Buchbesprechungen

***Blattner, Charlotte E.*: Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization.** Oxford: Oxford University Press. 2019. ISBN 978-0-19-094831-3 (Hardback). liii, 465 pp. £ 55,-

States and regional organizations have recently started to extend their animal welfare legislation abroad, thereby exercising a form of "extraterritorial jurisdiction". For instance, in 2009, the European Union (EU) adopted the "Seals Regulation",[1] which bans the trade in seal products in the EU in response to concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals. The killing and skinning of seals largely occurs *outside* the EU, notably in Canada. In another EU example, the Court of Justice of the EU held, in the *Zuchtvieh* case, that an EU Regulation concerning the welfare of animals during transport is not just applicable to transports on EU territory, but also to transports between an EU place of departure and a non-EU place of destination.[2] These assertions of extraterritoriality have at times proved internationally controversial, as they purport to regulate foreign activities and/or limit market access to foreign products. Notably, Canada complained against the aforementioned EU Seals Regulation with the World Trade Organization's dispute-settlement mechanism, which went on to find that the EU had breached World Trade Organization (WTO) law.[3] At the same time, such assertions may deserve support insofar as they raise animal welfare standards worldwide.

The extraterritorial projection of animal law calls for thorough scholarly investigation. And there is no more thorough investigation than *Charlotte Blattner's* "Protecting Animals Within and Across Borders: Extraterritorial

[1] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16.9.2009 on trade in seal products, O.J. L 286/36 (2009).

[2] Council Regulation (EC) No. 1/2005 of 22.12.2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No. 1255/97, O.J. L 3/1 (2005); Court of Justice of the EU, Case C-424/13: Judgment of the Court (Fifth Chamber) of 23.4.2015 (request for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof — Germany), *Zuchtvieh-Export GmbH v. Stadt Kempten*, O.J. C 205/5 (2015).

[3] WTO, DS 400: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, Report of the Appellate Body (AB) as adopted by the WTO Dispute Settlement Body, 18.6.2014. While the AB held that the EU Seal Regime is "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994, it found that the EU had not demonstrated that the EU Seal Regime meets the requirements of the chapeau of Article XX GATT, as the Regime was considered to be discriminatory towards Canadian and Norwegian producers.

Jurisdiction and the Challenges of Globalization", which is based on the author's Ph.D. manuscript defended at Basel University (2016). *Blattner* later went on to collaborate with, *inter alia*, *Will Kymlicka*, a pre-eminent animal rights philosopher, and developed an interdisciplinary research agenda on animal law and policy which she is currently carrying out at Harvard University.

In her monograph, *Blattner* attempts to shift the boundaries of legal extraterritoriality to better protect animal welfare threatened by transnational production chains. She explores how the existing jurisdictional principles and legal arrangements could be productively relied on to improve animal welfare worldwide. *Blattner* does not hide her normative preferences in this respect: while analyzing the positive law, she consciously looks for interpretations *that advance animal welfare* (an approach she terms "critical positivism"). Where the law is absent, or yields undesirable results, she does not refrain from making recommendations for legal reform. A fine example is her proposal to confer nationality on animals ("passportization"), which would then ground the exercise of passive personality-based jurisdiction over animal abuse and exploitation abroad. This is reformist, as animals, being objects of the law, do not have a nationality under the dominant interpretation of the concept.[4] Accordingly, from a methodological perspective, her research is a mix of doctrinal and normative, ethically-inspired scholarship that gives pride of place to the interests of a particular object – or rather subject – of the law: animals. This approach somewhat resembles the approach that is often espoused in human rights scholarship, which interprets international legal sources in light of the inherent rights of human beings (*pro homine* principle),[5] and criticizes existing legal arrangements that fail to adequately protect human rights. In fact, *Blattner* draws inspiration from the trajectory of human rights law, in particular the doctrine of extraterritorial obligations – a doctrine that could have traction in the field of animal law as well, and ground obligations for home states to regulate transnational corporations carrying out activities which compromise animal welfare.[6]

Blattner's monograph is extremely wide-ranging. Inevitably, a brief review like this one can only fail to do justice to the book's richness. I will

[4] See *C. E. Blattner*, Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization, 234 et seq.

[5] See, e.g., *Y. Negishi*, The *Pro Homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control, EJIL 28 (2017), 457 et seq.

[6] Compare UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, in particular Pillar II (state obligation to protect).

limit myself to an engagement with two fundamental, interrelated issues: the author's conception of extraterritoriality on the one hand, and the interventionist character of unilateral extraterritoriality on the other.

