The Consistency of Australia's Illegal Logging Prohibition Bill with International Trade Rules

Andrew Mitchell and Glyn Ayres

I INTRODUCTION

1. This brief examines the consistency of the Illegal Logging Prohibition Bill 2011 (Cth)[1] ('Bill') with Australia's obligations under the *Marrakesh Agreement Establishing the World Trade Organization*[2] ('WTO Agreement') and the *ASEAN–Australia–New Zealand Free Trade Agreement*[3] ('AANZFTA'). The brief assesses the legality of the Bill if enacted by Parliament in its current form.[4]

2. The Bill makes it a criminal offence to import into Australia certain products containing illegally logged timber. In addition, the Bill makes it an offence to import certain timber products without government approval, even if those products do not contain illegally logged timber. Finally, the Bill makes it an offence to use raw logs in manufacturing processes within Australia, whether or not the raw logs are imported, without government approval.

3. The Bill engages a number of Australia's obligations under international trade law. In particular, this brief considers:

    a. Whether the Bill is consistent with the most-favoured-nation, national treatment and quantitative restrictions disciplines in Articles I:1, III and XI:1 respectively of the *General Agreement on Tariffs and Trade 1994*[5] ('GATT 1994');

    b. Whether any general exceptions are available to justify the Bill under Article XX of the GATT 1994;

    c. Whether the Bill falls within the *Agreement on Technical Barriers to Trade*[6] ('TBT Agreement') and is consistent with its disciplines; and

    d. Whether the Bill is consistent with the AANZFTA, including its investment provisions.

II BACKGROUND

A *Motivations for Targeting Illegal Logging*

4. The Explanatory Memorandum to the Bill states that the Australian government has two main motivations for taking measures to combat illegal logging. The first is to combat

[1] Australian Government, *Illegal Logging Prohibition Bill 2011 – Exposure Draft* (18 March 2011).
[2] Opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).
[3] *Agreement Establishing the Association of Southeast Asian Nations (ASEAN)–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).
[4] The exposure draft of the Bill was tabled in the Australian Parliament on 23 March 2011: see Commonwealth, *Parliamentary Debates*, Senate, 23 March 2011, 1623 (Joe Ludwig).
[5] *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*').
[6] *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*').

unfair competition with Australian products. Illegally logged products are substantially cheaper than legal products due to reduced compliance costs. According to the government, this creates unfair competition between illegally logged imported products and legally logged domestic products.[7] The second motivation is a concern for the social and environmental costs of illegal logging. In a report commissioned by the government as a precursor to the Bill ('the CIE Report'),[8] the Centre for International Economics estimated that these costs can be quantified at around US$60.5 billion per year.[9]

5. However, the CIE Report also concluded that this figure is offset by the increased costs that consumers and producers would incur if illegal logging were eliminated, so that the total net cost of illegal logging is in fact only US$14.5 billion per year.[10] Moreover, although the best evidence suggests that as much as 5–10 per cent of global logging may be conducted illegally,[11] only around 15 per cent of timber is traded internationally.[12] Australia accounts for around 2.5 per cent of global timber imports. Of Australia's imports, around 10 per cent may include illegally logged timber.[13] Thus, the CIE Report concluded that Australia's consumption of imported illegally logged timber accounts for around 0.34 per cent of total global production, meaning that even if Australia were to completely eliminate illegal imports it would reduce the global cost of illegal logging by only US$51 million per year.[14]

6. These figures are noted in the Explanatory Memorandum, but the Memorandum criticises the CIE Report for not including 'intangible' costs in its analysis. These include the 'erosion of sustainable livelihoods', 'destruction of customary, spiritual and heritage values', 'human rights abuses', 'exploitation of illegal foreign workers', 'contamination of food and water sources', and the 'immeasurable value' that Australia places on forests and the sustainable use of resources.[15] The Memorandum also asserts, on the basis of another report,[16] that eliminating illegal logging worldwide would create an increase in legitimate logging almost equal to the eliminated illegal logging. This would lead to an overall global benefit of US$60.5 billion per year 'after the industry adjusts and restructures itself following the initial shock of shifting to only legally-sourced timber'.[17]

---

[7] Australian Government, *Illegal Logging Prohibition Bill 2011 – Explanatory Memorandum (Consultation Draft)*, 5.
[8] Centre for International Economics, 'A Final Report to Inform a Regulation Impact Statement for the Proposed New Policy on Illegally Logged Timber' (prepared for the Department of Agriculture Fisheries and Forestry, 29 January 2010).
[9] *Explanatory Memorandum*, above n 7, 8.
[10] CIE Report, above n 8, 8.
[11] Seneca Creek Associates, '"Illegal" Logging and Global Wood Markets: The Competitive Impacts on the US Wood Products Industry' (prepared for the American Forest and Paper Association, November 2004) ES-1.
[12] CIE Report, above n 8, 8.
[13] Ibid.
[14] Ibid 9.
[15] *Explanatory Memorandum*, above n 7, 8.
[16] Raymond Mi, Todd McInnis and Edwina Heyhoe, 'The Economic Consequences of Restricting the Import of Illegally Logged Timber: ABARE Report for the Department of Agriculture Fisheries and Forestry' (Australian Bureau of Agricultural and Resource Economics, May 2010).
[17] *Explanatory Memorandum*, above n 7, 16.

B *Illegal Logging Measures Taken by Other Countries*

7. Other countries have introduced measures and proposals that are broadly similar to the Bill. In the United States, a 2008 amendment of the *Lacey Act of 1900* provides that it is unlawful to import 'any plant taken, possessed, transported, or sold in violation of … any foreign law.'[18] In the United Kingdom, a Private Member's Bill entitled the Illegally Logged Timber (Prohibition of Import, Sale or Distribution) Bill 2010–2011 (UK) was presented to Parliament on 16 September 2010. The UK bill is somewhat broader than the Bill in that it makes it an offence to sell illegally exported or imported timber as well as illegally harvested timber.[19] The UK bill has not yet been read a second time.

III OPERATION OF THE BILL

A *Overview of the Three Offences Created by the Bill*

8. The Bill creates three offences. The primary offence prohibits the importation of *regulated timber products* that include *illegally logged* timber.[20]

9. 'Regulated timber products' means timber products prescribed in regulations that will not be made until after the Bill becomes law.[21] The range of products that will be covered is therefore currently unknown. In addition, the purpose of prescribing the covered products in regulations, rather than in the Act itself, is to allow regulatory flexibility in the import prohibition scheme.[22] This means that the range of covered products is likely to fluctuate after the Bill becomes law.

10. 'Illegally logged' means timber that was harvested 'in contravention of laws in force in the place … where the timber was harvested'.[23] Thus, neither the particular method used to log the timber nor the method's compliance with Australian law or international standards is relevant in determining whether the logging is legal for the purposes of the Bill. Rather, the sole criterion in assessing whether timber is 'illegally logged' is the law of its country of origin. The Explanatory Memorandum also states that the Australian Government regards illegal logging as taking place when harvesting occurs through 'corrupt practices'.[24] However, such practices would still need to contravene the laws of the place of harvesting for the timber in question to be 'illegally logged' within the meaning of the Bill.

