

Chapter 12

Trophy Hunting, the Race to the Bottom, and the Law of Jurisdiction



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Abstract Cross-border trade, industry outsourcing, and animal migration are increasingly challenging states that want to take their commitment to protecting animals seriously. When multinationals threaten to outsource, even the most powerful states succumb to economic pressure and give corporations what they so avidly desire: *laissez-faire*. Some argue this is an inevitable consequence of globalization; others say it prompts us to question whether animal law is not better off being regulated by international law. This chapter takes a third path. Instead of proposing that nations seek agreement on low and mostly ineffective animal welfare standards, it posits extraterritorial jurisdiction as a promising avenue for animal law, and takes trophy hunting as its example to illustrate the many jurisdictional options for states to overcome regulatory gaps in animal law and make animal issues more visible on the international plane.

1 Introduction

Cross-border trade, industry outsourcing, and animal migration are increasing challenges for states that want to take their commitment to protect animals seriously. When multinationals threaten to outsource, even the most powerful states succumb to economic pressure and give corporations what they so avidly desire: *laissez-faire*. Some argue this is the inevitable consequence of globalization, others say it should

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make us question whether animal law ought to be territorially bound and local, and emphasize the need for an international treaty in animal law. This chapter takes a third path. Instead of proposing that nations seek agreement on low and mostly ineffective animal welfare standards, it argues that extraterritorial jurisdiction is the more promising avenue for animal law, and takes trophy hunting as its example to illustrate the many jurisdictional options for helping animal law overcome regulatory gaps and making animal issues more visible on the international plane.

2 Regulating Trophy Hunting in an Era of Globalization: A Lost Cause?

In 2015, the world was outraged to hear that Cecil, a black-maned lion, was shot and killed by an American game hunter in Zimbabwe. Cecil was a resident of the Hwange National Park, where he was a star attraction for many visitors and part of a long-term national study on lion movement. Cecil was lured out of the park by carcasses tied to a car, and then shot with a bow and arrow by Walter Palmer, a US citizen who paid 50,000 USD to kill Cecil and claim his remains. Severely wounded, Cecil ran from the hunters for more than 40 h before they fired the fatal shot. When the public learned of these events, Palmer faced what some journalists described as ‘a global storm of internet indignation,’ and ‘an online witch-hunt’.¹

Though Cecil’s killing got abundant media coverage and sparked public outrage, many other such killings for trophies go unremarked. In trophy hunting (so-called sport or recreational hunting), animals are killed for their head, horns, paws, or skin.² Typically, hunters target the rarest and biggest animals, or those who are hardest to chase and shoot. Trophy hunting is practiced in many states, but has been subject to increased public scrutiny in the US due to its high imports. According to the Humane Society International, the US imported 1.26 million wildlife trophies between 2005 and 2014.³ Most trophies originated in Canada and South Africa; a smaller number came from Argentina, Botswana, Mexico, Namibia, New Zealand, Tanzania, and Zambia. Trophy hunters are known to pay large sums to kill exotic animals and take possession of their dead bodies. For an African lion, trophy hunters pay between 13,500 and 49,000 USD and for an African elephant, between 11,000 and 70,000 USD. Among the animals hunted and imported into the US, 32,230 were members of

¹Capecchi/Rogers, ‘Killer of Cecil the Lion’ 2015.

²The term trophy hunting does not indicate whether it is legal at the place where the animal is killed; poaching, in contrast, clearly denotes illegal wildlife killing.

³Humane Society International (HSI), ‘Trophy Hunting by the Numbers: The United States’ Role in Global Trophy Hunting’, 2016, available at: http://www.hsi.org/assets/pdfs/report_trophy_hunting_by_the.pdf.

the African ‘Big Five’: 5600 African lions, 4600 African elephants, 4500 African leopards, 330 Southern white rhinos, and 17,200 African buffaloes.⁴

Although the US prohibits the importation of (at least some) trophies under the Endangered Species Act (ESA),⁵ illegal trade of trophies continues unabated. One reason for this, as is claimed on a recurring basis, could be the lack of enforcement of the ESA, or of the Convention on International Trade in Endangered Species (CITES)⁶ upon which the ESA is based. Another reason could be that trophy hunting is still legal in more than twenty African countries,⁷ so regulating the importation of trophies does little to stop the ongoing endangerment of or threats to wild species. Arguably, the laws of trophy-importing states would be much more effective if they were not to apply at such a late point in time, namely when the animal is dead already. These states would ideally regulate the state of facts earlier, by governing acts of planning, hunting, shooting, and preparing an animal for exportation. Given the fact that—if we take Cecil’s case—the lion was killed on Zimbabwean territory, however, prescriptive jurisdiction over trophy hunting *prima facie* seems to lie with Zimbabwe. Any effort on part of importing states to chime in on the Cecil case before the animal crosses the border therefore would seem to violate Zimbabwe’s sovereign jurisdiction.

