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## The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Gaeseong

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# The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Gaeseong

Joongi Kim

## **Abstract**

Though still in its infant stages, the process of establishing the Sinuiju Special Administrative Region and the Gaeseong Industrial Complex heralds a tremendous paradigm shift on the part of North Korea. This Essay will seek to analyze the comprehensive legal structure that North Korea has adopted for these regions. It will seek to offer a glimpse into the future of how North Korea will establish similar economic zones throughout the country and, eventually, a market-based economic system across the entire country. This Essay will first offer an overview of the impetus behind North Korea's efforts to develop Sinuiju and Gaeseong. Next, it will offer an analysis of the recently adopted laws and regulations covering Sinuiju and Gaeseong. The Essay will then try to forecast what types of problems can be envisaged under the current regime and will conclude with some potential recommendations.

# THE CHALLENGES OF ATTRACTING FOREIGN INVESTMENT INTO NORTH KOREA: THE LEGAL REGIMES OF SINUJU AND GAESEONG

*Joongi Kim\**

## INTRODUCTION

The Democratic People's Republic of Korea ("DPRK")<sup>1</sup> remains one of the most controversial, secluded, and potentially dangerous countries in the world. Its geo-strategic location between South Korea, China, Japan, and Russia magnifies the Nation's significance. In recent years, however, North Korea has made bold attempts to embrace international market practices by establishing four special economic zones in the four corners of the country. Through Rajin-Seonbong in the northeast, Sinuiju in the northwest, and most recently Gaeseong in the southwest and Geumgang Mountain in the southeast, North Korea appears to be desperately trying to attract foreign investment and much needed hard currency in an effort to jumpstart its economy.<sup>2</sup> Instead of adopting a single law to cover all four regions, DPRK chose to promulgate individual laws for each city. Reports indicate that North Korea has even established a Special Economic Zone Development Office underneath the cabinet.<sup>3</sup>

Despite previous setbacks in Rajin-Seonbong, plans to estab-

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1. This Essay will alternatively use both DPRK or North Korea, and the Republic of Korea ("ROK") or South Korea.

2. See Geumgangsán Gwangwang Jigubeop [Geumgang Mountain Tourism Zone Law], Nov. 13, 2002 [hereinafter Geumgangsán Law]; Sinuiju Teukbyeol Haengjeonggu Gibonbeop [Basic Law of the Sinuiju Special Administrative Region], Sept. 12, 2002 [hereinafter Sinuiju Law]; Gaeseong Gongeop Jigubeop [Gaeseong Industrial Zone Law], Nov. 20, 2002 [hereinafter Gaeseong Law]. The Geumgangsán Law closely follows the Gaeseong Law in most of its major provisions. See MINISTRY OF JUSTICE, BUKHAN "GAESEONG GONGEOP JIGUBEOP" BUNSEOK [AN ANALYSIS OF NORTH KOREA'S "GAESONG INDUSTRIAL ZONE LAW"] 61-72 (S. Kor. May 2003) [hereinafter MOJ] (Comparing the Geumgangsán Law and the Gaeseong Law). Gaeseong is alternatively spelled as "Kaesong."

3. DONG HO CHO, KOREA DEVELOPMENT INSTITUTE, BUKHAN GYEONGJEJUNGCHAEKUI BYEON JEONMANGGWA NAMBUKGYEONGHYEOP I YEOKHAL [THE PROSPECTS OF CHANGE IN

lish a special region in Sinuiju and Gaeseong in particular, represent North Korea's most daring moves to date. In June 2003, North Korea also successfully commenced the development of an industrial park in Gaeseong, the heart of the Korean peninsula. An unprecedented array of legal infrastructure is being established in Gaeseong through comprehensive negotiations with counterparts in the Republic of Korea ("ROK"). At the same time, the original plans to develop Sinuiju, which borders China and can serve as a gateway for inter-regional trade, still appear to be under close consideration.

Though still in its infant stages, the process of establishing the Sinuiju Special Administrative Region and the Gaeseong Industrial Complex heralds a tremendous paradigm shift on the part of North Korea. This Essay will seek to analyze the comprehensive legal structure that North Korea has adopted for these regions. It will seek to offer a glimpse into the future of how North Korea will establish similar economic zones throughout the country and, eventually, a market-based economic system across the entire country.

This Essay will first offer an overview of the impetus behind North Korea's efforts to develop Sinuiju and Gaeseong. Next, it will offer an analysis of the recently adopted laws and regulations covering Sinuiju and Gaeseong. The Essay will then try to forecast what types of problems can be envisaged under the current regime and will conclude with some potential recommendations.

