Introduction

Armed conflict has disastrous effects on societies. Lives are lost, civilians displaced, infrastructure destroyed, and societal, political, and economic institutions damaged. Alongside humanitarian costs stands the economic impact of conflict with potentially long-lasting and substantial effects on the state’s economic growth and development that, in turn, can lead to prolonged instability and resurgence in violence. Even where a conflict party’s territory is not the theatre of military operations, the respective state is still affected by its engagement in hostilities and, depending on the scale of the conflict, may be forced to adopt more or less extensive emergency measures to cope with the situation.

Among those affected by conflict and attendant state responses are foreign investors, be it individuals or corporations, their employees as well as their property. The regime of international investment law accords foreign investors and investments specific protection from encroachments by state authorities and violent threats by third parties – protection that becomes, from the perspective of investors, all the more relevant and, from the perspective of states, all the more difficult to provide in times of armed conflict. In light of the increasing prevalence of investment treaties as well as the global flow of foreign investments, it was only a matter of time for investment disputes to arise out of armed conflict more frequently. The upheaval in many Arab countries from 2010 to 2012, the ‘Arab Spring’, marks a watershed moment in this respect. It has caused a wave of investor-state proceedings that pose new questions and challenges to international investment law – a legal regime that has become

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one of the most dynamic and, at the same time, most controversial areas of international law.

This book examines the effects of armed conflict on investment treaties in greater depth and breadth than has been done so far. It offers a solid conceptual basis for the continuity of investment treaties in armed conflict and theorises in-depth on the often underestimated relevance of international humanitarian law. Against this backdrop, it comprehensively examines substantive treaty standards, which relate not only to physical destruction of investments but also to other armed conflict-induced restrictions on foreign investments, as well as possible defences that states may raise during investment disputes. Ultimately, the book aims at finding solutions on how to resolve the clash of interests between foreign investors and states that arises in the face of extreme circumstances and pressing public needs arising out of armed conflict. International humanitarian law, the book suggests, has a key role to play in this respect.

This Introduction, first, sets the scene by pointing out present and historical links between foreign investments and armed conflict. Subsequently, it sketches the relevant legal frameworks of international investment and humanitarian law and elaborates on the methodology employed. The final section presents the book’s structure and leads over to the substantive part of the analysis.

International Investment Law and Arbitration in the Context of Armed Conflict

In a globalised economy with extensive investment activity, foreign investors and their investments are prone to being affected whenever an armed conflict, whether internal or cross-border, erupts. Some foreign businesses will continue to operate in the affected countries, while others may retreat and leave facilities and construction sites, equipment and material behind and vulnerable. Additionally, foreign investors and their

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investments as well as their personnel may become subject to a vast variety of emergency measures – the most extreme being the use of military force. Corporate actors are certainly not always mere victims of conflict. Their activities may also have adverse effects, including through the support of violent regimes (by paying taxes or revenues), through direct supply of the war machinery, or even through active involvement in human rights abuses. However, they also contribute to securing the supply of the civilian population with essential goods and critical infrastructure, or, in some cases, may even take the role of humanitarian actors. Above all, countries need foreign investments, once the dust has settled, to recover from conflict and promote sustainable economic growth and stability. The costs for the reconstruction of Syria’s physical infrastructure, for example, are estimated to be in the hundreds of billions of dollars – an insurmountable amount to raise without foreign involvement.

The proliferation of international investment law has increased chances of investment disputes arising from the context of armed conflict. The finely woven net of some 2,500 international investment treaties, which has been spun around the globe within the last few decades, has long since reached states that have been affected by conflict and turmoil. International law firms, for example, have sent out client alerts pointing to investment law in the context of the ‘Arab Spring’. Indeed, several Arab countries are parties to international investment agreements and have been host to substantial foreign investment. The sharp rise in arbitration

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10 E.g., Bälz and Mujally, ‘Client Alert: Yemen Three Years into the Civil War’ (Amereller, 20 March 2018); King & Spalding, ‘Client Alert: Crisis in Libya: What Legal Options are Available to Oil and Gas Companies?’ (17 May 2011); Freshfields Bruckhaus Deringer, ‘Investments in Libya: Potential Claims under Bilateral Investment Treaties and Political Risk Insurance Policies’ (March 2011).
claims lodged in the context of the upheaval in the Arab world\textsuperscript{12} and the conflict between Russia and Ukraine\textsuperscript{13} are clear indicators for a growing trend of investment disputes in the context of armed conflict.\textsuperscript{14} Russia’s egregious war of aggression against Ukraine launched in February 2022 has again caused scholars and practitioners to point out the relevance of investment treaties in the context of armed conflict.\textsuperscript{15} Since the manuscript for this book was completed before these events, they could not be fully considered in this analysis.

