

3-8-2021

Access to Environmental Justice: NGO Environmental Advocacy on Mining-Related Environmental Issues in Mongolia

Ulziilkham Enkhbaatar

Osgoode Hall Law School of York University (Student Author)

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“ACCESS TO ENVIRONMENTAL JUSTICE: NGO ENVIRONMENTAL ADVOCACY ON
MINING-RELATED ENVIRONMENTAL ISSUES IN MONGOLIA”

ULZIILKHAM ENKHBAATAR

A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS

GRADUATE PROGRAM IN LAW
OSGOODE HALL LAW SCHOOL, YORK UNIVERSITY
TORONTO, ONTARIO

October 2020

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ABSTRACT

In this thesis, I apply the theory of environmental justice to determine how NGOs use substantive and procedural environmental rights to advocate for mining-affected nomadic communities in Mongolia. Environmental NGOs often possess legal and scientific expertise pertinent to resolving and mitigating environmental risks and demanding justice for environmental damages on behalf of the mining-affected local communities. Based on the environmental justice theories, I have constructed a theoretical framework to examine how NGOs access and implement environmental justice tools, both domestically and internationally. Using a multi-methods research approach, including documentary analysis and qualitative interviews with NGO experts and lawyers, I was able to uncover the experiences, difficulties, and challenges faced by NGOs as they seek favourable environmental outcomes. My findings demonstrate that domestic and international environmental justice tools provided opportunities to NGOs to litigate, advocate, negotiate, and mediate the disputes between marginalized mining-affected nomadic communities and their much-larger opponents, mining companies.

ACKNOWLEDGMENTS

I would like to express my deep gratitude and sincere appreciation to my wonderful, kind and caring supervisor, Professor Estair Van Wagner, for her tremendous personal and professional support and guidance in writing this thesis during the challenging effects of the Covid-19 pandemic. I also would like to thank Professor Shin Imai, the LLM thesis supervisory committee member, for his unwavering support and guidance. Moreover, my sincere appreciation and gratitude also go to Professor Sonia Lawrence, the Graduate Program Director, for her invaluable support in guiding me through the ethics application process at the Office of Research Ethics. My further gratitude goes to Heather Moore, Chantel Carolyn Thompson, and Ammad Khan at the Osgoode Graduate Office for their administrative support and personal encouragement towards the thesis completion, submission, and defence. The Study Group on Law in a Global Context instructed by Professor Craig Scott was invaluable in facilitating my academic growth. I have also greatly benefitted from the York University Graduate Fellowship and the Harley D.Hallet Graduate Scholarship in undertaking this LLM research at the Osgoode Hall Law School.

I would like to express sincere gratitude and appreciation to my family members in Mongolia for their emotional support and encouragement during the Covid-19 lockdown in Canada. I am also thankful for the opportunity to enhance my graduate learning skills in the training organized by the Graduate Student Wellness Services, which was especially appreciated during the Covid-19 pandemic. Additionally, I have undertaken a research field trip to Mongolia for December 2019 – March 2020 to conduct interviews with environmental NGO experts, advocates, and lawyers, who have contributed immensely to my acquisition of in-depth knowledge of domestic court remedies and international corporate accountability mechanisms. I am indebted to all of my interviewees for sharing their valuable insight, knowledge, and experience in engaging with mining-affected nomadic communities in Mongolia. Furthermore, this study's research findings I will publish in various outlets, such as the University of British Columbia blog post dedicated to Mongolia, and several environmental and legal issues academic journals such as the Journal of Environmental Law and Practice.

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“ACCESS TO ENVIRONMENTAL JUSTICE: NGO ENVIRONMENTAL ADVOCACY ON MINING-RELATED ENVIRONMENTAL ISSUES IN MONGOLIA”

CHAPTER ONE: INTRODUCTION

Mongolia is a leading producer of coking coal, copper, iron ore, crude oil,¹ and some uranium. Mineral resources constitute 71 percent of industrial output, 85 percent of exports, and 21 percent of GDP in Mongolia.² The sheer amount of wealth and exploration in the extractive industry puts Mongolia at the epicentre of global mining development. Current large mining projects include the Oyu Tolgoi mining project, which has proven and probable reserves of 1.45 billion tonnes of copper, gold, silver, and molybdenum,³ and the Tavan Tolgoi coal mining project, which has an estimated mineral reserves of 6.4 billion tonnes, one quarter of which is high-quality coking coal.⁴ In 2018, 1,405 exploration and 1,673 mining licenses have been issued in Mongolia covering 5.5 percent of Mongolia’s territory.⁵ However, this extractive activity and economic development has not resulted in the eradication of poverty in the general population. The poverty rate remains stagnant with approximately 28.4 percent of the population living in poverty conditions in 2018.⁶ Moreover, the extractive industry is notorious for its record of human rights violations.⁷ Social and environmental issues associated with mining have contributed to

¹ Extractive Industries Transparency Initiative, “Mongolia: Overview” (2017) online: *EITI* <eti.org/mongolia>.

² Daniela, Assistant Trade Commissioner – Korea & Mongolia, “Mongolia METS Opportunities” (31 January 2019) at 8, online (pdf): *Government of Australia* <2019_event_presentation_Mongolia_METS_Opportunities_Webinar%20pdf>. Some Mongolian social and economic statistical data for March 2020: Population (3,312,818), GDP (13.3 billion US dollars in 2019), Foreign Trade Balance (20.7 million US dollars) Unemployment (8.1%), Inflation rate (6.4%), and Poverty (28.4% in 2018) (See, National Statistics Office of Mongolia, “Mongolian Statistical Information Service” (2019) online: *National Statistics Office of Mongolia* <1212.mn>).

³ Mining Technology, “Oyu Tolgoi Gold and Copper Project, Mongolia” (2019) online: *Mining Technology* <www.mining-technology.com/projects/oyu-tolgoi>.

⁴ Invest Mongolia, “Tavan Tolgoi” (2019) online: *Invest Mongolia* <www.invest-mongolia.com/mining/tavan-tolgoi>.

⁵ Bilguun Ankhbayar, Chairman of Board of the Mongolian National Mining Association, “Why mining sector is crucial for Mongolia’s economic development” (31 January 2019) at 6, online (pdf): *CFA* <2019_event_presentation_Mongolia_METS_Opportunities_Webinar%20pdf>.

⁶ World Bank, “Mongolia’s 2018 Poverty Rate Estimated at 28.4 Percent” (21 June 2019) online: *World Bank* <www.worldbank.org/en/news/press-release/2019/06/21/mongolias-2018-poverty-rate-estimated-at-284-percent>.

⁷ UN HRC, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, John G. Ruggie submitted as addendum to the 2008 SRSG Report HRC, 8 Sess, UN Doc A/HRC/8/5/Add.2, 23 May 2008 at 9.

an increase in the number of civil society movements demanding accountability and transparency of large mining companies in rural areas.⁸ The extent of situation is illustrated by alarming statistics about environmental degradation and associated violations of human rights: around 72 percent of the territory of Mongolia is experiencing land degradation, desertification and deforestation.⁹ Environmental impacts include water pollution, ecological imbalance, species and biodiversity loss, and the shrinking and disappearance of thousands of water sources including the underground water, rivers, streams, lakes, and ponds.¹⁰ Furthermore, continued air pollution and depletion of water quality and quantity have resulted in 852 out of 5,128 rivers and streams being completely dried up.¹¹ As a consequence of these environmental impacts, the right to life,¹² the right to a healthy and safe environment,¹³ the right to health,¹⁴ the right to liberty and safety,¹⁵ which are enshrined in the Constitution of Mongolia, have been infringed without restorative and remedial justice.¹⁶

The impact of mining exploration and extraction of fragile ecosystems particularly threatens ancient nomadic life and traditions. Nomads¹⁷ are unable to tend to their

⁸ Center for Citizens' Alliance, "State of Civil Society in Mongolia (2004-2005)" at 2-3, online (pdf): *CIVICUS Civil Society Index Report for Mongolia* <www.civicus.org/new/media/CSI_Mongolia_Executive_Summary.pdf>.

⁹ Sukhgerel D et al, "Environment-Mining-Human Rights Mongolian Stakeholders' Joint Submission to Universal Periodic Review of OHCHR" (3 May 2010) at 6, online <lib.ohchr.org/HRBodies/UPR/Documents/session9/MN/OTW_OTWatch_JS.pdf> [Sukhgerel D et al]. *Note:* There is a lack of accurate official data assessing mining operations' direct impact on land degradation, desertification, and deforestation in Mongolia. However, while mines cover a considerably small land base, these can have dramatic impacts on aquifers. For instance, in the South Gobi region, where the Oyu Tolgoi mine is located, the major sources of groundwater used for mining and the local herder population are 'non-renewable' and cannot be replenished. Thus, the development of the Oyu Tolgoi mine poses significant environmental challenges to the whole of the South Gobi region. See, World Bank, "Mongolia: Groundwater Assessment of the Southern Gobi Region" (April 2010) at 24, online (pdf): *World Bank* <documents1.worldbank.org/curated/en/734471468323712803/pdf/627890REPLACEM07018020110Box361493B.pdf>.

¹⁰ Sukhgerel D et al, *supra* note 9 at 6.

¹¹ *Ibid.*

¹² *Constitution*, 1992 (Mongolia), c 2, art 16(1), Uniform portal of laws, online: <www.legalinfo.mn/law/details/367> [Constitution].

¹³ *Ibid* at art 16(2).

¹⁴ *Ibid* at art 16(6).

¹⁵ *Ibid* at art 16(13).

¹⁶ Sukhgerel D et al, *supra* note 9 at 4-5.

¹⁷ As of 2018, 230,000 nomadic households or 288,700 individual nomads oversee a total of 66,460,000 livestock in Mongolia. (See, National Statistics Office of Mongolia, "Mongolian Statistical Information Service" (2019) online: *National Statistics Office of Mongolia* <1212.mn>). These nomads follow a seasonal routine raising and breeding the five kinds of animals (goat, sheep, cattle, camel, and horse) migrating from

livestock because the pastureland has been taken away by the license owning companies¹⁸ and their natural habitat has been destroyed, as a result of mining operations. Many of these herders have now turned their despair into resistance by joining forces with environmental movements. These coalitions have formed human rights and environmental activist groups such as the United Mongolian Movement for Lakes and Rivers (UMMLR), Oyu Tolgoi Watch NGO, Onggi River Movement, Patrons of Khuvsgul Lake Movement, and 50 similar environmental and human rights NGOs and movements in Mongolia. Through these movements and NGOs, nomads and other concerned residents continue to demand justice for the loss of their habitat and violation of their constitutional rights.

Moreover, widespread corruption constitutes a significant hurdle in resolving the environmental impacts of mining and enforcing rights. Corruption continues to dominate state decision-making levels locally and nationally despite the adoption of legislation and institutional mechanisms to combat it. According to 2019 Corruption Perception Index, Mongolia ranked 93rd out of 180 countries.¹⁹ Public officials' conflicts of interest, including their possession of mining companies' shares,²⁰ significantly delay any progress towards addressing environmental challenges. For instance, nearly all of the Members of the Parliament have some form of investment or shares in mining companies.²¹ Recently, the embezzlement of the Small and Medium Enterprises Support Fund by Mongolian

one location selecting the most favorable pastures and campsites. (See, Mongolia Travel Guide, "Nomadic Lifestyle" (2019) online: *Mongolia Travel Guide* <mongoliatravel.guide/Mongolia/view/nomadic-mongolia>). Unlike Kazakhstan, republics of the People's Republic of China including Inner Mongolia, Xinjiang or Tibet, nomadic pastoralism continues to be the prevailing type of land use in Mongolia. (See, Dorjburgedan Lkhagvadorj et. al, "Twenty Years After Decollectivization: Mobile Livestock Husbandry and Its Ecological Impact in the Mongolian Forest-Steppe" (2013) 41:5 Human Ecology 725 at 725).

¹⁸ The pastureland is approved by each province's local citizens' representative khural through its adoption of a land management plan. (*Law on Land, 2002* (Mongolia) at art 52(1), Uniform portal of laws, online: <www.legalinfo.mn/law/details/216>).

¹⁹ Transparency International, "Corruption Perceptions Index 2018: Mongolia", online: *Transparency International* <www.transparency.org/country/MNG>.

²⁰ Elbegdorj Tsakhia, President of Mongolia, "Geology, mining operations, environmental rehabilitation and public participation" (Speech delivered at the open forum on "Geology and Mining Operations, Nature Rehabilitation and Public Participation", Ulaanbaatar, Mongolia, 27 April 2011), online: *Office of the President* <www.president.mn/mongolian/node/1725>.

²¹ B.Dulguun, "Infographic: Income statements of the President, Members of the Parliament and Cabinet Members for 2018" (8 April 2018), online: *Ikon.mn Information Website* <www.ikon.mn/n/1jkc>.

politicians has outraged the public.²² Despite the ousting of some implicated government officials,²³ most of the Members of the Parliament, who were accused of funneling the funds to their affiliated companies, remained in power.²⁴

In the context of this ongoing violation of constitutionally-protected rights due to the irresponsible and unsustainable mining practices, I will explore the role of NGOs, as civil society representatives in Mongolia, to mobilize human and environmental rights to litigate and advocate on mining-related environmental issues both nationally and internationally. I will critically engage with scholarship on the existence and utility of substantive environmental rights, such as the right to a healthy and safe environment, and procedural environmental rights, including access to environmental information, meaningful participation in environmental decision-making processes and access to remedies. I will further explore how NGOs, as civil society representatives, use creative legal and non-judicial dispute resolution mechanisms to seek redress for environmental degradation caused by irresponsible mining operations to the local nomadic communities both nationally and internationally.

Research question:

The main research question animating this research can be framed as follows: *“How do Mongolian environmental NGOs employ substantive and procedural environmental and human rights to access environmental justice. In particular, how do they mobilize these rights to litigate and advocate for mining-related environmental issues both domestically and internationally in order to negotiate favorable environmental outcomes for mining-affected communities?”* Several detailed sub-questions include the following:

- a) *What is the unique role of NGOs, as civil society representatives, to advocate for environmental issues in Mongolia?*

²² Julian Dierkes and Mendee Jargalsaikhan, “Small and Medium-Sized Outrage Building Over Corruption in Mongolia” (6 November 2018), online: *The Diplomat* <thediplomat.com/2018/11/small-and-medium-sized-outrage-building-over-corruption-in-mongolia>.

²³ Ts.Enkhbayar, “We sent a proposal to the General Prosecutor’s Office of Mongolia to dismiss the criminal case initiation against 50 projects that received loans from the SME Fund due to lack of grounds” (15 April 2019), online: *Independent Authority Against Corruption of Mongolia* <www.iaac.mn/news/tsenkhbayar_jdukhs-gaas-zeel-awsan-5sh-garui-tusuld-gemt-khergiin-shinjgui-tul-khergiig-khaakh-sanaliig-prokuroriin-baiguullagad-khurguuleed-baina>.

²⁴ Khaliun Bayartsogt, “A scandal in Mongolia: heads roll in government after US\$1.3m SME fund embezzlement” (6 November 2018), online: *South China Morning Post* <www.scmp.com/news/asia/east-asia/article/2171965/scandal-mongolia-heads-roll-government-after-us13m-sme-fund>.

- b) *How do NGOs employ substantive and procedural environmental and human rights to access environmental justice, both nationally and internationally?*
- c) *What kind of legal and non-judicial environmental justice tools do NGOs use to advocate and litigate for mining-affected communities, both nationally and internationally?*
- d) *What kind of strategies do Mongolian NGOs employ in environmental advocacy and litigation, both nationally and internationally?*
- e) *How do NGOs act as mediators in mining-related environmental conflicts in Mongolia, both nationally and internationally?*
- f) *What is the impact of Mongolian NGOs on mining-related environmental issues locally, nationally, and internationally?*

This research aims to fill a gap in environmental legal scholarship regarding the role of NGOs in the context of mining-affected nomadic herder communities. Despite the abundance of research on environmental NGOs in various contexts and countries, there is a lack of research analyzing how NGOs use legal and non-judicial environmental justice tools to advocate and litigate for the rights of the mining-affected herder communities towards effective resolution of their grievances with mining companies.

Literature Review on NGO environmental advocacy and litigation on environmental and human rights

This research engages with three main scholarly conversations in the areas of NGO environmental advocacy and litigation, access to environmental justice, and linking human rights law with the environmental law. In engaging with these areas of scholarship I will explore how do the NGOs in Mongolia use substantive and procedural environmental and human rights to access environmental justice tools, which will aid in offering comprehensive answers to the main research question of this thesis.

“NGO environmental advocacy and litigation”

Since 1990s non-governmental organizations have emerged as important actors and advocates for environmental protection at both the national and the international²⁵ spheres. The number and types of NGOs have proliferated, and many of the countries around the world now house environmental NGOs.²⁶ Mongolia is no exception, where there were 487 registered environmental NGOs in 2017.²⁷ Environmental NGOs are actively engaged in the promotion of domestic and international environmental law,²⁸ some of them cooperate with government institutions to offer technical expertise,²⁹ and others are involved in advocacy, campaigning, and local decision-making processes at the grassroots level.³⁰ In concert with such diverse objectives, NGOs, as representatives of civil society organizations, can be “quiet and reformist” or “loud and deliberately confrontational”.³¹

Domestic environmental laws, regulations, and policies commonly allow NGOs to carry out public awareness-raising campaigns, expressions of environmental views, involvement in law and policy-making processes, influencing decision-making related to specific activities, plans, and programs, demanding reviews of administrative decisions and enforcement of existing environmental laws and regulations.³² Therefore, to realize these objectives, NGOs use various strategies, including advocacy, litigation, protests, media campaigns, persuasion, and lobbying governments and international organizations in the domestic or international arena.³³ Consequently, environmental NGOs, which constitute one of the essential components of civil society, are vital in mitigating

²⁵ Peter J Spiro, ‘NGOs and Human Rights: Channels of Power’ in S Joseph and A McBeth, eds, *Research Handbook on International Human Rights Law* (USA: Edward Elgar Publishing Limited, 2010) at 115 [Spiro 1].

²⁶ David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, 4th ed (New York: Foundation Press, 2011) at 255 [Hunter].

²⁷ UNECE, “Mongolia: Environmental Performance Reviews” (November 2018), online: *UNECE* <www.unece.org/index.php?id=50079> [UN Environmental performance reviews]. UNECE handbook further qualifies that, according to the Ministry of Environment and Tourism of Mongolia, the number of active environmental NGOs amounts to 100.

²⁸ Hunter, *supra* note 26 at 258.

²⁹ *Ibid.*

³⁰ *Ibid* at 257.

³¹ Jeff Atkinson & Martin Scurrah, *Globalizing Social Justice: The Role of Non-Governmental Organizations in Bringing about Social Change* (London, UK: Palgrave Macmillan, 2009) at 9 [Atkinson].

³² Jonas Ebbesson, “Public Participation” in Daniel Bodansky, Lutta Brunnee, and Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (UK: Oxford University Press, 2008) 682 at 683.

³³ Atkinson, *supra* note 31 at 22; Spiro 1, *supra* note 25 at 130.

environmental risks and demanding justice for environmental damages. In developing countries such as Mongolia, where the mineral resources sector constitutes the primary source of economic growth and development, and where endemic corruption and conflict of interest hamper any attempts at limiting environmental consequences of mining operations, NGOs are particularly active domestic players, to whom the locally mining-affected communities' approach for assistance.

Furthermore, NGOs play an important role in the international arena through participation in the international decision-making processes, which can strengthen their national environmental advocacy and lobby efforts. Accelerated globalization and progress in transportation and information technologies have facilitated rapid communication, information-sharing, travel, and networking between international and domestic environmental NGOs. International organizations such as the United Nations do not reject the environmental NGOs' participation in their decision-making processes as these NGOs are united by common concerns for humankind and global ecological balance.³⁴ On the contrary, several UN Committees welcome NGO submissions to have a broader understanding of a given country's human rights situation.³⁵ Thus, NGOs are important actors in providing submissions in addition to state reports that highlight issues not addressed by the state concerning the irregularities in complying with the international treaty obligations.³⁶ Also, NGOs promote awareness of a new international environmental treaty and lobby their governments to accede to this novel international instrument.³⁷ Moreover, the UN Universal Periodic Review (UPR) process has become an important avenue to offer NGOs a formal opportunity to report on their home countries' compliance with human rights commitments.³⁸ The state delegations of many countries include environmental NGOs to lend additional credibility to their reporting.³⁹ NGOs focus their efforts on raising awareness on local or global environmental challenges. NGOs have the leverage to improve the transparency of states, international organizations, and

³⁴ Hunter, *supra* note 26 at 257.

³⁵ Caroline Dommen, "Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms" (1998-1999) 11 *Geo Int'l Envtl L Rev* 1 at 16 [Dommen].

³⁶ Hunter, *supra* note 26 at 261.

³⁷ Spiro 1, *supra* note 25 at 126.

³⁸ *Ibid* at 125.

³⁹ Farhana Yamin, "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities" (2001) 10 *RECIEL* 158.

corporations because of their ability to rectify the imbalance in information regarding environmental degradation.⁴⁰ Therefore, increased NGO participation in international decision-making processes can be useful in highlighting the gaps between international law and domestic law, and consequently, put pressure on a country to harmonize its domestic legislation with its international obligations.

“Access to environmental justice”

Access to environmental justice involves legal processes to access remedies for environmental injustice. The environmental justice movement with Robert D. Bullard in the lead has consistently pointed to the unequal, unfair and unjust distribution of environmental burdens on the marginalized communities, especially racialized and low-income communities.⁴¹ Consequently, environmental justice is defined as the fair distribution of environmental benefits and burdens in the population.⁴² It is thus important to provide platforms for these affected communities to participate in environmental decision-making and influence the adoption and enforcement of environmental laws.⁴³ Environmental degradation, especially those that are largely contributed by mining activities, disproportionately harms marginalized local nomadic, indigenous or poor communities. In such circumstances, it is important to provide platforms for these affected communities to participate in environmental decision-making and influence the adoption and enforcement of environmental laws.⁴⁴ Environmental justice includes the principles of recognition of such communities, participation in environmental decision-making, minimization and fair distribution of ecological risks, redress and compensation of ecological harms.⁴⁵

⁴⁰ Thomas Princen, “NGOs: creating a niche in environmental diplomacy” in Thomas Princen and Matthias Finger, *NGOs: creating a niche in environmental diplomacy: Environmental NGOs in World Politics* (London and New York: Routledge, 1994) at 35 [Princen].

⁴¹ Robert D. Bullard & Glenn S. Johnson, “Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making” (2000) 56:3 JSI 555 at 555 [Bullard].

⁴² Dayna Nadine Scott, “Environmental Justice” in David Coghlan & Mary Brydon-Miller, eds, *The SAGE Encyclopedia of Action Research* (London: SAGE Publications Ltd, 2014) at 2, DOI: <10.4135/9781446294406> [Dayna].

⁴³ Felicity Millner, “Access to Environmental Justice” (2011) 16:1 Deakin Law Review 189 at 190 [Millner].

⁴⁴ *Ibid.*

⁴⁵ *Ibid* at 190-191.

Environmental justice is championed by grassroots political movements, which constitutes its central element.⁴⁶ Disproportionately affected communities like herders in Mongolia engage in various pressure activities to negotiate favorable environmental outcomes to continue their nomadic agricultural practices. However, commonly these herders lack the necessary knowledge and technical expertise to enter into negotiations with mining companies. Thus, here the strategic partnership with environmental NGOs is essential to advocate, litigate, and represent the affected communities. As non-state organizations, NGOs in Mongolia constitute an important source of environmental knowledge, expert technical information, which they impart on many occasions to assist the mining-affected communities to enter discussions and negotiations with mining companies through various dispute resolution mechanisms. In this thesis, I will discuss several cases in Mongolia, where environmental NGOs such as the Oyu Tolgoi Watch NGO critically acted as an advocate and mediator for the successful negotiation of environmental disputes for locally affected communities in the South Gobi region. Thus, an environmental justice framework is a theoretical backbone of this thesis to investigate the research question on the role of environmental NGOs in Mongolia to access environmental justice, advocate, and litigate for the mining-affected communities.

Comparative research among some Asian, African and Asia Pacific countries revealed that access to environmental justice includes citizens' access to environmental information, participation in environmental decision-making (environmental impact assessment process), access to the courts such as public interest environmental litigation, access to international mechanisms and alternative dispute resolution (environmental mediation).⁴⁷ For instance, in Australia, the procedural access to environmental justice includes the notice, consultation, access to information, review by courts and tribunals, and standing to bring proceedings in courts and tribunals.⁴⁸ The strategies to improve access to environmental justice include environmental justice educational campaigns, increased consultations by industry and the government regarding the impact of development on the environment, enforcement of legislative

⁴⁶ Dayna, *supra* note 42 at 5.

⁴⁷ Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007).

⁴⁸ Millner, *supra* note 43 at 194-199.

provisions to ensure participation of affected communities in environmental decision-making processes, facilitation of access to environmental information, and ensuring the judicial review of environmental laws.⁴⁹ Thus, the enabling legal and policy framework in any country is essential in ensuring access to environmental justice for affected communities, NGOs and other civil society groups, and I will further explore this issue in the thesis.

“Linking human rights law with the environmental law”

Despite the lack of international instruments specifically recognizing an international human right to a healthy environment, 120 countries around the world legislatively recognized a right to a healthy environment (100 countries recognize this right constitutionally).⁵⁰ Such widespread recognition of the right to a healthy environment has positively contributed to strengthening environmental laws, improving their implementation and enforcement, increasing accountability, increasing public involvement, providing a safety net, addressing environmental justice and leveling the playing field.⁵¹ International and domestic human rights law is also an important and useful platform for environmental NGOs seeking to advocate for environmental justice. The violation of procedural human rights, including the right to information, peaceful assembly, access to justice and participation in decision-making processes, can contribute to environmental harms.⁵² Observance and enforcement of these rights are essential for concerned environmental NGOs to advance environmental claims effectively.⁵³

There are several advantages to linking international human rights law with international environmental law. Firstly, human rights provide strong moral grounds for an absolute claim to a particular right. This enables NGOs to garner the necessary public support without being burdened with highly technical aspects of environmental law.⁵⁴

⁴⁹ *Ibid* at 206-207.

⁵⁰ David R. Boyd, “Catalyst for Change” in John H. Knox & Ramin Pejan, eds, *The Human Right to a Healthy Environment* (Cambridge, UK: Cambridge University Press, 2018) at 18.

⁵¹ *Ibid* at 25.

⁵² Hunter, *supra* note 26 at 1308.

⁵³ *Ibid*.

⁵⁴ Alan E Boyle & Michael R Anderson, eds, *Human Rights Approaches to Environmental Protection* (UK: Oxford University Press, 1996) at 21-23.

Secondly, it creates an opportunity to use the well-developed international human rights law remedies to address environmental grievances.⁵⁵ Environmental disputes can be addressed through the use of remedies available in human rights law.⁵⁶ Thirdly, a rights-based approach to environmental protection concentrates national and international attention on the plight of the people harmed by environmental degradation.⁵⁷ This situation enables NGOs to access environmental justice tools both domestically and internationally. Environmental damage can have negative implications for the enjoyment of human rights, such as the right to a healthy environment, the right to life, and culture.⁵⁸ Due to their direct relevance to the empirical case study of Mongolia, I will elaborate on the substantive and procedural environmental rights to a healthy environment. As mentioned earlier, while the international human rights instruments do not specifically refer to the international human right to a healthy environment, it is recognized in some environmental soft law instruments. For instance, a human right to a healthy environment is recognized⁵⁹ in the Hague Declaration on the Environment.⁶⁰

On the other hand, the domination of a rights-based approach or the employment of legal tools to achieve environmental justice outcomes are criticized for the lack of their widespread effect on the community.⁶¹ Over-reliance on legal tools are seen to threaten the environmental justice movement by pushing out community organizing efforts and shifting resources from social movements to legal battles.⁶² There are fears that local communities will lose their control over the environmental issues because they need to translate their struggles into legal terms and resort to legal expertise and representation.⁶³ NGO access to expertise, scientific knowledge, and financial resources make them well-placed to voice environmental issues in the legal language on behalf of the affected

⁵⁵ Puneet Pathak, "Human Rights Approach to Environmental Protection" (2014) 7:1 Int J Sust Dev 17 [Pathak].

