

OILS AIN'T OILS: PRODUCT LABELLING, PALM OIL AND THE WTO

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Under existing food labelling rules in Australia, palm oil can be classified generically as a 'vegetable oil' on labels. Due to concerns over the environmental impact of palm oil production on deforested land, and health concerns relating to the saturated fat content of palm oil, Senators Nick Xenophon and Bob Brown proposed the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010 (Cth) (the 'Bill'). The Bill seeks to change current food labelling rules to require that all food products containing palm oil specifically list palm oil as an ingredient. This commentary considers whether the Bill, if enacted, would be consistent with Australia's obligations under the Agreement on Technical Barriers to Trade ('TBT Agreement')¹ and the General Agreement on Tariffs and Trade 1994 ('GATT')² of the WTO. We begin by analysing whether the Bill is covered by the TBT Agreement and is consistent with arts 2.1 and 2.2 of that Agreement. We then turn to consider the requirements of the GATT, particularly art III:4, and whether the Bill could be saved from any inconsistency with this provision by the general exceptions in art XX by reason of its environmental and health justifications. We conclude that, if the Bill was enacted, and was then challenged in the WTO dispute settlement system, a WTO panel would probably find the Bill inconsistent with Australia's WTO obligations.

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¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*').

² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('*GATT*').

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I INTRODUCTION

The Community Affairs Legislation Committee of the Australian Senate is currently conducting an inquiry into the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010 (Cth) (the ‘Bill’), which was introduced on 30 September 2010 by Senators Nick Xenophon and Bob Brown.³ Under existing food labelling rules in Australia, palm oil can be classified generically as a ‘vegetable oil’ on labels. The Bill seeks to change these rules to require that all food products containing palm oil specifically list palm oil as an ingredient.

Although the second reading speech for the Bill identifies targeting the health impacts of saturated fats contained in palm oil as one purpose of the proposed labelling requirement (the ‘health purpose’), the primary justification for the Bill is to address the environmental impacts of palm oil production in Malaysia and Indonesia (the ‘environmental purpose’).⁴ The Explanatory Memorandum for the Bill states: ‘Palm oil production results in extensive deforestation. As the major producers are Malaysia and Indonesia, this has led to the removal of wildlife habitat and has placed many species, including the endangered Orang-utan, at risk.’⁵

By singling out palm oil and treating it differently from other vegetable oils, the Bill raises interesting issues relating to Australia’s obligations under WTO agreements, particularly given that its main purpose relates to production methods and environmental protection within the borders of other WTO members. The Bill itself cannot be challenged at the WTO, as only measures that are currently in force can be subject to the WTO’s dispute settlement system. This commentary considers whether the substantive provisions contained in the Bill, if enacted, would be consistent with Australia’s obligations as a WTO member, focussing on the provisions of the *Agreement on Technical Barriers to Trade* (‘*TBT Agreement*’) and the *General Agreement on Tariffs and Trade 1994* (‘*GATT*’). The WTO Appellate Body has stated that obligations under the *TBT*

³ The Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010 (Cth) (the ‘Bill’) replaces the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2009 (Cth) (the ‘2009 Bill’) that was introduced by Senators Nick Xenophon, Bob Brown and Barnaby Joyce in November 2009, as an election was called and the Parliament was consequently prorogued before the conclusion of the Senate Inquiry into Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2009.

⁴ Commonwealth, *Parliamentary Debates*, Senate, 30 September 2010, 363–4 (Nick Xenophon); see also the second reading speech for the 2009 Bill: Commonwealth, *Parliamentary Debates*, Senate, 23 November 2009, 8562–3 (Nick Xenophon).

⁵ See Explanatory Memorandum, Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010 (Cth) 2.

Agreement are different from, and supplement, the requirements of the *GATT*.⁶ Accordingly, if the Bill falls within the scope of both the *TBT Agreement* and the *GATT*, it must comply with both agreements. After introducing the Bill below, we first consider the implications of the *TBT Agreement*,⁷ given that it is the more specialised agreement and would prevail in the event of inconsistency with the *GATT*.⁸ In particular, we focus on whether the Bill is covered by the *TBT Agreement* and is consistent with arts 2.1 and 2.2 of the *TBT Agreement*. We then turn to consider the requirements of the *GATT*, particularly art III:4, and whether the Bill could be saved from any inconsistency with this provision by the general exceptions in art XX. We conclude that, if the Bill were enacted, and was then challenged in the WTO dispute settlement system (for example, by Malaysia or Indonesia), a WTO panel would probably find the Bill inconsistent with Australia's WTO obligations.

II BACKGROUND TO THE BILL

Palm oil is the most widely used vegetable oil in the world, with global annual production for the 2009–10 financial year estimated at over 45 million metric tonnes.⁹ Palm oil is also the most commonly traded vegetable oil in the world, with approximately 35 million metric tonnes of the oil being imported or exported in the 2009–10 financial year.¹⁰ The vast majority of the world's palm oil production occurs in Malaysia and Indonesia.¹¹ Australia does not produce palm oil, but it does produce some other vegetable oils, particularly rapeseed oils.¹²

The Bill seeks to amend the *Food Standards Australia New Zealand Act 1991* (Cth). If the Bill is approved by the Australian Parliament, then Food Standards Australia and New Zealand will have six months (from the date on which the Bill receives royal assent) to develop and implement labelling standards that require producers, manufacturers and distributors of food containing or using any

⁶ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [80] ('*EC — Asbestos*').

⁷ A similar approach was adopted in by the Panel in Panel Report, *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/R (29 May 2002) [7.16]–[7.19] ('*EC — Sardines*').

⁸ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Interpretative Note to Annex 1A*').

⁹ Foreign Agriculture Service, *Table 03: Major Vegetable Oils: World Supply and Distribution (Commodity View)* (8 August 2011) United States Department of Agriculture <<http://www.fas.usda.gov/psdonline/psdreport.aspx?hidReportRetrievalName=BVS&hidReportRetrievalID=702&hidReportRetrievalTemplateID=5>>.

¹⁰ *Ibid.*

¹¹ See Food and Agriculture Organization of the United Nations, *Commodity by Country* (2011) *FAOSTAT* <<http://faostat.fao.org/site/339/default.aspx>>.

¹² The most common variety of rapeseed oil produced in Australia is canola oil. See Australian Oilseeds Federation, *Industry Facts and Figures* (2001) <http://www.australianoilseeds.com/australian_oilseeds_industry/industry_facts_and_figures>.

amount of palm oil to list palm oil as an ingredient in the food.¹³ The designation ‘certified sustainable palm oil’ (‘CS Palm Oil’) may be used if the palm oil in question has been certified as sustainable in accordance with regulations. Any regulations made for the purpose of certifying the sustainability of palm oil must reflect the criteria determined by the Roundtable on Sustainable Palm Oil.¹⁴

The Bill’s introduction resulted from a broad campaign by a group of non-governmental organisations, including the Palm Oil Action Group and the Australian Orangutan Project.¹⁵ Some of the most vocal supporters of this legislative reform are Australian zoos, including Zoos Victoria, Perth Zoo, and the Taronga Conservation Society Australia. Each of these zoos has been involved in the ‘Don’t Palm Us Off’ campaign, which has raised significant public support and awareness relating to deforestation in South East Asia and the impact on endangered species such as the orangutan and the Sumatran Tiger.¹⁶ The inquiry into the Bill by the Senate Community Affairs Committee (the ‘Senate Inquiry’) has received over 500 submissions, the majority of which have come from individuals supporting the Bill.¹⁷

However, strong opposition to the Bill also exists, particularly from the Malaysian Palm Oil Council and the Malaysian Government. The Malaysian Palm Oil Council and the Ministry of Plantation Industries and Commodities of Malaysia argue that the Bill ‘has the potential to significantly damage the palm oil industry which is an important pillar in the nation’s economy and a strong

¹³ Notably, in its submission to the inquiry by the Senate Committee on Community Affairs, Food Standards Australia New Zealand explains that any standards developed in accordance with the Bill would not have direct legal effect or enforceability; this is due to constitutional restraints which require the *Food Standards Australia New Zealand Act 1991* (Cth) to be implemented by the States and Territories incorporating the existing standards into their own law. For the purposes of this commentary, we have assumed that if the Bill is passed, the standards developed in accordance with it will be incorporated by the States and Territories. See Food Standards Australia New Zealand, Submission No 247 to Senate Standing Committee on Community Affairs, *Inquiry into the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2009 (Cth)* (2009) [2].