3 Are Treaties the Solution?

Most states recognize that we live in a highly intertwined world, where daily activities across borders easily give rise to state interests reaching beyond domestic territory. A mediated view might therefore suggest that multiple states have a legitimate interest in the case—Zimbabwe as Cecil’s home state and the place where his killing took place, and the US as the perpetrator’s home state—and urge them to come to an agreement. Proponents of this mediated view might also suggest that the parties must seek to work towards an international treaty to prohibit hunters from killing animals that belong to endangered or threatened species. Such a treaty would ensure that all states’ views, preferences, and interests were taken into account, and it would be carried by their willingness to cooperate. Treaty making seems to offer the quickest way to resolve conflict in a manner acceptable to all parties over the long-term, and which is hence likely to be enforced by them.

⁴Ibid., 1.

⁵US, Endangered Species Act, 28 December 1973, 16 U.S.C. § 1531.

⁶Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243. See on enforcement issues of the CITES: McOmber, ‘Problems in Enforcement of the Convention on International Trade in Endangered Species’ 2002, 674-701. Ferraro et al. show that listing a species under the ESA is, on average, detrimental to species recovery if not combined with substantial government funds: Ferraro/McIntosh/Ospina, ‘The Effectiveness of the US Endangered Species Act’ 2007, 245-261.

⁷Onishi, ‘Outcry for Cecil the Lion Could Undercut Conservation Efforts’ 2015.

But how feasible is this proposal? The difficulty of coming to a broad agreement is easily underestimated, and failure to reach agreement is the rule, rather than the exception. Even in the specific and narrow context of protecting endangered species, states profoundly disagree over the optimal regulatory measures needed to thwart trophy hunting. How can this be explained? In a seminal article on antitrust law, Andrew Guzman used an economic analysis to determine the probability states would conclude an international treaty on jurisdictional matters. He hypothesized that economic incentives are states' primary motive for seeking or rejecting a treaty, and argued that finding common ground for a treaty will be difficult, if not impossible, when consumers and producers are unevenly distributed among states.⁸ Let us assume state A is a majority world country,⁹ strongly influenced by investors, and state B is a minority world country, presumably investment-exporting and, therefore, more consumer-oriented. According to Guzman, the optimal policy for state A is to have no policy, since welfare losses are borne by consumers abroad. The optimal policy for state B, however, is to regulate at a level that increases efficiency gains for consumers.¹⁰

Guzman's probability analysis can neatly be extrapolated to animal law, because economic considerations play such an important role in its policy-making, and because a large portion of the world's animal products is produced in the majority world. Let us again hypothesize that state A is investment-driven while state B is more consumer-oriented. For state A, the optimal solution is for animal production to be unregulated, so it will tend to under-regulate. For state B, the optimal solution is regulation that better satisfies consumer preferences, so it will tend to overregulate. Both states are biased to disproportionately protect either producers or consumers. Based on these disparate preferences, the likelihood that these states agree on a set of norms that allocate jurisdictional competence among them is extremely low. Moreover, states in Zimbabwe's position are unlikely to prohibit practices that generate considerable income revenue for them. These considerations show that treaties, designed to determine the jurisdictional parameters of animal law, are a less feasible policy option than they might initially appear.

Even if feasible, concluding an international treaty might not be desirable in the first place. A treaty may frustrate the very reason for which its conclusion is sought,

⁸Guzman, 'Is International Antitrust Possible?' 1998, 1501-1548.

⁹In international law, we typically speak of 'developing states' or the 'Third World' to denote countries in juxtaposition to 'developed countries.' These terms imply that development is a standardized and linear process, and that certain states have finished developing while others are still striving to develop. Because states evolve differently, and because their different strengths and challenges should be acknowledged, these terms seem both inaccurate and inappropriate. Scholars are increasingly using the terms 'majority world' and 'minority world' instead. The term 'majority world' highlights the fact that most of the world's population live in regions previously identified as 'developing.' The term 'minority world' refers to countries traditionally identified as 'developed,' in which a minority of the world's population resides. *See e.g.*, Punch, 'Exploring Children's Agency Across Majority and Minority World Contexts' 2016, 183-196.

¹⁰Guzman concedes that this is the simplest analytical model, yet it allows drawing the best inferences: Guzman, 'Is International Antitrust Possible?' 1998, 1514-1515.

by boiling animal laws to the lowest common denominator and by driving a wedge between different cultures and societies concerning the question of what the ‘optimal treatment’ of animals is. Also, the risks entered by waiting for an international agreement to form—risks that are born by the animals who are directly and indirectly affected, by local communities that rely on these animals, and by ecosystems in which animals play a key role—, make deferring the issue a poor option.¹¹ One could argue that the downsides of waiting for an agreement will easily be outbalanced by the benefits of coming to an agreement, but this view greatly underestimates the transaction risks. Since trophy money typically moves to the state that offers hunters the cheapest prices at the lowest level of regulation (hence, to state A), state B’s efforts to protect animals will always be undermined.¹² The time allocated to finding an agreement is thus likely time granted to a competition towards laxity, from which animals will suffer most.¹³

4 The Promises of Extraterritorial Jurisdiction

This is where the benefits of extraterritorial jurisdiction come into play. Extraterritorial jurisdiction, for the purposes of the present inquiry, refers to a state’s authority to prescribe law over persons, property, or events on foreign territory.¹⁴ Given the diverging views on and within animal law, there is a justified concern that extraterritorial jurisdiction might only exacerbate existing tensions. While these risks can never fully be excluded, judging extraterritorial jurisdiction solely on this basis fails to do justice to the concept and its promises. A noteworthy promise of extraterritorial jurisdiction is that the various forms of overlapping and concurring laws will create a dense jurisdictional net across the globe. This promise is famously defended by Schiff Berman and yields two important benefits.¹⁵ First, the *prima facie* permissi-

¹¹See on the effects of trophy hunting on lion communities: Packer/Brink/Kissui/Maliti/Kushnir/Caro, ‘Effects of Trophy Hunting on Lion and Leopard Populations in Tanzania’ 2011, 142-153. See on the role of lions in ecosystems: Estes/Crooks/Holt, ‘Ecological Role of Predators’ (2013), 229-249.

