Blakeney suggests that Article 31 can be relied upon to import branded drugs to treat HIV/AIDS diseases without incurring any legal responsibility; insofar as, the measures adopted do not conflict with the object and spirit of the TRIPS agreement.⁷³⁶ The above provisions indicate nominal benefits to developing countries, because the conditions attached to the utilisation of those benefits outweigh the gains. For example, there are bureaucratic procedures which a country would have to satisfy prior to obtaining any of

⁷³² Michael Blakeney, *Trade Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*, (Sweet & Maxwell, London 1996) 42-43

⁷³³ *Ibid.*, 43

⁷³⁴ Kenneth C. Shadlen, Samira Guennif, Alenka Guzman and N. Lalitha, “Globalization, Intellectual Property Rights and Pharmaceuticals: Meeting the Challenges to addressing health gap in the new international environment” in Kenneth C. Shadlen, Samira Guennif, Alenka Guzman and N. Lalitha, (eds) *Intellectual Property, Pharmaceutical and Public Health: Access to Drugs in Developing Countries*, (Edward Elgar, Cheltenham 2011) 18

⁷³⁵ Article 8, TRIPS: states members can adopt measure to advance the course of public health and moral issues, without incurring liabilities.

⁷³⁶ Michael Blakeney, (n 732) note p.43

the proposed benefits of TRIPS—payment of compensation as well as lengthy waiting period for acceptance. These render access to medicines in light of the agreement a mirage.⁷³⁷

Parallel importation is integral to the compulsory license provision as well as in respect of Article 31 of TRIPS.⁷³⁸ Parallel importation simply means the ability of a country to import branded drugs into its country as soon as the patent holder has placed the branded drugs for sale in another country. Theoretically, parallel importation seems to offer easy access to both branded and ‘generic’ versions of drugs for the treatment of HIV/AIDS, because developing countries can import the needed drugs/medicines without having to satisfy any legal requirements. The advantage of this provision is that it removes the power of monopoly conferred upon the patent holder, thereby making access to medicines much easier.⁷³⁹ Conversely, the ‘concept of national doctrine of exhaustion’⁷⁴⁰ negates most of the benefits associated with compulsory licence and parallel importation.⁷⁴¹ According to Blakeney, the concept of national doctrine of exhaustion compels member countries to TRIPS to incorporate the “the doctrine of exhaustion” as part of their local patent regime which forbids parallel importation.⁷⁴² Since Ghana has formally instituted an intellectual

⁷³⁷ Vishwas H. Devaiah, “TRIPS and Public Health” (2004) SSRN <<http://ssrn.com/abstract=2312324>>, accessed 26th August 2016

⁷³⁸ Article 31 of the TRIPS Agreement

⁷³⁹ Michael Blakeney, (n 732) note p.17

⁷⁴⁰ This concept means that under National Laws, IPRs remain territorial by restricting or preventing parallel importation or compulsory license agreements. Therefore, access to medicines through the flexible options of the TRIPS are minimised or denied. Thus, developing countries are constrained to secure effective access to drugs in treating their HIV/AIDS victims.

⁷⁴¹ Michael Blakeney, (732) note p.17

The doctrine of national exhaustion applies mostly to copyright and trademark holders. And this means that both copyright and trademark holders may lose any propriety rights, as soon as, the first item of the copyright/trademark is sold or placed on the market. However, the issue of exhaustion is not dealt with under beyond article 6 of the TRIPS Agreement.

⁷⁴² Michael Blakeney, (n 732) note p.17

property regime by the enactment of the Patent Act 2003/4,⁷⁴³ the national doctrine of exhaustion would apply to deny her any prospect of promoting access to medicine in respect of the above provisions.

Furthermore, the TRIPS Agreement provides that WTO members shall have the freedom to derogate from obligations in respect of extreme urgent and emergency circumstances, in order to respond to medicinal, human rights, morality and other environmental disasters without seeking permission from the patent holder.⁷⁴⁴ In this regard, Ghana can derive benefits by undertaking a parallel importation of medicines or issuing a compulsory license to contract a pharmaceutical company to produce antiviral medicines, for HIV/AIDS. However, “politics of reality means the US, which wields dominant power in WTO trade negotiations coupled with the usage of free trade agreements (FTAs), had been successful in threatening developing countries including Ghana with trade sanctions, to abandon such flexible option of securing access to medicines.”⁷⁴⁵ As mentioned above, the obligation to pay compensation to patent holders, aligned with the demands of Article 31(a) - (c) of TRIPS, undermine Ghana’s prospects of securing access to medicines for her citizens affected by HIV/AIDS.⁷⁴⁶

⁷⁴³ The Patent Act of 2003/4, Ghana. <<http://www.wipo.int/wipolex/en/details.jsp?i=9426>>accessed on 4 April 2015.

⁷⁴⁴ Article 27 (2), TRIPS Agreement states that: “members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect, order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusions is not made merely because the exploitation is prohibited by their law.”

⁷⁴⁵ Meredith Kolsky Lewis, “The politics and Indirect Effects of Asymmetrical Bargaining Power in the Free Trade Agreements” in Tomer Broude, Marc L. Busch and Amelia Porges (eds), *The Politics of International Economic Law* (Cambridge University Press, Cambridge 2011) 19

⁷⁴⁶ Article 31, TRIPS: “ where the law of a member allows for other use of the subject matter of a patent without the authorization of the patent holder, including the use by the government or third parties authorized by the government; the following provisions shall be respected:

Article 31 (a): authorization on its individual merits;

Article 31 (b): “proposed user makes the effort to seek the authorization form the patent holder on reasonable commercial terms within a reasonable time frame

Twenty years is the duration of a patent right⁷⁴⁷ granted to each new invention, which meets the criteria of innovative product, service or process.⁷⁴⁸ Any attempt to import branded patented drugs, sell or distribute it without authorization of the patent holder constitutes a breach of patent rights in light of the TRIPS agreement.⁷⁴⁹ Therefore, Ghana's effort to provide access to medicines for her HIV/AIDS population is stifled because Ghana lacks the resources to pay the necessary financial compensation to satisfy bureaucratic demands in order to gain compulsory licenses. Thus, the "provision of high level of incentive created by strong patent protection is grossly inconsistent with the principle that pharmaceutical industries should disclose inventive data to allow reverse engineering."⁷⁵⁰ It can be concluded that the promotion of a strong patent regime within the WTO, as policy and politics initiated by the US, cannot bring about mutual benefits to developing and developed country members of the WTO; especially in the case of access to HIV/AIDS medicines. Therefore, Ghana's chances of promoting access to medicines under the TRIPS Agreement exist but with the US adopting political manipulations in concert with other developed countries at the WTO, this option appears slim.

Article 31 (c): the request must be waived by a member in a national emergency or other crucial urgency or in cases of national public non-commercial use

⁷⁴⁷ A patent right gives patent holder a monopoly for 20 years.

⁷⁴⁸ Article 33, TRIPS.

⁷⁴⁹ Article 36, TRIPS.

⁷⁵⁰ Theodore C. Bailey, "Innovation and Access: the Role of Compulsory Licensing in the Development and Distribution of HIV/AIDS Drugs" (2001) *Journal of Law, Technology and Policy*, 214

4.1 Ghana's Obligation under WIPO to promote access to medicines

Ghana joined World Intellectual Property Organization (WIPO) in 1976⁷⁵¹ with the objective of gaining international assistance to build her technical infrastructures to promote the general wellbeing of the country and people, particularly in relation to medicines.⁷⁵² One of the principal goals of WIPO is to help developing countries obtain legal and technical assistance with the drafting of international legislations.⁷⁵³ In this respect, Ghana appears to have derived a benefit from WIPO because it played a significant role in the drafting of Ghana's Patent Act 2003 and related legislations.⁷⁵⁴ Practically, there is hardly any direct relationship between the Patent Act 2003 and access to medicines, which is crucial to the lives of Ghanaians. But, it is suggested that indirectly Section 11(4) (a) of the Patent Act 2003 provides access to medicines through the exhaustion of patent rights in Ghana.⁷⁵⁵ In essence, Section 11(4) (a) legalises parallel importation of cheaper medicines into Ghana or gives her the right to authorise a third party to manufacture the medicines/drugs for Ghana without incurring any legal sanctions. It is argued that the adoption of a development agenda by WIPO since 2007, in line with UNCTAD's principle to promote the interests of developing countries rather

⁷⁵¹ Ghana's Accession to the WIPO on 12th March 1976. See: WIPO Membership <www.wipo.int/members/en/details/jsp?country=id=65>, accessed 30th April, 2015

⁷⁵² *ibid*

⁷⁵³ Gerald J. Mossinghoff and Ralph Oman, "The World Intellectual Property Organization: a United Nations Success Story" (1997) 79 J. Pat. & Trademark Off. Soc'y 691, 692-214

⁷⁵⁴ Ghana's 2003 Patent Act <<http://www.wipo.int/wipolex/en/profile/jsp?code=GH>>, accessed 1st May 2015. Other legislations which benefited from WIPO's technical assistance are as follows:

Copyright Act, 2005 (Act 690);

Layout Design (Topographies) of useful Circuits Act 2004 (Act 667);

Trade Marks Act, 2004 (Act 664);

Geographical indications Act, 2003 (Act 659);

Industrial Design Act, 2003 (Act 660) – set this properly

⁷⁵⁵ Section 11 (4) (a), 2003 Patent Act of Ghana, states that, "the rights conferred under the patent shall not extend to acts in respect of articles which have been put on the market of Ghana or in any country by the owner of the patent or with owner's consent."

than TRIPS projects,⁷⁵⁶ appears to enhance Ghana's prospect of social development, especially with respect to medicines. However, Ghana's potential to undertake parallel importation of drugs and the availability of compulsory license to produce medicines, are not effective remedies to solve the right of access to medicines.

This is because the US and its allies often adopt trade sanctions and TRIPS-Plus measures to undermine local initiatives to procure or produce AVR. ⁷⁵⁷ WIPO works closely with the WTO and this is explained: "through a memorandum of Understanding between the WIPO and the World Trade Organisation..., the WIPO is undertaking a host of activities in support of the agreements reached in TRIPS."⁷⁵⁸ In this regard, WIPO is criticised by some commentators as failing to fulfil its obligation to advance the course of developing countries. Bravo states that: "WIPO's weaknesses in managing Intellectual Property effectively on the international plane, led the US and other developed countries to introduce the TRIPS Agreement at the WTO."⁷⁵⁹ Thus, it is suggested that the obligation to protect developing countries, including Ghana, to secure sound social progress and access to medicines, has been usurped by the US and its allies to promote the economic interest of their pharmaceutical corporations.

Furthermore, it is pointed out that: "to have the specialized agency within the United Nations that is responsible for maintaining the correct balance in the intellectual property system, buy into this narrow and biased maximalist rights culture would be little short of

⁷⁵⁶ Cynthia Ho (n 143) 353.

⁷⁵⁷ Andrew Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (Oxford University Press, Oxford 2011) 162-3

⁷⁵⁸ Massinghoff- and Oman (n.176) 23

⁷⁵⁹ Gustavo Bravo, "From Paris Convention to TRIPS: A Brief History" (2002) 12 J. Contemp. Legal Issues 445- 449

a tragedy.”⁷⁶⁰ The principle behind the maximalist rights culture is that: “to promote intellectual property is automatically to promote innovation and, in the process, the more rights the better.”⁷⁶¹ The use of the phrase “short of tragedy” is significant in the broader frame of discussions, given that several thousand human beings are dying of HIV/AIDS due to limited access to ARVs medicines in Ghana. The desire by developed countries to promote IPRs in line with their corporations’ interests, over and above the need to save human lives through access to medicines, resonates with the maximalist culture.⁷⁶² Moreover, WIPO is also described as “toothless” for failing to protect the interest of developing countries against pirate activities⁷⁶³ undertaken by developed countries. For example, the US has argued on behalf of its pharmaceutical industry to increase prices of “life-saving medicines/drugs towards saving human lives in Africa without any challenge by WIPO.”⁷⁶⁴ These arguments demonstrate that the position of the WIPO as UN specialised agency, established to promote the social and economic welfare, including access to medicines in the treatment of diseases such as HIV/AIDS is weak.

As a way forward, WIPO is urged to regain its role as a specialized organ of the UN with a commitment to advance human dignity, especially by promoting access to medicines as a priority

⁷⁶⁰ James Boyle, “A Manifesto on WIPO and the Future of Intellectual Property” (2004) *Duke Law and Technology Review*, 3

⁷⁶¹ Matthew David and Deborah (eds), *The SAGE Handbook of Intellectual Property* (Sage, London 2014) 82

⁷⁶² James Boyle, “ A Manifesto on WIPO and the Future of Future of Intellectual Property” (2004) *ibid.* p. 2 According to Boyle, the maximalist culture represents a policy which favours a strong Intellectual Property Rights as a motivation for innovation, therefore, the more rights accorded the patent holder the better.

⁷⁶³ William A. Kerr, Jill E. Hobbs and Revadee Yampocin, “Intellectual Property Protection, Biotechnology and Developing Countries: Will TRIPS Be Effective?” (1999) Vol.2 No.3 & 4 *AgBioforum*, 203-211 According to Kerr et al, developed countries have pirated or exploited genetic materials from developing countries and converted them to earn patent rights without recognising or promoting the welfare of the regions from which they obtained them.

⁷⁶⁴ Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers, UK 2006) 2 -4

and by acting as a “counterforce to TRIPS-plus measures⁷⁶⁵ that promote the narrow corporate interests of the pharmaceuticals.⁷⁶⁶ In this regard, it is proposed that WIPO should endeavour to promote transfer of technology to developing countries, as one of the provisions of the TRIPS Agreement stipulates,⁷⁶⁷ in order to enable a developing country like Ghana to produce its medicines locally and cheaply.

Finally, as stated above, WIPO has been instrumental in helping Ghana draft her Patent Act 2003. This Act has given Ghana an indirect legal power to access medicines through the options of parallel importation or compulsory licence.⁷⁶⁸ However, this indirect access to medicines has achieved little by way of treating those infected by the HIV/AIDS virus because developing countries including Ghana are conscious of sanctions from developed states especially the US.⁷⁶⁹ So, WIPO should adopt a human-centred approach to advance the developmental needs of developing countries, particularly Ghana with respect to medicines, by focusing more on the principles of UNCTAD.

4.2 The Doha Declaration and Access to Medicine in Ghana

⁷⁶⁵ TRIPS-Plus measures are bilateral trade agreements signed between developed and developing countries- with the object- to extend the standard of protection, high standard of protection and no exclusion from patentability

⁷⁶⁶ Boyle, (n183) 9

⁷⁶⁷ Ibid. 10.

⁷⁶⁸ Section 13(1) (a), (b) and (2), Patent Act of Ghana 2003 <www.wipo.int.wiplox>text>, accessed on 20th September 2016

⁷⁶⁹ Robert Bird and Daniel R Cahoy, “the Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargain Approach” (2008) Vol. 45 No.2 American Business Law Journal, 24

The Doha Ministerial Declaration⁷⁷⁰ brought together Trade ministers, delegates and diplomats from both developed⁷⁷¹ and developing countries,⁷⁷² with the objective of addressing the grievances of developing countries pertaining to the high prices of HIV/AIDS drugs affecting majority of their populations.⁷⁷³ One principal grievance presented at Doha by developing countries was to seek a clearer interpretation of the TRIPS Agreement so as to utilise its flexible provisions to access Antiretroviral drugs (ARVs) in the treatment of their peoples infected by the HIV/AIDS virus.⁷⁷⁴

The Doha Declaration made it clear that states parties to TRIPS⁷⁷⁵ have a legal duty to promote the health of their citizens by ensuring access to medicines. In the case of emergencies and national disasters, States have the right without recourse to TRIPS provisions, to adopt measures to provide access to medicines. Paragraph 6 of the Doha Declaration states that: “ no state shall be prevented from adopting measures to promote the health of human beings, animals, plant or the environment, so far as the measures adopted are not intended to restrict international trade.”⁷⁷⁶ Attram argues that the Doha declaration aims to create an even plane for developing countries without

⁷⁷⁰ Doha WTO Ministerial Declaration (WT/MIN (011 Dec 2001), adopted on 4 December 2001, <http://www.wto.org/english/thewto_e/minist_e/mindec_e.htm>, accessed on 4 April 2015

⁷⁷¹ The group of developed countries included Australia, Canada, Japan, Switzerland and the US. See Draft Ministerial Declaration, Proposal from a Group of Developed countries, IP/C/W/313 Oct.4, 2001), <http://www.wto.org/english/tratop_e/trips_e/mindecdraft_w3143_e.htm>, accessed 20th November 2015

⁷⁷² The group of developing countries included the African Group, Bangladesh, Barbados, Bolivia, Brazil, > accessed 20th November 2015

⁷⁷³ Alan O. Skeyes, “TRIPS, Pharmaceuticals, Developing Countries, and the Doha ‘Solution’” University of Chicago Law and Economics, Olins Working Paper No. 140 (2002) some of the developing countries at the Doha are: Cuba, Dominican Republic, Ecuador, Haiti, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela. Draft Ministerial Declaration, Proposal from a group of developing countries, IP/C/W312 (Oct. 4, 2001), <http://www.wto.org/english/tratop_e/trips_e/mindecdraft_w312_e.htm>, the Law School, the University of Chicago (2004) <<http://www.law.uchicago.edu/awecon/index.html>>, accessed 26th August 2016.

⁷⁷⁴ Margo A. Bagley, “Legal Movement in Intellectual Property: TRIPS, Unilateral Action, Bilateral Agreements, and HIV/AIDS” (2003) Vol. 17 Emory International Law Review, 781

⁷⁷⁵ Stine Jessen Haakonsson and Lisa Ann Richey, “TRIPS and Public Health: The Doha Declaration and Africa” (2007) Development Policy Review, 72

⁷⁷⁶ Paragraph 6, Doha Declaration

manufacturing capacities to use compulsory license to access medicines, thereby reversing the disadvantages which had been imposed on developing countries by TRIPS.⁷⁷⁷ This interpretation of the Doha Declaration seems to create an effective and efficient access to medicines in the face of life-threatening diseases such as HIV/AIDS, malaria and tuberculosis. Attram also urges developing countries to play an active role in the provision of access to medicines by abolishing tariffs on all medicines as well as finished medicines and other active ingredients; used in the manufacturing of medicines, as an ethical and moral principle to realise the medicinal needs of their peoples.⁷⁷⁸ Yamin, notes that access to medicines is a “critical component of right to health both as a treatment for epidemic and endemic diseases and as part of medical attention in the event of any sickness.”⁷⁷⁹ This supports the fact that the right of access to medications is beyond the confines of national emergencies and disasters.

The support for developing countries to secure access to medicines for the treatment of HIV/AIDS, malaria and tuberculosis is an international obligation of states, requiring immediate and progressive attention.⁷⁸⁰ This suggests that under the Doha Declaration, Ghana can adopt measures to improve the treatment of her HIV/AIDS population as a duty under international law, without breaching pharmaceutical corporations’ patent rights. Affirming the legality of the Doha Declaration with the mandate to allow developing

⁷⁷⁷ Amir Attram, “Assessing and Answering Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: the Case for Greater Flexibility and Non-Justiciability Solution”(2003) 17 *Emory International Law Review*, 745

⁷⁷⁸ Amir Attram, *ibid.* 755

⁷⁷⁹ Alicia Ely Yamin, “Not Just A Tragedy: Access to Medications as Right under the International Law”(2003) 21 *B.U. Int’l.J.* 325 336

⁷⁸⁰ Rebecca Amollo, “Revising the Trips Regime: Rwanda-Canadian ARV Drug ‘Tests’ the WTO General Council Decision” (2009) 17 *Afr. J. Int’l.J. &Comp. L* 240 -248

countries to provide access to medicines through compulsory licence and parallel importation, Gathii states that:

“The Ministerial Conference has the authority to take on decisions on all matters under any of the Multilateral Agreements. The Doha Declaration emerged from the WTO decision-making framework and was issued by the Ministerial Conference at Doha. This is consistent with the WTO’s established practice of decision-making by consensus. The various bodies of the WTO that negotiated the Doha Declaration possessed institutional competence, therefore the Declaration was the result of lawful process of negotiation and agreement that characterized the GATT/WTO.”⁷⁸¹

With the position of the Doha Declaration firmly established, developing countries and Ghana for that matter, can pursue access to medicines for her people by relying on the declaration. Furthermore, Gathii proposes that the Doha Declaration serves as “embryonic evidence” to establish precedent by which subsequent interpretations of WTO agreements, particularly the TRIPS Agreement, can be explained flexibly by states to promote access to medicines, in the hope of saving human lives.⁷⁸² There is a view that human dignity and human rights values should be the underlying factor in protecting access to medicines in the face of deadly diseases such as - HIV/AIDS, Malaria and Tuberculosis.⁷⁸³ Furthermore, is argued in light of paragraph 5(d) of the Doha Declaration, that the TRIPS Agreement favours public health policies of WTO members, therefore, any measures adopted with the intent to advance access to medicines incurs no legal challenge.⁷⁸⁴ In addition, Gathii emphasises that the “Doha Declaration seeks to empower states to devise and adopt measures that seek to promote the wellbeing of citizens in

⁷⁸¹ James Thuo Gathii, “ the Legal Status of the Doha declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties” (2002) 13 (2) Harvard Journal of Law & Technology, Vol. 13, 300-301

⁷⁸² Gathii, (n 781) 311

⁷⁸³ S.K. Verma, “The Doha Declaration and Access to Medicines by Countries without Manufacturing Capacity” in Carlos M. Correa (ed), *Research Handbook on the Protection of Intellectual Property under the WTO Rules: Intellectual Property in the WTO*, Volume I (Edward Elgar Ltd, 2010) p. 640

⁷⁸⁴ Bryan Mercurio, “TRIPS and Access to Essential Medicines” in Geert Van Calster and Denise Prevost (eds), *Research Handbook on Environment, Health and the WTO* (Cheltenham, Edward Elgar 2013) 247

critical circumstances and emergency situations, in line with the principle of sovereignty.”⁷⁸⁵ Moreover, Mercurio argues that: “TRIPS has been wrongly singled out as an impediment of access to medicine, while in reality, the problem rests with developing countries governments’ inability to use the flexibilities of TRIPS and poverty, are the true elements preventing access to medicines.”⁷⁸⁶ The suggestion that developing countries had not been proactive enough to utilise flexibilities within the TRIPS regime to promote access to medicines is contentious. This is due to two major reasons. One reason resonates with Matthews’s position, which explains that: “...much of the emphasis is on raising intellectual property enforcement standards. Far less attention is being paid to assist developing countries in utilising TRIPS flexibilities.”⁷⁸⁷ The other reason is that developing countries are requested in respect of Article 67 to ask developed countries for technical assistance, which must be agreed by the developed countries before such assistance can be delivered.⁷⁸⁸ Thus, a closer examination of the in-built provisions of Article 67 of TRIPS, engenders a culture of dependency of developing countries on developed countries without commitment to promote the industrial growth of developing countries.⁷⁸⁹ Hence, the position that developing countries fail to utilise flexibilities in TRIPS to boost access to medicine is a spurious one.

On the contrary, there are opposing views undermining the legality of the Doha Declaration as firstly, it has been proposed that the Doha Declaration is a moral statement because developed countries, especially the US and the EU, argue that the

⁷⁸⁵ Gathii, (n 781) 309

⁷⁸⁶ Mercurio (2013) (n 784) 269

⁷⁸⁷ Duncan Matthews, “TRIPS Flexibilities and Access to Medicines in Developing Countries: the Problem with Technical Assistance and Free Trade Agreements” (2005) E.I. P. R. 423

⁷⁸⁸ Ibid.

⁷⁸⁹ Ibid.

Doha Declarations cannot be enforced legally to promote access to medicines.⁷⁹⁰ Rather, developed nations continue to pursue nearly 130 TRIPS-PLUS bilateral agreements with most developing countries, under the guise of extending direct foreign investment to those countries.⁷⁹¹

Second, the Doha Declaration did not resolve the issues surrounding production of medicines for export. This means that pharmaceutical corporations with the technology and expertise in the field of manufacturing drugs, can exploit the developing countries' needs for essential medicines.⁷⁹²

Third, there is a suggestion that compulsory licence and parallel import provisions allowed under TRIPS and affirmed under the Doha Declaration, would be ineffective, "if developing countries cannot afford to buy and distribute off-patented medicines, then the guarantees secured under the Doha Declaration, is of no significance to the developing countries."⁷⁹³

Lastly, Tully has opined that, although some progresses were made at Doha to address access to medicines in the public health sector in developing countries, there remains a chasm between developing and developed countries, with respect to transfer of technology. More needs to be done to transfer technology to help developing countries manufacture their own medicines.⁷⁹⁴ This is because developed countries, particularly the US and EU had adopted bilateral and regional free trade agreements (FTAs), as

⁷⁹⁰ Steve Charnovitz, "the Legal Status of the Doha Declarations", GW Law Faculty Publications and Other Works, (2002) 211

⁷⁹¹ Collins-Chase, (n9) 779

⁷⁹² Ellen F. M. Hoen, "Trips, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and beyond" (2002) Vol. 3 (1) Chicago Journal of International Law, 20

⁷⁹³ Bryan C. Mercurio, "TRIPS, Patents, and Access to Life-saving Drugs in the Developing World" (2004) 8 Marq. Intell. Prop. L. Rev. 211 -250

⁷⁹⁴ Danielle Tully, "Prospects for Progress: the TRIPS Agreement and Developing Countries After the Doha Conference", Boston College (2003) Vol. 26 International and Comparative Law Review, 142-143

measures to undermine or limit access to medicines, as legitimately declared under paragraph 6 of the Doha Declaration.⁷⁹⁵

Finally, the above discussion has shown that Ghana has a duty to provide affordable medicines to treat her population infected by the HIV/AIDS virus, malaria and tuberculosis, in light of the Doha Declaration. This can be done by utilising the flexible provisions of the TRIPS Agreement. However, if Ghana is to achieve her commitment to provide access to essential medicines to HIV/AIDS patients in the country; the roles of US and other developed countries' pharmaceutical corporations must be addressed effectively so that they are unable to exert political pressure and threats of trade sanctions against Ghana. One way of achieving this objective is to empower the TRIPS Council to enforce legally the Doha Declaration as well as the flexible provisions of TRIPS to promote access to medicines in developing countries.

4.3 African Regional Intellectual Property Organisation (ARIPO)

Ghana is a signatory to the ARIPO.⁷⁹⁶ As a regional intellectual property organisation, ARIPO aims to conduct research on behalf of its members in order to ensure that members are compliant with their international obligations regarding IPRs.⁷⁹⁷ By undertaking activities on behalf of its members, it is hoped that ARIPO members would be able to pool together resources to target their crucial needs by building effective

⁷⁹⁵ S.K. Verma, (n 783) 667

⁷⁹⁶ The ARIPO began in the 1970s by African English speaking countries, during a Seminar on "Patents and Copyrights", in Nairobi- Kenya. In 1973, the United Nations Economic Commissioner for Africa (UNECA), the World Intellectual Property Organisation, (WIPO), responded to a request by the Africa English speaking countries, to help them form the ARIPO, with an object of dealing with patent issues. This resulted in the Lusaka Agreement, which was adopted by Ministers on December 1976. Again, the ARIPO adopted the Harare Protocol, which contained the WTO's TRIPS Agreement on "Patent" and "Industrial Design" in an Agreement signed in 1982 by sixteen African Countries, including Ghana, <<http://www.wipo.int.wipolex/en/details.jsp?i=9426>>, accessed 31st April 2015

⁷⁹⁷ ARIPO, *ibid*

technical capacities to promote access to medicines and address socio-economic needs in their respective countries, thereby, avoiding duplication of activities.⁷⁹⁸

The GlaxoSmithKline case is discussed below and although ARIPO has explained that Ghana and Cipla⁷⁹⁹ have done nothing legally wrong, the case suggests that pharmaceutical corporations have the leverage to undermine access to medicines through the instruments of threats and legal battles.

4.4 The GlaxoSmithKline (Glaxo) case in Ghana

In this case, Glaxo threatened legal action against Cipla of India and Healthcare Limited of Ghana, for breach of patent right for its HIV/AIDS drugs, Combivir.⁸⁰⁰ Cipla is a leading drug Company based in India, whereas Healthcare Limited (Ghana), is a private Pharmaceutical distributor which imports medical supplies; including: medicines, health-related logistics and HIV/AIDS drugs.⁸⁰¹ This case study is significant because it shows the unfair treatment of Ghana and India as developing countries by a powerful Pharmaceutical Corporation, which is supported by a powerful trading country, the US. Also, this demonstrates that developed countries in the WTO are capable of securing trade benefits which disadvantage most developing countries.⁸⁰²

⁷⁹⁸ ARIPO, *ibid*

⁷⁹⁹ Cipla is a leading pharmaceutical company based in Bombay, which produces generic versions of HIV/AIDS drugs through reverse engineering, <www.cipla.com>, accessed 2nd October 2016

⁸⁰⁰ Sarah Boseley, "Crusading Indian firm takes on might of GlaxoSmithKline" Guardian (February 14 2001) <www.theguardian.com/world/2001/feb/14/sarahboseley.lukeharding>, accessed 26 June 2015

⁸⁰¹ *Ibid*.

