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Bajar Scharaw

The Protection of Foreign Investments in Mongolia

Treaties, Domestic Law, and Contracts on Investments in International Comparison and Arbitral Practice

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Bajar Scharaw
Frankfurt am Main, Germany

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Preface

This book is the result of a doctoral thesis accepted by the University of Mannheim in Germany. It was written during my time as a research fellow at the Chair for Public Law and Legal Philosophy at that university. The manuscript reflects the legal situation and case-law as of December 2016.

I wish to express my deep gratefulness to my doctoral supervisor, Professor Dr. Hans-Joachim Cremer, who gave me the opportunity to combine my academic interest in public international law with a topic that was of personal importance to me. With his encouragement and dedication as my supervisor and mentor over the past years, he has become a role model for me, both personally and professionally.

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Frankfurt am Main, Germany
June 2017

Bajar Scharaw

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Abbreviations

ADB	Asian Development Bank
ADBI	Asian Development Bank Institute
AJIL	American Journal of International Law
AJWH	Asian Journal of WTO & International Health Law and Policy
Am. J. Comp. L.	American Journal of Comparative Law
Am. Rev. Int'l Arb.	American Review of International Arbitration
AöR	Archiv des öffentlichen Rechts
Arb. Int'l	Arbitration International
Art.	Article
ASEAN	Association of Southeast Asian Nations
ATS	Australian Treaty Series
BIT	Bilateral Investment Treaty
BLEU	Belgium-Luxembourg Economic Union
BYIL	British Yearbook of International Law
Ch. / Chap.	Chapter
CMLRev.	Common Market Law Review
DIAC	Dubai International Arbitration Centre
Doc.	Document
DRJ	Dispute Resolution Journal
ECJ	European Court of Justice
ECR	European Court Reports
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
Ed.	Edition / Editor
Eds.	Editors
EFTA	European Free Trade Association
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EPA	Economic Partnership Agreement
EPIL	(Max Planck) Encyclopedia of Public International Law

EU	European Union
FCN	Friendship, Commerce and Navigation (Treaty)
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
Fig.	Figure
FIL	Foreign Investment Law
Fn.	Footnote
Fordham Int'l L. J.	Fordham International Law Journal
FPS	Full Protection and Security
FTA	Free Trade Agreement
FY	Fiscal Year
GATT	General Agreement on Tariffs and Trade
Geo. Int'l Envt'l L. Rev.	Georgetown International Environmental Law Review
Harv. Int'l L. J.	Harvard International Law Journal
IAReporter	Investment Arbitration Reporter
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Rev. – For. Inv. L. J.	ICSID Review – Foreign Investment Law Journal
IFC	International Finance Corporation
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMF	International Monetary Fund
Int'l Bus. Law.	International Business Lawyer
Int'l Law.	International Lawyer
Int'l Rel. Asia-Pac.	International Relations of the Asia-Pacific
IO	International Organization
IP	Intellectual Property
Iran-US CTR	Iran-United States Claims Tribunals Reports
JIDS	Journal of International Dispute Settlement
JILIR	Journal of International Law and International Relations
J. Int'l Arb.	Journal of International Arbitration
J. Pub. L.	Journal of Public Law
JWIT	Journal of World Investment & Trade
LPAC	Law on the Procedure for Administrative Cases

