

LEGISLATIVE REFORM OF THE KAESONG INDUSTRIAL COMPLEX IN NORTH KOREA

Jeehye You*

ABSTRACT

The Kaesong Industrial Complex (KIC) in North Korea is the last vestige of inter-Korean cooperation. It contributes to economic modernization of North Korea, peace and stability in East Asia, and international trade and nonproliferation of nuclear weapons. However, flaws in the KIC legislative framework leave businesses and individuals unprotected and threaten the very existence of the KIC. This Article examines the legislative problems facing the KIC and offers proposals for legislative reform. Part I demonstrates that the KIC plays an important role in the domestic, regional, and international contexts. Part II presents a critical analysis of KIC legislation. It identifies three main problems: (1) flaws in the statutory text; (2) questions regarding the effectiveness of KIC laws; and (3) inadequate dispute resolution provisions. It argues that the combined effect of these legislative problems is to give North Korean authorities control over KIC businesses, personnel, and operations. Part III presents proposals for KIC legislative reform. It shows that two approaches are most promising—foreign assistance in improving and reforming KIC laws and inter-Korean agreements. The Article concludes that only through legislative reform can the KIC realize its domestic, regional, and international potential by safeguarding its businesses and individuals and by ensuring its stability and sound development.

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* J.S.D. Candidate, Washington University School of Law. LL.B., LL.M., Ajou University; LL.M., George Washington University. I thank Frances Foster and Jaewon Chang for their helpful comments on earlier drafts of this Article.

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INTRODUCTION

On March 26, 2010, a warship of the Republic of Korea [hereinafter South Korea], the Cheonan, exploded and sank in the West Sea of South Korea, killing 46 of the 104 sailors aboard.¹ The multinational Civilian-Military Joint Investigation Group later determined that a torpedo fired from a submarine of the Democratic People's Republic of Korea (DPRK) [hereinafter North Korea] was responsible for the loss of the Cheonan.²

1. For detailed information on this incident, see Gov't of the Republic of Korea, *The ROKS Cheonan White Paper* 12 (2011), http://www.mnd.go.kr/cms_file/policyDataBook/cheonan/whitepaper_all.pdf; MINISTRY OF NAT'L DEF. OF THE REPUBLIC OF KOREA, JOINT INVESTIGATION REPORT: ON THE ATTACK AGAINST ROK SHIP CHEONAN 36 (2010), <http://www.nautilus.org/publications/essays/napsnet/reports/Cheonan.pdf>.

2. The Ministry of National Defense of South Korea organized the Civilian-Military Joint Investigation, and the final investigation results were reported to the UN Security Council on May 20, 2010. For more information about the findings of

Eight months later, North Korea launched its first direct attack on South Korean territory since the 1953 Korean War armistice.³ On November 23, North Korean artillery fired over 170 shells onto and around South Korean civilian installations on Yeonpyeong Island,⁴ killing two civilians and two South Korean marines stationed on the frontline island, and injuring forty-four islanders and servicemen.⁵ In response, South Korea imposed economic sanctions,⁶ threatened military reprisals,⁷ and redesignated North Korea its “archenemy.”⁸ North Korea announced that it would cut off all inter-Korean relations for the remainder of the conservative Lee Myung Bak administration.⁹

the Civilian-Military Joint Investigation Group and the evidence, see MINISTRY OF NAT'L DEF., *supra* note 1. The UN Security Council unanimously adopted a Presidential Statement acknowledging and condemning North Korea's attack: “The Security Council . . . condemned the attack which led to the sinking of the Republic of Korea naval ship Cheonan off the coast of the Korean peninsula on 26 March, with the loss of 46 lives . . . the 15-member body also expressed deep concern in view of the findings of the Joint Civilian-Military Investigation Group led by the Republic of Korea, with participants from five other nations, which concluded that the Democratic People's Republic of Korea had been responsible for the sinking. At the same time, the Council took note of the response from the Democratic People's Republic of Korea that it had nothing to do with the incident.” The Security Council, *Security Council Condemns Attack on Republic of Korea Naval Ship 'Cheonan', Stresses Need to Prevent Further Attacks, Other Hostilities in Region*, 6355th Mtg. SC/9975 (July 9, 2010), <http://www.un.org/News/Press/docs/2010/sc9975.doc.htm>. North Korea remains silent on the facts surrounding the incident. Moreover, North Korea claimed that South Korea fabricated the investigation results. See *The Sinking of the Cheonan*, N.Y. TIMES, May 21, 2010, at A26.

3. See Lee Chi-dong, *S. Korea vows 'stern retaliation' against N. Korea's attacks*, YONHAP NEWS AGENCY (S. Kor.), Nov. 23, 2010. As South Korean President Lee Myung-bak stated, “[i]n the past, North Korea has provoked us on many occasions, but this is the first time they have made a direct attack on South Korean soil.” Keith B. Richburg, *S. Korea to Toughen Policy Toward North*, WASH. POST, Nov. 29, 2010, at A01.

4. Yeonpyeong Island lies seven and a half miles off the North Korean coastline.

5. *Military Under Fire for Response to N. Korean Attack*, CHOSUNILBO (S. Kor.), Nov. 25, 2010; Martin Fackler, *Haunted by Attack, Few Return to Island*, N.Y. TIMES, Dec. 4, 2010, at A8.

6. Evan Ramstad, *Strong Kaesong Boosts Inter-Korean Trade*, WALL ST. J., May 27, 2011, <http://blogs.wsj.com/korearealtime/2011/05/27/strong-kaesong-boosts-inter-korean-trade>.

7. Lee, *supra* note 3 (reporting that South Korea “vow[ed] ‘stern retaliation’ against North Korea’s attacks”); Richburg, *supra* note 3 (stating that South Korea’s president ordered the military to punish North Korea for its artillery attacks).

8. David E. Sanger & Choe Sang-Hun, *North Korea Cuts All Ties With South*, N.Y. TIMES, May 26, 2010, at A4.

9. *Id.* (“[T]he North responded by saying that it would terminate all communications with the South while Mr. Lee, a conservative, was in office, and would stop the South’s jets from using its airspace.”). For the text of the announcement, see *CPRK Declares Resolute Actions against S. Korean Puppet Group*, KOREAN CENTRAL NEWS AGENCY, May 25, 2010, <http://www.kcna.kp/goHome.do?lang=eng>.

These tensions between the two Koreas have halted nearly all inter-Korean military, diplomatic, and trade activities, with one notable exception—the Kaesong Industrial Complex [hereinafter the *KIC*] project.¹⁰ Indeed, in 2010, inter-Korean trade at Kaesong actually rose 54% to 1.44 billion U.S. dollars.¹¹ Since its establishment in 2000, the *KIC* has benefitted the economies of both Koreas by combining the South's capital and technology with the North's land and labor.¹² It has been an important component of North Korean economic reform¹³ and has arguably contributed to promoting peace and reconciliation on the Korean peninsula and East Asian security.¹⁴ The *KIC* also has had an impact on international security and trade.¹⁵ Moreover, as a recent Congressional report emphasized,¹⁶ the *KIC* has even raised concerns for U.S. strategic interests.¹⁷

Yet, despite its domestic, regional, and international significance, the future of the *KIC* remains uncertain. Although the *KIC* continues to operate and expand its business, North Korea retains full discretion to shut down the *KIC* and violate the rights of individuals therein at any time.¹⁸

This Article identifies a surprising source of North Korean control—*KIC* legislation. Even though the *KIC* began as a cooperative venture between North Korea and South Korea funded entirely by South Korean investment,¹⁹ its legislation offers no

10. The South Korean Minister of Unification announced that South Korea would halt all inter-Korean relations, except the Kaesong Industrial Complex. See GOV'T OF THE REPUBLIC OF KOREA, *supra* note 1, at 157. *Gaeseong*, a city in southern North Korea, is generally romanized as “Kaesong.” The South Korean Ministry of Unification, however, has also spelled it as “Gaeseong.” <http://eng.unikorea.go.kr/CmsWeb/viewPage.req?idx=PG0000000535#nohref>. The South Korean *KIC* management committee initially expressed it as “Gaeseong,” then changed the name to “Kaesong.” For more information about this committee, see *infra* note 100 and accompanying text.

11. Ramstad, *supra* note 6.

12. Much of “two-way trade between North and South Korea . . . [is] related to . . . work undertaken by South Korean firms in the KIC.” U.S. Dep't of State, Bureau of E. Asian & Pac. Aff., *Background Note: North Korea*, <http://www.state.gov/t/pa/ei/bgn/2792.htm>. For a more detailed description of the *KIC*, see Ministry of Unification-Inter-Korean Affairs-Exchanges & Cooperation, *Gaeseong Industrial Complex*, http://eng.unikorea.go.kr/eng/default.jsp?pgname=AFFexchanges_gaeseong (last visited June 18, 2011), and for economic benefits of the *KIC* to both Koreas, see *infra* Part I.A.2.

13. See *infra* Part I.A.

14. See *infra* Part I.B.

15. See *infra* Part I.C.

16. Mark E. Manyin & Dick K. Nanto, *The Kaesong North-South Korean Industrial Complex*, Congressional Research Service Report for Congress RL34093 (Apr. 18, 2011).

17. See *infra* Part I.C.

18. See *infra* Part II.B.2.

19. See *infra* notes 91-5 and accompanying text in Part II.A.

meaningful constraints on North Korea. As this Article will show, flaws in the *KIC* legislative framework leave businesses and individuals unprotected and threaten the very existence of the *KIC*.

This Article's goals are to examine the legislative problems facing the *KIC* and to offer proposals for legislative reform. Part I will demonstrate that the *KIC* plays an important role in the domestic, regional, and international contexts. Part II will present a critical analysis of *KIC* legislation. It will identify three main problems: (1) flaws in the statutory text; (2) questions regarding the effectiveness of *KIC* laws; and (3) inadequate dispute resolution provisions. Part II will argue that the combined effect of these legislative problems is to give North Korean authorities control over *KIC* businesses, personnel, and operations.

Part III will present proposals for *KIC* legislative reform. It will show that two approaches are most promising—foreign assistance in improving and reforming *KIC* laws and inter-Korean agreements. The Article will conclude that it is essential to reform *KIC* legislation to safeguard *KIC* businesses and individuals and to ensure the stability and sound development of the *KIC*. Otherwise the fate of this “last vestige”²⁰ of inter-Korean cooperation will remain precarious.

I. THE ROLE OF THE KAESONG INDUSTRIAL COMPLEX

A. DOMESTIC INTERESTS

1. *Effort to Overcome Famine: Attracting Foreign Investment*

Until the early 1970s, the Gross National Product of North Korea was higher than that of the South.²¹ In the intervening years, however, North Korea has slowly but surely fallen far behind other nations.²² The North's economic travails were compounded by a series of devastating famines, which, in the 1990's, killed as many as two million people.²³ “Famine and serious food

20. Manyin & Nanto, *supra* note 16, at 4.

21. In 1970, the Gross National Product (GNP) of South Korea was estimated at around 7.549 billion dollars. BANK OF KOREA, ANNUAL REPORT OF THE GROSS NATIONAL PRODUCT (1972) (S. Kor.). In the same year, the North's GNP was estimated at around 9.0318 billion dollars. UIGAK HWANG, THE ECONOMY OF NORTH KOREA 142 (1992) (S. Kor.).

22. Analysts have pointed to a combination of uninspiring economic policies, enormous investment for maintaining massive military facilities, and the end of economic subsidies from the Soviet Union as the reason for this decline. Christian F. Mahr, *North Korea: Scenarios from the Perspective of Refugee Displacement*, MIT CTR. FOR INT'L STUD. Working Paper No. 11, 2 (2002).