11. Two further offences prohibit:

---

[18] 16 USC § 3372(a)(1)(B)(i).
[19] Illegally Logged Timber (Prohibition of Import, Sale or Distribution) Bill 2010–2011 (UK) cl 2(1).
[20] *Illegal Logging Prohibition Bill 2011 – Exposure Draft*, above n 1, cl 6.
[21] Ibid cls 5, 46(1).
[22] *Explanatory Memorandum*, above n 7, 2.
[23] *Illegal Logging Prohibition Bill 2011 – Exposure Draft*, above n 1, cl 5.
[24] *Explanatory Memorandum*, above n 7, 5, referring to 'Definition of Legality in Securing the Future of Tasmania's Forest Industry' (2007) Statement by Kevin Rudd MP Federal Labor Leader.

a. The importation of regulated timber products (whether or not they contain illegally logged timber) by anyone who is not an *approved timber importer*;[25] and

b. The processing of raw logs within Australia by anyone who is not an *approved timber processor*.[26]

These two offences will not come into effect until two years after the offence of importing illegally logged timber comes into effect, which will occur a maximum of six months after the Bill becomes law.[27]

B *Prohibition on the Importation of Illegally Logged Timber*

12. Clause 6(1) of the Bill provides that a person commits an offence if:

> (a) the person imports a thing; and
> (b) the thing is a regulated timber product; and
> (c) the thing is, is made from, or includes, illegally logged timber.

13. Thus, the offence of importing illegally logged timber has three physical elements: (1) a conduct element of importing a 'thing'; (2) a circumstance element that the thing is a 'regulated timber product'; and (3) a circumstance element that the imported thing includes 'illegally logged' timber. The third element is the most important for determining the potential liability of importers under the offence.

14. Under Australian law, circumstance elements have a corresponding mental element of recklessness.[28] Therefore, to commit an offence under cl 6(1), an importer must, at minimum, be reckless to the fact that they are importing regulated timber products that include illegally logged timber.[29] This means that the importer must: (a) *know* that there is a *substantial risk* that their imports include illegally logged timber; and (b) *unjustifiably take* that risk.[30] This is a relatively high threshold. Criminal negligence, meaning a 'great falling short' of the standard of care that a reasonable person would exercise in the circumstances, would not meet it.[31]

C *Approval of Timber Importers and Processors: Legal Logging Requirements*

15. Clause 7 makes it an offence to import regulated timber products without being an *approved timber importer*. The Minister may grant such approval,[32] but only if satisfied that the applicant will comply with applicable *legal logging requirements*. The Minister

---

[25] *Illegal Logging Prohibition Bill 2011 – Exposure Draft*, above n 1, cl 7.
[26] Ibid cl 8.
[27] Ibid cl 2(1), table items 2 and 3. The primary offence will come into effect on a day to be fixed by Proclamation, but a maximum of 6 months after the Bill becomes law.
[28] *Criminal Code Act 1995* (Cth) sch 1, s 5.6 ('Criminal Code').
[29] Knowledge or intention that such imports include illegally logged timber would also suffice: Criminal Code s 5.4(4).
[30] Criminal Code s 5.4(1).
[31] See Criminal Code 5.5.
[32] *Illegal Logging Prohibition Bill 2011 – Exposure Draft*, above n 1, cl 15.

may also appoint 'timber industry certifiers' to grant approval and to monitor compliance with the legal logging requirements.[33]

16. Like the list of regulated timber products, the legal logging requirements will be set out in regulations and have not yet been made. Nevertheless, several provisions of the Bill, together with policy statements, provide an indication of what the requirements are likely to include.

17. First, cl 14(1) provides that the legal logging requirements may require importers to 'assess the risk of importing or processing illegally logged timber' and to 'implement appropriate risk management measures'. Secondly, cl 13(2) provides that requirements may be prescribed for the purpose of ensuring that imported timber products are 'accurately described'. And thirdly, the Australian Department of Agriculture Fisheries and Forestry ('DAFF') has stated that timber importers will be required to undertake 'due diligence requirements', including:

    a. assess[ing] the risk of sourcing illegal timber
    b. implement[ing] legality verification procedures commensurate with the risk identified
    c. disclos[ing] the species, country of harvest and any certification of timber in accordance with the legislation.[34]

18. Such requirements would place a substantial burden on importers. Assessing the risk that timber may be illegally logged and verifying its legality could be difficult tasks, particularly in relation to processed products containing timber from multiple sources.[35] On the other hand, the caveat that verification procedures need only be 'commensurate' to the particular risk would reduce compliance costs by leaving some discretion with the importer.[36]

19. Such requirements would also have the effect of requiring importers to assess, and therefore know, the risk that their imports may contain illegally logged timber. Thus, the offences in cls 6 and 7 are related: the approval offence in cl 7 and the legal logging requirements that go with it could preclude importers from claiming (or ensuring) ignorance in relation to the offence of importing illegally logged timber.

D *Approval to Process Raw Logs*

20. Clause 8 creates an offence of processing raw logs without being an *approved timber processor*. This offence mirrors the offence in cl 7 in all relevant respects, but relates to

[33] *Illegal Logging Prohibition Bill 2011 – Exposure Draft*, above n 1, cl 9(1). The Minister may also delegate his or her power of approval: cl 44(1).
[34] Department of Agriculture Fisheries and Forestry, 'Illegal Logging Questions and Answers' <http://www.daff.gov.au/forestry/international/illegal-logging/q-and-a> accessed 5 July 2011.
[35] Poyry Forest Industry, 'Legal Forest Products Assurance – A Risk Assessment Framework for Assessing the Legality of Timber and Wood Products Imported into Australia' (Final Report for the Department of Agriculture, Fisheries and Forestry, 12 February 2010) 4, A1-2, A1-6, A2A-1, A2A-10, A2A-18.
[36] Mi et al, above n 16, 15–16.

processing rather than importation and is restricted to raw logs rather than all regulated timber products.

IV CONSISTENCY WITH THE GATT 1994

A *GATT Article I:1 (Most-Favoured-Nation Treatment)*

21. Article I:1 of the GATT 1994 provides that where a Member of the World Trade Organization ('WTO') grants 'any advantage, favour, privilege or immunity' to any product in international trade, the Member must also grant it to any other 'like product' originating in or destined for the territories of all other Members. This obligation precludes discrimination between 'like products' in international trade[37] and relevantly applies to 'all rules and formalities in connection with importation',[38] thus covering the import prohibition in the Bill.

22. The elements of a contravention of Article I:1 are therefore:

    a. That the measure at issue creates an 'advantage'; and

    b. That the advantage is not accorded to all 'like products' in international trade.