LPICT	Law and Practice of International Courts and Tribunals
LCIA	London Court of International Arbitration
MAI	Multilateral Agreement on Investment
Max Planck UNYB	Max Planck Yearbook of United Nations Law
McGill L. J.	McGill Law Journal
MFN	Most Favoured Nation
Mich. J. Int'l L.	Michigan Journal of International Law
MIL	Mongolian Investment Law
Minn. J. Int'l L.	Minnesota Journal of International Law
MNCCI	Mongolian National Chamber of Commerce and Industry
MNT	Mongolian Tughrik
NAFTA	North American Free Trade Agreement
Neth. Ybk. Int'l L.	Netherlands Yearbook of International Law
NT	National Treatment
N.Y.U.	New York University
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
OBM	Obsolescing Bargain Model
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OT	Oyu Tolgoi
Para.	Paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PRC	People's Republic of China
PTIA	Preferential Trade and Investment Agreement
RCEP	Regional Comprehensive Economic Partnership (Agreement)
RdC	Recueil des Cours: Collected Courses of the Hague Academy of International Law
Rep.	Report
Ritsumeikan J. Asia Pac. Stud.	Ritsumeikan Journal of Asia Pacific Studies
S. / Sect.	Section
SCC	Stockholm Chamber of Commerce
SEFIL	Law on the Regulation of Foreign Investment in Entities operating in Strategic Sectors
Ser.	Series
SOE	State-Owned Enterprise
TDM	Transnational Dispute Management
Tex. Int'l L. J.	Texas International Law Journal
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporation

TPP	Trans-Pacific Partnership (Agreement)
TTIP	Transatlantic Trade and Investment Partnership (Agreement)
UB	Ulaanbaatar
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
Univ.	University
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
UNYBILC	Yearbook of the International Law Commission
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WiRO	Wirtschaft und Recht in Osteuropa
WPT	Windfall Profit Tax
WTO	World Trade Organisation
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Chapter 1
Introduction

"*Interest in investing in this final frontier is on the rise and is really just beginning. The geographic location and the fact that it is a parliamentary democracy make it a very attractive destination*"—indeed, as described by a Nasdaq article entitled "Emerging Markets: Mongolia, Truly the Final Frontier" from July 2015,[1] the economic and socio-economic conditions for investing in Mongolia are promising. Mongolia is extremely rich in mineral resources, whereas sales benefit from the country's proximity to the resource-hungry Chinese economy and two highly industrialised nations, Japan and South Korea. The German Federal Ministry for Economic Affairs and Energy believes that Mongolia, which is almost four times the size of California and the world's second biggest landlocked State, belongs to the 10 resource-richest countries in the world.[2] Particularly important are pit coal and lignite, gold, copper, silver and iron, oil, uranium, wolfram, molybdenum, other rare earths, and phosphates. Geological studies on large untapped reserves of rare earths, as a commodity for which China currently has a *de facto* national exploitation and distribution monopoly, have attracted international interest.[3] The level of education of the country's relatively young population is very high. Mongolia

[1]Kohli, 'Emerging Markets: Mongolia, Truly the Final Frontier', *NASDAQ* (online), 1 July 2015.

[2]See Dahlmann and Mildner, 'Deutschlands Rohstoff-Partnerschaften: Modell mit Zukunftscharakter?'(Konrad-Adenauer-Stiftung Analysen & Argumente Ausgabe 137, Konrad-Adenauer-Stiftung, November 2013) 4, fn. 19. On 13 October 2011, the Federal Government of Germany entered into a commodity partnership agreement with the Government of Mongolia to secure the supply with raw materials. Besides, the German Government concluded such commodity partnership agreements only with Kazakhstan (2012) and Peru (2015). The agreements are available at: <http://www.bmwi.de/Redaktion/DE/Artikel/Industrie/rohstoffpolitik.html> last accessed 11 May 2017.

[3]According to estimates, Mongolia has approximately 17% of the world's total in rare earths, which is only exceeded by China. See UNCTAD, *Investment Policy Review: Mongolia* (UN, 2013) 12.

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maintains excellent relations with Western States and belongs to the freest societies in Southeast and East Asia.[4] The country follows a strategy of political neutrality and seeks to fulfil an intermediary role with regard to remaining political challenges in the region.

