

Chair
c/o Naomi Bleaser
Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

RE: Inquiry into Food Standards Amendment (Truth in Labelling – Palm Oil) Bill 2009

Dear Senator Moore,

World Growth wishes to make an additional submission to the Senate Legislation Committee which discusses the proposed legislation in light of Australia's obligations under World Trade Organisation Agreements.

The opinion has been provided by Associate Professor, Andrew Mitchell, University of Melbourne Law School and Elizabeth Sheargold, Researcher, University of Melbourne Law School.

Please find attached the legal opinion commissioned by World Growth.

World Growth

*The Consistency of the Food Standards Amendment
(Truth in Labelling–Palm Oil) Bill 2009 with the WTO Agreements*

**THE CONSISTENCY OF THE FOOD STANDARDS AMENDMENT
(TRUTH IN LABELLING — PALM OIL) BILL 2009
WITH THE WTO AGREEMENTS**

ANDREW MITCHELL AND ELIZABETH SHEARGOLD

I Introduction

1. This opinion considers whether the Food Standards Amendment (Truth in Labelling—Palm Oil) Bill 2009 (Cth) (the ‘Palm Oil Labelling Bill’) is consistent with Australia’s obligations under the World Trade Organization (‘WTO’) Agreements. It focuses on Australia’s obligations under the Agreement on Technical Barriers to Trade (‘TBT Agreement’) and the General Agreement on Tariffs and Trade 1994 (‘GATT’).

II Overview of the Food Standards Amendment (Truth in Labelling—Palm Oil) Bill 2009

2. Palm oil is the most widely used vegetable oil in the world, with global annual production for the 2009–2010 financial year estimated to be over 45 million metric tons.¹ Palm oil is also the most commonly traded vegetable oil in the world, with approximately 35 millions metric tons of the oil being imported / exported in 2009–2010.² The vast majority of the world’s palm oil production occurs in Malaysia and Indonesia.³ Australia does not produce palm oil, but does produce other vegetable oils, particularly rapeseed oil.⁴
3. The Palm Oil Labelling Bill seeks to amend the *Food Standards Australia New Zealand Act 1991* (Cth). If the Palm Oil Labelling Bill is approved by the Parliament, Food Standard Australia and New Zealand (‘FSANZ’) 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 palm oil to list palm oil as an ingredient of the food, regardless of the amount contained or used.
4. The designation ‘CS palm oil’ may be used if the palm oil in question has been certified sustainable in accordance with regulations. Any regulations made for the purpose of certifying sustainability of palm oil must reflect the criteria determined by the Roundtable on Sustainable Palm Oil.⁵
5. Currently, palm oil can be classified generically as a ‘vegetable oil’ on food labels. The purpose of the Palm Oil Labelling Bill is to ensure that consumers have ‘clear, accurate information about the inclusion of palm oil in foods’.⁶ The Explanatory Memorandum and the Second Reading Speech for the Bill give two reasons why consumer information about the use of palm oil in food, as opposed to other ‘vegetable oils’, is important. First, that the production of palm oil, is causing extensive deforestation in Malaysia and Indonesia and consequentially

¹ United States Department of Agriculture, Table 03: Major Vegetable Oils: World Supply and Distribution, <http://www.fas.usda.gov/oilseeds/circular/Current.asp>

² Ibid.

³ See: Food and Agriculture Organisation of the United Nations (FAO), FAOSTAT website, <http://faostat.fao.org/site/339/default.aspx> .

⁴ The most common variety of rapeseed oil produced in Australia is Canola. See: Australian Oilseeds Federation, Facts and Figures, http://www.australianoilseeds.com/australian_oilseeds_industry/industry_facts_and_figures

⁵ Food Standards Amendment (Truth in Labelling—Palm Oil) Bill 2009 (Cth), sch 1, cl 1 (the ‘Palm Oil Labelling Bill’).

