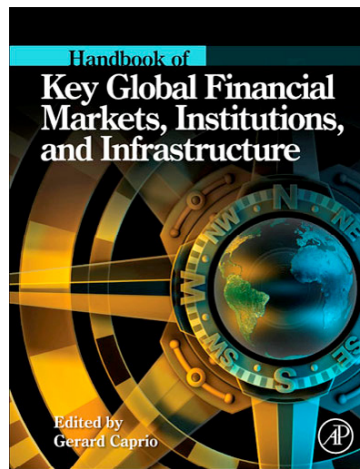


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# Property Rights in an Era of Global Finance

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## INTRODUCTION

From time immemorial, property rights have been a source of enormous legal, economic, and political interest. In *Commentaries on the Laws of England*, Blackstone (1765) famously stated that “there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.” Indeed, the nature and scope of property rights is a grand theme that has traversed historical eras, cultures, and borders. The modern period of economic globalization seems only to have intensified this trend.

In his world famous yet often contested book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, economist De Soto (2000) argues that the lack of sufficient formalization of property rights among many developing and transitional economies leads to a chronic problem of ‘dead capital’ that hinders the economic development of these societies. Following up on this theory, since 2007, the Property Rights Alliance, an international venture of economic policy and research NGOs, has been publishing the annual *International Property Rights Index*, which ranks countries based on a list of variables under the headings of ‘Legal and Political Environment,’ ‘Physical Property Rights,’ and ‘Intellectual Property Rights.’

In his foreword to the International Property Rights Index (Property Rights Alliance, 2010), De Soto contends that “each year it becomes more apparent that economic well-being is inextricably linked to the protection of legal property rights.” More broadly, contemporary economists, especially those holding a new institutional approach to development economics, have been engaged in investigating the effect of property rights on economic development. In so doing, such studies no longer simply assume a world with perfect property rights as a background for market economies, but rather view the creation and enforcement of property rights as a challenging and dynamic endeavor. Most prominently, this new economic viewpoint emphasizes the central role that *institutions*, especially state bodies – such as legislatures, administrative agencies, and courts – play in ensuring well-defined and enforceable property rights (Arruñada, 2003; Besley and Ghatak, 2009).

However, this growing attention to the construction of property rights and respective institutions in a globalized era has implications that extend beyond policy decisions made by developed countries or by global bodies such as the World Bank or the International Monetary Fund as to how to effectively allocate funds and organizational efforts to the developing world. In an era of globalization, nearly every individual, let alone those

who regularly engage in global finance, has a direct stake in the way that different property systems operate as well as in the complex relationships that exist between domestic and supranational/intergovernmental property institutions. In a global economy, in which capital, goods, services, and persons constantly move across borders, property systems are being put under a growing pressure to accommodate the forces of financial globalization. Even the most 'parochial' fields, such as land law, must now confront the massive globalization of real estate investments.

This chapter sets out to study the unique challenges of property rights in an era of global finance and is structured as follows. The section 'The Nature of Property Rights' defines the fundamental features of property, trying to bridge the gap that often exists between lawyers and economists in conceptualizing this term. The section 'The Local Origins of Property' explains the local origins of property laws and the ways in which their traditional construct is being increasingly challenged by the forces of globalization. The section 'Supranational Property Instruments: A General Survey' surveys the prominent institutions and mechanisms that currently address the cross-border effects of property rights through supranational norm-making or other types of coordination among different national property systems. The section 'The Challenge of Globalization: Resource-Specific Comments' moves to a more resource-specific analysis of the challenges of property rules in a globalized era. It assesses how the ordering of property rights in land, chattels, intangibles, and intellectual property can be better adapted to a rapidly changing global financial environment.

## THE NATURE OF PROPERTY RIGHTS

The question as to what 'property' is, and derivative queries such as what, if at all, are the fundamental features of 'ownership,' is a source of an ongoing debate not only among different academic disciplines, but also within each such field. The complexity of the institution of property is also reflected in the way in which state institutions entrusted with the role of determining what the law is – especially legislatures and courts – often struggle to come up with a clear conceptualization of such key terms. It should thus be realized at the outset that the task of establishing and enforcing 'well-defined' property rights is, and will continue to be, a major challenge even in the most developed of legal systems.

Without going into the many disputes about the *contents* of property norms (e.g., does private ownership entail an inherent substantive core of a right to exclude nonowners?), the chapter suggests that property, as a legal institution, possesses certain *structural* attributes

that attest to its distinctive foundational features and respective challenges.

