

## Extraterritorial Jurisdiction as a Practical Solution to Tackle Transnational Animal Welfare Issues

Maulidya Candra Dwi Putri<sup>1</sup>, Habib Adjie<sup>2</sup>

<sup>1,2</sup>Universitas Narotama, Surabaya

[maulidyacd@gmail.com](mailto:maulidyacd@gmail.com)

### Abstract

*The globalization of industrial animal agriculture including exportation of live animals has brought farm animals as the victims of global trade. Farm animals are still treated as commodities in most jurisdictions. They are the animals that suffer the most as they are mostly bred, kept and raised in intensive confinement just to be used or killed by humans. The farm animals are mostly treated inhumanely with no legal protection. Although global awareness regarding animal welfare has arisen, the development of animal law in national and international regulations has not changed much, especially regulation of farm animals. This journal will suggest a solution to the issues which arise regarding the farm animals' welfare through the WTO laws and extraterritorial jurisdiction. Extraterritorial jurisdiction is introduced in this journal as it is believed to be a practical solution to fill the regulatory gaps regarding farm animals' welfare that transported globally.*

### Keywords

*Animal welfare; farm animals' welfare; trade; global animal law; to laws; extraterritorial jurisdiction.*



### I. Introduction

Globalization has become a revolutionizing force on international trade, particularly that of animals and animal products. The globalization of industrial animal agriculture has been a benefit to multinational agribusinesses, which now control the global supply chains in pork, beef, and poultry production. Agribusiness is a massive industry with multibillion-dollar annual revenue. However, it has a dark side as millions of animals that are involved every year in this business are deprived from protection. This is because farm animals have been seen as commodities instead of non-human beings. To this day, most animals on factory farms do not enjoy the basic animal welfare standards. As the animals are subjected to intensive confinement and acts that inflict acute pain. For example, almost all pigs have their tails and genitals mutilated at birth without the use of painkillers, and most breeding pigs live almost their entire lives completely immobilized as they merely move from gestation crates (for pregnancy) and farrowing crates (for giving birth). The dairy cows are forced to carry excess milk, causing pain to the udders, and their unwanted male calves are often sold into the veal industry in which usually they are kept in veal crates that prevent them from turning around or socializing with other calves. And also beef cattle have to endure painful castration, long-distance export, and inhumane slaughtering process. The higher the company's leverage, the company tends to generate less cash, this is likely to affect the occurrence of earning management. Companies with high debt or leverage ratios tend to hold their profits and prioritize the fulfillment of debt obligations first. According to Brigham and Ehrhardt (2013), the greater the leverage of the company, it tends to pay lower dividends in order to reduce dependence on external funding. So that the greater the proportion of debt used for the capital structure of a company, the greater the number of

liabilities that are likely to affect shareholder wealth because it affects the size of the dividends to be distributed. (Yanizzar, et al. 2020)

Thus, animal welfare has increasingly become a global concern. It first emerged as a scientific concept, animal welfare focuses into the living and dying conditions of animals as they are kept, traded, and killed by humans. Animal welfare has gain support from the public, NGOs, scholars, and some governments. The most recent decision of the WTO dispute settlement body in EC–Seal Product case also suggested an acknowledgement of international trade organization on animal welfare which is demonstrates an advancement in the relationship between trade and public morals, concerning animal welfare. For a long time trade organization has been seen as an evil to the development of animal welfare. However, from the decision of this case, a question among scholars has arisen regarding what the relationship between the WTO laws and general international laws should be. Thus, it will be discussed in this journal.

Although there is an implicit acknowledgement of animal welfare from international trade organization (WTO), the development of animal laws (in domestic nor international spectrum) is not progressing fast enough, leaving the farm animals as a victim to inhumane global trade. Some countries (e.g., Australia, New Zealand, and also the European Union) are more advanced in their animal laws compared to any other country. This creates a regulatory gap that hampers the protection of animals especially farm animals that have been transported globally. This issue leads to an idea of an alternative solution. It is a practical solution to tackle global animal issues on trade. The alternative solution that will be offered in this journal is extraterritorial jurisdiction. Thus, the subsequent chapters will elaborate on the questions mentioned.

