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EXPORTING MORALITY WITH TRADE RESTRICTIONS: THE WRONG PATH TO ANIMAL RIGHTS

INTRODUCTION

In 1998, an undercover Humane Society¹ investigation revealed that the largest coat retailer in America, Burlington Coat Factory, had been selling men's parkas trimmed with dog fur imported from China.² Posing as American fur traders, investigators discovered that millions of dogs and cats throughout Asia were being slaughtered inhumanely for their pelts, while American consumers remained naive to the difference in stores because, when dyed, dog and cat fur is virtually indistinguishable from fox, rabbit, or coyote fur.³ The New York Times picked up the story immediately, and as public outrage ensued, the Humane Society took its findings to Congress.⁴ On November 9, 2000, the Dog and Cat

1. The Humane Society is a nonprofit U.S. animal protection group, which was established in 1954. For more information, see Humane Society of the United States, http://www.hsus.org/about_us/ (last visited Nov. 24, 2008).

2. *Retailer Recalls Parkas Trimmed in Dog Fur*, N.Y. TIMES, Dec. 16, 1998, at B11 [hereinafter *Recall*].

3. *Id.*

4. The following Congressional Findings were spurred by the Humane Society's 1998 report:

An estimated 2,000,000 dogs and cats are slaughtered and sold annually as part of the international fur trade. Internationally, dog and cat fur is used in a wide variety of products, including fur coats and jackets, fur trimmed garments, hats, gloves, decorative accessories, stuffed animals, and other toys.

. . . The United States represents one of the largest markets for the sale of fur and fur products in the world

. . . .

. . . Publicly available evidence reflects ongoing significant use of dogs and cats bred expressly for their fur by foreign fur producers for manufacture into wearing apparel, toys, and other products that have been introduced into United States commerce

. . . .

. . . The trade of dog and cat fur products is ethically and aesthetically abhorrent to United States citizens. Consumers in the United States have a right to know if products offered for sale contain dog or cat fur and to ensure that they are not unwitting participants in this gruesome trade.

Dog and Cat Protection Act of 2000: Findings and Purposes, Pub. L. No. 106-476, § 1442, 114 Stat. 2163 (2000) [hereinafter *Findings*]. *See also* Humane Society of the Unit-

Protection Act (“DCPA”) made it unlawful to import any “dog or cat fur product” into the United States.⁵

Having demonstrated that culture shock can be home delivered in the “flattening”⁶ global world, Chinese fur-farming practices left American pet lovers scowling eastward in bewilderment. The DCPA was a response to public *injury*; had anthrax been discovered lurking in imported coats, consumers may have been no more provoked to xenophobia. But dog fur differs significantly from anthrax in that it poses no harm to human health. Thus, if not for the Humane Society drumming up hyperbolic headlines, Americans could have continued buying and wearing dog fur unknowingly and perhaps indefinitely. To believe that the United States is devoid of dog and cat fur today is to assume that the DCPA has been enforced flawlessly. But more recent investigations indicate otherwise; over the past two years, dog fur has been discovered on the racks at J.C. Penney,⁷ Macy’s,⁸ Nieman Marcus, and many other stores.⁹ Rejecting the age-old aphorism that “what you don’t know can’t hurt you,” the Humane Society has been lobbying for a “Dog and Cat Fur Prohibition Enforcement Act” since 2007.¹⁰ This begs an obvious question—how many Americans unwittingly sport dog fur at present?—but there are many other important questions that have not been addressed in regard to this uniquely American legislative initiative premised on moral superiority.

ed States, Dog and Cat Fur: Aftermath of an HSUS Investigation, http://www.hsus.org/furfree/dogs_cats/betrayal/dog_and_cat_fur_aftermath.html (last visited Nov. 24, 2008).

5. The Dog and Cat Protection Act of 2000 provides, in relevant part:

In general, [i]t shall be unlawful for any person to

. . . import into, or export from, the United States any dog or cat fur product; or

. . . introduce into interstate commerce, manufacture for introduction into interstate commerce, sell, trade, or advertise in interstate commerce, offer to sell, or transport or distribute in interstate commerce in the United States, any dog or cat fur product.

Dog and Cat Protection Act of 2000, 19 U.S.C. § 1308 (2000).

6. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2006) (discussing globalization).

7. *Fur Flies as Penney Restocks Dog-fur Coats*, MSNBC, Jan. 12, 2007, <http://www.msnbc.msn.com/id/16597610>.

8. *Macy’s Pulls Sean John Hooded Jackets over Use of Dog Fur*, FOX NEWS, Dec. 26, 2006, <http://www.foxnews.com/story/0,2933,238864,00.html>.

9. *Humane Society Urges Crackdown on Dog Fur*, MSNBC, Mar. 13, 2007, <http://www.msnbc.msn.com/id/17584385/>.

10. Humane Soc’y of the U.S., *Dog Scandal Pushes New Fur Labeling Bill*, Feb. 7, 2007, http://www.hsus.org/furfree/news/fur_labeling_bill_introduced.html. See also H.R. 891, 110th Cong. (2nd Sess. 2007).

It is a truism that Westerners broadly and vehemently oppose animal cruelty and that Americans are generally fond of domesticated dogs—however, a consensus in opposition to cruel treatment is far from an agreement on the proper scope of animal “rights.” Activists call for the broadest possible scope of protection,¹¹ while scientists, consumers, consumer advocates, legislators, and journalists take varying, less comprehensive stances.¹² The 1998 Humane Society investigation that led to the DCPA was but another call to arms—an attempt to mobilize a generally indifferent public to stand up and do something about global animal suffering. A report describing puppies “strangled, bludgeoned, clubbed or bled to death”¹³ for their fur seems certain to garner unique attention in a nation where “pet lovers” are a large and uncontroversial group; but this group offers passive sympathy, which, to activists who literally embody the animal welfare cause, may seem unfortunately insufficient.¹⁴ Many activists seek nothing short of an end to human consumption of omelets and milk,¹⁵ but it is worth considering whether ordinary Americans would have been as outraged in 2000 had headlines told of dogs killed painlessly amidst a detrimental animal overpopulation in a region where selling fur to a thriving American fashion market was the only way many poverty-stricken farmers could feed their families.¹⁶

It is implicit that fewer Americans protest when foxes, rabbits, or coyotes are killed for coats. And it is demonstrable that self-described

11. See discussion *infra* Part I.B.

12. Various arguments stand in the way of an extremist animal rights agenda. For instance, some scientists have claimed that animal testing is “the only way of conducting important research into worldwide diseases such as HIV.” Demian Hobby, *Activist Cleared as Oxford Opens Animal Testing Facility*, JOURNAL, Nov. 23, 2008, <http://www.journal-online.co.uk/article/5086-activist-cleared-as-oxford-opens-animal-testing-facility>. It has also been argued that veganism can cause dangerous if not fatal protein deficiency, to such an extent that vegan pregnancy may be “irresponsible.” Nina Planck, *Death by Veganism*, N.Y. TIMES, May 21, 2007, at A19. Furthermore, regulators and consumer-protection groups may argue that a more appropriate public priority is to protect humans from animals rather than to protect animals from humans. See *Agriculture Dept. Wants Meat Inspectors to Focus on Food Safety*, N.Y. TIMES, Aug. 31, 2000, at A23 (quoting an associate within the U.S. Department of Agriculture who said in 2000, “We’re trying to make sure our resources are devoted to food safety That’s our first priority . . .”).

13. *Recall*, *supra* note 2.

14. See generally Michael Specter, *The Extremist*, NEW YORKER, Apr. 14, 2003, at 52 (profiling an “extremist” animal rights group leader).

15. See *id.* at 54, 56.

16. Chinese State Forestry Administration Deputy Chairman Zhao Xuemin has spoken out against the dog and cat fur trade, but has noted that it is unfortunately driven by economic hardship. *China Pledges to Stop Cat and Dog Fur Trade*, IRELAND. ONLINE, May 24, 2006, <http://breakingnews.iol.ie/news/?c=ireland&jp=cwgbaucweyql>.

animal sympathizers (those who want to save dogs but enjoy steak) are much less interested in helping animals when it means they must incur life-changing costs in the process.¹⁷ Sympathizers lured to the activist movement by outrageous images of cruelty may begin to have second thoughts when the totality of the animal rights agenda becomes clear.¹⁸ The only way to escape hypocrisy is to assert that the proper scope of animal rights is a question on which reasonable minds can disagree.

Disagree they do, and even though activism has been growing in power and persuasiveness,¹⁹ drastic reforms still seem unimaginably distant. Some activists, bolstered by scholars and scientists, have concluded that humans should treat animals as equals.²⁰ Still, others who take on the issue assert that the debate remains mired in nuance.²¹ Legislators have been left to act on the majoritarian sentiments of the moment, and thus, activists have been left to act on the morals of the majority.

To Americans who do not plan to abandon their hamburgers, the DCPA may serve as guilt reduction. Surely, Americans know when they sit down to eat pork chops that a living animal²² was born, raised, and then killed—perhaps painfully—for the sake of the meal. And with activists' reminders all the more frequent and public, it may feel quite redeeming to find an animal welfare law that is easy to get on board with—a law that will seemingly help animals but will not require alterations to the customary and ingrained ways of living in America.

In the end, however, it seems shortsighted to claim possession of a simple and clear (and globally applicable) answer to broad questions of human duty to animals. There are too many obscure factors and viewpoints that must be included in the calculus, and it is too easy to unknowingly allow ingrained prejudicial beliefs to dictate one's judgment. Some observers may form conclusions about animal treatment in the East without even scratching the surface of fundamental questions like, why

17. Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1364 (2000) (arguing that while U.S. laws prevent infliction of gratuitous pain on animals, animals still lose whenever their interests require balancing against human interests).

18. *Reductio ad absurdum*, the logical extension of the animal rights agenda is that animals are our equals and harming an animal is the same as harming a human. See Specter, *supra* note 14, at 58.

19. See *infra* note 58 and accompanying text.

20. See generally PETER SINGER, ANIMAL LIBERATION 1 (1975) (arguing that the "ethical principle on which human equality rests requires us to extend equal consideration to animals too").

21. See *supra* note 12 and accompanying text. See also discussion *infra* Part I.B.

22. See, e.g., E.B. WHITE, CHARLOTTE'S WEB (1952) (chronicling Wilbur the talking pig's miraculous avoidance of slaughter).

would such treatment differ geographically? To what extent should Western legal regimes premise their ideals on “universal truths”? When is it okay to impose one’s moral code on others? To what extent can humans parse meaningful differences among similar species of animals? To what extent would those differences be relevant to the treatment of animals? Should there be a hierarchy by which some animals are treated more favorably than others? Why is it “wrong” to wear dog fur but not fox fur in America? When is emotional harm as severe as physical harm when resulting from imported products? And, finally, when exactly is it okay to prohibit the importation of foreign products on the basis of morality under the long-standing General Agreement on Tariffs and Trade (“GATT”)?²³

All of these questions deserve more than passing consideration before laws with broad international impact are enacted at the behest of emotion. This Note will argue that the Dog and Cat Protection Act of 2000 is an ill-conceived federal statute and that Congress should not waste time or federal resources enacting, let alone debating, the presently pending Dog and Cat Prohibition Enforcement Act.²⁴ This argument should not be construed as a judgment as to the scope or nature of the duty humans owe to animals; rather, it is a judgment regarding the nature of morality-based trade restrictions and is rooted in pragmatic policy analysis of normative moral reasoning, competitive economic efficiency, and the principles of international free trade agreements.

Part I of this Note will critique normative moral theory with respect to its fundamental role in animal welfare proselytizing, its applicability to legal theory, and its usefulness as a basis for legal decision making. Part II will discuss international trade disputes arising over morality-based domestic import restrictions in order to examine why the GATT has consistently been interpreted to err on the side of free trade and consumer choice. Finally, Part III will argue that the DCPA is not only an ineffective and unenforceable law but also potentially counterproductive to the goals of the Western animal welfare movement and overly costly to global trade infrastructure in light of more effective alternatives.

I. ACTIVISM AND NORMATIVE MORAL REASONING: PIG, SHEEP, DOG, FOREIGNER, AMERICAN?

Even in progressive American families, children will not be scolded for ranking their favorite animals. They may judge these animals arbitra-

23. See discussion *infra* Part II.

24. This presently pending statute would improve enforcement of the DCPA. See discussion *infra* Part III.B.

rily by attributes like “pretty colors,” “scary tusks,” or “awesome shell,” and cartoons and other media may help them form misleading conceptions about animal personalities, but this is okay. There is no need for alarm so long as they are not ranking humans. Science has done good work clearing up long-held misconceptions about skin-tone and ethnicity-based differences,²⁵ and today, billions of humans expressing themselves through hundreds of collaborating governments seem to agree on the existence of something called fundamental or “natural” human rights.²⁶ Encompassing many of these rights is the amorphous notion of “liberty,” conceived and elaborated on by an oft-touted laundry list of classic thinkers and writers who have had unparalleled influence on the Western world.²⁷

When “natural” rights exist in or are enforced via constitution²⁸ or international agreement,²⁹ these rights can be seen as mere terms in a contract binding those who have agreed to be bound.³⁰ But when it is asserted that such rights belong to or must be imposed on those who have

25. See MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 13 (1993) (“[D]ifferences [among] the average members of different races are actually tiny and are mostly confined to a few genes that affect skin color, physiognomy, or physique.”).

26. The Universal Declaration of Human Rights (“Universal Declaration”), enacted in 1948, binds 192 Member States of the United Nations. The preamble to the Universal Declaration provides that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

27. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 283 (Peter Laslett ed., Cambridge University Press) (1824) (“The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth.”); JOHN STUART MILL, *ON LIBERTY* 14 (Random House 2002) (1859) (arguing that human liberty comprises, among other things, freedom of “thought and feeling,” “absolute freedom of opinion,” and freedom to express, publish, and unite).

28. See generally U.S. CONST. amend I–X (providing that certain rights cannot be abridged by Congress, for example, “freedom of speech” and freedom from “unreasonable search and seizure”).

