

Regulatory Readiness of the DPRK for Attracting Foreign Direct Investment

CHOI HYEONJUNG, LEE SOO-HYUN

JULY 2019



Asan Report

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The Asan Institute for Policy Studies

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List of Cited DPRK Laws

Law on Contractual Joint Ventures (조선민주주의인민공화국 합작법). Established by Resolution No. 18 of the Standing Committee of the Supreme People's Assembly on 5 October 1992, and lastly amended by Decree No. 173 of the Presidium of the Supreme People's Assembly on 8 October 2014.

Law on Employment of Foreign Corporate (조선민주주의인민공화국 외국투자기업노동법). Established by Decree No. 3053 of the Presidium of the Supreme People's Assembly on 21 January 2009, and lastly amended by Decree No. 651 of the Presidium of the Supreme People's Assembly on 26 August 2015.

Law on Equity Joint Ventures (조선민주주의인민공화국 합영법). Established by Resolution No. 10 of the Standing Committee of the Supreme People's Assembly on 8 September 1984, and lastly amended by Decree No. 258 of the Presidium of the Supreme People's Assembly on 8 October 2014.

Law on Financial Management of Foreign Corporates (조선민주주의인민공화국 외국투자기업재정관리법). Established by Decree No. 2907 of the Presidium of the Supreme People's Assembly on 2 October 2008, and lastly amended by Decree No. 2044 of the Presidium of the Supreme People's Assembly on 21 December 2011.

Law on Foreign Corporate Accounting (조선민주주의인민공화국 외국투자기업회계법). Established by Decree No. 2037 of the Presidium of the Supreme People's Assembly on 25 October 2006, and lastly amended by Decree No. 2046 of the Presidium of the Supreme People's Assembly on 21 December 2011.

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Law on Foreign Corporations (조선민주주의인민공화국 외국인기업법). Established by Resolution No. 19 of the Standing Committee of the Supreme People's Assembly on 5 October 1992, and lastly amended by Decree No. 1994 of the Presidium of the

Supreme People's Assembly on 29 November 2011.

Law on Foreign Economy Arbitration (조선민주주의인민공화국 대외경제중재법). Established by Resolution No. 875 of the Standing Committee of the Supreme People's Assembly on 21 July 1999, and lastly amended by Decree No. 2050 of the Presidium of the Supreme People's Assembly on 21 December 2011.

Law on Foreign Exchange Control (조선민주주의인민공화국 외환관리법). Established by Resolution No. 27 of the Standing Committee of the Supreme People's Assembly on 31 January 1993, and lastly amended by Decree No. 750 of the Presidium of the Supreme People's Assembly on 16 November 2004.

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Law on the People's Economic Plans (인민경제계획법). Adopted by the Supreme People's Assembly on 9 April 1999, and lastly amended by Decree No. 553 of the Presidium of the Supreme People's Assembly on 29 November 2011.

Executive Summary

Since the inter-Korean summit of April 2018, a string of diplomatic exchanges involving the Democratic People's Republic of Korea (DPRK) as well as indications by Chairman Kim Jung Un himself hinted at alternative economic development models for North Korea, ushering in a swell of optimism. Especially buoyant have been investors, both within and beyond the Korean Peninsula, who have been showing manifestly enthused preemption in prospecting profitable enterprises in the North Korean economy with its promising capital endowments. The DPRK also exhibits a clear willingness to create a regulatory climate that is conducive to the admission and hosting of foreign direct investment (FDI). This willingness was demonstrated through amendments to its legal system, even its *Socialist Constitution*, to create a hospitable regulatory environment for foreign investors. Adding to this is the fact that the DPRK entered into 24 known bilateral investment treaties (BITs). Further evidence of this willingness is found in the rules administering the special economic zones (SEZs) in North Korea as well as rules setting out the settlement of commercial and investment disputes through an arbitration center that functions as a separate juridical body.

Meanwhile, the DPRK nuclear program and military provocations remain at large and at odds with geopolitical sentiment, which finds expression through a multilateral sanctions regime. This reality renders the prospect of a globally integrated North Korean economy as little more than a distant fantasy. This report sidesteps this reality in order to examine the issue of FDI and the DPRK within a normative space of inquiry. By examining the laws and treaties of the DPRK as well as anecdotal evidence, this report evaluates the regulatory readiness of the DPRK as it pertains to the hosting of FDI, specifically on the issue of fair and equitable treatment (FET).

By examining the state of FET in the DPRK, one may estimate how those obligations are observed and enforced. Insofar as they pertain to FDI, the body of laws of the DPRK and the treaty provisions are both modern and at times more expansive in their treatment of FET than other states with more globally integrated economies. However, there remain at least three fundamental challenges to FET that shall undoubtedly influence the DPRK's investment climate.

The first is procedural propriety concerning whether government authorities and the

national court system provides foreign investors with access to the administrative services of the government, such as the means to settle disputes. Whether the DPRK provides such functions and remedies is an important element of FET. In the DPRK, foreign investors have access to two venues for dispute settlement: domestic courts and the Chosun International Trade Arbitration Committee. The greater challenge to procedural propriety lies in fair procedure, such as the availability of objective legal representation and the right to fair trial. In the DPRK, the Chosun Bar Association manages all attorneys in North Korea and has been shown to act as a political mouthpiece of the regime. This brings into question the fidelity of legal recourse available to foreign investors and therefore the extent to which the state provides for procedural propriety.

The second is whether foreign investors can hold legitimate expectations that the laws, regulatory mechanisms and/or public processes of the DPRK shall operate in the way that were made apparent to investors at the time of the investment. While foreign investors are granted fair and equitable treatment whether through a BIT or DPRK law, the regime's interpretation of what is fair and equitable remains uncertain. Without first understanding the regime's positioning on this substantive issue, the extent to which foreign investors may hold legitimate expectations remains obfuscated. If the DPRK knowingly takes actions that results in material injury to foreign investors, then it can be seen as acting contrary to the expectations of the investor that were legitimized by the object and purpose apparent in the laws and BITs of the DPRK to encourage investment and contribute to greater economic exchange.

The third is whether foreign investors are protected from arbitrary treatment by DPRK authorities and/or representatives. To identify whether treatment is arbitrary requires first to examine the purpose of the measure taken by the government that might have caused injury to the foreign investor. While DPRK law provides protections to the foreign investor against such injury, it also identifies numerous instances when the government may reserve its right to regulate for the sake of accomplishing a public policy objective, even if it results in losses to the investor. For instance, the DPRK can prohibit the incorporation of a foreign business when it threatens national safety or impedes the country's development. Ideological tenets play a central role in qualifying these sweeping ideas. The three most regularly appearing include: "democracy," "socialism," and "*Juche*." *The Socialist Constitution of the DPRK* identifies the purpose of the DPRK legal system as being for the sake of the will and interests of the working class and the role of the state is to complete the socialist legal system and strengthen socialist justice.

The way that the DPRK pursues those objectives through policy and, in turn, how those policies influence the regulatory framework for foreign investment determines whether investors have experienced arbitrary treatment. The isolated nature of the DPRK as well as its ideological commitments to *Juche* threatens predictability in its legal system.

On the basis of past decisions with comparable circumstances, third-party data and anecdotal evidence linked to investors operating in North Korea, this report reaches the following conclusion: the first-order interaction for the DPRK is that it must demonstrate good faith through continued engagement in international legal mechanisms and institutions. This can help overcome regulatory chill imposed by unclear FET standards. One especially illustrative case of lacking good faith includes the investments of Orascom Telecom Media, an Egyptian company, into North Korea. The DPRK employed measures starting from 2012 that violated the legitimate expectations that Orascom held at the time of its investment. Based on comparable circumstances in past decisions of investment treaty arbitration, this can be conclusively seen as an act of indirect expropriation. Such actions explicitly violate the DPRK-Egyptian BIT, which grants Orascom the guarantees of FET, which typically provides for legitimate expectations. The lack of precedence to understand how the North Korean judicial system operates and no record of arbitral practice involving the DPRK make it difficult to anticipate how the state may behave when engaging the regulatory instruments of international investment law.

Based on these findings, this report concludes by proposing the creation of a joint interpretation mechanism, e.g., joint government interpretation of treaties, as a policy solution that can help to not only strengthen the rule of law in the DPRK, but also boost North Korea's business climate to increase foreign capital injections. In addition to these medium-term benefits, providing incentives to pursue formal rather than informal economic transactions in North Korea can bolster long-term goals such as improved transparency, accountability and reduced reliance on shadow economies. Entering into treaty-based agreements on the harmonized interpretation of treaties represents a diplomatically flexible yet effectually robust means to strengthen confidence in the foreign investment regulatory climate of the DPRK.

I. Introduction

The year of 2018 hosted a series of optimistic events that conjured hopeful visions of an alternative future of the Korean Peninsula and a new chapter for the North Korean economy. The April 2018 Inter-Korean Summit resulted in the *Panmunjom Declaration for Peace, Prosperity and Unification of the Korean Peninsula*. There have been more inter-Korean summits this year than any other in the entire history of the divided peninsula. The 2018 North Korea-United States Summit in June brought together bitter rivals. The Republic of Korea (ROK) has been signaling that a cooperative if not unified economy has and continues to be viewed as a pathway to unlocking a new era of economic potential and prosperity for the peninsula. The Moon Jae-in Government demonstrated its commitment to this belief through inter-Korean policies that featured the creation of a “New Economic Community” based on a single Korean market that would work in tandem with issues of peace and security.¹ Continuing this narrative naturally leads to certain intrigue concerning foreign investments into North Korea. Such events vie well for the DPRK in boosting investors’ interests, evoking appealing prospects for both foreign investors and the North Korean economy.