23. John J. Metzler, *Celebrate Famine — Let's Have a Parade!*, KOREA TIMES, Sept. 16, 2008.

production shortfalls”²⁴ pushed thousands of North Koreans to risk their lives to escape from their country in search of subsistence. The exodus, which continues to this day, may very well contribute to the eventual collapse of the North Korean regime.²⁵

To address this national crisis, North Korea has attempted to introduce a highly regulated international market system in recent years. North Korea has introduced this market system by means of two different sets of legal systems: one for foreign investors in general, the other for foreign investors in special economic zones.²⁶ Since 1984, the North has enacted laws for foreign investment to open the door to foreign investors and enterprises.²⁷ To support the development of free economic and trade zones, North Korea adopted a constitutional amendment in 1992²⁸ and enacted fifty-seven laws and regulations related to foreign investment from 1992 to 2000.²⁹ In 1993, the first Free Economic and Trade Zone in Rajin-Seonbong was established.³⁰ Furthermore, in 1998, North Korea again amended its Constitution to recognize private ownership for the first time.³¹

Despite such efforts, North Korea failed to attract foreign investment.³² In order to overcome this failure, in July 2002,

24. *Id.*

25. See MIKE KIM, *ESCAPING NORTH KOREA: DEFIANCE AND HOPE IN THE WORLD'S MOST REPRESSIVE COUNTRY* (2008).

26. See Dae-Kyu YOON, *Overview of the Legal Structure of Foreign Investment in the DPRK*, 5 J. KOREAN L. 1, 2 (2005).

27. See *id.* at 5.

28. In 1992, an amendment to the Constitution was made “to attract foreign investment and boost trade in a desperate attempt to climb out of economic destitution . . . [T]he new revision removed the foreign policy clause of international cooperation with socialist States based on Marxist-Leninism and proletarianism by adopting independence, peace, and solidarity as the basic principles of foreign policy. . . [i]n the economic realm, . . . [t]he most notable change in this area was that constitutional ground was laid for the support of an ‘open-door’ policy, something that could be inferred from the inclusion of Article 37 which established that ‘[t]he State shall encourage institutions, enterprises or associations of the DPRK to establish and operate equity and contractual joint venture enterprises with corporations or individuals of foreign countries.’” Dae-Kyu Yoon, *The Constitution of North Korea: Its Changes and Implications*, 27 *FORDHAM INT’L L.J.* 1289, 1298-1301 (2004).

29. *E.g.*, Oegugintujabop [Foreigner’s Investment Law], Habjjagbop [Contractual Joint Venture Law], Oegugingieobop [Foreigner’s Enterprise Law], and Habyeongbop [Equity Joint Venture Law], etc.

30. “The Rajin-Sonbong area, which is in the far Northeast region, was announced . . . as North Korea’s first Free Economic and Trade Zone in 1991. . . [t]he basic law to govern this Free Economic and Trade Zone was promulgated in 1993.” Yoon, *supra* note 26, at 6.

31. “In the DPRK, the means of production are owned only by the State and social cooperative organizations.” N. KOREA CONST. art. 20. This Revised Constitution has been effective since 1998.

32. “The Rajin-Seonbong zone . . . was placed in a very disadvantageous position due to its ill-equipped infrastructure, an undeveloped market in the adjacent area, and its isolated location. Even worse is that it had to compete with the Russian

North Korea introduced its most significant liberalization measures, the so-called "July 2002 Economic Reform."³³ Under this reform project, the North introduced "general markets at which farmers could sell their produce and craftsman could sell their wares."³⁴ This measure, enacted domestically, was actually international in outlook, aimed at attracting foreign investment through a comprehensive reform of the country's legal-economic structure. Pyongyang then designated three special economic zones [hereinafter *SEZs*]³⁵ in Shinuiju,³⁶ Kumgangsan,³⁷ and Kaesong.

2. *Advantages of the Kaesong Industrial Complex*

As a business venture, the *KIC* helps North Korea overcome its financial difficulties by providing economic gains.³⁸ The *KIC*

Vladivostok port. Moreover, the Chungjin Industrial Complex where the Rajin-Seonbong economic zone is located is [not] a favorable environment for light industry, whereas it is a good environment for the heavy chemical industry, which made it very difficult to attract foreign investment for the short-to-mid term . . . [N]eighboring countries paid no attention and were passive in the area since there were no incentives to invest money there, ultimately leading to its demise." Sangyoung Rhyu, *North Korea's Economy and East Asia's Regionalism: Opportunities and Challenges*, 12 (Mar. 3-4, 2006) (unpublished paper prepared for presentation at a conference entitled "Northeast Asia's Economic and Security Regionalism: Old Constraints and New Prospects," Center for International Studies, University of Southern California).

33. Yoon, *supra* note 26, at 7.

34. A Staff Trip Report to the Committee on Foreign Relations United States Senate, *North Korea: Status Report on Nuclear Program, Humanitarian Issues, and Economic Reforms*, 108th Congress 2d Session, S. Prt. 108-40, 8 (2004).

35. *SEZs* are generally defined "as geographically delimited areas administered by a single body, offering certain incentives (generally duty-free importing and streamlined customs procedures, for instance) to businesses which physically locate within the zone." THE WORLD BANK GROUP, SPECIAL ECONOMIC ZONES: PERFORMANCE, LESSONS, LEARNED, AND IMPLICATIONS FOR ZONE DEVELOPMENT 2 (Apr. 2008).

36. The Shinuiju Special Administrative Region [hereinafter *SSAR*], located near the Chinese-North Korean border, targets Chinese investment. Despite intermittent efforts by the North to develop the *SSAR*, the region remains the most undeveloped of the special zones. The *SSAR*'s basic infrastructure totally depends on China; thus it is still "questionable whether the *SSAR* can ever succeed without the devotion of adequate resources . . . [and] critical support from China." Joongi Kim, *The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Kaesong*, 27 *FORDHAM INT'L L.J.* 1306, 1310, 1315 (2003).

37. Due to the failure of the first Free Economic and Trade Zone in Rajin-Seonbong and the *SSAR*, only the Kaesong Industrial Complex and the Kumgangsan Tourism Region [hereinafter *KTR*] are prospective *SEZs* in substance. Unlike the other special zones, the *KTR* and the *KIC* specifically target South Koreans and represent "inter-Korean economic cooperation." However, the *KTR* plays a limited role as an *SEZ* because its legislation is mostly aimed at tourism in the North's Mt. Kumgang region and its investments completely depend on Hyundai Group of South Korea. See Yoon, *supra* note 26, at 40.

38. See Seok Yoon, *An Economic Perspective of Kaesong Industrial Complex in North Korea*, 4 *AM. J. APPLIED SCI.* 938, 943 (2007).

brings unique economic benefits to North Korea in the form of “an international industry, trade, commerce, finance, and tourism zone.”³⁹ When the *KIC* was first designed, the total economic effect over nine years was estimated at approximately 73.7 billion dollars.⁴⁰ It offers potentially 200,000 jobs and enables the North to “sell not only raw and supplementary materials, but also impose transportation fees, taxes and collect foreign currency as well.”⁴¹

Moreover, North Korea can acquire the South’s technology and management know-how through the *KIC*, thus contributing to its economic development over the long term.⁴² In addition, North Korea’s involvement in the *KIC* project may help attract foreign capital by showing a “public open-door image”⁴³ to overseas investors.

Besides these economic gains, the *KIC* also provides the North with an opportunity to reform its economy. The *KIC* is especially desirable as a tool with which the North can “become comfortable with [market-based economic systems] and . . . revitalize [its] economy by implementing inter-Korean economic cooperation projects.”⁴⁴ The *KIC* may be “the proverbial camel’s nose under the tent in attempts [at] . . . deeper market reform, greater openness, and . . . massive investment to modernize decrepit plant[s] and infrastructure.”⁴⁵

In order to enjoy these benefits, North Korea attempts to lure South Korean firms by offering numerous incentives. Geographically, the *KIC*’s central location provides great market potential to South Korean companies.⁴⁶ The *KIC* is only thirty-seven miles from downtown Seoul, which has “one of the most lucrative consumer markets in the region and a wealth of resources.”⁴⁷ In addition, North Korea offers lower wages. In so

39. Gaeseonggongopjigubeop [Kaesong Industrial Zone Act], Decree No. 3430, Nov. 20, 2002, amended by Decree No. 3715, Apr. 24, 2003 (S. Kor.). The South Korean Ministry of Unification’s English-language translation of this act abbreviates it as the “KIZ Act”; however, this Article uses the “*KIC* Act” due to the more common international usage of “*KIC*.” About this act, see *infra* Part II.

40. Yoon, *supra* note 38, at 943.

41. Gi-Hyoung Oh, *The Legal Framework of the Gaesung Indus. Complex*, 5 J. KOREAN L. 21, 43 (2005) (indicating that “[s]umming it up with foreign currency from building industrial park and infrastructure will reach around 96 billion dollars. This is four times the amount of the annual budget of North Korea and its trade volume.”).

42. See Yoon, *supra* note 38, at 943.

43. *Id.*

44. Oh, *supra* note 41, at 43; see also Norimitsu Onishi, *South Brings Capitalism, Well Isolated, to North Korea*, N.Y. TIMES, July 18, 2006.

45. See Manyin & Nanto, *supra* note 16, at 16.

46. See Kim, *supra* note 36, at 1316.

47. *Id.*

doing, it provides a cost-cutting alternative to the emigration of South Korean plants to other countries such as China.⁴⁸ In fact, the business of South Korean companies in the *KIC* has been mostly profitable, while approximately forty percent of South Korean companies located in China have failed to succeed there.⁴⁹

Furthermore, North Korea allows South Korea to retain a degree of control over the *KIC* by selecting managers of the administrative agency.⁵⁰ The *KIC* is the only *SEZ* in North Korea that has relative independence from the North Korean government. The Korea Land Corporation of South Korea was appointed “the main concessionaire of the [*KIC*] project and Hyundai Asan, a private entity, [has been] the main contractor” since the initial plan of land development by North Korea.⁵¹ In addition, the North Korean government has designated the *KIC* as a duty-free zone.⁵²

Because of these advantages, in fact, by the end of April 2011, 122 South Korean companies were operating in the *KIC* with 46,874 North Korean workers and 808 South Korean staffers.⁵³ In comparison, in December 2005, North Korean workers numbered 6,013, and South Koreans 507.⁵⁴ The aggregate output of these companies increased from 251 million U.S. dollars as of 2008 to 323 million U.S. dollars as of 2010.⁵⁵

48. See Oh, *supra* note 41, at 43. The minimum monthly wage at the *KIC* was \$63.30 U.S. dollars as of December 2011. *Kaesong Industrial Complex*, HDASAN.COM, <http://www.hdasan.com/english/kaesong/incentive01.jsp>. In China as of April 2011, the minimum monthly wage in Shenzhen (*SEZ* in China) was \$207.00 U.S. dollars. Rahul Jacob, *China Wage Rises Bring Shift in Production*, CHINA DAILY, Sept. 6, 2011.

49. See EUL-CHUL LIM, *KAESONG INDUSTRIAL COMPLEX, HISTORY, PENDING ISSUES, AND OUTLOOK* 68-69 (2006).

50. See Yoon, *supra* note 38, at 940.

51. Kim, *supra* note 36, at 1316. “First-stage land surveys and soil analysis were completed in July and August 2003. The developers will have the option to transfer or delegate the actual construction to others, or they may pursue the projects themselves. North Korea has also agreed to guarantee human resources, materials and water.” *Id.* at 1311.

52. See *id.*

53. *KIC Introduction-Statistics*, Kaesong Industrial District Management Committee, as of June 17, 2011, <http://www.kidmac.com>. Other than the *KIC*, the recent total volume of inter-Korean trade decreased. See Ministry of Unification-Inter-Korean Affairs, *Overview of Exchanges & Cooperation, Monthly Report Inter-Korean Exchanges & Cooperation*, http://eng.unikorea.go.kr/eng/default.jsp?pgname=AFFexchanges_statistics.

54. *Id.*

55. *Id.*

B. REGIONAL SIGNIFICANCE

The *KIC* stands at the hub of not only domestic interests but regional concerns as well.⁵⁶ The tension in the Korean peninsula is not limited to both Koreas. It threatens regional peace and stability in all of East Asia.⁵⁷

In a limited scope, the *KIC* contributes to peace and stability in East Asia by promoting denuclearization of the Korean peninsula. In 2005, North Korea announced its possession of nuclear weapons as “bargaining leverage.”⁵⁸ North Korea aims to use its nuclear program as a bargaining chip with the outside world “to maintain the present regime and rehabilitate the country’s stagnant economy.”⁵⁹ The *KIC* potentially promotes the denuclearization of the Korean peninsula by providing developmental or economic assistance to North Korea via the *KIC*.⁶⁰ Thus, the *KIC* could give the South political and economic leverage to counter the North’s use of its nuclear program as bargaining leverage.

In a wider scope, the *KIC* could contribute to eventual Korean unification as an experiment in integrated economic systems.⁶¹ The *KIC* plays a role as a channel for cultural interaction, reconciliation between the two Koreas, and an interest-sharing community.⁶² Furthermore, if the *KIC* enabled South Korea to be connected to China, Russia, and Europe via a railway through North Korean territory, then South Korea could become an economic hub of East Asia.⁶³ Korean unification might have important economic, political, and social impacts on the East Asian community. At the very least, the North’s economic rehabilitation would be significant in that an unexpected collapse

56. See Manyin & Nanto, *supra* note 16, at 15.

57. See, e.g., NAT’L INST. FOR DEF. STUDIES, EAST ASIAN STRATEGIC REVIEW (1996-2011), <http://www.nids.go.jp/english/publication/east-asian/index.html> (the annual reports of the National Institute for Defense Studies analyzing the tension in the Korean peninsula as the most important destabilizing factors in East Asia every year).