29. See UDHR, *supra* note 26, ¶ 3 (providing that no U.N. Member State shall deprive its human citizens of certain rights, for example, “life, liberty and security of person”).

30. See LOCKE, *supra* note 27 and accompanying text.

not sought to be bound,³¹ the asserter is laying claim to the possession of universally applicable “truth.”³² To hold “self-evident”³³ that liberty is universally inherent to human nature is to claim that nonliberal sentiments (and thus, nonliberal societies) are necessarily “wrong”—wrong in the same way that “two plus two equals five” is wrong. This is the assertion of “moral realism” (also known as “universalism”) at its logical ends.³⁴

“Moral relativism,” on the other hand, fights nature with “nurture,” and proposes that moral codes do not merit sweeping claims at objective truth.³⁵ Relativists argue that cultures can simply possess “different” moral codes, that morality is shaped by the “exigencies of life” in a given society, and that those who believe otherwise are simply blinded by the codes ingrained in their own social set.³⁶ The debate between universalism and relativism is as fundamental to the question of animal rights as it has been to the question of human rights, at least in regard to the stance Westerners take toward those in the global community who operate “differently.”³⁷ Per these superficially simple definitions, it may be obvious that animal rights activists tend toward a theory of moral universalism. This section does not pine for a theory of relativism but, rather, puts forth a nuanced conception of morality as a locally adaptive system of social control. Expanding on a view presented by Judge Richard Posner in his book *The Problematics of Moral and Legal Theory*, this section argues that, alone, a society’s ingrained moral codes serve as a generally poor premise for the enactment of restrictions on international product importation.

A. Metaethics and Animal Utilitarianism

Moral universalism and moral relativism are the two most prominent metaethical perspectives on normative moral theory.³⁸ Normative theory first asks, “By what standards should conduct be labeled ‘right’ or

31. Meaning the governments of foreign nations that have not sought to join, for instance, the United Nations (and thus have not sought to be bound by the Universal Declaration).

32. See discussion *infra* Part I.A.

33. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

34. For a discussion of moral realism, see RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 17 (1999).

35. *Id.* at 6–8.

36. *Id.* at 19.

37. Stanford Encyclopedia of Philosophy, “Moral Realism” (2005), <http://plato.stanford.edu/entries/moral-realism>.

38. *Id.*

‘wrong’³⁹ Metaethics then asks whether “rightness” and “wrongness” exist independent of human judgment.⁴⁰ In addition to universalism and relativism, there are other derivative metaethical perspectives such as “pluralism,”⁴¹ “subjectivism,”⁴² and “skepticism,”⁴³ and each presents a different understanding of the elusive nature of truth with respect to moral inquiry.

Within normative theory, the two most prominent standards for labeling conduct “right” or “wrong” are “deontology” and “consequentialism.”⁴⁴ Deontology posits that conduct should be valued in reasoned consideration of one’s duty to others.⁴⁵ For example, Immanuel Kant’s⁴⁶ “Categorical Imperative” provides that one should act “only on that maxim” for which he or she would “at the same time will that it should become a universal law.”⁴⁷ Kant criticized the inhumane treatment of animals on the basis that empathy is essential to human adherence to the imperative.⁴⁸ Consequentialism, on the other hand, assigns value to conduct solely on the basis of its consequences.⁴⁹ Utilitarianism is a theory of consequentialism that proposes a battle between “pleasure” and “pain” (words as amorphous as liberty), and provides that humans should live so as to achieve the greatest good for the greatest number.⁵⁰ Utilitarianism has undergirded countless historical notions of justice and social duty, including, most notably, general deterrence theories of criminal punish-

39. *Id.* See also BLACK’S LAW DICTIONARY 1086 (8th ed. 2004).

40. See Stanford Encyclopedia of Philosophy, “Metaethics” (2007), <http://plato.stanford.edu/entries/metaethics>.

41. “Moral pluralism” claims that there can be more than one scale to weigh “value”; thus, values can be incommensurable such that an attempt to balance them is misguided. For instance, consider the question of whether “justice” is better than “loyalty” (or whether law professor is a “better” profession than philosophy professor). See POSNER, *supra* note 34, at 8.

42. “Moral subjectivism” claims that one’s “morality” can be judged only per compliance with whatever moral code one has chosen for oneself. *Id.* at 9.

43. “Moral skepticism” speculates that moral truth is completely unknowable. *Id.*

44. See Stanford Encyclopedia of Philosophy, “Deontological Ethics” (2007), <http://plato.stanford.edu/entries/ethics-deontological>.

45. *Id.*

46. See BERTRAND RUSSELL, HISTORY OF WESTERN PHILOSOPHY 637–52 (1946).

47. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (1785). See also JOHN RAWLS, A THEORY OF JUSTICE (1971) (arguing that morality is intuited in what all humans would willingly subject themselves to).

48. See Christine M. Korsgaard, *Fellow Creatures: Kantian Ethics and Our Duties to Animals* 14–16 (2004), available at <http://www.people.fas.harvard.edu/~korsgaard/CMK.FellowCreatures.pdf>.

49. See Stanford Encyclopedia of Philosophy, “Consequentialism” (2006), <http://plato.stanford.edu/entries/consequentialism>.

50. See JOHN STUART MILL, UTILITARIANISM 239 (Random House 2002) (1871).

ment.⁵¹ Moreover, utilitarianism has been the value scale of choice for one of the most prolific academic animal rights activists of all, Princeton University bioethics professor Peter Singer.⁵² Singer includes animals in his utilitarian morality calculus such that the addition of their “pain” would weigh in drastically to render mankind terribly immoral.⁵³

While Singer is the academic animal rights pioneer—the “activist” who lends extra credibility to the cause—he is not the face of outraged protest. His 1975 book *Animal Liberation*, however, was the catalyst that moved Ingrid Newkirk to found the notoriously controversial group People for the Ethical Treatment of Animals (“PETA”).⁵⁴ Today even the Humane Society, for all its feats, is shrinking in both power and popularity next to the organization known for covertly infiltrating fashion shows and unfurling signs that read (in one instance) “Gisele: Fur Scum.”⁵⁵ Both PETA and the Humane Society offer “lobbying” guides on their websites to explain how regular citizens can effectively engage Congressional representatives, but PETA’s website also includes an “everyday activism” guide, which explains how regular citizens can stir up controversy and outrage on their own, all the time.⁵⁶ PETA.org provides “all the information that you’ll need to hold a successful demonstration.”⁵⁷

Ingrid Newkirk, as PETA’s leader, is the resident captain of activism, and she commands an ever-burgeoning fleet.⁵⁸ According to Newkirk, animal sympathizers who decry abuse but then fail to renounce their

51. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14–15 (2006). See also MILL, *supra* note 50, at 283 (“And hence the sentiment of injustice came to be attached, not to all violations of law, but only to violations of such laws as *ought* to exist, including such as *ought* to exist but do not.”).

52. See SINGER, *supra* note 20, at 5. See also Richard A. Posner & Peter Singer, *E-mail Debates of Noteworthy Topics: Animal Rights*, SLATE, Jun. 12, 2001, <http://www.slate.com/id/110101/entry/110109/>.

53. Singer claims that humans engage in “speciesism,” which is just like sexism or racism. He argues that the “only acceptable limit to [human] moral concern is the point at which there is no awareness of pain or pleasure.” In other words, humans owe a duty not to cause pain to anything that can feel pain. See Posner & Singer, *supra* note 52.

54. Specter, *supra* note 14, at 60.

55. *Id.* at 52.

56. Humane Society Citizen Lobbyist Center, http://www.hsus.org/legislation_laws/citizen_lobbyist_center/ (last visited Nov. 24, 2008); PETA’s Legislative Guide, <http://www.peta.org/actioncenter/leg.asp> (last visited Nov. 24, 2008).

57. PETA’s Everyday Activism Guide, <http://www.peta.org/actioncenter/act.asp> (last visited Nov. 24, 2008).

58. Newkirk founded PETA in 1980; today the group boasts over two million members, annual donations in excess of \$25 million, and over 50 million hits received at its various websites. For more information, see People for the Ethical Treatment of Animals, About, <http://www.peta.org/about/> (last visited Nov. 24, 2008).

leather belts are but hypocrites who remain a large part of the global animal welfare problem.⁵⁹ It is Newkirk's mission to make full vegans of all who will listen,⁶⁰ so PETA seeks to lure as many followers as possible, often with shock tactics.⁶¹

One of PETA's most shocking (and perhaps effective) ploys has been to display on its website actual video footage of dogs abused and slaughtered in China.⁶² It is perhaps a truism that sympathizers are best baited to the cause with horrifying images of animal suffering.⁶³ But in soliciting and receiving support from sympathizers who, despite being outraged at such footage, inevitably remain meat eaters (i.e., "murderers"), PETA has been forced to compromise the totality of its principles to an extent—to put the "steak equals death" chants on brief pause.⁶⁴

When a magazine reported several years ago that Ben Affleck had bought a chinchilla coat for Jennifer Lopez, PETA mailed Affleck a graphic video (and explanatory letter) detailing the process by which nearly one hundred chinchillas are killed to make a single garment:

The preferred method of killing chinchillas is by genital electrocution: a method whereby the handler attaches an alligator clamp to the animal's ear and another to her genitalia and flips a switch, sending a jolt of electricity through her skin down the length of her body. The electrical current causes unbearable muscle pain, at the same time working as a paralyzing agent, preventing the animal from screaming or fighting.⁶⁵

Affleck wrote back: "You have opened my eyes to a particularly cruel and barbaric treatment of animals. I can assure you I do not endorse such treatment and will not do anything in the future that supports it."⁶⁶ Years later, while Ben's brother Casey is listed among "Famous Hollywood Vegetarians," Ben is not.⁶⁷

59. See Specter, *supra* note 14, at 58.

60. See *id.*

61. For instance, PETA has employed models and celebrities to pose for implied nude photos that tout the slogan, "I'd rather go naked than wear fur." *Id.*

62. A Shocking Look Inside Chinese Fur Farms, <http://www.peta.org/feat/ChineseFurFarms/index.asp> (last visited Nov. 24, 2008).

63. See Posner and Singer, *supra* note 52.

64. Specter, *supra* note 14, at 67.

65. *Id.* at 52.

66. *Id.*

67. International Vegetarian Union—Famous Vegetarians, <http://www.ivu.org/people/actors/index.html> (last visited Nov. 24, 2008).

The cost Americans are willing to incur in changing their lives and habits for animals remains minimal despite appalling videos.⁶⁸ Humans may feel noble when they cry out against cruelty for the domesticated pets of the West—but their sympathies may best be described as selective attention, cognitive dissonance, or even willful ignorance when they continue choosing to wear or eat other animals. There are minimal grounds on which to argue that importing fox, rabbit, coyote, wolf, or chinchilla fur is morally justifiable compared to importing “dog” fur. A Burlington Coat Factory spokesman said defensively in 2000, “[W]e were outraged [T]he purchase order actually called for coyote trim.”⁶⁹ A spokeswoman for the Fur International Council of America (a profur group, no less) explained, “[O]ur position is that dog and cat fur should not be sold in the United States *Culturally, it goes against our grain to do so. It’s just not something we want to see happening.*”⁷⁰ Furthermore, under the Congressional “Findings and Purposes” listed with the legislative history of the DCPA, the law was justified on the basis that “the trade of dog and cat fur products is ethically and aesthetically abhorrent to United States citizens.”⁷¹

To be fair, there are plenty of domestic laws rooted in moral norms.⁷² But laws that restrict trade serve to impose American moral norms on foreign societies. When nations hold distinctly incompatible moral codes, each side surely feels “right” in the same way that each side feels “right” in the incomparably divisive American debate over abortion.⁷³ Both sides wish to label the other morally inferior, and all arguments aspire to the persuasiveness of objective, mathematical truth.⁷⁴ When Americans

68. See *supra* note 17 and accompanying text.

69. Recall, *supra* note 2 (emphasis added).

70. *Id.* See also Fur Information Council of America, http://www.fur.org/about_fica.cfm (last visited Nov. 24, 2008) (providing “facts that counter the distortions and misrepresentations” proffered by animal welfare groups).

71. See *supra* note 4 and accompanying text.

72. Plenty of laws resemble moral dictates, but most also serve overarching societal functions. For instance, it may be a moral norm that stealing is “wrong,” but laws against theft also serve order, property interests, and predictability. See POSNER, *supra* note 34, at 108 (“[T]he reason for the overlap between morality and law is that they are parallel methods . . . for bringing about the kind and degree of cooperation that a society needs in order to prosper.”).

73. Compare Don Marquis, *Why Abortion Is Immoral*, 86 J. PHIL. 183 (1989) (arguing that abortion is “in the same moral category as killing an innocent adult human being”), with Sidney Buchanan, *The Abortion Issue: An Agonizing Clash of Values*, 38 HOUS. L. REV. 1481, 1487 (2002) (arguing that it is morally horrifying to force a pregnant woman to carry a fetus against her will).

74. See *supra* note 73 and accompanying text. Ronald Dworkin is one of the foremost legal proponents that there exists an objectively knowable “right” versus “wrong.” See

apply economic sanctions to “inferior” foreign moral codes, they are not enacting laws backed by majority vote; they are imposing one conception of global truth over another.⁷⁵ Federalists would argue that this describes the Court’s decision in *Roe v. Wade*,⁷⁶ but when the Court strikes a statute on review concluding that “what was popular” in a given instance “was not ‘right,’” “right” is given a meaning independent of human judgment only insofar as it defines a presently prevailing “interpretation”⁷⁷ of a social contract⁷⁸—a contract by which all concerned parties had already agreed to be bound.⁷⁹

Vegans are not a U.S. majority,⁸⁰ so the DCPA clearly required support from those who eat meat and wear leather (and maybe even those who wear other types of fur). One’s opinion on abortion rights may wholly depend on one’s moral convictions, but of those who unequivocally oppose abortion, few would place conditions on a fetus’s right to life on the basis of its ancestry or lineage. Meanwhile, lineage is the lone difference between wolves (which are hunted in America) and domesticated dogs.⁸¹ Still, even if a group’s moral code is logically consistent and

generally Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

75. In a world where morality is decidedly objective and universal, the “professors propose, and the judges impose.” POSNER, *supra* note 34, at 117.

