FDI INFLOW TO MONGOLIA:

DISPUTE RESOLUTION AND ARBITRATION

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ADR	Alternative Dispute Resolution
BIT	Bilateral investment treaty
EAP	East Asia and Pacific
ECT	Energy Charter Treaty
EKCP	East Kutai Coal Project
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IPC	Investor Protection Council
ISDS	Investor-State Dispute Settlements
MINAC	Mongolian International and National Arbitration Center
MNAC	Mongolian National Arbitration Court
NEA	Nuclear Energy Agency of Mongolia
QJPI	Quality of Judicial Processes Index
SOE	Stated-Owned Entity
UNCITRAL	United Nation Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollar

Introduction

In 2017 ERI conducted the base "Foreign Direct Investment Inflow in Mongolia" study in which the research team estimated the impact of FDI on the Mongolian economy and identified the main factors influencing foreign direct investment (FDI) (ERI, 2017). ERI then conducted two follow up studies in 2018 and 2019 with the former focusing on investment indices and the terms of trade of Mongolia as compared to Chile (ERI, 2018) while the later contained a comparative analysis of the investment environments of Mongolia and select countries (ERI, 2019). The studies then determined both short-term and long-term recommendations for Mongolia based on the best practices of countries such as Kazakhstan, Peru, Zambia and Chile.

These series of studies ultimately found that FDI inflow into a country was largely determined by the country's investment environment. Thus, in order to better attract FDI, Mongolia should take measures to better its overall business and investment environment. Moreover, in Mongolia's case, the aforementioned studies found that disputes with foreign investors and ill-conceived policy decisions were the factors that most negatively affected the country's investment environment. In light of these findings, this update of the "Foreign Direct Investment Inflow in Mongolia" study plans to focus on the issue of investment disputes and how to resolve them. In particular, as most FDI into Mongolia is centered around the mining sector, the scope of this report will be on investment dispute resolution and ways to improve contract enforcement institutions in the mining sector. More specifically, it will aim to identify ways and mechanisms for avoiding possible future disputes ex-ante and resolving disputes efficiently ex-post.

The report will first delve into the importance of dispute resolution for investment both internationally and in Mongolia. It will then focus on international best practices of dispute resolution, how these indicators are measured and analyze several international cases. The report will then focus on Mongolia's judicial system, how it compares to international best practices and touch on key cases.

Overall, a look at international best practices as well as an overview of dispute resolution in Mongolia could provide valuable insight for Mongolia on areas to improve its institutional and investment environment and ultimately bolster FDI.

International Dispute Resolution

Utilized properly, FDI can be key catalyst for economic development. This is especially true for smaller countries such as Mongolia that do not have access to large amounts of capital. Yet, attracting FDI can be a difficult task with numerous factors including government policies, mineral resource endowments, the institutional capabilities of the country etc. However, as the base "Foreign Direct Investment Inflow in Mongolia" study conducted by ERI has found, FDI is largely affected by the country's investment environment. While numerous factors ultimately contribute to a country's investment environment, in Mongolia's case in particular, the aforementioned study has found that the county's legal environment and how it deals with disputes with foreign investors is especially salient.

Dispute resolution in the mining sector can take multiple forms. The first is dispute resolution through going through the domestic judicial system. The second involves alternative dispute resolution mechanisms such as mediation and arbitration. Arbitration is especially an important form of conflict resolution for investor-state dispute settlements (ISDS).

The first line of defense for an investor operating in a foreign country is the host country's domestic judicial system. Depending on the type and scope of the project, the investor has the option to turn to the civil, administrative and if available, commercial courts. In most cases, the civil courts have the jurisdiction to handle cases between individuals and companies, allowing the investor the option to resolve any disputes they may have with other individuals or companies. They may also turn to the administrative courts for disputes based on issues that are connected to the host government. These include issues such as registration, licensing and other administrative concerns. Additionally, some countries, such as the United Kingdom and the Unites States, have separate courts that are specialized in commercial disputes. While similar to civil courts in that they handle disputes between individuals or legal entities, they have a much narrower scope of expertise and are much better equipped to handle complex commercial cases.

Moreover, in addition to the structure and specialization of the courts, the effectiveness of domestic courts as a mechanism for mining dispute resolutions lies in how well the country upholds the rule of law and ensures due processes. In fact, the rule of law has also been found to promote economic growth by providing opportunity and security through laws and legal institutions.

According to a report by the World Bank on judicial reform, the rule of law prevails where:

1. The government itself is bound by the law
2. Every person in society is treated equally under the law

3. The human dignity of each individual is recognized and protected by law
4. Justice is accessible to all

In order to better promote the rule of law, a country should work to ensure the following:

- Meaningful and enforceable laws: Laws must provide transparent and equitable rules by which society will be governed and provide legal empowerment and security in one's rights.
- Enforceable contracts: Contracts are private means of empowering oneself to gain rights, to take opportunities in business, commerce and other activities, and to gain security in being able to enforce them.
- Basic security: Safety in one's person and property allows one to participate fully in society and the economy.
- Access to Justice: Laws and rights are meaningless if people cannot realize, enforce, and enjoy them through actual access to justice (World Bank, 2003).

While there are several rankings and assessments by international organizations that look into the effectiveness of the judicial systems of countries, (these include indexes such as the World Justice Project's Rule of Law Index and Transparency International's Corruption Perception Index) in terms of measuring the effect of a country's legal environment on FDI, the enforcing contracts indicator of the World Bank's annual Doing Business report is especially informative. As contracts are the main mechanism through which interactions are managed in the mining sector, a country's ability to resolve issues pertaining to contracts and ensure their enforcement is vital. Therefore, when looking at international best practices of dispute resolution in the mining sector, the overall structure and data from the Doing Business report's enforcing contracts indicator will predominantly be used.

The enforcing contracts indicator "tracks the performance of courts and civil enforcement agencies in over 180 economies around the globe with regard to their ability to successfully resolve commercial cases." The report maintains that carefully tracking is an important step in improving performance over time and that "enhancing the efficiency of the judicial system can improve the business climate, foster innovation, attract FDI, and secure tax revenues" (World Bank, 2016).

