

# The Current State and Required Modifications of the Inter-Korean Exchange and Cooperation Act\*

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## Abstract

*After division of Korean Peninsula, problems which occurred between the North and South have been resolved in not a judicial judgment but the political determinations. However, resolving the various problems between the North and South not in the ways of the rule of law but by means of the political solution can decrease the legal stability and the predictability between the North and South. Since the 1990s, exchanges between the two have been steadily increasing. It is important to note that as the number of exchanges between the two increases, many more legal conflicts will arise. And to resolve these legal conflicts, legal issues such as the conflict between laws, the legal status of the North Korean citizen, and the legal effectiveness of the North and South Korean Basic Agreement Treaty must be clarified.*

*The two sides need to create a list of necessary laws that are required for the exchanges, and divide them into areas which need to be regulated by North/ South Korean laws and by areas that need to be regulated by a joint treaty. By doing this, the two sides should work to create a multi-dimensional legal infrastructure.*

*Also, the two sides must inspect how well the Basic Agreement Treaty is being carried out, and South Korea must take the necessary steps to ensure that the follow-up-measures take place, and any new treaties that need to be created should be signed swiftly and effectively.*

*Finally, making North Korea a member of the international community is a good way to ensure that the laws regarding the exchanges between the two Koreas gain force.*

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## I. Introduction

Since 1945 the Korean Peninsula has been divided into the North and South. They adopted the different ideologies and systems and experienced the Korean War. Since then they have not recognized each other normatively. Therefore the diverse problems which occurred between the North and South have been resolved in not a judicial judgment but the political determinations and compromises, though the problems have legal issues. This situation is not caused only by the reality that the Korean Peninsula is divided, the North and South Korea have the different ideologies and systems and they don't recognize each other but also by the practical limit of the judicial judgment considering the international situation of the cold war system. However, the realities like these are harmful elements which can threaten the principle of the peaceful unification based on a liberal democracy and the rule of law. In other words, resolving the various problems between the North and South not in the ways of the rule of law but by means of the political solution can decrease the legal stability and the predictability between the North and South. Besides, there is a danger that the relationship of the two Korea can be exploited politically.

As the cold war tensions had been eased internationally since the 1990s, the North and South Korea signed the Basic Agreement Treaty and pushed ahead with the exchange and cooperation in a wide range of fields. From the 2000s the exchanges and cooperations between the North and South have developed dramatically and faced a new complexion quantitatively as well as qualitatively. The reunions of separated families and the increase of the defectors from the North have created the various legal problems in reference to family relationship and inheritance. Especially, the cooperations with the North like Gaesong Industrial Complex business and Kumkang Mountain tourism have expanded and humanitarian aid to the North has proceeded actively, so the exchange of material resources between the North and South has increased. But most of the exchanges and cooperations have been suspended except the Gaesong Industrial Complex due to the shooting incident at Kumkang Mountain in 2008, the sinking of Cheonan navy ship by explosion and the attack on Yeonpyeong Island in 2010.

Although the overall relationship between the North and South Korea has been greatly affected by domestic and international conditions since the 1990s, exchanges between the two have been steadily increasing. As of the end of July 2011, there are a total of 123 South Korean firms in the Gaesong region, producing over 1.2 billion dollars' worth of goods — and here, there are over 46,000 North Koreans working with the South Koreans. Even the Kumkang Mountain tourism program had received over 1,930,000 tourists until the recent South Korean tourist shooting incident on July 11<sup>th</sup>, 2008.<sup>1)</sup> Although the exchange and cooperation between the South and the North Korea remain suspended, normalizing relations and increasing exchange and cooperation between two Korea is necessary to achieve the peaceful reunification our constitution is aiming at.

Although for the exchanges between the two to increase steadily, there must be a firm legal infrastructure, at the time being (as we can see from the situation where the South Korean worker had been held captive) many of the problems that arise from the two are being solved politically. Yet it is important to note that as the number of exchanges between the two increases, as it is increasing in the Gaesong area, many more legal conflicts will arise. And to resolve these legal conflicts, legal issues such as the conflict between laws, the legal status of the North Korean citizen, and the legal effectiveness of the North and South Korean Basic Agreement Treaty must be clarified. For example, ever the divide after the Korean War, the two sides have both claimed that they are the only legal nation in the Korean peninsula — yet in reality, the two recognize each other as nations, causing a conflict in stance.<sup>2)</sup> This paper will analyze the problems with the current laws that rule the exchanges between the two nations, and offer the right path to its development, while keeping in mind the unique relationship the two Korea currently share.

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1) Specific details on the South and North Korean exchanges can be found on the web, at the Ministry of Unification website ([www.unikorea.go.kr](http://www.unikorea.go.kr)) and Gaesong Industrial District Management Committee website ([www.kidmac.com](http://www.kidmac.com)).

2) For more detailed contents and normative characteristics of the theory of the special relation between the North and South which is a basic constitutional theory resolving the conflict between the law of North Korea and that of South Korea, see HYO-WON LEE, NAMBUKYORYUHYEOMNEYOGUI GYUBEOMCHEGYE [THE NORMATIVE SYSTEM ON THE EXCHANGE AND COOPERATION BETWEEN SOUTH AND NORTH KOREA] 13-164 (2006) (Korean).

## II. Current Status of the Inter-Korean Exchange and Cooperation Act, and its problems

Laws that regulate South and North Korean exchanges in domestic fields of norms can be roughly classified as the following: Basic Agreement Treaty between South and North Korea, South Korean laws, North Korean laws. Also, the principle of the international law can be included because the exchange and the cooperation between the two Korea are related to the field of the international law.