⁸⁰² Rorden Wilkinson, *What is wrong with the WTO and How to fix it* (Cambridge, Polity Press, Cambridge 2014) 77

Between 2000-2001, Ghana saw a sudden development and increase in the HIV/AIDS virus affecting a considerable number of her population. As a result of the expensive nature of branded drugs such as Glaxo's Combivir, Healthcare Limited imported a generic version of Combivir from Cipla. In order to control the HIV/AIDS epidemic, Healthcare Limited attempted to supply this drug to the Ghanaian market.⁸⁰³

The "generic" version of Glaxo's Combivir which Healthcare imported from Cipla, was described as an Anti-Aids cocktail drugs that contained the following: Stavudine, lamivudine and nevirapine. Cipla sold its "generic" drugs for \$600 (£430).⁸⁰⁴ At the time, Glaxo's Combivir was sold on the markets of the western world, between \$10,000 - \$15,000, respectively.⁸⁰⁵ The sale of this generic drug to Ghana alarmed Glaxo, which warned Cipla. In a letter written to Cipla, Glaxo stated that the sale of its cheaper generic version of Combivir was in breach of Glaxo's patent rights in Ghana.⁸⁰⁶ Consequently, Cipla stopped further exports of HIV/AIDS "generics" to Ghana. Healthcare Ltd was also prevented from distributing the consignment of the "generic" drugs in Ghana as it feared that Glaxo might bring legal action against it.⁸⁰⁷

As a result of the above chain of events, a legal exchanges ensued in which Sir Richard Skyes (chairman of Glaxo) called "generic" Companies "pirates" arguing that: "people are dying of HIV/AIDS in developing countries due to lack of political will by those governments to spend money to save lives; and in addition suggested that developing

⁸⁰³ Ibid.

⁸⁰⁴ Ibid.

⁸⁰⁵ Ibid

⁸⁰⁶ Ibid

⁸⁰⁷ Mark Schoofs, "Glaxo Attempts to Block Access to Aids Drugs in Ghana" Wall Street Journal, (1 December, 2000) < www.wjs.com/articles >accessed 20th November 2016

countries have no ethics and doctors to ensure that Aids drugs are properly administered.”⁸⁰⁸

According to Schoofs,⁸⁰⁹ Glaxo’s spokesman Sutton- argued that: “Glaxo is worried that if a small country like Ghana violates patent protection, that could open a Pandora’s Box of violations in larger countries such as South Africa, Latin America and parts of Southeast Asia, where AIDS is so raging.”⁸¹⁰ In defence of Ghana’s position, Kiilge, director of ARIPO explained that Ghana’s action does not constitute an infringement of patency, suggesting that: “while three of the patents issued in Harare, Zimbabwe, are not applicable in Ghana, Cipla has also argued that the formulation adopted in manufacturing its generic version of Combivir is different from that of Glaxo’s.”⁸¹¹ The implication is that neither Ghana nor Cipla were in violation of a patent right as being alleged by Glaxo. Also, there is also a suggestion that ARIPO wields little influence in comparison with in comparison with Glaxo, to protect its members against threats/litigations initiated by foreign multilateral corporations.

In its recent policy document, Glaxo has proposed that access to medicine should be the responsibility of governments, and has therefore insisted that a strong intellectual property regime is central to producing innovative drugs, to prevent deadly diseases.⁸¹² This policy position suggests that not only is Glaxo interested in promoting its corporate interest by maximising profits; but also it is determined to push governments to spend substantial portions of their budgets, in procuring medicines. As a result of public

⁸⁰⁸ Boseley (n 800)

⁸⁰⁹ Mark Schoof (n 807)

⁸¹⁰ Ibid.

⁸¹¹ Ibid.

⁸¹² GSK Public Policy Position: the Post -2015 Development Agenda, <<http://www.gsk.com/media/280887/post-2015-Development-agenda-policy-pdf>>, accessed 28th April 2015

condemnation in Ghana and India, Glaxo withdrew its threatened legal action against Cipla and Healthcare Limited. In addition, Médecins Sans Frontières/ Doctors Without Borders (MSF) defended Cipla arguing that, “reverse engineering adopted in producing “generic” versions of Combivir, constitutes no breach of Glaxo’s patent right.”⁸¹³ The adoption of legal threats/sanctions by Glaxo to deny Ghana and other developing countries access to essential medicines in treating their HIV/AIDS patients, indicates that global pharmaceutical corporations have the backing of their respective governments to coerce developing countries into buying their expensive HIV/AIDS drugs.⁸¹⁴

Thus, access to cheaper alternative drugs to stem the menace of HIV/AIDS is curtailed, leading to more human suffering and deaths.

5. Ghana’s Drug Policy in relation to the TRIPS Agreement

Ghana framed her policy on medicines/drugs⁸¹⁵ upon the advice of World Health Organization (WHO) which in collaboration with bilateral and multilateral institutions cooperated with several other NGOs including Médecins Sans Frontières (MSF).⁸¹⁶ This drug policy was formulated to ensure that: basic health and medical needs of Ghanaians are satisfied, access to medicines is realised at an affordable price, in the right quality, at the right quantity and at the right time.⁸¹⁷ Also, this policy was initiated in 2004 as a revision of the 1998 version by the Ghanaian government in order to meet her international obligation under the WTO’s TRIPS Agreement.⁸¹⁸ The discussion under

⁸¹³ Boseley (n 800)

⁸¹⁴ Ibid.

⁸¹⁵ The Ghana National Drug Policy (second edition) Ministry of Health, (Yamens P.P. limited Accra-Ghana, 2004) <http://wwwmt/selection_medicines/country_lists/gha_NDP_2nd.pdf>, accessed 16th March 2015

⁸¹⁶ Ibid.

⁸¹⁷ Ibid.

⁸¹⁸ Ibid.

this section focuses on the relationship between the TRIPS Agreement and Ghana's Drug's policy with respect to promote access to medicines. This drug policy aims to:

- To promote rational use of drugs by prescribers, dispensers and consumers; and
- To promote quality assurance by ensuring that only safe and effective drugs are sold or supplied to consumers by public and private institutions. It asks the government to establish financing mechanisms which ensure access and equity to essential drugs and;
- Improve the system of supply and management of drugs by rationalising the procurement system, and by improving drug distribution systems at all levels of the health care delivery.

Under the policy, the government aims to:

- Increase the quantity and quality of health care with the expansion of human resources in the pharmaceutical sectors at all levels of the health sector.⁸¹⁹

In addition, the government of Ghana has shown its willingness under this policy to support local pharmaceutical organisations to develop traditional herbal medicines; and to treat diseases like HIV/AIDS with financial and logistical support.⁸²⁰ According to Cohen et al, Ghana has made moderate progress by undertaking local manufacturing activities to ease access to medicines and added that: "Ghana manufactures 20% of its medicines locally; there are about 30 pharmaceutical manufacturing facilities in the country, and with

Under the WTO's TRIPS Agreement, each member state is obligated to institute a minimum standard of patent protection by reforming its domestic laws to grant patent protection to most pharmaceutical medicines/drugs and processes, to prevent counterfeit versions of those products from being manufactured.

⁸¹⁹ Ibid.

⁸²⁰ George O. Essebey and Stephen Awuni, "the Dynamics of Innovation in Ghana's Traditional Medicine Sector", WIPO Magazine, (WIPO Publication, February 2015) 15

nearly 17 -18 producing throughout the year.”⁸²¹ The initiative to produce medicines locally is a laudable strategy with Ghana’s potential to become self-reliant in the future. Moreover, examples of modest achievements can be mentioned. For instance, the Dan Adams Pharmaceutical Company of Ghana produces 13 generic ARV drugs and other malaria medicines⁸²² to treat HIV/AIDS and other life-threatening diseases. In addition, a World Bank Report states that Dan Adams had supplied about 5 percent of ARV medicines to the Ghanaian Government between the years 2004-2005 when the country was facing severe ARV shortages.⁸²³ The report also suggests that the production of ARVs by Dan Adams has the prospect of boosting Ghana’s medicines manufacturing capacity because there is a gradual development of technical capacity which can improve the social and economic spheres of the economy.⁸²⁴ Cohen et al also adds that: “the government of Ghana had restricted the importation of 17 medicines; including Paracetamol and Chloroquine, as a policy measure to help local pharmaceutical companies grow.”⁸²⁵ This suggests that Ghana can improve access to medicine in respect of its drug policy by taking advantage of the Doha Declaration, in order to promote access to medicine.⁸²⁶ This can be done by seeking a compulsory licence agreement with a

⁸²¹ J.C. Cohen, M. Gyansa-Lutherodt, K. Torppey, L.C. Esmail and G.Kurokawa, “TRIPS, the Doha Declaration and increasing Access to Medicines: Policy Options for Ghana” (2005) *Global Health*, 5

⁸²² Sara Al-Bader, Abdallah S. Daar and Peter A. Singer, “Science-based health innovation in Ghana: health entrepreneurs point the way to new development path” (2010) *BMC*, 7

The Dan Adams pharmaceutical Company, was founded in 2004 by a Ghanaian pharmacist- called Yaw Gyimah- who trained in the US. He formed a partnership with a Chinese entrepreneur in the early stages producing ARV and other drugs for supply in the West Africa. However, in 2007, Dan Adams has established itself as an independent pharmaceutical company and the only firm producing 13 generic AVR drugs and other anti-malaria medicines for the Ghanaian market.

⁸²³ World Bank *Improving Access to Medicines in Africa: Assessment of Trade-Related Aspect of Intellectual Property Rights (TRIPS) Flexibilities Utilization* (World Bank) 2008, 39, <<http://elibrary.worldbank.org/doi/book/10.596/978.08213-7544-0>>, accessed 28 June 2015.

⁸²⁴ *Ibid.* p. 43.

⁸²⁵ J.C. Cohen et al, (n 821) *ibid*

⁸²⁶ J.C. Cohen et al (n 821) *ibid*

foreign pharmaceutical company to enable local manufacturers like Dan Adams to produce generic HIV/AIDS drugs to treat the disease.

Conversely, Ghana's traditional sources of herbal medicines have been neglected by the government and private institutions with little financial and logistical investment being made in this sector. For example, the Akuapim Mampong Herbal Medical Research Institute and Hospital have seen little development over the years.⁸²⁷ The fact that successive governments of Ghana have failed to invest substantially in existing pharmaceutical facilities indicate that promoting access to medicines in the country remains a hurdle.⁸²⁸ According to Cohen et al, "most raw materials used in the manufacturing of the above medicines are imported at high costs to the local manufacturers at 12.5 value added tax; 0.5% Economic Development Investment Fund (EDIF); 0.5% ECOWAS levy - in addition to handling and inspection charges, with 0.004% freight costs."⁸²⁹ These costs, in the view of Cohen et al, have undermined the prospects of sustaining access to medicines through local manufacturing efforts.⁸³⁰ This is supported by the fact that as the TRIPS Agreement is "skewed towards benefiting developing countries,"⁸³¹ access to medicines in respect of treating HIV/AIDS patients in Ghana remains unattainable. Nevertheless, Laing et al, are of the opinion that access to

⁸²⁷ The Ghana Scientific Research Herbal Centre and Hospital, which was established at Akuapem-Mampong, in the Eastern Region; since the 1976, has still not been able to produce enough medicines to help treat chronic diseases and the HIV/AIDS epidemic, because of limited funding and absence of political will on the part of successive governments, <www.akuapem.ghanadistrict.gov/?arrow=newsread3435>, accessed 30 June 2015

⁸²⁸ George O. Essebey and Stephen Awuni (820) p.15

⁸²⁹ J.C. Cohen et al (n.821)

⁸³⁰ J.C. Cohen et al (n.821)

⁸³¹ Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization Law, economics, and politics*, (Routledge, London 2007) 111

medicines remains a fundamental human right, therefore, more cooperation at the international and national levels should be established to bring this right to fruition.⁸³²

However, as is often the case with projects in developing countries, the World Bank has pointed out that Dan Adams has several problems which go against its development as a sustainable manufacturing venture. The Report highlighted several factors, prominent among them are: high cost of bioequivalence tests for each product; high cost of API⁸³³ when bought in small quantities and inadequate market share as well as limited economies of scale.⁸³⁴ Furthermore, it has been mentioned that Ghana is unable to fully utilise its manufacturing capacity in producing required pharmaceutical needs of the country, and as a result, 50% of the capacity is left idle.⁸³⁵ This is because Ghana lacks the technical innovative skills, financial resources coupled with the failure by developed countries to transfer needed technical assistance to promote pharmaceutical operations.

On the legal front, the fact that Article 41 of the TRIPS Agreement can be enforced against developing countries in the context of using the flexible provisions—parallel importation and compulsory license to advance access to medicines is a deterrence for developing countries to adopt policies to propel the health needs of their respective countries.⁸³⁶ In addition, it is proposed that whereas “antiviral drugs are subsidized in the developed

⁸³² Richard Laing, Brenda Waning, Andy Gray, Nathan Ford and Ellen ‘t Hoen, “25 Years of the WHO essential medicines lists: progress and challenges” (2003) Vol.361 the Lancet, 1728

⁸³³ API stands for active pharmaceutical ingredient.

⁸³⁴ The World Bank Report on access to HIV/AIDS Medicines, (2008) (n 823) p. 41

⁸³⁵ Jonathan Harper, Martha Gynasa-Lutterodt, “the viability of Pharmaceutical Manufacturing in Ghana to Address Priority Endemic Disease in the West Africa Sub -Region” (2007) GTZ 3

⁸³⁶ Bernard M. Hoekman and Petros C. Mavroidis, *supra* 251 note p 75

countries,⁸³⁷ a user fee⁸³⁸ of around US\$5 had been collected from HIV/AIDS patients in Ghana, prior to being given anti-viral medications and laboratory tests.”⁸³⁹ The user fee of US\$5 dollars is insignificant in comparison with the price paid by HIV/AIDS patients in other jurisdictions. However, given the level and scale of poverty in Ghana, especially among those affected by the HIV virus, and against the background of high rate of unemployment, such fees can constitute a denial of access to medicine. Souteyrand et al proposes the “... abolition of user fees by adopting a reformative policy which would create a unique opportunity for HIV/AIDS patients, in Ghana; to access medicines in consonance with the principles of global development of health.”⁸⁴⁰ In this respect, access to medicines will be hampered if the government does not adopt measures to remove the burden of user fees among the most vulnerable people—HIV/AIDS patients.

Politically, pharmaceutical companies’ play active and influential roles to restrict access to medicines. For instance, Glaxo contributed nearly \$3,120, 000, in political donations towards both republican and democratic election campaigns over the past years. Barack Obama and George W. Bush have been among the recipients of cash donations from Glaxo; whilst \$27,497, 590 had been devoted to hiring lobbying firms and personnel to promote the above functions.⁸⁴¹ In this respect, Glaxo benefits politically from the US

⁸³⁷ Vitoria Baranov, Daniel Bennett and Hans-Peter Kohler, “The Indirect Impact of Antiretroviral Therapy” (2012) PSC Working Paper Series (University of Pennsylvania)

⁸³⁸ The policy of user fees in Ghana was initiated by the Ministry of Health (MOH) in 1973. The objective was to prevent unnecessary use of health services. However, in 1983 and 1985, the user fees policy was redesigned to recoup at least 15 % of the general national health expenses. Similarly, it is in line with this policy that US \$5 was levied in respect of supplying HIV/AIDS drugs, in Ghana.

⁸³⁹ Yves P. Souteyrand, Veronique Collard, Jean Paul Moatti, Ian Grubb and Teguest Guerma, “Free care at the Point of Service Delivery for Reaching Universal Access to HIV/AIDS Treatment in Developing Countries” (2008) Wolters Kluwer Health

⁸⁴⁰ Yves P. Souteyrand et al, (n 839) *ibid*.

⁸⁴¹ GlaxoSmithKline: Influence Explorer: Campaign Finance and lobby, <www.influenceexplorer.com/...glaxosmithkline/bfe12136b1c042cbbec042cfd3>, accessed on 30 June 2015 It has been mentioned that 10 personnel of GlaxoSmithKline sit on the US Federal Committee of Health, Trademark, Patents, Pharmacy and Health Services, so as to offer advice to the Federal Government on those matters.

government, and as a result, can adopt threats in promoting its corporate interests to maximise profits by restricting access to medicines as transpired in the Glaxo v Cipla and Ghana case above. This suggests that regardless of Ghana's political status as an independent country, it wields limited influence on the international plane to promote the economic and social interests of the nation.

In furtherance of the above, Thomas argues that: "Yet Glaxo's tactics have been successful; Cipla ceased exports to Ghana, and Healthcare Ltd is afraid to distribute the drugs that have already reached the country. In the meantime, Ghana's HIV sufferers continue to die."⁸⁴² As indicated above, Pharmaceutical corporations collude with governments in developed states (US) to restrict access to HIV/AIDS medicine as a strategy of profits maximisation, while humanity suffers in developing country, like Ghana. There is also a view that access to medicine is limited in HIV/AIDS cases because "donor funding"⁸⁴³ is frequently tied to 'pro-poor' efforts that have direct impact on communities; rather than science-based initiatives, which have longer-term contribution to economic and social development."⁸⁴⁴

Thus, it can be concluded that Ghana made some modest gains in respect of her drug policy of 2004, by producing locally 13 ARVs to help in the treatment of HIV/AIDS. Efforts, too, are being made to secure compulsory license to provide essential medicines to save human lives in national emergency situations. However, access to medicines continues to be limited because of external influences from the US; which adopts coercive tactics,

⁸⁴² Caroline Thomas, "Trade Policy and the Politics of Access to Drugs" (2002) *Third World Quarterly*, 258

⁸⁴³ The Donor-funds, mainly come Global Funds to Fight HIV/AIDS and Bill & Melinda Gates Foundation – these donations are geared towards paying for AVR drugs and other medical needs of people living HIV/AIDS.

Other donation sometimes come from the UNAIDS, are in the form of supplies of AVR and training of medical personnel to provide care towards HIV/AIDS patients.

⁸⁴⁴ Sara AI-Bader (n 822) 10

legal threats and lends support to pharmaceutical corporations to undermine local initiative to protect access to medicines.

5.1 Ghana's Ministry of Health (MOH)

The MOH is responsible for the overall national medical and health needs of the people of Ghana. The MOH is empowered to draft national policies, plans and allocate budgetary resources with a view to coordinating with international and NGOs to realise its objective.⁸⁴⁵ In addition, it has the mandate to contract financial agreements on behalf of the people and government of Ghana, respectively.⁸⁴⁶

In an effort to promote access to medicines for the treatment of HIV/AIDS in Ghana, the MOH has worked in collaboration with the UN to increase the right of access to ARVs to more than 33,745 people under the PEPFAR/WHO's 355 initiative.⁸⁴⁷ According to Darko-Gyeke, the provision of ARVs in the case of Ghana has significantly transformed the "deadly nature of the HIV/AIDS into a manageable chronic disease."⁸⁴⁸ However, the initiative of making ARVs accessible to HIV/AIDS patients by the MOH has been criticised immensely by Darko-Gyeke; since women are discriminated against with respect to accessing HIV/AIDS drugs because of their "sex, poverty, religious beliefs, lack of social insurance and social stigma."⁸⁴⁹ This is a drawback because most women in Ghana are perceived as subservient to men—only effective in performing domestic

⁸⁴⁵ Ghana: Ministry of Health, <www.moh.gov.gh>, accessed 26th July 2015

⁸⁴⁶ Ibid.

⁸⁴⁷ P. Dako-Gyeke, "Who is Utilising Anti-retroviral Therapy in Ghana: An analysis of ART" (2012) *International Journal for Equity in Health*, 5

⁸⁴⁸ Ibid.

⁸⁴⁹ Ibid.

chores. This could mean that not reaching women, could mean greater transference of HIV from mother to child increasing the spread of HIV.

The conclusion is that the MOH has contributed in stemming the spread of HIV/AIDS in Ghana, however, that contribution has been limited due to its inability to reach majority of those infected by the disease especially women and children.

5.2 Ghana Health Services (GHS)

The GHS was established by an Act of Parliament⁸⁵⁰ with the objective to administer and manage state-owned and other health facilities in Ghana.

According to a commentator, the Ghana Health Services Act (GHSA) was passed in line with the 1992 Constitution of Ghana to reform the medical health services in the country.⁸⁵¹

Prominent among its core objectives, the GHS has the mandate to implement approved national health policies, by increasing access to improved health services.⁸⁵² In order to achieve its goals, the GHS has the responsibility to ensure that provisions of health services are accessible to people at the community levels of Ghana. Also, the GHS must endeavour to extend health services to Ghanaians living in the rural areas of the country. Furthermore, it must contract out the provision of health care and related health services to private institutions which has the competency to deliver health care to the people, especially among those who cannot be reached by government agencies.⁸⁵³ The

⁸⁵⁰ The Ghana Health Services Act (Act 525), was passed in 1996

⁸⁵¹ Irene A. Agyepong, "Reforming Health Service Delivery at the district level in Ghana: the Perspective of a District Medical officer" (1999) 59 Health Policy and Planning, 59

⁸⁵² Section 1(a) – (b), GHSA.

⁸⁵³ Section 2(a), GHSA.

attempt by the government to provide improved health service at community level is a positive effort to fulfil part of its international obligations and to promote access to medicines. However, it has been suggested that lack of medical logistics, limited funding and poor communication equipment, have discouraged health personnel and other medical staff from accepting postings to work in the rural areas and districts of Ghana.⁸⁵⁴

One achievement recorded by the GHS is the contracting of public health delivery services to private agencies, in order to extend health delivery to some remotest parts of Ghana.⁸⁵⁵ However, this scheme is disadvantaged because in reality very little effort is devoted by the government in providing ARVs to people living with HIV/AIDS (PLHA), under this reformed health delivery scheme.⁸⁵⁶

5.3 Ghana AIDS Commission (GAC)

The Ghana AIDS Commission (GAC) is an umbrella commission established by an Act of Parliament in 2001⁸⁵⁷ with multiple responsibilities. It aims to provide leadership in an effort to stem the development and spread of HIV/AIDS among Ghanaians. Accordingly, the GAC formulates national HIV/AIDS policy, develops programmes for implementation of the policy, coordinates programmes and activities to fight the spread of HIV/AIDS, as well as provides health related facilities.⁸⁵⁸ Through GAC, the Ghanaian Government to some extent gives recognition to the obligation of the right of the people to health and access to medicines by collaborating with other sector agencies as mentioned above.

⁸⁵⁴ Agyepong, (n 851) 68

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid.

⁸⁵⁷ Ghana Aids Commissions Act 2001 (Act 613), passed in December 2001, and entered into force 16 January 2002 <www.ilo.org/wcmsp5/groups/public.../wcms_126709.pdf>, accessed 30th June 2015.

⁸⁵⁸ Section 2 (1) *ibid.*

Moreover, as the operation of GAC was placed under the office of the President⁸⁵⁹ suggests that the government recognises the people's right to health and access to medicines, particularly in the context of the HIV/AIDS epidemic as a serious national issue which deserves a prompt response.

In addition, GAC plays a role in disseminating information and raising public awareness of HIV/AIDS in Ghana. GAC was assigned supervisory and coordination of HIV/AIDS campaign programmes with the responsibility to increase Ghana's public awareness regarding the spread of HIV/AIDS.⁸⁶⁰

This includes an advocacy role in collaboration with the Ministry of Information to disseminate health information to the public, with an objective to educate them on preventive measures against HIV/AIDS disease.⁸⁶¹

Equally, GAC has obligations to promote access to HIV/AIDS drugs in Ghana as well as control and manage health equipment and logistics. GAC further undertakes responsibilities to foster linkages among stakeholders, promote research, prepares documents on HIV/AIDS, evaluate and monitor HIV/AIDS programmes; with the view to eliminate the prevalence of the AIDS epidemic.⁸⁶²

One commentator suggests that access to ARVs was granted to HIV/AIDS patients at an affordable price of US \$3.50 (which was around 5 cedi in Ghana currency) because of government subsidies initiated by GAC in 2009.⁸⁶³ Ampofo also states that: "702 Centres

⁸⁵⁹ Section 4 *ibid*

⁸⁶⁰ Section 2 (2) (a) – (d), *ibid*.

⁸⁶¹ Section 4 (a), *ibid*.

⁸⁶² Section 2(2) (e) – (h), *ibid*.

⁸⁶³ William K. Ampofo, "Current Status of HIV/AIDS Treatment, Care Support Services in Ghana" (2009) Vol. 43 (4) Ghana Medical Journal, 4

of Prevention of mother-to-child transmission of HIV had been catered for about 2,850 women with HIV; while 31, 400 PLHA also received Anti-Retroviral Therapy (ART) from 217 service sites.”⁸⁶⁴ Again, it is pointed out that there had been an improvement in access to medicines especially ARVs from 4,060 people in 2005 to 13, 534 in 2007; and 44 percent of people with advanced HIV infection receiving ATR in 2009.⁸⁶⁵ Thus, it is suggested that the government of Ghana has made some effort to promote access to ARVs medicines, though modestly.

Despite these modest successes, persistent problems remain regarding access to ARVs. This is because almost 70 per cent of PLHA have no access to AVR, especially those living in the rural areas of Ghana.⁸⁶⁶ The fact that some ARVs were sold at US \$3.50 to PLHA, as mentioned above, is a testament of the government’s effort to promote access to HIV/AIDS medicines. However, in relation to GAC, the government has been criticised for failing to promote adequate access to medicines (ARVs) because urban areas where incidences of HIV/AIDS are limited were prioritised, to the exclusion of those severely affected by the disease in the rural areas of the country.⁸⁶⁷

5.4 Ghana’s Food and Drugs Board (GFDB)

GFDB is responsible for regulating the food and medicines sector by ensuring that food items and medicinal products are appropriate for human consumption and wellbeing.⁸⁶⁸

⁸⁶⁴ Ibid., p.3

⁸⁶⁵ Ibid.

⁸⁶⁶ Ibid., 3-4

⁸⁶⁷ Ibid., 5

⁸⁶⁸ Sections 1 and 2 of the Ghana Food and Drugs Act 1992 (P.N.D.C.L 305B), http://www.wipo.int/wipolex/en/text.jsp?file_id=22584, accessed 30th July 2015

It is funded by the government's budget and fees from the registration of companies.⁸⁶⁹ Among its several functions, the GFDB aims to promote transparency and accountability and ensure strict adherence to the codes by which companies produce food and drugs.⁸⁷⁰ It provides information on legislations to companies relating matters affecting regulatory procedures; and prescribes information on whether a product has been approved/disapproved by it for public consumption.⁸⁷¹ Moreover, it undertakes a quality assurance role by ensuring that samples of foods and drugs produced by companies in Ghana are subjected to rigorous testing, in order to approve/disapprove them for registration, and consequently, for sale to the public.⁸⁷² In 2008 alone, 979 of 1147 human allopathic medicine samples tested, failed to meet the required standard for human consumption, and thus were rejected.⁸⁷³

Significantly, GFDB plays a vital role towards the promotion of access to drugs particularly in relation to Ghana's effort to fight against the spread of HIV/AIDS. This is because by testing samples, it seeks to rid the pharmaceutical industry and the pharmacies of any defective medicines which may affect or worsen the lives of the people, especially, PHLA. However, the GFDB needs the government's support in order to achieve its primary role of undertaking rigorous testing of pharmaceutical and chemical products so as to ensure that available drugs/medicines on the public markets, are congenial for human wellbeing. This is because the government has the constitutional obligation of ensuring and protecting the health and wellbeing of Ghanaians.

⁸⁶⁹ Ibid.

⁸⁷⁰ Section 16 1 (a) – (b), 2-3, *ibid*

⁸⁷¹ Section 47 (a) – (e), *ibid*

⁸⁷² Section 23(1), *ibid*

⁸⁷³ Daniel Kojo Arhinful, "WHO Pharmaceutical Situation Assessment –Level II –Health Facilities Survey in Ghana" (2008) Ministry of Health, Ghana (MOH) 14

5.5 Non-Government Organisations (NGOs) and International Organisations (IOs)

In this section, some of the activities of the above institutions are explored with a view to determine if access to HIV/AIDS drugs has been promoted.

The Ghana Government's effort to prevent the development and spread of the HIV/AIDS epidemic had been undertaken in collaboration with NGOS and IOs. The reason is that the government on its own cannot provide adequate health care and medicines to satisfy the medical needs of the people, especially with the increasing threat of HIV/AIDS.