Property law sets out the ways in which society allocates, governs, and enforces rights and duties in resources and in the human relationships around them. Property entitlements and obligations regarding both specific assets and more generally categories of resources (land, chattels, intangibles, intellectual property, etc.) regularly implicate numerous parties not only abstractly but also in social and economic practice. Unlike the case of contract law, affected parties to property rights do not necessarily have privity or voluntary relationships among them and may often be strangers that find themselves *ex post facto* entangled in a clash of competing claims regarding the same asset. Beyond the fact that such parties are usually not enumerated and identifiable to one another in advance, they often turn out to be much more heterogeneous in their epistemological, cultural, and social attributes, as compared to contractual counterparts. All of this means that for property law to function properly in creating, allocating, and enforcing such *in rem* ('toward the asset') rights, it must facilitate broad-based social understanding about the legal regime and the way in which property rights are structured.

Moreover, property rights reveal their true complexity not only in the allegedly straightforward owner's right of exclusion 'good against the world' (to the extent that the legal regime indeed validates such a right), but rather in cases in which numerous actors affected by the property regime diverge from one another in the particular 'bundle of rights' they hold with respect to the resource. For example, in the context of security interests, one can think about the way in which a property regime entangles numerous players: a mortgagee, mortgagors (both first and second), holders of mortgage-backed financial instruments, future lenders and assignees, and so forth. Likewise, the nature of property rights is put to a particularly challenging test in scenarios of a good faith purchaser of voidable or void title; conflicting transactions; and other types of 'legal triangles' where, due to the wrongdoing of an intermediary 'villain,' parties that are not in contractual privity find themselves asserting simultaneous claims to the same asset, and property law is required to *prioritize* the claims (Mautner, 1991). Bankruptcy, which will be discussed in several places further along in the chapter, is yet another priority-setting legal scenario in which property rights reveal their distinctive nature. Roughly speaking, in bankruptcy and similar legal proceedings, rights recognized as 'property' or as 'secured' have a categorical preference over mere contractual or obligatory rights, with a further internal ranking occurring within each one of the different categories. Therefore, in all of the above portrayed scenarios, the legal institution of property is typified by ranking different rights and interests

to the asset, and determining the ways in which superior rights will be enforced *in rem vis-à-vis* inferior rights or claims, as well as against the general public.

There are other qualitative differences between property and other fields of law that regulate relationships among persons. For example, parties who are displeased with the public laws of contracts, typically determined by legislatures or courts, can more easily *opt out* of this regime by resorting to private ordering mechanisms. This is not the case in the property context. To the extent that the law sets up certain requirements for a party to qualify as a 'good faith purchaser' or to register a mortgage so that it would have a binding effect on third parties, legal actors are much more constrained in their ability to privately circumvent such norms. This is in fact one of the underlying reasons for the *numerus clausus* principle, according to which only limited types of property rights (such as ownership, leasehold, mortgage, or certain kinds of servitudes) are recognized as such by the legal system. This structural principle thus prevents parties from exercising their nearly unbound transactional freedom to shape their legal relationships, if they wish their rights to have a binding effect on third parties as well (Merrill and Smith, 2000). As is shown below, this difference has especially important implications for cross-border dealings.

Yet another distinctive facet of property rights concerns the complex public/private interface of property law. The challenge faced by legal systems in designing property regimes is one of *simultaneously* delineating the borders of permissible versus impermissible government intervention into property rights, while at the same time defining the scope and nature of property rights *vis-à-vis* the entire spectrum of third parties. Accordingly, legal rules controlling governmental interventions into private property – as are set forth in constitutions, statutes, and the institution of judicial review – are not and cannot be hermetically detached from the private law of property. The interface between the private and public realms in property is extremely intricate and defiant of clear demarcation, and there is no *a priori* justification to argue that the law of governmental intervention into property should necessarily aspire for harmony with the law governing property relations among private parties in every doctrinal issue. Nevertheless, it would be safe to conclude that the law on takings and on other types of regulatory interventions does bear on the way in which different actors broadly understand property entitlements and obligations both in the private realm and in the public one. Indeed, the question of the public/private interface in property, and especially whether constitutional property rights also apply, directly or indirectly, to relationships among private parties, is a source of major controversy in many legal systems (Alexander, 2006).

This dual nature of property has particularly important implications for the protection of property rights in a globalized era, in which parties may be subjected to some extent to the powers of foreign sovereigns, while also exposed to *in rem* rights and duties of persons across borders. Accordingly, the section '[Supranational Property Instruments: A General Survey](#)' discusses supranational legal instruments such as the European Convention of Human Rights or the Charter of Fundamental Rights of the European Union, which, although aimed chiefly at protecting the property rights of individuals *vis-à-vis* member states, might also implicate private law relationships.