58. Matthew Liles, *Did Kim Jong-il Break The Law? A Case Study On How North Korea Highlights The Flaws Of The Non-Proliferation Regime*, 33 N.C.J. INT’L L. & COM. REG. 103, 111 (2007).

59. NAT’L INSTITUTE FOR DEF. STUDIES, EAST ASIAN STRATEGIC REVIEW 3 (2006).

60. See Hong Nack Kim, *The Lee Government’s Policy toward the Denuclearization of North Korea and its Implications for South-North Korean Relations*, 15-2 INT’L J. KOREAN STUD. 43, 44-7, 66 (2011).

61. See Onishi, *supra* note 44. For an extended discussion of a legal integration concerning unification of the two Koreas and the role of *KIC* laws, see Kyu Chang Lee, *Basic Principles and Courses of Legal Integration and Its Tasks*, 122 JUSTICE 61 (2011) (S. Kor.).

62. See Manyin & Nanto, *supra* note 16, at 16.

63. See *id.* at 17.

of the country could lead millions of North Koreans to flood into neighboring countries seeking shelters and jobs.⁶⁴

With this geopolitical significance in mind, the South Korean government has led the *KIC* project. In particular, the government provides certain incentives, such as below-market interest rates loans to companies in the *KIC*.⁶⁵ It also provides political risk insurance covering “financial losses up to 90 percent of a company’s investment in the *KIC*, up to 5 billion South Korean won.”⁶⁶

As far as North Korea’s nuclear weapons program is concerned, however, the *KIC* could be a double-edged sword. By promoting North Korean economic recovery, the *KIC* could deliver the North money to expend on its nuclear weapons program.⁶⁷

C. INTERNATIONAL CONCERNS

The *KIC* raises international security and trade concerns, including United States policy considerations.⁶⁸ Just as in the East Asian context, the *KIC* can play both a positive role and a negative role with respect to the North’s denuclearization.⁶⁹

While North Korea’s nuclear program threatens East Asian security most directly due to geographic proximity, it also implicates international security interests. Specifically, it calls for international attention to its proliferation of nuclear weapons and transfer of technology to other regions.⁷⁰ To promote non-proliferation of nuclear weapons, the international community has focused on economic measures to North Korea.⁷¹ The *KIC* could play a pivotal role in this approach. Investment in the *KIC* could encourage North Korea to abandon its nuclear program by

64. See Onishi, *supra* note 44 (focusing on the situation of South Korea after North Korea’s collapse).

65. See Manyin & Nanto, *supra* note 16, at 8 (stating that it is unclear whether those companies are “doing so primarily for political purposes or whether their operations in the complex are economically viable”).

66. *Id.* at 6.

67. See Daniel A. Pinkston, *Bargaining Failure and the North Korean Nuclear Program’s Impact on International Nonproliferation Regimes*, 8 *KNDU REV.* 5, 16 (2003).

68. See Daniel J. Knudsen & William J. Moon, *North Korea and the Politics of International Trade Law: The Kaesong Industrial Complex and WTO Rules of Origin*, 35 *YALE J. INT’L L.* 251 (2010); see also Joon-Sung Kho, *A Way for the Use of the Special Provisions in the FTA Rules of Origin for the Expansion of Gaeung Industrial Complex*, 28 *ANAM BOPAK* 485 (2009) (S. Kor.).

69. See *supra* Part I.B.

70. See generally, JONATHAN D. POLLACK, *NO EXIT: NORTH KOREA, NUCLEAR WEAPONS AND INTERNATIONAL SECURITY* (2011).

71. See DIANNE E. RENNACK, *CONGR. RESEARCH SERV., RL31696, NORTH KOREA: ECONOMIC SANCTIONS* (2003).

providing an opportunity to reform its economy.⁷² Also, if economic reforms led by the *KIC* fail, North Korea might focus its full attention on selling its nuclear program to improve its economy.⁷³

On the other hand, the *KIC* may become a risky device if it lacks appropriate control. International economic sanctions have been a major strategy to halt the North Korean nuclear program.⁷⁴ In this regard, North Korean economic gains from the *KIC* also should be allowed only when the North contributes to peace and stability in the Korean peninsula. Otherwise, the *KIC* might be converted into “one part of the standoff” in the strategy over North Korea’s nuclear weapons program.⁷⁵ Indeed, the *KIC* provided economic gains to North Korea even though the North directly attacked the South twice in 2010.⁷⁶ Also, the *KIC* could deliver the North money to expend on its nuclear weapon program.⁷⁷

Because of these security concerns, the United States has specific policies regarding the *KIC*. In particular, U.S. policies focus on financial sanctions against North Korea, including the *KIC*, and economic incentives if North Korea takes steps to halt its nuclear program.⁷⁸

The *KIC* has also emerged as an international trade issue. The fundamental question is whether the *KIC* might enable North Korea to detour around trade sanctions imposed by foreign countries. It could potentially do so if goods produced in the *KIC* are classified as originating in South Korea rather than North Korea.⁷⁹

For instance, the United States has considered this trade issue regarding the *KIC* as a matter of national policy. In particular, U.S. policies concern “exclusion of the *KIC* from the Korea-U.S. Free Trade Agreement” (KORUS FTA),⁸⁰ “oversight of the *KIC* following approval of the agreement,” and “U.S. restrictions

72. See Pinkston, *supra* note 67, at 16.

73. *Id.*

74. See Manyin & Nanto, *supra* note 16, at 16.

75. *Id.*

76. See *supra* notes 1-5 and accompanying text.

77. See Pinkston, *supra* note 67.

78. See Manyin & Nanto, *supra* note 16, at 20-21.

79. See, e.g., Knudsen & Moon, *supra* note 68, at 251-55.

80. One potential sticking point for the Korea-U.S. Free Trade Agreement, which has not yet been submitted to the U.S. Congress for approval, is whether the *KIC* will receive preferential treatment as provided for in the EU-Korea FTA of 2009. See Manyin & Nanto, *supra* note 16, at 5. The United States has consistently taken the position of excluding *KIC*-originated products from the FTA. *Id.* at 13. For a detailed analysis of issues on the origin of products at the *KIC* under international trade law, see Knudsen & Moon, *supra* note 68; Kho, *supra* note 68.

on South Korean firms at the *KIC*.”⁸¹ Indeed, on April 20, 2011, President Obama signed an executive order that aims to prohibit U.S. imports of *KIC* goods prior to the ratification of the KORUSFTA.⁸² The order prohibits “[t]he importation into the United States, directly or indirectly, of any goods, services, or technology from North Korea.”⁸³ Furthermore, the United States considers “Washington’s role when other countries consider including the *KIC* in FTAs with South Korea.”⁸⁴

To date, U.S. companies have not invested in the *KIC*, and the United States has no direct involvement in the industrial complex.⁸⁵ However, Washington has been supportive of the development of the *KIC* project due to the close relationship between South Korea and the United States.⁸⁶ In this regard, the United States considers “U.S. restriction or inducements conditions of American business activity in the *KIC*.”⁸⁷ Nevertheless, U.S. policy centers on curtailing or eliminating the nuclear program of North Korea.⁸⁸ Additionally, the United States considers “labor and other conditions in the *KIC* and related reforms.”⁸⁹

II. THE LEGISLATIVE PROBLEMS CONCERNING THE KAESONG INDUSTRIAL COMPLEX

The North Korean Constitution of 1998 provides the constitutional grounds for *SEZs* in North Korea.⁹⁰ Based on this constitutional authority, the legal framework of the *KIC* consists of the Gaeseonggongopjigubeop [Kaesong Industrial Zone Act] [hereinafter *KIC Act*]⁹¹ and its implementing regulations.⁹² Un-

81. Manyin & Nanto, *supra* note 16, at 20-21.

82. Lee Chi-dong, *Obama’s Executive Order Aims to Ban Imports of Kaesong Products: CRS Official*, YONHAP NEWS AGENCY (S. Kor.), Jun. 16, 2011.

83. Exec. Order No. 13,570, 31 C.F.R. Pt. 510, App. C (2011).

84. Manyin & Nanto, *supra* note 16, at 20-21.

85. Potential U.S. investment in the *KIC* is made complicated due to two conflicting considerations: Washington’s desire for the project to contribute to an easing in South-North tensions and the potential for Pyongyang to siphon off revenue from the *KIC* to its military and nuclear weapons programs. See Manyin & Nanto, *supra* note 16, at 18.

86. *Id.* at 20.

87. *Id.* at 20-21.

88. *Id.*

89. *Id.*

90. “The State shall encourage institutions, enterprises and organizations in our country to joint ventures and cooperation of enterprise with foreign corporations and individuals.” N. KOREA CONST. art. 37 (1998).

91. See Gaeseonggongopjigubeop [Kaesong Industrial Zone Act], *supra* note 39.

92. The *KIC* Regulations are as follows: Gaeseonggongopjigu Gaebalgyujeong [Development Regulations for the Kaesong Industrial Zone] (2003); Gaeseonggongopjigu Geopchangseolunyeonggyujeong [Regulations on Establishment and

like laws for other *SEZs*, the *KIC* Act and its regulations govern all economic matters in the *KIC* exclusively. Accordingly, the *KIC* Act and its regulations need to be self-sufficient in order to govern economic matters in the *KIC* without any aid from other North Korean laws. However, the substance of the *KIC* Act and its regulations is nebulous at best. These laws are inadequate for governing the *KIC*, both in quantity and quality.

This Part will review the legislative defects of the *KIC* Act and its regulations. Section A will present a structural and textual analysis of the legislative flaws of the *KIC* Act and its regulations. Even if the statutory text was perfect, the laws would be meaningless without effective implementation. Thus, Section B will consider whether the *KIC* laws are sufficiently effective. Finally, Section C will examine dispute resolution provisions, focusing on the special circumstances of jurisdiction and conflict of laws between the two Koreas.

A. LEGISLATIVE FLAWS

The *KIC* project was generated from an agreement between the North Korean government and a South Korean private company, Hyundai Group, to develop the *KIC*. In August 2000, Hyundai Asan and the North Korean government⁹³ signed the

Operation of Enterprises in the Kaesong Industrial Zone] (2003); Gaeseonggonggeopjigu Segeumgyujeong [Tax Regulations for the Kaesong Industrial Zone] (2003); Gaeseonggonggeopjigu Rodonggyujeong [Labor Regulations for the Kaesong Industrial Zone] (2003); Gaeseonggonggeopjigu Gwaligigwanseolipunyeonggyujeong [Regulations on Establishment and Operation of the Kaesong Industrial Zone Management Organ] (2003); Gaeseonggonggeopjigu Chulip, Cheryu, Geojugyujeong [Regulations on Entry and Exit, Stay and Residence in the Kaesong Industrial Zone] (2003); Gaeseonggonggeopjigu Segwangyujeong [Customs Regulations for the Kaesong Industrial Zone] (2003); Gaeseonggonggeopjigu Oewhagwaligyujeong [Regulations on Management of Foreign Currency for the Kaesong Industrial Zone] (2004); Gaeseonggonggeopjigu Gwanggogyujeong [Advertising Regulations for the Kaesong Industrial Zone] (2004); Gaeseonggonggeopjigu Budongsangyujeong [Real Estate Regulations for the Kaesong Industrial Zone] (2004); Gaeseonggonggeopjigu Boheomgyujeong [Insurance Regulations for the Kaesong Industrial Zone] (2004); Gaeseonggonggeopjigu Hoegyegyujeong [Accounting Regulations for the Kaesong Industrial Zone] (2005); Gaeseonggonggeopjigu Gieopjaeonggyujeong [Regulations on Financial Management of Enterprises in the Kaesong Industrial Zone] (2005); Gaeseonggonggeopjigu Hoegyegomjeunggyujeong [Audit Regulations for the Kaesong Industrial Zone] (2005); Gaeseonggonggeopjigu Jadongchagwaligyujeong [Automobile Management Regulations for the Kaesong Industrial Zone] (2006); Gaeseonggonggeopjigu Hwangyeongbohogyujeong [Environmental Protection Regulations for the Kaesong Industrial Zone] (2006). For the entirety of the *KIC* Act and other regulations in English, see CODE OF THE ACT AND REGULATIONS FOR THE KAESONG INDUS. ZONE (Ministry of Unification, translated by Bae, Kim & Lee, LLC, 2009).

93. Actually, Joseonasiatapeyeongnyangpyeongwhaiwonhoe [Korea Asia Pacific Peace Committee] and Minjokgyeongjeyeonhaphoe [National Economic Coalition] of the North Korean "Workers' Party of Korea" signed the agreement.