Multi-Level Approach of Investment Protection

Legal protection is a fundamental concern to foreign investors worldwide. If interest in investing in Mongolia is on the rise, how are the normative conditions for investments in this 'final frontier'? Posing this practically relevant question, one quickly realises that there is no in-depth legal analysis on the protection of foreign investments in Mongolia. This study aims at filling this gap. To attract growth-stimulating foreign capital from non-traditional sources,[5] Mongolia early on adopted and continues to pursue a multi-level approach of investment protection, the adequacy of which in its current form is the focus of this investigation. Beginning in 1991, after the peaceful change to democracy and the introduction of a market economy, Mongolia entered into 44 'bilateral investment treaties' (BITs). As the first transition country ever, it concluded a BIT with the United States of America in 1994. These 'international investment treaties' provide written international minimum standards of treatment and protection of foreign investors, which, in combination with a dispute settlement clause in the investment treaty, can be directly invoked by eligible investors in State-independent international investor-State arbitrations.

At the domestic level, Mongolia enacted a special 'Foreign Investment Law' to legalise, promote, and protect foreign investments already in 1990. After aligning the domestic economic laws with statutes of continental European countries, Mongolia could accede to the World Trade Organization (WTO), again as the first transition economy ever, in 1997. The lawmakers followed the Romano-Germanic legal system divide between public law and civil law.[6] Nowadays, many Mongolian statutes reflect the German legal system.[7] The adoption of a remarkably liberal approach towards the entry of foreign companies, which enjoyed utmost investment freedom, combined with the creation of a large web of international investment treaties and the implementation of promoting and protective

---

[4]Mongolia is rated as the sixth-freest country in the region after Japan, Hong-Kong, Taiwan, South Korea, and Singapore. See Friedrich Naumann Stiftung für die Freiheit, Regionalbüro Südost- und Ostasien, *Freedom Barometer Asia 2014* (2016) <http://www.freedombarometer.org> last accessed 11 May 2017.

[5]With a 32% share between 1990 and 2012, China has been by far the largest source of foreign investments in Mongolia (see UNCTAD, *Investment Policy Review: Mongolia* (UN, 2013) 26–7).

[6]See Narangerel, *Einführung in das mongolische Recht* (Berliner Wissenschaftsverlag, 2005) 27.

[7]Nelle, 'Investieren in der Mongolei' (2002) 9 *WiRO* 263. The influence of German law is also the result of long-standing bilateral relations between the two countries. Germany was the preferred destination for students from Mongolia for decades. In 2002, German was the second most spoken foreign language in Mongolia (spoken by one of twenty Mongolians) after Russian and followed by English.

measures in a special domestic investment law eventually paid off. Mongolia attracted large extractive industry investments during the 2000s.[8] In the years 2011 and 2012, the national GDP rose by incredible 17% and 12%.[9] Virtually overnight, Mongolia became the fastest-growing economy in the world.

1.1 Problem Definition and Research Question

Striking the Right Regulatory Balance

The Mongolian 'mining boom' promoted by an exceptionally liberal investment policy and the global rise of commodity prices at that time triggered considerable national security and economic interest concerns.[10] This finally became apparent with the investment arbitration in *Khan Resources v. Mongolia*. Submitted in 2011 and administered by the Permanent Court of Arbitration (PCA), the case concerned the suspension and cancellation of exploration and mining licences for a planned Canadian uranium investment in Mongolia.[11] The measures took place immediately after Khan Resources recommended its shareholders to accept a full takeover bid by a foreign nuclear corporation owned by the Chinese Government. The Tribunal in the case noted that the evidence presented indicate that the Mongolian Government was motivated by the prospect of developing the uranium deposit with a Russian partner instead.[12] In the arbitral award from March 2015, Mongolia was found liable to pay USD 80 million in compensation plus interests. In 2012, a similar incident occurred when Mongolia's largest coal deposit was about to be taken over by a Chinese State-owned investor. SouthGobi Resources, a Mongolian mining company based in Canada, intended to sell a 58% equity stake for approximately USD 900 million. Following the announcement, Mongolia suspended SouthGobi's exploration and mining licenses. The company filed a notice of an investment dispute under the Mongolia-Singapore BIT and later withdrew from the case when the transaction was cancelled.[13]

To remain in control over natural resources and their exploitation in the public interest, Mongolia carried out a fundamental policy turn. In May 2012, the Parliament of Mongolia ('*Ulsyn Ikh Khural*') adopted the Law on Foreign Investment in

[8]In 1990–2010, the mineral and oil industry received a share of 67% of the total investment inflow. Services represent the second largest aggregate of foreign investments, whereas a large share of which is likely to be mining-related (see UNCTAD, *Investment Policy Review: Mongolia* (UN, 2013) 26–7).

