
Overview of the Legal Structure of Foreign Investment in the DPRK

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Abstract

Since 1984 North Korea has been undergoing a relatively brisk legal overhaul. However, changes made thus far have not been adequate enough to erase the distrust foreign investors still feel toward the DPRK on account of the leadership's past behavior. Though it is difficult to say that the North has turned itself around, it is obvious that the North is well aware of its need to do so. Steps seen so far show a leadership that is willing to change yet overly concerned with losing power. This and the unique relationship the DPRK has with its neighbors have resulted in a series of patchwork legal structures that often overlap, contradict, or fail to adequately cover matters of concern. On the other hand, if one takes into account the late stage at which the DPRK embraced foreign investment, then this is a relatively new concept for Pyongyang, and the pace at which it has expanded its legal structures to meet the needs and demands of foreign enterprises and individual investors is commendable.

Looking at the improvements in North Korea, from Rajin-Sonbong to Kaesong, Mt. Kumgang and Sinuiju, one can see that Pyongyang has learned from its failures and is willing, at least on a small scale, to relinquish some legal authority over economic matters in order to provide an internationally competitive investment atmosphere. There are still many risks associated with investment in North Korea, some of which could be alleviated by more legislation or the revision or abolition of other legislation. There are several areas of investment in which it is unnecessarily vague which set of laws takes precedence, or under what circumstances this could change. Continued cooperation and increasing investment will bring these items more to the forefront where it will fall on the collective shoulders of the DPRK's Supreme People's Assembly to continue to improve the legal framework that provides an environment conducive to foreign investment.

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I. Introduction

North Korea (the North, DPRK) is going to great lengths in order to attract foreign investment and is desperate for hard currency as it intends to turn around its currently flagging economy. The way the North is going about it, however, results in a legal maze through which potential investors and foreign governments must weave. Rather than through universal, standardized legal procedures, the North has opened itself up to outside investment gradually, partially, and inconsistently.

The North Korean constitution provides some guidelines for overseas investment, but the DPRK has also developed a number of laws concerning foreign investment that include laws designating Special Economic Zones (SEZs) and a Special Administrative Region (SAR), all with their own unique structure. Broadly speaking, North Korea has developed two different sets of legal system for foreign investment: one for investors in general, the other for investors in special economic zones.

The nationalistic ties with South Korea mean that while there is no clear-cut legal differentiation, investors from South Korea (the South or ROK) do not fall under the same set of rules entertained by other foreigners, as neither Korea recognizes the sovereignty of the other.

As a preface to the more detailed analyses of issues that follow in this special issue on law in North Korea, this paper shall provide a general overview of North Korea's legal system for foreign investment.

II. Constitutional Grounds for Foreign Investment

The North Korean constitution exists essentially as a political manifesto and the discrepancy between what is written and what is practiced is so pervasive that the issue of legal ground is entirely irrelevant on many occasions. That said, the constitution of the DPRK can to some extent act as a prism that affords one an understanding of the state, and how its leaders would like to see it perform.

The North's constitution has undergone three major revisions since its introduction in 1948.¹⁾ That document, largely modeled after the 1936 Stalinist

Constitution of the former Soviet Union (USSR), governed North Korea for twenty-four years. While this constitution never once mentioned the word 'socialism,' economic guidelines restricted most activities to the state. This included Article 5, which restricted foreign trade to the state or to state-run agencies, and Article 10, which called for a national economic plan. These early years of the DPRK depended heavily on USSR support, and foreign investment took on the form of paternalistic assistance. The fifties and sixties saw a decline in Soviet economic assistance and a move toward DPRK self-sufficiency, in line with its guiding *Juche* (self-sufficiency) philosophy.

The first major constitutional revision in 1972 brought these changes to the forefront.²⁾ The constitution was expanded from ten chapters and 104 articles to eleven chapters and 149 articles, with Chapter Two dedicated to the economy. Article 24 stressed the importance of an independent national economy while Article 16 stated that North Korea would only negotiate with other states on the basis of non-interference in each other's internal affairs. This article would function to allow negotiations regarding foreign investment with many non-socialist states, although the constitution did not have any explicit provision allowing foreign investment. Article 18 reversed the previous constitution's allowance of private enterprise by fully nationalizing all production facilities, and Article 31 bolstered this by declaring that the economy was to be developed and run by the state.

This constitution represented the DPRK for the following two decades. Despite the emphasis on independent economics, this period also saw a number of changes designed to invite foreign investment, including enacting a joint venture law, though constitutional grounds for it were absent.

It was not until 1992 that the constitution explicitly addressed North Korea's need for foreign investment. Although the constitutional amendment of 1992 was largely designed to ensure a smooth transition in power from Kim Il Sung to his son, Kim Jong Il, it was also an opportunity to realign DPRK constitutional law with the reality of the then current economic environment. In April of that year, in a seemingly small change, one line was added. Article 37 was altered to read, "The State shall encourage institutions, enterprises, and organizations in our country to joint ventures and cooperation of enterprise with foreign corporations and

104 articles.