As a final note in this section, one should consider potential different perspectives of economists versus lawyers regarding the nature of property rights. One such issue concerns the separation between the *validation* of a legal right and the way it is *enforced* when the right is being breached by another person. Economists often assume that once a property right is defined and allocated to a certain party, it cannot be infringed, at least in the private realm, unless the right-holder consents to it (Barzel, 1997). In legal doctrine, the right/enforcement separation is more complex. Calabresi and Melamed (1972) portray two different types of protections against an infringement. One is entitled a 'property rule,' by which an infringing activity, such as a pollution causing a nuisance, would be legally forbidden by an injunction unless the right-holder agrees otherwise. The second is a 'liability rule' protection, by which the affected right-holder would be entitled to monetary compensation or to some other remedy determined by the court, but would not be entitled to the stronger injunctive relief. This is not merely theory: in practice, in many nuisance cases, as well as in other types of property disputes, the remedy is restricted to compensation, and there may even be instances in which the owner would receive no remedy, based on doctrines such as 'balance of interests.' But – and this is a crucial point that may be confusing because of Calabresi and Melamed's choice of terminology – the fact that a right-holder is not always protected by the strongest possible remedy *does not* mean that he is not considered as holding a property right (here, the right of ownership), such right being validated *in rem* as part of his legal entitlements.

## THE LOCAL ORIGINS OF PROPERTY

Every legal system is distinctive in the way it creates order and promulgates binding rules of conduct in society. Such distinctiveness reflects differences of history, culture, values, economic conditions, demography, and so forth. Accordingly, globalization places pressure on domestic legal systems in every area of human

activity on which it has a substantial bearing. What, if at all, makes property rights unique in this respect?

Here, the *in rem* nature of property rights, alongside the level of homogeneity or heterogeneity among the affected parties, may serve as a starting point for explaining both the origins of localism in property law and the way in which property regimes can deal with a world that has a globalized economy but no unified political sovereignty.

In this context, it is essential to realize that the different types of resources that are the objects of property rights tend to fare differently along the local–global spectrum. The legal regimes for some types of resources have traditionally been more domestic not only as a matter of historical evolution but also as a normative decree; others have looked outside national borders from the outset, even if not arriving at actual harmonization.

When one considers property rights in land, it seems safe to say that the legal control of land and the sociopolitical construction of societies and nations have gone hand in hand throughout history. The way in which different societies have shaped the allocation, control, and enforcement of land entitlements was, and still is, tightly intertwined with the political, religious, social, and economic structure of these political communities.

One of the most vivid illustrations of this interconnectivity is the evolution of the land tenure system in England. As Pollock and Maitland (1898) suggest in their *History of English Law*: “[I]n so far as feudalism is mere property law, England is of all countries the most perfectly feudalized.” Indeed, one cannot truly understand the way in which land law has evolved in England since the Norman Conquest without coming to terms with the sociopolitical developments in that country from that time onward (Lehavi, 2010).

But one need not delve too deeply into the past to identify the local nature of land law. Land reforms in post-Soviet countries, post-apartheid South Africa, or contemporary Venezuela are just a few examples illustrating the persistent ties between land law and nationhood.

Other types of assets have been more ambiguous as far as ‘inherent localism’ is concerned. Let us consider merchantable chattels – goods. On the one hand, the property law of chattels has developed differently in various legal systems, with distinctions existing not only between the two major legal families, the common law and the civil law, but also among systems within each such family. At the same time, merchants have engaged in cross-border transactions from the beginning of civilization, and were always well aware that territorial rules could impede the flow of commerce.

During the Middle Ages, a body of norms known as the *lex mercatoria* evolved in Europe. It was a grassroots form of private ordering that connected merchants from

different territories, and aimed at enabling traders to follow common rules and resolve disputes speedily. These norms were practiced in various meeting places, typically in trade fairs across the continent. The fairs also became places for dispute resolution, with the merchants setting up and administering such tribunals (Braithwaite and Drahos, 2000).

The scope of merchant norms exceeded the contractual aspects of the transactions. In fact, the *lex mercatoria* created prominent legal and financial instruments of personal property that are still in usage nowadays. Although instruments such as letters of credits had existed in earlier periods, an innovation of the merchant law era was the introduction of the idea of a documentary transfer of an intangible – the right to a debt – and even more importantly, the evolution of the practice by which a trader who purchased the negotiable instrument (e.g., a bill of exchange) in good faith did so free of any prior interests of third parties in it. The relative homogeneity of traders’ commercial interests and social understandings, and the fact that the norms – including their property aspects – had practical influence only within this professional community, allowed merchants to effectively handle their affairs by efficient organizational mechanisms.

Such cross-border conformity and efficiency gradually declined with the taking over of commercial law by national courts and legislatures. But modern forces of globalization once again put growing pressures on countries and nongovernmental professional organizations to match current economic reality with an appropriate legal ordering for both chattels and intangible instruments related to commerce and trade.

In response, in the late nineteenth century, international business organizations and official supranational bodies started making efforts to increase the level and scope of coordination among various legal systems. The International Chamber of Commerce, founded in Paris in 1919 and establishing the International Court of Arbitration in 1923, became instrumental both in promulgating professional norms (such as the INCOTERMS that define basic trade terms) and in resolving disputes through arbitration.

