The Regulation of the Counterfeit Goods Trade: The Case of Tanzania

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DECLARATION

I, **EUGENE EMMANUEL MNIWASA**, hereby declare that this thesis is my own work which has not been submitted to any other university or institution an award of a degree or any other academic qualification.

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28th August 2014

ABSTRACT

Tanzania, like other Sub-Saharan African countries, is struggling to control the trade in counterfeit goods which is driven by many factors. The counterfeiting business has a wide range of effects. Different regulatory techniques are used to curb the trade. This study examines the regulation of the counterfeit goods trade in Tanzania and appraises its potential in tackling the trade. The study explores the evolution, drivers and impact of the trade in counterfeit goods; investigates regulatory techniques for controlling the counterfeiting business; and evaluates the potential of those techniques in curbing the trade. The analysis of documentary materials was carried out and the fieldwork research, which involved conducting interviews, administering questionnaires and making observations, was undertaken. The findings show that the markets in Tanzania are flooded with counterfeit products. The counterfeit goods trade in Tanzania is a part of the worldwide counterfeiting business driven by political, economic, legal and social factors. The trade impacts on the welfare of consumers, economic interests of legitimate traders, the country's economy and general society. The law in Tanzania which partly embodies foreign law is the main policy instrument for fighting against the counterfeit goods trade. Alternative regulations supplement the use of the anti-counterfeiting law. Weaknesses of the law and alternative regulations, inadequacies of government authorities and agencies and challenges facing the authorities and non-state actors undermine the potential of the law and alternative regulations which, in most cases, do not address non law-related drivers of the trade. The study concludes that the law has to be revised, the mechanisms for enforcement of the law need to be augmented and alternative regulations should be improved in order to address both law- and non-law related drivers of the counterfeit goods trade effectively. The development-related strategies should also be used in conjunction with the law and alternative regulations in order to curb the trade in counterfeit goods in Tanzania more efficiently.

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LIST OF ACRONYMS

ACG	Anti-Counterfeiting Group
ACP	African, Caribbean and Pacific group of states
AGOA	Africa Growth Opportunity Act (the United States)
AIPT	Alliance against Intellectual Property Theft
ACTA	Anti-Counterfeiting Trade Agreement
ACTN	Advisory Committee for Trade Negotiations
APEC	Asian-Pacific Economic Cooperation Group
APHFT	Association of Private Health Facilities of Tanzania
ASEAN	Association of Southern Asian Nations
ARIPO	African Regional Intellectual Property Organization
ARV	antiretroviral drug
BASCAP	Business Action to Stop Counterfeiting and Piracy
BIRPI	United International Bureaux for the Protection of Intellectual Property
BRELA	Business Registration and Licensing Agency (Tanzania)
BRIC	Brazil, Russia, India and China group of states
CBP	Customs and Border Protection (United States)
CMA	Chemical Manufacturers Association
COMESA	Common Market for Eastern and Southern Africa
CTI	Confederation of Tanzania Industries
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
DSU	World Trade Organization's Dispute Settlement Understanding
EAC	East African Community
EAPCCO	East African Police Chiefs' Cooperation Organization
EBA	Everything But Arms
EC	European Community
ECOWAS	Economic Community of West African States
EPA	economic partnership agreement
ERB	Engineers' Registration Board (Tanzania)
ESA	Eastern and Southern Africa
ETA	Euskadi Ta Askatusuma (Spain)

EU	European Union
FAO	Food and Agricultural Organization (the United Nations)
FCC	Fair Competition Commission (Tanzania)
FBI	Federal Bureau of Investigation
FTA	Free Trade Agreement
GAO	Government Accountability Office (the United States)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSK	GlaxoSmithKline Plc
GSPs	Generalized System of Preferences
HCD	High Court Digest (Tanzania)
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
HP	Hewlett-Packard Company
IACC	International anti-Counterfeiting Coalition
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IIPA	International Intellectual Property Alliance
IMF	International Monetary Fund
INTA	International Trademark Association
Interpol	International Criminal Police Organization
IPC	Intellectual Property Committee (United States)
IRA	Irish Republican Army
ISI	import substitution industrialization
KAIDANREN	Japanese Federation of Economic Organizations
MAT	Medical Association of Tanzania
MEMA	Motor Equipment Manufacturers Association
MERCOSUR	*Mercado Común del Sur*
MNC	Multinational Corporation
MSD	Medical Store Department (Tanzania)
NAFDAC	National Agency for Food and Drug Administration and Control (Nigeria)
NAFTA	North American Free Trade Area
NICs	Newly Industrialized Countries
NIEO	New International Economic Order

OECD	Organisation for Economic Co-operation and Development
PCT	Pharmacy Council of Tanzania
PhRMA	Pharmaceutical Research and Manufacturing Association
PMA	Pharmaceutical Manufacturers Association
RFID	radio frequency identification
SADC	Southern African Development Community
SAP	Structural Adjustment Programme
SARPCCO	Southern African Regional Police Chiefs Cooperation Organisation
SOE	state-owned enterprises
STI	sexually transmitted infection
TAPI	Tanzania Association of Pharmaceutical Industries
TBS	Tanzania Bureau of Standards
TCCIA	Tanzania Chamber of Commerce, Industry and Agriculture
TFDA	Tanzania Food and Drugs Authority
TCSA	Tanzania Consumer Advocacy Society
TFFA	Tanzania Freight Forwarders Association
TRA	Tanzania Revenue Authority
TRIMS	Trade-Related Investment Measures
TRIPs	Trade-Related Intellectual Property Rights Agreement
TVI	Tanzania Vaccine Institute
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre for Transnational Corporations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICE	Union of Industrial and Employers' Confederations of Europe
UNIDO	United Nations Industrial Development Organisation

UNODC	United Nations Office on Drugs and Crime
US	United States
USITC	United States International Trade Commission
USTR	United States Trade Representative
ZAR	South African Rand

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G. South Africa

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The Uganda National Bureau of Standards (Chapter 327).

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L. United States

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*Smith v. Chadwick (*1882) 20 Ch D 27 (Court of Appeal).

CHAPTER ONE

INTRODUCTION: SETTING THE AGENDA

1.0. The Counterfeit Goods Trade: An Overview

The trade in counterfeit goods is a phenomenon which has been affecting developing countries in Sub-Saharan Africa including Tanzania for decades. Government authorities, agencies and non-state entities and actors in these countries use different regulatory techniques to deal with the counterfeit goods trade. In Tanzania, the state- and non-state entities and actors use different forms of regulatory techniques to control the trade in counterfeit goods. This study examines the regulation of the counterfeit goods trade in Tanzania and appraises the potential of the law and alternative regulatory mechanisms which have been adopted to control the trade.

The main objectives of this chapter are: i) to provide the general overview of issues about the trade in counterfeit goods in order to examine the control of the counterfeit goods business in Tanzania; ii) to survey literature on the counterfeit goods trade in Tanzania in order to identify gaps about issues concerning the law-related and alternative regulatory mechanisms for controlling the trade; iii) to highlight the significance and contribution of the study to the understanding of the issues about the regulation of the trade in counterfeit goods in Tanzania; and iv) to describe the methodology and methods employed to conduct the study.

1.1. The General Overview of the Worldwide Counterfeit Goods Trade

The trade in counterfeit goods is a worldwide phenomenon.[1] The trade, which is believed to expand at alarming proportions, in many countries, affects a wide range of industries.[2] The counterfeit goods trade emerged from practices of copying distinctive marks imprinted on goods and their containers or packages committed by fraudulent traders since ancient times.[3] The practices continued expanding during the medieval period when some nations in Europe enacted laws to regulate trademark usages and prohibit unauthorised copying and imprinting of trademarks on goods. The law also prohibited the sale of goods with forged trademarks.[4] Nevertheless, the counterfeiting business expanded parallel to the growth of production and sale of goods during the pre-Industrial Revolution era. The business grew further concurrently with the advancement of science and technology, the expansion of industrial production and the growth of the international trade that occurred during the Industrial Revolution in Europe and the United States from the 19th century. The Industrial Revolution period witnessed the growth of trademark usage[5] and the counterfeit goods trade.[6] The expansion of the trade has continued to the present time.

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1 Peter Lowe, 'The Scope of the Counterfeiting Business,' (1998) 7 *Currents International Trade Law Journal* 78, 78 - 80.

2 Sezayi Tunca & Johann Fueller, 'Impression Formation in a World Full of Fake Products,' (2009) 36 *Advances in Consumer Research* 287, 287. See also Thorsten Staake, Florian Michahelles, Elgar Fleisch, John R. Williams , Hao Min, Peter H. Cole, Sang-Gug Lee, Duncan McFarlane &Jun Murai, 'Anti-Counterfeiting and Supply Chain Security' in Peter H. Cole & · Damith C. Ranasinghe (eds) *Networked RFID Systems and Lightweight Cryptography: Raising Barriers to Product Counterfeiting* (Adelaide: Springer, 1st ed, 2008) 34 - 35.

3 K Liu, J-A Li, Y Wu & K K Lai, 'Analysis of Monitoring and Limiting Commercial Cheating: A Newsvendor Model,' (2005) 56 *Journal of Operational Research Society* 844, 844.

4 Diane E Prebluda, 'Countering International Trade in Counterfeit Goods,' (1986) 12 *Brooklyn Journal of International Law* 339, 339.

5 Carol P Sanborn, 'Introduction to Product Counterfeiting Survey,' (1986) 8 *Loyola of Los Angeles International & Comparative Law Journal* 593, 605 - 606.

6 Robert J Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,' (1984 - 1984) 5 *Boston College Third World Law Journal* 151, 153.

The trade in counterfeit goods affects high-priced and low-cost as well as industrial and consumer products.[7] Some agencies, institutions, knowledge-based multinational corporations (MNCs)[8] and industry coalitions from industrialized nations have commissioned or conducted several studies that have generated statistics to describe the magnitude of the worldwide trade in counterfeit goods and the scale of its impacts on consumers, traders and economies. There are disagreements about the authenticity of the statistics generated by the studies.[9] While some authors and commentators use the above statistics as the authentic measurements of the global counterfeiting business, others assert that the statistics are questionable and less authentic. Despite the disagreements, the MNCs, government authorities and agencies from the industrialized nations and pro-intellectual property scholars, commentators and media still use the disputed statistics as authentic measurements of the worldwide trade in counterfeit goods.

The pro-intellectual property scholars, commentators and media contend that developing countries in Africa, Asia and South America[10] and former socialist and communist states in Central and Eastern Europe and Asia are the world's largest sources of counterfeit products.[11] However, there is evidence which indicates that industrialized nations are sources of counterfeit goods that flow to the worldwide markets.[12] Counterfeit

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[7] David M Hopkins, Lewis T Kontnik & Mark T Turnage, *Counterfeiting Exposed: Protecting your Brand and Customers* (Hoboken, New Jersey: Wiley & Sons, 2003) 3 - 5.

[8] In this study, the term 'knowledge-based MNCs' refers to industries and enterprises from industrialized nations which own large portfolios of intellectual property. They produce, control, manage and sell technology-intensive products. The majority of these MNCs have their headquarters in the United States, Europe and Japan.

[9] Mateja K Koklic, 'Non-Deceptive Counterfeiting Purchasing Behaviour: Antecedents of Attitudes and Purchase Intentions,' (2011) 27 *Journal of Applied Business Research* 127, 127.

[10] In this study, the term 'developing countries' refers to nations in Africa, Asia and South America which were former colonies mostly of European imperial powers. The economies of the developing countries depend significantly on the production and export of primary products. Their industrial sectors are generally underdeveloped.

[11] Nejdet Delener, 'International Counterfeit Marketing: Success Without Risk,' (2000) *Review of Business* 16, 17.

[12] Peggy Chaudhry & Alan Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (Berlin: Springer, 2009) 9. See also, Amir Attaran, Roger Bate & Megan Kendall, ' Why and How to Make an International Crime of Medicine Counterfeiting,' (2011) *Journal of International Criminal Justice* 1, 2.

goods manufactured, exported or trafficked from the European Union (EU) and the United States are trafficked to the worldwide markets.[13] While there are indications that industrialized nations and developing countries are destinations of counterfeit products, there is a general view that the knowledge-based MNCs and economies of the industrialized nations are the major victims of the worldwide trade in counterfeit goods.[14]

The supply of counterfeit products in the markets and the demand for those commodities are the main drivers of the counterfeit goods trade. The demand for the counterfeit goods is attributed to consumers' willingness to purchase and use counterfeit products and inability of the consumers to distinguish genuine products from counterfeit goods.[15] Factors such as internationalisation of trade; the advancement of information and communication technologies; the improvement of means of transportation; and high returns generated from the counterfeit goods trade which motivate dishonest traders to supply counterfeit goods to the markets, are considered to be factors that facilitate or motivate traders to supply counterfeit products to the markets.[16] Other factors include weaknesses of anti-counterfeiting laws and inadequacies of mechanisms for enforcement of the laws that make the counterfeit goods trade a low-risk business. Furthermore, hostile attitudes and disrespect for intellectual property protection encourage traders to supply counterfeit goods to the markets and consumers to purchase and use the counterfeit products.[17]

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[13] Barbara J Ehrlich, 'The Private Sector Combats Products Counterfeiting,' (1986) 8 *Loyola of Los Angeles International and Comparative Law Review* 699, 702.

[14] Sindy Chapa, Michael S Minor & Cecilia Maldonaldo, 'Product Category and Origin Effect on Consumer Responses to Counterfeits: Comparing Mexico and the US,' (2006) 18 *Journal of International Consumer Marketing* 79, 81.

[15] Alberto Pezzi & Franncesca Faggioni, 'Preventing Counterfeiting: A Risk Management Model,' (2011) 1 *World Journal of Social Sciences* 197, 201-202; Peggy E Chaudhry 'Curbing Consumer Complicity for Counterfeits in a Digital Environment,' (2012) 7 *Journal of Business & Technology* 23, 29.

[16] Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 12) 19 - 25.

[17] Charles Stone, 'What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What Calls Intellectual Property,' (2008) 92 *Marquette Law Review* 199, 200.

Despite the increase in the supply and demand for counterfeit goods, it generally accepted that the trade in counterfeit goods has negative effects on consumers, traders, economies and societies in general.[18] However, there is evidence which suggests that the counterfeit goods trade has positive effects.[19] Thus, in order to evaluate negative impacts or positive effects of the trade on consumers, one has to examine the effects of consuming dangerous or harmless counterfeit goods. And to appraise positive or negative effects of the counterfeit goods trade on traders, one has to investigate the harm which suppliers of genuine goods suffer or the benefits which they obtain as a result of the operation of the illicit trade. Moreover, one can assess whether or not a country or its people suffer or benefit from the operation of the counterfeit goods trade.

Regulatory policies and mechanisms have been adopted to deal with the trade counterfeit goods. Both industrialized nations and developing countries are signatories of the multilateral treaties which provide for the protection of intellectual property and control of the counterfeit goods trade. The treaties include the Paris Convention on the Protection of Industrial Property of 1883 (the Paris Convention) [20] and the Agreement on Trade-Related Intellectual Property Rights (the TRIPs Agreement) [21] which came into force in 1995. Some countries have signed post-TRIPs treaties which also require the signatories of those legal instruments to enact laws that provide for criminal, civil and administrative procedures for protecting intellectual property and controlling the trade in counterfeit goods in their territories. The globalisation of intellectual property and anti-counterfeiting policies and laws has occurred concurrently with the establishment of the multilateral institutions such as the World Trade Organization (WTO) whose members

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[18] Kevin Lewis, 'The Fake and the Fatal: The Consequences of Counterfeits,' (2009) 17 *Park Palace Economist* 47, 52-53.

[19] Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,'(note 6) 158 - 159.

[20] The Paris Convention for the Protection of Industrial Property, U.N.T.S. 305 (signed on 20 March 1883).

[21] The Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, U.N.T.S 299 (signed on 15 April 1994).

are required to enact intellectual property and anti-counterfeiting laws.[22] Similarly, some countries which are member states of the regional free trade agreements (FTAs) do implement intellectual property and anti-counterfeiting policies and laws embodied in those FTAs.

Government authorities and non-state entities and actors in both industrialized nations and developing countries use laws and alternative regulatory mechanisms to control the trade in counterfeit goods.[23] All these measures are undertaken in order to implement the global, regional or bilateral intellectual property and anti-counterfeiting policies. Despite being signatories of multilateral, regional and bilateral treaties and enacting laws and adopting alternative regulations to deal with the counterfeit goods trade, the trade flourishes in many developing countries. It is against the above background that this study examines the regulation of the trade in counterfeit goods in Tanzania and appraises the potential of the law and alternative regulations for controlling the trade.

1.2. The Overview of the Counterfeit Goods Trade in Tanzania

Mainland Tanzania (hereinafter referred to as Tanzania), which is part of the United Republic of Tanzania,[24] is one of the developing countries located in the eastern part of Africa. It is bordered by Uganda and Kenya to the North; Burundi, Rwanda and the Democratic Republic of the Congo (DRC) [25] to the West; Zambia, Malawi and

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[22] Ayodele A Adewole, 'Globalization, the TRIPs Agreement and their Implications on Access to Essential Medicines for Developing Countries: A Case Study of Nigeria,' (2010) *NIALS Law & Development Journal* 171, 177 -178.

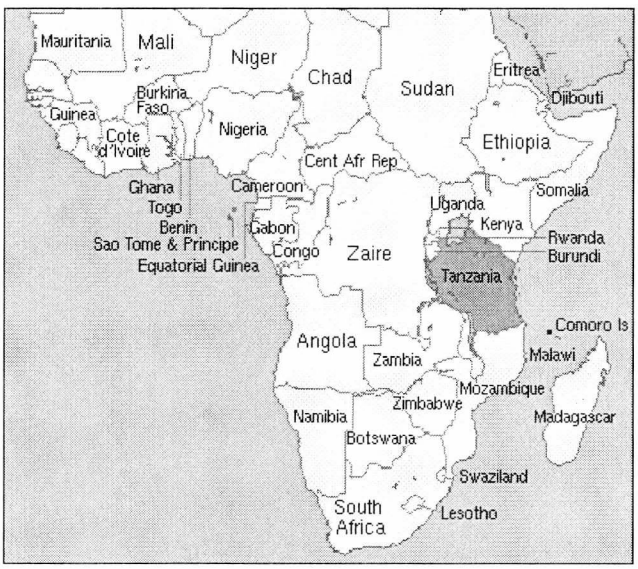
[23] 'Laws' include statutory instruments, administrative orders and judicial decrees. 'Alternative regulations' include market-based, information-based and technology-based regulations and other regulatory mechanisms.

[24] The United Republic of Tanzania was formed in 1964 following the union of two countries: Tanganyika (which forms Tanzania mainland) and Zanzibar.

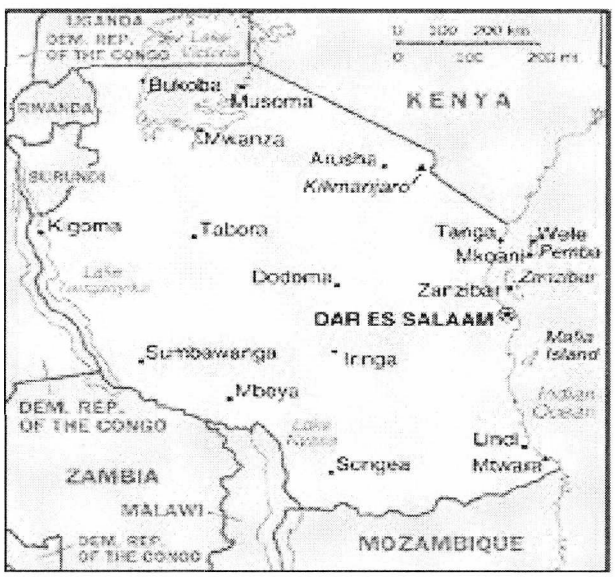
[25] The Democratic Republic of the Congo was formerly known as Zaire.

Mozambique to the South; and the Indian Ocean to the East. Tanzania has a surface area of 883,600 square kilometres [26] and a population of 44.9 million people.[27]

Map 1: Africa and location of Tanzania



Map 2: Tanzania and its neighbours



[26] Government of Tanzania, *Tanzania in Figures 2010* (Dar Es Salaam: Government Printer, 2011) 9.
[27] Government of Tanzania, *2012 Population and Housing Census Brief Results*, <http://www.nbs.go.tz/sensa/index.html> (accessed 5 December 2013).

Tanzania's economy depends mainly on agriculture which accounts for more than 50 per cent of the export earnings and employs about 70 per cent of the population, especially in the rural areas. The agricultural sector contributes about 45 per cent of the country's Gross Domestic Product (GDP) and provides the bulk of raw materials for Tanzania's industries.[28] The country has an underdeveloped industrial sector in terms of technologies used and production capacity[29] and underdeveloped infrastructures, transportation, communications and inadequate power generation and supply systems. Tanzania remains one of the poorest countries in the world.[30] According to the Government of Tanzania, about 33.6 per cent of Tanzanians live below the basic needs poverty-line and 16.6 per cent of the people live below the food poverty-line. The number of poor people has increased in recent years by 1.3 million and the rate of unemployment is also rising. Incidences of poverty vary among Tanzanians, but most poor people reside in rural and remote areas of the country.[31] The standards of health, education, housing and water services in Tanzania are generally not as good as they should be.[32]

The period from the 1980s onwards witnessed the increased involvement of Tanzania in global, regional and bilateral economic relations. The participation of the country in implementing the multilateral and regional economic policies also increased. It was during this period that Tanzania became a member of the WTO. The country joined

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[28] Government of Tanzania, *Agricultural Sectoral Reforms in Tanzania* (Dar Es Salaam, Government Printer, 2008) 1 - 2.

[29] A Mbelle & J Shitundu, 'The Management of Industrial Reforms in Tanzania: Perspective and New Challenges,' in D Bol, N. Luvanga & J Shitundu (eds) *Economic Management in Tanzania* (Dar Es Salaam: Tema Publishers, 1997) 180 -183.

[30] M Mahmud Khan, David R Hotchkiss, Andre SA Berruti & Paul L Hutchinson, 'Geographic Aspects of Poverty and Health in Tanzania: Does Living in a Poor Area Matter?' (2006) 21 *Health Policy Plan* 110, 111.See also Sanjeev Gupta, Benedict Clements, Maria Teresa Guin-Sui & Luc Leruth, 'Debt Relief and Public Health Spending in Heavily Indebted Poor Countries,' (2002) 80 *Bulletin of the World Health Organization* 151, 151.

[31] Government of Tanzania, *The National Poverty Eradication Strategy 2010* (Dar Es Salaam: Government Printer, 1996) 5.

[32] Joel P Lugalla, 'Economic Reforms and Health Conditions of the Urban Poor in Tanzania,' (1997) 1 *African Studies Quarterly* 19; J.M. Lusugga Kironde, 'Access to Land by the Urban Poor in Tanzania: Some Findings from Dar es Salaam, '(1995) *Environment and Urbanization, 77*; Burcu Duygan & Jesse B Bump, 'Can Trade Help Poor People? The Role of Trade, Trade Policy and Market Access in Tanzania,' (2007) 25 *Development Policy Review* 293.

the regional economic integration groups including the East African Community (EAC) and the Southern African Development Community (SADC). Tanzania has also increased its participation in economic and trade relations with the European Union (EU) member states,[33] the United States[34] and Asian countries.[35] Moreover, the government of Tanzania started implementing market-based policies formulated and imposed by the International Monetary Fund (IMF) and the World Bank.[36] Concurrent with the implementation of the market-based policies, the government has been undertaking regulatory and institutional reforms to support the operation of the liberalized economy.[37]

The integration of Tanzania's economy into the global and regional economies and the implementation of the market-based policies in the 1980s have coincided with the rise of illegal business activities in the country. The activities include smuggling of contraband; production, distribution and sale of counterfeit goods and substandard products; supply of adulterated products to consumers; and other market-related malpractices. It was during this period local media (newspapers, radio stations and television stations) started reporting about the influx of counterfeit products in the country's markets. Thus, one cannot understand the emergence and growth of the trade in counterfeit goods in Tanzania without examining the transition from the state-controlled economy to the market-based economy and issues about the opening up of the national economy and integration of the country's economy into the global and regional economies that took place over the last three decades.

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[33] Tanzania is a member of the African, Caribbean and Pacific (ACP) group of countries that have been trading with the EU countries under the EU-ACP Economic Partnership Agreement (EPA).

[34] Tanzania is a member of the African countries beneficiaries under the United States African Growth Opportunities Act (AGOA).

[35] Major trading partners of Tanzania include China, India, the European Union, South Africa, Kenya, the United Arab Emirates, Japan, and the United States. See European Commission, '*European Union, Trade in Goods with Tanzania*,' <http://trade.ec.europa.eu/doclib/docs/2011/january/tradoc_147401.pdf> (accessed on 12 November 2013).

[36] Mette N Grosen & Bezen B Coskun, 'A Decade of SAPs, Market Liberalization and Environment in Tanzania (1987 - 1998),' (2010) 3 *European Journal of Economic & Political Studies* 53, 59 - 62.

[37] Arrigo Pallotti, 'Tanzania: Decentralising Power or Spreading Poverty?,' (2008) 116 *Review of African Political Economy* 221, 221- 224.

Literature indicates that the markets in Tanzania are flooded with counterfeit goods. However, the magnitude of the trade in counterfeit goods in Tanzania has not been ascertained. The report of the study commissioned by the Confederation of Tanzania Industries (CTI) estimates that up to 20 per cent of all commodities in Tanzania are counterfeit goods and substandard products.[38] Tanzania Consumer Advocacy Society (TCAS) approximates that about 40 per cent of all commodities in the country are counterfeit products.[39] Besides presenting inconsistent statistics about the magnitude of the trade in counterfeit goods, the above studies have not examined the extent to which the absence of reliable statistics that describes the magnitude of the counterfeit goods trade affects the implementation of Tanzania's anti-counterfeiting policy and law.

Mkono *et al* point out that the bulk of counterfeit products in the markets in Tanzania originate from the Middle East and Asia.[40] The CTI observes that while the bulk of counterfeit goods originate from Asia, Europe and South America, some counterfeit goods in Tanzania are manufactured in the country.[41] The above literature acknowledges the fact that counterfeit products in Tanzania originate from foreign countries, but it does not describe adequately the nexus between the worldwide counterfeiting business and the trade in counterfeit goods in Tanzania. Moreover, the literature does not examine or describe local, public and non-state actors who operate or facilitate the operation of the counterfeit goods trade in Tanzania.

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38 Confederation of Tanzania Industries,'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (unpublished report, 2008) 13.

39 Tanzania Consumer Advocacy Society,'The State of Consumers' Awareness and Attitudes Towards Consumer Rights and Corporate Social Responsibility in Tanzania,' (unpublished report, 2007) 13.

40 Nimrod E Mkono, Audax K Kameja & August N Mrema, 'Tanzania's IP Changes are Good for Business,' (2008) *World IP Contacts Handbook* 96, 97.

41 Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 38) 16.

Kameja *et al* argue that the trade in counterfeit goods in Tanzania has been operational for many years,[42] but the authors point out that it is difficult to state with certainty when the trade emerged.[43] For Mrema, the trade in counterfeit goods has been operational in Tanzania since the time when the country attained its political independence.[44] The Fair Competition Commission (FCC) argues that the proliferation of counterfeit goods in Tanzania's is a recent phenomenon which started about two or three decades ago. [45] In view of the above, there are uncertainties as to when the trade in counterfeit goods in Tanzania arose. Furthermore, the above literature has not looked comprehensively at the circumstances which contributed to the emergence of the counterfeit goods business in Tanzania.

Several factors drive the trade in counterfeit goods in Tanzania. The CTI cites weaknesses of the anti-counterfeiting law, inadequacies of mechanisms for enforcing the law, high returns generated from the counterfeit goods trade and the involvement of organised criminals as factors which encourage or facilitate traders to supply counterfeit goods to consumers.[46] The FCC mentions the traders' abuse of the trade liberalisation policy and the susceptibility of the country's legal machinery to manipulation by fraudulent traders as the main causes for the proliferation of counterfeit products in the markets.[47] Kameja *et al* indicate that some consumers purchase counterfeit goods knowingly because those commodities are cheap and other buyers purchase the

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42 Audax K Kameja, August N Mrema & Francis Kamuzora, 'Turning the Tables on Counterfeiters,' (2008) *World IP Contacts Handbook* 1, 1.

43 *Ibid* 2.

44 August N Mrema, 'Recent Legislative Changes in Trademark Law in Tanzania,' (2009) p 2 <http://www.mkono.com/pdf/Inta%20paper%202009-Final%20doc.pdf> (accessed 18 August 2011). Tanzania attained its political independence from Britain in 1961.

45 Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (Dar Es Salaam: FCC, 2007) 76. See also Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 38) 3.

46 Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 38) 11.

47 Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (note 45) 77.

counterfeit products unknowingly believing them to be genuine goods.[48] However, the above literature has not examined several political, economic, legal and social factors that motivate traders to supply counterfeit goods to the markets and consumers to purchase and use the counterfeit products. The literature focuses on describing the drivers of the trade in counterfeit goods which operate at the national level, but the literature pays insufficient attention to examining international factors that drive the counterfeiting business.

With regard to the impact of the trade in counterfeit goods, the literature in Tanzania has described negative effects of the trade on consumers, legitimate traders and the economy. The CTI observes that consumers suffer financial loss as a result of buying defective or inferior quality counterfeit goods and they are exposed to health and safety risks as a result of using harmful and unsafe counterfeit products. Suppliers of genuine goods lose sales revenue and future profits and are compelled to close down or downsize their business activities due to unfair competition posed by traders in counterfeit goods.[49] The FCC points out that Tanzania's economy suffers due to the decline in the tax revenue and investments and the costs incurred in the fight against the trade in counterfeit goods.[50] However, other socio-economic effects of the trade have not been explored by the above literature. The literature has also not examined positive aspects of the counterfeiting business.

Tanzania is a signatory of the Paris Convention and the TRIPs Agreement. The country has enacted laws for protecting intellectual property and controlling the trade in

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[48] Kameja *et al*, 'Turning the Tables on Counterfeiters,' (note 42) 1.

[49] Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 38) 19 - 20.

[50] Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (note 45) 79 - 80. See also Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 38) 17 - 18.

counterfeit goods. Several authorities and agencies enforce these laws.[51] There are, however, several factors that undermine the efficacy of the anti-counterfeiting law in Tanzania. According to Kasonda *et al,* the factors include the obsoleteness of the law, the ineffectiveness of the mechanisms for enforcing the law and weak co-ordination and co-operation among the anti-counterfeiting agencies.[52] Nevertheless the literature has insufficiently examined limitations of the law, inadequacies of authorities tasked to control the trade in counterfeit goods and factors which impinge on the efficiency of the anti-counterfeiting law and authorities in Tanzania. While the above literature has examined the law, there is little investigation of the alternative anti-counterfeiting regulatory mechanisms and the involvement of non-state actors in formulating, making, implementing and enforcing the law and alternative regulations for controlling the counterfeit goods trade in Tanzania.

1.3. The Statement of the Problem

As a result of economic globalisation, national economies and markets have been integrated into the global economy.[53] Likewise, regionalization facilitates the integration of national economies into the global economy.[54] Due to globalisation and regionalisation, economic processes including production, distribution, supply and consumption of goods and services have become internationalized and networked. Internationalization and networking of the economic processes have facilitated the

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51 Said M Kalunde, 'Criminal Enforcement of Intellectual Property Rights: An Overview of the Policy, Legal and Institutional Framework,' (2011)<http://ssrn.com/abstract=192525> (accessed 12 October 2012); See also, Pauline H Kasonda, 'New Law on Counterfeit Drugs and Cosmetics,' (2003) 58 *INTA Bulletin* 7, 7. See also, Grace Kamugisha Kazoba, *Protection of Consumers and a Guard Against Counterfeit and Substandard Pharmaceuticals in Tanzania: Examining National, Regional and International Frameworks* (Dar Es Salaam University Press: Dar Es Salaam, 2013) 5 - 17.

52 Pauline H Kasonda, Blandina Gogadi & August N Mrema, 'Law against Counterfeits not Tough Enough,' (2005) *World IP Contacts Handbook* 1, 3; Kameja *et al,* 'Turning the Tables on Counterfeiters,' (note 42) 1- 4.

53 Andrew Heywood, *Politics* (London: Palgrave Macmillan, 3rd ed, 2007) 144 - 145.

54 H Proff, 'Business Unit Strategies Between Regionalization and Globalization,' (2002) 11 *International Business Review* 231, 233 - 238.

increased flow of legitimate goods, services and capital between nations.[55] Globalisation has also paved the way for the operation and expansion of international illicit activities.[56] The worldwide trade in counterfeit goods is one of the illicit activities.[57] Through globalisation of criminal activities, counterfeit goods flow to both international and national markets including those in developing countries.[58] The developing countries including Tanzania are affected by the influx of counterfeit products from the worldwide markets. The research on the trade in counterfeit goods has examined inadequately the link between the worldwide counterfeit goods business and the counterfeit goods trade that operates in Tanzania.

The trade in counterfeit goods is a socio-economic phenomenon driven by law- and non-law related factors.[59] The counterfeit goods trade has negative and positive effects on consumers, traders, economies and societies in many countries.[60] The research in Tanzania has not investigated comprehensively law- and non-law related factors that drive the trade in counterfeit goods. There is an insufficient examination of political, economic and social factors which have been responsible for the emergence and expansion of the trade in counterfeit goods in Tanzania. Moreover, the research has not

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[55] Robert O Keohane & Joseph S Nye, 'Globalization: What's New? What's Not? (And So What?),' in David Held & Anthony McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate* (Cambridge: Polity Press, 2002) 75 - 76.

[56] Roy Godson & Phil Williams, 'Strengthening Cooperation Against Transnational Crime,' (1998) 3 *Survival* 66, 66-70; See also, Usman A Karofi & Jason Mwanza, 'Globalization and Crime,' (2006) 3 *Bangladesh e-Journal of Sociology* 1, 4-10.

[57] Moises Naim, 'The Five Wars of Globalization,' (2003) *Foreign Policy* 29, 32 - 33. See also Tim K Mackey & Bryan A Liang, 'The Global Counterfeit Drug Trade: Patient Safety and Public Health Risks,' (2011) 100 *Journal of Pharmaceutical Sciences* 4571, 4572 - 4573.

[58] Joan E Foltz, 'Global Crime Case: Cybercrime and Counterfeiting,' (2008) *The Futurist* 46, 46; Ashatu Hussein & Muhajir Kachwamba, 'Low Quality Products in Developing Countries' Markets: Is it One of Globalization Challenges, '(2011) 2 *International Review of Social Sciences & Humanities* 26, 26-27.

[59] Viren Swami, Tomas Chamoro-Premuzic & Adrian Furnharm, 'Faking it: Personality and Individual Different Predictors of Willingness to Buy Counterfeit Goods,' (2009) 38 *Journal of Socio-Economics* 820, 820; Cleopatra Veloutsou & Xuemei Bian, 'A Cross-national Examination of Consumer Perceived Risks in the Context of Non-deceptive Brands,' (2008) 7 *Journal Consumer Behaviour* 3, 3.

[60] John Anderson, 'The Campaign Against Dangerous Counterfeit Goods,' (1999) *International Criminal Police Review* 56, 56-58.

explored sufficiently positive and negative effects of the counterfeit goods trade on consumers, traders, economies and the general society in Tanzania.

Globalisation of intellectual property and anti-counterfeiting regulatory policies, which came up parallel to the adoption of the TRIPs Agreement and the establishment of institutions such as the WTO, has necessitated nations to enact laws that prescribe criminal, civil and administrative mechanisms for protecting intellectual property and controlling the trade in counterfeit goods.[61] The FTAs embody intellectual property and anti-counterfeiting regulatory policies to which signatories of the agreements should conform.[62] Some bilateral agreements between countries embrace intellectual property and anti-counterfeiting regulatory policies. The research on the trade in counterfeit goods in Tanzania has looked insufficiently into the influence of the global, regional and bilateral treaties on the anti-counterfeiting policy and law in Tanzania.

Governments in many countries have enacted and enforce laws to control the trade in counterfeit goods.[63] Public agencies and non-state actors also do formulate and apply alternative regulations to curb the counterfeit goods trade.[64] In many countries, political, economic and social factors undermine the potential of the law and alternative regulations as policy instruments for fighting against the counterfeit goods trade.[65] The research in Tanzania has inadequately appraised the potential of the anti-counterfeiting law and not considered comprehensively the usefulness of the alternative regulations in tackling the counterfeit goods trade. Similarly, the research has not examined in detail

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61 Klaus Stegemann, 'The Integration of Intellectual Property Rights into the WTO System,' (2002) 23 *World Economy* 1237, 1237- 1245.

62 Peggy E Chaudhry & Michael G Walsh, 'Intellectual Property Rights: Changing Levels of Protection under GATT, NAFTA and the EU,' (1995) *Columbia Journal of World Business* 80, 87- 88.

63 Yasumasa Kioka, 'The Intellectual Property Protection in Japan,' (1999) International *Criminal Police Review* 47, 47- 49.

64 Domenico Sindico, 'Trademark and Counterfeiting; The Kappa Group Experience,' (2005) 2 *Journal of World Intellectual Property* 407, 407- 415

65 Wolfgang Hetzer, Wolfgang 'Godfathers and Pirates: Counterfeiting and Organized Crime,' (2002) 10 *European Journal of Crime, Criminal Law and Criminal Justice* 303, 320.

how political, economic and social factors impinge on the anti-counterfeiting law and alternative regulations in Tanzania.

1.4. Objectives of the Study

1.4.1.General Objectives

This study explores the main features, drivers and impact of the trade in counterfeit goods. It examines the global anti-counterfeiting regulatory policy and looks into regulatory techniques for controlling the trade in counterfeit goods. The aim is to achieve three main objectives:, first, to investigate the worldwide counterfeit goods business and examine its connection to the trade in counterfeit goods in Tanzania. Second, to examine international intellectual property and anti-counterfeiting regulatory policies and look into their influence over the anti-counterfeiting policy and law in Tanzania. Third, to look at the main regulatory techniques for controlling the trade in counterfeit goods and examine how the techniques are applied to deal with the counterfeit goods trade in Tanzania.

1.4.2.Specific Objectives

Specific objectives of this study are as follows:

a) To explore the salient features of the trade in counterfeit goods in Tanzania and describe its drivers and impact;

b) To examine the main regulatory techniques applied to control the trade in counterfeit goods in Tanzania; and

c) To appraise the potential of the regulatory mechanisms for controlling the trade in counterfeit goods in Tanzania.

1.5. Research Questions

This study answers the following questions:

a) What are the general features, drivers and impact of the trade in counterfeit goods?;

b) Which regulatory techniques are applied to control the counterfeit goods trade?;

c) What are the salient features, drivers and effects of the trade in counterfeit goods in Tanzania?;

d) Which regulatory techniques are applied to curb the counterfeit goods trade in Tanzania?; and

e) What is the potential of the regulatory mechanisms for controlling the trade in counterfeit goods in Tanzania?

1.6. Research Thesis

In this study I argue that Tanzania's law, which partly embodies foreign law, is the main policy instrument for fighting against the trade in counterfeit goods whose drivers are law- and non-law related factors. Alternative regulations are also applied to curb the counterfeit goods trade. The anti-counterfeiting law and alternative regulations operate within certain political, economic, legal and social environments. Some political, economic, legal and social factors in Tanzania undermine the efficacy of the law and alternative regulations for controlling the trade in counterfeit goods. The potential of the law and alternative regulations for dealing with the counterfeiting business will be enhanced if law- and non-law related drivers of the trade and legal and non-legal factors which impinge on the effectiveness of the law and alternative regulations will be

addressed. The application of the law and alternative regulations has to be accompanied by the use of other developmental strategies which can tackle the drivers of the counterfeit goods trade.

1.7. Significance of the Study

The significance of this study is threefold. First, issues relating to the regulation of the counterfeit goods trade in Tanzania are under-researched. Besides the CTI study, which looked at some drivers and impact of the counterfeit goods trade on the country's industrial sector and some measures to control the trade, government authorities and anti-counterfeiting agencies in Tanzania have not conducted studies to investigate the counterfeiting business, its driving factors and impact or the regulation of the trade. The existing literature has examined how the law in Tanzania seeks to curb the trade in counterfeit goods, but has looked inadequately into the global, regional and other international regulatory policies and their influence over Tanzania's anti-counterfeiting policy and law. Also the literature has examined the law for controlling the trade in counterfeit goods, but it has studied insufficiently alternative regulatory mechanisms for curbing the trade. The research has not looked at the role of non-state entities and actors in Tanzania in formulating, making, implementing and enforcing the anti-counterfeiting law and implementing alternative regulations. This study examines the above issues and contributes to the debate on the counterfeit goods trade and its regulation in Tanzania.

Second, this study is part of efforts undertaken by local stakeholders in Tanzania to examine, describe and explain issues about the trade in counterfeit goods and its drivers, impact and regulation in Tanzania. It is anticipated that these efforts will facilitate the process of devising strategies that can be applied by the EAC and individual EAC member states to formulate and enact home-grown anti-counterfeiting policies and laws

respectively.[66] Additionally, this study makes a contribution to the on-going debate about the counterfeit goods and trade and its regulation which may result in the adoption of the national and sectoral anti-counterfeiting regulatory policies that reflect the interests of people of Tanzania and take into account the local conditions of the country.

Third, this study reaffirms the calls which have been made by some stakeholders for the revision of Tanzania's anti-counterfeiting policy and law. The stakeholders have expressed their dissatisfaction with the existing law and appealed to the government of Tanzania to reform the anti-counterfeiting legal regime.[67] The CTI, an umbrella organization of traders in Tanzania, has urged the government to enact a new law to tackle the trade in counterfeit goods.[68] A consumer protection association, the TCSA, has also called on the government to take strict measures to curb the counterfeit goods trade.[69] The Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA), the Tanzania Freight Forwarders Association (TFFA), the CTI and the Tanzania Revenue Authority (TRA) have jointly made similar demands.[70] Newspapers have expressed some concerns about inadequacies of the anti-counterfeiting law and called on the relevant authorities in Tanzania to reform the policy and law and step up their efforts to fight the counterfeit goods trade.[71]

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[66] Moses Mulumba, *Anti-counterfeiting Legislation in East Africa: A New Assault against TRIPs Flexibilities for Access to Medicines,* EQUINET Newsletter, No. 111, 2010.
[67] Sebastian Mrindoko, *Free trade, policing laxity exacerbate counterfeiting,* The *Daily News* (Dar Es Salaam), 17 January 2012.
[68] Felister Peter, *CTI: Enact one law on counterfeit goods,* The *Guardian* (Dar Es Salaam), 9 March 2012.
[69] Felix Andrew, *Criminalize fake imports-call,* The *Guardian* (Dar Es Salaam), 24 December 2011.
[70] Sebastian Mrindoko, *Importers raise alarm as counterfeits flow,* The *Daily News* (Dar Es Salaam), 5 June 2012.
[71] Editor, *Just say no to fakes,* The *Citizen* (Dar Es Salaam) 27 September 2012. See also Editor, *War on fake goods must be intensified,* The *Daily News* (Dar Es Salaam), 8 October 2012. See also Editor, *We must the war on counterfeits,* The *Guardian* (Dar Es Salaam), 14 November 2012.

1.8. Research Methodology and Methods[72]

1.8.1. Qualitative Research

This study is a qualitative research which focuses on exploring, describing and explaining new insights about issues under investigation.[73] In exploring the international aspects together with political, economic and social factors which operate in Tanzania, this study provides new insights about the counterfeit goods trade in the country which the previous research has not examined adequately. The previous research focused on describing the political, economic and social dimensions of the counterfeit goods trade in Tanzania which operate at the national level. This study explores how the global, regional and other international regulatory policies influence or impact on the anti-counterfeiting policy and law in Tanzania. It also explores how the alternative regulations are applied to deal with the trade in counterfeit goods. These are some of the new dimensions about the regulation of the counterfeit goods trade in Tanzania which the previous research had not examined adequately. In the course of examining the new dimensions about the trade in counterfeit goods and its control in Tanzania, this study raises some questions which require further investigation.

A qualitative research is premised on an assumption that there are multiple realities about issues under investigation as experienced, understood, interpreted and explained by persons who participate in the study.[74] In this study, I considered the fact that there are different views about the trade in counterfeit goods in Tanzania and its evolution, drivers and regulation. For instance, there is a viewpoint that the supply of

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[72] Methodology' refers to the way of thinking about and studying phenomena and 'methods' consist of techniques for collecting and analysing data. See Jonathan Grix, *Demystifying Postgraduate Research: From MA to PhD* (Birmingham: University of Birmingham Press, 2001) 29 - 39.

[73] Loraine Blaxter, Christina Hughes & Malcolm Tight, *How to Research* (Buckingham: Open University Press, 2nd ed, 2000) 65; Alan Bryman, 'The Debate about Quantitative and Qualitative Research: A Question of Method or Epistemology,' (1984) 35 *British Journal of Sociology* 75, 77-78.

[74] Linda Finlay, 'Going Exploring,': The Nature of Qualitative Research,' in Linda Finlay & Claire Ballinger (eds) *Qualitative Research for Allied Health Professionals: Challenging Choices* (Hoboken, NJ: John Wiley & Sons, 2006) 6.

counterfeit goods to the markets by dishonest traders is the main factor which drives the trade.[75] Another perspective holds that the demand for counterfeit products by consumers is the key driver of the trade.[76] There is also a perception that the proliferation of counterfeit products in the markets in Tanzania is a result of inadequacies of the anti-counterfeiting law and mechanisms for enforcing the law.[77]

In a qualitative study limited number of persons, groups and organisations, settings or events that provide rich information about investigated issues is selected.[78] In this study, the respondents were drawn from a few institutions and groups including government authorities and anti-counterfeiting agencies; a traders' organisation and a consumer protection association; private business enterprises; consumers; and researchers and practitioners.[79] The selection of the respondents was based on several criteria. The government authorities and agencies in Tanzania implement and enforce the anti-counterfeiting policy and law respectively.[80] The traders' organisation and consumer protection association take part in the fight against the trade in counterfeit goods. Traders and consumers suffer harmful effects resulting from the operation of the counterfeit goods trade and are the actors in the fight against the trade. The researchers and practitioners have looked at or dealt with matters concerning the trade in counterfeit goods and its regulation.

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[75] Guardian Reporter, *Entrepreneurs urged to stop importation of bogus goods,* The *Guardian* (Dar Es Salaam), 7 September 2012. See also Elisha Magolanga & Mahamisha Habib, *TZ told to rein on fake food dealers,* The *Citizen* (Dar Es Salaam), 18 October 2013.

[76] Guardian Reporter, *VETA: Only consumers can help production, sale of fakes,* The *Guardian* (Dar Es Salaam), 5 August 2013.

[77] Veneranda Sumila, *Will the new law counter business in fakes,* The *Citizen* (Dar Es Salaam), 12 August 2013.

[78] Joseph A Maxwell, *Qualitative Research Design: An Interactive Approach* (Thousand Oaks: SAGE Publications, 2nd ed, 2005) 88 - 91.

[79] See **Appendix 1**.

[80] The Fair Competition Commission, the Tanzania Bureau of Standards, the Tanzania Drugs and Food Authority, the Tanzania Revenue Authority and police are the main agencies tasked to control the trade in counterfeit goods in Tanzania.

In selecting individuals, groups and entities that took part in this study, I applied the non-probability sampling procedure whereby the selection of the population of participants in a study is based on the need to get individuals, groups or entities that can provide information-rich data in order to answer the research questions.[81] The objective was to collect detailed information to address issues about the counterfeit goods trade in Tanzania and its regulation. The individuals, groups and entities were selected from five regions: Dar Es Salaam, Mbeya, Mtwara, Arusha and Singida.[82]

1.8.2. Doctrinal and Non-doctrinal Legal Research

This study employed both doctrinal and non-doctrinal research techniques. A doctrinal legal research is concerned with the examination of the law by analysing legal rules, principles and doctrines and how they have been developed and applied.[83] Legal rules are laid down in statutes and cases. Publications such as law textbooks and articles in journals examine and describe the development of the legal doctrines. Research which involves an examination of legal rules and doctrines is referred to as a 'black-letter law' research or 'research in law'.[84] I applied the doctrinal legal research technique to examine multilateral, regional and bilateral treaties which contain provisions that address issues about the protection of intellectual property and control of the trade in counterfeit goods. Tanzania is a party to some of these treaties. I also examined statutory provisions and principles emanating from cases that address issues pertaining to counterfeiting and the trade in counterfeit goods. I perused the literature to generate information about the development of the anti-counterfeiting policy and law in Tanzania.

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[81] Gina M A Higginbottom, 'Sampling Issues in Qualitative Research,' (2004) 12 *Nurse Researcher* 7, 14.

[82] See **Appendix 2**.

[83] Mike McConville & Wing H Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 14.

[84] Paul Chynoweth, 'Legal Research,' in Andrew Knight & Les Ruddock (eds) *Advanced Research Method in the Built Environment* (Oxford: Wiley-Blackwell, 2008) 30.

A non-doctrinal legal research, also known as a socio-legal research, investigates factors (for instance, political, economic or social factors) which create conditions for the existence of a phenomenon under investigation and how the law deals with such factors or how these factors impact on the application of the law in regulating or dealing with the phenomenon.[85] The main objective of this approach is to examine and describe how the law and legal system operate in political, economic or social contexts. Also this approach aims at appraising the impact of political, economic or social factors in enhancing the effectiveness or undermining of the efficiency of law and legal system in dealing with the phenomenon under investigation.[86] This approach can be applied to evaluate the adequacy of the laws and the legal systems in order to recommend changes to address their inadequacies.[87] This approach is known as 'research about law.'[88] In this study, I examined economic, political and social factors which gave rise to the emergence and growth of the trade in counterfeit goods in Tanzania. I also examined the non-law related factors that influence or impact on the potential of the law for controlling the trade in counterfeit goods in Tanzania. I used this approach to look at how the law and legal system deal with drivers of the trade in counterfeit goods and I explored how non-law related factors impinge on the application of the law for controlling the trade in Tanzania. This method was used to explore how non-law related mechanisms are used to tackle the counterfeit goods business.

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85 McConville & Chui, *Research Methods for Law* (note 83) 19.

86 Julius G Getman, 'Contribution of Empirical Data to Legal Research,' (1985) 35 *Journal of Legal Education* 489, 489.

87 Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm,' (2008)32 *Melbourne University Law Review* 1065, 1068.

88 Ashish K Singhal & Ikramuddin Malik, 'Doctrinal and Socio-legal Methods of Research Merits and Demerits,'(2012) 2 *Educational Research Journal* 252, 254 - 255.

1.8.3. Data Collection

The data in this study was generated from secondary and primary sources.[89] I gathered information from documentary materials: text books, academic articles, documents of government authorities and agencies and non-state entities, and reports and articles from magazines and newspapers to generate the secondary data.[90] This data provided the background information about: i) the trade in counterfeit goods and its driving factors and impacts; ii) the anti-counterfeiting regulatory policy; and iii) the anti-counterfeiting regulatory techniques.

Interviews, written surveys and non-participant observations were used to collect information that generated primary data.[91] I conducted face-to-face-interviews with respondents. I used interview guides with semi-structured questions covering several themes prepared for specific groups of respondents.[92] I wrote down respondents' responses and transcribed them shortly after conducting the interviews. I used written surveys to collect information from respondents who could not, for different reasons, be interviewed. Paper-based and online surveys containing closed- and open-ended questions were also used.[93] I conducted non-participant observations in order to look at the nature of transactions between buyers of goods and sellers who operated business in stalls, makeshift kiosks, flea markets and shops. The observations were made to gather information about, for instance, the scope of counterfeit goods in the markets, attributes

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[89] Primary data is original data collected for the specific research problem at hand. Materials created for different purposes but are made available for use by the general research community is called secondary data. See, Joop Hox & Hennie R Boejie, 'Data Collection, Primary vs Secondary,' (2005) 1 *Encyclopedia of Social Measurement* 593, 593 - 594.

[90] With exception of few materials such as text books, most of materials were sourced from online sources.

[91] Rosaline Barbour, *Introducing Qualitative Research: A Student Guide to the Craft of Doing Qualitative Research* (London: Sage Publications, 2008) 16 - 17.

[92] P Gill, K Stewart, E Treasure & B Chadwick, 'Methods of Data Collection in Qualitative Research: Interviews and Focus Groups,' (2008) 204 *British Dental Journal* 290, 290 -291.

[93] See **Appendix 3.**

of those goods and how sellers and consumers of counterfeits transacted. I noted down points to describe the places, actors and events observed.

In collecting and processing data and reporting the findings, I observed key ethical issues, namely securing the consent of the respondents; informing the respondents how the information would be disseminated; ensuring anonymity of the respondents; and observing confidentiality in handling and reporting information from the respondents.[94] Prior to collecting information from the respondents, I negotiated access to the authorities, agencies and entities where data was sourced and research was conducted. I asked for permission from the relevant authorities before conducting the research. I requested respondents' consent to their participation in the study. The requests which were made in writing or orally provided the respondents with information about: the objectives of the study; how information would be used and reported; the fact that the respondents were free to participate in the study and could withdraw from participating in the study, at any time, if they wished to do so; and the assurance that the respondents' confidentiality and anonymity would be observed.[95]

1.8.4. Data Analysis

The qualitative data analysis involves activities such as organising the data, breaking it into manageable units, synthesizing it, searching for patterns, and reporting what the data represents. This process consists of reviewing, connecting and interpreting data to describe and explain phenomena under investigation.[96] The analysis of data, which

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[94] Jean Martin & David A Marker, 'Informed Consent: Interpretations and Practice on Social Surveys,' (2007) 65 *Social Science & Medicine* 2260, 2264 - 2269. See also Angelica Orb, Laurel Eisenhauer & Dianne Wynaden, 'Ethics in Qualitative Research, '(2001) 33 *Journal of Nursing Scholarship* 93, 95-96. See also Ian F Shaw, 'Ethics in Qualitative Research and Evaluation,' (2003) 3 *Journal of Social Work* 9, 15 - 18.

[95] See **Appendix 4.**

[96] Ellie Fossey, Carol Harvey, Fiona McDermott & Larry Davidson, 'Understanding and Evaluating Qualitative Research,' (2002) 36 *Australian & New Zealand Journal of Psychiatry* 717, 728.

starts during data collection, takes place throughout the life of the research project.[97] The analysis takes place parallel to data collection in such a way that issues emerging from the initial stage of the analysis inform a researcher about other questions to be asked, other participants to be included, or other entities to be involved in the study.[98] The interpretation of data informs the researcher about the next cycle of data collection.[99] The initial analysis of information collected from the respondents from two anti-counterfeiting agencies, raised issues which required collection of information from other anti-counterfeiting agencies and a government authority. Similarly, information from consumers raised issues which necessitated collection of more information from the consumer protection association. During and after undertaking the fieldwork, information generated from the interviews, questionnaires, newspaper reports and observations was analysed. The analysis of data continued throughout this study.

Interview transcripts, notes generated from questionnaires, observational notes and texts of summarized or annotated written materials generate information which was analysed.[100] In analysing data, I employed the following procedures. Firstly, I transcribed interviews, observational notes and made annotations from written materials, particularly newspaper reports, into word processing documents and organised those materials in folders based on the collection techniques used and sources.[101] Secondly, I read and reviewed the transcripts, corrected some omissions and removed some parts which were

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97 Tehmina N Basit, 'Manual or Electronic? The Role of Coding in Qualitative Data Analysis,' (2003) 45 *Educational Research* 143, 144 - 45.

98 Barbara DiCocco-Bloom & Benjamin F Crabtree, 'The qualitative Research Interview,' (2006) 40 *Medical Education* 314, 317.

99 Lorelei Lingard, Matheiu Albert & Wendy Levinson, 'Qualitative Research: Grounded Theory, Mixed Methods and Action,' (2008) 337 *British Medical Journal* 459, 459.

100 Ellen Taylor-Powell & Marcus Renner, 'Analyzing Qualitative Data,' (2003) *Programme Development & Evaluation* 1, 1.

101 Julia Bailey, 'First Steps in Qualitative Data Analysis: Transcribing,' (2008) 25 *Family Practice* 127, 128 -130.

redundant.[102] Thirdly, I read and re-read the transcripts thoroughly in order to understand their contents. I assigned labels to words, sentences, or groups of sentences that described meaningful characteristics, interactions, incidents or events.[103] Fourthly, after all segments of data had been coded, I grouped the coded information into categories or themes.[104] This involved comparing and contrasting information from interviews, notes from questionnaires and annotated reports to find those patterns which showed similarities and those that showed differences. The objective of this procedure was to identify relationships and connections between themes or categories.[105] The patterns, relationships and connections within and between the categories were identified and used to describe and explain issues that were under investigation.

In presenting the findings, I applied the interpretive analysis technique whereby the researcher transcribes chunks of texts from the raw data followed by commentaries by the researcher to explain concepts emanating from the texts.[106] I selected the informative parts of the data to describe the findings. I quoted some extracts from transcripts and excerpts from written materials such as newspapers and reports to present the 'voice' of the respondents, illustrate points, or support or counter arguments. I also used some maps and tables to highlight some points. The above technique is referred to as an inductive analysis which involves reading raw data to derive themes, concepts or models through

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102 Eleanor McLellan, Kathleen M MacQueen, Judith L Neidig, 'Beyond the Qualitative Interview: Data Preparation and Transcription,' (2003) 15 *Field Methods* 63, 72-73.

103 U H Graneheim & B Lundman, 'Qualitative Content Analysis in Nursing Research: Concepts, Procedures and Measures to Achieve Trustworthiness,' (2004) 24 *Nurse Education Today* 105, 106 - 108.

104 Hsiu-Fang Hsieh & Sarah E Shannon, 'Three Approaches to Qualitative Content Analysis,' (2005) 15 *Qualitative Health Research* 1277, 1279.

105 Martyn Denscombe, *The Good Research Guide for Small-scale Social Research Projects* (Maidenhead: Open University Press, 2010) 272 - 273.

106 Luis Felipe Luna-Reyes & Deborah Lines Andersen, 'Collecting and Analyzing Qualitative Data for System Dynamics: Methods and Models,' (2003) 19 *System Dynamics Review* 271, 284.

the interpretations made from raw data.[107] In presenting the findings, the main focus was to demonstrate how the data answered the research questions.[108]

1.9. Contribution of the Study

The contribution of this study is threefold. First, this research looks at the trade in counterfeit goods in Tanzania as a national as well as transnational phenomenon. The study demonstrates that political, economic, legal and social factors operating at the international and national levels have been responsible for the emergence and growth of the counterfeit goods trade in Tanzania. Therefore, the study makes a contribution by showing that an examination of the trade in counterfeit goods in Tanzania will be incomplete unless one looks at the transnational or international factors that drive the trade. Moreover, this study shows that the trade in counterfeit goods has economic and social effects on consumers, traders and the society in general. It also reveals how the trade in counterfeit goods in Tanzania affects many sectors including industries, agriculture, trade, competition, public health and science and technology. Thus, the study makes a contribution by showing that in order to understand the trade in counterfeit goods in Tanzania and its drivers and impact, the whole environment in which the counterfeit goods trade operates has to be examined. Rather than looking at one viewpoint, which is common in the existing literature in Tanzania, one has to take a multi-faceted approach to unpack and uncover the complex dimensions of the trade.

Second, this study demonstrates that the anti-counterfeiting policy and law in Tanzania emanates from the national sources and are influenced by international regulatory policies. Government authorities and anti-counterfeiting agencies have taken

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[107] David R. Thomas, 'A General Inductive Approach for Analyzing Qualitative Evaluation Data,' (2006) 27 *American Journal of Evaluation* 237, 238.

[108] Philip Burnard, 'Writing a Qualitative Research Report,' (2004) 24 *Nurse Education Today* 174, 176.

initiatives to formulate and implement anti-counterfeiting regulatory policy and law. The anti-counterfeiting policy and law are also influenced by the global, regional and inter-regional intellectual property and anti-counterfeiting regulatory policies. This study shows also that public agencies and non-state actors in Tanzania use the law made by the public authorities to control the counterfeit goods trade. Besides the anti-counterfeiting law, alternative regulations made and implemented by the government agencies and non-state actors are applied to curb the counterfeiting business in Tanzania. Unlike the previous research, which looked at the anti-counterfeiting law made by public authorities in Tanzania, this study demonstrates that local and foreign agencies as well as public authorities and non-state actors participate in making or formulating and enforcing or implementing the law and alternative regulations for controlling the trade in counterfeit goods. While most literature has looked at the use of the formal regulatory mechanisms for controlling the trade in Tanzania, this study shows that both formal and informal regulatory policy instruments are applied to tackle the counterfeiting business.

Third, this study looks at the trade in counterfeit goods in Tanzania and its drivers, impact and regulation from the developmental viewpoint. The research shows that economic and industrial policies that the government of Tanzania adopted and implemented were/ have been responsible for creating conditions for the proliferation of counterfeit goods in the markets. Limited industrial capacity and endemic poverty facing many Tanzanians have facilitated the expansion of the counterfeit goods trade. The trade has had impact on Tanzania socio-economic development and development-related issues such as the lack of or limited resources on the part of government authorities and anti-counterfeiting agencies and non-state actors undermine the efficacy of the anti-counterfeiting law and alternative regulations. This study proposes that an efficient system to address the counterfeit goods trade in Tanzania should involve the enhancement of the anti-counterfeiting regulatory regime and be accompanied by

mechanisms that address development-related issues which create conditions for the operation or impinge on the efficacy of the anti-counterfeiting law and alternative regulations.

1.10. Organisation of the Thesis

The remainder of the thesis is structured as follows: **Chapter Two** conceptualises the trade in counterfeit goods and examines issues about the magnitude of the worldwide counterfeit goods trade. It describes the main drivers of the trade in counterfeit goods and looks at negative and positive effects of the trade. The chapter explores the nexus between the worldwide counterfeiting business and the counterfeit goods trade in developing countries in Sub-Saharan Africa. It also highlights the drivers and impact of the trade in counterfeit goods on consumers, legitimate traders, economies and societies in general in the Sub-Saharan African countries.

Chapter Three examines the global anti-counterfeiting regulatory policy. It describes the genesis and evolution of the global policy and factors which propelled the development of this policy. It highlights the features of the policy and explores how its addresses the worldwide trade in counterfeit goods. The chapter investigates the implementation of the global anti-counterfeiting regulatory policy and its implications for developing countries in Sub-Saharan Africa.

Chapter Four explores regulatory techniques for controlling the trade in counterfeit goods. It conceptualises regulation generally and the regulation of the counterfeit goods trade. It examines theories and rationales for adopting the regulation and their application to control the counterfeit goods trade. It explores anti-counterfeiting regulatory techniques and their potential for curbing the trade. The

chapter examines briefly the regulatory mechanisms for controlling the counterfeit goods business in some Sub-Saharan African countries.

Chapter Five focuses on describing the salient features of the trade in counterfeit goods in Tanzania. It describes the scale of the counterfeit goods trade, the scope of counterfeit products in the markets in Tanzania and the operators of the trade. The chapter describes the evolution and drivers of the trade in the country. This is followed by the description of the impact of the counterfeiting business on consumers, legitimate traders, the economy and the society in general.

Chapter Six explores issues concerning the regulation of the trade in counterfeit goods in Tanzania. It describes Tanzania's anti-counterfeiting policy and law and alternative regulations which are applied to control the trade. The chapter describes the potential of the law and alternative regulations and some challenges involved in applying regulatory policy instruments to fight against the counterfeit goods trade.

Chapter Seven discusses the main issues emerging from Chapters Two, Three, Four, Five and Six. **Chapter Eight** presents concluding remarks on the main issues examined, discussed and emerged in the preceding chapters and identifies matters which require further research.

CHAPTER TWO

THE COUNTERFEIT GOODS TRADE AS A POLITICAL, ECONOMIC AND SOCIAL PHENOMENON

2.0. Introduction

The trade in counterfeit goods is a worldwide phenomenon which affects a wide range of products.[1] Some international institutions and agencies controlled or financed by knowledge-based MNCs, industry coalitions and industrialized nations have conducted or commissioned the conduct of studies which generated statistics describing the magnitude of the worldwide counterfeit goods business and the scale of its impact. Some scholars use the statistics as authentic measurements of the magnitude of the worldwide counterfeit goods business.[2] Other researchers and commentators contend that those statistics are unreliable.[3] Most literature does not examine the veracity of such statistics. Regarding sources of counterfeit goods, the common view is that developing countries are the world's largest manufacturers and exporters of counterfeit products.[4] This view does not examine the role played by actors in the industrialized nations in creating conditions that catalyse the operation of the worldwide counterfeit goods business. While both law- and non-law related factors drive the counterfeiting business, internationalization of trade and markets, the advancement of communication technologies, the improvement of transport means, weak laws, inadequate enforcement of the laws, consumers' complicity and the lack of information have been cited as the

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[1] Pamela S Norum & Angela Cuno, 'Analysis of the Demand for Counterfeit Goods,' (2011) 15 *Journal of Fashion & Marketing* 27, 27.

[2] Tim Phillips, *Knockoff: The Deadly Trade in Counterfeit Goods* (London: Kogan Page, 2005) 3; David M Hopkins, Lewis T Kontnik & Mark T Turnage, *Counterfeiting Exposed: Protecting your Brand and Customers* (Hoboken, New Jersey: Wiley & Sons, 2003) 4 - 5.

[3] Thorsten Staake & Elgar Fleisch, *Countering Counterfeiting Trade: Illicit Market Insights, Best-Practice Strategies, and Management Toolbox* (Berlin: Springer, 2008) 14.

[4] Peggy Chaudhry & Alan Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (Berlin: Springer, 2009) 31 - 41.

dominant drivers of the counterfeit goods trade.[5] The above viewpoint pays little attention to some global economic policies and practices employed by the knowledge-based MNCs that create conditions which catalyse the operation of the worldwide counterfeiting business. The trade in counterfeit goods impacts on consumers, traders, economies and societies in general.[6] Most literature focuses on describing adverse effects of the counterfeit goods trade,[7] but ignores to examine the positive aspects of the trade.

With regard to developing countries including those in Sub-Saharan Africa, most literature has looked inadequately at political, economic and social factors that drive the trade in counterfeit goods, the nexus between the worldwide counterfeiting business and the trade in counterfeit goods in these countries. The literature examines insufficiently negative and positive effects of the counterfeit goods trade on consumers, traders, economies and societies in general in the Sub-Saharan African nations.

This chapter conceptualises the trade in counterfeit goods. It looks at issues regarding the magnitude and scope of the worldwide counterfeit goods trade. It describes political, economic, legal and social drivers of the trade in counterfeit goods. It explores negative and positive effects of the counterfeit goods trade on consumers, traders and economies and societies in general. The chapter examines the nexus between the worldwide counterfeiting business and the counterfeit goods trade in developing countries in Sub-Saharan Africa and describes the drivers and impact of the trade in these nations.

Several themes emerge in this chapter. First, the worldwide counterfeit goods business, the magnitude of which has not been ascertained, is a widespread phenomenon

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[5] *Ibid* 19 -25.

[6] Carol P Sanborn, 'Introduction to the Product Counterfeiting Survey,' (1986) *Loyola of Los Angeles International & Comparative Law Review* 593, 593 - 595.

[7] Kevin Outterson & Ryan Smith, 'Counterfeit Drugs: the Good, the Bad and the Ugly,' (2006) 16 *Albany Law Journal of Science & Technology* 525, 530 - 535.

affecting both industrialized nations and developing countries. Second, the counterfeit goods trade, which has evolved over many centuries and is driven by political, economic, legal and social factors, has negative and positive effects on consumers, traders, economies and societies in general. Third, the worldwide counterfeit goods business is a conduit through which counterfeit products flow to the markets of the developing countries in Sub-Saharan Africa. The counterfeit goods trade in these developing countries is a part of the worldwide counterfeiting business.

2.1. Conceptualising the Counterfeit Goods Trade

The understanding of the concepts of 'counterfeiting' and 'counterfeit goods' is a prerequisite to a discussion of the trade in counterfeit goods. This is because, from the practice of 'counterfeiting,' 'counterfeit goods' are produced. The counterfeit goods trade involves dealing in counterfeit products. Conceptualisation of the above terms is important in order, firstly, to distinguish counterfeiting, which affects intellectual property from other forms of counterfeiting, for instance, counterfeiting that involves currencies. Secondly, to differentiate counterfeiting which involves violations of rights related to trademarks from infringements of other forms of intellectual property that amount to piracy.

2.1.1. Counterfeiting and Counterfeit Goods

The term counterfeiting as applied to intellectual property refers to the unauthorized use of an identical or a substantially similar trademark which belongs to a lawful owner of such incorporeal property.[8] It involves the unauthorized imprinting of trademarks on goods or their packages to make them look identical to or indistinguishable

[8] Article 15 (1) of the TRIPs Agreement defines a trademark as any sign, or any combination of signs, capable of distinguishing goods of one undertaking from those of other undertakings.

from genuine products.[9] Han describes counterfeiting as 'the practice of affixing false or deceptive trademark [on goods] in order to make them superficially indistinguishable from brand name counterparts.'[10] For Hopkins *et al,*counterfeiting involves 'the knowing duplication of a product by a party who wishes to usurp the brand or trademark of another.'[11] Moreover, counterfeiting involves forging of packaging materials, labels or any other features or get-ups which distinguish goods made by different manufacturers.[12] Therefore, counterfeiting is the act of making trademarked goods without the authority of a trademark owner or the unauthorised imprinting of trademarks on goods or their packaging or copying of other features of goods (such as designs and logos) in order to make the counterfeit products appear identical to the authentic trademarked goods.

Some authors describe counterfeiting as a violation of trademarks, copyrights or patents, or an infringement of more than one of the above intellectual property rights. For instance, Kwong *et al* argue that counterfeiting 'refers to the infringement of intellectual property rights. It [involves] any unauthorized production of goods whose special characteristics are intellectually protected.'[13] Similarly, Rutter and Bryce point out that although counterfeiting contravenes rights related to patents, it involves the infringement of copyrights of another person.[14] For Cordell *et al,*[15] Shultz and Saporito[16] and Chaudhry

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[9] Daniel C K Chow, 'Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries,' (2011) 51 *Virginia Journal of International Law* 785, 786.

[10] Edward Han, 'Protection from Commercial Counterfeiters in Taiwan for US Firms,' (1984) 16 *Law & Policy in International Business* 641, 641.

[11] Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers* (note 2) 9.

[12] Peter Lowe, 'The Scope of the Counterfeiting Problem,' (1999) *International Criminal Police Review* 91, 92.

[13] Kenneth K Kwong, William Y P Yu, John W K Leung & Kan Wang, 'Attitude Toward Counterfeits and Ethnic Groups: Comparing Chinese and Western Purchasing Counterfeits,' (2009) 18 *Journal of Euromarketing*157, 159.

[14] Jason Rutter & Jo Bryce, 'The Consumption of Counterfeit Goods: Here be Pirates?,' (2008) 42 *Sociology* 1146, 1146. See also Humphrey P B Moshi, 'Trade-based Money Laundering: Counterfeit Goods in Eastern and Southern African Region, ' in Charles Goredema (ed) *The Invisible Threat: Money Laundering and in Eastern and Southern Africa* (Pretoria: Institute of Security Studies, 2010) 68.

[15] Victor V Cordell, Nittaya Wongtada & Robert L Kieschnick Jr, 'Counterfeit Purchase Intentions: Role of Lawfulness Attitudes and Product Traits as Determinants,' (1996) 35 *Journal of Business Research* 41, 41.

et al,[17] any unauthorised production of goods protected under trademarks, copyrights or patents amounts to counterfeiting. While some authors in the above group use the expressions 'counterfeiting' and 'piracy' interchangeably,[18] others regard piracy as a form of counterfeiting.[19] Other scholars treat counterfeiting as a type of product piracy.[20] For these researchers, piracy involved different forms of violations of intellectual property including counterfeiting.[21] The violation of intellectual property may amount to counterfeiting as well as piracy if the good or product concerned is protected under a trademark and other forms of intellectual property rights such as a patent. For instance, the process of manufacturing a pharmaceutical product is protected by patent and its name and packaging are protected by a trademark. Thus, infringements of the patent and trademark rights in respect of the pharmaceutical product will amount to both piracy and counterfeiting.

In view of the foregoing, counterfeiting occurs where: i) one person is a lawful trademark owner, ii) another person imprints a forged trademark on goods or their packaging, and iii) the objective of the forger is to make the imitated goods appear identical to those products of the lawful trademark owner. Counterfeiting takes place, for instance, where a person produces shirts and imprints a Lacoste trademark thereon, or manufactures trainer shoes and attaches a Nike trademark thereon, or makes watches and

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16 Clifford J Schultz II and Bill Saporito, 'Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets,' (1996) 31 *Columbia Journal of World Business* 18, 18.

17 Peggy E Chaudhry, Alan Zimmerman, Jonathan P Peters & Victor E Cordell, 'Preserving Intellectual Property Rights: Managerial Insights into the Escalating Counterfeiting Quandary, (2009) 52 *Business Horizons* 57, 59.

18 Swee H Ang, Peng S Cheng & Elison A C Lim & Siok Kuan Tambyah, 'Spot the Difference: Consumer Responses Towards Counterfeits,' (2001) 18 *Journal of Consumer Marketing* 219, 219.

19 Gael McDonald & Christopher Roberts, 'Product Piracy: The Problem that Will not Go Away,' (1994) 3 *Journal of Product & Brand Management* 55, 57 - 8.

20 Deli Yang, Mahmut Sonmez & Derek Bosworth, 'Intellectual Property Abuses: How Should Multinationals Respond?,' (2004) 37 *Long Range Planning* 459, 459 - 60.

21 Matthew C Mousley, 'Peer-to-Peer Combat: The Entertainment Industry's Arsenal in Its War on Digital Piracy,' (2003) 48 *Villanova Law Review* 667, 669. See also Ahasanul Haque, Ali Khatibi & Sabbir Rahman, 'Factors Influencing Buying Behaviours of Piracy Products and Its Impacts to Malaysian Market,' (2009) 5 *International Review of Business Research Papers* 383, 383 - 384.

engrains a Rolex trademark thereon without the authority of lawful owners of such trademarks. Also, counterfeiting occurs where trademarks or labels on packaging or containers of the above-mentioned goods are imprinted thereon without the authority of the trademark owners.

As regards counterfeit goods, Bian and Veloutsou define counterfeit goods are those products 'bearing a trademark that is identical to, or indistinguishable from, a trademark registered to another party and infringes on the rights of the holder of the trademark.'[22] They are products manufactured through unauthorised copying and imprinting of trademarks on goods or their packages by a person who unlawfully usurps the rights of trademark owners.

The TRIPs Agreement does not define the term counterfeiting, but the treaty describes 'counterfeit goods' and associates the term with the violations of trademark rights. The footnote to Article 51 of the treaty provides that:

> "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.[23]

The examination of the above definition of the term 'trademark counterfeit goods' in the TRIPs Agreement engenders three issues: first, counterfeit goods are those products on which or on whose packages or containers trademarks have been imprinted without the authorisation of trademark owners. Second, trademarks violated through

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[22] Xuemei Bian & Cleopatra Veloutsou, 'Consumers' Attitudes Regarding Non-Deceptive Counterfeit Brands in the UK and China,' (2007) 14 *Journal of Brand Management* 211, 211.
[23] A similar definition of 'counterfeit goods' is provided in Article 2 of the European Union Council Regulation (EC) 1383/2003.

counterfeiting must be validly registered. Third, the trademark violation is based on the law of the country into which counterfeit goods are imported or smuggled. I argue that the definition is wanting because the legal systems in many countries provide for the protection of both registered and unregistered trademarks. Additionally, the definition is silent on the violation of trademark rights under the law of the country where counterfeit goods are manufactured or exported. Moreover, the above definition does not address the issue of exhaustion that extinguishes owner's right to control subsequent sale of goods protected under intellectual property including trademarks.

Other authors describe counterfeit goods as any products manufactured in violations of intellectual property (trademarks, copyrights or patents), or goods produced through violations of more than one of the above forms of intellectual property rights occur. For instance, Swami *et al* define counterfeit goods as 'unauthorized products that infringe upon intellectual property rights (brand names, patents, trademarks, or copyrights).'[24]

Based on the definition in the TRIPs Agreement, counterfeit goods are those products created in violation of rights related to trademarks. They are products on which or whose packages or containers trademarks have been imprinted without the authorization of the trademark owners.[25] They are unauthorised imitations of goods protected under trademarks traded as original products. Drawing on the description of counterfeiting I have given earlier in this chapter, a shirt with a forged Lacoste trademark, or a pair of trainer shoes with a fictitious Nike trademark, or a watch with a spurious

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[24] Viren Swami, Tomas Chamoro-Premuzic & Adrian Furnharm, 'Faking it: Personality and Individual Different Predictors of Willingness to Buy Counterfeit Goods,' (2009) 38 *Journal of Socio-Economics* 820, 820.

[25] Jon Vagg & Justine Harris, 'False Profits: Why Product Counterfeiting is Increasing,' (2000) 8 *European Journal on Criminal Policy & Research* 107, 107; See also, Lauren S Estacio, 'Showdown in Chinatown: Criminalizing the Purchase of Counterfeit Goods,'(2013) 37 *Seton Hall Legislative Journal* 381, 382.

Rolex trademark, are counterfeit goods. Similarly, the unauthorized imprinting of trademarks on packages or containers of the above goods makes them counterfeit products.

Counterfeit goods include overruns which are goods that are identical to those protected under trademarks, but manufactured by licensees or sub-contractors of trademark owners in excess of amounts the trademark owners have authorised the licensees to manufacture.[26] Counterfeit products do not include simulations (also known as copycats or look-alikes), which are copies of trademarked goods in form or substance, but manufacturers of the imitated goods do not reproduce trademarks or affix them on those goods or their packaging.[27] Counterfeit goods do not include 'grey-market' products which are intellectual property-protected products authorised to be sold in one country, but are diverted and sold in another country without the consent of owners of intellectual property.[28] The trade in 'grey market' products may be part of the trade in counterfeit goods if they involve imitations of the goods, or trademarks imprinted on the goods or packaging materials used by the trademark owners.

2.1.2. The Counterfeit Goods Trade

According to Staake *et al,* the trade in counterfeit goods consists of commercial transactions that involve goods, their packages or containers which bear trademarks without the authorisation of their legitimate owners in such a manner that the counterfeit merchandise appear similar to the genuine goods protected under the trademarks.[29] Based on the above conceptualisation, I define the trade in counterfeit goods as the business

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[26] Simon Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (2010) 54 *Crime Law & Social Change* 21, 27.
[27] Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers* (note 2) 9.
[28] Richard A Fogel, 'Grey Market Goods and Modern International Commerce: A Question of Free Trade,' (1986) 10 *Fordham International Law Journal* 308, 308.
[29] Thorsten Staake, Frederic Thiesse & Elgar Fleisch, 'The Emergence of Counterfeit Trade: a Literature Review,' (2009) 43 *European Journal of Marketing* 320, 322.

which involves trading in products whose trademarks or their distinctive packaging are copied without the authority of rightful trademark owners.[30] The counterfeit goods trade comprises commercial activities including the production, importation, exportation, trafficking, distribution, marketing and sale of counterfeit products.

2.2. The Scale of the Worldwide Counterfeit Goods Trade

Some studies have attempted to describe the scale of the worldwide trade in counterfeit goods. In this section I examine the widely cited statistics from the reports of those studies and present views that challenge the veracity of those statistics.

2.2.1. The Magnitude of the Counterfeit Goods Trade

The widely quoted statistics that describe the magnitude of the worldwide counterfeiting business come from several sources. These sources include reports of studies conducted by international institutions and agencies controlled or financed by knowledge-based MNCs, industry coalitions or industrialized nations in Europe and the United States. First, the report of the Organization for Economic Co-operation and Development (OECD) study estimates that, in 2005, up to US$ 200 billion of the worldwide trade was the business that involved counterfeit goods and pirated products. The above amount excluded locally manufactured and consumed counterfeit goods and pirated products distributed through the Internet.[31] Second, the International Chamber of Commerce (ICC) estimated that the worldwide counterfeit goods business accounted for 5 per cent to 7 per cent of the global trade.[32] Third, the report of the study commissioned by the Business Action to Stop Counterfeiting and Piracy (BASCAP) Initiative of the ICC estimated that the total global value of counterfeit and pirated products amounted to

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[30] Swee H Ang, Peng S Cheng & Elison A C Lim & Siok Kuan Tambyah, 'Spot the Difference: Consumer Responses Towards Counterfeits,' (2001) 18 *Journal of Consumer Marketing* 219, 219.
[31] Organization for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Piracy* (Paris: OECD, 2008)15.
[32] *Ibid* 15.

about US$ 650 billion every year. [33] Fourth, the International Criminal Police Organization (Interpol) estimates that the counterfeit goods business exceeds 6 per cent of the global trade.[34]

With regard to medicines, the World Health Organization (WHO) estimates that in industrialized nations, namely Australia, Canada, Japan, New Zealand, most of the EU member states and the United States, counterfeit medicines comprise about 1 per cent of their markets, but countries in Africa, Asia and Latin America have higher percentages of pharmaceutical counterfeit products in their markets.[35] The WHO's survey conducted between 1999 and 2000 shows that 60 per cent of pharmaceutical counterfeiting incidents occurred in less developed countries and 40 per cent in industrialized nations.[36]

Several issues have been raised to challenge the veracity of the above statistics. The OECD indicates that the statistics described in its report were generated from surveys conducted in 30 OECD member states and 6 non-OECD countries.[37] The report further reveals that in collecting data, neither governments nor industries were in a position to provide solid assessments of their respective situations. Data were not systematically collected and evaluated. In many instances, the assessments relied on 'fragmentary and anecdotal information and where data was lacking, unsubstantiated opinions [were] treated as facts.'[38] Moreover, the OECD study did not differentiate counterfeit goods from pirated products, hence the statistics in the report do not provide separate measurements

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[33] International Chamber of Commerce, 'Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy,'(2011)<http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Final.pdf> (accessed 15 September 2011).

[34] Interpol, *The Impact and Scale of Counterfeiting,* <http://www.interpol.int/Public/News/Factsheet51pr21.asp>(accessed 16 July 2011).

[35] World Health Organization (2010), *Medicines: Counterfeit Medicines,*<http://www.who.int/mediacentre/factsheets/fs275/en/> (accessed 18 July 2011).

[36] Kristina M Lybecker, 'Keeping It Real: Anti-counterfeiting Strategies in the Pharmaceutical Industry,' (2008) 29 *Managerial & Decision* 389, 390.

[37] Organization for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Piracy* (Paris: OECD, 2008) 65.

[38] *Ibid* 65.

of the magnitude of the trade in counterfeit goods and those which involve pirated products. With regard to the ICC's estimations, Dryden observes that the metrics underlying such estimates were uncertain and based on judgments rather than hard data. The author further notes that, it is unclear which types of intellectual property violations were included in the ICC's estimates.[39] As for the statistics concerning counterfeit medicines, Outterson and Smith point out that 'the WHO [does not] really defend [the basis of their statistics] and generally cites figures from U.S [Food and Drugs Administration].'[40] Arguably, similar deficiencies water down the veracity of the Interpol statistics because the methodologies applied and techniques employed to collect and analyse data were not verified by independent actors. The ICC and BASCAP statistics are unreliable for similar reasons.

Chaudhry and Zimmerman observe that an examination of the statistics referred to above reveals that '...the majority of the figures [are] based on estimates [that are] difficult to verify. [The] same numbers from very few sources are repeated over and over. [It is, therefore,] impossible to determine the real size of the worldwide counterfeit product market.'[41] Staake and Fleisch remark that quantifying the magnitude of the trade in counterfeit goods is a challenging task. Hardly any reliable statistics on this matter exist.[42] Mackenzie points out that many of the estimates on the scale of the global counterfeit goods business are doubtful because they are 'in the form of unsupported statements, however, with reports referencing other reports without [describing] the

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[39] John Dryden, 'Counting the Cost: The Economic Impacts of Counterfeiting and Piracy: Preliminary Findings of OECD Study,' A Paper presented at the 3rd Global Congress on Combating Counterfeiting and Piracy, the International Conference Center, Geneva, Switzerland, 30 - 31 January 2007, p 5.

[40] Kevin Outterson & Ryan Smith, 'Counterfeit Drugs: The Good, the Bad and the Ugly,' (2006) 16 *Albany Law Journal of Science & Technology* 525, 528.

[41] Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 13.

[42] Staake & Fleisch, *Countering Counterfeiting Trade: Illicit Market Insights, Best-Practice Strategies, and Management Toolbox* (note 3) 14.

precise source of the estimates or the methodology and data used to arrive at them.'[43] In view of the foregoing, I argue that the magnitude of the worldwide counterfeit goods trade is unascertained. The clandestine nature of the trade makes it difficult to quantify the scale of the trade. Thus, the often cited statistics that describe the magnitude of the trade are unreliable.

2.2.2. The Scope of Counterfeit Goods in the Markets

The report of the OECD study describes a wide range of goods which are subject to counterfeiting. They include textile and clothing articles and footwear; automotive parts and accessories; chemicals, pesticides, herbicides, fungicides and seeds; consumer electronics and electrical products; metal products, machinery, equipment and their parts. Others are food and drinks; personal care products; beauty products and pharmaceutical products; tobacco products; toiletries and other household products.[44]

Commentators have observed that the counterfeit goods trade affects a wide range of industrial and consumer products. Hopkins *et al* observe that, 'no product is too cheap to counterfeit and no brand immune from the gaze cast by counterfeiters looking to [imitate] a brand and in some cases hijack it altogether.' [45] Heidi points out that the trade in counterfeit goods has become a massive and extensive global business involving the manufacturing and sale of counterfeit versions of everything.[46] Naim remarks that almost all products and industries are affected by counterfeiting.[47] Harvey observes that 'the spectrum of all goods being counterfeited is limited only by the outer bounds of human

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43 Simon Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (2010) 54 *Crime Law & Social Change* 21, 32.
44 Organization for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Piracy* (note 37) 68 - 9.
45 Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers* (note 2) 4.
46 Hedieh Nasheri, 'Addressing the Global Scope of Intellectual Property Crimes and Policy Initiatives,' (2005) 8 *Trends in Organized Crime* 79, 84.
47 Moises Naím, *Illicit: How Smugglers, Traffickers and Counterfeiters are Hijacking the Global Economy* (New York: Anchor Books, 2005) 109 - 110.

imagination.'[48] Thus, counterfeiting affects almost all types of goods: consumer and industrial products, low and high-priced goods, and domestic and foreign commodities.

2.3. Production and Distribution of Counterfeit Goods

As will be demonstrated in Chapter Four, many countries have laws which prohibit the production, importation, exportation, trafficking and sale of counterfeit goods. One would expect that counterfeit products would be manufactured in households, small cottage workshops or backyard factories. It would also be expected that counterfeit goods would be sold by small-scale traders on sidewalks or high streets, or from boot sales, or at flea markets in infamous localities such as Canal Street in New York City and Santee Alley in Los Angeles (the United States); the Silk Street Market in Beijing (China); Mah Boon Krong in Bangkok (Thailand); Gorbushka in Moscow (Russia); Harco Glodok in Jakarta (Indonesia); and Quiapo Shopping Centre in Manila (the Philippines).[49]

Contrary to the above assumptions, production of counterfeit goods is carried out on a large-scale industrial level which involves, for instance, subcontractors and licensees of trademark owners.[50] Similarly, counterfeit goods have infiltrated into legitimate distribution and supply channels. The OECD report states that counterfeit goods 'previously distributed through informal markets, are infiltrating legitimate supply chains, with products now appearing on the shelves of shops.'[51] Bate points out that due to the complexity of the distribution channels and weaknesses in the regulatory enforcement systems, counterfeit drugs have infiltrated the supply chains in many industrialized nations. These medicines find their way into legitimate supply chains consisting of

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48 Michael Harvey, 'A New Way to Combat Product Counterfeiting,' (1988) *Business Horizons* 19, 20.
49 These are some of the reportedly world's notorious places where counterfeit goods are sold.
50 D G F Fletcher Rogers, 'Combating Counterfeit Products, Licensing,' (1988) *Les Nouvelles* 113, 115 -116.
51 Organization for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Piracy* (note 37) 14.

pharmaceutical companies, private wholesalers and private pharmacies.[52] In demonstrating how counterfeit goods can infiltrate into legitimate supply chains, Abalos cites an incident where 'Mitsukoshi, [a] prestigious department store [in Japan], unknowingly sold a [counterfeit] Hermes necktie to [Japan's] Emperor.'[53] The counterfeit product found its way into the supermarket's supply system. There are media reports which indicate that one of the major supermarkets in Britain, TESCO, was reported to have been selling Tommy Hilfiger counterfeit jeans.[54] In another incident, the sportswear manufacturer, Nike, threatened another British supermarket, Sainsbury, with an injunction to prevent it from selling counterfeit Nike shirts.[55]

The Internet provides counterfeiters with an effective medium for distributing and supplying counterfeit goods to the markets. It enables the counterfeiters to reach consumers worldwide. The online markets offer for sale different types of counterfeit goods (which are sometimes termed as 'replicas' or 'knock-offs'). It is estimated that counterfeit goods worth US$25 billion are traded online annually and almost every counterfeit product is sold through the Internet. The online auction sites such as eBay are used as markets for selling counterfeit goods. [56]

The worldwide trade in counterfeit goods involves modernised and complex business activities. Some authors believe that the counterfeit goods trade involves intricate management structures, extensive employment divisions and sophisticated

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[52] Roger Bate, *Making a Killing: The Deadly Implications of Counterfeit Drug Trade* (Washington DC: AIE Press, 2008) 8 - 9.

[53] Robert J Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,' (1984 - 1984) 5 *Boston College Third World Law Journal* 151, 157.

[54] See *TESCO faces legal fight over 'fake' Hilfiger,* The *Independent* (UK), 29 May 1998 <http://www.independent.co.uk/news/tesco-faces-legal-fight-over-fake-hilfiger-1156603.html> (accessed 17 August 2010).

[55] See *Sainsbury faces legal Nike action,* The *Independent* (UK), 27 August, 1998 <http://www.independent.co.uk/news/business/sainsburys-faces-nike-action-1174357.html> (accessed 27 December 2012).

[56] Chaudhry & Zimmerman,*The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights,* (note 4) 23.

systems of distribution. The size of some counterfeiting operations rivals those of legitimate MNCs in terms of production, transportation, distribution, importation, exportation and financing systems.[57] Walker argues that the trade in counterfeit goods 'has become an international industry, often involving elaborate corporate structures and sophisticated distribution systems.'[58] For Hetzer, counterfeiters are no longer operating as small-scale entrepreneurs who work at home, but they are transnational enterprises which have equipment, expertise, production sites and sale outlets located in many countries.[59]

2.4. Sources and Destinations of Counterfeit Goods

The common view holds that the trade in counterfeit goods is widespread in developing countries in Africa, Asia and South America. The United Nations Office on Drugs and Crime (UNODC) indicates that the world's largest manufacturers and exporters of counterfeit products are Asian nations, namely China, India, Hong Kong, Taiwan, the Philippines, Malaysia, Viet Nam, Singapore and South Korea.[60] Other developing nations regarded as sources of counterfeit goods supplied to the worldwide markets include Brazil, Nigeria, Pakistan, South Africa, Mexico, Turkey, Russia and Ukraine.[61] The above view suggests also that the production, sale and consumption of counterfeit goods are widespread in developing countries.[62]

However, there is information which indicates that industrialized nations are sources of counterfeit goods. Silverman points out that Italy is a producer of counterfeit

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57 Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,' (note 53) 158 -160.
58 William N Walker, 'A Program to Combat International Commercial Counterfeiting,' (1980) 70 *Trademark Reporter* 117, 118.
59 Wolfgang Hetzer, Wolfgang 'Godfathers and Pirates: Counterfeiting and Organized Crime,' (2002) 10 *European Journal of Crime, Criminal Law and Criminal Justice* 303, 320.
60 United Nations Office on Drugs & Crime, *The Globalization of Crime: A Transnational Crime Threat Assessment* (Vienna: UNODC, 2010) 173 - 5.
61 Rosielyn A Pulmano, 'In Search of Compliance With TRIPs Against Counterfeiting in the Philippines: When Enough is Enough?,' (1999) 12 *Transnational Lawyer* 241, 254.
62 Derek Bosworth & Deli Yang, 'Conceptual Issues of Global Counterfeiting on Products and Services,' (2006) 11 *Journal of International Property Rights* 15, 17.

goods and in 2002, the country 'ranked third in the world in the manufacture of counterfeit products and first in Europe in both the manufacture and purchase of counterfeits.'[63] Ehrlich argues that Italy is the largest production center for the counterfeit goods trade in Europe, and possibly the world.[64] Italy is a source of counterfeit products, including imitated designer and luxury goods.[65] With regard to the EU, Ravillard notes that 'it is possible [that] counterfeit... goods [are] exported from the European Union after being illegally manufactured [within the Union].'[66] Katobe points out that Florida in the United States is a centre for production of counterfeit aircraft parts and accessories and Switzerland is a source of pharmaceutical products.[67] Counterfeit goods manufactured in the United Kingdom and the United States are commodities such as apparel, footwear, watches, computers and electronic components.[68]

The above information demonstrates that production, smuggling, distribution, the sale and consumption of counterfeit goods occur in industrialized nations. The industrialized nations are sources of counterfeit goods supplied to the worldwide markets. The information suggests, as Pulmano observes, that the trade in counterfeit goods 'persists even in countries which [have] the toughest laws for intellectual property protection and anti-counterfeiting [regulatory regimes].'[69] As I will demonstrate later in this chapter, consumption and markets for counterfeit products exist in both industrialized nations and developing countries. Yar remarks, arguably, that the worldwide counterfeit

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[63] Amanda Silverman, 'Draconian or Just? Adopting the Italian Model of Imposing Administrative Fines on Purchasers of Counterfeit Goods,' (2009) 17 *Cardozo Journal of International & Comparative Law* 175, 182.

[64] Barbara Jo Ehrlich, 'The Private Sector Combat Products Counterfeiting,' (1986) *Loyola of Los Angeles International & Comparative Law Review* 699, 702.

[65] Robert Galibraith, *Made in Italy: Counterfeits that were once mere imports,* The *New York Times,* 3 October, 2006; Duncan Kennedy, *Italian police seize tonnes of counterfeits,* The *BBC News,* 13 February, 2010.

[66] Patrick Ravillard, 'Combating Counterfeiting and Piracy in the European Union,' (1999) International *Criminal Police Review* 60, 64.

[67] Masaaki Katobe, 'Evolving Intellectual Property Protection in the World: Promises and Limitations,' (2010) 1 *University of Puerto Rico Business Law Journal* 1, 6.

[68] Pulmano, 'In Search of Compliance With TRIPs Against Counterfeiting in the Philippines: When Enough is Enough?,' (note 61) 257.

[69] *Ibid* 253.

goods trade involves 'elaborate and organized chains of production, distribution and marketing which span the developed and developing nations.'[70]

2.5. Drivers of the Counterfeit Goods Trade

Before examining the factors that drive the trade in counterfeit goods, it is imperative to describe, albeit briefly, how the trade evolved. The counterfeit goods business is believed to have evolved from practices of imitating marks on products imprinted on goods, or their containers and packages and the dealings in spurious products which date back to ancient times.[71] Practices of unauthorized copying of products and forging of marks on products are believed to be as old as commerce.[72] The practice of imprinting of marks on goods, containers and packages had been operational in some parts of Asia, China, Egypt, Greece, India and Rome for many centuries.[73]According to Paster[74] and Diamond,[75] craftsmen were imprinting marks on products including pottery, bricks, lamps, glassware, bronze instruments, iron articles, gold and silverware, packages of bread and containers of ointments, cheese or wax, jugs of wine and tapestries. The marks were of two main types: i) personal marks, which signified makers of goods and sometimes were used as a tool for attracting buyers of such products, and ii) proprietary marks, which indicated ownership of goods and were used to assist illiterate clerks to establish the ownership of such goods; in cases of salvage, from shipwrecks or piracy, owners of the cargoes used the marks to identify their properties

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70 Majid Yar, 'The *Other* Global Drug Crisis: Assessing the Scope, Impacts and Drivers of the Trade in Dangerous Counterfeit Pharmaceuticals,' (2008) 1 *International Journal of Social Inquiry* 151, 154.
71 Jonathan S Jennings, 'Trademark Counterfeiting: An Unpunished Crime,' (1990) 80 *Journal of Criminal Law & Criminology* 805, 841.
72 Marcus Hopperger, 'International Protection of Intellectual Property Rights,' (1999) *International Criminal Police Review* 78, 78.
73 Edward S Rogers, 'Some Historical Matters Concerning Trade Marks,' (1910-1911) 9 *Michigan Law Review* 29, 29 - 31. See also Diana Twede, 'The Packaging Technology and Science of Ancient Transport Amphoras,'(2002) 15 *Packaging Technology & Science* 181, 189 - 193.
74 Benjamin G Paster, 'Trademarks - Early History,' (1969) 59 *Trademark Report* 551, 552 - 555.
75 Sidney A Diamond, 'The Historical Development of Trademarks,' (1975) 65 *Trademark Report* 265, 266 - 272.

and claim them.[76] With the growth of production and exchange of commodities, manufacturers of goods in many nations in Europe and Asia Minor used the marks as devices for establishing ownership and indicating sources of such goods.

During ancient times, some traders from Gaul (in France) were imitating marks imprinted on *amphorae* of quality Roman wine in order to pass off their inferior quality wine.[77] Unscrupulous traders in Belgium were imitating *sigil* imprinted on Roman pottery products and exporting the imitated goods to Britain as early as the 1st century BC.[78] In ancient Egypt, artisans were falsifying marks to pass off their imitated *papyri* and stones.[79]In the United States, Snyder observes that fraudulent traders were manufacturing and supplying to the markets a 'greater number of counterfeit flint implements, and other objects of stones, so well executed as to successfully deceive some of the most experienced archeologists.'[80]

Certain economic and political developments occurred in some nations in Europe and Asia Minor during the Middle Ages,[81] which transformed production and trade in goods and usage of marks on those goods. These developments include the emergence of the guild system (which controlled production of and trade in different types of products) and the establishment of the municipal authorities (which administered the city states where the guild operated). The guilds, which monopolised all trades, consisted of several

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[76] Frank I Schechter, 'Rational Basis of Trademark Protection,' (1926-1927) 40 *Harvard Law Review* 813, 814.

[77] Viet-Dung Trinh & Ian Phau, 'The Overlooked Component in the Consumption of Counterfeit Luxury Brands Studies,' (2013) 8 *Contemporary Management Research* 251, 251-252. *Amphorae* were vase-shaped jars with two handles used for exporting wine.

[78] Gerald Ruston, 'On the Origin of Trademarks,' (1955) 45 *Trademark Reporter* 127, 133. *Sigil* were the Roman potters' marks.

[79] Anti-Counterfeiting Group, *What is Product Counterfeiting,?*<http://www.a.cg.org> (accessed 20 May 2009). *Papiry* is a thick paper-like material produced from the pith of papyrus plant.

[80] J F Snyder, 'Prehistoric Illinois: The Primitive Flint Industry,' (1910) 3 *Journal of the Illinois State Historical Society* 11, 21 - 22.

[81] The period from of European history from approximately AD 500 to 1500. See Sanborn, 'Introduction to Product Counterfeiting Survey,' (note 6) 601.

craftsmen.[82] The guilds developed a reputation for the quality of their products. To maintain production of good-quality commodities, the guilds needed regulations to punish their members who produced defective goods.[83] They passed regulations which required individual craftsmen to imprint guild and craftsmen's on goods they manufactured in order to distinguish those goods from products manufactured by other craftsmen.[84] These marks were used to fix responsibility for inferior quality goods on individual craftsmen.[85] The marks were also used to protect monopoly of the guilds over their markets. The marks made it possible for foreign goods smuggled into areas over which guilds had the monopoly to be identified and seized.[86] Municipal authorities enacted laws which compelled guilds to imprint certain marks on goods. The marks prescribed by the guild regulations and municipal laws were known as regulatory production marks. Some city states enacted criminal and civil laws to regulate the use of trademarks and protect trademarked products against counterfeiting. The enactment of these laws, which proscribed imprinting of trademarks on goods and their packages or containers and sale of those forged products, was an important starting point in controlling the trade in counterfeit goods.

Despite the enactment of laws which prohibited counterfeiting, imitations of goods or their packages and containers continued to flourish during the Middle Ages.[87] Richardson observes that imitations of goods during this period were widespread in Europe. The author points out that goods such as textiles, tools, military equipment and

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82 Abraham S Greenberg, 'The Ancient Lineage of Trademarks,' (1951) 33 *Journal of Patent Office Society* 876, 881.

83 Mark P McKenna, 'The Normative Foundations of Trademark Law,' (2007) 82 *Notre Dame Law Review* 1839, 1849 -1850.

84 Paster, 'Trademarks - Early History,' (note 74) 558 - 9.

85 Edward S Rogers, 'The Lanham Act and the Social Function of Trade-marks,' (1949) 14 *Law & Contemporary Problems* 173, 173 -174.

86 Schechter, 'Rational Basis of Trademark Protection,' (note 76) 814.

87 Susan M Stuard, 'Medieval Workshop: Toward a Theory of Consumption and Economic Change,' (1985) 45 *Journal of Economic Theory* 447, 450.

pottery objects, manufactured in Europe before the Industrial Revolution, were counterfeit products.[88]

With the advent of the Industrial Revolution in Europe and the United States in the 18th and 19th centuries respectively, the guild system collapsed and paved the way for the establishment of the capitalist production system. New industrial manufacturing techniques replaced handwork methods, which were applied during the guild era. There was also an expansion of the use of trademarks as devices for distinguishing goods produced by different manufacturers and marketing products. Counterfeiting activities expanded parallel to the growth of industrial production and expansion of international commercial activities. The industrial transformations and expansion of economies were accompanied by the growth of the trade in counterfeit goods.[89]

The above historical account demonstrates that the trade in counterfeit goods has existed in some parts in Europe and Asia for many centuries. The trade has evolved over many centuries. The underlying factors for the existence of the trade in counterfeit goods are demand for and supply of counterfeit goods in the markets.

Traders supply counterfeit goods to the markets. Applying the economic theory, it can be stated that supply of counterfeit goods in the markets depends on the existence of demand for the counterfeit products. This is because, as Albers-Miller observes, if there is little or no demand for a product, there will also be no supply of that commodity.[90] In emphasizing the above point, Maldonaldo and Hume point out that 'the demand for ... [counterfeit] products is the key element in the increase in the trade in

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[88] Garry Richardson, 'Brand Names Before Industrial Revolution,' NBER Working Paper 13930, (2008) 2- 3.
[89] Jed S Rakoff & Ira B Wolff, 'Commercial Counterfeiting: The Inadequacy of Existing Remedies,' (1983) 73 *Trademark Reporter* 493, 498.
[90] Nancy D Albers-Miller, 'Consumer Misbehaviour: Why People Buy Illicit Goods,' (1999) 16 *Journal of Consumer Marketing* 273, 275.

counterfeit goods.'[91] It is, therefore, imperative to analyse the factors which influence consumers to purchase and use counterfeit goods and factors which motivate traders to produce and sell counterfeit products to the buyers.

2.5.1. Demand for Counterfeit Goods

The demand for counterfeit products is the key driver of the counterfeit goods trade.[92] This trade thrives because consumers buy and use counterfeit products. Consumers of counterfeit goods can be classified into two broad groups: those who purchase the counterfeit products unknowingly and those who purchase the counterfeit commodities knowingly.[93] Accordingly, from the consumers' perspective, counterfeiting is categorized into two main types: deceptive and non-deceptive counterfeiting.[94] Deceptive counterfeiting involves consumers purchasing counterfeit goods without knowing, at the time of purchase, those goods are not genuine. Non-deceptive counterfeiting involves consumers buying counterfeit goods while knowing or suspecting, at the time of sale, that those goods are not authentic.[95] It is important to analyse deceptive and non-deceptive counterfeiting in order to understand why consumers purchase and use counterfeit products.

