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INVESTMENT LAW WITHIN INTERNATIONAL LAW

Developments within various subfields of international law influence international investment law, but changes in investment law also have an impact on the evolution of other fields within international law. With contributions from leading scholars and practitioners, they examine specific links between investment law and other subfields of international law, such as the law on armed conflict, human rights, sustainable development, trade, development and EU law. In particular, this book scrutinises how concepts, principles and rules developed in the context of such subfields could inform the content of investment law. Solutions aimed at resolving problems in other settings may provide instructive examples for addressing current problems in the field of investment law, and vice versa. The underlying question is whether key subfields of public international law, notably international investment law, are open to cross-fertilisation or whether they are evolving further into self-contained regimes.

FREYA BAETENS is Assistant Professor of Public International Law at Leiden University and Visiting Professor at the World Trade Institute in Berne. Concurrent with her academic activities, she is an associate lawyer with VVGB Advocaten/Advocats, Brussels, advising clients on public international law and EU law matters. She has published on a wide range of topics, including treaty interpretation, state responsibility, equality, sustainable development, interaction between legal regimes, discrimination in international migration law and EU external relations.

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CONTRIBUTORS

WOLFGANG ALSCHNER is a PhD candidate in international law at the Graduate Institute of International and Development Studies (IHEID) in Geneva, Switzerland. Before that, he studied international law, international relations and economics in Dresden, Beirut and Geneva. In addition, he has been working as a consultant in the Section on International Investment Agreements (IIA) of UNCTAD.

PHILIPP AMBACH is Special Assistant to the President of the International Criminal Court. He previously obtained his 1st and 2nd State Examination in law at Humboldt Universität, Berlin, and Oberlandesgericht Düsseldorf, in 2004 and 2007, respectively, and in 2009 wrote a PhD in international criminal law at the Freie Universität, Berlin. In 2007, he worked as a prosecutor in the Office of the Public Prosecutor of Cologne, Germany; from 2008 to 2009 as Associate Legal Officer in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia; and from 2009 to 2010 as Associate Legal Officer in the Appeals Chamber of the International Criminal Tribunal for Rwanda.

FREYA BAETENS, Cand.Jur. and Lic.Jur. (Ghent); LLM (Columbia); PhD (Cambridge), is Assistant Professor of Public International Law at Leiden University and Visiting Professor at the World Trade Institute, Berne. She has been a Research Fellow of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, and editor of the *Max Planck Encyclopedia of Public International Law*. She is a member of the Executive Board of the Society of International Economic Law (SIEL) and a Fellow with the Centre for International Sustainable Development Law (CISDL), McGill University, Montreal. She is on the editorial board of the *Leiden Journal of International Law* and the academic review board of the *Cambridge Journal of International and Comparative Law*. Concurrent with her academic activities, she is an associate lawyer with VVGB Advocaten/Advocats, Brussels, advising clients on international law and EU law matters.

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N. JANSEN CALAMITA is the Director of the Investment Treaty Forum and Senior Research Fellow at the British Institute of International and Comparative Law, London. He also holds the post of lecturer in Public International Law at the University of Birmingham. Prior to these posts, he was a member of the Faculty of Law at the University of Oxford, and a visiting fellow of Mansfield College, Oxford. Before becoming a full-time academic, he served in the Office of the Legal Advisor in the US Department of State, representing the United States before the Iran–US Claims Tribunal and in bilateral investment matters, and also in the Office of Legal Affairs at the United Nations as a member of the UNCITRAL Secretariat. He has also been in private practice in New York. He is a graduate of Boston University Law School (J.D. *summa cum laude*) and the University of Oxford (BCL).

DIANE A. DESIERTO specialises in international economic law, dispute resolution and ASEAN law, holding degrees from Yale Law School (JSD 2011, LL.M. 2009) and the University of the Philippines (LLB/JD equiv. *cum laude* 2004, BSc Economics *summa cum laude* 2000). At Yale, she was Howard M. Holtzmann Fellow in International Arbitration and Dispute Resolution; Lillian Goldman Perpetual Scholar; Editor of the *Yale Journal of International Law*; 2010–2011 Yale Fellow of HE Judge Bruno Simma and HE Judge Bernardo Sepúlveda-Amor at the International Court of Justice, The Hague, the Netherlands; and was awarded the Ambrose Gherini Prize in International Law for her JSD dissertation (*Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*, International Litigation in Practice Series, vol. 3, 2012). She has taught international law at several Philippine law faculties, before taking up her current position as Assistant Professor at Peking University School of Transnational Law, while also continuing as a partner at Desierto Ammuyutan Purisima and Desierto Law.