## I. NORTH KOREA ATTEMPTS TO ACCESS THE MARKETS

North Korea's economy has gradually collapsed during the past decade. Between 1990 and 1998 alone, the Nation suffered nine consecutive years of negative economic growth.<sup>4</sup> A significant part of DPRK's economic problems can be attributed to its deteriorating trade environment. Until the late 1980s, for instance, the former Soviet Union was North Korea's largest trading partner, accounting for more than 53% of its trade. At this

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NORTH KOREA'S ECONOMIC POLICY AND THE ROLE OF SOUTH-NORTH ECONOMIC COOPERATION] 146 (2003).

4. KOREA INSTITUTE FOR INTERNATIONAL ECONOMIC POLICY ["KIEP"], POLICY PAPER 02-26, BUKHAN GYEONGJE BAEKSEO [hereinafter NORTH KOREA ECONOMIC WHITE PAPER] 521 (2002).

time, former socialist countries as a whole accounted for over 72% of North Korea's trade. By 1991 and 1992, however, former Eastern Europe, China and the former Soviet Union ended their barter trade and shifted to hard currency systems, particularly in their trading relations with the DPRK. Most notably, by 1991 Russia represented only 14% of North Korea's trading volume and by 2001 its share dropped to a paltry 3%.<sup>5</sup>

Against this backdrop, during the past decade, North Korea attempted to rejuvenate its struggling economy by attracting trade and investment. The promulgation of the Joint Venture Law [*Hapyeongbeop*] in September 1984, the establishment of the first special zone in Rajin-Seonbong in 1993, and the adoption of various foreign investment-related laws represent DPRK's initial attempts to access international markets.<sup>6</sup> Other potential means to promote investment in North Korea include public and commercial loans, the issuance of foreign bonds and project finance.<sup>7</sup> Most of these prior efforts, however, failed miserably due to a host of factors ranging from the on-going nuclear crisis, general mismanagement, poor understanding of international markets, structural problems, geographic limitations, and even the financial contagion that ravaged Asia.<sup>8</sup>

Hoping to attract international attention and to learn from its mistakes, DPRK has boldly attempted to revamp its approach to foreign investment through its projects in Sinuiju and Gaeseong. With great fanfare, in the fall of 2002, North Korean leaders chose a foreigner, Bin Yang, as chief administrator of the Sinuiju Special Administrative Region. This appointment signified a bold attempt by the isolated communist regime to reform its crippled economy and demonstrate its commitment to change. As a Dutch national and one of the wealthiest persons of Chinese descent, Yang was a daring choice by DPRK to head its first major effort at attracting foreign capital. DPRK perhaps

5. NORTH KOREA ECONOMIC WHITE PAPER, *supra* note 4, at 491.

6. Contrary to DPRK's difficulties, China has been tremendously successful after passing its Chinese-Foreign Equity Joint Ventures Law in 1979. See George White, *Enter the Dragon: Foreign Direct Investment Laws and Policy in the P.R.C.*, 29 N.C.J. INT'L L. & COM. REG. 35, 36 (2003); see also Bin Xue Sang, *Pudong: Another Special Economic Zone In China?*, 14 NW. J. INT'L L. & BUS. 130 (1993).

7. See HWON IL PARK, HYUNDAI RESEARCH INSTITUTE, DAEBUK TUSAEOBE ISSEOSEO HYGWAJEUGIN OEJAYUCHI BANGAHN [EFFECTIVE WAYS TO ATTRACT FOREIGN CAPITAL IN NORTH KOREAN INVESTMENT PROJECTS] 163-77 (1999).

8. See NORTH KOREA ECONOMIC WHITE PAPER, *supra* note 4, at 516-21.

hoped Yang could attract Chinese investment and the attention of the European market, critical for Sinuiju's success. Yet, for unconfirmed reasons, the Chinese government subsequently arrested Yang for bribery, tax evasion, and other offenses, and sentenced him to a stiff penalty of eighteen years of imprisonment.<sup>9</sup> North Korea's interest in Sinuiju reportedly remains fervent despite this unfortunate turn of events.<sup>10</sup> It has been reported that Seung-hae Kye, former chair of North Korea's Committee for the Promotion of External Economic Cooperation ("CPEEC"), has been acting as the interim head since July 2003.