¹²Guzman, ‘Is International Antitrust Possible?’ 1998, 1523.

¹³I briefly answer the question of whether races to the bottom exist or prevail in the many regulatory areas of animal law in sec. 5.

¹⁴In other words, we are here dealing with prescriptive jurisdiction. The two other forms of jurisdiction—adjudicative and enforcement jurisdiction—are more problematic under international law: Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* 1994, 4.

¹⁵Schiff Berman argues that ‘we might deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us.’ (Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* 2012, 457).

bility of multiple jurisdictional assertions that overlap and concur decreases the likelihood of regulatory gaps in animal law: ‘Let both States assert jurisdiction.’¹⁶ Second, extraterritorial jurisdiction creates opportunity for political deliberation and nuanced negotiation, for adapting sweeping or insufficient laws, and leaves space for creative innovation and competition. The legal pluralism that emerges from extraterritorial jurisdiction makes apparent its nature as a vital, dynamic tool that could help improve social welfare in an age of globalization, including animal welfare.¹⁷

Consider the regulatory steps taken by the US to protect dolphins during the 1990s. In response to public outrage about the mass death of dolphins caused by common methods of fishing for tuna, the US banned imports of tuna sourced by certain fishing methods. The US’ efforts were soon after crushed at the WTO, where it was accused of protectionism.¹⁸ Though we can argue at length about the underlying motive of the US, what is important about this dispute is that it led to the creation of the International Dolphin Conservation Program (IDCP). In 1999, the US brought together Belize, Colombia, Costa Rica, Ecuador, El Salvador, the EU, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Vanuatu, and Venezuela to join the Agreement on the International Dolphin Conservation Program (AIDCP), whose declared objective is to eliminate dolphin mortality.¹⁹ Similarly, the EU’s efforts to ban importation of furs made from animals caught in leghold traps resulted in the US and Canada entering a common agreement with the EU and raising their standards on trapping.²⁰ Though one may oppose extraterritorial jurisdiction on various grounds, it can manifestly prompt states to adopt better laws for animals. If we wanted to pursue a similar strategy to prohibit trophy hunting, what would extraterritorial jurisdiction in this context look like? And how can it be exercised without causing conflict within the international community?

¹⁶Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ 1982, 14. See also Jennings/ Watts (eds), *Oppenheim’s International Law Vol. 1* 1992, 457.

¹⁷Schiff Berman, *Global Legal Pluralism* 2012, 237; Cover, ‘The Uses of Jurisdictional Redundancy’ 1981, 639-682.

¹⁸See WTO, *US – Restrictions on Imports of Tuna*, Report of the Panel of 3 September 1991, WT/DS21/R - 39S/155 (not adopted); *US – Restrictions on Imports of Tuna*, Report of the Panel of 16 June 1994, WT/DS29/R (not adopted).

¹⁹International Dolphin Conservation Program Agreement (AIDCP), 5 May 1998, 1999 OJ (L 132) 3.

²⁰While the agreement between the EU and Canada is binding, the agreement between the EU and the US solely incorporates a pledge to promote ‘humane’ standards of trapping: Agreement on International Humane Trapping Standards between the European Community, Canada and the Russian Federation, 15 December 1997, 1998 O.J. (L 42) 43; U.S.-EU Agreed Minute on Humane Trapping Standards, 1998 O.J. (L 219) 26, at 4.

5 Extraterritorial Jurisdiction: Mapping the Options

Extraterritorial jurisdiction is a generally recognized and accepted regulatory tool in criminal, human rights, environmental, labour, antitrust, securities, and banking law.²¹ In animal law, by contrast, extraterritorial jurisdiction is still largely unexplored.²² Let us therefore, in the following, sketch possible forms of extraterritorial jurisdiction at the example of trophy hunting.

The doctrine of jurisdiction distinguishes territorial, indirect extraterritorial and direct extraterritorial jurisdiction.²³ Territorial jurisdiction regulates domestic affairs, for example, by prohibiting trophy hunting on domestic territory. Indirect extraterritorial laws also regulate domestic affairs but have an ancillary effect on foreign territory. Among those norms are import restrictions of trophies intended to protect a society from participating in despised practices through consumption; these norms may (or may not) *en passant* protect animals abroad. Finally, a state exercises direct extraterritorial jurisdiction when it regulates a state of fact abroad, namely by directly prohibiting the hunting of animals on foreign territory. It can do so by invoking such principles of international law as the active personality, the passive personality, the subjective territoriality, or the effects principle of jurisdiction. Here, I outline these means of direct extraterritorial jurisdiction for animal law, beginning with the *lex lata*.