Yet 2019 demonstrated that formidable obstacles continue to exist. The United States expressed its dissatisfaction in the rate of denuclearization taking place in North Korea while, in return, the DPRK emphasized the need for a gradual process that should be rewarded by equal steps in reducing sanction burdens. This standstill continued to the 2019 North Korea-United States Hanoi Summit, which produced no remarkable conclusions. Negotiations continued to deteriorate thereafter. Then in May 2019, the DPRK resumed its missile tests, revitalizing military tensions in the region. The progression of these events demonstrated that most menacing of the challenges facing the DPRK is its denuclearization, to which UN Security Council Resolution 2375 requires to be done in a “complete, verifiable and irreversible manner.”² Whether the DPRK is committed to reporting and verification remains doubtful and shall require a coordinated effort between key stakeholders, such as the ROK and the United States.³ At a more essential level, the true motives and implications of the DPRK’s new diplomatic front remain opaque.⁴ While foreign investment into North Korea shall indubitably face impregnable barriers to entry without first addressing this core issue, the DPRK remains persistent in its search for other avenues of channeling foreign investment. It became party to the United Nations Convention on Contracts for the International Sale

of Goods (CISG) in April 2019 with its entry into force in North Korea on 1 April 2020.⁵ The DPRK’s accession to the CISG means that it will adopt a harmonized set of standards in contracts and other legal rules that protect the rights of parties involved in a commercial transaction. As this report shows, however, this is just one step in strengthening the DPRK’s regulatory climate.

This report turns its attention to a more fundamental obstacle to foreign investment: investor security. In doing so, it identifies that even should the DPRK denuclearize, it must demonstrate further commitment in connection to its regulatory climate should it hope to attract foreign investment. By analyzing the laws of the DPRK related to foreign direct investment (FDI), its existing international investment treaty obligations and anecdotal evidence, this report provides an overview of one of the most fundamental aspects of international investment regulation that the DPRK shall have to confront: fair and equitable treatment (FET).

Under the right circumstances, FDI can be a key driver of economic growth by bolstering capital accumulation, fostering knowledge spillovers and improving governance structures.⁶ It can provide economies that have limited access to domestic resources available for finance with the capital they need to develop infrastructure, human capacities and technologies to generate endogenous growth.⁷ To trigger these benefits of FDI into the North Korean economy, the DPRK began a process of reengineering its regulatory regime from the late 1990s.

There are records of investments by Chinese companies that stretch back to 2000, many of them focusing on developing the North Korean coal industry. Joint ventures (JVs) have consistently been the primary vehicle for foreign investment into North Korea. From 2005, Chinese investors began joint ventures with the state-owned enterprises (SOEs) of DPRK in such sectors as ironworks and steel production. Up until the end of 2010, approximately USD 290mn of Chinese investment flowed into North Korea over 200 or so businesses.⁸ The Open Source Center (now, the Open Source Enterprise) tracked 351 joint ventures valuing at USD 2.32bn, 205 of them with Chinese partners.⁹ Notable FDI projects in North Korea include Orascom, an Egyptian telecommunications firm, which is said to own a 75% stake in the country’s mobile networks.¹⁰ Loxley Pacific Company Limited (Thailand) famously provided internet services to North Korea and is now publically traded.¹¹ Gasparucci (Italy) invested in light industry and consumer goods in 2009 and now operates a joint venture under the name Unjong Gasparucci

J.V. Co. LTD.¹² Russian Railways builds infrastructure in North Korea and through its TransTeleCom laid out higher bandwidth internet capacities.¹³

If the DPRK admitted FDI, then there must be a functional regulatory framework overseeing them. This report examines a fundamental aspect of that regulatory framework and measures it against standards of international investment law.¹⁴ By doing so, this report finds that the laws of the DPRK and its current stock of bilateral investment treaties (BITs) are many ways harmonized with that of an international standard.

In focusing this analysis on the DPRK regulatory climate towards foreign investment, the impacts of international security and sanctions are not included into its scope of inquiry.¹⁵ However, it is clear that at the core of these challenges is the DPRK's ongoing nuclear program. The condition of the DPRK abandoning its nuclear program was clearly stated in the sanctions imposed by UN Resolution 2375 on 11 September 2017, which was an immediate international response to the sixth nuclear test of the DPRK on 2 September 2017.¹⁶ The economic sanctions (and possible secondary sanctions) brought a clear chilling effect for foreign investors owing to their fear of financial reprisal within key markets like that of the United States.¹⁷ This constraint on FDI to the North Korean economy can only be overcome if the DPRK is able to demonstrate a responsible, reliable effort and stance towards denuclearization. The objective of the following chapters is to demonstrate that even if the DPRK were willing and able to abandon its nuclear program, there are regulatory obstacles to FDI that shall continue to exist. Purely in terms of regulatory matters, perhaps the most significant barrier to FDI is the way how the DPRK laws and treaties are interpreted and enforced when involving foreign investment. Of the many aspects of that barrier, this report examines one of the most central conditions of fostering an investor-friendly climate: fair and equitable treatment (FET).

Based on an overview of the laws of the DPRK related to foreign investments, the treaty language employed in its fora of 24 BITs¹⁸ and anecdotal evidence, this report explores the state of FET in the DPRK and attempts to assess potential risks. It does this by alluding to interpretations of international investment law provided in past decisions by international tribunals concerning investor-state disputes (ISDs). Doing so further permits the reader to understand the current position of the DPRK in the wider universe of international investment law. This in turn can act as a compass in the DPRK's potential navigation towards harmonizing with wider regulatory norms in investment. In concluding,

this report argues that fostering a functional, rules-based investment regime in North Korea not only corroborates, but also facilitates other improvements in governance.

II. History of DPRK Foreign Investment Regulation

International investment law, in spite of its widely disputed nature, contains concepts and principles shared by states regardless of political ideology, state of development or membership in international governance systems. The mechanisms of international investment law are unique in that they are accessible to not only states, but also companies and individuals in states that share a relevant agreement. If no such agreement exists, then the admission of a foreign investment on the basis of a contract grants the investor the rights and protections laid out in national law. The state receiving the foreign investment, or the host state, then has an obligation to the conditions that are precursors to an investment as specified in the agreement between the host state and the home state of the investor.

In the 1990s, the DPRK began constructing the regulatory system for the admission of FDI through legislation, which was viewed by the state as a means to receive foreign technology and financing. Leading up to that effort, the DPRK emulated China in transitioning many parts of its regulatory regime towards market socialism, though in doing so adopted many of the challenges China once faced with these early legislative processes without any of China's experience in international economic affairs.¹⁹ Beginning with the *Law on Equity Joint Ventures* in 1984, the DPRK's key legislations related to foreign investment were largely established in the early 1990s. The legislations included *Law on Foreign Investment* (1992), *Law on Contractual Joint Ventures* (1992), *Law on Foreign Corporations* (1992), *Law on Foreign Investment Companies and Foreigners Tax* (1993), *Law on Foreign Exchange Control* (1993), *Law on the Leasing of Land* (1993), *Law on Foreign Investment Banks* (1993), and the first legal framework for the DPRK's Special Economic Zone (SEZ), i.e., *Law on Rasun Special Economic Trade Zone* (1993). Further legislations to facilitate and regulate foreign investment continued in the late 1990s and the 2000s, and the DPRK enacted *Law on International Trade* (1997), *Law on Foreign Economy Arbitration* (1999), *Law on Foreign Corporate Registration* (2006), *Law on Foreign Corporate Accounting* (2006), *Law on Financial Management of Foreign Corporates* (2008), and *Law on Employment of Foreign Corporate* (2009).

The DPRK's regulatory mechanisms to facilitate foreign investment grew much further after the death of Kim Jong-Il at the end of 2011. Following the legislation of its main laws on foreign investment, the DPRK proceeded with 57 further amendments and legislations from the early 1990s that sought to improve North Korea's investment climate. This included the substantial revision of laws on foreign investment and the amendment of articles in the DPRK Socialist Constitution to form the fundamental bases of foreign investments to North Korea – for example, Article 16 on the protection of foreign assets, Article 17 on the protection of sovereignty in conducting its external economic relations and Article 37 on permitting foreign nationals to incorporate and operate businesses in North Korea, whether independently or as a joint venture in the SEZs.

After the death of his father, Kim Jong-Un also sought to clarify the rules on foreign investment and expand it into areas that would facilitate greater investment certainty and predictability, such as providing a modern system of intellectual property laws.²⁰ While the provisions and laws pertaining to the protection of intellectual property (IP) were enacted before the second phase of legal reform starting in 1998, the Kim Jong-Un regime tried to harmonize the domestic IP regulations with international standards. The DPRK ratified several treaties administered by the World Intellectual Property Organization (WIPO), representing a third phase in the evolution of its legal regime for IP: harmonization. This includes, for instance, the ratification in 2016 of the *Singapore Treaty on the Law of Trademarks*, which harmonizes trademark registration procedures to an international framework.²¹ On 22 August 2018, the *Patent Law Treaty* (PLT)²² entered into force with respect to the DPRK, effectively pushing the bar of its IP law up to international standards.

