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CONTENT

VETO ANALYZE OF THE PRESIDENT OF MONGOLIA /FROM 1993 TO 2019/

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Abstract

It is common that in the most world countries the form state governance is defined depending on whether the function of the Presidential institution serves as a head of state or plays a role for executive or mixed form of these two. The presidential veto power has been studied widely theoretically and historically.

The Constitution of Mongolia determined a mutual involvement in the both activities of the State Great Khural /The Parliament/ and the President. With regard to Presidential influence in the legislative matters the President has formal power such as veto which is widely used as an important influential tool in the parliament's legislative process.

We will analyze how this power is exclusively implemented in the frame of the doctrine of separation of power in the most democratic counties. Also, we analyze how the presidential veto power's implementational restrictions, its capacity, legal and political role of the veto is exersized.

In our country, the State Great Khural, as the legislature and a Presidential institute as the head of state are both from the elected people.

The form state governance is defined depending on whether the function of the Presidential institution serves as a head of state or plays a role for executive or mixed form of these two forms in the most countries of the world. Therefore. Mongolia needs define special Constitutional regulation on the relation between the State Great Khural and the President.

Briefly, on one hand, the Constitution determined a mutual check between the State Great Khural and the President's activities by allowing involvement of the President in the State Great Khural's exclusive legislative power. On the other hand, a certain involvement of parliament is allowed when the President exercises his full power.[1]

When considering detailed provisions of a law or practices of the Presidential power in the connection to State Great Khural, the following powers are referred to be formal: to set and announce the date of elections of the President and recognizing the full mandate of the President after his/her election and to nullify the President's unlawful decree and to be responsible to the State Great Khural and present its appointees to the State Great Khural; but his other powers regarding to Presidential election candidates and appoint the Prosecutor General and his/her deputies, heads of diplomacy missions to foreign countries and Chief of the armed forces in consultation with the State Great Khural proved to be significante influence. Moreover, by allowing the President to possess some powers to appoint high state officials, the constitution deliberately introduced such mechanisms of appointment with proposals

[1] Amarjargal.P, The Presidential involvement at the State Great Khural: vetoed bills. International Symposium on Theoretical aspects: Constitutionality and the competence of the President (2015), pp.103-116.

from consultation with the State Great Khural, order to prevent from his potential abuse of his power or negative social acceptances associated with his appointees'. [2]

Furtherly, the President is elected on the basis of universal, free and direct suffrage by secret ballot by people and there is no particular subject for which he is accountable except for constitution clause standing that the President may be removed from his post on the basis of the findings of the Constitutional Court by an overwhelming majority of members of the State Great Khural present and voting in case of a violation of the Constitution.

With regard to Presidential influence in the legislative matters the President has formal power such as to propose of dissolution the State Great Khural, or initiate laws, or send proposals and reports on upcoming bills or finally the presidential veto. Because these rights create legal consequences, therefore serve the utmost measures of a limitation on the legislature. Also, these full powers cannot be analyzed under one research thesis, so this paper tried only study the Presidential veto within empirical and theoretical approaches.

The Presidential veto is widely used as an important influential instrument in the parliament's legislative process. There is no difference in Mongolia from international tendency of veto power since our constitutional provisions follow the latest trend. For example, *According to Article Thirty-three 1.* the Constitution stated that "The President … 1/ to exercise a right to veto against all or part of laws and other decisions adopted by the State Great Khural. The laws or decisions shall remain in force if two-thirds of the members of the State Great Khural present in the session do not accept the President's veto;".

For determing the role and importance of this Mongolian Constitutional Article, study of the usage of this mechanism's legal or political objectives and consequences is needed.

"Veto"

Before legal terminology analyzing the probems related to veto power or making conclusion upon the veto, we need to take a look at the terminology and its meaning basing on the domestic or foreign legal resources. According to the definition of Black's law dictionary, the origin of "veto" is a Latin word "I forbid", which later used as a definition of power of one governmental branch to prohibit an action by another branch. In constitutional law, the Veto means the power of the head of an executive branch refuses to sign a bill passed by parliament.[3]

In international law, the veto means one having an opposite opinion when it must have mutual agreements between parties or people. (Oxford Dictionary of Law,2006,564)[4] For example. "The power given to any permanent member of the Security Council of the United Nations to refuse to agree to any nonprocedural proposal ..."

Historically. the institution of veto originated with the Roman consuls and tribunes "*intercessio*" system which is as by a tribune to veto the actions of the consuls and other magistrates, thus protecting the interests of the plebeians as a class during the Roman Empire, founded in the 3rd century of B.C. The veto of Tribune can not stop the Senate from approving the bills but weaken its strength.

"Veto" concepts and in foreign country's practise

In modern times, the veto power implemented only by the executives. If in case of upcoming bill or draft of legislations are in contradiction with the President's opinion or his agenda then it referred to as being a "bad law", or not in compliance with the Constitution, or as being against the President's political ideology then the veto comes in action. For example, In the United States, the President can influence Congress bills by vetoing, therefore, it serves an important tool for President to check the legislature.

In Presidential countries, the President serves as of being both of the Head of State

[2] Amarjargal.P "Legislative power of the Parliament and the veto power", Law review, (2014) №2.

[3] Black's law dictionary, 8th ed., (2004), 1595.

[4] Oxford dictionary of Law, 6th ed., by Elizabeth A. Martin J. Law (2006), 564.

and the Head of the Executives at the same time and he exersizes has the veto power in terms of a Head of state but not the executive branch.

But according to the doctrine of separation of powers, the veto power is referred to as functions of the executives or judiciary. The veto power enables the President to prevent possible violations of laws by his conduct when he uses it proactively in order to pursue his policy agenda or assists him to reject "bad laws" with possible implementation. However, modern concept of the veto power is rejecting any laws or possible amendments to the laws inconsistent with the President's policy, is proved to be not so efficient and incompatible with the concepts of the Republicanism, the doctrine of separation of powers and the principle of sovereignty of the legislative power. [5]

The veto in the Westminster system[6] as well as constitutional monarchy is relatively rare, however a tradition of the Monarchy to exercise his absolute power under consultation with the Prime minister. The veto power commissioned in the House of Lords has been restricted lately by law. For example, by the Act on Parliament of 1911 and 1949, the veto power significantly shrunk that the suspensions of legislation allowing no more than a period of one year. In accordance with the Law of 1911 and by the tradition of Salisbury, the House of Lords has no right to postpone the financial legislation or laws reflected in the majority party program.

An observation could be made when considering the veto power within a principle or its usage that this right is unique for its implementational restrictions in the term of relevant function or objectivity in comparison with other State powers.

The veto power capacity

The veto is divided into an absolute or relatively used veto depending on its capacity. For example, each UN member enjoys the right to veto the UN Security Council decision at any time so their decision cannot be enforced. This is so-called an absolute veto. However, there is a veto that could not be accepted is called *'qualified' veto.* For example, the executive's power to veto legislation as regarded as being an example. Also, there is a "wide scope and extent of the veto power" which referred to its relation in both laws or amendments or a "status-quo veto" referring only in relation to amendments of law.

The veto power, its influence in the legislature as mentioned above has been studied among our scholars. For example, Ch. Enkhbaatar, T. Dookhuu mentioned that the Presidential veto must be accepted, which is an absolute veto is outdated so they introduced a rule when the parliament reconsiders the legislative veto and decides whether accept or reject such qualified_ used veto power. Furthermore, they explained that the most vetos refer to whole legislation, while other vetos, typically found in France, Philipin or Mexico, the President can veto specifically the certain article, clause or section of the legislation or law. This is called an "optional veto".[7]

Basing on these classifications it can be said that Article 31(1) of the Constitution of Mongolia guarantees Presidential veto power as for keeping the "status quo" and not only be limited to prevention of possible changes in laws, but within wide scope and extent of the veto power usage influences the state policy in general also the legislature's right to overturn a presidential veto, therefore, it qualifies as of "relatively used veto" or *"qualified veto"*.

Legal and political role of the veto

Currently, in the world practice, the institution of the President uses veto under legal or political main objectives. Some scholars consider that it's political purpose is for keeping a balance between the political party or other stake holders and serve political-strategic tool when promoted its position over state policy lastly attract voters. With regards to the legal purpose, the veto is understood as a tool to push parliament to enact legislation in conformity with the Constitution or legal policy.

[5] Nolan McCarty, "Presidential vetoes in the early republic" Princeton University, http://www.nyu.edu/gsas/dept/politics/seminars/mccarty.pdf

[6] Lundendorj.N Theory of state (2005), P.377.

[7] Enkhbaatar.Ch, Dookhuu.T International constitutional law (2006), P.151.

For Mongolia, the question of whether we use veto for these two purposes is open for discussion but there is any indication of its usage for being political or any political policy or agenda being promotional to the public. Here is how our scholars and citizens analyze the situation.

Veto - Mongolian scholars and politicians opinions

Reviewing the most academic researches, research papers or presentations written on the Presidential veto, there are two main trends among scholars and politicians of Mongolia: the veto being his competence or a form of his communication with the parliament.

Some scholars have pointed out that conceptually the presidential veto is a form of communications between the State Great Khural and the President. For example, P.Ochirbat, the first president of Mongolia stated that "… the presidential veto is not an indication of uncertainty in the decision of the State Great Khural but to make law by avoiding any mistakes, or the last warning, or rethinking, or rechecking, or run through and correcting the wrongdoings, or give an opportunity to legislatures being coextensive and serves important resolution for defining unity of state policy." [8] "except the President's communication with the Parliament by initiating the law, he or she may involve in the activity of the legislature through basic forms of communication by reporting on and submitting bill proposals by other initiators or addressing messages on a conceptual matter or exercising a right to veto against all or part of laws and other decisions adopted by the parliament.". A similar approach also has expressed by B.Dash-Yondon. [9]

When Presidential veto is viewed as being communication with parliament then "veto" becomes interference in the legislative power of the parliament. For example, S.Tumur gave his historical-comparative explanation that "… in accordance with Law of President, 1991, the President granted his or her signature, or assent, to the new laws of the People's Great Khural or State Low Khural giving it finality and formal legitimacy.". That time the provision proved to be in conformity with precedents of other countries but the Constitution of 1992 excluded it completely… However, this power /veto/ is a form of interference from the President in the activity of State Ikh Khural when it exercises its legislative power."[10] His expression has been praised in the late works of former parliament member G. Batkhuu and B.Dash-Yondon.

By giving the definition of veto as a form of relationship for communication with parliament it can be concluded that it clearly indicates expressions of its political significance or plays an influential tool over the state policy.

Governance, policy research institute conducted a survey among the public, lawyers, civil servants about the institution of President, function, and importance of its involvement in the state affair. 68.6% of the survey takers answered "yes" to a presidential veto, 52.3% answered that "the President is elected directly from people, therefore, plays a crucial role for a keeping the balance", 47% praised his veto power by reasoning that " the President shall be embodiment of the unity of the Mongolian people." and 0.7% chose answer of "others". [11]

This survey revealed that citizens support the Presidential veto power for its institutional and representative characteristics upon the establishment of the Constitution, therefore, it can be concluded that they accepted scholars' views on veto being his influential tool over the state policy.

[8] Ochirbat.P The President of Mongolia's competence and his first path (2001), pp.17-18, 27.

[9] Dash-Yondon.B The Head of the State, Presidential Institute in the parliamentary system of government, conceptual issues of the Mongolian constitutiton (1999), P.10.

[10] Tumur.S The Constitutional law of Mongolia: Maturity issues of Parliamentary in Mongolia 2nd ed.,(2006), P.10

[11] National Academy of Governance, Institute for Governance and Policy research Possibility, approaches perfectioning the Governance in Mongolia, (2011), P.84.

On the other hand, many legal scholars[12] have explained that the veto being the President's "exclusive *power*".

For example, B.Chimid and Ts. Tumenbayar was very critical when the parliament "overrode" the Presidential vetos which stripping off his power concerned official communication in executive, Prime Minister –the President relations and by ripping his legal grounds from a law article, or against the doctrine of separation of powers, or permanent parliamentary, or the principle of majority and lastly direct democracy principles. They expressed their notion that when vetoed enactments, on grounds of unconstitutionality and its principle or essence overturned or overridden by the legislature is an "unlawful" act of the parliament. [13]

Some scholars criticized that the Constitutional amendments (2000) made to parliament procedures on concerning attendance or voting of the State Great Khural and its permanent committees have restricted the Presidential veto powers.[14]

However, some scholars explained the Presidential veto within the connection of the President's power to implement laws as an executive rather than the Head of the State. As for our country, it is still being controversial whether the Presidential institution belongs to the executive power and it is important to consider it in the connection of his functions.

In practice, the head of the executive exercises veto power to implement laws whereas, for the Head of the State, the veto is more essential to protect the people's interests.

The legislative power of the parliament and the veto

Function and consequences of veto power in the constitutional system depend on acceptance of the veto. When the parliament's rejection threshold for challenging the Presidential vetos are low, the Presidential veto power will be weak. For example, according to Article 173 of the Constitution of Venezuela, the presidential veto is prohibited when laws approved by majority votes and it is also so weak that when vetoed enactment gets parliament reapproval of the majority then the bill becomes a law. The only principle that the veto must be accepted by the parliament is upon the ruling of the Supreme court that the bill is incompatible with the Constitution.[15]

When considering this example of regulation, rule of the veto power, its acceptance or rejection contented a separation of the power. Even in France, where the Presidential institution is strong but the presidential veto is also weak since it can be overridden by the majority of the legislature. [16]As regards to example of the Venezuela, the bills cannot become law when both executive and judicial power reject them.

As for our country, the Presidential veto power exercised only to the extent that it ensures bills or drafts of law must be compatible with the Constitutional principle and its provisions.[17]

It allows the Presidential vetoes expected to function as of the Constitutional reviewer and theoritically speaking it might be reappearing double functions of the Constitutional court (Tsets) at the same time. In this system, however, as the upper-mentioned examples of the countries, might imply restrictions or monitoring for the legislative.

[12] Solongo.D State law explanatory dictionary (2003), pp.57-58; Enkhbaatar.Ch, Solongo.D, Amarjargal.P, Ginsburg.T "The role of the Constitution of Mongolia in consolidating Democracy: an analysis (2015), pp.91-92; Enkhbaatar.Ch Legal status of the President of Mongolia: the Constitutional regulation and current practice, /presentation/, Democracy, Constitution-20 /Academic conference vol. by Amarjargal.P et.al (2012); Lundendorj.N, Transitional period: political and legal issues (2010), pp.174-175; Batkhuu.G "On relation between the parliament and state institution" Formation and development of permanent parliamentary in Mongolia: vol. Conference for theory and practice by Batjav.L (2010), pp15-28; Chimid.B, Tumenbayar.Ts Defining a legal status of the President of Mongolia /Action report of the project team research/ (2005), pp.28-29.

13 Chimid.B, Tumenbayar.Ts Defining a legal status of the President of Mongolia /Action report of the project team research/ (2005), pp.28-29.

[14] National Academy of Governance, Institute for Governance and Policy research "Possibility, approaches perfectioning the Governance in Mongolia" (2011), p.59.

[15] The failure of presidential democracy: Comparative perspectives Volume 1 Edited by Juan J.Linz and Arturo Valenzuela (1994), P.335.

[16] The failure of presidential democracy: Comparative perspectives Volume 1 Edited by Juan J.Linz and Arturo Valenzuela (1994), P.335.

[17] Chimid.B, Tumenbayar.Ts, Defining a legal status of the President of Mongolia /Action report of the project team research/ (2005), pp.28-29.

This system that rejects the Presidential veto by the majority of its vote, however, it strengthens this Presidential veto power. The reason is that unless the most representatives in the legislature are from the politically opponent party of the President, they have less chance of rejecting the Presidential veto by its majority. In this system, the President has a high chance to become more involved in legislative matters through the veto power, therefore, some scholars named it is one of the "chambers" of the legislature. For example, William H. Riker said "… the US legislative has three chambers" as referred to the executive veto. [18]

Article 31 of the Constitution of Mongolia stated that "The laws or decisions shall remain in force if two-thirds of the members of the State Ikh Khural present in the session do not accept the President's veto;". When considering this regulation, our country has strong Presidential veto rules as mentioned before but according to its specific procedural rule for attendance requires that in the valid session with the presence of a majority of members, which is 39 out of 76 can reject such vetoes by its 25 members. It gives us a contradictable picture when compared with other similar countries, also require *an overwhelming majority vote* to reject the veto.

Veto analyses of the President of Mongolia /from May 1993 to Aug 2019/

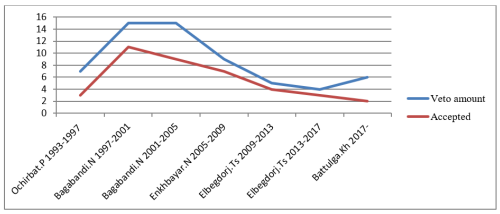
In 1992, the new constitution of Mongolia established Presidential institution and during 27 years of the period from 1992 to 2019 about 61 all parliament's legislation was vetoed and 23 vetos were against whore all laws and 38 vetos were against some part of laws.[19]

Table 1. Presidential veto (1993-2019)

№	Names of the President of Mongolia	Presidential term	Veto against all laws	Veto against parts of laws	Rejected		Total amount of vetos and accepted vetoes percentage
					yes	no	
1	Punsalmaagiin Ochirbat	1993-1997	2	5	3	4	7 (42 percent)
2	Natsagiin Bagabandi	1997-2001	6	9	11	4	15 (73 percent)
3	Natsagiin Bagabandi	2001-2005	4	11	9	6	15 (66 percent)
4	Nambariin Enkhbayar	2005-2009	3	6	7	2	9 (78 percent)
5	Tsakhiagiin Elbegdorj	2009-2013	2	3	4	1	5 (80 percent)
6	Tsakhiagiin Elbegdorj	2013-2017	3	1	3	1	4 (75 percent)
7	Khaltmaagiin Battulga	2017-	3	3	2	4	6 (35 percent)

In the total of 2/3 vetos accepted and only 1/3 has been overridden by the parliament decree. As for the contents of the veto is mostly for legislations for the following matters related to civil service, the Government, procedure of the Great State Khural, amendments to the Constitution, state organization, political party, tax, judicial procedures /including prosecutor and court decision execution authority/. As regards to overridden decrees for the vetos were related to matters of establishing ranks of high-level public officials and for providing additional pays and other allowances, the structure of the government and its function, the Constitutional amendments, amendments for judicial procedures, political party, budgeting or election laws.[20]

Table 2. Acceptance of the vetoes



[18] The failure of presidential democracy: Comparative perspectives Volume 1 Edited by Juan J.Linz and Arturo Valenzuela (1994), P.99.

[19] Amarjargal.P "Legislative power of the Parliament and the veto power" Law review (2014, №2); Munkbold.G, Munkhtulga. G The presidential veto power (2018), pp.261-265.

[20] Enkhbaatar.Ch, Solongo.D, Amarjargal.P, Ginsburg.T "The role of the Constitution of Mongolia in consolidating Democracy: an analysis (2015).

Article 20 of the Constitution of Mongolia stated that "… the legislative power shall be vested solely in the State Great Khural." If we consider this main concept of the State Ikh Khural of Mongolia as the highest organ of State power and the legislative power, then whether the State Ikh Khural accept or reject the Presidential veto is question of a soverign power of the legislature.

When the State Ikh Khural is being the highest organ of the State power and exercises a legislative power then it raises the possible question of whether approval of legislation is "unlawful". Since restriction for legislative power is permitted only in the scope of the Constitutional Review. On the other hand, if we explain this within the concept of rule of law which is a restricted parliamentary sovereign power for legislative [21]then it is impossible to left bills at legislature's own discretion to decide whether to accept or reject the Presidential vetos on grounds of legislative bills being against the rule of law or its standard.

When the President is not responsible for reviewing the Constitution but is closely related to the executive and having a right to influence in the legislative power then it is impossible to understand that the Presidential veto power is being[22] in the absolute sense. But according to the principle that the legislative power is for the organ of "representatives" [23]an institution of the President of Mongolia is directly elected from the people same as of the State Great Khural, therefore, in some sense, it is possible to influence the legislatures. This can be rightly resolved within the framework of the veto power but however, it is not enough that there are no detailed regulations or rules on how the veto power is exercised or conditions for rejection, since the only requirement is for the majority ruling of the State Great Khural when to override the veto.

For example, there is a need more detailed provisions defining the Presidential veto power within the scope or contents of the Constitutional provisions which reflected the Presidential full power, his main functions, the system of the state organization, embodiment of the unity of the Mongolian people. But in the case if his veto power is overridden whele exercised in accordance with the Constitution, the parliament must provide specific explanation of grounds for its refusal, or quantity of attendance for members, or a special rules for delibration in session and legislating other procedural issues is essential for clearly defining both involvement of the President in the legislative power and this full competence of the State Great Khural.

[21] Albert Venn Dicey Introduction to the study of the Law of the Constitution (2005), pp.179-200.

[22] Chimid.B Honoring the Constitution (2006), P.90.

[23] W.B.Mc Auslan Law, Legitimacy and the Constitution (1985), pp.62-82.

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INNOVATION IN THE PUBLIC ADMINISTRATION IN MONGOLIA

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INTRODUCTION

This article will examine Mongolia´s public policy for innovation. Innovation will be understood as a development process[1]. From this point of view, the improvement of innovation in a country like Mongolia expresses the future orientation of the country´s development. The development of public policy is a systematic process that often is done by politicians and implemented by civil servants. A public policy includes various aspects including ratifying laws and regulations, introducing new public service to the public, motivating business entrepreneurs and the public to take action on their own and providing collaboration among the stakeholders through policymaking and implementation processes. Different cultures and traditions of civil services in various countries must be considered by public policies. Countries where many actions have been taken to the civil servants and many programs have been implemented can have wholly integrated processes on both, public policymaking and law ratification process at the same time. The complexity and integrity of public policies differ from country to country and will be related to the countries' public administration's characteristic elements. It is worth mentioning that several steps have been taken to measure public service innovation performance since the 1990s and those reform attempts have been made by civil servants. Efforts to make a reform usually include attempts to implement strategic policies.

1. Basics of an innovative public policy

According to system theory, concepts such as innovation processes and their results, strategic public planning is a fundamental element of an innovative public policy.

According to a core competence model by Hamel and Prahalad, specific, integrated and applied knowledge and skills shall be integrated with multiple streams of technologies and public policy focusing on both, human capacities and technological advances. The authors emphasize that skills are "settled" in the minds of human beings, however, basic knowledge is the result of organized learning processes. It is not easy for others to assess the fundamental knowledge and skills of civil servants which they have learned through-out their work experience. Moreover, competition usually focuses on creating new or adjusted products and services. Getting, enhancing and strengthening basic knowledge and skills shall be systematically planned and implemented. However, it is important to have the "sensor" of being able to adjust to the rapidly changing opportunities regarding an appropriate combination of human capacities and technological appliances. Cornerstones of an innovative public policy can be provided by the establishment of competitive knowledge and skills which is available to be used in the

[1] The framework for an innovative, strategic public administration is based on ideas and concepts from the scientific articles by Jan Ziekow (2014); Igor Ansoff; Paul Joyce (2015) and Hermann Hill (2018).

different sectors. Strategic sources including decision-making power, financial source, and innovative processes shall be taken into consideration for establishing knowledge-based management on the sectoral, multi-sectoral and national levels. The optimal innovation process consists of not only the coherence of stakeholders, their knowledge and skills and values but also their legitimacy and responsibility. When these factors are mutually supported by each other and influence positively to fulfill goals according to the system theory, then innovative public policy could be successfully implemented.

In order to understand conflicts resulting from the difference between strategic management and operational management concepts in the public sector, it is important to notice that governments have both, power and authority for policymaking and implementation. Capable civil servants are the cornerstone of strategic management regarding the new products and services. There is no clear boundary in the difference or coherence of the innovation policy and strategic framework. Therefore, some elements could be overlapping for those concepts. In the end quality of life for citizens shall be increased in terms of innovation policy and strategic planning. More innovative and strategic public policies are required with regard to the countries' development. Main elements providing sustainable development of the countries is to have an innovative policy in all sectoral, multi-sectoral and national level. Natural resources are considered as basic development element in the traditional economic system; however, knowledge-based innovation is a core aspect of the modern economic system. Therefore, optimal public policy shall and must focus on knowledge-based innovation.

2. Characteristics of strategic public policies

Public policy is a system that contains environmental, social and economic policies and their implementing processes and results. From this point, strategic state and strategic planning have innovative characters. A main and additional trend of the strategic analysis is the emerging, tested and learning characteristics of the strategic implementing processes[2].

Quinn (1980) clarified that innovation is a new strategy. Innovation in the public administration can be reliable if public policy is innovative and strategic as far as the elaboration, ratification and implementation process is concerned and the penetration of innovation in public administration is being successfully implemented via setting long-term goals in the government organizations.

International experience has shown that politicians and decision-makers usually focus on the current situation of influencing factors and not paying attention to future trends and strategic elements. According to the role of ministries in the policy system report by the Organization for Economic Co-operation and Development (OECD) from 2007, political decision-makers have

- No long-term vision of the public policy since they mostly focus on the implementation phase which responses to the problems
- lack concern by not focusing on external and future aspect and not learning from previous mistakes[3]
- lack capabilities to identify risks and managing them and
- face insufficient consultation between ministries.

However, many actions are taken by government agencies to identify problems. There is a lot of criticism nowadays that problems are not systematically defined and implementing processes do not comply with the innovative policy.

Following recommendations are provided, including:

- Future-oriented and long-term approaches must be created,

[2] Paul Joyce: Strategic management in the public sector. London and New York 2015, p. 158.

[3] The Role of Ministries in the Policy System: Policy Development, Monitoring and Evaluation. Sigma Paper No. 39. Paris: OECD.

- Weaknesses and shortcomings of public policies should be managed in the framework of an innovative and imaginative manner,
- There is a need for improvement in policy evaluation and monitoring.

3. Current situation of the innovation policy of Mongolia[4]

Mongolia has several policies addressing the promotion and development of the innovation process in Mongolia. The National Innovation Development Program of 2007, Conceptions of development of high technology industry of 2010, Law of Mongolia on Innovation of 2012, and State policy of Mongolia on Innovation of 2018 have been ratified respectively.

An objective of the latter policy is defined as "Competitiveness and productivity of the innovative products and services will be improved by way of centralizing capital and resources in the leading sectors of economy and industry. Thus, it will ensure the diversification of the economy and improvement of livelihoods"[5]. Within the policy, innovation-targeted activities of scientific organization, institutes and universities will be promoted, innovations of entities will be developed, advanced technologies will be introduced into public service as well as eco-friendly and economically efficient technologies will be developed in modern industrial and high-tech spheres. The first phase of the eight-year policy will run from 2018-2021, focusing on creating a legal environment to centralize capital and resources in leading economic and industrial sectors. In the second phase between 2022 and 2025, it is planned to improve the competitiveness of leading sectors of economy, industry and information technology and put a basis of the knowledge economy[6]. Improving competitiveness of the labor market, increasing economy and investment of the country, improving likelihood, and even effectiveness of the public service delivery will be provided as a result of the State policy of Mongolia on Innovation.

The Global Innovation Index (GII) is a ranking of innovation indicators internationally. GII is measured by seven pillars of Innovation Input-Output- Sub-Index[7]. The GII relies on two sub-indices - the Innovation Input Sub-Index and the Innovation Output Sub-Index. Five pillars including institutions, human capital and research, infrastructure, market sophistication and business sophistication capture the Innovation Input Sub-Index; whereas knowledge and technology outputs and creative outputs capture the Innovation Output- Sub-Index.

Looking at the current situation of innovation in Mongolia, Mongolia is ranked 52nd from 129 countries in 2017 and 2018 and at 53rd in 2019 respectively.

What is the case of Mongolia in regarding the innovative state policy?

- Is eligible and reliable innovative public policy and its regulation?
- How is innovation implemented in the public sector?

Government officials at all levels of government are busy with regular workloads and do not spend enough time for policy monitoring and evaluation. Policy-makers in the government have weaknesses in assessing the effectiveness of policy alternatives, lack of expertise in impact assessment techniques, risk analysis, and management practices. In addition, effective inter-governmental coordination within ministries and among ministries is weak, the quality of policy and the role and capabilities of government units associated with policy implementation are inadequate to address effective policies. A

[4] "Innovation process" is creating competitive products and services by focusing on new ideas, enhanced knowledge and skills and penetrating them into market.

[5] According to the "Law of Mongolia on Innovation", product innovation is the creation and subsequent introduction of a good or service that is either new, or an improved version of previous goods or services in regarding to the technological, economic and scientific manner.

[6] A policy will be integrated with science, technology, higher education, high tech industries, food and agriculture, mining, energy, green development and intellectual property policies, and even banking, customs and tax policies.

[7] https://www.globalinnovationindex.org/Home.

serious problem in Mongolia's policy is to move directly to the drafting of the legislation without careful analysis of ministries. There is not enough consultation with political decision-makers to study past mistakes and future requirements. There is no adequate analysis of the reality in legislation; difficulties and costs of implementation. Groups that were deemed to benefit from policy outcomes are often confronted with policy contradictions. The International Development Law Organization has warned that the time spent on amendments to the legislation should be considered[8].

Designers and implementers of innovative products need sufficient knowledge[9]. The capacity of policy-makers and their teams working on policy innovation and strategies for the state and its public sector must be good. Public policy must be strategic, result-centered, integrated, satisfying participation, flexible, innovative and sustainable. It should be noted that two or more ministries should work together on policy issues that need to be addressed and achieve results. Theoretical linkage is important and ending the issues related promises of a declaration, can have a bearing on accountability for politicians. In Mongolia however, the long-term policy lacks long-term vision, there are only short-term responses to policy challenges. Long-term innovative public policies lack time and institutional commitment. The "comprehensive" nature and quality of the state policy implementation process vary widely. There are risks such as public policies or legislation cannot be implemented or remains ineffective.

Instead, the government should organize joint training among government ministries and government officials in order to have a common understanding of the possible strategies for implementing strategic policies. It is helpful to have a broad and sophisticated cross-sectoral and common viewpoint on important issues in foreign countries and what exactly is to be ready for the future of 5, 10, or 15 years of time. Also, it is important to support policy researchers who are committed to improving the capacity to implement evidence-based policies and create a knowledge-based network for policy information exchange.

It is all too common for politicians to criticize public officials in policy-making when the weaknesses in the policy implementation are revealed. The ministries are inadequate in evaluating their role in implementing policies of public servants reducing their ability to learn from previous experiences requires them to offer policy options that are pleasing to politicians, making it impossible for civil servants to develop the public administration reform. Unfortunately, government officials worry little about whether some policy is theoretically good or going to improve the lives of future generations of Mongolians. Instead, they worry about their own interests and the consequences for themselves.

4. What factors shall be taken into consideration for the decision making of an innovative public policy of Mongolia?

Sectors and organizations have different approaches and forms when it comes to innovation and strategic thinking. The coordination with evaluation, learning, development, organizational practices increases productivity and innovation. The subjects of decision-making authorities in Mongolia are often not adequately researched and consulted, do not think well, and do it too fast. For instance, what are the consequences of organizational structure in the context of public policy, consultation with the ministries occurs only when the draft law is at its final stage, but it is important to address the general lack of consultation at pre-policy stages. A new concept of governance is increasingly seen by the government as a partner in the community, seeking ways to accelerate the process of collaboration with stakeholders, civil society and others (Osborne and Gaebler, 1992; Kooiman, 1993).

[8] The Role of Ministries in the Policy System: Policy Development, Monitoring and Evaluation. Sigma Paper No. 39. Paris: OECD.

[9] https://ikon.mn/opinion/1byj

As you may remember, in September 2019 the Mongolian Parliament was unable to operate and the decision to dissolve parliament was discussed. Whenever we talk about the processes and events of the current state of Mongolia and the mistakes made by high ranking public officials, we will not have enough time to discuss it.

It is possible to learn from the experience of Northern Ireland, where business leaders and scientists are appointed as working group leaders, including government organizations, the private sector, local governments, trade unions, non-governmental organizations, citizens, research institutions and others as stakeholders. Countries are actively pursuing and implementing transforming knowledge and innovation-based economy by a government's strategist innovative management. Considering the linkage between productivity and innovation, it is important to study the innovation activity level.

Another way to improve public services and introduce innovation is to develop an e-government based approach Digitization of state services promotes a more citizen-centered society by rapidly delivering public services to citizens, sophisticated, efficient, accessible, ensuring transparency, create public participation in government activities, to make public services closer to citizens and without any difficulties. One success story is Estonia which regularly uses around 2,000 e-services per day to deliver efficient and effective citizen services to the public, private sector and civil society. Every Estonian citizen has a formal e-mail address, the government sends information to its citizens by this formal email, information and transparency of the information are fully democratized. Since 2005, citizens have been casting their ballot electronically. The citizens of this country have been able to vote anywhere in the world, and not only the technological advances but also the budget-saving and the highest security of the system. It is a truly innovative public policy.

It is commendable that the Government of Mongolia will partner with Estonia to integrate all the electronic transition projects. Within the framework of the "E-Mongolia" e-Government service transition, Mongolia's long-term development program, about 100 services that are constantly frustrating to Government services are being implemented nationwide from November this year.

However, even with the introduction of "e-government" structures, there is still a need for an integrated state strategy and innovative development policy in Mongolia. It is necessary to define an independent institutional function that combines theoretical responsibilities with innovative roles and responsibilities with the ability to define this policy and coordination with the theory and practice of ministries. Promote and develop advanced scientific technology with systematic support of government policy will update the economic system, the market for technology to use accumulated intellectual knowledge and technology will be used in economic circulation.

5. Conclusion

It is a long tradition of elected politicians to make changes emotionally without any prior examination and to create or eliminate ministries or. Without policy coordination and integrated strategies, we cannot generate the necessary capacities. It will be essential for Mongolia to develop a good understanding of how innovation happens in governments The current traditional approach to addressing public policy challenges has not provided the right solutions to the complex challenges that Mongolia faces today. There are many "wicked problems" such as changing geopolitical structures, high dependency on mining, climate change or air pollution that require new and different perspectives. This means that Mongolia too should look for new sets of organizational forms, improved governance structures, innovative partnerships between the public and private sectors to promote innovation and new solutions to address some of its pressing problems. At the same time, technological progress is advancing at high speed, changing all spheres of life.

This as well opens great opportunities for the Mongolian government to incorporate new tools and approaches. However, Mongolia should invest more in building the capacities of the government and the public sector to deal with the existing public sector problems as they are oftentimes complex, cross-sectoral and unsolvable by traditional government tools and approaches and to invent solutions. Without a doubt, Mongolia has come a long way since it gained independence in 1991. Academia together with the public sector will continue to drive Mongolia´s development towards a modern, open and efficient state. The public sector will strive to deliver to the citizens the services they require – openly, transparently and with high quality. But it will be important to understand that public sector innovation does not happen suddenly. It needs an organizational environment that is suitable and supportive. It will be important that the state and its public sector organizations learn to share information collected from a wider group of stakeholders including members of the public to support a sound and forward-looking policy formulation.

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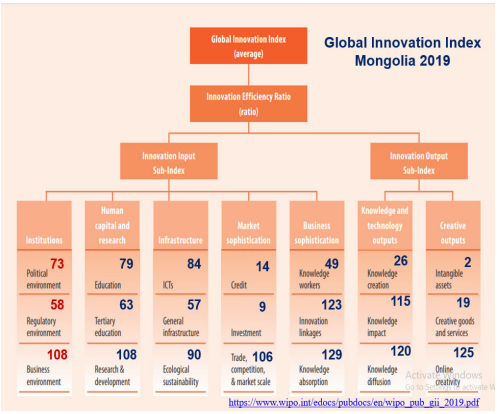
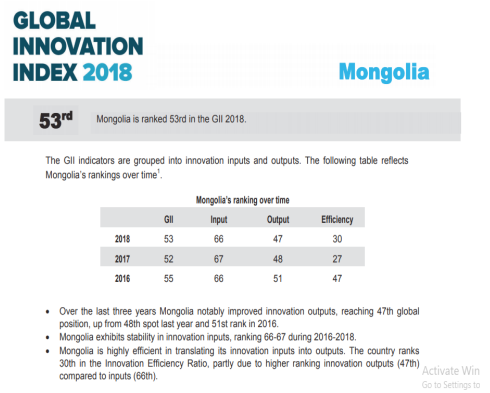
- https://ikon.mn/opinion/1byj

Appendix 1. Global Innovation Index Mongolia 2019 ranking



Appendix 2. Global Innovation Index Mongolia's ranking over time



Appendix 3. Global Innovation Index Mongolia 2019 Institutions

	INSTITUTIONS	**59.8**	**76**	
1.1	**Political environment**	**52.5**	**73**	
1.1.1	Political and operational stability*	77.2	44	◆
1.1.2	Government effectiveness*	40.2	86	
1.2	**Regulatory environment**	**68.8**	**58**	◆
1.2.1	Regulatory quality*	38.8	77	
1.2.2	Rule of law*	38.4	80	
1.2.3	Cost of redundancy dismissal, salary weeks	8.7	19	● ◆
1.3	**Business environment**	**58.1**	**108**	
1.3.1	Ease of starting a business*	86.9	70	
1.3.2	Ease of resolving insolvency*	29.4	122	○ ◇

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NATIONAL INVESTMENT DISPUTE ARBITRATION LAW

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Abstract

In the minds of many investors there is always the question on how one can secure the invested capital. Investors always look for legal protection of their possessions abroad. In the past this was never an easy task because host countries could change their national investment laws. Such changes can affect investments that have already been made and protection might be denied in local courts. Because of investors who seek to protect their possessions against changes in the law of the host country may enter into formal investment agreements with the host country in which the host country commits itself to treat the investment in the agreement.

There are many legal issues concerning the International Economic Disputes Settlement under the New Security Pattern but in this presentation will focus Current Trends of Arbitration legislation in Mongolia.

This paper purposefully intends that developing countries such as Mongolia create and abide by trustworthy investment dispute resolution system under the new security pattern.

It is important that Mongolia adopt and conform to a dependable and effective investment dispute settlement system which guarantees the security and safety of foreign investment.

In this article I use Mongolia as model to build our analysis presumption that a foreign investment dispute settlement regime in Mongolia will be of great importance to the country and foreign investors.

Introduction

In the minds of many investors there is always the question on how one can secure the invested capital. Investors always look for legal protection of their possessions abroad. In the past this was never an easy task because host countries could change their national investment laws. Such changes can affect investments that have already been made and protection might be denied in local courts. Because of investors who seek to protect their possessions against changes in the law of the host country may enter into formal investment agreements with the host country in which the host country commits itself to treat the investment in the agreement.

This presentation purposefully intends that developing countries such as Mongolia create and abide by trustworthy investment dispute resolution system under the new security pattern.