5.1 Lex Lata Options for Regulating Trophy Hunting

Active Personality Principle Under international law, the active personality principle gives states the right to prescribe actions of their nationals abroad. The principle is the most accepted and universally used basis for extraterritorial jurisdiction, as it relies on a loyalty connection between a state and its nationals.²⁴ In recent years, state practice has extended the principle to residents and domiciliaries operating abroad, where there is a strong enough connection between them and their home

²¹See for a general overview, Ryngaert, *Jurisdiction in International Law* 2015; Scott, 'Extraterritoriality and Territorial Extension in EU Law' 2014, 87-126; Zerk, 'Extraterritorial Jurisdiction' 2010.

²²See however, Blattner, *The Extraterritorial Protection of Animals* 2019.

²³Meng, *Extraterritoriale Jurisdiktion* 1994, 10-13; Rudolf, 'Territoriale Grenzen der staatlichen Rechtsetzung' 1973, 9-10.

²⁴Meng, *Extraterritoriale Jurisdiktion* 1994, 53. Nationality represents a loyalty connection between the state and its citizen that engenders mutual rights and duties. A state protects its citizens (diplomatically and socially, grants them the right to entry, or the right to vote) and, in turn, demands their subjection to its jurisdiction. See e.g., International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art. 12(4) para. 4.

states.²⁵ A state can use the active personality principle to prohibit its nationals or residents from hunting certain or all animals, if these acts of hunting are also prohibited on domestic territory. Importantly, because double criminality for trophy hunting is not required under international law,²⁶ the US could in the Cecil case prohibit Palmer from hunting endangered animals abroad regardless of whether these countries also prohibit, or even regulate these acts. This principle is thus a highly effective means to close regulatory gaps that plague animal law.

Objective Territoriality Principle The international community has also responded to the inadequacy of purely territorial jurisdiction by establishing the subjective and objective territoriality principles. If acts or omissions occur only partly in the territory of a state, the principles of subjective and objective territoriality cover the entire act or omission. The subjective territoriality principle establishes jurisdiction over an act that commenced in the territory of the state exercising jurisdiction. The complementary principle of objective territoriality gives the state in which the act was completed the right to exercise its jurisdiction over the entire act.²⁷ A state that wants to help end illegal trophy hunting abroad can invoke the objective territoriality principle. Since a constituent component of trophy hunting is trophy display at home, it is reasonable to argue that the act of trophy hunting is completed by the act of importation: importing the trophy is a constituent element of the crime, which is consummated in the US.

This line of argument might remind some readers of transporting rules, and specifically of the case *Zuchtvieh-Export GmbH v. Stadt Kempten*. In this case, the European Court of Justice (ECJ) held that harmonized provisions on the transport of animals destined for exports outside the EU apply beyond EU territory.²⁸ *Zuchtvieh-Export GmbH* addressed the Court in matters concerning a decision by the Stadt Kempten, whereby it refused clearance for a consignment of cows to be transported to Andijan (Uzbekistan). The Court sided with Kempten, holding that from the point of departure to the point of destination in any third country, the organizer of the journey must abide by Council Regulation (EC) No. 1/2005, by providing the necessary information on watering and feeding intervals, journey times, and resting periods.²⁹ These duties, as the Court clarified, are due during all stages of the journey, whether they take place inside the territory of the EU or in the territory of

²⁵For example, under French law, sexual intercourse with minors abroad is punishable based on the habitual residence of the perpetrator: France, Code pénal, 19 December 2015, art. 227-27-1.

²⁶Bantekas, 'Criminal Jurisdiction of States under International Law' 2011, 13.

²⁷Crawford, *Brownlie's Principles of Public International Law* 2012, 458; Inazumi, *Universal Jurisdiction in Modern International Law* 2005, 22; Harvard Research in International Law, 'Jurisdiction with Respect to Crime' 1935, 484-94.

²⁸ECJ, *Zuchtvieh-Export GmbH v. Stadt Kempten*, Judgment of 23 April 2015, Case C-424/13, 2015 E.C.R. I-1251.

²⁹Council Regulation 1/2005 on the Protection of Animals During Transport and Related Operations and Amending Directives 64/432/EEC and 93/119/EC and Regulation 1255/97/EC, 2005 O.J. (L 3) 1, and corrigendum 2011 O.J. (L 336) 86.

third countries. To justify the Regulation's extraterritorial application, the Court argued that animal welfare is a legitimate objective and public interest enshrined in art. 13 TFEU and in art. 14(1)(a)(ii) and (b) of Regulation No. 1/2005 that must be respected even outside EU borders. It therefore seems that the Court qualified the transport as an export over which the EU had control *qua* its public morals.

While the Court's justification is certainly understandable in the context of trade, it failed to note the crucial difference between transporting rules and export control laws. Export controls allow or disallow exports based on the laws of the destination country and extend beyond the transportation process. In contrast, laws on transport do not purport to regulate animal welfare beyond the point of arrival; they are an application of the subjective and objective territoriality principles. This difference is relevant because laws governing export controls are much more delicate, legally, than norms based on accepted jurisdictional principles.³⁰ Rather than risk venturing into a heated political debate, the ECJ could have chosen an easy and more coherent strategy by invoking the subjective territoriality principle, which would have given it full jurisdiction over cross-border animal transports.

