The Unexplored: Direct Extraterritoriality

§1  Jurisdictional Principles in Animal Law

Because animals are still predominantly seen as objects of law, and, hence, as commodities for trade, trade law has a tremendous impact on states’ ability to protect animals within and outside their borders. But from a jurisdictional perspective, WTO law, through which states can protect animals indirectly, is only one area where extraterritorial jurisdiction matters. General international law addresses debates and unpacks problems of extraterritorial jurisdiction that that loom larger. At a time when institutions finance projects abroad, where multinationals directly affect animals in foreign states, where animals are moved easily across borders to evade laws, and where animal production is split among numerous countries, one of the most pressing global problems of our time is how to directly protect animals abroad, namely, by tying jurisdiction to an anchor point located abroad or regulating content abroad.¹

Direct jurisdiction is more controversial than indirect jurisdiction because it is considered a more intrusive form of extraterritoriality, but it is neither illegal nor rare. In business law, competition law, mergers and acquisitions, human rights law, environmental law, and other fields, states routinely regulate matters abroad. Under international law, any state that claims direct jurisdiction across its borders must show a jurisdictional basis by any of the so-called

¹ See for an analysis of these elements, Chapter 1, §3.
principles of jurisdiction, like the territoriality, personality (or nationality), protective, effects, or universality principle.\(^2\)

Traditionally, states had jurisdiction over all persons and objects present on their territory and events that took place there (territoriality principle), as well as jurisdiction over their nationals wherever they are located (nationality principle).\(^3\) The principles of territoriality and nationality, however, did not satisfy the many regulatory interests of states, especially after globalization took off. As the needs of states for effective regulation deepened, the international community began to recognize more jurisdictional principles and refined, modified, and extended extraterritorial jurisdiction through state practice. Today, the most common jurisdictional principles are the territoriality, personality (or nationality), protective, effects, and universality principle. Together, these principles are believed to cover the full range of states’ social, economic, and legal interests, and they essentially determine the matters in which and the extent to which states can regulate extraterritorially.\(^4\) Thus, international law, rather than per se prohibiting states from prescribing law across the border, follows the permissive principles approach.\(^5\)

---


\(^3\) Oxman, Jurisdiction of States, in MPEPIL 11 (2007).

\(^4\) Given the dynamic state of customary international law, this list is not considered exhaustive. New principles can emerge in the future but they almost always meet strong resistance. Meng studies in detail the admissibility of and requirements for introducing new jurisdictional principles: Meng 498 ff. (1994).

\(^5\) In the early jurisdictional era, the PCIJ held that states are free to assert jurisdiction unless there is a prohibitive rule of international law. In principle, therefore, international law “leaves [States] in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.” (**Lotus**, 1927 P.C.I.J. 19). Almost all scholars reject this assertion, for several reasons. **Lotus** was based on the theory of legal positivism, but international law has matured over the last 60 years (through the adoption of the UN Charter, resolutions passed by the UN General Assembly, the acknowledgment of state duties, and various international bodies established by the international community). Spheres unregulated by positive law are now subject to fundamental principles of the international legal order; this is normativist or naturalistic theory of the international legal order. The permissive principles approach was strengthened in the post–World War II era (and hence in the post-**Lotus** era) by the emergence of the principles of sovereign equality of states, noninterference, and mutual respect for territorial integrity. See further Martti Koskenniemi, International Legal Theory and Doctrine, in MPEPIL 19 (Rüdiger Wolfrum ed., online ed. 2007); Meng 485–6 (1994); Schwarze 18 (1994). Moreover, the **Lotus dictum** was explicitly overridden by the Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11, art. 11, re-enacted in art. 97 para. 1 UNCLOS. These treaties establish jurisdiction based on the flag state and the active personality principle. The **Lotus** judgment was also reversed by the ICJ in these cases: Nationality Decrees, 1923 P.C.I.J., at 24; Barcelona Traction, 1970 I.C.J. 105, ¶ 70 (Separate Opinion of Sir Gerald Fitzmaurice); Corfu Channel, 1949 I.C.J. 35; Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, 152 (Dec. 18) (Individual Opinion of Alvarez, M.); Barcelona Traction, 1970 I.C.J. 64, 105, ¶ 70 (Separate Opinion of Sir Gerald Fitzmaurice); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 126, at 268, 270–1 ¶¶ 12–3 (July 8) (Declaration of President Bedjaoui) [Nuclear Weapons, 1996 I.C.J.]; Arrest Warrant, 2002 I.C.J. 63, 78, ¶ 51 (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal): “[…] the dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies.”
Some scholars argue the jurisdictional principles can fully determine the scope of states’ prescriptive jurisdiction and that they reliably resolve jurisdictional conflicts. But these principles operate less determinately. They are options within an array of possibilities. States can have multiple bases for their claims and more than one state can assert jurisdiction over the same matter. The more reasonable view thus is that these principles are a starting point for allocating jurisdictional competence and mitigating jurisdictional conflicts by separating valid from arbitrary claims.

Though states use the jurisdictional principles in various fields of law, they have not done so in animal law. That states may rely on these principles in any area of law—including in animal law—is accepted, tout court, by virtue of fundamental principles of the international legal order, including the sovereign equality of states, the prohibition of intervention, and the protection of the domaine réservé of states. But how states can or should apply the jurisdictional principles to animal law is still unanswered. In this chapter, I explore, under the lex lata, how and to what extent states can use the general territoriality principle, the subjective and objective territoriality principles, the personality principle, and the protective principle to protect animals across the border. As I proceed, I categorize each principle in the extraterritoriality framework and determine its scope under international law.

§2 Territoriality Principles

A. Protecting Animals Abroad through the Territoriality Principle

It is a fundamental rule of international law that states enjoy jurisdiction within their borders. Territorial jurisdiction, hailed as “one of the bedrock jurisdictional notions,” covers sovereign territory, limited by natural frontiers recognized by international law, by apparent signs of delimitation, or by legal treaties on boundaries. Territorial jurisdiction also covers the territorial sea of a state extending 12 nautical miles from its coast to its maritime zones, its waters, and airspace above its land and sea. States use the territoriality principle to regulate

---

6 Coughlan et al. 37 (2007).
7 Oxman, Jurisdiction of States, in MPEPIL 10 (2007).
8 Meng used these overarching principles to apply the jurisdictional principles to public economic law: Meng 499–500 (1994).
9 Coughlan et al. 31 (2007). See also Crawford 458 (2012); Inazumi 22 (2005); Mann 33 (1964).
11 UNCLOS, arts. 2 and 3. See also UNCLOS, arts. 27 and 29 exempting, in certain cases, the criminal and civil jurisdiction of the coastal state on board a foreign ship passing the territorial sea. Beyond the territorial sea (and thus beyond state territory), states may exercise jurisdiction in another 12 nautical mile zone (the contiguous zone). Contiguous zone jurisdiction is limited to customs matters, fiscal laws, immigration issues, and sanitary regulation (art. 33 UNCLOS). Even beyond the maximum 24 nautical mile contiguous zone, jurisdiction can be asserted to explore and exploit living and nonliving resources and energy in the exclusive economic zone, stretching up to 200 nautical miles from the baseline and subject to other states’ rights (UNCLOS, arts. 55 ff.).
not only territory or territorial appurtenances but also property, persons, and events that occur there. As a consequence, even foreign visitors are *prima facie* subject to a state’s territorial jurisdiction.\(^\text{12}\)

Territorial jurisdiction requires that we decide *what factor* is used to determine territorial connections. In criminal terms, the territorality principle primarily refers to *the place where a tort, offense, or injury has been committed*. Common provisions provide that “[a]ny person who commits a felony or misdemeanor in [state A] is subject to this Code.”\(^\text{13}\) The practical advantages of territorial jurisdiction over local crimes are accessibility when gathering evidence and availability of parties and witnesses.\(^\text{14}\) Prescribing law for locally committed crimes also respects a state’s interest in positively and negatively defining its public order.

Just as states have an interest in penalizing and preventing crimes against humans, they have an interest in preventing and sanctioning animal abuse, cruelty, and animal suffering. For instance, the German Animal Welfare Act (AWA) determines that individuals can be imprisoned or subject to fines for “killing a vertebrate without good reason or causing a vertebrate considerable pain or suffering out of cruelty or persistent or repeated severe pain or suffering.”\(^\text{15}\) The Swiss AWA criminalizes maltreatment of animals (article 26), offenses in international trade (article 27), and other offenses (article 28).\(^\text{16}\) The AWA of the United Kingdom lays down liability for inflicting on animals unnecessary suffering, mutilation, tail docking, poisoning, animal fighting, and other acts (section 32 paras. 1–5).\(^\text{17}\) Most states criminalize certain acts (or omissions) that harm animals, but they do not define their laws’ jurisdictional scope. States could add to the introductory articles of their animal welfare act wording like: “any person who commits a felony or misdemeanor in state A is subject to the code of state A.” This wording would help clarify the jurisdictional scope of their laws and show that they are primarily interested in regulating the welfare of animals in their territory.

In animal law, administrative orders like prohibitions against keeping an animal, administrative fines, and orders are an important form of regulation. States typically like to burden perpetrators with administrative consequences based on *where their animal welfare act, ordinance, or the like was violated*. This approach aligns with their understanding of general administrative law.\(^\text{18}\)

---


\(^\text{13}\) E.g., *Criminal Code* (Switz.), art. 3 para. 1.

\(^\text{14}\) Brownlie 301 (2008); Crawford 458 (2012); Oppenheim’s *International Law* 458 (1992).

\(^\text{15}\) Animal Welfare Act (Ger.), § 17.

\(^\text{16}\) Animal Welfare Act (Switz.), arts. 26–8.

\(^\text{17}\) Animal Welfare Act (U.K.), § 32 (1)–(5).

Property may also be used as a basis for jurisdiction under the territoriality principle. The rule that states have jurisdiction over property where it is located (lex loci situs) is firmly established in private international law.\textsuperscript{19} The \textit{lex situs} rule applies to immovable property, but some argue it also extends to animals. Klerman claims that the territoriality rule would uniformly allocate jurisdiction among states: “[T]he right to acquire wild animals is best determined by the law of the place where the animal is captured rather than by the residence of the hunter.”\textsuperscript{20} But the question of whether the \textit{lex situs} rule is appropriate for animal law is redundant if the wrong done to an animal entails administrative orders or criminal penalties that are covered by the law of the state where the crime was committed or where administrative provisions were violated. The \textit{lex situs} only matters when an animal’s interest is violated, but the violation is not penalized by criminal laws or administrative orders. Even then, it is unclear if the \textit{lex situs} covers animal welfare considerations since the rule is typically limited to disputes involving title to property and asset value.\textsuperscript{21}

The territoriality principle also establishes jurisdiction on the basis of a person’s domicile or residence, as in private law, tax law, migration law, and special criminal law concerns.\textsuperscript{22} For instance, article 4 of the Brussels Regulation determines that a defendant’s domicile is decisive for establishing jurisdiction over matters of private law, regardless of the defendant’s nationality.\textsuperscript{23} The UK Crime (International Co-operation) Act of 2003 introduced into the Terrorism Act jurisdiction on the basis of natural persons’ residence.\textsuperscript{24} And sections 402 and 410 of the US Restatement of Foreign Relations, which list nationality as an admissible link for jurisdiction, clarify that residence, domicile, and presence are equally accepted criteria.\textsuperscript{25} If legislation relates to animals, a state may use the domicile or residence of the perpetrator or the animal’s owner to establish jurisdiction. Imagine the owner of a herd of sheep has employed a shepherd to care for their sheep. The owner is domiciled in Germany, but the shepherd and the sheep reside in France. In case of negligence, Germany can apply its animal law based on the owner’s domicile, and France can apply its animal law based on the shepherd’s domicile.\textsuperscript{26}

Analogous to the place of domicile or residence for natural persons, states can establish jurisdiction over legal persons based on their \textit{seat}. Article 63 para. 1 of the Brussels Regulation defines domicile for legal persons as the statutory seat, the central administration, or the

\textsuperscript{20} Daniel Klerman, \textit{Jurisdiction, Choice of Law and Property, in Law and Economics of Possession} 266, 276 (Yun-Chien Chang ed., 2015).
\textsuperscript{22} Meng 474 (1994); Oxman, \textit{Jurisdiction of States, in MPEPIL} 11 (2007).
\textsuperscript{23} Council Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1 [Brussels Regulation]. \textit{See also} its preamble.
\textsuperscript{24} Crime (International Co-operation) Act 2003, c. 32, §§ 61B and 61C (U.K.); Terrorism Act 2000, c. 11 (U.K.).
\textsuperscript{25} U.S. Restatement (Fourth) of the Foreign Relations Law, § 402, cmt. g and reporters’ note 7; id. §410, cmt. c.
\textsuperscript{26} Negligence vis-à-vis sheep is quite common, \textit{see, e.g.}, Stefan Borkert, \textit{Tierhalteverbots für Schafbauer, Thurgauer Tagblatt, May 10, 2010.}
principal place of business. Canada and the United States establish personal jurisdiction over corporations where they are “doing business,” i.e., engaging in “systematic and continuous” activities, as opposed to “irregular or casual” ones. Since corporate seats are also used to determine their nationality, this link is both territorial and personal. Below, I examine jurisdiction based on the seat of corporations as an aspect of the personality principle. Overall, the territoriality principle seems to cover a wide range of cases and offer multiple anchor points to respond to globalized events in animal law.