2) The 1972 Constitution is referred to as the "Socialist Constitution."

1) The 1948 Constitution is referred to as the "People's Democratic Constitution," consisting of ten chapters of

individuals.” While the Equity Joint Venture Act had been in place since 1984,³⁾ there was no constitutional backing for it until this revision. In what might be seen as foreshadowing North Korea’s warming up to the international economic community, the 1992 constitution dropped all references to Marxism,⁴⁾ and the official stance toward South Korea softened considerably,⁵⁾ thus allowing for some exploration into economic exchanges and South Korean investment.

While the 1998 revision of the current constitution was largely due to the death of Kim Il Sung and the ascendancy of Kim Jong Il, it also offered an opportunity to again redefine the economic environment to overcome persistent destitution. Chapter Two of the new constitution was changed to lessen the tight grip of collectivism and to accommodate market-oriented economics to some extent.⁶⁾

For example, social organizations were added to the list of subjects that could own the means of production, in addition to the state and cooperative organizations.⁷⁾ In addition, the objects of state ownership were reduced, while those of private ownership as well as those of social and cooperative organizations were expanded.⁸⁾ Citizens can now legitimately earn income from economic activities, in addition to the products of individual sideline activities, including those from the gardens of cooperative farmers.⁹⁾ This means that citizens can earn money through commercial activities, something that had been tolerated since the collapse of the public distribution system and is now legalized by the constitution. This amounts to the initial reception of a primitive market economy. In this regard, the granting of citizens’ freedom to travel should be noted.¹⁰⁾ Individuals can travel for business as long as constitutional expression is concerned, although residents still need licenses to travel.¹¹⁾ Protection of patent rights, in addition to existing inventor’s rights and

3) This law was first adopted by the Standing Committee of the Supreme People’s Assembly on September 8, 1984.

4) Compare arts. 4, 10 and 16 of 1972 Constitution with arts. 3, 12 and 17 of 1992 Constitution.

5) Compare art. 5 of 1972 Constitution and art. 9 of 1992 Constitution.

6) For the 1998 constitutional revision, see Dae-Kyu Yoon, “The Constitution of North Korea: Its Changes and Implications,” *Fordham International Law Journal*, Vol. 27, No. 4 (2004), pp.1300-1304.

7) *See* 1998 Const., art. 20.

8) *See id.*, arts. 21, 22, 24.

9) Compare 1998 Constitution, art. 24 with 1992 Constitution, art. 24.

10) 1998 Const., art. 75.

11) This provision for freedom to travel seems to be included to legalize residents’ travel to seek food during

copyrights, was newly included in consideration of the expanded protection of intellectual property rights.¹²⁾

The current constitution also strengthens the autonomy of individual economic entities.¹³⁾ Expansion of independent enterprises will hopefully bring about expanded autonomy in the economic management of individual entities. The introduction of the concepts of costs, prices, and profits is concerned with the introduction of the market economy, although constitutionalization of these concepts will not automatically bring about a market economy.

Under the previous constitution, foreign trade activities were monopolized by the state. But the current constitution allows social and cooperative organizations to engage in them.¹⁴⁾ Undoubtedly, all of these changes will contribute to providing a more favorable environment for foreign investment.

Directly related with foreign investment, the 1998 constitution explicitly provides constitutional grounds for creating a special economic zone,¹⁵⁾ where foreign investors can enjoy broader freedom of economic activities. Although the Rajin-Sonbong Free Economic and Trade Zone was created in 1993 without explicit constitutional grounds, this new inclusion signifies a more progressive direction toward SEZs. This proved to be true when North Korea declared three laws for three SEZs in 2002 as is described later in this paper.¹⁶⁾

III. Evolution of Foreign Investment Laws

The evolution of North Korean investment laws can be loosely fitted into three stages. The first stage, kicking off in 1984, was the realization of the need to open up investment opportunities to foreign investors and enterprises by enacting laws for

the rampant food crisis since 1994, and the State could not but accept such travel because the crisis was out of control to those who were starving to death. Therefore, creation of the freedom to travel is the acceptance of fait accompli, but does not signify the automatic improvement in citizens’ fundamental rights.

12) *See* 1998 Const., art. 74.

13) *See id.*, art. 33.

14) *See id.*, art. 36.

15) *See id.*, art. 37.