The DPRK was able to address the overarching issue of lacking clarity in its laws concerning foreign investment through the law reforms. Legal scholars, however, maintain that while individual laws may have been clarified, the way in which they are interpreted and processed within the overarching legal system remains unclear.²³ The lack of predictability poses risks to potential foreign investments into North Korea.

III. The “Object and Purpose” of DPRK Laws Related to External Economy

Evaluating whether the DPRK's regulatory climate is facilitative towards FDI requires an assessment of the protections and rights it provides for foreign investors. These protections and rights are enshrined in treaties, agreements and/or contracts that the DPRK is party to, whether through its state organs or any other agent or entity whose structure, function and control can be attributed to the government. If a foreign company operating in North Korea enters into a contract with a domestic company, any contractual breaches by the North Korean company would not amount to a violation of the foreign investor's rights. However, should that North Korean company be found to have sufficient connections to the DPRK or it is found that the company's actions are significantly influenced by the government, these could amount to a violation of the foreign investor's rights. These attribution issues are particularly challenging in North Korea given the expanded role of the government.

Attribution regarding international investment refers to which agents, whether individual or institutional,²⁴ can be held responsible for violations against the rights and protections granted to foreign investors. Only the state, its organs and actors can be attributed to violating the rights and protections of foreign investors under a principle known as state responsibility. For state-run economies like that of the DPRK, the complex relationship between the state and business regularly give rise to attribution issues.²⁵

A simple yet illustrative example can include when a North Korean firm decides to violate the terms of a contract with a foreign investor, resulting in material injury, whether financial or in equity. The North Korean firm had no legitimate reason for violating its obligations to the foreign investor. While there are suspicions of government influence behind the decision, the DPRK rejects any connection with the North Korean firm. In this way, the DPRK can recuse itself of obligations to foreign investors by denying state responsibility in the matter.

In addition to such attribution issues, another elemental step in assessing the foreign investment climate of the DPRK involves identifying its “object and purpose,” such as whether the system seeks to expand investment. One way to do this is by becoming

signatory to international investment agreements (IIAs), such as bilateral investment treaties (BITs), treaties with investment provisions (TIPs) and investment related instruments (IRIs) that specify an object and purpose that seek to promote investment. The causality between IIAs and FDI inflows is a widely debated issue in international investment law literature. While a potential investor may see a state’s adoption of international standards or entering into an IIA as signaling its intention to provide investor confidence in its domestic regulatory landscape, whether that is a sufficient condition for FDI inflows remains a point of contention. Rather than taking a specific position on this issue, this report instead points to the language of the laws and treaties of the DPRK to examine the extent to which the state may protect investor rights and interests.²⁶

If the object and purpose of the agreement is to promote investment and the DPRK is signatory to that agreement, then the measures taken by the DPRK must demonstrate that object and purpose if it involves other signatory states. If the DPRK takes an action that is shown to be contradictory to the object and purpose of promoting investment, then the measure can be taken as a violation of the agreement. This idea is premised by, *inter alia*, Articles 18, 31(1) and 31(2) of the *Vienna Convention on the Law of Treaties* (VCLT).²⁷

By entering into an IIA, the DPRK affirms its dedication to the object and purpose of that agreement. It does this by ensuring that its domestic regulatory system does not contradict that object and purpose. Statements declarative of this object and purposes are often included into the preamble or early provisions of IIAs. Table 1 provides an overview of object and purpose statements located in the bilateral investment treaties (BITs) with the DPRK. Key points in these statements, which are emphasized in bold, show a recurring pattern.

An overview of the DPRK’s BITs shows that they follow the object and purpose of promoting bilateral investment, the creation of favorable conditions for investments and the encouragement of business initiatives.²⁸ Of those BITs, its treaties with Denmark, Russia, Egypt and Mongolia show a more expansive character, but largely due to the treaty cultures of those states, which is independent of considerations to North Korea. Otherwise, the DPRK’s BITs represent an older generation of treaties that are less expansive and generally tend to favor the investor.²⁹ Examining the treaty language used in the BITs of the DPRK³⁰ demonstrates that the expression of the object and purpose of facilitating investment is largely in harmony with international practice. A sample of such statements is provided in the following table.

Table 1. “Object and purpose” in DPRK’s bilateral investment treaties

<i>Agreement between the Government of the Kingdom of Denmark and the Government of the Democratic People’s Republic of Korea Concerning the Promotion and Reciprocal Protection of Investments</i> (1996)
<ul style="list-style-type: none">- Desiring to create favorable conditions for investments in both states and to intensify the co-operation between private enterprises in both States with a view to stimulating the productive use of resources,- Recognizing that a fair and equitable treatment of investments on a reciprocal basis will serve this aim
<i>Agreement between the Government of the Russian Federation and the Government of the Democratic People’s Republic of Korea on Promotion and Mutual Protection of Capital Investments</i> (1996)
<ul style="list-style-type: none">- Having in mind the creation of favorable conditions for the investment of investors of one Contracting Party in the territory of the other Contracting Party,- Considering that the promotion and mutual protection of such investments will facilitate the development of mutually beneficial trade economic and scientific-technical cooperation³¹
<i>Agreement on the Promotion and Protection of Investments between the Government of the Arab Republic of Egypt and the Government of the Democratic People’s Republic of Korea</i> (1997)
<ul style="list-style-type: none">- Desiring to create favorable conditions for greater economic cooperation between them, in principle of independence, equality and mutual reciprocity, and in particular for investments by investors of one Contracting Party in the territory of the other Contracting Party;- Recognizing that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both Contracting Parties
<i>Agreement on the Encouragement and Protection of Investment between the Government of the Republic of Macedonia and the Government of the Democratic People’s Republic of Korea</i> (1997)
<ul style="list-style-type: none">- In order to enhance economic cooperation in accordance with the mutual benefit of both parties and to encourage investors of one Contracting Party to create and maintain favorable conditions for investing in the other Party’s territory,- Recognize the need to encourage and protect investment³²
<i>Agreement between Macedonia, the former Federal Government of the Federal Republic of Yugoslavia, and the Government of the Democratic People’s Republic of Korea on Mutual Enlargement and Protection of Investment</i> (1997)
<ul style="list-style-type: none">- Desiring to create favorable conditions for enhancing economic cooperation between the Parties,- In order to create and maintain favorable conditions for mutual investments,- Convinced that the incentives and protection of investments contribute to the strengthening of entrepreneurial initiatives, and thus significantly contribute to the development of economic relations between the Parties³³

Agreement between the Government of Malaysia and the Government of the Democratic People's Republic of Korea for the Promotion and Protection of Investments (1998)

- Desiring to **expand and strengthen economic and industrial cooperation** on a long-term basis, and in particular, to **create favorable conditions for investments by investors** of one Contracting Party in the territory of the other Contracting Party;
- Recognizing the **need to protect investments by investors** of both Contracting Parties and to **stimulate the flow of investments and individual business initiative** with a view to promoting the economic prosperity of both Contracting Parties

Agreement between the Government of the Czech Republic and the Government of the Democratic People's Republic of Korea on the Promotion and Reciprocal Protection of Investments (1998)

- Desiring to develop **economic cooperation to the mutual benefit of both countries**,
- Intending to **create and maintain favorable conditions for investments of investors** of one Contracting Party in the territory of the other Contracting Party, and
- Conscious that the **promotion and reciprocal protection of investments**, according to the present Agreement, stimulates business initiatives in the field

Agreement between the Government of the Slovak Republic and the Government of the Democratic People's Republic of Korea on the Promotion and Reciprocal Protection of Investments (1998)

- Desiring to **intensify economic cooperation** to the mutual benefit of both countries,
- Intending to **create and maintain favorable conditions for investments of investors** of one Contracting Party in the territory of the other Contracting Party, and
- Conscious that the **promotion and reciprocal protection of investments**, according to the present Agreement, stimulates the business initiatives in this field

Agreement between the Swiss Confederation and the Democratic People's Republic of Korea on the Promotion and Reciprocal Protection of Investments (1998)

- Desiring to **intensify economic cooperation** to the mutual benefit of both States,
- Intending to **create and maintain favorable conditions for investments** by investors of one Contracting Party in the territory of the other Contracting Party,
- Recognizing the **need to promote and protect foreign investments** with the aim to foster the economic prosperity of both States

Agreement between the Government of the People's Republic of Bangladesh and the Government of the Democratic People's Republic of Korea on the Promotion and Reciprocal Protection of Investments (1999)

- Desiring to **intensify economic cooperation** to the mutual benefits of both States,
- Intending to **create and maintain favorable conditions for investments** by investors of one Contracting Party in the territory of the other Contracting Party,
- Recognizing the **need to promote and protect foreign investments** with the aim to foster the economic prosperity of both States

Agreement between the Government of the Kingdom of Thailand and the Government of the Democratic People's Republic of Korea for the Promotion and Protection of Investments (2002)

- Desiring to **create favorable conditions for greater economic cooperation** between both States and, in particular, for the investments by investors of one Contracting Party in the territory of the other Contracting Party,
- Recognizing that the promotion of such investments and the reciprocal protection of investments will be conducive to the **stimulation of individual business initiative** and will increase prosperity in both States