Even before the invasion of Ukraine, the Russian–Ukrainian conflict on the Crimean peninsula and in Eastern Ukraine and related arbitration claims have raised the question as to whether investment treaties apply also to occupied or annexed territory. Although the application of investment treaties is usually linked to the ‘territory’ of the host state, it may be argued, in the interest of the protection of individuals, that the notion is to be understood as referring not only to sovereign territory but also to territory under the (stabilised) de facto control of a foreign state.\textsuperscript{16} Yet, because cases of belligerent occupation and annexation raise entirely separate legal questions pertaining, among others, to the obligation of non-recognition of unlawful territorial situations,\textsuperscript{17} a comprehensive treatment

\begin{thebibliography}{99}
\bibitem{12} E.g., Güriş İnşaat ve Mühendislik A.Ş. and others v. Syria, ICC Case No. 21845/ZF/AYZ, Award (31 August 2020); Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya, ICC Case No. 21537/ZF/AYZ, Final Award (7 November 2018); Ampal-American Israel Corp. and others v. Egypt, ICSID Case No. ARB/12/11, Liability and Heads of Loss (21 February 2017); Gujarat State Petroleum Corp. Ltd., Alkor Petroo Ltd., and Western Drilling Constructors Private Ltd. v. Yemen and the Yemeni Ministry of Oil and Minerals, ICC Case No. 19299/MCP, Final Award (10 July 2015).
\bibitem{13} E.g., NJSC Naftogaz of Ukraine and others v. Russia, PCA Case No. 2017-16 (pending); Stabil LLC and others v. Russia, PCA Case No. 2015-35, Award (12 April 2019) (not public); PJSC Ukrnafta v. Russia, PCA Case No. 2015-34, Award (12 April 2019) (not public); Aeroport Belbek LLC and Igor Valerievich Kolomoisky v. Russia, PCA Case No. 2015-07, Interim Award (24 February 2017) (not public).
\bibitem{14} See also, e.g., Itsaluna Iraq LLC and others v. Iraq, ICSID Case No. ARB/17/10, Award (3 April 2020).
\bibitem{15} E.g., Zrilić, ‘Are We in for a New Wave of Investment Arbitrations? Russia’s Measures Against Foreign Investors and Investment Treaty Implications’ (Verfassungsblog, 21 March 2022); Jones Day, ‘Companies With Investments and Businesses in Ukraine and Russia: The Importance of Investment Treaties’ (March 2022).
\bibitem{17} See, e.g., De Vriese, ‘The Application of Investment Treaties in Occupied or Annexed Territories and “Frozen” Conflicts: \textit{Tabula Rasa or Occupata?}, in Ackermann and Wuschka (eds.), \textit{Investments in Conflict Zones: The Role of International Investment Law}
is not possible within the confines of this book. Instead, it focusses on the host state's role during armed hostilities with respect to its own territory only.

Whereas investment arbitration cases dealing with issues of armed conflict have emerged only recently, this should not cloud the fact that links between investment law and armed conflict are not novel. The very first investment arbitration that was based on a bilateral investment agreement (BIT), the 1990 case of *Asian Agricultural Products Ltd. v. Sri Lanka*, concerned the destruction of a shrimp farm and the killing of its employees during a Sri Lankan counter-insurgency. And the ties between armed conflict and the protection of foreigners and their property run even deeper. The precursors of modern investment treaties, the bilateral treaties of friendship, commerce, and navigation (FCN treaties) of the late eighteenth and nineteenth century, for example, included provisions on the protection of foreign property, sometimes specifically tailored towards situations of hostilities. At the same time, decisions of various claims commissions and mixed arbitral tribunals regularly concerned cases that arose out of war and internal conflict. They played a significant role in shaping the customary law on the treatment of aliens, on which today’s investment treaties are based.  

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The establishment of these first arbitral tribunals also resulted from the desire to develop a peaceful alternative to the aggressive ‘gunboat diplomacy’ of the nineteenth and early twentieth centuries, when disputes over the treatment of aliens and their property regularly led to the use of military force by Western states. The further pursuit of this idea ultimately culminated in the modern system of investment arbitration, which ‘has proved to be a significant and successful substitute for the gunboat diplomacy of the past’. Indeed, the creation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was also driven by the wish to ‘eliminate the risk of a confrontation of the host country and the national State of the investor’. As the tribunal in *Banro v. DRC* explained, investment law aims at putting ‘an end to international tension and crises, leading sometimes to the use of force, generated in the past by the diplomatic protection accorded to an investor by the State of which it was a national’. The reduction of tensions between states by depoliticising and judicialising investment disputes, accordingly, constitutes one basic justification for the conclusion of investment treaties and the establishment of a regime for investment arbitration.

And, yet, despite this historical background, investment arbitration in the context of armed conflict is likely to encounter scepticism from...
states. Traditionally, governments have been extremely sensitive towards any restriction on their freedom to take all measures they consider necessary in the context of armed conflict.  

In past judicial proceedings, for example, they argued that armed conflict, the use of force, or other issues involving security interests were not susceptible to judicial process. Along these lines, Sornarajah suggests that arbitral tribunals are, in fact, not designed to deal with ‘political issues’, ‘such as the characterisation of the war, the legality of the force used to suppress it and other like matters that may concern the internal sovereignty of the state’.