"Extraterritoriality" is an elusive concept that defies easy definition. In fact, what is territorial or extraterritorial depends on how connections to states and their territory are framed, as a result of which territoriality and extraterritoriality may become metaphysical or even illusory concepts.[7] It goes to the author's credit that, nevertheless, she has endeavored to *categorize* manifestations of extraterritoriality. She does so by distinguishing between the "anchor point", the "regulated content", and the "ancillary repercussion", each of which may be territorial or extraterritorial (p. 28), as well as by distinguishing between "direct" and "indirect" extraterritoriality (p. 29). According to *Blattner*, "[a] jurisdictional norm is indirect extraterritorial if and only if ancillary repercussions occur on foreign territory, or, put differently, if there is neither an extraterritorial anchor point nor an extraterritorial content regulation. By contrast, a norm is extraterritorial *stricto sensu* (or direct extraterritorial) if its anchor point *or* the regulated content lies outside the prescribing state's territory." (p. 28). *Blattner* goes on to make further distinctions and combinations, depending on whether the anchor points and/or regulated content are animal or non-animal related (pp. 31 et seq.).

This may sound complicated, and makes one think of *Rudolf von Jhering's* characterization of German doctrinal legal scholarship as a hair-splitting machine capable of splitting a hair into 999,999 accurate parts.[8] Still, the distinctions made are illuminating, and an original contribution to the doctrine of jurisdiction, to the extent that they enable us to assess the interventionist character and international lawfulness of various assertions of extraterritorial jurisdiction (a functionality that is however only clarified towards the end of the book, in Chapter 10). Take notably the most common type of extraterritorial jurisdiction, i.e., jurisdiction with a non-animal-related intra-territorial anchor point and animal-related extraterritorial content regulation (type γ1 in *Blattner's* scheme, p. 270). Such jurisdiction may consist of, e.g., home state regulation of overseas activities of domestically-incorporated corporations, the exercise of jurisdiction over "animal nationals", or the imposition of reporting duties on domestic corporations regard-

[7] *P. Szigeti*, The Illusion of Territorial Jurisdiction, Tex. Int'l L. J. 52 (2017), 369 et seq.

[8] *R. von Jhering*, Scherz und Ernst in der Jurisprudenz, 1. Aufl. 1884 (unveränd. reprografischer Nachdruck der 13. Aufl., Leipzig 1924. – Darmstadt: Wiss. Buchges., 1992). See for a discussion: *W. Seagle*, Rudolf von Jhering: Or Law as a Means to an End, U. Chi. L. Rev. 13 (1945), 71 et seq.

ing their activities involving animals abroad (pp. 267 et seq.). Because such jurisdiction is territorially anchored, even if it regulates activities abroad, it has a substantial connection to the regulating state. This limits its interventionist character (p. 394), and renders such jurisdiction lawful under international law. Intrusion may even be more limited, and hence, international lawfulness may be beyond doubt, in the "ancillary repercussions only" scenario, which notably occurs when states enact animal welfare-related trade measures. The only extraterritorial element of such measures is that "they leave foreign producers the choice of either conforming to the importing state's laws or not placing the products on its market" (p. 268, p. 394), even if this limited extraterritoriality does not necessarily serve as a defense against WTO challenges (expounded at length in Chapters 3 and 4).[9] In contrast, more intrusive direct extraterritoriality, characterized by an extraterritorial anchor point and extraterritorial content regulation, is by all means exceptional, and even non-existing as a matter of the *lex lata* in the field of animal law. For instance, the exercise of universal criminal jurisdiction over the abuse of animals abroad may, under currently applicable international law, be unlawful – although *Blattner* argues in favor of its lawfulness *de lege ferenda*.[10]

The second issue that I would like to take up is the tension between unilateral, extraterritorial jurisdiction and the principle of non-intervention. This issue is obviously related to the first one, as the *type* of extraterritorial jurisdiction determines the extent to which extraterritoriality intrudes on a foreign state's own regulatory sphere. The drawback of typologies, however, is that they may work well in the abstract, but may fail to account for jurisdictional imbalances and imperial practices. On the basis of *Blattner's* typology, most jurisdictional assertions may appear to be relatively non-intrusive, and thus lawful.[11] This is in line with contemporary jurisdictional theory, which considers the permissive principles of jurisdiction to be so capacious as to justify almost any jurisdictional assertion.[12]

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[9] In these chapters, *Blattner* carries out an impressive doctrinal analysis of the compatibility of animal-related trade measures with GATT and other WTO legal instruments.