Though states have not yet entertained this line of argument, it promises to successfully address and solve a considerable portion of cross-border issues in animal law. As states increasingly rely on the subjective and objective territoriality principles to combat business crime, corruption, and cross-border financial crimes, an extension of the principle to animal law seems only coherent.

Ordre Public Exception in Private International Law By paying large sums to hunt animals abroad, foreign nationals are concluding a private contract with park rangers domiciled in the target country. If either of the parties does not fulfil their contractual obligations, the other party can sue. According to the general contracts rule, the courts of the state where an obligation should have been performed have jurisdiction. The contract over trophies may be twofold, encompassing both the act of killing the animal and importing the trophy to the hunter's home country. According to the Brussels regime, which is representative of the rules in most private international law systems, a sales contract's place of performance is the place where the goods should have been delivered,³¹ that is, the US in Cecil's case. Even if a US court took jurisdiction, however, it is likely that the court would apply foreign law, because the Rome I Regulation gives parties the choice of law or applies the law of

³⁰See the dismissive stance of the Court in ECJ, *The Queen and Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Limited*, Judgment of 19 March 1998, Case C-1/96, 1998 ECR I-1251, paras. 66-69. In 1998, the ECJ was called by Compassion in World Farming (CIWF) and the International Fund for Animal Welfare (IFAW) to declare that the UK was entitled to ban exports of calves that would prospectively be confined outside its territory in veal crates, a method widely criticized for disregarding the most fundamental interests of calves. The ECJ held that member states were barred from invoking article 36 of the Treaty Establishing the European Community to rely on public morality, public policy, or the protection of the health or life of animals to justify export restrictions.

³¹Council Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 OJ (L 351) 1, art. 7 para. 1 lit. b.

the seller's domicile,³² in our case Zimbabwe. Under US law, a court has a larger margin of appreciation to enter the claim and apply its own law, based on its distinct 'most significant relationship' doctrine, which precludes party choice.³³ If foreign law is applied nonetheless, it likely leads to the result that trophy hunting is considered legal. The only way to avert such a judgment is to invoke the *ordre public* exception, i.e., showing that the application of foreign law would be manifestly incompatible with a home state's public policy.³⁴ A strong indication for the assumption that the US should be able to invoke this exception in Cecil's case is that 74% of the population opposes canned hunting, i.e., hunting an animal raised on a game ranch in a confined area.³⁵ An important caveat for applying the public order exception is, however, that the act contravening fundamental national values must also be prohibited on domestic territory. In this case, the US fulfils this criterion by section 9(a)(B) ESA, which prohibits hunting endangered animals within the US.

5.2 *Lex Ferenda Options for Regulating Trophy Hunting*

This brief overview illustrates the various *lex lata* options available to states that want to combat trophy hunting. Yet these options do not cover all jurisdictional interests of states, and there are good reasons to argue that the existing catalogue of jurisdictional options should be expanded to protect animals more effectively across the border.³⁶ In the following, I take a critical positivist approach to exploring novel applications of the effects principle and the universality principle, with this end in mind.

Effects Principle Based on the effects principle, a state can exercise jurisdiction over activities outside its territory if these activities have or threaten to have a substantial effect on domestic territory.³⁷ The effects principle historically emerges

³²Regulation 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, art. 4(1).

³³American Law Institute, 'Restatement (Second) of Conflict of Laws of the United States' (Philadelphia: The American Law Institute 1971), available at: <https://www.ali.org/projects/show/conflict-laws/>, § 6 cmt. c.

³⁴International Law Association, 'International Civil Litigation for Human Rights Violations, Final Report' (London: ILA 2012), available at file:///Users/charlotteblattner/Downloads/Conference%20Report%20Sofia%202012.pdf, 25.

³⁵Humane Society of the United States (HSUS), 'New Poll Reveals Majority of Americans Oppose Trophy Hunting Following Death of Cecil the Lion', 2015, available at: http://www.humanesociety.org/news/press_releases/2015/10/poll-americans-oppose-trophy-hunting-100715.html.

³⁶For example, if antitrust law gave rise to the effects principle, it is reasonable to argue that animal law could similarly give rise to a new jurisdictional principle, or considerably alter existing ones.

³⁷American Law Institute, 'Restatement (Third) of the Foreign Relations Law of the United States' (Philadelphia: The American Law Institute 1987), available at: <https://www.ali.org/projects/show/foreign-relations-law-united-states/>, § 402, cmt. d. It is argued the principle was accepted in the *Lotus* case: Fox, 'Jurisdiction and Immunity', in Lowe/Fitzmaurice (eds) 1996, 212.

from the objective territoriality principle³⁸ but is now recognized as a distinct jurisdictional principle that is chiefly used in antitrust law and which covers economic effects such as financial losses.³⁹ In the past years, the principle has been expanded to cover other types of effects, including environmental effects (environmental pollution, loss of biodiversity, etc.)⁴⁰ or reputational effects (relied on generally in cases of human rights violations,⁴¹ and in the context of corruption and sex tourism).⁴²

The latter variant of the effects principle could profitably be used to regulate trophy hunting across borders. A home country could in this sense prohibit hunting animals abroad, if its reputation is damaged by these practices. Transforming the effects principle in this manner, however, yields potential for abuse. Reputations, values, and sensitivities vary widely across states. What one state perceives as offensive, another does not. States could also easily end up imposing their public morals in a disproportionate and illegitimate way to other cultures or nations, which more likely threatens international peace. Zerk accordingly argues that this kind of effects-based extraterritorial jurisdiction would not stand a chance in international law.⁴³ The only way the international community might be persuaded to accept this version of the effects principle is by restricting the scope of its application.

