

# Contents

<b>1</b>	<b>Introduction</b> . . . . .	1
1.1	Problem Definition and Research Question . . . . .	3
1.2	Objects of the Investigation and Conceptual Framework . . . . .	5
1.3	The Course of the Argument . . . . .	8
<b>2</b>	<b>International Investment Treaties</b> . . . . .	11
2.1	Investment Protection Under International Investment Treaties . . .	13
2.1.1	Overview of Protection Standards in International Investment Treaties . . . . .	14
2.1.2	Development of Investment Protection Under International Treaties . . . . .	15
2.1.2.1	Friendship, Commerce and Navigation Treaties . . .	15
2.1.2.2	The Proliferation of Bilateral Investment Treaties . . . . .	19
2.1.2.3	Recent Developments in International Investment Treaty-Making . . . . .	21
2.1.3	Early Failures of Multilateral International Investment Treaty Attempts . . . . .	23
2.1.3.1	The Abs-Shawcross Draft Convention on Investments Abroad (1959) . . . . .	23
	Substantive Law Protection Standards . . . . .	24
	Procedural Law Protection Standards . . . . .	25
2.1.3.2	The OECD Draft Convention on the Protection of Foreign Property (1967) . . . . .	25
	Substantive Law Protection Standards . . . . .	26
	Procedural Law Protection Standards . . . . .	27
2.1.4	Significance of Legal Protection Under International Investment Treaties . . . . .	28
2.1.4.1	Creating a Favourable and Stable Legal Environment . . . . .	28

2.1.4.2	Enforcement of the Investment Treaty-Shaped Legal Environment . . . . .	29
2.1.5	The Legal Effect of International Law in Mongolia . . . . .	29
2.1.5.1	Customary International Law and International Minimum Standard of Treatment of Aliens . . . . .	29
2.1.5.2	General Principles of Law . . . . .	32
2.1.5.3	International (Investment) Treaties . . . . .	33
2.2	Bilateral Investment Treaties . . . . .	35
2.2.1	Bilateral Investment Treaties Entered into by Mongolia . . .	36
2.2.2	Approach Towards Bilateral Investment Treaties . . . . .	37
2.2.2.1	The 1990s . . . . .	37
2.2.2.2	The 2000s . . . . .	38
2.2.2.3	Approach Analysis . . . . .	38
2.2.3	Bilateral Investment Treaties Entered into with Member States of the European Union . . . . .	39
2.2.3.1	The European Union's Exclusive Competence for Foreign Direct Investments . . . . .	40
2.2.3.2	Regulation (EU) No. 1219/2012 on the Legal Status of Extra-EU Bilateral Investment Treaties Under European Union Law . . . . .	41
2.2.3.3	Future International Investment Treaties of the European Union . . . . .	42
2.3	Trade-Related and Sectoral International Treaties with Investment Chapters . . . . .	44
2.3.1	Preferential Trade and Investment Agreements . . . . .	45
2.3.1.1	The (Re-) Integration of Investment Rules into International Trade Agreements . . . . .	45
2.3.1.2	Implications for the Current International Investment Law System . . . . .	46
2.3.1.3	Preferential Trade and Investment Agreements and Regional Economic Integration in East Asia . . . . .	49
2.3.2	The Japan-Mongolia Economic Partnership Agreement (2015) . . . . .	51
2.3.2.1	Contents of the Agreement and Economic Significance . . . . .	51
2.3.2.2	Chapter 10 of the Agreement Governing Mutual Foreign Investments . . . . .	52
2.3.2.3	Relation of the Agreement to the Japan-Mongolia BIT (2001) . . . . .	53
2.3.3	The Energy Charter Treaty (1994) . . . . .	54
2.3.3.1	Treaty Origin . . . . .	54
2.3.3.2	Sectoral Scope of Treaty Application . . . . .	55