### 1. Basic Agreement Treaty

South and North Korean signed the “Basic Agreement treaty for the reconciliation and the expansion in exchange and cooperations between South and North Korea (Basic Agreement Treaty)” on February 19<sup>th</sup>, 1992. Here, the two sides recognized each other’s status as a nation, yet it clearly stipulated that the relationship between the two is not that of nations, but a unique relationship that has developed while pursuing the goal of unification. There have been many debates on the legal effectiveness of this, but the Constitutional Court and the Supreme Court have denied it of any legal status, stating that it is only a “political pact” or a “gentlemen’s pact.”<sup>3)</sup> Thus, although the pact isn’t recognized as a law or international treaty, it does reflect the basic principle in which the two sides will seek to economic, social and cultural exchanges – while also being realistic about the relationship between the two sides.<sup>4)</sup>

The treaties with legal effectiveness between the two sides are the most important. Among these are the four economic treaties (including those regulating topics about guaranteeing investment, the protection from

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3) See, e.g., Constitutional Court [Const. Ct.], 98Hun-Ba63, July. 20, 2000 (S. Kor.); Supreme Court [S. Ct.], 98Du14525, July. 23, 1999 (S. Kor.).

4) For more detailed contents on Basic Agreement Treaty, see Byung-hwa Yoo, *Nambukgibonhabuiseoui Beopjeokseonggyeok [The Legal Character of Basic Agreement Treaty]*, 27 KOREA DAEHAKGYO BEOPAKNONJIP [KOREA L. J.] 67 (1992) (Korean); Seong-ho Je, *Gibonhabuiseoui Beopjeok Seonggyeokgwa Hyoryeok [The Legal Character and Effectiveness of Basic Agreement Treaty]*, 37 GUKJEBEOPAKHOENONCHONG [KOREAN J. OF INT’L L.] 145 (1992) (Korean).

double taxation, liquidating settlements and procedures regarding investment dispute settlements) and 9 other agreements including the Agreement on Entering and Staying at Gaeseong/Kumkang Area treaty, for which the two sides have taken the necessary steps to make themselves law-binding for each government. The four economic treaties were officially signed in December 16<sup>th</sup>, 2000 at the fourth North and South Korean Minister's Summit. They were the first North and South Korean treaties to be passed at the National Assembly on June 20<sup>th</sup>, 2003, and by exchanging the required documents on August 20<sup>th</sup>, they gained full legal stature. Furthermore, the Agreement on Entering and Staying at Gaeseong/Kumkang Area treaty was passed in the National Assembly as well, and gained legal stature when the two Koreas exchanged the required documents. These treaties not only passed through the National Assembly, but followed the procedure of the Constitution, the Government Organization Act [Jeongbujoikbeop], the Act on the Promulgation of Acts and Subordinate Statutes [Beomnyeong Deung Gongpoe Gwanhan Beomnyul], and were reported on the gazette, thus giving them full status as an international treaty.<sup>5)</sup>

On the Agreement for Protecting Investments act, it states that each side will respect and protect the other's investments, and ensure that the two will not nationalize property or restrict the investments without cause. The Agreement on the Protection from Double Taxation, stipulates that taxation will be placed on areas where profit was made through business - but this profit must be what will be gained by the owner of the business, and when one side of the treaty places a tax, the other may not place a tax on the same profit. On the Agreement on liquidation of settlements, it states that any currency exchange or money transfer of any cash earned in the process of the exchanges between the two will not go through a third bank, but will be done directly by a bank that is appointed by the two governments. Furthermore, Agreement on the procedure of resolving investment dispute settlements states that any business related conflicts that arise will be resolved by an Arbitration Committee – and to do this, the two Koreas have further signed an Arbitration Committee for Business Conflicts Pact

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5) The legal status and effectiveness of the treaties between the North and South Koreans can be referred to LEE, *supra* note 2 at 237-260.

which regulates the composition of the committee and specific procedures.<sup>6)</sup> On the topic of the Gaesong Area, the following laws are currently in effect: Agreement on entering and staying at Gaeseong/Kumkang Area, Agreement on Communications in the Gaesong Industrial Area, Agreement on the Customs at the Gaesong Industrial Area, and the Agreement on the topic of Quarantine at the Gaesong Industrial Area. Four agreements on economic cooperation and nine following agreements between North and South have the legal effectiveness of treaty unlike Basic Agreement Treaty. There are four reasons. First, two Koreas had intention to give legal effectiveness to the agreements. Second, two Koreas signed the agreements in the way of conclusion of treaty and took follow-up measures. Third, two Koreas got the approval of the legislature - National Assembly, Standing Committee of Supreme People's Assembly. So they went through formalities which are necessary for effectivation, following the operative word of the Agreement. Finally, the Agreements were proclaimed by the law about the legislative process and published in the official gazette on the premise that they had legal effectiveness.

Because North Korea isn't yet a member of the WTO, MIGA, or the ICSID, it is through these treaties that they are legally protecting the investor's assets, prohibiting double taxation, following liquidation procedures, and solving legal disputes. In the meantime, on June 15, 2000, the first National Summit between the two was held, and as a result of that, the 6.15 North and South Joint Declaration was declared which further strengthened and increased the exchanges between the two and caused for more treaties to be signed. On October 4<sup>th</sup>, 2007, the second National Summit was held where the declaration of the 'Joint Declaration for the Improvement of Inter-Korean Relationship and Prosperity' took place and the spirit of 6.15 North and South Joint Declaration was reaffirmed.