Some consumers purchase counterfeit goods unknowingly. The lack of or limited information about the genuineness of counterfeit goods is the main cause for consumers to purchase those commodities unknowingly. Zaichkowsky observes that this

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91 Cecilia Maldonado & Evelyn C Hume, 'Attitudes Toward Counterfeit Products: An Ethical Perspective,' (2005) 8 *Journal of Legal, Ethical & Regulatory Issues* 105, 106.

92 Clifford J Shultz & Alexander Nill, 'The Societal Conundrum of Intellectual Property Rights: A Game Theoretical Approach to the Equitable Management and Protection of IPR,' (2002) 36 *Columbia Journal of World Business* 667, 673.

93 Lyn S Amine & Peter Magnusson, 'Targeting Buyers of Counterfeit Goods,' (2008)5 *WIPO Magazine* 18, 19 - 20.

94 Gene M Grossman & Carl Shapiro, 'Foreign Counterfeiting of Status Goods,' (1988) 103 *Quarterly Journal of Economics* 79, 80.

95 Irena Vida, 'Determinants of Consumer Willingness to Purchase Non-deceptive Counterfeit Products,' (2007) 5 *Managing Global Transitions* 253, 254.

phenomenon involves situations where uninformed or inexperienced consumers are deceived into believing that they are purchasing genuine products.[96] These consumers cannot distinguish genuine products from counterfeit goods. Information deficiencies affect the ability of consumers to identify genuine goods and impair their capacity to make informed purchase decisions. Therefore, deceptive counterfeiting occurs where information about the genuineness of commodities offered for sale is lacking, limited or withheld by manufacturers or sellers of counterfeit products.

Some consumers purchase counterfeit goods knowingly. Studies conducted in industrialized nations including the United Kingdom[97] and the United States [98] and developing nations such as Brazil,[99] China,[100] Singapore[101] and Malaysia[102] show that many consumers purchase counterfeit goods knowingly. Several factors motivate consumers to buy counterfeit goods knowingly.

Price is one of the key factors which motivate consumers to purchase counterfeit goods knowingly.[103] Buyers are attracted to the low prices of counterfeit products. Some consumers cannot afford to purchase expensive, genuine goods because they experience

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[96] Judith L Zaichkowsky, *The Psychology Behind Trademark Infringement and Counterfeiting* (London: Lawrence Erlbaum Associates, 2006) 3.

[97] Alexander Walthers & Cherry L Buff, 'Attitudes Towards Counterfeiting and Counterfeit Products: Have They Changed?,' (2008) 3 *Journal of International Business & Economics* 79.

[98] Jonathan M Barnett, 'Shopping for Gucci on Canal Street: Reflection on Status Consumption, Intellectual Property, and the Incentive Thesis,' (2005) 15 *Virginia Law Review* 1381.

[99] Marcia C Ferreira, Delane Botelho & Alda R D de Almeida, 'Consumer Decision Making in a Counterfeit-Plentiful Market: An Exploratory Study in the Brazilian Context,' (2008) 2 *Latin American Advances in Consumer Research* 109.

[100] Mohammad S Safa & Wang Jessica, 'Influential Decision Factors of Counterfeit Consumers in Shijizuang City China: A Logit Analysis,' (2005) 1 *International Journal of Management and Entrepreneurship* 160.

[101] Ian Phau, Tin Teah & Agnes Lee, 'Targeting Buyers of Counterfeit Luxury Brands: A Study on Attitudes of Singaporean Consumers,' (2009) 17 *Journal of Targeting, Measurements and Analysis of Marketing* 3.

[102] Jasmine Yeap Ai Leen & T Ramayah, 'Unraveling Perceptions on Counterfeit Goods: Insights from the Malaysian Mindset,' (2006) 7 *Delhi Business Review* 47.

[103] Chow-Hou Wee, Soo-Jiuan Tan & Kim-Hong Choek, 'Non-price Determinant of Intention to Purchase Counterfeit Goods,'(1995) 12 *International Marketing Review* 19, 21. See also Celso August de Matos, Cristiana Trindade Ituassu & Carlos Alberto Vargas Rossi, 'Consumer Attitudes Toward Counterfeits: A Review and Extension, ' (2007) 24 *Journal of Consumer Marketing* 36, 37.

budget constraints.[104] Some buyers trade off lower quality of counterfeit goods for lower prices. Cheap counterfeit products offer less value for lower costs. In illustrating the above point, Naim notes that 'some urbanites have adopted the ten-dollar watch that lasts for a few months as a lifestyle solution.'[105] For these consumers, low-priced, short lifespan counterfeit goods are substitutes for expensive, genuine commodities. In demonstrating the above point, Albers-Miller observes that counterfeit commodities 'represent a prestigious..., albeit inferior product..., at a good price.'[106] Some consumers purchase inexpensive counterfeit goods as trials and buy genuine products if such trials are successful. [107]

Some buyers purchase counterfeit goods where there are huge differences between prices of genuine products and those of counterfeit goods.[108] The consumers believe that prices of genuine commodities are excessively high. They believe that many suppliers of genuine goods are exploiting the consumers. Vida observes that consumers who perceive that they are exploited by sellers (by overpricing their brand-name goods) are more likely to purchase low-priced counterfeit goods.[109] By purchasing inexpensive counterfeit products, such consumers regard themselves as smart shoppers who do not succumb to greed and manipulation by the brand-name owners.[110]

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104 Elif A Ergin, 'The Rise in the Sale of Counterfeit Brands: The Case of Turkish Consumers,' (2010) 4 *African Journal of Business Management* 2181, 2182.
105 Naim, *Illicit: How Smugglers, Traffickers and Counterfeiters are Hijacking the Global Economy* (note 47) 115.
106 Albers-Miller, 'Consumer Misbehaviour: Why People Buy Illicit Goods,'(note 90) 275.
107 Vincent W Yao, 'An Economic Analysis of Counterfeit Goods: The Case of China,' (2006) 1 *Journal of Washington Institute of China Studies* 116,117.
108 Vida, 'Determinants of Consumer Willingness to Purchase Non-deceptive Counterfeit Products,' (note 95) 256.
109 *Ibid* 257.
110 Gail Tom, Barbara Garibaldi, Yvette Zeng & Julie Pilcher, 'Consumer Demand for Counterfeit Goods,' (1998) 15 *Psychology & Marketing* 405, 414.

Prendergast *et al* observe that some affluent consumers purchase counterfeit goods knowingly.[111] This implies that reasons such as high prices of genuine goods, or income constraints, or the feeling of being exploited by sellers of genuine goods cannot satisfactorily explain consumers' volitional purchase of counterfeit goods. Research has identified several non-price factors which motivate consumers to purchase counterfeit goods knowingly.[112] With regard to fashion goods, some buyers purchase luxurious counterfeit products with short lifespan to keep abreast of changes in fashions that occur regularly and sometimes rapidly. Hopkins *et al* quote a consumer who was justifying the purchase of a luxury counterfeit bag as saying 'with a luxury bag, you're bored of it after one season.'[113] This implies that some consumers, who do not want to have genuine products (with longer lifespan and whose fashions change quickly), buy counterfeit versions of luxury goods with short lifecycles. In some instances, consumers (who own genuine goods) use counterfeit goods on certain occasions and keep the genuine ones for special events. Naim observes that in Korea and Japan, some consumers keep their expensive genuine jewelries or costumes for special occasions and 'take the [counterfeits] with them on errand or in the rain... and save the real [jewelry or costumes] for worthy, and secure, occasions.'[114]

Some consumers buy counterfeit products with certain physical attributes because they derive symbolic or expressive utility from consuming those products.[115] These physical attributes include brand names, designs and colours. Nia and Zaichkowsky observe that some consumers buy counterfeit products with imitated famous brand names

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111 Gerard Prendergast, Leung H Chuen & Ian Phau, 'Understanding Consumer Demand for Non-deceptive Pirated Brands,' (2002) 20 *Marketing Intelligence & Planning* 405, 410.
112 Xuemei Bian & Luiz Moutinho, 'An Investigation of Determinants of Counterfeit Purchase Consideration,' (2009) 62 *Journal of Business Research* 368, 369 - 370.
113 Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers* (note 2) 49.
114 Naim, *Illicit: How Smugglers, Traffickers and Counterfeiters are Hijacking the Global Economy* (note 47) 115.
115 Jana Nicole Checa Chong, 'Sentencing Luxury: The Valuation in Sentencing Traffickers of Counterfeit Luxury Goods,' (2008) 77 *Fordham Law Review* 1147, 1148.

to show off that they can afford to buy brand-name goods, to demonstrate that they have high economic or social status, or use those goods for other symbolic self-expressions.[116] By consuming counterfeit products with physical attributes which resemble genuine commodities, the buyers of the counterfeit goods want to create impressions to onlookers that such buyers belong to the affluent class, or they keep abreast of changes in fashions. In this case, counterfeit goods are bought because of their communicative function and the purchasers' primary motivation for consuming such counterfeit products is to position themselves economically or socially.[117] Zaichkowsky points out that consumers place value on a brand image because 'it communicates something about themselves to other people. Prestigious brands are associated with higher price, and the higher the price, the more one can signal they are special (rich).'[118] Consumption of counterfeit goods is intended to enhance consumers' economic or social status, but the buyers do not pay full market value associated with the attributes of genuine products.[119] Consumers derive this symbolic or expressive utility from consuming counterfeit luxury products such as designer clothing, watches, shoes, leather products, electronic goods and perfumes.

Some consumers derive functional utility from using counterfeit goods whose intrinsic attributes such as good-quality, performance and durability are similar to those of genuine products.[120] Bian and Veloutsou observe that the quality of some counterfeit goods has improved so much in the recent years [121] and, arguably, the performance of some counterfeit goods is equivalent to that of genuine products. Prendergast *et al* argue

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116 Arghavan Nia & Judith L Zaichkowsky, 'Do Counterfeit Devalue Ownership of Brands,' (2000) 9 *Journal of Product & Brand Management* 485, 487.

117 Stephanie Geiger-Oneto, Betsy D Gelb, Goug Walker& James D Hess, '"Buying Status" by Choosing or Rejecting Luxury Brands and their Counterfeits,' (2013) 41 *Journal of the Academy of Marketing Science* 357, 359.

118 Zaichkowsky, *The Psychology Behind Trademark Infringement and Counterfeiting* (note 96) 10.

119 Cordell *et al*, 'Counterfeit Purchase Intentions: Role of Lawfulness Attitude and Product Traits as Determinants,' (note 15) 42.

120 Santi Budiman, 'Analysis of Consumer Attitudes to Purchase Intentions of Counterfeit Bag Products in Products in Indonesia,' (2012) 1 *International Journal of Management, Economics & Social Sciences* 1, 9.

121 Bian & Veloutsou, 'Consumers' Attitudes Regarding Non-Deceptive Counterfeit Brands in the UK and China,'(note 22) 213.

that some counterfeit goods are as durable as authentic products.[122] Some factors have contributed to the improvements in quality, performance and durability of counterfeit goods. The advancements in copying technologies have resulted in the production of high-quality counterfeit goods. Moreover, outsourcing agreements have created opportunities for outsourcers to manufacture overruns (in excess of the quantities of genuine goods authorised to be produced by brand-name owners) whose quality, durability and performance are, in many cases, almost similar to the genuine goods.

Perceived low risks associated with the purchase or use of counterfeit goods is another factor that encourages the volitional purchase of the counterfeit products. Consumers purchase or use counterfeit goods if they believe that the financial risk (the possibility of suffering pecuniary loss) as a result of purchasing those commodities is low. Phau and Teah observe that 'low financial risks provide [an] added benefit for consumer to purchase counterfeit goods....'[123] Similarly, consumers purchase counterfeit goods when they perceive that performance or physical risks (the possibility that the counterfeit products will be defective or harmful) involved in consuming those counterfeit products are low.[124] Consumers are unlikely to knowingly purchase potentially harmful counterfeit products such as medicines, food, aircraft components, automotive parts and electrical appliances because of their high performance risks.

Perceived low law-related and social risks motivate some consumers to purchase counterfeit goods knowingly. Vida observes that consumers purchase counterfeit goods knowingly in situations where there are low risks of being arrested, prosecuted or punished for buying such goods, if the law prohibits purchasing counterfeit. Similarly,

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[122] Prendergast *et al*, 'Understanding Consumer Demand for Non-deceptive Pirated Brands,' (note 111) 410 - 411.
[123] Ian Phau & Min Teah, 'Devil Wear (Counterfeit) Prada: A Study of Antecedents and Outcomes of Attitudes Towards Counterfeit Luxury Brands,' (2009) 26 *Journal of Consumer Marketing* 15, 17.
[124] Cordell *et al*, 'Counterfeit Purchase Intentions: Role of Lawfulness Attitudes and Product Traits as Determinants,' (note 15) 43.

some consumers purchase counterfeit goods where there is a low risk of suffering social consequences, for instance, the risk of being humiliated, detested, looked down upon, or being condemned by friends or colleagues for purchasing or using the counterfeit products.[125] The risks of being embarrassed or ostracized for buying or using counterfeit goods are high where social groups to which consumers belong disapprove of such behaviours. Albers-Miller observes that consumers are likely to purchase counterfeit goods knowingly if their colleagues or peers support such behaviour.[126]

Easy accessibility to counterfeit goods encourages consumers to purchase those goods. Where markets are flooded with counterfeit goods, buyers are likely to purchase those commodities repetitively and develop the habit of buying them. Ferreira *et al* cite an example of Brazil where consumers purchase counterfeit products because such commodities are plentiful in the markets.[127] The consumers who purchase counterfeit goods regularly become habitual buyers of those goods. Tom *et al* argue that consumers who purchase counterfeit goods repeatedly are likely to continue buying such commodities. They hold attitudes supportive of counterfeiting activities.[128] Due to this 'acceptance,' these consumers find nothing wrong with purchasing or using the counterfeit goods.

Some consumers purchase counterfeit goods when they are in certain situations or moods. Gentry *et al* show that some tourists buy counterfeit goods during holidays particularly abroad.[129] The authors note that, besides purchasing counterfeit goods which they use as 'small gifts' and 'souvenirs', spending 'the last bit of money' or making 'fun

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125 Vida, 'Determinants of Consumer Willingness to Purchase Non-deceptive Counterfeit Products,'(note 95) 258.
126 Albers-Miller, 'Consumer Misbehaviour: Why People Buy Illicit Goods,' (note 90) 283.
127 Ferreira *et al*, 'Consumer Decision Making in a Counterfeit-Plentiful Market: An Exploratory Study in the Brazilian Context,' (note 99), 109.
128 Tom *et al*,' Consumer Demand for Counterfeit Goods,' (note 110) 418 - 419.
129 James W Gentry, Sanjay Putrevu & Clifford J Shultz, 'The Effects of Counterfeiting on Consumer Search,' (2006) 5 *Journal of Consumer Behaviour* 245, 253 - 254.

or a joke to play on friends,' the holiday situation also creates 'a specific holiday mood which seems to drive the inclination to purchase counterfeit goods.'[130] Arguably, the tourists might not have opportunities to purchase counterfeit goods in their home countries; this chance may occur during holidays in foreign nations.[131] This abhorrent consumer behaviour can also be explained by tourists' perception that their acts of purchasing counterfeit products will not be discovered and publicized in their home countries. Moreover, the tourists' perceived low risks associated with purchase of counterfeit goods can explain the above consumer misbehaviour.

2.5.2.Supply of Counterfeit Goods

Several factors motivate traders to supply or facilitate the supply of counterfeit goods to the markets. These include internationalisation and liberalisation of trade; the advancements of information and communication technologies; the improvements of means of communications; business strategies and practices employed by knowledge-based MNCs, owners of trademarks, which create conditions that catalyse the operation of the counterfeit goods trade; and high returns generated from the business of producing, smuggling, distributing and selling counterfeit products which motivate traders to supply those commodities to the markets.

As a result of internationalisation of trade, national economies and markets of many countries have been interconnected. The interconnections of the national economies and markets have resulted in the increased flow of goods, services and capital across countries. Regional trading groups such as the EU, the North American Free Trade Area (NAFTA), the Association of Southeast Asian Nations (ASEAN) and the Southern

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130 Martin Eisend & Pakize Schuchert-Güler, 'Explaining Counterfeit Purchases: A Review and Preview,'(2006) *Academy of Marketing Science Review* 1,14.

131 Ergin, 'The Rise in the Sale of Counterfeit Brands: The Case of Turkish Consumers,'(note 104.) 2182.

Common Market (MERCOSUR), the EAC and the SADC have been established or consolidated. These groups have adopted measures to increase transnational movements of persons, goods and capital. Yar points out that globalisation and regionalisation of economic activities have increased the flows of the legitimate international trade and helped to globalise the illicit business which involves, amongst other products, counterfeit goods.[132]

The implementation of the trade liberalisation policy has compelled countries to open their national markets to allow free global trade. As I pointed out above, the free global trade has made the flows of licit and illicit products including counterfeit goods into national markets easy. Chaudhry and Zimmerman observe that the rapid growth of the world trade through 'opening of markets coupled with the reduction of barriers to financial and merchandise flows has certainly opened opportunities for product pirates.'[133] In emphasizing the above point, Hopkins *et al* observe that 'the result of having more open borders and more trade flowing across borders is that it [is] easier for counterfeit products to flow across borders.'[134]

Internationalisation of the counterfeit goods trade has evolved concurrent with the improvements of air, water and road transportation, which facilitate transnational transportation of counterfeit goods and movements of dealers in those products; development of communication systems, which has made transactions between suppliers of counterfeit commodities and their customers easier; and sophistication of payments methods, which facilitate the sale and purchase of counterfeit goods. Waltcherbach observes that the transnational movements of traders and transportation of counterfeit

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[132] Yar, 'The *Other* Global Drugs Crisis: Assessing the Scope, Impacts and Drivers in Dangerous Counterfeit Pharmaceuticals,' (note 70) 157.
[133] Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 20.
[134] Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers* (note 2) 6.

goods have become easier and speedier due to the improvements of the means of transportation and communication. The above factors catalyse the worldwide trade in counterfeit goods.[135] Naim notes that in some instances, telecommunication and logistics of traders in counterfeit goods and organised criminals are superior to those of law enforcement agencies of most countries.[136]

The availability of modern technologies has contributed to the sophistication and growth of the trade in counterfeit goods in several ways. First, the technologies facilitate designing, making, copying and printing of near-perfect replicas of trademarked goods and sophisticated packaging and labelling of counterfeit goods. Second, the technologies make falsification of trademarks and labelling of counterfeit products and their packaging easier and faster. Third, counterfeiters are capable of manufacturing counterfeit products on large scales and supply such commodities to the worldwide markets.[137] The use of the Internet has made the production, distribution and sale of counterfeit products easier. The OECD notes that the Internet has facilitated the expansion of the worldwide trade in counterfeit goods. It enables counterfeiters to disguise their identities, hence minimizing chances of their detection by trademark owners and national law enforcement agencies. Manufacturers and sellers of counterfeit goods situated anywhere in the world can create online websites quickly and take them down easily. The Internet provides dealers in counterfeit goods with the means through which they can reach the worldwide markets at low cost. It is easy for suppliers of counterfeit products to create websites that look

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[135] Maureen Walterbach, 'International Illicit Convergence: the Growing Problem of Transnational Organized Crime Groups' Involvement in Intellectual Property Violations,' (2007) 34 *Florida State University Law Review* 591, 601-2.

[136] Moises Naim, 'The Five Wars of Globalization,' (2003) *Foreign Policy* 29, 29 - 30.

[137] CL Hung, 'The Business of Product Counterfeiting in China and the Post-WTO Membership Environment,' (2003) 10 *Asia Pacific Review* 58, 62.

almost exactly like official sites of legitimate trademark owners and use them as forums for supplying counterfeit goods to worldwide markets. [138]

High returns generated from the counterfeiting business induce traders to supply counterfeit products to the worldwide markets. Chaudhry and Zimmerman observe that the counterfeit goods trade is highly profitable because counterfeit goods traders do not incur 'usual costs related to creating and marketing [goods], research and development, advertising, quality control, acceptable minimum wages and warranty services. Without [such costs], counterfeiting is vastly profitable.'[139] Additionally, many producers, traffickers and sellers of counterfeit goods evade paying taxes and duties to national revenue authorities.[140] The trade in counterfeit goods is lucrative because, in some instances, traders sell counterfeit products at prices similar to those of genuine commodities. Moreover, in other cases counterfeit goods are sold at higher prices than those of genuine commodities in order to induce consumers into believing they are purchasing authentic goods.[141]

The trade in counterfeit goods is highly profitable because in many countries anti-counterfeiting laws are weak, outdated and prescribe lenient penalties which have minimal and ineffectual deterrent effects, or the laws are not enforced. Nelson *et al* observe that inadequacies of anti-counterfeiting laws and mechanisms for enforcing those laws in many countries make it difficult for the law enforcement agencies and judicial authorities to arrest, prosecute or convict offenders.[142] Ineffectual enforcement of the laws

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138 Organization for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Piracy* (note 37) 14.
139 Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 19.
140 Rakoff & Wolff, 'Commercial Counterfeiting: The Inadequacy of Existing Remedies,' (note 89) 500.
141 Harvey, 'A New Way to Combat Product Counterfeiting,' (note 48) 21.
142 Maria Nelson, Michelle Vizurraga & David Chang, 'Counterfeit Pharmaceuticals: A Worldwide Problem,' (2006) 96 *Trademark Reporter* 1068, 1071.

is caused by factors such as limited resources allocated to the government authorities which inhibit their capacity to enforce the law. The above factors make the trade in counterfeit goods a low-risk crime and more profitable business than other criminal activities such as drug trafficking and trafficking in persons.

The rise of knowledge-based economy has facilitated the transformation of global capitalism. Technological advancements which occurred in Europe, the United States and Japan from the 1970s transformed economies of these nations. This caused the shift from industrial capitalism (which was based on production and sale of tangible industrial products) to knowledge-based capitalism (which is based on the control, production and trading in technology-intensive and intangible products). Knowledge-based capitalism is founded on the qualitative capacity to optimize the combination and the use of factors of production on the basis of knowledge and information.[143]

Knowledge-based capitalism emerged concurrently with the adoption of the global intellectual property regulatory policy. As will be shown in Chapter Three, this global policy is prescribed in the treaties including the Paris Convention. The implementation of this policy has enabled knowledge-based MNCs from the United States, the EU members and Japan to determine the terms of agreements for transferring and selling technologies and the brand-name goods protected by trademarks to developing countries. High prices and restrictive terms of transfer of technologies have made those technologies from the industrialized nations out of the reach of many local manufacturers in developing countries in Africa, Asia and South America. The lack of or limited technological and industrial capacities have made the developing countries susceptible to counterfeiting activities. Some producers in many developing countries

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[143] Manuel Castells, *The Rise of the Network Society* (Malden, Massachusett: Blackwell Publishers, 2nd ed, 2000) 17.

engage in counterfeiting of foreign as well as locally-made products in order to satisfy demand for low-priced commodities in these countries. Similarly, high prices make brand-name goods manufactured in industrialized nations and developing countries unaffordable to low-income consumers. The low-income consumers in the industrialized nations and the developing countries resort to buying and using inexpensive commodities including counterfeit products.

Knowledge-based MNCs from industrialized nations, the United States, the EU member states and Japan employ certain business strategies and practices which create conditions that catalyse the operation of the worldwide counterfeiting business. These practices and strategies include: outsourcing of production, distribution and supply of services from entrepreneurs in the developing countries, marketing of brand-name goods which make them vulnerable to counterfeiting, and pricing strategies that create the demand for counterfeit products.

Knowledge-based capitalism operates through globalised production, distribution and supply of goods and services. Modern technologies have facilitated the global dispersal of economic processes and have hence transformed the world into unified economic networks. The MNCs operate in the form of networks of units which are linked together.[144] There are global networks among MNCs linking them together via complex forms of contracting, monitoring and other forms of obligations. [145] The MNCs decentralise their production, distribution and supply activities in different countries. This is done through, among other methods, the outsourcing strategy which refers to an arrangement whereby one entity provides services to another. Outsourcing is done

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144 Blandine M Laperche, 'The Roles of Intellectual Property Rights in the Networked Enterprise: The Growing Importance of Coordination in Innovation Networks,' *Research Network on Innovation*, No. 11 (2010) pp 4 - 7.

145 George Liagouras, 'The Political Economy of Post-industrial Capitalism,'(2005) 81 *Thesis Eleven* 20, 21 -23.

through partnership, licensing, subcontracting or franchising arrangements between the MNCs and providers of the outsourced services.[146]

Outsourcing agreements provide opportunities for knowledge-based MNCs from industrialized nations to take advantage of low labour costs, raw materials, new markets and lenient regulatory regimes in developing countries.[147] Johnstone *et al* observe that 'outsourcing has become a major tool by which large organizations... increase competitiveness, cut costs, bypass regulatory controls, and secure flexible employment arrangements.'[148] The MNCs employ the outsourcing strategy in order to export capital, maximize profits and minimize costs. Kathawala *et al* point out that 'Global outsourcing has enabled [the MNCs] to explore new markets which maximize revenues, and new sources of labour, which [minimize] costs.'[149]

Hoetch and Trott observe that in many situations outsourcing of production and supply of goods and services involves the risk of leakage of information about intellectual property.[150] Mackenzie observes that 'outsourcing of production to countries with weak and low levels of ... control on production of [counterfeit goods] promotes the [counterfeiting] problem.'[151] Despite being aware of the prevalence of counterfeiting

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146 Dieter Ernst & Linsu Kim, 'Global Production Networks, Knowledge Diffusion, and Local Capability Formation,' (2002) 31 *Research Policy* 1417, 1419; See also, Wladimir Andreff, 'Outsourcing in the New Strategies of Multinational Companies: Foreign Investment, International Subcontracting and Production Relocation,' (2009) 18 *Papeles de Europa* 5, 6 - 8.

147 Chow, 'Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries,'(note 9) 816.

148 Richard Johnstone, Claire Mayhew & Michael Quinlan, 'Outsourcing Risk? The Regulation of Occupational Health and Safety Where Subcontractors are Employed,' (2001) 22 *Comparative Labour Law & Policy Journal* 351, 351.

149 Yunus Kathawala, Ren Zhang & Jing Shao, 'Global Outsourcing and Its Impacts on Organisations: Problems and Issues,' (2005) 1 *International Journal of Services Operations Management* 185, 200.

150 A Hoecht & P Trott, 'Innovation Risks of Strategic Outsourcing,' (2006) 26 *Technovation*672, 677 - 678.

151 Mackanzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (note 26) 23. See also, Ann Maruchecka, Noel Greis, Carlos Mena, Linning Cai, 'Product Safety and Security in the Global Supply Chain: Issues, Challenges and Research Opportunities,' (2011) 29 Journal of Operations Management 707, 710 -711.

activities in countries including China and India, the MNCs in the United States and the EU members continue to seek outsourcing services from manufacturers, distributors and sellers in these developing countries.[152] The outsourcing strategy catalyses the worldwide trade in counterfeit goods.[153] The process of 'global restructuring of capital' whereby the MNCs have shifted their production, distribution and sale sites of the United States and the EU to low-wage, low-cost economies in developing countries has created opportunities for counterfeiting.[154] Counterfeit products manufactured by the outsourcers in developing countries are supplied to the worldwide markets.

Knowledge-based MNCs use branding and advertising as marketing strategies for making their brand-name goods known worldwide. These strategies enhance consumer desires for the branded commodities. Mackenzie observes that 'in creating brands with such power and attempting to capitalize on them by way of charging premium prices...,'[155] the MNCs create conditions which propel the trade in counterfeit goods. Firstly, the above marketing strategies make brand-name goods known worldwide and, thus they become susceptible to counterfeiting. Secondly, the MNCs charge premium prices for their brand-name goods which make these commodities unaffordable to low-income consumers.[156] This increases consumers' demand for low-priced counterfeit goods. Similarly, due to shortages of the brand-name goods in the worldwide markets,

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152 Tetsuya Minagawa Jr, Paul Trott & Andreas Hoecht, 'Counterfeit, Imitation, Reverse Engineering and Learning: Reflections from Chinese Manufacturing Firms,' (2007) 37 *R & D Management* 455, 456.

153 Jon Vagg, 'The Policing of Signs: Trade Infringement and Law Enforcement,' (1995) 3 *European Journal on Criminal Policy and Research* 75, 78 -79

154 *Ibid* 79.

155 Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (note 26) 25.

156 Veer Singh, 'Combating Counterfeiting and Piracy: An Overview,' (2011) 6 *NALSAR Law Review* 17, 19.

some consumers purchase counterfeit goods.[157] Manufacturers and sellers of counterfeit goods take this opportunity to supply low-priced counterfeit goods to the markets.

Many knowledge-based MNCs from industrialized nations do not want to bear costs of protecting their intellectual property and curbing the trade in counterfeit goods affecting their brand-name goods. The MNCs have turned the fight against the trade in counterfeit goods into a 'crime issue' because, as Mackenzie observes, 'this diverts the cost of dealing with the problem onto the state and its policing functions....'[158] Chow points out that, by portraying themselves as victims of counterfeiting activities, 'the MNCs can shift some, or even the bulk, of the costs of enforcement to the public, rather than bearing the entire costs themselves.'[159] The MNCs wait for governments (both domestic and host governments) to take action to control the counterfeit goods trade and tax payers to provide resources to facilitate the enforcement of the anti-counterfeiting laws. The government authorities and anti-counterfeiting agencies in many nations particularly developing countries do not have sufficient resources and capabilities to control the trade in counterfeit goods efficiently. Consequently, criminals continue to supply counterfeit products to the worldwide markets.

2.5.3. Other Driving Factors

There are other factors that drive the trade in counterfeit goods. Suppliers and consumers' hostile attitudes towards protection of intellectual property catalyse the operation of the trade in counterfeit goods. Jacobs *et al* argue that in some developing countries, counterfeiting is perceived as an attack on the Western technological

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157 Mahmut Sonmez, Deli Yang & Gerald Fryxell, 'Interactive Role of Consumer Discrimination and Branding against Counterfeiting: A Study of Multinational Managers' Perception of Global Brands in China,' (2012) *Journal of Business Ethics* 1, 2.

158 Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity, (note 26) 22 - 23.

159 Chow, 'Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries,' (note 9) 819.

protectionism which is thought to be responsible for the widening technological and industrial development gap between industrialized nations and the developing countries.[160] Some consumers purchase counterfeit goods as an act of revenge for the behavior of brand owners for charging premium prices to capitalise on the snob appeal of their commodities.[161] In demonstrating the anti-big business sentiments, Mackenzie notes that impoverished buyers, who see manufacturers and sellers of brand-name goods as robbing rogues,[162] regard suppliers of counterfeit goods as 'Robin Hoods.'[163] Amine and Magnusson observe that some consumers in the United States buy counterfeit goods to express their opposition to the 'paternalistic government policy aimed at restricting their freedom of choice' to purchase and use cheap counterfeit commodities.[164]

Some suppliers and consumers of counterfeit goods participate in the trade in counterfeit goods due to their ignorance of the harmful impact of the trade on rights of consumers, traders and economies. The suppliers and consumers lack or have limited information about exploitative labour conditions under which counterfeit goods are produced, other illicit activities (such as smuggling, tax evasion and corruption) which the trade in counterfeit goods promotes and the burden imposed on government to curb the counterfeit goods business and associated unlawful activities.

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160 Laurence Jacobs, Coskun A Samli & Tom Jedlik, 'The Nightmare of International Product Piracy: Exploring Defensive Strategies,' (2001) 30 *Industrial Marketing Management* 499, 503.

161 Kevin Lewis, 'The Fake and the Fatal: The Consequences of Counterfeits,' (2009) 17 *Park Palace Economist* 47, 51.

162 Mackenzie,' Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,'(note 26) 25.

163 A 'Robin Hood' is a person who is known for 'robbing from the rich and giving the poor.' See Amit Poddar, Jeff Foreman, Syagnik Banerjee, Pam S Ellen, 'Exploring the Robin Hood Effect: Moral Profiteering Motives for Purchasing Counterfeit Products,' (2012) 65 *Journal of Business Research* 1500, 1501.

164 Lyn S Amine & Peter Magnusson, 'Cost-Benefit Models of Stakeholders in Global Counterfeiting Industry and Marketing Response Strategies,' (2007) 15 *Multinational Business Review* 63, 72.

Some societal beliefs which do not support concepts related to private intellectual property are believed to motivate traders to supply counterfeit goods to the markets.[165] There is a view that communal beliefs (which form part of the Confucianism practised) in many parts of Asia do not support the notion of private intellectual property rights. Deng *et al* argue that these principles hold the view that ideas and inventions should be collectively owned by communities and shared by all humankinds, and new technologies should be public goods.[166] With reference to China, Hung contends that the Chinese view is an imitation of an intellectual work as an expression of admiration and enhancement of image and reputation of the original creator of the work.[167] Sharing other persons' intellectual creations through, for instance, production of counterfeit goods and selling those products are not wrongful acts. According to the above view, manufacturing and selling counterfeit goods are not regarded as wrongful practices.

Pro-intellectual property scholars and commentators from industrialized nations use the above arguments to explain the prevalence of counterfeiting and other forms of intellectual property violations in Asian countries including China where many people practise the Confucian beliefs.[168] Shi argues that the above viewpoint is inaccurate. With regard to China, the author observes that the use of trademarks is traced back to prehistoric times. The system of registration of trademark protection existed since this period. Confucianism does not oppose the idea of private intellectual property rights and under 'the set of Confucian ethics there appears [to be] no credible evidence of a link between honesty and loyalty on the one hand and counterfeiting and piracy on the

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165 Kay Ka-Yuk Lai & Judith L Zaichkowsky,'Brand Imitation: Do the Chinese Have Different Views?,' (1999) 16 *Asia Pacific Journal of Management* 179, 183.

166 Shengliang Deng, Pam Townsend, Maurice Robert, Maurice & Normand Quesnet, 'A Guide to Intellectual Property Rights in Southeast Asia and China,' (1996) *Business Horizons*, 43, 45. See also, Alan Zimmerman & Peggy E Chaudhry, 'Protecting Intellectual Property: The Special Case of China,' (2009) 10 *Journal of Asia-Pacific Business* 308, 313.

167 Hung, 'The Business of Product Counterfeiting in China and the Post-WTO Membership Environment,' (note 137) 62.

168 Alan Zimmerman, 'Contending with Chinese Counterfeits: Culture, Growth, and Management Responses,' (2013) 56*Business Horizons* 141, 142.

other.'[169] The contention about the Confucian beliefs cannot satisfactorily account for the high incidences of counterfeiting in Asian countries. This is because, as Stone contends, if the Confucian philosophy was the cause of counterfeiting in Asia, this view fails to account for lower rates of counterfeiting in Japan where its citizens are influenced by the Confucian values.[170]

2.6. Impact of the Counterfeit Goods Trade

The trade in counterfeit goods has several effects on consumers, traders, economies and societies in general. In this section I look at the negative and positive effects of the counterfeit goods business.

2.6.1.Negative Effects

The trade in counterfeit goods adversely affects the welfare of consumers. In some instances, consumers purchase inferior quality, defective or useless counterfeit goods at prices similar to those of genuine products,[171] or at prices higher than those of genuine goods.[172] Since some counterfeit goods are generally malfunctioning and have short lifespan, consumers incur costs of repairing, replacing or disposing of those goods.[173] Similarly, consumers pay more for genuine commodities because costs incurred by legitimate traders in fighting the counterfeit goods trade are passed onto buyers in the form of increased prices of genuine products. In the above instances, consumers suffer a welfare loss and the trade in counterfeit goods affects interests of the consumers.

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169 Wei Shi, 'Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?,' (2006-2007) 32 *North Carolina Journal of International Law & Commercial Regulation* 1, 8 - 9; See also Kimberly Shane, 'Culture, Poverty, and Trademarks: An Overview of the Creation and Persistence of Chinese Counterfeiting and How to Combat It,' (2012) 16 *Intellectual Property Law Bulletin* 137, 140.

170 Charles Stone, 'What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What Calls Intellectual Property,' (2008) 92 *Marquette Law Review* 199, 206.

171 Mackenzie, Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (note 26) 26.

172 Harvey, 'A New Way to Combat Product Counterfeiting,' (note 48) 21.

173 *Ibid* 52.

Where consumers purchase counterfeit goods outside legitimate supply channels, such buyers do not get services that are provided by sellers to buyers of genuine products. Nasheri observes that, where counterfeit goods are purchased from dishonest suppliers, consumers will 'not receive after-sale services or enjoy any effective recourse in the event of damage or injury' arising from the use of such goods.[174] Moreover, consumers of counterfeit goods will not have warranties or the right to return and have goods exchanged for other corresponding genuine products.[175]

Consumption of potentially harmful counterfeit goods exposes users to health and safety risks. The use of toxic counterfeit medicines and consumption of harmful counterfeit food and beverages are reported to have caused deaths in many countries. Bird observes that, in Bangladesh, China and Haiti, several people died after taking toxic counterfeit medicines.[176] Counterfeit medicines are ineffective and cannot prevent or cure diseases.[177] Ineffective counterfeit birth control pills have exposed women to unwanted pregnancies and health complications.[178] The use of ineffective counterfeit medicines is believed to be responsible for the mutations of viruses, bacteria and parasites that are resistant to drugs. Consumption of counterfeit drugs can cause several side-effects such as skin irritations, rashes, allergies and scarring.[179] Consumption of harmful counterfeit alcohol has caused deaths in China and Scotland.[180]

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174 Nasheri, 'Addressing the Global Scope of Intellectual Property Crimes and Policy Initiatives,' (note 46) 84.

175 *Ibid* 84.

176 Robert C Bird, 'Counterfeit Drugs: A Global Consumer Perspective,' (2007) 8 *Wake Forest Intellectual Property Law Journal* 387, 390. See also, G Jackson, S Arver, I Banks & J Schecher, 'Counterfeit Phosphodieterase Type 5 Inhibitors Pose Significant Health Risks,' (2010) 64 *International Journal of Clinical Practice* 497, 497.

177 Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers* (note 2) 70 -72.

178 Douglas W Stearn, 'Deterring the Importation of Counterfeit Pharmaceutical Products,' (2004) 59 *Food & Drug Law Journal* 537, 540.

179 Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,' (note 53) 156.

180 Kui Hua Wang, 'Celebration Turn into Sorrow: Where is China's Consumer Protection Law,' (1998) 4 *Canberra Law Review* 151, 151.

The use of counterfeit aircraft parts and accessories has been cited to be the cause of accidents which resulted in deaths, fatal injuries to persons and loss of properties. Counterfeit parts and accessories are believed to be responsible for aircraft and helicopter crashes in the United States, Norway and New Zealand.[181] According to Brut[182] and Yar,[183] the use of counterfeit automobile parts and accessories is the cause of road accidents which result in fatal injuries and deaths of motor vehicle users, road users and loss of their properties in many countries. There are reports that counterfeit toys have caused harm to children and electric shocks and scalding resulting from the use of counterfeit equipment such as toasters and kettles have inflicted harms on the users of the equipment.[184] There are fears that defective counterfeit cellular phones or their batteries can explode and injure or kill the users.[185]

The prevalence of counterfeit products in markets undermines the exclusivity or rarity attached to or associated with expensive, genuine luxurious goods. The status attached to prestigious, genuine goods is lowered by the influx of counterfeit goods in the markets. Globeman observes that some consumers of genuine goods 'feel worse off as a result of a loss in status, as formerly exclusive goods become increasingly commonplace, at least to the casual observer.'[186] Some consumers of high-priced, luxurious or

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181 Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,'(note 53) 155; Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers,* (note 2) 3.

182 Jean Pierre Brut, 'Car Parts Counterfeiting: A Crime against Intellectual Property Rights which Threatens Economy and People's Safety,' (1999) *International Criminal Police Review* 7, 10 -11.

183 Majid Yar, 'A Deadly Faith in Fakes: Trademark Theft the Global in Counterfeit Automotive Components,' (2005) *Internet Journal of Criminology* 1, 11-13.

184 John Anderson, 'The Campaign Against Dangerous Counterfeit Goods,'(1999) *International Criminal Police Review* 56, 58.

185 Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 10

186 Steven Globerman, 'Addressing Intellectual Product Piracy,' (1987) *Journal of International Business Studies* 497, 499.

prestigious brand-name goods stop buying genuine versions of the counterfeit products because they feel that such genuine products have lost their exclusivity or rarity.[187]

The above discussion demonstrates that where counterfeiting is deceptive and the counterfeit goods are of inferior quality, defective or harmful or unsafe products (also known as 'safety-critical' counterfeit goods), consumers suffer a welfare loss. As a result of purchasing or using such counterfeit goods, consumer rights including the right to information about commodities offered for sale, the right to exercise informed choice, and the right to consume safe genuine products are violated.

The trade in counterfeit goods impacts adversely the economic interests of manufacturers and sellers of genuine goods. Since counterfeiters sell their products at generally low prices, some consumers are attracted to the counterfeit goods and purchase less genuine commodities. The prevalence of counterfeit goods in the markets displaces demands for genuine commodities. As a result, manufacturers and sellers of genuine goods suffer loss of sales revenue. Therefore, the operation of the counterfeit goods trade causes a diversion of revenues from trademark owners to counterfeiters. Shultz and Saparito observe that trademark owners lose sales revenue to counterfeiters.[188] It is estimated that the worldwide trade in counterfeit goods costs traders between 10 per cent and 20 per cent of their sale revenue.[189] Owners of legitimate business in the United States are reported to lose up to US$250 billion yearly to counterfeiting and piracy. [190]

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187 Sophie Hieke, 'Effects of Counterfeits on the Image of Luxury Brands: An Empirical Study from the Customer Perspective,' (2010) 18 *Brand Management* 159, 161.
188 Shultz II & Saporito, 'Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets,' (note 16) 19.
189 Ian Phau, Gerard Prendergast, Leung H Chuen, 'Profiling Brand-piracy-prone Consumers: an Exploratory Study in Hong Kong's Clothing Industry,' (2001) 5 *Journal of Fashion Marketing and Management* 45, 45.
190 Silvia Beltrametti, 'Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community,' (2010) 8 *Northwestern Journal of Technology & Intellectual Property* 147, 150.

Related to the above, counterfeiting causes damage to genuine brand names and images. Bian and Veloutsou observe that the counterfeit goods business undermines consumers' confidence in legitimate brand names and destroys brand equity and traders' reputation.[191] Consumers' perceived exclusivity or rarity and value of brand names and images are diluted by the presence of counterfeit goods in the markets and this may affect consumers' intention to purchase genuine brand-name products.[192] As a result, some consumers refrain from purchasing genuine versions of vastly counterfeited products due to their diminished exclusivity. This causes loss of future sales revenue to trademark owners. Also, the owners of trademarks suffer loss of goodwill attached to their brand-name goods.

Some scholars have argued that in some instances, trademark owners do not suffer loss of sales revenue or future profits as a result of operation of the counterfeit goods trade. This occurs where the presence of counterfeit goods in the markets does not displace demands for genuine commodities. Naim observes that sales of US$12,000 Omega watches have been up for several years despite the influx of US$80 counterfeit Omega watches in the markets. The author quotes a representative of Omega as saying buyers of counterfeit watches 'and ours are different. The person who buys a [counterfeit Omega] watch for less than one hundred dollars is not a client we are losing.'[193] In emphasizing the above point, Mackenzie observes that 'it is not correct to say that a consumer who [buys] a counterfeit would otherwise have bought the original version. This is [the case where] the original is priced at a point significantly higher than the [counterfeit products].'[194] It is inaccurate to take for granted that in all situations,

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191 Bian & Veloutsou, 'Consumers' Attitudes Regarding Non-Deceptive Counterfeit Brands in the UK and China,' (note 26) 212.
192 Globerman, 'Addressing International Product Piracy,' (note 186) 499.
193 Naim, *Illicit: How Smugglers, Traffickers and Counterfeiters are Hijacking the Global Economy* (note 47) 118 - 119.
194 Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (note 26) 34.

trademark owners lose sales revenue or future profits due to the proliferation of counterfeit goods in the markets.

Besides being a market sign, a trademark is a 'property' in its own right.[195] Thus, unauthorised copying and use of trademarks, which are integral components of the counterfeiting business, amount to misappropriation of the intangible property of trademark owners. This misappropriation undermines the opportunity of the trademark owners to obtain the reward for their investments used to create and develop trademarks and market their brand-name goods. This causes the decrease in funds available for research and development and affects trademark owners' incentives to invest more resources in research and development [196] in order to create high-quality trademarked goods. Globerman argues that counterfeiting reduces 'the incentive for [trademark owners] to invest in costly [innovative] activities. It will also reduce cash flow available for reinvestment in new product development.'[197] This will, in turn, reduce the supply of brand-name goods protected by trademarks in the markets.

Trademark owners incur costs of curbing the trade in counterfeit goods. These include costs of hiring employees, investigators and lawyers who fight counterfeiting activities. Similarly, trademark owners face displacement of their time in an attempt to control the counterfeit goods trade and minimize its adverse impacts.[198] Moreover, trademark owners use considerable resources to acquire and apply modern technologies

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[195] Dominic Scott, Alex Oliver & Miguel Ley-Pineda, 'Trademark as Property: a Philosophical Perspective,' in Lionel Bently, Jennifer Davis & Jane S Ginsburg (eds) *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge: Cambridge University Press, 2008) 290 - 291.

[196] Staake & Fleisch, *Countering Counterfeit Trade: Illicit Market Insights, Best-Practice Strategies, and Management Toolbox* (note 3) 6. See also Barnett, 'Shopping for Gucci on Canal Street: Reflection on Status Consumption, Intellectual Property, and the Incentive Thesis,' (note 98) 1381 - 1382.

[197] Globerman, 'Addressing Intellectual Product Piracy,' (note 186) 499.

[198] McDonald & Roberts, 'Product Piracy: The Problem that Will not Go Away,' (note 19) 61; Jacobs *et al*, 'The Nightmare of International Product Piracy: Exploring Defensive Strategies,' (note 160) 502.

to counteract counterfeiting of their brand-name goods.[199] Some trademark owners incur costs of recalling or withdrawing their genuine products that are affected by counterfeiting from the markets.[200]

In some situations, manufacturers and sellers of genuine goods incur liability to consumers injured as a result of purchasing or using substandard, defective or harmful counterfeit goods. Lewis observes that where counterfeit goods fail, consumers may lodge complaints against suppliers of genuine products because they believe that it is the responsibility of those sellers of genuine goods to prevent the supply of the counterfeit products to the markets. Likewise, if a consumer purchases a counterfeit good and suffers damage as a result of purchasing or using such good, the trademark owner, whose brand-name has been affected, can be sued or incur costs to disassociate himself/herself from liability to the injured consumer.[201]

The trade in counterfeit goods has broader economic, social and political effects. Counterfeiting activities undermine the operation of perfectly competitive markets.[202] Trademark owners lose competitive advantage to counterfeiters who free ride on expenses which the former incur to conduct research and development and marketing of brand-name goods. In some cases, the suppliers of counterfeit goods dominate markets, thus creating barriers of entry into such markets for manufacturers of genuine goods. Moreover, the trade in counterfeit goods undermines the market-based functions of trademarks. These functions are: i) to identify and distinguish goods of a particular manufacturer from commodities manufactured by other producers; ii) to indicate the

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[199] Jacobs *et al*, 'The Nightmare of International Product Piracy: Exploring Defensive Strategies,' (note 160) 506.

[200] Ann Grackin, 'Counterfeiting and Piracy of Pharmaceuticals: Reducing Risk in Global Supply Chain, ' (2008) *IEEE Engineering in Medicine & Biology Magazine* 66, 66. See also, Nelson *et al*, 'Counterfeit Pharmaceuticals: A Worldwide Problem,' (note 142) 1083.

[201] Lewis, 'The Fake and the Fatal: The Consequences of Counterfeits,'(note 161) 53.

[202] Lowe, 'The Scope of the Counterfeiting Problem,' (note 12) 93.

origin of trademarked goods; to advertise trademarked goods; and iii) to act as a symbol representing the goodwill of the business of the trademark owner.[203] Counterfeiting undermines the function of a trademark as a tool for conveying product information to consumers. This causes consumer confusion and increases search costs. The consumers incur costs of making searches to identify and distinguish genuine commodities from counterfeit goods.[204] The operation of the trade in counterfeit goods affects the supply of information to the markets. Due to the fact that counterfeiting undermines competition in the markets, the trade in counterfeit goods acts as a barrier to some suppliers of genuine goods to enter into the markets and reduces supply of information about goods in those markets, the counterfeit goods trade causes the market failures.[205]

The trade in counterfeit goods imposes negative externalities on non-market actors.[206] Non-contractual consumers who use toxic and unsafe counterfeit food, pharmaceutical or cosmetic products suffer bodily injury and passengers get killed or maimed in accidents resulting from the use of counterfeit aircraft or automobile parts and accessories.[207] In some countries, laws impose liability on persons who are not parties to the counterfeit goods trade. The third parties are held liable under the theory of contributory liability, whereby legal action can be taken against persons who aid or abet offenders in committing infringing wrongs or fail to stop such unlawful acts.[208] In the United States, landlords who lease premises to operators of the counterfeit goods trade

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[203] Lars H Liebeler, 'Trademark Law, Economics and Grey Market Policy,' (1987) 62 *Indiana Law Journal* 753, 755.

[204] Gentry *et al*, 'The Effects of Counterfeiting on Consumer Search,' (note 129) 246 - 247.

[205] Anna-Liisa Jacobson, 'The New Chinese Dynasty: How the United States and Intellectual Property Laws are Failing to Protect Consumers and Inventors from Counterfeiting,' (2008) 7 *Richmond Journal of Global Law & Business* 45, 56.

[206] In economics, an 'externality' occurs where a benefit accrues to or cost is imposed on an actor who is not a party to a market transaction. Where there is a benefit it is called a 'positive externality,' while where there is a cost it is known as a 'negative externality.' See N Gregory Mankiw, *Principles of Economics* (Mason: South-Western Cengage Learning, 6th ed, 2008) 12 -13.

[207] Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (note 26) 31- 32.

[208] Kurt M Saunders & Gerlinde Berger-Walliser, 'The Liability of Online Markets for Counterfeit Goods: A Comparative Analysis of Secondary Trademark Infringement in the United States and Europe,' (2011) 32 *Northwestern Journal of International Law & Business* 37, 42 - 44.

have been held liable to trademark owners for violations (operating the trade in counterfeit goods) committed by their tenants.[209] Similarly, proprietors of online markets which provide forums for counterfeiters to sell their merchandise may be held liable to trademark owners for facilitating the trade in counterfeit goods. For instance, eBay has been held liable for not taking measures to prevent its online market from being used to infringe on trademarks of manufacturers of genuine goods. In 2008, a French court ordered eBay to pay the Moët Hennessy-Louis Vuitton (LVMH) group €40 million for its failure to prevent counterfeit versions of LVMH products from being sold on eBay's online auction site. Moreover, the court granted an injunctive order to prevent eBay from selling on its website counterfeit goods bearing LVMH's trademark.[210] Owners of brand-name goods have continued suing eBay to seek recourse for the counterfeit goods trade alleged to be conducted on eBay's online marketplace; eBay has been sued in Germany, the United States, Belgium and the United Kingdom.[211]

The trade in counterfeit goods imposes negative externalities on societies in general. Bian and Veloutsou argue that Britain's economy suffers an estimated loss of tax revenue of £11 billion per year due to the operation of the counterfeiting business.[212] The use of counterfeit fertilizers caused damage and destruction of harvests in China, Russia, Ukraine and Italy, [213] which resulted in low agricultural production and the decline in the contribution of agriculture to economies of these countries. The operation of the trade in counterfeit goods forces manufacturers and sellers of genuine goods to reduce or close

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209 Daniel R Plane, 'Going After the Middleman: Landlord Liability in the Battle Against Counterfeits,' (2009) 99 *Trademark Reporter* 810, 821- 831.

210 Ellie Mercado, 'As Long as "IT" is not Counterfeit: Holding eBay Liable for Secondary Trademark Infringement in the Wake of *LVMH* and *Tiffany Inc,*' (2010) 28 *Cardozo Art & Entertainment* 115, 127- 132.

211 Lucy Aboulian & Simi Grewal, 'Brand Owners and their Continuing Fight against eBay,' (2009) 16 *Journal of Brand Management* 492, 492 - 495; Fara S Sunderji, 'Protecting Online Auction Sites from the Contributory Trademark Liability Storm: The Legislative Solution to the *Tiffany Inc v. eBay Inc* Problem,' (2005) 74 *Fordham Law Review* 909, 910 - 911.

212 Bian & Veloutsou, 'Consumers' Attitudes Regarding Non-Deceptive Counterfeit Brands in the UK and China,' (note 22) 212.

213 Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 11.

down their business and this causes loss of jobs. Wilcox *et al* assert that in the United States, 750,000 persons lose their jobs every year due to the trade in counterfeit goods.[214] In the EU, the counterfeit goods trade is believed to cause the loss of more than 100,000 jobs each year.[215] There is also a view that the trade in counterfeit goods hampers the flow of foreign investments and technologies which, in turn, adversely affect the economic development of many countries.[216] The counterfeit goods trade is associated with tax evasion which causes loss of revenue to governments.[217]

The statistics about the magnitude of negative impacts of the trade in counterfeit goods on economies have been challenged. In the United States, the Government Accountability Office (GAO) report has observed that three often-cited estimates of the losses which the business owners in the United States suffer due to counterfeiting have not be substantiated.[218] The report was making a reference to claims that the owners of business in the United States lose between US$200 and US$250 billion annually in revenue and that 750,000 jobs in the United States are lost due to the operation of trade in counterfeit goods. The above statistics were generated, from among other sources, the Federal Bureau of Investigation (FBI) and the United States Customs and Border Protection (CBP). The GAO report further observed that the FBI officials said that the Bureau had 'no record of source data or methodology for generating the estimate and that it cannot be corroborated.'[219] According to the above report, a CBP official acknowledged that 'these figures are of uncertain origin, have been discredited, and are no longer used

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214 Keith Wilcox, Hyoeng Min Kim & Sankar Sen, 'Why Do Consumers Buy Counterfeit Luxury Brands?,' (2009) 46 *Journal of Marketing Research* 247, 247.
215 Bosworth & Yang, 'Conceptual Issues of Global Counterfeiting on Products and Services,' (note 62) 16.
216 Michael Blakeney, 'International Proposal for Criminal Enforcement of Intellectual Property Rights: International Concern with Counterfeiting and Piracy,' (2009) 1 *Intellectual Property Quarterly* 1, 6 - 8.
217 Lewis, 'The Fake and the Fatal: The Consequences of Counterfeits,' (note 161) 53.
218 US Government Accountability Office, *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods,* April 2010, pp 18 -19 <http://www.gao.gov/new.items/d10423.pdf> (accessed 15 July 2010).
219 *Ibid* 18.

by [the CBP]'.[220] Concerning the unreliability of the statistics on the size of loss caused by the counterfeit goods trade to the United States economy, Chaudhry and Zimmerman observe that it is not clear whether the figures 'refer to lost sales on a worldwide or domestic basis... Certainly in order to agree with the OECD estimate of [US] $200 billion on a worldwide basis, the effect [of the counterfeit goods business] on US markets would have to be far smaller.'[221]

The trade in counterfeit goods is associated with criminal activities, the operations of which impact negatively on societies. Phillips[222] and Hopkins *et al* [223] and Chong [224] contend that the counterfeiting business is associated with or fuels crimes such as tax evasion, smuggling, corruption, child and forced labour, money laundering, drug trafficking and the trade in illegal weapons. There have been attempts to show that proceeds generated from the counterfeit goods trade finance organized crime, including terrorism. Groups such as Al-Qaeda, Euskadi Ta Askatasuna (ETA), Hamas, the Irish Republican Army (IRA) and Hezbollah, the Italian Mafia, the Chinese Triads and the Russian Mafia are believed to generate their funds from, among other sources, the counterfeit goods trade.[225] As observed earlier in this chapter, costs of investigating, pursuing offenders, arresting and prosecuting persons committing counterfeiting offences and associated crimes are negative externalities imposed on economies and societies in general.

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220 *Ibid* 19.
221 Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 13.
222 Phillips, *Knockoff: The Deadly Trade in Counterfeit Goods* (note 2) 70-73; 123 -126
223 Hopkins *et al*, *Counterfeiting Exposed: Protecting your Brand and Customers* (note 2)175 - 180.
224 Jana Nicole Checa Chong, 'Sentencing Luxury: The Valuation Debate in Sentencing Trafficking of Counterfeit Luxury Goods,' (2008) 77 *Fordham Law Review* 1147, 1158.
225 Irina Caunic & Gabriela Prelipcean, 'The Market for Counterfeit Goods and Financing of the Extremist Organizations in Europe in the Last Decade,' (2011) 17 *International Conference on Humanities, Historical & Social Sciences* 335, 336 - 338. See also Brandon A Sullivan, Steven M Chermak, Jeremy M Wilson & Joshua D Frelich, 'The Nexus Between Terrorism and Product Counterfeiting in the United States, ' (2014) *Global Crime* 1, 3 - 5.

Some scholars have observed that there is scanty evidence which links the trade in counterfeit goods to the above organized criminal activities. Wall and Large argue that there still remains 'too much uncritical reliance on the logic behind the link between counterfeiting and organized crime and not enough [information about] how it works and whether or not it exists at the present time.'[226] Pollinger observes that there is 'only a small amount of hard data in support of [the] claim' that revenue generated from the counterfeit goods trade funds terrorist activities.[227]

The operation of the trade in counterfeit goods is an externality on the general society because it imposes costs of disposing dangerous counterfeit products which is a risky and challenging task. Soentgen observes that the disposal of counterfeit products containing toxic substances is a difficult activity. The disposal of some counterfeit chemicals poses environmental and health risks and is complicated and costly. The disposal of these substances can generate air pollution and hazardous wastes. Moreover, many countries particularly developing countries do not have the necessary infrastructures and technical know-how to dispose these toxic and dangerous substances in an environmentally safe manner.[228] Transporting counterfeit products to other countries where there are disposal facilities is made difficult by national laws and international treaties.

Some industrialized nations particularly the United States have accused, threatened to take or have taken action against developing countries in Africa, Asia and South America for failing to control the trade in counterfeit goods. These actions have caused strained political and economic relations between the industrialized nations and

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[226] David S Wall & Joanna Large, 'Jailhouse Frocks: Locating the Public Interest in Policing Counterfeit Luxury Fashion Goods,' (2010) 50 *British Journal of Criminology* 1094, 1110.
[227] Zachary A Pollinger, 'Counterfeit Goods and their Potential Financing International Terrorism,' (2008) *Michigan Journal of Business* 85, 87.
[228] Judith Soentgen, 'Disposing of Counterfeit Goods: Unseen Challenges,' (2012) 6 *WIPO Magazine* 25, 26.

the developing countries. The United States has taken action or threatened to take action against countries including Thailand,[229] China [230] Brazil, South Korea, Saudi Arabia and Taiwan.[231] With regard to countries in Sub-Saharan Africa, Adewopo observes that the United States has taken or threatened to take action against Kenya, Nigeria and South Africa for their alleged failure to protect intellectual property of the US nationals and control counterfeiting and piracy in their territories.[232] The latter nations have denied any wrongdoing and accused the United States of arbitrarily undertaking unilateral action against them. This exchange of accusations and counter-accusations has created political and economic tensions between the United States and the developing countries.

2.6.2. Positive Effects

Notwithstanding the approach taken by the mainstream literature that focuses on describing negative effects of the counterfeiting business, the counterfeit goods trade has several positive aspects. In certain situations, the trade in counterfeit goods facilitates the provision of low-priced but good-quality products to consumers.[233] Additionally, the trade in counterfeit goods increases the overall supply of goods and enhances competition among suppliers of commodities. In order to outsmart manufacturers and sellers of counterfeit goods, suppliers of genuine products adopt measures which make their products more attractive to consumers than counterfeit products. Some suppliers improve quality of their genuine goods. Others reduce prices of their genuine products. As a result of the above measures, high-quality, low-priced genuine goods are supplied to the

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229 Preeti Sinha, 'Special 301: An Effective Tool Against Thailand's Intellectual Property Violations,' (1992) 1 *Pacific Rim Law* & Policy Journal 281, 288 -292.

230 Qiao Dexi, 'A Survey of Intellectual Property Issues in China-US Trade Negotiations under the Special 301,' (1993) 2 *Pacific Rim Law & Policy Journal* 259, 275 - 277.

231 Brian M Berliner, 'Making Intellectual Property Pirates Walk the Plank: Using Special 301to Protect the United States' Rights,' (1990) 12 *Los Angeles Loyola International & Comparative Law Journal* 725, 736 - 738.

232 Adebambo Adewopo, 'The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection,' (2002) 33 *University of Toledo Law Review* 749, 763 - 763. See also, Fantu Cheru, 'Debt, Adjustment and the Politics of Effective Response to HIV/AIDs in Africa,' (2002) 23 *Third World Quarterly* 299, 307.

233 US Government Accountability Office, 'Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods,'(note 218) 9.

markets and, therefore, the welfare of consumers is enhanced. Moreover, users of some luxury counterfeit products derive extrinsic or expressive utility associated with genuine goods without paying the full price for obtaining such utility. Arguably, where counterfeiting is non-deceptive and counterfeit goods produced are good-quality, not harmful or prestigious products (sometimes known 'non-safety critical' counterfeit goods), the welfare of consumers may be enhanced.

In certain situations, the counterfeit goods trade confers benefits to trademark owners.[234] Romani *et al* observe that counterfeiting raises the appeal of brand-name goods for some consumers.[235] Harbi and Grolleau point out that counterfeiting familiarizes genuine brand names to a large consumer base. In falsely representing counterfeit goods as genuine commodities, counterfeiters promote brand names of genuine products affected by counterfeiting and make them known to many consumers. Thus, counterfeit goods promote the brand names of genuine commodities they imitate.[236] The experience of consuming counterfeit goods may stimulate the desire for consumption of genuine, luxurious products. Raustiala and Sprigman argue that counterfeiting generates demand for new original products by accelerating the fashion cycles.[237] Barnett observes that the proliferation of counterfeit goods in the markets enables owners of brand-name goods to charge consumers (who are eager to distinguish themselves from the masses that settle for inexpensive and inferior quality counterfeit products) high premium prices.[238]

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234 Julio de Castro, David B Bakin & Dean Shepherd, 'Knock-off or Knockout?,' (2007) *Business Strategy Review* 28, 29 -31.

235 Simona Romani, Giacomo Gistri & Stephano Pace, 'When Counterfeit Raise the Appeal of Luxury Brands,' (2012) 23 *Marketing Letters* 807, 809.

236 Sana El Harbi & Giles Grolleau, 'Profiting from Being Pirated by Pirating the Pirates,' (2008) 61 *KYKLOS* 385, 385.

237 Kal Raustiala & Christopher Sprigman, 'The Paradox: Innovation and Intellectual Property in Fashion Design,' (2006) 92 *Virginia Law Review* 1687, 1722 -1728.

238 Barnett, Shopping for Gucci on Canal Street: Reflection on Status Consumption, Intellectual Property, and the Incentive Thesis,' (note 98) 1399 - 1403.

Some manufacturers or sellers of genuine goods enter into partnerships or merge with the counterfeiting enterprises and expand the former traders' business. These joint ventures present new development opportunities between trademark owners and dealers in counterfeit goods.[239] Jacob *et al* describe an incident where a German manufacturer of washers and driers sued a Turkish company for counterfeiting the former's brand-name goods protected by trademarks. After winning the suit, instead of demanding damages from the defendants, the plaintiffs decided to merge with the defendants because they were producing high-quality counterfeit washers and driers more cheaply than the plaintiffs could manufacture their genuine washers and driers. In so doing, the plaintiffs managed to expand their business by merging with the defendants. [240]

The operation of the counterfeit goods trade confers positive externalities to some consumers of goods. The needy people can benefit from the use of good quality counterfeit goods such as clothing, shoes and leather goods. Soentgen observes that authorities in China, the Philippines and the United Kingdom donate counterfeit goods to charities.[241] In the United Kingdom, the Trading Standards officers, in collaboration with the police, seized counterfeit products including clothing, electrical goods, computer equipment, bags and jewelleries. These authorities donated some of the counterfeit goods to charities which distributed the goods to the needy people or sold them to raise funds for those charities. In Durham County, law enforcement agencies confiscated huge quantities of counterfeit goods. The agencies distributed the seized goods to local charities.[242] In 2005, some victims affected by Hurricane Katrina in the United States benefitted from the use of counterfeit goods. The United States authorities donated

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239 P Trott & A Hoecht, 'Product Counterfeiting, Non-consensual Acquisition of Technology and New Product Development: An Innovative Perspective,' (2007) 10 *European Journal of Innovation Management* 126, 127.

240 Jacobs *et al*, 'The Nightmare of International Product Piracy: Exploring Defensive Strategies,' (note 160) 505.

241 Soentgen, 'Disposing of Counterfeit Goods: Unseen Challenges,'(note 228) 26.

242 *Counterfeit goods donated to charity in Durham,*The *BBC News*, March 20, 2011; See also, *Fake goods benefit homeless people in Teesside,* The *BBC News*, July 27, 2011.

counterfeit goods including designer jackets, shirts, pants, hats, bedding, toys, and dog food, to the displaced persons sheltered at the Houston Astrodome.[243] Scadifi observes that if the authorities 'really believed that illegally imported knockoffs were harmful ..., [they] wouldn't be distributing them to hurricane survivors.'[244] In another incident, the authorities in New York authorized shipping of counterfeit goods (particularly clothing and shoes) to the victims of the earthquake which occurred in Haiti in 2010.[245]

Since the operation of the counterfeit goods trade confers benefits to trademark owners, I argue that the trade in counterfeit goods is beneficial to national economies of producers and exporters where such owners operate their business. These benefits are in the form of employment opportunities created and revenue generated from the counterfeit goods trade. Sometimes, operators of the counterfeiting business pay taxes and governments get generate revenue. In demonstrating benefits of the trade in counterfeit goods to Italy's economy, Ehrlich observes that over 2.5 million Italians work in the factories producing counterfeit goods.[246] With regard to China, Jacobson points out that the counterfeit goods trade supports local economies and shutting down counterfeiting operations will involve 'closing down entire towns or municipalities, which can lead to unemployment, dislocation, or even social chaos.'[247]

Counterfeiting is a strategy for developing innovations as the industrial experiences gained from producing imitated products can be used to build technological and industrial capacities. Most industrialized nations in Europe, the United States and

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243 Kristina R Montanaro, 'Shelter Chic: Can the US Government Make it Work?,' (2009) 42 *Vanderbilt Journal of Transnational Law* 1663, 1664 -1665.

244 Susan Scadifi, *Katrina Pounds Trademarks: It's good and bad that hurricane survivors are getting counterfeit wares,* The *Legal Times,* 10 October, 2005.

245 CNN Wire Staff, *Haiti quake victims to receive knock-off goods,*28 April 2010,<http://edition.cnn.com/2010/WORLD/americas/04/21/haiti.seized.goods/>(accessed 12 December 2013).

246 Ehrlich, The Private Sector Combats Products Counterfeiting,' (note 64) 702.

247 Jacobson, 'The New Chinese Dynasty: How the United States and Intellectual Property Laws are Failing to Protect Consumers and Inventors from Counterfeiting,' (note 205) 58 - 59.

Japan managed to establish their technological and industrial capacities through imitative practices including counterfeiting.[248] With regard to the United States, Chaudhry and Zimmerman note that 'the Industrial Revolution in the United States began with the help of [counterfeiting and piracy which] were common. In the nineteenth century America it was common to find counterfeit foreign wine, gloves and thread.'[249] Arguably, developing countries can use counterfeiting as a strategy to acquire low-priced technologies from the industrialized nations.

2.7. The Trade in Counterfeit Goods in the Sub-Saharan Africa

The trade in counterfeit goods afflicts developing countries [250] including the nations in Sub-Saharan Africa. The concepts of counterfeiting and the counterfeit goods trade emerged when anti-counterfeiting laws were introduced into these developing countries. This occurred when the colonial powers transplanted their laws onto the colonized territories during the 19th and 20th centuries. Governments in some of these countries enacted anti-counterfeiting laws subsequent to these nations joining the multilateral institutions including the WIPO and the WTO and becoming parties to the Paris Convention and the TRIPs Agreement.

Literature indicates that markets in Ghana,[251] Nigeria [252] Mauritius,[253] Kenya,[254] Uganda[255] and several other Sub-Saharan African countries[256] are flooded with counterfeit

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248 Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2003) 83 - 85. See also Graham Dutfield & Uma Suthersanen, 'Harmonization or Differentiation in Intellectual Property? The Lessons of History,' (2005) 23 *Prometheus* 131, 135 - 143.

249 Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 9.

250 Stephen A Stumpf & Peggy Chaudhry, 'Country Matters: Executive Weigh in on the Causes and Counter Measures of Counterfeit Trade,' (2010) 53 *Business Horizons* 305.

251 The National Crusade Against Counterfeiting Products Project Ghana, 'An Assessment of the Social & Economic Causes and Impacts of Counterfeiting and Piracy in Ghana: An Analysis of Consumer and Industry Survey Findings,' Project No. 2007/146046, p 4.

252 A E Ndu Oko & Osuagwu Linus, 'Consumerism, the Nigeria Experience: Study of Food and Drink Industries 1980 -2012,' (2013) 1 *Business & Management* 18, 24.

goods. Like in other nations, the magnitude of the counterfeit goods trade in many Sub-Saharan African countries has not been ascertained. The statistics representing the magnitude of the worldwide counterfeit goods trade, such as those described in the report of the OECD study, do not reliably represent the scale of the counterfeiting business and the scale of its impacts in developing countries, particularly those in Sub-Saharan Africa which were not covered by the study. Despite the lack of accurate statistics on the magnitude of the trade in counterfeit goods, the markets in many developing countries (including those in Sub-Saharan Africa) are said to be flooded with counterfeit products.[257]

The bulk of counterfeit products in Sub-Saharan Africa originate from foreign countries including industrialized nations. Abalos observes that Holland is one of the sources of counterfeit chemicals exported to African countries.[258] Hertzer points out that, counterfeit pharmaceutical products from the industrialized nations are shipped to some of the poorest countries in Africa.[259] While the NICs including China, India, Taiwan, Malaysia, Singapore, Indonesia and the Philippines are sources of counterfeit goods flowing to the markets of the countries in Sub-Saharan Africa,[260] counterfeiters in Africa have limited or no capacity to produce counterfeit goods on a large scale to cater for the

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253 Kaushik Goburdhun, 'Enforcement of Intellectual Property Rights - Blessing or Curse? A Perspective from Mauritius ,' (2007) 32 *Africa Development* 131, 138 - 140.

254 Ben Sihanya, 'Combating Counterfeit Trade in Kenya,' *Intellectual Property Rights in Kenya*, in Moni Wekesa & Ben Sihanya (eds) (Nairobi: Konrad Adenauer Stiftung, 2006) 207 - 216.

255 Esther Nakkazi, A Dose of Reality About Fakes,' (2010) 16 *Nature Medicine* 358, 358.

256 Chioma J Onwuka, 'The Situation of Medicines Counterfeiting in Africa,' pp 12 -16. <http://www.whpa.org/Background_medicines_counterfeiting_in_Africa_Chioma_Jo_Onwuka11-2010.pdf> (accessed 20 November 2013)

257 Jeremy Haken, 'Transnational Crime in the Developing World,' (2011) pp 17 - 18, <http://www.gfintegrity.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf>(accessed 28 January 2012).

258 Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,' (note 53) 158.

259 Hetzer, Godfathers and Pirates: Counterfeiting and Organized Crime,' (note 59) 320.

260 Gordon Mathews & Yang Yang, 'How Africans Pursue Low-End Globalization in Hong Kong and Mainland China, '(2012) 41 *Journal of Current Chinese Affairs* 95, 98 - 99.

worldwide markets.[261] Similarly, manufacturers of counterfeit goods in these countries have limited or no capability to produce intricate counterfeit goods such as aircraft components, car parts, electronic goods and pharmaceutical products. The counterfeiters manufacture low-technology counterfeit products mainly for domestic consumption. Perhaps, counterfeiters in these countries also assemble counterfeit parts or components imported or smuggled from foreign countries. Some countries in Sub-Saharan Africa are used as transit routes for counterfeit products shipped to industrialized nations as well as other developing countries.[262]

The proliferation of counterfeit products in the markets of countries in Sub-Saharan Africa is caused by many factors such as the porosity of land and sea borders of many African countries, ineffectual anti-counterfeiting laws, inadequate mechanisms for enforcing the laws, weak institutions for implementing the anti-counterfeiting policies and laws, ineffective regulation of trade, the existence of a large private sector which is weakly regulated, high levels of corruption, the lack of or limited co-ordination of activities among government authorities and anti-counterfeiting agencies and the limited co-ordination and partnership between public agencies and private actors.[263] Other factors include the increased transnational trade contacts between Sub-Saharan African countries and nations believed to be the world's major producers and exporters of counterfeit goods, the existence of large informal economies, and the lack of effective national or regional anti-counterfeiting policies and strategies.[264]

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261 Jean R Homere, 'Intellectual Property, Trade and Development: A View from the United States,' in Daniel J Gervais (ed) *Intellectual Property and Development: Strategies to Optimize Economic Development in a TRIPs-Plus Era* (Oxford: Oxford University Press, 2007) 337.

262 K M Waziri, 'Intellectual Property Piracy and Counterfeiting in Nigeria: The Impending Economic and Social Conundrum,' (2011) 4 *Journal of Politics & Law* 196, 196. See also Sihanya, 'Combating Counterfeit Trade in Kenya,' *Intellectual Property Rights in Kenya*, (note 254) 210.

263 Omo Aregbeyen, 'An Investigation of the Severity, Causes, Impact and Actions against Counterfeiting and Smuggling in Nigeria,' (2012) 3 *Mediterranean Journal of Social Science*, 379, 382 - 283. See also O Y Buowari, 'Fake and Counterfeit Goods Drugs: (2012) 3 *AFRIMEDIC Journal* 1, 2.

264 East African Community, *Draft Policy on Anti-Counterfeiting, Anti-Piracy and Other Intellectual Property Violations*, (unpublished draft, 2009), pp 12 - 13. See also Consultancy Africa Intelligence,

The market-based policies that countries in Sub-Saharan Africa have been implementing since the 1980s have created conditions that drive the counterfeit goods business. The trade liberalisation policy advocated by the WTO has forced these countries to open up their economies and remove trade barriers to allow the free trade. This has integrated the economies of these African countries into the global economy. It is through the integration of national economies of these countries into the global economy that counterfeit products flows from the world's major producers and exporters of counterfeit goods into the markets of Sub-Saharan African countries. The IMF and World Bank prescribed market-based policies that consist, among others, of economic liberalisation, privatisation and deregulation have facilitated the expansion of the trade in counterfeit goods in these countries.

As will be demonstrated in Chapter Three, knowledge-based MNCs, industry coalitions and governments of the United States, the EU members and Japan pushed for the adoption of the TRIPs Agreement and post-TRIPs treaties which prescribe high standards for the protection of intellectual property. The implementation of the global intellectual property regulatory policy has resulted in, amongst other things, the rise in the prices of technology-intensive products manufactured and exported from the industrialized nations. This situation has constrained the capacity of developing countries particularly the nations in Sub-Saharan Africa to import and acquire modern technologies to build or enhance their technological and industrial capacity. This has constrained the ability of manufacturers in Sub-Saharan Africa to manufacture and supply their local markets with genuine goods. Dishonest traders take this opportunity to supply the markets in these countries with counterfeit products to offset the shortages of genuine commodities.

'The Trade in Counterfeit Goods: What is it, Why is it a Problem and What is its Impact on Africa,' (2010), < http://www.polity.org.za> (accessed 14 December 2013).

Business activities of knowledge-based MNCs from industrialized nations have been globalised through the outsourcing of production, distribution and supply services from manufacturers, distributors and sellers in developing countries. Where controls of outsourced producers, distributers and sellers by the MNCs are weak, the outsourcers manufacture, distribute and supply counterfeit goods to the markets in the developing countries.[265] With regard to production of clothing in Mauritius, in Africa, Edensor and Kothari observe that the local manufacturers produce brand-name goods including River Island, Principles, George, Gap, Ralph Lauren, Tommy Hilfiger and Calvin Klein. Most of the local factories 'produce "export overruns", usually approximating to about 10 per cent of all manufactures. [They] produce a "little bit extra" to sell on the local market.'[266] Moreover, the MNCs charge high prices for their brand-name goods protected by trademarks, causing such commodities to be out of the reach of many consumers in the developing countries. Since many people in these countries have low disposable incomes and cannot afford to buy expensive brand-name goods and the supplies of those products in the markets are inadequate, poor consumers resort to purchasing inexpensive counterfeit goods.

There are specific political, economic and social factors in Sub-Saharan African countries that drive the trade in counterfeit goods in these nations. For instance, in order to generate more revenue, governments in some these countries adopt fiscal policies which impose high rates of taxes and duties on locally produced and imported commodities such as food and medicines. These policies push up prices of these commodities and make them unaffordable for many low-income consumers. This creates opportunities for counterfeiters to supply the markets with inexpensive counterfeit food

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[265] Thomas T. Kubic, 'Enforcement Efforts and Partnership with Industry: A Needed Strategy Addressing Counterfeit Drugs,' (2011) 17 *Journal of Commercial Biotechnology* 254, 257.
[266] Tim Edensor & Uma Kothari, 'Extending Networks and Mediating Brands: Stallholder Strategies in a Mauritian Market,' (2006) 31 *Transactions of the Institute of British Geographers* 323, 328.

and medicines.[267] Similarly, economic policies in many countries in Sub-Saharan Africa have not enabled these countries to build strong technological and industrial capacities. Additionally, governments in these countries have not been able to address endemic poverty among the people. Due to the lack of or limited technological and industrial capacities, local manufacturers engage in the counterfeit goods trade and the endemic poverty among people limit their ability to purchase expensive genuine commodities, hence they have to consume inexpensive counterfeit products.[268]

Economic and social factors motivate or cause consumers in Sub-Saharan Africa to consume counterfeit products. Economic factors include the lack of or limited information which affects the capacity of many consumers in these African countries to differentiate genuine products from counterfeit goods; the intrinsic attributes such as functionality, performance and durability of counterfeit goods, and the extrinsic attributes such as forged brand names, imitated designs and good-looking colour which make counterfeit products attractive to the consumers; and limited supply of genuine goods in the markets which compel consumers to purchase and use counterfeit products.[269] The proliferation of counterfeit goods in the markets and limited supplies of genuine commodities causes consumers in these countries to consume counterfeit goods.[270] Social factors (such as 'acceptance' by consumers to the purchasing and using of counterfeit products as normal phenomena and the lack of or limited awareness by consumers on the adverse effects resulting in and using counterfeit goods) motivate or encourage consumers to buy and use counterfeit products.

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[267] Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 4) 25.

[268] Health Poverty Action, *Counterfeit Medicines*, <http://www.healthpovertyaction.org/wp-content/uploads/downloads/2011/01/counterfeitBriefingfinal1.pdf> (accessed 15 April 2012).

[269] Marius Haman, 'Africa Rising to the Anti-counterfeiting Challenges,' (2010) 5 *Journal of Intellectual Property Law & Practice* 344, 344 -345.

[270] Uche Nwokocha, 'Nigerian Intellectual Property: Overview of Development and Practice,' (2012) *Nigerian Institute of Advanced Legal Studies* 101, 109 - 110.

Like in other nations, the trade in counterfeit goods has had negative effects on consumers, traders, economies and societies in general in the Sub-Saharan African countries. At the micro-level, consumers suffer financial damage as a result of purchasing inferior quality, defective and harmful counterfeit goods. The use of unsafe or toxic counterfeit food, pharmaceutical and cosmetic products, automobile parts and electrical products expose consumers to safety and health risks as a result of consumption of counterfeit products.[271] Undoubtedly, consumers are affected through purchasing and using inferior-quality, malfunctioning or harmful counterfeit goods. Similarly, consumers incur costs of repairing or disposing counterfeit products. The operation of the counterfeit goods trade undermines economic interests of traders.[272] Suppliers of genuine goods suffer loss of sales revenue and future profits which, in turn, affect their investments and capacity to undertake innovation and expand their business. The suppliers have their reputation tarnished as a result of the influx of counterfeit goods in the markets.[273] Manufacturers and sellers of genuine products use resources to fight the trade in counterfeit goods and minimize its adverse impacts. These resources used to curb the illicit trade could be used to expand business of the suppliers of genuine goods.

At the macro-level, countries in Sub-Saharan Africa suffer from the adverse effects of the trade in counterfeit goods. Olenick observes that between 1979 and 1980, Kenya's economy, which depended significantly on agriculture, was badly affected because farmers had applied counterfeit agricultural chemicals that bore the label and name of Chevron Corporation.[274] Crop production fell and Kenya's economy was adversely affected. In addition, the operation of the trade in counterfeit goods is

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271 W O Erhun, O OBabalola & M O Erhun, 'Drug Regulation and Control in Nigeria: The Challenge of Counterfeit Drugs,' (2001) 4 *Journal of Health & Population in Developing Countries* 23, 23.

272 Kerryn Le Cordeur, 'The Fake Epidemic,' (2012) 12 *Journal of Marketing* 12, 12-13.

273 Sihanya 'Combating Counterfeit Goods Trade in Kenya,' (note 254) 215 - 216.

274 Shari D Olenick, 'Draft International Anti-Counterfeiting Code: Neo-Realism as a Vehicle for Analysing the Effect of Non-Signatories' Perceptions on the Development of an Anti-Counterfeiting Norm,' (1982) 15 *Vanderbilt Journal of Transnational Law* 803, 813.

associated with tax evasion and contributes to the problem of unemployment in many African countries.[275] With regard to counterfeit medicines, Morris and Stevens observe that besides being harmful and ineffective, the use of counterfeit drugs in developing countries has had broader implications. These include the development of new, drug-resistant strains of viruses, parasites and bacteria which multiply and spread in these countries. The prevalence of counterfeit pharmaceuticals impedes efforts by the governments in the Sub-Saharan African countries to prevent and control the spread of diseases including HIV/AIDs, malaria, tuberculosis and Bird flu.[276] Akunyili and Nnani observe that counterfeit drugs are responsible for causing resistance to malaria-causing parasites which contributed to the doubling of malaria deaths in Nigeria.[277] There is a view that the counterfeit goods trade has turned countries in Sub-Saharan Africa into dumping grounds for counterfeit goods. There is a concern that the continent 'has become a dumping ground for the world's unwanted goods.'[278] Africa is a dumping place for defective, malfunctioning or harmful counterfeit goods imported or smuggled from other countries particularly in the United States and Europe.

The counterfeit goods trade confers some benefits to developing countries and their people. Hilton *et al* observe that the counterfeit goods business makes contributions to the developing countries' economic and social development. The authors note further that given the fact that counterfeiters operate in countries where people face hardship, 'some might consider it a basic human right to make a living whatever way one can in order to survive.'[279] Thus, engaging in the trade in counterfeit goods is a way of making a

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275 Sihanya, 'Combating Counterfeit Goods Trade in Kenya,' (note 254) 218.
276 Julian Morris & Philip Stevens, 'Counterfeit Medicines in Less Developed Countries: Problems and Solutions,' in Philip Stevens (ed) *Fighting the Diseases of Poverty* (London: International Policy Press, 2007) 206 -208.
277 Dora N Akunyili & Ijeoma PC Nnani, 'Risk of Medicines: Counterfeit Drugs,' (2004) *International Journal of Risk & Safety in Medicine*181, 181 - 190.
278 Pamela Whitby, *Africa -'dumping ground' for counterfeit goods, BBC News,* 13 January, 2010.
279 Brian Hilton, Chong J Choi & Stephen Chen, 'The Ethics of Counterfeiting in Fashion Industry: Quality, Credence and Profit Issues,' (2004) 55 *Journal of Business Ethics* 345, 349.

living for poor people in these countries. Also, the use of good-quality counterfeit products, including shoes and clothing, can be beneficial to the poor people in the developing countries. Counterfeit goods seized in the United Kingdom were distributed to the needy people in some African countries.[280] One media report pointed out: 'Counterfeit goods seized by the [UK] trading standards office have been [shipped to] Liberia.... Gold Child Orphanage near Liberia's capital Monrovia and Bendou, a village in Grand Cape Mount, will [be among the beneficiaries of such aid].'[281] In another incident, a consignment of counterfeit designer clothing worth more than £200,000 was shipped to Sub-Saharan African countries including Zambia.[282] In emphasizing the above point, Abalos observes that the trade in counterfeit goods facilitates the provision of low-priced counterfeit products to poor consumers, thus sparing the developing countries the burden of importing expensive foreign-made goods.[283]

The trade in counterfeit goods confers some macro-economic benefits to developing countries. Naim [284] and Hopkins *et al*[285] acknowledge that the counterfeit goods trade provides employment to the impoverished people in developing countries. Direct employment involves activities such as production and assembling counterfeit products, while indirect employment involves those persons involved in the distribution and sale of counterfeit products. Yao points out that 'the counterfeiting manufacturer is often an important source of revenue for a certain locality...'[286] Arguably, the above benefits of the counterfeit goods trade accrue to some economies of the developing countries in Sub-Saharan Africa.

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280 See *Trading Standards send fakes haul to aid Africa, Carrick Gazette* (UK), 6 March, 2008.
281 See *Counterfeit goods sent to Liberia, BBC News*, 1February, 2008.
282 See *Seized fake designer clothes to be sent from Leicester to Africa and Eastern Europe, Mercury* (Leicester), 31 October 2012.
283 Abalos, 'Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide,' (note 53) 159.
284 Naim, *Illicit: How Smugglers, Traffickers and Counterfeiters are Hijacking the Global Economy* (note 47) 114.
285 Hopkins *et al, Counterfeiting Exposed: Protecting your Brand and Customers* (note 2) 178 -179.
286 Yao, 'An Economic Analysis of Counterfeit Goods: The Case of China,' (note 107) 122.

2.8. Conclusion

This chapter has examined the trade in counterfeit goods which is a global phenomenon. The trade affects a wide range of industrial and consumer goods. Counterfeiting affects well-known and less familiar trademarks. Statistics generated from the studies conducted or commissioned by some institutions and agencies controlled or financed by knowledge-based MNCs, industry coalitions and the industrialized nations that describe the size of the worldwide counterfeit goods trade and the scale of its impacts have been challenged as being unreliable and unrealistic.

Industrialized nations (in Europe, Japan and the United States) and developing countries (in Africa, Asia and South America) are sources of and destinations for counterfeit goods. Countries in Sub-Saharan Africa are generally destinations and transit points for distribution of counterfeit products flowing into the worldwide markets. Counterfeiters in developing countries produce low-technology counterfeit goods. They have limited capacity to undertake mass production and supply them to the worldwide markets.

Political, economic and social factors have been responsible for the emergence and expansion of the worldwide trade in counterfeit goods. At the international level, the global policies that promote the worldwide free trade and trade liberalisation and strategies applied by knowledge-based MNCs from industrialized nations create conditions which propel the counterfeit goods trade. At the national level, political, economic, legal and social factors drive the counterfeiting business. Therefore, the trade in counterfeit goods is a complex phenomenon whose evolution and expansion have been caused by a wide range of political, economic, law-related and social factors.

The trade in counterfeit goods has adverse effects on the welfare of consumers, economic interests of legitimate traders, economies in industrialized nations and developing countries particularly those in Sub-Saharan Africa. In some situations, the operation of the counterfeiting business confers benefits to consumers, traders and economies. On the whole, the counterfeit goods trade in both industrialized nations and developing countries has more negative effects than positive aspects.

CHAPTER THREE

THE GLOBAL ANTI-COUNTERFEITING REGULATORY POLICY: EVOLUTION, FEATURES AND IMPLEMENTATION

3.0. Introduction

As observed in Chapter Two the trade in counterfeit goods is globalised. Taking into account this fact, there have been some efforts to globalise the regulatory policy for dealing with the worldwide trade in counterfeit goods. The 'trade-related' intellectual property regulatory policy deals with the worldwide counterfeiting business. The global intellectual property regulatory policy (embodied in multilateral, plurilateral and bilateral treaties and other international legal instruments) prescribes measures that require governments to control the counterfeit goods trade in their territories. The evolution of this global policy was necessitated by economic changes that took place in industrialized nations particularly in Europe and the United States. These economic changes made it necessary for the industrialized nations to reform their domestic trade policies and intellectual property laws and, subsequently, to push for the revision of the international intellectual property regulatory policy into the global regulatory policy for protecting intellectual property rights of which the anti-counterfeiting policy forms part.

The global intellectual property regulatory policy has had an influence over national intellectual property and anti-counterfeiting policies and laws in developing countries including the nations in Sub-Saharan Africa.[1] The developing countries have been implementing this global policy by ratifying multilateral intellectual property treaties including the TRIPs Agreement and reforming their intellectual property laws and

[1] J Michael Finger, 'Implementing the Uruguay Round Agreements: Problems for Developing Countries,' (2001) 24 *World Economy* 1097-1108.

institutions. Some scholars have examined how the implementation of this global policy has facilitated the imposition of the Euro-American intellectual property and anti-counterfeiting laws on the developing countries.[2] Others have looked at the implementation of the global intellectual property regulatory policy and its effects on people's access to essential products such as medicines in the developing countries, costs involved in implementing the policy and the resultant transfer of resources from the developing to the industrialized nations.[3] Most literature has examined in general terms the influence of the global intellectual property regulatory policy over the national intellectual property policies and laws in the developing countries particularly those in Sub-Saharan Africa. There is an inadequate examination of the relationship between this global policy and the regulation of the counterfeit goods trade in the developing countries particularly the Sub-Saharan African nations. The literature has not explored how the implementation of the global policy undermines the fight against the counterfeit goods trade in the developing countries. It has not examined how the implementation of the global policy facilitates the operation of the counterfeiting business in the Sub-Saharan African countries.

This chapter examines issues about the global anti-counterfeiting regulatory policy and its evolution, features and implementation. The chapter looks into the influence of this global policy over national anti-counterfeiting policies and laws of developing countries including those in Sub-Saharan Africa. It starts by examining the divergent views between the industrialized nations and the developing countries about the need for the global intellectual property regulatory policy. It traces the evolution of this policy, which has passed through the pre-TRIPs, the TRIPs and the post-TRIPs eras. It

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[2] Akalemwa Ngenda, 'The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?,' (2005) 14 *Information & Communication Technology Law* 59, 60.

[3] Arvind Subramanian, 'The AIDs Crisis Pricing of Drugs, and the TRIPs Agreement,' (2005) 4 *Journal of World Intellectual Property* 323, 325 - 330.

explores the implementation of the policy and its implications for the developing countries particularly those in Sub-Saharan Africa.

The main theme in this chapter is that the global intellectual property regulatory policy evolved from domestic policies and regulations of industrialized nations. The transformations of capitalism which took place in Europe and the United States necessitated the revision of their domestic trade policies and regulations to incorporate issues pertaining to protection of intellectual property. The domestic intellectual property policies and laws were transformed into the global intellectual property regulatory policy to which nations (including developing countries) in Sub-Saharan Africa should conform. Despite taking measures to implement the global intellectual property regulatory policy, the developing countries have not been able to control the trade in counterfeit goods efficiently. The implementation of this global policy is costly and onerous and partly contributes to drive the operation of the counterfeiting business in developing countries particularly the Sub-Saharan African countries.

3.1. The Global Intellectual Property Regulatory Policy: Divergent Views

The global intellectual property regulatory policy embraces, among other issues, the policy for controlling the worldwide trade in counterfeit goods. This anti-counterfeiting policy calls upon countries: i) to enact laws that provide for criminal, civil and administrative procedures for curbing the counterfeit goods trade in their territories; ii) to set up mechanisms for effective enforcement of the anti-counterfeiting laws; and iii) to provide for regulatory and institutional frameworks for resolving disputes involving violations of intellectual property rights such as counterfeiting.

The origin of the global intellectual property regulatory policy is a complex and contentious one. This policy was a result of protracted contentions between industrialized

nations and developing countries which became fierce from the 1970s onwards. The developing countries in Africa, Asia and South America were in favour of lower standards for the protection of intellectual property, while the industrialized nations including the United States and the European Community (EC) member states pushed for the global regulatory policy that would provide for higher standards.[4] This section looks into arguments that were made to rationalise the above divergent views.

3.1.1. Views of Developing Countries

Developing countries in Africa, Asia and South America were in favour of the global regulatory policy which would provide for low standards for the protection of intellectual property. These were pushing for the formulation and adoption of the policy which would enable them: i) to acquire low-cost modern technologies to facilitate their technological and industrial development in the developing countries; ii) to reverse technological and economic dependence on industrialized nations; and iii) to close the economic development gap between the developing countries and the industrialized nations.[5]

Some developing countries pushed for the revision of the pre-TRIPs intellectual property treaties including the Paris Convention and the Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention). This push was aimed at establishing the global framework that would facilitate the transfer of low-cost modern technologies with less restrictive terms from the industrialized nations. In respect of the above point, Gerro and Lannan observe that in the view of the developing countries 'limited protection of intellectual property rights [would ensure that] the knowledge [was]

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[4] Paul Steidlmeier, 'Moral Legitimacy of Intellectual Property Claims: American Business and Developing Country Perspective,' (1993) 12 *Journal of Business Ethics* 157, 157.

[5] Michael Blakeney, 'Transfer of Technology and Developing Nations,' (1987 - 1988) 11 *Fordham International Law Journal* 689, 695 -697.

available to [these nations] at minimum costs.'[6] The acquisition of low-cost modern technologies from the industrialized nations was necessary for the promotion of technological, industrial and economic development of the developing countries.

The demand for the revision of the pre-TRIPS intellectual property treaties to facilitate the transfer of low cost modern technologies from industrialized nations to developing countries formed part of the initiatives aimed at creating the New International Economic Order (NIEO).[7] The United Nations passed the declaration for the establishment of the NIEO in 1974 [8] and this initiative was geared towards the 'setting up [of] rules in the sphere of economic activities that... [would] redress past inequalities and [would] re-establish some balance in their relations with developed countries.'[9] The proponents of the NIEO asserted that the developing countries had the right of access to low-priced modern technologies.[10] They argued that those technologies were a 'common heritage of humankind' that should be made available to the developing countries as an act of developmental aid.[11] In summary, the developing countries were calling for the establishment of the global intellectual property regulatory regime (which promoted low standards for protection of intellectual property) that would be responsive to their socio-economic needs.[12]

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[6] John Gero & Kathleen Lannan, 'Trade and Innovation: Unilateralism v. Multilateralism,' (1995) 21 *Canada-United States Law Journal* 81, 83.

[7] David M Haug, 'International Transfer of Technology: Lessons that East Europe can Learn from the Failed Third World Experience,' (1992) 5 *Harvard Journal of Law & Technology* 209, 219 - 20.

[8] United Nations, Declaration on the Establishment of a New International Economic Order, 1 May 1974, A/Res/S-6/3201.

[9] Pedro Roffe, 'Reflections on Current Attempts to Revise International Legal Structures: The North-South Dialogue - Clash of Values and Concepts, Contradictions and Compromises,' (1979) 9 *Georgia Journal of International & Comparative Law* 559, 560.

[10] Moni Wekesa, 'An Overview of the Intellectual Property Rights (IPRs) in Kenya,' in Moni Wekesa & Ben Sihanya (eds) *Intellectual Property Rights in Kenya* (Nairobi: Konrad Adenauer Stiftung, 2009) 5. See also Michael Blakeney, *Legal Aspects of the Transfer of Technology to Developing Countries* (Oxford: ESC Publishing, 1989) 59.

[11] Frank J Gracia, 'Protection of Intellectual Property Rights in North American Free Trade Agreement: A Successful Case of Regional Trade Regulation,' (1993) 8 *American University Journal of International Law* 817, 819.

[12] Kato G Kingston, 'The Implications of the TRIPs Agreement 1994 of the World Trade Organization for the Developing Countries,' (2011) 1 *African Journal of Social Sciences* 37, 40.

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Developing countries were concerned that owners of intellectual property and industrialized nations would take advantage of high standards for the protection of intellectual property rights to exploit the former countries and their people.[13] In the case of trademarks, Leaffer observes that there was a concern that foreign trademark owners with superior bargaining powers would impose unfavourable terms on local licensees in the developing countries. The increased flow of foreign brand-name goods would be an obstacle to the developing countries in attaining self-sufficiency. The author further notes that there was a concern that 'the public's dependence on products [manufactured] by foreign trademark owners [would make] it difficult for local producers to establish recognition for their own goods.'[14] Moreover, the importation of high-priced technology-intensive and intellectual property-protected products from industrialized nations was viewed as a tool for dominating the developing countries economically.[15] These countries feared that the global intellectual property regulatory policy proposed by the industrialized nations would perpetuate the dependence of the developing countries on the industrialized nations and increase the technological gap between the former countries and the latter nations.[16]

At the centre of developing countries' contention was the claim that the people in these nations had collective rights to economic, social and cultural development.[17] These countries were asserting that individual claims over intellectual property were subordinate

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13 Marshall A Leaffer, 'The New World of International Trademark Law,' (1998) 2 *Marquette Intellectual Property Law Review* 1, 4.

14 Marshall A Leaffer, 'Protecting United States Intellectual Property Abroad: Towards A New Multilateralism,' (1991) 76 *Iowa Law Review* 273, 284.

15 Carlos A P Braga, 'The Economics of Intellectual Property Rights and the GATT: A View from the South,' (1989) 22 *Vanderbilt Journal of Transnational Law* 243, 252.

16 Regina A Loughran, 'The United States Position on Revising the Paris Convention: Quid Pro Quo or Denunciation,' (1982) 5 *Fordham International Law Journal* 411, 423.

17 Article 1 of the United Nations Declaration on the Right to Development, A/RES/41/128, 4 December 1986,

to the fundamental societal claims.[18] Gadbaw observes that for the developing countries, intellectual property was regarded as 'a body of fundamental rights [that were supposed] to be managed for their contribution to general economic growth and industrial development [of these nations and their people].'[19]

Developing countries' dissatisfactions with the pre-TRIPs intellectual property treaties were justifiable. Being latecomers in the areas of industrialization and socio-economic development, the developing countries wanted to acquire low-cost, modern technologies which would enable them to catch up with the industrialized nations.[20] These developing countries were pushing for the adoption of the global intellectual property regulatory policy that would promote and safeguard their developmental interests.[21]

3.1.2. Views of Industrialized Nations

Industrialized nations represented by the United States and European Nations were pushing for the revision of the pre-TRIPs intellectual property treaties (particularly the Paris Convention and the Berne Convention) in order to adopt a treaty that would prescribe high standards for the protection of intellectual property worldwide. At the centre of their push were contentions that the pre-TRIPs intellectual property treaties had inadequacies and the global intellectual property regulation would provide for the framework that would provide for: i) protection to a wide range of intellectual property; ii) minimum standards for protection of intellectual property among nations; iii) effective

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[18] Steidlmeier,' Moral Legitimacy of Intellectual Property Claims: American Business and Developing Country Perspective,' (note 4) 161-162.

[19] R Michael Gadbaw, 'Intellectual Property and International Trade: Merger or Marriage of Convenience?,' (1989) 22 *Vanderbilt Journal of Transnational Law* 223, 224.

[20] Tara K Giunta & Lily H Shang, 'Ownership of Information in a Global Economy,' (1993 - 1994) 27 *George Washington Journal of International Law & Economics* 327, 331.

[21] Peter Gakunu, 'Intellectual Property: Perspective of Developing World,' (1989) 19 *Georgia Journal of International & Comparative Law* 358, 359 - 364; Huala Adolf, 'Trade-related Aspects of Intellectual Property Rights and Developing Countries,' (2001) 39 *The Developing Economies* 49, 49.

mechanisms for enforcing intellectual property laws; iv) robust mechanisms for resolving disputes related to intellectual property rights in that they would prescribe efficient mechanisms for controlling the trade in counterfeit goods and pirated products; and v) mechanisms that would assist the developing countries to encourage innovation and the flow of investments from the industrialized nations.[22]

Knowledge-based MNCs from industrialized nations and their governments asserted that counterfeiting and piracy which were believed to be widespread in developing countries impacted negatively on the former nations' industries, economies and people.[23] The MNCs from the United States contended that counterfeiting and piracy on intellectual property of US nationals were rampant, particularly in Asia. Liu observes that the US MNCs claimed that 'countries... [including] Japan, ... China, Hong Kong, Singapore, South Korea, Taiwan and Thailand [were taking] advantage of US products by copying the manufacturing or disparaging their [intellectual property] rights.'[24] The United States claimed that counterfeiting and piracy undermined the competitiveness of the US products in foreign markets and, consequently, the United States suffered balance of trade and budget deficits.[25] The trade in counterfeit goods and pirated products caused stagnation of economies of the industrialized nations particularly the United States and significant socio-economic harms including losses to industries, job losses, reduced tax revenue and a decline in general societal well-being.[26]

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22 Robert W Kastenmeier & David Beier, 'International Trade and Intellectual Property: Promise, Risks, and Reality,' (1989) 22 *Vanderbilt Journal of Transnational Law* 285, 291 - 297.

23 Frederick M Abbott, 'Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework,' (1989) 22 *Vanderbilt Journal of Transnational Law* 689, 699 - 702.

24 Paul C B Liu, 'US Industry's Influence on Intellectual Property Protection Negotiations and Special 301 Actions,' (1994-1995) 13 *Pacific Basin Law Journal* 87, 90.

25 William Alford, 'How Theory Does - And Does Not Matter: American Approaches to Intellectual Property Law in East Asia,' (1994-1995) 13 *Pacific Basin Law Journal* 8, 12 -13.

26 Steidlmeier, 'Moral Legitimacy of Intellectual Property Claims: American Business and Developing Country Perspective,' (note 4) 160.

The industrialized nations and knowledge-based MNCs claimed further that, due to low prices of counterfeit goods and pirated products, markets for their technology-intensive and intellectual property-protected products in the developing countries were displaced. The trade in counterfeit goods and pirated products undermined fair competition, caused distortion of international trade and was a barrier to the international competitive trade practices. With regard to the above point, Doanne observes that the United States asserted that 'inadequate intellectual property protection [resulted in] trade distortions and the impairment of concessions due to intellectual property piracy which [amounted] to a non-tariff barrier.'[27]

The push by industrialized nations for the revision of the pre-TRIPs intellectual property treaties and the adoption of the new global intellectual property treaty became vigorous from the 1970s.[28] This was as a result of certain developments that had occurred worldwide. From the 1970s, the United States' international economic dominancy began to decline. There emerged what became to be known as the newly industrialized countries (NICs) including Brazil, India, Hong Kong, Taiwan, Singapore and South Korea, which became challengers to the United States.[29] The NICs were catching-up with the industrialized economies in areas such as information and communication technologies, bio-technologies, chemicals, pharmaceuticals, publishing and entertainment.[30] Due to this competition, the industrialized nations started 'shifting their attention and resources [to] areas [which would give them] greater comparative advantage – activities that [were] creativity-, research-, and knowledge-intensive, and therefore intellectual property-

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27 Michael L Doane, 'TRIPs and International Intellectual Property in an Age of Advancing Technology,' (1994) 9 *American University Journal of International Law & Policy* 465, 466 - 467.

28 Peter Drahos, 'An Alternative Framework for the Global Regulation for the Intellectual Property Rights,' Centre for Governance of Knowledge and Development, Working Paper No. 1, (2005) pp 10 -11.

29 Peter Drahos, 'Global Property in Information: The Story of TRIPs at the GATT,' (1995) 13 *Prometheus* 6, 7- 8.

30 Gerhard Fisch & Bernhard Speyer, 'TRIPs as an Adjustment Mechanism in North-South Trade,' (1995) *INTERECONOMICS* 65, 68-68.

intensive.'[31] It was anticipated that the trade in technology-intensive and intellectual property-protected products would provide the United States' economy with trade surpluses and comparative advantages over economies of other countries.[32] The global intellectual property regulatory policy would provide the framework for the protection of technology-intensive products and facilitate the global trade in those commodities.[33]

It is against the above backdrop that I examine the evolution of the global intellectual property regulatory policy which has passed through three periods: the pre-TRIPs Agreement, TRIPs Agreement and post-TRIPs Agreement eras.