UNIDROIT, the International Institute for the Unification of Private Law, established in 1926 by the League of Nations but thereafter maintaining an independent status as a professional forum, has also worked to promote general principles for cross-border dealings. In 1966, the United Nations established UNCITRAL, the UN Commission on International Trade Law. UNCITRAL has been the driving force behind several international conventions. Probably the most notable is the 1980 Vienna Convention on the International Sale of Goods (CISG). But with respect to all these international organizations, forums, and legal instruments, it is important to note that

they have largely dealt with the *contractual* aspects of international trade and commerce, and especially limited to professional traders. The CISG convention, for example, does not deal with the property aspects of cross-border sales: it does not define the conditions under which title to the good is considered as transferred so that the purchaser qualifies as the 'owner.' Also, CISG has not created a new legal regime for security interests, nor has it defined the status of bona fide purchasers, or implicated in any way national bankruptcy priority setting.

Once again, it is understandable why it has been easier, with respect to items of commerce, to regulate contractual cross-border relations among merchants. This is especially so since such parties are often able to write up the contract in advance and to resolve disputes that may arise afterward by deviating from domestic laws and by approaching international arbitration tribunals. But the ordering of property rights with *in rem* applicability to third parties continues to be a major challenge for the law, even in an era of globalizing goods and related intangibles. Private international arbitration would be of little help in this sense, if the tribunal is not formally viewed by domestic legal systems as authorized to 'make law' that goes beyond the rights of the parties to the arbitration.

Intellectual property is located at yet another locus along the local–global continuum. The chief types of intellectual property rights, copyright, patents, industrial designs, and trademarks, have been a source of international concern from early in the modern era. International cooperation on intellectual property rights was initially undertaken through bilateral treaties, but soon matured into international conventions. The 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works have both been updated and are still in force, both currently being managed by the World Intellectual Property Organization, a UN agency.

But it was probably only in the 1990s that the international status of intellectual property became much more prominent. In a move led by Western countries, all countries who wished to join the General Agreement on Trade and Tariffs (GATT) and to become members of the World Trade Organization (WTO) had to also sign an annex to GATT, viz., the 1994 Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. TRIPS requires member states not only to bring their domestic legislation up to the minimum standards of intellectual property protection included in this and previous international conventions (such as the Paris and Berne conventions), but it also subjects states to the much more effective dispute-settlement system of the WTO.

This recent turn of events should not be misunderstood, however, to mean that intellectual property is

an 'international' branch of property law. First, from a purely legal viewpoint, the registration of copyrights, patents, designs, and trademarks continues to be made on a state-by-state basis. There is no global registry of intellectual property rights, and, accordingly, no universal protection of intellectual property rights unless the right in question is recognized by the country under whose laws a certain dispute is decided. Second, from a normative perspective, there is a genuine debate about the scope and content of protection of intellectual property. The massive infringement of these property rights in countries such as China is also the result of true cultural and ideological divides.

In this context, and as a kind of interim summation for the complicated local–global interplay in property law, one may consider the 2007 Property Rights Law of the People's Republic of China. Although the law was influenced in its drafting by civil law codes of other countries, most prominently Germany and Japan, and although it was celebrated in the media as a 'dramatic' event, a close look at China's property law reveals that it did not simply turn its back on its own ideological, cultural, or legal past. Thus, for example, alongside the protection of individual property rights in Article 4, by which such rights "shall not be infringed by any institute or individuals," the statute simultaneously includes the same protection for state and collective property rights. The law maintains a division of labor between these categories of ownership so as to implement 'the socialist market economy, ensuring equal legal status and right for development of all market players.' Articles 47 and 58 reiterate the principle already embedded in China's constitution by which all lands in China 'are owned by the State' with some lands owned by collectives, so that any individual rights in land are basically only usufructuary ones. Therefore, as the Chinese example shows, the concept of property, as a field of law which allocates rights and duties to society's scarce resources, continues to maintain its local grounding.

## **SUPRANATIONAL PROPERTY INSTRUMENTS: A GENERAL SURVEY**

Having analyzed the distinctive features of property and its local origins, this section moves to study current supranational and intergovernmental property instruments. While the section '[The Local Origins of Property](#)' briefly touched on a few such instruments in the context of goods or intellectual property, this section looks at more general mechanisms, focusing attention on foreign direct investment (FDI) as both affecting and being affected by cross-border property norms.

Consider, first, multinational institutions and entities that address property rights as one of the topics that are

regulated on the supranational level and thus have a binding effect, at least to some extent, on member states and their domestic legal systems.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, which was enacted by the Council of Europe and came into force in 1954, includes the First Protocol that was ratified by 45 Council members. Article 1 of the Protocol, entitled 'Protection of property,' states in the first paragraph as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Since under the Convention any person may file a claim also against his own country, the European Court of Human Rights (ECHR) has heard to date thousands of cases dealing with Article 1. In addition, many countries have formally internalized the First Protocol's provisions in their own laws, such as in Britain's Human Rights Act of 1998, so that domestic courts also constantly engage in Article 1's analysis of property rights.

