Property Law – Part IV

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Research Block Four

The conclusive panel of this two-days conference considered property in an international law perspective. It specifically dealt with the protection of private and public property in international law. Mr. Dayuan Han, Professor of Constitutional Law at Renmin University of China Law School, moderated the panel.

The floor was firstly given to Ms. Emily Crawford, a post-doctoral fellow and associate at the Sydney Centre for International Law. Her presentation focused on the means and methods of protection of movable and immovable property under the law of armed conflict, also known as international humanitarian law (IHL). She provided an overview of the main legal provisions specifically envisaging the protection of private and public property in the context of an armed conflict. These provisions are contained in the Geneva Conventions and their Additional Protocols, considered as the core of IHL. In general terms, these articles prohibit the damage, destruction or misappropriation of property having a public utility, such as an hospital or a school, or a private nature, such as the personal effects of a combatant subject to detention as a prisoner of war.

After establishing the general legal framework affording protection to public and private property during an armed conflict, Dr. Crawford showed what factors may prevent its effectiveness, that is the physical location of the property and the purpose of its use. In the context of an armed conflict, movable and immovable property having civilian status may very well change status and lose their immunity if used for military purposes, hence becoming legitimate targets of warfare for as long as they hold such military status. In such cases, however, protection of civilian population is promoted through precautionary measures providing for distinction, discrimination and proportionality rules and aiming at reestablishing balance between military exigencies and civilian urgency of security.

Dr. Crawford finally called attention to a number of factors that make the protection of civilians' property under international law all the more difficult. Among these: the increase in urbanized armed conflicts, the rise in internal armed conflicts, the increasing recourse to civilians for formerly military or quasi-military roles, and the expansion of opportunities for direct participation of civilians in armed conflicts, such as the democratization of armed technologies. In view of supporting her argument, she made the following example: "if a civilian is carrying an arm, can he become a legitimate target? And his property too?". All these elements directly affect the very nature of armed conflicts in the 21st century and make the distinction between military and civilian installations and public and private property even blurrier. For these reasons, Dr. Crawford concluded that there is more to be done under the umbrella of international law to guarantee effective protection of movable and immovable property in an armed conflict, since "protection of property means protection of people".

The second panelist was Mr. Wenqi Zhu, Professor of International Law at Renmin University of China Law School. Prof. Zhu dealt with protection of private property using the angle of immunity, with particular focus on China. The concept of immunity he referred to is embedded in the well-established principle of jurisdictional immunity of States and their

property under international law. According to this principle, a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State. Notwithstanding the universal recognition of this principle, Prof. Zhu pointed out the existence of a major exception to its application. It is indeed generally recognized nowadays that only the acts performed by a State as a sovereign and not those performed in a private capacity are covered by immunity from the jurisdiction of the courts of another State (*doctrine of restrictive immunity*). In other words, with respect to political activities performed by a State as a sovereign (*acta jure imperii*), the principle of jurisdictional immunity would apply. Whereas, with respect to commercial transactions concluded by a State in its private capacity (*acta jure gestionis*), the principle of jurisdictional immunity would be waived.

Prof. Zhu emphasized, nonetheless, that such exception to the principle of jurisdictional immunity of foreign States has not received universal recognition. It is true that the majority of States in the world embraced the *doctrine of restrictive immunity*, but there are still a few States – and China is among them – not distinguishing political activities from commercial transactions in view of the application of the principle of jurisdictional immunity of States and their property. Indeed, China and a few Latin American countries still embrace the *doctrine of absolute immunity*. This distinction, as pointed out by Prof. Zhu, is particularly important with respect to the protection of private property. Indeed, if a State, for instance, purchases some military equipment from a foreign company, the application of *the doctrine of absolute* or *restrictive immunity* determines whether such State may or may not invoke immunity from the jurisdiction of the courts of that foreign State in a proceeding arising out of that commercial transaction.