1 *Does the Bill Confer an 'Advantage'?*

23. 'Advantage' has a broad meaning in Article I:1, covering any form of competitive advantage conferred on any product.[39] Thus, an advantage may either be conferred 'directly', as a result of positive treatment of the product in question, or 'indirectly', as a result of negative treatment of other products with which the product in question is in competition.[40]

24. The sole criterion in the Bill for determining whether timber is 'illegally logged' is the law of the place where the timber was harvested.[41] This raises a strong possibility of discrimination because logging laws inevitably differ between countries. Thus, two identical products made with timber logged using an identical method would be treated differently if the timber in product A was from a country where that method was illegal and the timber in product B was from a country where it was legal. It would be illegal to import product A but legal to import product B into Australia, thus creating an 'advantage' for product B. Therefore, the Bill creates an indirect 'advantage'.

---

[37] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (25 September 1997) [183], [190] ('*EC – Bananas III*').
[38] GATT 1994 Article I:1.
[39] Appellate Body Report, *EC – Bananas III*, [206].
[40] GATT Article I:1; Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WTO Doc WT/DS139/AB/R, WT/DS142/AB/R (19 June 2000) [79] ('*Canada – Autos*').
[41] *Illegal Logging Prohibition Bill 2011 – Exposure Draft*, above n 1, cl 5.

2 *Are Legal Products 'Like' Illegal Products?*

25. The next question under Article I:1 is whether products that contain illegally logged timber are 'like' products that do not contain such timber. Although there is little jurisprudence on the meaning of 'like products' in Article I:1, the term appears numerous times throughout the GATT 1994 and has been analysed by the Appellate Body under Article III:2 and Article III:4. The Appellate Body has stated that the meaning of 'like products' varies according to its context.[42] Nevertheless, similar considerations are likely to apply under both Article III:4 and Article I:1, although the meaning of 'like products' is somewhat narrower under Article III:2 because in that provision it is juxtaposed with the phrase 'directly competitive or substitutable' products.[43]

26. In *EC – Asbestos*, the Appellate Body said that 'likeness' is 'fundamentally … about the nature and extent of a competitive relationship between and among products.'[44] Thus, four factors are relevant to whether two products are 'like': (1) physical similarities; (2) the end uses of the products; (3) consumer perception; and (4) tariff classification.[45] It is a matter of debate as to whether the processes and production methods by which products are produced are also relevant to 'likeness' when those methods do not otherwise relate to the products themselves (eg by affecting their physical properties).[46]

27. When a measure discriminates between products on the 'sole criterion' of their country of origin, a complaining party may satisfy the 'like products' requirement by showing that there 'can or will' be domestic and imported products that are 'like'.[47] However, the criterion in the Bill is not the origin of products or the timber that they contain per se, but whether the timber was harvested in contravention of the *laws* of its country of origin. For this reason, a complaining party challenging the Bill would need to point to particular products that are treated differently and demonstrate that they are 'like' according to the four-factor test set out in *EC – Asbestos*.

28. As discussed above, the Bill would discriminate between two products that were physically identical in every way if those products contained timber from countries with differing laws.[48] Moreover, the end uses of those products would be the same, and even their processes and production methods could be identical because the definition of

[42] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1 November 1996) 19–20 ('*Japan – Alcoholic Beverages II*').
[43] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (5 April 2001) [95] ('*EC – Asbestos*'); Appellate Body Report, *Japan – Alcoholic Beverages II*, 118.
[44] Appellate Body Report, *EC – Asbestos*, [95].
[45] Appellate Body Report, *EC – Asbestos*, [101].
[46] Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2nd ed, 2008) 331; Christiane R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press, 2011) 28–31.
[47] Panel Report, *China – Measures Affecting the Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/R (12 August 2009), [7.1446] ('*China – Publications and Audiovisual Products*').
[48] See above, [24].

'illegally logged' in the Bill focuses solely on the laws of the country of origin, not on the method of harvesting.

29. For these reasons, the Bill would discriminate between products that could be identical in their physical properties, their end uses and their processes and production methods. Such products would be 'like' within the meaning of Article I:1. Therefore, the Bill is likely to be inconsistent with Article I:1 because it would confer indirect 'advantages' on products from some countries without according them to all 'like products' originating in the territories of all WTO Members.

30. If, on the other hand, the import ban was limited to products that were logged in an environmentally unfriendly manner, Australia would have a stronger basis for arguing that the targeted products were not like other timber products because of (i) consumer preferences distinguishing between environmentally friendly and other products; and (ii) (more contentiously) differences between environmentally friendly and environmentally unfriendly processes and production methods, even if these methods did not affect the physical properties, end-uses or tariff classification of the final products.

B *GATT Article III (National Treatment)*

31. Article III:1 of the GATT 1994 sets out the general principle that internal measures should not be applied to imported or domestic products 'so as to afford protection' to domestic production. Preventing such protection is the primary purpose of Article III and this principle informs the remainder of its provisions.[49]

1 *GATT Article III:2*

32. GATT Article III:2 provides that Members must not apply 'internal taxes or other internal charges' to imported products 'in excess' of those applied to 'like' domestic products.

33. In order to be a 'tax' or 'charge', a measure must impose a pecuniary burden,[50] either on the product itself or in connection with the product, such as on its inputs or its production processes.[51] Although the Bill creates a number of measures that are clearly internal, such as the legal logging requirements and approval procedures, none of these imposes a pecuniary burden. Moreover, although the importation offences could lead to pecuniary penalties, these would not be 'taxes' or 'charges' within the meaning of Article III:2 because they are punitive and are therefore not imposed 'directly or indirectly' on the products themselves.[52] For these reasons, the provisions of the Bill do not fall within Article III:2.

---

[49] GATT Article III:1; Appellate Body Report, *Japan – Alcoholic Beverages II*, 15.
[50] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WTO Doc WT/DS155/R and Corr 1 (16 February 2001) [11.143] ('*Argentina – Hides and Leather*').
[51] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (24 March 2006) [8.45]; Van den Bossche, above n **Error! Bookmark not defined.**, 350.
[52] GATT Panel Report, *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco*, GATT Doc DS/44/R (12 August 1994, adopted 4 October 1994) GATT BISD 41S/I/131, [80]–[82].

2 *GATT Article III:4*

34. Article III:4 of the GATT 1994 provides that Members must accord imported products 'treatment no less favourable' than that accorded to 'like products' of national origin. This obligation applies to '*all laws, regulations and requirements* affecting [the] *internal* sale, offering for sale, purchase, transportation, distribution or use' of such products.[53] Thus, Article III:4 covers a wider range of measures than Article III:2 because it is not limited to 'taxes' or 'charges'. However, it still applies only to '*internal*' measures.

35. The issues under Article III:4 are therefore:

    a. Whether the Bill accords 'less favourable treatment' to 'like' imported products; and

    b. Whether the Bill is an 'internal' measure.[54]

(a) Does the Bill Accord 'Less Favourable Treatment' to 'Like' Imported Products?

