Parameters of Substantive Law

Contemporary studies in the doctrine of jurisdiction focus at length on jurisdictional options but they often do not describe how these options can be meaningfully linked to substantive law, or answer if substantive law places constraints on how jurisdiction can be exercised. These linkages are needed because they provide guidance to states for the still young and largely unexplored field of animal law, they help make extraterritorial jurisdiction operational, and ensure it is not misused for other purposes. This chapter examines these parameters of substantive law and focuses on four questions that seem most important and urgent to answer: Can states use extraterritorial jurisdiction to harm animals? Do animal laws need to be coherent for states to apply them across their borders? If so, how coherent? Can and should we ensure, by regulatory design, that extraterritorial jurisdiction in animal law converges toward a higher common denominator? Finally, do states have a duty to protect animals abroad, and do their corporations have a duty to respect animals’ lives and interests when they do their business on foreign soil? I begin by examining the moral trajectory of extraterritorial animal law and turn to the question of moral consistency. Then I offer a guide to a hierarchy of extraterritorial animal laws and finally explore duties to protect and respect animals abroad.

§1 Moral Trajectory of Extraterritorial Animal Law

One of the most pressing questions for extraterritorial animal law is whether states can make use of extraterritorial jurisdiction not only to protect animals abroad but also if they want to bereave them of protection or weaken their existing rights and protections. For example, could a state oblige its citizens operating abroad to withhold anesthetics in invasive research
on animals, even though the country in which their nationals operate mandates the use of anesthetics? Would an Indian national be punished for eating cow meat in India, but a European who travels to India could eat cows with impunity because the European's home laws authorize their nationals to eat cow meat abroad?

At first glance, applying law extraterritorially to strip animals of protection would amount to wanton cruelty, which the international community strongly condemns. But creating negative effects for animals abroad by applying norms extraterritorially might just be an unpleasant but acceptable side effect of, say, a lucrative trade deal. Moreover, laws that create net negative effects for animals abroad may be caused by mistakes in an *ex ante* analysis of the potential gains of extraterritorial jurisdiction, incorrect assessments of the level of foreign animal welfare, inexperienced handling of certain regulatory tools that affect the lives of animals, etc. We must therefore examine whether and to what extent there are substantive limits to extraterritorial animal law—an inquiry that can be summed up as “the moral trajectory of extraterritorial animal law.” But rather than using philosophical arguments, I use legal arguments from general international law, international trade law, and comparative animal law to answer if the law places a constraint on the trajectory of extraterritorial jurisdiction to protect animals.

A. **Moral Trajectory in General International Law**

I. **Global Justice**

Almost none of the many books and articles written about extraterritorial jurisdiction analyze the moral trajectory of these laws, possibly because jurisdictional principles are considered inherently procedural. The law of jurisdiction might be value-based when it gives rise to collectively shared jurisdictional principles, and it might be value-based when it adjudicates concurring claims of jurisdiction. But when a state invokes jurisdictional principles, international law appears mostly value-free. It determines how closely connected the state’s laws are to a state of facts, but does not judge the motive or effects of that law, which makes it seem neutral on the question of whether a state can use a jurisdictional principle in a manner that creates or is conducive to producing negative repercussions abroad.

In the past, extraterritorial laws were used to improve a deficient situation, and in this sense, international law has taken a stand on the moral direction of substantive laws that will be applied extraterritorially. For example, extraterritorial antitrust laws have been deemed legal when they seek to prohibit actions abroad that harm the national market. The detrimental effects of extraterritorial jurisdiction on individuals who wanted to profit from the antitrust agreement are outweighed by the benefits created for the community by applying law extraterritorially. Similarly, extraterritorial human rights establish liability to fill accountability gaps and create legal burdens for individuals who would otherwise profit from underenforced laws abroad. And extraterritorial criminal and tort law criminalizes and remedies behavior adverse to common values that would elsewise go unpunished. Given its record, it seems that the law of extraterritoriality has preeminently served the greater common good at the expense of a few individuals, suggesting that extraterritorial animal law should do the same.

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1 The common motives of states to use extraterritorial jurisdiction are examined in Chapter 2. The international legal limits of jurisdiction are studied in Chapter 10.
Scholars seem to support this argument. Guzman and Ryngaert argue that the only jurisdictional norms that should be applied to a case are those that maximize the overall well-being of all global players.\(^2\) Ryngaert calls this the “substantivist approach,”\(^3\) Buxbaum calls it “the better law approach,”\(^4\) and Addis speaks of “maximizing aggregate social welfare.”\(^5\) Instead of viewing the law with the strongest link as the better law, these opinions converge on the idea that the law with the best welfare outcomes ought to prevail. Accordingly, jurisdictional assertions that decrease global welfare and justice must scale back, and those that increase these values must expand.\(^6\)

In animal law, this rule suggests that norms that decrease global animal welfare cannot be applied extraterritorially. But when considering the factors on the basis of which global welfare is measured, international law might not be willing to accept that the interests of animals are of importance. After all, accounts of global welfare essentially focus on human welfare. Similarly, the prevailing ethical and political debates in the law of extraterritoriality take a human-centric perspective on whether or not the exercise of extraterritorial jurisdiction is just, say, for individual humans, groups of humans, or sovereign states.\(^7\) So when it evaluates the net effects of jurisdiction on global welfare, the law of jurisdiction does not normally recognize animals as recipients of justice.

Scholarly contributions of the past decade, however, suggest that animals are worthy of moral consideration and that they should be included in the calculus of justice, both on the national and international level. Horta argues a cosmopolitan conception of justice must include all sentient beings. Humans have fundamental rights because they are sentient and vulnerable beings, and because they possess basic interests; since many animals are also sentient and vulnerable beings with basic interests, they must also possess fundamental rights.\(^8\) Global justice must thus be open to claims of animals. As Nussbaum asserts: “Truly global justice requires not simply that we look across the world for other fellow species members who are entitled to a decent life. It also requires looking around the world at the other sentient beings with whose lives our own are inextricably and complexly intertwined.”\(^9\) And Peters finds that we must “push beyond pragmatic and conventional research boundaries, and consider the global improvement of animal welfare as a matter of global justice.”\(^10\)

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\(^{2}\) Guzman 1510–1 (1998). Cf. Ryngaert, who argues that “[â] la limite, a jurisdictional assertion could even be considered reasonable on the mere ground that it protects a global interest or a universally shared value.” (Cedric Ryngaert, Unilateral Jurisdiction and Global Values 120 (2015)).

\(^{3}\) Ryngaert, Jurisdiction 199 (2015).


\(^{5}\) Adeno Addis, Community and Jurisdictional Authority, in Beyond Territoriality 13, 16–7 (2012).

\(^{6}\) Ryngaert, Jurisdiction 186 (2015). See further id. at 199 ff.


\(^{10}\) Peters, Global Animal Law 22–3 (2016).
Premised on a global concept of justice that includes animal interests, we might argue that international law cannot turn a blind eye to extraterritorial laws that have adverse effects on animals abroad. Even under the assumption that a global justice calculus that includes animal interests will limit certain rights of humans (say, the right to economic freedom, or freedom of research), protecting animals still forms part of the greater common good. Protecting animals underlines core ideas of humanity, reinforces the collective will to be altruistic, and prevents us from exploiting one another.\textsuperscript{11} Maximizing animal welfare abroad thus yields considerable benefits for animals and is conducive to the common long-term good of humans. Applying this basic rule to the doctrine of jurisdiction would moreover be consistent with the aspiration of international law to be just and fair, or, in this case, coherent. If other fields of law declare inadmissible extraterritorial laws that are detrimental to global welfare, animal law must also prevent laws from reaching across the border if they satisfy less praiseworthy interests of a few to the detriment of important values shared and cultivated by the community.

II. The Precautionary Principle

Legal duties stemming from the precautionary principle might also dictate the moral direction of extraterritorial animal law. The precautionary principle is a recognized principle of international law that guides decision-making processes in environmental law. According to Principle 15 of the Rio Declaration, the precautionary principle demands that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”\textsuperscript{12} The principle originated in the German \textit{Vorsorgeprinzip}, which developed in the 1970s as an axiomatic principle of Germany’s environmental law.\textsuperscript{13} The principle quickly became recognized internationally and is now enshrined in the World Charter for Nature,\textsuperscript{14} the 1987 Montreal Protocol,\textsuperscript{15} the 1990 Bergen Ministerial Declaration on Sustainable Development,\textsuperscript{16} the 1991 Bamako Convention on Transboundary Movement of Hazardous Wastes,\textsuperscript{17} the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes,\textsuperscript{18} the 1992 Convention on Biological Diversity,\textsuperscript{19} the SPS Agreement,\textsuperscript{20} and the 1995

\textsuperscript{11} See, e.g., note 69 on the close link between animal violence and human violence.
\textsuperscript{12} Rio Declaration, principle 15.
\textsuperscript{13} The principle was used in Germany to combat acid rain, global warming, and marine pollution: Meinhard Schröder, \textit{Precautionary Approach/Principle}, in MPEPIL 6 (Rüdiger Wolfrum ed., online ed. 2014).
\textsuperscript{14} World Charter for Nature, art. 12 lit. b.
\textsuperscript{15} Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, preamble.
\textsuperscript{17} Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 10, 1991, 30 I.L.M. 771, art. 4.
\textsuperscript{19} CBD, preamble, art. 8 lit. h, and art. 14 para. 1 lit. d.
\textsuperscript{20} Article 5.7 SPS. See for an application of the principle in practice: \textit{EC—Hormones}, AB Report ¶ 124.
UN Fish Stocks Agreement. Due to its widespread acceptance, the precautionary principle is regarded as a guiding principle of international law.

Some scholars caution against the principle, arguing that it easily exploits popular fears and anxieties. Succumbing to those would result in overly restrictive regulation that hampers economic and technical development. But the principle helps us avoid taking existential risks for short-term benefits that result in long-term, often irreversible catastrophes that were not foreseeable at the time of decision-making. Since even expert decision makers make mistakes and frequently revise their hypotheses, especially in complex matters, we should use the precautionary principle to eliminate risks and err on the safe side, especially when these risks are critical for affected individuals and communities.

The prime application of the principle is in environmental law, which includes animals, who form an integral part of ecosystems. The principle is also increasingly applied to decisions that directly concern animals. In its communication on the precautionary principle, the European Commission states:

The precautionary principle is not defined in the Treaty, which prescribes it only once—to protect the environment. But in practice, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community.

The Commission considers that the Community, like other WTO members, has the right to establish the level of protection—particularly of the environment, human, animal and plant health—that it deems appropriate. Applying the precautionary principle is a key tenet of its policy, and the choices it makes to this end will continue to affect the views it defends internationally, on how this principle should be applied.

The European Union accordingly applies the precautionary principle not only where an animal species is endangered but also where intrinsic interests of animals are on the line. In

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22 See Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests Case (N.Z. v. France), Order, 1995 I.C.J. Rep. 288, 320, 342 (Sept. 22) (Dissenting Opinion Judge Weeramantry): “The law cannot function in protection of the environment unless a legal principle is evolved to meet this evidentiary difficulty, and environmental law has responded with what has come to be described as the precautionary principle—a principle which is gaining increasing support as part of the international law of the environment.”


25 Scholars have already applied the precautionary principle to individual animals regardless of their endangerment as a species: Michael C. Calver et al., Applying the Precautionary Principle to the Issue of Impacts by Pet Cats on Urban Wildlife, 144 Bio. Cons. 61895 (2011); Frida Kuhlau et al., A Precautionary Principle for Dual Use Research in the Life Sciences, 25 Bioethics 1 (2011).
sum, states consider animal interests important enough to opt for precaution when in doubt about the risks, harms, and utility of a decision.

Since animal law is so closely linked to ethics, it must constantly draw a line between acceptable violations of animals’ interests and unacceptable or “unnecessary” animal suffering. The question of whether animals suffer unnecessarily, however, is not only answered from their perspective. It is the result of a compromise made between the interests of animals, their owners, societal expectations, moral standards, scientific knowledge, and economic concerns. The most severe shortcoming of animal law is that decisions on the legality of using and exploiting animals are often taken to the detriment of animals. For example, for years humans have acted on the assumption that fish do not feel pain, but today we know that most fish react strongly to negative stimuli and experience pain and suffering. This prompts Gerick to argue that, even in light of considerable technical advances and the many conclusions they allow us to draw about our treatment of animals, the odds are high that the lives of animals and their cognition will remain inaccessible to us. Our conclusions are thus based on indices, rather than vigorous evidence. Since we remain insecure about the accuracy of the conclusions we draw from these indices, it is incumbent upon us decide in favor of animals wherever and whenever actions impair or are likely to impair their physical and psychological integrity: in dubio pro animali. Applying the precautionary principle to the law of jurisdiction demands, at the very least, that extraterritorial jurisdiction refrains from creating net negative effects for animals situated abroad.

B. MORAL TRAJECTORY IN TRADE LAW

Trade law might also limit states in their application of extraterritorial laws that harm animals. History shows that unrestricted trade easily destroys ecosystems, brings resources to exhaustion, eradicates species, endangers food security, and sacrifices minority interests to benefit the majority. In the scheme of trade law, any law intended to counter these effects and protect environmental and social values is classified as a nontrade concern, since it does not primarily focus on liberalizing trade. Because nontrade concerns are not a core issue of international trade law, the WTO treats them as “exceptions.” For the purposes of the present inquiry, namely, whether trade law places limits on extraterritorial jurisdiction, the

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26 See for details on the principle of unnecessary animal suffering and the balance of interests test, Chapter 8, §3 B. V.
27 For an overview, see Lynn U. Sneddon & Matthew C. Leach, Anthropomorphic Denial of Fish Pain, 3(28) Animal Sentience (2016).
28 If we denied certain animals protection on the grounds that they are not sentient and subsequently find evidence proving they are sentient, we face a tremendous moral dilemma. To prevent such worst-case scenarios, we should precautionarily consider these animals to be sentient: Nicole Gerick, Recht, Mensch und Tier 213 (2005); Robertson 67, 156 ff. (2015).
29 Nadakavukaren Schefer 7– 8 (2010).
crucial question is whether the WTO distinguishes between nontrade concerns based on their positive or negative effect on environmental and social values.