Agreement on the Promotion and Protection of Investments between the Government of Mongolia and the Government of the Democratic People's Republic Of Korea (2003)

- In the hope of **intensifying economic co-operation** of the Contracting Parties for mutual benefit,
- Desiring to **create and maintain favorable conditions for investments** by investors of either Contracting Party in the territory of the other Contracting Party,
- Recognizing the **need to promote and protect investments** with the aim of fostering the economic prosperity of the Contracting Parties,
- Hoping that **investments and economic co-operation will be promoted and strengthened** in accordance with the principles of sovereignty, equality, mutual benefit, mutual respect and mutual confidence

Agreement between the Government of the People's Republic of China and the Government of the Democratic People's Republic of Korea on the Promotion and Protection of Investments (2005)

- Intending to **create favorable conditions for investment** by investors of one Contracting Party in the territory of the other Contracting Party,
- Recognizing that the **reciprocal encouragement, promotion and protection of such investments** will be conducive to **stimulating business initiative of the investors** and will increase prosperity in both States

Agreement between the Government of the Democratic People's Republic of Korea and the Government of the Syrian Arab Republic for the Promotion and Reciprocal Protection of Investment (2006)

- Desiring to **intensify economic cooperation** between both States on the basis of equality and mutual benefit,
- Intending to **create and maintain favorable conditions for investment** by investors of one Contracting Party in the territory of the other Contracting Party,
- Recognizing that the **promotion and Reciprocal protection of such investments** will be conducive to the stimulation of individual business initiative and the economic prosperity of both States

Table 2. “Object and purpose” statements in international agreements

<i>Agreement on Trade-Related Investment Measures (TRIMs), WTO</i>
“Desiring to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition” ³⁴
<i>Multilateral Agreement on Investment (MAI), OECD</i>
“Wishing to establish a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures” ³⁵
<i>Convention on the Settlement of Investment Disputes between States and Nationals of Other States, World Bank</i>
“While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.”
<i>Republic of Korea Model BIT (2001)</i> ³⁶
“The Government of the Republic of Korea and the Government of [State] (hereinafter referred to as ‘the Contracting parties’)
“Desiring to create favorable conditions for greater investments by investors of one Contracting Party in the territory of the other Contracting Party, based on the principles of equality and mutual benefit”
<i>Agreement Between the Republic of Korea, on the One Hand, and the Belgo-Luxemburg Economic Union, on the Other Hand, on the Encouragement and Reciprocal Protection of Investments (1974, terminated)</i>
“Desiring to reinforce economic co-operation between the Contracting Parties and to intensify co-operation between private enterprises”
“Intending to create favorable conditions for investments by nationals or legal persons of either State in the territory of the other State”
“Recognizing the need to protect investments by nationals or legal persons of either State and to stimulate the flow of capital with a view to the economic prosperity of the Contracting Parties”

Republic of Korea – Belgium-Luxembourg Economic Union BIT, 2006

“Recognizing that the encouragement and protection of investments on the basis of this Agreement will have the effect of stimulating individual business initiative and increasing the prosperity of both States”

Agreement Between the Government of the Republic of Korea and the Government of the Republic of Kenya for the Promotion and Protection of Investments (2014)

“Desiring to create favorable conditions for greater investments by investors of one Contracting Party in the territory of the other Contracting Party, based on the principles of equality and mutual benefit”

“Recognizing that the promotion and protection of investments on the basis of this Agreement will be conducive to the stimulation of individual business initiatives and will increase prosperity in both States”

Understanding the position that the DPRK takes towards the object and purpose of its foreign investment obligations through its legal system is crucial in understanding the rights and protections that the foreign investor in North Korea may expect to receive. This becomes especially crucial in the settlement of disputes between the foreign investor and the government.

Facilitating means for the settlement of disputes to foreign investors on the basis of their rights and legal protections is a fundamental aspect of a state’s regulatory environment. Providing an objective, autonomous forum for the investor to seek compensation for losses caused by government actions is an essential protection granted to the investor. Should a dispute settlement mechanism be absent or if domestic mechanisms, such as courts, are unreliable, then investors are usually afforded means to settle disputes involving international third parties.

Dispute settlement mechanisms provided to foreign investors by the DPRK and their actual procedures remain matters of speculation without access to court proceedings. However, the legal system of the DPRK in the regulation of the settlement of disputes involving foreigners is thoughtfully furnished. Article 22 of the *Law on Foreign Investments* requires an attempt at reconciliation before the initiation of arbitration or litigation. Mandatory mediation and reconciliation is widely employed by countries as a means to reduce the burden on court systems, legal costs for conflicting parties and minimize the

hostility arising from a dispute that can threaten business relationships.³⁷ Article 2 of the *Law on Foreign Economy Arbitration* requires mandatory mediation by contract and Article 47 and 48 give both mediation and conciliation legally binding recognition. Should mediation fail, the Chosun International Trade Arbitration Committee (CITAC) is given jurisdiction to arbitrate disputes involving foreign investors. The arbitral rules for CITAC share characteristics common to arbitral proceedings.

Table 3. Select rules of the Chosun International Trade Arbitration Committee

Article 6	Trade and investment disputes shall be settled with arbitral independence in a manner that is objective, scientific, equitable and expedited
Article 21	The Tribunal consists of up to three arbitrators, one arbitrator elected by each party, who then in turn agree on the President of the Tribunal
Article 23	Parties may choose arbitrators based on their recognized competence in the field of arbitration regardless of nationality
Article 41	Parties may summon <i>amicus curiae</i> testimonies
Article 45	Applicable law in the arbitration is based on consensus between the parties, though if none can be reached the Tribunal shall decide based on contractual terms and relevant international arbitral cases

Article 3 of the *Law on Foreign Economy Arbitration*, however, identifies CITAC as the court of final instance. This means that foreign investors who enter into a dispute will have no option but to initiate proceedings through the CITAC, which may only have nominal differences from the national court system.

One can draw similarities between the DPRK system of dispute settlement and that of China’s when the China International Economic and Trade Arbitration Commission (CIETAC), formerly the Foreign Trade Arbitration Commission, monopolized all disputes involving foreign investors. Evocative accounts³⁸ of the Chinese dispute settlement may provide a basis for identifying the flaws that may exist for the DPRK adjudicative system. These include corruption, conflict of interests, failure to provide proper procedure, infrequent enforcement of awards and a general lack of predictability and consistency.

While foreign investors from states that share a BIT with the DPRK may choose to eclipse the domestic court system of the DPRK and the CITAC by going to the Permanent Court of Arbitration, for instance, the problem then becomes whether the

DPRK shall recognize their jurisdiction. Article 65 of the *Law on Foreign Economy Arbitration* entitles the government to reserve the right to refuse to recognize an arbitral award should it threaten the social fabric of the DPRK. Public policy exceptions to the rights and protections of foreign investors have become widely recognized in scholarship and practice, the lack of arbitral practice in the DPRK makes it difficult to anticipate how these proceedings are conducted and to what extent arbitral awards are enforced.³⁹ The DPRK is not signatory to core conventions related to arbitration or dispute settlement, such as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (or the “*New York Convention*”). This means that it is not bound to what has now become accepted as international standard practice, such as whether it decides to enforce an award. In effect, those decisions are reserved to its own sovereign right.

There are numerous provisions in the laws of the DPRK that share the object and purpose of its BITs, there remain certain obstacles that can contradict that posture – a few of which are addressed later in this report. This assessment shows that provisions that “encourage” (장려) or “contribute” (이바지) in relation to investment are likely to be aligned with the object and purpose of facilitating investment.

Table 4. “Encouraging” and “contributing” clauses in DPRK law

“Encouraging” foreign investment in/by (means listed below):	
<i>Socialist Constitution of the DPRK</i>	Joint ventures in special economic zones (Art. 37)
<i>Law on Foreign Investment</i>	Providing protection of law to the rights and interests of foreign investors (Art. 1) Sectors that produce high-tech and other modern technologies and products that are competitive in the international market, infrastructure construction sector, scientific research and technology development sector (Art. 7)
<i>Law on the Kaesong Industrial Region</i>	Infrastructure construction, light industry and advanced science and technology (Art. 4)
<i>Law on Equity Joint Ventures</i>	Equity joint ventures for entities in high-tech, scientific research and technology development, production of competitive products in international markets and infrastructure construction (Art. 3)

Establishing a system that/of (means listed below) in “contributing” to the expansion and development of external economic cooperation and exchange:	
Law on External Civil Relations	Protects the civil rights and interests of parties (Art. 1)
Law on External Economic Contracts	Protects the interests of the contracting parties and the performance of the contract (Art. 1)
Law on Processing Trade	Processing trade to increase foreign currency holdings (Art. 1)
Law on the Chamber of Commerce	Operation of a Chamber of Commerce (Art. 1)
Law on Foreign Corporations	Found and operate foreign corporations (Art. 1)
“Contributing” to the exchange and development with other states in (objective listed below) by/through (means listed below):	
Law on Equity Joint Ventures	Objective: Economic and technological Means: Joint equity ventures (Art. 1)
Law on Joint Ventures	Objective: Economic and technological Means: Joint ventures (Art. 1)
Law on Foreign Investment Banks	Objective: Financial sector Means: Foreign investment bank
Other provisions with similar object and purpose	
Law on Inventions	Expand investment to actively “encourage” the creation of inventions (Art. 6), developing exchange and cooperation in inventive sectors with foreign countries and international organizations (Art. 7)
Law on Computer Software Protection	Expand investment in the area software protection sector (Art. 6), developing exchange and cooperation with foreign countries and international organizations (Art. 7)
Law on the Software Industry	Develop exchange and cooperation in the computer software sector with other countries and international organizations (Art. 7)
Law on Processing Trade	Ensuring good faith as a principle for the purposes of encouraging processing trade and foreign currency inflows (Art. 2) Develop exchange and cooperation in areas of processing trade with other states and international organizations (Art. 7)