⁶ Palm Oil Labelling Bill, cl 4.

threatening the habit and survival of the endangered Orang-utan (the ‘environmental purpose’). Second, that palm oil is higher in saturated fats than other ‘vegetable oils’ (the ‘health purpose’).⁷

III Relevant WTO Agreements

6. Two WTO Agreements are likely to apply to the labelling requirements proposed in the Palm Oil Labelling Bill – the TBT Agreement and GATT. The WTO’s Appellate Body has stated that obligations under the TBT Agreement are different from and supplement the requirements of the GATT.⁸ Therefore if a measure falls within the scope of both the TBT Agreement and the GATT it must comply with both agreements.
7. As the TBT Agreement is the more specialised of these two agreements, we consider its application to the Palm Oil Labelling Bill first.⁹ In particular, we focus on whether the Palm Oil Labelling Bill is consistent with Articles 2.1 and 2.2 of the TBT Agreement. We then turn to consider the requirements of the GATT, particularly Article III:4, and whether the Palm Oil Labelling Bill is saved from any inconsistency with this article by the general exceptions in Article XX.

A. TBT Agreement

i) Coverage of the TBT Agreement

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

Document 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.
9. 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.
10. The Palm Oil Labelling Bill contains both mandatory and voluntary elements. However, in WTO case law a measure is usually considered as a whole.¹⁰ We therefore consider whether the TBT Agreement applies to the Palm Oil Labelling Bill as a whole and, if so, whether the Bill is consistent with Australia’s obligations under the TBT Agreement.

⁷ See, Explanatory Memorandum, Food Standards Amendment (Truth in Labelling—Palm Oil) Bill 2009 (Cth), pg 1 and Commonwealth, *Parliamentary Debates*, Senate, 23 November 2009, 8562 – 8563 (Senator Xenophon, Second Reading Speech).

⁸ ABR, *EC – Asbestos*, [80].

⁹ A similar approach was adopted in by the Panel in *EC – Sardines*, [7.16] – [7.19].

¹⁰ See, eg, ABR, *EC – Asbestos*, [64].

11. The Appellate Body has identified three key elements of the definition of a technical regulation under the TBT Agreement.¹¹ First, the products to which the technical regulation applies must be identifiable. Second, the measure must lay down certain characteristics for those products. Third, the measure must be mandatory.
12. **Identifiable groups of products.** Although the Palm Oil Labelling Bill does not explicitly list the products to which it applies, those products are clearly identifiable as any foods that contain palm oil.
13. **Product characteristics.** The definition of technical regulation in Annex I 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.¹² As the Palm Oil Labelling 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.
14. Whether the TBT Agreement covers measures that are based on non-product related process and production methods is contentious. A process or production method 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 process or production method, as the nature of the end product is unaffected by whether or not the person who produced it is a child or an adult. Similarly, whether palm oil is produced in a sustainable manner is a non-product related process or production method, as sustainably produced palm oil is indistinguishable from palm oil produced unsustainably (such as on deforested land).
15. In contrast, a labelling requirement placed on products that contain palm oil is clearly product related. Although this labelling requirement is intended to influence the process and production method of palm oil, in order to discourage deforestation and encourage sustainable farming, the application of the requirement is based on whether a product contains palm oil, regardless of how that palm oil was produced.
16. The requirement that all food products containing palm oil have palm oil listed 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,¹³ this is sufficient for the Palm Oil Labelling 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 non-product related processes or production methods.
17. As noted above, 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. In that case,

¹¹ ABR, *EC – Asbestos*, [66]-[70], as applied in ABR, *EC – Sardines*, [176].

¹² ABR, *EC – Asbestos*, [67] – [70]; ABR, *EC – Sardines*, [191].

¹³ ABR, *EC – Sardines*, [190] to [192], affirming PR, *EC – Sardines*, [7.39].

the Panel held that the TBT Agreement did not apply to part of the measure at issue (which was a general ban on the importation of products containing asbestos), but that the TBT Agreement did apply to the exceptions to that ban which were specified in the measure.¹⁴ The Appellate Body overturned the Panel on this point, stating that the Panel should not have taken a “two-stage” approach to determining whether the TBT Agreement applied to the measure at issue.¹⁵