¹⁴ Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010 (Cth) sch 1 cl 1.

¹⁵ Palm Oil Action Group, *Palmoilaction.org.au* (2011) <<http://www.palmoilaction.org.au/>>; Australian Orangutan Project, *Palm Oil* (2011) <<http://www.orangutan.org.au/palm-oil/>>.

¹⁶ Zoos Victoria, *Campaign Launch* (2011) <http://www.zoo.org.au/PalmOil/Campaign_Launch/>; Taronga Conservation Society Australia, *Don’t Palm Us Off* (2011) <<http://www.taronga.org.au/support-us/take-action/don-t-palm-us/don-t-palm-us/>>; Perth Zoo, *Don’t Palm Us Off* <<http://www.perthzoo.wa.gov.au/act/dont-palm-us-off-campaign/>>.

¹⁷ Submissions received by the Inquiry into the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2009 (‘2009 Inquiry’) are being considered in relation to the current Inquiry into the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010 (‘2010 Inquiry’). Submissions to the 2009 Inquiry are available here: Senate Standing Committees on Community Affairs, *Inquiry into Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2009: Submissions Received by the Committee as at 22 June 2010* (22 June 2010) Parliament of Australia: Senate <http://www.aph.gov.au/senate/committee/clac_ctte/food_standards_truth_in_labelling_palm_oil_09/submissions/sublist.htm>; Submissions to the 2010 Inquiry are available here: Senate Standing Committees on Community Affairs, *Inquiry into Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010: Submissions Received by the Committee* (11 February 2011) Parliament of Australia: Senate <http://www.aph.gov.au/senate/committee/clac_ctte/food_standards_amend_bill_2010/submissions.htm>.

enabler towards addressing rural poverty'.¹⁸ Palm oil exports represented 7.5 per cent of Malaysia's GDP in 2009 and employed 570 000 people (including 300 000 smallholders that produce palm oil), making it one of the nation's most important industries.¹⁹

Regulatory authorities in charge of administering food standards in Australia also have concerns about the Bill. Appearing before the Community Affairs Committee, Steve McCutcheon, the Chief Executive Officer of Food Standards Australia New Zealand, stated that the current focus of food standards in Australia 'is very much around health and safety', and that any implementation of the Bill would 'struggle' to meet the cost-benefit test usually applied to food regulations, 'in terms of the cost that would be imposed on industry to put in place the systems that would be required to underpin label statements, and then the benefits of that for the consumers who were interested in that information'.²⁰ Similarly, the Chief Executive Officer of the Australian Food and Grocery Council, Kate Carnell, submitted to the Senate Inquiry that it would be a 'huge step' to mandate labelling standards based on environmental or social concerns, rather than health concerns.²¹

The campaign to require products containing palm oil to be labelled as such is not limited to Australia, and other governments and international institutions are considering measures similar to the Bill. Some members of the European Parliament have suggested amendments to a recent food-labelling proposal by the European Commission, to require the identification of the origin of specific vegetable oils and fats, such as palm oil.²² The World Bank has only recently lifted a moratorium it placed on projects relating to palm oil production in 2009; it will use sustainability standards and certification (particularly those standards developed by the Roundtable for Sustainable Palm Oil) as criteria for assessing projects related to palm oil.²³

¹⁸ Ministry of Plantation Industries and Commodities on behalf of the Government of Malaysia, Submission No 265 to Senate Standing Committee on Community Affairs, *Inquiry into the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2009 (Cth)*, 23 April 2010, 1.

¹⁹ *Ibid* 1–2.

²⁰ Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 18 April 2011, 46 (Steve McCutcheon, Chief Executive Officer, Food Standards Australia New Zealand).

²¹ Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 18 April 2011, 18 (Kate Carnell, Chief Executive Officer, Australian Food and Grocery Council).

²² Malaysian Palm Oil Council, *Position Statement from the Malaysian Palm Oil Council on the EU Food Information to Consumers Regulation and the Labelling of Specific Origin of Vegetable Oils* (April 2011) The Oil Palm <<http://theoilpalm.org/2011/04/european-food-labelling-regulation-palm-oil-targeted-again/>>. This proposal has not been adopted by the European Union, which has instead adopted rules requiring the labelling of all vegetable oils. See: Council of the European Union, 'Q&A on the new EU food labelling rules' (Press Release, 14463/11, 29 September 2011) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/124805.pdf>.

²³ International Finance Corporation, 'World Bank Group Framework and IFC Strategy for Engagement in the Palm Oil Sector' (Report, World Bank Group, 31 March 2011) <[http://www.ifc.org/ifcext/agricconsultation.nsf/AttachmentsByTitle/Final_PO+paper_Mar2011/\\$FILE/WBG+Framework+and+IFC+Strategy_FINAL_FOR+WEB.pdf](http://www.ifc.org/ifcext/agricconsultation.nsf/AttachmentsByTitle/Final_PO+paper_Mar2011/$FILE/WBG+Framework+and+IFC+Strategy_FINAL_FOR+WEB.pdf)>.

This background demonstrates the staunch views held by the groups who support, or oppose, the introduction of the labelling requirements contained in the Bill. The importance of palm oil to the economy of countries such as Malaysia, when faced with the broad opposition to use of palm oil from environmental groups and the threat such opposition poses to the industry, creates a real possibility that, if enacted, the Bill may be challenged through the Dispute Settlement Body of the WTO. The Chief Executive Officer of the Malaysian Palm Oil Council, Yusof Basiron, argues that the labelling requirements contained in the Bill 'will violate ... WTO provisions' and that Malaysia and Indonesia 'will be compelled to complain to the WTO to ask Australia to remove the discriminatory treatment on palm oil afforded by the [Bill]'.²⁴ The issue therefore warrants careful examination of how specific provisions of the *TBT Agreement* and the *GATT* would apply to the Bill.

III IMPLICATIONS OF THE *TBT AGREEMENT*

The *TBT Agreement* applies to technical regulations, standards and conformity assessment procedures. Annex I of the *TBT Agreement* defines technical regulations as any

[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Standards are defined in similar terms to technical regulations, with the key difference being that compliance with standards is voluntary rather than mandatory. Conformity assessment procedures are the procedures for testing or verifying that technical regulations and standards are being fulfilled.

The Bill contains both mandatory and voluntary elements. However, in WTO case law, a measure is usually considered as a whole.²⁵ We therefore consider whether the *TBT Agreement* applies to the Bill as a whole and, if so, whether the Bill is consistent with Australia's obligations under the *TBT Agreement*.

A *Is the Bill a Technical Regulation?*

The Appellate Body has identified three key elements of the definition of a technical regulation under the *TBT Agreement*.²⁶ First, the products to which the technical regulation applies must be identifiable. Although the Bill does not explicitly list the products to which it applies, those products are clearly identifiable as any foods containing palm oil. Second, the measure must lay down certain characteristics for those products. Third, the measure must be mandatory. Below we consider whether the Bill satisfies these second and third criteria.