Without going into a detailed analysis of Article 1's jurisprudence in the ECHR, it is important to note that it is somewhat difficult to typify the overarching supranational philosophy of the court, that is, whether the court would generally defer to domestic property law provided that the respondent country abides by general 'rule of law' principles, or whether the court looks to create supranational unified property doctrines.

On the one hand, the Court has not hesitated to intervene in domestic practices in matters concerning due process, such as outright denial or excessive delays in payment of compensation for full-scale expropriation; and, more substantially, by reading into Article 1 principles of 'fair balance' and 'proportionality' regarding both full-scale deprivations and regulation of property. On the other hand, the ECHR has been often ambiguous and cautious about intervening in specific doctrines. In these cases, the court viewed the 'fair balance' and 'proportionality' tests as general standards that must give substantial leeway to domestic rulemaking. This is especially true in matters involving complex legal, social, and political traditions, such as certain land law doctrines.

Within the European Union, which currently comprises of 27 member states, one may identify a number of milestones regarding the 'Europeization' of the market and its consequent interplay with the legal institution of property, starting with the original 1957 Treaty of Rome establishing the European Economic Community and up to now.

Two of these landmarks are briefly mentioned here. First is the Treaty of the European Union, which was signed in Maastricht in 1992 and took effect in 1993. The Maastricht Treaty dramatically expanded the scope and nature of the reciprocal obligations among the EU countries. Entrenching and further expanding the 'Four Freedoms' (free movement of goods, services, capital, and people), the Treaty prohibited all substantial restrictions on capital movements. This provision was soon interpreted by the European Court of Justice (ECJ) to apply not only to cross-border financial investments in companies, businesses, shares, etc., but also to matters such as the acquisition of land.

In the landmark *Konle v. Austria* case (2000), the ECJ invalidated a legislative provision by which foreigners wishing to purchase land in the Tyrol region had to obtain a special administrative authorization. The ECJ ruled that restrictions on cross-border land acquisition generally amount to hindrance of free movement of capital under the Maastricht Treaty. As for the specific Austrian legislation, the Court ruled that whereas 'the aims of securing land management and environmental protection are imperative requirements in the general interest,' national legislation based on such aims must be applied in a nondiscriminatory manner. Further, any such restrictions must also meet the test of proportionality, meaning that these would be valid only when the regulatory aims are imperative and 'cannot be pursued by measures that are less restrictive.'

The *Konle* decision thus potentially entails major consequences for domestic regulation of property. This is so because *any restriction*, even when applied equally to citizens and noncitizens alike, must now be tested for 'proportionality.' On the other hand, it should be noted that the ECJ grants member states a considerable 'margin of appreciation' in reviewing the proportionality of their domestic regulation, and that more generally, Article 345 of the EU Treaty, in its current consolidated version, provides that "[T]he treaties shall in no way prejudice the rules in Member States governing the system of property ownership." This, in addition to a number of specific provisions in the EU Treaty that empower member states to regulate certain aspects of the freedom of movement.

Secondly, on 1 December 2009, following the ratification of the EU Lisbon Treaty, a 'right to property' clause was explicitly introduced into EU treaty law, in the Charter of Fundamental Rights of the European Union. Article 17 of the Charter reads as follows:

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possession. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair

compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

## 2. Intellectual property shall be protected.

Because the Charter went into effect only recently (although the ECJ in the past had already read principles from the European Convention of Human Rights into its own jurisprudence), it is still too early to tell whether the adoption of the Charter will exacerbate a process of creating a substantial layer of EU property law. But since the EU – unlike the council of Europe – is a thick supranational political body, one that constantly engages in EU rulemaking through regulations, directives, and other types of norms, it is more likely that the pressure to level up domestic property norms to the overarching economic goals of the European Union would become more substantial over time.

In addition to supranational organs such as the European Union, many of the efforts to deal with the legal ramifications of a global economy have been accomplished through bilateral treaties. The following analysis focuses on Bilateral Investment Treaties (BITs), which set up legal rights and duties pertaining to the flow of FDI.

Without delving into the historical evolution of BITs, it is uncontested that this cross-border mechanism has become increasingly dominant in the field of international investment. There are currently over 2700 BITs worldwide, such treaties being signed not only between developed and developing/transitional economies, but also between dyads of developed countries or of transitional/developing countries. Moreover, since contrary to the past, capital now increasingly flows from east to west and from south to north (one may consider sovereign wealth funds from China, India, Russia, or the Gulf Emirates), BITs are no longer solely a one-way street for the protection of the property rights of the West.

BITs have a fairly standard structure. They typically include provisions on the scope and definition of foreign investment; national and most-favored-nation treatment; provisions on 'fair and equitable treatment'; guarantees and compensation in respect of expropriation and compensation for war and civil disturbances; guarantees of free transfer of funds and repatriation of capital and profits; subrogation on insurance claims; and dispute settlement, both state to state and investor to state. Such resolution of disputes is regularly conducted by independent international arbitration, most often by the World Bank's International Centre for Settlement of Investment Disputes.

