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Committee on Technical Barriers to Trade

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**EUROPEAN UNION – TOBACCO PRODUCTS, NICOTINE CONTAINING PRODUCTS AND
HERBAL PRODUCTS FOR SMOKING. PACKAGING FOR RETAIL SALE OF ANY OF THE
AFOREMENTIONED PRODUCTS**

**STATEMENT BY MALAWI TO THE COMMITTEE ON TECHNICAL BARRIERS TO TRADE AT ITS
MEETING OF 30-31 OCTOBER 2013**

The following communication, dated 5 November 2013, is being circulated at the request of the delegation of Malawi.

1 INTRODUCTION

At the outset please allow me to thank the EU for responding, on 30 July 2013 to the concerns that Malawi had raised with the EUs TBT enquiry point in relation to the WTO compatibility of the TPD. Mr. Chairman, as Members are aware that, since the last meeting of this Committee, the European Parliament adopted on October 8 certain amendments to the proposed Tobacco Products Directive (TPD). While some of these changes were useful, others have made the draft law even more WTO-inconsistent than the initial version tabled by the Commission late last year. This should be of strong concern to all WTO Members that seek to uphold a rules-based system for technical regulations, particularly least-developed countries that are dependent on tobacco exports.

Mr. Chairman, before turning to the specifics of the revised TPD, we wish to make one point clear. We do not presume to tell the EU how to legislate in the area of public health. This is a decision for the EU. However, we have the right and the duty to point out how the revised proposal would violate the binding commitments that the EU has made to all WTO Members, including Malawi. The WTO Appellate Body has ruled that when Members legislate to protect health, they must do so in a WTO-consistent manner. Unfortunately, Mr. Chairman, the revised TPD falls short of this standard. We note that, while some of the recently adopted amendments may represent a step in the right direction, they are part of a legislative process which will remain open for some time, and the outcome of which is still highly uncertain.

Malawi would like to focus its intervention on three particularly problematic parts of the revised TPD, concerning (i) the regulation of additives; (ii) enlarged health warnings; and (iii) traceability requirements. These sets of provisions, if adopted in their current form, will breach the TBT Agreement and impair access to the EU market for Malawi. These are examples of Malawi's concerns and should not be regarded as an exhaustive list.

2 REGULATION OF ADDITIVES

I begin with additives. The revised TPD contains a new, and highly prescriptive, "positive list" approach to the regulation of additives. No additive can be used in tobacco products in the EU unless it has been approved and included in an Annex to the TPD. The amendments also prescribe the additives – or rather types of additives – that may not be approved.

Manufacturers and importers must make an application to the Commission in order to obtain approval for an additive. Yet there are no scientific criteria indicated to determine which additives can or cannot be accepted on the list.

To the contrary, the revised TPD enumerates prohibited categories of additives in vague, arbitrary and highly subjective terms. For example, the text indicates that approval cannot be granted for additives that "create the impression" that a tobacco product "has a health benefit or presents reduced health hazards". Prohibited additives also include those supposedly "associated with energy and vitality" or additives "which, when used, may impart a characterizing flavor".

Members will recall that these highly ambiguous criteria were included in the original version of the 2012 TPD proposal, as additives that were to be prohibited by the Member states. Such ill-defined standards have survived in the new version, as additives that cannot be included on the positive list.

When EU regulators consider applications to approve additives, they will be operating within a legal framework that is entirely subjective. How will manufacturers and importers know which additives will or will not be approved? The revised TPD mandates that an application for the approval of an additive must be accompanied by "clear evidence supported by scientific data that the additive does not fall under any of the exclusion criteria"[.] Yet what "clear evidence supported by scientific data" can be provided to demonstrate, for example, that additives do not "create impressions" of health benefits? The EU law requires manufacturers and importers to prove a negative. Additives do not "create impressions", and no evidence or data exists to demonstrate otherwise.

Such an approach to regulation will create "unnecessary obstacles to international trade" as it will be "more trade-restrictive than necessary" to fulfil the EU's health objectives, contrary to the EU's obligations under TBT Article 2.2. Blocking additives on such an arbitrary basis will inevitably impair market access for tobacco exporting countries such as Malawi.

3 HEALTH WARNINGS

I now turn to health warnings. The European Parliament recognized that the Commission's proposal for combined health warnings that cover 75% of the package was extreme and unwarranted. The amendments have reduced this to 65%.

While the amendment was a step in the right direction, Malawi is convinced that a 65% health warning on the front and back of packages nonetheless remains excessive, and will be ineffective. It is more trade-restrictive than necessary to fulfill the EU's health objectives, and therefore breaches TBT Article 2.2.

Mr. Chairman, as we have indicated earlier, enlarged warnings are based on two fundamentally flawed assumptions: that consumers currently lack information on the risks associated with smoking, and that larger warnings will discourage smoking, particularly at the stage of smoking initiation. Such assumptions are demonstrably incorrect. The revised text of the TPD continues to ignore the real factors that contribute to smoking initiation, particularly social interaction within peer groups. This is particularly important for young people, the target of the Directive.

The EU has not provided any reliable evidence that larger health warnings will reduce smoking. For this reason, the 65% combined warnings still violate Article 2.2.

4 TRACEABILITY REQUIREMENTS

Finally, I would like to address the issue of traceability requirements. Article 14 of the TPD contains new requirements in the area of traceability that would conflict with the EU's WTO obligations under Article 2.2 of the TBT Agreement, which requires not to introduce regulations which are more trade restrictive than necessary.

Mr. Chairman, there is already a current voluntary system for tracing and tracking, introduced by four manufacturers, which covers 95% of EU cigarettes sales. No scientific support has been provided to establish that the proposed TPD measures would better contribute to the EU's policy objective of reducing illicit trade. We believe that the current proposal would result in the implementation of an untested and redundant track and trace system. On the opposite,

obliging all manufacturers of cigarettes sold on the European market to comply with the current track and trace system would allow the EU to optimize its fight against illicit trade.

Overall, Mr. Chairman, the continued implementation of the current system would be sufficient to fulfill the EU's public health objectives. The proposal for additional legislation requiring implementation of the proposed Article 14 of the TPD would create a market barrier for foreign exports to the EU, which would amount to a technical barrier to trade, in which would violate the EU's WTO commitments under the TBT Agreement.

5 CONCLUSIONS

Mr. Chairman, we would offer two final observations. First, we should be clear that the EU's binding WTO obligations remain unaffected by other agreements. The European Parliament revised Recital 7 of the TPD to refer to the "landmark" WHO Framework Convention on Tobacco Control, and to state that the EU and its Member states "are bound under international law by its provisions". Other references to FCTC obligations appear in the TPD.

Malawi would make two important comments here. First, not all provisions of the FCTC are binding. Second, even for those FCTC provisions that do have legal force, the EU nevertheless remains bound by its commitments under the TBT Agreement. Nothing in the FCTC can alter the TBT Agreement. The TPD must be WTO-consistent.

Second, the damage to Malawi's tobacco exports to Europe, which will be caused by the EU TPD, is a matter of critical importance. In our written statement to the EU earlier this year, we noted that the adoption of this legislation would have disastrous consequences for Malawi's national economy, as 12% of the population is engaged in the value chain for tobacco. We also noted that out of the 15 million people in Malawi, 1.5 million are tobacco farmers, and tobacco is the backbone of their economic activities. The issues we are discussing today are thus of grave concern to Malawi and, indeed, other least-developed tobacco exporters.

We therefore renew our call on the EU to ensure that the TPD is in full compliance with its WTO obligations, including the TBT Agreement.
