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Alison G. Jones

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AUSTRALIA'S DAMAGING INTERNATIONAL TRADE PRACTICE: THE CASE AGAINST CRUELTY TO GREYHOUNDS

Alison G. Jones[†]

Abstract: The Australian greyhound racing industry is capitalizing on newly emerging markets in countries such as China and South Korea. The industry's drive to profit from promoting greyhound racing in these countries has put the welfare of greyhounds at risk. By exporting these dogs to China and South Korea, Australia is violating the spirit and general intent of its own animal cruelty laws, which guard against the type of animal abuse that occurs largely unchecked in those countries. Therefore, Australia should put an end to such exports as soon as possible. Under the General Agreement on Tariffs and Trade ("GATT"), Australia may enact regulations that effectively combat animal cruelty without overly obstructing free trade between nations. Even if there is a risk of GATT inconsistency, it is unlikely that either China or Korea would challenge an Australian restriction on greyhound exports. Australia should not be deterred from addressing this issue by its international trade obligations under the GATT.

I. INTRODUCTION

Greyhound racing has long been criticized for its breeding methods, which produce tens of thousands more dogs than can be placed at racetracks or in good homes.¹ As the world's second largest per capita greyhound breeder, Australia is constantly euthanizing these so-called "surplus" dogs.² The ethical issues associated with this institutionalized disposal of animals bred specifically for human entertainment have created controversy in Australia and around the world. Recently, however, Australia has exacerbated this problem by allowing surplus dogs to be exported to countries throughout Asia. Fledgling racing industries in many Asian countries are willing to purchase these surplus greyhounds that otherwise

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¹ HUMANE SOCIETY OF THE UNITED STATES, GREYHOUND RACING FACTS, at http://www.hsus.org/pets/issues_affecting_our_pets/running_for_their_lives_the_realities_of_greyhound_racing/greyhound_racing_facts.html (last visited May 30, 2005) [hereinafter GREYHOUND RACING FACTS]; See also GREYHOUND ACTION INTERNATIONAL, MEASURING THE MASSACRE, GREYHOUND ACTION NETWORK FACT SHEET 2, available at <http://ga.redblackandgreen.net/facts2.html> (last visited May 30, 2005) [hereinafter MEASURING THE MASSACRE] (estimating the number of greyhounds killed as a result of industry practices in Britain alone).

² See, e.g., Fiona Carruthers, *Running for Their Lives*, AUS. FIN. REV., May 30, 2003 (on file with Journal) (noting that vast numbers of greyhounds are put down each year due to over-breeding). Australia is second only to Ireland in the per-capita number of greyhounds bred each year. *Id.*

have little economic value to the Australian greyhound industry.³ However, many are concerned that the welfare of these dogs is at risk once they are shipped overseas.

Although surplus greyhounds are frequently euthanized in Australia once their racing careers are over,⁴ Australian law guards against, and punishes cruel disposal methods and inhumane treatment.⁵ This is not the situation in certain Asian countries however, that are currently receiving shipments of Australian greyhounds. These countries lack substantive animal welfare regulations which would deter acts of cruelty towards greyhounds.⁶ The exportation of Australian racing greyhounds to these countries should be prohibited for two reasons. First, it contravenes the general intent and purpose of Australian law and public policy and the emerging international norms on the treatment of animals. Second, Australia can alter its export laws to reflect these concerns without running afoul of its international trade obligations under the relevant trade regime, the General Agreement on Tariffs and Trade ("GATT").

Australia is the major exporter of dogs to Asia, and the states of New South Wales and Victoria are home to numerous animal transportation companies and greyhound breeders that participate in the business.⁷ China and South Korea are two of the Asian countries that have received regular shipments of these greyhounds in recent years. This Comment will therefore focus specifically on the laws of Victoria and New South Wales, and China and South Korea. Following this Introduction, Part II asserts that China and South Korea lack the legal infrastructure to humanely manage imports of

³ See *id.* (stating that Asian customers will pay up to \$5000 for dogs that are too slow to race by Australian standards).

⁴ *Id.*

⁵ Prevention of Cruelty to Animals Act, 1979, pt. 2, sec. 5 (New South Wales); Prevention of Cruelty to Animals Act, 1986, pt. 2, div. 1, sec. 9 (Victoria). Although of course these laws cannot prevent all animal cruelty in Australia, they at least provide some level of deterrence and punishment that would otherwise be lacking.

⁶ See, e.g., Press Release, International Fund for Animal Welfare, IFAW Calls for Beijing to Reconsider Animal Welfare Legislation (May 19, 2004), available at <http://www.ifaw.org/ifaw/general/default.aspx?oid=94485> (last visited May 30, 2005) [hereinafter IFAW Calls for Beijing to Reconsider] (noting that China has no law on animal welfare); Liu Li, *Beijing Suspends Draft Animal Welfare Rule*, CHINA DAILY, May 17, 2004, at http://www.chinadaily.com.cn/english/doc/2004-05/17/content_331357.htm (last visited May 30, 2005) (discussing a failed Chinese regulation that would have enacted rules for the treatment and welfare of animals for the first time in the country's history); see also KOREAN SOCIETY FOR THE PROTECTION OF ANIMALS, KOREAN ANIMAL PROTECTION LAW, at <http://www.koreananimals.org/animalprotectionlaw.htm> (last visited May 30, 2005) (noting that Korean animal welfare laws are not enforced).

⁷ Greyhound Action International, Greyhound Action International Alert: Ban the Export of Greyhounds to Asia Campaign 2004, at <http://ga.redblackandgreen.net/iaustralia.html> (last visited May 30, 2005) [hereinafter Greyhound Action Alert] (on file with Journal).

Australian racing greyhounds. Part III reasons that Australian state laws preventing cruelty to animals should be applied to the export of greyhounds and argues that the Australian Commonwealth Crown⁸ and the corporations that currently export greyhounds to Asia can be held liable for such acts. Part IV suggests that a change in the trade policy of Australia could be made without contravening the GATT. Part V provides further policy justifications for imposing such a ban.

II. EXPANDING AUSTRALIAN GREYHOUND EXPORTS TO ASIAN MARKETS RAISES ANIMAL WELFARE CONCERNS

Driven by the potential for increased profits, the Australian greyhound racing industry has sought out new markets across Asia.⁹ China and South Korea are among the countries that the industry has targeted for expansion.¹⁰ These countries however, are creating an animal-based entertainment industry without concurrently developing substantive animal welfare laws.¹¹ Management of abandoned and unwanted dogs in China and South Korea is a relatively new concept, and management techniques are often inhumane.¹² Unwanted dogs are plentiful in the greyhound industry,¹³ and the resultant welfare issues have caused concern among animal activists as well as those involved in the breeding and exporting of dogs.¹⁴ The Australia New

⁸ Carruthers, *supra* note 2. As used in this Comment, the term Commonwealth refers to Australia's federal government, as opposed to its respective state governments.

⁹ *Id.*

¹⁰ *Id.*

¹¹ IFAW Calls for Beijing to Reconsider, *supra* note 6; see KOREAN SOCIETY FOR THE PROTECTION OF ANIMALS, *supra* note 6 (noting that Korean animal welfare laws are not enforced).

¹² SIRIUS Global Animal Organization, *China Prepares for 2008 Olympics*, Oct. 10, 2004, at <http://sirius.2kat.net/cixiguilin.html> (last visited May 30, 2005) [hereinafter *China Prepares for Olympics*] (on file with Journal); *Pure-bred Dogs Are also Sold for Food; Not Just Mixed-breeds and Yellow Dogs* (SBS television broadcast, June 27, 2004), available at http://www.koreananimals.org/purebred_dog_news_story (last visited May 3, 2005) [hereinafter *Pure-bred Dogs also Sold for Food*] (summary on file with Journal); SHERRY GRANT, HUMANE SOCIETY INTERNATIONAL-ASIA, HSI: ASIA, at http://www.hsus.org/about_us/humane_society_international_hsi/hsi_asia/ (last visited May 30, 2005).

¹³ See, e.g., MEASURING THE MASSACRE, *supra* note 1 (documenting the thousands of dogs that are destroyed each month in the British Isles alone); GREYHOUND RACING FACTS, *supra* note 1 (highlighting the problematic overbreeding that takes place in the greyhound industry).

¹⁴ See Carruthers, *supra* note 2 (noting that the greyhound racing board, the Australia New Zealand Society Greyhound Association ("ANZGA"), held an animal welfare conference to address the issue of greyhound exports to Asia and that some ANZGA officials were concerned about the lack of accountability for greyhounds once they leave the track, and the possible mistreatment of dogs in Korea); See also AUSTRALIAN NATIONAL KENNEL COUNCIL, SUMMARY OF THE ANKC CONFERENCE, sec. 1.6 (October 20, 2001) [hereinafter SUMMARY OF THE ANKC CONFERENCE] (on file with Journal). At this conference the ANKC resolved that no member of the ANKC shall knowingly send a pedigree dog to any person residing in an overseas country known to be involved in the utilization of dogs for the meat trade except under certain circumstances. *Id.*

Zealand Greyhound Racing Association (“ANZGA”) held a conference to address this issue,¹⁵ and the Australian National Kennel Council (“ANKC”) (which is responsible for the oversight of Australian pure-bred dogs, but not greyhounds) currently prohibits knowingly exporting dogs to countries where they may enter the dog meat trade.¹⁶ The ANZGA conference and the ANKC’s recognition of the welfare issues associated with exporting dogs to countries where they may enter the dog meat industry, evidence industry recognition of the problems associated with such exports. The Australian government should recognize such problems and formally put an end to the export of greyhounds to countries such as China and South Korea, where they are likely to be treated inhumanely and/or used in the dog meat industry.

A. *Australia's Participation in the Newly Emerging Greyhound Markets in China and South Korea Is Problematic Because These Countries Lack Adequate Animal Welfare Laws*

Currently, Australian greyhounds are exported to countries across Asia, including South Korea, and China.¹⁷ The industry has sought out these locations largely because Asian purchasers are willing to pay high prices for greyhounds considered “second-hand” by Australian standards.¹⁸ The fledgling greyhound racing business in Asia has therefore produced a financial incentive for the Australian industry to ship dogs overseas. This drive for profit however, has produced significant animal welfare problems. The weak to non-existent animal welfare regulations and enforcement in many Asian countries, combined with the greyhound industry’s preexisting tendency to increase profits by destroying dogs in the least expensive way possible, makes greyhound exports to these countries undesirable.¹⁹

¹⁵ Carruthers, *supra* note 2.

¹⁶ SUMMARY OF THE ANKC CONFERENCE, *supra* note 14. The ANKC regulations prohibit knowingly exporting dogs to countries known to be involved in the dog meat industry without first “satisfying the affiliate body that the purchaser is of good character and is a member of the appropriate Canine Kennel Council or Canine Association in the country of import. The seller and buyer must further acknowledge that the dog is to be used for showing and/or breeding and not for any other purpose. *Id.*”

¹⁷ Carruthers, *supra* note 2; *Dog Racing Spreads to China*, GREYHOUND NETWORK NEWS ONLINE EDITION (2003), at http://www.greyhoundnetworknews.org/backissues/02/winter_2002.03_international.html (last visited May 30, 2005); see also *Greyhound Exports to Southeast Asia*, ANIMAL PEOPLE, Oct. 2004 (confirming that greyhounds were exported from Australia to South Korea in 2004 but that the number was smaller then in previous years) (on file with Journal).

¹⁸ Carruthers, *supra* note 2 (“With the Asian racing industry in its early stages, one Australian greyhound owner says Asian customers will pay up to AUS \$5000 for dogs that are a couple of seconds too slow to be competitive in Australia.”).

