Australia's Extended Producer Responsibility for Portable Consumer Batteries: Conflicting or Reconciling Trade and Environment Obligations?

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The article focuses on the Australian portable consumer battery market to consider whether the globalization that has fostered world trade can also deliver a sustainable product. Extended producer responsibility (EPR) is a tool used by many governments to deliver such outcomes. With increased portable consumer battery consumption and greater dependence on portable technologies, EPR could be a way to achieve sustainable battery consumption.

In the course of the discussion the article explores the nexus between trade and environment regimes. This is because the Australian market is largely supplied from overseas battery manufacturers. Given current trade flows in electronic waste these countries could also be the destination for battery wastes. The article considers whether Australia can navigate these two regimes in order to apply an EPR measure on portable consumer batteries. It examines the existing Australian hazardous waste framework and concludes with suggestions as to how the framework could be improved.

1. Introduction

It is widely accepted that technological developments in transport and communication have facilitated globalization and hence consumerism.[1] The results of the modernization of production may have raised country incomes and facilitated widespread consumption but it has not necessarily led to a concurrent reduction in waste.[2] The increased consumption and the advent of new portable technologies is certainly fuelling battery consumption. After all, batteries power all the 'must have' ipods, mobile phones, laptops and other electronic devices we eagerly use to organize our modern lives. It is of no wonder

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[1] Wilfred J. Ethier, 'Globalization, Globalisation: Trade, Technology, and Wages *International Review of Economics & Finance* 14 (2005): 237, 238.

[2] OECD, *Waste Generation* (2004) OECD 2004 Key Environmental Indicators [20] (Paris: OECD, 2004) <www.oecd.org/dataoecd/32/20/31558547.pdf> at 13 Dec. 2007. 'In most countries for which data are available, increased affluence, associated with economic growth and changes in consumption patterns, tends to generate higher rates of waste per capita.'

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then that the global battery market is expected to continue to grow by 5% annually[3] and in some countries as much as 46% by 2010.[4]

Portable consumer batteries are those used by householders and include single use or 'primary batteries' and those that can be recharged, 'secondary batteries'. The two types result in a variety of batteries chemistries. Typically primary batteries contain an alkaline electrolyte but zinc is also common, while secondary batteries include nickel cadmium, nickel metal hydride, lithium ion and lithium polymer.[5] While safe during normal use, the compounds and elements in batteries can be mobilized into the environment if disposed inappropriately.

On top of this, increasing consumer demand for batteries results in increasing extraction of the raw materials used in their manufacture, making concepts such as 'product stewardship' or 'extended producer responsibility'[6] (EPR) attractive to government policy makers. These concepts influence product manufacturers to take into account the impacts of creation, use and disposal of their products.[7] For example, EPR may encourage manufacturers to reduce the volume of raw materials used to create new batteries. Similarly it may require items to be designed in a way that enables components to be extracted from used products for reuse or recycling.[8] It may also include reducing the number and concentration of potentially harmful materials that are left in a discharged battery.[9]

An EPR approach has further appeal because it enables the market to internalize costs relating to ecologically friendly products. The concept is based on the assumption that the design stage of a product is influenced by both the components that remain at the end of the product's life and the recycling or disposal opportunities for the used product.[10] For example, if portable consumer batteries were collected and the contents extracted for recycling, the use of virgin materials in the manufacture of new units

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[3] World Batteries Report Oct. 2002 cited in Commission of the European Communities Commission, *Staff Working Paper Directive of the European Parliament and of the Council on Batteries and Accumulators and Spent Batteries and Accumulators, Extended Impact Assessment* (Commission Staff Working Paper) COM(2003)723 final (2003), 6. 'The global demand for batteries is projected to grow by more than five percent over the coming years, with the portable batteries market growing the fastest.'

[4] A recent Canadian study estimates a 44% increase for primary and 46% increase for secondary between 2004 and 2010. See, Environment Canada, *Canadian Consumer Battery Baseline Study* (RIS International Ltd, Final Report Feb. 2007).

[5] A good summary of the latest variety is provided by RECHARGE, the international association for the promotion and management of portable rechargeable batteries through their life cycle. RECHARGE *Batteries* (200?) <www.rechargebatteries.org/html/recharge-knowledge-batteries.html> at 12 Mar. 2007.

[6] There is some contention among commentators as to whether the two terms are interchangeable or represent subtle but substantial differences. As this article focuses on the Australia situation, the definition applied is that taken by the *Waste Avoidance and Resource Recovery Act 2001* (*NSW*); an EPR scheme: 'includes a scheme for product stewardship'. [s. 15(2)] Thus the term is used interchangeably.

[7] The Organization for Economic and Cooperative Development (OECD) defines this 'an environmental policy approach in which a producer's responsibility for a product is extended to the post-consumer stage of a product's life cycle'. OECD, *Extended Producer Responsibility: A Guidance Manual for Governments* (Paris: OECD, 2001), 9.

[8] See, US Environmental Protection Agency (EPA), *Extended Producer Responsibility: A Strategic Framework for Sustainable Products* (1998) [3] <www.epa.gov/epaoswer/non-hw/reduce/epr/docs/eprbrochure.pdf> at 5 Dec. 2007.

[9] Veena Jha and Rene Vossenaar, 'Environmentally Orientated Product Policies, Competitiveness and Market Access', in *Trade, Environment and Sustainable Development*, eds Veena Jha, Grant Hewison and Maree Underhill (New York: St. Martin's Press, 1997), 41, 43.

[10] Knut F. Kroepelien, 'Extended Producer Responsibility – New Legal Structures for Improved Ecological Self-Organisation in Europe?', *Review of European Community and International Environmental Law* 9, no. 2 (2000): 165, 166.

would be minimized.[11] Consumers will therefore buy the item on the basis of these credentials, i.e., because it creates less waste or it has less long-term residues to affect the environment.

This article focuses on the example of the Australian portable consumer battery market in order to consider whether Australia's membership to the World Trade Organization (WTO) allows or prohibits EPR to be applied to the trade of consumer portable batteries. In other words it considers whether all the trade transactions involved in portable consumer battery manufacture, import/export and eventual waste disposal can occur in a manner that fosters both human and environmental protection. The article therefore considers the multilateral environmental agreement (MEA) controlling the trade in hazardous wastes under the *Basel Convention*.[12] In the process jurisprudence from relevant WTO disputes are discussed before examining the Australian domestic regime. The article then concludes with some recommendations as to how this framework could be strengthened.

2. The Potential Human and Environmental Health Implications of Portable Consumer Batteries

Currently in Australia portable consumer batteries tend to be discarded by being sent to landfill. Given these batteries are expected to be the leading segment in the coming growth of the world's battery market[13] more spent batteries will result. For that reason managing their human and environmental protection consequences is all the more important. These consequences will be dependent on the type of battery chemistry.

A good summary of the latest variety of portable consumer batteries is provided by RECHARGE, the international association for the promotion and management of portable rechargeable batteries through their lifecycle.[14] Large batteries used in industrial equipment are usually recovered because of their value. In contrast most smaller batteries are not recovered.[15]

This is also the case for the alkaline and zinc portable consumer batteries and they are typically disposed to landfill. At the same time, only a small amount of rechargeable batteries are collected for recovery.[16] This means there is a risk that the materials batteries contain may leach into ground water and the surrounding environment if the landfill

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[11] Commission of the European Communities above n. 3, 20.

[12] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* opened for signature 22 Mar. 1989, 28911 UNTS (entry into force 5 May 1992) ('*Basel Convention*') and its text is available at available <www.basel.int/text/con-e-rev.doc> at 7 Jan. 2007.

[13] World Batteries Report October 2002 [6] cited in Commission of the European Communities n. 3 'the global demand for batteries is projected to grow by more than five per cent over the coming years, with the portable batteries market growing the fastest'. See also above n. 4 for a more recent report from Canada.

[14] RECHARGE Batteries above n. 5.

[15] Department of Environment and Conservation (NSW) (DEC) *DEC Report on Extended Producer Responsibility Preliminary Consultation Program*, Mar. 2004 (2004) 84, 85.

[16] See, DEC *Household Electrical & Electronic Waste Survey 2005 Report of Findings* (2005) <www.environment.nsw.gov.au/resources/spd060220_ewaste_ipsosreport.pdf> at 12 Mar. 2007. See also Environment Canada, *Canadian Consumer Battery Baseline Study* (RIS International Ltd, Final Report Feb. 2007).

Table 1. Summary of Health & Environmental Consequences of Mercury, Lead and Cadmium

		Metal		
	Aspect	**Mercury**	**Lead**	**Cadmium**
Human Protection	Means of exposure to be toxic	By inhalation	By inhalation or swallowing and, to reproduction	By inhalation, in contact with skin or swallowing
	Danger of cumulative effects is possible	Y	Y	N/A
	Carcinogenic	–	–	Y
	Areas of the human body it targets	Central nervous system	Major organs, circulatory and central nervous systems	Lungs, kidneys, bones and blood
Human & Environmental Protection	Mutagenic	–	–	Y
Environmental Protection	Dangerous for the environment	Particularly aquatic organisms	Very toxic to aquatic organisms	Very toxic to aquatic organisms

Source: Adapted from European Council Directive 67/548/EEC.[19]

is not properly managed.[17] So it is not so much battery use and storage that poses the 'particular environmental concerns … [rather] the materials they contain'[18] and what happens to these when the battery is spent.

The human and environmental health impacts of mercury, lead and cadmium have been the cause of the restrictions on the use of these metals in batteries, as outlined in Table 1. These controls have been in place for some time. For instance, the European Union introduced legislation to reduce mercury in batteries in 1991[20] and the United States in 1996.[21] However it is still present in current day batteries being manufactured in South East Asia.[22]

Even more importantly mercury will be present in older batteries hoarded by householders, which European research estimates to be six tons of batteries in German

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[17] Department of Environment and Conservation (NSW) 'Nickel Cadmium Batteries' in DEC NSW *Report on the Extended Producer Responsibility Preliminary Consultation Program* (2004), 37.