Two caveats render the territoriality principle less “user friendly.” First, even if an act or omission occurs on state A’s territory, other states may have a link to the same events. The owner of an animal might reside in state A, the perpetrator might permanently live in state B, or state B might have a legal interest in prosecuting the perpetrator. So, a case that appears territorial may still attract regulatory interests of foreign states, because owners, perpetrators, and victims have different nationalities, because damages and other effects are felt on foreign territory, or because auxiliary acts were committed by foreigners. It is only in exceptional circumstances that a case will have no connections across borders. Second, the territoriality principle presumes that acts are commenced and completed in a single state. This, however, runs counter to social and political reality. In Mann’s words: “[A] test developed in wholly different economic, social and technical conditions and at a time when corporations did not yet play a predominant role in international life is unlikely to satisfy a generation which is suspicious of rigidity, and, indeed, of principles.” Instead of rejecting the territoriality principle altogether on these grounds, it is more reasonable to view it as one of many bases of jurisdiction.

B. PROTECTING ANIMALS ABROAD THROUGH SUBJECTIVE AND OBJECTIVE TERRITORIALITY PRINCIPLES

To respond to some of the structural inadequacies of the territoriality principle, the international community established the subjective and objective territoriality principles. If acts or omissions span more than one state’s territory, the principles of subjective and objective territoriality cover the entire act or omission (also known as the ubiquity theory in criminal law). Consider the following case: person A is present in state A, while person B is present in state B. Person A shoots across the frontier of state A, and the bullet enters the territory of state B and kills person B. Based on the principles of objective and subjective territoriality, both

---

27 International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (U.S.). Cf. for Canada: Association Canadienne Contre l’Impunité (ACCI) v. Anvil Mining Ltd., [2012] QCCA 117 (Can.). Art. 3148(2) of the Civil Code of Québec (c. 64, 1991 (QC, Can.)) unequivocally determines that “[i]n personal actions of a patrimonial nature, a Québec authority has jurisdiction where […] the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec and the dispute relates to its activities in Québec.”

28 See Chapter 5, §3.

29 The territoriality principle is readily applied where an act or omission occurred on one state’s territory only, which is rarely the case. Most times, states use fictitious locations for committed acts, fictitious presence of persons, and terminological fictions to stretch the territoriality principle so that it fits their interests in extraterritorial regulation. See in detail Chapter 2, §2.

state A and state B have jurisdiction over the entire act. The subjective territoriality principle establishes jurisdiction over an act that commenced in the territory of state A. The complementary principle of objective territoriality gives the state in which the act was completed (state B) the right to exercise jurisdiction over the entire act.\textsuperscript{31} The objective territoriality principle was recognized by the Permanent Court of International Justice (PCIJ) in the landmark \textit{Lotus} case, where it confirmed—by the casting vote of the president—Turkey’s jurisdiction over a collision of two vessels on the high seas on the basis of effects felt on Turkish territory. In doing so, the Court was convinced that “control over territory necessarily include[s] control over events that affect that territory.”\textsuperscript{32}

The objective or subjective territoriality principles give states not only jurisdiction over the fragmented part of a crime committed in their territory but over the entire act or omission.\textsuperscript{33} By accepting both subjective and objective territoriality, the international community established parallel authority for both states.\textsuperscript{34} But not all acts or omissions that occur in the territory of two or more states justify applying the subjective and objective territoriality principles. If negligible parts of a crime are committed on one state’s territory, this does not entitle it to jurisdiction. Also, a state cannot unilaterally determine how substantive a contribution an act makes to a crime for it to have jurisdiction. The United States in this respect claims that the principles allow it to prescribe law over conduct that has “wholly or in substantial part” occurred within its territory.\textsuperscript{35} In contrast, Crawford argues that the conduct must be a constituent element of the act or omission in question.\textsuperscript{36} The two views are congruent. A crime is committed in whole on a state’s territory if all constituent elements are committed on its territory; it is committed in part on a state’s territory if one of the constituent elements is consummated there. In a given case, we must thus determine if one of the constituent elements of a norm occurred on domestic territory. The nature of these elements may vary greatly. The objective territoriality principle, for example, covers physical effects that amount to a constituent element of the offense, and nonphysical effects, as in the case of libel or defamation.\textsuperscript{37}

According to the International Bar Association’s (IBA) Report on Extraterritorial Jurisdiction, states increasingly use the subjective and objective territoriality principles to tackle business crime, corruption and international fraud, as well as internet and international financial crimes.\textsuperscript{38} The principles have also been applied to violations of antitrust

\begin{enumerate}
\item \textsc{Crawford 458 (2012)}; \textsc{Inazumi 12 (2005)}; Harvard Research in International Law, \textit{Jurisdiction with Respect to Crime}, 29 AJIL 435, 484–94 (Supp. 1935).
\item \textsc{Lotus, 1927 P.C.I.J. 23}.
\item \textsc{Akehurst 152 (1972–3)}; \textsc{Schwarze 23–4 (1994)}.
\item \textsc{American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, § 401 para. 1(a) (1987)} [U.S. Restatement (Third) of the Foreign Relations Law].
\item \textsc{Crawford 458 (2012)}.
\item \textsc{Meng 177 (1994)}.
\item \textsc{IBA Report Extraterritorial Jurisdiction 12 (2009)}.\end{enumerate}
law, immigration regulation, and, generally, in the field of policy. This expansion directly responds to economic globalization. As early as 1935, the Harvard Draft Convention noted that "with the increasing facility of communication and transportation, the opportunities for committing crimes whose constituent elements take place in more than one State have grown apace."

Just like humans, animals can be victims of cross-border crimes that allow states to invoke the subjective and objective territoriality principles. Animals may be moved across borders while a crime is committed against or related to them, or they may be in a single location but are affected by a crime initiated elsewhere, which is consummated where the animals are located. In the first case, if animals are transported from state A to state B in a manner contrary to the laws of either state, the transporting business may face criminal, administrative, or civil charges that cover the entire transportation process. This is supported by state practice. In the 1940s, Hackworth commented on an inhumane transport of cows from the former Republic Formosa to the United States: “[T]he offence, assuming that it originated at the port of departure in Formosa, was a continuing one, and every element necessary to constitute it existed during the voyage across the territorial waters. The completed forbidden act was done within American waters [...]”

If states consistently applied the two territoriality principles to cross-border crimes committed against animals, this would fill regulatory gaps and have a positive impact on animals’ lives. Thousands of animals are transported across borders each day, mostly to produce food, and many states assume they have no jurisdiction over these transports. Australia, the world’s biggest exporter of live animals, exported 878,190 live cows, 1,953,918 live sheep, and 13,694 live goats in 2017. With the rising number of live animal transports across the globe, claims that these transports cause immense suffering for animals have become more widespread. In an attempt to address the problem, Australia established bilateral agreements and memoranda of understanding with trading partners to oblige exporters to continually monitor the animals’ well-being and to hold them accountable if their actions do not meet international levels of animal welfare. This has satisfied neither Australia’s nor its trading partners’ interests. Australia, however, has not yet tried to establish its jurisdiction over these transports on the basis of the subjective territoriality principle.

---


40 Harvard Research in International Law, Jurisdiction with Respect to Crime 484 (1935).

41 Akehurst states that the objective and subjective personality principles apply in cases of cross-border crime, or to crimes that extend over a long period of time: Akehurst 192 (1972–3).


45 Australian Meat and Livestock Industry (Export of Live-stock to Egypt) Order 2008, Nov. 28, 2008, Annex A, Memorandum of Understanding on the Handling and Slaughter of Live Australian Animals (Austl.). Robertson refers to this as the “farm-to-fork” continuum and argues that the strategy is effective because failing to abide by the standards would decrease sales for exporters: Robertson 199–200 (2015).
A bolder jurisdictional assertion was recently made in Europe. In *Zuchtvieh-Export GmbH v. Stadt Kempten* (C-424/13), the European Court of Justice (ECJ) held that harmonized provisions on the transport of animals destined for exports outside the European Union apply beyond EU territory. Zuchtvieh-Export GmbH addressed the Court in matters concerning the decision by the Stadt Kempten, which refused clearance for transporting a consignment of cows to Andijan (Uzbekistan). The Court sided with Kempten, holding that from the point of departure to the point of destination in a third country, the organizer of the journey must abide by Council Regulation (EC) No. 1/2005, by providing necessary information on watering and feeding intervals, journey times, and resting periods. These duties, as the Court held, are due during all stages of the journey, whether inside the territory of the European Union or in the territory of third countries. To justify the Regulation’s extraterritorial application, the Court argued that animal welfare is a legitimate objective of public interest, as established in article 13 of the TFEU and in article 14(1)(a)(ii) and (b) of Regulation No. 1/2005, which must be respected outside EU borders. The judgment suggests the Court viewed the transport as an export over which the European Union had jurisdiction qua its public morals.

The Uttarakhand High Court used a similar line of arguments in a judgment of July 2018. The petitioner sought directions to restrict the movement of horse carts, or *tongas* between Indian and Nepal through Banbasa in Uttarakhand’s Champawat district. After addressing enforcement deficits and lax laws applying to cart-pulling horses, the High Court enlarged the scope of the petition to promote the protection and welfare of animals. It ruled that no animal should carry excess weight, that sharp equipment be banned, that animals not be made to work during excess heat, that they be provided with suitable shelters, that they be vaccinated, and that their health be checked by a veterinarian before transport. In its judgment, the Court pointed to the treaty of trade between India and Nepal that allows restricting trade for animal welfare reasons, which essentially conforms to article XX GATT. Like the ECJ, the High Court used public morals and state interests in protecting animal life as a basis for applying its law extraterritorially.

Though the line of argument used by the two courts is understandable, they failed to distinguish transporting rules from 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. These differences matter because the laws governing export controls are much more

---

48 Narayan Dutt Bhatt v. Union of India (UOI) et al., Writ Petition No. 43 of 2014 (HC Uttarakhand at Nainital 2014) (India).
49 *Id.* at 22.
delicate, legally, than norms based on jurisdictional principles. Rather than risking a venture into a heated political debate, the courts could have used a more coherent strategy by invoking the subjective territoriality principle, which gives them full jurisdiction over cross-border animal transports.

Improper transport is the most frequent crime committed against animals across the border, but it is not the only one. The principles establish extraterritorial jurisdiction over all continuing offenses—a series of offenses that trigger the legal interests of several states—and connected offenses. Theft, for example, is a continuing offense. Stealing an animal in state A and bringing them to state B gives jurisdiction to both states qua the subjective and objective territoriality principles, an insight which matters for illegal wildlife trade, for example.