The North and South Basic Agreement Treaty and Joint Declarations were important development in the politics between the North and South, but as they are not legal treaties, there are many limitations. Meanwhile, although there have been efforts to pass the four economic treaties in the National Assembly to give them legal status, there have been many

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6) See MINISTRY OF UNIFICATION, GAESONGGONGEOPJIGU BEOPGYUJIP [CODE OF THE ACT AND REGULATIONS FOR THE GAESONG INDUSTRIAL ZONE] (2011) (Korean).

criticisms because both Koreas have yet to take follow-up measures, making them nothing more than just a vague and abstract statement of principles. Many legal treaties between the two sides have also been lacking effectiveness (such as the North and South Korean cooperations committee, and the Arbitration Committee for the Business Conflicts), because the required follow-up measures have yet to take place. On the international level, because North Korea has not signed international treaties or become a member of international communities, it is hard to apply international rules and principles on them. On the other hand, whilst South Korea signing the FTA with individual nations in order to reflect the unique situation at the Gaesong Area, many international legal issues such as the 'strategic control of supplies' or the 'place of origin indication method' have yet to be resolved.

The Agreements should be guided by Constitution and the Development of Inter-Korean Relations Act [Nambukgwangye Baljeone Gwanhan Beomnyul] and the legal character and effectiveness of the Agreements also should be determined by them for the Agreements to gain power to regulate the relationship between North and South. Thus, the Agreements must obey Constitution and relevant regulations in both sides of the substantial law and the procedural law and should be carried out by two Koreas. If so, the Constitutional Court and the Supreme Court may admit legal effectiveness in the actual events.<sup>7)</sup>

## 2. South Korean Laws

South Korean laws that regulate the relationship between North and South Korea relationships are the following: The Development of Inter-Korean Relations Act, the Inter-Korean Exchange and Cooperation Act [Nambukgyoryuhyeomnyeoge Gwanhan Beomnyul] and its Enforcement

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7) For more detailed information of the way to secure the effectiveness of the Agreements, see Hye-Jin Lee, *Nambukhabuiseoui Gyubeomnyeok Hawkbo Bangan [A Study on Enhancing the Legal Effectiveness of Inter-Korean Agreements]*, 7 TONGILGWA BEOMNYUL [UNIFICATION AND L.] 102 (2011) (Korean); Gye-Hong Kim, *Nambukgwangye Baljeone Gwanhan Beomnyure Ttareun Nambukhabuiseoui Balhyojeolchae Gwanhan Saryeyeongu Mit Gaeseonbangane Gwanhan Gochal [The Study of the Case and the Way of Improvement of the Effectivation Procedure of the Agreements between Two Korea Following The Development of Inter-Korean Relations Act]*, 603 BUPJE [LEGIS. SYS.] 51 (2008) (Korean).

Decree, and the Inter-Korean Cooperation Fund Act [Nambukhyeom-nyeokgigeumbeop] and its Enforcement Decree, Criminal Act [Hyeongbeop] and National Security Act [Gukgaboanbeop], the Act on the Protection and Settlement Support of Residents Escaping from North Korea [Bukhanital-juminui Boho Mit Jeongchakjiwone Gwanhan Beomnyul], the Identification of Life or Death and the Promotion of Exchange Act [Nambuk Isangajok Saengsahwagin Mit Gyoryu Chokjine Gwanhan Beomnyul]. According to the theory of the special relationship between the North and South, Criminal Act and National Security Act will be applied in the field of norms where North Korea works as an illegal group or the organization of anti-state, the Inter-Korean Exchange and Cooperation Act will be applied in the field of norms where the North Korea works as the other side of conversation and cooperation for the peaceful unification. Laws that directly regulate the exchange and cooperation of the two Koreas will be mainly explained below.

The Development of Inter-Korean Relations Act, which was passed on December 29<sup>th</sup>, 2005, regulates the necessary areas which are needed for the exchanges between the two sides. In paragraph 1 of article 3, it states that the relationship between the two is not that of nations, but a unique relationship that has developed while pursuing the goal of unification. In paragraph 2, it states that the exchanges between the two sides are not the exchanges between two nations but those within the same people.<sup>8)</sup> This clearly states the unique relationship between the two sides. This law stipulates the basic principle that development of the relationship of the two Korea should follow the principle of autonomy, peace, democracy for peaceful unification, be based on national consensus, the principle of clarity and faith and not be exploited politically.<sup>9)</sup>

This law stipulates the duty of the government for the development of

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8) To see the contents of the Development of Inter-Korean Relations Act, see MINISTRY OF UNIFICATION, NAMBUKWANGYE BALJEONE GWANHAN BEOMNYUL HAESOLJARYO [THE EXPLANATION OF THE DEVELOPMENT OF INTER-KOREAN RELATIONS ACT] (2005) (Korean); Bong-do Ji, *Nambukwangyebaljeongibonbeobui Jejeong Uimiwa Hyanghu Gwaje [The Meaning and Task of the Enactment of The Development of Inter-Korean Relations Act]*, 309 GEUKDONGMUNJE [PROBS. FAR-EAST] 12 (2004) (Korean).