⁵⁶ Hunter, *supra* note 26 at 1308.

⁵⁷ Pathak, *supra* note 55 at 17.

⁵⁸ Hunter, *supra* note 26 at 1307.

⁵⁹ *Ibid* at 1324.

⁶⁰ American Society of International Law, "Hague Declaration on the Environment" (September 1989) 28 *International Legal Materials* 1308.

⁶¹ Luke Cole, "Lawyers, the Law & Environmental Justice: Dangers for the Movement" (Fall 1994/Winter 1995) 5:2/3, RP&E 2 at 3 [Cole].

⁶² *Ibid* at 4.

⁶³ *Ibid*.

communities. Thus, there is a danger that grassroots communities' environmental justice struggles could be appropriated by the NGOs to serve their interests and agenda above community goals and aspirations. These are all legitimate concerns. However, in the Mongolian context, the employment of substantive and procedural environmental rights by NGOs have contributed positively to the advancement of local communities' rights and attainment of successful environmental remedies both domestically and internationally.

Moreover, in many developing countries plagued with weak institutions, endemic corruption, uncooperative governments, and fragile democracies, NGOs and other civil society movements are the only solutions to translate the affected communities' struggles into various legal and non-judicial avenues for redress and compensation of environmental grievances. In many cases in Mongolia, NGOs turn to legal mechanisms as a last resort after failing to yield significant results in public awareness-raising campaigns or meetings with government officials. The important role of NGOs in advancing environmental causes is legislatively acknowledged. The 2016 amendments to the Law on Administrative Procedure, incorporated Article 18(3) allowing NGOs to have a standing in courts for public interest litigation on environmental issues.⁶⁴ NGOs resorting to legal avenues have ensured favorable environmental outcomes such as the annulment of extraction and exploration licenses of mining companies contributing to environmental harms, enforcement of the domestic environmental law, and environmental protection of the sacred religious and cultural sites in Noyon Mountain in Mongolia, as discussed in Chapters 4 and 5 of this thesis.

Chapter 2: Theoretical Framework of NGO Access to Environmental Justice

In Chapter 2, I discuss the theory of environmental justice, as developed by the American and Canadian scholars, particularly focusing on the NGO engagement with the procedural environmental justice processes. Based on these theoretical discussions, I

⁶⁴ Article 18(3) of the Administrative Procedure Law provides that "the competent entity authorized to represent the public interest, other than those exclusively entitled by law, shall have the right to lodge a claim to the court on the protection of the environment, children's rights, public health, and public property and this entity shall satisfy the following requirements:

18.3.1. The statement of the claim shall be consistent with the goals of the organization's charter;

18.3.2. The organization has conducted sustainable operations in accordance with the goals of its charter for no less than three years." (See, *Law on Administrative Procedure, 2016* (Mongolia) Uniform portal of laws, online: <www.legalinfo.mn/law/details/11703> [*Law on Administrative Procedure*]).

have constructed a theoretical framework on NGO access to environmental justice tools both domestically and internationally to be applied in the empirical case study of Mongolia. In the domestic context, environmental justice tools include the NGO access to environmental information, participation in environmental decision-making processes such as meaningful engagement in the environmental impact assessment of mining projects, and access to the courts. In the international context, NGOs' environmental justice tools include access to international decision-making processes such as the UN UPR process, access to international corporate accountability mechanisms such as the OECD National Contact Points and the Compliance Advisor Ombudsman of the World Bank. These national and international environmental justice tools allow NGOs to mediate the disputes of marginalized communities with large corporations.

Chapter 3: Qualitative Research Methodology: Document Analysis, Interviews, and Research Ethics

In Chapter 3, I describe the qualitative research methods combining the document analysis and the interview method to answer the research questions of this thesis. The document analysis research method includes the analysis of laws, legislation, and administrative court decisions of Mongolia concerning the resolution of mining-related environmental cases advanced by NGOs and the decisions of the international non-judicial grievance mechanisms of the OECD National Contact Point and the Compliance Advisor Ombudsman of the World Bank. The interviews were conducted with international and national NGO experts and lawyers, who had first-hand expert knowledge of the access to domestic courts in Mongolia and the engagement with international non-judicial grievance mechanisms; thus, this Chapter discusses the type of questions, the coding, and the content analysis of interview transcripts, and addresses the research ethics in carrying out research with human participants.

Chapter 4: Mongolian NGO Access to Environmental Justice Tools Domestically

In Chapter 4, I discuss the role of NGOs in demanding the state and mining company accountability for environmental degradation in Mongolia through their access to environmental justice tools domestically. Here, I provide an overview of the Mongolian legal, procedural, and administrative structure for adoption and implementation of

substantive and procedural environmental rights, as outlined in its domestic and international human rights commitments. In particular, I outline NGOs' role in accessing environmental information, decision-making processes, and court remedies through the analysis of 24 court cases, where NGOs act as claimants. The examination of these court cases illustrates the successes and challenges faced by NGOs in demanding access to environmental information, meaningful participation in environmental impact assessments, compensation for environmental harms, annulment of mineral licenses, and enforcement of environmental laws and regulations on behalf of mining-affected local nomadic communities.

Chapter 5: Mongolian NGO Access to Environmental Justice Tools Internationally

In Chapter 5, I explore the NGO access to environmental justice tools internationally to advocate and mediate for mining-affected communities concerning the negative environmental impacts of mining projects implemented by foreign mining companies and financed by the World Bank. Through participation in international cooperation and decision-making processes, such as the UN Universal Periodic Review, NGOs are able to highlight serious challenges faced by the Government of Mongolia in its implementation of international human rights instruments. Dynamic NGO engagement into the UN decision-making processes and submission of its civil society reports acts as an instrument to exert pressure on the state to faithfully enforce its human rights commitments before the international community. Moreover, the cases of NGO access to the international corporate accountability mechanisms such as the OECD and the CAO non-judicial grievance mechanisms illustrate the successes and challenges of Mongolian NGOs to mediate the resolution of nomadic herders' disputes with foreign mining companies.

Chapter 6: Conclusion

In Chapter 6, I provide an overall assessment of the main findings on the NGO access to environmental justice tools nationally and internationally to rectify environmental harms by mining companies and secure remedies for mining-affected local nomadic communities in Mongolia. NGO exploitation of domestic environmental justice tools such as access to environmental information, participation in environmental

decision-making processes, and access to court remedies reveal the inadequate state system in ensuring meaningful public consultation in environmental impact assessment processes, lack of support to human rights defenders, and irregular enforcement of environmental laws and regulations. With constrained legal avenues for domestic environmental remedies, Mongolian NGO partnership with international environmental NGOs contributes towards resolving mining-related grievances by nomadic communities through their engagement with alternative international non-judicial corporate accountability mechanisms with a sometimes-outstanding achievement as the establishment of the Tripartite Council in the South Gobi region.

CHAPTER TWO: THEORETICAL FRAMEWORK OF NGO ACCESS TO ENVIRONMENTAL JUSTICE

Introduction

In this Chapter, I discuss the theory of environmental justice, as developed by the American and Canadian scholars, the role of NGOs in the environmental justice movement, and on the basis of these theoretical discussions, I have constructed a theoretical framework on the NGO access to environmental justice tools both domestically and internationally. Domestic environmental justice tools include the NGO access to environmental information, participation in environmental decision-making processes such as meaningful involvement in the environmental impact assessment of mining projects, and access to the courts to rectify environmental harms. International environmental justice tools include the NGO access to international decision-making processes such as the UN Universal Periodic Review (UPR) process, access to international corporate accountability mechanisms such as the OECD National Contact Points and the Compliance Advisor Ombudsman (CAO) of the World Bank. This Chapter discusses the examples of NGO employment of all these national and international environmental justice tools to advocate, litigate, and mediate the disputes of marginalized communities with their corporate opponents.

Theoretical Framework: Environmental Justice Framework

Environmental justice scholarship was initially based on renowned scholar John Rawls' theory of distributive justice, which emphasizes the just distribution of goods in a society.⁶⁵ Scholars such as Robert D. Bullard built on this conception of justice to demonstrate how impoverished, vulnerable, and marginalized communities in the United States faced devastating environmental and health hazards due to the proximity of mining, industry, and other infrastructural projects to their communities.⁶⁶ Furthermore, unequal distribution of environmental harms included uneven enforcement of environmental, civil, and public health laws, different exposure to harmful chemicals, and

⁶⁵ John Rawls, *A Theory of Justice* (USA: Harvard University Press, 1999) at 267; Iris Marion Young, *Inclusion and Democracy* (UK: Oxford University Press, 2002) at 4 [Young].

⁶⁶ Bullard, *supra* note 41 at 555.

discriminatory zoning and land-use practices.⁶⁷ Such unfair, unjust, and unequal distribution of environmental risks sparked environmental justice movements – grassroots community resistance movements – that emerged in reaction to unjust, unfair, and illegal practices, policies, and conditions.⁶⁸ However, the sole focus on distributive justice was challenged by scholars such as Iris Young and Nancy Fraser, who stressed the need to examine the underlying causes of maldistribution.⁶⁹ Young emphasizes the importance of questioning the structural injustices such as prejudices, privileges, cultural beliefs, and misunderstandings that accompany group differences.⁷⁰ Therefore, she suggests a solution to this maldistribution by recognizing group differences through democratic processes and discussions of social, cultural, economic, and political impediments to fair distributional outcomes.⁷¹ Similarly, Fraser argues for expanding the understanding of justice to include claims of recognition.⁷² Without recognition, groups or communities face unfair justice outcomes, including environmental harms. Thus, to alleviate such instances of injustice, Fraser proposes ensuring the participation of affected parties as equal members of society.⁷³

Other scholars such as Amartya Sen and Martha Nussbaum add a so-called ‘capability approach’ to the distribution of justice. Instead of focusing on the distribution of goods as a sole concern of justice, these scholars argue that justice is better served if goods increase the individuals’ capabilities for a well-functioning human existence in society.⁷⁴ Here, Sen forcefully displaces the focus on the mere distribution of goods to concern on how the capacitated individuals can transform these goods into valuable assets to improve the quality of their lives.⁷⁵ Nussbaum has even enumerated central capabilities for the minimum flourishing of life, including bodily health, integrity,

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at 557.

⁶⁹ David Schlosberg, “Defining Environmental Justice: Theories, Movements, and Nature” (UK: Oxford University Press, 2007) at 14 [Schlosberg].

⁷⁰ Young, *supra* note 65 at 3.

⁷¹ Schlosberg, *supra* note 69 at 14.

⁷² Nancy Fraser, “Recognition without Ethics?” (2001) 18:2-3 *Theory Cult. Soc.* 21 at 23.

⁷³ *Ibid* at 24.

⁷⁴ Schlosberg, *supra* note 69 at 29-30.

⁷⁵ Amartya Sen, “Capability and Well-Being” in Martha C Nussbaum & Amartya Sen, eds, *The Quality of Life* (UK: Oxford University Press, 1993) 30 at 31-34.

imagination and thought, practical reason, control over one's environment, and so forth.⁷⁶ In practical terms, various communities, including indigenous groups, advance environmental justice claims demanding equity, recognition, participation, and other capabilities advancing basic 'functionings' of these communities.⁷⁷ Thus, recognition, participation in decision-making processes, and capabilities to enjoy environmental benefits all constitute vital cornerstones of the current environmental justice framework.

Another dimension of the environmental justice framework is procedural justice, particularly institutional processes (i.e., political or democratic processes) for the fair and equitable distribution of environmental goods or harms in a state. David Miller places importance on procedural justice that ensures political dialogue about the appropriate allocation of environmental goods and harms. According to him, the achievement of procedural justice is dependent on proper democratic institutional processes that ensure informed and participatory public decision-making concerning environmental justice issues.⁷⁸ Thus, procedural environmental justice is materialized when people impacted by environmental decisions have a right to environmental information, a right to participate in environmental decision-making processes, and a right to redress and compensation in the cases of environmental harms.⁷⁹ Consequently, in the empirical case study of Mongolia, I will explore the role of NGOs in accessing substantive and procedural environmental rights in the domestic context such as access to environmental information, participation in environmental decision-making, and access to the courts through public interest litigation, as well as those related to international context such as access to international cooperation and decision-making processes, and access to international non-judicial grievance mechanisms to advocate and litigate for mining-affected communities.

⁷⁶ Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (US: Harvard University Press, 2011) at 33-34.

⁷⁷ David Schlosberg & David Carruthers, "Indigenous Struggles, Environmental Justice, and Community Capabilities" (2010) 10:4 *Global Environmental Politics* 12 at 12-13.

⁷⁸ David Miller, "Social Justice and Environmental Goods" in Andrew Dobson, *Fairness and Futurity* (Oxford University Press, 1999) at 170.

⁷⁹ Millner, *supra* note 43 at 190-191.

Role of NGOs in Environmental Justice

Strategic partnerships between grassroots communities and environmental NGOs can contribute to environmental justice both nationally and internationally.⁸⁰ Studies in several countries have demonstrated how NGO participation in environmental decision-making stimulates active local community engagement and can contribute to the empowerment of marginalized groups.⁸¹ Particularly in the extractive sector, NGOs can serve as essential facilitators in mediating conflicts between the local community, on the one hand, and the state or the mining companies, on the other hand, by empowering and building the capacities of affected communities⁸² to deal with complex technical and scientific projects to negotiate just environmental outcomes. Where marginalized rural communities face significant barriers to engaging in decision-making processes, NGOs can step in to bridge this gap.⁸³ NGO capacity-building workshops and services assist local communities to challenge adverse environmental impacts inflicted by irresponsible corporate actions.⁸⁴ NGO access to legal expertise, technical and scientific knowledge makes them a valuable source of information and capacity for grassroots communities regarding domestic and international legal and non-judicial instruments for accessing environmental justice.

Environmental NGOs are active players in the promotion of international environmental law internationally.⁸⁵ Some NGOs provide technical expertise to governments,⁸⁶ while others are engaged in local community advocacy and decision-making efforts.⁸⁷ Intergovernmental bodies such as the UN greatly benefit from the contributions of NGOs, where they bring expertise and technical know-how on novel environmental issues.⁸⁸ In the regional European context, the Aarhus Convention on

⁸⁰ Eghosa Osa Ekhaton, "The Role of Non-Governmental Organizations in the Environmental Justice Paradigm" (2017) 8:2 NAUJILJ 28 at 29-30 [Ekhaton].

⁸¹ William F Fisher, "DOING GOOD? The Politics and Antipolitics of NGO Practices" (1997) 26:1 Annu Rev Anthropol 439 at 455 [Fisher].

⁸² Nguyen KimDung, Simon R Bush & Arthur P J Mol, "NGOs as Bridging Organizations in Managing Nature Protection in Vietnam" (2016) 25:2 The Journal of Environment & Development 191 at 193.

⁸³ *Ibid* at 196.

⁸⁴ James R Keese, "International NGO and Land Use Change in a Southern Highland Region of Ecuador" (1998) 26:3 Human Ecology 451 at 458.

⁸⁵ Hunter, *supra* note 26 at 258.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at 257.

⁸⁸ Ekhaton, *supra* note 80 at 31.

Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter⁸⁹ recognizes the right to information by the public and NGOs.⁹⁰ International financial institutions such as the World Bank recognize the critical role played by NGOs in addressing the institutional weaknesses of developing countries; thus, positively contributing to the development process.⁹¹

The role of NGOs in the domestic environment is even more compelling, particularly in developing countries. NGOs representing civil society are active players in demanding access to environmental justice, equal distribution of environmental benefits, and rectification of environmental harms. For the advancement of these goals, NGOs employ a diverse range of legal and non-judicial mechanisms, including advocacy, litigation, and persuasion strategies to demand accountability of states and corporations in the domestic or international arena.⁹² Corporations often respond to such NGO campaigning; thus, NGOs play a significant role in enforcing more robust corporate environmental practices.⁹³ For instance, NGOs in Nigeria have successfully organized coordinated struggle to demand environmental justice in the Niger Delta region fraught with environmental pollution and armed conflict.⁹⁴ NGO strength is derived from their ability to focus on single-issues and effectively highlight environmental matters.⁹⁵ In many instances, local communities turn to NGOs for scientific and environmental expertise.⁹⁶ On the other hand, NGOs have also come under increased scrutiny for the questions surrounding their governance structure, accountability, independence from various donors, lack of transparency, inefficiency, and abandonment of original goals.⁹⁷ NGOs are sometimes idealized as doers of good, nonprofit, and non-governmental institutions.⁹⁸

⁸⁹ UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [Aarhus Convention].

⁹⁰ Ekhaton, *supra* note 80 at 32.

⁹¹ Fisher, *supra* note 81 at 444.

⁹² Atkinson, *supra* note 31 at xii-xiv, 22; Spiro 1, *supra* note 25 at 130.

⁹³ Peter J Spiro, "NGOs in International Environmental Lawmaking: Theoretical Models" (2006) Temple University Research Paper No.2006-26 1 at 25 [Spiro 2].

⁹⁴ Ekhaton, *supra* note 80 at 33.

⁹⁵ Princen, *supra* note 40 at 35.

⁹⁶ *Ibid* at 33.

⁹⁷ Ekhaton, *supra* note 80 at 35.

⁹⁸ Fisher, *supra* note 81 at 442.

However, NGOs with all good intentions could also contribute to potential harm,⁹⁹ and large NGOs such as Green Peace and Oxfarm accept donations from large corporations and foundations, causing concern regarding their political aims and agenda.¹⁰⁰

Large transnational NGOs are also accused of hijacking grassroots organizations in developing countries, making them reliant on foreign funding, replacing local leaders with professional consultants, and transforming their strategies with alternative global strategies of influencing governmental political agendas.¹⁰¹ Such fears have exacerbated the adoption of strict laws limiting foreign funding and registration requirements of NGOs in the Russian Federation, Turkey, Cambodia, Venezuela, and Thailand.¹⁰² Restricting the foreign funding and registration requirements of NGOs through more stringent legal measures only contributes to suppressing the opposition and stifling the civil society movements. Instead, efforts should direct towards improving the NGO governance structures through elaborate public reporting mechanisms, the internal election of members, openness and transparency of funding and operations, adoption, and enforcement of codes of conduct and ethical practices.¹⁰³

There are further fears that NGOs could jeopardize the environmental struggles by overemphasizing expensive legal strategies, robbing the agency of the community to raise their profile and agenda, appropriating the Indigenous issues, turning collective movements into individual lawsuits, or legitimizing the status quo.¹⁰⁴ Moreover, there is a danger that legal instruments are exploited by NGOs, where the communities' environmental justice struggles are used by NGOs to serve their interests and raise their profile.¹⁰⁵ Lawyers engaging in these processes are not innocent bystanders; they are seen as actors constructing a specific narrative through translation, transformation, and

⁹⁹ *Ibid.*

¹⁰⁰ Naomi Klein, *Big green groups are more damaging than climate deniers* (10 September 2013), online: The Guardian <www.theguardian.com/environment/2013/sep/10/naomi-klein-green-groups-climate-deniers>.

¹⁰¹ Stephen Meyers, "NGO-ization and Human Rights Law: The CRPD's Civil Society Mandate" (2016) 5:2 *Laws* 21 at 25.

¹⁰² Melissa Curley, "Governing Civil Society in Cambodia: Implications of the NGO Law for the 'Rule of Law'" (2018) 42:2 *Asian Studies Review* 247 at 247; Jo Crotty, Sarah Marie Hall & Sergej Ljubownikow, "Post-Soviet Civil Society Development in the Russian Federation: The Impact of the NGO Law" (2014) 66:8 *Europe-Asia Studies* 1253 at 1265.

¹⁰³ Ekhtator, *supra* note 80 at 36

¹⁰⁴ Cole, *supra* note at 61.

¹⁰⁵ *Ibid.*

exertion of power.¹⁰⁶ Engaging with legal strategies could be particularly disadvantageous for local communities in land use disputes where claims falling outside of recognized property ownership may be subsumed by the private property ownership entitlements that are privileged in Anglo-American property law.¹⁰⁷ NGOs can support communities to overcome these obstacles by constructing claims in terms of the complex and diverse relations that local communities have with their land.¹⁰⁸ Through such reorientations of property relations NGOs and communities can resist the privileging of particular rights over others in order to arrive at an environmentally just outcome.¹⁰⁹ Environmentally just outcomes include the recognition of affected communities and their relationships to particular places, their participation in decision-making processes, and capabilities to enjoy environmental benefits and avoid environmental harms. Furthermore, as exemplified by the experiences of many developing countries, NGOs possess valuable legal and scientific expertise to assist marginalized communities in engaging appropriate legal strategies towards the successful resolution of their environmental grievances. Litigation is often necessary to demand the application and enforcement of environmental laws and regulations in countries with widespread corruption and weak institutional capacities.

Access to Environmental Information

Protection and promotion of procedural human rights enumerated in the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) are crucial to enable NGOs to demand environmental justice and avert environmental harm.¹¹⁰ These include, the right to an effective remedy and the right to fair and public hearing from the independent and impartial tribunal,¹¹¹ freedom of opinion

¹⁰⁶ Deborah G Martin, Alexander W Scherr & Christopher City, "Making law, making place: lawyers and the production of space" (2010) 34:2 Progress in Human Geography 175 at 176.

¹⁰⁷ Estair Van Wagner, "Putting Property in Its Place: Relational Theory, Environmental Rights and Land Use Planning" (2013) 43:Special Issue RGD 275 at 277.

¹⁰⁸ *Ibid* at 287.

¹⁰⁹ *Ibid*.

¹¹⁰ Hunter, *supra* note 26 at 1336.

¹¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at art 8 [UDHR]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) art 2(3), 14(1), 19, 21, 22 and 25 [ICCPR].

and expression, the right to receive information, and the right to take part in government.¹¹² Procedural rights such as the rights to receive environmental information, to participate in environmental decision-making processes, and the access to environmental remedy have been recognized as three core environmental procedural rights following the adoption of the Rio Declaration on Environment and Development.¹¹³ The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter is a formal international instrument recognizing and defining these procedural rights.¹¹⁴ Under this Convention, the right to receive information imposes an obligation on states to provide information to the public upon their request.¹¹⁵

While countries may regulate access to environmental information, such legislative provisions often lack procedural mechanisms critical to their fulfillment.¹¹⁶ Rights to access information regarding government processes and environmental impact assessments are integral to meaningful participation in environmental decision-making processes.¹¹⁷ Indeed, access to environmental information is a cornerstone of effective public consultation.¹¹⁸ Without such guarantees, public consultation is hampered, preventing local communities from voicing informed opinions, criticisms, and comments on environmental issues for consideration by the relevant government authorities.¹¹⁹ Access to accurate environmental information can lead to public actions such as protests and community educational awareness campaigns to strengthen the public debate and influence favorable environmental outcomes in government decision-making.¹²⁰ Consequently, legislative developments to ensure public access to environmental

¹¹² *UDHR* at art 19-21.

¹¹³ Hunter, *supra* note 26 at 1336-1337.

¹¹⁴ *Ibid.*

¹¹⁵ Aarhus Convention, *supra* note 89 at art 4(1).

¹¹⁶ Adriaan Bedner, "Access to Environmental Justice in Indonesia" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007) 88 at 94 [Bedner].

¹¹⁷ *Ibid.*

¹¹⁸ Millner, *supra* note 43 at 196.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

information contributes to openness and transparency of relevant government decisions.¹²¹

Even where there is robust access to information protections in relation to government, it is more difficult to obtain relevant information regarding environmental management from private companies' where the procedural obligations for reporting, monitoring, and enforcement by the private sector is lacking.¹²² Here, the role of NGOs is critical in demanding access to information from corporate actors. For instance, in Malaysia, NGOs were successful in demanding access to environmental information where the government imposed severe restrictions on freedom of speech.¹²³ Furthermore, the international certification process, such as those developed by the International Organization for Standardization (ISO), includes an obligation on corporations to disclose information about products developed for international markets.¹²⁴ Environmental NGOs such as the Indonesian Centre for Environmental Law have emphasized the importance of access to environmental information from private actors and initiated a draft law on the Freedom of Information Act.¹²⁵ These examples illustrate how environmental NGOs are active players in demanding access to environmental information, even resorting to drafting legislation to ensure the availability of this procedural environmental right.

Courts in many countries act as strong guardians in satisfying the public right to access environmental information. For example, comparative analysis reveals that the courts in Columbia, Ecuador, India, Latvia, Peru, Slovenia, South Africa, and South Korea have upheld the claimant's right to participate in environmental decision-making through access to environmental information.¹²⁶ Courts, in this context, can play a strong role by upholding claims that the lack of public access to environmental information can deleteriously impact the lives of the poor and marginalized communities. For example, in

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Andrew Harding & Azmi Sharom, "Access to Environmental Justice in Malaysia (Kuala Lumpur)" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007) 122 at 142.

¹²⁴ Bedner, *supra* note 116 at 96.

¹²⁵ *Ibid.*

¹²⁶ Joshua C. Gellers & Christopher Jeffords, "Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism" (2015) Economic Rights Working Papers 25 at 3.

Nepal, NGOs invoked a constitutional right to environmental information after the government failed to provide adequate information regarding the potential risks and benefits of the Arun III hydroelectric power project funded by the World Bank.¹²⁷ Such grassroots struggles amplify the voices of the subordinated, marginalized, and vulnerable communities in their environmental justice movements in order to exert bottom-up changes to environmental laws and procedures¹²⁸ to ensure public access to environmental information.

Participation in Environmental Decision-Making

Environmental justice can only be realized through meaningful participation of communities in the development of laws, projects, and policies that impact their lives and communities.¹²⁹ Involvement in the decision-making processes about projects that impact the environment constitutes one of the critical pillars of procedural justice.¹³⁰ Participation in environmental decision-making processes, including meaningful public involvement in the environmental impact assessment, constitutes another essential procedural environmental right, as defined in the Aarhus Convention. Accordingly, these two rights are linked as the right to participate in decision-making on environmental matters requires the timely provision of information to the public to give them sufficient time to “prepare and participate during environmental decision-making”.¹³¹ Meaningful engagement of people affected by various large-scale mining, development, and construction projects in decision-making processes, including their ability to freely express views and concerns, is considered necessary to ensure fair and just environmental outcomes.¹³² To ensure participation in environmental decision-making, states set up various forms of institutional bodies that enable and ensure the exercise of this right. For instance, in Ghana, the

¹²⁷ Surya P. Subedi, “Access to Environmental Justice in a Politically Unstable Environment: A Case Study of Nepal” in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007) 157 at 173.

¹²⁸ Carmen G. Gonzales & Sumudu Atapattu, “International Environmental Law, Environmental Justice, and the Global South” (2017) 26:2 *Transnat’l L & Contemp Probs* 229 at 238.

¹²⁹ Jona Razzaque, “Participatory rights in natural resource management: the role of communities in South Asia” in Jonas Ebbeson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009) at 118 [Razzaque].

¹³⁰ Aarhus Convention, *supra* note 89.

¹³¹ *Ibid* at art 6(3).

¹³² Millner, *supra* note 43 at 190.

Environmental Protection Agency is the body responsible for ensuring compliance with environmental impact assessment procedures for new or existing projects.¹³³ It appoints inspectors tasked with monitoring compliance with established environmental laws and regulations.¹³⁴

The involvement of local communities in environmental impact assessments (EIA) constitutes one of the primary mechanisms for public participation in environmental project decision-making. EIA process is commonly used to facilitate environmental decision making. For example, all South Asian countries use EIA processes to facilitate the right to public participation.¹³⁵ Communities are thus formally allowed to participate in environmental planning, conservation of shared natural resources, and activities related to waste disposal, energy facilities, and dams.¹³⁶ Local communities can challenge government decisions in the court through public interest litigation.¹³⁷ Thus, investments into adequate structures for participation in environmental decision-making processes can be beneficial by offsetting future uncertainties, protests, and other forms of disagreements that could arise from impacts on local communities.