First, the US Agency for International Development (USAID) contributed US\$1 million as seed money in 2001 to contribute to the purchase of ARVs drugs and to train health personnel with respect to caring for PLHA. Also, USAID tried to ensure that access to AVRr was available in Ghana between 2002-2003. Some of the beneficiary health institutions of USAID's contributions are: the Atua Government Hospital, St. Martin de Porres Hospital, Korle-Bu and Komfo -Anokye Teaching Hospitals.⁸⁷⁴ This contribution was provided to Ghana in a response to a request made by the UN General Assembly Special Session on HIV/AIDS;⁸⁷⁵ where ATR was proposed as an effective component of the HIV/AIDS programme.⁸⁷⁶ Although the USAID donation had long been expended, however, it is worth mentioning to illustrate the fact that Ghana received some assistance from the US government during the dire era of her HIV/AIDS crisis.

⁸⁷⁴ Robert Ritzenthandler, Delivery of Antiretroviral Therapy in Resource- Constrained Settings: Lessons learnt from Ghana, Kenya and Rwanda (KTI, Amsterdam 2005) 11

⁸⁷⁵ The UNGA Special Session on HIV/AIDS, (adopted 25-027 June 2001,) RES 55/1
<www.unaids.org/ua/un_supports/strategies/UNGASS> accessed 28 July 2015

⁸⁷⁶ Ritzenthandler (n 874) p.12

Second, the Global Fund to Fight AIDS, Tuberculosis and Malaria also donated some undisclosed money to purchase drugs to help treat people with HIV/AIDS in Ghana.⁸⁷⁷ The US President's Emergency Plan for AIDS relief, President's Malaria Initiative, DFID, UNCTAD, including the Bill and Melinda Gates Foundation, in collaboration with other Churches Health Institutions, had contributed some funds to the MOH in Ghana, so as to extend ARVs to Ghanaians suffering from HIV/AIDS.⁸⁷⁸

Moreover, Finance Health International (FHI) also played a supportive role in promoting the government's policy to stem HIV/AIDS in Ghana. This was done through a joint programme initiated by the FHI and MOH to supply ART to the Manya Krobo Hospital.⁸⁷⁹ In addition, training sessions were provided for nurses and doctors at the GAC and traditional Krobo leadership; to ensure that the people understood the social and economic impact of the HIV/AIDS disease upon the society. Also, this training was organised to promote efficient administration of ARVs to the affected communities in conformity with WHO's guidelines of dispensing medication to PLHA.⁸⁸⁰

Thus, it can be said that Ghana's policy to promote access to medicines in collaboration with NGOs and IOs has achieved modest successes. It follows that the government of Ghana is aware of her responsibilities to promote the right of access to health, especially the provision of ARVs. However, there is a criticism that the roles played by the government of Ghana in light of her drug policy has failed to achieve the desired impact. This is because the Ghana government's willingness to rely on external aids without

⁸⁷⁷ The Global Fund to Fight Aids, Tuberculosis and Malaria, <www.apperi.org/tag/the-global-fund-to-fight-aids-tuberculosis-and-malaria>, accessed on 28 July 2015.

⁸⁷⁸ Ritzenthandler (n 874) 13

⁸⁷⁹ Ritzenthandler ibid p.13

⁸⁸⁰ MDS-3: Managing Access to Medicines and Health Technologies, <<http://www.msh.org/sites/msh-org/files/mds3-jan2014.pdf>>, accessed 30 June 2015

releasing domestic funds to provide for the much needed medicines, may undermine the policy goals of protecting access to medicines. It is therefore argued that the government is more interested in drafting policy documents rather than adopting practical measures to protect access to medicine.⁸⁸¹

5.6. The impact of the TRIPS Agreement on the People of Ghana

As the above discussion shows, it is quite plausible that unsustainable management of access to medicines in Ghana has adversely impacted on the social and economic aspects of the people of Ghana. This is because only 13 generics of ARVs drugs are locally produced in the country, with nearly 50% of manufacturing facilities, left idle.⁸⁸² This limited development is coupled with the fact that Ghana has limited storage facilities to store pharmaceutical materials, which are deployed in the production of drugs; with the consequent that high expenses are incurred with importation of essential drugs to treat HIV/AIDS and malaria diseases.⁸⁸³ Also, the limited proportion of private and public manufacturing of pharmaceutical products in Ghana with over reliance on the Christians Health facilities to produce and supply essential medicines towards the treatment of HIV/AIDS and malaria, suggests that management of access to medicines is unreliable.⁸⁸⁴ Finally, the view is that currently Ghana's management of access to medicines, is unsustainable.⁸⁸⁵

⁸⁸¹ J.N. Fobil and I.N. Soyiri, "Assessment of Government Policy Response to HIV/AIDS in Ghana" (2006) 3 No. 2 Journal of Social Aspects of HIV/AIDS, 5

⁸⁸² J.C. Cohen et al (n 821) 6

⁸⁸³ Maria A. Miralles et al, Access to Essential Medicines in Ghana: Final Draft, Centre for Pharmaceutical Management, (Arlington, 2003) 19.

⁸⁸⁴ Ibid.

⁸⁸⁵ Ibid

Therefore, Ghana needs to promote vigorous pharmaceutical production by seeking to expand its local capacities, with regard to promoting traditional medicines. There is a suggestion that Ghana has made modest gains by supplying and distributing essential medicines to those infected by HIV/AIDS.⁸⁸⁶ These gains were made possible through collaboration with MOH which teamed with the GFDB to remove unqualified pharmacists outlets as well as preventing counterfeit production and selling of medicines in the country.⁸⁸⁷

However, there are concerns. First, de-Grant Aikins explains that people infected with HIV/AIDS are stigmatised more than people suffering chronic diseases such as cancer, and as a result, they are unable to venture out in search of employment or secure social prosperity.⁸⁸⁸ The fact that people infected by the HIV virus and tuberculosis are disregarded in Ghanaian society, means that economic productivity may suffer through loss of labour.⁸⁸⁹ Second, the adverse social and economic impact is more pronounced in the case of women, because most of them are denied education at the expense of men; with lack of education most women are less likely to secure gainful employment. Thus, most women are left without any reliable financial resources to seek medical attention.⁸⁹⁰ Moreover, HIV/AIDS destroys human capital, where peoples' accumulated life experiences, jobs and knowledge acquired over many years of education are

⁸⁸⁶ Emma Back and Daniel Graymore, "Towards a Medicines Transparency Alliance (META) in Ghana", DFID Health Resource Centre (2007) 2-29

⁸⁸⁷ Ibid.

⁸⁸⁸ Ama de-Grant Aikins, "Ghana's Neglected Chronic Disease Epidemic: a Development Challenge" (2007) 41 (4) Ghana Medical Journal, 1-154

⁸⁸⁹ Ibid.

⁸⁹⁰ Judy E. Mill and John K. Anarfi, "HIV risk environment for Ghanaian women: Challenges to prevention" (2002) 54 (3) 325-37 Science-Direct

vehemently dissipated, once an individual contracts the disease.⁸⁹¹ Again, Aids destroys investment in children's education through orphan hood. With the death of parents/guardians, most children are unable to pursue their education and as a result, adds to the burden of the government of Ghana's social and economic expenditure, as the government becomes solely responsible for the economic and social upkeep of the affected children.⁸⁹² Moreover, many deaths from young adults weakens the tax base of the country, with severe impact on Ghana's revenues. This suggests that Ghana's government will struggle to raise the needed funds to embark upon social and economic infrastructural development due to dwindled revenue.⁸⁹³ Third, the burden of the HIV/AIDS, malaria and tuberculosis is not only felt among those infected by the diseases but extends to impact most extended families, as there is not any effective social or economic benefits systems in Ghana to support these people. Russell explains that: "between 62%-70% of household incomes are spent on pharmaceuticals in the treatment of malaria cases, in Ghana. This is equal to loss of labour estimated at US\$7.63 per episode."⁸⁹⁴

Finally, it can be said that the burden of HIV/AIDS, malaria and tuberculosis upon the lives of Ghanaians, communities, institutions and the government at large, threaten not only the policies of economic and social development of the country, but poses a real challenge to human health including access to medicines.

⁸⁹¹ Commission on HIV/AIDS and Governance I Africa: the socio-economic impact of HIV/AIDS, <<http://www.uneca.org>>, accessed 28 June 2015

⁸⁹² Ibid.

⁸⁹³ Ibid.

⁸⁹⁴ Steven Russell, "The Economic Burden of Illness for Households in Developing Countries: A Review of the Studies Focusing on Malaria, Tuberculosis and Human Immunodeficiency Virus/Acquired Immunodeficiency syndrome" (2007) 71 American Journal of Tropical Medicine and Hygiene, 53

6. Conclusions

This chapter has examined access to medicines in respect of Ghana's international law, human rights and WTO obligations and concludes as follows:

First, the government of Ghana is aware of her obligations to promote access to medicines, especially in the case of HIV/AIDS, under international human rights instruments, regional treaties as well as with the national constitution. Although efforts are being made to protect access to medicines in Ghana, the prevalence of apathy and political lukewarm attitude on the part of government in this respect, undermines the human right to health in relation to access to medicines in the country.

Second, the discussion illustrates that human rights can be harnessed within IPRs to promote human health in the sphere of protecting access to medicines. In this vein, human health ought to be given due recognition by pharmaceutical corporations to allow access to medicines for human health rather than devising rigid protection for IPRs.

Third, the flexible provisions within TRIPS may allow Ghana to promote access to medicines among her HIV/AIDS population. This has been supported by the Doha Declaration. However, the legal threat issued by Glaxo against Cipla and Healthcare Limited of Ghana to stop supplying cheaper generic version of Glaxo's Combivir, suggests that access to medicines to treat HIV/AIDS in Ghana remains a challenge.

Fourth, Ghana has a comprehensive drug policy which aims to provide access to medicines with a view to stem HIV/AIDS. Also, it has received considerable donations of HIV/AIDS medicines from external NGOs as well as the US government, in an attempt to stem the menace of HIV/AIDS. In addition, the respective government ministries and agencies have contributed to ensuring that some ARVs are extended to affected

communities of Ghana. However, more needs to be done because Ghana is underutilising her manufacturing capacity in the pharmaceutical sector. This is occasioned by limited government investment to prop up national research initiatives into plant and herbal medicines; as well as promoting active research into orthodox medicines in order to produce AVRs locally to prevent HIV/AIDS disease in the country. The view that human rights laws can be deployed to facilitate access to medicines via IPRs should be given serious consideration. Thus, in the next chapter, access to justice in relation to water and medicine is examined.

Chapter 5: Access to Justice in Ghana: the case of water and medicines

1. Introduction

Although the 1992 Constitution of Ghana proposes the protection of the right of every Ghanaian to social and economic wellbeing, the implementation of the right to water and medicines is weak. The lack of any self-standing right to water and health, the links between the right to life and the rights to water and health, as well as the weaknesses to implement the constitutional right to life in Ghana are examined in chapter 3 (access to water) and chapter 4 (access to medicines). Chapter 3 and 4 also explored the ineffective role played by the various government agencies to implement and enforce these rights at the national level. Chapters 3 and 4 further highlighted the influence of WTO laws, particularly GATS and TRIPS on the national laws in Ghana and the impact it has on the people of Ghana.

Indeed, the Constitution of Ghana includes provisions on access to courts⁸⁹⁵ which may allow individuals and communities to bring a claim in the court if there is a breach of their rights by the government agencies or corporate actors. However, as this chapter highlights, underprivileged communities, including women, children, poor and minority groups are deprived of the right to access to justice as they lack the legal capacity and are unable to bear the costs of litigation. In addition, as the judiciary is not independent, there is a fear that this has an impact on the way decisions are made against the government, relevant government agencies and powerful private institutions.⁸⁹⁶

This chapter, therefore, examines access to justice as a human right within the judicial and quasi-judicial forums, access to information, public participation in decision-making processes, and access to legal aid with which Ghanaians can challenge for the protection of their rights to water and medicines. In order to achieve this objective: first, this section explores who has the right to bring a claim; second, where such claims can be challenged; third, the role of non-judicial forums in which human rights claims can be brought in respect of access to water and medicines is examined; fourth, the availability of information to the ordinary Ghanaian in light of bringing a claim is discussed; fifth, it examines the costs of litigation and legal aid in Ghana, and sixth, the scale/length of cases is explored. The issue of right to information and public participation is also addressed separately.

⁸⁹⁵ Article 125 (5) of the Republic of Ghana

⁸⁹⁶ E.Gyimah-Boadi and Theo Yakah, "Ghana: The Limits of External Democracy Assistance" (2012) Recom Working Paper, United Nations University, 3-5

2. Access to Judicial Forum

Access to justice is recognised as a human right under international law by the international community in the promotion of transparency and fairness in the adjudication of civil and criminal matters, as enshrined in the Universal Declaration of Human Rights (UDHR).⁸⁹⁷ Similarly, the International Covenant on Civil and Political Rights (ICCPR) affirms the view that individuals should be accorded access to justice in a competent court without discrimination on grounds of race, colour or creed.⁸⁹⁸ Although Article 14 of ICCPR mentions criminal proceedings, there is an implied duty on governments and public agencies to interpret this provision positively to ensure that access to justice is extended equitably to improve the rights of litigants in all claims.⁸⁹⁹ Furthermore, in respect of Article 29 of UDHR, Petersmann argues that: “access to justice is an obligation placed on respective national governments and intergovernmental organisations to protect human dignity within the spheres of international law, domestic constitutional provisions and in courts of law/ tribunals.”⁹⁰⁰ Moreover, a UN Resolution, which lends support to this right states that: “member-states should engage in dialogue with the view to sharing national resources, best practices on legal aid and experiences in order to promote access to justice.”⁹⁰¹ This supports the

⁸⁹⁷ UNGA Res 217 III (1948) GA www.un.org/Overview/rights.html > accessed 20th September 2015
Article 8 of the UDHR states that: ‘everyone has the right to an effective remedy by the competent national tribunal for acts relating the fundamental rights granted by the constitution or by law.’

⁸⁹⁸ ICCPR (1966), 999 UNTS 171(adopted 23 March 1976) <
www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx > accessed 21 August 2015
Article 14 states as follows: ‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Sub-sections (a) – (g) of Article 14 provide other grounds of achieving access to justice in a fairer manner.
⁸⁹⁹ Dinah Shelton, *Remedies in International Human Rights Law*, (3rd edn, Oxford: Oxford University Press, Oxford 2015) 17

⁹⁰⁰ Ernst-Ulrich Petersmann, “Theories of Justice, Human Rights and the Constitution of International Markets” (2004) *Loyola of Los Angeles Law Review* 42

⁹⁰¹ UNGA Sixth Legal Committee (2006): the Rule of Law at the National and International Levels (Agreement 82) < www.un.org/ga/Sixth/RuleOfLaw > accessed 20th December 2015

premise that access to justice is not only a human right but also an international obligation requiring governments and intergovernmental institutions to dedicate efforts in realising this right to achieve human dignity.

The 1992 Constitution of Ghana, in its preamble, guarantees protection of preserving the fundamental human rights, unity and stability of every citizen in the country and allows Ghanaians to resort to judicial remedy under the Constitution.⁹⁰² Moreover, in its Chapter 11, the Constitution provides that: “Citizens may exercise popular participation in the administration of justice through the institution of public and customary tribunals and the jury and assessor systems.”⁹⁰³ This suggests that every Ghanaian has a constitutional right to bring a claim against government, organs of government, private organisations and private individuals who infringe their fundamental rights enshrined in the Constitution.

In relation to the judiciary, the 1992 Constitution states: “the judiciary shall have jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as Parliament may, by law confer on it.”⁹⁰⁴

This provision confers powers on the judiciary to be the sole arbiter and decision-makers of all issues regarding justice, including socio-economic rights. The structure of the judiciary is laid out by the Constitution as follows: the Supreme Court of judicature comprising – (i) the Supreme Court, (ii) the Court of Appeal, (iii) the High Court and

⁹⁰² The Preamble of Ghana’s 1992 Constitution, (Ghana Publishing Corporation, Tema 1992) xxvii

⁹⁰³ Article 125(2) of the 1992 Constitution of Ghana, *ibid*,

⁹⁰⁴ Article 125(5) of the 1992 Constitution of Ghana, *ibid*

Regional Tribunals.⁹⁰⁵ This section focuses on whether these forums allow Ghanaians to pursue the right to water and access to medicines.

The Constitution of Ghana provides that: “subject to the jurisdiction of the High Court, the enforcement of Fundamental Human Rights and Freedoms, as provided for in Article 33, authorises the Supreme Court to assume jurisdiction to determine cases regarding human rights abuses.” Thus, the Supreme Court shall have exclusive original jurisdiction in:

“(a)all matters relating to the enforcement or interpretation of this Constitution, and (b) all matters arising as to whether an enforcement was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.”⁹⁰⁶

Clearly, the Supreme Court by virtue of the above provision is granted jurisdiction to protect human rights and fundamental freedoms by interpreting fundamental human rights so as to provide dignity to the people of Ghana. Similarly, there is another avenue through which Ghanaians can bring a claim to protect their human dignity—via the High Court. According to the Constitution, “the High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution.”⁹⁰⁷ As the following analysis illustrates, the Supreme Court’s jurisprudence with respect to protecting human rights has been skewed in favour of respective governments of the day, with little effort to promote human rights in consonance with its constitutional powers. This has been illustrated in a number of cases. First, in the case of *Centre for Public Interest Law v Attorney- General*, the court affirmed that it was the responsibility of the government to ensure the maximum welfare, freedom and happiness of

⁹⁰⁵ Article 126 (i), (ii), and (iii) of the 1992 Constitution of Ghana, *ibid.*

⁹⁰⁶ Article 130 (1) (a) and (b) of the 1992 Constitution of Ghana, *ibid.*

⁹⁰⁷ Article 140 (2) of the 1992 Constitution of Ghana, *ibid.*

Ghanaians and to provide adequate means of livelihood and suitable employment and public assistance for the needy;⁹⁰⁸ second, in *Re Presidential Election Petition*, the Supreme Court unanimously dismissed the Plaintiff's submission by saying that the case has no merit;⁹⁰⁹ third, in another case, the Centre for Public Interest Law sought a declaration in respect of a financial agreement (Master Facility Agreement)⁹¹⁰ being contracted by the President on behalf the people of Ghana with a Chinese Development Bank.⁹¹¹ Surprisingly, the Supreme Court provided the following verdict with reasons, that: (i) the plaintiff's action is premature because the matter has not been referred to Parliament since the Supreme Court has no jurisdiction in the issue; (ii) Article 73 of the Constitution affects international agreements therefore the 'Master Facility Agreement' is a transnational agreement which is beyond national interest and; (iii) it affirmed that the loan under the 'Master Facility Agreement' is constitutionally viable within the purview of Articles 1(1), 23, 36 (1), 40 (a) and 296 of the 1992 Constitution of Ghana.⁹¹²

In assessing the contribution of Ghana's Supreme Court jurisprudence towards promoting and advancing human dignity as enshrined in the Constitution of Ghana, it appears that very little has been done to further the right to water and medicines.

⁹⁰⁸ The Case of *Centre for Public Interest Law v Attorney-General*, SC J1/5/2012: the Centre is a group of lawyers working as an NGO to protect human rights in Ghana. It brought a claim in respect of Article 36 (1) of the 1992 Constitution of Ghana, requesting the government to adopt measures to improve the living standard of impoverished Ghanaians.

⁹⁰⁹ In *Re Presidential Election Petition: Akuffo-Addo, Bawumia and Obetseby-Lampsey* (No. 3) v *Electoral Commission (Mahama and National Democratic Congress (NDC) Interested Parties* No. 3 SC No. J8/44/2013: the facts of the case are, the Presidential candidate of an opposition political party –New Patriotic Party (NPP) (Nana Akuffo Addo, sued the President Mahama and the Electoral Commission with the ruling NDC for adopting fraudulent tactics to win the general elections.

⁹¹⁰ S.Y. Bimpong- Buta *Ghana Case Reports: Advanced Legal Publications* (Assembly Press Accra-Ghana 2001-2) 156 -163

⁹¹¹ Ministry of Finance, Ghana secures US\$3 billion term loan facility agreement between CDB and GOG < www.mofep.gov.gh>cdb-loan-summary> accessed 20th December 2015

⁹¹² Ibid.

Besides, other constitutional cases adjudicated by the Supreme Court concentrated on matters involving freedom of the press, freedom to form political parties and electoral litigations.⁹¹³ This suggests that the Supreme Court has devoted its energy to help promote fundamental human rights of Ghanaians on the political plane without seeking to protect social and economic rights especially access to water and medicines.

Conversely, Ghana's military revolution of 1979, and its emergent unconstitutional regime, lasting nearly two decades, might have led the Supreme Court to prioritise political freedom over access to water and medicines.⁹¹⁴ Scholars have expressed diverse views on the 1979 revolution. Biswal opines that Ghana's third republic and constitutional government with its elected President including appointed Ministers as well as policies and programmes were suspended by the revolutionary regime.⁹¹⁵ Similarly, Quaye attributes the degradation of human rights in Ghana to the 1979-1982 revolution stating that: "there is a strong tendency to use the law to protect Government and the revolutionary spill-over at the expense of individual liberty, thus the national legal system has suffered."⁹¹⁶ Furthermore, the stifling of human rights and freedoms under the revolutionary eras of the 1979-82s induced the Ghana Bar Association (GBA) to demand that the regime introduce measures to protect human dignity including religious freedoms.⁹¹⁷ As a result, the High Court also saw the need in protecting

⁹¹³ Gordon Crawford, "Democratisation in Ghana: Assessing the impact of Political Aid" Polis Working Papers No. 8, (2004) 63

⁹¹⁴ Abdul-Gafaru Abdulni, "Political context Study –Ghana" Human Rights, Power and Civic Association Research, (Universities of Oslo, Leeds and Ghana, 2009) 11

⁹¹⁵ Tapan P. Biswal, *Ghana Political and Constitutional Development* (Northern Book, New Dehli Centre 1992)187

⁹¹⁶ Mike Quaye , "Law, Justice and the Revolution" in E. Gyimah-Boadi (ed), *Ghana Under PNDC Rule* (Senegal Codesria, 1993) 173-174

⁹¹⁷ Kwame A. Ninsin, *Ghana's Political Transition- 1990-1993: Selected Documents* (Freedom Publications, Accra-Ghana 1996) 79

political and commercial independence of Ghanaians under the 1992 Constitution rather than enforcing access to social amenities including access to water and medicines.⁹¹⁸

While, there is no judicial decision dealing with the right to water and health/medicines in Ghana, some judicial decisions are relevant because they deal with the human rights provisions of the Constitution and grant some political rights to individuals. For example, in *Ahumah-Ocansey v Electoral Commission*⁹¹⁹ and the Centre for the *Human Rights and Civil Liberties (CHURCIL) v Attorney-General and Electoral Commission* (consolidated).⁹²⁰ These cases are about voting rights of prisoners and the Supreme Court held in favour of both Plaintiffs by reasoning that Article 42 of the Constitution “had expressly conferred the right to vote, being a fundamental human right, on all Ghanaians save those below eighteen years of age and persons of unsound mind.” Here, the cases were brought primarily to protect the interest of prisoners as public interest litigation and these two cases highlight that the court allowed petitions from an individual (in *Ahumah-Ocansey* case) and a NGO (CHURCIL) although they were not themselves aggrieved. These judgments show that Ghanaian Supreme Court is willing to uphold the constitutional provisions by allowing petitions to protect public interest.⁹²¹

⁹¹⁸ Gordon Crawford, (n 913) 11

⁹¹⁹ The facts of the *Ahumah-Ocansey* case are: a private legal lawyer and an advocate of prisoners’ rights sued on behalf of all categories of prisoners (both remand and convicted prisoners) in respect of up-coming election arguing that denial of denial of voting rights to the prisoners by the electoral Commission was in violation of their fundamental human rights as citizens of Ghana in respect of Articles 42 and 45 of the Constitution.

⁹²⁰ CHURCIL a NGO advocacy group sought relief at the Supreme Court of Ghana, on behalf of remand prisoners’ against the Electoral Commission that denying remand prisoners from registering to participate in the forth-coming Presidential and Parliamentary Election, was in breach of Article 42 of the Constitution. CHURCIL, therefore sought a declaration in light of section 7(5) of the Representation of the people Law (PNDCL 284); asking the Supreme Court to declare the Electoral Commission’s action as unconstitutional. The Attorney-General Responded in arguing that “prisoners had no right to register because they have no residence according to the literal meaning of section 7(5) PNDCL 284 and Article 295 (1) of the 1992 Constitution.

⁹²¹ Aharon Barak, *Purposive Interpretation in Law* (Princeton university Press, 2005) 88

In another case—*New Patriotic Party v Attorney-General*,¹⁶ Justice Atuguba held that the “rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this chapter 5, shall not be regarded as excluding others not specifically mentioned which are consigned to be inherent in a democracy and intended to serve freedom and human dignity of man.”⁹²² The Judge’s decision suggests that with respect to protecting and promoting human rights, an expansive approach of interpretation may be adopted to enhance the dignity of humanity, even though there may be occasions where specific written constitutional provisions are lacking. Atupare argues that: “the Supreme Court has endeavoured to interpret the provisions of the Ghanaian Constitution by giving effect to the provisions of the Covenant on Economic Social and Cultural rights, though these provisions have not been translated into the legislations of Ghana.”⁹²³ The above decision suggests that there is scope for the Supreme Court to adopt an expansive purposive approach⁹²⁴ of interpreting the human rights provisions of the Constitution such as access to water, medicines/health to the majority of Ghanaians.⁹²⁵

Furthermore, it has been suggested by some scholars that Judges of the Supreme and High Courts of Ghana have been hesitant in promoting access to water and medicines because Ghana is constitutionally a dualist state.⁹²⁶ Two alternative theories have been

⁹²² *The New Patriotic Party v Attorney-General*, *ibid*

⁹²³ Peter Atudiwe Atupare, “Judicial Review and the Enforcement of Human Rights: The Red and Blue Lights of the Judiciary of Ghana” (A Master’s Thesis, University of Ghana 2008) 41

⁹²⁴ The expansive approach adopts three methods: textual, subjective and teleological ways of interpreting provisions of constitution or law.

⁹²⁵ Barak, (n 921) 88.

Purposive approach to interpretation of legislation seeks to explain provisions or law in light of Parliament’s intention; by way of filling in gaps in the respective provisions.

⁹²⁶ Jean Chrysostome Rubagumya, “Application of International Human Rights Instruments (IHRIs) by Domestic Courts: A Comparative Study of Rwanda and Ghana” (A Master’s Thesis, University of Ghana, 2011) 3. See also K. Appiagyei –Atua-Bonsu, “Ghana at 50: The Place of International Human Rights norms

proposed as the underlying hesitation among Judges in Ghana to promote access to medicines and water.

These are namely monist and dualist.⁹²⁷ Nonetheless, Griffith argues that the judiciary owes an obligation towards the people in whose interest and protection they have been appointed, stating:

“They see governments come like water and go with the wind. They owe no loyalty to ministers, not even the temporary loyalty which civil servants owe... Judges are also lions under the throne but that seat is occupied in their eyes not by the Prime Minister but law and their conception of the public interest. It is to that law and to that conception that they owe allegiance. In that lies their strength and their weakness, their value and their threat.”⁹²⁸

The view is that members of the Ghanaian judiciary have a responsibility to protect the public interests by interpreting human rights provisions of the 1992 Constitution with respect to promoting access to medicines as highlighted in the Banjul Charter. Moreover, one of the core values emphasised during the Bangalore Colloquium/Summit⁹²⁹ (for Commonwealth Judges) is that judges must endeavour to be more independent-minded so as to protect the human rights of their citizens without regard to government’s

in the courts, <www.academia.edu>, accessed 10th September 2016; Magnus Killander and Horace Adjolohoun, “International Law and Domestic Human Rights Litigation in Africa: An Introduction” (2010) SSRN 11; Asare Larbi Paa Kwame, “The Justiciability of the Right to the Development in Ghana: mirage or possibility?” (2016) *Strathmore Law Review*, 43

⁹²⁷ Mirna E. Adjami, “African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence” (2003) 24 *Mich. J. Int’l L.* 108-109

According to the monist theory, international law and municipal law constitutes a single legal order with the international law, taking precedence over the national laws in matters of conflict. Contrary, according to the dualist theory, international law and municipal law are two separate legal regimes. Whereas, international law regulates relations between states, municipal law assumes primacy over international law by regulating national matters. Thus, international law can be given effect in municipal or domestic jurisdictions only if the legislature in the domestic jurisdiction, has enacted a specific law to incorporate the international provisions. Adjami, further explains that most Francophone countries are associated with the Monist system, whilst Anglophone countries, after regaining independence, built their legal systems on the dualist system; as a rejection of their colonial masters’ domination. Ghana, an Anglophone country falls under the prism of the dualist system, therefore, international law will be given effect in the country provided that a law has been enacted to recognise effect of that international provision.