9) NAMBUKWANGYE BALJEONE GWANHAN BEOMNYUL [DEVELOPMENT OF INTER-KOREAN RELATIONS ACT] art. 2.

the two Korea's relationship. It suggests the promotion of peace in Korean Peninsula, the realization of the economic community of the two Korea, the recovery of Korean identity, the resolution of humanitarian problems, the support for the North and the promotion of international cooperation. Especially, the government must organize the committee for development of relationship of the two Korea and formulate the plan of development of relationship of the two Korea every 5 years. The Minister of Unification must formulate the annual plan and briefs it on the National Assembly.<sup>10)</sup> This law has made the legal basis about the procedure of the representative's appointment of the two Korea's meeting and stipulated the representative's range of activity, the command and supervision in detail to rectify the problems which have been pointed out. Especially, this law raises transparency of the relationship of the two Korea by making the legal basis of sending government officials to North Korea and working during a certain period.<sup>11)</sup> Moreover, this law has stipulated the conclusion of agreement between the North and South, the procedure of a ratification and proclamation in detail, so made the basis for granting legal force. Also, this law has stipulated the necessary procedure like National Assembly's consent differently according to the contents of the agreement of the two Korea. Particularly, it has clarified the range of effectiveness of the agreement that it has the effectiveness between the North and South and made the basis for suspension of the agreement when a momentous change occurs between the North and South.<sup>12)</sup>

The Development of Inter-Korean Relations Act is the fundamental law which suggests the legal basis of peaceful reunification and policy toward North Korea, the special law which reflects the unique characteristics of the relations of two Korea, procedural law to secure the effectiveness of the Agreements. That means that The Development of Inter-Korean Relations Act is the normative basics for the relations of two Korea and peaceful reunification. However, The Development of Inter-Korean Relations Act only suggests the basic principle of the relations of two Korea, doesn't reflect specific characteristics. Moreover, it doesn't stipulate the legal

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10) *See id.* Arts. 13 and 14.

11) *See id.* Arts. 15, 16, and 17.

12) *See id.* Arts. 21, 22, and 23.

effectiveness of the Agreements precisely, so is pointed out that it is defective.

The Inter-Korean Exchange and Cooperation Act was passed in 1990, and since has been revised 13 times. The law was passed to instigate inter-Korean exchange and work for a peaceful reunification in the Korean peninsula.<sup>13)</sup> Article 3 of this law states that “Regarding any acts (within the purpose of this law) that are related to exchanges between the two Koreas, this law will be applied before others”, making it the basic law in inter-Korean exchanges. This legislation has important meaning that the South recognizes the North as the other side for the exchange and cooperation and admits the right of the exchange and cooperation to a person. Since this legislation the relationship between the North and South has changed greatly. As the exchange and cooperation between the North and South had been expanding and diversifying after the inter-Korean summit, this law was revised sharply to simplify complicated administrative procedure and expand the aid project in 2005 and 2009.

The Inter-Korean Exchange and Cooperation Act provided the institutional framework for the stable support of inter-Korean exchange and cooperation by organizing the conference for promotion of inter-Korean exchange and cooperation and practices committee which are establishing the policy or the basic principle about inter-Korean exchange and cooperation and adjusting the exchange and cooperation program generally.<sup>14)</sup> This law controls a personal exchange between the North and South rigorously by demanding the prior notification and the minister of unification’s permitting when people visit the North. It also requires the approval of the minister of unification about the items, form of trade, payment option when people exchange material resources, though it seems the exchange between the North and South as the inter-ethnic exchange, not the inter-national exchange. Moreover, it allows the minister of

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13) To see the contents of the Inter-Korean Exchange and Cooperation Act, see Ministry of Unification, NAMBUKGYORYUHYEOMNYEOGE GWANHAN BEOMNYUL HAESOLJIP [THE EXPLANATION OF THE INTER-KOREAN EXCHANGE AND COOPERATION ACT] (2009) (Korean); Jong-Dae Shin & Eun-Suk Choi, *Bukhanui Chejeonhwangwa Nambukgwangyebaljeone Gwanhan Beopjedo [Legal System for the System Transition of North Korea and for the Development of North-South Relations]*, 36 GONGBEOBYEONGU [PUB. L.] 145 (2008) (Korean).

14) DEVELOPMENT OF INTER-KOREAN RELATIONS ACT, arts. between 4 and 8.

unification to give orders about the trade.<sup>15)</sup> Meanwhile, it divides the program of the exchange and cooperation of inter-Korea into the economic cooperation program and the social and cultural cooperation program, so people who satisfy the required conditions can get the approval of the minister of unification and a notification is only needed for small investors.<sup>16)</sup> Furthermore, laws such as the Inter-Korean Cooperation Fund Act and its lower rules regulate exchanges in human resources, transportation and North Korean aid. The Inter-Korean Exchange and Cooperation Act has been revised and improved, reflecting the change of relationship of the two Koreas. But it has the essential limit, because it aims for the exchange's control and regulation, not for the support.

The relation between the Inter-Korean Exchange and Cooperation Act and National Security Act is important in a range of the specific application. North Korea is not only an anti-state organization but also the partner of exchange and cooperation. So, legal standard is necessary for application of the law that regulates relationship between North and South. Also, it is necessary to clarify a range of application and effectiveness of the law. Constitutional Court decided that the Inter-Korean Exchange and Cooperation Act and National Security Act have different legislative aim and regulation object.<sup>17)</sup> In other words, National Security Act is the law to regulate the anti-state activity that makes the state dangerous and the Inter-Korean Exchange and Cooperation Act is the law for establishment and pushing ahead of peaceful reunification policy based on liberal democratic basic order, so they are compatible through harmonious interpretation of constitution. On this topic, there is a counterview that they are in the relation of basic law and special law.<sup>18)</sup> Although the Inter-Korean Exchange and Cooperation Act and National Security Act have different legislative aim and regulation object, it is right to understand that they are in the relation of basic law and special law. Because they are admitted to the same object related to the North Korea which has dual status for the South Korea. The

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15) *See id.* arts. 9, 10, 13, and 15.

16) *See id.* arts. 17 and 18.

17) Constitutional Court [Const. Ct.], 92Hun-Ba48, July. 29, 1993 (S. Kor.).

18) NAK-IN SUNG, HEONBEOPAK [CONSTITUTIONAL LAW] 199-200 (2011) (Korean). Dissenting opinion of the decision above is same.