This line of argument, however, misconstrues issues as purely political that have long been subject to international rules and, in fact, dispute settlement. The ‘political question doctrine’ and related concepts may be part of some municipal legal systems to avoid the adjudication of politically charged cases. But these domestic manifestations of the separation of powers do not apply in international law. Rather, international courts and tribunals have rejected arguments that they should not exercise their jurisdiction because of political implications from the outset. Above all, the International Court of Justice (ICJ) explained in the Nicaragua case that it ‘has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force’. In principle, every legal


31 E.g., Russia—Measures Concerning Traffic in Transit, WT/DS412/R, Panel Report (29 April 2019), paras. 7.29–30 (Russia) and paras. 7.51–52 (the USA as a third party); Continental Casualty Co. v. Argentina, ICSID Case No. ARB/03/9, Award (5 September 2008) para. 183; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (Counter-Memorial of the USA) [1984] 2 ICJ Plead I, paras. 520–31.


dispute is justiciable.\(^{36}\) As soon as an investment tribunal has jurisdiction – for instance, under Article 25(1) of the ICSID Convention over a ‘legal dispute arising directly out of an investment’ – it must decide the dispute in accordance with the applicable laws. Such legal disputes over foreign investments do not cease to be legal due to political implications.\(^{37}\) Investment tribunals had, accordingly, no difficulty exercising jurisdiction over disputes involving the use of military force,\(^{38}\) the military occupation of a company,\(^{39}\) or a state of emergency.\(^{40}\) At the same time, political implications, especially with respect to security interests, cannot be completely ignored either. One of the purposes of this book is to evaluate ways through which such interests can find their proper way into the settlement of investment disputes.

There are sufficient encouraging examples of international courts and tribunals that have demonstrated the possibility to adjudicate disputes involving armed conflict.\(^{41}\) They include the Iran–United States Claims Tribunal, established by an agreement between the two states to deal with individual claims arising out of the 1979 Islamic Revolution in Iran,\(^{42}\) the United Nations (UN) Claims Commission, established by the UN Security Council to process claims for losses suffered by foreign governments, nationals, and corporations as a result of Iraq’s unlawful invasion and occupation of Kuwait in 1990 and 1991,\(^{43}\) as well as the Eritrea–Ethiopia Claims Commission, established by an agreement between Eritrea and Ethiopia after the end of their armed conflict in


\(^{38}\) AAPL v. Sri Lanka.


\(^{40}\) E.g., Continental Casualty Co. v. Argentina, ICSID Case No. ARB/03/9, Jurisdiction (22 February 2006); National Grid PLC v. Argentina, UNCITRAL, Jurisdiction (20 June 2006); Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/03, Jurisdiction (14 January 2004).

\(^{41}\) See Matheson, *International Civil Tribunals*.


Kidane notes that the latter ‘clearly demonstrated that there is a feasible way to determine civil liability for violations of international humanitarian law occurring during and in the aftermath of armed conflict for the compensation of victims of such violations’. These examples also highlight that property restitution and compensation for economic losses is an important aspect in post conflict societies and sustainable peace-building. Apart from mass-claims proceedings, regional human rights courts, criminal courts and tribunals, as well as, to a degree, domestic courts have demonstrated that delivering justice in individual cases arising from armed conflict is very much possible.

After all, the immediate task of investment tribunals in the context of armed conflict is a very traditional one: to award compensation for losses suffered. Awards establishing liability for emergency measures, especially if they involve high compensatory sums, could, however, give the impression of unrealistic standards and lead states to disregard investment law more generally. Especially against the backdrop of more permissive humanitarian rules, overly strict investment protection rules, applied without regard to the general context, could encounter strong backlash from both governments and civil society. At the same time, adherence to investment treaty obligations and participation in the proper adjudication of claims accruing from armed conflict could constitute a strong signal for other foreign investors and give incentives to invest after conflict has ended. The existence of investment treaties can, thereby, constitute one key element to attract such investment flows in post conflict economies.

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The Relevant Legal Framework

In light of the increasing practical relevance, this book presents a comprehensive legal examination of the operation of investment treaties during armed conflict. International investment law constitutes the primary object of study, complemented by the general law of treaties and state responsibility, which are applicable in the context of investment treaties as well. In addition, the book analyses the underexplored influence of international humanitarian law on the operation of investment treaties. While the relationship between these two sets of rules could lead to friction, this book suggests ways to avoid normative conflict through systemic treaty interpretation. To lay the groundwork for the subsequent analysis, the following two sections introduce the foundations of international investment and international humanitarian law, respectively.

International Investment Law

The global regime for the promotion and protection of foreign investments consists, above all, of BITs. They are flanked by other bilateral as well as several regional and plurilateral treaties, mostly comprehensive free trade agreements that include provisions on the promotion and protection of foreign investment. Although all these treaties are legally separate instruments, they are similar with respect to their structure, purpose, and principles as well as the language they employ. In general, an investment treaty reflects a reciprocal legal bargain for the promotion and protection of investments of investors from one state, the ‘home state’, in the territory of another, the ‘host state’. Host states have an interest in promoting foreign investment, expecting them, among others, to create jobs, import new technology and skills, improve linkage to world markets, strengthen the local economy, and increase public revenue. Foreign investors and principally also their home state, on the