While the Sinuiju Region is targeting Chinese investment, Gaeseong and Geumgang are primarily seeking South Korean investment. In August 2000, Hyundai Asan, a private company, achieved a dramatic breakthrough when it entered into a historic agreement with North Korea to develop Gaeseong Industrial Park.<sup>11</sup> Despite this initial progress, however, the project encountered a host of roadblocks due to the war against terror, a skirmish in the Yellow Sea between DPRK and ROK naval forces and Hyundai Asan's financial troubles. North Korea's acknowledgment of its attempts to develop nuclear rods further dealt a severe blow to the project.

On November 20, 2002, North Korea nevertheless promulgated the Gaeseong Industrial Zone Law. Groundbreaking ceremonies for the zone took place on June 30, 2003. Comprehensive implementing provisions for the Law in the form of the Development Regulations, Company Establishment and Management Regulations, Tax Regulations, Labor Regulations, Establishing and Operation Regulations for the Management Office, Entry, Visiting and Residency Regulations, and Customs Regulations were later passed in June, October, and December of 2003.<sup>12</sup> Furthermore, in November 2003, the South-North Ec-

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9. See Karby Leggett, *Economic Crimes Fell Chinese Entrepreneur*, ASIAN WALL ST. J., July 15, 2003, at A1 (discussing the speculation surrounding the reason behind China's harsh treatment of Yang and its apparent disapproval of the Sinuiju Region); see also Hyun Tae Cho, *Bukhanui Gaehyeokgaebangae Daehan Junggukui Sigak* [*China Viewpoint on North Korea's Reform and Opening*], 76 CURRENT ISSUES AND POLICY (Sejong Institute, Seoul, S. Kor.), Nov. 1, 2002, at 8.

10. See Cho, *supra* note 9, at 146.

11. See Gonggeopjigu Geonseolunyeonge Gwanhan Hapuiso [Agreement on the Construction and Management of the Industrial District], in MOJ, *supra* note 2, at 99-100.

12. See Gaebal Gyujeong [Development Regulations] and Geop Changdal

onomic Cooperation Promotion Committee announced that a Direct Trade Office would be established within the District by early 2004.<sup>13</sup> A preliminary district of 33,000 to 66,000 square meters (10,000 to 20,000 *pyung*) will be allotted in late 2004. On December 23, 2002, Hyundai was also granted a Land Use Permit for 66 million square meters (20 million *pyung*) in the Gaeseong Zone. In January 2003, over 900 South Korean companies in the textiles, clothing, machinery, metal, and electronic industries expressed interest in entering the Gaeseong project.<sup>14</sup>

Overall, North Korea has a dire need to ensure that Sinuiju and Gaeseong are successful. It has thus set into motion a variety of important initiatives to develop Sinuiju and Gaeseong. Among these structural moves, the most significant are the legal reforms that it has adopted in the process.

## II. A NOVEL UNDERTAKING TO ATTRACT FOREIGN INVESTMENT: THE SINUIJU SPECIAL ADMINISTRATIVE REGION ("SSAR")

The recent adoption of special economic zone laws relating to Sinuiju and Gaeseong represent the most significant legal development to attract foreign capital. The Sinuiju region, in particular, accounts for 80% of North Korea and China's trade and stands as the critical border city between the two Nations.<sup>15</sup> One reason Sinuiju was chosen after Rajin-Seonbong is because it remains equally distant and remote from the heart of the coun-

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Unyeong Gyujeong [Company Establishment and Management Regulations], June 28, 2003, KDI REVIEW OF THE NORTH KOREAN ECONOMY, July 2003, at 59-68; Segeum Gyujeong [Tax Regulations] and Nodong Gyujeong [Labor Regulations], Sept. 18, 2003, KDI REVIEW OF THE NORTH KOREAN ECONOMY, Oct. 2003, at 40-63; Gwanli Gigwan Seollip Unyeong Gyujeong [Establishing and Operation Regulations for the Management Office], Chulip, Cheryu Geju Gyujeong [Entry, Visiting and Residency Regulations], Segwan Gyujeong [Customs Regulations], KDI REVIEW OF THE NORTH KOREAN ECONOMY, Dec. 2003, at 3-23.

13. See *Nambuk Jikgyoyeok Samuso Naenyeonjung Gaeseonge Gaeseolkiro* [Establishment of a South North Direct Trade Office Next Year], CHOSUN ILBO, Nov. 8, 2003.

14. Jong Woon Lee, *Gaeseong Gongeop Danjiui Baljeon Ganeungseonggwa Hyanghu Gwaje* [Development Potential of the Gaeseong Industrial Complex and Future Issues], SEGYE GYEONGJE [WORLD ECON.] (KIEP, S. Kor.), Nov. 2003, at 50 n.6.