18. The Palm Oil Labelling Bill contains elements which, if they were contained in separate, stand-alone measures, may not fall within the scope of the TBT Agreement. However, as the measure as a whole contains all of the elements required to qualify as a technical regulation under the TBT Agreement, it is subject to the TBT Agreement. This leads to the result that, if the voluntary labelling scheme for “CS palm oil” was contained in another measure, it may not be subject to the TBT Agreement, but because it is contained in the Palm Oil Labelling Bill it will be covered by 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 is often reliant 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.¹⁶ Similarly, allowing products to be labelled as containing “CS palm oil” would be of much less value to the producers, manufacturers and distributors of those products if it were not for the mandatory requirement that all products containing palm oil list “palm oil” as an ingredient.
19. Therefore, when considering the application of the TBT Agreement to the Palm Oil Labelling 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”.
20. **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 palm oil. It merely provides a voluntary, supposedly less onerous means of fulfilling that requirement if the criteria for sustainability are met.
21. Given that the Palm Oil Labelling 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.
22. **Central government bodies.** The term ‘central government bodies’ is defined in Annex 1.6 of the TBT Agreement. The definition includes ‘a central government, its ministries and departments or any body subject to the control of the central government...’. This definition includes the Parliament of the Commonwealth of Australia (as the body that may enact the Palm Oil Labelling Bill).

¹⁴ See discussion at PR, *EC – Asbestos*, [8.71].

¹⁵ ABR, *EC – Asbestos*, [65].

¹⁶ ABR, *EC – Asbestos*, [73].

ii) *Article 2.2 of the TBT Agreement*

23. 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”.
24. **Legitimate objective/s.** 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 or animal or plant life or health, or the protecting the environment. The health purpose of the Palm Oil Labelling 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 Orang-utan).
25. **Unnecessary obstacles to international trade / not more trade-restrictive than necessary.** Under Article 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 the legitimate objectives.
26. Article 2.2 has not yet been interpreted in a WTO dispute, but the concept of necessity has been examined in relation to Article XX of the GATT. The analysis of necessity in relation to Article XX(b) of the GATT is analogous to Article 2.2 of the TBT Agreement, as Article XX requires an assessment of whether a measure is necessary to protect legitimate objectives such as the protection of human, plant or animal life or health.
27. Under Article XX(b) of the GATT, the Appellate Body has adopted a “weighing and balancing” approach in assessing whether a measure is necessary.¹⁷ 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.¹⁸ This test therefore takes account of the “risks of non-fulfilment” of the legitimate objective, as required by Article 2.2.
28. The health purpose of the Palm Oil Labelling 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.¹⁹ However, the Palm Oil Labelling Bill is not necessary to achieve that objective. Labelling requirements for most manufactured foods sold in Australia already require that the fat content, and the saturated fat content, be shown in nutritional

¹⁷ See, eg, ABR, Korea – Various Measures on Beef, [161] - [164] and ABR, Brazil – Tyres, [182].

¹⁸ ABR, *Brazil – Tyres*, [182].

¹⁹ As noted by the Appellate Body in ABR, *EC – Asbestos*, [172].

*The Consistency of the Food Standards Amendment
(Truth in Labelling–Palm Oil) Bill 2009 with the WTO Agreements*

- information on food packaging.²⁰ Adding a labelling requirement for palm oil does not provide any more information to consumers about the fat content of a food product. Therefore the Palm Oil Labelling Bill does not contribute to its health purpose. The Palm Oil Labelling Bill therefore is not a necessary measure for achieving its health purpose, consequently whether or not less trade restrictive alternatives exist that could achieve this purpose does not need to be considered.
29. The Palm Oil Labelling Bill also 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”.²¹ The essence of the problem targeted by the Palm Oil Labelling Bill is not the production of palm oil, but the deforestation that occurs in Malaysia and Indonesia to enable palm oil production.
30. In order to demonstrate that the Palm Oil Labelling Bill contributes to the objective of stopping or reducing this deforestation, it would have to be shown 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.²²
31. Although evidence might be produced to show that the Palm Oil Labelling Bill would reduce consumption of non-sustainably produced palm oil in Australia, it would be difficult to establish that this would stop or materially reduce deforestation in Malaysia or Indonesia. A reduction in the land used to produce palm oil would not necessarily restrict land clearing. Deforestation is still likely to occur, to support the production of timber and other commodities.
32. Even if it could be shown that the Palm Oil Labelling Bill would make a material contribution 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, and other vegetable oils that may be substitutes for palm oil (such as rapeseed, sunflower seed and soya oils) are largely produced in other countries, including Australia.²³ By making palm oil a less competitive product, the Palm Oil Labelling Bill has the effect of restricting imports of palm oil from Malaysia and Indonesia to Australia.