16) Three laws were promulgated to create the Mt. Kungang Tourist Zone, Kaesong Industrial Complex, and Sinuiju Special Administrative Region respectively. *See infra* at 12-21.

foreign investment. Without any significant prior experience, several laws were passed in an effort to muddle through an “opening-up” process. Before the 1992 constitutional revision, the North was well aware of the success of China’s 1979 constitutional changes and thus itself sought out the best method to open up to the foreign community. Laws regarding establishment and operation of equity joint ventures, as well as income tax for foreigners and companies involved in said joint ventures were promulgated in 1984 and 1985. These were primarily aimed at gaining hard currency from investment from overseas. Most foreign investors during this period were ethnic Koreans living in Japan.¹⁷⁾

The second stage is defined by the establishment of a Free Economic and Trade Zone¹⁸⁾ and preparation for a more comprehensive legal framework for foreign investment. Following the unification of Germany and the collapse of the Soviet Union, DPRK foreign trade plummeted. The socialist network literally vanished, leaving North Korea desperately in need of foreign currency. With the equity joint venture law already in place, the North needed to actively pursue foreign investment. According to the new legal framework, three modes of investment were created. Equity joint ventures or contractual joint ventures could be established in any place, while wholly foreign owned enterprises could be established within the boundaries of the Free Economic and Trade Zone until the revision in 1999 of the relevant laws.

During the 1990s the North took concrete steps to build an infrastructure to invite and manage foreign investment. Despite the efforts of the North Korean government, it failed to create an attractive investment environment, and foreign investors were skeptical of injecting the much-needed hard currency into the North’s system.

The collapse of the socialist network, the accumulation of poorly managed production and economic systems, and the combined effects of shortsighted agricultural techniques and uniquely harsh weather conditions put the DPRK economy in a tailspin in the mid 1990s, and as recovery was not imminent, Pyongyang again adjusted its approach to foreign investment. Major amendments to

17) The Jochongryeon, or pro-North Korean resident’s league in Japan, has been an important source of foreign currency since the establishment of a North Korean state.

18) The Rajin-Sonbong area, which is in the far Northeast region, was announced by the cabinet as North Korea’s first Free Economic and Trade Zone in 1991 even before the constitutional revision of 1992. The basic law to govern this Free Economic and Trade Zone was promulgated in 1993.

foreign investment laws were passed between February 1999 and October 2000¹⁹⁾ after the constitutional amendment of 1998. Catchphrases such as ‘new thought’ and ‘practicality’ were emphasized and more energetic reform measures were put into place. In time, the so-called Economic Reform Measures of July 2002 were launched in order to vitalize the dying economy by entertaining more market-oriented measures. By this time, Rajin-Sonbong was written off as a failure and another form of ‘special zone’ was sought out, which could be labeled the third stage. The results can be seen in Sinuiju,²⁰⁾ Kaesong,²¹⁾ and Mt. Kumgang.²²⁾ Of these three, Mt. Kumgang is the most established and most simplistic. It deals with one main investor, South Korea’s Hyundai Group, and regulations and laws are legislated for mainly tourism as new situations arise. Kaesong is well into the development stage, with production already underway, yet many legal loopholes and technicalities remain. Sinuiju is the most complex and most undeveloped of the three.

IV. Fundamental Laws for Foreign Investment

In 1984 the Equity Joint Venture Law²³⁾ was passed, and was supplemented one year later with the Joint Venture Tax Law and Alien Income Tax Law. Following the 1992 constitutional reform that included official approval of foreign investment, the same year saw the enactment of the Foreign Investment Law, Foreign Enterprise Law, and Contractual Joint Venture Law.²⁴⁾ The following year, the Free Economic

19) For example, the Foreign Investment Law, Foreign Investment Bank Law, Foreign Exchange Control Law, Land Lease Law, the Equity Joint Venture Law, Contractual Joint Venture Law, and the Wholly Foreign-Owned Enterprises Law were revised during this period. The Law for the Free Economic and Trade Zone was replaced by the Law for Rajin-Sonbong Economic and Trade Zone, removing “Free” and limiting jurisdiction to the specified area. However, the direction of these revisions was not toward more opening but toward more restriction, although the 1998 constitutional change was made toward more opening and a market-oriented system.

20) The Sinuiju Special Administration Region was established in 2002 and is located on the Chinese border. The project is still only on paper.

21) The Kaesong Industrial Complex entered its pilot stage after breaking ground in 2003.

22) The first South Korean tourists traveled to the Mt. Kumgang Tourist Zone in 1998.

23) This law was revised several times, that is, in 1994, 1999 and, finally, in 2001.

24) The Foreign Investment Law, the Foreign Enterprises Law and the Contractual Joint Venture Law were adopted by the Standing Committee of the Supreme People’s Assembly in 1992, and revised in 1999.

and Trade Zone Law²⁵⁾ was passed. The existing Equity Joint Venture Law underwent significant change in 1994. These were all general frameworks covering a broad spectrum of investment areas and were meant as a sign of official approval for these types of economic activity. The details were covered by over 100 specific laws and regulations for implementation and oversight, which were passed mainly between 1994 and 1996.

The Foreign Investment Law, which has twenty-two articles, is a basic law concerning general foreign investment. It provides general principles to protect the rights and interests of foreign investors. Establishment, management protection, benefits, labor, tax, restriction of nationalization, remittance of fruit, protection of business secrets, method of dispute resolution and so on are stipulated.