2.3.3.3	Investment Protection Under the Energy Charter Treaty . . . . .	55
2.4	Standards of Investment Protection and Reflection in the International Investment Treaties of Mongolia . . . . .	57
2.4.1	Scope of Application of International Investment Treaties . . . . .	58
2.4.2	Substantive Law Protection Standards in International Investment Treaties . . . . .	59
2.4.2.1	National Treatment . . . . .	59
	Overview of Content and Application of the Standard . . . . .	60
	Evaluation of International Investment Treaties . . . . .	63
2.4.2.2	Most-Favoured-Nation Treatment . . . . .	64
	Overview of Content and Application of the Standard . . . . .	64
	The Extension of Most-Favoured-Nation Treatment to Dispute Settlement Clauses . . . . .	66
	Evaluation of International Investment Treaties . . . . .	68
2.4.2.3	Fair and Equitable Treatment . . . . .	69
	Fair-and-Equitable-Treatment Clauses Linked to (Customary) International Law . . . . .	70
	Unqualified Fair-and-Equitable-Treatment Clauses as Autonomous Legal Standard . . . . .	71
	Principles of Protection Commonly Associated with Fair and Equitable Treatment . . . . .	73
	The Doctrine on the Protection of Legitimate Expectations . . . . .	78
	Evaluation of International Investment Treaties . . . . .	82
2.4.2.4	Full Protection and Security . . . . .	83
	Overview of Content and Application of the Standard . . . . .	83
	Evaluation of International Investment Treaties . . . . .	89
2.4.2.5	Expropriation and Compensation . . . . .	90
	Overview of Content and Application of the Standard . . . . .	90
	Evaluation of International Investment Treaties . . . . .	93
2.4.2.6	Free Transfer of Funds and Capital . . . . .	94
	Overview of Content and Application of the Standard . . . . .	95
	Evaluation of International Investment Treaties . . . . .	97
2.4.2.7	Umbrella Clauses in International Investment Treaties . . . . .	97
2.4.2.8	Interim Conclusion . . . . .	98

2.4.2.9	Competing Obligations Under Human Rights Law . . . . .	99
	International Human Rights Obligations . . . . .	101
	Domestic Human Rights Obligations . . . . .	104
2.4.3	Investor-State Arbitration Offers in International Investment Treaties . . . . .	106
2.4.3.1	Forms of State Consent to Investor-State Arbitration . . . . .	107
	Consent Through Dispute Settlement Clauses in International Investment Treaties . . . . .	107
	Consent Through Dispute Settlement Clauses in Domestic Investment Laws . . . . .	108
	Consent Through Arbitration Clauses in Investor-State Contracts . . . . .	109
2.4.3.2	Significance of Investment Treaty-Based Investor-State Arbitration . . . . .	109
2.4.3.3	Features of Dispute Settlement Clauses in International Investment Treaties . . . . .	110
	Scope of Consent to Investment Treaty-Based Investor-State Arbitration . . . . .	111
	(Pre-) Conditions of Investment Treaty-Based Investor-State Arbitration . . . . .	112
2.4.3.4	Evaluation of International Investment Treaties . . . . .	114
	Wide Dispute Settlement Clauses in International Investment Treaties . . . . .	115
	Narrow Dispute Settlement Clauses in International Investment Treaties . . . . .	116
	(Pre-) Conditions for Investor-State Arbitration in International Investment Treaties . . . . .	117
2.4.3.5	Interim Conclusion . . . . .	120
2.4.4	Investor-State Arbitrations Based on International Investment Treaties of Mongolia . . . . .	121
2.4.4.1	Alstom Power Italia v. Mongolia . . . . .	121
2.4.4.2	Paushok v. Mongolia . . . . .	121
2.4.4.3	China Heilongjiang v. Mongolia . . . . .	123
2.4.4.4	Khan Resources v. Mongolia . . . . .	129
2.5	International Conventions Supporting the Enforcement of International Investment Treaties . . . . .	133
2.5.1	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) . . . . .	133
2.5.1.1	International Obligation to Enforce Foreign Arbitral Awards . . . . .	134
2.5.1.2	Challenge and Review of Foreign Arbitral Awards by National Courts . . . . .	135