¹⁹ See *infra* Part II.B.

The actual number of dogs sent to Asia fluctuates and is difficult to determine because the Australian Quarantine and Inspection Service does not keep official figures.²⁰ However, some insiders believe that hundreds of dogs are sent to Asia from Australia annually.²¹ Some statistics show that in 2001, 200 dogs went to South Korea and 159 to China.²² In late 2002, fifty-three Australian greyhounds were shipped to the Shanghai Wild Animal Park.²³

One of the most difficult problems facing the racing industry is the inability to track the fate of greyhounds once their racing days are over.²⁴ Observers and industry insiders recognize that this lack of accountability is a significant problem for the sport, which is exacerbated when dogs are shipped overseas to countries lacking welfare laws.²⁵ Because of the problems associated with greyhound exports, one of the most prominent international greyhound advocacy groups campaigns heavily against this practice.²⁶

Despite the recognition and rapid growth of animal rights in countries such as the United States and parts of Europe, the concept is still in its infancy throughout many parts of Asia.²⁷ Issues such as responsible pet ownership and the care of abandoned and stray animals have yet to be addressed in many locations.²⁸ Although some Asian countries have laws that ban the consumption of dog meat,²⁹ it continues largely unchecked in China and South Korea and is often accompanied by horrific slaughter methods.³⁰ Despite these poor conditions, Australia continues to allow greyhound exports to countries where they will likely face inhumane

²⁰ Lorna Edwards, *Hounded to Death*, SYDNEY MORNING HERALD, Oct. 25, 2004, at 2.

²¹ *Id.*

²² Carruthers, *supra* note 2.

²³ *Dog Racing Spreads to China*, *supra* note 17.

²⁴ Carruthers, *supra* note 2.

²⁵ *Id.*

²⁶ GREYHOUND ACTION ALERT, *supra* note 7; RAVEN HAZE, GREYHOUND ACTION AUSTRALIA, PETITION TO BAN THE EXPORT OF GREYHOUNDS TO ASIA, at <http://www.petitiononline.com/GAIBEGA/petition.html> (last visited May 30, 2005).

²⁷ GRANT, *supra* note 12; ANIMALS ASIA, FRIENDS OR FOOD?, at <http://www.animalsasia.org/index.php?module=3&lg=en> (last visited May 30, 2005) [hereinafter FRIENDS OR FOOD?].

²⁸ GRANT, *supra* note 12.

²⁹ FRIENDS OR FOOD?, *supra* note 27. These countries include Hong Kong, the Philippines, and Taiwan. *Id.* South Korea also formally prohibits the consumption of dog meat, but the law is rarely enforced. See *infra* Part II.C.

³⁰ See, e.g., ELLY MAYNARD & DEIDRE BOURKE, ANIMAL RIGHTS AND LEGAL ADVOCACY NETWORK, NEW ZEALAND, FIGHTING THE INTERNATIONAL DOG MEAT TRADE, at <http://www.arlan.org.nz/articles/dogmeat.htm> (last visited May 30, 2005) (describing the torturous slaughter methods used in China and Korea to prepare dog meat for consumption).

treatment upon retirement.³¹ Without animal welfare regulations or enforcement, and without adequate management of abandoned dogs, these countries are ill-equipped to humanely manage greyhounds that will eventually retire and lose their economic value to their importers.³²

B. China Lacks an Appropriate Animal Welfare Framework to Manage Racing Greyhounds

Currently China has no law on animal welfare.³³ Although various regulations provide protection for animals in some limited contexts, they primarily apply to endangered species or livestock and set high standards of proof for violations.³⁴ Various attempts have been made by the city of Beijing to insert animal welfare regulations into other laws, but these attempts have met with mixed success.³⁵ For example, in May 2004 a draft law proscribing rules for the treatment and welfare of animals was released for public comment to a municipal website.³⁶ The draft law, however, was withdrawn several days later.³⁷ Authorities announced that the posting was accidental and that the draft had already been vetoed.³⁸ He Zhengming, Deputy Secretary General for the Chinese Society of Laboratory Animals, stated that it was premature for China to formulate an actual law devoted to animal welfare.³⁹ Given the mixed public opinion on the proper treatment of animals in China, law making in this area will most likely be difficult.

³¹ GREYHOUND ACTION ALERT, *supra* note 7.

³² See Letter from J.P. Kavanagh, Greyhound Action Australia, to Steve Rosier, Chief Executive GRA (N.S.W.), Greyhound Action International Alert: Animal Welfare in Asia, at <http://ga.redblackandgreen.net/iaustraliaimodel.html> (last visited May 30, 2005) (protesting the Australian export of greyhounds to China where there are no adoption programs for retired dogs) [hereinafter *Animal Welfare in Asia*]; See also GRANT, *supra* note 12 (noting generally that the care and management of abandoned animals in Asia is in its infancy).

³³ Liu Li, *supra* note 6.

³⁴ Betsy Tao, *A Stitch in Time: Addressing the Environmental, Health, and Animal Welfare Effects of China's Expanding Meat Industry*, 15 GEO. INT'L ENVTL. L. REV. 321, 351-352 (2003). China's Constitution requires states to rationally use national resources and protect rare animals and plants. It also has a Provisional Regulations Concerning the Slaughter Tax to protect livestock, transport animals, and draught animals, but allows individual states to modify these standards. Finally, the criminal law prohibits cruelly injuring draft animals with a goal of preventing the destruction of property rather than of protecting animal welfare. Furthermore this law requires a spiteful motive to be convicted. *Id.*

³⁵ *Being Humane to Animals*, CHINA DAILY, July 7, 2004, at http://www.chinadaily.com.cn/english/doc/2004-07/01/content_344705.htm (last visited May 30, 2005) [hereinafter *Being Humane*].

³⁶ China Moves to Revise Regulations on Animal Welfare, JAPAN ECONOMIC NEWSWIRE, May 27, 2004 [hereinafter *China Moves to Revise Regulations*].

³⁷ *Id.*

³⁸ *Being Humane*, *supra* note 35.

³⁹ *China Moves to Revise Regulations*, *supra* note 36.

Chinese culture and societal perceptions of animals appear to play a significant role in the current status of animal welfare in China. Some Chinese scholars believe that “animal welfare is irrational and anti-scientific,” and regard the movement as an unwelcome, Western intrusion.⁴⁰ The “animal rights theory”⁴¹ has been painted as “anti-humanity” by some commentators, who claim that animal-rights activists aim to give animals greater rights than humans.⁴² In support of this position, Professor Zhao, describing an incident in which outraged animal rights activists tried to compel a company manager to consume paint samples which were being force-fed to cats and dogs, concluded that the animal-rights movement would give animals more rights than humans.⁴³ He further cited the burdens that the animal rights movement would impose on humans to take care in dealing with animals in support of the position that animal welfare legislation is unrealistic.⁴⁴ These views present significant barriers to the future establishment of animal cruelty laws in China.

The slaughter of dogs in China is largely unregulated and inhumane.⁴⁵ International news and animal welfare organizations have documented, *inter alia*, numerous accounts of dogs being restrained and beaten either to prepare their meat for consumption or simply as an inexpensive means to destroy city pests.⁴⁶ Without any Chinese law to guard against acts of cruelty towards animals,⁴⁷ such slaughter methods will continue unchecked. This poses a significant ethical problem for Australians looking to profit from shipping dogs to Asia.⁴⁸

The lack of a tracking system for dogs shipped to countries in Asia means that there is no way to know the fate of Australian greyhounds.⁴⁹ However, the Chinese dog meat industry is enormously lucrative and the

⁴⁰ *Being Humane*, *supra* note 35.

⁴¹ The animal rights movement generally believes that non-human animals deserve to live according to their own natures, free from harm, abuse, and exploitation. See, e.g., The Animal Rights FAQ, *General Questions*, available at <http://www.animal-rights.com/arsec1q.htm#general> (last visited May 30, 2005).

⁴² *Being Humane*, *supra* note 35.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Tao, *supra* note 34; MAYNARD & BOURKE, *supra* note 30; *China Prepares for Olympics*, *supra* note 12.

⁴⁶ *China Prepares for Olympics*, *supra* note 12; Sarah Chalmers, *Carpet of Cruelty*, DAILY MAIL, May 29, 2003, at http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=182682&in_page_id=1770 (last visited May 30, 2005).

⁴⁷ *Being Humane*, *supra* note 35.

⁴⁸ Australian citizens are aware of the welfare problems associated with exporting greyhounds to China and South Korea. Reports of dogs being tortured before death to soften their meat caused the Australian and New Zealand Racing Association to be bombarded with protests. Slow racing dogs on Australian tracks are now sometimes referred to as “China dogs.” Carruthers, *supra* note 2.

⁴⁹ *Id.*

growing demand for dog meat currently outweighs the supply.⁵⁰ In addition, as China prepares for the 2008 Olympics, Chinese citizens are being paid bounties to rid the streets of stray dogs.⁵¹ The disposal methods are extremely cruel and inhumane.⁵² These economic incentives, combined with the lack of adequate legal protections for dogs in China, make it likely that retired greyhounds will face the same demise as other unwanted Chinese dogs. This combination makes China a forbidding place for Australian racing dogs and raises serious animal welfare issues.

C. South Korea's Inadequate Enforcement of Animal Welfare Laws Leaves Greyhounds in Situations That Violate Australian Standards

Although South Korea has an Animal Protection Law and an active Animal Protection Society, there is no significant enforcement of its regulations in this area.⁵³ South Korea's Animal Protection Law penalizes those who subject animals to unnecessary pain without "proper rational reason,"⁵⁴ or who kill them in ways that "provoke disgust" without "proper, rational reason."⁵⁵ The Korean Animal Protection Society ("KAPS") reports, however, that the law is almost never enforced.⁵⁶ Furthermore, KAPS has had to heavily lobby the government to keep the act's ban on the consumption of dog meat from being lifted.⁵⁷ These issues make South Korea an inhospitable place for Australian greyhounds.

The lack of enforcement of the Animal Protection Law is demonstrated by video and photographic documentation of South Korean dog-meat markets provided by welfare groups in South Korea.⁵⁸ These photographs display disturbing images of multiple dogs cramped in small cages and other dogs hanging by their necks.⁵⁹ They also describe the horrific torture methods that are alleged to bring out the medicinal qualities

⁵⁰ Tao, *supra* note 34.

⁵¹ *China Prepares for Olympics*, *supra* note 12.

⁵² *Id.*

⁵³ KOREAN SOCIETY FOR THE PROTECTION OF ANIMALS, *supra* note 6.

⁵⁴ Korean Animal Protection Law, art. 6(2) (1991). English translation available at <http://www.koreananimals.org/animalprotectionlaw.htm> (last visited May 30, 2005).

⁵⁵ *Id.*

⁵⁶ KOREAN SOCIETY FOR THE PROTECTION OF ANIMALS, *supra* note 6.

⁵⁷ Press Release, Korea Animal Protection Society, Urgent: Korean Government Tries to Legalize Dog-Meat, available at <http://www.koreananimals.org/urgentaction.htm> (last visited May 30, 2005) [hereinafter *Korean Government Tries To Legalize Dog-Meat*]; Wood, *supra* note 61.

⁵⁸ SEOUL SEARCHING, ABOUT EATING DOG, at <http://www.seoulsearching.com/DogMeat.html> (last visited May, 16 2005) [hereinafter *ABOUT EATING DOG*]; KOREAN ANIMAL PROTECTION SOCIETY, KOREAN DOG MARKET PHOTOS, at http://www.koreananimals.org/mm_photos.htm (last visited May 30, 2005).