²⁰ *Australia New Zealand Food Standards Code*, standard 1.2.8 - Nutrition Information Requirements. See:
http://www.foodstandards.gov.au/_srcfiles/Standard_1_2_8_Nutrition_Info_v115.pdf

²¹ ABR, *Brazil – Tyres*, [136], quoting PR, *Brazil – Tyres*, [7.146].

²² ABR, *Brazil – Tyres*, [151].

²³ For example, the largest producers of soybeans in the world are the United States of America, Brazil and Argentina, the largest producers of rapeseed are China, Canada and India while 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 (FAO), FAOSTAT website, <http://faostat.fao.org/site/339/default.aspx> .

*The Consistency of the Food Standards Amendment
(Truth in Labelling–Palm Oil) Bill 2009 with the WTO Agreements*

33. Although labelling requirements are generally considered to have a relatively small impact on trade, reasonably available less trade restrictive alternatives to the Palm Oil Labelling Bill do exist. If Malaysia or Indonesia brought a WTO complaint against the Palm Oil Labelling Bill, they would bear the burden of establishing these alternatives.²⁴
34. The Palm Oil Labelling Bill applies to all food products containing palm oil, and not just to those products that contain palm oil that is produced on land that has been subject to deforestation. Accordingly, the Bill impacts on the marketability of all palm oil, and not only palm oil produced in a manner that threatens the habitat of the Orang-utan. A less trade-restrictive alternative would be to target only palm oil produced on land subject to deforestation after the Bill comes into force. This would target any future production of palm oil that may threaten the habitat of the Orang-utan, without any adverse impact on other palm oil producers.
35. In addition, the Palm Oil Labelling 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 simply through a voluntary scheme allowing manufacturers and producers to label their products as containing vegetable oils certified as sustainable. This scheme 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 products in that market.
36. The environmental purpose and the health purpose of the Palm Oil Labelling Bill are both clearly legitimate objectives for the Australian government to pursue, and the risks of not fulfilling both of those purposes could be considered to be high given that they concern human and animal health or life. However, the Palm Oil Labelling Bill is not necessary to achieve either of these purposes and is therefore inconsistent with Article 2.2 of the TBT Agreement.

iii) Article 2.1 of the TBT Agreement

37. 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. This provision requires that technical regulations accord products imported from the territory of any other WTO Member treatment “no less favourable” than that accorded to “like products” of national origin or to like products originating in any other country.
38. Under the Palm Oil Labelling 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 that can currently be identified on labels using the generic term “vegetable oil”. 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 Article 2.1 of the TBT Agreement.

²⁴ ABR, *US – Gambling*, [311].

39. **Like products.** Article 2.1 does not define “like products”, and the provision has never been interpreted in case law. However, the concept of “like products” has been examined in relation to other WTO Agreements, particularly the GATT. Of the GATT articles that refer to “like products”, Article III:4 is the most analogous to measures covered by the TBT Agreement, as Article III:4 applies to regulatory discrimination. The leading case in examining the concept of “like products” under Article III:4 of the GATT is *EC – Asbestos*.
40. In that case, the Appellate Body considered four criteria in determining whether different products are “like” for the purposes of GATT Article 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.²⁵
41. Other vegetable 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 such that all of [the] evidence, taken together, demonstrates that the products are ‘like’”.²⁶ The second and third criteria outlined above—end-uses and consumer preferences—are key to proving whether such a competitive relationship exists.²⁷
42. Given the range of uses of palm oil, it is impossible to consider in detail in this opinion whether other vegetable oils are capable of serving all the end-uses of palm oil.²⁸ 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.²⁹ One of the most common ways in which palm oil is used in food products is as a base for frying.³⁰ Many liquid vegetable oils, such as soya,

²⁵ ABR *EC – Asbestos*, [101].