Law on the Export and Import of Technology	Develop exchange and cooperation in areas of technology imports and exports with other states and international organizations (Art. 7)
Law on Foreign Corporate Accounting	Develop exchange and cooperation in the area of accounting methods for foreign-invested corporations with other states and international organizations (Art. 8)

Understanding the object and purpose of the laws and treaties of the DPRK in relation to foreign investment is a key element in understanding not only its regulatory environment, but also the way that such regulations may be applied and interpreted. With the exception of foreign investors and investments in special economic zones and those whose origins are in a country with which the DPRK shares an international investment agreement (IIA), foreign investors will have to look to the above laws in pursuing their rights and protections. Should measures taken by the DPRK be determined to be contrary to the object and purpose of these laws, then the investor may choose to take the matter to arbitration. Investors from (or incorporated in) a country with an IIA with the DPRK, depending on the content of the agreement, may have access to international means of dispute settlement.

IV. Fair and Equitable Treatment in the DPRK

The object and purpose approach to assessing the regulatory climate of the DPRK is much like using a largescale brush to fill in the background color of a more detailed painting. To shade in those details, this report now switches to a finer instrument for analysis: minimum standards of treatment (MST)⁴⁰.

At the foundation of forming a regulatory climate that facilitates to FDI is ensuring a level of MST for foreign nationals and their assets. In international investment law, fair and equitable treatment (FET) is a core principle in observing one such a minimum standard. As identified in international legal practice, FET “consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”⁴¹ Scholars of international investment law

identified a list of rights most commonly guaranteed by FET, such as the following seven overarching principles:⁴²

1. Stability and predictability in legal and business environment for business planning and investment, consistency in applying domestic regulation
2. Domestic actors, such as the judiciary and other administrative agencies, do not violate domestic law
3. Protection of confidence and legitimate expectations in actions taken by the government as they pertain to the foreign national and their investment
4. Administrative due process guaranteed to foreign nationals in any claims in relation to their investment
5. Protection against arbitrariness and discrimination in government measures
6. Transparency in the rules and regulations, policies and administrative practices governing the foreign national and their investment
7. Reasonableness and proportionality in interventions made by the government into the investment

Building from the concept of FET, this chapter examines the fora of DPRK law and treaty obligations and the extent to which it confers each such protections and rights.

While recognized as having a central role in any regulatory climate for FDI, there is disagreement on the concept of FET and its place in international law that can be split into two general views. The first views the standard as falling under a wider set of minimum standards of treatment premised in international law, as discussed above. This view stipulates that FET needs to be interpreted within the broader purview of international customary law, which considers a broader universe of standards and regulation and in turn tends to strengthen the regulatory capacities of the state. The second is an expansive view towards FET that treats it as an autonomous standard applicable specifically to international investments, thereby requiring an independent interpretation from the wider body of international law. In practice, this tends to reinforce the rights and protections of the investor by restricting the scope of topics considered to international investment. By doing so, this view predominantly excludes considerations concerning the environment, labor rights and so forth when substantiating FET.

The OECD finds that when viewing the FET standard as being incorporated into international customary law, decisions arising from disputes showed a trend towards

prioritizing the rights of the state over those of the investor.⁴³ Conversely, viewing FET as an autonomous standard shaped around the rights and protections of the investor tended to harness the regulatory powers of the state.⁴⁴ For instance, within this autonomous FET perspective, government measures that antagonize the object and purpose of investment agreements, which is to facilitate investment, could then violate FET. While there are compelling arguments for both interpretations, exploring them further remains beyond the scope of the present discussion.

There are at least two ways to estimate a potential position that the DPRK may take on FET. The first looks at multilateral agreements with investment related instruments (IRIs) and the other examines both the BITs and the laws of the DPRK that relate to foreign investment. The former is part of a much more expansive discussion on the ideological and political aspects in the rule of law and thus in keeping to the scope of this report is only briefly examined.

Assessing the extent to which the DPRK would observe FET standards partly depends on the way it views sovereignty in a system of international laws. One illustrative example is the participation of the DPRK in the New International Economic Order (NIEO) and the Nonaligned Movement (NAM). When talks of NIEO first began in the 1970s, Kim Il Sung made clear that the DPRK would reserve the absolute authority and sovereignty of the state, particularly when it came to issues such as natural resources. Through its Socialist Constitution⁴⁵ and laws, the DPRK strongly reaffirms this belief through its treatment of land ownership and natural resources. Articles 8 to 10 of the *Law on Land* reserves full ownership of land to the regime, irrespective of what form that land may take. In application to a socialist understanding of property, the land of the DPRK cannot be sold or privately owned.⁴⁶ These views on sovereignty within a system of international law in many ways reflected the collective views grounded in the NIEO rhetoric. They provided a counter-narrative and resisted unifying standards concerning the treatment of foreign investments⁴⁷ and instead commission the allocation of such rights to the sovereignty of the state entirely.⁴⁸ In doing so, the state would only be obliged to such standards through multilateral or bilateral investment treaties,⁴⁹ which was an exercise of a state's sovereignty to enter willingly into an international agreement.

Observing the ways that the DPRK engaged the NIEO and NAM platforms allows one to extrapolate, assuming ideological continuity, how the DPRK would view the standard at-large. Unless bound to treaty obligation under its existing BITs, the DPRK

would most likely not acknowledge FET as an independent standard and choose to view the idea through a selective scope of the wider fora of international law – specifically those that protect the sovereignty of the state. This idea of a selective scope within international law is known as the concept of the reserved domain, which refers to a “domain of state activities where the jurisdiction of the state is not bound by international law.”⁵⁰ While there has been a customary scoping of such activities, the DPRK would undoubtedly take a more expansive approach to its reserved domain, in which areas it would consider the application of international law or standards as insufficient or inappropriate.

Understanding this position towards FET as being a principle within international customary law or an autonomous standard is important to estimating the treatment a foreign investor may expect to receive from the DPRK. Unless there is a BIT that set specific standards of FET to which the DPRK enters into as an act of sovereignty, there remains little basis for presuming that a foreign investor may hold the same expectations of FET.

The remainder of this chapter turns to the laws and treaties of the DPRK in their specific provisioning of FET to foreign investors.

4.1. Procedural Propriety

One of the primary foundations of FET is guaranteeing that foreign investors have access to fair procedures in judicial and/or administrative processes. Should a foreign investor not be afforded due process, such as being administratively excluded in ways that affect their investment, the host state may be in violation of not only FET, but also committing a denial of justice.⁵¹ Alternatively, if the investor has access to due process and exhausted remedies to a dispute offered by local courts yet finds that the quality of those national judicial mechanisms are questionable, either by intention or capacity, that in effect has the same effect of a denial of justice. For such questions of procedural propriety to be equated to a violation of FET and the international standard of a denial of justice, a clear distinction must be made between an erroneous decision and an act of manifest injustice.

The guarantee of judicial and/or administrative processes to investors and their investments are provided through the laws of the DPRK. A list of such provisions is reproduced below. These demonstrate that at least by writ of law, foreign investors are provisioned with and/or guaranteed due process under the protection of the law.

Table 5. Laws of the DPRK on due process

<i>Socialist Constitution of the DPRK</i>
Article 16 guarantees the legal rights and interests of foreign national in North Korea. Article 24 guarantees the protection of private property through law. Article 74 protects intellectual property ownership over inventions and patents.
<i>Law on the External Economic Contract</i>
Article 4 guarantees the observation of reciprocity and good faith in the performance of contractual agreements.
<i>Law on Foreign Corporations</i>
Article 4 guarantees the protection of the law to the foreign investor, their assets, its control and profits.
<i>Law on Foreign Corporate Registration</i>
Article 5 guarantees protection of the law and all legal rights to registered Foreign Corporations.
<i>Law on Financial Management of Foreign Corporates</i>
Article 1 contributes to the financial management of foreign corporations through the establishment of a system that protects that capacity. Article 8 protects the property of foreign-invested corporations by law and provides appropriate compensation for assets that are nationalized by the State for unavoidable reasons. If there is investment protection agreement with the country of origin of the foreign-invested corporation, then protections shall be offered in accordance to that agreement.
<i>Law on Foreign Investors</i>
Article 4 guarantees foreign investors their lawful rights, protection of profits and access to the conditions provided in the <i>Law on Foreign Investment Corporations</i> and the <i>Law on Foreign Investment Banks</i> . Article 19 protects foreign investors, investments, foreign investment banks and their assets from government takings and nationalizations for the public interest shall be guarantee legal procedures in claiming compensation.
<i>Law on the Chamber of Commerce</i>
Article 4 protects the activities of the Chamber of Commerce by law.
<i>Law on Joint Equity Ventures</i>
Article 6 provides the legal rights and interests of the joint equity venture as a domestic business.
<i>Law on Economic Development Zones</i> ⁵²
Article 7 protects the rights of the investor, their assets and their lawful earnings in economic development zones. In the instance of nationalization or government operation of the investment, provides legal procedures in claiming compensation. Article 48 provides legal protections for the intellectual property of investors in economic development zones.