⁹²⁸ J.A.G. Griffith, *The Politics of the Judiciary* (3rd edn Fontana Press, London 1985) 199

⁹²⁹ The Commonwealth Secretariat, “*Developing Human Rights Jurisprudence: Eight Judicial Colloquium on the Domestic Application of International Human Rights Norms, Vol 8* (The Commonwealth Bookshop 2001) 205-9

interferences, private interests or multilateral agreements, which seek to place profit, over and above human wellbeing.⁹³⁰ A commentary on the Bangalore Principles, noting that dualist systems within Commonwealth countries owe a duty to protect the general human rights of the people, states that: "...in many of those States in which the dualist theory is preferred, the recognition and observance of fundamental human rights and freedoms is nevertheless now generally accepted as obligation or certainly as influential in the ascertainment of and expression of domestic law."⁹³¹ Therefore, access to medicines in the Ghanaian context can be given protection in light of the principle and commentary of the Bangalore Colloquium. This resonates with Griffith, who argues that Judges of the High Court should assume their roles as independent "lions" vested with judicial power to promote the interest of health.⁹³²

This independence is illustrated in *New Patriotic Party v Inspector-General of police* (1993)⁹³³ where Justice Hayfron-Benjamin referred to foreign cases and international laws in finding for the Plaintiff by explaining that: "Constitutional protection of human rights should be adhered to strictly without bowing to subservient rules of the NRCD."⁹³⁴ The fact that Justice Hayfron-Benjamin relied on external cases and international laws to protect a fundamental human right in Ghana, suggests that similar approach(es) can

⁹³⁰ *Measures for the Effective implementation of the Bangalore Principles of Judicial Conduct* (The Implementation Measures), adopted by the Judicial Integrity Group at its Meeting held in Lusaka, Zambia (21-22 January 2010) <www.summitofhighcourts.com.2013/standartsUN2.pdf>, accessed on 30th April 2015

⁹³¹ Commentary on the Bangalore Principles of Judicial Conduct, (September 2007) 25, <http://www.unodoc.org/documents/corruption/publications_unodoc_commentary-c.pdf>, accessed on 1st May 2015

⁹³² Griffith (n 359) 199

⁹³³ Ghana: *New Patriotic Party v Inspector-General of Police* (2001) AHRLR 138 (GhSC 1993)

In this case the New Patriotic Party (the Plaintiff) sought permission from the Inspector-General of Police (the Defendant) to undertake peaceful demonstrations and rallies in Ghana. The permission was granted and at a later stage withdrew by the Defendant, on grounds that, the rally and demonstrations constitutes a threat to public safety and disorder, in respect of sections 7,8,12 and 13 of the NRCD. The Plaintiff sought redress at the Supreme Court of Ghana, arguing under article 21(1) (d) of the 1992 constitution, in pleading that the withdrawal of the permit contravenes their fundamental human rights.

⁹³⁴ *The New Patriotic Party v Inspector-General of Police*, *ibid.*

be adopted to advance access to medicines as a human right. Feng-Wu also reasons that Pharmaceutical corporations should endeavour to respect human rights of the various countries in which they operate to ensure that access to medicines is promoted in consonance with modern principles of development.⁹³⁵ Kirby underscores the crucial role of judges in promoting the interests of the public, arguing that: “Judges occupy a special place in ensuring that laws are fulfilled in the daily lives of the Citizens in whose interest, they assume office.”⁹³⁶

While the Supreme Court is willing to allow individuals or NGOs to bring claims on behalf of aggrieved people and adopt an expansive approach to interpret constitutional provisions, it is problematic in terms of the independence and accountability of the judiciary. The Constitution provides the neutrality of the judiciary by stating that: “judicial power of Ghana shall be vested in the judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given the final judicial power.”⁹³⁷ Article 125 (1) of Ghana’s Constitution states that: “justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution.”⁹³⁸ To ensure the neutrality and independence needed to promote this supreme function by the judiciary, the Constitution has made it clear that neither the President, Parliament nor any organ has any power to interfere in the deliberations of the judiciary, thereby,

⁹³⁵ Chuan –Feng-Wu, “ Transnational Pharmaceutical Corporations’ Legal and Moral Human Rights Responsibilities in relation to Access to Medicines” (2012) Asian Journal of WTO & International Health Law and Policy, 128

⁹³⁶ Michael Kirby, “Judicial Colloquium on Human rights Law in Bloemfontein, South Africa” (2009) Australian Law Journal < http://www.michaelkirby.com.au/images/speeches/1990s/vol31/1088-ALJ_judicialcolloquium_on_Human_Rights_Law-inBloemfontein_south_Africa.pdf > accessed 23rd March 2014

⁹³⁷ Article 125(3), 1992 Constitution of Ghana,(n 333) 91

⁹³⁸ The 1992 Constitution of the Republic of Ghana ibid

conferring autonomy upon the judiciary to ensure an effective system of dispensing justice in a democratic society.⁹³⁹

Bimpong-Buta, while discussing the role of the Supreme Court towards the development of the constitutional law of Ghana states that: “it is interesting that the Supreme Court has not as yet indicated its attitude as to what the constitutional guarantees on the independence of the judiciary entail in practical terms.”⁹⁴⁰ The lack of independence in the Ghanaian Supreme Court is given a further affirmation in the case of *GBA v Abban*.⁹⁴¹ The Supreme Court declined jurisdiction⁹⁴² by saying that: “the constitution reserved the question regarding the appointment of the Chief Justice, to the President, Parliament and Council of State. Thus, it is not the province of the Supreme Court to determine the moral character of a judge.”⁹⁴³ Obviously, the Supreme Court’s refusal to assume jurisdiction in this important constitutional legal battle, presupposes that it is not independent enough to exercise its constitutional right.⁹⁴⁴ Thus, it may be suggested that the judiciary appears to defer to the government who sanctions its appointment at

⁹³⁹ Article 125 (3); and Article 125 (4), Constitution, *ibid.* 91-92.

⁹⁴⁰ S.Y. Bimpong-Buta, *The Role of The Supreme Court in the Development of Constitutional Law in Ghana* (Advanced Legal Publications, Accra 2007) 42

⁹⁴¹ The *GBA v A-G Justice Abban*, [1995-96] 1 GLR. Here, the Ghana Bar Association sued the Government in its appointment of Justice Abban, one of the justices of the Supreme Court. The GBA argues that Justice Abban lacked integrity and moral uprightness to be promoted to such highest office.

⁹⁴² The jurisdiction of the Supreme Court is to review judicial decisions, supervise all courts below it and having adjudicatory powers as the final court of justice. See also: Theodora A. Christou, *Human Rights Manual and Sourcebook for Africa* (BIICL, UK 2005) 68

⁹⁴³ *GBA v A-G Justice Abban* (n372)

⁹⁴⁴ 103/93 Alhassan Abubakar “Ghana Decisions on Communications/ACHPR- African Commission on Human and Peoples’ Rights” (1996) <www.achpr.org/decision>, accessed 10th September 2016.

In this case, the African Commission on Human and Peoples’ Right (ACHPR) brought a claim on behalf of Abubakar, a Ghanaian citizen, whose human rights to a fair trial had been breached by the Supreme Court and government of Ghana, in respect to fair trial. The ACHPR has stated that the failure to protect the victim’s in right in accordance with the provisions of UDHR and ACHPR is an indication of Ghana’s violation of human rights.

the expense of human rights of the people.⁹⁴⁵ Gyimah-Boadi criticises the Supreme Court stating that “[it] is plagued with conflict of interests as most Senior Judges are politically appointed, thus they lack personal and institutional independence to make decisions against the government and those with political affiliations in the country.”⁹⁴⁶

There are also criticisms about the way social and economic rights are integrated in the Constitution of Ghana which make it difficult for the judiciary of Ghana to implement these rights. Anyidoho criticises the Constitution of Ghana in according supreme status to civil and political rights at the expense of socioeconomic rights, arguing that: “...the Constitution affirms the right of workers to work under fair conditions but does not address the right, nor does it provide for rights to basic materials such as housing, food and water.”⁹⁴⁷ Kludze opines that the hierarchical order of the human rights provisions in the Constitution of Ghana gives the impression that they are unenforceable, unless they are enacted into legislations.⁹⁴⁸ Ocran points out that: “the treatment of International law in the 1992 Constitution does of course suggest that the international law of socioeconomic rights is inapplicable in our domestic legal system or that an aggrieved person cannot make a claim in our courts based on international legal norms.”⁹⁴⁹ This means that Ghanaians have limited chance, if any, of bringing a claim to secure access to justice and promotion of human rights. Thus, the judiciary has very

⁹⁴⁵ Stefan I. Lindberg with Yongmei Zhou, “Co-optation Despite Democratization in Ghana” in Joel D. Barkan (ed), *Legislative Power in Emerging African Democracies* (Boulder, London 2009) 155-157

⁹⁴⁶ E. Gyimah-Boadi “ Strengthening Domestic Governance in Ghana: Proposals for Intervention and Reform”, (UKAid, USAid and Danida, April 2013) 13

⁹⁴⁷ Nana Akua Anyidoho, “Review of Human Rights Discourses” (2006) Research Project –Universities of Oslo, Leeds and Ghana, 8

⁹⁴⁸ A. Kodzo Paaku Kludze, “Constitutional Rights and International Human Rights in Ghana” (2008) 41 (.3) *Isr. L .Rev.* 700

⁹⁴⁹ Modibo Ocran, “Socioeconomic Rights in the African Context: Problems with Concept and Enforcement” (2007) 5 (1) *Loyola University of Chicago International Law Review*, 8

little opportunity to interpret socio-economic rights in Ghanaian courts. Kludze adds that: "... Ghana faces the dilemma of having to promote the sanctity of its Constitutional provisions as well as advancing the cause of human rights under the auspices of international treaties and obligations."⁹⁵⁰

The above discussion shows that the judiciary of Ghana, particularly the Supreme Court as well as the High Court, have contributed in establishing political freedom with respect to voting rights. However, there is a chasm in the promotion of human rights in the areas of social, economic and cultural rights. This is affirmed by Adjami, arguing that the paucity of judicial reliance on international laws and cases in the commonwealth countries, as exists in Ghana; indicates that the promotion of access to medicines and water, though possible in Ghana; remains a distance challenge.⁹⁵¹

Thus, as a strategy of protecting and improving human rights in Ghana, it is suggested that: " there should be established a human rights court to enforce and protect the rights of Ghanaians as a measure to complement the human rights endeavours of the CHRAJ. In this sense, the violations of human abuses suffered but investigated by the CHRAJ may be reduced or protected."⁹⁵²

2.3 Non-judicial forum: objectives and functions of the Commission on Human Rights and Administrative Justice (CHRAJ)

Ghana's attempt to improve access to justice in the areas of social, economic and political development of Ghanaians, led to establishing the CHRAJ. The CHRAJ is

⁹⁵⁰ Kludze, (n 379) 702

⁹⁵¹ See Mirna E. Adjami, (n 927) 166-167

⁹⁵² Nana Akua Anyidoho, "Ghana: Review of Rights Discourse" (2011) RIPOCA Research, Norwegian Centre for Human Rights, University of Oslo, 47

endowed with powers to investigate abuses and cases stemming from human rights violations.⁹⁵³ This section examines the functions of the CHRAJ with a view to answering whether the CHRAJ's role has improved Ghanaians' access to justice and access to water and medicines in the fulfilment of their human rights. This section first considers the creation of the CHRAJ, second, explores the CHRAJ's functions, and third, discusses the special powers, composition of the CHRAJ as well as the procedure of complaints. Lastly, some achievements and limitations of the CHRAJ are examined. The term 'CHRAJ' or 'Commission' is used interchangeably throughout this discussion.

The CHRAJ was founded by the Commission on Human Rights and Administrative Justice Act, 1993,⁹⁵⁴ by the Government of Ghana. The CHRAJ aims to promote human rights of Ghanaians through investigations and initiations of legal actions, at the law courts of Ghana.

2.3.1 Functions of CHRAJ

The functions of the CHRAJ as stipulated in section 7 of Act 456 as are follows:

1(a) It shall investigate all breaches relating human rights violations, injustices as well as corruption activities of those in both public and private sectors in order to promote effective social and economic wellbeing of the people; (b) that, the CHRAJ has a duty to investigate government officials and institutions engaged in criminal and fraudulent activities which undermine the social and economic prosperity of the citizens thereby

⁹⁵³ Sam K. Asibuo, "The Role of CHRAJ in Promoting Public Accountability under Ghana's Fourth Republic" (2004) African Training and Research Centre, 17

⁹⁵⁴ Commission of Human Rights Act, 1993 (Act 456) 6 July 1993

<<http://www.unchr.org/refworld/docid/44bf7804.html>>, accessed 13 May 2014.

recommending prosecution proceedings to the Attorney-General to hold them accountable. Although the functions of the CHRAJ in the current legislative instrument does not include investigations pertaining to water and medicines, it is suggested that the CHRAJ's powers must be extended to perform such role so as to protect access to water and medicines as a human right. (c) Also, the CHRAJ has the mandate to investigate activities of Ghana's State pension institutions to ensure that citizens on retirement receive the appropriate pension scheme in order to improve their living standards; (d) CHRAJ has a duty to educate the Ghanaian public on their civic duties, human rights and other social and political rights to consolidate the democratic foundation of the people and the country as a whole.

(2) In order to promote the effective discharge of the above functions, all costs and expenses related to the investigations conducted by the CHAJ into a Complaint shall be borne by the CHRAJ.⁹⁵⁵

The functions of the CHRAJ, stated in the above, show that the CHRAJ has the constitutional power to investigate public and private individuals in matters relating the abuse of power regarding breaches of human rights and corruption charges which may sabotage the economy. The *Ampiah* case⁹⁵⁶ for example, confirms this power. This is because in the face of stiff opposition and resistance by Ampiah to be investigated, the CHRAJ won the legal battle to proceed to investigate Ampiah and consequently made

⁹⁵⁵ Section 7 (2) of the Commission of Human Rights Act (n 385)

⁹⁵⁶ *Ampiah Ampofo v Commission on Human Rights and Administrative Justice* [2005-2006]SCGLR 227

In this case, between 2003-2003 Mr Ampofo the then National Insurance Commissioner of Ghana, fraudulently replaced the former Insurance Company of Ghana Airways with another Insurance Company called Aon. As a result, Mr. Ampofo made illegal gains of US\$96,500. The Commission investigated Mr Ampofo and found him guilty.

an adverse report of findings against him. One weakness of the CHRAJ is that it is unable to administer any form of punishment to the people who have breached human rights. As the case of *Anane*, Minister of Road and Transport who misappropriated public funds and lied when questioned about it indicates⁹⁵⁷; the Commission could only make recommendations to the government that Anane must be sacked.⁹⁵⁸ Being a National Commission on Human Rights without the corresponding power to sanction violators of human right breaches highlights the weak nature of the Commission.

In order to improve its role and effectiveness in promoting human rights, the CHRAJ needs to intensify its public education campaign to Ghanaians about their human rights obligations and protection, and the mechanism through which to seek redress. However, financially, the CHRAJ is constrained to extend its campaign activities of educating the public on their human rights and civil liberties.⁹⁵⁹ As Smith notes: “governments have deliberately reduced the budgets of human rights commissions in Cameroon, Chad, and Togo and other African countries, when they exercise their independent right to criticise their respective governments.”⁹⁶⁰ Smith’s assertion of the financial constraint facing those human rights institutions in parts of Africa similarly reflects the difficulty facing the CHRAJ in Ghana. Thus, an inadequate budget has been a major obstacle in Ghana and other African countries, undermining the efficacy of human rights institutions to promote access to justice.

⁹⁵⁷ *Republic v Commission on Human Rights and Administrative Justice, ex parte Richard Anane* [2007- 2008] SCGLR, 340-370

⁹⁵⁸ The CHRAJ’s investigations found a conflict of interest and abuse of ministerial powers, therefore, recommending that Anane be dismissed from office.

⁹⁵⁹ Nancy Chi Cantalupo, et al, “Domestic Violence in Ghana: the Open Secret” (2010) Georgetown Public Law and Legal Theory, Research Paper No.5-56, 555

⁹⁶⁰ Anne Smith, “The Unique Position of Human Rights Institutions: A Mixed Blessings?” (2006) Human Rights Quarterly, 920

2.3.2 The Powers of CHRAJ

The CHRAJ is granted special powers under section 8 of Act 456 to issue subpoenas to government/private bodies to appear before it as well as recommend prosecution against those who contemptuously disregard its subpoena order. Also, the CHRAJ has the power to question any person in respect of human rights violations or corruption allegations; and to request any public government/private person/organisation to disclose information in respect of any allegation being investigated by it.

These special powers of the CHRAJ can be effectively deployed to curb human rights abuses such as the commission of fraud or abuses of official powers. As examined in the cases of *Ampiah* and *Anane* above, the CHRAJ can be said to have made some progress in removing corrupt government officials from office.

Raz affirms that non-governmental and human rights institutions should adopt measures in “creating additional channels for exercising influence and affecting the international order”⁹⁶¹ so as to promote human rights globally. Deva argues that in respect of UN norms, transnational corporations (TNCs), governmental organisations and private institutions working in respective member-countries of the UN, should honour their obligation to “promote, secure the fulfilment of, respect and ensure the protection of human rights.”⁹⁶² Relying on the word ‘dignity’ as incorporated within the UN Charter as well as the UDHR, McCrudden argues that: “states, institutions including the judiciary

⁹⁶¹ Joseph Raz, “Human Rights in the NEW World Order” (2009) Columbia Public Law and Legal Theory Working Papers, NELCO 25

⁹⁶² Surya Deva, “UN’s Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right Direction?” (2004) 10 ILSA J’Int’L & Comparative L. 493

have a duty fundamentally to use their resources efficiently to protect the human rights of peoples in the spheres of economic, social, political and culturally.”⁹⁶³ There is thus little doubt that national institutions and intergovernmental organisations have a duty to protect human rights in their respective roles. This means the CHRAJ’s powers can be extended to prevent injustice regarding access to justice and socio-economic hardships caused by policies initiated by government organs and private sectors with respect to water and medicines. Unfortunately, since its establishment there has not been any investigation by the Commission on social and economic issues.

2.3.3 Legal Proceedings of CHRAJ

Section 9 (1) of the 1992 Constitution of Ghana provides that “for the purposes of performing his functions under the Constitution, this Act and any other law, the Commissioner may bring before any court in Ghana and may seek remedy which may be available from that court.”⁹⁶⁴ This suggests that the Commission may initiate legal actions on behalf of a complainant, whose human rights have been breached in order to seek redress with to respect human rights violations. This is a novel tool as it will allow the CHRAJ to represent and bring claims on behalf of poor and minority groups who have suffered human rights violations. It has also been suggested that the powers of the CHRAJ/Commission can be extended to allow it to prosecute minor violations relating human rights crimes.⁹⁶⁵ This means lengthy court litigations would be reduced to minimise case-loads in formal courts.⁹⁶⁶

⁹⁶³ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) Vol. 19 No.4 European Journal of International Law, 667

⁹⁶⁴ Section 9 of the Commission of Human Rights Act (n385)

⁹⁶⁵ Bonolo Dinokoplia, “Strengthening Civil Society Participation and Advocacy on human rights protection: the role National Human Rights Institutions” (2004) Centre for Human Rights, Pretoria, South Africa, 40

⁹⁶⁶ Richard Crook, “The State of and Accessible Justice in Africa: is Ghana unique?” (Policy Brief) (November 2011) 2

2.3.4 The Appointment of CHRAJ Commissioner and Officers

The Commission comprises a Commissioner for Human Rights and Administrative Justice, who is referred to as the “Commissioner.”⁹⁶⁷

He/she is assisted by two deputy Commissioners who are equally known as deputy Commissioners.⁹⁶⁸ They are appointed by the President of Ghana in consultation with members of Council of State. Also, the Commissioner shall only be appointed if he /she is qualified to be a Justice of Court of Appeal,⁹⁶⁹ and in the case of a deputy Commissioner, must be in the rank of a Justice of High Court.⁹⁷⁰ They enjoy terms of service comparable to a Justice of Court of Appeal and High Court,⁹⁷¹ and cease to hold office upon attaining the ages of seventy and sixty-five respectively.⁹⁷²

As the Commissioner and his deputies are politically appointed,⁹⁷³ the CHRAJ tends to be politically obedient to the government of the day, so as to hold onto their appointments.⁹⁷⁴ This potentially undermines the role and reputation of the Commission as an independent human rights organ/organisation. With the criticisms regarding the political appointment of the commissioner, one suggestion would be for the President to delegate the appointment of the Commissioner and his deputies to the Parliament.⁹⁷⁵

⁹⁶⁷ Section 2(1) (a), Commission of Human Rights Act (n 385)

⁹⁶⁸ Section 2 (1) (b), *ibid.*

⁹⁶⁹ Section 3(1) (a), *ibid.*

⁹⁷⁰ Section 3(1) (b), *ibid.*

⁹⁷¹ Section 4 (2) (1), *ibid.*

⁹⁷² Section 4 (2) (2), *ibid.*

⁹⁷³ The appointment of the Commissioners of CHRAJ is done by the president in consultation with the Council of Elders. Yet, the role of the council of Elders is merely advisory in nature; thus, they tend to rubber stamp any appointment made the President. Also, such appointments are political because the candidates are chosen from the President’s political party.

⁹⁷⁴ Stephen Sondem, “National Human Rights Institutions: the Ghanaian Experience” (2012) 16 *Journal for European Affairs*, 239

⁹⁷⁵ *Ibid.*

The Parliament can then vet, interview, and scrutinise any candidate prior to being appointed as Commissioner/s.⁹⁷⁶ This would not only ensure the credibility and transparency of the Commission/CRAJ, but also give it the confidence to perform its constitutional roles without fear of governmental threats or political influences.⁹⁷⁷ Consequently, this may enhance access to justice without fear or favour to any party.

2.3.5 Regional Branches of the CHRAJ

There are regional and district branches of the Commission established to ensure that human rights and dignity of the person as enshrined in the Constitution of Ghana and other international treaties are respected and consolidated.⁹⁷⁸ The regional and district Commissioners are appointed as representatives of the Commission to promote human rights including access to water and medicines. They receive complaints from the public in respect of government and private institutions which violate human rights of ordinary citizens and thereby conduct investigations into the human rights abuse in the districts and regions.⁹⁷⁹

The regional branches can assure people that there is a Commission responsible for human rights protection to which the people can seek redress at the district level. Unfortunately, most districts in the country have no such branches and those which have

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid.

⁹⁷⁸ Section 10 (1), Commission of Human Rights Act (n 385).

⁹⁷⁹ Section 11 (1) (a) and (b), Commission of Human Rights Act (n 385)

them are poorly resourced.⁹⁸⁰ In most cases the regional and district branches have no qualified personnel to run it.⁹⁸¹

2.3.6 The Complaint Procedure

With respect to procedures relating to complaints and investigations, the complaint may be made either orally or in writing. If the complaint is written, the complainant is required to sign the complaint. Where a person is unable to make the complaint personally due to death or sickness, a complaint may be made on his/her behalf by family relatives, personal representatives and individuals of their choice.⁹⁸²

First, the CHRAJ's complaint procedure does to some extent appear to offer Ghanaians the possibility of access to justice through which breaches of human rights can be protected inexpensively.⁹⁸³ Secondly, the CHRAJ has the power to obtain information from the public, institutions or persons as may be necessary in the course of its investigation.⁹⁸⁴ The Commission may also pay for expenses incurred by people called upon to give evidence in an investigation as well as allowance to those who might have lost time in respect of earnings, to attend the Commission's investigation.⁹⁸⁵ The procedural mechanism may appear encouraging to attract the people of Ghana to approach the Commission with respect to their complaints of human rights violations;

⁹⁸⁰ E.K. Quashigah, "The Ghana Human Rights Commission and Administrative Justice", in Birgit Lindsanaes, Lone Lindolt and Kirstine Yigen (eds), *National Human Rights Institutions*, (The Danish Centre for Human Rights, Denmark 2000-1) 209

⁹⁸¹ E. Gyimah Boadi, et al, "Achieving Successful Governance in Africa: The Case of Ghana's Commission on Human Rights and Administrative Justice" Ghana Center for Democracy, p 8

⁹⁸² Section 12 (1), (2) and (3), Commission of Human Rights Acts (n 385).

⁹⁸³ Godfrey M. Musila, "The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights" (2006) *African Human Rights Law Journal*, 450

⁹⁸⁴ Section 219(d), Commission of Human Rights Act (n 385)

⁹⁸⁵ Section 14 (1), (2), (3) and (4) *ibid.*

especially with respect to water and medicines. However, it is not known how feasible and viable this is in practice.

The establishment of the Commission, in itself, is a phenomenal achievement given that Ghana went through difficult political times with little opportunity for Ghanaians to exercise their democratic and human rights during the revolutionary days of the 1980s.⁹⁸⁶ During the 1980-1990s, Ghana was ruled by a military leader J.J. Rawlings. This regime brought the country to a halt politically by suspending fundamental human rights and the Constitution of Ghana.⁹⁸⁷

Moreover, as discussed above, the Commission's positive contributions are documented in exposing corruption in government as well as promoting the human rights of women and girls.⁹⁸⁸ Similarly, the Commission also investigated ex- President J.A. Kuffour in 2006 in respect of an allegation that the President had acquired a private hotel close to his private Residence in Accra.⁹⁸⁹ Although there was no specific recommendation made in light of the ex- president's investigation, it must be pointed out that the fact that an attempt was made to investigate is an encouraging and a positive contribution by the Commissioner. This may project the Commission in favourable light

⁹⁸⁶ Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers, Netherlands 2001) 229

⁹⁸⁷ John L. Adedeji, "the Legacy of J.J. Rawlings in Ghanaian Politics, 1979-2001" (2001) 5 (2) African Studies Quarterly, 7

⁹⁸⁸ International Association of Anti-Corruption Authorities (IAACA), 5
<<http://www.iaaca.org/antCorruption/ByCountriesandregions/G/Ghanajidou/201202/t201209801536.shtml>>, accessed 13th May2014

⁹⁸⁹ Ibid.

because future investigations can be undertaken against other government appointees using the presidential investigation as a precedent.

Furthermore, there are criticisms against the CHRAJ/Commission with respect to its weakened power to impose penalties; the CHRAJ plays a significant role in the realisation of human rights in Ghana. This is evidenced in the fight to stem corruption among government officials.⁹⁹⁰ Although there has not been a specific legal battle undertaken by the Commission to grant relief to Ghanaians with respect to accessing water and medicines, the success registered in the *Ampiah* case, coupled with its positive investigatory activity which led to the sacking of Dr Anane, the Minister for Roads and Transport, suggests that the Commission can do more to promote social justice, especially with an increased budget and more qualified personnel. However, its powers to protect human rights and access to justice are still limited as it cannot of its own power institute any fines or custodial sentences to back its findings.

The discussion in sections 2.2 and 2.3 has shown that every Ghanaian has been guaranteed a Constitutional right to bring a claim in the court i.e., that the Supreme Court and High Court of Ghana have demonstrated their judicial responsibility with respect to the Constitutional human right provisions by granting voting right to some disenfranchised Ghanaians. However, the judiciary's independence and accountability to a large extent, is limited and restricted. Although there are limitations and weaknesses of the CHRAJ, the existence of the CHRAJ needs to be encouraged by the government as it can educate Ghanaians on the availability of human rights protection. This can be

⁹⁹⁰ *The Republic V Commission of Human rights and Administrative Justice ex parte Richard Anane* [2007-2008] SCGLR 340-370

achieved by increasing the budget of the CHRAJ and placing the Commissioner's appointment under the supervision of Parliament. In relation to improving the CHRAJ's role in protecting the human rights of Ghanaians, Anyidoho explains that: "the CHRAJ should be proactive to evoke Article 35 especially sub section (4) as a relevant instrument to enforce and protect human rights abuses inflicted on Ghanaians by the government and other public institution."⁹⁹¹ Thus, the CHRAJ can be more forceful with the protection of human rights in Ghana by holding the government, organs of the state including private institutions to account for violations of human rights. Similarly, by collaborating with the Commonwealth Human Rights Initiative (CHRI) in Ghana, which includes newly qualified lawyers working to promote the rights of under-privileged; the CHRAJ can broaden its functions to secure some prosecutions relating human rights violations and, perhaps with access to water and medicines, too.⁹⁹²

3. Legal Aid and Costs of Litigation

Legal aid is a necessary and crucial tool as it helps the poor in society to bring genuine claims and assist them to secure justice with regard to protecting their human rights in the court of law. This section focuses on the availability of legal aid to the people of Ghana with a view to assess whether they are able to access legal assistance in the fight for justice when there are breaches of rights to water and medicines.

⁹⁹¹ Anyidoho, (n 383) 15.

Article 35 (1) of the 1992 Constitution of Ghana states: "Ghana shall be a democratic state dedicated to the realisation of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom government derives all its powers and authority through the Constitution."; Article 35(3) also adds that: "the State shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person."

