

ROTTEN TO THE CORE:
PROJECT CAPTURE AND THE
FAILURE OF JUDICIAL REFORM IN MONGOLIA

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Despite claims by international donor agencies that judicial reform efforts in Mongolia have been a great success, this Article argues that Mongolian courts continue to grossly lack integrity, transparency, and accountability—and are perceived by the Mongolian public as more corrupt today than when donor-funded judicial reform efforts began almost a decade ago. This Article further argues that the failure of judicial reform in Mongolia stems in significant part from the “capture” of donor-funded judicial reform efforts by elites within the Mongolian judicial sector. It concludes that the inherent tendency for project capture in the “institution-building” approach to judicial reform that international donor agencies favor should add to calls to limit the approach in favor of bottom-up efforts to push for meaningful judicial reform.

I. INTRODUCTION.....	210
II. METHODOLOGY FOR ASSESSING THE STATUS OF JUDICIAL REFORM	217
III. THE STATUS OF COURT REFORM IN MONGOLIA	222
IV. THE DANGERS OF CAPTURE BY TARGET (“REGULATED”) JUDICIAL INSTITUTIONS	240
APPENDIX A: COMPREHENSIVE REFORM MEASURES TO ADDRESS JUDICIAL CORRUPTION.....	249
APPENDIX B: SURVEY OF THE STATUS OF COURT REFORM IN MONGOLIA.....	258
APPENDIX C: RESULTS OF SURVEY OF THE STATUS OF COURT REFORM IN MONGOLIA	265

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I. INTRODUCTION

By the early 2000s, systemic corruption was widely recognized as an endemic and growing problem in post-communist Mongolia.¹ “Grand” corruption among political and economic elites was widespread and, according to an assessment by the United States Agency for International Development (“USAID”), threatened to “ultimately derail democracy and development.”² Courts were regarded as particularly corrupt, with judges and prosecutors ranking in public opinion surveys just below customs officials as the most corrupt governmental officials in Mongolia.³

It was in this environment that multilateral and bilateral donor institutions, including the World Bank and USAID, began to invest millions of dollars to reform the Mongolian judiciary.⁴ These donor agencies saw judicial reform as a key part of stemming corruption, ensuring the “rule of law” and thereby promoting economic growth and

¹ See generally CASALS & ASSOCS., ASSESSMENT OF CORRUPTION IN MONGOLIA: FINAL REPORT 9-10 tbl.1 (2005) (summarizing results of various corruption studies across sectors of Mongolian government); MORRIS ROSSABI, MODERN MONGOLIA: FROM KHANS TO COMMISSARS TO CAPITALISTS 59-62 (2005) (discussing the relationship of corruption to foreign donor institutions); David Sneath, *Reciprocity and Notions of Corruption in Contemporary Mongolia*, 25 MONGOLIAN STUDIES 85, 85 (2002) (recognizing a “rapid increase in perceived corruption”).

² CASALS & ASSOCS., *supra* note 1, at 1.

³ *Id.* at 9.

⁴ Such institutions include, among others, the World Bank, the Asian Development Bank (“ADB”), Deutsche Gesellschaft für Technische Zusammenarbeit (“GTZ”), and USAID. See, e.g., OPERATIONS EVALUATION DEP’T, ASIAN DEV. BANK, MONGOLIA: FROM TRANSITION TO TAKEOFF 28-30 (2008) (ADB); OPERATIONS POLICY & COUNTRY SERVS., THE WORLD BANK, STATUS OF PROJECTS IN EXECUTION—FY08 635 (2008) (World Bank); U.S. AGENCY FOR INT’L DEV., BUDGET JUSTIFICATION TO THE CONGRESS: FISCAL YEAR 2007 190 (2006); Division of Dev. Educ. & Info., Fed. Ministry for Economic Cooperation and Dev., *Legal and Judicial Reform in Development Cooperation* 17 (Position Paper Special 064, 2002) (GTZ), available at <http://www.bmz.de/en/service/infothek/fach/spezial/spezial064pdf.pdf> (last visited Oct. 28, 2009).

democracy.⁵ Moreover, donor agencies, and USAID in particular, recognized that “judicial [c]orruption ha[d] become a more prominent issue,” with “suspicions of improper influence and rumors . . . of high-level corruption in the judicial system.”⁶ Nevertheless, neither USAID nor any other major donor agency chose to address corruption within the judiciary directly.⁷

⁵ See INT’L PROGRAMS DIV., NAT’L CTR. FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM: ANNUAL REPORT 2006 24 (2007) [hereinafter REPORT 2006] (“Effective and efficient delivery of justice is vital for ensuring that all Mongolians live within a state in which the rule of law is respected and followed and essential for sustained economic growth.”), available at http://pdf.usaid.gov/pdf_docs/PDaci763.pdf (last visited Oct. 28, 2009); Susan Rose-Ackerman, *Judicial Independence and Corruption* (“measures of judicial independence are related to other positive outcomes such as higher levels of growth and of political and economic freedom”), in TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 15, 15 (Diana Rodriguez & Linda Ehrichs eds., 2007).

See generally KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 93-122 (2006) (discussing role of judiciary in rule of law); Caroline Sage & Michael Woolcock, *Introduction: Rules Systems and the Development Process*, 2 WORLD BANK LEGAL REV. 1, 5-11 (2006) (summarizing findings that rule of law and governance policies are holistically connected to economic and cultural norms and dynamically affect local power dynamics).

⁶ INT’L PROGRAMS DIV., NAT’L CTR. FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM (JRP): 2002 ANNUAL REPORT 24 (2003) [hereinafter REPORT 2002], available at <http://www.ncsc.mn/MJRP/Report/2002ReportEnglish.pdf> (last visited Oct. 28, 2009).

⁷ See, e.g., REPORT 2006, *supra* note 5, at 16 (“Although the [Judicial Reform Program (“JRP”)] did not plan specific anticorruption activities for 2006, the JRP’s work with the courts, POs and other relevant institutions focuses largely on the development of efficient and transparent processes aimed at reducing opportunities for corruption.”). This is consistent with judicial reform programs sponsored by international agencies in other countries. See, e.g., Linn Hammergren, *The Multilateral Development Banks and Judicial Corruption*, STRENGTHENING JUDICIAL INDEPENDENCE: ELIMINATING JUDICIAL CORRUPTION, 9 CIJL YEARBOOK 2000 73, 74 (2001) (“for corruption as for many other issues, a direct, frontal approach may not be the more effective strategy”).

Rather, donor-funded judicial reform in Mongolia followed, and continues to follow, an institution-building approach.⁸ This approach, which is consistent with donor-funded approaches to judicial reform in other developing countries, aims to strengthen judicial institutions by, for example, developing judicial resources and infrastructure, improving “case management,” enhancing judicial “professionalism” through training and education, and increasing judicial salaries.⁹ Moreover, this approach is “top-down” in that reform priorities are set by, or at least require the consent of, “key stakeholders”—which in Mongolia meant the Supreme Court, the General Counsel of Courts, the General Prosecutor’s Office, and the Ministry of Justice and Home Affairs (“MoJHA”).¹⁰ Consistent with this approach, the offices of the major

⁸ See, e.g., REPORT 2006, *supra* note 5, at 18 (noting that the JRP seeks to build public support for judicial institutions).

⁹ See INT’L PROGRAMS DIV., NAT’L CTR. FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM: ANNUAL REPORT 2007 3-5, 15-16 (2008) [hereinafter REPORT 2007] (discussing JRP efforts in these areas), available at http://pdf.usaid.gov/pdf_docs/PDACL250.pdf (last visited Oct. 28, 2009). The institution-building approach to judicial reform typically includes:

courthouse construction and repair; purchase of furniture, computers, and other equipment and materials; drafting new laws and regulations; training judges, lawyers, and other legal personnel; establishing management and administration systems for judiciaries; support for judicial and other training/management institutes; building up bar associations; and international exchanges for judges, court administrators, and lawyers.

Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* 11-12 (Carnegie Endowment for Int’l Peace, Rule of Law Series, Working Paper No. 41, 2003), available at <http://www.carnegieendowment.org/files/wp41.pdf> (last visited Oct. 28, 2009). See also U.S. AGENCY FOR INT’L DEV., JUDICIAL REFORM PROGRAM, ASSESSMENT REPORT OF THE STRATEGIC PLAN FOR JUSTICE SYSTEM OF MONGOLIA 1-7 (2006) [hereinafter ASSESSMENT REPORT 2006] (on file with author) (discussing goals of JRP); Linn Hambergren, *Fighting Judicial Corruption: A Comparative Perspective from Latin America* (describing these type of measures as “the usual reform measures”), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 138, 139.

¹⁰ See INT’L PROGRAMS DIV., NAT’L CTR. FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM: 2001 ANNUAL REPORT ii (2002) [hereinafter REPORT 2001] (noting that the JRP “responded to the priorities defined by the Ministry of Justice and Home Affairs and is designed to assist in the

donor-funded judicial reform programs in Mongolia, including USAID's Judicial Reform Program ("JRP"), were physically located within the MoJHA.¹¹

While this collaborative approach may help ensure the participation of institutional stakeholders, it also discourages discussion of corruption—much less action to address it. Donor agencies are “wary of fomenting bad relations with the courts” by bringing up the “corruption issue” and judges, especially to the extent that they benefit from corrupt practices, are “understandably reluctant to mention it.”¹² Nevertheless, donor agencies in Mongolia and elsewhere justify the institution-building approach to judicial reform on that grounds that the “usual reform measures”—such as training,¹³ increased professionalism¹⁴ and better “management structures”¹⁵—will have the corollary effect of reducing corruption and improper influence.¹⁶ Reformers argue that corruption is more prevalent when judges do not understand the law, cases are easily “lost” due to lack of case management systems, judicial salaries are low

implementation of the Strategic Plan for the Justice System of Mongolia, a plan developed by Mongolian stakeholders in 1999-2000, and passed by Parliament in 2000”), *available at* <http://www.ncsc.mn/MJRP/Report/2001ReportEnglish.pdf> (last visited Oct. 28, 2009); REPORT 2007, *supra* note 9, at 14, 20, 25 (identifying the Supreme Court, General Counsel of Courts, General Prosecutor's Office, and MoJHA as key stakeholders). *See also* REPORT 2006, *supra* note 5, at 23 (specifically excluding the Mongolian bar association from the list of “core stakeholders”).

¹¹ *See generally* Mongolia Judicial Reform Program, Main Page, <http://www.ncsc.mn> (last visited Oct. 28, 2009) (giving the address of the JRP within the MoJHA building).

¹² Hammergren, *supra* note 9, at 139.

¹³ REPORT 2007, *supra* note 9, at 16-17.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 5.

¹⁶ *See* Hammergren, *supra* note 9, at 139 (“Nonetheless, many of the usual reform measures—new selection systems, higher salaries and budgets, real judicial careers with guaranteed tenure, training, courtroom reorganisation and automation, and law revision—were also seen as partial solutions. . . . For example, the introduction of oral proceedings was said to increase transparency, while better courtroom administration would reduce the chances for manipulating files (a problem as often attributed to court staff as to judges).”).

and working conditions are poor.¹⁷ Reformers thus contend that addressing such second level facilitators of corruption will make corruption both less attractive and more difficult to conceal.¹⁸

Consistent with this theory, USAID claims that its nearly decade-long Mongolian JRP, which came to a close in March 2009, “significantly improved transparency and efficiency, and reduced opportunities for system manipulation,”¹⁹ and that, as a result, “[p]ublic perception of the justice sector has improved in all areas since the JRP began its work.”²⁰ As such, USAID has concluded that the JRP was “highly successful”²¹ and one of “the best projects ever implemented in Mongolia.”²²

¹⁷ See INT’L PROGRAMS DIV, NAT’L CTR FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM (JRP) WORK-PLAN YEAR THREE 3 (2003) [hereinafter WORKPLAN 2003] (“Inadequate salaries for judges, prosecutors, and other judicial sector staff made these positions less attractive for well-qualified lawyers and, most importantly, increased the potential for corruption.”), available at <http://www.ncsc.mn/MJRP/Workplan/2003WPEnglish.pdf> (last visited Oct. 28, 2009) and *id.* at 8 (implying that strengthening and development of case management systems creates a more accountable and accessible judiciary).

¹⁸ See EDGARDO BUSCAGLIA ET AL., UNDERMINING THE FOUNDATIONS OF ORGANIZED CRIME AND PUBLIC SECTOR CORRUPTION 20 (Hoover Inst. On War, Revolution & Peace, Essays in Pub. Policy Series No. 114, 2005) (arguing that “multiagency task force systems” incorporating electronic court records made available to defense attorneys and the general public reduces corruption); Vincent Yang & Linda Ehrlics, *The Professionalism of Judges: Education, Salaries, and Career Structure in Asia* (“judicial reform efforts in Asia often include education and training as part of efforts to fight judicial corruption”), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 48, 54.

¹⁹ USAID/Mongolia, Judicial Reform Program <http://www.usaid.gov/mn/programs/jrp/index.html> (last visited Oct. 28, 2009).

²⁰ Judicial Reform Program: Q3 Updates 2005, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html> (posting of Skip Waskin, Sept. 15, 2005, 01:56) (last visited Oct. 28, 2009).

²¹ USAID/Mongolia Updates March 2009, <http://www.usaid.gov/mn/updates/article-574.html> (April 6, 2009) (last visited Oct. 28, 2009).

²² USAID/Mongolia Updates April 2009, <http://www.usaid.gov/mn/updates/article-615.html> (May 11, 2009) last visited Oct. 28, 2009). See also REPORT 2007, *supra* note 9, at 3-4 (touting the successes of the JRP).

USAID's claim of success is belied, however, by a public opinion survey commissioned by the JRP itself in 2007. This survey found that only 28.0% percent of Mongolians believe that they would be treated fairly were they to find themselves in court.²³ It also found that around 85-90% of Mongolians believe that the courts show favoritism to the wealthy, public officials, relatives and friends of court personnel, and corporations.²⁴ Likewise, the survey reported that 72-75% of Mongolians believe judicial decisions are influenced by political considerations, judges' own personal interests, and by government officials.²⁵ Moreover, it reported that almost 97% of Mongolians believe that the cost of going to court is increased by the necessity of "paying bribes" and 94% believe that it is increased by "unethical behavior."²⁶

More strikingly, the survey found that public attitudes toward the judiciary have grown increasingly negative during the period of reform.²⁷ For example, 21.3% of the public thought that corruption was a problem within the judiciary in 2003, 33.8% thought it was a problem by 2005, and 38.1% thought so by 2007.²⁸ Additionally, there has been a "dramatic drop" in public confidence in the Supreme Court and the *Tsets* (Constitutional Court) in particular.²⁹ Tellingly, confidence in the courts is significantly lower—and increasingly so—among individuals who have had actual experience in the courts than among those who have not—with a three-fold increase since 2005 in negative perception of the courts among actual court users.³⁰

²³ L. Sumati & Ts. Sergelen, *Trend Lines in Public Perception of Judicial System Administration in Mongolia*, in REPORT 2007, *supra* note 9, attach. G. at 20 tbl.7.1.8. The 2007 JRP annual report claims that this opinion survey found that people "still believe" that judges are "honest and fair." REPORT 2007, *supra* note 9, at 26. In fact, only 21% of respondents strongly agreed with that statement in 2007. Sumati & Sergelen, *supra*, at 28 tbl.7.4.3.