36. As demonstrated above, the Bill applies differently to 'like products' in international trade under Article I:1.[55] For the same reasons, the Bill applies differently to 'like products' where one of the products in question is an Australian domestic product and the other is an imported product because Australian laws differ from the laws of other countries. An imported product would be subject to negative treatment not imposed upon a like domestic product if the imported product was illegally logged in its country of origin but would have been legally logged if it was harvested in Australia

37. However, different treatment of a *particular* imported product might not, on its own, mean that the Bill applies treatment to imported products that is 'less favourable than that accorded to like products of national origin' under Article III:4. In *EC – Asbestos* the Appellate Body said that:

> The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production". If there is "less favourable treatment" of *the group* of "like" imported products, there is, conversely, "protection" of *the group* of "like" domestic products.[56]

Thus, in order to determine whether the Bill accords 'less favourable treatment' to a particular class of imported products *as a group*, a WTO Panel or the Appellate Body might conduct a comparison of Australian logging laws and the logging laws of other countries to determine whether that class of products would be disproportionately

[53] Emphasis added.
[54] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R (10 January 2001) [133] ('*Korea – Beef*').
[55] See above, [25]-[28].
[56] Appellate Body Report, *EC – Asbestos*, [100]. Cf *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R and Add 1 (18 September 2000) [8.152]–[8.155] ('*EC – Asbestos*').

disadvantaged compared to like domestic products.[57] In this regard, it is relevant that the Explanatory Memorandum states that '[t]he content of the *legal logging requirements* will … ensure equal obligations for importers and Australian domestic processors' to avoid discrimination.[58] However, in *Korea – Beef*, the Appellate Body held that 'less favourable treatment' in Article III:4 means that the measure at issue 'modifies the *conditions of competition*' in favour of domestic production.[59] One of the explicit purposes of the Bill is to modify the conditions of competition in the Australian market so that domestic production is not in 'unfair competition' with illegally logged imports.[60] Thus, although this conclusion may change depending on the content of the legal logging requirements, it is likely that the Bill accords 'less favourable treatment' to 'like' imported products.

(b) Is the Bill an 'Internal' Measure?

38. Article III applies to 'internal' measures only and not to border measures, which are dealt with under Article XI. However, different aspects of the same measure may fall within Article III and Article XI if some aspects of the measure are 'internal' and some are not.[61] The Note *Ad* Article III clarifies that if a product is barred at the border because it fails a requirement that is also applied to like domestic products, Article III applies to the border measure.[62]

39. Some aspects of the Bill, such as the prohibition on processing raw logs without approval in cl 8, are clearly internal. The import ban in cl 6, on the other hand, applies only at the border. Once illegally logged timber has been imported into Australia, the Bill creates no further restrictions on its distribution or sale on the Australian market. For example, the Bill does not provide for an offence of possessing, distributing or selling illegally logged timber inside Australia, unlike the US legislation and the UK bill discussed above.[63] Absent any changes that may be made in the 'legal logging requirements', the sale of illegally logged imports on the Australian domestic market will remain voluntarily self-regulated by industry.[64] Moreover, while domestic products will be subject to regulation, they will not be required to comply with the laws of foreign countries, which is the criterion of liability that applies to imported products. Thus, the import ban applies only at the border and does not bar products on the basis that they fail requirements that also apply to like domestic products.

40. For these reasons, although the Bill contains some internal aspects, the import ban in cl 6 is not internal. Therefore, the import ban, which is the most relevant aspect of the Bill for

[57] See Nicolas F Diebold, 'Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency' (Society of International Economic Law, Working Paper No 24, 2010) 10.
[58] *Explanatory Memorandum*, above n 7, 3.
[59] Appellate Body Report, *Korea – Beef*, [144]. Emphasis in original.
[60] *Explanatory Memorandum*, above n 7, 5.
[61] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WTO Doc WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr 1, 2, 3 and 4 (23 July 1998) [7.224] ('*Indonesia – Autos*').
[62] GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, GATT Doc L/5504 (adopted 7 February 1984) BISD 30S/140, [5.14] ('*Canada – FIRA*').
[63] See 16 USC § 3372(a)(1)(B)(i) and Illegally Logged Timber (Prohibition of Import, Sale or Distribution) Bill 2010–2011 (UK) cl 2(1).
[64] *Explanatory Memorandum*, above n 7, 10.

the purposes of its consistency with the WTO Agreement, does not fall within Article III:4.

C *GATT Article XI:1 (Quantitative Restrictions)*

41. Article XI:1 of the GATT 1994 prohibits 'prohibitions or restrictions' of any kind,[65] other than duties, taxes or other charges, on 'the importation of any product'.

42. Measures that impose a penalty for importing a particular product are 'prohibitions or restrictions' on importation within the meaning of Article XI:1.[66] Moreover, although the heading to Article XI is 'General Elimination of Quantitative Restrictions', no actual quota on imports is needed to show a violation of the Article. This is because any measure that has the *de facto* effect of limiting imports is a 'prohibition or restriction' affecting importation, notwithstanding that there may be no *de jure* limitation.[67]

43. Although this brief has described cl 6 of the Bill as an 'import ban', the Bill does not actually directly ban the importation of illegally logged timber or impose a quota on products that contain it. Instead, cl 6 imposes criminal liability on those who import such timber where the importer has the requisite degree of mental fault. Thus, the focus of cl 6 is on the *act* of importing such products, rather than on the products themselves. In *Brazil – Retreaded Tyres*, the Panel found that a direct import ban and penalties that were intended to secure compliance with that ban constituted separate and independent violations of Article XI:1.[68] Therefore, even though the Bill does not contain a direct ban or quota, the criminal penalty in cl 6 is still a 'prohibition or restriction' on importation contrary to Article XI:1 because the penalty is imposed for importing particular products.

44. Moreover, the Bill will likely have the further *de facto* effect of limiting imports because it may cause importers to avoid importing products where they consider that there is a substantial risk that the products may contain illegally logged timber. Thus, the Bill may limit imports of products that do not actually contain illegally logged timber as well as those that do. That this would be a choice made by importers in response to the Bill, rather than the result of a *de jure* ban on such products, would not relieve Australia of responsibility for the restrictive effects of the Bill.[69] For these reasons, the importation offence in the Bill is a restriction on importation and is inconsistent with Article XI:1.

D *GATT Article XX (General Exceptions)*

45. Measures that are inconsistent with a provision of the GATT 1994 may be justified under the General Exceptions found in GATT Article XX. To justify a measure under Article

---

[65] GATT Panel Report, *Japan – Trade in Semi-Conductors*, GATT Doc L/6309, (24 March 1988, adopted 4 May 1988) GATT BISD35S/116, [104]; Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr 1 (5 April 2002) [7.246]–[7.249].

[66] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/R (17 December 2007) [7.372] ('*Brazil – Retreaded Tyres*').