3.2. The Evolution of the Global Intellectual Property Regulatory Policy

3.2.1.The Pre-TRIPs Agreement Period

The evolution of the global intellectual property regulatory policy has occurred over many years. The 19th century was an important turning point in the development of intellectual property regulatory policy in the world. Development in the production of goods and trade among some nations in Europe during this period necessitated the adoption of the international regulation for protecting intellectual property.[34] This development took place as a result of the Industrial Revolution, which resulted in the shift from mercantile capitalism to industrial capitalism. As a result of this development, production and trade in industrial products had become important components of economies and international commerce. These activities formed the backbone of industrialized nations' economies and, therefore, protection of intellectual property

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31 David Hartridge & Arvind Subramanian, 'Intellectual Property Rights: The Issue in GATT,' (1989) 22*Vanderbilt Journal of Transnational Law*293, 295.

32 Susan K Sell, 'Intellectual Property as a Trade Issue: From the Paris Convention to GATT,' (1989) 13 *Legal Studies Forum* 407, 411.

33 Paul N Doremus, 'The Externalization of Domestic Regulation: Intellectual Property Rights Reform in a Global Era,' (1996) 3 *Indiana Journal of Global Legal Studies* 341, 358.

34 Daniel J Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and Very New,' (2002) 12 *Fordham Intellectual Property, Media & Entertainment Law* 929, 935.

related to those commodities became an important issue. There was also a realisation that the laws of the industrialized nations in Europe that were enacted prior to the 18th century did not provide protection of intellectual property outside territories where such laws were in force.[35] It was imperative for the developed nations to adopt bilateral commercial treaties to address the above inadequacies in the national laws. Some nations negotiated and concluded bilateral treaties which contained provisions that prescribed reciprocal treatments which covered, among other issues, the protection of intellectual property of their nationals.[36] These treaties did not provide for the protection of intellectual property of nationals of the countries that were not signatories of the agreements.

In order to augment the efficiency of the frameworks for the protection of intellectual property of their nationals in many countries, some countries negotiated and adopted multilateral intellectual property treaties. These treaties were the Paris Convention[37] and the Berne Convention.[38] The adoption of the above treaties was accompanied by the formation of international organisations to administer the treaties. The Paris Convention and the Berne Convention were accompanied by the establishment of international bureaux which, in 1893, were merged to form the United International Bureaux for Protection of Intellectual Property (BIRPI), the predecessor of the World Intellectual Property Organization (WIPO). The WIPO was established by treaty in 1967.[39] The Paris Convention was the first multilateral treaty for the protection of industrial property that prescribed mechanisms for fighting against the worldwide trade in

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[35] Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 3rd ed, 2009) 5.

[36] Drahos, 'An Alternative Framework for the Global Regulation for the Intellectual Property Rights,' (note 28) 4.

[37]The Paris Convention was signed in 1883 by Belgium, Brazil, France, Guatemala, Italy, the Netherlands, Portugal, El Salvador, Serbia, Spain and Switzerland. Guatemala, El Salvador and Serbia denounced and reapplied the convention via accession.

[38] The original signatories of the Berne Convention signed in 1886 were Belgium, France, Germany, Great Britain, Haiti, Italy, Spain, Switzerland, and Tunisia.

[39] John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) 59 - 60. The WIPO was created by the Convention establishing the World Intellectual Property Organization of 1967.

counterfeit goods. The main provisions of the treaty which deal with the counterfeit goods trade are described below.

a) The Paris Convention

The Paris Convention, which is one of the multilateral intellectual property treaties administered by the World Intellectual Property Organization (WIPO), contains provisions that deal with the protection of industrial property rights including trademarks.[40]

With regard to measures for controlling the trade in counterfeit goods, the Paris Convention obligates its signatories to enact laws that provide for refusal, cancellation or prohibition of the registration of trademarks which reproduce, imitate or create confusion with well-known trademarks used in the member states of the Paris Union.[41] The treaty requires the signatories to enact laws that prohibit the importation of goods bearing unlawful trademarks or names entitled to be protected in member countries and authorize seizure of such goods. The seizure which is effected where unlawful affixation of trademarks or names was committed or where the goods are imported can be done at the request of public prosecutors, other competent authorities or interested parties.[42] The treaty requires signatory nations to prohibit the importation of goods which falsely indicate their sources or identity of their manufacturers or merchants. Goods bearing false indications as to their sources or identity of their manufacturers are liable to seizure by competent authorities in countries of importation.[43] The Convention obligates the signatories to enact laws that prohibit acts that mislead the public about the nature,

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[40] Article 1 of the Paris Convention. The expression 'industrial property' covers trademarks, service marks, commercial names and designations, including indications of source and appellations of origin and protection against unfair competition.
[41] Article 6*bis*. The signatories of the Paris Convention constitute what is known as the Paris Union.
[42] Article 9.
[43] Article 10.

characteristics or quantity of manufactured goods.[44] Prohibition of unfair trade practices is a way of curbing the trade in counterfeit goods which, in some situations, involve the commission of deceptive acts by manufacturers or sellers of those products.

The Paris Convention provided for a better framework for protecting industrial property rights and controlling the trade in counterfeit goods than those prescribed in the bilateral treaties signed by some European nations. Additionally, signatories of the Paris Convention were a larger number of nations than those which took part in the bilateral treaties. However, Cordray[45] and Kunz-Hallstein[46] have cited several limitations that undermined the efficacy of the Paris Convention in protecting industrial property and fighting the worldwide trade in counterfeit goods. First, the Convention did not require the signatories to apply specific standards for protecting industrial property. The signatories had discretions to decide on the minimum standards for the protection of industrial property in their territories provided that they granted to foreign nations rights similar to those available to their nationals. Second, despite providing for recourse to the International Court of Justice (ICJ), the Convention provided for inadequate enforcement and dispute and settlement mechanisms. While some members of the Paris Union took reservations on the ICJ's jurisdiction, some members did not honour the ICJ rulings. Moreover, the ICJ's dispute resolution procedures were too long, complex and burdensome. Third, non-membership of some countries in Asia including Taiwan, Hong Kong and Singapore where counterfeiting were widespread weakened further the efficacy of the Convention.

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[44] Article 10*bis*.

[45] Mornique L Cordray, 'GATT v. WIPO,' (1994) *Journal of Patent and Trademark Office* 121, 131.

[46] Hans P Kunz-Hallstein, 'The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property,' (1989) (1989) 22 *Vanderbilt Journal of Transnational Law* 265, 278 - 282.

Industrialized nations led by the United States started pushing strongly for the revision of the Berne Convention and the Paris Convention.[47] They insisted that the revision of the treaties ought to be done within the framework of the General Agreement on Tariffs and Trade (GATT) framework. The United States introduced the draft of the Agreement on Measures to Discourage the Importation of Counterfeit Goods (the Anti-Counterfeiting Code), which was prepared in collaboration with the US knowledge-based MNCs, to the GATT multilateral negotiations during the Tokyo Round which was launched in 1978.[48]

b) The Anti-Counterfeiting Code

From the 1970s, knowledge-based MNCs and industry coalitions pressurized the United States government to push for the adoption of the global treaty for controlling the worldwide trade in counterfeit goods and pirated products.[49] In 1978, the United States introduced the draft of the Anti-Counterfeiting Code to the GATT multilateral trade negotiations.[50] If adopted, the draft would be transformed into a multilateral treaty that would require its signatories to legislate for seizures of counterfeit goods at international borders by municipal customs authorities.[51] The treaty would require the signatories: i) to enact and enforce laws providing for mechanisms to minimize consumer deception; ii) to deprive counterfeiters of economic benefits derived from counterfeiting activities; and iii) to provide effective sanctions against counterfeiters.[52] Walker observes that the GATT

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47 The United Stated sought to include in the negotiating agenda the issue of intellectual property rights along with two other new subjects: trade in services and trade-related investment measures.

48 Huala Adolf, 'Trade-related Aspects of Intellectual Property Rights and Developing Countries,' (2001) 39 *The Developing Economies* 49, 53.

49 Owners of intellectual property including Levis Strauss and industry coalitions particularly the International Anti-Counterfeiting Coalition were instrumental in exerting pressures on the US government.

50 Doremus, 'The Externalization of Domestic Regulation: Intellectual Property Rights Reform in a Global Era,' (note 33) 358. The GATT Tokyo Round negotiations were conducted between 1973 and 1979.

51 Gail E Evans, 'Intellectual Property as a Trade Issue - The making of the Agreement on Trade Related Aspects of Intellectual Property Rights,' (1994) 18 *World Competition* 138, 158 - 159.

52 Christopher Wadlow, 'Including Trade in Counterfeit Goods: The Origin of TRIPs as a GATT Anti-Counterfeiting Code,' (2007) *Intellectual Property Quarterly* 350, 358.

signatories did not reach an agreement to adopt the Anti-Counterfeiting Code during the Tokyo Round GATT negotiations.[53]

Several conferences were held with a view to revising the pre-TRIPs intellectual property treaties including the Paris Convention, but these attempts were unsuccessful. There were several issues, for instance transfer of technology from industrialized nations to developing countries, which remained unresolved.[54] In 1982, following its failure to secure the adoption of the Anti-Counterfeiting Code and the collapse of the negotiations for the revision of the pre-TRIPs intellectual property treaties, the United States submitted to the GATT a draft of the treaty which had a part which dealt with control of the trade in counterfeit goods.[55] A sharp difference of opinions between industrialized nations and developing countries over the mandate of the GATT to deal with matters concerning intellectual property emerged. The former nations asserted that, since intellectual property violations impacted on trade, the intellectual property was a 'trade-related' issue and the GATT was the proper forum for discussing the proposed multilateral anti-counterfeiting treaty. The latter countries contended that intellectual property matters fell exclusively within the mandate of the WIPO.[56] Following pressures exerted by the United States on the Secretariat of the GATT and a series of consultations, the Directors General of the GATT and the WIPO agreed to put forward the proposal to adopt the TRIPs Agreement as an item for the agenda for the GATT Uruguay Round

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[53] William N Walker, 'Uruguay Round TRIPs: A Bibliographic Essay,' (1989) 22 *Vanderbilt Journal of Transnational Law* 911, 911.

[54] For instance, the conferences that were held in Geneva (in 1980) and Nairobi (in 1981) collapsed.

[55] Evans, 'Intellectual Property as a Trade Issue - The Making of the Agreement on Trade Related Aspects of Intellectual Property Rights,' (note 51) 159.

[56] *Ibid* 159. See also Sandro Sideri, 'GATT and the Theory of Intellectual Property,' in Meine Pieter van Dijk & Sandro Sideri (eds) *Multilateralism versus Regionalism: Trade Issues After the Uruguay Round* (London: Frank Cass, 1996) 136.

negotiations.[57] During these negotiations members of the GATT adopted the Uruguay Round Final Act that embodies the TRIPs Agreement.

3.2.2. The TRIPs Agreement Period

a) The Uruguay Round Final Act

Subsequent to the conclusion of the GATT Tokyo Round negotiations, some knowledge-based MNCs, industry coalitions and government agencies in the United States conducted or commissioned the undertaking of studies to quantify losses suffered by the US intellectual property owners and economy as a result of piracy and counterfeiting in foreign countries.[58] In 1986, the United States International Trade Commission (USITC) study estimated the aggregate worldwide losses of US $43 billion and US$ 61 billion due to intellectual property violations attributed to, among other factors, inadequacies of mechanisms for the protection of intellectual property. It was also asserted that counterfeiting and piracy were detrimental to the US nationals, industries and economy.[59] The chief executive officers of several knowledge-based MNCs formed the Intellectual Property Committee (IPC).[60] Through their influence to the US government committees, particularly the Advisory Committee for Trade Negotiations (ACTN), the MNCs, industry coalitions and the IPC managed to influence reforms of the US trade policy and regulation in order to integrate strategies to protect intellectual property of the US nationals in foreign countries.[61] They managed to get private

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57 A Jane Bradley, 'Intellectual Property Rights, Investment, and Trade in Services in Uruguay Round: Laying the Foundations', (1987) 23 *Stanford Journal of International Law* 57, 68 - 85.

58 L Dannielle Tully, 'Prospects for Progress: The TRIPs Agreement and Developing Countries after the Doha Conference,' (2003) 26 *Boston College International & Comparative Law Review* 129, 133.

59 Deborah Mall, 'The Inclusion of a Trade-Related Intellectual Property under the General Agreement on Tariffs and Trade (GATT),' (1990) 30 *Santa Clara Law Review* 265, 267 - 268.

60 The members of IPC were Bristol-Myres, CBS, Du Pont, FMC Corporation, General Electric Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International and Warner Communications. See, for instance, Carol J Blizi, 'Towards an Intellectual Property Agreement in the GATT: View from the Private Sector,' (1989) 19 *Georgia Journal of International & Comparative Law* 343, 343 -344.

61 The ACTN was established to give the US business sector direct input into the US trade policy. See Braithwaite & Drahos, *Global Business Regulation* (note 39) 61 - 62.

intellectual property interests incorporated into the US trade policy and laws, which prescribed strategies for protecting intellectual property of the US nationals.

In order to protect intellectual property rights of its nationals in foreign countries, the United States employed a two-pronged approach comprising the short-term and long term strategies. A short-term strategy consisted of bilateral and unilateral mechanisms. With regard to the bilateral approach, the United States induced several nations to enter into bilateral trade agreements whereby the latter nations were compelled to reform their laws and institutions in order to provide for efficient mechanisms for protecting intellectual property and controlling counterfeiting and piracy in their territories. These treaties vested the US government with powers to impose sanctions on countries that did not honour their commitments to upgrade their intellectual property laws and ensure effective protection of intellectual property rights.[62] As a result of the United States' threats to impose sanctions, several developing countries enacted or reformed their intellectual property laws and enhanced the mechanisms for enforcement of such laws in order to honour their commitments towards the United States.[63] These countries included South Korea, Brazil, Hong Kong and Thailand.[64]

With regard to the unilateral approach, the United States applied Section 337 of its Traffic Act of 1930 as a policy tool for protecting intellectual property of the US nationals and fighting against piracy and counterfeiting in foreign countries. On application by intellectual property owners brought under the above Act, the USITC is vested with powers to seize and forfeit infringing goods (including counterfeit goods and

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62 Thomas N O'neill III, 'Intellectual Property in Thailand: Asia's Young Tiger and America's "Growing" Concern,' (1990) *University of Pennsylvania Journal of International Business Law* 603, 605.
63 Sell, 'Intellectual Property as a Trade Issue: From the Paris Convention to GATT,' (note 32) 414.
64 Robert P Merges, 'Battles of Lateralisms: Intellectual Property and Trade,' (1990) 8 *Boston University International Law Journal* 239, 240.

pirated products) or to exclude such commodities from entering into the United States. [65] Also, Section 301 of the US Trade Act of 1974 became another policy instrument for protecting intellectual property rights of the US nationals. The legislation directs the United States Trade Representative (USTR), subject to the direction of US President, to take action if: i) the rights of the United States under a trade agreement are being denied, or ii) an act, policy or practice of a foreign government is 'unjustifiable' or 'unreasonable' and burdens or restricts US commerce. Actions include retaliation in the form of higher tariffs on goods from foreign countries engaging in unfair trade practices.[66]

The United States introduced Section 182 of the US Trade Act of 1974 to provide for the 'Special 301' procedure, which became a policy device for protection of intellectual property of the US nationals in foreign countries. Under the 'Special 301' procedure, the USTR was vested with powers to identify foreign countries which: deny adequate and effective protection of intellectual property or fair and equitable market access to the US nationals, and those countries, identified by the USTR to be the 'Priority Foreign Countries', which had the most onerous or egregious actions, policies or practices that adversely affected the US commodities and were not entering into negotiations (multilateral or bilateral) to provide adequate and effective protection of intellectual property.[67] The USTR established the 'Priority Watch List' of countries whose actions, policies and practices warrant a close monitoring to determine whether further Special 301 action is necessary. The USTR started maintaining the 'Watch List' of countries warranting special attention because they maintained intellectual property or barriers to trade which were of particular concerns to the United States. This procedure

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[65] Jeffrey S Neely & Hideto Ishinda, 'Section 337 and National Treatment under GATT: A Proposal for Legislative Reform,' (1989) 13 *Fordham International Law Journal* 276, 276 -278.
[66] Warren Maruyama, 'Section 301 and Appearance of Unilateralism,' (1990)11 *Michigan Journal of International Law* 394, 395.
[67] Judith H Bello & Alan F Holmer, 'Special 301,' (1990-1991) 14 *Fordham International Law Journal* 874, 875.

imposed a time frame within which the United States would pressurize the identified countries to take positive steps to improve protection of intellectual property or remove the barriers, or face economic consequences.

Section 505 of the Trade and Traffic Act of 1984 introduced changes to the system for granting preferential trade treatments to developing countries under the Generalised System of Preferences (GSPs) which allowed the beneficiary countries to receive duty-free trade privileges in the United States markets. Qualifying for obtaining the preferential trade benefits was made conditional upon beneficiary countries setting up appropriate legal regimes for protection of intellectual property.[68] In determining whether the United States should grant a country a preferential trade treatment, the US president had to consider the beneficiary country's record of protecting intellectual property, particularly those of US nationals. A country which, in the view of the US administration did not provide adequate protection of intellectual property of the US nationals, could not be granted the preferential trade treatments. The United States used the above policy tools to take retaliatory actions against South Korea, Brazil, Thailand, Singapore, Indonesia, Malaysia, Taiwan, and Mexico.[69]

Regarding the long-term strategy, the United States brought issues about intellectual property protection to the trade negotiations under the GATT.[70] Doane observes that pressures from industrialized nations '.... was rewarded by the inclusion of trade-related aspects of intellectual property rights in the Uruguay Round agenda.'[71] The governments of the United States, the European Community (EC) countries and Japan (in

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[68] Drahos, 'Global Property in Information: The Story of TRIPs at the GATT,' (note 29) 9.
[69] Ted L McDorman, 'US -Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property,' (1993 -1994) 14 *Michigan Journal of International Law* 90, 108.
[70] O'neill III, 'Intellectual Property in Thailand: Asia's Young Tiger and America's "Growing" Concern,' (note 62) 605.
[71] Doane, 'TRIPs and International Intellectual Property in an Age of Advancing Technology,' (note 27) 472.

collaboration with knowledge-based MNCs and industry coalitions from their countries) were instrumental in preparing the TRIPs Agreement draft, negotiating, manipulating and/or pressurizing the GATT members from developing countries to accept intellectual property protection as a 'trade-related' issue and become signatories of the TRIPs Agreement.

Before and during the Uruguay Round GATT negotiations, the US knowledge-based MNCs, their industry coalitions and the IPC worked hard to ensure the adoption of the TRIPs Agreement.[72] First, they collected information to quantify the magnitude of the worldwide trade in counterfeit goods and pirated products and their impacts on industries and economies of industrialized nations. This information was used to make a case for the need to adopt the TRIPs Agreement in order to enhance standards for the protection of intellectual property globally. Second, they networked with the knowledge-based MNCs from Europe and Japan and their industry coalitions (namely, the Union of Industrial and Employers' Confederations of Europe (UNICE) and the Japanese Federation of Economic Organizations (KEIDANREN)) and jointly lobbied and pushed for the adoption of the TRIPs Agreement. Third, they provided the necessary technical assistance, for instance, preparing agenda items for discussions, drafting documents which were used during the TRIPs negotiations, and providing expertise on matters related to trade and intellectual property. Despite the resistance from developing countries from Africa, Asia and South America, the United States, the EC and Japan managed to secure the adoption of the Uruguay Round Final Act of which the TRIPs Agreement forms part.[73]

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[72] Christopher May, *The World Intellectual Property Organization: Resurgence and Development Agenda* (London: Routledge, 2007) 28 -29.

[73] Emir A Crowne, 'Fishing TRIPs: A Look at the History of the Agreement on Trade-Related Aspects of Intellectual Property,' (2011) 2 *Creighton International & Comparative Law Journal*. 77, 83.

Industrialized nations shifted the intellectual property negotiations from the WIPO to the GATT forum because they knew that they could not successfully use the former forum to have the TRIPs Agreement adopted. This was because developing countries outnumbered the industrialized nations in the WIPO. Sell observes that, due to the above situation, the United States preferred the GATT to the WIPO because '[at the] WIPO deliberations were open to the entire United Nations membership (about 150 countries). At [the] GATT, membership [was] restricted to 90 countries, [therefore] the US felt better to use its clout [at the latter forum].'[74] The WIPO forum seemed to be favourable to the developing countries because, as Merges observes, '[the] WIPO had come under the sway of the [developing countries], ideological and economic objections to increased intellectual property protection hampered WIPO's ability to implement broader protection.'[75] The shifting of the venue of negotiations from one forum to another is referred to as 'forum shifting' which, according to Helfer, involves 'an attempt to alter status quo ante by moving treaty negotiations, law making initiatives or standard setting activities from one international avenue to another.'[76] This was a horizontal regime shift whereby the treaty making negotiations are shifted from one multilateral institution to another.[77]

A small group of actors consisting of the representatives of knowledge-based MNCs and industry coalitions from industrialized nations together with government representatives from the United States, Japan and the EC members steered the process which led to the adoption of the TRIPs Agreement. Drahos and Braithwaite, quoting a source from the United States, observe that 'probably less than 50 people were

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74 Sell, 'Intellectual Property as a Trade Issue: From the Paris Convention to GATT,' (note 32) 419. See also Braithwaite & Drahos, *Global Business Regulation* (note 39) 566.

75 Merges, 'Battles of Lateralisms: Intellectual Property and Trade,' (note 64) 239 - 240.

76 Laurence R Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Making,' (2004) 29 *Yale Journal of International Law* 1, 14.

77 Susan K Sell, 'TRIPs Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP,' (2011) 18 *Journal of Intellectual Property Law* 447, 450.

responsible for [the adoption of the] TRIPs Agreement.'[78] The main impetus for pushing for the adoption of the treaty came from the MNCs that benefit by the global intellectual property regulatory policy prescribed in the TRIPs Agreement.

The procedures which were employed to adopt the TRIPs Agreement produced the treaty that was not a product of democratic bargaining among all WTO members. Drahos points out that during the GATT Uruguay Round negotiations, three conditions for democratic bargaining were not met. First, not all interested parties were represented in the TRIPs Agreement negotiations. Not all developing countries participated in the negotiations of the treaty. Second, not all parties had full information about the consequences of various possible outcomes of the negotiations. During the TRIPs Agreement negotiations, the representatives of industrialized countries and knowledge-based MNCs and industry coalitions had more information about issues to that were discussed than other members of the GATT. Third, the GATT members from the developing countries were coerced to sign the TRIPs Agreement. Political pressure and economic coercion were applied to secure the consent of the developing countries to become parties to the TRIPs Agreement and other agreements embodied in the Uruguay Round Final Act.[79]

The above historical account shows how the rise of knowledge-based economy brought about the need for enhanced protection of intellectual property of MNCs and economic interests of the United States. These developments necessitated the revision of the US national trade and intellectual property policy and laws. The US national policies and laws provided the impetus for pushing for the adoption of the TRIPs Agreement. It

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[78] Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge* (London: Earthscan Publications, 2002) 10.

[79] Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting,' (2002) 5 *Journal of World Intellectual Property* 765, 769 - 774.

also demonstrates the involvement of non-governmental actors (particularly the MNCs) from industrialized nations in the global intellectual property regulatory-making process. The section below describes briefly the main provisions of the TRIPs Agreement that deal with the trade in counterfeit goods.

b) The TRIPs Agreement

The TRIPs Agreement requires the WTO members to enact laws for the protection of a wide range of intellectual property rights including trademarks.[80] The treaty globalises the minimum standards for the protection of those rights.[81] It incorporates and supplements the pre-TRIPs intellectual property treaties including the Paris Convention.[82]

Besides providing for the guidelines relating to conditions for registration of trademarks, protectable subject matters, rights conferred and the durations of protection granted to trademark owners,[83] the TRIPs Agreement imposes the obligation on the WTO member states to provide for the right of registered trademark owners to prevent third parties from using trademarks identical or similar to those registered by the relevant national authorities in order to avoid the likelihood of confusion.[84] In addition, the treaty incorporates the provisions of the Paris Convention which obligate the member states to provide for the protection of well-known trademarks.[85]

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[80] Besides trademarks, the TRIPs Agreement provides for the protection of rights to copyrights, geographical indications, industrial designs, patents, layout designs of integrated circuits and undisclosed information.

[81] Robert L. Ostergard Jr, 'The Measurement of Intellectual Property Rights Protection,' (2000) *Journal of International Business Studies* 349, 349 - 350.

[82] Articles 1 (3) and 2 of the TRIPs Agreement.

[83] Articles 18, 19 and 20.

[84] Article 16 (1).

[85] Article 16 (2) and (3).

The TRIPs Agreement requires the WTO member states to prescribe civil, criminal and administrative procedures to deter counterfeiting and the trade in counterfeit goods in their territories. The treaty obligates the member states to adopt enforcement procedures to provide for effective action against violations of intellectual property, and these procedures should include expeditious remedies to prevent infringements and remedies to deter such infringements. These procedures must be fair and equitable, should not be complicated or costly, or should not entail unreasonable time limits or unwarranted delays.[86]

With regard to civil mechanisms, the TRIPs Agreement obligates the WTO members to provide for judicial mechanisms to allow owners of intellectual property to enforce their rights to the intellectual property. Parties to judicial proceedings should be availed with adequate opportunity to present their evidence.[87] Injured parties are entitled to remedies, namely injunctive orders to prevent infringing goods from entering commercial channels; damages to provide compensation for damage suffered; and recovery of costs incurred in conducting litigation. The judicial authorities should grant intellectual property owners orders for recovery of profits generated as a result of violations of intellectual property and destruction of infringing goods and disposition of instrumentalities used to create such infringing goods.[88]

As for criminal procedures, the TRIPs Agreement requires the WTO member states to enact laws which provide for criminal mechanisms to deal with wilful trademark counterfeiting on a commercial scale. Criminal laws should prescribe sanctions including

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[86] Article 41.
[87] Article 42
[88] Articles 45 and 46.

imprisonment of offenders, payment of fines and confiscation, forfeiture and destruction of infringing materials and implements used to commit counterfeiting offences.[89]

The TRIPs Agreement requires the WTO member states to enact laws that provide for administrative procedures to fight against violations of intellectual property such as counterfeiting and curb the counterfeit goods trade. These procedures should be subject to review by the judicial authorities.[90]

The WTO member states have to legislate for the procedures that allow intellectual property owners, who have valid grounds and adequate evidence for suspecting that importation of counterfeit products has occurred, to apply to the relevant authorities for suspension of the release of the counterfeit products into commercial circulation.[91] The authorities should detain suspected counterfeit goods if they receive notice of the pendency of judicial proceedings relating to those goods; otherwise, the detained goods will be released.[92] The applicants should be ordered to pay importers, consignees or owners of suspected counterfeit goods damages for any harm suffered as a result of a wrongful detention of such goods.[93]

With regard to enforcement of the TRIPs Agreement, the treaty adopted the Dispute Settlement Understanding (DSU) set up by the WTO.[94] The procedures for settling disputes comprise a series of steps and actions which aggrieved WTO member states should initiate or follow. These steps include consultation; panel establishment,

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[89] Article 61.
[90] Article 49.
[91] Article 51. Under Article 53, the authorities may require applicants to provide security or assurance to protect defendants or the authorities and to prevent abuse of the process.
[92] Article 55.
[93] Article 56.
[94] Article 64. Under this Article provides that provisions of Articles XXII and XXIII of the General Agreement on Tariffs and Trade of 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under the treaty.

investigation and report; appellate review of the panel report; adoption of the panel decision and appellate review decision; and implementation of the decision adopted. According to Su, the DSU guarantees the right of a WTO member state to adopt the dispute panel's decision unless there is a consensus to reject the panel's decision. The appellate review of the dispute panel's decision on a violation by a WTO member state is also guaranteed. The offending member state must either change the inconsistent measure or compensate the injured party. The affected member state may choose to retaliate by imposing trade sanctions on the offending member state.[95]

The TRIPs Agreement brought about several changes. First, the treaty 'married' intellectual property to international trade within the WTO framework and established procedures for the enforcement of laws for protecting intellectual property.[96] The TRIPs Agreement established mechanisms for enforcing its provisions as well as requiring the WTO members to set up institutions for enforcing intellectual property laws in their territories.[97] Second, the TRIPs Agreement introduced the mandatory and minimum standards for protection of intellectual property to which the WTO should conform.[98] Third, the treaty harmonized standards for the protection of intellectual property based on the Euro-American laws.[99] Therefore, the treaty is modelled on the standard intellectual property norms and practices of the industrialized nations.[100] Fourth, the TRIPs

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95 Evelyn Su, 'The Winners and the Losers: the Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries,' (2000-2001) 23 *Houston Journal International Law* 169, 189 - 190.

96 Daniel Gervais, 'Intellectual Property, Trade and Development: The State of Play,' (2005) 74 *Fordham Law Review* 505, 506- 510.

97 J H Reichman, 'The TRIPs Agreement Comes of Age: Conflict or Co-operation with Developing Countries?,' (2000) 32 *Case Western Reserve Journal of International Law* 441, 443 - 444.

98 Eleanor M Fox, 'Trade, Competition, and Intellectual Property - TRIPs and its Antitrust Counterparts,' (1996) 29 *Vanderbilt Journal of Transnational Law* 481, 482.

99 Philippe Cullet, 'Plant Variety Protection in Africa: Towards Compliance with the TRIPs Agreement,' (2001) 45 *Journal of African Law* 97, 99.

100 Anna Lanoszka, 'The Global Politics of Intellectual Property Rights and Pharmaceutical Drug Policies in Developing Countries,' (2003) 24 *International Political Science Review* 181, 182.

transformed the international intellectual property regulation which existed since the 19th century into the global regulatory system for protecting intellectual property.[101]

The TRIPs Agreement establishes the 'floor' on the basis of which countries can negotiate and conclude agreements providing for higher standards for the protection of intellectual property.[102] The United States and the EU have exploited this opportunity to coerce or manipulate developing countries to sign post-TRIPs treaties, which prescribe higher standards for the protection of intellectual property than those provided for in the TRIPs Agreement.

3.2.3. The Post-TRIPs Agreement Period

Subsequent to the adoption of the TRIPS Agreement, the United States and the EU countries have been using economic or political coercion to compel countries in Africa, Asia and South America to sign post-TRIPs treaties. They are different types of treaties including FTAs, bilateral investment treaties and bilateral intellectual property treaties.[103] Provisions for the protection of intellectual property are also embodied in economic partnership agreements (EPAs) which industrialized nations impose on the developing countries.[104] These treaties require the signatory states to reform their national laws for protecting intellectual property rights in their territories.

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[101] Alufunmila B Arewa, 'TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, the Global Intellectual Property Frameworks,' (2006) 10 *Marquette Intellectual Property Law Review* 155, 156 - 159.

[102] Alan M Anderson, 'The Globalization of Intellectual Property Rights: TRIPS, BITs, and the Search for Search for Uniform Protection,' (2010) 38 *Georgia Journal of International and Comparative Law* 265, 267.

[103] Peter Drahos, 'BITs and BIPs: Bilateralism in Intellectual Property,' (2001) 4 *Journal of World Intellectual Property* 791, 808. See also Mohamed El-Said, 'The Road from TRIPS-Minus, to TRIPS, to TRIPS-Plus: Implications of IPRs for the Arab World,' (2005) 5 *Journal of World Intellectual Property* 53, 65; See also, Luigi Palombi, 'TRIPs, Bilateralism and Patents: How they are Failing Both the Developed and the Developing World and What to Do About It,' (2007) 1 *Electronic Journal in Communication, Information & Innovation in Health* 71, 72.

[104] Sisule F. Musungu, 'Innovation and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions,' IQSensato Studies No. 1, (2008) pp 11-12. <http://www.acp-eu-

Industrialized nations use post-TRIPs treaties as tools to compel developing countries to ratchet up standards for the protection of intellectual property. These agreements embody what is referred to as the 'TRIPS-plus' effect.[105] According to Yu, there are three main types of provisions in the TRIPs-plus treaties: i) TRIPs-plus provisions, ii) TRIPs-extra provisions and iii) TRIPs-restrictive provisions. The TRIPs-Plus provisions increase commitments of the developing countries by ratcheting up protection standards prescribed in the TRIPs Agreement. The TRIPs-extra provisions add new commitments that were not covered by the TRIPs Agreement. The TRIPs-restrictive provisions do not increase the protection provided for under the TRIPs Agreement, but enclose the policy space of the developing countries by restricting how the TRIPs Agreement should be interpreted.[106] The industrialized nations, which were not able to push for higher standards for intellectual property protection at the multilateral forums, have managed to do so by imposing the post-TRIPs intellectual property treaties onto the developing countries.[107] The adoption of the post-TRIPs treaties involves vertical forum shifts whereby forums for the intellectual property policy and regulation making are shifted from multilateral to bilateral and regional forums.

Besides the FTAs, EPAs and bilateral investment treaties and bilateral intellectual property treaties, several industrialized and semi-industrialized nations negotiated and concluded the Anti-Counterfeiting Trade Agreement (ACTA). The ACTA is a plurilateral treaty designed to enhance mechanisms for protecting intellectual property rights and controlling the worldwide trade in counterfeit goods and pirated products. The initial ACTA discussions, which commenced in 2007, involved the United States, the EU

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trade.org/library/files/Musungu_EN_0708_GTZ_Innovation-and-intellectual-property-in-the-EC-CARIFORUM-EPA.pdf> (accessed 4 July 2012).

[105] Drahos, 'BITs and BIPs: Bilateralism in Intellectual Property,' (note 103) 792 - 3.

[106] Peter K Yu, 'The International Enclosure Movement,' (2007) 82 *Indiana Law Journal* 827, 866 - 870.

[107] Mohamed El-Said, 'Free Trade, Intellectual Property and TRIPS-Plus,' (2007) 28 *Liverpool Law Review* 1, 8.

countries, Canada, Japan and Switzerland. From 2008, negotiations were expanded to include Australia, Mexico, Morocco, New Zealand and Singapore. The ACTA was concluded in December 2010.[108]

The ACTA, whose main objective is to provide for an international framework which strengthens enforcement of intellectual property laws in order to deal with the worldwide trade in counterfeit goods, consists of six chapters. The treaty covers several matters including: civil enforcement mechanisms, border control measures, criminal enforcement and enforcement in the digital environment; enforcement practices and the development of specialist intellectual property expertise in law enforcement and customs, intra-governmental coordination of enforcement intellectual property laws, collection and publication of statistical data and information about intellectual property laws and procedures as well as public education; international cooperation and provision of technical assistance; procedures for reviewing implementation of the treaty and considering proposed amendments thereof and potential acceding parties; and mechanisms for dispute resolution among the signatories of the ACTA.[109]

The ACTA negotiations, which were shrouded with secrecy and conducted without involving the WIPO and the WTO,[110] are an example of the vertical regime

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[108] Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-counterfeiting Trade Agreement,' (2011) 33 *Sydney Law Review* 229, 232.

[109] Bryan Mercurio, 'Beyond the Text: The Significance of the anti-counterfeiting Trade Agreement,' (2012) 15 *Journal of International Economic Law* 361, 365 - 6.

[110] Eddan Katz & Gwen Hinze, 'Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms through Executive Trade Agreements,' (2009) *Yale Journal of International Law Online* 24, 26; See also, David S Levine, 'Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking,' (2011) 26 *American University International Law Review* 811, 812 - 818.

shifts.[111] The international intellectual property regulation-making activity was shifted from multilateral and bilateral forums to the plurilateral forum.

Despite being among the world's large economies, China and India were not invited to participate in the ACTA discussions. Similarly, Argentina and Brazil, which actively participated in the TRIPs Agreement negotiations and are among the fast growing economies, were excluded from the negotiations of the ACTA. It is obvious that Argentina, China, Brazil and India were excluded because they had been opposing industrialized nations' efforts to raise and enlarge standards for the protection of intellectual property.[112] Certainly, the countries which were left out of the negotiations will be coerced to sign the ACTA in future international trade negotiations. They will be coerced to join the ACTA through signing the FTA, the EPA or bilateral treaties, which incorporate provisions requiring these countries to sign the ACTA.

3.3. Implementation of the Global Intellectual Property Regulatory Policy

Several institutions, agencies and actors implement the global intellectual property regulatory policy. These include multilateral institutions, international agencies, industrialized nations and pro-intellectual property industry coalitions.

3.3.1. Multilateral Institutions

The WIPO and the WTO are the main multilateral institutions which oversee the implementation of the global intellectual property regulatory policy.

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[111] Jeffery Atik, 'ACTA and the Destabilization of TRIPs,' Legal Studies Paper No. 18, (2011) 6 - 7 <http://ssrn.com/abstract=1856285> (accessed 4 July 2012).

[112] Peter K Yu, 'Access to Medicines, BRICs Alliances, and Collective Action,' (2008) 34 *American Journal of Law & Medicine* 345, 349 - 352.

The WIPO is responsible for international intellectual property treaty-making, registration and implementation.[113] The organisation promotes intergovernmental cooperation in administering intellectual property. It provides technical assistance to developing countries by the training of their government officials, drafting intellectual property laws, and setting up infrastructures for administration and enforcement of intellectual property in these countries.[114] The WIPO has the Arbitration Centre which resolves intellectual property disputes between the WIPO member states [115] and administers several procedures for non-judicial resolution of international commercial disputes.

The TRIPs Agreement establishes the Council for the Trade-Related Aspects of Intellectual Property Rights. The Council is vested with powers to supervise the implementation of the Agreement and the WTO members' compliance with their obligations prescribed in the treaty. The Council acts as a forum for conducting consultations and providing assistance requested by the WTO member states in relation to the dispute settlement procedures.[116] The member states should notify the Council about the compliance of their national intellectual property laws with the treaty.[117] The Council is tasked to review the implementation of the TRIPs Agreement after the expiration of the transitional periods.[118]

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113 Marcus Hopperger, 'International Protection of Intellectual Property Rights, (1999) *International Criminal Review* 78, 79 - 80.
114 Paul Salmon, 'Co-operation Between the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), (2003) 17 *Journal of Civil Rights & Economic Development* 429, 437 - 440.
115 Renee Marlin-Bennett, *Knowledge Power: Intellectual Property, Information, and Privacy* (London: Lynne Rienner Publisher, 2004) 45.
116Article 68 of the TRIPs Agreement.
117 Article 63 (2).
118 Article 71.

3.3.2. International Agencies

There are several international agencies which implement the global intellectual property regulatory policy. These agencies include the Interpol, the WHO and the World Customs Organization (WCO).

The above international agencies: i) have sections, departments or taskforces whose activities include identifying, disrupting and dismantling intellectual property related crimes; ii) have databases that are used as central reference points for their members, their partner agencies, and public as well as private sector stakeholders; iii) provide technical assistance to municipal law enforcement agencies on issues relating to intellectual property-related violations; iv) work in collaboration with municipal law enforcement agencies, governments, international organisations, private industries and industry coalitions, and stakeholders that participate in the fight against piracy and counterfeiting; and v) act as forums for facilitating exchange of information among national law enforcement agencies, governments, international organisations, private industries and industry coalitions and other stakeholders involved in the fight against the counterfeit goods trade.[119]

3.3.3. United States

The United States government takes unilateral action to compel the WTO members to implement the global intellectual property regulatory policy. It employs the '301 procedure' to ensure the WTO members, which in the US' view, have inadequate legal regimes for protecting intellectual property of the US nationals. Gero and Lannan point out that, immediately after the adoption of the TRIPs Agreement, the United States

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[119] Harjit Sandhu, 'Product Counterfeiting and Interpol,' (1999) *International Criminal Police Review* 98, 99 - 100; See also Will Robison, 'The World Customs Organization,' (1999) *International Criminal Police Review* 81, 84-85. See also, Nitin Shukla & Tanushree Sangal, 'Generic Drug in India: The Counterfeit Spin,' (2009) 14 *Journal of Intellectual Property Rights* 236, 237.

stated that it would continue to use the '301 procedure' in future 'to address areas outside of the realm of the new WTO codes, and to press for what it conceives to be improvements to the TRIPs Agreement, even where the target countries are in compliance with the WTO provisions.'[120] The USTR has continued blacklisting WTO member states in the 'Priority Watch List' and 'Watch List' and the United States government takes action against the listed countries.

Gerro and Lannan argue that unilateral use of the US '301 procedure' contravenes the WTO dispute resolution procedures.[121] The unilateral action taken by a WTO member state which is not sanctioned by the organisation's dispute settlement authority goes against the idea that disputes among the members should be submitted to the organisation's dispute settlement machinery before an aggrieved member can take any action against the violating member state of the WTO.

3.3.4. Multinational Corporations and Industry Coalitions

Knowledge-based MNCs and industry coalitions from industrialized nations particularly the United States and the EU member states implement the global intellectual property regulatory policy. In the United States, the industry coalitions include the International Intellectual Property Alliance (IIPA), the International anti-Counterfeiting Coalition (IACC), the Pharmaceutical Manufacturers Association (PMA), the International Trademark Association (INTA), the Chemical Manufacturers Association (CMA), the Pharmaceutical Research and Manufacturing Association (PhRMA) and the Motor Equipment Manufacturers Association (MEMA). In the United Kingdom, the industry coalitions include the Anti-Counterfeiting Group (ACG) and the Alliance against Intellectual Property Theft (AIPT).

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[120] Gero & Lannan, 'Trade and Innovation: Unilateralism v. Multilateralism,' (note 6) 94.
[121] *Ibid* 95.

Knowledge-based MNCs and industry coalitions carry out several activities to implement the global intellectual property regulatory policy. In the case of the United States, the MNCs and industry coalitions: i) collect information about violations of intellectual property of the US nationals and submit the information to the USTR, ii) testify before the US Congressional Committees on matters concerning foreign intellectual property rights violations; iii) file petitions against countries violating intellectual property of the US nationals under the '301 procedure' which will receive the USTR's attention; and iv) advise the USTR on issues relating to enforcement of laws in order to protect intellectual property of the US nationals.[122] Additionally, the MNCs and industry coalitions conduct public relations campaigns, send delegates to testify before the US Congressional hearings on matters affecting their interests and 'they take all available routes to register their cases with the government, to remind the government and the public of financial losses the United States has suffered.'[123]

The above discussion demonstrates that institutions, agencies and actors controlled or financed by or representing interests of knowledge-based MNCs and industrialized nations implement the global intellectual property regulatory policy. The WIPO and the WTO are institutions financed and controlled by the industrialized nations. The industrialized nations and the MNCs control and support the WCO, the WHO and the Interpol. The United States takes unilateral action to compel other countries to implement the global regulation to protect intellectual property in their territories. The MNCs and industry coalitions from the industrialized nations implement the global intellectual property regulatory policy.

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[122] Liu, 'US Industry's Influence on Intellectual Property Protection Negotiations and Special 301 Actions,' (note 24) 93.
[123] *Ibid* 93.

3.4. Implementation of the Global Intellectual Property Regulatory Policy by Developing and Least Developed Countries

3.4.1. Transitional Periods

As pointed out earlier in this chapter, the TRIPs Agreement obligates the WTO members to enact laws that provide for criminal, civil and administrative mechanisms to protect intellectual property and set up effective mechanisms for enforcing such laws.[124] The treaty has granted developing and the least developed countries different transition periods for effecting reforms of their laws. The developing countries were granted five years (until 1 January 2000) to conform to the TRIPs Agreement.[125] The least developed countries were granted 10 years (until 1 January 2006) to apply standards prescribed in the treaty.[126]

3.4.2. Challenges Undermining Implementation of the Global Intellectual Property Regulatory Policy in Sub-Saharan Africa

The implementation of the global intellectual property regulatory poses challenges to developing countries including those in Sub-Saharan Africa. First, the transition periods prescribed in the TRIPs Agreement for developing countries to reform their laws are not enough to enable them to set up efficient regulatory and institutional structures for protecting intellectual property. With regard to the above point, Botoy enquires that, if industrialized nations took more than one hundred years to reform their intellectual property regulatory regimes why should they '... grant only five or even ten years to [developing and the least developed] countries? It would not be fair to ask [the latter countries] to achieve in five or ten years what industrialized [nations] took over one

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[124] Daniel Gervais, 'Of Cluster and Assumptions: Innovation as Part of a Full TRIPS Implementation,' (2009) 77 *Fordham Law Review* 2353, 2353 - 2354.

[125] Article 62 (2).

[126] Article 66 (1). Pursuant to paragraph 7 of the Doha Declaration on TRIPs Agreement and Public Health, the least developing nations were granted up to 2016 to provide for pharmaceutical patents. See, World Trade Organization, *The Doha Declaration on TRIPs Agreement and Public Health,* Adopted November 14, 2001.

hundred years to achieve.'[127] The industrialized nations took advantage of weak international intellectual property law which existed prior to the 20th century to attain high levels of technological and industrial development.[128] These nations reformed their intellectual property policies and laws after attaining high levels of technological and industrial development. The industrialized nations use the existing global intellectual property regulatory policy to prevent the developing countries from using the path they followed to attain high technological and industrial development.[129] With regard to the countries in Sub-Saharan Africa, Blakeney and Mengistie observe that the opportunity for these nations to follow 'the incremental [intellectual property rights] development path that the USA and other industrialized nations enjoyed is simply not open to [the Sub-Saharan African] countries.'[130]

Second, some industrialized nations, international agencies and experts provide technical assistance to developing countries to reform their intellectual property laws and institutions, but this assistance is not adequate.[131] Additionally, the objective of the technical assistance is to ensure, as May observes, that 'models of [intellectual property] law favoured by the US and the EU are established in countries that have had different systems (or no systems) for the protection of [intellectual property].'[132] Therefore, through providing the technical assistance, the United States and the EU member states

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127 Ituku E Botoy, 'From the Paris Convention to the TRIPs Agreement: A One-Hundred-and - Twelve Year Transitional Period for the Industrialized Countries,' (2005) 7 *Journal of World Intellectual Property* 115, 129.

128 Christopher May, 'The Hypocrisy of Forgetfulness: The Contemporary Significance of Early Innovations in Intellectual Property World,' (2007) 10 *Review of International Political Economy* 1, 22.

129 Graham Dutfield, '"To Copy is to Steal": TRIPs, Un(free) Trade Agreement and the New Intellectual Property Fundamentalism,' (2006) 1*Journal of Information, Law and Technology* 1, 8 -10; See also, Christopher May, 'The Denial of History: Reification, Intellectual Property Rights and Lessons of the Past,' (2006) 88 *Capital & Class* 33, 50 - 53.

130 Michael Blakeney & Getachew Mangestie, 'Intellectual Property and Economic Development in Sub-Saharan Africa,' (2011) 14 *Journal of World Intellectual Property* 238, 240 - 241.

131 Timothy P Trainer, 'Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?,' (2008) 8 *John Marshall Review of Intellectual Property Law* 47, 58 - 60.

132 Christopher May, 'Escaping the TRIPs' Trap: The Political Economy of Free and Open Source Software in Africa,' (2006) 54 *Political Studies* 123, 129.

transplant Euro-American intellectual property laws and practices into the developing countries' legal systems.

Third, the implementation of the global intellectual property regulatory policy is costly and difficult for many developing countries. Finger observes that undertaking the reforms required under the WTO/TRIPs 'cost each country some 150 million dollars, more than a full year's development budget in many of the developing countries.'[133] Due to huge costs of implementing the global policy, many Sub-Saharan African countries have intellectual property laws on paper, but have ineffectual mechanisms for enforcing those laws. As a result of the inadequate enforcement of the laws, intellectual property violations and the trade in counterfeit goods are thriving in many of these countries.

Fourth, the implementation of the TRIPs Agreement is responsible for transfers of huge amounts of resources (in the form of fees and royalties) from developing countries to industrialized nations. Drahos points out that one of the effects of the implementation of the TRIPs Agreement is that 'resources and royalties ... flow from South to North.'[134] Similarly, May remarks that the implementation of the TRIPs Agreement is responsible for 'large flows of fees' from the developing countries to knowledge-based MNCs based in the United States, the EU and Japan.[135] Dutfield shows that a 2001 World Bank publication indicated that the TRIPs Agreement represents 'a yearly US$ 20 billion plus transfer of wealth from the technology-importing nations, many of which are developing countries, to the technology exporters....'[136] Moreover, the developing countries use huge resources to import expensive technology-intensive

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133 Finger, 'Implementing the Uruguay Round Agreements: Problems for Developing Countries,' (note 1) 1100.

134 Peter Drahos, 'Thinking Strategically About Intellectual Property Rights (1997) 21 *Telecommunications Policy* 201, 205.

135 May, Escaping the TRIPs' Trap: The Political Economy of Free and Open Source Software in Africa,' (note 132) 129.

136 Graham Dutfield, 'Turning Knowledge into Power: Intellectual Property and the World Trade System,' (2007) 59 *Australian Journal of International Affairs* 533, 534.

products from the industrialized nations. Such outflows of the resources prevent the developing countries from acquiring modern technologies necessary to develop their technological and industrial capacities. Limited or lack of technological and industrial capability (necessary for the production of genuine goods) fuels intellectual property violations. Producers in many developing countries who have limited technological and industrial capability are not able to manufacture sufficient genuine goods for the local markets. This creates opportunities for some traders to supply counterfeit goods to the markets. Due to the limited technological ability on the part of local manufacturers in the developing countries, the bulk of goods protected by trademarks in the markets of these countries belong to foreign MNCs. The governments in the developing countries take a relaxed attitude towards protecting intellectual property of foreign MNCs because, as Trebilcock and Howse observe, 'a country would have little or no interest in protecting intellectual property rights in products of which it is solely an imitator and intends to remain so....'[137]

Fifth, the WTO dispute settlement machinery is not friendly to and works against interests of developing countries. Tandon demonstrates that the operation of the WTO dispute settlement machinery works unfavourably against the developing countries. The author points out that it is difficult for the developing countries to lodge complaints against the industrialized nations because the former countries do not have resources (funds, expertise and personnel) to enable them to lodge and conduct litigation using the WTO dispute settlement mechanisms successfully. Also, economic power imbalances between the developing countries and the industrialized nations prevent the former countries from lodging complaints against the latter nations. The developing countries are afraid of losing aid and access to the industrialized nations' markets. Moreover, the

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[137] Michael Trebilcock & Robert Howse, *Regulation of International Trade* (London: Routledge, 2nd ed, 1999) 314.

developing countries have limited ability to enforce decisions and awards granted against industrialized nations.[138]

Scholars have observed that the adoption of global intellectual property regulatory policy has its 'winners' and 'losers.' Stiglitz observes that the global policy is not balanced because it serves 'the interests and perspectives of the producers [of intellectual property], as opposed to the users, whether in developed or developing countries....'[139] Accordingly, the TRIPs Agreement does not reflect the interests of developing countries in Africa and their peoples because it imposes considerable social costs on poor people in developing countries because it restricts people's access to necessary products including medicines.[140] For Su, the winners are knowledge-based MNCs from the industrialized nations. These intellectual property owners have enforceable legal remedies against foreign infringers of their rights.[141] As for provisions of the TRIPs Agreement that address the transfer of technologies and provision of technical assistance to the developing countries, Adolf points out that the industrialized nations particularly the United States 'do not even honour these special provisions especially designed in the interest of developing countries.'[142]

Several authors have described the repugnant nature of the TRIPs Agreement to developing countries and their people. Hamilton observes that 'the TRIPs [Agreement represents an] old-fashioned imperialism [because it] imposes Western intellectual

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138 Yash Tandon, 'The World Trade Organization and Africa's Marginalisation,' (1999) 53 *Australian Journal of International Affairs* 83, 85 - 86.
139 Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books, 2002) 8.
140 Christopher May, 'Unacceptable Costs: The Consequences of Making Knowledge Property in a Global Society,' (2002) 16 *Global Society* 124, 135 -139.
141 Su, 'The Winners and the Losers: the Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries,' (note 95) 214.
142 Huala Adolf, 'Trade-related Aspects of Intellectual Property Rights and Developing Countries,' (2001) 39 *The Developing Economies* 49, 77.

property systems across – the- board....'[143] Yu observes that the TRIPs Agreement is not only imperialistic and coercive, but also 'does not take into consideration the goals and interests of less developed countries.'[144] For Rahmatian, the TRIPs Agreement 'is a major device that drives economic neo-colonialism forward, and the process of making of [the] TRIPs also demonstrates instructively this development.'[145] Bhagwati points out that the TRIPs Agreement 'does not involve mutual gain and positions the WTO primarily as collector of intellectual property-related rent on behalf of multinational corporations.'[146] In view of the above, it is apparent that the TRIPs Agreement does not serve the political, economic and social interests of the developing countries particularly those in Sub-Saharan Africa.

If the TRIPs Agreement operates against interests of developing countries and their people, why did the governments of these nations including those in Sub-Saharan Africa become parties to this treaty? Scholars have given accounts of factors that compelled the developing countries to become signatories of the TRIPs Agreement. Yu observes that unequal bargaining powers between industrialized nations and the developing countries, whereby the latter were overpowered; coercive tactics being applied by the industrialized nations over the developing countries; and the lack of or limited information about issues pertaining to intellectual property on the part of representatives of the developing countries, are considered to be the main factors that compelled the developing countries to become parties to the TRIPs Agreement.[147]

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143 Marci A Hamilton, 'The TRIPs Agreement: Imperialistic, Outdated, and Overprotective,' (1996) 29 *Vanderbilt Journal of Transnational Law* 613, 615 - 6.

144 Peter K Yu, 'TRIPs and Its Discontents,' (2006) 10 *Marquette Intellectual Property Law Review* 369, 374.

145 Andreas Rahmatian, 'Neo-Colonial Aspects of Global Intellectual Property Protection,' (2009) 12 *Journal of World Intellectual Property* 40, 42.

146 Jagdish Bhagwati, 'What it Take to Get Developing Countries into a New Round of Multilateral Trade Negotiations,' at <http://www.iatp.org/files/What_It_Will_Take_to_Get_Developing_Countries_.htm> (accessed 14 June 2010).

147 Yu, 'TRIPs and its Discontents,' (note 144) 371 - 376.

There is a view that 'networked' governance facilitated the adoption of the TRIPs Agreement. Drahos points out that governments of industrialized nations, knowledge-based MNCs and industry coalitions mobilized 'networks' to support the adoption of the TRIPs Agreement. Cooperation among the government agencies, MNCs and industry coalitions from the industrialized nations (which had adequate resources in terms of funds, personnel and expertise) during the TRIPs negotiations overwhelmed the representatives of developing countries.[148] The government agencies and non-state actors from the industrialized nations were able to create wide circles of influence that were used to support and push for the adoption of the TRIPs Agreement.[149] Since resources determine the outcomes of interactions among actors in negotiations,[150] actors from the industrialized nations succeeded in getting the TRIPs Agreement adopted because they had more resources than the representatives of the developing countries.

Another explanation is that actors and agents from industrialized nations managed to frame intellectual property as a 'trade-related' issue.[151] This perspective comprised the view that '[intellectual property rights] protection promotes trade and investment and therefore, promotes economic growth.'[152] These actors and agents managed to get support from both industrialized nations and some developing countries. They also managed to manipulate and convince other WTO member states into accepting the above standpoint. The industrialized nations managed to get the TRIPs Agreement adopted because their framing of intellectual property as a 'trade-related' issue was

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148 Drahos, 'Thinking Strategically About Intellectual Property Rights,' (note 134) 209.

149 Scott Burris, Peter Drahos & Clifford Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30,36 - 49.

150 Kenneth C Shadlen, 'Resources, Rules and International Political Economy: The Politics of Development in the WTO,' Global Development and Environmental Institute, Working Paper No. 09-01, (2009) 4 - 5.

151 Framing refers to a form of public dialogue in which actors wishing to change political processes offer an alternative conceptual scheme through which to interpret those processes. See Peter Drahos, 'Does Dialogue Make a Difference? Structural Change and the Limits of Framing,' (2008) 117 *Yale Law Journal Pocket Part* 268, 268.

152 Susan K Sell & Aseem Prakash, 'Using Ideas Strategically: the Contest Between Business and NGO Networks in Intellectual Property Rights,' (2004) 48 *International Studies Quarterly* 143, 154 - 155.

inadequately contested by actors from developing countries.[153] Additionally, most representatives from the developing countries in the TRIPs Agreement negotiations had limited expertise on intellectual property. This placed them in a disadvantaged position when negotiating with their counterparts from industrialized nations,[154] whose triumph was attributed to their expertise and command of intellectual property and trade issues and framing skills. The industrialized nations had think-tanks and academics who researched on issues about trade and intellectual property and furnished this information to the negotiators.[155] Moreover, representatives of the developing countries did not comprehend the costs of becoming parties to the TRIPs Agreement. Yu notes that many developing countries 'did not understand the consequence of the [treaty] and how the required protection would impact their countries in such areas as agriculture, health, environment, education and culture.'[156]

In relation to the above, the actors for industrialized nations made the signing of the TRIPs Agreement part of the 'single undertaking' package which involved signing other treaties including the Multilateral Agreements on Trade in Goods, the GATT of 1994 and the Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS). The signing of the TRIPs Agreement and the above treaties was a condition for joining the WTO. Countries which opted out of the WTO system, as Hindley observes, would find themselves 'without multilateral legal protection against US trade-policy actions. Hence, even countries that deeply disliked [the TRIPs] had a

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153 Drahos, 'Does Dialogue Make a Difference? Structural Change and the Limits of Framing,' (note 151) 270.

154 Drahos, 'Global Property in Information: The Story of TRIPs at the GATT,' (note 29) 15.

155 Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003) 8. See also, Ruth Gordon, 'Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime,' (2006) 8 *Berkeley Journal of African-American Law & Policy* 79, 116.

156 Yu, 'TRIPs and Its Discontents,' (note 144) 375.

major incentive to accept it.'[157] The developing countries chose the WTO option in order to be part of the world multilateral trade system.

Moreover, developing countries expected to obtain financial aid, political support, technical assistance and access to industrialized nations' markets if they became signatories of the TRIPs Agreement.[158] The developing countries' expectations to secure certain preferential trade privileges from the industrialized nations motivated them to sign the treaty. In exchange for joining the multilateral system for the protection of intellectual property, the developing countries expected to get more access to the markets of the industrialized nations.[159] Their dependence on access to the industrialized nations' markets, for instance, under the United States' GSPs, made the developing countries vulnerable to the US 301 Procedure. The United States' threats to withdraw benefits under the GSPs concurrently with the use of the 'procedure 301' acted as coercive instruments throughout the Uruguay Round negotiations. Abbott notes that, the United States threatened that it 'would continue to use Section 301 actions, and even abandon the GATT altogether, if its negotiation agenda was not accepted.'[160] The United States used its hegemonic powers to coerce the developing countries to become signatories of the TRIPs Agreement.

Moreover, the economic recession which began in the late 1980s and affected many developing countries heightened power differentials between industrialized nations and these developing countries and made the latter countries vulnerable to adopting

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[157] Brian Hindley, 'The TRIPs Agreement: the Damage to the WTO,' in Meir P Pugatch (ed) *The Intellectual Property Debate: Perspective from Law, Economics and Political Economy* (Cheltenham: Edward Elgar Publishing, 2006) 41.

[158] El-Said, 'Free Trade, Intellectual Property and TRIPS-Plus,' (note 107) 8.

[159] Edmund W Kitch, 'The Patent Policy of the Developing Countries,' (1994- 1995) 13 *University of California at Los Angeles Pacific Basin Law Journal* 166, 167.

[160] Frederick M Abbott, 'The TRIPs-legality of Measures Taken to Address Health Crises: Responding to US-State-Industry Position that Undermines the WTO,' in Daniel L M Kennedy & James D Southwick (ed) *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002) 314.

economic policies which the former nations advocated. Due to the economic slump, the developing countries were coerced to adopt policies which promoted their integration into the global economy and corresponded to the wishes of the United States and other industrialized nations. Sell points out that these policies were aimed at 'opening their markets, liberalizing trade and investment, adopting policies to protect intellectual property rights, privatizing public-sector enterprises, and embracing market mechanisms...'[161] It was under the above circumstances that the developing countries were coerced to become parties to the TRIPs Agreement.

There were other reasons which motivated or caused developing countries to sign the TRIPs Agreement. Prior to the signing of the TRIPs Agreement, some of these countries had signed FTAs and bilateral agreements with industrialized nations which prescribed standards for the protection of intellectual property similar to those in the TRIPs Agreement.[162] The NAFTA, which has more or less similar provisions to those in the TRIPs Agreement, was signed in 1992.[163] It was, therefore, pointless for the signatories of the FTAs and bilateral treaties to resist signing the TRIPs Agreement. Moreover, the developing countries lacked or had inadequate coordinating mechanisms and this factor undermined their capacity to participate in the TRIPs Agreement negotiations effectively.[164] This was partly due to the collapse of the coalition among the developing countries that had stood firm and resisted the inclusion of intellectual property matters as an agendum of the GATT's Tokyo Round negotiations. Additionally, there was the lack of trust amongst groups that represented interests of the developing countries

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161 Susan K Sell, 'Intellectual Property Protection and Antitrust in Developing World: Crisis, Coercion, and Choice,' (1995) 49 *International Organization* 315, 321.
162 Drahos & Braithwaite, *Information Feudalism: Who Owns the Knowledge,* (note 78) 105.
163 Alan O Sykes, 'TRIPs, Pharmaceuticals, Developing Countries, and the Doha "Solution,"' University of Chicago Law & Economics, Olin Working Paper No. 140, (2005) 4. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=300834> (assessed on 13 October 2013).
164 Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (London: Kluwer Law International, 2001) 43 - 44.

which focused more on single issues rather than the totality of issues under the negotiations.[165]

The discussion above demonstrates that there were several factors which paved the way for and facilitated the adoption of the TRIPs Agreement. The making of the treaty involved complicated procedures. With regard to the above point, Yu observes that the TRIPs Agreement had very complex origins. Instead of attempting to suggest which narrative is correct, one has to examine 'the tension between the different, and sometimes competing, narratives [in order to understand] the background behind the TRIPs negotiations....'[166]

3.5. The Global Intellectual Property Regulatory Policy and the Economic Development Debate

Scholars have been debating about the impact of the implementation of the global intellectual property regulatory policy prescribed in the TRIPs Agreement on innovation, flow of investments, flow of trade and economic growth and development. Scholars from industrialized nations notably Maskus,[167] Homere,[168] and Mossingoff,[169] are of the general view that, besides providing protection of rights of intellectual property owners from the industrialized nations and their economies, the implementation of the global intellectual property regulatory policy is beneficial to developing countries. At the core of this school of thought is the contention that the implementation of the global policy confers benefits to the developing countries in terms of: i) providing incentives for local intellectual

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165.Peter Drahos, 'Access to Knowledge: Time for a Treaty?', p 15 <http://www.iprsonline.org/ictsd/docs/Drahos_AccessKnowledge_treaty_BRIDGES9-4.pdf> (accessed 10 December 2012).

166 Yu, 'TRIPs and its Discontents,' (note 147) 379.

167 Keith E Maskus, *Intellectual Property Rights in the Global Economy* (Washington: Institute for International Economics, 2000).

168 Jean R Homere, 'Intellectual Property, Trade and Development: A View from the United States,' in Daniel J Gervais, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford: Oxford University Press, 2007).

169.Gerald J Mossingoff, 'The Importance of Intellectual Property Protection in International Trade,' (1984) 7 *Boston College International & Comparative Law Review* 235.

property owners to invest in research and development, hence increase their knowledge and innovative capabilities; ii) increasing the flow of foreign direct investments and modern technologies, hence facilitating the improvement of productivity; iii) increasing the flow of trade to the developing countries; and iv) promoting economic growth and development of the developing countries.

Scholars from developing countries including Correa, [170] Hang,[171] Khor [172] and Kumar [173] and academics from Sub-Saharan Africa such as Sikoyo *et al*,[174] Adewole[175] and Tamale [176] challenge the view that developing countries obtain benefits as a result of implementing the global intellectual property regulatory policy. These scholars argue that high standards for the protection of intellectual property: i) create monopolies of information and knowledge-based resources that restrict flow of those resources to developing countries; ii) promote rent-seeking tendencies that work in favour of owners of intellectual property in industrialized nations; iii) limit the accessibility of necessary products such as medicines to poor people in the developing countries; iv) restrict the flow of modern technologies from the industrialized nations to the developing countries; and v) facilitate the flow of resources (including fees and loyalties) from the developing countries to the industrialized nations and, therefore, undermine economic growth and development of the former countries.

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170 Carlos M Correa, *Intellectual Property Rights, WTO and the Developing Countries: The TRIPs Agreement and Policy Options* (London: Zed Books, 2000).

171 Ha-Joon Hang, 'Intellectual Property and Economic Development: Historical Lessons and Emerging Issues,' (2001) 2 *Journal of Human Development* 287.

172 Martin Khor, *Globalization and South: Some Critical Issues* (Penang: Third World Network, 2000).

173Nagesh Kumar, 'Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries,' (2003) 47 *Economic & Political Weekly* 209.

174 George M Sikoyo, Elvin Nyukuri & Judi W Wakhungu, 'Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda,' African Centre for Technology Studies, Ecopolicy Series No. 16, (2006) p 8.

175 Ayodele A Adewole, 'Globalization, the TRIPs Agreement and their Implications on Access to Essential Medicines for Developing Countries: A Case Study of Nigeria,' (2010) *NIALS Law & Development Journal* 171, 171.

176 Sylvia Tamale, 'Gender Trauma in Africa: Enhancing Women's Links to Resources,' (2004) 48 *Journal of African Law* 50, 58.

Other critics have challenged the view that high standards for the protection of intellectual property promote economic development. The United Kingdom Commission on Intellectual Property observes that 'there appears to be little research that directly links the [intellectual property rights] regime to ... innovation and development.'[177] In supporting the above point, Mercurio notes that '... some studies ... conclude that connection is fairly weak (and there may not be a connection for [the least developed countries]).'[178] With regard to the assertion that protection of intellectual property facilitates increase in the flow of investments, McDorman observes that 'the prevailing view appears to [suggest] that increased intellectual property protection leads to increased investment. However, it is difficult to reconcile this approach with the experiences of Japan, Taiwan, and Hong Kong.'[179]

Other scholars have argued that there is evidence which disproves the contention that legal regimes in developing countries that provide for weak protection of intellectual property deter flow of investments and trade into these countries. They point out that China has experienced high flows of foreign direct investments and trade in recent few years despite having inadequate laws and institutions for protecting intellectual property.[180] In emphasizing the above view, Yu observes that intellectual property protection in China remains inadequate and ineffective, but foreign knowledge-based MNCs are attracted to the country. The author notes further that: '[to] many of these [corporations], the lower costs and the promise of an enormous market... easily make up for the losses incurred by ineffective intellectual property protection.... [The

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177 United Kingdom Commission on Intellectual Property Rights, *Integrating Intellectual Property and Development Policy* (London: CIPR, 2002) 21.
178 Bryan Mercurio, 'Reconceptualising the Debate on Intellectual Property Rights and Economic Development,' (2010) 3 *Law & Development Review* 65, 65 - 67.
179 McDorman, 'US - Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property,' (note 69) 117.
180 Wei Shi, *Intellectual Property in the Global Trading System* (Berlin: Springer, 2008) 33.

corporations] do not find stronger protection a prerequisite for obtaining profits in the first place.' [181]

Strong legal regimes for the protection of intellectual property alone cannot provide the necessary and sufficient incentives for foreign knowledge-based MNCs to invest in developing countries. Many developing countries with inadequate intellectual property legal regimes can attract foreign direct investments from industrialized nations provided that they have political, economic and legal conditions which are attractive to such investments.[182] These factors include the availability of cheap labour and large markets, existence of laws that guarantee against expropriation, provision for repatriation of profits and the presence of incentives investors, for instance, tax exemptions.

Yu observes that policymakers, industry groups, scholars and commentators from industrialized nations 'have not been able to demonstrate empirically how stronger protection [of intellectual property] ... benefit less developed countries and how such protection... maximize[s] global welfare.'[183] Thus, there is insufficient evidence to support the assertion that the implementation of the global intellectual property regulatory policy will assist the developing countries to attain high levels of economic growth and development. Besides being the tool for protecting intellectual property of knowledge-based MNCs, the implementation of the global intellectual property regulatory policy limits transfer of technologies from industrialized nations to the developing countries and

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[181] Peter K Yu, 'Intellectual Property, Economic Development, and the China Puzzle,' in Daniel J Gervais (ed) *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPs Plus Era* (Oxford: Oxford University Press, 2007) 180 - 181.

[182] Clifford J Schultz II & Alexander Nill, 'The Societal Conundrum of Intellectual Property Rights: A Game-Theoretical Approach to Equitable Management and Protection of IPR,' (2002) 36 European *Journal of Marketing* 667, 684.

[183] Yu, 'TRIPs and Its Discontents,' (note 144) 381.

restricts access to medicines by the people in these nations, thus 'undermines prospects for improved quality of life and economic development in developing countries.'[184]

3.6. Conclusion

This chapter has examined issues about the evolution, features and implementation of the global intellectual property regulatory policy of which the anti-counterfeiting policy forms part. Economic transformations that occurred in Europe and the United States between the 19th and 20th centuries necessitated the adoption of national laws, bilateral agreements and the pre-TRIPs Agreement treaties for the protection of intellectual property, which later paved the way for the adoption of the TRIPs Agreement that globalised intellectual property regulatory policy. This agreement was followed by the post-TRIPs treaties that provide for higher standards for the protection of intellectual property than those prescribed in the TRIPs Agreement. Knowledge-based MNCs and industry coalitions from the United States, the EU member states and Japan lobbied for the adoption of the TRIPs Agreement. Subsequently, the MNCs and the industrialized nations pushed for the adoption of the post-TRIPs intellectual property treaties. The implementation of these treaties benefits mostly knowledge-based MNCs from the United States, the EU member states and Japan and their economies.

Developing countries in Africa, Asia and South America did not take part in negotiating and making the pre-TRIPs intellectual property treaties. The participation of these nations in the negotiations and adoption of the TRIPs Agreement and post-TRIPs treaties was limited or minimal. Industrialized nations transplanted the provisions of the pre-TRIPs Agreement onto the developing countries. They have also imposed the TRIPs

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[184] Mohsen Al Attar & Rebekah Thomson, 'How the Multi-level Democratisation of International Law-making Can Effect Popular Aspirations Towards Self-Determination,' (2011) 3 *Trade Law & Development* 65, 76. See also Sikoyo *et al*, 'Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda,' (note 174) 8.

Agreement and post-TRIPs treaties on the developing countries. The developing countries are required to revise or adopt laws and establish institutions protecting intellectual property and controlling intellectual property violations including counterfeiting.

The implementation of the global intellectual property regulatory policy has had several undesirable implications for developing countries in Sub-Saharan Africa. These include the costs involved in setting up regulatory structures and systems for implementing new intellectual property regulatory regimes. This inhibits the ability of the developing countries to enforce these laws. Most the developing countries have intellectual property laws and institutions, but these nations have limited capacity to enforce the laws. Moreover, the implementation of the global intellectual property regulatory policy has had economic implications in terms facilitating flow of resources from the developing countries to industrialized nations. Also, the implementation of the intellectual property global regulatory policy has resulted in high prices for brand-name goods and makes such products unaffordable to low-income consumers in these nations. Despite adopting the global intellectual property regulatory policy, most developing countries are unable to control the trade in counterfeit goods efficiently. Arguably, the implementation of this global policy has created conditions that catalyse the operation of the counterfeit goods trade in Sub-Saharan African nations.

CHAPTER FOUR

REGULATORY TECHNIQUES FOR CONTROLLING THE COUNTERFEIT GOODS TRADE

4.0. Introduction

Government authorities and agencies and non-state actors use different types of regulatory mechanisms to control the trade in counterfeit goods. The regulatory techniques fall into two broad categories, namely laws and alternative regulations. Scholars from industrialized nations have examined the laws and alternative regulations and appraised their effectiveness in curbing the counterfeit goods trade.[1] With regard to developing countries particularly the nations in Sub-Saharan Africa, literature has focused on describing the efficacy of anti-counterfeiting laws, [2] but there is little research which has looked at alternative regulations that deal with the trade in counterfeit goods. Besides examining the deficiencies of the laws, the literature has explored inadequately political, economic and social factors that prevail in the developing countries and how these factors impact on the application of the anti-counterfeiting laws and alternative regulations.

This chapter conceptualises regulation and applies this concept to the anti-counterfeiting regulation. It examines theories that justify the adoption of regulation and their application to control the trade in counterfeit goods. It describes rationales for regulating markets in order to explain reasons for adopting regulatory interventions to

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1 See Jonathan S Jennings, 'Trademark Counterfeiting: An Unpunished Crime,' (1989) 89 *Journal of Criminal Law & Criminology* 805, 806 - 808; Brian J Kearney, 'The Trademark Counterfeiting Act of 1984: A Sensible Legislative Response to Ills of Commercial Counterfeiting,' (1985) 14 *Fordham Urban Law Journal* 115, 120 - 144; Malcolm Todd, 'The New United Kingdom Trade Mark Law,' (1995) 17 *World Patent Information* 24, 24 - 27.

2 See K M Waziri, 'Intellectual Property Piracy and Counterfeiting in Nigeria: The Impending Economic and Social Conundrum,' (2011) 4 *Journal of Politics & Law* 196, 199 -200; Magnus A. Atemnkeng, Katelijne De Cock & Jacqueline Plaizier-Vercammen, 'Quality Control of Active ingredients in Artemisinin-derivative Antimalarials within Kenya and DR Congo,' (2007) 12 *Tropical Medicine and International Health* 68, 68 - 69.

address the trade in counterfeit goods. It examines anti-counterfeiting regulatory techniques and examines their potential for controlling the counterfeit goods trade. The chapter presents an overview of the regulation of the trade in counterfeit goods in developing countries with a particular reference to some countries in Sub-Saharan Africa and highlights the potential of the laws and alternative regulations for dealing with the counterfeit goods trade in the developing countries.

The main theme in this chapter is that laws and alternative regulations are policy instruments for controlling the trade in counterfeit goods in both industrialized and developing countries. Several inadequacies of the laws and enforcement mechanisms undermine the efficacy of the anti-counterfeiting laws in both industrialized and developing countries. Economic, political, legal and social factors undermine the efficacy of the anti-counterfeiting laws and institutions in the developing countries. Several socio-economic factors impinge on the efficacy of the alternative anti-counterfeiting regulations in developing countries particularly the Sub-Saharan Africa nations.

4.1. Conceptualising Regulation of the Counterfeit Goods Trade

The starting point for conceptualising anti-counterfeiting regulation is to describe the term regulation which scholars have defined narrowly and broadly. In its narrow sense, regulation involves a sustained and focused control exercised by public agencies, on the basis of legislative mandates, over activities or conduct of persons.[3] This view presupposes that public authorities promulgate rules, standards or principles to control behaviour of persons. Sanctions are used to ensure compliance of the rules, standards or principles that are enforced by government authorities or public agencies. An example of such regulations is a statutory instrument enacted by the legislature or a government

[3] Giandomenico Majone, 'Regulation and Its Modes,' in Giandomenico Majone (ed) *Regulating Europe* (London: Routledge, 1996) 9.

department and enforced by public authorities or agencies. The above conceptualisation is subject to several criticisms. First, non-governmental entities and non-state actors do make regulations. Second, in some instances, there is no compulsion that obligates the regulated persons to act in a manner prescribed by the regulations. Third, in some situations, compliance with the regulations can be attained without a threat of sanctions. Fourth, entities or actors other than public authorities do implement or enforce regulations.[4]

In its broader perspective, the regulation refers to the use of any form of mechanisms by public authorities and non-state actors to influence or steer behaviours of persons in order to achieve certain policy objectives.[5] In this perspective, the regulation involves setting of rules, standards or principles which govern the conduct of public or private actors.[6] This viewpoint takes into account the fact that, first, public authorities and private actors do make regulations. Second, regulations may originate from national and international sources. Third, techniques other than compulsion can be used to influence or steer behaviours of regulated persons. Both sanctions and non-sanction techniques are used to influence or steer behaviours of the regulated persons. Fourth, government authorities and agencies and non-state actors do implement regulations. Fifth, the adoption and implementation of regulations are aimed at achieving economic or social policy objectives.[7]

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[4] Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation* (Cambridge: Cambridge University Press, 2007) 4.

[5] Robert Baldwin, Colin Scott & Christopher Hood, 'Introduction' in Robert Baldwin, Collin Scott & Christopher Hood (eds), *A Reader on Regulation* (Oxford: Oxford University Press, 1998) 3 - 4.

[6] Nupur Chowdhury & Ramses A Wessel, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18 *European Law Journal* 335, 338.

[7] Robert Baldwin, Martin Cave & Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford: Oxford University Press, 2nd ed, 2012) 2 - 3. See also Sol Picciotto, 'Paradoxes of Regulating Capitalism,' (2011) 1 *Oñati Socio-Legal Series* 1, 3 - 4.

Regulations can be classified in several ways. They can be categorised as 'economic regulation' or 'social regulation.' The economic regulations address market failures such as inadequate competition and information deficits in the markets. The social regulations deal with issues such as health and safety issues and environmental and consumer protection. Regulations can also be classified as 'command-and-control' regulations or alternative regulations. The 'command-and-control' regulations apply 'hard' policy instruments such as statutory instruments, judicial orders or administrative decrees enacted or given by the government authorities or public agencies to control or modify behaviours of persons. The alternative regulations involve the use of 'soft' policy instruments such as market-based instruments, information-based instruments, technology-based instruments, guidelines, declarations, resolutions and codes of conduct[8] to influence or steer behaviours of regulated persons.

Based on the broader definition of regulation, I define the anti-counterfeiting regulation as any mechanism adopted and implemented by government authorities and non-state actors to influence or steer behaviours of persons or actors in order to achieve objectives of the anti-counterfeiting policy. The regulated persons or actors include government authorities, non-state entities and suppliers and consumers of goods. Both 'hard' and 'soft' regulations are used to control the trade in counterfeit goods. The 'hard' regulations comprise statutory instruments and judicial orders. The 'soft' regulations include market-based, information-based and technology-based instruments. Government authorities and non-state actors as well as national and international agencies make the anti-counterfeiting regulations. Both government entities and non-state actors implement the anti-counterfeiting regulation. Sanctions and non-sanction mechanisms are used to influence or steer behaviours of the regulated persons.

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[8] Charalampos Koutalakis, Aron Buzogany & Tanja A Borzel, 'When Soft Regulation is not Enough: The Integrated Pollution Prevention and Control Directive of the European Union,' (2010) 4 *Regulation & Governance* 329, 330.

4.2. Theories of Regulation and the Control of the Counterfeit Goods Trade

Through the operation of markets, suppliers and consumers meet to sell and purchase counterfeit goods. Accordingly, the trade in counterfeit goods can be tackled by controlling the demand for counterfeit products and the supply of the commodities in the markets. The analysis of the perfectly competitive market and theories which rationalise its regulation is, therefore, the starting point for examining the regulatory control of the trade in counterfeit goods in the markets and the theoretical underpinnings of the anti-counterfeiting regulation.

The economic theory hypothesizes a perfectly competitive market as the one where: i) there is a large number of suppliers and buyers of commodities such that activities of any one of the market actors will have only minimal impact on outputs or prices of the commodities in the market; ii) the suppliers produce and sell homogenous commodities; iii) there are no costs for the suppliers to enter or exit the market; iv) the suppliers and buyers have perfect information about the commodities traded; and v) costs and benefits of market transactions are accrued to or borne by the suppliers and buyers.[9] The theory holds further that the perfectly competitive market is a device for the efficient allocation of resources and advancing social and economic welfare. This theory postulates that government intervention into the perfectly competitive market through regulation is unnecessary because the regulation hinders the efficient operation of such market.[10]

Where some of the above conditions of perfectly competitive markets are missing, the markets will experience imperfections which are known as market failures.

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[9] Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Portland: Hart Publishing, 2nd ed , 2007) 56.

[10] M B Adams & G D Tower, 'Theories of Regulation: Some Reflections on Supervision of Insurance Companies in Anglo-American Countries,' (1994) 19 *The Geneva Papers on Risk & Insurance: Issues & Practice* 156, 160.

The market failure occurs where: there is deficient competition due to the existence of monopoly or oligopoly; or there are information asymmetries or deficiencies which limit the capacity of suppliers or buyers to make informed decisions; or there are barriers which prevent new firms from entering into the market, or there are costs for the suppliers to exit from the market. The market failure will also occur where: there is product differentiation, which causes the lack of product homogeneity; or benefits or costs arising from market transactions accrue to or are borne by third parties. Under the above circumstances, the market fails to act as an instrument for the efficient allocation of resources and attainment of desired economic and social outcomes.[11]

Addressing market failures is the focal point of the public interest theory which postulates that the regulation is required to address market imperfections.[12] This theory presupposes that the regulation is needed to address imperfect competition, unbalanced market operations and undesirable market results and missing markets.[13] According to this theory, the regulation is a tool for safeguarding the interests of the public by overcoming market failures. This is because the regulation enables the competitive market to allocate resources efficiently. Since the assumption under this regulatory model is that correcting the market failures increases the welfare of the society, the theory holds that the adoption of the regulation will eventually serve collective goals and safeguard the interests of the public.[14]

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11 Iain Ramsay, 'Framework for Regulation of the Consumer Marketplace,' (1985) 8 *Journal of Consumer Policy* 353, 354 - 355.

12 Oliver James, 'Regulation Inside Government: Public Interest Justifications and Regulatory Failures,' (2000) 78 *Public Administration* 327, 330.

13 Andrei Shleifer, 'Understanding Regulation,' (2005) 11 *European Financial Management* 439, 440.

14 Michael Hantke-Domas, 'The Public Interest Theory of Regulation: Non-Existence or Misrepresentation?,' (2003) 15 *European Journal of Law & Economics* 165, 165. See also, Robert G Harris & James M Carman, 'Public Regulation of Marketing Activity: Part I: Institutional Typologies of Market Failure,' (1983) *Journal of Macromarketing* 49, 52 -56.

The public interest theory, therefore, justifies the regulation of the trade in counterfeit goods, because the operation of the trade undermines the efficient operation of competitive markets. The counterfeit goods trade undermines the competitiveness of suppliers of genuine goods because it acts as a barrier which prevents some traders of genuine goods from entering into the markets, it affects supply of information to consumers and impairs their ability to make informed purchase decisions; and it imposes externalities on non-market actors as well as the general society.[15] Therefore, the regulation of the trade in counterfeit goods is required to correct the above market imperfections by: controlling unfair trade practices, addressing information asymmetries between suppliers and consumers of goods, protecting non-market actors and the general public against the negative externalities, and correcting undesirable effects caused by the operation of the counterfeit goods trade. Since the anti-counterfeiting regulation is intended to safeguard the welfare of consumers, economic interests of traders and the general public, such regulation is a policy instrument for serving the interests of the public against undesirable effects of the trade in counterfeit goods.

The private interest theory conceives the regulation as a response of politicians to the demands of interest groups for the adoption of such regulation. The regulation serves the interests of the groups which influence its adoption.[16] This theory holds that private interest groups use the political and law-making processes to secure for themselves regulatory benefits. One variant of the private interest theories, namely the public choice theory sees politics as a market place where the regulation is a good sold by the politicians to the highest bidders – groups interested in getting the regulation adopted. The interest groups, which influence politicians to make decisions that favour the

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[15] Peter Lowe, 'The Scope of the Counterfeiting Problem,' (1999) *International Criminal Police Review* 91, 93. See also Simon Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (2010) 54 *Crime Law & Social Change* 21, 31 - 4.

[16] Randall S Kroszner & Philip E Strahan, 'What Drive Deregulation? Economics and Politics of Relaxation of Banking Branching Restrictions,' (1999) *Quarterly Journal of Economics* 1437, 1437.

interests of the groups, compete against each other. Different groups struggle and bid for regulations which are favourable to their interests.[17] The groups which are well-resourced, well-organised and offer the highest bids will secure favourable regulations from the politicians at the expense of other groups that are under-resourced and weakly organised. Since it is generally viewed that associations of traders (of which manufacturers and sellers of goods or services are members) are well-resourced and have the capacity to organise more effectively and can offer higher bids than other groups, politicians are more likely to adopt regulations that favour traders' interests over the interests of other groups such as consumers.[18]

Applying the private interest theory, the groups which are mostly affected by the trade in counterfeit goods (suppliers and consumers of genuine goods) are interested in having the anti-counterfeiting regulation adopted to protect their interests. Thus, groups that expect to benefit from the adoption and implementation of the regulation to control the trade in counterfeit goods will have high incentives to influence politicians to adopt such regulation. Since traders are more economically powerful and well-organised than consumers, organisations of traders are more likely to push for the adoption of the anti-counterfeiting regulation than the latter group. The traders can influence the regulatory process and this may result in the adoption of the anti-counterfeiting regulation that safeguards the interests of manufacturers and sellers of genuine goods.

Another variant of the private interest theory, known as the regulatory capture theory, posits that the regulatory process is 'captured' by interest groups and the regulation adopted through this process operates primarily for the benefits of such

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[17] David D Haddock & Jonathan R Macey, 'Regulation on Demand: A Private Interest Model, with an Application to Inside Trading Regulation,' (1987) 30 *Journal of Law and Economics* 311, 312.
[18] Collin Scott & Julia Black, *Cranston's Consumer and the Law* (London: Butterworths, 2000) 29.

groups.[19] The regulatory capture involves those persons the manipulation of regulatory agencies mandated to formulate and adopt the regulation by those persons who are to be regulated.[20] As a result, public authorities will make regulations that serve the best interests of those persons they are regulating. [21] It is common for the regulated industries to influence regulators in order to benefit from the regulatory rents.[22]

As discussed in Chapter Three, the process that led to the adoption of the TRIPs Agreement which embodies the global intellectual property and anti-counterfeiting regulatory policy was 'captured' by knowledge-based MNCs and industry coalitions from industrialized nations particularly the United States and the EU member states.[23] At the national level, the MNCs and industry coalitions in the United States lobbied for the reform of the US domestic trade policy and laws. At the global level, the MNCs and their coalitions from the United States and their counterparts from the European Community and Japan lobbied and pushed for the adoption of the TRIPs Agreement; afterwards, these industrialized nations pushed (and continue to pressurize) other WTO member states particularly developing countries to become parties to post-TRIPs Agreement treaties. The treaties require nations to adopt legislative, administrative and institutional mechanisms to protect intellectual property and control the trade in counterfeit goods in their territories. The MNCs (which are regulated by the national and international intellectual property and anti-counterfeiting laws) captured the national and global institutions which adopted the laws and the corporations that benefitted from the application of the laws.

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[19] George J Stigler, 'The Theory of Economic Regulation,' in Robert A Dahl, Ian Shapiro & Jose A Cheibub (eds) *The Democracy Sourcebook* (Massachusetts: MIT Press, 2003) 393.
[20] T Makkai & J Braithwaite, 'In and Out the Revolving Door: Making Sense of Regulatory Capture,' in in Robert Baldwin, Collin Scott & Christopher Hood (eds), *A Reader on Regulation* (Oxford: Oxford University Press, 1998) 173 - 174.
[21] Baldwin *et al*, *Understanding Regulation: Theory, Strategy and Practice* (note 7) 46 - 48.
[22] Tony Prosser, 'Theorising Utility Regulation,' (1999) 62 *Modern Law Review* 196, 203 - 205.
[23] Sol Picciotto, 'Defending Public Interest in TRIPs and WTO,' in Peter Drahos & Ruth Mayne (eds) *Global Intellectual Property Rights: Knowledge, Access and Development* (New York: Palgrave MacMillan: 2002) 229.

4.3. Rationales for Regulating the Counterfeit Goods Trade

There are two broad rationales for adopting the regulation. These are the market-based and public policy rationales. The market-based justifications which apply the public interest arguments hold that the regulation is needed to address imperfections in the markets.[24] The regulation prevents suppliers of goods or services from abusing their dominant market powers and controls restrictive practices, removes barriers for some suppliers to enter into or exit from the markets, ensures that there is an increased supply of information about commodities in the markets; and addresses externalities which accrue to or are borne by non-market actors.[25]

The regulation of trade in counterfeit goods is intended to address the market imperfections. The imperfections are as follows: first, there is a tendency for suppliers of counterfeit goods to free-ride on investments made by trademark owners. This causes distortions of the competition in the markets. Second, the counterfeit goods trade acts as a barrier which prevents some traders of genuine goods from entering into markets. Third, there is a reduction in the supply of information to the markets as a result of the operation of the counterfeit goods trade. This increases consumer search costs, causes consumer confusion and impairs the ability of consumers to make informed purchase decisions.[26] Fourth, the counterfeit goods trade imposes negative externalities on non-contractual consumers and the society in general because it causes reduction of government revenue, loss of jobs and loss of resources used to control counterfeiting activities and associated crimes.[27]

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[24] Anthony I Ogus, 'Regulatory Institutions and Structures,' (2002) 73 *Annals of Public & Cooperative Economics* 627, 629.

[25] Damien Geradin, Rodolphe Munoz & Nicolas Petit, *Regulation Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar: Cheltenham, 2005) 25.

[26] Ellen R Foxman, Darrel D Muehling & Phil W Berger, 'An Investigation of Factors Contributing to Consumer Brand Confusion,' (1990) 24 *Journal of Consumer Affairs* 170, 171 - 173.

[27] Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (note 15) 31 - 32.

Public policy justifications for regulating markets are based on several grounds. First, the regulation of markets is needed to achieve distributive justice in that it reallocates powers and resources on the basis of what is regarded to be just or equitable.[28] Powers and resources are redistributed from 'strong' or 'advantaged' groups to 'weak' or 'disadvantaged' groups. The powers and resources can also be redistributed from the affluent to the poor or from suppliers of goods or services to consumers of those commodities. The main assumption here is that, due to inequalities in resources, the latter groups are less powerful than the former groups.[29] Second, the regulation is required to protect individuals even where the application of such regulation may override preferences of those individuals.[30] Third, the regulation is intended to enhance the supply of goods and services in the markets where such commodities are in short supply. Fourth, the regulation may be necessary to safeguard community values such as to encourage fair dealings, to maintain or restore public trust in the markets, and to make markets work smoothly and transparently.[31]

Doellinger [32] and Goldstone and Toren [33] describe some public policy rationales for controlling the trade in counterfeit goods. The authors point out that the anti-counterfeiting regulation is intended, first, to prevent consumers from buying or using counterfeit goods, even where they wish to exercise their freedom to consume those counterfeit products. The regulation of the trade in counterfeit goods is intended to safeguard the welfare of consumers and interests of the general society by, for instance,

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[28] Iain Ramsay, 'Consumer Credit Law, Distributive Justice and Welfare State,' (1995) 15 *Oxford Journal of Legal Studies* 177, 181-182. See also, Anthony Ogus, 'W(h)ither the Economic Theory of Regulation? What Economic Theory of Regulation?' in Jacint Jordana & David Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham: Edward Elgar, 2004) 35.

[29] Baldwin *et al*, *Understanding Regulation: Theory, Strategy and Practice* (note 7) 23.

[30] Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (Cambridge: Cambridge University Press, 2001) 33.

[31] *Ibid* 33.

[32] Chad J Doellinger, 'A New Theory of Trademarks,' (2007) 111 *Pennsylvania State Law Review* 101, 105 - 111.

[33] David J Goldstone & Peter J Toren, 'The Criminalization of Trademark Counterfeiting,' (1998) 31 *Connecticut Law Review* 1, 8-19

prohibiting consumption of 'safety critical' counterfeit goods. Second, to safeguard fair trade practices and promote the integrity of competitive markets. In so doing, the regulation enhances public trust and confidence in the market transactions. Third, to promote honesty and encourages fair dealings between suppliers of goods on the one hand, and consumers of such commodities and the general public on the other.

4.4. Regulatory Techniques for Controlling the Counterfeit Goods Trade

As I observed earlier in this chapter, regulatory policy instruments for controlling the counterfeit goods trade fall under two broad categories: laws and alternative regulations. The former comprise legislative instruments, administrative decrees and judicial orders enacted or made and enforced by public authorities including the legislature, judiciary and the police. The latter consists of regulations adopted by government authorities and agencies and non-state actors and are implemented by the use of non-law-related mechanisms. I examine the above regulatory techniques in the section below.

4.4.1. Anti-counterfeiting Laws

The use of laws to control the counterfeit goods trade dates back to the Middle Ages. During this era government authorities in some nations in Europe passed decrees to control counterfeiting and the trade in counterfeit goods. Rogers [34] and Paster[35] provide some narratives about how the European countries used laws to prohibit and punish imitations of trademarks and sale of products imprinted with forged trademarks since the Middle Ages. The authors point out that in the 14th century, the Elector of Palatine issued an edict that criminalised the sale of counterfeit wine and this crime was punishable by hanging. Under the edict of Charles of V dated 1544, counterfeiting of Flemish tapestries

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[34] Edward S Rogers, 'Some Historical Matters Concerning Trade Marks,' (1910-1911) 9 *Michigan Law Review* 29, 33 - 35.

[35] Benjamin G Paster, 'Trademarks - Early History,' (1969) 59 *Trademark Report* 551, 557 - 561.

was an offence. In France, by the edict of Charles IX of 1564, imitation of marks on goods amounted to a crime which was punished capitally. Statutes protecting the drapers of Carcassone dated 1666 imposed the penalty of pillory on imitators of marks on clothing. In the 16th century, England passed a statute which placed counterfeiting of trademarks on cloth under the same category as counterfeiting of the currency.

Besides criminalising imitations of trademarks and the use of forged trademarks on goods, the laws in some countries in Europe prescribed counterfeiting as a civil wrong. Rogers observes that in France, trademarks were in use from ancient times. The trademarks were regarded as 'property' and protected against infringement by civil remedies.[36] Unauthorised imitations of trademarks amounted to civil wrongs and the aggrieved trademark owners were entitled to seek civil remedies against violators of rights to the trademarks.

The contemporary anti-counterfeiting laws in most countries in Europe and the United States emerged during the 19th and 20th centuries.[37] As it will be demonstrated later in this chapter, the anti-counterfeiting laws that were enacted in Europe and the United States or their replicas were transplanted onto their colonies particularly those in Sub-Saharan Africa during the 19th and 20th centuries. The anti-counterfeiting laws comprise criminal law and civil law whose salient features are highlighted below.

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[36] Rogers, 'Some Historical Matters Concerning Trade Marks,' (note 34) 33.

[37] Jed S Rakoff & Ira B Wolff, 'Commercial Counterfeiting: The Inadequacy of Existing Remedies,' (1983) 73 *Trademark Reporter* 493, 505 - 513. See also Paul R Paradise, *Trademark Counterfeiting, Product Piracy, and the Billion Dollar Threat to the U.S. Economy* (Westport: Greenwood Publishing: 1999) 15 -19.

a) Criminal Law

Criminal law is as regulatory policy instrument for controlling the trade in counterfeit goods. Some criminal statutes contain general provisions for controlling the counterfeit goods trade.[38] Some statutory instruments prescribe mechanisms for curbing counterfeiting of specific types of products such as drugs, food and cosmetics.[39] In general, these laws proscribe and penalise activities including: forging of trademarks, applying false trademarks or trade descriptions on goods; making of or possessing instruments for forging trademarks; selling or possessing for sale, or any purpose of trade or manufacture, any goods on which forged trademarks or false trade descriptions have been affixed; and importing, exporting, distributing and trafficking of counterfeit products. In most jurisdictions, the laws control the supply of counterfeit goods in the markets by prohibiting production, importation, exportation, trafficking and sale of counterfeit products. The laws prohibit and criminalise the supply of counterfeit products in the markets. In some jurisdictions, for instance Italy and France, the laws control both the demand for and supply of counterfeit goods in the markets. In these countries, buying and/or being in possession of counterfeit products are crimes.[40]

Criminal law prescribes various penalties for commission of counterfeiting offences. The penalties include payment of fines, imprisonment, forfeiture of counterfeit goods by government authorities, proceeds generated from the counterfeit goods trade and instrumentalities by which counterfeiting crimes were committed, and destruction of

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[38] In the United States, the general anti-counterfeiting provisions are contained in the Trademark Counterfeiting Act of 1984, the Anti-Counterfeiting Consumer Protection Act of 1996, the Anti-cybersquatting Consumer Protection of 1999, the Racketeer Influenced and Corrupt Organizations Act of 1994 and the Stop Counterfeiting in Manufactured Goods Act of 2005. In the United Kingdom, the Trade Description Act of 1986 and the Trademark Act of 1994 contain anti-counterfeiting criminal provisions.

[39] An example of this in the United States is the Food Quality Act of 1990.

[40] Amanda Silverman, 'Draconian or Just? Adopting the Italian Model of Imposing Administrative Fines on Purchasers of Counterfeit Goods,' (2009) 17 *Cardozo Journal of International & Comparative Law* 175, 182 - 192.

counterfeit goods and instrumentalities of crime and payment of costs of destruction of the counterfeit products.[41]

Government authorities and agencies enforce anti-counterfeiting criminal law. The authorities and agencies include specialised anti-counterfeiting agencies, the police, border control agencies, customs authorities, standards bureaus, competition commissions, intellectual property offices and courts. The authorities have powers to enter and search premises, seize, detain and destroy counterfeit goods. Other authorities have investigative, prosecutorial and judicial powers which are applied to investigate counterfeiting offences, prosecute and conduct proceedings against persons suspected of committing counterfeiting offences.

b) Civil Law

Trademark law embodies civil law for dealing with the trade in counterfeit goods through controlling infringements of registered trademarks and passing off goods protected by unregistered trademarks.[42] While in some jurisdictions the registration of trademarks is necessary to enable trademark owners to have their rights protected, in other countries laws protect both registered and unregistered trademarks.[43] An owner of a registered trademark whose rights have been violated can sue for infringement of his or her rights.[44] An infringement of a registered trademark occurs where a person uses a mark that is identical or confusingly similar to the registered trademark of another person in relation to goods which are similar or identical to the goods which the registered

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41 Brett August & Daniel Hwang, 'The Surprising Reach of the US Anti-Counterfeiting Law,' (2009) *IP Litigator* 32, 32- 36.

42 In some jurisdictions, the trademark legislations contain criminal provisions dealing with trademark infringement. See Andreas Rahmatian, 'Trade Mark Infringement as a Criminal Offence,' (2004) *Modern Law Review* 670, 670 - 671

43 Jeremy Phillips, *Trade Mark Law: A Practical Anatomy* (Oxford: Oxford University Press, 2003) 6.

44 Jennifer Davis, *Intellectual Property Law* (London: Butterworths, 2001) 232 - 4.

trademark represents.[45] An owner of an unregistered trademark whose rights have been violated has a cause of action for passing off.[46] Passing off goods consists of an act of a person falsely representing the goods as being made by someone else and trading on the other's reputation.[47] In order for a trademark owner to succeed in an action for passing off of goods, he/she must show that: i) he/she has goodwill in respect of the trademark; ii) the infringer's misrepresentation to the public about the connection between him or her and the trademark is likely to deceive or confuse the public; and iii) there was damage to the trademark owner's goodwill as a result of passing off.[48] Remedies available to trademark owners against infringement and passing off are injunctive orders, payment of damages and recovery of profits and costs incurred by trademark owners to conduct litigation.[49]

Trademark owners can use the law of contract as part of civil law to control the trade in counterfeit goods. It is common for trademark owners to enter into agreements with outsourced manufacturers, distributors or sellers of goods whereby: the outsourcers are prohibited from counterfeiting brand-name goods covered under the agreements; the trademark owners have the right to monitor operations of the outsourcers; the outsourcers have to return technical, production, marketing and sales information upon the expiration of the agreements; and the outsourcers are prohibited from manufacturing, distributing or selling counterfeited versions of the goods covered under the agreements upon the expiration of the agreements. Where the outsourcers breach terms of the agreements, the trademark owners can sue the outsourcers for damages and injunctive orders to restrain

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45 Paul Torrenmans, *Holyoak & Torremans Intellectual Property Law* (Oxford: Oxford University, 4th ed, 2005) 398.
46 Alison Firth, Gary Lea & Peter Cornford, *Trade Marks Law and Practice* (Bristol: Jordan Publishing, 2005) 42 - 43.
47 Tina Hart, Linda Fazzani & Simon Clark, *Intellectual Property Law* (New York: Palgrave Macmillan, 4th ed, 2006) 132 -133.
48 *Reckitt & Colman Limited v Borden Inc* [1990] 1 All E.R. 873 (House of Lords).
49 Astha Negi & Bhaskar J Thakuria, 'Principles Governing Damages in Trademark Infringement,' (2010) 15 *Journal of Intellectual Property Rights* 374, 375-376.

them from violating trademarks.[50] The trademark owners can, therefore, use the law of contract to control the production, distribution and sale of counterfeit goods by the outsourcers.

Consumers of products can use the law of contract and the law of tort as part of civil law to protect their rights against the suppliers of counterfeit products. Through contracts, consumers can inform suppliers about types, standards and quality of the products they wish to purchase. Where consumers suffer damage as a result of, for instance, purchase of defective or harmful counterfeit goods, they can sue the sellers of such products for breach of contract and claim damages.[51] In many jurisdictions, the right to sue sellers of goods on contract is available to 'contractual' consumers; these are buyers who are parties to sale agreements through which goods are purchased. Consumers who are not parties to sale agreements do not have the right to sue the sellers of counterfeit products. The doctrine of privity of contract does not allow 'strangers' to sue or be sued on contracts to which they are not parties.[52]

With regard to the law of tort, where sellers of counterfeit goods fraudulently misrepresent the genuineness, standards or quality of goods on sale, consumers who purchased such goods and suffered damage can sue the sellers and claim damages for deceit. An injured party must show that the misrepresentation made by a seller of counterfeit products caused him/her to act to his/her detriment and that he/she suffered loss as a result of the misrepresentation.[53] Where consumers suffer damage as a result of consumption of defective or harmful products, such consumers have the right to sue

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[50] Barry Berman, 'Strategies to Detect and Reduce Counterfeiting Activity,' (2008) 51 *Business Horizons* 191, 196.
[51] Morton R Covitz, 'Product Liability: The Rise and Fall of Privity,' (1962) 3 *Boston College Industrial & Commercial Law Review* 259, 259 - 260.
[52] Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (Oxford: Oxford University Press, 15th ed, 2007) 572 - 582.
[53] *Smith v. Chadwick* (1882) 20 Ch D 27 (Court of Appeal).

manufacturers or suppliers for negligence and claim damages. The consumers have to show that, first, the manufacturers or sellers owed a duty of care to such consumers. Second, the manufacturers or sellers breached the duty of care. Third, the consumers suffered damage.[54] Applying the above principles, consumers who suffer injuries as a result of consumption of defective or harmful counterfeit goods can sue manufacturers or sellers of those products for negligence and claim damages.

Several authorities enforce civil law for controlling the counterfeit goods trade. These include government authorities and agencies tasked to oversee the registration, administration and protection of trademarks. There are also judicial authorities vested with powers to hear and determine disputes involving trademarks and consumer rights. In other jurisdictions, some quasi-judicial authorities are vested with powers to resolve disputes involving consumers' rights.

c) Potential and Challenges

In most jurisdictions, the anti-counterfeiting laws constitute the main policy instruments for controlling the trade in counterfeit goods. Through the use of criminal law, designated government authorities and agencies seize, detain and destroy counterfeit goods and instrumentalities of crimes and prosecute and penalise manufacturers, importers, traffickers and sellers of counterfeit goods.[55] Moreover, civil law enables trademark owners and consumers whose rights have been violated to take legal action and seek remedies against manufacturers or sellers of counterfeit products.

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[54] Mark Lunney & Ken Oliphant, *Tort Law: Text and Materials* (Oxford: Oxford University Press, 4th ed, 2010) 109 - 121.