²⁴ Sumati & Sergelen, *supra* note 23, at 21 tbls.7.2.4-6, 32 tbl.7.5.2.

²⁵ *Id.* at 29 tbl.7.4.10, 32 tbls.7.5.3-4.

²⁶ *Id.* at 38 tbls.8.7-8.

²⁷ *See id.* at 2 (noting "significant changes in public attitudes of negative nature" since 2005) and *id.* at 31 (noting "significant growth" in the percentage of people who think that judicial decisions are influenced by "political considerations" and judges' "personal interests").

²⁸ *Id.* at 39 tbl.8.1.

²⁹ *Id.* at 2.

³⁰ *Id.* at 2, 39 tbl.8.1.

These surveys not only contrast with claims made by USAID about the effectiveness of its Judicial Reform Program, but also contradict the view of judges who contend that corruption is not a significant problem within the judiciary.³¹ Given that public perceptions of corruption may overstate its actuality,³² these insider views should not be dismissed. In contrast, the fact that actual court users have the most negative perceptions of the courts suggests that something more than public misperception may be at play.

In an attempt to sort out competing claims about the status of judicial reform in Mongolia, I conducted an assessment of the Mongolian courts in the summer of 2008.³³ This assessment found that while progress has been made in improving judicial resources and training, Mongolian courts still lack sufficient political independence and, contrary to the claims of USAID, grossly lack integrity, transparency, accountability. In addition, despite significant donor effort and expense in computerizing case tracking systems and improving court administration the assessment found that Mongolian courts are not particularly efficient.

³¹ For a discussion of judges' views of the courts, *see infra* note 50. As a general matter, judges blame the perception of corruption within the judiciary on an irresponsible press and incompetent lawyers who accuse judges of taking bribes in order to cover their own inadequacies as lawyers. Interview with Anonymous, Supreme Court Justice, Ulaanbaatar, Mongolia (May 6, 2008).

³² *See* Transparency Int'l, *How Prevalent Is Bribery in the Judicial Sector?*, ("the public often views its judiciary as more corrupt than it actually is: more people around the world described their judiciary as 'extremely corrupt' than have personally been part of judicial corruption"), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 11, 14. *See also* INT'L PROGRAMS DIV., NAT'L CTR. FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM YEAR FOUR WORKPLAN 8 (2004) ("public opinion surveys are an imperfect measure of judicial effectiveness because the public has a relatively low level of expertise about the judiciary and how judicial institutions should be working"), *available at* <http://www.ncsc.mn/MJRP/Workplan/2004WPEnglish.pdf> (last visited Oct. 28, 2009).

³³ This assessment was conducted at the request of the Open Society Forum of Mongolia ("OSF"). The opinions and conclusions drawn from the assessment in this Article, however, are the author's alone, and should not be misconstrued as the views of OSF. In Mongolia, the judiciary includes both the courts and the prosecutor's office. The assessment looked only at the courts and the term judiciary is used generally in this Article to refer to the courts only.

The results of this assessment are important in their own right. But their public disclosure is especially critical given USAID recent claims that its JRP was one of its “best projects ever.”³⁴ Such a rosy picture of the success of judicial reform in Mongolia risks the project’s approach being repeated in other developing countries—particularly as Mongolia has been held out by the donor community as “a model for democratic development and anti-corruption in Central Asia.”³⁵ This Article is thus meant primarily as a counterpoint to the view of USAID, and its implementing contractor, that judicial reform in Mongolia has been a resounding success.³⁶

The Article also argues that the failure of judicial reform in Mongolia stems in significant part from the “capture” of donor-funded judicial reform by elites within the target judicial institutions—in much the same way that domestic regulatory bodies can be captured by regulated industries. It concludes that the inherent tendency for project capture in the institution-building approach to judicial reform should add to calls to limit top-down approaches to judicial reform in favor of a bottom-up effort to build up local civil society organizations that can push themselves for meaningful judicial reform.

II. METHODOLOGY FOR ASSESSING THE STATUS OF JUDICIAL REFORM

Assessing the status of judicial reform within a country is no simple task. First, there is no generally accepted methodology, nor is there agreement over which criteria are most important in evaluating a judicial

³⁴ USAID/Mongolia Updates April 2009, *supra* note 22.

³⁵ Bank Information Center, Mongolia: Overview, <http://www.bicusa.org/en/Region.22.aspx> (last visited Oct. 28, 2009).

³⁶ See USAID/Mongolia, *supra* note 22, (referring to its previous judicial reform projects as “some of the best projects ever implemented in Mongolia”). See also REPORT 2007, *supra* note 9, at 3-4 (describing the successes of the JRP in glowing terms). This USAID annual report on the JRP was prepared by its implementing contractor, the U.S.-based National Center for State Courts (“NCSC”). NCSC also runs judicial reform programs for USAID in Haiti, Kosovo, and Lebanon. In January 2001, NCSC received \$10 million from American taxpayers for its work in Mongolia alone. See REPORT 2001, *supra* note 10, at 1.

system.³⁷ Additionally, many aims of judicial reform—judicial independence, fairness, impartiality, and even efficiency to some degree—tend toward qualitative rather than quantitative measurement.³⁸

Nevertheless, it is certainly possible to identify some essential characteristics of an independent, fair, impartial, and efficient judiciary. For example, in an independent judiciary, decisions would be free from undue political influence from other branches of government or other public officials. Similarly, an impartial judiciary would not be influenced by payments, gifts, or favors from litigants or other interested parties. To the extent that characteristics of an independent, impartial, qualified and efficient judiciary can be identified, and assuming those are the goals of the reform, the central task in assessing the progress of reform in a particular judicial system lies in developing a metric for measuring, more or less objectively, the extent to which these various characteristics are descriptive of that judicial system.

For example, the Rule of Law Initiative of the American Bar Association (“ABA”) uses a Judicial Reform Index (“JRI”) to qualitatively assess the status of judicial reform in emerging democracies and transitioning states.³⁹ The JRI identifies 30 factors “that facilitate the

³⁷ See Linn Hammergren, *Diagnosing Judicial Performance: Toward a Tool To Help Guide Judicial Reform Programs*, paper prepared for Transparency International 9th International Anti-Corruption Conference, Durban 9-10 (Oct. 13, 1999) (discussing disagreement among reformers over the correct methodology and criteria for evaluating judicial reform), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf> (last visited Oct. 28, 2009).

³⁸ See *id.* at 3 (“[R]eformers have tended to shy away from the more qualitative aspects of judicial performance.”).

³⁹ See generally American Bar Association, *The ABA Rule of Law Initiative: Judicial Reform Index*, http://www.abanet.org/rol/publications/judicial_reform_index.shtml (last visited Oct. 28, 2009) (describing the basis and application of the JRI). See also Mariana Sousa, *A Brief Overview of Judicial Reform in Latin America: Objectives, Challenges, and Accomplishments* (noting that the American Bar Association’s JRI developed for the Eastern and Central European Law Initiative “serves as an analytic device to evaluate the accomplishments of reform efforts”), in *THE STATE OF STATE REFORM IN LATIN AMERICA* 87, 106 (Eduardo Lora, World Bank, ed., 2007).

development of an accountable, effective, independent judiciary.”⁴⁰ Each factor is fashioned in the reform index as a descriptive statement (e.g., “Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.”⁴¹) and then allocated one of three values—positive, neutral, or negative—depending on whether or not the statement corresponds to the reality in a given country.⁴² If it strongly corresponds, the country is given a score of “positive” for that statement. However, if the statement is not at all representative of the conditions in that country, the country gets a “negative” score. If the conditions within the country correspond in some ways but not in others, it gets “neutral” score. Additionally these 30 factors are grouped into categories including: Quality, Education, and Diversity; Judicial Powers; Financial Resources; Structural Safeguards, Accountability and Transparency; and Efficiency.⁴³ This grouping of factors allows the reader to form a quick impression of a country’s progress in any given area.⁴⁴

While this approach has many strengths, which were incorporated into an assessment tool for the Mongolian courts, it has several weaknesses that the Mongolian assessment tool sought to avoid. First, while the factors identified by the JRI are all relevant in assessing the progress of judicial reform, the JRI does not include a number of other factors that are relevant to status of judicial reform⁴⁵ and fails specifically to address a number of issues that should be of great importance to judicial reform if the goal of reform is to promote fair and impartial judicial decision-making. Many of these involve the degree of judicial

⁴⁰ See, e.g., AM. BAR ASS’N, JUDICIAL REFORM INDEX FOR GEORGIA ii-iii (2005) (explaining the methodology for assessing reform efforts), *available at* <http://www.abanet.org/rol/publications/georgia-jri-2005-eng.pdf> (last visited Oct. 28, 2009).

⁴¹ American Bar Association, The ABA Rule of Law Initiative: Judicial Reform Index Factors, http://www.abanet.org/rol/publications/judicial_reform_index_factors.shtml (last visited Oct. 28, 2009).

⁴² See Sousa, *supra* note 39, at 106.

⁴³ American Bar Association, *supra* note 41.

⁴⁴ The JRI, however, leaves it to the reader of the JRI report to develop their own impression of the judicial system’s overall reform progress.

⁴⁵ See, e.g., Hammergren, *supra* note 37, at 19-22 (proposing a detailed checklist for evaluating judicial performance).

integrity, transparency, and accountability. Thus, while borrowing heavily from the JRI, the assessment tool for the Mongolian courts identifies 60 separate factors (rather than 30 as in the JRI) that would be indicative of successful judicial reform.⁴⁶ These factors were evaluated as part of the assessment of the Mongolian courts.

An additional weakness of the JRI is that the score for each factor represents the conclusion of one, or at most a few, “legal specialists who are generally familiar with the country and region,” after “limited questioning of a cross-section of judges, lawyers, journalists, and outside observers with detailed knowledge of the judicial system.”⁴⁷ The JRI thus risks being tainted by the biases of the specialist who is generally familiar with the country and will consciously or unconsciously approach the task with preconceived notions and opinions about the country’s judiciary. Such biases may cause the specialist to selectively attend to information that supports those beliefs and discount or reinterpret information that does not.⁴⁸

To counter this possibility of bias, the assessment tool for the Mongolian courts reflects the collective judgments of 22 individuals with significant expertise and experience with the Mongolian judiciary, all of whom completed anonymous and confidential surveys in which they

⁴⁶ Some of the disparity in the number of factors comes from the fact that the assessment tool for the Mongolian courts breaks some JRI factors into their component parts. For example, rather than asking in one compound statement whether “[e]thnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally,” AM. BAR ASS’N, *supra* note 40, at 16, the assessment tool for the Mongolian courts asks separate questions—one about representation of minorities and the other about gender representation. Similarly, whereas the JRI asks whether “[j]udicial decisions are based solely on the facts and law without any undue influence from senior judges (e.g. court presidents), private interests, or other branches of government,” AM. BAR ASS’N, *supra* note 40, at 37, the assessment tool for the Mongolian courts breaks this down into several questions and adds additional questions related to other types of undue influence over court decisions.

⁴⁷ See, e.g., AM. BAR ASS’N, *supra* note 40, at iii.

⁴⁸ See Ralph D. Ellis & Natika Newton, *Introduction* (summarizing collected papers addressing influence of emotion on perception), in CONSCIOUSNESS & EMOTION: AGENCY, CONSCIOUS CHOICE, AND SELECTIVE PERCEPTION ix, x-xi (Ralph D. Ellis & Natika Newton eds., 2005).

evaluated the Mongolian courts on each of the 60 factors.⁴⁹ In choosing the experts, every effort was made to draw from a broad cross-section of the legal community and across the political spectrum. Survey participants included commercial attorneys, law professors, heads of non-governmental organizations, public officials, law enforcement officers, defense attorneys and prosecutors—such that no particular viewpoint was overrepresented and one can have confidence at the very least in areas where there was broad consensus among survey participants.

Another concern with the JRI is that it scores each factor as only negative, positive or neutral. Such a scoring system, while simple, provides little information other than an up or down for each factor and does not distinguish between factors that are overwhelmingly negative or positive and those that are only marginally either. Additionally, as discussed above, the positive or negative score represents the subjective conclusion of only one or a few individuals—and thus appears to convey more information than it actually does.

In contrast, the assessment tool for the Mongolian courts assigns each factor a numerical score based upon the collective judgment of 22 Mongolian legal experts—and my personal opinion, as the “specialist” conducting the assessment, is not reflected or included in the score.⁵⁰

⁴⁹ See Appendix B, *infra*.

⁵⁰ At the request of a member of the Supreme Court whom I interviewed, I also distributed copies of the “Survey of the Status of Court Reform in Mongolia” to the Research Center of the Supreme Court for distribution to Supreme Court justices, primarily as a means of comparing the Courts’ perception of the judiciary with that of outside experts. There are 15 Supreme Court Justices, but only eight surveys were returned by the Supreme Court’s Research Center. All but two of the returned surveys did not identify the position of the individual who filled out the survey, as the form requests. Thus, it was impossible to tell if the rest of the surveys were actually filled out by Supreme Court Justices or were filled out by Supreme Court staff, such as clerks or employees of the research center. Additionally, because the forms were collected by one individual at the Supreme Court, the anonymity of the survey participants and their ability to answer the survey without fear of reprisal may have been compromised. As a general matter, however, the surveys returned by the Supreme Court Research Center gave the judiciary significantly higher scores than did the outside experts. This was particularly the case in terms of court integrity—which the Supreme Court rated as high and outside experts

Rather, the score represents the average response of experts surveyed on a scale of 1-5 and asked to identify on that continuum the degree to which they agreed that each positive statement was an adequate reflection of the Mongolian Courts (“1” represented “Strongly Disagree” and “5” represented “Strongly Agree”). Scores below 3 (with 3 being “Neutral”) are failing scores and those above 3 are passing scores and are identified as such. Additionally, the assessment includes the percentage of experts who agree or disagree with each statement so as to identify those areas where there is widespread consensus as to the state of the Mongolian courts.