[18] Commission of the European Communities Commission, *Staff Working Paper Directive of the European Parliament and of the Council on Batteries and Accumulators and Spent Batteries and Accumulators, Extended Impact Assessment*, above n. 3, 6-7.

[19] EC, *Directive on the Approximation of Laws, Regulations and Administrative Provisions Relating to the Classification, Packaging and Labelling of Dangerous Substances*, 67/548/EEC [1967] OJ 196, 16.8.1967 [1] <http://ec.europa.eu/environment/chemicals/pdf/report-4-instruments_en.pdf> at 1 Mar. 2007.

[20] EU, *Battery Directive*, 91/157/EEC.

[21] *Mercury-Containing and Rechargeable Battery Management Act*, §.110, Stat 1329 (1996).

[22] Commission of the European Communities, above n. 3, 6-7.

households alone and 32% of batteries sold across Europe.[23] A 2005 survey indicates Australian households are comparable hoarders.[24] Similarly, in the case of nickel cadmium batteries it may never be possible to design a new chemistry that provides equivalent shelf life or high demand energy supply.[25]

Batteries containing these toxic materials are likely to be on the market for some time. Furthermore the potential area affected by their disposal is no longer limited to domestic environments as globalization has facilitated transboundary waste exchange. China for example has become one of the world's leading manufacturers and exporters of electronic and electrical equipment. At the same time China has also become the destination for these wastes.[26] As a result the potential area exposed to pollution during manufacture, shipment and disposal has greatly expanded. It is no different for the Australian portable consumer battery market.

The majority of portable consumer batteries on the Australian market are supplied by overseas manufacturers; for example the United States, Singapore, Malaysia, Indonesia and China. Key disposal routes for electrical waste include these countries in addition to France and Sweden.[27] In the future, it may also include other less-developed countries such as Thailand or India. Also in terms of the spent batteries, Australia currently has few processing facilities for these materials. This means that any policy shift to encourage their recovery is likely to result in the waste being shipped overseas.

In fact, the pressure of global trade has already encouraged Australia to adopt measures that prevent it from becoming a dumping ground for inferior products. Australia has responded to this pressure via a number measures: firstly, the Commonwealth *Hazardous Waste (Regulation of Exports and Imports) Act 1989*[28] and then the national environment ministerial council, the Environment Protection and Heritage Council adopted product stewardship as a guiding principle for waste matters. More recently, jurisdictions have considered incorporating EPR into their waste legislative frameworks, with New South Wales doing so.[29]

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[23] Ibid. The report notes a 2001 German estimate of six tons being kept in households [8]; and EU households hoarding 32% of batteries sold [11].

[24] DEC above n. 15.

[25] A 2000 report on the substitution of rechargeable nickel cadmium (NiCd) batteries noted that while it was possible to replace NiCds with other chemistries for emergency lightning, UPS systems, toys, home appliances and electrical vehicles, it was not possible to estimate a time frame for other applications such as emergency power systems for hospital and avionics. See Dag Noréus, *Substitution of Rechargeable NiCd Batteries* (Stockholm: Stockholm University, 2000) University of Stockholm [2] <http://ec.europa.eu/environment/waste/studies/batteries/nicd.pdf> at 13 Dec. 2007.

[26] Xin Tong, Reid Lifset and Thomas Lindqvist, 'Extended Producer Responsibility in China "Where is Best Practice"?,' *Journal of Industrial Ecology* 8, no. 4 (2005): 6.

[27] Respectively: Société Nouvelle D'affinage des Métaux (SNAM) in France and Saft Batteries in France and Sweden.

[28] *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) 'HWA' text is available from <www.comlaw.gov.au/ComLaw/Management.nsf/current/bytitle/7F57AE35CC04BF1DCA256F710006F2B3?OpenDocument&mostrecent=1> at 11 Mar. 2007.

[29] The New South Wales, *Waste Avoidance Resource Recovery Act 2001* established the provisions for EPR and the listing of 'Wastes of Concern' in regular 'Priority Statements' (ss 15-18). Another jurisdiction, Western Australia also signalled its intention to adopt EPR, releasing a public discussion paper *Waste Avoidance Resource Recovery Bill* in November 2006. Adopted in December 2007, the Bill establishes an EPR head of power. See, *Explanatory Notes for Waste Avoidance Resource Recovery Bill 2006*.

EPR's approach of managing a product from cradle to eventual grave makes it an attractive tool for managing the human and environmental implications of portable consumer batteries. For example, it can influence the design of products that are battery powered, so that installed batteries can be readily removed. This in turn favours resource conservation, an objective the Ministerial Council has agreed to be legitimate for pursuing product stewardship,[30] by encouraging battery recovery rather than landfilling.

However if EPR was to be applied to the Australian portable battery market, the overseas manufacturers may decide to have the wastes returned to them. Hence battery EPR could result in offshore shipments, even more so because domestic reprocessing facilities are limited. Consequently these transactions will need to be consistent with any international agreement Australia is party to.

3. The International Regime Dealing with Battery Wastes

3.1. Trade obligations relating to australian portable consumer battery EPR

Australia as a WTO member is obliged to adhere to the requirements of the WTO's principles, as encapsulated in WTO agreements, namely to liberalize trade and remove any barriers that restrict fellow Members' products from being imported. However if Australia's central government were to adopt a product stewardship measure based on EPR to prohibit the import and use of certain portable consumer batteries including those containing certain heavy metals, the measure would impact on fellow WTO members.

In designing the measure, consideration needs to be given to the impact of restrictions on the volume of portable consumer battery products entering Australia. Similarly, the flow on effects these have on the ability of other WTO members' to access the Australian market requires examination.

3.1.1. *General Agreement on Tariffs and Trade*

The General Agreement on Tariffs and Trade (GATT)[31] would be the first point of reference as it contains the WTO's core principles: 'National Treatment' (that imported goods and services are treated the same as those created domestically 'including both domestic taxes and regulations'[32]) and 'Most-Favoured-Nation' or MFN (all nations and their products

[30] Environment Protection and Heritage Council (EPHC) Communiqué, *Climate Change and Water Top Ministers' Agenda*, 2 Jun. 2007 [1] <www.ephc.gov.au/pdf/EPHC/Comm_02_06_07.pdf> at 15 Oct. 2007.

[31] *The General Agreement on Tariffs and Trade 1994* opened for signature 17 Dec. 1994 (entry into force 1 Jan. 1995) ('*GATT 1994*') and includes the provisions established by *The General Agreement on Tariffs and Trade 1947*, opened for signature 30 Oct. 1947, 4248 (entered into force 1 Jan. 1948) ('*GATT 1947*'). The two must be read together. *GATT 1994* text is available at WTO Legal Text <www.wto.org/English/docs_e/legal_e/06-gatt.doc> and <www.wto.org/English/docs_e/legal_e/gatt47_e.doc>at 13 Dec. 2007.

[32] Jonell B. Goco, 'Non-Discrimination, "Likeness", and Market Definition in World Trade Organisation Jurisprudence', *Journal of World Trade* 40, no. 2 (2006): 315, 320.

are treated in the same manner). Contained in Articles I and III, these two principles are about non-discrimination, ensuring that similar products are given the same consideration, so that a domestic product is not favoured over an import[33] or one country's imports over another country's.[34] Similarly, any benefit accrued by an import duty must be available to all Members unconditionally.[35]

In addition the 'non-discrimination' principle, GATT Article III, requires Members to treat the products from importing countries equally by removing discriminating measures such as imposing tariffs based on country of origin. The second principle contained in Article III, that of 'equal treatment' is probably the most significant and contentious. This principle concerns the same treatment for 'like products' in order to stop the protection of domestically produced items. Hence there are implications for products that have desirable environmental attributes that are bestowed by a particular production method or process, a point that will be considered in more detail shortly. Also of note is the principle of the general elimination of quantitative restrictions, Article XI, which relates to the measures used to limit the volumes of goods imported or exported, such as quotas and licenses.

The scope of these core principles is only tempered by the general exceptions of GATT Article XX, which Members tend to rely on when applying trade-related environmental measures (TREMs).[36] The exceptions allow a restriction or import prohibition provided the measure does not entail arbitrary discrimination, is not a disguised trade restriction and is:

(a) necessary to protect human, animal or plant life or health;
(b) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[37]

This means that under GATT Article XX(a) measures concerning the protection of human, animal or plant life or health are allowed, provided they are not used as a form of discrimination between countries or as a disguised restriction on international trade.[38] In addition, under Article XX(g) measures relating to conserving exhaustible resources are permitted with the proviso that they are applied in conjunction with restrictions on

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[33] GATT 1994 Interpretation (2006) sub-s. 1(C)(1)(c) 'like products' citing the Indonesia – Autos Appellate Body Ruling, WTO Analytical Index <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1C1c> at 7 Jan. 2007.

[34] GATT 1994 Interpretation (2006) sub-s. 1(C)(1)(d) 'any product originating in or destined for another country' citing the EC-Bananas III Appellate Body Ruling, WTO Analytical Index <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1C1d> at 7 Jan. 2007.

[35] GATT 1994 Interpretation (2006) sub-s. 1(e) 'shall be accorded immediately and unconditionally' Indonesian – Autos Appellate Body Ruling, WTO Analytical Index, <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1C1e> at 7 Jan. 2007.

[36] Shawkat Alam, 'Trade-Environment Nexus in GATT Jurisprudence: Pressing Issues for Developing Countries', *Bond Law Review* 17, no. 2 (2005): 1, 12.

[37] GATT 1994 s. XX(b), (g).

[38] *GATT 1994 Interpretation (2006)* sub-s. 20C(c) *WTO Analytical Index* <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20C2c> at 7 Jan. 2007.

domestic production or consumption. These two clauses are pertinent to EPR because the motivations behind EPR are usually the efficient use of resources as well as protecting human and environmental health during use and disposal.