²⁴ Yusof Basiron, *Australian Labelling Bill on Palm Oil against WTO Provisions* (27 June 2011) CEO Palm Oil: Getting the Facts Right <<http://www.ceopalmoil.com/2011/06/australian-labelling-bill-on-palm-oil-against-wto-provisions/>>.

²⁵ See, eg. Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [64].

²⁶ *Ibid* [66]–[70], as applied in Appellate Body Report, *EC — Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3 (26 September 2002) [176].

1 Product Characteristics

To qualify as a technical regulation, the Bill must lay down certain characteristics for those products. Whether or not the *TBT Agreement* covers measures that are based on a non-product-related process and production method ('PPM') is contentious. A PPM is 'non-product-related' if it does not affect the physical attributes of the end product. For example, the use of child labour is a non-product-related PPM, as the nature of the end product is unaffected by whether the person who produced it is a child or an adult. Similarly, the sustainability of palm oil production is a non-product-related PPM, as sustainably produced palm oil is indistinguishable from palm oil produced unsustainably (such as on deforested land).

In contrast to these examples, a labelling requirement placed on products containing palm oil is clearly related to the product itself. Although this labelling requirement is intended to influence the PPM of palm oil by discouraging deforestation and encouraging sustainable farming, the application of the requirement is based on whether a product contains palm oil, regardless of how that palm oil was produced. This labelling requirement therefore lays down a product characteristic pursuant to *TBT Agreement* annex I.

Moreover, the definition of technical regulation in annex I of the *TBT Agreement* specifically lists 'labelling requirements' as a product characteristic. A labelling requirement does not change the intrinsic nature or quality of a product, but it is a product-related characteristic because it affects the means of identification, presentation or appearance of the product.²⁷ As the Bill includes a labelling requirement for any food product containing palm oil, it meets the requirement of laying down product characteristics in the definition of a technical regulation.

Accordingly, the requirement that all food products containing palm oil have palm oil listed on the label as an ingredient clearly specifies a product characteristic within the meaning of Annex I of the *TBT Agreement*. As the definition of a technical regulation only requires that one or more product characteristics be laid down by the measure,²⁸ this is sufficient for the Bill to be classified as a technical regulation. This is true even if the option of labelling sustainably produced palm oil as 'CS Palm Oil' would not fall within the scope of the *TBT Agreement* because it is based on a non-product-related PPM, as we discuss further below.

2 Mandatory

The third criterion for a technical regulation, as stated by the Appellate Body, is that the measure must be mandatory. Under the Bill, all food products that contain palm oil must list palm oil as an ingredient. Sustainably produced palm oil *may* be listed as 'CS Palm Oil', but this voluntary requirement does not remove the mandatory obligation for the product to be labelled as containing

²⁷ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [67]–[70]; Appellate Body Report, *EC — Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3 (26 September 2002) [191].

²⁸ Appellate Body Report, *EC — Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3, [190]–[192], affirming Panel Report, *EC — Sardines*, WTO Doc WT/DS231/R, [7.39].

palm oil. It merely provides an additional means of fulfilling that requirement if the criteria for sustainability are met.

3 Application to the Voluntary Scheme for Labelling 'CS Palm Oil'

As set out above, the voluntary scheme allowing labelling of certified sustainable palm oil as 'CS Palm Oil' may not fall within the definition of a technical regulation, as it is not mandatory and is based on a non-product-related PPM. The Appellate Body in *EC — Asbestos* emphasised that a measure must be considered as a whole, rather than considering whether the *TBT Agreement* applies to some aspects of the measure but not to others.²⁹ In that case, the Panel held that the *TBT Agreement* did not apply to part of the measure at issue (a general ban on the importation of products containing asbestos), but that the *TBT Agreement* did apply to the exceptions to that ban as specified in the measure.³⁰ The Appellate Body overturned the Panel on this point, stating that the Panel should not have undertaken a 'two-stage' approach to determining whether the *TBT Agreement* applied to the measure at issue.³¹

The Bill contains elements that, if contained in separate, stand-alone measures, might not fall within the scope of the *TBT Agreement*. However, as the measure as a whole contains all the elements required to qualify as a technical regulation, it is subject to the *TBT Agreement*. While this may seem to be a purely formal distinction, the consideration of measures as a whole can be justified on the basis that the significance of each element of the measure often relies upon other elements of the measure. The exceptions to the ban on asbestos products considered in *EC — Asbestos* had no legal significance in isolation from the general prohibition on those products.³² Similarly, labelling products as containing 'CS Palm Oil' would be of little or no value to the producers, manufacturers and distributors of those products (and could even be detrimental to their interests) in the absence of the requirement that all products containing palm oil list 'palm oil' as an ingredient. While 'green' branding or labelling products as sustainably produced is an increasingly common and effective marketing tool, the meaning of the phrase 'CS Palm Oil' may not be readily understood by consumers, and products which are produced in an environmentally friendly manner may benefit more from a general label such as 'sustainably produced', rather than a labelling scheme which specifies that they contain palm oil.

Therefore, when considering the application of the *TBT Agreement* to the Bill, the effect of the Bill as a whole must be considered, not just the parts of the Bill that satisfy the definition of a technical regulation.

Given that the Bill applies to identifiable products, lays down a product characteristic and is mandatory, it falls within the definition of a technical regulation under the *TBT Agreement*. Article 2 of the *TBT Agreement* sets out requirements for the preparation, adoption and application of technical regulations by central government bodies.

²⁹ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [64].

³⁰ See discussion at Panel Report, *EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [8.71].

³¹ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [65].

³² *Ibid* [73].

B *Necessity of the Bill: TBT Agreement Art 2.2*

Article 2.2 of the *TBT Agreement* obliges WTO members to

ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

1 *Legitimate Objectives*

Article 2.2 includes a non-exhaustive list of legitimate objectives that a technical regulation may pursue, such as ensuring national security; protecting human health, animal or plant life or health; or protecting the environment. The health purpose of the Bill would fall within the category of protecting human health, and the environmental purpose of the Bill would fall within the category of protecting animal life or health (as it relates to the protection of the orangutan).

2 *Unnecessary Obstacles and Trade-Restrictiveness*

Under art 2.2 of the *TBT Agreement*, a measure creates an unnecessary obstacle to international trade if it is more trade-restrictive than necessary to achieve its legitimate objectives.

The meaning of the phrase ‘more trade-restrictive than necessary’ in art 2.2 has not yet been interpreted in a WTO dispute,³³ but the concept of necessity has been examined in relation to art XX of the *GATT*, which requires an assessment of whether a measure is necessary to protect legitimate objectives such as (under para (b)) the protection of human, animal or plant life or health. The Appellate Body’s approach to art XX(b) of the *GATT* therefore provides useful guidance in determining how art 2.2 of the *TBT Agreement* might apply to the Bill.

Under art XX(b) of the *GATT*, the Appellate Body has adopted a ‘weighing and balancing’ approach in assessing whether a measure is necessary.³⁴ This approach involves considering the importance of the objective of the measure, the contribution of the measure to that objective and the trade-restrictiveness of the measure. In addition, if this weighing and balancing test suggests the measure is necessary, ‘possible alternatives, including associated risks’ to the measure at issue should be examined in order to confirm its necessity.³⁵ This test therefore

³³ In Panel Report, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc WT/DS290/R (15 March 2005) [7.515] (*‘EC — Trademarks’*), the Panel did not consider the question because it considered the relevant measure not to be a ‘technical regulation’ within the meaning of the *TBT Agreement*.