The subjective and objective territoriality principles also apply to crime commenced in state A and consummated in state B, while the animal has remained in state B throughout. In this case, a constituent element of a crime must have been committed on the territory of each state. It is again useful to look at the case of an owner of sheep in France who hired a shepherd to look after them. This time, the owner is domiciled in and a national of the United Kingdom. Because the shepherd failed to take care of the sheep, they suffered from hunger, thirst, and adverse weather conditions before dying. According to section 9 para. 1 of the UK AWA, “[a] person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.” If the owner has insufficiently chosen, instructed, or supervised the shepherd, the owner is liable for negligent omission committed on British territory, the legal consequences of which are felt on French territory.

Thus, jurisdiction over cross-border crimes against animals is highly relevant for more complex cases where people fail to fulfill special duties as caretakers.

Likewise, extraterritorial jurisdiction has been accepted when parties have attempted, aided or abetted, or incited criminal offenses. By establishing jurisdiction over these acts,

---

50 See the dismissive stance of the ECJ in Case C-1/96, The Queen and Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Limited, 1998 E.C.R. 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 United Kingdom was entitled to ban exports of calves that would likely be confined outside its territory in veal crates, a method widely criticized for negatively affecting the welfare of calves. The ECJ held that member states were barred from invoking article 36 of the Treaty Establishing the European Community (TEU) to rely on public morality, public policy, or the protection of the health or life of animals to justify export restrictions.


52 Akehurst 153 (1972–3). This includes jurisdiction over persons who assist the thief: R v. Elling [1945] AD 234 (U.K.).

53 Animal Welfare Act (U.K.), § 9(1).

54 For this example, the presumption against extraterritoriality as provided for in Animal Welfare Act (U.K.), Explanatory Notes, para. 8 was ignored.

55 Cf. CoE, Extraterritorial Criminal Jurisdiction 447 (1992). Meng makes the point that such a broad scope of jurisdiction exists in continental Europe (e.g., Criminal Code (Switz.), art. 8), but is less established in the US system: Meng 175 ff. (1994). Conspiracy connotes an agreement of two or more persons to commit a crime. Complicit persons who fail to intervene by means reasonably available to them are liable for the acts of others. Persons may also be accessorially liable when they assist, but do not actually commit a crime. The same is true
the subjective territoriality principle may confer on a state a wide degree of extraterritorial jurisdiction. In *Serre et Régnier*, the French *Cour de cassation* ruled that because France had jurisdiction over one national involved in committing a crime in Belgium (Serre), it could also claim jurisdiction over the national’s accomplices, even though they were not French nationals. In *Doe v. Unocal*, a local Myanmar subsidiary of the multinational corporation Unocal was alleged to have been complicit in the rape, torture, and murder of Burmese citizens by the Myanmar military. Before the parties settled on the issue, the US Court of the 9th Circuit, which had adjudicative jurisdiction on the basis of the parent corporation’s seat, was determined to bring to application the aiding and abetting standards to hold the US parent liable for human rights violations abroad. The same considerations apply to crimes committed against animals, including when instructions to mistreat animals are given by people in one state to people of another, when people located in different countries conspire to commit a crime against animals, or for attempted cross-border crimes. For example, in 2014, a documentary called *Cowspiracy: The Sustainability Secret* (directed by Kip Andersen and Keegan Kuhn), documented the massive negative environmental, social, and animal welfare effects of modern animal agriculture and showed how Greenpeace, Rainforest Action Network, Sierra Club, Surfrider Foundation, and other environmental nongovernmental organizations (NGOs) are paid by the farmed-animal industry to remain silent about the fact that animal agriculture is the biggest climate killer. Although neither public prosecutors nor animal NGOs have (yet) brought charges, Greenpeace et al. could conceivably be viewed as conspirators to environmental law offenses that span the globe.

C. TERRITORIALITY PRINCIPLES IN THE EXTRATERRITORIALITY FRAMEWORK

In the extraterritoriality framework, if animals are moved across the border the regulation links to the transported animal (animal-related anchor point) who becomes a transient anchor point moving from domestic (intraterritorial) to foreign (extraterritorial) territory. The content regulated (rules on transport) moves with the animal from intraterritorial content of incitement, which modern forms of communication facilitate: Oxman, * Jurisdiction of States*, in MPEPIL 16 (2007).

---


57 *Cour de cassation* [Cass.] [Supreme Court for Judicial Matters], Recueil Dalloz Sirey 395, 1991, “Serre et Régnier” (Fr.).

58 The Court did not issue its judgment due to prior settlement of the parties: *Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003) (U.S.).

59 *Cowspiracy, About the Film, available at* http://www.cowspiracy.com/about/ (last visited Jan. 10, 2019).

60 See Chapter 9, §3 C. for a more detailed examination of the substantial tests of conspiracy and complicity liability.
regulation to extraterritorial content regulation. In the most extreme scenario, this form of jurisdiction has an animal-related extraterritorial anchor point and regulates animal-related content extraterritorially. In the extraterritoriality framework, it qualifies as a type $\alpha_1$ regulation.

Jurisdiction over cross-border crimes committed against animals who have stayed in one state throughout is treated differently in the extraterritoriality framework. Again, there is a sheep owner in the United Kingdom who hires but fails to instruct the shepherd to take care of their sheep in France. The United Kingdom has jurisdiction based on the subjective territoriality principle. Its jurisdiction is based on an intraterritorial anchor point that is non-animal-related (the owner is present on domestic territory and responsible for maltreating animals). The goal of ensuring the well-being of animals abroad is extraterritorial animal-related content regulation, so this is a type $\gamma_1$ regulation. France, which has jurisdiction based on the objective territoriality principle, uses an anchor point that is animal-related and intraterritorial (sheep welfare infringed on national territory). The content it regulates is animal-related and intraterritorial (improving the lives of animals by holding the UK owner responsible for violating a duty that is owed in France).

The scope of jurisdiction conferred to states on the basis of the subjective and objective territoriality principles is limited to the acts in question (e.g., violation of cross-border duties of care owed to animals). Jurisdiction does not cover any other acts of the responsible person unless they relate to the first (e.g., as accessory and auxiliary offenses). The subjective and objective territoriality principles thus narrowly apply to a specific act commenced or consummated on a state’s territory.

§3 Active Personality Principle

A. NATURAL PERSONS

The personality principle springs from a state’s personal sovereignty over its permanent population. By virtue of the personality principle, “a State is competent to create legal consequences for its nationals in relation to other States, which can take the form of direct rights, obligations, or the acquisition or loss of claims and property.”61 The principle refers to jurisdictional links from a state to natural or legal persons who have its nationality, and it applies regardless of their whereabouts, whether they are present on its territory, on foreign territory, or on lawless territory. The interest of states in regulating the behavior of their nationals abroad is the most accepted and universally used basis of extraterritorial jurisdiction, as acknowledged by the ICJ in Nottebohm62 and in Ahmadou Sadio Diallo.63 The active personality principle applies to actions and omissions of nationals abroad, while the passive personality principle establishes jurisdiction over nationals who are victims of crimes abroad.64

61 Oliver Dörr, Nationality, in MPEPIL 44 (Rüdiger Wolfrum ed., online ed. 2006).
64 ORAKHELASHVILI 220 (2019).
The personality principle is justified by the special bond established between individuals and a state \textit{qua} nationality, which is why it is also referred to as the nationality principle. Nationality is seen as a form of allegiance, loyalty, or solidarity between a person and a state, and denotes the sum of obligations and rights between them. Allegiance from a person’s perspective translates as protection and submission; from the state’s perspective, it translates as diplomatic protection and jurisdiction.\textsuperscript{65}

Given the dwindling importance of nationality in a globalized era, states sometimes invoke the personality principle to link their jurisdiction to a person’s residence or domicile, regardless of their nationality. Sexual intercourse with minors abroad, for example, is punishable under French law based on the habitual residence of the perpetrator.\textsuperscript{66} Permanent residents of Australia, Denmark, Finland, Iceland, Liberia, Malaysia, the Netherlands, Norway, Russia, Sweden, the United Arab Emirates, the United Kingdom, and the United States are liable to the laws of their domiciliary state if they commit crimes abroad.\textsuperscript{67} International law considers lawful states’ expansion of their personality link from nationality to residence or domicile, if the connection is strong enough to meet the jurisdictional purposes in question.\textsuperscript{68}

Under international law, the personality principle—whether it relies on nationality, residence, or domicile—can be used in all fields of law. A state that demands its nationals abide by its AWA when they are temporarily or permanently situated abroad, acts in line with international law. Where a state’s connection to its residents is strong enough, this is true, too.

In India, 80 percent of the population is Hindu and believes cows are sacred. Under the laws of India, killing female cows or calves for human consumption is illegal,\textsuperscript{69} but each year, cows worth several hundred million dollars are raised in India and smuggled to its Muslim neighbor Bangladesh, where they are slaughtered.\textsuperscript{70} In the summer of 2015, 30,000 Indian border guards were ordered to stop all Indian cows from crossing the border.\textsuperscript{71} Instead of penalizing persons unrelated to India for smuggling cows, and thereby raising delicate issues of multiculturalism, India could rely on the active nationality principle for egregious acts

\textsuperscript{65} This is also called \textit{protectio et subiectio}: \textsc{Thomas Hobbes}, \textit{Elementa Philosophica III}: \textit{De Cive}, ch. 5, 12. Some qualify the relationship of allegiance as a contract between individuals and a state: \textsc{Paul Weis}, \textit{Nationality and Statelessness in International Law} 50 (2d ed. 1979).

\textsuperscript{66} \textit{Penal Code} (Fr.), art. 217-27-1.

\textsuperscript{67} According to the IBA Report on Extraterritorial Jurisdiction, 8 of 25 examined states provide for resident or domicile jurisdiction in addition to nationality jurisdiction. Those countries are Denmark, Finland, Malaysia, Netherlands, Norway, Russia, Sweden, and the UAE: \textit{IBA Report Extraterritorial Jurisdiction} 145 (2009). For Australia, see \textit{Criminal Code Act 1995}, Act No. 12, Dec. 1, 2015, § 272 (Austl.) [\textit{Criminal Code Act 1995 Austl.}]. For the United Kingdom, see, e.g., \textit{Terrorism Act 2000}, c. 11, s. 63B, s. 63C (U.K.). For the United States, see U.S. \textit{Restatement (Fourth) of the Foreign Relations Law, § 410}, reporters’ note 3. For the remaining countries, see Akehurst 156 (1972–5).

\textsuperscript{68} \textit{Oppenheim’s International Law} 469 (1992).

\textsuperscript{69} Constitution of India, Jan. 26, 1950, art. 48 (India). See on this matter also art. 51 A lit. g of the Indian Constitution.

\textsuperscript{70} In India, illegal trade in cow meat is flourishing: Sudhir Kumar Mishra, \textit{Illegal Cattle Trade Headache for Cops}, \textit{The Telegraph}, June 16, 2018.

\textsuperscript{71} Kate Pickles, \textit{Killing a Cow Is Equal to Raping a Girl Claims Hindu Nationalist Organization as 30,000 Indian Troops Are Told to Stop the Sacred Animals Being Smuggled Across the Border into Bangladesh to Be Eaten}, \textit{Mail Online}, July 2, 2015.
committed by its nationals against animals abroad, such as killing a cow. The connection is based on personal allegiance owed by Indian nationals to their state and the rising societal belief in India that cows must be treated respectfully.\textsuperscript{72}

This is just one example of the many ways in which the active personality principle could be made fruitful for cross-border issues in animal law. Under international law, a state is in principle free to hold its nationals or residents, who are present abroad, liable for violating its animal laws, including norms prohibiting animal cruelty, improper transport or slaughter of animals, or norms laying down positive duties toward animals. The principle also confers on states a wide jurisdictional scope, since it covers people acting in private and professional capacity (e.g., as members of administrative boards or associates).