According to Nadakavukaren Schefer, we can classify nontrade concerns by the extent to which members support them and based on the moral direction they pursue. She classifies nontrade concerns by three categories: law-disabling, law-supporting, and law-creating norms. Law-disabling nontrade concerns pursue less commendable policy goals. These goals are regulator-only oriented and have an adverse effect on the international legal system by imposing assumed benefits on nonconsenting parties. Law-supporting nontrade concerns encourage law-abiding behavior of other members by convincing or coercing them to adhere to international obligations, which benefits the international community without creating new obligations. Law-creating nontrade concerns facilitate the emergence of legal norms that further ideas and goals beneficial to the international community. The community might find these norms attractive, but they might be too progressive, novel, or costly to implement now.

For decades, animal law was considered illiberal and trade-disabling. For example, bans on eating dog meat imposed by Western countries on others were widely perceived as a form of cultural parochialism. To this day, the question of who may use which animals and in what manner divides the international community. As such, proposing an international treaty in animal law can easily be seen as a manifestation of neocolonialism, by demanding that some countries adapt their laws to those of the dominant group. But there is also reason to believe that states have come to a truly common understanding of how we must treat animals. Any trade standards adopted on the basis of such an understanding will qualify as law-supporting. Nadakavukaren Schefer thinks that the laws underlying the Shrimp/Turtle dispute, by which the United States sought to protect five species of endangered turtles abroad, are law-supporting in this sense. These laws aim to ensure that other states abide by international obligations they entered to protect endangered turtles. In Tuna/Dolphin, the United States prohibited tuna imports in response to a startling increase in dolphin mortality. This norm is law-creating because it prompts the international community to develop guidelines for sustainable fishing. The European Union import ban on furs inhumanely caught by leghold traps was also law-creating, because it set up the “rights of animals to humane treatment.” Overall, Nadakavukaren Schefer broadly considers animal laws to be law-supporting and law-creating.

The WTO seems to prefer law-creating and law-supporting trade regulations over law-disabling ones, which we can tell from its exceptions. Article XX of the GATT allows safeguarding positively connoted values like public morals (article XX(a) GATT), animals’ life and health (article XX(b) GATT), artistic, historic, or archaeological treasures (article XX(f) GATT), and endangered species (article XX(g) GATT). These exceptions do not allow member states to pursue less commendable goals, and no report suggests that states may adopt laws that are per se harmful in nature and purpose. The ethical direction of nontrade

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32 During the 2002 Olympic games held in South Korea, protesters around the world demanded the country cease killing dogs for food purposes: Minjoon Oh & Jeffrey Jackson, Animal Rights vs. Cultural Rights: Exploring the Dog Meat Debate in South Korea from a World Polity Perspective, 32 J. Intercultural Stud. 31, 33 (2011): “Koreans—both government officials and citizens—accused protestors of cultural imperialism for their attempt to impose Western values on Koreans.”
33 Nadakavukaren Schefer 5 (2010).
regulation in trade law is made explicit in the preamble to the Marrakesh Agreement, which states that trade law should be developed while “seeking both to protect and preserve the environment and to enhance the means for doing so.”

Overall, WTO law suggests that a state can only pursue equivalent or higher levels of animal protection when it indirectly protects animals abroad. The rule is supported by the general principle of animal welfare, which embodies “legitimate concerns or internationally recognized ethical positions” that require systemic integration in the WTO framework. As a general rule, WTO law thus demands members to channel the better protection of animals.

C. MORAL TRAJECTORY IN ANIMAL LAW

As a third source, animal law may answer whether states can rely on jurisdictional principles to harm animals. In order to find out more about the moral and legal demands of animal law, it is necessary to briefly examine its history and the development of public attitudes toward animals, since these inform our current understanding of the Regelungszweck of animal law.

I. From Property Protection to Animal Protection

Early animal laws reflect the social valuation of animals as a means to human ends. Animals that had exchange value on the market and gave their owners an economic advantage (primarily farmed animals) were protected from excessive use. The Babylonian Code of Hammurabi, the most important digest of the law of its time (1754 BCE), did not directly prohibit cruelty and abuse of farmed animals but declared such actions to be subject to restitution by the owner. By 273 BCE, similar laws requiring ahimsa or nonviolence toward all living beings emerged in India. In the West, one of the first acts prohibiting animal cruelty was Ireland’s Thomas Wentworth Act of 1635. As in the Code of Hammurabi, relationships with animals were couched in property relations and contractual obligations, which emphasized the worthiness of animals as capital. This is why farmed animals, including cows, draft horses,
and pigs, were historically subject to these laws. Companions, by contrast, were excluded from legal protection against abuse at the time, because they had no economic value. But even those animals visible to early animal laws were protected only insofar as they had market value, and their owners could not be held liable for animal cruelty. Many may have regarded cruelty committed against owned animals as morally wrong, but law gave priority to the property rights over the interests of animals in their physical and psychological integrity. These first-generation animal laws hence emerged from and expressed the sole desire to protect human interests in property.

Around 1820, one of the early humane movements started in England, driven by mounting concerns about the suffering of farmed animals. These efforts culminated in the Martin’s Act of 1822, also known as the “Ill Treatment of Horses and Cattle Bill,” which is often identified as the first animal law to criminalize wanton and cruel animal abuse. But it was not until the Protection of Animals Act of 1911 superseded the Martin’s Act that a law finally provided that animals are protected from such actions even if committed by their owners: “For the purposes of this section, an owner shall be deemed to have permitted cruelty within the meaning of this Act if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom [. . .].” With these norms, animal law began emancipating itself from the property paradigm, giving way to second-generation animal laws that provided for full cruelty protection.

By the late twentieth century, most states had adopted similar anti-cruelty laws that acknowledged animals are aware, can suffer and feel pain, and have an interest in leading a meaningful life. Eventually, laws went beyond prohibiting the most outrageous forms of animal cruelty and began prescribing species-specific standards of care that determine whether animals must be kept in groups, how often they must be fed, what they must be fed, whether they can go outside, duties to provide veterinary care, etc. These third-generation animal laws are no longer limited to (negatively) laying down how animals must not be treated; they determine (positively) how animals must be treated. The titles of the acts illustrate this shift away from “anti-cruelty act(s)” to “animal protection act(s)” and “animal welfare act(s).”

Although praiseworthy, this development comes late. For centuries, the law has lagged behind scientific evidence and social beliefs about animals, which have long grappled with and recognized animal sentience. As early as the Renaissance, philosophers like Vinci, Erasmus,  

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40 The Martin’s Act, for example, protected horses, mares, geldings, mules, asses, oxen, cows, heifers, steers, sheep, and others: An Act to Prevent the Cruel and Improper Treatment of Cattle 1822, c. 71, preamble (U.K.).

41 Wagman & Liebman 148 (2011).


43 Protection of Animals Act 1911, c. 27, § 1(2) (U.K.).

44 Whitford notices that “[a]round the world, recent reforms to animal welfare legislation have demonstrated that without including negligence as a basis for criminal liability, the vast majority of animal abuse cases cannot be prosecuted. In most instances of animal suffering, the owner is not deliberately cruel, but causes suffering through negligence or ignorance. It is only where the law imposes a duty on owners to provide a reasonable minimum standard of care towards their animals that animal welfare is effectively safeguarded.” (Amanda Whitford, Evaluating China’s Draft Animal Protection Law, 34 Sydney L. Rev. 347, 357 (2012)).
Montaigne, Shakespeare, and Bacon had accepted that animals are sentient. Animal sentience was firmly recognized within the scientific community of the early nineteenth century, which should have had an influence on animal law at that time. But scientists quickly began to avoid studying animal feelings thereafter. Only since Harrison’s *Animal Machines* of 1964—which culminated in the publication of the Brambell Report and changed animal welfare legislation in the UK and beyond—a renewed scientific focus on animal sentience emerged. In the United States, it was Griffin’s *The Question of Animal Awareness* of 1976 that had renewed the awareness of the scientific community about the lives and experiences of animals.

II. Toward Pathocentrism

Today, 60 years after animal sentience gained momentum in social and political movements, animal sentience is virtually undisputed. Sentience includes far more than one’s ability to experience nociception, which is a simple response to sensations. In reaction to noxious stimuli, sentient animals begin to adapt physically and emotionally. For example, they try to avoid negative stimuli and, if they cannot avoid them, develop anxiety or learned helplessness. Animals’ reactions make clear that they feel pain, suffering, and pleasure (i.e., they experience affective states), and that they have an intrinsic interest in having or not having these feelings. Some scholars clearly distinguish sentience from consciousness. Sentience, they argue, is one’s ability to experience affective states, whereas consciousness is one’s ability to

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46 Duncan argues that English veterinarians had accepted that “animals have senses, emotions and consciousness; they demonstrate sagacity, docility, memory, association of ideas and reason; they also have imagination and the moral qualities of courage, friendship and loyalty” (Duncan 12 (2006)).

47 Duncan also argues that even though animal scientists endorsed animal sentience 120 years ago, they did not pay enough attention to the study of animal feelings, i.e., behavioral science. He argues that behaviorism had a huge effect on how we perceive animals’ minds, needs, consciousness, and feelings: Duncan 12 (2006).

48 Ruth Harrison, *Animal Machines* (1964). Harrison was motivated by more than “the fact that these animals were stressed (...); it was the fact that they were sentient and could feel stressed.” (Duncan 13 (2006), emphasis added). While drafting the Brambell Report, the responsible committee said assessing animal welfare depended on acknowledging sentence: “Welfare is a wide term that embraces both the physical and mental well-being of the animal. Any attempt to evaluate welfare, therefore, must take into account the scientific evidence available concerning the feelings of animals that can be derived from their structure and functions and also from their behaviour.” (F.W. Rogers Brambell, Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems (Her Majesty’s Stationery Office, 1965), command paper 2856). The Brambell Report spurred the Agriculture (Miscellaneous Provisions) Act 1968 (U.K.) and the UK Farm Animal Welfare Advisory Body, which established the Five Freedoms: freedom from hunger and thirst (animals shall have ready access to fresh water and adequate food); freedom from discomfort (animals shall be given appropriate shelter and comfortable resting area); freedom from pain, injury, and disease (which requires acting preventively, rapidly, and with adequate treatment); freedom to express normal behavior (animals shall have sufficient space, proper facilities, and be able to maintain social relations); and freedom from fear and distress.


recognize the intrinsic importance of affective states. In this view, sentience is a minimal definition or nuance of consciousness.\textsuperscript{51} Most legislators, however, group these concepts when they define sentience.

Because sentient animals consciously experience affective states, they must be protected from pain and suffering. Earlier, we have found that virtually all states today recognize animals as living and sentient beings, and determine that this recognition forms the guiding rationale of their animal protection acts.\textsuperscript{52} Although sentience is a bedrock principle of animal law, many legislators refrain from deciding which animals are sentient. Instead, they determine that this decision is informed by findings from the natural sciences like animal welfare, cognitive ethology, or animal behavior.\textsuperscript{53} Leaving such an important decision in the hands of another discipline may appear risky, but it ensures that unbiased criteria will be applied. For example, for years it was thought that only vertebrate animals are capable of feeling pain. More recent research, by contrast, revealed that many animals lacking a spinal cord have the ability to feel pain and are thus sentient. This view is prominently defended by an international group of cognitive neuroscientists, neuropharmacologists, neurophysiologists, neuroanatomists, and computational neuroscientists that together formulated the 2002 Cambridge Declaration on Consciousness:

The neural substrates of emotions do not appear to be confined to cortical structures. […] Artificial arousal of the same brain regions generates corresponding behavior and feeling states in both humans and non-human animals. Wherever in the brain one evokes instinctual emotional behaviors in non-human animals, many of the ensuing behaviors are consistent with experienced feeling states, including those internal states that are rewarding and punishing. […]

[Non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Non-human animals, including mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates.\textsuperscript{54}

Animals that lack cortical structures, but have a subcortical neural network, are thus capable of experiencing positive and negative emotions in a conscious state, which means that most nonhuman animals (including mammals, birds, fishes, octopi, and many other creatures) meet the scholarly definition of sentience (they are able to experience pleasure, pain, suffering, etc.) and consciousness (they are aware of themselves as experiencing pleasure, pain,


\textsuperscript{52} See Chapter 1, §4 B I.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} Cambridge Declaration on Consciousness in Non-Human Animals (2012).
suffering, etc.). These findings, if taken seriously, must lead to changes in the law in particular by granting legal protection to a vast majority of animals, many of which are still unprotected today. The fact that scientific findings directly inform animal law, rather than being contingent on social sentiment, suggests that we are in much better position to detect and avoid biases against animals. Needless to say, also scientists are prone to biases, and our scientific understanding of animals’ lives is still in a nascent state, so it is crucial for the law to remain critical and alert about anthropocentrically informed assumptions.