[55] Hedieh Nasheri, 'Addressing the Global Scope of Intellectual Property Crimes and Policy Initiatives,' (2005) 8 *Trends in Organized Crime* 79, 95.

Han,[56] Vagg and Harris,[57] Harvey and Renkainen,[58] Coblenz[59] and Roncaglia[60] describe several limitations that undermine the efficacy of anti-counterfeiting laws. First, the laws have loopholes which minimize the chances of getting manufacturers, importers, traffickers or sellers of counterfeit goods convicted or liable in criminal or civil cases respectively. Second, in some jurisdictions, the laws provide for cumbersome procedures for adducing evidence and proving cases against manufacturers, importers, traffickers or sellers of counterfeit products and ascertaining damage suffered by trademark owners as a result of the operation of the trade in counterfeit goods. Third, in many jurisdictions, the laws prescribe lenient and inadequate sanctions that do not have meaningful deterrent effects due to the fact that they do not discourage suppliers of counterfeit goods from manufacturing, importing, trafficking or selling counterfeit products. Fourth, due to their national nature, laws that are applicable in one country cannot be applied to control production and exportation of counterfeit products in another country. Countries use customs laws to stop foreign-made counterfeit goods from entering into their territories. In some cases, customs laws have been ineffective to stop the flow of foreign-made counterfeit products to national markets.

Several factors undermine the efficiency of government authorities and agencies tasked to enforce anti-counterfeiting laws. The factors include the existence of multiple law-enforcement agencies whose mandates and functions are weakly co-ordinated;[61] allocation of meagre resources that undermine the capacity of the authorities and agencies

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56 Edward Han, 'Protection from Commercial Counterfeiters in Taiwan for US Firms,' (1984) 16 *Law & Policy in International Business* 641, 646 - 47.

57 Jon Vagg & Justine Harris, 'False Profits: Why Product Counterfeiting is Increasing,' (2000) 8 *European Journal on Criminal Policy & Research* 107, 112 - 114.

58 Michael G Harvey & Ilkka A Ronkainen, 'International Counterfeiters: Marketing Success Without the Cost and the Risk,'(1985) *Columbia Journal of World Business* 37, 39 - 40.

59 Michael Coblenz, 'Intellectual Property Crimes,' (1998 - 1999) 9 *Albany Law Journal of Science & Technology* 235, 262 - 282.

60 Pier Luigi Roncaglia, 'Handling of Counterfeit Goods: A Hands-on Problem for the Italian Criminal System,' (2002) 92 *Trademark Reporter* 1393, 1399 -1401.

61 World Health Organization, 'Effective Medicines Regulation: Ensuring Safety, Efficacy and Quality,' (2003) *WHO Policy Perspectives on Medicines* 1, 3.

to enforce the laws;[62] and the exercise of discretionary powers by the authorities and agencies which, when resources are limited, place higher priorities to controlling crimes other than intellectual property violations counterfeiting.[63]

In some situations, traders do not use the laws to curb the counterfeiting business. This is due to several reasons. First, some trademark owners feel that legal mechanisms are cumbersome, lengthy and costly and judicial awards cover only parts of damages claimed against manufacturers or sellers of counterfeit goods.[64] Detection and prosecution of counterfeiters are sometimes costly due to the small size of most counterfeiting operations as well as the lack of assets that can be attached to recover damages claimed against the counterfeiters.[65] Second, as Shultz and Saparito [66] and Cockburn *et al*[67] observe, some trademark owners will not take action to fight against the counterfeiting business where they fear that such measures will create negative publicity that may cause consumers to avoid purchasing goods subject to counterfeiting or switch to competing brand-name products, or they perceive that the effects of counterfeiting activities are insignificant, or they view that the counterfeit goods trade confers benefits to the owners of trademarks.

In many instances consumers who suffer damage as a result of purchasing or using counterfeit products do not use the legal machinery to enforce their rights. Some

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62 Tim Phillips, *Knockoff: The Deadly Trade in Counterfeit Goods* (London: Kogan Page, 2005) 36 - 37.
63 Jonathan M Barnett, 'Shopping for Gucci on Canal Street: Reflection on Status Consumption, Intellectual Property, and the Incentive Thesis,' (2005) 15 *Virginia Law Review* 1381, 1395.
64 James J Holloway, 'Canadian Anti-counterfeiting Laws & Practices: A Case for Change,' (2006) 96 *Trademark Law Reporter* 724, 740.
65 Barbara Kolsun & Jonathan Bayer, 'Indirect and Counterfeiting: Remedies Available Against Those Who Knowingly Rent to Counterfeiters,' (1998) 16 *Cardozo Arts & Entertainment Law Journal* 383, 387.
66 Clifford J Schultz II and Bill Saporito, 'Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets,' (1996) 31 *Columbia Journal of World Business* 18, 22.
67 Robert Cockburn, Paul N Newton, E Kyerematen Agyarko, Dora Akunyili & Nicholas J White, 'The Global Threat of Counterfeit Drugs: Why Industry and Governments Must Communicate the Dangers,' (2005) 2 *PLos Medicine* 302, 302 - 304.

consumers have limited or no information about their rights, where to lodge complaints about violations of their rights and how to enforce their rights against suppliers of counterfeit products. Some consumers do not have financial capacity to enforce their rights against suppliers of counterfeit goods. Some consumers have limited or no access to the legal machinery. Factors such as lack of or limited legal representation and complexity and unfriendly nature of the legal machinery prevent many consumers from using the laws to enforce their rights against manufacturers or sellers of counterfeit products.

4.4.2. Alternative Anti-counterfeiting Regulations

Different forms of alternative regulations supplement the use of law to deal with the trade in counterfeit goods. In this section I examine the market-based regulation, information-based regulation and other regulatory techniques applied to curb the counterfeiting business.

a) Market-based Regulation

The market-based regulation applies economic instruments to influence behaviours of market actors in order to achieve certain objectives.[68] This regulatory approach is applied to control demand for counterfeit goods. Suppliers of genuine goods use price as a policy instrument to induce consumers to stop purchasing counterfeit goods. Some sellers of genuine goods use price reductions to compete with suppliers of counterfeit goods. Jacobs *et al* observe that, when faced with competition from dealers in counterfeit goods, 'some [sellers of genuine goods] cut their prices to compete directly with the [suppliers of counterfeit products].'[69] Amine and Magnusson point out that some

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[68] Andrew Jordan, Rudiger K W Wurzel & Anthony Zito, 'The Rise of "New" Policy Instruments in Comparative Perspective: Has Governance Eclipsed Government?,' (2005) 53 *Political Studies* 477, 482.

[69] Laurence Jacobs, Coskun A Samli & Tom Jedlik, 'The Nightmare of International Product Piracy: Exploring Defensive Strategies,' (2001) 30 *Industrial Marketing Management* 499, 506.

traders use the 'bottom-of-the pyramid' marketing strategy whereby they supply products and provide services solutions to low-income consumers. The suppliers sell genuine goods at affordable prices so that the low-income consumers can purchase basic needs and improve the quality of their life. The authors observe that the suppliers use the above strategy because the low-income consumers 'will no longer be constrained to buying only poor-quality counterfeit products.'[70] Some traders offer price discounts and provide services to consumers to induce the purchasers to buy genuine goods.[71] Chiu *et al* point out that, traders can 'provide low-priced goods or cumulative programs for loyal customers in an attempt to retain [such consumers].'[72] Yang *et al* argues that if suppliers of genuine products sell their commodities and provide attractive after-sale services, they will induce consumers to purchase genuine goods.[73] Some traders use marketing strategies to build customers' loyalty to genuine brand-name goods. Lambkin and Tyndall observe that some traders invest in developing and maintaining strong brands 'to the point that customer loyalty is so strong that [consumers] will not be prepared to switch to cheaper... counterfeit [products].'[74]

With regard to the control of supply of counterfeit goods in the markets, trademark owners can use market-based incentives such as provision of discounts and monetary prizes to encourage outsourced manufacturers, distributors or sellers to refrain from supplying counterfeit products to consumers. Similarly, government authorities can use economic instruments such as tax exemptions, subsidies and other monetary prizes to

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[70] Lyn S Amine & Peter Magnusson, 'Cost-Benefit Models of Stakeholders in Global Counterfeiting Industry and Marketing Response Strategies,' (2007) 15 *Multinational Business Review* 63, 80.
[71] Steven Globerman, 'Addressing Intellectual Product Piracy,' (1987) *Journal of International Business Studies* 497, 501.
[72] Hung-Chang Chiu, Yi-Ching Hsieh, Sheng-Hsiung Chang & Wen-Ruey Lee, 'Exploring the Effect of Anti-Counterfeiting Strategies on Consumer Values and Loyalty,' (2009) 19 *Ethics & Behaviour* 403, 406.
[73] Deli Yang, Mahmut Sonmez & Derek Bosworth, 'Intellectual Property Abuses: How Should Multinationals Respond?,' (2004) 37 *Long Range Planning* 459, 466.
[74] Mary Lambkin & Yvonne Tyndall, 'Brand Counterfeiting: A Marketing Problem that Won't Go Away,' (2009) 20 *Irish Marketing Review* 35, 44.

manufacturers and sellers of genuine products as incentives for conducting their business activities in accordance with the fair trade practices or stop supplying counterfeit goods to consumers.

b) Information-based Regulation

Information-based regulation uses communicative instruments to steer behaviours of regulated persons in order to attain economic or social policy objectives.[75] This regulatory approach can be applied with or without the use of statutory legislation. With the use of legislation, this regulation requires suppliers of goods to provide information about products offered for sale and inform prospective buyers about matters such as safety, quality, origin, use and price of the products.[76] The information can be used to direct consumers how to use the products, describe side-effects emanating from the use of the products and give warnings about matters such as consequences of the improper use of those products. Information is provided through writing, marking or labelling products, their packaging or containers or other materials supplied with the products such as instruction booklets and brochures. Failure to comply with the mandatory disclosure requirements or to provide consumers with incomplete or false information amount to breach of the law which are punishable offences.[77]

Howells observes that information-based regulation is a useful policy instrument because it: i) addresses asymmetries of information between consumers and suppliers; ii) helps to enhance competition in the markets; iii) assists consumers to participate effectively in the market-based economy; and iv) serves as a policy tool for consumer

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[75] Giandomenico Majone, 'The New European Agencies: Regulation by Information,' (1997) 4 *Journal of European Public Policy* 262, 266 - 267.
[76] Scott & Black, *Cranston's Consumer and the Law* (note 18) 343 - 349.
[77] Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (note 30) 48 -53.

protection.[78] Additionally, information serves as a policy instrument for enabling persons to become responsible consumers [79] and a device for the empowerment of consumers.[80] Williams points out that beyond managing their own conduct, informed consumers can regulate behaviours of firms and the operation of the market. The author further emphasizes that besides enhancing their ability to conduct effective market search and monitor firms efficiently, informed consumers can use their power 'to drive out of the... firms that are dishonest, incompetent, or indifferent to consumers' needs.'[81]

With regard to the control of the counterfeit goods trade, the mandatory information disclosure procedures can be applied to provide consumers with information about manufacturers of genuine products, places of manufacture, contents of the goods and production and expiry dates of the products. Such information can assist consumers to determine the authenticity of the goods and, possibly, distinguish genuine products from counterfeit goods. Informed consumers will be in a position to protect their interests by avoiding or abstaining from purchasing or using counterfeit goods. The above information is an important tool which can be used by consumers to drive suppliers of counterfeit products out of the markets.

The government authorities and agencies can provide information to consumers to enable them to tackle the trade in counterfeit goods.[82] Objectives of providing this information are: i) to alert consumers about the existence of counterfeit goods in the markets; ii) to enable the consumers to distinguish genuine products from counterfeit

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78 Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information,' (2005) 32 *Journal of Law & Society* 349, 350 - 352.

79 Iain Ramsay, 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation (2006) 28 *Sydney Law Review* 9, 13.

80 Toni Williams, 'Empowerment of Whom and for What? Financial Literacy Education and the State of Consumer Financial Services,' (2007) 29 *Law & Policy* 226, 232.

81 *Ibid* 233.

82 Shultz II & Saparito, 'Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets,' (note 66) 23.

goods; iii) to encourage members of the public to refrain from buying or using counterfeit products; iv) to sensitise the consumers about their rights; and v) to inform them about how and where they can lodge complaints against suppliers of counterfeit goods. These programmes are useful to make consumers responsible market actors and enable them to protect their own welfare.

With regard to non-statute mandated information-based regulation, some traders use communicative instruments to warn buyers about the presence of counterfeit goods in the markets. Some traders conduct awareness programmes through which information is provided 'to enable buyers to differentiate genuine goods from counterfeit [goods] and ... emphasizing the truly prestigious image portrayed by genuine products and possible embarrassment [associated with] the purchase of [counterfeit products].'[83] Through these programmes, consumers are informed about how to detect counterfeit goods. They are also informed about benefits of consuming genuine goods and potential risks associated with the purchase or use of counterfeit products.[84] They are informed about the outlets where they can purchase genuine goods, hence avoid purchasing counterfeit products.[85] In some instances, trademark owners use advertisements to disseminate anti-counterfeiting information to members of the public.[86] Through information, the consumers can be encouraged to report instances of counterfeiting to the relevant authorities.[87] If the customers know how to identify counterfeit goods, they may avoid buying the commodities. Similarly, if consumers understand the potential risks associated with consumption of counterfeit goods, they may refrain from purchasing or using

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[83] *Ibid* 23.

[84] Barry Berman, 'Strategies to Detect and Reduce Counterfeiting Activity,' (2008) 51 *Business Horizons* 191, 195.

[85] Hung-Chang Chiu, Yi-Ching Hsieh, Sheng-Hsiung Chang & Wen-Ruey Lee, 'Exploring the Effect of Anti-Counterfeiting Strategies on Consumer Values and Loyalty,' (2009) 19 *Ethics & Behaviour* 403, 405.

[86] Ronald F Bush, Peter H Bloch & Scott Dawson, 'Remedies for Product Counterfeiting,' (1989) *Business Horizons* 59, 61.

[87] Alberto Pezzi & Franncesca Faggioni, 'Preventing Counterfeiting: A Risk Management Model,' (2011) 1 *World Journal of Social Sciences* 197, 206.

counterfeit products. Likewise, if consumers are able to report incidents of counterfeiting to government authorities and agencies, legal action can be taken against manufacturers or sellers of counterfeit products.

Knowledge-based MNCs and industry coalitions, which are umbrella organisations that represent the interests of owners of intellectual property in areas such as clothing, automobiles, food and pharmaceutical industries, use information-based regulation to fight the trade in counterfeit goods. For instance, the IACC conducts media campaigns code-named the 'Get Real' campaigns, sponsors conferences and carries out programmes to educate students in schools and colleges about the counterfeit goods trade and its control.[88]

In some countries, government authorities and agencies use information to encourage traders to adhere to fair trade practices and refrain from supplying counterfeit goods to the markets. Similarly, trademark owners use this strategy to inform outsourced manufacturers, distributors and sellers about risks of selling counterfeit goods, including liability to persons who suffer injury as a result of purchasing or consuming counterfeits.[89] If traders refrain from engaging in unfair trade practices, they will not supply counterfeit goods to the markets. Similarly, if outsourced suppliers conform to the appeal not to manufacture, distribute, or supply counterfeit goods, supply of the counterfeit products in the markets will be reduced.[90] Some trademark owners provide anti-counterfeiting information to and build co-operation with officials from law enforcement agencies. Chaudhry *et al* observe that educating officials from government

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[88] Peggy Chaudhry & Alan Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (Berlin: Springer, 2009) 112 - 113.
[89] Berman, 'Strategies to Detect and Reduce Counterfeiting Activity,' (note 84) 195.
[90] Pezzi & Faggioni, 'Preventing Counterfeiting: A Risk Management Model,' (note 87) 201.

authorities helps to build good relations with these authorities and to secure effective action when necessary.[91]

c) Other Alternative Regulatory Mechanisms

There are other alternative regulatory mechanisms which are used to control the trade in counterfeit goods. These include the use of anti-counterfeiting technologies and acquisition of enterprises that manufacture, distribute or sell counterfeit products.

Different types of technologies are applied to thwart counterfeiting and control the supply of counterfeit goods in the markets and assist consumers to identify counterfeit products. This helps to reduce demand for such commodities. Staake and Fleish point out that the anti-counterfeiting technologies are used: i) to authenticate genuine goods; ii) to enable buyers to identify counterfeit goods; and iii) to increase costs of counterfeiting.[92] The anti-counterfeiting technologies include watermarking, barcodes, holographic images, biotechnology, micro-tagging identification and radio frequency identification (RFID).[93]

Concurrent with the use of the anti-counterfeiting technologies, some trademark owners change designs and models of their products and special labelling and packaging techniques of the goods. For instance, manufacturers of athletic footwear products such as Nike and Asics introduce new models and designs of their products and phase out old

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[91] Peggy E Chaudhry, Alan Zimmerman, Jonathan R Peters & Victor V Cordell, 'Preserving Intellectual Property Rights: Managerial Insights into the Escalating Counterfeiting Quandary,' (2009) 52 *Business Horizons* 57, 65.

[92] Thorsten Staake & Elgar Fleisch, *Countering Counterfeiting Trade: Illicit Market Insights, Best-Practice Strategies, and Management Toolbox* (Berlin: Springer, 2008) 151.

[93] Elisabeth Lefebvre, Alejandro Romero, Louis-A. Lefebvre & Caroline Krissi, 'Technological Strategies to deal with Counterfeit Medicines: the European and North-American Perspectives,' (2011) 5 *International Journal of Education and Information Technologies* 275, 276; Fred Jordan & Martin Kutter, 'Identifying Counterfeiting Medicines with Industry-Suitable Technologies,' (2012) *Pharmaceutical Engineering* 1, 1.

ones periodically.[94] Similarly, brand owners including Louis Vuitton use the above techniques to counteract counterfeiting.[95] Some suppliers of genuine goods apply mechanisms which discourage dishonest traders from refilling containers and packets of used genuine goods or the dilution of genuine goods.[96] In essence, the anti-counterfeiting technologies are applied to make counterfeiting more difficult and enable consumers to identify counterfeit products.

In some situations, trademark owners, manufacturers of genuine goods, co-opt manufacturers, distributors or sellers of counterfeit goods. Under such arrangements, the latter become part of the legitimate production, distribution or supply systems of the former's brand-name products.[97] In Chapter Two, I described the incident where a Germany manufacturer of genuine washers and driers acquired a Turkish company that was counterfeiting the former's products. This strategy stopped counterfeiting activities that were affecting economic interests of the German company.

According to Shultz and Saparito, [98] acquisition of counterfeiting enterprises by manufacturers of genuine products has several advantages. First, counterfeiting operations will be closed down, while the manufacturing capacity of the counterfeiters will be utilized. Second, the legitimate producers will gain quality control and inspection rights over the co-opted counterfeiting enterprises. Third, profits which the co-opted counterfeiters used to misappropriate will accrue to the legitimate producers. Fourth, this

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94 Jacobs *et al*, 'The Nightmare of International Product Piracy: Exploring Defensive Strategies,' (note 69) 505.
95 Shultz II & Saparito, 'Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets,' (note 66) 25.
96 Chaudhry & Zimmerman, *The Economics of Counterfeit Goods Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (note 88) 155.
97 *Ibid* 154.
98 Shultz II & Saparito, 'Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets,' (note 66) 23.

strategy may be used as a tool for good public relations and as leverage for the trademark owners' future business interests.

Self-regulation among manufacturers or sellers of goods can be used to control the trade in counterfeit goods. According to Gunningham and Rees, self-regulation refers to a regulatory process whereby an industry or professional organisation sets rules and standards relating to the conduct of firms or members of an industry or professional organisation. It includes mechanisms whereby firms or their associations, professionals or their organisations, in their undertaking of business activities, ensure that unacceptable consequences to their workers, consumers, clients and environment are avoided.[99] Thus, in self-regulation the industry, profession, association or organisation rather than the government is doing the regulation. Sometimes the government may be involved the process of making or implementing self-regulation. For instance, an industry may be involved at the stage of making of the regulation by developing a code of practice and leaving enforcement of the code to the government. The government may make regulations, but delegate enforcement to the private sector. Sometimes the government will mandate that an industry adopt and enforce self-regulatory codes of conduct.[100]

With regard to control of the trade in counterfeit goods, manufacturers or sellers' organisations may set up codes of conduct which require their members to: i) refrain from committing trade malpractices including supplying counterfeit goods to consumers; ii) supply information which enables consumers to distinguish genuine commodities from counterfeit products; and iii) lodge complaints against suppliers of counterfeit goods. The

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[99] Neil Gunningham & Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective,' (2002) 19 *Law & Policy* 363, 364 - 365.

[100] Angela J Campbell, 'Self-Regulation and the Media,' (1999) 51 *Federal Communications Law Journal* 712, 715

codes can provide for penalties which may be imposed on traders who fail to comply with codes and mechanisms for enforcing the provisions of the codes.

d) Potential and Challenges

As I pointed out earlier in this chapter, alternative regulations supplement the use of law-related mechanisms to control the counterfeit goods trade. However, several factors undermine the efficacy of the alternative regulations. The use of some of the alternative regulatory techniques is costly and, due to this factor, they are mostly employed by trademark owners with huge intellectual property portfolios and human and financial resources. The ability of under-resourced trademark owners to use the regulations to curb the counterfeit goods trade is limited.

In some instances, the use of information is not or less effective to control the trade in counterfeit goods. Many consumers cannot identify counterfeit products despite being provided with information. Some consumers do not take notice of information provided. For instance, they overlook the anti-counterfeiting warnings. Some consumers have limited ability to understand and process information provided. For instance, written information is not effective for persons who cannot read. Similarly, consumers may not understand information that contains technical terms. Some consumers may not accept anti-counterfeiting information because it does not support their opinions. Some believe in their ability to avoid risks in purchasing or using counterfeit products. In some situations, consumers ignore such information. In other cases, consumers resist what they perceive as paternalistic tendencies by government authorities and agencies and traders that limit their choice in purchasing counterfeit products. In many situations the anti-counterfeiting information is wanting in that it falls short of: i) informing consumers satisfactorily about risks associated with consuming counterfeit goods, ii) raising ethical consideration against purchasing and using counterfeit products; iii) describing

adequately negative consequences of the counterfeit goods trade on the society; and iv) convincing the consumers that compared with the value of genuine products in the long run, counterfeit goods are not worth money.

Staake and Fleish,[101] Hopkins *et al*[102] and Yang *et al* [103] cite several challenges involved in applying the anti-counterfeiting technologies. First, producers and sellers of counterfeit products can imitate security features of the anti-counterfeiting technologies and this gives such products the stamp of authenticity. Second, covert security features embodied in genuine products require the use of equipment or chemicals to identify those products. These procedures require reading devices and laboratory tests. Retailers and consumers of goods who do not have such facilities cannot identify counterfeit goods. Third, the technologies are expensive and under-resourced trademark owners may not be able to acquire such technologies. As a result, the use of the anti-counterfeiting techniques raises trademark owners' costs of production. This is passed onto consumers in the form of increased prices.

Co-optation of manufacturers, distributors or sellers of counterfeit products by legitimate traders is an ineffectual technique for controlling the counterfeiting business where such suppliers manufacture, distribute or sell low-quality or 'safety critical' counterfeit products. Additionally, co-opting counterfeiters is possible where the counterfeiters can be identified. Where the counterfeiters operate in foreign countries or clandestinely, it will be difficult to identify and co-opt them. Moreover, this technique may encourage dishonest traders to counterfeit well-known brand-name goods in the anticipation that the trademark owners will co-opt them to the legitimate business.

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101 Staake & Fleisch, *Countering Counterfeit Trade: Illicit Market Insights, Best-Practice Strategies, and Management Toolbox* (note 92) 155.

102 David M Hopkins, Lewis T Kontnik & Mark T Turnage, *Counterfeiting Exposed: Protecting your Brand and Customers* (Hoboken, New Jersey: Wiley & Sons, 2003) 254 - 9.

103 Deli Yang, Mahmut Sonmez & Derek Bosworth, 'Intellectual Property Abuses: How Should Multinationals Respond?,' (2004) 37 *Long Range Planning* 459, 464 - 465.

4.5. The Regulation of the Counterfeit Goods Trade in Sub-Saharan Africa

This section examines some salient features about regulatory techniques for controlling the trade in counterfeit goods in developing countries in the Sub-Saharan African nations. It also explores the potential of the anti-counterfeiting laws and alternative regulations in these nations.

4.5.1. Anti-counterfeiting Laws

The history of the laws for curbing the trade in counterfeit goods in Sub-Saharan Africa, which evolved as part of the laws to protect intellectual property, dates back to the colonial period that started in the 19th century. The European imperial powers (Belgium, Britain, France, Germany, Italy, Portugal and Spain) that colonised Africa transplanted their intellectual property laws onto their African colonies.[104] Additionally, the colonial powers imposed the pre-TRIPs intellectual property treaties, namely the Paris Convention and the Berne Convention on their colonies.[105]

With regard to the intellectual property laws imposed on colonies in Africa, Okediji points out that the imperial law was not only part of the colonial legal apparatus, but also a tool used by European powers to protect their economic interests in the colonies.[106] In emphasizing the above point, Mgboeji observes that foreign intellectual property laws were part of the cultural, economic and subordination of the colonised people and economies. The author points out that the transplantation of the European intellectual property laws onto colonies was an essential part of 'the racist and

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[104] Lionel Bently, 'The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century,' (2011) 12 *Theoretical Inquiries in Law* 161, 162-181; George M Sikoyo, Elvin Nyukuri & Judi W Wakhungu, 'Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda,' African Centre for Technology Studies, Ecopolicy Series No. 16, (2006), pp 15 -20.

[105] Carolyn Deere, *The Implementation Game: The TRIPs Agreement and Global Politics of Intellectual Property Reform in Developing Countries* (Oxford: Oxford University Press, 2009) 37.

[106] Ruth L Okediji, 'International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System,' (2003) 7 *Singapore Journal of International and Comparative Law* 315, 324 - 325.

exploitative repertoire of the colonial project [which was] premised on two main grounds, namely, a sense of European innate superiority over colonized peoples, and, ...economic exploitation of the colonized [territories].'[107] The colonial laws were policy instruments for promoting and safeguarding economic interests of the European imperialists because they: i) provided the frameworks for facilitating commercial transactions among foreign entrepreneurs in colonies; ii) protected private property of European intellectual property owners; and iii) protected colonies as markets for intellectual property-protected manufactured by foreign companies.[108]

Many countries in Africa attained their political independence after the World War II. The post-colonial governments in Africa retained laws (including intellectual property laws) and institutions inherited from the European colonial powers.[109] The colonial laws remained in the statute books of many newly independent African nations.[110] Some nations revised the colonial laws, while others enacted new laws.[111] In both cases, the laws were replicated from the colonial laws.[112] Additionally, some of the post-colonial governments in Africa ratified the pre-TRIPs Agreement treaties which they did not participate to negotiate and adopt.[113]

Intellectual property laws in most Sub-Saharan African territories during the post-colonial era evolved concurrently with the political and economic developments

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107 Ikechi Mgbeoji, 'Colonial Origins of Intellectual Property Regimes in African States,' in David Armstrong, *Routledge Handbook of International Law* (New York: Routledge, 2009) 317.

108 Deere, *The Implementation Game: The TRIPs Agreement and Global Politics of Intellectual Property Reform in Developing Countries* (note 105) 35 - 36.

109 Okediji, 'International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System,' (note 106) 335.

110 Peter K Yu, 'International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia,' (2007) 1 *Michigan State Law Review* 1, 5.

111 Sope Adegoke, 'Intellectual Property Rights in Sub-Saharan Africa,' (2011) *CMC Senior Theses* 1, 15 - 25

112 Deere, *The Implementation Game: The TRIPs Agreement and Global Politics of Intellectual Property Reform in Developing Countries* (note 105) 38.

113 Patricia Kameri-Mbote, 'Patents and Development, in Yash Vyas, Kivuthu Kibwana, Okech Owiti & Smokin' Wanjala (eds), *Law and Development in the Third World* (Nairobi: University of Nairobi, 1994) 2.

which occurred in these nations. This evolution took place parallel to the use of laws as policy instruments to facilitate and promote economic and social developments. The transformations of intellectual property laws in the in Sub-Saharan Africa like in many other developing countries occurred concurrently with the evolution of 'law and development' theories and practices. According to Trubek and Santos, law and development discourse focuses on the interrelationship between economic theory, legal ideas and policies and practices of development institutions.[114] The law and development passed through three 'moments'.[115]

The first 'moment' of law and development, which commenced after nations in the African countries attained their political independence and ran from the end of World War II to the mid-1970s, [116] was based on development theories that emphasized the role of the state as the driver of economic growth and development. Under this model, the state planned, formulated and implemented economic policies and the ownership of major industries and utilities. The state played the dominant role because it was thought that the private sector in the newly independent countries was underdeveloped. The governments in these nations used the law to implement the import substitution industrialization policies designed to de-link their economies from the world markets, protect domestic infant industries from competition and build independent manufacturing capacity.[117] Trubek observes that the first moment of law and development was characterised by, among other aspects, the 'forced modernization through law and state action, state

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[114] David M Trubek & Alvaro Santos, 'Introduction: The Third Moment in Law and Development and the Emergence of New Critical Practice,' in David M Trubek & Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 4.

[115] *Ibid* 5 – 9. The 'moments' are sometimes referred to as 'waves,' 'phases', or 'eras' of the law and development movement.

[116] See, John H Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline and Revival of Law and Development Movement,' (1977) 25 *American Journal of Comparative Law* 457; Elliot M Burg, 'Law and Development: A Review of the Literature and A Critique of Scholars in Self-Estrangement,' (1977) 25 *American Journal of Comparative Law* 492.

[117] David Trubek, 'The Rule of Law in Development Assistance: Past, Present, and Future,' in David Trubek & Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 74.

planning, state-owned enterprises (SOEs), detailed regulation, high tariffs, and [the implementation of the] import-substitution industrialization (ISI) [policy].'[118]

The state-centric law and development project, which was the US-led initiative[119] and heavily premised on the modernisation theory, postulated that underdevelopment in developing countries including those in Africa was a result of local 'traditional' cultures, societies, norms and institutions. It also hypothesized that these countries would attain development if they adopted 'modern' cultures, norms and institutions similar to those in industrialized nations of Europe and the United States.[120] The developmental state required 'modern' laws that would act as tools for directing and influencing economic behaviours. Laws were instruments for implementing national economic policies and creating the frameworks for bureaucratization and governance of state industries. Laws were also used to set out developmental goals and programmes and assign resources and tasks to selected industries and the SOEs.[121] Modernising judiciaries and law schools in the newly independent countries was an integral part of the first moment of law and development. Writing new laws to foster economic growth, founding law schools and training judges and lawyers were among the activities of newly independent governments that were carried out during this state-centric law and development period.[122]

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118 David Trubek, 'Developmental States and Legal Order: Towards a New Political Economy of Development and Law,' (2009) *University of Wisconsin Legal Studies Research Paper*, No. 1075, (2009) 4.

119 Scholars from universities such as Harvard, Stanford, Yale and Wisconsin were supporters of this initiative which received its funding from the Ford Foundation, the Agency for International Development and the American Bar Association.

120 Kevin E Davis & Michael J Trebilcock, 'The Relationship Between Law and Development: Optimists versus Skeptics,' (2008) 56 *American Journal of Comparative Law* 899, 901; Francis G Snyder, 'The Failure of "Law and Development",' (1982) *Wisconsin Law Review* 373, 373.

121 Lawrence Tshuma, 'The Political Economy of the World Bank's Legal Framework for Economic Development,' (1999) 8 *Social & Legal Studies* 75, 84.

122 Elliot M Burg, 'Law and Development: A Review of Literature and A Critique of "Scholars in Self-Estrangement"', (1977) 25 *American Journal of Comparative Law* 492, 512; Leah Larson-Rabin, 'Happenstance and Memory: A Legacy of Law and Development Scholarship and Policy in Legal Education,' (2007) 25 *Wisconsin International Law Journal* 209, 214.

The reforms of intellectual property laws in many African countries implemented between the 1950s and the 1970s can be seen as part of the state-centric law and development project. They were intended to assist the developmental states in these nations to boost access to modern technologies, advance industrialisation, protect local industries and promote economic growth and development. Deere observes that the reforms were undertaken because these nations were convinced that the state would play the central role 'in advancing national development, these countries adopted policies with the eye of building industrial capacity and shifting their competitive advantage in international economy.'[123] Kameri-Mbote points out that the reforms of the legal systems were also an important political step of yoking out colonial laws and institutions and establishing the legal systems that reflected the economic situations in countries. The substance of the legal systems was not different from those left by the colonialists.[124]

The first 'moment' of law and development came to an end in the 1970s.[125] While there were several weaknesses and contradictions which contributed to its collapse,[126] the failure of the first moment of law and development was a result of the transformations of the global political economy, which resulted in the shift from the state-centric to market-based development policies. This shift occurred at the beginning of the 1980s, with the ascendancy of neo-liberalism as the world's dominant economic and political system. During this period, the IMF and the World Bank compelled developing countries, including the Sub-Saharan African nations, to undertake the market-based reforms

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123 Deere, *The Implementation Game: The TRIPs Agreement and Global Politics of Intellectual Property Reform in Developing Countries* (note 105) 39.

124 Patricia Kameri-Mbote, 'Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya,' International Environmental Law Research Centre, Working Paper No.2, 2005, p 6.

125 Brian Z Tamanaha, 'The Lessons of Law and Development,' (1995) 89 *American Journal of International Law* 470, 481.

126 For detailed discussions about the failure of the first moment of law and development, see David M Trubek & Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,' (1974) *Wisconsin Law Review* 1062. See also Maxwell O Chibundu, 'Law in Development: On Tapping, Gourding, and Serving Palm-wine,' (1997) 29 *Case Western Reserve Journal of International Law* 167, 174 - 176.

implemented as part of the Structural Adjustment Programmes (SAPs). The developing countries implemented the market-based policies through liberalisation, privatisation and deregulation of their economies.[127] The market-centric economic policies altered the role of the state in promoting economic growth and development. This ushered in the second moment of law and development founded on market-based policies as drivers of economic growth and development.

During the second moment of law and development, the main functions of the laws were to support the operation of competitive markets, to protect the markets from the government's interference, and to safeguard private property rights. These issues required the frameworks which allowed the markets to function freely and protect the market actors. The laws were policy instruments for limiting state interference into the operation of the markets through private property and contract rights.[128] They were policy tools for protecting private property including intellectual property. This period witnessed deregulation of economic activities, opening up of national markets to foreign capital, goods and services, the reduction of the role of the state in managing the economy, privatization of the SOEs and the increased role of export-oriented production policies.

The reforms of intellectual property laws which many countries in Africa undertook during the second moment of law and development were aimed at strengthening protection of intellectual property thereby allowing owners of such property to engage in market transactions. This would enable the owners to enter into and enforce the transactions. For instance, the laws would enable trademark owners to engage in producing or selling goods protected by trademarks or transfer their rights through, for

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[127] Lance Taylor, 'The Revival of Liberal Creed - the IMF and the World Bank in a Globalized Economy,' (1997) 25 *World Development* 145, 147- 151.
[128] F Charles Sherman, 'Law and Development Today: The New Developmentalism,' (2009) 10 *German Law Journal* 1257, 1263 - 1264.

instance, subcontracting or licensing arrangements. Using the law of contract, the trademark owners would be able to enforce these contracts in order to protect their intellectual property. The intellectual property laws were important tools in supporting the market-based policies in these African countries during the second moment of law and development.

The implementation of the market-based reforms in African countries produced many undesirable consequences. There was a dismal failure of the policies to achieve the promised growth.[129] Additionally, inequality and poverty among the people became worse.[130] It was thought that inadequacies of the market-based policies were caused by the absence of institutions supporting the efficient operation of the markets. The new institutional economics (that embraces the theory which posits that institutions play the central role in driving economic development) provided the solution.[131]

The institution-led development approach posited that institutions were necessary to support the operation of liberalised markets. This paved the way for the third moment of law and development, which focused on the role of institutions in supporting the operation of the markets and promoting economic growth and development. Under this development model, the state uses law to create the institutional environment for the proper functioning of the markets. Davis and Trebilcock observe that proponents of this model view the state and its institutions 'as endogenous to the development process [and

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[129] Sonny Nwankwo & Darlington C Richards, 'Privatisation: The Myth of Free Market Orthodoxy in Sub-Saharan Africa,' (2001) 14 *International Journal of Public Sector Management* 165, 169 - 171.
[130] Claudia Buchamann, 'Poverty and Educational Inequality in Sub-Saharan Africa,' (1999) 29 *Prospects* 503, 508 - 510; Adebayo Adedeji, 'Structural Adjustment Policies in Africa,'(2002) 51 *International Social Science Journal* 521, 525.
[131] Tor Krever, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model,' (2011) 52 *Harvard International Law Journal* 287, 303.

that] the design and functioning of institutions as critical determinants of countries' development prospects.'[132]

Under the institution-led developmental model whose implementation began in the 1990s, the law is regarded as an 'institution' with important economic implications.[133] The general view is that the overall quality of legal institutions is an important determinant of economic development of a country.[134] Legal institutions conducive to the efficient operation of the markets and economic growth include well-defined and inalienable private property rights, a formal system of law of contract, corporate law regime, a bankruptcy regime and non-distortionary tax regime. With regard to the intellectual property, Ohnesorge observes that supporters of the institution-led development model contended that broadly defined and vigorously enforced intellectual property rights [are] important for economic development because, without such laws, 'locals [would] not invent [and] foreign intellectual property owners [would] not invest or make technology available through licensing.' [135]

During the third moment of law and development, countries in Sub-Saharan Africa were compelled to reform their legal systems to make them market-friendly. This era witnessed the increased interests of the World Bank and foreign donors in promoting the 'rule of law' via legal and judicial reforms. [136] The reforms, which embraced the rule

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[132] Kevin E Davis & Michael J Trebilcock, 'Legal Reforms and Development,' (2001) 1 *Third World Quarterly* 21, 23.

[133] John K M Ohnesorge, 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience,' (2007) 28 *University of Pennsylvania Journal of International Economic Law* 219, 243.

[134] Kevin E Davis, 'What Can the Rule of Law Variable Tell Us About Rule of Law Reforms,' (2004) 26 *Michigan Journal of International Law* 141, 143.

[135] Ohnesorge, 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience,' (note 133) 249.

[136] The World Bank, European governments and Japan, regional development banks including the Inter-American Development Bank and the Asian Development Bank, and organizations such as Swedish International Development Cooperation Agency, the Organisation for Economic Co-operation and Development Organization, the United States Agency for International Aid and the Japan International Cooperation Agency sponsored these 'rule of law' reform projects.

of law as a goal of development policy, were intended to ensure the proper functioning of the market economies, by providing protection for property rights, enforcement of contracts and stable and crime-free investment environments.[137] These reforms were designed to strengthen judiciaries, public prosecutors' offices, lawyers' associations and law schools. The measures were intended to make the judicial branch independent; to speed up the processing of cases, to increase access to dispute resolution mechanisms, and to professionalise judiciaries and legal practice.[138] Judicial authorities tasked to resolve commercial disputes were set up, and the financing of judiciaries and ministries responsible for justice and training members of the legal profession were given high priorities. Authorities for registering business entities and administering intellectual property rights were set up or reformed. The promotion of rule of law, good governance, protection of human rights and poverty alleviation are part of law and development during the third moment.[139]

The third moment of law and development occurred concurrently with the establishment of the WTO and the adoption of the TRIPs Agreement. The WTO requires its members to undertake the market-based reforms aimed at lowering of barriers to allow free international movement of goods, services and capital. The TRIPs Agreement requires the WTO members to adopt legislative mechanisms to provide for criminal, civil and administrative and institutional mechanisms for the protection of private intellectual property and to control the trade in counterfeit goods and other forms of violations of intellectual property. Most of the countries in Sub-Saharan Africa are members of the WTO and signatories of the TRIPs Agreement.

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[137] Gordon Barron, 'The World Bank and Rule of Law Reforms,' Development Studies Institute, Working Paper Series No. 05 - 70, 2005, p 9.
[138] Richard E Messick, 'Judicial Reform and Economic Development: A Survey of the Issues,' (1999) 14 *World Bank Research Observer* 117, 118.
[139] Thomas Carothers, 'The Rule of Law Revival,' (1998) *Foreign Affairs* 95, 99 - 100.

After examining the evolution of intellectual property and anti-counterfeiting legal regimes in Africa, I now highlight anti-counterfeiting laws in some Sub-Saharan African countries. South Africa has statutes for controlling the trade in counterfeit goods[140] and protecting trademark rights.[141] Nigeria has legislations for protecting trademarks and curbing the counterfeit goods trade.[142] Kenya has laws for controlling the counterfeiting business and protecting trademark rights.[143] These countries use the customs and excise laws to control the importation and smuggling of counterfeit goods into their national markets. South Africa[144] and Nigeria[145] have customs and excise laws which are used to control the inflow of foreign counterfeit products into these nations' markets.

As in industrialized nations, criminal law in many Sub-Saharan African countries prescribes penalties for commission of counterfeiting crimes. The penalties include imprisonment, payment of fines, confiscation of counterfeit goods and instrumentalities of crime, and destruction of counterfeit goods and such instrumentalities. Civil law allows injured parties to sue suppliers of counterfeit goods for orders of recovery of damages, recovery of profits lost as a result of the operation of the trade in counterfeit goods, and destruction of infringing goods, forged trademarks and containers or packages of counterfeit goods. The laws in these countries establish authorities tasked to control the trade in counterfeit goods. The authorities include the specialised anti-counterfeiting agencies, customs and revenue departments, standards bureaus, the police and courts. The authorities have powers to conduct inspections, confiscate and detain counterfeit goods,

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140 The Counterfeit Goods Act of 1997 and the Merchandise Marks Act of 1941.
141 The Trademarks Act of 1993.
142 The Counterfeit and Fake Drugs (Miscellaneous Provisions) Decree of 1989, the Merchandise Marks Act of 1958 and the Trademarks Act of 1965.
143 The Anti-Counterfeit Act of 2008 and the Trademark Act of 1957.
144 The Customs and Excise Act of 1964.
145 The Customs and Excise Management Act of 1958.

prosecute manufacturers, smugglers and sellers of counterfeit products and destroy counterfeit goods and equipment used to manufacture those products.

In many countries in Sub-Saharan Africa, criminal law is a useful instrument for controlling the counterfeit goods trade. Government authorities and agencies in these countries apply criminal law to seize, detain and destroy counterfeit goods.[146] The authorities arrest, prosecute and impose penalties on manufacturers, importers, smugglers and sellers of counterfeit products. [147] The national authorities and agencies in these countries, or in collaboration with the international agencies such the WHO, the Interpol[148] and the WCO,[149] conduct these anti-counterfeiting initiatives.

In Sub-Saharan Africa, there are general limitations similar to those affecting the laws for controlling the trade in counterfeit goods in industrialized nations described earlier in this chapter. The main limitations are: i) the laws are comprised in many statutes which, at times, contain conflicting provisions; ii) the laws are obsolete and cannot effectively address challenges which have come up with, for instance, the advent of globalisation, the Internet-based counterfeiting and the online counterfeit goods trade; iii) the laws provide for inadequate sanctions which do not deter traders from manufacturing, importing, trafficking or selling counterfeit goods; and iv) the laws provide for cumbersome procedures which make criminal and civil litigation unattractive to traders and consumers affected by the operation of the counterfeit goods trade. These

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146 *Counterfeit goods worth R20m seized,* The *News24* (South Africa), 23 March 2012, <http://m.news24.com/news24/SouthAfrica/News/Counterfeit-goods-worth-R20m-seized-20120323> (accessed 18 June 2012).

147 Rwanda National Police, *Five arrested for trading counterfeited products,* 16 February 2012, <http://police.gov.rw/content/five-arrested-trading-counterfeited-products> (accessed 18 June 2012)

148 Interpol, *East Africa's Operation Mamba III bolsters fight against counterfeit medicines with INTERPOL-IMPACT support,* Interpol Media Release, dated 26 August 2010, <https://www.interpol.int/Public/ICPO/PressReleases/PR2010/PR065.asp> (accessed 20 June 2012).

149 World Customs Organization, *Operation "Vice Grips" delivers tons of fake goods,* WCO Press Release, 16 June 2006, <http://www.wcoomd.org/press/?v=1&lid=1&cid=5&id=161> (accessed 20 June 2012).

factors, as Erhum *et al* observe, undermine the potential of the laws in many African countries for controlling the trade in counterfeit goods.[150]

Other factors such as the lack of resources and limited capability on the part of anti-counterfeiting agencies, weak coordination among law enforcement agencies and inefficiencies among officers in the agencies weaken the efficacy of the anti-counterfeiting laws in many Sub-Saharan African countries.[151] Despite the implementation of foreign donor-sponsored 'rule of law' reforms aimed at enhancing the efficiency of courts, prosecuting authorities, law enforcement agencies and other institutions, the reforms have failed to achieve their objectives. The reformed institutions have not been operating satisfactorily due to, among other factors, the lack of or limited human and financial resources. The quality of regulators and regulatory expertise and structures are wanting in many of these countries.[152] Kameri-Mbote points out that though most African countries have taken, or are taking measures to ensure the compliance of international intellectual property treaties, these countries have limited capacity that hinders the effective implementation of the global intellectual property regulatory policy. The author observes further that 'there are very few people and institutions in the continent with experience and capacity to [deal with intellectual property rights], especially with respect to trade, competition, investment and other recent global imperatives.'[153]

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150 W O Erhun, O O Babalola & M O Erhun, 'Drug Regulation and Control in Nigeria: The Challenge of Counterfeit Drugs,' (2001) 4 *Journal of Health & Population in Developing Countries* 23, 27-29.

151 Uche Nwokocha, 'Nigeria Intellectual Property: Overview of Developments and Practice,' (2012) *NIALS Journal of Intellectual Property* 101, 109 - 110.

152 David Parker, 'Researching Economic Regulation in Developing Countries: Developing a Methodology for Crisis Analysis,' Centre on Regulation and Competition, University of Manchester, Working Paper Series, No. 34, (2002) pp 10-11.

153 Kameri-Mbote, 'Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya,' (note 124), p 5.

Moreover, malpractices including solicitation and receipt of bribery by officers of public authorities,[154] police,[155] and customs agencies [156] compromise the capacity of these institutions in many countries in Sub-Saharan Africa to enforce laws. Misconducts such as collusion with offenders, negligence and lack of professionalism are widespread in these nations. Authorities such as police and courts, which are general not user-friendly, are accessible to small proportions of the populations. The above factors undermine the efficient enforcement of the anti-counterfeiting laws in these countries. As a result, the trade in counterfeit goods flourish in many Sub-Saharan African countries.

There are several political, economic and social factors which undermine the efficacy of laws for protecting intellectual property and controlling the trade in counterfeit goods in many countries in Africa. First, the foreign intellectual property laws including anti-counterfeiting laws (transplanted onto these countries by the imperial powers or imposed on these nations when they joined multilateral institutions including the WIPO and the WTO), operate in different political, economic and social contexts from which they originated. These contextual factors hamper the capacity of municipal institutions in African countries to implement the laws.[157] This is because these countries are consumers and importers of knowledge-based and intellectual property-protected goods. As a result, the governments in these countries (where local traders do not own significant amounts of intellectual property portfolios) do not take strict regulatory measures to protect intellectual property and control the trade in counterfeit goods. Second, the trade in counterfeit goods confers benefits to economies and people in many

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154 Gbenga Lawal, 'Corruption and Development in Africa: Challenges for Political and Economic Changes,' (2007) 2 *Human & Social Sciences Journal* 1, 1-3.

155 David Stasavage & Cécile Daubrée, 'Determinants of Customs Fraud and Corruption: Evidence from Two African Countries,' OECD Working Paper No. 138, 1998, pp 12 -28.

156 Gareth Newham, 'Tackling Police Corruption in South Africa,' A Report written for the Study of Violence and Reconciliation, (2000) <http://www.csvr.org.za/docs/policing/tacklingpolicecorruption.pdf> (accessed 15 July 2012).

157 Martin Brownbridge & Colin Kirkpatrick, 'Financial Regulation and Supervision in Developing Countries,' (2002) 20 *Development Policy Review* 243, 245.

developing countries[158] and, therefore, stringent enforcement of the anti-counterfeiting laws may have a detrimental effect on these countries. Third, limited enforcement of the laws may be partly caused by the pre-occupation of many governments in Africa with solving g political and socio-economic problems facing these nations and their people. Some governments are pre-occupied with addressing political instability.[159] Others are struggling to repay debts to the international financial institutions and industrialized nations.[160] Some are pre-occupied with implementing programmes to provide water and education to their citizens, to fight poverty and hunger, and to control diseases such as malaria, tuberculosis and HIV/AIDs.[161] Arguably, due to the above factors, many governments in African countries give less priority to matters concerning the protection of intellectual property rights[162] and control of the trade in counterfeit goods.

The endemic poverty creates conditions that catalyse the operation of the trade in counterfeit goods in many countries in Sub-Saharan Africa. It is difficult for poor people to stop purchasing or using low-priced, 'non-safety critical' counterfeit products such as clothing, shoes and leather products. It is hard for the poor to refrain from consuming counterfeit goods because, sometimes, there are no alternative sources of genuine and affordable goods available in the markets. As a result, the laws in Sub-Saharan Africa countries have had limited impact in influencing behaviours of poor people in order to stop them from buying and using counterfeit goods. Since there is demand for counterfeit products, the trade in counterfeit goods continues to thrive in these African nations.

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158 Assafa Endeshaw, 'Intellectual Property Enforcement in Asia: A Reality Check,' (2005) 13 *International Journal of Law & Technology* 378, 381.

159 Civil conflicts are taking place in several countries in Africa including the Democratic Republic of the Congo, Uganda, Burundi, Rwanda, Somalia and Sudan.

160 Silvia Federici, 'The Debt Crisis, Africa and New Enclosures' (1992) *Midnights Notes* 10, 12 -15.

161 Wangari Maathai, *The Challenge for Africa: A New Vision* (London: William Heinemann, 2009) 10-11; See also Nana Poku, 'Poverty, Debt and Africa's HIV/AIDs Crisis,' (2002) 78 *International Affairs* 531, 537 - 542.

162 Jeremy Phillips, 'Intellectual Property and Africa: The Agony and Entropy,' (2008) 3 *Journal of Intellectual Property Law & Practice* 205, 205.

The discussion above unveils political, economic and social conditions prevailing in Sub-Saharan African countries that impinge on the efficacy of foreign laws transplanted onto these nations and this situation applies to intellectual property and anti-counterfeiting laws. The implementation of the foreign laws in Africa cannot be effective 'without taking African socio-economic and politico-legal situation into proper account.'[163] In formulating and implementing these foreign laws, law-makers and implementers should take into account, in Baderin's view, the fact that the '"context matters," "local conditions are crucial," and "circumstances on ground shape how things work...."'[164]

4.5.2. Alternative Anti-counterfeiting Regulations

Different forms of alternative regulations are applied to control the trade in counterfeit goods in Africa.[165] The government authorities and agencies in these nations use information as a policy instrument for controlling the trade in counterfeit goods. In Nigeria, the National Agency for Food and Drug Administration and Control (NAFDAC) conducts public awareness programmes to inform people about matters concerning the trade in counterfeit goods and its control.[166] Traders use information as a regulatory tool for controlling the counterfeit goods trade. In Kenya, some manufacturers conduct public awareness programmes to alert consumers about the presence of counterfeit goods in markets and assist the consumers to avoid purchasing counterfeit goods.[167] In South Africa, some manufacturers use electronic media particularly the Internet to disseminate

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[163] Mashood A Baderin, 'Law and Development in Africa: Towards A New Approach,' (2011) *NIALS Journal of Law & Development* 1, 8.
[164] *Ibid* 9.
[165] Veronica Chan, Iris Lui, Grace Lun & Naushin Nagji, 'From Nigeria to Benin: Applying a Vendor Awareness Initiative to Combat the Counterfeit Drug Trade,' (2010) 17 *The Meducator* 1, 2-4.
[166] Dora Akunyili, 'Lessons from Nigeria: the Fight against Counterfeit Drugs in Africa,' (2006) 51 *Diabetes Voice* 41, 43.
[167] Ben Sihanya, 'Combating Counterfeit Trade in Kenya,' *Intellectual Property Rights in Kenya*, in Moni Wekesa & Ben Sihanya (eds) (Nairobi: Konrad Adenauer Stiftung, 2006) 214.

information to enable consumers to identify genuine goods and avoid purchasing counterfeit products.[168]

Technological methods are also applied to control the trade in counterfeit goods in some countries in Africa. In Nigeria, the NAFDAC has approved the use of the RFID technology to authenticate pharmaceutical products and enhance the safety and quality of medicines supplied to markets.[169] This technology helps the NAFDAC personnel and sellers to identify counterfeit pharmaceutical products and therefore fight the counterfeiting business. In Kenya, the mobile phone technology is applied to curb the trade in counterfeit medicines. Consumers use cellular phones to send text messages in order get information about the genuineness of medicines they wish to purchase from pharmacies.[170] The mobile phone technology is also used to fight the trade in counterfeit goods in Nigeria and Ghana.[171] Other commonly applied technological methods to counteract counterfeiting include the use of engraved marks on products or packaging, the use of packaging materials with security features, and the use of barcodes on packaging of genuine products.

Several factors impinge on the effectiveness of information-based regulation in Sub-Saharan African countries. Arguably, these challenges apply to information used to fight against the counterfeit goods. Dutta, who conducted a study on information-seeking

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[168] For instance, producers of safety matches branded *Lion* use the Internet to provide such information. See Lion Safety Matches, *WARNING: Counterfeit Matches on the Loose,* <http://www.lionsafetymatches.co.za/pages/3583/warning-counterfeit-matches-on-the-loose> (accessed 23 April 2012).

[169] Claire Swedberg, 'Nigeria Drug Agency Opts for RFID Anti-counterfeiting Technology,' *RFID Journal,* 9 September 2010, <http://www.rfidjournal.com/article/view/7856/1> (accessed 20 February 2012)

[170] Claire Wanja, *Kenya Launches Mobile Phone Application to Fight Counterfeit Medicines,* KBC News, 3 December 2010, <http://www.kbc.co.ke/news.asp?nid=67851> (accessed20 February 2012).

[171] A Chika, S O Belo, A O Jimoh & M T Umar, 'The Menace of Fake Drugs: Consequences, Causes and Possible Solutions,' (2011) 5 *Research Journal of Medical Sciences* 257, 259; Sproxil, *Combating Counterfeit Drugs with Mobile Phones,* <http://www.businesscalltoaction.org/wp-content/files_mf/sproxilcasestudy2.23.2012forweb17.pdf> (accessed 12 July 2012).

behaviour in developing countries generally,[172] Musoke, who researched on information dissemination in Uganda[173] and Okwu *et al* who investigated the use of radio as a medium for delivering agricultural information to farmers in Nigeria,[174] describe several factors that limit the efficacy of information as a regulatory instrument. First, in some instances, instruments used to disseminate information are inadequately designed and information intended to be disseminated is unclear. This lowers the quality of the disseminated information. Second, the language barriers and low literacy limit the use of information-based policy instruments. This is the case where information disseminated is in foreign languages or information disseminated consists of technical terms and persons do not understand the foreign languages or those technical terms. Similarly, where the literacy level of the people is low, information disseminated through written instruments will be less useful. Third, in some cases, information-conveying media (for instance newspapers, radio or television stations) are less accessible to the intended targets. In many Sub-Saharan African countries, these media outlets are accessible to persons who reside in urban areas. They are less accessible to or unavailable to people in the rural areas. Fourthly, access to information disseminated through the print and electronic media may be costly to under-resourced persons. Many poor people in Sub-Saharan Africa do not have radios or television sets or cannot buy newspapers in order to access the information.

The use of anti-counterfeiting technologies is problematic for many countries in Sub-Saharan Africa due to several factors. Owing to the resource constraints, it is difficult for many local manufacturers and sellers of goods in these countries to acquire modern

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172 Reene Dutta, 'Information Needs and Information-seeking Behaviour in Developing Countries: A Review of the Research,' (2009) 41 *International Information & Library Review* 44, 46 - 49.

173 Maria G N Musoke, 'Information and Its Value to Health Workers in Rural Uganda: A Qualitative Perspective,' (2000) 17 *Health Library Review* 194, 199 - 200.

174 O J Okwu, A A Kuku & J I Aba, 'An Assessment of the Use of Radio in Agricultural Information Dissemination: A Case Study of Radio Benue in Nigeria,' (2007) 2 *African Journal of Agricultural Research* 14, 15 -17.

anti-counterfeiting technologies. These traders use less sophisticated anti-counterfeiting technologies which are vulnerable to imitations and, therefore, are less effective in tackling the counterfeit goods trade. Due to low technological capacity, law enforcement agencies in many of the African nations do not have the appropriate equipment for verifying genuine products or their packaging. Sellers and consumers who do not have information about features embedded on genuine goods and their packaging cannot the use of technological methods to identify counterfeit products.

4.6. Conclusion

This chapter has examined the regulation of the trade in counterfeit goods, its rationales and potential for controlling the trade. The objective of the anti-counterfeiting regulation is to address the market failures that emanates from the operation of the counterfeit goods trade. The anti-counterfeiting regulation is also an instrument used for the purpose of achieving certain public policy objectives such as enhancing the integrity of markets and protecting consumers from harmful effects resulting from the purchase or use of counterfeit products.

Both industrialized and developing countries have enacted laws for controlling the trade in counterfeit goods. While in industrialized nations the anti-counterfeiting laws evolved as a result of the domestic political and economic conditions that prevailed in these nations, in many Sub-Saharan African countries these laws have foreign origins. They originate from the laws transplanted from foreign countries during the colonial era and the laws imposed on these countries when they joined multilateral institutions including the WIPO and the WTO. In the industrialized nations, the effectiveness of anti-counterfeiting laws is undermined by the limitations in the laws and challenges facing institutions tasked to enforce the laws. In the case of the Sub-Saharan African countries, besides the limitations in the laws and institutions, adverse political, economic and social

factors in these nations undermine the potential of the laws to curb the trade in counterfeit goods. The above factors affect the quality of the anti-counterfeiting laws and mechanisms for enforcing the laws.

Different forms of alternative regulations complement the use of laws to control the trade in counterfeit goods. The efficacy of the alternative regulations depends on the capacity of government authorities and agencies, traders and consumers to use the regulations. Additionally, the availability of resources and equipment is important for the efficient implementation of alternative regulations. In many instances, the government authorities and agencies, traders and consumers do not or have limited capacity to use alternative regulations to tackle the counterfeiting business. Similarly, the government authorities and agencies, traders and consumers lack or have limited resources to facilitate the implementation of alternative regulations. The above limitations weaken the efficacy of alternative regulations for controlling the trade in counterfeit goods in many countries particularly in Sub-Saharan Africa.

CHAPTER FIVE

THE COUNTERFEIT GOODS TRADE IN TANZANIA: SALIENT FEATURES, DRIVERS AND IMPACT

5.0. Introduction

This chapter describes the salient features of the trade in counterfeit goods in Tanzania, its driving factors and impact. Information in this chapter was generated from interviews, questionnaires and observations. Interviews and questionnaires were used to gather information from personnel from government authorities and agencies, anti-counterfeiting agencies, NGOs, traders and consumers. The interviews and questionnaires were also used to gather information from scholars and experts. This data is complemented by information gathered from documentary sources including newspaper reports.

5.1. Salient Features of the Counterfeit Goods Trade

5.1.1. State of the Counterfeit Goods Trade

Before gathering information about the magnitude of the trade in counterfeit goods in Tanzania, I searched for information about the state of the counterfeit goods trade in the country. Respondents from the anti-counterfeiting agencies were of the general view that markets in the Tanzania are flooded with counterfeit goods.[1] This information was based on the fact that their agencies had conducted operations which resulted in the seizure and destruction of various types of counterfeit goods. Consumers indicated that they had purchased different types of counterfeit products.[2] The respondent from a local company, a manufacturer of food products and soft drinks, said that maize

[1] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).
[2] Interviews: Mukadam (20 October, 2010); Irunde (8 October 2011); Dori (28 October 2011); Chivanga (29 September, 2011).

flour produced by his company was at one time being counterfeited.[3] Newspapers have reported extensively about flooding of counterfeit products in the markets in Tanzania.[4]

The above information indicates that the trade in counterfeit goods is a common phenomenon in Tanzania. It also confirms the findings in the report of the CTI study [5] and the observations made by the FCC[6] about the proliferation of counterfeit products in the markets in Tanzania.

5.1.2.Counterfeit Goods Markets

Counterfeit products in Tanzania are sold in both informal markets (operated by unlicensed traders) and formal markets (operated by licensed traders). Consumers indicated that they had bought counterfeit goods from shops, kiosks, makeshift stalls, flea markets and street vendors.[7] While operators of wholesale and retail shops in Tanzania are licensed, the majority of owners of stalls and makeshift kiosks and sellers who operate their business at the flea markets and street vendors are unlicensed. With regard to the formal markets, a law practitioner who had purchased automobile parts from licensed shops in Dar Es Salaam said:

> It is as if the trade in counterfeit automobile parts has been legalised.... If you visit the shops where these accessories are sold, you will find that traders sell both genuine and non-genuine products. The non-genuine parts, which are counterfeit products, are sold in public.... If you go to places such as Msimbazi, Lumumba or Gerezani, you will see for yourself what I am talking about.[8]

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[3] Interview: Sales officer, Company producing food and soft drinks (22 September 2010).
[4] Beldina Nyakeke, *Trade in fake drugs 'widespread,'* The *Citizen* (Dar Es Salaam), 22 July 2012. See also Editor, *Big No to fakes – From anywhere ,'* The *Daily News* (Dar Es Salaam), 15 October 2012.
[5] Confederation of Tanzania Industries,'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (unpublished report, 2008) 3.
[6] Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (Dar Es Salaam: FCC, 2007) 76.
[7] Interviews and Questionnaires: (consumers) (various dates).
[8] Interview: Law practitioner (14 October 2010).

I visited three automobile accessories shops situated along Lumumba and Msimbazi streets in Dar Es Salaam. I observed some shop attendants advising buyers that some automobile accessories were genuine and other parts were not. The above information was further corroborated by a newspaper report which indicated that some licensed traders in Tanzania sell genuine and non-genuine automobile parts and accessories.[9] Other newspapers reported about the seizure of counterfeit pharmaceutical and chemical products in Dar Es Salaam, Mbeya, Arusha, Mwanza, Shinyanga and Dodoma by the Tanzania Food and Drugs Authority (TFDA) personnel [10] and the impoundment of counterfeit electronic goods in Dar Es Salaam by the FCC officers and the police.[11] The police and the FCC officers seized cartons of counterfeit razor blades in Dar Es Salaam.[12] The FCC officers impounded counterfeit automobile parts[13] and cartridges, tonners and ink [14] and other types of counterfeit goods.[15] in Dar Es Salaam. The media reports indicated that the above counterfeit commodities were confiscated from shops and warehouses owned or operated by licensed traders.

The above information engenders two main points. First, some licensed traders and unlicensed business operators in Tanzania supply and sell counterfeit goods. Second, counterfeit products are available in formal and informal markets in many regions of Tanzania.

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9 John Ndunguru, *Fakes: Another serious threat to our lives,* The *Daily News* (Dar Es Salaam), 11 March 2012; Guardian Reporter, *TFDA seizes 1.5 tons of counterfeit goods,* The *Guardian* (Dar Es Salaam), 11 February 2013.

10 Correspondent, *TFDA seize 18.3 bn/= dangerous chemicals,* The *Guardian* (Dar Es Salaam), 27 August 2010.

11 Guardian Reporter, *Police, FCC, Samsung raid Dar counterfeit shop,* The *Guardian* (Dar Es Salaam), 24 September 2011.

12 Guardian Reporter, *FCC officials seize counterfeit goods,* The *Guardian* (Dar Es Salaam), 14 November 2012.

13 Felix Andrew, *Fake brake pads worth 16.1m/- destroyed in Dar,* The *Guardian* (Dar Es Salaam), 12 April 2013.

14 Felix Andrew, *Commission destroys fake HP products in Dar,* The *Guardian* (Dar Es Salaam), 19 April 2013.

15 Sunday News Reporter, *FCC Seizes counterfeit merchandise,* The *Sunday News* (Dar Es Salaam), 8 September 2013.

5.1.3. The Magnitude of the Counterfeit Goods Trade

Regarding the magnitude of the trade in counterfeit goods, the general view was that the statistics represented in the report of the CTI study mentioned in Chapter One describe the magnitude of the counterfeiting business in Tanzania. The respondent from the traders' organisation said:

> The report of the study commissioned by the [Confederation of Tanzania Industries] has statistics which represent the magnitude of the trade in counterfeit and substandard products.... I believe that those statistics describe the scale of the counterfeiting business in Tanzania.[16]

The report of the CTI study indicates that between 15 per cent and 20 per cent of all commodities in the markets in Tanzania are counterfeit goods and substandard products (worth between US$ 450 million and US$ 600 million).[17] The above statistics are the commonly cited figures which represent the magnitude of the trade in counterfeit goods and substandard products in Tanzania.

One respondent was of the opinion that statistics in the report of the CTI study did not represent the magnitude of the trade in counterfeit goods only; they conflated metrics of the trade in counterfeit goods and substandard products. He pointed out that 'the study did not differentiate counterfeit goods from substandard products. Substandard goods are not necessarily counterfeit products.'[18] With regard to the scale of the trade in counterfeit pharmaceutical, food and cosmetic products, another respondent said: 'it is not possible to describe the precise size of the business involving counterfeit food, drug and

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[16] Interview: Director, Traders' organisation (9 November 2011).
[17] Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 5) 13.
[18] Interview: Director, Anti-counterfeiting agency (17 September 2010).

cosmetic products, because our [agency] has not conducted a study to determine the magnitude of the business affecting those business.'[19]

The above information implies that the magnitude of the trade in counterfeit goods in Tanzania is not ascertained. The report of the CTI study did not differentiate the trade in counterfeit goods from the business which involves substandard products. The respondents from the Ministry of Industry and Trade and the anti-counterfeiting agencies said that neither the above Ministry nor the agencies had conducted studies to investigate and determine the magnitude of the trade in counterfeit goods in Tanzania, the scope of counterfeit goods in the markets and the scale of the impact of the trade.[20]

The general opinion of the respondents from the Ministry of Industry and Trade and the anti-counterfeiting agencies was that there had been a massive influx of counterfeit goods into Tanzania's markets. The respondent from the enforcement agency was of the view that 'counterfeit goods are widespread in the country. Most of goods in the markets in Dar Es Salaam are counterfeit products.'[21] Newspaper commentaries gave an impression that the country's markets were awash with counterfeit goods. This could be inferred from phrases used to describe the prevalence of counterfeit goods in the markets such as the markets are 'flooded with counterfeit goods,'[22] or 'inundated with fake products,'[23] or 'awash with counterfeit products.'[24] Although the above newspaper reports did not state the exact magnitude of the trade in counterfeit goods in the country, they presented the general opinion that the markets in Tanzania are awash with counterfeit products.

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[19] Interview: Manager, Anti-counterfeiting agency (25 September 2010).
[20] Interviews: Director, Ministry of Industry and Trade (22 October 2010); Director, Anti-counterfeiting agency (17 September 2010).
[21] Interview: Commissioned Officer, Law enforcement agency (30 September 2010).
[22] Editorial, *War against fake must be intensified,* The *Daily News* (Dar Es Salaam), 4 March 2012.
[23] Editorial, *Let's eradicate counterfeits,* The *Citizen* (Dar Es Salaam), 13 November 2011.
[24] Edwin Agola, *Fake drugs flood Misungwi district,* The *Guardian* (Dar Es Salaam), 2 October 2011.

Information sourced from interviews, questionnaires and newspaper reports indicate that the trade in counterfeit goods in Tanzania involves a wide range of products as listed in **Table 1** below.

Table 1: Counterfeit goods in markets in Tanzania

	Industrial sector	Examples of counterfeit products
1.	**Apparel, clothing and footwear**	Jeans, underwear, shirts, suits, jerseys, caps, shoes, socks
2.	**Electronic goods and accessories**	Television sets, radios, calculators, refrigerators, compact disc players and video compact disc players, remote control devices, cellular phones, satellite dishes, solar panels, computers, printer ink cartridges, toner cartridges.
3.	**Automotive parts and accessories**	Motor cycles and accessories, bicycles and parts, automobile parts and accessories
4	**Fuel related products**	Engine oils, lubricants
5	**Chemicals**	Insecticides, herbicides, fertilizers, pesticides
6.	**Electrical goods**	Switches, circuit breakers, fuses, earth rods, cables, batteries, adaptors, chargers, irons, kettles, cookers, bulbs, ovens
7.	**Food products**	Milk powder, maize flour, rice, beans, wheat flour, tea, tomato sauce, chilli sauce
8.	**Drinks**	Alcohol, juice, mineral water
9.	**Personal accessories**	Watches, glasses, handbags, belts
10.	**Pharmaceutical products**	Medicines used for treating HIV/AIDs, malaria, cough, erectile dysfunctions, antibiotics, pain killers, hormones
12.	**Tobacco**	Cigarettes
13.	**Personal care products**	Perfumes, shampoos, lotions, soaps, feminine protection products, skin care products, razor blades, condoms
14	**Security equipment**	Car locks, Padlocks, keys
15.	**Construction materials**	Roofing tiles, corrugated iron sheets, pipes, taps, iron bars, cement, paints
16.	**Farm equipment**	Hand hoes, tillers, machetes
17.	**Agricultural products**	Seeds
19	**Others**	Foam mattresses, mosquito nets, toys, games

Sources: Information from the respondents, media reports, court reports and observations.

Table 1 above indicates that a wide range of goods in the markets in Tanzania are counterfeit products. This information validates findings in the CTI study[25] and observations made by Kameja *et al*[26] that the counterfeit goods trade in Tanzania affects different types of products.

5.1.4. Sources and Destinations of Counterfeit Goods

Counterfeit goods in the markets in Tanzania originate from different countries. Respondents from the anti-counterfeiting agencies said that the bulk of counterfeit products originate from foreign countries. They cited China and India as the main sources of counterfeit products.[27] Other respondents were of the view that Asian countries are the major sources of counterfeit goods sold in Tanzania.[28] Newspaper reports cite China, India, Malaysia, Pakistan, Singapore, Taiwan, the United Arab Emirates, Indonesia and Korea as the main sources of counterfeit goods available in Tanzania's markets. The Director of the FCC has been reported as saying that 'most [counterfeit] electronic [products] are from the Far and Middle East....'[29] In Africa, Kenya and the DRC have been mentioned as the sources of counterfeit which flow into the markets of Tanzania.[30]

During the interview one respondent displayed some counterfeit products which the anti-counterfeiting agencies had seized from traders. These goods included electronic products, electrical equipment and different types of household goods whose production requires sophisticated technologies. The local television stations and newspapers showed

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[25] Confederation of Tanzania Industries,'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (unpublished report, 2008) 13.
[26] Audax K Kameja, August N Mrema & Francis Kamuzora, 'Turning the Tables on Counterfeiters,' (2008) *World IP Contacts Handbook* 1, 1.
[27] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).
[28] Interview: Economics researcher (24 October, 2010); Written Response: Marketing researcher (27 April 2011).
[29] Waryoba Yankami, *Most Fake Electronics from Far and Middle East -FCC* , The *Guardian* (Dar Es Salaam), 30 October 2013.
[30] Special correspondent, *Fighting counterfeit goods: Challenges and prospects*, The *Daily News* (Dar Es Salaam), 24 March 2011. See also, Correspondent, *Govt warns over importation of fake seeds, TRA to monitor,* (Dar Es Salaam), 16 April 2014.

officers of the anti-counterfeiting agencies destroying foreign-made counterfeit products such as television sets, satellite signal receivers, cellular phones and radios.[31] Certainly, such sophisticated counterfeit products are not manufactured in Tanzania. Possibly, the components of some of the above merchandise are imported or smuggled into Tanzania, but assembling of those components and affixing or imprinting of forged trademarks on the assembled products are done in the country.

There was information which indicated that some counterfeit products were manufactured in Tanzania.[32] The respondent from the traders' organisation cited incidents 'where products manufactured by Bakhresa [Food Products Limited] and Yuasa [Battery East African Limited] were counterfeited by local traders in Tanzania.'[33] With regard to the former incident, one respondent said: 'some traders were re-filling used bags of maize flour with counterfeit flour and sell it as genuine products manufactured by our company.'[34]

Regarding the production of counterfeit pharmaceutical, food and cosmetic products, one respondent said that it was likely that counterfeit goods whose production requires less sophisticated technologies are manufactured in Tanzania. He observed further that counterfeiters could re-fill used containers with counterfeit medicines or cosmetics, or re-fill used bags with counterfeit food, or re-fill used bottles with counterfeit beverages.[35]

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31 Observations: Dar Es Salaam (various dates).
32 Written response: Marketing researcher (27 April 2011). See also FCC, *FCC Seizes Counterfeit Merchandise Worth 44.2 m/-*, Press Release dated 6 September 2013.
33 Interview: Director, Traders' organization (9 November 2011).
34 Interview: Sales officer, Company producing food products and soft drinks (22 September 2010).
35 Interview: Manager, Anti-counterfeiting agency (25 September 2010). See also Songa wa Songa, *Fake drugs nightmare,* The *Citizen* (Dar Es Salaam), 8 October 2011.

Several newspaper reports indicate that some counterfeit products are manufactured in Tanzania. There was also a newspaper report which asserted that some foreign private investors were using their warehouses as facilities for assembling counterfeit goods. The warehouses were used for assembling the counterfeit products which were, subsequently, supplied to the markets. [36] Another newspaper observed that some traders use bags imprinted with forged names and marks of genuine traders and 'pack them with [counterfeit] seeds and sell them to unsuspecting farmers.'[37] Newspapers have reported about incidents where the police in Tanzania had seized equipment used to produce counterfeit goods. The police in Dar Es Salaam arrested three persons who were manufacturing counterfeit insecticides.[38] In Arusha, the police uncovered a facility which was used to manufacture counterfeit agricultural products and several tons of counterfeit seeds, pesticides, herbicides and fertilizers.[39]

There was information which suggested that Tanzania was a source and a transit country for the shipment of counterfeit goods trafficked to neighbouring nations in Eastern and Central Africa. One respondent said that other EAC member states had been complaining about the flow of counterfeit products from Tanzania to their markets. He pointed out that some officials and owners of industries from other EAC countries 'claim that the counterfeit commodities which originate from or transhipped via Tanzania are smuggled to their countries.'[40]

Newspaper reports corroborated the information that Tanzania is a source of counterfeit goods trafficked to other African countries. One newspaper reported that

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[36] Sebastian Mrindoko, *Firms now make fake goods locally,* The *Daily News* (Dar Es Salaam), 4 July 2010.
[37] Anthony Tambwe, *Fake seed traders debilitate national economy,* The *Daily News* (Dar Es Salaam), 15 June 2013.
[38] Edwin Agola, *Police seize fake spays factory,* The *Guardian* (Dar Es Salaam), 19 June 2011.
[39] *Unga Limited factory produces fake pesticides, fertilizer, bread: Name any international brand, you get it,* The *Arusha Times* (Arusha), 16 - 22 October 2010.
[40] Interview: Director, Traders' Organization (9 November 2011).

traders in Dar Es Salaam were manufacturing counterfeit medicines and exporting them to the Democratic Republic of the Congo.[41] There was a report that the Kariakoo market, which is situated in Dar Es Salaam's main business district, was 'stocked with [counterfeit] merchandise –[ranging] from imported car parts to handbags – and traders from across Africa come to buy cheap imports to sell at home.'[42] It was also reported that counterfeit sugar was being smuggled into Kenya from Tanzania.[43]

The above information shows that first, the bulk of counterfeit goods in the markets in Tanzania originate from foreign countries particularly some nations in Asia. This confirms observations made by Mkono *et al* [44] and the CTI [45] to the effect that counterfeit goods are imported or smuggled from foreign countries into Tanzania. Second, some local traders in Tanzania manufacture counterfeit products. The CTI study has mentioned about this phenomenon.[46] Third, Tanzania is the source of and transhipment country for counterfeit goods smuggled to other countries in East and Central Africa.

5.1.5. Operators of the Counterfeit Goods Trade

Local and foreign traders operate the counterfeit goods trade in Tanzania.[47] The respondent from the main law enforcement agency pointed out that 'our investigation shows that both local and foreign traders are involved in running the counterfeit goods

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41 Express Reporter, *FAKE! FAKE! Tetracycline,* The *Express* (Dar Es Salaam), 22 - 28 October 2009 <http://www.theexpress.com> (accessed 26 October 2009).

42 IRIN News, *Counterfeit drugs put lives at risk,* 15 January, 2009 <http://www.irinnews.org/Report/82374/TANZANIA-Counterfeit-drugs-put-lives-at-risk> (accessed 24 January 2009).

43 Manuel Odeny & Samuel Otieno, *Alarm over smuggled Tanzania cheap sugar,* The *Star* (Nairobi), 2 January 2012.

44 Nimrod E Mkono, Audax K Kameja & August N Mrema, 'Tanzania's IP Changes are Good for Business,' (2008) *World IP Contacts Handbook* 96, 97.

45 Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 5) 16 - 17.

46 *Ibid* 16.

47 Written response: Marketing researcher (27 April 2011).

business.'[48] Respondents from the anti-counterfeiting agencies expressed similar opinions.[49]

Some respondents mentioned about the involvement of traders from China in manufacturing and selling counterfeit goods in Tanzania.[50] Newspapers have reported about the involvement of traders from China in producing and supplying counterfeit goods to the markets in Tanzania. One newspaper reported about Chinese traders who had set up '[facilities] at Temeke and Kiwalani in Dar Es Salaam [used to manufacture counterfeit] drugs, cosmetics, soaps and chemicals [which are later supplied] to the local markets.'[51]

China's authorities have refuted the involvement of Chinese traders in importing, smuggling, manufacturing or selling counterfeit goods in Tanzania. The Deputy Director of China's National Development and Reform Commission, Cong Liang, is reported to have told journalists from Tanzania that African countries should stop accusing traders from China of exporting counterfeit goods and substandard products to Africa, but encouraged them to improve the border controls and port inspection systems to thwart the flow of foreign-made counterfeit goods and substandard commodities to their markets. The Deputy Director further asserted that it was '"unfaithful businessmen" from other countries who export counterfeit products [while] claiming that they [are traders from China].'[52]

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48 Interview: Commissioned officer, Law enforcement agency (30 September 2010).

49 Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010). See also, FCC, *FCC Seizes Counterfeit PVC Pipes,* Press Release dated 25 July 2013.

50 Interviews: Director, Anti-counterfeiting agency (17 September 2010); Director, Traders' organization (9 November 2011).

51 Pius Rugonzibwa, *Chinese in fake drug business,* The *Daily News* (Dar Es Salaaam), 18 May 2011.

52 Steve William, *China: Our products are not fake,* The *Guardian* (Dar Es Salaam), 22 August 2012.

Some local politicians have absolved traders from China from the blame of participating in the operation of the counterfeit goods trade. Tanzania's Prime Minister, Mizengo Pinda, is reported to have stated that traders from China had nothing to do with counterfeit products which have flooded Tanzania's markets. He further asserted that dishonest local traders are responsible for the importation of the counterfeit goods 'from China or elsewhere and [turning country] into a dumping ground for those commodities.'[53] In another incident, the former President of Tanzania, Benjamin Mkapa, argued Africans to reject the United States and European countries' claims about the influx of Chinese traders in Africa and Chinese substandard and counterfeit products in Africa's markets.[54]

Some public agencies in Tanzania have also been implicated in facilitating the supply of counterfeit products to the markets. In September 2012, newspapers reported that the public department, namely the Medical Store Department (MSD) was involved in supplying to hospitals counterfeit antiretroviral (ARV) drugs. The counterfeit medicines were reportedly manufactured by Arusha-based Tanzania Pharmaceutical Industries Limited. [55] In October 2013, newspapers reported that some officers of Tanzania Vaccine Institute had supplied to veterinary pharmacies counterfeit chicken flu vaccines. The vaccines were found in pharmacies in different regions of Tanzania. [56]

The interpretation of the above information is that, first, local traders in Tanzania operate the trade in counterfeit goods. Second, there is evidence which indicates that

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53 Levina Kato, *Importation of substandard goods irks – PM,* The *Daily News,* (Dar Es Salaam), 6 July 2010.

54 Guardian Reporter, *Mkapa: China-Africa coop cornerstone for South-South Relations.* The *Guardian* (Dar Es Salaam), 13 July 2012.

55 Citizen Reporter, *Fake ARVs in town: The plot thickens,* The *Citizen* (Dar Es Salaam), 25 September 2012; See also Deogratius Mushi, *TFDA should be cautious on fake ARV drugs,* The *Daily News* (Dar Es Salaam), 9 October 2012.

56 Guardian Reporter, *Tanzania Vaccine Institute marketing fake chicken vaccine,* The *Guardian* (Dar Es Salaam), 12 October 2013. See also, *Chicken flu vaccine suspended,* The *Daily News* (Dar Es Salaam), 18 October 2013

foreign traders particularly from China manufacture, import or sell counterfeit products in Tanzania. Third, private traders and enterprises run the counterfeit goods trade and there are reports that indicate that some public agencies are involved in supplying or facilitate the supply of counterfeit products to the markets.

5.2. Drivers of the Counterfeit Goods Trade

There was no information which described with certainty when the trade in counterfeit goods in Tanzania emerged. Some respondents associated the emergence of the counterfeit goods trade with the economic liberalisation policy whose implementation commenced in the 1980s. An economics researcher observed that:

> ... the trade liberalisation period was the turning point in the history of the counterfeit goods trade in Tanzania.... It was during this period we have witnessed some traders taking advantage of the operation of the weakly regulated free market economy in the country to manufacture, import, distribute and sell counterfeit goods. [57]

Regarding the link between liberalisation of the economy and the rise of the trade in counterfeit goods in Tanzania, The respondent from the traders' organisation said that:

> ... prior to the economic liberalisation era, Tanzania's economy was controlled by state- and publicly-owned enterprises. The levels of counterfeit products were not as high as it is today. What I can say is that, liberalisation of the economy that embraced privatisation and deregulation of the economy created a space within which the counterfeit goods business has been thriving.[58]

Other respondents said that prior to the economic liberalisation period, government authorities and SOEs in Tanzania monopolised the production, importation, distribution and sale of goods. Due to the monopoly and stringent regulatory controls by

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[57] Interview: Economics researcher (24 October 2010).
[58] Interview: Director, Traders' organization (9 November 2011).

the state agencies during this era, there were, arguably, insignificant volumes of counterfeit products in the markets in Tanzania.[59]

The respondent from the anti-counterfeiting agency tasked to control the trade in counterfeit food, drugs and cosmetic products expressed a different opinion from the above view. He said that the trade in counterfeit goods in Tanzania emerged before the economic liberalisation period. He pointed out that Tanzania had laws that prohibited counterfeiting and dealt with infringements of trademarks and passing off goods since the colonial period. The independence government of Tanganyika (later Tanzania) inherited, retained and reformed some of the laws. The respondent enquired: 'if the trade in counterfeit goods was not in existence, why has the anti-counterfeiting law subsisted for the whole of this period?'[60] As I will demonstrate in Chapter Six, trademark law and criminal law for curbing the counterfeit goods trade in Tanzania trace their origin from English laws that were transplanted onto Tanganyika during the colonial period.

The analysis of the above information is that there is limited information which describes with certainty when the trade in counterfeit goods in Tanzania came into being. Possibly, the trade in counterfeit goods has evolved for many decades. The counterfeit goods trade in Tanzania became a noticeable phenomenon after the government of Tanzania liberalised the economy in the 1980s. The FCC [61] and the CTI [62] have observed Tanzania witnessed the influx of counterfeit goods in its markets when the government started implementing the trade liberalisation policy.

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[59] Interviews: Director, Ministry of Industry and Trade (22 October 2010); Economics researcher (24 October 2011).

[60] Interview: Manager, Anti-counterfeiting agency (25 September 2010).

[61] Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (note 6) 77.

[62] Confederation of Tanzania Industries,'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 5) 11.

After looking at the genesis of the trade in counterfeit goods in Tanzania, I now describe the drivers of the trade that can be classified into two main categories, namely those drivers that encourage or compel consumers to purchase or use counterfeit goods and those factors which facilitate or motivate traders to supply counterfeit products to the markets.

5.2.1.Demand for Counterfeit Goods

Consumers in Tanzania purchase and use counterfeit goods. These consumers fall into two broad groups: those who at the time of purchasing counterfeit goods do not know that the commodities are not genuine and those who at the time of sale know that commodities are counterfeit products.

Some consumers in Tanzania purchase counterfeit goods unknowingly. A consumer who had bought a counterfeit hair lotion said: 'I bought the lotion because I did not know that it was a counterfeit product. If I knew that the product was not genuine, I wouldn't purchase the lotion.'[63] Another consumer who purchased a counterfeit fabric material and a pair of counterfeit sandals pointed out that she purchased those commodities unsuspectingly. She said: 'I did not notice that the goods were counterfeit products.'[64] Another consumer who purchased counterfeit fumigating equipment and fake dry cells said that he did not know that the commodities were counterfeit products.[65] One consumer bought counterfeit shoes and bicycle tyres because he believed that those goods were genuine products.[66] Other consumers indicated that their inability to distinguish genuine goods from counterfeit products was a reason for purchasing those commodities.[67]

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[63] Interview: Shufaa (30 October 2010).
[64] Interview: Huruka (28 October 2010).
[65] Interview: Irunde (8 October 2011).
[66] Interview: Chivanga (29 September 2011).
[67] Questionnaires: consumers (various dates).

The respondents from the anti-counterfeiting agencies were of the general view that some consumers purchase counterfeit goods because they are unable to differentiate genuine products from counterfeit goods. This was due to, among other factors, sophistication of counterfeiting that makes it difficult for many consumers to identify counterfeit products. A respondent from one of the anti-counterfeiting agencies said:

> Look at those goods..., they are all counterfeit products. The counterfeiting is so perfect that it is difficult for buyers to detect them. ... In one incident, we impounded counterfeit *Speedo* ball pens. We invited representatives of the manufacturers of the genuine *Speedo* ball pens from India. They were not able to distinguish the counterfeit pens from the genuine products manufactured by their industries.[68]

With regard to counterfeit medicines, one respondent pointed out that it was difficult for many purchasers to identify counterfeit medicines. He said: 'it is difficult for some pharmacists to detect counterfeit medicines without conducting laboratory tests.'[69] The inference which can be drawn here is that, if manufacturers of products or pharmacists (who have technical knowledge) cannot detect counterfeit goods, it will be more difficult for consumers to distinguish genuine goods from counterfeit products.

Newspapers have indicated that many consumers in Tanzania purchase counterfeit goods unknowingly due to their inability to distinguish genuine commodities from counterfeit goods. One newspaper observed that '[counterfeit goods] and genuine products are similar in almost every aspect that most people can hardly [distinguish] one from the other; only experienced experts can notice ... differences [between the two].'[70] Another newspaper pointed out that counterfeiters falsify trademarks and brand names imprinted on counterfeit products and their packaging materials or containers and make

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[68] Interview : Director , Anti-counterfeiting agency (17 September 2010).
[69] Interview: Manager, Anti-counterfeiting agency (25 September 2010).
[70] *Fake goods a hard nut, but we can tame tide,* The *Guardian* (Dar Es Salaam), 8 July 2011.

them appear confusingly similar to the genuine ones. The newspaper pointed out that counterfeiters deceive consumers by imprinting on their goods 'names that look similar to original products. Names like Philibs (Phillips), Sanya (Sanyo) and Natinal (National) are... used to confuse buyers.'[71]

Besides the inability of consumers to detect counterfeit products, there are other factors that cause many buyers in Tanzania to purchase those goods unknowingly. Some consumers pointed out that they bought counterfeit goods because they did not examine the commodities prior to purchasing them. They learnt afterwards that the goods had bought were counterfeit products.[72] This could be attributed to some consumers' recklessness or carelessness to inspect goods before purchasing them. Many consumers purchase goods from unauthorised dealers or distributors of products who sell counterfeit goods. Other consumers indicated that they purchased counterfeit goods because sellers had falsely represented that those goods were genuine while they were counterfeit products.[73]

The above information shows that some consumers in Tanzania purchase counterfeit goods unknowingly. Besides consumers' failure to inspect counterfeit goods and their reliance on traders' representations about the genuineness of commodities, many purchasers face challenges in identifying counterfeit products. They cannot distinguish genuine products from counterfeit goods. As I described in Chapter Two, the above phenomenon is known as deceptive counterfeiting which involves situations where consumers purchase counterfeit goods erroneously while believing that those

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[71] Editor, *No to counterfeit goods in Tanzania,* The *Daily News* (Dar Es Salaam), 3 December 2007.
[72] Questionnaires: consumers (various dates).
[73] *Ibid.*

commodities are genuine goods.[74] The above consumers lack and, or have limited information to assist them to identify counterfeit goods.

Some consumers in Tanzania purchase counterfeit goods knowingly. Low prices at which counterfeit products are sold make these goods attractive to many consumers. Some consumers indicated that low prices motivated them to buy counterfeit products.[75] The respondent from the consumer protection association said that low prices induce consumers in Tanzania to purchase counterfeit goods knowingly. Consumers who have limited disposable incomes purchase counterfeit goods knowingly[76] In explaining the relationship between low incomes and the propensity to purchasing low-priced counterfeit products, a law practitioner observed that low-income consumers have no, or have limited options other than purchasing cheap counterfeit goods. He said: 'Many poor people in Tanzania buy low-priced products. The majority of these commodities are counterfeit goods. The poor cannot buy expensive, genuine products.'[77]

There was also a view that some consumers want luxurious, genuine products, but they could afford to purchase those goods because they were expensive. A consumer said:

> Some consumers want to acquire high-status goods, for example, nowadays young people want to own flashy cellular phones. For us women, we want to have perfumes which, apparently, are expensive. But, most of us cannot afford to buy expensive genuine goods. We end up in buying cheap commodities, some of which are counterfeit products.[78]

Following the liberalisation of Tanzania's economy, there has been an influx of high-priced commodities into Tanzania from foreign countries. These include clothing,

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[74] Jason M Carpenter & Karen E Edwards, 'U.S. Consumer Attitudes Toward Counterfeit Fashion Products,' (2013) 8 *Journal of Textile and Apparel, Technology & Management* 1, 2.
[75] Interviews and questionnaires: consumers (various dates).
[76] Interview: CEO, Consumer protection association (24 October 2010).
[77] Interview: Law scholar (21 October 2010).
[78] Interview: Dori (29 September 2010).

leather products (such as handbags, belts and shoes), watches, electronic goods (such as television sets, radios, cellular phones and computers), jewelleries, cosmetics and building materials. Advertisements (through the television, radio, newspapers and the Internet) and other marketing strategies are used to make these known to the consumers and stimulate consumer demand. As I pointed out in Chapter One, about one third of the people in Tanzania live under the absolute poverty conditions. They cannot afford to purchase these high-priced commodities. They resort to buying counterfeited versions of those products.

Some respondents disagreed with the viewpoint that counterfeit goods are low-priced. A respondent from one of the anti-counterfeiting agencies said 'some counterfeit products are sold at the same prices as genuine commodities, but the poor buy them .... I think the buyers' perception that counterfeit goods are cheap is incorrect in some circumstances.'[79] The respondent's observation was based on two factors. First, in some instances, traders sell counterfeit goods at the same prices as or higher than those of genuine products. Second, where counterfeit products are defective or non-functioning, consumers incur costs of repairing or replacing defective or malfunctioning counterfeit products. These factors make counterfeit goods more expensive than what most consumers think.[80] One newspaper commentator gave similar opinion that: 'Counterfeit and substandard goods are considered "cheap",.... but at the end of the day their apparent cheapness is not without a price - to individuals as well as to the nation.'[81]

Another respondent was of the opinion that consumers did not choose to purchase or use substandard, defective or harmful counterfeit products solely because those goods

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[79] Interview: Director, Anti-counterfeiting agency (17 September 2010).
[80] *Ibid.*
[81] Henry Muhanika, *Counterfeit goods in our midst: The challenge ahead,* The *Guardian* (Dar Es Salaam), 25 November 2012.

were inexpensive. He observed that sometimes, consumers purchased counterfeit goods because genuine products were unavailable in the markets. He said:

> ... no person wants to buy or use substandard, defective or harmful counterfeit products. I believe that buyers and users want affordable goods, but this cannot be interpreted to mean that they want counterfeit goods because they are cheap.... If goods, manufactured locally or imported are genuine products and sold at affordable prices, no consumer will purchase or use counterfeit commodities despite their cheapness.[82]

The interpretation of the above information is that some consumers in Tanzania purchase counterfeit goods knowingly because they are attracted to low prices of those commodities. Poor consumers cannot afford to buy expensive, genuine goods. They buy inexpensive, counterfeit goods. Some consumers are attracted to the 'status-enhancing' luxury counterfeit products. Other buyers purchase counterfeit goods knowingly because genuine commodities are unavailable in the markets. As I pointed out in Chapter Two, the above phenomenon is known as non-deceptive counterfeiting. It involves consumers who know, at the time of purchasing goods, that those commodities are counterfeit products.[83]

5.2.2.Supply of Counterfeit Goods

There are several factors that facilitate and motivate traders to manufacture, import, smuggle or supply counterfeit goods to the markets in Tanzania. These factors are as described below.

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[82] Interview: law practitioner (14 October 2010).

[83] Imran A Mir, 'Examination of Attitudinal and Intentional Drivers of Non-deceptive Counterfeiting in A South Asian Context,' (2013) 14 *Journal of Business & Management* 601, 602.

a) The Market-based Reforms

Some respondents were of the opinion that the trade in counterfeit goods in Tanzania became a noticeable phenomenon subsequent to the government adopting and starting to implement the market-based policies imposed by the World Bank and the IMF. The implementation of these reforms started in the 1980s. The general view was that the market-based reforms created opportunities for dishonest traders to manufacture, import, smuggle or sell counterfeit products.

With regard to the nexus between the market-based reforms and the proliferation of counterfeit products in the markets in Tanzania, the respondent from the lead anti-counterfeiting agency said:

> Trade liberalisation lifted the economic monopoly which state-owned enterprises in Tanzania enjoyed. Private persons participate in economic activities which they were previously not allowed to undertake. Deregulation of the economy lifted restrictions that constrained private persons from operating business activities. Dishonest traders have taken advantage of these reforms to manufacture, or import and sell counterfeit products.[84]

The interpretation of the above information is that liberalisation of Tanzania's economy opened the 'door' for local and foreign traders to manufacture, import, smuggle or sell counterfeit products. Inadequacies of the regulation of the liberalised economy in Tanzania have provided opportunities for the traders to supply counterfeit goods to the markets. The studies by the CTI[85] and Kameja *et al* [86] have observed that liberalisation of the economy have catalysed the operation of the counterfeit goods trade in Tanzania.

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[84] Interview: Director, Anti-counterfeiting agency (17 September 2010).
[85] Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 5) 11.
[86] Kameja *et al*, 'Turning the Tables on Counterfeiters,' (note 26) 2.

b) International Trade and Regional Integration

Internationalisation of trade has brought traders and consumers in Tanzania into contact with their counterparts in foreign countries. These commercial contacts have made it possible for commodities including counterfeit products from foreign nations to flow to Tanzania's markets. The respondent from the law enforcement agency pointed out that: 'traders import or smuggle counterfeit goods from Asian countries such as China, Hong Kong, India, Singapore and Taiwan.... These are some of Tanzania's major trade partners.'[87]

The respondents from anti-counterfeiting agencies said that the bulk of counterfeit products in Tanzania's markets are imported or smuggled from the world's notorious producers and exporters of counterfeit products particularly India and China.[88] Arguably, commercial contacts between the traders from Tanzania and their counterparts from Asian countries particularly China and India facilitate the flow of the foreign-made counterfeit merchandise from the above countries to Tanzania.

Tanzania's membership of the regional trading groups, namely the EAC has made the country a recipient of counterfeit products flowing from other EAC member states.[89] One respondent said:

> There have been increased movements of goods within the region as a result of the regional economic co-operation and integration among the East African countries. This factor makes it easy for importers and traffickers of counterfeit medicines, cosmetics and food to consign these products into Tanzania. Media reports show that the East African region is flooded with counterfeit commodities.[90]

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[87] Interview: Commissioned officer, Law enforcement agency (30 September 2010).
[88] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, anti-counterfeiting agency (25 September 2010).
[89] The EAC member states are Burundi, Kenya, Rwanda, Tanzania and Uganda.
[90] Interview: Manager, Anti-counterfeiting agency (25 September 2010).

Reports indicate that the EAC common market is flooded with counterfeit goods. One report by the United Nations Office on Drugs and Crime observes that 'East African states have become a market for counterfeit goods.... [These illicit goods] are widely available [in the region].'[91] Regarding individual EAC countries, Lunga notes that Uganda is flooded with counterfeit goods.[92] Patroba remarks that Kenya's markets are awash with counterfeit products. [93] Some of the counterfeit products from the neighbouring EAC are imported or smuggled into Tanzania. One newspaper reported that counterfeit solar panels and accessories are smuggled from Kenya to Tanzania. [94]

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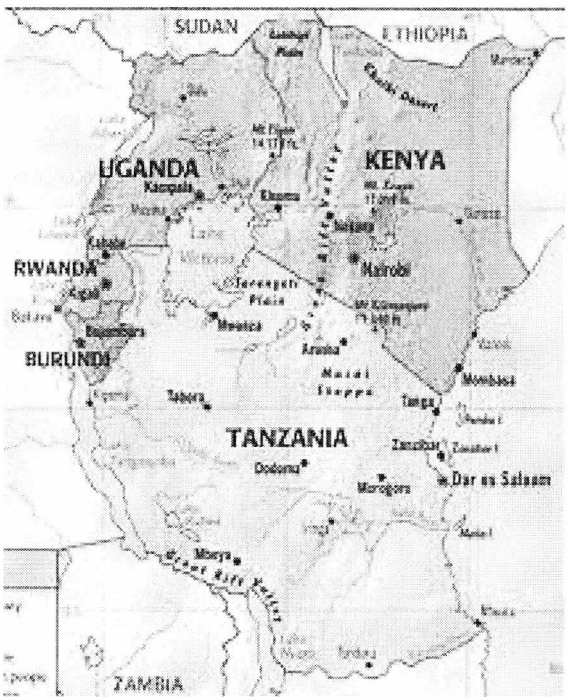
[91] United Nations Office on Drugs and Crime, 'Organized Crime and Trafficking in Eastern Africa,' A Discussion Paper at the *Promoting the Rule of Law and Human Security in Eastern Africa* Conference, held Nairobi, Kenya, 23 -24 November 2009, pp 11- 12. See also Boniface Otieno, *Alarm raised as fake goods flood East African Countries,* The *East African Business Times* (Nairobi), 14 March 2014.

[92] Zweli Lunga, 'Problems in Defining Counterfeiting: The Case of Uganda's 2009 Proposed Anti-counterfeit Law,' (2009) 15 *East African Journal of Peace & Human Rights* 503, 503 -504.

[93] Hilary Patroba, 'China in Kenya: Addressing Counterfeit Goods and Construction Sector Imbalances,' Southern Africa Institute of International Affairs, Occasional Paper No. 110, 2012, pp 14 - 16.

[94] Lucas Lukumbo, *solar power counterfeits from neighbours strangling market,* The *Guardian* (Dar Es Salaam), 18 August 2010.

Map 3: EAC member states



Tanzania is also a member of the SADC [95] whose member states' markets are awash with counterfeit goods. Goredema observes that the SADC region is flooded with '...counterfeit goods of various kinds [and] Malawi, Swaziland, Zambia, Lesotho, South Africa and Zimbabwe highlight prominent manifestations of counterfeit goods flooding the markets.'[96] Some of counterfeit goods from the SADC members find their way into Tanzania's markets. A newspaper reported that counterfeit solar equipment were smuggled in Tanzania from Zambia and South Africa. [97]

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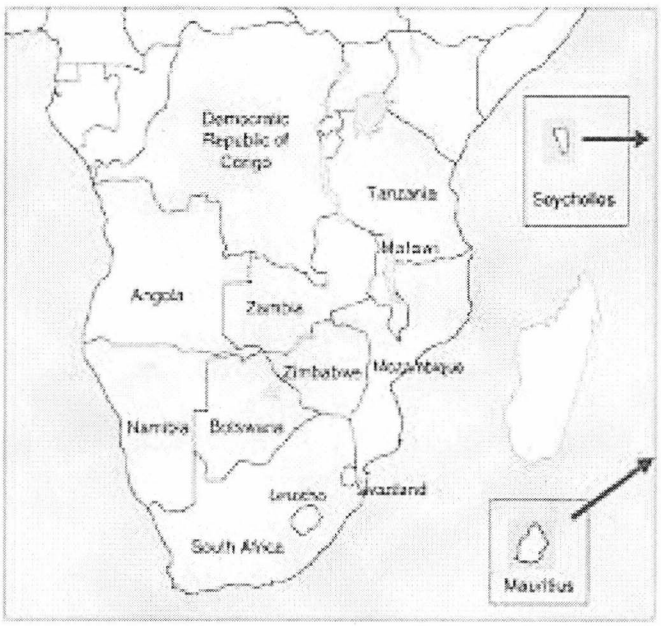
[95] The SADC members are: Angola, Botswana, the DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[96] Charles Goredema, 'Money Laundering Survey in East and Southern Africa - January to June, Institute of Security Studies, 2006, pp 10 - 11.

[97] Lucas Lukumbo, *solar power counterfeits from neighbours strangling market,* The *Guardian* (Dar Es Salaam), 18 August 2010.

Map 4: SADC member states



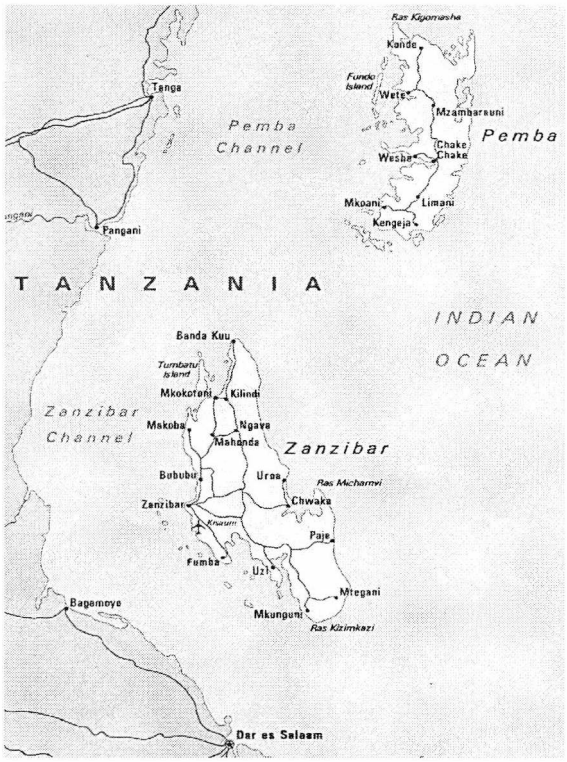
The interpretation of the above information is that the trade in counterfeit goods in Tanzania is linked to the global and regional counterfeiting business. Through trade contacts between Tanzania and other countries, counterfeit goods flow into Tanzania's markets. Tanzania's proximity to the world's major counterfeit goods producing centres in Asia facilitates the flow of counterfeit products to Tanzania's markets. The opening up of Tanzania's markets, as part of the implementation of the economic liberalisation policy, has made the flow of counterfeit goods to the country easy. The influx of counterfeit products in the markets in Tanzania can partly be explained by Tanzania's location within the regions (namely, the EAC and the SADC regions) where national markets are flooded with counterfeit products.

c) Zanzibar as Transhipment Point of Counterfeit Goods

Zanzibar, which is located off Tanzania Mainland, consists of a group of islands. The main islands are Unguja and Pemba. Zanzibar, which forms part of the United

Republic of Tanzania, is semi-autonomous state with its legislative and judicial powers over the islands.[98] Mainland Tanzania mainland and Zanzibar islands (Pemba and Zanzibar) are separated by the Pemba and Zanzibar Channels across which criminals tranship contraband to Mainland Tanzania.