⁵⁹ *ABOUT EATING DOG*, *supra* note 58; *KOREAN DOG MARKET PHOTOS*, *supra* note 58.

in the dogs before their death.⁶⁰ Experts estimate that three million dogs are eaten in South Korea each year despite the fact that the practice is technically against the law.⁶¹ Such a lack of enforcement renders the animal welfare law virtually useless.

Despite popular belief, demand for dog meat in South Korea is supplied not only through the use of dogs bred specifically for their meat, but also by dogs not initially intended to be used for consumption.⁶² A recent investigation by the Korean media revealed that an economic slowdown, combined with an increase in the number of pure-bred dogs in South Korea, has caused some breeders of pure-bred dogs to sell their stock to auctions where it is purchased by dog meat traders.⁶³ The media reported that one man was able to purchase ten cocker spaniel puppies for the equivalent of US\$ 85 at such an auction.⁶⁴ Stolen or abandoned pets have also been known to enter the dog meat trade.⁶⁵ This evidence suggests that large dogs such as greyhounds, which lose their economic value once they retire from the race track, could easily end up in the dog meat industry.

While there are no documented accounts of Australian greyhounds being sent to South Korea's dog meat markets, there is at a minimum an economic incentive for this to occur. The greyhound industry faces the need to eliminate surplus greyhounds. Humane euthanization imposes certain veterinary costs,⁶⁶ but dog meat producers in South Korea are willing to purchase purebred dogs in order to supplement their meat supply.⁶⁷ This creates a desirable alternative for those in the greyhound racing industry. When faced with the choice of making money on unwanted dogs or losing money by humanely euthanizing them, it seems probable that the South Korean greyhound industry will choose the former.

KAPS and other animal welfare groups in South Korea have had some success in changing cultural and societal views about animals and in influencing governmental policy.⁶⁸ A proposed amendment to the Animal Protection Law legalizing the dog-meat industry was rejected last year after

⁶⁰ *Id.*

⁶¹ Andrew Wood, *No Dogs on Seoul Menus*, BBC NEWS, Sept. 29, 1999, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/460627.stm> (last visited May 30, 2005).

⁶² *Pure-bred Dogs also Sold for Food*, *supra* note 12.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See GREYHOUND RACING FACTS, *supra* note 1 (noting that greyhounds are often destroyed using the least expensive methods, which include gunshots, bludgeoning, abandonment, and starvation).

⁶⁷ *Pure-bred Dogs also Sold for Food*, *supra* note 12.

⁶⁸ KOREAN ANIMAL PROTECTION SOCIETY, IN THE NEWS, at <http://www.koreananimals.org/currentnews.htm> (last visited May 30, 2005).

serious lobbying efforts by KAPS.⁶⁹ Recently, the South Korean government proposed strengthening the law and has forwarded a copy of the proposal to KAPS for review.⁷⁰ KAPS however, faces a constant struggle to prevent the legalization of dog consumption,⁷¹ and the fact remains that the existing laws often go unenforced.⁷²

While South Korea may be farther along towards achieving adequate protection for animals than China in the sense that it has an existing animal welfare law, neither country actually punishes acts of cruelty towards animals. Australia should not allow exporters to knowingly send dogs to countries where they will likely be treated in a way that would violate Australian law if such treatment were to take place in Australia. Australia should work towards eliminating its greyhound exports to China and Korea as soon as possible.

III. EXPORTING GREYHOUNDS TO COUNTRIES WITH INADEQUATE ANIMAL WELFARE LAWS VIOLATES THE PRIMARY GOAL OF AUSTRALIAN ANIMAL WELFARE LAWS

Exporting greyhounds to China and South Korea contravenes the purpose of the animal welfare laws of the Australian states. These laws contain detailed regulations prohibiting many of the abuses known to occur in China and South Korea⁷³ and should be applied to prevent Australian organizations from shipping greyhounds to these nations. Although imports and exports are traditionally managed by the Commonwealth, these state laws impose constitutionally valid regulations that affect the way the Commonwealth can carry out its duties.⁷⁴ The Commonwealth should be prohibited from disregarding the most fundamental objective of these state regulations (the prevention of cruelty to animals) by shipping greyhounds to Asia.

⁶⁹ *Id.*

⁷⁰ Kyenan Kum, *Korean Animal Protection Society - A Government Breakthrough?*, K9 MAGAZINE, at <http://www.k9magazine.com/viewarticle.php?sid=14&aid=406&vid=0&npage> (last visited May 30, 2005).

⁷¹ Korean Government Tries To Legalize Dog-Meat, *supra* note 57.

⁷² KOREAN SOCIETY FOR THE PROTECTION OF ANIMALS, *supra* note 6.

⁷³ See *infra* Part III.A.

⁷⁴ *Id.*

A. *Australian State Animal Welfare Laws Require That Greyhounds Be Treated Humanely*

Australia's governmental system regulating the treatment of animals is complex and multi-layered. There is no single Commonwealth legislation that applies to all animal cruelty offenses throughout the country.⁷⁵ Instead, there are eight statewide Prevention of Cruelty to Animals Acts that regulate this area.⁷⁶ Companion animals such as dogs are protected by the state Prevention of Cruelty to Animals Acts.⁷⁷ The laws of New South Wales and Victoria ban the type of cruelty that occurs largely unchecked in China and South Korea.⁷⁸ Though the existing laws do not explicitly prohibit the shipment of animals to countries where they will likely be treated inhumanely, the spirit of these laws appears to prohibit such an act.⁷⁹ Both the Victoria and the New South Wales Acts contain multiple provisions that make it clear that exposing dogs to such a risk of harm runs contrary to the basic policies of the respective states.⁸⁰ In order to achieve consistency with the intent of its laws and with public policy,⁸¹ Australia should prohibit the export of greyhounds to China and South Korea.

⁷⁵ KATRINA SHARMAN, ANIMAL LEGAL AND HISTORICAL CENTER, ANIMAL LAW IN AUSTRALIA (2004), at <http://www.animallaw.info/nonus/articles/ovaustralia.htm> (last visited May 30, 2005). There are national codes and committees that aim to achieve integrated national animal welfare strategies. AUSTRALIAN GOV'T DEPT. OF AGRICULTURE, FORESTRY, AND FISHERIES, AUSTRALIA ANIMAL WELFARE STRATEGY, available at <http://www.daff.gov.au/naws> (last visited May 30, 2005) [hereinafter AUSTRALIA ANIMAL WELFARE STRATEGY].

⁷⁶ Animal Welfare Act, 1992 (Australian Capital Territory); Animal Welfare Act 1999 (Northern Territory); Prevention of Cruelty to Animals Act, 1979 (New South Wales); Animal Care & Protection Act, 2001 (Queensland); Prevention of Cruelty to Animals Act, 1985 (South Australia); Animal Welfare Act, 1993 (Tasmania); Prevention of Cruelty to Animals Act, 1986 (Victoria); Animal Welfare Act, 2002 (West Australia). Sharman, *supra* note 75.

⁷⁷ Both the Victoria Act and the New South Wales Act apply to greyhounds, as they define animal as any live member of the vertebrate species other than a human being. Prevention of Cruelty to Animals Act, 1986, pt. 1, sec. 3(1) (Victoria); Prevention of Cruelty to Animals Act, 1979, pt. 1, sec. 4(1) (New South Wales).

⁷⁸ See *infra* Part III.A.2-3.

⁷⁹ The Victoria Act, however, contains a provision that makes it a crime to knowingly act or fail to act in a way that results in unnecessary suffering or pain. Prevention of Cruelty to Animals Act, 1986, pt. 2, sec. 9(1)(C) & sec. 9(2) (1986) (Victoria); see *infra* Part III.A.2-3.

⁸⁰ See *infra* Part III.A.2-3.

⁸¹ The public policies of the nation seem to be in accord with these state acts as demonstrated by the Commonwealth's concerted effort to develop a nationwide strategy to address animal welfare issues. AUSTRALIAN GOV'T DEPT. OF AGRICULTURE FISHERIES AND FORESTRY, INTERNATIONAL DEVELOPMENTS, (May 26, 2004), available at <http://www.affa.gov.au/content/output.cfm?ObjectID=60D8C37D-9518-4A9B-85B88251AB68FE70> (last visited May 30, 2005).

1. *The New South Wales Prevention of Cruelty to Animals Act Prohibits Shipping Dogs to China and South Korea*

Animal law in New South Wales is governed primarily by the Prevention of Cruelty to Animals Act⁸² (“New South Wales Act”). This Act establishes that cruelty towards animals will not to be tolerated and will be penalized.⁸³ Its broad language circumscribes subjecting animals to unnecessary suffering, which is the likely outcome of exporting dogs to China and South Korea.

The purpose of the New South Wales Act is to prevent cruelty to animals and to promote their welfare.⁸⁴ Under the New South Wales Interpretation Act, statutes should be construed in a manner that promotes the “purpose or object underlying the Act.”⁸⁵ Such a construction is preferred to one that would not promote the statutory purpose.⁸⁶ The shipment of greyhounds to China and South Korea clearly does not comport with the goal of preventing cruelty to animals or promoting their welfare. The various cruelty prohibitions in the New South Wales Act therefore should be interpreted with the overall object of the Act in mind. Interpreting the Act in a limited manner in order to avoid its application to greyhound exports would not promote its underlying purpose.

In keeping with its broad objectives, the New South Wales Act defines “cruelty” broadly.⁸⁷ Cruelty includes any unreasonable, unnecessary, or unjustifiable act or failure to act which results in an animal being: “beaten, kicked, wounded, pinioned, maimed, abused, tortured, terrified . . . infuriated . . . or inflicted with pain.”⁸⁸ “Aggravated cruelty to animals” carries a higher penalty and occurs where the acts of cruelty result in “death, deformity or serious disablement of the animal; or the animal is so

⁸² Prevention of Cruelty to Animals Act, 1979 (New South Wales). The Prevention of Cruelty to Animals (Animal Trades) Regulation, 1996 (New South Wales) is also relevant. The New South Wales Act covers the treatment of animals while the Animal Trades Regulation regulates certain businesses or organizations that deal with animals. Stephanie Abbott, *Prevention of Cruelty to Animals Act 1979 (New South Wales): A Summary* 19, available at http://www.lawsociety.com.au/uploads/filelibrary/1087453462281_0.6702970716946971.pdf (last visited May 30, 2005). New South Wales has developed, *inter alia*, a Code of Practice for the Care and Management of Breeding Dogs under the Animal Trades Regulation. *Id.* at 19-20. This code requires, *inter alia*, that persons breeding dogs protect them from people or adverse environmental conditions and from disease, distress, and injury, and that where an animal is to be put down, it should be by euthanasia. Animal Welfare Code of Practice No. 6 Breeding Dogs, 2001 secs. 2.1(b), 2.1(e) & 6.4.1 (New South Wales).

⁸³ Prevention of Cruelty to Animals Act, 1979, pt. 1, sec. 3 (New South Wales).

⁸⁴ *Id.*

⁸⁵ Interpretation Act, 1987, sec. 33 (New South Wales).

⁸⁶ *Id.*

⁸⁷ Prevention of Cruelty to Animals Act, 1979, pt. I, sec. 4(2) (New South Wales).

⁸⁸ *Id.*

seriously injured, diseased or in such a physical condition that it is cruel to keep it alive.”⁸⁹ The New South Wales judicial system has reinforced the strength of the Act’s primary purpose. In *Pearson v. Janlin Circuses* the Supreme Court of New South Wales held that a criminal conviction for an offense of cruelty or aggravated cruelty does not require a component of *mens rea* in proof of the offense.⁹⁰ Therefore, offenders can be convicted of cruelty or aggravated cruelty whether or not they knowingly commit these offenses.

