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

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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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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. 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, Australian law guards against, and punishes cruel disposal methods and inhumane treatment. 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. 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. 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 Whales, 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.
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 Crown 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. China and South Korea are among the countries that the industry has targeted for expansion. These countries however, are creating an animal-based entertainment industry without concurrently developing substantive animal welfare laws. Management of abandoned and unwanted dogs in China and South Korea is a relatively new concept, and management techniques are often inhumane. Unwanted dogs are plentiful in the greyhound industry, and the resultant welfare issues have caused concern among animal activists as well as those involved in the breeding and exporting of dogs. The Australia New

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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).
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, 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. 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. 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. 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.

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. However, some insiders believe that hundreds of dogs are sent to Asia from Australia annually. Some statistics show that in 2001, 200 dogs went to South Korea and 159 to China. In late 2002, fifty-three Australian greyhounds were shipped to the Shanghai Wild Animal Park.

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. 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. Because of the problems associated with greyhound exports, one of the most prominent international greyhound advocacy groups campaigns heavily against this practice.

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. Issues such as responsible pet ownership and the care of abandoned and stray animals have yet to be addressed in many locations. Although some Asian countries have laws that ban the consumption of dog meat, it continues largely unchecked in China and South Korea and is often accompanied by horrific slaughter methods. Despite these poor conditions, Australia continues to allow greyhound exports to countries where they will likely face inhumane conditions.

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21 Id.
22 Carruthers, supra note 2.
23 *Dog Racing Spreads to China*, supra note 17.
24 Carruthers, supra note 2.
25 Id.
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.
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/australiamodel.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 then of protecting animal welfare. Furthermore this law requires a spiteful motive to be convicted. Id.


\(^{36}\) 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. The “animal rights theory” has been painted as “anti-humanity” by some commentators, who claim that animal-rights activists aim to give animals greater rights than humans. 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. 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. 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. 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. Without any Chinese law to guard against acts of cruelty towards animals, such slaughter methods will continue unchecked. This poses a significant ethical problem for Australians looking to profit from shipping dogs to Asia.

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. However, the Chinese dog meat industry is enormously lucrative and the

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40 Being Humane, supra note 35.
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.
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.\textsuperscript{50} In addition, as China prepares for the 2008 Olympics, Chinese citizens are being paid bounties to rid the streets of stray dogs.\textsuperscript{51} The disposal methods are extremely cruel and inhumane.\textsuperscript{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.\textsuperscript{53} South Korea's Animal Protection Law penalizes those who subject animals to unnecessary pain without "proper rational reason,"\textsuperscript{54} or who kill them in ways that "provoke disgust" without "proper, rational reason."\textsuperscript{55} The Korean Animal Protection Society ("KAPS") reports, however, that the law is almost never enforced.\textsuperscript{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.\textsuperscript{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.\textsuperscript{58} These photographs display disturbing images of multiple dogs cramped in small cages and other dogs hanging by their necks.\textsuperscript{59} They also describe the horrific torture methods that are alleged to bring out the medicinal qualities

\textsuperscript{50} Tao, supra note 34.
\textsuperscript{51} China Prepares for Olympics, supra note 12.
\textsuperscript{52} Id.
\textsuperscript{53} Korean Society for the Protection of Animals, supra note 6.
\textsuperscript{55} Id.
\textsuperscript{56} Korean Society for the Protection of Animals, supra note 6.
\textsuperscript{59} ABOUT EATING DOG, supra note 58; KOREAN DOG MARKET PHOTOS, supra note 58.
in the dogs before their death.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{64} Stolen or abandoned pets have also been known to enter the dog meat trade.\textsuperscript{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,\textsuperscript{66} but dog meat producers in South Korea are willing to purchase purebred dogs in order to supplement their meat supply.\textsuperscript{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 loosing 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.\textsuperscript{68} A proposed amendment to the Animal Protection Law legalizing the dog-meat industry was rejected last year after

\textsuperscript{60} Id.
\textsuperscript{62} \textit{Pure-bred Dogs also Sold for Food}, supra note 12.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} \textit{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).
\textsuperscript{67} \textit{Pure-bred Dogs also Sold for Food}, supra note 12.
serious lobbying efforts by KAPS.\(^6^9\) Recently, the South Korean government proposed strengthening the law and has forwarded a copy of the proposal to KAPS for review.\(^7^0\) KAPS however, faces a constant struggle to prevent the legalization of dog consumption,\(^7^1\) and the fact remains that the existing laws often go unenforced.\(^7^2\)

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 Korea\(^7^3\) 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.\(^7^4\) 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.

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\(^6^9\) Id.


\(^7^1\) Korean Government Tries To Legalize Dog-Meat, supra note 57.