In the discipline of animal ethics, the law’s recognition that animals are sentient is an expression of pathocentrism or sentientism—the belief that those who can experience pain have inherent value. Sentient animals should be included in the circle of our morality because they have an interest in “living a good life” free from suffering, which has to be respected by humans. Pathocentrism is typically associated with contemporary utilitarian writings like Singer’s *Animal Liberation* and *Practical Ethics*. Singer argues that there are no morally justifiable grounds for excluding nonhuman animals from our moral consideration since they are able to experience positive and negative emotions just like we do. Bereaving them of protection because they are “just animals,” so by pointing to their species membership, is an unjustified form of discrimination like racism and sexism, but called *speciesism*. An unbiased view of ethics therefore mandates that the interests of animals codetermine a judgment on utility maximization. Aside from the utilitarian school, deontologists like Regan and egalitarians like Krebs support the theory of pathocentrism, which today is the most widely accepted basis for the moral status of animals.

In pathocentric ethics, animals deserve protection for their own sake. Their well-being matters, because it matters to them. Most states implicitly acknowledge that animals have inherent value by recognizing their sentience. A number of states, however, have made this

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55. 95 percent of all animals are invertebrates, so law, by excluding them, leaves most animals unprotected: Jedelhauser 34 (2011).
56. Andrew Linzey, *Sentientism*, in *Encyclopedia of Animal Rights and Animal Welfare* 331 (Marc Bekoff & Carron A. Meaney eds., 2010); Tom Regan, *The Radical Egalitarian Case for Animal Rights*, in *Environmental Ethics: Readings in Theory and Application* 81–9 (Louis P. Pojman ed., 6th ed. 2012); Richard Ryder, *Sentientism*, in *The Great Ape Project* 220 (Paola Cavalieri & Peter Singer eds., 1993). A footnote from Jeremy Bentham is probably the most quoted argument for sentientism: “It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as more conversable animal, than an infant of a day or a week or even a month old. But suppose they were otherwise, what would it avail? The question is not, Can they reason? or Can they talk? but, *Can they suffer?*” (Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* n. 1 at 310–1 (1781) emphasis in original).
link explicit. The preamble to the Dutch Animal Welfare Act recognizes the “intrinsic value of the animal.” Article 3 lit. a of the Swiss Animal Welfare Act speaks of the “[i]nherent worth of the animal that has to be respected […]”. And the preamble to the Latvian Animal Protection Law states that “[t]he ethical obligation of humankind is to ensure the welfare and protection of all species of animals, because every unique being is in itself of value.

But pathocentrism is not the only theory that informs animal law. Some states still only protect animals based on their appearance, utility, and emotional value for humans. In the United States, most state anti-cruelty acts exempt farm practices, which has made farmed animals literally disappear from the law. As a consequence, virtually nothing done to them is legally relevant, which is even worse than what the Code of Hammurabi required in 1754 BCE. According to these laws, animals do not have intrinsic value but are a means to satisfy human ends like property interests, economic gains, culinary pleasure, or aesthetic values. Laws that are motivated and benchmarked by human interests are mainly a product of the anthropocentric theory of animal law. Etymologically, anthropocentrism (from the Greek anthropoi) places human beings at the center of all moral concerns. The idea of human centrality, primacy, or superiority in the “scheme of things” dates back to Aristotle’s Politics and Kant’s moral philosophy. In their view, only humans have intrinsic value, so obligations that determine how animals ought to be treated are only owed to humans. Whether and to what extent animals will be protected will depend on the benevolence and charity of humans, because animals themselves do not have a solid claim to protection, well-being, or rights rooted in a concept of interspecies justice. Clearly, for those who seek to protect animals and recognize their rights, anthropocentrism is not the preferred theory. It bears mention, however, that even this limited approach centers around sentience. For example, because people who are cruel to humans often have a history of animal cruelty, policymakers treat animal abuse as a red flag for the abuse of another family member. Anthropocentrically informed animal

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61 Animal Law (Neth.), preamble states “onder erkenning van de intrinsieke waarde van het dier.”
62 Animal Welfare Act (Switz.), art. 3 lit. a.
63 Animal Protection Law (Lat.), preamble.
67 Deutsches Referenzzentrum für Ethik in den Biowissenschaften (DRZE), Ethical Aspects (Bonn, June 2016).
laws recognize this link, and animal sentience with it, since this link only exists because animals are sentient. Property damage, which is also criminalized, is not considered a precursor to child abuse, whereas the “damage” of animals is. Quite obviously, there is thus a difference between damaging a chair and “damaging” an animal.

III. Pathocentrism and the Moral Trajectory of Animal Law

This short overview of the history of animal law shows that animals have played an ever-increasing role in animal law and that an overwhelming majority of states today protect animals for pathocentric reasons. Our commitment to pathocentrism precludes employing laws extraterritorially that inflict pain, suffering, harm, anxiety, or distress on animals. Instead, it demands that laws be extraterritorially applied only if they benefit animals. Even anthropocentrism tacitly endorses this view and thereby contributes to the universally shared commitment to animal welfare that builds on the recognition of animal sentience, criminal animal law, the principle of humane treatment, and avoidance of animal suffering. Together, public international law, trade law, and animal law all determine that states cannot invoke jurisdictional principles to bereave animals of protection or otherwise harm them.

§2 Moral Consistency

The trajectory that impels us to use extraterritorial jurisdiction to the benefit, or at least not to the harm of animals is clear. But ambiguities persist, particularly if incoherent, biased, or fragmentary laws are applied extraterritorially. People belonging to Western societies, for example, frequently consume pigs but condemn those who eat dogs. Some Asiatic cultures condemn those who eat cows, yet they may consume dogs. Strictly speaking, cows, dogs, and pigs should all be protected under the law because they are sentient. And the law of jurisdiction should help us achieve this goal. But instead of addressing and resolving these inconsistent practices for the benefit of animals, the law often merely mirrors them. Ribbons explains with a view on the United States:

In every state, the legislation that prohibits cruelty to animals exempts animals destined for human consumption. In every single one of the 50 states, if you are raising an animal for meat, for milk, or for eggs, you can without restriction subject that animal to conditions, which, if you did that to a dog or cat, would land you in jail.

These and many other laws reflect an incoherent morality: “We love dogs and eat cows not because dogs and cows are fundamentally different—cows, like dogs, have feelings, preferences, and consciousness—but because our perception of them is different. And consequently, our


70 On the general principle of animal welfare, see Chapter 2, §4.

perception of their meat is different as well.” Law simply mirrors and reproduces the many cognitive biases that inform our subjective social reality. Although law cannot force humans to abandon their psychological biases, it is reasonable to ask whether the law should legitimate and replicate such prejudices and misconceptions. How morally pure, rational, and objective can and should the law be? And what happens when we apply our biased laws in another state’s territory where people have different views about animal suffering and protection? We may have good reasons to protect animals abroad, but different cultural traditions have different priorities and perceptions about animal protection, making this a charged and ethically delicate undertaking. Addressing these questions is essential for animals who suffer from biased views, but also because people may suffer if animal protection laws are instrumentally used to oppress them. In the following, I examine what international law has to offer in response to inconsistent and biased laws applied across the border. I focus specifically on WTO law because the WTO has had to deal with most of the disputes involving cross-border issues of animal protection.

Efforts to address animal welfare at the WTO have often brought states’ attitudes toward animals more sharply into contrast. Most states only want to extend protections to species they deem worthy of protection. In disputes over cross-border trade, this creates a paradox situation where members devote considerable effort to ensuring WTO law protects certain species, while readily disregarding the lives of others or even facilitating trade in them. Nollkaemper describes this inconsistency in his analysis of the European Union’s effort to ban the importation of fur from leghold traps:

The EC policy to outlaw leghold traps is an eclectic and somewhat opportunistic response to public concern that has little to do with a reasoned policy to protect animal welfare. One must doubt, for instance, whether animals living in the wild and finding themselves killed in a leghold trap are worse off than animals spending their entire life in a cramped European cage, even if those animals are more “humanely” killed.73

Similarly, in the Seals dispute, Canada contended that the EU Seal Regime “does not address genuine risks to public morals on animal welfare on the ground that the European Union ‘tolerates’ a similar degree of animal suffering in slaughterhouses and terrestrial wildlife hunts.”74 The Canadian press was less cautious in its judgment:

The celebrity-studded campaign against the seal hunt has persisted for decades, but it has never demonstrated that the slaughter of a seal is systematically worse than that of a cow or a chicken. On the contrary, the Canadian government insists the highly regulated seal hunt is humane, a claim supported by veterinarians who have studied it. As well, seals are never confined as livestock; they are, to borrow a popular term, the ultimate free-range animal.75

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72 Joy 18 (2011) (emphasis in original). The social norms implicated in rendering the consumption of sentient animals legitimate is what Joy calls “carnism.” Carnism is an invisible belief system, or ideology, that conditions people to eat certain animals (id.).


74 Seals, AB Report ¶ 2.142.

Most states that have tried to establish or maintain some sort of protection for animals at the WTO were accused of operating selectively and arbitrarily. Although these inconsistencies are ethically problematic, they are not necessarily condemned by law. Under WTO law, when a member state relies on an exception to protect animals, its policy must be even-handed, nonarbitrary, justifiable and reasonable, and form part of its public concerns. WTO case law shows it takes laws that violate these demands seriously, perhaps even too seriously. When the European Union prohibited the importation and marketing of seals and seal products, it put in place two exceptions for what it considered valid claims to use and trade seals, exempting indigenous communities and those involved in managing marine resources. These exceptions, though well-intentioned by paying regard for minority and special interest groups, ultimately cost the European Union the AB’s approval, on grounds of moral inconsistency. The exceptions allowed inhumanely killed seals and seal products to enter the European market, permitting the same cruelty from which the European Union sought to protect its consumers. The AB underlined that if members want the DSB to rule that specific trade restrictions are justified, they must be sufficiently consistent in meeting the member’s policy objective. So, although the WTO leaves it to states to define their own policy objectives, if their actions do not match their predefined objective, there is a claim to inconsistency.

In the absence of a specifically formulated policy objective, scholars contend we should not confuse public morals with moral purity. According seals special treatment certainly is inconsistent when states deliberately subject (many) other species to extreme forms of suffering. But WTO law and general international law do not have the power to call these policies into question, mainly because they are not covered by an international treaty. Asking the WTO to intervene in these cases is tantamount to demanding that international law police domestic policies, which would encroach upon the sovereign authority of states to make their own laws. Hannan, a member of the European Parliament, noted this in the context of the seals ban:

There is something not strictly rational about singling out seals for special treatment. They are not an endangered species—even the WWF says so. We do not get anything like the clamour about hunting seals on behalf of wasps or woodlice or wolverines or worms. Then again, democracy is not strictly rational.

International law—unless it attempts to establish a totalitarian regime—is bound to accept that inconsistencies structure domestic law and that those impinge on the law of jurisdiction,
though there are exceptions for human rights violations and other breaches of international law. This suggests that, in principle, the moral inconsistency of policies does not affect their legality under trade law.\footnote{Nollkaemper 241 (1996).} US— Gambling to this effect noted that members “should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.”\footnote{US— Gambling, Panel Report ¶ 6.461. See also China— Audiovisuals, Panel Report ¶ 7.759.}

On grounds of consistency, the same parameters should apply to the law of jurisdiction. The rationale behind applying animal protection standards extraterritorially should align with a state’s policy objective. Outside that sphere, a state’s laws can, in principle, give effect to the cognitive biases of its people, as long as these laws reflect matters of public concern and are applied in an even-handed, nonarbitrary, and nondiscriminatory manner. In international law, such a postulate for relative or minimal consistency may also arise from the principle of reasonableness, or the rule of law.\footnote{According to Corten, the functions of the principle of reasonableness are limited to providing flexibility for rules, filling lacunae in existing law, bringing about systematization and legitimacy for the international legal order, and providing room for different interpretations: Olivier Corten, Reasonableness in International Law, in MPEPIL 6–10 (Rüdiger Wolfrum ed., online ed. 2013). From this does not follow that the principle of reasonableness plays only a limited role in law. Particularly in legal reasoning, the principle requires consistency on grounds of syllogistic argumentation: Peter Cane, Responsibility in Law and Morality 17 (2002); Giacinto della Cananea, Reasonableness in Administrative Law, in Reasonableness and Law 295, 298 (Giorgio Bongiovanni et al. eds., 2009). See on consistency as a subprinciple of the rule of law: Esther Herlin-Karnell & Theodore Konstadinides, The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications of European Integration, in The Cambridge Yearbook of European Legal Studies, vol. 15, 2011–3, 139, 142 (Catherine Barnard et al., 2013).}

Even if the law of jurisdiction accepts and permits a certain degree of moral inconsistency, states should consider policies that protect animals more coherently and comprehensively. Extraterritorial jurisdiction casts a wide jurisdictional net of overlapping laws that stimulate political debate and encourage states to critically reflect on their social and legal norms. Extraterritorial jurisdiction invites us to ask why we should protect seals and rely on scientific findings that demonstrate their suffering, while ignoring research that shows farmed animals suffer equally. As long as states are vigilant and respond to such claims in intraterritorial or extraterritorial contexts, there is a reason for optimism. But many states fail to live up to these demands, and often, the very states that push to improve the legal environment for animals within the WTO are the very same states that fail animals within their borders. For instance, in 2004, the European Food Safety Authority (EFSA) published a report finding that the most common slaughter methods used in the European Union—like carbon dioxide used to kill pigs or electric current used to kill birds—are incredibly painful for these animals.\footnote{E.g., Opinion of the Scientific Panel on Animal Health and Welfare (AHAW) on a Request from the Commission Related to Welfare Aspects of the Main Systems of Stunning and Killing the Main Commercial Species of Animals (EFSA, Parma 2004) [AHAW/EFSA Report on Animal Slaughter and Killing (2004)].}

The EFSA recommended that Directive 93/119/EC phase out these slaughter methods, but the European Union decided not to implement its recommendations because they are “not
economically viable at present in the EU." But what would the reaction of the European Union have been if Canada said the same about seal hunts?