76. In this well-known and divisive case, the Supreme Court held that the right to have an abortion is implicitly guaranteed under the Due Process Clause of the Fourteenth and Fifth Amendments to the U.S. Constitution. But as Chief Justice Rehnquist noted in dissent, “[T]he very existence of the debate is evidence that the ‘right’ to an abortion is not [as] universally accepted as the appellant would have us believe.” *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

77. See U.S. CONST. art. VI, cl. 2 (establishing that the Constitution is the supreme law of the land). See also *Marbury v. Madison*, 5 U.S. 137 (1803) (recognizing that the Constitution vests the Supreme Court with the power to strike legislation that is repugnant to the Constitution). When a judge decides that a right to abortion does not flow from the Constitution, he or she is not ostensibly expressing an independent opinion on whether or not humans should have a right to abortion. See generally ARISTOTLE, ON INTERPRETATION § 14 (“It is an error to suppose that judgments are to be defined as contrary in virtue of the fact that they have contrary subjects.”).

78. See *supra* note 27 and accompanying text.

79. The U.S. Constitution can be amended by two-thirds of the federal legislature or by three-fourths of state legislatures or conventions. U.S. CONST. art. V.

80. As of 2006, only an estimated 1.4% of U.S. adults considered themselves “vegan.” Charles Stahler, *How Many Adults Are Vegetarian?*, VEGETARIAN J. (2006), <http://www.vrg.org/journal/vj2006issue4/vj2006issue4poll.htm>.

81. “The history of the domestic dog traces back at least 15,000 years, and possibly as far back as 100,000 years, to its original domestication from the grey wolf in East Asia.” Kerstin Lindblad-Toh et al., *Genome Sequence, Comparative Analysis and Haplotype Structure of the Domestic Dog*, 438 NATURE 803 (2005).

uncontroversial, claims to its objective, universal truth may be no less misguided.

B. Posner and “Pragmatic Moral Skepticism”

Judge Richard Posner has opined that “many moral claims are just the gift wrapping of theoretically ungrounded and ungroundable preferences and aversions.”⁸² This strong assertion came in an attack on what Posner terms “academic moralism”—attempts by “ivory tower” professors to play a role in “improving the moral judgments” of everyone, from themselves and their students to judges, Americans, and foreigners.⁸³ Posner’s chief gripe with these “moralists” lies in his claim that, while it is useful to study morality, normative proselytizing “has no prospect of improving human behavior.”⁸⁴ “Knowing the moral thing to do furnishes no motive . . . for doing it,” he contends.⁸⁵

In his book, *The Problematics of Moral and Legal Theory*, Posner establishes his own compelling “theory about morality,” which he says differs from a “moral theory” in that it *does not* dictate how humans should behave.⁸⁶ He calls it “Pragmatic Moral Skepticism,” and it comprises an amalgam of relativism and pluralism, plus an abundance of “skepticism” over the usefulness of moral theorizing in general.⁸⁷ In short, Posner argues that while moral “sentiments” like “pity” and “disgust” may very well be universal, common attempts to craft reasoned universal “truths” (e.g., “murder is wrong”) produce mere tautologies (i.e., “wrongful killing is wrong”) or abstractions that are too vague to be useful (e.g., “don’t lie all the time”).⁸⁸ Ultimately, Posner asserts that moral codes are contingent on locality,⁸⁹ but he does not go so far as to say that these codes should be immune to judgment from outsiders (he refers to such a perspective as “vulgar relativism”).⁹⁰ Rather, Posner

82. POSNER, *supra* note 34, at 11.

83. *Id.* at 5, 8.

84. *Id.* at 7. *Cf.* RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997) (arguing that moral reasoning should play a role in constitutional interpretation).

85. POSNER, *supra* note 34, at 7 (“[M]otive and motivation have to come from outside morality. Even if this is wrong, the analytical tools employed in academic moralism—whether moral casuistry, or reasoning from the canonical texts of moral philosophy, or careful analysis, or reflective equilibrium, or some combination of these tools—are too feeble to override either narrow self-interest or moral intuitions.”).

86. *Id.* at 14 (emphasis added).

87. *Id.* at 1, 12.

88. *Id.* at 6, 19.

89. *Id.* at 6.

90. *Id.* at 8.

praises the value of thoughtful moral criticisms but with the important caveat that they should be grounded in “functional” (as opposed to normative) rationales.⁹¹

For instance, Posner speculates that Nazi genocide is so much more widely condemned today than “the genocidal policies the United States pursued toward the American Indians” because the former was clearly not “adaptive to any plausible or widely accepted need or goal” of the locality,⁹² whereas the latter, in functional terms, was “beneficial” in that Americans continue benefiting from the seized land today.⁹³ As another example, Posner notes that we object to human sacrifice partly because we know it “does not avert drought, flooding, famine, earthquakes, or other disasters and is thus a poor means to a society’s ends.”⁹⁴ Posner explains:

[W]hen human sacrificers do not make falsifiable claims for the efficacy of the practice, so that the issue becomes a choice of ends rather than a choice of means to an agreed end (making the crops grow), our critical voice is stilled. Or rather, it becomes a voice expressing disgust—a reaction to difference—rather than a voice uttering reasoned criticisms.⁹⁵

Posner’s analyses speak to the mentations of the meat-eating animal “sympathizers” who supported the DCPA even given the proposition that eastern farmers depend on trade in dog and cat pelts for their livelihoods. His critique of normative moral theory serves to condemn the cogency and usefulness of the “universalist” moral rhetoric that activists as well as “academic moralists” rely on in pushing their agendas.

In 2001, via eight letters published by *Slate*, Peter Singer engaged in a written debate with Posner to challenge his moral skepticism as it relates to animal welfare.⁹⁶ Posner, in turn, challenged Singer’s utilitarianism. In a hypothetical, Posner suggested that, if the only way to stop a dog from biting a small child is to inflict more pain on the dog than the child would suffer from the bite, utilitarian philosophy dictates that the dog must be left to bite.⁹⁷ Singer agreed.⁹⁸ Posner said that this conclusion

91. *Id.* at 21.

92. *Id.*

93. *Id.* See also HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 9 (1980) (considering the prevailing image of Christopher Columbus in U.S. history as a “quiet acceptance of conquest and murder”).

94. POSNER, *supra* note 34, at 21.

95. *Id.* at 22.

96. See Posner & Singer, *supra* note 52.

97. *Id.*

98. *Id.*

goes against a moral intuition “deeper than any reason that could be given for it and impervious to any reason” that could be given against it.⁹⁹

Posner agrees with Singer that humans should indeed incur costs to reduce the gratuitous suffering of animals.¹⁰⁰ But he rejects the use of force to coerce humans to incur these costs, especially when the use of force is rationalized by one group’s tenuous claim to superior knowledge of “moral truth.”¹⁰¹ Posner advocates “persuasion” as the best means of improving animal treatment, and he has touted “graphic depictions” like those in Singer’s book and on PETA’s website for their ability to inspire human empathy for the plight of suffering animals.¹⁰² Regarding Ben Affleck’s sentimental reply to PETA (and subsequent failure to become a vegetarian), Posner might have suggested mailing him additional video clips of the slaughter of all his favorite meals.

Posner would admit that passive persuasion alone will not imminently revolutionize the treatment of animals around the world,¹⁰³ but in weighing the alternative (the force of law), he would probably first find it worth exploring the roots of disparate global views on the scope of animal rights. “Squeamishness is a big factor in morality,” Posner has argued, quoting Hamlet (“[t]he hand of little employment hath the daintier sense”).¹⁰⁴ “In poor societies most people have seen human corpses and have participated in killing, at least of animals. They are inured to blood and gore, and so they do not recoil.”¹⁰⁵ Meanwhile, Americans are largely detached from the process by which food travels from the slaughterhouse

99. *Id.*

100. *Id.*

101. *See id.* Law and Philosophy Professor Gary Francione has also rejected the use of force as impractical:

On the social and legal level, there needs to be a paradigm shift as a social matter before the legal system will respond in a meaningful way. I disagree with those who maintain that the legal system will lead in the struggle for animal rights or that significant legal change will occur in the absence of the development of a political and social movement in support of animal rights and the abolition of animal exploitation.

Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 40 *LAW & CONTEMP. PROBS.* 9, 42 (2007).

102. *See Posner & Singer, supra* note 52. While this may sound like a decidedly Kantian argument, Posner’s emphasis is that exposure to facts is the best catalyst for change. *See id.* *See also infra* text accompanying note 103.

103. Posner argues that humans already grasp thoroughly that animals feel pain and that “to inflict pain without a reason is bad”; thus, it is an altogether different task to persuade humans to *stop* causing animals pain. *Id.*

104. POSNER, *supra* note 34, at 56.

105. *Id.*

to their grocers' freezers. Posner has gone on to say, "We congratulate ourselves on being morally more refined than our predecessors," when in reality, we simply make use of technology to kill from afar.¹⁰⁶ "Science—not moral insight—has made us more civilized (by our lights)."¹⁰⁷

These observations serve Posner's resounding conclusion that "even if moral theorizing can provide a usable basis for some moral judgments, it should not be used for making *legal* judgments."¹⁰⁸ Ultimately, Posner views law and morality as separate systems of social control with distinct and often detached goals (despite the frequent appearance of overlap).¹⁰⁹ He claims that neither system can lay claim to a framework of globally universal truth, and he argues that "[i]t is not a scandal when the law fails to attach a sanction to immoral conduct or when it attaches a sanction to conduct that is not immoral."¹¹⁰ The grounds for criticism, he maintains, reside in the "function" of a given law or moral tenet per its adaptability to a "plausible or widely accepted need or goal."¹¹¹

II. THE GATT AND WORLD TRADE IN MORALITY

A widely accepted goal of many international agreements is the reduction of encumbrances to free trade, which has been viewed as largely adaptable to the goal of enhancing global prosperity.¹¹² In light of short-term domestic concerns like unemployment and international economic power, free trade remains a contentious political issue in the United States;¹¹³ however, modern economists largely agree that free international trade is not only a boon to its voluntary participants, but also an

106. *Id.*

107. *Id.*

108. *Id.* at 3 (emphasis added). Moreover, Posner was referring to *domestic* legal judgments which (since they are rendered locally) are even less likely than international judgments to contravene the prevailing moral codes of the groups they impact. *Id.*

109. *Id.* at 110.

110. *Id.* at 108–10 (noting that an involuntary contract breach is punishable but not considered "immoral" in the United States, whereas adultery is considered immoral but not punishable).

111. *Id.* at 6, 21 (explaining that under an "*adaptionist*" framework, morality can be judged "by its contribution to the survival, or other ultimate goals, of a society," and that this is a nonmoral judgment akin to criticizing a hammer per how "well or poorly adapted" it is to "its goal of hammering nails into wood or plaster").

112. *See infra* text accompanying note 116.

113. *See infra* note 118 and accompanying text.

exceptional benefit to the growth of developing economies.¹¹⁴ This latter view can be simplified: free-trade leads to the reduction of global poverty.¹¹⁵ Today's relatively unencumbered "global trading community" was born in the wake of World War II when twenty-three nations signed the 1948 General Agreement on Tariffs and Trade in order to liberalize international commerce and eradicate "self-defeating mercantilist protection" among contracting members.¹¹⁶ Originally, the GATT served as a platform for countries to negotiate tariff reductions "item-by-item," and with the peer-pressure typical of popular group consensus, the GATT developed a strong antiprotectionist spirit that fueled decades of "pro-trade bias" among contracting members and dispute resolution panels.¹¹⁷

Today, calls for protectionism have not quite ceased. Domestic American workers, fearful of "outsourcing," have leveled widespread criticism at politicians who support free trade agreements,¹¹⁸ but in the decades since the GATT's inception, sincere protectionism has become something of a global anachronism, and many of today's disputed import

114. See WILLIAM J. BAUMOL & ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICIES 445 (9th ed. 2003) (explaining that international trade is economically desirable). See also *infra* text accompanying note 116.

115. See *infra* text accompanying note 116.

116. See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. See also SUNGJOON CHO, FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM 1-2 (2003) (noting the rationale behind the adoption of the GATT). Under a mercantilist philosophy, trade was seen as a zero-sum game. Protectionism was advocated on the premise that a nation builds wealth by supplying more exports while demanding fewer imports. This theory was first condemned in the eighteenth century by Adam Smith, and then nineteenth century economist David Ricardo shattered the premise when he explained the theory of "comparative advantage," which demonstrates how trade can increase value for two nations even when one *could* produce all its own goods. For example, say Portugal can produce wine for \$1.00 and cloth for \$2.00, whereas England can produce wine for \$3.00 and cloth for \$2.00. Portugal and England *could* produce both goods on their own at total costs of \$3.00 and \$5.00, respectively. But Portugal can produce two bottles of wine at \$2.00, and England can produce two pieces of cloth at \$4.00. When Portugal trades wine for English cloth, both nations save \$1.00 total. The lesson is that trade can be mutually beneficial if nations specialize in goods production for which they hold a comparative advantage, even if one is more efficient than the other in every industry. See BAUMOL & BLINDER, *supra* note 114, at 444 ("[T]rade is a win-win situation.").