In addition to its broad regulation of cruelty to animals, the New South Wales Act regulates certain specific offenses that are also known to be commonplace in China and South Korea. The Act makes it an offense to neglect, abandon, or fail to provide an animal with reasonable care when needed.⁹¹ Furthermore, it is an offense to carry or convey an animal in a way that inflicts unreasonable pain upon the animal.⁹²

Under the New South Wales Act, any offender may be prosecuted for committing an offense.⁹³ This includes corporations, whose managers and directors can be held personally liable.⁹⁴ Personal liability is found when a director or manager knowingly authorized the offense.⁹⁵ Personal liability does not affect the liability of the corporation for the same offense.⁹⁶ Furthermore, the New South Wales Act purports to apply to governmental officials who commit proscribed acts.⁹⁷

The New South Wales Act is enforced by the state police force and by officers of charitable organizations such as the New South Wales Royal Society for the Prevention of Cruelty to Animals (“RSPCA”), and the New South Wales Animal Welfare League.⁹⁸ The RSPCA conducts thousands of investigations into allegations of animal cruelty each year.⁹⁹ In 2004 there

⁸⁹ Prevention of Cruelty to Animals Act, 1979, pt. I, sec. 4(3) (New South Wales).

⁹⁰ *Pearson v. Janlin Circuses Pty Ltd. (t/a Stardust Circus)* (2002) N.S.W.S.C. 1118 (Windeyer, J.). The Court noted that the offenses were created “with the purposeful legislative intention of protecting animals [who] in most cases [are] totally unable to protect themselves.” *Id.* at 4.

⁹¹ Prevention of Cruelty to Animals Act, 1979, pt. 2, sec. 8, 9, & 11 (New South Wales).

⁹² *Id.* pt. 2, sec. 7(1). The term “unreasonable” is not defined in the Act, but the term “pain” includes suffering and distress. *Id.* pt. 1, sec. 4.

⁹³ Abbott, *supra* note 82, at 4.

⁹⁴ Prevention of Cruelty to Animals Act, 1979, pt. 3, sec. 33(a) (New South Wales).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* pt. 3, sec. 35(a)(1). Police dogs and horses, and any other cases prescribed by the regulations are excepted from this section. *Id.* pt. 3, sec. 35(a)(1); *see infra* Part III.B.3.

⁹⁸ Sharman, *supra* note 75. These officers report to governmental authorities and their duties are delineated by the New South Wales Act. Prevention of Cruelty to Animals Act, 1979, pt. 3, secs. 25-33 (New South Wales).

⁹⁹ RSPCA AUSTRALIA, RSPCA AUSTRALIA NATIONAL STATISTICS 2003-2004, at 8, available at http://www.rspca.org.au/news_info/stats2004.pdf (last visited May 30, 2005) [hereinafter RSPCA

were 112 cruelty prosecutions in New South Wales, and in the preceding year there were 119.¹⁰⁰

It is clear that the New South Wales animal welfare laws provide significantly more protection to animals than is afforded in China or South Korea. Many of the animal abuses that occur in Asia would not be tolerated if they were to occur in New South Wales. By exporting greyhounds to China and South Korea, however, Australia is putting greyhounds into the stream of commerce knowing where they will go and what treatment they will likely receive. The New South Wales Prevention of Cruelty to Animals Act and related law advocate against this uncontrolled export of greyhounds to China and South Korea.

2. *The Victoria Prevention of Cruelty to Animals Act Should Be Applied to the Export of Greyhounds to China and South Korea*

The Victoria Prevention of Cruelty to Animals Act ("Victoria Act") is similar in many ways to the New South Wales Act. Both Acts state that their purpose is to prevent cruelty to animals, but the Victoria Act also notes that its purpose is "to encourage the considerate treatment of animals; and to improve the level of community awareness about the prevention of cruelty to animals."¹⁰¹ Under the Interpretation of Legislation Act, a statutory construction that would promote these purposes "shall be preferred" to one that would not promote them.¹⁰² Allowing business organizations to ship greyhounds to Asia is not compatible with these objectives and should be prohibited under Victoria's Prevention of Cruelty to Animals Act.

"Cruelty" in the Victoria Act is defined as wounding, mutilation, torture, abuse, beating, tormenting, terrifying, abandoning, poisoning, or cropping the ears of a dog.¹⁰³ Knowingly acting or failing to act in a manner that results in an animal's unnecessary or unjustifiable suffering or pain is also cruelty under the Victoria Act.¹⁰⁴ This provision seems to directly prohibit the export of greyhounds to China and South Korea when the exporters are aware of the dangers presented by such exports. Although it is a defense if the owner can prove that he entered into an agreement with

STATISTICS 2004]; RSPCA AUSTRALIA, RSPCA AUSTRALIA NATIONAL STATISTICS 2002-2003, at 5, available at http://www.rspca.org.au/news_info/stats2003.pdf (last visited May 30, 2005) hereinafter RSPCA STATISTICS 2003].

¹⁰⁰ *Id.*

¹⁰¹ Prevention of Cruelty to Animals Act, 1986, pt. 1, sec. 1 (Victoria).

¹⁰² Interpretation of Legislation Act, 1984, pt. 4, sec. 35 (Victoria).

¹⁰³ Prevention of Cruelty to Animals Act, 1986, pt. 2, sec. 9(1)(a-1) (Victoria).

¹⁰⁴ *Id.* pt. 2, sec. 9(1)(c).

another person by which the other person agreed to care for the animal,¹⁰⁵ evidence of such an agreement is not a defense to a charge of aggravated cruelty.¹⁰⁶ Furthermore, this defense would seem weaker where the owner has reason to believe that the “care giver” will treat the animal inhumanely. The term “unnecessary pain and suffering” is broad, and the likelihood that such suffering is occurring in China and South Korea is great.

Like the New South Wales Act, the Victoria Act is enforced by state police force members and officers of the RSPCA.¹⁰⁷ In 2004 there were fifty-two cruelty prosecutions in Victoria, and the preceding year there were seventy.¹⁰⁸ The Act also authorizes the adoption of Codes of Practice similar to those adopted in New South Wales.¹⁰⁹ Unlike the New South Wales Act, however, the Victoria Act contains a provision for serious offenses. If a person has been convicted of one or more serious offenses under the Victoria Act, the court may order that the person be disqualified from retaining custody of a certain type of animal for a specified time period, or order that specific conditions be met for maintaining custody.¹¹⁰ Repeated exportation of greyhounds to China and South Korea where they are in danger of being treated inhumanely should trigger such a penalty. Local greyhound producers who continue exporting must be barred from keeping greyhounds at all, which would effectively put them out of business.

Overall, the Victoria and the New South Wales Acts provide many indications that the Commonwealth government’s tolerance of the exportation of greyhounds to China and South Korea violates its core policies. Both Acts explicitly prohibit the animal crimes known to occur in China and South Korea and define cruelty broadly. In order to interpret these laws in a manner that prevents cruelty to animals, greyhound exports to China and South Korea should be prohibited. The businesses organizations shipping greyhounds to China and South Korea are acting in a way which is highly likely to result in cruelty to greyhounds. The text of the states’ laws provides the basic rationalization for prohibiting uncontrolled

¹⁰⁵ *Id.* pt. 2, sec. 9(2).

¹⁰⁶ *See id.* pt. 2, sec. 11. Aggravated cruelty occurs where any cruelty offense is committed with the result that the animal either dies or becomes seriously disabled. *Id.* pt. 2, sec. 10(1).

¹⁰⁷ *Id.* pt. 3, sec. 18(1).

¹⁰⁸ RSPCA STATISTICS 2004, *supra* note 99, at 8; RSPCA STATISTICS 2003, *supra* note 99, at 8.

¹⁰⁹ Prevention of Cruelty to Animals Act, 1986, pt. 1, sec. 7 (Victoria). The Code of Practice for the Operation of Breeding and Rearing Establishments in Victoria states generally that the manager of the establishment is responsible for the well-being of all animals in the establishment, and gives specific requirements for pen sizes, nutrition, and general animal health. STATE OF VICTORIA, DEP’T OF PRIMARY INDUSTRIES, CODE OF PRACTICE FOR THE OPERATION OF BREEDING AND REARING ESTABLISHMENTS, 2002, sec. 2.1 (Victoria).

¹¹⁰ Prevention of Cruelty to Animals Act, 1986, pt. 2, sec. 12(1) (Victoria).

greyhound exports to Asia. Additionally, they impose constitutionally permissible regulations on the Commonwealth, and therefore require that the Australian Commonwealth government abide by their provisions. The following sections argue that the Commonwealth Crown is bound by these state laws.

B. The Australian Commonwealth Crown Is Bound by Its State Animal Welfare Law

The Parliaments of Victoria and New South Wales are capable of binding the Commonwealth Crown.¹¹¹ In order for this to occur, three barriers must be overcome. The first two barriers stem from the Constitution: there must be some basis to overcome the doctrine of crown immunity under section 61¹¹² and there must be no conflicting Commonwealth Statute under section 109.¹¹³ Section 109 would be implicated whether or not the Commonwealth government is involved, since the state acts would not apply to business organizations involved in the exportation of greyhounds to Asia if they were acting under a valid Commonwealth statute.¹¹⁴ The third barrier is the common law rule of statutory construction under which statutes do not bind the executive unless they say so explicitly.¹¹⁵

I. Section 61 Allows for Commonwealth Immunities to Be Overcome

The Victorian and New South Wales Prevention of Cruelty to Animals Acts can be applied to the Commonwealth Crown without running afoul of section 61 of the Constitution Act. Section 61 states that “the executive

¹¹¹ The Constitution Act creates three principal sources of governmental power: legislative, executive, and judicial. H.E. RENFREE, *THE FEDERAL JUDICIAL SYSTEM OF AUSTRALIA* 1 (1984). This is known as the separation of powers, not to be confused with the balance of power, which is the balance between the states and the commonwealth. ROBERT WATT, *CONCISE LEGAL RESEARCH* 24 (2001). The term “Crown” refers to the executive government of nine polities—the Commonwealth, the six states, and the two internal self-governing territories. AUSTRALIAN LAW REFORM COMMISSION, *JUDICIAL POWER OF THE COMMONWEALTH: A REVIEW OF THE JUDICIARY ACT 1903 AND RELATED LEGISLATION*, ALRC Report No. 92, sec. 22.3 (2001), available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/92/ch22.html> (last visited May 30, 2005) [hereinafter *JUDICIAL POWER OF THE COMMONWEALTH*]. This is known as the doctrine of the Indivisibility of the Crown, which simply means that the Crown, in all its capacities, is “one and indivisible.” *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129, 152.

¹¹² See *infra* Part III.B.1.

¹¹³ *JUDICIAL POWER OF THE COMMONWEALTH*, *supra* note 111, at 28.10.

¹¹⁴ See *id.* (noting that when there is an inconsistency between a State and a Commonwealth law, the State law is invalid).

¹¹⁵ *Id.* at 28.13-28.14.

power of the Commonwealth . . . extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth."¹¹⁶ It has been interpreted to mean that the Commonwealth retains implied special immunity from the laws of the several states and territories.¹¹⁷ The breadth of this immunity, however, has been substantially narrowed in recent years.¹¹⁸ The respective powers of the state and Commonwealth governments have been delineated so as to allow state laws to bind Commonwealth officials unless such laws aim to modify the Commonwealth's "essential capacities."¹¹⁹ Because the Victoria and New South Wales laws do not do this, they are not in violation of Article 61.