Inter-Korean Exchange and Cooperation Act stipulates that this law is prior to other laws in the purpose of this law. This regulation seems to express characteristics of special law. But explanation above is a systematic and harmonious interpretation when it is admitted to the same range of National Security Act.

The Gaesong Industrial Zone Support Act [Gaeseonggonggeopjigu Jiwone Gwanhan Beomnyul], which was passed on May 25<sup>th</sup> 2007, has since been revised 4 times. It was created to make the Gaesong area more active, allowing the government to provide administrative and economic aids and giving South Korean citizens in the area special protection. In other words, it lets the Industrial Sites and Development Act [Saneobipji Mit Gaebare Gwanhan Beomnyul] and the Industrial Safety Health Complex Act [Hanguksaneobanjeonbogeongongdanbeop] of South Korea be in effect on Gaesong Industrial Zone's supply of infrastructure like road, water, railroad and industrial safety, health and the protection of the environment to support development, investment.<sup>19)</sup> Also, it lets the social insurance like the National Pension Act [Gungminnyeongeumbeop], the use of the medical facility and law of working conditions be in effect on the corporations and South Korea's citizens in Gaesong. Especially, it allows the corporations which invest in Gaesong Industrial Complex to use the inter-Korean cooperation fund and the fund which is stipulated in the Small and Medium Enterprises Promotion Act [Jungsogieopjinheunge Gwanhan Beomnyul]. Moreover, it permits tax-break and exception for procedure of entrance and stay.<sup>20)</sup>

Although this law is a South Korean law, it not only directly regulates the Gaesong Area, but also indirectly regulates the North Koreans by providing economic and human resources to the North Korean administrative branch in the area. This law is unique in that it is only in effects on the people within the Gaesong Area and those with direct relationships to it.<sup>21)</sup>

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19) GAESEONGGONGGEOPJIGU JIWONE GWANHAN BEOMNYUL [GAESONG INDUSTRIAL ZONE SUPPORT ACT] arts. between 6 and 12-4.

20) *See id.* arts. between 13 and 17.

21) Wook Yoo, *Enforcement and Inadequate Points of legislature about Support for Gaesong Industrial Zone*, in LEGAL TASKS FOR PROMOTION OF GAESUNG INDUSTRIAL ZONE AFTER INTER-KOREAN SUMMIT, 2007 Symposium, pp. 98~104.

Although the Gaesong Industrial Zone Support Act provides legal justification for those who wish to start a business in that area, the law itself isn't comprehensive enough and only seeks to resolve problems that have risen at that given time, making itself a less than adequate legal device.

### 3. North Korean Law

North Korean laws that regulate the exchanges between the two sides are the following: The Economic cooperations between the North and South Korea Act, The Gaesong Industrial Zone Act, the Tourism in the Kumkang Mountain Act and Socialism criminal law. North Korea doesn't have a special law like the National Security Act of South Korea. It uses Socialism criminal law to handle the national security crime. Socialism criminal law stipulates the nation subversion conspiracy crime, anti-state incitement crime, treason and the crime of espionage in chapter 3 about the crime of anti-state and anti-people. This work explains the laws that the North enacts for the exchange and cooperation with the South.

On July 6<sup>th</sup> of 2005, the Supreme People's Council declared Act number 1182, named The Economic cooperations between the North and South Korea Act which aims at establishing the institution and order in the exchange and cooperation of the two Korea and developing the ethnic economy.<sup>22)</sup> It consists of 27 articles. It is adopting the benefit of all ethnic people, the balanced development of the ethnic economy, the mutual respect and faith as a basic principle.<sup>23)</sup> This act organizes the central institution for ethnic economy and cooperation which controls the economic cooperation program of the inter-Korea and makes progress on the cooperation program in the way of direct dealing according to the agreement between the North and South, applicable regulations. It bans the economic cooperation in the certain field of social security. It regulates the general area of economic cooperation of inter-Korea like the approval of cooperation

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22) For more detailed information on the Economic Cooperations between the North and South Korea Act, see MINISTRY OF JUSTICE, BUKHAN BUNGNAMGYEONGJEHYEOMNYEOKBEOP BUNSEOK [THE ANALYSIS OF THE ECONOMIC COOPERATIONS BETWEEN THE NORTH AND SOUTH KOREAS ACT OF NORTH KOREA] (2006) (Korean).

23) BUNGNAMGYEONGJEHYEOMNYEOKBEOP (ECONOMIC COOPERATIONS BETWEEN THE NORTH AND SOUTH KOREAS ACT), art. 4 (N. Kor.).

program, a personal exchange, a material exchange, the way of employment, the ways of tax and payment. This law can be seen as a comprehensive law to regulate the North and South Korean economic exchanges like the Exchange and Cooperations between Inter-Koreas Act of South Korea.

The law is effective not only in North Korea but in South Korea and other 3<sup>rd</sup> party regions. It also effects North Korean administrative branches as well as South Korean individuals and firms.<sup>24)</sup> Furthermore, it stipulates that any conflict that may arise is to be solved mainly by discussion, but if it is unsolvable, than it will be resolved by the Arbitrary Council for North and South Korean business disputes.<sup>25)</sup> North Korea only regulates the field of economic cooperation except the field of the social and cultural cooperation. But enacting the comprehensive law for economic cooperation between inter-Korea is meaningful, for it intends to regulate the relationship between inter-Korea following the rule of law. It can contribute to a legislation and vitalization of the relationship between inter-Korea. However, the Economic cooperations between the North and South Korea Act has the following problems: the real effectiveness of the law is questionable; the clear relationship with other laws is vague, and there is a major lack of follow-up measures.