117. See CHO, *supra* note 116, at 2.

118. Steelworkers called for protection in 2001 and asked that duties or quotas be imposed on foreign-made steel. See Joseph Kahn, *Trade Panel Backs Steel Makers, Enabling Broad Sanctions*, N.Y. TIMES, Oct. 23, 2001, at C1. See also Robert E. Reich, *The Poor Get Poorer*, N.Y. TIMES, Apr. 2, 2006 ("Most economists and policy makers now accept Ricardo's [comparative advantage] argument, although the popular debate over the merits of free trade continues.").

restrictions are premised on other domestic goals that at least appear sufficiently well-intentioned.¹¹⁹ Still, very few “domestic goals” have been persuasive enough to warrant international approval when challenged, and consistent invocation of the GATT’s “pro-trade bias” has meant that “non-trade social concerns, such as human health and environmental protection, have been treated as mere exceptions to general obligations” and have been subject to narrow interpretation under “stringent tests.”¹²⁰ Indeed, prior to the formation of the World Trade Organization (“WTO”) in 1994,¹²¹ not one domestic import restriction was deemed justifiable under the GATT’s general exceptions provided for in Article XX.¹²²

Only recently has the GATT’s pro-trade bias seemed to “soften,”¹²³ though some commentators suggest that this is merely a result of increased information costs (which render risks of harm from certain products more difficult to detect)¹²⁴ and shifts among societal norms regarding environmental protection.¹²⁵ This softening is evident in the 1994 Preamble to the WTO Charter, which touts desirable goals (like “sustainable development”) that “certainly [go] beyond the narrow anti-protectionist motto embedded” in the pre-WTO GATT.¹²⁶ Additionally, agreements born alongside the WTO preemptively tackle the ongoing conflict between free trade and state regulation; for instance, the 1994 Agreement

119. The measures seem “well-intentioned” in the sense that they do not appear discriminatory toward other nations and are simultaneously defensible as a sovereign nation’s legitimate internal preferences.

120. See CHO, *supra* note 116, at 2–3. Cho also notes that the “textual dichotomy” of the agreement has led interpreters to ignore the merits of domestic regulatory goals until an initial determination has been made as to whether “general obligations” have been violated. *Id.* This would be the case even if the “domestic regulatory goal” was to prevent importation of poisoned food; one could argue that a ban on exporting poisoned food should be a “general obligation” and not an afterthought exception to a blanket ban on import restrictions.

121. The WTO was established in 1994 to serve as a global organization to facilitate international trade. As of 2008, it is comprised of 153 member nations. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144. For more information, see WTO, What Is the WTO?, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Apr. 27, 2009).

122. See CHO, *supra* note 116, at 3. For discussion of Article XX, see *infra* Part II.B.2.

123. See CHO, *supra* note 116, at 3.

124. Increased information costs are a result of technological advances as well as increased specialization that goes hand-in-hand with greater division of labor. *Id.* See also THOMAS SOWELL, KNOWLEDGE AND DECISIONS 7–8 (1996). See also *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (spelling the end of the doctrine of caveat emptor).

125. See CHO, *supra* note 116, at 3 (“More domestic regulations have been issued in response to the popular demands of the welfare state.”).

126. For instance, it may be easier today to ban imports deemed harmful to the environment. *Id.* at 4.

on Sanitary and Phytosanitary Measures established harmonized scientific risk assessment methods that can be employed to objectively justify import restrictions based on a product's risk to health or the environment.¹²⁷

Still, contemporary panel decisions (and commentators' arguments for additional reforms)¹²⁸ indicate that the GATT and recent derivative WTO agreements remain largely and undeniably pro-trade.¹²⁹ While the GATT may be growing more receptive to legitimate domestic regulatory goals, there are bright-line rules in place preventing lengthy slides down the slippery slope. Restrictions that protect human health or the environment can be analyzed empirically; however, there is no truly objective standard for judging the merits of an invisible, subjective, and unquantifiable "harm." And the GATT is inherently skeptical of such "harms," lest they be embellished as a veiled attempt at protectionism.¹³⁰ Furthermore, regulations still must comply with the GATT's general obligations unless they fit squarely within an explicit Article XX exception.¹³¹ This section argues that, even applying the most favorable casuist interpretations of the relevant GATT provisions, the DCPA would not pass muster before a dispute resolution panel.

A. China and the GATT

Before examining specific GATT provisions, it is necessary to establish China's role with respect to the agreement. China was one of the original twenty-three parties to sign the GATT in 1948,¹³² but after a revolution splintered the nation in 1949, a new government in Taiwan

127. See *id.* See also Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1165, 1165–68 (1994), available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf. See also CHO, *supra* note 116, at 4.

128. See, e.g., Peter Stevenson, *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107, 126 (2002) (calling for dispute settlement leniency when trade restrictions are enacted in the interest of animals). See also CHO, *supra* note 116 (advocating the loosening of the GATT pro-trade bias to make room for more "sustainable development" initiatives).

129. See discussion *infra* Part II.B.1–2.

130. See David Barboza, *China Posts a Surplus Sure to Stir U.S. Alarm*, N.Y. TIMES, July 11, 2006, at C1 (explicating American concerns over trade imbalance with China). See also *supra* note 118 and accompanying text.

131. See discussion *infra* Part II.B.1–2.

132. *WTO Successfully Concludes Negotiations on China's Entry*, WTO NEWS, Sep. 17, 2001, http://www.wto.org/english/news_e/pres01_e/pr243_e.htm [hereinafter China-WTO].

quickly announced its abandonment of the agreement, and an era of political instability left the nation internationally unfastened.¹³³ Today, China is composed of two decreasingly adversarial “States”—the People’s Republic of China (“PRC”) and the Republic of China (“ROC”)—both of which have since regained membership to the GATT, albeit separately and not until very recently.¹³⁴

The PRC, which was ranked second among world exporters by the WTO in 2008,¹³⁵ is the entity commonly referred to as “China”; it is much larger than the ROC and controls most of the nation’s mainland as well as Hong Kong and Macau.¹³⁶ The ROC, on the other hand, (ranked sixteenth among exporters) controls only a handful of smaller territories and is often referred to as “Chinese Taipei,” Taipei being its capital in Taiwan.¹³⁷

Even though Hong Kong and Macau are essentially controlled by the PRC, they are largely self-governed.¹³⁸ In fact, before either the PRC or ROC regained membership to the GATT, Hong Kong and Macau became independent members in 1986 and 1991 respectively, and both entities became founding members of the WTO in 1994.¹³⁹ The PRC (under the name “China”) did not accede to the WTO until December 11, 2001,¹⁴⁰ and the ROC (under the name “Chinese Taipei”) not until January 1, 2002.¹⁴¹

Investigators have found that fur farming of dogs and cats is practiced primarily in the impoverished northeastern provinces of the PRC like

133. U.S. Dep’t of State Bureau of E. Asian & Pac. Affairs, *Background Note: China* (Jan. 2009), <http://www.state.gov/r/pa/ei/bgn/18902.htm> [hereinafter *Background Note: China*]; U.S. Dep’t of State Bureau of E. Asian & Pac. Affairs, *Background Note: Taiwan* (Apr. 2009), <http://www.state.gov/r/pa/ei/bgn/35855.htm> [hereinafter *Background Note: Taiwan*]; China-WTO, *supra* note 132.

134. WTO: Understanding the WTO—Members, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited May 16, 2009).

135. The European Union was ranked first, and the United States was ranked third. International Trade Statistics 2008, World Trade Organization 13 (2008).

136. *Background Note: China*, *supra* note 133.

137. *Background Note: Taiwan*, *supra* note 133.

138. *See supra* note 133; U.S. Dep’t of State Bureau of E. Asian & Pac. Affairs, *Background Note: Macau* (Mar. 2009), <http://www.state.gov/r/pa/ei/bgn/7066.htm>; U.S. Dep’t of State Bureau of E. Asian & Pac. Affairs, *Background Note: Hong Kong* (Mar. 2009), <http://www.state.gov/r/pa/ei/bgn/2747.htm>.

139. WTO: Understanding the WTO—Members, *supra* note 134; China-WTO, *supra* note 132.

140. WTO: Understanding the WTO—Members, *supra* note 134.

141. *Id.*

Heilongjiang and Shandong.¹⁴² One Chinese official within the nation's State Forestry Administration, Zhao Xuemin, proved sympathetic to Western animal welfare ideals when he pledged in 2006 to fight for an end to what he terms a "barbaric" practice, but Xuemin acknowledged the implicit difficulty of such a fight when he noted that fur farming in China is fueled by economic hardship.¹⁴³ If the fur trade combats regional poverty, other Chinese officials weighing broader economic concerns may recognize much greater incentives to ensure the practice's survival and may even be impelled to challenge foreign trade laws aimed at impeding the industry. Though the DCPA was enacted one year prior to China's accession to the WTO, China could now use its membership status to file a WTO complaint against the United States over the trade restrictive measure.

B. Interpreting the Relevant GATT Provisions

When the WTO was established in 1994, its founders designed an adjudicatory system through which aggrieved member nations could air and settle their disputes.¹⁴⁴ Through the Dispute Settlement Understanding ("DSU"), the founders declared that a delegate could complain to the WTO upon belief that his or her nation was the victim of a trade agreement violation,¹⁴⁵ and the WTO would then assemble a qualified and impartial dispute resolution panel to hear arguments and ultimately issue a binding interpretive decision.¹⁴⁶ The DSU also established a seven-person Appellate Body with authority to review and reverse panel decisions if necessary.¹⁴⁷

Before examining the relevant opinions these bodies have handed down, an overview of GATT interpretive methodology is instructive.

142. Gary Feuerberg, *Dogs and Cats Skinned Alive for Their Fur in China*, EPOCH TIMES, Feb. 21, 2007, available at <http://en.epochtimes.com/news/7-2-21/51905.html>. See also BARBARA MAAS ET AL., FUN FUR?: A REPORT ON THE CHINESE FUR INDUSTRY 3 (2005).

143. See *supra* note 16 and accompanying text.

144. See Understanding on Rules and Procedures Governing Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1226 (1994) [hereinafter DSU]. For an explanation of GATT dispute settlement procedure prior to the establishment of the WTO, see *infra* text accompanying note 172.

145. See DSU, *supra* note 144, art. 1.

146. *Id.*

147. *Id.* art. 17.1–3. Appellate cases are presided over by any three of the seven justices. The DSU provides that the Appellate Body's composition is to be "broadly representative of the membership of the WTO" and free of conflicting interests and other obstacles to justice, in order to ensure equitable adjudication. *Id.*

Article 3.2 of the DSU charges panel members with clarifying the provisions of existing international agreements “in accordance with customary rules of interpretation of public international law.”¹⁴⁸ The “customary rules,” as the Appellate Body explained in its first issued opinion from 1996, refer to those that the Vienna Convention on the Law of Treaties (“Vienna Convention”) laid out in 1969.¹⁴⁹ The Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵⁰ While this instruction remains somewhat vague, it delineates three general interpretive approaches: “textual,” “contextual,” and “teleological.”¹⁵¹ Both commentators and adjudicators have debated these approaches at length in regard to their relative merits, the proper sequence of their application,¹⁵² and the extent of their interdependence.¹⁵³ But while a review of this debate may imply that certain interpretive approaches garner more favor than others, such formalist characterizations as to “favored” or “disfavored” approaches may be misleading.¹⁵⁴ Panelists are necessarily pragmatic in that, without regard to form, they favor objectively verifiable arguments and disfavor

148. See DSU, *supra* note 144, art. 3.2.

149. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.7 WT/DS2/AB (Apr. 29, 1996) [hereinafter *Gasoline*]. See also LAURA NIELSEN, *THE WTO, ANIMALS AND PPMs* 198 (2007).

150. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

151. See NIELSEN, *supra* note 149, at 200.

152. Compare Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court,”* 36 J. WORLD TRADE 605, 615–16 (2002), and Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 12, WT/DS8/AB/R, WT/DS10/AB/R, WT/11/AB/R (Oct. 4, 1996) (arguing that “textual” interpretation—determined by a dictionary—is the best approach, while “telos” should be considered secondarily and “context” lastly), with Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.22, WT/DS152/R (Dec. 22, 1999) (arguing that the three approaches may be equally valuable and, while it is natural to look first to the text and then to its context and purposes, the approaches should be applied holistically without regard to order).

153. See IAN SINCLAIR, *THE VIENNA CONVENTION AND THE LAW OF TREATIES* 121 (2d ed. 1984) (claiming that the true meaning of a text can only be ascertained by “taking into account all the consequences normally and reasonably flowing from that text”). Cf. Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. INT'L ECON. L. 17, 21 (2002) (“The Vienna Convention[,] while including some elements of the other methods, is clearly designed as a fundamentally ‘textual’ approach; the text is given primacy and is the basic lens through which the ‘intention’ of negotiators is objectively discerned.”).

154. See Lennard, *supra* note 153, at 21 (“The Vienna Convention rules emphasize that what is being sought is essentially the *objectively ascertained* intention of the parties *as manifested in the text of the agreements*; the ‘expressed intent’ rather than the ‘subjective intent,’ of the parties.”).

substantively speculative arguments.¹⁵⁵ Thus, the persuasiveness of an approach will rise and fall case by case per the substance and weight of the underlying facts. Still, while textual interpretation per “ordinary meaning” may not always be dispositive, it is at least the agreed-upon starting point.¹⁵⁶

There are three provisions of the GATT that would be relevant in a panel review of the DCPA. The first two are “general obligations” that broadly forbid the enactment of trade restrictions.¹⁵⁷ The third provision lists narrow exceptions that can redeem a regulation if it contravenes one of the aforesaid obligations.¹⁵⁸ The first obligation, Article XI.1, provides that “[n]o prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or *other measures*, shall be instituted or maintained by any contracting party *on the importation* of any product of the territory of any other contracting party”¹⁵⁹ This provision was aimed primarily at “quotas,” but its inclusion of the phrase “other measures” has rendered it presumptively applicable to blanket import bans as well.¹⁶⁰ It is additionally significant that this provision was intended to apply only to measures enforced directly at a nation’s border.¹⁶¹

The second “general obligation” provision, Article III.4, requires that imported products be “accorded treatment no less favourable than that accorded to *like products* of national origin.”¹⁶² This provision originally targeted “internal” measures—meaning the treatment of imports after they pass through customs¹⁶³—but an interpretive note that was later annexed to Article III.4 explained that the provision could be invoked as to border-enforced regulations as well.¹⁶⁴ This has caused some jurisprudential confusion among dispute settlement panels as to which (if not both) of the two obligation provisions would be implicated by a regulation like the DCPA.¹⁶⁵

The DCPA need only fail under one obligation to trigger analysis of the Article XX exceptions; thus, failure under Article XI.1 would render

155. *See id.* Empirical evidence is perhaps an international language.

156. *See id.*

157. *See* discussion *infra* Part II.B.1.