⁹⁹² Magdalena Sepulveda Carmona and Kate Donald, "Beyond Legal Empowerment: Improving Access to Justice from Human Rights Perspective" (2015) *The International Journal of Human Rights*, 242-259

It begins, firstly, by exploring the nation's responsibility to accord legal aid to victims in respect of fulfilling UN obligations; secondly, it explains the role of lawyers in respect of the ICCPR⁹⁹³ to represent victims in litigations; thirdly, this section explores the African Charter on Human and Peoples' Rights (the Banjul Charter),⁹⁹⁴ on the role of legal representation in respect of victims; and finally, Ghana's legislation on legal aid. Also, this section examines the costs involved in bringing a legal action in the Ghanaian judicial system.

There is international recognition and obligation upon UN member countries to accord adequate legal representation to an accused before any legal institution/ court system.⁹⁹⁵ Such assistance would enable the accused to advance his case through a competent lawyer with the aim of ensuring a fair trial. One document which emphasises the role of legal aid or legal representative to an accused is the United Nations Basic Principles on the Role of the Lawyers.⁹⁹⁶ Although UN Resolutions/Principles are not binding, they act as "recommendatory in determining principles of International law."⁹⁹⁷ According to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems⁹⁹⁸ document, it is the responsibility of every State to ensure that every accused is provided with a legal representative and legal services. Although

⁹⁹³ ICCPR (1966) (n329)

⁹⁹⁴ The African Charter on Human and Peoples' Rights (Banjul Charter) adopted 27 June 1981 (OAU Doc. CAB/LEG/67/3rev.5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

⁹⁹⁵ The UN Principle and Guidelines on Access to Legal Aid in Criminal Justices, adopted on December 21 202, <www.opensocietyfoundations.org/facts-and-sheets/un-guidelines-and-principles-access-legal-aid-criminal-justice-sytem> accessed on 18 February 2015.

⁹⁹⁶ UN Doc A/CONF144/28Rev1 at 118 (1990), Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August to 7 September 1990).

⁹⁹⁷ Gregory J. Kerwin, "The Role of UN General Resolutions in determining Principles of International Law in United States" (1983) Duke Law Journal, 876-899

⁹⁹⁸ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (United Nations New York 2013) 3-6

the focus of this document relates to criminal offenders, it affirms that legal services need to cover every person with limited financial resources and those who cannot afford the costs of hiring lawyers.

In Ghana, the majority of the people are poor and can hardly afford the costs of hiring legal representatives.⁹⁹⁹ In addition, human rights cases are determined in the High and Supreme Courts of Ghana which involve high costs.¹⁰⁰⁰ Thus, without a legal aid, most Ghanaians are unable to initiate human rights actions.

Secondly, legal aid is mentioned in the ICCPR.¹⁰⁰¹ According to the ICCPR, an accused without the resources to hire the services of legal representative ought to be provided with a lawyer under the scheme of legal aid in their respective country.¹⁰⁰² As Ghana has ratified the ICCPR,¹⁰⁰³ Ghana is obliged to extend legal aid to its citizens who cannot afford to pay for legal services and whose human rights are breached.

Thirdly, the Banjul Charter¹⁰⁰⁴ guarantees the right to a counsel as a necessary human right obligation without which most litigants, particularly the poor in Ghana who struggle to secure their human dignity.¹⁰⁰⁵

⁹⁹⁹ UNODC, 'United Nations Office on Drugs and Crimes: Access to Legal Aid in Criminal Justice Systems in Africa Survey Report' (UNODC, 2011) 12

¹⁰⁰⁰ Ibid. 21.

¹⁰⁰¹ ICCPR (n329).

¹⁰⁰² Article 14 (3) (d), ICCPR, *ibid.*

¹⁰⁰³ UN Treaty Collection, < <http://www.chchr.org/en/.../ccpr/.../ccprindex.a.html> > accessed 20 September 2014

¹⁰⁰⁴ African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev5, ILM 58 (1982), entered into force 21 October 1986.

¹⁰⁰⁵ *Ibid.* Article 3

Ghana saw the need to legislate to make the provisions of legal aid as a human right requirement so as to remain compliant with her international and human rights responsibilities with a vision to promote her democratic and judicial systems in respect of international standards.

The Ghana Legal Aid Scheme Act 542 (LASA) was passed in 1997.¹⁰⁰⁶ For the purposes of this section, the following articles are examined briefly. In Article 2 (1), a person is entitled to the scheme of legal aid by showing that he/she has reasonable grounds “for taking, defending, prosecuting or bringing a party to the proceeding.”¹⁰⁰⁷ Article 2 (2) defines the eligibility to legal aid scheme by saying peoples’ whose earnings are below government minimum wage or less.¹⁰⁰⁸ It extends further to criminal and civil matters such as “landlord, tenancy, inheritance - especially intercessions issues, child maintenance as well as civil issues that may be accorded such right by parliament.”¹⁰⁰⁹ So, in effect, legal aid covers criminal and civil litigations which imply that the assistance can be extended to the poor majority in Ghana.¹⁰¹⁰ Also, given that a large section of the population is unemployed, they have limited money to fend for their basic needs. It is in respect of those people that access to water and medicines is a problem, and these people would require legal aid to bring a claim in the court of law.

¹⁰⁰⁶ Ghana Legal Aid Scheme Act, 1997, Act 542, www.wmis2014.org/docs/laws/12%REP/LEGAL%20AIDS%SCHEME%201997%20ACTS%20542.html, accessed on 23rd July 2014.

¹⁰⁰⁷ Article 2, *ibid*.

¹⁰⁰⁸ Article 2 (a) *ibid*.

¹⁰⁰⁹ Article 2 (a) (i) and (ii) *ibid*.

Legal aid is defined in the Act to “consist of representation by a lawyer, including the assistance given by a lawyer, in the steps preliminary or incidental to proceedings or arriving at or giving effect to a compromise to avoid or bring an end to proceedings,” (Art. 3)

¹⁰¹⁰ The majority of Ghanaians’ incomes are below the government’s wage scheme.

Ghana has a Legal Aid Board (LAB) with branches in each of the regional districts.¹⁰¹¹ It comprises of legal experts and professionals from other institutions and agencies. The LAB is assigned with the responsibility to manage and administer the scheme and prepare a report of progress for Parliament and ensure that deserved applicants are appointed to run the scheme.¹⁰¹² The crux of LASA lies in respect of its accessibility as laid out in the mode of application. In Article 24 of Legal Aid Scheme Act 1997 (LASA No.5542), the applicant must fill a form which is submitted to the committee for approval. Then, an appeal is made upon rejection by the committee.¹⁰¹³ The applicant also pays a fee to have the application processed and where the application is granted, such payments are exempted.¹⁰¹⁴

There is a concern that Ghana's legal aid is inadequate given that applicants would have to pay fees in order to have their applications determined.¹⁰¹⁵ Morhe argues that: "25 regional officers managing the Legal Aid Scheme in Ghana's population of 25 million people hardly improves access to the scheme culminating in denial of legal aid to those in need of legal representation."¹⁰¹⁶ Morhe suggests improving the scheme by instituting: "more *pro bono* schemes ... in the legal training of law students as well as legislating for each fresh law graduate who qualifies, to undertake two years legal aid practice - thereby instilling the culture of legal aid practice among future lawyers."¹⁰¹⁷ The

¹⁰¹¹ Renee Aku Sitsofe Morhe, "An Overview of the Legal Aid for Criminal Cases in Ghana: the History and challenges of Providing Legal Aid" (2012) 38 (1) Commonwealth law Bulletin, 106- 8

¹⁰¹² Articles 5 (a) – (d); Art. 10 (1) – (2) and Art. 11 (1) (a) – (e), *ibid.*

¹⁰¹³ Renee Aku Sitsofe Morhe, (n 1011) 112-113

¹⁰¹⁴ Articles 24 (1) (2)-(5) and 25 (1) and (2) of Ghana' Legal Aid Scheme Act (No. 542)

¹⁰¹⁵ There is concern among human rights organisations, victims of human rights abuses and the general public that payment of fees in securing of a legal aid is an impediment to justice.

¹⁰¹⁶ Renee Aku Sitsofe Morhe (n 1011)112-113.

¹⁰¹⁷ *Ibid.*, 115

limited number of lawyers undertaking legal aid cases has also been expressed as one of the challenges confronting the justice system in Ghana.¹⁰¹⁸ Thus, it can be said that the current system of Ghana's legal aid scheme is still underdeveloped.

Certainly, the costs of litigation can be a hindrance to the realisation of justice particularly among poor people in developing countries such as Ghana.¹⁰¹⁹ This section attempts to estimate the costs of litigations in the Ghanaian judicial system with an objective to determine whether the poor majority of Ghanaians would be able to initiate and sustain the challenge of securing access to justice regarding human rights breaches.

The following are some of the charges currently being levied in Ghana under the Ghana Bar Association's (GBA) Guidelines, which were recently agreed upon at a conference titled 'Scales of Fees' as adopted at the General Conference of the GBA.¹⁰²⁰ The charges for legal consultations and proceedings in the various Court are as follows:¹⁰²¹

- Consultation fees \$500 – senior counsel with (10 years and above call to the Bar); while \$200 for junior counsels with 5 years and under call to the Bar), this must in the equivalent of Ghana cedi.
- Human Rights Litigation- GH 2,000- GH 10,000 or hourly rates would apply if the hourly involved exceeds 20% GH 10,000

¹⁰¹⁸ Ghana Justice Sector and the Rule of Law: Discussion Paper, Open Society Initiative for West Africa (2007) 17

¹⁰¹⁹ UN, Handbook on Improving Access to Legal Aid in Africa: Criminal Justice Handbook Series, United Nations, New York, 2011, <www.unodoc.org/pdf/criminla_justice/handbook_on_improvingaccess_to_legal_aid_in_Africa.pdf>, accessed 30th July 2014

¹⁰²⁰ Scales of fees adopted at the 2011 Conference of the Ghana Bar Association <www.codjola.co.uk/r_a_codjoe_law_offices_post_march_2010_launch_3_003.thm> accessed 23th July 2014

¹⁰²¹ Scales of fees adopted at the 2011 Conference of the Ghana Bar Association, *ibid.*

- Brief Fees for District Court- Brief fees at the District Courts should not exceed 50% of the brief fees in the high Courts and Circuit Court.
- High Court- 15% of value of subject-matter or if no value GH 15,000.00
- Court of Appeal-15% of value of subject-matter or if no value GH 20,000.00
- Supreme Court- 15% of value of subject-matter or if no value GH 75, 000.00 – GH 150,000.00.
- Legal opinion and specialised services and Legal Opinion writing
 - Intra-Country –Minimum rate of GH 3,000.00
 - Cross Border- Minimum rate of US\$5,000.00 (cedi equivalent)

Most human rights cases are pleaded at the High Court and Supreme Court of Ghana and the recent charges released by the GBA is GH150, 000.00 cedis in the Supreme Court, with human rights cases being charged at between GH2, 000.00 to 20,000.00 cedis. These guidelines on legal costs in Ghana suggest that it will be difficult for ordinary Ghanaians to pay these costs in order to bring a claim in the Court. This is because a large number of Ghanaians are unemployed, with majority of them living in towns and rural areas with farming as the mainstay of the social and economic sources of income.¹⁰²² Also, the majority of people living in the cities and urban centres of Ghana are on wages below US\$ 2 dollars a day.¹⁰²³ In this regard, it is difficult to perceive how the majority of Ghanaians can institute any legal action for the violation of their human rights.

¹⁰²² A. I. Adeoti, O.I. Oladele and O. Cofie, “Sustainability of Livelihoods through Urban Agriculture: Gender Dimensions in Accra, Ghana” (2011) *Life Science Journal*, 841

¹⁰²³ Gunther Fink, John Weeks and Allan G. Hill, “Income and Health in Accra, Ghana, Results from Time use and Health Study” (2012) *American Journal of Tropical Medicines and Hygiene*, 613-615

The discussion above highlights that legal aid can play a crucial role by enabling a majority of Ghanaians to institute action to secure access to water and medicines. However, so far, the government of Ghana has failed to make legal aid available to poor Ghanaians in accordance with its international obligations.

3.1 Time and Length of Litigation

The time span of litigation in Ghana differs from case to case. This section focuses on civil proceedings because prospective cases in human rights tend to be dealt with in the civil branch of the High Court and the Supreme Court of the country. In this respect, the following are some examples after the Writ¹⁰²⁴ is served:

- the defendant has eight days from the service of writ to file appearance;
- the defendant has five days before the return day to file notice supported by affidavit for leave to defend;
- the defendant has four days clear before return day to file a counterclaim or set-off;
- after granting the motion to defend, the defendant shall file his defence in respect of a direction given by the court;
- the plaintiff, on the other hand, has four days from the day of filing a counterclaim, to file a defence;
- any reply to defence should be done within seven days after the service on the other party;

¹⁰²⁴ At common law, a writ is formal written order issued by an Administration body or judicial organ. At present, warrants, prerogative writs, subpoenas are examples of writs.

- No time limit is provided for the filing of an affidavit in opposition to motion supported by affidavit.¹⁰²⁵

The above time/length of litigation is scanty and hardly makes any reference to proceedings in the High Court and Supreme Court of Ghana, where most cases involving human rights are determined. For example, a case of common tenancy litigation can extend beyond one week.¹⁰²⁶ Tenancy litigation, which is a common litigation in Ghana, is cited here as an illustration to show that human rights proceedings, which is pleaded at High Court and Supreme Court can take months or years to be determined. This gives the impression that the procedure provided in this discussion does not reflect what really happens in the Ghanaian courts. The speculation is that human rights claims may take several months or years to be determined.

Viljoen decries the Ghanaian legal system by stating that: "... the fact that none of the nine international treaties ratified by Ghana had been adopted into national legislations to protect and promote human rights with respect to water or medicines, portrays lack of recognition for the dignity of Ghanaians."¹⁰²⁷ Access to the justice system is also hampered by the lengthy procedural constraints which impact adversely on individuals seeking remedy.¹⁰²⁸ The maxim justice delayed is justice denied is essential in this

¹⁰²⁵ S.A. Brobbey, *The Practice and Procedure in the Trial Courts and Tribunals of Ghana*, (Black Mask Ltd, Ghana 2000) 270.

¹⁰²⁶ Richard C. Crook, "State Courts and the Regulations of land disputes in Ghana- the Litigants' Perspective" IDS Working Papers, (2005) 10-12

¹⁰²⁷ Frans Viljoen, *International Human Rights Law in Africa* (University of Oxford Press, Oxford 2012) 519-24

¹⁰²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

<www.conventions.coe.int>, accessed on 10th September 2016.

Article 6(1) – (3): right to a fair trial, describe the various rights of an accused person or victim during a trial.

regard.¹⁰²⁹ Poverty among the majority of Ghanaians coupled with high court charges may also add to undermine the prospect of Ghanaians wanting to seek justice relating access to water.¹⁰³⁰ Busia associates lack of education among the weaker population of Ghana with denial of human rights.

Busia argues that: “constitutional and legal protection of rights are limited in practice by the conditions of poverty in which women live, lack of education, non-participation by women in political and public life, none of which bodes well for women’s right.”¹⁰³¹ This view reflects one prominent obstacle which contributes to reduce access to justice relating to human rights in Ghana because most women are uneducated and therefore are unable to press charges against abusers of their human rights.

3.2 Tribunal

Ghana has two systems of adjudicating litigation and administering justice.¹⁰³² These are made available to Ghanaians through the regular courts and tribunal systems. This section mainly explains the significance of the tribunal system by attempting to provide reasons for its establishment in Ghana. The view is that although Tribunals have no jurisdiction in adjudicating criminal and human rights cases, their jurisdictions can be extended by an act of Parliament to help prosecute minor violations of human rights

¹⁰²⁹ Ibid, section 3 of the above Article 6 enjoins the judiciary and allied law enforcement agencies to discharge justice expeditiously.

¹⁰³⁰ Charles Joseph Mmbando, Towards the Realisation of the Right of Access to Justice: A Comparative Analysis of the Legal Aid Schemes in Ghana and Tanzania, (A PhD University of Pretoria, 3rd November 2008) 29

¹⁰³¹ Nana K.A. Busia Jr. “Ghana: Competing Visions of Liberal Democracy and Socialism” in Abdullahi Ahmed An-Na’im (ed), *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Pennsylvania: University of Pennsylvania Press, 2013) 56.

¹⁰³² Kenneth Agyemang Attafuah, Criminal Justice Policy, Public Tribunals and the Administration of Justice In Rawlings’ Ghana (1982-1992): A Study in the Political Economy of Revolutionary Social Change and Criminal Law Reform, (A PhD Thesis, Simon Fraser University, Canada 1993) 12-14

abuses at the district levels.¹⁰³³ For example, it can be empowered to prosecute crimes relating to the pollutions of the environment, rivers/streams, deforestation, and wanton exploration of mineral resources in towns and villages of Ghana.

The Tribunal system of administering justice was established to promote an efficient and effective adjudication to the majority of Ghanaians who cannot afford the expensive charges of the regular courts. Also, it was founded to expedite determination of cases in the towns and districts so as to provide easy access of forums to justice to the masses.¹⁰³⁴ In this regard, one can see the benefits which would accrue to the ordinary Ghanaian in respect of the claims that can be adjudicated at the Tribunals such as pollution of rivers and the environment. The protection of the environment, rivers/streams and forests can be interpreted expansively as a human right to protect the health and well-being of the people.¹⁰³⁵ And, by vesting the Tribunals with power to adjudicate breaches, may be construed as providing as access to justice.

Furthermore, the Tribunals were specially created as courts after the 31st December 1981 Revolution of Ghana and have been operating since 1982 as a separate and independent quasi-judicial organ with a responsibility to dispense justice, in addition to the regular courts of Ghana.¹⁰³⁶ There are two principal reasons for the creation of the Tribunals system in Ghana. First, the regular courts were perceived to be deficient and

¹⁰³³ Kenneth Aggyemang Attafuah, “the Shadows behind the Law: An Overview of the Legal Systems in Ghana” National Library of Canada, (1988) iii and 6.

¹⁰³⁴ James C. Read, “Access to Environmental Justice in Ghana (Accra)” in Andrew Harding (ed), *Access to Environmental Justice: A comparative study* (Martinus Nijhoff, Netherlands 2007) 29

¹⁰³⁵ Oliver C. Ruppel, “Third-Generation Human Rights and the Protection of Environment in Namibia” (LLM Lecture 1 delivered at University of Oslo, 4th November 2013) 119

¹⁰³⁶ Kwadwo Afari-Gyan, *Public Tribunals and Justice in Ghana* (Asem Publishers, Ghana 1986) 4.

slow in dispensing justice, and as a result lost public confidence. It was also criticised that in determining cases, regular courts adopted arbitrary standards by according recognition to people with class, status and wealth.¹⁰³⁷ Secondly, the tribunals were established in the spirit of the revolutionary ideals that is to reconstruct major State institutions in the hope of weeding out corruption and injustice, thereby removing abuses for the majority of the public who are in need of justice.¹⁰³⁸

With respect to the differences between tribunals and regular courts, it can be said the tribunals have wider discretionary powers.¹⁰³⁹ Also, in comparison with the delay and complicated procedure in regular courts, the costs to bring a case before the tribunals are low and the tribunals offer easy access to the people especially those at the district level.¹⁰⁴⁰ However, most of the personnel working in the tribunals, except the chairmen, are often not trained in the intricacies of laws and procedures of the justice system.¹⁰⁴¹ This undermines the entire Ghanaian judicial set-up.

3.3 Public Right of Access to Information

This section explores the right to information (RTI) in Ghana. RTI emerged in Ghana as a result of civil society pressure on the government to adopt measures to promote

¹⁰³⁷ Ibid., 4

¹⁰³⁸ Ibid. 5

¹⁰³⁹ *Re Akoto* (GLR 1961-523): this case decided that it was constitutionally acceptable for Ghanaians to be deprived of their human rights in respect of the 'Preventive and Detention Act' under the 1960 Constitution of Ghana.

¹⁰⁴⁰ Prince Opoku Agyemang, "The Shadows Behind the Law: An Overview of the Legal Systems in Ghana" (2004) 2-3, <http://works.bepress.com/prince_opokuagyemang/1/>, accessed 20th September 2016

¹⁰⁴¹ Afari-Gyan, (n 467) 9

access to public information as of right.¹⁰⁴² This development led to the drafting of ‘Right to Information Bill’ (Bill) in 2007.¹⁰⁴³ This discussion traces, firstly, the right to information as a human right under international law and also the 1992 Constitution of Ghana with a view to assess whether Ghanaians are granted adequate access to information; so as to make decisions affecting their constitutional rights; secondly, the Right to Information Bill (2007)¹⁰⁴⁴ is discussed to evaluate whether the national bill contains all the necessary provisions to grant the people of Ghana a genuine right and access to information so as to secure justice in light of international agreements ratified by Ghana; and thirdly, recommendations made by the Commonwealth Human Rights Initiative (CHRI)¹⁰⁴⁵ is examined as a way of improving access to information in Ghana.

First, in its Article 19, the UDHR proposes that access to information is a human right.¹⁰⁴⁶ This right obliges governments, state agencies and private institutions to make available to their citizens, information held on behalf and in respect of government policies; to enable citizens to form opinions, engage in public discussions or express their views through writing without discrimination.¹⁰⁴⁷

¹⁰⁴² Gilbert Ronald Sendugwa, “Legislation and Implementing Public Access to Information in Africa: What are the Incentives for Government and Civil Society Actors?” (2010) 7 <www.spaa.newark.rutgers.edu>, accessed 20th September 2016

¹⁰⁴³ Kofi Koranteng Adu, “Ghana’s Right to Information Bill: An Opportunity for the Implementation of the Digital Reservation Infrastructure” (2013) 4 (10) *Journal of Emerging Trends in Computing and Information Sciences*, 795

¹⁰⁴⁴ The Right to Information Bill (2007) Ghana

¹⁰⁴⁵ The Commonwealth Human Rights Initiative (CHRI) is a NGO based in Delhi, India, with the objective to promote human rights; especially in the area of right to information. It proposes that the right to information is a fundamental human right,

<http://www.humanrightsinitiative.org.postoftheday/2013/Dec/GhanaRTIBill2013_CHRI_Critique_ATI_Team_Dec13.pdf> accessed 5th April 2014

¹⁰⁴⁶ UDHR (n 20) Article 19 states that: “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless frontiers.”

¹⁰⁴⁷ Ibid.

Second, Article 21 (1) (f) of the 1992 Constitution of Ghana states that every Ghanaian has a “right to information.”¹⁰⁴⁸ This constitutional right is in accordance with the universal human rights which urges countries to make information available to their citizens as a way of fostering democratic governance.¹⁰⁴⁹ Furthermore, Banisar argues that: “freedom of information is an essential right for every persons because it empowers individuals and groups to protect their rights by guarding against abuses, mismanagement and corruption; thereby enabling governments to gain the confidence of their citizens by way of the contributions they make towards national decision and policy makings.”¹⁰⁵⁰ Significantly, this right has been recognised by the UN General Assembly as a critical element in the promotion of good governance with the view to enhance human rights.¹⁰⁵¹ Also, there are views expressed by some experts¹⁰⁵² that Ghana’s ambition to make access to information as a human right is a positive attempt which recognises international democratic principles and values of governance. But the current bill falls short in achieving those aspirations,¹⁰⁵³ as explained below:

(a) That, making the Minister responsible for providing information has the prospect of undermining the right and access to information. As the Minister

¹⁰⁴⁸ Article 21 (1) (f) of the 1992 Constitution of Ghana

¹⁰⁴⁹ Musah Adams, “Freedom of Information and Records Management in Ghana” (2006) 16 (1) African Journal of Library, archives and Information Science, 29

¹⁰⁵⁰ David Banisar, “The Right to Information and Privacy: Balancing Rights and Managing Conflicts” (2011) The World Bank Working Paper, (Washington D.C.) 5

¹⁰⁵¹ UN General Assembly adopted Resolution 59(1) right to information as a human right, <www.article19.org/data/files/pdfs/publications/foi-as-an-international-rigt.pdf>, accessed on 18th February 2015

¹⁰⁵² Paivi Tiilika “Access to Information as a Human Right in the case of European Court of Human Rights” (2013) Vol. 5 Issue Journal of Media Law, 79-103; see also: Maeve McDonagh, “The Right to Information in International Human Rights Law” (2013) 13(1) 25-55; Cheryl Ann Bishop, Access to Information As a Human Right (Lfb Scholarly Pub LIC Canada, 2011) 60-66

¹⁰⁵³ Adams (n 1049)

is the member of the reviewing committee,¹⁰⁵⁴ there is a fear that she/he may influence the complaint procedure thereby reviewing the complaint in favour of the government.¹⁰⁵⁵

(b) That, there is a lack of awareness with respect to which information is public or private. At present, there are ambiguities in the bill as it does not explain clearly the- differences between private and public information; thus, creating confusion with respect to the objectives of the bill.¹⁰⁵⁶

(c) That, the bill is replete with extensive exemptions and inherent weaknesses. For example, clause 5(1) (a) gives broad exemption powers to the President and the vice President from disclosing information to the public.¹⁰⁵⁷

These problems undermine the object of the bill, because the President and the Vice President may hide under such broad exemption powers not to release vital information regarding government activity to the public. Also, it has been pointed out that the powers conferred on the President to determine which information is classified or non-classified may dilute the effectiveness of the bill. The concern is that information may be arbitrarily designated as classified in order to deny access to the public.¹⁰⁵⁸

The above bill demonstrates, that while the potential exist to promote freedom and right of access to information in the nascent democracy of Ghana, the proposed bill is flawed.

¹⁰⁵⁴ The reviewing committee is an oversight body charged with the responsibility to supervise and monitor access to information, in furtherance of good and democratic governance, with the object to promote human rights. This body is expected to monitor by progressively reviewing the implementation of the bill.

¹⁰⁵⁵ Adams (n 1049).

¹⁰⁵⁶ Adams (n 1049)

¹⁰⁵⁷ Seema Choudhary, Venkatesh and Amrita Patel (n-----?)13

¹⁰⁵⁸ Kwadwo Appiagyei-Atua, "Access to Information and National Security in Ghana: Drawing the Balance" Research Paper for OSIWA, Faculty of Law, University of Ghana, Legon, Ghana (2010) 2.

One such flaw is that there is ambiguity in some of the provisions, which makes it difficult to understand the difference between classified and non-classified information.¹⁰⁵⁹ Also, the bill falls short of promoting access to information in respect of human rights and effective governance because Clause 6¹⁰⁶⁰ is broad and vague, making it difficult for the public to understand what the provisions stand for. Furthermore, it has been recommended that the powers of the President and the Minister for information included in the Bill must be reviewed and there should be an independent information Commission¹⁰⁶¹ to deal with complaints. This would empower Ghanaians to access information freely, and aware of the human rights breaches that affect their rights.

In order to improve the Bill of 2007, the CHRI offers some recommendations.¹⁰⁶² For example, the CHRI has recommended that the preamble to the Bill must be expanded to include the president, the vice president and parliament as legally obliged, to disclose information to the public because public interest overrides political expediency.¹⁰⁶³ Also, it has been recommended that the Supreme Court should determine disputes relating to information in an open court to restore confidence in the public, except in cases where security may be comprised.¹⁰⁶⁴

¹⁰⁵⁹ Anne McShane, "Our right to information: We need it and we don't have it", CHRI (2006) <www.humanrightsinitiative.org/chrisnews/2006/our_rti_we_need_it_we_don't_hv_it.pdf>, accessed 18th February 2015

¹⁰⁶⁰ Clause 6 of the Right to Information Bill of Ghana, (2007)

¹⁰⁶¹ Clause 40 (b) of the Right to Information Bill of Ghana (2007)

¹⁰⁶² CHRI (n 476)

¹⁰⁶³ The Preamble to the Right of Information Bill of Ghana (2007) 3

¹⁰⁶⁴ Clauses 2 and 43 of the 'right to information Bill of Ghana, (2007)

Another CHRI recommendation deals with the removal of any barrier that restricts access to information. It states that the government should endeavour to remove every barrier designed to make access to information a burden. This can be done by removing any arbitrary charges in respect of securing information. In the case of charges being levied, this should be determined by the information officer¹⁰⁶⁵ rather than the Minister for Information.¹⁰⁶⁶

These recommendations show that constitutionally Ghanaians have a right to access information from the government, private individuals and other institutions. However, for the current Freedom for Information Bill to fulfil this constitutional right in Ghana, it is imperative that the government accepts its constitutional responsibility and international human rights obligations by amending the bill as recommended by the experts in Ghana and the CHRI.

This section has argued that information is a critical element needed by the government of Ghana to plan and execute strategic policies to promote the objectives of social and economic projects. Similarly, the people of Ghana require quality access to information with which to make decisions affecting their lives and also to enable them to challenge violations of human rights that stem from arbitrary policies of government and other institutions.