The Foreign Enterprise Law, with thirty-one articles, is the governing law for wholly foreign owned enterprises, which at the moment are only permitted in the Rajin-Sonbong Economic and Trade Zone.²⁶⁾

The Contractual Joint Venture Law, with twenty-one articles, creates a unique mode of foreign investment. According to this mode of joint venture, a foreign partner is not allowed to participate in production and management even though he or she has invested money. While dividends can be collected, production and management responsibilities fall solely on the North Korean partner.²⁷⁾ However, a foreign investor is not responsible for sharing losses. This mode seems to have been invented to recruit investment from overseas Koreans who have sympathy for North Korea and are willing to assist in the form of business, and do not care much about how it is managed. In consideration of the restrictiveness and difficulty in visiting and traveling to North Korea, and thus *de facto* difficulty in the participation in management, this type of joint venture might be preferred. Since there need not be detailed provisions to harmonize both parties concerning management, the governing law is relatively simple in comparison to that for the equity joint venture where a foreign investor also engages in management. When this law was first enacted, there was no restriction on location for this type of joint venture company.

25) The Law on Free Economic and Trade Zone was adopted by the Standing Committee of the Supreme People's Assembly in 1993.

26) Foreign Enterprise Law, art. 1.

27) Contractual Joint Venture Law, art. 2.

However, the 1999 revision restricted joint ventures of this type to the Rajin-Sonbong area in principle, but allowed for exceptions to be made.²⁸⁾ Thus as far as the law is concerned, these types of joint ventures can be established almost anywhere.

The Equity Joint Venture Law, with forty-seven articles, is the basic law for joint ventures with joint management. Both partners must share dividends as well as losses according to the ratio of their investment. Since a foreign investor takes part in both production and management, more details are provided to adjust the mutual relationship concerning management in comparison to the Contractual Joint Venture Law. The restriction on locality is the same as that of the Contractual Joint Venture Law.²⁹⁾ That is, this type of joint venture can be created outside of the Rajin-Sonbong area as well.

The Free Economic and Trade Zone Law of 1993 was replaced by the Rajin-Sonbong Economic and Trade Zone Law in 1999, though there is no substantial difference besides minor expressional changes. This law consists of forty-two articles and governs activities in the Rajin-Sonbong area. The authority of the management office of the area, protection of economic activity, customs, currency, banking, benefits, dispute resolution, and so on are provided.

The most popular type of business involving North Korea and foreigners—including South Koreans—has been processing on commission, which has been conducted, without legal grounds, on the basis of contracts between parties concerned. In consideration of the high risk of other types of businesses or investment, this has been the dominant type of business involving foreign engagement with North Korea. North Korean authorities enacted a law governing this type of business in 2001. The Processing Trade Law provides details concerning this type of business.³⁰⁾

Other laws concerning foreign investment enterprises include the Foreign Investment Enterprise Labor Law passed in 1993 and a series of laws in 1996 including laws on registration, bookkeeping, and accounting oversight of these foreign investment enterprises. Within a short period of time, a range of legislation covering customs, foreign currency management, insurance, environmental

28) *Id.*, art. 5.

29) Equity Joint Venture Law, art. 2.

30) The Regulation for Processing Trade in Rajin-Sonbong area of 1996 was replaced by this upgraded general law for this type of business.

protection, contracts, land and building leases, immigration control, tourism, vehicle registration, pricing, statistics, etc., were established, revealing just how serious the DPRK authorities were about building an attractive investment atmosphere. Afterward, many of them were revised and new laws, such as a bankruptcy law for foreign investors, were legislated. The decision to seek foreign investment and the accompanying international presence within North Korea brought to light a large void in DPRK law.

V. Foreign Investment Laws Regarding Special Economic Zones

North Korea tried for several years to embrace the international market, but these attempts were partial, guarded, and inconsistent. The outcome of foreign investment—not surprisingly—was negligible. The result has been several sets of laws, each written for a specific area and each a reaction to the economic situation at the time. Four special economic zones have been designated in the border regions of the DPRK; Rajin-Sonbong, Sinuiju, Kaesong, and Mt. Kumgang all have separate legal codes concerning investment eligibility, management and development guidelines, and financial activities. Accordingly, all four have had different stories of success and failure. Mt. Kumgang and Kaesong, now both in their early stages, reflect what the North learned from its mistakes in Rajin-Sonbong, and the legal infrastructures in these zones are considerably more complex. Kaesong and Mt. Kumgang, aimed mainly at South Koreans, are already producing goods and hosting South Korean tourists, although the legal systems are not yet complete. To manage these legal webs, North Korea has established a Special Economic Zone Development Agency overseen by the Cabinet. Sinuiju has not been as lucky, as it has been beset by legal problems. However, it was Chinese law, not North Korean, that tripped up Pyongyang's choice for chief administrator of the Sinuiju Special Administrative Region. Bin Yang, a Dutch national and the second richest man then in China, was chosen to run the project but was then subsequently jailed in China for bribery and tax evasion. A replacement has not yet been named.