As demonstrated by *Rumeli v Kazakhstan*⁵³, however, the guarantee of due process is a necessary but not a sufficient condition to fair procedure. When access to third-party international arbitration is contingent on first exhausting domestic remedies, the extent to which fair procedure is guaranteed in such national fora is of the utmost significance. Should judicial procedures, whether through the domestic court system or the Chosun International Trade Arbitration Committee (CITAC), be of such an insufficient character that it in effect deprives the foreign investor of due process, this would be rendered as a violation of FET by the state for permitting and recognizing that process and decision. The laws of the DPRK identify the standard qualities of fair procedure in measuring procedural propriety.

Table 6. Laws of the DPRK on fair procedure

Law on Foreign Economy Arbitration
Article 6 states that trade and investment disputes shall be settled with arbitral independence in a manner that is objective, scientific, fair and expedited. Article 24 provides procedures to challenge the competencies of an arbitrator, such as independence.
Law on Civil Procedure
Article 5 guarantees that civil procedures shall be conducted scientifically, objectively, prudently and fairly. Article 6 extends the jurisdiction of this law to foreign nationals and entities.
Law on Administrative Punishment
Article 4 guarantees that administrative punishment shall be holistically conducted scientifically, objectively, prudently and fairly. Article 5 extends the jurisdiction of this law to foreign nationals and entities with the exception of those with diplomatic privileges.
Law on Court Formation
Article 2 views the composition of a court as guaranteeing that court procedures shall be scientific, objective, prudent and fair, therefore calling for its expedient and rightful maintenance.
Law on the Attorney-at-Law
Article 1 identifies the role of the attorney-at-law as contributing to the protection of rights and interests of legal entities as well as upholding the rightful enforcement of the law. Article 2 identifies that the attorney-of-law through their practice protects human rights and the legal system of the DPRK. Article 4 secures the right to freedom in choosing an attorney for foreign nationals and companies. Article 5 identifies the basic principles for attorneys as being fair, objective and scientific. Article 6 secures the independence of attorneys.

Specific qualifications of the conduct of the attorney that is made quite evident in DPRK law can be found in both civil and common law traditions as well as in principles by the Council of Bars and Law Societies of Europe (CCBE) and the International Bar Association (IBA).⁵⁴ Principle Two of the *International Principles on Conduct for the Legal Professional* by the IBA, for instance, requires standards of “honesty, integrity and fairness.”⁵⁵ The Articles 1 and 2 of the *Law on the Attorney-at-Law* show similarities with Article 1 of the *Attorney-at-Law Act* of the ROK⁵⁶ or the *Attorney Act* of Japan⁵⁷, which emphasize the protection of human rights, achievement of social justice and improvement of the legal system as the mission of the attorney. Notably, these similarities are more prevalent than any shared with the *Law of the People’s Republic of China on Lawyers*, which identifies in Article 1 that lawyers are to “play their role in the development of the socialist legal system.”⁵⁸ While the people’s economy is mentioned regularly in the other laws of the DPRK, such as Article 1 in the *Law on Arbitration*, its mention is notably absent from this law.

However, while ethics committees such as the Legal Ethics and Professional Conduct Council of Korea or central bar associations such the Japan Federation of Bar Associations take up matters of conduct concerning attorneys, the Chosun Bar Association (CBA) of the DPRK commands significantly greater authority. Article 26 of the *Law on the Attorney-at-Law* authorizes the CBA to decide compensation for attorney services, undoubtedly a powerfully interventionist role. The CBA has also been observed to manage strict control over DPRK attorneys, some saying that it ultimately serves as a means to implement the policies of the DPRK onto the populace.⁵⁹

4.2. Legitimate Expectations

Legitimate expectations refer to the treatment that foreign investors may expect based on the domestic laws at the time of the investment. Should there be a change in those laws during the lifetime of the investment, those changes should be predictable for the investor less those adjustments can be proven to be normal. One can here look to an interpretation of normal based on whether the administrative process is replicated by other states and is thus seen as an ordinary feature within the rights of the regulating body. Another violation of the legitimate expectations standard includes a guarantee that the host state shall implement its policies and any regulatory measures in good faith, or for the purposes that they are intended to serve. Should a foreign investor receive treatment that is contrary to the intended purposes of a regulatory measure or policy,

then the host State can be shown to be acting in bad faith and in violation of FET.

As mentioned throughout this report, it is difficult to understand the DPRK’s position on FET without first understanding how it actually provides protections to foreign investors. While its laws and BITs⁶⁰ provide insight into the rights and protection foreign investors can expect to receive from the DPRK, whether those rights and protections are realized is a different question entirely. One tenable methodology in inferring the state of FET in North Korea can be to draw lessons from past disputes involving a violation of legitimate expectations and comparing actions taken by the infringing state with those taken by the DPRK based on anecdotal evidence.

Based this methodology, one can surmise at least two bases upon which the DPRK demonstrates risk to the legitimate expectations of investors through government measures. The first deals with the object and purpose of facilitating investment in the DPRK, whether in terms of its legal system or BIT obligations. If the DPRK knowingly takes actions that results in material injury to foreign investors, then it can be seen as acting contrary to the expectations of the investor that were legitimized by the object and purpose apparent in the laws and BITs of the DPRK to encourage investment and contribute to greater economic exchange.

The events surrounding government treatment towards an investment into North Korea by Orascom Telecom Media and Technology Holding SAE (OTMT)⁶¹, an Egyptian firm, demonstrates one way that the DPRK may violate legitimate expectations towards foreign investors. Orascom’s legitimate expectations find basis in the BIT between the DPRK and the Government of the Arab Republic of Egypt, which came into force on 1 January 2000. The treaty confers rights and protections to the investor that are commonly found in BITs.

Orascom began its operations in North Korea after being awarded a tender to construct a mobile network in 2008 through a joint venture called CHEO Technology Joint Venture (also known as Koryolink), over which it owns 75% voting rights. According to reports⁶² as well as financial statements by Orascom,⁶³ the company began experiencing restrictions on outbound cash transfers and other operational obstacles from 2012, when the company no longer held exclusive rights to the North Korean mobile network. Compounding this problem was Orascom’s inclusion into sanction lists from 2013, though notably its operations were granted an exemption from UN Security Council Resolution 2375

Table 7. Bilateral Investment Treaty (BIT) between DPRK and Egypt

Preamble: Object and purpose	Identifies the object and purpose of the treaty as “[d]esiring to create favorable conditions for greater economic cooperation between [DPRK and Egypt] in principle of independence, equality and mutual reciprocity.”
Art. 2(1), 2(2): Fair and equitable treatment	FET is provided here as a means to “encourage and create favorable conditions for investors of the other Contracting Party to invest in its territory.” Art. 2(2) states, “Investments of the investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security.” Specific government measures against which investors receive protection are those that “in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors.”
Art. 3(1), 3(2): Most-favored nation and national treatment	FET is provided here in terms of the guarantee that an Egyptian or North Korean investor as foreign investor in the other state shall not receive any worse treatment than foreign investors from other states and domestic firms. These concepts are known as the principles of most-favored nation (MFN) and national treatment (NT) and are explored further in Subchapter 4.3.
Art. 3(3): Stabilization	Known as a stabilization clause, this Article entitles foreign investors between the two countries to expect treatment and protections conferred at the time of the investment. This means that should the DPRK or Egypt undergo a reformation process that results in a change in the legal or policy conditions to which the foreign investor is subject, those changes do not necessarily apply to the investor or their assets. The foreign investor is provided with the option to lock in conditions governing their investment at the time that the investment was made.
Art. 4(2), Art. 5: Compensation	Foreign investors who suffer damage or loss as a result of measures attributable to the government are provided compensation for that damage or loss. Such measures include requisition, destruction, nationalization and expropriation.
Art. 6(1): Repatriation	Foreign investors are guaranteed the right to repatriate assets related to their investment and its returns.
Art. 7: Subrogation	Foreign investors are guaranteed subrogation in the instance of state succession. This refers to the transfer of liabilities, i.e., debt or obligations, related to the investment in the situation that the state hosting the investment undergoes a change in government or statehood. For instance, should the DPRK undergo a change in government, this would guarantee that the succeeding government also recognizes the rights and protections of the foreign investor. However, it should be noted here that in the situation of a change in sovereignty through state succession, whether the successive state adopts the liabilities of its predecessor as a matter of acquiescence or estoppel. This refers to whether the inheritance of liabilities requires express acquiescence of both states or whether it applies irrespectively of such statements. ⁶⁴