15. Jong Woon Lee, *Sinuiju Jiyegui Saneop Hyeonhwanggwa Gyeongje Teukgu Seong-gongui Gwaje* [Industry Status of the Sinuiju Region and Issues in the Success of the Special Economic Zone], SEGYE GYEONGJE [WORLD ECON.] (KIEP, S. Kor.), Nov. 2002, at 39.

try.<sup>16</sup> Under this rationale, the DPRK remains wary of the undue influence such special regions might have upon the country, particularly from a security and ideological perspective.

Nevertheless, given its significance as a potential conduit for trade and investment, North Korea passed the Basic Law of the Sinuiju Special Administrative Region in September 2002. The Sinuiju Law was unprecedented in many regards. For instance, the Sinuiju Law established a “one country-two system” type of regime that has been described as a “Hong Kong-style” administrative zone.<sup>17</sup> In fact, from its use of the name “Special Administrative Region” for the governing law, North Korean law-makers clearly paid close attention to the Hong Kong Law when adopting their own version.<sup>18</sup> Many provisions directly follow the dictates of the Hong Kong Law in terms of format, structure and even wording.

As testimony to its independence, the Sinuiju Law resembles a mini-constitution in its structure and content. First, the law is structured according to the broad themes of politics, economics, culture, rights and duties of residents, organizations and the flag and emblem of the region. This structure closely follows the Hong Kong Law. The first chapter grants independent legislative, executive and judicial authority to the Region.<sup>19</sup> Aside from special examples such as Hong Kong or Macao, this type of wholesale independence for the legislative, executive and judicial branches is rare for a special economic zone.<sup>20</sup> Article 6 also stipulates that the DPRK’s cabinet, executive committee, office and central organization cannot participate in the Region. Furthermore, if these types of central government institutions want to send their staff to the Region, they must obtain permission from the Minister. This non-interference provision seeks to ad-

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16. Deok Ryong Yoon, *Sinuiju Gyeongjeteukguui Jeonmang* [*The Prospects of the Sinuiju Special Economic Zone*], CURRENT ISSUES & POL’Y 7, 76 Sejong Inst., Nov. 2002.

17. MOJ, *supra* note 2, at 24; Ihk Pyo Hong, *Sinuiju Gyeongje Teukgu Seollip Baegyeong Mit Hyanghu Baljeon Gwaje* [*Background of the Establishment of the Sinuiju Special Economic Zone and the Issues for the Future*], WORLD ECON. UPDATE (KIEP, S. Kor.), Oct. 1, 2002, at 13; Yoon, *supra* note 16, at 5.

18. See Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, 29 I.L.M. 1511 [hereinafter Hong Kong Law]; see also Michael C. Davis, *From British Colony to Chinese Special Administrative Region*, 18 U. PA. J. INT’L ECON. L. 157 (1997).

19. Lee, *supra* note 15, at 46 n.3.

20. Hong, *supra* note 17, at 1.



dress the previous complaints that the central government was overly meddlesome in the affairs of Rajin-Seonbong.

On its face, several aspects of Sinuiju's legal regime appear more liberal than that of Hong Kong. In the case of military troops for instance, Sinuiju allows the stationing of troops only "when necessary." By contrast, Hong Kong does not have such a condition on stationing troops but instead requires that military forces "shall not interfere in the local affairs."<sup>21</sup> With regard to top administrative positions, Hong Kong limits the position of Chief Executive to Chinese nationals that are older than forty and that have resided in Hong Kong for at least twenty years.<sup>22</sup> By comparison, the Sinuiju Law only requires that the person be a resident and a person with "business competence and one held in high regard by the residents."<sup>23</sup> Hence, Bin Yang, who was thirty nine and a Dutch national at the time of his appointment, would not have qualified as a candidate in Hong Kong.

Sinuiju's Minister has even more power than Hong Kong's Chief Executive in certain regards. For example, the Minister can hire or fire almost all personnel at his or her discretion.<sup>24</sup> The Minister acts as the head of the executive branch and as the head of the Region. While the Minister is appointed and can be terminated by the Supreme People's Congress' Executive Committee, the Minister's term is unspecified. By contrast, the Hong Kong Chief Executive can only nominate or recommend the senior positions for appointment or removal by the central government in Beijing.<sup>25</sup> The Sinuiju Law allows the Region to carry out independent consular affairs and even to issue its own passports.<sup>26</sup> Similarly, Sinuiju, like Hong Kong, allows the use of its own flag and emblem. These are all truly novel features, given that North Korea is considered to be one of the most totalitarian Nations left.