³⁴ See, eg. Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R, WT/DS169/AB/R, AB-2000-8 (11 December 2000) [161]–[164] (*‘Korea — Beef’*); Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) [182] (*‘Brazil — Retreaded Tyres’*).

³⁵ Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4, [182].

takes account of the ‘risks non-fulfilment [of the legitimate objective] would create’, as required by art 2.2.

As noted in the introduction to this commentary, the justification for the Bill focuses on environmental protection, but proponents of the Bill have also suggested that the labelling requirements will protect human health. Below, we consider in turn whether the Bill is necessary to achieve either its environmental purpose or its health purpose.

3 *Is the Bill Necessary to Achieve Its Environmental Purpose?*

Strong arguments suggest that the Bill does not make a material contribution to the achievement of its environmental purpose. When considering the contribution of a Brazilian import ban to the objective of reducing the damage to human and animal health from waste tyres accumulated in Brazil, the Appellate Body agreed with the Panel that the ‘very essence of the problem is the actual accumulation of waste [tyres] in and of itself’.³⁶ In contrast, the essence of the problem targeted by the Bill is not the production of palm oil, but the deforestation of the land that occurs in Malaysia and Indonesia, which is then used for palm oil production.

In order to demonstrate that the Bill contributes to the objective of stopping or reducing this deforestation, Australia would have to show that: (i) the Bill reduces the amount of palm oil that is unsustainably produced; and (ii) that reduction in palm oil production makes a ‘material contribution to’ the reduction of deforestation.³⁷

Evidence could possibly be produced to show that the Bill would reduce consumption of non-sustainably produced palm oil in Australia, as the assumption underlying the Bill is that the labelling requirements will change consumer behaviour. However, it would be difficult to establish that this change in consumer behaviour in Australia would stop or materially reduce deforestation in Malaysia or Indonesia, as a reduction in the land used to produce palm oil would not necessarily restrict land clearing. Deforestation could still occur, for example, to support the production of timber or agricultural commodities.

While Australia would not have to prove that its measure could single-handedly solve the problem of deforestation in Malaysia and Indonesia, it would need to prove that it was making a material contribution. In our view, establishing that the Bill is necessary to achieve its environmental purpose would be difficult as the purpose is several steps removed from the direct impact of the Bill. It would have to be shown that the Bill would cause less palm oil (particularly non-sustainably produced palm oil) to be consumed, and that this reduction in consumption in turn leads to less palm oil production, and that the lowering of production will reduce deforestation.

While we are not arguing that the size of the Australian market is a key consideration in whether or not the Bill is necessary to achieve its environmental purpose, any argument in favour of the validity of the Bill would rely on the claim that it will reduce consumption of palm oil to an extent great enough to

³⁶ Ibid [136], quoting Panel Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/R (12 June 2007) [7.146].

³⁷ Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4, [151].

impact on production levels and land clearing. It is possible that any reduction in palm oil consumption in Australia would lead to that palm oil being sold in another market. As noted earlier, palm oil is widely in demand and is the most used vegetable oil in the world. If palm oil that may previously have been sold in Australia was diverted into another market, this would severely limit any impact that the Bill may have on production of palm oil, and hence on rates of deforestation.

Appearing before the Senate Community Affairs Committee, Yusof Basiron, the Chief Executive Officer of the Malaysian Palm Oil Council, explained that logging and forest clearing is an industry separate from palm oil production, and that it is only after the forest has been logged that a decision is made as to whether 'to replant it or to plant more productive crops, like oil palm or rubber'.³⁸ The Roundtable on Sustainable Palm Oil notes that even though the Bill (if enacted) may

decrease the demand for palm oil, [it] will not eliminate the key reasons this proposal is aimed at addressing in the first place. This is because edible oil is a key ingredient in most consumer products. Demand would merely shift to other vegetable oils, increasing the sustainability problems connected to these other particular crops.³⁹

The Malaysian Government argues that palm oil is inherently more sustainable than other oilseeds that could be an alternative for farmers to produce, as oil palm has a significantly higher yield per hectare of production, requires less fertiliser, and generates ten times the energy its production uses.⁴⁰ It must be acknowledged that the Malaysian Government has an obvious interest in this issue, and therefore its contention that palm oil is in fact more sustainable than other vegetable oils should be subject to scrutiny (although detailed scrutiny of the sustainability of vegetable oil production is beyond the scope of this commentary). As the broad range of submissions to the Senate Inquiry demonstrated, experts' views differed on whether palm oil is responsible for, or contributes to, deforestation in Malaysia and Indonesia. Without expressing an opinion in favour of either side of this argument, the point we seek to make in this commentary is that the Malaysian Government would, if the Bill is enacted and a complaint was made in the WTO, vehemently argue that the Bill will in fact increase the environmental harm caused by oilseed production.

Further, even if it could be shown that the Bill would materially contribute to the objective of reducing or stopping deforestation, the Bill may still be more trade-restrictive than necessary to achieve that aim. The Bill does not explicitly discriminate between imported and domestic goods, but it is likely to restrict or distort trade because palm oil is predominantly produced in Malaysia and Indonesia, while other vegetable oils that may be substitutes for palm oil (such as

³⁸ Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 18 April 2011, 37 (Yusof Basiron, Chief Executive Officer, Malaysian Palm Oil Council).

³⁹ Roundtable for Sustainable Palm Oil, *Promoting the Growth and Use of Sustainable Palm Oil — Comments on Proposed Palm Oil Labelling Bill in Australia* (21 April 2011) <<http://www.rspo.org/?q=content/rspo-comments-proposed-palm-oil-labeling-Bill-australia>>.

⁴⁰ Ministry of Plantation Industries and Commodities on behalf of the Government of Malaysia, above n 18, 5.

rapeseed, sunflower seed and soya oils) are largely produced in other countries, including Australia.⁴¹ Although Australia produces some oilseeds, such as rapeseed, other countries such as the United States, China, Brazil and Canada have larger oilseed industries and would be likely to receive a greater share of any trade diverted away from palm oil. By reducing the competitiveness of palm oil against these other products, the Bill is likely to have the effect of restricting imports of palm oil from Malaysia and Indonesia into Australia.

Although labelling requirements are generally considered to have a relatively small impact on trade, reasonably available less trade-restrictive alternatives to the Bill arguably exist. If Malaysia or Indonesia brought a WTO complaint against the Bill, they would bear the burden of establishing these alternatives.⁴²

The Bill applies to all food products containing palm oil, and not just to those products that contain palm oil produced on deforested land. Accordingly, the Bill affects the marketability of all palm oil, and not only palm oil produced in a manner that threatens the habitat of the orangutan. The Roundtable for Sustainable Palm Oil has expressed concerns about the Bill on the basis that it 'singles out palm oil [and] may only serve to ostracize agricultural farmers in developing countries such as Indonesia, Malaysia, Papua New Guinea, South America, West Africa, etc whose key source of income comes from palm oil'.⁴³ A less trade-restrictive alternative would be to target only palm oil produced on land that is deforested after the Bill comes into force, since reducing the marketability of palm oil serves no environmental purpose if the land has already been cleared. This would target any future production of palm oil that may threaten the habitat of the orangutan, without any adverse impact on other palm oil producers. For this sort of scheme to work, it would need to be possible to determine the source of palm oil. Given that the Bill in its current form includes a scheme to allow sustainably produced palm oil to be labelled as 'CS Palm Oil', we assume that it is possible to trace the source of palm oil and establish whether it was produced on cleared land in order to accurately label consumer products.