The aim of this article is to give a suggestion on how the relationship between the WTO laws and international general laws should be regarding farm animals' welfare issues. Furthermore, it will also give a suggestion of a practical solution to tackle farm animals' welfare issues which is extraterritorial jurisdiction. However, the ultimate goal of this journal is to give a suggestion to countries (e.g., Australia, etc.) to end cruelty toward animals on trade in national and international territories.

## **II. Research Method**

The method that will be used to answer the legal questions proposed above is the doctrinal method. This method is chosen because this research will collect the data through the existing regulations, cases, journals, and previous research and then analyze it.

## **III. Result and Discussion**

### **3.1 A Practical Solution to Tackle Transnational Farm Animals' Issues: Extraterritorial Jurisdiction**

The WTO scopes in dealing with animals' welfare protection on trade are restricted to cross-border trade, to its member states, and only through the WTO laws' exception clauses. To tackle farm animals' welfare issues, a practical approach is needed and therefore an extraterritorial jurisdiction is the approach to fill the regulatory gaps especially on transnational trade of farm animals. In this chapter, a recent case decision by the Court of Justice of the EU (CJEU) in *Zuchtvieh–Export GmbH v Stadt Kempten* case will be taken as an example of the implementation of extraterritorial jurisdiction concerning the welfare of the cattle that were transported outside the EU. Moreover, this case will be taken further into a discussion on how Australia, as one of the biggest long-distance

exporters of live animals, should emulate the effort of the EU to diminish the farm animals' issues. Australia is chosen as an example also due to its developed animal welfare policies that have not been utilized to protect farm animals in transnational trade.

A recent case decision by the CJEU can be a good example of the implementation of extraterritorial jurisdiction. In *Zuchtvieh–Export GmbH v Stadt Kempten* case (Zuchtvieh–Export case), the Court held that the application of an EU Regulation (Regulation 1/2005) concerning the welfare of animals during transport does not limit itself to road transports within the EU. The Court then also stated that it also applies to such transports between an EU place of departure and a non-EU place of destination, or vice versa. In this case, the cattle transported from Kempten in Germany to Uzbekistan had to comply with the EU law also after crossing the EU border. A firm and unambiguous judgement by the CJEU in this case has an important meaning that Regulation 1/2005 on the Protection of Animals during Transport is also applicable outside of the EU borders to transport taking place in third states. Moreover, this decision implicitly shows that the EU exercising its jurisdiction outside its border line. According to the Regulation 1/2005, the transporter must comply with the regulation even in the territory of third countries and it is including the transporter needs to take regular breaks and let the animals rest and be fed from time to time.

Under international law, jurisdiction has been defined as the power states have at any given moment of development of the international legal system. Jurisdiction is related to sovereignty. In a world composed of equally sovereign states, each state is entitled to give shape of its own sovereignty including the law relating to persons, activities, or legal interest, jurisdiction becomes a concern of international law when a state is eager to promote its sovereign interests abroad. In other word, “extraterritorial” jurisdiction is a term where a state regulates matters which, having a link with another sovereign, are not exclusively of domestic concern. A state with a strong regulation for animal protection can enforce its protection towards the transported animal, which extend beyond its own territory. Extraterritorial jurisdiction is also suggested to promote a better protection of farm animals globally because then the third country will be directly involved – e.g., in the process of unloading and/or slaughtering of the farm animals that comply with higher standards. Therefore, the workers in the third country will be trained in advance to meet the requirements.

Extraterritorial jurisdiction on animal law is not a common concept and no literature elaborates upon this concept yet. However, it can be inferred that animal law should be seen in a similar fashion as environment law or human rights law, in which the concept should be understood that the law is enforced because it is a state responsibility. This means that rather than delimiting spheres of jurisdiction (i.e. the classic goal of the law of jurisdiction in public international law), it is concerned on how states extent its animal protection.