158. *See* discussion *infra* Part II.B.2.

159. GATT, *supra* note 116, art. XI.1. This blanket ban on import prohibitions and restrictions is meant to ensure free market access for all member nations. *See* CHO, *supra* note 116, at 27.

160. *See* CHO, *supra* note 116, at 27–28.

161. *See id.* at 29.

162. GATT, *supra* note 116, art. III.4.

163. *See* CHO, *supra* note 116, at 29.

164. GATT, *supra* note 116, Annex A–1.

165. *See* CHO, *supra* note 116, at 29–33.

survival under Article III.4 irrelevant.¹⁶⁶ Furthermore, the DCPA's incompatibility with Article XI.1 (a presumptively unyielding blanket ban on import restrictions) is conspicuous enough to take for granted.¹⁶⁷ Accordingly, the primary focus of this section will be the DCPA's dubious chance of survival under Article XX; however, there remains a chance that a panel could ignore Article XI.1 and analyze the DCPA under Article III.4 only.¹⁶⁸ This is somewhat unlikely, as will be demonstrated, but nevertheless, it is necessary to consider Article III.4 at some length, and in doing so, the DCPA's failings with respect to both Articles III.4 and XI.1 will be illustrated.

1. Articles XI.1 and III.4: GATT General Obligations

The previously disputed U.S. trade restriction most closely analogous to the DCPA was a 1991 amendment to the Marine Mammal Protection Act ("MMPA") that prohibited the importation of yellowfin tuna captured using a fishing practice often fatal to dolphins.¹⁶⁹ In the eastern tropical Pacific Ocean, tuna swim directly below dolphins, and when fishermen use dolphins to locate tuna, their nets have been liable to inadvertently trap and kill the dolphins as well.¹⁷⁰ After the United States rejected its tuna imports in 1991 as dolphin-deadly, Mexico requested a panel hearing to examine whether the MMPA prohibition violated Articles XI and III.¹⁷¹

A panel was assembled and a decision was rendered in this dispute in 1991 ("*Tuna-Dolphin I*") declaring that the MMPA amendment violated Article XI.1 of the GATT.¹⁷² The panel deemed the U.S. import prohibi-

166. See discussion *infra* Part II.B.1.

167. See CHO, *supra* note 116, at 27 ("The inflexible quality of the article has naturally resulted in jurisprudential treatment in which the mere existence of a trade restriction itself would suffice to find a violation of the Article.").

168. See discussion *infra* Part II.B.1.

169. See Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R (Aug. 16, 1991) GATT B.I.S.D. (39th Supp.) at 155 (1991) [hereinafter *Tuna-Dolphin I*].

170. *Id.* ¶¶ 2.1–2.

171. *Id.* ¶ 1.

172. *Id.* It is important to note that this decision was not officially adopted into GATT jurisprudence. While dispute resolution proceeded identically (by panel formation) under the GATT prior to the existence of the DSU, panel decisions were formerly not deemed binding unless adopted by a consensus of all GATT members. For the specifics of the pre-WTO dispute resolution procedure, see GATT, *supra* note 116, art. XXIII. When the panel issued its opinion in *Tuna-Dolphin I*, U.S. and Mexican representatives entered into negotiations and agreed that Mexico would not seek adoption of the decision in exchange for a U.S. commitment to redesign its legislation. See Paul J. Yechout, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards*, 5 MINN. J. GLOBAL TRADE 247, 259 (1996). The result was a 1992 amendment to the MMPA known

tion facially inconsistent with Article XI's general obligation of free market access, and further explained that this finding rendered consideration of Article III unnecessary.¹⁷³ Most notably, however, the panel chose to explain in dicta that the measure would have been inconsistent with Article III nonetheless.¹⁷⁴ Focusing on tuna solely as a "product," the panel concluded that the exported end result—edible tuna—was the same regardless of how the fish was captured.¹⁷⁵ "A determination of 'likeness' under Article III.4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products," panelists have explained.¹⁷⁶ Emphasis is to be placed on the extent to which, according to a consumer, the product is objectively substitutable.¹⁷⁷

Of course, one would argue that consumers do not find dog fur substitutable for fox fur. However, this claim is somewhat undermined given that consumers have been satisfied with dog fur purchases so long as they have remained ignorant.¹⁷⁸ Consumers acquired dog fur indiscrimi-

as the International Dolphin Conservation Act, which lifted the import ban with respect to any nation that would agree to a five-year moratorium on the controversial practice. *See id.* *See also* 16 U.S.C. § 1411 (1994). This outcome demonstrates that some nations are amenable to compromise despite another's (admitted) violation of the GATT. *See* Yechout, *supra*, at 172. But one might justifiably raise concerns about the outcome given disparate economic bargaining power between the United States and Mexico. U.S. contract law polices such disparities carefully when judges consider whether contracts should be deemed voidable for lack of consideration or unconscionable as against public policy. *See generally* ARTHUR L. CORBIN, CORBIN ON CONTRACTS 188 (8th ed. 2001) (discussing unconscionable bargains); *id.* at 221–23 (discussing mutuality of obligation). *See also* Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L. L. 689, 733 (1998) ("[A]symmetry of market power . . . give[s] larger countries more coercive power."). To this point, one may ask whether American policy makers thoroughly imagine all potential implications of trade bans; if politicians consider illegal immigration a pressing problem in the United States, they might consider that import bans can make it even more difficult for citizens in poorer nations to earn wages. But the more pressing point here is that, though not adopted, the panel decision rendered in the *Tuna-Dolphin I* dispute has nonetheless been deemed probative and indicative of how qualified panelists may address similar issues. *Id.* at 723.

173. *See Tuna-Dolphin I*, *supra* note 169, ¶¶ 5.14–.18.

174. *Id.* ¶¶ 5.14–.15.

175. *Id.*

176. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, ¶ 99 WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos AB*].

177. Distinguishing a product harmful to consumers (e.g., a product containing Asbestos) from dolphin-deadly tuna is instructive; objectively verifiable harmfulness renders the former not substitutable. *See id.* ¶ 145.

178. *See Recall*, *supra* note 2 (discussing the deception of retailers).

nately and would have continued to do so had the Humane Society never released its findings.¹⁷⁹ In fact, consumers may continue to do so today if DCPA enforcement is ineffectual.¹⁸⁰ Consumers may disapprove of the practices that brought them their edible tuna and wearable coats, but panelists have explained that Article III.4 calls for a comparison of imported and domestic products without regard to the “practices, policies and methods” of their production within the exporting nation.¹⁸¹ This principle is justifiable in that international traders usually depend to an extent on the stability and predictability of ongoing relationships.¹⁸² Responding rationally to market demand, exporters may make substantial investments in product production, believing (perhaps quite justifiably) that their demand is not liable to instantaneously and arbitrarily evaporate.¹⁸³ A fur farmer in China may view dogs and foxes as identical wild beasts, all the more identical when their furs are dyed and processed to adorn garments. This level of abstraction may be difficult for Americans to swallow, but it renders tenable the argument that the DCPA causes “fur” produced and sold domestically to be given more “favourable” treatment than “fur” imported from China.

Granted, one may cry foul on the grounds that, if “all fur” is the same, then “all jewelry” is the same, and cubic zirconium is thus substitutable for diamond. But this rebuttal is misdirected. When different products are deceptively identical, the prime rationales for protecting consumers relate to real difference in function, pecuniary value, or risk.¹⁸⁴ Normative arguments become decreasingly persuasive the more two products can be seen as having a comprehensibly substitutable function, given that “function” can include considerations of value and risk.¹⁸⁵ In other

179. This speculation may best be supported in that not one consumer complained after purchasing dog fur prior to the Humane Society report, see *id.*, and it remains activists and not consumers uncovering the continued prevalence of dog and cat fur sold in U.S. stores. See *supra* notes 7–10.

180. See *supra* notes 7–10.

181. A second dispute over the U.S. dolphin-deadly tuna import ban arose in 1994 when the European Communities complained to the GATT; the panel then reaffirmed its previous conclusions about Article III.4. See, e.g., Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.9, DS29/R (Jun. 16, 1994).

182. See CHO, *supra* note 116, at 27 (citing Report of the Panel, *Japan—Measures on Imports of Leather*, L/5623 (Mar. 2, 1984) GATT B.I.S.D. (31st Supp.) at 113, ¶ 55 (1984).

183. *Id.*

184. These bases are self-evident under the contract law theory of “expectation damages,” which attempt to give the plaintiff the “benefit of the bargain” he or she had entered, meaning, to put him or her in the position he or she would have been in if the defendant performed in accordance with the agreement. See generally CORBIN, *supra* note 172.

185. In other words, the function of a diamond is to *have* a certain value, and the function of dog food is to *feed* a dog *without* causing the dog harm or undue risk of harm.

words: are generic pants made in China “like” Armani pants? Under Article III.4, the answer is yes. Otherwise, either could be arbitrarily banned from the United States.

Dr. Laura Nielson, author of *The WTO, Animals and PPMs*,¹⁸⁶ has noted that a dispute comparing the fur of endangered animals to that of nonendangered animals may be much more likely to survive Article III.4.¹⁸⁷ The two products could be deemed distinct in that one poses potential harm by depleting a resource.¹⁸⁸ This is a fair argument, but it is more aptly invoked as a justification under the Article XX(g) exception for resource conservation.¹⁸⁹ And such a justification would be invoked *after* a regulation’s failure under Articles XI or III.¹⁹⁰ As such, this hypothetical may be most illustrative of the pro-trade bias inherent to the GATT general obligations¹⁹¹ and may also be viewed as a rationale for that bias, given that there is a separate GATT provision—Article XX—for raising claims that clearly have little to do with the functional substitutability of products.¹⁹² Nielsen concluded that it remains unclear whether the fur of endangered animals is “like” that of nonendangered animals for the purposes of Article III.4.¹⁹³ This coincidentally implies that Nielsen would find the existing jurisprudence at least equally unclear on whether the fur of nonendangered dogs is “like” the fur of nonendangered foxes.¹⁹⁴ Still, speculation may be unnecessary. Article III.4 ambiguities have invited substantial debate, but the provision may not prove significant in a DCPA challenge.¹⁹⁵

What is the function of a carpet? *See Vista St. Clair, Inc. v. Landry’s Comm. Furnishings, Inc.*, 57 Or. App. 254 (1982) (refusing to deem that a defective discolored carpet was worth zero dollars because plaintiff made “use” of the carpet nonetheless).

186. “PPMs” refers to Nielsen’s consideration of trade restrictions that are based on “Product or Production Method.” *See* NIELSEN, *supra* note 149, at xxii.

187. *Id.* at 151.

188. *Id.* (analogizing the panel’s reasoning in the *Asbestos* dispute).

189. Article XX(g) provides an exception for trade restrictions “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” *See* GATT, *supra* note 116, art. XX(g). *See also* CHO, *supra* note 116, at 32–33.

190. *See* CHO, *supra* note 116, at 32.

191. *See* NIELSEN, *supra* note 149, at 151 (stressing specifically the broad coverage of Article XI).

192. *See* CHO, *supra* note 116, at 32 (reasoning that defendants are most likely to focus solely on Article XX once an import ban is found to violate either of the two obligations).

193. *See* NIELSEN, *supra* note 149, at 151.

194. *See id.*

195. Article III.4 would only come into play if a panel reversed course drastically and determined that Article XI does not apply to “other measures.” *See supra* note 159 and accompanying text; *infra* note 201 and accompanying text.

The most recent panel decision in which a complainant challenged a trade restriction under both Articles XI and III was the *Asbestos* dispute.¹⁹⁶ France had banned the importation of products containing Asbestos,¹⁹⁷ and when Canada complained to the WTO, a panel determined, first, that the regulation was most properly subject to Article III.4; second, that the regulation violated Article III.4; third, that the regulation was nonetheless redeemable under Article XX; and fourth, that Article XI therefore did not require consideration.¹⁹⁸ From the panel's methodology in this decision, it has since been inferred that regulatory measures imposed on both domestic production *and* importation (i.e., measures like the asbestos ban and the DCPA)¹⁹⁹ are only subject to analysis under Article III.4 (and not Article XI.1).²⁰⁰ This is a desirable reading for defendant nations given that Article XI.1 would facially invalidate any import ban barring an Article XX exception,²⁰¹ but there are a number of reasons that this inference is flawed.²⁰² Dr. Nielsen has recognized, most blatantly, that the inapplicability of Article XI.1 to total²⁰³ bans would

196. See Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/R (Sep. 18, 2000) [hereinafter *Asbestos*].

197. See *id.* ¶ 8.1.

198. See *id.* ¶¶ 8.99, 8.241.

199. The DCPA also bans domestic manufacture and trade in dog and cat fur. See *supra* note 5 and accompanying text.

200. See CHO, *supra* note 116, at 33 (“[I]t can be said that the decision in *Asbestos* constitutes the authoritative case law on this point.”). Moreover, this is one basis on which the United States would disclaim invalidity of the DCPA. See Findings, *supra* note 4 (“The imposition of a ban on the sale, manufacture, offer for sale, transportation, and distribution of dog and cat fur products, regardless of their source, is consistent with the international obligations of the United States because it applies equally to domestic and foreign producers . . .”).

201. See CHO, *supra* note 116, at 27–28 (noting that the inclusion of the phrase “other measures” in the text of Article XI.1 has been interpreted broadly in accordance with the GATT pro-trade bias).

202. For instance, the panel admitted it was unclear on whether Canada was even claiming that Articles XI.1 and III.4 should be analyzed collectively given that Canada failed to follow a procedural guideline for making *alternative* allegations. See *Asbestos*, *supra* note 196, ¶ 8.100. Furthermore, in its opinion considering Canada's appeal of the panel's Article XX ruling, the Appellate Body couched the panel's neglect of Article XI as a mere matter of “judicial economy.” *Asbestos AB*, *supra* note 176, ¶ 5 (“Having found that the [Asbestos ban] is subject to, and inconsistent with, the obligations set forth in Article III.4 of the GATT 1994, the Panel *did not deem it necessary* to examine the claims of Canada under Article XI of the GATT 1994.”) (emphasis added). Most notably, a pure textual analysis of Article XI renders it unequivocally applicable to *all* restrictions. See NIELSEN, *supra* note 149, at 151; *supra* note 201 and accompanying text. See also GATT, *supra* note 116, art. XI.1.