MARY E. FOOTER is Professor of International Economic Law and Head of the Business, Trade and Human Rights Unit at the Human Rights Law Centre, University of Nottingham School of Law. She holds a Master's degree in Dutch civil law from the University of the Netherlands Antilles, an LL.M. in Public International Law from University College London and a PhD (*cum laude*) from the Erasmus University, Rotterdam. She has served as Senior Programme Legal Counsel at the International Development Law Organization and as expert consultant to the WTO and the EU. She is series editor of the *Edward Elgar Series on International Economic Law*, a member of the Editorial Board of the *Manchester Journal of International Economic*

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Law, the *European Journal of Risk Regulation*, and a member of the Advisory Board of *Legal Issues in International Integration* and of the e-journal *Law, Social Justice and Global Development*. She is a member of the Executive Board of the European Society of International Law, the Executive Council of the British Branch of the International Law Association, the ILA International Trade Law Committee and the Society of International Economic Law.

MARKUS W. GEHRING is a university lecturer in Sustainable Development Law at the Law Faculty, Deputy Director of the Centre for European Legal Studies (CELS) and Fellow in Law at Robinson College, Cambridge University. He holds an *ad personam* Jean Monnet Chair in Sustainable Development Law at the University of Ottawa, Canada, and serves as affiliated lecturer in European and International Law at the Department of Politics and International Studies. He holds an LLM from Yale and a Dr. jur. from Hamburg. He practised European and international trade law with Cleary Gottlieb in their Brussels office. Prior to joining Robinson College, he was a tutor in Public International Law at University College, Oxford. He serves as Lead Counsel for Sustainable International Trade, Investment and Competition Law with the Centre of International Sustainable Development Law (CISDL), McGill University, Montreal and was a member representative of the Concerted Action on Trade and Environment (CATE) research initiative, funded by the European Commission.

ANASTASIOS GOURGOURINIS practises law in Greece as a member of the Athens Bar specialising in international economic law. He is an elected lecturer in International Law at the National and Kapodistrian University of Athens, Faculty of Law, and is a Special Legal Adviser to the Hellenic Ministry of State and Strategic Investments. He completed his doctoral thesis at University College London in 2010, focusing on the fragmentation of international law, and, more specifically, the normative role of equity and equitable principles in the WTO. Among his current and recent publications are: 'Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)', *American Society of International Law Proceedings*, 103 (2009): 79–82; 'Delineating the Normativity of Equity in International Law', *International Community Law Review*, 11 (2009): 327–47; 'The Distinction between Interpretation and Application of Norms in International Adjudication', *Journal of International Dispute Settlement*, 2 (2011): 31–57; and 'Lex Specialis in WTO and Investment Protection Law', *German Yearbook of International Law*, 53 (2010): 579–621.

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MARIA GRITSENKO is an associate in the International Arbitration and Litigation Group of Skadden, Arps, Slate, Meagher & Flom (UK) LLP. Her expertise includes investment treaty and investment contract disputes, as well as international commercial arbitration proceedings under a variety of different rules. Originally from Ukraine, she trained as a lawyer in France and the United States. She holds a Master's degree in public international law from the Pantheon-Assas University, Paris II, and an LLM from the University of Michigan Law School, Ann Arbor.

NICOLAS HACHEZ, LLM (NYU), LLB (Louvain), is Project Manager and Research Fellow at the Institute for International Law and at the Leuven Centre for Global Governance Studies, University of Leuven. His research interests mainly include global governance studies, international legal theory, international human rights law and international investment law. He has published on various issues connected to those disciplines, such as corporate social responsibility, the role of non-state actors and of private regulation in global governance, or the relations between international investment law and other branches of international law. Formerly, he worked as an attorney in the Brussels office of an international law firm, where he focused his practice on international investment law and European Community law.

THOMAS HENQUET studied at the University of Amsterdam (LLM) and Yale University (LLM). He practised law in the Amsterdam office of Clifford Chance, specialising in litigation/arbitration and international law. In his current position as legal counsel in the International Law Division of the Netherlands Ministry of Foreign Affairs, his practice includes investment protection.