²⁶ ABR, *EC – Asbestos*, [118].

²⁷ ABR, *EC – Asbestos*, [118].

²⁸ The Appellate Body has 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”. ABR, *EC – Asbestos*, [119]. It is beyond the scope of this opinion to conduct a detailed analysis of all of the potential end-uses of palm oil in food products and whether substitutes are available.

²⁹ Australian Government Bureau of Rural Sciences, GM Oilseed Crops and the Australian Oilseed Industry (2007) 10–11 (available from www.daff.gov.au/__data/assets/pdf.../gm_oilseed_crop_report.pdf).

³⁰ It was estimated in 2005 that of the 8 billion pounds of partially hydrogenated vegetable oils (eg palm oil) that was used annually in the US, 5.5 billion pounds were used for frying and other similar applications. See: Centre for Science in the Public Interest, *Cruel Oil: How Palm*

corn, rapeseed or sunflower oils could easily replace palm oil for this end-use.³¹ As a further example, palm oil has been replaced by other vegetable oils as an additive in chocolate and biscuit products made by certain manufacturers.³²

43. In *EC – Asbestos* the Appellate Body explained the third criteria, 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”.³³ In relation to the Palm Oil Labelling Bill, this third criteria for assessing the likeness of products therefore relates to how willing consumers are to see 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 who oppose the use of palm oil in food and products in pressuring manufacturers to stop using palm oil.³⁴ The fact that consumers will continue to purchase products which have replaced palm oil with other vegetable oils demonstrates that there is 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.
44. On the basis of end-uses and consumer preferences, there is a strong argument that palm oil and other vegetable oils can be considered like products, but this would need to be established with further empirical evidence of their competitive relationship.
45. However, the definition of like products adopted in relation to Article III:4 of the GATT, or any WTO provision, will not necessarily be applied when interpreting Article 2.1 of the TBT Agreement. According to the Appellate Body, the concept of likeness is like an accordion, which “stretches and squeezes” to suit the different provisions of the WTO Agreements in which it is incorporated.³⁵ 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”.³⁶
46. Unlike the GATT, the TBT Agreement contains no general exceptions. In other words, if a measure is found to violate a provision of the TBT Agreement such as Article 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

Oil Harms Health, Rainforest and Wildlife, (Washington DC, 2005), pg 27 (available from <http://www.cspinet.org/>).

³¹ Ibid.

³² Cadbury has replaced palm oil with cocoa butter in the production of its chocolate products in Australia and New Zealand, see: Cadbury Website, *Frequently Asked Questions*, <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: Centre for Science in the Public Interest, *Open Letter to Acting Commissioner Lester Crawford, Food and Drug Administration*, 4 August 2004, pg (available from <http://www.cspinet.org/>).

³³ ABR, *EC – Asbestos*, [101].

³⁴ See, eg, <http://www.palmoilaction.org.au/index.html>

³⁵ ABR, *Japan – Alcoholic Beverages II*, 21.

³⁶ ABR, *Japan – Alcoholic Beverages II*, 21.

*The Consistency of the Food Standards Amendment
(Truth in Labelling–Palm Oil) Bill 2009 with the WTO Agreements*

Article XX, WTO panels and the Appellate Body may be more likely to adopt a narrow interpretation of “like products” in Article 2.1.³⁷