Kaesonggonggeopjigu Geonseolunyeonge Gwanan Habuiseo [Development and Management Agreement for the Kaesong Industrial Complex].⁹⁴ In December 2000, Hyundai Asan, however, due to Hyundai's financial troubles,⁹⁵ conveyed the land use right in the *KIC* to the Korea Land Corporation [hereinafter *KLC*].⁹⁶ Instead of Hyundai Asan, *KLC*, a South Korean government-invested corporation, invested in *KIC* development.⁹⁷ In the end, the *KIC* project developed from a private project to a national undertaking between North and South Korea.

On November 20, 2002, the Kaesong Industrial Zone was established as "an international industry, trade, commerce, finance and tourism zone managed and operated in accordance with the law of [North Korea]."⁹⁸ To support the *KIC*, the *KIC* Act was enacted to "provide strict guidelines for the development and management of the [*KIC*], thereby contributing to the development of the economy of the Korean nation" as a decree of the North's Presidium of the Supreme People's Assembly [hereinafter *SPA*].⁹⁹ In implementing this Act, however, North Korea adopted its former agreement with Hyundai Asan as the *KIC* Act without substantial improvements.¹⁰⁰ As a result, the *KIC* Act and other regulations became riddled with numerous flaws.

1. Lack of Sufficient Regulations

As mentioned above, the *KIC* Act and its implementing regulations have exclusive authority over economic matters in the *KIC*.¹⁰¹ The *KIC* Act establishes its authority by providing that

94. On the background of the *KIC* development, see *Kaesong Industrial Complex*, HDASAN.COM, <http://www.hdasan.com/> (last visited Dec. 27, 2011); see also Sung-wook Nam, *Theory and Practice: Kaesong and Inter-Korean Economic Cooperation*, 13-1 E. ASIAN REV. 67 (2001).

95. See Kim, *supra* note 36, at 1309.

96. See Suhk-sam Park, *Creating a Visible Bridge: The Economic Impact of Kaesong Industrial Complex Construction*, 16-3 E. ASIAN REV. 87, 90 (2004).

97. See *id.*

98. See Gaeseonggonggeopjigubeop [Kaesong Industrial Zone Act], Decree No. 3430, Nov. 20, 2002, amended by Decree No. 3715, Apr. 24, 2003 (S. Kor.).

99. *Id.* "The Supreme People's Assembly is the highest organ of State power in the DPRK." N. KOREA CONST. art. 87 (1998). "The SPA exercises legislative power [w]hen the SPA is not in session, the SPA Presidium also can exercise legislative power." N. KOREA CONST. art. 88 (1998). "The SPA Presidium is the highest organ of power in the intervals between sessions of the SPA." N. KOREA CONST. art. 106 (1998).

100. See Chulsun Kim, *The Characters and Prospects of Kaesong Industrial Complex Project 47* (KIMPOPYUNGHWAFORUM, June 20, 2007) (S. Kor.).

101. The *KIC* is subject to: i) the laws and regulations established, and ii) inter-Korean agreements respectively established by the two Koreas. See *KIC* Act Addenda art. 2. See also Gaeseonggonggeopjigubeop [Kaesong Industrial Zone Act], *supra* note 92, at 1. Part II limits the scope of analysis to the law and its regulations

“[e]conomic activities in [the *KIC*] shall be conducted pursuant to this Act and its enforcement regulations.”¹⁰² Therefore, any other general laws and regulations of North Korea cannot be applied to economic matters in the *KIC*. Moreover, since the North Korean Jungangteuggugaebaljidochongguk [Central Special District General Bureau (CSDGB)]¹⁰³ as the central industrial zone guidance organ and the South Korean Gaeseonggonggeopjigu gwalliwonhoe [Kaesong Industrial District Management Committee (KIDMC)]¹⁰⁴ as the *KIC* management organ “shall consult with each other and handle matters which are not specifically provided by laws and regulations,” there is no possibility that general laws of North Korea such as the Foreign Investment Law and the Free Economic and Trade Zone Law would be applied to matters in the *KIC*.¹⁰⁵

For the independence of the *KIC* Act and its implementing regulations from other North Korean laws, the *KIC* Act establishes the hierarchy of laws in the *KIC* as follows: (1) “acts” issued by the Presidium of the *SPA*, such as the *KIC* Act, have the highest authority; (2) “regulations” adopted by the Presidium of the *SPA* for the application of “acts” are the next-highest authority; and (3) “enforcement regulations”¹⁰⁶ drawn up by the central industrial zone guidance organ and “operating rules”¹⁰⁷ drawn up by the *KIC* management organ follow.¹⁰⁸ Since the *KIC* pro-

only. For a detailed analysis of inter-Korean agreements, see *infra* Part III.B. This Article only deals with the legal framework of the North for the *KIC*. For literature on the legal framework of the South, see Wook Yoo, *The Overview of the Act on Support of Gaeseong Industrial Complex*, 20-1 BOPHAKNONCHONG 53 (2007) (S. Kor.).

102. *KIC* Act art. 9.

103. The duties of the CSDGB are as follows: “designate developer; guide the [*KIC*] management organ’s operation; draw up detailed enforcement regulations for this Act and its regulations; guarantee the supply of labor, water, and goods as requested by the enterprise; receive and store documents related to design of construction; promote the sale of goods manufactured in the [*KIC*] in the markets of the North; manage the tax affairs in the [*KIC*]; and perform other tasks delegated by the State.” *Id.* art. 22.

104. The duties of the KIDMC are as follows: “create conditions for and attract investment; approve establishment of enterprises, register enterprises, and issue business operation permit; issue construction permit and inspect completion of the construction; registration of land-use rights, buildings, and vehicles; support management activities of the enterprises; manage infrastructure facilities; protect the environment of [the *KIC*] and prevent fires; issue certificates of passage for personnel and vehicles from the South entering and exiting the [*KIC*]; draw up operating rules of the [*KIC*] management organ; and perform other tasks delegated by the central industrial zone guidance organ.” *Id.* art. 25. For more information about KIDMC, see <http://www.kidmac.com>.

105. *KIC* Act art. 9.

106. *Id.* art. 22.

107. *Id.* art. 25.

108. *Id.* art. 25 (9).

ject started in 2003, several comprehensive regulations, enforcement regulations, and operating rules have been enacted to supplement the *KIC* Act.¹⁰⁹ However, as of June 2011, only one *KIC* Act, sixteen regulations, and forty-one operating rules in the *KIC* were in existence.¹¹⁰

This lack of sufficient rules in the *KIC* Act and its implementing regulations has been a serious obstacle for attracting investment into the *KIC*. For instance, regulations for real estate do not have sufficient procedural provisions for secured transactions. The Real Estate Regulations for the Kaesong Industrial Zone guarantee “proper conditions for the economic activities and daily life of enterprises and individuals” and allow them to “acquire, transfer, lease, or mortgage real estate” in the *KIC*.¹¹¹ However, the Real Estate Regulations for the Kaesong Industrial Zone comprise only fifty-eight provisions. This cannot be sufficient to regulate comprehensive real estate problems, such as procedures for compulsory sale.¹¹²

The lack of regulations on matters of personal safety, criminal investigation, and litigation processes is another matter that could discourage foreign investment. At first glance, the *KIC* Act seems to protect personal safety strongly by providing that “personal safety and criminal cases, in cases where there is any agreement between the North and the South or any treaties between the [North Korea] and other foreign countries, such matters shall be handled pursuant to the applicable agreements or treaties.”¹¹³ Article 8 of the *KIC* Act provides that “[c]itizens of the South, overseas Koreans, and foreigners may not be apprehended or placed under arrest; nor can their bodies and homes be searched without any legal grounds.”¹¹⁴ However, there are no implementing regulations relating to personal safety, criminal investigation, and litigation processes.

Particularly troubling is the fact that there is not even a statutory definition of the “legal” grounds that allow arrest or search of foreigners. Thus, the general laws of North Korea may be ap-

109. On a list of specific regulations, see *supra* note 91-92.

110. The current statutes in the *KIC* are available at *Code of the Act and Regulations for the GIC*, UniKorea.go.kr, <http://eng.unikorea.go.kr/CmsWeb/viewPage.req?id=PG000000535#nohref> (last visited Dec. 27, 2011).

111. Gaeseonggongjeopjigu Budongsangyujeong [Real Estate Regulations for the Kaesong Industrial Zone], July 29, 2004, arts. 1, 2, adopted by Decision No. 33 (S. Kor.).

112. For instance, there is no provision to regulate a right of public sale and preferred payment processes. See HAEJEONG LEE, LEGISLATIVE PROBLEMS FOR REVITALIZATION OF THE KAESONG INDUSTRIAL COMPLEX, HYUNDAI RESEARCH INSTITUTE REPORT (Oct. 26, 2007) (S. Kor.).

113. *KIC* Act art. 8.

114. *Id.*

plicable in this matter, and the term “legal” can be interpreted as pertaining to the Penal Code and Criminal Procedure of North Korea.¹¹⁵ If so, it would spawn personal security and jurisdiction problems, which could undermine the investment environment of the *KIC*.¹¹⁶ In fact, on March 30, 2009, the North Korean government detained a South Korean worker for several months on charges of denouncing its government and political system and trying to persuade a North Korean worker at Kaesong to defect to the South.¹¹⁷ During his detention, the North Korean government did not allow him to talk to South Korean officials.¹¹⁸

2. *Vague Language*

Statutes for the *KIC* contain numerous instances of vague language that can trigger misreading by or incomprehensibility for all interested parties in the *KIC*. For instance, according to Article 9 of the *KIC* Act, economic activities in the *KIC* shall be conducted pursuant to “the *KIC* Act” and “its enforcement regulations,”¹¹⁹ and matters not specified in the content of these rules shall be handled by “the central industrial zone guidance organ and the [*KIC*] management organ.”¹²⁰ This is the most essential provision for regulating economic activities in the *KIC*. However, the meaning of “its enforcement regulations” is unclear. According to the *KIC* Act, the “regulations” are adopted as a decision by the Presidium of the *SPA* for the application of an “Act”;¹²¹ “enforcement regulations and its regulations” are drawn up by the central industrial zone guidance organ,¹²² and “operating rules” are drawn up by the *KIC* management organ for regulating *KIC*-related matters.¹²³

A critical issue for application of the *KIC* Act thus involves whether “its enforcement regulations” includes the “regulations” of the Presidium of the *SPA*, the “enforcement regulations and its regulations” of the central industrial zone guidance organ,

115. See Byungki Kim, *Legal Problems of the Kaesong Industrial Zone Act of the DPRK*, 34 KOREAN PUB. L. ASS'N 319, 328 (2005) (S. Kor.).

116. *Id.*

117. Choe Sang Hun, *South Korean Worker Freed by North*, N.Y. TIMES, Aug. 13, 2009, available at <http://www.nytimes.com/2009/08/14/world/asia/14korea.html?scp=1&sq=south%20korean%20worker%20freed%20by%20north&st=cse>.

118. *See id.*

119. *KIC* Act art. 9. Although it is not an official version, the KIDMC confuses the language by translating *Geu Sihaengeul Wihan Gyujeong* into “its enforcement regulation,” rather than “regulation for its enforcement.” “Enforcement regulation” is a distinctive regulation composed by the central industrial zone guidance organ. *KIC* Act art. 22.

120. *KIC* Act art. 9.

121. *See supra* note 92.

122. *KIC* Act art. 22.

123. *Id.* art. 25(9).

and/or the “operating rules” of the *KIC* management organ. Moreover, the *KIC* Act simply lists the central industrial zone guidance organ’s duty as drawing up “enforcement regulations for this Act and its regulations.”¹²⁴ However, there is no further description of the meaning, scope and effects of those regulations of the guidance organ.¹²⁵ Indeed, in order to supplement the *KIC* Act and its regulations, the *KIC* management organ of South Korea has created “operating” or “practical rules.”¹²⁶

Similar to Article 9 of the *KIC* Act, Article 46, which applies to the regulation of disputes in the *KIC*, is marred by vague language.¹²⁷ Article 46 provides that a settlement relies on a “consultation among the parties concerned,” and when the settlement does not work, dispute settlement procedures may be allowed “agreed upon by the North and the South, and arbitration procedure, or court proceedings.”¹²⁸ However, there is no supplement or comment on those procedures, which are vaguely worded. As a result, serious problems arise due to the uncertain meaning of dispute-settlement procedures, arbitration, and court proceedings.¹²⁹

B. QUESTIONS REGARDING EFFECTIVENESS OF LAWS

Two possible problems exist regarding the effectiveness of regulations in the *KIC*: (1) the incomplete implementation of the laws and (2) the danger of legal intervention by the North Korean government.