GLEIDER I. HERNÁNDEZ is Lecturer in Law at Durham Law School, Durham University. Previously, he served as Associate Legal Officer at the International Court of Justice (2007–2010), acting as law clerk to Vice-President Peter Tomka and Judge Bruno Simma from 2008 to 2010. He holds a DPhil from the University of Oxford, where he researched the concept of the international judicial function from the perspective of the International Court of Justice. Previously, he read for an LLM (Hons) at Leiden University, the Netherlands, and for BCL and LLB degrees at McGill University, Montreal, Canada.

MOSHE HIRSCH holds the Maria von Hofmannsthal Chair in International Law, and has been the Director of the Forum of International Law and the

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chairperson of the Committee on Advanced Studies of the Faculty of Law and Department of International Relations, Hebrew University of Jerusalem since 2005. He is also a Member of the list of the Panel of Conciliators and Arbitrators maintained by the International Centre for the Settlement of Investment Disputes (ICSID) (since November 2008). He was a Visiting Lecturer at the Academy of International Trade Law, Macao; the Jay Altmayer Distinguished Visiting Professor of Law, Tulane University School of Law, New Orleans; and Visiting Professorial Fellow at the Institute of International Economic Law, Georgetown University, Washington. He served as a member of the committee established by the Israeli Ministry of Justice to prepare a new statute on sovereign immunity and as a member of the Israeli–Palestinian Research Group on the Jerusalem Area, established under the auspices of the Olof Palme International Center, Stockholm, Sweden. He has been a researcher and member of the think tank on the Future Status of Jerusalem, at the Jerusalem Institute for Israel Studies since 1989, and a member of the Israel Bar Association since 1988.

AVIDAN KENT is a PhD candidate at the University of Cambridge, focusing on international trade and investment and climate change law, with degrees from the University of Haifa (LLB) and McGill University (LLM). He is an Associate Fellow at the Centre of International Sustainable Development Law and a member of the Israeli Bar.

URSULA KRIEBAUM is Associate Professor for Public International Law at the Department of European, International and Comparative Law, University of Vienna. Her academic research focuses on international investment protection law and arbitration, and international and European human rights law. She has worked in the office of the legal adviser of the Austrian Ministry of Foreign Affairs, and is the author of several publications in the fields of international investment law and arbitration. She also acts as consultant for law firms in investment arbitration and human rights cases.

JUDITH LEVINE is Senior Legal Counsel at the Permanent Court of Arbitration, The Hague. From 2003 to 2008, she was an attorney in the arbitration group at White & Case LLP, New York, where she represented corporations and sovereign states in ICSID, ICC, AAA and UNCITRAL arbitrations. Her prior roles include law clerk at the International Court of Justice, adviser to the Australian Attorney-General, associate at the High Court of Australia, lecturer at the University of New South Wales (UNSW) and for the Chartered Institute of Arbitrators, and member of the Australian

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delegation to UNCITRAL Working Group II. She holds a BA/LLB (University Medal) (UNSW) and LLM (NYU).

RALPH ALEXANDER LORZ has held the Chair of German and Foreign Public Law, European Law and Public International Law at Heinrich Heine University of Düsseldorf since 2000. From 2007 to 2009 and again from 2012 to the present, he was on a sabbatical leave serving as Vice-Minister for Higher Education, Research and the Arts in the state government of Hesse. He has studied at the universities of Mainz, Marburg and Mannheim, earned an LLM degree at Harvard Law School in 1994 and is admitted to practise law in Germany and New York. His research work focuses on the European Common Market and international economic law.

VID PRISLAN is a Research Fellow and PhD candidate at the Grotius Centre for International Legal Studies, Leiden Law School. He holds a Diploma in International Relations from the University of Ljubljana and an LLM in International Law from Leiden University. He is an experienced researcher in the field of public international law, has assisted counsel in contentious cases before the PCA and the ICJ, and has regularly provided expert advice to governments and private parties in territorial and maritime delimitation disputes, and in the context of various investment arbitration proceedings. He is book review editor of the *Leiden Journal of International Law*.

