The Complexity of Enforcing Intellectual Property Rights in the Absence of Antitrust Legislation and a Related Enforcement Institution: A Classic Policy Failure in Ghana

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Owing to the fact that TRIPS provides for a stringent enforcement of IPRs, this article examines the consequences of enforcing IPRs in the absence of an antitrust legislation and a related enforcement institution in Ghana. The article takes the view that such an absence undermines economic rights of Ghanaian consumers because unruly corporations are able to undertake predatory anti-competitive behaviour unnoticed. Although the author acknowledges the philosophical complexity in validating consumer protection as a complete human right subject matter, for the purpose of this article, a human right claim is made for consumer protection. This claim is founded on evidence that several multinational corporations operating in Ghana infringes antitrust laws in Europe. Given the understanding that antitrust legislations and its enforcement institutions offer a critical vehicle for protecting human rights, this article seeks a complete evaluation of a legal remedy, and the outcome is a logical conclusion for a legislative intervention to establish an enforcement institution to monitor antitrust undertakings in Ghana in order to protect consumers against the exploitation of IPRs by private corporations.

I. Introduction

Intellectual property rights (hereinafter 'IPRs') and competition laws are both the creation of a domestic policy. The interaction between an antitrust policy and the concept of IPRs are complex. This relationship has over the years become contentious, sparking philosophical tension in legal thinking, even though both serve a modifying social purpose of keeping markets

open. IPRs encourage creativity by recompensing innovators with exclusive rights.[1] This is in the hope that innovators would be induced to venture into undertakings that would ultimately improve the living standard of consumers.[2] On the other hand, antitrust legislations are cautious of the exercise of a right that seeks to limit the welfare of consumers.[3] With their distinctive locus and vast reach, both pursue the same line of objectives of ensuring consumer welfare.[4] Though these two bodies of law have assumed greater significance in governments' policies, some scholars still contest them as non-conforming to each other.[5]

Historically, the discussion of the intersection between IPRs and antitrust legislations has focused on the exercise of abusive market power by private corporations and their potential pernicious effect on consumer welfare.[6] The common presumption is that markets require no interruptions if perfect conditions exist for it to work satisfactorily in the interest of consumers. However, given the profit ambitions of modern businesses, it is expected that some multinational corporations (hereinafter 'MNCs') are likely to abuse their dominant positions in sidestepping weaker competitors and consumers for profit.[7] Presumably, this underlines the common sense position that several corporations are indeed complicit in violating human rights.[8] This is even exacerbated, as the free trade market continues to push forward the global economy. Consequently, holding corporations

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[1] Ludmila Striukova, 'Patents and Corporate Value Creation: Theoretical Approach*'* (2007) 8(3) Journal of Intellectual Capital, 431-443.

[2] Christine Greenhalgh, Mark Rogers, 'The Value of Intellectual Property Rights to Firms and Society' (2007) 23(4) Oxford Review of Economic Policy, 541-567. See also Carlos Braga, Carsten Fink and Claudia Sepulveda, Intellectual property rights and economic development (2000) TechNet Working Paper, < http://www.iatp.org/files/Intellectual_Property_Rights_and_Economic_Deve.pdf> accessed 08 December 2013.

[3] Valentine Korah, 'The Interface Between Intellectual Property and Antitrust: The European Experience' (2002) 69 Antitrust Law Journal 3, 801-839.

[4] Beatrice Dumont, Peter Holmes, 'The Scope of Intellectual Property Rights and their Interface with Competition Law and Policy: Divergent paths to the same goal?' (2002) 11(2) Economics of Innovation and New Technology, 149-162.

[5] Donna Gitter, 'The Conflict in the European Community Between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facilities Doctrine' (2002) 40(2) American Business Law Journal, 217-300.

[6] Steven Anderman, *The Interface Between Intellectual Property Rights and Competition Policy* (Cambridge University Press 2007).

[7] Richard Whish and David Bailey, *Competition Law* (7th edn. Oxford University Press 2012).

[8] Jordan Paust, Human Rights Responsibilities of Private Corporations (2002) 35(3) Vanderbilt Journal of Transnational Law, 801-825.

accountable for their poor practices become a difficult proposition because MNCs are working harder than ever to cover abuses instead of preventing them. Significantly, the current territorial model for confronting those abuses are inadequate in circumventing gross human rights violations by transnational corporations, since MNCs continue to gain unprecedented market power to influence governments' policymaking.[9] Unfortunately, the absence of a standardised global competition treaty similar to IPRs has made the creation of uniform antitrust legislations more complex, and by implication, the inability of LDCs to stop MNCs activities that breach human rights.

The free trade rhetoric that perhaps called for a global regulation of IPRs has met resistance.[10] Proponents of IPRs are struggling to rescue several credibility questions hovering its conception, particularly, on grounds that a global IPRs system does not strike the right balance in least developed countries (hereinafter 'LDCs') for economic development.[11] It is because IPRs, which were simpler in the pre-TRIPS era, have thus become more complex for LDCs that were already lacking capacity to produce technology for development, this in turn placed the regulation of IPRs into the hands of the WTO.[12] Following the introduction of the TRIPS Agreement,[13] the concept of IPRs is witnessing a progressive change for both current and future Members' of the WTO who are obliged to adopt non-discriminatory

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[9] Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat' (2004) 5(1) Melbourne Journal of International Law, 37-65.

[10] Keith Maskus, 'Normative concerns in the International Protection of Intellectual Property Rights' (1990) 13(3) The World Economy, 387-409.

[11] Carlos Correa, 'New Intellectual Standards for Intellectual Property: Impact on Technology Flows and Innovation in Developing Countries' (1997) 24(2) Science and Public Policy, 79-92.

[12] Keith Maskus, '*Private Rights and Public Problems: The Global Economics of Intellectual in the 21st Century*' (Peterson Institute for International Economics 2010).

[13] See the Agreement on Trade Related Aspect of Intellectual Property Rights, 15 April 1994. Annex 1 C Legal instrument-result of the Uruguay round vol. 31, 13 I.L.M (1994) establishing a multilateral agreement creating a minimum standard for various forms of Intellectual Property Rights among Member States. For more on the TRIPS Agreement, see Laurence Helfer, Regime Shifting, 'The TRIPS agreement and new dynamics of international intellectual property law-making' (2004) 29 Yale Journal of International Law, 2-62. See also Daniel Gervais, '*The TRIPS Agreement: Drafting history and analysis'* (vol. 2, sweet & maxwell, 1998); Christopher May, Susan Sell, *Intellectual property rights: A critical history* (Lynne Rienner Publishers 2006).

minimum standards for enforcing IPRs.[14] Just as IPRs have been experiencing transformation within the international trading system, the TRIPS Agreement has also been undergoing serious global scrutiny regarding its current purpose and future possibilities for LDCs.[15] Nevertheless, LDCs have had no choice but to accede to diplomatic pressures to remodel their IPRs to the same standards as developed countries under the ambiance of the WTO jurisprudence.[16] While several LDCs have started implementing their obligations under TRIPS in compliance with the transitional arrangement,[17] majority of them have failed to find analogous antitrust regimes in order to monitor probable anticompetitive undertakings involving MNCs who will exploit IPRs.

This article extends the line of inquiry by relating this debate to the consequences of the longstanding absence of antitrust legislation and its enforcement institutions in Ghana. In so doing, it addresses the main features of the TRIPS Agreement by pointing out the debate on the consequences of enforcing IPRs without an antitrust legislation and its enforcement institutions. Although, at the heart of this article, there are several fundamental questions, it ultimately seeks to answer the question of why Ghana has tended to ignore the siren call for an antitrust legislation and a related enforcement institution given the years of awareness on the problem. This article approaches to the question with a hypothesis arguing that consumer protection remains counterproductive without a precise antitrust legislation and a related enforcement institution for the appropriate operation of IPRs in Ghana. In this respect, it will rely on evidences of gross

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[14] Duncan Matthews, *Globalising Intellectual Property: The TRIPS Agreement* (Routledge, 2002).

[15] Bernard Hoekman, Michel Kostecki, *The political economy of the world trading system: from gatt to WTO* (Oxford University Press, 1995). See Also Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003).

[16] Peter Drahos, 'When the weak bargain with the Strong: Negotiations in the worlds Trade Organisation' (2003) 8 International Negotiation, 79-109. See importantly Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Dialogue*',* in Peter Drahos, Ruth Mayne eds. *Global Intellectual Property Rights: Knowledge Access and Development* (Basingstoke: Palgrave Macmillan, 2002).