Access to the Courts: Public Interest Environmental Litigation

Meaningful and unobstructed access to the courts constitutes a precondition for successful implementation of the procedural environmental rights such as access to information and participation in environmental decision-making processes.¹³⁸ Without such access to domestic remedies, environmental justice is undermined or unattainable.¹³⁹ States need to ensure the effectiveness of the domestic judicial mechanisms by reducing legal, practical, or other barriers to accessing state justice systems for environmental matters.¹⁴⁰ NGOs are swift in resorting to the legal system to

¹³³ James S. Read, "Access to Environmental Justice in Ghana (Accra)" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007) 21 at 32.

¹³⁴ *Ibid.*

¹³⁵ Razzaque, *supra* note 129 at 127.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Maria Adebawale, "Using the Law: Access to Environmental Justice. Barriers and Opportunities" (London: Capacity Global Ltd, 2004) at 6, online (pdf): *Capacity Global* <AnnexBEJUsingtheLaw009Capacity04.pdf>.

¹³⁹ *Ibid.*

¹⁴⁰ John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Human Rights Council, *Report on the*

challenge governments in violation of the procedural environmental rights. For instance, a Nepalese NGO successfully lodged a complaint against the government for its violation of the constitutionally protected right to freedom of information.¹⁴¹ They pointed to the government failure to provide them with adequate information concerning the construction of an infrastructural project and its impact on the local community.¹⁴²

The establishment of environmental courts specifically developed to adjudicate environmental disputes is a recent important development. There are more than 350 environmental courts and tribunals in 41 countries.¹⁴³ Some scholars argue that providing access to justice through environmental adjudication has grown in significance to become customary international law.¹⁴⁴ Countries with burgeoning populations such as China and India have expanded their system of environmental courts and tribunals.¹⁴⁵ Here, population growth and urbanization strain natural systems, contributing to ever-increasing numbers of environmental conflicts and disputes.¹⁴⁶ Therefore, orderly and efficient resolution of these environmental disputes and protection of the natural environment have become increasingly pivotal to mitigate environmental threats.¹⁴⁷ Access to environmental courts and tribunals is necessary to both the enforcement of environmental laws and the provision of environmental remedies to ameliorate environmental harms.¹⁴⁸ Dedicated environmental courts and tribunals facilitate speedy resolution of environmental disputes and consistent rulings.¹⁴⁹ Due to the complex nature of environmental disputes, specific judicial expertise and training in environmental laws and practice are essential to the facilitation of judicial rulings based on a sound understanding

Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) at 23 (principle 26) [Ruggie Framework].

¹⁴¹ *Gopal Siwakoti and Rajesh Gautam v Ministry of Finance, Ministry of Water Resources, Managing Director of Nepal Electricity Authority and Director General of Arun III Hydro-Electric Project* (Writ Petition No. 3049 of the year 2050 (1992)) in Alice Palmer & Cairo A R Robb, eds, *International Environmental Law Reports Volume 4: International Environmental Law in National Courts* (UK: Cambridge University Press, 2004) 330 at 331-332.

¹⁴² *Ibid.*

¹⁴³ Nicholas A. Robinson, "Ensuring Access to Justice Through Environmental Courts" (Winter 2012) 29:2 *Pace Env'tl. L. Rev.* 363 [Robinson].

¹⁴⁴ *Ibid* at 364.

¹⁴⁵ *Ibid* at 369.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* at 372.

¹⁴⁹ *Ibid.*

of environmental law, science, and technology.¹⁵⁰ However, there are some criticisms about environmental courts' rulings serving as extensions of political decisions with close interactions of the legislative and policy agenda.¹⁵¹ Despite the challenges, these specialized courts can provide a successful forum for public interest litigation on pressing environmental issues.¹⁵²

There are also examples of innovative dispute resolution mechanisms on environmental issues. For instance, India has an expedited system to enable environmental justice in line with the Consumer Protection Act, where the disputes are resolved in 90 days without the necessity for legal representation, court fees, or other complex rules of evidence.¹⁵³ However, such examples are rare. In most countries, environmentally-impacted communities face various procedural and substantive obstacles in demanding environmental protection and accountability. For example, in Australia, procedural obstacles in public interest litigation include legal costs, security for costs applications, undertakings in seeking interim injunctions, standing requirements, lack of access to lawyers, and difficulty in obtaining scientific evidence.¹⁵⁴ Local communities without access to legal advice are at a significant disadvantage, and public interest litigation assistance is limited or lacking in the Pacific region.¹⁵⁵ Citizens thus require resources, expertise, money, and information to access public interest litigation.¹⁵⁶ Access to justice is also denied to the poor urban communities and those living in informal settlements. For example, in Pakistan, plaintiffs experience exclusion and marginalization in their dealings with the courts as a result of living in squatter settlements.¹⁵⁷

¹⁵⁰ *Ibid* at 379.

¹⁵¹ Ceri Warnock, "Reconceptualising specialist environment courts and tribunals" (2017) 37:3 *Legal stud* 391 at 415.

¹⁵² Robinson, *supra* note 143 at 379.

¹⁵³ Amanda Perry-Kessaris, "Access to Environmental Justice in India's Garden City (Bangalore)" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007) 59 at 64 [Perry-Kessaris].

¹⁵⁴ Nicola Pain, "Access to Environmental Justice in the South West Pacific" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007) 237 at 250.

¹⁵⁵ *Ibid* at 253.

¹⁵⁶ Perry-Kessaris, *supra* note 153 at 67.

¹⁵⁷ Martin Lau, "Access to Environmental Justice: Karachi's Urban Poor and the Law" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (Boston, USA: Martinus Nijhoff Publishers, 2007) 177 at 197.

Despite these barriers, public interest environmental litigation can play an important role in raising public awareness. Environmental cases reported on and portrayed through mass media can alert the public about environmental issues, inform political decision-making, and place a spotlight on the required legal reform.¹⁵⁸ Due to the contentious nature of environmental issues in many countries, activists have long used media platforms to highlight the sites of contention and political conflict for the broader public.¹⁵⁹ Activists can be either portrayed by the media as lawbreakers disrupting social and economic stability or as saviors of natural habitats and communities.¹⁶⁰ The use of legal tools, in addition to other grassroots strategies, provides environmental activists with an opportunity to present their own version of contested environmental issues, address opposing parties' arguments, and enter the public consciousness through media depictions of court cases. In this way, public interest litigation can help garner sufficient public support to prevent proposed environmental harms or demand remedies for past and ongoing harms.¹⁶¹ Consequently, public interest litigation on environmental issues can help make environmental conflicts visible to the public eye and challenge attempts by the government or the corporations to undermine ecosystems, and allowing for open and heated public debates on the legality of various development, construction, and mining projects.

Access to International Cooperation and Decision-Making Processes

NGO participation in international decision-making processes can enhance environmental justice by supporting the advocacy and lobby efforts of environmental NGOs. International organizations welcome NGO participation in their decision-making forums, where NGOs can submit their civil society reports to several UN Committees to present an accurate record of human rights of the state under review.¹⁶² NGOs can access most international lawmaking forums, where the UN Economic and Social Council, Secretariat, the Security Council, General Assembly, International Court of

¹⁵⁸ Claire Konkes, "Green Lawfare: Environmental Public Interest Litigation and Mediatized Environmental Conflict" (2018) 12: 2 *Environ Commun* 191 at 192.

¹⁵⁹ *Ibid* at 193.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*.

¹⁶² Dommen, *supra* note 35 at 16.

Justice, and most UN-related intergovernmental organizations have formal or informal working relations with NGOs.¹⁶³ Environmental NGOs are keen to participate in various international forums in their area of interest and expertise¹⁶⁴ and, most importantly, build meaningful international partnerships with other like-minded NGOs from other countries. Thus, NGOs can forge such alliances and act as a focal point for linking local environmental issues with global environmental challenges.¹⁶⁵ Government delegations to the UN and other international bodies include NGO representatives to enhance their status and legitimacy.¹⁶⁶

The UN Universal Periodic Review (UPR) process provides a unique platform for NGOs to report their home countries' compliance with their international human rights commitments domestically.¹⁶⁷ All 193 UN Member States are reviewed once every four years on their implementation of the international human rights instruments.¹⁶⁸ It is a peer-review process, where other countries are given an opportunity to comment on the human rights record of the State under Review (SuR). Consequently, countries use the UPR mechanism to exert peer pressure on SuR to improve its obligations to respect, protect, and fulfill human rights. Here, civil society organizations, including NGOs, are invited to supply "credible and reliable" information on the situation of human rights in UPR.¹⁶⁹ NGOs may provide critical information that otherwise would not have come to the attention of the international community due to the interests of the SuR to suppress it; thus, NGO access to this international consultative forum ensures that the needs of the most vulnerable communities are addressed by the SuR.¹⁷⁰

After this step, the representatives of NGOs and National human rights institutions attend the review process by the Working Group with no right to comment.¹⁷¹ Later they are presented with an opportunity to make oral comments before the adoption of the final

¹⁶³ Barbara K Woodward, *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice* (Leiden: Martinus Nijhoff Publishers, 2010) at 21 [Woodward].

¹⁶⁴ Princen, *supra* note 40 at 36.

¹⁶⁵ *Ibid* at 39.

¹⁶⁶ *Ibid* at 158.

¹⁶⁷ *Ibid* at 125.

¹⁶⁸ United Nations, Member States (2020), online: United Nations <www.un.org/en/member-states/index.html>.

¹⁶⁹ Woodward, *supra* note 163 at 364.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*.

document.¹⁷² NGOs participate in the UPR process in three steps, including: (i) providing valuable information regarding SuR state of environmental and human rights situation; (ii) attending as an observer of the Working Group (WG), which is made up of all UN Human Rights Committee (HRC) member states;¹⁷³ (iii) providing oral comments at the HRC plenary before WG adoption of the outcome.¹⁷⁴ Furthermore, NGOs may engage in communication strategies with the media regarding the outcome of the SuR to influence its implementation processes. Consequently, NGO access to international cooperation and decision-making processes is significant in exerting pressure on states to carry out their environmental and human rights obligations domestically.

Access to International Corporate Accountability Mechanisms

International efforts to adopt enforceable regulatory mechanisms to ensure corporate accountability have been going strong since the 1980s. The motto of ‘greed is good’ is being changed to ‘good ethics is good for businesses’.¹⁷⁵ International human rights law largely failed to address the corporate violation of human rights because they regulate state relations in international arena, where states are considered the main actors.¹⁷⁶ Therefore, the international community has been struggling to come up with a solid framework to make corporations accountable for their human rights violations. Accountability measures include the availability of information and justification for actions and operations, and the possibility for sanctions in cases of violations.¹⁷⁷ To address the lack of accountability mechanisms internationally, various voluntary and non-binding ‘codes of corporate conduct’ such as the UN Global Compact, “Protect, Respect and Remedy: A Framework for Businesses and Human Rights” (Ruggie Framework), and the Guidelines for Multinational Enterprises of the Organization for the Economic Co-operation and Development (the OECD Guidelines) were developed by intergovernmental bodies and promoted among corporations, as discussed below.

¹⁷² *Ibid.*

¹⁷³ *Ibid* at 363.

¹⁷⁴ Marcia E Greenberg, “NGO Participation in International Law and Its Processes: An Eastern European Case Study” (2001) 95 American Society of Intl L Proceedings 300 at 303 [Greenberg].

¹⁷⁵ Damian Grace, ‘Business Ethics and Human Rights’ (1998) 4 *Australian Journal of Human Rights* 59, 59.

¹⁷⁶ Spiro 2, *supra* note 93 at 8.

¹⁷⁷ Eugénia C Heldt, “Lost in internal evaluation? Accountability and insulation at the World Bank” (2018) 24:5 *Contemporary Politics* 568 at 572.

The UN Global Compact (GC) was originally advanced by the former UN Secretary-General Kofi Annan during the World Economic Forum in 1999, and the GC was officially launched on July 26, 2000.¹⁷⁸ GC is one of the largest global voluntary initiatives that encourage business entities to conform their activities around the ten principles of human rights, labour, the environment, and anti-corruption.¹⁷⁹ Currently, there are over 14,224 member companies and other stakeholders from over 154 countries globally.¹⁸⁰ Despite its voluntary nature, this mechanism seeks to integrate some form of accountability among its members by encouraging them to submit Communication in Progress (CP), which details their success in implementing the ten GC principles.¹⁸¹ CP promotes the sharing of best practices globally, and due to its affiliation with the UN, many corporate actors adopt GC.

Another important intergovernmental corporate guideline is the so-called Ruggie Framework. In July 2005, following his appointment as a Special Representative on Business and Human Rights, John Ruggie¹⁸² was mandated to develop the standards of corporate responsibility and accountability on human rights.¹⁸³ Ruggie produced a report on “Protect, Respect and Remedy: A Framework for Businesses and Human Rights”, where he discussed the three pillars of human rights protection, such as the state duty to protect, the corporate responsibility to respect and access to remedies.¹⁸⁴ The Ruggie Framework recognized that the states need to take steps to prevent, investigate, punish, and redress human rights abuses by private actors.¹⁸⁵ However, the voluntary nature of the GC and the Ruggie Framework constitute serious limitations to their successful application. Stepan Wood proposes to address such limitation of an impact-based responsibility characteristic of voluntary mechanisms such as GC and the Ruggie Framework through the focus of a leverage-based responsibility, whereby the corporate

¹⁷⁸ UN Global Compact Office, *Corporate Sustainability in the World Economy* (February 2011) online (pdf): <www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf> [UN Global Compact].

¹⁷⁹ UN Global Compact, “Our Participants” (2020), online: United Nations Global Compact <www.unglobalcompact.org/what-is-gc/participants>.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² John Ruggie, *Introduction by the Special Representative* (July 2009) <www.reports-and-materials.org/Ruggie-introduction-to-portal-Jul-2009.doc>.

¹⁸³ *Ibid.*

¹⁸⁴ Ruggie Framework, *supra* note 140.

¹⁸⁵ *Ibid.*

social responsibility is extended to cover the “web of activities and relationships” in the chain of its operations.¹⁸⁶ Despite such qualification, the lack of institutional mechanisms to monitor and adjudicate grievances related to corporate misbehavior renders the voluntary mechanisms ineffectual; thus, paving the way for the growth in the record of human rights abuses committed by corporations.

Internationally, there are several accountability mechanisms that have an institutional capacity for adjudicating grievances against corporations. Due to the relevance to the empirical case study of Mongolia, in this thesis, I will elaborate on two such mechanisms. First, the OECD Guidelines were adopted in 2008 to ensure compliance of the operations of the multinational corporations of OECD member states with the sustainable development objectives of the home countries.¹⁸⁷ The OECD Guidelines urge the member states to establish National Contact Points (NCPs) to promote awareness and forum for discussion on all issues related to the OECD Guidelines.¹⁸⁸ Furthermore, Canada was one of the first countries to ratify the Convention on the OECD on April 10, 1961. According to international practice, it has the mandate to raise awareness among the Canadian companies operating abroad on OECD Guidelines and ensure its effective implementation.¹⁸⁹ Therefore, communities negatively affected by corporate activities can address their grievances to the relevant host country’s NCP for review, adjudication, and resolution.

Secondly, the accountability mechanisms of international financial institutions (IFIs) such as the World Bank, provides a much-sought-after venues for overseeing human rights complaints. The International Finance Corporation (IFC) of the World Bank has a dedicated Compliance Advisor Ombudsman (CAO), which was established in 1999 to address complaints regarding the social and environmental impacts of the IFC and Multilateral Insurance Guarantee Association (MIGA) investments implemented by the

¹⁸⁶ Stepan Wood, “The Case for Leverage-Based Corporate Human Rights Responsibility” (2012) 22:1 *Bus. Ethics Q* 63 at 68, 72-92.

¹⁸⁷ OECD, *OECD Guidelines for Multinational Enterprises* (2008) at 9 online (pdf): <www.oecd.org/dataoecd/56/36/1922428.pdf> [OECD Guidelines].

¹⁸⁸ *Ibid* at 13.

¹⁸⁹ *Ibid*.

private sector in developing countries.¹⁹⁰ Investment-affected communities, including private individuals, groups, or their representatives, can file complaints with the CAO.¹⁹¹ After receiving the complaint, the CAO determines three criteria of eligibility for oversight, including the connection of the complaint to the IFC or MIGA supported projects, social and environmental impacts of the investments, and the eligibility of the claimant.¹⁹² Upon determining the admissibility of the claim, the CAO acts in the capacities of the ombudsman (through the processes of dialogue, mediation, and settlement), compliance advisor (determining the compliance of the IFC and MIGA with the environmental and social policies), or the advisor (advising the upper management of the IFC and MIGA regarding the environmental and social policies).¹⁹³ The CAO uses soft-mechanisms such as fact-finding, dialogue, negotiation, mediation, and settlement in dealing with complaints raised by the project-affected communities.¹⁹⁴ In overseeing some serious complaints concerning torture, imprisonment, environmental damage, and loss of livelihoods,¹⁹⁵ the CAO's final outcome may result in revising the project, providing monetary compensation or outright halting of the project.¹⁹⁶ Such an accountability mechanism has been welcomed by NGOs, which successfully used this avenue to advocate for affected communities.¹⁹⁷ NGO partnership with affected communities is essential in accessing and obtaining successful remedies for the complainants.¹⁹⁸ As the empirical case study of Mongolia in Chapter 5 will show, access to this important accountability instrument has become an important avenue for NGOs to advocate for the redress of human and environmental rights of nomadic communities.

¹⁹⁰ Benjamin M Saper, "The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective" (2012) 44:4 NYUJ Int L & Pol 1279 at 1283 [Saper].

¹⁹¹ *Ibid* at 1281.

¹⁹² Lynn MG Ta & Benjamin AT Graham, "Can Quasi-Judicial Bodies at the World Bank Provide Justice in Human Rights Cases" (2018) 50:1 Geo J Intl L 113 at 120 [Ta & Graham].

¹⁹³ Saper, *supra* note 190 at 1296.

¹⁹⁴ *Ibid* at 1313.

¹⁹⁵ Ta & Graham, *supra* note 192 at 116.

¹⁹⁶ *Ibid* at 114.

¹⁹⁷ *Ibid* at 122.

¹⁹⁸ *Ibid* at 128.

Table 1. Theoretical Framework on NGO Access to Environmental Justice

| Domestic/International Context | Legal and Non-Judicial Tools | NGO Access to Environmental Justice Tools |
|---------------------------------------|---|--|
| Domestic Context | Access to Environmental Information | Access to environmental information constitutes an essential procedural environmental right for effective public consultation and consent regarding various mining, infrastructural, and construction projects, and ensures openness and transparency of relevant government decisions. NGO demanding access to environmental information is significant in amplifying the voices of the subordinated, marginalized, and vulnerable groups affected by these projects. |
| | Participation in Environmental Decision-Making Process (EIA) | Participation in environmental decision-making processes, including meaningful public involvement in Environmental Impact Assessments, constitutes another critical procedural environmental right. NGOs play a significant role in ensuring active engagement of people into the decision-making process through their ability to express views and concerns regarding various developmental projects freely. Such engagement provides fair and just environmental outcomes for affected communities. |
| | Access to the Courts (PIL) | For environmental justice scholarship, meaningful and unobstructed access to the courts constitutes a precondition for successful implementation of the procedural environmental rights such as access to information and participation in environmental decision-making processes. NGOs provide legal expertise for marginalized communities to demand remedy for environmental harms through public interest litigation. |
| International Context | Access to International Cooperation and Decision-Making Processes | NGO participation in international intergovernmental forums such as UN UPR provides opportunities to highlight domestic environmental issues and the needs of the most vulnerable communities in the international arena. NGO access to international cooperation and decision-making processes is significant in exerting pressure on states to carry out their environmental and human rights obligations domestically. |
| | Access to International Corporate Accountability Mechanisms | International institutional mechanisms of accountability, such as the OECD National Contact Points and the Compliance Advisor Ombudsman of the World Bank, provide opportunities for communities negatively affected by corporate activities to address their grievances for review, adjudication, and resolution. NGO partnership with affected communities is essential in accessing these accountability mechanisms towards obtaining successful remedies for the complainants. |

CHAPTER THREE: QUALITATIVE RESEARCH METHODOLOGY: DOCUMENT ANALYSIS, INTERVIEWS, AND RESEARCH ETHICS

Introduction

In Chapter 3, I describe the qualitative research methods, including the document analysis and the interview method, to answer the research questions of this thesis. Through the use of document analysis research method, the primary source documents such as the laws, regulations, and administrative court decisions of Mongolia concerning the NGO advanced claims on mining-related environmental issues as well as the decisions of the international corporate accountability mechanisms of the Canadian National Contact Point on OECD and the Compliance Advisor Ombudsman of the World Bank were analyzed. During my research field trip to Mongolia for December 2019 – March 2020, I conducted interviews with environmental NGO experts, advocates, and lawyers, whereby the interview transcripts were coded to generate new themes and ideas. Thus, this Chapter provides detailed information on the coding and content analysis of interview transcripts and discusses the research ethics in conducting research with human subjects.

Methodology: Qualitative research design

The aim of this research is to investigate how NGOs in Mongolia employ substantive and procedural environmental and human rights to access environmental justice. In particular, my research aims to examine litigation and advocacy strategies for mining-related environmental issues in the domestic as well as international context. To answer this research question, I have employed multi-method research through document analysis and qualitative interview methods.¹⁹⁹ My qualitative research approach was designed to study people's reflections on their social experiences and to comprehend and interpret their social reality through theoretically generated themes.²⁰⁰ The combination of multiple research methods will ensure the validity and reliability of data through triangulation.²⁰¹

¹⁹⁹ Ishwara Bhat, *Idea and Methods of Legal Research* (UK: Oxford University Press, 2020) 112 [Bhat].

²⁰⁰ *Ibid* at 360.

²⁰¹ Lisa Webley, *Qualitative Approaches to Empirical Legal Research* (Oxford University Press, 2010) at 940.

Employing document analysis method, I examine NGO access to domestic environmental justice tools through the analysis of civil and administrative court decisions of Mongolia concerning mining-related environmental claims, advanced by NGOs. In the international context, I examine relevant documents of intergovernmental bodies such as the UN and the World Bank. Further, I analyze several complaints brought by Mongolian NGOs to international non-judicial accountability mechanisms such as the OECD National Contact Points (NCPs) and the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC), the World Bank. I also conducted interviews with the representatives of NGOs, and environmental lawyers to understand the role of environmental NGOs in Mongolia. These open-ended interviews focused on the availability and use of various legal and non-judicial domestic and international environmental justice tools in NGO advocacy. Thematic coding of content analysis was used to extract relevant information from the data collected through document analysis and interviews.

Document analysis: Content analysis of the decisions of the Mongolian courts and the international non-judicial accountability mechanisms

I analyzed primary domestic legal instruments and documents such as the Constitution, environmental laws and regulations of Mongolia, civil and administrative court decisions concerning the resolution of mining-related environmental cases submitted by NGOs. Mongolian civil and administrative court decisions are a key source for understanding the legal and non-judicial strategies employed by NGOs in the domestic context such as the access to the environmental information, participation in environmental decision-making processes and access to the courts for remedies. Decisions of the three-tier²⁰² civil and administrative courts concerning mining-related environmental issues have been collected for the period of 2011-2020 from the public online database of Mongolian court decisions (www.shuukh.mn) developed by the Judicial General Council of Mongolia.²⁰³ Cases where NGOs filed the claims and

²⁰² See, Chapter 4.

²⁰³ The working group to create the online database of court decisions was established by the Decree no.39 of the Chairman of the General Judicial Council of Mongolia on 10 November 2010. The goal of this online database is to make court proceedings transparent, open, and accessible to the public, to enable the research by the judges, scholars, teachers, researchers, experts, and lawyers, to provide guidance to

participated as the parties to the dispute were selected for analysis. Notably, due to inadequate procedural guidance and monitoring, not all court cases are submitted to this electronic database promptly.²⁰⁴ Consequently, not all court cases from 2011 onwards were available for collection through this online platform. Where possible, I have searched and obtained court cases initiated by the NGOs from other publicly available sources such as the relevant NGO websites and the websites of international NGOs and partners of Mongolian NGOs, which publish court decisions for public awareness-raising purposes. Twenty-four civil and administrative court cases launched by Mongolian NGOs, including Oyu Tolgoi Watch NGO, Center for Human Rights and Development NGO, “Patrons of Khuvsgul Lake” NGO, UMMRL NGO, and “Angir Nuden Munduukhui movement” NGO involving mining-related environmental and human rights issues were identified and analyzed for the thesis.²⁰⁵

In addition to these domestic cases, I have identified and analyzed cases brought through international mechanisms. Three international cases have been analyzed to examine Mongolian NGO access to international corporate accountability mechanisms. Firstly, I discuss the two complaints brought by the consortium of international and domestic NGOs to the OECD National Contact Point (NCP) in Canada on the activities of the Canadian-based mining companies such as Ivanhoe Mines Ltd. and the Centerra Gold company in Mongolia. These NGOs complained to the Canadian NCP about the failure of these Canadian-based mining companies to adhere to the OECD Guidelines on environmental and human rights and to abide by the laws of Mongolia in their operations.²⁰⁶ Second, I analyze the complaint brought by nomadic herders, Oyu Tolgoi Watch NGO, and “Gobi Soil” NGO to the International Finance Corporation’s (IFC) Compliance Advisor Ombudsman (CAO), an institution responsible for resolving disputes with local communities affected by IFC investments. The complainants argued that the use of land and water by the Oyu Tolgoi mine deleteriously affected their nomadic culture

students, and to establish a precedent for uniform and consistent application of the law. The online database contains all court decisions of three-tier courts since 2011, and all decisions except those related to personal, organization and state secrets may be downloaded for public use. (See, JGCM, “Online database of Mongolian court cases,” online: <old.shuukh.mn>).

²⁰⁴ I was informed about this through my conversation with the analyst at the JGCM in 2019.

²⁰⁵ Refer to Appendix A: Mongolian NGO Court Cases.

²⁰⁶ These international cases are discussed in detail in Chapter 5.

and livelihoods.²⁰⁷ CAO found the complaint admissible for assessment and conducted multiple field trips to Mongolia between November 2012 and February 2013. This dispute resolution mechanism ended in successful mediation between the mining company and the affected local community, where an agreement was signed between the parties in May 2017.²⁰⁸ Furthermore, a Tripartite Council was established consisting of relevant stakeholders to act as an independent forum for the resolution of future complaints.²⁰⁹

I organized each of the cases, both international and domestic, into five main categories such as: 1) the parties' identities (NGOs); 2) the content of the claims and the types of legal issues raised; 3) the outcome of the domestic court case in the three-tier judicial system; 4) and the judge's reasoning for the final ruling; 5) judge's use of domestic or international human rights instruments for justifying their reasoning.²¹⁰ Furthermore, I used content analysis method by coding and categorizing the cases into common themes. The following six themes were identified, including NGO advocacy on environmental and human rights, substantive and procedural environmental rights, access to environmental information, participation in environmental decision-making processes, access to the courts and access to international corporate accountability mechanisms. The impact of the case on the society²¹¹ as a whole will be further extrapolated from the precedent-setting impact of the final court decision with respect to minimizing negative environmental harms on mining-affected communities. Analysis of data from these cases formed the foundation for my discussion of how NGOs in Mongolia engage with substantive and procedural environmental and human rights to advocate and litigate for mining-affected communities both domestically and internationally.

Interviews with environmental NGO experts and environmental lawyers

In addition to the document analysis, I have carried out fieldwork in Mongolia, for the period of 2 December 2019 – 30 January 2020. I conducted interviews with environmental NGO experts and environmental lawyers who advocate and litigate on mining-related

²⁰⁷ Compliance Advisor Ombudsman, "Mongolia /Oyu Tolgoi-01/Southern Gobi" (2012), online: CAO <www.cao-ombudsman.org/cases/case_detail.aspx?id=191>.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Mark A Hall & Ronald F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96:1 Cal L Rev 63 at 107.