[9]World Bank, 'Mongolia Quarterly Economic Update (June 2012)' (World Bank Working Paper No. 70210, World Bank, 1 June 2012) 7.

[10]See also UNCTAD, *Investment Policy Review: Mongolia* (UN, 2013) 36.

[11]See in more detail *infra* at 2.4.4.4.

[12]See *Khan Resources v. Mongolia*, Award, 2 March 2015, para. 340.

[13]A SouthGobi subsidiary could allegedly rely on the 1995 Mongolia-Singapore BIT. See also *infra* at 3.2.1.3 ("Background of the Law").

Strategic Sectors,[14] which allowed the screening of foreign investment endeavours. Both private and State-owned foreign companies had to secure the Mongolian State's approval for investment projects in strategic sectors, including mining.[15] Even though similar legislation exists all around the world, the legal measure was perceived very negatively and led to uncertainty among foreign investors, who were henceforth prevented to pursue investment strategies that include future takeovers by foreign third companies at one's own discretion. In subsequent periods, overseas investments dramatically plunged in Mongolia also because of the sharp decrease of world commodity prices.

That economic interests "are among the driving forces for creating and forging legal rules"[16] became apparent in 2013, when foreign investments in Mongolia slumped to about 45% to the previous year. Mongolia had to intervene. In the vanguard of its domestic legal measures stood the enactment of an entirely renewed Mongolian Investment Law (MIL) on 1 November 2013,[17] which presents in one piece of legislation the main domestic rules for the entry, promotion, and protection of foreign investments. The 2013 MIL aims to provide a modern and transparent domestic legal framework. Mongolia decided to further control activities by foreign State-owned entities in strategic economy sectors but abolished the screening of private foreign investments. The Mongolian Investment Law also contains rules for the conclusion of 'investor-State contracts', which, besides international investment treaties and domestic *erga omnes* guarantees and rights in the 2013 MIL itself, constitute the third distinct legal source of foreign investment protection in Mongolia. In addition to that, Mongolia acted at the international level. In 2015, the Mongolian Government signed an investment-related Economic Partnership Agreement (EPA) with Japan to decrease Mongolia's economic dependency as a landlocked State between Russia in the North and China in the South. Furthermore, Mongolia entered into another bilateral investment treaty with Canada in 2016.

Research Question

This study takes the recent events as the occasion to explore from the viewpoint of legal doctrine the adequacy of Mongolia's international and domestic legal rules of foreign investment protection in international comparison. The study questions whether the country's international investment treaties on the one hand and the 2013 Mongolian Investment Law on the other reflect common international and domestic legal standards of treatment and protection of foreign investors. Moreover, the study inquires whether the domestic laws applicable to investor-State

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[14] *Law on the Regulation of Foreign Investment in Entities Operating in Strategic Sectors 2012*, published in the Official State Journal, *Töriin Medeelel*, 2012 No. 23 ('*Law on Foreign Investment in Strategic Sectors*').

[15] See *infra* at 3.2.1.3.

[16] Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2014) 1.

[17] *Mongolian Law on Investment 2013*, published in the Official State Journal, *Töriin Medeelel*, 2013 No. 41 ('*MIL*'). See Annex.

contracts in Mongolia allow foreign investors and the Government of Mongolia to negotiate and agree on protective terms according to the (not uncontroversial) standards of international contract practice. The legal analysis involves relevant references to the application of Mongolia's international and domestic rules on investment protection in international arbitral practice. To date, foreign investors filed four known international investment arbitrations against Mongolia as a respondent State.