[17] The WTO/TRIPS General Council Decision of 8 July 2002 on Least-Developed Country Members-Obligations Under Article 70(9) of the TRIPS Agreement with Respect to Pharmaceutical Products (WT/L/478 12 July 2002). Pursuant to Article 66(1) of the TRIPS Agreement, LDC Members Group of the WTO requested for an extension of the TRIPS Transitional arrangement on 5 November 2012. See WTO/TRIPS Doc. IP/C/W/583. On 11 June 2013, TRIPS Council confirmed further extension from 1 January 2016 until 1 July 2021. See also WTO/TRIPS Official Document IP/C/64.

violations of antitrust legislations in Europe by some MNCs operating in Ghana today, with the mind-set of making a human right claim for consumer protection. Accordingly, the logical conclusion is the need for a legislation intervention to initiate antitrust legislations and its enforcement institution to protect consumers.

The structure of the article is as follows. Section II discusses the economic growth theory that informed the culmination of TRIPS into the WTO jurisprudence. In addition, it evaluates human rights emphasis of IPRs, and then reviews literature against the legitimacy of IPRs in LDCs. Section III outlines the framework underpinning antitrust regimes. It considers TRIPS and its relevant enforcement provisions for antitrust as found in Articles 8 and 40, including a discussion of the World Bank's suggestion for a consistent national action on consumer protection. Section IV therefore, examines the extent to which consumer protection could be claimed as integral part of human rights in order to enhance its protection in Ghana. To conclude section V assesses the antitrust legal landscape in Ghana, mainly from the notion that Ghana's Constitution ignores consumer protection. Again, evidences that some MNCs operating in Ghana today have been found guilty of antitrust violations in Europe are considered to show the political failure to create antitrust regimes despite the years of policy considerations.

II. Understanding the WTO jurisprudence on IPRs

1. Introduction

Intellectual property (hereinafter 'IP') refers to the creation of inventions resulting from the exercise of creativity to which the inventor has rights, and for which a State must provide protection.[18] It falls principally into several bands such as; copyrights, trademarks, design rights, and patents.[19] IPRs, which aim to reward intellectual creations, derive its framework directly from the concept of knowledge ownership that underpins the innate desire for the inventor to be recompensed as a matter of commutative justice.[20]

[18] Peter Drahos, *A Philosophy of Intellectual Property* (vol. 223, Aldershot: Dartmouth, 1996).
[19] Lionel Bently, Brad Sherman, *Intellectual Property Law* (vol. 59, Oxford University Press, 2001).
[20] For theories of justice, see Brain Barry, *Theories of justice* (vol. 16, University of California Press, 1989).

Titleholders are thus, able to prevent unauthorised use while subjecting the content of the subject matter to exploitation.[21] From an economic perspective, IPRs could lead to significant economic growth.[22] Therefore, the inception of the TRIPS Agreement into the international trading system remains consequential to this standpoint.[23] Primarily, the social purpose of IPRs is to provide protection for the result of investments regarding the development of new knowledge, and thereby giving the incentive and means to finance research and innovation.[24] The fundamental principle reinforcing the idea that IPRs are bound by economics of innovation has led to several shades of fragmented opinions against such a presumed ideological line.[25] While the socio-economic objective of IPRs is outlined, it should also be noted that such exclusive rights are generally amenable to certain limitations for adjusting the balance that has to be found between the legitimate interest of a right holder on one hand, and the interest of the public on the other.[26]

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[21] See, for example in the Canada-Patent protection of pharmaceutical products case, the WTO panel stressed that the exclusion of *'all forms of competition'* is the essence of patent rights. It held that

> The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent's grant of market exclusivity . . . Patent laws establish a carefully defined period of market exclusivity as an inducement to innovation, and the policy of those laws cannot be achieved unless patent owners are permitted to take effective advantage of that inducement once it has been defined.

Report of the WTO Dispute Panel (WT/DS/114/R, para. 7.55).

[22] David Gould and William Gruben, The role of intellectual property rights in economic growth' (1996) 48 Journal of Development Economics, 323-350. See also Kai Wu, Hong Cai, Renai Jiang and Gary Jefferson, 'Trade and Intellectual Property Rights as channels for Economic Growth' (2013) 20 Asia-Pacific Journal of Accounting & Economics, 20-36.

[23] Robert Merges, *Justifying intellectual property* (Harvard University Press 2011). See also Josef Zweimuller and Ted O'Donoghue, 'Patents in a Model of Endogenous Growth' (2004) 9 Journal of Economic Growth, 81-123.

[24] Eric Hippel, Georg Krogh, 'Free Revealing and the Private-Collective Model for Innovation Incentives' (2006) 36(3) Research & Development Management, 295-306. See also Ove Granstrand, 'Innovation and intellectual property rights' (2005) The Oxford Handbook of Innovation, 266-290.

[25] Birgitte Andersen, 'If 'Intellectual Property Rights' is the Answer, What is the Question? Revisiting the Patent Controversies' (2004) 13(5) Economics of Innovation and New Technology, 417-442.

[26] Article 31 of TRIPS. US Statute Code Title: 28 USC 1498(a). Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006. See Reiko Aoki, John Small, 'Compulsory Licensing of Technology and The Essential Facilities Doctrine' (2004) 16(1) Information Economics and Policy, 13-29. See also Jerome Reichman, Catherine Hasenzahl, 'Non-voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in

The next part of the article discusses the economic growth theory that informed the culmination of TRIPS into the WTO system. In addition, it assesses the human rights emphasis of IPRs, and then reviews literature against the legitimacy of IPRs in LDCs.

2. The Economic Growth Theory

Prior to the TRIPS Agreement three attempts were usually made to justify IPRs, these being natural rights, distributive justice, and consequentialism, which together elaborated a so-called logic of entitlement.[27] These were predominantly, rooted on the impression that a person who labours upon resources that are either not owned or held in common has a natural IP protection to the fruits of her/his labour, and that States have duties to respect such rights. More importantly, in view of the success of globalisation, it was extremely difficult for the world at large to ignore the eruptive activism, which sought to push for a global treaty meant to protect the interest of innovators.[28] This necessitated the reconstruction of IPRs in a way that befits it newfound significance regarding the future economic success of countries.[29] The 'economic growth theory' then emerged as a substantive validation of IPRs, which footholds the view that IPRs remain catalysts for socio-economic development.[30] This theory recognises technology as central ingredient in economic welfare, similar to human capital, alongside the classical factors of production, land, labour and capital stock.[31] The theory also advances the argument that corporations would be reluctant to invest in innovation in the absence of financial incentives.[32]

3. A Human Right Emphasis of IPRs

Canada and the USA' (2003) Issue Paper 5 UNCTAD-ICTSD Project on IPRs and Sustainable Development Series, 1-41.

[27] William Fisher, *Theories of Intellectual Property: New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001).

[28] Jose M. Martin, 'The WTO TRIPS Agreement' (2004) 7(3) The Journal of World Intellectual Property, 287-326.

[29] Rod Falvey, Neil Foster, David Greenaway, 'Intellectual Property Rights and Economic Growth' (2006) 10 Review of Development Economics, 700-719.

[30] Arthur Lewis, *Theory of Economic Growth* (Routledge, 2013).

[31] Alfred Taubman, 'TRIPS Jurisprudence in the Balance: Between the Realist Defence of Policy Space and a Shared Utilitarian Ethic. Ethics and Law of Intellectual Property: Current Problems in Politics, Science and Technology' (2011) ANU College of Law Research Paper No. 08-10.

[32] Gideon Parchomovsky, Peter Siegelman, 'Towards an Integrated Theory of Intellectual Property' (2002) 88(7) Virginia Law Review, 1455-1529.