Finally, the assessment tool, like the JRI, divides the factors into categories (for example, “Integrity”), but unlike the JRI, each category is given an overall “grade” reflecting the status of judicial reform in that area. The possible “grades” are excellent, sufficient, marginally sufficient, marginally insufficient, insufficient, or grossly insufficient.

In order to inform these overall assessments with more than raw numbers, the survey also invited written comments and explanations from those who took the survey—an opportunity taken advantage of by many survey participants. I also conducted in-person interviews with various experts on the Mongolian Judiciary—including Supreme Court Justices, attorneys, law professors, and heads of NGOs, public officials, and law enforcement officers. While there was not a one-to-one correlation to those interviewed and those surveyed, the narrative accounts gathered during those interviews help elucidate the raw numbers.

III. THE STATUS OF COURT REFORM IN MONGOLIA

As the below numbers show, quality, training and diversity of judges is an overall area where judicial reform has made some significant progress in Mongolia, but where much remains to be done. One particular bright spot is continuing education of judges. This has been a focus of GTZ, USAID, and the World Bank, all of which have not only

generally rated as extremely low. On the other hand, the Supreme Court surveys reflected a need for more resources and better facilities, whereas outside experts rated the level of court resources as sufficient.

sponsored and funded numerous trainings,⁵¹ but also helped establish the National Law Center (“NLC”), housed in a gleaming new building, as a hub for the training of judges and lawyers.⁵² The fact that a significant plurality of experts (43%) agrees that judges receive adequate continuing legal education, with only 19% disagreeing, is evidence of the success of these efforts.

Table 1: Quality, Training, and Diversity—Insufficient

Survey Question	Avg. Score	Distribution	Score
Judges are well-qualified (Judges have formal university-level legal training and have practiced before tribunals before taking the bench.)	2.4	Disagree 66% Agree 20% Neutral 14%	Failing
Judges are well-trained (Before taking the bench judges are required to take relevant courses concerning basic substantive and procedural areas of the law and the role of the judge in society.)	2.4	Disagree 57% Agree 19% Neutral 24%	Failing
Judges receive adequate continuing legal education (Judges must undergo, on a regular basis professionally prepared legal education courses, which adequately inform them of changes and developments in the law.)	3.3	Disagree 19% Agree 43% Neutral 33%	Passing
Minority Representation (The number of judges who are members of ethnic and religious minorities adequately reflects the percentage of ethnic and religious minorities in the overall population.)	2.5	Disagree 42% Agree 21% Neutral 37%	Failing
Gender Balance (The number of male and female judges is roughly equal at all levels of the court system.)	2.0	Disagree 77% Agree 5% Neutral 18%	Failing

On the other hand, 66% percent of experts disagree with the statement that judges are well-qualified to begin with and 57% believe that they do not receive adequate training before taking the bench.

⁵¹ See REPORT 2007, *supra* note 9, at 16-18 (describing the JRP’s involvement with continuing legal education in Mongolia).

⁵² See The World Bank Group, Projects and Operations: Contract Details: Construction of the National Legal Center, <http://web.worldbank.org/external/projects/main?pagePK=104542&contractid=1233911> (last visited Oct. 28, 2009) (reporting that a US \$999,000 contract was awarded for construction of the NLC).

Survey and interview participants suggested some possible reasons for these low marks including concern that the clearest path to becoming a judge is not legal competence but serving first as a court secretary. Others complained that familial relations played a significant role in selection of judges, with a few family networks occupying a large number of judicial positions. Additionally, experts noted that the selection process is highly politicized, with the President having disproportionate influence over the selection of judges—such that loyalty to the President may supersede all else in the selection of judges. That said, a number of experts distinguished between Supreme Court Judges, whom they felt tended to be highly qualified, and lower court judges, who they felt often were not.

Table 2: Judicial Power/Authority—*Sufficient*

Survey Question	Avg. Score	Distribution	Score
Courts have the authority to determine the ultimate constitutionality of legislation and official acts.	4.0	Provided by Constitution	Passing
Courts have exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.	4.0	Provided by Constitution	Passing
Court decisions are respected and enforced by other branches of government.	2.7	Disagree 50% Agree 32% Neutral 18%	Failing
Court decisions may be reversed only through the appellate process.	3.8	Disagree 9% Agree 82% Neutral 9%	Passing
Courts have adequate subpoena, contempt, and enforcement powers.	3.9	Disagree 9% Agree 82% Neutral 9%	Passing
The courts' subpoena, contempt, and enforcement powers are utilized and supported by other branches of government.	3.8	Disagree 5% Agree 77% Neutral 18%	Passing
Other branches of government do not override or ignore court decisions, or if they do, they are subject to legal action.	3.0	Disagree 36% Agree 41% Neutral 22%	Neutral

Mongolian courts are not lacking in formal authority or power; as the survey results show, they received higher marks here than in any other category. Much of the authority of the Mongolian Courts is vested in the Courts by the Constitution itself. For example, Article 47(1) provides

that judicial power belongs solely to the courts.⁵³ Article 50(2) provides that Supreme Court decisions are final judiciary decisions that are binding upon all courts and other parties.⁵⁴ Article 50(1)(3) empowers the Supreme Court “to examine and take decision on matters related to the protection of law and human rights and freedoms therein.”⁵⁵

In addition, Mongolia has a separate and independent Constitutional Court, or Constitutional Tsets,⁵⁶ that has “supreme” authority to interpret the Constitution⁵⁷ and the power to invalidate “laws, decrees and other decisions of the State Great Hural and the President, as well as Government decisions and international treaties signed by Mongolia” that are incongruous with the Constitution.⁵⁸

Nevertheless, 50% of experts surveyed disagreed with the statement “Court decisions are respected and enforced by other branches of government.”⁵⁹ Similarly several experts who were interviewed indicated that the executive branch often does not honor court decisions with which it disagrees. This raises the concern that the Supreme Court does not, in fact, have the final authority to interpret the law, and that government officials are free to ignore Supreme Court decisions with which they disagree.⁶⁰ Indeed, the Constitution itself seems to undermine the “final authority” ostensibly given to the Supreme Court. Furthermore, Article 50(2) provides that if the Supreme Court makes an interpretation that is “incompatible with a law, the latter shall have precedence.”⁶¹ What is left unclear in practice, however, is who has the

⁵³ MONGOL ULSYN ÜNDSÉN KHUULI [Constitution] art. 47 § 1 (1992) (Mong.), translated at http://www.frc.mn/eng/index.php?option=com_docman&task=doc_download&gid=330&Itemid=29 [hereinafter MONG. CONST.] (last visited Oct. 28, 2009).

⁵⁴ *Id.* art. 50 § 2.

⁵⁵ *Id.* art. 50 § 1.

⁵⁶ *See id.* arts. 64-67 (describing the composition and function of the Constitutional Court).

⁵⁷ *Id.* art. 64 § 1.

⁵⁸ *Id.* art. 66 § 2.

⁵⁹ *See supra*, Table 2.

⁶⁰ One expert indicated that even tax inspectors feel free to ignore the Supreme Court’s decisions when they believe the Supreme Court’s interpretations to be wrong. Interview with Tsogt Natsagdorj, Partner, Bona Lex Law Firm, Ulaanbaatar, Mongolia (May 7, 2008).

⁶¹ MONG. CONST., *supra* note 53, art. 50 § 2.

authority to decide that the Supreme Court's interpretation is incompatible with the law.⁶²

**Table 3: Survey Results on Judicial Resources and Infrastructure—
*Marginally Insufficient***

Survey Question	Avg. Score	Distribution	Score
The overall budget of the courts is adequate to satisfy the demand for court services.	2.8	Disagree 33% Agree 29% Neutral 38%	Failing
The overall budget of the courts has increased proportionately with the growth of the national budget.	3	Disagree 19% Agree 23% Neutral 58%	Neutral
The judiciary receives a share of the national budget reflective of its position as co-equal branch of government	3.2	Disagree 19% Agree 47% Neutral 33%	Passing
Offices provided to judges and court administrators are adequate to allow performance of their duties	3.2	Disagree 41% Agree 50% Neutral 9%	Passing
The court system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.	3.9	Disagree 5% Agree 78% Neutral 18%	Passing
Each judge has the staff support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.	3.7	Disagree 10% Agree 80% Neutral 10%	Passing
A system exists so that new court positions are created as needed.	2.8	Disagree 28% Agree 19% Neutral 52%	Failing
Judges' salaries are adequate. Judges salaries are based on a reasonable proportion of private sector wages and are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment without having to supplement with additional sources of income.	3.0	Disagree 36% Agree 46% Neutral 18%	Neutral
Court buildings provide a respectable environment for the dispensation of justice with adequate infrastructure.	2.1	Disagree 63% Agree 5% Neutral 32%	Failing

⁶² The Constitution seems suggest that authority belongs to the Supreme Court alone. *See id.* (granting the Supreme Court “final” and “binding” judicial authority).

Improving judicial resources and infrastructure is another area where the Mongolian judiciary has made considerable strides, mainly due to the largess of the international donor community. For example, USAID modernized and equipped the Capital City and eight district courts with computers, furniture and audio equipment,⁶³ and the World Bank funded the repairing and furnishing of the Supreme Court's courtrooms, the Capital City Administrative courts, and *Darkhan-Uul Aimag*.⁶⁴ As a result of these improvements, more than 78% of the experts surveyed agreed that the Mongolian court system "operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner."⁶⁵

Mongolia has also made significant strides in improving judicial support staffing—each judge now has a set of court clerks. With this addition, 80% of the experts agreed that judges have "the staff support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research."⁶⁶ Judicial salaries have also increased five times by a total of 220%,⁶⁷ which translates to current salaries of roughly US \$300-400 per month for lower court judges, and around US \$700 per month for Supreme Court Judges.⁶⁸ This amount is generally sufficient for judges to support their families and live in a reasonably secure environment.⁶⁹ Even so, judicial salaries are unfavorable compared to private sector wages for professionals, and indeed, are significantly less than the salaries received by even relatively junior professional employees of some civil society organizations.⁷⁰

⁶³ See ASSESSMENT REPORT 2006, *supra* note 9, at 28-34.

⁶⁴ For a list of the contract awards and amounts awarded by the World Bank Group for the renovation, construction, and furnishing of the Mongolian courts, search for "Mongolia" at The World Bank Group's Projects Portfolio, <http://www.worldbank.org> (last visited Oct. 28, 2009).

⁶⁵ See *supra*, Table 3.

⁶⁶ See *id.*

⁶⁷ ASSESSMENT REPORT 2006, *supra* note 9, at 40.

⁶⁸ Interview with Luvsandorj Byambaa, Supreme Court Justice, Ulaanbaatar, Mongolia (May 21, 2008).

⁶⁹ Cf. ASSESSMENT REPORT 2006, *supra* note 9, at 40 (indicating that despite the salary increases, "the judges' salaries . . . are not yet sufficient to guarantee decent living conditions.").

⁷⁰ Interview with Tsogt Natsagdorj, *supra* note 60.

When compared to the salaries of top local corporate attorneys in Ulaanbaatar—who have billing rates of US \$150 or more—judicial salaries are woefully insufficient to attract the best and the brightest attorneys.⁷¹ Furthermore, judicial positions in Mongolia are not prestigious enough to compensate for the low salary.⁷² Moreover, despite recent improvements to the Mongolian courtrooms, a significant majority of experts surveyed (63%) reported that court buildings, as a whole, still do not provide a respectable environment and infrastructure for the dispensation of justice.⁷³

Finally, the judiciary budget remains low, both in absolute dollar amounts and in comparison to the other branches of government. In fact, the judiciary budget constitutes less than 0.5% of the national budget.⁷⁴ As a result, only 29% of the experts agreed that the overall court budget was sufficient to meet judicial demands.⁷⁵ Nevertheless, the Mongolian Legislature has repeatedly rejected proposals to make the judicial budget to a percentage of the national budget, even when the requested budget is a mere 1% of the national budget.⁷⁶ Consequently, the judicial budget is not only minimal at best, and actually less than the amount the courts generate in user fees each year, but also subject to manipulation by the other branches of the government.⁷⁷ Thus, despite significant improvement in judicial resources and infrastructure, the situation is marginally sufficient at best.

⁷¹ *Id.*

⁷² There are, however, many opportunities to supplement one's judicial salary through corrupt activities. *See infra*, Table 4 & accompanying text.

⁷³ *See* Table 3, *supra*.

⁷⁴ Interview with Luvsandorj Byambaa, *supra* note 68.

⁷⁵ As shown in Table 3, *supra*, only 29% of the experts surveyed agreed with the statement: "The overall budget of the courts is adequate to satisfy the demand for court services."

⁷⁶ Interview with Luvsandorj Byambaa, *supra* note 68.

⁷⁷ *Id.*

Table 4: Survey Results on Judicial Independence—*Insufficient*

Survey Question	Avg. Score	Distribution	Score
The court system has sufficient input and control over its own budget. The courts have a meaningful opportunity to influence the amount of money allocated to the courts by the legislative and/or executive branches. Once the funds are allocated to the courts, the courts have control over their own budget and expenditure.	3.1	Disagree 32% Agree 41% Neutral 27%	Passing
The selection and appointment process fosters the selection of independent, impartial judges. Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system fosters the selection of independent, impartial judges.	2.7	Disagree 54% Agree 32% Neutral 14%	Failing
Judges are provided adequate security. Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination.	2.5	Disagree 55% Agree 14% Neutral 32%	Failing
Judges have guaranteed tenure. Judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.	3.9	Disagree 9% Agree 77% Neutral 14%	Passing
Judges are promoted through the court system on the basis of objective criteria such as ability, integrity, and experience.	3.1	Disagree 23% Agree 36% Neutral 41%	Passing
Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.	3.0	Disagree 32% Agree 41% Neutral 27%	Neutral
Once assigned to a case, a judge may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.	3.1	Disagree 32% Agree 50% Neutral 23%	Passing
A judges' association exists, the sole aim of which is to protect and promote the interests of the courts, and this organization is active.	2.3	Disagree 40% Agree 5% Neutral 40%	Failing
Court decisions are free from political influence from other branches of government or other public officials.	2.5	Disagree 43% Agree 19% Neutral 38%	Failing

Although Mongolian judges do not lack in formal authority, are constitutionally independent from the other branches of government, and are guaranteed life tenure, the reality of judicial independence leaves much to be desired. Indeed, only 19% of the experts surveyed agree that “Court decisions are free from political influence from other branches of government or other public officials.”⁷⁸ Many of the experts share the view that high-ranking government officials, and in particular the President, exert considerable influence over Supreme Court and Tests decisions. Moreover, some experts identified specific instances where high-ranking government officials arranged specific outcomes by interfering directly with judges. This, however, is not to imply that government officials interfere in most cases. Indeed, most cases are likely free from political interference. But for cases where the personal, political, or business interests of government officials are at stake, the outcome is often heavily influenced.