Within the scope of enforcing contracts, the Doing Business report scores over 180 countries out of 100 points on the following factors:

1. Time (days)
2. Cost (% of claim value)
3. Quality of Judicial Processes Index (QJPI)

These indicators were assessed for a hypothetical commercial case between

2 domestic businesses as the case was resolved through a local court of first instance. While it may not be directly related to foreign investors and FDI, it gives a comprehensive understanding of the general judicial system and legal environment of a country. Both these factors greatly affect the overall business environment and can either attract or deter FDI.

Time refers to how many calendar days it takes to enforce a contract through the courts. This includes the time it takes to file and serve the case, the time needed to conduct a trial and obtain a judgement and the time needed to enforce the judgement.

Cost is calculated as a percentage of the claim value. It includes the average cost of attorneys and legal advice, court costs and any enforcement costs.

The QJPI is a comprehensive index that includes 15 good practice areas under

FIGURE 1. QJPI BREAKDOWN

Court Structure and Proceedings	Case Management	Court automation	Alternative dispute resolution
1. Availability of a specialized commercial court or division	1. Regulations setting time standards for key court events	1. Ability to file initial complaint electronically	1. Availability and regulation of arbitration
2. Availability of a small claims court or simplified procedures for small claims	2. Regulations on adjournments and continuances	2. Ability to serve process electronically	2. Availability and regulation of voluntary mediation or conciliation
3. Availability of pretrial attachment	3. Availability of performance measurement mechanisms	3. Ability to pay court fees electronically	
4. Criteria used to assign cases to judges	4. Use of pretrial conference	4. Publication of judgements	
	5. Availability of an electronic case management system		

Source: World Bank Doing Business report

The first 3 categories (court structure and proceedings, case management, and court automation) are largely linked to the domestic judicial system of the host country and will be assessed in conjunction. The final category, alternative dispute resolution, will be assessed in a separate section in light of arbitrations important role in resolving international disputes in the mining sector.

Court Structure and Proceedings

This indicator is focused on how the court is structures and how it deals with commercial cases. A large portion of this indicator is based on whether or not a country has a specialized commercial court or division. This is important as court specialization addresses broader business and development concerns and improves the courts' ability to deal with complex topics. Moreover, as mentioned in the 2016 Doing Business report, 97 out of 189 countries have some kind of commercial court specialization, highlighting how widespread the practice is. Countries with a booming business environment such as the United Kingdom and the US have long since had specialized commercial courts.

The presence of a small claims court or a fast-track procedure for small claims is also important when promoting the overall business environment of a country. Small claims courts help businesses resolve smaller disputes quickly and easily. As these cases are likely to have less evidence and be more streamline to assess, a small claims court or a fast-track procedure for small claims can help businesses resolve less serious disputes with ease, aiding in the smooth operations of a business. It will encourage businesses to rely on the domestic court system to resolve smaller issues before they become a larger problem that requires costlier, more nuanced handling. From a legal perspective, it will also lessen the pressures of the courts, allowing judges to resolve small stakes claims without adding undue stress to the overall court system. With a separate court, the amount of cases that are within the jurisdiction of general civil courts will be greatly reduced, narrowing down the scope of cases and leading, arguably, to better judgements.

The key elements of a court structure and proceedings that support business development and endorse FDI are data-driven specialization, streamlined court processes, specialized judicial selection and capacity building for judges and court staff, the presence of a monitoring system to track progress. Most importantly, for specialization to be effective and successfully implemented, it requires extensive research and continued adjustments to best suit the needs of the implementing country. Moreover, as different types of specialization are available, (the appointment of specialized judges to regular panels, specialized benches, the establishment of a specialized court) conducting a cost benefit analysis of each type is essential.

Case management

Case management refers to the enforced standards and performance measurements mechanisms used during court proceedings. In a general sense, it refers to a set of principles and techniques intended to ensure the timely and organized flow of cases through the court from initial filing through deposition (Gramckow & Nussenblatt, 2013). Efficient case management requires a defined and limited jurisdiction of the courts (both in terms of case type and cost), affordable services, simplified processes and the quick completion of cases. This is important as a speedy trial is one of the hallmarks of a well-functioning judicial

system and a key component of court efficiency. As such, according to the 2016 Doing Business report, 111 countries have implemented laws or regulations that set time standards for key court events. Unfortunately, these standards are only held in practice in 76 of the 111 countries.

For the case management of courts to improve a careful assessment of court resources and capacity, the legal framework and any changes that would be required if time standards were implemented, the promotion of better management practices by judges and the consistent review and adjustment of implemented measures is necessary.

Court Automation

Court Automation refers to the use of electronic systems to increase overall court efficiency. As suggested, full automation requires the cooperation of the government and significant amounts of capital investment. As such, it is the least widespread of the 4 areas with only 4 countries (Estonia, South Korean, Lithuania and Singapore) fulfilling all 4 measures of the category as mentioned in the 2016 Doing Business report. Conversely, 74 out of the 189 countries assessed had no level of court automation at all.

In light of the preconditions needed to successfully implement full court automation, it is more realistic to focus on the other categories to improve judicial performance quality.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) complements adjudication as it offers the disputing sides additional options beyond going through court proceedings. ADR is a distinct form of dispute resolution in that it requires the voluntary participation of both parties and its effectiveness is directly dependent on how willing the disputing parties are to come to a resolution. While the judicial systems of some countries require that the disputing parties take part in some kind of ADR process before adjudication, the key principle of the process is still based on the willingness of both parties.

ADR processes may be binding or non-binding. The outcomes of binding ADR processes are non-negotiable and must be followed. When participating in binding ADR processes, parties forfeit their right to dispute the judgement and seek different forms of resolution. In this sense, binding ADR processes are very similar to court judgements. Non-binding ADR processes however, allow parties to dispute the conclusions of the process and are usually meant to facilitate and support negotiation between parties (USAID , 1998).