In addition, the Bill contains both a mandatory labelling requirement to list palm oil as an ingredient, and a voluntary requirement that products containing certain types of palm oil can be listed as 'CS Palm Oil'. If the intention of the Bill is to encourage consumers to use sustainably produced palm oil, this could be done through a voluntary scheme allowing manufacturers and producers to label their products as containing vegetable oils certified as sustainable. In the same way that a product must meet clearly defined standards to be labelled as containing 'CS Palm Oil', criteria could be established which set out when a vegetable oil could be certified as being 'sustainable'. The proliferation of food labelling schemes based on the environmental impact of products suggests that these voluntary schemes are an effective marketing tool, and that (some)

⁴¹ For example, the largest producers of soybeans in the world are the United States, Brazil and Argentina; the largest producers of rapeseed are China, Canada and India; and the largest producers of sunflower seeds are Russia and the Ukraine. Some of these oils, such as rapeseed oil, are produced in Australia. See Food and Agriculture Organization of the United Nations, *FAOSTAT* (2011) <<http://faostat.fao.org/site/339/default.aspx>>.

⁴² Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (7 April 2005) [311].

⁴³ Roundtable for Sustainable Palm Oil, above n 39.

consumers' choice of product will be influenced by them. For example, a study of the controversial 'dolphin-safe tuna' labelling regime in the US⁴⁴ concluded that consumers respond to eco-labels as the 'presence of dolphin-safe labels increased tuna market share'.⁴⁵ A voluntary scheme allowing the labelling of sustainably produced vegetable oil would be less trade-restrictive, as it would not be targeting or discriminating against products made in a small number of countries and would instead apply equally to all vegetable oil products.

4 *Is the Bill Necessary to Achieve Its Health Purpose?*

The health purpose of the Bill, which is to give consumers greater information about the saturated fat content of food products, relates to the protection of human life or health, which is an extremely important objective.⁴⁶ The health risks of palm oil, as stated in the second reading speech, are that 'palm oil is high in saturated fat and low in polyunsaturated fat, and, according to the Heart Foundation, biomedical research indicates that the consumption of palm oil increases the risk of heart disease'.⁴⁷ However, in our view, the Bill is not necessary to achieve the health objective. Labelling requirements for most manufactured foods sold in Australia already require that the content of fat and saturated fat be shown in nutritional information on food packaging.⁴⁸ Adding a labelling requirement for palm oil does not provide any more information to consumers about the fat or saturated fat content of a food product. As a result, the Bill neither contributes to nor is necessary to achieving its health purpose.

The environmental and health purposes of the Bill are clearly legitimate objectives for the Australian Government to pursue, and the risks of not fulfilling these purposes could be considered to be high given that they concern human and animal life or health. However, the Bill may not be necessary to achieve either of its purposes, and could therefore be inconsistent with art 2.2 of the *TBT Agreement*.

C *Discrimination through the Bill: TBT Agreement Art 2.1*

Article 2.1 of the *TBT Agreement* embodies both the most-favoured-nation ('MFN') and national treatment principles that are central to the legal regime of the WTO. Article 2.1 requires that technical regulations accord products imported from the territory of any other WTO member treatment 'no less

⁴⁴ This scheme itself has been challenged in the WTO by Mexico on the basis that it violates the *TBT Agreement*. Mexico contends that the scheme discriminates against tuna imported from Mexico and that the standards required to be met under the scheme were inconsistent with relevant international standards. A summary of the dispute can be found at: World Trade Organization, *Dispute Settlement: Dispute DS381: United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (15 September 2011) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm>.

⁴⁵ Mario F Teisl, Brian Roe and Robert L Hicks, 'Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labelling' (2002) 43 *Journal of Environmental Economics and Management* 339, 351.

⁴⁶ As noted in Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [172].

⁴⁷ Commonwealth, *Parliamentary Debates*, Senate, 23 November 2009, 8562–3 (Nick Xenophon).

⁴⁸ *Australia New Zealand Food Standards Code — Standard 1.2.8 — Nutrition Information Requirements 2000* (Cth) cl 5(1)(e).

favourable' than that accorded to 'like products' of national origin or to like products originating in any other country.

Under the Bill, palm oil — a product that is not produced in Australia and that is primarily imported from Malaysia and Indonesia — is subject to a labelling requirement that does not apply to other oils currently identified on labels using the generic term 'vegetable oil'.⁴⁹ If this labelling requirement constitutes less favourable treatment of palm oil as compared to other vegetable oils, and those vegetable oils are 'like' palm oil, then the Bill may be inconsistent with art 2.1 of the *TBT Agreement*.

1 Like Products

Article 2.1 does not define 'like products', and the meaning of the term in that provision has never been interpreted in WTO case law.⁵⁰ However, the concept of 'like products' has been examined in relation to other WTO agreements,⁵¹ particularly the *GATT*. Of the *GATT* provisions that refer to 'like products', art III:4 is the most analogous to measures covered by the *TBT Agreement*, as it applies to regulatory discrimination. The leading case in examining the concept of 'like products' under art III:4 of the *GATT* is *EC — Asbestos*.

In that case, the Appellate Body considered four criteria in determining whether different products are 'like' for the purposes of *GATT* art III:4:

- (i) the physical properties of the products;
- (ii) the extent to which the products are capable of serving the same or similar end-uses;
- (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and
- (iv) the international classification of the products for tariff purposes.⁵²

Other vegetables oils, such as soya oil and rapeseed oil, share some similarities with but are also physically different to palm oil. These differences include saturated fat content, melting point and colour. Where physical qualities distinguish products, the Appellate Body has imposed a high burden on the complainant to prove that the 'competitive relationship between the products is

⁴⁹ Schedule 1 cl 1 of the Bill, which would insert a new s 16B(1) into the *Food Standards Australia New Zealand Act 1991* (Cth), states that the labelling requirements must apply to foods containing palm oil, but does not establish a similar labelling requirement for foods containing other vegetable oils. As set out in the table to cl 4 of the *Australia New Zealand Food Standards Code — Standard 1.2.4 — Labelling of Ingredients 2011* (Cth), under the current requirements labels need only state whether the oil is sourced from an animal or vegetable, although peanut, soy bean and sesame oils must be specifically identified.

⁵⁰ In Panel Report, *EC — Trademarks*, WTO Doc WT/DS290/R, the Panel did not consider the meaning of 'like products' in *TBT Agreement* art 2.1 because it found Australia had not 'made a prima facie' case for its claim that the Regulation accorded 'less favourable treatment' in violation of *TBT Agreement* art 2.1: at [7.464]–[7.475].

⁵¹ As stated in the body of this commentary, the term has been interpreted in the context of the *GATT*, and also in relation to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Anti-Dumping Agreement*') and the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Subsidies and Countervailing Measures*').

⁵² Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [101].

such that all of [the] evidence, taken together, demonstrates that the products are “like”.⁵³ The second and third criteria outlined above — end-uses and consumer preferences — are key to proving whether such a competitive relationship exists.⁵⁴

Given the range of uses of palm oil, it is impossible to consider in detail in this commentary whether other vegetable oils are capable of serving all the end-uses of palm oil.⁵⁵ However, clear evidence exists that different vegetable oils are highly substitutable, as most oilseeds contain a combination of five main fatty acids — stearic, palmitic, oleic, linoleic and linolenic fatty acids — along with a number of minor fatty acids.⁵⁶ One of the most common ways in which palm oil is used in food products is as a base for frying.⁵⁷ Many liquid vegetable oils, such as soya, corn, rapeseed and sunflower oils, could easily replace palm oil for this end-use.⁵⁸ As a further example, some manufacturers have replaced palm oil with other vegetable oils as an additive in chocolate and biscuit products.⁵⁹

The Appellate Body in *EC — Asbestos* disagreed with the Panel’s consideration of the end-uses of products, as the Panel Report had only focussed on a small range of uses of the products in question.⁶⁰ Based on the comments of the Appellate Body in that case, a panel considering the validity of the Bill would need to examine any end-uses of the products which were both different and similar in order to ‘assess the significance of the fact that products share a limited number of end-uses’.⁶¹ As we have noted above, a detailed examination of all of the end uses of various vegetable oils is beyond the scope of this commentary. However, based on the evidence that there are some similar end-uses for palm oil and other oils, there is certainly a basis on which Malaysia and Indonesia could argue that these are ‘like’ products.