In *Residential Tenancies Tribunal (NSW) v. Henderson*,¹²⁰ the High Court eroded previous barriers that prevented a state from enacting legislation that bound the Commonwealth.¹²¹ The Defense Housing Authority claimed that it was not bound by the state Residential Tenancies Act ("RTA"), which granted an owner of a residential premise the authority to gain access to the premise during the lease period.¹²² The Court held that the Commonwealth was bound by the state statute because states had the power to regulate Commonwealth executives.¹²³ Since the statute was aimed at regulation and was not an attempt to modify the capacities of the executive, the statute was valid. The RTA was a law of general application that applied to anyone and did not specifically discriminate against, or purport to alter the basic powers of the Commonwealth Crown.¹²⁴ Therefore, the High Court had no difficulty finding that the RTA did not contravene Commonwealth prerogatives under Section 61 of the Constitution Act.¹²⁵

Similar to the RTA in *Henderson*, the Victorian and New South Wales Prevention of Cruelty to Animals Acts apply generally to anyone who would

¹¹⁶ AUSTL. CONST. ch. 2, sec. 61.

¹¹⁷ JUDICIAL POWER OF THE COMMONWEALTH, *supra* note 111, at 22.26.

¹¹⁸ *Id.* at 28.9. The High Court has noted that "it is a consequence of our federal system that two governments of the Crown are established within the same territory, neither superior to the other." *Bradken Consolidated Ltd. and Bradford Kendall Foundries Pty Ltd. v. Broken Hill Proprietary Co. Ltd. and Others* (1979) 24 ALR 9, 21 (quoting *Federal Commissioner of Taxation v. Official Liquidator of EO Farley Ltd.* (1940) 63 CLR 278, 312).

¹¹⁹ *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex Parte Defense Housing Authority* (1997) 190 CLR 410, 439 (Dawson, Toohey & Gaudron, JJ.) [hereinafter *Henderson*].

¹²⁰ *Id.*

¹²¹ JUDICIAL POWER OF THE COMMONWEALTH, *supra* note 111, at 28.8.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 28.8, 28.11.

¹²⁵ *Id.*

cause undue suffering or harm to animals.¹²⁶ Abiding by the policies of these laws would not circumscribe the Crown's power to conduct foreign trade; it would simply regulate the manner in which the Crown seeks to exercise this power. It would require the Crown, in the right of the Commonwealth, to tailor its exportation policies to meet the basic animal welfare standards established under state law and now recognized at the national level.¹²⁷ The Australian Animal Welfare Strategy is evidence of a national intent to coordinate state and national law with the end goal of promoting the welfare of animals throughout the country.¹²⁸ Requiring the Commonwealth to abide by these policies would not unduly hinder its ability to control international trade and would not contravene section 61 of the Constitution Act.

2. *The Commonwealth External Affairs Power Does Not Conflict with the Prevention of Cruelty to Animals Acts Under Section 109*

The Parliaments of Victoria and New South Wales were within their power to bind the Commonwealth Crown, because their Prevention of Cruelty to Animals Acts do not run afoul of Section 109 of the Constitution. Section 109 provides that when a state law is inconsistent with a law of the Commonwealth, the Commonwealth law shall prevail.¹²⁹ This constitutional barrier is significant because any business organization exporting greyhounds to Asia under a valid Commonwealth statute that directly conflicts with the Prevention of Cruelty to Animals Act could claim safe harbor under Section 109. The extent to which this section would bar a claim under the Prevention of Cruelty to Animals Act (against either the Commonwealth or individual business organizations) depends on the nature and the scope of the Commonwealth power over live animal exports.

Section 51 of the Constitution Act lists thirty-nine "heads of power" that are granted to the Commonwealth.¹³⁰ A few of these powers are of specific importance to animal law: the power to regulate trade and commerce with other countries, the external affairs power, and the

¹²⁶ Abbott, *supra* note 79, at 4-5; see Prevention of Cruelty to Animals Act, 1986, pt. 2, sec. 9(1) & pt. 1, sec. 4 (Victoria). The Act proscribes certain acts of cruelty when committed by "a person" and explicitly applies to the Crown in all its capacities. *Id.*

¹²⁷ AUSTRALIA ANIMAL WELFARE STRATEGY, *supra* note 75.

¹²⁸ AUSTRALIAN GOV'T DEPT. OF AGRICULTURE, FORESTRY, AND FISHERIES, GOALS, OBJECTIVES AND STRATEGIES, available at <http://www.daff.gov.au/content/output.cfm?ObjectID=462600A0-BA52-41FD-993045C5AD03B9BE> (last visited May 30, 2005).

¹²⁹ AUSTL. CONST. ch. V, sec. 109.

¹³⁰ *Id.*, ch. I, pt. V, sec. 51.

corporations power.¹³¹ Neither the power to regulate trade and commerce with other countries, nor the external affairs power is reserved exclusively for the Commonwealth.¹³² Although the import and export of live animals tends to be regulated by the Commonwealth government,¹³³ this does not mean that a state statute could have no affect on the area.

The Court in *Henderson*, in addition to finding that the RTA did not contravene Section 61, held that it was also consistent with Section 109.¹³⁴ The Court reasoned that the RTA was not in conflict with the Defense Housing Authority Act ("DHAA"), a Commonwealth regulation, because the former was not a comprehensive and exclusive code for the Defense Housing Authority.¹³⁵ Rather, the DHAA assumed an existing legal system by which the Defense Housing Authority would exercise the powers conferred to it by the DHAA.¹³⁶ Importantly, the Court noted that the Commonwealth may be bound by any state legislation that "does not conflict with a valid Commonwealth law."¹³⁷

The Export Control Act governs the export of live animals and contains broadly worded provisions that appear to allow many factors to be taken into account in developing export regulations for specific countries.¹³⁸ The Export Control Act, through the Export Control Regulations (Orders), authorizes the Minister to make orders related to specific exportation areas.¹³⁹ Section 7 describes the criteria under which the Minister may make such regulations. It states that the regulations may prohibit exports of prescribed goods¹⁴⁰ from Australia altogether, or it may prohibit their export to a specified place, or it may require that specified conditions or restrictions be complied with in order for goods to be exported there.¹⁴¹

¹³¹ Sharman, *supra* note 75, at 2.

¹³² See AUSTL. CONST. ch. I, pt. V, sec. 52. This section reserves to the Commonwealth several exclusive powers. These are the exclusive powers to make laws with respect to the peace, order, and good government of the Commonwealth, with respect to Commonwealth places, public service departments (which are transferred to the Executive government of the Commonwealth by the Constitution), and other matters declared by the Constitution to be within the exclusive power of the Parliament. *Id.* Section 107 of the Constitution reserves to the states any power which they had at the time of the enactment of the Constitution, and which was not either divested from them or exclusively vested in the Parliament of the Commonwealth. COLIN HOWARD, AUSTRALIA FEDERAL CONSTITUTIONAL LAW 37 (3rd ed. 1985).

¹³³ Sharman, *supra* note 75, at 2.

¹³⁴ JUDICIAL POWER OF THE COMMONWEALTH, *supra* note 111, at 28.11.

¹³⁵ *Henderson*, *supra* note 119, at 432-433.

¹³⁶ *Id.* at 432.

¹³⁷ JUDICIAL POWER OF THE COMMONWEALTH, *supra* note 111, at 22.28.

¹³⁸ Animal Welfare in Asia, *supra* note 32.

¹³⁹ Export Control (Orders) Regulations, 1982, reg. 3 (Commonwealth).

¹⁴⁰ This includes live animals pursuant to the Export Control (Animals) Order, 2004, sec. 1.04(a) (Commonwealth).

¹⁴¹ Export Control Act, 1982, sec. 7 (Commonwealth).

Like the DHAA in *Henderson*, the Export Control Act does not seem to be a comprehensive and exclusive code. The Act states that it "is not intended to exclude the operation of any other law of the Commonwealth or any law of a State or Territory insofar as that law is capable of operating concurrently with this Act."¹⁴² Like the DHAA, the Export Control Act empowers the minister with certain functions that, in order to be preformed soundly, should be referenced against existing law. In making determinations as to where Australian live animals should be exported, the Commonwealth ministers should be required to take into account existing law that regulates the treatment of live animals.

The language of the Export Control Act suggests that the Victoria and New South Wales Animal Cruelty Acts are not inconsistent with its provisions. Because they are not inherently contradictory, and because the state laws do not attempt to alter the fundamental powers of the Commonwealth, the requirements of *Henderson* are met, and the Crown should be bound by these acts. In addition, the policies of the nation of Australia, as exemplified by state law and growing national awareness, would be best served by including animal welfare considerations in the Commonwealth exportation regulations.

3. *The Victoria and New South Wales Acts Refute the Presumption That a Statute Does Not Bind the Commonwealth*

Australian common law has established a traditional presumption that the Crown is immune from a state statute unless the statute expressly purports to bind the Commonwealth.¹⁴³ Because the Victoria and New South Wales Act establish a clear intent to bind the Commonwealth Crown, this presumption should be refuted.

Australian law experts have noted that a "plainly indicated intention" in the state statute will bind the Commonwealth, assuming that any constitutional issues can be overcome.¹⁴⁴ The Court in *Henderson* found that the New South Wales RTA bound the Crown because the language of the RTA indicated the intention to do so.¹⁴⁵ Section 4 of the New South Wales RTA states that it binds the Crown "not only in the right of New South Wales but also, so far as the legislative power of Parliament permits, the

¹⁴² *Id.* sec. 5.

¹⁴³ *Bradken Consolidated Ltd. and Bradford Kendall Foundries Pty Ltd. v. Broken Hill Proprietary Co. Ltd. and Others* (1979) 24 ALR 9, 16; JUDICIAL POWER OF THE COMMONWEALTH, *supra* note 111, at 28.13-28.14.

¹⁴⁴ JUDICIAL POWER OF THE COMMONWEALTH, *supra* note 111, at 28.17.

¹⁴⁵ *Henderson*, *supra* note 119.

Crown in all its other Capacities.”¹⁴⁶ The Court interpreted this to mean that if it may validly do so, the Act extends to the Crown in the right of the Commonwealth.¹⁴⁷

Similar to the RTA evaluated in *Henderson*, both the New South Wales Act and the Victoria Act have language that purports to bind not only the respective states but, “so far as the legislative power of parliament permits, the Crown in all its other capacities.”¹⁴⁸ Although the state acts could have clarified any lingering confusion by specifically stating an explicit intent to bind the Crown in the right of the Commonwealth, *Henderson* makes it clear that this language alone is sufficient to bind the Commonwealth to the extent that it is constitutionally permissible.

In prohibiting greyhound exports to China and South Korea, Australia must take into account not only its own domestic law, but also its international obligations. The above sections have demonstrated that Australia’s domestic laws should be applicable to the exportation of greyhounds to Asia, and that they are binding on the Commonwealth Crown. However, even if the Commonwealth is obligated by its domestic law and policy to stop the practice of greyhound exportation to Asia, it still must satisfy its international obligations. As a member of the WTO, Australia has trade obligations to co-members China and South Korea. Although this might provide a disincentive for Australia to ban greyhound exports, the following sections will argue that this disincentive can be overcome.