²¹¹ *Ibid* at 86.

environmental issues. The interview method was selected to generate ideas and insight about various legal and non-judicial strategies that NGOs use to advocate for mining-related environmental issues, the legal and procedural obstacles NGOs face in accessing domestic and international environmental justice tools, and their insight and recommendations for responsible government and corporate actions.²¹² Interviews with experts generate facts, evidence, experiences, and interpretations, which are unique to the participants of the research, and allows the researcher to probe into the role and functions of law in their social reality.²¹³ Individual interviews were a great source of data about NGO advocacy in the Mongolian context, which was not readily available in primary and secondary source materials. I selected research participants who were involved as parties to domestic court cases with successful environmental outcomes as well as those who established partnerships with international governmental and non-governmental institutions to achieve efficient environmental remedies for mining-affected local communities through their use of international corporate accountability mechanisms. Some participants were also selected through snowball sampling technique.²¹⁴ My active participation in an international conference on mining-related environmental issues organized by Mining Watch Canada in November 2019 aided me to establish useful contacts with international NGO activists, who provided me with an opportunity to establish a friendly rapport²¹⁵ with other domestic and international NGO representatives. These domestic and international NGO experts later became my research participants.

²¹² Bhat, *supra* note 199 at 342.

²¹³ *Ibid* at 303.

²¹⁴ *Ibid* at 374.

²¹⁵ *Ibid* at 342.

Table 2. Interview participants

| No. | Participants | Occupation | Interview duration | Transcript pages |
|-----|---------------|--------------------------------------|--------------------|------------------|
| 1. | Interviewee A | Environmental NGO representative | 50 minutes | 11 pages |
| 2. | Interviewee B | Environmental NGO representative | 45 minutes | 8 pages |
| 3. | Interviewee C | Environmental Lawyer | 45 minutes | 11 pages |
| 4. | Interviewee D | Legal aid NGO representative, lawyer | 47 minutes | 10 pages |

Individual interviews were thoroughly prepared and conducted in a structured format with predetermined questions.²¹⁶ During the interview process, I prepared in advance the probing questions and focus issues,²¹⁷ and used conversational language.²¹⁸ I was open, engaging and avoided conflicts,²¹⁹ and asked interviewees to add any issues of concern not raised by the interview.²²⁰ I offered positions and interpretive frames, and shared personal or professional information that related to the interviewee experiences.²²¹ Questions were open-ended to allow for the expression of personal opinions and viewpoints.²²² Interviews encouraged a free, unimpeded flow of information, thoughts, and ideas on particular themes.²²³ I focused on engaging the participants into the conversation and posed questions to clarify some points and arguments. After explaining the aims of the research, I asked initial questions that were understandable and appealing to the interviewees²²⁴ such as “Why do you pursue environmental advocacy and

²¹⁶ *Ibid* at 375, 341. Refer to Appendix B on Interview Questions.

²¹⁷ *Ibid* at 681.

²¹⁸ *Ibid* at 679.

²¹⁹ Laura R. Woliver, “Ethical Dilemmas in Personal Interviewing” (2002) 35:4 PS Political Sci. Politics 677.

²²⁰ *Ibid* at 678.

²²¹ Katja Vähäsantanen & Jaana Saarinen, “The power dance in the research interview: Manifesting power and powerlessness” (2013) 13:5 Qual. Res 493 at 508.

²²² Bhat, *supra* note 199 at 341.

²²³ Tim Rapley, “Interviews” in Clive Seale et al., *Qualitative Research Practice* (United Kingdom: SAGE Publications Ltd, 2004) at 20.

²²⁴ Kristin Luker, *Salsa Dancing into the Social Sciences: Research in an Age of Info-glut* (US: Harvard University Press, 2006) at 168-172 [Luker].

litigation?” and “What kind of environmental advocacy and litigation do you do?”.²²⁵ Moreover, the questions focused on participants’ knowledge of Mongolian efforts to use procedural and substantive environmental and human rights (in domestic and international law) to hold mining companies to account for environmental harms. The interviews lasted approximately 45-50 minutes each, and with the permission of the interviewees, the interviews were tape-recorded, transcribed, and the relevant sections were translated. Interview transcriptions facilitated detailed analysis of individual responses, data reorganization into specific themes, and uncovering of underlying assumptions and beliefs.

I used a content analysis method to analyze the interview transcripts thoroughly. The transcription and translation process of the interview were significant in generating new ideas for exploring the topic.²²⁶ Interview questions were developed with the goal of engaging the participant with specific themes related to the main research question. The themes, which formed the basis for codes, were generated from the theoretical framework on NGO access to environmental justice tools, developed in Chapter 2. The specific themes were: NGO access to legal and non-judicial environmental justice instruments domestically and internationally, NGO access to environmental information, NGO participation in environmental decision-making processes, access to the courts and remedies, use of substantive and procedural environmental and human rights, mining company violations, impact of mining on nomadic herders and local communities, coalition of domestic and international NGOs, access to international corporate accountability mechanisms, successful international and domestic resolution of cases, responsible mining in Mongolia, and the role of environmental NGOs in Mongolia. These codes and classification of interview transcripts enabled me to compare the differences and similarities of participants’ responses, determine the frequency of particular themes, and contextualize them within the relevant literature as supporting arguments and evidence in the empirical case study of Mongolia, as outlined in Chapters 4 and 5.²²⁷

²²⁵ Refer to Appendix B on Interview Questions.

²²⁶ Graham Gibbs, “Data Preparation” in *Analyzing Qualitative Data* (UK: SAGE Publications, Ltd, 2007) at 11-13 [Gibbs].

²²⁷ Kathryn Roulston, “Analysing Interviews” in Uwe Flick, *The SAGE Handbook of Qualitative Data Analysis* (United Kingdom: SAGE Publications Ltd, 2014) at 315.

Moreover, through the transcription and coding process I remained open to the generation of new themes and ideas. This is the strength of the interview method, as it allows for the emergence of new themes and ideas that previously did not come to the attention of the researcher.²²⁸ For example, new themes emerged about the government efforts to suppress NGO activities in Mongolia through the process of amending the law on NGOs that stifles their funding, and refusing to continue with the adoption of the draft law on the Legal Status of Human Rights Defenders. Interviews also revealed the lack of grievance mechanisms in state-owned Chinese mining companies and the lack of government approvals for third party experts to carry out environmental impact assessments, which raises doubts about their transparency and fairness. Further strengths of the interview method in this research included a collection of rich data in a relatively short time, clarification of ambiguities or misperceptions of documentary research, and elicitation of personal opinions, perceptions, and feelings of various participants in their employment of domestic and international environmental justice tools to advocate for mining-affected communities. One notable limitation of the interview method in this project was the lack of opportunity to engage more participants due to time constraints of the LLM program, cancellation of events and shutdown of workplaces due to the Covid-19 pandemic internationally. To address these shortcomings, I used multiple data sources,²²⁹ including the primary sources (laws, regulations, procedures, court decisions, government policies, and intergovernmental bodies' documents) and secondary source materials such as academic articles, news articles, interviews, and other published literature on NGO environmental advocacy in Mongolia.

Research ethics

The interview research method involves human subjects or interviewees; therefore, the Office of Research Ethics, York University, conducted a "procedural ethics"²³⁰ review to grant ethics approval for carrying out the interviews.²³¹ The interviewees were

²²⁸ Luker, *supra* note 224 at 174.

²²⁹ Jeffrey M. Berry, "Validity and Reliability Issues in Elite Interviewing" (2002) 35:4 PS Political Sci. Politics 679 at 680.

²³⁰ Marilys Guillemin & Lynn Gillam, "Ethics, Reflexivity, and 'Ethically Important Moments' in Research" (2004) 10:2 Qualitative Inquiry 261 at 263 [Guillemin].

²³¹ Td2 form, informed consent form, tcps2 core certificate, and interview protocol were developed and submitted for approval on 12 September 2019 to the Office of Research Ethics, York University, and the

representatives of environmental NGOs and environmental lawyers. To protect the fundamental rights and safety of research participants all data obtained during the interviews were anonymized, which was reflected in the informed consent form.²³² The detailed informed consent form, which was also translated into Mongolian, was signed by the research participants voluntarily with their full knowledge and understanding of the research objectives.²³³ Before signing the informed consent form, the research participants were informed about the research aims, interview protocol and procedures, the duration of the interview, storage, and application of interview data. Another critical requirement for ethics approval was related to ensuring the confidentiality of human subjects. To ensure the full confidentiality of the participants, no direct quotes were used in the research. All information provided by the participants were kept confidential, and their names will not appear in any future reports or publications of the research. The digital recordings and the transcripts of the interviews are stored on my computer in a password-protected file, and the digital recording will be destroyed before December 2020. The research setting and the field of NGO environmental advocacy in democratic countries such as Mongolia and the US are not contentious, illegal, or dangerous; therefore, there are no known risks to research participants. Three of the interviewees were lawyers and legal aid experts with high level knowledge of research process and understanding of the research context. I have continually adopted a reflexive approach²³⁴ during my interview process to respect the autonomy, dignity, and privacy of research participants by scrutinizing all questions, decision-making, and their effects on interviewees. The use of multi-methods including the document analysis and interview methods to collect the data allowed me to cross-check the data collected from interviews through triangulation to ensure their validity and reliability.

ethics approval was granted on 29 November 2019, which allowed for carrying out fieldwork in Mongolia for the period of 2 December 2019 – 30 January 2020.

²³² Guillemin, *supra* note 230 at 268.

²³³ Gibbs, *supra* note 226 at 8.

²³⁴ Guillemin, *supra* note 230 at 275.

CHAPTER FOUR: MONGOLIAN NGO ACCESS TO ENVIRONMENTAL JUSTICE TOOLS DOMESTICALLY

Introduction

In this Chapter, I discuss how the Mongolian NGO use domestic environmental justice tools such as the access to environmental information, participation in environmental decision-making processes, including the environmental impact assessment, and access to the courts for environmental remedies to advocate and litigate for the promotion of the environmental and human rights of mining-affected communities. I provide an overview of Mongolian domestic and international environmental and human rights commitments, which constitute the basis for the exercise of substantive and procedural environmental rights in Mongolia. Through the analysis of 24 court cases, advanced by the NGOs, I discuss the achievements of NGO strategic environmental litigation such as the enforcement of environmental laws and regulations, annulment of illegal mineral licenses and environmental impact assessment reports, assessment and compensation for environmental damages; thus, aiming to restore some of the substantive and procedural environmental rights of mining-affected communities. NGOs have become powerful voices domestically demanding environmental justice in cases of mining violations, pastureland damage, and pollution of water resources, which pose serious threats to herders' livelihoods. Despite the many challenges and losses in domestic courts, NGOs unabatedly demand government and mining company accountability for their illegal actions, particularly in ensuring the implementation of environmental and human rights in Mongolia.

Mongolian Legal Framework on Substantive and Procedural Environmental Rights

Mongolia peacefully transitioned from a socialist one-party system into a vibrant young democracy in the 1990s, spurred by the dissolution of the bipolar world system and the ensuing swift continent-wide changes. Under the resulting democratic Constitution of 1992, Mongolia is a unitary state.²³⁵ The Constitution requires the state to adhere to the

²³⁵ *Constitution, supra* note 12 at art 2(1).

supreme principles of “democracy, justice, freedom, equality, national unity and the rule of law.”²³⁶ The Preamble specifically outlines the highest objectives of the state as the development of a humane, civil, democratic society, cherishing human rights and freedoms, justice and national unity,²³⁷ paving the way for the development of a vibrant civil society movement. State power is vested in the people of Mongolia, who elect their representative bodies²³⁸ through universal, free, and direct suffrage.²³⁹ The state is separated into legislative, executive and judicial powers. The supreme legislative power is vested with the unicameral State Great Khural (Parliament), while the Government exercises the highest executive power and the Supreme Court implements the highest judicial power in the three-tiered court system. Mongolia is a civil law jurisdiction (continental legal system); therefore, the court decisions do not create a precedent or become a source of law.²⁴⁰ The courts merely apply the law, and their decisions are binding upon the parties. In applying the laws, judges adhere to the universally recognized norms and principles of international law.²⁴¹ International treaties become effective as domestic legislation upon their ratification or accession.²⁴² Thus, Mongolia adopts a monist approach to ratifying international treaties.²⁴³ On the other hand, Mongolia is prohibited from adhering to any international instruments that are in contravention to the Constitution.²⁴⁴ As described in the following sections, Mongolia has established a complex legal framework for environmental and human rights, which includes both domestic and international laws.

²³⁶ *Ibid* at art 1(2).

²³⁷ *Ibid* at Preamble.

²³⁸ *Ibid* at art 3(1).

²³⁹ *Ibid* at art 21(2).

²⁴⁰ Odgerel Tseveen & Battsentseg Ganbold, *The Mongolian Legal System and Laws: a Brief Overview - GlobaLex* (January 2006), online: GlobaLex <www.nyulawglobal.org/globalex/Mongolia.html#_Judicial_practice>.

²⁴¹ *Constitution*, *supra* note 12 at art 10(1).

²⁴² *Ibid* at art 10(2).

²⁴³ Following their ratification or accession, translation, and publication into the State Gazette; it becomes part of the domestic law. (See, *Ibid* at art 10(3)).

²⁴⁴ *Ibid* at art 10(4).

Domestic and International Human Rights Instruments and Institutions

Mongolia is a party to eight out of nine core international human rights conventions,²⁴⁵ including the International Covenant on Civil and Political Rights (ICCPR)²⁴⁶ and International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁴⁷ Moreover, in the area of international environmental law, Mongolia has ratified a total of 11 international environmental conventions and three protocols including the three Rio Conventions on Biodiversity, Climate Change and Desertification.²⁴⁸ In concert with these international human rights and environmental instruments, Mongolia has adopted 26 laws²⁴⁹ aimed at the environmental protection and the sustainable development of natural resources including 1995 Law on Environmental Protection,²⁵⁰ 2002 Law on Land,²⁵¹ 2012 Law on Forest,²⁵² 2012 Law on Water,²⁵³ 1994 Law on Special Protected Areas,²⁵⁴ 2012 Law on the Environmental Impact Assessment,²⁵⁵ 2009 Law to Prohibit Mineral Exploration and Mining Operations at Headwaters of Rivers, Water Protection Zones, and

²⁴⁵ Mongolia is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. (See, UN Human Rights Office of the High Commissioner, *The Ratification Status for Mongolia* (Accessed 3 June 2020) online: [Treaties <tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=115&Lang=EN>](http://treaties.tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=115&Lang=EN) [UN OHCHR]).

²⁴⁶ Mongolia ratified ICCPR on 18 November 1974 and acceded to the Second Optional Protocol to the ICCPR aimed at the abolition of the death penalty on 13 March 2012.

²⁴⁷ Mongolia ratified ICESCR on 18 November 1974 and the Optional Protocol of the ICESCR on 1 July 2010.

²⁴⁸ Mongolia ratified the UN Framework Conventions on Biological Diversity and Climate Change on 30 September 1993, and the UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa on 3 September 1996. (See, UN Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General* (Accessed 3 June 2020) online: treaties.un.org/pages/Treaties.aspx?id=27&subid=A&clang=_en [UN Treaty Collection]).

²⁴⁹ In addition to these laws, Mongolia has 370 standards and 75 acts of subsidiary legislation, which describe various rules and procedures. (See, UN Environmental performance reviews, *supra* note 28 at 29).

²⁵⁰ *Law on the Protection of the Environment, 1995* (Mongolia) Uniform portal of laws, online: www.legalinfo.mn/law/details/8935 [Law on the Protection of the Environment].

²⁵¹ *Law on Land*, *supra* note 18.

²⁵² *Law on Forest, 2012* (Mongolia) Uniform portal of laws, online: www.legalinfo.mn/law/details/12171.

²⁵³ *Law on Water, 2012* (Mongolia) Uniform portal of laws, online: www.legalinfo.mn/law/details/8683.

²⁵⁴ *Law on Special Protected Areas, 1994* (Mongolia) Uniform portal of laws, online: www.legalinfo.mn/law/details/479?lawid=479.

²⁵⁵ *Law on the Environmental Impact Assessment, 2012* (Mongolia) Uniform portal of laws, online: www.legalinfo.mn/law/details/8665.

Forested Areas²⁵⁶ (Water and Forest Law)²⁵⁷ and the laws on waste management and regulation of toxic and hazardous chemicals.²⁵⁸

Government bodies that are tasked with implementing and ensuring compliance with these environmental and human rights laws include the National Human Rights Commission (NHRC),²⁵⁹ Human Rights Sub-Committee of the State Great Khural, the Ministry of Environment and Tourism, which is responsible in promoting the human right to live in a safe and healthy environment by ensuring cooperation among other government bodies, citizens, and private entities,²⁶⁰ and the General Agency for Specialized Inspection (GASI), which conducts inspections to determine compliance with environmental standards.²⁶¹ Notably, despite the scarcity of water resources and widespread exploitation of water in the mining industry, the independent governmental Water Agency, which has existed since 2005, was dismantled in 2012.²⁶² Its functions were transferred to the Department of Land Management and Water Policy Regulation²⁶³ at the Ministry of Environment and Tourism. Also, the high staff turnover in government bodies, which are regularly replaced by the winning political party supporters in respective Parliament elections, continues to create substantial obstacles in proper implementation and monitoring of state environmental laws, regulations, and policies.²⁶⁴

The Right to A Healthy and Safe Environment

In comparison to other countries, Mongolia is progressive in recognizing the substantive environmental right to a healthy and safe environment in its Constitution even

²⁵⁶ *Law to Prohibit Mineral Exploration and Mining Operations at Headwaters of Rivers, Water Protection Zones and Forested Areas, 2009* (Mongolia) Uniform portal of laws, online: <www.legalinfo.mn/law/details/223>.

²⁵⁷ Although 2009 Law to Prohibit Mineral Exploration and Mining Operations at Headwaters of Rivers, Water Protection Zones, and Forested Areas is widely known among the public as the "Law with the Long Name", in this thesis, this law will be abbreviated as the "Water and Forest Law".

²⁵⁸ *Law on Waste, 2017* (Mongolia) Uniform portal of laws, online: <www.legalinfo.mn/law/details/12652> and *Law on Toxic and Hazardous Chemicals, 2006* (Mongolia) Uniform portal of laws, online: <www.legalinfo.mn/law/details/526>.

²⁵⁹ National Human Rights Commission of Mongolia was established in 2000.

²⁶⁰ UN Environmental performance reviews, *supra* note 27 at 39.

²⁶¹ *Ibid* at 38. GASI has taken over the environmental inspection and enforcement functions of the ministry responsible for the environment in 2003.

²⁶² *Ibid* at 39.

²⁶³ *Ibid*.

²⁶⁴ *Ibid*.

though international human rights instruments, including the ICCPR and the ICESCR, do not expressly guarantee this substantive environmental right. Article 16(2) of the Constitution of Mongolia upholds the “right [of all citizens] to a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance.”²⁶⁵ As discussed in Chapter 2, promotion and protection of procedural environmental rights such as access to environmental information, participation in environmental decision-making processes, and access to court remedies for environmental harm are crucial in ensuring the implementation of the substantive environmental right to live in a safe and healthy environment. Mongolia is not a party to the Aarhus Convention. However, the procedural rights enumerated in the ICCPR such as the right to an effective remedy,²⁶⁶ the right to fair and public hearing from the independent and impartial tribunal,²⁶⁷ freedom of opinion and expression,²⁶⁸ the right to receive information,²⁶⁹ and the right to take part in the conduct of public affairs²⁷⁰ as well as the right to an adequate standard of living recognized in the ICESCR²⁷¹ are equally important in ensuring the exercise of this substantive environmental right in Mongolia. In 2012, Mongolia made significant strides in guaranteeing procedural environmental rights by amending environmental laws to conform to the international standards on public access to environmental information, participation in environmental decision-making processes, and access to remedies for environmental harm.²⁷² The Parliament also adopted two new laws, the Law on the Payment for the Pollution of Water²⁷³ and the Law

²⁶⁵ *Constitution*, *supra* note 12 at art 16(2).

²⁶⁶ *ICCPR*, *supra* note 111 at art 2(3)(a).

²⁶⁷ *Ibid* at art 14(1).

²⁶⁸ *Ibid* at art 19(2).

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid* at art 25(a).

²⁷¹ *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976) at art 11(1) [ICESCR]. Interviewee C indicated this issue to me.

²⁷² UN Environmental performance reviews, *supra* note 27 at 29.

²⁷³ Despite such positive developments, the polluter-pays principle in the Law on the Payment for the Pollution of Water failed to materialize due to lack of secondary legislation of Mongolia on wastewater permit, which was required under the Law on Water. (See, *Ibid* at 56). This gross inaction became the focus of a hearing of the Parliamentary Standing Committee on Petitions in 2018. It was amended in 2019; however, it continues to fail to be implemented, demonstrating strong lobby from mining companies, which constitute the main polluters of water. (See, Interview with B.Bayarmaa, Head of the “Patrons of Khuvsgul Lake” NGO, “Reducing water pollution charges by 50-60 percent will not create incentive for not polluting or efficient use of water,” *News1* (12 October 2018), online: <news1.mn/?p=25049>).

on the Protection of the Soil and Prevention against Desertification.²⁷⁴ The Law on the Environmental Impact Assessment was also amended to require mining proponents to obtain comments from mining-affected local citizens,²⁷⁵ to ensure access to monitoring by environmental NGOs on the implementation of the mining management plans and mine closure plans,²⁷⁶ and to require the Ministry of Environment and Tourism to inform the public via its website on the projects, which are to undergo environmental impact assessments.²⁷⁷ Moreover, 2010 amendments to the Law on Environmental Protection guaranteed environmental NGOs standing in court regarding public interest litigation on environmental damages.²⁷⁸

Despite this complex international and domestic legislative framework, Mongolia has failed to effectively protect and promote the substantive environmental right to a healthy and safe environment. With 72 percent territory of Mongolia experiencing land degradation, desertification, and deforestation, the intersection between environmental degradation and violations of human rights has become increasingly clear.²⁷⁹ In particular, nomadic communities,²⁸⁰ who live in remote and environmentally sensitive areas, have seen their right to a healthy and safe environment severely compromised by environmentally harmful mining operations, which contribute to air and water pollution, overuse of scarce underground water resources, and destruction of traditional pasturelands.²⁸¹ These communities are directly dependent upon their natural ecosystems, which is damaged and destroyed, often irreparably, by the mining

²⁷⁴ These amendments were done to reduce the number of duplication and loopholes as well as to introduce several new international standards such as the polluter pays principle and increasing public participation in environmental decision-making processes. Interview with N Batsuur, former State Secretary of the Ministry of Nature and Tourism, “Environmental Protection Has Reached a New Level,” *World Wildlife Fund* (24 July 2012) online: <wwf.panda.org/wwf_news/?205753%252F>.

²⁷⁵ *Law on the Environmental Impact Assessment*, *supra* note 255 at c 2, art 8(4)(8).

²⁷⁶ *Ibid* at art 9(12).

²⁷⁷ *Ibid* at art 18(1).

²⁷⁸ *Ibid* at 32(1).

²⁷⁹ *Ibid*.

²⁸⁰ In 2008, nomads engaged in animal husbandry throughout the year and whose livestock income constitutes their source of livelihoods make up around 9 percent of Mongolia’s total population. Mongolian population data for 2018 was 3,238,479 people, while the nomads amounted to 288,700 people (See, National Statistical Office of Mongolia, “Mongolian population statistics” (Accessed 3 June 2020) online: *Mongolian Statistical Information Service* <www.1212.mn/tables.aspx?tbl_id=dt_nso_0300_071v3>).

²⁸¹ John H. Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on his mission to Mongolia*, UNGA, 37th sess, UN Doc A/HRC/37/58/Add.2 (2 May 2018) at 5-6 [Knox].

activities.²⁸² Moreover, herders' access to water is severely compromised with 852 out of 5,128 rivers and streams wholly dried up.²⁸³ The deepening of social and environmental impacts from mining can be traced back to efforts by the Mongolian government to aggressively expand mining in the 1990s, as discussed below.

Mining Development in Mongolia

Mongolia adopted the Law on Minerals in 1997²⁸⁴ and the “Gold-1” programme in 1992,²⁸⁵ which provided the basis for the rapid growth of mining explorations and the issuance of mineral licenses. Mongolian nomads are still reeling from the devastating environmental effects of the “Gold-1” Programme. John H. Knox, former Special Rapporteur on human rights and the environment made the following observations during his country visit to Mongolia from 19-27 September 2017:

Massive dredgers, each as large as an office building, churn up the river; children play near unguarded, dangerous open pits; dust clouds cause respiratory illnesses; wells dry up; fish have disappeared; and pasturelands for herders have greatly decreased.²⁸⁶

Despite these gloomy observations about mining impacts in Mongolia, the Government has nonetheless decided to pursue the “Gold-2” programme with continued unabated issuance of mining licenses.²⁸⁷ Mining continues to be seen as a vital source of revenue and economic growth for the state. According to the preliminary results of 2019, the agricultural sector, including the animal husbandry of nomadic communities, contributed 10.9 percent of gross domestic (4 billion tugrugs) and 8.2 percent of exports, while the mining sector contributed 24.3 percent of gross domestic product (8.7 billion

²⁸² *Ibid* at 10.

²⁸³ Sukhgerel D et al, *supra* note 9.

²⁸⁴ *Law on Minerals, 2006* (Mongolia), Uniform portal of laws, online: <www.legalinfo.mn/law/details/63?lawid=63> [*Law on Minerals*].

²⁸⁵ Khashchuluun Ch, “Development Policies of Mongolia: Incorporating Mining as a Growth Engine” (Speech delivered at the Mongolia-Australia Business Forum, Committee of National Development and Innovation, Mongolia, 21 February 2011) at 7, online: <www.austrade.gov.au/eventpresentations>.

²⁸⁶ Knox, *supra* note 281 at 5-6.

²⁸⁷ Government resolution no.20 on the Approval of the Gold-2 programme (Mongolia) (18 January 2017), Uniform portal of laws, online: <www.legalinfo.mn/law/details/12431>.

tugrugs)²⁸⁸ and almost 90 percent of exports.²⁸⁹ Mongolia is dependent on these two sectors of economy for its national economic development with substantial contributions coming from the mining sector output. However, such raw statistics grossly underestimate the genuine value of nomadic communities as a source of ancestral culture and traditions, and the ecological preservation of the pristine flora and fauna in the vast untapped territories of Mongolia they inhabit. This dual dependence of Mongolia on the traditional agricultural practices and the recent so-called mineral boom continues to place nomads against the mining development for access to scarce natural resources such as land and water. Nomadic herders traditionally graze their livestock on the communal pasture land, which is state-owned land, prohibited from privatization.²⁹⁰ These lands were protected despite the enormous pressure from donor organizations such as the Asian Development Bank to privatize all land for economic exploitation.²⁹¹ However, bowing to both outside and some internal pressure, Mongolia has circumvented these protections and opened the gateway to privatization through the granting of mining licenses. The Law on Land authorizes land exploitation for resource development making it difficult for herders to deny access to their traditional pasture land to non-members.²⁹² Mining companies lease the land from the state for mining operations, and traditional users with limited formal rights are increasingly excluded,²⁹³ both formally through the enforcement of mineral licenses, and informally by the irreparable erosion of land and water resources.²⁹⁴ The profound environmental costs of mining outlined above, particularly for nomadic

²⁸⁸ National Statistical Office of Mongolia, "Social and economic situation of Mongolia, 2016-2019" (2020) at 72, online: *Mongolian Statistical Information Service* <1212.mn/BookLibraryDownload.ashx?url=Statistic_2016-2019.pdf&ln=Mn>.

²⁸⁹ Ministry of Mining and Heavy Industry, *Statistics of mining and heavy and industry* (21 January 2020), online: <www.mmhi.gov.mn/public/more/id/923>.

²⁹⁰ *Constitution*, *supra* note 12 at art 6(3). It provides, "The state may give for private ownership land, other than pastures and areas under public use or reserved for the State's special needs, only to the citizens of Mongolia. This provision shall not apply to ownership of the land subsoil. Citizens shall be prohibited to transfer the land in their possession to foreign nationals and stateless persons by way of sale, barter, donation or pledge as well as from transferring to others for their use without the permission from the competent authorities of the State."

²⁹¹ Holly R Barcus, "Contested space, contested livelihoods: a review of Mongolia's pastureland management and land-tenure reform" (2018) 108:1 *Geogr. Rev.* 138 at 153.