⁵³ Ibid [118].

⁵⁴ Ibid.

⁵⁵ In Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [119], the Appellate Body noted that having a small number of similar end-uses can be relevant to determining if products are like, but that it would still be necessary to consider a ‘complete picture of the various end-uses of a product’. It is beyond the scope of this commentary to conduct a detailed analysis of all of the potential end-uses of palm oil in food products and whether substitutes are available.

⁵⁶ Ruth Holtzapffel, Hilary Johnson and Osman Mewett, ‘GM Oilseed Crops and the Australian Oilseed Industry’ (Research Report, Australian Government Bureau of Rural Sciences, 2007) 10–11 <http://www.daff.gov.au/_data/assets/pdf_file/0008/367109/gm_oilseed_crop_report.pdf>.

⁵⁷ It was estimated in 2005 that of the 8 billion pounds of partially hydrogenated vegetable oils (for example, palm oil) that was used annually in the US, 5.5 billion pounds were used for frying and other similar applications. See Ellie Brown and Michael F Jacobson, ‘Cruel Oil: How Palm Oil Harms Health, Rainforest and Wildlife’ (Research Report, Center for Science in the Public Interest, May 2005) 27 <<http://www.cspinet.org/palm/PalmOilReport.pdf>>.

⁵⁸ Ibid.

⁵⁹ Cadbury has replaced palm oil with cocoa butter in the production of its chocolate products in Australia and New Zealand: see Cadbury, *Frequently Asked Questions* (2011) <<http://www.cadbury.co.nz/About-Cadbury/Frequently-Asked-Questions.aspx>>. A range of US biscuit manufacturers have replaced palm oil with canola, sunflower or soybean oil: see Nutrition Action Healthletter from Centre for Science in the Public Interest to Acting Commissioner Lester Crawford of the Food and Drug Administration, 4 August 2004 <http://www.cspinet.org/new/pdf/newman_letter.pdf>.

⁶⁰ Panel Report, *EC — Asbestos*, WTO Doc WT/DS135/R, [119].

⁶¹ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [119].

In *EC — Asbestos*, the Appellate Body explained the third criterion, consumer preferences, as a question of ‘the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand’.⁶² In relation to the Bill, this third criterion for assessing the likeness of products relates to how willing consumers are to view palm oil and other vegetable oils as alternative means of performing the same function in their food products. The willingness of consumers to accept other vegetable-based oils and fats as a replacement for palm oil is demonstrated by the success of groups that oppose the use of palm oil in food and products in pressuring manufacturers to stop using palm oil.⁶³ The fact that consumers will continue to purchase products that substitute vegetable oils for palm oil suggests a competitive relationship between palm oil and other vegetable oils, as consumers see one vegetable oil as interchangeable with another when used in food products.

The final criterion, that of the tariff classification, weighs in favour of palm oil and other vegetable oils being considered unlike. Palm oil is given code 1511 under the Harmonised System of Tariff Classification, while other vegetable oils are also given their own codes (for example, soya-bean oil is code 1507, olive oil is code 1509 and rapeseed oil falls within code 1514). The weight that a panel would give to tariff classification is unclear, as in previous cases, such as *EC — Asbestos*, this fourth criterion for determining whether two products are ‘like’ has been given little consideration.⁶⁴

On the basis of end-uses and consumer preferences, palm oil and other vegetable oils can arguably be considered like products. If the Bill were enacted and later challenged before a panel on the basis that it violates art 2.1 of the *TBT Agreement*, the complainant WTO member would need substantial empirical evidence of their competitive relationship to establish that they are like products. While it is beyond the scope of this commentary to determine whether or not they are like products, there appears to be reasonably strong evidence on which such a challenge could be based.

However, the definition of like products adopted in relation to art III:4 of the *GATT*, or any other WTO provision, will not necessarily be applied when interpreting art 2.1 of the *TBT Agreement*. According to the Appellate Body, the concept of likeness resembles an accordion which ‘stretches and squeezes’ to suit the different provisions of the WTO agreements in which it is incorporated.⁶⁵ The scope of the term ‘like products’ depends on ‘the particular provision in which the term “like” is encountered as well as ... the context and the circumstances that prevail in any given case to which that provision may apply’.⁶⁶

Unlike the *GATT*, the *TBT Agreement* contains no general exceptions. In other words, if a measure is found to be inconsistent with a provision of the *TBT*

⁶² Ibid [101].

⁶³ See, eg, Palm Oil Action Group, above n 15.

⁶⁴ See Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [124]; Panel Report, *EC — Asbestos*, WTO Doc WT/DS135/R, [8.143].

⁶⁵ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2 (4 October 1996) [21].

⁶⁶ Ibid.

Agreement such as art 2.1, the measure cannot be saved from that inconsistency on the grounds that it is necessary for a legitimate purpose, such as the protection of human health or the environment. In the absence of a provision corresponding to *GATT* art XX, WTO panels and the Appellate Body may be more likely to adopt a narrow interpretation of ‘like products’ in art 2.1.⁶⁷

On the basis of a narrow definition, the physical differences between palm oil and other vegetable oils, such as their melting point, colour and saturated fat content, may render them unlike. As noted above, in *EC — Asbestos*, the Appellate Body emphasised physical differences between two products as being an important consideration when deciding if they were ‘like’.⁶⁸ However, physical differences are not the sole criterion used by the Appellate Body, and are not determinative of the issue. In that same case, the Appellate Body noted that ‘a determination of “likeness” under art III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products’,⁶⁹ and that:

evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are — or would be — willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the ‘likeness’ of those products ...⁷⁰

These statements demonstrate that two products may be considered to be ‘like’ even though they are physically different, and that competitiveness between products is a key consideration.

While the burden on the complainant to demonstrate a strong competitive relationship between palm oil and other vegetable oils would be high, if that claim could be made out, then a WTO panel or the Appellate Body might hold that palm oil and other vegetable oils are ‘like’ products in spite of their physical differences. As outlined above, a range of evidence appears to be available to support an argument that there is a competitive relationship between palm oil and other vegetable oils.

Further, even if a narrow view is taken of the definition of ‘like products’ under art 2.1, the physical differences between palm oil and certain other vegetable oils are decreasing over time, owing to the genetic modification of various oilseed crops. Genetically modified varieties of crops such as rapeseed and soybean have more of the characteristics of palm oil, such as producing partially or fully hydrogenated oils, and oils that are free of trans-fats. Similarly, a 2007 report by the Australian Government’s Bureau of Rural Sciences noted that Australian oilseed producers are economically threatened by the competition they face from new varieties of palm oil that are more similar to canola oil.⁷¹ The impact of genetic modification on the similarity of competing agricultural commodities is an interesting issue that a panel or the Appellate Body may have to consider if a question of whether two crops are ‘like products’ arises.

⁶⁷ See Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2nd ed, 2008) 818.

⁶⁸ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [118].

⁶⁹ *Ibid* [99].

⁷⁰ *Ibid* [117].