B. LEGAL PERSONS

Like (though not identical to) natural persons, corporations, associations, foundations, and other legal persons may be subject to a state’s personal jurisdiction.\textsuperscript{73} International law recognizes the need to affiliate legal persons to a state in order to establish personal jurisdiction (and diplomatic protection).\textsuperscript{74} This affiliation is usually based on legal persons’ nationality. But unlike natural persons, legal persons’ nationality is not established on the basis of a statutory norm. Nationality also is not formally conferred, and no passports are issued to legal persons.\textsuperscript{75} On this basis, Meng and others argue that “nationality” for legal persons is only a shorthand that identifies the applicable \textit{Personalstatut}, i.e., the laws of the state that has the closest personal connection to a legal person. The German term \textit{Staatszugehörigkeit} and the French term \textit{allégeance politique} thus more accurately capture the affiliation between a legal person and its home state.\textsuperscript{76} The personality principle covers ships and aircraft, too. Ships are identified as quasi-nationals on the basis of the flag state principle,\textsuperscript{77} as are vehicles in airspace.\textsuperscript{78}

\textsuperscript{72} Wagman and Liebman, examining the Indian constitution, its AWA provisions, and court cases, argue that India is particularly sensitive to animal cruelty: \textit{Wagman & Liebman 154} (2011).

\textsuperscript{73} In economic terms, an entity that is geared to maximize profits qualifies as a corporation. But to count as a legal person, a corporation must have rights and duties, thus, legal capacity, which is conferred on it through law. A corporation is an entity recognized by law for its independent legal existence from its owners, and which can be sued in its own name, as a legal person: \textit{Philip Blumberg, The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality} 4, 24 (1993); \textit{Geisser 12} (2013); Menno T. Kamminga & Saman Zia-Zarifi, \textit{Introduction, in Liability of Multinational Corporations under International Law} 1, 3 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Peter T. Muchlinski, \textit{Corporations in International Law, in MPEPIL} 1 (Rüdiger Wolfrum ed., online ed. 2014).

\textsuperscript{74} Dörr, \textit{Nationality, in MPEPIL} 24 (2006). Nationality of legal persons is important for the law of jurisdiction, because it protects corporations from injuries by foreign states and because states may claim treaty rights on behalf of their nationals: U.S. Restatement (Third) of the Foreign Relations Law, § 213, cmt. b.

\textsuperscript{75} CoE, \textit{Extraterritorial Criminal Jurisdiction} 449 (1992).

\textsuperscript{76} \textit{Meng 467} (1994); Andreas Kley-Struller, \textit{Die Staatszugehörigkeit juristischer Personen, 2 SZIER} 163, 167, paras. 8–9, 174, para. 23 (1991).

\textsuperscript{77} The flag state principle is enshrined in art. 91 UNCLOS. \textit{See also} The Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71, art. VIII(1); Antarctic Act 1994, c. 15, s. 21 (U.K.).

\textsuperscript{78} United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205, arts. XII lit. a and IX
International law leaves the question of how states determine nationality for legal persons largely unanswered. State practice on this question is mixed. Common law countries use the theory of incorporation to determine corporations as their nationals if they are incorporated in their territory. A notable advantage of this theory is that nationality is definitely established, which fosters legal certainty and consistency. But the theory of incorporation may define corporations as nationals of a state when they factually lack a substantial connection to it. Civil law systems therefore favor the place of the seat of corporate management or its headquarters as a link to establish nationality (real seat theory, siège social, or headquarters theory). The real seat theory is less predictable because personal jurisdiction can change when the company’s seat is moved. States sometimes choose a combined approach, by determining nationality based on the seat and the place of incorporation, as done in the Hague Convention Concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions.

Other factors that influence a state’s personality jurisdiction over legal persons are the nationality of shareholders who own a substantial part of a corporation, the management of an office outside the declared seat of formal management, and the principal place of business. The theory that defines nationality in reference to persons who possess real control over a legal person is called control theory. Unlike the incorporation theory and the real seat theory, the control theory is disputed in international law. States are hesitant to apply domestic law to a foreign corporation that shows no outward connection to them. For example, the former US Securities Exchange Act established personal jurisdiction over foreign corporations that neither possessed listed US securities, nor offered any in its territory, and thereby caused a fierce debate in the international community.

C. PARENT CORPORATIONS, BRANCHES, AND SUBSIDIARIES

Corporations that do business across borders, because they are incorporated in one state, manage operations abroad, and are controlled by people in yet another state, do not squarely fit the incorporation, real seat, and control theories. Because these corporations can be viewed as nationals by multiple states, they qualify as multinationals. A multinational enterprise is neither a single corporation operating on multiple territories, nor a single corporate form. It is a cluster of corporations with different nationalities, which


Hague Convention Concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions, June 1, 1956, 1 A.J.C.L. 277, art. 1. Three states have adopted the convention so far.


makes it not a multi- but a polycorporate enterprise.\textsuperscript{84} In contrast to corporations, an enterprise is neither created by law nor recognized by it as a legal person. To be clear, “multinational corporation” and “multinational enterprise” are economic terms.\textsuperscript{85} Because multinationals come in various economic forms, their definition is quite broad: they are clusters of corporations that own, control, or manage income-generating assets in more than one country. This definition encompasses both direct investment abroad (financial stake in foreign venture and managerial control) and portfolio investment (financial stake in foreign venture only).\textsuperscript{86}

Some may think that having multiple states assert their jurisdiction over multinationals is useful because it creates a dense jurisdictional net across the globe. But nationality theories are often systematically exploited by multinationals to advance their corporate agenda. For this reason, scholars increasingly question the incorporation, real seat, and control theories as adequate tests for determining the nationality of enterprises.

Asset and unit mobility, flexibility in accommodating conduct, superior knowledge about compliance, and retention of common control make multinational enterprises appear to hover above and beyond legal systems, detached from nation states, and escaping all legal accountability. In some fields of law, states have concluded bilateral and multilateral agreements to fill these gaps, which unequivocally determine the nationality of enterprises and allocate them to a specific state. These agreements include tax treaties, treaties of friendship, commerce, and navigation, dispute settlement agreements, investment treaties, and treaties of establishment.\textsuperscript{87} In all other cases, domestic law determines the nationality of multinational enterprises, within the limits of international law.

I. Dissecting the Multinational

There are two ways to assert jurisdiction over multinational enterprises, whether through an international treaty or domestic law. The multinational can either be treated as a legal entity or as a cluster of legally separate units.

A multinational is usually dissected into its corporate units, each subject to a particular state by virtue of its separate nationality. Any state using this method respects the principle of corporate separateness (also called the principle of corporate entity or of legal personality),

\begin{itemize}
  \item \textsuperscript{84} José Engrácia Antunes, \textit{The Liability of Polycorporate Enterprises}, 13 CONN. J. INT’L L. 197, 207–8 (1999).
  \item \textsuperscript{87} E.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, art. 25(2) [ICSID Convention]. \textit{Further} Kley-Struller 165, para. 5 (1991).
\end{itemize}
which presumes a corporation formed by shareholders is legally separated from them by its distinct legal personality. In *Barcelona Traction*, the ICJ held:

Separated from the company by numerous barriers, the shareholder cannot be identified with [the company]. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights.

The rationale for separating the corporation from its shareholders is that legal persons and individual shareholders have structurally different interests. In addition to legal separateness, corporations have the prerogative of limited liability. Shareholders only risk their capital contribution when they invest in a corporation and are insulated from the corporation's debts, which encourages investment. Although the principle of limited liability was initially designed to apply to shareholders who are natural persons, half a century later it was extended to businesses. Limited liability for natural and legal persons today is an established pillar of company law around the world.

Combining limited liability with corporate separateness is a major advantage for multinational enterprises. A parent corporation and its incorporated subsidiaries are recognized by law as separate and distinct legal entities with their own rights and duties. If limited liability protects shareholders, and a parent is a shareholder of its subsidiary, then limited liability protects the parent. Despite the economic advantages this combination seems to offer, it carries a variety of social and legal risks. Blumberg remarks:

In the multilayered group, there are [. . .] as many layers of limited liability as there are tiers in corporate structure. Limited liability for corporate groups thus opens the door

---

88 Legal personality denotes the “extent to which an entity is recognized by a legal system as having rights and responsibilities” (Zerk, Multinationals and Corporate Social Responsibility 72 (2008)).

89 Barcelona Traction, 1970 I.C.J. ¶ 41. The principle of separate legal personality was also recognized in Ahmadou Sadio Diallo, 2007 I.C.J. ¶ 61.


92 Code des sociétés [Companies Code], No. 1999A09646, M.B. 29440, May 7, 1999, arts. 210 (pour la société privée) and 438 (pour la société anonyme) (Belg.); [Companies Code (Belg.)]; Code de Commerce [Business Act], Sept. 21, 2000, art. 223-11 (Fr.). Under German law, the principle is called Trennungsprinzip: Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl. I at 1089, § 1 para. 2 (Ger.) [Stock Corporation Act (Ger.)]. For the Netherlands, see Karen Vanderkerckhove, Piercing the Corporate Veil 33 (2007). In the United Kingdom, the principle of limited liability is known as the Salomon principles established in Salomon v. A. Salomon & Co. Ltd. [1897] AC 22 (U.K.).

to multiple layers of insulation, a consequence unforeseen when limited liability was adopted long before the emergence of corporate groups.\textsuperscript{94}

If we accept these concepts of company law for multinationals, this results in peculiar forms of jurisdiction. Domestic laws end up regulating separate, small fractions of the multinational entity, and ignore their economic entanglement, while corporations exercise control over their subsidiaries abroad without incurring liability. Though many laws are advantageous for corporations, it seems unreasonable that the law of jurisdiction should give multinationals a free pass to circumvent domestic laws, including animal law.\textsuperscript{95}

This legal wall still stands strong, but the principles of limited liability and corporate separateness are not immutable, nor are the obstacles to applying national animal law to corporate units abroad. In exceptional circumstances, a state’s personal jurisdiction, including its prescriptive authority over animal welfare matters, can be applied extraterritorially to other members of a multinational group.

The degree to which international law allows states to extend their jurisdiction to multinationals differs considerably and depends on whether jurisdiction covers actions of branches or subsidiaries. A branch is an unincorporated legal entity, an operating arm of the parent with no separate legal status.\textsuperscript{96} In cross-border cases where a domestic parent establishes a branch abroad, the parent acts through its branch on foreign territory, so the parent’s home state has personal jurisdiction over acts and omissions of the parent’s branch abroad. International law generally permits parent-based personality jurisdiction, exercised by the home state over branches abroad.\textsuperscript{97}

Unlike branches, subsidiaries are entities that are legally separate from their parents. Through the act of incorporation, a subsidiary becomes “legally more distant from the state of the parent corporation than if it operates as a branch.”\textsuperscript{98} As a rule, the principles of


\textsuperscript{95} Jodie A. Kirshner, Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty, and the Alien Tort Statute, 30 Berkeley J. Int’l L. 259, 265 (2012); José Maria Lezcano Navarro, Piercing the Corporate Veil in Latin American Jurisprudence: A Comparison with the Anglo-American Method 16 (2016); Muchlinski 115 (2007). Blumberg argues that applying the principle to multinational enterprises is a “mockery of the underlying objective of the doctrine” (Blumberg, The Multinational Challenge to Corporation Law 59 (1993)).

\textsuperscript{96} More specifically, branches are wholly or jointly owned unincorporated enterprises in the host country. They can either be (i) a permanent establishment or office of the foreign investor; (ii) an unincorporated partnership or joint venture between the foreign direct investor and one or more third parties; (iv) land, structures, and/or immovable equipment owned by a foreign resident; or (v) mobile equipment operating within a country other than that of the investor for at least a year: Grazia Ietto-Gillies, Transnational Corporations and International Production: Concepts, Theories and Effects 12, 25 (2d ed. 2012).