\(^7^2\) KOREAN SOCIETY FOR THE PROTECTION OF ANIMALS, supra note 6.

\(^7^3\) See infra Part III.A.

\(^7^4\) 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.

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\(^{76}\) 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). Sharmar, 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-9518-49A9B-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 Act ("New South Wales Act"). This Act establishes that cruelty towards animals will not be tolerated and will be penalized. 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. Under the New South Wales Interpretation Act, statutes should be construed in a manner that promotes the "purpose or object underlying the Act." Such a construction is preferred to one that would not promote the statutory purpose. 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. 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." "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..."
seriously injured, diseased or in such a physical condition that it is cruel to keep it alive." 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. 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. Furthermore, it is an offense to carry or convey an animal in a way that inflicts unreasonable pain upon the animal.

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

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. The RSPCA conducts thousands of investigations into allegations of animal cruelty each year. In 2004 there

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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.
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.
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.
were 112 cruelty prosecutions in New South Wales, and in the preceding year there were 119.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{101} Id.

\textsuperscript{102} Interpretation of Legislation Act, 1984, pt. 4, sec. 35 (Victoria).

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

\textsuperscript{104} Id. pt. 2, sec. 9(1)(c).
another person by which the other person agreed to care for the animal, evidence of such an agreement is not a defense to a charge of aggravated cruelty. 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. In 2004 there were fifty-two cruelty prosecutions in Victoria, and the preceding year there were seventy. The Act also authorizes the adoption of Codes of Practice similar to those adopted in New South Wales. 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. 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

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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).
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, DEPT’T OF PRIMARY INDUSTRIES, CODE OF PRACTICE FOR THE OPERATION OF BREEDING AND REARING ESTABLISHMENTS, 2002, sec. 2.1 (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.


The Parliaments of Victoria and New South Wales are capable of binding the Commonwealth Crown. 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 61 and there must be no conflicting Commonwealth Statute under section 109. 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. The third barrier is the common law rule of statutory construction under which statutes do not bind the executive unless they say so explicitly.

1. 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

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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).

power of the Commonwealth ... extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth." It has been interpreted to mean that the Commonwealth retains implied special immunity from the laws of the several states and territories. The breadth of this immunity, however, has been substantially narrowed in recent years. 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." 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*, the High Court eroded previous barriers that prevented a state from enacting legislation that bound the Commonwealth. 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. The Court held that the Commonwealth was bound by the state statute because states had the power to regulate Commonwealth executives. 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. Therefore, the High Court had no difficulty finding that the RTA did not contravene Commonwealth prerogatives under Section 61 of the Constitution Act.

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

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116 AUSTL. CONST. ch. 2, sec. 61.
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.*
122 *Id.*
123 *Id.*
124 *Id.* at 28.8, 28.11.
125 *Id.*
cause undue suffering or harm to animals.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. \textit{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{126} Abbott, \textit{supra} note 79, at 4-5; \textit{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. \textit{Id}.
\item \textsuperscript{127} \textit{AUSTRALIA ANIMAL WELFARE STRATEGY, supra} note 75.
\item \textsuperscript{128} \textit{AUSTRALIAN GOV'T DEPT. OF AGRICULTURE, FORESTRY, AND FISHERIES, GOALS, OBJECTIVES AND STRATEGIES, available at} \url{http://www.daff.gov.au/content/output.cfm?ObjectID=462600A0-BA52-41FD-993045C5AD03B9BE} (last visited May 30, 2005).
\item \textsuperscript{129} \textit{AUSTL. CONST.} ch. V, sec. 109.
\item \textsuperscript{130} \textit{Id.}, ch. I, pt. V, sec. 51.
\end{itemize}
corporations power.\textsuperscript{131} Neither the power to regulate trade and commerce with other countries, nor the external affairs power is reserved exclusively for the Commonwealth.\textsuperscript{132} Although the import and export of live animals tends to be regulated by the Commonwealth government,\textsuperscript{133} this does not mean that a state statute could have no affect on the area.