The governing structure of the Region provides that the Legislative Assembly will consist of fifteen persons, who will each serve five-year terms. These members are in charge of enacting laws and overseeing the executive branch and the Minister. For-

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21. Sinuiju Law, art. 7; Hong Kong Law, art. 14.

22. Hong Kong Law, art. 44.

23. Sinuiju Law, art. 77.

24. *Id.* art. 79.

25. Hong Kong Law, art. 48.

26. Sinuiju Law, art. 8.

eigners in the Sinuiju Special Administrative Region are not only eligible to obtain *junmingweon* [residency rights], but can also become legislative members of the Assembly.<sup>27</sup> Theoretically, the entire Sinuiju Legislative Assembly could consist of foreigners. Whereas in Hong Kong, the participation of foreigners is limited to no more than 20% of the Assembly's composition.<sup>28</sup>

Under Sinuiju Law, the Region independently establishes its own judicial branch and prosecutor's office. The Minister appoints the head of the prosecutor's office from among the Region's residents to a five-year term.<sup>29</sup> The various rights and duties of the prosecutor's office are outlined in Sinuiju Law. For instance, prosecutors are expressly charged with the duty to "enforce the law," "investigate crimes and issue indictments." By contrast, Hong Kong Law only provides only a general statement regarding the prosecutors' responsibilities. The Department of Justice "controls all criminal prosecution free from any interference."<sup>30</sup> No further elaboration is provided.<sup>31</sup>

Sinuiju has a simpler set of provisions concerning the judiciary than Hong Kong. The independence of the Sinuiju's judiciary is guaranteed with it remaining separate from the executive branch. Sinuiju Law provides for one level of appeal, however, the final stage of judicial review is conducted by the court of the Region, granting it substantial autonomy.<sup>32</sup> Furthermore, the three branches of government in the SSAR are independent of one another.

The authority to interpret the law, however, lies with the Supreme People's Congress Executive Committee. This can create problems if conflicts arise.<sup>33</sup> This structure appears to be another adaptation of Hong Kong Law that provides, "[t]he power of interpretation of this Law shall be vested in the Standing

27. *Id.* art. 62.

28. *Id.* art. 62; Hong Kong Law, art. 67.

29. Sinuiju Law, arts. 85-90.

30. Hong Kong Law, art. 63.

31. For a comprehensive review of Hong Kong's Department of Justice, see *The Statement of Prosecution Policy and Practice*, available at <http://www.info.gov.hk/justice/new/depart> (Oct. 2002).

32. Hong, *supra* note 17, at 13.

33. Sinuiju Law, app., art. 3; Soon Jick Hong, *Sinuiju Teukgu Jijeongui Uimiwa Seong-gong Yogeon* [The Meaning and Conditions for Success of Designating Sinuiju a Special Economic Zone], Hyundai Research Institute, VIP Report, Oct. 1, 2002, at 2.

Committee of the National People's Congress."<sup>34</sup> At the same time, Article 3 of the Sinuiju Law stipulates that the Law will remain unchanged for the next fifty years. This provision seeks to guarantee stability and predictability of the regulatory framework.

In terms of economic affairs, SSAR has adopted many features found in classic market economies, such as the quasi-private ownership of property. One of the most sensitive issues in a socialist system such as the DPRK is the ownership of real estate. This essential property right remains with the State. Nevertheless, the new Law grants real estate rights pertaining to development, usage and management, and also provides for leasing and use.<sup>35</sup> This grant further stipulates that land can be leased until 2052 and the right of hereditary succession to "privately owned property" is equally guaranteed.<sup>36</sup> These features are essential in attracting long-term foreign investment.

Furthermore, the Law protects foreign investors within the SSAR by providing that the State can only expropriate privately owned property "for the purposes of the [N]ation's safety," and by requiring that the State must compensate the owner.<sup>37</sup> This provision seeks to provide the most important assurance to foreign investors, but its protections should be expanded. For instance, the circumstances and processes surrounding expropriation and guidelines for determining the appropriate compensation should be spelled out in greater detail.

SSAR has strict provisions governing labor standards. Laborers, for example, must be at least sixteen years old and may work a maximum of eight hours per day or forty-eight hours per week.<sup>38</sup> Companies located within the Region must use North Korean laborers and may only use foreign laborers with approval from the Region's Executive Office.<sup>39</sup> While this remains a thorny issue, DPRK should still consider liberalizing this strict provision if it wants to enhance labor flexibility and encourage foreign investment.