As with the ordinary effects principle, the reputational effect sustained by the home country could be limited to substantial effects (i.e., shared by a majority of its citizens) that are directly felt at home, and were reasonably foreseeable to the violator.⁴⁴ The state invoking the principle would also need to show it is more

³⁸Bantekas, 'Criminal Jurisdiction' 2011, 5; Crawford, *Brownlie's Principles* 2012, 459.

³⁹See e.g., Ryngaert, *Jurisdiction over Antitrust Violations in International Law* 2008.

⁴⁰A 2012 study of the European Union Directorate-General for External Policies found the principle applies to environmental law based on environmental effects (environmental pollution, loss of biodiversity, etc.): Directorate-General for External Policies, Policy Department, 'The Extraterritorial Effects of Legislation and Policies in the EU and US, requested by the European Parliament's Committee on Foreign Affairs', 2012, available at: <http://www.europarl.europa.eu/the-secretary-general/en/organisation/directorate-general-for-external-policies-of-the-union>, 5.

⁴¹In labour law, the effects are reputational. States resent being identified with domestic parent corporations of enterprises that run on cheap labour, forced labour, or human rights violations abroad (The Parliament of the Commonwealth of Australia (Parliamentary Joint Statutory Committee on Corporations and Securities), Report on the Corporate Code of Conduct Bill 2000 (Parliament House, Canberra, June 2001)). Similarly, in *Kiobel*, a minority opinion argued that foreign human rights violations should be remedied domestically, because they 'substantially and adversely affect [...] an important American national interest.' (US, *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659, 1671 (2013) (Breyer, J., concurring)).

⁴²Corruption and sex tourism threaten a state's international reputation, which is why domestic law is frequently applied to these extraterritorial events: Zerk, 'Extraterritorial Jurisdiction', 2010, 207-8.

⁴³Zerk, *Multinationals and Corporate Social Responsibility* 2008, 110-111.

⁴⁴See e.g., US, *Hartford Fire Insurance Co v. California*, 509 U.S. 764 (1993); US Department of Justice, 'Antitrust Enforcement Guidelines', 1995, available at: <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>, paras. 3.1, 3.12; Commission Notice, Guidelines on the Effect on Trade Concept Contained in arts. 81 and 82 of the Treaty (2004/C 101/07),

affected than any other state. Reputational damage might occur, e.g., when animals abused abroad were transported there from the affected country, or when a former domestic corporation of the affected state now conducts abhorrent animal experiments abroad, or in any case where there is substantial proximity to the state exercising jurisdiction. The New Zealand Animal Welfare Act in this sense reads '[t]he purpose of this Part is to *protect the welfare of animals being exported* from New Zealand and to *protect New Zealand's reputation* as a responsible exporter of animals [...].'⁴⁵

Universality Principle Under international law, the universality principle endows states with prescriptive jurisdiction over egregious crimes, regardless of where or by whom they were committed. Its legitimacy emanates from the fact that certain crimes are so serious and threatening that all states share an interest in preventing or stopping them.⁴⁶

The universality principle could be fruitfully employed to combat the most egregious crimes against animals—crimes strongly condemned by the international community. An absolute majority of states expressly recognize that animals are sentient beings to whom we owe moral and legal duties. Anti-cruelty laws of many states are based on the idea that it is abhorrent to cause physical and psychological harm to animals or to deprive them of basic needs. An overwhelming majority of states has also enshrined the obligation to treat animals humanely and to spare them unnecessary suffering. These laws serve as proof of a universal belief that animals be properly treated: the general principle of animal welfare in international law.⁴⁷ Scholars predict this principle will develop into a norm of customary international law, concomitant with rising global concerns for animals and the on-going juridification of animal law.⁴⁸ If this proves true, states could criminalize animal cruelty and suffering that undermine fundamental values of humanity and are condemned by the world community wherever and by whomever they are committed.

The universality principle also covers crime that is not necessarily the most heinous, but which is detached from states' jurisdictions, such as piracy.⁴⁹ States could prosecute crimes against animals, if those crimes manifestly escape the

2004 O.J. (C 101) 81, para. 92 (substantial), para. 24 (direct or indirect), para. 23 (foreseeable). Ryngaert qualifies the test of direct, substantial, and reasonably foreseeable effects as a norm of customary international law: Ryngaert, *Jurisdiction over Antitrust Violations* 2008, 58.

⁴⁵New Zealand, Animal Welfare Act 1999, Public Act 1999 No 142, §38 (emphasis added).

⁴⁶ICJ, *Arrest Warrant (Dem. Rep. Congo v. Belg.)*, Judgment of 14 February 2002, ICJ Reports 2002, 81 (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal).

⁴⁷Blattner, 'An Assessment of Recent Trade Law Developments from an Animal Law Perspective' 2016, 302; Bowman/Davies/Redgwell, *Lyster's International Wildlife Law* 2010, 678 f.; Sykes, 'Sealing Animal Welfare into the GATT Exceptions' 2014, 471-498; Trent/Edwards/Felt/O'Meara, 'International Animal Law, with a Concentration on Latin America, Asia, and Africa' 2005, 77.