⁷¹ Holtzapffel, Johnson and Mewett, above n 56, 50–1.

2 Treatment No Less Favourable

The meaning of the phrase ‘treatment no less favourable’ in art 2.1 of the *TBT Agreement* has not been the subject of detailed consideration in any case to date. In *EC — Trademarks*, the Panel briefly considered the phrase and stated that ‘the starting point for this analysis must be whether the measure at issue accords any difference in treatment’.⁷² It found that Australia had ‘not made a prima facie case’ of ‘less favourable’ treatment.⁷³ However, guidance on the interpretation of this phrase may be found in WTO jurisprudence concerning *GATT* provisions,⁷⁴ particularly art III:4. In relation to art III:4 of the *GATT*, the Appellate Body has held that treatment no less favourable does not require a formal difference between imported products and domestic products. Rather, the question is whether the ‘measure modifies the conditions of competition in the relevant market to the detriment of imported products’.⁷⁵

If palm oil and other vegetable oils are ‘like’ products, the Bill clearly modifies the conditions of competition in that market. No other vegetable oil that is likely to be used as a substitute for palm oil — such as sunflower oil or canola oil — requires labelling as an ingredient in all food products.⁷⁶ Similarly, labelling requirements do not require (or allow) any distinction to be drawn in the case of any other oil on the basis of whether it has been sustainably produced.

In order to achieve its objectives, the assumption behind the Bill is that a labelling requirement for palm oil will alter the products that consumers purchase, thus diminishing the consumption of palm oil.⁷⁷ It is therefore impossible for the Bill to achieve its aims without modifying the conditions of competition in the market and encouraging manufacturers and consumers not to use palm oil or to use only sustainably produced palm oil.

Article 2.1 will be violated only where the imported products are treated less favourably than ‘like’ domestic products or ‘like’ products imported from another country. The Bill does not explicitly treat palm oil imports differently from domestically produced palm oil, or palm oil produced in any country differently from any other palm oil.⁷⁸

⁷² Panel Report, *EC — Trademarks*, WTO Doc WT/DS290/R (15 March 2005) [7.464].

⁷³ *Ibid* [7.475].

⁷⁴ Appellate Body Report, *Korea — Beef*, WTO Doc WT/DS 161/AB/R, WT/DA169/AB/R, AB-2007-4 (11 December 2000) is one example. Other WTO jurisprudence on the clause includes: Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R; Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) (*US — Gasoline*); Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, WTO Doc WT/DS44/R (31 March 2008).

⁷⁵ Appellate Body Report, *Korea — Beef*, WTO Doc WT/DS 161/AB/R, WT/DA169/AB/R, AB-2007-4, [135]–[137].

⁷⁶ Some vegetable oils, for example, nut-based oils such as sesame oil or peanut oil, are currently required to be listed as an ingredient of a product as they are common allergens.

⁷⁷ Explanatory Memorandum, Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2009 (Cth) 1; Commonwealth, *Parliamentary Debates*, Senate, 23 November 2009, 8562–3 (Nick Xenophon).

⁷⁸ We note that if sustainable palm oil came predominantly from a particular country or group of countries, and palm oil which was not certified as being sustainably produced came from a different country, then the Bill may be in violation of art 2.1 on this basis.

However, it is well-accepted that de facto discrimination can constitute a violation of the national treatment or MFN principles in WTO law.⁷⁹ All palm oil in Australia is imported, particularly from Malaysia and Indonesia.⁸⁰ As noted above, other widely produced vegetable oils, such as soya oil, rapeseed oil and sunflower seed oil, are predominantly produced in other countries such as China, Canada and the US. Therefore, by targeting palm oil, as opposed to other vegetable oils, for labelling intended to reduce consumption, the Bill is according a product imported from Malaysia and Indonesia less favourable treatment than 'like products' imported from other countries and products originating in Australia, in violation of the MFN principle. If the enactment of the Bill also caused Australian-produced rapeseed or other vegetable oils to be used in preference to palm oil, the Bill may also be found to be in breach of the national treatment requirement.

IV IMPLICATIONS OF THE GATT

As noted above, the Appellate Body has held that the requirements of the *GATT* are in addition to those of the *TBT Agreement*.⁸¹ Therefore, regardless of the Bill's consistency with the *TBT Agreement*, it must also be consistent with Australia's obligations under the *GATT*. The provisions of the *GATT* that are most relevant to the Bill are the national treatment requirement contained in art III:4 and the MFN treatment requirement in art I:1. We consider these in turn.

A National Treatment: GATT Art III:4

Article III:4 of the *GATT* requires members to treat imported products no less favourably than 'like products' of national origin in respect of all laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use. The Bill, if enacted, would fall within the category of a law, regulation or requirement affecting the internal sale or offering for sale of palm oil products.

Article III:4 of the *GATT* is similar to art 2.1 of the *TBT Agreement*, as both provisions require that 'like products' are given treatment that is 'no less favourable' than the other. We considered above the approach taken by the Appellate Body to the interpretation of each of these terms, and how that approach may apply to the Bill. For the reasons already stated, a panel or the Appellate Body is likely to take a similar approach to these concepts in art 2.1 of the *TBT Agreement* and art III:4 of the *GATT*.

However, as indicated above, one potential point of difference is that the meaning of 'like products' may be broader under art III:4 of the *GATT* than under art 2.1 of the *TBT Agreement*, because of the availability of the exceptions

⁷⁹ See, eg, Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, WTO Doc WT/DS139/AB/R, WT/DS142/AB/R, AB-2000-2 (31 May 2000) [107] ('*Canada — Autos*'); GATT Panel Report, *United States — Section 337 of the Tariff Act of 1930*, GATT Doc L/6439 (16 January 1989, adopted 7 November 1989) [3.18].

⁸⁰ In 2007, Malaysia and Indonesia accounted for a combined total of 87 per cent of world palm oil production: Jim Crutchfield, 'Indonesia: Palm Oil Production Prospects Continue to Grow' (Commodity Intelligence Report, United States Department of Agriculture Foreign Agricultural Service, 31 December 2007).

⁸¹ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, AB-2000-11, [80].

in *GATT* art XX. Palm oil and other vegetable oils are therefore more likely to be 'like products' under *GATT* art III:4 than under *TBT Agreement* art 2.1.

Article III:4 of the *GATT* relates exclusively to national treatment, so inconsistency with that provision would require establishing that the Bill treats palm oil less favourably than 'like products' of domestic origin. Some alternatives to palm oil, such as rapeseed oil, are produced in Australia.⁸² If it can be shown that these domestically produced vegetable oils are like palm oil, then the Bill will most likely be considered to treat palm oil less favourably and consequently may be inconsistent with art III:4 of the *GATT*.

B MFN Treatment: *GATT* Art I:1

Many of the vegetable oils that are alternatives to palm oil, such as soya oil, are produced outside Australia. According these oils treatment more favourable than that accorded to palm oil may constitute a violation of the MFN treatment obligation in *GATT* art I:1.