A. Rajin-Sonbong Economic and Trade Zone

Rajin-Sonbong, set up in 1993, was the first attempt to create a Special Economic Zone in which foreign companies could build factories and inject some hard currency into the ailing North Korean economy. But it, too, has been plagued with problems.

The basic legal structure for the Rajin-Sonbong Economic and Trade Zone was designed to be simple and clear in order to alleviate many of the concerns potential investors had. An official in charge of enticing investors described the legal structure as clearly stipulating that:

“[F]oreign investment shall be protected and all rights of the investor to the invested properties shall be recognized and realized. The right to use land is negotiable and may be disposed of freely in the Zone. All decisions can be made according to demand and supply on the principle of market economy free from any artificial regulation. Foreign-invested businesses can adopt any form of ownership and operation at their own discretion according to their preference and undertake business activities freely. There shall be no discrimination against foreign-invested businesses in the form of special treatments granted to local enterprises in the Zone. The Zone has been made a nearly complete duty-free area where goods and people can move freely, and classification of taxes is simple and clear and the tax rates are low.”³¹⁾

The aforementioned laws are applicable to foreign investors in the Rajin-Sonbong area. Relatively sophisticated legal systems have been provided for this area as it has been around for more than a decade.

Unfortunately for the North Koreans, many obstacles were not cleared and the atmosphere for foreign investment is still bleak. Mistakes such as allowing only DPRK currency or specific convertible currencies to circulate or to be used in business transactions, and excessive interference by DPRK officials kept many investors wary. The governing law of this area, however, has changed in recognition

31) From a speech made by Hwang Jong Nam, Director of the Committee for Promotion of External Economic Cooperation of the DPRK at the second day of the Rajin-Sonbong Zone International Investment and Business Forum on Sept. 13, 1996. <http://www1.korea-np.co.jp/pk/rason/speech/speech2.htm>.

of the less-than free nature of the area by eliminating “Free” from its original title, although legal provisions do remain practically identical.³²⁾

B. Mount Kumgang Tourist Resort Zone

The Mount Kumgang resort area, a project of the South Korean enterprise Hyundai and largely (financially) supported by the South Korean government, has recently turned a profit for the first time since its inception in the late 1990s. Activities within this area are governed by a basic Mt. Kumgang Tourist Zone Law. It consists of twenty-nine articles, as well as a series of more specific regulations based on the law in order to govern a range of activities in the region.³³⁾ This region is unique in that while other regions have a number of investors and firms operating within them, this project is a joint venture between South Korea’s Hyundai-Asan Corporation and its Northern counterpart, and does not face many of the complications that the manufacturing zones do. Both parties worked in close cooperation with each other to draft the regulations for management of (mainly South Korean) tourists and for the operation of facilities. Legal voids were also largely worked out through bilateral negotiations between the two investors. In addition, relevant agreements between the North and South also serve as the governing rules for this area (as is explained in a following article of this issue). As more tourists visit the area and overland travel increases, interaction between North and South Koreans is likely to increase, thus requiring close cooperation between the two governments regarding the legal status of each country’s citizens should a situation arise requiring the involvement of authorities.

32) Rajin-Sonbong area was announced as a Free Economic and Trade Zone in 1991 and followed by the Free Economic and Trade Zone Law in 1993, which was replaced by the Rajin-Sonbong Economic and Trade Zone Law in 1999.

33) Mt. Kumgang Tourist Zone Law was adopted by the Standing Committee of the Supreme People’s Assembly on November 13, 2002. A series of regulations for this area were enacted such as Mt. Kumgang Tourist Zone Real-Estate Regulations (September 21, 2004), Mt. Kumgang Tourist Zone Labor Regulations (May 6, 2004), Mt. Kumgang Tourist Zone Customs Regulations (April 29, 2004), Mt. Kumgang Tourist Zone Advertisement Regulations (May 6, 2004), Mt. Kumgang Tourist Zone Foreign Currency Management Regulations (May 6, 2004),

C. Kaesong Industrial Complex

North Korea passed the Kaesong Industrial Complex Law, which is the basic law of the area, and it was followed by regulations on complex development, company establishment, management agency establishment, taxes, entry and residency, customs, labor, etc.³⁴⁾ This basic law consists of forty-six articles that cover basic rules, development of the complex, administration, establishment and operation of enterprises, and dispute resolution. Three additional supplementary articles clarify that the law is now in effect, that the agreements between the North and South concerning this area have the same effect as this law, and that the final authority to interpret this law is vested in the Supreme People’s Assembly (SPA) of the DPRK.³⁵⁾

These laws effectively create a special industrial zone without the full-blown government structure such as in the Sinuiju Special Administrative Region. Rather, the laws are more focused on investment and industry, and activities of investors. Issues such as culture, health, education, and law and order still fall under the general jurisdiction of North Korea. Article 1 specifies that the Kaesong area be administered according to North Korean laws, which is quite natural since Kaesong is a part of the DPRK. However, Article 6 of this law stipulates that North Korean agencies are not to meddle in business affairs of this area. When the law or regulations do not cover a particular situation, the central management agency under the cabinet and the management agency of this area should discuss and handle it.³⁶⁾ This signifies that North Korean authorities would like to endow

Mt. Kumgang Tourist Zone Management Agency Establishment Regulations (April 29, 2004), Mt. Kumgang Tourist Zone Entry, Sojourn, and Residency Regulations (April 29, 2004), Establishment and Operation of Enterprise Regulations (May 12, 2003), and Mt. Kumgang Tourist Zone Development Regulations (May 12, 2003).