²⁹² *Ibid.*

²⁹³ See, *Law on Land*, *supra* note 18 at art 52(1).

²⁹⁴ *Ibid.*

communities, have spurred the emergence of strong civil society opposition in Mongolia. These local and national “river movements” and NGOs are discussed below.

Role of Mongolian NGOs in Environmental Justice Domestically

NGOs play an essential role in demanding government accountability and transparency in the application and enforcement of environmental legislation. This is particularly important in the context of the mining, which has the most impact on the very existence of the traditional ecosystems in Mongolia, but is also a major contributor to the national economy. Democratic changes spurred the development of civil society movements in Mongolia with the burgeoning of non-governmental organizations (NGOs) working in such diverse fields as culture, science, art, education, environmental issues, domestic violence, community development, women and children’s rights, and human trafficking. The Parliament adopted the Law on Non-governmental Organizations in 1997 that defined NGO as an:

not-for-profit, self-governing organizations operating independently from the state and voluntarily established by citizens or by legal persons other than state legislative, executive, and judicial bodies, based on their individual or social interests and opinions.²⁹⁵

The Law on NGOs was adopted to guarantee the people’s fundamental right to freedom of assembly, association and expression.²⁹⁶ The number of environmental NGOs specifically targeting the operations of mining companies and attempting to hold them accountable for environmental damage has proliferated. As of January 2020, there are 10,958 nationally registered active NGOs, conducting their operations in Mongolia.²⁹⁷ In 2010, the number of environmental NGOs rapidly increased from 312 up to 500 in a five

²⁹⁵ *Law on Non-governmental Organizations, 1997* (Mongolia) Uniform portal of laws, online: <www.legalinfo.mn/law/details/494>.

²⁹⁶ *Ibid* at art 1.

²⁹⁷ National Statistical Office of Mongolia, “Number of Mongolian business entities conducting operations” (Accessed 3 June 2020) online: *Mongolian Statistical Information Service* <www.1212.mn>.

year period.²⁹⁸ Since then, the number of registered environmental NGOs has risen to 700, out of which 160 actively conduct their operations.²⁹⁹

Environmental NGOs may adopt cooperative or confrontational approaches in dealing with the government and mining companies.³⁰⁰ NGOs that choose cooperative strategies receive government funding, while more confrontational NGOs, which demand accountability for the government's failure to protect the fragile environmental ecosystems of Mongolia, do not receive any financial support.³⁰¹ The cooperative coalition of NGOs such as the Environmental Civil Society Council (ECSC) was established in 2008 by the "First National Conference of Environmental NGOs". They closely engage with the government pursuant to a memorandum of understanding with the Ministry of Environment and Tourism to build a partnership on environmental issues.³⁰² Thus, it has received government funding in support of its operations and dedicated office space.³⁰³ It mostly carries out activities on environmental research, environmental NGO capacity building training, public awareness-raising on environmental protection issues, and promotion of public and civil society partnership in the field of sustainable development.³⁰⁴ In February 2020, the ECSC signed a memorandum of understanding with the General Police Department's ecological police division to promote ecological education among citizens.³⁰⁵ However, close engagement with government bodies makes it difficult to distinguish ECSC from the arms of the state and limits their ability to promote public awareness on the more controversial or pressing environmental issues. Its activities are

²⁹⁸ WWF Mongolia, "Number of Environmental NGOs Reaches 500" (29 December 2010) online: <mongolia.panda.org/en/?198453/Number-of-environmental-NGOs-reaches-500>.

²⁹⁹ Mongolian Environmental Civil Society Council, "About Us" (Accessed 3 June 2020) online: <mecc.mn/?page_id=803> [MECSC].

³⁰⁰ Danaasuren Vandangombo, "NGOs as accountability promoters: in the Mongolian case", Paper presented at the Sixth Asia Pacific Interdisciplinary Research in Accounting Conference, University of Sydney (AUS), 12th and 13th of July 2010 at 24 (Accessed 1 May 2020) online: <apira2010.econ.usyd.edu.au/conference_proceedings/APIRA-2010-166-vanDanGombo-NGOS-as-accountability-promoters-Mongolia.pdf>.

³⁰¹ Interviewee A.

³⁰² Asian Development Bank, "Civil Society Brief: Mongolia" (May 2019) at 12, online: <www.adb.org/publications/civil-society-brief-mongolia> [Vandangombo].

³⁰³ *Ibid.*

³⁰⁴ MECSC, *supra* note 299.

³⁰⁵ MONTSAME, "Joint collaboration of the ecological police division and the environmental NGO" (11 February 2020) online: *MONTSAME News Agency* <www.montsame.mn/mn/read/215632>.

not widely known among the public in comparison to their confrontational counterparts, which are most prominently featured in the media.

A more confrontational coalition of NGOs is the United Movement for Mongolian Rivers and Lakes (UMMRL), which was established in 2009, with a mission to safeguard and monitor the protection of the people's right to a healthy and safe environment and to raise public consciousness on the protection of rivers.³⁰⁶ The UMMRL is a union of several river movements,³⁰⁷ which have emerged to demand environmental justice for herders, who lost access to their pastures and water due to mining operations. Legal and non-judicial strategies that UMMRL engages include the drafting of environmental legislation and regulations, protests at mining sites and the central square in the capital city of Ulaanbaatar, hunger strikes, public awareness-raising campaigns on the adoption and implementation of environmental laws, and litigation in courts to demand rectification of environmental harms and restoration of environmental justice for nomadic communities.³⁰⁸ They were instrumental in the drafting of the Water and Forest Law, gathering signatures from more than 6,000 citizens demanding the adoption of this law, and sending these demands to the President, Chairman of the State Great Khural and the Prime Minister.³⁰⁹ Consequently, the UMMRL continues to adopt more confrontational strategies to demand environmental justice for mining-affected communities. Despite their success in pressuring the adoption of the Water and Forest Law, their confrontational strategies have resulted in some negative outcomes. They lost some supporters when their leaders were charged with terrorism after protests with weapons were held in front of the Parliament House.³¹⁰

In 2019, one of the most active human rights NGOs in Mongolia, the Centre for Human Rights and Development (CHRD), in collaboration with the Asian Forum for Human Rights and Development produced a fact-finding report in several provinces of Mongolia with

³⁰⁶ Eugene Simonov, "Protect Mongolian Rivers from Mining!" (20 November 2013), online: *International Rivers* <www.internationalrivers.org/blogs/227/protect-mongolian-rivers-from-mining>.

³⁰⁷ The UMMRL consists of five river movements, such as the Onggi River Movement, the Toson Zaamar River Movement, the Salkhin Sandag Association, the Angir Nuden Munduuhei, and the Khuder River Movement.

³⁰⁸ Eugene Simonov, "Major assault on the "Law with Long Name" (21 February 2015), online: *Rivers without Boundaries* <www.transrivers.org/2015/1483/>.

³⁰⁹ Vandangombo, *supra* note 302 at 15.

³¹⁰ Dulam Bumochir, *The State, Popular Mobilisation and Gold Mining in Mongolia: Shaping 'Neoliberal' Policies* (UCL Press, 2019) at 114.

active mining explorations, documenting instances of violence against environmental and human rights defenders. For instance, community-based human rights movement “Save Onon River” received threats against the members of their organization and their families as a result of their advocacy opposing mining operations polluting Onon river.³¹¹ This report also documented allegations of a physical altercation between herders and the security guards of the Canadian-based Steppe Gold mining company.³¹² On the other hand, the most notorious case is 2015 killing of a human rights defender, Mr.Lkhagvasumberel Tumursukh, who protected the snow leopards. His case is still unresolved, as the police ruled his death as a suicide despite the evidence of him confronting mining companies illegally operating in the environmentally protected area.³¹³ This case has come to the attention of human rights specialists, who called on the government of Mongolia to investigate this case and offer support and protection to other human rights defenders.³¹⁴

Environmental advocates argue Mongolia is in a dire need of legislative mechanisms to support the civil society organizations similar to the best practices of the US and EU countries such as the Netherlands, including confrontational organizations which carry out monitoring and accountability functions.³¹⁵ However, instead of protecting the environmental and human rights defenders, the Government of Mongolia is in the process of revising the Law on NGOs to include provisions on the creation of a Civil Society Development Council, which will be a government oversight body to monitor the funding of NGOs and to exercise extensive powers over NGO operation up to their closures, if they are deemed to be a “money-laundering” or “terrorist financing” organization.³¹⁶ Several draft laws exist with provisions ranging from demanding access to all NGO documentation, taxation statements, and further restricting NGO operations by branding

³¹¹ Dominique Calanas et al, *Fact-finding mission report on the impacts of mining on defenders and environment in Khentii and Dornod provinces, Mongolia* (2019), online: Asian Forum for Human Rights and Development <www.forum-asia.org/uploads/wp/2019/10/2019-Mongolia-FFM-Report-Final-02122020-Compressed.pdf> [Calanas].

³¹² *Ibid* at 46.

³¹³ *Ibid* at 39.

³¹⁴ Knox, *supra* note 281 at 10.

³¹⁵ Interviewee A.

³¹⁶ Joseph Lewis-Hughes, “Proposed Legislation To Restrict Civil Society In Mongolia” (12 November 2019), online: *The Organization for World Peace* <theowp.org/proposed-legislation-to-restrict-civil-society-in-mongolia/>.

them as “foreign-financed agents.”³¹⁷ All the provisions related to terrorism and money laundering already exist in a separate Law on Combating Money Laundering and Terrorism Financing;³¹⁸ thus, there is a suspicion among the NGOs in Mongolia that the government is adamant in inserting these provisions into the Law on NGOs in order to stifle opposing viewpoints.³¹⁹ This legal development is similar to the new laws in other jurisdictions such as the Russian Federation, Poland, and Hungary, which restrict civil society organizations.³²⁰

In reaction to these government proposals, NGOs, along with the National Human Rights Commission of Mongolia, produced a draft Law on the Legal Status of Human Rights Defenders (Law on HRDs) and submitted it to the Ministry of Justice in 2018. However, it was rejected by the Parliament on the pretext that the current legal climate was sufficient to protect human rights defenders.³²¹ Through continued and tireless efforts of NGOs, the draft Law on the HRDs was finally submitted by the Ministry of Foreign Affairs to the Parliament on 11 May 2020 for discussion and approval.³²² This illustrates the important role of NGOs in monitoring legislative developments and drafting laws that are conducive to the protection of the environmental and human rights, essentially fulfilling their role as a civil society for the enhancement of the rule of law and democracy in Mongolia. Only when the civil society organizations such as NGOs can freely exercise their capacity to engage in the democratic processes and voice the diverse opinions of local communities can real environmental justice be achieved. One crucial aspect of this engagement is access to environmental information, as discussed below.

³¹⁷ Interviewee A; The Organization for World Peace, “Proposed Legislation To Restrict Civil Society In Mongolia – The Organization for World Peace” (12 November 2019), online: <theowp.org/proposed-legislation-to-restrict-civil-society-in-mongolia/>.

³¹⁸ *Law on Combating Money Laundering and Terrorism Financing, 2013* (Mongolia), Uniform portal of laws, online: <www.legalinfo.mn/law/details/9242>.

³¹⁹ Interviewee A.

³²⁰ *Ibid.*

³²¹ Calanas, *supra* note 311 at 38.

³²² National Human Rights Commission of Mongolia, “Draft Law on the Legal Status of Human Rights Defenders is submitted to the Parliament” (11 May 2020), online: *NHRCM* <nhrcm.gov.mn/мэдээ/хүний-эрхийн-хамгаалагчийн-эрх-зүйн-байдлын-тухай-хуулийн-төслийг-өргөн-бариллаа/>.

Mongolian NGO Access to Environmental Information

Access to environmental information is an essential prerequisite for asserting rights to participation in environmental decision-making processes and demanding fair, just, and equitable environmental remedies to mining-induced environmental harms. Environmental justice requires access to environmental information about potential projects that encroach on local communities' access to pastureland and water and contribute to denigrating the livelihoods of nomadic herders. The right to access environmental information is Constitutionally guaranteed in Mongolia, and can be denied only in exceptional cases of public and private secrets.³²³ The public can demand access to environmental information including operations,³²⁴ human resources,³²⁵ budget and financial transparency,³²⁶ procurement of goods, works and services³²⁷ from such state bodies as the Ministry of Environment and Tourism,³²⁸ local provincial authorities,³²⁹ and state-owned legal entities.³³⁰ Legislatively, these public service institutes and state-owned entities are obligated to provide requested environmental information within 14 days.³³¹ Moreover, the main Law on the Protection of the Environment protects access to accurate environmental information.³³² Public servants who fail to provide the requested information will be sanctioned according to the relevant legislation on public service, misdemeanors or criminal code.³³³ Other environmental laws similarly have provisions on access to accurate environmental information related to forest reserves,³³⁴ state land database,³³⁵ water database,³³⁶ and geological and mineral resources database.³³⁷

³²³ *Constitution*, *supra* note 12 at art 16(17).

³²⁴ *Law on Information Transparency and Right to Information, 2011* (Mongolia) at c 2, art 6(1)(1), Uniform portal of laws, online: <www.legalinfo.mn/law/details/374> [*Law on Information Transparency and Right to Information*].

³²⁵ *Ibid* at art 6(1)(2).

³²⁶ *Ibid* at art 6(1)(3).

³²⁷ *Ibid* at art 6(1)(4).

³²⁸ *Ibid* at art 3(1)(5).

³²⁹ *Ibid* at art 3(1)(8).

³³⁰ *Ibid* at art 3(1)(9).

³³¹ *Ibid* at art 14(8) and 14(9).

³³² *Law on the Protection of the Environment*, *supra* note 250 at 4(1)(4).

³³³ *Ibid* at art 25 and the *Law on the Information Transparency and Right to Information*, *supra* note 324 at art 25.

³³⁴ *Law on Forest*, *supra* note 252 at 20(1)(3).

³³⁵ *Law on Land*, *supra* note 18 at art 23(2)(14).

³³⁶ *Law on Water*, *supra* note 253 at arts 16¹(4)(5) and 17(1)(5).

³³⁷ *Law on Minerals*, *supra* note 284 at art 11(1)(5).

The Ministry of Environment and Tourism maintains two main online environmental information platforms: one is its website (www.mne.mn), and the other is the more comprehensive Environmental Information Center (www.eic.mn) for proactive release of environmental data. The Ministry's website most notably contains information related to its operational reports,³³⁸ and 31 companies, which have received accreditation from the ministry to conduct environmental audits, and environmental status report of Mongolia for 2017-2018. The Environmental Information Center provides public with the environmental information related to the databases on land,³³⁹ soil,³⁴⁰ mineral resources,³⁴¹ cadastral data on forest, water and special protected areas,³⁴² water,³⁴³ forest³⁴⁴ flora, fauna, air pollution,³⁴⁵ environmental radiation,³⁴⁶ climate,³⁴⁷ natural disaster, chemical toxic

³³⁸ The website includes ministerial operational reports for 2016 and 2017, while the operational reports for 2018, 2019, and 2020 are unavailable.

³³⁹ This database contains useful information related to, for instance, unified land territory classification including the agricultural land and surface water, land damages inflicted due to mining and agriculture in all aimags, specially protected areas, and the amount of land area covered under the Product-Sharing Contract on oil exploration.

³⁴⁰ This database contains statistics on the monitoring and measurement of soil area up to 2016.

³⁴¹ This database contains three sets of databases on environmental protection and rehabilitation of mining companies (i.e., number of mining licenses, mining companies, rules and decisions of relevant ministries on mining; however, no information on environmental rehabilitation or the mining contracts); mining cadaster database (i.e., statistics on the number of mining and exploration licenses, and basic information on the area covered in the special mining license); and degraded land inventory database (i.e., degraded land area due to mining operations).

³⁴² This database can be used by the license holder of special mining permits to determine whether the land covered by the license overlaps with the areas protected as rivers and streams, water protection zones, forest reserves, state-protected areas, and local water protection zones.

³⁴³ This database is compiled by the coordination of several government bodies including the ministries in charge of environmental issues, agriculture, and energy, state agencies on national emergency, professional inspection, meteorology, urban water supply, and sanitation, water management, provincial water and environmental departments and governors of soum and districts. The database contains information on surface water, underground water, sprinkles, and water basin. However, information related to water polluters is only available to signed users of the database.

³⁴⁴ This website includes databases on forest resources, forest inventory, forest logging, reforestation, forest and steppe fire, and forest insect.

³⁴⁵ This database shows air quality index, air quality standard, definitions of greenhouse gases, and air pollutants in Ulaanbaatar city, and other Mongolian regions.

³⁴⁶ This database contains brief information about the monitoring data of soil radiation and air radiation levels in Mongolia.

³⁴⁷ This database has up-to-date information on the weather forecast; however, the statistical data on average wind speed, severe weather, and climate change is outdated.

substance,³⁴⁸ waste,³⁴⁹ special protected areas,³⁵⁰ environmental legislation, environmental impact assessment,³⁵¹ environmental project and policy, environmental statistics, tourism, environmental finance,³⁵² environmental organizations and staff,³⁵³ environmental damage,³⁵⁴ environmental offence (2007-2015), geo-database, desertification (2010, 2015), geo-database on ecological health, green technology, generic resources and associated traditional knowledge, community-based organizations for environmental conservation,³⁵⁵ illegal wildlife trade, pollutant release and transfer registers, and wild animal and vegetation monitoring.

The creation of such an online database on various environmental issues has been critical for the public, including the NGOs, to access available environmental information to demand the implementation of environmental laws, participation in environmental decision-making processes, and litigation of environmental harms connected specifically to mining-induced challenges. However, there are serious issues with gaps, inaccuracies, and accessibility that undermine the role of the databases. For example, while mining companies approved general and detailed environmental impact assessment reports are available to the public, the environmental management plan is not publicly shared, as required by domestic regulations.³⁵⁶ Additionally, these databases are not updated regularly, and information related to the full range of mining permits, operations, monitoring, audits, water quality, pollution from dust, emissions, and discharges in the mining-affected areas is not sufficient or outright absent.³⁵⁷ Public authorities are required to collect and update these critical environmental databases continually. Most importantly,

³⁴⁸ This database contains information on companies that have received permits for import, trade and use of toxic chemicals, and hazardous substances. However, there are no statistics on the number of imports via borders and reports on the use of chemical substances.

³⁴⁹ This database contains information regarding the business entities managing ordinary waste and hazardous waste as well as the geographical sites for the burial of waste.

³⁵⁰ This database contains the registration of national and local special protected areas.

³⁵¹ This database contains useful data on 7,732 conclusions of the approved general impact assessments, 5,969 approved detailed impact assessment reports, and 135 companies with a permit to conduct detailed impact assessments.

³⁵² This database contains no information.

³⁵³ This database contains no information.

³⁵⁴ This database contains no information.

³⁵⁵ This database contains information on the number and location of cooperatives, which jointly use and protect environmental resources for mutual social and economic benefits following *Law on the Protection of the Environment*, *supra* note 250 at art 3(2)(8).

³⁵⁶ *UN Environmental performance reviews*, *supra* note 27 at 65.

³⁵⁷ *Ibid* at 75.

they should promote and raise public awareness on the availability of this environmental data.³⁵⁸ In practice, however, rural communities are often unaware of the availability of these resources, and when directed to these information portals found it difficult to understand technical, environmental data and government documents.³⁵⁹ Therefore, there is a clear need for both government authorities and environmental NGOs to translate the environmental information in an accessible and useful manner to the local communities affected by the extractive industry.³⁶⁰

Litigation about access to information has included cases brought by NGOs such as the CHR³⁶¹ and Parents against the Pollution. These organisations have filed two cases at the administrative court of Mongolia, each demanding the Government of Mongolia to respond to their demands on the government actions mitigating pollution in the capital city. Parents against the Pollution, which was initially established to protest against dangerous levels of pollution in Ulaanbaatar, organized several large-scale protests at the city centre's Sukhbaatar square, Parliament House, which involved around 10,000 people.³⁶² Galvanized by these protests, Parents against the Pollution sent its 14-point demand to the President, Prime Minister, National Security Council, and the Ulaanbaatar city authorities.³⁶³ They demanded the declaration of the pollution as a national emergency issue, the presentation of a report on the use of finances from the state budget, the development of a program on mitigating pollution, and action to reduce pollution in the city by 25 percent in 2017.³⁶⁴ After failing to receive the response, Parents against the Pollution submitted their claim to the administrative court of Mongolia. As a result, the government representative agreed to provide a response containing the

³⁵⁸ The United Nations Environment Programme (UNEP), "Putting Rio Principle 10 into Action: An Implementation Guide" (2015) at 44 (Guideline 4), online (pdf): [UNEP <wedocs.unep.org/bitstream/handle/20.500.11822/11201/UNEP%20MGSB-SGBS%20BALI%20GUIDELINES-Interactive.pdf?sequence=1&isAllowed=y>](http://wedocs.unep.org/bitstream/handle/20.500.11822/11201/UNEP%20MGSB-SGBS%20BALI%20GUIDELINES-Interactive.pdf?sequence=1&isAllowed=y).

³⁵⁹ Carole Excell & Elizabeth Moses, "Transparency and Poor People's Struggle for Clean Water in Indonesia, Mongolia, and Thailand" (2017) at 42, online (pdf): [World Resources Institute <www.wri.org/events/2017/09/thirsting-justice-transparency-and-poor-peoples-struggle>](http://www.wri.org/events/2017/09/thirsting-justice-transparency-and-poor-peoples-struggle) [Excell].

³⁶⁰ *Ibid* at 55.

³⁶¹ Administrative court of first instance in the capital city (Ulaanbaatar), 28 June 2017, "*Center for Human Rights and Development*" NGO v Government of Mongolia (Mongolia), no.514 at 2, online (pdf): [Online portal of court cases of Mongolia <www.shuukh.mn>](http://www.shuukh.mn).

³⁶² Sugarmaa D., "A demand has been made to recognize and declare the air pollution a national emergency issue", *Eagle News* (26 December 2016), online: eagle.mn/r/21944.

³⁶³ *Ibid*.

³⁶⁴ *Ibid*.

requested environmental information within the specified date, and the case was dismissed.³⁶⁵ The active stance of this NGO produced successful outcomes in demanding access to environmental information.

The pollution issue attracted the national attention due to the high percentage of the population residing in the capital city.³⁶⁶ However, it is more challenging to garner national attention about mining-induced environmental issues in rural areas, where the population is much smaller.³⁶⁷ There is much less availability of environmental information about individual facility discharges, the permits regulating these discharges, or the compliance record of specific companies, which are requested by rural communities.³⁶⁸ Moreover, despite the demands by the Oyu Tolgoi Watch NGO to make the Law on Minerals transparent,³⁶⁹ article 57(2) of this law stipulates that technical and economic feasibility study can become classified information, if the investor so requests.³⁷⁰ Therefore, the Law on Minerals is somewhat secretive without the possibility for citizens and NGOs to access information and participate in decision-making to mineral licenses' issuance, let alone access to remedies for environmental damage. Also, there is a lack of detailed information regarding exploration and mining (exploitation) licenses.³⁷¹ The claims advanced by the "Compassionate nature, peaceful life, compassionate actions" NGO at the civil court of Mongolia in 2014, demanding the payment of environmental damages inflicted by mineral companies operations without the required government approvals, was dismissed at the first instance court.³⁷² The NGO was unable to access companies' water permits, environmental protection plan, and the relevant government approvals because this

³⁶⁵ Administrative court of first instance in the capital city (Ulaanbaatar), 17 July 2017, "*Parents against the Pollution*" NGO v *Government of Mongolia* (Mongolia), no.551 at 2, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

³⁶⁶ Ulaanbaatar city population amounted to 2,146,716 people in 2017 (See, National Statistical Office of Mongolia, "Mongolian population statistics" (Accessed 3 June 2020) online: *Mongolian Statistical Information Service* <www.1212.mn/tables.aspx?tbl_id=dt_nso_0300_027v1&resident_select_all=0&residentsingleselect=_2&year_select_all=0&yearsingleselect=_2017&viewtype=table>).

³⁶⁷ Interviewee B.

³⁶⁸ Knox, *supra* note 281 at at 16.

³⁶⁹ Sukhgerel D et al, *supra* note 9 at 5.

³⁷⁰ *Ibid.*

³⁷¹ Excell, *supra* note 359 at 42.

³⁷² District civil court of first instance no.1 (Ulaanbaatar), 15 August 2014, "*Compassionate nature, peaceful life, compassionate actions*" NGO v "*Redhill Mongolia*" Co., Ltd. (Mongolia), no.3393 at 6, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn> [*Compassionate nature, peaceful life, compassionate actions*" NGO v "*Redhill Mongolia*" Co., Ltd.].

information was not available to the claimants.³⁷³ However, the court was presented with these documents by the company; thus, it concluded that the company had the requisite documents and did not violate the environmental laws in their operation.³⁷⁴ The proactive release of information to the public, including the pollution-related information, environmental impact assessment reports and mineral licenses, is necessary to ensure civil society monitoring on the compliance of mining companies with relevant environmental laws and regulations of Mongolia. This case demanding the release of company's environmental impact assessment documents illustrates a lack of transparency of mining companies' operations, which seriously impedes the implementation of the public right to access environmental information.

Mongolian NGO Participation in Environmental Decision-Making

Participation in environmental decision-making processes is an essential procedural environmental right, the exercise of which can aid in mitigating any adverse environmental impacts on the livelihoods of local communities affected by extractive developmental projects. The effectiveness of this procedural environmental right is measured by its possibility to be properly exercised by the public, which is dependent on the state granting access to this right.³⁷⁵ Out of 24 court cases under analysis in this thesis, 14 cases specifically addressed participation in environmental decision-making processes such as the lack of environmental impact assessment reports before mining operations,³⁷⁶ and annulling the decisions of government authorities on the issuance of mineral licenses³⁷⁷ with varying degrees of success.

The Law on Minerals provides for two types of mining licenses: the exploration license³⁷⁸ and mineral (exploitation) license.³⁷⁹ This Act provides for minimal environmental protection. Upon the granting of the exploration license it only requires the

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ Knox, *supra* note 281 at 16.

³⁷⁶ *Compassionate nature, peaceful life, compassionate actions*" NGO v "Redhill Mongolia" Co., Ltd, *supra* note 372.

³⁷⁷ Refer to Appendix A for details of case descriptions.

³⁷⁸ *Law on Minerals*, *supra* note 284 at art 4(1)(15), which legislates that "exploration license" means a document authorizing the prospecting and exploration of minerals in accordance with this law".

³⁷⁹ *Ibid* at art 4(1)(16), which provides that "mining license" means a document authorizing the use of mineral resources in accordance with this law".

holder to develop an environmental protection plan in consultation with the governor of the local administrative body,³⁸⁰ and submission of the monetary contributions in the amount of 50 percent towards the implementation of this plan.³⁸¹ The issuance of the mining license allows the public to consult during the general or detailed environmental impact assessment (EIA) processes.³⁸² Thus, the public is largely not involved in whether the mining will take place, but only how it will be implemented. The local authorities are required to inform the public during the general EIA, which can be carried within 14 days.³⁸³ The public consultation period for the detailed EIA, in comparison to the general EIA process, is more generous, allowing the public to comment on the project for up to 30 days. A detailed EIA is carried out only if deemed necessary by auditor bodies, which have received the necessary licenses from the Ministry of Environment and Tourism to conduct such detailed EIA.³⁸⁴ It includes an environmental management plan to mitigate the adverse environmental effects.³⁸⁵ Civil society groups, including NGOs and the international organizations have heavily criticized the EIA regime in Mongolia. According

³⁸⁰ *Ibid* at art 38(1), which states that “an exploration license holder shall have the following obligations to protect the environment:

38(1)(1) which states that “within 30 days after receiving the license to develop the Environmental Protection Plan in consultation with the Environmental Monitoring Department and the soum and district governors located in the exploration area”.

³⁸¹ *Ibid* at art 38(1)(8), which prescribes that “transfer funds equal to 50 percent of the annual expenditures required for environmental protection measures to a special account opened by the relevant soum or district governor as a guarantee of fulfilling its obligations to protect the environment”.

³⁸² *UN Environmental performance reviews*, *supra* note 27 at 53.