Unfortunately, judicial reform in Mongolia has done little to address political interfering in judicial decision-making. In fact, certain features of the current system seem to reinforce, rather than restrict, such corroding influences. First, the President has disproportionate power over the appointment, removal, and promotion of judges, and furthermore, each process lacks sufficient transparency. Second, the judiciary budget, as well as the judges’ salaries, are subject to decrease in any given year.⁷⁹ In the words of one Supreme Court justice, “the judicial budget depends on maintaining good relations with those in the legislative and executive branch who control budgetary decisions.”⁸⁰ This justice also indicated that the current Chief Justice has been very good at maintaining good relations, but “who knows what he had to give in return.”⁸¹ Third, the Judicial Code of Conduct does not prohibit judges from privately discussing pending or future litigation with other public officials or other non-parties who are free to convey their preferred outcomes to the judges.⁸²

⁷⁸ See Table 4, *supra*.

⁷⁹ Interview with Anonymous, *supra* note 31.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Judicial Disciplinary Committee, Roundtable Meeting of Ethics and Disciplinary Committees and Councils of Legal Institutions 1 (Apr. 19, 2006)

Table 5: Survey Results on Judicial Integrity—Grossly Insufficient

Survey Question	Avg. Score	Distribution	Score
Court decisions are not influenced by payments, gifts, or favors from litigants or other interested parties.	2.0	Disagree 77% Agree 0% Neutral 23%	Failing
Family, social, business, or other relationships do not influence judges' conduct or judgment.	2.0	Disagree 73% Agree 9% Neutral 18%	Failing
Court decisions are free from the appearance of impropriety. Judges refrain from hearing cases in which the judge's family, social, business, or other relationships may create the appearance of a conflict of interest, whether or not such a conflict actually exist.	2.3	Disagree 59% Agree 9% Neutral 32%	Failing
Judges refrain from ex parte communications. Judges refrain from substantive communication with parties and their attorneys regarding matters before the court outside the presence of the other parties or their attorneys.	2.0	Disagree 82% Agree 9% Neutral 0%	Failing
Trial court decisions are reached without any undue influence from senior judges within the courts. The senior judges include chief judges, Supreme Court judges, etc.	2.3	Disagree 64% Agree 14% Neutral 22%	Failing

From the expert surveys and interviews, there was near universal agreement that court decisions are influenced by improper payments to judges and the judges' personal interests. A full 77% of the experts surveyed disagreed with the statement that "Court decisions are not influenced by payments, gifts, or favors from litigants or other interested parties."⁸³ In addition, 73% disagreed with the statement that "Family, social, business, or other relationships do not influence judges' conduct or judgment."⁸⁴ While one might expect, and should therefore guard against, a certain degree of relational influence over judicial decision-making in a country as small as Mongolia, the fact that none of the

(on file with author) ("Personal communication that might create an appearance of impropriety is discouraged, but not outright banned.").

⁸³ See Table 5, *supra*. Notably, none of the experts surveyed agreed with the statement.

⁸⁴ *Id.*

experts felt that judicial decisions were not influenced “by payments, gifts, or favors from litigants or other interested parties,” suggests a degree of outright bribery and corruption that cannot be rationalized.⁸⁵ Indeed, the experts interviewed expressed grave concern over corruption, and described judicial corruption as “pervasive.” Furthermore, these experts pointed to numerous examples of judges trading decisions for personal or family gain, including apartments, health care abroad for family members, and, most commonly, cash.

Table 6: Survey Results on Judicial Code of Ethics—Insufficient

Survey Question	Avg. Score	Distribution	Score
The code of ethics for judges adequately defines and prohibits judges from hearing cases in which they have a conflict of interest.	2.5	Disagree 55% Agree 23% Neutral 23%	Failing
The code of ethics for judges prohibits ex parte communications.	2.3	Disagree 53% Agree 14% Neutral 33%	Failing
The code of ethics for judges prohibits judges from engaging in political activity.	3	Disagree 32% Agree 32% Neutral 36%	Neutral

Mongolia suffers from a weak judicial code of ethics that does not adequately define or prohibit judicial impropriety, nor guard against the appearance of impropriety, leading to the perception of corruption as well as actual judicial corruption.⁸⁶ For example, the judicial code of ethics does not prohibit ex parte communications between judges and parties⁸⁷ and 82% of the experts surveyed agreed that judges do, in fact,

⁸⁵ *See id.*

⁸⁶ *See, e.g.,* WORKPLAN 2003, *supra* note 17, at 24-25 (indicating that amongst judges there was much confusion and misunderstanding as to the new ethical rules, forcing the JRP to create study guides and videos to educate the judiciary). *Cf.* REPORT 2002, *supra* note 6, at 25 (finding that despite the Judicial Reform Program’s recommendations for a new code of ethics, “some judges did not understand the need for a code of judicial ethics that held them to a higher standard than civil servants”).

⁸⁷ REPORT 2002, *supra* note 6, at 25. *See also* Judicial Disciplinary Committee, *supra* note 82.

privately meet with parties and/or their lawyers.⁸⁸ Regardless of the substance of the discussions, such *ex parte* communications create an opportunity for corruption and may contribute to the public's general suspicion of the courts. Additionally, the judicial code of ethics does not prohibit judges from hearing cases in which they have a conflict of interest. The surveyed experts indicated that judges frequently hear cases in which the judge's family, social, business, or other relationships create a conflict of interest. But regardless of whether judicial decisions are actually influenced by such conflicts, the lack of a clear prohibition creates an appearance of impropriety that no doubt contributes to the public perception of corruption within the courts. Moreover, anecdotal evidence suggests that these conflicts may indeed frequently influence judicial outcomes.

Table 7: Survey Results on Judicial Accountability—Insufficient

Survey Question	Avg. Score	Distribution	Score
A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning misconduct by individual judges.	2.8	Disagree 41% Agree 27% Neutral 32%	Failing
Complaints of misconduct by judges are adequately investigated.	2.5	Disagree 46% Agree 23% Neutral 31	Failing
Complaints of misconduct by judges are investigated without political interference from other branches of government.	2.7	Disagree 32% Agree 19% Neutral 50%	Failing
Investigations of misconduct by judges are not influenced by unofficial payments, gifts, or favors from judges or other interested parties.	2.7	Disagree 41% Agree 18% Neutral 41%	Failing

In addition to a weak judicial code of ethics, Mongolian judges who engage in clearly prohibited activities, such as taking bribes, are rarely held accountable. Though Mongolia has established a Judicial Disciplinary Committee, the experts surveyed expressed concern that the Disciplinary Committee is used primarily to punish judges who are too independent, rather than those who abuse their power to solicit or accept bribes, or otherwise further their own self-interest. For example, one

⁸⁸ See Table 6, *supra*.

judge was reportedly brought before the Disciplinary Committee for “performance issues” after he publicly disagreed with the Chief Judge over whether the judiciary should “work as a team,” arguing instead that judges should exercise independent judgment.⁸⁹

The experts also expressed concern—both in face-to-face interviews and in the survey—that judicial misconduct investigations are tainted by political interference and bribery. Because Judicial Disciplinary proceedings lack transparency, however, it is difficult to substantiate such concerns. Nevertheless, the Judicial Disciplinary Committee has released general statistics, which illustrate that the vast majority of complaints against judges are dismissed without action or explanation.⁹⁰ For example, between 2003 and 2005, 22 of the 28 complaints against judges in Ulaanbaatar were dismissed without explanation.⁹¹ Furthermore, no information is publicly available as to who filed the complaints, the general content of any of the allegations, or the ultimate disposition of the other six complaints that were not dismissed.⁹² In the absence of public transparency, or an independent audit, the Judicial Disciplinary Committee is a black box, the inner workings of which remain a mystery. Given the prevalence of grand corruption in Mongolia, the public—including the bar association—is also suspicious of corruption within the Disciplinary Committee.

Because Mongolian law does not provide for whistleblower protection to individuals who report corruption, individuals risk persecution should they report instances of corruption to the authorities. Additionally, given the growing misuse of defamation law to silence those who report corruption, including the high-profile jailing of several reporters who have reported specific corruption incidents, there are few individuals willing to come forward even when they themselves are not

⁸⁹ Interview with Anonymous, Professor of Law, National University of Mongolia, Ulaanbaatar, Mongolia (May 22, 2008).

⁹⁰ ASSESSMENT REPORT 2006, *supra* note 9, at 53.

⁹¹ *Id.* Nationally, only 14 judges were disciplined for unspecified reasons, though 143 complaints were filed. See REPORT 2007, *supra* note 9, at 10.

⁹² *Cf.* REPORT 2007, *supra* note 9, at 10 (noting the JRP-recommended implementation of systems to inform complainants of the status of their complaints, but not mentioning any public disclosure).

implicated.⁹³ The silencing of those who would report judicial corruption reflects a broader climate of systemic corruption and lack of accountability in Mongolia.

The glaring lack of transparency as to how courts actually make decisions is one possible explanation for the high level of perceived or real corruption within the Mongolian courts. The lack of transparency not only enables corrupt judges to hide impropriety, but also results in individuals suspecting corruption, even when there is none. Given the systemic nature of corruption in Mongolia, one can hardly fault a losing litigant for, in the absence of a detailed written decision, suspecting that the judge may have been bought. Experts believe that the only way to fight this perception of corruption is through a resolute commitment to absolute transparency. Regrettably, agencies dealing with judicial reform in Mongolia have failed to make transparency a sufficient priority, despite frequent claims that increasing “transparency” is a core goal of reform.⁹⁴ As evidence of this failure:

- Only 18% of the experts surveyed agree that judges are assigned to cases in a transparent and objective manner.⁹⁵
- Although courtroom proceedings are technically open to the public, in practice, courtrooms have inadequate space to accommodate the public. As a result, members of the public are routinely excluded from hearings and trials.⁹⁶

⁹³ One public official within the anti-corruption agency, in fact, warned me that I would risk prosecution for defamation if I published this report, and particularly if I identified specific judges as those perceived to be most corrupt by attorneys. Interview with Anonymous, Prevention and Public Awareness Department, Anti-Corruption Agency, Ulaanbaatar, Mongolia (June 5, 2008).

⁹⁴ The 2006 Judicial Reform Program (“JRP”) annual report claims, for example, that 2006 was “highlighted by improved access to and transparency in the courts,” and identifies courtroom redesign and renovation as one of the main activities leading to increased transparency. REPORT 2006, *supra* note 5, at 3. The 2006 report also argues that the JRP increased “transparency” through the creation of a website, www.judgeinfo.mn, which operates as a source of basic information about the courts “including court decisions.” *Id.* at 3. Local attorneys complain, however, that the website contains very few decisions and is frequently inaccessible. Interview with Tsogt Natsagdorj, *supra* note 60.

⁹⁵ See Table 8, *infra*.

⁹⁶ Court Observer Program by Otgontenger Univ., Final Report (2005) (on file with author). I also witnessed court clerks order all members of the public,

- Supreme Court and significant appellate opinions are rarely published, and when published, are not widely circulated.
- District court decisions are never published, and are not otherwise available to the public.
- There are no transcripts of trial court proceedings. The only records of trial court proceedings are court-produced summaries of the trial testimony that provide, at best, an incomplete record, and, at worst, a distorted record for appeal.
- Even these incomplete court-produced summaries of trial court proceedings are not available to the media or the general public.
- 82% of the experts surveyed indicate that court users do not have easy access to information on the status of their cases.⁹⁷
- District courts typically announce outcomes but rarely explain the reasoning (i.e., the facts and the application of the law) behind their decisions, leading to a sense of inscrutability as to the basis of court decisions.
- Supreme Court and significant appellate opinions are rarely subject to academic scrutiny,⁹⁸ which contributes not only to sloppy and unclear decisions, but also to a lack of accountability, as questionable decisions are not subject to criticism.

except for the parties, out of courtrooms on several occasions. For example, I was twice ordered to leave myself.

⁹⁷ Despite USAID touting the new public access computers stationed in many courthouses as evidence of the progress of judicial reform in Mongolia, *see* ASSESSMENT REPORT 2006, *supra* note 9, at 15-19, there is still a lack of access to information. In reality, the public access computers are often turned off, broken, or otherwise inaccessible to the public. Court Observer Program, *supra* note 96.

⁹⁸ One expert explained that most law professors must also practice law in order to survive given their low salaries and fear that criticizing the courts would threaten their livelihood. Most academics, the expert explained, “are in the pockets of the judges.” Interview with Anonymous, *supra* note 89.