The option to voluntary apply for ADR is especially attractive for promoting FDI as it gives investors the option to resolve disputes without having to rely on the domestic judicial system of the host country. The main types of ADR are detailed below with especial attention paid to arbitration.

1. Mediation is a process in which an impartial third person, a "mediator," facilitates the discussions and assists the parties in trying to reach a mutually acceptable agreement. The mediators do not decide the outcome. It is a process that leaves control in the hands of the parties and can be used in different types of disputes. Mediation has the benefit of being cost-efficient and preserving the relationship between disputing sides.

2. Conciliation: is similar to mediation and is a process in which a conciliator (much like a mediator) meets with the parties to establish a mutual understanding of the underlying cause of the dispute and the settlement.

3. Neutral Evaluation: is a process in which each party is provided with the opportunity to present a summary of the case to a neutral person, an "evaluator," who is most often an attorney or expert in the subject matter. The evaluator then presents the parties with a nonbinding assessment of the merits of the case, including the strengths and weaknesses of each party's evidence and arguments and how the dispute could be resolved.

4. Arbitration: is a process in which the parties select one or more impartial third parties, or "arbitrators," to resolve a dispute. It is used primarily in cross-border disputes and can be used in resolving differences between investors and governments pursuant to bilateral investment treaties, national investment laws, or contracts. Arbitration can be lengthy and costly for both parties involved (World Bank, 2016).

Arbitration

Arbitration is commonly used in the mining sector to resolve invest-state dispute settlements (ISDS). It is consensual, neutral, binding, private and is typically faster and more cost effective than domestic court proceedings (Luttrell & Murphy). From a theoretical standpoint, arbitration has the advantage of preventing diplomatic protection[1], introducing and promoting principles of good governance in domestic judicial systems and providing investors an option to resolve conflicts without relying on the host country's domestic judicial system (Schreuer, 2014).

As mentioned above, for arbitration to occur, the consent of both parties and is invoked pursuant to bilateral investment treaties (BIT), international investment agreements (IIA) and directly in investment contracts. Within the scope of FDI, the legal protection of investment is guaranteed by a network of more than 2000 BITs, multilateral investment treaties such as the Energy Charter Treaty as well as numerous free trade agreements.

[1] Diplomatic protection refers to the practice of a country taking up the claims of an investor who is a citizen of said country and bringing this claim against the host country in international court or arbitration. Thus, this makes a commercial dispute an inter-country dispute. However, to the countries involved, this method has the downside of leading to potential diplomatic tensions while for the investor, it has the drawback of being unreliable as diplomatic protection is discretionary.

International arbitration is typically carried out according to the United Nation Commission on International Trade Law's (UNCITRAL) Arbitration Rules, a comprehensive set of procedural rules adopted in 1976 and last revised in 2010 (UNCITRAL). While the Arbitration Rules are geared more towards disputing parties and resolving disputes, UNICITRAL also published its Model Law on International Commercial Arbitration in 1985, with amendments in 2006. This Model Law is intended as a guide for countries to incorporate into domestic arbitration laws. In addition to the aforementioned documents, the enforceability of binding arbitration, a key feature that makes investor protection viable, is ensured by the United Nation's Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Effective since 1959 and signed by 161 countries, the convention ensures that foreign arbitration awards are recognized and enforced.

Recognizing the importance and need for FDI and international cooperation for economic development, the International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 by Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID has 153 contracting member states and is focused on resolving legal disputes between international investors with a particular concentration on ISDS.

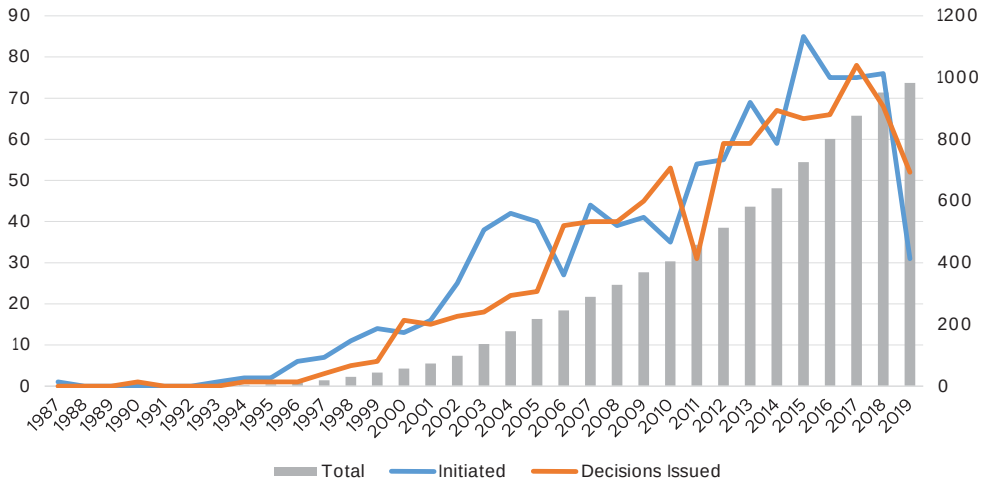
Disputing parties can turn to the ICSID or a number of other international institutions to resolve their disputes. Major international arbitration institutions include the International Court of Arbitration, the London Court of International Arbitration, the Singapore International Arbitration Center, the Hong Kong International Arbitration center, the American Arbitration Association and the Arbitration Institute of the Stockholm Chamber of Commerce.

According to a report by the United Nations Conference on Trade and Development (UNCTAD), the total number of known treaty-based cases reached 514 by the end of 2012 with the actual number likely to be higher as most arbitration forums do not maintain a public registry of claims (UNCTAD, 2013). Since then the total number of treaty-based ISDS cases have gone up to 983 as of July 31 2019. Of this, 35.5% of the decisions were in favor of the state, 29.5% of the decisions were in favor of the investor, 21.5% were settled and 11.3%[2] were discontinued (UNCTAD, 2019).

The following figure shows the steady increase of the ISDS from 1987 to 2019.