Article I:1 of the *GATT* requires, inter alia, that with respect to all matters covered by art III:4 of the *GATT*, any advantage, favour, privilege or immunity granted by a WTO member to any product originating in any other country shall be accorded immediately and unconditionally to the 'like product' originating from any other WTO member. The Bill is 'a matter covered by art III:4 of the *GATT*' as it is a 'law, regulation or requirement affecting [the] internal sale [or] offering for sale' of food products containing palm oil.⁸³

The word 'advantage' in art I:1 of the *GATT* is interpreted broadly, with the Appellate Body noting that 'any advantage' will satisfy this requirement.⁸⁴ Even though this is a low threshold, the Bill does not bestow an advantage on any vegetable oil other than palm oil. Instead, the Bill modifies the conditions of competition by putting palm oil at a competitive disadvantage through the imposition of the labelling requirement. This disadvantage could constitute a violation of the most-favoured nation principle under the *TBT Agreement*. This is because art 2.1 expresses that principle as according imported products treatment which is no less favourable than that accorded to like products imported from another country. However, the Bill does not contain any element that can be characterised as an 'advantage' which is given to vegetable oils other than palm oil. On this basis, the Bill will not constitute a violation of art I:1 of the *GATT*.⁸⁵

⁸² See Food and Agriculture Organization of the United Nations, *FAOSTAT* (2011) <<http://faostat.fao.org/site/339/default.aspx>>; Australian Oilseeds Federation, *Industry Facts and Figures* (2001) <http://www.australianoilseeds.com/australian_oilseeds_industry/industry_facts_and_figures>; Holtzapffel, Johnson and Mewett, above n 56.

⁸³ *GATT* art III:4.

⁸⁴ Appellate Body Report, *Canada — Autos*, WTO Doc WT/DS139/AB/R, WT/DS142/AB/R, AB-2000-2, [79] (emphasis in original).

⁸⁵ If Malaysia or Indonesia were to challenge, under art I:1, the labelling requirement placed on palm oil, they would need to challenge the labelling requirements which apply to vegetable oil (rather than the requirements that apply to palm oil under the Bill) and argue that the ability to classify other vegetable oils under the generic term 'vegetable oil' was an advantage granted to those products which should extended immediately and unconditionally to the like product of palm oil.

C General Exception under GATT Art XX

Article XX(b) of the *GATT* provides a general exception to inconsistency with other provisions of the *GATT* for measures ‘necessary’ to protect human, animal or plant life or health. In addition, art XX(g) provides an exception for measures ‘relating to’ the conservation of exhaustible natural resources. Article XX also contains an introductory provision, known as the ‘chapeau’, which states that such measures cannot be applied in a manner constituting either an ‘arbitrary or unjustifiable discrimination’ between countries where the same conditions prevail, or a ‘disguised restriction’ on international trade.

1 *Necessary to Protect Human, Animal or Plant Life or Health?*

Both the health purpose and the environmental purpose of the Bill relate to the protection of human, animal or plant life or health. If the Bill is necessary to achieve those purposes, it may therefore be saved from inconsistency with art III:4 (or another article of the *GATT*) by art XX(b).

We applied the Appellate Body’s approach to art XX(b) of the *GATT* to our analysis of whether the Bill is necessary to achieve either its health or environmental purpose above at Part III(B)(2) of this commentary. We do not consider the Bill necessary within the meaning of *GATT* art XX(b), regardless of whether it complies with the chapeau of art XX.

2 *Relating to the Conservation of Exhaustible Natural Resources?*

The Appellate Body has recognised that the words ‘relating to’ in art XX(g) entail a lower standard than ‘necessary’, requiring only that a measure be ‘primarily aimed at’⁸⁶ the conservation of exhaustible natural resources and that its means be ‘reasonably related’ to that objective.⁸⁷ In addition, art XX(g) requires that such measures be made effective ‘in conjunction’ with restrictions on domestic production or consumption. The Appellate Body has said that this requires ‘*even-handedness*’ in the treatment of domestic and imported products, although it does not strictly preclude differential treatment.⁸⁸

The Bill is primarily aimed at the conservation of forests, which are exhaustible natural resources.⁸⁹ However, its means may not be reasonably related to that objective because, as noted above,⁹⁰ product labelling is several steps removed from deforestation and may have little or no impact upon it. Nevertheless, if Australia could show some evidence of a reasonable causal relationship between labelling and the prevention of deforestation, the Bill would likely be considered provisionally justified under art XX(g) because it relates to

⁸⁶ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (29 April 1996) [19].

⁸⁷ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [141] (*‘US — Shrimp’*).

⁸⁸ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1, [18], [21] (emphasis in original).

⁸⁹ The Appellate Body has held that the term ‘exhaustible natural resources’ include living resources: Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, AB-1998-4, [128], [131].

⁹⁰ See Part III(C)(2) above.

the conservation of exhaustible natural resources and applies to palm oil regardless of its origin.

3 *The Chapeau*

As shown above, the Bill accords ‘less favourable treatment’ to countries such as Indonesia and Malaysia that are the predominant producers of palm oil.⁹¹ However, this does not necessarily mean that the Bill is a means of ‘arbitrary or unjustifiable’⁹² discrimination between countries. In *Brazil — Retreaded Tyres*, the Appellate Body said that ‘[t]he assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure’ and that a measure would fail to satisfy the chapeau ‘when the alleged rationale for discriminating does not relate to the pursuit of or would go against’ that objective.⁹³

Although the burden of the Bill might fall disproportionately on major producers of palm oil, this is reasonably related to the objective of protecting the environment against the deforestation that the production of palm oil may entail. Thus, the Bill does not appear to constitute a means of ‘arbitrary or unjustifiable’ discrimination. On the other hand, if a complaining party could show that other vegetable oils, such as soya oil, rapeseed oil and sunflower seed oil, also cause comparable environmental problems, discrimination between countries that produce those oils and countries that produce palm oil might well be ‘arbitrary or unjustifiable’.

V CONCLUSION

While considerable debate has taken place in Australia regarding the merits of requiring food products containing palm oil to be labelled, whether the Bill would be valid and consistent with Australia’s obligations under the WTO agreements has received little consideration. However, any labelling scheme that distinguishes a certain kind of product from its competitors, particularly when those products generally originate from different countries, is likely to raise issues under the *TBT Agreement* and the *GATT*.

In our view the Bill, if enacted, would be inconsistent with Australia’s obligations under WTO agreements, notably with art 2.2 of the *TBT Agreement*, as it is not necessary to achieve its health or environmental purposes. If a panel was to find the Bill inconsistent with art 2.2 of the *TBT Agreement*, regardless of the Panel’s findings on other provisions such as art III:4 of the *GATT*, the measure as a whole would be inconsistent with Australia’s WTO obligations.

The Bill may also constitute a violation of art 2.1 of the *TBT Agreement* and art III:4 of the *GATT*. In relation to these provisions, whether the Bill is consistent with WTO obligations is likely to turn on the scope given to the term ‘like products’. Even in relation to art 2.1 of the *TBT Agreement*, where a narrower approach to the phrase ‘like products’ may be taken, evidence exists to support an argument that palm oil and other vegetable oils are like products. In

⁹¹ See Part IV(A) above.

⁹² *GATT* art XX.

⁹³ Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4, [224].

the same way that the Bill is likely to violate art 2.2 of the *TBT Agreement*, it is unlikely to be saved from any inconsistency with art III:4 of the *GATT* by the general exception in art XX(b) of the *GATT*; in our view it is not likely to be held to be a necessary measure to protect human, plant or animal life or health. On the other hand, the Bill may be justified under art XX(g) of the *GATT* because it relates to the conservation of exhaustible natural resources and appears to satisfy the requirements of the chapeau. However, although this means that the Bill may be consistent with the *GATT*, it would still be inconsistent with the *TBT Agreement*.

[Editor's note: subsequent to the authors' completion of this commentary, the Community Affairs Legislation Committee released the report of its inquiry, recommending against the passing of the Bill, as did the House of Representatives Standing Committee on Economics.⁹⁴]

⁹⁴ See Community Affairs Legislation Committee, Senate, *Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2010* (2011); Standing Committee on Economics, House of Representatives, *Advisory Report on the Food Standards Amendment (Truth in Labelling — Palm Oil) Bill 2011* (2011).