1. *Incomplete Implementation of the Laws*

Apart from the question of legislative flaws, the *KIC* laws have not been sufficiently implemented. As a result, there is a yawning gap between laws and reality in the *KIC*. One of the most competitive aspects of the *KIC* is its potential to provide foreign investors with highly qualified laborers at low wages. Even though Labor Regulations for the Kaesong Industrial Zone

124. *Id.* art. 22.

125. See *KIC* Act art. 22 (“*Junganggonggeopjigujidogigwaneu Imuneun Daeumgwa Gadda* [Duties of the central industrial zone guidance organ are as follows:] . . . 3. *Gonggeopjigu Bopgyui Sihaengsechik Jaksseong* [Draw up the enforcement regulations for this Act and its regulations].”). Furthermore, the meaning of *Gonggeopjigu* [this Act and its regulations] is also unclear, thus which make the meaning of “enforcement regulation” more difficult to grasp. *Id.*

126. As of March 2011, KIDMC has enacted and implemented 50 working rules. KIDMAC, <http://www.kidmac.com> (last visited Mar. 15, 2012).

127. *KIC* Act art. 46.

128. *Id.*

129. For more analysis of dispute resolution in the *KIC*, see *infra* Part II.C.2.

has developed provisions on wages and employment,¹³⁰ those provisions have yet to be implemented.

For example, among several forms of labor rights violations in the *KIC*, the U.S. government and activists have highlighted the egregious violation that the North Korean government cheats *KIC* workers of nearly all their pay.¹³¹ The South Korean KIDMC discovered that North Korea's CSDGB "misappropriated 96 percent of [*KIC*] employees' wages by abusing the rate of dollar exchange."¹³² The plundering of *KIC* workers' wages by the North Korean government is a flagrant violation of the *KIC* Labor Regulations. Article 32 of the Labor Regulations for the Kaesong Industrial Zone provides that "[e]ach enterprise shall pay labor remuneration in cash,¹³³ directly to each of its employees."¹³⁴ However, this provision has not been implemented in practice.¹³⁵ Rather, the CSDGB, as the central industrial zone guidance organ of North Korea, receives all the wages of employees and distributes wages at its discretion to each employee.¹³⁶ South Korean companies in the *KIC*, meanwhile, have continuously called for the implementation of wage regulations because the direct payment system is directly connected with productivity.¹³⁷ The North Korean government, however, claims that this labor regulation is not being implemented due to lack of a foreign exchange center in the *KIC*.¹³⁸

130. Gaeseonggonggeopjigu Rodonggyujeong [Labor Regulations for the Kaesong Industrial Zone], Sept. 18, 2003, adopted by Decision No. 2 (S. Kor.).

131. See Jan Jettel, *Kaesong Industrial Park Emerges as NK Human Rights Flashpoint*, KOREA TIMES, Apr. 13, 2006 (S. Kor.). See also Onishi, *supra* note 44.

132. Taewon Ha, *North Korea Misappropriated 96 Percent of Kaesong Industrial Employees' Wages by Abusing the Rate of Dollar Exchange*, DONGAILBO, Nov. 6, 2006 (S. Kor.).

133. Article 32 of the Labor Regulations for the Kaesong Industrial Zone provides "in cash," but not "in U.S. dollars." Gaeseonggonggeopjigu Rodonggyujeong [Labor Regulations for the Kaesong Industrial Zone], Sept. 18, 2003, art. 32, adopted by Decision No. 2 (S. Kor.). However, Article 25 provides that "[t]he minimum monthly wage of each employee employed by an enterprise shall be US\$50 per month." *Id.* art. 25. Thus, the vagueness of the phrase "in cash" in Article 32 is another example of the legislative problems afflicting the *KIC*.

134. *Id.* art. 32.

135. See EUL-CHUL LIM, *Changes in Legislation of North Korea's Special Economic Zones and Conditions for Development*, 48 TONGILMUNJAEYONGU 219, 241 (2007) (S. Kor.).

136. See *id.* (citing the interview with the KIDMC official).

137. "North Korean workers receive a monthly salary plus overtime and the salary is a composite of coupons and commodities such as sugar and rice worth the value of their earnings . . . [W]orkers are believed to be told and confirm the amount they earn every month. But it is difficult to confirm whether the North Korean government pays them in full." Kim Se-jeong, *Two Koreas Differ on Payment Method for Kaesong Workers*, KOREA TIMES, June 22, 2007, available at http://www.koreatimes.co.kr/www/news/nation/2008/04/113_5269.html.

138. See Manyin & Nanto, *supra* note 16, at 10.

The employment-at-will guaranteed by the Labor Regulations for the Kaesong Industrial Zone has also not been implemented. *KIC* Labor Regulations provide that “[e]ach enterprise requiring a supply of labor shall enter into a recruitment agency agreement with the recruiting agency, and such agreements shall be strictly adhered to by both parties,”¹³⁹ and that “[e]ach enterprise shall confirm the monthly wage, duration of employment, working hours, etc. by agreement with the recruited worker and an employment contract shall be signed by the enterprise and the worker.”¹⁴⁰ However, such a recruitment agency has yet to be created, leaving the CSDGB to perform the role of de facto recruitment entity.

Similarly, regulations for insurance in the *KIC* remain ineffective. According to Article 6 of the Insurance Regulations for the Kaesong Industrial Zone, “[i]t is mandatory for every juristic person and individual to take out appropriate insurance to cover” four kinds of losses and damages set out in the regulation.¹⁴¹ But without a legal infrastructure for insurance, such as a guarantee of reasonable damage assessments, the CSDGB has the exclusive authority to appoint the insurance company.¹⁴² As a result, the South Korean companies in the *KIC* have hesitated to sign an insurance contract with Choseon International Insurance Company, which is the sole insurance company in the *KIC* appointed by the CSDGB.¹⁴³ On December 24, 2010, a fire broke out at a South Korean factory complex in the *KIC*.¹⁴⁴ Damaged companies could not recover their losses because they were not insured.¹⁴⁵ Only twenty percent of South Korean companies in the *KIC* have signed fire insurance contracts with the Choseon International Insurance Company thus far.¹⁴⁶

139. Labor Regulations for the Kaesong Industrial Zone art. 9.

140. *Id.* art. 10.

141. “It is mandatory for every juristic person and individual to take out appropriate insurance to cover the following losses and damages: 1. Physical loss or damage to buildings and machinery that may arise due to fire, explosion, or natural disaster; 2. Death, bodily injury or property damage of a third party due to a gas-related accident; 3. Death or bodily injury of a person or damages to other property due to an automobile accident; and 4. Loss or damages suffered by an employee due to a work-related accident (except employees for whom the employing enterprise is required to pay a social insurance premium).” Gaeseonggongjeopjigu Boheomgyujeong [Insurance Regulations for the Kaesong Industrial Zone], Sept. 21, 2004, art. 6, adopted by Decision No. 35 (2004).

142. Lee, *supra* note 112, at 4.

143. *Id.*

144. Sam Kim, *Fire breaks out at inter-Korean factory park in N. Korea*, YONHAP NEWS AGENCY (S. Kor.), Dec. 24, 2010.

145. *Kaesong Companies Exposed to Fire Damage Without Protection*, YONHAP NEWS AGENCY (S. Kor.), Dec. 24, 2010.

146. *Id.*

2. *Danger of Legal Intervention by the North Korean Government*

Article 9 of the *KIC* Act basically provides that the Act shall regulate all economic activities in the *KIC*.¹⁴⁷ However, the same article also stipulates that “matters which are not specifically provided by laws and regulations” shall be handled by the agreement between the “the central industrial zone guidance organ” and “the [*KIC*] management organ.”¹⁴⁸ North Korea established the CSDGB as the central industrial zone guidance organ under the *KIC* Act. Since the CSDGB is subordinate to the North Korean cabinet, there is a real danger of the North Korean government intervening in laws governing matters not specified in the *KIC* Act. Thus, policy changes of the North Korean cabinet could undermine the independence of economic activities in the *KIC*.¹⁴⁹

Moreover, even though Article 6 of the *KIC* Act prohibits the intervention of other organizations in the *KIC*, it also provides an exception.¹⁵⁰ According to Article 6, if the need arises, other North Korean organizations can intervene in *KIC* matters with the consent of the CSDGB.¹⁵¹ Therefore, the ultimate authority that draws up the “enforcement regulations”¹⁵² and determines when other organizations, including North Korean government agencies, can engage in activities in the *KIC* is totally reserved for the CSDGB, i.e. the North Korean government.

A more serious problem is that the *SPA* Presidium has not only the legislative power but also the final authority to interpret the *KIC* Act. Article 3 of the *KIC* Act Addenda states that “[i]nterpretation of this Act shall be conducted by the Presidium of the [*SPA*].”¹⁵³ Therefore, under the *KIC* Act, the *SPA* Presidium has the power to revise or repeal the *KIC* Act at any time. In North Korea, where a word from Kim Jong Il can overrule the law, this danger of arbitrary legal intervention hangs over the *KIC* project like the sword of Damocles, threatening ruin at any moment.¹⁵⁴

147. “Economic activities in [the *KIC*] shall be conducted pursuant to this Act and its enforcement regulations.” *KIC* Act art. 9.

148. Gaeseonggongjeopjigubeop [*Kaesong Industrial Zone Act*], Decree No. 3430, Nov. 20, 2002, amended by Decree No. 3715, Apr. 24, 2003 (S. Kor.).

149. See Kim, *supra* note 115, at 324.

150. *KIC* Act art. 6.

151. *Id.*

152. *Id.* art. 22.

153. *Id.* Addenda art. 3.

154. “North Korea can be characterized as a charismatic society where the supreme, godlike leader’s words and directives are the principal governing norms that supersede all else, including the law. His word is considered the quintessential

Recent events demonstrate the risks of giving North Korean authorities discretion over interpretation and application of *KIC* legislation. From December 2008 to August 2009, North Korea imposed several limitations on the *KIC* on Kim's orders. On December 1, 2008, North Korea shut its overland border crossings with the South.¹⁵⁵ The move was aimed at temporarily closing the *KIC* as a retaliatory measure for the South's policy toward the North.¹⁵⁶ The South Korean government had no legal recourse against an unexpected closedown of the *KIC*, and North Korea refused to resume inter-Korean dialogue.¹⁵⁷

On March 30, 2009, North Korea detained a South Korean worker in the *KIC*, maneuvering to get the upper hand as it wrangled with the South over its nuclear weapons program.¹⁵⁸ On April 21, 2009, North Korea unilaterally gave notice to the South of the nullification of all *KIC* agreements made between the two Koreas.¹⁵⁹ Then, on August 20, 2009, North Korea normalized *KIC* operations by lifting all restrictions and reopening the Kaesong liaison office¹⁶⁰ after both Koreas agreed on a five percent wage hike for workers in the *KIC*.¹⁶¹ Thus, such unpredictability shows that so long as there is no legal protection for the *KIC*, the operation of the industrial complex will remain dependent on the will of North Korea.

C. DISPUTE RESOLUTION

As the *KIC* project develops, disputes between citizens of the two Koreas are likely to increase. To resolve these disputes, a legal system needs to support a dispute resolution system. On this matter, Article 46 of the *KIC* Act provides that “[a]ny disa-

source of enlightenment capable of dispensing justice.” Yoon, *supra* note 28, at 1291.

155. Michael Schuman, *Pyongyang Tightens North-South Border*, TIME, Dec. 1, 2008, available at <http://www.time.com/time/world/article/0,8599,1862921,00.html>.

156. The North's action was a retaliatory measure for Seoul's tacit support of the launch by South Korean civic groups of balloons carrying more than 100,000 fliers of anti-regime propaganda into North Korean territory. See Kim Sue-young, *N. Korea to Shut Border with South*, KOREA TIMES, Nov. 12, 2008, http://www.koreatimes.co.kr/www/news/nation/2008/11/116_34307.html.

157. See *id.*

158. See Choe, *supra* note 117.

159. North Korea announces nullification of all “Kaesong agreements,” HANKYORE (S. Kor.), May 16, 2009, http://english.hani.co.kr/arti/english_edition/e_northkorea/355236.html.

160. Inter-Korean economic cooperation Kaesong office reopens, HANKYORE (S. Kor.), Sept. 8, 2009, http://english.hani.co.kr/arti/english_edition/e_northkorea/375550.html.

161. North Korea makes overtures to normalize Kaesong project, HANKYORE (S. Kor.), Sept. 12, 2009, http://english.hani.co.kr/arti/english_edition/e_northkorea/376365.html.

greement arising over the development and management of the [KIC] or business operations in the [KIC] shall be settled through consultation among the parties concerned. If the dispute cannot be settled through consultation, the parties may rely on dispute settlement procedures agreed upon by the North and the South, an arbitration procedure, or court proceedings.”¹⁶² To analyze the problems of the dispute resolution system under the KIC Act, this section first clarifies the identity of the parties to a dispute in the KIC and the dispute resolution methods pursuant to the KIC Act. It then analyzes the problems of each dispute resolution method under the KIC Act.