[2] The remaining 2.2% were cases in which the tribunal decided in the favor of neither party. This means that liabilities were found but no damages were awarded.

FIGURE 2. TREATY BASED ISDS CASES, 1987-2019 [3]



Source: UNCTAD Investment Policy Hub

The next section will focus on a few international arbitration cases and their outcomes. Cases from resource-rich countries comparable to Mongolia were picked in order to gain an understanding of international best practices on arbitration.

[3] As of July 31 2019.

International Cases

Bear Creek Mining Corporation v. Republic of Peru[4]

The 2014 case between Bear Creek Mining Corporation (Bear Creek), a Canadian company, and the Republic of Peru concerned the issue of indirect expropriation and fair and equitable treatment (FET) (ICSID). Bear Creek sought to invest in Peru's Santa Ana silver mine, obtaining the authorization to acquire, own and operate the mine through Supreme Decree 83 in 2007. Following exploration work and an environmental and social impact assessment, the local community of Santa Ana strongly opposed the development of the mine. This social unrest eventually led to violent protests.

In light of this public unrest, in 2011, the government of Peru issued Supreme Decree 83, revoking the previous Supreme Decree 32 and stopping the development of the Santa Ana silver mine. Following this decision, Bear Creek filed a claim against the Peruvian government pursuant to the Canada-Peru Free Trade Agreement. The arbitration process would be conducted according to the ICSID Rules of Procedure for Arbitration Proceedings and be would be presided by a tribunal of 3 arbitrators.

Ultimately, the tribunal found that Bear Creek did not have the social license to operate its investment. In this case, a social license is not a legal requirement but the approval and acceptance of the local population to conduct an economic project (IISD, 2018). However, the tribunal also found that the development and implementation of a legal framework that accounted for and enforced processes to gain the approval of the local population was the duty of the host country. As such, while Bear Creek's activities to conduct outreach activities were lacking, it was up to the Peruvian government to implement a legal procedure that mandated ample interaction between Bear Creek and the local population. Thus, the initial issuance of Supreme Decree 83 can be regarded as the government's support and approval of Bear Creek's actions, making its revocation via the issuance of Supreme Decree 32 indirect expropriation.

Another interesting issue touched upon in the Bear Creek award was the calculation of the damage amount. In its claim, Bear Creek cited damages of USD 522 million, the expected profitability of the Santa Ana mine calculated using the discounted cash inflow method. As the future profitability of the investment was uncertain, the tribunal refused to use discounted cash inflow method and rather awarded damages using the sunk costs approach. The tribunal decided to award Bear Creek USD 18.2 million in damages with one dissenting opinion citing the International Labor Organization's Indigenous and Tribal Peoples Convention and Bear Creek's failure to take appropriate action as cause to cut the award amount in half.

[4] ICSID Case No. ARB/14/21

Overall, the case highlighted the importance of local population approval, the duty of the government to develop legal institutions to enforce communication between investors and the local population and the consequences that may arise from government decisions to revoke licenses. From a legal standpoint, the case showcased how broadly a tribunal can interpret the concepts of indirect expropriation and FET. These concepts are especially salient to Mongolia as the country deals with numerous issues regarding foreign investors and mining licenses.

Churchill Mining PLC and Planet Mining Pty LTD v. Republic of Indonesia[5]

The 2012 case between Churchill Mining PLC (Churchill), a British company, Planet Mining Pty Ltd (Planet), an Australian company, and the Republic of Indonesia concerned the issues of expropriation and FET (ICSID). However, as the case processed, it largely became an issue of forgery and the due diligence of investors.

Churchill and Planet planned to invest into the East Kutai Coal Project (EKCP) on the island of Kalimantan in Indonesia. The aforementioned companies entered into a joint venture with several Indonesian companies for the operation and managed to obtain the licenses needed to develop and operate the EKCP. However, upon a recommendation from the Indonesian Ministry of Forestry that suspected that the licenses were forged, the Regent of East Kutai revoked EKCP's licenses. Churchill, Planet and the related Indonesian companies turned to the domestic court system without success. They then applied for arbitration under the United Kingdom-Indonesia and the Australia-Indonesia BITs using the ICSID Rules of Procedure for Arbitration Proceedings.

First, the tribunal found that as the Indonesian government was claiming that the investors had forged documentation in order to obtain a mining license, the burden of proof resided with the Indonesian government. After reviewing the facts and events related to the case, the tribunal found that while the Indonesian companies working with Churchill and Planet were the likely source of the forgery, it was up to the investors to exercise sufficient due diligence when carrying out the project. As such, the tribunal decided in favor of the Indonesian government and awarded USD 9.5 million in arbitration fees.

[5] ICSID Case No. ARB/12/40

This case was important in that it dealt with the potential irresponsible behavior of investors and ensured that they were held accountable for not only their own actions but the actions of their associates. While the tribunal employed the use of a broad definition of investor fraud in order to deem the case within the jurisdiction of arbitration, the case also showed how countries could be vulnerable to investor misconduct. In particular, the tribunal highlighted the lack of provisions within the ICSID Convention or most BITs that detailed the consequences of unlawful investor conduct after an investment has been made. While arbitration tribunals have been relying on principles of international public policy to assess the conduct of investors, as indicated by the Churchill, Planet v. Republic of Indonesia tribunal, it is best to include clear provisions in investment treaties themselves if states want to ensure responsible investor behavior (IISD, 2018).

Moreover, as most cases of arbitration are reliant on either BITs or multilateral investment treatments, the scope and issues that are available for arbitration are especially important. A provision that broadly makes available all aspects of the investment process for arbitration may lead to unwanted and expensive claims for states. Developing states are especially susceptible to this. However, too narrow of a provision will not provide the protection needed. This will be explored further in the Beijing Shougang v. Mongolia arbitration case in a later section.