In the last decade, the European Union has expressed interest in creating a more coherent scheme for protecting animals. In its Impact Assessment on the European Strategy for the Protection and Welfare of Animals 2012–2015, the European Commission states that it seeks “to improve the coherence of animal welfare across animal species.” In the WTO realm, trade restrictions should accordingly \textit{a fortiori} apply to products derived from farmed animals, who are forced to endure intolerable levels of suffering. More broadly, claims of inconsistency should not be used to reverse achievements of animal law, but must be interpreted positively to ensure more coherent and comprehensive protection of animals. Special attention should therefore be given to the many animals ignored or neglected by a specific legal regime.

\section*{§3 Guide to a Hierarchy of Extraterritorial Animal Laws}

Extraterritorial animal law, as argued earlier, cannot be used to produce negative effects for animals abroad, but must ensure that it raises the level of protection or justice for animals abroad. Since animal law is a relatively new field of law, states may lack the knowledge needed to decide which laws benefit animals and which ones do not. In the following, I propose a hierarchy to help authorities decide which laws they should reasonably endow with extraterritorial application to ensure the required moral directionality.

\subsection*{A. Minimum Standards}

It would seem that minimum standards are the most useful and accepted method of evaluating if extraterritorial law is used to benefit or thwart the interests of animals. Minimum standards would determine that states apply norms extraterritorially only if those provide a certain minimum level of protection. Laws that fall below that level could not be applied across the border because they risk having a net negative effect on foreign animals. For farmed animals, the Five Freedoms, developed by the British government in 1965, are often regarded as useful minimum standards. In its initial proposal to the British government, the drafting committee determined that animals should be free to stand up, lie down, turn around, groom themselves, and stretch their limbs. The UK Farm Animal Welfare Council (FAWC) used these determinations as a starting basis and developed them into the Five Freedoms. According to this scheme, animals have a right to:

\begin{itemize}
  \item[(i)] Freedom from hunger and thirst, by ready access to water and a diet to maintain health and vigour;
\end{itemize}

\begin{footnotesize}
87 See also Stohner 193 ff. (2006).
\end{footnotesize}
(2) freedom from discomfort, by providing an appropriate environment;
(3) freedom from pain, injury and disease, by prevention or rapid diagnosis and treatment;
(4) freedom to express normal behaviour, by providing sufficient space, proper facilities and appropriate company of the animal’s own kind;
(5) freedom from fear and distress, by ensuring conditions and treatment, which avoid mental suffering.\textsuperscript{89}

The Five Freedoms are a legal standard in the AWAs of Costa Rica, Nicaragua, and other states.\textsuperscript{90} The Welfare Quality Project (WQP), a research partnership of scientists from Europe and Latin America funded by the European Commission, embraced the Five Freedoms and complemented them with additional and more detailed criteria.\textsuperscript{91} The OIE, an internationally recognized standard setter in matters of animal welfare, also endorses the Five Freedoms for farmed animals.\textsuperscript{92} And for animals used in research, the OIE recognizes and recommends the 3Rs, which mandate the number of animals be reduced, experimental methods be refined, and animal use be replaced by alternatives.\textsuperscript{93} The 3Rs, like the Five Freedoms, are a globally recognized minimum standard that determines how animals must be treated in research.\textsuperscript{94}

Minimum standards seem to be a formidable method to gauge if extraterritorial animal laws protect, rather than harm, animals. They are supported by a representative number of people (and states), they have been used for years and are sufficiently established, and they are not overly demanding. But this is also their weakness. Minimum standards risk being an overly careful compromise and often end up codifying the lowest common denominator at the expense of robust protections of animals.\textsuperscript{95} The 3Rs, for example, are widely accused of

\textsuperscript{89}\textit{Farm Animal Welfare Council (FAWC), Farm Animal Welfare in Great Britain: Past, Present and Future 2} (FAWC, London 2009).

\textsuperscript{90} Decree on the Well-being of Animals (Costa Rica), art. 3; \textit{Law for the Protection and Well-being of Pets and Wild Animals in Captivity} (Nicar.), art. 7.

\textsuperscript{91} The 12 points are: (1) animals should not suffer from prolonged hunger; (2) animals should not suffer from prolonged thirst; (3) animals should have comfort around resting; (4) animals should have thermal comfort; (5) animals should have enough space to be able to move around freely; (6) animals should be free of physical injuries; (7) animals should be free of disease; (8) animals should not suffer pain induced by inappropriate management, handling, slaughter, or surgical procedures (e.g., castration, dehorning); (9) animals should be able to express normal, nonharmful, social behavior, such as grooming; (10) animals should be able to express other normal behavior, such as foraging; (11) animals should be handled well in all situations; (12) negative emotions such as fear, distress, frustration, or apathy should be avoided, whereas positive emotions such as security or contentment should be promoted: Welfare Quality Project, Fact Sheets, available at http://www.welfarequality.net/en-us/home/ (last visited Jan. 10, 2019).


\textsuperscript{93} \textit{Id.} art. 7.1.2, para. 3 and art. 7.8.3. The 3Rs were developed by psychologist Russell and biologist Burch in the late 1950s: \textit{William M.S. Russell & Rex Burch, The Principles of Humane Experimental Technique} (1959).


rubber-stamping the exploitation of animals, and the Five Freedoms, rather than providing any form of freedom to animals, gloss over injustices against animals held in extreme confinement and killed by the millions. The argument that these standards lack detail and foresight is accepted by the OIE, when it states that “the use of animals carries with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable.” If we used minimum standards as a yardstick, they would cap animal law by anchoring it to the bare minimum and prevent states from establishing meaningful rights for animals.

This is neither acceptable nor justifiable given the moral and legal duties we owe animals. It would mean that we lag far behind achievements in science and ethics, and that we fail to respond to the growing concerns of the public. It is also not acceptable for states with well-established levels of animal law, who would be forced to considerably lower their standards in cross-border application. States should not have to compromise their high levels of animal protection to conform to bare minimum standards, especially when international law gives them the freedom to apply their laws across the border to protect animals.

B. HIERARCHY OF PREJUSMPTIONS

Therefore, a more nuanced approach is needed, which consistently ensures better treatment of animals and empowers states at every level of animal law to make meaningful use of the law of jurisdiction. This is a challenging task but can be mastered by what I call “a hierarchy of presumptions.” When we reflect on human rights law and its progressive development, we can identify certain signpost achievements that are considered necessary worldwide to create just legal systems: transparency, recognizing interests, integrating interests into decision-making processes, establishing concrete and specific standards, adequately balancing interests, prohibiting certain behavior, and establishing rights. These steps form a series of interrelated achievements and are the foundation on which robust rights are built. Similar developments can be observed in animal law: transparency in matters crucial to the lives of animals, recognizing animal interests, integrating animal interests, concretizing animal protections, adequately balancing interests, and establishing prohibitions and rights. This trajectory is an oversimplified model of a more complex socio-legal development that often is not linear, and which encompasses many other dimensions. Nonetheless, the model is a useful starting point for assessing the moral trajectory of extraterritorial animal laws and helps states to converge toward a higher common denominator in animal law.

In the following, I propose that we operate with presumptions that rely on this gradual, progressive hierarchy. The way these presumptions work is that, for instance, norms that

96 Stilt, for example, criticizes that rather than applying Australian standards to live animal transports from Australia to the Middle East, Australia makes use of the much weaker OIE standards: Kristen Stilt, Trading in Sacrifice, 111 AJIL Unbound 397, 400 (2017).

97 OIE, Terrestrial Animal Health Code art. 7.1.2 para. 6 (OIE, Paris 2018) (emphasis added).

98 Also, minimum standards risk legitimating practices that cannot be justified from an ethical perspective, including many of the current methods of factory farming: Gerick 93 (2005).

99 Convergence toward a higher common denominator, also known as the race to the top, describes competition between state jurisdictions to promote better regulation through government intervention. See further on this, Chapter 2, §2.
recognize animal interests should be presumed to extend extraterritorially and be given preference in extraterritorial application, as opposed to norms that do not acknowledge that animals have intrinsic interests. Or, when it can, a state that applies norms to animals abroad should choose those that set up detailed animal protection standards over those that are limited to recognizing animal interests. These presumptions are designed to help states decide on the type of norms they want to apply extraterritorially (given they have jurisdiction by virtue of one or more jurisdictional principles). Because the presumptions build on each other and are ranked in a hierarchy, they ensure that extraterritorial jurisdiction will maintain or gradually increase the level of protection of the animals concerned. This helps states achieve the earlier defined objective of using extraterritorial jurisdiction only to improve the lives of animals. The presumptions are also preferable to minimum standards because they are nuanced enough to account for the interests of states with higher and lower levels of animal law.

I. Presumption in Favor of Transparency

When they are informed about the extent of suffering animals endure in research, agriculture, or the entertainment industry, most people are in shock. They have difficulty believing these cases are not an exception but that they are part and parcel of industries that use animals, and whose financial support through consumption makes us all its unwitting sponsors. The European Union’s Animal Welfare Strategy 2012–2015 made clear how little information about animal welfare is provided to consumers, noting that “consumers in general are not empowered to respond to higher animal welfare standards.”100 Most people make decisions on a daily basis that strongly impact animals (and that also affect the environment, social security, and human rights), without having the necessary information about these matters readily available. At the same time, most businesses conceal information about their practices, knowing that the public would broadly oppose them if they were truly informed.101 Laws have often helped businesses keep consumers in the dark. Procedures for animal experimentation are protected by intellectual property rights and the right to freedom of research; facts and figures in farmed animal production are concealed by ag-gag laws that prohibit filming or photographing animal cruelty; and property rights over animals permanently subjugate the interests of animals to those of humans.102

100 EU Animal Welfare Strategy 2012–2015, at 11. See also id. at 5.
101 Joy argues: “The industry knows that people love animals, and so makes every effort to keep the public from finding out what goes on in the windowless warehouses where hens are kept by the tens of thousands, living in cages that are so cramped they can never, in their entire lives, lift a single wing, their beaks cut off so they don’t mutilate and kill each other in their fury at how they are forced to live. The industry doesn’t want you to know how the animals live as they are prepared for slaughter. It doesn’t want you to know that dairy cows are kept in massive concentrations on crowded dry feed-lots, hardly able to move, devoid of a single blade of grass. So the industry gives you ad campaigns telling you that ‘great cheese comes from happy cows,’ and showing images of cows grazing contentedly in beautiful pasture land.” (Joy 8 (2011)).
102 Maneesha Deckha, Critical Animal Studies and the Property Debate in Animal Law, in Animal Subjects 2.0 45 (Jody Castricano & Lauren Corman eds., 2016); Doris Lin, Ag-gag Laws and Farming Crimes Against
But the notion that the public is only a victim of corporate manipulation to hide animal suffering is an incomplete one. Kelch asserts:

[T]he perceptual distance between humans and the treatment of animals in a global civilization is not built just by corporate interests trying to protect their business; we consciously take advantage of that distance by erecting our own perceptual curtains as a defense to experiencing all the unpleasantness visited on animals in the world.\textsuperscript{103}

In other words, the public is quite comfortable being left in the dark about the reality of animal use and abuse. Public calls for greater transparency and more information are usually only made after shocking and abhorrent revelations about animal suffering.\textsuperscript{104} In 2008, the US Department of Agriculture gave a dairy farm the “Supplier of the Year” award even though the cruelty its workers inflicted on downer cows (cows that could no longer stand up) had been documented.\textsuperscript{105} When this was publicized, the public expressed strong disapproval of the way producers trifle with the lives of sentient animals and demanded more immediate and accessible information about the industries’ treatment of animals.\textsuperscript{106}

In the past few years, animal law has been hampered by a real information crisis that makes it difficult for activists to do their work and keeps millions of people in the dark about what we do to animals.\textsuperscript{107} But making an informed decision about actions that are of ethical, environmental, and social paramountcy requires the public to have knowledge about production numbers, the number of imports, subsidization policies, repercussions of production methods, and other facts. Accurate and sufficient information is also a prerequisite for revisiting and revising animal law because information and education shape public attitudes and can change societal expectations about the role of animal law. If we take animal suffering

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\textsuperscript{103} Kelch 296 (2011). Or, as Robertson points out: “Interestingly, while all people have an established attitude regarding animals (even having no attitude is arguably a way of thinking and feeling about animals), few have actually questioned ‘why’ they think/feel about animals the way they do or ‘who has informed them’.” (Robertson 10 (2015)).

\textsuperscript{104} Robertson 10 (2015).

\textsuperscript{105} Rampant Animal Cruelty at California Slaughter Plant: Undercover Investigation Finds Abuses at Major Beef Supplier to America’s School Lunch Program, HUMANE SOCIETY OF THE UNITED STATES (HSUS), Jan. 30, 2008: “In the video, workers are seen kicking cows, ramming them with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks and even torturing them with a hose and water in attempts to force sick or injured animals to walk to slaughter.”

\textsuperscript{106} For further details on these kinds of scandals, see Erin E. Williams, Factory Farms, in ENCYCLOPEDIA OF ANIMAL RIGHTS AND ANIMAL WELFARE 245, 246 (2010).

seriously, at the very least, we need to produce publicly accessible and freely available information about how and where they are held, and under what conditions, and to which end.