Map 5: Zanzibar Islands



One respondent said that some smugglers use Zanzibar as the transit point for shipment of the foreign-made counterfeit goods to Mainland Tanzania. These counterfeit products originated from Asia. He pointed out that:

> Zanzibar is a free port where some of contraband and counterfeit goods in Tanzania mainland are transhipped through. The counterfeit products originate from Asian countries. Our agency does not have powers to deal with the trade in counterfeit goods in Zanzibar. Zanzibar has its own

[98] Article 4 of the Constitution of the United Republic of Tanzania of 1977 (Chapter 2 RE 2002).

> intellectual property and anti-counterfeiting laws. The counterfeit goods flow to Tanzania mainland easily the sea channel between Zanzibar and the mainland is poorly policed.[99]

The Merchandise Marks Act, the Merchandise Marks Regulations, the Tanzania Food, Drugs and Cosmetics Act and the Standards Act (the main legislations for controlling the trade in counterfeit goods in Mainland Tanzania) do not apply to Zanzibar. Accordingly, the anti-counterfeiting agencies, namely the FCC, the TFDA and the TBS do not have mandate to operate in Zanzibar.

The interpretation of the above information is that Mainland Tanzania's proximity to Zanzibar exposes the former to counterfeit goods transhipped through the latter. The situation is complicated by the fact that Mainland Tanzania's anti-counterfeiting laws do not apply to Zanzibar and the former's anti-counterfeiting agencies do not have powers to operate in the latter's territory. The Zanzibar Channel and Pemba Channel separating Zanzibar islands from Mainland Tanzania are porous and weakly policed.

d) The Green Channel Imports Clearance System

Clearance of imported goods at the ports of entry (harbours and airports) in Tanzania is done through three channels: the 'Green Channel' (low risk imports); the 'Yellow Channel' (medium risk imports) and; the 'Red Channel' (high risk imports). While the 'low risk' imports are not inspected, those considered to be the 'medium risk' imports are inspected through X-ray scanning by the TRA's agent, namely TISCAN Limited. The Tanzania Revenue Authority (TRA) personnel conduct physical inspections

[99] Interview: Director, Anti-counterfeiting agency (17 September 2010).

of the 'high risk' imports.[100] The FCC, the TFDA and the TBS have no authority to inspect imported goods passing through the Green Channel system.[101]

The respondent from the TRA pointed out that the revenue authority does not inspect these imports because the goods belong to: '300 tax payers who contribute about 80 per cent of the government's revenue. Since their contribution to the government's revenue is significant, the TRA accords them a special treatment. The TRA cannot delay clearing their imports.'[102] The above respondent was of the view that through the Green Channel import clearance system counterfeit products might find their way into Tanzania, but the TRA was vigilant to ensure that importers of goods do not abuse this system.[103]

Newspapers reports have raised concerns about the Green Channel import clearance system. One newspaper observed that the system could facilitate the importation of counterfeit products into Tanzania.[104] Another newspaper was of the view that 'some companies exempted by the TRA from inspections [consign] counterfeit imports.... Unscrupulous people [take] advantage of such exemption to import substandard counterfeit goods both food and drugs....'[105] One can, therefore, argue that there is a possibility for dishonest traders to use loopholes in the import clearance system to bring into Tanzania counterfeit products.

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100 Interviews: Principal officer, Anti-counterfeiting agency (12 October 2010); Senior officer, Company inspecting imported cargoes (18 October 2010).
101 Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).
102 Interview: Principal Officer, Anti-counterfeiting agency (12 October 2010).
103 *Ibid.*
104 Patrick Kisembo, *Fake Imports: TRA's Green Channel Blamed,* The *Guardian* (Dar Es Salaam), 8 October 2009.
105 Jaffar Mjasiri, *Import exemptions pave way to fake goods,* The *Daily News* (Dar Es Salaam), 25 May 2010.

e) Shortage or Unavailability of Genuine Goods in Markets

There was an observation that local industries in Tanzania had limited capacity to manufacture genuine goods to satisfy the markets in the country. Shortages of genuine commodities have created opportunities for dishonest traders to supply to consumers counterfeit products. With regard to pharmaceutical products, the respondent from the anti-counterfeiting agency that deals with drugs, food and pharmaceutical products pointed out that:

> Tanzania has a low capacity to satisfy demand for pharmaceutical products. Local industries produce about 30 per cent of domestic demand. About 70 per cent drugs are imported from abroad. Some fraudulent traders exploit this opportunity to import counterfeit medicines into the country.[106]

The Minister for Health and Social Welfare has indicated that Tanzania imports over 70 percent of pharmaceutical products and this situation creates loopholes for counterfeit medicines to find their way into the country's markets.[107] With regard to seeds, one newspaper reported that Tanzania produces 30 per cent of seeds used by farmers in the country; it imports 70 per cent of seeds used in the country. Undoubtedly, this situation provides an opportunity for some traders to supply to farmers counterfeit seeds in the country.[108]

One respondent disagreed with the view that limited production of commodities by local manufacturers in Tanzania creates an opportunity for traders to supply the markets with counterfeit goods. The respondent noted that the inability of the local manufacturers to satisfy the markets cannot satisfactorily account for the proliferation of

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[106] Interview: Manager, Anti-counterfeiting agency (25 September 2010).

[107] Guardian Reporter, *Technology progress worsens spread of fake malaria drugs,* The *Guardian* (Dar Es Salaam), 17 June 2012. See also Guardian Reporter, *JK: Excessive drug imports helps fake drugs importers,* The *Guardian* (Dar Es Salaam), 17 June 2012.

[108] Citizen Reporter, *Increase in high quality seed production, says farm manager,* The *Citizen* (Dar Es Salaam), 6 June 2013. See also, Guardian Reporter, *Country in short of standard seeds,* The *Guardian* (Dar Es Salaam), 25 January 2014.

counterfeit products in the markets. The importation of commodities from abroad could be used to address shortages of goods in the local markets. The respondent further added that:

> Tanzania has had few industries which have not been able to satisfy local demands and, because of that, the country has been importing goods from abroad. However, this should not justify the importation of counterfeit products into the country. I think, the country can import genuine goods and still control the influx of counterfeit goods if proper mechanisms are put in place....[109]

The above information suggests that shortages of genuine commodities in the markets in Tanzania have created opportunities for some traders to manufacture, import, smuggle or sell counterfeit products. Tanzania has a weak industrial sector. Owing to limited industrialisation, local manufacturers are unable to produce goods to satisfy demands for commodities in the markets. This situation has created opportunities for some traders to supply to consumers counterfeit products.

f) Lucrative Business

The trade in counterfeit goods generates high profits and this factor motivates traders to supply the markets in Tanzania with counterfeit products. With regard to pharmaceutical products, the respondent from the anti-counterfeiting agency that deals with the control of the trade in counterfeit drugs, food and pharmaceutical products said that generation of profits was due to high demand for those products. He said:

> Products such as medicines have high demands and this makes them fast moving commodities. Many people in Tanzania are affected by diseases such as malaria, tuberculosis, cancer and others. The trade in counterfeit pharmaceutical products generates huge profits to manufacturers and sellers of such

[109] Interview: Director, Anti-counterfeiting agency (17 September 2010).

> products. This induces dishonest traders to participate in this illegal business.[110]

Some officials of the government of Tanzania have expressed views that illicit profits motivate dishonest traders to supply counterfeit goods to the markets. The former Deputy Minister for Health and Social Welfare, Aisha Kigoda, informed the Parliament of the United Republic of Tanzania that 'the quest to generate and acquire high profits motivates dishonest manufacturers and greedy traders in Tanzania' to operate the trade in counterfeit medicines.[111] It is believed that the trade in counterfeit goods is highly profitable partly because the operators of the counterfeiting business do not 'pay taxes. Even when they do, the ...value [of the counterfeit merchandise] is under-declared'[112] and, therefore, they pay less taxes and duties to the TRA. Undoubtedly, the inadequacies of laws and enforcement mechanisms are factors that make the trade in counterfeit goods a low-risk business and lucrative business.

g) Technological Factors

Some respondents from the anti-counterfeiting agencies were of the general view that modern technologies provide counterfeiters with means to imitate genuine products and made detection of counterfeit products difficult. With regard to medicinal products, one respondent observed as follows:

> Counterfeiting of medicines has become sophisticated, I think, because of modern technologies used to imitate products and labels of tins or packets that contain the medicines. I have seen some of the counterfeit drugs seized during several operations. It is difficult for many people including some pharmacists to detect them....[113]

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[110] Interview: Manager, Anti-counterfeiting agency (25 September 2010).
[111] Parliament of Tanzania, Parliamentary Proceedings, Seating No. 16, Session No. 3, 2009, p 8, <www.parliament.go.tz/POLIS/PAMS/DOCS/HS-16-3-2009.pdf> (accessed 15 October 2010).
[112] Joseph Mwamunyange, *Dar drug barons now enter fake goods market,* The *East African* (Nairobi), 1 January 2008.
[113] Interview: Manager, Anti-counterfeiting agency (25 September 2010).

I examined different types of counterfeit products such as cellular phones, radios, clothing, shoes, watches, cosmetics and beauty products and pharmaceutical products in the markets.[114] Those counterfeit products were confusingly identical to genuine goods. It was apparent that modern technologies were applied to make these counterfeit goods perfect replicas of the genuine products. The use of these technologies makes it difficult for consumers to differentiate genuine products from counterfeit goods.

5.2.3. Other Driving Factors

There are several other factors that drive the trade in counterfeit goods in Tanzania. There was a view that traders supply counterfeit products to the markets because they disregard fair trade practices. These fraudulent traders do not abide by the principles governing the operation of the fair competition.[115] In breach of fair trade practices, the fraudulent traders manufacture, import, smuggle or sell counterfeit products.[116]

The markets in Tanzania are flooded with different types of counterfeit products.[117] It is difficult for many consumers to avoid purchasing counterfeit products in an environment where such commodities have flooded the markets. Perhaps, due to the easy availability of counterfeit goods in the markets, many people have become habitual buyers of counterfeit goods. Buying and using counterfeit products have become common phenomena. The trade in counterfeit goods in Tanzania has become an 'acceptable' socio-economic phenomenon.[118]

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[114] Observations: Dar Es Salaam (10 November 2011); Singida (19 October 2011), Mtwara (27 October 2011).
[115] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Economics Researcher (24 November 2011).
[116] Sebastian Mrindoko, *Minister warns 'unethical traders,'* The *Daily News* (Dar Es Salaam), 17 December 2012.
[117] Editor, *Why have we lost war on counterfeit goods,* The *Guardian* (Dar Es Salaam), 31 October 2013.
[118] Interview: Director, Anti-counterfeiting agency (17 September 2010).

5.3. Impact of the Counterfeit Goods Trade

The trade in counterfeit goods in Tanzania impacts on the welfare of consumers, economic interests of legitimate traders, the economy and general society. In this section I explore negative and positive effects of the counterfeiting business in Tanzania.

5.3.1.Negative Effects

a) Effects on Consumers

Consumers suffer harms as a result of purchasing and using counterfeit goods. Some consumers said that they sustained bodily harm as a result of consuming unsafe counterfeit products. A consumer who had used a counterfeit hair lotion said: 'when I used the lotion, my hair got burnt and started falling. I went hospital where I received medical treatment.'[119] Two other consumers sustained skin burns as a result of using a counterfeit after-shave lotion[120] and a counterfeit body cream.[121] One newspaper reported about an incident about a resident of Dar Es Salaam whose skin was badly damaged after using a counterfeit body lotion. She had to take medication to cure the ailment.[122]

There were also some concerns about poisonous nature of counterfeit food and pharmaceutical products. One consumer said:

> Some counterfeit goods including food products and medicines.... are toxic and harmful. Recently, it was reported that counterfeit infant milk was on sale. I am worried that our children's health will be affected as a result of the use of these products.[123]

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[119] Interview: Shufaa (30 October 2010).
[120] Questionnaire: (Consumer).
[121] Questionnaire: (Consumer). See also, *Fake goods will kill you,* The *Guardian* (Dar Es Salaam), 19 October 2013.
[122] Correspondent, *Mabibo resident Neema learns hard way about harmful facial lotions,* The *Guardian* (Dar Es Salaam), 23 June 2012.
[123] Interview: Mukadamu (20 October 2010).

In 2010, the police in Arusha seized counterfeit feminine sanitation towels. There were fears that users of the towels would suffer bodily injury. They would be exposed to infectious diseases such as fungal infections, urinary tract infections and sexually transmitted infections.[124] However, there has not been any scientific investigation or tests to determine how the users of the counterfeit towels were affected.

Consumers suffer damage as result of purchasing and using counterfeit goods in three main ways. First, they suffer loss of money as a result of purchasing inferior quality, defective or useless counterfeit products. Second, they incur costs of getting malfunctioning counterfeit articles repaired, replaced or disposed..[125] Consumers who sustain bodily harm after consuming counterfeit food, medicines, cosmetics or beverages incur costs of obtaining medical services.[126] Third, the enforcement of consumer rights violated by suppliers of counterfeit goods involves loss of time, waste of efforts and inconvenience to the consumers of such products.[127]

Consumers listed other negative effects they suffered from purchasing or using counterfeit goods. These included disappointment after learning that commodities they had purchased were counterfeit goods; inconvenience occasioned to track down sellers of counterfeit goods to have their money refunded, or counterfeit goods exchanged for corresponding genuine products or make efforts to have faulty counterfeit articles repaired or defective counterfeit goods disposed of; and frustration for failing to trace the sellers of counterfeit goods or refusal by the sellers to exchange counterfeit goods for corresponding genuine products or refund money to the consumers had paid. [128]

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[124] Adam Ihucha, *Fake sanitary pads unearthed in Arusha,* The *Guardian* (Dar Es Salaam), 26 January 2010.
[125] Questionnaires: (Consumers) (various dates).
[126] Interview: Shufaa (30 October 2010). See also Editorial, *Fake goods will kill you,* The *Citizen* (Dar Es Salaam), 19 October 2013.
[127] Interviews: Dori (28 October 2010); Irunde (8 October 2011); Chivanga (29 September 2011).
[128] Interviews and Questionnaires: (consumers) (various dates).

Some respondents said that the use of counterfeit automotive parts and accessories was a cause of road accidents that result in loss of lives, damage of property and injury to motor vehicle and road users; the use of counterfeit electrical articles was a cause of outbreaks of fire which caused damage to property including houses and motor vehicles, and the use of counterfeit construction materials affected strength of buildings and poses safety risks to occupants of the buildings and their property.[129] The respondents were unable to cite specific incidents to support the above views. Newspapers have raised concerns that the use of counterfeit automotive parts and accessories contributes to the occurrence of road accidents,[130] the use of counterfeit electrical articles causes fire outbreaks,[131] and the use of counterfeit construction materials endanger safety of buildings.[132]

Owing to the proliferation of counterfeit goods in the markets, some consumers have lost confidence in the operation of the liberalised economy in Tanzania.[133] The presence of counterfeit goods in the markets undermines the integrity of the market-based economy. For instance, the presence of counterfeit drugs in the markets has eroded people's confidence in the liberalised health system[134] and caused some people particularly those living with HIV/AIDs to lose faith in the country's health system to the point of stopping to take ARVs.[135]

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129 Interviews: Law Practitioner (14 October 2010); Director, Traders' organization (9 November 2011); Director, Anti-counterfeiting agency (17 September 2010).

130 Faustine Feliciane, *Ajali nyingi husababishwa na wingi wa vipuri 'feki', Nipashe* (Dar Es Salaam), 12 October 2013. See also, Daily News Reporter, *Fake motor vehicle spares blame over road accidents,* The *Daily News* (Dar Es Salaam), 4 March 2014.

131 *Tackle fake goods scourge* The *Citizen* (Dar Es Salaam), 23 July 2012.

132 Sebastian Mrindoko, *Construction industry pushes up demand for electric equipment,* The *Daily News* (Dar Es Salaam), 5 July 2011.

133 Questionnaire: Consumer (25 May 2012).

134 Alpha Nuhu, *For TDFA, the anti-fake drugs battle isn't over,* The *Daily News* (Dar Es Salaam), 10 July 2013.

135 Editorial, *The slow pace of case on ARVs is upsetting,* The *Citizen* (Dar Es Salaam), 6 June 2013.

b) Effects on Traders

The trade in counterfeit goods in Tanzania impacts adversely on the economic interests of traders. The operation of the counterfeit goods trade undermines fair competition in the markets. A respondent from a local company said:

> Local industries need to be protected against unfair competition posed by counterfeiters. We invest lots of resources to develop our products which can compete with goods from local and foreign producers. Counterfeiting activities undermines fair competition in the markets.[136]

Since counterfeiting business involves unfair trade practices, the counterfeit goods trade displaces markets for genuine products. This situation has forced some traders to downsize their activities or close their business. One respondent observed that counterfeiting activities have undermined markets for genuine products because 'the markets for their commodities are [displaced] by the presence of counterfeit goods [and] this situations [forces] legitimate traders to scale down or close their business.'[137] With regard to the above point, the respondent from the traders' organisation said:

> our members including Matsushita Electric (East Africa) Company Limited and Kibo Match Group Limited are threatened by counterfeiting affecting their business. Counterfeiting activities have also affected many local industries including Chemi and Cotex Limited and Bakhresa Food Products Limited.[138]

The above observations confirm the previous research[139] and newspaper reports which have observed that some manufacturers in Tanzania, affected by the presence of counterfeit goods in the markets, have had their business downsized or shut down. The business activities of Kibo Match Group Limited, a local manufacturer of safety matches,

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136 Interview: Sales Officer, Company producing food and soft drinks (22 September 2010).
137 Interview: Director, Anti-counterfeiting agency (17 September 2010).
138 Interview: Director, Traders' Organisation (9 November 2011).
139 Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 38) 18 -19.

were reported to have been threatened by the influx of counterfeit safety matches in the markets. One newspaper observed that, due to counterfeiting activities, '[Kibo Match Group Limited] has already reduced production from 42, 000 to 13, 000 cartoons of matches [per] month....'[140] The closure of the local manufacturer of tyres, namely General Tyre (EA) Limited is believed to been caused partly by the proliferation of foreign-made counterfeit tyres in Tanzania's local markets.[141]

Table 2 below show some enterprises in Tanzania which have been affected by the operation of the trade in counterfeit goods.

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[140] *Imitators pushing Kibo Match out of business,* The *Arusha Times* (Arusha), 1 - 7 July 2006.

[141] Parliament of Tanzania, *Hansard,* Session No. 27, Seating No. 20, 9 July, 2010, pp 11-13 <http://www.parliament.go.tz/POLIS/PAMS/Docs/HS-20-27-2010.pdf (accessed 15 March 2011).

Table 2: Some enterprises in Tanzania affected by the operation of the counterfeit goods trade.

	Name of enterprise	Products affected
1	Matsushita Electric (East Africa) Company Limited	Dry cells, radios, television sets and fans.
2.	Kibo Match Group Limited	Match boxes
3.	Bakhresa Food Products Limited	Food products, beverages
4.	Tanzania Distilleries Limited	Spirits, liquor
5.	Chemi & Cotex Industries Limited	Toothpaste
6.	General Tyre (East Africa) Limited	Tyres
7.	Tanfoam Limited	Foam mattresses
8.	Mansoor Daya Limited	Pesticides
9.	Kibo Seeds Company Limited	Seeds
10.	East African Seed Company Limited	Seeds
11.	East African Cables (Tanzania) Limited	Electric cables
12	Simba Pipelines Limited	Pipes

Sources: interviews and newspapers' reports.

The trade in counterfeit goods in Tanzania imposes financial burdens on manufacturers and sellers of genuine products. These traders incur costs of conducting market surveillance to uncover counterfeiting activities; issuing notices to alert the public about the presence of counterfeit goods in the markets; circulating information to notify purchasers how to detect counterfeit goods; and conducting litigation against counterfeiters.[142] A law scholar said that enforcement of trademark law and anti-counterfeiting law is costly because 'of the high charges paid to hire advocates, court fees and costs which litigants pay to conduct litigation against manufacturers or sellers of

[142] Interview: Sales Manager, Company producer of food and soft drinks (22 September 2010).

counterfeit goods. Under-resourced traders face a challenge of instituting legal proceedings against counterfeiters.'[143] Undoubtedly, owners of brand-name goods whose products are counterfeited suffer reputational damage as a result of the proliferation of such counterfeit goods in the markets.

c) Effects on Economy

The trade in counterfeit goods impacts adversely on Tanzania's economy. The respondents from the anti-counterfeiting agencies were of the general view that the economy loses revenue as a result of tax evasion associated with the operation of the counterfeit goods trade. [144] The CTI study [145] and the FCC[146] have mentioned about the above negative effects of the trade in counterfeit goods on Tanzania's economy.

Undoubtedly, Tanzania's economy suffers revenue loss as a result of some local enterprises' closing down or scaling down their business due to the operation of the trade in counterfeit goods. The government loses taxes and duties which would have been levied on incomes of affected enterprises. Moreover, the government loses revenue which would have been collected as income tax from laid off workers or those who would be employed if enterprises operated full capacity.

Respondents from the Ministry of Industry and Trade and anti-counterfeiting agencies could not provide reliable statistics about the magnitude revenue lost as a result of the operation of the counterfeiting business. They made reference to the statistics indicated in the report of the CTI study which estimated that Tanzania's economy loses

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143 Interview: Law Scholar (21 October 2010).

144 Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, anti-counterfeiting agency (25 September 2010).

145 Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 5) 17 -18.

146 146 Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (note 6) 79.

between shs 450 billion (£ 1.8 billion) and shs 900 billion (£ 3.6 billion) annually due to the operation of the trade in counterfeit goods and substandard products.[147] With regard to the above statistics, the respondent from the TRA said: 'it is impossible to quantify exact losses the economy suffers as a result of the operation of the trade in counterfeit goods. Due to the lack of reliable statistics on the scale of the counterfeiting business, it is difficult to state the actual figures of revenue loss which Tanzania suffers.'[148] Therefore, the quantum of the revenue the government of Tanzania loses as a result of the operation of the counterfeit goods trade is unascertained.

There are concerns that the use of counterfeit farm products in Tanzania contributed to the decrease in agricultural production. Newspaper commentaries have observed that the use of counterfeit fertilizers and seeds caused the decline in crop production.[149] The use of counterfeit fertilizers is believed to lower agricultural production and lessens farmers' revenue generated from sale of their crops.[150] The use of counterfeit farm equipment undermines development of the agricultural sector.[151] However, there is no information which quantifies volumes of crop production which have fallen or the decrease in revenue caused by the use of counterfeit farm equipment, fertilizers and seeds.

As I pointed out earlier in this chapter, the anti-counterfeiting agencies in Tanzania seize, detain or destroy different types of counterfeit goods. They are also involved in curbing other unlawful activities associated with the trade in counterfeit

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147 Confederation of Tanzania Industries, 'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (note 5) 17.
148 Interview: Principal officer, Anti-counterfeiting agency (21 September 2010).
149 Peti Siyame, *Rukwa farmers warned over fake fertilizers,* The *Daily News* (Dar Es Salaam), 21 December 2010; Guardian Correspondent, *Expert crises foul over advent of fake seeds,* The *Guardian* (Dar Es Salaam), 3 May 2013.
150 Editor, *Fake inputs hurt farmers' efforts,* The *Guardian* (Dar Es Salaam), 8 August 2013.
151 Pius Rugonzibwa, *LGAs that buy poor power tillers to be disciplined,* The *Daily News* (Dar Es Salaam), 5 June 2011.

goods such as smuggling of goods and tax evasion. Undoubtedly, controlling the counterfeit goods trade requires resources (funds, equipment and personnel) and imposes a huge financial burden on the economy and the general society. These resources could be used to promote socio-economic activities such as the provision of education, water and health services.

There was a view that operation the trade in counterfeit goods in Tanzania scared off investors. One respondent observed that the proliferation of counterfeit goods in the markets dissuades investments. He said 'no investor will invest in an economy where counterfeit goods are widespread. [Investors' fear is that their] products will not be able to compete with cheap counterfeit goods.'[152] The respondent from the consumer protection association pointed out that 'local and foreign entrepreneurs may refrain from investing in the country due to presence of counterfeit goods....'[153] The FCC has observed that the operation of the counterfeit goods trade in Tanzania scares off investors and some of the investors who undertake various economic activities are forced to closed down their business due to unfair competition posed by the counterfeit products.[154]

d) Other Broader Societal Effects

There are several broad socio-economic effects of the trade in counterfeit goods in Tanzania. Following revelations that the MSD had been involved in facilitating the supply of counterfeit ARVs to hospitals in different regions of Tanzania, there were fears that lives of persons who were taking the counterfeit ARVs would be in danger. The anti-counterfeiting agencies confiscated and destroyed consignments of counterfeit condoms. There are concerns that the use of such condoms would expose users or their partners to

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[152] Interview: Director, Anti-counterfeiting agency (17 September 2010).
[153] Interview: CEO, Consumer protection association (24 October 2010).
[154] Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (note 6) 80.

HIV/AIDs, other sexually transmitted infections (STIs) and unwanted pregnancies. One newspaper observed that, reports about the confiscation of counterfeit condoms 'must have shocked people who... used [them as] protective [gears] against sexually transmitted diseases [and] for family planning purposes...'[155]

The trade in counterfeit goods in Tanzania acts as 'a drawback to the development of industries that [manufacture] genuine products.'[156] The operation of the counterfeiting business limits the prospects for industrialization of the country's economy. Mongula observes that:

> Economic participation by domestic investors and entrepreneurs has been undermined by large foreign investors and free entry of imports from low-income Southern Asian countries. The chances for local industrialisation are limited are limited by cheap and sometimes counterfeit products from China and elsewhere that go untaxed due to corruption.[157]

The prevalence of counterfeit agro-products in markets in Tanzania impedes the implementation of the policy of *Kilimo Kwanza* (literary means 'agriculture first') whose main objective is to modernize and transform the agricultural sector in the country. [158] The Deputy Minister for Agriculture, Adam Malima, expressed the government's concerns about the influx of counterfeit fertilizers in the markets. He pointed out that dishonest traders mix cement and fertilizers or salt and fertilizers in order to generate high profits.

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155 Daily News Reporter, *Sterner action needed against fake condom importers,* The *Daily News* (Dar Es Salaam), 17April 2010.

156 Editor, *TFDA should begin biting hard and long,* The *Guardian* (Dar Es Salaam), 20 August 2010.

157 Benedict Mongula, 'Does National Development Policy Encourage Participatory Communication?: The Case of Tanzania,' (2008) 1 *African Communication Research* 113, 121.

158 Sturmius Mtweve, *Fake agro-inputs derail Kilimo Kwanza Efforts,* The *Citizen* (Dar Es Salaam), 27 August 2012; Lusekelo Philemon, *Vegetable farmers: protect us from fake agricultural inputs,* The *Guardian* (Dar Es Salaam), 9 November 2009.

They counterfeit seeds and agro-chemicals and the use of these counterfeit products by farmers lowers crop production. [159].

There are reports that markets in Tanzania are flooded with counterfeit solar panels.[160] This situation undermines efforts by low-income consumers and people in rural and remote areas of the country to access low-cost electricity, create jobs, generate income, improve livelihood of marginalised groups in these areas.

The trade in counterfeit goods is one of the causes which exacerbate poverty among Tanzanians. This is because besides wasting money in purchasing defective, malfunctioning or useless counterfeit products, the use of 'safety critical' counterfeit products such as electrical equipment may cause explosions and destruction of properties.[161] Many Tanzanians do not have financial ability to restore the damaged properties. The use of counterfeit seeds, fertilizers, pesticides, herbicides and farm equipment which results in the decrease in agricultural production causes food insecurity among the peasants. The above situation undermines efforts of the government of Tanzania to alleviate poverty among the people.[162]

Newspapers reports have expressed concerns that procedures applied to dispose of counterfeit goods cause environmental degradation that poses risks to health of the people. The techniques for disposing of the counterfeit goods are outdated and not

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159 Leonard Mwakalebela, *Govt declares war on fake fertilizer dealers,* The *Daily News* (Dar Es Salaam), 6 July 2012.

160 Lucas Lukumbo, '*Solar Power from neighbours strangling markets,* The *Guardian* (Dar Es Salaam), 8 August 2010; Citizen Reporter, '*Counterfeit solar products flood markets,* The *Citizen* (Dar Es Salaam), 27 September 2012.

161 Sosthenes Mwita, *Counterfeit products impoverish Tanzanians,* The *Daily News* (Dar Es Salaam), 11 December 2010.

162 Lusekelo Philemon, *Vegetable farmers: Protect us from fake agricultural inputs,* The *Guardian* (Dar Es Salaam), 19 November 2010.

environmentally-friendly. [163] Counterfeit goods are taken to dumpsites where they are crashed or burnt. Chemical wastes from crashed counterfeit articles percolate into the soil and contaminate water and toxic gases emitted from burning counterfeit goods pollute air and endanger health of residents of areas that surround dumpsites. A local environmental expert has been quoted as stating that 'the destruction or burning of imported counterfeits by [the anti-counterfeiting] agencies in the country are [harmful] to the environment.'[164] There are also concerns that the use of counterfeit agro-chemicals damage to soil which may cause lower crop production.[165]

Counterfeit products such as electronic goods including radios, computers and cellular phones and counterfeit chemicals such as pesticides, insecticides, fertilizers and other products such as alkaline batteries contain potentially hazardous substances. Some of these counterfeit goods have piled up in residential areas. Consumers do not have expertise or means to dispose of these useless, poisonous and dangerous counterfeit products. [166] The presence of these counterfeit articles in residential areas poses serious threats to the people in Tanzania. Some of these articles may explode and cause physical injuries to people and their properties or decompose and cause air or water pollution.

5.3.2. Positive Effects

Most consumers were of the view that consumption of counterfeit goods conferred no benefits.[167] While acknowledging the fact that counterfeit goods are

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163 Samuel Kumdaya, *'Stop burning counterfeits, says expert,* The *Citizen* (Dar Es Salaam), 7 March 2009.

164 *Cleaner production experts condemn burning of counterfeits,* The *Guardian* (Dar Es Salaam), 9 March 2009.

165 Editor, *Farmers should be wary of counterfeit inputs,* The *Daily News* (Dar Es Salaam), 12 October 2010.

166 Interviews and Questionnaires (consumers).

167 Questionnaires and Interviews: (consumers) (various dates).

inexpensive, the consumers in this study indicated that counterfeit goods were generally defective, malfunctioning or harmful products and had short life-spans.[168]

The respondent from the Ministry of Industry and Trade said that consumption of counterfeit goods would be beneficial if, such commodities were of good quality and their prices were lower than those of genuine products. His opinion was that the markets in Tanzania are flooded with counterfeit goods which are generally products of substandard quality, defective or harmful.[169] In expressing similar views, one respondent said:

> I examined counterfeit goods confiscated during the different operations. The majority of these commodities were of inferior quality products. They become useless after short-time use. I think many of those products were not fit for human use. What kind of benefits can people derive from using such goods?[170]

I made observations at two flea markets in Dar Es Salaam and found that some counterfeit goods were of reasonable and good quality.[171] These goods included clothing and shoes. Arguably, poor people who have low disposable incomes could use those 'non-safety critical' counterfeit products without being exposed to health or safety risks. The consumers in Tanzania derive 'functional' or communicative utility from consuming such counterfeit goods.

Small-scale traders in Tanzania sell different types of goods with imitated trademarks, logos and trade descriptions at considerably lower prices than those of genuine goods. I observed that pairs of counterfeit jeans with imitated brand names including Levi's, Calvin Klein and Ralph Lauren were selling at prices ranging from shs 8, 000 (£3.2) to shs 10, 000 (£4) and counterfeit jerseys of some English premier league

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[168] *Ibid.*
[169] Interview: Director, Ministry of Industry and Trade (22 October 2010).
[170] Interview: Commissioned officer, Law enforcement agency (30 September 2010).
[171] Observations : Dar Es Salaam (10 November 2011).

football clubs selling at shs 1500 (£0.6). There were shoes with forged trademarks of manufacturers such as Converse and Levi's selling at as low price as shs 10, 000 (£4). The price of an imitated Seiko 5 watch was shs 6, 000 (£2.4). [172] These counterfeit goods appeared to be of reasonable quality and low-income consumers could use them without being exposed to safety or health risks.

Possession of purportedly expensive, luxurious counterfeit products such as cellular phones, clothing, leather products (such as handbags) and watches confer an 'expressive' utility to users of such commodities. [173] Arguably, consumption of those luxury counterfeit goods 'enhances' economic or social status of consumers. The consumers show off that they can afford to buy brand-name, expensive goods or demonstrate that they have high economic or social status. By consuming those counterfeit products the consumers want to create impressions that they belong to the affluent class, or they keep abreast of changes in fashions. The consumers in Tanzania derive 'expressive' utility from consuming this type of counterfeit goods.

The counterfeit goods business in Tanzania provides employment particularly to small-scale traders. [174] Small-scale traders sell different types of goods some of which are counterfeit products. These traders have flooded many urban areas of Tanzania including Dar Es Salaam [175] and Arusha.[176] Also, small-scale traders operate in Mbeya, Mtwara and Singida. Arguably, this trade provides employment and, therefore, is a source of livelihood for the traders and their families. Due to the fact that this business is informal

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172 Observations: Dar Es Salaam (10 November 2011), Singida (19 October 2011), Mtwara (27 October 2011).
173 Interview: Economics researcher (24 October 2011).
174 *Ibid.*
175 Emmanuel Onyango, *Plight of petty traders in Dar City business areas alarming – Survey,* The *Business Times* (Dar Es Salaam), 22 July 2011.
176 Happy Lazaro, *Anarchy in Arusha's streets as hawkers takeover whole city,* The *Arusha Times* (Arusha), 30 June 2012.

and unrecorded activity, it was not possible to obtain and gather information about the number of traders who operated this trade and the income they generated.

With regard to the positive impact of the trade in counterfeit goods on Tanzania's industrial sector, a law practitioner observed that:

> when counterfeiting is done locally [and accompanied by] reverse engineering, it enables [the] advancement of local technology without necessarily being impeded by bureaucracy of multinational corporations which own... intellectual property rights.[177]

The above respondent did not elaborate whether Tanzania had the necessary technical capacity to undertake reverse engineering of products manufactured in industrialized nations. Reverse engineering involves the process of studying an item or a product in order to understand how its components and how it works. This technique is also used to create a duplicate or superior version of the original product or item.[178]

The respondent from the Ministry of Industry and Trade said that counterfeiting could not be used as a policy tool for enhancing technical and industrial capacity because Tanzania did not have 'the right infrastructures and personnel such as engineers and technicians to facilitate copying of high quality goods and adapt the technologies to suit the local situations in the country.'[179] The respondent from the law enforcement agency was of the view that Tanzania could not enhance its technological and industrial capacity through copying of inferior quality goods from Asia. [180] The above respondents were of the general view that local industries could be developed by the government and

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[177] Written Response: Law practitioner (11 May 2011).

[178] Craig L Uhrich, 'The Economic Espionage Act - Reverse Engineering and the Intellectual Property Public Policy,' (2000 - 2001) 7 *Michigan Telecommunications & Technology Law Review* 147, 155 -156. Jon Vagg, 'The Policing of Sign: Trademark Infringement and Law Enforcement,' (1995) 3. *European Journal on Criminal Policy and Research* 75, 78.

[179] Interview: Director , Ministry of Industry and Trade (22 October 2010).

[180] Interview: Commissioned officer, Law enforcement agency (30 September 2010).

entrepreneurs adopting and implementing sound industrial and investment policies, but not through counterfeiting and pirating intellectual property-protected products owned by foreigners.

5.4. Conclusion

This chapter has described the salient features of the trade in counterfeit goods in Tanzania and its drivers and impact. The magnitude of the trade in counterfeit goods in Tanzania which covers a wide range of commodities is unascertained. The bulk of counterfeit products in Tanzania originate from foreign countries particularly in Asia and the EAC and the SADC countries. Some counterfeit products are manufactured in Tanzania. Tanzania is also the source and transhipment point for foreign-made counterfeit products exported or smuggled to neighbouring countries. Local traders manufacture, import, smuggle or sell counterfeit products. While the reports indicate that foreign traders particularly those from China are involved in running the counterfeit goods trade, China's authorities have denied or been noncommittal about the involvement of Chinese traders in operating the counterfeiting business.

The trade in counterfeit goods in Tanzania might have emerged have evolved for many years, but the trade became noticeable phenomenon after the economic liberalisation which started in the 1980s. There are indications that the counterfeiting business in Tanzania is expanding.

The trade in counterfeit goods in Tanzania is linked to the global and regional counterfeiting business. Through the operation of the transnational trade, counterfeit products flow into local markets of Tanzania particularly from countries in Asia and nations in Eastern and Southern Africa. Some counterfeit goods flow from the EAC and SADC countries into Tanzania's markets. The implementation of the market-based

policies created opportunities for private traders in Tanzania to manufacture, import, smuggle, distribute or sell counterfeit products.

Some consumers in Tanzania purchase counterfeit goods unknowingly. Besides the consumers' failure to inspect counterfeit goods before purchasing them and being deceived through misrepresentations made by suppliers of commodities, some buyers have difficulties to identify counterfeit products. Other consumers purchase counterfeit goods knowingly because they are attracted to their lower prices of those products. These consumers cannot afford to purchase expensive, genuine products. It is possible that some consumers buy counterfeit products knowingly because genuine products are limited or not available in the local markets.

The trade in counterfeit goods in Tanzania impacts on the welfare of consumers, economic interests of legitimate traders, the economy and the general society. The counterfeiting business has broader effects on different sectors of Tanzania's economy including industry, competition, agriculture and public health. Arguably, positive aspects of the counterfeit goods trade include facilitating the availability of low-priced products to low-income consumers and providing employment to small-scale traders who peddle counterfeit products. It is evident that negative effects of the trade in counterfeit goods on consumers, traders and the general society outweigh the positive aspects of the trade.

CHAPTER SIX

THE REGULATION OF THE COUNTERFEIT GOODS TRADE IN TANZANIA

6.0. Introduction

This chapter looks at the regulatory mechanisms for controlling the trade in counterfeit goods in Tanzania. It describes Tanzania's anti-counterfeiting policy, the regulatory techniques and the potential of those techniques for controlling the trade in counterfeit goods. Information in this chapter was sourced from the government's policy documents, statutes, judgments of the courts, records of the parliamentary proceedings and newspaper reports. It is supplemented by information collected from respondents (through interviews and questionnaires) and observations.

6.1. Policy Response to the Counterfeit Goods Trade

6.1.1. The National Anti-Counterfeiting Policy

The respondents from the anti-counterfeiting agencies said that there were no specific policy documents that prescribed in detail the frameworks or guidelines for dealing with the trade in counterfeit goods in Tanzania.[1] However, the examination of Tanzania's National Trade Policy of 2003 reveals that the policy contains statements which call on regulatory authorities in the country: i) to prohibit traders from engaging in anti-competitive practices and abusing their dominant positions in the markets; ii) to deal with traders who restrict the supply of goods and services, or supply products of unacceptable standards to the markets; iii) to protect consumers against restrictive trade and monopolistic practices committed by suppliers of goods and services; and iv) to ensure traders' unimpeded access to the markets; and v) to safeguard consumers' freedom

[1] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).

of choice.[2] Arguably, the National Trade Policy addresses, in general terms, matters relating to the control of unfair trade practices and the protection of consumers, traders and the general society against the negative impact resulting from unfair competition and trade malpractices caused by, among other factors, the operation of the trade in counterfeit goods.

Some high-ranking government officials have made statements which, in my view, represent some features of the country's anti-counterfeiting policy. The President, Jakaya Kikwete, has stressed that the trade in counterfeit goods is a problem whose control requires joint efforts of stakeholders in Tanzania. He stated that 'dishonest traders [are] responsible for the [proliferation] of counterfeit goods in the markets. Co-operation [among] stakeholders and the government is required to tackle the vice.'[3] Additionally, the Vice President, Mohamed Gharib Bilal, has directed 'government authorities to take urgent measures against people who ...produce and distribute fake antiretroviral drugs (ARVs) in the country.'[4] Moreover, the former Minister for Health and Social Welfare, Aisha Kigoda, stated that the government was aware of the proliferation of counterfeit medicines in pharmacies and hospitals in the country. She described some measures the government had been taking to address the problem. The measures included: i) providing training to inspectors of drugs; ii) strengthening inspections of drugs at the ports of entry into the country; iii) conducting raids on manufacturing facilities, warehouses and pharmacies; and iv) disseminating anti-counterfeiting information to members of the citizenry through television, radio and newspapers.[5]

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[2] Government of Tanzania, *National Trade Policy,* (Dar Es Salaam: Government Printer, 2003) 22 -23.
[3] Muhib Said, *Bidhaa feki zamkera Rais Kikwete, Nipashe* (Dar Es Salaam), 5 May 2010.
[4] Guardian Correspondent, *People making fake ARVs put on notice, The Guardian* (Dar Es Salaam), 2 December 2013.
[5] Parliament of Tanzania, *Hansard,* Seating No.16, Session No. 3, 11 June 2009, pp 8 - 9. <http://polis.parliament.go.tz/PAMS/docs/HS-16-3-2009.pdf> (accessed 15 March 2011).

High-ranking officials of the Ministry of Industry and Trade have described the measures which the government of Tanzania and its agencies have been taking to control the trade in counterfeit goods. During the parliamentary sessions held in 2009,[6] 2010[7] and 2011,[8] officials of the Ministry of Trade and Industry informed the Parliament that the country's markets were flooded with counterfeit products and the Ministry (in collaboration with other authorities) was implementing measures to curb the counterfeit goods trade. During the session which was held in February, 2013, the deputy Minister for Industry and Trade stated that:

> Tanzania's markets are flooded with counterfeit goods. The Ministry of Industry and Trade, through the Fair Competition Commission and the Tanzania Bureau of Standards, has been applying various strategies to control the illicit trade. The Commission in cooperation with trademark owners is fighting against the trade in counterfeit goods. Similarly, the Bureau is working vigorously to control the counterfeiting business.... Stakeholders should co-operate with the Commission, the Bureau and the Tanzania Food and Drugs Authority to stamp out the trade in counterfeit goods.[9]

The above information engenders four main points: first, the statements made by the high-ranking government officials are acknowledgements of the fact that the trade in counterfeit goods in Tanzania is a common phenomenon. Second, the counterfeit goods trade affects the economy and the welfare of the people. Third, government authorities and anti-counterfeiting agencies take measures to curb the trade in counterfeit goods. Fourth, cooperation between public authorities and non-state actors is necessary for the effective control of the counterfeit goods trade.

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[6] Parliament of Tanzania, *Hansard*, Session No. 17, Seating No. 2, 6 November 2009, p 28 <http://www.parliament.go.tz/POLIS/PAMS/DOCs/HS-17-2-2009.pdf> (accessed 15 March 2011).

[7] Parliament of Tanzania, *Hansard*, Session No. 20, Seating No. 27, 9 July 2010, pp 12-23 <www.parliament.go.tz/POLIS/PAMS/Docs/HS-20-27-2010.pdf> (accessed 15 March 2011).

[8] Parliament of Tanzania, *Hansard*, Session No. 2, Seating No. 6, 15 February, (2011) pp 27-28, <www.parliament.go.tz/POLIS/PAMS/Docs/HS-2-6-2011.pdf> (accessed 15 March 2011).

[9] Parliament of Tanzania, *Hansard*, Session No. 10, Seating No. 4, 1 February 2013, pp 31-32, <http://polis.parliament.go.tz/PAMS/docs/HS-10-4-2013.pdf> (accessed 14 May 2013).

6.1.2. International Influence over Tanzania's Anti-Counterfeiting Policy

The policy statements described in the preceding section suggest that the fight against the trade in counterfeit goods in Tanzania is driven by the national policy initiatives. However, international forces do, to a certain extent, influence the anti-counterfeiting policy in Tanzania. The global, regional and inter-regional treaties prescribe intellectual property and anti-counterfeiting regulatory policies to which Tanzania's anti-counterfeiting policy and law should conform. Additionally, some industrialized nations have imposed conditions that require Tanzania to adopt policies and regulatory mechanisms to protect intellectual property and control counterfeiting. This section looks at the influence of the international policy and law over the anti-counterfeiting regulatory policy in Tanzania.

a) The Paris Convention and the TRIPs Agreement

Tanzania is a member of the WTO and the WIPO and is a party to the TRIPs Agreement and the Paris Convention. The country is obligated to implement the global intellectual property and anti-counterfeiting regulatory policies embraced in multilateral intellectual property treaties, namely the Paris Convention and the TRIPs Agreement. With regard to the implementation of the TRIPs Agreement, the National Trade Policy states that Tanzania 'has already enacted [laws] to ensure conformity with [the] TRIPs [Agreement] in some of these areas and initiatives are continuing to ensure full compliance.'[10] Tanzania has committed itself and, as will be shown later in this chapter, taken measures to align its intellectual property and anti-counterfeiting policies and laws to the provisions of the TRIPs Agreement.

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[10] Government of Tanzania, *National Trade Policy* (note 2) 37 - 38.

b) The EAC and SADC Treaties and Protocols

As pointed out in Chapters One and Five, Tanzania is a member state of the EAC and the SADC. The members of these trading groups are required to adopt measures to protect intellectual property and control intellectual property violations. The Treaty Establishing the East African Community of 1999 requires the EAC member states to promote co-operation in development of science and technology within the Community through, among other things, harmonization of policies on commercialisation of technologies and promotion and protection of intellectual property.[11] The Protocol on the Establishment of the East African Community Common Market of 2009 requires the EAC member states to improve protection of intellectual property in their territories. The member states are required: i) to promote public awareness about intellectual property; ii) to cooperate and exchange information about matters concerning intellectual property; iii) to adopt intellectual property policies that promote creativity, innovation and the development of intellectual capital; iv) to cooperate in controlling intellectual property piracy and counterfeiting; and v) to implement the multilateral intellectual property treaties.[12] In compliance with the above provisions, Tanzania has adopted measures to protect intellectual property and fight counterfeiting and piracy.

As observed in Chapter Two, the trade in counterfeit goods has become a regional phenomenon and is impacting negatively on the EAC market and economies and people in the EAC member states.[13] The EAC nations have adopted and are implementing regulatory policy measures to thwart the counterfeit goods trade. The EAC countries have laws and authorities and established agencies vested with powers to control the trade. All EAC countries, which are also members of the WIPO and the WTO and signatories of the

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[11] Article 103 (1) (i) of the Treaty Establishing the East African Community.
[12] Article 43 of the Protocol on the Establishment of the East African Community Common Market.
[13] Ben Sihanya, 'Combating Counterfeit Trade in Kenya,' *Intellectual Property Rights in Kenya,* in Moni Wekesa & Ben Sihanya (eds) (Nairobi: Konrad Adenauer Stiftung, 2006) 210 - 211. See also, Wayne Meiring, 'Fighting the Pirates,' (2014) *World Trademark Review* 43, 43 - 44.

Paris Convention and the TRIPs Agreement, have been taking measures to align their national laws to the multilateral treaties. The reforms of the laws are intended: i) to provide standards for the protection of intellectual property prescribed in the TRIPs Agreement; ii) to establish comprehensive intellectual property systems covering copyrights, industrial designs, patents, trademarks and trade secrets and other forms of intellectual property; and iii) to set up judicial and administrative procedures for the enforcement of intellectual property laws, settling disputes and monitoring and reviewing of the implementation of the TRIPs Agreement.[14]

The EAC (in collaboration with some international and national agencies, institutions and stakeholders) has been implementing some measures to curb the trade in counterfeit goods. The EAC is in the process of formulating the regional policy (namely, the Policy on Anti-Counterfeiting, Anti-Piracy and other Intellectual Property Rights Violations) that will provide for, among other matters, the framework for addressing the trade in counterfeit goods in East Africa. [15] The authorities in the EAC are also deliberating on the Bill (namely, the EAC Anti-Counterfeit Bill of 2010) which will lead to the enactment the regional legislation for curbing counterfeiting. Stakeholders are deliberating on the contents of the Bill. It is anticipated that after the enactment of the EAC Anti-Counterfeit legislation, the EAC member states will align their national laws to the regional anti-counterfeiting law.

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[14] Moni Wekesa, 'An Overview of the Intellectual Property Rights (IPRs) in Kenya,' in Moni Wekesa & Ben Sihanya (eds) *Intellectual Property Rights in Kenya* (Nairobi: Konrad Adenauer Stiftung, 2009) 7 - 9. See also Anthony CK Kakooza, 'The Civil, Administrative and Criminal Law Standards in Intellectual Property Enforcement in Uganda: The Good, the Bad and the Hoped for,' Social Science Research Network, 2010, pp 3 - 4, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658658> (accessed 14 November 2013).

[15] Amanda Chavez, 'A Growing Headache: The Prevalence of International Counterfeit Pharmaceutical Trade in Developing African Nations,' (2009) 32 *Suffolk Transnational Law Review* 631, 642 - 643.

Some foreign actors have been influencing the anti-counterfeiting policy- and law-making processes and lobbying for the adoption of the anti-counterfeiting policies and the enactment of legislations to fight against the trade in counterfeit goods in the EAC countries. For instance, the Investment Facility Climate (an international NGO financed by some international financial institutions and MNCs from industrialized nations) and the United States government agencies have been hosting workshops[16] and sponsoring conferences[17] to discuss issues concerning intellectual property and anti-counterfeiting policies and legislations for the EAC member states. Participants in the workshops and conferences have included the representatives of the EAC, officials of the governments and other stakeholders. Although some analysts in East Africa have played down the negative implications of the foreign involvement in or interference with the intellectual property and anti-counterfeiting policy- and law-making processes,[18] my opinion is that, by hosting workshops, sponsoring conferences and facilitating seminars the foreigners will transplant the Euro-American intellectual property and anti-counterfeiting policies and laws into the EAC and its member states' intellectual property and anti-counterfeiting policies and laws.

While consultations and deliberations on the EAC anti-Counterfeiting Policy and Bill are underway, each EAC member state uses its national laws to fight the trade in counterfeit goods in its territory. Tanzania has the Merchandise Marks Regulations of 2008 which is applied concurrently with the Merchandise Marks Act of 1963 (the main statute for controlling the trade in counterfeit goods). As I will demonstrate later in this chapter, there are several other laws for curbing the counterfeit goods trade in Tanzania. Similarly, Kenya has the Anti-Counterfeit Act of 2008 (Act No. 13), the Industrial

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[16] Investment Climate Facility, *Investment Climate Facility: Summit Summary,* 3 -4 May 2010, p.7.
[17] US Embassy in Tanzania, *U.S. Government Sponsors Regional Anti-Counterfeiting Conference,* 9 March 2010, <http://tanzania.usembassy.gov/pr_03092010.html> (accessed 14 May 2011).
[18] Michael Mumbi, *"Concerns About Anti-Counterfeit Campaign is Alarmist,"* The *Inter Press Service,* 10 May 2010.

Property Act of 2001 (Act No. 3), the Trademark Act of 1955 (Chapter 506), the Trade Descriptions Act of 1979 (Chapter 505), the Pharmacy and Poisons Act (Chapter 244) and the East African Community Customs Management Act of 2004 which contain provisions for curbing the trade in counterfeit goods. In Uganda, the laws for controlling the counterfeit goods trade include the Trade Marks Act (Chapter 217), the United Kingdom Designs (Protection) Act (Chapter 218), the East African Community Customs Management Act (Act No. 1 of 2005), the National Drug Policy and Authority Act (Chapter 206) and the Uganda Bureau of Standards Act (Chapter 327) and the Uganda Revenue Authority Act (Chapter 196). Uganda has also published the Anti-Counterfeit Bill of 2010 which is under discussion. In Burundi, the Law Relating to Industrial Property of 2009, and in Rwanda, the Law on the Protection of Intellectual Property of 2009 (Law No. 31) are main statutory laws for curbing the trade in counterfeit goods in these countries. The Zanzibar Industrial Property Act of 2008 (Act No. 4) and the Zanzibar Food, Drugs and Cosmetics Act of 2006 (Act No. 2) are used to curb the counterfeit goods trade in Zanzibar.

The specialized anti-counterfeiting authorities or agencies, standard bureaus, customs authorities, competition agencies, the police and courts are the main institutions for fighting the trade in counterfeit goods in the EAC member states. The anti-counterfeit authorities and law enforcement agencies seize, detain and destroy counterfeit products. The authorities and agencies arrest and prosecute traders in counterfeit goods. For instance, the Kenya Anti-Counterfeit Agency (ACA), in collaboration with other law enforcement agencies, has been confiscating and destroying counterfeit products and arresting and prosecuting manufacturers, importers, smugglers and sellers of counterfeit

products. [19] In Uganda, the Uganda National Bureau of Standards (UNBS), in collaboration with other law enforcement agencies, has been seizing and destroying counterfeit products and arresting and prosecuting persons who commit counterfeiting offences.[20]

The trade in counterfeit goods is part of organised crime affecting the Eastern African region. The national police forces of the EAC countries have been carrying out joint operations to curb the organised crime in the region. The police chiefs in the EAC member states who constitute a group known as the East African Police Chiefs Cooperation Organisation (EAPCCO) coordinate activities designed to control organised crime including the trade in counterfeit goods and pirated products in the region.[21] Moreover, the law enforcement agencies in collaboration with anti-counterfeiting agencies in East Africa have participated in the Interpol- and the WHO-sponsored anti-counterfeiting *Operations Mamba* I, II and III whereby huge volumes of counterfeit goods particularly pharmaceutical products were confiscated and destroyed.[22] Some traders were arrested and prosecuted as a result of the operations.

Despite the above anti-counterfeiting initiatives, government authorities and anti-counterfeiting agencies in EAC countries face a daunting task to curb the counterfeit goods trade in their territories. The government authorities and agencies have not been able to control counterfeiting activities satisfactorily. For instance, Kenya's markets are

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[19] George Omondi, *Watchdog seizes 800 cartons of counterfeit cigarettes,* The *Business Daily* (Nairobi) 30 July, 2013. See also Martin Mwita, *Anti-counterfeit officers seize Sh 18 million counterfeit goods at the port,* the *Star* (Nairobi), 30 April 2014.

[20] Joseph Olanyo, *Anti-counterfeit law to rein in errant traders,* the *Observer* (Kampala), 24 February 2012. See also Denis Mubangizi, *Pre-import verification benefits all Ugandans,* The *Daily Monitor* (Kampala), 28 June 2013.

[21] A Correspondent, *EAC member states to conduct joint security operations,* The *East African* (Nairobi), 14 August 2011.

[22] Interpol, *Operations,* <http://www.interpol.int/Crime-areas/Pharmaceutical-crime/Operations/Operation-Mamba> (accessed 13 December 2013).

flooded with different types of counterfeit goods. [23] Similarly, Uganda's markets are awash with counterfeit products. [24] The above situation is caused by several factors such as the lack of national policies for controlling the counterfeit goods trade; weaknesses of anti-counterfeiting laws and inadequacies of mechanisms for enforcing the laws; the lack of harmonisation of anti-counterfeiting laws within one country and co-ordination of the mandates of authorities tasked to fight the counterfeit goods trade; malpractices that compromise the effectiveness of the anti-counterfeiting authorities; and the lack of resources which undermine the capacity of national anti-counterfeiting agencies. Other factors include the trademark owners' inability to control the trade in counterfeit goods; shortages of commodities in markets that causes consumers to buy counterfeit products; low purchasing power that causes some buyers to consume counterfeit products; consumers' inability to identify counterfeit products; and the lack or limited cooperation and coordination between actors in private and public sectors.[25]

With regard to the SADC region, the SADC Protocol on Trade of 1996 obligates its signatories to adopt policies and implement measures for the protection of intellectual property in accordance with the TRIPs Agreement.[26] The Protocol requires the national regulatory policies of the SADC member states to conform to the multilateral intellectual property treaties particularly the TRIPs Agreement. This can be done by the members

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[23] Kenneth Wanjau & Muli Muthiani, 'Factors Influencing the Influx of Counterfeit Medicines in Kenya: A Survey of Pharmaceutical Importing Small and Medium Enterprises within Nairobi,' (2012) 2 *International Journal of Business & Public Management* 23, 24. See also, Agnes W Karingu & Patricia K Ngugi, 'Determinants of the Infiltration of Counterfeit Agro-based Products in Kenya: A Case of Suppliers in Nairobi,' (2013) 1 *International Journal of Human Resource & Procurement* 1, 3.

[24] Anthony C K Kakooza, 'The Civil, Administrative and Criminal Law Standards in Intellectual Property Enforcement in Uganda: The Good, the Bad and the Hoped for,' Social Science Research Network, 2010, pp 30 - 33. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658658> (accessed 12 November 2013). See also, Martina Björkman, Jakob Svensson & David Yanagizawa-Drott, 'Can Good Products Drive Out Bad? Experimental Evidence from Local Markets for Antimalarial Medicine in Uganda,' 24<http://dev3.cepr.org/meets/wkcn/7/789/papers/Svensson.pdf> (accessed 12 November 2013)

[25] East African Community, *Draft Policy on Anti-Counterfeiting, Anti-Piracy and Other Intellectual Property Violations,* (unpublished draft, 2009) pp 12 - 13.

[26] Article 24 of the SADC Protocol on Trade.

setting up the legislative, administrative and institutional mechanisms for protecting intellectual property in their territories which conform to the requirements prescribed by the TRIPs Agreement.

The SADC member states have laws for controlling the counterfeit goods trade. Examples of the anti-counterfeiting laws include the Trademark Act of 1957 (Chapter 401) and the Merchandise Marks Act of 1958 (Chapter 405) in Zambia; the Trade Mark Act of 1967 (Chapter 49: 01) and the Merchandise Marks Act of 1966 (Chapter 49:04) and the Trade Description Act of 1987 (Act No. 18) in Malawi; the Industrial Property Code of 2006 (Decree No. 4); the Patent, Industrial Designs and Trademarks Act of 2002 (Act No. 25) and the Protection Against Unfair Practices (Industrial Property Rights) Act of 2002 (Act No. 22) in Mauritius; and the Merchandise Marks Act of 1941 (Act No.17) and the Counterfeit Goods Act of 1997 (Act No. 37) in South Africa.

The SADC countries are members of the WIPO and the WTO and signatories of the multilateral intellectual property treaties include the Paris Convention and the TRIPs Agreement. In order to comply with the above multilateral intellectual property treaties, the SADC member states have established national authorities and agencies tasked to control the trade in counterfeit goods. They include the specialized anti-counterfeiting authorities, standard agencies, customs departments, the police and courts. The anti-counterfeiting authorities and law enforcement agencies seize, detain and destroy counterfeit products. They also arrest and prosecute persons who commit counterfeiting crimes.

The Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) coordinates activities to control organised crime including the trade in counterfeit goods in the Southern African region. In October 2013, the law enforcement

agencies in some SADC countries in collaboration with anti-counterfeiting agencies took part in the anti-counterfeiting *Operation Giboia*, sponsored by the Interpol and the WHO, which was conducted in Angola, Malawi, Swaziland, Tanzania and Zambia. Huge volumes of counterfeit products were seized, some traders were arrested and several pharmaceutical sale outlets were shut down.[27]

Governments and anti-counterfeiting agencies in the SADC countries have been struggling to curb the counterfeit goods trade. For instance, in South Africa, Malawi and Zambia government authorities and anti-counterfeiting agencies have been seizing and destroying counterfeit products and arresting and prosecuting dealers in those products. [28] The above situation has been caused by several factors such as poverty and consumer attitudes that create demand for counterfeit products; the lack of appropriate legislation to fight intellectual property violations; the lack of enforcement of existing law; and limited capacity of the law enforcement agencies to control the counterfeit goods trade.[29]

The anti-counterfeiting regulatory interventions in individual EAC and SADC countries have helped, to a certain extent, to thwart the flow of counterfeit products to Tanzania's markets. Similarly, the regional initiatives to tackle the trade in counterfeit goods have lessened the flow of counterfeit products into the EAC and SADC regional markets and Tanzania is a beneficiary of the above measures. Arguably, if the above interventions were not made, the problem of counterfeit goods in the markets in Tanzania would have been bigger than it is. Owing to the lack of statistics about the magnitude of the counterfeit goods trade in the EAC and the SADC countries, it is difficult to state the

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[27] Interpol, *Operations,* <http://www.interpol.int/Crime-areas/Pharmaceutical-crime/Operations/Operation-Giboia> (accessed 13 December 2013).

[28] *R4.5m worth of drugs and counterfeit goods seized,* The *City News* (Pretoria), 23 September 2013; Ruth Mhlanga, *Fake drinks seized,* The *Zambia Daily Mail* (Lusaka), 6 August 2013; *Malawi burn pirated materials on world intellectual property day,* The *Nyasa Times* (Blantyre), 27 April 2013.

[29] Annette Hubschle, 'Organized Crime in Southern Africa: First Annual Review,' Institute of Security Studies, 2010, pp 19.

exact amounts of reduction in the flow of counterfeit products from the EAC and SADC member states to Tanzania that have occurred as a result of the adoption of the above-mentioned regional interventions by the EAC and the SADC authorities. It is my view that full potential of the interventions has not been realised due to the inadequacies and limitations of the anti-counterfeiting laws and authorities for controlling the counterfeit goods trade mentioned above.

c) US and EU Preferential Trade Arrangements

Tanzania receives preferential access to industrialized countries' markets under several GSP schemes. These schemes include the United States' Africa Growth Opportunity Act (AGOA); the African, Caribbean and Pacific (ACP) Group of States and the EU Economic Partnership Agreement (EPA); and the EU's Everything But Arms (EBA).[30] The schemes impose the obligation on the beneficiary countries to set up regulatory mechanisms for protection of intellectual property. The AGOA provides the framework whereby the United States grants some countries in Sub-Saharan Africa, including Tanzania, preferential trade treatments whereby designated commodities produced in these countries are with duty-free and quota-free access the US markets.[31] The requirements for the eligibility to this GSP include the commitment by the beneficiary countries to eliminate barriers to the United States trade and protect investments and intellectual property.[32]

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[30] Government of Tanzania, *National Trade Policy* (note 2) 56 - 57.
[31] T L Malyamkono & H Mason, *The Promise* (Dar Es Salaam: TEMA Publishers, 2006) 72 -73. See also Tony Waters, 'Markets and Morality: American Relations with Tanzania,' (2006) 8 *African Studies Quarterly* 46, 50.
[32] Section 104 of the Africa Growth Opportunity Act.

The ACP-EU EPA originates from the Cotonou Agreement between the ACP countries and the EU member states.[33] The Agreement calls on the parties to 'recognise the need to ensure an effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by [the TRIPs Agreement].'[34] Moreover, the Agreement requires the parties to strengthen their cooperation in preparing laws and regulations for the protection and enforcement of intellectual property rights, and the prevention of the infringement of such rights and 'the establishment and reinforcement of domestic and regional offices and other agencies including support for the regional intellectual property organizations involved in enforcement and protection, including the training of personnel.'[35] The EU is negotiating treaties with the Eastern and Southern African (ESA) countries (which are also members of the EAC and the SADC) that will provide for comprehensive economic partnerships.[36] In these negotiations the EU is seeking 'to strengthen [intellectual property rights] provisions... and the enforcement of existing commitments [by the ACP countries]....'[37] Therefore, the ACP countries including Tanzania are obligated to implement intellectual property regulatory policies that conform to the conditions imposed by the EU.

Tanzania's accession to the global and inter-regional treaties and the receipt of preferential trade benefits under the GSPs has had several implications for the protection of intellectual property and control of the trade in counterfeit goods. Tanzania has aligned

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33 Stephen R Hurt, 'Co-operation or Coercion? The Cotonou Agreement Between the European Union and ACP States and the End of the Lome Convention,' (2003) 24 *Third World Quarterly* 161, 161 - 166.

34 Article 46 (1) of the Cotonou Agreement.

35 Article 46 (6).

36 Axel Borrmann, Matthias Busse & Manuel De La Rocha, 'Consequences of Economic Partnership Agreements between East and Southern African Countries and the EU for Inter- and Intra-regional Integration,' (2007) 21 *International Economic Journal* 233, 236 - 238.

37 Dalindyebo Shabalala, Nathalie Bernasconi-Osterwalder & Marcos Orellana, 'Intellectual Property in European Union Economic Partnership Agreements with African, Caribbean and Pacific Countries: What Way Forward after the Cariforum EPA and the Interim EPAs,' Center for International Environmental Law, 2008, p 1. <http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf> (accessed 3 February 2012).

its intellectual property and anti-counterfeiting laws to the provisions of the TRIPs Agreement that embraces the Euro-American intellectual property laws and practices. Additionally, in order to conform to the conditions prescribed under the AGOA and EU-ACP's GSPs, Tanzania's laws are aligned to foreign laws. Moreover, through the technical assistance provided by the foreign institutions and agencies, the foreign laws and practices are transplanted onto Tanzania's legal system. This assistance is provided by the multilateral agencies including the WIPO and industrialized nations particularly the United States government and its agencies.[38]

With regard to the involvement of foreign actors in pushing for or influencing the intellectual property and anti-counterfeiting policy- and law-making processes in Tanzania, there is information which indicates that the United States and the United Kingdom and their agencies played part in drafting and pushing for the enactment of the Merchandise Marks Regulations. In 2000, the British High Commission in Tanzania facilitated the undertaking of a study to determine the prevalence of counterfeit products in the country's markets. Based on recommendations made in the study, in 2005 the government made the Merchandise Marks Act of 1963. In 2007, the United States Embassy in Tanzania organised and sponsored a conference on the protection of intellectual property. During this seminar the US 'experts' emphasized on the need for Tanzania to enhance its regulatory mechanisms for fighting the trade in counterfeit goods and pirated products. Additionally, the Embassy provided training to the FCC personnel on issues related to protection of intellectual property and enforcement of laws to control counterfeiting and piracy.[39] In 2008, the Merchandise Marks Regulations was enacted. Subsequently, the United States agencies have been organising and sponsoring

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[38] Saudin J Mwakaje, 'National Study on Intellectual Property and Medium-sized Enterprises in Tanzania, (unpublished report, WIPO, 2011) 26.

[39] Martha Kisyombe, 'Competition and Consumer Protection Policy: A Tanzanian Perspective,' A Paper presented at the Ad Hoc Experts Meetings on Competition Policy and Consumer Welfare: The Interface between Competition and Consumer Policies, held at Palais De Nations, Geneva, Switzerland, 12 - 13 July 2012, p 12.

workshops and public awareness campaigns aimed at dealing with counterfeit pharmaceutical products in Tanzania.[40]

After looking at the anti-counterfeiting policy in Tanzania, in the section below I explore the regulatory techniques applied to fight the counterfeit goods trade in the country.

6.2. Regulatory Techniques for Controlling the Counterfeit Trade in Tanzania

The law and alternative regulations are policy instruments for controlling the trade in counterfeit goods in Tanzania. The law consists of statutory instruments and judicial orders made government authorities. The alternative regulations comprise mechanisms (other than the law) that are applied to curb the trade. This section looks into the application of the above anti-counterfeiting regulatory techniques.

6.2.1. Legal and Institutional Frameworks

a) Evolution of Anti-counterfeiting Law

The evolution of the law for controlling the trade in counterfeit goods in Tanzania has passed through four major phases: i) the colonial era which ended in 1961, ii) the period between 1961 to the early 1980s, iii) the phase between the late 1980s and the 1990s and iv) the present period which commenced from the 1990s.[41]

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[40] Grace Kamugisha Kazoba, *Protection of Consumers and a Guard Against Counterfeit and Substandard Pharmaceuticals in Tanzania: Examining National, Regional and International Frameworks* (Dar Es Salaam University Press: Dar Es Salaam, 2013) 29. See also, Staff Reporter, *American Ambassador Advocates Wider Anti-counterfeit Awareness,* The *FCC Newsletter,* January-March 2011, p 7. See also, US Embassy in Tanzania, *Remarks by Ambassador Alfonso E. Lenhardt at the opening of the Anti-Counterfeiting Workshop,* 10 March 2010, <http://tanzania.usembassy.gov/sp_03102010.html> (accessed 11 March 2011).

[41] The eras described mentioned in clauses (ii), (iii) and (iv) corresponded to the first, second and third 'moments' of law and development examined in Chapter Four.

The anti-counterfeiting law in Tanzania traces its origin from the laws transplanted into the country's legal system by the British imperial government. The British colonial government introduced into laws of Tanganyika the Penal Code (Chapter 16) which had provisions that prohibited trademark counterfeiting.[42] The colonial government enacted the Trade Marks Ordinance (Chapter 216) which was subsequently repealed and replaced by the Trade Marks Ordinance (Chapter 394). These trademark statutes had provisions that dealt with infringements of registered trademarks and passing off goods protected by unregistered trademarks. There were other statutes which dealt with the quality and standards of goods such as pharmaceutical and food products supplied to the markets. These statutes included the Food and Drugs Ordinance (Chapter 93) and the Pharmacy and Poisons Ordinance (Chapter 416). These statutes contained provisions that prohibited the production and sale of substandard and toxic food, pharmaceutical products and cosmetics. Most of the above statutes were replicas of the English statutes.[43] The English received law (the common law, the principles of equity and the statutes of general application)[44] supplemented the laws that were enacted by the British colonial government in Tanganyika.

The British imperial government in Tanganyika enacted trademark law and criminal law for controlling the trade in counterfeit goods as part of the colonial legal project that involved, among other aspects, transplanting imperial laws onto the colony's legal system. The colonial intellectual property and anti-counterfeiting regulatory policies were tools for 'modernising' Tanganyika, subjugating the colonised people and facilitating the exploitation of resources of the colony. The laws were instruments for

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42 Sections 367 and 368 under Chapter XXXVIII of the Penal Code contained provisions which prohibited trademark counterfeiting.

43 The Trademark Ordinance was a replica of the English Trade Mark of 1938 and the Merchandise Marks Act reproduced the provisions of the English Merchandise Marks Act of 1887. See Chris M Peter, *Foreign Private in Tanzania: A Study of the Legal Framework* (Konstanz: Hartung-GorreVerlag, 1992) 69.

44 Section 17 (2) of the Tanganyika Order-in-Council of 1920.

safeguarding the economic interests of colonialists, that is, to protect Tanganyika as the market for foreign commodities and to safeguard intellectual property of British nationals and nationals of Britain's allies. The laws were not intended to protect interests of the local people who, in the view of the British colonialists, had no intellectual property rights worth protection.

Subsequent to attaining its political independence, the government of Tanzania reformed the laws inherited from the British colonial government. The provisions that criminalised counterfeiting in the Penal Code (Chapter 16) were repealed, re-enacted and incorporated into the Merchandise Marks Act of 1963 (Chapter 85). The Trade Mark Ordinance (Chapter 394) was repealed and replaced by the Trade and Service Marks Act of 1986 (Chapter 326).

The Pharmaceutical and Poisons Act of 1978 (Act No. 9) and the Food (Control of Quality) Act of 1978 (Act No.10) repealed and replaced the Food and Drugs Ordinance and the Pharmacy and Poisons Ordinance respectively. In 1975, the government of Tanzania enacted the Standards Act (Act No. 3) which was later repealed and replaced by the Standards Act of 2009 (Act No. 2). The Tanzania Food, Drugs and Cosmetics Act of 2003 (Act No. 1) repealed and replaced the Food (Control of Quality) Act of 1978 and the Pharmaceutical and Poisons Act of 1978. The government of Tanzania enacted other laws including the Companies Ordinance (Chapter 212), the Business Licensing Act of 1972 (Act No. 25) and the Business Activities Registration Act of 2007 (Act No. 14) to regulate business registration, business licensing and the conduct of business activities respectively in Tanzania.

Besides revising the trademark law and criminal law, the government of Tanzania became a signatory of several multilateral intellectual property treaties. In 1963, the

government acceded to the Paris Convention and became a member of the WIPO. Moreover, Tanzania became a member of the African Regional Intellectual Property Organisation (ARIPO) established by the Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization of 1976. In 1993, Tanzania signed the Banjul Protocol on Marks within the Framework of the African Regional Industrial Property Organisation.[45]

The above information raises several points. First, Tanzania has had laws for controlling the counterfeit goods trade since the colonial period. Second, the view by Kameja *et al,* [46] and Mkono *et al,* [47] that the emergence and expansion of trade in Tanzania was due to the absence of the anti-counterfeiting law or due to the delay by the government of Tanzania to make the Merchandise Marks Act operational for more than four decades does not satisfactorily account for such expansion of the counterfeiting activities. There were several laws that could be applied to thwart the trade in counterfeit goods. Third, the government of Tanzania reformed the colonial anti-counterfeiting law. Arguably, the enactment of the anti-counterfeiting and trademark legislations was an attempt by the government of Tanzania to assert its legislative autonomy and a measure aimed at protecting rights of local trademark owners in order to enable them to contribute to the country's socio-economic development.[48]

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[45] The ARIPO whose headquarters is in Harare, Zimbabwe is the organisation was established co-ordinate registration and administration of industrial property among some African countries. Its members are Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

[46] Audax K Kameja, August N Mrema & Francis Kamuzora, 'Turning the Tables on Counterfeiters,' (2008) *World IP Contacts Handbook* 1, 1.

[47] Nimrod E Mkono, Audax K Kameja & August N Mrema, 'Tanzania's IP Changes are Good for Business,' (2008) *World IP Contacts Handbook* 96, 96.

[48] Robert B Seidman, 'Law and Development: A General Model,' (1972) 6 *Law & Society Review* 311, 314 - 316. See also Barthazar A Rwezaura & Ulrike Wanitzek, 'Family Law Reform in Tanzania: A Socio-legal Report,' (1988) 2 *International Journal of Law & the Family* 1, 1 - 4.

From the 1980s onwards, the government of Tanzania started implementing the market-based policies imposed by the World Bank and the IMF which embraced, among other issues, liberalisation, privatisation and deregulation of Tanzania's economy. The government reformed trademark law and anti-counterfeiting criminal law in order to support the operation of the market-based economy. In 1986, the government enacted the Trade and Service Marks Act which, as I pointed out earlier, repealed and replaced the Trade Marks Ordinance (Chapter 394). The above laws were reformed to provide for better frameworks for the protection of trademarks and enable trademark owners to engage in the market-based transactions through, for instance, selling their trademarked products or assigning their trademarks to other persons.

In the 1990s, Tanzania continued to undertake the market-based reforms and implement measures to integrate the national economy into the global economy. It was during this period that Tanzania became a member of the WTO and a signatory of the TRIPs Agreement in 1995. Tanzania was obligated to enact laws that prescribe criminal, civil and administrative procedures for protecting intellectual property and controlling the counterfeit goods trade in order to align Tanzania's laws to the WTO's intellectual property regulatory policy.

In order to align the country's anti-counterfeiting law to multilateral intellectual property treaties, the government of Tanzania amended the Merchandise Marks Act (which had not been operational since its enactment in 1963) in 2004 and 2005.[49] The Act was amended again in 2007[50] and 2012.[51] The Merchandise Marks Act became

[49] The Written Laws (Miscellaneous Amendments) of 2004 (Act No. 19) and the Written Laws (Miscellaneous Amendments) of 2005 (Act No. 5).
[50] The Written Laws (Miscellaneous Amendments) Act of 2007 (Act No. 19).
[51] The Business Laws (Miscellaneous Amendments) Act of 2012 (Act No. 3).

operational in 2005.[52] In 2008, the Merchandise Marks Regulations [53] were enacted to provide for the efficient enforcement of the Merchandise Marks Act.

The reforms of intellectual property and anti-counterfeiting laws during the third moment of law and development went concurrently with the transformations and establishment of institutions vested with powers to protect intellectual property and control the trade in counterfeit goods in Tanzania. The Fair Competition Act established the FCC. The Tanzania Food, Drugs and Cosmetics Act established the TFDA. The FCC and the TFDA are among the agencies tasked to control the counterfeiting business. Others agencies include the TRA (established under the Tanzania Revenue Authority Act), the TBS (established under the Tanzania Bureau of Standards Act) and the police.

The regulatory and institutional transformations in Tanzania highlighted above, which form part of the foreign donor-driven 'rule of law' and 'good governance' reforms which the government has been implementing since the 1990s, were intended to create institutions to support the operation of the market-based economy. The reforms were implemented under five major programmes, namely the Legal Sector Reform Programme,[54] the Financial Sector Reform Programme,[55] the Public Sector Reform Programme,[56] the Local Government Reform Programme[57] and the Business Environment Strengthening for Tanzania (BEST). The institutions that were reformed under these programmes include the Tanzania Investment Centre, the TRA and the

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52 Government Notice 95 of 2005.

53 Government Notice No. 89 of 2008.

54 Bede Lyimo, 'Tanzania and Problem of the Missing Middle: A Regulatory Reform Case of the United Republic of Tanzania,' in Andre Nijsen, John Hudson, Christopher Muller, Kees van Paridon & Roy Thurik (eds), *Business Regulation and Public Policy* (New York: Springer, 2008) 100 - 102.

55 Roger Nord, Yuri Sobolev, David Dunn, Alejandro Hajdenberg, Niko Hobdari, Samar Maziad & Stephane Roudet, *Tanzania: The Story of an African Transition* (Washington: IMF, 2009) 39 - 47.

56 J A Rugumyamheto, 'Innovative Approaches to Reforming Public Services in Tanzania,' (2004) 24 *Public Administration & Development* 437, 438 - 444.

57 Boniface E S Mgonja, 'Institutional Impacts of Local Government Reform Programme on Good Governance Process in Tanzania,' (2012) 2 *International Journal of Academic Research in Business & Social Sciences* 206, 208 - 213.

Business Registration and Licensing Agency (BRELA). The reforms went concurrent with the setting up of the Commercial Division of the High Court of Tanzania and providing capacity building and equipment to the judiciary and the Ministry of Justice and Constitutional Affairs. Also, these legal reforms involved the modernisation of company law, bankruptcy law, intellectual property law and arbitration law, updating of the legal system and the revisions of imports, exports and customs procedures.[58]

The government of Tanzania reformed trademark law and criminal law for curbing the trade in counterfeit goods in order to accommodate economic changes which were brought about by economic liberalisation and globalisation.[59] Besides establishing the robust framework for protecting trademarks, the intellectual property and anti-counterfeiting laws were reformed to enable the transformations and setting up of the institutions to support the operation of the market-based economy in Tanzania.

The above historical account reinforces the observation I made earlier in this chapter that the anti-counterfeiting law in Tanzania embodies 'foreign ' laws. The anti-counterfeiting law evolved from the laws transplanted onto Tanganyika's legal system during the British colonial rule. Statutes that embodied trademark law and criminal law for dealing with counterfeiting were replicated from English legislations. The legislations were supplemented by English common law, doctrines of equity and statutes of general application. After independence, Tanzania reformed its anti-counterfeiting law in order to align the national law to the multilateral intellectual property treaties particularly the Paris Convention and the TRIPs Agreement which are based on Euro-American intellectual property laws and practices.

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[58] Lyimo, 'Tanzania and Problem of the Missing Middle: A Regulatory Reform Case of the United Republic of Tanzania,' (note 54) 102.

[59] Paul F Kihwelo, 'Intellectual Property Rights (IPR) protection in Tanzania: The Nightmare and the Noble Dream,' (2003) 5 *Huria: Journal of the Open University of Tanzania* 111, 114.

In the section below I look at the main features of criminal law, civil law and special provisions related to border measures for controlling the trade in counterfeit goods in Tanzania. I also appraise the potential of the law in curbing the trade and challenges involved in applying the law to deal with the counterfeiting business in Tanzania.

b) Criminal Law

The law provides for criminal procedures for controlling the trade in counterfeit goods in Tanzania. The statutory law describes 'counterfeiting' and 'counterfeit goods'. The Merchandise Marks Regulations provide that counterfeiting occurs when a person, without the authority of an owner of any intellectual property subsisting in Tanzania or elsewhere in respect of protected goods, engages in:

a) the making, producing, packaging, repacking, labelling or making, whether in Tanzania or elsewhere, of any goods whereby those protected goods are imitated in such manner and to such degree that those other goods are identical or substantially similar to copies of the protected goods;

b) the manufacturing, producing or making, whether in Tanzania or elsewhere, the subject matter of that intellectual property, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected of the said owner, or any goods manufactured, produced or made under his licence;

c) the manufacturing, producing or making of copies in Tanzania or elsewhere, in violation of authors' rights or related rights.

The Regulations define counterfeit goods as those 'goods available as the result of counterfeiting or piracy and includes any means used for the purposes of counterfeiting or piracy.'[60] The Regulations further provide that piracy means 'an illicit, prohibited or

[60] Rule 2 of the Merchandise Marks Regulations. 'Counterfeit goods' are also known as 'offending goods.'

unauthorized copying of any intellectual property rights on or over goods for the purpose of trade.'[61]

With regard to food products, medicines, cosmetic products and medical devices, the Tanzania Food, Drugs and Cosmetic Act does not define 'counterfeiting,' but the legislation describes 'counterfeit products' to mean those: i) which are manufactured under names that belong to or used in respect of other products; or ii) which are imitations of or substitutes for other products or produced by imprinting on their containers names or labels that are used for other products; or iii) which are manufactured where names of individuals or companies that are fictitious or do not exist are imprinted on products; or iv) which have been substituted wholly or partly by other substances; or v) which do not belong to their purported manufacturers.[62]

The definition of 'counterfeiting' described in the Merchandise Marks Regulations encompasses all types of infringements of intellectual property. Accordingly, counterfeit goods are those products produced as a result of violations of intellectual property (including copyrights, patents and trademarks). This definition is incompatible to the description of 'counterfeit trademark goods' in the TRIPs Agreement which, as I pointed out in Chapter Two, means those products produced in violation of rights related to trademarks. Moreover, the phrase 'any intellectual property subsisting in Tanzania or elsewhere' in the definition of the term counterfeiting in the Merchandise Marks Regulations is problematic. It means that counterfeiting can be done in respect of intellectual property which does not subsist in Tanzania (as long as such rights subsist 'elsewhere,' for instance, in a foreign country). This is against the principle of territoriality of intellectual property whereby rights of an owner of intellectual property

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[61] Rule 2.
[62] Sections 76 and 89 of the Tanzania Food, Drugs and Cosmetics Act.

are enforceable within the territory of nation granting protection of such property and limited to that territory. Trademarks are territorial in nature. The ownership of a trademark in one country does not automatically confer protection in another country. [63] Arguably, the application of the Regulations imposes the burden on the government and anti-counterfeiting agencies to protect intellectual property rights which do not subsist in Tanzania.[64]

The definitions of 'counterfeiting' and 'counterfeit goods' (under Rule 2 of the Merchandise Marks Regulations) are wide and may include lawfully manufactured and traded 'generic medicines' that are identical copies of the original drugs. The definitions do not make distinctions between brand-name goods protected by trademarks and generic products of such goods. The application of the definition of 'counterfeit goods' in the Regulations (which is similar to the definition in Kenya's Anti-Counterfeit Act of 2008) can have adverse effects on people's rights to health and life because it has the potential of restricting the access to low-priced generic medicines. In view of its implication for the right of people to access to low-priced generic medicines, some petitioners challenged the legality of the Anti-Counterfeit Act at the High Court of Kenya on the grounds that it threatened access to essential drugs and violated the right to life of persons living with HIV/AIDs. The Court ruled that the definitions of the terms 'counterfeiting' and 'counterfeit goods' were too broad and, if implemented, they would adversely affect people's access to low-cost medicines, including generic drugs, for fighting against HIV/AIDs. The Court struck out the Sections of the Act (which defined 'counterfeit goods' and limited access to low-cost medicines) for being against the Constitution of

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[63] Hanns Ullrich, 'TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy,' (1995) 4 *Pacific Rim Law & Policy Journal* 153, 158 -159. See also Anne G Lalonde, 'Don't Know You From Somewhere? Protection in the United States of Foreign Trademarks That are Well Known But Not Used There,' (2008) 98 *Trademark Reporter* 1379, 1381.

[64] Flavia Nakakooza, 'Tightening the Noose of Intellectual Property Enforcement: The Uganda Anti-Counterfeiting Bill,' 2011, pp 11-12. <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=flavia_nabakooza> (accessed 14 October 2012).

Kenya. [65] However, no persons, groups of persons or organisations in Tanzania have instituted to challenge the legality or constitutionality of the provisions of the Merchandise Marks Act or the Merchandise Marks Regulations that define the terms 'counterfeiting' and 'counterfeit goods.'

The Merchandise Marks Act prohibits the following criminal acts: manufacturing, producing or making counterfeit goods for purposes of trade; selling, hiring out, bartering or exchanging, or offering or exposing for sale counterfeit goods; displaying or exhibiting counterfeit goods; owning or possessing or controlling dies, blocks, machines, or instruments for purposes of making counterfeit products; exporting, or causing to be transshipped, counterfeit goods outside Tanzania; or imprinting false trade descriptions to goods; or disposing in any manner counterfeit products.[66] It is an offence for a person to import into Tanzania goods with forged trademarks or false trade descriptions or to import into Tanzania goods with trademarks or trade descriptions that indicate false or fictitious names of manufacturers, places or countries where those goods are purported to have been manufactured.[67]

The above Act prohibits hosting, operating or managing websites or electronic networks by or through which counterfeit goods are displayed or advertised.[68] Similarly, advertising counterfeit products through any media and aiding, abetting or assisting in advertising those commodities in paper-based or electronic media are criminal offences.[69]

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[65] See *Patricia Asero Ochieng & 2 Others v. Attorney General,* Petition No. 409 of 2009, High Court of Kenya, at Nairobi. See also, Ebenezer Durojaye & Gladys Mirundi-Mukundi, ' States' Obligations in Relation to Access to Medicines: Revisiting Kenyan High Court Decision in *P.A.O and Others v Attorney-General and Another* ' (2013) 17 *Law, Democracy & Development* 24, 25 - 29. See also Carlos M Correa, 'Anti-Counterfeiting: A Trojan Horse for Expanding Intellectual Property in Developing Countries,' in Christphe Geige (ed) *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Cheltenham: Elgar Publishing, 2012) 66.

[66] Section 3 (1) of the Merchandise Marks Act.

[67] Section 10.

[68] Section 18B.

[69] Section 18C.

The above provisions were introduced in 2012 in order to deal with online counterfeiting and the Internet-based trade in counterfeit goods.[70]

There are laws that criminalise counterfeiting and the trade in counterfeit goods affecting specific types of products. The Tanzania Food, Drugs and Cosmetics Act deals with the trade in counterfeit food, cosmetic and pharmaceutical products and medical devices. It is an offence for a person to manufacture, import, supply, possess or offer for sale counterfeit foods, drugs, cosmetics or medical devices.[71] Additionally, a person who deals in counterfeit drugs, food, cosmetics or medical devices commits an offence.[72] The Seeds Act of 2003 (Act No. 18) provides that it is a crime to import, export or sell seeds under a name that resembles or identical to a grade name registered and used by another person. It is also a crime to import, export or sell seeds in packages which indicate grade names or designations that resemble or identical to the grade names or designation registered and used by another person.[73] The Fertilizers Act of 2009 (Act No. 9) prohibits sale of fertilizer without registering the name or mark under which the fertilizer is sold.[74] The packages containing fertilizers should be marked.[75] Additionally, the Act prohibits the sale of adulterated fertilizers.[76] Therefore, the above Act deals, in general terms, with the trade in counterfeit fertilizers.

There are other laws in Tanzania which deal with offences associated with or emanating from the operation of the counterfeit goods trade. The Penal Code prohibits sale of toxic and adulterated food and beverages [77] and criminalises the commission of

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[70] The Business Laws (Miscellaneous Amendments) Act of 2012 (Act No. 3).
[71] Section 76 (1) of the Tanzania Food, Drugs and Cosmetics Act.
[72] Section 76 (2).
[73] Section 14 (1) and (3) of the Seeds Act.
[74] Section 19 (1) of the Fertilizers Act.
[75] Section 21 (1)
[76] Section 30 (1).
[77] Section 181 of the Penal Code.

fraudulent misrepresentations intended to deceive.[78] The Code can be used to control the trade in adulterated and poisonous counterfeit food and beverages and punish traders who deceive consumers by supplying counterfeit goods to the markets. The Fair Competition Act prohibits acts that can mislead or deceive consumers.[79] Suppliers of goods are prohibited to make false representations about the quality, grades or composition of goods or misleading representations about places of origin of the goods.[80] Additionally, the suppliers are prohibited to mislead consumers as to the nature, manufacturing process or characteristics of goods offered for sale.[81] The above Act can be applied to curb misrepresentations and fraud associated with the counterfeit goods trade. The EAC Customs Management Act of 2004 criminalises the importation and smuggling of prohibited goods into Tanzania.[82] Prohibited goods include counterfeit products. Smuggling prohibited goods into Tanzania is an offence.[83] The provisions of the above Act are used to control the importation and smuggling of counterfeit products into Tanzania.

The Merchandise Marks Act and the Merchandise Marks Regulations, the Tanzania Food, Drugs and Cosmetics Act, the Seeds Act and the Fertilizers Act prescribe penalties for persons who are guilty of committing counterfeiting offences. Persons convicted of committing counterfeiting crimes are liable to pay fines, imprisonment, have their counterfeit goods destroyed and pay the costs of destroying the counterfeit products. Courts may order persons convicted of counterfeiting offences to pay compensation to persons injured as a result of the commission of counterfeiting offences and to have instrumentalities used for and proceeds generated from commission of counterfeiting

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78 Section 301.
79 Section 15 (1) of the Fair Competition Act.
80 Section 16.
81 Section 18.
82 Section 200 of the East African Community Customs Management Act of 2004. Under Section 2 (1) of the Act, 'prohibited goods' means any goods the importation, exportation or carriage of which is prohibited in the EAC member states.
83 Section 207.

crimes forfeited. The Anti-Money Laundering Act of 2006 (Chapter 423) designates counterfeiting as a predicate crime to money laundering.[84] The anti-money laundering legislation makes instrumentalities used to commit counterfeiting offences and proceeds generated from commission of the offences liable to confiscation, freezing and forfeiture under the Proceeds Crime Act of 1991 (Chapter 256).

The criminal law vests authorities and agencies in Tanzania with powers to control the trade in counterfeit goods. The authorities and agencies include the FCC, the TFDA, the TRA, the TBS and the police. The authorities and agencies have powers to: enter and inspect any place, premises and vehicles; seal off any place, premises or vehicles; seize, detain and remove counterfeit goods; confiscate, detain and remove manufacturing, production and packaging equipment; shut down the manufacturing of, production of, or making counterfeit products; question persons and procure documents that may contain evidence of commission of crime; and arrest, detain and/or prosecute persons suspected of committing counterfeiting offences.

The above powers of the anti-counterfeiting agencies can be demonstrated by the authority of the Chief Inspector of Merchandise Marks (the Chief Inspector) to control the counterfeiting business. The office of the Chief Inspector is part of the FCC. [85] The Merchandise Marks Regulations provide that upon receiving information from a trademark owner, the Chief Inspector or authorised officers can enter and search any premises suspected of containing counterfeit goods and, if necessary, can use force to obtain access to such premises.[86] The Chief Inspector will notify the police who shall provide security. [87] Any goods suspected of being counterfeit products will be seized and

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84 Section 3 of the Anti-Money Laundering Act.
85 The Chief Inspector is appointed under Section 2 of the Merchandise Marks. The Director General of the FCC is the Chief Inspector.
86 Rule 30 (1) of the Merchandise Marks Regulations.
87 Rule 30 (2)

stored in a government warehouse or private premises or shop that will be sealed off until an order for the disposal or destruction of the counterfeit products has been issued.[88] Where goods have been seized and stored the Chief Inspector is required to issue a receipt to evidence seizure and detention of the goods.[89] The Chief Inspector has powers to summon witnesses, procure evidence and examine documents for the purposes of making decisions in respect of the seized and detained goods.

An owner of detained counterfeit goods may submit an application to the Chief Inspector for the release and restoration of the detained goods.[90] Upon an application being lodged and payment of the prescribed fees being made, the Chief Inspector shall give notice of such reference to the owner requesting him or her to make a submission to support his or her application.[91] On receipt of the submission from the owner, the Chief Inspector shall publish in the Government Gazette or a newspaper a notice about the application and its nature and the intention to hold a public inquiry into the application.[92] Any person who desires to be heard at the inquiry or who claims to have an interest in the subject matter of the inquiry may apply to the Chief Inspector to make a submission stating the nature of his/her interests.[93] Except by the special permission of the Chief Inspector, no witness may be called to give evidence during the inquiry unless a statement of the evidence which he/she proposes to give has been presented to the Inspector.[94] The Chief Inspector will issue a summons to any witness whose attendance may be necessary for the determination of the matter.[95] The Chief Inspector shall appoint a committee to hear and determine the complaint lodged by the owner of the goods.

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88 Rule 31 (1) and (2).
89 Rule 31 (3).
90 Rules 31 (4) and 34.
91 Rule 35 (1).
92 Rule 38 (5).
93 Rule 39
94 Rule 41.
95 Rule 44 (1).

Where, upon hearing the complaint, the hearing committee is satisfied that seized and detained goods are counterfeit products, the Chief Inspector shall make an order to that effect.[96] Similarly, where the owner admits that the seized or detained goods are counterfeit products, the Chief Inspector will issue what is known as a 'compoundment' order and impose the penalties on the owner of those goods. Also, if the owner of the goods does not apply for the release or restoration of those goods within the prescribed period, the Chief Inspector will make an order for the forfeiture or destruction of the goods.[97] Moreover, where the Chief Inspector has made a finding that the seized or detained goods are counterfeit products, the order to that effect will be made and the penalties will be imposed on the owner of those products.[98] A person who is found guilty and aggrieved by the decision of the Chief Inspector may appeal to the Fair Competition Tribunal within fourteen days of the date of such decision.[99]

With regard to the institutional framework, there are several authorities and agencies in Tanzania which enforce criminal law for controlling the trade in counterfeit goods. These are the FCC (the lead anti-counterfeiting agency), the TFDA (the anti-counterfeiting agency which deals with drugs, food and cosmetics products), the TBS (the anti-counterfeiting agency which enforces standards law); the TRA (the anti-counterfeiting agency which controls the importation and smuggling of counterfeit goods); and the police (which is the lead law enforcement agency). Other authorities are the police and the office of the Attorney General. The representatives from the FCC, the TFDA, the TBS, the TRA; and any other representative from a public office constitute a body known as the Interdepartmental Taskforce.[100] The Taskforce coordinates anti-counterfeiting activities in Tanzania. The above authorities and agencies operate under

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[96] See *In the Matter of Claim No. 1 of 2003 by M/s TUK TUK Limited.*
[97] Rule 33 (2).
[98] Rules 49 and 55.
[99] Section 2C (2) of the Merchandise Marks Act.
[100] Rule 8 (1) of the Merchandise Marks Regulations.
[100] Rule 30 (2)

different ministries. While the FCC and the TBS are under the Ministry of Industry and Trade, the TFDA operates under the Ministry of Health and Social Welfare. While the TRA is under the Ministry of Finance, the police and the office of the Attorney General operate under the Ministry of Home Affairs and the Ministry of Justice and Constitutional Affairs respectively.

Other institutions in Tanzania are involved in enforcing criminal for controlling the trade in counterfeit goods. The Tanzania Intelligence and Security Services gathers intelligence information for the purposes of detecting and preventing the commission of counterfeiting offences. The office of the National Prosecution Services headed by the Director of Public Prosecution (DPP) oversees the prosecution of persons accused of committing crimes. The Immigration Department controls movements of persons into or out of Mainland Tanzania. The Tanzania Ports Authority and the Tanzania Airports Authority oversee the entry of goods into the country through harbours and airports respectively. The Medical Store Department oversees the supply of the quality drugs and medical equipment in the country. The Government Chemist Laboratory Agency performs several functions such as conducting analysis of different types of products, testing samples and exhibits; evaluating and identifying the quality and safety of products for consumption; determining the composition of products; and testing the quality of products. Depending on the pecuniary values of counterfeit goods involved, cases involving the counterfeiting business are heard by District Courts and the High Court of Tanzania. In some cases, the local authorities participate in anti-counterfeiting operations conducted in their areas of jurisdictions.

The information presented above validates the observations in the report of the CTI study,[101] Kameja *et al,*[102] Mkono *et al*[103] and Kalunde [104] that pointed out that Tanzania has enacted criminal law and institutions for dealing with the trade in counterfeit goods. As I demonstrated earlier in this chapter, criminal law for controlling the counterfeiting business is contained in several statutes that are not harmonised. Therefore, the anti-counterfeiting law is fragmented. Additionally, the law in Tanzania controls the supply of counterfeit products in the markets by prohibiting production, importation, smuggling, advertising and sale of those products. Purchasing or using counterfeit products are not offences.

The respondents from anti-counterfeiting agencies said that criminal law is a useful policy instrument for controlling the trade in counterfeit goods in Tanzania. The law vests the anti-counterfeiting agencies with the powers to inspect shops, warehouses and manufacturing facilities, search and seize counterfeit products. As a result of these operations, huge volumes of counterfeit goods have been seized and destroyed and several suppliers of counterfeit products have been arrested and prosecuted in courts of law. The anti-counterfeiting agencies in collaboration with Interpol and the WHO have conducted anti-counterfeiting *Operations Mamba* I, II and III in 2008, 2009 and 2010 respectively.[105] Additionally, the anti-counterfeiting *Operation Giboia* was conducted in 2013.[106] Newspapers have reported that the FCC seized and destroyed counterfeit goods

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101 Confederation of Tanzania Industries,'Position Paper on Effects of Counterfeit Goods on the Tanzanian Economy: The Case of Manufacturing Sector,' (unpublished report, 2008) 21 - 27.
102 Kameja *et al*, 'Turning the Tables on Counterfeiters,' (note 46) 3 - 4.
103 Mkono *et al*, 'Tanzania's IP Changes are Good for Business,' (note 47) 96 - 98.
104 Said M Kalunde, 'Criminal Enforcement of Intellectual Property Rights: An Overview of the Policy, Legal and Institutional Framework,' (2011)<http://ssrn.com/abstract=192525> (accessed 12 October 2012). See also Kamugisha-Kazoba, *Protection of Consumers and a Guard Against Counterfeit and Substandard Pharmaceuticals in Tanzania: Examining National, Regional and International Frameworks* (note 40) 5 - 17.
105 Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).
106 International Criminal Police Organization, <http://www.interpol.int/Crime-areas/Pharmaceutical-crime/Operations/Operation-Mamba> (accessed 30 October 2013).

worth shs 4.2 billion (£1.7 million) between 2007 and June 2014.[107] The TFDA seized, detained and destroyed counterfeit pharmaceutical, food and cosmetic products worth shs 4.8 billion (£1.92 million) between 2008 and 2011.[108]

The anti-counterfeiting agencies arrest, detain or prosecute manufacturers, importers, smugglers and sellers of counterfeit goods. For instance, the FCC officers arrested a person who was selling counterfeit beer and prosecuted him before the District Court of Kinondoni, in Dar Es Salaam. The trader was found guilty and sentenced to imprisonment for 11 years.[109] In another incident, the District Court of Temeke in Dar Es Salaam convicted three persons of offences of manufacturing and selling counterfeit whisky, purported to be manufactured by Tanzania Distilleries Limited. The court ordered each person convicted to pay shs 300, 000 (£120).[110] In another incident, the District Court of Kibiti, in Pwani Region, found a seller guilty of selling a counterfeit camera and sentenced him to imprisonment for seven years.[111] The FCC, in collaboration with the police, arrested three persons in Mwanza for selling counterfeit insecticide. Each offender was fined to pay shs 1 million (£400).[112] In February 2014, the chief executive officer of Pharmaceutical Industries Limited and five other persons were arraigned before the Resident Magistrate Court of Dar Es Salaam and charged with offences of manufacturing and supplying counterfeit ARVs to the hospitals in the country. The hearing of the case is expected to start in the near future.[113]

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[107] Guardian Reporter, *FCC impounds counterfeits worth 4.2 bn/- in eight years,* The *Guardian* (Dar Es Salaam), 7 August 2014.
[108] Thobias Mwanakatwe, *TFDA yateketeza bidhaa zisizofaaza shs milioni 4.8, Nipashe* (Dar Es Salaam), 26 March 2012.
[109] Interview: Director, Anti-counterfeiting agency (17 September 2010).
[110] See, *Wanaotengeneza bidhaa 'feki' washughulikiwe, HabariLeo* (Dar Es Salaam), 21 October 2009.
[111] Waryoba Nyankami, *Most fake electronics from Far and Middle East,* The *Guardian* (Dar Es Salaam), 30 October 2013.
[112] Cosmas Mlekani, *Wafanyabiashara watozwa faini kwa kuuza madawa bandia, Nipashe* (Dar Es Salaam), 15 June 2011.
[113] Karama Kenyunko, *Madabida, five others in court over fake drugs,* The *Guardian* (Dar Es Salaam), 11 February 2014. See also, Daily News Reporter, *Fake ARV drugs case ready for hearing,* The *Guardian* (Dar Es Salaam), 19 March 2014.

At the instances of trademark owners or their representatives, anti-counterfeiting agencies have confiscated different types of counterfeit goods. At the request of a brand-name owner, namely Al Khair Parts Limited, the FCC raided some shops in Dar Es Salaam and seized 800 and 10 sets of counterfeit brake pads and shoes respectively.[114] Following the application made by a local representative of Samsung Electronics, the FCC conducted an operation in Dar Es Salaam which resulted in seizure of counterfeit Samsung products.[115] In another incident, Yara Tanzania Limited lodged a complaint to move the FCC and the police to conduct a raid whereby hundreds of bags of counterfeit fertilizers were impounded.[116] Similarly, at the request of Super-Max International Limited, FCC officials confiscated cartons of counterfeit razor blades..[117]

Several observations about criminal procedures applied to control the trade in counterfeit goods in Tanzania can be made. First, the law in Tanzania does not provide, as prescribed in the TRIPs Agreement, that criminal procedures and penalties should be applied in cases of wilful counterfeiting on a commercial scale.[118] In Tanzania, the criminal procedures can be applied even where there is no wilful counterfeiting or counterfeiting is not on a commercial scale. Second, in many cases powers of anti-counterfeiting agencies to enter and search premises and detain and seize counterfeit goods are exercised without judicial oversights. The exercise of those broad powers without judicial supervision is against principles that promote the fair administration of justice. Arguably, the powers are susceptible to abuse by corrupt officers of the government authorities and anti-counterfeiting agencies. Third, seizure, detention or storage of suspected counterfeit products that are perishable easily such as medicines and

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[114] Reporter, *FCC confiscates fake brake pads, shoes in crackdown,* The *Daily News* (Dar Es Salaam), 1 February 2013.
[115] Guardian Report, *Police, FCC, Samsung raid Dar counterfeit shops,* The *Guardian* (Dar Es Salaam), 24 September 2011.
[116] Victor Kerega, *Drive against fake to cost sh 50 m,* The *Citizen* (Dar Es Salaam), 18 October, 2012.
[117] Felix Lazaro, *Manufacturer intensifies war on fake razor blades,* The *Citizen* (Dar Es Salaam), 14 November 2012.
[118] Article 61 of the TRIPs Agreement.

food products raises several challenges. The storage of medicines or food products requires special facilities to protect products from contamination, excess temperature, cold or wetness. Poor storage may affect the quality and standards of the pharmaceutical products and make them ineffective to prevent or cure diseases.

c) Special Provisions Related to Border Measures

Besides customs law that prohibits the importation and smuggling of foreign-made counterfeit goods into Tanzania, the Merchandise Marks Regulations provide for procedures which empower the customs authority to suspend the release of or detain imported counterfeit products. The Regulations provide that a person who has valid grounds for suspecting that the importation of counterfeit goods into Tanzania may take place can apply to the Chief Inspector to issue an order to request the customs authority to suspend the release of the goods to the importer.[119] The applicant has to furnish the Chief Inspector with information about: i) the grounds for lodging the application, ii) the descriptions of suspected counterfeit goods, iii) the name and address of the importer, iv) the origin and destination of the goods; and v) facts evidencing that the importer has violated the anti-counterfeiting law.[120] The Chief Inspector may require the applicant to provide a security or bond or an undertaking to cover costs or liability that may arise where the imported goods are not counterfeit products or where the applicant abuses the legal process.[121] The Chief Inspector has powers to summon witnesses and examine them or require the witnesses to furnish documentary evidence that may be relevant to the proceedings. The applicant will bear expenses incurred by witnesses who attend the proceedings.[122]

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[119] Rule 12 (1) of the Merchandise Marks Regulations.
[120] *Ibid.*
[121] Rule 13.
[122] Rule 14 (1) and (2).