34) The Kaesong Industrial Complex Law was adopted by the Standing Committee of the Supreme People’s Assembly on November 20, 2002. Eleven regulations now apply to the Kaesong Industrial Complex; they are the regulations on 1) development of complex (April 24, 2003), 2) formation and management of enterprises (April 24, 2003), 3) taxation (September 18, 2003), 4) labor (September 18, 2003), 5) formation of a management agency (December 11, 2003), 6) entry and residence (September 11, 2003), 7) customs (December 11, 2003), 8) foreign exchange (February 25, 2004), 9) commercial advertisement (February 25, 2004), 10) real-estate transactions (July 29, 2004), and 11) insurance (September 21, 2004).

35) See the Kaesong Industrial Complex Law, supplementary arts. 1-3.

36) *Id.*, art. 9.

as broad an autonomy to the area as possible. Furthermore, notwithstanding the source of the legislation (i.e. the SPA), most of the laws and regulations were drafted and enacted following close cooperation between North and South Korea, and are based on the principles of market economics. Management and administrative authority are carried out by the Management Agency of the Kaesong Industrial Complex. However, although this is a North Korean agency, South Koreans are appointed as directors in charge in order to impart confidence to foreign investors.³⁷⁾ This is a desirable measure, considering that the vast majority of investors are South Koreans. Enactment of specific laws indicates the North's willingness not only to open up, but also to accept the advice of outside experts who are versed in market economics. Obviously, Pyongyang learned one thing from the failures of the Rajin-Sonbong special area: overzealous administrators are bad for business. Article 3 invites investments from 'Southern and overseas countrymen, and corporations and individuals of other countries' and the following article puts emphasis on safety, social and environmental protection, and technological advancement. Other articles aimed at setting up an independent business environment include Article 7, which guarantees that the government will not expropriate leased land without prior consultation with the investor and then only if social communal interests demand it. Article 31 allows advertising and Article 40 allows free pricing at globally competitive standards. Land is leased for 50 years, allowing some sense of stability for the investor. Circulating currency and credit cards are allowed in the zone, although there is some discrepancy as to the legality of South Korean won, as the money allowed to circulate is referred to as "foreign currency," and that would rule out money from the South—a major point as most if not all of the investment is expected to come from the ROK. Article 33 states that the area is tariff free as long as the goods do not enter North Korea. Taxes have been set at 14 percent, and the minimum wage at US \$50 per month.

Article 8 guarantees some legal rights to South Korean and foreign workers in the area, but more clarification on legal process is required. Article 46 covers the settlement of disputes, but again, more clarification could make this a much more

37) See *id.*, art. 24. South Korean Kim Dong-keun, former president of the ROK government-run Korea Industrial Complex Corporation, was named as the first head of this agency.

attractive investment for foreigners. Article 28 grants South Korean and foreign workers the freedom to use mail and telephone services. It states that travel between the area and South Korea is permitted without a visa, although since one must have a travel permit, that serves the same purpose. Kaesong still falls underneath the watchful eye of the Supreme People's Assembly, and the SPA has the final say in the interpretation of the law. While North Korean administrative bodies cannot interfere with economic affairs, the government has the ability to decide what is and is not deemed an "economic affair," meaning it would be possible that necessary activities such as transportation, education, medical, and sanitation activities could be manipulated by Pyongyang.

D. Sinuiju Special Administrative Region

In September 2002, the Basic Law of the Sinuiju Special Administrative Region (SAR) was promulgated by the Standing Committee of the Supreme People's Assembly.³⁸⁾ This law effectively sets up a Hong-Kong style "one country-two systems" regime. In fact, many of the provisions of the law resemble the Hong-Kong law in format, structure, and wording.³⁹⁾ The law covers a wide range of concerns for the Sinuiju zone, including politics, economics, culture, rights and duties of those who will live there, organizations, and even a separate flag and emblem. The SAR was set up with the intention of providing investors more freedom from meddling by the DPRK government than the Kaesong Industrial Complex does, as it has been granted independent legislative, executive and judicial authority, with the only exceptions being defense and diplomatic representation.⁴⁰⁾ In order to ensure this autonomy, the law also bars those at even the highest levels of the DPRK government from meddling. According to Article 6, members of the cabinet, executive committee, ministry and central organization are all not only barred from participating, but also cannot even send their staff to the region without permission from the governor of the SAR. Article 77 states that

38) This law consists of 101 articles and four supplementary provisions.