[67] Panel Report, *Argentina – Hides and Leather*, [11.17].

[68] Panel Report, *Brazil – Retreaded Tyres*, [7.32], [7.370]–[7.372]. The Appellate Body did not review this finding.

[69] Appellate Body Report, *Korea – Beef*, [146].

XX, a Member must show: first, that it is provisionally justified under one of the subparagraphs of the Article; and secondly, that it complies with the chapeau of the Article.[70]

46. The subparagraphs that Australia might invoke to justify the Bill cover measures:

> (*b*) necessary to protect human, animal or plant life or health;
> …
> (*d*) necessary to secure compliance with laws or regulations… relating to… the prevention of deceptive practices;
> …
> (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; …[71]

47. If Australia were to demonstrate that the Bill is provisionally justified under one or more of these subparagraphs, it would then need to demonstrate that it also complies with the chapeau in that it is:

> …not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…

1 *The Necessity Test*

(a) Overview

48. In order to demonstrate that the Bill is provisionally justified under subparagraphs (b) or (d), Australia would need to show: first, that the Bill pursues the objective set out in the relevant subparagraph; and secondly, that the measures in the Bill are 'necessary' to achieve that objective.

49. 'Necessary' means more than simply making a contribution to the objective in question. In *Korea – Beef*, the Appellate Body said that in the context of Article XX, 'necessary' falls on a continuum between 'making a contribution to' and being 'indispensable' to that objective and is significantly closer to 'indispensable'.[72]

50. To determine whether a measure is 'necessary', Panels and the Appellate Body apply the following test:

    a. First, determine the *importance* of the objective pursued;

[70] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (adopted 6 November 1998) [117]–[120] ('*US – Shrimp*').
[71] Emphasis added.
[72] Appellate Body Report, *Korea – Beef*, [161].

b. Secondly, in light of the importance of the objective, weigh and balance the *contribution* that the measure makes to that objective with the *extent to which the measure restricts international trade*.

c. Thirdly, if this results in a preliminary conclusion that the measure is 'necessary', consider whether a *less trade-restrictive measure* exists that is reasonably available and that would achieve the Member's chosen level of protection.[73]

If the measure satisfies both the weighing and balancing test and the less trade-restrictive measure test, it is 'necessary' to achieve the objective in question and therefore provisionally justified.

(b) Necessity under Subparagraph (b): Human, Animal or Plant Life or Health

51. Applying this test to the Bill under Article XX(b), the first question is whether the Bill pursues the objective of protecting human, animal or plant life or health. The Explanatory Memorandum states that one purpose of the Bill is to protect the environment by reducing the loss of ecosystems and soil and water degradation that occur as a result of illegal logging.[74] Thus, one purpose of the Bill is to protect plant life or health by promoting sustainable forestry practices that are undermined by illegal logging. Although neither the Bill nor the Explanatory Memorandum mentions animals, the reference to 'ecosystems' in the memorandum makes it clear that this purpose extends not only to plants that grow in forests, but also to animals that depend on forest ecosystems.[75] Moreover, one of the 'intangible' costs identified in the memorandum is the contamination of human food and water sources.[76] Therefore, the Bill also has a purpose of protecting human health, albeit perhaps only obliquely. Thus, the Bill falls within the scope of subparagraph (b) because one of its purposes is the protection of human, animal and plant life or health.

52. The next stage of the test is to determine the importance of this objective. In *EC – Asbestos*, the Appellate Body said that the protection of human health is 'vital and important in the highest degree'.[77] However, the main objective of the Bill insofar as subparagraph (b) is concerned is the protection of plant and animal life or health, rather than that of humans. Moreover, the human health risks identified in the Explanatory Memorandum are not direct and severe, as they were in *EC – Asbestos*.[78] Nevertheless, the objectives of sustainable development and preservation of the environment are

[73] Appellate Body Report, *Korea – Beef*, [162]-[164]; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R and Corr 1 (20 April 2005) [305]-[308] ('*US – Gambling*'); Appellate Body Report, *Brazil – Retreaded Tyres*, [156]; Appellate Body Report, *China – Measures Affecting the Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (19 January 2010) [242] ('*China – Publications and Audiovisual Products*').

[74] *Explanatory Memorandum*, above n 7, 2, 8.

[75] See, generally, Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293/R, Add 1 to Add 9 and Corr 1 (21 November 2006) [7.372].

[76] *Explanatory Memorandum*, above n 7, 8.

[77] Appellate Body Report, *EC – Asbestos*, [172].

[78] Appellate Body Report, *EC – Asbestos*, [115].

explicitly recognised in the Preamble to the WTO Agreement, confirming that they are important under Article XX(b).[79] Therefore, the objective would likely be found to be important, but not 'vital and important in the highest degree'.

53. After determining the importance of the Bill's objective, a Panel or the Appellate Body would weigh and balance the Bill's contribution to that objective with its trade-restrictive effects. The degree to which the Bill will contribute to the objective of preventing illegal logging is contested. The CIE Report commissioned by the government found that:

> applying unilateral import restrictions *would only stop production of about a tenth of the products incorporating illegally logged timber currently coming to Australia*. The rest would be diverted to other markets and other products (export and domestic).[80]

Thus, the Bill might only make a limited contribution to preventing illegal logging because a significant proportion of the illegally logged timber that it stopped from entering Australia would simply be diverted to other markets, rather than not being logged and exported at all. The Explanatory Memorandum explicitly rejects some of the conclusions of the CIE Report. Importantly, however, it only rejects those conclusions that relate to the net benefit that would flow from the *total elimination* of illegal logging worldwide, not those that relate to the *effectiveness* of the Australian measure.[81] Nevertheless, the Memorandum states that the range of potential benefits from the regime is 'US$0–21 million per annum (based on the CIE estimates of benefit),' meaning a maximum potential benefit of around 40 per cent of the cost of illegal logging that is currently attributable to Australian imports.[82] This maximum is significantly higher than the CIE estimate of 10 per cent, meaning that there is uncertainty about the effectiveness of the Bill.

54. In *Brazil – Retreaded Tyres*, the Appellate Body said that even where the effectiveness of a measure is uncertain, the measure might still be 'necessary' if the respondent can show that it is '*apt* to produce a *material contribution* to the achievement of its objective' on the basis of 'quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.'[83] The Appellate Body indicated that a contribution would be 'material' unless it was 'marginal or insignificant'.[84] In this case, even a contribution at the lower end of the available

---

[79] Appellate Body Report, *US – Shrimp*, [129]. The relevant part of the Preamble provides (emphasis added):

> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so*…

[80] CIE Report, above n 8, 11. Emphasis added.
[81] *Explanatory Memorandum*, above n 7, 11.
[82] Ibid 8, 11, 18.
[83] Appellate Body Report, *Brazil – Retreaded Tyres*, [151]. Emphasis added.
[84] Appellate Body Report, *Brazil – Retreaded Tyres*, [150].

estimates is not 'marginal or insignificant' and is therefore 'material'. Thus, the Bill is apt to make a material contribution to its objective and would not automatically fail the necessity test at this initial hurdle.