PIERRE-OLIVIER SAVOIE is counsel in the Trade Law Bureau, Department of Foreign Affairs and International Trade, Ottawa, Canada. He has acted as counsel to the government of Canada in several NAFTA Chapter Eleven arbitrations, as well as in several FIPA negotiations. Prior to joining the Trade Law Bureau in 2009, he worked in the international arbitration and commercial litigation groups at White & Case LLP, New York, clerked for Justice Marie Deschamps at the Supreme Court of Canada and for judges Peter Tomka and Mohammed Bennouna at the International Court of Justice.

CHRISTOPH SCHREUER is a graduate of the universities of Vienna, Cambridge and Yale. Over an academic career spanning more than forty years, he has published numerous articles and several books in the field of international law. Since 1992, he has concentrated on international investment law; the main product of which is a 1,500-page commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States under the title *The ICSID Convention: A Commentary*. He has written expert opinions in many investment cases and has served as an

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arbitrator in ICSID and UNCITRAL cases. He has spent most of his academic career at the Department of International Law of the University of Salzburg, Austria. From 1992 to 2000, he was the Edward B. Burling Professor of International Law and Organization, Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University, Washington, DC. From 2000 to 2009, he was Professor of International Law at the University of Vienna, Austria. Since 2008, he has been Of Counsel with the law office Wolf Theiss.

NICO SCHRIJVER is Professor of International Law and Academic Director of the Grotius Centre for International Legal Studies, Leiden University and is a member of the Senate of the Dutch Parliament. He serves as the President of the International Law Association, is vice-chair of the UN Committee on Economic, Social and Cultural Rights, and is a member of the Royal Netherlands Academy of Arts and Sciences, the Permanent Court of Arbitration and the Institut de droit international. He is the author of *Sovereignty over Natural Resources. Balancing Rights and Duties* (Cambridge University Press, 1997), *The Evolution of Sustainable Development in International Law* (2008) and *Development without Destruction. The UN and Global Resource Management* (2010).

SILKE STEINER, MA (Bruges), Dr.iur. (Graz), is working as an assistant professor at the Department of European, International and Comparative Law, University of Vienna. Before joining the University of Vienna, she studied law in Graz and EU external relations at the College of Europe, Bruges, and worked at the Austrian Ministry of Foreign Affairs. Her special areas of research include European institutional law, the EU's external relations, fundamental principles and judicial protection on the EU level, as well as international economic law.

LEONIE TIMMERS obtained her LLB in Law with International Relations from the University of Sussex, Brighton. She went on to complete her LLM in Public International Law at Leiden University, where she graduated cum laude. Her chapter in this book is based on her LLM thesis for which she obtained the Leiden Journal of International Law Thesis Prize. She started working as an associate in the Caracas office of Norton Rose, where she has been involved in several arbitrations against the Bolivarian Republic of Venezuela, before moving to her current post at the Norton Rose London office. Her main areas of interest are public international law and investment arbitration.

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ELISABETH TUERK is a legal expert in the United Nations Conference on Trade and Development (UNCTAD), Section on International Investment Agreements in UNCTAD's Division on Investment and Enterprise. She manages the Section's research work and contributes to its technical assistance and capacity-building work, and to the management and organisation of UNCTAD's intergovernmental meetings and events. In her previous UNCTAD assignment, she worked as an Economic Affairs Officer at the Trade Negotiations and Commercial Diplomacy Branch, Division on International Trade in Goods and Services and Commodities of the UNCTAD. Prior to joining UNCTAD, she worked as staff attorney for the Trade and Investment Program of the Center for International Environmental Law (CIEL), Geneva. She holds a Magistra Degree in Law and a Magistra Degree in International Management from the Karl-Franzens University, Graz, Austria, as well as a Master's degree from the World Trade Institute in Berne, Switzerland.

FRIEDL WEISS is a professor in the Department of European, International and Comparative Law at the University of Vienna, as well as Visiting Professor at the universities of Bratislava and Bocconi, Milan. Previously he was Lecturer in Law at the London School of Economics and Political Science, held the Chair of International Economic Law and International Organisations at the University of Amsterdam, as well as various visiting professorships, including at the universities of Louvain-la-Neuve, Panthéon-Assas Paris II, HEI Geneva, Minnesota, Tulane and Wuhan. His research focus includes European and international (economic) law, international organisations, including those of international economic governance and European Community law. He holds a doctorate in law, a Licence spéciale en droit Européen from the European Institute of the Free University of Brussels, as well as an MA in Public International Law and European Law from the University of Cambridge. He has been legal adviser in the EFTA Secretariat, a legal consultant in GATT, and is a member and a former rapporteur of the ILA Committee on International Trade Law, as well as a former member of the ILA committees on International Law on Sustainable Development on Foreign Investment.