IV. PROHIBITING GREYHOUND EXPORTATIONS TO ASIA CAN BE DONE WITHOUT VIOLATING PRINCIPLES OF INTERNATIONAL TRADE

As members of the World Trade Organization (“WTO”), Australia, South Korea, and China have agreed to abide by certain rules and principles regarding international trade.¹⁴⁹ These obligations are enforced by dispute resolution panels that are formed when one member country challenges another’s legislation as being inconsistent with the GATT.¹⁵⁰ Whether a ban on the exportation of greyhounds to China and South Korea violates the GATT depends on (1) whether it is a quantitative restriction on exports,

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Prevention of Cruelty to Animals Act, 1986, pt. 1, sec. 4 (Victoria); Prevention of Cruelty to Animals Act 1979, pt. 3, sec. 35(a) (New South Wales).

¹⁴⁹ THE WORLD TRADE ORGANIZATION, WTO IN BRIEF, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited May 30, 2005).

¹⁵⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3, 4, 7, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 112 (1994).

contrary to Article XI of the GATT, and (2) whether, if it is found to be a quantitative restriction, Australia could defend the ban based on the general exceptions outlined in Article XX. This Part argues that although an outright ban on the exportation of greyhounds to China or South Korea may violate Australia's obligations under Article XI, Australia could still pursue the ban by structuring it to fit under one of GATT's exceptions. Furthermore, neither China nor South Korea is likely to challenge such a ban.

A. *An Australian Ban on Greyhound Exports May Be Permitted Under the Article XX Exceptions to GATT*

An Australian ban on the export of greyhounds to China or South Korea would most likely run afoul of Article XI,¹⁵¹ which provides that "no prohibitions . . . shall be instituted . . . on the exportation or sale for export of any product destined for the territory of any other contracting party."¹⁵² In Article XX however, the GATT provides a list of exceptions that allow importing and exporting countries to erect barriers to trade when important domestic policy issues are implicated.¹⁵³ Australia can prohibit greyhound exports to China and South Korea if it does so in a way that conforms with the requirements of these exceptions.

In order to fall within a GATT Article XX exception, trade barriers must meet certain requirements so as not to be overly burdensome on international trade.¹⁵⁴ First, the trade measure must be aimed at achieving one of the policy goals listed in Article XX. Second, it must be "necessary" to achieve that goal.¹⁵⁵ Finally, it must conform with the introductory

¹⁵¹ Entitled "General Elimination of Quantitative Restrictions" General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

¹⁵² GATT, *supra* note 151, art. XI(1). Although only governmental measures fall within the ambit of Article XI, "the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it." WTO Panel Report on Argentina Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R, para. 11.18 (Dec. 19, 2000) [hereinafter Argentina Bovine Hides].

¹⁵³ GATT, *supra* note 151, art. XX(a)-(j).

¹⁵⁴ *See, e.g.*, GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155, paras. 5.27, 5.28, 5.39 (1993), 30 I.L.M. 1594 (1991), available at 1991 WL 771248 [hereinafter Tuna-Dolphin I] (discussing the requirement that a trade measure be "necessary" to protect life and health under article XX(b) and that it not constitute arbitrary or unjustifiable discrimination); *see also* WTO Report of the Appellate Body on Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef, paras. 161-164, WT/DS169/AB/R (Dec. 11, 2000), available at 2000 WL 1811011 [hereinafter Korea Beef] (further discussing the "necessary" requirement under article XX(d)).

¹⁵⁵ This section will analyze GATT, arts. XX(a) and XX(b), which use the term "necessary." Not all of the exceptions are qualified by this term. GATT, *supra* note 151, art. XX.

language in Article XX (the Chapeau),¹⁵⁶ which states that the measure must not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail.¹⁵⁷ If Australia follows the relevant GATT jurisprudence and tailors its export ban to meet these conditions, it can pursue its trade policies without violating the GATT.

Australia may defend its ban under either Article XX(a), which allows trade measures that are "necessary to protect public morals," or Article XX(b), which allows measures "necessary to protect human, animal, or plant life or health."¹⁵⁸ Although Article XX(b) in particular has been interpreted narrowly in past dispute panel decisions,¹⁵⁹ more recent panel decisions and an increased awareness of the impact that free trade policies can have on the environment indicate that this interpretation may change.¹⁶⁰ Because of these developments, Australia is more likely to be able to rely on Articles XX(a) or XX(b) to defend an export restraint or related regulation that is supported by important policy goals. Although it would be a case of first impression, future GATT panels may find that Australia's export restrictions on greyhounds to Asian countries such as China and South Korea are permissible under the current and more liberal interpretation of the exceptions outlined in Articles XX(a) and XX(b).

GATT jurisprudence notes that Article XX is to be analyzed in a two-step process.¹⁶¹ First the challenged trade measure must be examined in light of the Article XX-specific exceptions in order to secure provisional justification.¹⁶² Second, the trade measure must be further examined to determine whether or not it is consistent with the Chapeau.¹⁶³ Despite some negative judicial precedent, this Comment argues that the proposed trade

¹⁵⁶ WTO Report of the Appellate Body on United States Import Prohibition of Certain Shrimp and Shrimp Products, paras. 117-118, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle II*].

¹⁵⁷ GATT, *supra* note 151, art. XX.

¹⁵⁸ GATT, *supra* note 151, art. XX (a, b).

¹⁵⁹ *See, e.g.*, *Tuna Dolphin I*, paras. 5.27, 5.28 (holding, *inter alia*, that extra-jurisdictional measures could not be considered necessary to protect life or health); GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, paras. 5.35-5.38, WT/DS29/R (June 16, 1994) [hereinafter *Tuna-Dolphin II*] (holding, *inter alia*, that the term "necessary" in Article XX(b) meant that no alternative existed and that Article XX should be interpreted narrowly to preserve the basic objectives of the GATT).

¹⁶⁰ This Comment analyzes *The Tuna-Dolphin* and the *Shrimp-Turtle* reports even though they dealt with quantitative restrictions on imports (rather than exports). This is necessary because there are no GATT panel disputes over export restraints imposed on the basis of environmental or animal welfare policy goals to both export and import restraints. These cases are also relevant to the Australian greyhound situation because they dealt with similar policy issues.

¹⁶¹ *Shrimp-Turtle II*, *supra* note 156, para. 118.

¹⁶² *Id.*

¹⁶³ *Id.*

measure could pass scrutiny under two of the specific exceptions as well as the Chapeau.

1. *Overly Restrictive Past Interpretations of the Exceptions Unnecessarily Prevented Provisional Justification Under the GATT*

The language of Articles XX(a) and XX(b) would appear to protect an Australian export restriction on greyhounds. However, Article XX has been interpreted by some GATT panels in a way that is overly protective of the free trade goals and gives little meaning to the exceptions themselves.¹⁶⁴ The primary example of this narrow interpretation of Article XX was articulated in a trade dispute involving the United States Marine Mammal Protection Act (“MMPA”), the *Tuna-Dolphin* case.¹⁶⁵ After finding that the MMPA violated Article XI,¹⁶⁶ both *Tuna-Dolphin* panels concluded that the MMPA was not covered by Article XX(b) in large part because of the way they interpreted the term “necessary” in that provision.¹⁶⁷

The *Tuna-Dolphin* panels substantially narrowed the scope of Article XX(b)¹⁶⁸ by defining the term “necessary” in an overly-inclusive way. Instead of asking whether the conservation methods in the MMPA were needed to protect dolphin populations, they determined that no trade measure was necessary enough to support extraterritorial conservation methods because a necessary measure (1) could not be contradictory to the free trade objectives of GATT, and (2) could not be an attempt to alter the policy of the affected member country.¹⁶⁹ By reading these two new elements into the term “necessary” in Article XX(b), the *Tuna-Dolphin* panels appeared to foreclose the possibility that legislation such as the MMPA would ever be upheld. Although this interpretation of Article XX(b) has not been specifically overruled, later panels have undermined much of the reasoning of the *Tuna-Dolphin* panels, leading to a less restrictive definition of the term “necessary.”

¹⁶⁴ Peter Stevenson, *The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107, 122 (2002).

¹⁶⁵ Marine Mammal Protection Act, 16 U.S.C. §1371 (1994). For more detailed information on this dispute, see *Tuna-Dolphin I*, *supra* note 154, & *Tuna-Dolphin II*, *supra* note 159.

¹⁶⁶ *Tuna-Dolphin I*, *supra* note 154, para. 5.18; *Tuna-Dolphin II*, *supra* note 159, para. 5.10.

¹⁶⁷ *Tuna-Dolphin I*, *supra* note 154, para. 5.27-28; *Tuna-Dolphin II*, *supra* note 159, para. 5.38.

¹⁶⁸ Although neither panel analyzed the MMPA in light of Article XX(a), both Article XX(a) and XX(b) are qualified by the term “necessary” and, thus, could be interpreted similarly.

¹⁶⁹ *Tuna-Dolphin I*, *supra* note 154, para. 5.27; *Tuna-Dolphin II*, *supra* note 159, paras. 5.38, 5.39.

2. *Recent Panel Reports and Trade Declarations Have Enabled a Broader Interpretation of the GATT Exceptions*

While a primary function of the GATT is to “ensure that trade flows as smoothly, predictably and freely as possible,”¹⁷⁰ recent panels have recognized the importance of balancing the dual goals of free trade and environmental protection and have provided for a much more logical interpretation of the GATT-specific exceptions in Article XX.¹⁷¹ Non-trade concerns, such as allowing for measures that promote environmental protection, are playing an increasingly important role.¹⁷²

In the *Shrimp-Turtle* dispute, Malaysia, India, Pakistan, and Thailand challenged the United States’ ban on shrimp imports which were caught in a manner that could adversely affect sea turtles.¹⁷³ The original *Shrimp-Turtle* panel ruled that these regulations were contrary to GATT Article XI, and were not saved by Article XX(g).¹⁷⁴ The appellate report stressed however, that in interpreting Article XX the panel should have looked to the environmental as well as the free trade goals that were articulated in the Uruguay Round.¹⁷⁵ The *Shrimp-Turtle* appellate panel noted that rather than solely focusing on free trade, the Preamble to the 1994 GATT articulated dual goals: to expand production and trade, while allowing for optimal use of the world’s resources in accordance with the objectives of sustainable development and environmental protection.¹⁷⁶

In addition to examining the dual goals of GATT, the appellate panel also found it useful to examine other international agreements and conventions that had defined and discussed the environmental goals that Article XX(g) purports to promote.¹⁷⁷ Although the appellate panel interpreted the language of Article XX(g), rather than XX(b) or (a), the principle that considerations not exclusively commercial in nature should be taken into account would seem to apply to the other GATT exceptions as

¹⁷⁰ WORLD TRADE ORGANIZATION, THE WTO IN BRIEF, *supra* note 149.

¹⁷¹ *Id.*

¹⁷² See World Trade Organization, Ministerial Declaration, Nov. 14, 2001, WT/MIN(01)/DEC/W/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]; WTO Panel Report on United States Import Prohibition of Certain Shrimp and Shrimp Products, para. 129, WT/DSS8/AB/R (May 15, 1998) [hereinafter *Shrimp-Turtle*].

¹⁷³ *Shrimp-Turtle*, *supra* note 172, para. 1.1.

¹⁷⁴ *Stevenson*, *supra* note 164, at 124. Article XX(g) allows measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” GATT, *supra* note 151, art. XX(g).

¹⁷⁵ *Shrimp-Turtle II*, *supra* note 156, para. 116.

¹⁷⁶ *Id.* para. 129.

¹⁷⁷ *Id.* para. 130.

well. In addition to the GATT Preamble, current WTO negotiations have focused on environmental concerns. For example, the Doha Declaration states that under WTO rules no country should be prevented from taking measures designed to protect human, animal, or plant life or health, or to protect the environment at levels it considers appropriate.¹⁷⁸ These statements indicate that the GATT does not exist to promote the solitary objective of trade at the expense of all others.