The fact that corporations, aided by the law, can conceal such elementary information should be a serious concern even to people who approve of using animals and have no intention to protect them. Withholding information that people need to make informed decisions threatens the core values of democratically organized states. Unless these states are comfortable being put on par with authoritative regimes, they must guarantee the public access to information by collecting and sharing qualitative and quantitative data about how animals are treated. Austria has led the way in this effort. Its APA obliges the federal, provincial, and municipal authorities “to create and deepen understanding for animal protection on the part of the public and in particular on the part of youth and, to the extent possible within their budgets, to promote and support animal-friendly keeping systems, scientific animal protection research as well as any matters of animal protection.”

The duty to inform the public encompasses the actions of governments and of nonstate actors, including natural persons and corporations. The government has a duty to gather information about who is violating its animal law and to make it publicly available. It also has a duty to ensure that there is symmetry of information between corporations and the people, which it discharges by issuing comprehensive rules on labeling, reporting, and public access to information. Where governments impact the lives of animals by their direct actions, funding, insurances, or other means, they may discharge their duties to inform the public by conducting comprehensive impact assessments, by ensuring the legal environment is responsive and by issuing critical *ex post* reports.

From a jurisdictional perspective, provisions that provide for a duty to inform the public about animal matters should be preferred in extraterritorial application over norms that do not guarantee access to information. For example, where Austrian authorities issue export credits for animal feeding operations abroad, Austria should require operators to make public their production numbers, the number of imports, issued credits, and anticipated repercussions, especially if host countries lack duties to share information.

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109 In human rights law, the duty to provide information is derived from the people’s right to information. For instance, environmental disclosure established by national laws is derived from the human right to receive information. If the same standard is applied to animal law, the claim that information should be provided is less convincing. As Knox explains: “Basing environmental interests on human rights has limits, however. Human rights are inherently anthropogenic; they are humans’ rights. Human rights law is ill-suited to protecting values not easily expressed in terms of human interests, including the conservation of biological diversity when such conservation does not directly benefit humans.” (John H. Knox, *Diagonal Environmental Rights, in Universal Human Rights and Extraterritorial Obligations* 82, 85 (2010)).

110 Animal Protection Act (Austria), § 2.

111 Robertson 86–7 (2015). See also Peters, *Global Animal Law* 17 (2016), who argues that “the first stage of regulation should aim for transparency, consumer information, certification, and labelling.” In the case of animal law, this duty also includes humane education in public schools: Schaffner 186 (2011).

112 See on impact assessments, Chapter 6, §1 E.
II. Presumption in Favor of Recognizing Animal Interests

Once duties for transparency in matters concerning animals are in place, it is important to give this information the moral weight it deserves. Producing and sharing information does not guarantee animals will be deemed worthy of consideration in the law. The next step is to ensure that the law fully recognizes the interests of animals. Only if laws acknowledge that animals possess interests, can they see, understand, and, ultimately, consider important the fact that the lives of animals matter to animals. As we saw in Chapter 3, more and more laws center around the idea of “animals as ends in themselves,” and declare that it is the intrinsic value of animals that underlies and justifies these laws, not human interests in using them.\(^{113}\)

If we incorporate these insights into the law of jurisdiction, provisions that recognize animal interests should be given preference in being applied extraterritorially, over norms that do not acknowledge that animals possess intrinsic desires. For instance, if Polish nationals act as directors on the board of a company incorporated in Belarus, Poland should oblige them to recognize animal interests when they make decisions that affect animals. This presumption is based on the active personality principle and article 1 para. 1 of the Polish APA, which states that “[t]he animal as a living creature, capable of suffering, is not an object. The human being should respect, protect and provide care for it.”\(^{114}\)

III. Presumption in Favor of Integrating Animal Interests

Informing the public about animal matters and recognizing animals’ interests are indispensable for any well-developed body of animal law and states interested in applying it across the border. But just because laws recognize the intrinsic interests of animals does not mean that they are designed or empowered to give effect to these interests. We should further be guided by the presumption in favor of integrating animal interests, which means we must factor in and incorporate animals’ interests into the decision-making process. Integration should primarily be understood in a procedural manner; it introduces considerations of animal welfare into policy discourse and legal decision-making.\(^{115}\)

Procedural integration can mean either that relevant stakeholders take account of animals’ interests or that they appoint persons to represent the interests of animals. Animal research committees, for instance, decide whether researchers may use animals for certain purposes, like the development of drugs or the treatment of human diseases, and to what extent animal use or suffering is necessary to achieve this goal.\(^{116}\) Committees that assess the need for animal suffering have also been set up in agriculture. New Zealand’s AWA established the National Animal Welfare Advisory Committee to make decisions about actions that impinge on the interests of farmed animals.\(^{117}\) In India, the Animal Welfare Board evaluates

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\(^{113}\) See Chapter 2, §4.

\(^{114}\) Law Regarding Animal Protection (Pol.), art. 1(1).


\(^{117}\) Animal Welfare Act (N.Z.), preamble.
farmed animal welfare issues. And in Austria, the Animal Protection Council operates as a special body to critically evaluate the application and enforcement of the APA.

If animal interests are represented in committees, we must consider whether their representation is carefully designed and effective. Most committees that decide on animal research have no dedicated member that represents animals, and if there is such a person, she or he is a minority member on the committee. Thanks to this poor institutional fit, committees on average wave through 90 percent of applications from researchers who want to perform experiments on animals. Because they are so few and have little or no power, animal representatives have a purely formal role. They give the committee the appearance of taking animal interests into account while merely sugarcoating the exploitation of animals. In essence, underrepresentation makes the presence of animal representatives—and the idea that there ought to be a committee that takes into account animal interests—pointless. In recognition of the importance of optimal representation, in extraterritorial application, norms that properly integrate animal interests in decision-making processes should be preferred over norms that do not allow animal interests to be considered in decision-making processes or that do so insufficiently.

IV. Presumption in Favor of Extensive and Detailed Laws

Once animal interests are diligently integrated into decision-making, the next step is determining the extent to which these decisions effectively protect the interests of animals. The degree of animal protection that laws provide can be determined, very roughly, on the basis of the different “generations of animal law.” The first-generation animal laws only protected the monetary interests of owners. Second-generation animal laws penalized cruelty and abuse of animals, even if committed by an animal’s owner. And third-generation animal laws additionally lay down binding rules on the proper care and treatment of animals. The basic

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118 The committee comprises representatives of the government, specialized governmental animal agencies, veterinary practitioners, corporate representatives, parliament members, and one animal cruelty specialist: The Prevention of Cruelty to Animals Act (India), § 5.

119 ANIMAL PROTECTION ACT (Austria), § 42.

120 In the United States, no member of IACUCs represents the interests of animals: National Institutes of Health and Office of Laboratory Animal Welfare, Public Health Service Policy (PHS) on Humane Care and Use of Laboratory Animals, art. IV, 3.b. (National Institutes of Health and Office of Laboratory Animal Welfare, Bethesda 2015).

121 For example, in Chile, the seven-member committee only has one representative from an animal protection organization: Law N°20,380/2009 on the Protection of Animals, 2009, art. 9(f) (Chile).

122 Arianna Ferrari & Vanessa Gerritsen, Güterabwägung, in Lexikon der Mensch-Tier-Beziehungen 139, 142 (2015). Gerritsen, speaking as a then-member of the committee for animal experimentation in Zurich, Switzerland, argued: “[H]ealth benefits outweigh and even overbalance the harm done to animals even if their suffering is considered to be within severity degree 3 [most severe experiments]. In fact, the committees perceive themselves as 3R boards, trying to disburden the animals in use without questioning their disposability regarding the actual project. Only in rare cases of poorly described experimental designs, project applications are challenged with respect to the harm-benefit analysis and rejected, giving the researcher ample opportunity to revise his application.” (Vanessa Gerritsen, Evaluation Process for Animal Experiment Applications in Switzerland, 4(1) ALTEX PROCEEDINGS 37, 38 (2015)).

123 See Chapter 2, §4. Robertson established a similar model by using key performance indicators that indicate states’ strongest commitment to animal interests. At the lowest position are states with no animal laws. Second
structure of first-, second-, and third-generation animal laws is indicative of the progress of animal law, so it could be used to assess laws in extraterritorial application. But this basic structure uses general terms and leaves ample room for interpretation that is easily used to the detriment of animals. In this sense, the European Union, in its Animal Welfare Strategy 2012–2015, conceded that many of its existing laws, including Directive 98/58/EC, are “too general to have practical effects.”

Schmid and Kilchsperger proposed a more detailed scheme that is designed to better protect animals. They analyzed different regulatory standards on farmed animals (excluding breeding, slaughter, and transportation) in Australia, Brazil, Canada, China, Germany, Italy, Macedonia, the Netherlands, New Zealand, Poland, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Schmid and Kilchsperger noted widespread underregulation in laws detailing our interactions with cows, calves, pigs, and chickens. The most pressing points concerned tethering, space requirements, castration practices, group accommodation, bedding, and access to adequate food and water. The researchers also categorized the countries’ levels of animal protection. Group A countries (like Switzerland) set animal welfare standards higher than the European Union (more than four main aspects clearly exceed EU rules). Group B countries (like Argentina and New Zealand) have animal welfare standards comparable to EU legislation (deviations exist only on minor points). Group C countries (like Australia, Canada, and Brazil) have lower animal welfare standards than the European Union (deviations exist in more than four main aspects). Group D countries (like China and the United States) have animal welfare standards well below EU legislation (several main aspects are not regulated by national legislation).

Schmid and Kilchsperger’s research suggests that the broader and more detailed a state’s laws, the more protection it accords to animals, at least in abstracto. So in matters of extraterritorial jurisdiction, extensive and detailed animal laws should be preferred when applied across the border, over norms that make general and sweeping claims. It bears mention that the presumption in favor of extensive and detailed animal laws also demands that we apply secondary sources of animal law, like decrees, regulations, codes, etc., across the border. For instance, if a Swiss parent corporation has a branch in France where it rears and slaughters pigs for meat, Switzerland can oblige the branch to operate in line with the Swiss AWA and adhere to its detailed rules on spacing, feed, social interaction, roughage, and outdoor exercise, as laid down in the Swiss AWO.

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126 Because, as the FAWC highlights, “[t]he welfare codes are valuable additions to animal welfare legislation and are widely incorporated into farm assurance schemes and food retailer product specifications.” (FAWC, Policy Instruments Farm Animal Welfare § 73 (2008)).
V. Presumption in Favor of Adequate Interest Balancing

In animal law, the issue of relativity is omnipresent. While *prima facie* demanding that certain ends be achieved (like ensuring the well-being of animals) or declaring certain conduct mandatory (like not treating animals cruelly), animal laws often conflict with human interests against which they are balanced. Article 26 of the Swiss AWA makes this plain: even if certain conduct violates an animal’s dignity, human and animal interests will be balanced against each other; only if courts find that the interests of animals are more important than those of humans, will article 26 of the Swiss AWA be violated. This is not a *faux pas* of Swiss legislators. Across the world, states only condemn suffering inflicted on animals if it is “unnecessary.” Strictly defined, animal suffering is unnecessary if it could have been averted, i.e., if there are alternatives available that do not entail animal suffering.\(^{127}\) Because animals commonly desire to be free from pain, suffering, anxiety, harm, other impairments to their well-being, and death, no common use of animals (for food, entertainment, or research) is necessary for their sake.\(^{128}\) But necessity is not only evaluated from the animals’ perspective. Courts weigh animals’ needs against human, corporate, and governmental “needs” to exploit animals to determine if animals do in fact suffer “unnecessarily.”

Different stakeholders take different positions on whether and what kind of animal suffering is necessary. An animal agricultural production facility for which animals are a source of economic income, will favor using them in ways that decrease economic input and increase economic output, usually at the expense of animals’ interest in not suffering. For example, an egg-producing corporation may argue that battery cages are necessary to reduce space and personnel (which reduces input) because they allow it to cram more chickens into the same space (reducing input and increasing output). Average citizens, however, may not deem necessary the suffering of chickens in battery cages, or feel that it is unjustified to keep them in spaces too small to turn around or move, preventing them from interacting with friends and family, or making them severely ill. Other factors considered when judging necessity are public health concerns, environmental pollution and degradation, and food security. Assessing necessity and balancing interest thus requires recognizing, factoring in, and assessing the interests of all relevant stakeholders.\(^{129}\)

Even though animals’ voice carries some weight in the balance of interests, decision-making bodies frequently use the vagueness of the necessity test to the detriment of animals. In *People v. Rogers*, the New York City Court was called to prosecute a person responsible for docking a puppy’s tail with a rubber band, as a consequence of which the puppy died. The Court held that if the legislature wanted to prohibit tail docking, it should do so explicitly. Consequently, plaintiffs were barred from invoking the unnecessary animal suffering claim.\(^{130}\) This is not an isolated case. As just seen, in evaluating the necessity of animal suffering in research, research committees standardly approve 90 percent of all experiments.\(^{131}\)

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\(^{129}\) The goal of balancing interests is to ensure that all interests, values, and goals are adequately addressed and considered: Bolliger, Richner, & Rüttimann 81 (2011); Ferrari & Gerritsen, *Güterabwägung, in Lexikon der Mensch-Tier-Beziehungen* 139 (2015).

\(^{130}\) People v. Rogers, 703 N.Y.S.2d 891 (N.Y. City Ct. 2000) (U.S.).