On November 13<sup>th</sup>, 2002, The Supreme People's council further passed the "Act on the contents of the Gaesong Industrial Area" and on the 20<sup>th</sup>, declared the "Gaesong Industrial Area Act."<sup>26)</sup> This law states that on certain business related areas, other North Korean laws will not be applied. In article 9, it states that "Business activities in the Gaesong industrial area will be regulated by this law. Areas not regulated by this law will be dealt with by the Guidance Center for the Central Industrial Area and the Guidance Center for the Industrial Area." There may be some disputes as to what the "Business activities in the Gaesong Industrial Area" exactly means, but nevertheless it states that other North Korean laws will not be applied in this area. Instead, the Gaesong Industrial Areas Act as well as the rules set forth by the Guidance Center for the Central Industrial Area will be applied.

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24) *See id.* art. 3.

25) *See id.* art. 27.

26) For more detailed information, see MINISTRY OF JUSTICE, BUKHAN GAESEONGGONGEOPJIGUBEOP BUNSEOK [THE ANALYSIS OF THE GAESONG INDUSTRIAL AREA ACT OF NORTH KOREA] (2003) (Korean).

To regulate the economic activities in the Gaesong Area, there have been a total of 16 lower level laws passed, since April 2003. With regard to the “Business activities in the Gaesong Industrial Area” mentioned in the Gaesong Industrial Areas Act, these regulations not only directly regulate economic activities such as the creation and operation of firms, but also indirectly regulate other economic activities such as labor rules, creations and operation of related branches, and protection of the environment. Furthermore, the Commission for the Gaesong Industrial Area has created 50 business regulations with accordance with article 25 of Gaesong Industrial Areas Act – this was done as a follow-up measure by the Commission, to fill the blank created by the lack of follow-up measures that were needed to take place by the Guidance Center for the Central Industrial Area.<sup>27)</sup>

On November 13<sup>th</sup> 2002, The Supreme People’s Council passed the “Kumkang Mountain Tourism Act.” In article 4, it states that “Economic activities like tourism in the Kumkang mountain area will be regulated by this law. Areas not regulated by this law will be dealt with by the Guidance Center for the Central Tourism Area and the Guidance Center for the Tourism Area.”<sup>28)</sup> According to this article, it stipulates the organization of Guidance Center for the Central Tourism Area and the Guidance Center for the Tourism Area, and the enactment of the executive order.<sup>29)</sup> From May 2003 to July 2011, North Korea enacted 9 executive orders like ‘the Regulation of Development’, ‘the Regulation of Establishment and Management of the Corporation’, but didn’t enact the more detailed regulations.<sup>30)</sup> Meanwhile,

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27) For more detailed information of the law about Gaesong Industrial Zone, see BAE, KIM & LEE(LLC), GAESEONGGONGEOPJIGU BEOPGYU MIT JEDO HAESOL [THE EXPLANATION OF THE LAW AND SYSTEM ABOUT GAESONG INDUSTRIAL ZONE] (2005) (Korean); Hyo-Won Lee, *Gaeseonggongdanui Beomnyulchegyewa Namhan Haengjeongbeop Jeogyong Yeobu* [Legal System of Gaesong Industrial Zone and Application of the South Korea’s Administrative Punishment], 627 BEOPJO [LAW. ASS’N J.] 5 (2008) (Korean).

28) For more detailed information, see MINISTRY OF JUSTICE, BUKHAN GEUMGANGSANGWANGWANGJIGUBEOP BUNSEOK [THE ANALYSIS OF KUMKANG MOUNTAIN TOURISM ACT OF NORTH KOREA] (2003) (Korean).

29) However, there is no committee of management in Kumkang tourism area unlike Gaesong Industrial Area.

30) After halt of Kumkang Mountain Tourism, North Korea declared that Hyundai Asan's exclusive right was canceled on April 8th, 2011 and then designated Kumkang

on September 12 2002, North Korea enacted “Sinuiju Special Administrative District Act” to set up a special district which would have the wide rights of autonomy including legislation, administration and jurisdiction. However, Yang bin appointed the first minister of special district was arrested on suspicion of tax evasion by China, so the development of the special district ceased.<sup>31)</sup>

The Gaesong Industrial Act and the Kumkang Mountain Tourism Act do have legal binding force, and are being applied, while the North and South Korea have been making progress in creating necessary regulations. Yet nevertheless, these laws are too comprehensive and ambiguous — and the area they regulate is also far too small, making it unsuitable in both qualitative and quantitative measures to legally regulate North and South Korean exchanges. Especially, despite the law there is no committee of management in Kumkang tourism area. Also, Kumkang tourism program was operating with insufficient legislation and it has been suspended since the shooting accident in 2008. It is especially important to note that the laws’ content and structure are not in harmony, and that there are no methods to punish acts that go against these laws, making it hard to implement them.

### **III. Ways to Develop the North and South Korean Exchanges Laws, and the Future Questions to be Answered**

#### *1. Basic Principles to Guide the Maintenance of Laws*

The purpose of creating laws to regulate the inter-Korean exchanges is to reach a peaceful reunification and to increase exchanges. Thus, the legal principles required to create an effective law can be found in the study of

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Mountain as a special area for international tourism. Furthermore, they are trying to change Kumkang Mountain Tourism Program by enacting Kumkang Mountain International Tourism Zone Act.

31) For more detailed information, see MINISTRY OF JUSTICE, SINUIJUTEUKBYEOLHAENGJEONGGUGI-BONBEOP BUNSEOK [THE ANALYSIS OF SINUIJU SPECIAL ADMINISTRATIVE DISTRICT ACT OF NORTH KOREA] (2002) (Korean).

