

## Chapter 3: The Free Movement of Trade-marked Goods in the East African Community

### *A. Introduction*

This chapter analyses the principle of free movement of branded goods in relation to the EAC Common Market. In this regard, three documents, namely, the Treaty for the establishment of the East African Community and the Protocols<sup>99</sup> establishing the East African Community Common Market and the Customs Union are identified as the main legal basis for the free movement of goods in the EAC Common Market. The extent to which these laws support the principle of free movement of branded goods is subjected to a critical scrutiny. Following some general considerations addressing the way in which trade mark proprietors may invoke their nationally registered trade marks to obstruct free movement of goods and whether such practice may be justified by virtue of the functions of trade marks, the principle of trade mark exhaustion, and the principles of international law; the Chapter analyses different forms of trade mark exhaustion, pointing out the specific form(s) of exhaustion employed in the EAC Partner States.

### *B. The Principle of free movement of goods*

#### *I. Legal basis*

##### 1. The EAC Treaty (EACT)

Article 76(1) EACT establishes a Common Market among the Partner States with a primary objective of achieving a single market in the EAC.<sup>100</sup> A Common Market is generally ascribed to an area without frontiers in which free movement

99 According to the delineation offered in Article 1 East African Community Treaty (EACT), a protocol is any agreement among the EAC Partner States that supplements, amends or qualifies the EACT.

100 See also Articles 2(2) and 5(2) of the EACT, which anchor the desire of the Partner States to establish an EAC Common Market.

of goods is, *inter alia*, ensured.<sup>101</sup> In the specific context, Article 1 EACT portrays the EAC Common Market as the Partner States' markets integrated into a single market in which there is a free movement of capital, labour, goods and services.

## 2. The EAC Common Market Protocol (CMP)

Article 76(1) of the EACT only demonstrated the desire of the EAC Partner States to establish a Common Market. The concrete establishment of such Market was dependent on the conclusion of a relevant Protocol by the Partner States pursuant to Article 76(4) of the EACT. A Protocol on the establishment of the EAC Common Market was approved on 1 November 2009 and came into force on 1 July 2010.<sup>102</sup> The Protocol stipulates the realisation of accelerated economic growth and development through attainment of various freedoms<sup>103</sup> such as the free movement of goods as the impetus for the establishment of the Common Market.<sup>104</sup>

## 3. The EAC Customs Union Protocol (CUP)<sup>105</sup>

Article 6(1) of the CMP links the free movement regime to the Customs Union Protocol. In this regard, the "free movement of goods between the Partner States shall be governed by Customs Laws of the Community" as stipulated in Article 39 of the CUP. Article 39(1) (a) to (f) of the CUP elaborates that the Customs law of the Community consists of the relevant provisions of the EAC Treaty; the CUP itself; regulations and directives made by the EAC Council; case law; Statutory instruments enacted by the EAC legislative Assembly; and the relevant principles of international law.

In relation to relevant principles of international law, an attempt is made, in section C (II) of this chapter, to find out whether provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the General

101 M.A. Consulting Group, "Study on the Establishment of an East African Community Common Market", (submitted to the EAC on 28th August 2007), at p. 44.

102 Establishment of the EAC Common Market is viewed as "a transitional stage to and an integral part of the Community" (*cf.* Para 3(a) of the Preamble to the CMP).

103 These freedoms are enumerated in Article 2(4) of the CMP.

104 *Cf.* Article 4(2) and Para 6 of the Preamble to the CMP.

105 The Protocol on the establishment of the East African Customs Union came into force on 1 July 2006.

Agreement on Trade and Tariffs (GATT)<sup>106</sup> may be invoked to facilitate free movement of branded goods in the EAC Common Market.

## *II. Trade mark rights in the Common Market*

Trade marks are essential aspects for the proper functioning of any Common Market. Practical experience shows that unless a special trade mark regime is established to cater for the interests of the common market, national trade mark regimes of the cooperating States will encourage imposition of some restrictions on the free movement of branded goods.<sup>107</sup> While the Common Market among the EAC Partner States has been established, a common trade mark regime that may substantially contribute to proper functioning of such market has not yet been put in place. The absence of such regime means that the exercise of independent national trade mark rights is likely to come into conflict with the Common Market's objectives of ensuring free movement of goods.

The national trade marks characterising the EAC trade mark protection regime are not only territorial but also independent of each other.<sup>108</sup> It is, thus, lawful for a trade mark proprietor to apply for registration of a single trade mark for identical goods in different countries.<sup>109</sup> In the circumstances, a trade mark proprietor owning a trade mark registered in Tanzania, Kenya and Uganda has some legal power not only to control the initial marketing, but also the further commercialisation, of the trade-marked goods and thereby dissecting the EAC Common Market into national markets. Goods marketed in one of these countries may not lawfully be re-imported in any of the rest countries. This legal possibility stands in contradiction with the noble purpose of the free movement principle enunciated in the EAC Treaty and the Protocols thereto.

106 The General Agreement on Tariffs and Trade of 30 October 1947 forms part of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

107 Cf. chapter 6 which describes this problem in relation to the European Common Market.

108 Regarding the territoriality principle of national trade marks cf. ECJ, Case C-9/93 *IHT Internationale Heiztechnik GmbH v Ideal-Standard GmbH* [1994] ECR, I-02789, para. 22.

109 Cf. STUART, M., "The Function of Trade Marks and the Free Movement of Goods in the European Economic Community", 7(1) IIC 27, 34 (1976).