I. Investment Dispute Arbitration Legal System

First of all, I have examined national law regarding investment dispute arbitration in Mongolia.

A. Development of Arbitration Law

The first Foreign Trade Arbitration law was only adopted in 1995.[1] It is obvious from its name that this law had regulated arbitration dealing with the foreign trade. But new a law was adopted in May 9, 2003.[2]

In Mongolia, ad hoc arbitration, which formerly was not allowed by the previous law, is now permitted by the new law. The new law defines the institutional and ad hoc arbitration. In Article 4.1(1), (2) of the law, the institutional arbitration means an arbitration body established to carry out permanent arbitration and ad hoc arbitration means an arbitration established for one time to resolve the particular dispute. The institutional arbitration is no longer restricted to one institution.

However, unlike the Model Law, the new Mongolian arbitration law represents a unified regime regulating both international and domestic arbitration. Therefore, even if all parties are non-residents of Mongolia and the Mongolian law does not govern the substance of the case, the awards will be domestic.

The law does not prohibit the disputes of intellectual property to be referred to arbitration. It is a common practice in Mongolia that disputes related to corruption or bribe, are covered under the criminal law. Therefore, the disputes concerning a trademark, a patent or an anti-trust are usually resolved by the state court.

According to the new law, the member of Constitutional court, the judge, the prosecutor, the case registrar, the detective, the officer of court enforcement, the advocator or the notary who had served to any of the parties, other officials who are prohibited to conduct other work which is not related to the legal duties, are not allowed to serve as arbitrators.[3]

Also, the new law gives authority to the Court of appeal to appoint, challenge and replace arbitrators, if the parties fail to agree or the agreed procedure fails in ad hoc arbitration. In the institutional arbitration, this issue will be decided by the rules thereof. The procedure of the appointment and challenge of arbitrators closely tracks the Model law.

The court intervention in arbitration is limited by the Model Law principles. In most cases the Court of appeal is a competent court. The arbitral tribunal has the same power as the Model law in ordering interim and conservatory measures. If the measure is not implemented with, the party may submit its request to the competent court. The old law did not say anything about the court intervention in arbitration. It can be said that the court was never involved in the arbitration. The arbitral award was directly executed by a court enforcement organization. The law was silent on the issue of interim and conservatory measures.

Therefore, the arbitrators were not allowed to issue such orders. Moreover, there were no regulations allowing the parties to submit a request for an interim order before the court. Therefore, it is needless to say that the judicial intervention should be limited as there was not such a thing in the Mongolian arbitration. The assistance of the court is particularly important when the claim of one of the parties to arbitration must be secured or the evidence is taken. An assistance of court is always needed when an interim order is to be directed to a third party, as the arbitration has the contractual nature and the arbitration agreement could not affect the third parties. Therefore, the new law follows the ruling of the Model law in this regard.

According to Article 35 in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties and by the majority of all its members. However, questions of procedure may be decided by a presiding arbitrator if it is authorized so by the parties or all members of the arbitral tribunal.[4]

Article 37 deals with the form and contents of making an award. It requires that the arbitral award shall contain names of the

[1] Munkhjargal.T , ''The Arbitration Procedures Law'' UB, The National University of Mongolia/hereinafter referred as NUM/ School of Law/hereinafter referred as SOL/ 2007, P. 3

[2] Ibid

[3] Mongolian Arbitration Law, 2003, Art.34.

[4] Mongolian Arbitration Law, 2003, Art.35.

arbitral tribunal or a sole arbitrator, the place of arbitration and its date, legal reasons of the arbitral award unless otherwise agreed by parties or the dispute is settled by the parties and arbitration costs. The award may also contain the dissenting opinion, if any.[5]

The setting aside is the only remedy against the award that may be requested from the competent court. The grounds for setting aside are similar to the grounds in the Model law. The only difference is that these grounds for setting aside may be proved by either the requesting party or a court.

The Court of appeal, when asked to set aside an award, may, where appropriate if requested so by a party, suspend the setting aside proceedings for a period of time. It will determine the time in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take other such action. If the arbitral tribunal fails to correct it, the court of appeal shall withdraw its decision then discuss and decide the request.

If a party observes that an award contains an obvious error as a consequence of typographical, clerical, computation or other similar mistakes committed by the tribunal, s/he shall submit the request to the tribunal for the correction of the mistake within thirty days of the receipt of the award.

The tribunal may also correct, supplement or interpret an award if any of the parties should request so within thirty days of the receipt of the award. If the tribunal finds those mistakes it corrects and interprets the award by its own initiative within thirty days from the rendered date of the award.

Costs are specifically regulated in Article 41 of the new law. The arbitration cost includes itself: arbitrators' fee, expenses occurred to the arbitrator during the arbitral proceedings, unpaid costs of interpretation, translation example, the costs related to witnesses, other costs of the arbitral tribunal during arbitration.[6]

As for the institutional arbitration, the administration fee is stated in its rules. Unless the parties agree otherwise, the basic arbitration costs shall be borne by a Respondent in case the Claimant's claim is fully upheld, and by a Claimant in case of dismissal of the claim. If a certain part of claim was satisfied, the basic arbitration costs shall be apportioned between the Claimant and Respondent upon adjustment of the amount of satisfied or dismissed claim. If the losing party does not perform the award voluntarily, the award may be simply brought to the Court of Appeal.

The procedure for recognition and enforcement is regulated in Articles 42 and 43 which are similar to the grounds in the 1958 New York Convention. According to Article 43, the Court of Appeal has a right to refuse to recognize and enforce the arbitral award if the arbitral award is not valid or challenged or withdrawn by the court of place of arbitration. According to Article 42.9 of the new law, if the Court of Appeal fails to make the write of execution under illegal or unclear reasons, this will not be a reason not to conduct the court enforcement measure. In this case, the court enforcement organization may execute the arbitral award on its own initiative.[7]

The new law was elaborated by leading practitioners of international arbitration. Major characteristics of the new law are presented: 1) The internationally accepted principle of territoriality. The law is applied if the place of arbitration is in Mongolia; 2) Contractual and non-contractual disputes may be resolved by the arbitration unless the parties agreed or the law stated otherwise. The new law does not restrict itself to international commercial arbitration, does it provide special rules for commercial disputes; 3) The parties have to choose a permanent or an ad hoc arbitration. In the ad hoc arbitration if the parties fail to appoint the arbitrator, the court of appeal will appoint the arbitrator. As for the institutional arbitration, this matter will be regulated by its rules; 4) The parties are free to decide on

[5] Mongolian Arbitration Law, 2003, Art.37.

[6] Mongolian Arbitration Law, 2003, Art.41.

[7] National Legal Institute /hereinafter referred as NLI/ the research work of "Implementation of Arbitration Law, and difficulties, the way of improving the legal environment" Mongolia, UB, 20118 P.5

any aspect of the arbitration procedure either in their arbitration agreement or by choosing rules of an arbitration institution. If the parties fail to agree on this, the arbitral tribunal will conduct the arbitration in such a manner as it concerns appropriate; 5) The parties can submit proposals to the arbitral tribunal or the courts to carry out interim measures of protection; 6) The language of arbitration can be in Mongolian or other foreign language. The parties are free to determine the language of arbitration. If such an agreement fails the language of arbitration shall be Mongolian; 7)

The arbitral tribunal may request from the courts to take assistance in taking evidence or other judicial act; 8) Are course against an arbitral awards and enforcement is only available on the basis of very limited grounds well known from the New York Convention of 1958. Unless the international conventions state otherwise than this law, international convention shall prevail.[8]

Therefore, the 1958 New York Convention and the 1965 Washington Convention that were ratified by Mongolia, will prevail in arbitration.

B. Reform of Arbitration Law

Under the objectives "to reform the justice and law enforcement organizations' framework" and "to plan and resolve the technical and organizational activities that ensure the implementation of the justice reform package of laws" specified in the 5th section of the "The Action Plan of the Government of Mongolia 2012-2016" approved by the 37th Parliament decree of 18 September 2012, the Government is working with the aim to raise the competitiveness of the arbitration activities in order to promote international and domestic arbitration.

In accordance with the 1.9.2 of the "Activity plan to implement in the Year of Business environment reform" approved by the Government in 2010, the revised law on arbitration is being planned to be submitted to the Parliament urgently upon having amended the relevant laws and legislations in order to promote dispute settlement through arbitration in economic and business sectors, to ensure the timely enforcement of the decisions, to make the activities transparent and to facilitate the activities.

As the foreign direct investment into Mongolia is decreasing since 2012, if the Government makes an effort to approve a new Law on Investment, to create a reliable and effective system for resolving disputes in accordance with international best practices, to allow the acceptance of foreign arbitration decisions in Mongolia and to ensure enforcement of the decisions, the revised Law on Arbitration shall make a significant contribution to an enabling environment for investors.

During the meeting organized by Business Plus Initiative of the USAID on 27 March 2014, public and private sector representatives expresses that the current arbitration activities are not satisfactory and the arbitration organizations need reform. These representatives emphasized the following issues:

(a) Improving the public trust and confidence in the arbitration process as a mean to resolve disputes;

(b) Clearly regulating the domestic and foreign arbitration in the Law on Arbitration;

(c) Taking measures to reduce the time and cost associated with arbitration processes;

(d) Regulating the court involvement in a clear manner that is aligned with international best practices and independence of arbitration;

(e) Restricting the grounds for voiding arbitration decisions in accordance with international best practice and to prevent courts to monitor the content of arbitration decisions;

(f) Regulating the sovereign rights of arbitration regarding intermediary measures in a clearer manner in accordance with international best practices; and

(g) Creating a clearer and more effective framework for accepting arbitration decisions and enforcement thereof.

[8] National Legal Institute /hereinafter referred as NLI/ the research work of "Implementation of Arbitration Law, and difficulties, the way of improving the legal environment" Mongolia, UB, 2011, P.6

Selected issues to be considered when amending the Arbitration Law as following mentioned:

Reviewing the provisions on arbitrability (Articles 6 and 7)

1. Permitting the delivery and receipt of electronic communications (Article 9)

2. Reviewing the restrictions on who can act as an arbitrator (Article 15.2)

3. Removing Mongolian as the default language of the arbitration (Article 26)

4. Clarifying the scope of the confidentiality provisions (Article 32)

5. Expressly allowing the Mongolian courts to issue interim relief in support of foreign arbitrations (Article 13)

6. Allowing orders or directions (including interim or emergency relief) issued by an arbitral tribunal or an emergency arbitrator in or outside Mongolia to be enforceable in Mongolia

7. Affording the arbitral tribunal greater flexibility in allocating costs (Article 41.4)

8. Expressly providing that the arbitration law apply to any arbitration agreement to which the Mongolian government is a party.[9]

The new law was based on the UNCITRAL Model Law. The basic ideas, concepts and principles of the Model law and even most detailed provisions have been adopted. I can assume that the new law on arbitration follows the Model law in Mongolia.

C. Substantive Laws

Dispute between foreign investors and Mongolian partners, companies or private persons:

Foreign investment disputes arise from breaches of foreign investment agreements. Arbitration law of Mongolia, set forth as clearly that Arbitration agreement /regardless of containing of agreements nature and forms/ means a specific type of bargain concluded between parties with a purpose of settling disputes over any matters, arisen or may arise out of legal relations or other particular type of dispute. Arbitration agreement shall be made in a written form and parties concerned may conclude such agreement at any time prior or after the occurrence of such disputes.

However, in case of a contract with "standards and conditions" provided by the Civil law of Mongolia, such arbitration agreements shall be made upon occurrence of the dispute. Arbitration agreement shall consist of independent arbitration agreement /containing nature and certain form of contract/ signed by the parties concerned, and a letter, telegram, official note, fax or other similar documents that express agreed parties'' willingness to conclude an arbitration agreement shall be considered as an arbitration agreement. If any documents pertaining to the arbitration agreement is cited in the basic contract between the parties and this is specified in the contract as an inseparable part thereof, this shall be considered as an independent arbitration agreement between the parties concerned. Regardless of effectiveness of the basic contract of the concerned parties, an arbitration agreement, which is an inseparable part thereof, shall be effective.[10]

Stated by Arbitration law of Mongolia, the disputes on which parties (between foreign investors and Mongolian partners, companies, private person) have agreed to undertake arbitrage proceeding are subject to jurisdiction of an arbitration. Similar provision can be found in Civil Procedures law of Mongolia, it provides that disputes between citizens, legal entities shall be resolved by an arbiter if it is provided by law, international treaty to which Mongolia is a party of or the litigants have agreed so though arbitration agreement. If the parties have not provided in their agreement to resolve disputes by an arbiter or have not entered independent agreement on the issue or if the inter-governmental agreements do not provide to resolve disputes by an arbiter, the

[9] The draft of research documents on Arbitration Law for the purpose of The State Great Khural to debate. MNCCI. UB, 2003 . National Legal institute of International legal sector's the research work of "Implementation of Arbitration Law, and difficulties, the way of improving the legal environment" Mongolia, UB, 2011.

[10] Mongolian Civil law, 2009, Art. 200.1.

claim shall be resolved by Court.

In the Company law, dispute arisen between the parties to an equity joint venture, and the board of directors has failed to settle through conciliation, may seek resolution through mediation or arbitration by an arbitration agency of Mongolia or through arbitration by another arbitration agency agreed upon by the parties. If no arbitration clause in the contract or they cannot reach agreement of arbitration after dispute arises, they can file lawsuit in the Mongolian court.[11] Similar provision can be found in Civil law.

It provides the parties of the joint venture have dispute during the interpretation or performance of the Agreement, Contract, Article of joint venture, they should firstly try to settle in amicably through conciliation or mediation, if these measures failed, they can require arbitration or litigation to settle it.

In these provisions, then law emphasizes the first amicable settlement through conciliation and the conciliation is the mandate procedure. But there is no any time requirement for the procedure, so while the parties to the dispute have shown the evidence of conciliation, they can ask arbitration or file lawsuit in the people's court.

In Arbitration law and Civil Procedures law, there is a similar provision. The difference is that this law gives the disputing parties right to choose. Usually the conciliation is the necessary procedure, but if the parties are not willing to use conciliation, they can directly ask for arbitration or litigation. It reflects more flexibility and efficiency of Mongolia dealing with the foreign investment.[12]

In regulations on the Foreign Investment law, there is same provision that disputes between foreign investors and Mongolian investors as well as between foreign investors and Mongolian legal or natural persons on the matters relating to foreign investment and the operations of the business entities with foreign investment and branches of foreign legal persons, shall be resolved in the Courts of Mongolia unless otherwise provided in the by international treaties to which Mongolia is a party of or in the agreements between the parties.

From all these provisions I can see, for the investment disputes between the foreign investors and Mongolian partners of the joint venture, they can use conciliation, arbitration, or litigation to resolve the disputes. If they choose settlement through court, they can only file the lawsuit in Mongolian court if the parties agree they can choose the arbitration in Mongolia of a foreign arbitration.

The dispute between foreign investors and other Mongolian company, the dispute will be subject to the Civil law, Company law and other Mongolian domestic laws. They can choose arbitration, or a lawsuit in the Mongolian court.

The dispute settlement mechanism for the disputes between the foreign investors and the Mongolian government:

The Civil law provides that in filing a lawsuit and responding to lawsuit in the People's Court, foreigners, people without nationality, foreign enterprises and other organizations shall have the same equal litigant right and obligations as the citizens, legal persons and other organizations.

Also, the foreign investor can find some provision in Mongolian domestic procedure laws. The Administrative Procedure law provides that a citizen, a legal person or any other organization who suffers damage because of the infringement upon his or its lawful rights and interests by a specific administrative act of an administrative organ or the personnel of an administrative organ, shall have right to claim compensation. Stated by Civil Procedures law that a foreign stateless person, foreign organization undertake civil procedure, they have the equal legal right and obligation with Mongolian citizen, organization.

So far, we can see Mongolian law has provided guarantee to foreign investors to seek compensation and claim their right against Mongolian authority through domestic

[11] Mongolian Company law, 2009, Art. 200.1.

[12] Doljin S, "Recent development Arbitration law in Mongolia" Asian Law Quarterly, Volume 1-2 Oct, KLRI, Korea, 2014, PP. 18-32.

Administrative procedures law and Civil Procedures law.

Until now Mongolia did not make specific and clear regulation for foreign investors to bring investment disputes against Mongolian government. The several major foreign investment laws only provide settlement mechanism between private business parties and don't provide any dispute settlement between foreign investors and Mongolian government.

III. Issues to Consider International Investment Dispute

Consent of Arbitration

The Arbitration law applies to all arbitrations seated in Mongolia but don't provide about apply to international arbitrations regardless of the seat of the arbitration. According, Foreign Investment law guaranteed that the state shall not nationalize or requisition any enterprise with foreign capital. Under special circumstances, when public interest requires, enterprises with foreign capital may be requisitioned by legal procedures and appropriate compensation shall be made. These regulations admit to compensate foreign investment of expropriation, but do not define the term of compensation.

Domestic arbitral awards Article 35 of the Arbitration law states that an arbitral award rendered in Mongolia shall have the same effect on the parties as the final and conclusive judgment of the court. It should be noted, however, that article 36 of the law provides procedures for a party wishing to apply to the court of competence to set aside an arbitral award rendered in Mongolia. The grounds for setting aside a domestic award in Mongolia are similar to the grounds for declining to recognize or enforce a foreign arbitral award. No application to set aside an award may be made after three months from the date on which a party received a duly authenticated copy of the award, nor may any such action be entertained after a conclusive judgment of recognition or enforcement of the award has been rendered by a Mongolian court.

There is no corresponding provision under Mongolian law permitting a party to apply for the setting aside of a foreign arbitral award, as Article 35 of the law does not apply to foreign awards.

Applicable Law

According Arbitration Law of Mongolia, there is no any provision about choice of applicable law and in Rules of MIETAC (Mongolian International Economic and Trade Arbitration Chamber), which is special used in foreign investment dispute, there is also no any provision about choice of law.

Therefore, in agreements with foreign investors Mongolia can clearly express that any disputes first be resolved apply laws of Mongolia and only if really needed should international law can be applied. As to the applicable international law and considering this diversity of interpretation in international law, Mongolian scholars always claim the applicable international law should be recognized and accepted by Mongolia.

An opinion may represent the understanding among Mongolian scholars however that is the applicable international law should be, a) principles and rules of international law stipulated and recognized in the law of host state; b) BIT of which the host state is a member; c) the universally recognized principles and rules of international law about treatment of the foreign party. New principles of international law can be developed by developing countries. For example, the UN Assembly declarations or resolutions in the 1970s. These new principles can be referenced as appropriate and practicable international law and used in Mongolia.

Court Involvement

When foreign investment disputes happen, administrative resolution always is the first choice or sole choice. Even though the parties choose arbitration or litigation, under the strong administrative influence, the law is easily ignored or suspended. The resolution of dispute often lacks transparency and due

process. Therefore, the key point is to establish a more efficient court system and curtail the bureaucracy and reinforce transparency of administrative procedure.

There are a many disputes that belong to the exclusive jurisdiction of court. We can see it on Article this in 6.1 of Arbitration law, and Article 13.3 of Civil Procedures Law. The court, at the same time, has a strong authority to supervise jurisdiction and judgment of arbitration. I can assume that the jurisdiction of arbitration is restricted to a limited scope in Mongolia.

Qualifications of Arbitrator

The experience and outlook are also vital qualifications of an arbitrator. It is becoming increasingly, important for international arbitrators to show their awareness of the world of international investment relations and of the different traditions, aims, and expectations of the people of that world. The qualified arbitrators play a significantly important role in forming a reliable arbitral institution. As a consequence, an arbitrator must possess the certain qualifications, including education and training, efficiency languages, experience and outlook.

One of the most important qualifications for an arbitrator is that he is experienced in the law and practice of arbitration. In this sense, it is not very useful to appoint an arbitrator who is an experienced lawyer but is short to useful experience of arbitration.

Considering this point, from experience the arbitral process will depend on the quality of the Mongolian arbitrators.

Enforcement of Foreign Arbitration Awards

The enforcement of foreign arbitration award through domestic judicial proceedings is controversial in Mongolia. Having been previously indicated, it is nearly a generally accepted fact that the court of law systems as Mongolia are facing the issues within the system itself, including detrimental political influence and corruption.

In this sense, once the enforcement of the foreign arbitration aware by the courts is sought, it is very likely that such enforcement process consumes much time and it is also possible that further, and probably unnecessary, cost for such enforcement is required to the corrupt and bureaucratic system. Thus, it turns away from the inherently original concept of and desire for Mongolian arbitration mechanism, which was excepted to save both costs and time.

National emergency

Mongolia should take great care to clearly outline the adjustment of entry policies in some key sectors and have more state control of extractive industries. The manifold motivations for these policies included considerations of national security, food security and industrial policy, as well as the wish to control strategic industries and infrastructure. Restrictions appeared not only in the regulatory framework itself, but also in more stringent administrative practices, for instance, in screening procedures for incoming investment and in a broader interpretation of national security concerns.

In addition, Mongolia should be concerned about excessive purchase of land by large-scale foreign firms and government-controlled entities (e.g, sovereign wealth funds), the environmental consequences of overexploitation and their implications for the promotion of rural economic development among domestic rural producers.

Mongolia needs to give careful attention to State control over natural resources, as well as their dissatisfaction with the performance of private operators. To obtain more control over extractive industries, governments have chosen different paths. These paths have led to nationalization, expropriation or divestment requirements. For example, to increase to different degrees taxes and royalties in extractive industries to introduce new taxes that relate to the participation of the private sector in the reform process, and to adopt new laws that raised royalties and

taxes following negotiations with the mining business associations

Protection of Public Policy

It is widely accepted that investment activities impact on environmental and labour standards and on the human rights of individuals in the territories where investment activities are carried out in Mongolia. There are many potential environmental disasters such as floods, droughts, high winds, earthquakes, biological disasters, forest fires and great amount desertification and air and water pollution that can happen in Mongolia. As statistic information shows that mining has damaged nearly 4,000 hectares.

In this situation, we need to pay particular attention to environmental protection. Certain provisions of new U.S.-BIT model, may hinder negotiation of new BITs developing country as Mongolia. For example, the new U.S BIT model includes provisions on investment and the environment. It provides that: "... neither party can waive or derogate from its domestic environmental laws or offer to do so in order to encourage the establishment, acquisition, expansion or retention of an investment in its territory".

In this regard, the ICSID authority is that states are required to pay compensation for environmental regulations that impact on foreign investment. The tribunal in Santa Elena v. Costa Rica stated as follows: "While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the property was taken does not alter the legal character for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory measures no matter how laudable and beneficial to society as a whole are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".

For the most part, even though investment dispute settlement tribunals frown upon protectionism, environmental protection is emerging as an area of global concern and is not necessarily a particular interest area of only capital exporters or importers.

It is my suggestion that Mongolia should be required to pay compensation for environmental regulations that impact on foreign investment in future BITs.

In addition, new U.S BIT model includes provisions on the both NGOs and investors should be pleased with the new transparency provisions, which could have the effect of forestalling a certain percentage of investor-State arbitrations, since the new provisions give investors an opportunity to discuss the effects of regulatory amendments and host states a chance to reevaluate proposed changes before final promulgation. In essence, these modifications allows for exchanges of views before the conditions for a dispute actually arise. Therefore, we need to be concerned with participating NGOs.

A further contention is that international principles of investment law that require developing states to pay "fair and equitable" compensation for expropriation bypass the fact that Mongolia lacks the resources to compensate foreign investors according to such international standards. As a result, "fair and equitable" compensation for a foreign investor from a developed state may "unfairly" cripple a developing country as Mongolia by perpetuating a history of dominant foreign states and their investors dispossessing it of its natural resources. Conversely, new BITs devised by developed states that are now capital importers may artfully invoke defenses of necessity, national security, health, safety and the protection of the environment to deny "fair and equitable" treatment to investors from Mongolia.

Balancing Investment Protection and the Public Interest

International legal regimes depend on the vertical relationship between state responsibility and sovereignty, and the right balance between investment protection and the public interest.

BITs have not yet developed a coherent approach to the standard of review applicable to disputes engaging the competing interests of host states and foreign investors. BITs typically do not address the relationship between the standards of investment protection (such as indirect expropriation, fair and equitable treatment and national treatment) and the continuing powers of host states to regulate and take other actions in the interest of their populations. Nor, like most other treaties, do they generally stipulate the applicable standard of review, meaning that tribunals must rely on their inherent powers in the determination of the appropriate degree of deference to the extent that the treaty text does not shed light on the matter.

The greater the degree of deference afforded by investment tribunals, the correspondingly wider the degree of regulatory flexibility enjoyed by host states and conversely the stricter the standard of review, the greater the risk of state liability for action in pursuit of public welfare objectives. Employing standards of review that reflect an appropriate allocation of authority between tribunals and states may be one way, within the current system of investor-state arbitration, for international investment law to find a better balance between public and private interests.

Deference on the basis of sovereignty and proximity is especially relevant to the determination of whether the host state' asserted objective serves the public interest, an inquiry that in many cases operates as a prerequisite for a finding that the host state has acted lawfully. Provided that a measure does not pursue a discriminatory, protectionist or otherwise impermissible objective, a tribunal should display deference in relation to the host state' determination of the regulatory objectives it wishes to pursue and should refrain from second guessing the importance of the objective or the desired level of protection or achievement of it, including in relation to the regulation of novel or localized issues requiring intervention.

Balancing proportionality has been performed, or referred to, in a number of investment cases, and some tribunals have referred to the concept of reasonableness as delimiting lawful state conduct in the context of fair and equitable treatment.

Balancing, or determining whether a measure is reasonable, risks highly subjective decision-making that is influenced by adjudicators own political, ideological and economic beliefs and assumptions: many cases, it will be more appropriate for national decision makers to make this assessment or adjudicators should attach significant weight to their views.

The adoption of strict standards of review in investor-state arbitration has, most notoriously, resulted in tribunals holding that Argentina' general regulatory measures taken in response to its economic crisis violated its obligations toward foreign investors. We also see overly strict approaches to the standard of review in a number of cases in which tribunal members do not appear to agree with host states as to the importance of their objectives or the gravity of the situation, or where tribunals have not taken account of host states' comparatively greater expertise in designing regulatory policy. Yet, an increasing number of tribunals have acknowledged the desirability of deference or have approached the standard of review with an understanding of the need for deference for reasons of sovereignty and proximity and relative institutional competence and expertise.

Furthermore, BITs need to be developed a coherent approach to the standard of review applicable to disputes engaging the competing interests of host states and foreign investors. Such an approach to the standard of review would go some way toward achieving a more balanced relationship between the protection of foreign investments and host state's right to regulate in the public interest.

The New International Economic Order of today is a finely tuned balance between the rights of developing countries, the desires of developed countries and the protections granted to individual investors from around the globe.

Therefore, I suggest that the balancing investment protection and public interest is a priority for future development BITs including in Mongolia.

III. Conclusion

International investment law has undergone a remarkable transformation in a relatively short time in Mongolia. In conclusion, by recognizing the unique problems caused by inconsistency in the context of investment arbitration, we can begin to move forward to consider how best to resolve these challenges.

Therefore, Mongolia has changed the reform and improve its current investment dispute arbitration legislation. In doing so, when a dispute between foreign investors and the Mongolian government appears, the foreign investors can seek a satisfactory resolution through the domestic procedure and avoid the application of ICSID mechanism. It will be a mutual benefit for both parties. However, some scholar and researchers point out the current investment dispute arbitration legislation is adequate for investment at present.

The new law was based on the UNCITRAL Model Law. The basic ideas, concepts and principles of the Model law and even most detailed provisions have been adopted. I can assume that the new law on arbitration follows the Model law in Mongolia.

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THE COURT SYSTEM AND JUDICIAL ADMINISTRATION IN MONGOLIA: INTRODUCTION AND RECENT DEVELOPMENTS

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Mongolia's system of judicial administration is relatively young, and has had to quickly adapt to significant changes. Thanks to Mongolia's rapid transition to democracy, it has not had the luxury of gradual evolution. Rather, it has had to free itself from its soviet roots and adapt. It has had to adapt to changes to the political ideology of its government. It has also had to adapt to changes to the role which judges play in administering justice, in their status and responsibilities, to changes to the court hierarchy, and the introduction of specialized courts, and to social changes, which require new legislation and variance in the demands made of the court services of city and regional courts. It has needed to adapt to changes in technology. While this has presented challenges, it has also meant that those people tasked with developing judicial administration systems and processes have had the freedom to choose a system appropriate to Mongolia's needs. In recent years, in particular, there has been a focus on examining international recommendations around best practice in the field and how those practices might have domestic application.

This article provides an introduction to judicial administration in Mongolia. It first briefly outlines Mongolia's modern judicial history, a broad understanding of which helps to highlight the challenges which judicial administrators and legislators have faced in bringing the court system to its present state. It then considers the effects of the 1992 Constitution of Mongolia on the operation of the courts, and the extensive series of legislative and policy reforms that followed. Many of these reforms reflect ongoing concerns about securing the rule of law and the independence of the judiciary, and guarding against corruption or public perceptions of corruption. Finally, it considers the state of judicial administration today.

A brief history - 1911 to 1990

In the space of less than 100 years, Mongolia has transitioned from theocratic khanate to communism to democracy. At the beginning of the twentieth century,

Mongolia was ruled from China by the Qing Dynasty. At this time, there was no clear distinction between criminal and civil law,[1] and prosecutions were generally commenced by the person aggrieved.[2] The person tasked with conducting an investigation into a legal complaint would usually also be the judge in that matter.[3] Some courts did not have the jurisdiction to try higher ranking individuals.[4] Torture was used, both as a punishment and as an investigatory tool.[5] It was possible in some instances to appeal the decision of an inferior court, but the processes for this were ad hoc.[6]

The early twentieth century was an unstable time for Mongolia. On 1 December 1911, the country declared itself independent and accepted the rule of the Bogd Khan, a high ranking lama. The Bogd Khan government established five ministries, including a ministry of judicial affairs.[7] Although codification of some laws occurred under the Bogd Khan, the court system did not change significantly. By 1919, the country was occupied again by Chinese troops, but the following year the Bogd Khan was reinstated on the throne. Although he remained there until his death, the sound of communist rumblings in Russia carried south, and in 1921, the People's Revolution resulted in Mongolia becoming the second socialist country in the world. After the Bogd Khan passed away in 1924 the country was declared the Mongolian People's Republic (MPR). The country's first constitution was passed on 26 November 1924. A Court Procedure Code was adopted in 1926, which introduced features of a continental legal system, subject to the constraints imposed by the soviet style constitution.

Being a constitution founded in socialist principles, the first MPR constitution bore many similarities to that of the Russian Soviet Federative Socialist Republic,[8] which was not concerned with the rule of law. In Mongolia, the highest court was the Supreme Court, beneath it the Provincial Courts, and under those the District People's Courts.[9] The MPR constitution provided that judges should be independent and subordinate only to law,[10] however the judicial appointment processes provided for under the constitution were incongruent. Judges did not have security of tenure, a key safeguard of judicial independence, nor were they accountable only to the law. MPR Supreme Court judges were appointed by the Great People's Khural[11] for terms of 4 years and they were accountable to the Great People's Khural and its presidium.[12] Judicial officers in precinct courts were elected by residents of the relevant precinct for terms of 3 years. [13] Although a separate judiciary existed, the executive effectively controlled the judiciary. Judges often decided cases along party lines.[14]

Two further constitutions were promulgated while Mongolia remained a communist state, however the court administration system did not change dramatically. Over this time, however, law - a discipline which could previously only be studied abroad - became part of the curriculum on offer at Mongolian universities.

It is worth noting that at the time Mongolia adopted communism, its economy was vastly different to today, as was its population distribution. In 1926 the country was more sparsely populated, and only around 1,500 people lived in the nation's capital, Ulaanbaatar.[15] Most people lived as nomadic herders in the countryside, away from urban areas. This has steadily changed over time,

[1] Butler, *The Mongolian Legal System: Contemporary Legislation and Documentation*, 1982, p 6

[2] Ibid

[3] Ibid, p 8

[4] Ibid

[5] Ibid, p 6-9

[6] Ibid, p 8

[7] Makoto Tachibana, *The 1911 Revolution and "Mongolia": Independence, Constitutional Monarchy, or Republic*, The Journal of Contemporary China Studies Vol 3, No 1, p 72

[8] Ibid, p 174-175

[9] John N Hazard, *The Constitution of the Mongol People's Republic and Soviet Influences*, Pacific Affairs – University of British Columbia, Vol 21, No 2 (Jun 1948), p 167

[10] MPR Constitution 1924, article 71

[11] The Great People's Khural is the parliament of Mongolia

[12] MPR Constitution 1924, article 66

[13] MPR Constitution 1924, article 68

[14] Sebastian R Astrada, *Exporting the rule of law* , Denver Journal of International Law and Policy, Vol 38:3, p 485

[15] http://www.themongolist.com/blog/society/89-rethinking-ulaanbaatar-s-population.html

so that by 1990, when the country stepped away from communism, around 20% of the population lived in Ulaanbaatar, and others had migrated to regional centres. Today, 45% of the population lives in the capital city, while around 23% lives in aimag capitals.[16] The remaining third of the population still lives in rural areas, some more than a day's travel from their aimag capital by car. These demographic changes have affected utilasation and access to courts.

The beginnings of an independent judiciary

In 1990 a peaceful revolution resulted in Mongolia moving away from socialism, becoming a democracy governed by the rule of law.[17] That year, the first free parliamentary elections were held. Two years later, the present constitution was promulgated. This provides that judicial power is vested only in the courts,[18] and that the judiciary is to be independent and subject only to law[19]. The Constitution provides for a judicial system comprising a Supreme Court, aimag[20] and capital city courts, Soum[21], intersoum and district courts. [22] It also provided for specialized courts such as criminal, civil and administrative courts to be formed, subject to the supervision of the Supreme Court.[23] A General Council of Courts (now referred to as the Judicial General Council of Mongolia, or JGC) is mandated with protecting the independence of the judiciary.[24] Its duties include selection of judges and protection of their rights.[25] The new constitution placed some limits on the grounds upon which a judge could be removed from office, improving - although not guaranteeing - security of tenure for judges.

The Supreme Court was not given jurisdiction to hear constitutional matters. These are heard by the Constitutional Tsets (court) of Mongolia, which supervises enforcement of the Constitution and decides constitutional disputes.[26] Members of the Tsets are subject only to the Constitution and are independent of other organizations, officials and people.[27]

Unlike earlier constitutions, the 1992 Constitution includes express protection of human rights. This includes the provision that all people lawfully residing within Mongolia are equal before the law and the courts,[28] and that every human being shall be a legal person.[29] All people are guaranteed the right to appeal to the court if they consider their rights and freedoms under Mongolian law or international treaties have been violated.[30] They have a right to a fair trial, to receive legal aid, to appeal against decisions and to the presumption of innocence until proven guilty by the courts.[31] If a person does not speak Mongolian, they should be assisted by an interpreter and be able to express themselves in their native language during trial.[32] Except as prescribed by law, cases are to be conducted by open hearing.[33]

For constitutional rights to realistically be exercisable, legislation and systems needed to be developed to secure them. This was a process, rather than something which occurred immediately. For example, article 49.1 of the Constitution provides that judges shall be independent and subject only to law. At the time that the present constitution was promulgated, the vast majority of judges and legal practitioners had been trained under the socialist system, where independence

[16] Available from the Mongolian Statistical Information Service – www.1212.mn

[17] The principle that a nation should be governed by law, to which all people, including government officials and entities, are subject.

[18] 1992 Constitution of Mongolia, Article 47

[19] 1992 Constitution of Mongolia, Article 49

[20] Mongolia is divided administratively into Aimags and the capital city. There are currently 21 aimags, or administrative subdivisions.

[21] Each Aimag is, for administrative purposes, divided into Soums. There are currently 331 soums in Mongolia. Soums are further administratively divided into Baghs. The capital city, Ulaanbaatar, is divided into districts, and each district divided into Khoroos.

[22] 1992 Constitution of Mongolia 1992, article 48

[23] Ibid

[24] Ibid, article 49(1)

[25] Ibid, article 49(4)

[26] Ibid, article 64(1)

[27] Ibid , article 64(2),(3)

[28] Ibid, article 14(1)

[29] Ibid, article 14(2)

[30] Ibid, article 16(14)

[31] Ibid

[32] Ibid, article 53(2)

[33] Ibid, article 54

from influence by the executive was not guaranteed. Retraining was required, as well as the implementation of other safeguards of judicial independence, in order for article 49.1 to be effective. This was not the only hurdle to be overcome in order for the judiciary to operate effectively under democracy. Legal professionals had not been trained to deal with disputes under a market economy, and had to adjust to a numerous and swift changes to the legal system.[34] In addition, judges received low salaries and had limited access to technical equipment and assistance.[35] As a result, public belief in the independence of the courts and judiciary was not strong.[36]

Post-1992 judicial reforms

While there had been ongoing efforts to improve the operation of the courts from 1991 onwards, in 2000, the State Great Khural decided to take a more strategic approach to reform, adopting the "Judicial Strategic Plan of Mongolia".[37] This aimed to strengthen the judiciary and improve the rule of law through securing the independence of the courts and building the capacity of judges.[38] Under the strategic plan, the courts were given an independent budget, steps were taken to improve the economic independence of judges, judicial ethics rules were established and revised,[39] and specialized courts, (including in 2004 the administrative court), were created to streamline judicial dispute resolution.

Between 2000 and 2009, the Mongolian justice sector worked in conjunction with a number of international aid organisations, particularly the United States Agency for International Development (USAID) and the United States' National Center for State Courts, to improve the justice system in Mongolia.[40] This included USAID funding improvements to information technology infrastructure so that most courts were connected to the internet and judges had access to court decisions from all Mongolian courts.[41] Later, several aimag courts were set up with video conferencing technology to assist regionally based court staff in attending training seminars.[42] Case management practices were studied to provide a better understanding of what prevented judges from dealing with their allocated cases within statutory timeframes. As a result, Caseflow Standards for Mongolia were developed.[43] Improving the legal awareness of the public was also a focus, with the creation of television and radio programmes which provided information and commentary on real life legal issues.[44]

Although significant steps were taken to improve court processes and judicial independence from 2000 on, persistent public concerns about a lack of judicial independence and impartiality remained. These concerns were not aided by the overall lack of awareness that many Mongolians had about justice institutions. A 1200 person survey conducted in 2005 by the Open Society Forum considered people's levels of awareness of state and non-governmental justice institutions, their access to those institutions, and their confidence in current and future justice institutions.[45] The results of that survey indicated a lack of familiarity with justice institutions, particularly among the young or those with limited education, and confidence levels in the fairness of legal institutions was low, with only 6.6% of people rating them as fair.