55. Nevertheless, the next step would be to weigh and balance the contribution of the Bill with its trade-restrictive effects. In this regard, the CIE Report describes the compliance costs associated with the Bill as 'high'.[85] The Explanatory Memorandum states that these costs 'are expected to be absorbed within current operational costs and offset by increased economic benefits resulting from the exclusion of illegally logged timber from the market.'[86] However, this describes the putative increased benefit to Australian producers of excluding illegally logged timber, rather than an offset of the trade-restrictive effects of the Bill in terms of the compliance costs that it imposes on importers and the products that it may cause to be excluded from Australia because there is a risk that they contain illegally logged timber. Weighing and balancing the potentially limited contribution that the Bill would make to the objective of preventing illegal logging with the significant degree to which it would restrict trade, a Panel or the Appellate Body would likely find that the Bill is not 'necessary' under Article XX(b). However, if Australia could show that its effectiveness at preventing illegal logging fell within the upper range of the available estimates, it would be able to make a stronger case that the Bill is 'necessary'.

(c) Necessity under Subparagraph (d): Deceptive Practices

56. A threshold problem for Australia if it sought to justify the Bill under Article XX(d) would be whether it pursues a purpose that falls within that Article. Subparagraph (d) does not apply to laws that prevent 'deceptive practices' at large, but to measures that '*secure compliance*' with such laws.[87] As noted above, the Australian timber industry currently operates on a voluntary legality certification system and the Bill does not introduce laws making it a 'deceptive practice' to import, distribute or sell illegally logged timber.[88] Australia might argue that such actions constitute 'misleading or deceptive conduct' under the *Australian Consumer Law*.[89] However, although the Bill is clearly intended to prevent illegal timber being passed off as legal timber, it is not clear that doing so is unlawful under Australian law.[90] For this reason, the Bill may not fall within the scope of subparagraph (d).

57. Assuming that it does, however, the next question is whether it is 'necessary' to secure compliance with laws relating to the prevention of deceptive conduct. Applying the test set out above, the Appellate Body has said that the importance of this objective will vary according to the 'common interests or values that the law or regulation to be enforced is intended to protect.'[91] In the case of the Bill, the 'common interest or value' at stake is

[85] CIE Report, above n 8, 49, 60.
[86] *Explanatory Memorandum*, above n 7, 3.
[87] GATT Article XX(d). Emphasis added.
[88] See above, [37]. See, also, *Explanatory Memorandum*, above n 7, 5.
[89] *Competition and Consumer Act 2010* (Cth) sch 2, s 18.
[90] Cf Appellate Body Report, *Korea – Beef*, [153].
[91] Appellate Body Report, *Korea – Beef*, [162].

fair competition in the Australian timber market,[92] which is unlikely to be found to be as important as the protection of human, animal or plant life or health. The contribution that the Bill makes to securing compliance with laws relating to deceptive practices within Australia under subparagraph (d) is likely to be somewhat greater than its contribution to stopping illegal logging outside Australia under subparagraph (b). This is because only the volume of illegal imports is relevant under subparagraph (d), not the extent to which such imports would be diverted to other markets. The degree to which the Bill restricts trade, on the other hand, would be the same under both subparagraphs. Nevertheless, because the contribution of the Bill under subparagraph (d) might still be limited and because of the lesser importance of the common interests or values at stake, a Panel or the Appellate Body would still likely weigh and balance the Bill's contribution with its trade-restrictive effects to find that it is not 'necessary' under Article XX(d).

58. It should also be noted that preventing deceptive practices is at best a secondary motivation for the Bill. The Explanatory Memorandum makes clear that its primary purpose is to prevent environmental degradation. [93] Thus, particularly in the absence of a domestic law that clearly prohibits passing off illegally logged timber as legally logged, Australia's level of protection with respect to such deceptive practices does not appear to be high.[94] Thus, a WTO Member challenging the Bill could likely propose alternative less trade-restrictive measures that would achieve Australia's level of protection, such as a 'quasi-regulatory' approach under which industry would be given incentives to comply with a uniform Code of Conduct setting out standards for legality verification.[95] This would also demonstrate that the Bill is not 'necessary'.

2 *Subparagraph (g): Exhaustible Natural Resources*

59. The Appellate Body has recognised that the words 'relating to' in Article XX(g) do not provide for as strict a standard as 'necessary'.[96] Thus, the inquiry under subparagraph (g) is whether the measure at issue is 'primarily aimed at'[97] the conservation of exhaustible natural resources and whether its means are 'reasonably related' to that end. [98] 'Exhaustible natural resources' includes living resources.[99] Moreover, an underlying violation of Article I, Article III or Article XI does not automatically mean that the measure fails to meet the 'means and ends' standard in Article XX(g) because this would subvert the purpose and object of the exception.[100] Finally, the requirement that measures under Article XX(g) be 'made effective in conjunction with restrictions on domestic

[92] *Explanatory Memorandum*, above n 7, 10.
[93] *Explanatory Memorandum*, above n 7, 4, 5.
[94] Appellate Body Report, *Korea – Beef*, [178].
[95] See, eg, CIE Report, above n 8, 56, 67.
[96] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (adopted 20 May 1996) 18 ('*US – Gasoline*').
[97] Appellate Body Report, *US – Gasoline*, 19.
[98] Appellate Body Report, *US – Shrimp*, [141].
[99] Appellate Body Report, *US – Shrimp*, [127]–[128], [131].
[100] Appellate Body Report, *US – Gasoline*, 18.

production or consumption' requires only '*even-handedness*' in the treatment of domestic and imported products, not strict equality.[101]

60. As noted above, the primary purpose of the Bill is to prevent environmental degradation arising from illegal logging.[102] Forests and the animals that live in them are 'exhaustible natural resources' within the meaning of paragraph (g), and although the Bill is not 'necessary' to prevent their degradation, it is 'reasonably related' to that purpose in that it would make some contribution to it. In addition, although the definition of 'illegally logged' in the Bill gives rise to discrimination between identical products under Article I:1, Article XI and possibly Article III:4, the import ban in the Bill is 'made effective in conjunction with restrictions on domestic production' in that the Bill also imposes domestic legal logging requirements that must be complied with.[103] For these reasons, the Bill falls within subparagraph (g) because it relates to the conservation of 'exhaustible natural resources' and will be made effective in conjunction with restrictions on domestic production.

3 *The Chapeau*

61. Once a measure has been shown to satisfy the requirements of one of the subparagraphs of Article XX, the respondent must show that it complies with the chapeau. The central requirement of the chapeau is that the measure at issue must not constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'. In *Brazil – Retreaded Tyres*, the Appellate Body said that 'arbitrary or unjustifiable discrimination' means discrimination that is not rationally connected to the objective pursued under the relevant subparagraph of Article XX or that would go against that objective.[104] Thus, whether discrimination is 'arbitrary or unjustifiable' may vary according to the subparagraph under consideration.