Dispute Resolution in Mongolia

According to the World Bank's Doing Business report, in 2020, Mongolia scored 67.8 out of 100 in terms of ease of doing business. It scored 61.4 out of 100 in terms of enforcing contracts, an average litigation time of 374 days, an average cost of litigation of 22.9% of the claim and a quality of judicial processes score of 8.1. Mongolia's scores after 2015, when the World Bank changed its calculation methodology, are shown below. For comparison, the average for the East Asia and Pacific (EAP) region are also included.

TABLE 1. DOING BUSINESS AND ENFORCING CONTRACTS, MONGOLIA AND EAST ASIA AND PACIFIC REGION, 2016-2020

	Ease of doing business (0-100)		Enforcing contracts (0-100)		Time (days)		Cost (% of claim)		Quality of judicial processes index (0-18)	
	Mongolia	EAP Average	Mongolia	EAP Average	Mongolia	EAP Average	Mongolia	EAP Average	Mongolia	EAP Average
2016	65.3	61.5	58.5	52.7	374	553.8	30.6	48.8	5.5	7.6
2017	66.1	62.0	58.5	52.9	374	560.0	30.6	49.1	5.5	7.9
2018	67.4	62.7	58.5	53.1	374	565.7	30.6	47.3	5.5	7.9
2019	67.7	63.4	61.4	52.8	374	581.1	22.9	47.2	5.5	7.9
	67.8	63.3	61.4		374	581.1	22.9	47.2	5.5	8.1

Source: World Bank, Doing Business report

Since 2016, both the ease of doing business and enforcing contracts scores of Mongolia and the EAP region average have gone up marginally. Mongolia boasts much lower time and cost of litigation results compared to the EAP region average. However, in terms of the QJPI, Mongolia has consistently ranked below average since the inception of the index. Most notably, the country's score has not increased since 2016 while the EAP average has improved. Therefore, special attention was paid to the QJPI and its breakdown. The following sections looks at the 3 subcategories of the QJPI. Overall, it is evident that Mongolia's legal environment has much room for improvement.

Court Structure and Proceedings

For the enforcing contracts indicator, court structure and proceedings account for 5 points out of the total of 18 points. The largest factor that effects the scoring is whether or not the courts are designed to assist in the quick and effective litigation of commercial disputes. This can include having a specialized court or division for commercial cases as well as a small claims court.

Unfortunately, Mongolia has neither a specialized commercial court or court division. It also lacks a small claims court or any kind of expedited small claims procedures. Thus the creation of these institutions can help improve Mongolia's legal and investment environments, positively effecting FDI.

The creation of a separate, specialized courts however, come with their own issues. It requires an ample amount of research to properly define the need for a specialized court or a new court division. In addition to studying historical case data, research also needs to be done on future prospects and whether it is necessary to invest the capital needed to create new judicial infrastructure. The issue of who will work

in these new courts, how they are to be selected, trained and rotated is also key. While separate courts make specialization and expertise possible, if the judges aren't constantly rotated and changed, it may lead to stagnation and introduce biases into the judicial system. Moreover, unless the creation of a specialized court comes with new streamline procedures to resolve commercial cases, it may not have the desired effect of improving case processing times as the caseloads of other courts are likely to increase as resources are directed to the new commercial court.

In Mongolia's case, this means the conducting an extensive cost-benefit analysis of whether court specialization is necessary and if so, what kind. The implementation of new procedures and training that comes with establishing a new court are likely to have spillover effects and lead to a better judicial system in general. However, considering Mongolia's current court system and its caseload, it's worth considering if a commercial court is viable at all. Another issue worth considering is the public's perception of the establishment of a new court. Many people may have a negative view of a commercial court and consider its creation preferential treatment of certain business sectors. Thus, in Mongolia, it may spark issues of resource nationalism as cases from the mining sector are likely to be the main focus of a specialized commercial court.

The need for ample research also holds true for the establishment of a small claims court or an expedited small claims procedure. A focus on why the court system may lead to delayed resolutions and where the blockages are that hinder speedy trails is especially important when trying to figure out a faster small claims procedure. Research may find that it would be a better option to boost pre-existing mediation services for small claim cases rather than establish an unnecessary court, for instance. The cost of court services is also key here as higher costs naturally lead to the suppression of small claims and ultimately negatively affect the court's caseload, efficiency and its allocation of resources

(World Bank, 2016). In Mongolia's case, small claims may not the more pertinent issue that undermines its business environment as the cost of court services in Mongolia, as a percentage of initial claim, is far below the EAP average and has decreased since 2016. Thus, a study into possible time delays would be effective in overhauling the entire system and improving overall efficiency but the establishment of a new court is likely to be unnecessary.

Case Management

Case management refers to the inner workings of the judicial system and whether it promotes the timely, effective resolution of disputes. Mongolia ranks well in terms of time standards as there is legislation that sets the overall time standards for key court events and these time standards are largely respected. Mongolia's average case resolution time of 374 days compared to the EAP average of 581.1 in 2020 alludes to this.

However, apart from time standards, Mongolia has much to improve in terms of case management. For instance, while the Civil Procedure Code of Mongolia details instances in which adjournments are allowed[6], limiting them to unforeseen and exceptional circumstances, it does not limit adjournments to be granted in a case. Thus disputing parties may try to invoke adjournments and purposefully delay the

resolution of a case. In such cases, the management of cases are up to the discretion of judges and can vary wildly, highlighting the need for better judicial training.

This is especially key in Mongolia as judges have the discretion to make a vast majority of decisions and while time standards exist, performance indicators and standards do not. Thus, there are no repercussion for judges with subpar performance as most performance data is not even collected. The first step towards case management in this case would be to define certain performance indicators and begin collecting aggregate data. This data can then be analyzed to spot areas of improvement and ultimately lead to achievable performance standards that can bolster case management performance.

Moreover, Mongolia's lack of electronic case management makes the system slower and harder to manage and regulate. As there are no electronic case management tools that can be used by judges and lawyers, this remains an area for improvement.

[6] Civil Procedure Code of Mongolia, Article 80.1

Court Automation

As mentioned in the International Dispute Resolution section of the report, court automation refers to the use of electronic and digital systems to streamline judicial processes and make them more efficient. However, full court automation requires a large amount of capital investment for the infrastructure needed (servers, wiring, hardware, software, etc.). Thus, it is not an area that the courts can improve without extensive help from the government.