47. On the basis of a narrow definition, the physical differences between palm oil and other vegetable oils may render them unlike. However, if a strong competitive relationship between palm oil and other vegetable oils could be demonstrated, 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 we outlined above, there appears to be a range of evidence to support this argument.
48. Further, even if a narrow view is taken of the definition of “like products” under Article 2.1, we note that the physical differences between palm oil and certain other vegetable oils are decreasing over time, as genetically modified varieties of crops such as rapeseed and soybean are produced which have more of the characteristics of palm oil (such as producing partially or fully hydrogenated oils, and oils that are free of trans fats). A 2007 report by the Australian Government’s Bureau of Rural Sciences noted that Australian oilseed producers are economically threatened by competition they face from new varieties of palm oil which are more similar to canola oil.³⁸
49. **Treatment no less favourable.** Similarly to the concept of “like products”, the meaning of the phrase “treatment no less favourable” in Article 2.1 has not been considered in any case to date. Again, guidance on the interpretation of this phrase may be found in GATT provisions, particularly Article III:4.
50. In relation to Article 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, it relates to whether a “measure modifies the conditions of competition in the relevant market to the detriment of imported products”.³⁹
51. The Palm Oil Labelling Bill clearly modifies the conditions of competition in the market. No other vegetable oil that could be used as a substitute for palm oil—such as sunflower oil or soya oil—is required to be labelled as an ingredient in all food products. Similarly, labelling requirements do not require any distinction to be drawn in the case of any other oil on the basis of whether it has been sustainably produced.
52. 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.⁴⁰ It is therefore impossible for the Palm Oil Labelling Bill to achieve its aims without modifying the conditions of

³⁷ See: Peter van den Bossche, *The Law and Policy of the World Trade Organization* (2nd ed, 2008) 818.

³⁸ Australian Government Bureau of Rural Sciences, *GM Oilseed Crops and the Australian Oilseed Industry*, (2007), pgs vii and 50-51 (available from www.daff.gov.au/__data/assets/pdf_file/000/000/gm_oilseed_crop_report.pdf).

³⁹ ABR, Korea – Various Measures on Beef, [135] – [137].

⁴⁰ Explanatory Memorandum, Food Standards Amendment (Truth in Labelling—Palm Oil) Bill 2009 (Cth), pg 1 and Commonwealth, *Parliamentary Debates*, Senate, 23 November 2009, 8562 – 8563 (Senator Xenophon, Second Reading Speech).

competition in the market and encouraging manufacturers and consumers not to use palm oil or to use only sustainably produced palm oil.

53. 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 Palm Oil Labelling Bill does not explicitly treat palm oil imports differently from domestically produced palm oil, or palm oil produced in one country differently from any other palm oil.⁴¹
54. However, it is well-accepted that *de facto* discrimination can constitute a violation of the national treatment or MFN principles in WTO law.⁴² Palm oil is exclusively imported into Australia, particularly from Malaysia and Indonesia.⁴³ As noted above, other widely produced vegetable oils, such as soya oil, rapeseed oil and sunflower seed oil, are predominantly produced in other countries. Therefore, by according less favourable treatment to palm oil, as opposed to other vegetable oils, the Palm Oil Labelling Bill is according a product imported from Malaysia and Indonesia less favourable treatment than like products imported from other countries or products produced within Australia.

B. GATT

i) *Application of GATT Article III:4*

55. Article III:4 of the GATT is a national treatment requirement. It 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 Palm Oil Labelling 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.
56. **Like products.** We considered the interpretation of “like products” under Article III:4 of the GATT above at paragraphs 39 to 47.
57. As explained above, the meaning of “like products” is likely to be broader under Article III:4 than under Article 2.1 of the TBT Agreement. It is therefore likely that, for the purposes of GATT Article III:4, palm oil and other vegetable oils would be “like products”.
58. **Treatment no less favourable.** Again, we have considered above at paragraphs 49 to 54 whether for the purposes of Article 2.1 of the TBT Agreement the Palm Oil Labelling Bill treats palm oil no less favourably than other vegetable oils.
59. Some alternatives to palm oil, such as rapeseed oil, are produced in Australia.⁴⁴ If it can be shown that domestically produced vegetable oils, such as rapeseed oil,

⁴¹ We note that, if sustainable palm oil came predominantly from a country/ies, and palm oil which was not certified as being sustainably produced came from a different country, then the Bill may be in violation of Article 2.1 on this basis.

⁴² See, eg, ABR, *Canada – Autos*, [78] and PR, *US – Section 337*, [5.11].