JAN WOUTERS is Professor of International Law and International Organizations, Jean Monnet Chair *Ad Personam* EU and Global Governance, and Director of the Leuven Centre for Global Governance Studies and Institute for International Law at the Katholieke Universiteit Leuven (KU Leuven). He is Visiting Professor at the College of Europe (Bruges), in the Master of

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Laws in International Economic Law and Policy (University of Barcelona), in the European Master's Degree in Human Rights and Democratisation (Venice), and in the Executive Master of European and International Business Law (University of Sankt-Gallen). He is President of the Flemish Foreign Affairs Council, which advises the Flemish Government, and practises law as Of Counsel at Linklaters, Brussels. He is the Editor of the *International Encyclopedia of Intergovernmental Organizations* and the Vice-Director of *Revue belge de droit international*. He studied law and philosophy in Antwerp and Yale universities, was a Visiting Researcher at Harvard Law School and obtained his PhD at KU Leuven.

RUMIANA YOTOVA is currently pursuing a PhD in international law at Cambridge University under the supervision of Professor James Crawford. Previously, she obtained a LL.M. degree in Public International Law (cum laude) at Leiden University, a Master of Law degree (with excellence) at Sofia University, and a Diploma in English and EU Law at Cambridge University. In 2009, she also obtained a Diploma in Public International Law (cum laude) at The Hague Academy of International Law. She acquired practical experience in her work as a research associate of Professor James Crawford, and as a legal trainee at the Permanent Court of Arbitration and the European Commission, Directorate General Maritime Affairs and Fisheries.

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PREFACE

The last two decades have witnessed an exponential increase in investor–state arbitrations. Investment tribunals now regularly render binding decisions as to whether states have violated protection standards guaranteed under various investment treaties. The pace by which these tribunals deliver their awards has turned investment law into one of the most dynamic fields of public international law. Developments in other subfields of international law influence the development of international investment law, but also vice versa, changes in investment law have an impact on the evolution of other fields of international law.

As the majority of publications focus on the application and interpretation of investment protection standards, the interaction of international investment law with other subfields of international law has not yet been so extensively explored. To fill this gap, academics and practitioners contributing to this collection examine specific links between investment law and such other rules of international law. In particular, this book scrutinises how concepts, principles and rules developed in the context of other subfields of international law could, or should, inform the content of investment law. Solutions conceived for resolving problems in other settings may provide instructive examples for addressing current problems in the field of investment law, and vice versa. This serves as an aid for several contributors to determine whether various subfields of public international law, particularly international investment law, are open to cross-fertilisation or whether they are evolving ever further into self-contained regimes.

This book contains a peer-reviewed selection of the most innovative and outstanding papers resulting from presentations at the international conference on ‘The Interaction of International Investment Law with Other Fields of Public International Law’, which took place on 8 and 9 April 2011 at Leiden University. This conference brought together experts from the field of international investment law with renowned scholars and practitioners from other subfields of international law.

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Every part of this volume addresses one particular interrelationship: the authors of each part have had the opportunity to examine each other's ideas so as to guarantee a coherent approach to the matter, thereby avoiding a fragmented discussion.

One important comment received in the course of preparing this volume was that a book such as this one could pursue two goals: (1) an overall, single volume, assessment of the literature 'with some extra edge'; or (2) a selection of the most relevant issues. So, in which category does this work belong? The answer would be that this book pursues mainly the first goal, but without any claim to exhaustiveness, while each individual part focuses more on the second goal. Fully achieving the first goal would be impossible without publishing a series of volumes on the topic, while merely focusing on the second goal might result in a rather incoherent collection. For that purpose, this book has been divided into broad themes, whereby the contributions to each part are of a more specific nature: aiming to add to existing scholarship by analysing new angles. This inevitably entails choices in terms of topics that are addressed, so, for example, in Part II, aside from two contributions with a general approach from a novel angle (sociological and constitutional) by Hirsch and Calamita, two more specific topics are analysed which bear high current relevance (indigenous peoples and the right to property) by Levine and Timmers.