Recognising the need for regulatory clarity after a time of many legal changes, this study seeks to increase legal certainty and security, as well as to contribute to legal stability as a main prerequisite for receiving foreign investments. Furthermore, this study hopes is of relevance from a feedback perspective for Mongolia, which continues to rely on foreign investments and needs to deal with an increasingly complex field of investment law, as a multi-dimensional area of law, where conflicts between public and private interests become particularly visible and countries worldwide struggle to find the right regulatory approach.

1.2 Objects of the Investigation and Conceptual Framework

To address the questions raised, the study distinguishes between (the) three main legal sources that specifically aim to protect foreign investments, not only in Mongolia but generally, namely 'international investment treaties', special 'domestic investment laws', as well as 'investor-State contracts'.[18]

Terminology

The protection of foreign investments becomes usually relevant in relation to 'foreign direct investments' (FDIs). An FDI is often defined as an "equity or ownership investment of more than 10% by an investor in one country (known as 'the home country' or 'capital-exporting country') in an enterprise located in another country (the 'host country' or 'capital-importing country')."[19] The crucial criterion is the amount of control acquired, whereby the share must be high enough to play a role in the investment operation. In addition, the United Nations Conference on Trade and Development (UNCTAD) uses the 10% criterion for its statistical FDI analyses and annual World Investment Reports.[20]

[18] See also Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed., 2010) 276–7.

[19] Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2013) 29. See also Cohen, *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity* (Oxford University Press, 2007) 38.

[20] UNCTAD, *Definitions of FDI* (2016) <http://unctad.org/en/Pages/DIAE/Definitions-of-FDI.aspx> last accessed 11 May 2017. See also IMF, *Balance of Payments Manual* (Washington, D.C., 5th ed., 1993) 86.

'International investment treaties' promote and protect foreign investments by providing special substantive and procedural legal safeguards. They are instruments of international law by which the contracting States assume binding inter-State obligations with regard to the treatment and protection of investors from the other contracting State(s) and the settlement of investor-State disputes by international arbitration. This study addresses 'bilateral investment treaties' (BITs), which exclusively deal with international investments, but also the more recent phenomenon of 'preferential trade and investment agreements' (PTIAs), which include, alongside trade and service-related rules, entire investment chapters that equal BITs in both structure and legal contents.

Special 'domestic investment laws', as the second legal source of investment protection, legalise foreign investments at the domestic level by providing the main domestic rules for investments by foreign enterprises. They address the entry and protection of foreign investments and provide important investment-backing legal preferences such as tax incentives.

Lastly, 'investor-State contracts' play an important role for the protection of foreign investments. Investment contracts are typically created for large-scale natural resources projects and are therefore of high relevance in Mongolia. They are complex agreements directly entered into by and between private investors and host governments. Investment contracts comprehensively define the investor-State relationship, allow bargaining for special investment conditions, are important tools of public governance, and include special contractual terms, which multinationals have virtually developed by themselves to protect the assets that flow based on the contract.

It is very important to note that, as shall be seen, international investment treaties, domestic investment laws, and investor-State contracts are not isolated from each other but rather interrelated and mutually reinforcing.

Conceptual Approach

To approach the question of whether Mongolia's international investment treaties, the domestic investment law, and investor-State contracts entered into with the Mongolian Government provide an adequate, *i.e.* conventional, level of protection, this study adopts a comparative method with regard to each legal source. First, it identifies and discusses the main substantive and procedural law standards of investment protection in international investment treaties, domestic investment laws, and investor-State contracts from a general point of view. On this basis, the study, second, examines whether and to which extent the international investment treaties of Mongolia, the country's special domestic investment law, and investor-State contracts entered into with the Government under Mongolian law include or may contain the designated standards of protection.

The examination of Mongolia's international investment treaties is based on UNCTAD's International Investment Agreement (IAA) Database, which provides country-specific lists and the texts of international investment treaties.[21] With 44 BITs and one recently concluded PTIA with Japan, Mongolia is at the forefront

[21] See UNCTAD, *Investment Policy Hub* (2016) <http://investmentpolicyhub.unctad.org/IIA> last accessed 11 May 2017.

of investment treaty-makers in East Asia and the Pacific.[22] The IAA Database of UNCTAD provides the treaty texts of all international investment treaties of Mongolia.