The Court in \textit{Henderson}, in addition to finding that the RTA did not contravene Section 61, held that it was also consistent with Section 109.\textsuperscript{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.\textsuperscript{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.\textsuperscript{136} Importantly, the Court noted that the Commonwealth may be bound by any state legislation that "does not conflict with a valid Commonwealth law."\textsuperscript{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.\textsuperscript{138} The Export Control Act, through the Export Control Regulations (Orders), authorizes the Minister to make orders related to specific exportation areas.\textsuperscript{139} Section 7 describes the criteria under which the Minister may make such regulations. It states that the regulations may prohibit exports of prescribed goods\textsuperscript{140} 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.\textsuperscript{141}

\textsuperscript{131} Sharman, \textit{supra} note 75, at 2.
\textsuperscript{132} \textit{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. \textit{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. \textit{Colin Howard, Australia Federal Constitutional Law} 37 (3rd ed. 1985).
\textsuperscript{133} Sharman, \textit{supra} note 75, at 2.
\textsuperscript{134} \textit{Judicial Power of the Commonwealth,} \textit{supra} note 111, at 28.11.
\textsuperscript{135} \textit{Henderson,} \textit{supra} note 119, at 432-433.
\textsuperscript{136} \textit{Id.} at 432.
\textsuperscript{137} \textit{Judicial Power of the Commonwealth,} \textit{supra} note 111, at 22.28.
\textsuperscript{138} \textit{Animal Welfare in Asia,} \textit{supra} note 32.
\textsuperscript{139} Export Control (Orders) Regulations, 1982, reg. 3 (Commonwealth).
\textsuperscript{140} This includes live animals pursuant to the Export Control (Animals) Order, 2004, sec. 1.04(a) (Commonwealth).
\textsuperscript{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."  

Like the DHAA, the Export Control Act empowers the minister with certain functions that, in order to be performed 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. 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. 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. 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

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142 Id. sec. 5.
144 JUDICIAL POWER OF THE COMMONWEALTH, supra note 111, at 28.17.
145 *Henderson*, supra note 119.
Crown in all its other Capacities.” 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.

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.” 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. 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. 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,
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, 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." 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. 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. 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. Finally, it must conform with the introductory requirements.

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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).


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), which states that the measure must not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail. 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." Although Article XX(b) in particular has been interpreted narrowly in past dispute panel decisions, 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. 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. First the challenged trade measure must be examined in light of the Article XX-specific exceptions in order to secure provisional justification. Second, the trade measure must be further examined to determine whether or not it is consistent with the Chapeau. Despite some negative judicial precedent, this Comment argues that the proposed trade

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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.

I. 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) 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."

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," 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. Non-trade concerns, such as allowing for measures that promote environmental protection, are playing an increasingly important role.

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. The original *Shrimp-Turtle* panel ruled that these regulations were contrary to GATT Article XI, and were not saved by Article XX(g). 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. 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.

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. 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

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

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, the panel report leaves open the possibility that other extraterritorial trade measures could also survive scrutiny. While greyhounds are obviously not migratory species, they are born and raised in Australia and often spend a significant portion of

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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/tratop_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. As a result, the nexus between the Australian state and the greyhounds seems stronger then 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. Before 1995, the GATT dispute settlement process was generally regarded as limited and unsatisfactory. One party to the dispute could block the decision from being adopted. 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.


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

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182 See, e.g., Carruthers, supra note 2 (noting that dogs are sent to Asia after their racing careers fail in Australia).
185 Id.
protects either public morals or animal life or health. 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. 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). Australia has grounds to argue that such exports are contrary to public morals as evidenced by its state animal welfare laws. Such evidence would likely be relevant in analyzing whether the trade measure conforms with Article XX(a).

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.” 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. 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.” Suggested alternatives are not “reasonably available” however, if they would require a country to deviate from its “chosen level of health protection, or if they do not “contribute to the realization of the end pursued.” 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.”

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
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lessen its chosen level of protection, “fail to contribute to the realization of the ends pursued,” or would not be less GATT-inconsistent then 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. Plausible alternatives have not been given much judicial notice in circumstances where they would lessen a nation’s chosen level of health protection.

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) very similarly to the way it has been interpreted in Article XX(b). 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. Although each GATT exception is unique and will not necessarily use the same definition of the term “necessary,”

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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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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

\textsuperscript{203} Shrimp-Turtle II, supra note 156, para. 147.
\textsuperscript{204} GATT, supra note 151, art. XX.
\textsuperscript{205} Shrimp-Turtle II, supra note 156, at 48.
\textsuperscript{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. 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.

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 process and were enacted before the United States had engaged in good faith negotiations. 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.

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. 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

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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.  

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. 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. 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.  

Import restrictions, imposed to protect the domestic economy, are the traditional "protectionist" trade measures that corrode the world trading system. 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. 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. In 2003, China and South Korea were the third and thirteenth largest importers respectively. Given the available numbers on Australian greyhound exports to these countries, 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. 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.

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.
220 Id.
221 See supra Part II.A.
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 Animals\textsuperscript{224} 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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{228} This prompted many countries, such as Australia,\textsuperscript{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.\textsuperscript{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


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

\textsuperscript{226} Sankoff, supra note 225.


\textsuperscript{228} Id.


\textsuperscript{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.