203. “Total,” meaning bans applicable to foreign *and* interstate commerce.

render the existence of certain Article XX exceptions redundant or irrelevant.²⁰⁴ For instance, Article XX(a) provides an exception for morality-based trade restrictions,²⁰⁵ and such restrictions must necessarily be imposed on domestic as well as imported products lest the moral premise be immediately contradicted.²⁰⁶ Thus, if Article XI.1 were to apply only to discriminatory measures,²⁰⁷ the moral exception would have no reason to exist.²⁰⁸

Furthermore, Article III.4 was originally applied, for instance, in disputes over “dual retail systems” through which imported and domestic products received unequal distribution or other forms of unfair internal treatment.²⁰⁹ While the 1994 note to Article III has indeed caused jurisprudential confusion,²¹⁰ the *Asbestos* panel report may have maligned the distinctions between Article XI.1 and Article III.4. The note provides, in relevant part, that “[a]ny internal tax or other internal charge, or any law, regulation or requirement . . . collected or enforced . . . at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement” The note’s text evinces a clear intention to secure a loophole—to ensure that internal discriminatory preferences cannot skirt Article III.4 analysis on the basis that they were imposed at the border and were thus not internal.²¹¹ More so than the existence of Article XX(a) presupposes a reason for its existence, the definitive purpose behind the note to Article III.4²¹² (compared with the separate and distinct purpose behind Article XI.1)²¹³ implies that the two provisions have no reason to overlap redundantly.

In sum, the DCPA should fail under Article III.4’s “like product” inquiry if subjected to it, but, like the MMPA amendment in *Tuna-*

204. See NIELSEN, *supra* note 149, at 152.

205. See GATT, *supra* note 116, art. XX(a). See discussion *infra* Part II.B.2.

206. In other words, it would be difficult (i.e., blatantly hypocritical) to argue that a product cannot be imported for moral reasons if the product were not also prohibited from interstate commerce. See NIELSEN, *supra* note 149, at 152.

207. “Discriminatory,” meaning measures that ban one nation’s product without banning the same product from other nations or domestically.

208. See NIELSEN, *supra* note 149, at 152.

209. See Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 130–51, WT/DS161/AB/R (Jan. 10, 2001) [hereinafter *Korea-Beef*].

210. See CHO, *supra* note 116, at 29–33.

211. See *id.* at 30 (citing GENERAL AGREEMENT ON TARIFFS AND TRADE, ANALYTICAL INDEX—GUIDE TO GATT LAW AND PRACTICE 136 (1994)).

212. The note to Article III.4’s purpose is to secure the loophole so that Article III.4 is certain to apply to *all* internal measures (to prevent internal discrimination).

213. Article XI.1’s purpose is to prevent external discrimination.

Dolphin I, the DCPA should most probably be analyzed under Article XI.1, in which case it would be presumptively invalidated barring the Article XX exception. Still, even if the DCPA were to be tested under Article III.4 (and were to survive), there are strong textual, contextual, and teleological arguments to be made for subsequent invalidation under Article XI.1.²¹⁴ It follows that the United States should focus more on the persuasiveness of its Article XX affirmative defenses than on arguments directly relating to either general obligation provision.²¹⁵

2. Article XX: "Exceptions" to the GATT General Obligations

In an article published in the journal *Animal Law*, British animal welfare activist Peter Stevenson argues that, in enacting laws like the MMPA and DCPA, countries are not attempting to "force other countries to change their standards"; they are simply seeking the "liberty to prohibit *within their own territory* the marketing of products (whether domestically produced or imported) derived from practices which involve animal suffering."²¹⁶ Touting the preamble to the DCPA, which states that U.S. consumers have a right to "ensure that they are not unwitting participants in [a] gruesome trade,"²¹⁷ Stevenson has congratulated the United States for embracing the argument that "a country should be able to act as an *ethical* consumer."²¹⁸ Stevenson's sentiment is widely shared²¹⁹ and, at first glance, it even appears compatible with the text of the GATT. As mentioned above, Article XX sets out a limited number of exceptions to the agreement's general member obligations, including an exception for "morality."²²⁰ The Article XX provisions relevant to the DCPA are as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or

214. See NIELSEN, *supra* note 149, at 151–52.

215. See CHO, *supra* note 116, at 32 ("Once an import ban is found to violate either provision, the defendants are most likely to rely on Article XX . . . in arguing that the measure in question is a justified exception under *either* provision"). See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S.-Shrimp*] (illustrating a dispute in which the United States admitted a probable violation under Article XI.1 and moved straight to affirmative defenses).

216. Stevenson, *supra* note 128, at 126.

217. See Findings, *supra* note 4.

218. Stevenson, *supra* note 128, at 126.

219. This is self-evident given the enactment of the DCPA by a U.S. legislative majority.

220. See GATT, *supra* note 116, art. XX.

a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health²²¹

Looking first at the exception under Article XX(b), one may immediately assume that “animal life or health” is a surprisingly explicit roadblock to a DCPA challenge. This appearance is deceiving. A regulation examined under Article XX must pass a multipart test; not only must its aim be provided for explicitly (for example, “animal protection”), but the panel must deem the method by which it would be achieved “necessary” and find it to be in accordance with the requirements of the Article XX headnote.²²² While the latter two prongs of this test will prove difficult for the DCPA, the first prong will be surprisingly problematic as well. Though the DCPA was tailored directly to the text of Article XX(b),²²³ it is almost certain to fail on an unobvious threshold inquiry.

Before asking the “necessity” question (which primarily considers whether there is a way to accomplish the domestic regulatory goal at issue in a manner less restrictive of trade), a panel will illuminate an Article XX textual ambiguity. The United States may claim the DCPA is necessary to protect animal life or health, but in what nation?²²⁴ This issue arose in *Tuna-Dolphin I* when the United States argued that Article XX(b) allowed for U.S. laws that protect the lives of Mexican dolphins.²²⁵ The panel firmly rejected this proposition on the basis that Article XX(b) refers to protection of *domestic* animals only.²²⁶ Thus, only if Mexican tuna-fishing threatened dolphins located within U.S. territory would the ban have been justifiable.²²⁷ The DCPA suffers the same flaw in its attempt to save dogs not located within U.S. jurisdiction. A number of commentators, including Steve Charnovitz, former Director of the

221. *Id.* Article XX provides for additional exceptions, but they are not relevant to an examination of the DCPA’s validity.

222. This test was prescribed in the first panel opinion under the newly established WTO DSU. *See Gasoline, supra* note 149, at 296.

223. Findings, *supra* note 4 (“Such a ban is also consistent with provisions of international agreements to which the United States is a party that expressly allow for measures designed to protect the health and welfare of animals.”).

224. The DCPA is an admitted attempt to protect “health and welfare of animals” in foreign nations. *See supra* note 221 and accompanying text.

225. *See Tuna-Dolphin I, supra* note 169, ¶¶ 5.25–28.

226. *Id.*

227. *Id.*

Yale Global Environment and Trade Study,²²⁸ have stood behind the *Tuna-Dolphin I* panel's assertion that Article XX(b) cannot be invoked to protect life or health "extrajurisdictionally."²²⁹ The primary rationales for this argument invoke debate over economic coercion²³⁰ and sovereignty²³¹—considerations that are identically relevant when examining the DCPA under Article XX(a).²³²

The DCPA's survival of the necessity test under both Articles XX(b) and XX(a) hinges on a determination that the United States can justifiably coerce behavior in a foreign nation. Presumably, a majority of American citizens do not want dog or cat fur to be imported into the country.²³³ To realize this goal, they have chosen to burden suppliers of dog fur²³⁴—Chinese fur exporters. Whether the rationale of this goal is a XX(b) aim to save animal lives in China,²³⁵ a XX(a) aim to protect the sensibilities of unwitting American fur consumers,²³⁶ or a XX(a) aim to coercively export U.S. morality to China,²³⁷ all would be better served if the burden was placed not on foreigners but directly on American importers and retailers. This is why the DCPA would probably fail the "necessity" test under either XX(a) or XX(b).²³⁸

If Congress required fur distributors and retailers to test the fur they import, American consumers could retain the *choice* of purchasing dog

228. For more information on the Yale Global Environment and Trade Study, which employed experts who sought to reconcile environmental protection with trade liberalization, see <http://envirocenter.research.yale.edu/programs/completed-projects> (last visited Nov. 28, 2008).

229. See Chamovitz, *supra* note 172, at 731 (calling efforts to prescribe behavior in foreign countries paternalistic).

230. *Id.* at 733.

231. See *infra* note 244 and accompanying text.

232. See discussion *infra* Part II.B.2.

233. Again, this is self-evident per enactment of the DCPA by a legislative majority.

234. See DCPA, 19 U.S.C. § 1308. See also *supra* text accompanying note 4.

235. See GATT, *supra* note 116, art. XX(b) ("necessary to protect human, animal or plant life or health").

236. See GATT, *supra* note 116, art. XX(a) ("necessary to protect public morals").

237. *Id.*

238. In a 2000 decision, the Appellate Body defined the "necessity" text via textual interpretation, determining that the word "necessary" can mean, at one extreme, "indispensable" to a goal, and on the other end, merely "making a contribution to" a goal. The Appellate Body concluded that, for the purposes of Article XX jurisprudence, "necessary" lies closer to "indispensable." See *Korea-Beef*, *supra* note 209, ¶¶ 159–60. In a 2005 dispute, the Appellate Body ruled that a complaining party can raise a specific less-restrictive alternative, and the defendant then has to prove that its present measure remains necessary in light of the alternative. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

and cat, and if they so chose, they would do so knowingly and purposefully.²³⁹ If American distaste for dog and cat fur were genuine, consumer demand would diminish authentically and, U.S. garment importers would begin shunning dog and cat fur exporters just as they would shun exporters of outdated fashion.²⁴⁰ Soon enough, those exporters would start shunning dog and cat fur themselves. This alternative is not only less restrictive of trade but also more adaptive to genuine achievement of the underlying goal (regardless of the goal's exact rationale).²⁴¹ If this option was not pursued by Congress in 2000 because it would have imposed costs on American business instead of foreign business, then the DCPA could fail under the Article XX headnote prohibition of “disguised” protection or “unjustifiable discrimination.”²⁴² Regardless, the existence of such an alternative suggests that the DCPA's necessity is highly questionable, and the necessity test would not even be implicated should a

239. Invalidating a cigarette import ban enacted by Thailand in 1990, a panel ruled that strict labeling and ingredient disclosure requirements would have been a preferable, less-restrictive alternative. See Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R (Nov. 7, 1990) GATT B.I.S.D. (37th Supp.) at 200, ¶¶ 75–81 (1990). A panel's preference for such an alternative may evince a preference for choice versus force (i.e., informed individual decision making versus forced collective decision making), or it may simply be that market decisions made by fully informed consumers to avoid a product are almost always a less trade-restrictive alternative to achieving the same goal of a forced ban. This may even hold true for illegal drugs, as, for instance, while U.S. citizens are free to drink as much alcohol as they so choose, only a small percentage actually become alcoholics.

240. The United States seemingly keeps bell-bottoms off retailer shelves today without use of import bans.

241. Of course, the goal of “exporting morality” would be achieved superficially, but there is no reason to think Chinese attitudes toward cats and dogs (and ingrained beliefs about animals and animal welfare in general) would change; any changes in animal treatment would merely represent a response to change in U.S. consumer preferences.

242. Given publicized U.S. concerns over growing trade imbalance with China, see *supra* note 130 and accompanying text, it is easy to imagine a disguised protectionist motive behind the DCPA. But more practically, one could accuse the United States of engaging in arbitrary discrimination against eastern nations—arbitrary because the DCPA does not ban *all* fur, it only bans fur likely to come from nations with subjectively different norms and socioeconomic conditions. Consider this statement from the panel in *U.S.-Shrimp*:

[I]t is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

U.S.-Shrimp, *supra* note 215, ¶¶ 163–64.

panel immediately invalidate the DCPA as an “extrajurisdictional” over-reach.²⁴³

For the DCPA to survive as a GATT exception, a panel would need to take a tenuous stand on the nature of sovereignty.²⁴⁴ In his article “Moral Exception in Trade Policy,” Charnovitz acknowledges economist Richard N. Cooper’s contention that “the international community cannot, and should not be able to, force a country to purchase products, the production of which offends the sensibilities of its citizenry.”²⁴⁵ This is basically the same argument made by Stevenson, excerpted above.²⁴⁶ Though Charnovitz does not raise a direct objection, this reasoning is arguably disingenuous if one examines what it means to “force a country” to purchase products. The United States government is not the “purchaser” of fur. Fur is only imported into the United States because U.S. consumers value it enough to create demand. Cooper imagines a citizenry that is somehow forced to demand what it finds offensive.²⁴⁷ This argument holds water if the product is addictive or otherwise manipulative of consumer preference, but in the case of dog fur, his argument becomes circular. A citizen offended by an utterly nonessential product will never be “forced” to purchase it unless he or she inadvertently confuses it with a less offensive substitute.²⁴⁸ If he or she does confuse it, either the prod-

243. See *Tuna–Dolphin I*, *supra* note 169, ¶¶ 5.25–.28

244. One would have to implicitly recognize a U.S. stake (and thus, a “say”) in the treatment of animals in a foreign country, and this is a repudiation of the very notion of state sovereignty. Article 3 of the U.N. General Assembly Declaration on Social Progress and Development sets out a list of conditions necessary for the social progress and development of a nation, including the

. . . [p]ermanent sovereignty of each nation over its natural wealth and resources;

. . . The right and responsibility of each State and, as far as they are concerned, each nation and people[,] to determine freely its own objectives of social development, to set its own objectives of social development, to set its own priorities and to decide in conformity with the principle of the Charter of the United Nations the means and methods of their achievement without external interference

Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), art. 3(d)–(e), U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969).