The rise of knowledge economy has in no doubt facilitated the unavoidable ever-expanding use of IP related goods. In this regard, proponents of IPRs have over the years drawn on diverse arrays of international legal venues to map up a human right claim for IPRs.[33] Despite this development, the interface between IPRs and human rights are still not clear.[34] It is not surprising to see how the debate has played into the hands of critics who are seeking to influence their line of understanding to delineate the conceptual edges of IPRs from the primacy of human rights.[35] Nevertheless, scholarly analysis of IPRs as a human right suggests it finds legitimate support in certain international human rights instruments.[36] This has often impelled most progressive countries to accept the persuasive end of IPRs as human rights within their constitutional provisions.[37] Human rights justification of IPRs thus, begins from Article 17.1 of the Universal Declaration of Human Rights (hereinafter 'UDHRs'), which specifies a right to own property.[38] Article 27.2 of the UDHRs, and Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (hereinafter 'ICESCRs') confirms the right of everyone to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the person is an inventor.[39] Similarly, the African Charter on Human and People Rights also guarantee the right to own property.[40]

4. Literature against the Fundamental Legitimacy of IPRs

The controversy surrounding the exponential expansion of IPRs to a global reach opened the floodgate for counterclaims, some of which are probing

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[33] Laurence Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 University of California Law Review, 971-1020.

[34] Ruth Gana, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18(2-3) Law and Policy, 315-354.

[35] Paul Torremans, 'Is Copyright a Human Right' (2007) Michigan State Law Review, 271-291.

[36] Robert Ostergard, 'Intellectual Property: A Universal Human Right?' (1999) 21(1) Human Rights Quarterly, 156-178.

[37] Laurence Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40(3) University of California Davis Law Review, 971-1020.

[38] Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A (III), 3 U.N. G.A.O.R. (Resolutions, part 1), U.N. Doc.A/810 (1948).

[39] International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), p. 49, U.N. Doc. A/6316 (1966).

[40] African (Banjul) Charter on Human and Peoples' Rights adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force 21 October 1986), art 14.

the validity of incentives affording IPRs a global protection.[41] The very fundamental notion suggesting IPRs carry the persuasion for innovation is the relic of the provocative scholarship driving almost all the speculative insurgencies aimed at repairing the misconception about the winners and losers of IPRs.[42] This is premised on a contrary belief that even though there is a minimum standard for a global protection of IPRs, it does not lead to a uniform economic growth but rather escalates social costs and the loss of balance for consumers in LDCs.[43] This viewpoint also extends to a correction made in order to carry into effect the actual intention of IPRs in global economy with an argument asserting in a straightforward manner that IPRs afford MNCs the power to employ voracious commercial tactics in defence of their profit motives.[44] The proper context is that stringent enforcement of IPRs in LDCs would intently override consumer safeguards in favour of MNCs. This is because the TRIPS Agreement submits to loose consumer protection against the uncompromising IPRs enforcement supportive of MNCs some of whom lobbied global policymakers for the extension of IPRs as a global trade issue.[45]

As a result, LDCs by contrast, who are generally users, and not producers of formal technology have condemned IPRs from a differing hypothetical neatness arguing that it potentially, restricts their access to technology.[46] Nonetheless, the important subject stricken in our intellectual conscience brings forth a deeper issue of whether global minimum standards for

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[41] Jerome Reichman, 'Universal minimum standards of intellectual property protection under the TRIPS component of the WTO Agreement' (1995) 29(2) The International Lawyer, 345-388. See Also Gary Lea, Peter Hall, 'Standards and Intellectual Property Rights: An Economic and Legal Perspective' (2004) 16(1) Information Economics and Policy, 67-89.

[42] Frederick Abbott, 'Are the competition rules in the WTO TRIPS Agreement adequate?' (2004) 7(3) Journal of international economic law, 687-703. See Also Peter Lloyd, Gary Sampson, 'Competition and Trade Policy: Identifying the Issues after the Uruguay Round' (1995) 18(5) The World Economy, 681-705.

[43] Donald Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPS Agreement* (ME Sharpe Incorporated, 2004).

[44] Hanns Ullrich, 'Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective' (2004) 7(2) Journal of International Economic Law, 401-430.

[45] Peter Drahos, John Braithwaite, 'Intellectual property, corporate strategy, globalisation: TRIPS in context' (2002) 20(3) Wisconsin International Law Journal, 451-480. See also David Levy, Aseem Prakash, 'Bargains Old and New: Multinational Corporations in Global Governance' (2003) 5(2) Business and Politics, 131-150.

[46] Yongmin Chen, Thitima Puttitanun, 'Intellectual Property Rights and Innovation in Developing Countries' (2005) 78(2) Journal of Development Economics, 474-493.

enforcing IPRs are still relevant, amid the diminutive innovation activities among LDCs.[47] Evidence suggests otherwise, given the probable shift towards private interests in developed countries.[48] Moreover, the fact that the global enforcement of IPRs emerged in 1994 further diminishes the role of IPRs as tools for economic development. This is because industrialised countries, which promoted the inclusion of IPRs on the global trade agenda, were already developed in 1994. The same uncertainty regarding IPRs as mechanisms for economic growth prompted the United Nations Conference on Trade and Development's (hereinafter 'UNCTAD') criticism of the current construction and operations of IPRs as antithesis to competition.[49]

On the basis of the preceding angle, the idea of IPRs becoming a trade issue has also not been spared for lacking conceptual certainty.[50] This criticism falls on the idea that TRIPS is interventionist treaty pursued by some industrialised countries to defend the commercial interest of their MNCs knowing that the knowledge content of LDCs remains untradeable.[51] Knowing that IPRs push the frontier of innovation towards an extreme web of intricate global legal structures that tends to place knowledge in the hands of private agents as opposed to knowledge as public goods, corporations could exploit exclusive rights to frustrate competition.[52] Consequently, there is a difficult end to reach a workable global IP system, which works for the benefit of all, since enforcing IPRs to a level that could enliven innovation

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[47] Africa's Technology Gap: Case Studies on Kenya, Ghana, Uganda and Tanzania (UNCTAD, 2003: UNCTAD/ITE/IPC/Misc.13).

[48] Keith Maskus, 'The International Regulation of Intellectual Property' (1998) 134(2) Review of World Economics, 186-208.

[49] Workshop on Developing Local Productive and Supply Capacity in the Pharmaceutical Sector: The Role of Intellectual Property Rights (The United Nations Conference on Trade and Development (UNCTAD), Addis Ababa, 19-23 March 2007).

[50] Gail Evans, 'Intellectual property as a trade issue: The making of the agreement on trade-related aspects of intellectual property rights' (1994) 8(2) World Competition, Law and Economics Review, 137-180. See also Keith Maskus, Mohan Penubarti, 'How Trade-related are Intellectual Property Rights?' (1995) 39(3) Journal of International Economics, 227-248.

[51] Susan Sell, 'Intellectual property and public policy in historical perspective: contestation and settlement' (2004) 38(1) Loyola of Los Angeles Law Review, 267-322. See also James Bassen, Eric Maskin, 'Sequential Innovation, Patents, and Imitation' (2009) 40(4) The RAND Journal of Economics, 611-635.

[52] Peter Drahos, 'The regulation of public goods' (2004) 7(2) Journal of International Economic Law, 321-339. See Also Michael Blakeney, Getachew Mengistie, 'Intellectual Property and Economic Development in Sub-Saharan Africa' (2011) 14(3-4) The Journal of World Intellectual Property, 238-264.

in LDCs would potentially overstep consumer protection.[53] This explains the existence of fundamental variances in academic opinion on the topic of IPRs, such as whether it provides justice for all, given that LDCs rely on imported solutions. At this point, it should be considered that the presumed difficulties faced by LDCs on the understanding of a global minimum standard for enforcing IPRs in itself undermines the trust required by LDCs to manage their multilateral ties.