\textsuperscript{98} U.S. Restatement (Third) of the Foreign Relations Law, § 413, cmt. b. Subsidiaries are affiliates with equity involvement in excess of 50 percent and have a right to appoint or remove a majority of the members of the administrative management or supervisory body: Ietto-Gillies 12, 25 (2012).
legal separateness and limited liability preclude applying parent-based jurisdiction to foreign subsidiaries. However, under exceptional circumstances, a parent’s home state can exercise jurisdiction over subsidiaries abroad, (a.) by combining the incorporation and real seat theories, (b.) by adopting the control theory, or (c.) by piercing the corporate veil.

a. Combining the Incorporation and Real Seat Theories
There is no hierarchy among the common theories used to determine corporate nationality in international law, so extraterritorial jurisdiction over subsidiaries or parents located abroad can in principle be asserted through either the incorporation or the real seat theory. States might declare a foreign subsidiary or parent a national and exercise jurisdiction over them while ignoring the fact other states have conferred their nationality on them already. In any given case, these claims must be based on accepted criteria. If a parent corporation in state A is connected to a foreign subsidiary incorporated in state B, their legal separateness should, in principle, be respected. But if the foreign subsidiary—although incorporated according to the laws of state B—simultaneously has its main management or headquarters in state A, which regards the siège social as the link to nationality, a conflict arises. The US Export Administration Act of 1979, for example, was widely criticized for conferring US nationality to subsidiaries abroad, even though they were already incorporated in foreign territory and thus nationals of another state. A conflict also emerges in the reverse case. If a parent corporation of state A is linked to the foreign subsidiary in state B, where it is primarily managed and regarded as a national of state B, there is a conflict if state A declares the subsidiary its national based on the incorporation theory. The same considerations apply when one state determines a parent’s nationality that is incorporated in and managed from another state. An optimist might regard these combinations as openings for applying animal law to subsidiaries abroad. Since international law leaves the determination of corporate nationality to the states, this strategy cannot per se be viewed as violating international law.

b. Adopting the Control Theory
A corporation deemed alien based on the incorporation and real seat theories can be subject to a state’s personal jurisdiction on grounds of the control theory. According to the control theory, a corporation (parent or subsidiary) incorporated and managed abroad (thus otherwise foreign) qualifies as a national of a state, if controlling persons or interests are located in its territory or if most of a company’s shares are owned by its nationals. The United States has incorporated the control theory in Title VII of the Civil Rights Act and the Export Administration Act. Section 402 of the US Restatement more generally expands the reach of US law to corporations organized under the laws of a foreign state, if they are controlled

---

or owned by its nationals and if it was unreasonable not to exercise jurisdiction over them. According to the Restatement, the link of ownership or control is established where a national corporation owns a majority of the voting shares of the foreign corporation, where it owns a substantial bloc of its voting shares, or is its principal creditor and exercises significant decision-making authority over the affairs of the foreign corporation.

The control test is often argued to better reflect economic realities than the theories of incorporation or management, but its acceptance in international law is disputed. In *Barcelona Traction*, Belgian shareholders invoked their right to diplomatic protection by Belgium over a Catalonian-managed company incorporated in Canada. The ICJ ruled that Belgium was barred from exercising diplomatic protection for its nationals because the Barcelona Traction company still existed as a legal person. Only Canada (as the place of incorporation) and Spain (as the place of the real seat) were entitled to these enforceable rights. Thereby, the ICJ rejected the control theory for the purposes of diplomatic protection. According to the Court, two exceptions justify determining nationality on the basis of controlling interests: if a company ceases to exist or if the company’s home country lacks authority to act on the company’s behalf. Contra the majority opinion, Judge Fitzmaurice considered the control theory permissible where there is no genuine link to the state of incorporation or seat, giving rise to what he called “a different test of nationality.”

In *Elettronica Sicula*, decided 19 years after *Barcelona Traction*, the ICJ allowed the United States to bring a claim against Italy based on the nationality of controlling shareholders (who were US citizens), even though the corporation was a national of Italy. In the eyes of some scholars, this judgment changed position vis-à-vis *Barcelona Traction*. However, the claims made in *Elettronica Sicula* were based on the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States, so the judgment tells us little about the state of customary international law. Moreover, *Elettronica Sicula* is authoritative only for the interpretation of international rules on diplomatic protection, which does not allow inferring rules from it about corporate nationality. The same, however, could be said of *Barcelona Traction*.

In the realm of investment, states are more willing to use the control theory. Several investment treaties allow using effective control to establish nationality from a corporation to a state. This is commonly done through the nationality of shareholders or a company’s genuine economic activity within a state. Article 1 lit. b of the Netherland-Venezuela bilateral

---

103 U.S. Restatement (Fourth) of the Foreign Relations Law, § 402, reporters’ note 7.
104 U.S. Restatement (Third) of the Foreign Relations Law, § 413, cmt. e.
111 Peter Tomka, Elettronica Sicula Case, in MPEPIL 19 (Rüdiger Wolfrum ed., online ed. 2007).
investment treaty (BIT), for example, states that nationals comprise, *inter alia*, “legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons [. . .].”113 Similarly, the Multilateral Investment Guarantee Agency Convention (MIGA Convention) defines eligible investors, *inter alia*, as legal persons whose capital is owned by a majority of members of the MIGA or nationals thereof.114

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) also allows states to treat any legal person as a national of another contracting state on the basis of control (article 25 para. 2 lit. b). This provision was subject to dispute in *Tokios Tokeles v. Ukraine*, a case that involved claims against Ukraine by Ukrainian controlling shareholders of a company incorporated in Lithuania.115 In principle, the Ukraine-Lithuania BIT would have allowed nationals to bring claims before the ICSID against their own states, based on the control theory.116 But invoking the control theory would have removed the case from the ICSID’s jurisdiction by transforming it into a national dispute (*Ukraine v. Ukraine*). Moreover, the parties did not expressly agree on establishing nationality based on the control theory. The ICSID Tribunal upheld the validity of the claim because the nationality of the corporation (determined by the place of incorporation) conformed to article 25 of the ICSID Convention and the definition of “investor” in article 1 para. 1 of the Ukraine-Lithuania BIT. The same ruling underlies *Rompetrol*.117 In sum, the Tribunal is reluctant to use criteria of substantive control to determine corporate nationality in the absence of an express agreement between the parties. Scholars who criticize this practice claim that disregarding substantive control amounts to sacrificing the international character of the ICSID.118

It seems that the control theory is not yet sufficiently established as a third option, in addition to the incorporation and real seat theories. Scholars are reluctant to endorse the control test for many reasons, including the fact that the nationality of corporations quickly changes when members of the board of directors are replaced or when new shareholders invest. Many believe that the control test should therefore be applied only when rights are abused, specifically when legal obligations are deliberately circumvented.119 This does not

---

115 *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, July 26, 2007.
117 In *Rompetrol*, the corporation was incorporated in the Netherlands, but controlled by Romanian nationals. The tribunal ruled that jurisdiction must be granted, since Rompetrol was a foreign investor, regardless of shareholder control: *Rompetrol v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, Apr. 18, 2008.
118 D’Agnone finds that “the control test is the key element to discover the real nature of the dispute—whether it is genuinely international or not” (Giulia D’Agnone, *Determining the Nationality of Companies in ICSID Arbitration, in The Changing Role of Nationality in International Law* 153, 157 (Alessandra Annoni & Serena Forlati eds., 2013)).
mean the control test cannot in the future develop into a fully-fledged and accepted third theory for determining corporate nationality. That the ICJ’s judgment in *Barcelona Traction* concerned a case of diplomatic protection suggests that it is of limited value for nationality jurisdiction. Moreover, *Elettronica Sicula* and the many investment treaties prove that the test is increasingly accepted. Whether a state will therefore act in line with international law by invoking the control theory in a general and broad manner remains to be seen.¹²⁰

c. Piercing the Corporate Veil

Though the control test is not currently accepted as a third alternative to the incorporation and real seat theories, states frequently soften the rigid and limited principles of corporate separateness and limited liability. Lifting or piercing the corporate veil (*percer le voile*) is an exceptional tool of corporate law that allows states to extend shareholder liability to the parent corporation or subsidiary, so it is no longer limited to the shareholder’s capital contribution.¹²¹ The purpose of this exception is, by and large, to frustrate the principle of limited liability, where legal risks are taken in obvious misrelation to economic reality. Accordingly, lifting the corporate veil is sometimes argued to be an application of the control theory, which more accurately mirrors economic relationships.¹²² If the subsidiary’s shareholder is its parent, lifting also disregards their separate corporate personality.¹²³ From the jurisdictional perspective, piercing the veil allows the regulating state to extend its personal jurisdiction to shareholders with foreign nationality (which may be foreign parents or subsidiaries). Jurisdictional veil piercing is therefore largely congruent with piercing the corporate veil in company law.¹²⁴

¹²⁰ Most scholars are silent on this topic: Oxman, *Jurisdiction of States*, in MPEPIL 20 (2007).
¹²¹ Day Wallace 611 (2002). “Lifting the veil” is widely used in the United Kingdom, while “piercing the veil” is the most established term in the United States: Day Wallace 650 (2002). Other terms are “penetrating,” “ignoring,” “extending,” or “parting” the veil: Vandekerckhove 11 (2007).
¹²⁴ According to a number of scholars (especially German scholars), there is a cardinal difference between piercing the corporate veil in substantive law (*Haftungsdurchgriff*) and piercing the corporate veil for jurisdictional purposes (*Zuständigkeitsdurchgriff*): Geisser 243 n. 898 (2013); Hofstetter 169, 171 (1995); Haimo Schack, *Der prozessuale Durchgriff im internationalen Konzern*, in *Gedenkschrift für Jürgen Sonnenschein* 705 (Joachim Jickeli et al. eds., 2003); Dietrich Welp, *Internationale Zuständigkeit über auswärtige Gesellschaften mit Inlandstöchtern im US-amerikanischen Zivilprozess* 131 (1982). State practice, however, does not support this distinction. In *Prest v. Petrodel Resources Limited et al.*, a case decided by the UK Supreme Court, Lord Sumption held: “‘Piercing the corporate veil’ is an expression rather indiscriminately used to describe a number of different things.” (Prest v. Petrodel Resources Limited et al. [2013] 2 AC 415, Lord Sumption, para. 16 (U.K.)). That jurisdictional and substantive corporate veil piercing theories overlap makes sense in light of the more general observation that, as Justice Reed noted, “‘[t]he line between procedural and substantive law is hazy’” (Erie Railroad Co. v. Tompkins, 304 U.S. 64, 91 (1938) (U.S.)). Schwenger and Hosang note that if the corporate veil is lifted by extending liability in substantive law, procedural laws must extend accordingly (Ingeborg Schwenger & Alain F. Hosang, *Menschenrechtsverletzungen: Schadenersatz vor Schweizer Gerichten*, 21 SZIER 275, 283 (2011)). Vandekerckhove, the author of one of the most comprehensive works on corporate veil piercing, observes that in most cases, jurisdictional questions were answered by examining traditional piercing doctrines under entity law (Vandekerckhove 522 (2007)). The ILA Report on International Civil Litigation for Human Rights Violations argues that...
States use various theories to pierce the corporate/jurisdictional veil, most of which are uncodified and subject to frequent change through judicial practice. These theories include:

- express agency (the subsidiary merely acts as an agent of the parent);\(^\text{125}\)
- guarantee (the parent guarantees to be liable for the subsidiary’s actions);\(^\text{126}\)
- clear authorization or direction (the subsidiary is authorized or directed to follow the parent’s instructions);\(^\text{127}\)
- implied agency (attribution of a subsidiary’s actions to its nonresident parent);\(^\text{128}\)
- instrumentality (there is parental control over the subsidiary to such an extent that the subsidiary has no separate mind, will, or existence of its own);\(^\text{129}\)
- *alter ego* (a parent and its subsidiary are fundamentally indistinguishable);\(^\text{130}\)
- façade, sham, or paper corporation (the subsidiary has no assets, employees, or business of its own);\(^\text{131}\)
- *faktische Organschaft* (a formally elected parent dominates a subsidiary’s governance decisions);\(^\text{132}\)

the theories of piercing the corporate veil, agency, control theory, integration, agent doctrines, and other substantive liability tools establish jurisdiction over corporations which *per se* do not have contact to the state in question (*International Law Association* [ILA], *International Civil Litigation for Human Rights Violations, Final Report* 8 (ILA, London 2012)). Also supporting the opinion defended herein: Peter Behrens, *Der Durchgriff über die Grenze*, 46 RabelsZ 308, 309 (1982); Hannah L. Buxbaum, *The Viability of Enterprise Jurisdiction: A Case Study of the Big Four Accounting Firms*, 48 U.C. Davis L. Rev. 1769, 1769–70 (2015) (emphasis added); Blumberg, *The Multinational Challenge to Corporation Law* 168 (1993).