Table 8: Survey Results on Judicial Transparency—Grossly Insufficient

Survey Question	Avg. Score	Distribution	Score
Supreme Court and significant appellate opinions are subjected to academic scrutiny.	2.3	Disagree 68% Agree 19% Neutral 13%	Failing
Supreme Court and significant appellate opinions are subjected to scrutiny by the media and the general public.	2.7	Disagree 50% Agree 41% Neutral 9%	Failing
Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise.	2.6	Disagree 41% Agree 18% Neutral 41%	Failing
Courtroom proceedings are open to the public and the media.	2.5	Disagree 59% Agree 23% Neutral 18%	Failing
Courtrooms have adequate space to accommodate the public and the media.	2.0	Disagree 82% Agree 9% Neutral 9%	Failing
Court decisions are generally a matter of accessible public record.	2.5	Disagree 68% Agree 23% Neutral 5%	Failing
Supreme Court and significant appellate opinions are published.	2.2	Disagree 86% Agree 14% Neutral 0%	Failing
Transcripts or some other reliable record of courtroom proceedings are maintained and are available to litigants and their attorneys.	3.5	Disagree 14% Agree 69% Neutral 17%	Passing
Transcripts or some other reliable record of courtroom proceedings are maintained and are available to the media and general public.	2.2	Disagree 63% Agree 14% Neutral 23%	Failing
Court users have easy access to information on the status of their case.	1.9	Disagree 82% Agree 9% Neutral 9%	Failing
Current law is distributed and indexed. There is a nationally recognized system for indexing current domestic laws and jurisprudence, and identifying and organizing changes in the law.	2.7	Disagree 45% Agree 41% Neutral 14%	Failing

**Table 9: Survey Results on Judicial Efficiency and Predictability—
Insufficient**

Survey Question	Avg. Score	Distribution	Score
The court system maintains an effective and accessible case filing and tracking system that ensures cases are heard in a reasonably efficient manner.	2.7	Disagree 50% Agree 27% Neutral 23%	Failing
Judges follow and enforce procedural rules.	2.2	Disagree 68% Agree 14% Neutral 18%	Failing
Rules of evidence exist as to what evidence judges may or may not consider.	2.4	Disagree 63% Agree 23% Neutral 14%	Failing
Judges follow any existing rules of evidence. Judges do not consider improper evidence nor exclude proper evidence.	2.3	Disagree 63% Agree 23% Neutral 14%	Failing
Court standards for evaluating legal arguments exist and are applied in a predictable fashion.	2.1	Disagree 64% Agree 14% Neutral 14%	Failing

Despite the fact that the Judicial Reform Program focuses on improving judicial efficiency through better case management and court automation,⁹⁹ only 27% of the experts surveyed agree that there is an effective and accessible case management system.¹⁰⁰ Similarly, 68% felt that judges fail to follow and enforce procedural rules for handling cases.¹⁰¹

Moreover, the survey participants indicated that judges do not enforce procedural rules, do not follow rules of evidence, and do not apply legal standards or rules in a predictable fashion.¹⁰² The unpredictability and unevenness of judicial decision-making is reflected in the error rate in district court decisions, which approaches nearly

⁹⁹ See REPORT 2007, *supra* note 9, at 10-13 (describing JRP programs and results).

¹⁰⁰ See Table 9, *supra*. Notably, 50% of the experts surveyed disagreed with the statement that the court system maintains an effective and accessible case filing and tracking system.

¹⁰¹ *Id.*

¹⁰² *Id.*

80%.¹⁰³ This error rate is persuasive evidence that district court judges are either unqualified, continue to be inadequately trained, or decide cases (or are reversed) on the basis of external factors such as political influence or bribery.

Table 10: Survey Results on Judicial Alternative Dispute Resolution Mechanisms—*Insufficient*

Survey Question	Avg. Score	Distribution	Score
The pre-trial settlement of disputes is encouraged but not forced.	3.2	Disagree 28% Agree 58% Neutral 14%	Passing
Established alternative dispute resolution mechanisms such as mediation and arbitration provide a viable alternative to court processes.	2.5	Disagree 54% Agree 23% Neutral 13%	Failing

Mongolia has taken a number of positive steps to promote alternative dispute resolution. First, to encourage pre-trial settlement, the filing fees are halved for parties who settle before trial.¹⁰⁴ Mongolian law also allows for voluntary binding arbitration of any civil dispute, either before established tribunals such as one set up by the Chamber of Commerce, or an ad hoc tribunal agreed upon by the parties.¹⁰⁵ Additionally, on May 5, 2006, a mediation center, staffed by nine attorneys, was established with the assistance of the Japan International Cooperation Agency.¹⁰⁶ Nevertheless, several of the experts interviewed gave the mediation center low marks in terms of quality. Moreover, mediation is not formally recognized as a form of dispute resolution in Mongolian law, and there are no court-annexed mediation programs. Judges also lack the

¹⁰³ Interview with Luvsandorj Byambaa, *supra* note 68. Only 3% of civil cases are actually appealed. *Id.* Possible explanations for this low rate of appeal, despite a reversal rate that would seem to encourage appeals, are: lack of financial resources to appeal, lack of information about the right to appeal, or—as one expert suggested—that only those who are well-connected enough to be able influence the appellate courts bother to appeal. Interview with Anonymous, Corporate Attorney, Ulaanbaatar, Mongolia (May 6, 2008).

¹⁰⁴ ASSESSMENT REPORT 2006, *supra* note 9, at 75.

¹⁰⁵ *Id.* at 76.

¹⁰⁶ *Id.* at 7.

power to order parties to attempt settle their dispute through mediation before continuing with litigation.

IV. THE DANGERS OF CAPTURE BY TARGET (“REGULATED”) JUDICIAL INSTITUTIONS

The actual state of the Mongolian judiciary hardly supports USAID’s claim that its Judicial Reform Program was “very successful” and “one of its best projects ever.”¹⁰⁷ In particular, the Judicial Reform Program failed to deliver on its primary goal to “[i]ncrease transparency and accountability throughout the judicial sector.”¹⁰⁸ Nor did the project substantially improve judicial efficiency, predictability, or transparency—despite USAID claims to the contrary.¹⁰⁹ In short, the substance and quality of the “justice” dispensed by the Mongolian courts does not seem to have changed for the better. It is just dispensed in better surroundings, by better paid judges, who have nice computers.

The failure of judicial reform to noticeably improve judicial integrity, accountability or transparency stems at least in significant part from the failure to implement meaningful and comprehensive measures to address corruption.¹¹⁰ This less-than-vigorous approach to addressing

¹⁰⁷ See USAID/Mongolia, *supra* note 22.

¹⁰⁸ REPORT 2002, *supra* note 6, at 1. See also REPORT 2007, *supra* note 9, at 20 (“One of the main goals of the JRP throughout the project has been to increase the transparency and accountability of the courts. One important activity that was implemented to achieve this goal was the installation of Public Access Terminals (PATs) in each court.”) As discussed above, *supra* note 74, the PATs which are touted as proof of the success of the JRP in increasing transparency are frequently turned off or otherwise inaccessible to court users. See Court Observer Program, *supra* note 96.

¹⁰⁹ See REPORT 2006, *supra* note 5, at 3 (“A number of JRP activities have led to better access to and increased transparency in the judicial sector.”).

¹¹⁰ The establishment of a Special Investigative Unit to investigate misconduct by justice sector officials “was the only concrete step by the Government of Mongolia to combat crime and corruption within the justice sector.” REPORT 2006, *supra* note 5, at 8. A consultant hired by JRP found, however, that the SIU’s ability to investigate corruption is severely limited by underfunding and the failure of the legislature to give the SIU “authority to conduct surveillance and undercover operations.” Emery E. Adoradio, *Special Investigative Unit Under the Prosecutor General Preliminary Assessment and Recommendations*, in REPORT 2006, *supra* note 5, attach. B at 2. As such,

corruption may have reflected, in part, inadequate political will among key Mongolian stakeholders within the judiciary and government.¹¹¹ It is not enough, however, to blame the failure of judicial reform on corrupt Mongolian elites. Lack of political will to address judicial corruption should have factored into the decision of whether and under what conditions to embark on judicial reform in Mongolia in the first place, and might have warranted an early end to some donor projects. As early as 2002, for example, USAID recognized that “lack of accountability and transparency, and lack of public trust and confidence” threatened the ability of the Mongolian judiciary to serve the interests of a “democratic society and free market economy.”¹¹²

Yet, no effort seems to have been made to secure host country commitment to the goals of transparency and accountability before investing over 13 million dollars into its multi-year Judicial Reform Program. Moreover, USAID funded a multi-million dollar extension of

“[t]he SIU analyst focuses on statistics and workload indicators that are used to determine bonuses rather than on analyzing data that could be used to identify patterns of police, judicial and prosecutorial corruption.” *Id.* Moreover, SIU work focuses almost exclusively on police misconduct, not corruption among judges. Interview with Badamragchaa Purevdorj, Program Manager, Legal and Human Rights Programs, Open Society Forum, Ulaanbaatar, Mongolia (May 18, 2008).

In contrast to this half-hearted approach, a comprehensive anti-corruption program would have included measures to incentivize judicial integrity, shore-up judicial independence, create meaningful accountability, ensure actual transparency and otherwise limit opportunities for judicial corruption. A list concrete and specific measures that Mongolia could have taken, and might still take given adequate political will, as part a comprehensive program to address judicial corruption is included in Appendix A, *infra*.

¹¹¹ Not only does judicial corruption benefit corrupt judges, but it also facilitates grand corruption among other economic and political elites in Mongolia. Absent pressure from donor agencies, there is simply no incentive for these elites to promote anti-corruption reform in the judiciary, and plenty of reason for them to actively obstruct it. See U.S. AGENCY FOR INT’L DEV., USAID ANTICORRUPTION STRATEGY 11 (2005), http://www.usaid.gov/policy/anticorruption_strategy05.pdf (last visited Oct. 28, 2009) (“Sixty-nine percent [of USAID missions] indicated that insufficient political commitment on the part of national counterparts was a constraint [in combating corruption].”).

¹¹² REPORT 2002, *supra* note 6, at 1.

JRP,¹¹³ despite indications of growing corruption within the judiciary during the first six years of the Judicial Reform Program—indications the JRP dismissed as “coincid[ing] with the public’s overall dissatisfaction with Mongolia’s government.”¹¹⁴ As with the original establishment of the JRP, the extension was funded without any commitment from the judiciary to address the corruption issue. To the contrary, the extension was granted in the face of demonstrated stakeholder resistance to measures designed to improve accountability within the courts—including changes to the judicial ethics code, introduction of judicial performance evaluations, and reforms to ensure the merit-based selection of judges.¹¹⁵

Similarly, the World Bank funded the construction of the NLC¹¹⁶ and recently invested an additional five million dollars, primarily to refurbish the Supreme Court,¹¹⁷ despite the widespread perception of undue political influence and corruption with the judiciary. World Bank funding was, on both occasions, not accompanied by a commitment from the judiciary to address corruption issues. This lack of conditionality seems incongruent with the Bank’s view of corruption as “among the greatest obstacles to economic and social development.”¹¹⁸ It is also incongruent with the Bank’s recognition that because “the legal system will be the ultimate arbiter of any anticorruption program, a corrupt

¹¹³ REPORT 2006, *supra* note 5, at 3 (“JRP . . . was granted a cost extension in June [2006] to operate until June 30, 2008”).

¹¹⁴ REPORT 2007, *supra* note 9, at 27.

¹¹⁵ See, e.g., REPORT 2007, *supra* note 9, at 8-10 (indicating, *inter alia*, that JRP recommendations from 2006 to ensure merit-based selection of judges were still on hold by the General Council of Courts at the end of 2007); REPORT 2006, *supra* note 5, at 10-11 (discussing incomplete action from the General Council of Courts on JRP recommendations to ensure merit based selection of judges and on strengthening the judicial code of ethics); REPORT 2002, *supra* note 6, at 25 (noting that despite the JRP recommendations there was refusal to add restrictions to the judicial code of ethics against *ex parte* communications).

¹¹⁶ See The World Bank Group, *supra* note 52.

¹¹⁷ THE WORLD BANK, *supra* note 4, at 635.

¹¹⁸ The World Bank Group, Anticorruption: Overview of Anticorruption Continued, <http://go.worldbank.org/K6AEEPROC0> (last visited Oct. 28, 2009).

judiciary will fundamentally undermine anticorruption efforts themselves.”¹¹⁹

Absent a high-level commitment to root out judicial corruption, “top-down” judicial reform programs are destined to neglect the core concerns of judicial integrity, accountability, and transparency. Moreover, judicial reform does not address these core issues, it is likely not only to fail but also to perpetuate and reinforce perceptions of corruption within the courts.¹²⁰ One lesson of Mongolia is thus one that has been learned before: donors should not finance institutional reform of judiciaries “with pervasive levels of corruption,”¹²¹ at least not until high-level political leadership has demonstrated a commitment to combating judicial corruption.

Another lesson is that donor-funded judicial reform projects risk capture by target judiciaries—in much the same way that domestic regulatory bodies risk capture by regulated industries.¹²² The risk of judicial capture arises as an initial matter because top-down approaches to judicial reform typically depend on elites within target judicial

¹¹⁹ THE WORLD BANK, ANTICORRUPTION IN TRANSITION: A CONTRIBUTION TO THE POLICY DEBATE 14 box 1.5 (2000).

¹²⁰ *Cf. id.* at 18. (“The costs of state capture and administrative corruption are mutually reinforcing . . .”).

¹²¹ U.S. AGENCY FOR INT’L DEV., *supra* note 111, at 16-17 & box 1.

¹²² See Jean-Philippe Platteau, *Community-Based Development in the Context of Within-Group Heterogeneity* (“Project facilitators tend to easily fall prey to local elites either because they are in a rush to show results and therefore gloss over local power relations, or because they are too weak to resist their pressure and the donor agency is not supporting them enough.” (citation omitted)), in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 2004: ACCELERATING DEVELOPMENT, 241, 251 (François Bourguignon & Boris Pleskovic eds., 2004). See also THE WORLD BANK, *supra* note 119, at 33-34 (“FDI firms headquartered in . . . local market[s] . . . are just as likely [as domestic firms] to engage in state capture,” and this is “substantially more likely” when the firm is located in a country with existing “high levels of administrative corruption and state capture.”).

For a discussion of regulatory agency capture, see generally PHILIP P. FRICKEY & DANIEL A. FARBER, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) and Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture,” and Airline Security*, 10 AM. U. J. GENDER SOC. POL’Y & L. 381 (2002).

institutions for information as to the realities and needs on the ground¹²³—particularly when donor project employees do not speak the local language or have significant country expertise.¹²⁴ This dependency is compounded by the frequent physical location of donor projects within target judicial institutions, which risks over-identification with institutional interests at the cost of reform goals.¹²⁵ Similarly, close working relationships, and friendships, that arise between project employees and target institution employees can obscure objectivity and lead to willful blindness to corruption within judicial institutions.¹²⁶ This tendency for willful blindness can be exacerbated when, as is not infrequently the case, high-ranking project employees themselves wish to be identified with the political and social elites of the host country¹²⁷—or

¹²³ See, e.g., Golub, *supra* note 9, at 17-19 (explaining that reformers frequently operate without good information or knowledge of “the real intents of the government officials who are their local partners”).

¹²⁴ Cf. *id.* at 18 (noting that the knowledge of project facilitators often “skate[s] along the surface of how a foreign society operates”); Platteau, *supra* note 122, at 248 (stating that program “facilitators are too often young, poorly paid, and inexperienced individuals”). See also Judicial Reform Program: Q4 Updates 2005, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q4-05.html> (posting of Skip Waskin, Dec. 13, 2005, 20:13) (last visited Oct. 28, 2009) (evidencing former JRP Chief of Party Ledbetter’s lack of previous Mongolian expertise or experience); Lawyer John A. Carver Appointed as the JRP Chief of Party, <http://www.ncsc.mn> (follow link to document title) [hereinafter Carver Appointed] (last visited Oct. 28, 2009) (evidencing newly appointed JRP Chief’s lack of experience with or knowledge of Mongolia).