However it is not possible to apply such exemptions *carte blanche* without first satisfying the above mentioned core principles. In addition, limitations explicitly stated and those implied or arising from the application of a measure on imports are not permitted.[39] GATT framework's principle of equal access[40] is about stopping exclusions on some imports as well as encouraging Members to stop making special or exclusive deals for one particular Member's imports.[41] Thus the flow on effect of imposing a measure on the imported product needs to be fully examined to ensure compliance.

Trade-related obligations continue once a product is within the country as Article III prohibits the use of internal taxes. Article XX combined with Article III also have implications for goods once inside a country: the internal pricing needs to use the same criteria as that imposed on domestic products.[42] However, it is possible to apply a duty, tax or other charge on the import, provided that the domestic product is subjected to similar weighting. An EPR example of this could be charging the consumer at point of sale an additional fee to cover the eventual cost of the product's disposal. This advanced disposal fee would need to be the same for both domestic and imported products. Yet there are controls on pricing to stop dumping or safeguarding.[43] In both instances, the Member needs to prove there is serious harm to their domestic industry, which in turn implies thresholds or tests.[44]

Significantly there are implications for an EPR policy that promotes a product's desirable environmental attributes. This is because making such a distinction between products contravenes the WTO's 'like product' principle: that any imported product is treated the same as the domestic items in 'respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use'.[45] Unless the principle is uniformly applied to domestic products, such policies could be deemed as discriminatory.

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[39] GATT 1994 Art. 1.

[40] *GATT 1994 Interpretation (2006)* para. 1.(C)1 Interpretation in Canada – Autos Appellate Body ruling footnote 4, *WTO Analytical Index* <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1C1> at 7 Jan. 2007.

[41] *GATT 1994 Interpretation (2006)* para. 1.(C)1 General Interpretation in Canada – Autos Appellate Body ruling footnote 8, *WTO Analytical Index* <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1C1> at 7 Jan. 2007.

[42] See *GATT 1994 Interpretation (2006)* Art. 2 Protection of tariff commitments under Art. III/Relevance of tariff concessions citing Japan – Alcoholic Beverages II Appellate Body ruling footnote 167, *WTO Analytical Index*, <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_02_e.htm#article2> at 7 Jan. 2007; *GATT 1994 Interpretation (2006)* Interpretation and Application of Art. XI, *WTO Analytical Index*, <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_02_e.htm#article2XI> 7 Jan. 2007; and *GATT 1994 Interpretation (2006)* Interpretation and Application of Art. XI footnote 570 GATT Panel Report on Japan – Semi-Conductors, *WTO Analytical Index*, <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_05_e.htm#article11> at 7 Jan. 2007.

[43] Respectively GATT Arts VI and XIX.1.

[44] Yuka Fukunaga, 'An "Effect-Based" Approach to Anti-Dumping: Why Should We Introduce a "Mandatory Lesser Duty Rule"?,' *Journal of World Trade* 38 (2004): 491, 493. 'Article XIX:1 may be applied by an importing Member when increased imports cause or threaten to cause serious injury to an importing Member's domestic industry.'

[45] GATT 1994 Art. III(4).

In the WTO's view while the environmental credentials may have been bestowed by a particular production process or absence thereof, both items are still in direct competition with each other and ignoring this amounts to discrimination. This is an important linkage because according to the rulings of the WTO's Appellate Body (AB) a determination of 'likeness' under GATT Article III(4) 'is fundamentally a determination about the nature and extent of a competitive relationship between and among products'.[46] If a Member ignores the competition between two products, then it is in effect interfering in the market and creating a trade barrier.[47]

It is of no surprise then, that the use of environmental restrictions, such as using a distinguishing process or production method (PPM) has been the subject of Member disputes. The most notable was attempts by the US in the 1990s to impose environmental restrictions on tuna products in the process of upholding its domestic marine conservation law (*Marine Mammal Protection Act*)[48] known as the 'Tuna-Dolphin' disputes. The dispute concerns the US imposition of environmental restrictions on tuna products in the process of upholding its domestic marine conservation law (*Marine Mammal Protection Act*).[49] Mexico challenged these arrangements in the first dispute in 1991 which has become known as 'Tuna-Dolphin I'.[50] In the second case known as 'Tuna-Dolphin II'[51] in 1994, the European Economic Community was the primary complainant.

In both of these cases the WTO Panel found the US had not satisfied the 'necessity provision' because the link between the two different types of tuna harvesting was arbitrary. Also there was no evidence that there was no alternative trade measure available[52] or that the US had negotiated with affected countries or exhausted other measures to achieve the environmental goal.[53] As this interpretation has been reiterated in two further cases[54] it is assumed that an EPR measure will also have to satisfy this test.

The other test raised by the Tuna Dolphin case is the 'proportionality requirement': where a measure used by an importing party is not 'any more severe, and should not remain in force any longer than necessary to protect the human, animal or plant life or health involved'.[55] The unpredictability of the measure also had to satisfy the 'primarily

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[46] European Union – Asbestos WT/DS135/AB/R 12 Mar. 2001 para. 99. This case also set out the factors that should be used test to determine whether two products are 'like': (1) properties, nature and quality; (2) end-uses; (3) tastes and habits of consumer; and (4) tariff classifications. para. 85.

[47] Goco above n. 32, 338.

[48] *Marine Mammal Protection Act* USC 1371 (1988).

[49] Ibid.

[50] See *United States-Restrictions on Imports of Tuna*, GATT Doc DS21/R-39S/155 (1991) (Report of the Panel), (not adopted) herein referred to as 'Tuna-Dolphin I'.

[51] See *United States-Restrictions on Imports of Tuna* GATT Doc DS29/R (1994) (Report of the Panel) (not adopted) herein referred to as 'Tuna-Dolphin II'.

[52] Alam above n. 36, 13.

[53] GATT Council, United States – Restriction on Imports of Tuna, Report of the Panel DS21/R-395/155, (1991) para. 5.15.

[54] It is not the purpose of this article is to review all dispute cases concerning the application of 'necessary'. However, the next case to use this interpretation was *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes*, GATT BISD 38 Supp (1990) and then *United Stated Standards for Reformulated and Conventional Gasoline* WTO Doc W/DS2/9 (1996) (report of the Panel).

[55] J. McDonald, 'Green the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order', *Environmental Law* 23, no. 2 (1992): 12, 41.

aimed at' requirement of being used to achieve conservation under GATT Article XX (g). However these tests proved that the measure did not have conservation as its first aim[56] and hence its application was invalid.

All of these points demonstrate the difficulty of applying Article XX exceptions, particularly with the narrow interpretation afforded by the WTO Panel. Certainly it is not possible to unilaterally impose an EPR based measure for portable consumer batteries. It may be that an EPR measure is better positioned if applied within the context of an existing collaboratively agreed arrangement. However it will still need to satisfy the requirements of necessity and proportionality. In addition, it must be clearly linked to conservation in order to achieve the 'primarily aimed at' requirement. Also negotiation with affected parties needs to occur in addition to demonstrating that no other measure can achieve the same outcome.

However as the Shrimp-Turtle dispute[57] demonstrated that the EPR measure should instead focus on desired outcomes rather than imposing strict prescriptive measures. This dispute concerned the US imposed requirement for turtle excluder devices being used when harvesting shrimp and shrimp products. The AB's ruling considered whether one exact policy result was required.[58] It found that the US should instead have required a programme comparable in effectiveness, that is, broadened the requirement to cite the desired performance outcome.

In summary these two disputes concerned the unilateral imposition of a measure that would erode the entitlements the WTO agreement is supposed to bestow on all members. The US' economic bargaining power placed it in a better position to impose and defend its measures compared to others.[59] This a common fear held by developing countries, who point to an erosion of the WTO's position on PPMs. EPR will be viewed no differently. From their perspective, the developed country has the leverage to impose its own political will 'in terms of environmental and social standards on others, thus impeding multilateral cooperation'.[60] Hence they take the view that demanding these measures is an example of the new form of emerging 'green protectionism'.[61] Green Protectionism is considered to occur when environmental import/export restrictions

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[56] Alam above n. 36, 17.

[57] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body) and for subsequent rulings: *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* WTO Doc WT/DS58/RW (15 June 2001) (Report to the Panel); and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/RW (22 October 2001) (Report of the Appellate Body).

[58] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (1998) [paras. 166-173] (Report of the Appellate Body) <www.wto.org/english/tratop_e/dispu_e/58abr.doc> at 28 Jan. 2007.

[59] Belinda Anderson, 'Unilateral Trade Measures and Environmental Protection Policy', *Temple Law Review* 66 (1993): 751, 755.

[60] Shawkat Alam and Rafiqul Islam, 'The Trade-Environment Interface: Issues Lurking Behind the North-South Tensions', *Journal of International & Comparative Environmental Law* 2, no. 1 (2005): 121, 133.

[61] WTO, *Session III: Trade and Environment* (2001) Symposium on issues confronting the world trading system-summary reports by the Moderators [1] <www.org/english/forums_e/ngo_symp2001_repenvir_e.htm> at 29 Apr. 2004.

imposed by developed countries are in practice actually measures aiming to prevent developing economies from accessing fair and open trade.[62]

From the cases outlined it is apparent that the EPR measure involves a restriction on certain processes or production methods. These could therefore be contested under two other WTO agreements which are discussed next.

3.1.2. *The Agreement on Technical Barriers to Trade*

The Agreement on Technical Barriers to Trade (TBT Agreement)[63] concerns non-tariff measures such as technical performance standards that imported or exported items need to comply with. The Agreement deals with technical regulations, including PPMs[64] recognizing a country's right to make standards and has provision for regional agreements.[65]

Thus an EPR measure could be considered to satisfy the TBT's definition of regulation or even a standard. For example a standard is defined as including: '… terminology, symbols, packaging, marking or labelling requirement as they apply to a product, process or production method'.[66] This is because EPR includes parameters the product is required to meet over its life, such as a product not emitting health threatening substances during its use.