\(^\text{126}\) English courts established that to be held liable for the subsidiary’s obligations, a parent must operate as a guarantor: Amalgamated Investment & Property Co. v. Texas Commercial Bank [1982] QB 84 (CA) (U.K.); Gold Coast Ltd v. Caja de Ahorros del Mediterraneo [2001] EWCA Civ. 1806 (U.K.).


\(^\text{131}\) Arnold v. Phillips, 117 F.3d 497, 502 (5th Cir. 1991) (U.S.). The less independent a business operation, the more likely the parent is to use the subsidiary as a façade: Cheng (2011) 385.

\(^\text{132}\) BGer Dec. 12, 1991, BGE 117 II 570, 574 (Switz.). *The de facto* body must have had the power to cause, prevent, or considerably influence the subsidiary’s business: BGer Oct. 29, 2001, BGE 128 Ill 92 (Switz.); BGer Aug. 27, 1991, BGE 117 II 432, at 2.b (Switz.).
• *la société fictive* (the subsidiary’s only purpose is to benefit the parent);\(^{133}\)
• *naamlening* (the subsidiary is the “straw man” of its parent);\(^{134}\) and
• vicarious liability or instrumentality liability (the parent is involved in the managerial control of its subsidiary in the context of tort activities).\(^{135}\)

In various cases, the concepts of agency, instrumentality, identification, and identity have been treated as interchangeable for the purpose of piercing the corporate veil.\(^{136}\) Some courts have given up on identifying an overarching theory, and simply use a “laundry list” of factors to determine personal jurisdiction. The most frequently used factors to pierce the veil include involvement in management, investment, appointment, and daily business operations\(^{137}\) that are seen as wrongful, inequitable, unfair, or morally wrong to such an extent that regulatory intervention is justified, even if these actions do not constitute fraud and are not per se illegal.\(^{138}\)

Though states are far from abolishing limited liability and corporate separateness, they will look behind the veil where circumstances permit it. According to Matheson’s recent empirical study, the overall pierce rate for his data set of 9,380 cases was 31.86 percent.\(^{139}\) Under the law of Canada and the United States, two elements are needed to pierce the veil. First, the parent must have exerted excessive control over the subsidiary, such as by intruding into its day-to-day operations. A second factor is that the subsidiary’s financial condition is inadequate for the conduct of its business, or that the subsidiary is so managed as to be practically dependent on the parent for its financial support. Matheson’s study of the 9,380 cases he reviewed found that 31.86 percent of the cases involved a parent who had exerted excessive control over a subsidiary.\(^{139}\)

\(^{133}\) *Wera Kuckertz,* Der Haftungsdurchgriff auf ausländische Unternehmen und Geschäftsleiter nach französischem Recht 41 (2002).

\(^{134}\) *Hof van Cassatie [Cass.] [Court of Cassation],* May 26, 1978, Stagno v. Vanhoyland q.q., RW 846 (1978–9) (Belg.).


\(^{136}\) *House of Koscot Dev. Corp v. Am. Line Cosmetics Inc.,* 468 F.2d 64 (5th Cir. 1973) (U.S.): “Although some commentators have distinguished between the ‘agency’ and ‘instrumentality’ or ‘identity’ rationales, the theories are interchangeable.” *See also New York Trust Co. v. Carpenter,* 350 F. 668, 673 (6th Cir. 1918) (U.S.).

\(^{137}\) The following factors are usually considered when assessing parental domination: common stock ownership; common directors or officers; common business departments; consolidated financial statements and tax returns; transfer of finances from the parent to the subsidiary; whether the parent caused subsidiary to incorporate; whether the subsidiary operates with grossly inadequate capital; whether the parent pays the salaries and other expenses of the subsidiary; whether the subsidiary receives no business except that given to it by the parent; whether the parent uses the subsidiary’s property as its own; whether the daily operations of the two corporations are kept separate; and whether the subsidiary observes the basic corporate formalities, like keeping separate books and records and holding shareholder and board meetings: *Carte Blanche (Singapore) Pte. Ltd. v. Diners Club Int’l,* 2 F.2d 24 (2d Cir. 1933) (U.S.); United States v. Jon-T Chemicals Inc., 768 F.2d 686, 691 (5th Cir. 1985) (U.S.). Canadian courts have used similar criteria. In *Amfac,* the Oregon Court of Appeals relied on the following factors: inadequate capitalization; excessive dividends siphoning the subsidiary’s funds; misrepresentation of facts; commingling of funds; representation of the parent and subsidiary as one entity; and violation or circumvention of a statute by relying on limited liability: *Amfac v. Int’l Systems & Controls Corp.,* [1981] 654 P.2d 1092, 1101 (Ore Ct. App.) (Can.).

\(^{138}\) *Blumberg,* The Multinational Challenge to Corporation Law 83 (1993).

decisions. Second, the parent must have acted fraudulently, unjustly, or inequitably, which is broadly interpreted by courts.\footnote{Tort, for these purposes, is not sufficient to trigger fraudulent behavior: Blumberg, Accountability of Multinational Corporations 306 (2001); Sandra K. Miller, Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches, 36 Am. Bus. L.J. 73, 88 (1998).} This kind of conduct encompasses actual fraud, evading the law, dominance, commingling of assets, and other sorts of undue reliance on limited liability within multinational enterprise structures. Other criteria operate as indicia for excessive parental control, such as owning 100 percent of shares, undercapitalization, and hiring the same directors or managers.\footnote{Various courts have held that 100 percent ownership is insufficient to pierce the veil: Ebbw Vale Urban District Council v. South Wales Traffic Area Licensing Authority [1951] 2 KB 366, 370 (U.K.); Amfac v. Int’l Systems & Controls Corp., [1981] 654 P.2d 1092 (Ore Ct. App.) (Can.). Other courts have held that undercapitalization is insufficient: Radaszewski v. Telecom Corp., 981 F.2d 305, 308 (8th Cir. 1992) (U.S.); Re Southard and Co. Ltd. [1979] 1 WLR 1198, 1208 (U.K.); DeWitt Truck Brokers v. W. Ray Fleming Fruit Co., 540 F.2d 681, 687–8 (4th Cir. 1976) (U.S.). Pursuant to article 646 of the Belgium Companies Code, concentrating all shares in one shareholder results in “l’actionnaire unique est réputé caution solidaire de toutes les obligations de la société nées après la réunion de toutes les actions entre ses mains.” (Companies Code (Belg.), art 646.). See also United States v. Scophony Corp, 333 U.S. 795 (1948) (U.S.); Hofstetter 15 (1995); Jonathan Macey & Joshua Mitts, Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil, 100 CORNELL L. REV. 99, 107 (2014).}

In Europe, states have a slightly different approach. The United Kingdom is rather resistant to piercing the corporate veil because of its Salomon principles established in 1897 that are still a cornerstone of contemporary UK company law.\footnote{Salomon v. A. Salomon & Co. Ltd. [1897] AC 22 (U.K.). The principles are considered “sacrosanct” in the United Kingdom: LEZCANO NAVARRO 21 (2016); VANDERKERCKHOVE 499 (2007).} The centuries-old rule, however, may have been significantly relaxed after the recent Prest v. Petrodel Resources Limited et al. case.\footnote{Prest v. Petrodel Resources Limited et al. [2013] 2 AC 415 (U.K.).} The rest of Europe appears willing to pierce the corporate veil based on factors similar to those adopted in US jurisprudence, including majority share ownership, actual direction, and excessive control.\footnote{Daniel Augenstein, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union, Prepared by the University of Edinburgh for the European Commission 63 (2010).}

Piercing the corporate veil is often seen as a response to the lingering conflict between lawfully resorting to the principles of limited liability and corporate separateness, and abusing established principles of corporate law. Courts accordingly apply the principle of abuse of rights quite frequently when they lack statutory law that would allow them to peep behind the veil.\footnote{VANDERKERCKHOVE 33 (2007).} In Castleberry v. Branscum, the Supreme Court of Texas held:

We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. […] Specifically, we disregard the corporate fiction: […] where the corporate fiction is resorted to as a means of evading an existing legal obligation; […] where
the corporate fiction is used to circumvent a statute; and [...] where the corporate fiction is relied upon as a protection of crime or to justify wrong.\textsuperscript{146}

Also UK courts are willing to pierce the veil when corporations circumvent the law. In the 2013 \textit{Prest v. Petrodel Resources Limited et al.} case, Lord Sumption argued that piercing the corporate veil is justified where corporations abuse limited liability to evade or frustrate the law.\textsuperscript{147} To achieve the same results, civil law courts rely on the principle of good faith and the prohibition of abuse of rights to pierce the veil.\textsuperscript{148} But the line between abusive exploitation and legitimate use of the principles of company law is delicate. In \textit{Aguas del Tunari v. Bolivia}, a case submitted to an ICSID Tribunal, the controlling company moved its seat to another state, and the respondent alleged this move was an abuse of the corporate form. The Tribunal rejected the argument: “[I]t is not uncommon in practice, and—absent a particular limitation—not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction [...].”\textsuperscript{149} Overall, whether a state will be able to successfully establish personal jurisdiction over animal matters related to foreign subsidiaries, branches, or parents thus depends strongly on the specific state of facts and the law that applies to the case.

\section*{II. The Multinational as a Single Legal Unit}

Because states do not recognize multinationals as legal persons, they do not usually have rights or obligations toward them as a whole.\textsuperscript{150} But there are important exceptions to this rule. Single economic unit theories, which consider the extent of economic integration between the parent and the subsidiary (i.e., actual exercises of power within a multinational enterprise), allow a state to bring a multinational as a single unit under its jurisdiction without having to pierce the corporate veil. Economic unit theories, by narrowly focusing on economic factors, are distinct from veil piercing theories that also look at elements of equity or fraudulent and otherwise wrongful behavior.\textsuperscript{151}

The first cases that treated multinationals as legal units emerged in antitrust law. In \textit{Dyestuffs}, the English parent \textit{Imperial Chemical Industries Ltd. (ICI)} was accused of having engaged in

\begin{thebibliography}{9}
\bibitem{} Aguas del Tunari v. Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, Oct. 21, 2005.
\end{thebibliography}
illegal practices in the European Union (before it became a member of the European Union) through acts of its subsidiaries. The ICI owned most of its subsidiaries’ shares, exercised decisive influence over them, and ordered them to engage in anticompetitive behavior. Despite being legally distinct, the ECJ argued, the parent and the subsidiaries together formed a “unity of the group.”\textsuperscript{152} According to the Court, “[t]here is a presumption that a subsidiary will act in accordance with the wishes of its parent because according to common experience subsidiaries generally do so act; [. . .], unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as one single undertaking [. . .].”\textsuperscript{153} In this case, intragroup liability can be established that spans borders “without having to establish the personal involvement of the latter in the infringement.”\textsuperscript{154} The Court thereby clarified that a single undertaking is determined as such by reference to economic involvement rather than legal attribution.\textsuperscript{155}

The ECJ’s “unity of the group” theory, also known as economic entity theory, was used in several cases following Dyestuffs.\textsuperscript{156} In Akzo Nobel NV, the ECJ held:

Community competition law is based on the principle of the personal responsibility of the economic entity, which has committed the infringement. If the parent company is part of that economic unit, which [. . .] may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. \textit{Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries that have participated in it}.\textsuperscript{157}

The Dyestuffs ruling marks a departure from the standard exceptions to the principles of corporate separateness and limited liability. The Court determined that a parent’s \textit{capacity} to control or influence its subsidiaries is sufficient to attribute the subsidiaries’ acts to it,


instead of using the parent’s *actual exercise* of control or influence. This was heavily criticized by scholars, who argued that the existence of control is a necessary but not a sufficient factor to establish intragroup liability.\textsuperscript{158} According to them, the economic unit theory should be concerned only with cases in which a parent *in fact* exercises control by intervening in a subsidiary’s business in excess of normal management structures. Control can be exerted in matters of general corporate policies, budgeting, employee policies, ethical standards, planning, capital expenditure, etc. Additional factors are financial (adequate capital of the subsidiary, loans by the parent, etc.) and administrative interdependence (centralized administration, common legal, tax, accounting, finance, insurance, research, public relations, education and training, services, etc.), overlapping employment structures (mutual exchange of personnel, group insurance, etc.), or common group persona (use of same name, trademarks, logo, or style).\textsuperscript{159}

The European Union’s single economic unit theory, which emerged in antitrust law, inspired some of its member states to use this test more generally in company law.\textsuperscript{160} US civil courts have also begun to apply the single economic unit theory, which they identify as the “single global enterprise” theory. In *Rocker Mgmt. v. Lernout & Hauspie Speech Pros.*, the New Jersey District Court held that the defendants (KPMG International, KPMG UK, and KPMG Belgium) formed integral parts of a single global enterprise and were subject to the jurisdiction of the United States, despite lacking a connection to the forum.\textsuperscript{161} There is also a Swiss variant of the single economic unit theory, based on creditor protection. According to the theory of *Konzernvertrauen* (liability based on trust or good faith in multinational enterprises), a parent is liable for its subsidiary’s actions if it gave third parties the impression it was liable for the subsidiary’s debts.\textsuperscript{162}

III. Synthesis

Piercing the corporate veil and the single economic unit theory are the two dominant exceptions to the principles of legal separateness and limited liability, which allow a state to hold multinationals accountable and establish personal jurisdiction over foreign subsidiaries or parents. Both theories, *grosso modo*, require that there is excessive economic integration, financial involvement, or managerial control among members of a multinational group. A state may also look to abuse of rights or reconcilability with an overall regulatory scheme.