[10] *C. E. Blattner* (note 4), 253 et seq.

[11] *C. E. Blattner*, (note 4), 399 (submitting that "as animal law has become so entangled across borders, many states now have a vested interest in protecting animals abroad", and that "the principle of nonintervention will only be violated if a state uses forcible, dictatorial, or otherwise coercive means when it interferes in the affairs of another state").

[12] See, e.g., *D. J. Svantesson*, The Internet Jurisdiction Puzzle, 2017 (proposing to abandon the first-order permissive principles, like territoriality and personality, and instead suggesting reliance on the substantial connection requirement and the principle of reasonableness); *C. Ryngaert,* Selfless Intervention: The Exercise of Jurisdiction in the Common Inter-

However, the political reality is that the states exercising extraterritorial jurisdiction tend to be the industrialized Western powers (labelled by *Blattner* as the "majority world", apparently taking her cue from *Kymlicka*), with less developed nations (labelled as the "minority world") being at the receiving end. Extraterritorial jurisdiction may then become a replay of colonialism's civilizing mission: extraterritoriality is used as an imperial tool to impose Western conceptions of animal welfare on non-Western cultures seen as backward, also in respect of their attitudes towards animals. Such majority imposition also plays out intra-territorially for that matter, when dominant cultures impose their value conceptions on minority and migrant cultures within the same state.[13]

As a staunch supporter of animal rights, *Blattner* is visibly uncomfortable with sacrificing animal rights on the altar of cultural diversity. In fact, she comes out strongly in favor of extraterritoriality as a means of raising standards globally in the absence of adequate multilateral action. At the same time, she is cognizant of the risks of imperialism and cultural hegemony, in particular the danger of Western states hectoring non-Western communities regarding their animal welfare practices, while sweeping under the carpet their own animal-unfriendly agro-industrial practices. Apparently inspired by *Paul Berman's* writings on global legal pluralism,[14] she sees a way out of the conundrum, however, through the creation of "overlapping forms of jurisdiction" giving rise to "legal pluralism that is conducive to multiculturalism and promotes the interests of animals" (p. 408). Her claim is that "[c]oncurring forms of jurisdiction stimulate discourse that fosters multicultural sensibility, awareness of shared histories, and an understanding of the intersectional forms of oppression, including intersections of race and speciesism, of sexism and speciesism, and of ableism and speciesism." (p. 408).

While this nuanced approach appears sensible, it is open to speculation whether extraterritoriality can and will serve all these goals at the same time. Certainly, the existence of concurrent jurisdiction in international law limits the kind of pervasive global under-regulation which haunts animal law. But it may not magically yield sensibility, awareness, and understanding. Such

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est, 2020 (discussing the malleability of sovereignty and jurisdiction, and suggesting techniques to mitigate the exercise of potentially overbroad jurisdiction).

[13] The ongoing debate over whether or not to prohibit ritual slaughter of animals, which tends to be practiced by certain minority religious groups, can serve as an example that brings into stark relief the tension between animal rights and the freedom of religion (a human right). *C. M. Zoethout*, Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter, HRQ 35 (2013), 651 et seq.

[14] *P. S. Berman*, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders, 2012.

values should be accounted for at an earlier stage: they should be factored in by regulators at the moment of designing extraterritorial regulation, or by law-enforcers at the moment of deciding on an enforcement action. Rather than waiting for the fall-out of concurrent jurisdiction, states may want to *a priori* ensure the reasonableness of particular jurisdictional assertions. *Blattner* acknowledges the potential role of reasonableness at the pre-conflict stage, but does not fully see through the limitations which reasonableness may place on extraterritoriality. She submits that "[c]oncerns for animals can play a role in this assessment if they are a high priority on the regulator's agenda or if they are a common concern of states" (p. 398), i.e., concerns that militate in favor of extraterritoriality – but obviously other concerns can militate *against* extraterritoriality. Arguably, it is *Blattner's* – understandable – fear that states may invoke "reasonableness" as an excuse to limit the geographic reach of their animal laws, that brings her to downplay the importance of reasonableness. Reasonableness, as traditionally conceived (e.g., in the Third Restatement of United States [US] Foreign Relations Law), indeed serves as a technique of jurisdictional *restraint*, which limits the jurisdictional overreach flowing from the wide net potentially cast by the permissive principles of jurisdiction. In essence, reasonableness is a tool to counter *over-regulation*, whereas it is precisely *under-regulation* that plagues the field of animal welfare.