[34] Above n3, p 487

[35] International Council of Jurists, *Mongolia – Attacks on Justice, 11th Ed*, available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/03/mongolia_attacks_justice_27_08_2002.pdf, p 268

36 See, for example, Brent T. White, *Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia*, East Asia Law Review Vol 4:209, page 210.

[37] *Introduction on draft law on judiciary and other relevant draft laws of Mongolia,* 1 September 2011

[38] https://www.unicef.org/tdad/unicefmongoliajjevaluation09full.pdf

[39] Code of Ethics for Mongolian Judges (1997), Code of Ethics of Judges of the Mongolian Courts (2002), Code of Ethics of Judges of the Mongolian Courts (2010). See also the subsequent Code of Professional Conduct for Lawyers (2013).

[40] Jay Carver, United States Agency for International Development, The Judicial Reform Program in Mongolia: Accomplishments, Lessons Learned, and Recommendations for the Future: Final Project Report, 30 June 2009.

[41] Ibid, page 6.

[42] Ibid, page 9.

[43] Ibid, page 7.

[44] Ibid, page 11.

[45] Open Society Forum, "Access to Justice" needs assessment report, 2005

The recent judicial administration reforms – 2010 onwards

In 2010, President Elbegdorj developed the "Program on Judicial Reform Strengthening" in light of continued public dissatisfaction in the justice system.[46] The purpose of this program was to address community concerns through improving the performance and accountability of judicial staff, increasing transparency, and establishing a system for fair dispute settlement and resolution of cases.[47] The program resulted in the enactment of a package of laws concerning the legal system, which entered into force on 15 April 2013. In preparing the laws, the drafters had regard to international standards such as the United Nations Basic Principles on the Independence of the Judiciary and the European Charter on the Statute for Judges.[48]

The United Nations Basic Principles on the Independence of the Judiciary consider the independence of the judiciary, freedom of expression and association for judges, qualifications, selection and training, conditions of service and tenure, professional secrecy and immunity, and discipline, suspension and removal. The European Charter on the Statute for Judges has similar concerns, with an additional focus on career development. The recommendations made in this documents are captured with the package of laws, which include, inter alia:

1. the Law on the Judiciary, which regulates the operation of the judicial system, its mandate and organization. It affirms provisions for judicial independence already set out in the Constitution, stating that judicial power shall be exercised exclusively by the courts.[49] It also stipulates that the judiciary shall be independent from the legislative and executive powers,[50] and the courts subject only to the rule of law.[51]

2. the Law on Judicial Administration, which regulates the duties and functions of the Judicial General Council, its organizational structure and operational principles.

3. the Law on Legal Status of Judges, which is intended to regulate the qualification requirements for appointing judges, and the grounds upon which they are appointed, procedures for termination, guarantees of impartiality and sanctions for violations by judges of the law. Article 20.3 of the Law on the Legal Status of Judges provides that no law or administrative act can be passed or performed if it weakens the legal, economic and social guarantees of the independence and safety of judges.

Mongolian courts today

Although there have been significant changes made to the administration of the judiciary, the court structure today remains as envisaged by the constitutional drafters in 1992. The courts continue to operate under a civil law system. The laws of Mongolia are primarily captured in statute, and precedent is not a source of law. An inquisitorial process is used in criminal cases, and such cases are run by the Prosecutor's Office on behalf of the public. A person aggrieved who wishes to seek recompense may do so through civil processes.

Soum, intersoum and district courts hear matters at first instance, whilst aimag courts deal with appeals from lower level courts. The Supreme Court, comprising a chief justice and judges, is the highest judicial organ in Mongolia, with the power to hear criminal cases at first instance or on review, to hear matters related to the protection of human rights, and to provide official interpretations for the correct application of all laws except the Constitution. The Supreme Court has three chambers, each with a panel of five justices, who respectively hear appeals of criminal, civil and administrative cases. Constitutional disputes are referred to the Constitutional

[46] http://www.president.mn/eng/newsCenter/viewEvent.php?cid=22&newsId=611&newsEvent=Drafts%20laws%20on%20judiciary%20reformp

[47] Introduction on draft law of judiciary and other relevant laws of Mongolia

[48] http://www.president.mn/eng/newsCenter/viewEvent.php?cid=22&newsId=611&newsEvent=Drafts%20laws%20on%20judiciary%20reformp

[49] Law on the Judiciary, article 5.3

[50] Ibid, article 6.1

[51] Ibid , article 7

Tsets which solely deals with constitutional issues.[52] Since the passage of the package of laws, there has been increased specialization across the lower courts, with the majority now either criminal or civil law courts.[53]

Following the package of laws reforms, there has been an increase in openness of court operations. Article 8.1 of the 2012 Law on the Courts of Mongolia provides that judicial proceedings shall be open and transparent to the general public. Article 8.7 provides that courts shall inform the public of their adjudication through mass media, expect where information about individual privacy, state secrets and legal entities must have their confidentiality protected by law. In administering this law, the JGC now arranges the publication of almost all court decisions online so that they are freely available to the public. In addition, court rooms have been updated to allow better public access, and many have had audio-visual recording equipment installed to allow recording of proceedings.[54]

The Judicial General Council

As noted above, the essential purpose of the Judicial General Council of Mongolia (JGC) is to secure the independence of the judiciary. Prior to the enactment of the Law on Judicial Administration, the JGC comprised 12 members, including the Minister of Justice and a secretary appointed by the President. The inclusion of government officials on the JGC arguably put at risk the JGC's independence from government. The new Law on Judicial Administration addresses this concern, altering the structure of the JGC so that it is a five member council comprising a chief and four members. Although members are appointed by the Mongolian President, they must be non-partisan. In order to be appointed to the JGC, a member must have legal training, at least five years professional experience, be of high integrity and ethics, and be able to independently evaluate others' skills without undue influence. The Chief of the JGC must have ten years professional experience, including managerial experience. In reality, all members of the JGC are former judges who have significantly more professional experience than the minimum prescribed by law.

The JGC's responsibilities are set out under the constitution and in the laws that form the 2013 package of laws on the court. The responsibilities include providing administrative support to the judiciary, alongside court secretariats,[55] and developing the court budget for general expenses and capital investments.[56] Some functions are administered by the JGC directly. For example, it is required to be an advocate for judges' rights. Article 23.5 of the Law on the Legal Status of Judges, which prohibited reduction of judges' salaries, was recently annulled by parliament. The JGC is currently negotiating with government for reinstatement of this provision on the basis that it was an important safeguard of judicial independence.

Other functions are administered by sub-committees. The JGC is responsible for the appointment of judges, and its Qualifications sub-committee performs this task by evaluating candidates for the position of judge. The Ethics sub-committee handles complaints from citizens, government officials or legal entities regarding judges and the courts. It has the discretion to investigate or dismiss a complaint, and can decide to impose a disciplinary sanction on a judge. It must comply with strict timeframes for addressing complaints, so that both complainant and judge soon have certainty on the outcome of the complaint. Both the complainant and judge have a right to participate in the disciplinary investigation and submit evidentiary materials.

In addition to the sub-committees, the JGC runs a research, information and training institute (the JRITI), which performs a range of functions. These include publically publishing

[52] The Constitutional Court. See Article 64 of the 1992 Constitution of Mongolia.

[53] UN OHCHR, Consideration of the reports submitted under Article 40 of the Covenant – Mongolia, 30 March 2016, p 12

[54] UN OHCHR, Consideration of the reports submitted under Article 40 of the Covenant – Mongolia, 30 March 2016, p 11

[55] Ibid, article 6.5

[56] Ibid, article 6.1.1

analysis of statistical data about the courts on a quarterly basis, publishing summaries of key cases, and conducting research into court administration issues.

The JRITI also provides induction training and ongoing professional development training for judges and other court staff. Conduct of judicial training by an organization associated with the courts, but independent of the other arms of government, is in line with recommended international practices designed to secure the independence of judges. The United Nations Committee on Human Rights has commented that: 'it is… the Judiciary itself or the independent associations of judges that must ultimately be responsible for the promotion of the professional education and/or training' of judges'.[57] Similarly, the Council of Europe has recommended that: 'an independent authority should ensure, in full compliance with educational autonomy, that initiation and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office'.[58] Training provided by the JRITI encompasses a range of theoretical and practical areas, and includes mandatory training on judicial ethics. Ongoing training helps equip judges with the skills needed to perform their duties.

Conclusion

Judicial independence now enjoys greater protection than ever before. This is partly as result of the 2012 package of laws, but work has not stopped there. Legislators and judicial administrators continue to look for ways to improve. In 2013, the Code of Professional Conduct for Lawyers came into force. Under the Code, judges are prohibited from misusing their official positions for personal or economic gain,[59] performing their duties with bias,[60] participating in judicial activities or accepting gifts that would undermine their independence.[61] They are also not allowed to engage in ex part communications with parties.[62]

While the 2012 reforms and ongoing work of the JGC are positive, any change requires buy-in from both the judiciary and court administrators to be effective. As USAID noted in their review of the judicial reforms from 2000 to 2009, institutional reform takes time.

'Lasting reforms involve forging consensus on a vision for the future, changes to the legal framework, strengthening the institutions responsible for carrying out the improvements, developing human capacities within the institutions, and ensuring that the overall direction can survive changes in government.'[63]

Changing public opinions about judicial institutions also takes time. Concerns about judicial independence continue to be raised, although it is unclear whether these concerns are an accurate reflection of the current state of the judiciary or based on outdated notions. It may be some time before an accurate assessment can be made of whether the most recent round of reforms have been sufficient to sway public opinion about the independence of the judiciary.

[57] UN Committee on Human Rights, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, page 133, available at: http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf

[58] Council of Europe, Committee of Ministers Recommendation No. 12 (2010) on judges: independence, efficiency and responsibilities, page 14, available at https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2010)12E_%20judges.pdf

[59] Code of Professional Conduct for Lawyers, art 15.3

[60] Ibid, art 15.5

[61] Ibid, art 17.1, 17.11

[62] Ibid, art 15.10

[63] USAID report, above 40, page 13.

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THE RISE OF THE CONCEPT OF CONSTITUTIONAL IDENTITY

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Abstract

This paper examines the concept of constitutional identity and how it has evolved over time. The idea of constitutional identity has its roots in Greek philosophy. Later Carl Schmitt and Carl Bilfinger first introduced the notion of constitutional identity in 1928 to justify limits on amendments to the Weimar Constitution. The notion reemerged in German constitutional law after the current German Basic Law was adopted. More recently the debate over the concept of constitutional identity was revived in the context of European integration. The paper investigates the development of the concept of constitutional identity till the present day starting from Aristotle`s idea of the identity of a state. Then it focuses on the issues around the post-socialist constitutional identity and the identity of the Constitution of Mongolia.

Origin of the concept

'Constitutional identity' is a contested notion as there is no agreement over what it means. Aristotle said that the identity of a state depends on its constitution. For him, a `constitution is the organization of offices in a state and determines what is to be the governing body, and what is the end of each community. `[1] In other words, it is the organization of the sovereign authority. If the identity of a state depends on the constitution, any change in the constitution will stimulate changes in the state. Therefore, in Aristotle`s viewpoint, national or state identity is closely related to the constitution of a state. Although there is no universal definition of constitutional identity it differs from national identity as it is intimately connected with the constitution of the given state. Scholars approach constitutional identity from various aspects. The concept was first used by constitutional lawyers Carl Schmitt and Carl Bilfinger in 1928 in justification of the notion of unamendable constitutional provisions.

In many constitutions around the world, there is a tendency that constitutional amendments are harder to amend compared to ordinary legislation. In India, certain constitutional amendments are so fundamental values, therefore, unamendable under the doctrine of the basic structure of the constitution.[2] In the United States, the idea that some constitutional provisions are unamendable is associated with the concept of `eternal clause` or `entrenched clause`.

Development of the concept in German constitutional law

In Germany, the constitutional amendment procedure is different from the amendment procedures that apply to ordinary legislation. Not only constitutional amendments require a special procedure, some constitutional amendments are unamendable

[1] Aristotle, Politics, Book 4, chapter 1.

[2] Virendra Kumar, "BASIC STRUCTURE OF THE INDIAN CONSTITUTION: DOCTRINE OF CONSTITUTIONALLY CONTROLLED GOVERNANCE [From Kesavananda Bharati to I.R. Coelho]," Journal of the Indian Law Institute 49, no. 3 (2007): 365–98.

and therefore called `eternal clauses`.[3] The concept of constitutional identity was developed due to the absence of limitations on constitutional amendments in the Weimar Constitution.[4] There were no requirements for a special constitutional assembly to amend the constitution. It was to be amended via the legislative process.[5] The Reichstag, the parliament of the Republic, was believed to be a constitutional assembly.

In this context, Schmitt argued about the existence of limitations on constitutional amendments based on the concept of constitutional identity. Carl Schmitt assumed that the source of all powers is the constituent power.[6] Therefore, only constituent assembly (constituent power) can decide the fate of the constitution. The fundamental questions in the constitution, the type of government, separation of powers shall be decided by the constituent power. Schmitt distinguished between two types of constitutional provisions.[7] One is the constitutional text that can be amended by the legislature or the constituted powers. The other more important values or the core of the constitution cannot simply be amended by constituted powers, but can only be amended by the constituent power (the people).[8] This way Schmitt produced a theoretical assumption that the core of the constitution is not to be amended by the legislature or the constituted power.

The Basic Law of the Federal Republic of Germany adopted in 1949, provides for a two-thirds threshold both in Bundestag and Bundesrat to pass constitutional amendments. It further stated that principles laid down in Article 1 and 20 shall be unamendable.[9] Schmitt`s concept of constituent and constituted powers were not discussed during the drafting process. Rather it was introduced to prevent a revolutionary movement like the Nazis. However, the notion of constitutional identity, in light of Schmitt`s theory, developed in the process of interpreting article 79.3 of the Basic Law. The principles enshrined in article 79.3 are considered as the core of the constitution or the identity of the Basic Law. Others developed the concept of constitutional identity outside of the Schmitt`s theory, where the limitation on constitutional amendments exist independently from the eternal clause that the constitutional amendments shall not destroy the identity of the constitution.

The concept of constitutional identity was used later as a limit to the domestic application of EU law and European integration. The term identity of the constitution was first used in *Solange I* decision on limitation of the supremacy of the European law. The court decided that the core of the Basic Law is unamendable and even an international organization does not have the power to change the identity

[3] Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism (Duke University Press, 1997).”properties”:{“formattedCitation”:”Peter C. Caldwell, {\\i{}Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism} (Duke University Press, 1997

[4] Ibid. at 105.”publisher”:”Duke University Press”,”number-of-pages”:”324”,”source”:”Google Books”,”abstract”:”Popular Sovereignty and the Crisis of German Constitutional Law is a historical analysis of competing doctrines of constitutional law during the Weimar Republic. It chronicles the creation of a new constitutional jurisprudence both adequate to the needs of a modern welfare state and based on the principle of popular sovereignty. Peter C. Caldwell explores the legal nature of democracy as debated by Weimar’s political theorists and constitutional lawyers. Laying the groundwork for questions about constitutional law in today’s Federal Republic, this book draws clear and insightful distinctions between strands of positivist and anti-positivist legal thought, and examines their implications for legal and political theory. Caldwell makes accessible the rich literature in German constitutional thought of the Weimar period, most of which has been unavailable in English until now. On the liberal left, Hugo Preuss and Hans Kelsen defended a concept of democracy that made the constitution sovereign and, in a way, created the \”Volk\” through constitutional procedure. On the right, Carl Schmitt argued for a substantial notion of the \”Volk\” that could overrule constitutional procedure in a state of emergency. Rudolf Smend and Heinrich Triepel located in the constitution a set of inviolable values of the political community, while Hermann Heller saw in it a guarantee of substantial social equality. Drawing on the work of these major players from the 1920s, Caldwell reveals the various facets of the impassioned constitutional struggles that permeated German legal and political culture during the Weimar Republic.”,”ISBN”:”978-0-8223-1988-7”,”note”:”Google-Books-ID: RyoQnCUu_WkC”,”title-short”:”Popular Sovereignty and the Crisis of German Constitutional Law”,”language”:”en”,”author”:[{“family”:”Caldwell”,”given”:”Peter C.”,”multi”:{“_key”:{}}}],”issued”:{“date-parts”:[[“1997”]]},”seeAlso”:[]},”locator”:”105”}],”schema”:”https://github.com/citation-style-language/schema/raw/master/csl-citation.json”}

[5] Constitution of the Weimar Republic, art 76.

[6] Carl Schmitt, Constitutional Theory (Duke University Press, 2008), 160.

[7] Ibid. at 248–216.

[8] The distinction between constituent power and constituted powers were formulated by Joseph Sieyes,.

[9] Basic Law for the Federal Republic of Germany, art 79.3.

of the prevailing constitutional order.[10] The Federal Constitutional Court of Germany, in its Lisbon judgment in 2009, expressly protected essential constitutional principles on the basis of the Schmitt`s idea of constituent power. It held that people or the constituent power did not grant the parliament the power to destroy the identity of the constitution.[11] Based on Lisbon's judgment, we can see that the notion of constitutional identity in German constitutional law is eventually related to Article 79.3 of the Basic Law or the eternity clause. One more issue worth noting here is that although the court justified eternal clause based on Schmitt`s theory, Schmitt himself is seen as opposing the liberal democracy and judicial review seeing the President to be the guardian of the constitution.

Various discourses on constitutional identity

Scholars in different part of the world increasingly looks at the notion of constitutional identity from differing perspectives. Monika Polzin distinguishes five different discourses on constitutional identity starting from constitutional identity vs EU law, constitutional values vs international law, national discourses on constitutional identity, which is often associated with eternal provisions or ``basic structure doctrine``, relationship between constitution and the culture and constitutional identity and migration.[12]

US constitutional lawyer Michel Rosenfeld[13] distinguishes three distinct general meanings of constitutional identity. The fact of having a constitution, a federal or a unitary constitution and different cultures all play a signify role in shaping the constitutional identity of a given state. He acknowledges the link between constitutional identity and national identity but also distinguishes them as separate notions. Like national identity, the constitutional identity can be recognized as belonging to a collective self-identity. The two concepts overlap in many areas, but one can easily talk about national identity without referring to the constitution of the state. ``Relative stability of the constitutional texts along with the adaptation process of constitutional interpretation constructs two characteristics of constitutional identity namely sense of collective selfhood and textual sameness. ``[14]

He then distinguishes seven distinct constitutional models, such as the German, the French, the American, the British, the Spanish, the European, and the post-colonial models, which have peculiar constitutional identities. These contrasting models can be distinguished by whether it is built upon a single homogenous ethnic group; a polity of equal citizens bound together by a social contract; a constitutional identity that unified a diverse multiethnic and multicultural population into a nation; a constitutionalism that emerges gradually by means of a process of accretion; a transnational constitutional model tailored to constitutionalism in the EU; or a process of involving an ongoing struggle between identification with, and differentiation from, the colonizer`s constitutional identity. [15]

Constitutional identity arises from the culture of a state. Gary Jacobsohn describes constitutional identity as `a mix of political aspirations and commitments of a nation`s past, as well as the determination of those within the society who seek to transcend that past`.[16] According to Jacobson, `the function of constitutional identity is to deal with constitutional disharmony, which can arise from political contestation, the text of the constitution and in the context of historical change. Societal values, founding ideals, and actual constitutional texts create a wide range of disharmony and the constitutional identity

[10] BVerfGE 37, 271, at 279–280—Solange I.

[11] BVerfGE 126, 286, at 302 and 307

[12] Monika Polzin, "Constitutional Identity as a Constructed Reality and a Restless Soul," *German Law Journal* 18 (December 1, 2017): 1598–99.

[13] Michel Rosenfeld, "Constitutional Identity," The Oxford Handbook of Comparative Constitutional Law, May 17, 2012.

[14] Ibid.

[15] Rosenfeld, "Constitutional Identity."

[16] Gary Jeffrey Jacobsohn, "Constitutional Identity," *The Review of Politics* 68, no. 3 (2006): 361–97.\\uc0\\u8220{}Constitutional Identity,\\uc0\\u8221{} {\\i{}The Review of Politics} 68, no. 3 (2006

is to deal with them. `[17]

Two contrasting aspects of constitutional identity

What is missing from Rosenfeld`s models` is the post-socialist constitutional model. This model encompasses all constitutions adopted by the former Soviet Republics including Mongolia after the demise of the Soviet system. Post-socialist countries pursued one of two paths: a constitutional democracy or a dictatorship. Upon achieving independence many enacted liberal constitutions. The most salient feature of the post-socialist liberal constitutions is that the constitutional identity of the newly independent states struggled to reject the identification with the socialist identity and absorb the new constitutional identity. This created constitutional disharmony that questions, from time to time, the legitimacy of the newly introduced liberal constitutional values in post-socialist democracies. This process is exemplified by the adoption of the 1992 Constitution of Mongolia and subsequent constitutional developments.

Identity means somebody identifies with something else. Where there is a regime change, it forces a new regime to establish its legitimacy to the people, the international community, and other stakeholders. If people identify themselves with the new constitution, they will find the constitution legitimate. The making of the 1992 Constitution of Mongolia was not based on a revolution like the French revolution or war such as in Germany or Japan. Imperial Japan and Nazi Germany both experienced defeat in World War II. The victors imposed transition to constitutional democracy in these countries. In contrast to the post-socialist countries, they had to negate the past constitutional identity and in both countries, the citizens eventually embraced as its own the resulting constitution launched by the victors. The war-based constitution-making was successful in both countries and both developed a distinct constitutional identity although there are major differences.

Elsewhere in the developed legal systems, constitutional identity refers to various peculiarities. Highly diverse successive waves of immigrants created a national identity in the United States. The US constitutional identity transformed through constitutional interpretations and created a unified distinct nation. Unlike the US, Britain does not have a written constitution. However, it has not seen a conquest or domination by a foreign power since 1066 and constitutionalism emerged gradually in contrast to the US, where the constitution had to transcend the pre-constitutional legal order.

In Mongolia, there was neither an explicit input from international intervention nor a clear break with the past. It was a peaceful transition in which neither the reformers nor the former communist party could impose their will on their political opponents. The Constitution itself is often praised as a decent liberal constitution. However, the peaceful transfer and the compromise among different constitutional interests created a constitutional identity that is peculiar and common to many of the post-socialist countries that survived for decades. This model avoids violence, but at the expense of a transition that has no clear break from the socialist constitutional identity, which eventually may result in the democratic backsliding to occur.

Recent developments of constitutionalism in Hungary and Poland raised the question of constitutional identity. However, most research focus on the constitutional identity in these countries in

[17] Ibid.a major preoccupation of theorists--constitutional change--will continue to be inadequately considered. The argument is advanced that there are attributes of a constitution that allow us to identify it as such, and that there is a dialogical process of identity formation that enables us to determine the specific identity of any given constitution. Representing a mix of aspirations and commitments expressive of a nation's past, constitutional identity also evolves in ongoing political and interpretive activities occurring in courts, legislatures, and other public and private domains. Conceptual possibilities of constitutional identity are, herein, pursued in two constitutional settings--India and Ireland--that highlight its distinctive features.",",ISSN":"0034-6705","author":[{"family":"-Jacobsohn","given":"Gary Jeffrey","multi":{"_key":{}}}],"issued":{"date-parts":[["2006"]]},"seeAlso":[]}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

light of the European integration process.[18] No study examined whether democratic backsliding in these post-socialist countries could be investigated within the relatively broader context of post-socialist constitutional identity. Populist rhetoric and the follow-up actions pursued systematically have striking similarities to the recent constitutional developments in Mongolia.

In Europe, national constitutional courts started raising the concept of constitutional identity to limit the European integration process. Starting from the German Federal Constitutional Court, many constitutional courts in Europe, such as Hungary and Czech Constitutional Courts challenged the decisions of ECJ on the basis of the national constitutional identity. The case laws in many of these states may differ in content and context, but the practice of the national constitutional courts in post-socialist countries reveals new challenges that are associated with the illiberal ideas of constitutionalism and national identity. Hungary and Poland are known to have dismantled the checks on their powers and created shields against EU interventions using the concept of constitutional identity.

Mongolia is often praised as one of the few democracies in Central Asia. However, with the recent surge of populism, the rhetoric on the system change has been openly promoted. There has been demand for the dissolution of the parliament and for a referendum to be held on the change of the system of government from parliamentary democracy to presidential one. The President recently obtained the power to suspend judges, and remove the General Prosecutor and the head of the Independent Agency Combatting Corruption in addition to his power to appoint judges, the General Prosecutor and his deputies as well as the head of the Independent Agency Combatting Corruption. The idea of national identity and sovereignty played an important role in this regard.

On the positive side, the State Great Khural of Mongolia amended nineteen constitutional provisions in 2019. These amendments include changes that seek to stabilize the government and strengthen parliamentary supervision and promote judicial independence. Apart from the provision that limits the freedom of association, the rest of the amendments strengthen the check and balance of powers by restricting the President`s appointment power and ability to obtain new powers through ordinary legislation. During the drafting process, the eternal clauses of the Constitution stipulated in the Law on Constitutional Amendment found to be effective in restraining the parliament.

Conclusion

The question of whether attempts to abuse the concept of constitutional identity is predictable and more likely to occur in post-socialist countries due to the nature of the transition or the inherent danger of constitutional identity remains to be answered. Identity is an elusive concept to define whether it is personal, national, or constitutional and there are ambiguities and disagreements over it. However, the concept is certainly associated with constitutional change. Many studies have examined about European constitutional identity of its member states. Deeper investigation into Mongolian constitutional identity and the constitutional change may provide an interesting perspective to the diverging national constitutional identities among the post-socialist countries as Mongolia had a long socialist heritage as it was the second socialist country after the Bolshevik revolution in Russia.

[18] R. Daniel Kelemen and Laurent Pech, "Working Paper: Why Autocrats Love Constitutional Identity and Constitutional Pluralism – RECONNECT,".

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SOCIOLOGICAL RESEARCH TO RUN SMALL TO MEDIUM SIZED BUSINESS (SME) IN MONGOLIA

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Abstract

The government found in 2014 set a goal to analyze what activities were carried out in the framework of the reform of legislation in 2012-2015 as well as making a plan and strategy for further reform of legislation and jurisdiction. The scope of these goals, principles, structures and a set of activities implemented were covered in the policy in order to be enable and responsible for the activities as well as to be participated in an official institutions such as Ministry of Justice, National Policy Agency, General Executive of Court Decision, State Registration, and The National Legal Institute of Mongolia, General Authority for Border Protection, and Mongolian Immigration Agency.

The purpose of this study is to identify the goals, general state reached targets, lessons learned from the process, the new strategies for reforming legal, and perception and imagination for the target groups connected with the plan and further goals and objectives within the framework of the legal reforms.

Key Words: Legal reform, small to medium-sized business, SME, entrepreneurs, businessmen and businesswomen, national products, taxation, social insurance, export, import, license, finance capacity, control, bureaucracy

INTRODUCTION

Sociological research to run small to medium-sized business (SME) in Mongolia

The background of topic and legal circumstances

The program "Legal reform" was approved by The Great Khural of Mongolia in 1998, and German Cooperation for International Cooperation (GIZ) has collaborated within the framework of a project. The project which has a purpose to improve the sustainable development of the economy is being implemented in the framework of collaboration. The main purpose of the project is to make law and legal acts and improve its quality and implement, and apply it more practically. Through collaborating with the Ministry of Justice, a lot of actions have been taken step by step during the project implementation.

In order to evaluate and improve the processing to reform of authority of a court, law, and legislation, the government which was found in 2012 has carried out the projects aimed at making changes to law and a court.

In the 5th part of governmental operation program in 2012-2016;

- E-Governance program will be implemented;
- In order to implement the following reforms, the goal which will be made changes to the system of legislative institution and the court was set up;
- To be more open exequatur, and provide the public with information associated with judgment
- The structure of the investigation department and activity relating to attorney and procurator will be reformed according to making changes as it works as if how the court works by the system of circulation which means 3-4 judges associated due to their location.
- As a court will be changed by a system of circulation, the structure of the investigation department and activity relating to attorney and procurator will be reformed.
- To separate judicial proceeding from activity of administrative, and encourage to be specialized administration of jury;
- To provide the implementation of the complex of judgemental reform laws, and make a plan to solve a set of activity for the organizational and the technical.

The government found in 2014 set a goal to analyze what activities were carried out in the framework of the reform of legislation in 2012-2015 as well as making a plan and strategy for further reform of legislation and jurisdiction. The scope of these goals, principles, structures and a set of activities implemented were covered in the policy in order to be enable and responsible for the activities as well as to be participated in an official institutions such as Ministry of Justice, National Policy Agency, General Executive of Court Decision, State Registration, and The National Legal Institute of Mongolia, General Authority for Border Protection, and Mongolian Immigration Agency.

In 2016, the following activities were implemented within the framework of legal reform year:

- All subjects initiating new laws have been developed new approaches (approaches to draft laws, approaches to estimate the cost of laws and efficiency of laws and approaches for evaluation and monitoring of law) in accordance with a new law on “Laws initiated newly”
- Approved laws “General Administrative”
- The monitoring of legal proceedings by the Civil and Administrative court was transformed into an electronic monitoring system.
- The prosecutor’s office has become an electrical monitoring system so as to monitor activities.
- The institutions of the judicial authority became a specialized administrative units
- The juridical administration institutions became units to provide the citizens with information and services.
- The court of appeals in which is under control of the local jurisdiction has changed
- Law on Promoting Economic Transparency
- The General Tax Law
- Social Insurance Law
- Law on VAT
- Law on accounting
- Law on customs
- Law on Legal Status of the General Customs and Tax Administration
- Legal Entity of State Registration
- Law on Administrative Responsibility

The purpose and objectives of the survey

The purpose of this study is to identify the goals, general state reached targets, lessons learned from the process, the new strategies for reforming legal, and perception and imagination for the target groups connected with the plan and further goals and objectives within the framework of the legal reforms. In

order to achieve the above goals, the following objectives have been set:

- To identify the achievement of goals and objectives set within the framework of legal reform
- To identify the lessons learned during the reform process
- To discover the imaginations and expectations of target groups related to the legal reform strategy and plan.
- To define further goals and objectives of legal reform

Within the framework of this study, 'Legal Reform in the Business Situation", we have studied the following basic target groups classified as: for example, the detailed approach of the research was the following basic target groups which were divided into governmental organizations and business entities.

Research methodologies and techniques: The data of the survey was collected by quantitative and quality analysis of sociological studies. The highlighted issues will be mentioned according to the agenda as the tools of the survey are developed.

The relevance of factors and comparison of the result developed on the IBM SPSS 22 program will be calculated. The data will be developed by the methodology which is used to survey quality in order to classify and define cases.

The target group of the survey: Administrators working in this field, and businessmen and businesswomen will have participated in the survey, and the data will be collected by the different methodologies as the relevance of its significance and the range of activity.

Part one.The Issues of registration, LICENSE, and MONITORING

About 400 entrepreneurs including customs, taxation, professional inspections from Ulaanbaatar, the capital city of Mongolia and some provinces such as Dornogobi, Darkhan-Uul, Khentii, and Khovd, and 10 specialists from the state agencies gave information about small to medium business. The respondents as showing their social and demographic situation follow:

Figure 1.1. Gender of respondents

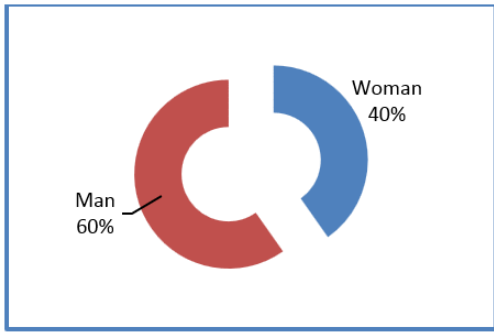
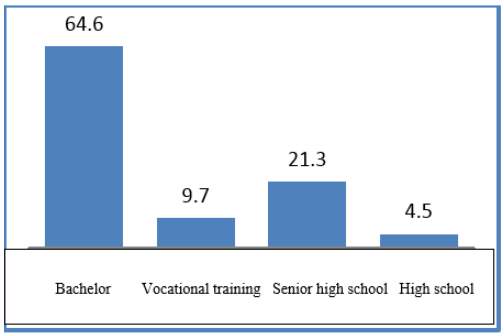


Figure 1.2. Educational attainment of respondents



As showing the period of running the business, it started from 2 months to 20 years, and the age of participants was 20 to 65.

Figure 1.3. The scope of operation and sector

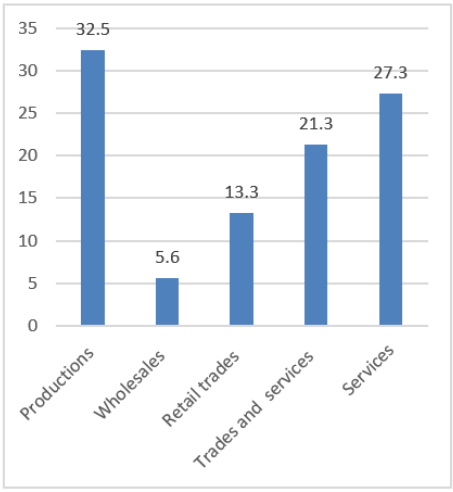
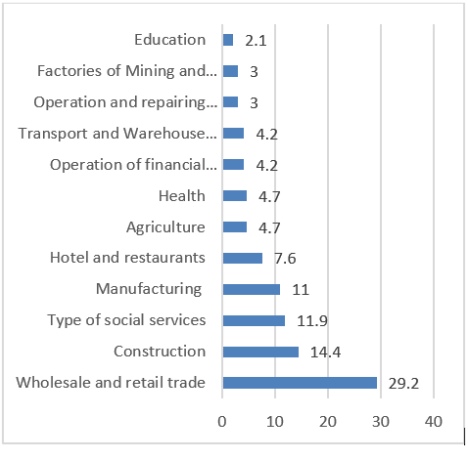


Figure 1.4. Sector related to economic



87% of these small businesses and business entities are officially licensed and registered as well as 13% of them are not officially registered and licensed by legal institutions. 23,6% of respondents were certified officially as entrepreneurs, and the rest of 76.3% are running business without any license.

The main reasons they were licensed officially for running their business are:

- Do not realize the significance of registration
- The registration process is difficult
- It takes much time to register
- Registration fee is high and expensive
- Bureaucratic and poor quality of service

There are few difficulties for companies registered officially to get a name, and register district taxes which is subordinate legally and insurance departments

Table.1. some difficulties to register and to be licensed officially as a company

№	Operation	Weaknesses	Strengthens
1	Pick a name	23.8%	76.2%
2	Have a bank account	11.2%	88.8%
3	Pick a certificate	27.1%	72.9%
4	Official letter/ recording	29.2%	70.8%
5	Total amount of spending time	46.0%	54.0%
6	Determine the amount of the required capital	40.7%	59.3%
7	Reference of social insurance	26.0%	74.0%
8	Register for taxation	35.4%	64.6%
9	Register to social insurance	26.9%	73.1%
10	Register in local district	26.4%	73.6%

According to table 1, there is less difficulty to register as an entrepreneur, and pick a name for business entities, whereas due to the fact that public is lack of knowledge, they waste their time, and it takes much time to register, even the documents are returned over and over again to individuals requesting.

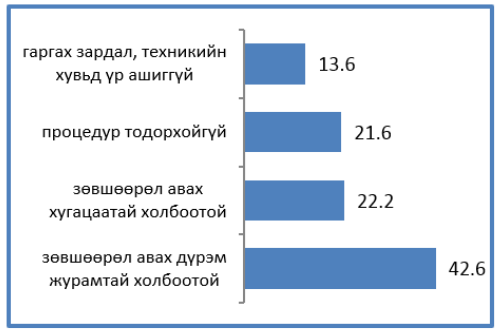
Registration as an entity and an entrepreneur is relatively less complication and its steps are clear. Nevertheless, picking a license for operation tends to be complicated.

In particular, the information relating to grant a license was unclear for entities requested to pick a license, and how to run operation according to the regulation. There have still been quite difficulties for the individual who solicits to complete documents.

For instance, the state agents who are to provide the required information to **those solicited** are working under pressure because of their incomplete documents, duplications of information required from employees, refusing to wait for the time to get information associated with the environment and the soil so as to issue license of restaurants, sales and service of alcoholic beverages and manufacturing alcoholic beverages, manufacturing of construction cement, and building constructions.

On the other hand, **the state agents** tend to be indolence to give information associated with register, license and others, which meant to be likely the individual who solicited were returned over and over again in order to obtain these types of documents.

Figure 1.5. Issues connected with picking a license



There are not few conflicts among small to medium entrepreneurs as showing on the figure 1.5 because of lack of information, license, standards as well as tend to be rush in processing to be required detail analysis. Due to the fact that people do not have any notion associated with tax, there are many cases to be offered bribery and corruption to the state agents. In the workplace, the license of water, heating system and electricity also have problems, and approximately 50% of respondents considered not to have any problems. The rest of them considered having the issues as it was first taken a license and repaired, which was concerned that it has difficulties during the process of utilizing. All of the above answers were 11 to 19% suggesting that at least one mentioned above is complicated. In accordance with the state monitoring, approximately 10% of respondents for the state monitoring expressed their positions, but even though the rest of them send out answers, none of them sent a rational answer. Consistent with the proposals from the respondents, the proposals were made to consolidate financial, tax and social insurance controls and combine hygienic and professional controls. As the result of research shown proposition were reported to integrate in control of its finance, tax, and social insurance, and aggregate health and professional investigation

Table 1.2. Expenditure for monitoring procedure, and whether there is pressure

№	Process of monitoring	Yes	No
1	Enabled	55.4%	44.6%
2	Possibility to prepare in advance and plan	50.9%	49.1%
3	Whether continues for quite few days	44.7%	55.3%
4	Whether implements within the period of required regulation	41.8%	58.2%
5	High expenses related to investigation	57.4%	42.6%
6	Double-checked by inspection agency	56.2%	43.8%
7	Invetigation is non dependent and fair	43.6%	56.4%
8	Payment is fair and proper according to regulation	44.0%	56.0%

The table shows that SMEs and entities have to consolidate the controls, and not only should the amount of fine be determined properly, but also reduce expenses that were allocated during the monitoring.