The term 'investment' is typically defined in BITs as comprising a list of rights in *assets* – such assets effectively encompassing the entire range of objects of property rights: immovable, movable, and intangible property; intellectual property; shares, stocks, futures,

options, and other derivatives; licenses and permits; related property rights such as leases, mortgages, liens, and pledges; and in some cases even claims to debts. Investors seek to have these rights to assets protected against all types of third parties, including domestic private actors that have a conflicting claim to such assets. In this sense, investors may be said to aspire to protection by some sort of property *lex specialis* resulting from the BIT provisions, which would bind not only the host government, but also other private actors with rival contentions to rights in these assets.

These features make BITs a more complicated mechanism than what they might seem to be at first glance (Lehavi and Licht, 2011). When an arbitral tribunal is required to give content to a BIT term such as 'fair and equitable treatment' – a mechanism explicitly designed to create an independent international standard detached from domestic law and the mere application of a 'national treatment' obligation – it must keep in mind the overall impact that such a resolution might have on the entire domestic property system of the relevant host country, especially because of the *in rem* nature of property rights. The cross-border heterogeneity that is often involved in property law includes issues such as cultural differences about the very concept of property, heterogeneity among various types of affected actors, and differences among various types of resources covered by the BIT (e.g., can one similarly promulgate and evaluate norms regarding land, intellectual property, or capital markets?)

Moreover, because countries are typically signatories to dozens of BITs (Germany, e.g., is party to over 130 BITs), and since property rights in a resource within a certain host country would apply *in rem* to all affected stakeholders, BITs – which are intuitively considered a harmonization mechanism – may actually lead to an *over-fragmentation* of norms within the host country. This makes BITs far from being a simple and straightforward mechanism for facilitating the cross-border protection of property rights.

Finally, BITs exemplify a broader dilemma about the resolution of property conflicts in a globalized era. In the past, the dominant approach of private international law (also known as the field of 'conflict of laws'), was that for each dispute involving different parties, the law can objectively identify a certain domestic legal system that applies to this scenario, being the *lex situs* (the law of the seat) in proprietary issues. In contrast, the move toward international arbitration and the consequent calls to adopt a 'new *lex mercatoria*' (Dalhuisen, 2007) suggest an alternative legal route. Although this dilemma typifies other legal fields such as contracts, the *in rem* nature of property rights and the difficulty to opt out of the public legal regime make this quandary particularly challenging for property rights in an era of financial globalization.



## THE CHALLENGE OF GLOBALIZATION: RESOURCE-SPECIFIC COMMENTS

This final section briefly addresses a few topics regarding the cross-border protection of property rights in land, chattels, intangibles, and intellectual property. Due to brevity of space, and since some of the discussion on these various resources has been developed in previous sections, the following paragraphs will only highlight these dominant themes.

### Land

As the previous sections illustrated, land is closely intertwined – probably more than any other resource – with local politics, culture, and values. Creating legal order in this scarce and finite resource is of paramount importance to national governments. Moreover, in many countries, rights to land often involve reparations for historical injustices and informal claims made especially by formerly or currently disenfranchised groups. One may consider indigenous populations in the United States, Canada, Australia, New Zealand, Latin America, etc. On the other hand, cross-border real estate investment has been increasingly on the rise, this trend often creating a major boost for local economies. Moreover, the inclusion of property clauses in bilateral and supranational legal instruments almost always invokes this resource, which many around the world continue to view as the paradigm of property rights. Walking the fine line between the local nature of land laws and the explosion of real estate foreign investment will continue to pose a major challenge for legal systems.

### Chattels

Chattels, and especially movable articles of commerce, pose different types of challenges in the current global arena. Whereas various types of goods have always been traded across borders, the international landscape of property rights in movables differs not only quantitatively but also qualitatively in the global era. This is so because of the ever-increasing development of sophisticated financial products, which result from *contractual* innovation among professionals but that may also have *proprietary* effects, especially in bankruptcy or in other settings of contests over assets among distant stakeholders.

Consider, for this purpose, modern financial sales such as financial leasing, conditional sales that include a reservation of title clause, sale of future assets (whether such assets already exist but are not yet owned by the seller, or do not yet exist at the time of sale), 'bulk' transfers; various kinds of trusts, and modern security interests such as floating charges or other forms involving the pledging of future assets by the debtor.

These innovative contractual structures cause difficult proprietary problems even in domestic disputes, when a bankruptcy court has to decide, for example, who 'owns' a certain asset or whether the contractual pledge has materialized into a security with an *in rem* effect so as to trump claims by other creditors. When these disputes involve parties from different countries – and this is constantly the case in the era of globalization – the legal ordering becomes extremely difficult. Different legal systems have distinctive rules on the form and manner in which title is transferred or on when a pledge on an asset is considered as having proprietary force (e.g., is a creditor required to register the right, or to physically or constructively possess the chattels, or at least to publicize the pledge in some manner?). Bankruptcy codes are also often highly diverse among different countries. Some legal systems, mostly common law ones, are more willing to recognize innovative forms of legal interests that have a proprietary effect, by employing mechanisms such as trusts. Other legal systems remain more loyal to the *numerus clausus* principle.