In light of these developments, the *Tuna-Dolphin* principle that no trade measure can be “necessary” if it contravenes free trade is untenable. Seemingly in recognition of this, the *Shrimp-Turtle* appellate panel noted that:

It is not necessary to assume that requiring from exporting countries compliance with, or adoption of certain policies . . . prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.¹⁷⁹

Thus not only did *Shrimp-Turtle* note the necessity of focusing on all of the objectives of GATT instead of just the free trade objectives, it also cast doubt on the *Tuna-Dolphin* extraterritoriality rule. Although the panel’s ultimate decision to uphold the regulation was based in part on the fact that the highly migratory nature of sea turtles enabled the panel to establish a sufficient nexus between the U.S. and the turtles,¹⁸⁰ the panel report leaves open the possibility that other extraterritorial trade measures could also survive scrutiny.¹⁸¹ While greyhounds are obviously not migratory species, they are born and raised in Australia and often spend a significant portion of

¹⁷⁸ Doha Declaration, *supra* note 172, art. 6. This declaration was adopted by the WTO’s highest decision-making body which meets once every two years. WORLD TRADE ORGANIZATION, THE FOURTH WTO MINISTERIAL CONFERENCE, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited May 16, 2005). This declaration “recognizes the importance of non-trade concerns and suggests a course of action that is likely to require the WTO to more squarely address the relationship between trade and non-trade policy.” Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving A Voice to Non-Trade Concerns Within the WTO Regime*, 36 VA. J. INT’L L. 95, 96 (2003).

¹⁷⁹ *Shrimp-Turtle II*, *supra* note 156, para. 121. Since the appellate panel was referring to Article XX in this excerpt, and Article XX applies to both export and import restrictions, there is reason to believe that this passage would also apply to an exporting country requiring compliance from an importing country.

¹⁸⁰ *Stevenson*, *supra* note 164, at 125.

¹⁸¹ *Shrimp-Turtle II*, *supra* note 156, para. 121.

their racing life in Australia before they are exported to foreign countries.¹⁸² As a result, the nexus between the Australian state and the greyhounds seems stronger than it would if Australia were instead regulating the importation of foreign animals or products.

Shrimp-Turtle removed the overly-restrictive barriers to enacting trade regulation that were established in *Tuna-Dolphin* and suggests that it is possible for Australia to enact a ban on greyhound exports to China and South Korea without violating the GATT. Furthermore, it is much more likely to be followed in future disputes than the *Tuna-Dolphin* decisions. Aside from the difficulties associated with the overly-restrictive interpretation of the term “necessary,” the precedential value of *Tuna-Dolphin* is weakened because it was never adopted by the GATT.¹⁸³ Before 1995, the GATT dispute settlement process was generally regarded as limited and unsatisfactory.¹⁸⁴ One party to the dispute could block the decision from being adopted.¹⁸⁵ The post-1995 *Shrimp-Turtle* reports are a product of a newer, more streamlined system and are therefore more persuasive than the *Tuna-Dolphin* reports.¹⁸⁶

3. *Recent Panel Reports Provide Guidance on How Australia Can Impose an Export Prohibition That Is GATT-Consistent*

Although *Shrimp-Turtle* seems to have discredited the logic behind the *Tuna-Dolphin* panel’s interpretation of Article XX(b), it did not specifically analyze this provision, and no panel has yet interpreted Article XX(a). Therefore, in order to ascertain the exact limitations of these articles, it is important to examine how recent dispute resolution panels have interpreted both Article XX(b) and other GATT-specific exceptions.

In order to create an export restraint that can be defended under either Articles XX(a) or (b), Australia would first need to prove that the restraint

¹⁸² See, e.g., Carruthers, *supra* note 2 (noting that dogs are sent to Asia after their racing careers fail in Australia).

¹⁸³ WORLD TRADE ORGANIZATION, MEXICO ETC VERSUS U.S.: ‘TUNA-DOLPHIN,’ available at http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (last visited May 30, 2005).

¹⁸⁴ David A Gattz, *A Post Uruguay Round Introduction to International Trade Law in the United States*, 12 ARZ. J. INT’L & COMP. L. 7, 19 (1995).

¹⁸⁵ *Id.*

¹⁸⁶ The innovative new system contains a highly formalized set of rules and procedures that ensures greater certainty in decision making and no longer requires complete consensus to adopt a panel decision. Carson Wen, *WTO Dispute Settlement Mechanism and the Emerging Jurisprudence*, ASIA L. & PRACTICE (2002), available at <http://www.hewm.com/use/articleDetails.asp?articleID=1342> (last visited May 30, 2005).

protects either public morals or animal life or health.¹⁸⁷ Australia could make a strong case that shipping greyhounds to Asia poses a significant risk to the life or health of the greyhounds due to inadequate animal welfare laws and enforcement in Asia.¹⁸⁸ Previous panels have noted that the existence of such a risk to humans in an import context is enough to conclude that the measure is covered by Article XX(b).¹⁸⁹ Australia has grounds to argue that such exports are contrary to public morals as evidenced by its state animal welfare laws.¹⁹⁰ Such evidence would likely be relevant in analyzing whether the trade measure conforms with Article XX(a).¹⁹¹

Once Australia proves that the export restraint is generally compatible with Article XX(a) or (b), it would still need to show that the restraint is “necessary.”¹⁹² GATT panels have confirmed that a measure is “necessary” for the purposes of Article XX(b) only where less GATT-inconsistent alternatives are not reasonably available to the party imposing the trade measure.¹⁹³ The stronger the policy goal that the trade measure supports (i.e. the more vital the common values pursued), and the more effective the trade measure is, the more likely it is that it is “necessary.”¹⁹⁴ Suggested alternatives are not “reasonably available” however, if they would require a country to deviate from its “chosen level of health protection,”¹⁹⁵ or if they do not “contribute to the realization of the end pursued.”¹⁹⁶ This is because it is “undisputed that WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation.”¹⁹⁷

In order to comply with the GATT, Australia would need to prove that prohibiting greyhound exports to China and South Korea would combat a generally acknowledged animal health risk and that any alternatives would

¹⁸⁷ See WTO Appellate Panel Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, para. 155, WT/DS135/AB/R (March 12, 2001) [hereinafter Asbestos Appellate Report].

¹⁸⁸ See *supra* Part II.

¹⁸⁹ See Asbestos Appellate Report, *supra* note 187, para. 162-63 (noting that an import restriction on products containing asbestos because of the risk such products had to human life was the sort of risk Article XX(b) was intended to cover).

¹⁹⁰ See *supra* Part III.

¹⁹¹ Because no trade measure has been defended under Article XX(a) in a GATT dispute, it is difficult to know what would be required, but some observers have noted that the public morals exception would likely cover policies aimed at promoting animal welfare. Steven Charnovitz, *Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 729-30 (1998).

¹⁹² Asbestos Appellate Report, *supra* note 187, para. 155.

¹⁹³ *Id.* para. 171.

¹⁹⁴ *Id.* para. 172.

¹⁹⁵ See *id.* para. 174 (noting that France could not be expected to employ alternatives where those alternatives would result in preventing it from achieving its chosen level of health protection).

¹⁹⁶ *Id.* para. 172.

¹⁹⁷ *Id.* para. 168.

lessen its chosen level of protection, “fail to contribute to the realization of the ends pursued,” or would not be less GATT-inconsistent than a prohibition on exports. Trade measures enacted to combat a proven and generally acknowledged health risk are likely to be regarded as necessary to combat that risk.¹⁹⁸ Plausible alternatives have not been given much judicial notice in circumstances where they would lessen a nation’s chosen level of health protection.¹⁹⁹

The animal welfare situation in China and South Korea evidences a high level of risk for dogs in those countries. Some industry representatives argue however, that greyhounds will not meet the same fate as other dogs and point out that animal welfare advocates cannot give specific examples of greyhounds entering the dog meat trade. These arguments may mitigate the perceived animal health risk. Therefore Australia should explore whether any reasonably available alternatives exist which would not lessen its chosen level of animal health protection and yet still contribute to the goal of preventing greyhound cruelty in China and South Korea. Plausible alternatives might include regulating the Chinese and South Korean greyhound industry’s practices with respect to retired dogs, establishing an adoption program for retired greyhounds, or funding animal rescue organizations to deal with stray dogs in these countries. While these alternatives may be less GATT inconsistent, it is unlikely that they will be as effective as prohibiting greyhound exports to China and South Korea altogether. As demonstrated above, enforcement problems and cultural attitudes toward animal welfare would likely diminish the effectiveness of such alternatives. However, by examining the likely success of these programs prior to instituting a prohibition on greyhound exports, Australia is more likely to be able to defend its actions in front of a GATT panel.

Previous panel reports have interpreted the term “necessary” in Article XX(d)²⁰⁰ very similarly to the way it has been interpreted in Article XX(b).²⁰¹ The reports have noted that it requires balancing of numerous factors, including the degree of effectiveness of the regulation, the importance of the common interests or values protected by the law, and the extent of the impact on trade.²⁰² Although each GATT exception is unique and will not necessarily use the same definition of the term “necessary,”

¹⁹⁸ *Id.* para. 165-169.

¹⁹⁹ *See, e.g., id.* para. 174.

²⁰⁰ Article XX(d) allows measures necessary to secure compliance with laws or regulations not inconsistent with other GATT provisions. GATT, *supra* note 151, art. XX(d).

²⁰¹ Korea Beef, *supra* note 154, paras. 161-64.

²⁰² *Id.* para. 164.

previous panel interpretations of "necessary" in Article XX(d) are relevant because they are so similar to Article XX(b) interpretations. That the term "necessary" has been interpreted similarly for the purposes of Articles XX(d) and XX(b) may mean that it would be interpreted in a like manner in Article XX(a).

By pursuing alternatives discussed above, Australia would be more likely to be able to justify an export restraint on greyhounds. Given the tenuous welfare situation in China and South Korea, such a restraint would contribute to the policy goal of preventing cruelty to animals. Because it would be a relatively minor disruption of free trade, a dispute panel would be less likely to strike it down as unnecessary.

B. An Australian Ban on Greyhound Exports to Asia Must Not Constitute Arbitrary Discrimination Between Countries Where the Same Conditions Prevail

Once a trade measure is provisionally justified under one of the specific Article XX exceptions, the measure must still be analyzed under the Chapeau.²⁰³ If the measure in question constitutes arbitrary or unjustifiable discrimination in countries where the same conditions prevail, or is a disguised restraint on trade, it will not pass scrutiny.²⁰⁴ The first *Shrimp-Turtle* appellate panel did not certify the U.S. fishing regulations as consistent with the Chapeau even though it had provisionally justified them under Article XX(d).²⁰⁵ Its conclusion was largely based on the fact that the trade measure was applied in a rigid and inflexible manner and that it was imposed prior to engaging in good faith negotiations.²⁰⁶ These pitfalls, however, could be avoided in an Australian restriction on greyhound exports.

Perhaps the primary flaw the panel found in the United States' shrimp fishing regulations was that they were applied in a manner that gave affected countries little or no flexibility in developing their own sea turtle

²⁰³ *Shrimp-Turtle II*, *supra* note 156, para. 147.

²⁰⁴ GATT, *supra* note 151, art. XX.

²⁰⁵ *Shrimp-Turtle II*, *supra* note 156, at 48.