But what would be the rationale behind China's minority approach? According to Prof. Zhu, China's position may be justified by the fact that its legislation on immunity is not fully developed yet. As a matter of fact, the Chinese government showed a sign of change by signing the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Properties, which expressly endorsed the *doctrine of restrictive immunity*. However, in his view, until this Convention enters into force, China will stick to its position, being reluctant to be brought before a foreign domestic court.

The consequences of such position are twofold. Although it is true that, following the doctrine of absolute immunity, China enjoys immunity in foreign courts when it acts as a sovereign as well as when it engages in business on the territory of another State, it is nevertheless reciprocally called to grant absolute immunity with respect to both sovereign acts and commercial activities carried out by a foreign State on Chinese territory. And this entails the disadvantage that foreign State-owned enterprises investing in China are entitled to claim immunity from Chinese courts in proceedings arising out of commercial transactions conducted on Chinese territory. Prof. Zhu concluded, therefore, that "China needs legislation on immunity" and that its position may overturn with the entry into force of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Properties.

After a delightful coffee break, the floor was given to Mr. Henry E. Smith, Fessenden Professor of Law and Director of the Project on the Foundations of Private Law at Harvard Law School. His presentation focused on the relation between property law (and in broader terms the rule of law) and equity. Before developing his talk, he clarified that, although the selected topic did not constitute *per se* an international legal topic, he considered that the

discussion about equity and the rule of law might provide interesting insights to international law, since it is often brought up in an international context.

With respect to property and the rule of law, on the one hand, he argued that property has renowned associations with the rule of law and it has certain features that dovetail with the rule of law. Hence, in his view, it was pertinent to consider them together. Concerning equity, on the other hand, he specified that the concept he was referring to was twofold: firstly, equity regarded as a different style of decision-making adopted by Courts of Equity in Anglo-American systems with respect to certain legal areas, like the trusts; and, secondly, equity considered as a certain tradition of decision-making involving more discretion and more attention to particulars, that is "a different kind of justice that sounds more in fairness". But, what relation exists between property (and in broader terms the rule of law) and equity?

According to Prof. Smith, the core of the issue is that equity, in either of these two senses, has always been considered in tension with the formality, predictability and certainty associated both with a certain vision of property and the rule of law, since equity appears to be an exercise of discretion. In a nutshell, this has been the major criticism raised to equity. Prof. Smith's argument, instead, was that this tension between property and the rule of law, on the one hand, and equity, on the other hand, while not non-existent, is overblown. In other words, in his view, it is possible to reconcile equity and the rule of law better than it would look at first. Indeed, equity would have a certain specific function helping to maintain general stable structures within property (and that are called for by the rule of law). Such function would be performed when equity is targeted against opportunism, a notion explained as "near fraud", that is a behavior that is either close to fraud and really deceptive although it does not technically constitute fraud or that is likely to translate into fraud but which is very difficult to prove.

With specific regard to private law and, in particular, property law, Prof. Smith argued that equity might have a "safety role", by preventing people from misusing the law. Indeed, the general terms in which property law and private law are usually framed correspond to individual multifaceted situations only indirectly and in any case not perfectly. Furthermore, these formal general rules may be vulnerable to people who try to "game the system" and gain private benefits by structuring a transaction that meets the criteria of the rule but does not satisfy its purpose and may result in a behavior harming someone else. Prof. Smith concluded, therefore, that equity may step in precisely in these contexts and perform an important role by opposing opportunistic behaviors, defined as behaviors that are undesirable but cannot be cost-effectively captured or detected by explicit *ex ante* rule making. As a result, in his view, property law theories and equity theories may very well converge both at the micro-scale and at the macro-scale.