III. The empirics of antitrust legal frameworks and its related institutions for enforcement

1. Introduction

The word 'antitrust' denotes traditionally, a broad term covering several aspects of legal and institutional infrastructures for monitoring impropriety in commercial actions intending to obstruct consumer welfare.[54] The underlying rationale behind antitrust policy in a State is meant to preserve its commercial environment free from anticompetitive transactions that tend to circumvent its structural economic welfare.[55] This makes the regulation of competition a quintessential component of a modern economy in order to optimise an economic growth.[56] It is against this backdrop that of late civilised countries everywhere adopt proactive statutory instruments as part of national actions to regulate and at the same time monitor possible restrictive business practices. Notwithstanding, it follows on from the perception that IPRs heighten the predatory powers of MNCs who are able to dictate tough terms of the market to the inconvenience of consumers.[57]

Though some scholars may have somehow over-elaborated the fluidity about the destructive signs of IPRs, a common school of thought is that if a State enforces IPRs without a sanitised competition policy, such a country would fail to foster the interest of its people. The progressive view in light

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[53] Sol Picciotto, 'Private Rights vs. Public Standards in the WTO' (2003) 10(3) Review of International Political Economy, 377-405.
[54] Brian Harvey, Deborah Parry, *The Law of Consumer Protection and Fair Trading* (4th edn. Butterworths, 1992).
[55] Kip Viscusi, Joseph Harrington, John Vernon, *Economics of Regulation and Antitrust* (4th revised edn. MIT Press, 2005).
[56] Jonathan Baker, 'The Case for Antitrust Enforcement' (2003) 17(4) The Journal of Economic Perspectives, 27-50.
[57] Christopher May, 'Unacceptable Costs: The Consequences of Making Knowledge Property in a Global Society' (2002) 16(2) Global Society, 123-144.

of this is a call for an exhaustive legal framework to balance consumer interest against the profit interest of MNCs.[58] Notably, this call has in recent years found meaning in judicial reasoning given that aggressive commercial transactions by MNCs are capable of undermining consumer welfare.[59]

This is why the recognition of strict rule-based antitrust policies has spread, in order to avoid potential abuse by MNCs who are always tempted by their ever-widening profit ambitions to exploit consumers in an open market.[60] The next part of the article outlines the framework underpinning antitrust regimes. It considers TRIPS and its relevant enforcement provisions for antitrust as found in Articles 8 and 40 with a discussion of the World Bank's suggestion for a consistent national action on consumer protection.

2. A Brief History of Antitrust Legislations

The conceptual underpinnings of antitrust regimes rest on a viewpoint that markets alone as a loose system offers the opportunity to powerful MNCs to intimidate weaker competitors.[61] The United States (hereinafter 'US') pioneered the enactment of antitrust legislation to regulate commercial undertakings that impose illicit limits on competition with the view to promote the interest of consumers.[62] This follows public reaction over trusts, which were dominating the US manufacturing and mining sector in the late-nineteenth-century. It is believed that common law failed to restraint aggressive monopoly. In effect, this lapse brought the contrasting models of the market and the State into sharp collision with the end result, the promulgation of the first antitrust legislation in the US known as the Sherman Act.[63] The Sherman Act embodied a statutory compromise for a

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[58] Shahid Alikhan, Raghunath Mashelkar, *Intellectual Property and Competitive Strategies in the 21st Century* (Kluwer Law International, 2004).
[59] Geraint Howells, Stephen Weatherill, *Consumer Protection Law: Markets and the Law* (2nd revised edn. Avebury, 2005).
[60] Marc Allen Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* (University of Carolina Press, 1991). See also Giorgio Monti, *EC Competition Law* (Cambridge University Press, 2007). Refer to Anti-Competitive Agreements under EU Law found in Consolidated Version of the Treaty on the Functioning of the European Union Articles [101 and 102], 2008 O.J. C 115/47.
[61] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004).
[62] Eilliam Kovacic, 'The Modern Evolution of US Competition Policy Enforcement Norms' (2003) 71(2) Antitrust Law Journal, 377-478.
[63] The Sherman Anti-Trust Act of 1890 (15 USC.A. § 1 et seq.). See Clayton Act of 1914 (15 USC.A. § 12 et seq.). The Robinson-Patman Act of 1936 (15 USC.A. § 13 et seq.). See

healthy competition in the market, which was understood as fundamental machinery for the allocation of resources.[64] It countered the long held view that the perfection of conditions in the market is not the function of governments, and therefore, requires no intervention. By 1990 the use of antitrust policy to regulate commercial undertakings in markets has become a common phenomenon across the globe.[65]

3. Articles 8 and 40 of the TRIPS Agreement

The idea that IPRs are prone to animate over-ambitious MNCs to undertake abusive actions to the detriment of consumers has not been disputed empirically.[66] Even the TRIPS Agreement acknowledges the extent to which IPRs could distort competition. To this end, TRIPS offered its Members the cardinal discretion to adopt antitrust precautionary measures for consumer protection.[67] Primarily, Articles 8, and 40 of the TRIPS Agreement enjoins Member States to take consistent, and appropriate measures to prevent undertakings intended to unreasonably restrain competition. Thus, the TRIPS Agreement seeks to match the implementation of IPRs with legislative and institutional developments that ensure MNCs do not over exploit IPRs to insulate their interests. The reality, however is that the enforcement provisions for safeguarding consumer protection, as contained in the TRIPS Agreement are permissive in nature, rather than mandatory. Hence, they do not require minimum standards to be applied by Member States as in the case of other provisions dealing with substantive IPRs protection. Article 8.1 of the TRIPS Agreement provides as follows:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their

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also the regulatory agency to administrate and enforce the law, under the Federal Trade Commission Act of 1914 (15 USC.A. §§ 41--58).

[64] William Page, The Ideological Origins and Evolution of US Antitrust Law in Wayne Dale Collins (ed.) *Issues in Competition Law and Policy* (ABA Antitrust Section 2008).

[65] For example the Antimonopoly Act of Japan, officially the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of April 14, 1947. See also James Fry, 'Struggling to Teethe: Japan's Antitrust Enforcement Regime' (2000) 32 Georgetown Journal of International Law, 825-858.

[66] Herbert Hovenkamp, Mark Janis, Mark Lemley, *IP and Antitrust* (Wolters Kluwer Law & Business, Aspen Publishers, 2002).

[67] Eleanor Fox, 'Competition Law and the Millennium Round' (1999) 2(4) Journal of International Economic Law, 665-665.

> socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.[68]

Of particular importance is Article 8.2:

> Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade or adversely affect the international transfer of technology.

Article 40 of the TRIPS Agreement also states:[69]

> (1) Members agree that some licensing practices or conditions pertaining to intellectual property rights, which restrain competition, may have adverse effects on trade and may impede the transfer and dissemination of technology. (2) Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

4. World Bank's view on the impact of TRIPS Agreement and competition

The economic purpose of IPRs has dominated government policies of LDCs to the extent that it has overshadowed the distributive understanding of IPRs, and its overriding discontents on consumer protection. Social norms and moral considerations have often presumed that if IPRs were applied without a parallel antitrust legislations and its enforcement institutions,

[68] Article 8 of TRIPS emphasises on Members' discretion to prevent the abuse of IPRs.
[69] Article 40 of TRIPS enjoins Members' to control anti-competitive practice.

MNCs are highly likely to be tempted to circumvent consumer welfare.[70] Different states have dissimilar reasons for the adoption of antitrust policies. Some states consider internal reasons, such as national economic reforms. Others reacted to external pressure by international institutions, such as the World Bank. The World Bank, in particular, places weights on the impact of IPRs regimes on consumer protection. While developed countries could easily deploy antitrust regimes to monitor destructive effects of IPRs, the possibility that MNCs would exercise momentous market power using IPRs as shields is practical in LDCs. As a result, the World Bank responded to this reality of MNCs violating antitrust laws by recommending a redefinition of a total symmetry between antitrust legal frameworks and its institutional re-orientation in order to reduce the degree at which TRIPS may impair competition to the detriment of consumer welfare. The World Bank stated that:

> Unless countries rapidly establish adequate competition frameworks and regulatory institutions that also address monopoly abuse of intellectual property rights, it is possible that increasing intellectual property right protection could result in welfare losses from monopoly demeanour.[71]

Additionally, the WTO is likely to put pressure on LDCs to implement their TRIPS obligations to apply sturdier IPRs which may weaken consumer protection. The World Bank's report forewarned in particular LDCs to intervene quickly to implement appropriate antitrust regulatory frameworks in their jurisdictions. The World Bank is convinced that enforcing IPRs without a comparable statutory infrastructure for antitrust and a related enforcement institution would make LDCs run the risk of harming consumer rights. Since, in the absence of a well-defined antitrust legislation and a related institution exercising competition supervision, industry cannot be trusted to voluntarily play by commercial rules. Even if it were to put matters too high, the alternative position is that the approach to develop a suitable legislative landscape to address gaps in competition policy in

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[70] Katlin Cseres, *Competition Law and Consumer Protection* (vol. 49, Kluwer Law International, 2005). See also Case C-48/69 *ICI Ltd v Commission* [1972] ECR 619 paras 64-68.

[71] Keith Maskus, Mohamed Lahouel, *Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement* (The World Bank Global Conference on Developing Countries and the Millennium Round, Geneva, September 1999).

predominantly, an LDC jurisdiction remains unrealistic proposition. Moreover, conventional wisdom is against the odd that policy developments in this direction are rather less optimistic, as institutional immaturity issues alone stand to deteriorate the already prevailing capacity constraints confronting LDCs.