39) See Joongi Kim. "The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Gaeseong." *Fordham International Law Journal*, Vol. 27, No. 4 (2004), pp. 1310-1315.

40) Basic Law of the Sinuiju Special Administrative Region, arts. 2, 7, 8.

this governor must be someone held in high regard by the residents, although the position is one appointed by the SPA, which retains the right to remove the governor as well. The governor is not required to be a citizen of the DPRK. The SAR is to have its own passports and conduct consular affairs,⁴¹⁾ although travel restrictions are still an issue. Some semblance of stability is also guaranteed to investors, as the law decrees that it cannot be changed for the next fifty years.⁴²⁾ This means that leased land would be guaranteed until at least 2052. The government is only allowed to expropriate property if it is deemed a threat to national security, and if it is expropriated, compensation must be paid.⁴³⁾

As outlined, legislative duties are to be carried out by an assembly made up of fifteen residents of the SAR, each serving five-year terms. The legislative assembly oversees executive duties, including the actions of the governor. The governor, in turn, oversees the prosecutor's office. The job of head prosecutor is an appointed position, chosen by the governor for a five-year term. Once appointed, the prosecutor is duty-bound by Article 63 to enforce all laws and investigate all crimes, "free from any interference." The Chief of the Court is appointed by the legislature on the recommendation of the governor. The Court's independence is secured, free from any interference.⁴⁴⁾ Although the SAR government is almost independent from Pyongyang, the DPRK Supreme People's Congress still holds on to some control by maintaining the right to interpret the Sinuiju SAR Law.⁴⁵⁾ As there is no nationality requirement for any of the governing positions, it is possible for the entire government, including the governor, to be non-North Korean.

Labor standards are also a part of the law. Minimum age and maximum hours are dictated,⁴⁶⁾ as is the requirement to use North Korean labor. The use of outside labor requires the explicit permission of the SAR's executive office.⁴⁷⁾ While there are sure to be foreigners working in the region, the law is vague on the requirements for permission. Also allowed under Article 42 is the freedom of

41) *Id.* art. 8.

42) *Id.*, arts. 3, 4.

43) *Id.*, art. 17.

44) *Id.*, art. 93.

45) *Id.*, supplementary art. 4.

46) *Id.*, arts. 18, 19.

47) *Id.*, art. 20.

religion, press, publication, assembly, and gathering.

Fiscal policy shows that much was learned from the mistakes of Rajin-Sonbong. In Sinuiju, independent budget, currency, fiscal and financial policies are in place.⁴⁸⁾ In a bid to improve the investment environment, free repatriation and transfer of overseas currency is allowed, as well as tax and tariff benefits.⁴⁹⁾ U.S. Dollars and the Chinese Renminbi have been designated as the official currencies. Unlimited transportation of foreign currencies is protected.⁵⁰⁾

DPRK authorities took bold initiatives to guarantee the success of this region. It would be almost impossible for an independent state to vest more authority to a special economic zone than what North Korea has done with Sinuiju. In spite of its efforts, however, the region has fallen into a state of dormancy due to the unexpected arrest of the first governor by Chinese authorities.

VI. Inter-Korean Agreements as Sources of Governing Laws for South Korean Investors

Both Koreas regard the other as a "special region" rather than a sovereign nation, and therefore South Korean investment to the North has some unique aspects. Whether aforementioned ordinary foreign investment laws are applicable to South Korean investors or not is not always clear. When not expressly stipulated in the laws, North Korean counterparts have been reluctant to apply them to South Koreans. The term "foreigners" in North Korean foreign investment law has often been interpreted as "non-Korean," that is non-North or South Korean. That is why both Koreas have reached many agreements to handle relevant issues between each other through bilateral negotiations. In this regard, inter-Korean agreements are an important source of law governing investment made by South Korea.

Inter-Korean agreements preempt North Korean foreign investment laws. There are a number of agreements, some applicable to general South Korean investment, and some applicable strictly to investment in one or more of the

48) *Id.*, arts. 26, 27.

49) *Id.*, art. 29, 31.

50) *Id.*, art. 23.

North's special economic regions. In 2000, four economic cooperation pacts were hammered out between the two Koreas: investment protection; protection from dual income taxation; dispute resolution and arbitration mechanism; and procedures on payment, clearance and settlement. Other inter-Korean agreements cover procedures for labeling goods with a country of origin, establishment of the structure and management of an inter-Korean arbitration committee, and agreements on road and railway usage. In addition, there are some inter-Korean agreements that apply only to the Kaesong Industrial Complex and Mt. Kumgang Tourist Zone. They deal with telecommunications, customs, quarantine, and entry to and residence in these areas.

Finally, it should be noted that international laws also cannot be ignored with respect to these regions and South Korean investment in them. While the South does not recognize the DPRK as a sovereign nation (and *vice versa*), the international community does,⁵¹⁾ and the South is a signatory to many international agreements, including the Wassenaar Arrangement,⁵²⁾ that affect trade and investment. Preferential treatment such as low or no tariffs, as well as

country-of-origin issues for products manufactured through joint ventures between the North and South may contradict the South's trade agreements with other nations. Also, due to the U.S.-ROK alliance, American sanctions and other related U.S. trade laws such as the Trading with the Enemy Act⁵³⁾ could be relevant.

