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Mr. BB Maloboka  
Ministry of Health and Social Services  
Windhoek  
NAMIBIA

Dear Maloboka

### **COMMENTS ON NAMIBIA'S DRAFT REGULATIONS UNDER TOBACCO PRODUCTS CONTROL ACT 2010**

On 14 November 2011, Namibia published its "Notice of intention to make regulations: Tobacco Products Control Act, 2010" (the "draft TPC Act") in the Republic of Namibia's Government Gazette, providing 30 days for comments. The draft TPC Act raises a number of concerns in terms of Namibia's compliance with its international trade law obligations in general and its obligations as a Member of the World Trade Organization ("WTO") in particular.

The rules of the WTO, free trade agreements, and investment treaties do not prohibit governments from protecting the health of their citizens, as long as positive, scientific evidence supports such measures and the measures are not more trade restrictive than necessary to achieve the health objective. The balance of rights and obligations set out in the WTO Agreements allows Members to take effective measures to protect health while ensuring respect for the legitimate trading interests of other Members. Indeed, it is well-established under WTO law that any WTO Member is free to regulate economic and other activities within its territory in any way that it deems most appropriate, provided that such regulation is consistent with the trade rules that all WTO Members have agreed to follow. The draft TPC Act risks violating important WTO obligations of Namibia under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"), the WTO Agreement on Technical Barriers to Trade (the "TBT Agreement"), and the General Agreement on Tariffs and Trade 1994 ("GATT").

The draft TPC Act requires that a graphic and textual health warning be affixed to each package in which a tobacco product is sold on a retail basis. It provides that the health warnings be positioned in the centre of the package and fill the area on the package as presented in Annexure 1 to the draft TPC Act. This picture or pictogram must cover not less than 60% of the surface area on both the largest sides of the pack, while the remaining areas must bear the rest of the text. In total, it appears that the health warnings

“must occupy not less than 60% and not more than 70% of the area in which it is displayed.”<sup>1</sup>

Furthermore, the draft TPC Act provides that a retailer may indicate the availability of tobacco products and the price thereof only by means of a sign at the point of sale that bears only the name of the product and its retail costs, and is in a colouring similar to the rest of the pricing labels of all other products in that retail outlet.<sup>2</sup> The draft TPC Act thus appears to prohibit the use of tobacco products’ trademarks in the course of trade. Moreover, the draft TPC Act regulates the packaging of tobacco products by requiring that cigarettes may only be sold in “a package of at least 20 cigarettes.”<sup>3</sup>

The above-mentioned features of the draft TPC Act violate several important provisions of the TRIPS Agreement in relation to the protection of trademarks and constitutes an unnecessary barrier to trade in violation of Namibia’s obligation under the TBT Agreement, as incorporated also in, for example, the free trade agreement between the European Free Trade Association and the Southern African Customs Union.<sup>4</sup>

First, Article 20 of the TRIPS Agreement requires that the use of trademarks in the course of trade shall not be “unjustifiably encumbered by special requirements, such as... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.” By imposing a health warning that covers at least 60 % of the pack and is to be positioned in the centre of the pack both at the front and back, the draft TPC Act is clearly inconsistent with Article 20. Namibia’s measure would significantly encumber the use of trademarks. Trademarks can only be used on a limited and specifically assigned space on the pack. By requiring such a large health warning at the center of the pack, the draft TPC Act effectively prevents trademarks from being visible and thus from being able to perform their important functions as a badge of origin. The draft TPC Act thus imposes a special requirement on the use of the trademark in a special form and place on the pack and requires its use in a manner that will inevitably be detrimental to its capability to distinguish the product from that of other producers. The unjustifiable encumbrance on the use of the trademarks imposed by the draft TPC Act is inconsistent with Namibia’s obligations under Article 20 of the TRIPS Agreement.

Article 8.1 of the TRIPS Agreement allows WTO Members to adopt measures “necessary” to protect public health, but only “provided they are consistent with the provisions of this Agreement.” WTO jurisprudence confirmed that the TRIPS Agreement does not contain a general health exception such as the exception that is provided for in GATT Article XX entitled General Exceptions.<sup>5</sup> In any case, the lack of positive, scientific evidence supporting the effectiveness of ever large health warnings in terms of contributing to the reduction of tobacco consumption, confirms that the significant encumbrances on the use of trademarks resulting from the draft TPC Act are not “necessary” and thus “unjustifiable” by any standard.

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<sup>1</sup> Draft TPC Act, Article 3. (1) (e).

<sup>2</sup> Draft TPC Act, Article 5.

<sup>3</sup> Draft TPC Act, Article 10 (a).