IV. Human rights emphasis of consumer protection

1. Introduction

The United Nations Guidelines for Consumer Protection (hereinafter 'UNGCP') was adopted in 1985.[72] It featured a comprehensive list of objectives described as 'legitimate needs' including the right to safety, the promotion of sustainable consumption patterns, and the advancement of economic interest of consumers. Even though several of these objectives appear to have their origins in human rights treaties, they are often not treated as part of the operational content of human rights.[73] Invariably, while the relevance of consumer protection has shown signs of great importance in policy considerations of several governments, decorating consumer protection as an obligatory human right is bound to face several philosophical ambiguities. Therefore, it seems premature to characterize the same as mandatory human rights as opposed to permissive or soft rights, and clearly, arguing otherwise would not achieve a precise outcome in the midst of ideological resistance. Theoretical uncertainties together with other notional opposition makes it daunting to supply adequate philosophical presumptions to support its acceptance and practice as overriding human rights. One fundamental objection is that the admission of new rights into the already over-filled human rights instruments could create a damaging climate in terms of the value and validity of existing human rights.[74]

Furthermore, substantive and procedural analysis of human rights support the broadening of the definition of a consumer protection in the same thread as rights bestowed to individuals in human rights instruments. In this regard, consumer protection as a human right ought to be given intellectual hearing,

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[72] United Nations Guidelines for Consumer Protection: G. A. Res. A/RES/39/248 (16 April 1985).

[73] Shaoping Gan, 'Consumer Rights: A Part of Human Rights' (2008) 1(1) Journal of International Business Ethics, 18-20.

[74] Phillip Alston, 'Human Rights and Basic Needs: A Critical Assessment' (1979) 12(19) Human Rights Journal, 55-56.

since there are already sufficient compromises both at the international and national levels to accept its conceptual legitimacy.[75] In the absence of this, violations of consumer rights by MNCs would not be accompanied by grave consequences, in contrast to what may be the case if governments, and its administrative bodies were to infringe consumer rights. Taking fundamental assumptions of comparative approach into consideration one is able to conclude that the power position of IPRs titleholders are enhanced by virtue of legal protection, which allows them to dispose of the subject matter within the confines of exclusive rights. Given this situation, invoking a human right, as a balancing exercise, ought to be accepted as a necessity in order to counterbalance the private control of IPRs in contravening public interest. Thus, the next part of the article examines the extent to which consumer protection could be claimed as a vital part of human rights in order to overly enhance its protection in Ghana. To that aim, the article implies to widen the claim that consumer protection must be acknowledged as derivative rights or a right considered integral to the larger substantive economic rights.

2. The Development of Consumer Protection as Human Rights

Consumer protection comprising economic and social rights was recognised by the UDHRs based on the United Nations Charter, which put emphasis on consumer protection.[76] Article 25.1 of the UDHRs intended to enhance the standard of living, and the well-being of the individual as a consumer. In today's real world, it forms the philosophical background to a defence of consumer protection as part of wider rights that States have a responsibility to protect. The UNGCP, which were unanimously approved by the UN General Assembly, constitutes an important project for the recognition of consumer protection as a human right at the international level. Although in principle the UN General Assembly lacks a complete legal authority to enter into a binding treaty, the UNGCP is the first international statement of purpose by the UN to explicitly acknowledge consumer protection with a common international language. The understanding of the concept of law reflected in position of the UNGCP suggests it lacks a binding legal force,

[75] Portuguese Constitution April 25, 1976 first revision in 1982: under Title III. Chapter I, Economical, social and cultural rights and duties, Article 60 declares consumer rights as basic constitutional human rights.

[76] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Article 55(a) declares that '[t]he United Nations shall promote: a higher standards of living, full employment, and conditions of economic and social progress and development.'

nonetheless, the approach reconciling status differences now is not even critical. Since, the normative power of the UNGCP has already paved the way for the current definition that protecting the right of a consumer should be considered a human right. Section 1 of the guidelines provision states the objective that:

> Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels, and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives (…).

Of particular importance is Section 1(d), which states that: '[t]o assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers.' Section 13 imposes obligations on States to promote the economic interest of its consumers. It also leaves States with the freedom to institute measures for fair business practices based on countries own priorities, and in accordance with the economic, and social circumstances of its people.[77] In July 1988, the UN Economic and Social Council (hereinafter 'ECOSOC') passed a resolution urging all governments to implement the UNGCP Guidelines.[78] Again, in 1990, the ECOSOC passed another resolution requesting the UN Secretary-General to develop a programme of action for reviewing the Guidelines in its tenth anniversary of its adoption; this was as a result of LDCs failure to implement the Guidelines.[79]

Currently, general statements about private corporations and economic, and social rights provide the indispensable foundation for a more detailed examination of specific human rights issues arising in the private sector involving, predominantly MNCs. The UN has noted lately the issue of private corporations' involvement in the abuse of consumers and has

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[77] David Harland, 'The United Nations Guidelines for Consumer Protection' (1987) 10(3) Journal of Consumer Policy, 245-266.
[78] Consumer Protection, ESC Res. 1988/61, UN ESCOR, 2d Reg. Sess., Supp. No. 1A, UN Doc. E/1988/88/Add.1 (1988) 15).
[79] Consumer Protection, ESC Res. 1990/85, UN ESCOR, 2d Reg. Sess., 37th Plen. Mtg., Supp. No. 1A, UN Doc. E/1990/90/Add.1 (1990) 27.

expressed concern on corporate responsibility and human rights.[80] In June 2011, the UN Human Rights Council endorsed an all-inclusive guiding principles on business and human rights.[81] This, *inter alia*, provides guidance for businesses on how to implement their corporate responsibility programmes to respect human rights, which represent a key element of the global compact principle.[82] It outlined a need for MNCs to adopt human rights-sensitive approach to their businesses models. In a related development the Special Representative of the UN secretary-general on the issue of human rights and transnational corporations and other business enterprises observed that:

> It is essential to achieve greater conceptual clarity with regard to the respective responsibilities of States and corporations […] In doing so we should bear in mind that companies are constrained not only by legal standards but also by social norms and moral considerations.[83]

Appreciatively, the UNGCP entered into the domains of another UN agency, the UNCTAD, who announced the revision of the UNGCP

[80] The Sixty-First Session of the Commission on Human Rights 2005, Resolution 2005/69 recommended that the UN Secretary-General appoint a Special Representative to review the whole matter of corporations and human rights. See Also David Weissbrodt, Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 97(4) The American Journal of International Law, 901-922.

[81] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. This Guiding Principles was developed by the Special Representative to the UN Secretary-General on the issue of human rights, and transnational corporations and other business enterprises. The Guiding Principles was endorsed in a Resolution A/HRC/17/L.17/Rev.1 on 16 June 2011. See Also Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev.2).

[82] The UN Global Compact initiative was lunched on July 26, 2000 to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation in ten principles in the areas of human rights, labour, the environment and anti-corruption. The UN General Assembly has recognized the UN Global Compact on a number of occasions. For example, Resolution (A/RES/60/215). In 2005 World Summit, UN Member States provided unanimous political support to the Global Compact (see paragraph 175 of the World Summit Outcome-A/RES/60/1). See also Andreas Rasche, Georg Kell, (eds.) *The United Nations Global Compact: Achievement, Trends and Challenges* (Cambridge University Press, 2010).

[83] The UN Special Representative on Guiding Principles, which was annexed to his final report to the UNHRC Doc. A/HRC/17/31.

Guidelines scheduled for July 2014 with the view to make its operation relevant to LDCs.[84]

3. Supplying the Philosophical Context of Consumer Protection as a Human Right

Consumers are entitled to accountability and greater consistency in the enforcement of their rights against unconscionable conducts. For decades consumers have not received adequate protection from corporations. This is because the over-reliance on a market-oriented approach has failed to serve as a definite avenue to define a right-based consumer concept. One way to resolve this problem is the adoption of a new legal approach premised on the fundamental-rights based thinking. This has already offered some countries the platform to broaden the scope of consumer protection to include a social dimension.[85] A closer look at these legal frameworks suggests consumer rights are an integral part of human rights and vice versa. This understanding takes the view that actually, there is no contradiction between citizens and consumers, and for that reason, consumer protection requires no fine demarcation from human rights.