Table 1.3. Planned and unplanned, duration of controlling performance, expenses, and process evaluated

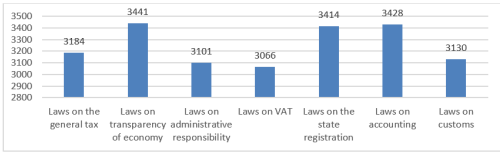
№	Criteria	Agree	Disagree
Planned controlling			
1	Ongoing optimally for 15 days	21.4%	18.5%
2	High cost	22.9%	16.6%
3	Difficulties of process	63.7%	36.3%
Unplanned controlling			
4	Informing 5 days ago is advisable	31.0%	8.9%
5	Ongoing for 10 days	17.0%	18.8%
6	Processing is difficult	65.3%	34.7%
7	High cost	60.4%	39.6%
Monitoring of performance			
8	Informing 2 days is available	23.2%	16.6%
9	High cost	57.1%	42.9%
10	Time is factual to eliminate conflict	21.0%	17.7%

Modify planned time for monitoring to 5-7 days, minimize time, reduce costs by 50%, even process is difficult, but no alternative options. Modifying time to unplanned monitoring vote- inform as possible as many days ago, minimize its duration 5-7 days, even though the processing is difficult, there are no alternative options. Modifying the time to monitoring performance – inform 5 days ago, costs are high, there is not any rational options, but time is unfactual to eliminate the conflicts.

Image 1.6.The difficulties of monitoring

During the survey, even though there were responses that changes are needed and the monitoring process is difficulty from the state agents and SMEs, there was no clear variant options what sort of monitoring would be needed. Common responses were considered that monitoring was demanded indispensable, so as to define the standard, it should be suited in reality not to be damnification in accordance with regulation to SMEs. Since 2011 within the framework of legal reform of regulating the activity of the economic of SMEs and entrepreneurs, respondents evaluated the significance of the following 8 laws passed since 2011 is on average for their implementation.

Figure 1.7. The statement that laws passed newly is evaluated by its significance. (5 laws are most significant, one is not considered significant at all)



The importance of laws such as transparency of economic, accounting and registration was evaluated highly, whereas laws on VAT and administrative responsibility were evaluated by its significance.

PART TWO. THE ISSUES ASSOCIATED WITH BUSINESS OPERATION

The support to process national products and sale it is insufficient from the government.

Figure 2.1. The government support to

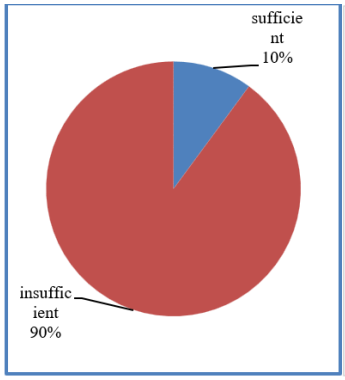
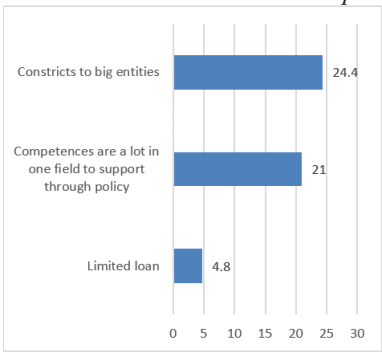
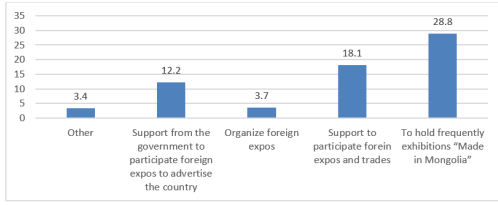


Figure 2.2 get into the market, set legal sell national products condition to compete with



The government is responsible for policymaking and regulating it but it does not provide real support and market protection for SMEs. In particular, when one enters a big company or when it comes to introducing new services or when there are too many similar companies – one cannot succeed.

Figure 2.3. Marketing supports form the government to small to medium factory



About 60% of respondents agreed that they should be given tax and tax exemption to participate in government exhibitions and expos to be held in foreign countries in Figure 2.3 and that the remaining 40% do not support this type of action. Small and medium-sized businesses (SMEs) are not sufficient to participate in the purchase of goods and services with government and local goods.

Figure 2.4. Government bid submission and exit

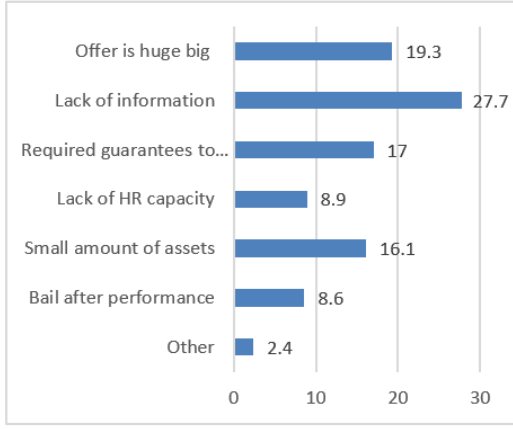
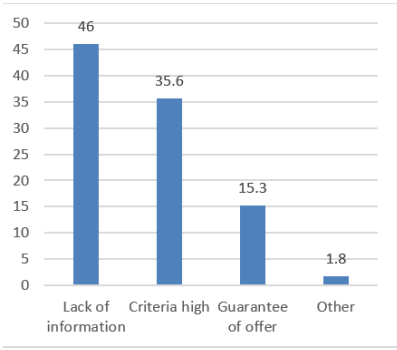


Figure 2.5. The difficulty of bidding for the sale of goods and services by the state and local property



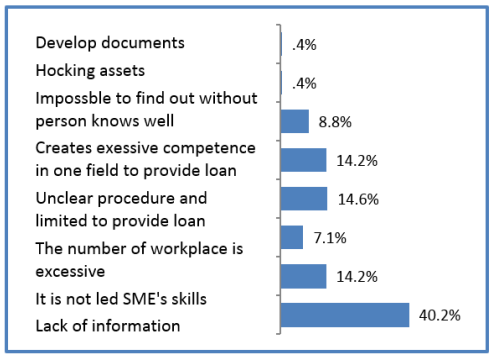
About 60% of the SMEs that participated in the survey did not participate in the bid selection process and did not provide information while the others considered that the main difficulties encountered were:

- The lack of information
- The criteria are high

The offer is too important and the bid guarantee linked to it is very high.

In addition, the evaluation of the technical capacity of the bid, as well as the **assessment of financial capacity, the assessment of technical capacity and experience**, are considered **unfair** and must be taken into account.

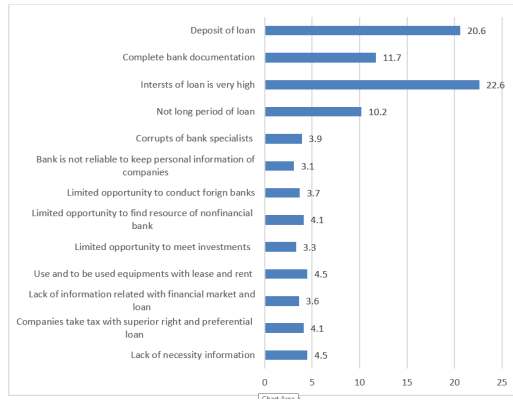
Figure 2.6. Difficulties obtaining loans from Funds for SMEs



In addition to offers, the activities of the SME Support Fund also reflect the same position. The common problem is the lack of information, creating excessive competition in a sector and the priority of the loan is uncertain and limited.

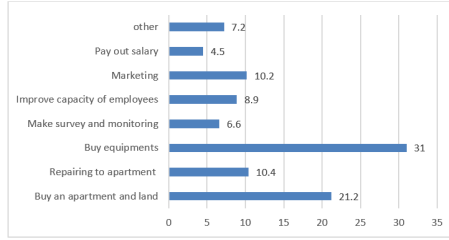
It is also a matter of policy and regulation by the government, but that does not seem to be in the real situation and the regulation is incomplete. In the case of debt financing, it is necessary to modify the criteria of the loan guarantee fund and increase the source of loan guarantees and disseminate the information. In addition to tenders and SME support projects, SMEs are relatively open to having loans from outside but the high-interest rates, shortage, and bank building documents are difficult to obtain.

Figure 2.7. Difficulties obtaining credit from commercial banks



For SMEs, the debt financing activity is often used to buy equipment and buy land

Figure 2.8. Activities by loan financing



The researchers' team's view is that research and development expenditures are part of the loan financing process, but it is considered as a new progressive step.

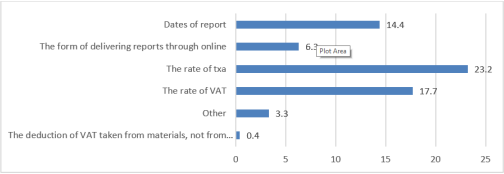
Table 2.1. Evaluation of the implementation of the following laws governing the business activity

№	Laws	No implementation and no need to change	Need to amend some enactments
1	Financial renting, 2006	46.2%	53.8%
2	Deposit on Real, 2009	33.3%	66.7%
3	Information about market, 2011	43.5%	55.6%
4	Loan guarantee of fund, 2012	36.3%	62.8%
5	Deposit real estate and unreal estate , 2015	38.9%	60.0%
6	Bankrupt, 1997	44.0%	56.0%

The implementation of the laws governing commercial activities has been relatively well evaluated. The worst laws of law enforcement are the law on financial leases.

SMEs have little criticism of the issues of tax payments and the transfer of ownership to others. For respondents, the percentage of income or operating taxes is high and the transfer of ownership and the tax rate of ownership is high.

Figure 2.9. Evaluation of tax regulations



Not over 40% of respondents had experience with the Intellectual Property Office and had no realistic proposals for the registration of intellectual property and intellectual property law. The received suggestions show:

– It is needed to clarify the regulatory provisions in the case of trademarks and trade names;

– Needed to open a partnership rights;

– Needed to reduce the life cycle of intellectual property registration. However, these provisions were not optimal and could not offer an alternative solution.

Respondents said that the minimum wage reform of 2017 would not be too difficult for SMEs. 23.8% of respondents said they had difficulty meeting the new minimum wage while the remaining percentage said that it was difficult. The overview of the survey results shows that the duplication and cost of supervision exceed the activities of SMEs while the requirements of the working environment and standards of business practice are respected by SMEs.

Table 2.2. The possibility of implementing the measures to be taken with regard to occupational safety

№	The measurement of employment	Availability of implementing standard (on average 1-5 points)
Big entities		
1	Salary	3.881
2	Standard of workplace	3.792
3	Transit sheet	3.714
4	Equipments	3.727
5	Tools for protection / helmet/ clothing	3.854
6	Substances of sanctifying	3.778
7	Services of intoxication	3.723
8	Other	3.672
Small entities		
1	Salary	3.697
2	Standard of workplace	3.548
3	Transit sheet	3.449
4	Equipment	3.558
5	Tools for protection / helmet/ clothing	3.543
6	Substances of sanctifying	3.627
7	Services of intoxication	3.470
8	Other	3.556

In the case of wages, sanitation, and equipment, employer preparation and standards are relatively good, the level of implementation of decontamination services is relatively low, depending on the nature of their activities. In addition, the respondent data indicates that large firms provide the TSB standard for small businesses. Most of the interviewees were criticized in the process of assessing working conditions in the workplace and the procedures for assessing working conditions were not clear and costly and the Committee considered that the bureaucracy was heavy as well.

Figure 2.10. The procedure to evaluate the labor condition

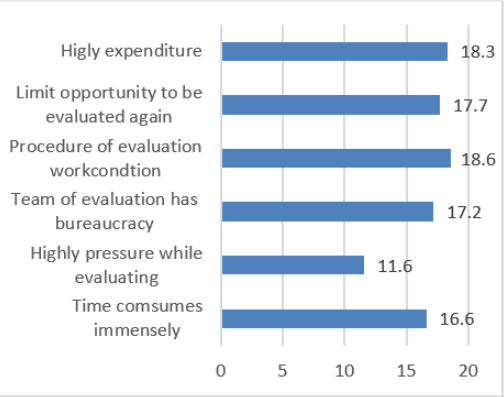
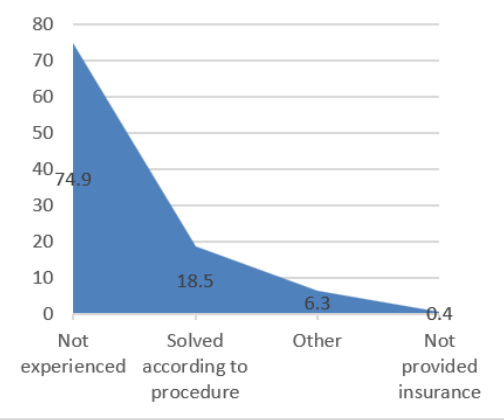


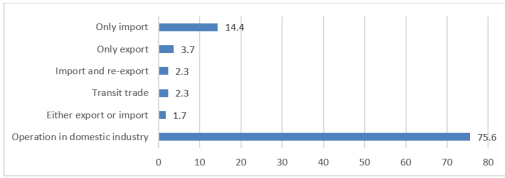
Figure 2.11. Experience solved in workplace factory accident



PART THREE THE ISSUES RELATED TO CUSTOMS AND TAXES

About two-thirds of the legal entities participating in the survey operate at the national level and one-third for export and import.

Figure 3.1. Operation in field



The defendants did not provide a definitive answer at the time of customs clearance and the process that could facilitate the second round of exports. Although the response was 30 minutes to 45 days, there was no specific item for the product.

This situation was also observed during interviews with customs and professional inspectors. Although there is a standard for customs clearance and documentation requirements, it is difficult to follow.

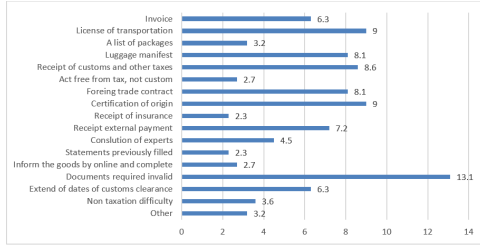
Box 1

... Our foreign trade is classified as a border trade rather than imported. Import and export are work done by both state and enterprise agreements but when our people cross the border, they buy something from a store or buying them to import. In this case, the purchasing contracts and other documents accompanying the goods can not be required. On the one hand, it is difficult for customs officers to make a difficult situation and on the other side – of the business.

Interview with customs employee

It is important to specify the type of imported goods, standard requirements, the number of goods that must be allowed for personal use, the quality requirements and the required documentation. There are laws to regulate these issues but there are no provisions; the internal rules associated with them are constantly changing and the regulatory environment does not exist.

Figure 3.2. Time to be needed for customs clearance, processing through customs, and the issues related to expenditures



This situation creates difficult conditions for citizens and entrepreneurs and creates a burden on job descriptions for customs officers and authoritative personalities.

Box 2

... Quick or slow customs clearance depends on the individual person. It's possible to get the documents you need in 30 minutes to 1 hour to cross the customs.

Interview with the SME provider

The documents that citizens claim unreasonably include the origin of documents, an agreement on foreign trade and conclusions on hygiene or sanitation. Problems related to customs inspection and documentation, as well as the unreasonably required questions and bases for taxation of customs value. While respondents import similar goods, they sometimes claim that they do not understand the rules of customs' pricing rules which sometimes impose the large taxes and also sometimes they do not understand the situation.

Figure 3.3. The harmonized constraints in the classification of the goods

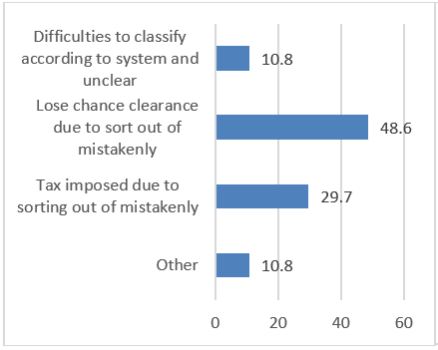
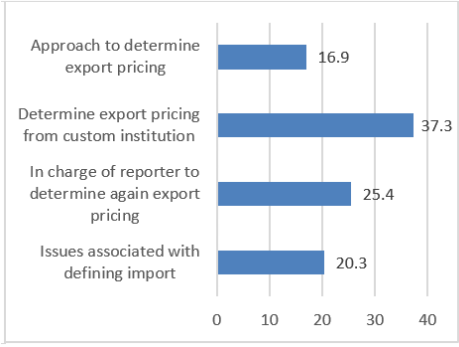


Figure 3.4. The difficulties associated with the system of determining customs value that is linked



In addition to the reference prices, the small and medium-sized enterprises often misunderstand the fact that tax breaks and shortcomings have been violated and that these systems are difficult to understand and difficult to identify.

Problems of customs pricing are complex in export and import markets and the biggest problem is the definition of the export price for customs authorities. The process of issuing bank guarantees during customs guarantees and guarantees is a serious problem and the processing of monetary security is less complicated.

Respondents were told that 64 percent of respondents consider different customs duties and impose different taxes on the same goods or impose different taxes on similar goods.

In addition, 5% of respondents were fined for violation of customs procedures and the goods were deprived of guarantees for unauthorized warehouses and were punished for violating Article 293 of the Customs Law.

The fine amounted to MNT5 thousand in the amount of MNT100 thousands and the amount of the fine was like 50:50 percent in both ways. The interviewed respondents were concluded that the customs duty rate was completely out of place as a result of these issues. The duration of the country's audit for the origin of the goods in 30 days which makes the work of some small and medium-sized enterprises more difficult.

On the other hand, a small and medium-sized factory that did not match the 30-day study of the origin of the customs clearance system and the procedure for changing the country of origin was not seen.

On the other hand, both customs clearance and payment for services are usually reduced in both cases and in an orderly manner.

Table 3.1. Problems related to the transportation of goods within the countries

д/д	Difficulties to have happened farther	Complicated	Uncomplicated
Devices of vehicle			
1	Certification of Vehicle	37.5%	62.5%
2	Documentation of Vehicle	46.5%	53.5%
3	Documentation of trading	52.9%	47.1%
Train			
4	Sheet of transit	34.4%	65.6%
5	Sheet of train	22.2%	77.8%
6	Documentation of transport	38.2%	61.8%
7	Documentation of trading	35.3%	64.7%

More than half of the respondents stated that the transportation and storage of goods is not a difficult task, and there is a high percentage of trade documents that are difficult to handle during freight transport.

Customs clearance for small and medium-sized enterprises prevents Customs, Licensee, transport documents and the Professional Inspection Agency to establish a non-tariff restriction. The complaints procedure for the decision of the customs officer is relatively clear but the estimated period of 30 to 90 days is often a problem for business operations.

Business involves relatively easy access to the information necessary for trade-in trade which is relatively easy to get quickly and goes into electronic systems. In particular, you can get information about the codes. In the case of post-clearance of the customs clearance works, the large enterprises face relatively small difficulties while small firms have difficulties with the transit of customs, customs zones from transportation, goods reception, and transit stages.

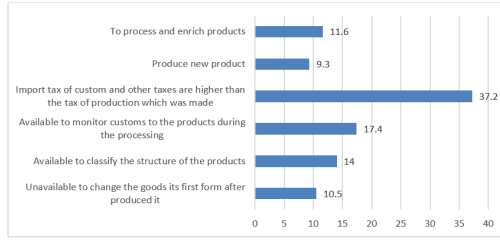
Figure 3.5. Problems with customs clearance procedures schedules or procedures

Procedures for customs clearance and classification of goods were relatively incomplete and there were few cases of complaints were seen.

The most difficult problem is that the customs cannot control imports of imported goods for domestic use and use it for domestic production. Participants were divided into one year during the processing period, depending on the type, quality, and storage of the imported goods. Customs may be able to distinguish between goods produced with goods and the conditions for customs control over goods subject to processing during processing or enrichment should be the same condition or duty as at least equal to or less than the tax on goods subject to customs duties.

While this situation requires customs clearance and product requirements, it is necessary to conduct further research, production, and processing of ready-to-sell products and a list of products to be used for production. In this case, the research team is likely to have a more professional association and a public research group than small and medium-sized enterprises but it should be also noted that the proposals of SMEs should be included.

Figure 3.6. Issues to import the goods produced for domestic manufacturing



It is also necessary to make a conclusion and a list based on the previous research rather than complication when the productions aiming to produce for domestic manufacturing are maintained in storage.

Figure 3.7. Difficulties of procedures to manufacture for domestic

CONCLUSION

The majority of respondents engaged retailers, manufacturing, and wholesalers. The survey team considered that the period of time when they run business and the priority of their business are sufficiently valuable to get information that is a necessity. The following conclusions have been made:

- It is leading that obtaining necessary information about the legal condition that SME runs a business, expressing what their ideas are, taking advocacy action is rather than counterreaction that is suitable for those circumstances.
- Even though legal conditions for registration, tax, and regulations of activity are improving, there is needed certain enactments and supports for the activity of SME.
- In this case, SME did not express clearly what their position was, and what their responses were following three such as high tax, strict monitoring, and traditional responses such as high taxation, strict monitoring and bureaucratic of customs were given
- The trade around the border and the trade of a peddler have been prevailing more than export and import in Mongolia. It is determined as following SMEs identify the origin of the good from which country, the contract of foreign trade, the conclusion of expeditionary required and personal thinking of Customs inspectors.
- Classification of raw materials processed and produced in Mongolia, the standard of ingredients, dates to save, a quantity of garbage is needed to be determined by the conclusion which is cooperated with SMEs, professional associations and monitoring organization.
- To provide the safety of labor, SMEs tend to utilize what opportunity they have. In order to improve work conditions, there is a high demand for investing to buy equipment and improve working conditions.
- They lack knowledge about the procedure of how they take a loan from the bank, so the information on how they take a loan is needed to deliver them.
- For coincidence about monitoring, even though it has high expenses, the monitoring, in any case, is overlapped that's why there is no information on how much money was spent during the monitoring. There is the only idea that it is suitable for informing before monitoring 7-10 days. There is needed to find the chance to combine these monitoring completely such as taxation, social insurance, healthcare, and professional investigation.

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CONCEPTS OF MEDICAL TERMINOLOGY IN THE GENERAL PART OF CRIMINAL CODE

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Abstract: It explores how the general part used in Criminal code is explained in law and other legislation norms, and explains how it relates to basic medical concepts and explains the medical description and content.

Key word: sexual orientation, sexual development, disability, total disability, psychotherapy, adolescence

Introduction:

Criminal Code science includes a broad understanding of Criminal Code history, development trends, crime, about punishments, and comparative study of Criminal Code, as well as criminal procedure law, criminology, criminal penalties law, citizen, labor, economic, etc., have been linked to the legal and other sciences[1]. In the current new editing Criminal Code of the 2002 Criminal Code, the norms of the general part have been compared to the current Criminal code, language, meaning, content with a few medical terminology that have never been used or used yet.

The study summarizes the following terms in the literature and analyzes how the law defines the definition of medicine, terms of medical interpretation and terms of reference.

Main section:

I. On the terms "sexual orientation, sexual development and disability"

The concept of the non-discrimination based on sexual and gender orientation and disability that was not reflected in the General part of Criminal Code of 2002 was enacted in 1.3.1 of Article 1 of the General part of Criminal Code

2002 Criminal Code	Updated 2015 Criminal Code
5.1. A culprit who's guilt has been established by court shall be subject to criminal liability irrespective of his/her ethnic origin, language, race, age, sex, social origin and status, property, official position, occupation, religion, opinion, belief and education.	1.3.2. ~~In the crimes, a person shall be punished without discrimination by his/her ethnic origin, language, race, age, sex, social origin, status, property, official position, occupation, religion, opinion, belief, sexual orientation, sexual development education and disabilities.~~

A. Explanation of the concept of "Sexual orientation":

From legal perspective: "An understanding of human sexual life and sexual orientation is sexual desire and desire. In other words, consider it attracted to what kind of gender by sexual desire"[2].

[1] Erdenebulgan.J, presentation compilation titled "Study and use of legal terminology", at the national level scientific conference, Ulaanbaatar., 2016, page 99.

[2] Order No 485 of Minister of Health, 2013, Appendix 1.

Sexual orientation includes "Heterosexuals - to the opposite sex, Homosexuals - to the same sex, gay and lesbians, Bisexuals - attracted to both the same and the opposite sex, loves and who is interested in sex with them. In addition to the main three, it is defined as several categories[3].

From medical perspective: The above definition is in the Mongolian National Medical Encyclopaedia: "...that person may have sexual habit of homosexual and opposite sex, or both sexes, to be attracted for one or both sexes by "congenital phenomenon" of physical, love and heart. Similarly, orientation of the sexes is divided into three parts[4].

The main approaches to sexuality are defined by the "sexual object" mental and sexual orientation (name of medical). "Sexual object is assigned anything to enjoy sexual pleasure by to engage in sexual relation, stimulate sexual appetite, sexual emotional and derive sexual gratification"[5]. In modern times, the this three sexual orientations are assessed as "normal development" of psychosocial or normal sexual orientation and do not account for any orientation as a single disease.

In medical science, considered to it is not disorder of sexual orientation of sexual minorities, so it should not a requirement that the law be discriminatory on the basis of sexual orientation, or to include a medical explanation that "sexual orientation is not considered as a disorder".

Б. Explanation of the concept of "Gender orientation":

From legal perspective: "Gender orientation – is a natural feeling for a person to have sex with his / her own gender. It is a masculine born being imagined as a feminine and feminine born being imagined as a masculine or determined to be neither masculine nor feminine"[6].

From medical perspective: In order to understand gender orientation, it is important to know the genetic features of sexual development or gender. The Mongolian National Medical Encyclopaedia, "Sexual development is an integral part of the development of the ontogenesis, and the complete development of the original genital and secondary signs of the development of the fetus. Sexual development is a process of gender disparities. Three types of sexual differentiation have during human development. Genetic sex- this type of develops during fertilization in male and female gametal cell. If the heterogeneous formation (XY chromosomes) is formed, it is considered male sex and homogeneous formation (XX chromosomes) is formed considered female sex. Morphological sex– The morphological sex differentiation has on the based to genetic sex. It is a process of inner and outer genitalia. In the first part of the embryo the source of the sexual system is the same. In the first part of the embryo the source of the sexual system is the same.

However, from 6 to 8 weeks of embryo, the Y-chromosome will produce seed tubes, male glands and start to produce androgen hormones. The female glands source is available influenced by the X chromosome; eggs are formed late and emitted female hormones. The inside organ arise to embryo within 8-10 weeks. Then outside organ arise to embryo within 20 weeks and as a result of this process, the morphological sex is formed. Hormonal sex – in the further development of the genetic sex, male and female hormones are released from male and female glands. At the same time, the difference in morphological disparities reveals a biochemical basis"[7]. In other words, the sex of the hormone is determined by gender and male and female. In other words, the sex of the hormone is determined by gender and male and female. Gender orientation refers to psychiatry and morphology.

[3] Order No 485 of Minister of Health, 2013, Appendix 1.

[4] Lkhagvasuren.Ts, et al, Mongolian National Medical Encyclopaedia. Volume II. Ulaanbaatar., 2012, page 330.

[5] Byambasuren.S, Psychopathology, Ulaanbaatar., 2007, page 647.

[6] Order No 485 of Minister of Health, 2013, Appendix 1.

[7] Lkhagvasuren.Ts, et al, Mongolian National Medical Encyclopaedia. Volume II. Ulaanbaatar., 2012, page 330.

Within the Psychology: "transcendental or transgender person is a disorder of mental and sexual disorders of a person who refers to the opposite sex, appearance to the opposite sex, believes the opposite sex and feels. It is formed by gender psychological synthesis and biological sex disagreements"[8]. Specifically, gender "psychological unity" is the feeling of a man or a woman feeling psychologically sensitive to one's own sex. The sex of at birth is called "biological sex". "Psychologically normal people's biological sex and psychological unity are mutually compatible"[9]. Additionally, gender orientation and gender roles will be examined and gender orientation will be determined. Personally, I realized I was a woman and I'm a man and consistent beliefs are called "gender feel"[10]. If gender feel matches biological sex, "psychic sexual development is normal."

"Gender responsibilities" is means male and female gender responsibilities in society, the position of society, the conduct of the body and followed by other social norms[11]. A gender responsibility is manifestation of appearance and karma. It's usually exposed to transshipment or transvestite people. "The psychic sexual orientation of a person is natural, normal, and healthy. It's impossible to choose you're the psychic sexual orientation / attitude/ or change yourself"[12].

Within the morphology: Gender orientation is not defined by outside genitals and there are many innate disorders. This is usually done by a judicial examination of a sex-testing court in practice. In embryonic stages, various genital disorders (vaginal discharge, low lip gloss, exudate and persistent adhesion, etc.) arise as a result of sex disagreement over the development of genitalia. "In the embryonic stages, there is formation of various genital defects (the vagina is closed, etc.) The problem of sex disputes arises because of the development of the genital defect. Hermaphrodite - is a person (or plant or animal) that has both male and female sexual organs"[13]. Inside are classified as real and fake hermaphrodites. The hermaphrodite has a sex gene that defines one gender, but the development of the outer genitalia is developing with the opposite sex. Based on this, women and men are divided into fake hermaphrodites.

Provide explanatory notes on medical and sex orientation medicine.

B. Explanation of the concept of "Disability":

From legal perspective: According to the original legal dictionary, "Persons with disabilities are persons who have lost their mental, intellectual and sensory capacity due to congenital or hereditary disorders or accidents, and have limited access to work and to live independently of their bodily injury"[14].

Mongolia ratified the 2006 Convention on the Rights of Persons with Disabilities in 2008, which states that "disability is a perceived evolution, recognizing that there is a bodily defect that may impede the full participation of the society as in the ordinary course of life, social attitudes and rise in environmental constraints"[15]. "Persons with disabilities - the person with a permanent impairment of bodily, mental, emotional and sensory impairments, and whose disability has become more and more effective in the full and effective participation of society as a result of merging with other kinds of disadvantages"[16].

Within the framework of the internationally accepted obligation, the Parliament passed the Law on the Rights of Persons with Disabilities in 2016.

[8] Byambasuren.S, Psychopathology, Ulaanbaatar., 2007, page 666.

[9] ibid. page 665.

[10] Byambasuren.S, Psychopathology, Ulaanbaatar., 2007, page 666.

[11] ibid. page 665.

[12] ibid. page 665.

[13] Ganbat.E, Tserenbat.M, Forensic Medicine. Ulaanbaatar., 2015, page 102.

[14] Narangerel.S, Original legal dictionary. Third edition. Ulaanbaatar., 2011, page 536.

[15] Convention on the Rights of Persons with Disabilities, Ulaanbaatar., 2008.

[16] Ibid.

Article 4.1.1 states that persons with disabilities[17] are defined as the same as before, the Attachment A / 512 of the Minister of Health states that "...bodily, mental, psychological and sensory defects are accompanied by environmental other constraints as in the social life of others, and the person with limited opportunities to participate effectively". According to the WHO definition, "... a person who is a social and personal life requirements cannot be met by physical and mental potential is lacking in natural and acquired causes"[18].

"Disability is defined by two types: congenital and acquired. The genetic disorders inherited by the person are classified as "congenital" and disability has been identified as "acquired" during the course of life. The type of disability is related to how the physical, mental, emotional and sensory impairment is manifest in the individual and is considered by 6 categories: visual, speech, hearing, movement, mental, other (other than or combined)"[19].

From medical perspective: "Disability is any limitation that would prevent the completion of the process of conducting human activity or the conventional process of action or being unable to perform (due to imperfections)"[20]. In other words, the term "disability" is used. "Disabled - the body's long-term or complete loss of activity due to illness or injury. Disability means loss or disability due to injuries or chronic illness or physical activity or permanent or permanent disability. Disability means injuries, chronic illnesses, or bodily injury and it is a temporary or permanent loss of profession to complete or temporary occupation. Congenital malformations, inadequate organs development and defective organs. Depending on the level of loss of work in Mongolia, the disability ranks. In addition to paying pensions, the administration and the workplace shall be responsible for the production and service of disabled persons, reducing their working hours and wasting their time and working conditions and responsible for caring"[21].

Incorporate the concept of disability into one line and include an explanation of disability.

II. On the term "Total disability":

The 2002 Criminal Code was able to include total and partial disability as well as other reasons why not to work. According to Article 5.4.5 of the Criminal Code of Mongolia, only a person who has lost his or her ability to work is considered as limiting the scope of this provision.

2002 Criminal Code	Updated 2015 Criminal Code
50.4. Forced labor may not be imposed on the persons unable to work, pregnant women, women with children under the age of 3, women over 55 years of age, as well as men over 60 years of age and persons in the active military service.	5.4.5. ~~The penalty for the benefit of a public benefit shall not be imposed on persons who have lost their working ability, pregnant women, women over 55 years of age, as well as men over 60 years of age and persons.~~

Explanation of the concept of "Total disability":

From legal perspective: In the Original legal dictionary, "The ability to work in labor skills. Depending on the nature of the work being performed, the ability of a worker to be general (ie, any ability to perform under normal circumstances), professional (ie, the ability to perform a specific occupation), and special (ie, in specific industrial or meteorological conditions, such as underground or underwater and high mountain or desert region). Dimensions are defined as full or incomplete (limited, partial) ability to work"[22] .

State "Loss of ability means the condition of becoming unable to perform

[17] The Law of Mongolia on Human Rights of Persons with Disabilities, 2016, clause 4.1.1. Persons with Disabilities - who have physical, intellectual, mental and sensory impairments, which in interaction with various barriers; hinder them from fully and effectively participating in social lives .

[18] The Mongolian initial report about implementation of United Nations Convention on the Rights of Persons with Disabilities, Ulaanbaatar., 2011, page 27.

[19] Disability issues: Policy and activity. Information reference-book. Ulaanbaatar., 2017, page 6.

[20] Lkhagvasuren.Ts, et al, Mongolian National Medical Encyclopaedia. Volume III. Ulaanbaatar., 2012, page 1569

[21] Jambaldorj.Ya, Medical cognitive dictionary, Ulaanbaatar., 2009, page 413.

[22] Narangerel.S, Original legal dictionary. Third edition. Ulaanbaatar., 2011, page 540.

physical activities" in the standards of Occupational safety. Health. Terminology, definitions approved by National Center for Standardization and Metrology regulations No. 11. The clause 2.22 of the said standards sets out "Loss of work ability – loss of work ability means to become unable to perform one's main occupational work as the illness or the disorder of chronic nature and slow progression damages and weakens organs and tissues and their normal activity, and the condition is chronic and does not improve when treated, while it is stated in the clause 2.22.1, "total disability" is to lose 70% and more"[23]. The clause 1.4 of the rule book for the Medical and Labor Exam Commission considers "the cause for losing one's work ability can be divided into normal illness, household and industrial accidents and illness due to occupation, while the clause 1.5.1 indicates complete loss is loss of 70% or more"[24].

From medical perspective: Medical glossary states "Ability means using knowledge for daily activities. Ability can be classified into approaching a matter, communicating, defining problems, making decisions, reasoning, team work or collaborating, and physical activities. Ability indicates the skills and productivity level when performing something"[25].

"Loss of ability means not being able to do activities with purpose. There are many types of loss of ability such as physical, cognitive, intellectual, emotional and disability or all above. Social and individual factors greatly affect loss of ability"[26]. In the practice of forensic medicine, it is defined as "Ability to work – the combination of physical and intellectual abilities to perform work of certain level and quality. General ability to work is the non-occupational ability to serve oneself, so loss of general ability to work means losing the general non-occupational ability to serve oneself. Whereas, occupational ability to work means knowledge, skills, and experience, so one becomes unable to perform occupational work if he/she loses occupational ability to work.

Loss of work ability can be classified into, due to disease or injury, temporary or permanent, and completely or partially becoming unable to perform work of certain level and quality."[27]

In medical terms, complete loss of work ability is not based on threshold percentages; therefore, it is necessary to sort this legal terminology and adopt the medical definition.

III. On the term "Psychotherapy"

Section 7.4.9, Article 7 of the newly revised Criminal law states that "The Court can impose involuntary treatments for addiction and mental health issues upon considering the circumstances in which the criminal act has occurred".

Explanation of the concept of "Psychotherapy":

From legal perspective: The appendix of the order No A/512 of the Minister of Health states that "Psychotherapy means treating people who have mental disorders /anxiety, depression, post-traumatic stress disorders, etc./ and behaviour disorders /aggression, temper tantrums, disruptive behaviour disorders, etc./ through conversations and other methods. The paragraph 1.2 of the rule book for victims' psychotherapy states "victims who experience acute psychological reactions, mental disorders / fear disorders, anxiety, sleep disorders, body dysmorphic disorders, emotional disorders, post-traumatic stress disorders, "adaptation disorders", transient disorders, insanity/ shall receive mental health

[23] Mongolian standards: MNS 4967:2000, Occupational safety. Health. Terminology, definitions.

[24] Appendix to Government's resolution No. 11 of 2015.

[25] Lkhagvasuren.Ts, et al, Mongolian National Medical Encyclopaedia. Volume III. Ulaanbaatar., 2012, page 1730.

[26] Ibid. page 1731.

[27] Ganbold.Ts, et al, Glossary of forensic medicine terminology, Ulaanbaatar., 2015. page 218.

assistance"[28]. The paragraph 1.5[29] of the said rule book discusses how general principles of law should be applied with regards to mental health assistance and services, however, no other explanations or definitions are provided.

From medical perspective: Mongolian National Medical Encyclopaedia defines "Psychotherapy means treatment of physical disorders of psychological origins, with the use of psychological methods. Many psychological methods are used for psychotherapy. The psychotherapist shall choose the appropriate psychological method depending on the reason behind the ailment, the clinical condition, and the individual's psychological characteristics."[30] while Mongolian honourable medical doctor professor S. Byambasuren defines in his article "A study on mental disorders" that "... psychotherapy is the treatment of physical and psychological disorders of psychological origins"[31]. In addition, the main purpose of psychotherapy is "to treat and stop illness that is interrupting an individual's normal activities and growth process, or to counteract this illness process"[32] and it can be classified into the following depending on the purpose and the specialty of psychotherapy. These are: "Persuasion, Enlightening, Cognitive, Perceptual, Cognitive – perceptual, Meditative, Psychoanalysis, Existential, Movement, Jacobson's progressive muscle relaxation technique, Self-priming techniques, Hypnotherapy, Game, and Other specialties of psychotherapy"[33]. Also, psychotherapy can be grouped into "...two types, single or individual and multiple or group psychotherapy depending on how many subjects are participating"[34].

Therefore, in addition to the use of psychotherapy as an involuntary medical measure for people who are legally incompetent, it is necessary to seek for opportunities to combine this with other types of punishment.

IV. On the term "Adolescence"

Criminal code specifies if a minor who is 14 to 18 commits a crime, he/she shall be imposed involuntary educational measures without receiving any sentences, which implies an adolescent is a person who has reached 14 but is not 18 yet. The concept of adolescence is studied in a broader scope in humanics, in which stages of age development is compared against mental development. Section 8.1 of the Article 8 of the currently revised Criminal code is considered to be the grounds for imposing criminal liability to adolescents. Section 8.1.1 of the Article 8 of the said code states "A person who is 14 years old and has not reached 18 at the time of committing a crime, shall be imposed criminal liability according to the grounds and rules specified in this article".