\(^{131}\) Ferrari & Gerritsen, *Güterabwägung, in Lexikon der Mensch-Tier-Beziehungen* 142 (2015).
And the laws governing agriculture exempt the biggest producers of meat, egg, and dairy from claims that they are inflicting unnecessary suffering on farmed animals, by declaring that “common farm practices” overrule any and all anti-cruelty norms.132

This deficiency could be partially remedied by stringently applying the balance of interests test to all animals and laying down more detailed requirements for balancing interests. A few states have used this strategy, including the United Kingdom. Section 4 para. 3 of the United Kingdom’s AWA demands that decision makers balance interests by using the following factors:

(a) whether the suffering could reasonably have been avoided or reduced;
(b) whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a license or code of practice issued under an enactment;
(c) whether the conduct which caused the suffering was for a legitimate purpose, such as—
   (i) the purpose of benefiting the animal, or
   (ii) the purpose of protecting a person, property or another animal;
(d) whether the suffering was proportionate to the purpose of the conduct concerned;
(e) whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person.133

The claim that animal suffering be proportionate to the purpose for which an animal is used—a point highlighted by the UK AWA (section 4 para. 3 lit. d)—lies at the heart of animal law and needs to be examined in more detail. European countries widely use the principle of proportionality, among others to evaluate the necessity of animal suffering by requiring that anything done to animals must be proportional to the desired ends.134 Common law countries, too, use the principle of proportionality across their legal systems.135 On the international level, the principle is regularly applied by the European Court of Human Rights (ECtHR),

132 See Chapter 9, §4 B.
133 Animal Welfare Act (U.K.), § 4 para. 3 (emphasis added). This list is not exhaustive: ROBERTSON 100 (2015).
134 Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 COLUM. J. TRANSNAT’L L. 72, 96 (2008): “From German origins, proportionality analysis spread across Europe into Commonwealth systems (Canada, New Zealand, South Africa) and Israel, and has also migrated to treaty-based regimes, including the European Union, the European Convention on Human Rights, and the World Trade Organization.” In Europe, the principle is firmly established in all EU member states’ jurisdictions and also in Switzerland. See SCHWEIZERISCHE BUNDESVERFASSUNG [BV] [FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION], Apr. 18, 1999, SR 101, arts. 36 and 5 para. 2 (Switz.). In Israel, as Justice Strasberg-Cohen recognized, “[b]alance between interests is part and parcel of our legal system,” which also applies if animal interests oppose human interests: HCJ 9232/01 Noah v. Att’y General 215 PD 254 (2002–2003) (Isr.), Justice Strasberg-Cohen.
the ECJ, the ICJ, and the WTO DSB. The principle of proportionality is therefore, as Crawford and Engle argue, an established axiom of contemporary legal thought.

For a measure to be proportional, it must be suitable, necessary, and proportional stricto sensu. Suitability requires a measure be appropriate to achieve the desired ends. Necessity calls for the mildest means, so methods used to reach those ends should not be excessive. To help decision makers determine when a burden is too excessive or demanding for animals, some states use a scheme that classifies pain and suffering as mild, moderate, severe, or nonrecoverable. When deciding if there are reasonable alternatives, necessity is strictly interpreted. It is not sufficient to claim that there are no readily available alternatives to encroaching upon animals’ interests. Alternatives must be explored and adopted even if they are more burdensome or costly, or require more time and labor. Finally, proportionality stricto sensu demands that interests affected by the act at hand be diligently balanced. The purpose for which animals are used must also be legal, ethically sound, reasonable, and equitable. Bolliger et al. specify that using animals for pleasure, affection, luxury, sports, or entertainment, or out of boredom, wanton, revenge, need for attention, annoyance, rage, etc. would not be legitimate under this test. For a measure to be proportional stricto sensu, the benefits of using animals must decidedly outweigh the suffering inflicted on animals.

Because humans decide on the necessity of animal suffering, the balance of interests test is almost always biased in favor of humans. But given the firm and widespread commitment of states to animal sentience, it is reasonable to argue that they should use a qualitative approach to balancing interests. A qualitative balance of interests is based on the recognition that sentient beings have identical interests, whether they are human beings or animals. If we qualitatively balance interests, then economic, culinary, or aesthetic interests cannot

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142 BOLLIGER, RICHRNER, & RÜTTIMANN 87 (2011).

143 Ferrari & Gerritsen, Güterabwägung, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN 141 (2015).

outweigh interests in bodily integrity, which would invalidate most of our current uses of animals.\textsuperscript{145} This is the same test we accept in the human case, where interests in obtaining scientific results do not trump interests in bodily integrity; or where interests in buying cheap products are considered inferior to the bodily harms suffered by people who produce these products.

In practice, it is extremely rare to find a court using the proportionality principle in this unbiased manner. In a couple of exemplary cases, the Israeli Supreme Court has qualitatively balanced interests to evaluate the necessity of animal suffering. In \textit{Let the Animals Live}, the Court was called to adjudge if an entertainment show that featured a battle between a man and an alligator led to unnecessary animal suffering. The show usually lasted for thirty minutes, climaxing with the interspecies battle, which the alligator always lost. When it assessed the legality of the practice, the Court addressed the following questions: Does the suffering inflicted on the animal qualify as torture, cruelty, or abuse? For what purpose was the suffering inflicted? Are the means employed proper means? Is the amount of suffering proportional to the purpose for which it was inflicted?\textsuperscript{146} After considering these factors, the Court held that interests in profit-making and entertainment do not justify the alligator’s suffering and that the show was anti-educational and sadistic.\textsuperscript{147}

In \textit{Cat Welfare Society}, a local animal protection organization claimed that the measures taken by veterinary services to “thin” the stray cat population were too drastic. Justice Dorner emphasized:

\begin{quote}
[W]hen the authority decides to thin the population of cats by killing them, it must consider before making the decision the possibility of achieving the same goals using less drastic measures, and must bear this consideration in mind, because in any case it is necessary to examine the relation between the purpose and the means used to achieve it. This is the principle of proportionality that stipulates that government measures must suit the accomplishment of the goal, and not exceed what is needed to accomplish the goal.\textsuperscript{148}
\end{quote}

Justice Dorner’s approach of resorting to milder means is, in essence, the necessity test of the principle of proportionality.

In another case, \textit{Noah v. Attorney}, the Israeli Supreme Court had to decide whether the production of foie gras and the suffering it entails for geese are permissible. Justice Grunis used the necessity test of the proportionality principle to see whether milder means are available.\textsuperscript{149}

\begin{footnotesize}
\begin{enumerate}
\item Bolliger, Richner, & Rüttimann 90 (2011).
\item LCA 1684/96 Let the Animals Live v. Hamat Gader 51(3) PD 832 (1997), at 22 (Ist.).
\item Id. at 41: “One who treats helpless animals cruelly shall become hard of heart and is one step away from hurling the same treatment upon his fellow man; those who watch someone abuse animals will also stand idly by as humans are being abused.” See further Yossi Wolfson, \textit{Animal Protection under Israeli Law}, in \textit{Animal Law and Welfare: International Perspectives} 157, 160 (2016).
\end{enumerate}
\end{footnotesize}
Justice Strasberg-Cohen put emphasis on proportionality _stricto sensu_, and explained that “[t]he ‘production of food’ will have greater weight the more the food item is necessary for human existence.”150 Also with proportionality _stricto sensu_ in mind, Justice Eliezer Rivlin argued that gastronomic pleasure cannot justify the “pain inflicted upon [the geese] by physical injury or by violent intrusion into their bodies.”151 On the basis of these arguments, the Court declared the laws on force-feeding geese invalid and banned foie gras production in Israel. The Court understood the effects of the ban on local farmers and granted them a transitioning period by postponing the regulation’s annulment by 18 months and by offering compensation for losses.152

A qualitative balance of interests is useful for more than evaluating foie gras production, the use of wild animals for entertainment, or the fate of stray animals. The public increasingly rejects other uses of animals, including veal crates, sow stalls, hen cages, and other forms of extreme confinement. There is growing disapproval of debeaking chickens, docking pigs’ tails, dehorning cows, and performing other mutilations.153 In these cases, the proportionality principle should be applied with the same vigor as in _Noah v. Attorney_, to reveal if using these animals for the short-lived pleasure of humans is truly justified.

Norms that establish qualitative balances of interests in assessing the use of animals should be given preference when applied extraterritorially. Norms that do not provide for this content should not benefit from this presumption. Let us assume an Israeli domestic parent unduly interferes in its foreign subsidiary’s business. When claiming jurisdiction over the subsidiaries’ operations by virtue of piercing the veil theories, the law of jurisdiction expects Israel to evaluate the necessity of animal suffering by its detailed rules on interests balancing, rather than just demand it respect animal welfare.

VI. Presumption in Favor of Prohibitions

Some states prohibit certain actions done to animals because they consider them so abhorrent that human interests can never outweigh them. Prohibitions effectively preempt a balance of interests. The law determines that animals cannot at all be used or cannot be used in a certain way, and precludes adjudicative and executive bodies from evaluating whether animal suffering is or was necessary.154 Prohibitions may cover entire species (the Swiss prohibition

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152 Unless, of course, they kept violating the ban, which would have subjected them to the sanctions of the APA. This judgment is even more remarkable because the court is only allowed to declare parliamentary regulations illegal if the parliament acted _ultra vires_, or if the regulation suffered from a substantial legal error: Bendor & Dancig-Rosenberg 109 (2018). Bans on foie gras are mounting worldwide. On January 7, 2019, the US Supreme Court denied _certiorari_ in a lawsuit challenging California’s foie gras ban. Hence, the 9th Circuit ruling upholding the ban stays in place. See _Association des Éleveurs de Canards et d’Oies du Québec_ v. _Becerra_, 870 F.3d 1140 (9th Cir. 2017) (U.S.) and SCOTUSblog, _Association des Éleveurs de Canards et d’Oies du Québec_ v. _Becerra_, available at http://www.scotusblog.com/case-files/cases/association-des-eleveurs-de-canards-et-oeies-du-quebec-v-becerra/ (last visited, Jan. 10, 2019).
153 See Amelia Cornish, David Raubenheimer, & Paul McGreevy, _What We Know about the Public’s Level of Concern for Farm Animal Welfare in Food Production in Developed Countries_, 6(11) _Animals_ 74 (2016).
154 _Bolliger, Richner, & Rüttimann_ 82 (2011).
on owning dolphins, for instance) or they may prohibit certain practices on animals (for example, force-feeding geese).

Prohibitions often reflect a society’s strongest moral sentiments about the treatment of animals. For the European Union, for example, clubbing baby seals to sell their fur is not justifiable under any circumstances. Prohibitions are an extremely important regulatory tool in animal law, because they, in essence, posit that animals have a certain sphere of bodily or mental integrity that is inaccessible to humans. Due to their ethical and social paramountcy, laws that prohibit certain actions, uses, or entire species from being used, shall be presumed to apply extraterritorially and given preference over laws that legitimize the use of animals.

VII. Presumption in Favor of Animal Rights

Section 85 para. 1 of New Zealand’s AWA provides that “[n]o person may carry out any research, testing, or teaching involving the use of a non-human hominid unless such use has first been approved by the Director-General and the research, testing, or teaching is carried out in accordance with any conditions imposed by the Director-General.” This norm can be regarded as prohibiting the use of hominids for research, testing, or teaching. But some scholars consider it a right of hominids to life and bodily and mental integrity. Wagman and Liebman argue that “the ban on certain conduct seems to grant the affected animals the ‘right’ to be free of such conduct.” If we do consider freedom rights the flip side of prohibitions, then many more states have granted rights to animals. Section 27 para. 1 of the Austrian AWA, for instance, lays down that “[s]pecies of wild habitat animals are not allowed to be kept in circuses, variety show institutions and similar facilities.” Accordingly, wild animals have a negative freedom right not to be held captive. Or, if animal caretakers must provide animals with care, food, and water, then these animals have a right to care, food, and water.

The idea that the duties of some can be translated into rights of others (to whom the duty is owed) is disputed in animal law and animal ethics. A stricter view is that these norms

155 After several dolphins died in an entertainment park in Switzerland, public prosecutors started investigating their deaths. One dolphin died after a techno party was hosted in the park, and others died from an overdose of antibiotics. The same year, the parliament banned the importation of dolphins and thereby effectively ended the suffering (and existence) of dolphins in Switzerland. The veterinarians accused of misconduct were exculpated by courts. See Nationalrat zementiert “Lex Conny Land,” NZZ, May 29, 2012.