Upon receiving the application, the Chief Inspector may request the Commissioner of Customs of the TRA (the Commissioner of Customs) to suspend the release of the imported goods. The notice of the request will be served to the importer of the goods who will have an opportunity to respond within three days of the receipt of the notification.[123] Where the importer who has been served with the notice fails to respond or does respond to the notice unsatisfactorily, the Chief Inspector will issue a suspension order addressed to the Commissioner of Customs and the copy of the order shall be sent to the importer of the goods. The goods will be kept in a customs controlled area.[124] If the goods are not in a customs controlled area, the Chief Inspector will order the detention of such goods in premises where they situated and the goods shall be stored in a government warehouse or other places at the expenses of the applicant.[125] The Chief Inspector can permit the applicant to inspect the goods in order to substantiate his/her claim.[126]

An importer of counterfeit goods may admit that the imported commodities are counterfeit products and request the Chief Inspector to issue a 'compoundment' order indicating that the importer has committed the offence. The Chief Inspector will issue the compoundment order and impose a fine (with or without the order for forfeiture of the goods) and order the destruction of the counterfeit products.[127] The Chief Inspector will order the release of the detained goods if the applicant has not provided sufficient proof to show that the goods are counterfeit products. The release order will be issued where the owner has provided sufficient evidence to show that the goods are not counterfeit products.[128]

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123 Rule 16 (1), (2) and (4).
124 Rule 17 (1).
125 Rule 18 (1).
126 Rules 18 (4) and 19.
127 Rules 21 and 22.
128 Rule 18 (5) and Rule 20 .

The Chief Inspector can order a person who makes an application frivolously or with improper motives to compensate the owner, consignee or consignor for harm or loss occasioned through wrongful detention of goods which are not counterfeit products.[129] This measure is aimed at preventing applicants from abusing the legal process and causing financial loss to the owners, consignors or consignees of imported goods that are genuine products.

A party who is dissatisfied with the decision of the Chief Inspector has can appeal to the Fair Competition Tribunal of Tanzania.[130] Appeals from the Tribunal are lodged at the Court of Appeal of Tanzania.[131] Therefore, as far as the special border mechanisms for controlling the trade in counterfeit goods in Tanzania are concerned, the authorities involved are the FCC (through the Chief Inspector), the Commissioner of Customs of the TRA, the Fair Competition Tribunal and the Court of Appeal of Tanzania.

The border control procedures have several limitations. The procedures do not grant consumers the right to apply to the Chief Inspector for the suspension or detention orders to stop the release of counterfeit products. This is because consumers are not intellectual property owners. Additionally, the Chief Inspector can issue the suspension or detention orders, but the law does not compel the Commissioner of Customs to comply with the orders. The law does not provide for remedies to trademark owners against the Commissioner of Customs where the customs authority releases imported counterfeit goods and the trademark owners suffer damages as a result of the circulation of those goods.

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[129] Rule 23.
[130] Section 2C (2) of the Merchandise Marks Act and Rule 51 of the Merchandise Marks Regulations.
[131] Section 84 (1) of the Fair Competition Act.

By and large, the enforcement of the provisions of the Merchandise Marks Act and the Merchandise Marks Regulations can have several undesirable consequences for Tanzania and its people. First, the Merchandise Marks Regulations embodies the provisions that have the TRIPs-Plus effects because the legislation defines 'counterfeit goods' more broadly than what is prescribed in the TRIPs Agreement. Second, the enforcement of the Regulations may result in the encroachment of the flexibilities (for instance, the authority of a signatory of the TRIPs Agreement to grant a compulsory licensing) available under the TRIPs Agreement[132] and which were affirmed in the Doha Declaration on the TRIPs Agreement and Public Health of 2001.[133] Third, the enforcement of the Merchandise Marks Act and the Merchandise Marks Regulations requires the government authorities and anti-counterfeiting agencies in Tanzania to allocate huge amounts of resources (funds, equipment and persons) that may be used to protect private or foreign intellectual property to the detriment of other public priorities such as health and education. The application of the Act and Regulations makes it difficult to delineate the boundary between the legitimate interests to protect members of public against consumption of 'safety-critical' counterfeit goods (such as medicines and food products) and the responsibility of trademark owners to fight the trade in 'non-safety critical' counterfeit goods in order to protect their private intellectual property.

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132 Under Article 31 (b), (c) and (f) the TRIPs Agreement, a compulsory licence can be granted in '... situations of national emergency or other circumstances of extreme urgency,' but the scope and duration of the licence must 'be limited to the purpose for which it was authorised...' Moreover, the compulsory licence should 'be authorised predominantly for the supply of the domestic market of the [WTO member] authorising such use.

133 The Doha Declaration on the TRIPs Agreement and Public Health of 2001 restated the right of the signatories of the treaty to grant compulsory licences and stated that each WTO member 'has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted. The member can 'determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.' See Paragraph 5(b) and (c) of the Declaration.

d) Trademark law

Trademark law in Tanzania embodies civil law that can be applied to control the counterfeit goods trade. The Trade and Service Marks Act and local case law constitute the main trademark law in Tanzania. The English received law supplements Tanzania's statutory and case law.[134] Counterfeiting violates rights of trademark owners through infringements of registered trademarks and passing off goods.

The Trade and Service Marks Act provides for the rights of owners of registered and unregistered trademarks.[135] The trademark owners have, among other rights, the exclusive right to use or authorise others to use the trademarks.[136] This exclusive right arises when a trademark owner has fulfilled requirements relating to the registration of the trademark.[137] Upon registration of a trademark, any unauthorised use of a mark identical to the registered trademark will amount to an infringement of the trademark. The Act prohibits infringements of the registered trademarks. An infringement of a registered trademark occurs where a person who, not being an owner of the trademark or its authorized user, 'uses a [mark on the goods]:

> a) Identical with or so nearly resembling it as to be likely to deceive or cause confusion, in the cause of trade or business, in relation to any goods in respect of which it is registered or in relation to any closely related goods…; or
>
> b) Identical with or nearly resembling it in the course of trade or business in any manner likely to impair the distinctive character or acquired reputation of the trademark. [138]

The Trade and Service Marks Act further provides that an infringement of a registered trademark on goods purchased from the trademark owner occurs where an

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134 Section 2(3) of the Judicature and Applications of Laws Act (Chapter 358).
135 Section 28 and 30 of the Trade and Service Marks Act.
136 Section 31.
137 Sections 16 -20.
138 Section 32 (1).

infringer: i) applies the trademark to goods whose conditions, get-ups or packaging have been altered; or ii) changes or obliterates the trademark imprinted on the goods wholly or partly; or iii) applies another mark to the trademark imprinted on the goods; or iv) adds a writing to the trademark imprinted on the goods that is likely to injure acquired reputation of such trademark.[139]

In order for a plaintiff to succeed in a suit for an infringement of a trademark, he/she must establish the following: i) the defendant imprinted on goods or their packages or containers a mark which is identical to or nearly resembling the plaintiff's trademark, and ii) the use of the defendant's mark is likely to deceive or cause confusion to buyers of the goods.[140]

Owners of goods protected by unregistered trademarks have the right to sue for passing off and seek remedies against violators of the trademark rights.[141] In the case of *Tanzania Cigarette Company Limited v. Mastermind Tobacco (T) Limited*,[142] the High Court of Tanzania stated that passing off consists of a false representation: i) made by a person in the course of trade; ii) that the goods passed off as genuine products are commodities made by another person who is a rightful trademark owner; iii) to prospective consumers; iv) which is calculated to injure the business or goodwill of the rightful trademark owner; and v) which causes actual damage to the business or goodwill of the rightful trademark owner. The Court stated further that:

> ... there must not only be established the party suing has a goodwill in the mark, but also there must be intention to deceive there are a few confusions in the market. Although the party need not established actual deception, but reasonable grounds for

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139 Section 32 (2).
140 Alex B Makulilo, 'Likelihood of Confusion: What is the Yardstick? Trademark Jurisprudence in Tanzania,' (2012) 7 *Journal of Intellectual Property Law & Practice* 350, 352.
141 Section 30.
142 Commercial Case No. 11 of 2005, High Court of Tanzania, Commercial Registry, at Dar Es Salaam (unreported).

> apprehending deception, he must however establish distinctive features, substantial use and wide reputation. [143]

The remedies that can be awarded to trademark owners in cases of infringements of registered trademarks and passing off goods include orders for payment of damages to compensate trademark owners and injunctions to restrain wrongdoers to stop violating trademarks. The courts can order infringers to pay profits generated from the sale of counterfeit goods to trademark owners; to destroy the counterfeit products and their packaging; and to pay costs incurred by trademark owners to conduct litigation.[144]

Several institutions administer and enforce trademark law in Tanzania. These include the BRELA, whose mandates include, among others, administering company law and business names law; registering and administering intellectual property; and assisting to stimulate scientific and technological ingenuity and innovation and encouraging technology transfer.[145] There is also the Commercial Division of the High Court of Tanzania vested with the jurisdiction to resolve commercial disputes including cases which involve trademarks. [146]

Trademark owners apply civil law to fight trademark infringements and passing off goods in Tanzania. In the case of *Colgate–Palmolive Company Limited v. Zakaria Provision Store and 3 others*,[147] the plaintiffs, manufacturers of toothpaste traded under the registered trademark 'Colgate,' sued the defendants for infringing the plaintiffs' trademark. The defendants were manufacturers of toothpaste branded as 'ABC Dent'. The tubes containing the defendants' toothpaste and their packaging materials had general

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[143] *Ibid* at p 39.
[144] Audax K Kameja, Blandina S Gogadi, August N Mrema & Francis Kamuzora, 'IP Protection Meet Global Standards,' (2007) *World IP Contacts Handbook* 414, 414 - 416.
[145] The BRELA is a government executive agency made under the Government Executive Agencies Act of 1997 (Act No. 30).
[146] The Commercial Division of the High Court of Tanzania is established under Rule 5A of the High Court Registries Rules of 2005 (Government Notice No. 96 of 2005)
[147] Civil Case No. 1 of 1997, High Court of Tanzania, Main Registry, at Dar Es Salaam (unreported).

make-ups, appearance, colours, and markings similar to those containing plaintiffs' toothpaste. The High Court of Tanzania held that the defendants had violated the plaintiffs' trademark and ordered them to pay damages to compensate the plaintiffs for the loss of sales and goodwill. Additionally, the Court granted a permanent injunction to restrain the defendants from infringing the plaintiffs' trademark and an order for the defendants to pay the costs of the suit.[148]

The courts grant temporary injunctive orders to restrain parties from violating trademark rights. For instance, in *Kibo Match Group Limited v. Mohamed Enterprises (T) Limited*,[149] the plaintiffs, manufacturers of match-boxes traded under the registered trademark by the name of 'Kangaroo,' applied to the High Court of Tanzania for, among other remedies, an order of permanent injunction to restrain the defendants from infringing the plaintiffs' trademark. The defendants were importing, distributing and selling matchboxes which were imprinted with a trademark which was confusingly similar to that of the plaintiffs. The Court granted the plaintiffs a temporary injunction, pending the hearing of the main case and the determination of the rights of the parties.

In another case, *Sabuni Detergents Limited v. Murzah Oil Limited*, [150] the plaintiffs, manufacturers of a detergent soap registered under the trademark as 'Foma Limao' sued the defendants for violating the trademark through production and sale of a detergent soap trademarked as 'Takasa Limao.' The High Court held the defendants liable for infringing the plaintiffs' trademark. Besides ordering the defendants to pay damages to compensate the plaintiffs and the permanent injunction to restrain the defendants from

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[148] Similar orders were granted in *Agro Processing & Allied Products Limited v. Said Salim Bakhresa & Company Limited & Another*, Commercial Case No. 31 of 2004, High Court of Tanzania, Commercial Division Registry, at Dar Es Salaam (unreported).

[149] Commercial Case No. 6 of 1999, High Court of Tanzania, Commercial Division Registry, at Dar Es Salaam (unreported).

[150] Commercial Case No. 256 of 2001, High Court of Tanzania, Commercial Registry, Dar Es Salaam (unreported).

violating the plaintiffs' trademark, the Court ordered the defendants to destroy the infringing goods and their packages.[151]

e) Law of Contract and Law of Tort

The law of contract is part of civil law in Tanzania that can be used to control the trade in counterfeit goods. The Law of Contract Act (Chapter 345), the Sale of Goods Act (Chapter 214) and local case law constitute law of contract, which regulates the sale of goods in Tanzania.[152] The English received law supplements the local law of contract.[153] The Law of Contract Act provides that in order to form a contract the consent of parties to an agreement should be free. The consent is free, if it is made without coercion, undue influence, fraud, misrepresentation or mistake.[154] Fraud and misrepresentation which are involved in deceptive counterfeiting vitiate the genuineness of the consent of parties to agreements. The Act further provides that when consent to an agreement is obtained by 'fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused....' [155] The party whose consent has been obtained by fraud or misrepresentation can institute a case move the court to repudiate the contract and claim compensation for damage suffered.[156] Accordingly, where a seller of counterfeit goods commits fraud or misrepresentation (especially where there is deceptive counterfeiting), consent of the buyer of the counterfeit products is not free. The buyer can apply the law of contract to sue the seller to repudiate the agreement for sale of the counterfeit goods and recover damages.

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151 See *Kiwi European Holding BV v. Sajad Ali Limited* [2005] TLR 434 (High Court of Tanzania).
152 Nicholas N N Nditi, *General Principles of Contract Law in East Africa* (Dar Es Salaam: Dar Es Salaam University Press, 1st ed, 2009) 14.
153 See *Tanganyika Garage Limited v. Marcel Mafuruki* (1975) LRT 23 (High Court of Tanzania).
154 Section 14 (1) of the Law of Contract Act.
155 Section 19 (1).
156 See *Bartholomew Ndyanabo v. Petronida Ndyamukama* [1968] HCD n 339 (High Court of Tanzania).

A buyer of counterfeit products can also use the Sale of Goods Act to sue the seller of those goods for breach of contract. This can happen where the seller breaches express terms of the sale agreement or terms implied in the sale agreement by the Act. Where the sale agreement expressly provides that the seller should supply genuine goods, the seller will breach the express term of the agreement if he supplies counterfeit goods to the buyer. Moreover, the seller may be liable for breaching the terms implied into the sale agreement by the Sale of Goods Act where, for instance, the sale is made by description and counterfeit products supplied do not correspond with the descriptions of the genuine goods given by the buyer, [157] or where the sale is made by sample and counterfeit goods supplied to the buyer do not correspond with the sample in quality, or where the counterfeit goods supplied have defects in quality which make them unmerchantable.[158] Besides claiming damages from the sellers of counterfeit products, the buyers can apply for repudiation of the agreement for sale of the goods.

The right of consumers of goods to sue on contract is available to only 'contractual' consumers, that is to say, buyers who are parties to the sale agreements. Where there is no privity of contract between suppliers and consumers of goods, the consumers will not have the right to sue the suppliers of goods on contract.[159] There is no privity of contract between a user of goods, who is not a buyer, and a seller of those goods. A user of the goods (who is not a buyer) is not regarded to be a consumer. The Fair Competition Act defines a consumer as a 'person who purchases or offers to purchase goods or services otherwise than for the purpose of resale....'[160] There is no privity of contract between a purchaser of goods and a manufacturer of those

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[157] Section 15 of the Sale of Goods Act.
[158] Section 17.
[159] Privity of contract is a doctrine which holds that only parties to a contract acquire rights and incur liabilities under the contract. A person who is not a party to a contract cannot sue or be sue on the contract. See *Burns & Blane Limited v. The United Construction Company Limited* [1967] HCD n. 156.
[160] Section 2 of the Fair Competition Act.

commodities. The High Court of Tanzania has held in several cases that only parties to a contract can sue or be liable under that contract. In the case of *D Moshi t/a Mashoto Auto Garage v National Insurance Corporation*,[161] the High Court stated that 'only a party to any agreement... can sue or be sued [on that contract].'[162]

Both contractual and 'non-contractual' consumers can use the law of tort to sue suppliers of counterfeit goods. Local case law and the English received law constitute the law of tort in Tanzania.[163] According to the English law received in Tanzania,[164] a person will be liable for the tort of deceit if he commits a fraudulent misrepresentation to another person which causes damage to another. Where sellers of counterfeit goods fraudulently misrepresent facts about genuineness of those goods, the sellers commit tort of deceit against the buyers of the commodities. The contractual consumers can sue the sellers and seek damages for injury suffered as a result of the misrepresentations.

The contractual and non-contractual consumers have the right to sue suppliers of unsafe or harmful commodities for the tort of negligence and claim damages for injury suffered.[165] This can be illustrated by the case of *B A Minga v. Mwananchi Total Service Station, Shinyanga & Total (T) Limited*,[166] where the plaintiff sued the defendants for damages due to negligence. The plaintiff was the owner of a house which was damaged by fire caused by the use of kerosene purchased from the filling station owned by the first defendant and supplied by the second defendant company. The kerosene was mixed with petrol and this mixture was highly inflammable and dangerous for the ordinary household use. When this mixture was used in a hurricane lamp, there was an explosion causing a fire that burnt down the plaintiff's house. The High Court of Tanzania ruled that the

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161 Civil Case No. 210 of 2000, High Court of Tanzania, Dar Es Salaam Registry (unreported).
162 At p 1.
163 Section 2 (3) of the Judicature and Applications of Laws Act.
164 This law is received through cases such as *Derry v. Peek* (1889) 14 App Cas. 337.
165 C S Binamungu, *Law of Torts in Tanzania* (Morogoro: Mzumbe Book Project, 2002) 45.
166 [1972] HCD 241 (High Court of Tanzania).

defendants owed a duty of care towards the plaintiff which consisted of taking precautions not to sell adulterated or dangerous kerosene. Since the defendants had breached their duty of care towards the plaintiff who suffered damage, the defendants were liable and ordered to pay damages to the plaintiff.

Consumption of inferior quality, defective or harmful counterfeit products exposes safety and health risks and, in many cases, causes injury to purchasers and users of those commodities. Suppliers of the counterfeit products breach the duty of care towards the consumers and commit the tort of negligence. Accordingly, the aggrieved consumers can sue the suppliers of the counterfeit products for negligence and claim damages.

f) Compliance with the TRIPs Agreement

Information in the preceding demonstrates that Tanzania has laws and institutional mechanisms for protecting intellectual property and controlling the trade in counterfeit goods. The anti-counterfeiting law in Tanzania is comprised in criminal law, trademark law, law of contract, standards law and competition law. In theory, the law in Tanzania conform to provisions of the TRIPs Agreement, which require the signatories of the treaty to enact laws providing for criminal procedures,[167] civil measures[168] and special requirements related to border measures[169] to curb intellectual property violations including counterfeiting. Some authors such as Kihwelo[170] and Kameja *et al*[171] argue that to some extent, Tanzania's law meets the TRIPs Agreement standards. However, there are

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[167] Article 62 of the TRIPs Agreement.
[168] Articles 42 - 48
[169] Articles 51 - 59.
[170] Paul F Kihwelo, 'Intellectual Property Rights Jurisprudence in Tanzania: Turning an Eye to the Commercial Division of the High Court,' (2006) 9 *Journal of the World Intellectual Property* 673, 677 - 688.
[171] Audax K Kameja, Blandina S Gogadi, August N Mrema & Francis Kamuzora, 'IP Protection Meet Global Standards,' (2007) *World IP Contacts Handbook* 414, 414 - 416.

several factors that undermine the potential of the law for controlling the counterfeit goods trade in Tanzania. The section below describes some of these factors.

g) Factors Affecting Efficacy of Anti-counterfeiting Law

Some inadequacies, weaknesses or challenges weaken the efficacy of the anti-counterfeiting law. These inadequacies, weaknesses or challenges are those which: i) are inherent in the law; ii) undermine the efficiency of authorities that enforce the law; iii) hamper the ability of traders and consumers to use the law; and iv) involve the context under which the law operates. These inadequacies, weaknesses or challenges are described below.

(i) Inadequacies of Law

The examination of the anti-counterfeiting criminal law in Tanzania reveals that some provisions of the law are not harmonised and this fact is evidenced by inconsistencies of the definitions of some terms; penalties prescribed for commission of counterfeiting offences; and the procedures for dealing with counterfeiting crimes.

Under the Merchandise Marks Regulations, 'counterfeit goods' are those products manufactured in violation of any form of intellectual property rights. Under the Tanzania Food, Drugs and Cosmetics Act, 'counterfeit products' are those which have been produced in violation of rights pertaining to trademarks or trade descriptions. Therefore, in the former case, a person can be held liable for committing a counterfeiting offence if he/she infringes any form of intellectual property rights (such as trademarks, patents or copyrights). In the latter case, a person commits a counterfeiting crime if he/she imitates a product, its get-up or other features which violates rights of the owner of the trademark that protects that product.

The Merchandise Marks Act prescribes several punishments for first-time and subsequent offenders. The Act provides that a person who is convicted of committing a counterfeiting offence will be liable to imprisonment for a term not exceeding five years, or payment of a fine not exceeding shs 10,000,000 (£4000) or not less than three times of the value of the counterfeit goods or instrumentalities used in the commission of the crime, or both such fine and imprisonment in the case of the first conviction.[172] In the case of the second or subsequent conviction, the convicted person will be liable to imprisonment for a term not exceeding fifteen years, or to pay a fine of not less than shs 50,000,000 (£20, 000) or five times of the value of the retail price of the counterfeit products or instrumentalities used to commit the counterfeiting offences; or to both such fine and imprisonment.[173] Other statutes such as the Tanzania Food, Drugs and Cosmetics Act,[174] the Seeds Act[175] and the Fertilizers Act[176] impose uniform penalties on persons committing first-time and repeat counterfeiting offences. Arguably, second-time and subsequent offenders charged and convicted under the Tanzania Food, Drugs and Cosmetics Act, the Seeds Act and the Fertilizers Act are likely to receive more lenient penalties than those convicted under the Merchandise Marks Act.

There was a view that the law in Tanzania prescribes lenient punishments that have limited deterrent effect on persons who commit counterfeiting offences. One respondent observed that:

> Laws are effective in controlling the counterfeiting activities. For instance, the Tanzania Food, Drugs and Cosmetics Act provides for lenient penalties which cannot deter offenders from committing counterfeiting crimes. If you impose a penalty, say, a fine of shs 500,000/= or imprisonment for a term not exceeding six months on counterfeiters, they will not be

172 Section 3 (2) of the Merchandise Marks Act.
173 Sections 3 (2) and 6.
174 Sections 76 (1) and 91 of the Tanzania Food, Drugs and Cosmetics Act.
175 Section 26 (1) of the Seeds Act.
176 Section 40 (2) and (2) of the Fertilizers Act.

> deterred from undertaking counterfeiting activities.... I think this factor undermines the usefulness of the law in curbing counterfeiting activities.[177]

Newspaper commentaries have expressed similar observations. One newspaper observed that the Merchandise Marks Act was outdated and not effective to control the counterfeit goods trade.[178] Another newspaper which quoted an official of the Tanzania Seed Certification Institute observed that the law for fighting the trade in counterfeit seeds is ineffectual because it prescribes lenient penalties.[179] There were also observations that penalties stipulated in the Tanzania Food, Drugs and Cosmetics Act [180] and the Fertilizers Act [181] were lenient and had limited deterrent effect.

Punishments and sanctions prescribed in Tanzania's law are lighter than penalties provided for in the anti-counterfeiting legislations in other jurisdictions. For instance, in South Africa, the Counterfeit Goods Act provides that in the case of the first conviction, a person guilty of committing a counterfeiting offence will liable to pay a fine not exceeding ZAR 5,000,000 (£280,000) per counterfeit article. In the case of a second or subsequent conviction, the fine payable for each counterfeit article is up to ZAR 10,000,000 (£560,000). In the United States, the Trademark Counterfeiting Act of 1984 provides for penalties of up to five years in prison and a fine of US$ 250,000 for first-time offenders, and 15 years in prison and fines of up to US$1 million for repeat

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177 Interview: Commissioned officer, Law enforcement agency (30 September 2010).
178 Pius Rugonzibwa, *CTI for review of Merchandise Marks Act of 1963,* The *Daily News* (Dar Es Salaam), 8 July 2008.
179 Christopher Majaliwa, *Institute vows to set up fight against bad seeds,* The *Daily News* (Dar Es Salaam) 10 October 2012.
180 Elisha Magongalanga & Mahamisha Habib, *Tz told to rein on fake food dealers,* The *Citizen* (Dar Es Salaam) 18 October 2013.
181 Leonard Mwakalebela, *Government Declares War On Fake Fertilizer Dealers,* The *Daily News* (Dar Es Salaam), 6 July 2012.

offenders. In the case of corporate offenders, the Act provides for payment of fines up to US $1 million for first-time offenders and up to US$5 million for repeat offenders.[182]

The penalties prescribed in the Tanzania Food, Drugs and Cosmetics Act include payment of fines which range between shs 500,000 (£200) and 5,000,000 (£2000), or imprisonment for terms ranging from three months to two years, or both payment of fines and imprisonment.[183] The penalties provided for in the Seeds Act are payment of fines ranging from shs 1,000,000 (£400) and shs 5,000,000 (£2000), or imprisonment for a term not exceeding one year, or both imprisonment and fine.[184] The penalties prescribed in the Fertilizers Act are payment of fines ranging from shs 5,000,000 (£2000) and shs 10,000,000 (£5000), or imprisonment for a term between six months and three years, or both imprisonment and fine.[185] The above fines are manifestly lower than those prescribed in the anti-counterfeiting statutes in South Africa and the United States. My opinion is that, the penalties prescribed in the Tanzania Food, Drugs and Cosmetics Act, the Seeds Act and the Fertilizers Act are lenient and have limited deterrent effects on counterfeiters and would-be counterfeiters.

Despite prescribing fines which are lower than those provided for in the legislations in other jurisdictions, there is a wide range of penalties provided for in Tanzania's anti-counterfeiting law. As I demonstrated earlier in this chapter, the punishments include payment of fines, imprisonment, destruction of counterfeit goods and payment of costs of destructing counterfeit products, forfeiture of counterfeit products and instrumentalities of crimes and proceeds generated from the counterfeit goods trade. Arguably, if the above punishments are appropriately combined and imposed

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[182] Douglas B Foster, 'Recent Development in US Trademark, Copyright and Semiconductor Chip Anti-counterfeiting,' (1986) 8 *Loyola of Los Angeles International & Comparative Law Review* 649, 656.
[183] Sections 76 and 91 (1) of the Tanzania Food, Drugs and Cosmetics Act.
[184] Section 26 (1) of the Seeds Act.
[185] Section 40 (2) of the Fertilizers Act.

on offenders, they can have effective deterrent effects on persons who commit counterfeiting offences or would-be counterfeiters.

With regard to procedures for dealing with counterfeiting offences, the Merchandise Marks Act and the Merchandise Marks Regulations vest the FCC, through the Chief Inspector or authorised officers of the FCC, with powers to prosecute offenders in courts of law.[186] The Chief Inspector has powers to hear and determine complaints lodged by trademark owners against importers of suspected counterfeit products.[187] In this case, the FCC acts as a quasi-judicial authority. In contrast, the Tanzania Food, Drugs and Cosmetics Act provides for procedures that vest police officers with powers to prosecute persons who breach the Act in courts of law. The TFDA officials do not have powers to prosecute persons who violate the Tanzania Food, Drugs and Cosmetics Act. The TFDA does not have quasi-judicial authority in matters concerning the control of the counterfeit goods trade. It is evident, therefore, that the criminal procedures for dealing with counterfeiting cases in Tanzania are not harmonised.

Due to the lack of harmonisation of the anti-counterfeiting law in Tanzania, the demarcations of the mandates and functions of the FCC, the TFDA, the TRA, the TBS and the police are weakly coordinated. The fact that the anti-counterfeiting agencies operate under different ministries undermines the co-ordination of their mandates and functions of the agencies. In many instances, the agencies operate individually (or in collaboration with trademark owners or their representatives) in fighting the trade in counterfeit goods. Such operations cannot be as successful as joint operations undertaken by all anti-counterfeiting agencies. Joint operations such as *Mamba* I, II and III and *Giboia* which involved all anti-counterfeiting agencies in Tanzania produced better

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[186] Section 2B (1) of the Merchandise Marks Act and Rule 18 (4) of the Merchandise Marks Regulations.
[187] Rules 12 -23 of the Merchandise Marks Regulations.

results in terms of the number of the regions that were covered and volumes of counterfeit products that were seized, detained and destroyed.

(ii) Limitations of Institutions

Institutional factors weaken the potential of the law for controlling the counterfeit goods trade in Tanzania. The criminal statutes do not obligate all anti-counterfeiting agencies to give equal priorities to initiatives to fight against the trade in counterfeit goods. Priorities of the agencies towards controlling counterfeiting activities are different. One newspaper observed that the main priority of the TBS is to ensure that traders manufacture, import or sell products that meet standards prescribed by the law, irrespective of the fact that those products may be manufactured or imported in violation of trademark rights.[188] The TBS places higher priority on enforcing the standards laws than fighting counterfeiting offences. Responding to the above claim, the respondent from the TBS said:

> ...the duty to control the trade in counterfeit goods falls within the mandates of the Fair Competition Commission and the Tanzania Food and Drugs Authority. The Bureau's responsibility is to deal with standards of goods, to ensure that locally manufactured and imported products meet standards prescribed by the law. The Bureau has the task of curbing the production, importation and sale of commodities in violation of standards laws.[189]

Related to the above, the anti-counterfeiting agencies have different interests or perceptions towards controlling the trade in counterfeit goods. One respondent said that the TRA is keen to collect more revenue for the government and promote and maintain the 'business-friendly' environment which facilitates the speedy clearance of imported

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[188] Daily News Correspondent, *Fighting counterfeit goods: challenges and prospects,* The *Daily News* (Dar Es Salaam), 21 March 2011.4

[189] Interview: Principal officer, Anti-counterfeiting agency (21 September 2010).

goods.[190] The respondent from the FCC said that the TRA's view is to have the imported goods cleared without undue delays because 'holding imported consignments of goods in order to inspect them if they contain counterfeit products will cause unnecessary delays and negatively affect the economy.'[191] Reacting to the above claims, the respondent from the TRA said:

> The Tanzania Revenue Authority has the duty to ensure that imported goods are cleared without undue delay. It works hard to reduce the time for clearing imported goods. The Authority does not hold or detain consignments suspected of containing counterfeit goods unless the Fair Competition Commission or the Tanzania Food and Drugs Authority direct it to take such action....[192]

The above information indicates that the task of controlling the trade in counterfeit goods in Tanzania falls primarily on two agencies, namely the FCC and the TFDA. The TBS, the TRA and the police participate in the anti-counterfeiting initiatives simply because, as I indicated earlier in this chapter, members appointed from the above agencies constitute a body known as the Interdepartmental Anti-Counterfeiting Taskforce.

The anti-counterfeiting agencies in Tanzania have limited personnel, equipment and facilities.[193] This situation affects their capacity to detect and investigate counterfeiting crimes and prosecute offenders. The TRA has no helicopters and own few speed boats for patrolling land and sea borders.[194] Taking into consideration the porosity of the borders and the existence of many unofficial border entry points into Tanzania, it is

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[190] Interview: Commissioned officer, Law enforcement agency (30 September 2010).
[191] Interview: Director, Anti-counterfeiting agency (17 September 2010).
[192] Interview: Principal officer, Anti-counterfeiting agency (12 October 2010).
[193] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010); Commissioned officer, Law enforcement agency (30 September 2010).
[194] Interview: Principal officer, Anti-counterfeiting agency (12 October 2010).

difficult for the TRA to control smuggling of counterfeit goods into Tanzania.[195] Goods are smuggled into the country through several of unofficial entry points.[196] Apart from the TBS and the TFDA (which have laboratories for testing substandard products and counterfeit products), other agencies do not have those facilities.[197] It is difficult for the agencies which lack the above facilities to identify counterfeit goods without the assistance of the Tanzania Government Chemist Laboratory Agency which is overwhelmed by its responsibilities. This causes delays in analysing samples of counterfeit products submitted by the anti-counterfeiting agencies and this situation delays the process of taking of legal action against manufacturers, importers, smugglers or sellers of counterfeit goods.

The anti-counterfeiting agencies have few personnel with the required expertise to curb the trade in counterfeit goods efficiently. The TBS has limited number of personnel making it difficult for the Bureau 'to effectively control [the influx of foreign-made] of counterfeit products and substandard goods....'[198] Some agencies do not have offices throughout Tanzania and this situation hampers their capacity to control of the trade in counterfeit goods in rural and remote areas of the country. While the police and the TRA have offices in all districts of Tanzania, the TFDA and the TBS have zonal offices. Additionally, some of these agencies have limited equipment and personnel.[199] The FCC has the office in Dar Es Salaam only. Concerned about the above challenge facing the FCC, the former Minister for Industry and Trade, Cyril Chami, advised the

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195 Aisia Rweyemamu, *Illegal entry points source of fake goods flooding,* The *Guardian* (Dar Es Salaam), 15 December 2012.

196 Rodgers Luhwago, *How importers evade tax through illegal ports,* The *Guardian* (Dar Es Salaam), 18 May 2013.

197 Interviews: Manager, Anti-counterfeiting agency (25 September 2010); Principal officer, Anti-counterfeiting agency (21 September 2010).

198 Marc Nkwame, *TBS says limited by staff shortage,* The *Daily News* (Dar Es Salaam), 8 January 2013. See also Gerald Kitabu, *TFDA short of lab equipment,* The *Guardian* (Dar Es Salaam) 13 February 2013. See also Correspondent, *Drugs agency short of border inspectors,* The *Guardian* (Dar Es Salaam) 21 February 2013

199 The TFDA zonal offices were in Mwanza (the Lake Zone), Arusha (the Northern Zone), Mbeya (the Southern Highland Zone) and Dar Es Salaam (the Eastern Zone).
The TBS has offices at ports and border entry points at Sirari, Holili, Horohoro and Namanga.

Commission to open offices in all regions and districts of Tanzania in order to curb the counterfeit goods trade efficiently.[200] The Minister cautioned the FCC that: 'If you [have the office] in Dar Es Salaam [only], you won't be able to [stop] the spread of counterfeit goods in the country....'[201]

Some anti-counterfeiting agencies have several duties and this factor impairs their capacity to fight the trade in counterfeit goods. For instance, the FCC, the main agency for implementing the competition policy and law in Tanzania, is tasked to 'promote and protect effective competition in trade and commerce, to protect consumers from unfair and misleading market conduct and to [discharge functions in relation to] other related matters.' [202] Thus, the FCC, which is the overall regulator of markets in Tanzania, has the duty to protect the welfare of consumers and is the main anti-counterfeiting agency. Given that the fact that the FCC has limited funds, personnel and equipment, it is impractical for the Commission to discharge the above duties efficiently.

Malpractices undermine the capacity of anti-counterfeiting agencies in Tanzania to fight against the trade in counterfeit goods. One respondent said that there was concern that some law enforcers solicit and receive bribes from manufacturers, importers, smugglers or sellers of counterfeit products.[203] A law practitioner was of the view that collusion between some law enforcement agents and criminals water down the effectiveness of the anti-counterfeiting legal regime.[204] A law researcher observed that corruption weakens the efficiency of the anti-counterfeiting agencies.[205] Newspapers in Tanzania have raised similar concerns. One newspaper commented that as long as

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[200] *Minister Visits FCC: Urges the Commission to go National Worldwide,* FCC Newsletter, Issue No. 0002, April-June 2011, p 3.
[201] Mariam Saidi & Hasina Mjingo, *Stiffer penalties for counterfeiters advised,* The *Daily News* (Dar Es Salaam), 20 May 2011.
[202] See the preamble to the Act.
[203] Interview: Director, Anti-counterfeiting agency (17 September 2010).
[204] Written response: Law practitioner (11 May 2011).
[205] Written response: Law researcher (18 May 2011).

corruption was endemic among some officers of the port authority, the revenue authority and officials responsible for inspecting imported goods, it would be difficult for government authorities and agencies in Tanzania to control the counterfeit goods trade.[206]

The police and courts tasked to investigate and prosecute offenders and hear and decide cases are inefficient and ineffective in handling criminal cases including counterfeiting offences. Corruption and the lack of or limited funding, personnel and equipment are some of the factors which undermine the efficiency of the police and courts in handling cases and disputes.[207] Besides facing challenges such as the lack of or limited expertise and equipment, there is a general view that police officers in Tanzania are infamous for demanding and receiving bribes and colluding with criminals.[208] These malpractices weaken police force's efficiency in fighting crimes[209] including counterfeiting offences.

Delays in hearing cases affect the enforcement of the anti-counterfeiting law in Tanzania.[210] An official of the TFDA once observed that 'delays in hearing cases and [lenient] punishments have resulted in the increased counterfeiting incidents in the country.'[211] As for corruption, the general perception is that bribery is rampant among the judicial officers and affects the efficiency of the judiciary. A retired judge has been quoted as stating that 'it is a fact that corruption is still a real problem within the

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206 Peter Muthamia, *Counterfeits: Fair Competition Commission should be given teeth,* The *Citizen* (Dar Es Salaam), 13 November 2010.
207 Pius Rugonzibwa, *Judges: Judiciary Budget Outrageous,* The *Daily News* (Dar Es Salaam), 14 September 2011.
208 Arnold Swai, *Corruption makes more inroads in police force,* The *Daily News* (Dar Es Salaam), 29 July 2013.
209 Guardian Correspondent, *police associated with sabotaging community policing,* The *Guardian* (Dar Es Salaam), 26 March 2013.
210 Rose Mwalongo, *LHRC: Delay major flow in dispensation of justice,* The *Guardian* (Dar Es Salaam), 29 January 2011.
211 Correspondent, *TFDA: case delays fuel counterfeiting,* The *Guardian* (Dar Es Salaam), 8 December 2011.

judiciary. People have to literally buy what is in fact their right.....'[212] Besides being regarded as one of the highly corrupted authorities in Tanzania, many people view the judiciary as an ineffective institution to handle disputes.[213]

The problems and challenges described above undermine the efficacy of the courts in Tanzania. The above-cited limitations and inadequacies have rendered the country's judicial system ineffective in facilitating the enforcement of the anti-counterfeiting law.

(iii) Challenges Facing Traders and Consumers

Limited or non-use of the law and the legal machinery by some traders in Tanzania undermine the potential of the law for controlling the counterfeit goods trade. The high costs involved in enforcing their rights prevent some trademark owners from using the courts to fight the counterfeiting business. A law scholar observed that:

> Trademark owners have to secure evidence necessary for the institution of suits against manufacturers or sellers of counterfeit products. This is costly. The trademark owners have to pay court fees, lawyers' fees and court costs if their cases are dismissed. These costs can be prohibitively high for trademark owners with limited resources. Moreover, litigation can take considerable time and efforts of the trademark owners.[214]

The above respondent pointed out further that some legitimate traders of genuine products do not sue counterfeiters for fear that they would not be able to satisfy court decrees awarded. Some trademark owners do not institute civil cases against suppliers of

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[212] Faustine Kapama, *Retired judge decries corruption in the judiciary,* The *Daily News* (Dar Es Salaam), 8 December 2011.
[213] Pius Rugonzibwa *CJ uptight on case jam in court,* The *Daily News* (Dar Es Salaam), 9 October 2011.
[214] Interview: Law scholar (21 October 2010).

counterfeit products because the charges and costs of conducting litigation against the counterfeiters exceed the damages which courts can award.[215]

There is also limited or non-use of the law and legal machinery by consumers to enforce their rights against suppliers of counterfeit products. Some consumers in this study indicated that they had not reported or lodged complaints against manufacturers or sellers of counterfeit goods with the FCC or the TDFA.[216] One consumer had lodged a complaint against a seller of counterfeit goods with the police, but he did not pursue the matter as he thought that it would be a waste of time, money and effort.[217]

There are factors that prevent some consumers from lodging complaints with the FCC and the TFDA, or reporting suppliers of counterfeit goods to the police, or suing those suppliers in courts of law. The general view in this study was that many people had no information that the FCC and the TFDA have procedures for handling complaints from consumers.[218] With regard to the police and courts, some consumers said that their inability to pay court fees and their concerns about loss of time, efforts and resources discouraged them from lodging complaints with the police and courts.[219] Other consumers said that they did not have confidence in the police and courts because these authorities were insensitive to ordinary people's needs. They were not complainant-friendly; they were slow in handling complaints; and their officers were corrupt and not accessible to the citizenry.[220]

There are some technical reasons that affect the ability of consumers in Tanzania to use the legal machinery to protect their rights against suppliers of counterfeit products.

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215 *Ibid.*
216 Questionnaires and interviews: (consumers).
217 Questionnaire : (consumer).
218 Interviews: Chivanga (29 September 2011); Irunde (8 October 2011).
219 Interviews: Dori (28 October 2011); Mukadam (20 October 2010).
220 Interviews and questionnaires: (consumers).

Some consumers in this study said that they did not have documents to show they had purchased counterfeit products.[221] Many traders in Tanzania do not issue receipts to buyers of goods. Some consumers could not trace street vendors of counterfeit products because the traders did not have fixed places of business.[222] Many small-scale traders do not have fixed places of business; they move from one location to another. Some consumers could not prove harm sustained as a result of consuming counterfeit products. Due to the lack of evidence, consumers could not take action against manufacturers or sellers of counterfeit products.[223]

The lack of or limited information about consumer rights are other obstacles which prevent many consumers in Tanzania from enforcing their rights against suppliers of counterfeit goods. The respondent from the consumer protection association said that generally the consumers in Tanzania lack or have limited information about their rights. He said:

> The majority of people are not aware of their rights... These people do not know when their rights are violated. They have no information about where to report or complain when they have been violated. Under these circumstances, they cannot enforce their rights. Very few people are informed about mechanisms for enforcing their rights.[224]

Newspaper commentaries expressed similar opinions. They pointed out that many consumers in Tanzania have limited or no information about their rights, or do not know the type of action they should take when their rights have been violated by manufacturers or sellers of goods, or do not have information about authorities where to

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221 *Ibid.*
222 Interview: Shufaa (30 October 2010).
223 Interviews and questionnaires: (consumers).
224 Interview: CEO, Consumer protection association (24 October 2010). This information was based on study the association had conducted in 2007.

lodge their complaints against the suppliers of goods.[225] Another newspaper observed that it is difficult for uninformed consumers to take legal action and enforce their rights against manufacturers or sellers of counterfeit products.[226]

A law scholar cited several factors which discourage some consumers from using courts to enforce their rights against suppliers of counterfeit products. First, legal procedures are laborious and lengthy and these factors make the judicial procedures unfriendly to many consumers. Second, court fees and costs payable are prohibitively high and unaffordable for many low-income consumers. Third, the costs (fees, time and inconveniences) involved are higher than amounts of compensation awarded by the courts.[227] A law practitioner added that '... some consumers cannot afford to hire services of private advocates.... Some consumers do not know where to get lawyers who provide legal services to litigants voluntarily and without payment or at a reduced fee as a public service.'[228]

The government of Tanzania provides legal aid to litigants who do not have the financial ability to hire services of lawyers in certain criminal cases. This legal aid is normally provided to accused persons or appellants in homicide and treason cases. This scheme, which is provided for in the Legal Aid (Criminal Proceedings) Act of 1969 (Chapter 21), is aimed at providing legal assistance for a low-income accused or an appellant in a criminal case to prepare and conduct his/ her defence or appeal by assigning the case to an advocate who will prepare and conduct a defence or an appeal.[229]

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[225] Editor, *Consumer Rights: Nation must care,* The *Guardian* (Dar Es Salaam), 9 March 2010; See also, Henry Muhanika, *Consumers should unite to fight for their rights,* The *Guardian* (Dar Es Salaam), 23 July 2013. See also Daniel Ondigo, *Dar consumers have little awareness about counterfeits,* , The *Guardian* (Dar Es Salaam), 13 December 2009.

[226] Edwin Agola, *PM: Most consumers ignorant of their rights,* The *Guardian* (Dar Es Salaam), 16 March 2010.

[227] Interview: Law scholar (21 October 2010).

[228] Written response: Law practitioner (11 May 2011).

[229] Section 3 of the Legal Aid (Criminal Proceedings) Act.

The scheme does not cover civil cases. Consequently, consumers who are affected through the purchase or use of defective or unsafe counterfeit products are not covered under the legal aid scheme.

With regard to NGOs, the law scholar pointed out that there are few NGOs which provide assistance to the poor people in Tanzania.[230] The majority of the NGOs are urban-based with their offices in Arusha, Dar Es Salaam, Dodoma and Mbeya and Mwanza.[231] Poor people including consumers in many rural areas do not have access to these NGOs. The respondent from the consumer association said that his organisation had limited resources and thus inhibited its capacity to provide assistance to consumers. He said:

> We do not have resources. Funds and personnel are limited. We depend on donor funds to run our operations. We do not get any of these resources from the government. We do not have lawyers. We do not have branches in regions or districts. It is very difficult to reach rural people who need our assistance.[232]

Newspaper accounts indicate that due to the lack of or limited provision of legal aid, poor people in Tanzania experience difficulties in accessing the legal machinery. One newspaper quoted Tanzania's Chief Justice, Othman Chande, as stating that access to justice was a challenge facing poor people and it was high time the government adopted a policy to govern the provision of legal aid to enable many people to access justice.[233] It is estimated that 'more than 80 per cent of Tanzanians are poor and cannot afford to hire [services of private advocates] to represent them in courts of law.'[234]

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[230] Interview: Law scholar (21 October 2010).
[231] These legal aid include the Tanganyika Law Society, the Legal Aid Committee of the Faculty of Law of the University of Dar Es Salaam, the Legal and Human Rights Centre, the Women's and Legal Aid Centre , the Tanzania Women Lawyers' Association.
[232] Interview: CEO, Consumer protection association (24 October 2010).
[233] Guardian Reporter, *CJ underlines access to justice for the poor,* The *Guardian* (Dar Es Salaam), 27 September 2011.
[234] Michael Haonga, *Paralegals vital in govt's 'justice for all' initiative,* The *Guardian* (Dar Es Salaam), 15 November 2013.

(iv) Contextual Factors Impinging on Law

The law in Tanzania operates under the context that impinges on its effectiveness to tackle the trade in counterfeit goods. The law operates in an environment where poverty is widespread. Many people in Tanzania live under absolute poverty conditions. Poverty is one of the factors that motivate people to buy low-priced counterfeit products. Additionally, the liberalised market in Tanzania is inadequately regulated and experiences many incidences of unfair trade practices.[235] Many traders are unregistered[236] and registered enterprises are inadequately regulated.[237] This disorderly operation of the market-based economy in Tanzania has created conducive environment for counterfeiting activities and operation of the counterfeit goods trade. Moreover, the anti-counterfeiting law operates in an environment where legal regimes for regulating investments,[238] business registration[239] and consumer protection[240] provide limited or insignificant support to the law for controlling the counterfeit goods trade. Limitations of these laws and inadequacies of their enforcement mechanisms weaken their usefulness in supporting the anti-counterfeiting law.

The anti-counterfeiting law in Tanzania operates in an environment where traders (manufacturers, importers and sellers of goods) are weakly organised. Tanzania has a limited number of organised traders' associations. Few traders' organisations particularly the TCCIA and the CTI have been participating in fighting against the trade in counterfeit goods. Similarly, there is lack of independent and strong consumer protection

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235 Editor, *We must create level ground in competition,* The *Guardian* (Dar Es Salaam), 13 August 2012.
236 Anne Robi, *State orders crackdown on unregistered pharmacies,* The *Daily News* (Dar Es Salaam), 29 March 2012.
237 Editor, *Naughty pharmacies treated too leniently,* The *Guardian* (Dar Es Salaam), 17 May 2010. See also Editor, *Junk food, junk car, junk everything,* The *Guardian* (Dar Es Salaam), 5 April 2014.
238 The main investment statute is the Tanzania Investment Act of 1997 (Chapter 38).
239 The statute which regulates registration of business activities is the Business Activities Registration Act of 2007 (Act No. 14).
240 Law for protecting rights of consumers is contained in several statutes which are not harmonized and activities of several authorities, agencies and entities which are tasked to protect consumer rights are not co-ordinated.

associations.[241] Few consumer protection organisations such as the TCSA are taking part in the fight against the trade in counterfeit goods. The inadequacies of traders' organisations and consumer protection associations hamper their ability to push for a vigorous enforcement of the anti-counterfeiting law.

The trade in counterfeit goods is a transnational phenomenon. The flow of counterfeit goods from Asian countries particularly China and India into Tanzania's markets has not been adequately controlled. The regulatory mechanisms for controlling the trade in counterfeit goods by Tanzania's neighbours, where some counterfeit products originate, are inadequate. As I pointed out earlier in this chapter, other neighbours of Tanzania particularly the EAC members have laws for curbing the trade in counterfeit goods in their territories. However, the enforcement of the laws in these countries is ineffectual. Some of the counterfeit goods from the markets of these EAC member states find their way to Tanzania. There is an inadequate coordination of initiatives to fight the cross-border counterfeit goods trade among members of the EAC. Similarly, authorities in Zanzibar have not been able to stop criminals from using the Zanzibar islands as transit points for shipping contraband including counterfeit products into Tanzania. Under the above circumstances, it is difficult for Tanzania to stop counterfeit products flooding from foreign countries, taking into account the weaknesses of Tanzania's customs authority that impinge on its capacity to enforce the anti-counterfeiting law.

The information presented above demonstrates that, despite the enactment of anti-counterfeiting law and establishment of authorities and agencies to enforce the law, the trade in counterfeit goods in Tanzania is flourishing. Observations I made during this study showed that traders sell counterfeit products. Most counterfeit products are sold by

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[241] Fair Competition Commission, *Competition Policy and Law, Consumer Protection and the Fight against Counterfeit Goods* (Dar Es Salaam: FCC, 2007) 62.

owners of makeshift kiosks and stalls, street vendors and traders at flea markets. [242] Newspaper reports have corroborated the view about flooding of counterfeit goods in the markets. One newspaper observed that 'the Tanzanian market is flooded with [different types] of fake goods ...'[243] Another newspaper reported that the counterfeit goods trade is a widespread phenomenon in the country. It also observed that although the anti-counterfeiting and law enforcement agencies have been fighting the trade by 'raiding shops and seizing [counterfeit goods] from shelves and at the ports, some fake and low-quality goods still slip through.'[244] Another newspaper noted that the proliferation of counterfeit products in the markets is 'one of [the challenges] facing Tanzania today.'[245] This above information validates the view that the law in Tanzania is ineffective or has had an insignificant effect on curbing the counterfeit goods trade. This vindicates the calls that have been made by different stakeholders about the inadequacy of the anti-counterfeiting law and backs up their demands for the revision of Tanzania's anti-counterfeiting regulatory policy and law.[246]

6.2.2. Alternative Anti-counterfeiting Regulations

This section looks at alternative regulatory or 'non-law' related mechanisms that are applied to curb the trade in counterfeit goods in Tanzania. I describe information-based regulation and technology-based regulation that are used to control the counterfeiting business. I also explore how self-regulatory and communalist mechanisms are applied to tackle the anti-counterfeiting business.

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[242] Observations: Dar Es Salaam (10 November 2011); Singida (19 October 2011); Mtwara (27 October 2011).

[243] Editorial, *Why have we lost war on counterfeit goods?,* The *Guardian* (Dar Es Salaam), 31 October 2013.

[244] Editorial, *War on fakes must be won,* The *Citizen* (Dar Es Salaam, 19 October 2013.

[245] Editorial, *Every need to sustain war on fakes products,* The *Guardian* (Dar Es Salaam), 14 January 2014.

[246] Sosthenes Mwita, *Fake imported goods impoverish Tanzanians,* The *Daily News* (Dar Es Salaam), 8 August 2013; Queenter Mawinda, *Chicken flu vaccine joins counterfeit list,* The *Guardian* (Dar Es Salaam), 19 October 2013; Sturmius Mtweve, *Minister: Law to deal with dishonest agro-dealers in the pipeline,* The *Citizen* (Dar Es Salaam), 25 June 2013.

a) Information-based Regulation

Information-based regulatory instruments that are applied to curb the trade in counterfeit goods in Tanzania can be classified into two main groups, namely statute-mandated and non-statute mandated information instruments. These regulatory techniques are described below.

(i) Statute-mandated Information

Several statutory instruments in Tanzania require suppliers of goods to provide information to consumers of those products. The Fair Competition Act requires suppliers of goods to disclose certain information about their products. The suppliers have to provide buyers and users with information about contents, manufacturing or processing techniques and packaging of such commodities.[247] The Tanzania Food, Drugs and Cosmetics Act provides that suppliers of medicines, food, cosmetics and medical devices should label containers or packages of food, pharmaceutical and cosmetic products as prescribed by the law.[248] The Industrial and Consumer Chemicals (Management and Control) Act of 2003 (Act No. 3) requires suppliers of chemicals and related products to label their products in order to provide buyers and users with information necessary for the protection of health of users of the chemicals and environment.[249] The Fertilizers Act requires suppliers of fertilizers to ensure that their products are packed and labelled in manners prescribed by the law. The legislation further provides that containers and packages of fertilizers should contain warnings or directions for their use which are necessary for the protection of plants, animals, humans, aquatic life, soil, water and environment.[250] The above statutes prohibit traders from selling commodities without the

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247 Sections 49 and 50 of the Fair Competition Act.
248 Section 92 (1) of the Tanzania Food, Drugs and Cosmetics.
249 Section 42 (1) of the Industrial and Consumer Chemicals (Management and Control) Act.
250 Sections 29 and 30 (2) (b) of the Fertilizers Act.

information prescribed by the law. Traders who supply goods to consumers without such information commit offences.

The provisions in the above Acts that require suppliers of goods to provide information to buyers and users are intended to ensure that consumers of those products are furnished with information about the goods and to assist buyers to make informed decisions before purchasing those products. The information can also assist the buyers to distinguish genuine goods from counterfeit goods and enable them to avoid purchasing non-genuine products.

(ii) Non-statute Mandated Information

The FCC and the TFDA disseminate information to the general public. The Fair Competition Act [251] and the Tanzania Food, Drugs and Cosmetics Act [252] mandate the FCC and the TDFA to disseminate information to members of the public. The information focuses on four main areas: i) to alert the public about the presence of counterfeit goods in the markets; ii) to encourage traders and consumers to report the presence of counterfeit products in the markets to the relevant authorities; iii) to enable the affected traders and consumers of goods to take legal action against suppliers of counterfeit commodities; and iv) to call on members of the public and other stakeholders to take part in the anti-counterfeiting initiatives.

The TFDA uses newspapers and its own website to disseminate information for fighting against the trade in counterfeit goods. For instance, in September 2011, the TFDA issued a notice in newspapers and posted the notice on its website about the presence of counterfeit malaria pills in the markets. The Authority required sellers and

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[251] Section 65 (2) (c) and (d) of the Fair Competition Act.
[252] Section 5 (1) (k) of the Tanzania Food, Drugs and Cosmetics Act.

buyers to stop selling and purchasing the above counterfeit drugs. It advised persons who were in possession of the counterfeit malaria tablets to submit them to the TFDA offices, government health centres or the police. In February 2012, the TFDA issued a notice to inform the general public about the presence of counterfeit drugs in some pharmacies in Tanzania. In October 2012, the TFDA issued another notice to alert the public about the presence of counterfeit ARVs in local hospitals and pharmacies in the country.[253]

Traders in Tanzania use information-based regulatory mechanisms to control the trade in counterfeit goods. Some traders use television and radio to disseminate information in order to fight against the trade in counterfeit goods. They use the media: i) to encourage consumers to buy genuine commodities; ii) to alert the public about the presence of counterfeit goods in the markets; iii) to inform consumers how to identify counterfeit goods and about benefits of using genuine products; and iv) to warn off manufacturers and sellers of counterfeit goods. For instance, a manufacturer of foam mattresses in Tanzania, namely Quality Foam Limited commissioned advertisements on a television station to encourage consumers to purchase the company's genuine mattresses. The advertisements warned that counterfeiting the company's mattresses was an offence.[254] Similarly, a local company which represents Korea's LG Electronics Limited in Tanzania was running advertisements on radio stations to encourage consumers to purchase genuine products from LG Electronics Limited's authorised dealers. The advertisements indicated further that LG products were durable and consumers would get guarantees if they purchased genuine products.[255]

Some traders use newspapers as forums for disseminating anti-counterfeiting information to the public. Gathani (Tanzania) Limited, a local distributor of NGK spark

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253 See **Appendix 5**.

254 The local television, namely *Independent Television* was running the advertisements.

255 The local radio, viz *Clouds FM* was running the advertisements.

plugs, issued a notice in a local newspaper to inform members of the public about the circulation of counterfeit NGK spark plugs in the markets. The distributor threatened to take legal action against suppliers of the counterfeit spark plugs.[256] Another newspaper carried a notice by a local representative of Hewlett-Packard (HP) Company; it advised consumers to refrain from purchasing counterfeit HP cartridges. The notice stated that genuine HP cartridges would guarantee 'smooth printing' and 'perfect prints.' It described signs that could be used to identify genuine HP cartridges.[257] Other traders that have used newspapers to disseminate information to fight the trade in counterfeit goods include Sollatek Limited, [258] Said Salim Bakhresa and Company Limited[259] and African Seed Company Limited.[260]

Some traders use billboards to disseminate anti-counterfeiting information to members of the public. Examples of those traders include Tanzania Distilleries Limited and Hewlett-Packard Company.[261] The information displayed on the billboards is intended to encourage consumers to purchase genuine goods and enable them to differentiate genuine products from counterfeit goods.

Some consumer protection associations and traders' organisations in Tanzania use information as a policy instrument for fighting against the trade in counterfeit goods. These NGOs educate personnel from government authorities and anti-counterfeiting agencies about issues pertaining to counterfeiting activities and the fight against the counterfeit goods trade, encourage traders and consumers to refrain from selling and buying counterfeit products respectively, and empower traders and consumers and enable them to protect their rights against manufacturers and sellers of counterfeit products.

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256 See **Appendix 6.**
257 See **Appendix 7.**
258 See **Appendix 8**
259 See **Appendix 9**
260 See **Appendix 10**
261 Observations: Dar Es Salaam (10 November 2011).

With regard to the use of information-based regulation by traders' organisations to deal with the trade in counterfeit goods, the respondent from the traders' organisation said:

> Our organisation disseminates information to various stakeholders including government officials, officers from the anti-counterfeiting agencies, industry representatives and consumer associations. We educate these stakeholders and the public about the importance of the anti-counterfeiting initiatives and regulatory mechanisms for controlling the trade in counterfeit goods. We also use these campaigns to advise traders on how they can avoid importing or selling counterfeit goods.[262]

The CTI Director of Policy and Advocacy has been reported as saying his organisation: 'will initiate a campaign to educate consumers [about] ways of identifying counterfeit products so as to eliminate them.'[263] Moreover, the respondent from the consumer protection association said:

> We have programmes to disseminate information whereby we inform consumers about their rights and how to protect them. Informed consumers will avoid buying counterfeit products. They will also take action against manufacturers and sellers of those commodities. I believe that this information will be useful in assisting consumers in our country to fight against the counterfeit goods trade.[264]

There are several limitations that undermine the potential of information-based regulation for controlling the trade in counterfeit goods in Tanzania. First, anti-counterfeiting agencies conduct awareness campaigns in urban areas. Residents of rural and remote areas of the country have limited access to this information. Second, some information posted on the websites of the FCC and the TFDA and notices issued by traders are written in English. The majority of Tanzanians who speak Ki-Swahili do not

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[262] Interview: Director, Traders' organisation (9 November 2011).
[263] George Michael, *CTI set to initiate campaign against counterfeit products,* The *Guardian* (Dar Es Salaam), 31 July 2013.
[264] Interview: CEO, Consumer protection association (24 October 2010).

understand the meaning of such information. Third, some information contains jargon which is understood only by technical personnel.[265] Fourth, information disseminated is generally premised on the conventional hypothesis that 'counterfeit goods are substandard, defective or harmful products.'[266] Consumers who perceive that counterfeit products represent lesser value for lower prices, or those who believe that some counterfeit products are not defective or are not of inferior quality or do not cause physical harm to consumers, or those who purchase counterfeit further because genuine products are not available in the markets may ignore such anti-counterfeiting information.

The lack of or limited resources (funds, personnel and equipment) affect the capacity of NGOs to provide the anti-counterfeiting information to stakeholders. The respondent from consumer protection association pointed out that his society's activities are constrained due to the lack of funds. He said 'we depend on funds from foreign donors. The government does not provide us with funding.'[267] The respondent from the traders' organisation said that his association depends considerably on donor funds. [268] Due to such resource constraints, the NGOs do not conduct the public information dissemination programmes regularly. Moreover, the anti-counterfeiting information does not reach most of the intended targets.

Consumers in this study indicated that information disseminated by government authorities and anti-counterfeiting agencies, traders and their organisations and consumer protection associations in Tanzania is inadequate. They said that information is not disseminated regularly.[269] Few members of the general public receive the information and people in the rural areas where those media outlets are not accessible do not receive any

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[265] Observations: (newspapers and television advertisements).
[266] *Ibid.*
[267] *Ibid.*
[268] Interview: Director, Traders' organization (9 November 2011).
[269] Questionnaires: (consumers).

information or may receive limited information.[270] The above limitations weaken the potential of information as a policy instrument for curbing the trade in counterfeit goods in Tanzania.

b) Technology-based Regulation

Technological methods are among non-law instruments for controlling the trade in counterfeit goods in Tanzania. These techniques are employed to make counterfeiting difficult and costly and to assist the law enforcement agencies, traders and consumers to distinguish genuine commodities from counterfeit products.

The respondent from a company that manufactures building materials said: '...we engrave computerised marks on our products. The marks cannot be imitated and imprinted on counterfeit goods easily. You can see the marks on those roofing materials.'[271] The respondent was showing marks engraved on corrugated iron sheets which were on display during an exhibition. The sheets were imprinted with the company's trademark and stamped with the TBS mark (that indicates the standard regulations have been complied with). The respondent said that those marks could help consumers to differentiate genuine corrugated iron sheets from counterfeit products.

Other manufacturers of goods use special packaging materials, marks and seals to thwart counterfeiting. The respondent from another company, the manufacturer of food products and soft drinks, observed that:

> ... we started using special packaging materials that are difficult to imitate. We pack our maize and flour products in special bags which are sealed. Look at how we pack our juices. We pack them using special imported materials. As you can see, our emblems and

[270] Interviews: Mukadamu (20 October 2010); Chivanga (29 September 2011); Irunde (8 October 2011).
[271] Interview: Principal officer, company manufacturing building materials (22 September 2010).

> marks are imprinted on the packaging materials technologically. It is difficult for fraudulent traders to imitate them. [272]

Tanzania Distilleries Limited, the local manufacturer of spirits, has introduced the use of 'sophisticated labels in packages [of its products] with the view [to curbing] counterfeiting of [such products.]'[273] This measure is aimed at making counterfeiting of the liquor produced by the company more difficult. The company introduced the use of hologram stickers to enable consumers to differentiate genuine products from counterfeit liquor. With regard to barcodes, several manufacturers in Tanzania use the barcode technology as a tool to enhance safety and quality products and, possibly, to thwart counterfeiting. [274]

The authorised agent of Hewlett-Packard in Tanzania has introduced the use of software to enable consumers to identify authentic cartridges. This procedure involves the use of software on HP laser jet printers which validates whether or not the installed cartridge as an original HP product. The procedure will indicate if the product is remanufactured, re-filled, cloned or copied.[275] A local representative of Samsung Electronics in Tanzania launched the use of short message services (sms) to enable consumers to verify the genuineness of cellular phones they purchase.[276] GlaxoSmithKline (GSK), the British pharmaceutical company, introduced the use of the sms programme known as *Hakikisha Dawa* to enable patients to verify whether medicines supplied by GSK were genuine or not. The programme would enable patients to authenticate genuine products through the use of the sms-texting procedure. A local

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[272] Interview: Senior officer, Company producing food and soft drinks (22 September 2010).
[273] Bernard Lugongo, *Spirits firm moves to fight fake products,* The *Citizen* (Dar Es Salaam), 19 August 2013.
[274] Reporter, *Barcode technology to promote local products,* The *Daily News* (Dar Es Salaam), 2 April 2013.
[275] Daily News Reporter, *HP, law enforcers team up against counterfeit printing supplies,* The *Daily News* (Dar Es Salaam), 22 July 2011.
[276] Daily News Reporter, *Samsung against counterfeits,* The *Daily News* (Tanzania), 22 April 2010; See also, Prosper Makene, *Remove all fake phones market, expert advises government,* The *Guardian* (Dar Es Salaam), 20 July 2013.

representative of GSK stated that '[the] quality alone gives them confidence that the products they are purchasing for the use have been supplied by GSK and, as such, meet the required standards for quality and safety in Tanzania, where the project has just been launched....'[277]

While modern technologies are useful policy instruments for controlling the trade in counterfeit goods in Tanzania, the use of the technologies is costly.[278] The anti-counterfeiting technologies have to be upgraded periodically to prevent counterfeiters from imitating their security features. This requires considerable resources which most under-resourced manufacturers do not have. The technologies need the reading equipment and expertise which the anti-counterfeiting agencies, traders and consumers do not have.[279]

Many manufacturers of genuine goods in Tanzania use simple technologies to counteract counterfeiting. Respondents from local companies said that many manufacturers have limited resources and this situation inhibits their capability to acquire modern anti-counterfeiting technologies.[280] Commodities such as food products (for instance, rice, maize flour, white flour and beans), soft drinks and water (for instance, juice and mineral water) and cosmetic products are manufactured and packed using simple technologies which make those goods vulnerable to counterfeiting. In some cases, manufacturers use barcodes to protect their products from copying. Drinks and cosmetic products are contained in plastic bottles or containers which show names of manufacturers, contents, the TBS marks and expiry dates. Food products are packed in simple plastic bags or paper wrappers that indicate contents, manufacturers, and

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[277] Times Correspondent, *Shoddy drugs: firm launches 'mobile' platform to enhance safety of patients*, The *Business Times* (Dar Es Salaam), 7-13 June 2013.
[278] Interview: Marketing officer, Company manufacturer of building materials (22 September 2010).
[279] Written response: Law researcher (18 May 2011).
[280] Interviews: Marketing officer, Company manufacturer of building materials (22 September, 2010); Manager, Company producer of food and soft drinks (22 September 2010).

production and expiry dates. These bags or wrappers have no special seals.[281] Counterfeiters can re-fill used bottles or containers of genuine goods with counterfeit drinks and cosmetic products. It is also possible for fraudulent traders to re-fill used bags with counterfeit food products.

c) Self-regulation

With regard to the use of self-regulatory mechanisms, the respondent from the traders' organisation said that his association encouraged its members not engage in trade malpractices, but the organisation did not have specific self-regulatory mechanisms for dealing with the counterfeit goods trade.[282] A pharmacy owner whose enterprise was a member of Tanzania Association of Pharmaceutical Industries (TAPI) said that, while the association discouraged its members from producing substandard medicines or selling expired drugs, the association did not have specific regulations aimed at dealing with the members who manufacture, import or sell counterfeit pharmaceutical products.[283]

Information from a respondent from one anti-counterfeiting agency, a legal practitioner and a law scholar indicated that the use of self-regulatory mechanisms to control the trade in counterfeit goods in Tanzania is underdeveloped. Arguably, the above situation is caused by the attitude which regards the trade in counterfeit goods as a law-related phenomenon which can be controlled by the use of law-related solutions.

d) Market-based Regulation

With regard to the market-based regulatory mechanisms, there was no information in this study that indicated that government authorities or anti-counterfeiting

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[281] Observations: Dar Es Salaam (10 November 2011), Singida (19 October 2011), Mtwara (27 October 2011).
[282] Interview: Director, Traders' organisation (9 November 2011).
[283] Interview: CEO, Pharmacy selling human medicines and veterinary products (6 October 2010).

agencies in Tanzania use economic instruments such as tax incentives, subsidies or other financial benefits to induce traders to refrain from manufacturing, importing, smuggling or selling counterfeit goods.[284]

Some manufacturers or sellers offer discounts to induce consumers to purchase genuine goods. These discounts are offered to customers who buy commodities in bulk.[285] Other traders give warranties to their customers that enable them to return and have the commodities exchanged where such commodities have defects.[286] Some traders have introduced the provision of after-sale services that encourage their customers to purchase genuine products. For instance, in order to curb counterfeiting, the authorised dealer of Samsung cellular phones has introduced an 'e-warranty service' for its customers. The service essentially gives customers 24 months of technical support [services] as well as the access to repairs in the case of accidental damage of [their Samsung phones].'[287] Besides enabling buyers of the phones to verify genuine products, it was anticipated that this service would attract consumers to buy genuine products from the company.

Other traders offer prizes to customers who buy genuine products. In this study I observed that a manufacturer of foam mattresses (namely, Quality Foam Limited, a producer of paints (Sadolin Paints (Tanzania) Limited) and the supplier of detergent soap (Unilever Group of Companies) were selling their genuine products together with 'scratch

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[284] Interviews: Director, Ministry of Industry and Trade (22 October 2010); Director, Anti-counterfeiting agency (17 September 2010).
[285] Interviews: Marketing officer, Company manufacturer of building materials (22 September, 2010); Manager, Company producer of food and soft drinks (22 September 2010).
[286] Observations: Dar Es Salaam (10 November 2011), Singida (19 October 2011).
[287] *Samsung introduce e-warranty service to fight counterfeit products,* The *Corporate Digest* (Dar Es Salaam), (n.d) <http://www.corporate-digest.com/index.php/samsung-introduces-e-warranty-service-to-fight-counterfeit-products> (accessed 16 December 2013).

to win' cards and coupons to enable some buyers to win different types of prizes. The prizes include money, television sets, cell phones, refrigerators and cookers. [288]

The market-based instruments are applied to encourage consumers to purchase genuine goods and building customer loyalty which may, in the long run, induce consumers to refrain from purchasing or using counterfeit products. However, the efficacy of this regulatory technique is undermined by several factors. Since production and sale of goods is carried out by medium and small-sized enterprises, the capability of these traders (who have limited financial resources) to use the market-based anti-counterfeiting instruments is limited. Also, the beneficiaries of instruments such as discounts are customers who purchase goods in bulk from wholesalers. Many consumers who buy commodities from retail shops do not get the discounts or other financial benefits.

e) African Communalist Regulatory Mechanisms

Taking into account that in many countries in the Eastern and Southern Africa, the general law (which comprises statutory law, case law and imported law) operates side by side with 'non-law' related norms that regulate socio-economic affairs of the indigenous people in these nations,[289] this study explored how principles and practices, based on the African communalism of which *utu* or *ubuntu* ethos form part, are applied to deal with the trade in counterfeit goods in Tanzania.

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[288] Promotional advertisements were broadcast on *Radio One* and *ITV* and displayed on the *Daily News* (Dar Es Salaam), 11 April 2014.

[289] Agnete W Bentzon, Anne Hellum, Julie Stewart, Welshman Ncube & Torben Agersnap, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Harare: Mond Books, 1998) 30 - 32. See also David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique,' (2011) 14 *Yale Human Rights & Development Law Journal* 59, 60 - 75. In most cases, these norms emanate from traditions and customs of indigenous people.

In many societies in the Eastern, Central and Southern Africa, the general law is the 'primary' normative order, but principles and practices based on the African communalism govern interactions or transactions among indigenous people. The principles and practices, which comprise the 'secondary' normative order, have been practised since the pre-colonial time. Subsequent to attaining political independence, some governments in Sub-Saharan Africa incorporated the traditional communalism into the socialist ideologies that guided political, economic and social affairs in these countries between the 1960s and 1980s.[290] There were several forms of African socialist ideologies including negritude, consciencism, humanism and *Ujamaa* (the African socialism that has been practised in Tanzania).[291]

Some of the key elements of the African communalist ideologies include: i) the obligation to respect for human beings, human dignity and human life, ii) the expression of compassion, caring and empathy to other people, iii) the adherence to moral principles, ethics and honesty, iv) the undertaking of collective efforts to address issues which affect or benefit the community; v) the expression of trust to each other, good faith and reciprocity in the interest of building and maintaining harmony and justice among all members of the community; and vi) the demonstration of good character, generosity, discipline and honour and respect. [292] Among the core values of the African socialism include *utu* (in Ki-Swahili) or *ubuntu* (in other Bantu languages), which literally means

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290 Maurice M Makumba, *Introduction to African Philosophy* (Nairobi: Paulines Publications Africa, 2007) 135 - 136. See also Archie Mafeje, *In Search of an Alternative: A Collection of Essays on Revolutionary Theory and Politics* (Harare: SAPES Books, 1992) 12 -13.

291 Ehud Sprinzak, 'African Traditional Socialism - a Semantic Analysis of Political Ideology,' (1973) 11 *Journal of Modern African Studies* 629, 636; Garth A Myer, 'Place and Humanistic African Geography: A Tanzanian Case,' (2005) 22 *Journal of Cultural Geography* 1, 3 - 6.

292 Richard Tambulasi & Happy Kayuni, 'Can African Feet Divorce Western Shoes? The Case of "Ubuntu" and Democratic Good Governance in Malawi,' (2005) 14 *Nordic Journal of African Studies* 147, 148; Barbara Nussbaum, '*Ubuntu:* Reflections of a South African on Our Common Humanity' (2003) 4 *Reflections* 21, 21-23; Elza Venter, 'The Notion of Ubuntu and Communalism in African Educational Discourse,' (2004) 23 *Studies in Philosophy & Education* 149, 150 - 154.

humanness, humanity or kindness.[293] The *ubuntu* or *utu* ideals have been integrated into aspects of day-to-day life of the people in East Africa, Central and South Africa.[294]

The African communalist principles and practices govern or regulate, among other things,: i) the conduct of members of a community, ii) the inter-relationship among the members, iii) the obligations and entitlements of members of the community against or toward each other and iv) the procedures for solving problems, resolving disputes and maintaining harmony among members of the community.[295]

In the case of Tanzania, the African communalism has been part of the life of the indigenous people in Tanzania for many years before colonialism.[296] It was during the first decade of Tanzania's independence that these traditional communalist ideals and practices were integrated into the politico-economic system of the country. In 1967, the government of Tanzania proclaimed the Arusha Declaration whereby Tanzania took a socialist approach of developing the country and its people.[297] Through the Arusha Declaration, the government adopted the African socialism known as *Ujamaa* (which literally means familyhood) as the ideology to guide political and socio-economic affairs and activities in Tanzania.[298]

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[293] David A McDonald, 'Ubuntu Bashing: the Marketisation of "African Values" in South Africa,' (2010) 37 *Review of African Political Economy* 139, 140; Patrick McAllister, 'Ubuntu- Beyond Belief in South Africa,' (2009) 6 *SITES-New Series* 1, 2.

[294] James K Khomba & Ella C Kagandauge-Ulaya, 'Indigenization of Corporate Strategies in Africa: Lessons From the African Ubuntu Philosophy,' (2013) 12 *China-USA Business Review* 672, 673. In other Bantu languages the concept of humanness is expressed in different terms such as *'omundu', 'umuntu,' 'umunthu,' 'umundu,', 'gimuntu,' or 'vumuntu'*

[295] Frederick M Nafukho, 'Ubuntu Worldview: A Traditional African View of Adult Learning in Workplace,' (2006) 8 *Advances in Developing Human Resources* 408, 409 - 411; Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-colonial "Criminal Justice" in Kenya,' (2009 -2010) 10 *Tribal Law Journal* 1, 2-15

[296] AST Mchomvu, Felician SK Tungaraza & Sam Maghimbi, 'Social Security Systems in Tanzania,' (2002) 17 *Journal of Social Development in Africa* 11, 20 -21.

[297] Julius K Nyerere, *Ujamaa, Essays on Socialism* (Oxford University Press: Dar Es Salaam, 1968) 1-12. See also, John Briggs, 'Villagisation and the 1974-6 Economic Crisis in Tanzania,' (1979) 17 *Journal of Modern African Studies* 695, 695.

[298] James H Weaver & Alexander Kronemer, 'Tanzania and African Socialism,' (1981) 9 *World Development* 839, 842 - 843.

The main objective of the *Ujamaa* ideology was to create a society where all members of the community would have equal rights and equal opportunities; could live with their neighbours without suffering or imposing injustice, being exploited or exploiting; and would work collectively towards the welfare of the community.[299] Members of the community were required to work together, share the resources generated from their work, and apply joint efforts to deal with societal problems.[300] Moreover, the members were obliged to respect or take into account humanity, kindness or humaneness in their relationship with other members of the community. Values and practices based on *utu* were central pillars of the *Ujamaa* ideology.

With reference to the control of the trade in counterfeit goods and mechanisms for dealing with its impacts, this study explored how the African communalist principles and practices embrace procedures which are applied to: i) to influence or steer conduct of sellers and buyers of goods in order to curb the demand for and the supply of counterfeit goods in the markets; ii) to encourage or apply collective strategies to tackle the counterfeit goods trade; ii) to govern inter-relationships between the sellers and buyers in order to provide safeguards to the buyers to enable them to avoid purchasing counterfeit products; iii) to provide for entitlements of consumers in situations where they buy counterfeit goods; and iv) to prescribe procedures for resolving disputes between buyers of counterfeit products and the sellers of those goods.

Some government officials and community leaders have invoked the *utu* ideals in order to tackle the trade in counterfeit goods. They have urged traders to be honest and refrain from operating the counterfeit goods trade with a view to avoiding inflicting harm

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[299] Julius K Nyerere, *Man and Development* (Oxford University Press: Dar Es Salaam, 1974) 109 -110; See also, Caspar Scheigman, 'Ujamaa, A Phantom,' (2001) 15 *Quest* 113, 115.
[300] Julius K Nyerere, *Freedom and Development* (Oxford University Press: Dar Es Salaam, 1973) 66 - 71.

on consumers, economy and society in general. With regard to honesty, the Prime Minister, Mizengo Pinda, has observed that the trade in counterfeit goods is harmful to Tanzania's economy and consumers and stated that 'it is important for local traders to be honest and refrain from importing sub-standard products. Importing fake goods has an adverse impact on [the country's] economy.'[301] In the Prime Minister's view, honesty among traders was an important 'tool' for fighting against the counterfeit goods trade. By being honest and refraining from operating the counterfeiting business, the traders would be fulfilling their ethical obligation, that is to say, not to inflict harm on other members of the community (consumers of goods and the general society).

Community leaders have also urged traders to refrain from undertaking business which is unlawful and detrimental to Tanzania's economy and people. During a trade exhibition organised by the Bohra community, Tanzanians were warned off purchasing and using counterfeit goods because consumption of those products were affecting the welfare of consumers.[302] During the same occasion, one community leader urged the traders to supply good-quality products and engage in ethical and legitimate business activities and urged them refrain from operating the counterfeit goods trade.[303] Implicitly, the community leader was urging the traders to engage in legitimate business activities and to refrain from committing immoral or unlawful acts such as manufacturing, importing or selling counterfeit products which go against virtuous values and cause harm to consumers and the community generally.

Newspapers have cited dishonesty and unfair trade practices among traders as factors that propelled the trade in counterfeit goods. One newspaper urged government

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301 Levina Kato, *Importation of substandard goods irks - PM,* The *Daily News* (Dar Es Salaam), 6 July 2010.

302 Michael Haonga, *Bohra community member warns public of imported counterfeits,* The *Guardian* (Dar Es Salaam), 26 April 2011.

303 Joseph Mchekadona, *Govt lauds Burhani community for displaying locally made goods,* The *Guardian* (Dar Es Salaam), 25 April 2011.

authorities in Tanzania to direct their efforts to deal with 'unscrupulous traders who supply counterfeit products [to] the [markets].'[304] Another newspaper quoted an official of the FCC observing that the trade in counterfeit goods was 'unfair' business and caused 'untold damage to consumers and suggesting that one of the ways to tackle the counterfeiting business was to deal with 'the dishonest traders who import such products.' [305] The above newspapers implied that the counterfeit goods trade could be thwarted by traders abiding by the *utu* principles by being honest, fair and avoiding to inflict harm on consumers.

The African communalist ideals put the community and the common good of the society before individual members of the community.[306] They emphasize on collaboration among the members of the community in order to tackle societal problems.[307] They also promote collectiveness in dealing with commission of wrongs including crimes.[308] There have been attempts by government authorities and anti-counterfeiting agencies in Tanzania to involve the community in fight against the counterfeit goods trade. The Minister for Trade and Industry has called for the use of joint efforts by industrialists, importers and consumers to curb the trade. He pointed out that the government was determined to stamp out the counterfeiting business, but the Minister admitted that the government 'cannot succeed on its own. It needs the cooperation of traders, manufacturers and consumers to expose those who are involved in the trading of those

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304 Elisha Magolanga & Mahamisha Habib, *TZ told to reign on fake foods dealers,* The *Citizen* (Dar Es Salaam), 18 October 2013.
305 Ibrahim Kadilo, *Commission destroys counterfeit imports worth Tsh 2.3 bn in 4 yrs,* The *Business Times* (Dar Es Salaam), 28 January 2011.
306 Kurt April & Kai Peters, 'Communal Versus Individual Modalities of Work: A South African Investigation,' (2011) 2 *Asia Pacific Journal of Business & Management* 5, 8.
307 Timothy Murithi, 'Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu,' (2006) 1 *Journal of Pan African Studies* 25, 29
308 Jean-Claude Manaliyo & Paul-Francois Muzindutsi, 'Communal Participation: Informal Social Control Practices in Site B, Khayelitsha Township,' (2013) 4 *Mediterranean Journal of Social Sciences* 121, 124.

goods.'[309] In my opinion, the Minister was calling on the Tanzanian community to work collectively to fight against the trade in counterfeit goods.

As I pointed out earlier in this chapter, the anti-counterfeiting agencies have been holding workshops and seminars whereby information is disseminated to stakeholders. The TFDA has been conducting workshops to sensitize suppliers of goods, law enforcement agents and representatives from government authorities and NGOs about issues concerning the control of the counterfeiting business affecting pharmaceutical, food and cosmetic products.[310] Similarly, the FCC have been holding seminars attended by government officials, judicial officers, industry representatives, law enforcement agents, traders and consumers.[311] Representatives from the business community, the judiciary, the police, the tax revenue authority, regional and district trade offices, cooperatives, consumer protection associations, academic institutions and the press have been attending these seminars.[312] Besides providing information, these workshops and seminars are forums through which the general public participates in the fight against the trade in counterfeit goods. Moreover, through these workshops, personnel from the anti-counterfeiting agencies have been urging manufacturers and sellers to abide by fair trade practices; to be honest and fair; and to stop operating the counterfeiting business.

The communitarian principles promote closeness and social networking among people and expect them to be responsible towards each other.[313] In the case of Tanzania, there is a social networking or interconnectedness especially between traders in the

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309 Business Times Reporter, *Standards Bureau seeks EAC rules on substandard imports,* The *Business Times* (Dar Es Salaam), 8 December 2012.
310 Interview: Manager, Anti-counterfeiting agency (25 September 2010).
311 Interview: Director, Anti-counterfeiting agency (17 September 2010).
312 Fair Competition Commission, *FCC Conducts Awareness Campaigns on Competition Advocacy, Consumer Protection and Anti-Counterfeit Efforts in Mara and Mwanza Regions,* Press Release, 3 November 2011.
313 Moeketsi Letseka, 'In Defence of Ubuntu,' (2012) 31 *Studies in Philosophy & Education* 47, 54; Nafukho, 'Ubuntu Worldview: A Traditional African View of Adult Learning in the Workplace,' (note 295) 410 - 411.

informal sector and their customers, which are shaped by their repeated interactions.[314] Through these transactions, the traders and buyers build mutual trust and have responsibilities towards each other. Some consumers in this study indicated that they normally purchased goods from the small-scale traders they knew. They bought goods from the sellers who provided regular door-to-door services or those who had fixed places of business. [315] Arguably, the consumers believed that the traders they knew would treat their customers humanely and with empathy and they would not sell defective goods or products whose consumption would expose the consumers to health or safety risks. Additionally, the buyer-seller close relationships would make it possible for consumers who had purchased counterfeit goods, to trace the sellers (who had sold such commodities inadvertently) and have such goods exchanged for genuine goods or be refunded the price paid. If a seller refused to exchange defective goods for similar, genuine goods, he or she would be contravening the *utu* principles. The mutual relationships between sellers and buyers provided some mechanisms that enabled the consumers to secure their 'entitlements' in cases the goods sold were counterfeit products. The relationship provides mechanisms for consumers to have non-legal 'recourse' and enforce their 'entitlements' against sellers of counterfeit goods.

The communalist ideology encourages trust and promotes good faith among members of a community.[316] This view holds that parties to transactions should show trust and good faith to each other. This viewpoint has had an influence over how some traders and sellers in Tanzania transact. Most commercial transactions between traders in the informal sector (for instance owners of small stalls, kiosks and mobile street vendors)

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[314] Thomas Molony, '"I Don't Trust the Phone; It Always Lies: Trust and Information and Communication Technologies in Tanzania Micro- and Small Enterprises,' (2007) 3 *Information Technologies and International Development* 67, 72 - 74.

[315] Interviews: Mukadamu (20 October, 2010); Dori (28 October 2011).

[316] J K Khomba, F N S Vermaak & D G Gouws, 'Redesigning an Innovation Section of the Balanced Scorecard Model: An African Perspective,' (2011)15 *Southern African Business Review* 1, 4.

and buyers of goods are based on trust and good faith between the parties. [317] For instance, sale agreements are not evidenced by documents and processes of securing entitlements of the parties do not, in most cases, involve the use of the formal legal machinery. These practices have had positive and negative effects on the fight against the trade in counterfeit goods in Tanzania. I demonstrated earlier in this chapter that some buyers in this study indicated that they purchased goods, but the sellers did not issue receipts to evidence the purchase of commodities.[318] Arguably, the buyers trusted that the sellers would act in good faith and honestly by supplying genuine products. In case of dissatisfactions concerning the goods purchased, the buyers would return the goods to the sellers and have them exchanged for other similar commodities or get refund of money paid.

The communitarian beliefs and practices impacted on behaviours or reactions of some consumers when they learnt that they had bought counterfeit goods. Some consumers said that after learning that they had purchased counterfeit products, they stopped buying goods from the sellers who had sold those commodities, but they did not take any legal action against those sellers.[319] Other buyers informed their family members, relatives and friends about the incidents.[320] Arguably, the consumers stopped purchasing goods from sellers of counterfeit products because they did not expect sellers who respected *utu* principles would sell harmful, defective or inferior quality counterfeit goods to their fellow members of the community. Informing others about the purchase of counterfeit goods was a communal technique for alerting their family members, relatives or friends and a way of helping them to avoid purchasing counterfeit products from the dishonest traders.

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317 Sayaka Ogawa, "Earning among Friends": Business Practices and Creed among Petty Traders in Tanzania, (2006) 9 *African Studies Quarterly* 23, 26 - 34.
318 Interviews and questionnaires: (consumers).
319 *Ibid.*
320 *Ibid*

Many people in Tanzania who practise the African communalist beliefs particularly under-resourced persons and people living in rural areas use the community-based systems of resolving disputes. These procedures involve the use of less formal, flexible machinery for resolving disputes.[321] While in some cases village or clan leaders and religious leaders settle disputes, in some incidents the Ward Tribunals are used to resolve disputes.[322] The tribunals deal with small-scale disputes in local communities with a view to maintaining peace and tranquillity by using the cheapest means of resolving the disputes. They apply reconciliatory procedures in resolving disputes.[323] Arguably, this is the reason why some people in Tanzania do not use the laws and court system to resolve disputes; they use informal, traditional and reconciliatory dispute resolution mechanisms. As I indicated earlier in this chapter, some consumers in this study indicated that they had not lodged complaints with the police against suppliers of counterfeit goods or sued suppliers of counterfeit products in courts of law.[324] In my view, these consumers did not lodge complaints with the police or institute suits in courts of law because they were used to communitarian or informal methods of resolving disputes that promoted reconciliation and were flexible, speedy and less costly. Owing to the costs and complex nature of the legal system, it is difficult for the complainants to use the legal machinery to deal with their complaints against suppliers of counterfeit products.

The above revelations demonstrate African communalist ideology in Tanzania, of which *utu* values form part, has generated 'non-law' related norms that are applied concurrently with the anti-counterfeiting law. Since 'non-law' related norms (the communitarian normative system, the market-based regulation, information-based-regulation and technology-regulation) exist side by side with the state law, it is evident

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321 Simon Robins, 'A Place for Tradition in an Effective Criminal Justice System: Customary Justice in Sierra Leone, Tanzania and Zambia,' Policy Brief No.17, 2009.

322 Yusufu Q Lawi,'Justice Administration Outside the Ordinary Courts of Law in Mainland Tanzania: The Case of Ward Tribunals in Babati District,' (1997) 1 *African Studies Quarterly*1, 6 - 14

323 *Ibid* 5.

324 Interviews and questionnaires: (consumers).

that there are various norms that deal with the trade in counterfeit goods in Tanzania. The law-related and 'non-law' related norms interact with or impact on each other.

The use of the African communalist regulatory mechanisms to deal with the counterfeit goods trade is not well-organised. These procedures are applied in less organised manners than law-related, formal mechanisms for controlling the trade. Also, the communitarian mechanisms are not supported by effective procedures for enforcing their compliance. Suppliers of products may ignore or refuse to adhere to the humanist or moral values and principles with impunity. There is no way of compelling the traders to abide by these principles. In such situations, affected consumers are left without remedies. Furthermore, transactions based on trust (for instance where buyers purchase goods, but sellers do not issue receipts) put consumers at a disadvantageous position. This happens where buyers fail to secure their entitlements through non-law related mechanisms and need to have proof of purchase of the goods to enforce their rights against suppliers of counterfeit products in courts of law.

Perhaps the major challenge to the application of the African socialist beliefs and practices is the ascendency of neo-liberalism (that embodies the market-based policies and practices) whereby 'the value, dignity, personal safety, even survival of the human person no longer constitute central concerns.'[325] With regard to Tanzania, there are observations that suggest that *utu* values and ethical principles among the people in Tanzania have been replaced by individualistic behaviours and tendencies brought about by neo-liberalism.[326] The communalist ideals and practices have been replaced by the market-based ideologies that promote individualism and have no respect for *utu*

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[325] Wim van Binsbergen, '*Ubuntu* and the Globalisation of Southern African Thought and Society,' (2001) 15 *Quest* 53, 57 -58.

[326] Henry Muhanika, *Why we need to address ethical issues in our society,* The *Guardian* (Dar Es Salaam), 10 March 2013; Editor, *Ignore moral values, and this is the price!,* The *Guardian* (Dar Es Salaam), 20 November 2012. See also Marie M Shaba *Do we need Ujamaa and self-reliance or individualism and dependence?,* The *Citizen* (Dar Es Salaam), 18 June 2013.

principles. The disregard or refusal to abide by moral or humanist values by traders in Tanzania is evidenced by the widespread of malpractices such as collusion among traders not to supply products in order to create artificial of commodities in the markets,[327] incidents of the supply of adulterated products to consumers,[328] and cases of suppliers tampering with measuring equipment in order to cheat buyers.[329]

With regard to the counterfeit goods trade, one commentator has observed that the proliferation of counterfeit products is partly contributed to by the erosion of moral values among traders. Some traders in Tanzania do not treat other members of the community humanely and do not want to refrain from running their business that is harmful to other members of the community. One commentator pointed out that:

> The erosion of morals [that affects the] business sector is shocking. When you go to a supermarket or pharmacy, you have to inspect every product to make sure it is [the date for its use has] not expired [or such commodity is not] fake. Dealers care least about selling poisonous or adulterated [products] to consumers as long as they make money and are they are not caught..... This is a regular occurrence in Tanzania; and greedy businesspeople are getting away with [those malpractices].[330]

Regarding counterfeit pharmaceutical products, another newspaper observed that 'criminals manipulate trade liberalisation to flood the market with fake drugs to reap huge profits by preying on people's ignorance, consequently exposing them to [serious] health risks.'[331] Usefulness of the *utu* ideals and practices as tools for dealing with business malpractices including the counterfeit goods trade in Tanzania has been undermined considerably by the emergence of the individualistic tendencies.

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327 Rodgers Luhwago, *15 oil firms on notice over fuel shortage,* The *Guardian* (Dar Es Salaam), 9 November 2012.
328 Editor, *Fuel adulteration bad for economy,* The *Guardian* (Dar Es Salaam), 4 April 2011.
329 Dominic Nkolimwa, *Govt seizes 10 petrol pumps for 'cheating',* The *Guardian* (Dar Es Salaam), 18 December 2009.
330 Saumu Jumanne, *No more national values, what happened?,* The *Citizen* (Dar Es Salaam), 11 May 2013.
331 Editorial, *Beware of fake drugs,* The *Citizen* (Dar Es Salaam) 27 February 2012.

6.3. Conclusion

This chapter examined the regulation of the trade in counterfeit goods in Tanzania. Government authorities, anti-counterfeiting agencies and non-state actors make and implement regulations to control the trade. The law and alternative regulatory mechanisms are used to deal with the counterfeiting business.

The government of Tanzania has enacted laws that provide for criminal, civil and administrative mechanisms for controlling the counterfeit goods trade. The law is the main policy instrument for fighting counterfeiting activities. The potential of the law is undermined by the inadequacies of the law, weaknesses affecting the authorities and agencies that enforce the law, challenges facing non-state actors in applying the law and the context under which the law operates. Consequently, the anti-counterfeiting legal regime has not been able to control the trade in counterfeit goods efficiently.

Alternative regulations supplement the use of laws to control the trade in counterfeit goods in Tanzania. The efficiency of the alternative regulations depends on the capacity of government authorities and agencies, traders and consumers to use the regulations. It also depends on the availability of resources and equipment for the implementation of the regulation. The government authorities and agencies, traders and consumers lack or have limited capacity to use the alternative regulatory mechanisms to fight against the counterfeit goods trade. Similarly, the government authorities and agencies, traders and consumers lack or have scarce resources (funds, personnel, expertise and equipment) to facilitate the implementation of alternative regulations. The above limitations or challenges undermine the efficacy of alternative regulations to control the counterfeit goods trade in Tanzania.

CHAPTER SEVEN

DISCUSSION

7.0. Introduction

In this chapter, I discuss issues emerging from Chapters Two, Three and Four about the worldwide trade in counterfeit goods and its magnitude, drivers and impacts; the global anti-counterfeiting regulatory policy and its evolution and implementation; and the regulatory techniques for controlling the counterfeit goods trade. I also consider matters emanating from Chapters Five and Six about the trade in counterfeit goods, its driving factors, its effects and the regulatory techniques for controlling the counterfeit business in Tanzania.

7.1. The Worldwide Counterfeit Goods Trade and its Regulation

7.1.1. Localisation and Scale of the Counterfeit Goods Trade

In Chapter Two, I demonstrated that the counterfeit goods trade affects a wide range of consumer and industrial products. It affects goods whose production requires high technologies or less sophisticated technologies. It also affects high-priced and low-cost products. And that the supply of counterfeit goods occurs in the markets of both industrialized nations and developing countries. Similarly, consumers in both developed and developing countries purchase and use counterfeit products.

The above revelations controvert the dominant perspective on the trade in counterfeit goods which regards developing countries in Asia, South America, Africa and the former communist and socialist countries in Central and Eastern Europe as major centres for the production and exportation of counterfeit goods. It also exposes the tendency that plays down counterfeiting activities which are prevalent in the

industrialized nations in Europe and the United States. The industrialized nations such as Italy, [1] the United States [2] and the United Kingdom[3] are sources of counterfeit goods. As I pointed out in Chapter Two, some of the counterfeit goods from the industrialized nations flow to the worldwide markets. Counterfeit products such as aircraft parts, automobile accessories, electronic and electrical products which require high technologies are manufactured in the industrialized nations where such technologies are available. These technologies enable mass production of counterfeit products that are supplied to the markets of industrialized and developing countries.

Several institutions and agencies have conducted or commissioned studies which describe the magnitude of the worldwide trade in counterfeit goods. These include government agencies in the United States, international organisations such as the OECD, the ICC and the supranational agencies such as the WHO and the Interpol. The studies generated data based on information that was mainly sourced from private industries, industry associations and law enforcement agencies and customs authorities mostly from industrialized nations.

However, some scholars have argued that statistics described in the reports of the above studies have been exaggerated and are biased.[4] Yu observes that self-interested industry associations often collect information and looking at how such data is collected,

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[1] Amanda Silverman, 'Draconian or Just? Adopting the Italian Model of Imposing Administrative Fines on Purchasers of Counterfeit Goods,' (2009) 17 *Cardozo Journal of International & Comparative Law* 175, 182; [1] Barbara Jo Ehrlich, 'The Private Sector Combat Products Counterfeiting,' (1986) *Loyola of Los Angeles International & Comparative Law Review* 699, 702.

[2] Masaaki Katobe, 'Evolving Intellectual Property Protection in the World: Promises and Limitations,' (2010) 1 *University of Puerto Rico Business Law Journal* 1, 6.

[3] Rosielyn A Pulmano, 'In Search of Compliance With TRIPs Against Counterfeiting in the Philippines: When Enough is Enough?,' (1999) 12 *Transnational Lawyer* 241, 257.

[4] Nixon K Kariithi, 'Is the Devil in the Data? A Literature Review of Piracy Around the World,' (2011) 14 *Journal of World Intellectual Property*, 133, 135-136.

one finds that the data generated from is highly unreliable.[5] Yar argues that industry coalitions have vested interests in inflating the statistics because the larger the figures they generate, the greater the pressure that can be exerted on legislators and enforcement agencies to fight against the trade in counterfeit goods more rigorously.[6] In Blakeney's view, the statistics provided by enforcement agencies such as police and customs authorities are likely to exaggerate the magnitude of the counterfeit goods trade with the view of securing favourable budget allocations to fight the trade.[7]

Due to the fact that the statistics in the above studies were generated from extrapolation of the figures mainly from industrialized nations,[8] those statistics cannot represent a reliable scale of the worldwide trade in counterfeit goods. As a matter of fact, the statistics cannot represent a reliable magnitude of the counterfeit goods trade in developing countries particularly those in Sub-Saharan Africa which were not covered by these studies. Due to the unreliable nature of the statistics, statements like 'up to 60 [per cent] of drugs sold in developing countries are counterfeit [products]'[9] cannot be accepted on their face value without analysing studies or procedures from which these statistics were generated. In view of the above arguments, the statistics describing the worldwide trade in counterfeit goods are not authentic representations of the magnitude of the illicit business.[10]

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5 Peter K Yu, 'Enforcement, Economics and Estimates,' (2010) 2 *World Intellectual Property Organization Journal* 1, 7.

6 Majid Yar, 'The Global "Epidemic" of Movie "Piracy": Crime-wave or Social Construction,' (2005) 27 *Media, Culture & Society* 677, 690.

7 Michael Blakeney, 'International Proposal for Criminal Enforcement of Intellectual Property Rights: International Concern with Counterfeiting and Piracy,' (2009) 1 *Intellectual Property Quarterly* 1, 4.

8 Majid Yar, 'A Deadly Faith in Fakes: Trademark Theft the Global in Counterfeit Automotive Components,' (2005) *Internet Journal of Criminology* 1, 9.

9 Robert C Bird, 'Counterfeit Drugs: Global Consumer Perspective' (2007-2008) 8 *Wake Forest Intellectual Property Law Journal* 387, 389.

10 Justin Picard, 'Can We Estimate the Global Scale and Impact of Illicit Trade?' in Michael Miklaucic & Jacqueline Brewer (eds) *Convergence: Illicit Networks and National Security in the Age of Globalization* (Washington: National Defence University Press, 2013) 42 - 44.

The studies make a claim that the worldwide counterfeit goods trade is on the rise.[11] Some scholars have argued that there are two main factors which make such assumption unrealistic. First, following the signing of the TRIPs Agreement, the WTO members are required to set up regulatory mechanisms to curb intellectual property violations including counterfeiting in their territories. Countries which had no anti-counterfeiting laws enacted such laws to prohibit acts that were not unlawful previously. So, the supposed growth of the counterfeit goods trade was, as Yar observes, attributed to '[the shift] of [the] legal goal posts, rather than simply to any dramatic increase in practices of copying.'[12] Second, in the recent past, intellectual property owners, industry coalitions and government agencies from the industrialized nations have increased their involvement in conducting investigations, gathering information and laying complaints before national and international authorities. As a result, there has been an increase in the incidences of intellectual property violations detected, hence this has given an impression that the worldwide counterfeiting business is on the rise. [13] The point here is that due to the enhanced policing of intellectual property violations, the previous 'unseen' incidents of counterfeiting are uncovered. However, this does not necessarily mean that the worldwide counterfeiting business is escalating.

The studies mentioned above employed methodologically flawed procedures to generate inflated statistics that represent the quantum of loss that the owners of intellectual property and economies of industrialized nations in Europe, the United States and Japan suffer as a result of the operation of the worldwide trade in counterfeit goods. Regarding losses incurred by knowledge-based MNCs, Chow observes that financial

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11 Alan S Zimmerman, 'Accepting "Conventional Numbers": Determining the Size of the Worldwide Counterfeit Goods Market,' (2011) 11 *Insights* 11, 11.
12 Yar, The Global "Epidemic" of Movie "Piracy": Crime-wave or Social Construction,' (note 6) 686.
13 *Ibid* 686.

losses that the MNCs claim to suffer from lost sales are based on methods which grossly exaggerate both the levels of counterfeit products sold and losses suffered.[14]

Despite many criticisms, the statistics generated by the above-mentioned studies are widely used by policy makers, researchers and media. This has been possible because owners of intellectual property from industrialized nations, industry coalitions and their governments use their political and economic powers to make the world to believe that the findings in their studies are accurate however doubtful they might be. Similarly, scholars and government authorities and NGOs have accepted and use the statistics as the authentic measurements of the worldwide trade in counterfeit goods.

Knowledge-based MNCs and industry coalitions in industrialized nations exaggerate figures which represent the scale of the worldwide counterfeiting business and the quantum of its impacts to achieve three objectives. First, to influence the public and governments to support the fight against the trade in counterfeit goods. Second, to use such statistics as a tool for lobbying and pushing for the adoption of national and international anti-counterfeiting policies and laws. Third, to externalise costs of protecting private rights of intellectual property owners to their governments and taxpayers.

7.1.2. Drivers of the Counterfeit Goods Trade

In Chapter Two, I explored political, economic and social factors that drive the worldwide counterfeit goods trade. The factors operate at the national and international levels. Internationalization of trade, advancements of information and communication technologies, generation of high returns and weak anti-counterfeiting laws and

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[14] Daniel C K Chow, 'Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries,' (2011) 51 *Virginia Journal of International Law* 785, 787.

enforcement of the laws facilitate or motivate traders to supply counterfeit goods to the worldwide markets. The supply of counterfeit goods in the markets is possible where there is demand for the counterfeit products. The markets exist because consumers do, knowingly or unknowingly, purchase and use counterfeit goods. Several economic, social and cultural factors motivate or compel consumers to purchase or use counterfeit goods in both industrialized nations and developing countries.