Without going into a detailed analysis of each one of these substantive issues, a major dilemma that arises has to do with the overall strategy for handling such cross-border complexities, especially if we assume that legal proceedings such as bankruptcy will continue to be governed by national courts. One possibility would be to stick to the conventional 'choice of law' approach while trying to accommodate new scenarios. Another strategy would be to try and create some type of supranational legal mechanisms. European countries, for example, have been discussing for years the potential harmonization of security rights in movables (Drobnig et al., 2006). Others have gone further in calling to apply a supranational distinctive set of norms – a new *lex mercatoria* – for professional parties, and to set up a supranational commercial tribunal (Dalhuisen, 2007).

Regardless of such different perspectives, the essence of the problem can best be formulated as follows: How can legal institutions best accommodate the rapid quantitative and qualitative changes in the traffic and finance of cross-border commerce in movables, while adhering to the broad principles of property, so that such new legal mechanisms could have *in rem* applicability without inadequately depriving third parties' interests?

### Intangibles

Property rights to intangible assets are not a novelty. As described in the section 'The Local Origins of Property,' merchant law has long ago introduced the idea of a documentary transfer of an intangible – the right to a debt – and moreover, developed the legal

concept by which a party who purchased or acquired the negotiable instrument, did so free of any prior interests of other parties in it. The bill of exchange (in which a creditor instructs a debtor to pay a certain sum to a specific payee or to the bearer of the note) and the promissory note (in which a debtor promises to pay a certain sum to someone named in the note or to the order of the bearer) were traditionally two prominent forms of negotiable instruments. As with other such instruments, they acquired a status *independently* of the original transaction, so that the bearer of the note had a direct claim for payment regardless of any contractual claims or other interests involving the original parties or other previous stakeholders. Thus, this type of right to a debt acquired the status of a property right, one with an *in rem* effect. Moreover, whereas the right itself was intangible, the fact that it was grounded in a physical document in which one could have possession, made it easier for legal systems to conceptualize and validate the claim as a distinctive right with a proprietary effect.

Contemporary economy has seen the gradual decline of traditional negotiable instruments, and their replacement by modern financial instruments, many of which are based on a paperless transfer. This poses a challenge for legal systems in trying to distinguish between mere contractual or obligatory rights to debts or receivables, and between distinctive rights that acquire an independent proprietary status and would accordingly gain priority in legal settings such as bankruptcy or conflicting transactions.

While one can definitely not enumerate within the scope of this chapter a complete list of such financial instruments, one could mention instruments such as a *swap* (a contract in which parties agree to exchange periodic interest payments or liabilities on outstanding debts), a repurchase agreement or *repo* (where a borrower sells securities to a lender and agrees to repurchase the shares at a later date for a higher price), or *netting* (a process in which a national securities clearing corporation compares and matches all purchase and sale orders for a given security made by the clients of a brokerage firm). In all of these cases, similar questions arise as to the preconditions and timing of title transfers (so that when an event such as bankruptcy occurs the court could say which party 'owns' the right to the intangible stream of benefits); the ability to distinguish the intangible 'asset' from other rights and liabilities; or the conditions under which one could pledge the right to such intangible assets, including future or contingent ones.

The same dilemmas apply more broadly to the modern sale and purchase of securities in stock exchange markets, especially when transactions are made in the *book-entry system*, in which the issuer of the securities places them with a depository who becomes the legal

owner of all these securities, with investors holding security entitlements against these depositories, expressed in securities accounts, and with other intermediaries holding their own rights based on a system of tiers of ownership rights (Dalhuisen, 2007).

As discussed, in a world of global financial markets, the proprietary effects of these otherwise complex-but-functioning contractual arrangements are put to the test when a national forum such a bankruptcy court has to decide on questions of 'ownership' or on other types of legal concepts in order to prioritize competing claims of distant parties.

## Intellectual Property

As the section 'The Local Origins of Property' illustrates, intellectual property law has long been familiar with cross-border issues. With practically no international customary law rules in this field, cross-border aspects of intellectual property have been mainly the realm of treaty law through both international agreements such as TRIPS and bilateral arrangements such as BITs or free trade agreements that include provisions on intellectual property that go beyond the minimum standards of TRIPS (thus often coined 'TRIPS-plus' provisions). In addition, some Western countries such as the United States have also resorted to unilateral mechanisms. Section 301 of the US Trade Act authorizes the Office of the US Trade Representative to investigate into 'unfair' trade practices, including in the field of intellectual property, and to impose retaliatory sanctions against a country in breach.