156 Animal Welfare Act (N.Z.), § 85 para. 1.


158 ANIMAL PROTECTION ACT (Austria), § 27 para. 1.


160 Raspé argues that the existence of duties does not mean that the objects of protection are accorded rights, and illustrates this by using the example of cultural goods: RASPE 284 (2011). The same argument is made by CURNUTT 19 ff., 26 ff. (2001); and ANNE PETERS, LIBERTÉ, ÉGALITÉ, ANIMALITÉ, 5 TEL 25, 44 (2016).
are simply prohibitions. Rights would therefore only exist if they were clearly designated and identified as such by declaring, “hominids have a right to life and a right to bodily and mental integrity.” Seen from this perspective, very few states have conferred rights on animals. For example, article 4 lit. a of the Turkish Animal Protection Law provides: “All animals are born equal and have a right to life within the framework of the provisions of this Law.”161 But Turkey’s overall level of animal protection may make us wonder if we can take these rights at face value. The Israeli Supreme Court seems more committed to the idea of animal rights. In confirming the permanent revocation of a veterinarian’s license for gross negligence in performing surgery on animals, the Court noted that “the freedom of occupation and income of the appellant are rights and interests deserving protection, but they are not absolute rights and must be balanced against conflicting interests and rights, including the rights of animals to receive professional, appropriate, and dedicated medical treatment.”162 In another case, the Court held that limitations on the destruction of stray cats express “the emphasis placed on the animals’ right to live.”163 More recently, the Court explained in detail what it understands by animal rights:

[I]n discussing the prerogatives of the local authorities regarding the destruction of animals, we must bear in mind the right of animals to live. Even if this right is not directly enshrined in Israeli legislation, it is part of our culture and of an inner sense, ethical and utilitarian alike, regarding the obligation and the need to protect all creation that has a living spirit. The starting point of the legislation that touches upon the right of animals to live is that this right exists and is protected in our legal system.164

In India, the judiciary is even more outspoken about animal rights. Indian courts frequently invoke animal rights, as prominently done in N.R. Nair et al. v. Union of India. In this case, the High Court of Kerala found:

[I]t is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights. [...] In our considered opinion; legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.165

Minority countries have yet to catch up with these legal developments, according to which animals have interests in living and enjoying bodily and mental integrity that deserve more

161 Animal Protection Law (Turk.), art. 4 lit. a.
162 LCA 4217/12 Mamut v. Ministry of Agriculture, para. 8 (2012) (Isr.).
163 LCA 537/08 Kağan v. Unicol, para. 5 (2008) (Isr.).
than perfunctory consideration and must be respected as robust rights. Scholars around the world have demonstrated the risks of legislation that endow humans with rights (e.g., the right to research, right to art, the right to property, etc.), while providing only protections to animals (e.g., protection from abuse or unnecessary suffering). This imbalance is not just about semantics. When confronted with rights in a balance of interests, protections are effectively undermined because they are a weaker legal tool. Instead of balancing interests, the balance is performed by reference to the legal tools that encapsulate the interests. When rights and protections clash this way, protections never win. As a consequence, balancing animal interests against human interests, within the current parameter, is effectively superfluous because the bias is structural.166

Establishing rights for animals could remedy the balance of interests test and thereby fundamentally transform animal law. Animal rights are those rare tools that could ensure human and animal interests enter the balance of interests test without bias, giving rise to a qualitative balance of interests. As Peters explains, “animal rights would allow a fair balancing in which the proper value of fundamental animal interests (such as the interest to live) could be integrated. Animal rights would therefore preclude the current routine sacrifice of fundamental animal interests in favour of trite human interests.”167

Like human rights, the rights of animals may be violated in exceptional and clearly defined circumstances. In the European tradition, rights can justifiably be violated if there is a legal basis for the infringement, if public interests or the protection of fundamental rights of third parties justify the violation, and if the violation is proportional to the ends desired.168 Despite their violability (albeit limited), rights set much higher standards than protections for violations of the interests they encapsulate. Rights also respect that rights holders possess certain core interests that may not be impaired under any circumstances. This core essence grants animals a sphere of immunity and underlines the much-needed ethos that animals are not “there for us.”

Unlike prohibitions that are specific and context-dependent, rights operate more broadly and are less determinate, granting advantages to rights holders because rights are applicable in myriad situations.169 And unlike mere protections, rights render the infringement of animals’ interests actionable. As rights holders, animals have the right to sue perpetrators, or the right to have humans sue on their behalf. This considerably adds to the effectiveness of animal law, because only the enforced duty of others to respect the right in question renders its worthiness palpable. This is the “reaction-constraining” function of rights as liberty rights.170

166 Peters, Libérté, Égalité, Animalité 49 (2016).
167 Id.
169 This is what Peters calls the “tendency to overshoot”: Peters, Libérté, Égalité, Animalité 51 (2016).
170 Applied to Hohfeld’s table of rights, the rights enjoyed by animals would not be limited to liberty rights (right holders enjoy the liberty to do what they please without having a corollary duty). Rather, animals shall have claim rights that entail certain duties to respect and protect their life, bodily liberty, and integrity. These rights have to be actionable and enforceable or they would be of as little use as current protections. See William A. Edmundson, Do Animals Need Rights?, 22 J. Pol. Phil. 15 (2014). See on the Hohfeldian analysis of legal
Ethicists have long made the case for legal rights of animals on the basis of moral rights, arguing that animals have a moral claim to be recognized as rights holders and be granted rights. In Regan’s view, animals’ right to just treatment derives from the duty of justice, which is an unacquired and basic right. For Wise and Francione, the principles of liberty and equality demand we consider the moral value of beings other than human. While equality demands that like be treated alike, liberty entitles individuals to be treated commensurate with their abilities. Whatever basis we use to establish animal rights, the challenge is to bring justice into legal processes “by establishing a default position that animals are innately entitled to the protection of their bodily and mental integrity.”

In sum, rights confer more power on rights holders than protections confer on their recipients. Rights require special justification, give effective weight to animal interests in balancing tests, operate broadly, and have an inviolable core content. Rights habituate us to new ethical boundaries, but, as Donaldson and Kymlicka point out, “achieving legal rights on paper is just one stage, not the end, of the political struggle.” Until this is the case, jurisdictions that have introduced animal rights should give these rights preference in being applied extraterritorially. For example, if Argentina introduces basic rights to life and bodily and mental integrity for whales, it should protect these rights extraterritorially wherever its whales travel. From the perspective of international law, Argentina’s claims can be based on the functional nationality it confers on whales and the passive personality principle that enables it to protect its national whales across borders.

§4 Duty to Protect and Respect Animals Across the Border

So far, the guiding parameters for extraterritorial animal law were all based on the premise that a state has the authority to make use of jurisdictional options to protect animals. When we look to other fields of law that practice extraterritoriality, like human rights law, an increasingly common claim is that states are under a duty to apply laws across the border. Does this duty also exist in animal law?

A. LEARNING FROM THE “PROTECT, RESPECT AND REMEDY” FRAMEWORK

Extraterritorial jurisdiction is a hotly debated issue in human rights law. Although human rights are universal, efforts to implement and enforce human rights meet with the same global obstacles that animal law currently struggles to overcome:

[... ] States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment. Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters. 175

As in animal law, the extraterritoriality debate in human rights law tries to tackle these transborder issues by ascertaining whether and when states can prescribe law extraterritorially. But unlike animal law that is solely dealing with the question of whether states are entitled to exercise jurisdiction across the border, human rights law also deals with the more specific question of whether states are obliged to protect people against human rights violations abroad. 176

The UN has been at the forefront of refining, promoting, and implementing extraterritorial human rights obligations. In June 2008, UN Special Representative of the Secretary-General (SRSG) John Ruggie proposed the “Protect, Respect and Remedy” framework to the UN Human Rights Council, which rests on the state duty to protect against human rights abuses, the corporate responsibility to respect human rights, and effective access to remedies. 177 The framework is grounded in the preamble to the third recital of the UDHR, which reminds peoples, nations, individuals, and organs of society to constantly keep the promotion of human rights in mind. 178 Although the UN framework does not create binding duties, it was widely hailed as making great progress toward filling cross-border governance gaps that account for human rights violations. 179 As a continuation of this success, the SRSG issued the “Guiding Principles on Business and Human Rights” under his extended mandate in 2011, which are accepted as soft law. 180 A detailed examination of the framework should reveal if and, possibly, how it can be made fruitful for animal law.

175 Protect, Respect and Remedy Framework ¶ 14–5.
176 E.g., da Costa (2013); de Schutter (2006); Milanovic (2011); Langford et al. eds. (2013); McCorquodale & Simons (2007); ESCR-Net (2014); Zerk, Extraterritorial Jurisdiction (2010).
177 Protect, Respect and Remedy Framework.
180 Guiding Principles on Business and Human Rights. See also Christine Kaufmann, Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?, 1 SZW/RSDA 45, 46 (2016).
The framework’s first pillar, the *state duty to protect*, is based on the rule of international law that states have a duty to protect against human rights abuses by nonstate actors, be they natural or legal persons. For many years, states were considered competent to protect against human rights abuses committed by nonstate actors abroad, but there was no consensus among the international community as to whether they were also obliged to do so. With the introduction of the framework, states have been encouraged to take action to prevent companies based on their territory from committing human rights abuses abroad. The later issued *Guiding Principles* emphasized that “[t]here are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad.” On this basis, scholars and international organizations now argue that home states do have an obligation to protect against human rights violations done by nonstate actors abroad. To meet their duty, the framework recommends that states prevent, investigate, punish, and provide for redress by virtue of their prescriptive, adjudicative, and enforcement jurisdiction. The *Guiding Principles* more specifically demand that states

(a) [e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
(b) [e]nsure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

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181 *Protect, Respect and Remedy Framework* ¶ 18.
182 See, e.g., Special Representative of the Secretary-General John Ruggie, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, ¶ 15, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009); “The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met. Within those parameters, some treaty bodies encourage home States to take steps to prevent abuse abroad by corporations within their jurisdiction.”
183 *Protect, Respect and Remedy Framework* ¶ 19.
The second pillar of the framework, the corporate duty to respect human rights, is based on international soft law instruments, namely the International Labor Organization’s (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises. This duty has also been debated for years, with one camp arguing that corporations should not get a free pass on human rights violations when they operate abroad, and the other arguing that corporations cannot be addressees of duties under international law since international law is, first and foremost, a set of rules, agreements, and treaties that are binding between states. Although this is still somewhat controversial in international law, most scholars today argue that corporations are bound to human rights law and must observe at least fundamental human rights standards when operating abroad.

The corporate duty to respect human rights is discharged by corporations that act with due diligence. Due diligence describes the steps companies must take to become aware of, prevent, and address adverse effects on human rights with which they are involved. Companies should pay regard to three sets of factors:

The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context—for example, in their capacity as producers, service providers, employers, and neighbors. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances.

The due diligence duty falls on small- and medium-sized enterprises, members of supply chains, primary investors, banks, lender financiers, and other parties closely involved in a corporation’s business activities. By covering all enterprises, regardless of size, sector, operational context,
ownership, or structure, and all of these actors’ business partners, the corporate duty to respect human rights tackles “the entire life cycle of a project or business activity.”

To render these two pillars actionable, victims of human rights violations need access to mechanisms that investigate, punish, and redress abuses. Access to remedy is the third pillar of the framework and obliges states to put in place appropriate judicial, administrative, legislative, and other enforcement mechanisms in civil and criminal law. Access to remedy may be provided by formal adjudicative or by nonjudicial mechanisms if they operate alongside formal bodies. Nonjudicial mechanisms, like the OECD national contact points, are sometimes argued to bring about more immediate, accessible, affordable, and responsive enforcement. According to the SRSG, it is important that these bodies provide for redress that includes compensation, restitution, guarantees of nonrepetition, changes in the relevant law, and public apologies.

Together, the three pillars of the framework are designed to close governance gaps by setting up a multilevel scheme that prevents, deters, adjudicates, and offers retribution for human rights violations abroad and at home. The framework was assessed critically by NGOs who claim that it does not create actual obligations, is ignorant about law enforcement, places too little emphasis on state cooperation, insufficiently captures corporate complexities in attributing responsibility, and fails to surmount practical barriers of cost and legal representation. Though imperfect and suffering from notable weaknesses, the framework has done a tremendous job of centering cross-border governance gaps for public debate, and of reviving and revolutionizing the human rights discourse in international law, giving rise to new obligations at the national and international level. Given this success, we must determine if the framework holds the same promise for animal law: Is it, or could it be used as a basis for introducing duties to protect and respect animals abroad, and remedy violations of animal interests across the border?

B. THE “PROTECT, RESPECT AND REMEDY” FRAMEWORK IN ANIMAL LAW

In human rights law, international treaties and declarations like the UDHR operate as a basis for the “Protect, Respect and Remedy” framework. But in animal law, there is no equivalent agreement or declaration that would express the common motive of states to promote the interests of animals. NGOs have repeatedly urged states to sign and ratify the proposed International Convention for the Protection of Animals (ICAP) or the Universal Declaration on Animal Welfare (UDA), but this has not yet happened. Because animal law lacks such a basis, states are de lege lata under no obligation to protect animals against

193 Protect, Respect and Remedy Framework ¶ 83; Guiding Principles on Business and Human Rights, principle 25.
194 Protect, Respect and Remedy Framework ¶ 84.
195 Id. ¶ 83.
infringements abroad—at least according to international law. International law solely grants states the discretion to apply animal law across the border. In other words, rather than dealing with a duty to protect animals extraterritorially, international law answers whether and when states are allowed to regulate and remedy the infringement of animal interests abroad.

Even though there is no international basis for the framework and there are no traces of its pillars in animal law, states could profit from the framework’s conceptual and policy proposals that tackle “the governance gap created by globalization,” to start developing analogous duties in animal law. Below, I consider the framework’s state duty to protect animals, the corporate duty to respect animals, and international cooperation.

A state duty to protect animals abroad can be established in domestic law by virtue of state constitutions or AWAs. When a state’s constitution provides that it is under a duty to protect animals, then this duty typically binds the state in all its actions, including its authority to prescribe, adjudicate, and enforce law. Considering that customary international law allows states to prescribe animal law extraterritorially, their constitutional mandate to protect animals obliges them to make use of this option. As Faller argues, a constitutionalized state objective in matters of animal protection, if it is as broad as article 20a of the German Basic Law, demands that the state protect animals beyond its borders within the limits of international law.

