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Committee on Technical Barriers to Trade

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## EUROPEAN UNION – TOBACCO PRODUCTS DIRECTIVE

### STATEMENT BY MALAWI TO THE COMMITTEE ON TECHNICAL BARRIERS TO TRADE AT ITS MEETING OF 6-7 MARCH 2013

The following communication, dated 12 March 2013, is being circulated at the request of the delegation of Malawi.

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1.1. Malawi is deeply concerned that the EU's proposed Tobacco Products Directive (TPD) will significantly restrict trade, and is inconsistent with the EU's binding obligations under the TBT Agreement.

1.2. We wish to make a critically-important point. No one is questioning the right of the EU to take measures to protect public health. That is not at issue. Rather, when the EU or any other Member acts to protect public health, it must do so in a *WTO-consistent manner*. This key concept is embodied in the TBT Agreement that was accepted by the EU, Malawi and other Members at the end of the Uruguay Round.

1.3. The Appellate Body summarized this key principle succinctly in its ruling last year in *US – Clove Cigarettes*. It emphasized that "we are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking" but that "if it chooses to do so, this has to be done consistently with the TBT Agreement".

1.4. The EU TPD falls short of this standard, as it pursues its health objectives in a manner that is *not* consistent with the TBT Agreement. This should be a serious concern to all WTO Members.

1.5. Turning to the specifics of the TPD, Malawi would highlight in particular four aspects of the proposed measure that would breach the TBT Agreement:

1.6. I begin with the ingredients bans. The TPD includes three types of ingredients bans. First, it provides that EU Member States must prohibit the placing on the market of tobacco products with a so-called "characterising flavour", including menthol. Second, EU Member States are required to prohibit the use of certain specified additives in tobacco products, including those that "create the impression" of health benefits, and additives that are "associated with energy and vitality". Third, Member states are also required to prohibit the use of flavourings in filters, papers, and packages.

1.7. It is Malawi's strong conviction that these ingredients bans are inconsistent with the EU's binding obligations under TBT Article 2.2, as they are clearly "more trade-restrictive than necessary" to fulfil the EU's health objectives.

1.8. The ingredients bans are clearly trade-restrictive, as they will have the effect of banning the importation into the EU market of tobacco products with a "characterising flavour", including menthol, even though it is unclear what a "characterising flavour" actually is, and how this will be applied through the implementing acts.

1.9. In *US – COOL*, the Appellate Body made clear that assessing the consistency of a measure with TBT Article 2.2 includes consideration of whether it "actually contributes to the achievement of the legitimate objective". The TPD, by its own terms, focuses on the "initiation of tobacco consumption, in particular by young people". The EU has provided no evidence to demonstrate that these ingredients bans will actually contribute to lower rates of smoking initiation by young people. Indeed, the initiation of smoking by young people is principally the result of social factors such as peer pressure rather than "characterising flavours". It is also unclear to us how additives can "create impressions" or are "associated with energy and vitality". These bans thus breach Article 2.2.

1.10. Second, the labelling provisions of the TPD are similarly inconsistent with Article 2.2. The TPD would require the use of "combined health warnings" comprising a text warning and a colour photograph, along with "smoking cessation information". The combined health warnings must cover 75 % of the front of the package. These labelling requirements will clearly restrict trade by imposing costly compliance requirements on companies seeking to export to the EU market. The measure will not contribute to the EU's health objectives. There is no evidence that such enhanced warnings will provide consumers with information they do not already have, or will change their behaviour.

1.11. Third, the TPD also includes WTO-inconsistent new rules on packaging. A cigarette package must have a "cuboid shape" and must include at least 20 cigarettes. Moreover, the package cannot contain "an opening that can be re-closed or re-sealed after the opening is first opened, other than the flip-top lid".

1.12. These strict and unprecedented requirements restrict trade by prohibiting the importation and sale of packages that do not conform to such specifications. It is not apparent to us, Mr. Chairman, why the shape of a package or the number of cigarettes inside it would reduce smoking, and the EU has not provided any credible information on why it would. The packaging requirements will not fulfil the EU's health objectives, and are more trade-restrictive than necessary within the meaning of Article 2.2.

1.13. These packaging requirements also breach the requirement in TBT Article 2.8 that Members are to specify technical regulations based on product requirements "in terms of performance rather than design or descriptive characteristics".

1.14. Fourth, the TPD will ban small diameter cigarettes from the EU market, following an unexplained legislative pronouncement in the draft Directive that such products "shall be deemed to be misleading". This breaches Article 2.2.

1.15. An import ban is clearly highly trade-restrictive. There is no basis to consider that such an arbitrary measure would promote the EU's health objectives. Nowhere in the TPD is there any indication as to why cigarettes with a diameter of less than 7.5 mm is "misleading".

1.16. Thus, according to the TPD, cigarettes with a diameter of 7.4 mm would be "misleading", while those with a diameter of 7.6 mm would not be "misleading". The logic of this would escape most people and, we assume, most WTO Members.

1.17. The ban on small-diameter cigarettes is also clearly based on "design or descriptive characteristics" rather than the "performance" of the product, in breach of Article 2.8.

1.18. As Members are well aware, Article 12.3 provides that Members preparing technical regulations shall – not should – "take account of the special development, financial and trade needs of developing country Members", with a view to ensuring that such technical regulations "do not create unnecessary obstacles to exports from developing country Members." The onerous new obligations of the TPD will clearly create new, unnecessary obstacles to the tobacco exports of developing countries. I must also stress that this will disproportionately hit least-developed tobacco exporters such as Malawi.

1.19. These comments are not exhaustive of Malawi's views on the TPD, and we reserve our right to make additional statements in future meetings.

1.20. Malawi has some specific requests for the EU. We would ask the EU to please provide credible scientific evidence to support the TPD, particularly the evidence to support the position that:

- a. Ingredients bans, including those on "characterising flavours" and additives "associated with energy and vitality" will reduce the "initiation of tobacco consumption, in particular by young people";
- b. Enhanced health warnings, including the 75% combined health warnings on the package, will provide consumers with information they do not already have, or will change their behaviour;
- c. Prescriptive rules on packaging, and minimum cigarettes per package requirements, will reduce smoking initiation and smoking rates; and
- d. Cigarette diameter sizes can "mislead", and increasing prescribed diameter sizes will reduce such smoking initiation and smoking rates.

1.21. We also respectfully request the European Union to ensure that the TPD is fully consistent with its binding obligations under the TBT Agreement.

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