Similarly PPM and related EPR requirements such as the phasing out of components that are hazardous fit the definition. Additionally any product labelling designed to indicate certain characteristics such as being 'x-toxic component free' to signal its compliance with the EPR measure will be covered by the definition of a standard. Also under this definition something as simple as a recycling symbol or crossed out wheelie bin used to indicate that the item is banned from landfill will similarly be included.[67] In each instance the EPR measure needs to be consistent with other international standards already in existence or at least the norms they contain.[68]

While the Agreement, like GATT Article XX does allow for technical measures imposed for environmental or human health and safety, the phrasing of the Agreement clearly states that such measures should be imposed for a limited time.[69] Even then as per standard legal practice the measure would need to be reviewed. If the measure was to be

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[62] Helias A. Udo de Haes, 'Life-Cycle Assessment and Developing Countries', *Journal of Industrial Ecology* 8, nos 1-2 (2004): 8, 9. See also Alam and Islam above n. 60, 134.

[63] *The TBT Agreement* opened for signature 15 Apr. 1994 (entered into force 1 Jan. 1995) ('*TBT Agreement*'). Its text is available from the WTO Analytical Index <www.wto.org/English/docs_e/legal_e/17-tbt.pdf> at 13 Dec. 2007.

[64] Ibid., Annex 1 subs.

[65] Ibid., Art. 10 s 7.

[66] Ibid., Appendix 1 sub-s. 2.2.

[67] Labelling requirement of EU's *Directive on Waste Electrical and Electronic Equipment*.

[68] TBT Art. 5, s. 4.

[69] TBT Agreement sub-s. 5.7 '… urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member …'.

a permanent arrangement then it would be captured by *The Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement)[70] which is discussed next.

3.1.3. *The Agreement on the Application of Sanitary and Phytosanitary Measures*

The intent of this Agreement is to protect human, animal and plant health from risks due to disease, pests, disease causing organisms as well as additives, contaminants, toxins and disease causing organisms in food, beverages or feedstuffs. This may be within a WTO member's territory[71] or where appropriate the area concerned is extended to regions across a number of Member countries.[72] The measures must be implemented in a manner consistent with GATT Article XX (b),[73] MFN and National Treatment principles and not used in a way to hide a trade restriction.[74] In terms of the measure's design it needs to be based on international standards or guidelines.[75] While the Agreement makes it permissible to use the Precautionary Principle (PP)[76] and science to design and implement the measure[77] their use can be contentious.

This was demonstrated by the European Union Beef Hormone Case, a dispute about the importation of North American beef from cattle possibly given growth hormones.[78] The European Union (EU) had banned the import of meat containing hormones on the basis of potential harm to its citizens, while the US and Canada, the countries responsible for exporting such meat, contested the restriction. All three countries involved used the PP but held differing opinions as to its status.[79]

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[70] *The Agreement on the Application of Sanitary and Phytosanitary Measures* opened for signature 15 Apr. 1994 (entered into force 1 Jan. 1995) ('*SPS Agreement*') SPS Interpretation *WTO Analytical Index* <www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_e.htm> at 15 Dec. 2006.

[71] SPS Agreement Preamble and Art. 1.

[72] Ibid., Art. 6, s. 1.

[73] Ibid., Art. 2, s. 4.

[74] Ibid., Art. 2, s. 2, Arts 4 and 5, s. 5, respectively. David Hunter, James Salzman and Durwood Zaelke, 'International Environmental Lawmaking', in *International Environmental Law and Policy*, 1st edn (New York: Foundation Press, 1998, 1207.

[75] Ibid., Art. 3, s. 1.

[76] 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation' *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 Jun. 1992) Annex I A/CONF.151/26 (Vol. I) Distr. GENERAL 12 Aug. 1992 <www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> at 15 Dec. 2006. It is important to note here however the WTO Panel's did not recognize PP to be a part of international customary law and asserted that no single definitive formulation of the principle currently exists: European Communities – Measures Affecting the Approval and Marketing of Biotech Products [7.88] (EC Biotech Products) Doc Nos WT/DS291, WT/DS292, WT/DS293 (Panel Report).

[77] SPS Agreement Arts 2, 5. Indeed, the WTO Panel's decision on Biotech Products in 2006 emphasized the central role science is to play in the application of safety regulations under this Agreement: *European Communities – Measures Affecting the Approval and Marketing of Biotech Products Report of the Panel*, WTO Doc Nos. WT/DS291/R, WT/DS292/R, WT/DS293/R, final report issued 29 Sep. 2006 <www.wto.rog/english/nes_e/news06_e/291r_e.htm> at 5 Dec. 2007.

[78] See *EC Measures Concerning Meat and Meat Products (hormones)* WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) (Report of the Appellate Body).

[79] The EU at least considered the PP to be a general principle of law at that time; the US disagreed considering that it should be seen as an approach rather than principle. Canada also thought that it was not a principle of customary international law but that the precautionary approach or concept was an emerging principle of law.

While the WTO's AB saw the PP as a non-trade principle suitable for use when interpreting WTO provisions, it did not consider that this could be used as an exemption to justify measures that were inconsistent with WTO obligations.[80] Additionally, while the AB found that the PP could be too broad, it was an appropriate tool members could use to help them with setting their own levels in domestic policy.

However, the PP does not have precedence over existing principles of treaty interpretation.[81] The AB found that discriminating against beef containing the growth-promoting hormone was not a permitted trade restriction and using the PP to support the claims of potential detrimental impacts to citizens eating it, was invalid. The AB also reaffirmed the SPS obligation of using a scientific risk assessment when determining if a sanitary and phytosanitary measure was warranted.[82] Furthermore, this needed to be systematic, disciplined and objective, also demonstrating a real world risk, not one just posed in the laboratory.[83]

The EU Beef Hormones case fuelled green protectionism[84] fears by not being consistent with international standards as per TBT. Also if developing countries will have difficulty meeting an imposed higher standard, this will be viewed as an unnecessary trade barrier. Certainly an EPR measure that is applied in the absence of scientific risk assessment will most likely fail WTO conditions. Not only that, the extent to which the assessment is applied needs to be undertaken with care, as demonstrated by the 2003 EC Biotech Products case.[85]

In this dispute, the United States and Canada were concerned about measures the EC and its member States had applied to their agricultural and food products. Significantly the subsequent ruling found that what constituted the risk assessment and the degree that this information was applied when determining the product's entry onto their markets, were inappropriate.[86] This demonstrates that even the application of a scientific risk assessment will be open to scrutiny and is likely to be viewed with suspicion. The Panel found that the EC and its members had applied the measure more than to the extent necessary[87] and that it was not based on scientific principles or sufficient scientific

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[80] IISD, 'The Relationship of WTO Obligations to Multilateral Environmental Agreements', in *The State of Trade and Environment Law – 2003: Implications for Doha and Beyond*, eds H. Mann and S. Porter (Canada: International Institute for Sustainable Developed, 2003) IISD Trade and Environment Law [19, 22] <www.iisd.org/pdf/2003/trade_enviro_law_2003.pdf> at 25 Feb. 2004.

[81] IISD, 'The Precautionary Principle, the Role of Science and the WTO Agreements', in *The State of Trade and Environment Law – 2003: Implications for Doha and Beyond*, eds H. Mann and S. Porter (Canada: International Institute for Sustainable Developed, 2003) IISD Trade and Environment Law [27, 29] <www.iisd.org/pdf/2003/trade_enviro_law_2003.pdf> at 25 Feb. 2004.

[82] *The Agreement on the Application of Sanitary and Phytosanitary Measures* opened for signature 15 Apr. 1994 (entered into force 1 Jan. 1995) ('*SPS Agreement*') SPS Interpretation *WTO Analytical Index* <www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_e.htm> at 15 Dec. 2006.

[83] IISD, 'The Relationship of WTO Obligations to Multilateral Environmental Agreements', above n. 82, 30.

[84] Alam and Islam, above n. 60, 134.

[85] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (EC Biotech Products) Doc Nos WT/DS291, WT/DS292, WT/DS293 (Panel Report).

[86] The EC had breached SPS s. 2.2 by applying the measure more than to the extent necessary and not basing it on scientific principles or sufficient scientific evidence. Thus Art. 5, s. 1 appropriate risk assessment was also breached along with Art. 5, s. 5 when they made 'arbitrary or unjustifiable distinctions' in the application of the assessment.

[87] SPS Art. 2, s. 2.

evidence. Although the PP does not require complete scientific proof, the WTO panel has adopted a narrow view of the PP in trade-related matters. Thus the requirement of an appropriate risk assessment[88] was also breached along with SPS Article V section 5 because they made 'arbitrary or unjustifiable distinctions' in the application of the assessment. Such reasoning has ramifications for Australia's portable consumer battery market, which is discussed next.

3.2. Implications for the australian situation

It appears from the above disputes an EPR measure cannot be unilaterally imposed, or imply that Members or their products are being treated differently. In addition the measure cannot create a bias between like products. In the Australian context the interpretation of whether two products are sufficiently like each other includes '[f]unctionality, substitutability, end-use, consumer recognition and market competition'.[89] Importantly according to EPR's philosophy, the whole point of the exercise is to give products environmental characteristics that are desirable to consumers. In this respect it is not whether the product is *like* another, rather that it is *different* to the other because it does not have the unwanted characteristics, properties, etc. This in turn has the flow on effect of creating consumer awareness or expectation to choose products that have environmental traits.

However, a Member cannot create a measure that only allows preferred products to be imported, for example batteries without certain toxic substances. This also rules out the use of quantitative restrictions.[90] Furthermore if the EPR measure involves a restriction on certain PPM, under TBT or SPS it needs to be consistent with existing international standards.[91] For example the measure is just a labelling requirement such as listing the product's characteristics (toxic component-'x' free, contains <2% mercury, etc.) provided these are similar to those used internationally. Given that the European Union has three Directives to promote such labelling,[92] this may be plausible.

Similarly there is the US mercury restriction,[93] in addition to Japan[94] and China having similar requirements and South Korea, Taiwan[95] and Thailand[96] being in the process of developing them. Only Malaysia and Singapore do not,[97] but it may not be in

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[88] SPS Art. 5, s. 1.

[89] Daniel Moulis and Patrick Gay, 'The 10 Major Problems with the Antidumping Instrument in Australia', *Journal of World Trade* 39, no. 1 (2005): 75, 77-78.