¹⁰⁶⁵ This is ensure that levies are imposed reasonably so as not to deny access to information.

¹⁰⁶⁶ Clause 25 of the Right to Information Bill of Ghana (2007)

3.4 Public participation in the decision making

Access to information on its own cannot be useful to the individual, public or private institutions, unless it is combined with practical and active public participation. In this respect, this section discusses the culture of public participation among Ghanaians with respect to decision-making and access to securing justice from the judiciary. With this aim, this section first explores the right to participate in public decision-making as a human right under international law; constitutional background of the right of Ghanaians to participate in decision-making at the government level; secondly, some examples where Ghanaians have engaged in participatory decision-making are explored; and thirdly, this section assesses participatory decision-making with respect to constitutional right to access justice.

In the first place, Article 25 (a) of the ICCPR states that every person has the right to “take part in the conduct of public affairs, directly or through freely chosen representatives.”¹⁰⁶⁷ Similarly, the 1992 Constitution of Ghana grants that: “all citizens shall have the right and freedom to form or join political parties to participate in political activities subject to such qualifications and laws as are necessary in a free and democratic society and are consistent with this constitution.”¹⁰⁶⁸ The Constitution of Ghana not only recognises participation in political activities, but also urges people to get involved actively by way of contributing ideas towards decision-making regarding social and economic matters. Adams suggests that: “for citizens to participate in governance and decision making effectively, the electorate must be well informed and

¹⁰⁶⁷ ICCPR, Article 25 (a) (n 329)

¹⁰⁶⁸ Article 21 (3) of the 1992 Constitution of Ghana

this means granting them access to facts about government businesses and activities.”¹⁰⁶⁹ This view reinforces the fact that access to information regarding the activities of the government in Ghana is a pre-requisite to promote effective participation by the individual in the country’s politics.

The people of Ghana, given a chance, can participate in public consultation with the government and other public institutions in respect of contributing ideas towards national policies to promote human dignity. They can also engage in national debates in reviewing laws and policies, for example, providing ideas towards improving the Information Bill for the benefit of the citizens and the country as a whole. This type of public engagement can impact directly on the nation, by galvanising national and moral support from the people to accept the legislation. Additionally, involving people in the decision-making would promote the government as being people-centred and transparent.

Secondly, there are three examples given below, to help explain levels of participation among Ghanaians at the national, district and community levels, where citizens have had an input in the decision-making processes. However, the results had had mixed success. In this regard, participation is defined as “a mechanism for achieving liberal ends in the sense that it provides a space for ordinary people to organize against any authoritarian tendencies of the state and exploitative habits of the market.”¹⁰⁷⁰

¹⁰⁶⁹ Adams (n 480)

¹⁰⁷⁰ Michael W. Kpessa, “ The Politics of Public Policy in Ghana From Closed Circuit Bureaucrats to Citizenry Engagement” (2011) *Journal of Developing Societies*, 35

In the first example, there had been consultation on social, economic and human rights issues by successive governments in Ghana with policy and think-tank bodies such as the Institute for Economic Affairs (IEA); Center for Democracy and Development (CDD); Third World Network (TWN); African Security Dialogue and Research (ASDR) and Center for Policy Analysis (CPA).¹⁰⁷¹ These bodies are independent organisations which offer their opinions independent of government influences. Yet, they do not represent the broad and varied interest of the Ghanaian population as they are city/urban based and therefore have a limited scope with respect to the needs of the rural majority. However, it is submitted that the government's success in reforming the social security and pension's scheme in Ghana drew on a broader public participation of Ghanaians through the agency of the media and other public agencies, prior to enacting the Pensions and Social Security Act (209) of 2006.¹⁰⁷²

The second example is related to the participation of local residents in a town called Dome, which falls within the district of Asante-Akim in Ghana. The youth in this community were led by their leaders to revolt fiercely against the chiefs and the District Assembly Executive. The reason for such revolt was that royalties being paid to the community had been misappropriated by the leaders. This protest led to government intervention by way of enacting the Timber Resource Management Act (Act 547).¹⁰⁷³ This Act stipulates that there shall be an undertaking between timber merchants and the people of an area where timber resources are exploited; so that social amenities and

¹⁰⁷¹ Ibid., 42

¹⁰⁷² Ibid., 44

¹⁰⁷³ *Handbook for Paralegals in Forest Communities in Ghana*, "Rights and Responsibilities of Forest-Fringe Communities" Center for Public Interest Law (CEPIL, Accra-Ghana 2009) 27- 31

facilities of the peoples' choice are provided to promote the economic and welfare of the people.¹⁰⁷⁴ This development created a social space which allowed for the participation and incorporation of the local residents' input in the enactment of the above legislation. However, this public consultation was not without its challenge.¹⁰⁷⁵ One drawback of allowing public participation, as was in this case, depended upon the capability to manage the large community members in order to give each member an opportunity to participate with his/her contribution towards the decision-making.¹⁰⁷⁶

In the last of the public participation example, the governments of Canada and Ghana signed a development agreement –Northern Region Rural Integrated Project (NORRIP) – which was jointly financed by the Canada International Development Agency (CIDA) and government of Ghana.¹⁰⁷⁷ NORRIP, spanning the selected districts of Yendi and East Mamprusi region, entrusted management and ownership of the project to the people through a participatory decision-making process.¹⁰⁷⁸ The argument is that by involving the people, especially those in whose districts NORRIP was launched, creates a sense of patriotism and sustainability of the project because they will be devoted to protecting the project as their property.¹⁰⁷⁹ Though, the project provided satisfactory means of access to water in those districts; there was a drawback because most members of the community complained that they were not consulted adequately under

¹⁰⁷⁴ Emmanuel Marfo, "Instituting Citizen Participation and Community Representation in Natural Resource Management: lessons from the Social Responsibility Agreement Negotiation in Ghana" (2008) *Community Development Journal*, 400

¹⁰⁷⁵ *Ibid.* 409.

¹⁰⁷⁶ *Ibid.*

¹⁰⁷⁷ The NORRIP Project was an initiative between the governments of Canada and Ghana to water facilities to peoples of the Northern regions; by sinking water boreholes.

¹⁰⁷⁸ Karl Botchway, "Paradox of Empowerment : Reflections on a case study from Northern Ghana" (2001) *World Development*, 137

¹⁰⁷⁹ *Ibid.* 135.

NORRIP.¹⁰⁸⁰ Thus, the short span of NORRIP is attributed to the absence of adequate and effective participation among members in those regions.¹⁰⁸¹

The above discussion shows that participatory decision-making in Ghana is in its infant stage. However, given the effective role played by the local people, for instance, in securing the Timber Resources Management Act coupled with the support to such participation by the NGOs, it is worth pointing out that the participation at grassroots level has made modest gains. Therefore, consultation with Ghanaians can be encouraged with respect to finding a national solution to promote access to water and medicines. At the same time, the government with a view to promoting access to justice in protecting human rights, can solicit for comments, views, and ideas and even organise public debate at the national and local levels to gather public opinions to improve national legislations.

4. Conclusion

This chapter has examined access to justice and explored the judicial and non-judicial forums of Ghana. It has been pointed out that the judiciary has shown limited independence and accountability to promote and protect the dignity of Ghanaians as enshrined in the 1992 Constitution of Ghana. Although the judiciary accorded some human rights protection to the people of Ghana, these protections are limited to political rights – such as voting rights. The importance of access to justice in Ghana and the potential role expected to be played by the Supreme Court of Ghana in the realisation of a right to justice and social justice have been discussed in this chapter. Article 33 (5)

¹⁰⁸⁰ There was grave concern because most people in the region were not directly consulted nor had the chance to participate in the decision-making processes; as few of their leaders were allowed such opportunity.

¹⁰⁸¹ Botchway, (n 1078) 146

of the 1992 Constitution of Ghana clearly empowers the judiciary to adopt measures not specified in the Constitution. However, so far, there has been no case dealing with access to water and medicines. Along with the importance of the CHRAJ as an alternative forum, the discussion also highlighted that the current scheme of legal aid needs to be broadened as a human right and national responsibility. This will help the poor majority of Ghanaians to bring human rights cases (including cases dealing with right to water and medicines) in the High Courts of Justice. In addition, it was pointed out that respect for human rights and access to social amenities, is equally an obligation of TNCs, government agencies, private institutions including individuals operating in respective countries to uphold human dignity over and above corporate profit. These institutions ought to adopt practical strategies to enable human beings to gain access to essential resources – water and medicines without incurring exorbitant charges. Moreover, the right to information holds the potential for creating awareness among ordinary Ghanaians to know about their human rights, violations of these constitutional human rights, and judicial and alternative forums to bring claims. Wide public consultation enables Ghanaians to play an effective role in resource decisions (for example, decisions dealing with forest or water resources) and provide inputs to improve national laws dealing with information, water or health.

CHAPTER 6: Way forward: Conclusions and Challenges

1. Introduction

This chapter aims to highlight the key observations from the preceding chapters of this thesis and to explore some of the challenges for Ghana in relation to trade liberalisation of the health and water sector. This chapter is thus divided into two sections: section one is devoted to analysis whereas section two deals with specific challenges and suggestions for Ghana.

Section 6.2, first, examines the weaknesses in Ghana's capacity to negotiate international agreements, especially financial and loan conditionality agreements. Also, this chapter analyses the impact of the above mentioned economic policies of the WB and IMF on the social and economic standard of living of ordinary Ghanaians. In addition, Ghana's weak negotiation capacity at the WTO is highlighted. Second, section 6.2 also examines some of the key concerns identified in chapter 3 (access to water) and chapter 4 (access to medicines) in Ghana. Section 6.2 then explores some of the concerns in relation to access to justice in Ghana. This concentrates upon issues such as cost of pursuing human rights claims in the High Court of Ghana, and the availability of information to help Ghanaians decide and pursue such claims.

Section 6.3 aims to suggest measures and strategies which can be adopted by Ghana in order to improve her negotiation capacity so as to advance the social and economic wellbeing of Ghanaians as enshrined in the 1992 Constitution of Ghana. To achieve this, discussions under this section draw upon case studies and examples from around the world. For example, judicial protection of access to water and medicines as in the cases of South Africa and India is explored.

Moreover, international practices and case studies are brought in as ways of helping Ghana to devise strategies to negotiate favourable international agreements. For example, developing countries' strategy to grow their domestic economy as a way to reduce dependence on international aid is explored. By way of example, Brazil and India's domestic industrialisation policy is explored. This is because both countries played a leading role at the Doha Trade Negotiation of the WTO¹⁰⁸² on behalf of developing countries and continue to gain some clout on the international scene through domestic economic growth. Also, Bolivia's Constitutional guarantee of access to medicines is worth following. It is because Bolivia has developed an effective national pharmaceutical project aimed at protecting HIV/AIDS people in the country.

Furthermore, recommendations are be made by drawing on examples from South Africa, Gambia and India's constitutional provisions and judicial decisions. These examples from other developing countries serve as models which can be adopted by Ghana to improve social and economic rights, thus access to water and medicines.

¹⁰⁸² The Doha Round of Trade Negotiation < http://www.wto.org/english/tratop_e/dda_e.htm, > accessed 20th December 2015

2 Key observations from previous chapters

2.1 Ghana's negotiating capacity at the IEIs and WTO

Developing countries including Ghana can play a crucial role on the international plane especially at the WTO with respect to the Doha Round of negotiation on access to medicines. Chapter 2 shows that negotiating capacity requires financial resources, competent diplomats with proficient negotiation skills and experience, and international lawyers well versed in international law and WTO laws with training facilities and infrastructure. The list is inexhaustible. However, it is argued that if adequate resources are present, these will enable the country to achieve beneficial outcome. In addition, resource adequacy creates comfort for diplomats to concentrate on negotiation so as to gain better deals for their respective countries.

With the implementation of the WB and IMF SAPs and macro-economic policy of privatisation and liberalisation of economic activities in Ghana, chapter 2 has shown that Ghana's negotiation powers are weak at international economic institutions.¹⁰⁸³ This is because Ghana accepted the WB and IMF loan conditionality- privatisation agenda, SAPs, and liberalisation of her economy –without any effective alternative measures¹⁰⁸⁴ to reform market access to her domestic institutions and economy. Thus, Ghana lost her

¹⁰⁸³ M. Rodwan Abouharb and David Cingranelli, *Human Rights and Structural Adjustment*, (Cambridge University Press, Cambridge 2007) 201-202

¹⁰⁸⁴ Chapter 2, section 5.1 of this thesis.

clout to negotiate better trade or market access deals within the international or trade negotiations. The ramifications are that Ghana is perceived as a weak developing country with little ability to protect the economic interest of Ghanaians. Consequently, with the above privatisation policies implemented by Ghana, extensive powers were handed over to private sectors by the government that allowed them to hire and fire workers at ease.¹⁰⁸⁵

Chapter 2 made three key observations. First, the social and economic benefits derived from joining the international economic institutions primarily favoured the new owners of the previously privatised government institutions. Through corrupt practices among some government officials associated with the privatisation, most Ghanaians suffered various hardships.¹⁰⁸⁶ For instance, many people lost their jobs through privatisation, downsizing, and economic structural programmes. Government owned industries such as Ghana Industrial Holding Corporation (GIHOC), Tema Drydock and Nsawam Canary became defunct, sold-off or privatised.¹⁰⁸⁷ Although these corporations were not the only government institutions privatised or sold off, they are cited as examples of the adverse social and economic impacts brought upon Ghanaians by the privatisation agenda. Thus, most families suffered starvation through lack of employment with children unable to attend school and lacked access to needed social and economic resources such as access to water and medicines.¹⁰⁸⁸

¹⁰⁸⁵ M. Rodwan Abouharb and David Cingranelli, *ibid.*

¹⁰⁸⁶ *ibid*

¹⁰⁸⁷ Yaw Afriyie, "How the World Bank and the IMF Reinforces the Peripheral Status of Countries: the Implementation of the Structural Adjustment Program,

<www.gjis.journals.yorku.ca/index.php/gjisarticle/download/35115/31866 > accessed 20th October 2015

¹⁰⁸⁸ Yaw Afriyie, *ibid*

Second, regardless of the loan given to Ghana under the SAPs, there continues to be a chasm between the rich and the poor in Ghana as poverty forced many children to become street residents in the major cities of the country. Some hospitals were closed down with majority of the staff laid off. Similarly, the SAPs affected access to medical services with most vulnerable people like children and elderly unable to access healthcare.

Third, the severe social and economic hardships suffered by the majority of Ghanaians due to the WB and IMF's macro-economic policies contradict human rights and international law obligations of these institutions.

The IELs are under international obligation to respect and cooperate with national governments in order to ensure that social and economic well-being of every citizen especially in developing countries is protected.¹⁰⁸⁹

The absence of such protection, as evidenced in chapter 2, suggests that Ghana's negotiation capacity at the international levels, especially with respect the WB, IMF and WTO is weak. This weakness led to the restricted power of the government to protect social and economic rights of Ghanaians. The privatisation and liberalisation agenda to a certain extent led to fledging industrial bases and vital economic institutions to be wiped out through the acceptance of unfavourable macro-economic policies of the IELs.

Chapter 2 also highlights that Ghana needs an economic strategy to increase her trading capacity internationally with the aim to promote social and economic well-being of the people through job creation at the domestic level. Ghana needs to nurture the industrial

¹⁰⁸⁹ Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing limited, London 2001) 194-195

bases of her economy that may promote the export of her local exports, e.g. fruits (such as pineapples, mangoes, pawpaw) to other WTO member states. Also, Ghana may seek to consolidate her domestic economic growth by exporting other local products (e.g. food items such as avocado, garden eggs, and pepper) to other African states.

Ghana also needs to invest to develop the social and economic capitals of her people in order to participate vigorously in the global economy and at WTO trade negotiations by deriving concrete benefits through favourable trade partnership agreements with African states within the WTO and external developing countries. This will enhance not only her economic and social infrastructures but also promote access to essential means of livelihood (water and medicines) to promote wellbeing of Ghanaians.

2.2 Access to affordable water

Chapter 3 has established that Ghana has embraced the privatisation policy and loan conditionality of the WB and IMF together with liberalisation in services under the WTO. This was so that Ghana could attract private investors and foreign corporations to promote technology transfer into the country as a way of providing cheaper access to water for Ghanaians. However, prices of water in Ghana have ever been increasing and water supply is selectively limited to urban centres in Ghana where only the rich people can afford it. One argument in favour of such price hike is that is “water infrastructure investments are huge, therefore, it requires an upfront financing with a payback period of twenty years or more.”¹⁰⁹⁰ This proposition reflects the fact that private investors are primarily profit –oriented rather than seeking to protect the poor majority who are often unable to pay the price associated to water. Thus, it is no surprise that majority of

¹⁰⁹⁰ Sharmila L. Murthy, “The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization” (2013) *Berkeley Journal of International Law*, 130

Ghanaians continue to pay exorbitant water bills as well as having to travel long distances in search of potable water.¹⁰⁹¹

The key observations from this chapter are as follows. First, chapter 3 explains, that the 1992 Constitution of Ghana places all natural resources including water in the hands of the President as a trustee. Thus, the President has the power to ensure that all Ghanaians have equitable access to water at an affordable price. However, the example of the privatisation contract signed with Azurix, a subsidiary firm of Enron, has shown that the water concession contract led to price hikes in water bills in Ghana. The effect is that not only do the urban populations of Ghana have access to water supply at exorbitant price but also the majority of Ghanaians living in towns and rural communities have to travel long distances to fetch polluted water for their domestic needs. This restricted and discriminatory access to water undermines the WHO's policy that water should be accessible at affordable price and within a short distance from the people.¹⁰⁹² Chapter 3 highlighted arguments from the critics that the GATS Agreement would not make access to water readily available and cheaper in developing countries.¹⁰⁹³ Therefore, the GATS Agreement is not favourable to Ghanaians with respect to accessing water. Moreover, chapter 3 has showed that the newly constituted Ghana Water Company Limited (GWCL) has been divided into urban and rural areas for water supply purposes and water is being supplied to those in the urban areas with reasonable income to purchase it. However, Ghanaians living in the rural and remotest parts of the country are discriminated against

¹⁰⁹¹ Yaw Afriyie, (n 1087)

¹⁰⁹² Right to Water < www.who.int/water_sanitation_health/hygiene/en/ > accessed 20th December 2015.

¹⁰⁹³ Tim Concannon and Hannah Griffiths, "Stealing Our Water: Implications of GATS for Global Water Resources" < www.foe.co.uk/resources/briefings/gats_stealingwater.pdf, > accessed 20th December 2015

because no pipe-borne water facilities are installed for them nor pipe-borne water is supplied in those communities.

Second, the Ghana Investment Protection and Promotion Act (1994), also showed that a bias against the majority of Ghanaians with respect to water supply exists. This legislation which came into effect after Ghana signed the UNCITRAL Agreement; which gave foreign investors and MNCs the freedom to seek compensation against Ghana through international arbitration procedures. This means that the government cannot reverse the unfavourable terms of the of Azurix contract without incurring severe financial repercussions. Also, the presence of a weak judiciary system in Ghana means that access to water is not only being compromised but rather the majority of Ghanaians still struggle to access water. In light of the above, access to water remains unaffordable to majority of Ghanaians and this undermines their human dignity and human rights.

2.2.1 Access to adequate supply of water

Access to water is defined in light of the Accra Declaration to promote safe drinking water to people by stating that: “water is a public good for social and economic purposes. Water-service providers ... and Governments must ensure that resources are mobilized first from internal sources, using public funds to service the poor.”¹⁰⁹⁴ Thus, it is an imperative responsibility of the government of Ghana to ensure that provision of water facilities is established within convenient reach of the citizens and that water is affordable as well as accessible and clean. Paragraph 6 of the UN General Comment No.15 has emphasised

¹⁰⁹⁴ The Accra Declaration on Water and Sustainable Development, Final Draft- Africa Water Task Force, 17th April, 2002

the significance of water, in stating that: “water is essential for securing livelihood and enjoying other cultural practices. Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses.”¹⁰⁹⁵ Also, if the UN Resolutions on the right to water is applied, there is an obligation on the government of Ghana to provide effective access to water for Ghanaians.¹⁰⁹⁶

However, majority of Ghanaians continue to struggle for adequate supply of water as they travel long distances to fetch water from hand-dug wells and boreholes. Similarly, this practice contravenes UN’s obligation requiring that States “take steps to ensure that natural water resources are protected from contamination, harmful substances and pathogenic microbes.”¹⁰⁹⁷ Undoubtedly, this is not a sign of efficient and effective distribution of water which was promised Ghanaians under the SAPs, Economic Recovery Programme (ERP) and water privatisation schemes. Chapter 3 shows that from 1960s- 1990s, majority of the Ghanaians had access to purely treated pipe-borne water supply which was within short distance and vicinities. This development was possible because public stand-pipes were installed in most towns, communities and rural areas, where people could access quality pipe-borne water within a short distance.

In contrast, from 1992 onwards and under the IMF/WB sponsored economic policies and loan conditionality in Ghana, not only had public stand-pipes disappeared in cities, town

¹⁰⁹⁵ The UN General Comment No. 15, (2002), (the Right to Water (arts 11-12 of the International Covenant Economic, Social and Cultural Rights) < [www.unchr.ch/tbs/doc.nsf/0/a5481d1bbd713fc1256cc40038c94/\\$FILE/G0340229.pdf](http://www.unchr.ch/tbs/doc.nsf/0/a5481d1bbd713fc1256cc40038c94/$FILE/G0340229.pdf) > accessed 30th October 2015

¹⁰⁹⁶ UN Resolution- Human Right to Water and Sanitation () <www.un.org/waterforlifedecade/human_right_to_water.shtml, accessed 20th December 2015
See also: UN Sanitation for All, < www.un.org/.../GA%20Sanitation%20resolution2024%20J > accessed 20th December 2015; see further: Resolution A/HRC/24/L.31 on access for water: < www.righttowater.info/new-human-rights-council-resolution-on-rightto > accessed 20th December 2015

¹⁰⁹⁷ UN General Comment No.15, supra 13, para 8

and rural areas, but also Water and Sewerage Centres, which treated and supplied water to Ghanaians, had been closed down. Thus, access to adequate water has been eroded extensively with distances travelled or walked by Ghanaians in search of water has doubled, whilst accessing water at the right time and place remains a mirage. Privatisation of a state's utility services does not absolve governments including Ghana government from their duties towards their citizens. In this light, Murthy has pointed out that: "states/governments have a responsibility in the event of privatisation, to ensure that private corporations are monitored and regulated; so as to provide essential human needs –water to meet the people's human rights."¹⁰⁹⁸ This means that the human right of Ghanaians with respect to access to water must be protected under the government sponsored privatisation schemes. So, today 14 litres of water is sold in Ghana at 5,000 cedi (US\$2) which is equivalent to a day's wages in the urban cities of Ghana. Most average workers receive US\$ 2 a day in wages while 14 litres of water is sold around US\$ 2. Therefore, access to water to adequate water supply for the people of Ghana remains a daily struggle.

2.2.2 Capacity and infrastructure to produce and supply water in Ghana

Chapter 3 (section 3.6.2) highlighted in respect of the SAPs and the privatisation policies of the WB/IMF along with the WTO's liberalisation in services provisions, Ghana was granted some financial assistance with a view to restructure the Ghanaian economy through social development projects.

Moreover, from 1982-1992 as the WB/IMF's macro-economic policies were implemented in Ghana, majority of people faced harsh social and economic miseries especially those

¹⁰⁹⁸ Sharmila L. Murthy (n 1090) 122-125

working with the Ghana Water and Sewerage Corporation (GWSC). During this period, nearly one thousand five hundred (1,500) workers from the GWSC were sacked. This was done in an attempt to reform the water corporation so as to supply quality water with cheaper rates and offer accessibility. However, it is worth mentioning that the WB provided US\$ 85 million between 2002-2003 toward the construction of water storage and treatment tanks in regions of Accra, Sunyani and Wa. This was an effort by the WB to boost Ghana's capacity to treat and supply water at cheaper rate in the country.¹⁰⁹⁹ Prior to the above mentioned WB's macro-economic policies, 4,101 stand-pipes provided water throughout the entire country. This contrasts with the post- privatisation and liberalisation era where stand-pipes were reduced to 3,721 boreholes; 6,827 hand-dug wells provided in the years 2008 and 2009 respectively. By comparing both eras, one can infer that access to water in Ghana was better during the pre-privatisation era than the post privatisation era. Although a further loan of US\$614 million grant was handed to the government of Ghana by the IMF and WB between 2002 and 2008,¹¹⁰⁰ access to water did not improve. One reason for such failures is that the implementation of such projects is fraught with bureaucratic policies and interferences from the creditors thus undermining the objective of the scheme.

Also, with nearly 1,500 workers laid off under the restructure scheme, it was not difficult to conclude that the capacity to produce and supply water was compromised. This is because most of the laid-off workers were engineers and technicians who were equipped with knowledge and expertise in repairs, maintenance, water treatment, water operations and management of the water industry. Sacking or laying-off such important experts in

¹⁰⁹⁹ An AMCOW Country Status Review “ Water Supply and Sanitation in Ghana: Turning Finance into Services for the 2015 and Beyond” < www.wsp.org >accessed 20th October 2015

¹¹⁰⁰ An AMCOW, *ibid* p. 24

one of the critical service industry of a country in the name of reform and structural adjustment is synonymous to destroying the existence of the industry as well as human lives depending on it.

Finally, chapter 3 has shown that access to water in respect of the WB/IMF and the WTO's policies of privatisation, SAPs, ERP and liberalisation in services under GATS has increased private participation in the water infrastructure development projects from the 1990s with some social and economic benefits. But these benefits rested with only a few private and government actors while access to water remains a big social challenge.

2.3 Access to affordable medicines

Chapter 4 deals with access to affordable essential medicines in Ghana. According to the World Health Organization (WHO), access means "having medicines continuously available and affordable at public or private facilities or medicines outlets within one hour's walk from the homes of the populations."¹¹⁰¹ Therefore, within the context of this thesis, any measure adopted by Ghana in an effort to increase access to medicines must reflect the above criteria so as to satisfy Ghana's obligation under international law. Chapter 4 emphasised that Ghana can adopt local and national measures from the obligations of TRIPS to provide affordable and cheaper access to medicines in order to treat those affected by HIV/AIDS, Malaria and Tuberculosis.

However, the influence of giant pharmaceutical corporations with their target to maximise profit have militated against access to medicines in Ghana. As shown in

¹¹⁰¹ Access to Affordable Essential Medicines –World Health Organization-
<www.who.int/medicines/mdg/MDG080ChaterEmdes.EN.pdf, > accessed 27th August 2015

chapter 4, GlaxoSmithKline (GSK) in a bid to maximise profit at the expense of high HIV/AIDS incidences in Ghana¹¹⁰² resorted to legal threat to prevent Healthcare Ltd in Ghana from distributing cheaper generic HIV/AIDS drugs. Discussion in chapter 4, highlighted that one essential medication – Combivir - produced by Glaxo and generically reproduced by Cipla, is exorbitantly priced beyond the reach of the average Ghanaian. The huge costs associated with the HIV/AIDS drugs meant that most lives are at stake in the healthcare delivery system of Ghana.

Given that majority of those affected by HIV/AIDS and other deadly diseases are very poor and live on less US\$2 a day, it is beyond their income to gain access to essential medicines. The result is that most people living in Ghana with HIV/AIDS have very limited chance of regaining their health because prices of essential medicines are unaffordable. Matthew and Halbert argued that “intellectual property rights ought to be designed with an objective of meeting the needs of the global population especially indigenous people, rather than meeting the parochial interests of the industrialist.”¹¹⁰³ Thus, access to medicines is compromised since most Ghanaians have limited income of purchasing generic drugs to treat the menace of HIV/AIDS.