While there is a rich literature on the standards of investment protection in international investment treaties, the findings of which this study can rely on when examining the contents of Mongolia's international investment treaties, the particular topic of investment protection under domestic (investment) laws is widely disregarded in contemporary scholarship. Exceptions include two comparative legal studies,[23] which this study can refer to when questioning whether the domestic investment law of Mongolia affords an adequate legal standard of investment protection from an international comparative perspective.

Finally, in-depth studies and recent legal literature on investment protection under investor-State contracts are rare.[24] As vividly noted by one commentator, investment contracts impinge "upon some of the hardest questions of international law", which "cannot be considered apart from the relationship of international law and municipal law; the relationship of public international law and private international law; the question of the subjects of international law; and the limits of domestic jurisdiction and the reserved domain."[25] The topic of contractual investment protection is difficult to examine because countries usually lack clear domestic rules on investor-State contracts. The agreements often escape special legislation but must be considered under legal rules and principles of public or administrative law and contract laws. Generally, national law defines the limits within which 'government contracting' or 'public contracting' can take place.[26] As shall be seen, the conventional protective terms in investor-State contracts aim to immunise the foreign investor against certain detrimental legal changes that may occur after the investment has been made. Furthermore, investment contracts seek to detach contractual disputes from the domestic judiciary and to attach them to means of international dispute settlement. In other words, investor-State contracts interfere with the host State's legislative and judiciary authority, which is why one must carefully examine whether the specifically agreed terms in investment

[22] See also Salomon and Friedrich, 'Investment Arbitration in East Asia and the Pacific: A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitration in the Region' (2015) 5–6 *JWIT* 800, 804.

[23] See Parra, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 2 *ICSID Rev. – For. Inv. L. J.* 428 (comparing special domestic investment laws of 51 countries); Shan (ed.), *The Legal Protection of Foreign Investment: A Comparative Study* (Hart Publishing, 2012) (comparing 22 selected jurisdictions).

[24] Some of the few comprehensive legal analyses have been delivered by Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff, 2011); Besch, *Schutz von Auslandsinvestitionen – Risikovorsorge durch Investitionsverträge* (VerlagRecht und Wirtschaft, 2008).

[25] Jennings, 'State Contracts in International Law' (1961) 37 *BYIL* 156.

[26] Schill, 'Contracting with Foreigners: International Investment Law Implications', in Noguellou and Stelkens (eds.), *Droit Comparé des Contrats Publics – Comparative Law on Public Contracts* (Bruylant, 2010) 63.

contracts are valid under general domestic law or constitutional law of the host State. Because of this and their practical relevance in Mongolia, this study devotes a great part of its attention to investor-State contracts.

1.3 The Course of the Argument

To advance the thesis that Mongolia's international investment treaties, the country's domestic investment law, as well as investor-State contracts concluded with the Government of Mongolia afford foreign investors a degree of legal protection in reflection of common international, domestic, and contractual standards, this study proceeds as follows.