The conference's final speaker was Mr. Zachary Douglas, Professor of International Law at the Graduate Institute of International and Development Studies (IHEID) of Geneva. His presentation dealt with the different uses of the concept of property by international judges and arbitrators. Prof. Douglas argued that international judges, like their domestic counterparts, use different conceptions of property to justify particular results in expropriation or taking cases. In particular, he specified that the change in the use of the concept of property happens almost on a weekly basis in a very dynamic field of law, that is investment treaty arbitration.

For the purpose of better contextualizing this frequent phenomenon, he provided an overview of what investment agreements are and how they work. He firstly emphasized that investment treaties increased in number in the last decades, amounting nowadays to more than three thousand. Furthermore, he explained the function of these treaties, which allow the investor of one contracting State who has invested in another contracting State to bring proceedings against that Host State of its investment before an international tribunal if that Host State has interfered with its investment in such a way that the investor can say that there has been a breach of one of the substantive obligations set up in the treaty itself. One of these obligations typically is the prohibition against unlawful expropriation to which is attached the obligation to compensate for expropriated property. But what are the different conceptions of property which international arbitrators indiscriminately had recourse to in a single case or judgment?

The first conception is property as thing, also known as the ordinary conception of property translated into the legal relation of a person to a thing; under this conception, the owner enjoys exclusive use of the thing. The second conception, which juxtaposes to the first conception, is a scientific or legal conception of property that considers property as a bundle of rights, that is a complex aggregate of different rights *in personam*. The third conception is property as wealth, that is the idea that property is not an object that you need in some way but repository of value that represents a certain amount of wealth. According to Prof. Douglas, the impact of the use of different conceptions of property may be understood with reference to a well-known case in the investment arbitration jurisprudence, which gave rise to two different decisions: the *Lauder v. Czech Republic* award and *CME v. Czech Republic* award. In his view, this case is interesting because the two separate arbitral tribunals were hearing precisely the same dispute and looking precisely at the same claims on the same facts and nonetheless reached two completely different outcomes. The *Lauder* tribunal dismissed all the claims, whereas the *CME* tribunal upheld them all and condemned the Czech Republic to pay a compensation of more than 300 million USD. But, how was it possible to justify such a different outcome? Prof. Douglas argued that each tribunal adopted an entirely different conception of property – a 300 million USD question in this case! – which played a role in the three different phases of the litigation: jurisdiction, merits and quantum phases.

At the jurisdictional level – when the tribunal tries to see whether it has adjudicative power at all – both tribunals used the first conception of property as a thing and found that they had jurisdiction. At the merits stage there was a divergence. The *Lauder* tribunal used the second conception of property and found that there was no taking because “no stick had been taken out of the bundle of rights”, hence the owner still had his investment. The *CME* tribunal, instead, by using the third conception of property as repository of value, found that there was an expropriation, because Mr. Lauder lost his exclusive right to provide his service. However, at the quantum stage – where the tribunal quantifies the damages – the *CME* tribunal contradicted its reliance on property as wealth by asking for restitution in kind, thus restoring the concept of property as thing.

In the light of this talking example, Prof. Douglas emphasized the legitimacy for international arbitrators to use different conceptions of property. Even in the context of a single case, tribunals may need to have recourse to different conceptions of property for each type of action or claim. However, he suggested that this cannot be a strategic choice; it cannot be up to the tribunal to simply select the conception of property that fits best with the particular finding that it wants to reach on liability. In other words it has to be a legal question, from which follows that if the investor is advancing a particular conception of property within his investment, then he is limited to a particular claim for a particular type of loss. Therefore, in

his view, a much tighter relationship between the institution of property – which is fundamental to the investment treaty arbitration area of law – and the different liability rules as part of the investment treaty has to be established.

Overall, what I personally found very interesting in this conclusive panel was the opportunity to look at the protection afforded by international law to public and private property under four completely different angles, that is under international humanitarian law, law of State immunity, equity and the rule of law, and investment law perspectives. Moreover, the fact that the panelists were scholars as well as practitioners coming from four distinct legal traditions allowed a rich and cross-cultural exchange of ideas.

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