[90] GATT Agreement s. III.1.

[91] TBT Agreement sub-s. 5.4.

[92] The *Battery Directive*, the *Waste Electrical and Electronic Equipment Directive* also called the WEEE Directive and *Restriction of Hazardous Substances Directive* also called the RoHS Directive.

[93] United States – *Mercury-Containing and Rechargeable Battery Management Act 1996* 110 Stat 1329.

[94] US Office of Technology Policy Technology Administration, *An Overview of E-waste Policy Issues* (2006) 51, 57.

[95] Paul Bainton 'RoHS in Australia' (unpublished Department of the Environment and Heritage Paper, Canberra, 13 Oct. 2005).

[96] Zeina al-hajj, 'Greenpeace International Presentation' (paper presented at the *Take It Back* Conference, Bally's Las Vegas, Day 1, 3 Apr. 2006), 151, 167.

[97] Jim Gardner, 'Product Stewardship Challenges in the Asia-Pacific Region' (paper presented at the *Take It Back* Conference, Bally's Las Vegas, Day 2, 4 Apr. 2006), 69, 72.

their interests to contest such labelling because of the sheer weight of numbers in terms of other countries that have adopted these measures.

The only way forward under the TBT appears to be where the technique has an impact on the final product itself.[98] Hence an EPR measure framed in terms of the waste avoided due to the way the product was manufactured may be permissible. To do so suggests invoking a particular technical standard during manufacture. Alternatively this could be achieved by testing the product before its sale to ensure the absence of the toxics and any associated labelling, as either approach would fall under TBT requirements. For products that fail to meet the requirement under the TBT the country could then invoke the environmental exceptions of GATT Article XX ss (b) and (g) and thus impose conditions on imports that did not meet these production requirements.

In that regard a labelling requirement for toxics is more likely to succeed because of the known impact of an individual battery's content. For batteries containing alkaline materials, the potential harm is caused by the accumulative impact of many alkaline batteries when disposed over time. Thus a measure applied to alkaline batteries is likely to be less successful because the linkage to the unwanted potential harm is not as direct or immediate. In addition, framing the EPR measure as an exemption is not an altogether simple process. As the Shrimp-Turtle dispute showed,[99] it needs to avoid being an arbitrary or unjustifiable discrimination as per the chapeau of GATT Article XX.[100]

Likewise in relation to the SPS, structuring the measure around the PP needs to be in concert with a sound environmental risk assessment and robust scientific evidence, as found in the *Beef Hormone Case*. In any case, the measure needs to be consistent with WTO core principles, first and foremost before a precautionary approach could be used. Additionally the causal link between harm to the environment from these toxic materials and the portable consumer batteries as the source would need to be proved. If for example it was found that other materials entering landfill were a greater or more likely source of these toxins, then the ability to invoke measures under the WTO is significantly weakened.

In light of these points it is safe to assert that Australia's WTO membership will dictate the design of the EPR measure. One upside is that as Australia has almost no domestic portable battery manufacturing, WTO Member dissent is unlikely to involve concerns about the measure being used to protect the Australian domestic market.[101]

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[98] Katharina Gnath, 'The WTO and Environment: More Words Than Deeds?', (2004) Wetpolitik.net [1,7], <www.weltpolitik.net/Sachgebiete/Weltwirtschaft%20und%20Globalisierung/Institutionen%20und%20Akteure/WTO/Analysen/wto_env.html> at 22 Jan. 2007.

[99] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body).

[100] The chapeau of GATT 1994 XX prohibits the application of a measure '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 …'.

[101] For this reason this article does not include consideration of the agreements on dumping and safeguards. These are: *The Agreement on Subsidies and Countervailing Measures* opened for signature 15 Apr. 1994 (entered into force 1 Jan. 1995); The *Agreement on Safeguards* opened for signature 15 Apr. 1994 (entered into force 1 Jan. 1995); and The *Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade 1994* opened for signature 15 Apr. 1994 (entered into force 1 Jan. 1995) ('*ADA*').

There are a number of commentaries on the issue that the reader may refer to[102] and these suggest that an antidumping measure's ability to protect domestic industries makes it attractive to countries trying to disguise trade protection.[103] By the same token, any counterclaim by another WTO Member against Australia's use of an EPR measure on the basis of domestic protection is unlikely to be credible.

If an objection was to be raised it is more likely to be couched in terms of 'green protectionism'[104] because an EPR measure is truly about achieving environmental outcomes that benefit the domestic users. Furthermore concerns about proceedings being initiated within the WTO enables the assumption that another Member will object. How likely this is to occur is difficult to predict and diplomatic pressure to withdraw or modify the measure may suffice. This was the case in the 2002 dispute between India and Bangladesh over lead acid battery dumping. The dispute was caused by India's imposition of duties on Bangladeshi battery imports, which was later withdrawn.[105]

Another option if an ongoing measure was to be used on the basis of environmental and human protection is the SPS. Either way the causal link between harm to the environment and portable consumer batteries as the source of the toxic materials would need to be proved. As per the *EC Biotech Products* case[106] care will be needed not to overzealously apply the outcomes of the risk assessment. If for example it was found that other materials entering landfill were a greater or more likely source of these toxins, then the ability to invoke measures under the WTO is significantly weakened.

In addition the language of the measure needs to be sufficiently broad and performance based so that firms can choose how they meet these requirements. Such an approach avoids requiring an eco-label that indicates a certain production method and hence cannot be viewed as green protectionism. An EPR measure that satisfies all these requirements has a greater likelihood of surviving a WTO challenge.

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[102] The reader is referred to: Aubrey Silberston, 'Anti-dumping Rules – Time for Change?', *Journal of World Trade* 37 (2003): 1063); Tomer Broude, 'An Antidumping "To Be or Not To Be" in Five Acts: A New Agenda for Research and Reform', *Journal of World Trade* 37, no. 2 (2003): 305-328; Gary Horlick and Edwin Vermulst, 'The 10 Major Problems with the Antidumping Instrument: An Attempt at Synthesis', *Journal of World Trade* 39, no. 1 (2005): 67-73; Aluisio de Lima-Camp, 'Nineteen Proposal to Curb Abuse in Antidumping and Countervailing Duty Proceedings', *Journal of World Trade* 39, no. 2 (2005): 239-280; William A. Kerr and Laura J. Loppacher, 'Antidumping in the Doha Negotiations: Fairy Tales at the World Trade Organization', *Journal of World Trade* 38 (2004): 211, 212.

[103] Broude, above n. 102, 310.

[104] Udo de Haes, above n. 62, 9.

[105] *India – Antidumping Measure on batteries from Bangladesh* WTO Doc WT/DS306/1 G/L/669 G/ADP/D52/1, 04-0371 (2 Feb. 2004) (Request for Consultation by Bangladesh) [1] Advisory Centre on WTO Law (ACWL) Assistance in WTO dispute settlement proceedings since Jul. 2001 <www.acwl.ch/misc/getfile.aspx?id=a0c83083-dc62-4-d84-b117-bac044ab3del> at 13 Dec. 2007.

[106] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* above n. 78.

3.3. Hazardous waste obligations relating to australian portable consumer battery EPR

3.3.1. *The Basel Convention*

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)*[107] is a MEA that imposes trade restrictive measures on the trans-boundary movement of hazardous wastes.[108] Its objectives are the protection of human health and the environment by controlling trans-boundary movements of hazardous waste.[109] The Convention acknowledges the sovereign right of a State to control the entry and disposal of foreign hazardous wastes and other wastes in its territory.[110] Wastes are defined as being 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law'.[111] Ideally, wastes should be disposed of in the State where they were originally generated, however, the limited capabilities of developing countries to adequately dispose of waste are acknowledged.[112]

Wastes that need controlling or special attention and their hazardous characteristics are listed in three Annexes. Annex I, concerns waste streams such as wastes from industrial process, ink manufacturer, pharmaceuticals, etc. and wastes having a range of constituents including cadmium; zinc, mercury and lead and their compounds. Annex II covers categories of wastes requiring special consideration household municipal wastes and their incinerated residues. Annex III lists characteristics that may classify a material as hazardous.

Signatories are required to take 'all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment',[113] otherwise known as environmentally sound management (ESM). This key concept is used in combination with an 'information exchange regime to help countries make informed decisions on whether they wished to receive future shipments'[114] otherwise known as Prior Informed Consent (PIC). PIC requires the exporting State to notify the competent authority of the importing State and transit State of the contents of all transboundary movement of hazardous waste and the risks associated with the intended movement. The receiving State then has discretion to permit or conditionally permit the entry of waste into their territory. Members cannot 'permit hazardous wastes

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[107] Basel Convention, above n. 12.
[108] Basel Convention, Art. 1.
[109] OECD, *Experience with the Use of Trade Measures in the Montreal Protocol on Substances that Deplete the Ozone Layer* (OCDE/GE(97))230 (Paris: OECD, 1997), 16.
[110] Basel Convention, Preamble para. 6.
[111] Basel Convention, Art. 2, s, 1.
[112] Basel Convention, Preamble para. 8.
[113] Basel Convention, Art. 3, s. (4), Art. 2, s. (8).
[114] Australian Government Joint Standing Committee on Treaties, *Regulation Impact Statement for consideration of the Ratification of the Rotterdam Convention on the Prior Informed Consent* (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade final 23 Jul. 2003 [1] <www.aph.gov.au/house/committee/jsct/September2003/treaties/rottris.pdf> at 14 Dec. 2007.

or other wastes to be exported to a non-Party or to be imported from a non-Party'.[115] unless they have a bilateral, multilateral or regional agreement or arrangement that contains provisions no less environmentally sound than those of the Basel Convention.[116]

Importantly the Convention encapsulates the primary aim of EPR by having the Preamble acknowledge the link between toxic residues in wastes and reducing waste generation in the first place.[117] Thus it reflects EPR's aim of nipping the problem in the proverbial bud by assigning the consequences of the wastes being created to the country, generator of origin or to the exporter. It achieves this by establishing that trading in waste contrary to the Convention is illegal[118] and that States have a joint responsibility under international law to protect human health as well as to protect and preserve the environment.[119] Subsequently Members are obliged to put into their domestic legal frameworks the powers to prosecute on this basis.[120]

3.3.2. *The Australian Domestic Framework*

In Australia's case, the legislative framework is provided by *The Hazardous Waste (Regulation of Exports and Imports) Act 1989* ('HWA 1989')[121] and its associated Regulations.[122] The framework is largely based on Basel but also entails obligations as an Organization for Economic and Cooperative Development (OECD)[123] member. The Department of the Environment, Water, Heritage and the Arts currently administers the framework[124] which also establishes Ministerial power for granting exports and imports. The key criterion for

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[115] Ibid., Art. 4, s. 5.