1. *Scope of Parties and Disputes*

The CSDGB as the central industrial zone guidance organ, the KIDMC as the KIC management organ, and developers and companies as investors in the KIC are the main parties to disputes under Article 46 of the KIC Act.¹⁶³ Additionally, owners or residents of structures in the KIC,¹⁶⁴ partners of developers,¹⁶⁵ the quarantine and inspection office,¹⁶⁶ North Korean nationals as employees,¹⁶⁷ suppliers of materials or processing of parts and consumers of KIC products who are outside the industrial complex but in North Korea,¹⁶⁸ banks¹⁶⁹ and branches, subsidiaries or representative offices of companies¹⁷⁰ can also be parties to disputes in the KIC. With such a varied roster of potential par-

162. KIC Act art. 46.

163. *See id.*

164. “The central industrial zone guidance organ shall, in a timely manner, relocate or remove buildings and fixtures, and relocate residents so that it does not hinder the development projects. The cost of moving and removing buildings and fixtures in the development area and relocating residents shall be borne by the developer.” *Id.* art. 15.

165. “[T]he developer may partner with other investors for infrastructure construction or transfer or assign infrastructure construction.” *Id.* art. 17.

166. “The quarantine and inspection organ shall conduct, in a scientific and expeditious manner, the tasks of entry inspection, customs inspection, and hygiene and quarantine inspection of animals and plants so that the safety and investment inducement of the [KIC] is not hindered.” *Id.* art. 34.

167. “An enterprise shall . . . employ nationals of the DPRK.” *Id.* art. 37.

168. “An enterprise may purchase goods necessary for its operation from regions of the DPRK located outside of the [KIC]; it may also sell its products in the territory of the DPRK. An enterprise may, if necessary, consign the processing of raw materials, other materials or parts to government agencies, enterprises, or organizations of the DPRK.” *Id.* art. 39.

169. “All enterprises shall open an account at a bank located in the [KIC]. . . .” *Id.* art. 42.

170. “If an enterprise wishes to establish branches, places of business or offices in the [KIC], it shall submit a relevant application to and obtain approval from the [KIC] management organ.” *Id.* art. 45.

ties to disputes, the types of disputes can likewise be expected to increase in complexity.

Article 46 of the *KIC* Act limits the scope of disputes to “[a]ny disagreement arising over the development and management of the [*KIC*] or business operations in the [*KIC*].”¹⁷¹ Therefore, disputes under Article 46 of the *KIC* Act might include administrative disputes between officials, including those of the CSDGB and the KIDMC, and developers and companies; and civil disputes between developers and companies, between companies themselves, and between employees and developers or companies. Article 46 of the *KIC* Act, however, does not account for criminal and civil cases unrelated to business matters in the *KIC*. Thus, as the *KIC* Act does not regulate all matters in the *KIC*,¹⁷² the general laws of North Korea apply ipso jure to those criminal or civil cases in the *KIC* not related to business matters.

2. *Methods of Dispute Resolution*

According to Article 46 of the *KIC* Act, disputes over business matters in the *KIC* shall be settled primarily through consultation among the parties concerned.¹⁷³ If the dispute cannot be settled through consultation, then the parties may rely on commercial dispute settlement procedures agreed upon by the North and the South, an arbitration procedure, or court proceedings.¹⁷⁴ Significantly, other than Article 46, no other provision regulates the specific scope and procedures of dispute resolution methods. Moreover, Article 46 of the *KIC* Act is vague regarding the regulation of disputes. The Act clearly provides that consultation among the parties is a primary method of dispute resolution.¹⁷⁵ However, the meaning of the other methods, including the commercial dispute settlement procedures, arbitration, and court proceedings, is uncertain.

First, the *KIC* Act is unclear as to whether one party has an option to choose one method among the dispute-settlement procedures, arbitration and court proceedings. Second, it fails to specify whether one party needs to obtain the agreement of the other party to choose a particular method of dispute resolution. Third, the *KIC* Act does not provide a definition of what the “arbitration procedure” of Article 46 of the *KIC* Act comprises. In North Korea, there are three kinds of arbitration procedures.

171. *Id.* art. 46.

172. *Id.* art. 9. *See supra* Part II.A.1.

173. *KIC* Act art. 46.

174. *Id.*

175. *Id.*

One is domestic arbitration by the North Korean central court and the arbitral department of the courts in each province over matters of domestic relations among governments, companies, and other organizations.¹⁷⁶ Another is foreign business arbitration by the North Korean arbitral committee over matters of foreign investment relations among North Korean companies, foreign companies and foreign nationals.¹⁷⁷ The other is the general international arbitration process for international matters.¹⁷⁸ Therefore, the *KIC* Act needs to clarify which among these arbitration processes is the “arbitration procedure” mentioned in Article 46.

Fourth, the *KIC* Act is unclear as to whether the agreement of both or only one of the two Koreas is needed for arbitration processes and/or court proceedings. Article 46 provides that if the dispute cannot be settled through consultation, the parties may rely on *Bungnam Saie Habuihan* [agreed upon by the North and the South], *Sangsa Bunjaeng Haegyeoljeolcha* [commercial dispute settlement procedures], or *Jungjae, Jaepanjeolcha* [arbitration procedure, court proceedings].¹⁷⁹ According to the order of these Korean words, Article 46 is unclear as to whether arbitration procedures and/or court proceedings require “agreement upon by the North and the South.” If a dispute arose, North Korea and South Korea might have differing views about these matters. In such a case, these vague provisions would be likely interpreted in favor of the North because the North Korean *SPA* Presidium has the ultimate authority to interpret the *KIC* Act.¹⁸⁰ Accordingly, the provisions for dispute resolution in the *KIC* must regulate the disputes in *KIC* more clearly and specifically.

“Court proceedings,” as a dispute resolution method, have a more specific set of problems. In jurisprudence, it is essential to determine which court has the authority to hear and decide a specific case before a lawsuit is filed. However, jurisdiction over matters in the *KIC* is ill-defined. Article 3 of the Constitution of South Korea provides that “[the] territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.”¹⁸¹ While debate in South Korea still rages over how to interpret said Article 3 vis-à-vis the status of North Korea, the

176. See Seong-Ho Jhe, *Some Ideas for the Settlement of South-North Korean Disputes Relating to Gaesung Industrial Complex*, 85 *JUSTICE* 226, 233 (2005) (S. Kor).

177. See *Daeogyongjeungjaebop* [The Foreign Business Arbitration Act], art. 4 (S. Kor).

178. See Jhe, *supra* note 176, at 233.

179. *KIC* Act art. 46.

180. *Id.* Addenda art. 3.

181. *Daehanminkuk Hunbeop* [Hunbeop] [Constitution] art. 3 (S. Kor.).

Supreme Court has consistently interpreted this provision to mean that North Korea is a part of the Korean peninsula, and thus is the territory of South Korea.¹⁸²

Moreover, the Court has ruled that, under the Constitution, South Korea has the only sovereign power on the Korean peninsula.¹⁸³ Therefore, at least according to the legal viewpoint of the South Korean Supreme Court, North Korea is not a legally independent nation. Rather, the North Korean government is an illegal insurgency that should be expelled by South Korea. It follows then, that under this interpretation, a North Korean is actually a national of South Korea.¹⁸⁴ Thus, in theory, South Korea has jurisdiction over North Korean territory.¹⁸⁵

If South Korean courts have jurisdiction over Kaesong workers, South Korean constitutional law effectively protects the rights of those workers by allowing them the opportunity to petition the South Korean Constitutional Court.¹⁸⁶ However, North Korea has declared South Korea a U.S.-supported insurgency that should be overthrown.¹⁸⁷ And since Kaesong workers are physically restricted to North Korean territory, petitioning the South Korean Court would seem highly unrealistic.¹⁸⁸ Indeed, internationally, North and South Korea have been considered independent nations with discrete sovereignty ever since the two Koreas became members of the United Nations at the same time.¹⁸⁹ Even though there are numerous debates on the theoretical legal arguments and factual developments of inter-Korean relations, jurisdiction in transnational litigation between the two Korean governments or nationals is still in dispute.

182. See Supreme Court [S. Ct.], 4292Hangsang48, Sept. 28, 1961 (S. Kor.).

183. See *id.*

184. See Supreme Court [S. Ct.], 96Nu1221, Nov. 12, 1996 (S. Kor.).

185. See *id.*

186. For more on arguments on jurisdiction of the South Korean court over labor rights of the KIC workers, see Lavanga V. Wijekoon, *Litigating Labor Rights Across a Demilitarized Zone: The South Korean Constitutional Court as a Forum to Address Labor Violations In North Korea's Kaesong Special Economic Zone*, 17 PAC. RIM L. & POL'Y J. 265, 267 (2008). There is also an argument that the South Korean court has jurisdiction over property in the KIC, and that the land use right in the KIC is protected by South Korean property law. See Sang-Yong Kim, *Institutionalization and Transaction of Land Use Right in North Korea—For the Protection of Land Use Right in the Gaeseong Industrial District*, 18 BEOPAKYEONGU 1 (2008) (S. Kor.).

187. See Kim, *supra* note 115, at 325.

188. See Wijekoon, *supra* note 186, at 267 (arguing that “[t]he South Korean legislature and the Constitutional Court should look to trends in adopting procedural reforms that will allow the North Korean workers to file a constitutional petition in the Constitutional Court”).

189. On September 17, 1991, North Korea and South Korea became member states of the United Nations. See *United Nations Member States*, UN.ORG, <http://www.un.org/members/growth.shtml> (last visited Oct. 28, 2011).

Choice of law is yet another problem in litigation on matters in the *KIC* because of the differences between the laws of the two Koreas. If the two nations acknowledged each other's sovereignty and legal systems, then litigation over matters in *KIC* could conform to transnational norms. However, as mentioned above, North and South Korea have acknowledged each other's temporary and factual status, but not their respective legal sovereignty. Therefore, a conflict of law is inevitable.

The failure of each country to recognize the other's sovereignty has been revealed in two aspects: denying the other's sovereign power in one's own territory, and extending one's own sovereign power into the other's territory.¹⁹⁰ The *KIC* is in an area governed by North Korean sovereignty. The issue thus rests on how South Korea interprets North Korean sovereign power and enforcement, and whether the Constitution and other South Korean statutes can apply to matters in the *KIC*, which is located in North Korean territory. The economic activities in the *KIC* should be conducted pursuant to the *KIC* Act and regulations for its enforcement, rather than the general laws of North Korea.¹⁹¹ But under Article 3 of the Constitution of South Korea, which defines the nation's territory as being the whole of the Korea peninsula,¹⁹² South Korean laws should govern matters in the *KIC*. It is little wonder that the interested parties in the *KIC* are confused as to which law applies to them. This fundamental issue of jurisdiction needs to be resolved immediately.

III. LEGISLATIVE REFORM OF THE KAESONG INDUSTRIAL COMPLEX

For the success of the *KIC*, the legislative, administrative, and court systems pertaining to the *KIC* should be well-organized and effectively operated. The general socialist laws of North Korea do not apply to the *KIC*'s economic matters.¹⁹³ The *KIC* Act and its implementing regulations govern all such matters exclusively.¹⁹⁴ Assuming that the *KIC* functions as an independent society, like a nation, the new legislative system for the *KIC* should be comprehensive enough to regulate all possible problems in the *KIC*. Indeed, the future success of the *KIC* rests

190. See SEONG TAG LIM, PROBLEMS OF LAWS IN SOUTH KOREA TO ASSIST ACTIVITIES OF COMPANIES IN THE KAESONG INDUSTRIAL COMPLEX 8 (Ministry of Unification Report, 2005) (S. Kor.).

191. See *KIC* Act art. 9.

192. "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands." Daehanminkuk Hunbeop [Hunbeop] [Constitution] art. 3 (S. Kor.).

193. *Id.*

194. *Id.*

upon not only the sufficiency of the relevant laws, but on the substance of those laws as well.

Ideal legislation is not a sufficient condition for a legal infrastructure in the *KIC*. For the effectiveness of laws, the administrative and court system should be well-organized and effectively operated. Additionally, in order to develop the relevant legislative, administrative, and court systems, a legislative basis for those systems should be established first. Thus, this Part proposes some methods for legislative reform in the *KIC*. More specifically, it provides an overview of two possible approaches—assistance from South Korea and international organizations in improving and reforming *KIC* legislation, and an agreement between the two Koreas.