¹²⁵ See Platteau, *supra* note 122, at 244-45 (indicating that “social capital may be harnessed against rather than in favor of vulnerable segments of the population” as a result of close social and economic relationships with local elites that act as a “barrier[] to entry” for the actual public interest).

¹²⁶ See *id.* at 242-43 (discussing the “praise culture” that arises among actors in a top-down approach). One project manager in a donor-funded Judicial Reform Program, for example, insisted that in “ten years” of working with the Courts, he had never seen “any evidence” of judicial corruption or improper influence. Interview with Javkhlan, GTZ Project Manager, Ulaanbaatar, Mongolia (May 12, 2008).

¹²⁷ See ROSSABI, *supra* note 1, at 64-65 (“The lifestyles of the resident representatives of the international donor agencies also raised some eyebrows. A few, although certainly not all, lived in gated, guarded communities in Ulaanbaatar, while a tiny group were in even more lavish surroundings, guarded by the military, in an area where the president and the prime minister resided,

are driven by career goals that “are not well aligned with the needs of [the] projects.”¹²⁸

A combination of these factors seems to have contributed to the capture of USAID’s Judicial Reform Program by elites within the judiciary, who were then able to successfully direct the efforts of the Judicial Reform Program toward their own priorities.¹²⁹ These elites understandably preferred to focus on activities such as courthouse construction and repair, purchase of computers and equipment, judicial training, and international jaunts rather than on accountability and transparency.¹³⁰

Looking beyond Mongolia, the inherent risk of project capture in the institution-building approach to judicial reform may help explain the continued focus on resources and infrastructure in donor-funded judicial reform projects, despite repeated criticism from both within and without donor agencies that the approach yields dismal results.¹³¹ In other words, judicial reform efforts may begin, as the USAID project in Mongolia seems to have begun, with noble intentions of addressing “lack of accountability and transparency,”¹³² but end up doing little to address either as projects increasingly focus on the concerns and priorities of

which was closed to the public. Visitors had to have invitations; otherwise, the military would not permit them to enter this compound. The spacious quarters, well-appointed furnishings, and the latest appliances, contrasted sharply with the lifestyles of all but the very highest officials with whom the foreign representatives dealt.”).

¹²⁸ Platteau, *supra* note 122, at 248.

¹²⁹ *Cf.* REPORT 2006, *supra* note 5, at 23 (“The Strategic Plan has a large number of specific objectives and tasks. However, USAID, in consultation with the Mongolian stakeholders, focused the JRP on a limited number of critical areas which included: Court Administration and Case Management, Review of Court and Justice Sector Agency Jurisdictions, Continuing Legal Education (CLE), Lawyer Qualification, Public Education and improved Ethics.”).

¹³⁰ *See, e.g.*, Golub, *supra* note 9, at 8-9 (describing that the orthodox institutional approach to judicial reform); Judicial Reform Program: Q4 Updates 2005, *supra* note 124 (posting of Skip Waskin, Nov. 9, 2005, 20:07) (reporting study tour to Hawaii).

¹³¹ *See, e.g., id.* at 11-14 (documenting the “weak track record” of donor efforts to promote rule of law through judicial reform and noting that “[e]xternal reviews of ROL aid efforts have been highly critical”).

¹³² REPORT 2002, *supra* note 6, at 1.

institutional elites. In Mongolia, for example, this meant USAID's Judicial Reform Program spent much of its final year focusing on completing software upgrades that were considered the "highest priorities" of "the Chief Justice and the Director of the General Council of Courts" rather than addressing widespread perceptions of judicial corruption.¹³³ Indeed, USAID's view that its Judicial Reform Program was a great success seems closely tied to "complet[ing] the development and testing of the new Judge2008 automated case tracking and caseload management software" and "hand[ing] over" the software prior to the project's termination in March 2009.¹³⁴ While this software upgrade may in fact have been a significant accomplishment, such technical progress is overshadowed by growing corruption, bias, and other forms of undue influence within the Mongolian judiciary.¹³⁵

USAID's rosy picture of the success of judicial reform in Mongolia simply cannot be squared with the continuing presence of rampant corruption within the judiciary and the crisis of public legitimacy that the courts face as a result. The divergence between USAID's assessment of its Judicial Reform Program's impact and the shared negative assessment of the courts among local experts highlights, at a minimum, the need for independent, outside review of the progress and success of donor-funded reform projects.¹³⁶ This need arises from the intrinsic incentives for donor agencies, their implementing partners, and their employees to oversell the success of reform projects. First, donor agencies must

¹³³ USAID/Mongolia Programs August 2008, <http://www.usaid.gov/mn/programs/jrp/jrp-update-367.html> (last visited Oct. 28, 2009).

¹³⁴ USAID/Mongolia Programs February 2009, <http://www.usaid.gov/mn/programs/jrp/jrp-update-566.html> (last visited Oct. 28, 2009).

¹³⁵ See, e.g., Golub, *supra* note 9, at 18 ("Although technical progress can take place even in the face of undue influences, where such influences are widespread they tend to trump the value of the technical change.").

¹³⁶ Cf. REPORT 2006, *supra* note 5, at 4 (revealing a lack of independent monitoring of the JRP in that the review was conducted by of key stakeholders, namely "a group of representatives from the judiciary, prosecution, advocacy and MoJHA led by the JRP's consultant"). See generally LIVINGSTON ARMYTAGE, CTR. FOR JUDICIAL STUDIES, MONITORING PERFORMANCE OF LEGAL AND JUDICIAL REFORM IN INTERNATIONAL DEVELOPMENT ASSISTANCE: EARLY LESSONS FROM PORT MORESBY & PHNOM PENH 3 (2006), available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Monitoring_Impact.pdf (last visited Oct. 28, 2009) (arguing for increased "monitoring and evaluation of legal and judicial reform efforts around the world").

justify judicial reform programs in countries where candid assessment of the progress of judicial reform might raise questions about the proper use of taxpayer funds. Second, implementing partners, such as the National Center for State Courts which oversaw the Judicial Reform Program in Mongolia and the ABA Central European and Eurasian Law Initiative, which oversees USAID judicial reform programs in much of Central Asia and Eastern Europe, compete for USAID funds and must tout the success of their projects both to secure extensions of existing projects and to win future projects and grants. Third, high-ranking employees of these organizations often go from country-to-country as “judicial reform experts,” leveraging “successful” reform efforts for other high-level positions.¹³⁷

Even independent assessments of donor funded projects, however, cannot address the fundamental problem with the top-down, institution-oriented approach to judicial reform: It just doesn’t work, particularly in countries characterized by systemic corruption.¹³⁸ Despite USAID’s

¹³⁷ See, e.g., ABA Rule of Law Initiative Europe and Eurasia Division Staff, <http://www.abanet.org/rol/staff-ceeli.shtml> (last visited Oct. 28, 2009) (stating that former JRP Chief of Party Gary Ledbetter left Mongolia to work for the ABA as a Country Director for its judicial reform program in Georgia); *JRP Chief of Party, Robert La Mont, To Leave Mongolia*, MONG. JUD. REFORM PROGRAM MONTHLY NEWSL., Sept 15-Oct 15, 2006, at 1, 1-2, available at <http://www.ncsc.mn/MJRP/Newsletter/EN/Newsletter62English.pdf> (last visited Oct. 28, 2009) (reporting that former JRP Chief of Party to begin a USAID judicial reform project in Indonesia); *JRP Project Director, Dr. Heike Gramckow, To Leave the National Center for State Courts*, MONG. JUD. REFORM PROGRAM MONTHLY NEWSL., March 2008, at 1, 1-2, available at <http://www.ncsc.mn/MJRP/Newsletter/EN/Newsletter76English.pdf> (last visited Oct. 28, 2009) (reporting that former JRP Director to take a position as the Senior Legal Counsel to the World Bank’s Legal and Judicial Reform Group); and Carver Appointed, *supra* note 124 (reporting that current Chief of Party, John Carver previously worked for USAID in both Haiti and Mexico).

¹³⁸ Golub, *supra* note 9, at 11-14 (documenting the “weak track record” of donor efforts to promote rule of law and arguing the folly of such efforts). See generally HARRY BLAIR & GARY HANSEN, *WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS* § 3 (1994), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnaax280.pdf (last visited Oct. 28, 2009) (noting the folly of the institution-oriented strategy to judicial reform where

claims to the contrary, Mongolia is no exception. Rather, the record of judicial reform in Mongolia should add to calls for a shift from institution-building, top-down models of judicial reform to bottom-up, community-based models designed to empower local communities to fight on their own against corruption, bias, and unequal access to justice.¹³⁹

corruption is rampant); THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 170-76 (1999) (reporting the “disappointing” record of USAID work with judiciaries across the world); WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* 1-9 (2000) (offering bleak assessment of donor funded judicial reform in Latin America); U.S. GEN. ACCOUNTING OFFICE, *GAO/NSAID-93-149, FOREIGN ASSISTANCE: PROMOTING JUDICIAL REFORM TO STRENGTHEN DEMOCRACIES* (1993) (finding serious flaws in the institutional approach to judicial reform in Latin America); Klaus Decker et al., *Law or Justice: Building Equitable Legal Institutions* 18 (World Bank, Working Paper No. 33653, 2005), available at <http://go.worldbank.org/2YW13HB010> (last visited Oct. 28, 2009).

¹³⁹ See generally DANIEL MANNING, *THE ROLE OF LEGAL SERVICES ORGANIZATIONS IN ATTACKING POVERTY* 5-6 (1999), available at http://siteresources.worldbank.org/EXTAFRREGTOPGENDER/Resources/RoleLegal_en.pdf (last visited Oct. 28, 2009); *MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD* (Mary McClymont & Stephen Golub eds., 2000), available at http://www.fordfound.org/pdfs/impact/many_roads.pdf (last visited Oct. 28, 2009); Golub, *supra* note 9, at 25-41 (calling for “legal empowerment” approach to reform); Monica Das Gupta et al., *Fostering Community-Driven Development: What Role for the State?* 1-3 (World Bank, Policy Research Working Paper No. 2969, 2003).

APPENDIX A: COMPREHENSIVE REFORM MEASURES TO ADDRESS JUDICIAL CORRUPTION

“[T]he [Multilateral Development] Banks and other international agencies” have failed to develop an “effective[] judicial anti-corruption strategy” in spite of continuing involvement in combating judicial corruption.¹⁴⁰ Meanwhile, judicial reform experts have in fact identified a number of specific, targeted measures that can be effective in reducing corruption, especially when combined in a comprehensive anti-corruption program. Given the apparent lack of political will within the Mongolian judiciary to address corruption, however, the list below is meant primarily to identify measures—both tested and new—that civil society organizations, NGOs, and private industry could push for in Mongolia to combat judicial corruption. Moreover, some of the measures could be undertaken with or without the cooperation of the courts and might thus be appropriate avenues for donor funding.

Measures To Incentivize Judicial Integrity

1. Judges should be subjected to periodic judicial performance evaluations designed to, at a minimum, evaluate each judge’s integrity, fairness, temperament, legal knowledge, legal reasoning, diligence and professionalism.¹⁴¹ These evaluations should be based upon confidential surveys completed by members of the bar and members of the general public who have appeared before the judge. Judges’ overall scores on these periodic surveys should be made publicly available. Ideally, such evaluations should be administered by an independent commission—with the backing of the General Council of Courts, the Ministry of Justice and Home Affairs, and the Mongolian Bar Association. However, it would also be possible for civil society organizations to conduct the performance evaluations independently and publicize the results. Such evaluations might serve as further evidence of the need for the types of reforms proposed below.

¹⁴⁰ Hammergren, *supra* note 7, at 73.

¹⁴¹ See generally INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, TRANSPARENT COURTHOUSE™: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION (2006), <http://www.du.edu/legalinstitute/pubs/TransparentCourthouse.pdf> (last visited Oct. 28, 2009) (outlining a judicial performance evaluation program).

2. Minimum qualification requirements should be established for newly appointed judges. Judges should be required to have graduated from a law school,¹⁴² passed the bar exam, and have at least three years experience as an attorney or prosecutor.¹⁴³

3. Selection of judges should be based on objective criteria, such as scores on a civil service exam with only the highest scorers eligible for appointment, in order of their scores.¹⁴⁴ Such a system would not only ensure that the most qualified individuals were appointed to the bench, but also mitigate social exchange corruption pressures inherent in the current appointment system.¹⁴⁵

4. In order to incentivize good judging, promotions within the court system (for example, from district court judge to appellate court judge), and the level of a judge's pay, should be merit-based—at least in some significant way.¹⁴⁶

¹⁴² Ideally judges should be required to have graduated from an *accredited* law school. Likewise, Mongolia should also implement accreditation standards for law schools. Because Mongolia currently does not have an accreditation process for law schools, there has been a proliferation of law schools of questionable quality.

¹⁴³ See, e.g., Carlo Guarnieri, *Professional Qualifications of the Judiciary in Italy, France, and Germany* (citing the German practice of requiring high marks on state exam and six years of training before full judicial appointment), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 56, 59; Keith Henderson, *The Rule of Law and Judicial Corruption in China: Half-way Over the Great Wall* (noting that China now requires all judges to have a college degree and to pass a national examination, both significant steps in the arena of Chinese judicial reform), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 151, 157.

¹⁴⁴ See Rose-Ackerman, *supra* note 5, at 19-20 (discussing the civil law model, which creates a more apolitical judiciary through emphasis on lifetime civil service that begins with a competitive exam and promotion through the judicial hierarchy pursuant to evaluation by superiors and special councils).

¹⁴⁵ See Transparency International, *Executive Summary: Key Judicial Corruption Problems* (“Failure to appoint judges on merit can lead to the selection of pliant, corruptible judges.”), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at xxi, xxiv.

¹⁴⁶ See Yang & Erichs, *supra* note 18, at 51-52 (supporting the promotion of judges through transparent, merit-based criteria in order to prevent promotions due to political affiliation and/or improper means).