⁴³ In 2007 Malaysia and Indonesia produced a combined total of 87% of world palm oil production: http://www.pecad.fas.usda.gov/highlights/2007/12/Indonesia_palmoil/

⁴⁴ See, Food and Agriculture Organisation of the United Nations (FAO), FAOSTAT Website, <http://faostat.fao.org/site/339/default.aspx> and Australian Oilseeds Federation, Facts and

are like palm oil, then the Palm Oil Labelling Bill will most likely be considered inconsistent with Article III:4 of the GATT.

ii) *GATT Article I:1*

60. Many of the vegetable oils that are alternatives to palm oil, such as soya oil, are produced outside Australia. According these oils treatment which is more favourable than that accorded to palm oil may constitute a violation of the most-favoured nation principle.
61. Article I:1 of the GATT requires that, with respect to all matters covered by Article 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 Palm Oil Labelling Bill is “a matter covered by Article III:4 of the GATT” as it is a law, regulation or requirement affecting the internal sale or offering for sale of food products which contain palm oil.
62. **Advantage, favour, privilege or immunity.** The phrase “advantage” in Article I:1 of the GATT is to be interpreted broadly, with the Appellate Body noting that ‘any advantage’ will satisfy this requirement.⁴⁵ Even though this is a low threshold, the Palm Oil Labelling Bill does not bestow an advantage on any vegetable 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, because Article 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 Palm Oil Labelling Bill does not contain any element which can be characterised as an “advantage” which is given to vegetable oils other than palm oil.
63. On this basis, the Palm Oil Labelling Bill will not constitute a violation of Article I:1 of the GATT.⁴⁶

iii) *General exception under GATT Article XX*

64. 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. Article XX also contains an introductory provision, known as

Figures,
http://www.australianoilseeds.com/australian_oilseeds_industry/industry_facts_and_figures;
and Australian Government Bureau of Rural Sciences, GM Oilseed Crops and the Australian Oilseed Industry, (2007) (available from
www.daff.gov.au/__data/assets/pdf_file/000/000/gm_oilseed_crop_report.pdf).

⁴⁵ ABR, *Canada – Autos*, [79] (emphasis in original).

⁴⁶ If Malaysia or Indonesia were to challenge under Article I:1 the labelling the 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 Palm Oil Labelling 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.

the ‘chapeau’, which states that such measures cannot be used as a disguised restriction on international trade.

65. Both the health purpose and the environmental purpose of the Palm Oil Labelling Bill relate to the protection of human, animal or plant life or health, and if the Bill is necessary to achieve those purposes it may therefore be saved from inconsistency with Article III:4 of the GATT by Article XX(b).
66. Our analysis of whether the Palm Oil Labelling Bill is necessary to achieve either its health or environmental purpose is at paragraphs 25 to 36 above. We do not consider the Palm Oil Labelling Bill necessary within the meaning of GATT Article XX(b), regardless of whether it complies with the chapeau to Article XX.

IV Conclusions

67. In this opinion we have considered whether the Palm Oil Labelling Bill, if enacted, would be a measure that is inconsistent with Australia’s obligations under the WTO Agreements. In our opinion, the Palm Oil Labelling Bill most likely is inconsistent with Article 2.2 of the TBT Agreement, as it is not necessary to achieve either its health or environmental purposes. If a panel was to find that the Bill was inconsistent with Article 2.2 of the TBT Agreement, regardless of the panel’s findings on other provisions such as Article III:4 of the GATT, the measure as a whole could be inconsistent with Australia’s WTO obligations.
68. We also conclude that the Bill may constitute a violation of Article 2.1 of the TBT Agreement and Article III:4 of the GATT. In relation to each of these two provisions, whether or not the Bill will be held to be inconsistent with WTO obligations is likely to turn on the scope given to the term “like products”. Even in relation to Article 2.1 of the TBT Agreement, where a narrow approach to the phrase “like products” may be taken, there is still strong evidence to support an argument that palm oil and other vegetable oils are like products. Further, palm oil and other vegetable oils will most likely be considered to be “like products” for the purposes of Article III:4 of the GATT. The Palm Oil Labelling Bill is unlikely to be saved from any inconsistency with Article III:4 of the GATT by the general exception in Article XX(b) of the GATT, as it is not a necessary measure to protect human, plant or animal life or health.