In applying animal protection policies beyond its own territory, a comity of nations is an inseparable concept to extraterritorial jurisdiction. Comity is a traditional diplomatic and international law concept, which is defined as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws”. Thus, the states respect each other's policy choices and interests without inquiring into the substance of each other's laws. As mentioned in *Jurisdiction in International Law 2nd Edition*, in a jurisdictional context, the states will limit the reach of their laws and defer to other states that may have a stronger, often territorial, nexus to a situation. Therefore, in current situation where the policies regarding protection of animals in some jurisdiction are

stronger (e.g., in the EU and in Australia) compared to each other, extraterritorial jurisdiction is suggested applicable. Here, comity may ensure that the exercise of jurisdiction remains reasonable and accords due regard to the sovereignty of other states.

As explained above, the evidence suggests the possibility to extent one's animal welfare jurisdiction to other states that have weaker regulations. In this journal, a suggestion to Australian Government on how it can utilize its Acts to protect its farm animals that has been exported around the world every year, as it is one of the biggest exporters, will be provided next.

Australia's live animals export had achieved \$1.2 billion income (Appendix 1). Compared to the average productivity of global competitors in 2017, Australia had scored higher than 10% of the world's agribusiness industry (Appendix 2). Millions of live animals are involved in this industry and millions of them were transported outside Australia. These facts have showed Australia's massive agribusiness industry and the urgency of Australian Government to step forward on implementing its regulations beyond its border specifically regarding farm animals that transported alive outside Australia.

The regulatory framework that concerns exporting livestock is falling under the Australian Meat and Livestock Industry Act 1997 (AMLI Act) and the Export Control Act 1982 (EC Act). Both are administered by the Australian Government Department of Agriculture and Water Resources (DAWR). In addition, the Commonwealth Navigation Act 1912 and state-based animal welfare legislation also play a role in regulating the live animal's trade. Both AMLI Act and EC Act provide different regulation which complement each other. In order to show the promising solution that offered in this journal (extraterritorial jurisdiction), it is necessary to understand what these regulations are about and how to utilize these regulations to achieve better farm animals' welfare.

The AMLI Act provides a regime for the licensing of exporters in which it prohibits the export of livestock without an appropriate license. The Secretary of DAWR, in order to impose certain conditions on export licenses, created the Australian Meat and Livestock Industry (Standards) Order 2005. Furthermore, this order requires the license holders to comply with the Australian Standards for the Export of Livestock (Version 2.3) 2011 (ASEL), which sets out the requirements for the live export process. This ASEL covers the export chain from planning the consignment, sourcing and on farm preparation of animals, land transportation, pre-embarkation assembly, vessel preparation and loading of the vessel, and the sea voyage or flight. The ASEL also impose the exporters of reporting obligations, in which they must notify DAWR if the mortality rate exceeds 1% for cattle or 2% for sheep. It is reported that since 2006, this occasion occurred at least 70 times.

On the other hand, the EC Act provides a legislative framework to govern the export of 'prescribed goods' including live animals from Australia. Furthermore, the administrative detail of this regime (primary for the export of live animals) is given effect through subordinate instrument known as Export Control (Animals) Order 2004 (EC (Animals) Order). Under the EC (Animals) Order, a person who wishes to export live animals must first be licensed under the AMLI Act and must comply with any conditions imposed on that license. Moreover, it also outlines the process for approving consignments of livestock.

Additionally, exporters must submit an Exporter Supply Chain Assurance System (ESCAS) which was recommended by the Farmer Review in 2011 after an evidence of cruel animal handling and slaughter practices in Indonesia to Australian's cattle. The ESCAS is designed to monitor the movement of livestock in importing countries. Thus, ultimately to ensure the animals can be traced from its departure in Australia to the slaughter houses around the world. However, since 2012 there have been 154 reports of

non-compliance with the ESCAS and non-compliance that goes unreported is unknown. The ESCAS require a submission of an end processing report and an independent performance audit report by the exporter. However, the ESCAS merely covers animals that exported for slaughter and not for breeder animals (including dairy cattle).