Overall, the Law provides for an independent budget pol-

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34. Hong Kong Law, art. 158.

35. Sinuiju Law, arts. 12, 14.

36. *Id.* arts. 15, 17.

37. *Id.* art. 17.

38. *Id.* art. 18.

39. *Id.* art. 20.

icy, currency policy, fiscal policy, and financial policy, as well as free repatriation and transfer of foreign currency, tax benefits, tariff benefits, free occupational movement of labor, and proof of origin.<sup>40</sup> In terms of currency, Sinuiju has made another bold move by designating U.S. dollars and Chinese *reminbi* as the official currencies. This marks a significant advance from the original Rajin-Seonbong region where only DPRK currency could be circulated and corporate transactions were limited to DPRK currency or certain convertible currency.<sup>41</sup>

Finally, the Sinuiju Law governing the SSAR also has a detailed chapter related to culture that addresses the arts, medical insurance, education, childcare, and sports. Unlike Gaeseong, Sinuiju also provides for freedom of religion, press, publication, assembly and gathering.<sup>42</sup>

Despite this revolutionary legal framework, it remains questionable whether the SSAR can ever succeed without the devotion of adequate resources. Furthermore, Sinuiju cannot succeed without critical support from China. China's Dandong region offers the basic infrastructure, such as electricity, transportation, raw materials and even consumer demand, that Sinuiju desperately needs in order to develop. Chinese political support and economic cooperation in the form of investment and trade are critical to bring about serious change. South Korea's potential interest remains secondary given its distance and lack of initiative, especially with the development of Gaeseong.

### III. THE ULTIMATE TEST IN OPENING NORTH KOREA: THE GAESEONG INDUSTRIAL ZONE

Gaeseong offers an array of potential benefits, especially when compared to the initially stalled attempts to establish special economic zones in Rajin-Seonbong and Sinuiju. First, its central location has tremendous strategic value and market potential. Some of Rajin-Seonbong's critical weaknesses were its remote location, limited population and lack of infrastructure. It remained distant from any major economic centers or markets.<sup>43</sup> As a result, transportation was inadequate and trade volume in-

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40. *Id.* arts. 23-27.

41. Hong, *supra* note 17, at 8.

42. Sinuiju Law, art. 45.

43. Yoon, *supra* note 16, at 7.

sufficient. Although not as pronounced, Sinuiju shared many of these limitations, especially when considered from South Korea's perspective. Gaeseong, by contrast, can benefit from one of the most lucrative consumer markets in the region and a wealth of resources resulting from its close proximity to downtown Seoul. Seoul, with its exorbitant real estate prices and market demand, stands only sixty kilometers away.

The designation of Gaeseong as a special district therefore has "special meaning" because of its geographic benefits.<sup>44</sup> It also represents a special "industrial zone" and therefore can be distinguished from the prior attempts in Sinuiju or Rajin-Seonbong.<sup>45</sup>

Second, North Korea has delegated the ROK's Korea Land Corporation as the main concessionaire of the Gaeseong project and Hyundai Asan, a private entity, as the main contractor for the initial plot of land development.<sup>46</sup> The DPRK has attempted to grant them sufficient independence. 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.

To overcome the general skepticism that has developed over the years toward North Korea's efforts at reform, experts believe that "path-breaking policies and systems" must be adopted.<sup>47</sup> Along these lines, the legal structure of the Gaeseong Law has a fundamentally different approach when compared to the Sinuiju Law. The Gaeseong Law primarily focuses on the development of the industrial zone, investment and establishment of companies. As of yet, the Gaeseong industrial zone does not have the independent legislative, executive and judicial branches that were prominently featured in the Sinuiju Special Administrative Zone. Article 1 of the Gaeseong Law pro-

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44. Lee, *supra* note 14, at 45.

45. Some argue that due to many similarities the Gaeseong Law and Geumgangsang Law should be combined under a single law. See MOJ, *supra* note 2, at 25.

46. Jong Hun Choe, *Gaeseong Gongdan Saeopeun Nambuk Modu Winwin Kadeu* [Gaeseong Industrial Complex is a Win Win Situation for Both the South and North], HANKYOREH SHINMUN, Nov. 19, 2003.

47. Lee, *supra* note 15, at 45.

vides that North Korean Law specifically applies to the entire zone.