2.3.1 Availability of medicines in adequate quantity

Ghana endeavours to respect her obligations under international agreements¹¹⁰⁴ with a view to make access to medicines adequately available and within reach of her citizens. Yet, her efforts have been undermined by legal threat and exorbitant prices by

¹¹⁰² Jorn Sonderholm, “Intellectual Property Rights and the TRIPS Agreement: an Overview of Ethical Problems and Some proposed Solutions” World Bank Policy Research Working Paper No 5228, (2010) 30 < <http://sitesresources.worldbank.org.EXTDEVIALOGUE/IMAGES/537297-123842276193215> > accessed 26 June 2015

¹¹⁰³ David Matthew and Debora Halbert, *Globalization and Intellectual Property* (Sage, London 2014) 85

¹¹⁰⁴ ICSECR, ICCPR and the Convention on the Right of the Child

pharmaceutical corporations through the WTO's TRIPS Agreement. This is because as shown in chapter 4, TRIPS has led Ghana to pass the 2004 Patent Act which contains prohibitive clauses that prevent it from resorting to parallel and compulsory licences to procure essential medicines towards the treatment of HIV/AIDS and related deadly diseases. With the majority of Ghanaians living in remotest communities, town and villages, access to essential medicines at the right place and in adequate quantity cannot be met. In Ghana, only a few privileged people have the financial resources to afford medical care. In a country where a very limited number of the citizens have access to financial resources coupled with limited government capacity to produce/manufacture medicines, recognition of the WHO's principle of providing medicines in adequate supply and at the right time is non-existent. In Ghana, it appears that securing access to medicines is measured by one's capacity to pay the required price.¹¹⁰⁵

2.3.2 The capacity and infrastructure to produce ARVs and essential medicines in Ghana

With respect to medicines production, examples in chapter 4 have shown that Ghana manufactures only 20% of her entire medicinal needs locally with 17 out of 30 pharmaceutical companies able to produce throughout the year. This suggests that Ghana can meet her health obligations in respect of international agreements by relying on external donations of medicines, as well as buying from pharmaceutical firm – Cipla. Also, most of the 17 pharmaceutical companies are private companies with only one company – DanAdams - which has the capacity to produce Anti-Retroviral drugs (ARVs) used in the

¹¹⁰⁵ Jorn Sonderholm, (n1102)

treatment of HIV/AIDS. The fact that there is no national pharmaceutical company to produce ARVs suggests that majority of the population affected by HIV/AIDS will be forced to purchase exorbitant medicines from external sources. The implication is that access to essential generic drugs remains unaffordable and unattainable.

Similarly, the National Herbal Research Institute located at Akuapim-Mampong in Ghana has the potential to develop and produce HIV/AIDS medicines by processing herbal compounds is neglected by the government financially.¹¹⁰⁶ Locally, Ghana has a very limited capacity to transform that sector as a pharmaceutical industry.

In summary, the limited usage of capacity in the production of medicines exposes Ghana to either accepting unfavourable agreements under the WTO or forces her to procure expensive drugs from abroad. The impact is that many people will die young as HIV/AIDS is spreading across the country sporadically.

2.4 Access to justice in respect of water and medicines

Chapter 5 analyses the possibility of better access to water and medicines through the judicial avenues in Ghana. This is because the 1992 Constitution of Ghana recognises human rights of the Ghanaians. Therefore, it is expected that the judiciary will protect these rights by promoting human dignity in relation to access to water and medicines. This chapter highlights the following.

First, according to paragraph 3 of the UN Resolution A/HRC/24/50, justice means: “the ability to seek and obtain remedies for wrongs through institutions of justice, formal or

¹¹⁰⁶ Perpetual Crentsil, “Death, Ancestors, and HIV/AIDS among Akan of Ghana, (A Doctoral Thesis, University of Helsinki, January 2007) < www.thesis.helsinki.fi/julkaisut/val/vk/crentsil/deathan.pdf > accessed 20th October 2015

informal, in conformity with human rights standards.”¹¹⁰⁷ With respect to Ghana, it is expected that both the High Court and CHRAJ which are constitutionally created institutions will endeavour to promote those rights in respect of human rights and judicial obligations.

Second, access to information is critical to ensure better access to water and medicines in Ghana. According to the Universal Declaration of Human Rights (UDHR):“everyone has the freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.”¹¹⁰⁸ As the UDHR points out, the significance of human rights and the realisation of allied justices in a democratic society would be impossible without adequate and effective access to information.¹¹⁰⁹ So, the judiciary has a role to play in the effective dissemination of information.

As shown throughout in chapter 5, there is a non-judicial forum in which Ghanaians can seek partial redress for breaches of human rights. The establishment of the Commission for Human Rights and Administrative Justice (CHRAJ) has a constitutional mandate to investigate both public and private agencies with respect to breaches of human rights. Also, it has the mandate to investigate all Ghanaian citizens who have acted in contrary to the constitutional provisions regarding corruption. However, the discussion in chapter 5 has shown that although the authority of the CHRAJ stems from the 1992 Constitution of Ghana, it remains purely an investigatory and recommendatory body. The CHRAJ does

¹¹⁰⁷ Access to justice in the promotion and protection of Indigenous Peoples < www.ohchr.org/EN/HRBodies/HRC/.../Sessions24/...A-HRC24-50en.pdf > accessed 27th August 2015

¹¹⁰⁸ Article 19 of the UDHR < www.un.org/en/document/undhr/ > accessed 27th August 2015

¹¹⁰⁹ Report of the Special Rapporteur on the promotion of the right to freedom of opinion and expression < www2.ohchr.org/English/bodies/councils/docs/.../A.HRC.17.27_en.pdf > accessed 27th August 2014

not have any enforcement power and it has no legal powers of its own to impose punitive measures to protect the public. In this sense, the CHRAJ does not offer any effective remedy to the Ghanaians who are in need of urgent and critical access to water and medicines.

Chapter 5 showed that the recommendation of the CHRAJ was acted upon in at least one case: the case of Richard Anane. Anane was consequently forced to resign as the Minister for Roads and Transport upon the recommendation of the CHRAJ. However, it must be emphasised that the resignation took immediate effect because of nation-wide condemnation and demonstrations. The implication is that CHRAJ on its own is ineffective without enforcement powers. This is also due to fact that “the subordination of the CHRAJ and its members to the politically appointed Minister of Justice, in deciding which investigated cases to pursue in a court of law. This means that the CHRAJ is an establishment of satisfying political expediency rather than promoting human rights.”¹¹¹⁰

Chapter 5 then examines the efficiency of the judiciary. The determination of the human rights breaches in the judicial system of Ghana falls within the purview of the High Court. With this comes the added disadvantage of exorbitant cost. For example, as shown in chapter 5 , the paucity of legal aid coupled with unavailability of pro-bono activity by junior lawyers in Ghana imply that ordinary people are unable to access judicial remedy for human rights breaches. Most importantly, counsel fees in bringing a claim in the High Court of Ghana ranges between GH 2,000- 10,000 (£200-£1000) for senior and junior lawyers respectively. As mentioned in chapter 5, majority of Ghanaians are poor with a minimum subsistence earning of \$US2 a day. Therefore, it is beyond their means

¹¹¹⁰ Abul-Gafaru Abdulai, political context study (January 2009) < www.polls.leeds.ac.uk/.../abdulai-ghana-political-context-study-jano9.pdf, > accessed 20th October 2014

to access justice given that majority of the people whose human rights are breached have limited income to engage the service of a lawyer. It can therefore be inferred that access to justice from the non-judicial and judicial forum in Ghana poses a challenge majority of Ghanaian especially those who are poor.

In this respect, most Ghanaians may find that access to judicial remedy in light of water and medicines are compounded by restrictive access to information (discussed in chapter 5). Without effective legislative instrument to grant the public access to government and private information, the majority of Ghanaians struggle in search of quality information to enable them make decisions affecting their social and economic well-being. For example, the Access to Information Bill 2007 is replete with inconsistencies. It requires that Ghanaians pay a fee or charge to access certain information. In case of dispute, the Minister for Information is the adjudicator at first instance. The discussion in chapter 5 analyses the recommendations by the Commonwealth Institute that criticised the Bill and urged the government of Ghana to improve the Bill. Instead of the increased power for the Minister of Information, the Commonwealth Institute has also urged the government to set up an independent commission to deal with disputes relating access to public information. However, the government remains lukewarm on the issue.

In conclusion, with access to judicial remedies being restricted through exorbitant legal charges coupled with scanty legal aid, access to medicines and water as a human right constitutes a privilege of the rich. Thus, the judiciary and Human rights activists especially lawyers in Ghana, have an obligation to advocate for the protection and promotion of social and economic rights in the spheres of water and medicines so as to

consolidate the principles of universality and indivisibility of all human rights in the country.¹¹¹¹

The next section offers some recommendations and suggestions that may assist Ghana to ensure better access to medicines and water and to promote their social and economic well-being as a human right.

3 Challenges and way forward

The aim of this section is to propose strategies and policies as adopted by some developing (for example, in Latin America, India and parts of Africa) that promote social and economic well-being of the people. Also, these examples may enable Ghana to fulfil some of her international obligations in respect of access to medicines and water. Although these examples are not perfect, they have shown some positive impacts on the social and economic well-being of their people. Therefore, Ghana can adopt similar measures to promote access to water and medicines.

3.1 Role of UN Agencies in relation to access to medicines and water

The Special Rapporteur of the UN Social and Economic Council has reiterated that governments have immediate obligations to promote access to medicines which falls under three main strands in light of article 12 of ICESCR.¹¹¹² First, governments have a responsibility to ensure that each individual gains access to medicines without discrimination; second, that medicines should be affordable and within the reach of those who need it, and finally, governments have additional responsibility of ensuring that there

¹¹¹¹ Evadne Grant, “Accountability for human rights abuses: Taking the universality, indivisibility, interdependence and interrelatedness of human rights seriously” (2007) 32, SAYIL, 179

¹¹¹² International Covenant on Economic, Social and Cultural Rights

is “effective legislation and regulatory mechanism and transparent process which promote equality, safety and efficacy of medicines.”¹¹¹³ The significance of promoting human rights through the prism of access to medicines was given extra impetus when Brazil sponsored a resolution on access to medicines at the UN General Assembly.¹¹¹⁴ The Resolution on access to medicines imposed obligation upon international organisations and UN member states to adopt measures to provide access to medicines especially in the case of HIV/AIDS victims. Thus, Ghana has an obligation to ensure that access to medicines is grounded in legislation either by reforming her Constitution or passing a new set of legislation in that respect. Indeed, human rights are given recognition under the 1992 Constitution of Ghana. Chapter five of Ghana’s Constitution purports to protect human rights but there is no specific provision listed in the 1992 Constitution granting access to water and medicines as human rights. At the same time, the 1992 Constitution empowers the CHRAJ to investigate human rights violations by making recommendations to the Attorney-General to decide penal matters, no protective powers are delegated to the CHRAJ to promote access to water and medicines.

Moreover, the UNGA in 2010, affirmed that exceptional global action is required to stem the HIV/AIDS pandemic with special focus on Africa. In light of the global effort, paragraph 15 of the UNGA Resolution stated that no trade related regulations either on national or international levels should impede efforts by respective governments’ programmes to grant access to medicines. Rather, international agencies and developed nations must deploy technical and diagnostic equipment including vaccines to help combat this deadly

¹¹¹³ Anand Grover, Human Rights Council Twenty-third session Agenda item 3: promotion and protection of all human rights, civil and political, economic, social and cultural rights, A/HRC/23/42

¹¹¹⁴ Res. 2001/33, UN Commission on H/R, U.N. DC E/CN4/RES/2001/33 (2001)

human disease.¹¹¹⁵ Therefore, Ghana is bound politically and legally to promote access to medicines in the acute cases of those affected by HIV/AIDS. Furthermore, the UNSC lends its weight towards the promotion of access to medicines in the fight against HIV/AIDS by calling upon corporations, institutions and nations to “scale up their efforts to eradicate the menace of HIV/AIDS, which is eroding most human lives in sub Saharan Africa.”¹¹¹⁶ Both the UNGA and UNSC Resolutions, mentioned above, share a common theme that access to medicines should be prioritised in every country irrespective of trade related agreements such as the TRIPS and GATS. Also, the UNSC Resolution¹¹¹⁷ on Sub-Saharan Africa encompasses Ghana. With this, it can be stated that the government, institutions, corporations and pharmaceutical operations in Ghana ought to provide medical facilities and vaccines to reduce the threat of HIV/AIDS in line with international obligations.¹¹¹⁸

In the water sector, as part of its contribution towards improving the living conditions of Ghanaians, the UNDP is collaborating with Ghana by providing technical support to extend water facilities to most rural communities.¹¹¹⁹ Although Ghana receives some technical support from the UNDP in order to improve access to water and health related amenities, access to water and health remain acute for most rural people because of weak implementation processes and lack of governmental commitment.

¹¹¹⁵ UNGA RESO adopted by General Assembly 60/262 Political Declaration on HIV/AIDS 87th Plenary Session 2 June 2006

¹¹¹⁶ UNSC Resolution 1983 (2011) Adopted by Security Council at its 6547th meeting, on 7th June 2011, < www.unaids.org.ua/files20110607_UNSC-Resolution1983.pdf, > accessed 26th July 2015

¹¹¹⁷ UNSC Resolution 1983 (2011) *ibid*

¹¹¹⁸ *Ibid*.

¹¹¹⁹ Evaluation of UNDP Contribution to south-south cooperation (2007) < www.sss.undp.org/.../Evaluation%20of%20%undp.20contribution%20to%20ss, > accessed on 20th October 2015

Notwithstanding the lukewarm attitude on the part of the government of Ghana, to protect the right to water, the UN continues to emphasise the indispensability of water as a critical component in the attainment of human rights.¹¹²⁰ On another occasion, the UN has stated that: “water is a multi-dimensional issue and a prerequisite for achieving human security, from the individual to the international level.”¹¹²¹ Given that water is recognised as a resource which has the capacity to promote life, security and health at individual and the international community level, it requires of Ghana to develop her national resources in collaboration with other respective international organisations (e.g., UN agencies, WB/IMF and WTO) to ensure that water is readily provided to Ghanaians. In addition, the United Nations Regional Information Centre (UNRIC) has affirmed the significant role of water in the realisation of human rights. It stated that: “Access to water should no longer be seen as a service, but as a human right. States and organizations should work towards using economic resources and technology to provide safe, clean, accessible and affordable water particularly in the developing countries.”¹¹²² Water should be perceived as a human right rather than a service. This, in the view of UNRIC, transforms and elevates water as a resource into an enforceable obligation upon governments and institutions, which should deploy their available economic and technological resources to protect and promote water for their peoples. This obligation requires the Ghana government to initiate programmes to ensure access of water to all Ghanaians.

¹¹²⁰ Paragraph General Comment No.15, < <http://www1.umn.edu/humanrts/generalcomm/escgencom1.htm>, > accessed 13th February 2106.

¹¹²¹ UN Water: Water Security & the Global Water Agenda: A UN –Water Analytical Brief, < http://www.unwater.org/downloads/watersecurity_analyticalbrief.pdf, > accessed 13th February 2016

¹¹²² Making Water a Human Right- UNRIC- < www.unric.org/en/water/27360-making-water-a-human-right, > accessed 13th February 2016

In 2004, WHO made a recommendation to help Ghana improve access to generic and essential medicines by stating that: “Ghana should devise a national medicines price regulation policy which set price to avoid exploitation of patients; undertake measures to produce medicines locally at affordable prices and; remove taxes and tariffs on all essential medicines and raw materials used in producing medicines.”¹¹²³ Moreover, with support from the UN, Ghana has established the Pharmacy and Poison’s Board to ensure that quality medicines are made available within the primary healthcare and at all centres of healthcare.¹¹²⁴ Recently, WHO has urged UNGA to promote access to medicines in Ghana and other developing countries by implementing the political Declaration¹¹²⁵ to extend access to medicines.¹¹²⁶ In spite of the above measures adopted by WHO to help promote access to medicines in Ghana, the strategy of promoting access is not coordinated with the national government or respective agencies.

3.2 Public- Private Partnership

This section explores Public-Private Partnership (PPP) as a strategy which can be adopted by Ghana to promote access to water and medicines in the country. Kralic and Kelebuda have explained that governments especially those in developing countries are often constrained financially to fund their infrastructural developments especially water and medicines projects; and thus can utilise PPP with external and internal organisations to advance the provision of essential goods and services to advance the wellbeing of their

¹¹²³ World Health Organization (WHO) “Medicines Prices in Ghana” Action International Africa, < www.who.int/medicines/areas/technical/medicinespricesGhana.pdf, > accessed 10th November 2015

¹¹²⁴ Evanson Z. Sambala et al, “the role Primary Health Care in Ensuring Access to Medicines” (2010) 51 (3) Croatian Medical Journal, 181-90

¹¹²⁵ “Universal Health Coverage at the Center for Sustainable Development: Contributions of Sciences, Technology and Innovation to Health Care Systems” < www.un.org/en/ecosoc/.../concept_paper-uhc_during_ecosoc_amr.pdf, > accessed 12th February 2016

¹¹²⁶ Catherine E. Vialle et al., “Evidenced on Access to Medicines for Chronic diseases from House-hold surveys in five low- and –middle –income countries” (2014) 30 (1) Health Policy and Planning, 1044-1052

peoples.¹¹²⁷ In line with this recommendation, Ghana can form a strategic partnership with Cipla (India) in order to establish a joint- research institute to investigate herbal resources in the country so as to produce generic drugs to treat HIV/AIDS diseases.

Similarly, Yarygina has proposed three forms of PPP¹¹²⁸ which can be implemented in Ghana to encourage collaboration with the government and private firms; in finding a lasting solution to treat deadly diseases like malaria and tuberculosis.¹¹²⁹ For example, Ghana can strike a partnership deal with Dan Adams, a private pharmaceutical company in Ghana, in an effort to produce anti-malaria drugs for Ghanaians, locally. Under this partnership scheme, the government of Ghana can provide financial incentives and tax exemptions on all the imported components which are used by Dan Adams to produce its drugs. This strategy will not only encourage cheaper production and supply of essential medicines to treat malaria and deadly diseases, but will also create the foundation of a sustainable pharmaceutical capability for the country.

Furthermore, Timm has suggested that incubation schemes¹¹³⁰ should be established by the government of Ghana in concert with local universities to promote entrepreneurial knowledge and creative skills among Ghanaian students. With this scheme, some of the

¹¹²⁷ Sandra Kralic and Mauro Kelebuda, “The Role of the Public-Private Partnership in Providing of Public Goods: Possibilities and Constraints” (2010) ProQuest, 16

According to Kralic and Kelebuda, the term ‘Public-Private Partnership’ emerged in the second half of the 20th century, but gained currency in the 1980s.

¹¹²⁸ the three forms proposed by Yarygina are as follow: (i)PPP formed with an intention to undertake business venture so as to share the profit, for example, partnership to engage in Baking or insurance services; (ii) Joint-funds PPP is another form in which both government and private firm contribute capital and technology to undertake research into finding a solution to common problem in order to benefit the people or society; (iii) there is also the special PPP arrangement whereby the government provides tax incentives and capital assistance to private firms to provide affordable and accessible services to the people at cheaper price.

¹¹²⁹ Yarygina I, “Public- Private Partnership within the BRICS” (2014) GISAP: Economic, Jurisprudence and Management, 5-7

¹¹³⁰ Business incubations are small enterprise development agencies which are often established and funded by government’s agencies in partnership with universities; which provide knowledge, skills, guidance, training and mentorship to help these incubators developed into accomplished businesses in their respective sectors.

students would emerge as businessmen and women with the prowess to undertake social and economic projects that promote the wellbeing of Ghanaians especially in the spheres of water and medicines.¹¹³¹ The fact that incubation schemes can be mentored by respective universities in Ghana suggests that there will be less dependence on foreign experts to solve problems confronting Ghana.¹¹³² Thus, the PPP should be implemented together with the incubation strategy in order to build a sustainable national capacity to promote the social and economic wellbeing of Ghanaians, including access to water and medicines.

3.3 Examples from Africa and other countries

This section aims to discuss some examples of good practices which are implemented in parts of Africa and other developing countries as models to be adopted by Ghana to ensure that trade agreements are economically and socially beneficial to the people.

First, example can be drawn from Brazil. The strategy of Brazil to grow and expand its domestic industries played a critical role to secure a favourable deal at the WTO Doha round for most developing countries. As the US, the European Union (EU) and Japan aimed for “selective liberalism in the services sector in which they have competitive advantage”,¹¹³³ Brazil argued on behalf of developing countries that access to medicines in respect of HIV/AIDS constitutes national health emergency.¹¹³⁴ Also, with growth in its local pharmaceutical industry coupled with strong industrial infrastructural capability to produce and export goods and services, Brazil is able to earn substantial foreign

¹¹³¹ Stephen Timm, “How the State Private Sector can partner to boost support to SMEs: Lessons from Chile and Malaysia” A Report for the Department of Trade and Industry (DTI) (June 2012) 22

¹¹³² Stephen Timm, *ibid.* 11

¹¹³³ Braz Baracuhy, “the Geopolitics of Multilateralism: the WTO Doha Round Deadlock, the BRICS and the Challenges of Institutionalized Power Transition”, CRP Working Paper No. 4, (20th January 2012) < <http://www.polis.cam.ac.uk/CPR/research/workingpaper/>, > accessed 20th September 2025

¹¹³⁴ Jane Galvao, “Brazil and Access to HIV/AIDS Drugs: A Question of Human Rights and Health”, *American Journal of Health* (2005) p. 12

currency.¹¹³⁵ This strategy has enabled Brazil to create universal access to anti-retroviral drugs as human right.¹¹³⁶ Again, the significance of Brazil with respect to gaining clout in international negotiations is portrayed in Brazil's cooperation on global health with developing countries.¹¹³⁷ In addition, as a member of the BRICS states, Brazil initiated a south-south cooperation to extend technical cooperation with African countries including Ghana.¹¹³⁸ The above initiatives adopted by Brazil have enabled it to extend its technical cooperation with African countries. Taking advantage of such south-south cooperation remains a way forward for Ghana. Being a prominent member of the African Union (AU), Ghana has to extend her trading activities to member countries within the union so as to promote her socio-economic status by establishing favourable trade deals at the regional level.

Second, Ghana must also redouble efforts to update the negotiation knowledge and skills of the various staff working at foreign and trade missions abroad especially those at the WTO in Geneva. The knowledge must come from specialisation in international trade law and human rights law, international negotiation skills and procedures. As pointed out in chapter 2 of this thesis, Ghana is barely represented by residential trade representatives in Geneva. To overcome this limitation so as to improve Ghana's negotiation capacity at international levels, Ghana should emulate the strategy of, for example Nigeria, where Oxfam trained Nigerian trade negotiators to equip them with negotiation and analytical skills in order to secure favourable deals at the WTO.¹¹³⁹ Another example is the Rio

¹¹³⁵ Amy Stevens Nunn, Elize Massard da Fonseca, Francisco I. Bastos et al, "Aids Treatment in Brazil: Impacts and Challenges" (2009) 28 (8) Health Affairs, 21

¹¹³⁶ *ibid*

¹¹³⁷ Brazil's conception of south-south "structural cooperation" in health (RECIIS, 2010) Vol.14, No.1

¹¹³⁸ S. Kass, A.T. Gullberg and G. Heggelund, "The Group of 77 in the International Climate Negotiations: Recent Developments and the Future Directions" (2008) 8 (2) Politics, Law and Economics, 113-127

¹¹³⁹ Hamisu Muhammad, "Nigeria: FG, Oxfam train Nigerian negotiators for WTO meetings" (All Africa Global Media, 2007).

Branco Institute of Diplomacy in Brazil that trains and updates Brazilian diplomats in the skills of negotiation and cooperation. This negotiation strategy has proved effective in many ways especially at the Doha Ministerial negotiation of access to medicines.¹¹⁴⁰ With adequate capacity building and training, Ghana may be able to adopt the Brazilian model as a guide to provide her diplomats at the WTO with effective negotiation skills. Under the sponsorships of the United Nations Development Programme (UNDP), United Nations Institute for Training and Research (UNITAR) and Regional Bureau for Africa (RBA), a training course was organised in Kenya in 2011 to provide negotiation and analytical skills for African leaders and officials. This training course aimed to build the capacity of national trade officials to participate effectively in multilateral negotiations¹¹⁴¹ and 71 participants from Ghana received training.¹¹⁴² However, this type of negotiation and capacity building training must be held regularly and Ghana needs to establish a national scheme/institution as seen in Brazil to develop the negotiation capacity of her trade negotiators.

¹¹⁴⁰ Edmundo Sussumu Fujita, "Discussions for Middle Power Diplomacy 3: Roundtable discussions for Middle Power Diplomacy Power No.3, < www.eal.or.kr/bbs/report, >accessed 25th October 2015. Brazil's negotiation strategy comprises the 3Ds which means development, disarmament and decolonisation. With respect to development strategy, Brazil adopts cooperation as an approach to pursuing its interest in a spirit of securing human rights and development.

¹¹⁴¹ UNDP-UN Institute for Training and Research- *Strengthening Multilateral Negotiation Capacities of African Decision Makers* (UNITAR, Geneva 2011-2012) 1-6

¹¹⁴² *Ibid.*

3.4 Constitutional and legislative Reforms: examples from developing countries

Noting the weaknesses in relation to access to water and medicines in Ghana, one recommendation would be for Ghana to promote constitutional and judicial reforms in a bid to ensure access to water and medicines. Examples of best practices may offer some guidance to Ghana.

First, Brazil provides an example where constitutional powers have been relied upon to gain access to medicines. Biehl et al argued that the establishment of the United Health System (UHS) in Brazil played a prominent role in the passage of Universal Access to Anti-Retroviral Drugs (ARVs) for HIV infected people.¹¹⁴³ Furthermore, Biehl et al have pointed out that the 1998 Constitution of Brazil has been construed by the Supreme Court to say that access to ARVs is an integral part of the right to health.¹¹⁴⁴ However, concerns were raised that incessant judicial challenges risk duplicating functions of the federal government and that of the municipal administrations in Brazil.¹¹⁴⁵ With regard to distributing medicines in Brazil, it has been stated that “88% of cases have been decided by the courts in favour of the right to medicines.”¹¹⁴⁶ This means that constitutional provisions have been acted upon by the Brazilian court to save human lives from the dangers of HIV/AIDS. This judicial precedent had been created by the Supreme Court to promote health.

¹¹⁴³ Jao Biehl Joseph J. Amon, et al, “Between the Courts and the Clinics: Lawsuits for Medicines and the Right to Health in Brazil” (2012) 14 (1) Health and Human Rights, 36

¹¹⁴⁴ Ibid.

¹¹⁴⁵ Jan Peter Wogart, Giberto Calcagnotto, Wolfgang Hein and Christian Von Soest, “Aids, Access to Medicines, and the Different Roles of the Brazilian and South African Governments in Global Health Governance” (2008) GIGA Working Papers, WP 86/2008, 22

¹¹⁴⁶ Jao Biehl et al, (n1151)46

Whereas this judicial strategy or intervention has worked in promoting access to HIV/AIDS drugs in Brazil, the opposite is the case in Ghana. The judiciary in Ghana can follow the example of Brazil to promote access to medicines within the provisions of the 1992 Constitution. This recommendation is feasible because chapter five of the 1992 Constitution of Ghana seems to anticipate access to medicines and water by stating that: “other rights which are not stated in this section but have the prospect of promoting the right of the people.”¹¹⁴⁷ To achieve access to water and medicines in Ghana as human rights, the judiciary needs to do more by reneging on their narrow positivistic attitude towards law. There is a need for them to see the broader spectrum of human rights pertaining under Ghana’s international obligations (e.g. under the International Covenant on Social and Economic Rights). Members of the Ghanaian Judiciary need an awareness on human rights and adequate training (e.g. by the Commonwealth Institute, UNDP).

Second, by the year 2020, India hopes to provide quality health care to all its citizens without discrimination.¹¹⁴⁸ To achieve this, India is consciously transforming the health-care system to ensure that every citizen is given appropriate, adequate and affordable health-care which is backed by the constitution. Reddy et al have pointed out that there is no specific provision of the India Constitution which promotes access to medicines. However, the Supreme Court of India has been creative by incorporating the preamble of the constitution to promote access to medicines.¹¹⁴⁹

¹¹⁴⁷ Chapter Five of Ghana’s 1992 Constitution

¹¹⁴⁸ Article 15 of the Constitution of India, <: <http://India.gov-in/my-government/constitution-of-india>, > accessed 12th February

¹¹⁴⁹ K. Srinath Reddy, Vikram Patel, et al, “Towards Achievement of Universal Healthcare in India of 2020: A call to Action” (2011) 377 *Lancet*, 762.

The judiciary is actively promoting access to medicines by implementing constitutional provisions.¹¹⁵⁰ For example, in the case of *F. Hoffman-La Roche Ltd v Cipla Ltd*, it was held by the Supreme Court of India, at paragraph 82 that: “granting an injunctive order to stop Cipla from producing generic and cheaper versions of cancer and HIV/AIDS drugs would lead to shortening human lives.” Thus, the Supreme Court refused the application of the complainant company (Hoffman).¹¹⁵¹ Tellingly, this Supreme Court of India’s decision resonates with the view that human dignity in the sphere of access to medicines should be prioritised over business interests and intellectual property right. The significance is that the Indian court recognised that human dignity with access to water and medicines are fundamental to the realisation of all other human rights. Such proactive judiciary is required in Ghana.