Moreover, the usage of certain services, such as filing claims electronically, is largely dependent on the general public and their level of technological literacy. Thus, it would be pointless to implement an expensive overhaul of the judicial system to include technological improvements that people are not prepared to use. For instance, while it would be beneficial to allow court fees to be paid electronically as Mongolia has a strong internet banking system, other types of court automation improvements should be considered only after improvements in other areas are made and based on careful research.

Alternative Dispute Resolution

Mediation

Mediation in Mongolia is a court-annexed process that is regulated by the Mediation Law ratified in 2012. With the exception of family law cases, mediation is a voluntary process in which the disputing sides can decide to get appointed and meet with a mediator who guides and facilitates discussions. The success of the process is heavily dependent on the willingness of the disputing parties and should they come to an agreement, a mediation agreement is signed and ratified by a civil court judge. The mediation agreement has the same legal powers as an official judgement and the provisions of the agreement are enforceable by law. As such, if an agreement is reached, mediation can be a cost-effective, speedy process that has the benefit of being enforceable.

However, most courts only have 1 mediator on duty at any one time with a limited capacity to take on new cases. Though there is a list of off-duty mediators and the disputing parties may suggest other licensed mediators, there is a general lack of experienced mediators in Mongolia. Moreover, judges are tasked with suggesting the process of mediation to disputing parties. Thus, most only mention it in passing without making a convincing argument, limiting the willingness of disputing parties to take

part in mediation. These findings, coupled with a general lack of experience, due to how new the process is in Mongolia, make it an underutilized conflict resolution method. As the process becomes more reliable and mediators become more experienced, mediation can be an easy, affordable way to resolve commercial disputes without relying on lengthy adjudication processes.

Box 1. Investment Protection Council

The Mongolian government has been making efforts to promote and protect investors' interest and rights. One such initiative was the establishment of the Investor Protection Council (IPC) in 2016 under the supervision of the Mongolian government with support from the World Bank. The council is composed of a Chairman, 16 members and a Secretary. The IPC has the following duties:

- Preview and make a preparatory prognosis on foreign investment related issues that will be discussed during the Cabinet Session
- Protect foreign investors 'rights, analyze and solve their complaints (aside from the cases inspected under court or arbitrage)
- Improve investment legal system, expel duplications and ruptures of laws, present investment related suggestion that made by important associations from the Cabinet.
- Make proposition on an execution of laws and resolutions identified with investment, and acquaint it to the Cabinet.

Since its establishment the IPC has received 105 requests, complaints and statements from both international and domestic organizations and investors (IPC, 2019). Of these, 40% was related to mining, 20% for road, transportation, construction, manufacturing, 10% for information, communication, space technology, 10% for bank, finance, tax, 5% for land, land proprietorship, utilization, 5% for national development, planning, and remaining percentage was claims related to fair competition, as well as supervision, pressure and burden, registration, and authorization activities of the law enforcement agencies (Enebish, 2018).

One successful case resolved by the IPC is the Mobicom Corporation, a business entity entirely owned by the Japanese KDDI company. The case concerned the termination of one of Mobicom Corporation's licenses by the Communications Regulatory Authority. Based on the investor's complaint, the IPC held a session on April 20 2017 and decided in favor of the investor, reissuing its license. This dispute had been ongoing for nearly 10 years and following its resolution, KDDI announced plans to invest over USD 10 million into expanding Mobicom Corporation's operations (IPC, 2019).

In this way, the IPC acts as a governmental organization that handles investor complaints and resolves them without the dispute having to go to court or arbitration. Its continued operations are likely to reassure investors and ultimately benefit Mongolia's investment environment and FDI. However, its operations are still limited and it is unlikely that the council will be effective in resolving high profile mining disputes considering their complexity and the council's political composition.

Arbitration

In 1929, Mongolia established the Ministry of Justice and Arbitration, introducing the concept of arbitration to resolve foreign trade disputes. Following this, Mongolian government established the State Arbitration Office in 1940 (MNAC , 2012). This organization was then replaced by Foreign Trade Arbitration Court, a part of the Mongolian National Chamber of Commerce and Industry in 1960 (MINAC, 2019).

In terms of legislation, in 1995, the Parliament ratified the Foreign Trade Arbitration Law and more significantly, joined the United Nation's Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This meant that according to international law, Mongolia must recognize and enforce foreign arbitral awards, opening up the venue for international arbitration. In general, arbitration can refer to arbitration of foreign disputes through the Mongolian arbitration court (termed in this section as arbitration) or it can refer to international arbitration in which cases involving Mongolian companies are resolved in foreign arbitration courts (termed in this section as international arbitration).

The 1995 law was completely overhauled and in 2003, Parliament ratified the new Arbitration Law, heavily based on the United Nation's Model Arbitration Law. With the ratification of this law, the aforementioned Foreign Trade Arbitration Court was renamed to the Mongolian National Arbitration Court (MNAC) in 2003 and further changed to Mongolian International and National Arbitration Center (MINAC) in 2013. These changes in the name of the main arbitration organization in Mongolia reflects a shift towards international arbitration and its growing importance.

Furthermore, following criticisms after the 2003 Arbitration Law wasn't recognized as having conformed to international standards (Lkhagvaa, 2017), the Ministry of Justice created a working group consisting of MDSKhanLex LLP and Sidley Austin LLP in 2013. This working group was tasked with researching and drafting a renewed Arbitration Law that better complies to international standards (MDSKhanLex, Sidley, 2017). Thus, the current law in effect was amended in 2017.

Under the 2017 Arbitration Law international and domestic arbitration regulations are more consistent with international best practices, the time and cost for the settlement of disputes are decreased, the cost of running a business in Mongolia is reduced and the caseload of Mongolian courts are expected to decline as case settlement through Mongolian arbitration in encouraged with the improvements made to the law (MDS KhanLex , 2019).