[116] Basel Convention, Art. 11.

[117] Basel Convention, Preamble para. 3: 'the most effective way to protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum in terms of quantity and/or hazard potential'.

[118] Ibid.

[119] Ibid., para. 15.

[120] Ibid., Art. 4, sub-s. 2(h) 'cooperate in activities … in order to … achieve the prevention of illegal traffic'; Art. 4, sub-s. 3 'consider that illegal traffic in hazardous wastes or other wastes in criminal'; and Art. 4, s. 4 'take appropriate legal, administrative and other measures to implement and enforce … to prevent and punish conduct in contravention of the Convention'.

[121] The *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the 'HWA 1989') was introduced in the Australian Commonwealth Parliament by the Government in Sep. 1989 and took effect on 17 Jul. 1990.

[122] The suite includes 1 Act and 6 Regulations: *The Hazardous Waste (Regulation of Exports and Imports) Act 1989*; *Hazardous Waste (Regulation of Exports and Imports) (Decision IV/9) Regulations 1990* Statutory Rules 1990; *Hazardous Waste (Regulation of Exports and Imports) (Fees) Regulations 1990* Statutory Rules 1990; *Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations 1996* Statutory Rules 1996; *Hazardous Waste (Regulation of Exports and Imports) Regulations 1996* Statutory Rules 1996; *Hazardous Waste (Regulation of Exports and Imports) (Imports from East Timor) Regulations 1990* Statutory Rules 2003; *Hazardous Waste (Regulation of Exports and Imports) (Waigani Convention) Regulations 1999*.

[123] Since 1971.

[124] The Department of the Environment Water, Heritage and the Arts has had a number of other titles, most recently the Department of the Environment and Water Resources (Jan.-Oct. 2007), Department of the Environment and Heritage (2003-2006) Environment Australia (prior 2003).

such transactions[125] is the proposed shipment(s) demonstrating that the ESM[126] of waste will occur during transport as well as at its intended destination.[127]

On first examination the framework appears to be strong on environmental grounds because it establishes a preference for transactions between OECD members.[128] This is based on the supposition that only these countries are able to responsibly ship, treat and dispose of the waste.[129] Yet despite the Australian framework adopting the OECD's own control system[130] trade and economic interests and hence free trade, have prevailed over the OECD's intentions. Consequently the framework irrespective of the OECD's Amendment Ban[131] allows for shipments to non-OECD members but under more stringent conditions. These are discussed shortly.

In the portable consumer battery example, OECD countries already involved in processing electrical components include United States, France and Sweden. A determination will involve a series of steps, firstly demonstrating whether the material is to be recovered, that it is a waste and it contains hazardous traits.[132] The Australian framework places the onus on the ESM of waste in-country first,[133] making permission for shipping materials for disposal in an overseas landfill unlikely.[134] It is worth noting that if the material was to be shipped between domestic jurisdictions, other state or territory based legislation would apply.[135] For exported material the next step is examining the legislation to determine whether the shipment material is a waste or a 'non-waste' and if spent batteries would be captured.

Under the HWA 1989 the 'definition of the term waste hinges on the definition of disposal'[136] which is defined as 'an operation specified in Annex IV to the Basel'.[137] Thus any battery would be considered a waste when it is:

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[125] The HWA 1989 Part 1 Division 2 Sections 12, 13, 13A, 13B.

[126] The HWA 1989 Part 1 Division 2 Section 4E: 'A reference in this Act to the ESM of hazardous waste is a reference to taking all practicable steps to ensure that the waste is managed in a manner that will protect human health, and the environment, against the adverse effects that may result from the waste.'

[127] As defined in the objects of the HWA 1989 Part 1 Division 1 Section 3.

[128] *Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations 1996* (Cth) ('OECD Decision Regulations').

[129] Basel Convention, Art. 4, sub-s. 5.

[130] This was agreed to at the Third Meeting of the Conference of the Parties to the Basel Convention in Sep. 1995.

[131] Commonwealth of Australia, 'Assessment of Environmentally Sound Management of Hazardous Waste Destined for Recovery Operations in Non-OECD Countries' (Information Paper No. 6, First Edition, 1999) 3.

[132] Given this article is considering the international trade implications of portable consumer battery product stewardship, material destined for an Australian based facility is outside its scope.

[133] HWA Section 3, sub-s. 1(2).

[134] Commonwealth of Australia, above n. 131, 3.

[135] For example NSW interstate hazardous waste shipments are controlled by *Protection of the Environment Operations Act 1997* and its *Waste Regulation 2005*. These measures are consistent with Basel and are mirrored by other state and territory legislation.

[136] Environment Australia 'Distinguishing wastes from non-waste under Australia's Hazardous Waste Act' (Information Paper No. 2 Fourth Edition, June 2001), 5, 6.

[137] The HWA 1989 Division 2, 4.

- being sent or accumulated to recovery operations that recycle/reclaim metals and metal compounds;[138] or
- considered to be unusable parts or parts which no longer perform satisfactorily and have no further use.[139]

For the purposes of this discussion it will be assumed that the portable consumer batteries will be shipped to an overseas recovery operation and are therefore a waste. Next whether the shipment is 'hazardous' needs to be determined.

The next weakness in the Australian framework comes when defining whether the material to be shipped is hazardous because this step relies on five interrelated *Basel Convention* Annexes. These have been appended to the HWA 1989 as Schedule 1. Furthermore the Annexes are to be used in combination with the process set out by the OECD's control system,[140] making the determination complex. For instance, it is not just a matter of a substance appearing in an Annex, the volume of the material, the form it is in and whether it presents certain characteristics also need to be known. In addition a material is not hazardous unless it contains Annex I items (such as materials containing lead, cadmium or mercury) in quantities that make them demonstrate the characteristics listed in Annex III e.g. explosive, oxidizes, ecotoxic.[141] Otherwise if the material is among those listed in Annex II 'Categories of waste requiring special consideration', these require controlling regardless of having the hazardous characteristics of Annex I. It will be shown that this is an important distinction.

As identified earlier primary batteries contain an alkaline electrolyte but zinc is also common, while secondary batteries include nickel cadmium, nickel metal hydride, lithium ion and lithium polymer. With this in mind, on first reading it appears that Basel Annex I applies to most portable consumer batteries. However when read in relation to Annex III, this is only the case for a shipment with *sufficient volume* to make the materials exhibit any of the Annex III characteristics. For example lithium batteries would be captured because lithium explodes on exposure to oxygen, making partially discharged batteries or damaged cells dangerous. Nickel cadmium is also listed, hence batteries containing such are classed as 'ecotoxic'.[142]

At the same time items that contain the listed material but are not in a highly mobile form would be exempt. In that respect zinc although a heavy metal, is not necessary included if it is in an immobile form such as in galvanized materials. By the same

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[138] Classification 'R4' and 'R13' of Basel Convention Appendix IV, B: *Operations which may lead to resource recovery, recycling reclamation, direct re-use or alternative uses*.

[139] Classification 'Q6', 'Q7' and 'Q14' of Table 1 of the *OECD Decision C(88)90(Final)*.

[140] The current revision in operation is *The OECD Decision C(92)39(Final)*.

[141] Department of the Environment and Heritage 'Guide to controlled and other wastes under Australia's Hazardous Waste Act' (Information Paper No. 4, Second Edition, April 2005), 6.

[142] Basel Convention, Annex III classification 'H12' states: 'substance or waste which if released presents or may present immediate or delayed adverse impacts to the environment by means of bioaccumulation and/or toxic effects upon biotic systems'.

token a shipment that contains materials with traces of mercury under those levels specified by the domestic agency, WorkSafe Australia[143] could also be excluded.[144]

However on closer examination Annex VIII covers waste lead-acid batteries whether whole or crushed and unsorted waste batteries 'excluding mixtures of those made to a specification, excluding those made with lead, cadmium or mercury'[145] otherwise known as 'List B, batteries'. It also includes waste batteries not specified in List B 'containing Annex I constituents to an extent to render them hazardous'.[146] This means that mixtures of batteries not containing the metals lead, cadmium or mercury are *not necessarily included* unless they exhibit the hazardous properties of Annex III. Alternatively small used lead acid batteries used in children's toy cars and scooters and not just the larger automotive type would be included because 'they contain lead, lead compounds and/or sulphuric acid, the lead being high mobile and toxic; the acid being corrosive'.[147]

In summary the definitions are complex and vague enough to allow a certain amount of 'wriggle room'. This makes it difficult to predict whether a shipment will be in or out of those specified in the Australian regime and hence the Basel Annexes. For that reason the *Hazardous Waste Technical Group*[148] advises on permit applications, with the onus being on the applicant to document the properties of the materials so that a determination can be made. Having established the nature of the material the shipping requirements for an OECD country are discussed next.

The HWA 1989's *OECD Decision Regulations*[149] also require the application of the OECD control procedure via the *Hazardous Waste (Regulation of Export and Imports) 1996*. This sets up another layer of complexity courtesy of a two tier control system[150] and the required OECD 'special permits'.[151] The matters that need to be specified in the permit are extensive[152] but are commensurate with *Basel* requirements. The Regulation also

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[143] WorkSafe Australia is the Commonwealth department that carries out the daily operations of the National Occupational Health and Safety Commission.