The mainstream view on the trade in counterfeit goods pays less attention to examining certain policies and practices, which are integral part of the global capitalist system, that catalyse the operation of the worldwide counterfeit goods business. These policies and practices include the globalised free trade, the market-based reforms, the rise of knowledge-based economy and the trade practices and strategies employed by the knowledge-based MNCs.

a) Globalised Free Trade

The globalised free trade (which is an integral part of global capitalism) has contributed to internationalise the trade in counterfeit goods. Global capitalism[15] is propelled by, among other factors, neo-liberalism[16] of which trade liberalisation forms

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[15] The term 'globalisation' means different things including: 1) the intensification and deepening of economic, political and social integration and interconnectedness among countries, societies, people and actors; 2) the compression of time and space which has resulted in speeding up economic, political and social processes and interactions; 3) the shrinkage of the world as a result of greater international connectivity; 4) the stretching of social, political frontiers across the national borders so that events, decisions and activities in one part of the world have impacts on nations, people and actors on the other part of the world; and 5) the proliferation of international networks of political economic and social systems. See, Peter Dicken, *Global Shift: Mapping the Changing Contours of the World Economy* (London: Sage Publications, 5th ed, 2009) 6 - 29; See also David Held & Anthony McGrew, 'The Great Globalization Debate: An Introduction,' in David Held & Anthony McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate* (Oxford: Polity Press, 2nd ed, 2002) 1- 42.

[16] 'Neoliberalism' is a theory of political economic practices which postulates that human well-being can best be advanced by the liberating individual entrepreneurial freedoms within an institutional framework characterised by private property rights, individual liberty, unencumbered markets, and free trade. The state interventions in markets must be kept to a bare minimum. Neoliberal policies advocate for trade liberalisation, privatisation and deregulation of the economy

part. The WTO advocates liberalisation of trade across national boundaries by requiring countries to remove barriers to transnational flow of goods, services and capital.[17] Parallel to implementing measures to enable the expansion of the global free trade, many regional trading blocs have been established in different parts of the world. The trading blocs include the EU, the NAFTA, the Asian-Pacific Economic Cooperation Group (APEC), the ASEAN and the MERCOSUR. In Africa, there are the EAC, the SADC and the Economic Community of West African States (ECOWAS) just to mention a few. These regional free trade groupings are building blocks towards the establishment of the global free trade because it is easier for countries to dismantle trade barriers within the regional arrangements. Once the barriers have been removed, it becomes easier for the regions to liberalise towards the rest of the world.[18]

The global free trade facilitates the operation of the worldwide legitimate trade as well as illicit business[19] including the trade in counterfeit goods. The removal of trade barriers has increased transnational movements of goods, services, capital and people. [20]. This has also facilitated transnational movements of counterfeit goods and dealers in such goods.[21] As a result of the growth of the global free trade and the expansion of the worldwide distribution and production operations, Solyomon observes, 'the ability of counterfeiters to market inauthentic goods has become faster and easier than before. This

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and state withdrawal from providing social services. See David Harvey, A *Brief History of Neoliberalism* (New York: Oxford University Press, 2006) 2.

17 Elaine Hartwick and Richard Peet, 'Neoliberalism and Nature: The Case of the WTO,' (2003) 590 *The ANNALS of American Academy of Political & Social Science* 188, 191 - 192; Cephas Lumina, 'Free Trade or Just Trade? The World Trade Organization, Human Rights and Development,' (2008) 12 *Law, Democracy & Development* 20, 22-23.

18 Diana Tussie & Ngaire Woods, 'Trade, Regionalism and the Threat to Multilateralism,' in Ngaire Woods (ed) *Political Economy of Globalization* (London: MacMillan Press, 2000) 67.

19 Peter Andreas, 'Illicit International Political Economy: The Clandestine Side of Globalization,' (2004) 11 *Review of International Political Economy* 641, 646.

20 Elaine Hartwick and Richard Peet, 'Neoliberalism and Nature: The Case of the WTO,' (2003) 590 *The ANNALS of American Academy of Political & Social Science* 188, 191 - 192; Cephas Lumina, 'Free Trade or Just Trade? The World Trade Organization, Human Rights and Development,' (2008) 12 *Law, Democracy & Development* 20, 22-23.

21 Yar, 'A Deadly Faith in Fakes: Trademark Theft and the Global Trade in Counterfeit Automotive Components,' (note 8) 16.

means consumers now have greater access to inexpensive [counterfeited] luxury items.'[22] Unscrupulous traders take advantage of the globalised free trade to produce, distribute and supply counterfeit goods to the worldwide markets.

b) Market-based Reforms

Since the 1980s the World Bank and the IMF have been compelling developing countries in Africa, Asia and South America to adopt and implement market-based policies.[23] Besides forcing the developing nations to remove trade barriers, to open up national markets, and to attract foreign investments, the market-based policies have embraced measures such as the reduction of state intervention into markets; liberalisation of economies whereby private actors are allowed to manage economic activities; the divesture of SOEs; deregulation of trade by abolishing import and export controls; and deregulation of exchange controls and devaluation of currencies. Other reforms include the abolition of price controls, the removal of subsidies on commodities such as food and drugs and the introduction of user fees in education, water and health services.[24]

In many developing countries, the market-based reforms have not been accompanied with the establishment of strong state institutions such as the police and judiciary as well as effective regulators to oversee the operation of liberalised markets. For instance, political reforms in Central and Eastern European nations which were supported by the capitalist nations in Europe and the United States resulted in the collapse

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[22] Jessica A Solyom, 'Tearing the Seams of (In) visibility: Anti-counterfeiting, *Harper's Bazaar,* and the Project of Neocolonialism,' (2012) 11 *Kaleidoscope* 59, 59.

[23] Ngaire Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (Ithaca: Cornell University Press, 2006) 3. See also Constantine V Nakassis, 'Brands and their Surfeits,' (2013) 28 *Cultural Anthropology* 111, 116.

[24] J Barry Riddell, 'Things Fall Apart Again: Structural Adjustment Programmes in Sub-Saharan Africa,' (1992) 30 *Journal of Modern African Studies* 53, 57-58. See also, Akpan H Ekpo, 'Economic Development under Structural Adjustment: Evidence from Selected West African Countries,' (1992) 7 *Journal of Social Development in Africa* 25, 27.

of former socialist and communist regimes.[25] Subsequently, the World Bank and the IMF compelled those countries to undertake the market-based reforms. In many instances, the reforms did not go together with the establishment of strong state institutions that could support the market-based transformations. In many of those nations there emerged weak states comprising, among others, weak regulatory institutions and poorly functioning police and courts.[26]

Due to the existence of weak state institutions, some countries in Central and Eastern Europe have witnessed the rise in organised criminal activities. Caparini and Otwin observe that many post-socialist nations experienced an explosion of transnational organised crimes.[27] Similarly, the institutions to oversee the operation of liberalised nation economies in these nations are ineffective. Allum and Sands point out that organised crime in Russia 'has risen due to the weakness of the state in the transition to a free market economy, epitomized by legislative vacuum and weak law enforcement.'[28] Similarly, the market-based reforms created opportunities for criminals in many of developing countries to undertake illicit activities including running the counterfeit goods trade.

The market-based reforms have catalysed the operation of the worldwide counterfeiting business in several ways. First, privatisation of the economies has created a chance for dishonest private traders to run the counterfeit goods business. Second, the opening up of national economies has allowed counterfeit goods from foreign countries to

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[25] Janine R Wedel, 'US Assistance for Market Reforms: Foreign Aid Failure in Russia and Former Soviet Bloc,' (1999) *Policy Analysis* No. 338 at p. 2

[26] Leslie Holmes, 'Crime, Organised Crime and Corruption in Post-communist Europe and CIS,' (2009) 42 *Communist & Post-Communist Studies* 265, 281 -282. See also, Mark Shaw, 'Crime, Police and Public in Transitional Societies,' (2002) 49 *Transformation: Critical Perspectives on Southern Africa* 1, 4 - 12.

[27] Marina Caparini & Otwin Marenin, 'Crime, Insecurity and Police Reform in Post-Socialist CEE,' (2005) *Journal of Power in Post-Soviet Societies* 1, 5.

[28] Felia Allum & Jenifer Sands, 'Explaining Organized Crime in Europe: Are Economists Always Right?' (2004) 41 *Crime, Law & Social Change* 133, 144.

flow into domestic markets of many developing countries. Third, the economic reforms have created conditions which have stimulated demand for counterfeit products in the developing countries. As a result of downsizing of the public sector, many workers were laid off. The removal of subsidies on farm implements, fertilizers, pesticides and insecticides has caused the increase in prices of those goods. While some farmers have reduced production, others have abandoned farming. Consequently, the laid off workers and the affected farmers have joined the class of poor people.[29] The poor people have become consumers of inexpensive products including low-priced counterfeit goods.

c) Knowledge-based Capitalism

Technological advancements which occurred in some European nations, the United States and Japan in the last few decades transformed economies of these capitalist industrialized nations. Transformations occurred in areas including information and communication technologies, telecommunications and communications media, pharmaceuticals, biotechnologies and artistic creations. These advancements compelled the industrialized nations to put more emphasis on investment on research and development. Production, distribution and trade in technology-intensive product and technologies became drivers of these nations' economies.[30] This transformation in capitalism (from industrial to knowledge-based capitalism) required the enhanced protection of rights relating to the technologies and technology-intensive intangible objects. This was aimed at protecting private rights of owners of intellectual property and giving the industrialized nations comparative advantage over other countries.

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[29] Murat Ozturk, 'Neo-liberal policies and Poverty: Effects of Policies on Poverty and Poverty Reduction in Turkey,' (2011) 1 *International Journal of Technology and Development Studies* 88, 91 - 98.
[30] Carsten Vogel, 'The Impact and the Implication of TRIPs in a Knowledge-based Global Economy: A Developing Country's Perspective,' (2006) 2 *Asia-Pacific Trade and Investment Review* 47, 54 - 55.

The transformation from industrial to knowledge-based capitalism paved the way for globalisation of intellectual property regulation. This led to the adoption of the TRIPs Agreement and post-TRIPs treaties which embody provisions for the protection of the 'trade-based' intellectual property and require the establishment of high standards for protection intellectual property.[31] The implementation of this global regulatory policy, embodied in the TRIPs Agreement and post-TRIPs treaties, enables the owners of these intangible properties and technologies from industrialized nations to determine high prices and restrictive terms for transferring such technologies. This gives owners of intellectual property including trademark owners the right to set premium prices for their brand-name goods.

Due to high prices at which owners of intellectual property from industrialized countries sell their technologies, the technologies are out of the reach of many manufacturers in developing countries. The lack of or limited technical or industrial capacities make manufacturers in the developing countries prone to counterfeiting activities.[32] Similarly, in many situations high prices of brand-name goods protected by trademarks make the commodities out of the reach of consumers with limited incomes.[33] As a result, many low-income consumers are compelled to buy and use low-priced commodities including inexpensive counterfeit goods.

d) Brand Owners' Business Strategies and Practices

Knowledge-based MNCs, owners of brands protected by trademarks, from industrialized nations in Europe and the United States employ some policies and

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31 Alan M Anderson & Bobak Rozavi, 'The Globalization of Intellectual Property Rights: TRIPs, BITs, and the Search for Uniform Protection,' (2010) 38 *Georgia Journal of International & Comparative Law* 265, 270 - 283.

32 Vincent D W Aryanto ' Intellectual Property Rights Theft in Far East Countries,' (2003) 2 *Journal of Business Administration Online* <https://www.atu.edu/jbao/fall2003/Didiek.pdf> (accessed 10 November 2011).

33 Piyush Sharma & Ricky Y K Chan, 'Counterfeit Proneness: Conceptualisation and Scale Development,' (2011) 27 *Journal of Marketing Management* 602, 606 - 607.

strategies which create conditions or catalyse the operation of the worldwide the trade in counterfeit goods. The MNCs outsource services of manufacturers, distributors and sellers from developing countries; they brand and market their products in order to charge high prices; and they externalise costs of controlling counterfeiting activities to governments and tax-payers.

Many MNCs from industrialized nations operate through globalised 'networks' of production, distribution and supply of goods and services to the markets. The MNCs decentralise their production, distribution and supply activities in different countries. This is done through, among other strategies, the outsourcing technique which, in some situations, involves the risk of leakage of information protected by intellectual property laws.[34] In situations where the MNCs do not adopt and implement effective control mechanisms over their outsourcers, some of the outsourcers manufacture, distribute or sell counterfeit goods.[35] Therefore, the outsourcing strategy facilitates production and the supply of the counterfeit goods to the worldwide markets.[36]

Knowledge-based MNCs from industrialized nations use branding and advertising as strategies for marketing their goods. These strategies enhance consumer desires for brand-name goods. The strategies create conditions for the operation of the trade in counterfeit goods. Firstly, they make brand-name goods known worldwide and become susceptible to counterfeiting. Secondly, the MNCs charge premium prices for their branded products which make these goods. This makes the products unaffordable to low-income consumers. Consequently, the increase in consumers' demand for low-priced counterfeit goods arises. Similarly, due to shortages of the brand-name goods in the

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[34] A Hoecht & P Trott, 'Innovation Risks of Strategic Outsourcing,' (2006) 26 *Technovation* 672, 677 - 678.

[35] Simon Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (2010) 54 *Crime Law & Social Change* 21, 23.

[36] Jon Vagg, 'The Policing of Signs: Trade Infringement and Law Enforcement,' (1995) 3 *European Journal on Criminal Policy and Research* 75, 78 - 79.

worldwide markets, some consumers purchase counterfeit goods. Counterfeiters take this opportunity to supply low-priced counterfeit goods to the markets.

Many MNCs do not want to shoulder the costs of protecting their intellectual property and controlling the trade in counterfeit goods. The MNCs divert the cost of dealing with the problem to the governments.[37] They shift the costs of enforcement of anti-counterfeiting laws to the public, rather than bearing the entire costs themselves.[38] The MNCs wait for governments to take action to control the trade in counterfeit goods and tax payers to provide resources to facilitate the enforcement of laws to curb the counterfeiting business. The government authorities and anti-counterfeiting agencies in many developing countries, do not have sufficient resources and capabilities to control the trade efficiently. Consequently, dishonest traders continue to supply counterfeit goods to the worldwide markets. Moreover, some MNCs do not publicise counterfeiting activities affecting their goods or take action against manufacturers or sellers of counterfeit products due to the fear that they will adversely affect their brand names, sales and profits.[39] As a result, counterfeiting activities remain uncontrolled and the supply of counterfeit goods to the markets continues with impunity.

7.1.3.Impact of the Counterfeit Goods Trade

In Chapter Two, I demonstrated that the trade in counterfeit goods impacts adversely on the welfare of consumers, economic interests of traders and national economies and societies in general. Most pro-intellectual property literature focuses on describing negative effects of the counterfeit goods trade. This school of thought claims

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[37] Mackenzie, 'Counterfeiting as Corporate Externality: Intellectual Property Crime and Global Insecurity,' (note 35) 22 - 23.

[38] Chow, 'Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries,' (note 14) 819.

[39] Robert Cockburn, Paul N Newton, E Kyerematen Agyarko, Dora Akunyili & Nicholas J White, 'The Global Threat of Counterfeit Drugs: Why Industry and Governments Must Communicate the Dangers,' (2005) 2 *PLos Medicine* 302, 303 - 306.

that: i) buyers are deceived into purchasing low-quality, defective or harmful counterfeit goods and that the consumers are exposed to safety and health risks as a result of using dangerous counterfeit automobile parts, aircraft components and using harmful counterfeit pharmaceutical, cosmetic and food products, ii) legitimate traders lose sale revenue and future profits and incur costs of curbing counterfeiting activities, and iii) jobs, revenue and investment opportunities are lost as a result of the operation of the counterfeiting business and that the trade is associated with or fuels crimes such as tax evasion, smuggling, corruption and terrorism. Therefore, the counterfeit goods trade imposes the burden on governments to control the above-mentioned crimes.

The above viewpoint represents the one-sided truth about impacts of the trade in counterfeit goods on the welfare of consumers, economic interests of traders and national economies. In Chapter Two, I pointed out that the counterfeiting business has positive aspects. With regard to consumers, I indicated that the illicit trade facilitates the provision of necessary and inexpensive goods such as clothing and shoes to low-income consumers.[40] I also demonstrated how government authorities and anti-counterfeiting agencies in the United States and the United Kingdom sanctioned the distribution or shipment of good-quality counterfeit goods to the needy people both in industrialized nations and developing countries. The counterfeit goods trade facilitates supply of good-quality, but low-priced goods to the markets in many countries. The advancements of technologies have made it possible for counterfeiters to manufacture high-quality counterfeits.[41] In some situations, the counterfeit goods trade makes available to consumers counterfeit products where genuine goods are in short supply or unavailable in the markets. In such situations, consumers buy and use counterfeit products as substitutes

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[40] Luuk van Kempen, ' Fooling the Eye of the Beholder: Deceptive Status Signalling Among the Poor in Developing Countries,' (2003) 15 *Journal of International Development* 157, 161.
[41] Seung-Hee Lee & Boonghee Yoo, 'A Review of the Determinants of Counterfeiting and Piracy and the Proposition for Future Research,' (2009) 24 *Korean Journal of Policy Study* 1, 7.

for genuine goods. Moreover, consumers of low-cost, luxurious counterfeit goods derive 'signalling' or 'expressive' utility from consuming such commodities at discounted prices.[42]

While it might be true that consumers are deceived and lose their money when they buy counterfeit goods unknowingly (deceptive counterfeiting), buyers who purchase counterfeit products knowingly (non-deceptive counterfeiting) are not affected by such deception. Many authors do not distinguish the impact of deceptive counterfeiting and effects of non-deceptive counterfeiting on consumers of goods. Also, while counterfeit food, beverages, pharmaceutical products, car parts or aircraft components ('safety-critical' counterfeit goods) pose risks to health and safety of the users, it is difficult to see how the consumption of luxurious, prestigious counterfeit products such as clothing, handbags, shoes or watches ('non-safety critical' counterfeit products) poses similar health and safety risks to the users of those commodities. Most literature does not differentiate effects of consuming 'safety critical' counterfeit products from the impact of using 'non-safety critical' counterfeit goods, but the literature applies arguments about the harmful impact of resulting from consuming counterfeit goods to all types of such products.[43]

With regard to the positive impact, the counterfeit goods business confers benefits or advantages to manufacturers and sellers of genuine products in the sense that counterfeiting acts as a device for promoting the authentic goods. Counterfeiting helps trademark owners to make their brand-name goods known to many consumers and people worldwide. Arguably, counterfeiting increases the consumer base for the brand-name

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42 Robert E Pfeffer, 'Who's Fooling Who: An Economic Analysis of Expressive Trademark Use,' (2006) 6 *Wake Forest Intellectual Property Law* 69, 73.

43 Joanne Large, 'Consuming Counterfeits: Exploring Assumptions about Fashion Counterfeiting,' (2009) 9 *Papers from the British Criminology Conference* 3, 4.

goods affected by copying. This may, in the long run, increase the demand for the brand-name goods. Counterfeiting can also speed up the fashion cycles by destroying the status value of the originals, thereby generating the demand for genuine goods from the original producers.[44] Moreover, in some situations the trade in counterfeit goods provides an opportunity for manufacturers or sellers of genuine products to expand their activities through merging with producers, distributors or sellers of high-quality counterfeit goods. The dominant perspective on counterfeiting overlooks the potential of counterfeiting activities for establishing collaborative new product development opportunities between manufacturers of genuine commodities and producers of counterfeits goods.[45] In Chapter Two, I cited an incident where the German manufacturer of dishwashers merged with the Turkish company which was counterfeiting the former company's washers. The counterfeit products were of high quality and manufactured at low costs.

With regard to economies, the counterfeit goods trade provides certain benefits to the economies. With respect to the people in developing countries who face economic hardship, there is a view that the counterfeit goods trade constitutes 'a basic human right to make a living whatever way one can in order to survive.'[46] Also, through counterfeiting, the developing countries can procure needed goods at little cost, while industries that specialise in producing counterfeit goods employ thousands of workers.[47] Moreover, production of counterfeit goods can make significant contribution to economies of developing countries particularly where 'the small- and medium-sized

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44 Sana El Harbi & Giles Grolleau, 'Profiting from Being Pirated by Pirating the Pirates,' (2008) 61 *KYKLOS* 385, 385.

45 Tetsuya Minagawa Jr, Paul Trott & Andreas Hoecht, 'Counterfeit, Imitation, Reverse Engineering and Learning: Reflections from Chinese Manufacturing Firms,' (2007) 37 *R & D Management* 455, 457.

46 Brian Hilton, Chong J Choi & Stephen Chen, 'The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues,'(2004) 55 *Journal of Business Ethics* 343, 349.

47 Marshall A Leaffer, 'Protecting United States Intellectual Property Abroad: Towards A New Multilateralism,' (1991) 76 *Iowa Law Review* 273, 282. See also, Sarah H Xiao & Michael Nicholson, 'Trick or Treat? An Examination of Marketing Relationships in a Non-deceptive Counterfeit Market,' (2010) 30 *Journal of Organizational Behaviour Management* 247, 259.

enterprises engaged in the informal economy are able to make the transition to become part of the formal economic sector.'[48] Where the appropriate infrastructures and personnel are available, counterfeiting can be used to facilitate non-consensual acquisition of low-cost technologies for the developing countries. In Chapter Two, I demonstrated that some industrialized nations including the United States used imitative practices including counterfeiting as a strategy to acquire low-cost technologies from Europe. These imitative practices partly helped the United States to industrialize.

The objective of the above discussion is not to ignore harmful aspects of the counterfeit goods business which involves 'deceptive counterfeiting' and the supply and consumption of 'safety-critical' counterfeit goods, but is to show that the orthodox arguments premised on the view that the 'trade in counterfeit goods is harmful' is not valid in all situations. In order to understand negative or positive impacts of the counterfeit goods business on consumers, one has to distinguish between deceptive counterfeiting and non-deceptive counterfeiting and determine whether the goods involved are 'safety-critical' or 'non-safety critical' counterfeit products. Also, in order to determine negative or positive effects of the trade in counterfeit goods on traders, an examination of costs or burden incurred by or benefits accrued to manufacturers or sellers should be made. Additionally, in order to understand the adverse or beneficial aspects of the trade in counterfeit goods to economies or societies in general, an investigation should be conducted to look at the countries where counterfeiting activities take place and their levels of socio-economic development. Most literature on the trade in counterfeit goods does not make the above distinctions. The orthodox 'counterfeit goods are harmful products' viewpoint has been generally accepted because '[the dominant] anti-counterfeiting discourse ... does not distinguish between safety critical and non-safety

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[48] Minagawa Jr *et al*, 'Counterfeit, Imitation, Reverse Engineering and Learning: Reflections from Chinese Manufacturing Firms,' (note 45) 458.

critical counterfeit [products].' Many scholars disregard positive effects of the counterfeit goods trade on traders and national economies. Failure to make the above distinctions has caused many people to believe that the trade in counterfeit goods has only adverse effects on consumers, traders, national economies and societies in general.

Notwithstanding the fact that the trade in counterfeit goods might not be harmful to consumers or traders, there is still a need to control the trade. In many circumstances, consumers are neither deceived into buying counterfeit goods (there is no fakery that is occasioned to the buyers) nor do they suffer damage (financial or physical harm) as result of purchasing or using counterfeit products. Similarly, the counterfeit goods trade has to be controlled notwithstanding the fact that some trademark owners and economies particularly in many developing countries may derive benefits from the operation of this trade. The regulation of the trade which involves 'non-harmful' counterfeit products is intended to safeguard the welfare of consumers, the interests of traders, economies and the general society.

Regarding consumer protection, control of the trade in counterfeit goods is intended to safeguard 'signalling' or communicative utility which consumers derive from purchasing or using genuine, prestigious commodities. Trademarks or brand-names imprinted on luxurious, prestigious genuine products perform a communicative function. Possession or ownership of such commodities has 'signalling' effects; they convey information about the consumers' high economic or social status or class. High-priced, luxurious goods are also associated with, among other characteristics, uniqueness, rarity or exclusivity.[49] Protection of the distinctive quality of trademarks is intended to protect

[49] Viet-Dung Trinh & Ian Phau, 'The Overlooked Component in the Consumption of Counterfeit Luxury Brands Studies: Materialism - Literature Review,' (2012) 8 *Contemporary Management Research* 251, 254; See also, Sezayi Tunca & Johann Fueller, 'Impression Formation in a World Full of Fake Products,' (2009) 36 *Advances in Consumer Research* 287, 287 - 289.

the 'signalling' function of famous trademarks.[50] Johnson observes that 'when unauthorized copies ... of a Veblen good become prevalent, it decreases the signalling function and "snob effect" of the trademark...'[51] Where markets are flooded with inferior-quality counterfeit products, some consumers may not buy genuine goods affected by counterfeiting because of the saturation and dilution of the 'snob effect' attached to these genuine products. The argument here is that consumers of original, luxurious goods are harmed by the widespread of counterfeit goods in the markets because high value of the genuine goods, which is partly derived from their scarcity, is lessened.[52] In many jurisdictions anti-counterfeiting laws prohibit 'poor people to possess and display trademarks intended to be exclusive purview of the wealthy.'[53] Therefore, the regulation of the counterfeit goods trade is intended to protect social or economic 'welfare' of consumers of luxurious, high-priced goods protected by trademarks.

With regard to owners of trademarks, control of the trade in counterfeit goods is intended to protect the right to the 'property' in the trademarks. A trademark is the property in its own right.[54] If the law does not prevent counterfeiting, counterfeiters will be misappropriating the property of the trademark owners. A counterfeiter who uses a trademark, without authorisation from its owner, 'wrongfully misappropriates this valuable asset. Misappropriation also literally steals a sale from the legitimate trademark owner.'[55] Therefore, the regulation of the trade in counterfeit goods is aimed at curbing

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[50] Jeffrey L Harrison, 'Trademark Law and Status Signaling: Tattoos for the Privileged ,' (2007) 59 *Florida Law Review* 195, 202. See also, 'Young Jee Han, Joseph C Nunes & Xavier Dreze, 'Signaling Status with Luxury Goods: The Role of Brand Prominence,' (2010) 74 *Journal of Marketing* 15, 18 -19.

[51] Michael A Johnson, 'The Waning Consumer Protection Rationale of Trademark Law: Overprotective Courts and the Path to Post-Sale Consumer Use,' (2011) 101 *Trademark Reporter* 1320, 1327.

[52] Zachary J King, 'Knock-off My Mark, Get Set, Go to Jail? The Improprieties of Criminalizing Post-sale Confusion,' (2013) 88 *New York University Law Review* 2220, 2228 - 2229.

[53] Ann Bartow, 'Counterfeits, Copying and Class,' (2011) 48 *Houston Law Review* 707, 744.

[54] Valentina S Vadi, 'Trademark Protection, Public Health and International Investment Law: Strains and Paradoxes,' (2009) 20 *European Journal of International Law* 773, 776.

[55] David J Goldstone & Peter J Toren, 'The Criminalization of Trademark Counterfeiting,' (1998) 31 *Connecticut Law Review* 1, 15. See also, Pfeffer, 'Who's Fooling Who: An Economic Analysis of Expressive Trademark Use,' (note 42) 80.

'theft' of the property of trademark owners. If the trade in counterfeit goods is not controlled, the trademark owners will not be able to reap the 'fruits' of their labour invested in creating brand-name products and marketing those commodities. This will de-incentivize the trademark owners and discourage them from being innovative which, may eventually, affect the supply of good-quality brand-name products in the markets.

The general society suffers from the adverse effects of the trade in counterfeit goods even where such trade seems to be harmless. In Chapter Two, I pointed out that the counterfeiting business fuels or is associated with unlawful activities such as smuggling, tax evasion, corruption, child labour and forced labour. The operation of the trade in counterfeit goods deprives governments in many countries of tax revenues. Also, governments use considerable amounts of resources to fight against the trade and associated crimes. Thus, the operation of the trade in counterfeit goods imposes negative externalities on the governments and societies in general.[56] The trade must be controlled in order to curb the counterfeiting business and its associated unlawful activities.

The regulation of the trade in counterfeit goods is also intended to promote ethical behaviours among traders and consumers and safeguard integrity in the operation of the markets. By using trademarks without authorisation of their owners, counterfeiters act unethically. Similarly, consumption of counterfeit products particularly luxurious, prestigious products involves unethical behaviours on the part of consumers [57] Moreover, the proliferation of counterfeit goods in the markets undermines the integrity of the markets. Therefore, the regulation of the trade in counterfeit goods is intended to

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[56] Asif Efrat, 'A Theory of Internationally Regulated Goods,' (2008) 32 *Fordham International Law Journal* 1446, 1495 - 1503.

[57] Giana M Eckhardt, Russell Belk & Timothy M Devinney, 'Why Don't Consumers Consume Ethically,' (2010) 9 *Journal of Consumer Behaviour* 426, 431 - 433.

encourage honesty, maintain or restore public trust in markets and safeguard integrity of the markets.

The above discussion demonstrates that the rationales for controlling the trade in counterfeit goods embrace both public and private interests. The private interests involve the need to protect the economic interests of trademark owners. The public interests comprise the need to safeguard the welfare consumers and the general public. Considering the fact that there are some aspects of the counterfeit goods trade that harm consumers and the general society, it is necessary for the regulatory policy to prescribe the use of public law and resources to fight this trade. This can be done by criminalising production, importation, smuggling, distribution and sale of the 'safety critical' counterfeit goods. As for the trade in counterfeit goods which affects rights of trademark owners (without causing harms to consumers or the general society), the anti-counterfeiting policy can take the approach which imposes the responsibility on the trademark owners to use civil law to protect their rights against manufacturers, distributors or sellers of counterfeit products.

Some scholars have observed that consumption of the 'safety critical' counterfeit goods exposes consumers and the public to health and safety risks and justifies the use of public law and resources to deal with the counterfeit goods business which involves those goods.[58] But, with regard to 'non-safety critical' counterfeit goods, Wall and Large observe that many of the goods do not pose safety and health dangers to the users and 'there is little public interest support for using public funds to policing and prosecuting the commissioning and manufacture of counterfeits and that the bulk of the responsibility

[58] Large, 'Consuming Counterfeits: Exploring Assumptions about Fashion Counterfeiting,'(note 43) 4.

for this must rest with the brand owners.'[59] The trademark owners have the obligation to control the counterfeit goods trade involving 'non-safety critical' commodities. They can use private law (particularly trademark law, law of contract and law of tort) and alternative regulatory mechanisms (for instance, information-based and technology-based regulations) to curb the trade.

Trademark owners have the responsibility to protect their private property. This is because many trademark owners, particularly knowledge-based MNCs, have resources and capability to protect their intellectual property. For instance, the MNCs have been taking action to protect their intellectual property in different countries particularly in Asia. Green[60] Zimmerman[61] and Brauer[62] show that the owners of brand-name goods such as Nike, Burberry, Louis Vuitton, Prada, Chanel, Gucci and Tiffany are active in enforcing their trademark rights in China. The measures implemented by the MNCs include registering trademarks, carrying out surveillance of the markets and conducting litigation against counterfeiters and cooperating with government authorities in host countries to fight against counterfeiting and the trade in counterfeit goods.

7.1.4. The Regulation of the Worldwide Counterfeit Goods Trade

In Chapter Three, I pointed out that the global intellectual property regulatory policy (of which the global anti-counterfeiting regulatory policy forms part) evolved concurrently with the evolution of capitalism (from industrial capitalism to knowledge-based capitalism) in Europe, the United States and Japan. Development of production and

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[59] David S Wall & Joanna Large, 'Jailhouse Frocks: Locating the Public Interest in Policing Counterfeit Luxury Fashion Goods,' (2010) 50 *British Journal of Criminology* 1094, 1113.
[60] Stephanie M Green, 'Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders,' (2008) 45 *American Business Law Journal* 371, 371 - 386;
[61] Alan Zimmerman, 'Contending Chinese Counterfeits: Culture, Growth, and Management,' (2013) 10 *Business Horizons* 141, 146 - 147.
[62] Tricia M. Brauer, 'You Say, "普拉达" I Say "Counterfeit": The Perils of Civil Litigation as a Trademark Protection Strategy in China,' (2012) 12 *John Marshall Review of Intellectual Property Law* 262, 272 - 277.

exchange relations necessitated the adoption of intellectual property treaties to enable capitalists in industrialized countries to control and reap benefits and profits generated from business activities that involved their technology-intensive commodities.

The pre-TRIPs intellectual property treaties including the Paris Convention came up subsequent to countries in Europe that underwent the Industrial Revolution. Expansion of production of industrial goods that occurred as a result of the Industrial Revolution and the growth of international trade that necessitated the adoption of the pre-TRIPs intellectual property treaties. Between the 1970s and 1980s, industrial capitalism in Europe and the United States underwent transformations which paved the way for the emergence of knowledge-based capitalism. In order to take advantage of this knowledge-based economy, capture the worldwide markets knowledge-intensive products and limit the expropriation of these technologies, owners of intellectual property in industrialized nations needed a new multilateral treaty, hence the adoption of the TRIPs Agreement. The post-TRIPs intellectual property treaties were designed to ratchet up protection of intellectual property prescribed in the TRIPs Agreement and consolidate the comparative advantage of the industrialized nations over economies of developing countries in relation to the trade in technology-intensive products.

The global intellectual property regulatory policy espoused in the TRIPs Agreement and post-TRIPs treaties were adopted at the instance of private industries (owners of intellectual property), industry coalitions and governments of the United States, Europe and Japan. The treaties embody a corporate-led intellectual property regulatory policy.[63] Government agencies from industrialized nations, owners of intellectual property and industry coalitions have been active in enforcing the global

[63] Gail E Evans, 'Corporate-led Regulation of Intellectual Property,' (2005) 7 *International Studies Review* 70, 72.

intellectual property law. At the core of the global intellectual property regulatory policy is the protection of economic interests of owners of intellectual property in the industrialized nations and economies of those countries.

The implementation of the global anti-counterfeiting regulatory policy has contributed, to a certain degree, to create conditions which facilitate or catalyse the operation of the trade in counterfeit goods. The implementation of the global policy allows owners of brand-name goods protected by trademarks to determine prices of their brand-name goods. In many instances, the owners set prices of their goods beyond the reach of low-income consumers. As a result, some low-income consumers who cannot afford to purchase high-priced genuine brand-name products are attracted to inexpensive counterfeit goods. Similarly, in order to maintain comparative advantages over other nations in respect of high technologies, the owners of intellectual property sell their technologies at high prices which make them unaffordable to many manufacturers in developing countries. This limits the flow of modern technologies to the developing countries which, in turn, restrict these nations' technological and industrial capabilities. The limited industrial capacity has made the developing countries prone to counterfeiting activities.

Governments in many developing countries have enacted anti-counterfeiting laws as a symbolic sign to comply with the TRIPs Agreement and avoid being penalised by the United States under the 'Special 301' procedure. In my opinion, if many developing countries were not *de facto* parties to the process that led to the adoption of the TRIPs Agreement and the post-TRIPs intellectual property treaties, such nations will be less likely to put adequate efforts to enforce their national intellectual property laws. Similarly, the exclusion of the developing countries in the negotiations which led to the

adoption of treaties such as the ACTA will undermine the efficacy of the treaties in tackling the trade in counterfeit goods.

In order to implement the global intellectual property regulatory policy, the members of the WTO are compelled to enact statutory laws (which provide for criminal, civil and administrative mechanisms) to deal with the counterfeit goods trade in their jurisdictions. This global policy treats the counterfeiting business as a law-related problem and its solution lies in the adoption and implementation of the law-related anti-counterfeiting strategies. The law-related approach applied to fight against the trade in counterfeit goods cannot adequately curb the trade. I demonstrated in Chapter Four that even in the United States and the United Kingdom and other industrialized nations that have resources (personnel, expertise and equipment), the enforcement of the anti-counterfeiting laws has not enabled these nations curb the trade in counterfeit goods satisfactorily.

Due to weaknesses of anti-counterfeiting laws and enforcement mechanisms in many developing countries, the law-related approach has been ineffective to tackle the counterfeit goods trade.[64] This law-related approach does not address issues such as transfer of technology to developing countries and how these nations can acquire technological and industrial capability to produce high-quality goods for their local markets. Moreover, the approach does not address issue of poverty which, as I pointed out earlier in this chapter, is one of reasons why poor people in many countries consume low-priced counterfeit products. Counterfeiting activities in the developing nations will continue if manufacturers in these countries do not have modern technologies to produce

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[64] Andrew Jaynes, 'Why Intellectual Property Rights Infringement Remains Entrenched in the Philippines,' (2009) 21 *Pace International Law Review* 55, 71 - 89. See also, C S Gautam, A Utreja & G L Singal, 'Spurious and Counterfeit Drugs: a Growing Industry in the Developing World,' (2009) 85 *Postgraduate Medical Journal* 251, 252.

inexpensive commodities notwithstanding the adoption of national laws to control the trade in counterfeit goods. Moreover, national anti-counterfeiting laws in the developing countries will have limited impact on the counterfeit goods trade if the global capitalist system continues to create the environment which facilitates the production, distribution and supply of counterfeit goods in the worldwide markets.

With regard to developing countries, the implementation of the global intellectual property regulatory policy has been costly. The costs of enacting and setting up or reforming laws and institutions are enormous.[65] Thus, the developing countries cannot, on their own, afford to undertake these legal and institutional reforms. The assistance provided by the multilateral agencies such as the WIPO and some institutions from industrialized nations is not sufficient to enable many developing nations to set up efficient intellectual property and anti-counterfeiting legal and institutional regimes. As a result, the enforcement of the laws in most developing countries particularly the nations in Sub-Saharan Africa is inefficient and the control of the trade in counterfeit goods is ineffective.

In Chapter Four, I indicated that the anti-counterfeiting laws in developing countries have foreign origins. These laws (which have been transplanted from developed nations) have not been working effectively because they are operating in political and economic contexts different from where the laws originated. As it was pointed out earlier in this chapter, substantial investments are needed to enable the developing countries to establish institutional infrastructures for the enforcement of the intellectual property laws. Governments in many developing countries are struggling to provide clean water, food, electricity, schools and health services for their people. They are also struggling to repay

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[65] Patricia Kameri-Mbote & James Otieno-Odek, 'The Genetic Use Restriction Technologies, Intellectual Property Rights and Sustainable Development in Eastern and Southern Africa,' TRALAC Working Paper No. 14, 2006, pp 15 - 16.

debts to industrialized nations and multilateral financial institutions. It is, therefore, unrealistic to expect that the developing countries that face such difficulties can give priority to fighting violations of intellectual property rights including counterfeiting. Yu remarks that, despite the widely documented hardships facing the developing countries, policy makers, knowledge-based MNCs and industry coalitions from industrialized countries 'continue to blindly and unrealistically attribute to [the former nations' failure] to enforce intellectual property rights to lack of political will...'[66]

Due to low levels of industrialization, the bulk of intellectual property-protected goods (including brand-name goods protected by trademarks) in developing countries' markets belong to foreign knowledge-based MNCs. Governments in most of the developing countries particularly in Sub-Saharan Africa do not allocate sufficient resources to protect such foreign interests taking into account the fact that these countries are pre-occupied with addressing a myriad of political, economic and social problems facing their nations and people. As regards the above point, Moran observes that when a developing country has limited legal resources, 'it should be extremely careful about how these resources are used to protect another country's property rights.'[67]

In some developing countries, the anti-counterfeiting regulatory approach advocated by industrialized nations is becoming less appealing to the governments and public officials. With regard to China, Chow observes that the focus of the United States government agencies, companies and industry coalitions has been on the enhanced '...enforcement [of intellectual property laws]. Almost all of the efforts of the US government officials, taking their cues from their constituent companies, are focused on

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[66] Yu, 'Enforcement, Economics and Estimates,' (note 5) 2.
[67] Beverley I Moran, 'Homogenized Law: Can the United States Learn from African Mistakes?,' (2001-2002) 25 *Fordham International Law Journal* 361, 370.

enforcement... [China's] officials react to these training sessions by becoming totally disinterested, bored, sickened, and hostile.'[68]

In both industrialized nations and developing countries, alternative regulations (such as the market-based regulation, information-based regulation and technology-based regulation) supplement the use of laws to curb the trade in counterfeit goods. However, the efficacy of these alternative regulatory mechanisms is undermined by: i) weaknesses of the regulatory instruments; ii) limitations of institutions in applying the alternative regulations; and iii) inability of government authorities and agencies and non-state actors to use the regulations efficiently. The above factors impinge on the efficacy of alternative anti-counterfeiting regulations in both the industrialized nations and the developing countries.

The discussion above suggests that the worldwide trade in counterfeit goods is thriving despite the adoption of the global intellectual property regulatory policy that requires the WTO members to enact or reform laws and set institutions in order to protect intellectual property rights and control the trade in counterfeit goods in their territories. To a certain extent, the implementation of this global policy fuels the operation of the trade in counterfeit goods. Also, the implementation of this policy does not tackle side-effects of global capitalism which, to a certain extent, create conditions for the operation of the worldwide counterfeit goods trade. As a result of the limitations of the global intellectual property regulatory policy and national laws and alternative regulatory mechanisms in many nations, the worldwide counterfeiting business thrives. Markets in many countries including developing nations particularly those in Sub-Saharan Africa are

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[68] Daniel Chow, 'Anti-Counterfeiting Strategies of Multinational Companies: How a Flawed Approach is Making Counterfeiting Worse,' (2010) 41 *Georgetown Journal of International Law* 749, 775-76.

flooded with counterfeit products. Through this worldwide counterfeiting business, counterfeit goods flow into the markets of many countries including Tanzania. Furthermore, some counterfeit products are manufactured domestically in the developing countries. It is against the above backdrop that I consider issues concerning the trade in counterfeit goods in Tanzania and regulatory mechanisms for controlling the trade.

7.2. Salient Features, Drivers and Impact of the Counterfeit Goods Trade in Tanzania

7.2.1. Scale and Operators of the Counterfeit Goods Trade

In Chapter Five I pointed out that a wide range of counterfeit products have flooded Tanzania's markets.[69] The magnitude of the counterfeit goods trade in Tanzania and the scale of its impacts remain unascertained.[70] The statistics which the report of the CTI study has generated do not represent the whole picture about the magnitude of the counterfeit goods trade in Tanzania. Besides conflating counterfeit goods with substandard products, the CTI study did not use the commonly used methods for measuring the magnitude of the trade in counterfeit goods. In calculating the magnitude of the trade in counterfeit goods, two main methods are used: i) the substitution rate technique (which assumes that for every counterfeit product sold there is a loss of sale in respect of genuine version of such goods) and ii) the valuation technique (which takes into account production costs, domestic values, or retail prices of counterfeit goods.) [71] The CTI study did not use either of the above methods. Due to the covert nature of the operation of the counterfeit goods trade, it is difficult to obtain reliable statistics to enable the quantification of the scale of the trade in counterfeit goods. In addition, since the traders' organisation (namely, the CTI) commissioned the study, it is possible that the

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[69] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Commissioned officer, Law enforcement agency (30 September 2010). See also Queenter Mawinda, *Why Dar is awash with fake imports,* The *Guardian* (Dar Es Salaam), 13 April 2013.

[70] Interviews:. Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).

[71] Zimmerman, 'Accepting "Conventional Numbers": Determining the Size of the World Counterfeit Goods Market,' (note 11) 11.

statistics about the magnitude of the trade in counterfeit goods in Tanzania in the report were on the high side. As I pointed out earlier in this chapter, studies conducted or commissioned by private industries or industry coalitions tend to exaggerate statistics about the magnitude of the trade in counterfeit goods (and the size of its impacts). In so doing, the private industries and their coalitions intend to achieve three main objectives. First, to seek public support and solicit government funds to finance anti-counterfeiting initiatives. This is because governments are likely to allocate more funds and provide more equipment to curb the trade in counterfeit goods where statistics indicate that the levels of the illicit trade are high. Second, to use such statistics as a device for lobbying for reforms of intellectual property and anti-counterfeiting policies and laws. Many industry coalitions are lobby groups and have vested interests in exaggerating figures about losses which their members suffer as a result of the operation of the trade in counterfeit goods. Third, to externalise costs of protecting private rights of intellectual property owners and curbing counterfeiting activities to their governments and taxpayers.

The scale of the trade in counterfeit goods in Tanzania is unascertained because the Ministry of Industry and Trade, other ministries and government authorities and anti-counterfeiting agencies have not conducted studies to investigate, determine and describe the magnitude of the trade in counterfeit goods and its driving factors and impact. The above situation is partly caused by the lack of resources (funds, personnel, expertise and equipment) which limit the capacity of the above authorities and anti-counterfeiting agencies to conduct the studies.[72] As a result, there is lack or deficiency of information about the magnitude of (and other issues about) the trade in counterfeit goods in Tanzania. It is also difficult for government authorities and anti-counterfeiting agencies and non-state actors to determine upward or downward trends of the trade in counterfeit

[72] Interviews: Director, Ministry of Industry and Trade (22 October 2010); Director, Anti-counterfeiting agency (17 September 2010).

goods. It is hard to estimate resources required to control the counterfeit goods trade. It is also difficult to evaluate reliably the efficacy of Tanzania's anti-counterfeiting policy and law.

Despite the limitations in the CTI study as I described above, the study is a good starting point for investigating issues about the trade in counterfeit goods in Tanzania. It signifies the ownership by local actors of the process which can be used to generate information about the above issues which, in my opinion, is a significant step towards finding the root causes of the trade in counterfeit goods and strategies to tackle the trade. Government authorities and anti-counterfeiting agencies, traders' organisations and consumer protection associations in Tanzania should emulate the CTI's initiative and singly or jointly conduct studies in order to examine the above issues in details.

The counterfeit goods trade in Tanzania involves manufacturing, importation, smuggling, distribution and sale of counterfeit goods. The trade involves both foreign-manufactured and local-made products. Evidence indicates that counterfeit products imported and trafficked from Asia, Europe and Africa (mostly from the EAC member states) have flooded Tanzania's markets.[73] And that Tanzania is a transhipment country for counterfeit goods which are exported or smuggled to other countries.[74] Some counterfeit goods, which are consumed locally and smuggled to other countries, are manufactured in Tanzania.[75] Both licensed and unlicensed traders operate the counterfeit goods trade. Registered business entities and private individuals run the counterfeit goods trade. Some government agencies have been implicated in facilitating the supply of

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[73] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).

[74] Sebastian Mrindoko, *Influx of fake goods in Dar dismays the Chinese traders*, The *Daily News* (Dar Es Salaam), 17 September 2013.

[75] Interviews: Director, Traders' organization (9 November 2011); Sales officer, Company producing food products and soft drinks (22 September 2010).

counterfeit goods in the markets.[76] While the counterfeit goods trade is mostly operated by local business persons, there is evidence that implicates foreign traders especially those from China, in running the counterfeit goods business.[77]

The above discussion uncovers the complex nature of the counterfeit goods trade in Tanzania in terms of its operations, actors and countries involved as sources and destinations of counterfeit products. The trade, as I stated earlier in this chapter, is part of the regional and global counterfeit goods trade and, due to this reason, measures to address the trade in counterfeit goods in the country require the use of the international, regional and bilateral regulatory mechanisms and the involvement of actors from Tanzania and in other countries. Besides the anti-counterfeiting policy and law (comprising criminal law, trademark law, law of tort and law of contract), other policies and laws such as the laws governing business licensing, the registration of business activities, competition, investments and the import and export trade should be employed to control the trade in counterfeit goods.

7.2.2. Drivers of the Counterfeit Goods Trade

Chapter Five shows that it is difficult to determine with certainty when the trade in counterfeit goods in Tanzania emerged. Arguably, the political and economic factors that prevailed in the country between the mid-1970s and early 1980s[78] precipitated conditions that enabled the counterfeit goods trade to take shape. The economic crisis caused, among other things, shortages of commodities in the markets.[79] Meanwhile, the

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[76] Rose Athumani, *Factory closed over fake ARVs,* The *Daily News* (Dar Es Salaam), 11 October 2012. See also Daily News Reporter, *Chicken flu vaccine suspended,* The *Daily News* (Dar Es Salaam), 18 October 2013.

[77] *Fair Competition Commission: counterfeit goods won't just go away!* The *Business Times* (Dar Es Salaam), 4 February 2011.

[78] Peter Wobst, *Adjustment and Intersectoral Shifts in Tanzania: A Computable General Equilibrium Analysis* (Washington DC: International Food Policy Research Institute, 2001) 10.

[79] Stephen M Kapunda, Reforms and Industrial Development and Trade in East Africa: The Case of Tanzania,' (2004) 7 *African Journal of International Affairs* 167, 168.

relevant government authorities failed to ensure that the markets were sufficiently supplied with goods manufactured in the country or imported commodities. Additionally, the above situation created opportunities for dishonest traders to smuggle commodities into Tanzania or manufacture illicit products to offset shortages of the goods in the markets.[80] Some of these commodities were counterfeit goods. It was under the above circumstances that the counterfeit goods trade in Tanzania came into being.

The evolution of the trade in counterfeit goods in Tanzania was partly caused by the government's inability to ensure that the production and importation of genuine goods satisfied consumers' demands for those commodities. Dishonest traders took advantage of shortages of commodities in the markets to supply to consumers illicit goods manufactured locally and smuggled from foreign countries.[81] Government authorities and agencies were not able to control effectively the importation and smuggling of the contraband into Tanzania. Subsequent to the adoption and implementation of the market-based reforms, the trade in counterfeit goods in Tanzania became a well-established phenomenon.[82] The inadequacies of the legal regime for regulating the market-based economy provided a space for the growth of the counterfeit goods trade.

The above revelations imply that inadequacies or limitations of the industrial and economic policies helped to create conditions for the emergence of the trade in

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[80] Kelly Askew, 'Sung and Unsung: Musical Reflections on Tanzanian Postsocialisms,' (2006) 76 *Africa* 15, 29. See also T L Maliyamkono & MSD Bagachwa, *The Second Economy in Tanzania* (Nairobi: Heinemann Kenya, 1990) 63 - 108.

[81] Andrew E Temu & Jean M Due, 'The Business Environment in Tanzania After Socialism: Challenges of Reforming Banks, Parastatals, Taxation and Civil Service,' (2000) 38 *Journal of Modern African Studies* 683, 698.

[82] Interviews: Economics researcher (24 October 2010); Director, Traders' organization Kelly Askew, 'Sung and Unsung: Musical Reflections on Tanzanian Postsocialisms,' (2006) 76 *Africa* 15, 29. See also T L Maliyamkono & MSD Bagachwa, *The Second Economy in Tanzania* (Nairobi: Heinemann Kenya, 1990) 63 - 108.

[82] Andrew E Temu & Jean M Due, 'The Business Environment in Tanzania After Socialism: Challenges of Reforming Banks, Parastatals, Taxation and Civil Service,' (2000) 38 *Journal of Modern African Studies* 683, 698.

[82] Interviews: Economics researcher (24 October 2010); Director, Traders' organization (9 November 2011).

counterfeit goods. The trade has expanded due to the existence of several factors including the existence of the markets for counterfeit goods, the involvement of dishonest traders in supplying counterfeit goods to the markets, limited industrialisation; the implementation of the market-based policies, and the integration of Tanzania's economy into the global and regional economies.

a) Markets for Counterfeit Goods

Tanzania has a market for counterfeit goods. Some consumers purchase counterfeit products unknowingly. The lack of or limited information impairs ability of some consumers to identify counterfeit goods. The consumers cannot differentiate genuine commodities from counterfeit products.[83] There is also a failure or inability by some consumers to inspect goods before purchasing them or to require information from sellers about goods offered for sale before purchasing them in order to verify their genuineness.[84] Other consumers purchase counterfeit goods because suppliers falsely represent that such commodities are genuine products.[85] The deficiencies or asymmetries of information cause some consumers in Tanzania to purchase or use counterfeit goods unknowingly. Government authorities and anti-counterfeiting agencies, traders and traders' organisations and consumer protection associations do not provide sufficient information to the public to enable consumers to avoid or refrain from purchasing or using counterfeit goods.[86]

Other consumers purchase counterfeit goods knowingly. Many consumers in Tanzania are attracted to low prices of counterfeit goods because they cannot afford to

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[83] Interviews: Huruka (28 October 2010); Shufaa (30 October 2010); Manager, Anti-counterfeiting agency (25 September 2010).
[84] Sharifa Kalokola, *How carefree attitude is source consumer woes,* The *Citizen* (Dar Es Salaam), 15 March 2010.
[85] Interviews and Questionnaires: Consumers (various dates).
[86] Questionnaires: (consumers).

purchase seemingly expensive, genuine commodities.[87] Most of the consumers have low disposable incomes. This is a result of, among other factors, poverty facing many Tanzanians. One should bear in mind that Tanzania is one of the poorest countries in the world with one-third of its population living below the absolute poverty conditions.[88] The government of Tanzania has not been able to tackle poverty among its citizens successfully. Soon after its political independence in 1961, the government declared the 'war' against what were known as the three 'enemies,' namely disease, ignorance and poverty.[89] This anti-poverty war was very strong between the late 1960s and early 1970s. But, the fight became less vigorous from the second half of 1970s. The economic crisis which faced the country between the mid-1970s and early 1980s weakened the government's ability to tackle poverty. As a result, poverty became a serious problem and this situation worsened when Tanzania started implementing the market-based policies imposed by the World Bank and the IMF from the late1980s. Poverty is among the major problems that afflict many Tanzanians.

Cooksey,[90] Ngowi[91] and Harrington[92] observe that the implementation of the market-based policies has had negative impacts on Tanzania and its people and, arguably, the policies have exacerbated poverty among Tanzanians. As a result of the downsizing of the public service sector and privatization of the SOEs in Tanzania, many workers have lost their jobs and become poor. The removal of subsidies on fertilizers, herbicides,

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87 Interviews: Mukadamu (20 October 2010); Shufaa (30 October 2010); Chivanga (29 September 2011).

88 Government of Tanzania, *Poverty Reduction Strategy: The Third Progress Report* (Dar Es Salaam, Government Printer, 2004) 5 - 8.

89 Boniface E S Mgonja & Mrisho Malipula, 'Globalization, Governmentality and Socio-Economic Development: Reflections from Tanzania,' (2012) 1 *International Journal of Developing Studies* 54, 55 - 56.

90 Brian Cooksey, 'Tanzania: Can PRS Succeed Where SAP has Failed?,' HakiElimu Working Paper Series No. 3, (2004).

91 Honest P Ngowi, 'Economic Development and Change in Tanzania Since Independence: the Political Leadership Factor, ' (2009) 3 *African Journal of Political Science and International Relations* 259, 265.

92 John A Harrington, 'Law and the Commodification of Health Care in Tanzania,' (2003) 2 *Law, Social Justice & Global Development Journal* 1, 7- 8

pesticides, insecticides and farm equipment has forced many peasants to reduce agricultural production or stop producing food and cash crops. This has resulted in the reduction of incomes and increased food insecurity among families whose livelihood depends on agriculture. Consequently, the peasants and their families have joined the class of poor people. Similarly, the removal of subsidies on food and medicines has caused the rise of prices of these commodities. The high prices have made the goods unaffordable to many impoverished consumers. Additionally, the introduction of user fees in health services made the services less accessible or completely inaccessible to the impoverished people in Tanzania.

The government of Tanzania has been implementing several policies and strategies to alleviate poverty. These include the National Poverty Eradication Strategy of 1998, the Poverty Reduction Strategy Paper of 2000 and the National Strategy for Growth and Reduction of Poverty of 2005. Despite the implementation of these policies and strategies, poverty continues to affect among many Tanzanians. The United Nations Development Programme's Human Development Index Report for 2013 ranked Tanzania 152nd place out of 187 nations. About 33 per cent of Tanzanians are living under the absolute poverty conditions.[93] The World Bank report has observed that '...Tanzania remains a poor country. In 2012, its average per capita income stood at US$ 570, placing it in the 176th position out of 191 countries in the world... [There are] approximately 12 million poor people living in Tanzania...'[94]

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93 United Nations Development Programme, *Human Development Report 2013* <http://hdrstats.undp.org/en/countries/profiles/TZA.html> (accessed 29 November 2013).

94 World Bank, *Raising the Game: Can Tanzania Eradicate Extreme Poverty* (World Bank: Washington, 2013) 19.

Poverty is one of the factors that compel low-income consumers to buy counterfeit goods.[95] For low-income consumers, low-priced counterfeit goods are substitutes for expensive, genuine products. The impoverished consumers cannot afford to purchase high-priced genuine goods. It is impossible for a poor Tanzanian employee to afford an expensive genuine Lacoste shirt, or high-priced genuine Nike trainers, or a costly genuine Rolex watch. Similarly, an impoverished Tanzanian peasant who cannot feed his family will likely to purchase and use cheap counterfeit medicines if he/she or a member of his/her family needs medications.

Shortages or unavailability of some goods in the markets compel consumers to purchase counterfeit products knowingly as substitutes for the unavailable goods.[96] As I pointed out earlier in this chapter, due to low technological and industrial capacity, many manufacturers in Tanzania lack or have limited capacity to produce commodities that satisfy requirements of the markets. Due to the above fact, Tanzania imports a wide range of consumer and industrial goods from abroad. The products include automotive parts and accessories, medicines, electrical goods, construction materials and electronic products. Similarly, luxurious products such as clothing, shoes, and leather products are imported from foreign countries. Dishonest traders take advantage of the shortages to supply counterfeit goods to the markets[97] and consumers purchase those goods.

b) Supply of Counterfeit Goods

Manufacturers and sellers in Tanzania operate the trade in counterfeit goods. Some traders run the illicit trade knowingly. High returns generated from this business

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95 Kimberley Shane, 'Culture, Poverty and Trademarks: An Overview of the Creation and Persistence of Chinese Counterfeiting and How to Combat it,' (2012) 16 *Intellectual Property Law Bulletin* 137, 156.

96 Interview: Law practitioner (14 October 2010).

97 *Can EAC drug body stop counterfeit imports*, The *Citizen* (Dar Es Salaam), 1 October 2013.

motivate traders to supply counterfeit goods to the markets.[98] The traders neither incur the costs of research and development nor do they incur the costs of providing after-sale services to consumers of goods. In many circumstances, these traders do not incur liability arising from damage suffered by consumers of inferior quality, defective or harmful counterfeit goods. The inadequacies of the anti-counterfeiting law and weaknesses of the law enforcement mechanisms minimise the chances of manufacturers, importers, smugglers and sellers of counterfeit goods being arrested, prosecuted or convicted and punished. The above factors contribute to making the trade in counterfeit goods in Tanzania a low-risk crime, hence a lucrative business. Moreover, the traders' disregard for the protection of intellectual property and their disrespect for the anti-counterfeiting policy and law have contributed to the growth of the counterfeit goods trade in Tanzania.[99] Possibly, some traders, particularly retailers, sell counterfeit goods unknowingly due to their inability to differentiate genuine commodities from counterfeit goods and failure to inspect the counterfeit products supplied by wholesalers.[100]

There have been ineffectual mechanisms which can deter traders from producing, importing, smuggling or selling counterfeit goods. The strategies to make operation of the illicit trade more costly are ineffective. In my view, the imposition of concurrent penalties on counterfeiters may increase costs of running the trade in counterfeit goods. This can involve the imposition of hefty fines, together with the forfeiture of proceeds generated from counterfeiting activities, freezing bank accounts of persons or enterprises involved in operating the counterfeit goods trade, and suspension or cancellation of business licences or investment permits of such traders. There is no evidence of the use of market-based incentives such as tax incentives, exemptions or other financial benefits by

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[98] Felix Andrew, *FCC to identify magnitude of counterfeits at product level*, The *Guardian* (Dar Es Salaam), 4 November 2012.
[99] Editor, *We must create level ground in competition*, The *Guardian* (Dar Es Salaam), 23 November 2012.
[100] Bernard Lugongo, *Govt in fresh attempt to curb imports of counterfeit goods*, The *Citizen* (Dar Es Salaam), 26 September 2011.

government authorities to induce the traders to refrain from operating the counterfeit goods business knowingly. Additionally, the government authorities and anti-counterfeiting agencies in Tanzania do not provide sufficient information to enable the traders to avoid participating in the counterfeit goods trade unknowingly.

c) Shortage or Unavailability of Goods in Markets

Limited industrialisation is a contributory factor to the growth of the trade in counterfeit goods in Tanzania. Tanzania has had no strong industrial base which could have facilitated the production of consumer and industrial goods to satisfy consumer demand. Genuine goods are in short supply or unavailable in the markets.[101] This situation has been partly caused by the implementation of inadequate or adverse industrial and economic policies. The ISI policy which the government of Tanzania implemented between the 1960s and the 1970s resulted in the establishment of few publicly-owned industries which manufactured consumer and light industrial goods.[102] Consumer goods that were produced included food, beverages, tobacco, leather products and textiles. Light industrial goods included wood products, paper and printing materials, rubber products, chemicals and petroleum products, cement, and metal products, machinery and equipment.[103] The economic downturn, which faced the country between the mid-1970s and early 1980s, affected these industries. Industrial production was critically affected and reduced. Moreover, due to mismanagement and other factors such as corruption and embezzlement of resources of SOEs by their managers, some of the industries performed

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[101] Interviews: Manager, Anti-counterfeiting agency (25 September 2010); Law practitioner (14 October 2010).

[102] Samuel M Wangwe, 'Industrialization and Resource Allocation in a Developing Country: The Case of Recent Experiences in Tanzania,' (1983) 11 *World Development* 483, 484 - 488; G P Mpangala, 'Towards an Integrated Industrial Development Among the SADCC Countries and the Problem of Industrial Dependence,' (1993) 7 *Botswana Journal of African Studies* 35, 41 - 43.

[103] Ravi Ghulhati & Uday Sekhar, 'Industrial Strategies for Late Starters: The Experience of Kenya, Tanzania and Zambia,' (1982) 10 *World Development* 949, 955 - 961.

poorly. Many of these public industries were later privatised as part of the implementation of the market-based policy.[104]

The implementation of the market-based reforms has negatively impacted on industrialisation in many developing countries. The reforms have caused de-industrialisation in these countries and in Tanzania, some of the privatised industries have been closed and many others have been performing badly.[105] Some of the de-nationalised industries have not been able to withstand unfair competition posed by traders who import, smuggle and manufacture low-cost consumer and industrial goods.[106]

Despite the adoption and implementation of the policies to promote industrial development such as the Tanzania Development Vision of 2025, the Small and Medium Development Policy of 2003 and the Sustainable Industries Development Policy, the industrial sector in Tanzania is still underdeveloped. The manufacturing sector remains unimpressive, and due to that fact Tanzania, 'lags behind [other countries] in terms of the quantity and quality of industrial goods produced and exported. [The economy] relies.... heavily on [less] productive agricultural sector, the extractive sector and low value added manufacturing.'[107] Many industries in Tanzania have limited capacity to manufacture genuine goods that satisfy local demands. A local newspaper has quoted a CTI official stating that Tanzania imports 50 per cent of corrugated iron sheets, 80 per cent of

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104 Adam M Mwandenga, 'Socio-Economic Impact of Privatisation: The Tanzania Experience,' (2000) 9 *African Journal of Finance & Management* 43, 45 - 48.

105 Florence Mugarula, *How 17 industries were privatised only to die*, The *Citizen* (Dar Es Salaam), 16 January 2012.

106 Economic and Social Research Foundation, 'Import Liberalization, Industrialization and Technological Capability: A Case of Garment Industry in Tanzania,' Dialogue Policy Series No. 010, 1998, pp 2 - 3. See also Josephat Kweka, George Kabelwa & Justine Musa, 'Trade and Poverty in Tanzania: Missing Linkages?' in Mohammad A Razzaque & Selim Raihan, *Trade-Development-Poverty Linkages: Reflections from Selected Asian and Sub-Saharan African Countries* (Jaipur: CUTS International, 2008) 241.

107 Orton Kiishweko, *Call: Design policies to curb resource curse*, The *Daily News* (Dar Es Salaam), 8 January 2013.

pharmaceutical products and about 100 per cent of commodities such as textile products, dry cells and tyres.[108]

One can, thus, argue that the proliferation of counterfeit products in Tanzania and the growth of the counterfeit goods trade in the country is partly explained by the inability of local industries to manufacture good-quality products, and shortages of consumer and industrial goods in the markets. To bridge the gap, some traders take this opportunity to supply foreign as well as locally-manufactured counterfeit goods to the markets. The inability of the customs authority to control the importation or smuggling of foreign-made counterfeit goods has also contributed to the proliferation of those products in Tanzania's markets.

d) Market-based Policies

The market-based reforms, which the government of Tanzania has been implementing since the 1980s, have created conditions for the expansion of the trade in counterfeit goods.[109] It is important to describe briefly how these reforms came about. Economic development of Tanzania has passed through three main epochs: i) the post-colonial period which was characterised by the mixed economy policies (between 1961 and 1967); ii) the African socialist era during which the country's economy was under the monopoly of SOEs (between 1967 and 1985); and iii) the liberalised economic period characterised by the market-based policies (from 1986 to the present). The implementation of the market-based reforms was intended to reverse the economic downturn that faced Tanzania between the mid-1970s and early 1980s.[110] In order to

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[108] See, *Imports surpass local products*, The *Citizen* (Dar Es Salaam), 24 December 2013.
[109] Interviews: Economics researcher (24 October 2010); Interview: Director, Traders' organization (9 November 2011).
[110] Frank Ellis & Ntangua Mdoe, 'Livelihoods & Rural Poverty Reduction in Tanzania,' (2003) 31 *World Development* 1367, 1369 -1370.

implement the reforms, the government adopted the Structural Adjustment Programme (SAP) whose operation commenced in second half of the 1980s.[111]

The market-based reforms have contributed to the expansion of the trade in counterfeit goods in Tanzania in several ways. First, the privatisation policy has created an enabling environment for private persons to set up enterprises some of which are used for running the trade in counterfeit goods. Second, economic liberalisation has opened the country's economy and facilitated the flow of foreign-made counterfeit goods into Tanzania. Third, de-industrialisation, which was partly catalysed by the implementation of the market-based policies, has limited the capacity of local manufacturers to produce genuine commodities. Such a situation has created shortages of genuine commodities in the markets and demands for counterfeit goods. Fourth, deregulation of the financial sector and the abolition of the import and export trade restrictions have enabled fraudulent traders to obtain foreign currency to facilitate production and smuggling of counterfeit goods. Fifth, the removal of price controls and subsidies have increased prices of genuine products particularly food, pharmaceutical products, fertilizers and farm implements. High prices have made these brand-name goods unaffordable to many poor people. The poor people have resorted to consuming low-priced counterfeit products.

It is important to point out that liberalisation of Tanzania's economy was not accompanied with the establishment of efficient mechanisms to regulate the market-based economy. Whereas the government started to undertake the market-based reforms in the 1980s, the law for regulating fair trade practices, namely the Fair Trade Practices Act was

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[111] Ibrahim F Shao, Angwara D Kiwara & George J Makusi, 'Structural Adjustment in a Socialist Country: The Case of Tanzania,' Allast M Mwanza (ed) *Structural Adjustment Programmes in SADC: Experiences and Lessons from Malawi, Tanzania, Zambia and Zimbabwe* (Harare: SAPES Books, 1992) 74 - 76. See also, Justin Katunzi, 'Managing Change in Tanzania Public Enterprises: Swallowing Bitter Pills,' (1998) 6 *IFM Journal of Finance & Management* 14, 18 -21; John Briggs & Davis Mwamfupe, 'Peri-urban Development in an Era of Structural Adjustment in Africa: The Case of Dar Es Salaam,' (2000) 37 *Urban Studies* 797, 800 - 802.

enacted in 1994. Tanzania did not have the regulatory machinery to oversee competition and fair trade practices in the markets for about a decade after the commencement of the market-based reforms.[112] Arguably, the proliferation of counterfeit products in the markets in Tanzania can partly be explained by the inadequacies of the legal regime for regulating competition in the country. The liberalised economy is regulated inadequately and this situation has created the space for the rise of incidents of trade malpractices. The trade in counterfeit goods operates alongside other malpractices such as traders' collusion to charge high prices for goods, refusal to supply goods and services, and the supply of adulterated products in the markets.[113]

Some strategies employed to implement the market-based reforms have facilitated the flow of foreign-made counterfeit goods to the country's markets. The relaxation of inspection procedures brought about by the 'Green Channel' import clearance system has facilitated the importation of foreign counterfeit goods into Tanzania.[114] This procedure was set up to enable designated 'high-profile' business-persons in Tanzania to have their imported commodities cleared without undue delays.[115] This measure was part of the implementation of the tax reforms which would enable the TRA to collect more duties and increase the government's revenue. The procedure would encourage traders to import more goods and enable the TRA to collect more revenue levied on such imports. The above strategy was intended to make Tanzania's ports more competitive than other ports in the Eastern and Southern African regions. Tanzania's ports handle goods for landlocked countries, namely Malawi, Zambia, Burundi and Rwanda. The ports also handle goods for the DRC and Uganda. These ports in Tanzania

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112 The Fair Competition Act of 2003 replaced the Fair Trade Practices Act of 1994.

113 Editorial; *Rogue petrol traders must be dealt with,* The *Daily News* (Dar Es Salaam), 1 January 2012; Guardian Reporter, *Bitter-sweet tale of sugar scarcity,* The *Guardian* (Dar Es Salaam), 3 December 2012;

114 Patrick Kisembo, *Fake imports: TRA's Green Channel blamed,* The *Guardian* (Dar Es Salaam), 8 October 2009.

115 Interviews: Principal officer, Anti-counterfeiting agency (12 October 2010); Senior officer, Company inspecting imported cargoes (18 October 2010).

compete with harbours in Mombasa (Kenya) and Beira (Mozambique).[116] Therefore, the quest to establish the 'business-friendly' import clearance system, the need to increase the government's revenues, and the desire to enhance the competitiveness of Tanzania's ports have resulted in the setting up of the import clearance system which facilitates the flow of counterfeit goods into Tanzania.

e) International Trade and Regional Integration

The trade in counterfeit goods in Tanzania is linked to the global and regional counterfeiting business. Dishonest traders import and smuggle counterfeit goods from different countries and supply counterfeit products to the markets in Tanzania. As pointed out earlier in this chapter, the counterfeit goods flow to Tanzania from the world's largest sources of counterfeits situated in Asia.[117] Some counterfeit goods are trafficked from Europe. Other counterfeit goods flow to Tanzania from the EAC and SADC member states.[118] The bulk of counterfeit goods in the markets in Tanzania originate from its trading partners particularly the countries in Asia.[119] Tanzania's integration into the global and regional economies has made the country a destination for foreign-made counterfeit products originated from global and regional markets. The trade in counterfeit goods in Tanzania is part of the transnational counterfeiting business that affects other countries in the Eastern and the Southern African regions.

The flow of counterfeit goods into Tanzania has been made easy by economic liberalisation which allowed the opening up of the country's markets to foreign goods, services and capital. Liberalisation of the economy has facilitated transnational

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[116] The Citizen Reporter, *Zambia trusts Dar port, says TPA official*, The *Citizen* (Tanzania), 24 August 2010; Edward Qorro, *Dar Port must expand to beat Mombasa, Beira*, The *Citizen* (Tanzania), 3 November 2012.

[117] Interview: Commissioned officer, Law enforcement agency (30 September 2010).

[118] Interview: Manager, Anti-counterfeiting agency (25 September 2010).

[119] Waryoba Nyamkami, *Most fake electronics from Far and Middle East – FCC*, The *Guardian* (Dar Es Salaam), 30 October 2013. See also, Arusha Times Reporter, *'Chinese' handsets: phones or time bombs*, The *Arusha Times* (Arusha), 12 - 18 September 2009, Issue No. 00584.

movements of counterfeit goods and persons who smuggle counterfeit goods to and from Tanzania. The above situation has been exacerbated by the fact that counterfeiting activities are widespread in China[120] and India,[121] the countries which are among Tanzania's major trade partners. Similarly, the markets in the EAC[122] and the SADC,[123] of which Tanzania is a member, are flooded with counterfeit goods. The counterfeit products from the global and regional markets flow into Tanzania's markets.

7.2.3. Impact of the Counterfeit Goods Trade

In Chapter Five it was revealed that the trade in counterfeit goods in Tanzania affects consumers, traders, the economy and the society in general. Consumption of 'safety critical' counterfeit products poses health and safety risks to consumers.[124] Consumption of malfunctioning counterfeit products imposes financial burden on the purchasers of such commodities.[125] Similarly, consumption of substandard and harmful counterfeit products negatively affects the quality of life of users.[126] The consumers incur costs or are exposed to dangers associated with the disposal of malfunctioning and unsafe counterfeit products.

Consumers in Tanzania could benefit from consumption of counterfeit goods if those goods were 'non-safety critical' goods, if the counterfeit products were of the same quality as that of genuine commodities, or if the counterfeit goods were durable and sold

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120 Donald P Harris, 'The Honeymoon is Over: The US-China WTO Intellectual Property Compliant,' (2008) 32 *Fordham International Law Journal* 96, 102 - 105.
121 Saikrishna Rajagopal & Bharatvir Singh, 'Developing an Effective Anti-counterfeiting Strategy for India,' (2013) *Managing the IP Lifecycle* 49, 51 - 52.
122 Christabel Ligami, *Region loses $600m to counterfeits, seeks new laws*, The *East African* (Nairobi), 2013.
123 See *Let us check counterfeit products*, The *Zambia Daily Mail* (Lusaka), 31 October 2013.
124 Interviews: Mukadamu (20 October 2010); Shufaa (30 October 2010).
125 Interview: Chivanga (29 September 2011); Questionnaires: consumers (various dates).
126 Henry Muhanika, *Counterfeit goods in our midst: the challenge ahead*, The *Guardian* (Dar Es Salaam), 25 November 2012; Editor, *war on counterfeit goods must be intensified*, The *Daily News* (Dar Es Salaam), 8 October 2012.

at lower prices than those of genuine goods.[127] On the contrary, the bulk of counterfeit goods in Tanzania are commodities which are substandard, defective or harmful products.[128] The trade in 'non-safety critical' counterfeit goods may confer a 'benefit' to consumers in that the business facilitates the provision of necessary goods (such as clothes and shoes) to low-income people.[129] Similarly, consumption of luxury counterfeit goods such as leather products, watches and cellular phones may confer 'signalling' or 'expressive' utility and enhance the social and economic 'status' of the consumers of those goods without paying the full market value for extrinsic utility.[130]

The trade in counterfeit goods adversely affects the economic interests of traders in Tanzania because it displaces the markets for genuine goods, thereby causing traders to lose sale revenue and future profits. Legitimate traders are forced to scale down or shut down their business as a result of the operation of the counterfeit goods business. The traders suffer loss of brand value and reputational risks.[131] and they incur costs of fighting counterfeiting activities that could have been used to expand their business.[132] This study found no evidence which indicates that suppliers of genuine products in Tanzania derive benefits from the operation of the counterfeiting business. There was no indication that suppliers of genuine goods use counterfeiting operations as vehicles for promoting genuine products. Also, no evidence was found to show that manufacturers or sellers of genuine products in Tanzania have merged or could merge with enterprises or individual traders who manufacture, distribute or sell counterfeit goods. Arguably, many small-scale traders in Tanzania sell counterfeit goods and these traders derive 'benefits' from selling those

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127 Interview: Director , Ministry of Industry and Trade (22 October 2010).
128 Interview: Commissioned officer, Law enforcement agency (30 September 2010).
129 Observations: Dar Es Salaam (10 November 2011), Singida (19 October 2011), Mtwara (27 October 2011).
130 Interview: Economics Researcher (21 October 2010).
131 Interview: Director, Traders' organization (9 November 2011).
132 Interview: Sales Officer, company producing food and soft drinks (22 September 2010).

commodities. The benefits are illegal because, as I pointed out in Chapter Six, under the Merchandise Marks Act, selling counterfeit goods is an offence.[133]

If the trade in counterfeit goods in Tanzania is left uncontrolled or is weakly regulated, the trade will continue to hold back the country's industrial development.[134] It is difficult for Tanzania to implement its industrial policy successfully if the machinery, parts and equipment imported into Tanzania are counterfeit products. Thus, the counterfeit goods trade is a hindrance to Tanzania's efforts to promote the country's fragile industrial sector.[135] The country will not be able to improve the agricultural sector if farm implements, machinery, insecticides, pesticides, fertilizers and seeds are counterfeit products. The trade in counterfeit agricultural products undermines the development of the agricultural sector.[136] Similarly, programmes to prevent and control diseases or improve health services in Tanzania will not be successful if medicines and medical equipment in pharmacies and hospitals are counterfeit products.[137] Diseases such as malaria, tuberculosis and HIV/AIDs-related ailments cannot be controlled if the medicines for treating such diseases are counterfeit products.

The trade in counterfeit goods in Tanzania has had negative effects on many sectors including competition, internal and external trade, science and technology, industrial development, agriculture, public health, transport and consumer welfare and crime control. There are also fears that the counterfeit goods trade is associated with or fuels criminal activities such as tax evasion, smuggling, corruption and money laundering. The control of the counterfeit goods business drains resources from the public

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133 Section 6 of the Merchandise Marks Act.
134 Interview: Sales officer, Company producing food and soft drinks (22 September 2010).
135 Editor, *War on counterfeit goods needs more push,* The *Daily News* (Dar Es Salaam), 8 November 2010.
136 Editor, *Counterfeit seeds killing agriculture,* The *Guardian* (Dar Es Salaam), 27 September 2012.
137 See also, Dickson Ng'hily, *Government faulted over delay in fake ARVs probe,* The *Guardian* (Dar Es Salaam), 9 May 2013.

entities (government authorities and anti-counterfeiting agencies) and non-state actors (traders and consumers). The authorities and anti-counterfeiting agencies and non-state actors spend resources to fight against the trade. Therefore, the operation of the trade in counterfeit goods imposes negative externalities on the general society of Tanzania.

This study did not find any evidence to show that Tanzania can use the counterfeiting as a tool for facilitating non-consensual acquisition of modern technologies from industrialized nations. Unlike the NICs in Asia which have high imitative capacities, Tanzania does not have resources and capacity to facilitate the acquisition of modern technologies through counterfeiting. Tanzania has a low level of industrial capacity, it lacks appropriate infrastructures, and has a limited number of qualified technical experts.[138] Taking into account the above factors, it is impossible for Tanzania to use counterfeiting as a device for facilitating non-consensual acquisition of low-cost modern technologies from the industrialised nations.

The above discussion demonstrates that consumers, traders, the economy and the Tanzanian society in general suffer more harm caused by the operation of the trade in counterfeit goods than 'benefits' derived from the illicit trade. The above fact rationalises the regulation of the trade in counterfeit goods. In my view, the public interests justifications rationalise the adoption and implementation of regulatory measures to control the counterfeit goods trade in Tanzania. Other rationalisations are secondary to the public interest justifications.

The primary objective of controlling the trade in counterfeit goods in Tanzania is to prevent consumers and the general society from suffering harm resulting from the operation of the illicit trade. As pointed out earlier in this chapter, apart from inflicting

[138] Interview: Director , Ministry of Industry and Trade (22 October 2010).

financial loss on buyers, the use of 'safety-critical' counterfeit products exposes the consumers to safety and health risks. Secondly, scaling down or closing down industries or business of legitimate traders causes loss of jobs and the decline in the government's revenue. Thirdly, negative effects of the trade in counterfeit goods on sectors including industry, agriculture and public health undermine socio-economic development of Tanzania. Unlawful activities associated with or fuelled by the counterfeit goods trade undermine peace, security and the welfare of the people in Tanzania. Fourthly, public resources, which government authorities and agencies in Tanzania utilise to curb the trade in counterfeit goods, could be used to provide services such as education, health and water to the people.

There are other justifications which rationalise control of the trade in counterfeit goods in Tanzania. Firstly, regulation is intended to promote honesty, fairness and integrity in the operation of the liberalised markets in Tanzania. Secondly, the trade is 'unfair' and 'anti-social' business practice which should to be controlled. This approach disregards consumers' preference or choice to purchase or use counterfeit goods, or their ability to differentiate genuine commodities from counterfeit goods, or the benefits that consumers may derive from consuming counterfeit commodities. The benefits are insignificant as compared to the adverse impact which consumers suffer and the far reaching social and economic harms inflicted upon the Tanzanian society.

Based on Wall and Large's argument,[139] as highlighted earlier in this chapter, policing the trade in 'non-safety critical' counterfeit goods and counterfeiting activities which do not harm the general society may not be a high priority for government authorities and counterfeiting agencies in Tanzania. This should be the responsibility of

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[139] Wall & Large, 'Jailhouse Frocks: Locating the Public Interest in Policing Counterfeit Luxury Fashion Goods,' (note 59) 1113.

the trademark owners. Government authorities and anti-counterfeiting agencies in Tanzania need not to use public resources to protect private rights of trademark owners particularly the knowledge-based MNCs from industrialised nations.

My opinion is that the primary beneficiaries of the anti-counterfeiting policy should be local consumers, traders and the Tanzanian society. Local traders have the responsibility to protect their trademarks. Likewise, traders from the industrialized nations have the capability of taking legal action to protect their intellectual property. The foreign MNCs have the capability to appoint local agents in Tanzania who will undertake the task of enforcing the MNCs' trademark rights. There is little public interest for Tanzania to use its scarce public resources to protect the trademarks of the foreign MNCs if the violation of such intellectual property does not involve inflicting harms on consumers and the general society. After all, government authorities and anti-counterfeiting agencies in Tanzania lack or have limited resources and, therefore, are not capable of protecting private intellectual property from the industrialized nations.

7.3. The Anti-counterfeiting Regulatory Policy in Tanzania

7.3.1.National and Sectoral Policies

Tanzania does not have specific national or sectoral policy documents which address the trade in counterfeit goods.[140] The National Trade Policy of 2003 prescribes the general policy framework for dealing with trade malpractices in Tanzania, but the Policy does not deal directly with control of the trade. Sectoral policies which deal with intellectual property, science and technology, industry, agriculture, public health and consumer protection issues are generally silent about issues concerning control of the trade in counterfeit goods. Some high-ranking officials of the government of Tanzania

[140] Interviews: Director, Anti-counterfeiting Agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).

have issued policy statements which address the counterfeiting business in the country. These public statements do not describe in detail frameworks for controlling the trade in counterfeit goods. The examination of the above policy measures reveals that the anti-counterfeiting policy in Tanzania is fragmented, uncoordinated or not comprehensive and that the policy does not prescribe adequate guidelines and frameworks for curbing the counterfeit goods trade.

The trade in counterfeit goods in Tanzania is a cross-cutting phenomenon that affects many sectors or areas such as intellectual property, competition, internal and external trade, science and technology, industrial development, agriculture, public health, consumer protection and crime control. The existing policy mechanisms in Tanzania do not prescribe comprehensive guidelines to enable the involvement of government authorities and agencies (which have mandates to deal with matters in the above sectors) in implementing the anti-counterfeiting policy. The fight against the trade in counterfeit goods requires participation of government authorities and anti-counterfeiting agencies and non-state actors including consumers and consumer protection associations, traders and their organisations, activists, scholars and other stakeholders. The existing policy mechanisms do not prescribe adequate frameworks for the public-private partnership between government authorities, agencies, non-state entities and actors in implementing the anti-counterfeiting policy.

The lack of the national policy document or the sectoral policy documents that prescribe guidelines for controlling the trade in counterfeit goods in Tanzania has several implications. First, the objectives of anti-counterfeiting initiatives are not clear and there are limited details as to how the objectives, if any, can be attained and how resources for the implementation of the initiatives can be sourced and mobilised. Second, there are no guiding principles for harmonising several laws for controlling the trade in counterfeit

goods. Third, there are no guidelines that govern participation of non-governmental entities and non-state actors such as consumers, traders, scholars and activists in the fight against the trade.

The national and sectoral policies for controlling the trade in counterfeit goods in Tanzania need to be formulated and adopted. Some challenges or problems may be encountered in the process of formulating and adopting the policies. While personnel from government authorities and anti-counterfeiting agencies, traders, scholars and the media may have the capacity to participate in the formulation and adoption of the policies, the involvement of groups, especially consumers and the general public, may be limited. For instance, consumers in Tanzania are weakly organised. Thus, it will be difficult for the government authorities to secure and incorporate views of the consumers into the policies without empowering them and strengthening their organisations. There is also the tendency by the government authorities in Tanzania to sideline local non-state actors and stakeholders in public policy and regulation-making processes. In some instances, government personnel and foreign actors participate in formulating policies which are subsequently imposed on the people. The policies which govern investments and mining in Tanzania were formulated as a result of the pressures from multilateral institutions and foreign governments and they were, in fact, prepared by foreign 'experts.' [141] The general view is that the above policies are aimed at safeguarding the interests of foreign MNCs.[142] With regard to control of the counterfeit goods trade, if the policy formulation process is monopolised by the government technocrats and foreign experts,

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[141] See for instance, France Bourgouin, 'Mining for Sustainable Development? What Role for Multinational Corporations in Resource-rich Developing Countries,' A Paper presented at the *Rethinking Development in an Age of Scarcity and Uncertainty* Conference, University of York, 19-22 September 2011. <http://eadi.org/gc2011/bourgouin-232.pdf> (accessed 29 December 2013).

[142] See, for instance, Guardian Correspondent, *Don to govt: Have shares in every mining company,* The *Guardian* (Dar Es Salaam), 25 November 2013. See also, Richard Mgamba, *How foreign miners made their fortune in Tanzania,* The *Guardian* (Dar Es Salaam), 1 April 2012.

Tanzania will have policies based on the views of the technocrats and foreign experts without incorporating the opinions of other local stakeholders.

Related to the above, local stakeholders and actors should be watchful and ensure that the national and sectoral anti-counterfeiting regulatory policies in Tanzania take into account the local conditions of the country and interests of Tanzanians.[143] The local stakeholders and actors should ensure that foreign actors do not interfere with or 'hijack' the process of formulating the policies. If actors and agencies from the industrialized nations, especially the United States and the EU, steer the policy-making process, it will be impossible for Tanzania to have anti-counterfeiting policies and law that will be suitable for the country's development and responsive to the country's socio-economic conditions.

7.3.2. Regulatory Techniques for Controlling the Counterfeit Goods Trade

The law and alternative regulatory mechanisms are policy instruments for dealing with the trade in counterfeit goods in Tanzania. Government authorities and anti-counterfeiting agencies and non-state actors use the law to fight the counterfeit goods trade in Tanzania.[144] Similarly, the government authorities and anti-counterfeiting agencies and non-state actors use different forms of alternative regulatory mechanisms to control the counterfeit goods trade.[145] While the law and alternative regulations are useful policy tools for fighting against the trade in counterfeit goods in Tanzania, many factors weaken the potential of the policy regulatory instruments for curbing the trade.

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[143] For instance, Tanzanians would like to have a policy which will facilitate, among other things, acquisition of low-cost technologies from industrialized nations and availability of low-priced goods such as medicines

[144] Interview: Director, Anti-counterfeiting agency (17 September 2010); Written response: Law researcher (18 May 2011).

[145] Interviews: Director, Traders' organization (9 November 2011); Director, traders' organization (9 November 2011).

a) Anti-counterfeiting Law

Criminal law and civil law for controlling the trade in counterfeit goods in Tanzania evolved from English laws imposed on the country by the British colonial government. Through British colonialism, foreign anti-counterfeiting law was directly transplanted into Tanzania (by then Tanganyika). Subsequent to Tanganyika's independence, the foreign law was indirectly incorporated into Tanzania's anti-counterfeiting law when the country was obligated to align its intellectual property and anti-counterfeiting laws to multilateral intellectual property treaties particularly the TRIPs Agreement and the post-TRIPs intellectual property treaties. Through the implementation of these treaties, Tanzania is compelled to adopt the Euro-American intellectual property and anti-counterfeiting laws. Moreover, the technical assistance provided by multilateral agencies such as the WIPO and experts from the United States and the EU is another way through which foreign intellectual property and anti-counterfeiting laws and practices have been or are imposed onto Tanzania.

The involvement of foreign actors in drafting or lobbying for enactment of legislation can have undesirable consequences for Tanzania and its people. It is through such involvement of foreign actors in the drafting provisions with the 'TRIPs-Plus effects' were introduced into the Merchandise Marks Regulations of 2008. This means that the Merchandise Marks Regulations prescribe higher standards for controlling the trade in counterfeit goods than those prescribed in the TRIPs Agreement.[146] The TRIPs Agreement defines 'counterfeit trademark goods' as those goods produced in violation of rights related to trademarks, whereas the Merchandise Marks Regulations define counterfeit goods as those goods produced in violation of rights to any form of intellectual property (such as copyrights, patents, or trademarks). Moreover, the TRIPs Agreement requires the WTO to legislate and vest the national authorities with powers to

[146] Peter K Yu, 'The International Enclosure Movement,' (2007) 82 *Indiana Law Journal* 827, 866 - 870.

deal with foreign-made counterfeit goods. Under the Merchandise Marks Regulations, authorities in Tanzania have powers to seize, detain and destroy foreign-made counterfeit products.

Literature from Uganda and Kenya shows that local actors and stakeholders tend to oppose 'foreign' laws when they perceive that the laws undermine interests of the people. In Uganda, where the government published the Anti-Counterfeit Bill of 2010, some members of the public opposed the Bill because they believed that foreign agents and institutions from the United States and the EU were behind the drafting of the Bill. According to Mullard, the EU funded the drafting of the Ugandan Counterfeit Goods Bill that would result in the enactment of legislation that could affect access to medicines. Activists, worried that the proposed legislation would outlaw generics, have raised alarm at the allegations.[147] Some activists and academics have expressed their opposition to the Anti-Counterfeit Bill contending that, if the Bill is passed into legislation, such law will 'hinder patients' access to generic drugs. [This is because] real medicines can be costly and people pay out-of-pocket for their drugs.'[148] In my opinion, the perception by members of the public that a law is 'foreign' may undermine the legitimacy, enforcement and efficacy of that law. When a law lacks legitimacy, people may be reluctant to obey such a law [149] and, arguably, they may not be willing to assist the relevant authorities and agencies to enforce the law. Kingsley observes that 'If change is perceived as being forced from outside sources and not possessing domestic benefit or legitimacy, the laws are unlikely to be implemented successfully.... [The laws are] simply ignored or

[147] Asher Mullard, 'EU Implicated in Controversial Counterfeiting Bill, '(2010) 375 *Lancet* 1335, 1335.
[148] Tatum Anderson, 'Confusion over Counterfeit Drugs in Uganda,' (2009) 373 *Lancet* 2098, 2098.
[149] Tom R Tyler, 'Compliance with Intellectual Property Laws: A Psychological Perspective,' (1996 - 1997) 29 *New York University Journal of International Law & Policy* 219, 229 - 232.

rejected.' [150] And thus, conflicts between supporters and opponents of a 'foreign' anti-counterfeiting law may occur.

In Kenya, the conflict ensued between groups which were supporting the enactment and enforcement of the Anti-Counterfeit Act of 2008[151] and the public health and human rights advocates who were of the view that foreign actors and local trademark owners pushed and lobbied for the enactment of the Act. It was asserted that the legislation was intended to serve private interests of foreign manufacturers of pharmaceutical products. [152] The latter groups felt that foreigners were the force behind the enactment of the Anti-Counterfeit Act of 2008. The general view of the advocates was that the legislation undermined the right of the people to access low-priced generic medicines.[153] The conflict resulted in the institution of a civil case against the government to challenge the constitutionality of the Act. In the case of *Patricia Asero Ochieng & 2 Others v The Attorney General,* [154] the petitioners, persons living with HIV/AIDs, sued the government of Kenya at the High Court of Kenya to challenge the Anti-Counterfeit Act 2008. The plaintiffs asserted, among other things, that the wide definitions the terms 'counterfeiting' and a 'counterfeit product' in the legislation would limit access to generic medicines and that infringed their right to access to cheap medications for HIV/AIDs and life. Articles 26(1), 28 and 43(1) (a) of the Constitution of Kenya of 2010 protect the fundamental rights to life, human dignity and health. The Court ruled that the disputed terms were too wide and Sections 2, 32, and 34 of the Act violated the plaintiffs'

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[150] Jeremy J Kingsley, 'Legal Transplantation: Is What the Doctor Ordered and are the Blood Types Compatible?: The Application of Interdisciplinary Research to Law Reform in the Developing World - A Case Study of Corporate Governance in Indonesia,' (2004) 21 *Arizona Journal of International & Comparative Law* 493, 511.

[151] These include the Kenya Association of Manufacturers, the Pharmaceutical Society of Kenya Private Sector Alliance, the American Chamber of Commerce of Kenya .

[152] These advocates include: the AIDs Law Project, Kenya AIDs NGOs Consortium, Kenya Legal and Ethical Issues Network on HIV and AIDs and Women Fighting AIDS in Kenya.

[153] Dagi Kimani, *Anti-fakes bill threatens access to medicines*, The *East African* (Nairobi), 8 September, 2008.

[154] Petition No. 409 of 2009, High Court of Kenya, Nairobi.

constitutional rights to life and health as they severely limited their access to generic drugs. The Court added that the government of Kenya should apply the provisions of Section 2 of the Act alongside its constitutional obligation to 'ensure that its citizens have access to the highest attainable standard of health and make appropriate amendments to ensure that the rights of petitioners and others dependent on generic medicines are not put in jeopardy.'[155]

The anti-counterfeiting law in Tanzania has many characteristics that were retained from the English colonial law for controlling the trade in counterfeit goods. The law has the features required by the Paris Convention and the TRIPs Agreement. As a result, the anti-counterfeiting law is not supported by the efficient machinery or environment to facilitate the effective enforcement of the law in Tanzania. This factor weakens the efficiency of the legal machinery in curbing the counterfeit goods trade.

Some authors have argued that transplantation of laws allows 'importing' countries to spend less time to enact or reform their laws compared to the time taken for the laws to evolve in the 'exporting' countries. However, available evidence from the former socialist and communist countries in Central and Eastern Europe suggests that the enforcement of transplanted law is generally problematic.[156] Weak legal institutions have been cited as an obstacle to the enforcement of the transplanted laws.[157] In case of countries in Africa, it has been observed that though most African countries have aligned their municipal laws to the international intellectual property norms, they lack the

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[155] At p. 48. See also Jacinta Nyachae & Paul Ogendi, 'Anti-Counterfeiting and Access to Generic Medicines in Kenya: Reviewing *Patricia Asero Ochieng & 2 Others v. The Attorney General,* ' (2012) 13 *ESR* 12, 14 - 15; See also Zenande Booi, 'Generics, Patents, and HIV in Kenya: *Ochieng and Others v Attorney General* (2012),' (2013) 1 *People's Law Journal* 50 - 53.

[156] Daniel Berkwitz, Katharina Pistor & Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect,' (2003) 47 *European Economic Review* 165, 166.

[157] *Ibid* 166.

capacity to effectively enforce the laws.[158] This is a result of, among other factors, inadequacies of authorities and agencies tasked to enforce the laws efficiently.

The transplantation of intellectual property and anti-counterfeiting laws onto Tanzania was not accompanied by the establishment or presence of the environment to facilitate the efficient enforcement of the laws. Firstly, as demonstrated in Chapter Six, the government authorities and anti-counterfeiting agencies have limited resources to enable them to enforce the anti-counterfeiting law efficiently. Secondly, for many years people in Tanzania have been practising the African traditional communalism[159] and, due to that fact, the concept of private intellectual property is underdeveloped. The idea of private intellectual property is generally alien to many people in Tanzania. Thirdly, science and technology and industrial development in Tanzania are at the infancy stages.[160] There are few indigenous owners of brand-good names protected by trademarks. Arguably, government agencies and local traders do not have incentives to push for and/or participate in protecting trademarks owned by foreign intellectual property owners.

Intellectual property and anti-counterfeiting laws in the Europe and the United States evolved over many centuries. This evolution was a result of certain conditions and developments, namely: i) the existence of a well-established concept of private intellectual property,[161] ii) the advancement of technology and industrial production of

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158 Patricia Kameri-Mbote, 'Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya,' International Environmental Law Research Centre, Working Paper No.2, 2005, p 5.

159 Bonny Ibhawoh & J I Dibua, 'Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Quest for Social and Economic Development in Africa,' (2003) 8 *African Journal of Political Science* 59, 62 - 64.

160 Astrid Szogs, *Technology Transfer and Technological Capability Building in Informal Firms in Tanzania* (Unpublished PhD Thesis, University of Lund, 2010) 91.

161 Robert P Merges, 'The Economic Impact of Intellectual Property Rights: An Overview and Guides,' (1995) 19 *Journal of Cultural Economics* 103, 105 -107.

knowledge-intensive products,[162] and iii) the expansion of international trade in the technology-intensive products.[163] The above factors necessitated the enactment of national laws and, later, international treaties for protecting intellectual property. Subsequently, multilateral intellectual property treaties were adopted. In addition, the EU member states and the United States have reasonably adequate resources which are necessary for the efficient enforcement of the intellectual property and anti-counterfeiting laws. Moreover, several non-state actors are active to enforce the intellectual property rights and anti-counterfeiting laws. In contrast, the concept of private intellectual property was introduced into Tanzania and during colonialism; it is an alien concept to many people in Tanzania. Also, the transplantation of foreign intellectual property and anti-counterfeiting laws on Tanzania was not accompanied by creation of an environment for efficient enforcement of the laws.

Due to the municipal nature of the anti-counterfeiting law in Tanzania, the law can only be applied to curb the trade in counterfeit goods within the country. This municipal law of Tanzania cannot be used to deal with the counterfeiting activities in foreign countries (where counterfeit merchandise originates). It is important to point out that the law of Tanzania cannot be used to fight the counterfeit goods trade in Zanzibar.[164] Mainland Tanzania uses customs law and border controls to stop the importation or smuggling of counterfeit products from different countries including Zanzibar. The customs law and authorities in Tanzania have inadequacies which limit their usefulness in controlling the flow of foreign-made counterfeit goods into the country's markets.[165] Tanzania continues trading with countries including China and India where the bulk of

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[162] Ronald V Bettig, *Copyrighting Culture: Political Economy of Intellectual Property* (Oxford: Westview Press, 1996) 15 - 26.

[163] Lester C Thurow, 'Needed: A New System of Intellectual Property Rights,' (1997) *Harvard Business Review* 95, 97.

[164] As pointed out in Chapter One, Tanzania mainland and Zanzibar form the United Republic of Tanzania. But, the anti-counterfeiting law of Tanzania mainland does not apply to Zanzibar.

[165] Editor, *Crossroads: TRA can't win the battle against 'coastline,'* The *Citizen* (Dar Es Salaam), 26 May 2013.

counterfeit goods sold in Tanzania originates. The control of the counterfeit goods business in China[166] and India[167] is not adequate. At present, there are no bilateral treaties between Tanzania and the above countries that provide for mechanisms for controlling the flow of counterfeit products from China and India into Tanzania.

As pointed out in Chapter Six, the EAC is in the process of adopting the anti-counterfeiting policy and legislation. This process, which is expected to result in the harmonisation of anti-counterfeiting laws in the EAC nations, has been slow and complicated. It is not known when the process will be finalised. One newspaper has observed that the EAC countries 'remain divided on a proposed regional law to curb the inflow... [Some members have not taken steps] to endorse the proposal by the EAC [in order] to enact [new] anti-counterfeit [laws]'[168] which would synchronise laws for dealing with counterfeiting activities and the regional trade in counterfeit goods. The lack of harmonisation of the anti-counterfeiting laws makes it difficult for the EAC countries to have uniform and common regulatory approaches to deal with the trade in counterfeit goods within the region. The EAC member states have generally inadequate anti-counterfeiting laws and weak mechanisms for enforcing the laws. [169]

Likewise, the SADC has an inadequate framework for undertaking joint actions to protect intellectual property and control the trade in counterfeit goods within the region. McPhee observes that the SADC countries have established the cross-border initiatives and regional arrangements dealing with several policy issues, but such initiatives 'do not provide for cross-border protection of [intellectual property] rights,

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166 Daniel C K Chow, 'Counterfeiting in the People's Republic of China,' (2000) 78 *Washington University Law Quarterly* 1, 16 - 26.

167 R Balamurugan & R Radhakrishnan, 'Protection of Intellectual Property Rights an Indian Perspective,' (2010) 17 *International Journal of Management Studies* 19, 30.

168 Guardian Reporter, *Counterfeit drugs to continue flowing into East Africa,* The *Guardian* (Dar Es Salaam), 25 February 2010.

169 East African Community, *Formulation of an EAC Policy on Anti-Counterfeiting, Anti-piracy and other Intellectual Property Violations: Final Report,* (unpublished report, 2009) pp 9 - 36.

leaving it up to the various brand owners and investors to ensure that these rights are ... protected in [the member states.]'[170] The laws and institutions in many SADC countries have not been effective in stamping out the trade in counterfeit goods. The lack of or limited resources contribute significantly to undermine the efficacy of the legal machineries in many SADC countries to control the trade in counterfeit goods. Likewise, individual SADC countries with laws for fighting intellectual property violations and counterfeiting have weak mechanisms for enforcing the laws.[171]

In Chapter Six it was observed that Tanzania has ineffectual anti-counterfeiting law and weak institutions for the law enforcement. Where the law is obsolete, prescribes lenient penalties, or has inconsistent provisions,[172] such law will be an ineffectual policy tool for controlling the trade in counterfeit goods. If government authorities and anti-counterfeiting agencies have insufficient resources (funds, equipment, personnel and expertise),[173] it will be difficult for these authorities and agencies to detect counterfeiting activities, investigate counterfeiting crimes and prosecute manufacturers, smugglers, importers, distributors or sellers of counterfeit goods efficiently. Similarly, where the authorities and agencies do not have offices in regions and districts, the chances for the authorities and agencies to control counterfeiting activities and the counterfeit goods trade in all regions and districts of Tanzania will be minimal. If the police and judiciary are underfinanced, it will be difficult for them to enforce the anti-counterfeiting law effectively.

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[170] Vanessa McPhee, 'Cross-border Brand Protection in Southern Africa,' (2007) Building and Enforcing Intellectual Property Value 238, 239.

[171] Peter Gastrow, 'Organized Crime in the SADC Region Police Perceptions,' <http://dspace.cigilibrary.org/jspui/bitstream/123456789/31495/1/Mono60.pdf?1> (accessed 8 January 2014)

[172] Interview: Commissioned officer, Law enforcement agency (30 September 2010). See also, Guardian Correspondent, *Expert cries foul over fake seeds,* The *Guardian* (Dar Es Salaam), 3 May 2013.

[173] Editor, *Empower TFDA in war on fakes,* The *Guardian* (Dar Es Salaam), 26 March 2012.

The efficacy of the anti-counterfeiting law and institutions depends on, among other things, the efficiency of measures adopted to tackle malpractices (such as corruption, collusion with offenders, and failure to abide by ethics and the lack of professionalism) affecting the FCC, TFDA, TBS, TRA and the police and courts. It is apparent that the institutional reforms which Tanzania has been implementing, as described in Chapter Six, have not enabled the above public institutions to tackle the cited malpractices. Some surveys have indicated that corruption is rife in the judiciary, the police and the TRA.[174] If the malpractices are not controlled, the capacity and efficacy of the above authorities to curb the trade in counterfeit goods will be compromised.

Tanzania is one of the poorest countries in Sub-Saharan Africa. Many people are afflicted with diseases such as malaria, tuberculosis and HIV/AIDs.[175] The country has inadequately developed transportation infrastructures[176] and inadequate provision of social services such as water, education and health services.[177] Tanzania is a highly indebted country and has been struggling to repay debts to international financial institutions and developed nations.[178] It is plausible to expect that government authorities and agencies in Tanzania will place higher priorities in solving the above problems than making efforts to protect intellectual property and control the trade in counterfeit goods.

Non-use of the law and legal machinery by traders and consumers in Tanzania to fight the trade in counterfeit goods is a critical issue. Few traders in Tanzania use the law

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174 Lucas Liganga, *Judiciary, police top EA graft list,* The *Citizen* (Dar Es Salaam), 13 November 2010; Sylvester Domasa, *Survey: Police, Judiciary, TRA most corrupt,* The *Guardian* (Dar Es Salaam), 19 November 2011.