5. Judges' salaries should be sufficiently high to attract the best legal minds and also high enough that judges will be reluctant to engage in corrupt activities that risk their jobs. This would require salaries in the USD\$1,000 to \$3,000 range—with a judge's actual pay within that range determined by merit. Additionally, judges' salaries should, by law, never decrease—except for demotions with the defined pay range for judicial misconduct. However, the proposed salary increases should not take place until the judiciary adopts a no tolerance policy toward corruption and puts in place specific mechanisms designed ensure judicial transparency and accountability.¹⁴⁷

Reforms Targeted at Transparency

1. A transparent system for the assignment of cases, such as a lottery, should be developed. Once assigned to a case, the rules should provide that a judge may be removed only for good cause, such as a conflict of interest.¹⁴⁸

2. Notices should be posted on every courtroom that all proceedings are open to the public, regardless of whether the member of the public has any connection to the case being heard. Judges and clerks should be censured for failing to allow open access.¹⁴⁹

¹⁴⁷ See Tom Blass, *Combating Corruption and Political Influence in Russia's Court System* (favoring judicial salaries which achieve parity to comparable private sector industry salaries so as to reduce incidences of bribery and to retain a qualified judiciary), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 31, 34. See also Yang & Erichs, *supra* note 18, at 49 (defining "adequate" salaries for the judiciary as salaries which allow legal professionals to "support their families, remain loyal to their profession and, at least, have no economic 'need' for resorting to corruption").

¹⁴⁸ See Mary Noel Pepys, *Corruption Within the Judiciary: Causes and Remedies* (preferring random case assignment so as to avoid the intentional assignment of particular cases to corrupt judges), in GLOBAL CORRUPTION REPORT 2007 *supra* note 5, at 3, 8.

¹⁴⁹ See Rose-Ackerman, *supra* note 5, at 21 (mentioning the role of open public access to trials and court proceedings as a check on judicial power). See also Edward Buscaglia, *Judicial Corruption and the Broader Justice System* (arguing that public court proceedings are correlated with lower incidences of corruption), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 67, 72.

3. District courts should be required by law produce written decisions that discuss the relevant facts and law and explain the reasoning behind their decisions.¹⁵⁰

4. All court decisions and court filings should be made available on a daily basis in a public access or media tray at each courthouse, so that the media or other members of the public can review the filings and decisions and thereby monitor the daily activities of the court.¹⁵¹

5. Verbatim transcripts should be produced of all court proceedings. These transcripts should be available to both litigants and any member of the public for a reasonable fee—and should be provided free to indigent litigants who need the transcripts for appeal.¹⁵²

6. An official reporter system should be established to collect and publish all district court, appellate court, and Supreme Court decisions. Preferably, the reporter system should be electronic and online to ensure broad access, reduce costs, and enable timely publication. There should also be free computer access terminals to the reporter system at the National Legal Center in Ulaanbaatar and other convenient locations in

¹⁵⁰ See Rena Safarelieva, *Azerbaijan's Yawning Gap Between Reforms on Paper and in Practice* (recommending the online publication of all Azerbaijan's Supreme Court, economic court and constitutional court decisions and requiring that these decisions provide written reasoning explaining the verdict of each case), in *GLOBAL CORRUPTION REPORT 2007*, *supra* note 5, at 175, 178.

¹⁵¹ Copy machines should be available so that media organizations, civil society organizations, and other members of the public can, for a reasonable fee, make copies of court filings and decisions. Media organizations, and possibly civil society organizations, should assign “court reporters” the responsibility of checking the public access or media tray on a daily basis. See, e.g., Buscaglia, *supra* note 149, at 74 (finding that effective monitoring of the court occurs through public access to judicial procedures as well as social pressure created by media assessment and critique).

¹⁵² Cf. Press Release, New Jersey Judiciary, New Appellate Pilot Program Helps Indigent Litigant Obtain Free Legal Representation (September 13, 2007) (discussing New Jersey pilot program established to provide for representation for indigent litigants involved in the appellate process, where volunteer attorneys purchase trial record for indigent clients), available at <http://www.judiciary.state.nj.us/pressrel/pr070913a.htm> (last visited Oct. 28, 2009).

each Aimag or Soum for use by attorneys and other members of the public.¹⁵³

7. The public should be provided meaningful access to information about the status of cases before the courts. Such information should be provided in the form of a “docket sheet,” which should, for example, list the title and date of all court filings, list all actions taken by the court such as hearings and rulings on motions, and the date of any future hearings or court deadlines. These docket sheets should be available not only via public access terminals in the court houses, but also online.

8. A court observer program should be instituted to monitor whether judges exclude the public from hearings and follow proper procedures. Observers should also evaluate judges on their fairness, temperament, and professionalism. A previous court observer program conducted by law students at Otgontenger University could be revamped and revived for this purpose.¹⁵⁴

9. De novo appeals should be eliminated.

10. Uniform rules of evidence should be adopted and published. These rules of evidence should be trans-substantive and applied in all court proceedings.

11. A uniform code of civil procedure should be adopted and published. The code of civil procedure should be trans-substantive and applied in all civil proceedings.

12. Upon termination of trial court proceedings, all court users should be given an easy-to-understand pamphlet explaining their right to appeal and describing clearly the necessary steps and deadlines to file such an appeal. The pamphlet should also inform individuals of the right to receive a copy of the trial court’s written decision and, if they are unable to pay for it, a free copy of the record of trial court proceedings.

Reforms Targeted at Accountability

1. A separate body should be established to investigate judicial misconduct—or the current Judicial Disciplinary Committee should be reconstituted. No judges should be on the Committee, nor should it be headed, as it is currently, by the Chief Justice. Members of the Committee should not be politically appointed, but rather selected by a

¹⁵³ See Pepys, *supra* note 148, at 9 (finding that publishing judicial decisions reduces judicial corruption).

¹⁵⁴ See Court Observer Program, *supra* note 96.

civil service exam or some other objective measure. The Committee should have investigative and subpoena powers and the resources to conduct investigations, including undercover operations.¹⁵⁵

2. A clear set of rules for removal of judges from office should be developed to ensure that judges may be removed from office or otherwise punished only for specified official misconduct through a transparent process, governed by objective criteria.¹⁵⁶

3. Independent audits of the Judicial Disciplinary Committee should be conducted to ensure the proper and consistent investigation of complaints of judicial misconduct. The results of these audits should be made public.¹⁵⁷

4. The procedures and rules for investigating and disciplining judges should be revamped in according to best international practices so that: (a) the disciplinary process is more transparent and fair, with strict and exacting standards; (b) the standard of proof is not so high as to effectively shield judges from a finding of misconduct; (c) judges who are eventually found to have engaged in misconduct are publicly identified; and, (d) if there is a finding of corruption, the judge is prosecuted as matter of policy and practice.

¹⁵⁵ See Oluyemi Osinbajo, *Sub-National Reform Efforts: The Lagos State Experience* (citing the implementation of an independent investigation panel to examine claims of judicial corruption), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 146, 149. See also, Transparency International, *Country Reports on Judicial Corruption: Introduction* (recommending the creation of an independent disciplinary committee with the authority to investigate complaints of judicial wrongdoing in countries where there is strong political influence on the judiciary and arbitrary discipline of independent judges), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 167, 169.

¹⁵⁶ See Transparency International, *Executive Summary: Key Judicial Corruption Problems* (stressing the importance of standardized discipline and removal procedures to minimize the removal of independent judges because of political differences), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at xxi, xxvi. See also Rose-Ackerman, *supra* note 5, at 21 (noting that U.S. federal judges are removed only for egregious behavior).

¹⁵⁷ See Roxana Salazar & José Pablo Ramos, *Increased Transparency Helps Curb Corruption in Costa Rica* (discussing Costa Rican reforms, which created a supreme judicial council with administrative and disciplinary duties as well as a separate tribunal of judicial inspection which handles complaints against the judiciary), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 190, 191.

5. The Judicial Code of Ethics should be revised in keeping with international best practices. At a minimum, the Code should be amended to:

- Prohibit *ex parte* communications with parties or their lawyers.¹⁵⁸
- Prohibit high court or senior judges from discussing pending or prospective cases with junior or lower court judges.
- Prohibit judges from hearing any case where a relative was involved in any part of the case, including as a lower court judge hearing the case, a prosecutor trying the case, or an attorney or party on either side of the litigation.¹⁵⁹
- Prohibit judges from engaging in any employment other than as a judge, or from owning, in whole or in part, any business enterprise.¹⁶⁰
- Clearly define what constitutes a conflict of interest and prohibit judges from hearing any case in which there is a real or apparent conflict of interest.¹⁶¹
- Prohibit judges from discussing pending or prospective litigation with any individual outside the court, whether a private individual or government official.

6. Rigorous asset and income disclosures should be required, and the burden should be placed on judges to document lawful sources for all income and assets.¹⁶²

¹⁵⁸ See Hammergren, *supra* note 7, at 77 (intimating that *ex parte* communications, though not always “readily perceived as corruption by the lay person,” are nevertheless a damaging form of judicial corruption).

¹⁵⁹ See Greg Mayne, *Judicial Integrity: The Accountability Gap and the Bangalore Principles* (supporting judicial restrictions to prohibit members of the judiciary from hearing cases involving family members, as well as prohibiting family members from appearing before judges in any capacity), in GLOBAL CORRUPTION REPORT 2007, *supra* note 5, at 40, 42.

¹⁶⁰ See Rose-Ackerman, *supra* note 5, at 21 (noting that the United States has strict laws restricting business activities of judges).

¹⁶¹ See Transparency International, *supra* note 155, at 170 (advocating the need for a clear description of “conflict of interest” and a requirement that judges report such conflicts of interest and recuse themselves from cases in which conflicts exist).

7. Judges should be required to disclose the identities of all relatives (including their degree of relation) who are, or were, previously judges, prosecutors, or attorneys.

8. A judicial “family tree” should be constructed and publicized to highlight family connections with the judiciary and to help monitor conflicts of interests.

Special Anti-Corruption Measures

1. A jury system should be considered—at least in criminal cases which defendants face jail time and in civil matters where the amount in dispute is over Tug 10 million.¹⁶³

2. Individuals who report judicial corruption should receive whistleblower protection. Such protection must include immunity from prosecution and immunity from civil or criminal liability for defamation should the corruption not ultimately be substantiated (at least in absence evidence of malice or actual knowledge by the individual that the allegation was false at the time it was made).¹⁶⁴

3. Judges should be rotated to different courts, including courts in different Aimags and Soums in order to mitigate the corrupting effect of social exchange relationships. Such rotations should ideally require

¹⁶² See Pepys, *supra* note 148, at 9 (advocating for thorough verification and monitoring system of judges’ assets). See also Rose-Ackerman, *supra* note 5, at 21 (highlighting the United States’ practice of strict asset disclosure requirements for judges).

¹⁶³ See Brent T. White, *Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies*, 43 CORNELL INT’L L. J. (forthcoming 2010), available at <http://ssrn.com/abstract=1359338> (last visited Oct. 28, 2009) (manuscript at 3) (arguing that juries can serve as an effective means of combating judicial corruption and of increasing public trust in the fairness of the judicial process).

¹⁶⁴ See Paul Latimer & A.J. Brown, *Whistleblower Laws: International Best Practice* 18-22, (Monash U. Dep’t of Bus. L. & Taxation Research Paper No. 1326766, 2008), available at <http://ssrn.com/abstract=1326766> (last visited Oct. 28, 2009) (finding that best practices of whistleblower protection laws include support of disclosure of wrongdoing as well as trust in the system stemming from protection from civil or criminal liability, discrimination and retaliation).

judges to move to a different court every few years.¹⁶⁵ A less disruptive alternative, however, might be to require judges to rotate during parts of the year (such as during the summer months) to courts in different Aimags or Soums.

¹⁶⁵ See, e.g., Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L., 793, 803 (1997) (proposing that the Chinese judiciary system follow example of the Chinese imperial system which required magistrates to move every three years to decrease the development of collusive relationships).

APPENDIX B: SURVEY OF THE STATUS OF COURT REFORM IN
MONGOLIA

This survey seeks your input on the status of court reform in Mongolia. Your responses will remain anonymous. If you do not have sufficient knowledge to respond to any particular item, please leave it blank.

Years in Legal Profession: _____

Current Position (optional): _____

Years in Current Position (optional): _____

Please state your agreement or disagreement with the statements below according to following scale:

Strongly disagree	1
Disagree	2
Neutral	3
Agree	4
Strongly Agree	5

- | | | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|---|---|---|---|
| 1. Judges are well-qualified. (Judges have formal university-level legal training and have practiced before tribunals before taking the bench.) | 1 | 2 | 3 | 4 | 5 |
| 2. Judges are well-trained. (Before taking the bench judges are required to take relevant courses concerning basic substantive and procedural areas of the law and the role of the judge in society.) | 1 | 2 | 3 | 4 | 5 |
| 3. Judges receive adequate continuing legal education. (Judges must undergo, on a regular basis professionally prepared legal education courses, which adequately inform them of changes and developments in the law.) | 1 | 2 | 3 | 4 | 5 |
| 4. The number of judges who are members of ethic and religious minorities adequately reflects the percentage of ethic and religious minorities in the overall population. | 1 | 2 | 3 | 4 | 5 |

- | | | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|---|---|---|---|
| 5. The number of male and female judges is roughly equal at all levels of the court system. | 1 | 2 | 3 | 4 | 5 |
| 6. Court decisions are respected and enforced by other branches of government | 1 | 2 | 3 | 4 | 5 |
| 7. The courts provide adequate oversight over the administrative practices of the executive branch. (In other words, the court has the power to review administrative acts and to compel the government to act where a legal duty to act exists—and it exercises this power when appropriate.) | 1 | 2 | 3 | 4 | 5 |
| 8. Court decisions may be reversed only through the appellate process. | 1 | 2 | 3 | 4 | 5 |
| 9. Courts have adequate subpoena, contempt, and enforcement powers. | 1 | 2 | 3 | 4 | 5 |
| 10. The courts' subpoena, contempt, and enforcement powers are utilized and supported by other branches of government. | 1 | 2 | 3 | 4 | 5 |
| 11. Other branches of government do not override or ignore court decisions, or if they do, they are subject to legal action. | 1 | 2 | 3 | 4 | 5 |
| 12. The overall budget of the courts is adequate to satisfy the demand for court services. | 1 | 2 | 3 | 4 | 5 |
| 13. The overall budget of the courts has increased proportionately with the growth of the national budget. | 1 | 2 | 3 | 4 | 5 |
| 14. The judiciary receives a share of the national budget reflective of its position as co-equal branch of government | 1 | 2 | 3 | 4 | 5 |
| 15. Offices provided to judges and court administrators are adequate to allow performance of their duties | 1 | 2 | 3 | 4 | 5 |
| 16. The court system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner. | 1 | 2 | 3 | 4 | 5 |