³⁸³ *Law on EIA*, *supra* note 255 at art 7 states the following:

7(4) A general environmental impact assessment for new and existing plants, services, facilities, their renovation, expansion and natural resource use projects shall be made by an assessment expert within 14 working days and the following conclusions shall be made:

7(4)(1) Refuse or reject projects that are technically, technologically and operationally harmful to the environment, are not reflected in the land management plan, do not comply with the strategic assessment conclusion and relevant legislation;

7(4)(2) Consider that the project can be implemented under certain conditions without conducting a detailed environmental impact assessment;

7(4)(3) Consider that a detailed environmental impact assessment is required.

7(5) If necessary, the period specified in article 7(4) of this Law may be extended once for a period of 14 days by the decision of the General Expert specified in article 7(6) of this Law”.

³⁸⁴ *Ibid* at art 12 on Granting and revoking the right to conduct a detailed environmental impact assessment prescribes in art 12(1) that “the license specified in article 15(6)(6) of the Law on Licensing of Business Activities shall be issued by the state central administrative body in charge of environmental issues to a business entity of Mongolia that meets the requirements set forth in article 7(5) of the Law on Environmental Protection.”

³⁸⁵ *Ibid* at art 8(4) states that the “detailed environmental impact assessment report shall include the following issues:

8(4)(7) Objectives, scope and indicators of the environmental management plan”.

to John Knox, Special Rapporteur on the issue of human rights obligations, and other NGO lawyers, EIA is not conducted in accordance with required standards and procedures, and these are often “copied and pasted” without proper assessment of the project in the field.³⁸⁶

NGOs have identified several challenges litigating to enforce the right to active participation in environmental decision-making processes. First, as pointed out above, there are serious concerns about whether auditor bodies tasked with conducting detailed EIAs actually carry out proper environmental assessments. For instance, the “Angir Nuden Munduukhei movement” NGO successfully applied to the court to annul the approval of the EIA report of the “M” Co., Ltd. on oil exploration and research project by the Professional Council on Environmental Impact, Ministry of Environment and Tourism. The court found the protocol of the meeting to approve the EIA was missing and there was no evidence that the quorum was present to prove that EIA approval process actually took place. Further, a review of the environmental audit, as required by law, was lacking.³⁸⁷ Another ruling by the appellate administrative court found that the local administrative authorities illegally extended their powers by signing a cooperation agreement for carrying out mining operations with the “Buyan Tsetseg” Co., Ltd. under the pretext of land rehabilitation.³⁸⁸ Additional gross violations of the Law on EIA were found concerning the issuance of mining licenses to the “C.M” company by the Cadastral Department of the Mineral Resources and Petroleum Authority without the requisite EIA and the environmental protection plan.³⁸⁹ These findings support the claims by the NGOs

³⁸⁶ *UN Environmental performance reviews*, *supra* note 27 at 62; Knox, *supra* note 281 at 7; Interviewee C. However, this situation is not unique to Mongolia, whereby in other jurisdictions similar concerns were expressed concerning EIA reports.

³⁸⁷ Administrative court of first instance of the capital city (Ulaanbaatar), 22 January 2018, “Angir Nuden Munduukhei movement” NGO v Professional Council on Environmental Impact, Ministry of Environment and Tourism (Mongolia), no.40 at 3-6, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

³⁸⁸ The appellate administrative court (Ulaanbaatar), 6 September 2019, “Baidrag Nutag Usaa Hairlan Hamgaalya” NGO v Citizens’ representative khural, Jargalant soum of Bayanhongor aimag, and Jargalant soum’s Governor (Mongolia), no.221/MA2019/0467 at 4-5, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

³⁸⁹ Supreme Court of Mongolia on Administrative Cases (Ulaanbaatar), 9 December 2019, *NUAKh” public service NGO v Cadastral Department of the Mineral Resources and Petroleum Authority* (Mongolia), no.404 at 16, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

that the EIA process is carried out without proper observance of legal and procedural regulations.³⁹⁰

Second, public interest litigation to demand compensation for environmental damages constitutes one of the crucial areas of environmental justice. In eight cases NGOs advanced claims for compensation.³⁹¹ Out of these eight cases, there were an equal number of four wins and losses. However, the win in one case at the Supreme Court was dragged through the whole judicial system again due to the requirement to correctly determine the respondents responsible for the environmental damage. This ultimately resulted in a loss for the “Onggi River Movement” NGO,³⁹² meaning that substantively losses outweigh wins. In this case, the NGO demanded the Ministry of Environment and Tourism to determine the amount of environmental damage to the Booroljuut River due to mining operations in the prohibited areas and to inform the public of its findings.³⁹³ The respondent Ministry successfully argued they had delegated the functions to assess the environmental damage and recover the costs to the local, provincial and district authorities and therefore, was not the correct respondent to the claims.³⁹⁴

Third, the auditor bodies, which approved the detailed EIA, are also responsible for assessing environmental damages.³⁹⁵ This creates suspicion among the public on the transparency, neutrality, and authenticity of the environmental damage assessments.³⁹⁶ NGOs have been calling for third party experts to carry out environmental damage assessments such as international organizations,³⁹⁷ however, to date, only the assessment reports on the environmental damage conducted by authorized auditor bodies are accepted as evidence in the courts. These concerns are supported by comments from several international observer reports on the production of environmental

³⁹⁰ Interviewee C.

³⁹¹ Three claims were advanced in the administrative courts, and five claims were submitted to the civil courts. See, Appendix A.

³⁹² Supreme Court of Mongolia on administrative cases (Ulaanbaatar), 28 January 2019, *Onggi River Movement NGO v Ministry of Environment and Tourism* (Mongolia), no.23 at 5, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

³⁹³ *Ibid* at 1.

³⁹⁴ *Ibid* at 5. Thus, the ministry evaded its obligations through the adoption of a ministerial resolution, which delegated these functions to its lower administrative authorities.

³⁹⁵ *Law on EIA*, *supra* note 255 at art 12(1).

³⁹⁶ Interviewee C.

³⁹⁷ *Ibid*.

impact assessments without actual fieldwork.³⁹⁸ The only substantial environmental damage payment was awarded in a case advanced by the “Coalition of Mongolian Civil Environmental Movements” NGO in 2012. The Chinese investment “Petro China Daqing Tamsag” Co., Ltd., was ordered to pay 1,356,622,460 tugrugs for environmental damage to Matad soum, Dornod aimag.³⁹⁹ The success of this case could also be related to its extensive coverage in the media, which garnered national attention.⁴⁰⁰

Fourth, apart from the actual infliction of demonstrable environmental damages, the courts fail to consider the loss of herders’ livelihoods due to mining operations that limit their access to water and pastureland.⁴⁰¹ The ICESCR explicitly recognizes the right to an adequate standard of living. In line with its international commitments, the courts of Mongolia need to uphold requirements for a full range assessment of environmental risks and harms of mining operations so that the adequate standard of living of all Mongolians is not compromised. Thus, NGO advocates argue there is a need to develop judicial capacity to apply international conventions in their decisions, and for Parliament to amend domestic laws to ensure conformity with the international conventions.⁴⁰²

Finally, where the Supreme Court made a final ruling in favor of annulling mineral licenses, the case is dragged again through the three-tier system with an outcome resulting in the dismissal of the previous Supreme Court decision under the pretext of newly discovered circumstances. This was a significant legal loophole used by the respondent company in the case advanced by the “Patrons of Khuvsgul Lake” NGO.⁴⁰³

³⁹⁸ *UN Environmental performance reviews*, *supra* note 27 at 62; Knox, *supra* note 281 at 7.

³⁹⁹ Supreme Court of Mongolia on civil cases (Ulaanbaatar), 4 October 2012, “Coalition of Mongolian Civil Environmental Movements” NGO v “Petro China Daqing Tamsag” Co., Ltd. (Mongolia), no.563 at 13, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

⁴⁰⁰ *Ibid* at 6.

⁴⁰¹ Administrative court of first instance of the capital city (Ulaanbaatar), 22 August 2018, “Oyu Tolgoi Watch” NGO v Cadastral Department of the Mineral Resources and Petroleum Authority (Mongolia), no.508 at 14-15, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn> [“Oyu Tolgoi Watch” NGO v Cadastral Department of the Mineral Resources and Petroleum Authority]; Administrative court of first instance of Dornod aimag (Kherlen soum), 5 September 2018, “NNZAZZ” Public service NGO, Tsagaan-Ovoo soum, Dornod aimag, citizens C.T and I.B. v Citizens’ representative khural, Tsagaan-Ovoo soum, Dornod aimag, and soum’s Governor (Mongolia), no.13 at 21-22, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

⁴⁰² Interviewee C.

⁴⁰³ Supreme Court of Mongolia on administrative cases (Ulaanbaatar), 24 June 2013, “Patrons of Khuvsgul Lake” NGO and four citizens v Cadastral Department of the Mineral Resources and Petroleum Authority (Mongolia), no.117 at 12-13, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>; Supreme Court of Mongolia on administrative cases (Ulaanbaatar), 11 May 2015, “Patrons of Khuvsgul

Consequently, the mining operations, which were halted in the winter, renewed their operations in the spring.⁴⁰⁴ The genuine observance of legislative and procedural guarantees of public participation in environmental decision-making processes carried out by government authorities, mining companies and auditor bodies is essential to upholding the human rights of herders and local communities affected by mining operations. Without the guarantees of the substantive and procedural environmental rights, the local nomadic communities will continue to face human rights abuses and environmental degradation in Mongolia.

Mongolian NGO Access to the Courts for Environmental Remedies including the Enforcement of Environmental Laws

Barriers to NGO and local citizens' participation in environmental decision-making processes contribute to increased civil society engagement with the courts for restitution of violated environmental and human rights. In Mongolia, standing in the courts for environmental NGOs has been won through the advocacy of environmental lawyers and activists, who contributed to the amendments of the Law on the Protection of the Environment and the Law on Administrative Procedure.⁴⁰⁵ Civil society engagement with the courts is an essential precondition for accountability of government officials and mining companies for infliction of environmental harms due to their illegal actions and inactions. NGOs enjoy standing in the courts under articles 32(1)(1) of the Law on the Protection of the Environment⁴⁰⁶ and 18(3) of the Law on Administrative Procedure,⁴⁰⁷ which constitute a procedural environmental right of the NGO to seek justice for environmental damage. Consequently, out of 24 cases advanced by NGOs, which are analyzed in this thesis, there were 11 cases of NGO confirmed court standing under

Lake" NGO and four citizens v Cadastral Department of the Mineral Resources and Petroleum Authority (Mongolia), no.118 at 10-11, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

⁴⁰⁴ Interviewee A.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Article 32(1)(1) on the Participation of non-government organization in the protection of the environment of the Law on the Protection of the Environment provides that "the public service organization with a charter goal of protecting the environment and its wealth ... may conduct the following activities: 1) to monitor the implementation of the legislation on environmental protection, to inspect, to demand the elimination of discovered violations, to submit this issue to the competent authority for resolution, and to file a claim to the court to compensate the damage inflicted on the environment."

⁴⁰⁷ *Law on Administrative Procedure*, *supra* note 64 at art 18(3).

article 32(1)(1) of the Law on the Protection of the Environment and 5 cases of NGOs granted with a court standing following article 18(3) of the Law on Administrative Procedure. The remaining cases were either dismissive of NGO standing or recognized the standing of other co-claimants instead of NGOs such as the citizens and the Governor of the respective territorial units. NGOs have been denied standing due to a lack of evidence of the consistency of the claim with its charter or conducting sustainable operations for less than three years.⁴⁰⁸ There are two opposing viewpoints on this issue. First, some argue the courts narrowly apply the law without investigating the NGO's progress and development since its initial inception and charter.⁴⁰⁹ Alternatively, others point out that NGOs themselves fail to adequately conform to requirements to maintain their records in line with operations through registering their updated charter in a timely fashion. Thus, despite being operational for much longer than three years, these NGOs are denied standing in court due to lack of evidence to support their consistent operations.⁴¹⁰

In terms of NGO litigation achievements to date, the number of cases won (11 cases) by NGOs is slightly lower to their losses (13 cases), amounting to 46 percent of wins and 54 percent of losses. Successful litigation resulted in the annulment of 8 exploration licenses and four mining licenses, enforcement of the environmental law, payment of environmental damages in the amount of 1,356,622,460 tugrugs, resolution of contractual obligations, provision of environmental information, annulment of the EIA report, annulment of the decisions granting access to mining, determination of the illegality of the mining agreement and imposition of a duty on the Minister of Mineral Resources and Heavy Industry to resolve illegal mining operations, as has been discussed above. These substantive accomplishments demonstrate the importance of environmental NGO litigation in the enforcement of environmental laws, monitoring of mining operations, and rectification of environmental harms.

However, litigation is a serious challenge for NGOs not only due to its legal complexities but also because it requires significant financial resources to hold much-

⁴⁰⁸ *"Oyu Tolgoi Watch" NGO v Cadastral Department of the Mineral Resources and Petroleum Authority*, *supra* note 401 at 10-11.

⁴⁰⁹ Interviewee A.

⁴¹⁰ Interviewee C.

larger and wealthier opponents to account. After establishing standing in the courts, NGOs have to pay the court fees or stamp duties, which might pose a barrier for some organizations.⁴¹¹ Under article 41(1)(13) of the Law on Stamp Duty, the claimant's court fees may be waived if they are representing the public interest in administrative cases. In the cases under analysis, seven cases had NGO fees waived, while the remaining cases required the stamp duty, which amounts to 70,200 tugrugs for each case.⁴¹² Further, apart from the court fees, NGOs need to pay lawyer fees to obtain professional legal services, which can accumulate over time, especially in technically-intensive environmental claims. Environmental NGOs often lack the necessary legal expertise or financial capacity to cover expert lawyers' expenses. Therefore, there is a great need for pro bono environmental lawyers in the field of public interest litigation on environmental issues.⁴¹³ Currently, pro bono lawyers are regulated under the provisions of the Law on the Legal Status of Lawyers⁴¹⁴ and 2013 Regulations of the Mongolian Bar Association (MBA) on Lawyers' Public Service Professional Activities.⁴¹⁵ As of 2019, there were 2,297 lawyers registered with the MBA who could choose to carry out pro bono lawyering;⁴¹⁶ however, they are not required to do pro bono activities for more than 40 hours per year. Thus, due to such few required pro bono hours, the supply often fails to meet the demand.

Strategic environmental litigation is an important avenue for NGOs to force the government to enforce environmental laws and regulations. Successful litigation signals to the government that failures to implement and enforce environmental laws will not be tolerated.⁴¹⁷ There are several notable achievements by environmental NGOs in holding the government to account. One of the most significant achievements of the UMMRL is intensifying the implementation of the Water and Forest Law through successful litigation

⁴¹¹ *UN Environmental performance reviews*, *supra* note 27 at 65.

⁴¹² *Law on Stamp Duty, 2010* (Mongolia) at art 7(1)(2) states that the stamp duty shall be "for non-property claims, as well as for invaluable claims, 70,200 tugrugs", Uniform portal of laws, online: <www.legalinfo.mn/law/details/515>.

⁴¹³ Interviewee C.

⁴¹⁴ *Law on the Legal Status of Lawyers, 2012* (Mongolia) at art 5(3), which states that "A lawyer shall seek to conduct publicly beneficial professional activities voluntarily", Uniform portal of laws, online: <www.legalinfo.mn/law/details/8661>.

⁴¹⁵ Regulations of the Mongolian Bar Association (MBA) on Lawyers' Public Service Professional Activities (14 December 2013), online (pdf): *Mongolian Bar Association* <www.mglbar.mn>.

⁴¹⁶ Mongolian Bar Association, *Uniform statistical information on lawyers* (1 October 2019), online: *MBA* <www.mglbar.mn/content/35>.

⁴¹⁷ Interviewee C.

against the Government of Mongolia. In October 2011, UMMRL won a historic decision in which the Supreme Court of Mongolia recognized the failure of the Government to implement this legislation. The Court ordered the Government to execute the legislation as well as the Parliamentary Resolution no.55 concerning prohibition of mining at river headwaters and forested areas.⁴¹⁸ This case illustrates how the UMMRL is utilizing substantive as well as procedural environment rights in the domestic legislation to advance environmental advocacy. Secondly, the “DMNN” NGO has also won a historic case against the Prime Minister of Mongolia. They succeeded in having four decisions of the Government of Mongolia regarding Oyu Tolgoi’s underground mining development (Dubai Agreement) annulled.⁴¹⁹ Their claim was upheld based on the illegal extension of the powers (abuse of power) of the Prime Minister to issue four decisions regarding Oyu Tolgoi’s underground mining development, which were contrary to the public interests of Mongolia, as determined by the court.⁴²⁰ NGOs in Mongolia pursue strategic environmental litigation to defend the human right to live in a safe and healthy environment against the encroachment and violation of environmental laws and regulations by government authorities and mining companies.⁴²¹ NGOs possess valuable legal and scientific expertise to assist marginalized communities in engaging with appropriate legal instruments towards the successful resolution of their environmental grievances. The cases reviewed above demonstrate how NGOs use litigation to ensure herder communities affected by mining operations in Mongolia can exercise their procedural rights to access environmental information, participate in environmental decision-making processes, and have access to environmental remedies, albeit with some limitations.

⁴¹⁸ Supreme Court of Mongolia on civil cases (Ulaanbaatar), 20 October 2011, *UMMRL NGO v Government of Mongolia* (Mongolia), no.687 at 4-5, online (pdf): *Business and Human Rights* <www.business-humanrights.org/Search/SearchResults?SearchableText=mongolia+and+centerra&x=0&y=0>.

⁴¹⁹ Administrative court of first instance (Ulaanbaatar), 18 November 2019, “DMNN” NGO v Prime Minister of Mongolia (Mongolia), no.808 at 21, online (pdf): *Online portal of court cases of Mongolia* <www.shuukh.mn>.

⁴²⁰ *Ibid.*

⁴²¹ Interviewee C.

CHAPTER FIVE: MONGOLIAN NGO ACCESS TO ENVIRONMENTAL JUSTICE TOOLS INTERNATIONALLY

Introduction

In this Chapter, I explore how environmental NGOs in Mongolia employ various international instruments in order to advocate for environmental and human rights of mining-affected local communities. Participation in international cooperation and decision-making processes, such as the UN Universal Periodic Review process, provides an essential platform for NGOs to supplement state reports and highlight challenges and shortcomings in state implementation of international human rights commitments. International non-judicial grievance tools such as OECD and the CAO mechanisms constitute novel procedural mechanisms for environmental NGOs to demand alleviation of corporate abuses of environmental and human rights of local communities in Mongolia. As I outline below, the CAO resolution mechanism resulted in a successful adjudication, mediation, and settlement of the dispute between the Oyu Tolgoi mine and the nomadic herders. The settlement culminated in the creation of a Tripartite Council to ensure the implementation of the agreements between the parties on access to pastureland and water resources in the fragile ecological system of South Gobi region.

Mongolian NGO Access to International Cooperation and Decision-Making Processes

Mongolian environmental NGOs effectively use international decision-making processes to highlight serious domestic environmental issues on the international platform. Since 2006,⁴²² Mongolian NGOs have been submitting their own reports to the UN mechanisms in addition to Mongolia's status reports on the implementation of international human rights conventions, which were used as a critical means of exerting pressure on Mongolia. NGO submissions have been accepted and used in the relevant UN human rights treaty bodies' decision-making processes to produce final concluding

⁴²² OHCHR, "UN Treaty Body Database" (2020), online: OHCHR <tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=MNG&Lang=EN>.

observations on the country's periodic reports.⁴²³ One of important international platforms for environmental NGOs to address environmental and human rights challenges facing Mongolia in the extractive sector has been the Universal Periodic Review (UPR) process. To date, Mongolia has undergone two cycles of the UPR in 2010 and 2015, and the third cycle is in progress in 2020. The Government of Mongolia and the NGO stakeholders have already submitted their 2020 reports outlining the implementation of the recommendations of the previous review cycles. The UPR process was instrumental in the development of NGO consortium to address human rights challenges in Mongolia. Joint submission of NGO reports is encouraged to ensure the credibility and reliability of information.⁴²⁴ Consequently, the NGO submission becomes an important source of credible information on the realities and specifics of implementation of environmental and human rights commitments in the State under Review (SuR). In preparation of NGO reports for three UPR cycles, the working groups preparing the national report had held several meetings with various NGOs and civil society organizations.⁴²⁵ Consequently, a consortium of environmental and human rights NGOs comprising over 50 NGOs appointed their own working groups to carry out discussions, data collection, and drafting of NGO stakeholder reports.⁴²⁶

⁴²³ NGOs are considered to be “competent bodies” within the civil society institutions to engage with UN human rights treaty bodies system, which is usually seen as facilitators for the involvement of other members of the civil society such as the individual experts, human rights defenders, representatives of academic and research institutions with building their capacities for submitting human rights information. (See, OHCHR, “Working with the United Nations Human Rights Programme: A Handbook for Civil Society” (2008) at 46, online (pdf): [OHCHR <www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf>](http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf)). In Mongolia, the only civil society actors engaging with UN human rights treaty bodies have been the NGOs in various fields of expertise. National Human Rights Commission of Mongolia also submits additional information, but it is a governmental body.

⁴²⁴ UPR and NGO Group for the CRC, “NGO written submission for the Universal Periodic Review: Information for NGOs” (factsheet 2, 2011) at 2, online (pdf): [UPR and NGO Group for the CRC <www.upr-info.org/sites/default/files/general-document/pdf/upr_factsheet_2_ngo_submission_e.pdf>](http://www.upr-info.org/sites/default/files/general-document/pdf/upr_factsheet_2_ngo_submission_e.pdf).

⁴²⁵ Human Rights Council, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Mongolia*, UN Doc A/HRC/WG.6/9/MNG/1, 9th sess (1-12 November 2010) at 4; Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Mongolia*, UN Doc A/HRC/WG.6/22/MNG/1, 22nd sess (4-15 May 2015) at 2; Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Mongolia*, UN Doc A/HRC/WG.6/36/MNG/1, 36th sess (4-15 May 2020) at 2.

⁴²⁶ Sukhgerel D et al, *supra* note 9 at 4.

Strong NGO submission is dependent on the capacity of the NGOs. Therefore, building the capacity of NGOs is understood to be very important for active participation in the international decision-making processes, and the UN bodies facilitate NGOs' involvement in the UPR process. For instance, in 2010, the UN Resident Representative Office organized a tripartite meeting involving UPR report developing working groups from the government, UN agencies, and the NGO Forum.⁴²⁷ Such events contributed to better interaction and exchange of various thematic issues between the stakeholders on the submission of their respective UPR reports consolidating their positions before the international community.⁴²⁸ For example, the Human Rights NGO Forum comprising 35 NGOs such as the Centre for Human Rights and Development (CHRD), Oyu Tolgoi Watch NGO (OT Watch), Steps without Borders and others, made a joint submission to the UN Committee on Economic, Social and Cultural Rights (CESCR) highlighting the lack of support for herders displaced from their pasturelands,⁴²⁹ the lack of accountability measures for mining companies violating herders' rights to access traditional pasturelands and water,⁴³⁰ and the lack of proper enforcement of environmental impact assessment requirements for mining companies.⁴³¹ Based on the NGO submissions, the UN CESCR, in its concluding observations, recommended Mongolia ensure meaningful consultation with herders affected by mining, guarantee their access to pasturelands and water resources, and carry out EIA before granting mineral licenses.⁴³² The CESCR urged the Government of Mongolia to consult with NGOs to implement the concluding observations.⁴³³ In addition to human rights treaty bodies, environmental NGOs have been

⁴²⁷ Center for Citizens Alliance, "Mongolia – NGO Submission on Human Rights Status to OHCHR for UPR" (23 November 2010) at 2 online (pdf): *Universal Periodic Review* <lib.ohchr.org/HRBodies/UPR/Documents/session9/MN/CCA_CenterforCitizensAlliance_JS.pdf> [Center for Citizens Alliance].

⁴²⁸ *Ibid.*

⁴²⁹ The Human Rights NGO Forum of Mongolia, Report to submitted to 55th session on Committee of Social and Cultural Rights on the Implementation of the economic, social, cultural rights in Mongolia (2015) at 10, online (pdf): *OHCHR* <tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MNG/INT_CESCR_CSS_MNG_20525_E.pdf>.

⁴³⁰ *Ibid* at 11.

⁴³¹ *Ibid* at 12.

⁴³² CESCR, *Concluding Observations on the fourth periodic report of Mongolia*, UN Doc E/C.12/MNG/CO/4, 50th meeting (19 June 2015) at 3.

⁴³³ *Ibid* at 10.

galvanizing support from the UN Special Rapporteurs to enforce genuine environmental and human rights reforms in Mongolia.⁴³⁴

In accordance with the three-stage process for NGO participation in the UPR process, as has been highlighted in Chapter 2, firstly, the NGOs submit their reports. Secondly, NGOs participate in the Working Group (WG), which is made up of Human Rights Council (HRC) members. In the WG, NGOs participate with no right to comment. However, the countries are able to discuss the highlights from NGO reports. Thirdly, NGOs provide oral comments at the HRC plenary before the adoption of the final UPR document.⁴³⁵ During the first review cycle, fourteen stakeholder submissions including the submissions from the National Human Rights Commission of Mongolia, international NGOs such as the Amnesty International, Asia Foundation and Open Society Forum, and joint submissions involving more than 50 domestic NGOs including environmental NGOs such as the Centre for Citizens' Alliance, UMMRL, OT Watch, Environmental Citizens' Council, National Federation for the Protection of the Tuul River, Patrons of the Khuvsgul Lake Movement, and Onon-Ulz River Movement, were accepted for the review.⁴³⁶ Forty-three countries made statements regarding the implementation of human rights laws and norms in Mongolia, posed questions, and advanced recommendations to Mongolia.⁴³⁷

NGO submissions alleged the violations of domestically and internationally recognized human rights such as the right to a safe environment, protection from environmental pollution and loss of ecological balance,⁴³⁸ the right to preserve traditional culture,⁴³⁹ the right to land,⁴⁴⁰ and the right to protection of health,⁴⁴¹ safety and security

⁴³⁴ Interviewee A. Active engagement with the Special Rapporteur on the situation of human rights defenders culminated in the drafting and promotion of the draft Law on the Status of Human Rights Defenders in Mongolia, as discussed in Chapter 4. (See, "OHCHR, "Mongolia: UN expert warns against setbacks in the rule of law and shrinking space for civil society" (13 May 2019) online: *OHCHR* <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24604&LangID=E>).

⁴³⁵ Greenberg, *supra* note 174 at 303.

⁴³⁶ Working Group on the Universal Periodic Review, Human Rights Council, *Mongolia: Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1*, 9th sess, UN Doc A/HRC/WG.6/9/MNG/3 (5 August 2010).

⁴³⁷ Working Group on the Universal Periodic Review, Human Rights Council, *Mongolia: Report of the Working Group on the Universal Periodic Review*, 16th sess, UN Doc A/HRC/16/5 (4 January 2011) at para 5 [Working Group].

⁴³⁸ Center for Citizens Alliance, *supra* note 427 at 7; Sukhgerel D et al, *supra* note 9 at 7.

⁴³⁹ *Ibid.*

⁴⁴⁰ Sukhgerel D et al, *supra* note 9 at 9; *Constitution*, *supra* note 12 at art 16(3); *Law on Land*, *supra* note 18 at art 5(2).

⁴⁴¹ Center for Citizens Alliance, *supra* note 427 at 7; *Constitution*, *supra* note 12 at art 16(6).

of person⁴⁴² with profound environmental implications. Furthermore, they argued that the exercise of the substantive environmental right to a healthy and safe environment is severely compromised due to mining-related environmental issues such as soil erosion, water contamination with harmful chemical substances,⁴⁴³ uranium mining near human settlements,⁴⁴⁴ and rivers and ponds drying up.⁴⁴⁵ Moreover, environmental NGOs pointed out that the “uncontrolled issuance” of mining licenses⁴⁴⁶ had disproportionately affected nomadic communities by displacing them from their homelands and pressuring them to abandon their traditional livelihoods.⁴⁴⁷ Several countries such as Malaysia, Hungary, and Pakistan, made recommendations to Mongolia based on NGO submissions. For instance, Malaysia urged Mongolia to make significant progress towards harmonizing domestic legislation with international treaties,⁴⁴⁸ ensure the public exercise of the procedural environmental right to access information concerning environmental pollution and degradation,⁴⁴⁹ and request for international technical assistance in the fulfillment of its human rights obligations.⁴⁵⁰ Also, Hungary recommended Mongolia to offer opportunities for public participation in decision-making processes and amend laws to allow civil society to engage in public interest litigation.⁴⁵¹ Mongolia did yield to this advice, and it amended the Law on Administrative Procedure to guarantee NGOs’ legal standing to seek environmental redress. Consequently, Mongolia accepted all of the aforementioned recommendations.