[144] Other traits include: explosive or flammable liquids and solids, liable to spontaneous combustion, emit gases when in contact with water, oxidizing, poisonous, corrosive, release toxic gas when in contact with air or water toxic, ecotoxic (bio-accumulated and or toxic on biotic systems) or would leach a material with the above characteristics.

[145] Annex IX to the Basel Convention.

[146] Annex III to the Basel Convention.

[147] Department of the Environment and Water Resources *Used Lead Acid Battery Fact Sheet* (2007) Hazardous Waste Publications <www.environment.gov.au/settlements/publications/chemicals/hazardous-waste/lead-acid-fs.html> at 4 Feb. 2007.

[148] See the HWA 1989 Sections 58B, 58C and 58D. The Group is comprised of eleven experts and generally meets monthly. It can seek industry information in order to prepare guidance documents. More details are available from: the Department's *Hazardous waste Technical Group* see <www.environment.gov.au/settlements/chemicals/hazardous-waste/tg/index.html> at 23 May 2007.

[149] *Hazardous Waste (Regulation of Export and Impost) (OECD Decision) Regulations 1996* ('the OECD Regulation').

[150] These are green for any batteries satisfying the conditions of Basel Annex IX and the more stringent amber for any batteries satisfying the conditions of Annexes II and VII. There was originally a red control procedure making three levels but this was simplified in 2001 by *Revision of Decision C(92)39/FINAL on the Control of Transboundary Movements of Wastes Destined for Recovery Operation*, C(2001)107 22 May 2001. JT00108183. Text is available from *Revision of Decision C(92)39/FINAL:* <www.olis.oecd.org/olis/2001doc.nsf/7b20c1f93939d029c125685d005300b1/c1256985004c66e3c1256a54003e1583/$FILE/JT00108183.PDF> at 23 May 2007.

[151] Ibid., Part 2 Regulation 9 sub-ss (1)(a)-(b).

[152] Ibid., Part 3 Division 1 Regulation 18.

empowers the Minister to reject applications, seek more information and set additional conditions.[153]

An additional concern is that countries that fall under non-OECD category such as Singapore, Malaysia, China and Indonesia are not treated the same as OECD and instead subject to additional conditions. The HWA 1989 requires Australia as per its *Basel* obligations to ensure the export of hazardous wastes only be allowed on two grounds. These are that Australia does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in an environmentally sound and efficient manner.[154] The second condition is that the importer will use the raw material for recycling or recovery industries.[155] Certainly in the case of processing nickel cadmium and lithium batteries the latter would be true. The argument is weaker for single use alkaline or zinc batteries because the majority are currently sent to landfill.

Finally, the determination process requires the advantages and disadvantages of processing in the country of import to be considered in the ESM assessment.[156] In this example an application to export batteries containing cadmium, lead or mercury for offshore processing is likely to be supported. However if there is no clear domestic policy to recover the batteries that do not contain these metals i.e. alkaline batteries, the Minister is unlikely to support their offshore processing. The overall position is:

> the onus of proof rests with the applicant [who] is asked to demonstrate that the management of the waste in the importing country is broadly comparable to what would happen in Australia.[157]

There is some jurisprudence that may guide as to whether an application will be accepted.

Decisions to grant or withhold permits can be appealed via the Administrative Appeals Tribunal[158] and there has only been one case concerning the Hazardous Waste Act and battery shipments: *Australian Refined Alloys Pty Limited and The Minister for the Environment and Heritage and Anor [2003] AATA 247*.[159] The matter concerns the proposed shipment of used lead acid batteries, the type installed in automobiles, to New Zealand by an Australian based company. At dispute was the Minister's ability to grant a permit, which in the Applicant's view (Australian Refined Alloys Pty Ltd), was not in the public's interest.[160] Exide Australia Pty Ltd had applied and been successfully granted an export permit for up to 15,000 metric tonnes of the used leaded batteries to be shipped to Exide Technologies Ltd of Wellington, New Zealand for processing.

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[153] Ibid., Part 3 Division 2 Regulation 23, Part 3 Division 3 Regulation and Part 4 Regulation 34; Part 2 Regulation 11 and Part 4 Regulation 37; Part 3 Division 4 Regulation 33.

[154] Basel Convention, sub-s. 4.9(a).

[155] Basel Convention, sub-s. 4.9(b).

[156] Commonwealth of Australia, above n. 131, 3.

[157] Ibid., 5-6.

[158] The HWA 1989 Part 6 Section 57.

[159] *Australian Refined Alloys Pty Limited and The Minister for the Environment and Heritage and Anor [2003] AATA 247 (17 March 2003)*.

[160] Australian Refined Alloys Pty Ltd ('ARA') was the Applicant, the Minister for the Environment and Heritage ('the Minister') the Respondent, Exide Australia Pty Ltd ('Exide Australia') was the Joined Party.

Australian Refined Alloys Pty Ltd having its own Australian based processing facilities was in direct competition with Exide. It disputed the permit, claiming the circumstances warranted the Minister using his discretion under *The Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations 1996* to refuse the permit.[161] After determining the processing capacity of both the Australian and New Zealand operations and the potential for the creation of an Australian based regional monopoly, the Tribunal observed a broader definition of public interest applied in the interest of Australia's neighbours and how they may be affected by a decision.[162]

The Tribunal considered that this view was supported by the OECD Regulation qualifying in sub-regulation 23(2)

> the words 'international obligations' by the addition of the words 'in relation to the international movement of hazardous waste (for example, obligations under the Basel Convention and the OECD Decision)'.[163]

The application of the above phrase in combination with comments made in the Bill's Reading Speech meant that the 'Minister (and the Tribunal) is not limited to a consideration of obligations arising only under the Basel Convention or pursuant to Article 11 arrangements.'[164] The Tribunal found that since the Australian facilities did not have the additional capacity to process the materials in the shipment, a refusal to export would lead to closure of the New Zealand plant and create a processing monopoly in Australia.

Importantly this had ramifications for Australia and New Zealand obligations under their membership of *The Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region*.[165] This is because other South Pacific clients who are also Forum[166] members, would be affected.[167] The chain of events consequently increased shipping costs and possibly processing costs, therefore increasing the likelihood of dumping. Together these possibilities significantly reduced

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[161] *The Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations 1996* ('the OECD Regulations') sub-regulation 16 (2): 'The Minister may refuse to grant the permit if the Minister considers that it is in the public interest to do so.'

[162] *Australian Refined Alloys Pty Limited and The Minister for the Environment and Heritage and Anor [2003] AATA 247*, para. 101. 'the legislation requires that "the public interest" be seen in a broader context than just the Australian public interest … the interests of human beings and the environment of neighbouring countries who may be affected by a decision to be taken into account, in addition to relevant Australian interests'.

[163] Ibid., para. 104.

[164] Ibid., para. 109 [Tribunal's emphasis].

[165] *The Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region* (opened for signature 16 Sep. 1995 (entry into force Oct. 2001) ('Waigani Convention').

[166] Founded in 1971 as the South Pacific Forum; the name was changed in 2000 to Pacific Islands Forum. Its headquarters are in Suva, Fiji. Members are Australia, the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. Since 2006, associate members territories are New Caledonia and French Polynesia.

[167] Waigani Convention sub-s. 10(1): 'to facilitate the availability of adequate treatment and disposal facilities and to improve and achieve the ESM of hazardous wastes'.

the ESM of waste continuing, all of which was contrary to the objects of the Hazardous Waste Act:

> to regulate the export, import and transit of hazardous waste to ensure that exported, imported or transited waste is managed in an environmentally sound manner so that human beings and the environment, both within and outside Australia, are protected from the harmful effects of the waste.[168]

For that reason the Tribunal found it was in the public interest of Australian and New Zealand residents as well as the Pacific Islands to grant the permit and for the Wellington facility to continue.[169] It also observed that the broad application of public interest extended the term to the interests of the region.[170] Consequently, halting a shipment that would set in motion a series of actions resulting in the closure of the New Zealand facility would also be denying adjacent communities access to the facility. It would also increase the risk of these communities' exposure to illegal dumping. Accordingly, the Tribunal also affirmed the Minister's decision and the shipments proceeded, for the Minister to decide otherwise would have allowed anticompetitive behaviour.

Thus a permit to export to Singapore, Malaysia, China and Indonesia is likely to be granted on the grounds of it being in the interest of the wider public, provided the applicant demonstrates the transaction will be according to *Basel's* ESM of waste. Notably, the broad definition of public interest with the ability the HWA grants to trade with Non-OECD countries provides a clear signal that the economics of trade speak louder than environmental concerns.

The article concludes by considering how this could be achieved along with other recommendations to strengthening the Australian legislation.

4. Suggestions for the Australian Approach

4.1. Capturing alkaline batteries, domestically and under basel

Currently non-rechargeable alkaline or zinc batteries are sent to landfill rather than recovered and processed but an EPR policy has the potential for reversing this situation. The national council of Environment Ministers, the Environment Protection and Heritage Council, could agree to its product stewardship and EPR policies being appended to the HWA 1989 via a schedule. This modification *in concert* with a more active pursuit of these policies would provide suitable impetus.

For example, the amendment would enable the Minister to grant permits for alkaline battery shipments being sent to offshore processing facilities. In the long term the certainty provided by a clear domestic policy to recover the batteries could also lead to an expansion of domestic facilities to process these materials, if not investment in

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[168] HWA 1989 Part 1 Division 1 Section 3 (1).

[169] *Australian Refined Alloys Pty Limited and The Minister for the Environment and Heritage and Anor [2003] AATA 247*, para. 119.

[170] Ibid.

constructing new ones for this purpose. Further weight to this recommendation is provided by the recent changes to the *Basel Convention's* work programme. In 2002 it was expanded to include the ESM of used mobile phones[171] for two reasons. Firstly their batteries contain metals: lithium ion, nickel metal hydride and lithium polymer and secondly, the annual numbers put onto the market is steadily increasing.[172] This suggests the volume, in terms of the total number or weight of units collected containing a particular substance can be as much a trigger for concern by the Conference of the Parties as the presence of a substance that is hazardous in very small amounts.