In the AMLI Act Part I point 5 and point 6, which sequentially named “application of this act” and “application of the criminal code”, it is said that the AMLI Act applies both within and outside Australia, and that the Criminal Code applies to all offences against this Act. Furthermore, in the EC Act Division 2, Subdivision C “extended geographical operation of offences” stated that the Criminal Code Section 15.2 (extended geographical jurisdiction – category B) applies to an offence against any of sections 9F to 9L (offences by the veterinarians and/or exporters). Moreover, in the state regulation level, for example Western Australia’s Animal Welfare Act 2002, the provisions of this Act can also be utilized since it provides that a person is guilty of animal cruelty if they transport an animal “in a way that causes, or is likely to cause, it unnecessary harm”. This Act also provides a penalty from minimum \$2000 to maximum \$50,000 and imprisonment for 5 years. This Animal Welfare Act 2002 is vital due the largest shipment of sheep is from Fremantle, Western Australia – with 1.59 million of the 1.78 million sheep exported in 2016.

Although the regulations which have been provided by Australian Government seems convincing, the implementation of these regulations are weak. The implementation of the regulations mentioned above, the criticism needs to be addressed to the Australian Government regarding no sanction issued against non-compliance by the Australian exporters (e.g., including revocation of the licenses). When a non-compliance occurred or in case where animals are treated inhumanely outside Australia territory but according to the Act is still under the exporter’s responsibility – such case that revealed by Four Corners regarding thousands of animals died slow and hideous deaths in Indonesia’s slaughter houses which installed by the Australian industry and with Australian Government support – the Government inclines to take a “soft” approach, for example by demand the exporters to review their supply chains and provide more regular reports . Thus, a commitment to enforce these regulations need to be made by Australian Government.

Learning from the CJEU and its *Zuchtvieh–Export* case, the Australian Government should be stricter on implementing its regulations. As both Australia and the EU are equipped with regulations that explicitly state that the regulations apply within and outside its territory, which can be interpreted as an extension of one’s national jurisdiction outside its territory. Moreover, both Australians and the EU citizens put a high value on animal and its welfare, which can be seen from their active involvement in pushing the government to end animal cruelty. In Australia, for example, local non-government organizations (NGO) are more active than the government and the exporters on reporting allegation of non-compliances. Similar to the EU, for the protection of its farm animals’ welfare Australia has the ground to apply extraterritorial jurisdiction because it should pay full regards to the welfare requirements of transported animals. Therefore, it will ensure a consistent and effective application of the Acts.

#### **4.2 The Possible Limitations of the Extraterritorial Jurisdiction**

Similar to any solution that has been suggested, there is always limitations to it and this extraterritorial jurisdiction is not an exception. There are some aspects that will be estimated limits of the implementation of extraterritorial jurisdiction. From the most basic is if the destination country of the farm animals refuses one’s jurisdiction enter its territory. Then the possibility of diplomatic issues arise additionally.

Another limitation is that the extraterritorial jurisdiction that has been proposed in this journal is applicable merely by the country that has strong regulations in animal law. It make sense because a country could not push its jurisdiction if it does not have a strong regulation to begin with. That is also the reason why the decision of Zuchtvieh–Export case held Regulation I/2005 still applies even outside the EU territory. Australia, as explained in previous sub-chapter, is one of those countries that the animal law is well regulated and the most advanced. Therefore, it has sufficient reason to implement its jurisdiction regarding farm animals beyond its territory. Those countries that do not have the strong basis obviously could not do it (which for this reason the extraterritorial jurisdiction might also be a good way to promote a better regulation of animal law in destination countries).

Lastly, extraterritorial jurisdiction imposes a heavier work load and extra costs which will be incurred by the origin country of the farm animals and its exporters. For example, to ensure that all the requirements are met by the exporter, the government of the country of origin will need to check and furthermore need to do an investigation for non-compliance. Thus, it will cost time and money especially to conduct the investigation, if the government also needs to travel to the destination country of the farm animals. From the exporter's perspective, a compliance to stricter rules may indeed cost them more money which would not have a beneficial impact upon their business.