62. As demonstrated above, the Bill discriminates between countries because it applies differently depending on the laws of the country where the relevant timber was logged. This discrimination is not rationally connected to the objective of protecting 'human, animal or plant life or health' under subparagraph (b) of Article XX because harvesting practices with an identical impact on forests, animals and humans would be treated differently. Nor is it rationally connected to the conservation of 'exhaustible natural resources' under subparagraph (g), for the same reason. Thus, the Bill is inconsistent with the chapeau in connection with both subparagraph (b) and subparagraph (g).

63. On the other hand, if Australia could show that a provision exists making it unlawful to pass off illegally logged timber as legally logged, the discrimination in question would not be 'arbitrary or unjustifiable' when considered in connection with subparagraph (d). This is because the laws of the country in which the timber was harvested would

[101] Appellate Body Report, *US – Gasoline*, 21. Emphasis in original.
[102] See above, [56].
[103] *Illegal Logging Prohibition Bill 2011 – Exposure Draft*, above n 1, cl 8. However, the offence of conducting domestic logging without being an approved processor will not come into effect until two years after the importation offence, meaning that Australia may need to point to other domestic measures in the meantime.
[104] Appellate Body Report, *Brazil – Retreaded Tyres*, [227].

determine the legality of the logged timber under both the Bill and the law of passing off. Thus, the discrimination would be rationally connected to the objective of excluding illegally logged timber to secure compliance with a law relating to the prevention of deceptive practices. Moreover, the Bill is not a 'disguised restriction on international trade' because although it seeks to reduce 'unfair' competition caused by illegal timber in the Australian market, it does not do so in a 'disguised' manner[105] and in any case applies only to timber that was unlawfully logged in its country of origin in the first place. For these reasons, the Bill would be consistent with the chapeau in connection with subparagraph (d).

V CONSISTENCY WITH THE TBT AGREEMENT

A *TBT Annex 1.1 (Applicability)*

64. The TBT Agreement applies to 'technical regulations,' which are defined as documents that lay down '*product characteristics* or their related *processes and production methods*, including the applicable administrative provisions, with which compliance is mandatory'.[106]

65. 'Product characteristics' clearly include the physical properties of products. However, the Appellate Body has noted that 'related' characteristics that are not physical also fall within the definition:

> In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product.[107]

66. Moreover, 'technical regulations' explicitly include 'processes and production methods' that are '*related*' to product characteristics, although it is a subject of debate as to whether this might also include processes and production methods that do not affect the final characteristics of a product.[108]

67. The Bill does not lay down physical characteristics for products, nor does it set out processes or production methods that relate to product characteristics with which compliance is mandatory. Moreover, the legality of the way in which timber is harvested is not a 'related' non-physical characteristic because it does not relate to 'the means of identification, the presentation or the appearance' of the product. Moreover, as explained above, the Bill does not apply to processes or production methods, whether or not they

[105] Panel Report, *EC – Asbestos*, [8.236].
[106] TBT Agreement Annex 1(1). Emphasis added.
[107] Appellate Body Report, *EC – Asbestos*, [67]. See also *European Communities – Trade Description of Sardines*, WTO Doc WT/DS231/AB/R (23 October 2002) [189].
[108] Van den Bossche, above n **Error! Bookmark not defined.**, 808.

affect the final physical characteristics of product.[109] For these reasons, the Bill does not lay down 'technical regulations'. Therefore, the TBT Agreement does not apply to it.

68. A caveat should be added to this, however. Once they are prescribed, the legal logging requirements could conceivably set out labeling or other identification requirements that importers would be required to comply with. If such requirements related to physical characteristics or processes and production methods they would constitute 'technical regulations' under TBT Annex 1.1 and thus come within the scope of the TBT Agreement. However, at present this possibility is purely speculative.

B *TBT Article 2.1 (National Treatment and Most-Favoured-Nation Treatment)*

69. If, in the alternative, the TBT Agreement does apply to the Bill, Article 2.1 of the Agreement provides:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

70. Article 2.1 of the TBT Agreement broadly incorporates the Most-Favoured-Nation Treatment and National Treatment disciplines in Articles I and III of the GATT 1994. However, the Appellate Body has warned against casually importing the interpretation of GATT provisions into the TBT Agreement, stating that the TBT Agreement 'imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.' [110] Nevertheless, given that the Bill discriminates between products that may be identical in every way except for the legality of their method of harvesting, there is every reason to conclude that such products are 'like' under Article 2.1 for the same reasons that they are 'like' under Articles I:1 and III:4 of the GATT 1994. 'Treatment no less favourable' is also likely to mean the same thing in TBT Article 2.1 as in GATT Article III:4. The creation of an offence under the Bill for importing one product but not the other would constitute such treatment.

71. Moreover, one way in which TBT Article 2.1 is different from GATT Article III:4 is that it is not limited to 'internal' measures. Therefore, even if the Bill does not fall within GATT Article III:4, it could be inconsistent with TBT Article 2.1 for the reasons outlined above in relation to that Article as well as those in relation to GATT Article I:1.[111]

C *TBT Article 2.2 (Necessity)*

72. Article 2.2 of the TBT Agreement relevantly provides that 'technical regulations shall not be more trade-restrictive than *necessary* to fulfil a *legitimate objective*'.[112] 'Legitimate

[109] See above, [24], [27].
[110] Appellate Body Report, *EC – Asbestos*, [80]. Emphasis in original.
[111] See above, [21]–[28], [32]–[38].
[112] Emphasis added.

objectives' include 'the prevention of deceptive practices' and 'protection of human health or safety, animal or plant life or health, or the environment.'[113]

73. Thus, if the Bill falls within the TBT Agreement, it would be more trade-restrictive than 'necessary' to achieve its objectives for the same reasons that it is not 'necessary' to achieve them under subparagraphs (b) and (d) of GATT Article XX.[114] Moreover, Article 2.2 does not provide for the lower standard of 'relating to' the conservation of exhaustible natural resources provided for in subparagraph (g) of Article XX. Thus, even though the Bill would likely satisfy subparagraph (g),[115] it would be inconsistent with Article 2.2 because it is not 'necessary' for the protection of 'the environment' for the same reasons that it is not necessary to protect human, animal or plant life or health. For these reasons, the Bill would be inconsistent with Article 2.2 of the TBT Agreement.