While been a fairly limited number of arbitration cases resolved in Mongolia, with 41 cases in 2014, 70 cases in 2015 and 58 cases in 2016, arbitration is still lauded for being more efficient in terms of time and costs (Lkhagvaa, 2017). For instance, in the Marketing and Trading report conducted by ERI, several of the companies interviewed for the report "mentioned that in cases where there is a dispute over breach of contract, arbitration is the favored resolution method. The reason for this lies in the fact that arbitration usually has lower transaction

costs compared to court cases and there is no chance for the case to continue onto a court of appeals. While breach of contract cases are rarer now due to better contract practices, arbitration is still a valuable alternative to resolving disputes in court" (ERI, 2018).

With international arbitration, investors can resolve disputes without having to rely on the domestic court system. Thus, it remains an important safeguard for foreign investors, especially for disputes in relation to a contract concluded with the Mongolian government (Allens , 2016). In Mongolia, it is facilitated by an increasing network of IIAs and BITs and as of 2020, Mongolia has entered into 42 BITs, of which 36 are in force, and 4 treaties with investment provisions, all of which are in force (Investment Policy Hub, 2020). This is the case as arbitration requires the prior consent of the involved parties and many rely on IIAs or BITs as the legal basis of arbitration.

However, as global linkages between economies become more prevalent, countries must strike a balance such that they promote FDI but still retain the right to regulate. Many countries have retaliated with stricter treaty provisions or have been reluctant to enter into IIAs, such as Russia and the Energy Charter Treaty, in order to lessen the pressures of ISDS (OECD, 2004). On the other hand, narrow IIA and BIT provisions do not provide the protection foreign investors would like, as can be seen in the Beijing Shougang v. Mongolia case discussed below.

Mongolia does not have the negotiating power, as a small economy that is dependent on FDI, to dictate the terms of IIAs or reject joining them. However, increasingly, Mongolia has focused more on creating individual investment agreements with foreign investors, particularly in the mining sector, to better regulate its investor-state interactions. This allows for arbitration clauses that fit the scope of the project and provide more nuanced protection for both the state and the investor.

Nevertheless, regardless of how arbitration proceedings are begun, as FDI into Mongolia increases, so will arbitration cases. The following section focuses on key ISDS cases involving Mongolia and what lessons can be learnt from them.

Cases in Mongolia

As investment into Mongolia grows and its economy becomes more globalized, cases of ISDS and international arbitration become more prevalent. Currently, according to the UNTCAD's investment dispute settlement navigator, Mongolia has had 5 known treaty-based ISDS cases since 2004. These include:

1. Alstom Power v. Mongolia (2004), Settled
2. Paushok v. Mongolia (2007), Pending
3. Beijing Shougang and others v. Mongolia (2010), In favor of the state
4. Khan Resources v. Mongolia (2011), In favor of the investor, Settled
5. Munshi v. Mongolia (2018), Pending

The next section will analyze the Khan Resources and Beijing Shougang cases and offer insight into ISDS in Mongolia.

In addition to the aforementioned treaty-based ISDS cases, cases based on individual investment agreements also occur. For instance, recently, under the Oyu Tolgoi Investment Agreement, Rio Tinto has sent the settlement of a tax dispute with the Mongolian government to the United Nations arbitration panel (Khan Bank, 2020). The dispute involves a tax assessment for about USD 155 million on January 16 2018 from the Mongolian tax authority, based on an audit of taxes paid between 2013 and 2015. While the Mongolian government maintains that Rio Tinto did not pay its due taxes, the investor claims that it paid an amount of USD 4.8 million in January 2018 to settle the issue of unpaid taxes, fines and penalties (Reuters, 2020). While the escalation of the dispute to international arbitration points to deteriorating relations and may negatively impact FDI in the future, the fact that foreign investors can rely on international arbitration is an important safeguard for investment. Moreover, as the arbitration is set to proceed according to UNCITRAL Arbitration Rules, both the state and the investor have acknowledged the finality of the decision and have agreed to follow through with the arbitral award without delay (Turquoise Hill , 2020).

ISDS are an inevitable part of increased FDI into a country. Thus, rather than focusing on limiting the number of cases via reducing IIAs or BITs, it is important to focus on improving the overall legal environment of Mongolia. In cases of ISDS, it is vital the Mongolian government honor arbitral awards and act in accordance with international law. By doing so, the government solidifies its position to support FDI and shows its willingness to provide an investment environment equipped with the appropriate safeguards for investors.

Beijing Shougang v. Mongolia[7]

The 2010 case between Beijing Shougang and 2 other Chinese companies and Mongolia was also concerned with indirect expropriation. In particular, the three aforementioned Chinese companies invested in and had been developing the Tumurtei iron ore deposit of Mongolia, a deposit of strategic importance (Investment Policy Hub, 2010). However, in September 2006, mining license 939A, under

which Beijing Shougang had been operating was nullified by the Department of Geology Mining Cadaster's Resolution #902.

The license was then granted to Erdenes MGL, a stated-owned entity (SOE) and then transferred to Darkhan Metallurgical Plant, another SOE. Following these events, Bejing Shougang challenged Resolution #902 in Mongolian courts with no success. It then applied for international arbitration under UNICTRAL Arbitration Rules at the Permanent Court of Arbitration in the Netherlands pursuant to the China-Mongolia BIT on the grounds of indirect expropriation, failure to provide FET and protection.

The tribunal found that it did not have the jurisdiction ratione materiae[8] to decide on the merits of the claim. This was due to the narrow scope of Article 8.3 of the China-Mongolia BIT which only consented to international arbitration in regard to the amount of compensation for expropriation, not on the expropriation itself. Thus, the tribunal stated that arbitration was only available "in cases where an expropriation has been formally proclaimed and what is disputed is the amount to be paid by the State to the investor for its expropriated investment" (Italaw, 2017).

Ultimately, due to this reasoning, the tribunal decided in favor of Mongolia, however, it is unclear whether Mongolia would have won had it not been for the narrow scope of the China-Mongolia BIT.