175 F S Mhalu, 'Burden Diseases in Poor Resource Countries: Meeting the Challenges of Combating HIV/AIDs, Tuberculosis and Malaria,' (2005) 7 *Tanzania Health Research Bulletin* 179, 180 - 183.

176 Lourdes D. Olvera, Didier Plat & Pascal Pochet, 'Transportation Conditions and Access to Service in a Context of Urban Sprawl and Deregulation: The Case of Dar Es Salaam,' (2003) 10 *Transport Policy* 287, 288 - 290.

177 Masuma Mamdan & Maggie Bangser, 'Poor People's Experiences of Health Services in Tanzania: A Literature Review,' (2004) 12 *Reproductive Health Matters* 138, 138 -145.

178 Aisha Rweyemamu, *Government debt hovers on non-sustainability, NGO insists,* The *Guardian* (Dar Es Salaam), 23 February 2013.

to curb counterfeiting activities affecting their products.[179] Many of the affected consumers in Tanzania do not use the legal machinery to enforce their rights against manufacturers or sellers of counterfeit products.[180] The high legal fees and court charges and complex bureaucratic procedures prevent the traders and consumers from accessing the legal machinery.[181] Malpractices such as corruption, inefficiencies and negligence make the legal machinery in Tanzania user-unfriendly to the populace including traders and consumers of goods.[182] The legal machinery in Tanzania is overwhelmed by several challenges which undermine its efficacy to tackle illicit activities,[183] which include the trade in counterfeit goods.

Traders and consumers' limited access to the legal machinery is also attributed to factors such as limited or non-availability of legal aid provided by the government authorities and agencies and limited accessibility of legal aid provided by NGOs.[184] Unless the provision of legal aid is expanded, many under-resourced traders and low-income consumers in the country will not be able to use the legal machinery to enforce their rights. The traders and consumers will have limited capacity to take legal action against suppliers of counterfeit goods.

b) Alternative Anti-counterfeiting Regulations

Public authorities and agencies and non-state actors in Tanzania use different techniques as alternatives to the law to tackle the trade in counterfeit goods. The

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179 Written response: Law researcher (18 May 2011).
180 Interviews and questionnaires: (consumers) (various dates).
181 Written response: Law researcher (18 May 2011).
182 Written response: Law practitioner (11 May 2011).
183 Guardian Reporter, *Police called upon to work diligently, despite low wages,* The *Guardian* (Dar Es Salaam), 19 February 2014; Lusekelo Philemon, *Stop unnecessary judgment delays, judiciary officials told,* The *Guardian* (Dar Es Salaam), 13 November 2012.
184 Devota Mwachang'a, *CJ: address scarcity of advocates,* The *Guardian* (Dar Es Salaam), 18 December 2012; Gerald Kitabu, *The rich versus the poor in Tanzania's courts,* The *Guardian* (Dar Es Salaam), 17 December 2013.

alternative regulations are subsidiary policy instruments for controlling the trade.[185] The anti-counterfeiting agencies use alternative regulatory mechanisms particularly information-based regulation to curb the trade in counterfeit goods.[186] Traders use information and technologies to counteract the counterfeiting business.[187] Some traders' organisations and consumer protection associations disseminate information to enable traders and consumers to fight against the trade in counterfeit goods.[188] Some traders use the market-based instruments to tackle the counterfeiting business. Moreover, some government authorities and members of the business community apply African communalist ideals and practices to address the trade in counterfeit goods.

There are several challenges which hamper the potential of the alternative regulations as policy instruments to curb the trade in counterfeit goods in Tanzania. There are limitations which are inherent in the regulatory instruments. Some instruments used to convey information are written in foreign or technical languages that cannot be understood by the general public. The information contained in some of the instruments is based on the 'counterfeit goods are defective, inferior quality and harmful products' hypothesis which, in some cases, fails to dissuade traders and consumers of goods from participating in the counterfeit goods trade. With regard to the anti-counterfeiting technologies, a few well-resourced traders can use this technique. Many enterprises in Tanzania are owned by medium and small-sized operators.[189] These enterprises do not have the capacity to acquire and use modern technologies to counteract counterfeiting.

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185 Written response: Law practitioner (11 May 2011); Interview: Director, Traders' organization (9 November 2011).

186 Felix Andrew, *FCC take awareness campaign to Iringa and Mbeya,* The *Guardian* (Dar Es Salaam), 27 February 2012.

187 Interview: Principal officer, Company manufacturer of building materials (22 September 2010).

188 Interviews: Director, Traders' organization (9 November 2011); CEO, Consumer protection association (24 October 2010).

189 *SMEs should heed advice on markets,* The *Guardian* (Dar Es Salaam), 4 July 2012. See *SMEs told to move from poverty reduction to wealth creation,* The *Guardian* (Dar Es Salaam), 11 June 2012.

There are also problems relating to the application of information and technologies as policy instruments for controlling the trade in counterfeit goods. Dissemination of information is mainly carried out in the urban areas leaving many people in rural areas without access to anti-counterfeiting information. Similarly, the effectiveness of anti-counterfeiting technologies is undermined by the fact there is the lack of equipment and expertise to enable law enforcement agencies, traders and buyers to use the anti-counterfeiting technologies to tackle counterfeiting and the trade in counterfeit goods. Some traders and consumers disregard anti-counterfeiting information or technologies because they believe that they can distinguish genuine goods from counterfeit goods without using the information or technologies.

Government authorities in Tanzania do not use market-based instruments such as tax exemptions, subsidies and financial benefits to encourage traders to stop supplying counterfeit goods to the markets. Arguably, the authorities have not explored the potential of the market-based instruments as policy tools for controlling the trade in counterfeit goods. Many manufacturers in Tanzania are medium and small-scale enterprises which do not have the resources to enable them to use a wide range of the market-based instruments to curb the counterfeit goods trade. They use a limited number of the market-based instruments. The commonly used instruments include the provision of discounts, guarantees, after-sale services and financial prizes to encourage consumers to purchase genuine goods.[190]

The use of self-regulation as a policy instrument for controlling the trade in counterfeit goods in Tanzania is underdeveloped. This situation is attributed to three factors. First, there is a general tendency for traders and traders' organisations to regard law as the effective instrument for implementing the anti-counterfeiting policy. This is

[190] Observations: Dar Es Salaam (10 November 2011), Mtwara (27 October 2011).

why traders' organisations (including the CTI) have called on the government to enact a new anti-counterfeiting law,[191] without proposing alternative regulatory approaches to controlling the trade in counterfeit goods. Second, there is a general lack of or limited information and knowledge about the operation of self-regulation among manufacturers, importers and sellers of goods and services in Tanzania. The use of self-regulation is limited to few professions and industries such as law, medicine, engineering, banking and insurance. Third, many traders in Tanzania are not affiliated to business associations and this situation makes it difficult for self-regulation to operate.

The government authorities and anti-counterfeiting agencies in Tanzania have not explored the potential of self-regulation as a policy tool for fighting against the trade in counterfeit goods in the country. There are several traders' and professionals' associations which could use this regulatory approach to deal with the counterfeit goods trade. Traders' organisations in Tanzania such as the CTI and the TCCIA can set up mechanisms to control the production, importation and sale of counterfeit goods among their members. The Medical Association of Tanzania (MAT), the Pharmacy Council of Tanzania (PCT) and the Association of Private Health Facilities of Tanzania (APHFT) can adopt self-regulatory mechanisms to control the counterfeit goods trade which involves pharmaceutical products and medical equipment. Similarly, the Engineers' Registration Board of Tanzania (ERB) can participate in the fight against the trade in counterfeit construction materials by its members.

The usefulness of the African communalist principles and practices in tackling the trade in counterfeit goods in Tanzania seems to be limited. This is due to the fact that these ideals and practices are less formal, uncoordinated and not incorporated into the 'formal' regulatory systems for controlling the trade. Mechanisms that are commonly

[191] Felister Peter, *CTI: Enact one law on counterfeiting,* The *Guardian* (Dar Es Salaam), 9 March 2012.

regarded to be formal include laws, information-based and technology-based regulations. Additionally, the adoption of the market-based policies paved the way for the emergence of the individualistic tendencies. This shift of the policies has undermined the relevance or significance of the socialistic ideals and practices as tools for fighting vices including the trade in counterfeit goods in Tanzania.[192] Moreover, the communitarian ideals and practices have been eroded and this has paved the way for individualistic and unethical behaviours and practices which embrace, among others, manufacturing, importing, smuggling and selling counterfeit products.

It is important to point out that the law in Tanzania addresses law-related factors which drive the trade in counterfeit goods. Alternative regulatory mechanisms address some of the non-law related drivers of the counterfeiting business. The law-related and alternative regulatory approaches do not incorporate mechanisms that would address some factors which create conditions for the operation of the counterfeit goods trade. The above approaches do not address issues related to limited industrial and technological capacity in Tanzania which undermine the ability of local manufacturers and sellers in the country to supply the markets with good-quality genuine products. As pointed out earlier in this chapter, the lack of or limited industrial and technological capacity in Tanzania are debilitating the capacity of local manufacturers to produce goods to cater for local markets in the country. This situation has created the opportunity for unscrupulous traders to supply counterfeit goods to the markets. Additionally, the above strategies do not address endemic poverty afflicting many people in Tanzania which makes low-income consumers susceptible to purchasing low-priced counterfeit goods.

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[192] Florence Kaijage, *Shivji: Revive Arusha Declaration, else prosperity will remain elusive,* The *Guardian* (Dar Es Salaam), 1 May 2011.

7.4. Conclusion

The discussion in this chapter has demonstrated that the evolution of the trade in counterfeit goods in Tanzania occurred over many years and has been caused by political, economic and social factors. The inappropriate economic and industrial policies precipitated conditions for the emergence and growth of the counterfeiting business. The unsuitable policies failed to tackle domestic counterfeit production and trafficking of foreign-made counterfeit products. The legal machinery and the customs authorities failed to stop the supply of the counterfeit products in the markets in Tanzania.

The trade in counterfeit goods in Tanzania is driven by the political, economic and social factors. The driving factors operate internationally and domestically. With regard to the international dimension, the counterfeiting business in Tanzania is linked to the worldwide trade in counterfeit goods. This global business facilitates the flow of counterfeit goods into Tanzania's markets. This has been made easy by the integration of Tanzania into the global and regional economies and economic liberalisation whereby Tanzania has opened up its national economy and market to foreign capital, goods and services. It is through liberalisation of the economy, counterfeit goods flow to Tanzania's markets. At the national level, there are several factors which have motivated traders to supply counterfeit goods to the markets and consumers to demand those commodities. Traders are motivated to supply counterfeit goods to the markets due to the weaknesses of the regulation of the market-based economy in Tanzania; the limitations inherent in anti-counterfeiting laws and institutions that make the counterfeit goods trade a low-risk enterprise; and the lucrative nature of the illicit trade. As for the demand for counterfeit goods, low prices, shortages or unavailability of genuine goods in the markets, failure to detect counterfeit goods and the lack of awareness about the effects of consuming counterfeit goods are factors which make consumers purchase these products knowingly or unknowingly.

This chapter has demonstrated that the trade in counterfeit goods in Tanzania harmfully affects the welfare of consumers, economic interests of traders, the economy and general society. The trade has broader effects on different sectors of Tanzania's economy including industry, competition, agriculture and public health. There are positive aspects of the trade in counterfeit goods which include facilitating the availability of inexpensive products to low-income consumers and providing employment to small-scale traders who peddle counterfeit products. It is apparent, however, that negative effects of the trade in counterfeit goods on consumers, traders and the general society outweigh its positive aspects.

With regard to the regulation of the trade in counterfeit goods, government authorities and agencies and non-state actors in Tanzania use the law to control the trade. Due to several limitations of this approach, Tanzania has not been able to control the trade efficiently. Alternative regulations are applied to supplement the use of the law to curb the trade in counterfeit goods, but the use of alternative anti-counterfeiting regulations is undermined by several challenges. Consequently, the application of the law and alternative regulations has not helped Tanzania to stamp out counterfeiting activities and the counterfeit goods trade.

CHAPTER EIGHT

CONCLUSION

8.0. Recapitulation of Issues Examined

This study has examined generally the worldwide counterfeiting business, the global anti-counterfeiting regulatory policy and regulatory techniques for controlling the trade in order to understand their links, impact or influence over the trade in counterfeit goods and its regulation in Tanzania. Specifically, the study looked at the salient features, drivers and impact of the trade in counterfeit goods in Tanzania, the regulatory techniques for controlling the trade and the potential of the regulatory mechanisms for dealing with the counterfeit goods trade in the country.

Based on the literature reviewed, the findings presented, the analysis and discussion of issues that emerged from the preceding chapters, this chapter presents concluding remarks about regulation of the trade in counterfeit goods and its potential for controlling the counterfeit goods trade in Tanzania. The chapter starts by making the concluding observations about the worldwide counterfeiting business, the global anti-counterfeiting regulatory policy and regulatory techniques for controlling the trade in counterfeit goods. It is followed by the concluding remarks about the issues concerning the trade in counterfeit goods and its regulation in Tanzania.

8.1. The Worldwide Counterfeit Goods Trade

8.1.1. Localisation and Scale

This study has shown that the trade in counterfeit goods is a worldwide phenomenon which covers a wide range of consumer and industrial products.[1] The counterfeit goods trade impacts on industrialized nations and developing countries.[2] The studies conducted or commissioned by knowledge-based MNCs, private industries, industry coalitions and agencies from industrialized nations do not present the whole truth about the counterfeit goods trade. The studies have generated and presented unreliable statistics about the magnitude of the worldwide counterfeiting business. The studies play down the fact that the trade in counterfeit goods is prevalent in the industrialized nations and, as indicated in Chapter Two, many of these developed nations are sources of counterfeit goods that flow to the worldwide markets. Moreover, the above studies do not point out the fact that, in carrying out their activities, the MNCs from the industrialized nations create conditions which catalyse the operation of the worldwide counterfeit goods trade.

In order to get fairly reliable information about the magnitude of the worldwide counterfeiting business, governments of developing countries in Africa, Asia and South America should call for and participate in conducting studies that will generate information about, among other issues, the prevalence and scale of the trade in counterfeit goods, sources and destinations of counterfeit goods, and operators of the illicit trade. These studies should collect information from all countries and different sources within individual countries. Data can be sourced from government authorities and agencies, traders and their organisations, consumers and consumer protection associations,

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[1] Lauren D Amendolara, 'Knocking Out Knock-Off: Effectuating the Criminalization of Trafficking in Counterfeit Goods,' (2005) 15 *Fordham Intellectual Property, Media & Entertainment Law Journal* 789, 807 - 813,

[2] Maria Nelson, Michelle Vizurraga & David Chang, 'Counterfeit Pharmaceuticals: A Worldwide Problem,' (2006) 96 *Trademark Reporter* 1068, 1068 - 1099.

scholars, private entities and individuals. The studies should be conducted under auspices and supervision of intergovernmental agencies such as the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Food and Agricultural Organization (FAO) and the United Nations Industrial Development Organization (UNIDO).[3] Regional organizations should co-operate with the UN agencies to conduct the studies. In the case of Sub-Saharan Africa, the regional groups such as the EAC, the SADC, the Common Market for Eastern and Southern Africa (COMESA), the ECOWAS and other African regional trading groups should participate in conducting studies that will cover their member states. Besides generating relatively more authentic estimates of and trends in the worldwide counterfeit goods business and individual countries, information from these studies will be used to challenge biased and distorted information which knowledge-based MNCs, government authorities and agencies from the industrialized nations and pro-intellectual property scholars and commentators use to describe the sources and destinations of counterfeit goods and the magnitude of the worldwide counterfeiting business and the scale of its impacts. In order to get unbiased results, methodologies and techniques for collecting information and analysing data should be verified by independent agencies and experts.

8.1.2.Driving Factors

The counterfeit goods trade emerged from practices of copying marks imprinted on goods and their containers or packages in ancient times. These practices continued to expand during the medieval period when some nations in Europe passed laws to regulate trademark usages and prohibit forging and imprinting of trademarks on goods and

[3] These are some of the United Nations agencies concerned with development of the developing countries.

proscribe the trade in goods with forged trademarks. The laws prohibited the production and sale of the counterfeit goods. The trade expanded during the pre-Industrial Revolution era. This business grew further during the Industrial Revolution which occurred in Europe and the United States during the 19th century. The expansion of the counterfeit goods trade has continued to the present time.

The demand for counterfeit goods and supply of such products in the markets are the main drivers of the trade.[4] Several economic, legal and social factors that prevail in industrialized nations and developing countries motivate or compel consumers to purchase and use counterfeit goods. There are also political, economic, legal and social factors in the industrialized nations and the developing countries that facilitate or encourage traders to supply counterfeit products to the consumers.

At the international level, policies and practices that propel globalised neo-liberalism create conditions which catalyse the operation of the worldwide counterfeit goods trade. The WTO advocates the removal of barriers to global trade to allow the transnational flows of goods, services and capital. The IMF and the World Bank compel countries to liberalise their national economies. These policies have facilitated the increase in the flows of illicit products including counterfeit goods to the national markets. Policy measures which call upon countries to lower trade barriers and open national borders to licit trade cannot keep the national borders closed to the illicit business activities such as the counterfeit goods trade. [5]

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[4] Peggy E Chaudhry, 'Changing Levels of Intellectual Property Rights Protection for Global Firms: A Synopsis of Recent U.S. and EU Trade Enforcement Strategies,' (2006) 49 *Business Horizons* 463, 467.

[5] Asi Efrat, 'A Theory of Internationally Regulated Goods,' (2008) *Fordham International Law Journal*1466, 1481 - 1483.

Moreover, the endemic poverty facing people especially in many developing countries (which is partly a result of the implementation of the free trade and market-based policies) limits the ability of the poor to consume high-priced genuine products. Poverty makes consumers particularly in the developing countries susceptible to consuming inexpensive counterfeit products and these nations have become markets for counterfeit goods.[6] Similarly, the de-industrialisation and the decline in production of goods in many developing countries (partly caused by the implementation of the market-based policies)[7] have caused the fall in the supply of local commodities in the national markets. This situation has created the opportunity for dishonest traders to supply locally made and imported counterfeit products to these markets.

Strategies which knowledge-based MNCs from industrialized nations in the United States, the EU and Japan employ such as outsourcing production, distribution and supply services from manufacturers, distributors and sellers in developing countries in Africa, Asia and South America create opportunities for inadequately controlled outsourcers to manufacture, distribute and supply counterfeit goods to consumers worldwide.[8] Moreover, the MNCs charge premium prices for their brand-name goods protected by trademarks. Many consumers cannot afford to buy high-priced brand-name goods.[9] The consumers buy or use low-priced counterfeit products as alternative to expensive brand-name goods. Additionally, in some cases the MNCs do not take action to

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[6] Rosana Pinheiro-Machado, 'The Attribution of Authenticity to "Real" and "Fake" Branded Commodities in Brazil and China,' in Andrew Bevan & David Vengrow (eds) *Cultures of Commodity Branding* (London: Left Coast Press, 2010) 109.

[7] Peter Arthur, 'Ghana: Industrial Development in the Post-Structural Adjustment Program (SAP) Period,' (2003) 23 *Canadian Journal of Development Studies* 717, 725 -727; See also, Titus Adeboye, 'Governance and Technological Development in Sub-Saharan Africa,' (2002) 5 *African Journal of Sociology* 1, 9 - 12.

[8] Peter Navarro, 'A Thousand Points of Conflict: The Dark Side of China's Economic Miracle,' (2007) 8 Journal of Asia-Pacific Business 5, 8.

[9] Abubakr A. Alfadl, Mohamed Izham M. Ibrahim & Mohamed A. Hassali, 'Consumer Behaviour Towards Counterfeit Drugs in a Developing Country,' (2012) *Journal of Pharmaceutical Health Research* 1, 7.

fight counteract counterfeiting activities affecting their products. The MNCs externalize costs of controlling the counterfeit goods trade to governments and tax payers.

In order to deal with the worldwide counterfeit goods trade, the global anti-counterfeiting regulatory policy should prescribe mechanisms that will address political, economic and law-related factors which drive the transnational counterfeiting business. These mechanisms should deal with the side effects of global capitalism, propelled by neo-liberalism, which create conditions that catalyse the operation of the worldwide trade in counterfeit goods. The mechanisms should incorporate strategies for regulating activities of knowledge-based MNCs that create conditions for the operation of the worldwide counterfeit goods trade. In addressing the above aspects, several approaches can be employed.

First, national authorities (in collaboration with the United Nations agencies such as the UNCTAD, the FAO and the UNESCO and international and local NGOs) should push for the adoption of a multilateral treaty to regulate activities of the MNCs and their affiliates, subsidiaries or agents. This will serve as a global regulatory tool to ensure that knowledge-based MNCs, their affiliates or outsourcers do not, directly or indirectly, produce, distribute or sell counterfeit goods. Efforts to adopt the multilateral treaty should be built on initiatives to set up the international codes of conduct for the MNCs under the United Nations Centre for Transnational Corporations (UNCTC) which commenced its activities in the 1970s, but the Centre collapsed in the 1990s.[10]

Second, the MNCs should be pressurized to adopt and implement voluntary codes of conduct which prohibit the corporations from engaging in or encouraging trade

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[10] Peter Newell, 'The Governance of TNCs,' in Robin Cohen & Shirin M Rai (eds) *Global Social Movements* (London: Athlone Press, 2000) 120.

malpractices.[11] The national authorities should closely monitor activities of the MNCs to ensure compliance with the codes.[12] The international and local NGOs should take legal action against the MNCs to make them accountable for their actions or omissions which affect consumers, traders, economies and the welfare of the general society. Additionally the NGOs should conduct surveillance of activities of the MNCs and publish and disseminate information which exposes their malpractices.[13] The NGOs can also sensitise consumers to take action, for instance, boycotting goods produced by the offending MNCs or their affiliates, subsidiaries or agents that produce, import, smuggle or sell counterfeit products. If the international and local agencies and actors work jointly and exert joint pressure, the MNCs will be compelled to adopt and implement the codes of conduct which may address the conditions that fuel the operation of the worldwide trade in counterfeit goods.

8.1.3. Impact on Consumers, Traders and Economies

The studies and reports produced by agencies and institutions controlled or supported by knowledge-based MNCs, industrialized nations and pro-intellectual property scholars have generated incomplete and less authentic statistics that represent the impacts of the worldwide trade in counterfeit goods.[14] Just as for the magnitude of the worldwide counterfeit goods business, the statistics overstate the scale of the impact of the counterfeiting business on traders and the economies of industrialized nations as well as developing countries.

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[11] Ruth Mayne, 'Regulating TNCs: the Role of Voluntary and Governmental Approaches,' in Sol Picciotto & Ruth Mayne (eds), *Regulating International Business* (London: MacMillan Press, 1999) 239 -252.

[12] Caroline Thomas, *Global Governance, Development and Human Security: The Challenge of Poverty and Inequality* (London: Pluto Press, 2000) 107 - 108.

[13] Newell, 'The Governance of TNCs,' (note 10) 123 -129.

[14] Justin Picard, 'Can We Estimate the Global Scale of Illicit Trade?' in Michael Miklaucic and Jacqueline Brewer (eds) *Convergence: Illicit Network and National Security in the Age of Globalization* (Washington DC: Institute for National Strategic Studies, 2013) 42- 44.

Due to the lack of impartiality in conducting the studies, many studies have focused on describing negative impacts of the worldwide counterfeiting business on consumers, traders and national economies.[15] The reports do not examine beneficial aspects of the counterfeit goods trade. Due to this omission, the net effects of the world trade in counterfeit goods remain unascertained.[16] There is insufficient understanding of circumstances which make the trade in counterfeit goods a deep-rooted phenomenon particularly in developing countries in Africa, Asia and South America. As a result, traders and consumers in these nations appear to be reluctant or ignore to support the implementation and enforcement of the Euro-American intellectual property and anti-counterfeiting policies and laws. There is also inadequate examination of reasons to why governments in many developing countries seem to take relaxed attitudes towards implementing and enforcing the anti-counterfeiting policies and laws transplanted from the United States and the EU.

The studies I proposed earlier in this chapter should examine the impacts of the trade in counterfeit goods on consumers, traders and economies in both industrialized nations and developing countries. The studies should also explore and describe both negative and positive effects of the counterfeit goods trade in order to determine the net effects of the illicit trade. The understanding of positive aspects of the trade in counterfeit goods can be useful in devising intervention strategies to deal with consumers and traders who supply and consume respectively counterfeit goods in industrialized nations as well as in developing countries,

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[15] Brandon A Sullivan, Steven M Chermak, Jeremy M Wilson & Joshua D Freilich, 'The Nexus Between Product Counterfeiting in the United States,' (2014) *Global Crime* 1, 2-7.
[16] Peter Andreas, 'Illicit Globalization: Myths, Misconceptions and Historical Lessons,' (2011) 126 *Political Science Quarterly* 403, 408- 409.

8.2. The Global Anti-counterfeiting Regulatory Policy

The global regulatory policy for controlling the trade in counterfeit goods is prescribed in the pre-TRIPs treaties, the TRIPs Agreement and the post-TRIPs treaties. The pre-TRIPs treaties including the Paris Convention were adopted in response to the needs which came about as a result of the rise of industrial capitalism in Europe.[17] The TRIPs Agreement and the post-TRIPs treaties were adopted to respond to the emergence of knowledge-based capitalism in Europe, the United States and Japan.[18]

The EU member states, Japan and the United States (using the multilateral institutions and agencies particularly the WTO and the WIPO) have managed to steer and control procedures that were employed to adopt the global intellectual property and anti-counterfeiting regulatory policies. [19] They use these institutions to impose the Euro-American intellectual property and anti-counterfeiting policies and laws on developing countries in Africa, Asia and South America. While the process which resulted in the adoption of the pre-TRIPs treaties was based on political compromise among few industrialized nations that participated in the negotiations, some scholars have observed that the process which gave birth to the TRIPs Agreement and the post-TRIPs treaties involved political and economic coercion by the industrialized nations to compel the developing countries to become parties to the treaties.[20]

Due to the fact that the global intellectual property and anti-counterfeiting regulatory policies which have been imposed on developing countries in Africa, Asia and

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[17] Joel Reidenberg, 'The Rule of Intellectual Property Law in the Internet Economy,' (2007) 44 *Houston Law Review* 1073, 1074.

[18] Ngai-Ling Sum, 'Informational Capitalism and US Economic Hegemony: Resistance and Adaptation in East Asia,' (2003) 35 *Critical Asian Studies* 373, 374.

[19] Sammy Adelman & Abdul Paliwala, 'Law and Development in Crisis,' in Sammy Adelman & Abdul Paliwala (eds) *Law and Crisis in the Third World* (London: Hans Zell Publishers, 1993) 1 - 2.

[20] Peter Drahos & John Braithwaite, 'The Globalization of Regulation,' (2001) 9 *Journal of Political Philosophy* 103, 123 - 124. See also S Tiwari, 'Intellectual Property Rights in the Uruguay Round, ' in CL Lim & Margaret Liang (eds) *Economic Diplomacy: Essay and Reflections by Singapore's Negotiators* (Singapore: World Scientific Publishing, 2011) 84 -85.

South America, do not take into account economic, social and cultural conditions of the developing countries and the implementation of the policies has been problematic for many of the developing nations.[21] The implementation of the regulatory policies makes it difficult for these nations to acquire modern and low-cost technologies from industrialized nations.[22] It is difficult for manufacturers of products in the developing countries to acquire technological and industrial capacity or enhance their existing capacity in order to produce goods to satisfy needs of their local markets. This situation undermines the ability of manufacturers in many developing countries to produce genuine goods to satisfy demands of the local consumers in these nations. Shortages of genuine products in the markets have created the demand for counterfeit goods; and as a result, dishonest traders continue supplying counterfeit products to the markets of these nations.

Developing countries particularly in Sub-Saharan Africa need to take several measures to deal with inadequacies of the global intellectual property and anti-counterfeiting regulatory policy. First, they should push for the reforms of the global intellectual property regulatory policy by 'framing' the intellectual property debate not as a 'trade-related' issue but as a competition policy, human rights, public health, industrial development or consumer protection issue.[23] Second, the developing countries can apply the regime shift strategy and use venues hospitable to their interests to negotiate the reforms of the global intellectual property regulatory policy. These avenues include the UNCTAD, the UNESCO and the FAO, which are likely to offer the developing countries advantages they do not possess in the WTO and the WIPO. Third, the developing countries should make use of the networks of actors and agents (both local and

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21 Wei Shi, 'Globalization and Indigenization: Legal Transplant of a Universal TRIPs Regime in a Multicultural World,' (2010) 47 *American Business Law Journal* 455, 462- 463.

22 Carlos M Correa, 'Review of TRIPs Agreement: Fostering the Transfer of Technology to Developing Country,' (2005) 2 *Journal of World Intellectual Property* 939, 939 -940.

23 Peter Drahos, 'Thinking Strategically about Intellectual Property Rights,' (1997) 21 *Telecommunications Policy* 201, 206 -207; See also, Laurence R Helfer, Human Rights and International Intellectual Property: Conflict or Coexistence,' (2003) 5 *Minnesota Intellectual Property Review* 47, 57-58.

international and government agencies and NGOs) to push for the reforms of the global intellectual property regulatory policy.[24] Fourth, the developing countries should make use of the economic power and political influence of Brazil, Russia, India, China and South Africa (the BRICS countries) to push for the reforms of the global intellectual-property regulatory policy. Due to their high rates of economic growth, the BRICS' economic power and political influence on global issues have been increasing.[25] The BRICS' influence on global governance can be used to push for reforms of global intellectual property policy, regulation and institutions. The developing countries can form an alliance with the BRICS countries and take collective action to reduce the push by the EU member states, Japan and the United States to ratchet up the global intellectual property standards and enlarge the policy space that can be used to develop intellectual property, trade and public health policies that reflect the needs and take into account the interests of the developing countries and their people.[26]

8.2.1.Regulatory Techniques for Controlling the Counterfeit Goods Trade

Governments in many nations have enacted intellectual property and anti-counterfeiting laws. To supplement the anti-counterfeiting laws, different forms of alternative regulations are applied to curb the trade in counterfeit goods. Owing to limitations of the laws and weaknesses of institutions tasked to control the counterfeit goods trade, the use of the laws has not enabled government authorities, anti-counterfeiting agencies and trademark owners in industrialized nations to counteract the

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[24] Susan K Sell & Aseem Prakash, 'Using Ideas Strategically: The Contest Between Business and NGOs in Intellectual Property,' (2004) 48 *International Studies Quarterly* 143, 161 -167; See also, Obijiofor Aginam, 'The Global Health Governance, Intellectual Property and Access to Essential Medicines: Opportunities and Impediments for South-South Co-operation,' (2010) 4 *Global Health Governance* 1, 8.

[25] Vladimir Davydov, 'The Role of Brazil, Russia, India and China (BRIC) in the Reconstruction of the International Order,' (2008) 5 *Megatrend Review* 85, 85- 87; Cynthia Roberts, 'Building the New World Order BRIC by BRIC,' (2011) *European Financial Review* 4, 7.

[26] Peter K Yu, 'Access to Medicines, BRICS Alliances, and Collective Action,' (2008) 34 *American* Journal of Law & Medicine 345, 347.

trade efficiently.[27] Similarly, several weaknesses undermine the efficacy of the alternative anti-counterfeiting regulatory mechanisms in the industrialized nations. As a result, the counterfeiting business in the industrialized nations continues to flourish.

In developing countries particularly those in Sub-Saharan Africa, laws are policy instruments applied to control the trade in counterfeit goods. Different forms of alternative regulatory mechanisms are also used to curb the trade in these nations. Besides the limitations that are inherent in the laws,[28] political, economic and social factors undermine the capacity of government authorities and anti-counterfeiting agencies and non-state actors in the developing countries to apply the laws to curb the trade in counterfeit goods. Similarly, several factors undermine the effectiveness of the alternative anti-counterfeiting regulations. As a result, the trade in counterfeit goods in these countries is thriving.

The worldwide counterfeiting business can be controlled by employing law-related and non-law related strategies to address legal, political, economic and social factors that fuel the demand for counterfeit goods and the supply of the counterfeit products in the markets of industrialized nations and developing countries. These approaches should be applied concurrently with strategies to enhance developing countries' access to low-cost modern technologies from industrialized nations in order to enhance the technological and industrial capacities of local manufacturers to produce good-quality commodities. The approaches should be supported by strategies for alleviating endemic poverty facing many people especially in the developing countries in Sub-Saharan Africa to address the propensity of consumers to purchase or use low-priced

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[27] Edward Han, 'Protection from Commercial Counterfeiters in Taiwan for US Firms,' (1984) 16 *Law & Policy in International Business* 641, 646 - 47. See also Vagg & Harris, 'False Profits: Why Product Counterfeiting is Increasing,' (2000) 8 *European Journal on Criminal Policy and Research* 107, 112 -11 4.

[28] Andrew Jaynes, 'Why Intellectual Property Rights Infringement Remains Entrenched in the Philippines.(2009) 21 *Pace International Law Review* 55, 71 – 89.

counterfeit goods. It is, thus, imperative that the laws and alternative anti-counterfeiting regulatory mechanisms should be accompanied by strategies that address a wide range of socio-economic drivers of the trade in counterfeit goods particularly in the developing countries in Africa, Asia and South America.

In line with the general concluding observations about the worldwide counterfeit business, the global anti-counterfeiting regulatory policy and techniques for curbing the trade in counterfeit goods that have been made, I present the concluding remarks about the trade in counterfeit goods and its drivers, impact and regulation in Tanzania.

8.3. The Counterfeit Goods Trade in Tanzania

8.3.1. Magnitude and Operators

This study has shown that markets in Tanzania are flooded with different types of consumer and industrial counterfeit goods, but the magnitude of the trade in counterfeit goods and the scale of the impacts of the illicit trade have not been ascertained. [29] Local traders operate the counterfeit goods business and some foreign traders manufacture, import or smuggle into the country and sell counterfeit goods.[30] Business entities and individual traders in the formal as well as informal sectors operate the trade in counterfeit goods. Moreover, private traders and some public agencies have been implicated in supplying or facilitating the supply of the counterfeit products to the markets. Besides being a destination for counterfeit goods imported or smuggled from other countries, Tanzania is also a source of counterfeit goods consumed in the country and the origin or transhipment point for the counterfeit products exported or smuggled to Tanzania's neighbouring nations.

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[29] Interviews: Director, Anti-counterfeiting agency (17 September 2010); Manager, Anti-counterfeiting agency (25 September 2010).

[30] Musa Juma, *TFDA destroys counterfeit items,* The *Citizen* (Dar Es Salaam), 7 January 2014. See also Kizito Makoye, *Tanzanian traders seek rescue from Chinese,* The *Inter Press Service,* 15 August 2013.

There is, nonetheless, insufficient information that describes the nature of the counterfeit goods trade in Tanzania. There is a need to obtain more information about several issues including the scope of counterfeit products in the markets; the magnitude of the counterfeit goods trade and the scale of its impact; local and foreign as well as private actors and public entities that produce, import, smuggle, distribute or sell counterfeit products; the sources of counterfeit goods consumed in Tanzania and destinations of counterfeit products exported or smuggled from Tanzania to other countries; the outlets which sell counterfeit goods; and the profiles of consumers of counterfeit products and different factors which motivate consumers to buy and use those products. The government authorities and non-state actors in Tanzania cannot formulate, adopt and implement appropriate intervention strategies unless they have sufficient information about the nature of the trade in counterfeit goods. These actors should conduct studies to look into various aspects of the trade in counterfeit goods in Tanzania.

The FCC has pointed out that there is a need for undertaking the proposed studies.[31] I propose that different ministries and government agencies should conduct separate studies to investigate the trade in counterfeit goods and counterfeiting that affect information technology products, agricultural products, food products, pharmaceutical products, electronic products, electrical goods, construction materials, chemicals, machinery and accessories and automotive parts and accessories. The studies should also involve non-state actors including traders and their organisations and consumers and their associations and researchers (in areas such as economics, marketing, law and trade) media personnel and the general public. If the proposed studies are appropriately conducted, they will generate information about the scope, trends of the trade in counterfeit goods and scale of its impacts in Tanzania. The studies can identify and

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[31] *Felix Andrew, FCC to identify magnitude of counterfeits at product level,* The *Guardian* (Dar Es Salaam), 4 December, 2012.

describe the nature of the trade in terms of its foreign and local sources and destinations and local and foreign actors as well as private and public actors involved in operating the trade. It will also be possible to identify places where counterfeit products are manufactured; the routes used to smuggle counterfeit goods into or out of Tanzania; the regions, cities and towns where counterfeiting activities are rife; the outlets where counterfeit commodities are sold and profiles of consumers of counterfeit products (in terms of age, gender, status and other characteristics).

Information generated from the proposed studies will be useful in several ways. First, the information about the metrics and trends of the counterfeit goods trade in Tanzania can be used for policy-making purposes. The statistics will be part of the country's central database which can be accessed by personnel from government authorities, anti-counterfeiting agencies, policy makers, researchers, traders and their organisations and consumers and their associations and other stakeholders. They will be used to determine upward or downward trends of the trade in counterfeit goods. These can be used to approximate resources needed to curb the trade. Based on the statistics, it will be possible for government authorities and anti-counterfeiting agencies and non-state actors to evaluate the efficacy or otherwise of Tanzania's anti-counterfeiting policy and law. Second, the information will assist the government authorities and agencies and non-state actors to devise intervention strategies for tackling the trade in counterfeit goods. Third, the government authorities and anti-counterfeiting agencies and non-state actors in Tanzania can use information from the studies to challenge biased information which knowledge-based MNCs, industry coalitions and government agencies from industrialized nations and pro-intellectual property scholars present about the trade in counterfeit goods in developing countries (including Tanzania).

8.3.2. Driving Factors

This study has shown that the trade in counterfeit goods in Tanzania might have emerged long time ago, but the economic crisis which plagued the country between mid-1970s and early 1980s was the catalyst for the expansion of illicit trade. Inappropriate economic and industrial policies and mismanagement and inefficiencies in running SOEs (which monopolised the production, importation and sale of goods in Tanzania) created fertile conditions for the rise of illegal activities in the country between the late 1970s and early 1980s.[32] The trade in counterfeit goods was one of those unlawful activities. The counterfeit goods trade became a widespread phenomenon in Tanzania after the government started implementing the market-based reforms imposed by the World Bank and the IMF[33] and when the country became a member of the EAC and the SADC and expanded its trade relations particularly with some Asian nations from the 1980s onwards. The expansion of commercial relations and activities between Tanzania and other countries particularly the Asian nations has made Tanzania's markets vulnerable to counterfeit goods flowing from the regional and global markets. Certainly, the implementation of the market-based and economic 'open-door' policies has catalysed the operation of the counterfeit goods trade in Tanzania.

The above situation calls for the review and reform of Tanzania's policies whose inadequate operation has created conducive conditions for the expansion of the counterfeit goods trade. The government of Tanzania should take measures to enhance the capacity of local manufacturers to produce and supply good-quality, genuine products to the markets. One way of doing so is to revive closed industries and those which have been underperforming after being de-nationalized.[34] Additionally, new industries should

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[32] Augustine Sangi, *Fake goods trade still thrives,* The *Citizen* (Dar Es Salaam), 9 July 2012.
[33] Interview: Director, Anti-counterfeiting agency (17 September 2010).
[34] Nestory Ngwega, *Tanga Industries Set for Revival,* The *Daily News* (Dar Es Salaam), 13 January 2013. See also Stella Jimmy, *4 privatised dormant industries for revival,* The *Guardian* (Dar Es Salaam), 27 August 2013.

be built in order to enhance the capacity of the country's industrial sector to produce good quality, low-priced products for local markets. This will help to minimize shortages of genuine commodities in the markets and the demand for counterfeit products. Concurrent with the above measure, the importation of goods into the country should be closely monitored to ensure that the flow of foreign-made counterfeit products into Tanzania is minimized.[35] The newly-introduced pre-shipment verification system can assist to check the flow of the foreign-made counterfeit products to Tanzania.[36] In addition, government authorities and anti-counterfeiting agencies should take measures to control production, distribution and sale of locally-made counterfeit goods and substandard products.[37] Moreover, the government should identify inadequacies in the market-based policies which catalyse the operation of the trade in counterfeit goods and find some ways to address the defects.

Demand for counterfeit goods and supply of those commodities in the markets are the key drivers of the trade in Tanzania. Consumers do, knowingly and unknowingly, purchase and use counterfeit goods.[38] Similarly, traders do, intentionally and unknowingly, supply counterfeit goods to the markets.[39] The trade in counterfeit goods in Tanzania can be addressed efficiently if intervention measures will be adopted and implemented to tackle the demand for counterfeit goods which will, in turn, reduce the supply of those commodities in the markets. The assumption here is that if demand for counterfeit goods is controlled, the supply of those products will be minimized.

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35 CEO, Consumer protection association (24 October 2010).

36 Lusekelo Philemon, *Pre-shipment inspection paying off-govt,* The *Guardian* (Dar Es Salaam), 30 January 2013. See also Malela Kassim, *Pre-shipment inspections to curb flow of fake goods in Tanzania, Guardian* (Dar Es Salaam), 21 May 2014.

37 James Kandoya, *Follow rules, regulations or suffer consequences, TFDA tells traders,* The *Guardian* (Dar Es Salaam), 8 April 2014. See also Emmanuel Onyango, *TBS advised to emulate Kenya in curbing fake goods,* The *Guardian* (Dar Es Salaam), 17 May2013.

38 Henry Muhanika, *counterfeit goods in our midst: the challenge ahead,* The *Guardian* (Dar Es Salaam), 25 November 2012.

39 Guardian Reporter, *FCC issues a strong warning to importers of counterfeit goods,* The *Guardian* (Dar Es Salaam), 21 September 2012.

8.3.3. Impact on Consumers, Traders and Economy

This study has shown that the bulk of counterfeit goods in the markets in Tanzania are defective, harmful and shoddy products. The operation of the trade impacts adversely on the welfare of consumers, economic interests of suppliers of genuine goods and the economy and general society.[40] To a certain degree, the trade in counterfeit goods contributes to holding back Tanzania's socio-economic development because the trade is a stumbling block to the growth of sectors including industry, agriculture, transport, competition, public health and science and technology.[41] The counterfeiting business impacts harmfully on Tanzania's fragile economy which depends mostly on agriculture. Consequently, there is a need for government authorities and anti-counterfeiting agencies in Tanzania to step up their efforts to control the trade.[42]

The trade in counterfeit goods in Tanzania may confer certain benefits such as providing inexpensive counterfeit products to low-income consumers and providing employment to small-scale traders who peddle those commodities. However, the benefits are insignificant and they are overshadowed by the negative aspects of the trade. The government authorities and agencies should employ several policy options to enable low-income consumers to buy goods at affordable prices. The government should adopt fiscal policies to lower taxes and duties on essential consumer goods, set up price ceilings and introduce subsidies on essential commodities such as medicines and food. As for the involvement of small-scale traders in peddling counterfeit products, government authorities, anti-counterfeiting agencies, traders' organisations and consumer protection

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40 Interview: Director, Anti-counterfeiting agency (17 September 2010). See Editorial, *Save lives, integrity by curbing fake products,* The *Citizen* (Dar Es Salaam), 2 March 2014.

41 Sosthenes Mwita, *Counterfeit goods impoverish Tanzanians, Daily News* (Dar Es Salaam), 21 May 2013. See also *Counterfeit goods continue to haunt Tanzanian industries,* The *Citizen* (Dar Es Salaam), 15 November 2012.

42 Pius Rugonzibwa, *FCC challenged to control counterfeit products,* The *Daily News* (Dar Es Salaam), 12 September 2013; Editorial, *War on fakes must be won,* The *Citizen* (Dar Es Salaam), 27 December 2013. See also Nestory Ngwega, *DC wants campaign against fake goods intensified,* (Dar Es Salaam), 16 March 2014.

associations in Tanzania should provide information to urge and encourage traders to sell genuine goods.[43]

8.3.4. The Policy for Controlling the Counterfeit Goods Trade

This study has shown that the anti-counterfeiting policy in Tanzania does not prescribe comprehensive guidelines for controlling the trade in counterfeit goods. The policy is incoherent and prescribes ineffective frameworks for co-ordinating activities of different institutions, agencies and actors that deal with the counterfeit goods trade. There is a need to review and reform the existing policy and formulate a new national policy to deal with the trade in counterfeit goods. The new policy should describe the problems which need to be tackled; spell out the objectives of the anti-counterfeiting initiatives; describe strategies which should be employed to address the problems; identify institutions, agencies and actors to be involved; and harmonise the sectoral anti-counterfeiting policies. The sectoral anti-counterfeiting policies should cover areas such as intellectual property, competition, consumer protection, public health, industry, agriculture, transport, competition and science and technology. If those policies are appropriately formulated, the national and sectoral policies can address the limitations of the existing anti-counterfeiting policy in Tanzania and enhance the efficacy of the mechanisms for dealing with the trade in counterfeit goods.

The proposed anti-counterfeiting policies should be the product of home-grown initiatives. They must emanate from broad consultations and transparent participation of the stakeholders in Tanzania including government authorities and anti-counterfeiting agencies and non-state actors such as traders and their organizations, consumers and consumer protection associations, scholars and media personnel. The local experts in

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[43] Mgeta Mganga, *Consumer society declares war on low quality products.* The *Guardian* (Dar Es Salaam), 1 April 2009.

areas such as law, economics, marketing, consumer protection, competition, science and technology and crime control should be consulted and participate in the process of formulating the national and sectoral anti-counterfeiting policies. While foreign resources (including funding, expertise and equipment) are needed to facilitate the process of formulating policies, such assistance should not justify the usurpation of the policy-making process by foreign actors and agencies from industrialized nations. If foreigners 'capture' the policy-making process, the resultant policies will be used to promote and safeguard interests of knowledge-based MNCs from the industrialized nations and economic interests of those industrialized nations.

Since the trade in counterfeit goods is a transnational phenomenon affecting the EAC, the SADC member states and many countries in Sub-Saharan Africa, the government of Tanzania and anti-counterfeiting agencies should enhance their co-operation with regional authorities and agencies in controlling the trade in counterfeit goods. The government should actively participate in the on-going initiatives to formulate the EAC anti-counterfeiting policy and legislation.[44] The EAC members should implement the regional anti-counterfeiting policy and legislation. Thereafter, the EAC will have to harmonise their national anti-counterfeiting policies and laws; enhance the capacity of national authorities tasked to implement and enforce those policies and laws; coordinate activities of agencies tasked to control the trade in counterfeit goods within individual countries and authorities among the EAC countries to enable them to undertake joint anti-counterfeiting initiatives and operations; and share and exchange information which will facilitate initiatives to fight against the regional counterfeiting business in East Africa. Concurrent with the above measures, Tanzania should push for the harmonisation of national legal regimes of the EAC and SADC member states which

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[44] *EAC states vow to fight counterfeit goods jointly*, The *Citizen* (Dar Es Salaam), 11 August 2012. See also, Guardian Reporter, *Harmonization of laws on fakes in EA*, The *Guardian* (Dar Es Salaam), 20 December 2013.

deal with matters such as competition, standards, customs and crime control in order to support regional initiatives to fight the trade in counterfeit goods.

The use of diplomatic strategies to engage countries which are the main sources of counterfeit goods flowing to East Africa can assist the EAC countries to address the problem. In 2012, the EAC members requested China to control the flow of counterfeit goods from China to the EAC member states' markets. China's envoy to the EAC, Lui Xinsheng, said that his government was aware of the problem and was keen to implement measures including setting up 'an institution [for] checking on all products manufactured for export and [introducing the] system of blacklisting those companies that would be [found guilty of] exporting substandard and counterfeit [goods to the EAC member states].'[45] The EAC countries should make follow-ups to ensure that China fulfils its promise to curb the flow of counterfeit products from China and implements the above measures. Tanzania should apply diplomatic strategies to counteract the trade in counterfeit goods. The governments of Tanzania and China were reported to have agreed to use joint efforts to thwart the importation and smuggling of counterfeit goods and substandard products from China into Tanzania.[46] The diplomatic strategies to engage nations which are believed to be sources of counterfeit goods flowing to Tanzania can assist the country to thwart the inflow of foreign-made counterfeit products.

8.3.5. Regulatory Techniques for Controlling the Counterfeit Goods Trade

Tanzania is a signatory to multilateral treaties and regional agreements providing for the protection of intellectual property and control of the counterfeit goods trade. The country has anti-counterfeiting law that evolved from the laws for controlling the trade in counterfeit goods enacted by the British colonial government. After independence, the

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[45] David Muwanga, *China to blacklist firms exporting fake goods,* The *Business Week* (Kampala), 16 June 2011.

[46] Frank Aman, *Dar, Beijing to curb fake goods jointly,* The *Citizen* (Dar Es Salaam), 3 July 2012.

government of Tanzania reformed the anti-counterfeiting law to respond to, among other things, the need to promote the country's socio-economic development and political and economic changes brought about by economic liberalisation and globalisation. Government authorities and anti-counterfeiting agencies use the law to control the counterfeit goods trade. Traders and consumers use the law to protect their rights against suppliers of counterfeit goods. Despite all these efforts, Tanzania has not managed to control the trade in counterfeit goods efficiently. [47] This situation is attributed to several weaknesses of the anti-counterfeiting law and inadequacies of the law enforcement mechanisms and other extraneous factors which impinge on the efficacy of the law.

Inadequacies in the competition policy and law exacerbate the deficiencies of the anti-counterfeiting law in Tanzania. The competition policy and law are weak and institutional mechanisms for implementing and enforcing the policy and law are inadequate. The efficacy of the anti-counterfeiting law is undermined further by inadequacies of other laws and institutions that could provide support to the anti-counterfeiting law and agencies. These include laws which regulate business registration and business licensing and those regulating investment and controlling corruption, money laundering and organised crime. Because of the limitations facing institutions tasked to enforce the above laws, their usefulness in supporting the anti-counterfeiting law is undermined.

Different regulatory mechanisms alternative to the law are employed to counteract the trade in counterfeit goods in Tanzania. The anti-counterfeiting agencies, traders' organizations and consumer protection associations apply information-based regulation to fight the trade in counterfeit goods. Technological methods and market-

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[47] Interview: CEO, Consumer protection association (24 October 2010). Queenter Mawinda, *Why Dar is awash with fake goods,* The *Guardian* (Dar Es Salaam) 13 April, 2014.

based instruments are also used to curb the counterfeit goods trade. Moreover, the African communalist ideals are also invoked to deal with the counterfeit goods trade. Besides several limitations inherent in the information instruments, the anti-counterfeiting agencies, traders' organisations, consumer protection associations and private business entities in Tanzania have not been able to provide adequate information to the people, particularly those who live in rural areas. While foreign owners of brand-name goods protected by trademarks apply sophisticated anti-counterfeiting technologies, many local producers use much less sophisticated technologies to counteract the trade in counterfeit goods. Limited availability of expertise and equipment to enable the application of modern anti-counterfeiting technologies undermine their usefulness in curbing the trade in counterfeit goods. Due to the lack of or limited financial resources, there is a limited use of the market-based instruments to fight the trade in counterfeit goods. Moreover, the use of self-regulation among traders to thwart the counterfeiting business is underdeveloped. The use of African communalist ideals and practices has not been well integrated into the commonly used regulatory mechanisms for curbing the counterfeit goods trade.

The reforms should be undertaken to enhance the efficiency of Tanzania's anti-counterfeiting regulatory regime. The starting point should be to reform the country's competition policy and law. The Minister for Trade and Industry, Abdallah Kigoda, has indicated that the government is keen to review and re-formulate the competition policy and law.[48] The competition policy and law should be strengthened in order to deal with widespread malpractices undermining the operation of liberalised markets in the country. The government has showed intention to undertake a study that will facilitate the

[48] Guardian Reporter, *Govt to rework competition law and policy,* The *Guardian* (Dar Es Salaam), 27 November 2012.

overhauling the legal regime which deals with consumer protection.[49] There is a need to assign mandates and functions to different government authorities and agencies in order to oversee competition, consumer protection and the control of the counterfeit goods trade. The mandates and functions of these authorities and agencies should be well-coordinated and harmonised in order to address functional overlaps and conflicts of interests among those authorities and agencies.

The anti-counterfeiting law in Tanzania should be reformed. These reforms should involve, among other things, updating and synchronising provisions of the law. Laws for controlling corruption, money laundering, organised crime and trafficking of illicit goods and those regulating business registration, business licensing and private investments should also be updated and aligned to, among other laws, the anti-counterfeiting law. The reforms should go together with capacity building of the authorities and agencies tasked to enforce these laws. The above measures should be implemented concurrently with strategies to address malpractices such as corruption, bureaucratic tendencies and failure to adhere to professionalism and ethics among the personnel in the public institutions, including the anti-counterfeiting agencies, the police and the judiciary which undermine their efficacy in fighting against the trade in counterfeit goods in Tanzania.

The reforms of the laws and institutions in Tanzania should be accompanied by measures to make government authorities and agencies easily accessible to traders, consumers and the general public. These public institutions are the anti-counterfeiting agencies, courts and police. Mechanisms should be adopted to ensure that the police and courts handle complaints and resolve disputes without undue delays. Provision of legal

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[49] Nelson Kessy, *Commission to research on consumer rights,* The *Guardian* (Dar Es Salaam), 5 April 2014.

aid services will enhance the access of low-income complainants and litigants to the state legal machinery. The government of Tanzania is in the process of enacting legislation to facilitate and regulate provision of legal aid in the country.[50] Making the police and courts complainant-friendly will assist to improve their accessibility to under-resourced complainants and litigants. The establishment of small claims courts or quasi-judicial bodies that will apply simplified procedures of resolving disputes may reduce the apathy the ordinary people have toward Tanzania's legal machinery.[51]

Concurrent with the above proposed measures aimed at updating and strengthening the country's anti-counterfeiting legal regime and law enforcement agencies in Tanzania should collaborate with the regional law-enforcement organisations in order to curb the counterfeit goods trade and associated organised crime efficiently. The EAC and the SADC need to conduct joint operations to curb the transnational trade in counterfeit goods as part of organised crime affecting the regions. The EAPCCO and the SARPCCO can assist in tackling the trade in counterfeit goods in the EAC and the SADC regions respectively.

The government of Tanzania should enhance the use of alternative regulatory mechanisms for controlling the trade in counterfeit goods. The government should provide more resources to the anti-counterfeiting agencies to enhance their capacity to provide information to traders and consumers and other stakeholders involved in the fight against the trade in counterfeit goods. The government should allocate more resources to enable the anti-counterfeiting agencies to have modern equipment, expertise and infrastructures to enable them to fight the counterfeit goods trade efficiently. The

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[50] Guardian Reporter, *Bill on Legal aid provision in offing,* The *Guardian* (Dar Es Salaam), 11 February 2014. See also, Staff Writer, *Justice: Why many believe Legal Aid Provision Bill long overdue,* The *Daily News* (Dar Es Salaam), 26 June 2013.

[51] Orton Kiishweko, *Dar-based merchants call for small claim court,* The *Daily News* (Dar Es Salaam), 29 September 2013; Rose Athuman, *State considers setting up minor claim court,* The *Daily News* (Dar Es Salaam), 4 May 2013.

government agencies and traders' organisations should educate local manufacturers and traders of goods about issues relating to counterfeiting and techniques for controlling the trade in counterfeit goods. The organisations of traders and consumer protection associations should provide information to consumers in assisting them to avoid or refrain from buying or using counterfeit products and to protect their rights against suppliers of those commodities. The Ministry of Industry and Trade in Tanzania should encourage traders to use self-regulation to control malpractices among traders. This measure should be taken concurrent with encouraging manufacturers, importers or sellers of goods to form organizations which will register and monitor activities of their members. The government authorities and anti-counterfeiting agencies can assist the traders' organisations to design self-regulatory codes of conduct and, where necessary, to enforce the codes in order to control production, importation, distribution and sale of counterfeit goods.

Besides the above measures, the government agencies, traders and their organisations and consumer associations in Tanzania should encourage the use of anti-counterfeiting technologies. Traders should be encouraged to acquire and apply modern technologies to counteract counterfeiting that affects their products. Moreover, the technologies should be made available to enable traders and consumers to detect counterfeit products and avoid to purchase or use such commodities.

The government of Tanzania has the central role to play in undertaking the anti-counterfeiting policy and regulatory reforms. This is due to several factors. First, the government is better placed in terms of having resources (funds, expertise, equipment and information) for controlling the trade in counterfeit goods. Second, although NGOs represent the interests of various groups including traders and consumers, the majority of

these societies are weak in terms of resources and organisation.[52] In addition, participation of the NGOs in policy making and implementation is limited due to, among other factors, the lack of capacity to make and implement the policy. The government should facilitate the empowerment of these groups, including organisations of traders and associations of consumers to make them active in fighting against the trade in counterfeit goods. Third, the government can steer Tanzania's economy by coordinating investments, establishing the environment for the operation of the market-based economy and promoting public-private partnerships in planning and implementing economic policies and projects.

This study has pointed out that some government authorities, communities and local people in Tanzania use the African communalist ideals and principles to deal with the trade in counterfeit goods and enforce rights of consumers against suppliers of counterfeit goods. It is not clear how effectual these ideals and principles, which form part and parcel of the *Ujamaa* ideology, have been effective in addressing the counterfeiting business. It is apparent that the *Ujamaa* ideals and principles are applied haphazardly and have not been well incorporated into the 'formal' procedures for controlling the trade in counterfeit goods. With the rise of the individualistic tendencies which emerged with the advent of the market-based reforms,[53] the significance of the African communalist ideals and practices in providing a framework for fighting unlawful activities including the counterfeit goods trade has been eroded significantly.

If the government of Tanzania is keen to use the African communalist ideals and practices to deal with the trade in counterfeit goods, then government authorities and anti-

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[52] Claire Mercer, 'Performing Partnership: Civil Society and Illusion of Good Governance in Tanzania,' (2003) 22 *Political Geography* 741, 753 - 756.
[53] Guardian Reporter, *Bring back Arusha Declaration leadership code,* The *Guardian* (Dar Es Salaam), 11 January 2014.

counterfeiting agencies should conduct research on how the values and principles embodied in the African communalist ideals can be used to tackle the counterfeit goods trade in the country. Thereafter, the values and principles can be integrated into the system of dealing with the trade in counterfeit goods. Information disseminated to traders, consumers and the general public during the anti-counterfeiting awareness campaigns can include the traditional values and principles.

8.4. Areas for Further Research

This study has described political, economic, legal and social factors which motivate or facilitate traders to supply counterfeit products to the markets of Tanzania and the economic and social factors which encourage consumers to purchase or use the counterfeit products. A combination of these factors has made the counterfeit goods trade a deeply entrenched phenomenon in Tanzania. There could be many other factors which drive the counterfeiting business. An investigation of a wide range of political, economic, legal and social factors that motivate traders to manufacture, import, smuggle or sell counterfeit goods and consumers to purchase and use counterfeit products has to be carried out. It is through the investigation of these factors, government authorities, anti-counterfeiting agencies and non-state actors in Tanzania can obtain information and understand the nature of the problem and devise efficient regulatory interventions which can augment the existing mechanisms for controlling the counterfeiting business.

The trade in counterfeit goods has several impacts on consumers, traders, the economy of Tanzania and society generally. Product-specific studies need to be conducted to look into the impact of the counterfeiting business affecting different types of products. This approach will be useful to determine the effects of the 'safety critical' counterfeit goods and 'non-safety critical' counterfeit products separately. It will also be possible to separately identify negative and positive effects of the trade in counterfeit

goods on consumers, traders and the economy. This will enable the studies to determine the net effects of the counterfeiting business.

The anti-counterfeiting legal machinery in Tanzania has several limitations. The limitations are in the law and affect authorities tasked to enforce the law. Studies should be conducted to identify a wide range of inadequacies of the legal machinery and the types of reforms which need to be undertaken in order to rectify those limitations. The studies should indicate new laws which should be put into effect to enhance the efficacy of the existing anti-counterfeiting legal regime. The studies should also investigate how the use of alternative regulations can be improved. The studies should propose new forms of alternative regulations which can be applied to tackle the trade in counterfeit goods efficiently.

This study has shown that the control of the trade in counterfeit goods in Tanzania is a cross-cutting phenomenon which involves several sectors or areas such as intellectual property, industry, agriculture, competition, public health, transport, consumer protection and science and technology. Several policies and laws (dealing with the above issues) should be applied to counteract the counterfeiting business efficiently. The policies and laws which cover the mentioned sectors or areas have not been harmonised. Research needs to be conducted to describe policies and laws which need to be harmonised in order to prescribe the efficient policy and regulatory frameworks for fighting against the counterfeit goods trade.

The formulation and implementation of national and sectoral policies and laws to control the counterfeit goods trade in Tanzania should involve participation of government authorities and agencies as well as non-state actors. Studies need to be carried out to identify the authorities, agencies and actors that need to be involved in

formulating and implementing the anti-counterfeiting policy and law. The studies should also investigate the models of the public-private partnerships which can be employed to facilitate the efficient formulation and implementation of the policy and law to fight against the counterfeit goods trade in Tanzania.

This study has demonstrated that development-related factors (limited funds, expertise and personnel) hamper the capacity of government authorities and agencies and non-state entities and actors in Tanzania to deal with the trade in counterfeit goods efficiently. A further research needs to be conducted to examine how the development-related factors can be addressed. The research has to examine how the country's development-related policies and strategies can be used to tackle the trade in counterfeit goods. This research should recommend ways to address the development-related issues which impinge on the efficacy of the anti-counterfeiting law. The use of the extra-legal mechanisms can be useful in assisting the law-related mechanisms to fight the trade in counterfeit goods in Tanzania.

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Appendix 1

A: ENTITIES, ORGANIZATIONS & INDIVIDUALS INVOLVED

	Entities, Organizations, Individuals	Area/Category	Number of respondents
1	Governmental department	Trade & Industry	1
2.	Anti-counterfeiting agencies	Competition	1
		Drugs, cosmetics, food & medical devices	1
		Standards	1
		Customs control	1
		Crime control	1
3.	NGOs	Traders	1
		Consumer protection	1
4.	Private business enterprises	Manufacturers of goods	2
		Seller of goods	1
		Provider of services	1
5.	Consumers		16
6.	Practitioners	Law	2
7.	Scholars/researchers	Law	2
		Economics	1
		Marketing	1
		Total	34

B: DATA COLLECTION & SAMPLING TECHNIQUES

	Respondents	Sampling techniques	Data collection techniques
1.	Governmental department	Purposive sampling	Interview
2.	Anti-counterfeiting agencies	• Purposive • Theoretical	Interviews
3	NGOs	• Purposive • Theoretical	Interviews
4.	Private business enterprises	• Purposive • Convenience	Interviews
5.	Consumers	• Purposive • Snowball • Convenience	• Interviews • Questionnaires
6.	Practitioners	Purposive	• Interviews • Questionnaires
7.	Scholars/researchers	Purposive	• Interviews • Questionnaires
8	Other techniques		Non-participant observations: shops, flea markets, street vendors

C: RESPONDENTS (Governmental, NGOs, Scholars and Researchers):

	Entities, Individuals		Gender	Position	Experience (years)	Date
1.	**Ministry**	Trade & Industry	M	Director	More than 10	**22/10/10**
2.	**Anti-counterfeiting Agencies**	Competition	M	Director	5 – 10	**17/9/10**
		Customs	M	Principal officer	More than 10	**12/10/10**
		Drugs, food & cosmetics	M	Manager	5- 10	**25/9/10**
		Police	F	Commissioned officer	Less than 5	**30/9/10**
		Standards	F	Principal officer	More than 10	**21/9/10**
3.	**NGOs**	Traders' organization	M	Director	5- 10	**9/11/11**
		Consumer protection	M	CEO	5-10	**24/10/10**
4.	**Private business enterprises**	Manufacturer of food & soft drinks	M	Officer	5-10	**22/9/10**
		Manufacturer of building materials	M	Officer	More than 10	**22/9/10**
		Sellers of pharmaceutical & veterinary products	M	CEO	More than 10	**6/10/10**
		Inspection of cargoes	M	Officer	More than 10	**8/10/10**
5.	**Law practitioners**	General practice	M	Partner	More than 10	**11/5/11**
		General practice	M	Partner	5-10	**14/10/10**
6.	**Scholars/researchers**	Law	M	Lecturer	10	**21/10/10**
		Law	F	PhD candidate	Less than 5	**11/5/2011**
		Economics	M	PhD candidate	Less than 5	**24/10/11**
		Marketing	M	Assistant Lecturer	Less 5	**27/4/2011**
					Total	**18**

Sampling techniques:

[1] **Purposive sampling** involves conscious selection of 'information rich' cases, namely individuals, groups, or organizations that provide the greatest insight into the research question.

[2] **Theoretical sampling** necessitates the building of interpretative theories from the emerging data and selecting a new sample to examine and elaborate on this theory.

[3] **Convenience sampling** refers to a sampling technique whereby individuals, groups, or organizations most accessible to a researcher.

[4] **Snowball sampling** refers to a sampling method whereby a researcher accesses informants through contact information provided by other informants.

D: RESPONDENTS (Consumers):

	Technique	Gender	Pseudonyms	Date
1.	Interviews	F	Huruka	28/10/10
		F	Shufaa	30/10/10
		M	Mukadamu	20/10/10
		F	Dori	28/10/10
		M	Irunde	8/10/11
		M	Chivanga	29/9/11
2.	Questionnaires (10)	Various		Various
			Total	16

Appendix 2

Tanzania: Regions covered by study

	Region	Reasons for Selection
1.	Dar Es Salaam	• Tanzania's largest commercial city • The country's largest ports of entry i.e. harbor and airport. • The country's principal administrative city. • The headquarters of the anti-counterfeiting agencies. • Many media reports about counterfeiting activities.
2.	Arusha	• Situated near the Tanzania/Kenya border. • Many reports about cross-border smuggling of goods to and from Kenya. • Many media reports about counterfeiting
3.	Mbeya	• Situated near the Tanzania/Zambia border. • Many reports about cross-border smuggling of goods to and from Zambia and Malawi. • Many reports about counterfeiting activities.
4.	Mtwara	• Situated near the Tanzania/Mozambique border. • Limited incidences of counterfeiting activities reported.
5.	Singida	• Situated in Central Tanzania. • Limited incidences of counterfeiting reported.

Map of Tanzania: Regions

Appendix 3

CONSUMER'S QUESTIONNAIRE

University of Kent

Kent Law School
Eliot College
University of Kent
Canterbury
CT2 7NS
UNITED KINGDOM
Phone: +44 (0)1227 824595
Fax: +44 (0) 1227 827442

Dear respondent,

Re: Study on Regulation of Regulation of Counterfeit Goods Trade in Tanzania

I, the undersigned, am a Tanzanian who is undertaking a Doctor of Philosophy candidate study entitled: Regulation of the Counterfeit Goods Trade: A Case Study of Tanzania whose objective is to investigate, among other issues, the evolution of the trade in counterfeit goods, its driving factors and impact on the country's economy, traders and consumers. In addition, the study intends to explore anti-counterfeiting regulation and its efficacy in controlling the trade in counterfeit goods. It is anticipated that information from the study will contribute inputs to the process for reforming policy and regulation which will augment the efficacy of mechanisms for controlling the trade in counterfeit goods and its impact in Tanzania.

I request you to participate in this study by filing in the questionnaire attached herewith. Information from consumers is sought in order to get their experiences and views about: 1) purchasing or using counterfeit goods, 2) benefits or negative effects resulting from buying or using counterfeit goods, and 3) using the existing anti-counterfeiting mechanisms to protect their rights against violations by manufacturers or sellers of counterfeit goods.

Be informed that your participation is **voluntary** and if, at any time during the study, you wish to withdraw from participating, you may do so. In addition, unless you decide otherwise, your identity will be **anonymous** and information provided will be used for purposes of this research only and be treated **confidentially**.

Thank you for accepting to participate in this study.

Eugene E MNIWASA

Contacts:

- Email: eem6@kent.ac.uk, or mniwasa@gmail.com
- Phone: +44 (0) 7532156144 (UK)
  +255 (0) 715840038 (Tanzania).

PART I

1. Which one of the following statements is the best description of the term 'counterfeit goods'? (*choose one option only).*
   a. Goods which are of inferior quality. ☐
   b. Goods which are harmful to users. ☐
   c. Goods which are sold at low prices. ☐
   d. Goods which are defective. ☐
   e. Goods which are unlawfully imitated and sold as genuine products. ☐

2. Have you ever bought counterfeit good(s)? YES/NO.

3. If your answer to Question No. 2 above is YES, list down counterfeit goods you have ever bought.

4. From which shopping outlets did you buy the counterfeit goods listed down in your answer to Question No. 3 above? (*you may choose more than option*).
   a. Licensed shops. ☐
   b. Flea markets. ☐
   c. Kiosk s. ☐
   d. Street vendors. ☐
   e. Other shopping outlets _____ (*please specify*) ☐

5. At the time of buying the goods listed down in your answer to Question No. 3 above, were you aware that the goods were counterfeit products? YES/NO.

6. Which factor(s) made you to buy the counterfeit goods listed down in your answer to Question No. 3 above?

7. Were you satisfied with the purchase of the counterfeit goods listed down in your answer to Question No. 3 above? YES/NO.

8. If your answer to Question No. 7 above is YES, briefly state how you were satisfied with purchase of the counterfeit goods.

9. If your answer to Question No. 7 above is NO, what was your dissatisfaction? State briefly action, if any, you took against the seller(s) or manufacturer(s) of the counterfeit goods.

10. If the action you described in your answer to Question No. 9 above was not successful, why?
If you did not take any action, why?

11. List down benefits, if any, you have ever derived from buying or using counterfeit goods.

12. List down negative effects, if any, you have ever suffered from buying or using counterfeit goods?

13. Have you ever lodged a complaint or case to any authority (for example, the Fair Competition Commission (FCC), the Tanzania Food and Drugs Authority (TFDA), the police or a court of law) against manufacturer (s) or seller(s) of counterfeit goods? YES/NO.

14. If your answer is to Question No. 13 above is YES, what was your complaint or case about and how did the authority solve the matter?
If your answer is NO, why haven't you lodged a complaint or a case to the authorities?

15. Have you ever hired services of private lawyer (s) to deal with a complaint or claim related to purchase or the use of counterfeit good(s)? NO/YES.

16. If your answer to Question No. 15 above is NO, briefly state why you have not hired services of private layer(s).

17. Have you ever sought or received assistance from any consumer protection non-governmental organization (NGO) in dealing with a complaint or claim related to purchase or use of counterfeit good(s)? NO/YES.

18. If your answer to Question No. 17 above is YES, name of the NGO and state the nature of the complaint or case and whether or not you were able to realize your rights.
If the answer is NO, why haven't you sought or received such assistance?

19. Have you ever received any information (through, for instance, notices, advertisements or brochures) from any governmental authorities, NGOs or business entities) about issues related to the trade in counterfeit goods? YES/NO.

20. If your answer to Question No. 19 above is YES, name the governmental authority, NGO or business entity which provided such information.

21. Which of the following issues was/were covered by information which the governmental authorities, NGOs or business entities named in your answer to Question No. 20 above provided (*you may choose more than one option*).

a. To alert the public about circulation of counterfeit goods in shopping outlets. ☐
b. To inform buyers how to identify counterfeit goods. ☐
c. To educate consumers where to report in the event of purchasing the counterfeit goods. ☐
d. To inform consumers how to take action against sellers or manufacturers of counterfeit goods. ☐
e. To encourage buyers to purchase genuine goods. ☐
f. To threaten manufacturers or sellers of counterfeit goods of legal action. ☐
g. To encourage consumers to purchase local products ☐

G. Indicate your estimated monthly income (*choose one option only*)

a. Below shs 100, 000 ☐

b. Between shs 100, 000 and shs 500, 000 ☐

c. Between shs 500, 000 and shs 1,000, 000 ☐

d. Between shs 1, 000, 000 and shs 1, 500, 000 ☐

e. Between shs 1, 500, 000 and shs 2, 500, 000 ☐

f. Above shs 2, 500, 000 ☐

Appendix 4

University of Kent

Kent Law School
Eliot College
University of Kent
Canterbury
CT2 7NS
UNITED KINGDOM

Dear Sir/Madam,

Re: Study on Regulation of Counterfeit Goods Trade in Tanzania

I, the undersigned, am a Tanzanian who is undertaking a Doctor of Philosophy candidate study entitled: ***Regulation of the Counterfeit Goods Trade: A Case Study of Tanzania*** whose objective is to investigate, among other issues, the evolution of the trade in counterfeit goods, its driving factors and impact on the country's economy, traders and consumers. In addition, the study intends to explore anti-counterfeiting regulation and its efficacy in controlling the trade in counterfeit goods. It is anticipated that information from the study will contribute inputs to the process for reforming policy and regulation which will augment the efficacy of mechanisms for controlling the trade in counterfeit goods and its impact in Tanzania.

Be informed that your participation is **voluntary** and if, at any time during the study, you wish to withdraw from participating, you may do so. In addition, unless you decide otherwise, your identity will be **anonymous** and information provided will be used for purposes of this research only and be treated **confidentially**.

I will appreciate if you accept to participate in this study and provide me with information which addresses issues described above.

Thanking you in advance.

Eugene E MNIWASA

Contacts:

- Email: eem6@kent.ac.uk, or mniwasa@gmail.com
- Phone: +44 (0) 7532156144 (UK).
  +255 (0) 715 840048 (Tanzania).

Appendix 5

TFDA
Tanzania Food & Drugs Authority

TAARIFA KWA UMMA

TAHADHARI YA UWEPO WA DAWA BANDIA KWENYE SOKO

1. UTANGULIZI

Mamlaka ya Chakula na Dawa (TFDA) ni taasisi ya Serikali iliyo chini ya Wizara ya Afya na Ustawi wa Jamii iliyoanzishwa chini ya Sheria ya Chakula, Dawa na Vipodozi Na.1 ya mwaka 2003. Mamlaka ina jukumu la kudhibiti ubora, ufanisi na usalama wa vyakula, dawa, vipodozi na vifaa tiba ili kulinda afya ya jamii.

Kuanzia tarehe 21 Agosti 2011 hadi tarehe 8 Septemba 2011, TFDA ilifanya ukaguzi katika maeneo 390 ya kuuzia dawa na kutolea huduma za afya yaliyopo katika mikoa 13 hapa nchini ili kubaini ubora na usalama wa dawa zilizopo katika soko na kuchukua hatua stahiki. Mikoa hiyo ni Ruvuma, Dodoma, Mwanza, Mtwara, Lindi, Morogoro, Mbeya, Kagera, Manyara, Pwani, Tanga, Kigoma na Dar Es Salaam.

2. MATOKEO YA UKAGUZI

Kufuatia ukaguzi uliofanyika, TFDA imefanikiwa kukamata **aina tano (5) za dawa bandia** na pia **dawa moja (1)** ambayo imesambazwa kwa kiasi kikubwa bila kuwa imesajiliwa na TFDA kama Sheria Na.1, 2003, inavyoelekeza.

Dawa bandia zilizokamatwa ni kama ifuatavyo:-

a. Artemether + Lumefantrine (ALu) yenye jina la biashara "Coartem" ambayo ni mojawapo ya Dawa Mseto ya kutibu ugonjwa wa Malaria.
b. Dawa ya kutuliza maumivu ya Ibuprofen ambayo inauzwa kama Erythromycin Stearate BP 250mg.
c. Pheoymethylpenicillin (vidonge) yenye jina la biashara Penizin - V
d. Elphedrin na Elphedren zote za vidonge.
e. Laifin (**Sulphamethoxazole** + Pyrimethamine) vidonge.

Dawa ambayo haijasajiliwa ni Orodar (Sulfadoxine + Pyrimethamine) vidonge.

Maelezo ya kina yanayotofautisha dawa halisi zilizosajiliwa na dawa bandia ni kama ilivyoanishwa katika jedwali hapa chini:

Na.	Dawa halisi iliyosajiliwa	Maelezo ya dawa bandia
1.	• Jina la dawa: Artemether + Lumefantrine (ALu) (Coartem) tablets • Mtengenezaji: Norvatis	• Jina la dawa: Artemether + Lumefantrine (ALu) (Coartem) tablets • Mtengenezaji: Norvatis

	Pharmaceuticals Corporation, Suffern, New York, USA • Mwaka wa kutengenezwa: 2007 • Mwaka wa kumaliza matumizi: 2009 • Sehemu zinapopaswa kupatikana: Vituo vya afya Serikali	Pharmaceuticals Corporation, Suffern, New York, USA • Mwaka wa kutengenezwa: umebadilishwa kuwa 2009 • Mwaka wa kumaliza matumizi: umebadilishwa kuwa 2012 • Sehemu zinapopatikana kwa sasa: Maduka ya Dawa (Famasi na Maduka ya Dawa Muhimu) na Vituo vya Afya vya watu Binafsi
	Ufafanuzi: a) Dawa hizi ziliisha muda wake wa matumizi. Hivyo mwaka wa kutengenezwa umefutwa kutoka mwaka 2007 na kuwa mwaka 2009. Aidha, mwaka wa kumaliza matumizi umefutwa kutoka mwaka 2009 na kuwa mwaka 2012 b) Dawa hizi zimepatikana katika wilaya ya Kilombero Mkoani Morogoro	
2.	• Jina la dawa: Phe**noxy**methylpenicillin tablets 250mg • Mtengenezaji: Zenufa Laboratories Ltd, Dar Es Salaam • Jina la biashara: PENIZEN – V • Namba ya toleo (Batch No.) 1044 • Tarehe ya kutengenezwa: **Mei** 2011 • Tarehe ya kumaliza matumizi **Aprili** 2013	• Jina la dawa bandia: Phe**oy**methylpenicillin tablets 250mg • Mtengenezaji aliyeandikwa: Zenufa Laboratories Ltd, Dar Es Salaam • Jina la biashara: PENIZIN-V • Namba ya toleo (Batch No.) 1044 • Tarehe ya kutengenezwa: **Machi**, 2011 • Tarehe ya kumaliza matumizi: **Machi** 2013
	Ufafanuzi: a) Vidonge havina harufu ya Penicillin ambayo inapaswa kuwepo na pia vinaonekana vichafu na vimemegukameguka b) Dawa hizi zimepatikana wilayani Geita mkoa wa Mwanza	
3.	• Jina la dawa: Ibuprofen 200mg • Mtengenezaji: Astra Lifecare (India) Pvt. Ltd	Jina la dawa bandia: Erythromycin Stearate BP 250mg tablets • Mtengenezaji: Astra Lifecare (India) Pvt Ltd

		• Rangi ya lebo ya nje imepauka sana • Katika baadhi ya lebo neno **'tablets'** limeandikwa **'tables'** • Katika baadhi ya makopo ya dawa bandia lebo zilizopo kwenye makopo zinaonesha uzito ni 25mg badala ya 250mg.
	Ufafanuzi: a) Dawa halisi zilizopo kwenye kopo ni Ibuprofen tablets, lebo halisi ya kwenye kopo imetolewa na kubandikwa lebo nyingine inayoeleza kuwa dawa hiyo ni Erythromycin Stearate tablets 250mg. b) Dawa bandia zimepatikana katika wilaya za Geita, Misungwi na Sengerema mkoani Mwanza na wilaya ya Urambo mkoani Tabora.	
4.	Jina la dawa: **Ephedrine 30mg vidonge**	• Majina ya dawa bandia: **Elphedren** na **Elphedrin** • Majina ya watengenezaji: a) Brown & Burk Pharmaceuticals Ltd, India, b) Pharmaceutical Manufacturing Company Ltd, Kenya • Namba ya toleo (Batch No.): Dawa kutoka viwanda vilivyotajwa zina namba ya toleo inayofanana ambayo ni **604003** • Neno **'Batch'** limeandikwa **'Match'** • Pamoja na kuwa namba ya toleo inafanana katika kila dawa bandia, muda wa mwisho wa matumizi (shelf-life) kwa kila dawa unatofautiana
	Ufafanuzi: Dawa bandia zimepatikana katika Wilaya za Misungwi na Geita mkoani Mwanza	
5.	Jina la dawa: **Laefin vidonge** Mtengenezaji: Laboratories and Allied Ltd, Kenya Viambata hai: **Sulphametopyrazine** + Pyrimethamine	• Jina la dawa bandia: **Laifin** vidonge • Jina la mtengenezaji: Hakuna • Viambata hai: **Sulphamethoxazole** + Pyrimethamine • Namba ya toleo: LF001

		• Tarehe ya kutengenezwa:06/2010 • Tarehe ya kumaliza muda: 05/2012
	Ufafanuzi: Dawa bandia zimepatikana katika Wilaya za Misungwi, Geita na Sengerema mkoani Mwanza.	

Vile vile, Mamlaka imebaini kuwepo katika soko dawa ya Malaria ya vidonge aina ya Orodar inayotengenezwa na Kampuni ya Elys Chemicals Ltd., ya Kenya ambayo haijasajiliwa na TFDA. Tofauti na dawa iliyosajiliwa ambayo kasha lake lina rangi ya **njano,** Orodar isiyosajiliwa ina kasha lenye rangi **nyekundu** na pia kuna neno 'Antipaludeen' kwenye lebo.

3. Hatua zilizochukuliwa hadi sasa

a) Watuhumiwa 7 wamekamatwa na kufunguliwa mashitaka katika vituo mbalimbali vya Polisi vya Wilaya za Kilombero, Mtwara Mikindani, Kasulu, Nyamagana na Sengerema.
b) Maduka ya dawa 7 yamefungwa kwa mujibu wa Sheria katika mikoa ya Pwani, Morogoro na Dar Es Salaam.
c) TFDA imesitisha kwa muda uingizaji, usambazaji na matumizi ya vidonge vya Erythromycin Stearate 250mg, ya kopo inayosambazwa na Astra Pharmacy ambayo imetengenezwa na Astra Lifecare (Pvt) Ltd, India.
d) TFDA imesitisha kwa muda uagizaji, usambazaji na matumizi ya dawa ya Malaria ya Orodar inayotengenezwa na Kiwanda cha Elys Chemical Industries Ltd., Kenya baada ya kubainika kuwepo katika soko kwa kiasi kikubwa, cha dawa hiyo isiyosajiliwa, ambayo inafanana na ile iliyosajiliwa kiasi cha kutoweza kutofautishwa kirahisi na watumiaji.
e) TFDA imesitisha kwa muda uingizaji, usambazaji na matumizi ya dawa ya malaria ya Laefin inayotengenezwa na kiwanda cha Laboratories and Allied Ltd, Kenya.

4. Matarajio

a) Kufanya uchunguzi wa kina kwa kushirikiana na Vyombo vya Dola ili kubaini chanzo cha dawa bandia.
b) Kufanya uchunguzi wa kimaabara kwa dawa nyingine zilizotiliwa mashaka
c) Kuimarisha ukaguzi wa dawa na bidhaa nyingine zinazodhibitiwa na TFDA kwa kushirikiana na Mikoa na Halmashauri.
d) Kuendelea kutoa elimu kwa umma kuhusu jinsi ya kutambua dawa bandia na madhara yanayoweza kutokana na matumizi ya dawa hizo.

5. Hitimisho

a) TFDA inawataka Wakaguzi wa Dawa waliopo katika Wilaya na Mikoa kufanya ukaguzi wa mara kwa mara katika maeneo yao ili kubaini uwepo wa dawa duni na bandia na kutoa taarifa TFDA Makao Makuu na ofisi za TFDA za Kanda zilizopo katika Mikoa ya Mwanza, Dodoma, Arusha na Mbeya.

b) TFDA inatoa wito kwa wananchi kuwa makini wanapopewa au kununua dawa kutoka katika maduka ya dawa na vituo vya afya ili kuepuka madhara yanayoweza kutokea kutokana na matumizi ya dawa zisizokidhi ubora na usalama.

c) Waagizaji, wasambazaji na wauzaji wa dawa wanaelekezwa kuhakikisha kwamba wanatunza nyaraka zote zinazohusu dawa na hasa taarifa za matoleo (batch numbers), jina halisi na jina la biashara la dawa. Hivyo, wafanyabiashara na wataalam wanaosimamia maduka yakayokutwa na dawa ambazo hazina risiti halali za manunuzi watabeba jukumu la kupatikana na dawa hizo na kuchukuliwa hatua za kisheria ikiwa ni pamoja na kufutiwa vibali vyao.

d) TFDA inatoa wito kwa wananchi kutoa taarifa TFDA Makao Makuu, ofisi za TFDA za Kanda, ofisi za Waganga Wakuu wa Mikoa na Wilaya na pia Vyombo vya Dola kuhusu watu watakaobainika kujihusisha na utengenezaji na usambazaji wa dawa bandia.

e) Mamlaka kwa kushirikiana na Vyombo vingine vya Dola inapenda kuwahakikisha wananchi kuwa ipo imara kuhakikisha afya za wananchi zinalindwa kwa kudhibiti ubora na usalama wa dawa zilizoko katika soko.

Imetolewa tarehe 27 Septemba 2011.

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Appendix 5

MAMLAKA YA CHAKULA NA DAWA

TFDA
Tanzania Food & Drugs Authority

TAARIFA KWA UMMA

TAARIFA KUHUSU UWEPO WA DAWA BANDIA YA KUTIBU UGONJWA WA MALARIA IITWAYO ELOQUINE (Quinine Sulphate 300mg USP)

Mamlaka ya Chakula na Dawa (TFDA) ni wakala wa Serikali iliyo chini ya Wizara ya Afya na Ustawi wa Jamii yenye jukumu la kudhibiti ubora, ufanisi na usalama wa vyakula, dawa, vipodozi na vifaa tiba ili kulinda afya ya jamii.

TFDA inapenda kuutaarifu umma kuwa imebaini kuwepo kwa dawa bandia ya kutibu ugonjwa wa Malaria katika soko. Dawa hiyo inaitwa **Eloquine (Quinine Sulphate 300mg U.S.P)** na ipo katika makopo ya vidonge 1000 (elfu moja) kila moja. Maelezo yaliyopo katika lebo yanaonesha kuwa dawa hiyo imetengenezwa na kiwanda cha Elys Chemical Industries Ltd cha nchini Kenya.

Hata hivyo, TFDA imebaini kuwa kiwanda cha Elys Chemical Industries Ltd hakitengenezi dawa yenye jina la biashara la 'ELOQUINE'. Kiwanda hicho kimesajili Tanzania Quinine Sulphate 300mg B.P isiyo na jina la kibiashara. Aidha, kiwanda cha Elys Chemical Industries Ltd kimebainisha tofauti mbalimbali zilizopo katika lebo ya dawa bandia ikilinganishwa na dawa halisi inayotengenezwa na kiwanda hicho iliyosajiliwa na TFDA na hivyo kuthibitisha kuwa kiwanda hicho hakitengenezi dawa hiyo.

Katika kudhibiti usambazaji wa dawa hiyo hapa nchini, hadi sasa TFDA imekamata jumla ya makopo 155 ya dawa hiyo bandia ya Eloquine jijini Dar Es Salaam yaliyokuwa yakisubiri kusambazwa. Aidha, kopo moja lenye vidonge 115 limekamatwa Moshi, Kilimanjaro. Tayari mtuhumiwa mmoja amekwishafikishwa mahakamani na upelelezi wa chanzo na wasambazaji wa dawa hii unaendelea kwa kushirikiana na Jeshi la Polisi.

Uchunguzi wa dawa bandia katika maabara umebaini kuwa vidonge hivyo **havina kiambato hai (active ingredient) cha Quinine Sulphate** kwa ajili ya kutibu ugonjwa wa Malaria na hivyo matumizi yake ni hatari kwa afya ya binadamu.

Maelezo ya kina yanayotofautisha dawa halisi iliyosajiliwa na dawa bandia ni kama yalivyoainishwa katika jedwali hapa chini.

Dawa halisi iliyosajiliwa	Maelezo ya dawa bandia
• Jina la dawa: Quinine Sulphate 300mg **B.P**	• Jina la dawa: Quinine Sulphate 300mg **U.S.P**
• Jina la biashara: **Haina jina la biashara**	• Jina la biashara: **ELOQUINE**
• Mtengenezaji: Elys Chemical Industries Ltd, Road B, Off Enterprise Road, P.O Box **40411**, 00100 Nairobi, Kenya	• Mtengenezaji: Elys Chemical Industries Ltd, Road B, Off Enterpises Road, P.O Box **4011** 00100 Nairobi, Kenya
• Rangi ya Lebo: **Nyeupe na kahawia (*Brown*)**	• Rangi la Lebo: **Njano na Nyekundu**
• Namba ya toleo: Huanzia na namba na **siyo herufi. Kwa mfano: 2167E**	• Namba ya toleo: **GE410**
	• Tarehe ya kutengenezwa: 04/2009
• Muda wa matumizi (Shelf life): **Miaka 4**	• Tarehe ya mwisho wa matumizi: 4/2014 **(Miaka 5)**

Wafanyabiashara wote wa dawa na wananchi wanatahadharishwa kutozitumia dawa hizi na wale wote waliouziwa dawa hizi wanaelekezwa kuzirudisha dawa hizo katika ofisi za TFDA, vituo vya afya vya Serikali au vituo vya polisi vilivyo jirani nao.

TFDA inapenda pia kuwakumbusha wafanyabiashara wa dawa, wasafirishaji wa vifurushi na wananchi kutoa taarifa haraka iwezekanavyo pale wanapohisi kuuziwa dawa duni, bandia au zilizoisha muda wa matumizi. Taarifa zitolewe ofisi za TFDA makao makuu zilizopo Barabara ya Mandela, EPI Mabibo External, Dar es Salaam na Ofisi za Kanda zilizopo mtaa wa Nkurumah, Mwanza, Mtaa wa Sakina – Arusha, Hosptali ya mkoa ya Dodoma na Jengo la Ofisi ya Mifugo Mkoa wa Mbeya.

Kwa maelezo zaidi tafadhali wasiliana na:-

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Appendix 5

Imetolewa tarehe: 30 Oktoba, 2012

MAMLAKA YA CHAKULA NA DAWA

TFDA
Tanzania Food & Drugs Authority

UFAFANUZI WA TAARIFA MBALIMBALI ZINAZOTOLEWA KWENYE VYOMBO VYA HABARI KUHUSU DAWA BANDIA ZA ARVs

1.0 UTANGULIZI

a) Mamlaka ya Chakula na Dawa (TFDA) ni Wakala wa Serikali chini ya Wizara ya Afya na Ustawi wa Jamii yenye jukumu la kudhibiti usalama, ubora na ufanisi wa chakula, dawa, vipodozi na vifaa tiba ili kulinda afya ya jamii. TFDA imeweka mifumo mbalimbali ya udhibiti chini ya sheria ya Chakula, Dawa na Vipodozi, Sura 219. Mifumo hiyo ni pamoja na usajili wa bidhaa, usajili wa majengo/maeneo ya kuzalisha na kuuza bidhaa, uchunguzi wa kimaabara wa sampuli za bidhaa pamoja na ukaguzi na ufuatiliaji wake kwenye soko.

b) Kupitia mifumo iliyowekwa, TFDA imekuwa ikihakikisha usalama, ubora na ufanisi wa dawa katika soko. Aidha, mifumo hiyo pia huwezesha kubaini uwepo wa bidhaa bandia na duni kwenye soko na kuchukua hatua mbalimbali kwa mujibu wa Sheria. Hatua hizo ni pamoja na kusitisha matumizi ya bidhaa husika na kuziondoa kwenye soko, kuziteketeza na kuwafikisha watuhumiwa kwenye vyombo vya dola na sheria.

c) Itakumbukwa kwamba, mnamo tarehe 21 Septemba 2012, tarehe 4 Oktoba, 2012 na tarehe 10 Oktoba 2012, Wizara ya Afya na Ustawi wa Jamii ilitoa taarifa kwa umma juu ya uwepo wa dawa bandia ya kupunguza makali ya UKIMWI yenye jina la kibiashara 'TT-VIR 30' toleo Na. 0C.01.85 ikiwa ni pamoja na hatua zilizochukuliwa. Baada ya taarifa hizi za Wizara kutolewa, kumekuwa na taarifa mbalimbali kupitia vyombo vya habari zinazoleta mkanganyiko kwa wananchi kuhusu suala hili.

d) Baadhi ya mikanganyiko hiyo ni pamoja na jinsi dawa hiyo bandia ilivyobainika, kama barua za TFDA ziliwafikia Tanzania Pharmaceuticals Industries (TPI) Ltd na kama uzalishaji wa dawa bado unaendelea au la.

e) Ili kuondoa mkanganyiko ambao umeanza kujitokeza, Mamlaka inapenda kutoa ufafanuzi zaidi kuhusu dawa hizo bandia ambazo matumizi yake yamesitishwa. Vilevile, TFDA inapenda kutumia fursa hii kutoa ufafanuzi kuhusu mfumo wa udhibiti wa dawa nchini.

2.0 UFAFANUZI KUHUSU DAWA BANDIA YA TT-VIR 30

a. TFDA ndiyo iliyobaini uwepo wa dawa bandia aina ya TT-VIR 30 toleo Na. 0C.01.85 kwenye soko mnamo tarehe 28 Julai, 2012 kupitia mfumo wake wa ukaguzi na ufuatiliaji wa bidhaa katika soko.

b. Kama ilivyoelezwa katika taarifa zilizotolewa na Wizara ya Afya na Ustawi wa Jamii, TFDA inasisitiza kwamba kampuni ya TPI Ltd iliiuzia MSD dawa bandia aina ya TT-VIR 30 toleo Na. 0C.01.85, kwa mujibu wa nyaraka zilizopo.

c. Nyaraka hizo pamoja na vielelezo mbalimbali zimewasilishwa kwenye vyombo vya usalama kwa hatua zaidi za kisheria.

d. TFDA imesitisha uzalishaji wa dawa za ARVs za kiwanda cha TPI Ltd kupitia barua Kumb. Na. CA/C.80/222/01A/47 ya tarehe 4 Oktoba, 2012 na vile vile uzalishaji na usambazaji wa dawa zote kupitia barua Kumb. Na. CA/C.80/222/01A/55 ya tarehe 10 Oktoba, 2012.

e. Barua hizo zilipelekwa kwa 'dispatch' katika ofisi za Makao Makuu ya Kampuni ya TPI Ltd iliyoko eneo la Mikocheni, Dar es Salaam na kupokelewa tarehe 04 na 10 Oktoba, 2012.

f. Taarifa zilizotolewa na Wizara ya Afya na Ustawi wa Jamii zilionesha wazi kwamba TFDA ndiyo iliyositisha uzalishaji wa dawa katika kiwanda cha TPI Ltd.

g. Ukaguzi uliofanywa na TFDA kwenye kiwanda cha TPI Ltd, Arusha tarehe 12 na 23 Oktoba 2012, umethibitisha kwamba hakuna uzalishaji wa dawa unaoendelea kwenye kiwanda husika kama ilivyoelekezwa na TFDA.

3.0 MFUMO WA UDHIBITI WA DAWA NCHINI

Aidha, Mamlaka inapenda kutumia fursa hii kufafanua zaidi kuhusu mfumo wa udhibiti wa dawa nchini kama ifuatavyo;

a. Udhibiti wa dawa unazingatia Sheria ya Chakula, Dawa na Vipodozi, Sura 219, kanuni zilizowekwa, miongozo, misingi ya kisayansi (science based) pamoja na miundombinu kama vile maabara na mtandao wa ukaguzi. Mifumo ya udhibiti hujumuisha yafuatayo;-

   i. Kufanya tathmini ya taarifa za kisayansi kuhusu ubora, usalama na ufanisi wa dawa, kufanya ukaguzi wa viwanda na hatimaye kusajili dawa husika.

   ii. Kusajili maeneo yanayojishughulisha na uzalishaji na biashara ya dawa ikiwepo masharti ya kuwa na wataalam wa kusimamia uzalishaji.

   iii. Kufanya ukaguzi wa maeneo yanayotengeneza dawa, vituo vya forodha pamona na maeneo ya kusambaza na kuuza dawa.

   iv. Kufanya ufuatiliaji wa ubora, usalama na ufanisi wa dawa zilizosajiliwa kwa lengo la kuhakikisha kwamba zinakidhi vigezo na matakwa ya usajili.

   v. Kufanya uchunguzi wa kimaabara ili kuhakiki usalama na ubora wa dawa zinazoombewa usajili na zile zilizoruhusiwa kutumika nchini.

b. Katika kutekeleza mifumo ya udhibiti na kwa kuzingatia misingi ya udhibiti wa bidhaa duniani, mwenye jukumu la kwanza la kuhakikisha usalama, ubora na ufanisi wa bidhaa ni la aliyeisajili bidhaa (marketing authorization holder) ili kuhakikisha kuwa mtumiaji hapati madhara.

c. Mifumo hii ndiyo inayoiwezesha TFDA kuhakikisha usalama, ubora na ufanisi wa dawa na pia kubaini dawa bandia na duni katika soko na kuchukua hatua kwa mujibu wa sheria.

4.0 HITIMISHO

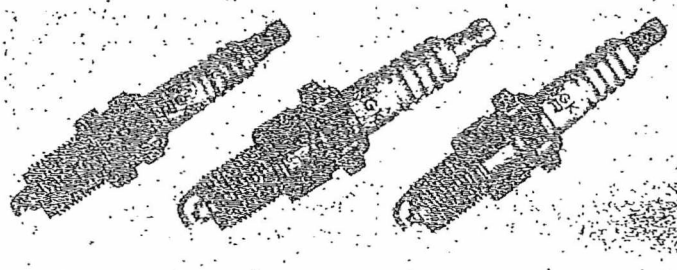
a. Uchunguzi zaidi wa dawa bandia aina ya TT-VIR 30 toleo Na. 0C.01.85 unaendelea kupitia vyombo vya usalama kwa hatua zaidi za kisheria.
b. TFDA itaendelea kufuatilia usalama, ubora na ufanisi wa dawa kwenye soko kupitia mifumo iliyowekwa ili kulinda na kudumisha afya ya jamii;
c. Tunapenda kuwakumbusha wote wanaojihusisha na biashara ya dawa, chakula, vipodozi na vifaa tiba kuzingatia Sheria, Kanuni na Miongozo iliyowekwa na kwamba yeyote atakayekiuka taratibu hizo atachukuliwa hatua kali za kisheria.
d. Tunawahakikishia wananchi kwamba dawa za ARVs zilizoko katika vituo vya kutolea huduma za afya ni salama na hivyo waendelee kuzitumia bila wasiwasi wowote.
e. Tunatoa rai kwa vyombo vya habari, watoa huduma za afya na wananchi kuendelea kutoa ushirikiano kwa kutoa taarifa pale wanapobaini au kuhisi kuwepo kwa chakula, dawa, vipodozi na vifaa tiba vyenye mashaka au uvunjifu wa Sheria ya Chakula, Dawa na Vipodozi, Sura 219.

Hiiti B. Sillo
MKURUGENZI MKUU
MAMLAKA YA CHAKULA NA DAWA
30 OKTOBA, 2012

Appendix 6

NGK SPARK PLUGS

CAUTIONARY NOTICE



Notice is hereby given to the trade and public that NGK SPARK PLUG ME is the lawful and sole proprietor of trademark "NGK" as represented above for goods included with registration.

Be advised, NGK SPARK PLUG has acquired a worldwide reputation with the trust as the leading manufacturer of the products from continuous promotion by reliable authorized distributors.

In these days, it has been found that imitations of NGK products are floating in the market being imported, distributed and sold with the above trademark and logo illegally.

Further notice is hereby given that trademark use for imitation products is an infringement of NGK SPARK PLUGS intellectual property rights.

NGK SPARK PLUG ME will take all appropriate legal actions and measures including civil and criminal proceedings to protect their intellectual property rights at the registered countries.

All necessary remedies including an injunction, customs action to collect and /or confiscate imitation products, damages for infringement including legal fee account of profits and costs are contemplated against any person (s), corporate body / company incorporated or unincorporated firm who are found manufacturing, supplying, distributing, retailing for sales these imitation products, or violating the intellectual property rights of, NGK SPARK PLUG ME

Any question, comments or queries regarding NGK SPARK PLUG ME shown above should be referred to.

If you find any imitation products or any source who is supplying imitation of our products please contact us at the following address.

NGK SPARK PLUG MIDDLE EAST FZE
P.O.BOX 17859,JAFZWHSE,YB03 & 04 Dubai – U.A.E.
Tel:+971 -4-8832122
Fax : 971- 4 – 8832123
Email:ngkntk@emirates.net.ae

AUTHORISED DISTRIBUTORS

GATHANI (T2) LIMITED
Plot 80, Gerezani, Nkuruma st,
P.O.Box 79002, Dar es Salaam
Tel: 2181158/2185622 Fax: 2185601
Mob: 0754 479980/0784 228378

Appendix 7

HP PRINT
INTELLIGENTLY
COUNTERFEIT CARTRIDGES
AND UNRELIABLE
FAKE
DOG
ARE YOU BEING LYNCHED BY NON-GENUINE ORIGINAL CARTRIDGES
IS ENTERING A DANGER ZONE
CE253A
27
129

Appendix 8

Say 'NO' to COUNTERFEITS

All genuine Sollatek products display this sticker on the carton.

Sollatek™

Power Control • Solar Power

The illegal counterfeiting and purchasing of electronic products designed to protect appliances from voltage fluctuations has become a widespread problem. Dealers selling these substandard products, in both quality and technology, are not only endangering lives through the risk of fires, but are selling items not up to the job for which they were intended. We would appeal to both dealers and purchasers of these products that you are not only breaking the law you are

putting yourselves and others at risk!

Make sure it's the real thing - Make sure it's Sollatek

Power Control Ltd Ghangombe Road, Opposite VETA Dar-es-Salaam
Tell:2863810 Fax: 2863820 Mob:0784724461 Email:hasnain.laving@sollatek.co.ke

EYECATCHERS

Appendix 9

unterfeits

KOSA LA JINAI

Ku-ghushi Bidhaa Kwa njia yoyote ile.

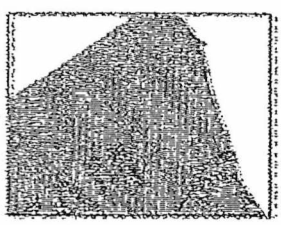
Adhabu yake ni, Faini ya

kati ya Shs Milioni 10 hadi 50.

Au Kifungo miaka 4 hadi miaka 15

Au yote – Faini na Kifungo.

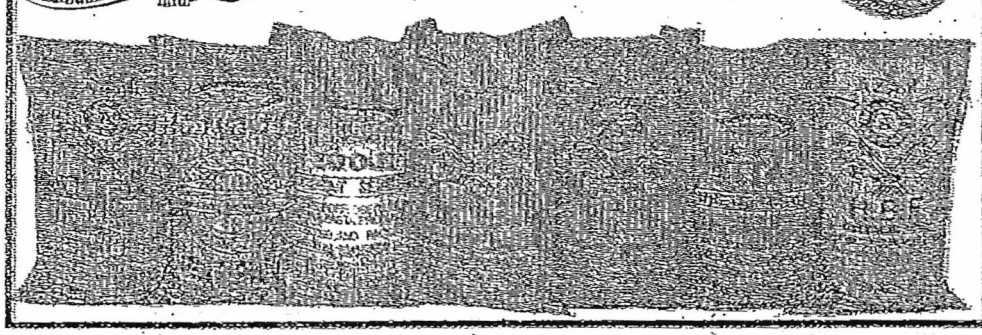
Mwenye duka, unapo nunua Unga wa Azam Special Bakers Flour, Hakikisha kiroba ni kipya na kimefungwa kwa nyuzi rangi mbili – Mweupe na Nyekundu na kukuna dalili za kuonyesha kiroba kimerudiwa kufungwa upya.



Said Salim Bakhresa & Co. Ltd

Bidhaa Bora za Bakhresa

zimethibitishwa na TBS na I.S.O



Appendix 10

Important message for farmers !

Did you know that you can now get the full range of genuine SeedCo seeds in all Tanganyika Farmers Association (TFA) shops country wide?

Go visit them now and get the best for your harvest.

Seed Tanzania : Feed Tanzania

SEED-CO
The African Seed Company