VI CONSISTENCY WITH THE AANZFTA

74. The AANZFTA was signed by Australia on 27 February 2009 and came into force on 1 January 2010. Articles 4 and 7.1 of Chapter 2 of the AANZFTA respectively incorporate Articles III and XI of the GATT 1994. Article 1.1 of Chapter 15 also incorporates Article XX of the GATT 1994 for the purposes of Chapter 2. However, the Agreement does not incorporate GATT Article I; nor does it contain an analogous provision requiring most-favoured-nation treatment in relation to trade in goods. Therefore, the analysis above with respect to Articles III, XI and XX of the GATT 1994 also applies to the incorporating provisions in the AANZFTA. Thus, the Bill is inconsistent with Article 7.1 of Chapter 2, may be inconsistent with Article 4 of Chapter 2, and is not justified under Article 1.1 of Chapter 15 of the AANZFTA.

75. In addition to incorporating a number of disciplines from the WTO Agreement, Chapter 11 of the AANZFTA provides for investor-State dispute settlement. Article 20 of Chapter 11 provides that a 'disputing investor' may bring a claim in respect of certain specified Articles. One of those is Article 4, which is headed 'National Treatment' and provides:

> Each Party shall accord to *investors* of another Party, and to *covered investments*… *treatment no less favourable* than that it accords, in *like circumstances*, to its own investors and their investments.[116]

76. The definition of an 'investment' in the AANZFTA is broad, including 'every kind of asset owned or controlled by an investor'.[117] The definition provision also provides examples of an 'investment', which relevantly include 'movable and immovable property' and 'rights under contracts.'[118] Although the definition is not limited by these examples,

[113] TBT Article 2.2.
[114] See above, [49]–[56].
[115] See above, [57]–[58].
[116] AANZFTA, Chapter 11, Article 2(c).
[117] AANZFTA, Chapter 11, Article 2(c).
[118] AANZFTA, Chapter 11, Article 2(c)(i) and (v).

arbitral tribunals have often looked to them under identical provisions in other investment treaties to determine whether an interest is an 'investment'.[119]

77. In the case of 'investments' consisting of shares, it is unlikely that an investor could show that the Bill is inconsistent with Article 4 of Chapter 11 of the AANZFTA. This is because, although it treats some imported products less favourably than other like products, there is nothing in the Bill to suggest that it would treat the shareholders of other Parties to the AANZFTA less favourably than Australian shareholders. In this respect the Bill applies regardless of the nationality of the investors, exporters or importers affected by it.

78. However, an investor challenging the Bill under Article 4 would have a stronger case if the 'investments' at issue were property rights. In this scenario, similar considerations would apply to those under Article III:4 of the GATT 1994.[120] Thus, an investor could show a violation of Article 4 if the Bill imposed 'less favourable treatment' on the investors of other Parties by subjecting products to which those investors held property rights to an import ban where no analogous restrictions were placed on like products to which Australian investors held property rights. Moreover, like Article 2.1 of the TBT Agreement, Article 4 is not limited to 'internal' measures, in contrast to GATT Article III:4.[121]

79. If an investor did show that the Bill is inconsistent with Article 4, Australia could invoke exceptions in an attempt to justify it. Article 1.2 of Chapter 15 of the AANZFTA incorporates Article XIV of the WTO *General Agreement on Trade in Services* for the purposes of Chapter 11 of the AANZFTA.[122] Article XIV contains exceptions that are similar to those in Article XX, including for measures that are 'necessary' to protect 'human, animal or plant life or health' or to secure compliance with laws relating to the prevention of 'deceptive practices'.[123] Thus, Article XIV contains provisions analogous to Article XX(b) and Article XX(d) of the GATT 1994, but contains no provision analogous to Article XX(g) in respect of measures 'relating to the conservation of exhaustible natural resources'.

80. However, as demonstrated above, the Bill cannot be justified under GATT Article XX(b) or Article XX(d) and therefore cannot be justified under the analogous provisions of GATS Article XIV as incorporated into the AANZFTA.[124]

---

[119] See *Petrobart Ltd v Kyrgyz Republic (Award)* (2005) SCC Case 126/2003; *Jan de Nul NV & Dredging International NV v Arab Republic of Egypt (Jurisdiction)* (2006) ICSID Case ARB/04/13.
[120] See above, [36]–[37].
[121] See above, [38]–[71].
[122] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*')
[123] GATS Articles XIV(b) and XIV(c)(i).
[124] See above, [48]–[58].

VII CONCLUSION

81. The Illegal Logging Prohibition Bill 2011 (Cth) aims to secure compliance with the laws of other countries by imposing criminal liability on importers who import timber harvested in contravention of those laws. As the Explanatory Memorandum states:

> It is generally acknowledged that, as the forestry laws in developing countries are sufficiently robust to stop illegal logging if they were adequately enforced, it is not the legal framework that is the problem. A lack of capacity of governments to enforce those laws or to monitor compliance with the regulatory regimes applying to forestry has subsequently led to consumer countries taking action to address the illegal logging problem.[125]

82. However, by conditioning the legality of importing timber into Australia on the laws of the place where it was harvested, the Bill discriminates between like products contrary to Australia's obligations under the WTO Agreement and the AANZFTA. Moreover, although Australia's objectives are clearly the protection of the environment and fair competition in its domestic market, the shifting content of the term 'illegally logged' as it appears in the Bill undermines its ability to pursue those objectives in a consistent way. Finally, government-commissioned economic analysis of the Bill is far from supportive, with the CIE Report concluding that its benefits would be slight, its costs significant and its effectiveness limited.[126]

83. Having regard to these difficulties, the conclusions of this brief are that:

    a. The Bill is inconsistent with Article I:1 of the GATT 1994;

    b. The Bill does not fall within Article III:2 of the GATT 1994;

    c. The import ban in the Bill does not fall within Article III:4 of the GATT 1994, but if it does the Bill is inconsistent with Article III:4;

    d. The Bill is inconsistent with Article XI:1 of the GATT 1994;

    e. The Bill cannot be justified under Article XX(b) of the GATT 1994 because:

        i. It does not satisfy the requirements of subparagraph (b); and

        ii. It is inconsistent with the chapeau in connection with subparagraph (b).

    f. The Bill cannot be justified under Article XX(d) of the GATT 1994 because:

        i. It does not satisfy the requirements of subparagraph (d); even though

[125] *Explanatory Memorandum*, above n 7, 5.
[126] CIE Report, above n 8, 12–14.

ii. The Bill is consistent with the chapeau in connection with subparagraph (d).

g. The Bill cannot be justified under Article XX(g) of the GATT 1994 because:

i. It satisfies the requirements of subparagraph (g); but

ii. It is inconsistent with the chapeau in connection with subparagraph (g).

h. The Bill does not fall within the scope of the TBT Agreement.

i. However, if the TBT Agreement applies to the Bill, the Bill is inconsistent with Articles 2.1 and 2.2 of the TBT Agreement.

j. The Bill is inconsistent with Article 7(1) of Chapter 2 of the AANZFTA and may be inconsistent with Article 4 of Chapter 2 of the AANZFTA.

k. The Bill may be inconsistent with Article 4 of Chapter 11 of the AANZFTA in respect of investments consisting of property rights.

l. The Bill is not justified under any applicable exceptions in the AANZFTA.