Chapter 2 explores the international legal system of investment protection of Mongolia, which is at the head of the hierarchy of special investment norms. First, the study refers to the development of international investment treaties and failed multilateral investment treaty attempts. The latter efforts left to countries worldwide a legacy of international standards, which the authors of these multilateral treaty attempts considered fundamental to protect investments abroad. The subsequent parts address the notion of investment treaty protection and examine the legal effect of international law in Mongolia. Afterwards, the study turns to Mongolia's international investment treaties. The country's BIT portfolio and BIT approach are discussed in more detail. A particular focus is put on the current and future status of BITs with Member States of the European Union (EU) under both international law and EU law. This is important because, following the 2009 Lisbon Treaty of the EU, the particular matter of FDIs is now within the exclusive competence of the European Union. The EU Commission plans to gradually phase out BITs between EU Member States and non-EU countries and to replace them with new international investment treaties of the European Union. The subsequent part deals with the protection of investments under international treaties that are 'trade-related' on the one side and 'sectoral' on the other. This includes an introduction into the recent phenomenon of international investment protection under preferential trade and investment agreements (PTIAs) and implications for both the traditional system of international investment law, as well as the process of regional economic integration in Southeast and East Asia are pointed out. On this basis, the study discusses the 2015 Economic Partnership Agreement with Japan, which is one of Mongolia's most recent investment treaties and currently only PTIA with investment chapter. Subsequently, the sectoral and multilateral 1994 Energy Charter Treaty is referred to, which was acceded by Mongolia in 1999 and provides international legal protection for foreign energy investments in the country. The emphasis of Chap. 2 lies on the following designation and illustration of the main substantive and procedural law standards of investment protection in international investment treaties and the examination of Mongolia's investment treaty portfolio based thereon. Finally, international investor-State arbitrations with Mongolia as a respondent State, as well as international conventions to which Mongolia is a

party that support the enforcement of the country's international investment treaties, are discussed.

Chapter 3 is devoted to Mongolia's domestic legal system of investment protection. First, it highlights the relevance of *erga omnes* protection measures and investor rights in domestic (investment) laws and refers to drawbacks compared to investment protection under international investment treaties. Subsequently, Mongolia's special domestic investment law—the 2013 Mongolian Investment Law (MIL)—is analysed in detail. For this purpose, the course of the legislative process of Mongolia's special investment legislation is revisited to build an understanding for the reasons that led to the MIL's establishment, as well as to have a solid basis for comparing the MIL with its predecessor Mongolian investment law versions. The subsequent parts present the scope of application of the MIL, its rules for the admission of foreign investments, and its provision of tax preferences and other legal incentives that have been created to facilitate desired investment operations in the country. Lastly, Chap. 3 identifies and discusses the main substantive and procedural standards of treatment and protection that especially capital-importing countries tend to incorporate in special domestic investment laws to afford foreign investors legal protection at the national level before, on this basis, the study examines whether the 2013 Mongolian Investment Law includes these globally shared domestic standards of foreign investment protection.

Chapter 4 addresses investor-State contracts and the special contractual techniques employed by foreign investors in these contracts to protect their investment projects. After providing a definition for this study, the study deals with the specific characteristics of investment contracts in comparison with ordinary commercial contracts, assesses their meaning for the legal protection of foreign investments, and reveals that investor-State contracts in Mongolia have a public law nature. Subsequently, Mongolia's domestic legal framework for the conclusion of investor-State contracts is traced and analysed in detail. In the next main step, the study identifies and discusses the globally shared principles and standards of investment protection under exclusive investor-State contracts. On this basis, the question is raised of whether and to which extent the domestic laws applicable to investor-State contracts in Mongolia entitle foreign investors and the Mongolian Government to negotiate and agree on these special contractual terms of investment protection. The final part of Chap. 4 discusses the application and effect of so-called 'umbrella clauses', as contained in many of Mongolia's international investment treaties. This is done here rather than in Chap. 2 as umbrella clauses in international investment treaties are typically invoked in relation to alleged breaches of investor-State contracts. After an examination of the umbrella clauses in the international investment treaties of Mongolia, the study concludes with a discussion of whether breaches of investment contracts by the host State can be invoked under international investment treaties in the absence of an umbrella clause.

Chapter 5 summarises the study's main findings of the current state of legal protection for foreign investors in Mongolia under international investment treaties, the domestic investment law, as well as exclusive investor-State contracts, and concludes with an outlook.

Chapter 2
International Investment Treaties

The nations of the world have built a distinct international legal system to protect foreign investments. During the second half of the last century, countries began to conclude special international investment treaties by which the contracting States assume binding inter-State obligations with respect to the treatment and protection of investors from the other contracting State(s) and the settlement of investor-State disputes by international arbitration. Today, there are more than 2500 international investment treaties worldwide.