⁴⁸Bowman/Davies/Redgwell, *Lyster's* 2010, 680; Sykes, 'Sealing Animal Welfare' 2014, 479-80.

⁴⁹United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, art. 101(a); US Third Restatement 1987 (n. 37), §404.

jurisdictional authority of most states. Especially if animal exploitation coincides with organized crime—as is often the case with trophy hunting and illegal wildlife trade⁵⁰—states should be entitled to expand their universal jurisdiction to ensure that those crimes will not go unpunished.

6 Trophy Hunting Is Only the Tip of the Iceberg

Trophy hunting is only one of many more cases in which the current inadequacy of international animal law manifests itself. Though most consumers like to think that animals used for agricultural production enjoy a high standard of care and are mainly produced ‘at home’, these animals are readily transported, shipped, and flown across states to save on production costs. To meet growing demand for animal products and save land and labor costs, corporations have merged into multinationals and split up production across sites in the territories of different countries. Shrimp, for instance, are harvested in the North Sea and driven 2000 miles south to Morocco, where producers profit from cheap labour. After they are shelled and enriched with preservatives to inhibit decay, they are transported back to Northern Europe.⁵¹ For other products, including meat, eggs, milk, and compound products derived from them, another couple of production steps in different states might add to this.

On-going division of labor, fewer barriers of trade, and foreign direct investments also encourage companies to disperse production over the globe. In the coming years, we anticipate a wave of agricultural outsourcing from the minority world to the majority world, prompted by heavy investments in farmland in the majority world.⁵² This is expected to be the third wave of global industry outsourcing, following the first wave of manufacturing outsourcing in the 1980s and the second wave of information outsourcing in the 1990s. Relocation and outsourcing are also common in the research industry, notably among biomedical and pharmaceutical institutions and their supplying facilities.⁵³ Overall, multinational corporations, which own most of the world’s domesticated animals,⁵⁴ are highly mobile and do not shy away from moving production to states with more lenient regulatory environments.

⁵⁰United Nations Office on Drugs and Crime, Bulletin on Organised Crime in Southern Africa (2012), available at: https://www.unodc.org/documents/southernafrica/Bulletin_on_organised_crime_in_Southern_Africa/UNODC_ROSAF_-_Bulletin_on_Organised_Crime_in_Southern_Africa_-_Issue_1.pdf, i.

⁵¹Documentary Presseportal, ‘Vorsicht Krabbe! – Das grosse Geschäft mit dem kleinen Tier’, 2014, available at: http://presse.phoenix.de/dokumentationen/2014/10/20141017_Krabbe/20141017_Krabbe.phtml.

⁵²‘Outsourcing’s Third Wave’, *The Economist* (21 May 2009).

⁵³Laster, ‘Plan to Breed Lab Monkey Splits Puerto Rican Town’ 2009; Pocha, ‘Outsourcing Animal Testing: US Firm Setting Up Drug-Trial Facilities in China’ 2006.

⁵⁴Park/Singer, ‘The Globalization of Animal Welfare’, 2012, 122-133.

Given these developments, it can confidently be said that issues of animal production and protection have become so globally entangled that jurisdictional connections often cannot be traced to a single state anymore. This approximation has brought states' regulatory particularities more sharply into focus, by accentuating remaining differences in regulation.⁵⁵ This, in turn, makes it convenient for corporations to choose home states based on the regulatory advantages they provide them, which stokes fear among states that business will move somewhere more advantageous. Rather than autonomously exercising their sovereign authority, states have begun to compete with each other through their regulatory systems, and learned that they gain a comparative advantage by designing their laws to the investors' and producers' liking.⁵⁶ These dynamics are commonly described as regulatory competition, also known as jurisdictional competition or systems competition.⁵⁷

As states compete over jurisdictional authority, regulation tends to converge towards laxity. Corporations predictably seek to maximize capital value, which is more likely when governments intervene less, and when corporations incur fewer costs than their competitors in other jurisdictions do.⁵⁸ To attract corporations and gain 'regulatory market shares', states lax their legal standards and create incentive for other states to follow suit. This competitive move eventually results in global convergence toward a lower common denominator, also known as competition in laxity or the race to the bottom.⁵⁹

Animal law theorists often argue that regulatory competition in animal law moves towards laxity.⁶⁰ The more rigidly laws insist on specific performances of corporations—such as by determining how animals ought to be bred, reared, transported, or slaughtered—the more corporations are disabled from choosing the cheapest factors of production needed to outpace competitors. Because policies that seek to improve animal welfare commonly restrict business activities, these standards tend to impede market growth.⁶¹ And vice versa, because there is always an economically more

⁵⁵Kaufmann, *Globalisation and Labour Rights* 2007, 232 *et seq.*; Picciotto, 'The Regulatory Criss-Cross' 1996, 89-123.

⁵⁶Bratton/McCahery/Picciotto/Scott, 'Regulatory Competition and Institutional Evolution' 1996, 2; Koenig-Archibugi, 'Global Regulation' 2010, 413; Murphy, *The Structure of Regulatory Competition* 2004, 4.