It could possibly be argued that the principle of reasonableness should not apply to fields that are globally under-regulated, such as animal welfare, insofar as such under-regulation tends to undersupply global public goods or encourage the commission of *mala in se* (acts that are wrong in themselves),[15] or alternatively that extraterritorial jurisdiction that addresses global public goods or *mala in se* is *ipso facto* reasonable. This is an avenue that *Blattner* seems to take when calling attention to the *substance* of the laws projected extraterritorially (Chapter 8). A characterization of animal welfare as a global public good, a global common concern, or a *malum in se* can be challenged, however, in view of the globally divergent practices regarding the level of legal protection offered to animals, and the absence of international animal law. But even if more stringent animal welfare standards do respond to common concerns, or are internationally desirable, it makes sense for states projecting these standards extraterritorially to pay

[15] *Mala in se* are juxtaposed to *mala prohibita*, which are only wrong because they are penalized by statute. See for one of the seminal contributions: X., The Distinction between "Mala Prohibita" and "Mala in se" in Criminal Law, Colum. L. Rev. 30 (1930), 74 et seq.

attention to the exact design of extraterritorial regulation.[16] One should bear in mind in this respect that requiring strict compliance from (foreign) addressees of such regulation may be neither legitimate nor effective in actually improving animal welfare. For instance, such addressees may possibly already be subject to similar, even if not fully identical requirements under their domestic law, which the extraterritorial regulator may want to recognize. In the aforementioned *Zuchtvieh* judgment, the Court of Justice of the EU sensibly held as follows in this respect:

Should it nevertheless be the case that the law or administrative practice of a third country through which the [animal] transport will transit verifiably and definitely precludes full compliance with the technical rules of that regulation, the margin of discretion conferred on the competent authority of the place of departure empowers it to accept realistic planning for transport which, in the light *inter alia* of the means of transport used and the journey arrangements made, indicates that the planned transport will safeguard the welfare of the animals at a level equivalent to those technical rules.[17]

In addition, as *Blattner* could have mentioned, foreign addressees, especially in the "minority world", may lack the technical and financial capacity to fully comply with extraterritorial animal law. In such a situation, the extraterritorial regulator may want to put in place financial or technical transfer arrangements to enable operators to comply with its extraterritorial law, or to provide for a grace or transition period that allows for adjustments to production processes.

These mechanisms may not as such restrain the exercise of extraterritorial jurisdiction, but may certainly render it more legitimate and more effective. They increase the legitimacy of extraterritoriality as they recognize the situatedness and agency of the addressees. They increase its effectiveness as they enable the addressees to actually implement its requirements.

It remains, nonetheless, that sensitivity to foreign concerns will do little to improve the lot of animals if foreign operators and communities, for cultural, economic or other self-interested reasons, vehemently oppose stricter animal welfare standards. In such cases, bystander states should be allowed to draw a line in the sand and exercise forms of extraterritorial jurisdiction, in particular to avoid becoming complicit in abuses which they themselves consider as morally reprehensible or wrongful, and are in a position to pre-

[16] See on the principle of considerate design in the practice of extraterritorial jurisdiction in the environmental field: *N. Dobson,* Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law (forthcoming 2021).

[17] *Zuchtvieh-Export GmbH v. Stadt Kempten* (note 2) para. 54.

vent (e.g., by taking trade measures).[18] Extraterritoriality "offers hope", as *Blattner* writes on the last page of the book, and has "the potential to overcome the inertia and deregulation that characterize animal law to this day" (p. 409). As extraterritorial jurisdiction in the field of animal law does not directly contribute to a state's national welfare, unlike, for instance, the extraterritorial application of competition law,[19] realizing this hope is however crucially dependent on regulatory courage, to be kindled by sustained civil society and consumer pressure. International legal constraints should not be cited as an excuse for inaction, as most forms of "extraterritorial" jurisdiction and regulation discussed in *Blattner's* monograph are based on a sufficiently strong connection with the regulating state, allowing them to pass muster with the international law of jurisdiction.

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[18] See, e.g., on complicity and environmental abuses in an extraterritorial context: *J. Scott*, The Global Reach of EU Law, in: M. Cremona/J. Scott (eds.), EU Law Beyond Borders, 2019, 54 et seq. (submitting that "the failure of the EU to take available steps to prevent or minimize environmental wrongdoing in third countries is capable of constituting complicity").

[19] See on economic rationales of extraterritorial jurisdiction (as exercised by the US) notably *F. Irani*, Beyond de jure and de facto boundaries: tracing the imperial geographies of US law, forthcoming in European Journal of International Relations 2019/2020, doi: 10.1177/1354066119869801.