245. See Charnovitz, *supra* note 172, at 732 (citing RICHARD N. COOPER, ENVIRONMENT AND RESOURCE POLICIES FOR THE WORLD ECONOMY 30 (1994)).

246. See Stevenson, *supra* note 128, at 126.

247. See Charnovitz, *supra* note 172, at 732.

248. This point rebuts any possible comparisons between a fur market and a human organ market. Professor Margaret Jane Radin argues that a market for organs would leave the poor helplessly induced to sell (while the dying would be forced to buy). See

ucts are so indistinguishable (and the distinction so benign) that the substitution is all but irrelevant, or the products *are* distinguishable. In the latter case, if the distinction is still benign,²⁴⁹ demanders are probably the “cheapest cost avoiders”²⁵⁰ (as opposed to suppliers) when it comes to preventing the mix-up, especially if prevention is desirable solely out of moral contempt. Cooper’s reasoning is inapplicable when disgust is all that is at stake; in such instances, force need not be imposed on suppliers *or* demanders; desired outcomes will be achieved by market action or will otherwise be exposed as too superficial to matter.²⁵¹ As will be argued below, the type of force imposed by the DCPA is not only unnecessary but also ineffective and potentially counterproductive.²⁵² Furthermore, these same implications undergird the teleological argument that the GATT should be interpreted to err on the side of trade.²⁵³ Indeed, the DCPA faces yet another obstacle in light of the objectively verifiable (and justifiable)²⁵⁴ teleological impetus for narrow interpretation of Article XX exceptions under “stringent tests.”²⁵⁵

MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996). However, since no human will ever depend on fur as a life necessity, it would be disingenuous to characterize purchasers of a certain type of fur as “helplessly induced.”

249. “Benign” is used in the sense that “moral outrage” is the only imaginable consequence of inadvertent substitution. Granted, the implication is not that dogs are “substitutable” for foxes, rabbits, or coyotes; but it is noteworthy that American shoppers will think this the case if they are not told otherwise. Moreover, it is noteworthy that if not for the extensive Humane Society undercover investigation overseas, it is possible that not one consumer, consumer protection advocate, investigative journalist, American fur importer, or retailer would have made the discovery.

250. According to Guido Calabresi, one who can prevent harm at the least expense should be charged with doing so. See JOHN C.P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* 129–30 (2004).

251. If enough consumers—at least enough to sustain a fur market—would buy fur given some unknowable probability that it came from a dog or cat, this behavior would perhaps demonstrate a moral calculation explicitly contradictory to the legislatively professed (majority) desire to keep dog fur out of the country. In other words, consider that all consumers buying fur coats assume a fifty-percent chance that they will be buying dog. Then consider that all consumers buying fur coats assume wearing fur has a fifty-percent chance of causing cancer. Consumers will either largely continue buying, meaning the force of law is not warranted (because it is incompatible with majority preference), or they will cease buying the product, meaning the force of law is not necessary.

252. See discussion *infra* Part III.

253. The GATT was established on the principle that all voluntary transactions are (logically) of mutual benefit (or they would not occur). See BAUMOL & BLINDER, *supra* note 114, at 444; Cho, *supra* note 116, at 2.

254. “Justifiable” because the GATT is not an objective list of rules, it is an “agreement”; thus, its text may not always explicate its object and purpose, let alone the express

Though much has been written about the GATT Article XX(a) morality exception, not one morality-based import ban has ever been directly challenged by a member nation.²⁵⁶ The reason for this is unclear, but Charnovitz puts forth a plausible explanation regarding political considerations.²⁵⁷ When the European Commission, for instance, banned the importation of fur from animals captured with leg traps, the United States (as a nation that used leg traps) threatened a WTO challenge. The United States and the European Commission settled the disagreement without WTO intervention, however,²⁵⁸ and Charnovitz speculates that “although the U.S. government probably felt confident that it could win on legal grounds in Geneva, it knew that it would lose political ground in Washington if the animal welfare groups joined the anti-WTO coalition.”²⁵⁹

If China were to challenge the United States over the DCPA, Westerners naive to GATT nuance would probably be as outraged as they were in the wake of the 1998 dog-fur scandal.²⁶⁰ China may be avoiding the issue for fear of the publicity, but it is also possible that, within the nation, the power to initiate the complaint does not lie in the same hands as the interest to do so. Or perhaps those most familiar with the economic impact of the DCPA are not also intimately familiar with the nature of China's membership rights under the DSU and the GATT. Most likely, however, Chinese officials possess the requisite information but believe that the cost of the DCPA to poverty-stricken Chinese citizens, though significant, does not outweigh the nonpecuniary cost of a publicized protest.²⁶¹ If this is the case, the United States has successfully perpetrated economic punishment²⁶² with little more justification than that offered by

intentions of those who voluntarily agreed to be bound by it. *See* Lennard, *supra* note 153, at 21.

255. *See id.* *See also* Cho, *supra* note 116, at 2–3.

256. *See* Charnovitz, *supra* note 172, at 731.

257. *See id.* at 740.

258. *See id.* at 736–40.

259. *Id.* at 740.

260. *See Recall*, *supra* note 2.

261. If China challenged the DCPA, some Americans may merely increase calls for economic sanctions or greater restrictions on importation of Chinese products. *See, e.g.*, Martin Tolchin, *House, Breaking with Bush, Votes China Sanctions*, N.Y. TIMES, June 30, 1989 (reporting that Congress voted unanimously to impose economic sanctions on China upon learning of increasing human rights violations within the nation).

262. In 2000, just months before the DCPA was enacted, Cass Sunstein illuminated the economic implications of the ban:

[A ban on the importation of dog fur] places certain companies that are prepared to sacrifice the well-being of animals at a competitive disadvantage, by

the Fur Information Council of America as to its objection to the sale of dog fur in the United States: “*It’s just not something we want to see happening.*”²⁶³

III. PRAGMATIC ACTIVISM CAN BE CONTROVERSIAL TOO

While the DCPA would probably fail a doctrinal challenge under the GATT, there are additional reasons to conclude that morality-based trade restrictions are contrary to domestic and international policy goals. Thus far, it has been argued that unencumbered international trade serves mutuality of economic prosperity²⁶⁴ and that morality is “a product of the exigencies of life in a given society.”²⁶⁵ From these premises, there is considerable support for the contrarian argument that purchasing an abundance of dog fur imports from impoverished foreigners is actually the most advisable and realistic approach toward the DCPA’s purported goals of aligning foreign moral codes with prevailing U.S. norms and improving *future* animal treatment globally (i.e., reducing future dog and cat fur imports). This is a significantly speculative claim, but it is perhaps easier to support than its polar opposite—a call for additional restrictions and improved enforcement of the DCPA. The latter proposal is as wrongheaded as it is popular among activists at present, and this section will examine its practical (and theoretical) flaws, arguing first, that free trade is the best path to “improving” global morals, and second, that trade restrictions are no better at keeping dog and cat fur off U.S. shelves than they are at keeping cocaine out of the hands of millions of Americans.²⁶⁶

forbidding those companies from engaging in practices that would help them in the marketplace.

...

... [This] would plainly help companies that sell ordinary or synthetic fur coats, because such companies would face less competition. The existing cases on competitor standing suggest that [ordinary or synthetic fur coat] companies would be fully entitled to sue to produce legally required enforcement action. Or suppose that a statute designed to protect animal welfare is obeyed by some commercial actors but not by others; suppose too that compliance is costly and hence those who disobey the statute are at a competitive advantage (as is highly likely).

Sunstein, *supra* note 17, at 1346.

263. *Supra* note 70.

264. *See supra* note 114 and accompanying text.

265. *See discussion supra* Part I.B.

266. *See Not Winning the War on Drugs*, N.Y. TIMES, Jul. 2, 2008, at A18 (“While seizures are up, so are shipments.”).

A. Free Trade "Improves" Morals

Judge Posner would argue that when A seeks to "improve" the morals of C, this just means A would like C's morals to become more like hers.²⁶⁷ Still, Posner would point out that this does not immediately repudiate A's mission. A may seek to persuade C that adopting a different moral code would be more adaptive to C's goals or needs, and if A were right, C would be foolish to ignore the advice. For instance, say C lives on a farm, and economic conditions in his country render his income too meager to afford him the most basic necessities his family requires for survival. C's wife, son, and daughter subsist on very little, and as conditions become worse, C learns of a way he could earn extra money; he could capture, skin, and sell the pelts of the wild dogs that overpopulate the woods near his farm. C, however, would consider it immoral to do this. A may be able to convince C that the norm he is bound by has begun to detrimentally contravene the most basic human impetus of survival (a definitively plausible "goal"), and thus, C should skin the dogs and sell their pelts.²⁶⁸

Facially, Chinese conformity to American norms can no more be deemed an "improvement" than can American conformity to Chinese norms, absent a functional argument.²⁶⁹ In other words, it is useless to imagine the two nations as siblings, one of which is *normatively better-behaved*. At best, one can try to understand *why* norms differ among cultures, but even the resulting explanations may be too speculative. Regardless of whether a norm is "adaptive to a plausible need or goal," the origin of the norm (meaning the societal conditions present that caused, or at least allowed for, its spread) may be indeterminable.²⁷⁰ Still, some logical inferences are plausible. For example, if A and B are both necessary conditions for X, then the existence of X presupposes A and B. With respect to norms regarding the treatment of animals, similar deductions are possible. If it is demonstrable that international free trade serves the mutuality of economic prosperity (i.e., wealth), and that wealth is necessary for the spread of animal welfare ideals,²⁷¹ it might be logical to propose next that free trade improves the overall treatment of animals

267. See discussion *supra* Part I.B.

268. One Chinese official who seeks an end to the inhumane slaughter of dogs and cats has implied that this hypothetical is not far from reality in the impoverished parts of his nation. See discussion *supra* Part II.A.; *supra* note 16 and accompanying text.

269. Cf. POSNER, *supra* note 34, at 21 (explaining that the only grounds for criticizing a moral norm is per whether or not it is "adaptive to any plausible or widely accepted need or goal of the societies in question").

270. *Id.* at 21–23.

271. See discussion *infra* Part III.A.

within a society. This claim actually finds some support in humanistic psychology, specifically within Abraham Maslow's 1943 paper "A Theory of Human Motivation."²⁷²

Maslow's approach to psychology is significant because, while theoretical, it is similar to Posner's approach to morality. Maslow holds certain basic human ends as biologically universal, but acknowledges that the means adopted toward those ends may vary by culture, and thus, he examines behavior per its pursuit of these intuitive motivating ends only.²⁷³ Maslow's most noteworthy contribution is his "hierarchy of needs," which posits that human behavior is driven largely by needs that can be ranked in order of importance.²⁷⁴ At the bottom of Maslow's hierarchy are the essential physiological needs like food and water; then, moving up the ladder, humans strive for "safety," "belonging," "esteem," and finally, "self-actualization."²⁷⁵ Maslow's theory is relevant because it explains persuasively why a nation with a higher per capita standard of living would have more animal welfare activists. In such societies, it is faster and easier for citizens to travel up the hierarchy of need satisfaction in order to move on to more complex "self-actualizing" goals.²⁷⁶

As a profession—and even as a hobby—activism requires funding. At the very least, this means activists require sufficient food, water, safety, shelter, and clothing.²⁷⁷ Animal welfare activism will not be viable in a society unless many other needs can easily be met first with stable consistency.²⁷⁸ Furthermore, since activism is not productive of wealth, it cannot exist unless other members of society divert a surplus of wealth to

272. Maslow taught psychology at Brandeis University from 1951 to 1969.

273. See Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 371–72 (1943) ("Motivation theory is not synonymous with behavior theory. The motivations are only one class of determinants of behavior. While behavior is almost always motivated, it is also almost always biologically, culturally and situationally determined as well.").

274. See *id.* at 394.

275. See *id.*

276. See *id.* at 393 ("[O]ur needs usually emerge only when more prepotent needs have been gratified.").

277. See *id.*

278. See SOWELL, *supra* note 124, at 7 ("Food reaches [the civilized accountant's] local supermarket through processes of which he is probably ignorant He lives in a home constructed by an involved process whose technical, economic, and political intricacies are barely suspected, much less known to him."). See also POSNER, *supra* note 34, at 27 ("A nation that lacks the resources necessary to educate its entire population will have to make painful choices It would be fatuous to think such a nation morally . . . backward and to suppose that its situation could be improved by preaching to it.").

its funding.²⁷⁹ In sum, animal welfare is not likely to be a legitimately widespread societal goal until wealth and stability are legitimately widespread within society. Moreover, even if sufficient wealth is attained in a society, childhood education (familial and public) must at the very least remain neutral on the subject of animals. Just as Americans have ingrained beliefs about dogs and cats, other cultures can impart starkly different perceptions—e.g., that dogs and cats are *evil*—and this could prevent the development of mass sympathy for their plight.

To be sure, these claims are intuitive, but by extension, they serve the argument that free trade improves the plight of animals not only by increasing societal wealth but also by exposing traders to the differences that exist among cultures. Exposure to adversarial ideas, as John Stuart Mill famously argued, is necessary to the pursuit of “truth”²⁸⁰ and can also incite renewed curiosity as to the truth of one’s own ingrained beliefs.²⁸¹ Still, while “trade” and “wealth” exhibit a discernible causal relationship, causation among the coexistence of “wealth,” “ideas,” and “behavior” is admittedly difficult to pin down.²⁸² But some correlations are noteworthy nonetheless. For instance, it is frequently argued that the liberalization of China’s economy has gone hand in hand with the nation’s recent “human rights improvements.”²⁸³ And some political and

279. PETA depends on millions of dollars in donations to function. *See supra* note 58 and accompanying text.

280. *See* MILL, *supra* note 27, at 38 (“He who knows only his own side of the case knows little of that.”). *See also id.* at 37 (“[O]n every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons.”).

281. *See id.* *See also* POSNER, *supra* note 34, at 228 (explaining that exposure to ideas that contravene one’s presuppositions “incites doubt, and doubt incites inquiry, making [one] less of a dogmatic, [and] more of a pragmatic or at least open-minded” decision maker).