The emergence of international investment treaties reflects the desire of capital-exporting countries to establish clear and binding international rules for the protection of investments by nationals abroad. Investment treaties did not "arise suddenly and miraculously the way Athena sprang from the head of Zeus"[1] but are the result of earlier attempts to protect alien property under rules of international law.[2] As shall be seen, early international commercial treaties, which primarily addressed bilateral trade relations, are important precursors of modern investment treaties. In addition, investment treaties are based on customary international law. Historically, special investment treaties sought to resolve conflicts between capital-exporting and capital-importing States about the protection of aliens under customary international law.[3] Their creation was meant to reaffirm what was believed to be the fundamental rules of treatment and protection of foreign investors by host States. The rules of international investment treaties guarantee eligible investors written international minimum standards of treatment and protection that are outside the general legislative control of host States. Investment treaties provide a

[1]Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2014) 1.

[2]See Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law', in Bungenberg, *et al*. (eds.), *International Investment Law: A Handbook* (C.H. Beck, Hart Publishing, Nomos, 2015) 6. See also *infra* at 2.1.5.1.

[3]See Brown, 'The Evolution of the Regime of International Investment Agreements: History, Economics and Politics', in Bungenberg, *et al*. (eds.), *International Investment Law: A Handbook* (C.H. Beck, Hart Publishing, Nomos, 2015) 153, 158–60.

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minimum level of legal protection and stability, independent from the quality of domestic legal norms. Furthermore, they incorporate a procedural safeguard which does not exist under traditional international law. Traditionally, only States, as the main subjects of international law, have the capacity to present an international claim because of another State's violation of international rules. Private individuals, by contrast, could not directly invoke internationally wrongful conduct by a foreign State but were required to seek 'diplomatic protection' by their home State. The latter would or would not consider the case on behalf of a national abroad and demand compensation from the host country for an alleged violation of international law.[4] Diplomatic protection means that the home State invokes its own right to protect its citizens abroad.[5] International investment law overcomes the dependency on diplomatic protection. At the heart of every modern international investment treaty there is a dispute settlement clause that entitles investors covered by the investment treaty to invoke violations of treaty rules before an international treaty tribunal and to demand compensation from the violating host State. It is often emphasised that, by doing so, international investment treaties have placed investment protection in the realm of law and depoliticised the settlement of investor-State disputes.[6]

Generally, there are two main categories of international investment treaties. First, there are international investment agreements that exclusively govern foreign investments ('self-standing or standalone investment treaties'). This includes the well-known type of bilateral investment treaties (BITs) but also plurilateral self-standing investment treaties. The second category concerns international agreements that address international investment activities alongside international trade matters. These 'trade- and investment-related' international treaties are often labelled as 'free trade agreements' (FTAs) or 'economic partnership agreements' (EPAs). Contemporary legal literature refers to them as 'preferential trade and investment agreements' (PTIAs) with investment chapters.[7] Here again, one can distinguish between bilateral and plurilateral PTIAs.

[4]On diplomatic protection, see, *e.g.*, Salacuse, *The Three Laws of International Investment* (Oxford University Press, 2013) 312–3.

[5]See also *Mavrommatis Palestine Concessions (Judgment)* [1927] PCIJ (ser. A) No. 2, 12: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – the right to ensure, in the person of its subjects, respect for the rules of international law."

[6]See Shihata, 'Towards a Greater Depoliticization of Investment Disputes' (1986) 1 *ICSID Rev. – For. Inv. L. J.* 1; Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010) 59. Suggesting a potential reform of the current system, *inter alia* by increasing home State control and responsibility, as well as by making State-to-State investment arbitration more acceptable in the future: Kessedjian, 'Where Public meets Private: A few Thoughts on Investment Law and Arbitration', in Bungenberg, *et al.* (eds.), *International Investment Law: A Handbook* (C.H. Beck, Hart Publishing, Nomos, 2015) 1879, 1883, para. 13.

[7]See only the contributions in Hofmann, Schill and Tams (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos, 2014).