2.5.2	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) . . . . .	136
2.5.2.1	International Obligation to Enforce Convention-Based Arbitral Awards . . . . .	137
2.5.2.2	Challenge and Annulment of Convention-Based Arbitral Awards . . . . .	137
2.6	Summary of the Main Results . . . . .	138
<b>3</b>	<b>Domestic Investment Law . . . . .</b>	<b>143</b>
3.1	Investment Protection Under Domestic Investment Laws . . . . .	145
3.1.1	Significance of Legal Protection Under Domestic Investment Laws . . . . .	146
3.1.2	Drawbacks of erga omnes Protection Under Domestic Investment Laws . . . . .	147
3.2	The Mongolian Investment Law (MIL) (2013) . . . . .	147
3.2.1	The Course of the Legislative Process . . . . .	148
3.2.1.1	The Foreign Investment Law (1993) . . . . .	148
	Scope of Application and Admission of Foreign Investments . . . . .	149
	Legal Preferences and Incentives for Foreign Investors . . . . .	150
	Substantive Law Provisions on Investment Protection . . . . .	150
	Procedural Law Provisions on the Settlement of Investor-State Disputes . . . . .	151
3.2.1.2	Amendments to the Foreign Investment Law (2002) . . . . .	151
	Scope of Application and Admission of Foreign Investments . . . . .	152
	Legal Preferences and Incentives for Investors . . . . .	152
	Provisions on Investment Protection and the Settlement of Investor-State Disputes . . . . .	153
3.2.1.3	Law on Foreign Investments in Strategic Sectors (2012) . . . . .	154
	Background of the Law . . . . .	154
	Legal Content and Restricting Measures . . . . .	156
3.2.1.4	Fundamental Revision of the Domestic Investment Law System (2013) . . . . .	158
3.2.2	Scope of Application of the Mongolian Investment Law . . . . .	159
3.2.3	The Admission of Foreign Investments in Mongolia . . . . .	160
3.2.3.1	Private-Owned Foreign Investments . . . . .	161
3.2.3.2	State-Owned Foreign Investments . . . . .	162
	Definition of Foreign State-Owned Legal Entity . . . . .	162
	Admission Requirements and Authorisation Procedure . . . . .	162

3.2.4	Taxation Preferences and Incentives for Investments . . . . .	163
3.2.4.1	Types of Taxation Incentives and Covered Tax Rates . . . . .	164
3.2.4.2	Tax-Rate-Stabilisation Certificates . . . . .	164
	Issuing Criteria and Validity Periods of Tax-Rate-Stabilisation Certificates . . . . .	164
	Right to Demand a Tax-Rate-Stabilisation Certificate and Legal Effect . . . . .	166
3.2.5	Other Legal Incentives for Investments . . . . .	167
3.2.5.1	Land Use-Related Measures . . . . .	167
3.2.5.2	Other Promotional Measures . . . . .	168
3.2.6	Qualified-Majority Requirement for Future Legal Amendments . . . . .	169
3.3	Standards of Investment Protection and Reflection in the Mongolian Investment Law . . . . .	169
3.3.1	Substantive Law Protection Standards in Domestic Investment Laws . . . . .	170
3.3.1.1	National Treatment . . . . .	171
	Direct and Indirect Guarantees of Equal Treatment . . . . .	171
	Evaluation of the Domestic Investment Law . . . . .	172
3.3.1.2	Expropriation and Compensation . . . . .	173
	Constitutional and Domestic Investment Law Guarantees on Expropriation . . . . .	173
	Evaluation of the Domestic Investment Law . . . . .	174
3.3.1.3	Free Transfer of Funds and Capital . . . . .	175
	Transferable Funds and Transfer Restrictions . . . . .	175
	Evaluation of the Domestic Investment Law . . . . .	176
3.3.1.4	Fair and Equitable Treatment . . . . .	176
3.3.2	Investor-State Arbitration Offers in Domestic Investment Laws . . . . .	177
3.3.2.1	Significance of Investor-State Arbitration Based on Domestic Investment Laws . . . . .	178
3.3.2.2	Scope of Consent to Investor-State Arbitration Based on Domestic Investment Laws . . . . .	179
3.3.2.3	(Pre-) Conditions of Investor-State Arbitration Based on Domestic Investment Laws . . . . .	179
3.3.2.4	Evaluation of the Domestic Investment Law . . . . .	180
3.4	Summary of the Main Results . . . . .	181
<b>4</b>	<b>Investor-State Contracts . . . . .</b>	<b>185</b>
4.1	Investment Protection Under Investment Contracts with Host States . . . . .	186
4.1.1	Definition of Investment Contracts . . . . .	188
4.1.2	Investment Contracts as a Unique Source of Rights and Obligations . . . . .	189