The case clearly highlighted the involvement of the Mongolian government in the operations of deposits of strategic importance, furthered by the inclusion of provisions related to deposits of strategic importance in the Minerals Law of Mongolia. While it is within the right of a state to assert its interests, within the legal framework, it is likely that an investor will contest, leading to more ISDS claims. In light of this, the Mongolian government must ensure it operates within the law and with due process in order to avoid unnecessary claims and costly award payments.

[7] PCA Case No. 2010-20

[8] Subject-matter jurisdiction, referring to the courts authority to decide a particular case (US Legal , 2020).

Khan Resources v. Mongolia[9]

The 2011 case between Khan Resources, a Canadian company, and Mongolia was concerned with indirect expropriation (Investment Policy Hub, 2011). Khan Resources sought to invest into a uranium deposit located in Dornod province in the northeast of Mongolia. As a part of the investment, Central Asian Uranium Company LLC, a local joint venture subsidiary for Khan Resources, obtained uranium mining license 237A and exploration license 928X (Italaw, 2015).

However, in 2009, the Parliament of Mongolia passed the Nuclear Energy Law under which the Nuclear Energy Agency of Mongolia (NEA) was created. Following its establishment, the NEA suspended overall 100 uranium licenses owned by various companies, including the 2 owned by Khan Resources in April 2010. Following this decision, Khan Resources cited a breach of domestic law and customary international law and applied for international arbitration pursuant to the Energy Charter Treaty (ECT) [10] under UNICTRAL Arbitration Rules at the Permanent Court of Arbitration in the Netherlands.

The tribunal ultimately decided in favor of Khan Resources, stated that there was no legal basis for the invalidation of the 237A and 928X licenses as Khan Resources had no breached Mongolian law. The

tribunal further found a lack of due process and jurisdiction of the NEA to invalidate licenses under the Nuclear Energy Law. Furthermore, the tribunal found a breach of the ECT's umbrella clause as the Mongolian government did not uphold its obligations under Article 8.2 of the Foreign Investment Law of Mongolia (Italaw, 2015).

This is an interesting interpretation as it considers any breach of the domestic investment law a breach of the ECT umbrella clause. As the majority of the IIAs Mongolia has joined have umbrella clauses, it is possible that this interpretation may lead to a wave of new ISDS cases. Thus, it may be prudent to renegotiate past IIAs and consider umbrella clauses in the future.

Moreover, this interpretation brings attention to domestic laws, especially in the case of mining licenses. As seen in the Bear Creek case above, a common grievance among investors is the unjust revocation of mining and exploration licenses. As Mongolia laws become more comprehensive and include more provisions on how and when to revoke licenses (such as new environmental rehabilitation obligations, the revised Protection of Cultural Heritage Law, etc.), it is necessary to adhere more strictly to the due process of law. Unjust license revocation or suspension may be interpreted as indirect expropriation and Mongolia needs to ensure its actions are lawful, especially with new legislation, in order to prevent future ISDS cases.

[9] PCA Case No. 2011-09

[10] The ECT is an international investment agreement that supports cross-border cooperation in the energy industry. The treaty was created in 1994 and has been signed by 54 countries.

Following the USD 80 million award, Khan Resources and the Mongolian government settled for USD 70 million (Edwards, 2016). This settlement highlights the Mongolian government's desire adhere to international law and improve its investment environment. While issues of due process still exist, the ratification of more comprehensive legislation and their ramifications in international arbitration are likely to lead to a better legal environment in Mongolia, lest the government deal with costly cases of ISDS.

Conclusion and Recommendations

FDI is a key driver of economic growth in Mongolia and as the previous reports by ERI have shown, Mongolia's investment environment and how it deals with investor disputes can promote or hinder FDI inflow. Thus, improving Mongolia's legal environment and how investment disputes are resolved are a vital part of promoting overall FDI.

In terms of enforcing contracts and the number of days it takes to resolve commercial disputes, Mongolia scores marginally above the EAP average. However, it lacks in terms of the quality of its judicial processes. Thus, improvements in judicial quality, namely court structure, case management, court automation and alternative dispute resolution are necessary.

In term of court structure, the creation of specialized commercial and small claims courts may be needed. However, this is a long process that needs to be implemented carefully and adjusted accordingly to be successful. Thus, Mongolia should first focus on collecting data from its judicial system and conducting the necessary research in order to see if it would be beneficial to establish specialized courts.

Likewise, in terms of case management, the government should collect more data and implement more performance measures in order to promote and enforce better judicial performance standards. As for court automation, recent strides such as making judgements public have led to improvements in how judges write up judgements. Further improvements, however, would require heavy government involvement to establish the necessary infrastructure needed (such as a fully electronic database to improve court automation). As for ADR, better utilization of Mongolia's mediation system and more comprehensive training of mediators and judges on how to best offer mediation services could reduce the workload of the courts and improve court efficiency.

These suggestions would lead to an overall improvement in Mongolia's legal environment, indirectly bolstering FDI. However, most FDI related disputes, particularly in the mining sector, depend on arbitration for its resolution. Arbitration is distinct in that it does not depend on the domestic judicial system of the host country and requires the prior consent of participating parties. As Mongolia is already part of an ever widening network of IIAs and BITs, the issue of party consent does not occur often.

However, as more ISDS cases are likely to appear due to the increased FDI into Mongolia and its globalizing economy, its best to focus on preventing needless cases of ISDS moving forward. As the analysis of previous ISDS cases have shown, Mongolia's domestic legislation seems to have made improvements. However, the issue of their implementation and the government's adherence to due processes remains an issue. In fact, the majority of cases of ISDS involving Mongolia seems to be centered on indirect expropriation due to unlawful license nullification. Thus it is key for Mongolia to focus on bettering its legal environment by improving the government's adherence to due processes while learning from past ISDS cases such as the Khan Resources case. This will lead to more stable government actions are in line with the government's policies to promote FDI. In fact, the creation of the IPC and the settlement of the Khan Resources case highlight the government's willingness to adhere to its FDI promotion policies.

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