VII. Conclusion

Since the first big step in 1984, with the passing of the Equity Joint Venture Act, constitutional revisions, legal preparation of a structure for foreign

51) Both Koreas became members of the UN in 1991.

52) The Wassenaar Arrangement promotes transparency and responsibility in transfers of conventional arms and dual-use goods and technologies. Participants are required to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities of undesirable states. This has become an issue in the Kaesong Industrial Complex as South Korean firms wish to use equipment that the United States government feels should be banned from North Korea under this agreement.

53) The Trading with the Enemy Act was enacted in the United States in 1917 and allows the President to freeze the assets of enemy states or those involved in business with enemy states.

investment, and the current Sinuiju SAR, Mt. Kumgang Tourist Zone, and Kaesong Industrial Complex legal frameworks, the North has been undergoing a relatively brisk legal overhaul. But these changes have not been fundamental changes of the government, and the North also has done nothing to erase the distrust foreign investors feel toward the DPRK on account of its defaulting on loan payments in the past. Thus it is still difficult to say that the North has turned itself around. But what can be said with some assurance is that the North is well aware of its need to do so. Steps seen so far show a leadership that is willing to change yet overly concerned with losing power. This and the unique relationship the DPRK has with its neighbors have resulted in a series of patchwork legal structures that often overlap, contradict, or fail to adequately cover matters of concern. On the other hand, if one takes into account the late stage at which the DPRK embraced foreign investment, then this is a relatively new concept for Pyongyang, and the pace at which it has expanded its legal structures to meet the needs and demands of foreign enterprises and individual investors is commendable. With North Korea's unique political and social relations with its neighbors and the international community, there is no single model on which reforms can be based.

Looking at the improvements from Rajin-Sonbong to Kaesong and Sinuiju shows that Pyongyang has learned from failures and is willing, at least on a small scale, to relinquish some legal authority over economic matters in order to provide an internationally competitive investment atmosphere. Rajin-Sonbong failed largely due to overly intrusive administration. The Kaesong Industrial Complex has considerably more autonomy over business affairs, and a much more appealing investment atmosphere, with legally guaranteed long-term leases, labor standards, and autonomy over commercial activity. The Sinuiju SAR legal structure goes even further, guaranteeing autonomy over judicial, legislative, and executive affairs within the region, molded largely on the Chinese-Hong Kong agreement.

Other more general reforms also improve the environment for investors. The continued interest at North Korea's highest levels in China's successful transition increases the possibility of future economic reform that will be more conducive to foreign investment. Although the current legal environment in general is still far behind the global standard, there have been significant legal changes. The recent revision of the criminal code and new enactment of the Damage

Compensation Law are highlights of the legal reform toward a market-oriented economy. In addition, for the first time in the legal history of the DPRK, an official collection of laws and regulations for the public was published (2004). These changes will definitely contribute to the establishment of market institutions.

There are still many risks associated with investment in North Korea, some of which could be alleviated by more legislation or the revision or abolition of other legislation. There are several areas of investment in which it is unnecessarily vague which set of laws takes precedence, or under what circumstances this could change. Continued cooperation and increasing investment will bring these items more to the forefront where it will fall on the collective shoulders of the Supreme People's Assembly to continue to improve the legal framework that provides an environment conducive to foreign investment.

It is, of course, important to enact more sophisticated laws in order to reduce the contradictions and loopholes in this area. However, what is more important is to implement already existing laws and agreements to command the trust of the international community as well as South Korean investors.

The Legal Framework of the Gaesung Industrial Complex

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Abstract

Since the 2000 inter-Korean Summit, the two Koreas have continuously carried out the Gaesung Project while overcoming some challenges. At the outset of the Gaesung Project, North Korea's military objected to opening the Gaesung by reason of the military defense line. North Korea made the decision to open the Gaesung toward South Korea to revitalize its economy by persuading its military to tolerate the Gaesung Project. Meanwhile, in the summer of 2002, when the two Koreas began to move ahead with the Gaesung Project by re-connecting the inter-Korean expressway and railroad crossing the DMZ, the United States strongly resisted the two Koreas' attempts. Immediately afterwards, the two Koreas agreed on a detailed schedule for the reconnection of the inter-Korean expressway and railroad and North Korea designated Shinuiju, Kungangsan and Gaesung as special economic zones. To date, the two Koreas have established, through painstaking negotiations, the foundational work for the Gaesung ICZ's legal system.

This article attempts to investigate the legal framework of the Gaesung Industrial Complex, focusing on the Gaesung Industrial Complex Zone Law enacted in 2002. After conducting a detailed discussion on the various aspects of the law such as the administrative structure, foreign currency control and taxation, the author looks into the factors that are necessary for the successful development of the Zone.

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