In terms of the governance structure of Gaeseong, a Regional Management Organization will be in charge of general management and administration of the Zone.<sup>48</sup> The Gaeseong Law also tries to address persistent complaints that arose in the case of Rajin-Seonbong like that of excessive interference by North Korean officials in business operations.<sup>49</sup> As in the case of Sinuiju, the Gaeseong Law has stipulated that administrative agencies cannot interfere in business affairs.<sup>50</sup> The DPRK government must guarantee an independent operating environment for foreign businesses.

The Gaeseong Law has a host of market-oriented features related to price mechanism and ownership. Article 40 of the Law, for example, recognizes that prices for goods can be set at international market prices according to the agreement of the parties involved. In terms of property rights, the Gaeseong Law also follows the Sinuiju Law and allows that real estate may be leased for a period of fifty years. The term, however, is not subject to automatic renewal but a request must be filed.<sup>51</sup> This condition remains comparable to similar provisions in other North Korean laws but in the future, more "automaticity" should be considered in the renewal process. If an investment is stopped or retracted, it is unclear to what extent a right to reclaim the investment or to receive compensation might exist.

The Gaeseong Law notably has much more strict terms with regard to potential State expropriation of property, compared to the Sinuiju Law that was relatively less defined. Article 7 of the Gaeseong Law in fact clearly provides that expropriation must occur with "prior consultation" with the investor and can only happen in inevitable cases related to "social communal interests." This represents a much tougher standard to meet relative to Sinuiju's.

Perhaps, one of the most subtle but revolutionary changes in Gaeseong from the perspective of adopting market practices is that the zone law specifically allows advertising.<sup>52</sup> All types of

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48. Gaeseong Law, art. 21.

49. Lee, *supra* note 15, at 46, 53.

50. Gaeseong Law, art. 6.

51. *Id.* art. 12.

52. *Id.* art. 31.

advertising are permitted regardless of location, type, content and manner; one exception is that outside advertising must be approved by the Zone's Management Office.

In terms of currency, the present law holds that the circulating currency within the Zone should be convertible currency and even allows for credit cards.<sup>53</sup> Circulating currency, however, is designated as "foreign currency," which suggests that ROK currency cannot be used.<sup>54</sup> Given that the predominant portion of investment will be coming from South Korea, the implementing provisions should consider clarifying this point to permit ROK currency. The currency provision therefore appears less liberal than the comparable provision in the Sinuiju Law. The Development Regulations provide considerable details as well.

The law also provides that South Korean or foreign workers will not be subject to arrest, detention or search without legal basis.<sup>55</sup> Some analysts are critical that this provision could be interpreted to mean that as long as a government action is legal according to North Korean law, an arrest or search can take place.<sup>56</sup> But this type of provision is quite standard in criminal law for most countries. The central issue of course that has yet to be decided is what would be the legal basis for allowing an arrest, detention or search.

Finally, goods that enter the Zone or leave the Zone destined for other countries will be tariff free.<sup>57</sup> Goods that are imported into the Zone and then directly sold to another region within DPRK, however, could be subject to duties. It remains uncertain if a good made in the Zone that later gets sold to another region in DPRK will receive duty-free treatment as well.<sup>58</sup>

The Law also addresses essential issues related to travel and communications. Article 28, for instance, provides that persons with a travel permit from the appropriate authority can travel between South Korea and Gaeseong along designated routes without a visa. Some critics, however, hold that although this

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53. *Id.* art. 41.

54. MOJ, *supra* note 2, at 46.

55. Gaeseong Law, art. 8.

56. MOJ, *supra* note 2, at 27-28 (suggesting that similar provisions that were adopted for KEDO are needed).

57. Gaeseong Law, art. 33.

58. MOJ, *supra* note 2, at 39.

provision appears like a concession, in reality, a travel permit requirement differs little from a visa requirement.<sup>59</sup> Therefore, some experts suggest that even the travel permit should not be required. In another significant step, freedom to use mail and telecommunications is also granted.<sup>60</sup>

Interestingly, unlike the Sinuiju Law, the Gaeseong Law has its own provision covering dispute settlement. The dispute settlement provisions of the law provide for consultation if differences of opinion arise between parties.<sup>61</sup> If consultations are unsuccessful, the parties are supposed to resort to "arbitration or court procedures" or the "commercial dispute settlement procedures" that have been negotiated but have not yet taken effect between South and North Korea. It remains uncertain whether "the arbitration or court procedures" are limited to North Korean "arbitration or court procedures" or whether they include "arbitration or court procedures" of other countries.<sup>62</sup>

Since the adoption of the Law, North Korea has enacted a host of new implementing regulations to supplement the Gaeseong Law. These implementing provisions are not only expansive in their scope but also considerable in their detail. They have been thoroughly negotiated with counterparts in the ROK and provide the greatest amount of legal infrastructure that has developed between the two countries. The Company Establishment and Management Regulations that were established in June 2003, for example, contain provisions covering the investment period and manner, management conditions, capital requirements, issuance of bonds, accounting, profit distribution and liquidation.