4.1.2.1	Parties Involved and Objects of Investment Contracts . . . . .	190
4.1.2.2	Special Contractual Techniques of Investment Protection . . . . .	190
4.1.2.3	Investment Contracts and Relation to International Law . . . . .	191
4.1.2.4	Public Law Nature of Investment Contracts . . . . .	192
4.1.3	Significance of Legal Protection Under Investment Contracts . . . . .	193
4.1.3.1	Contractual Support of Investment Law Protection and Public Governance . . . . .	194
4.1.3.2	The Role of Investment Contracts in Mongolia . . . . .	194
4.1.4	The Public Law Character of Investment Contracts in Mongolia . . . . .	195
4.2	The Statutory Framework for Investment Contracts in Mongolia . . . . .	197
4.2.1	Government Entitlement and Right to Demand an Investment Contract . . . . .	198
4.2.2	Minimum Contract Duration of Investment Contracts . . . . .	198
4.2.3	Contents of Investment Contracts Pursuant to Article 20.4 MIL . . . . .	199
4.2.4	Government Regulation on Investment Contracts (2014) . . . . .	200
4.2.4.1	Scope of Application . . . . .	200
4.2.4.2	Application for an Investment Contract and Grounds for Refusal . . . . .	201
4.2.4.3	Negotiation and Conclusion of Investment Contracts . . . . .	201
4.2.4.4	Contents of Investment Contracts Pursuant to the Government Regulation . . . . .	202
4.2.4.5	Monitoring and Termination of Investment Contracts . . . . .	203
4.2.5	General Remarks on the Statutory Framework for Investment Contracts . . . . .	203
4.2.5.1	Investment-Threshold-Amount Requirement and Consequences . . . . .	204
4.2.5.2	Changes of Circumstances and Adaption or Termination of Investment Contracts . . . . .	205
	Implementation of Renegotiation Clauses . . . . .	205
	Change of Circumstances Addressed by National Law . . . . .	206
4.3	Standards of Investment Protection Provided by Investment Contracts . . . . .	208
4.3.1	Contracting on Legal Stability . . . . .	209
4.3.1.1	Origins of Legal Instability . . . . .	209
4.3.1.2	Legal Stability and Fair-and-Equitable-Treatment Clauses in International Investment Treaties . . . . .	211