<sup>4</sup> Article 13 of the EFTA – SACU FTA provides that “The rights and obligations of the Parties in respect of technical regulations, standards and conformity assessment shall be governed by the WTO Agreement on Technical Barriers to Trade (hereinafter referred to as “the WTO TBT Agreement”) as well as the decisions and recommendations adopted by the WTO TBT Committee since 1 January 1995.”

<sup>5</sup> Panel Report, *EC – Trademarks and GIs*, para. 7.248.



Similarly, the prohibition to display the trademark on signs that indicate the availability of tobacco products in the retail store is a prohibited special requirement that unjustifiably encumbers the use of the trademark in the course of trade. To prohibit the use of the trademark on signs that are intended to inform consumers at the point of sale of the brands available is the ultimate encumbrance on the use of the trademark at the important moment of doing trade. It is at that point in time that consumers may become aware of the existence of different brands and make their choice. Not being able to display the trademarks that identify the product available for sale is a very significant and unjustifiable encumbrance on the use of the trademark that is inconsistent with Namibia's obligations under Article 20 of the TRIPS Agreement.

Second, the draft TPC Act sets out mandatory rules relating to the identification and packaging of tobacco products and is thus a technical regulation covered by the disciplines of the WTO TBT Agreement. Article 2.2 of the TBT Agreement requires that Members ensure that their technical regulations prescribing product or packaging requirements shall not be prepared, adopted, or applied with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective. The draft TPC Act's requirement relating to the appearance of large graphic health warnings on tobacco packages and the requirement that cigarettes be sold only in packages of at least 20 cigarettes is more trade-restrictive than necessary to fulfill the objective of reducing tobacco consumption. The draft TPC Act's graphic health labeling and packaging requirements impose a very significant barrier to trade, which is not necessary to protect health because it is not likely to materially contribute to the achievement of the health objective of reducing smoking prevalence. The effective prohibition on the use of trademarks on tobacco product packages significantly restricts competitive opportunities for imports of branded tobacco products into the Namibian market. The potential adverse impact on international trade in tobacco products is certainly not outweighed by any positive, scientific evidence that the measure is apt to result in a further reduction in tobacco consumption. Importantly, the health objective can be achieved through the use of less trade restrictive but at least equally effective alternative measures which are reasonably available to Namibia.

We wish to note that the Framework Convention on Tobacco Control (the "FCTC") to which Namibia is a party does not provide a justification for the apparent violations of the TRIPS and TBT Agreements. Neither the FCTC nor the non-binding FCTC Guidelines require Namibia to impose such large health warnings or to ban the use of trademarks from signs indicating the availability of tobacco products. The binding FCTC requires health warning covering only 30% of the pack and does not mention the prohibition of trademarks for signs in stores. The non-binding Guidelines on Articles 11 of the FCTC merely propose that Members should "consider using" health warnings that cover more than 50% of the principal display area. The non-binding nature of the Guidelines, and the hortatory language suggesting merely that members "consider" increasing health warnings confirm that the binding international obligations of Namibia under the WTO Agreements prevail.

The Guidelines cannot and should not be read as superseding international commitments such as those set out in the WTO Agreements. Indeed, Article 2.1 of the FCTC provides that countries may impose requirements stricter than those required by the FCTC, such as large graphic health warnings and plain displays at point of sale, provided they are consistent with their international obligations. In other words, the WHO itself, and the text

of the FCTC expressly refer the question back to a country's international obligations such as those binding commitments set out in the TRIPS and TBT Agreements. This is also true in respect of the requirement to sell in packages of at least twenty cigarettes given that Article 16 of the FCTC merely imposes a soft obligation to "endeavor" to prohibit the sale of cigarettes "individually or in small packets" without requiring that the pack should contain at least twenty cigarettes.

In sum, certain key features of the draft TPC Act, such as in particular the large graphic health warnings at the centre of the pack, are inconsistent with Namibia's binding obligations under international law. We therefore request that the draft TPC Act be revised to ensure that Namibia continues its efforts to protect the health of its citizens in a manner that is respectful of its international obligations. Only such a balanced and proportionate approach that seeks to put in place those measures that have been demonstrated to be effective in reducing smoking rates and does so in a manner that does not violate the rights and legitimate expectations of Namibia's trading partners, will be sustainable and effective in the long run. A similarly balanced and proportionate approach is what Namibia will expect of its trading partners when adopting measures that affect Namibia's trading interests.

Yours faithfully

**British American Tobacco Namibia Pty Ltd**



Michael Schefermann  
**General Manager**

Cc: The Permanent Secretary for the Ministry of Health