Explanation of the concept "Adolescence":

From legal perspective: Original legal dictionary defines "adolescence – the transition period between childhood and adulthood or ages between 12 and 18"[35]. Criminal code of 2002 states the age limit to impose criminal liability to a person is 16, while stating that a person aged 14-16 shall also be imposed criminal liability for certain serious crimes. Article 69 of the general section of the said code specifies imposing involuntary educational measures to minors. The Criminal code and process law, that were

[28] Order No A/394 of Minister of Health, 2017, Appendix 2, clause 1.2.

[29] Order No A/394 of Minister of Health, 2017, Appendix 2, clause 1.5. When providing psychotherapy assistance and services – respect the client's good name and rights by not discriminating due to age, sex, ethnicity, social origin, education, religion, marital status, and wealth;-protect the client's life and health, and ensure safety;-ensure client confidentiality and maintain confidentiality;-build effective relationships with the client;-listen to the client patiently;-understand each client as an individual;-provide appropriate advices to the client;- get feedback from the client while applying the following general principles.

[30] Lkhagvasuren.Ts, et al, Mongolian National Medical Encyclopedia. Volume III. Ulaanbaatar., 2012, page 1167

[31] Byambasuren.S, Psychopathology, Ulaanbaatar., 2007, page 292.

[32] Byambasuren.S, Psychopathology, Ulaanbaatar., 2007, page 292.

[33] Byambasuren.S, Psychopathology, Ulaanbaatar., 2007, page 292.

[34] ibid.

[35] Narangerel.S, Original legal dictionary. Third edition. Ulaanbaatar., 2011, page 365.

in use previously, used the term minor and it has been changed to the term adolescent in the revised version.

However, in other laws, the term minor is still being used. For example, the Convention of the Rights of the Child states "...if not considered adult before reaching 18, every person under the age of 18 is a child"[36], the Law on the Rights of the Child states "this law shall serve to ensure the rights of the child from the time he/she is born until the time he/she reaches 18"[37], and the Child Protection Law states "the assistance and service specified in this law shall be provided to the Mongolian citizen from the moment he/she is born until he/she reaches 18, or the person aged between 18 and 21 if specified in the Mongolian international contracts"[38]. Section 16.1 of the Article 16 of the Civil law titled Incomplete legal capacity of an individual, specifies "A minor or a person aged 14-18 has an incomplete legal capacity" which is consistent with the understanding that the upper limit of adolescence is a person who has not reached 18, however, it does not define the lower age limit. General section 6.2.3 of the current Criminal code states that "it is possible to use the involuntary educational measures specified in this law, without imposing sentences, for a person who has reached the age of 14 and has not reached the age of 18 at the time of committing a crime" which indicates that age 14 is the lower age limit of the term adolescence.

From medical perspective: The above concept of adolescence is studied, from the perspective of age group, in the Mongolian National Medical Encyclopaedia "Adolescence – the second decade of a child's life is called adolescence. This is further grouped as: early adolescence 10-14 years; middle adolescence 14-17 years; and late adolescence 18-19 years. Adolescence is a special transition period from childhood to adulthood and adolescents have specific needs due to specific changes in their bodies, mentality, intellect, and social interactions, sexual maturation which differs depending on the sex, and the presence of secondary sexual characteristics.

...The most difficult stage of mental development during which desire, consciousness, and ethics develop, and susceptible to any influences /positive, negative/, tries to imitate adults' behaviours, and interested in experimenting. During this period, boys and girls evaluate and analyse everything in life as their intelligence develops and as they receive general education. ... Adolescents are prone to bad habits /alcohol, cigarettes, drugs/, and can attempt suicide"[39]. Age grouping system by World Health Organization defines adolescence as 11-20 years. "From the perspective of forensic medicine, adolescence is grouped as 14-20 years"[40] and the age level is consistent with the law which defines a person aged 14-18 as minor.

If lawmakers defined the term adolescent by not considering the subject's age characteristics, it is not appropriate. In psychology, many factors such as age group, sexual maturation, and mental development are compared and evaluated when studying adolescence. In other words, it is considered as transitional period or the period from childhood to adulthood. In each adolescent development stage, physical, social and mental indicators differ.

Therefore, it is necessary to consider the age group, sexual maturation, and mental development stage when using the concept of adolescence.

Brief proposals

- "Criminal code must define crimes clearly and with clarity, therefore, need to choose terminology that is definite and not ambiguous nor vague:

[36] Convention of the Rights of the Child. 1990., article 1.

[37] Law on the Rights of the Child. 2016., clause 3.1.

[38] Child Protection Law. 2016., clause 3.3.

[39] Lkhagvasuren.Ts, et al, Mongolian National Medical Encyclopaedia. Volume II. Ulaanbaatar., 2012, page 994.

[40] Forensic medicine, for the 55th anniversary of the establishment of forensic medicine office in Mongolia. Ulaanbaatar., 2015, page 213.

- Choosing terminology properly is the foundation for understanding and implementing laws properly:

- Need to rely on scientific descriptions when using scientific concepts and terms in law:

- It is necessary to refine terminology in the criminal code, however, complete denial of traditional terminology can lead to regression rather than progression"[41].

- It is possible to prevent mistakes, ambiguity, and complications in practice if these are reflected when defining terminology.

[41] Erdenebulgan.J, presentation compilation titled "Study and use of legal terminology", at the national level scientific conference, Ulaanbaatar., 2016, page 99

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AMARJARGAL Peljid Associate Professor, Doctor who is an Academic secretary of the National Legal Institute worked as a visiting researcher at the German Research Institute for Public Administration between 6th to 28th Aug 2019. He worked on his research paper writing in the fields of administrative law and public administration.

He also discussed possibilities of further cooperation between these institutions with the Head of the German Research Institute for Public Administration.

TAX LAW REFORM POLICY IN MONGOLIA

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Abstract

Taxation is a key factor determining the development of a country. Correct regulation of taxes makes the state stronger. Thus, the countries pay great attention to tax policy. One of the most problem solving of the country is to improve the tax law regulatory mechanisms.

Mongolia has been regulating tax law reform policy since ancient times. For example, the first constitution of Mongol people's republic in 1924[1], the constitution of Mongol people's republic in 1940[2], 1960, the constitution of Mongolia in 1992. These constitutions regulated tax problems.

The tax law reform has been intensifying since 1990 in Mongolia because this problem is important for improving the country's legal regulation. The main purpose of the tax law reform is to accelerate the development of the country, to increase economic growth and gross domestic product, to reduce unemployment, and create jobs.

This research job aimed to analyze the legal environment of Mongolia's tax law, reform problems, and how tax laws are developing. Also, the principle of determining the development of the tax legislation is to use the legal comparison method, mechanisms of enforcement, country experiences, state concepts based on scientists' viewpoint.

Tax law reform is still a controversial problem at national and international levels. Nevertheless, countries are still trying to implement this tax reform policy in the right direction and way.

Keywords

Tax law reform policy, taxation schemes, tax rate, international tax law, world-wide income tax system, territorial income tax system, profits generated in a foreign country.

Introduction

In most countries, taxes have evolved over time. The role of tax regulation in developing countries has been important.

Mongolia adopted the new fourth constitution in 1992. This constitution performed an important role in determining Mongolia's economic reforms policy. For example, Mongolia shall have the economy based on different forms of ownership and complying with universal trends of the world economic development and the peculiar specifics of its country. The citizens of Mongolia shall uphold justice and humanity, and shall discharge in good faith to pay official taxation levied by law basic duty[3]. The Mongolian government aims within the framework of economic reforms to create a tax legal environment, to stabilize the economy, to improve the tax collection and supervision, to support a favorable business environment.

The tax law independent system was

[1] Apart that all expenditures of the State shall be expended from the state funds, but also the local administrative organs shall collect taxation from people under their jurisdiction and expend them to the relevant local needs, in accordance with the regulation promulgated by the central government.

[2] The matters of competence to be exercised on behalf of the Mongol people's republic by the organs of the state supreme power and highest organs of administration, shall be as follow to define the taxation and revenues.

[3] The Constitution of Mongolia, 1992. (http://www.legalinfo.mn/law/details/367?lawid=367)

not in Mongolia until 1990. However, the parliament of Mongolia approved new complex tax laws, and new tax types were created. A taxpayer only 'owns a tax' and it shall pay 'by the amount determined by law' in accordance with the grounds and rules provided by law. The State Ih Hural of Mongolia (Parliament and Great Hural) approved General law of taxation in 1992. For the first time, the purpose of this law is to define the national taxation system of Mongolia. This tax law was developed to expansion the tax base, tax collection activities, promotion of industries, business enabling environment, encouraging foreign investment, reducing tax credit and exemptions, and increasing the real income of the population.

Mongolia is still up to date resolved the following problems in the purpose of tax legal reforms; to create new jobs, increasing competitiveness by way reducing the tax burden on businesses, to resolve reducing labor force costs by way reducing the tax burden in the labor force, and to eliminate the difference in tax exemptions and tax credit, supporting domestic foreign investors, to make the tax administration's activities transparent and speedy, to expand services to taxpayers. Mongolia has been successfully implementing tax reform policies. Furthermore, it is important to regulate problems with the elaboration of detailed legal concepts within tax law policy reforms, adopting tax laws, and improving the tax law regulation between national and foreign countries.

I. The current status of the national tax law system

The basic purpose of the state's activities is to focus on the creation and redistribution of centralized state revenue. In other words, tax is to provide the independence of the State, its constituent component of the basic economic law. In the time of any legal system, it is included in the tax to pay limitation capacity, proper use of tax, can be set in real time, and consists conditions to be implemented for of state's stable policy.

Taxes are considered to have begun from the ancient civilization humanity, and the concept of taxation was originally from Greece, Rome, and Egypt, ancient Mesopotamia has been created for more than 4500 years people have to pay tax from livestock. The main source of this time is Hammurabi's code of laws, the laws of Many, the laws of the Twelve Tables. The word tax is derived from the Latin word "taxare" which means to evaluate and calculate it.

The first tax law of the United States was adopted in 1861 under the name of the Revenue Act. In most European countries since 1917, there has been an active tax law reform, particularly in Canada, the Business Profits War Tax Act and the Income War Tax Act.

Mongolia first time was adopted Taxation Act in 1229, the Salt tax law in 1230, the Supplemental Tax Act in 1233, the Trade Custom law in 1234.

Today, Mongolia has adopted the rule of law new laws and regulations. For example, Economic entity and organization income tax law of Mongolia in 1992, General law on taxation in 2008, Personal income tax law in 2006, Corporate income tax in 2006, Value-added tax law in 2006, etc. The purpose of the 1992 Act is to regulate the relations arising from the imposition of tax on economic entity and organization income and transference of it to the budget.

The tax law applies the two principles 'who will benefit' and 'who can pay'. There are several models of tax theory. For example, ability theory and the benefit theory. Also, Lindahl model, Bowen model, Arthur Cecil Pigou model, etc.

Most countries have to follow the theoretical principles of modern tax law. These are theoretical principles to mention; the principle of tax free theory (A.Smith)[4], the principle of state policy theory (J.Keynes), the principle of tax growth theory (P.Samuelson), the principle of reducing tax rates (A.Laffer)[5], the principle of double taxation theory (R.August), the principle of investment tax theory (T.Brewer) etc.

[4] (Грачева и Соколова 2000, 117)

[5] (С.Г.Пепеляев 2003, 73)

Taxation schemes are usually created for three basic purposes: first to raise revenue for a government, second to encourage, regulate, or restrict local or foreign investment, third to protect consumers or local producers[6]. The main functions of taxation are fiscal, regulatory and incentive, social, information and control[7].

The general form of the tax schemes is classified as a classical system, tax reduction system, complete exemption tax profit system. Mongolia is a tax reduction system. This system will be taxed at taxed on minimum income tax rate or discounted on certain tax rates.

The method to improve the tax schemes is to reduce tax type and tax rates, invalidate the applicable tax, tax credit and exempt, to support tax incentives on specific sectors.

These methods are reflected in the Mongolian legislation. For example, income generated from production and planting of the cereal, potatoes and vegetables, milk, fruits and berries, fodder plant products shall only be subject to fifty percent tax credit. And taxpayers shall be provided tax discounts or exemptions in the reducing taxes imposed; reducing tax rates; exempting from taxes on income, property, goods, works, and services below established minimum; exempting taxpayers from taxes; exempting from taxes certain parts of taxable items; forms in accordance with legislation.

Tax law covers the rules, policies, and laws that oversee the tax process, which involves charges on estates, transactions, property, income, licenses and more by the government[8]. This is international terminology.

Taxes of Mongolia shall comprise of taxes, fees, and payments. For example, taxable items shall include income, property, goods, work, services, certain rights, land, its sub-soil, natural wealth, mineral resources; and air, soil and water pollution. The Mongolian tax definition is a meaning similar to the international term of taxation.

However, Mongolian government needs to adopt more comprehensive legislation that regulates tax rules because the only parliament of Mongolia shall have the sole right to introduce, amend, discount, exempt and annul taxes by law.

The principles of tax law are sufficient budget revenue, broad tax base, tax pay more favorable, keeping taxpayers comfortable, the special purpose of tax collection, tax effect, the fair of the tax system, neutral in tax implementation, predict tax estimates, tax limited exemption, taxes are simple. This compliance of these tax laws principles is essential to the implementation of tax law reforms. The principle of taxation law in Mongolia shall respect the law, rights and legal interests of taxpayers, avoid being influenced by others.

Taxes are important for determining the right tax rate. The tax rate classified progressive tax[9], proportional tax[10], regressive tax[11]. Mongolia has been implementing these types of tax rates. For example, considered the tax rate and type.

Year	Personal income tax (percent, %)	Corporate income tax (percent, %)	Value-added tax (percent, %)
1992-1994 years	6 stages	4 stages	2 stages
	2%, 5%, 15%, 27%, 40%, 45%	15%, 25%, 35%, 45%	0%, 10%
1994-1998 years	5 stages	4 stages	2 stages
	2%, 5%, 15%, 27%, 40%	15%, 25%, 35%, 40%	0%, 13%
1998-2004 years	3 stages	2 stages	2 stages
	10%, 20%, 40%	15%, 40%	0%, 15%
2004-2006 years	3 stages	2 stages	2 stages
	10%, 20%, 30%	15%, 30%	0%, 15%

[6] (Ray August 1997, 643)

[7] (Парыгина и Тедеев, 2002, 55)

[8] (HG.org legal resources)

[9] Progressive tax is income tax that takes a larger percentage of a larger income and a smaller percentage of a smaller income. (Definition of progressive tax. http://www.businessdictionary.com/definition/progressive-tax.html)

[10] A proportional tax is an income tax system where the same percentage of tax is levied from all taxpayers, regardless of their income. (Investopedia academy. http://www.investopedia.com/terms/p/proportionaltax.asp)

[11] Regressive tax is taxation that taxes a larger percentage of a lower-income and a smaller percentage of a higher income. (Definition of regressive tax. http://www.businessdictionary.com/definition/regressive-tax.html)

2006-2018 years	1 stage	2 stages	2 stages
	10%	10%, 25%	0%, 10%
2018 year	4 stages	2 stages	2 stages
	10%, 15%, 20%, 25%	10%, 25%	0%, 10%

Explanation. The personal income tax rate has been increased to four stages in 2018,

but the government may decide to take a one-stage back-to-back decision.

The tax income of a business entity or organization in Mongolia is zero to three billion togrogs, it shall be taxed at the rate of ten percent. If annual taxable income exceeds three billion togrogs, it shall be three hundred billion togrogs twenty five percent of income exceeding three billion togrogs. Mongolia's current tax law system is based on international experience. However, there is a need to refine Mongolia's tax legislation based on national characteristics.

II. Some understanding of international tax law reform

One of the important problems of Mongolia's tax law reform is the legalization of international taxation. National tax systems are based on the nationality of the taxpayer, the residence of the taxpayer, the source of the taxpayer is income, or on some combination of these variables.

Now international trade of each country is broadening, intensifying investment and is drawing more attention to thedevelopment of external marketing. Tax law regulation is used in the concerned country under the specific relation. An original source of international tax regulation includes international laws of tax regulation, in other words, contracts made between two and more countries. Taxpayers who earn income in two or more countries face the problem of dual taxation. That is, income earned in one country may be taxed a second time in another country.

International tax systems are classified into world-wide income and territorial income system two types. World- wide income tax system is A citizen is an individual who is a member of state or nation, who owes allegiance to it and is entitled to full civil rights. Domestic companies are sometimes treated as citizens or nationals of their home country. Territorial income tax system[12] is countries applying the source principle tax all income from sources within their territorial jurisdiction and generally exempt from taxation income accruing abroad. Mongolia is a world-wide income tax system.

Unless the international treaties of Mongolia stipulate otherwise than tax legislation of Mongolia, the provisions of international treaties shall prevail[13]. This concept of Mongolian tax law means that international norms apply as domestic law. For example, tax credits for a corporate entity taxed in a foreign country shall be determined by bilateral agreements on double taxation and prevention of tax avoidance[14].

the Organization for Economic Cooperation and Development (OECD) Model Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital is a model tax treaty promulgated by OECD. Now Mongolia has contracts with 36 countries concerning not allocating double income tax, preventing avoiding paying tax, and 25 contracts concerning exchanging confirmation international countries are complying with effectively. But Mongolia does not have controlled foreign corporation (CFC) rules. These rules used in United States Subpart F[15] and in Germany Aust name.

Most countries tax on the basis of both the residence status of the taxpayer and the source of income. International double taxation can arise from a variety of causes. The three types of double taxation arising from conflicts over tax jurisdiction. For example, source-source

[12] (Jane G. Gravelle 2012, 13-16)

[13] General law on taxation. (http://www.legalinfo.mn/law/details/473?lawid=473)

[14] Corporate income tax of Mongolia. (http://www.legalinfo.mn/law/details/33?lawid=33)

[15] 26 U.S.Co §957-Controlled foreign corporations: United States persons. Amended Pub.L. 108-357, 2004

conflicts[16], residence-residence conflicts[17], residence-source conflicts[18]. Of these three types of international double taxation, residence-source conflicts are the most likely to occur absent measures to relieve double taxation. Residence-source conflicts are very difficult for a taxpayer to avoid through tax planning.

The international tax law of a country has the taxation of resident individuals and corporations on income arising in foreign countries, and the taxation of nonresidents on income arising domestically that two dimensions.

The arguments of international tax law are the concepts of tax evasion, tax avoidance, tax fraud[19], resident or non-resident, transfer pricing, transferred income, profits generated in a foreign country, dependent party. The following terms of law have been enacted in Mongolian tax legislation. For example, 'Transferred income' refers to cashless transfer of payment for work or services rendered by individuals and legal entities on a contract basis to the individual or entity itself or to others at their request, 'Profits generated in a foreign country' mean profits of a taxpayer generated in a foreign country from its business, property, and sale of property, 'Dependent party' to taxpayer means owns twenty percent or up of the common stock, has the right for twenty percent or up on the dividends or income distributions, and has the right to appoint twenty percent or more of the management of the corporate entity or to determine its business policies.

The source of international tax law consists of international treaties[20], international courts and arbitral decisions, national court decisions, customs norms and domestic legislation[21].

International tax law uses three methods: tax credits, tax exemptions, and tax deductions. But in Mongolia uses reducing taxes imposed and tax rates, exempting from taxes on income, property, goods, works and services below the established minimum, exempting taxpayers from taxes, exempting from taxes certain parts of taxable items, and other credits provided by legislation. For example, the taxable income of a taxable year shall not exceed 1.5 billion togrogs and the tax imposed on income earned from the activities under this law shall be reduced by 90 percent: petroleum and livestock production and related support activities, production of food products, manufacture of garments and construction materials.

Conclusion

1. Today, most countries are trying to improve their tax regulations. Mongolia still does tax law reform. It is impossible to imagine the economic environment of any country without tax regulation.

2. The rules of tax law in ancient Mongolia have been developed in certain stages. As time passes, tax legislation is increasingly improving.

3. Mongolia has successfully implemented the legal reform rule of law. Since 1990, Mongolia has been regulating tax legislation on a certain tax relations basis. However, there is a need to improve the legal environment for taxation.

4. There is still a need to maintain a stable political environment, to increase the profit tax and to obtain potential economic opportunities in Mongolia.

5. The tax disputes are in national and international relations still present. These tax disputes are regulated by international agreements and domestic legislation. Furthermore, international tax law disputes tend to increase.

6. Mongolia participates in international law relations, compliance with the regulatory norms and the legislation of the required tax law.

[16] Two or more countries assert the right to tax the same income of a taxpayer because they all claim the income is sourced in their country.

[17] Two or more countries assert the right to tax the same income of a taxpayer because they claim the taxpayer is resident in their country. A taxpayer that is a resident of two countries is commonly referred to as a 'dual-resident taxpayer'.

[18] One country asserts the right to tax foreign-source income of a taxpayer because the taxpayer is a resident of that country, and another country asserts the right to tax the same income because the source of the income is in that country.

[19] (Victor Thuronyi 2003, 223)

[20] (Сутырин и Погорлецкий 1998, 74)

[21] (Крохина 2003, 584)

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HAS THE MINORITY RIGHTS FRAMEWORK SUFFERED BECAUSE OF THE ADVANCEMENT OF INDIGENOUS PEOPLES' RIGHTS WITHIN THE UNITED NATIONS SYSTEM?

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I. Introduction

It can be inferred that the human rights framework of indigenous peoples in international law has been stimulated significantly with the adoption of the Declaration on the Rights of Indigenous Peoples[1] (UNDRIP) by the United Nations (UN) in 2007. The new declaration, which sets an important standard for the protection of indigenous rights in international law, is now seen as a pathway to remove various obstacles faced by indigenous communities all over the world.

Prior to the adoption of the Declaration by the UN, the rights of the indigenous peoples were generally understood within the minority rights framework. There are many similarities between indigenous peoples and minorities, and it is often argued that the human rights issues of these two have more in common and overlap with each other in many cases. However, there are now serious concerns that the minority rights framework has been overshadowed at the UN as a result of the spotlight that has been given to indigenous rights since the adoption of the Declaration in 2007. The minority rights framework is found within Article 27 of the International Covenant on Civil and Political Rights[2] (ICCPR) and the UN Declaration on the Rights of Persons Belonging Religious or Linguistic Minorities[3]. Although Article 27 of the ICCPR aims to protect not only individual rights of minorities but also members of indigenous peoples, past experiences faced by indigenous peoples, especially from the forces of colonialism and dispossession, prove that indigenous peoples' rights deserve stand-alone recognition and protection under international law. This is because indigenous peoples all over the world have often (not always) had their rights infringed from external forces, from colonial empires in the 17th-20th centuries, to the forces of climate change in the 20th century. This has led to an erosion of indigenous culture, language, possession of the land, and access to traditional food and water sources which are crucial for their collectiveness. Given this, indigenous people require special protection of collective rights which provides a pathway for states to resurrect past wrongs towards indigenous populations.

The objective of this article is to argue that the minority rights framework of international law has not suffered as a result of the advancement of indigenous peoples' rights within the UN. This is because there has always been a necessity for special protection for indigenous peoples as they need to be treated separately from minorities due to their unique

[1] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('UNDRIP').

[2] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 23 March 1976) ('ICCPR').

[3] United Nations Declaration on the Rights of Persons Belonging Religious or Linguistic Minorities, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, UN Doc A/RES/47/135 (18 December 1992) ('Minority Declaration')

characteristics that go beyond the classification of minorities under international law. In other words, indigenous peoples generally seek collective rights for their survival, while the minority rights framework is devoted to protecting individual rights of minorities including indigenous individuals. Therefore, it is appropriate to look at the legal distinction between two for the future realization of their rights, instead of considering the advancement of the indigenous peoples' rights framework or the recent malaise that the minority rights framework finds itself in.

Part II of this article considers the advancement of indigenous peoples within the UN and its correlation with the minority rights framework. Part III will look at the necessity of collective rights of indigenous peoples while looking at the legal distinction between indigenous peoples' rights and minority rights in the light of the two Declarations adopted by the UN.

II. The advancement of indigenous peoples' rights at the UN and its correlation with the minority rights framework

Prior to the adoption of the UNDRIP, indigenous peoples' rights had been defined under the framework of the Conventions of the International Labour Organization (ILO). Although the UNDRIP determines the rights of the indigenous peoples in the broader sense, ILO conventions No's. 107 and 169 remain as the only binding international norms which recognize indigenous peoples' rights[4] [5]. The significance of Convention 107 was that the term 'indigenous' was first used[6], and it highlighted to the international community about the existence of another major vulnerable group of people within the context of human rights.

However, critics claim that Convention 107 aims to integrate indigenous peoples into their 'respective national communities'[7]. The word 'integration' contradicts defining characteristics of indigenous people as being the original occupants in their respective countries and it raises the question whether or not indigenous peoples' rights can be protected sufficiently by international human rights norms. Although ILO Convention 169 corrected this bias[8], it received sparse international recognition.[9] Regardless, owing to Convention 107, indigenous peoples became an integral part of international law[10] and a number of initiatives that aim to protect the rights of indigenous peoples have later been made by the UN.

At the international level, indigenous peoples' rights have experienced more complicated challenges. The UN has made an attempt to tackle such challenges by moving the concept of collective indigenous peoples' rights out of the minority rights framework while indigenous individuals are still capable of claiming minority rights. Generally, indigenous people's rights were partly included in the minority rights framework before substantial attention was given to

[4] Jeremie Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples', (2007) 14 International Journal on Minority and Group Rights, 209.

[5] Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention 107), opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) ('ILO Convention 107'); Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 Sep 1991) ('ILO Convention 169').

[6] The attempt to define indigenous peoples was included in Article 1, para 1, section (b) of the ILO Convention 107, which provided: "members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong."

[7] Ibid. Preamble.

[8] Preamble of the ILO Convention 169 stipulates that "developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards".

[9] Currently 22 countries have ratified the ILO Convention 169.

10 Stephen Allen, 'The Consequences of Modernity for Indigenous Peoples: An International Appraisal', (2006) 13 International Journal on Minority and Group Rights, 320.

indigenous rights by the UN.[11]

This is evident in Article 27[12] of ICCPR which states:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Article 27 is seen as the only binding provision that recognizes the individual rights of minorities and indigenous peoples. Because it emphasizes the 'persons belonging to minorities'. In other words, it grants indigenous members the specific sets of rights to preserve their culture, religion, and language as an individual. The UN Human Rights Committee (the Committee) mentioned that cultural rights enshrined in Article 27 could also be realized by an effective participation of the members of indigenous communities.[13] [14] Moreover, Article 27 can be used by indigenous peoples[15] as a gateway to initiate communication procedures at the treaty body level. This process is available only when the indigenous individual claims his/or her individual rights. There are several examples of cases brought to the Committee. For instance, in Kitok vs. Sweden[16], the Committee recognized the indigenous peoples' right to hunting, fishing, and herding as activities relating to their culture under the framework of Article 27.[17]

The UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992. The Declaration amplifies the rights contained within Article 27 as it builds on the individual rights of persons belonging to minorities. Since the indigenous peoples can work within the definition of 'minorities', the Declaration was also a significant advancement for the protection and recognition of indigenous rights. It is noted that 'most indigenous communities qualify for minority status and have used minority mechanisms to their own benefit.'[18] There is no question that as a human being, every indigenous individual is entitled to all of the human rights, as well as minority rights which are stipulated in the Universal Declaration of Human Rights[19] and other binding instruments. To be brief, it can be said that the Minority Declaration recognized indirectly the individual rights of indigenous peoples under the definition of minorities.

Nevertheless, indigenous peoples were vocal for the need for special protections as distinct from minorities. This was because the above-mentioned instruments did not fully accomplish recognition of indigenous peoples' rights in light of their 'collectiveness' within the UN, but were seen as a catalyst towards the recognition of indigenous peoples' rights separately from minorities. In order to achieve full recognition of indigenous rights, including recognizing historical injustices as a result of colonialism and dispossession, the UN began to work towards a stand-alone indigenous rights instrument. The Sub-Commission on the Protection and Promotion of Human Rights established the UN Working Group on Indigenous Populations in 1982 and

[11] Yousef T. Jabardeen, 'Redefining Minority Rights: Successes and Shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples', (2011) 18(1) Journal on International Law and Policy, 131.

[12] ICCPR, Article 27.

[13] See generally Human Rights Committee, *General Comment No. 23: Article 27 (Rights of Minorities)*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

[14] Emma Henderson and Nicole Shakleston, 'Minority rights advocacy for incarcerated indigenous Australians: The impact of Article 27 of the ICCPR', (2016) 41 *Alternative Law Journal*, 244.

[15] Even though Article 27 does not determine the terms 'peoples' or 'minorities', the concept of 'ethnic, religious or linguistic minorities' fits for most indigenous peoples.

[16] Ivan Kitok, an indigenous citizen of Sami ethnic origin was refused to reindeer herding as a Sami due to his absence in Sami community for a periods of time. The Committee did not conclude that Article 27 was violated, but accepted traditional activity as means of culture within Article 27.

[17] Human Rights Committee, *Decision: Communication No. 197/1985*, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) (*'Kitok vs. Sweden'*).

[18] Gaetano Pentassuglia, 'Reforming the UN Human Rights Machinery: What Does the Future Hold for the Protection of Minorities and Indigenous Peoples?' (2007) 14 *International Journal on Minority and Group Rights,* 130.

[19] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1984) (*'UDHR'*).

it was seen as a crucial step for advancing the indigenous peoples' rights at the international level. This is because one of the two mandates of the Working Group was 'to give attention to the evolution of international standards concerning indigenous rights'[20].

In light of this mandate, the Working Group offered a potential definition of indigenous peoples based on four criteria[21] as they started work on drafting a Declaration.[22] [23] The definition offered by the Working Group clearly indicated that there was a necessity for indigenous peoples to be protected separately from minorities. In fact, actual advancement begins with the consideration of the Draft Declaration on the Rights of Indigenous Peoples.

Furthermore, the Permanent Forum on Indigenous Issues was established under the auspices of the UN Economic and Social Council in 2002 for the purpose of consolidating indigenous peoples' rights at the international level.[24] The aim of this high-level body was to promote dialogue and cooperation among tri-partite stakeholders: The Member States, the UN, and indigenous peoples. It is still seen as a major international forum on indigenous peoples' issues and is also responsible for the implementation of the UNDRIP.[25] In addition, another major achievement for the protection of indigenous rights at the international level is the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) which is established by the UN Human Rights Council (the UNHRC). While the UNHRC often carries out Special Procedures in relation to the issues of indigenous peoples with the support of its Special Rapporteurs, the objective of the EMRIP is to provide the UNHRC with 'thematic expertise, mainly in the form of studies and research, on the rights of indigenous peoples.'[26]

The adoption of the UNDRIP in 2007 was the core achievement of the indigenous peoples' rights within the UN. The UNDRIP became the first soft law[27] describing the distinct collective rights of indigenous peoples and, according to many scholars, the principles stipulated in UNDRIP clearly reflect the existence of customary international law concerning indigenous peoples.[28] [29] The important thing is that since the adoption of the UNDRIP, indigenous peoples have no longer been considered inseparable from the definition of 'minorities' in international law.

However, the successful advancement of indigenous peoples' rights at the UN level did not put minorities in a disadvantaged position in the field of international law. Even though indigenous peoples' rights have been recognized by the UN separately from minorities, indigenous peoples still have equal opportunity to demand their individual rights under the Minority Declaration. The last part of the article will look at this by considering a legal distinction between the rights of indigenous peoples and minorities under two Declarations.

III. The necessity of collective rights protection of indigenous peoples under the UNDRIP

Current international law inarguably extends special protections for indigenous peoples to address the specific challenges that they face, while indigenous peoples and minorities have some similarities under international law. They are common in certain characteristics, such as being the non-dominant group within the State and being distinct from the majority of the population due to ethnic, cultural, linguistic or religious differences.

[20] ESC Res 34, 28th plen mtg, UN Doc E/RES/1982/34 (7 May 1982).

[21] The UN WGIP stressed on four criteria when defining indigenous peoples: (1) priority in time; (2) voluntary perpetuation of cultural uniqueness; (3) self-identification; and (4) the experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant population in a society. Jabardeen, above note 11, 128.

[22] Gilbert, above note 4, 213.

[23] Megan Davis, 'To bind or not to bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On', (2012) 19 *Australian International Law Journal*, 20.

[24] ESC Res 22, 45th plen mtg, UN Doc E/RES/2000/22 (28 July 2000).

[25] OHCHR, *Indigenous Peoples and the United Nations Human Rights System*, (United Nations, 2013) Fact Sheet No. 9/Rev.2, 13.

[26] OHCHR, above note 25, 14; HRC Res 6/36, 34th mtg, UN Doc A/HRC/RES/6/36 (14 December 2007).

[27] Davis, above note 23, 36-40.

[28] James Anaya, Indigenous Peoples in International Law, (Oxford University Press, 2nd ed, 2004) 70.

29 Davis, above note 23, 19.

There are many authoritative definitions on indigenous peoples and minorities which indicate these similarities between both groups[30].[31] Some scholars argue that indigenous peoples can represent the national minorities[32] [33], while some see indigenous peoples as ethnic minorities.[34] [35] Although indigenous peoples enjoy the same rights as minorities, an evident legal distinction appears in UNDRIP, which differs from that of minorities by their unique characteristics. But it does not mean that minority rights have suffered as a result of the adoption of UNDRIP. This is because UNDRIP does not take away from the minority rights movement, rather it reinforces the need for indigenous communities to advocate for their rights collectively. This is reflected in the preamble of UNDRIP where it states:

"Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,"[36]

In general, UNDRIP provisions indicate a 'unique indigenous identity'[37] of indigenous peoples distinct from minorities. Based on a comparative analysis of the two Declarations, it can be concluded that this unique indigenous identity consists of at least two important characteristics which are especially devoted to indigenous peoples and their collective rights. In other words, these two characteristics of indigenous peoples are interrelated and crucial for indigenous peoples' preservation of culture and economy[38] [39]. Moreover, it can be said that indigenous peoples have enduring histories of unique lifestyles in specific geographic locations and therefore a more decisive measure was required by the UN to ensure their collective rights.

Firstly, UNDRIP emphasizes the fact that indigenous peoples' occupation of the territory prior to the arrival of others and their historical connection to the lands which minorities do not have. Historically, indigenous peoples inhabited and owned their territory before the colonization or the establishment of the

[30] The definition formulated by Special Rapporteur Martınez Cobo is considered to be an authoritative one. It reads as follows: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:
Occupation of ancestral lands, or at least of part of them;
Common ancestry with the original occupants of these lands;
Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
Residence on certain parts of the country, or in certain regions of the world;
Other relevant factors."
See generally UN Department of Economic and Social Affairs, 'The Concept of Indigenous Peoples' (Background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues, 19-21 January 2004).

[31] UN Special Rapporteur Capotorti's definition on minorities is seen as widely recognized one. It reads: "A group numerically inferior to the rest of the population of a state and in a **non-dominant position, whose members – being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population** and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."
See Abdulrahim P. Vijapur, 'International Protection of Minority Rights', (2006) 43 International Studies, 371.

[32] Jabardeen, above note 11, 125.

[33] Miriam J. Aukerman, 'Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context' (2000) 22 Human Rights Quarterly, 1046.

[34] Anna Meijknecht and Byung Sook de Vries, 'Is There a Place for Minorities' and Indigenous Peoples' Rights within ASEAN?: Asian Values, ASEAN Values and the Protection of Southeast Asian Minorities and Indigenous Peoples' (2010) 17 International Journal on Minority and Group Rights, 78.

[35] Ruxandra Nut, 'Indigenous rights vs. Minority rights. The case of the Norwegian Sami', (2015) 3 International Relations, 100.

[36] UNDRIP Preamble.

[37] Erica-Irene Daes and Asbjıırn Eide, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples' (2000). UN Doc. E/CN.4/Sub.2/2000/10. Cited in Ulrike Barten, 'What's in a Name? Peoples, Minorities, Indigenous Peoples, Tribal Groups and Nations' (2015) 14(1) Journal on Ethnopolitics and Minority Issues in Europe, 10.

[38] Asbjıırn Eide, 'Ensuring Social and Economic Rights of National Minorities through the Work of the Advisory Committee on the Framework Convention' in Tove H. Malloy and Ugo Caruso (eds), Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities (Martinus Nijhoff Publishers, 2013) 57.

[39] Pentassuglia also noted that "…land rights and the right to self-determination are emerging as the most genuine additional layers of protection that are needed to tackle the indigenous experience." Pentassuglia, above note 18, 130.

state and this fact justifies their inherent rights related to their lands. From the human rights perspective, recognition of land rights of indigenous peoples is to 'counterbalance the negative effects of the historic colonization'[40]. In regard to land rights, some concluded that "The need for a separate set of definitions and protections for indigenous groups, as opposed to other minorities, is arguably due to the fact that indigenous groups are not only among the most impoverished, marginalized, and persecuted populations of the world, but unlike many other national minorities … they also have historical claims to the specific land on which a nation has been created."[41] In addition, it was also noted by Daes that 'attachment to a particular territory has never been associated with the concept of minorities'.[42]

Although the General Comment[43] considers the use of land resources within the scheme of cultural rights in Article 27 of ICCPR, it is noted that it can be invoked especially in the case of indigenous peoples. In Poma Poma vs. Peru, the Committee strictly said "Certain aspects of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This might particularly apply in the case of the members of indigenous communities which constitute a minority."[44] In other words, the Committee did not recognize the land rights of minorities in its General Comment. While the preamble of the UNDRIP emphasizes 'the urgent need to respect and promote the inherent rights of indigenous peoples… especially their rights to their lands, territories, and resources'[45], Articles 25, 26 and 27 of the UNDRIP are wholly devoted to the land rights of indigenous peoples. Comparatively, the Minority Declaration does not provide minorities with land rights.

Secondly, UNDRIP also focuses on the different political and cultural characteristics of indigenous peoples distinct from minorities, in particular, self-determination within their territory[46] (as their historical sovereignty was wrongfully taken from them), which minorities also do not have. In detail, indigenous peoples contributed significantly to expanding the recognition of the right to self-determination, which is enshrined in the Charter of the United Nations[47] and two binding Covenants[48] [49]. Before the right to self-determination was recognized by the UNDRIP, there had been a consensus that this right was seen as the right of the population as a whole of Sovereign States or those who live in non-self-governing or occupied territories.[50] Due to its collective manner, this right is also applicable to indigenous peoples, because the word 'peoples' is often understood as an indication of sufficient realization of the right to self-determination[51].

However, the purpose of the Minorities Declaration is not for self-determination but the progressive integration of a minor group into the majority. It is evident here that the Committee distinguished minority rights from the right to self-determination as enshrined in Article 1 of the ICCPR and concluded that 'self-determination is not a right cognizable under the Optional Protocol.'[52] Again in Poma Poma vs. Peru[53], the Committee concluded that self-determination is not an individual right of persons belonging to minorities. In contrast,

[40] Rene Kuppe, 'The Three Dimensions of the Rights of Indigenous Peoples' (2009) 11 International Community Law Review, 107.