During the second review cycle, 18 stakeholders’ submissions, including the submission of ecologically-oriented institutions such as the National Human Rights Commission, CHRD, Ecology Centre, OT Watch, and Lawyers for Environment, were

⁴⁴² Sukhgerel D et al, *supra* note 9 at 11; *Constitution*, *supra* note 12 at art 16(13).

⁴⁴³ Center for Citizens Alliance, *supra* note 427 at 7.

⁴⁴⁴ *Ibid* at 7.

⁴⁴⁵ *Ibid* at 7-8.

⁴⁴⁶ *Ibid* at 7.

⁴⁴⁷ *Ibid*, Sukhgerel D et al, *supra* note 9 at 9.

⁴⁴⁸ Working Group, *supra* note 437 at para 84.14.

⁴⁴⁹ *Ibid* at para 84.108.

⁴⁵⁰ *Ibid* at para 84.116.

⁴⁵¹ *Ibid* at para 84.16.

accepted.⁴⁵² Sixty-four countries made recommendations to Mongolia.⁴⁵³ Here, NGO submissions included recurring themes about herders' access to pastureland and water, violations of the right to a clean and safe environment,⁴⁵⁴ lack of judicial independence in the adjudication of the environmental cases,⁴⁵⁵ and the rights to development and land for both urban and rural populations.⁴⁵⁶ On the other hand, the majority of recommendations focused on torture, domestic violence, and corporal punishment of children.⁴⁵⁷ There were no recommendations in connection to the environment, except those related to responsible mining practices such as the adoption of the national plan on the use of mercury, as expressed by Switzerland,⁴⁵⁸ securing mining rights of small-scale miners, as commented by Hungary,⁴⁵⁹ and the recommendation to adopt the Voluntary Principles on Security and Human Rights Initiative to promote human rights in the provision of security in the mining industry by the USA.⁴⁶⁰ Mongolia accepted all of these recommendations and acknowledged that mercury in the mining sector poses a serious health risk to small and artisanal miners, which prompted the national standard of "Mercury poisoning diagnosis and treatment".⁴⁶¹ Furthermore, Mongolia recognized the need to improve the compensation to herders for loss of their pastureland and the sustainable use of water supply.⁴⁶² Despite the government's acknowledgment of these persistent mining-related environmental impacts affecting herders' livelihoods, these issues continue to be unresolved in 2020. It is disappointing that relatively few recommendations related to environmental concerns were made in the second review

⁴⁵² Working Group on the Universal Periodic Review, Human Rights Council, *Mongolia: Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1*, 22nd sess, UN Doc A/HRC/WG.6/22/MNG/3 (9 February 2015) at 12 [Working Group on UPR 1].

⁴⁵³ Working Group on the Universal Periodic Review, Human Rights Council, *Mongolia: Report*, 30th sess, UN Doc A/HRC/30/6 (13 July 2015) at 6 [Working Group on UPR 2].

⁴⁵⁴ Working Group on UPR 1, *supra* note 452 at 3.

⁴⁵⁵ *Ibid* at 6.

⁴⁵⁶ *Ibid* at 11.

⁴⁵⁷ *Ibid* at 7-14.

⁴⁵⁸ UPR of Mongolia – Second Cycle, "Thematic list of recommendations" (2015) at 8 online: *Universal Periodic Review* <ohchr.org/EN/HRBodies/UPR/Pages/MNindex.aspx>.

⁴⁵⁹ *Ibid* at 2.

⁴⁶⁰ *Ibid* at 14.

⁴⁶¹ Working Group on UPR 2, *supra* note 453 at 6.

⁴⁶² *Ibid*.

process addressing harmful mining practices and their impacts on the nomadic livelihoods.

Before the third review cycle, 21 stakeholder submissions including the joint submissions from environmental NGOs such as MONFEMNET National Network, “Step by Step for Development” NGO, OT Watch NGO, Center for Human Rights and Development NGO, and “Beautiful Hearts” NGO were accepted for the review.⁴⁶³ These NGOs highlighted the urgency of strengthening human rights mechanisms in Mongolia by adopting the draft Law on Human Rights Defenders,⁴⁶⁴ undertaking strategic impact assessments of mining policies, upholding international environmental and human rights commitments, and revising national standards for the use of chemical substances in the mining sector in compliance with World Health Organization standards on human health.⁴⁶⁵ Mongolia’s National Report states that it actively supported human rights defenders during its membership of the UN Human Rights Council in 2016-2018.⁴⁶⁶ Further, it points out that the Special Rapporteur on human rights defenders was invited to Mongolia to assess the domestic situation of human rights defenders.⁴⁶⁷ Because of this Government invitation of a Special Rapporteur, a hope is raised among the civil society community that Mongolia will soon adopt a standalone law on the protection of human rights defenders, which will guarantee protections to NGOs operating as human rights defenders in mining and environment, as discussed in Chapter 4. In response to previous UPR recommendations, Mongolia has advised the international community that it is working to implement a national action plan to implement “Guiding Principles in Business and Human Rights.” Following the ratification of the Minamata Convention on Mercury in 2015, it has adopted a government resolution no.317 in 2019 on the implementation of the “National program on reducing the mercury pollution from artisanal gold mining”.⁴⁶⁸

⁴⁶³ OHCHR, Human Rights Council, *Summary of Stakeholders’ submissions on Mongolia*, 36th sess, UN Doc A/HRC/WG.6/36/MNG/3 (24 February 2020) at 10-11.

⁴⁶⁴ *Ibid* at 3.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ Working Group on the Universal Periodic Review, Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Mongolia*, 36th sess, UN Doc A/HRC/WG.6/36/MNG/1 (14 February 2020) at 8.

⁴⁶⁷ *Ibid*.

⁴⁶⁸ *Ibid*.

There were no other issues relating to the protection of herder communities' environmental and human rights discussed in the national report because none of the participating parties raised these issues. Notwithstanding the shortcomings of the state report, NGOs' engagement in developing the national report before its submission to the UPR demonstrates an openness to dialogue between civil society and the Government on various human rights challenges in their joint efforts to devise appropriate countermeasures. Consequently, Mongolian NGO access to international decision-making processes such as the UPR has been an important avenue in ensuring Mongolia's oral commitment before the international community to alleviate its shortcomings in the implementation of international environmental and human rights commitments domestically. On the other hand, due to the procedural limitations for active NGO engagement in the WG discussions, as well as the lack of coercive international mechanisms to enforce oral commitments of Mongolia, the UPR and other intergovernmental decision-making processes continue to be merely a soft power tool (without coercive powers of enforcement) for NGO participation in international decision-making processes. Nonetheless, as described in the above section, there has been some progress on the part of the Government to adopt legislative and regulatory measures to strengthen environmental and human rights in Mongolia such as the adoption of the national plan on business and human rights.

Mongolian NGO Access to International Corporate Accountability Mechanisms

NGO Access to the OECD Accountability Mechanism

The OECD Accountability Mechanism has become an essential platform for environmental NGOs to lodge environmental and human rights-related complaints against foreign mining corporations that do not adhere to domestic environmental laws and regulations in conducting their Mongolian operations. OT Watch NGO filed two complaints with the Canadian National Contact Point (NCP) for OECD against Oyu Tolgoi mine⁴⁶⁹ and the Centerra Gold Inc. (Centerra Gold). In the first case, OT Watch submitted

⁴⁶⁹ The Government of Mongolia owns 34 percent, while the Turquoise Hill Resources owns 66 percent of the Oyu Tolgoi mine in South Gobi region. Here, the Australian Rio Tinto company owns 50.8 percent of

a request for review on 1 April 2010, concerning the Oyu Tolgoi mining development project jointly implemented by Canadian Ivanhoe Mines Ltd. and UK-based Rio Tinto International Holdings Ltd. in Mongolia.⁴⁷⁰ Originally, NGOs made their complaint to three NCPs of Canada, the UK, and the US; however, the Canadian NCP became the leading arbiter of the case.⁴⁷¹ The complaint raised questions regarding the violations of article 1 of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) on the lack of sustainable development considerations in the project's economic, social and environmental impact, and article 3 on the lack of appropriate environmental impact assessment, in particular, concerning environmental, health and safety-related issues of the project.⁴⁷² Most importantly, the OT Watch raised the issue of the lack of sustainable water resources to implement the South Gobi region project.⁴⁷³ The insatiable use of precious water resources in Gobi's fragile ecosystem contributes to the degradation of nomadic herder livelihoods. The OT Watch has demanded a full environmental impact assessment of the 30-60-year water-intensive project including the project's river diversion proposals.⁴⁷⁴

The principal responder to the Canadian NCP, Ivanhoe Mines, objected to the complaints raised by the OT Watch NGO, stating that they had fully complied with legal and regulatory mechanisms of Mongolia and supplied technical and scientific information on alleviating environmental impacts of the mining project.⁴⁷⁵ During its lengthy initial assessment, which took three times longer than the expected timeframe,⁴⁷⁶ the Canadian NCP requested further information from the parties, whereby the Ivanhoe Mines supplied completed and pending environmental impact assessments and some of the project's

Turquoise Hill Resources and manages the overall operation of the mine. See, Rio Tinto, "Oyu Tolgoi" (2020), online: *Rio Tinto* <www.riotinto.com/operations/mongolia/oyu-tolgoi>.

⁴⁷⁰ OECD Watch, "OT Watch vs. Ivanhoe Mines Ltd." (1 April 2010), online: *OECD Watch Case Database* <complaints.oecdwatch.org/cases/Case_188> [OT Watch Case no.1].

⁴⁷¹ *Ibid.*

⁴⁷² Global Affairs Canada, "National Contact Point for the OECD Guidelines for Multinational Enterprises" (30 July 2014), online: *GAC* <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/mining_project-Oyu_Tolgoi-projet_minier.aspx?lang=eng>.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Global Affairs Canada, "Procedures Guide for Canada's National Contact Point for the Organization of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises" (31 July 2014), online: *GAC* <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng>.

economic and technical feasibility study, which argued that the project envisioned adequate supply of groundwater resources for the mining project's lifespan.⁴⁷⁷ On the other hand, the OT Watch NGO further reiterated its allegations that there were no adequate water resources for implementing the mining project in the South Gobi region, which could have serious deleterious effects on the whole region's social and economic sustainability.⁴⁷⁸ Furthermore, two conflicting statements from the World Bank, which was used by the parties as evidence, further raised doubts about the project's adequate water resources supply. Firstly, the World Bank's 2010 "South Gobi Regional Environmental Assessment" report stated that the OT project was an example of a sufficient groundwater extraction project.⁴⁷⁹ In contrast, in its letter to the OT Watch, the World Bank's International Finance Corporation (IFC) indicated that at the time of the pending case, the environmental and social impact assessment of the OT mine still had not fully met with international standards.⁴⁸⁰ Disregarding the IFC's statement on the lack of sufficient compliance of the OT mine with international environmental standards, the Canadian NCP concluded that the case did not merit further examination due to the complex nature of water management, which should fall under the purview of the Government of Mongolia, and further encouraged the parties to continue their dialogue towards a possible resolution of the NGO grievances.⁴⁸¹ OT Watch complained that the Canadian NCP violated its own procedures in resolving the NGO's complaint and it failed to inform the NGO on the need to provide all requisite documents in the initial assessment.⁴⁸² Therefore, OT Watch did not supply all the materials they possessed, which significantly reduced their chances of proving their claims with substantial documents.⁴⁸³ Despite the lack of a satisfactory outcome of their first international experience with the OECD

⁴⁷⁷ Global Affairs Canada, "National Contact Point for the OECD Guidelines for Multinational Enterprises", (30 July 2014), online: GAC <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/mining_project-Oyu_Tolgoi-projet_minier.aspx?lang=eng>.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ World Bank, "Mongolia: Southern Gobi Regional Environmental Assessment" (January 2010) at 27, online (pdf): [World Bank <openknowledge.worldbank.org/bitstream/handle/10986/27597/597030WP0P10881taI0Assessment01Eng1.pdf?sequence=1&isAllowed=y>](http://openknowledge.worldbank.org/bitstream/handle/10986/27597/597030WP0P10881taI0Assessment01Eng1.pdf?sequence=1&isAllowed=y).

⁴⁸⁰ OT Watch Case no.1, *supra* note 470.

⁴⁸¹ *Ibid.*

⁴⁸² Interviewee A.

⁴⁸³ *Ibid.*

accountability mechanism, the OT Watch NGO filed a second complaint to the Canadian NCP.

In the second case, the OT Watch NGO, in cooperation with the UMMRL and partnership with the international environmental NGOs such as Mining Watch Canada, US Southwest Research and Information Center, and the British Rights and Accountability Development, submitted a complaint against the Canadian-based Centerra Gold mining company.⁴⁸⁴ The consortium of domestic and international NGOs lodged their complaint on 15 March 2012 to the Canadian NCP alleging that the Centerra Gold failed to adhere to the OECD Guidelines on human rights and environment⁴⁸⁵ and to follow the Water and Forest Law in its mining operations in Mongolia, which prohibited mining operations at the forested areas.⁴⁸⁶ In particular, the coalition of environmental NGOs complained that the Centerra Gold violated the substantive environmental right to a healthy and safe environment by contaminating the source of safe drinking water of the nomadic communities with heavy metals released during its forest clearing activities at the Gatsuert River valley.⁴⁸⁷ However, the NCP determined that there is no evidence that the mining company's operations contributed to the contamination of the water reserves.⁴⁸⁸ In response to the notifiers' complaints regarding violation of nomads' religious and cultural rights through the company's denial of access to sacred Noyon Mountain, the NCP advised Centerra Gold to improve its communication strategy with the local community.⁴⁸⁹ As a result, the Canadian NCP rejected the NGO complaint based on the lack of sufficient evidence to support these claims.⁴⁹⁰ Despite the lack of success at the Canadian NCP, the OECD proved to be a useful soft-power environmental justice tool

⁴⁸⁴ OECD Watch, "Miningwatch Canada et al vs Centerra Gold" (15 March 2012), online: *OECD Watch Case Database* <complaints.oecdwatch.org/cases/Case_246> [OT Watch Case no.2].

⁴⁸⁵ MiningWatch Canada, "Centerra Gold Inc. Flouting Mongolia's Environmental Protection Laws: Organizations File Complaint with Canadian Government" (15 March 2012) online: *MiningWatch Canada* <www.miningwatch.ca/news/centerra-gold-inc-flouting-mongolia-s-environmental-protection-laws-organizations-file> [MiningWatch Canada].

⁴⁸⁶ *Ibid.*

⁴⁸⁷ OT Watch Case no.2, *supra* note 484.

⁴⁸⁸ Canadian National Contact Point, "NCP Centerra Gold Initial Assessment" (2 November 2012) at 4, online (pdf): *Canadian NCP* <www.miningwatch.ca/news/centerra-gold-incflouting-mongolia-s-environmental-protection-laws-organizations-file>.

⁴⁸⁹ *Ibid* at 7.

⁴⁹⁰ Global Affairs Canada, "2019 Report of the peer review of the National Contact Point of Canada" (27 November 2015), online: *GAC* <www.international.gc.ca/trade-commerce/ncp-pcn/pr-report-2019-rapport-ep.aspx?lang=eng#f16>.

for Mongolian environmental NGOs to highlight mining-related environmental issues caused by foreign mining companies in Mongolia among its international environmental NGO partners. On their part, the UMMRL continued to demand the Centerra Gold to stop its illegal mining operations in the domestic courts, as discussed in Chapter 4.

In 2011 the UMMRL won a case at the Supreme Court of Mongolia ordering the Government to assess the damages inflicted by the mining companies' operations in the forested areas and the river basin in contravention of the Water and Forest Law.⁴⁹¹ In 2016, the Canadian-based Centerra Gold mining company faced another NGO-challenger in the domestic courts of Mongolia, namely the "Noyon Mountain Rescue Movement" public service NGO.⁴⁹² The NGO advanced a claim to Mongolia's administrative court to revoke its four mining licenses for the operation of the mine at the sacred Noyon Mountain, the site of valuable archeological artifacts of the Hunnic period.⁴⁹³ Finally, after four years of a court battle in 2019, the Supreme Court ordered the Cadastral Department of the Mineral Resources and Petroleum Authority to revoke the licenses issued to the Centerra Gold.⁴⁹⁴ The domestic court battle was full of controversies with the court delays setting a national record of 53 times,⁴⁹⁵ which garnered the general public's attention. Faced with the controversy over the delays and charges against the independence and impartiality of the courts in the face of powerful mining lobby in Mongolia, the Government decided to submit a proposal for the inclusion of the Noyon Mountain into the list of strictly protected areas,⁴⁹⁶ which was enforced by the Parliament resolution in 2020.⁴⁹⁷ Consequently, even though the domestic court remedy can be considered a hard-power environmental justice tool for NGOs, the battle

⁴⁹¹ Refer to Appendix A: Mongolian NGO Court Cases.

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.* Also, see, Coal International, "Mongolian court recalls 4 mining licenses of Centerra Gold Inc." (10 December 2019), online: *Tradelink Publications* <mqworld.com/2019/12/10/mongolian-court-recalls-4-mining-licenses-centerra-gold-inc/>.

⁴⁹⁴ *Ibid.* Also, refer Appendix A: Mongolian NGO Court Cases. The "Noyon Mountain Rescue Movement" public service NGO was not involved in the OECD case against Centerra Gold.

⁴⁹⁵ Asuudalmn, "Noyon Mountain's trial has been postponed 48 times, setting a record in the history of the judiciary" (18 February 2019), online: *Asuudal* <www.asuudal.mn/more/2304>.

⁴⁹⁶ Akipress, "Noyon Mountain is to be 'a strictly protected area' - Minister of Environment and Tourism, Mongolia", online: <akipress.com/news:625118:Noyon_Mountain_to_be_strictly_protected_-_Tourism_Minister_of_Mongolia/>

⁴⁹⁷ Eguur.mn, "Noyon Mountain Rescue Movement" thanked the staff of the Ministry of Environment and Tourism" (14 May 2020), online: *Eguur.mn* <eguur.mn/103205/>.

to protect the sacred cultural site of merely one mountain could tarnish the Mongolia's judicial reputation. Thus, Mongolia's environmental NGOs are sometimes faced with the necessity to use twin-systems of domestic and international dispute resolution mechanisms, as there is no guarantee that either of these mechanisms will succeed, to obtain hard-won struggles for remedying mining-related environmental harms in Mongolia.

NGO Access to CAO Accountability Mechanism

Oyu Tolgoi mine in Mongolia, one of the largest gold and copper mines in the world,⁴⁹⁸ continues to be the subject of complaints through international grievance mechanisms due to its extensive mining footprint in the South Gobi region with a fragile ecological system, and its significant impact on the local nomadic herders' livelihoods. The mine-affected herders approached the OT Watch NGO for assistance in negotiating better terms with the foreign company concerning the forced relocation and compensation because of its previous expertise of the OECD mechanism. The exploration and development of the enormous mine required substantial financial investment into the project. Thus, the OT Watch NGO advised the local communities affected by the mine to file a complaint to the World Bank's Compliance Advisor Ombudsman (CAO), as the proponents obtained substantial IFC financing and MIGA guarantee.⁴⁹⁹ Consequently, the consortium of domestic (national and local) and international environmental NGOs, namely the OT Watch, Gobi Soil NGO, the Accountability Counsel, and the Bank Information Center, acted as advisors to the mine-affected local nomadic communities to file two separate complaints to the CAO.

In the first complaint in 2012, 37 nomads expressed concerns regarding the threats posed to their livelihoods through inappropriate use of land and water, and the lack of

⁴⁹⁸ Mining Technology, "Oyu Tolgoi Gold and Copper Project, Mongolia" (2020), online: <www.mining-technology.com/projects/oyu-tolgoi/>.

⁴⁹⁹ World Bank provides the following investments: International Finance A Loan for 400 million US dollars and B Loan of 1 billion US dollars, and Multilateral Investment Guarantee for up to 1 billion US dollars. See, Compliance Advisor Ombudsman, "Case Detail: Mongolia/Oyu Tolgoi-01/Southern Gobi", online: CAO <www.cao-ombudsman.org/cases/case_detail.aspx?id=191> [CAO Case Detail].

proper compensation and relocation schemes.⁵⁰⁰ In the second complaint in 2013, seven herders complained about the diversion of the Undai river,⁵⁰¹ which could diminish the water supply and deteriorate the pasture land. Moreover, for nomads, who live in harmony with nature, the Undai River is considered a sacred river, which nurtures the nomadic livelihoods for many centuries.⁵⁰² The CAO determined these two complaints to be eligible for review, which prompted it to conduct several fact-finding missions to Mongolia to clarify the complainants' grievances.⁵⁰³ During the CAO assessment process, the complainants and the company agreed to submit themselves to its dispute resolution process voluntarily.⁵⁰⁴ Moreover, the two nomadic complaints were merged into one, where the local herders elected a team of herders to represent their interests in a single CAO dispute resolution mechanism.⁵⁰⁵ Consequently, the environmental NGOs with expertise on the international environmental justice tools aided the mining-affected local communities to organize, unite, and file a complaint to the appropriate dispute resolution mechanism in conformity with its procedures.

The involvement of domestic and international environmental NGOs such as the OT Watch and the Accountability Counsel has strengthened the positions of herders, ensured a more equal balance of power in their negotiations with the much more well-resourced opponent, and supplied them with various legal, technical and scientific information, as needed.⁵⁰⁶ Initially, the disputing parties were totally consumed by their interests and expressed no desire to give in to each other's concerns.⁵⁰⁷ The nomadic herders told their advisers that the representatives of OT mine stated that they would never give up their positions on compensation.⁵⁰⁸ On their part, the nomadic herders themselves were especially unhappy with the diversion of the Undai River plans; however, the international

⁵⁰⁰ Compliance Advisor Ombudsman, "CAO Dispute Resolution Conclusion Report: Oyu Tolgoi 01 & 02/Southern Gobi" (May 2020) at 1, online (pdf): <www.cao-ombudsman.org/cases/document-links/documents/CAOMongolia_Conclusion_Rpt_2020-05-ENG.pdf> [CAO Conclusion Report].

⁵⁰¹ As was discussed in the OECD mechanism section of this thesis, the OT mine developers assured the Canadian NCP that no river diversions were envisioned in the mine's implementation.

⁵⁰² CAO Conclusion Report, *supra* note 500 at 1.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

⁵⁰⁵ CAO Case Detail, *supra* note 499.

⁵⁰⁶ CAO, "Mongolia: New Tripartite Council Video on CAO Mediation Process" (1 May 2019), online: CAO <www.youtube.com/watch?v=_yiY6rgdRP0&feature=youtu.be> [CAO Mediation Process].

⁵⁰⁷ Interviewee D.

⁵⁰⁸ *Ibid.*

NGO mediator helped them develop different strategies and tactics of negotiation by offering some concessions and compromises⁵⁰⁹ because the river diversion plans were already approved by the government authorities and in the process of implementation.⁵¹⁰ Also, the capacity-building of a national mediator in the CAO process⁵¹¹ was a vital contributing factor for effective negotiation and communication between the parties. The parties have identified the strong skill of a local mediator as essential in building trust with each other.⁵¹² Initially, the CAO could not find an experienced Mongolian mediator; thus, they had to involve an international mediator. However, in the course of the dispute resolution process, one of the interpreters was formally trained as a professional mediator.⁵¹³ Consequently, the capacity-building of a local mediator was one of the important by-products of the CAO dispute resolution process in Mongolia.⁵¹⁴ Consequently, for 2013-2019, the CAO team facilitated numerous meetings between the company and the mining-affected herder communities, where both parties were provided with trainings on negotiation, conflict resolution, and communication skills.⁵¹⁵

As a result of these trainings, the parties agreed to commission joint fact-finding by Independent Expert Panel and Multidisciplinary Team on Undai river diversion, access to grazing land, and determine the socio-economic impact of the OT project on herder household livelihoods.⁵¹⁶ Two reports were produced by external experts, who offered 42 recommendations, which were accepted by the parties.⁵¹⁷ Thus, based on these recommendations, over 60 actions on access to water sources, pastureland, compensation, health services, SME development, vocational training, and creation of wells, were agreed by the parties.⁵¹⁸ Furthermore, a new local NGO, “Eternal Green

⁵⁰⁹ Here, more interviews with affected herders could further reveal whether all the nomads were happy with the proposed concessions.

⁵¹⁰ Interviewee D.

⁵¹¹ See, CAO Conclusion Report, *supra* note 500 at 6-7.

⁵¹² CAO Mediation Process, *supra* note 506.

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.* Moreover, an official apology from OT mine to herders was an important transformative moment towards reconciliation. (Interviewee B)

⁵¹⁶ CAO Conclusion Report, *supra* note 500 at 3.

⁵¹⁷ Interviewee B.

⁵¹⁸ All expenses involved in this negotiation were born by the Oyu Tolgoi mine. Interviewee B; CAO Conclusion Report, *supra* note 500 at 4.

Galbo”, was established to carry out environmental monitoring.⁵¹⁹ Moreover, the parties have established a Tripartite Council (TPC)⁵²⁰ consisting of an equal number of representations from a local government,⁵²¹ the company, and the herders for implementation of the agreed action plan. The TPC mechanism offered a unique platform to resolve issues concerning the agreements, exchange of information, provision of recommendations, and monitor the implementation of agreements.⁵²² The roles played by the international environmental NGO mediator and the CAO local mediator were paramount in building trust, transforming the attitudes and perceptions, and honing the negotiation and communication skills of the conflicting parties to arrive at mutually acceptable agreements, and the creation of a formal TPC institutional mechanism tasked with implementation and monitoring the parties’ mediated agreements.

Since the closing of the CAO dispute resolution mechanism, the TPC has been operating independently. The support of the environmental NGOs has been immensely influential not only in the capacity-building noted above, but also in terms of assessment and monitoring of the implementation of the agreements. In its 2020 report on the assessment of the TPC independent actions, the Accountability Counsel NGO pointed out that the TPC has completed around one-third of all commitments and another one-third were still in progress.⁵²³ Due to the urgency of the matter, the individual compensation package of agreements has been implemented successfully, which included the distribution of scholarships to 37 university students from herders’ households, the construction of 10 wells equipped with solar-powered pumps, and the determination of 114 eligible claimants for compensation concerning physical and economic displacement from OT project.⁵²⁴ On the other hand, the activities and projects,

⁵¹⁹ *Ibid* at 5.

⁵²⁰ In June, 2015, the local government, herders and OT company established the Tripartite Council by signing the MOU and approved the TPC charter. *See, Ibid* at 2.

⁵²¹ The local government was included into the TPC because livelihood projects could not be implemented without a local government support.

⁵²² CAO Mediation Process, *supra* note 506.

⁵²³ Accountability Counsel, “From Paper to Progress: Tracking agreements between nomadic herders and Mongolia’s largest copper mine” (June 2020), online: *Accountability Counsel* <tpcprogress.com/> [International NGO report].