This recent practice also sheds light on the broad gap that often exists between the international obligations of a certain country to protect intellectual property and the lack of effective enforcement of these norms. The lines between an overt or covert governmental policy not to abide fully by its obligations and a genuine problem of enforcing such norms against its citizens may often be blurred (China being a case of particular interest).

Another potential tension arises in regards to the ability of countries to exercise their sovereign powers, and to limit the scope of internationally protected intellectual property when a pressing domestic need makes this vital. The most prominent example is probably that of AIDS pharmaceutical products. Following initiatives by countries such as South Africa or Brazil to grant compulsory licenses to local producers to manufacture otherwise-protected drugs, and consequent suits by foreign patent-owner companies, the WTO issued in 2003 the *Doha Declaration* and amended the TRIPS agreement so as to allow countries in cases of "a national emergency or other circumstances of extreme urgency ..." to issue compulsory licenses against payment of compensation to the owner.

As mentioned briefly in the section ‘[The Local Origins of Property](#),’ as of today, there is no universal registration of any one of the major intellectual property rights: copyright, patents, industrial designs, and trademarks. Regionalism, however, may fare better. The EU has a unified registration for trademarks and designs, managed by the Trade Marks and Design Registration Office of the European Union (OHIM), as well as for geographical indications and domain names.

In view of the above, and to aid intellectual property developers to simultaneously register their rights in various countries outside of specific blocs such as the EU, the international Patent Cooperation Treaty facilitates a streamlined process, including an ‘international phase’ and a ‘national phase,’ that allows applicants to quite effectively register their rights subsequently in the various member states ([Dinwoodie et al., 2008](#)). It seems, therefore, that out of all of the chief objects of property rights, the field of intellectual property is currently equipped with the most effective cross-border institutions and mechanisms to address the era of financial globalization.

## CONCLUSION

Property is a complex legal institution. Even if one accepts De Soto’s basic argument that the formalization of property rights is essential for the development of economies across the world, it should be clear that the ordering of property cannot be achieved simply by a legal enforcement of transactions and the setting up of national registries. Property law, which designs rights that apply *in rem*, must be able to coherently address and guide heterogeneous and distant parties throughout society, and should accordingly attend to complex considerations of economics, culture, and politics. The globalization of property rights proves to be an even more challenging task. Globalization does not and should not necessarily mean sweeping harmonization of property rights. At the same time, in an era of economic and financial

globalization, property rights must be made current, both institutionally and substantively, so as to properly achieve a balance between localism and universalism.

## References

- Alexander, G.S., 2006. *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*. University of Chicago Press, Chicago.
- Arruñada, B., 2003. Property enforcement as organized consent. *Journal of Law, Economics, and Organization* 19, 401–444.
- Barzel, Y., 1997. *Economic Analysis of Property Rights*, second ed. Cambridge University Press, Cambridge.
- Besley, T., Ghatak, M., 2009. Property rights and economic development. LSE STICERD Research Paper No. EOPP 006. Available from <http://sticerd.lse.ac.uk/dps/eopp006.pdf>.
- Blackstone, W., 1765. *Commentaries on the Laws of England*, vol. 2. University of Chicago Press, Chicago 1979.
- Braithwaite, J., Drahos, P., 2000. *Global Business Regulation*. Cambridge University Press, Cambridge.
- Calabresi, G., Melamed, A.G., 1972. Property rules, liability rules, and inalienability: one view of the cathedral. *Harvard Law Review* 85, 1089–1128.
- Dalhuisen, J., 2007. *Dalhuisen on International Commercial, Financial, and Trade Law*, third ed. Hart Publishing, Oxford and Portland, Oregon.
- De Soto, H., 2000. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. Basic Books, New York.
- Dinwoodie, G.B., et al., 2008. *International Intellectual Property Law and Policy*, second ed. LexisNexis, Newark, NJ.
- Drobniq, U., Snijders, H.J., Zippo, E.J., 2006. *Divergences of Property Law: An Obstacle to the Internal Market*. Sellier European Law Publishers, Munich.
- Lehavi, A., 2010. The global law of the land. *University of Colorado Law Review* 81, 425–471.
- Lehavi, A., Licht, A.N., 2011. BITS and pieces of property. *Yale Journal of International Law* 36, 115.
- Mautner, M., 1991. ‘The Eternal Triangles of the Law’: toward a theory of priorities in conflicts involving remote parties. *Michigan Law Review* 90, 95–154.
- Merrill, T.W., Smith, H.E., 2000. Optimal standardization in the law of property: the numerus clausus principle. *Yale Law Journal* 110, 1–70.
- Pollock, F., Maitland, F.W., 1898. *The History of English Law Before the Time of Edward I*, second ed. Lawbook Exchange, Union NJ reprint 2006.
- Property Rights Alliance, 2010. *International Property Rights Index*. Available from <http://www.internationalpropertyrightsindex.org/>.