[41] Jabardeen, above note 11, 125.

[42] ESC, 40th sess, UN Doc E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996), para 60.

[43] Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities), UN Doc CCPR/C/21/Rev.1/Add.5, para 7.

[44] Human Rights Committee, Decision: Communication No. 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (27 Marc 2009) ('Poma Poma vs. Peru'). Para 7.2.

[45] UNDRIP Preamble.

[46] UNDRIP Article 3.

[47] Charter of the United Nations, Article 1.2 and 55.

[48] ICCPR Article 1.

[49] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Article 1 ('ICESCR').

[50] Asbjưrn Eide, 'United Nations standard setting regarding rights of minorities and indigenous peoples', (2014) 71 Europa ethnica: Vierteljahresschrift fưr Nationalitätenfragen: mit offiziellen Mitteilungen der 'Fưderalistischen Union europäischer Volksgruppen', 59.

[51] Barten, above note 37, 1.

[52] Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities), UN Doc CCPR/C/21/Rev.1/Add.5, para 3.1.

[53] Poma Poma vs. Peru, above note 44, para 6.3.

the collective right to self-determination of indigenous peoples is connected to both Article 1 of ICCPR and ICESCR[54], while they also can claim other individual rights under Article 27 of ICCPR, along with minorities.

Moreover, Article 3 of the UNDRIP clearly stipulates that "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[55] while the Minority Declaration does not provide minorities with such a guarantee. In contrast, the Minority Declaration avoids the right to self-determination by stating in Article 8.4 that: "Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States."[56]

Furthermore, some argue that this difference fades in a claim by indigenous peoples' aim at autonomous development within their territory.[57] Because Article 4 of UNDRIP stipulates that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[58], while the Minority Declaration limits their status by stating "Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation."[59] In comparison with the right to autonomy or self-government of indigenous peoples, the right to participation is described with an inessential position in the UNDRIP.[60]

These differences in characteristics of indigenous peoples that go beyond the classification of minorities under international law further determine the legal distinction between indigenous peoples' rights and minority rights. The major distinction is that the rights of indigenous peoples are collective, while minorities seek individual rights. To sum up, collective rights, land rights and the right to self-determination are the important claims of indigenous peoples. These rights are the core reason why their rights are protected by a separate Declaration at the UN.

If we look at the broader notion of human rights, giving priority to indigenous peoples over minorities or vice versa is not important for today's context. As human rights are universal, interdependent and interrelated, every human being, including indigenous peoples and minorities, would be able to claim their rights under international human rights law. In 1993, during the World Conference on Human Rights, the international community affirmed that "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[61] In this case, minorities might have more advantageous than indigenous peoples. This is because their rights are specified under the binding Article 27 of ICCPR and able to be claimed under Optional Protocol.

Nevertheless, modern international humanitarian law has grown to enunciate state

[54] It is more meaningful, according to Daes, for indigenous peoples who were subject to colonisation from overseas. See generally, Erica-Irene Daes, 'Equality of Indigenous Peoples under the Auspice of the United Nations: Draft Declaration on the Rights of Indigenous Peoples' (1995) 7 ST. Thomas L. Rev.

[55] UNDRIP Article 3.

[56] Minority Declaration Article 8.4.

[57] Barten, above note 47, 11.

[58] UNDRIP Article 4.

[59] Minority Declaration Article 2.3.

[60] UNDRIP Article 18.

[61] *Vienna Declaration and Programme of Action*, GA Res 48/121, A/CONF 157/23, 85th plen mtg, A/RES/48/121 (20 December 1993). Para 5.

obligations towards certain groups of people[62]. Although, as mentioned earlier, indigenous peoples have individual rights under the UDHR and other binding instruments, they have been provided with limited access under international law as a group.[63] There is also criticism that individual rights have been overemphasized at the international level in comparison with collective rights.[64] This is because individual rights are insufficient to realize the rights of ethnic-related groups whose very nature is strongly related to their 'collectiveness'.[65] Under these circumstances, indigenous peoples' rights have made a significant contribution to the development of collective rights in international law.

To conclude

The recent advancement of indigenous peoples at the UN is a clear reflection of the necessity of special protection for the survival of indigenous peoples all over the world. This reflects the fact that indigenous peoples are different in characteristics from minorities: the historical connection to their lands and self-determination. Both of these characteristics further lead to the legal distinction between the two. Although Article 27 has limited meaning for the protection of indigenous peoples as minorities, it helped to stimulate the process of elaborating indigenous peoples' rights separately from minority rights. As a result, the UNDRIP is structured to guarantee the collective rights of indigenous peoples while the Minority Declaration aims to protect the individual rights of persons belonging to a minority group.

Recent attention given by the UN to indigenous peoples' rights means that the international community recognizes the apparent gaps between the rights of indigenous peoples and minorities based on shared history and claims to land. Moreover, the recent advancement of indigenous peoples has given them the ability to address certain issues regarding collective rights at the UN, while Article 27 of ICCPR and the Minority Declaration are still seen as the core protection of the individual rights of minorities, including indigenous peoples. In other words, the present recognition of indigenous peoples' rights and minority rights is described as a possible correlation between individual rights and collective rights ininternational law. Therefore, it would be appropriate to treat them as both as crucial contributors to international human rights norms.

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[62] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 3 (entered into force 3 September 1981); and Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS (entered into force 3 May 2008).

[63] Barten, above note 37, 2.

[64] Prosper Nobirabo Musafiri, 'Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/National Minority?' (2012) 19 International Journal on Minority and Group Rights, 486.

[65] Ibid 487.

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THE USE OF ARBITRATION FOR SOLVING INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES

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Keywords: Arbitration, Intellectual Property, International Intellectual Property Disputes, Arbitrability, Alternative Dispute Resolution

Abstract

Intellectual Property is the branch of the law which protects some of the finer manifestations of human achievement". What is more, intellectual property rights are territorial (territoriality principle). In other words, those types of rights are governed by individual countries. However, when it involves international boundaries, many jurisdictions are intricate. On the one hand, when intellectual property disputes are handled by way of litigation, the complexity of intellectual property litigation arises and this includes jurisdictional issues, choice of law, lis pendes, and the recognition and enforcement of foreign judgments. In addition, Intellectual Property litigation is commonly known as a highly complex, unpredictable and expensive method. However, with the global economy, intellectual property has progressively become one of the most valuable asset of business and the sheer number of transactions involving intellectual property such as the rising trend in license sublicense agreements, joint venture agreements, employment contracts and business acquisition agreements has increased dramatically at both the domestic and international level. Owing to this, it is no wonder that Alternative Dispute Resolution like Arbitration is an attractive technique in solving international intellectual property disputes.

On the other hand, when using arbitration in solving international intellectual property disputes some hurdles may arise. The first thing that really matters is Arbitrability. Many intellectual property rights must be registered if they are to subsist, the process of registration involving the filing of an application with a state authority, such as a patent office[1]. As a result, this creates state involvement, public policy and local sovereign power and for disputes relating to grants, the validity and extent of the rights granted should be decided only by the authority that granted the rights[2]. In such a case, it leads to the question of which intellectual property rights are arbitrable and which are not in certain jurisdictions.

Different legal system and legislation may affect the way certain countries govern the issue of resolving intellectual property disputes. Hence, it is ideal to understand different the approaches of different countries in dealing with this particular issue. And this contributes to the objectives of this research. Through the means of analyzing and comparing, there are two main aims of this paper. The

first aim is to offer an insight into how different jurisdictions, mainly the U.S and South Korea, which are the leading nations

[1] Trevor Cook & Alejandro I. Garcia. International Intellectual Property Arbitration.

[2] The Final Report on Intellectual Property Disputes and Arbitration adopted by the ICC Commission on International Arbitration on 28 Oct, 1997.

in intellectual property protection, use arbitration in solving transnational intellectual property disputes and govern their regulatory framework regarding arbitrability issue in intellectual property dispute.

I. INTRODUCTION

Since Intellectual Property Rights are the foremost property related rights in this era of fast-growing technology, protection of these rights is the main aim of state regulators around the world. This can be shown by the establishment of courts specializing in intellectual property in many countries around the world, the creation and the use of various institutions to enforce IP protection in US such as home courts, International Trade Commission (ITC), United States Patent and Trade Office (USPTO), Federal Trade Commission (FTC) etc. While there are continuous developments made in resolving intellectual property disputes in South Korea ranking from court litigation to Alternative Disputes Resolution. Similarly, Cambodia, whose Intellectual Property legal framework is still in the early stage of development, is also striving to accomplish the enforcement of intellectual property rights and comply with the international legal framework.

Meanwhile International Intellectual Property Disputes often involve nations that may have very different thoughts regarding the arbitrability and other matters of intellectual property issues and the level of protection that should be afforded10. Among many issues that can arise in intellectual property disputes, this paper will be discussing the issue of arbitrability. Due to the fact that there are two main types of arbitrability (subjective and objective), Objective Arbitrability which is the effect of the mandatory rules on the arbiltrability of IP disputes[3] will be the main focus. Aided by the significant experience gained by the US and South Korea in improving the pioneering solutions to resolve intellectual property disputes outside the courts, I submit my contribution with this paper. Hence, the aim of this paper is (1) to present a study of analytical and comparative perspectives on the use of Arbitration as a tool for solving international intellectual property disputes in the context of these two countries, and how the U.S and South Korea

govern their regulatory framework regarding arbitrability issues in intellectual property disputes; and (2) to show what could be the recommendations derived from the above study for Cambodia in introducing the most appropriate practical application of the use of arbitration in solving disputes as such.

II. INTELLECTUAL PROPERTY RIGHTS ISSUES

A. INTELLECTUAL PROPERTY DEFINED

The term "intellectual property" is of nineteenth-century coinage.[4] Since then the definition of intellectual property has been given a variety of meanings. One of those definitions was explained from the categorization of the three different kinds of property that a legal person or a legal entity can own: real property, personal property and intellectual property relating to the products of human activity, including literature, commercial slogans, songs, or new creations. Thus, "property that is the result of thought, namely, intellectual activity, is called intellectual property".[5] Meanwhile intellectual property appears to be a rather recent expression that has come compendiously to describe a diversity of legal rights, originating from different places, and sometimes in practice having an overlapping scope, that allow the rights holders to protect those intangibles, such as ideas, inventions, creative expressions and data, names and commercial reputations.[6] Furthermore, technically defined by the World Intellectual Property Organization (WIPO),

[3] Ana Gerdau de Borja. Intellectual Property Mandatory Rules and Arbitrability in the U.Sand in Brazil.

[4] MICHAEL SPENCE. "Intellectual Property". CLARENDON LAW SERIES.

[5] Deborah E. Bouchoux. Intellectual Property. The Law of Trademarks, Copyrights, Patents, and Trade Secrets.

[6] Trevor Cook& Alejandro I. Garcia. International Intellectual Property Arbitration.
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intellectual property refers to the creations of the mind: inventions, literary and artistic works, and symbols, names and images used in commerce.

B. INTELLECTUAL PROPERTY RIGHTS

The rights of ownership of other types of property rights are also the same as intellectual property in that they can be put into commercial use such as buying, selling or licensing. Also, they can be protected against infringement and other forms of illegitimate activities.[7] According to Michael Spence[8], intellectual property rights are : (1) a type of right that can be treated as property, (ii) a right to control certain kinds of usage, (iii) a specific form of intangible asset. He added that intellectual property rights normally possess specific characteristics in that the rights are only granted to the creator(s) and those rights can be enforced by both civil and criminal law.

C. RATIONALE FOR THE PROTECTION OF INTELLECTUAL PROPERTY

Like other forms of property, ownership is of an essential element and the protection of such property is made against any sort of trespassing from others. Human effort or the so-called creative effort and the incentive for such effort are the basic rationale for the protection of Intellectual property. According to Eborah, he explicitly mentioned that the aim of intellectual property is to protect and promote the knowledge and efforts of humans for the development of further creativity. The essence of this, therefore, is that creators would not involve themselves in additional creative pursuits if no profit or incentive can be gained from their efforts.[9] He also added that in regard to this protection, there could possibly be a clash between the monopoly of the right of the property owner and the public interest in that once the monopoly occupies, an excessive price for the invention can happen. Therefore, in order to balance the need to reward the efforts of the creator with the public interest, under U.S federal law, for example, the period of time for the protection of an invention is twenty years from the date when the application for the patent is filed with the U.S Patent and Trademark Office (PTO).

D. SCOPE OF PROTECTION AND INFRINGEMENT

Intellectual property rights are seen as negative rights rather than positive rights.[10] It is because intellectual property rights only provide their owner with a right to stop others doing something. In other words, the right to use is not inherently granted to the owner, rather law only grants the owner the right to exclude others from using intellectual property.[11]

Moreover, unlike any contractual obligation, the value of intellectual property is effective against all persons and organizations (except in some cases, the state) in the particular country in which it subsists.[12] On top of this, the limitation of the effectiveness of intellectual property rights is the doctrine of "exhaustion".[13] Doctrine of Exhaustion or First Sale Doctrine refers to one of the limits of intellectual property rights.[14] When a product under the protection of intellectual property right has been marketed either by the owner's small and medium sized enterprises (SME) or by others with the owner's consent, consequently those rights are exhausted and through that exploitation that right can no longer be exercised by the owner's SME. It should also be noted that the first sale doctrine allows re-sale of the work at any price that may be set by the secondary market.[15] The owner or holder of an intellectual property right has no legal control over the secondary markets

[7] Deborah. Intellectual Property. Ibid. At 4

[8] MICHAEL SPENCE. Intellectual Property. Ibid.

[9] Deborah. Ibid At 4.

[10] Trevor Cook& Alejandro I. Garcia. International Intellectual Property Arbitration.

[11] The Scope of Protection Offered by Intellectual Property Law. National Paralegal College. www.nationalparalegal.edu

[12] Trevor Cook& Alejandro I. Garcia. Ibid.

[13] www.nationalparalegal.edu Ibid

[14] International Exhaustion and Parallel Importation. www.wipo.int

[15] www.nationalparalegal.edu Ibid

which are put in the stream of commerce through selling or giving away.[16]

III. BENEFITS OF INTERNATIONAL ARBITRATION FOR INTELLECTUAL PROPERTY DISPUTES

Alternative dispute resolution in resolving intellectual property disputes had been used and developed a long time ago in many developed countries.[17] Among the various types of alternative dispute resolution, arbitration, having private and confidential characteristics, has been progressively used in intellectual property disputes, especially when it involves international parties from different jurisdictions.[18] The reputation of arbitration is on the rise especially among in-house counsel, for example, in the U.S., the steady increase of arbitration in IP disputes is due to its cost effectiveness, the confidentiality factor and other benefits that litigation simply cannot provide.[19] Despite the advantages of arbitration, there are also some cases where parties are reluctant to refer their disputes to arbitration. For example, arbitration requires a pre-existing agreement to arbitrate while IP disputes could arise out of any contractual relationship among parties unless the parties enter into a submission agreement after the disputes have arisen. Moreover, particular disadvantages can arise along the way when arbitration is used in international fields.[20] Therefore, a detailed discussions of both the positives and drawbacks of using arbitration in intellectual property disputes is needed, below I will evidence the case of each.

A. NEUTRAL FORUM

Having international disputes over an intellectual property issue may bring concerns for parties in having an appropriate forum to resolve such disputes, as parties might not want to risk litigating in the national court of the other party. Therefore, the alternative of including an arbitration clause in the international contract would provide not only a neutral forum for the resolution of any dispute which arises but also offers certainty as to which forum will be used, which leaves no risk of having numerous forums across numerous jurisdictions.[21]

B. PARTY AUTONOMY

Arbitration possesses this distinct feature of party autonomy which provides parties in international arbitration the right to choose the applicable substantive law that shall govern the construal relationship of the parties, the freedom to determine arbitration rules and process and even their tribunal. And the principle of party autonomy is explicitly demonstrated in international legal instruments such as the New York Convention, the UNCITRAL Model Law and International Chamber of Commerce Rules(ICC Rules) etc.[22]

C. EXPEDITIOUS

Even though the length of arbitration proceeding depend greatly on the type and circumstances of the disputes, it is important to note that there are many steps in litigation that arbitration do not need. Arbitration is done under a single procedure and many arbitration rules may also provide "fasttrack or expedited procedure" for certain types of disputes.[23] Examples of expedited procedure can be seen in many international arbitration rules such as arbitration rules of ICC, Singapore International Arbitration Centre and Hong Kong International Arbitration Centre.

[16] www.nationalparalegal.edu Ibid. Bobbs-Merrill Co. v. Snellenburg, 131 F. 530 (E.D. Pa.
1904)

[17] Arpad Bogsch. Opening Address. WORLDEIDE FORUM ON THE ARBITRATION OF
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[18] Why Arbitration in Intellectual Property? World Intellectual Property.
http://www.wipo.int/amc/en/arbitration/why-is-arb.html

[19] M. Scott Donahey. Unique Consideration for The International Arbitration Of Intellectual
Property Disputes. Dispute Resolution Jornal. 2010.

[20] Daniel Schimmel and Ila Kappor. Resolving International Intellectual Property Disputes
in Arbitration. 2009.

[21] Philip J. McConnaughay. ADR of Intellectual Property Disputes..

[22] Sunday A. Fagbemi. The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality? 2015

[23] Trevor & Cook. Ibid. At 41.

D. ECONOMIC PROCEDURE

Like the length of arbitration, the cost during the procedure of arbitration also relies on the behavior and the complexity of the case. However, in comparison with court litigation, there are certain expenses that arbitration does not need.

E. CONFIDENTIALITY

Confidentiality might be one of the most attractive elements to parties when considering dispute resolution methods. As in intellectual property issue, the parties require much confidentiality to the information of their business and its reputation. In national courts, it is far more likely that the court cannot protect information. However, in arbitration proceedings, confidentiality can be protected from all the parties involved. For instance, the parties to arbitration often enter into a confidentiality agreement, the arbitrators are under the obligation of the agreement to arbitrate with confidentiality and the arbitration center never publish their arbitration caseloads.[24]

F. EASE OF ENFORCEMENT

Though there is no worldwide convention on the recognition and enforcement of arbitral awards, the universal adoption of international instruments on the recognition and enforcement of arbitral awards like the New York Convention with 120 signatory countries makes the enforcement of foreign awards easier and more consistent. This makes arbitration a better option than court litigation. The special features of arbitral awards include the finality of the awards, the binding effect among the parties (if so choose) and they are readily enforceable in most countries owing to the adoption of the New York Convention. However, concerning the enforcement and recognition of disputes of intellectual property it may be difficult in some jurisdictions based on domestic public policy conditions. For example, domestic court may not recognize or enforce an award on the issue of validity or infringement of registered intellectual property rights because

those issues are under the exclusive jurisdiction of the Court.[25]

G. COMMERCIAL RELATIONSHIP

Owing to the flexibility of remedies provided by arbitration, it does not only provide for ease in resolving the dispute but also can save the commercial relationship between parties better than bringing a law suit to the court of law.[26] In addition, arbitration may also provide an incentive for a settlement to be made among parties, as in some case the parties may reach settlement at any stage of the arbitration procedure.[27]

CONCLUSION

The use of arbitration in resolving intellectual property disputes is on the rise and becoming more and more important for intellectual property asset related business both on the domestic and international level because of the benefits that court litigation cannot provide in the same way. On a domestic level, it is very appealing for the in-house council to include arbitration clauses in agreement related to intellectual property rights such as license or sub-license agreements, research& development agreements and joint venture agreement etc. so as to secure a neutral forum for resolving disputes that may arise in the future without having to get involved in court proceeding. On an international level, however, it has also becoming renowned among countries in the world because arbitration possesses special features that best match the characteristics of international intellectual property disputes, and it can serve as a safe harbor for parties in resolving their intellectual property related disputes in a certain and neutral forum without having to risk facing the boiling plate of litigation in domestic courts of other jurisdictions.

[24] M. Scott Donahey. Ibid. Supra note 35.

[25] Trevor & Cook. Ibid. At 24

[26] International Arbitration: Practice and Modern developments. Kenneth R. Adamo. The 2011 Global Business Law Review Symposium.

[27] Trevor & Cook. Ibid. At 33.

The studying of the legal and regulatory framework of intellectual property arbitration in both the U.S and South Korea provides significant insight into understanding how these two countries practice arbitration in resolving such disputes and how different legal systems of the two countries affect and shape the regulations on issues regarding arbitrability of intellectual property disputes. In the context of the U.S, as it is a big player in the field of intellectual property and a country with long-developed legislation and practice in the area of arbitration, there are numerous sources of law ranking from state to federal and international level, court precedents, rules, and institutions governing and administering these issues. In regard to the issue of arbitrability of intellectual property disputes in particular public policy has great influence on arbitrability. Interestingly, the U.S is seen as a pro-arbitration country because almost all types of intellectual property disputes can be arbitrated including validity and infringement of patents owing to the amendment of the Patent Code. In South Korea, however, arbitration is greatly governed by Korean Arbitration Act and some other significant international instruments such as the New York Convention and UNCITRAL Model Law. The question concerning arbitrability does not explicitly address in the Act, however, the revised Article 3(1) of the Act paves the way for defining the scope of arbitration in South Korean jurisdiction. The new article expands the scope from "any dispute in private law" to "any property dispute and non-property disputes" which is likely to show that intellectual property disputes have a high possibility in arbitrating. Unlike the U.S where the majority of disputes are allowed to arbitrate, South Korea carries a distinct concept regarding this issue depending on types of rights and claims at issue. The categories of disputes and claims that are allowed to arbitrate include any type of disputes of unregistered rights and issue of "infringement of rights" of registered intellectual property. However, claims regarding validity or invalidation of registered intellectual property are not treated the same way due to the fact that in South Korea the institutions that have the power to decide validity and invalidity of intellectual property include Intellectual Property Tribunal(IPT) which is part of the Korean Intellectual Property Office(KIPO) and the Patent Court (in the case of patent).

Once adopted and well implemented, this practice will be able to replace the poorly practical way of resolving disputes related to intellectual property and make parties more receptive in referring IP disputes to arbitration. Further, it will also help diminish the barriers of the development of new creation in intellectual property area and develop a legally-sound and stable atmosphere for international trade and investment in Cambodia and could possibly be the blueprint for other countries in its region like Myanmar.

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FREEDOM OF OPINION AND EXPRESSION IN MONGOLIA

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Key words

freedom of thought, opinion and expression, speech, press, peaceful assembly; the right to seek and receive, impart information.

Introductory

The rights to freedom of opinion and expression is guaranteed by the international Bills of Human rights and other conventions: UDHR (1945), ICCPR and its Optional Protocol I, II of ICCPR (1966), UN Chapter (1978), Convention on the Political Rights of Women, NY (1953), European Convention on Human Rights (1950), American Convention on Human Rights and in Mongolia sect. (16), Article 16 of the Constitution (1992) states that "The citizens of Mongolia are guaranteed to enjoy the following rights and freedom of thought, opinion and expression, speech, press, peaceful assembly. Procedures for organizing any peaceful demonstrations and other assemblies shall be determined by law.", "the right to seek and receive information except that which the state and its bodies are legally bound to protect as secret. In order to protect human rights, dignity and reputation of persons and to ensure State defense, national security and public order secrets of the State, organization or individuals, which are not subject to disclosure shall be determined and protected by law."[1]. The rights to freedom of opinion and expression recognized during the communication. On the one hand, for this reason, he/she freely exercises right to freedom of opinion and expression and on the other hand, he/she should contend or accept the one's opinions or expressions, in other words this rights require that recipient's acceptance of information must be in a realization.[2] The provisional statements made on freedom of thought, opinion and expression in the articles of 16 and 17, the acceptance of these rights means that these rights are fully protected as of basic human rights and purpose will be ensuring its constitutional guarantee. In order to achieve such outcome parliament must pass laws in accordance with the constitution or international norms and must ensure implementations of these laws.

National Human Rights Commission of Mongolia received 623 complaints in total which lodged by the citizens, private entities

[1] The Constitution of Mongolia (1992), Turiin medeelel emkhetgel /1992/ №1.

[2] Moritz Lorenz, How Article 5.1.1 of the Basic law which declares a right freely to express and disseminate his opinions is an essential element of democracy and pluralism, Reflection pages on State and law, Hanns Seidel Foundation /2000/ №7, at 106.

or organizations between December 15, 2017 and December 25, 2018 and resolved 3 complaints involved rights to freedom of opinion and expression.[3] The aforementioned statistic indicates that there are very few incidents if we consider over infringements of mentioned rights and freedoms. However, according to PRESS FREEDOM INDEX of Reporters Without Borders for Freedom of information, which compared in between 180 countries around the world indicates that Mongolia ranked at 60th in 2016, in 2017 at 69th and in 2018 at 71 showing continuous cut backs in last 3 years.[4] It reveals us that there are still unresolved issues or further improvements to the sphere of exercising the rights to freedom of opinion and expression.

ONE. UNDERSTANDING OF FREEDOM OF OPINION AND EXPRESSION

The enjoyment of rights to a freedom of thought, opinion had expressed in many different forms since Middle Ages to totalitarian regimes with ideological oppressiveness and dictatorship therefore it had become a final answer to those dominators. In Europe when Christians dominated during Middle Ages only priests or ministers had a privilege to pass on judgements what was right and wrong. The tyranny of the absolute monarchy influenced public to acknowledge that it is essential being consciousness about the rights to freedom of opinion and expression at any cost. The natural science begun to proper and it put constraints on the religion resulting strengthened ideological dictatorship of monarchy. The Kings and Lords proclaimed themselves being the highest lord of all men and things therefore directly prohibited all critics or thoughts against them or to spread any information over lack of his policy. The answer for that was adoption of the Declaration of the Rights of the Man and of the Citizen in 1789. At first time in history it declared that rights of a free communication of ideas and of opinions are basic human rights.[5]

The first constitution of 1924 (art.3 sect.7) determined that "Respect all critics given by genuine ard/no feudal/ over the state affair and he/she shall have full power on any press or publication." and constitution of 1940 (art.85) stated that "In purpose of strengthening the state power of the People's Republic of Mongolia in conformity with working class's interests, following legal rights are guaranteed by law to people of the People's Republic of Mongolia: enjoy freedoms to free speech, press, peaceful assembly and organize any podium meetings or other street demonstrations" and lastly constitution of 1960 (art. 87) stated that "In the purpose strengthen the state power of the People's Republic of Mongolia in conformity with working class's interests, following legal rights are guaranteed by law to people of the People's Republic of Mongolia: enjoy freedoms to free speech, press, peaceful assembly and organize meetings and other demonstrations or ceremony." The current constitution of 1992 secures a basic protection and guarantee of the rights to freedom of opinion and expression by stating in its Article 16 as follows:

sect.16

"freedom of thought, opinion and expression, speech, press, peaceful assembly. Procedures for organizing any peaceful demonstrations and other assemblies shall be determined by law."

Article 16, sect.17

"the right to seek and receive information except that which the state and its bodies are legally bound to protect as secret. In order to protect human rights, dignity and reputation of persons and to ensure State defense, national security and public order secrets of the State, organization or individuals, which are not subject to disclosure shall be determined and protected by law."[6]

[3] National Human Rights Commission of Mongolia, Activity report of 2018, at 18.

[4] World Press Freedom Index, accessed on April 1, 2019; available at: https://rsf.org/en/ranking/2018

[5] Moritz Lorenz, How Article 5.1.1 of the Basic law which declares a right freely to express and disseminate his opinions is an essential element of democracy and pluralism, "State and law" Reflection pages/2000/№7, (Hanns Seidel Foundation), at 106.

[6] The Constitution of Mongolia, Turiin medeelel /1992/, №1.

These two provisions serve bases for combating against corruption, bureaucracy or other illegal activities of the state when citizens take a participation in the state affairs and be able to monitor state practices. The rights to freedom of thought, opinion and expression is a complete process and it reveals person's psychology and his/her political and moral values and other characterizations.[7] It has a close relation with human nature and depends on his/her direct existence meaning if not provided by the state or others it can exist independently and should understood as of a natural human right or spiritual thing. The rights to freedom of thought, opinion and expression is very fragile or easy to be infringed once exercised, therefore, must be protected by appropriate mechanisms maintaining the essence of culture in the same time.[8]

The rights to freedom of opinion and expression implied in following approaches:

- By speech or making statements without territorial borders (in speech)
- Disseminate his opinions in writing (in print)
- Freedom of reporting or express his opinion by means of broadcasts, art or films
- Right freely to express his opinion in other ways as he prefers
- Seek to (receive an information)
- Receive (an information)
- Right to disseminate
- Freedom of peaceful assembly
- Freedom of association
- Have a right to submit a petition or a complaint to the state bodies and officials and receive officials' responds
- Go on strike
- Declare a hunger strike "particular" or "collective rights"[9] are made source and bases of political rights, freedoms as well as freedom of opinion and expression.

Citizens may participate socially at any stages of policy making process of the state and local affairs. The right to a freedom of opinion and expressions is exercised extent to the following mechanisms:

- Citizens can participate at his/her residential state and local representative bodies or public meetings and public assemblies
- Through representative bodies in the State Great Khural /parliament members/
- Participate at referendum
- Entitled to comment on bills or participate at deliberations when adopting
- Through the NGO's
- In media or print, broadcasting, press or television
- Send letters to the state bodies or state officials
- Participate at any peaceful demonstrations and other assemblies
- Submit their proposals to officials over concerned issues
- Exercise a freedom of free speeches[10].

The main mechanism when exercising a freedom of thought and opinion and expression is to give a free speech and expressing one's opinion in print or press and take a participation at peaceful assemblies.[11]

TWO. LIMITATION ON THE RIGHTS TO A FREEDOM OF OPINION AND EXPRESSION

In accordance with an international human rights instruments or constitution, there are certain (absolute) rights which may not be interfered at any time or circumstances. For example: No derogation allowed at any time when person has rights not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and nothing refrain

[7] Amarsanaa.J, The rights to freedom of opinion and expression, "State and law" Reflection pages/2000/ №7, (Hanns Seidel Foundation), at 103.

[8] Globe International NGO, The rights to freedom of opinion and expression, Journalist and laws /2001/ №3, at 23.

[9] National Legal Institute of Mongolia, Research on the Laws related to a freedom of media /2004/, at 2.

[10] National Human Rights Commission of Mongolia, Human rights magazine /2012/, at 54.

[11] Hanns Seidel Foundation Mongolia Office, Legal Education Academy, Explanatory dictionary of the constitution of Mongolia /2009/, at 98.

him from exercising his right to have a thought or hold an opinion (it differs from the expressing his thoughts or opinions).[12] Except those absolute rights limitations on other basic rights can be imposed only extent to the rights and freedoms of others. However, we should draw a distinctive line between basic rights and liabilities. This role could be imposed constitutionally to legislative bodies. If no restriction applies to these rights or liabilities then it means that only rule of law principle is guaranteed so executives have to proceed in accordance with the laws. As regards to the exceptional guarantee, which has an explanatory characteristic that these basic rights may be interfered with only pursuant to a law was established only and derived from the principle of a rule of law.[13] Limitations on basic rights posed by the legislative bodies are:

- National security
- Social order
- Prevention of a crimes
- Protection of a public health and morals of others
- Protection of human dignity and reputation
- Judiciary independence[14].

Although in the sense of natural rights, the enjoyment of the rights to freedom of thought, opinion or expression cannot be interfered with or limited at any sense and at any time despite upper mentioned necessary circumstances.

THREE. RIGHTS TO A FREEDOM OF PEACEFUL ASSEMBLY AND RELEVANT LEGISLATIONS AND OTHER NORMAMIVE ACTS

As mentioned before[15] any enjoyment of a right to organize a peaceful assembly is one of the main implementation approaches of a freedom of thought, opinion and expression. When citizen addresses his/her will for any resolution solely over any political or social issue is not so effective way in comparison with others involvement or help because of their assembled participation secures better chances for resolving the issues. In other words, enjoyment of a freedom to peaceful assemblies or demonstrations gives a chance to voice their concerns and influencing the decision makers by attracting the public attentions or even involving the media. Protest is a main activity of the political party if enjoyment of rights to a freedom of opinion and expression is not permitted then there is no democratic election. During the protests and demonstrations people express their right to freedom of thought, conscience and religion so it means that the right to freedom to have or to adopt a religion or belief of his choice is also exercised cohesively. [16] If consider that right to hold opinions without interference, to freedom of expression either orally or in free speeches and the right of peaceful assembly have all inseparable features, therefore, it cannot be implemented without one another.

As main mechanisms used when one is exercising the rights to freedom of opinion and expression can be classified in 3 forms:

1. Right to initiate any peaceful demonstrations and assemblies;

2. Right to organize any peaceful demonstrations and assemblies;

3. Right to participate in a peaceful demonstrations and assemblies.[17]

In order to provide an enjoyment of the right to a freedom of a peaceful assembly

[12] Munkhsaikhan.O, Regulation of a slander adjusting to a right to freedom of opinion and expression, NUM Law review /2017/ №2, at 7.

[13] Moritz Lorenz, How Article 5.1.1 of the Basic law which declared a right freely to express and disseminate his opinions, is an essential element of democracy and pluralism, "State and law" Reflection pages /2000/ №7, (Hanns Seidel Foundation), at 107.

[14] National Human Rights Commission of Mongolia, Human rights magazine /2013/, at 59.

[15] Ibid. Research report, at 5.

[16] Munkhsaikhan.O, Rights to freedom to peaceful assembly and its implementation, "Judiciary" journal /2018/ №1, at 15.

[17] Orosoo.D, Rights to freedom of peaceful assembly and its legal ground reformation issues, The Law Review /2004/ №3, at 41.

or demonstration the parliament passed Law on Rules for organizing any peaceful demonstrations, assembly and public meetings in July 7, 1994. This law serves as a main implementation of the constitutional provision that guaranteed human rights and freedom in the Article 16 and a right to give a permission to organize any peaceful assembly or demonstrations was given to the Governor. The revised law version of 2005 introduced a terminological change which made a "permission" into "notification". Even registration of a notification to organize any peaceful assembly or demonstrations is to fulfill purposes to ensure that there will be no risk to the national security or disturbance to public order and public health and prevent from the possible violations of others rights and freedoms it is still in question whether such regulation is required or not. For example:

The Article 9 and sect.1 of the "Law on Rules for organizing ant peaceful demonstrations, assembly and public meetings" stated that "When one shall organize street demonstrations and public meetings, he/she must notify the Governor of the soum or district where such event will take a place must apply for a registered permission. If streets or planned place in where such street demonstrations or public meetings will take two or more soum or district's territory then one must directly apply for a registered permission to the Governor of the capital city or aimag. The Governor must respond whether accept or dismiss requests for a permission within three days upon receipt of such application.". It is considered being legal that if one's planned peaceful assembly, demonstrations or public meetings can take a place in the same day upon given notifications to Governor in accordance with structural features of procedure to notify. On the other hand, preventive measures must be taken in case of an any sudden interference or oppositions from other people or organizations. It is always preferable to the state officials to be ready to stop any possible disorders or disturbances caused by the citizens resulting damages to others property or health of others. This is the real reasoning behind a notification for registration and it must be observed at any time. The adoption of the structure of notification is very essential which itself committed to protect interests of public order and national security.[18]

However according to the aforementioned law article which made Governor being only subject who to register any requests for assembly or demonstration, who is also happens to be a political appointment civil servant in accordance with the Article 11, sect.11 Law on Civil service. It makes a full sense, therefore, he/she could cause politically reasoned circumstances or delays even could grant a refusal when his/her political opponents apply for an assembly or demonstration to be registered. For example:

The first instance court of the Administrative case decided on disputes between the Governor of the Songino-Khaikhan district on May 26, 2017 and claimants are being Adya-Ariun.D, Munkhbat. Ya, Uugan and Tsand Khatanselenge.D. The court held by its decision #406 that Governor's refusal to register request made by the claimants for organizing assembly was illegal.[19]

In practice, many incidents occur when the local governors refuse to register any peaceful assemblies or any other demonstrations based on many non-legal grounds.

For example: In 2006 "For a healthy society" civic movement applied for a permission and to be registered organizing an assembly or demonstration. However, the Governor refused citing many grounds such as "overlapping other planned events, may result unexpected traffic delays or disturbing or frustrating citizens." [20].

These legal regulations became the sources forming legal frameworks establishing that Governors have rights to control citizens thought, opinions or expressions or dismiss a

[18] Interview given by Munkhsaikhan.O, "The rights to freedom of peaceful assembly and for organizing demonstrations are in the hand of Governor's own discretion and blockade", available at: https://ikon.mn/n/z1y

[19] available at: http://new.shuukh.mn/zahirgaaanhan/3138/view

[20] Interview given by Munkhsaikhan.O, "The rights to freedom of peaceful assembly and for organizing demonstrations are in the hand of Governor's own discretion and blockade", available at: https://ikon.mn/n/z1y

registration for any organized demonstration or assembly.

FOUR. FREEDOM OF MEDIA AND OTHER LEGAL NORMATIVE ACTS

Freedom of media means a transparency of information and the state guarantees to ensure that a citizen, legal entities allowed to seek and receive information which they assume relevant to them. Every person has a right to freedom of media. In order to exercise these rights authorized methods or instruments are essential. They are defined by the category of "human rights". Any information reaches to public upon particular actions of participants' or activities, therefore meets spiritual and social needs of public. This process includes three stages[21]:

First stage: Freedom to seek information

Second stage: Freedom to receive information

Third stage: Freedom to impart information

These three stages for seeking, receiving and imparting information are very much corelated with each other and any information must go through these passages to reach a public.

The vey process for seeking, receiving and imparting information is recognized as basic human rights in the international and national legal frameworks of laws and legislations. They are main legal instruments guaranteeing the enjoyment of a freedom of media. In order to provide freedom of media and information the parliament passed on a Law on Freedom of press in August 28, 1998.

The article 2, sect.1 of this law stated that "State Great Khural of Mongolia is prohibited to adopt any law, which limits freedom of media and independency of media outlets.", article 3, sect. 1 "Media outlets organizations should bear the responsibility for the information published and broadcasted by them. The State shall not control or censor the content of public information." and the article 4 prohibited that "state bodies not to have their own media organizations making media outlets organizations should bear the responsibility for the information published and broadcasted by them.".

In 2015, the Law on Public radio and television had changed a legal status of the state-owned radio and television making it publicly owned enterprises. In 2011, the Law on the Information transparency and right to information had guaranteed public rights to ensure transparency of the state activity or information and rights of citizen, legal entities to seek and receive information that affects public interest.

In 2015, some positive improvements made for the implementation of a right to freedom of media, a Revised law of Criminal Code excluded slander or defamation for being minor administrative infringements not the criminal offenses or misdemeanors. Despite favorable improvement to legal environment there are still many issues at present over the concerned subject.