Not only that, in the recent years, consumer protection has found logic in legal discussion, it has significantly become part of a modern social expectation; as a result, it is too risky to ignore its relevance within human rights treaties. Particularly, when its essential characteristics could easily survive both the substantive and procedural tests central to human rights reasoning. Therefore, it is time to supply the theoretical background for the recognition of consumer protection as a human right, since several features of consumer protection conform to the precepts of human rights. The starting point is that consumer protection is an individual (rather than a communal) right. Consumer protection remarkably, satisfies the substantive test of fairness inherent to human rights values, which provides a solid ground for its recognition on merit. These conceptual characteristics set the individual consumer protection in the same legal context as the already established human rights.

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[84] *UNCTAD Ad Hoc Expert Meeting on Consumer Protection* (Delhi, India 2013).

[85] The Spanish Constitution was approved by a Joint Session of Parliament on October 10, 1978 and ratified by a referendum on December 6, 1978, which received the Kings assent on December 27, 1978. Article 51 is an illustration of the acknowledgement of basic consumer rights as human rights.

The intention of antitrust laws and its enforcement institutions fit within the accepted view that governments must protect consumers in line with international human rights principles, which demand mandatory actions from States to protect its citizens. Even though human rights bind governments and its administrative bodies, it makes judicial sense that, if a corporation assumes the responsibility of infringing consumer protection, it is fair, just, and reasonable to impose liability thereof.

Moreover, another point, which calls for an absolute consumer protection as a human right, reflects the apprehension of the fundamental responsibility of a State to protect its consumers from arbitrary abuse by MNCs. This falls within a wider part of the primary function of a State, not only for the purpose of economic efficiency, but also as part of the quest for social justice.[86] While dissenting views may dispute the relevance of consumer protection emphasis of human rights, the question of States accepting to be bound by obligations to protect its people does not only flag the very foundation of this argument rather it also adds weight to its cogency. Well-accepted doctrines of protecting human dignity as the baseline for human rights can also serve as another basis to broaden the definition of human rights in order to constructively include consumer protection.

4. Claiming consumer protection as human rights

Human rights are traditionally divided into two main groups of civil, political rights, and of economic, social and cultural rights. Human rights are claimable upon a proper theory backed by intellectual evidence to establish its legal context before UN institutions could declare its status, subsequent a publication in the international bill of human rights.[87] Claiming consumer protection as a human right would not only be a question of norm setting rather such a solution involves many philosophical aspects, mainly on a notion that human rights ought to be advanced on a theoretical idea. In reality, theory and practice are interdependent.

[86] John Ruggie, 'Business and human rights: the evolving international agenda' (2007) 101 American Journal of International Law, 819-840. See also Robert Lowe, Geoffrey Woodroffe, *Consumer Law and Practice* (3rd edn. Sweet & Maxwell, 1991).

[87] International Bill of Human Rights is a comprehensive treaty document of the United Nations including the International Covenant on Economic, Social and Cultural Rights (ICESCRs), the Universal Declaration of Human Rights (UDHRs) and the International Covenant on Civil and Political Rights (ICCPRs) including all Optional Protocols. See Fact Sheet No. 2 (Rev.1) The International Bill of Human Rights, UN OHCHR. June 1996.

Additionally, while human rights foundation rests on theoretical presumptions, justifying consumer protection as human rights should not present severe conceptual difficulty, on an assumption that theories are shaped by practice just as practice are also influenced by theories.[88] The status of IPRs as a human right in international law is not in dispute. These rights are enforceable by individual human beings, and juristically by corporations. It is against this foundation that, if corporations are made juristic persons, and could lay claim to rights reserved for human beings, such as IPRs, which are now a significant part of the WTO architecture, then protecting consumers who are human beings and also citizens of States have a better chance of becoming human rights. On this basis of the foregoing, the conceptual foundation of consumer protection has reached a point in legal philosophy that justifies it as a human right.

This raises a fundamental question about the importance of recognising consumer protection as a human right. The tendency to broaden the scope of individual consumer protection and to include it as a constitutional right furthers the argument that if consumer protection were not admitted as a human right, they would be overridden when in conflict with other statutory rights such as IPRs.[89] It is indisputable if the aggressive institutions of IPRs by the WTO, and evidence on gross violations of antitrust laws by MNCs with high levels of impunity is considered. The fear is that enforcing IPRs alone without antitrust legislations and its enforcement institutions would present additional licence for MNCs to abuse dominant positions, which will eventually affect consumer welfare. It seems that, notwithstanding its feeble legal status as a human right, consumer protection can still benefit from being acknowledged as part of economic rights in relation to which States have responsibilities to protect. The idea of proposing consumer protection to be recognised as a separate or derivative branch of human rights is the result of the attitude of some MNCs who are consistently violating antitrust laws with somehow greater freedom.[90] Therefore, in a civilised consumer-oriented society, consumer protection must be professed

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[88] Sinai Deutch, 'Are consumer rights human rights?' (1995) 32 Osgoode Hall Law Journal, 538-578. See also Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal, 443-466.

[89] William Meyer, 'Human Rights and MNCs: Theory versus Quantitative Analysis*'* (1996) 18 Human Rights Quarterly, 368-397.

[90] On 6 December 2012, the Court of Justice of the European Union (CJEU) upheld the European Commission's decision fining AstraZeneca (AZ) 60 Million Euros for abuse of a dominant position. See Case C-457/10 P *AstraZeneca v Commission* [2012] ECR I-0000.

as part of the overall duty to maintain human dignity, especially, imposing a legal responsibility against threats of anticompetitive behaviour by MNCs ought to be accepted as inevitable.[91]

There is no alternative choice for States not to establish the necessary antitrust legal framework to protect its citizens against would-be infringements of MNCs. If a State fails in discharging its responsibility in this perspective, then it in question must shoulder a greater human right responsibility should the relevant circumstances arise.[92] Accordingly, it is legally daunting to implement consumer protection as human rights given its weak conceptual justification. However, rather than arguing on to recognise consumer protection as entirely new rights, the key objective here is that they could be elaborated as derivative human rights contingent on economic rights. This idea is already obvious from several jurisdictions that have designated consumer protection as a specific human right subject matter of which scope is relatively clear-cut in their constitutional provisions.[93]

V. Enforcement of antitrust law in Ghana

1. Introduction

The principal output of a State's legal system is information, upon which both its citizens and commercial agents rely to form expectations that meet their prospective aspirations. In the context of Ghana, political mandates are not reserved for the creation of effective policies in this direction. Ghana on the contrary is not up-to-date with the same mind-set that shaped the evolutionary understanding that legal landscape, which is reliant solely on common law rules, is incapable of monitoring commercial interactions among innovative corporations.[94]

Despite years of advocacy in favour of competition policy, several antitrust bills are stagnated in policy archives, which have failed to move into a

[91] David Kinley, Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6(3) Human Rights Law Review, 447-497.
[92] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6(2) Northwestern Journal of International Human Rights, 304-326.
[93] *Ibid.*
[94] See generally Mark Palim, 'The Worldwide Growth of Competition Law: An Empirical Analysis' (1998) 43(1) Antitrust Bulletin, 105-145.

concrete political process in line with Ghana's economic transition.[95] This significantly, discounts logic as to why bills that passed through several phases of political considerations have failed to migrate into legislative processes that translate them into enforceable laws. To this end, the debate on the need for a comprehensive policy on antitrust is gradually becoming a forgotten subject in Ghana, since policymakers are often expected to depart from the common sense position, which calls for a legislative intervention. In its five decades of independence from British colonial rule, Ghana has gone through different cycles of economic and political evolutions.[96] Figures-wise, observers believe that the transition into lower middle-income league of countries is impressive.[97] However, Ghana's socio-economic, infrastructural, and innovation developments are punctuated by abysmal performance.[98]

There is nothing like a substantive antitrust law that is vested in a specific enforcement institution in Ghana. The country is at present experiencing a total erosion of legitimate authority to make a collective decision that promotes the interest of its people. Despite Ghana's success in creating somehow workable institutional frameworks to regulate some sectors of its economy,[99] the current approach to monitor anticompetitive acts of corporations is not going to yield any credible result. This is because Ghana's jurisdictive landscape is nothing but trouble band, which is not only operating under unconvincing diffused system, but more worrying a confused legal infrastructure as well made up of exhausted bureaucratic institutions with old mandates meant to oversee contemporary antitrust undertakings involving very innovative MNCs. Thus, the next part of the article assesses the antitrust legal landscape in Ghana, mainly from a notion that Ghana's Constitution that ignores consumer protection. Again, evidence on that some MNCs operating in Ghana today have been found guilty of

[95] For example the Draft Competition and Fair Trade Practices Bill in 2004 went through parliamentary readings but failed to become law due to the lack of practical political will.
[96] Ghana is the first Black African nation to achieve independence from the British on 6 March 1957.
[97] The World Bank classified the Economic Status of Ghana as Lower Middle-Income in 1 July 2011. See also Todd Moss, Stephanie Majerowicz, 'No longer poor: Ghana's new income status and implications of graduation from IDA' (2012) Centre for Global Development Working Paper 300.
[98] John Kwakye, *Ghana's Middle-Income Reality Check Part II: Social and Infrastructure Dimensions* (Institute of Economic Affairs, Monograph No. 30, 2012).
[99] For example The Public Utilities Regulatory Commission Act, (Act 538) 1997. See Also the National communication Authority Act, (ACT 524) 1996.

antitrust legislations in Europe is considered in contention with a political failure to have found a specific legal framework for antitrust regime despite years of policy considerations.