The Tax Regulations also adopted on September 18, 2003 confirm that the corporate income tax for the companies operating in the Zone will be held at 14%.<sup>63</sup> In contrast, special economic zones in China have corporate taxes between 14% to 24%, in Vietnam between 10% to 25%, and in Hong Kong at

59. *Id.* at 29.

60. Gaeseong Law, art. 29.

61. *Id.* art. 46.

62. MOJ, *supra* note 2, at 48; Kwang Rok Kim, *Settling Business Disputes with North Koreans in the Advent of the External Economic Arbitration Law*, 16 *TRANSNAT'L LAW* 401 (2003).

63. Gaeseong Law, art. 43; Tax Regulations, art. 31.



16%.<sup>64</sup> Given the enormous security risks associated with North Korea, the income tax should perhaps be lowered even further.

Similarly, the Labor Regulations that were announced at the same time provide that the minimum wage for North Korean laborers will be set at US\$50 and that social insurance must be 15% of the minimum wage or US\$7.50 per month. It remains unclear, however, what the wage rate will be for the advanced skilled workers that North Korea cannot provide.<sup>65</sup> The regulations also provide that the tax must be in U.S. dollars. These standards represent significant reforms because North Korean officials are typically directly involved in the labor conditions and wage payments of laborers. In principle, all laborers must be North Korean. Only after consultation can certain management positions, technicians or specialists from ROK or other countries be used.<sup>66</sup>

North Korea also plans to enact similar detailed implementing provisions concerning entry and stay of ROK laborers, the transfer of materials, accounting, foreign currency, customs, advertising, and real estate.<sup>67</sup> Other areas such as the basic rights of freedom of religion, freedom of the press, and freedom of travel should be explicitly added in a similar fashion to that of the Sinuiju Law.<sup>68</sup>

Some observers believe that despite the persistent demands of ROK, the various laws that DPRK has adopted as part of its desperate drive to revive its economy, remain unsatisfactory.<sup>69</sup> From this perspective, the North Korean government has not taken a sufficient enough role. Forms of social overhead capital, for instance, water, telecommunications and electricity, still remain woefully inadequate for the zone. Also, more detailed implementing provisions for many other areas remain undetermined.

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64. The Geumgangsan Law provides for tax-free treatment for tourism development and sales activities by the developers in the Zone. Geumgangsan Law, art. 8; See MOJ, *supra* note 2, at 71.

65. Cho, *supra* note 9, at 147.

66. Gaeseong Law, art. 37.

67. See Kyo Jun Ihn, *Gaesung Gongdan Segeum Mit Nodong Gyujeong Uimi [The Meaning of the Tax and Labor Regulations in Gaesung Industrial Complex]*, YONHAPNEWS, Oct. 1, 2003.

68. See MOJ, *supra* note 2, at 31.

69. *Id.* at 59.

*CONCLUSIONS*

Despite being in their nascent stages, North Korea's recent initiatives in Sinuiju and Gaeseong herald a new beginning for North Korea's future, in terms of adopting a market-based economic system. This Essay has analyzed the general background and legal structure of the recently established Sinuiju Special Administrative Region and the Gaeseong Industrial Complex. Korea's efforts to develop Sinuiju and particularly Gaeseong also signify how desperate their situation presently stands.

A vast number of issues and problems remain under the current legal regimes for both Sinuiju and Gaeseong. First and foremost, North Korea's relations with South Korea, China and the United States must improve for them to suade jittery investors and to have any chance of success in attracting foreign capital. International support remains just as critical. To properly develop, DPRK must receive much-needed aid from international organizations such as the World Bank, the International Monetary Fund or the Asian Development Bank. A critical factor for the success of these legal reforms remains the faithful and neutral implementation of the laws. Only this type of rule by law can restore North Korea's credibility and help attract capital and trade. Finally, other potential means to promote investment in North Korea other than equity financing such as public and commercial loans, foreign bonds, and project finance, must be thoroughly pursued.