\textsuperscript{158} Vanderkerckhove 528 (2007).
to hold multinationals accountable. Subsidiaries that run animal businesses abroad may come under the personal reach of their parent’s home state if they are subject to excessive control or undue involvement or were founded and maintained to evade liability. Based on these (and other) factors, states can extend the reach of their criminal or civil (contract, corporate, or tort) animal laws to protect animals used or impacted by multinationals abroad. Animal law should use these theories, among others, to disincentivize multinational enterprises from outsourcing ethically risky business operations.

Domestic laws or acts of the judiciary that disregard the principles of limited liability and corporate separateness are subject to the limits of international law. The task of international law in this context is to ensure that a Durchgriff (piercing the corporate veil) does not turn into an Übergriff (intervention). Scholars generally do not believe international law is violated when states lift the corporate veil or find that there is a single economic unit because these theories are limited to exceptional cases. As the ICJ held in Barcelona Traction:

The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.

To ensure that theories of veil piercing and economic unity stand the test of international law, states should take into account the manner in which they exercise jurisdiction over foreign units. Jurisdiction over foreign subsidiaries can either be exercised directly, by holding a foreign subsidiary liable (foreign-prescriptive extraterritorial regulation), or indirectly, by holding the parent that controls the foreign subsidiary liable (parent-based extraterritorial regulation). From a jurisdictional perspective, parent-based extraterritorial jurisdiction clearly is less controversial. Moreover, sweeping and general expansion of jurisdiction to foreign subsidiaries is more problematic than exceptional veil piercing. The international community thus views norms like section 414 para. 2(b) US Restatement, which gives the

---

163 There is a big difference between financial control and managerial control. The fact that a subsidiary is wholly owned is not sufficient to establish liability; there must be proof of control over the subsidiary: Day Wallace 643–4 (2002). See also Meng 331 (1994); Muchlinski 143 (2007).

164 Behrens 327 (1982).


United States jurisdiction over foreign subsidiaries to serve “major national interests” or to help make national programs more effective, with suspicion.  

D. ACTIVE PERSONALITY PRINCIPLE IN THE EXTRATERRITORIALITY FRAMEWORK

In the extraterritoriality framework, jurisdiction over foreign branches and domestic corporations that operate abroad is based on the allegiance of the domestic parent to the issuing state (non-animal-related intraterritorial anchor point), and regulates facts and events that concern animals abroad (animal-related extraterritorial content), so it is a type $\gamma_1$ regulation. The same is true when a state uses the incorporation, real seat, or control theories to broadly determine corporate nationality, or when multinationals qualify as a single economic unit. In contrast, piercing the veil establishes a non-animal-related jurisdictional connection to a foreign corporation (extraterritorial anchor point) and is used to regulate the lives of animals abroad, which is a type $\alpha_3$ regulation. Using indirect parent-based extraterritorial jurisdiction (intraterritorial anchor point) instead of direct foreign-prescriptive extraterritorial jurisdiction (extraterritorial anchor point) can prevent conflicts that might arise from type $\alpha_3$ regulations, by turning them into a $\gamma_1$ norm.

If states have jurisdiction qua the active personality principle, they can in principle apply all their animal laws to nationals abroad (unlimited active personality principle). The Japanese Criminal Code, for example, adopted an unlimited active personality principle. Though most states, like Japan, prefer to reserve full jurisdictional rights vis-à-vis nationals, they often only apply the personality principle to certain kinds of actions and omissions. In the United Kingdom, jurisdiction is exercised over nationals for, e.g., treason, murder, bigamy, soccer hooliganism, child sexual abuse and breaches of the Official Secrets Acts, wherever they are committed. Business crimes committed abroad are also regularly punished based on the personality principle. In R v. Hape, for example, the Canadian Supreme Court exercised active personality jurisdiction over a national accused of money laundering in connection with an investment company on the Caicos Islands. The same is true for acts of bribery and corruption. Crawford accordingly argues that the personality principle is commonly applied to serious crimes only, especially in common law.

---

168 U.S. Restatement (Third) of the Foreign Relations Law, § 413 para. 2 (b). Since this provision still has to pass the overarching reasonableness test, there is less concern that it overreaches from the standpoint of international law.

169 Keihō [Penal Code] (Japan), art. 3.


171 Offences Against the Person Act 1861, c. 100, s. 9 (U.K.).

172 Id. s. 57.

173 Football Spectators Act 1989, c. 57, s. 22 (U.K.).

174 Sexual Offences Act 2003, c. 42, s. 72, schedule 2 (U.K.).

175 Official Secrets Act 1989, c. 6, s. 15 (U.K.).


178 The scope of the active personality principle will depend on what constitutes a “serious” crime: Crawford 460 (2012). See also Ryngaert, Jurisdiction 105 (2015).
Taking this narrow approach, states will very likely act in line with international law if they proceed cautiously and apply only core principles of animal law to nationals operating abroad, like the prohibition of animal cruelty.

Scholars sometimes also claim that the active personality principle ought not to apply if the conduct is not punishable where it was committed. Only a few states limit their jurisdictional powers to double criminality (also called conditional active personality principle). For instance, section 7 of the German Criminal Code covers acts of nationals abroad only if they are punishable where they were committed, or if no law applies to the acts. For animal law, this would mean that nationals can only be convicted by their home state if their conduct is punishable where they acted. Since it is exactly the purpose of multinationals to move to states that have no or lax animal laws, this rule would considerably limit the active personality principle. But double criminality is not uniformly applied. States that demand double criminality for some crimes punish others irrespective of whether they are punishable at the place they were committed. Since conditional personality jurisdiction is incongruently applied and not uniformly practiced, it is not required under international law.

Where the active personality jurisdiction is exceptionally relied upon, such as in cases of veil piercing, this rule does not apply. Lifting the corporate veil only deals with specific instances of excessive power, intrusion into decision-making processes, fraud, etc., so states may apply their animal laws only where the factors that gave rise to lifting the corporate veil also violated their animal laws. For instance, if the parent, Novartis Switzerland, unduly interferes in its subsidiary’s (e.g., Novartis Singapore) daily decision-making on animal research, then lifting the corporate veil will make the parent responsible only for the consequences that resulted from this interference. So unless there is excessive involvement


180 Iain Cameron, *International Criminal Jurisdiction, Protective Principle*, in *MPEPIL* 10 (Rüdiger Wolfrum ed., online ed. 2007). Conditionality requires broad identity of the elements of an offense (objective and subjective ones), whether or not criminal consequences are identical: Petrig 41 (2013).

181 *Strafgesetzbuch [StGB] [Criminal Code]*, Nov. 13, 1998, BGBl. I at 3322, § 7 (Ger.), *translation at http://www.gesetze-im-internet.de/englisch_stgb/ [Criminal Code (Ger.)]*. Also article 7 para. 1 of the Swiss Criminal Code limits the personality principle to instances of double criminality: *Criminal Code (Switz.)*, art. 7 para. 1.

182 The German crime of terminating pregnancy abroad is an example of this, see *Criminal Code (Ger.)*, § 5. Also the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse establishes unconditional active personality jurisdiction over national and resident perpetrators: CoE, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Oct. 25, 2007, C.E.T.S. No. 201, art. 25 paras. 1 and 2.

183 Akehurst 156 (1972–3); *Harvard Research in International Law, Jurisdiction with Respect to Crime* (1935).

by the parent, it is unlikely that international law will accept jurisdiction over a foreign subsidiary that contravenes Swiss animal laws.

§4 Protective Principle

A. Protecting Animals Abroad through the Protective Principle

The protective principle allows states to prescribe behavior beyond their borders if essential state interests are at stake. The principle is based on the idea that states need to be able to protect their most fundamental interests, without having to rely on the discretion of other states. In short, the protective principle is rooted in states’ right to self-defense.185

According to the 1935 Harvard Draft Convention, the protective principle aims to safeguard a state’s security, territorial integrity, and political independence.186 Any act that endangers or violates these interests may be subject to extraterritorial jurisdiction qua the protective principle. Because the means threatening essential state interests in the 1930s were vastly different from those today—consider environmental pollution, technological hazards, and artificial intelligence—the protective principle is not limited to the above-mentioned interests. States are thus free to respond to new challenges by invoking the protective principle. The only limit placed on the principle is that it must be concerned with “vital issues,” “essential state interests,” and the like.187

The protective principle prevails in criminal law, but has been applied to counterfeiting of currency, which scholars argue bears out “the legitimacy of extending the principle to conduct with economic consequences.”188 Several states have expanded their jurisdiction in this manner. For example, the Polish Penal Code provides that essential economic interests are covered by the protective principle.189 Experts in antitrust law also consider the protective principle legal where foreign conspiracies practically devastate a state’s economy.190 Any threat to the whole economic structure of a state is thus in principle covered by the protective principle.191


186 The protective principle is sometimes considered a variant of the territoriality or effects principle: Crawford 459 n. 16 (2012); Ryngaert, Jurisdiction 82–3 (2015). Cf. Tentative Draft of the U.S. Restatement (Fourth) of the Foreign Relations Law, § 216, reporters’ note 1.

187 Harvard Research in International Law, Jurisdiction with Respect to Crime (1935), arts. 7 and 8.

188 Bowett 10–1 (1982). See HR Nov. 13, 1951, NJ 1951, 42 (Public Prosecutor v. L.) (Neth.) (affirmed the conviction of a Belgian national for acts of counterfeiting against the Netherlands when present in Belgium).

189 Kodeks karny [Penal Code Act], June 6, 1997, Dziennik Ustaw Rzeczypospolitej Polskiej [Journal of Laws of the Republic of Poland], No. 88 Item 553, art. 112 para. 3 (Pol.).

190 Acevedo argues in the context of the Dyestuffs case that if the EC were to accept trade alongside security, territorial integrity, independence, and other high-ranking values, it would not have to rely on the effects principle: Antonia Acevedo, The EEC Dyestuffs Case: Territorial Jurisdiction, 36 Mod. L. Rev. 320 (1973).

An increasing number of states also use the protective principle to protect important environmental values. Section 9 para. 1(3) of the Estonian Penal Code applies to acts committed abroad if they cause damage to the Estonian environment. The Turkish Criminal Code applies the protective principle to cases of intentional environmental pollution. The German Criminal Code regards offenses against the environment as offenses “against domestic legal interests,” which are covered by the protective principle. The sense and purpose of these norms are that, just like a state relies on a functioning economy to thrive, it depends on a functioning environment. Any act that endangers this must thus be prevented or condemned through extraterritorial jurisdiction based on the protective principle.