2. Overview of the Consumer Protection in Ghana

Given Ghana's level of political maturity in Africa's standard, it is alarming to find out why there exists no compacted antitrust regime in a country whose political elites regard the direction of its governance as a beacon of Africa's development. Ghana adopted its current Constitution in 1992.[100] Exclusively, the Constitution overlooked consumer protection, which falls within economic rights of its people, as against several constitutional provisions safeguarding political rights.[101] The Constitution adopted bifurcated systems of British and US strings of constitutional foundations, making it very easy to spot the confusion created by the wisdom of a modern constitution that ignores consumer protection as adopted by other countries. [102] Surprisingly, in Ghana, consumer protection is under the watchdog of a non-governmental organisation which has no statutory authority to enforce compliance.[103]

Understandably, the exercise of a right over an IP alone does not create violations of antitrust law. However, this conventional view only works within a restricted assumption that IP rights holders would operate within a laid down antitrust legal framework. Nevertheless, the reason why this represents a middle ground for concern is the absence of a substantive antitrust legislation and a related enforcement institution from the legislative radar of a country like Ghana, which according to many socio-economic commentators leads Africa's agenda to its future prosperity. The only legislation in Ghana, which appears to enforce some elements of competition law, is embodied in about 10 short Sections.[104] Act 589 was promulgated in the year 2000 with the view to protect businesses, rather than consumers. Almost all the 10 Sections of Act 589 focus on the offense

[100] The 4th Republican Constitution of Ghana 1992.
[101] *Ibid* 99. See Chapter 5 of Ghana's Constitution.
[102] The Constitution of the Republic of Poland adopted on April 2 1997 by the Polish National Assembly and approved by the Polish people in a referendum on May 25, 1997: Article 76 impose an obligation on the State to protect consumers.
[103] Ghana Consumer Association in an NGO formed in 1984, which has ever since taken a very active role in advocacy on issues on competition and consumer welfare.
[104] Protection against Unfair Competition Act, (Act 589) 2000.

of damaging the goodwill or reputation of a company by another, Section 3 seems to loosely impose liability in the event that companies mislead the public. However, the fundamental fairness in this context is that Section 3 is theoretically defective in legal terms subsequent the Section 8 remedy proviso, emerging to make misleading the public a civil liability.[105]

3. Evidence of Antitrust Undertakings among MNCs Operating in Ghana

Globalisation-induced competition has provoked the influx of MNCs across national boundaries in search of markets. This has given rise to gross violations of antitrust legal provisions by MNCs wanting to meet their over-stretched commercial ambitions.[106] Policymakers are still making a timid transition towards legislative intervention, despite the fact that concentrated industries seem to enjoy unopposed market dominance in Ghana.[107] The current status quo is not sustainable because several MNCs operating in Ghana today have violated antitrust legislations within several jurisdictions, such as the European Union, even though Europe has stricter antitrust laws and enforcement institutions. Circumstantial evidence suggests a culture of anticompetitive behaviour by the Heidelberg Cement group of companies operating in Ghana.[108] Heidelberg Cement was found guilty of price-fixing in Poland making it highly nervy to exonerate Ghacem from impropriety of bribery allegations.[109] These violations of antitrust laws involving the same

[105] See Act 589.

[106] On 5 December 2012, the European Commission fined seven companies nearly 1.5 billion Euros for their role in ten-year long cartels fixing prices involving cathode ray tubes used in television and computer monitors. See Commission Decision, *TV and Computer Monitor Tubes* (COMP/3943).

[107] *State of Competition Regime in Ghana, Preliminary Country Paper* (Institute of Statistical, Social and Economic Research, 2008).

[108] Germany's Competition Authority, the Federal Cartel Office, found Heidelberg Cement and others guilty of anti-competitive behaviour with 660 Million Euros fine on the 14th April 2003. Scancem the parent company of Ghacem became part of the Heidelberg Cement in 1999.

[109] The Polish Office for Competition and Consumer Protection imposed a record fine of 26 Million Euros on some companies including Heidelberg Cement owners of Ghacem in Ghana. *See* Brian O'Mahony, *Polish regulator fines CRH 26 million euros* (Irish Examiner Friday, December 2009).

MNCs operating in Ghana leaves open that Ghanaian consumers may be at risk.[110]

Though several Ghanaian public officials implicated in the Scancem bribery scandal have refuted these damaging allegations,[111] such analytical formulation of allegations of bribery against public officials who are meant to protect consumers is worrisome. More significantly, the prevailing policy position, which implies that in the absence of an antitrust legal framework, Ghana would be able to promote a balanced level of antitrust enforcement matters, is not practically cogent. A closer scrutiny of the aggressive breaches of antitrust legislations in Europe by the same MNCs operating in Ghana lends a thoughtful credence that must pause Ghanaian policymakers to shift to a new conviction of resetting their future political agendas in line with the economic interest of its people.[112]

Given the comparative lens that modern MNCs face stiff competition to realise their commercial intentions, anticompetitive behaviour will always be a major theme of their strategies. Hence, the critical preoccupation is that it would be impossible for Ghana to interrupt anticompetitive undertakings in the absence of antitrust legislations and its enforcement institutions.[113] This is because little remedy exists through the long and expensive practice of using the normal common law judicial process as a safeguard mechanism for antitrust cases, which has similarly, failed to correct anticompetitive practices in the US before the end of the nineteenth century.[114]

4. Historical Confirmation of Policy Failure in Ghana

[110] Vodafone is a big player in the telecommunication industry in Ghana. The Competition Regulators in Netherland fined Vodafone 3.71 million Euros for breaking anti-trust rules in 2001.

[111] Scancem Bribery Trial in Asker and Bærum District Court (Case No. 06-147582TVI-AHER/1/08.09.2006).

[112] EU Competition Watchdog imposed a fine of 732 Million USD on Microsoft, and this amount represents just a 1% of Microsoft annual revenue. In total, EU Competition Watchdog has fined Microsoft a total of 2.2 Billion USD for anti-competitive breaches See Wall Street Journal, Wednesday 6 March, 2013 Edition).

[113] James Kanter, Europe Fines Intel $1.45 Billion in Antitrust Case (The New York Times, 13 May 2009).

[114] James May, The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History (1990) 59 Antitrust Law Journal, 93-107. See also Keith Hylton, *Antitrust law: economic theory and common law evolution* (Cambridge University Press, 2003).

Over twenty years of constitutional stability, regulatory bodies in Ghana are still struggling to migrate from licensing services to policing antitrust standards. In the face of several warnings, Ghana is one of the countries in Africa still fighting its own political shadows in order to become forward-looking on matters of consumer protection.[115] It is no longer secret that Ghanaian policymakers lack the practical understanding that antitrust legislation and a related enforcement institution offer a realistic prospect to ensure that markets work efficiently to deliver economic welfare. This fading hope to found a substantive antitrust legislation and a related enforcement institution do not only emanate from the exercise of consistent poor intellectual balance but clearly, an evolving liberal interpretation also suggests weak political calculation is one of such fundamental issues perpetuating the uncertainty to protect Ghanaian consumers. Consequently, it further indicates that national economic policies in operation are subject to synthetic luck rather than thought out. The absence of judicial records of large-scale antitrust violations in Ghana is due to the absence of antitrust legislation and a related enforcement institution, which are necessary to investigate these violations.