17. Each judge has the staff support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research. 1 2 3 4 5
18. A system exists so that new court positions are created as needed 1 2 3 4 5
19. Judges' salaries are adequate. (Judges' salaries meet some reasonable proportion of good wage in private sector, are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income). 1 2 3 4 5
20. Court buildings provide a respectable environment for the dispensation of justice with adequate infrastructure. 1 2 3 4 5
21. The court system has sufficient input and control over its own budget. (The courts have a meaningful opportunity to influence the amount of money allocated to the courts by the legislative and/or executive branches, and, once funds are allocated to the courts, the courts have control over their own budget and how such funds are expended). 1 2 3 4 5
22. The selection and appointment process fosters the selection of independent, impartial judges. (Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system fosters the selection of independent, impartial judges). 1 2 3 4 5
23. There is adequate security for judges. (Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination). 1 2 3 4 5

24. Judges have guaranteed tenure. Judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration. 1 2 3 4 5
25. Judges are promoted through the court system on the basis of objective criteria such as ability, integrity, and experience. 1 2 3 4 5
26. Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria. 1 2 3 4 5
27. Once assigned to a case, a judge may be removed only for good cause, such as a conflict of interest or an unduly heavy workload. 1 2 3 4 5
28. A judges' association exists, the sole aim of which is to protect and promote the interests of the courts, and this organization is active. 1 2 3 4 5
29. Court decisions are free from political influence from other branches of government or other public officials. 1 2 3 4 5
30. Court decisions are not influenced by payments, gifts, or favors from litigants or other interested parties. 1 2 3 4 5
31. Court decisions are free from impropriety. Family, social, business, or other relationships do not influence judges' court conduct or judgment. 1 2 3 4 5
32. Court decisions are free from the appearance of impropriety. Judges refrain from hearing cases in which the judge's family, social, business, or other relationships may create the appearance of a conflict of interest, whether or not such a conflict actually exist. 1 2 3 4 5

33. Judges refrain from ex parte communications. (Judges refrain from substantive communication with parties and their attorneys regarding matters before the court outside the presence of the other parties or their attorneys). 1 2 3 4 5
34. Trial court decisions are reached without any undue influence from senior judges within the courts (e.g., chief judges, Supreme Court judges, etc...). 1 2 3 4 5
35. The code of ethics for judges adequately defines and prohibits judges from hearing cases in which they have a conflict of interest. 1 2 3 4 5
36. The code of ethics for judges prohibits ex parte communications. 1 2 3 4 5
37. The code of ethics for judges prohibits judges from engaging in political activity. 1 2 3 4 5
38. A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning misconduct by individual judges. 1 2 3 4 5
39. Complaints of misconduct by judges are adequately investigated. 1 2 3 4 5
40. Complaints of misconduct by judges are investigated without political interference from other branches of government. 1 2 3 4 5
41. Investigations of misconduct by judges are not influenced by unofficial payments, gifts, or favors from judges or other interested parties. 1 2 3 4 5
42. Supreme Court and significant appellate opinions are subjected to academic scrutiny. 1 2 3 4 5
43. Supreme Court and significant appellate opinions are subjected to scrutiny by the media and the general public. 1 2 3 4 5

44. Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise. 1 2 3 4 5
45. Courtroom proceedings are open to the public and the media. 1 2 3 4 5
46. Courtrooms have adequate space to accommodate the public and the media. 1 2 3 4 5
47. Court decisions are generally a matter of accessible public record. 1 2 3 4 5
48. Supreme Court and significant appellate opinions are published. 1 2 3 4 5
49. Transcripts or some other reliable record of courtroom proceedings are maintained and are available to litigants and their attorneys. 1 2 3 4 5
50. Transcripts or some other reliable record of courtroom proceedings are maintained and are available to the media and general public. 1 2 3 4 5
51. The court system maintains an effective and accessible case filing and tracking system that ensures cases are heard in a reasonably efficient manner. 1 2 3 4 5
52. Court users have easy access to information on the status of their case. 1 2 3 4 5
53. Current law is distributed and indexed. (There is a nationally recognized system for indexing current domestic laws and jurisprudence and identifying and organizing changes in the law). 1 2 3 4 5
54. Procedural rules for handling cases are standardized and time limits are set for the completion of various stages of litigation. 1 2 3 4 5
55. Judges follow and enforce procedural rules. 1 2 3 4 5
56. Rules of evidence exist as to what evidence judges may or may not consider. 1 2 3 4 5

57. Judges follow any existing rules of evidence (Judges do not consider improper evidence nor exclude proper evidence). 1 2 3 4 5
58. Court standards for evaluating legal arguments exist and are applied in a predictable fashion. 1 2 3 4 5
59. The pre-trial settlement of disputes is encouraged but not forced. 1 2 3 4 5
60. Established alternative dispute resolution mechanisms such as mediation and arbitration provide a viable alternative to court processes. 1 2 3 4 5

Please add any comments relating to any of your responses above. In particular, we would be very interested in your thoughts as to the most pressing issues, if any, that need to be addressed in reforming the Mongolian Courts. Please use additional pages as necessary.

APPENDIX C: RESULTS OF SURVEY OF THE STATUS OF COURT REFORM IN MONGOLIA

Survey Question	Strongly	Disagree	Neutral	Agree	Strongly	Avg.	Disagree	Agree /
	Disagree	(2)	(3)	(4)	Agree		/ Strongly	Strongly
	(1)	(2)	(3)	(4)	(5)		Disagree	Agree
1. Judges are well-qualified. (Judges have formal university-level legal training and have practiced before tribunals before taking the bench.)	14%	52%	14%	20%	0%	2.4	66%	20%
2. Judges are well-trained. (Before taking the bench judges are required to take relevant courses concerning basic substantive and procedural areas of the law and the role of the judge in society.)	19%	38%	24%	19%	0%	2.4	57%	19%
3. Judges receive adequate continuing legal education. (Judges must undergo, on a regular basis, professionally prepared legal education courses, which adequately inform them of changes and developments in the law.)	0%	19%	33%	43%	5%	3.3	19%	48%
4. The number of judges who are members of ethnic and religious minorities adequately reflects the percentage of ethnic and religious minorities in the overall population.	26%	16%	37%	21%	0%	2.5	42%	21%
5. The number of male and female judges is roughly equal at all levels of the court system.	29%	48%	19%	5%	0%	2.0	77%	5%

	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
6. Court decisions are respected and enforced by other branches of government.	9%	41%	18%	23%	9%	2.7	50%	32%
7. The courts provide adequate oversight over the administrative practices of the executive branch.(In other words, the court has the power to review administrative acts and to compel the government to act where a legal duty to act exists—and it exercises this power when appropriate.)	18%	46%	18%	18%	0%	2.3	64%	18%
8. Court decisions may be reversed only through the appellate process.	4.5%	4.5%	9%	73%	9%	3.8	9%	82%
9. Courts have adequate subpoena, contempt, and enforcement powers.	4.5%	4.5%	9%	59%	23%	3.9	9%	82%
10. The courts' subpoena, contempt, and enforcement powers are utilized and supported by other branches of government.	0%	5%	18%	68%	9%	3.8	5%	77%
11. Other branches of government do not override or ignore court decisions, or if they do, they are subject to legal action.	9%	27%	22%	36%	5%	3.0	36%	41%

		Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
12.	The overall budget of the courts is adequate to satisfy the demand for court services.	14%	19%	38%	24%	5%	2.8	33%	29%
13.	The overall budget of the courts has increased proportionately with the growth of the national budget.	5%	14%	33%	42%	5%	3.0	19%	47%
14.	The judiciary receives a share of the national budget reflective of its position as co-equal branch of government.	5%	14%	33%	42%	5%	3.2	19%	47%
15.	Offices provided to judges and court administrators are adequate to allow performance of their duties.	0%	41%	9%	41%	9%	3.2	41%	50%
16.	The court system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.	0%	5%	18%	64%	14%	3.9	5%	78%
17.	Each judge has the staff support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.	0%	10%	10%	62%	18%	3.7	10%	80%
18.	A system exists so that new court positions are created as needed.	14%	14%	52%	19%	0%	2.8	28%	19%

Survey Question	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
19. Judges' salaries are adequate.(Judges salaries meet some reasonable proportion of good wage in private sector, are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income).	9%	27%	18%	32%	14%	3.0	36%	46%
20. Court buildings provide a respectable environment for the dispensation of justice with adequate infrastructure.	27%	36%	32%	0%	5%	2.1	63%	5%
21. The court system has sufficient input and control over its own budget. (The courts have a meaningful opportunity to influence the amount of money allocated to the courts by the legislative and/or executive branches, and, once funds are allocated to the courts, the courts have control over their own budget and how such funds are expended).	0%	32%	27%	36%	5%	3.1	32%	41%

Survey Question	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
22. The selection and appointment process fosters the selection of independent, impartial judges. (Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system fosters the selection of independent, impartial judges).	18%	36%	14%	27%	5%	2.7	54%	32%
23. There is adequate security for judges. (Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination).	14%	41%	32%	14%	0%	2.5	55%	14%
24. Judges have guaranteed tenure. Judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.	0%	9%	14%	68%	9%	3.9	9%	77%
25. Judges are promoted through the court system on the basis of objective criteria such as ability, integrity, and experience.	5%	18%	41%	36%	0%	3.1	23%	36%

	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
26. Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.	5%	27%	27%	41%	0%	3.0	32%	41%
27. Once assigned to a case, a judge may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.	0%	32%	23%	50%	0%	3.1	32%	50%
28. A judges' association exists, the sole aim of which is to protect and promote the interests of the courts, and this organization is active.	20%	20%	40%	5%	0%	2.3	40%	5%
29. Court decisions are free from political influence from other branches of government or other public officials.	19%	24%	38%	19%	0%	2.5	43%	19%
30. Court decisions are not influenced by payments, gifts, or favors from litigants or other interested parties.	23%	54%	23%	0%	0%	2.0	77%	0%
31. Court decisions are free from impropriety. Family, social, business, or other relationships do not influence judges' court conduct or judgment.	32%	41%	18%	9%	0%	2.0	73%	9%

Survey Question	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
32. Court decisions are free from the appearance of impropriety. Judges refrain from hearing cases in which the judge's family, social, business, or other relationships may create the appearance of a conflict of interest, whether or not such a conflict actually exist.	18%	41%	32%	9%	0%	2.3	59%	9%
33. Judges refrain from ex parte communications. Judges refrain from substantive communication with parties and their attorneys regarding matters before the court outside the presence of the other parties or their attorneys.	27%	55%	9%	9%	0%	2.0	82%	9%
34. Trial court decisions are reached without any undue influence from senior judges within the courts. Senior judges include chief judges, Supreme Court judges, etc.	23%	41%	23%	14%	0%	2.3	64%	14%
35. The code of ethics for judges adequately defines and prohibits judges from hearing cases in which they have a conflict of interest.	14%	41%	23%	23%	0%	2.5	55%	23%
36. The code of ethics for judges prohibits ex parte communications.	24%	29%	33%	14%	0%	2.3	53%	14%

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
Survey Question	(1)	(2)	(3)	(4)	(5)			
37. The code of ethics for judges prohibits judges from engaging in political activity.	5%	27%	36%	32%	0%	2.9	32%	32%
38. A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning misconduct by individual judges.	9%	32%	32%	27%	0%	2.8	41%	27%
39. Complaints of misconduct by judges are adequately investigated.	23%	23%	31%	23%	0%	2.5	46%	23%
40. Complaints of misconduct by judges are investigated without political interference from other branches of government.	14%	18%	50%	14%	5%	2.7	32%	19%
41. Investigations of misconduct by judges are not influenced by unofficial payments, gifts, or favors from judges or other interested parties.	5%	36%	41%	18%	0%	2.7	41%	18%
42. Supreme Court and significant appellate opinions are subjected to academic scrutiny.	27%	41%	14%	14%	5%	2.3	68%	19%
43. Supreme Court and significant appellate opinions are subjected to scrutiny by the media and the general public.	18%	32%	9%	36%	5%	2.7	50%	41%

Survey Question	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
44. Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise.	9%	32%	9%	36%	5%	2.6	41%	41%
45. Courtroom proceedings are open to the public and the media.	18%	41%	18%	23%	0%	2.5	69%	23%
46. Courtrooms have adequate space to accommodate the public and the media.	27%	55%	9%	9%	0%	2.0	82%	9%
47. Court decisions are generally a matter of accessible public record.	18%	50%	5%	23%	0%	2.5	68%	23%
48. Supreme Court and significant appellate opinions are published.	27%	59%	0%	14%	0%	2.2	86%	14%
49. Transcripts or some other reliable record of courtroom proceedings are maintained and are available to litigants and their attorneys.	5%	9%	17%	64%	5%	3.5	14%	69%
50. Transcripts or some other reliable record of courtroom proceedings are maintained and are available to the media and general public.	27%	36%	23%	14%	0%	2.2	63%	14%

	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
51. The court system maintains an effective and accessible case filing and tracking system that ensures cases are heard in a reasonably efficient manner.	9%	41%	23%	27%	0%	2.7	50%	27%
52. Court users have easy access to information on the status of their case.	36%	46%	9%	9%	0%	1.9	82%	9%
53. Current law is distributed and indexed.(There is a nationally recognized system for indexing current domestic laws and jurisprudence, and identifying and organizing changes in the law).	18%	27%	14%	36%	5%	2.7	45%	41%
54. Procedural rules for handling cases are standardized and time limits are set for the completion of various stages of litigation.	27%	27%	14%	32%	0%	2.4	54%	32%
55. Judges follow and enforce procedural rules.	23%	45%	18%	14%	0%	2.2	68%	14%
56. Rules of evidence exist as to what evidence judges may or may not consider.	18%	45%	14%	23%	0%	2.4	63%	23%
57. Judges follow any existing rules of evidence. Judges do not consider improper evidence, nor exclude proper evidence.	27%	36%	14%	23%	0%	2.3	63%	23%

	Strongly Disagree (1)	Disagree (2)	Neutral (3)	Agree (4)	Strongly Agree (5)	Avg.	Disagree / Strongly Disagree	Agree / Strongly Agree
58. Court standards for evaluating legal arguments exist and are applied in a predictable fashion.	32%	32%	23%	14%	0%	2.1	64%	14%
59. The pre-trial settlement of disputes is encouraged but not forced.	14%	14%	14%	58%	0%	3.2	28%	58%
60. Established alternative dispute resolution mechanisms such as mediation and arbitration provide a viable alternative to court processes.	18%	36%	23%	18%	5%	2.5	54%	23%