Following the brief historical introduction by Nico Schrijver, who uses the early foreign investment policy of the Netherlands as a case study, some chapters build on previous research, such as those examining the relationship between investment and sustainable development, human rights or trade. Other topics are highly novel and controversial, for example, as elaborated upon in the contributions on investment and armed conflict in Part I. Attention is also paid to the relationship of investment with regional developments, such as those occurring in the EU and in developing countries. The main aim of this book is to assess these interactive relationships so as to inspire future debate and scholarship.

Part I: international investment and armed conflict

This volume commences with the, perhaps, most unusual interrelationship of all: the link between international investment and armed conflict. Rarely were two legal fields seemingly so distinct; yet cannot virtually every conflict be found to be rooted in economic ground? This part

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shows that two of the most specialised subfields of international law interact and will probably do so increasingly in the future. Although historically many investor claims have arisen out of armed conflict and have been examined under customary international law, in contemporary scholarship it is uncommon to analyse current investment treaty rules in the light of the law on armed conflict, and vice versa.

The starting shot is fired by a universally acknowledged *éminence grise* of international investment law, Christoph Schreuer, who delivers an in-depth examination of the protection of foreign investment in times of armed conflict. He concedes that there is no obvious or express link between international investment law, on the one hand, and the law that applies in situations of armed conflict or hostilities, on the other. However, rules on protection of foreign investors are not automatically suspended as soon as an armed conflict looms; on the contrary, bilateral investment treaties (BITs) often contain clauses that address precisely such situations: ‘full protection and security’ clauses. This chapter examines how such clauses have been applied and interpreted by arbitral tribunals in cases such as *Amco Asia v. Republic of Indonesia*, including the question as to why such claims have been brought rather rarely. Another point of interest pertains to how the interpretation of these clauses has been extended beyond physical security in certain more recent cases. Moreover, during armed conflict, it is explored how foreign investors could be protected under other investment treaty obligations, for example, expropriation or national treatment clauses. Finally, this chapter assesses potential expansion of investment protection during armed conflict.

The baton is then passed to a public international law scholar, Gleider I. Hernández, who continues on the theme of full protection and security clauses. He sees international investment law as containing a tension between its existence as a primarily treaty-based *lex specialis* and its claim to being a projection of principles of general international law. It is, indeed, consistent with the inner logic of international investment law that only those rules of investment protection which *must* yield to the law of armed conflict *should be expected* to yield. Yet in an international legal order where even fundamental human rights may become subject to derogation in situations of armed conflict, certain questions concerning the scope and applicability of international investment law must be answered. As investment law transcends its origins as a primarily self-contained regime, there are areas in which it borrows extensively by analogy from international humanitarian law, such as the protection of

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aliens. However, claims of the continued application of investment law in situations where humanitarian law supersedes general international law are scrutinised with a certain dose of scepticism in this chapter.

The final chapter in Part I is perhaps the most extraordinary one: it does not address the role of foreign investors during armed conflict from the perspective of the protection that is owed to them, but rather the opposite: what are the *duties* of such investors? As Special Assistant to the President of the International Criminal Court, Philipp Ambach is well placed to assess the international criminal responsibility of transnational corporate actors doing business in zones of armed conflict. He maintains that investor protection during armed conflict highlights only one group of interests worthy of protection. Civil communities also need protection, not only from the immediate effects of the armed conflict, but from the persons or entities ‘pulling the strings’ as well. Business corporations that maintain trade relations with partner groups or entities that are at the same time engaged in armed conflicts may become indirectly involved in the commission of serious crimes. Through the provision of financial resources to regional armed groups, for the exploitation of natural resources in conflict zones, for example, international business actors may even incur criminal liability if they know that their resources are also used to provide these armed groups with weapons that are subsequently used against civilians. The crimes committed may amount to international crimes, such as war crimes, crimes against humanity or even genocide. In such cases, corporate actors may even come under scrutiny by the International Criminal Court for their participatory role in such crimes, if the individual criminal liability of the person(s) in control of such financial transactions on behalf of a corporate actor can be established.

Part II: international investment and human rights

From international humanitarian law to human rights law, the need to balance corporate and community interests continues in time of peace. The interrelationship between international investment and human rights is often examined in scholarly writings, but this part zooms in on less-often explored aspects of that relationship.

Starting with a sociological perspective to investment and human rights treaties, Moshe Hirsch, a legal scholar as well as international relations specialist at the Hebrew University of Jerusalem, explains how analysis of the decisions of investment tribunals relating to human rights