Art. 8: Dispute settlement	Should a dispute arise between the foreign investor and the host state, domestic remedies for the settlement of that dispute must first be exhausted, such as the CITAC in North Korea. If the dispute cannot be settled or the domestic remedy, such as the national court system, demonstrate a lack of procedural propriety, then the foreign investor reserves the right to seek settlement through an international forum. While Egypt ratified and enforces the <i>Convention on the Settlement of Investment Disputes between States and Nationals of Other States</i> permitting use of the International Centre of Investment Dispute (ICSID), the primary forum for settling investment disputes, the DPRK is not a signatory state. Unless that event arises, investment disputes shall be settled through an ad-hoc court of arbitration.
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(2017).⁶⁵ These restrictions escalated to a level where Orascom announced that it had lost control of Koryolink’s activities by 2015 September 30 in accordance with International Financial Reporting Standard (IFRS) 10.⁶⁶ 2015 was also when the DPRK incorporated and transferred Koryolink’s services to a state-owned telecoms company, Byol.⁶⁷ Orascom’s Q3 financial statements put losses resulting from the adjustment from IFRS 10 at USD 476,779 at the official exchange rate by the DPRK central bank.⁶⁸ Overall losses were estimated to be at USD 15mn in profits as of 2017.⁶⁹

Fully assessing the extent to which Orascom experienced violations to its legitimate expectations requires a detailed assessment of government measures and their resulting injury at arm’s length quantification. However, should the above anecdotal evidence hold merit, even a brief explanation demonstrates fairly clear contradiction to the provisions of the Egypt–DPRK BIT. The obstacles that Orascom faced dealing with administrative processes by officials with government attribution can be identified as contradicting the object and purpose of the BIT. Should Byol not be exposed to the same obstacles as Koryolink, this would be a violation of Orascom’s FET in virtue of national treatment. Orascom’s incapacity to repatriate its assets out of North Korea also clearly presents a violation of its rights to repatriation. Of the suspected adversarial treatment by the DPRK, however, this report highlights one in particular. The transfer of Koryolink’s operations to Byol in 2015 resulting in financial loss for Orascom and a subsequent loss of control. The key question here is whether this decision by the DPRK was made on arbitrary and/or discriminatory grounds.

4.3. Public Interest or Arbitrary Treatment

While a state is bound to obligations arising out of an IIA, they maintain the right to

implement public policy measures, even if it in effect violates FET. Known as the right to regulate, the government can employ general regulatory measures in matters that seek to accomplish a public interest objective.

In the situation that North Korea undergoes political, economic or legal change, there are at least two regulatory implications related to international investment to consider.

- 1. *What happens to obligations that existed before the change took place? Would those new conditions entitle the North Korean government to derogate⁷⁰ from obligations from before the change?*

The treaty obligations that the DPRK has towards its BIT partners, and vice versa, shall continue to remain valid unless terminated by the parties. The DPRK, or any state for that matter, cannot immediately assume that it derogates from its treaty obligations after any manner of change in political structure or power. One may look to the *Vienna Convention on the Law of Treaties* (VCLT) for further enlightenment on this topic. Article 62 of the VCLT⁷¹ has been interpreted as identifying tests on the legitimacy of derogation in the event of a fundamental change in this context.⁷²

Such conditions as “essential” and “radically” are of such subjectivity that they remain largely unpersuasive to international courts. This was shown most prolifically in international investment law in application to Argentina during its economic crisis and reform period. International investors filed 40 cases against Argentina for damages that they incurred as a result of government policy measures. Only one case was awarded circumstantial derogation.⁷³

- 2. *Are all foreign investments admitted before the change entitled to the same rights and protections after the change?*

Whether foreign investors in North Korea are able to appeal for compensation for any losses in the situation of a political change or government measure shall depend on how that investor acquired their investment. Questionable means of acquiring investor rights have in the past served as a basis for derogating those rights and protections, oftentimes by discounting the lawfulness of the transaction.⁷⁴ For instance, if a foreign investor was admitted into North Korea based on a corrupt transaction, that investor would not have access to international courts should their rights and protections be

violated or threatened as a result of political change.

Other questionable means that have appeared at the center of disputes include: an investor misrepresenting its technical and financial capacities to receive regulatory approval from the host state⁷⁵ or the acquisition of an investment through a transaction that is not at arms' length and thereby discriminatorily provided at lower than the market value.⁷⁶

While Article 19 of the *Law on Foreign Investors* provides protections to the foreign investor from expropriation, DPRK law also identifies numerous instances when it may reserve its right to regulate for the sake of accomplishing a public policy objective. When the DPRK conducts such a taking, it is a nationalization of foreign assets that does not obligate the state to compensate for damages to the foreign investor but provides sufficient compensation for the value of the asset. The DPRK also reserves its right to act or regulate on behalf of a public policy objective, which includes prohibiting the incorporation of a foreign business should it threaten national safety or be of insufficient technological quality (Article 3 of the *Law on Foreign Corporations*). The DPRK further bars actions by foreign corporations that may impede the country's development (Article 5 of the *Law on Foreign Corporations*).

Better understanding the above public policy objectives first requires an examination of what falls under the remit of public interest. Ideological tenets can play an important role in qualifying both more common objectives such as "prosperity" and "flourishing" and less common ones as well, such as "sovereignty," "autonomy," "independence" or "people's economy." In terms of ideological concepts present in DPRK law, three are recurring: "democracy," "socialism" and "*Juche*." While a study of the legal significance of such ideological values in connection to international investment is certainly warranted, this report discusses the subject only in brief. The approach to one such a study would undoubtedly involve examining ideological aspects of DPRK law and how they apply to public policy as they relate to investment. Particular attention must be paid to areas that traditionally qualify as public policy goals, such as environment, natural resources, or any of the other legitimate objectives identified in GATT Article XX.

Regarding public morality or values, for instance, one may look to *the Socialist Constitution of the DPRK*. Chapter 1, Article 18 identifies the duties of the DPRK legal system as being for the sake of the will and interests of the working class and the role of the state is to complete the socialist legal system and strengthen socialist justice. Chapter 2, Article

21 secures the planning role of the state in the North Korean economy, prioritizing state ownership over property. The way that the DPRK pursues those objectives through policy and, in turn, how those policies influence the regulatory framework for foreign investment shall require specific examination.

Another common area of public policy that arises in international investment law is economic planning. When Argentina underwent sovereign debt restructuring in the wake of financial crisis in 2001, for instance, the government attempted to justify the measure, and the associated losses to foreign investors and creditors, as collateral of economic policy. Nevertheless, it opened up the doors to numerous high-profile investment disputes that continue to have ramifications today.⁷⁷

DPRK law not only openly facilitates state planning of the economy, but also operates on a socialist understanding of ownership. As such, the state would be justified as a matter of its sovereignty to take foreign assets. Foreign investors would be susceptible to such measures through such legal entitlements to the DPRK as Article 27 of the *Law on the People's Economic Plans*, which obliges all institutions, corporations and organizations to observe the economy planning of the DPRK at all times. Article 6 identifies fundamental principles of people's economy as "planned," "balanced" and in observation of the socialist economic law, though in consideration of "realistic conditions."

When looking through the scope of DPRK public policy, the Orascom scenario identified earlier may be justified as the state acting within its rights when it transferred operational control of Koryolink to Byol. However, the DPRK, by making the sovereign decision of entering into a BIT with Egypt, is obliged to respect the protections laid out in the Egypt-DPRK BIT. Orascom, as an Egyptian company, is thus protected from measures taken by the DPRK that it may consider to be legitimate under its national legal system, but within the larger practice of international investment law would most likely be determined to be arbitrary.

Should any aspect of a government measure, such as its objectives, implementation and/or consequence, be deemed to be arbitrary, then the state is required to compensate the investor for damages. To determine whether a measure is arbitrary, one would assess whether it was conducted for a legitimate objective as well as the proportionality of the measure. In the case of the Egypt-DPRK BIT, one can identify in Article 2 that the DPRK provides these protections to Egyptian investors:

(2)[...]Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.⁷⁸

The treaty language that Egypt and the DPRK employ is in accordance with common practice, in which “unreasonable” has been shown to be interchangeable with “arbitrary.”⁷⁹ This means that the DPRK recognizes the treaty obligation that any measure taken by a state shall not be arbitrary and/or discriminatory taken in the meaning regularly attributed to them in international investment agreements.

Yet even in international practice, there has been disagreement on attribution to a common standard.⁸⁰ For instance, in *Libyan American Oil Company (LLAMCO) v. The Libyan Arab Republic* (1981), a claim by LIAMCO that measures taken by Libya were politically motivated rather than of a legitimate public purpose was dismissed on the grounds that “the public utility principle is not a necessary requisite for the legality of nationalization.” This decision grants the authority of judging matters of public interest to national bodies, such as the legislature. An opposing interpretation of this standard can be identified in the famous *Chorzow Factory Case* (1928), which espoused an approach that nationalization necessarily results in compensation regardless of the circumstances.

At present, DPRK laws do not contain provisions that qualify the conditions that would define arbitrary measures with the exception of regulation that applies specifically to special economic zones. The applicability of these laws to foreign investment at large is uncertain – a regulatory conflict of interests that has been long examined.⁸¹ In its laws governing SEZs, the DPRK adopted fairly harmonized international standards barring discriminatory behavior of state measures limited to the Rasun Special Economic Trade Zone, as per Article 7 of the *Law on Rasun Special Economic Trade Zone*. The same standards are applied in Article 8 of the *Law on Hwanggumpyong & Wihwa Islands Economic District*. The same standard again appears in the *Basic Law of the Sinuiju Special Administrative Region*, Chapter 4 (Basic Rights and Duties of Residents) Article 43, which provides a broader, normative definition of discrimination based on nationality. Foreign investors, both individual and institutional, that maintain residence for seven or more years fall into the remit of these protections under Articles 42(2) and 42(3).