North and South Korean relationship. The following principles should guide the maintenance of the laws:

First, it must be based on the rule-of-law. This is because South Korea's constitution states that South Korea is a free democratic nation, one that is based on the rule-of-law, and because this is the best way to ensure that legal problems are solved not politically but by laws, making the resolution predictable and stable. Thus, laws with regard to people's rights and duties, or laws with regard to the continuation of a nation must be passed through the national assembly, in the form of a law. Furthermore, to ensure legal stability, the law must recognize the unique status of the inter-Korean relationship, and if there is a legally notable trust by the people with regard to these laws, it must be protected sternly.<sup>32)</sup>

Secondly, it must contribute to the exchange programs between North and South Korea — These laws must substantially instigate and provide North and South Korean exchange. Applying South Korea's own laws on all problems that may arise during the exchanges is not only unrealistic, but will cause problems in the inter-Korean relationship itself. Thus, any conflict in laws between North and South Korea must be resolved rationally, and to do this, South Korea needs to recognize North Korea's laws and systems in some areas.<sup>33)</sup>

Thirdly, all laws must be in harmony with other laws and systems. In other words, laws that regulate North and South Korean relationships must not be in conflict with those that regulate exchanges and trade. Furthermore, upper-level-laws and lower-level-regulations must also be in compliance and be systematic. However, it must also be noted that not only is the relationship between the two sides capricious, but also very political. And regulated all situations in itself is very difficult, and thus in many situations,

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32) Article 75 of Constitution stipulates "The President may issue presidential decrees concerning matters delegated to him by Act with the scope specifically defined and also matters necessary to enforce Acts." The form of legislature which delegates specific and technical things about the peaceful reunification and the relationship between North and South to administrative order, not to law may be helpful for flexible reflection of special characteristics of the relationship between North and South.

33) For more detailed information about the law of the North Korea, see Hyo-won Lee, *Bukhanbeomnyurui Gungnaebeopjeok Hyoryeok [Domestic effectiveness of the law of the North Korea]*, 583 BEOPJO [LAW. ASS'N J.] 19 (2005) (Korean).

administrative orders may be needed to resolve situations. Especially, public law and private law are not distinct in legal system of the North Korea and the legal system of the North Korea is divided into constitution, the law that regulates sector, regulation and detailed enforcement regulation. Considering these characteristics may give the regulatory power to the law.<sup>34)</sup>

Fourth, the laws must be made in accordance with the principle of mutuality. This means that South and North Korean relationships must abide mutuality, but at the same time should be ready to forgo the principle in certain areas. In the Gaesong Industrial Area in particular, the North and South Koreans are not under the same conditions, and thus principle of mutuality must step aside. In these cases, there must be clear rules as to when this principle will be ignored, and to what extent it will be not be applied. Especially, admitting reciprocity strictly can hinder exchange and cooperation when judicial assistance between North and South is needed. So modified reciprocity is necessary for the exchange and cooperation between North and South.<sup>35)</sup>

Fifth, there must be special attention to the Gaesong Industrial Area. In this area, there are many South Korean laws that are being overlapping, and those laws are not systematic as well. Furthermore, Gaesong is an important inter-Korean legal and political meeting point, and can act as an educational ground for the joint law-making after the unification of the Korean peninsula. Thus, laws regarding the Gaesong Industrial Area must recognize this unique status, and be made so that it can resolve the diverse legal conflicts that may arise due to the differences in the North and South Korean legal structure.<sup>36)</sup>

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34) For more detailed information about the law of the North Korea, see Wook Yoo, *Bukhanui Beopchegyewa Bukhanbeobui Ihaebangbeop [North Korean Legal System and the Method of Understanding North Korean Law]*, 6 TONGILGWA BEOMNYUL [UNIFICATION & L.] 50 (2011) (Korean).

35) For more detailed information about the judicial assistance between North and South and reciprocity, see Hyo-won Lee, *Nambukgwangyebaljeongwa Bukhangwau Sabeopgongjobangan [The Development of Relationship between North and South and Judicial Assistance of Two Koreas]*, 106 JUSTICE 175 (2008) (Korean).

36) For more detailed information about the law enforcement in Gaesong Industrial Zone, see Hyo-won Lee, *Gaeseonggongdanui Beopjilseo Hwakbobangan [The Plan to Secure Law and Order in Gaesong Industrial Area]*, 124 JUSTICE 352 (2011) (Korean).

## *2. Future questions regarding the laws, and their answers.*

Revising and developing the exchange laws face the long goal of preparing for the unification. Yet the following issues need immediate attention:

First is the safety of the people. The basis for the exchanges between North and South Korea is the free travel between the two by its people, and their safety during the travel. The safety of the people is a very important issue, as the 2008 Kumkang Mountain South Korean Tourist Shooting Incident and the Imprisonment of the South Korean in Gaesong Industrial Area in 2009 clearly show. Currently, the only North Korean document existing regarding the safety of the South Koreans is the words inscribed on the invitation sent by North Koreans, and Article 10 of the Agreement on Entering and Staying at Gaeseong/Kumkang Area, which stipulates that the South Koreans in these areas cannot be tried in North Korean criminal courts. In other words, Article 2 of the Agreement above stipulates "People must respect and obey the law and order in the district." Paragraph 1 of article 10 stipulates "North Korea guarantees people's inviolable right of body, dwelling, property." Paragraph 2 stipulates "North Korea stops an offence against the law and order of the district and inspects and then notifies the offence to the South. North Korea gives a warning, fines or banishes to the South. In the case of severe offence agreed by the two, two sides arrange and handle it separately." Paragraph 3 stipulates "North Korea guarantees the fundamental rights while the people are inspected." These regulations stipulate banishment in principle about the crime of the people from the South. In other words, the Agreement adopts the personal principle as the exception of the territorial principle. So, South Korea has executive jurisdiction of criminal jurisdiction. Meanwhile, North Korea has the right of investigation as a part of executive jurisdiction.<sup>37)</sup>

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37) Ministry of Justice enacts and implements 'Guidelines for handling criminal cases in Gaesong Industrial area and Kumkang Mountain tourism area (Instruction of Ministry of Justice no. 512)' on Mar 14<sup>th</sup>, 2005, considering the reality that crime by people from the South is occurring in Gaesong and Kumkang Mountain.