Although states increasingly use the protective principle to prevent environmental threat and destruction, these interests do not easily extend to concerns about animals. The values covered by the protective principle are those necessary for the state’s survival, and those it requires for its basic functioning. If the environment is thrown out of balance, public health and the economy will eventually degrade. But the interests of animals are not standardly seen as affecting the core functions of a state, so the protective principle cannot be used to directly protect animals abroad.

In an indirect manner, however, the principle can be used to protect animals abroad, namely, where foreign animal industries considerably pollute a state’s environment. This, unfortunately, is not an unlikely development. Since 1960, the global population has more than doubled, from 3 billion to more than 7 billion people. During the same period, meat production tripled and egg production increased fourfold. The FAO announced that, by 2050, the world will need to produce 70 percent more food for an additional 2.3 billion people. Meat production will have to increase by 50 percent since consumption will increase from 30 kg to 44 kg per capita in the minority world and from 41 kg to 52 kg per capita in the majority world.

194 Criminal Code (Ger.), § 5 para. 11. The offenses are enumerated in § 324 (water pollution), § 326 (unlawful disposal of waste), § 330 (aggravated cases of environmental offenses), and § 330a (causing a severe danger by releasing poison) of the same code. See also Liane Wörner & Matthias Wörner, Länderbericht Deutschland, in Conflicts of Jurisdiction in Cross-Border Crime Situations 203, 243 (2012).
196 Zerk agrees that vital state interests can be threatened by polluting activities: Zerk, Extraterritorial Jurisdiction 185 (2010).
Ever-increasing consumption of animal products eats up a huge portion of the world’s crops and raises cereal prices as it depletes what could be directly consumed by people.\textsuperscript{202} The resultant food shortage disproportionately harms the poor. By 2\textsuperscript{050}, “Sub-Saharan Africa’s share in the global number of hungry people could rise from 2.4% to between 40 and 50%.”\textsuperscript{203} To meet the demand, majority world countries would have to produce 72 percent of the world’s meat.\textsuperscript{204} The current use of animals is thus not an elitist concern of privileged minority world countries; it is an issue of global concern.

Animal production industries are manifestly unsustainable and a massive contributor to environmental pollution. Animal products consume 70 percent of the global freshwater, use 38 percent of total land use, and produce 14 percent of the world’s greenhouse gases.\textsuperscript{205} Meat and dairy products use more resources, cause higher emissions, and have a disproportionately negative effect on the environment compared to plant-based alternatives.\textsuperscript{206} They devour excessive amounts of water and protein-rich plants, which threatens agriculture and drinking water supplies.\textsuperscript{207} Livestock production is responsible for more greenhouse gas emissions than the worldwide transport sector. Methane and carbon dioxide are produced while animals digest, and nitrous oxide is emitted when manure degrades microbially.\textsuperscript{208} Massive amounts of manure, made more toxic by adding antibiotics to feed, overwhelm the environment and annihilate the natural cleansing cycle. Feed imports render the ground application of manure impossible, creating artificial lagoons of manure that pollute groundwater as they overflow or leak.\textsuperscript{209}

Widespread abuse of antibiotics and antimicrobials also breeds bacterial resistance. Reservoirs of resistant bacteria are a serious public health concern and pose a global threat to food security.\textsuperscript{210} Overuse of antimicrobials and antibiotics also increases the probability

\textsuperscript{202} Delgado et al., Livestock to 2\textsuperscript{010} (1999); Felicity Carus, \textit{UN Urges Global Move to Meat and Dairy-Free Diet}, The Guardian, June 2, 2010.
\textsuperscript{203} UN FAO, \textit{How to Feed the World in 2\textsuperscript{050}, at 30} (2009).
\textsuperscript{204} \textit{2050: A Third More Mouths to Feed}, FAO Media Centre, Sept. 23, 2009.
\textsuperscript{206} Animal production has a much larger ecological footprint (or hoof print) than plant-based diets, typically by a factor of 10 or 11: \textit{2050: A Third More Mouths to Feed}, FAO Media Centre, Sept. 23, 2009. Oxford researchers Poore and Nemecek were the first to conduct a meta analysis of \textasciitilde{}38,000 farms producing 40 different agricultural goods around the world, to assess the impacts of food production and consumption. They found, specifically, that plant-based diets reduce food’s emissions by up to 73 percent depending on where people live. Moreover, the impacts even of the lowest-impact animal products typically exceed those of vegetable substitutes: Poore & Nemecek 987 (2018). See also Hertwich & van der Voet, \textit{Assessing the Environmental Impacts of Consumption and Production} 51, 79 (2010).
\textsuperscript{210} Martin, Thottathil & Newman 2409 (2015); Pew Commission, \textit{Report on Antimicrobial Resistance and Human Health} 11 (2008); Commission on Genetic Resources for FAO, \textit{Global Plan of
of new treatment-resistant strains (superbugs) that can sometimes jump between species and have been declared epidemic.\textsuperscript{211}

These large-scale effects show that animal agriculture can fundamentally endanger a state’s environmental health and functioning, in response to which the state can invoke the protective principle. Any state affected by foreign CAFO emissions, pollution, or other negative effects on its environment can thus use its laws to reach across the border and prevent the continued endangerment of its environment. Some might caution that states will randomly use the principle to counter diffuse environmental effects, but states usually apply the protective principle in environmental matters to intentional pollution,\textsuperscript{212} and other clearly defined offenses.\textsuperscript{213} For instance, article 2 para. 1 of the Council of Europe’s Convention on the Protection of the Environment through Criminal Law urges members to take appropriate measures to establish, \textit{inter alia}, as criminal offenses:

the discharge, emission or introduction of a quantity of substances […] into air, soil or water which causes death or serious injury to any person, or creates a significant risk of causing death or serious injury to any person (lit. a);

the unlawful discharge, emission or introduction of a quantity of substances […] into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to […] protected objects, property, animals or plants (lit. b); and

the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants (lit. d).\textsuperscript{214}

Although jurisdiction established by the Convention is based only on the territoriality and the active personality principle (article 5 para. 1), the enumerated offenses can serve as indicia for serious environmental offenses that may trigger the protective principle.\textsuperscript{215} So if a foreign

\textsuperscript{211} P\textit{ew Commission, Report on Industrial Farm Animal Production} 15 (2008);

\textsuperscript{212} E.g., \textit{Criminal Code, Law No. 5237, Sept. 26, 2004, 13 lit. d (Turk.).}

\textsuperscript{213} E.g., \textit{Penal Code (Est.), § 9 para. 1(3). CoE, Convention on the Protection of the Environment through Criminal Law, Nov. 4, 1998, C.E.T.S. No. 172, art. 5 para. 1 lit. a.}


\textsuperscript{215} That the convention did not set up the protective principle over these offenses does not mean the principle is not applicable to them. Drafters likely decided to refrain from interfering in states’ affairs by telling them when they can rely on the protective principle.
CAFO causes or is likely to cause a person’s death or serious injury, substantial damage to protected properties, animals, or plants, or substantial damage to the quality of air, soil, or water on domestic territory, then states have jurisdiction over these events by virtue of the protective principle. Cross-border environmental pollution caused by manure lagoon overspill, gaseous pollution in the proximate environment of CAFOs (which is common in pig and cow production facilities), loss of land fertility, groundwater pollution, fish kills, and other externalities entitles a state to extend its jurisdiction to prohibit or order the cessation of foreign CAFOs. This right of a state exists regardless of whether polluters acted intentionally or whether their actions were also illegal in their home state.\textsuperscript{216} For this reason, the principle is considered “non-cooperative,”\textsuperscript{217} and one of the most effective means of extraterritorial jurisdiction.

B. PROTECTIVE PRINCIPLE IN THE EXTRATERRitorialITY FRAMEWORK

According to the extraterritoriality framework, the protective principle identifies a state’s domestic interests, like protecting their environment, as necessary anchor points to regulate content abroad. The anchor point must be intraterritorial (fundamental state interests), otherwise the principle cannot be invoked. The content it regulates (e.g., ordering polluting facilities to cease production) can lie outside or inside the territory, but presumably is extraterritorial, or a state would not need to rely on the protective principle. Neither the anchor point nor the content regulated is animal-related, since the principle does not use animals as anchors, nor does it purport to regulate animal welfare.

§5 Interim Conclusion

Under the lex lata, states have several possibilities to directly protect animals in foreign countries. For centuries, the territoriality principle was the standard principle used to settle jurisdictional disputes, but its utility is inherently limited, and even more so in this age of globalization. The principle fails to cover cross-border actions and offers no solution for the many cases that involve parties from more than one state (e.g., foreign perpetrators, owners present on foreign territory, animals from other states, etc.). Due to the considerable shortcomings of the territoriality principle, jurisdictional principles based on factors other than the territorial have become more important. Under customary international law, states claiming jurisdiction outside their territory must use a jurisdictional principle that determines matters in which and the extent to which they can prescribe law extraterritorially.

To protect animals abroad, states can use the subjective and objective territoriality principles. These allow them to cover continuing offenses (cross-border animal theft or improper transport), cross-border crimes where constituent elements of the same crime occur in


\textsuperscript{217} Iain Cameron, The Protective Principle of International Criminal Jurisdiction 47 (1994).
different states, and cases of cross-border duties of care owed to animals. These are useful to tackle business activities of multinational enterprises that are organized and managed by corporate units spread across multiple states.

The personality principle gives states jurisdiction over their nationals or residents when they deal with animals abroad. The principle covers public and private activities of nationals and their actions as associates or as members of administrative boards. The personality principle also applies to corporations that are considered nationals on the basis of their place of incorporation, seat, or management. This means that the personality principle is virtually useless when clusters of corporations, known as multinationals, establish branches, subsidiaries, or parents abroad to evade domestic animal laws. However, in certain circumstances, domestic animal law applies to actions of multinational enterprises wherever they operate. Whether this is possible depends in particular on the corporate form of the units of a multinational enterprise, namely, whether they are a branch, a subsidiary, or a parent. A state’s jurisdiction extends to branches abroad (permanent offices located abroad and managed by domestic corporations) because the domestic corporation and the branch operating abroad form a legal entity. When parent corporations establish subsidiaries abroad (incorporated as separate legal entities), applying animal law across the border is virtually impossible. In certain circumstances, however, a domestic parent can be held liable under domestic law for the infringement of animal interests abroad by its subsidiaries. The conditions under which this can be done are exceptional: states can use different strategies to determine nationality, they can invoke the control theory, or pierce the corporate veil of a multinational. In even more exceptional circumstances, a state is also entitled to view a multinational as a single legal entity and hold it accountable on this basis.

Some states limit the active personality principle to double criminality or a narrow set of crimes, even though this is not required. Under international law, states are free to hold their nationals—including natural and legal persons and, under certain circumstances, foreign subsidiaries and parents—responsible for all their actions against animals abroad.

Another principle states can use to protect animals abroad is the protective principle. The principle traditionally protects the interests of a state in its security and territorial integrity. In recent decades, states have expanded it to protect other interests, including economic, political, and environmental concerns, which they consider threatened by people or events abroad. In animal law, the principle is useful to tackle cross-border environmental pollution and degradation. If foreign actions cause or will likely cause a person’s death or serious injury, substantial damage to protected properties, animals, or plants on domestic territory, or substantial damage to the quality of domestic air, soil, or water, then home states possess jurisdiction over these actions by virtue of the protective principle. Given the dominance and continued proliferation of CAFOs and their diverse and large-scale spill-over effects on foreign environments, this possibility is, sadly, a likely one.

The *lex lata* analysis has shown that international law offers states many different bases of jurisdiction to protect animals abroad, only by linking the law of jurisdiction to animal law. If states were to use the objective and subjective territoriality, active personality, and protective principles systematically to address, prevent, and punish actions abroad that considerably thwart the interests of animals, some of the worst legal loopholes caused by globalized business in agriculture, biomedicine, and entertainment could be filled. In the next chapter, I show how these principles can and must be complemented by more subtle forms of jurisdiction and cooperation initiatives with governmental and nongovernmental stakeholders.