One of the much speculated reasons for the unacceptable delay to found antitrust legislation and a related enforcement institution points to the fact that policymakers prefer to utilise the prevailing weaker legal system as a vehicle to attract foreign direct investment (hereinafter 'FDI'). However, in following up such a political decision failure, it is submitted that such a hypothetical excuse of subjecting Ghanaian consumer protection, as a subclass of FDI is ill conceived. Knowingly, it is not easy to rule out the earlier suggestion that opposition from some business lobbying groups have been behind the absence of antitrust legislation and a related enforcement institution in Ghana.[116] Accordingly, Ghana's case is, nonetheless, a typical example of a domestic policy failure, since evidence exists to underscore the fact that antitrust bill(s) have been on the political agenda for well over

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[115] Long before 2001, several international organisations were informing African governments on the need for consumer protection. For example, Competition and Consumer Policies*: Regional Consumer Seminar for Africa* (UNCTAD Technical Assistance Activities, Accra-Ghana, 20-21 August 2001).

[116] See generally Karen Ellis, Rohit Singh, Peter Quartey, and Elvis Agyare-Boakye, *Assessing the Economic Impact of Competition: Findings from Ghana* (UK:Overseas Development Institute 2010).

twenty years.[117] The logical deduction is that the Ghanaian political landscape is populated with several ordinary politicians who do not understand the kind of policies required to move the country forward. This is why Ghana desperately needs not just common politicians but those with forward-thinking political mind-sets.

5. A Demand of Political Responsibility

It is time to discount the over politicisation of the importance of IPRs. Accepting to be bound by the TRIPS Agreement is not only meaningless but also counterproductive, since this may not lead to any precise outcome in economic growth. IPRs do not produce economic effect on their own without sound economic policies. Ghana cannot begin to reap the benefit of IPRs in the absence of other critical institutional development to commensurate the functioning of it. In other words, the use of IPRs as a tool for economic development requires certain legal and administrative structures, such as antitrust legislation and a related enforcement institution to check MNCs that would exploit IPRs for profit.[118] Perhaps the most straightforward path that can be desirable for Ghana to mitigate the impact of the TRIPS Agreement on consumer protection could also undermine the very condition by which the WTO seek to protect the commercial interest of private corporations. Notably, the existence of chaotic arrangements within the history of the administration of IPRs in Ghana adds weight to the long held view that policymakers do not clearly understand the huge difference between the pre-TRIPS era of IPRs as pursued by States to facilitate innovation for socio-economic development, and the contemporary IPRs as pursued by the WTO as a rent seeking system for MNCs.[119]

The fact is LDCs policymakers did not have the opportunity to consult from well-informed sources regarding their States burden in enforcing the TRIPS

[117] The Trade Practices Draft Bill, 1993 also failed to become law due to the lack of political will.
[118] Howells and Weatherill (n 59).
[119] For example Ministerial responsibility for Copyright matters changed from Ministry of Information to the National Commission on Culture following PNDC Law 238, 1990. In 2005, ministerial responsibility again, shifted to the Ministry of Justice. On TRIPS activation on 1 July 2013, IPRs matters are expected to be under the Ministry of Trade but their technical legal functions as usual will be within the Ministry of Justice, whilst the TRIPS Council meetings and Trade Rounds will be attended by Ministry of Foreign Affairs.

Agreement.[120] Policymakers were instead swayed by seemingly, the half-baked rhetoric that led to a justification of IPRs as forming an 'insurance policy' for economic growth.[121] In contrast, the cost of protecting IPRs within LDCs could outweigh its benefits derived from enforcing the same. It therefore, follows that Ghana is unable to survive the reality of affording strong legal protection to corporations through the vehicle of IPRs without extending the same to its people, in a country sprang by MNCs some of whom are culprits of antitrust legislations in Europe. Ghanaian policymakers often get the politics right but not the policies, which means that the country deliberately denies its people the right to defend their economic interests. This begs the question of why Ghana is even perceived as a gateway to Africa, while it cannot even implement an antitrust law and a related enforcement institution. This is why it seems quite urgent to commence a debate on legal enforceable means of protecting consumers, unless Ghana wants to experience the negative side of IPRs to propagate anticompetitive behaviour.

It must be noted in principle that individuals form society and therefore, remains the beneficiary of a State's policy. Upon the other hand, corporations are creatures of States, incorporated presumably for the benefit of the public. Even if corporations receive certain special privileges they still must hold themselves subject to the laws of the State. Particularly note, that individual rights precede that of corporations. Therefore, without a legal framework, which will serve as checks and balances like in the case of Ghana, it is possible for corporations to operate outside the basic principles inherent in consumer protection. Whilst this elementary idea is widely accepted, most fundamentally, understanding the general conceptual difference between legal provisions and its enforcement is even critical, noting that in Ghana laws are hardly enforced even if they visibly exist. Therefore, it still proves difficult to pin down exactly the kind of antitrust laws and its enforcement institutions that count as appropriate for a country like Ghana to protect its people given that MNCs wield too much power to manipulate policymakers.

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[120] Thaddeus Manu, 'The Social Cost of Criminalizing a Civil Act: TRIPS Section 5 Obligations in Africa' (2012) 1(2) International Journal of Arts and Humanities, 112-132.

[121] Robert Bird, 'Defending Intellectual Property Rights in the BRIC Economies' (2006) 34(2) Journal of American Business Law, 317-363.

Nonetheless, the complete difficulty is when one reads through the already recorded cases of violations in antitrust legislations. In light of the foregoing, consumer protection must be viewed and bracketed in a refined social expectation in the same broader human rights context. This reinforces the notion that Ghana could no longer retreat from a forward-thinking path to promulgate antitrust legislations, since the long-term cost of exclusion could be dangerous.

VI. Conclusion

Innovation benefits consumers.[122] This, in principle geared up the conclusion of the TRIPS Agreement in order to release the entrepreneurial energies of innovators to strive after economic efficiency.[123] Both antitrust and IPRs policies is complementary, and not intrinsically in philosophical conflict.[124] In fact, competition is the periphery on which IPRs incentivise innovators to be creative.[125] Despite these two legal fields strongly interrelated, clearly the relationship between them is still not an easy one to approach. IPRs' basis in natural law lies in the power of private agents, whereas antitrust legislations extend the authority of the State to defend the economic rights of its consumers.[126] Nevertheless, it follows from the foregoing consideration that despite the manifestation of somehow a twisted end of the debate on the importance of IPRs in economic growth, the seminal methodology for measuring the generic impact of IPRs on competition and consumer welfare within an LDC economy remains a question of evidential difficulty. It is upon this basis, supporters maintain that concerns over IPRs on consumer protection are unfounded. They argue that criticisms of IPRs in that direction are just over-simplistic

[122] Hall Bronwyn, 'Business and Financial Method, Patents, Innovation, and Policy' (2009) 56(4) Scottish Journal of Political Economy, 443-473.
[123] John Barton, 'Global trade issues in the new millennium: the economics of trips: international trade in information-intensive products' (2001) 33(3-4) George Washington International Law Review, 473-1063. See generally Pamela Samuelson, 'Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections' (2004) 71(1) The University of Chicago Law Review, 223-239.
[124] Frank Machovec, *Perfect Competition and the Transformation of Economics* (Routledge, 1995).
[125] Gustavo Ghidini, *Innovation, Competition and Consumer Welfare in Intellectual Property Law* (Edward Elgar Publishing, 2010).
[126] Neil Averitt and Robert Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74(1) Antitrust Law Journal, 175-264.

characterization aimed at miscasting its concept as unorthodoxy to consumer welfare.[127]

This paper has examined in detailed the legal basis for claiming consumer protection as human rights by delving into legal justifications for it, especially, as a means for promoting the dignity of individual consumers. Depending on which end of the spectrum one finds his or her ideological comfort zone, this article may be striking as strange to some degree, as overemphasising the demand for consumer protection by equating this to a human right. Consistent with the hypothesis, this article has discussed not only the legal but economic and political remedies by contending that not much would move further in safeguarding consumer protection until a complete antitrust legal infrastructure is unearthed within Ghana's judicial landscape. Considering the difficulty of reading in between the lines of the impact of IPRs on consumer welfare, the logical balance is a requirement of a positive edge for Ghana to defend the economic rights of its people in order to place its citizens at the centre of a realistic national economic development for its current and future generations.

[127] Edward Hettinger, 'Justifying Intellectual Property' (1989) 18(1) Philosophy and Public Affairs, 31-52.