A. FOREIGN ASSISTANCE IN IMPROVING AND REFORMING THE LEGISLATION

Since North Korea has little experience with a market economy, outside help in improving and reforming the *KIC* legislation is essential. The *KIC* project had its genesis in an agreement between the North Korean government and a South Korean private company,¹⁹⁵ and the South Korean KIDMC has enacted most of the *KIC* regulations.¹⁹⁶ Therefore, assistance from South Korea, which has been fundamental in improving and reforming *KIC* legislation, offers the most efficient way to promote legislative reform.

Although the *KIC* originally targeted investments by South Korean companies, foreign companies outside South Korea would be interested in the project if the *KIC* market system met international standards. Thus, legislative reform should consider not only the South Korean legal standards, but the international ones as well. On this point, assistance from international organizations would be helpful.

As shown above, *KIC* legislative problems arose from the fact that when North Korean authorities adopted the *KIC* Act and its implementing regulations, they simply copied the former private agreement between the North Korean government and the South Korean company.¹⁹⁷ The reason for this mechanical adoption was that the North Korean government did not have legal experts on the market system.¹⁹⁸ Therefore, systematic and experienced outside assistance in reforming the *KIC* laws will be crucial to resolving fundamental legislative flaws identified in

195. See *supra* Part II.A.

196. See *id.*

197. See *id.*

198. See *id.*

Part II.A, most notably the lack of sufficient regulations and vague language.

1. Assistance from South Korea

In January 2001, the Hyundai Group submitted a draft of the Kaesong Industrial Complex Act to North Korea; in November 2002, the North Korean government adopted the proposal as the *KIC* Act without any substantial alteration.¹⁹⁹ When the North Korean government and Hyundai were negotiating an agreement for the *KIC* project, the North did not have any legal experts on the market system.²⁰⁰ Even now, the North Korean government collects the opinions of the South Korean government and companies through the KIDMC.²⁰¹ In addition, the Ministry of Unification in Seoul has presented South Korea's opinion²⁰² to Pyongyang.²⁰³ In 2005, the Ministry established the Legal Consultation Conference for the *KIC*, whose participants consist of South Korean judges, prosecutors, attorneys, and law professors.²⁰⁴

Apart from its nonbinding opinions, South Korea has actual authority to enact operating rules in the *KIC* through the KIDMC. Article 24 of the *KIC* Act provides that “[t]he [*KIC*] management organ shall be composed of members recommended by the developers.”²⁰⁵ The [*KIC*] management organ, namely the KIDMC, is staffed by South Koreans because the developer is the South Korean company, Hyundai. This South Korean [*KIC*] management organ has the authority to enact the operating rules under the *KIC* Act.²⁰⁶ In fact, the KIDMC has enacted dozens of operating rules since October 2004.

The South Korean government already has the infrastructure to support *KIC* legislative reform, such as the Legal Consultation Conference for the *KIC* under the Ministry of Unification.²⁰⁷ Moreover, the South Korean government has the

199. See Kim, *supra* note 100, at 47.

200. Before the negotiations for the *KIC* project, representatives from the North Korean government were trained by U.S. experts through a short-term legal program. See *id.*

201. *Id.*

202. Including opinions from relevant ministries, experts and the “Legal Consultation Conference for the *KIC*” under the Ministry of Unification. *Id.*

203. *Id.*

204. Wook Yoo, *The Present and Problem of Kaesong Industrial Complex 3* (presented at Bukhanbebyeonguhoe, May 26, 2005) (S. Kor.).

205. The *KIC* Act art. 24. Hyundai Asian and Korea Land Corporation are co-developers, and the South Korean government is the sponsor for construction in the *KIC*. See Yoo, *supra* note 204, at 9.

206. See *KIC* Act. art. 25.

207. See Yoo, *supra* note 204.

authority to enact operating rules and regulate matters in the *KIC*. Therefore, assistance from South Korea has been and will continue to be the most essential and direct way to support *KIC* legislative reform. As shown above,²⁰⁸ the present *KIC* Act and its implementing regulations have a host of serious problems, including a lack of sufficient regulations, vague statutory language, ineffectiveness of laws, and uncertainty of dispute resolution. Revising the current provisions or enacting new rules is fundamental to solving these legislative problems. South Korea must take the lead to reform laws in the *KIC* and North Korea should refrain from wielding the *KIC* for political expediency.²⁰⁹ In order to promote the interests of both Koreas, the shutdown of the *KIC* in December 2008 must not be allowed to happen again.²¹⁰ Rather, North Korea needs to accept South Korean assistance.

2. Assistance from International Organizations

Notwithstanding the central role of South Korean assistance in reforming *KIC* legislation, transferring legislation from South to North Korea does not guarantee successful legislative reform of the *KIC*. The particularity of North Korean legislation, culture, and other circumstances should be considered in the legislative reform process. At this point, there is a limit to South Korea's ability to assist in *KIC* legislative reform because South Korea has little experience with the socialist system. In addition, even though the *KIC* has been targeting South Korean companies, the project should make an effort to attract foreign companies from outside the Korean peninsula.

In order to solve the problems of North Korean particularity and attract foreign companies, the *KIC* should rely on the legal and judicial reform programs of international organizations. International organizations, such as the World Bank, the European Bank for Reconstruction and Development (EBRD), and the Asian Development Bank (ADB), have played a vital and even essential role in governmental efforts to reform their judicial and legal systems.²¹¹

208. See *supra* Part II.

209. For a methodology to develop legal infrastructure for the *KIC* by South Korea, see Jeong Won Park, *A Study on Expansion of Governance to Improve Legal Infrastructure in the 'Gaeseong Industrial Complex' of North Korea*, 15-2 SEoul INT'L L. J. 117 (2008) (S. Kor.).

210. See *supra* note 156.

211. See Emmanuel Maurice, *EBRD's Role in Judicial Reform and Training*, Report from the ADB Symposium on Challenges in Implementing Access to Justice Reforms (2005), <http://www.adb.org/documents/reports/law-policy-reform/legal-reform.pdf>; see also Maria Dakolias, Essay, *Legal And Judicial Development: The Role Of Civil Society in the Reform Process*, 24 FORDHAM INT'L L.J. 26, 26 (2000). For more extensive literature on precedents of legal reform projects led by

Vietnam provides a prime example. The United Nations Development Programme (UNDP),²¹² the World Bank, and the ADB were the dominant donors working on legal reforms to integrate Vietnam into a market-oriented economy.²¹³ The UNDP helped to establish a legal framework in Vietnam that promoted the market-based economic activity and strengthened the rule of law.²¹⁴ With financial support, the UNDP assisted Vietnam by providing knowledge relating to legal systems in the developed countries rather than by simply transplanting other countries' laws.²¹⁵ In addition, the ADB focused on educating legal professionals in Vietnam on proper legal skills and knowledge for lawyers practicing in a market economy.²¹⁶ The World Bank also helped Vietnam by providing financial assistance and legal advice regarding property ownership, foreign investment, banking, company law, commercial law, financial law, and dispute resolution.²¹⁷

Among international organizations, the World Bank has performed the most active role in assisting developing countries. Since the 1960s, the Bank began to assist developing member countries in legal and judicial reform.²¹⁸ Since 1991, it has provided significant assistance with more than 350 projects related to legal and judicial reform in countries in Africa, Europe, Latin America, the Middle East, and Asia.²¹⁹ Its program is not limited to legislative reform but also includes legal and judicial train-

international organizations, see W. PAATHI OFOSU-AMAAH, REFORMING BUSINESS-RELATED LAWS TO PROMOTE PRIVATE SECTOR DEVELOPMENT: THE WORLD BANK EXPERIENCE IN AFRICA (2000); Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (2008), <http://www.hrw.org/en/reports/2008/07/24/law-and-reality>; Peter DeShazo & Juan Enrique Vargas, *Judicial Reform in Latin America: An Assessment*, POLICY PAPERS ON THE AMERICAS, vol. 17, Study 2 (2006); C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT'L L. 363 (2000); Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC'Y REV. 93 (1998).

212. The United Nations Development Programme (UNDP), as "the UN's global development network, advocating for change and connecting countries to knowledge, experience and resources to help people build a better life" supports "countries to reach their own development objectives and internationally agreed goals." *The United Nations Development Programme—Our Work*, <http://www.beta.undp.org/undp/en/home/ourwork/overview.html>.

213. See Rose, *supra* note 211, at 93.

214. See *id.* at 108.

215. See *id.* at 109.

216. See *id.* at 110.

217. See *id.* at 109-10.

218. W. Paatii Ofosu-Amaah, *Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience*, 8 L. & BUS. REV. AM. 551, 557 (2002).

219. *Id.* at 564.

ing, court administration, case management, appointment of judges, and accountability of government.²²⁰

In particular, the Bank has experience in assisting formerly socialist Eastern and Central European countries in legal and judicial reform.²²¹ The situation in these European countries, like North Korea's, was different from that of other developing countries that needed the World Bank's assistance.²²² In the former case, "[t]he main emphasis was on how the countries could be assisted in their quest to move their so-called 'command economies' to market-oriented economies."²²³ For this reason, the Bank "focused in the first instance, on assistance for the promulgation of new laws or amendment of existing laws in the economic and corporate areas."²²⁴

Specifically, the World Bank assisted in legal and judicial reform in the formerly socialist countries in two ways. First, it facilitated structural adjustment by "supporting the government's program to consolidate stabilization and foster strong and sustained growth recovery."²²⁵ For example, in 1996 and 1997, the Republic of Georgia, as the borrower, provided the World Bank "with a letter of development policy, which included the borrower's intention to enact a law on entrepreneurs, reform of accounting standards and to establish independent share registrars, enact a securities law, including the establishment of a securities and exchange commission; and to open and operate a stock exchange . . . Also included were proposals for the enactment of banking legislation to facilitate the establishment of the legal and regulatory oversight of commercial banks. All of these measures were designed to put in place a legal and regulatory framework intended to attract substantial private investment."²²⁶

Second, the Bank also provided technical assistance for legal and judicial reform. "[S]imply passing laws did not ensure the achievement of the desired objectives without an appropriate enforcement framework."²²⁷ For this reason, in the Georgia project, the Bank "provided financing through a technical assistance project to help the government implement the structural reforms

220. See World Bank, *Legal and Judicial Reform Strategic Directions* (July 2002), <http://www.worldbank.org>.

221. See Ofosu-Amaah, *supra* note 218, at 568. For example, the Tajikistan-Institutional Building Technical Assistance Project, the Bulgaria-Technical Assistance for Economic Reform Project, the Azerbaijan-Institutional Building Technical Assistance Project, and a number of projects in Russia. *Id.*

222. *Id.* at 567.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

covered in the program described in the letter of development. Financing was provided to tackle the issues related to the enforcement of these economic-related laws.”²²⁸ As discussed in Part II.B, the ineffectiveness of the *KIC* laws is a serious problem. Technical assistance (such as that provided by the World Bank) to ensure implementation of structural reforms would be the best remedy for the ineffectiveness of the *KIC* laws.

Therefore, in consideration of the North Korean socialist particularity and the need to create a legal system that meets international standards for attracting foreign companies, international assistance, such as the World Bank’s legal and judicial reform program, would be a major boost for legislative reform of the *KIC*. North Korea has expressed its willingness to obtain membership in international financial organizations, including the World Bank, the International Monetary Fund (IMF), and the ADB.²²⁹ However, due to geopolitical security considerations, the North has been prevented from joining those international organizations and has asked for help from the United States on this front.²³⁰ On October 11, 2008, the Bush administration officially removed North Korea from U.S. list of state sponsors of terrorism.²³¹ North Korea analysts expected that this

228. “Good examples of this type of support include, the Tajikistan-Institutional Building Technical Assistance Project, the Bulgaria-Technical Assistance for Economic Reform Project, the Azerbaijan-Institutional Building Technical Assistance Project, and a number of projects in Russia supporting this reform process, including the Legal Reform Project. These projects support, *inter alia*, the preparation of the legal and regulatory framework for privatization and private sector development; the reorganization and revision of the frameworks for banks; the revision of laws related to property rights such as land access rights and transferability of access rights; the development of the institutional and legal framework for the development of economic-related legislation, including those for commercial law and public procurement; the dissemination of laws and other legal information; and legal education, including public education campaigns and judicial reform in the form of training and development of alternative dispute resolution institutions. The Russian Project, a large-scale freestanding project, covered issues related to improving the performance of the overall Russian Legal system and is still being executed.” Ofosu-Amaah, *supra* note 218, at 568

229. See Hyungsu Chang, ‘Consultative Group’ for North Korea Membership in *International Organization*, MINJOK 21 (S. Kor.), Sept. 1, 2008

230. See Jeongjin Lee, *North Korea Denounces U.S. for Delaying Terror List Removal*, YONHAP NEWS (S. Kor.), Aug. 18, 2008.