⁵²⁴ Compensation Claims Committee was established at the TPC in 2017, which found that 114 out of 174 have been found eligible for new compensation packages. The total amount of new compensation came to approximately 945,000 US dollars. *See, Accountability Counsel*, “From Paper to Progress: Tracking

which benefitted the whole community and required the active involvement of the local government bodies, including the development of herder markets, supply chain for local livestock produce, planting of livestock fodder, and building of livestock slaughter line, continued to be delayed.⁵²⁵ Environmental NGOs advised the TPC to improve communication with local herders, monitor the implementation of commitments by third parties, and build the capacities of TPC representatives⁵²⁶ to overcome these challenges because, for instance, government authorities did not prioritize the commitment to building wells and thus, the financial resources were saturated elsewhere.⁵²⁷ Environmental NGOs have played an invaluable role in the implementation of the CAO process as an independent monitoring and review mechanism to ensure that the TPC fulfills its commitments towards the mining-affected herder community in the South Gobi region. Moreover, the CAO dispute resolution mechanism's success in Mongolia has become the focus of international attention. In 2017, TPC members attended an international conference in Colombia to share their experiences on reaching mutually accepted agreements between the mining company and the local community with their international colleagues.⁵²⁸ Thus, the environmental NGOs in the case of CAO dispute resolution contributed towards the achievement of agreements between the nomads and the mining company with local, national, and international resonance.

agreements between nomadic herders and Mongolia's largest copper mine" (2019) at 18, online (pdf): <scorecard-static.s3-us-west-1.amazonaws.com/media/public/ProgressReport2019_en.pdf>.

⁵²⁵ *Ibid* at 16.

⁵²⁶ International NGO report, *supra* note 523.

⁵²⁷ *Ibid*.

⁵²⁸ CAO, "Representatives of TPC participated at the International Conference "Sustainability Exchange-2017" held in Colombia" (June 2017), online (pdf): CAO <www.cao-ombudsman.org/cases/document-links/documents/June2017_Colombiatrippublicinformation_ENG.pdf>

CHAPTER SIX: CONCLUSION

In this thesis, I applied the theory of environmental justice to determine how NGOs use substantive and procedural environmental rights to advocate for mining-affected nomadic communities and curtail environmental degradation caused by mineral exploitation in Mongolia. Environmental NGOs are essential players and representatives of civil society in the environmental sector. In particular, they often possess legal and scientific expertise pertinent to resolving and mitigating environmental risks and demanding justice for environmental damages on behalf of the mining-affected local nomadic communities. Based on the environmental justice theories, I have constructed a theoretical framework to examine how NGOs access and implement environmental justice tools, both domestically and internationally, as shown in Table 2 of Chapter 2. Using a multi-methods research approach, including doctrinal research analyzing judicial decisions and qualitative interviews with NGO experts and lawyers with direct knowledge of many of the domestic and international cases of this thesis, I was able to uncover the experiences, difficulties, and challenges faced by NGOs as they seek favorable environmental outcomes. As outlined in the thesis, my findings demonstrate that domestic and international environmental justice tools provided opportunities to NGOs to litigate, advocate, negotiate, and mediate the disputes between marginalized mining-affected nomadic communities and their much-larger opponents, mining companies.

In Chapter 4, I examined NGO access to domestic environmental justice tools. I conclude that access to environmental information, meaningful public participation in environmental decision-making processes, and access to the courts were particularly significant in achieving environmental remedies through the analysis of 24 court cases advanced by the NGOs. Remedies examined included the payment of environmental damages by the foreign mining company, annulment of mineral licenses and environmental impact assessments, enforcement of environmental laws and regulations, provision of environmental information, as shown in Appendix I on Mongolian NGO Court Cases. I argue that the recognition of NGO standing in domestic courts is a significant achievement in Mongolia's legal history, providing opportunities for environmental NGOs to litigate claims on environmental damage and violations of environmental procedural

rights of local communities such as participation in the environmental impact assessment process. However, strategic environmental NGO litigation also reveals that the courts in Mongolia have failed to consider international human rights instruments when assessing compensation for nomadic herders for the loss of their livelihoods due to mining operations. Thus, there is a need for capacity-building the judiciary on the use and application of international human rights conventions, to which Mongolia is a party, to restore and remedy the environmental and human rights of the most vulnerable communities such as nomads. Overall my research demonstrates the importance of access to domestic environmental justice tools for environmental NGOs working in partnership with local nomadic communities to advocate and litigate to restore rights and demand accountability for irresponsible government and mining company operations.

In Chapter 5, I examined how NGO access to international environmental justice tools, such as the participation in international decision-making processes of intergovernmental bodies such as the UN, international corporate accountability mechanisms such as the Canadian National Contact Point on OECD Guidelines, and the World Bank's Compliance Advisor Ombudsman (CAO), were significant in advocating for nomadic communities' environmental and human rights. My research illustrates how Mongolian NGOs have become active participants of international human rights treaty-bodies since 2006 by submitting their civil society reports on the status of human rights in Mongolia. In particular, their participation in the UN Universal Periodic Review process was notable in highlighting the nomadic communities' violations of environmental and human rights due to mining-related environmental issues, the need to adopt the Law on the Legal Status of Human Rights Defenders, upholding environmental and human rights in Mongolia, and revising national standards for the use of chemical substances in the mining sector. My research further reveals how Oyu Tolgoi Watch NGO has become a significant civil society player in the international arena. It has extensively used international non-judicial grievance mechanisms such as the OECD and the CAO mechanisms to forward complaints on behalf of nomadic communities concerning the violations of their environmental and human rights due to the exploitation of the largest gold and copper Oyu Tolgoi mine in Mongolia. Crucially, OT Watch NGO formed partnerships with other local, national, and international environmental NGOs to submit the complaints jointly with

the mining-affected nomads. As I demonstrate, environmental NGOs have played a crucial role in advising, capacity-building, and assisting the nomads to strengthen their negotiation positions with their more powerful opponents. For example, the successful agreements in the OT mine development to establish a Tripartite Council in the South Gobi region were the result of the NGO mediation in the CAO process. Agreements between the nomads and the mining company on the allocation of individual compensations and development of infrastructural projects to facilitate herders' access to pastureland and water resources, restricted due to OT mine operations, are significant achievements for the communities. Environmental NGOs continue to advise the local nomadic community and the TPC representatives to ensure the fulfillment of all agreements, which were considered exemplary locally, nationally, and internationally.

Consequently, this research has demonstrated the invaluable role played by the domestic and international environmental NGOs in Mongolia to promote and advocate environmental and human rights of nomadic communities through their active engagement with domestic and international environmental justice tools such as access to environmental information, participation at the environmental decision-making processes, both domestically and internationally, access to court remedies and the exploitation of international corporate accountability mechanisms such as the OECD and CAO dispute resolution forums. Further Constitutional amendments⁵²⁹ concerning the regulation of land allocation for public use, including the livestock grazing, and the parliamentary discussions of future land reforms should encourage more research on the effects of these novel developments on nomadic agricultural land practices in Mongolia, and the potential role of NGOs in ensuring that these reforms do not unnecessarily curtail the herders' environmental and human rights.

⁵²⁹ In 2019, the State Great Khural adopted Constitutional amendments, where it stated that: "6.2. Land other than the land allocated to citizens of Mongolia for ownership, as well as the subsoil, its resources, forests, water resources, and wildlife shall be the public property of the state". See, *Constitution, supra* note 12. There is a controversy regarding the meaning of the land being a "public property of the state", and if the nomadic communities with their livestock grazing practices will be able to roam their pastureland, as before these amendments freely.

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APPENDICES

Appendix A: Mongolian NGO Court Cases

| No. Year | Parties | | Court Decision | | |
|------------|---|--|--|--|---|
| | Claimant(s) and the statement of a claim | Respondent(s) | Court of first instance | Intermediate appellate court | Supreme Court of Mongolia |
| 1. 2011 | <p>“Onggi River Movement” NGO</p> <p>Claim: <i>To demand the outstanding fee of 2,500,000 tugrugs for the implementation of the rehabilitation duties outlined in the “Forestation and rehabilitation agreement.”</i></p> | <p>Forest Authority (Implementing agency of the Government of Mongolia)</p> | <p><u>Civil court decision no.44:</u></p> <p>The case is dismissed on the grounds of an amicable agreement between the parties being reached under the transfer of the outstanding payment from the respondent to the claimant’s banking account.</p> | <p><u>The appellate civil court decision</u> N/A</p> | <p><u>Supreme court decision on civil cases</u> N/A</p> |
| 2. 2011 | <p>UMMRL NGO</p> <p>Claim: <i>To assign assessment of environmental damages caused to the river basins of Onggi, Zavkhan, Tuul, Khangiltsag, Khuder, Ulz, Yeruu, and Gachuurt rivers within two months, and to inform the public of the said assessment, to assign the restoration of the forenamed river basin areas to be carried out by UMMRL under contractual terms with the respondent, pay the damages totaling 68,908,512 tugrugs, to enforce the Water</i></p> | <p>Government of Mongolia</p> | <p><u>Civil court decision no.447:</u></p> <p>The claim is dismissed based on articles 9.4.2, 9.4.3, 497, 510.1, and 510 of the Civil Code; and, Clause 1.1, Article 32, of the Law on the Protection of the Environment.</p> | <p><u>The appellate civil court decision no.493:</u></p> <p>The decision of the first instance court is upheld.</p> | <p><u>Supreme court decision on civil cases no.687:</u></p> <p>All claims are dismissed, except to order the Government of Mongolia to enforce Article 1 of Water and Forest Law and the Parliamentary resolution no.55 on measures to be taken concerning the implementation of the Water and Forest Law.</p> |

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| | and Forest Law, and to issue a resolution that revokes the licenses of the entities operating in the river basins. | | | | |
| 3. 2012 | <p>“Coalition of Mongolian Civil Environmental Movements” NGO</p> <p>Claim: To demand the “Petro China Daqing Tamsag” Co., Ltd., to carry out environmental rehabilitation activities following the environmental protection plan and pay 1,356,622,460 tugrugs for environmental damage to Matad soum, Dornod aimag.</p> | <p>“Petro China Daqing Tamsag” Co., Ltd.</p> | <p>Civil court decision no.854:</p> <p>The claim is partially upheld: the company failed to rehabilitate the land fully; thus, it is required to pay environmental damages in the amount of 1,356,622,460 tugrugs to Matad soum, Dornod aimag, and is not required to rehabilitate the land.</p> | <p>The appellate civil court decision no.519:</p> <p>The decision of the first instance court is upheld.</p> | <p>Supreme court decision on civil cases no.563:</p> <p>Decisions of the first and appellate civil courts are upheld.</p> |
| 4. 2012 | <p>“Onggi River Movement” NGO</p> <p>Claim: To demand the payment of 3,278,499 tugrugs.</p> | <p>Mineral Resources Department (Implementing agency of the Government of Mongolia)</p> <p>Third party: “Bayarsgold” Co., Ltd.</p> | <p>Civil court decision no.0809:</p> <p>The case is dismissed on the grounds of lack of evidence to support the claim of damages inflicted on the Onggi River Movement due to illegal actions of the Mineral Resources Department’s issuance of the exploration license to “Bayarsgold” Co., Ltd.</p> | <p>The appellate civil court decision</p> <p>N/A</p> | <p>Supreme court decision on civil cases</p> <p>N/A</p> |
| 5. 2013 | <p>“Lawyers’ Association for Environment” NGO</p> <p>Claim: To demand the payment for infliction of environmental damage in the</p> | <p>Tavan Tolgoi Co., Ltd., “Nuursnii Zam” Co., Ltd., and “Energy Resources” Co., Ltd.</p> | <p>Civil court decision no.1542:</p> <p>Uphold the claim and assign a duty on Tavan Tolgoi Co., Ltd. to pay 101,851,492,835 tugrugs, and “Energy Resources” Co., Ltd. to pay 52,235,485,736 tugrugs for environmental damages,</p> | <p>The appellate civil court decision no.965:</p> <p>Dismiss the case due to insufficient evidence to determine that the actions or inactions of the respondents caused the damage.</p> | <p>Supreme court decision on civil cases</p> <p>N/A</p> |

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| | <i>amount of 57,676,600,000 tugrugs.</i> | | which will be transferred into the Environmental Protection Fund. | | |
| 6. 2013 | <p>“Khongor Nutgiin Duudlaga” NGO and the Governor of Gurvanbulag soum, Bayankhongor aimag</p> <p>Claim: <i>To demand the payment for infliction of environmental damage in the amount of 3,965,000,000 tugrugs.</i></p> | “G and U Gold” Co., Ltd. | <p><u>Civil court decision no.1204:</u></p> <p>Uphold the claim and assign a duty on “G and U Gold” Co., Ltd. to pay 739,300,000 tugrugs to Gurvanbulag soum, Bayankhongor aimag.</p> | <p><u>The appellate civil court decision no.643:</u></p> <p>Dismiss the case due to insufficient evidence that the respondents caused the damage and send the case back to the first instance court for review.</p> | <p><u>Supreme court decision on civil cases no.587:</u></p> <p>Uphold the decision of the appellate civil court decision.</p> |
| 7. 2013 | <p>“Patrons of Khuvsgul Lake” NGO and four citizens</p> <p>Claim: <i>To assign a duty on the Geology, mining, and cadastral department of the Mineral Resources Authority to determine illegality of 2 exploration licenses and annul the decisions on the issuance of 6 mining licenses to Talst Margad Co., Ltd.</i></p> | Cadastral Department of the Mineral Resources and Petroleum Authority | <p><u>Administrative court decision no.36:</u></p> <p>The case is dismissed, and the mining licenses are suspended until the determination of social and environmental impacts of mining.</p> | <p><u>The appellate administrative court decision no.138:</u></p> <p>The decision of the first instance court is upheld.</p> | <p><u>Supreme court decision on administrative cases no.117:</u></p> <p>Decisions of the first and appellate courts are annulled, and the Geology, mining, and cadastral department of the Mineral Resources Authority is assigned a duty to determine the illegality of 2 exploration licenses and to annul the issuance of 6 mining licenses to Talst Margad Co., Ltd.</p> |
| 8. 2014 | “Compassionate nature, peaceful life, compassionate actions” public service NGO | “Redhill Mongolia” Co., Ltd. (Canadian investment company) | <p><u>Civil court decision no.3393:</u></p> <p>The case is dismissed in whole on the evidence relating to the existence of required licenses and approvals for conducting</p> | <p><u>The appellate civil court decision</u> N/A</p> | <p><u>Supreme court decision on civil cases</u> N/A</p> |

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| | <p>Claim: <i>To determine the illegal actions of the respondent in carrying out its activities without water permit, 2012 environment protection plan, 2012 report, 2013 forest activity plan, environmental protection plan, and environmental impact plan, and demand the payment of 1,300,000 tugrugs to “Daughter of Choibalsan” Co., Ltd. to assess environmental damages.</i></p> | | mining operations by the respondent. | | |
| 9. 2014-2015 | <p>“Patrons of Khuvsgul Lake” NGO and four citizens</p> <p>Claim: <i>To assign a duty on the Geology, mining, and cadastral department of the Mineral Resources Authority to annul the decisions on the issuance of 8 mining licenses to Talst Margad Co., Ltd. and one mining license to “Sutaikhentso” Co., Ltd.</i></p> | <p>Cadastral Department of the Mineral Resources and Petroleum Authority</p> <p>Third party: Talst Margad Co., Ltd.</p> | <p><u>Administrative court decision no.0568:</u> The case is dismissed.</p> | <p><u>The appellate administrative court decision no.0078:</u> The decision of the first instance court is upheld.</p> | <p><u>Supreme court decision on administrative cases no.118:</u> Decisions of the first and appellate courts are upheld due to a lack of evidence that the rights of the claimants were violated.</p> |
| 10. 2016 | <p>“Baidrag Nutag Usaa Hairlan Hamgaalya” NGO</p> <p>Claim: <i>To compensate the damage caused to citizens and the NGO due to illegal</i></p> | <p>Citizens’ representative khural, Jargalant soum of Bayankhongor aimag, and Jargalant soum’s Governor</p> | <p><u>Administrative court decision no.20:</u> “Withdrawal of the claim by the claimant due to lack of sufficient evidence related to the claim” is upheld.</p> | <p><u>The appellate administrative court decision</u> N/A</p> | <p><u>Supreme court decision on administrative cases</u> N/A</p> |

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| | <i>decision and inaction.</i> | | | | |
| 11. 2016 | <p>“World Mongolia Green Association” NGO</p> <p>Claim: <i>To revoke the exploration license granted to the “Gutain Davaa” Co., Ltd. by the Cadastral Department of the Mineral Resources Authority due to its violation of the Water and Forest Law.</i></p> | <p>Head of the Cadastral Department of the Mineral Resources Authority</p> <p>Third party: “Gutain Davaa” Co., Ltd.</p> | <p><u>Administrative court decision no.539:</u></p> <p>The case is dismissed on the grounds that the decision to grant the exploration license to the “Gutain Davaa” Co., Ltd. did not violate the law or the legitimate interests of the “World Mongolia Green Association” NGO.</p> | <p><u>The appellate administrative court decision</u> N/A</p> | <p><u>Supreme court decision on administrative cases</u> N/A</p> |
| 12. 2017 | <p>“Angir Nuden Munduukhei movement” NGO</p> <p>Claim: <i>To annul the decision on the Environmental impact assessment report of the “Mongolia Gladvill Uvs Petroleum” Co., Ltd. on oil exploration and research project assessment report.</i></p> | <p>Professional Council on Environmental Impact at the Ministry of Environment and Tourism</p> <p>Third Party: “Mongolia Gladvill Uvs Petroleum” Co., Ltd.</p> | <p><u>Administrative court decision no.173:</u></p> <p>The case is dismissed on the grounds that the environmental impact assessment report did not violate the provisions of the Law on Environmental Impact Assessment.</p> | <p><u>The appellate administrative court decision no.221/MA2017/0366:</u> The first instance court decision is upheld.</p> | <p><u>Supreme court decision on administrative cases</u> N/A</p> |
| 13. 2017 | <p>Centre for Human Rights and Development (CHRD)</p> <p>Claim: <i>To demand response on eight questions from the Government of Mongolia on the implementation of the Law on Air.</i></p> | <p>Head of the department, Ministry of Environment and Tourism, representing the Government of Mongolia</p> | <p><u>Administrative court decision no.514:</u></p> <p>The case is dismissed on the grounds of the respondent’s agreement with the statement of claim and assurances to respond within the specified date.</p> | <p><u>The appellate administrative court decision</u> N/A</p> | <p><u>Supreme court decision on administrative cases</u> N/A</p> |
| 14. 2017 | <p>“Parents against the Pollution” NGO</p> | <p>Accredited representatives of the</p> | <p><u>Administrative court decision no.551:</u></p> | <p><u>The appellate administrative court decision</u></p> | <p><u>Supreme court decision on</u></p> |

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| | Claim: <i>To demand response on ten questions from the Government of Mongolia on the air pollution of Ulaanbaatar city.</i> | Government of Mongolia | The case is dismissed on the grounds of the respondent's agreement with the statement of claim and assurances to respond within the specified date. | N/A | <u>administrative cases</u> N/A |
| 15. 2018 | "Angir Nuden Mundukhei movement" NGO Claim: <i>To annul the decision on the Environmental impact assessment report of the "M" Co., Ltd. on Uvs-1 oil exploration and research project.</i> | Professional Council on Environmental Impact at the Ministry of Environment and Tourism Third Party: "M" Co., Ltd. | Administrative court decision no.40: The case is suspended for two months until a clarification regarding the fulfillment of procedural obligations related to approving the EIA report by the Ministry of Environment and Tourism. If the Ministry does not produce the protocol related to the EIA's approval, the decision to approve the EIA shall be annulled. | The appellate administrative court decision N/A | Supreme court decision on administrative cases N/A |
| 16. 2018 | "NNZAZZ" Public service NGO, Tsagaan-Ovoo soum, Dornod aimag, citizens C.T and I.B. Claim: <i>To annul the Citizens' representative khural and soum Governor's decisions on the allocation of land for mining exploration.</i> | Citizens' representative khural, Tsagaan-Ovoo soum, Dornod aimag, and soum's Governor | Administrative court decision no.13: The case is dismissed on the grounds that the decisions were made under relevant legislation. | The appellate administrative court decision N/A | Supreme court decision on administrative cases N/A |
| 17. 2018 | "Oyu Tolgoi Watch" NGO and citizen S. Claim: <i>To annul the decisions of the Cadastral Department of the Mineral Resources and Petroleum Authority on issuing mining licenses to "South</i> | Cadastral Department of the Mineral Resources and Petroleum Authority Third Parties: "South Gobi Coal Trans" Co., Ltd., "Trade and Development Bank" Co., Ltd. | Administrative court decision no.508: The claim is dismissed based on the lack of court standing by the "Oyu Tolgoi Watch" NGO under the provisions of the Law on Administrative Procedure. The right of Citizen S. has not been violated yet, because the respondent has not started the mining | The appellate administrative court decision N/A | Supreme court decision on administrative cases N/A |

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| | <i>Gobi Coal Trans” Co., Ltd.</i> | | operations. Therefore, citizen S. has a right to submit a claim if their legitimate right is violated by mine’s operation. | | |
| 18. 2018 | <p>“N” public service NGO</p> <p>Claim: <i>To assign a duty on the Cadastral Department of the Mineral Resources and Petroleum Authority to annul the decisions on the issuance of the mining licenses with numbers of 372A, 431A, 5082A, 10810A to “C” Co., Ltd. in Selenge aimag.</i></p> | <p>Cadastral Department of the Mineral Resources and Petroleum Authority</p> <p>Third Parties: “C” Co., Ltd. and the Government of Mongolia</p> | <p><u>Administrative court decision no.128/ShSh2018/0361:</u> The claim is upheld, and the Cadastral Department of the Mineral Resources and Petroleum Authority is ordered to annul the decisions on the issuance of the mining licenses to “C” Co., Ltd. in Selenge aimag.</p> | <p><u>The appellate administrative court decision no.221/MA2018/0510:</u> The first instance court decision is annulled, and the case is sent back to the administrative court of the first instance for review of the decision.</p> | <p><u>Supreme court decision on administrative cases no.0458:</u> The decision of the appellate administrative court on the determination of all relevant legal issues by the administrative court of the first instance is upheld.</p> |
| 19. 2016-2018 | <p>Onggi River Movement NGO</p> <p>Claim: <i>To assign a duty to the Ministry of Environment and Tourism to determine the amount of environmental damage inflicted on the Booroljuut river due to illegal mining operations and inform the public.</i></p> | <p>Ministry of Environment and Tourism</p> | <p><u>Administrative court decision no.128/ShSh2017/0653:</u> Uphold the claim and assign a duty on the Ministry of Environment and Tourism to determine the amount of environmental damage inflicted on the Booroljuut river due to illegal mining operations and inform the public.</p> | <p><u>The appellate administrative court decision no.221/MA2017/0859:</u> Uphold the decision of the first instance administrative court.</p> | <p><u>Supreme court decision on administrative cases no.88:</u> The case is dismissed and sent to the first instance court to identify the respondent and review the case anew correctly.</p> |
| 20. 2018-2019 | <p>Onggi River Movement NGO</p> <p>Claim: <i>To assign a duty to the Ministry of Environment and Tourism to determine the amount of environmental damage inflicted on the Booroljuut</i></p> | <p>Ministry of Environment and Tourism</p> | <p><u>Administrative court decision no.128/ShSh2018/0644:</u> Dismiss the claim.</p> | <p><u>The appellate administrative court decision no.221/MA2018/0630:</u> Uphold the decision of the first instance court.</p> | <p><u>Supreme court decision on administrative cases no.23:</u> Uphold the decisions of the first instance court and the appellate court. The Ministry does not have a responsibility to determine the</p> |

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| | <i>river due to illegal mining operations and inform the public.</i> | | | | damages, but the aimag and soum governors have this responsibility. |
| 21. 2019 | <p>“Water, plant, life” Public service NGO</p> <p>Claim: <i>To demand from the Minister of Mineral Resources and Heavy Industry to stop the illegal act of coal mining operations by a mining company.</i></p> | Minister of Mineral Resources and Heavy Industry | <p><u>Administrative court decision no.134:</u> Uphold the claim and assign a duty on the Minister of Mineral Resources and Heavy Industry to resolve the illegal mineral operations under relevant regulations and respond to the claimant on the actions undertaken.</p> | <p><u>The appellate administrative court decision</u> N/A</p> | <p><u>Supreme court decision on administrative cases</u> N/A</p> |
| 22. 2019 | <p>“Baidrag Nutag Usaa Hairlan Hamgaalya” NGO</p> <p>Claim: <i>To determine the decision of the Citizens’ representative khural and cooperation agreement between the Jargalant soum’s Governor and the “Buyan Tsetseg” Co., Ltd., on the rehabilitation to be illegal.</i></p> | Citizens’ representative khural, Jargalant soum of Bayanhongor aimag, and Jargalant soum’s Governor | <p><u>Administrative court decision no.12:</u> The claim is upheld, and the relevant administrative decisions are annulled due to their illegality.</p> | <p><u>The appellate administrative court decision no.221/MA2019/0467:</u> The claim is upheld, and the relevant administrative decisions are annulled due to their illegality.</p> | <p><u>Supreme court decision on administrative cases</u> N/A</p> |
| 23. 2019 | <p>“DMNN” NGO</p> <p>Claim: <i>To annul four decisions of the Government of Mongolia regarding Oyu Tolgoi’s underground mining development (Dubai Agreement).</i></p> | Prime Minister of Mongolia | <p><u>Administrative court decision no.808:</u> The claim is upheld based on the illegal extension of the powers (abuse of power) of the Prime Minister to issue four decisions regarding Oyu Tolgoi’s underground mining development, which constituted the basis for the Dubai Agreement.</p> | <p><u>The appellate administrative court decision</u> N/A</p> | <p><u>Supreme court decision on administrative cases</u> N/A</p> |
| 24. 2019 | <p>“NUAKH” public service NGO</p> <p>Claim: <i>To assign a duty on the</i></p> | Cadastral Department of the Mineral Resources and | <p><u>Administrative court decision no.128/ShSh2019/0180:</u> The claim is upheld, and the Cadastral</p> | <p><u>The appellate administrative court decision no.221/MA2019/0473:</u></p> | <p><u>Supreme court decision on administrative cases no.404:</u></p> |

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| | <p><i>Cadastral Department of the Mineral Resources and Petroleum Authority to annul the decisions on the issuance of the mining licenses with numbers of 372A, 431A, 5082A, 10810A to "C M" Co., Ltd. in Selenge aimag.</i></p> | <p>Petroleum Authority</p> <p><u>Third Party:</u> "C M" Co., Ltd.</p> | <p>Department of the Mineral Resources and Petroleum Authority is ordered to annul the decisions on the issuance of the mining licenses to "C M" Co., Ltd. in Selenge aimag.</p> | <p>The decision of the first instance court is upheld, and the decisions by the Cadastral Department of the Mineral Resources and Petroleum Authority are annulled.</p> | <p>The decision of the appellate court is annulled, and the decision of the first instance court is upheld.</p> |
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Appendix B: Interview Questions

General NGO open-ended questions:

1. Why does your NGO pursue environmental advocacy and litigation?
2. What kind of environmental advocacy and litigation does your NGO do?
3. What kind of barriers do you experience (legislative or otherwise)?
4. How to alleviate these obstacles?
5. What kind of substantive environmental rights exist in Mongolia?
6. What kind of procedural environmental rights exist in Mongolia?
7. Is the legal climate in Mongolia conducive to environmental advocacy (strategic environmental litigation)?
8. What kind of legislative, regulatory, and procedural changes need to be made in Mongolia?
9. What is a genuine environmental NGO?
10. In 2016 Mongolian NGOs were allowed to have a standing in courts for public interest litigation on environmental issues under Article 18.3 of the Law on Administrative Procedure. How has this change impacted your work? What still needs to be improved?
11. What other types of strategies apart from litigation have you employed in carrying out environmental advocacy on mining related issues?
12. How would you describe your NGO's impact on mining-related environmental issues locally, nationally, regionally, and internationally?
13. What is responsible mining, and how can it be developed in Mongolia?

Questions specific to lawyers:

1. What environmental NGO are you affiliated with?
2. Can you describe the types of strategies you employ for environmental litigation? (i.e., case selection, partnerships with other NGOs and lawyers)?
3. How successful are you in utilizing international treaties and conventions, to which Mongolia is a party, in litigating at domestic courts?
4. Is the legal climate in Mongolia conducive to public interest litigation?
5. What procedural challenges do you face in litigating for environmental issues?
6. How many environmental cases have you worked on?
7. Can you describe your major successes and setbacks in public interest litigation for environmental issues?