When study legal normative acts which have no direct applicability to a freedom of media or media organizations activities, there are in total of 44 laws, The Supreme court's 14 interpretations, 6 decrees of the State Great Khural and 4 of the International treaties.

Upon studying these legal normative acts, a few procedural misdeeds and incomplete results were observed. For example: By the Number 41, Resolution of the State Great Hural (parliament) of Mongolia on 24 October, 2003 adopted the "National Human Rights Action Programme of Mongolia' which determined to implement "A law on freedom of the media and freedom of information shall be enacted by which the activities of State agencies shall be opened to public scrutiny. Access to information shall be restricted only in conformity with human rights standards of privacy and strict requirements of public or national security, strict criteria for which will be specified in law and adhered to.", "Freedom of press shall be ensured, coordination and legal actions shall be taken to strengthen the independence of all the state and local owned mass media.", "The laws regulating registration of media enterprises shall be amended as necessary in such a way

[21] National Legal Institute of Mongolia, Research on the Laws related to a freedom of media, /2004/, at 2.

that all relevant procedures and requirements may be clearly understood.", "A rational legal mechanism shall be introduced to ensure the right of journalists not to reveal their sources, to prevent groundless harm by members of the media to the reputation or privacy of others while protecting their freedom of expression, and to remedy any such violations.". However, the programme's some incomplete actions or unachieved purposed implementations were observed according to the researches or other relevant reports.[22]

On 2nd December of 2004 the Parliament had approved a Decree, basic document of Economic and Social Development Mainstreams of Mongolia for 2005 which defined that "…needed further studies for better improvements and resolving issues for a developing policy relevant to the legislations on freedom of press and media.".

The Law on the Defense article 15, para 2 stated that "The Minister of Defense shall be in charge of the following spheres of activities as a member of the Government: to establish defense sector state-owned enterprises, universities or institutions of an armed forces, research and analyses training facility, traineeship, cultural, art, sport, health and media organizations in every units of armed forces of its state authorities and aimag, capital city /district/.", The Art.34, Law on Legal status of city and villages stated that "the city may have the media or newspapers, radio and television." and now it is in contradiction with the Law on Freedom of press, Art. 4 sect.1, "State bodies are prohibited to have their own media organizations." In other words, in accordance with the Law on freedom of press there should be no media organizations owned by the state.

The Law on Public radio and television (2005), art.9 sect. 4 stated that "In case the public radio and television transmits news, information and broadcast of other press or media organization, the source shall be mentioned." which puts some limits to the right of the journalists which are to observe its professional secrecy and not to divulge the source of information obtained in confidence and right to a freedom of expression, comment or criticisms.

The Law on Child protection Art. 8, sect.4 stated that "If state officials, persons or legal entity who have committed crimes shall be subject to the criminal and legal liability when used of press or media, radio, internet or social networking by violating privacy protection of a child or invade child's personal privacy by disseminating any material such as recordings, videos, photos or any other digital images of a child or intentional false reporting on a child about commission of crimes and other administrative infringements or defamation publicly.". There is still not certain and missing legal regulations for liabilities if it was reported on press or media.

Mongolia has a long history of slander or defamation are being crimes and punishable offenses under the Criminal Code. The Revised Law on Criminal Code (2015) had excluded these offenses as being administrative infringements making some positive impacts on the protection of the rights to freedom of opinion and expression. However, in accordance with newly adopted Law on Adjudicating of Infringement (2017) which in the art. 6.21, sect.1 states "Slander, that is, the dissemination of wittingly false data besmirching the honour and dignity of another person or business entity or insult the reputation in a public speech, a work of art shown in public or in mass media shall entail the imposition of an administrative fine on citizens in the amount of one to two thousand units equal of currency, on legal entities in the amount of twenty thousand units equal of currency.". When it introduced new understandings of business reputation and integrity to the law it also increased spheres of legal regulation.

So, the possibility of risk that state officials could use an insult, the infringement

[22] Reporters Without Borders for Freedom of information, Research on legal environment of the freedom of media, available at: https://mongolia.mom-rsf.org/mn/translation-context/translation-law/;
National Legal Institute of Mongolia, Research on the Laws related to a freedom of media /2004/;
The Globe International NGO, Research recommendation based on indicators developed by the UNESCO, Evaluation of the International Programme for the Development of Communication: Press and Media development of Mongolia 2013.

as of a crime such as slander or defamation, against those who are being critical about them or any critics for public goods still remains.

The monetary fine imposed by the Law on Adjudicating of Infringement for slander remains quite a high and is fearsome to the enjoyment of the rights to freedom of opinion and expression and press.

The fear of such high monetary fine makes publishers refrain from printing articles or any materials affected public interest.[23]

When studied total of 47 government decrees and 3 decisions of the Constitutional court of Mongolia (Undsen Khuuliin Tsets) in a relation of freedom of media there were any contralateral or contradicted law clauses relevant to the issue or un-executed decisions of the Constitutional court and no need for further improvements to these legal acts.

CONCLUSION

The State Great Hural approved Law on Freedom of media on 28th August, 1998. The Article 2 of this law prohibited to adopt any law, which limits freedom of media and independency of media outlets. In accordance with Article 3, it is prohibited that the states not establish organizations to monitor the information that is published and broadcasted by media outlets. It also stated that "media outlets organizations should bear the responsibility for the information published and broadcasted by them.". The Article 4 prohibited states to have their own media organizations. It is worth to mention that local state authorities and administrative units, cities still own media organizations of their own.

In order to implement the Article 3, sect.1 of the Law on Freedom of press journalists have lost their privilege of right not to reveal their sources. So subject clause (article 3 sect.1) should not be the organization therefore requires a change that entails the imposition of an administrative fine on only those particular officials who proven to be guilty. Except broadcasting information authored by the journalists or distinctive authors particular media outlets organizations must bear the responsibility for the information published and broadcasted by them.

The vast regulation, which the Law on Adjudicating of Infringement (2017) art.6.21, sect.1 stated that "Slander, that is, the dissemination of wittingly false data besmirching the honour and dignity of another person or business entity or insult the reputation in a public speech, a work of art shown in public or in mass media shall entail the imposition of an administrative fine on citizens in the amount of one to two thousand units equal of currency, on legal entities in the amount of twenty thousand units equal of currency." could serve as favorable cover for politicians or high state officials and allowing them subject the journalists, summoning them by using different accusations or burdening with other issues. Because of that Law on Adjudicating of Infringement must need a change.

It can be concluded that the Article 9 and sect.1 which stated that "Law on Rules for organizing ant peaceful demonstrations, assembly and public meetings" stated that "When one shall organize street demonstrations and public meetings he/she must notify the Governor of the soum or district where such event will take a place must apply for a registered permission. If streets or planned place in where such street demonstrations or public meetings will take two or more soum or district's territory then one must directly apply for a registered permission to the Governor of the capital city or aimag." meaning rather introducing new notification structure former regulation of permission is still in effect today.

The law clause only defined one sided condition for a Governor to register and left out regulation on grounds for refusals or dismiss, therefore, it creates possibility of uncertain delays for demonstrations and assembly and even threatens the chance for organizing such events in the future or may create other consequences.

[23] Munkhsaikhan.O, Regulation of a slander adjusting to a right to freedom of opinion and expression, NUM Law review /2017/ №2, at 25.

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EXTENDING AN ARBITRATION AGREEMENT TO NON-SIGNATORIES:PIERCING THE CORPORATE VEIL

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Abstract

Whilst the bedrock principle of the arbitration agreement is the consensus of the parties to resolve their disputes through arbitration, many jurisdictions around the world have developed a number of legal theories that are used in extending the arbitration agreement to a non-consensual party that is not a party to the arbitration agreement. The jurisprudence on these theories has been established to a varying degree, with piercing the corporate veil doctrine is one of the widely-accepted methods. The concept of corporate veil-piercing in the context of corporate law, and the intersection of such corporate law doctrine and arbitration, has not been discussed to a great extent in Mongolia. This article discusses corporate veil-piercing and its application to international arbitration as a means to compel a non-signatory party to arbitrate and analyzes the position under Mongolian law.

I. Introduction

Arbitration is fundamentally a consensual method of dispute resolution. In principle, an arbitration agreement is binding only on those parties that have entered into a contractual agreement to submit to arbitration[1]. However, as exceptions to this rule, there are circumstances in which entities that have not signed or assented to an arbitration agreement may be bound by its terms. The issue of extending an arbitration agreement to non-signatories recurs in both at the stage of the arbitration proceedings and enforcement of arbitral awards, and therefore arbitral tribunals as well as national courts play an important role in creating and developing jurisprudence in this field.

In virtually all instances, international arbitration conventions and national arbitration legislations do not provide any express guidance in how to identify the parties to an international arbitration agreement[2]. That said, there are instances where arbitral tribunals and courts have bound non-signatories to arbitration agreements through the application of general principles of law[3]. These theories include agency, apparent or ostensible authority, implied consent, third party beneficiaries, assignment, incorporation by reference, estoppel, groups of companies, and corporate veil piercing/alter ego[4]. As can be inferred from above, most of these theories have been developed based on the general principles of agency or contract law. Among them, corporate veil-piercing is a corporate law theory utilized in arbitration, particularly to achieve an equitable remedy. This topic presents an interesting intersection of the consensual nature of arbitration agreements and a non-consensual instrument of corporate law.

The issue of the extension of arbitration agreements to non-signatories and whether

[1] Gary Born (2014), International Commercial Arbitration, 2nd Ed, Wolters Kluwer, at p. 1404.

[2] Id, at p. 1406.

[3] See generally, Id, at p. 1411.

[4] It is established that "alter ego" is one form of corporate veil-piercing theory, as an umbrella doctrine.

the corporate law theory of piercing the corporate veil in arbitral proceedings that apply Mongolian law has not been discussed to any great extent, if at all. The enactment of the new Arbitration Law of Mongolia on 26 January 2017 is expected to make the country a more arbitration-friendly jurisdiction. The Arbitration Law was based on the UNCITRAL Model Law on International Commercial Law, including its amendments in 2006, in an effort to import the best practices in the field of international arbitration. With the steady increase in the number of international arbitration cases involving Mongolian legal entities and cases handled by Mongolian arbitral institutions, the legal framework for the corporate veil- piercing and potential usage of the doctrine in arbitration under Mongolian law is a topic worth exploring.

On this basis, this article will discuss the concept of corporate veil piercing as a method of extending arbitration agreements to non-signatories and its applicability under Mongolian law. First, Part II will briefly discuss the concept of corporate veil-piercing. In Part III, a case illustrating the application of the corporate veil-piercing theory in international arbitration will be presented. Part IV will attempt to analyze the current legal framework for corporate veil-piercing under Mongolian law, which will be followed by concluding notes in Part V.

II. The Concept of Piercing the Corporate Veil

In essence, piercing the corporate veil means disregarding the legal separateness of a limited liability entity in order to hold its shareholder liable for the acts and omissions of the entity. The doctrine has been developed to prevent shareholders from abusing the corporate limited liability form.

The concept of limited liability is a notion that a company has its own distinct legal personality, separate from its owners. The implication is that companies are solely liable for their debts, limiting liability for investors. Thus, limited liability is considered as the "primary benefit of the corporate form"[5], creating legal certainty for investors and encouraging investment business activities.

In broader terms, the corporate form of limited liability does not limit the liability of the company but shifts the risk from the shareholders of the company to creditors and other third parties. However, as many jurisdictions have recognized, providing unyielding protection to the shareholders may lead to injustices on particular occasions. Therefore, as an exception to the general rule of limited liability, the legal separation of entities can in some instances be discarded in order to provide an equitable remedy to injured parties.

As a starting point, almost all jurisdictions respect the legal form of an entity and only allow legal personality to be disregarded in exceptional cases. The test for piercing the corporate veil varies from one jurisdiction to another. The most commonly-accepted formulation of piercing the corporate veil under common law establishes a two-pronged test:

1) the parent completely controls and dominates the subsidiary (the "control test"); and

2) the parent's conduct in using the subsidiary was unjust, fraudulent, or wrongful toward a third party[6] (the "injustice test").

In practice, whether the abovementioned test is satisfied in a particular case appears to be largely a question of fact and not of law. For example, while some U.S. court decisions primarily relied on the notion of fraud as the cornerstone of veil piercing[7], that has not been a decisive factor in other cases[8].

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[5] Macey, Jonathan R. and Mitts, Joshua (February 18, 2014), "Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil" Cornell Law Review, Forthcoming; Yale Law & Economics Research Paper No. 488. Available at SSRN: https://ssrn.com/abstract=2398033

[6] See generally, Charles R.T. O'Kelly and Robert B. Thompson (2014), Corporation and Other Business Associations: Cases and Materials, 7th Ed, Wolters Kluwer, at p. 606.

[7] For example, "Lowendahl v. Baltimore & O.R.R.", 287 N.Y.S. 62.

[8] For example, the U.S Supreme Court, in Anderson v. Abbott, incorporated public policy considerations in the undercapitalization of corporations as a ground for veil piercing.

III. Piercing the Corporate Veil and Extension of Arbitration Agreement

In the context of arbitration, the application of corporate veil piercing is typically seen in cases compelling the parent of an entity to be joined in arbitral proceedings where the parent itself was not a party to the arbitration agreement nor the underlying contract. A common reason for this would be the subsidiary itself has already been liquidated and/or is undercapitalized such that the claimant in the arbitration proceeding has no prospect of recovering damages unless it pursues the parent entity. Therefore, the effect of the theory is to join the parent entity to the merits of the dispute as well as the arbitral jurisdiction.

Despite its reputation as being controversial, Bridas S.A.P.I.C v. The Government of Turkmenistan[9] is an interesting case illustrating the application of the doctrine in international arbitration.

The facts of the case are not complicated. Bridas, an Argentine company, entered into a long-term joint venture agreement with an entity wholly-owned by the Government of Turkmenistan (the "Turkmenian party") for oil and gas exploitation. In accordance with the joint venture agreement, the parties would share certain revenues from the production. However, after a few years of operation, the Government of Turkmenistan insisted on raising its share of the revenue and subsequently halted the export activities by Bridas. Bridas commenced an ICC arbitration against the Turkmenian party and the Government of Turkmenistan. Following the initiation of the proceedings, the Government dissolved the Turkmenian party that signed the joint venture agreement, replaced it with Turkmenneft, and decreed that all proceeds from oil and gas exports in the country were to be directed to a special fund, the assets of which were immune from seizure.

The arbitral tribunal found that the Government of Turkmenistan, although a non-signatory to the joint venture agreement, was bound by it. Bridas was awarded US$ 495 million against the Government of Turkmenistan and Turkmenneft. The parties then initiated the confirmation and vacatur proceedings in relation to the award in a U.S. court.

In Bridas S.A.P.I.C v. The Government of Turkmenistan, U.S. Fifth Circuit Court held that the Government of Turkmenistan was a proper party in the underlying arbitration, despite the fact that it never signed the arbitration agreement nor was defined as a "party" in the joint venture agreement. The court concluded that the Government had acted as the "alter ego" of the Turkmenian party later replaced with Turkmenneft, and therefore the piercing of the corporate veil of the company was justified.

The tests to be applied in corporate veil-piercing theory to bind the Government of Turkmenistan to an arbitration agreement between Turkmenneft and Bridas were elaborated in detail. The court confirmed the two-prong test for applying the corporate veil-piercing doctrine, i.e., the injustice test and the control test. Addressing the injustice test, the court reasoned that the Government's replacement of the Turkmenian party with Turkmenneft, a grossly undercapitalized company, as well as the Government's measures to limit its own potential exposure to liability caused injustice to Bridas. The court continued with its analysis of the control test and provided a number of factors to be considered in determining the satisfaction of the test. These factors included:

1) whether the parent and subsidiary have common stock ownership;

2) whether the parent and subsidiary have common directors or officers;

3) whether the parent and subsidiary have common business departments;

4) whether the parent and subsidiary file consolidated financial statements;

5) whether the parent finances the subsidiary;

6) whether the parent affected the incorporation of the subsidiary;

[9] Bridas S.A.P.I.C v. Government of Turkmenistan (2006), 447 F. 3d 411.

7) whether the subsidiary operated with grossly inadequate capital;

8) whether the parent pays the salaries and other expenses of the subsidiary;

9) whether the subsidiary receives no business except that given by the parent;

10) whether the parent uses the subsidiary's property as its own;

11) whether or not the daily operations of the parent and subsidiary are kept separate;

12) whether or not the subsidiary observes corporate formalities;

13) whether the directors of the subsidiary act in the primary and independent interest of the parent;

14) whether other parties pay or guarantee the debts of the subsidiary;

15) whether the parent deals with the subsidiary at arm's length;

16) in the case of a state-owned entity, whether state legislation and case law view the entity as an arm of the state;

17) the source of the subsidiary's funding;

18) the subsidiary's degree of autonomy;

19) in the case of a state-owned entity, whether the entity is concerned primarily with local, as opposed to statewide, problems;

20) whether the subsidiary has the authority to sue and be sued in its own name; and

21) whether the subsidiary has the right to hold and use property[10].

Despite the detailed list of factors to bear on the facts of the case, the weight of each factor may vary case by case. In Bridas S.A.P.I.C v. The Government of Turkmenistan, while the factors on corporate formalities indicate the separateness of legal personalities, the court focused extensively on the financial factors, such as the grossly inadequate capitalization of Turkmenneft, the absence of any financial statement or balance sheet of the company and the fact that its revenues were diverted into a fund that also collected revenue from other state-owned entities.

The usage of corporate veil-piercing theory to compel a non-signatory to arbitrate remains limited and is used in exceptional circumstances. The main reason for this is that the corporate veil-piercing is an exception to the general rule of limited liability, providing an equitable remedy in circumstances where adhering to the general rule would result in gross injustice. However, the liberal application of the doctrine would undermine the commercial expectation of shareholders, i.e., limited risk for equity investors. Therefore, a considerably stringent standard should be utilized in order to balance the shareholders' expectations and the attainment of justice.

IV. Corporate Veil-Piercing under Mongolian law

The basic principle of the corporate form of limited liability and exceptions to the principle are provided in Section 9 of the Company Law of Mongolia, adopted on 6 October 2011. With respect to corporate veil-piercing, Article 9.5 of the Company Law states that "[I]f it is not possible to distinguish the property and property rights contributed to a company by a shareholder from other property and property rights of such shareholder, such shareholder shall be liable for the company's debts to the extent of the value of all of his/her/its property and property rights." Further, Article 6.6 of the Company Law provides that "if a subsidiary becomes insolvent due to the decision of its parent company, the parent company shall be jointly liable for the debts of the subsidiary".

The Supreme Court of Mongolia provided an interpretation of the meaning of the provision of Article 9.5 in its Resolution No. 27, dated 18 June 2007[11]. It explained that the equity investment by the shareholders must be separated from the personal assets of the shareholders and be recorded on the balance sheet of the company. However, if such

[10] Id, at 359.

[11] Although the Supreme Court Resolution No. 27 provided the interpretations of certain provisions of the Company Law of Mongolia (1998), it contained the same provision as Article 9.5 of the Company Law of Mongolia (2011).

separation has not been achieved, all assets of the shareholders will be regarded as the company's assets and can be used in settling the debts and liabilities of the company[12].

Mongolian law provides a somewhat broad test for piercing the corporate veil. While common law requires a two-prong test, i.e., the control test and injustice test, that involves careful consideration of a number of factual factors, the Mongolian law takes a substantially different approach. The only tests prescribed by Mongolian law appear to be (i) where the shareholder of a company is another company, the insolvency test, and such insolvency being caused by the shareholder's decision; or (ii) whether there was commingling of assets of the parent and subsidiary. Under those tests, the parent's conduct does not have to involve fraud, injustice or wrongdoing. With respect to the test provided in Article 9.5 of the Company Law, it appears not to require any level of control or dominance by the concerned shareholder exerted over the subsidiary. Instead, a simple mixing of assets would be sufficient to discard the separateness of legal personalities. The implication is that even a minority shareholder who fails to separate its own assets from those contributed to the company could be liable for the debt of the company to the extent of all of its assets. In the absence of any additional criteria to be established in practice, the test presents a considerably loose approach in disregarding the corporate form of limited liability. A potential ramification of such a loose test is that it increases the liability of shareholders and may lead to a decrease in investment activity by risk-averse investors.

Studies on the exact test for and application of corporate veil-piercing theory in the practice of Mongolian law are extremely limited. Further, publicly-available court judgments on this issue are not abundant and therefore it is difficult to assess how the doctrine is used in judicial practice. In a dispute between Golomt Bank against Khet LLC, the first instance court analyzed whether the sole shareholder and other affiliated entities of Khet LLC should be liable for the debts of the company[13]. Although the grounds for alleging the affiliated entities' liability were based on certain guarantee arrangements, the claimant's argument on holding the individual shareholder of Khet LLC liable for the company's debt was based on the failure to separate the assets of the shareholder from those of the company in accordance with Article 9.5 of the Company Law. The claimant supported its argument by way of presenting several factors, among others, the fact that (i) the concerned shareholder is the sole shareholder of Khet LLC and other affiliated companies; (ii) the sole shareholder exercised the management of these companies solely; (iii) the balance sheets of the companies are not separated in full; (iv) the funds and assets to be used for repaying the loan extended by the claimant Golomt Bank were not distinguishable as between the companies; and (iv) the companies all shared the same physical address.

In rendering its decision, the district court accepted the fact that the sole shareholder of Khet LLC himself had established a separate company, Khet Motors LLC, but that the assets contributed by him to Khet Motors LLC's share capital was immovable property owned by Khet LLC. Despite such acknowledgment, the court continued in its reasoning that "[T]he fact the Mr. A. Gantumur is the sole shareholder of Khet LLC and the fact that he exercises the management power of the company solely should not be a ground to establish that his personal assets and the company's assets are indistinguishable."[14],

The reasoning of the judgment on this point is not particularly detailed nor clear, and therefore the exact criteria for determining whether there has been a commingling of assets within the meaning of Article 9.5 of the Company Law remains vague. At most, the judgment confirms that the corporate veil-piercing under Mongolian law solely focuses on the financial separateness of legal persons, and the factors relating to control

[12] The Supreme Court of Mongolia, Resolution No. 27 (18 June 2007), "Interpreting Certain Provisions of the Company Law of Mongolia", para. 14.

[13] District Court Judgment No. 637, dated 23 January 2015

[14] Id, p. 22.

and dominance by the shareholder over the subsidiary would not be considered to any great extent, if not at all.

There is no publicly-available arbitration case that involves the application of corporate veil-piercing under Mongolian law, although this is no surprise as the jurisprudence of the corporate veil-piercing itself has not been discussed extensively in Mongolia. However, as discussed above, the test under Mongolian law in disregarding the limited liability exhibits a contrasting approach to that under common law. Therefore, exactly how the corporate veil-piercing under Mongolian law would be understood and applied especially in international arbitration proceedings in light of the reasonable expectation of the business community remains to be seen.

V. Conclusion

The corporate veil-piercing theory is an exception to the corporate form of limited liability, and it is designed to provide an equitable remedy to those injured by the abuse of limited liability. The concept is used in the context of arbitration in order to compel a non-consensual and non-contractual party to arbitrate disputes relating to its subsidiary. As it is an exception, not a general principle, the common law approach provides a stringent standard and clear guidance in determining the circumstances that justify the piercing of the corporate veil.

In contrast, the Mongolian law approach in relation to the exception to limited liability focuses on the commingling of assets of the shareholder and its subsidiary, and the exact criteria applied in practice remains unclear. In disregarding the corporate form, unlike common law, the Mongolian law approach does not appear to give regard to factors relating to the commitment of injustice, and the manipulation and abuse of the subsidiary by the shareholder. Since the Mongolian law adopts substantially different criteria, it may cause tension in respect of how the concept of the corporate veil-piercing should be applied to a case with international elements. As the number of international arbitration cases that involve Mongolian parties increase, constructive and comprehensive discussions and studies on the corporate veil-piercing theory under Mongolia law would be welcomed.

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THE ELECTRONIC GOVERNMENT POLICY PROCESS OF MONGOLIA: A HISTORICAL APPROACH

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1. Introduction

This paper aims to analyze the policy-making process of the electronic government policy of Mongolia in Kingdon's multiple streams framework (KMSF). In the scope of analyzing a policy-making process, the paper briefly states the policy-making process of the electronic government policy for understanding the Mongolian situation at first and covers an examination of the policy-making process in cases of the electronic government strategy since 2000. The Government of Mongolia (GoM) established the Communications and Information Technology Authority (CITA) in 2004. The main mission of the agency is to develop e-government policies and then to execute them throughout the country. The national programs, developed by the CITA, "Electronic Mongolia National Program" and "e-Government National Program" were as key policy documents for e-government initiative.[1]

What is the electronic government? Brown and Brudney defined electronic government as "the use of technology, especially web-based applications to enhance access to and efficiently deliver government information and services"[2], while Jaeger and Thompson defined it as "the provision of government information and services through the Internet to citizens and businesses and among government agencies"[3]. Also, the United Nations (UN) described it as "utilizing the internet and the world-wide-web for delivering government information and services to citizens".[4]

Basically, Mongolian electronic government initiatives had been under the three dynamics including a modernization of civil services, bureaucracy, and corruption in governmental institutions. On the other hand, the purpose of electronic government reform was to establish a smart government that had both skilled personnel and technological capacity for delivering public services. An issue related to transferring the government services into electronic services has moved to an institutional agenda because it has gathered the attention of citizens and politicians.[5] Therefore, for improving cooperation between government organizations and citizens, the government must adopt Information and Communication Technology (ICT) innovation for introducing electronic public services. Consequently, the electronic government policy can contribute to improving shared

[1] Sambuu, Uyanga, Uranchimeg Tudevdagva, and Ganbold Erdene. "E-governance initiatives in Mongolia." In Proceedings of the 2nd international conference on Theory and practice of electronic governance, pp. 474-477. ACM, 2008.

[2] Brown, Mary M., and Jeffrey L. Brudney. "Achieving advanced electronic government services: An examination of obstacles and implications from an international perspective." In National Public Management Research Conference, Bloomington, IN, vol. 2, pp. 143-49. 2001.

[3] Jaeger, Paul T., and Kim M. Thompson. "Social information behavior and the democratic process: Information poverty, normative behavior, and electronic government in the United States." Library & Information Science Research 26, no. 1 (2004): 94-107.

[4] Benchmarking E-government: A Global Perspective. United Nations, 2002, Retrieved from https://publicadministration.un.org/egovkb/portals/egovkb/documents/un/-english.pdf.

[5] Birkland, Thomas A. An introduction to the policy process: Theories, concepts, and models of public policy making. Routledge, 2015.

prosperity and eliminating poverty in society.

For understanding an explanation of the policy-making process, the multiple streams framework was applied; hence, I am going to explain what were comprised of three independent and separate streams, and what happened after the convergence of three streams (what policy change was made?). Therefore, using multiple streams theory and empirical evidence of the policy-making process of the digital government initiative, the case will be interpreted for an insightful analysis. The policy documents of digital government programs, dedicated statutes, and research papers are scrutinized for the case study.

The rest of the paper is arranged into the following parts: the second part briefly discusses the Electronic Government strategy. The third section explains the phases of the policy-making process, while the fourth section reviews Kingdon's Multiple Streams Framework used in this paper. Problems, policies, and politics of the electronic government strategy and policy windows and entrepreneurs are discussed in sections five and six, respectively. Finally, the conclusion is provided in the last part.

2. Electronic Government strategy

In this section, I try to review the electronic government strategy of Mongolia briefly.

Sandwiched between Russia and China, and landlocked country, Mongolia has a vast territory and a small population. One-third of the population are nomads,[6] and half of them live in the capital city. Delivering public services in a hybrid society is challengeable; therefore, the use of ICT is vital for overcoming the challenge.[7] Fortunately, ICT readiness of Mongolia has been prepared well regarding equipment.

Historically, an initiative of the electronic government started early 1990's and the legal environment improved several times.[8] Since 2000, the parliament and the government have intensively paid attention to the electronic government initiative by adopting laws, regulations, strategies, and programs.[9] In particular, the parliament enacted "Law on e-signature (2011)" and "Law on Information right (2011)", and the government approved "Concept on ICT Development for Mongolia (2000-2010)", "e-Mongolia National Program (2005-2012)", and "e-Government Master Plan of Mongolia (2012-2016)" policy documents (NDI, 2014).

Concepts in ICT policy document revolve around three main frameworks: "government-legislation framework, business-economy framework, and people-society framework".[10] The policy for ICT was to form the knowledge-based society by developing ICT usage in social departments.[11] "e-Mongolia National Program" approved by the government in 2005 contained several main goals, such as enhancing the legal environment, decreasing a lack of Internet penetration rate and a service tariff, and encouraging the extension of the Internet in households, etc.[12] For enhancing the legal environment, the major laws have to be amended, and a new law on electronic government has to be drafted according to concepts of electronic government.[13] Unfortunately, there were some barriers to these activities; for instance, altering the major laws was burdensome, and the action might need a tremendous effort into the parliament by political leaders.

The Internet subscribers are divided into three groups along with location: 23 percent in a rural area, 40 percent in a suburban area,

[6] Warf, Barney. E-Government in Asia: Origins, Politics, Impacts, Geographies. Chandos Publishing, 2016.

[7] Ulziikhutag, M. O., & Sukhbaatar, M. S. e-Government Key Challenges to Enhance Citizen Participation, 2006.

[8] CITA (Communication and Information Technology Authority of Mongolia). White Paper (Annual report), Issued in 2017, Ulaanbaatar, Mongolia.

[9] Sambuu, Uyanga, Uranchimeg Tudevdagva, and Ganbold Erdene. "E-governance initiatives in Mongolia." In Proceedings of the 2nd international conference on Theory and practice of electronic governance, pp. 474-477. ACM, 2008.

[10] Ibid.

[11] Ibid.

[12] Sambuu, Uyanga, Uranchimeg Tudevdagva, and Ganbold Erdene. "E-governance initiatives in Mongolia." In Proceedings of the 2nd international conference on Theory and practice of electronic governance, pp. 474-477. ACM, 2008.

[13] Research on e-government legislation in recent days, National Development Institute, 2014, Ulaanbaatar, Mongolia.

and 37 percent in an urban area.[14] "Concepts of sustainable development of Mongolia - 2030" approved by the parliament in 2016 consisted of three main phases of electronic government development.[15] The first phase (2016-2020) represented that "Provide high-speed internet connection for 70 percent of the population, enforce the same price/ tariff across all territories, and increase the information flow speed running through the high-speed network connecting Asia and Europe by 10 times."[16] However, fixed broadband access has been introduced in urban areas and some rural areas. Expanding it in suburban areas has been greatly reliant on the urbanization; therefore, the CITA inferred that "expecting the urbanization to speed up and telecom businesses to follow and invest in fixed Internet infrastructure in those areas is beyond our wildest dreams".[17]

In general, the electronic government policy could not be implemented completely because of social and economic factors, especially, the definition of solutions for providing government services to the public using ICT. Mongolian electronic government development index has decreased in world rank since 2010. According to reports of the United Nations e-Government Development Index, Mongolia was in 53rd place in 2010 and dropped to 84th place within six years by 2016.[18]

3. Phases of the policy-making process

The policy process consists of six stages according to Lasswell's stage model: "problem formation, formulation, adoption, implementation, and evaluation".[19] But this model has some shortages such as explaining the policy-making process discretely, relating to a rational decision-making model closely etc. Kingdon expanded the utilization of the garbage can model to the government for policy formation analysis and his model considers the policy-making beneath conditions of ambiguity.[20] It is common that policy-makers study problems incompletely and make decisions based on invalid information in a short-range. Even though policy-makers have to make a decision on behalf of the public, they do it in their personal view, belief, and experience.[21]

Monteverde argues that the agenda-setting process is a complex stage because many dissimilar factors have to be supposed for explaining why problems excluded and included from the agenda-setting at the same time with the approval of policy changing. He also emphasizes that the pre-decision processes such as the setting of the agenda and the specification of alternatives.[22]

4. Kingdon's Multiple Streams Framework

This section reviews Kingdon's multiple streams framework.

In 1984, Kingdon suggested a multiple streams model that describes the convergence of three streams ("the problem stream", "the policy stream", and "the politics stream") run via their respective paths in the policy-making process.[23] If three streams meet at the certain time, "a window of opportunity" opens for

[14] CITA (Communication and Information Technology Authority of Mongolia). White Paper (Annual report), Issued in 2017, Ulaanbaatar, Mongolia.

[15] Ibid.

[16] Mongolia Sustainable Development Vision 2030, The parliament, 2016, Retrieved from https://www.un-page.org/files/public/20160205_mongolia_sdv_2030.pdf, p.21.

[17] CITA (Communication and Information Technology Authority of Mongolia). White Paper (Annual report), Issued in 2017, Ulaanbaatar, Mongolia.

[18] United Nations Public Administration Country Studies 2010-2016, "UN E-Government Survey", Retrieved March 5th 2018, from https://publicadministration.un.org/-egovkb/en-us/Global-Survey.

[19] Nakamura, Robert T. "The textbook policy process and implementation research." Review of policy Research 7, no. 1 (1987): 142-154, p.142.

[20] Monteverde, Federico. "The Process of E-Government Public Policy Inclusion in the Governmental Agenda: A Framework for Assessment and Case Study." In Systems Thinking and e-Participation: ICT in the Governance of Society, pp. 233-245. IGI Global, 2010.

[21] Dorjbat. Public policy, Retrieved March 10th, 2018, from http://dorjbat.blogspot.jp/2007/12/blog-post_03.html.

[22] Monteverde, Federico. "The Process of E-Government Public Policy Inclusion in the Governmental Agenda: A Framework for Assessment and Case Study." In Systems Thinking and e-Participation: ICT in the Governance of Society, pp. 233-245. IGI Global, 2010, p.236.

[23] Bŭland, Daniel, and Michael Howlett. «The role and impact of the multiple-streams approach in comparative policy analysis.» (2016): 221-227.

policy changes.[24] The window of opportunity gives actors a chance of putting their problem solutions into the decision making agenda.[25] In other words, policy advocates spend their time and power for increasing their opportunity to put their ideas on the decision making agenda. They try to participate in both "problem stream" and "the policy stream" quickly when the window of opportunity opens.[26]

KMSF is an extended version of the Garbage Can Model developed for a circumstance that has "multiple actors, objectives, and views" and it facilitates an understanding of the decision-making process in an ambiguous circumstance.[27] KMSF makes this concept larger to the government level and how and why certain policy issues move onto a government's agenda while others do not.[28]

There is no such thing as perfect! Similarly, the multiple stream framework is not the full analytical framework. Sabatier claims that Kingdon's framework has one common criticism that Kingdon did not try to examine the framework in the cases of the countries except the United States.[29] He also recommended that it should be the framework improved for Eastern specificity in the theoretical and empirical way. It is obvious that the political systems of some Asian countries are different in social structure, culture, history, and political ideology from those in the United States. Therefore, the multiple stream framework in its contemporary version is not fully compatible to accommodate Asian politics.[30] Stout and Stevens state another weakness of the framework that the multiple stream framework did not adequately cover the media effects.[31]

5. Problems, policies, and politics of the electronic government strategy

Here are considerations of the three streams in detail with the electronic government strategy of Mongolia.

5.1. A stream of problems

Kingdon argues that government officials and other people who are around the government can define problems derived from conditions in some ways.[32] The first two ways are "violate important values are transformed into problems" and "conditions become problems by comparison with other countries".[33] Furthermore, he claims that the problem cycle has to be in government attention. In Mongolia, the e-government national programs, "e-Mongolia" and "e-Government of Mongolia", were adopted for being solutions to some major issues related to the electronic government initiatives.

First, for enhancing transparency, reducing bureaucracy, and eliminating corruption, the government organizations need to provide their information and services to the public via the Internet.[34] The citizens always complain about the difficulties of delivering the services and obtaining information of the government organizations on the Internet. For instance, the National University of Mongolia took a survey to assess the State registration services in 2011.[35] The result of the survey analysis illustrated that the government needs to: be responsible, transfer possible services into online, use a one-stop platform for improving their customer services, and remove its burden.[36]

[24] Kingdon, John W. Agendas, alternatives, and public policies, 2003, New York: Longman.

[25] Cordoba-Pachyn, Jose Rodrigo, and Alejandro Elias Ochoa-Arias. "Systems Thinking and E-Participation: ICT in the Governance." (2010).

[26] Chow, Anthony. "Understanding policy change: multiple streams and national education curriculum policy in Hong Kong." Journal of Public Administration and Governance 4, no. 2 (2014): 49-64.

[27] Ibid.

[28] Sabatier, Paul A. "The need for better theories." Theories of the policy process 2 (1999), p.83.

[29] Ibid.

[30] Chow, Anthony. "Understanding policy change: multiple streams and national education curriculum policy in Hong Kong." Journal of Public Administration and Governance 4, no. 2 (2014): 49-64.

[31] Stout, Karen Evans, and Byron Stevens. "The case of the failed diversity rule: A multiple streams analysis." Educational evaluation and policy analysis 22, no. 4 (2000): 341-355, p.352.

[32] Kingdon, John W. Agendas, alternatives, and public policies, 2003, New York: Longman, p.198.

[33] Ibid.

[34] E-government national program 2012, Government of Mongolia, Retrieved March 8th, 2018, from http://www.legalinfo.mn/annex/details/6019?lawid=9465.

[35] To Mongolia for a Smart government project, MN: SMART Government, The World Bank, 2014, Retrieved March 9th 2018, from http://projects.worldbank.org/P130891?lang=en.

36 Ibid.

Second, for increasing allotment of high-speed broadband access, the government has to support Internet service provider companies with specific projects, such as universal obligation funds.[37] During the past decade, there has been a huge migration to the cities from rural areas because of a lack of economic factor and poverty in rural. It has affected the expansion of the suburban area in Ulaanbaatar and other cities that have a good economic climate.[38] In order to deal with this issue, investing for extension of fixed broadband access infrastructure in those areas is inevitably for implementing "Universal obligation funds policy".

Third, reaching the level of electronic government development of the world was defined in most of the programs as the main achievement. For instance, "e-Mongolia" national program emphasized the other countries' programs, such as Japanese "e-Japan" program, Singaporean "Smart island" project, Malaysian "Multimedia super corridor" program, and South Korean "Infrastructure of Information",[39] etc., while "e-Government" national program stated drawing lessons from the United States, German, South Korea, Malaysia, Japan, New Zealand, and India. Hence, the electronic government development programs could be formulated in the international tendency.