282. *See* ROBERT ALAN DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 70–71 (1971).

283. President Bill Clinton believed “liberalized trade could weaken the Chinese leadership’s grip on society as the nation’s private sector grows and its contact with the outside world increases.” *Clinton Signs China Trade Bill*, CNN.COM, Oct. 10, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/10/10/clinton.pntr/>. Moreover, as a 2008 Background Note published by the U.S. State Department’s Bureau of East Asian and Pacific Affairs claimed, “The market-oriented reforms China has implemented over the past two decades have unleashed individual initiative and entrepreneurship. The result has been the largest reduction of poverty and one of the fastest increases in income levels ever seen.” *Background Note: China*, *supra* note 133.

economic theorists argue not only that trade is a boon to peace but also that history demonstrates trade barriers can be catalysts of war.²⁸⁴

Even if many such speculations are not sufficiently verifiable, it is reasonable to ask that Congress, at the very least, deliberate on the broader, less foreseeable implications of import bans when constituents begin calling for them. The debate between “force” and “persuasion” need not end when the majority rules out persuasion; the next step should be a careful cost-benefit analysis between the choices of “force” and “inaction.”

B. The Dog and Cat Protection Act Is Unenforceable

Ironically, the DCPA may actually be equivalent to “inaction” in that its enforceability is dubious at best.²⁸⁵ Thus, even if one rejects the above syllogistic speculation—that the DCPA is counterproductive to the spread of wealth and ideas and thus counterproductive to the spread of animal welfare ideals—one may at least admit that the law has been wasteful of time and U.S. resources. Writing about federal animal welfare laws, Cass Sunstein has recognized the widespread lack of enforcement.²⁸⁶ “It would be an overstatement to say that the relevant provisions are entirely symbolic[,]” Sunstein claims, “[b]ut because they are dependent on prosecutorial decisions, and because few prosecutors have them as a high priority, they have a largely expressive function. They say much more than they do. They express an aspiration, but one that is routinely violated in practice, and violated with impunity.”²⁸⁷

The DCPA is not the first federal law governing the importation of fur, and many zealous activists are working to ensure that it will not be the last.²⁸⁸ At present, the Humane Society urges its website visitors to support the Dog and Cat Prohibition Enforcement Act (“DCPEA”), which is presently pending in the House of Representatives.²⁸⁹ The prime

284. See, e.g., Henry F. Grady, *The Consequence of Trade Barriers*, 198 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 42 (1938) (explaining that trade barriers lead to “frictions and trade rivalries which may lead to war”); *id.* at 40 (noting that the practical elimination of foreign trade can have the same effect on an economy as war).

285. See Jean C. Yasuhara, Note, “Cruella De Vil” Revisited: *The International Dog and Cat Fur Trade*, 22 LOY. L.A. INT’L & COMP. L. REV. 403, 421 (2000).

286. See Sunstein, *supra* note 17, at 1339.

287. *Id.*

288. PETA and the Humane Society ask visitors of their websites to support various pending legislative initiatives by contacting their congressional representatives. See *supra* note 56.

289. See H.R. 891, 110th Cong. (2d Sess. 2007); Dog and Cat Prohibition Enforcement Act Fact Sheet, http://www.hsus.org/web-files/PDF/legislation/110_furlabeling_HR891.pdf (last visited Nov. 28, 2008). The statute is also pending in the Senate under the title “Truth in Fur Labeling Act.” S. 610, 110th Cong. (2d Sess. 2007).

reason to support this law, the activists insist (or, openly admit), is that the measures currently in place to keep dog and cat fur out of the United States are not sufficiently effective.²⁹⁰ The DCPEA is designed to seal a “loophole” in a 1951 law—the Fur Products Labeling Act (“FPLA”)²⁹¹—which requires that animal fur-bearing garments sold in the United States be properly labeled as to the species of animal if the value of the adorned fur exceeds \$150.²⁹² The loophole, as the activists point out, arises in that a \$500 coat trimmed with \$149 worth of fur is not subject to the statute.²⁹³

Before looking closer at the merits of the pending DCPEA, a pressing question looms: if \$149 worth of fur shows up at the border without a label, how do customs officials know whether it is dog, cat, rabbit, coyote, or fox? In reality, it seems they cannot.²⁹⁴ In fact, DCPA enforcement may have been practically impossible since the law’s inception.²⁹⁵ One commentator remarked succinctly that until border officials can instantaneously conduct fur DNA testing, they will be as helpless as consumers in differentiating the products.²⁹⁶ Meanwhile, overzealous enforcement efforts may lead to profiling and unwarranted obstruction of imports from Asian States.²⁹⁷ How would the DCPEA improve the present scenario? It would amend the 1951 FPLA so that *all* fur-bearing products would require labels indicating the “species,” regardless of the fur’s monetary value.²⁹⁸

The most striking aspect of this straightforward measure is its conspicuous absence from the 2000 DCPA; even today, Burlington Coat Factory prices the overwhelming majority of its coats below \$150 total.²⁹⁹ But that observation is not worth dwelling on; the question going forward is whether the DCPEA would bring efficacy to the laws that have preceded it, and furthermore, whether such efficacy would come with hidden implications.

290. *See supra* notes 7–10.

291. *See* Fur Products Labeling Act, 15 U.S.C. § 69 (1951).

292. *Id.*

293. *See* Humane Society Truth in Fur Labeling Act Fact Sheet, http://www.hsus.org/web-files/PDF/legislation/truth-in-fur-labeling-act_s3610.pdf (last visited Nov. 28, 2008).

294. Yasuhara, *supra* note 285.

295. *Id.*

296. *Id.*

297. *Id.*

298. *See* H.R. 891, 110th Cong. (2d Sess. 2007). *See* S. 610, 110th Cong. (2d Sess. 2007).

299. *See generally* Burlington Coat Factory Online Shopping, www.burlingtoncoatfactory.com (last visited Nov. 28, 2008) (selling 223 coats, only ten of which were priced over \$150).

At this point, an analogy to the U.S. market for illegal drugs is unavoidable. While the DCPEA would be easy to enforce—all unlabeled fur would promptly be turned away—the law’s overall effectiveness is premised on the notion that exporters will label their fur truthfully. Cocaine exporters are surely aware on some level that their product can potentially harm its purchasers, yet they remain driven (presumably by profit, if not by dependence on prior investment) to push the drug across U.S. borders by any means necessary.³⁰⁰ Should the DCPEA prove too difficult to skirt with false labeling, fur farmers, who know their products are not even harmful to purchasers, may have greater incentives than drug dealers to turn to smuggling.³⁰¹ For one, the proven existence of a market for their fur may cause them to feel unfairly oppressed by what they perceive as arbitrary and unjustifiable cultural prejudice.³⁰² This could inspire sentiments of anti-Western self-righteousness, which harm perceptions of U.S. power while bestowing moral validation upon those who disobey.³⁰³

Furthermore, smuggling fur is liable to be easier than smuggling drugs, especially if false labeling would be as difficult to police as could be expected. While one may presume that the DCPEA would preemptively deter false labeling, this should only be true for exporters who trade in more than just dog fur. For these traders, an injunction and damaged reputation could impact future legitimate business deals, but for those with no alternatives other than to deal in dog fur or earn wages via domestic employment, taking the risk would be rational.³⁰⁴ Whether they are caught mislabeling or never try, the result is the same; fur farmers would have to smuggle the products in the underground economy or find other ways to earn income.

The DCPEA is ultimately victim to a catch-22. The law is a response to the problem that border officials cannot distinguish unlabeled dog fur from unlabeled fox fur, but its effectiveness is premised on the ability of border officials to distinguish dog fur from fox fur when they are both labeled fox fur. In other words, the law is premised on the efficacy of the

300. See *Not Winning the War on Drugs*, *supra* note 266 and accompanying text.

301. See generally Susan Fiske et al., *Anti-American Sentiment and America’s Perceived Intent to Dominate: An 11-Nation Study*, 28 BASIC & APPLIED SOC. PSYCHOL. 363, 363 (2008) (reporting that foreigners perceive the United States as competent but “cold” and “arrogant,” and arguing that such perceptions of America decrease U.S. security).

302. See *id.*

303. See *id.*

304. This assumption is rooted in Rational Choice Theory, which posits that an actor will generally behave so as to maximize personal utility. See Stanford Encyclopedia of Philosophy, “Philosophy of Economics” (2008), <http://plato.stanford.edu/entries/economics/#5>.

“honor system” in labeling. Meanwhile, foreigners may find more honor in disobeying the law, lest they be inclined to willfully sigh in resignation at their unfortunate moral inferiority.

To be sure, Section 1308(c)(5) of the DCPA additionally authorizes federal officials to pay “rewards” to citizens who furnish information regarding violation of the statute.³⁰⁵ Ironically, this may be the most effective way to enforce the law (albeit a questionable use of taxpayer funds). But more notably, this provision actually serves as additional evidence of the difficulty of enforcing the DCPA at the border; and as more evidence of such difficulty becomes clear, the likelihood that exporters will falsely label increases.³⁰⁶ Finally, and most significantly, if the DCPEA actually could be enforced effectively, this would only strengthen the incentive for Chinese officials to challenge the DCPA at the WTO. Ultimately, impoverished foreigners will wish to export fur to the United States so long as genuine demand renders it profitable.

CONCLUSION

Some Western animal rights activists preach intractable ideals under the guise of progressivism, but they do so with a fervor and single-mindedness unbecoming of the thoughtful worldview they aspire to. Whereas the case for progressivism is often made by pointing to conservative extremes that are clung to unthinkingly and inflexibly, the case for pragmatism may best be made by demonstrating that progressive extremes can likewise be clung to unthinkingly and inflexibly.³⁰⁷ If the DCPA is an indication, attempts to spread Western animal welfare ideals globally may be contemporarily doomed, but the ideological tunnel vision and pervasive lack of pragmatism among activist initiatives may be a greater obstacle to the movement’s spread than resistance from imagined legions of “cold-hearted” opponents.

A call for pragmatism has been central to the foregoing critique of the DCPA. The moral universalism of the animal welfare agenda has been challenged as naively presumptuous of Western superiority and substantively flawed for its reliance on normative rather than functional moral criticism. As such, moral universalism has been condemned as an impro-

305. DCPA, 19 U.S.C. § 1308.

306. See *supra* note 266 and accompanying text.

307. *Compare SC Priest: No Communion for Obama Supporters*, MSNBC, Nov. 13, 2008, <http://www.msnbc.msn.com/id/27705755/> (reporting that a Roman Catholic priest told his parishioners that voting for Barack Obama, a supporter of abortion rights, “constitutes material cooperation with intrinsic evil”), with Specter, *supra* note 14, at 57–58 (reporting that PETA’s founder Ingrid Newkirk once remarked, “[T]he world would be an infinitely better place without humans in it at all.”).

per premise for the enactment of laws restrictive of trade—the result of which is nothing more than coercive economic punishment based on a powerful nation’s subjective (and largely hypocritical) disapproval of a weaker nation’s norms. Furthermore, the DCPA has been shown to contravene the provisions and underlying pro-trade principles of the GATT, meaning China could successfully challenge the law by filing a complaint with the WTO. Finally, the DCPA has been deemed most impractical in that, if it were not so demonstrably unenforceable, it would perhaps be even less productive of its goal. All in all, free trade has been endorsed for its rejection of force in favor of voluntary and transparent international dealings.

The Humane Society has advocated for the pending DCPEA’s increased labeling requirements by noting that “[c]onsumers making well-informed decisions based on complete information is a cornerstone of a functioning market economy.”³⁰⁸ The DCPEA contradicts this worthy principle, however, in that, even if dog fur arrives at customs properly labeled as such, it would be rejected without regard to whether some U.S. consumers would be willing to purchase it knowingly from a retailer. Ultimately, placing the burden on U.S. fur buyers (as opposed to suppliers) to test and properly label imported fur would be less restrictive of trade and better-suited to the regulatory goals of the DCPA. This is not the type of burden that need be imposed with respect to all imported products the U.S. legislature wishes to ban. But to those who would ask how best to draw that line, the GATT has already responded by setting out “narrow” Article XX exceptions to the agreement’s general obligations. These exceptions properly distinguish valid and invalid regulations per their “necessity” in preventing some form of objectively verifiable damage. Furthermore, the GATT is the best arbiter of the type of damage that merits prevention because any such determination represents a contractual consensus among the parties subject to it and not merely one nation’s attempt at objective rule promulgation. As such, GATT jurisprudence offers the most pragmatic approach to equitable trade relations.

Perhaps the defining difference between ideologues and pragmatists is the latter’s willingness to change course when new facts so dictate. In his book, *The Audacity of Hope*, forty-fourth President of the United States Barack Obama made a case for pragmatism in comparing “values” with “ideology.”³⁰⁹ “Values are faithfully applied to the facts before us,” he

308. Humane Society Truth in Fur Labeling Act Fact Sheet, *supra* note 293.

309. President Barack Obama was a constitutional law professor at the University of Chicago Law School from 1992 to 2004. See University of Chicago, Statement Regarding Barack Obama, <http://www.law.uchicago.edu/faculty/obama> (last visited Nov. 28, 2008).

said, “while ideology overrides whatever facts call theory into question.”³¹⁰ In the interest of Western values and sound policy, animal welfare activists, sympathetic citizens, and lawmakers should collectively change course by ceasing advocacy of legislation that would improve enforcement of the DCPA or otherwise restrict international trade. Granted, a call for the imposition of costs on domestic businesses for the sake of animals may never be as popular among U.S. animal sympathizers (or as effective at luring them to the cause) in comparison to emotional calls for sanctioning the “repugnant” (that is, “different”) practices of foreign societies. But a more open-minded approach to the animal welfare agenda may be absolutely necessary if Western ideals regarding the treatment of animals are ever to take hold globally. Thus, for those who claim to care for the plight of *all* animals (including humans) but have not yet expelled the dissonance of dog-trumps-fox favoritism, it might be wise to let nuance and pragmatic reasoning trump emotion when international trade policy enters the equation.

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310. BARACK OBAMA, *THE AUDACITY OF HOPE* 59 (2006).

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