²⁰⁶ In analyzing the trade measure under the Chapeau, the panel also noted it was important to take into account both the environmental and the free trade objectives of the GATT. *Shrimp-Turtle II*, *supra* note 156, paras. 152-153. The Chapeau was intended to strike a balance between these competing goals, and thus the panel stressed that such consideration was necessary in order to give it proper meaning. *Id.* paras. 154-56. The panel also noted that a trade measure could fail to pass muster under Article XX based on its plain meaning or based on its application. *Id.* para. 160. In this situation the panel noted that although the language of the trade measure was satisfactory, its application contravened Article XX. *Id.* para. 161.

conservation programs.²⁰⁷ The panel did not fault the United States for requesting that foreign countries improve their fishing techniques in order to decrease sea turtle bycatch, but rather for the fact that the application of the U.S. regulations forced every country to adopt essentially the same regulations as the United States.²⁰⁸

The other factors that played a role in the *Shrimp-Turtle* decision were the fact that the U.S. regulations failed to give member countries applying for certification adequate due process²⁰⁹ and were enacted before the United States had engaged in good faith negotiations.²¹⁰ The combination of these factors led the first appellate panel to conclude that the U.S. regulations amounted to arbitrary and unjustifiable discrimination between countries where the same conditions prevailed.²¹¹

In order to comply with the Chapeau, Australia should engage in good faith negotiations with China, South Korea, and other Asian countries where it currently exports greyhounds. These negotiations should aim to achieve a solution that is both compatible with greyhound welfare and with the specific needs of each affected country.²¹² If an adequate solution cannot be reached, Australia should tailor the application of its trade measures so that it ensures that affected parties are given an opportunity to contest restraints imposed upon them, and understand why the restraints were imposed. Australia should also make a commitment to helping these countries improve their animal welfare laws and enforcement techniques to conform to the Australian regulations. Australia should not require however, that affected Asian countries enact essentially the same laws as in Australia.

Australia should not only draft its export provision in a way that takes into account these factors, but should also ensure that the restriction is not applied differently from the way it is drafted. For example, Australia could ban the export of greyhounds to countries that do not have an effective system for ensuring greyhound welfare. In doing so, however, it should

²⁰⁷ *Shrimp-Turtle II*, *supra* note 156, paras. 161-65. Although the regulation stated that it required programs of "comparable effectiveness," in practice, U.S. government officials were refusing to certify foreign fishing methods if they did not conform exactly to U.S. methods. *Id.* para. 162.

²⁰⁸ *Stevenson*, *supra* note 164, at 132.

²⁰⁹ *Shrimp-Turtle II*, *supra* note 156 para. 182.

²¹⁰ *Id.* para. 166.

²¹¹ *Id.* para. 186. The analysis in determining whether a trade measure is a disguised restriction on international trade is similar. Previous panels have noted that if a measure constitutes arbitrary or unjustifiable discrimination, it is likely that it is also a disguised restriction on international trade. Concealed or unannounced measures that show an intent to pursue trade-restrictive objectives will also be considered disguised restrictions on international trade. WTO Panel Report on Dominican Republic Measures Affecting Importation and Internal Sale of Cigarettes, para. 4.98, WT/DS302/R (Nov. 26, 2004) [hereinafter *Dominican Republic Cigarettes*].

²¹² Some possible solutions are discussed *supra* Part IV.B.3.

ensure that it does not apply its restriction in a manner that requires other countries to adopt animal welfare regulations identical to its own. Countries should be given the flexibility to determine how to address the problem without having unbendable standards imposed upon them.

Australia should pursue good faith negotiations, allow affected countries the greatest level of flexibility that is possible without sacrificing its basic policy goals, and ensure that due process standards are met. If Australia tailors its export provision in a way that takes these factors into account, it will likely pass muster under the GATT Chapeau.²¹³

C. An Australian Ban on Greyhound Exports Is Unlikely to Be Challenged

Although China and South Korea could potentially prove that an Australian export restraint is contrary to the GATT, neither country is likely to raise the issue. Although all quantitative restrictions on both imports and exports are banned by Article XI, there have been relatively few GATT disputes over export restrictions.²¹⁴ Because of the nature of the proposed quantitative restriction, it is unlikely that China or South Korea would object through formal use of a GATT panel.

GATT is more concerned with trade barriers created by import restrictions than with barriers associated with export restrictions.²¹⁵ This is evidenced both by the lack of GATT disputes over export restrictions such as the proposed restraint on greyhounds, and the lack of literature analyzing such measures. The authors of the GATT charter “had broadly in mind a regulatory system that would essentially inhibit the use of restrictions in

²¹³ These conclusions are bolstered by the fact that the revised U.S. guidelines (implemented in an attempt to conform to the Shrimp-Turtle appellate report decision) were upheld by a third Shrimp-Turtle panel. *Stevenson, supra* note 164, at 132-33. The new U.S. guidelines made the application of its fishing restrictions GATT-consistent because they increased the flexibility given to affected member countries. The United States also offered further technological support and addressed the due process concerns of the appellate panel. *Id.*

²¹⁴ Some panel reports that do deal with export measures are: Argentina Bovine Hides (where the EU failed in its allegations that by participating in customs inspections of exported bovine hides, representatives of the Argentine tanning industry were putting pressure on exporters and thus restrained exports) and WTO Panel Report on Canada Measures Relating to Exports of Wheat and Treatment of Imported Grain, WT/DS276/AB/R (Aug. 30, 2004) (where the United States failed in its allegations that Canada was giving the Canadian Wheat Board “lavish and special privileges” in violation of the provisions governing State Trading Enterprises in GATT, art. XVII).

²¹⁵ This excludes export restraint agreements (“ERAs”), which have been identified as troublesome and increasingly common types of safeguard actions. ERAs occur when an importing country requests that an exporting country impose voluntary restraints on their exports in order to improve some aspect of the importing country’s economy. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 203 (2nd ed. 1997).

imports other than tariffs, and then provide for negotiation of reduced tariff levels.”²¹⁶ Import restrictions, imposed to protect the domestic economy, are the traditional “protectionist” trade measures that corrode the world trading system.²¹⁷ Export restraints on goods such as live animals, which are not a result of unfair corroboration or a desire to do political favors for an importing country, are not the type of restraints normally challenged.²¹⁸ Presumably this has to do with the fact that such restraints do not create the same sort of economic damage as import restraints.

If Australia were to ban the exports of greyhounds to China or South Korea, any economic effects would likely be felt in Australia rather than Asia. China and South Korea are two of the world’s leading traders.²¹⁹ In 2003, China and South Korea were the third and thirteenth largest importers respectively.²²⁰ Given the available numbers on Australian greyhound exports to these countries,²²¹ greyhound trade does not appear to constitute a large share of this market. Although gambling is on the rise in locations throughout Asia, some reports show that greyhound racing enterprises have not been profitable.²²² Requesting a GATT panel over such an issue would not be worth risking strained relations with Australia, especially with the various negotiation-based dispute resolution opportunities available.²²³

V. AUSTRALIA SHOULD PROHIBIT GREYHOUND EXPORTS TO CHINA AND SOUTH KOREA NOTWITHSTANDING THE RISK OF A GATT DISPUTE

Even at the risk of facing a GATT dispute, Australia should move forward with legislation to prevent greyhounds from being shipped to China and South Korea. Animal welfare considerations are becoming more pronounced in the international arena. The Universal Declaration for the

²¹⁶ *Id.* at 139.

²¹⁷ See BLACK’S LAW DICTIONARY 1260 (8th ed.) (defining “protectionism” as the protection of domestic business and industries against foreign competition by imposing high tariffs and restricting imports).

²¹⁸ A very small percentage of GATT dispute panel reports that deal with quantitative restrictions under Article XI deal with export restraints. See *supra* note 214.

²¹⁹ WORLD TRADE ORGANIZATION, LEADING EXPORTERS AND IMPORTERS IN WORLD MERCHANDISE TRADE 2003, available at http://www.wto.org/english/res_e/statis_e/its2004_e/section1_e/i05.xls (last visited May 30, 2005).

²²⁰ *Id.*

²²¹ See *supra* Part II.A.

²²² *Macau’s Gaming Industry Seeks a Profit Hike*, PEOPLE’S DAILY ONLINE, Apr. 1, 2004, at http://english.people.com.cn/200404/01/eng20040401_139160.shtml (last visited May 30, 2005).

²²³ Robert J. Girouard, *Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes*, 15 GEO INT’L ENVTL. L. REV. 247, 278-286 (2003) (noting that parties can resolve disputes through the WTO’s Committee on Trade and the Environment or by consultation). Also, the DSU provides alternative dispute resolution methods such as arbitration and mediation. *Id.*

Welfare of Animals²²⁴ is an indication of this growing international concern. There is widespread support for the idea that animals should have the right to be free from pain, fear, and hunger,²²⁵ and many countries have domestic laws and policies that reinforce this view. A recent international conference held to discuss the Declaration was attended by delegations from twenty-three countries including Australia, the European Commission, the United States, and China.²²⁶ By taking a stand on the exportation of greyhounds to Asia, Australia could show its support for this important animal welfare issue.

Recently many countries, including the United States and Australia, have expressed their support for the rights of companion animals by banning the export and import of cat and dog fur.²²⁷ After a lengthy investigation, the Humane Society of the United States recently uncovered the “widespread brutal slaughter of domestic dogs and cats in China and other Asian nations” for the manufacture of clothing, accessories, and trinkets that are exported around the globe.²²⁸ This prompted many countries, such as Australia,²²⁹ the United States, Italy, Denmark, France, Greece, Sweden, and the United Kingdom to ban or make a commitment towards banning trade in dog and cat fur.²³⁰ This growing international support for animal welfare could prove to be important in future trade disputes.

VI. CONCLUSION

Australia’s export of greyhounds to China and South Korea is inconsistent with its Animal Welfare Acts and with its expressed policies on animal cruelty. Nevertheless Australia continues to allow the exportation of companion animals to countries without adequate animal welfare laws. Australia must put an end to this practice in order to conform to its domestic

²²⁴ WORLD SOCIETY FOR THE PROTECTION OF ANIMALS, UNIVERSAL DECLARATION FOR THE WELFARE OF ANIMALS (2000), available at <http://www.wspa.org.uk/index.php?page=351> (last visited May 30, 2005).

²²⁵ Peter Sankoff, *WSPA Director Highlights Need for UN Declaration on Animal Welfare*, at <http://www.arlan.org.nz/articles/WSPA%20on%20UN%20Dec%20for%20animals.htm> (last visited May 30, 2005); *International Developments*, *supra* note 81.

²²⁶ Sankoff, *supra* note 225.

²²⁷ HUMANE SOC’Y OF THE U. S BETRAYAL OF TRUST: THE GLOBAL TRADE IN DOG AND CAT FUR, available at http://www.hsus.org/wildlife/issues_facing_wildlife/fur_and_trapping/betrayal_of_trust_the_global_trade_in_dog_and_cat_fur/ (last visited May 30, 2005) [hereinafter BETRAYAL OF TRUST].

²²⁸ *Id.*

²²⁹ Media Release, New South Wales Young Lawyers Animal Rights Committee, Young Lawyers Welcome Government Ban on Cat & Dog Fur (May 26, 2004), available at http://www.lawsociety.com.au/uploads/filelibrary/1085970177515_0.8146122727182272.pdf (last visited May 30, 2005).

²³⁰ BETRAYAL OF TRUST, *supra* note 227.

law and policy. An Australian export ban is unlikely to be challenged by China or South Korea, but Australia could tailor such a ban so that it is more likely to be defensible under the GATT. There is no reason to continue to condone this cruel trade. It should and can be phased out as soon as possible.