231. See OFFICE OF THE SPOKESMAN, WHITE HOUSE, FACT SHEET, NORTH KOREA: PRESIDENTIAL ACTION ON STATE SPONSOR OF TERRORISM (SST) AND THE TRADING WITH THE ENEMY ACT (TWEA) (JUN. 26, 2008), available at <http://merln.ndu.edu/archivepdf/northkorea/state/106281.pdf>. This removal ensued after “the President announced the lifting of the application of the Trading with the Enemy Act (TWEA) with respect to” North Korea, on June 26, 2008. *Id.* See generally LARRY A. NIKSCH, CONG. RESEARCH SERV., RL30613, NORTH KOREA: TERRORISM LIST REMOVAL, (2010); CLAY WILSON, CONG. RESEARCH SERV., RL32114, BOTNETS, CYBERCRIME, AND CYBERTERRORISM: VULNERABILITIES AND POLICY ISSUES FOR CONGRESS (2008).

action would help North Korea join international financial organizations.²³² Yet, North Korea made no progress on this.²³³ For successful legal reform in North Korea, and especially the legislative evolution of the *KIC*, the assistance of international organizations is crucial. The entry of the North onto the membership registers of such organizations would be a first significant step toward meaningful reform of *KIC* legislation.

B. PROSPECTS OF INTER-KOREAN AGREEMENTS

As Part II has demonstrated, current *KIC* legislation is riddled with problems. Legislative reform is the main way to solve those problems. However, legislative reform, including revising current provisions and enacting new rules, cannot respond quickly to numerous legal problems. Moreover, so long as the North Korean government has the ultimate authority to interpret the *KIC* Act, legislative reform will be effectively meaningless because the government can change laws at its discretion.²³⁴ Even more troubling is the North's history of extralegal action such as its unilateral closure of cross-border routes into the *KIC* in 2008 and 2009.²³⁵

As Part II.B has shown,²³⁶ legislative reform alone cannot easily secure the effectiveness of laws. Recent events have demonstrated that *KIC* laws cannot ensure the independence of the *KIC* from the North Korean government without binding instruments for the implementation of laws from the outside. As discussed earlier,²³⁷ Seoul has proven unable to prevent the North's arbitrary border closures (which effectively shut down the *KIC*). Indeed, according to the *KIC* Act, the North Korean government has no duty to ensure the continuance of the *KIC* project.

Inter-Korean agreements can provide alternative ways to overcome these legislative limitations of the *KIC*. Under the *KIC* Act, any inter-Korean agreements on the *KIC* have the same authority and effect as the *KIC* Act itself.²³⁸ Currently, the two Koreas have four inter-Korean agreements aimed solely at

232. See Chang, *supra* note 229.

233. See Yun-seok Ahn, *Experts "North Korea Should Provide Accurate Data"*, JOONGANG ILBO (S. Kor.), Nov. 16, 2011.

234. See *supra* Part II.B.2.

235. See *supra* notes 155-161 and accompanying text.

236. See *supra* Part II.B.

237. See *supra* note 156.

238. *KIC* Act Addenda art. 2. See Code of the Act and Regulations for the Kaesong Industrial Zone, *supra* note 92, at 1.

the *KIC* project.²³⁹ However, the quality and quantity of these four *KIC*-related inter-Korean agreements are still insufficient. Thus, both Koreas need to make comprehensive new inter-Korean agreements for the *KIC* project. In particular, to prevent future shutdowns of the *KIC*, the two sides should conclude an inter-Korean agreement to secure continuity and independence from the North Korean government and to guarantee implementation of the laws in the *KIC*.

Additionally, four general inter-Korean agreements²⁴⁰ could provide another alternative to address these deficiencies in *KIC* legislation. Compared to the inter-Korean agreements on the *KIC*, these general inter-Korean agreements contain more comprehensive articles. It is debatable whether the four general inter-Korean agreements could apply to matters in the *KIC*, as they are not designed merely for specific matters in the *KIC* but rather for general inter-Korean issues.²⁴¹ However, general inter-Korean agreements can have legal authority under the *KIC* Act because they have essential provisions that can apply to matters involving the *KIC*. Under the *KIC* Act, any inter-Korean agreements on the *KIC* have the same authority and effect as the *KIC* Act itself.²⁴²

In particular, dispute resolution is perhaps the most important factor for the success of the *KIC*. However, as shown above,²⁴³ due to the uncertainty and insufficiency of the dispute resolution provisions of the *KIC* Act, and the conflict of laws between South and North Korea, interested parties in the *KIC*

239. The agreements include the Gaeseonggongopjigu Tongsine Gwanan Habuiseo [Agreement on Communications for the Kaesong Industrial Zone], the Gaeseonggongopjigu Tonggwane Gwanan Habuiseo [Agreement on Customs Clearance for the Kaesong Industrial Zone], the Gaeseonggongopjigu Geomyeoge Gwanan Habuiseo [Agreement on Quarantine for the Kaesong Industrial Zone], and the Gaeseonggongopjigu Wa Kumgangsangwangwangjigui Chulip Mit Chelyue Gwanan Habuiseo [Agreement on Entry to, Exit from, and Stay in the Kaesong Industrial Zone and Kumgangsang Tourist Zone]. CODE OF THE ACT AND REGULATIONS FOR THE KAESONG INDUSTRIAL ZONE, *supra* note 92.

240. The Nambuksaiui Tujabojange Gwanan Habuiseo [Agreement on Inter-Korean Investment Protection], the Nambuksaiui Sodeuge Daehan Ijunggwasebangji Habuiseo [Agreement on Prevention of Double Taxation], the Nambuksaiui Cheongsangyeoljee Gwanan Habuiseo [Agreement on Clearing Settlement] and the Nambuksaiui Sangsabunjaeng Haegyeoljeolchae Gwanan Habuiseo [Agreement on Resolution Procedures for Commercial Disputes]. *Id.* The four inter-Korean agreements came into effect with the ratifications of both South and North Korean legislatures on August 18, 2003 and became legally binding for both Koreas. *Id.*

241. For more extensive discussion of inter-Korean Agreements concerning the *KIC*, see Hyun-Yoon Shin, *Legal Problem and Its Improvement Scheme on Investment Protection and Commercial Dispute Settlement in the Kaesong Industrial Complex*, 45 BEOPHAKYEONGU 85 (2010) (S. Kor.).

242. *KIC* Act Addenda art. 2. See Gaeseonggongopjigubeop [Kaesong Industrial Zone Act], *supra* note 39, at 1.

243. See *supra* Part II.C.

cannot expect enforcement of their rights and reliable dispute resolution processes.

Here too inter-Korean agreements could be helpful. Unlike the *KIC* Act dispute resolution provision, the Agreement on the Resolution Procedures for Commercial Disputes establishes the predictable and transparent nature of inter-Korean commercial disputes. This Agreement addresses issues as to "(i) the establishment of the inter-Korean Commercial Arbitration Committee, (ii) the arbitral tribunal, (iii) jurisdiction, (iv) the arbitral procedure, (v) governing law and (vi) the enforcement of arbitral award etc. . . . Additionally, the two Koreas executed the Agreement on the Establishment and Operation of the Inter-Korean Commercial Arbitration Committee."²⁴⁴ Therefore, Article 2 of the *KIC* Act Addenda, which states that an inter-Korean agreement on the *KIC* has the same authority as the *KIC* Act, should be interpreted to include the general inter-Korean agreements, such as the Agreement on the Resolution Procedures for Commercial Disputes. Parties to disputes in the *KIC* should be able to rely on these inter-Korean agreements to resolve their disputes, and both Koreas should make an effort to develop those agreements as alternatives to the inadequate *KIC* dispute resolution provisions.

CONCLUSION

In recent decades, famine and serious food production shortfalls compelled thousands of North Koreans to escape from their country in search of food.²⁴⁵ In response to this national crisis, Pyongyang attempted to introduce, in limited forms, an international market system—including the *KIC*, which has been the most promising *SEZ* in North Korea. However, the *KIC* has been hamstrung by serious legislative flaws that prevent it from reaching its full potential as a development engine for the North's ailing economy and as a mechanism for cross-border détente. Comprehensive reform of the relevant legislation is thus inseparably linked to the project's ultimate success or demise.

In discussing the legislative problems plaguing the *KIC* project, this Article has reached the following conclusions. First, numerous legislative flaws exist. These include a lack of sufficient regulations and vague language in the relevant provisions. The *KIC* Act and its implementing regulations have exclusive authority over economic matters in the *KIC*.²⁴⁶ For this reason, the *KIC* Act should be as flawless as possible for governing all mat-

244. Oh, *supra* note 41, at 47.

245. See *supra* note 21-25 and accompanying text in Part I.A.

246. See *KIC* Act art. 9.

ters in the *KIC*. However, the current *KIC* Act does not fulfill the minimum standards for regulating *KIC* matters in terms of either quantity or quality. Insufficient regulations and confusing language seriously undermine the *KIC*'s development.

Second, what is worse, the *KIC* Act, with its myriad structural legislative problems, is inadequate for effective governance of *KIC* matters. Simple legal reform cannot ensure the objectives of the legislation without proper enforcement of laws. Third, recourse for dispute resolution remains poorly defined. Even though the *KIC* Act has a dispute resolution provision,²⁴⁷ it fails to specify the scope and procedure of dispute resolution methods. Moreover, the provision in question is ambiguously worded regarding the regulation of disputes in the *KIC*.²⁴⁸ As a result, the current dispute resolution provision is inadequate for interested parties. In addition, North and South Korea have acknowledged each other's temporary and factual status, but not their mutual legal sovereignty. Thus, problems of jurisdiction and conflict of law will be unavoidable so long as these issues remain unresolved.

Meanwhile, cross-border tensions between the two Koreas have compounded the negative effects of these legislative flaws. Indeed, the arbitrary shutdowns of the *KIC* by North Korea are a clear manifestation of both the resulting fallout and South Korea's utter powerlessness to ensure the project's continuity in the face of Kim Jong Il's caprice and the lack of a binding legal framework. To prevent future shutdowns and overcome the legislative flaws, this Article has proposed two possible solutions: foreign assistance in improving and reforming the *KIC* laws, and inter-Korean agreements.

Since North Korea has little experience with a market economy, outside help in improving and reforming *KIC* legislation is essential. Assistance from South Korea would be the most efficient way to promote legislative reform in the *KIC*. However, South Korea has limited ability to assist in the legislative reform process due to its relative inexperience with the socialist system. Moreover, because the *KIC* seeks to attract foreign companies from all over the globe, it must look outside the Korean peninsula for assistance with legal reforms. Accordingly, the *KIC* also should rely on the legal and judicial reform programs of international organizations, such as the World Bank. The combination of systematic and experienced assistance from South Korea and international organizations in reforming *KIC* laws should effec-

247. *See id.* art. 46.

248. *See id.*

tively lay the groundwork for solving the fundamental legislative flaws that restrain the *KIC* from its maximum development.

Second, inter-Korean agreements may provide the solution to problems with the *KIC* laws' ineffectiveness and concerns over the North's unpredictable actions. Under the current *KIC* Act, the *KIC* laws' effectiveness is solely dependent on the North Korean government's discretion. As a result, the *KIC* has suffered unexpected shutdowns at the apparent dictate of Kim Jong Il. At this point, inter-Korean agreements may provide an alternative for overcoming this legislative limitation. Furthermore, inter-Korean agreements can establish an alternative legal basis for *KIC* dispute resolution, replacing the nebulously worded *KIC* Act dispute resolution provision.

Experts estimated the minimum loss of South Korean companies caused by the *KIC* shutdown in December 2008 at over three hundred million dollars.²⁴⁹ While Seoul is preparing to petition the North Korean government concerning the losses, it appears that there are no laws to support such a complaint.²⁵⁰ Without an ironclad legislative regimen that effectively protects businesses and individuals within the complex, the *KIC* will remain dependent on the will of North Korea. Moreover, it could even provide funds for the North's nuclear weapons program and promote nuclear proliferation worldwide.

Even so, this setback can be seen as an opportunity in that it exposes fundamental problems of the *KIC* legislation. Restructuring the *KIC* legislation is a must not only to prevent a repetition of the debacle in the future, but also to see the project's ultimate success. The *KIC*'s success could help North Korea overcome its devastating famines by providing economic benefits. It also could contribute to peace and stability in East Asia by promoting denuclearization and unification of the Korean peninsula. Furthermore, it has international significance in non-proliferation of nuclear weapons and trade issues. Only through legislative reform can the *KIC* realize its domestic, regional, and international promise.

249. Honghwan Park, *KIC Closedown*, SEUL NEWS, Nov. 25, 2008.

250. *Id.*