However, these are not enough. Instead, follow-up measures must take place ensure the following: to create a North and South Korean joint committee; the rights and duties of the South Koreans; the procedure in ordering a South Korean a fine, and the procedure for expulsion; the procedure and limitation of the North Korean government's investigations; the limitations of serious offenses; and the creation of a joint-Korean criminal code.

Secondly, there must be procedure regulation that is quick and effective. This is especially true in the Gaesong Area, where the procedure laws must reflect the area's uniqueness, by sternly punishing acts that are a threat to national security or acts that are of political purpose, but at the same time actively supporting and protecting law-abiding exchanges between the two. By doing this the laws will gain force as well as stability. To do this, laws must be revised to simplify communications, travel and customs, thus allowing for more South Korean goods to enter the area, while the procedure for approval on exchanges must be given more flexibility. The exchange and cooperation between East Germany and West Germany, between China and Taiwan are a good example for simplifying procedure of the exchange and cooperation between the North and the South.<sup>38)</sup>

Thirdly, a rational conflict resolving procedure must be created. Because of the differences in the North and South Korean legal structure, it is difficult to create a legal device to quickly solve the problems that arise. The two Koreas have signed the Procedures for Settling Trade Disputes Agreement to principally solve the issues through arbitration, but the follow-up measures are still yet to take place. In particular, the North and South Korean Arbitration committee, which was to have been created within six months since the pact gained legal effectiveness, has yet to be created – and the rules needed for the two sides to exchange the drafts has also yet to be made. Furthermore, there lacks the legal system to execute court orders with regard to assets within the Gaesong Area, and there is no joint evidence examination or legal cooperation, either. Thus, the two

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38) For more detailed information about the exchange and cooperation between China and Taiwan, see Sang-Chul Lee, *Gaejeong Yangangwangyejorye Yeongu [Study on Revised Ordinance of Relation between China and Taiwan]*, 2 TONGILGWA BEOJNYUL [UNIFICATION & L.] 119, 141-166 (2010) (Korean).

Koreas must open a summit as soon as possible and act on the problems above — creating the North and South Korean Arbitration committee, making regulations that it requires, and signing other pacts as well.<sup>39)</sup>

#### IV. Conclusion

Exchanges between the North Korea, such as the Gaesong Industrial Area are being regulated by laws that are facing many problems, such as how the Basic Agreement Treaty, and the North and South Korean laws are being overlapped, and by the lateral appliance of laws created by each side. Thus, the two sides need to create a list of necessary laws that are required for the exchanges, and divide them into areas which need to be regulated by North/ South Korean laws and by areas that need to be regulated by a joint treaty. By doing this, the two sides should work to create a multi-dimensional legal infrastructure, while creating a structure that is systematic. The truth is, that the contents of itself is not being carried out, and that the political situation in both sides greatly affects the power of the laws that currently exist.

Thus, the two sides must inspect how well the Basic Agreement Treaty is being carried out, and South Korea must take the necessary steps to ensure that the follow-up measures take place, and any new treaties that need to be created should be signed swiftly and effectively. It is important to realize that the Basic Agreement Treaty will be a very important precedent in the area of law-making, after a peaceful reunification — and thus the form of the treaty, the content, the words used, the representatives that sign it, its area of effectiveness and the procedure in which it gains legal effectiveness must be created in a unified matter. There must also be a comprehensive study as to how to change the treaty and apply them in different areas.

International cooperation and support is vital for the Gaesong Industrial

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39) For more detailed information about procedure of dispute resolution in Gaesong, see Sung-Taek Lim, *Gaeseonggonggeopjiguui Bunjaenghaegyeyoreul Wihan Sabeopjedo [Dispute Resolution Procedures at Kaeseong Industrial District]*, 6 TONGILGWA BEOMNYUL [UNIFICATION & L.] 112 (2011) (Korean).

Area, as well as the Exchanges between North and South Korea and a peaceful unification process. Thus it is important to place the inter-Korean relationship into the international stage and manage it there with stability.

In this meaning, making North Korea a member of the international community is a good way to ensure that the laws regarding the exchanges between the two Koreas gain force. In particular, with regard to the strategic control of the supply of goods, the problem should be solved by cooperating with the U.S. and International Institutions to recognize its uniqueness, while the problem of creating a 'place of origin indication system' should be dealt with by taking it into consideration when signing the FTA with the US. The laws regulating the exchange and cooperation between South and North Korea aren't just a system to further develop the relationship between the two Koreas, but are a system to induce the unification of South and North Korean laws. And thus, the problems have must be resolved, and the laws will need to be continuously maintained so that they will be the leader of a free democracy and rule-of-law.

KEY WORDS: Basic Agreement Treaty between South and North Korea, The Development of Inter-Korean Relations Act, The Inter-Korean Exchange and Cooperation Act, National Security Act, The Gaesong Industrial Zone Support Act, The Economic cooperations between the North and South Koreas Act, The Gaesong Industrial Zone Act, the Tourism in the Kumkang Mountain Act

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