Due to the limitation of the WTO's scope in dealing with animals' welfare protection with regard to trade, a different approach to tackle transnational farm animals' welfare issues is suggested, which is extraterritorial jurisdiction. The only case that can show the implementation of animal law beyond the state territory is in Zuchtvieh–Export GmbH v Stadt Kempten case (Zuchtvieh–Export case). Extraterritorial jurisdiction in animal law is a new concept and no literature elaborates upon this concept yet. However, this method has a promising future to tackle farm animals' issues. This is due to the less powerful states limiting the reach of their laws to defer their power to other stronger states that have a stronger (often territorial) jurisdiction to a specific situation (in this case farm animal welfare). Furthermore, a suggestion is addressed to Australia to implement extraterritorial jurisdiction as Australia is one of the biggest long-distance exporters of live animals and also it has one of the strongest national regulatory frameworks regarding animals (AMLI Act, EC Act, Commonwealth Navigation Act 1912, and state-based animal welfare legislation).

Here, it can be seen that Australia is equipped with regulations to protect its farm animals' welfare even beyond its own territory. To ensure a consistent and effective implementation of the Acts, it is suggested that Australia should follow the EU's firm stance on protecting its animals as it is seen in the decision of the Zuchtvieh–Export case. Lastly, although extraterritorial jurisdiction is a better solution to tackle farm animals' welfare issues than using the WTO laws and dispute settlement body, still it has some limitations. The possible limitations of the extraterritorial jurisdiction are the refusal of destination countries of one's jurisdiction to enter their territories; secondly, extraterritorial jurisdiction is not for all country since it is merely applicable if the original country has a strong regulation to begin with; lastly, it will cost extra effort and expenses both to the government also to the exporters.

## V. Conclusion

A lack of animal law in national, regional and international platforms has become an obstacle to protect farm animals from abusive treatment in trade. However, progress can be

seen from the legal decision by the WTO laws dispute settlement body in EC–Seal Products case, in which the tribunal scrutinized the case on the ground of public moral exception on animal welfare. This case has a great meaning in the development of animal welfare in many ways. Firstly, acknowledgement of animal welfare as a global concern and an international customary norm. Secondly, acknowledgement of animal welfare in international trade organization which for many years has been viewed as the obstacle to the development of animal welfare. Thirdly, the relationship between the WTO laws and general international laws should be integrated with each other.

The relationship between the WTO laws and general international laws is suggested to be integrated. Considering that trade is always related to another sector, it is almost impossible to exclude general international laws. It is because international laws are most of the time detailed and overlapped with each other, therefore, it is almost impossible for a subsystem (e.g. the WTO laws) to be isolated from norms rooted from outside its specific area. EC–Seal Products case is the example that the non-trade factor should be considered, in this case the moral value of EU citizens regarding animal welfare. Therefore, it is suggested that the WTO laws and general international laws should be integrated.

However, the WTO laws main focus is trade. In regard to animal welfare, its scope is limited to the cross-border trade, to its member states, and merely through exception clauses that are provided in the WTO laws. Here, an extraterritorial jurisdiction is suggested as a practical solution to tackle transnational farm animals' welfare issues. A decision from Zuchtvieh–Export case is a perfect example of the EU applying its Regulation I/2005 regarding the protection of animals during transport beyond its territory. As the name suggests, extraterritorial jurisdiction is when a state promotes its sovereign interests abroad. States should still respect each other's policy choices and interests without inquiring into the substance of each other's laws, while exercising extraterritorial jurisdiction.

Here, a state with strong farm animals' policy (Australia) is suggested to extend beyond its territory. It is because Australia is one of the biggest exporters of live animals and also one of very few countries that have a strong regulation of farm animals (AMLI Act, EC Act, and state-based animal welfare regulation). In order to ensure a consistent and effective application of the Acts, extraterritorial jurisdiction is a solution to deal with this issue.

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