There may be delicate cases where states lack jurisdictional authority over animals abroad but considerably control the financial, logistical, and institutional parameters that structure their exploitation. Is a state in this situation bound by its animal laws? In human rights law, scholars argue that even if a state’s factual power exceeds its jurisdictional authority, it should be under a duty to protect against human rights violations simply because it has factual control. This is called control theory. Outside the sphere of human rights law, international law also tends to expect states with factual power (potentia) to assume higher responsibility. Muchlinski calls this the dependency theory:

[The dependency theory] predicts that less developed host states are in a permanently weaker bargaining position in relation to MNEs [multinational enterprises] as a result of

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198 Protect, Respect and Remedy Framework ¶ 5.

199 Extrapolating concepts from the human rights domain to animal law must be done cautiously, since “the transposition of a concept aimed at limiting jurisdiction to a field where jurisdiction may be obligatory is not without dangers.” (Cedric Ryngaert, Jurisdiction: Towards a Reasonableness Test, in GLOBAL JUSTICE, STATE DUTIES 192, 194 (2013)).

200 However, states remain free to do this by means of their criminal, civil, or administrative laws: Geisser 361 (2013).


the unequal conditions of trade and investment in the international economy, and because of the willingness of local ruling elites to submit to the interests of foreign capital. Thus, dependency theory posits a picture of exploitation of less developed host states by MNEs which cannot easily be remedied.\textsuperscript{203}

The dependence of majority states on foreign capital is a constant challenge for international law that accepts states are equal sovereigns. Economic dependency does not call into question the principle of state sovereignty, for good reasons.\textsuperscript{204} But it does prompt us to ask if there is a moral and legal case to be made that its detrimental effects must be eased. Joseph argues:

\begin{quote}
[T]he developed home state is more likely to possess the requisite technical expertise to impose adequate safety standards, and to have a legal system able to cope with the proper attribution of responsibility within the complex corporate arrangements [. . .]. Indeed it is common for developed nations to demand higher standards of behaviour from multinational enterprises within their jurisdictions than do developing nations.\textsuperscript{205}
\end{quote}

Since home states provide the financial, political, and logistical support necessary for corporate actions to succeed abroad, they have “a role to play in ‘encouraging’ and ‘promoting’”\textsuperscript{206} positive standards abroad. For animal law, this means that states, whether they act in line with or in excess of international law, should be under a duty to protect animals abroad to the extent that they have factual control over them. Whenever they have the power to negatively affect animals abroad, states should thus be bound to protect them.

In sum, a proposed state duty to protect animals extraterritorially could be based on the control theory or on a constitutional mandate. This duty has two dimensions, following the Human Rights Council’s \textit{Guiding Principles}. A state shall \textit{refrain from violating} the interests of foreign animals and it shall \textit{ensure the enjoyment} of standards, by protecting animals from social actors who impede or negate those claims.\textsuperscript{207}

As part of the second pillar of the “Protect, Respect and Remedy” framework, we must determine if there is a corporate duty to respect animals abroad. International law does not provide that corporations have a duty to respect animals abroad, but this may be expected from corporations by virtue of domestic law. In human rights law, the rationale behind the corporate duty to respect lies in the fact that corporations have the \textit{capacity} to (especially negatively) affect human rights abroad. Analogously, if corporations affect or could affect

\begin{footnotesize}
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\item[\textsuperscript{203}]Muchlinski 105–7 (2007).
\item[\textsuperscript{204}]That international law recognizes states as equal before it is not the same thing as international law offering assurance that states are equal in power, wealth, territory, and the like. The principle of sovereign equality only ensures that states hold the same position in the international legal order and have identical rights and duties: Juliane Kokott, \textit{Sovereign Equality of States}, in MPEPIL 2, 23 (Rüdiger Wolfrum ed., online ed. 2011).
\item[\textsuperscript{206}]Zerk, \textit{Multinationals and Corporate Social Responsibility} 151 (2008).
\item[\textsuperscript{207}]\textit{Guiding Principles on Business and Human Rights}, principle 3.
\end{itemize}
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the lives of animals abroad, they should observe certain standards, because they are, in a sense, ambassadors of their home states.\textsuperscript{208}

In human rights law, the standard of conduct expected from corporations when they operate abroad is due diligence. Due diligence denotes the duty to detect, examine, and evaluate risks of any nature (legal, social, financial, etc.) before taking relevant decisions or actions, and is an established standard in investment law, environmental law, criminal law, and general managerial decision-making.\textsuperscript{209} Due diligence centers on corporations’ capacity to influence, manage, and avert risks, so it could be a useful parameter to adjudicate the liability of corporations for infringing the interests of animals abroad.\textsuperscript{210} Using this standard is consistent with the growing body of CSR policies, codes of conduct, and impact assessments in animal law that all suggest that corporations accept they have a responsibility toward animals abroad.\textsuperscript{211}

Along with three pillars of the “Protect, Respect and Remedy” framework, the SRSG highlights that international cooperation and coordination are indispensable to the effective development, adjudication, and enforcement of human rights law. International bodies and special mandate holders are in a strong position to provide states with assistance, coordinate information sharing, and establish best practices.\textsuperscript{212} The same is true for animal law. Global interspecies justice cannot be achieved by relying only on extraterritorial jurisdiction. These steps must be adequately complemented by joint international efforts to acknowledge, integrate, and properly regulate duties owed to animals. In animal law, there are plenty of options available for states to cooperate and coordinate. States can enter bilateral or multilateral agreements in criminal or civil proceedings. They can draw up or join treaties or declarations, like the UDAW proposed by the World Society for the Protection of Animals. They can actively contribute to the development of soft law by supporting recommendations by IOs, such as the Terrestrial and Aquatic Animal Health Codes by the OIE,\textsuperscript{213} the IFC performance standards for investment,\textsuperscript{214} or the BBFAW.\textsuperscript{215}

The updated UDAW shows that its drafters might have taken note of the SRSG’s work. Article IV UDAW reads:

> All appropriate steps shall be taken by Member States to prevent cruelty to animals and to reduce their suffering. This Declaration provides a basis for states and peoples to: work to improve their national animal welfare legislation

\textsuperscript{208} Zerk, Multinationals and Corporate Social Responsibility 153 (2008). Cf. Kaufmann, Konzerntantwortungsinitiative 54 (2016), who argues in the context of human rights that a due diligence test that relies solely on the factual possibility to influence and affect human rights may be an insufficient standard for liability in domestic law.


\textsuperscript{210} Langford et al., Introduction: An Emerging Field, in Global Justice, State Duties 3, 22 (2013).

\textsuperscript{211} See Chapter 6, §1 G. and H.

\textsuperscript{212} Protect, Respect and Remedy Framework ¶¶ 43 ff.


\textsuperscript{214} IFC, Performance Standards on Environmental and Social Sustainability (2012).

introduce animal welfare legislation in countries where it does not currently exist
encourage those businesses which use animals to keep welfare at the forefront of their policies
link humanitarian, development and animal welfare agendas nationally and internationally
inspire positive change in public attitudes towards animal welfare.

And article VI states:

The policies, legislation and standards attained by each state on animal welfare shall be observed, recognized and promoted by improved practices and capacity-building, nationally and internationally. Whilst there are significant social, economic and cultural differences between societies, each should care for and treat animals in a humane and sustainable manner in accordance with the principles of the Declaration.216

The “Protect, Respect and Remedy” framework fits the UDA W, whether the drafters had it in mind or not. It lays down state responsibilities owed to animals intraterritorially (article IV: “work to improve their national animal welfare legislation”) and encourages states to introduce animal laws with extraterritorial reach (article IV: “introduce animal welfare legislation in countries where it does not currently exist”). These recommendations seem inspired by the SRSG’s state duty to protect. In line with the corporate duty to respect, the UDA W urges businesses to adhere to the highest standards of animal law (article IV: “encourage those businesses which use animals to keep welfare at the forefront of their policies”). The UDA W also calls for policy alignment (article IV: “link humanitarian, development and animal welfare agendas nationally and internationally”), international capacity building, and public outreach (article IV: “inspire positive change in public attitudes towards animal welfare”). Finally, the UDA W emphasizes that differences in animal law shall not prevent countries from caring for animals and treating them humanely.

Here I have outlined the most obvious commonalities between animal law and human rights law and offered suggestions on how they could be made fruitful for the extraterritoriality debate. Debates over state and corporate duties owed to animals are far from reaching the momentum of the debates in human rights law, and a lot more legal and empirical research is still required before animal law can fully profit from the debates in human rights law.217 But it is clear that this research has great potential to link the issue of extraterritorial animal law to existing achievements in human rights law and to give it the impetus needed to design and implement political and legal initiatives.

216 UDA W, arts. IV and VI.
217 Future research should examine what state rights and duties exist to protect animals abroad, what duties corporations must observe in respect to animals abroad, and finally, what remedies are available to animals or representatives of their interests. This research should also uncover why and how such duties should be designed and implemented.
§ 5 Interim Conclusion

The aim of this chapter was to establish for animal law what is often neglected in jurisdictional studies—a meaningful connection between jurisdictional options available to states and their substantive laws, and clarity about the constraints of substantive law on the law of jurisdiction. The parameters of substantive law I devised focus on limits to harm, demands for coherence, factors needed to ensure a convergence toward a higher common denominator in animal law, and duties to protect animals abroad.

I found that general international law gives us two answers to the question of whether states can apply animal law extraterritorially for the benefit of animals, or whether they can also use this scheme to export laws that adversely affect animals living abroad. First, states typically rely on the doctrine of jurisdiction to pursue praiseworthy goals for the collective good and to the detriment of a few, based on claims of global justice. Because animals must be included in the global justice calculus in accordance with a nonspeciesist ethic, the law of jurisdiction must set limits on laws that adversely affect animals abroad. Doing so enables international law to live up to its claim to be fair and consistent. If, in most fields of law, international law implicitly demands that extraterritorial norms ensure the common good to the disfavor of a few, the same must hold for animal law. Efforts to secure just relationships with animals constitute a collective good that reinforces humanity and that must be protected from adverse actions of a few. The precautionary principle makes the same demand: states are obliged to act precautionarily toward animals, which precludes using laws that cause animals abroad to suffer.

Trade law also offers guidance for the moral trajectory of extraterritorial animal law. Because states increasingly share a common view on the proper treatment of animals, norms that restrict trade on the basis of this consensus are considered law-supporting and law-creating. The customary practice of states shows that only law-supporting and law-creating norms are accepted as exceptions to trade law. In contrast, laws that aim to deprive animals of protection are law-disabling and precluded from being used to indirectly protect animals abroad.

Animal law also provides answers to these questions. Animal law has evolved historically from protecting property interests of owners at all costs (first-generation animal laws), to protecting animals from the most heinous forms of cruelty (second-generation animal laws), and, finally, to ensuring their well-being (third-generation animal laws). For most states, this development was influenced by the recognition that animals are sentient beings who are fully conscious of their (negative and positive) affective states. From an ethical standpoint, these motivations evidence that legislators are committed to the theory of pathocentrism. From a legal standpoint, their enshrinement in law proves that the moral duty to protect animals has become a legal imperative. And because the majority of states explicitly commit to ensuring animals’ well-being and the absence of pain and suffering, states must be barred from prescribing laws extraterritorially that have negative effects on animals.

This chapter also asked whether and to what degree animal laws must be morally coherent to be applied extraterritorially. I used WTO law, which has given rise to the highest number of cross-border disputes over animal welfare, to show that many states’ laws merely mirror the biased moral views of their people about the proper treatment of animals. Since moral inconsistency is a democratic reality, the measures a state uses to protect animals extraterritorially must conform only to its predefined policy objective. Outside this sphere, states have some discretion to give effect to the biases of their people, though they are advised to and seem more and more interested in making their laws and policies more coherent. Coherency in this sense does not allow states to revoke and reverse achievements in animal law. First and foremost, states are called upon to establish coherence by extending their laws to those animals that are commonly ignored. In other words, the demand for coherence must be used in favor of animals and not to their detriment.

To guide states in deciding when to apply their laws extraterritorially, I established a hierarchy of presumptions: a presumption in favor of transparency in matters crucial to animals; a presumption in favor of recognizing animal interests; a presumption in favor of integrating animal interests; a presumption in favor of extensive and concretized animal laws; a presumption in favor of adequately balancing interests; a presumption in favor of prohibitions; and a presumption in favor of animal rights. These tools, by being designed hierarchically, ensure that in cases of extraterritorial jurisdiction, the level of protection offered to animals either remains constant or increases. This precludes a race to the bottom and takes into account the interests of states operating at any level of animal law.

Human rights law can also guide us in assessing the demands of substantive law when protecting animals abroad. The revolutionary UN “Protect, Respect and Remedy” framework stipulates a state duty to protect, a corporate duty to respect human rights abroad, and effective access to remedies. This framework does not apply to issues of animal law de lege lata, but can inspire its future development. The state duty to protect animals abroad may either derive from domestic law or from the control theory. If states have a constitutional mandate to protect animals, this mandate stretches across borders, assuming international law gives the state discretion to prescribe law extraterritorially. In the rare cases where a state’s factual power exceeds its jurisdiction in territorial terms, it should still be under a duty to protect animals, because it has the capacity to negatively affect the lives of animals abroad (based on the control theory). The corporate duty to respect animals relies on due diligence, traces of which we see in various domestic animal laws, CSR, codes of conduct, and best practices. The framework also points to the necessity of engaging in joint efforts in the international arena to acknowledge, integrate, and properly regulate animal interests internationally. The “Protect, Respect and Remedy” framework gave rise to spin-off principles in animal law, as set out in the recently updated UDAW, which can be further refined and strengthened. With these guiding parameters for extraterritorial animal law in place, there is a good chance it can keep its promise to meaningfully fill governance gaps in animal law, overcome the challenges of globalization, and help us work toward a more just world for animals.