5.2. A stream of the politics

The political stream involves two types of players: politicians who can feel "national mood" and influence to specific policy formation by their political activities and specialists who can participate in making alternatives in the policy stream.[40] In fact, Mongolia faced a lack of leadership in the management of ICT in the public sector because the concept of electronic government was new for major politicians.[41] In 2004, the government established a key organizer of ICT in the public sector as the CITA.[42] From this time, the organization has drafted the sectoral policy, program, and law, and has executed programs, policies, and laws under the auspice es of the Prime minister.[43]

In 2013, Mongolian president declared a reform that "from big government to smart government". His will was to form the government equipped with technological advances, the appropriate legal framework, and skilled personnel.[44] He could perceive "the national mood" because the citizens had extensively criticized the huge governmental structure and economic crisis during his presidential term. Consequently, the Smart Government Project in Mongolia (2014-2020) started to implement for improving accessibility, transparency, and efficiency of public services in Mongolia using ICT funded by the World Bank.[45] Besides, another important actor who is the Minister of Finance can represent an impact on ICT policy-making process by allowing the allocation of the budget according to the Law on budget and investment funds.

Moving on now to consider specialists ("hidden participants") who work for interest groups of the electronic government policy-making process. According to Kingdon, hidden actors involve "academics, researchers, consultants, career bureaucrats, congressional staffers, and analysts".[46] In terms of research about electronic government policy, a few scholars and consultants conducted studies. For instance, Ulziikhutag implied that

[37] E-government national program 2005, Government of Mongolia, Retrieved March 10th, 2018, from http://www.legalinfo.mn/annex/details/2122?lawid=8347.

[38] Mayer, Benoot. "Managing "Climate Migration" in Mongolia: The Importance of Development Policies." In Climate Change in the Asia-Pacific Region, pp. 191-204. Springer, Cham, 2015.

[39] E-government national program 2005, Government of Mongolia, Retrieved March 10th, 2018, from http://www.legalinfo.mn/annex/details/2122?lawid=8347.

[40] Kingdon, John W. Agendas, alternatives, and public policies, 2003, New York: Longman.

[41] Ulziikhutag, O. Adaptability of e-government policy in Mongolia: comparative study with Japan. Awarded theses, 2006, The World Bank, 89-104.

[42] CITA (Communication and Information Technology Authority of Mongolia). White Paper (Annual report), Issued in 2017, Ulaanbaatar, Mongolia.

[43] Ibid.

[44] Secret to smart government, 2013, Retrieved March 10th 2018, from: http://ubpost.mongolnews.mn/?p=6954.

[45] To Mongolia for a Smart government project, MN: SMART Government, The World Bank, 2014, Retrieved March 9th 2018, from http://projects.worldbank.org/P130891?lang=en.

[46] Kingdon, John W. Agendas, alternatives, and public policies, 2003, New York: Longman, p. 200.

citizens' participation, human development, security, and digital divide were the main challenges,[47] while Sambuu, Tudevdagva, and Erdene claimed that the initiative was the main challenge for Mongolia in e-governance.[48] Besides, stakeholders of ICT companies try out suggestions to develop electronic government policy in different ways, such as to lobby parliament members and ministers, to criticize current policies, and to introduce technological innovations to the public, etc. Above mentioned participants can be identified as in the following table:

Table 1. Participants in the case of Mongolia

	Actors	Influence	Resources
Governmental Sphere	President of Mongolia	Agenda	President is protected by the Constitution Law
	Prime Minister	Agenda Create alternatives	Prime Minister is supported by the parliament
	IT council	Agenda Create alternatives	Directly advising to the Prime Minister
	Ministry of Finance	Create alternatives	Allocating budget
	Communications and Information Technology Authority	Agenda Create alternatives	Drafting policy documents related to ICT, and implementing policies
Non-governmental Sphere	Scholars	Create alternatives	Research
	ICT companies	Create alternatives	Economic and technological resources
	International organizations	Create alternatives	Economic resources and research

Note. Reprinted [adapted] from "The Process of E-Government Public Policy Inclusion in the Governmental Agenda: A Framework for Assessment", by F. Monteverde, 2009, Systems Thinking and E-Participation: ICT in the Governance of Society: ICT in the Governance of Society, 237. Copyright 2010 by "IGI Global".

5.3. A stream of the policy

Kingdon stated that "policy primeval soup" consists of some initiatives, combinations of ideas, and modified proposals around the policy league as being alternatives.[49] During the transition era, Mongolia had quickly adapted into the market economy from the planned economy, but the huge public institution with bureaucratic staffs was transferred from the previous political system; therefore, the first main challenge was the reconstruction of the public institution.[50]

As mentioned above in the problem stream section, electronic government policies were adopted as solutions for reducing the bureaucracy of the public institution and corruption in government services and intensifying the modernization of the governance. In the scope of initial electronic government policies, some activities were implemented; in particular, the national ICT Council was formed, and a government LAN established between 27 agencies in 1997. Laws on telecommunications, patent, and copyright were approved in 2001. Also, the CITA was established in 2004, and "e-Mongolia" program was released to support ICT usage in 2005.[51]

Ulziikhutag and Sukhbaatar argued that the parliament needs to approve several law amendments for enhancing the legal framework of electronic government.[52] After the parliamentary election in 2004, the bundle of laws (Basic IT Law, Electronic governance Law, Electronic Signature Law, and the Electronic Transactions Law) shaped by the CITA were submitted to the parliament.[53] But, approvals of these laws required modifications of some major laws, such as the Civil Code, Banking Law, Law on Taxation, and Customs and Consumer Protection Law in force.[54]

[47] Ulziikhutag, O. Adaptability of e-government policy in Mongolia: comparative study with Japan. Awarded theses, 2006, The World Bank, 89-104.

[48] Sambuu, Uyanga, Uranchimeg Tudevdagva, and Ganbold Erdene. "E-governance initiatives in Mongolia." In Proceedings of the 2nd international conference on Theory and practice of electronic governance, pp. 474-477. ACM, 2008.

[49] Kingdon, John W. Agendas, alternatives, and public policies, 2003, New York: Longman, p. 200.

[50] World Governance Survey in Mongolia, United Nations University, 2002, Retrieved March 10th 2018, from: http://www.unu.edu/p&g/wga/country/Mongolia.pdf.

[51] Warf, Barney. E-Government in Asia: Origins, Politics, Impacts, Geographies. Chandos Publishing, 2016.

[52] Ulziikhutag, M. O., & Sukhbaatar, M. S. e-Government Key Challenges to Enhance Citizen Participation, 2006, p. 2.

[53] Ibid.

[54] Ibid.

Policy windows and entrepreneurs

The three lines of the streams are laid on one line when the appropriate moment comes at the right time. At this time, the policy window opens for policy supporters and allows them to put their resolution to policy agenda settings.[55]

In the politics stream, the main entrepreneurs who educated in the United States and other western countries participated in the policy making process of electronic government intensively.[56] Their foremost activities were to establish an ICT agency under the Prime Minister and to sign an agreement of cooperation with the South Korean Industry Promotion Agency (KIPA) for making e-governance programs.[57]

In the problem stream, the entrepreneurs suggested solutions to the problems in detail to the government.[58] Besides, they considered that the electronic government was the gate to enhance government services and to supply transparent of the government actions.[59]

In the policy stream, the CITA formulated the electronic government master plan with the South Korean KIPA.[60] The parliament discussed the amendments of major laws and the government approved "e-Mongolia" National Program that covered "e-government", "e-education", "e-health", and "e-commerce" subroutines.[61]

In the end, because the entrepreneurs had enough power in both the parliament and the government, they had successfully used the moment of opening of the "policy window".

6. Conclusion

In conclusion, the government accepted the significance of the electronic government by solutions to several main challenges including bureaucracy and corruption of the government organizations, infrastructure for the government services, and modernization of the governance. Bringing up the challenges at the right level of the government attention might be depended on political actions supported by the powerful players who have known the way of solutions. Thus, analyzing the policy-making process under KMSF, the policy-making process has become more comprehensible. In this case, the application of the Kingdon's multiple streams model seems to be likely to analyze because the political system of Mongolia is similar to that of the United States and other democratic countries.

In the case of the electronic government policy-making process in Mongolia, three main problems emerged initially. For instance, equipping the government with ICT achievements, diminishing the burden of the government, and increasing ICT literacy. But there were not many people who worried about the problems. In the early 2000s, education of Information technology was not common among citizens, even among politicians. The intersection of three streams happened in the second half of 2000s. Consequently, the electronic government programs were released, and the implementation of those policies started with a wide range and a long span.

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COMPARATIVE RESEARCH ON TRANSFER PRICING REGULATION

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KEY WORDS

Transfer pricing, related party/ies/, transfer pricing methods, local file, master file and country-by-country reporting.

Abstract

Within a framework of adoption of revised Tax laws of Mongolia, the transfer pricing is regulated in detail as compared with existing methodology to define actual price under Order of the Minister of Finance. Additionally, the new documentation requirements on transfer pricing are introduced and will become effective from 01 January 2020. As transfer pricing reports are totally new to the Mongolian companies which are a subsidiary of multinational enterprise and it shall submit the report if it meets the threshold of revenue to submit the reports on transfer pricing.

I expect that this comparative research will add knowledge about the general understanding of transfer pricing methods, its legal requirement on reporting and liability of non-compliance of the lawyers, taxation consultants, tax researchers, business owners, and readers. The research paper is used comparison method and compared regulation on transfer pricing of the Organization of Economic Co-operation and Development(hereinafter "OECD"), the Republic of Kazakhstan and Mongolia.

Overview

Transfer pricing means a price at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises. The growth of multinational enterprise (hereinafter "MNEs") presents increasingly complex taxation issues for both tax administrations and the MNEs themselves since separate country rules for the taxation of MNEs cannot be viewed in isolation but must be addressed in a broad international context.

Transfer prices are significant for both taxpayers and tax administrations because they determine in large part the income and expenses, and therefore taxable profits, of associated enterprises in different tax jurisdictions. Transfer pricing issues originally arose in a transaction between associated enterprises operating within the same tax jurisdiction.

Arm's length principle, which is the international transfer pricing standard that OECD member countries have agreed and should be used for tax purposes by MNE groups and tax administrations. Arm's length principle means conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly. The arm's length principle provides a broad parity of tax treatment for

members of MNE groups and independent enterprises. Because the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity. In so removing these tax considerations from economic decisions, the arm's length principle promotes the growth of international trade and investment[1].

Mongolian Ministry of Finance and Tax Administration recently introduced new rules for transfer pricing (hereinafter "TP") by the General Taxation Law, Corporate Income Tax and its associated guidelines. The new regulations defined the term of transfer pricing broadly, introduced analysis methods, documentation requirements, reporting requirements, penalties for non-fulfillment of the obligation, threshold and exemptions under Law on Corporate income taxation. The revised law on Corporate income taxation shall take effect on 1 January 2020.

TP rules will apply to virtually all types of transactions between related parties. The transaction between related parties shall be conducted on an arm's length principle. If the parties failed on it, the tax authorities entitled to seek an adjustment of the transaction to fair market value.

We have compared newly adopted regulation on transfer pricing under laws of Mongolia which will be effective from 01 January 2020 and Law on Transfer pricing of the Republic of Kazakhstan which became effective from 01 January 2009 on basis of OECD guidelines on TP.

Definition of related parties

According to Article 9.1 of the Model Tax Convention of OECD, two enterprises are associated or related enterprises with respect to each other if one of the enterprises meets the following condition: Where

1. An enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

2. The same participate directly or indirectly in the management, control or capital of enterprise of Contracting State and an enterprise of the other Contracting State, and in

either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Republic of Kazakhstan

According to Article 11 of Law of the Republic of Kazakhstan on TP, individuals and legal entities with specific interrelations that affect the economic results of deals between them shall be recognized as related parties. Such specific interrelations include the following conditions:

1. One party is recognized as an affiliate of the other party;

2. A party is a major shareholder, a major participant (owing 10 or more percent of a participation interest or voting shares) in a transaction party;

3. A party is related to a transaction party through an agreement including property trust, whereby it is entitled to determine the decisions made by a trust manager;

4. A property owner is related to a party, to which one or more of the property owner's powers have been assigned with regard to this property (possession, use, disposal), including under a trust agreement, whereby the owner is entitled to determine the decisions to be made by that party;

5. A party is an official person of a transaction party or a legal entity mentioned

[1] OECD Transfer pricing guidelines for multinational enterprises and tax administration – 2017.

in subparagraphs 2, 3, 6, 10 of this Article, except for an independent director;

6. A legal entity is controlled by a party being a major shareholder, major participant or an official person of a transaction party;

7. A legal entity, with respect to which a party being a major shareholder, major participant or an official person of transaction party is a major shareholder, major participant, that has a right to appropriate part of the property;

8. A legal entity, with respect to which a transaction party is a major shareholder, major participant, that has a right to appropriate part of the property;

9. A legal entity together with a transaction party is under the third party control;

10. A party independently or together with its affiliate owns, uses, disposes of 10 or more percent of voting shares or participation interest in a transaction party or a legal entity mentioned in subparagraphs 2, 3, 6, 9 of this Article;

11. An individual is in an immediate relationship (parent, son, daughter, adoptive parent, adoptee, brother, sister, grandmother, grandfather, grandchildren), as well as is an in-law relative (brother, sister, parent, son or daughter of a spouse) of an individual, who is a major shareholder, major participant or an official person, except for an independent director, of a transaction party;

12. Two trust managers are related if a trust founder under both trust agreements is the same person and has the possibility to determine their decisions;

13. A trust manager and an organization where a trust founder is a major shareholder or major participant (owing 10 or more percent of voting shares or participation interest), if the trust founder may determine the decision to be made by the trust manager;

14. A trust manager under one trust agreement and a beneficiary under another trust agreement are recognized related if the trust founder under both trust agreements is the same person that may determine the decision to be made by the trust manager;

15. Transaction parties apply a transaction price, which deviates from a market price in view of the range of prices according to the data of one of the authorized bodies.

Mongolia

TP rules apply to virtually all types of transactions between related parties. Currently, Article 48.4 of Law on General Tax Law /GTL/ provides that related parties shall mean "bodies who are authorized to participate directly or indirectly in the management, control or ownership" of other entities. According to the Article 6.1 of Law on Corporate Income Taxation /CIT/, – if the following relation is present with a taxpayer, it shall be a related party:

1. Who owns 20% or more of the common stock of the other entity; or

2. Who has the right to receive 20% or more of the dividends or distributions from the other entity;

3. Who has the right to appoint 20% or more of the management of the other entity or is otherwise able to determine its policies.

It raises many issues for the TP determination in practice due to diverse definitions found in different laws in Mongolia so we need a more clear definition on the related party as the Republic of Kazakhstan.

New GTL redefined the definition of related parties under Article 27.1 which provides that entities listed below shall be considered to be related parties who are possible to influence each other on the conditions or economic outcome of a transaction by a way of direct or indirect participation, by a person in the other, or the same person in two or more persons, of the assets, control or managerial activities, including:

1. Taxpayer's parents, blood sisters and brothers, grandparents, children and grandchildren; or taxpayer's spouse or partner (cohabitant), or their parents, or their blood sisters and brothers;

2. Members of the same group - A group is further defined in the law as the related persons those which are related in their ownership or management and consolidated for financial reporting purposes.

3. If one person directly or indirectly holds 20% or more of the share, participation or voting rights in other entity;

4. If one person has a right to directly or indirectly participate 20% or more of the profits or liquidation proceeds in other entity;

5. Entities who are controlled by the third same person who directly or indirectly holds 20% or more of the share, participation or voting rights in such entities;

6. Entities who are controlled by the third same person who has a right to directly or indirectly participate 20% or more of the profits or liquidation proceeds in such entities;

7. Entities stipulated in items #3 -6 above if controlled by individuals specified in item #1 i.e., entities in separate groups which are under common control by same individuals;

8. Representatives, nominees or assignees of the parties stipulated in this section;

9. Branch office or other forms of permanent establishments of related parties;

10. An unrelated person with the main purpose of reducing taxable income or increase tax losses of Mongolian tax residents;

11. Other persons are similar to preceding nature.

TP Methods:

Transfer pricing methods (or "methodologies") are used to calculate or test the arm's length nature of prices or profits. Transfer pricing methods are ways of establishing the arm's length prices or profits from transactions between associated enterprises. The transaction between related enterprises for which an arm's length price is to be established is referred to as the "controlled transaction".

Republic of Kazakhstan

Under Article 12 of Law on Transfer pricing, one of the following methods shall be applied to determine a market price:

1. Comparable uncontrolled price method;

2. Cost plus method;

3. Subsequent resale price method;

4. Profit distribution method; and

5. Net margin method. If the comparable uncontrolled price method cannot be applied, one of the methods provided shall apply consecutively.

Mongolia

The transfer pricing adjustment methods are adopted under Appendix 1 of Order No 353 on Approving the methods by Minister of Finance dated 2015 and revised General taxation law(to be effective from 01 January 2020) as follows:

1. Comparable uncontrolled price method;

2. Resale method;

3. Cost plus method;

4. Profit split method;

5. Transactional net margin method;

6. Other methods which are compliant with the principal of transfer pricing.

The Comparable Uncontrolled Price (CUP) method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances. The CUP method may also sometimes be used to determine the arm's length royalty for the use of an intangible asset. CUPs may be based on either "internal" comparable transactions or "external" comparable transactions[2].

For performing the comparability analysis, the controlled transactions and

[2] United Nations Practical Manual on Transfer pricing for Developing countries (2017), United Nations, New York page 196.

uncontrolled transactions should be compared based upon comparability five factors such as characteristics of the property being transferred or services provided, contractual terms, economic circumstances and business strategies.[3]

In cases where comparable uncontrolled transactions can be found, the CUP Method is typically a very reliable method to use in determining whether the terms of commercial and financial transactions between associated enterprises are at arm's length.

The Resale Price Method (RPM) is one of the traditional transaction methods that can be used to determine whether a transaction reflects the arm's length principle. The Resale Price Method focuses on the related sales company which performs marketing and selling functions as the tested party in the transfer pricing analysis[4]. This method analyses the price of a product that a related sales company charges to an unrelated customer to determine an arm's length gross margin which the sales company retains to cover its sales, general and administrative expenses and still make an appropriate profit.

Under this method the transfer price for the sale of products between the sales company and a related company can be described in the following formula:

TP= RSP x (1-GPM), where:

- TP = the Transfer Price of a product sole between a sales company and a related company;
- RSP = the Resale price at which a product is sold by a sales company to unrelated customers;
- GPM= Gross profit margin that a specific sales company should earn, defined as the ratio of gross profit to net sales. Gross profit is defined as Net Sales minus Cost of Goods Sold. [5]

The Resale Price Method is more typically applied on a functional than on a transactional basis so that functional comparability is typically more than product comparability. Product differences will probably be less critical for the Resale Price Method applied on a functional basis than for the CUP Method because it is less probable that product differences will have a material effect on profit margins than on price.

The Cost plus Method (CPM) focuses on the related manufacturing company as the tested party in the transfer pricing analysis in a controlled transaction involving tangible property. The CPM may also be used in the case of services rendered. The CPM is used to analyze transfer pricing issues involving tangible property or services. The CPM focuses on the related party manufacturer or service provider as the tested party in the transfer pricing analysis. The method evaluates the arm's-length nature of an inter-company charge by reference to the gross profit mark-up on costs incurred by suppliers of property (or services) for tangible property transferred (or services provided). It compares the gross profit mark-up earned by the tested party for manufacturing the product or for providing the service to the gross profit mark-ups earned by comparable companies.[6]

The formula for the transfer price in inter-company transactions of products is follows:

TP=COGS x (1+cost plus mark-mark), where:

- TP = the Transfer price of a product sold between a manufacturing company and a related company;
- COGS = the Cost of Goods Sold to the manufacturing company and
- Cost plus mark-up = gross profit mark-up defined as the ratio of gross profit to the cost of goods sold. Gross profit is defined as sales minus cost of goods sold.

[3] Article 5.2.1.1 of Appendix 1 of Order No 353 on Approving the methods by Minister of Finance dated 2015.

[4] United Nations Practical Manual on Transfer pricing for Developing countries (2017), United Nations, New York page 204.

[5] United Nations Practical Manual on Transfer pricing for Developing countries (2017), United Nations, New York page 205.

[6] United Nations Practical Manual on Transfer pricing for Developing countries (2017), United Nations, New York page 216.

These are transactional profit methods, which analyze the profits arising from particular controlled transactions in order to determine whether a transfer price is at arm's length. Transactional profit methods can be divided into two categories; the Transactional Net Margin Method (TNMM) and the Profit Split Method (PSM).

The TNMM examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction (or transactions that are appropriate to be aggregated.

The TNMM looks at the profits of one of the related parties involved in a transaction, as do the Cost Plus Method and Resale Price Method. The party examined is referred to as the tested party. The TNMM compares the net profit margin (relative to an appropriate base) that the tested party earns in the controlled transactions to the same net profit margins earned by the tested party in comparable uncontrolled transactions or alternatively by independent comparable companies. The TNMM is used to analyse transfer pricing issues involving tangible property, intangible property or services.[7]

Several profit level indicators (PLI) are allowed under the TNMM, typically based upon operating profit. PLI is a measure of a company's profitability that is used to compare comparables with the tested party. The three PLI's of return on capital employed (ROCE), operating margin (OM) and return on total cost (ROTC) are most used in practice.

An OM is typically used for marketing, sales and distribution activities and full cost plus, ROCE and ROA are typically used for manufacturing activities. The ROA and ROCE divide operating profit by a balance sheet figure.

The Profit Split Method is typically applied when both sides of the controlled transaction contribute significant intangible property. The profit is to be divided such as is expected in a joint venture relationship. The Profit Split Method seeks to eliminate the effect on profits of special conditions made or imposed in a controlled transaction (or in controlled transactions that it is appropriate to aggregate) by determining the division of profits that independent enterprises would have expected to realize from engaging in the transaction or transactions.[8]

There are generally considered to be two specific methods to allocate the profits between the associated enterprises: contribution analysis and residual analysis.

Under the contribution analysis, the combined profits from the controlled transactions are allocated between the associated enterprises on the basis of the relative value of functions performed by those associated enterprises engaged in the controlled transactions.

Under the residual analysis the combined profits from the controlled transactions are allocated between the associated enterprises based on a two-step approach:

Step 1: allocation of sufficient profit to each enterprise to provide basic arm's length compensation for routine contributions. This basic compensation does not include a return for possible valuable intangible assets owned by the associated enterprises. The basic compensation is determined based on the returns earned by comparable independent enterprises for comparable transactions or, more frequently, functions. In practice, TNMM is used to determine the appropriate return in Step 1 of the residual analysis; and

Step 2: allocation of residual profit (i.e. profit remaining after Step 1) between the associated enterprises based on the facts and circumstances. If the residual profit is attributable to an intangible property then the allocation of this profit should be based on the relative value of each enterprise's contributions of the intangible property.

The Profit Split Method might be used in cases involving highly interrelated transactions that cannot be analysed on a

[7] United Nations Practical Manual on Transfer pricing for Developing countries (2017), United Nations, New York page 227.

[8] United Nations Practical Manual on Transfer pricing for Developing countries (2017), United Nations, New York page 250.

separate basis. This means that the Profit Split Method can be applied in cases where the associated enterprises engage in several transactions that are so interdependent that they cannot be evaluated on a separate basis using a traditional transaction method. In other words, the transactions are so interrelated that it is impossible to identify comparable transactions. In this respect, the Profit Split Method is applicable in complex industries such as the global financial services business.[9]

Any of the above five methods can be used as the best estimation of an arm's length result in each particular case.

Transfer pricing report

Guidelines of OECD on Transfer pricing

Republic of Mongolia and Republic of Kazakhstan are not a member of the OECD, however, requirements on transfer pricing report are similar to the Guidelines of OECD. It included Local file, Master file, and Country-by-country report.

Republic of Kazakhstan

The Minister of Finance of the Republic of Kazakhstan approved the following forms and rules of their filling on TP report:

- Local File form and rules for its filling;
- Master File form and rules for its filling; and
- Country by country reporting form.

Mongolia

All affected taxpayers should file a report on covered transactions on a semi-annual and annual basis to Tax administration. Under Paragraph 1 of Article 38 of General Tax Law /GTL/, transfer pricing report shall classify as follows:

1. Transfer Pricing Transactional annual report;
2. Master file;
3. Local file; and
4. Country-by-Country Report.

Transfer pricing transactional annual report

The taxpayer shall deliver transfer pricing transactional annual report and year-end tax report to the Tax administration.

Master file

The master file is intended to provide a high-level overview in order to place the multi-national enterprise's transfer pricing practices in their global economic, legal, financial and tax context. The master file shall contain standardized information relevant to all multi-national enterprise group members.

A taxable person of a multi-national enterprise group, a taxpayer with a related party transaction, and liable to prepare a detailed Master file shall prepare the master file.

Under the new laws, the information required in the master file provides a "blueprint "of the MNE group and contains relevant information that can be grouped in the following categories:

a) The multi-national enterprise group's organizational structure;

b) A description of the multi-national enterprise's business or businesses;

c) The multi-national enterprise's intangibles;

d) The multi-national enterprise's intercompany financial activities; and

e) The multi-national enterprise's financial and tax positions.

Description of multi-national enterprise business

1. List of members of the business group and business activities of each member of a Business group;

2. Determining factors that have an important role in determining the profit of

[9] United Nations Practical Manual on Transfer pricing for Developing countries (2017), United Nations, New York page 257.

each member of a business group;

3. Description of the functions, assets and risk analysis of the group entities of the international group that contribute a major part of the revenue or assets or profits of such group;

4. List and exploration of important agreement among members of a business group providing service as well as transfer pricing policy on the allocation of costs in the context of the provision of service, as well as a determination of price which must be paid for the provision of services;

5. Explanation of the geographical location which becomes the main market of products or services produced by a business group;

6. Description of the supply chain for the main products or services of an international group in terms of revenue;

7. Explanation of the business restructuring business acquisition, and business divestment which has been conducted by a member of a business group during the accounting year.

Local file

In contrast to the master file, the local file provides more detailed information relating to specific intercompany transactions. The local file focuses on information relevant to the transfer pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries and which are materials in the context of the local country's tax system in accordance with OECD guidelines on transfer pricing.

Taxable person, transaction carried out with its related party and the total value of the related party transactions to be followed as per the upcoming transfer pricing guidelines shall prepare the local file.

Under Article 38.5 of General Tax Law /GTL/, Local file shall refer specifically to the activities and material related party transactions of the local (Mongolian) taxpayer. For example, information on conducting business and business strategy, policy of taxpayer or presentative office located in Mongolia and financial information of a taxpayer located in Mongolia.

The following taxpayer shall submit a report of Master file and Local file with end-year tax report to tax administration:

1. Earned sales in the previous tax year of six and more billion MNT

2. The activities are included in the consolidated financial statements of a multi-national enterprise and earned sales of six and more billion MNT in the previous tax year

3. Foreign investment.

Country-by-Country Report

The Country-by-Country Report requires aggregate tax jurisdiction-wide information relating to the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which the multi-national enterprise's group operates. The report also requires a listing of all the Constituent Entities for which financial information is reported, including the tax jurisdiction of incorporation, where different from the tax jurisdiction of residence, as well as the nature of the main business activities carried out by that Constituent Entity.

In accordance with Article 27.1 of Law on Corporate income tax, Country-by-Country Report shall contain certain information relating to the global allocation of the Multi-national enterprise's income and taxes paid together with certain indicators of the location of economic activity within the Multi-national enterprise group. When make reporting of country by country, official definitions of transfer pricing and corporate entity have defined. For example:

"Group" means to an entity which issue a consolidated financial statement for financial reporting or for sale of its stocks via stock exchanges, or affiliated entities in terms of ownership and management.

"The multi-national enterprise that doesn't obligate to report" means earned sale of less than MNT 1.7 trillion in consolidated financial statements of the group.

"Reporting person" means participant shall be obliged for submitting a report on behalf of multi-national enterprise and it shall be heading the office of the multi-national enterprise, appointed reporting person and participant that non-heading the office of multi-national enterprise locating for tax purposes in Mongolia.

Each country of the following taxpayers shall submit the report to the taxation authority within 12 months from the last day of the financial year of the multi-national enterprise.

1. Head office of the Multi-national enterprise located in Mongolia for tax purposes.

2. The participant of the group that is not the head office of the Multi-national enterprise is located in Mongolia.

a. The tax office has been notified failure of the system to the head of the multi-national enterprise that residing for tax purposes etc.

3. If two or more participants of the multi-nationals are obliged to make a country by country report, the head office of the multi-national enterprise may select any of the participants as the reporting entity.

The transfer pricing report shall require as following:

- Integrated information related to income earned, profit/loss before the tax, paid income tax, income tax debt, a sum of share capital, accumulated profit, number of employees, movable and immovable property except money or similar items;
- Information means taxpayer's number, residing country information for tax purpose, if a registered country and residing country for tax purpose are different, information regarding incorporation of each participant of the group and their activities.

The transfer pricing report definitely connected to tax confidentiality. Tax confidentiality deals with transparency in terms of national legislative rules on tax confidentiality concerning the possibilities open to the public to obtain information on individual taxpayer held by tax authorities. The confidentiality of information obtained in the course of a tax official's duties is a crucial issue within a tax administration. Failure to properly manage the responsibility of confidentiality can challenge the integrity of the Host Administration, whose audit capacity the Expert is working to build.

For example: Under section 7213 of the Internal Revenue Code of United States, willful unauthorized disclosure of returns or return information is a felony punishable by a fine of up to USD 5 000 or imprisonment of up to five years, or both. These penalties apply not only against the government employee who committed the unauthorized disclosure but also against a person who receives the information and knowingly publishes it. [10]

In terms of Mongolia, there is a new article about an automatic exchange of information under General Tax Law /GTL/. "Exchange of information automatically" means an exchange of information that is negotiated with a foreign resident in exchange for the constant and frequency negotiations between the parties without any prior request. There is no regulation and another related article yet.

The regulation of the Republic of Kazakhstan and Mongolia have met with Guidance of OECD on transfer pricing. There is some difference that the transfer pricing report of Mongolian has four criteria in which added transfer pricing transactional annual report.

Administrative penalties for failure of transfer pricing documentation obligations

Guidelines of OECD on Transfer pricing

Under the guidelines of OECD on transfer pricing, penalties are generally designed to make tax underpayments and other types of non-compliance more costly than compliance.

[10] Tax confidentiality: A Legislative Proposal at National level by Anna Maria Hambre.

There are a number of different types of penalties that tax jurisdictions have adopted. Penalties can involve either civil or criminal sanctions – criminal penalties are virtually always reserved for cases of very significant fraud, and they usually carry a very high burden of proof for the party asserting the penalty.

Republic of Kazakhstan

Special penalties are in place for failure to comply with the documentation requirements established by the transfer pricing. The maximum penalty is set at KZT7 40,000 (approximately USD 2,550).

The penalty for an understatement of tax resulting from a transfer pricing adjustment is up to 50% of the additional accrued tax amount. Transfer pricing penalties are also imposed on individuals for the personal liability of an administrative violation, including criminal liability if the tax amount misreported exceeds KZT 48.1 million (approximately USD 145,000).[11]

Mongolia

All transfer pricing documentations are required to be submitted by taxpayers to Mongolian tax authorities within the specified timeframe by law. If transfer pricing documentation is not submitted to the Tax administration when requested, the Tax administration may impose penalties of transaction value in accordance with Article 11 of Law on Offence.

Type of documents	Imposed penalty	Frequency
Transfer Pricing Transactional Report (an annual report)	2% of respective related party transaction value	Per non-compliance
Master File	3% of respective related party transaction value	Per non-compliance
Local File	3% of respective related party transaction value	Per non-compliance
Country by country Report	4% of respective related party transaction value	Per non-compliance

[11] EY Worldwide Transfer Pricing reference guide 2017-2018, page 367.

Under Guidelines of OECD on transfer pricing, penalties can involve either civil or criminal sanctions whereas the Republic of Kazakhstan, transfer pricing penalties can involve also either civil or criminal sanctions. Therefore, it is imposed on individuals for the personal liability of an administrative violation, including criminal liability if the tax amount misreported exceeds KZT48.1 million (approximately USD 145,000). In terms of Mongolia, the transfer pricing penalty involved civil sanction that imposed monetary fines. The Tax Administration may impose penalties of 2%-4% of the transaction value.

Threshold and exemption from transfer pricing

Guidelines of OECD on transfer pricing

A multi-national enterprise with consolidated group revenue below MNT 7.1 trillion (approximately USD 640 million as of the date of this publication) is exempted from preparing the Country-by-Country Report under OECD guideline on transfer pricing.

Republic of Kazakhstan

On 25 December 2017, along with the new Tax Code, the President signed a law introducing significant changes to the local transfer pricing reporting procedures for multinational enterprises operating in Kazakhstan. Following threshold shall declare to Local file, Master file, and Country by country report:

- Local File form and rules for its filling -The threshold for the Local file requirement is 5 million time the MIF* (MIF – Monthly Index Factor for 2018 is 2,405tenge or approximately 36 million US dollars) in consolidated group revenue in the previous year;
- Master File form and rules for its filling - The threshold for the Master file requirement is the same as that for Country by country reporting; and
- Country by country reporting form - Starting 1 January 2018, transaction participants

should file notification on their participation in an international group. This notification should be filed no later than 1 September of the year following the reporting period. CbC reports are required to be filed with the Kazakhstan tax authorities for tax years beginning on or after 1 January 2016 by the following entities:

1. Kazakhstan resident entities that are ultimate parent entities (UPEs) of an MNE group;

2. Surrogate parent entities of UPEs of the MNE group that are Kazakhstan tax residents;

3. A Kazakhstan tax resident, a member of a multinational group provided that its UPE is not resident in Kazakhstan, and not required to file a CbC report in its country of residence, or failed to comply with CbCR requirements in its country of residence, or although obligated to file a CbC report there is no international tax treaty on the automatic exchange of information in place with Kazakhstan or there is a systemic failure of the jurisdiction of tax residence of the UPE on automatic exchange of information with Kazakhstan;

4. Any other entity of the multinational group that is a non-Kazakhstan tax resident conducting activities in Kazakhstan through a structural subdivision or Permanent Establishment (PE), provided that its UPE is not resident in Kazakhstan, and not required to file a CbC report in its country of residence, or failed to comply with CbCR requirements in its country of residence, or although obligated to file a CbC report there is no international tax treaty on the automatic exchange of information in place with Kazakhstan or there is a systemic failure of the jurisdiction of tax residence of the UPE on automatic exchange of information with Kazakhstan.

For entities under points 1 or 2 above, the filing date is no later than 12 months following the reporting period. For entities under points 3 or 4, a CbC report may need to be filed upon the request of the Kazakhstan tax authorities, and the filing date is no later than 12 months from such a request. Applicable to international groups with consolidated revenue of:

- For parent company that is a Kazakhstan tax resident, EUR750 million for the year preceding the reporting year;
- For non-resident parent companies, depends on the threshold established for the jurisdiction of such nonresident parent company or authorized participant of an international group.[12]

Starting from 2019, a failure to file the required transfer pricing documentation or filing misleading reports will be subject to administrative penalties.[13]

Mongolia

Mongolia has not set any threshold to exempt smaller transactions from transfer pricing documentation obligations. Instead a multi-national enterprise with consolidated group revenue under MNT6 billion /via Mongol bank USD exchange rate, app USD 2,255,000/annual turnover is exempt from certain transfer pricing documentations that of the local file and master file.

However Mongolia has not set any threshold to exempt transactions, a multi-national enterprise is exempted from certain transfer pricing documentations which include local file and master file. In terms of the Republic of Kazakhstan, threshold and exemption regulated more detail for the Local file, master file, and country by the country report.

Conclusion

Transfer prices are significant for both taxpayers and tax administrations because they determine in large part the income and expenses, and therefore taxable profits, of associated enterprises in different tax jurisdictions. Both tax administrations and taxpayers often have difficulty in obtaining adequate information to apply the arm's length principle. Because the arm's length

[12] EY Worldwide Transfer Pricing reference guide 2017-2018, page 366.

[13] Newsflash Tax and Legal Special issue by KPMG Kazakhstan and Central Asia.

principle usually requires taxpayers and tax administrations to evaluate uncontrolled transactions and the business activities of independent enterprises and to compare these with the transactions and activities of associated enterprises, it can demand a substantial amount of data.

The Ministry of Finance and the Mongolian Tax Administration ("MTA") have developed regulations strengthening the current transfer pricing rules. The new regulations define the covered transactions more specifically, introduce the tools for analysis methods, documentation requirements, reporting requirements, penalties for non-fulfillment of the obligation, threshold and exemptions under Law on Corporate income taxation and General Taxation Law.

Transfer pricing rules will apply to virtually all types of transactions between related parties.

Similar to the OECD's TP Guidelines for Multinational Enterprises and Tax Administrations, there will be five methods for TP analysis in Mongolia and Republic of Kazakhstan:

1. Comparable uncontrolled price method
2. Cost plus method
3. Resale method
4. Profit split method
5. Transactional net margin method.

The previous TP rules established only the first three methods (so-called "traditional transaction methods") from the above list before the revision of tax reform in Mongolia. Any of the five methods can be used following the most appropriate method approach i.e., that provides the best estimation of an arm's length result in each particular case.

The taxpayer shall deliver transfer pricing transactional annual report and year-end tax report to the Tax administration. The transfer pricing report is similar to the Guidelines of OECD. It included Local file, Master file, and country by country report.

The master file should provide an overview of the MNE group business, including the nature of its global business operations, its overall transfer pricing policies, and its global allocation of income and economic activity in order to assist tax administrations in evaluating the presence of significant transfer pricing risk.

The local file focuses on information relevant to the transfer pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries and which are material in the context of the local country's tax system.

The Country-by-Country Report requires aggregate tax jurisdiction-wide information relating to the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which the MNE group operates.

According to the revised law in Mongolia, the Tax administration will be further introducing detailed tax and transfer pricing reporting forms on the above transfer pricing reports. Likewise, the Ministry of Finance is to release a number of implementing guidelines on the new rules such as:

- Determining financial organization which is required to submit report and information;
- Reportable information and e-information and its content and format;
- Standard on information set and detail to be reported etc;
- Procedure on implementation of information exchange;
- Procedure on regulating confidentiality of the information and its storage;
- Procedure on the implementation of automatic and request information exchange.

Therefore penalties can involve either civil or criminal sanctions under Guidelines of OECD on transfer pricing and Republic of Kazakhstan whereas transfer pricing penalty

involved civil sanction that imposed monetary fines in Mongolia.

The Tax Administration shall develop a number of new procedures in order to implement the transfer pricing practice in effective or efficient ways in Mongolia.

The automatic exchange of information for taxation purpose is needed specific regulation. Otherwise, the taxpayer information will be considered as confidential. The Tax administration is obliged to keep the confidentiality of the taxpayers even there is an obligation to send taxpayer information to other country's tax administration.

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