⁵⁷Eidenmüller argues that systems competition must be differentiated from regulatory competition. Systems competition is a competition not only of legal rules but also of a state's infrastructure, while regulatory competition refers to the competition of laws only: Eidenmüller, 'The Transnational Law Market, Regulatory Competition, and Transnational Corporations,' 2011, 715.

⁵⁸Kaufmann, *Globalisation and Labour Rights* 2007, 15; Murphy, *The Structure of Regulatory Competition* 2004, 10-11.

⁵⁹The race to the bottom is also frequently called 'Delaware effect' (coined by Vogel, *Trading up: Consumer and Environmental Regulation in a Global Economy* 1995) or 'Zug effect' (Murphy, *The Structure of Regulatory Competition* 2004, 6).

⁶⁰Kelch, 'Towards Universal Principles for Global Animal Advocacy' 2016, 82.

⁶¹Vernon and Nwaogu argue that a number of recently introduced changes to the regulatory framework of the EU have the potential to act as a barrier for future innovation. These barriers include, in particular, testing and marketing bans of cosmetic products: Vernon/Nwaogu,

efficient jurisdiction where capital can move, unhampered regulatory competition frustrates the successful introduction of or adherence to well-established levels of animal law.

In other cases, industries merely threaten to relocate their production to prevent parliamentary or ballot initiatives from improving the legal status of farm, research, or wild animals. Such threats are often enough to prompt states to enter a state of regulatory chill, meaning they decline to raise animal protection standards.⁶² For example, in 2015, the German public pushed for a national ban on chick shredding, but the *Bundestag* feared that the ban might prompt hen producers to relocate their facilities to less regulated countries.⁶³ Eventually, parliament did not adopt the ban and overruled the people's will to save 50 million male chicks per year from being shredded alive in the first few minutes of their lives. Regulatory chill—like competition in laxity—thus often defies societal demands and new scientific evidence about the complex and valuable lives of animals.

States that seek to withstand this pull towards laxity and decide to adopt stricter animal laws are often penalized. In 2006, the US tried to ban the commercial slaughter of horses for meat by prohibiting the issuance of federal funds to inspectors of horsemeat.⁶⁴ Without federal meat inspections, institutions that slaughtered horses could not run their businesses legally. Within a year of the ban, horse exports from the US to Mexico increased by 312%.⁶⁵ In other words, the entire horse slaughter industry of the US was effectively outsourced to Mexico, and this reignited societal concerns about animal welfare. The only way states can successfully counter this disconcerting development is to use the principles of extraterritorial jurisdiction outlined herein.

7 Concluding Remarks

By and large, animals lack a voice in the formation of law and have no opportunity to escape oppressive jurisdictional authority. Most states use their territorial primacy to attract foreign investment by bereaving animals—who are at the mercy of a single

⁶²‘Comparative Study on Cosmetics Legislation in the EU and Other Principal Markets’, Final Report Contract No. FIF.20030624, Prepared for European Commission DG Enterprise (Norfolk 2004), available at: http://rpaltd.co.uk/uploads/report_files/j457-final-report-cosmetics.pdf, 37.

⁶³Analogously: Murphy, *The Structure of Regulatory Competition* 2004, 7.

⁶⁴Deutscher Bundestag, 18. Wahlperiode, Gesetzesentwurf des Bundesrates zur Änderung des Tierschutzgesetzes, Drucksache 18/6663, 11 November 2015, Stellungnahme der Regierung, 10-11.

⁶⁵US, The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, 119 U.S. 2120, Public Law 109-97, H.R. 2744-45, §794. The ban was upheld in US, The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2014, 128 U.S. 5, Public Law 113-76, H.R. 3547.

⁶⁵Nolen, ‘U.S. Horse Slaughter Exports to Mexico Increase 312%’ 2008.

regulator—of protection and rights. This praxis is increasingly criticized by citizens witnessing the ‘globalization of animal cruelty’⁶⁶ and has brought jurisdictional issues to the forefront of the discussion in animal law. Ideally, these problems would be addressed and solved by concluding an international treaty in animal law. Yet, an economic analysis shows that this strategy is unlikely to work, and perhaps not even desirable, because international agreements tend to cap law at the lowest common denominator.

Extraterritorial animal law may offer a way out of this dilemma. The example of trophy hunting shows the range of possibilities the international doctrine of jurisdiction provides: the active personality principle, the subjective and objective territoriality principle, the *ordre public* exception, the effects principle, and the universality principle. By adopting these, we could abandon the archaic territorial conception of jurisdiction that binds individuals to it in an exclusive fashion and fences off other sovereigns. The territorial primacy a state may once have enjoyed vis-à-vis its regulatees offered ample room for misuse by bereaving regulatees—who are at the mercy of this single regulator—of protection and welfare. Thanks to the development of the modern law of jurisdiction, states can choose among viable jurisdictional options to protect animals abroad. These options are especially valuable to animals—more than to any other group that benefits from extraterritorial jurisdiction—because they still live under a totalitarian regime of law. Needless to say, extraterritorial jurisdiction runs the risk of being used to oppress or discriminate others, but if properly applied and strengthened with the necessary safety valves, it can be a powerful tool to advance our ongoing struggle for interspecies justice.

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⁶⁶White/Cao, ‘Introduction: Animal Protection in an Interconnected World’ 2016, 2.

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