4.3.1.3	Contractual Stabilisation Clauses . . . . .	215
4.3.1.4	Parliamentary Authorisation to Contract on Investment Stabilisation . . . . .	217
4.3.2	Contracting on the Applicable Law . . . . .	219
4.3.2.1	The Combined Application of National Law and International Law . . . . .	221
4.3.2.2	Party Freedom to Choose the Applicable Law . . .	224
4.3.2.3	Potential Choice-of-Law Restrictions Under National Law . . . . .	226
	Special Local-Law Requirements for Public Law Contracts . . . . .	226
	General Local-Law Requirements in Domestic Investment Laws . . . . .	228
	Restrictions Under Arbitration Rules and Domestic Arbitration Laws . . . . .	228
4.3.2.4	Applicable Law in the Absence of a Choice of Law . . . . .	230
4.3.3	Contracting on Dispute Settlement by International Arbitration . . . . .	232
4.3.3.1	Significance of Investment Contract-Based Investor-State Arbitration . . . . .	232
4.3.3.2	The Legality of Arbitration Agreements Involving the State and Public Law Contracts . . .	234
	Incapacity of State Entities to Enter into Arbitration Agreements . . . . .	235
	Non-Arbitrability of Public Law Contracts and Disputes Arising from the Contract . . . . .	238
4.3.3.3	Forum Selection Clauses in Investment Contracts . . . . .	240
4.4	Standards of Investment Protection and Implementation in Investment Contracts in Mongolia . . . . .	241
4.4.1	Stabilisation Clauses in Investment Contracts . . . . .	242
4.4.2	Applicable-Law Clauses in Investment Contracts . . . . .	243
4.4.2.1	General Permissibility of Applicable-Law Agreements . . . . .	245
4.4.2.2	Potential Choice-of-Law Restrictions Under National Law . . . . .	246
	Article 7.2 of the MIL . . . . .	247
	Article 20.4 of the MIL . . . . .	248
4.4.2.3	Application of International Law in the Absence of Its Choice . . . . .	249
4.4.3	Arbitration Clauses in Investment Contracts . . . . .	249
4.4.3.1	Statutory Framework for Public-Private Arbitrations . . . . .	250



4.4.3.2	Standing Offer to Arbitrate Investment Contracts in Article 6.9 of the MIL . . . . .	252
4.4.3.3	Scope of Arbitration Agreements and Compatibility with National Law . . . . .	252
	Claims in Relation to Investment Contracts . . . . .	253
	Claims in Relation to Domestic Laws . . . . .	254
	Claims in Relation to International Investment Treaties . . . . .	256
4.4.4	Interim Conclusion . . . . .	258
4.4.4.1	Contracting on Investment Stabilisation . . . . .	258
4.4.4.2	Contracting on the Applicable Law . . . . .	259
4.4.4.3	Contracting on Dispute Settlement by International Arbitration . . . . .	260
4.5	Investment Contracts Invoked Under Umbrella Clauses in International Investment Treaties . . . . .	261
4.5.1	Umbrella Clauses and Contractual Undertakings by the Host State . . . . .	262
4.5.1.1	Overview of Principle and Rationale . . . . .	263
4.5.1.2	Legal Debates and Interpretive Uncertainty . . . . .	263
4.5.2	Umbrella Clauses and Unilateral Promises or <i>erga omnes</i> Guarantees by the Host State . . . . .	270
4.5.3	Umbrella Clauses and Relation to Forum Selection Clauses in Investment Contracts . . . . .	274
4.5.4	Evaluation of International Investment Treaties . . . . .	279
4.5.4.1	Classic Umbrella Clauses . . . . .	281
4.5.4.2	Umbrella Clauses with Particularities . . . . .	282
	Restriction to Contractual Undertakings . . . . .	282
	Exclusion of <i>erga omnes</i> Guarantees . . . . .	282
	The ‘Singaporean Type’ of Umbrella Clause . . . . .	283
4.5.5	Investment Contracts and International Investment Treaties in the Absence of an Umbrella Clause . . . . .	285
4.5.5.1	The Extension of Most-Favoured-Nation Treatment to Umbrella Clauses . . . . .	286
4.5.5.2	Investment Contracts Invoked Under Wide Dispute Settlement Clauses in International Investment Treaties . . . . .	289
4.6	Summary of the Main Results . . . . .	294
<b>5</b>	<b>Results and Concluding Remarks . . . . .</b>	<b>303</b>
	<b>Annex . . . . .</b>	<b>309</b>
	<b>Table of Cases . . . . .</b>	<b>325</b>
	<b>Table of Treaties . . . . .</b>	<b>335</b>
	<b>Bibliography . . . . .</b>	<b>343</b>