Third, the Bolivian Constitution provides a good example for Ghana to emulate in granting access to medicines. In Bolivia, access to medicines for people infected by the HIV/AIDS is prioritised through the production of anti-retroviral medicines. This strategy has been constitutionally affirmed in Article 41 (ii) of its Constitution.¹¹⁵² Bolivia’s contribution in drafting and tabling of the General Assembly Resolution in respect of right to water is commendable in this regard. Bolivia argued that: “right to water is essential for the enjoyment of life.”¹¹⁵³ In the case of Bolivia, not only is access to medicines constitutionally protected, but also breakthrough in traditional knowledge in medicines is

¹¹⁵⁰ *H. Sankalp Rehabilitation Trust v Union and Ors* [2010] (43) PTC813 (Del): The court decided that with respect to the health delivery and especially in the case of HIV/AIDS, no citizen should be discriminated against with access to medicines.

¹¹⁵¹ *F. Hoffman-La Roche Ltd., v Cipla Ltd* (Delhi) (High Court) 148 [2008]DL 598

¹¹⁵² The Constitution of Bolivia (2009) <: http://www.constituteproject.org/constitution/Bolivia_2009_.pdf, > accessed on 12 February 2016

¹¹⁵³ The Drafting of the UN Resolution to Water by Bolivia, < www.un.org/press/en/2010/ga10967.doc.htm, > accessed 12th February 2016

recorded in national archives with an aim of securing intellectual property rights. This calls for special government commitment to invest financial and human resources to that effort. This example highlights that it is possible for Ghana to promote the research for and develop cheaper medicines. This is because medicines produced through national initiative may be easily accessible and cheaper in comparison to imported medicines. Although local medicines may not contribute towards healing infected HIV/AIDS patients, it can play a significant role in the treatment of malaria to which the government spends a fortune on imported medicines. However, private sector involvement may be necessary to develop the medicines and the government needs to have adequate regulation to ensure that medicines are accessible to the people. Through research in local medicines, as in the example of Bolivia, the history, knowledge and records of discoveries can be kept so as to gain intellectual property rights.¹¹⁵⁴

Fourth, the Constitutions of South Africa and Gambia offer another set of examples. In South Africa, the state has an obligation to ensure that everyone in the country can access health-care needs which encompasses reproductive facilities, sufficient food, and water as well as social security measures for the disabled and elderly people.¹¹⁵⁵ Similarly, Ghana can amend her Constitution to reflect the social and health needs of the people by protecting the elderly in society with some social safety-nets. For instance, this measure can be implemented by inserting specific constitutional provisions by way of amending part of the 1992 Constitution to state that access to medicines with respect to the elderly people and people with HIV/AIDS patients are mandatory.

¹¹⁵⁴ The Constitution of Bolivia, article 42 (ii), *ibid*.

¹¹⁵⁵ The Constitution of the Republic of South Africa (1996) Article 27 (2) and 27 (3) (a-c) < <http://www.justice.gov.za/legislation/constitution/SAconstituion-Web-eng.pdf>, > accessed 25th august 2015

Similarly, the powers of the courts especially the High court must be set out in the Constitution so that the judges are empowered to protect this right.

Gambia is one of the African countries which promotes access to water and medicines for its people through its Constitution. According to section 216 (4) of the Constitution : “the State shall endeavour to facilitate equal access to clean safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons.”¹¹⁵⁶

The fact that access to water and medicines including food and shelter has been given constitutional protection within one provision is remarkable. Ghana can amend aspects of chapter five of her 1992 Constitution to give effect to water and medicines by removing the clause which says “other human rights”. By amending that aspect of chapter five of the Constitution, perhaps, the judiciary in Ghana will be prompted to entertain cases relating social and economic rights; thereby granting access to water and medicines.

In addition, another suggestion in light of Articles 27 (2) and (3) of the South African Constitution, is that the government of Ghana should introduce a Bill in the Parliament together with government policy to affirm, protect and grant access to medicines.¹¹⁵⁷

These recommended strategies and measures, if adopted and implemented by the government of Ghana, may enable the judiciary to promote effective human rights judgements. It will also enable lawyers, the CHRAJ and other human rights activists and health campaigners to promote access to medicines.

¹¹⁵⁶ The Constitution of the Republic of Gambia (1996) < www.umu/humanrights/gambia-constituion.pdf, > accessed 12 February 2016.

¹¹⁵⁷ Articles 27(2) and (3) of the South African Constitution, *ibid.*

The criticisms are that some judges in India are reluctant to grant access to water in the absence of constitutional provisions.¹¹⁵⁸ Whilst in South Africa, the government keeps renegeing on its constitutional obligations to make access to water and medicines by citing the political nature of the access right.¹¹⁵⁹ Although the above examples are not perfect, the fact that these countries have made efforts in promoting access to water and medicines within their existing constitutional provisions suggest that Ghana can emulate these provisions to protect the Ghanaians.

4. Steps to be taken by Ghana

4.1 Legal and institutional reform

First, it is possible for Ghana to reform aspects of her 1992 Constitution by inserting specific provisions¹¹⁶⁰ and guarantee access to medicines in the treatment of HIV/AIDS, malaria and tuberculosis. Equally, the examples of the Constitutions of Brazil, Gambia and South Africa can provide an effective guidance to promote access to social and economic rights and enable individuals citizens make human rights claims. Ghana can improve further access to medicines by emulating the example of Gambia¹¹⁶¹ to initiate legislative instrument which obliges public and private institutions to respect access to medicines. The Gambian example shows that Ghana can reform aspects of her 1992

¹¹⁵⁸ Sharmila L. Murthy (n 1090) p.122-123

¹¹⁵⁹ *ibid*

¹¹⁶⁰ For example, Ghana can follow the Constitution of Bolivia, (n 1160)

¹¹⁶¹ Article 216(4) of the Gambian Constitution states in the following: "The State shall endeavour to facilitate equal access to clean water, adequate health and medical services, habitable shelter, sufficient food and security to all person" < <http://www.umu.edu/humanrts/gambia-constitution.pdf>, > accessed 25th August 2015

Constitution by inserting a single provision to create a statutory access to medicines and water as a human right to be respected by government and private institutions, alike.

Moreover, it is expected that constitutional amendments to incorporate the above recommended provision will create a concrete legal protection of access to water and medicines in Ghana. The view is that there will emerge a legal basis upon which some Ghanaians may initiate actions regarding breaches of human rights involving access to medicines. Equally, the enforcement or protection of such rights by the judiciary becomes much feasible. Indeed, there is no guarantee that constitutional reform will bring about immediate access to water or medicines. As a social and economic right, access to water and medicines will be subjected to progressive realisation. So, there is very little scope for the immediate implementation of such right/s. In addition, access to justice in the Ghanaian context is beyond the means of the ordinary citizen. Coupled with this is the fact that legal aid is woefully non-existent as far as judicial remedy is concerned.

With respect to water, Ghana must adopt proactive measures through legislative instruments and political strategies to ensure that access to water is not only protected but realised. Ghana must respect the UNGA in its Resolution 64/292 that affirms the importance and indispensable nature of water as constituent element in promoting human rights. Again, this Resolution and the General Comment No.15 of the UNCESCR require both government and institutions in the country to adopt practical measures to provide water services to the people.

Second, Ghana must make conscious effort to improve her traditional medicine manufacturing through intensified research and investment as being undertaken by the

government of Bolivia.¹¹⁶² Bolivia and Brazil have invested more financial and technical resources to finding local remedies towards the treatment of HIV/AIDS. At the same time, they have adopted measures to record and document each and every process and results identified through local manufacturing effort with a view to secure intellectual property rights in accordance with TRIPS. Ghana can undertake a similar project by documenting historic curative practices upon which the country can expand her medical inventions in line with the knowledge and skills acquired through national investment and research endeavours.¹¹⁶³

4.2 Substantive and procedural rights

There are several weaknesses of the participatory rights, consultation and information in Ghana. The recommendations below highlight various ways the government and the judiciary may promote access to medicines and water. It is equally important that government agencies and ministries (e.g. Ministry of Information and Justice and the CHRAJ), extend public education to ordinary Ghanaians on human rights, access to information and the possibility of seeking remedy at court of law. This may enhance the public's awareness on issues relating to human rights and access to justice. Underpinning this recommendation is an UNGA Resolution¹¹⁶⁴ on the independence of Judges and Lawyers. This Resolution urges Judges and lawyers to show integrity in deliberating and dispensing justice. At paragraph 86 of the above UN Resolution, it is stated that:

¹¹⁶² The Constitution of Bolivia, Article 20, clause (iii) states as follows: “access to water and sanitation constitute human right and therefore are not objects of concession nor privatisation.

¹¹⁶³ Ibid.

¹¹⁶⁴ The UN General Assembly – Independence of Judges and Lawyers- Report of the special Rapporteur on independence of Judges and Lawyers, < www.mdlo.ca.../UN-General-Assembly-Independence-of-Judges-and-lawyers.pdf, > accessed 25th August 2015

“The integrity of the justice system is a precondition for democracy and rule of law. The justice must be structured on the pillars of independence, impartiality and accountability in order for the principles of independence of the judiciary and the separation of powers to be respected.”¹¹⁶⁵

Generally, Resolutions are said to have no legal effect which means they are not binding upon States. However, the UN Resolutions play useful role to establish evidence of sources of law or *opinio juris*.¹¹⁶⁶ Thus, it is imperative that member States of the UN including Ghana responds favourably to implementing such resolutions. Ghana can endeavour to do the following:

First, the Judges of the Ghanaian High Court need to exercise the highest level of integrity by holding accountable government, institutions and other private agencies entrusted with responsibility to provide water and water-related services under the present 1992 Constitution. The problem facing most judges in this position is that they are politically appointed therefore unable to display impartiality and integrity required of them in cases involving the state. One way of curbing such conflicts of interests among Ghanaian Judges is to provide them with knowledge in modern human rights laws which places public interest beyond political gains.

With a sponsorship from the United Nations Environmental Programme (UNEP), some Ghanaians Judges received training in order to protect the environment of Ghana in accordance with multilateral environmental treaty obligations.¹¹⁶⁷ This training provided the judges with skills in sources of environmental law, the relationship between international environmental law, human right law, and national law.¹¹⁶⁸ Similar training

¹¹⁶⁵ Paragraph 86 independence of judges and lawyers, *ibid*.

¹¹⁶⁶ Hugh Thirlway, *The Sources of International Law*, (Oxford University Press, Oxford 2012) 79

¹¹⁶⁷ UNEP Global Judges Programme, < www.unep.org/delc/portal/119/.../unep-global-judges-programme.pdf, > accessed 12th February 2016

¹¹⁶⁸ *Ibid*.

programmes can be initiated by the UNEP or ECOSOC to provide training to the judges to enable them promote access to water and medicines.

As shown in the cases of *Minister of Health v Treatment Campaign (TAC)*¹¹⁶⁹ and *Mazibuko and Others v City of Johannesburg*¹¹⁷⁰ in South Africa, the Judges in the High Court of Ghana can endeavour to entertain social and economic litigations as well as pronounce judgments promoting access to water and medicines as implied in chapter five of the 1992 Constitution of Ghana. Mclean has urged African Courts including Ghana to promote access to social needs such as medicines by stating that: “reviewing government policy is not policy making. Judicial review is also not overstepping constitutional boundaries but rather a means of protecting social and economic means of livelihood for the poor in society.”¹¹⁷¹ By extension, Mclean suggests that courts in Ghana should

¹¹⁶⁹ *Minister of Health v. Treatment of Action Campaign (TAC)* (2005)5 SA, < <http://www-escri-net.org/docs/i/403050>, > accessed 25th August 2015

The fact of the case are as follows: newly born babies in South Africa were highly infected with HIV/AIDS through mother –to-child at around 80,000 each year. The government of South of Africa had a consignment of Nevirapine, a medication which recommended to save children’s lives to about 30,000 each year. However, the government of South Africa was that Nevirapine would be distributed on a basis of pilot programme. TAC, therefore, challenged the government, arguing a breach of 27 of the South African Constitution. Judge Chris Botha of the High Court held in favour of TAC, stating that: ... restricting distribution of Nevirapine on pilot of basis, is a denial and exclusion of those who could not be included. The government was further ordered to provide Nevirapine in addition to counsellors and testing to infected people throughout public sector.

¹¹⁷⁰ *Mazibuko and Others v City of Johannesburg and Others*, Case, CCT 39/09, (2009) ZA CC 28, < <http://www.escri-net.org/docs/i/1110326>, > accessed 25th August 2015

The facts of the case are: the Phiri Community, a suburb of Johannesburg city, had pre-paid water metres installed in their various homes, by the Johannesburg Water Corporation; in order to charge water consumption usages. Over time, the people in the Phiri Community could not pay their water charges, and as a result, water supply to the community was cut-off. The Community instituted legal action, arguing a breach of their constitutional right under article 27(1) (b) of the South African Institution. The South Gauteng High Court held that installation of pre-paid water metres in Phiri was unlawful; and ordered that each person be provided 50 litres of water per day.

The decision was challenged at the Court of Appeal and the previous decision was varied that each person should be provided with 42 litres of water on daily basis. Also, it was held that the pre-paid installed metres were unlawful. However, this decision was suspended by the Court; to allow the government, to issue its policy on water supply in the country.

¹¹⁷¹ Kirsty McLean, “Constitutional Deference, Courts, and Socio-Economic rights in South Africa”, (Pretoria University Press, South-Africa 2009) 210-211.

emulate the pro-active approach adopted by the South African judiciary in promoting access to economic and social rights –such as medicines and water.

Second, the judiciary of Ghana should also recognise and invoke international law as part of their jurisprudence in granting access to water and medicines. For example, there is no provision on granting access to medicines and water within the Constitution of India. However, the Supreme Court of India, for instance, in the case of *L. Hoffman Ltd v Cipla*¹¹⁷² has ensured that human dignity and sanity is protected over business and intellectual property rights by alluding to international human rights and related international obligations.¹¹⁷³ The judiciary of Ghana needs to display such proactive approach to protect the majority of poor Ghanaians.

Third, the lawyers must endeavour to revise their charges to meet the needs of majority of poor Ghanaians who are constantly being priced out of the justice system due to limited income. As mentioned by Morhe¹¹⁷⁴ (discussed in chapter 5), the government may work with the Ghana Bar Association and the Ghana Law Schools to train future lawyers in human and socio-economic rights subjects. Also, Pro-Bono projects which can offer opportunity to newly qualified lawyers to gain practical experience should be centred on legal aid practice. This way, poor people with human rights cases may gain legal assistance. This will satisfy the dual purposes of giving legal assistance to citizens as well as enhancing legal professional skills among newly qualified lawyers.

¹¹⁷² *L. Hoffman-La Roche v Cipla Ltd (Delhi)* (n.1159) 73

¹¹⁷³ Phillipe Cullet, “Right to water in India-plugging the Conceptual and Practical gap” (2013) (17 (1))*The International Journal of Human Rights*, 56-78

¹¹⁷⁴ Rene Aku Sisofe Morhe, (n.1011) 84

Fourth, the CHRAJ should be given some enforcement powers to punish and enforce human rights violations as an independent protective human right institution so as to make its presence in the Ghanaian society relevant. For the CHRAJ to become effective as a human rights protective organ, it must be given some powers to institute fines, initiate legal proceedings and even pronounce a limited sentence to back its operations. This will not only reduce the burden of adjudication of cases at the regular courts; but also provide an effective mechanism of protecting human rights. This is viable through constitutional amendment because most of the personnel working at the CHRAJ are lawyers and professionals with law related qualifications.

Fifth, adequate financial and logistical resources must be invested by the government of Ghana to provide the Judges and lawyers with modern knowledge and skills in the fields of social and economic rights. As mentioned in the examples from South Africa, the Constitutional Court of South Africa granted that access to Nevirapine should be given to expectant mothers',¹¹⁷⁵ while water must be supplied to the people without disruption as it is a human right which is constitutionally protected.¹¹⁷⁶ Furthermore, the Supreme Court of India also played a proactive role to protect access to water as human right. Thus, in the case of *Subash Kumar v. State of Bihar*,¹¹⁷⁷ the Supreme Court reasoned that: "the right to life is a fundamental right under Article 24 of the Constitution and it includes the right of enjoyment of pollution free water which is necessary for the enjoyment of life."¹¹⁷⁸ The Supreme Court of India understands that all human rights are equal and that no right can be realised at the expense of the other. In this sense, the Supreme Court strived to

¹¹⁷⁵ The *TAC* case, (n 1177)

¹¹⁷⁶ The *Mazibuko* case,(n.1178)

¹¹⁷⁷ The case of *Subash Kumar v. State of Bihar* (AIR1991 SC 420/1991 (1) SCC 598

¹¹⁷⁸ Phillipe Cullet, (n.1181) 82

protect access to water although there is no specific constitutional provision backing that right. By way of good practice, the judges of Ghana's High Court can emulate the pro-human right stance of India's Supreme to interpret the Ghanaian Constitution to grant access to water and medicines. However, the recent corruption scandal involving Ghana's judiciary system has led to suspensions of some senior judges with litigations being conducted by the Attorney-General. According to Baneseh, the Judicial Service of Ghana has interdicted 22 judges while 100 members of the judicial staff have been accused as accomplices.¹¹⁷⁹ It has been stated that sums of money, foodstuffs as well as goats have been allegedly collected in bribes with the promise of deciding cases in favour of their pursuers.¹¹⁸⁰ Given that most Ghanaians have limited funds to pursue human rights litigations in the absence of legal aid, corruption among judges together with judicial staff make it extremely difficult for justice to be accessed by the poor in the society.

As a way of improving access to justice in human rights, water and medicines, the government of Ghana needs to implement effective anti-corruption measures in respect of the United Nations Convention against Corruption (UNCAC)¹¹⁸¹ and the African Union Convention on Preventing and Combating Corruption (AUCAC)¹¹⁸², in order to create a society in which human dignity and welfare are promoted and protected through the rule of law. According to article 5 (1) of UNCAC, each UN member has a responsibility to

¹¹⁷⁹ Mabel Aku Baneseh, "Judicial bribery: 12 High Court Judges to face impeachment" < <http://graphic.com/gh/news/general-news/49193-judicialbribery-12-high-courtjudges-to-face-impeachment.html>, > accessed 20th October 2015

¹¹⁸⁰ Mabel Aku Baneseh, *ibid*

¹¹⁸¹ United Nations Convention against Corruption, entered into force 14th July 2005 < <http://treaties.un.org/doc/source/Recent/Corruption/E.pdf> > accessed 20th June 2017

Ghana signed the UN Convention on 9th December and ratified it on June 2007 respectfully.

¹¹⁸² African Union Convention on Preventing and Combating Corruption, entered into force on 5th August 2006 < www.business-anti-corruption.com/anti-corruption...african-union-convention-on-pr > accessed on 20th June 2017

Ghana signified the African Convention Union on 3rd October 2003; and ratified on 13th June 2007.

institute and implement a legal system which investigates, coordinates and punishes public and private officials engaged in corruption activities so as to foster a system in which human rights is protected.¹¹⁸³ Similarly, the AUCAC requires member States to penalise by confiscating assets belonging to public and private officials engaged in corruption-related activities; in order to create a fairer social, economic and political environment favourable to their peoples' development.¹¹⁸⁴ Thus, the judiciary system of Ghana would be improved to create a favourable economic, social and political environment to promote access to water and medicines.

4.3 International actors: WTO, World Bank and African Union

International actors such as the WTO, World Bank and African Union can offer various forms of assistance to Ghana to promote the growth of her economy so as to advance the social and economic wellbeing of the people.

Under the WTO, Ghana gained assistance with respect to acquiring negotiation skills. In chapter 2, reference is made to the fact that a Ghanaian representative at Geneva was invited to be trained in negotiation skills so as to acquire knowledge and skills with which to promote Ghana's interests at the WTO. While it is not sufficient in comparison to match the developed world (e.g. US, EU and Japan) representatives who have resources and extensive knowledge and skills in trade negotiations, this type of negotiation skill training is still required by Ghana.

¹¹⁸³ Article 5 (1) *ibid*, (N.1196)

¹¹⁸⁴ Article 2 (1-5), (African Convention against Corruption) *ibid*. n.1197

In respect of the above, developing countries including Ghana need to collaborate at the WTO level with a view to press for transparent and open negotiation system which allows them to engage in deliberations with their counterparts from the developed countries so as to reach and implement agreements that promote the economic social of their peoples.¹¹⁸⁵

4.4 GATS and TRIPS

As regards GATS, there is a proposition that technical and infrastructural assistance in respect of water supply should be demand-driven to allow Ghana to implement facilities which address her water-supply needs in order to advance the social and economic wellbeing of the people; rather than relying on facilities provided by the WTO and MNCs that do not spur the people's economic and social prosperity.¹¹⁸⁶ The strategic importance of implementing a demand-driven infrastructures in the water-supply sector of Ghana, received affirmation among some developing countries¹¹⁸⁷ at the Doha Ministerial Conference; where it was argued that having a free-hand to decide technical assistance unique to their social and economic needs of developing countries provides a lasting benefit to their development instead of depending on external aids.¹¹⁸⁸

Similarly, some developing countries including Ghana have argue that one effective way of improving access to technical assistance under the GATS Agreement so as to promote effective access to water-supply; is that the officials of WTO should refrain from acting as

¹¹⁸⁵ Richard Blackhurst and David Hartridge, "Improving the Capacity of WTO Institutions to fulfil their Mandate" in Ernst-Ulrich Petersmann and James Harrison (eds) *Reforming The World Trading System: Legitimacy, Efficiency, and Democratic Governance*, (Oxford University Press, Oxford, 2005) 456-457

¹¹⁸⁶ Gregory Schaffer, "Can the WTO Technical Assistance and Capacity Building serve Developing Countries?" in Ernest-Ulrich Petersmann and James Harrison (eds) *Reforming The World Trading System: Legitimacy, Efficiency and Democratic Governance*, (Oxford University Press, Oxford, 2005) 259

¹¹⁸⁷ Some of the developing countries which favoured a demand-driven technology during the Doha Conference are: Columbia, Kenya, Mauritania, Morocco and Thailand.

¹¹⁸⁸ Gregory Schaffer, *ibid.* 259

rules-promoters during states visits and behave as partners of developing countries in finding sustainable technical solutions to promote the social and economic wellbeing of their peoples.¹¹⁸⁹

Moreover, Schaffer has proposed that Ghana should endeavour to build an internal technical capacity in respect of her water-supply needs by cooperating with the Water and Hydraulic Department of the Kwame Nkrumah University of Kumasi (KNUST); in order, to establish a sustainable domestic water engineering capacity to produce and supply water at an affordable rate and accessible for the majority of Ghanaians.¹¹⁹⁰ Impliedly, this strategy has the prospect of reducing Ghana's dependence on foreign MNCs and FDIs for the supply of water in the country.

With respect to the TRIPS Agreement, the recommendation is, that provisions in the TRIPS should be modified to provide a cheaper license fee or free access for Ghana to use developed countries' technologies to produce essential medicines to stem the menace of HIV/AIDS and other deadly diseases threatening the livelihoods of her people.¹¹⁹¹ This means that Ghana can derive a benefit under the WTO's patent regime by utilising the existing technologies of the Pharmaceutical corporations to extend

¹¹⁸⁹ Gregory Schaffer, *ibid.* 255

¹¹⁹⁰ Gregory Schaffer, *ibid.* 260-261

¹¹⁹¹ Frederick M. Abbott, "Are the Competition Rules in the WTO Agreement on Trade Related Aspects of Intellectual Property Rights Adequate?" in Ernst-Ulrich Petersmann and James Harris (eds) *Reforming The World System: Legitimacy, Efficiency, and Democratic Governance*, (Oxford University press, Oxford, 2005) 318-319

medicinal and allied health facilities to promote the wellbeing of Ghanaians affected by the HIV/AIDS epidemic.

In addition, Abbott has expressed the view that Ghana should work in concert with other countries in the sub-region of West Africa to exercise political discretion and pressure in respect of the Doha Declaration; in order to promote the social and economic welfare of their peoples with a particular focus on access to medicines.¹¹⁹² Practically, one cannot see the possibility of Ghana and other countries within the sub-region exerting external political pressure to secure cheaper medicines from the developed countries under the current TRIPS regime. However, working in collaboration, they can build a strong economic block with which they can transform into a powerful sub-regional entity; so as to wield influence on the international plane especially in the spheres of international trade and access to medicines.

There is also a view that developing countries should press for the TRIPS Agreement to be amended or be supplanted by the Brussels Text of the 1980s.¹¹⁹³ The Brussels text was drafted with a view to grant more freedom and discretion to developing countries to exploit intellectual property rights for their social and economic benefits without incurring legal sanctions. The argument is that the Brussels text contained provisions which may waiver compulsory license fees and allow importation of generic versions of patented

¹¹⁹² Frederick M. Abbott, *ibid.* p.323

¹¹⁹³ The Brussels Text of the 1980s on Patent law within the WTO was purported to grant much freedom and discretionary powers to developing countries as to how they would implement patent regimes within their national legislations. In simple terms, the Brussels text aimed to promote the WTO's patent regime by recognising the peculiar developmental and health needs of developing countries; thus creating options for them to choose aspects of the patent provisions which enhance their countries' social and economic wellbeing.

drugs; so that developing countries can adopt national health measures in light of the provisions to advance the wellbeing of their peoples.¹¹⁹⁴

The development of South-North partnership is another recommended strategy which can be implemented in order to promote effective access to medicines under the current TRIPS regime. In this respect, it has been suggested that developed countries should endeavour to provide developing countries with the technology and of training their peoples in the field of manufacturing medicines; so as to enable them respond to the medicinal and health-related needs of their respective countries.¹¹⁹⁵

Abbott also argued that a global public welfare scheme should be established by the patent holders of the pharmaceutical corporations; to encourage developing countries to utilise their technologies to produce medicines to treat HIV/AIDS patients without incurring economic or legal sanctions.¹¹⁹⁶ This recommendation affirms the fact that the right to health is crucial to human survival, and therefore should be protected in the spirit of making access to medicines a paramount duty of all WTO members.

The WB has also played and continues to offer assistance in the management of Ghana's economy especially with access to water and medicines. For example, the WB donated US\$700, 000 towards Ghana's Growth and Poverty Reduction (GPRDII) in 2007, with an objective of empowering the private sector as engine of growth.¹¹⁹⁷ It has been suggested by the IMF/WB that the Ghana Government should ensure good governance through

¹¹⁹⁴ Frederick M. Abbott (n 1190) 320

¹¹⁹⁵ Frederick M. Abbott, *ibid.* 329-330

¹¹⁹⁶ Frederick M. Abbott, *ibid.* 332-333

¹¹⁹⁷ IMF Country Report No.091/238, < [www.siteresources.worldbank.org/.../GhanaCostingsofGPRS_2\(Nov-2005\).pdf](http://www.siteresources.worldbank.org/.../GhanaCostingsofGPRS_2(Nov-2005).pdf), > accessed 12 February 2016.

accountability and transparency.¹¹⁹⁸ Crawford suggests that, under GPRDII, the District Assembly system of local governance was introduced in Ghana to reduce poverty among majority of the rural people; however, little improvement was recorded in respect of GPRDII due to structural constraints.¹¹⁹⁹

Moreover, the AU which is an intergovernmental organisation of African States can promote the interests of its member-states; especially Ghana with respect to medicines and water on international platforms.¹²⁰⁰ However, little has been done thus far beyond proposing legislations, declarations and conferences on social and economic issues without adopting practical measures to achieve them. This is because the AU is often constrained by internal struggles and lack of political will.¹²⁰¹

In conclusion, Ghana's Sustainable Development Report (2012) suggests, that there has been 5.8% growth in the economy from 2001 – 2010 which gives Ghana a middle income status.¹²⁰² However, financial, institutional and infrastructure deficit have contributed to the limited access to water and medicines in most parts of the country and Ghana's economic success has been confined narrowly to the macro level without benefiting the

¹¹⁹⁸ *ibid*

¹¹⁹⁹ Gordon Crawford, "Decentralization and the Limits to Poverty Reduction: Findings from Ghana" (2008) 36 (2) Oxford Development Studies, 235-258

¹²⁰⁰ B. Gawanas, "The African Union: concepts, and the Implementation Mechanism Relating to Human Rights" < www.kas.de/namibia/6_gawanas, > accessed 25th October 2015

¹²⁰¹ Sonya Sceats, "Africa's New Human Rights Court: Whistling in the Wind?" (Chatham House, London 2009) 4

¹²⁰¹ IMF Country Report No.091/238, < [www.siteresources.worldbank.org/.../GhanaCostingsofGPRS_2\(Nov-2005\).pdf](http://www.siteresources.worldbank.org/.../GhanaCostingsofGPRS_2(Nov-2005).pdf), > accessed 12 February 2016.

¹²⁰² Republic of Ghana: National Assessment Report on Achievement of Sustainable Development Goals and Targets for Rio +20 conference < <http://sustainabledevelopment.un.org/content/documents/1016ghananationalreport.pdf> > accessed 20th November 2015

majority of Ghanaians. This means that access to water and medicines are compromised under the sustainable development programmes as well. However, with Sustainable Development Goals, it is hoped that new opportunities will be created in the water and medicines sector benefiting the poor people of Ghana.

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