It is therefore possible that Parties could consider revising the *Basel* Annexes particularly if the ESM of large volumes of alkaline electrolyte was being delivered to developing countries that do not have adequate processing facilities. Hence, when the increase in export applications for alkaline batteries occurs, Australia could raise this issue at the next Conference of the Parties and lobby for such a review. These changes in turn would lead to international companies from the recovery industry seeking Ministerial approval to supporting offshore processing. In turn the changes to the HWA 1989 would give the Minister grounds to support their applications.

4.2. The inclusion of strict liability

The HWA could also take a leaf out of *Bamako*'s[173] book and enhance its criminal liability by adopting a strict liability approach towards hazardous waste generators[174] instead. This stipulates that the importer is criminally liable,[175] 'even if the waste is not to be disposed of in the importing nation'.[176] Currently *Basel* does not oblige the exporter to investigate the laws of importing nations; provided an official has given them consent, then the shipment can occur.

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[171] This was at the sixth meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal in Geneva, 9-13 Dec. 2002. Decision VI/31 outlines the mandates of the Mobile Phone Working Group (MPWG), the roles and responsibilities of the MPWG, the Open Ended Working Group and the Secretariat of the Basel Convention. *Report Of The Conference Of The Parties To The Basel Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Their Disposal* UNEP/CHW.6/40, 10 Feb. 2003 [147] <www.basel.int/meetings/cop/cop6/english/Report40e.pdf#vi31> at 5 Jun. 2007.

[172] World Batteries Report Oct. 2002 cited in Commission of the European Communities Commission *Staff Working Paper Directive of the European Parliament and of the Council on Batteries and Accumulators and Spent Batteries and Accumulators, Extended Impact Assessment* (Commission Staff Working Paper) COM(2003)723 final. (2003) [6] <http://ec.europe.ue/environment/waste/batteries/pdf/exten_impact_assessment.pdf> at 27 Feb. 2007.

[173] *The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Moment and Management of Hazardous Wastes within Africa* ('*Bamako*'), opened for signature 30 Jan. 1991 (entry into force 22 Apr. 1998) International Legal Materials 1991, 775.

[174] Bamako Arts 4 (1) and 3(b).

[175] Ibid., 4, s. 3.

[176] J. Wylie Donald, 'The Bamako Convention as a Solution to the Problem of Hazardous Waste Exports to Less Developed Countries', *Columbia Journal of Environmental Law* 17 (1992): 419, 435.

4.3. Removing the 'vagueness' while maintaining flexibility

Concerning the determination process, the fact that is not prescriptive to suit WTO requirements for an outcomes based approach is a double-edged sword. While this flexibility allows the procedure to suit WTO requirements, the Australian process has as a result become quite complex and subjective. The procedure does use *Basel* principles[177] in its structure. However, by requiring the advantages and disadvantages of processing in the country of import to be set out in the assessment,[178] a certain amount of 'wriggle room' is created. This discretion could allow for biases or just enough uncertainty about a shipment being permitted into the country as to dissuade new capital investment for domestic infrastructure. It may also deter legitimate processors negotiating shipments for their overseas facilities.

The solution would be to use stronger language concerning the granting of permission on the basis of the importing states capacity for ESM; it says 'shall not permit'[179] while *Basel* says 'reason to believe',[180] a discretion which may allow blindness.[181] It would also require more expansive disclosure in the transport documents themselves and in the requirement to 'forward as soon as possible all information relating to … illegal hazardous waste import activity to the Secretariat'.[182] Also required will be a broader definition of management that encompasses prevention and reduction of hazardous wastes, storage and treatment for reuse or disposal;[183] which continue for longer: 'even after the waste is in storage or when it has been recycled'.[184]

4.4. Embedding ESM shipments of waste into agreements with trading partners

Guidelines developed by the Commonwealth Department have gone some way to provide the needed clarity but further strengthening could be by targeting specific trading partner countries where these facilities exist. For example Australia could have written into existing (or yet to be negotiated) free trade or regional agreements support (financial or physical) for that country's processing facilities. This could be in terms of agreeing to grant export permits for shipments that do not derogate from the environmentally sound waste management, when firms from these countries apply. In doing so, the agreement has the additional benefit of being commensurate with *Basel* Article 11 agreements.

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[177] HWA 1989 Arts 4.2(a)-4.2(d), 4.8, 4.10.
[178] Commonwealth of Australia, above n. 131, 11.
[179] Bamako, Art. 4.3(j).
[180] Basel, Art. 4.2(e) 'shall not allow export … or if it has reason to believe that the wastes in question will not be managed …'.
[181] Wylie Donald, above n. 176, 438.
[182] Bamako, Art. 4, sub-s. 1(a).
[183] Ibid., Art. 1, s. 3.
[184] Wylie Donald, above n. 176, 437.

Additionally, as per the ARA case the Minister's approval to permit an export would satisfy the HWA 1989 requirement for it being in our neighbour's public interest.[185]

Implementation of the *Basel Convention* into Australian legislation may be in direct conflict with its obligations to the WTO Agreement. This is due to the conflicting duties between the two conventions which demonstrate the antagonistic relationship between environmental protection and trade facilitation. As stated earlier, the only provision within GATT that allows protection of the environment at the limited expense of trade is Article XX. The extent to which the *Basel Convention* may be applied under Article XX(g) is not yet clear in international jurisprudence. It could be argued that hazardous waste treatment comes under 'exhaustible natural resources'. However in order to invoke this exception, it must first be determined whether landfills and treatment facilities can be classified as 'natural' or are an artificial creation.[186]

The *Shrimp-Turtle* dispute was significant because it acknowledged that legitimate environmental objectives can invoke the use of Article XX(g). Yet it emphasized that a stringent test will be applied to ensure that unjustifiable discrimination does not result. Coupled with other Panel decisions which take a restrictive view of Article XX, it seems that implementation of the *Basel Convention* will only be deemed acceptable in narrow, if not exceptional circumstances. By Australia implementing the *Basel Convention* in its domestic legislation it is in danger of being perceived as being protectionist under the guise of environmental protection due to the general fear of 'green protectionism'.

4.5. The PP or PPMs and australian domestic standards

As previously observed, developing countries 'face particular difficulties in adopting adequate measures in compliance with international commitments and obligations',[187] leading to their green protectionism fears about developed countries impositions of environmental standards. The application of either the PP or PPMs will be no different. The key will be to ensure the measure does not impose any further domestic requirements than those stipulated by the *Basel Convention* and focuses on post impact. Even then measures will need to be periodically reviewed.[188]

However it should be noted that MEA disputes reflect technical problems rather than the 'will' to enact the measure required. Using WTO jurisprudence, if Australia uses either the PP or PPMs in creating its EPR measure, these will need to be underpinned by a rigorous scientific risk assessment. Furthermore the domestic application needs to facilitate rather than hinder WTO participation. That is to say the approach needs

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[185] *Australian Refined Alloys Pty Limited and The Minister for the Environment and Heritage and Anor [2003] AATA 247*, para. 101.

[186] David Hunter, James Salzman and Durwood Zaelke (eds), 'Hazardous Wastes and Material'. *International Environmental Law and Policy* (New York: Foundation Press, 2002), 847.

[187] OECD, 'The Use of Precaution in the Context of Trade and Environment: Issues for Discussion', *Uncertainty and Precaution: Implications for Trade and Environment* (2002) Joint Working Party on Trade and Environment: Meanings and Objectives of Precaution, COM/ENV/TD(2002)114/FINAL, 26.

[188] SPS Agreement Art. 3(4) and TBT Agreement Art. 15.

to provide incentives for developing countries involvement. Additionally the measure should harmonize with other jurisdictions emerging norms. Thus, making an international firm take back its waste via export to an offshore processing facility would more likely be WTO compliant if tied to a trade agreement with that country.

4.6. Alternatively it is a matter of expediency

Finally, it may all be a matter of expediency rather than creating a brave new measure. That is, adopting an already established one being used by number of trading partners. A case in point would be the adoption of an Australian Restriction of Certain Hazardous Substances[189] (RoHS) equivalent[190] to the EU's measure of the same name. This would be particularly prudent as China has already signalled its intention to do the same. WTO disputes then become less likely when it is only a handful of countries that would be affected and the bulk of our trading partners are already compliant. In fact, according to gaming theory,[191] the pressure of joint access may facilitate others to opt-in.

5. Conclusion

Clearly some tension exists between Australia's obligations as a Member of the WTO and as a signatory to the *Basel Convention*. On the one hand *Basel* expects 'all practicable steps' of managing wastes to be undertaken. The discussion on the WTO disputes on the other hand has demonstrated how narrow the scope is for environmental protection measures under the WTO. While MEAs encourage a high threshold of environmental action, the WTO restricts measures that have an impact on international trade to only those that are strictly *necessary*.

However, the evidence discussed in this article suggests it is possible to find a midpoint in the trade and environment nexus to develop a WTO compliant EPR measure for portable consumer batteries. How much of the 'trade off' occurs between maintaining access to free and fair trade while protecting the environment will depend on who has the greatest influence when WTO Members are drafting their internal domestic policies and legislation. EPR is however a multi-faceted policy that supports the economic, social and political context,[192] making it an invaluable tool for governments.

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[189] This EU Directives supports the restrictions previously established under the EU's *Battery Directive*.

[190] The Dept of the Environment, Water, Heritage and the Arts released in Sep. 2007 a preliminary report which unidentified and assessed a range of RoHS issues for Australia. See <www.environment.gov.au/settlements/waste/electricals/index.html> at 19 Dec. 2007.

[191] Duncan Snidal, 'Coordination versus Prisoner's Dilemma: Implications for International Cooperation and Regimes, *American Political Science Review* 79 (1985): 932, 930.

[192] WTO, 'Lamy calls for "full speed" negotiations' (WTO NEWS: SPEECHES 12 Mar. 2007) News <www.wto.org/english/news_e/sppl_e/sppl56_e.html> at 20 Mar. 2007.