However, simultaneously, Chapter 3, Article 27 of the *Law on External Civil Relations* identifies that DPRK law in general shall govern the ownership of assets by individuals

and institutions in the SEZs. This undermines the legitimate expectations that foreign investors may find comfort in when choosing to invest in the SEZs of North Korea by obfuscating their regulatory autonomy. The rules governing the SEZs may in many ways be harmonized with the texts in the universe of international investment law, but this has little procedural worth should its propriety be challenged by unclear legislation, administration and/or interpretation. Thus, in application to arbitrary treatment, it will be important for the DPRK to maintain procedural propriety within the scope of legitimate expectations of the foreign investor.

In examining the issue of arbitrary measures, there is clearly a conflict of laws between those of the DPRK and the obligations provisioned in its BITs. Assessing what is arbitrary would depend largely on if one was viewing the standard from the point of view of DPRK law or that of international investment agreements like BITs.

There are methods in international investment law known to help reconcile such regulatory conflict. One approach may be to take an arm’s length approach by comparing whether a measure taken by the DPRK can be deemed arbitrary based on a comparative standard. This would involve examining prior international disputes involving a foreign investor taking claim against the actions of a state that has roughly similar characteristics as the DPRK, whether in terms of ideology or even having SEZs with their own regulatory framework. This comparative standard principle was applied in *Noble Ventures v Romania*,⁸² where a measure taken by Romania that resulted in material injuries to a foreign investor was determined not be arbitrary because similar measures were taken in other economies for similar purposes.

178. Such proceedings are provided for in all legal systems and for much the same reasons. One therefore cannot say that they were “opposed to the rule of law.” Moreover, they were initiated and conducted according to the law and not against it. ... [The measure] was in a situation that would have justified the initiation of comparable proceedings in most other countries. Arbitrariness is therefore excluded.⁸³

Should this principle be applied to a measure involving the DPRK, then assessing that measure in comparison with similar actions taken by other states would be an influential factor in assessing its legitimacy.

Another approach to determining the arbitrariness of a measure involved assessing the

intention behind it. This connects back to what the DPRK defines as the public interest within its legal framework and the way in which the measures pursued by the state are essentially meant to serve those purposes. In effect, the legality of an action does not depend so much on whether it can be qualified as “right” or “wrong,” but rather if the measures were conducted under malign intentions. If the measure was intended to serve a public purpose and cannot be shown to have been a deliberate effort to cause injury to the investor, then past deliberations have shown that this is not an arbitrary measure and thus not a violation of FET. This exact principle was shown in *Enron v Argentina*⁸⁴:

*281. [...] The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, [...] but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.*⁸⁵

Governmental measures taken on behalf of the public interest are commonly reacted to with contention as to whether they are used appropriately, both in developing and developed economies. As this chapter attempted to demonstrate, the isolated nature of the DPRK as well as its ideological commitments to *Juche* are certain to aggravate this contention by means of a lack of predictability: how do business activities of a foreign investor infringe on *Juche*? Are the principles of *Juche* comprehensible to the foreign investor insofar that they may be able to avoid violating them in the operation of their investment? These and related questions are fundamental to the subject of public interest and arbitrary treatment. This report argues in the following chapter that one way to address the challenge of predictability can be through joint interpretation mechanisms.

V. Policy Proposals

The combination of geopolitical challenges and uncertainty concerning FET poses significant barriers to foreign investment to North Korea. A long-term policy solution strictly regarding the latter must address a lack of predictability and consistency of the DPRK regulatory climate. This must inevitably involve harmonization. There remain

numerous challenges to that effort. As this report showed, while considerable harmonization with international investment law standards already exists in the content of relevant laws and the BITs of the DPRK, the rule of law remains uncertain insofar as it concerns the equitable protection of investor rights. Furthermore, the DPRK is not party to major legal instruments related to investor-state disputes that harmonize the application, interpretation and enforcement of international investment agreements, such as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958). Finally, while it is clear that the DPRK seeks to attract foreign investment, as demonstrated by its accession to the United Nations Convention on Contracts for the International Sale of Goods (CISG), its general willingness to harmonize to global regulatory standards (and observe them in good faith) is difficult to speculate given its persistent derogation of agreements and conventions.

Achieving any such long-term policy solution must be built on trust. No progress can be made with a state that deliberately eschews its obligations to agreements that it consensually acceded. If the DPRK is prepared to begin building that trust, then this report concludes with an intermediate-term policy solution of a more practical hue: joint interpretation mechanism, *i.e.*, joint government interpretation of investment treaties. This refers to two or more states engaged or engaging in an international investment agreement, such as a BIT, coordinating an additional agreement on a specific interpretation of the provisions of the IIA. Given the fact that the DPRK is not averse to entering into BITs as it does so as a decision of its own sovereignty and self-interest in attracting foreign sources of finances, approaching matters such as FET through similarly diplomatic channels presents logical merit.

An analysis of the legal framework behind such joint interpretation mechanisms by the OECD identified that not only are they binding, but also reciprocal joint interpretations of investment agreement are legally viable and already in usage by the ASEAN, Central America and Latin America.⁸⁶ On the former, the OECD points to the 2013 Annual Report of the International Law Commission (ILC), of which Chapter IV deliberates the matter of subsequent treaties and practice in relation to the authentic means of interpreting treaties.⁸⁷ Building off this analysis, it is plausible for the DPRK to identify a rate of harmonization in the interpretation, application and observance of international investment law building off the experience of other states with greater exposure to existing systems. The DPRK may choose any of its existing BIT partners with whom to jointly interpret provisions of their respective treaty to provide greater assurances to

contracting party investors that North Korean judicial mechanisms shall follow a consensual, authentic means of interpretation. However, a joint interpretation can be applied in ways other than subsequent agreements on the means of interpretation. A diplomatic exercise of great economic significance, for instance, could be to draft an investment agreement with built-in jointly interpreted clauses between the DPRK and other states with a binding authentic means of interpretation that apply to projects operated between them. This would not only provide a remedy for many of the legal challenges to the DPRK investment regime identified in this report, but also gradually position the DPRK in a way that confronts standards and regimes of international investment law.

Joint government interpretation of investment treaties can help to strengthen the rule of law and regulatory propriety by poising the judicial and legal mechanisms of the DPRK to appropriately handle matters involving international investments. This includes situations of disputes or in the negotiation of treaties. They can also help to incentivize the DPRK to reduce the size of its unofficial and unregulated trade and investment interactions.⁸⁸ The inherent risk of unregulated, and thus unprotected, transactions would pose costs far greater than any benefits. Furthermore, demonstrating an ability and willingness to observe and protect and sanctity of contracts can help to steer the regulatory image of the DPRK away from that of a lawless state and into one that is rules-based.

In drafting an agreement for the joint interpretation of treaties or certain provisions of treaties, contracting states seeking to enter into such an agreement with the DPRK should clearly address certain procedural matters. This is important to being able reasonably predict the potential benefits and risks of such mechanisms. For instance, one effective addition that can be agreed on through a joint interpretation mechanism can be whether state-to-state arbitration is a permissible option in the situation of an investor-State dispute. Should an investor, such as Orascom, seek compensation from the DPRK for damages inflicted on its investments in North Korea, the DPRK may very well refuse to recognize the jurisdiction of international arbitration, despite those options being enshrined in the DPRK-Egypt BIT.⁸⁹

If the DPRK and Egypt agreed to interpret state-to-state arbitration as a means of settling a dispute, then it would permit Egypt to act on behalf of Orascom to pursuing

the claim to the Permanent Court of Arbitration (PCA) or even the International Court of Justice (ICJ).⁹⁰ This would require the DPRK and Egypt coordinate the interpretation of Articles 8 and 9 of the DPRK-Egypt BIT, which define the means of settlement disputes between the parties. This would raise issues since investment treaty arbitration (ITA), such as investor-State dispute settlement (ISDS), decisions are meant to be last instance, or of exclusive competence, thus making available alternative forums such as the PCA or ICJ as essentially an appellate measure could disenfranchise the merits of the ITA procedure itself. In designing agreements for joint government interpretation, one reasonable solution has been a shared system of authority in interpreting treaties, where investment disputes do not preclude the state entirely, but is more permissive in relation to particular matters agreed upon by the contracting states.⁹¹

Simultaneously, both parties must consider how such an agreement would impact the substantive rights provided to the investor and home state through the original IIA, such as a BIT. The current stock of BITs involving the DPRK are largely older generation IIAs, though as noted in this report, these IIAs tend to be at times more expansive in securing the regulatory powers of the state. Issuing a joint interpretative agreement can tilt the existing balance between the rights guaranteed to the investor and those reserved by the state. In response to this concern, states sharing an IIA with the DPRK or those considering to do so in the future should embrace the trend of new-generational IIAs. These include identifying more specifically the general exceptions to the rights and protections granted to the investor, even creating a shopping list of such exceptions as is seen in GATT XX. The practice of terminating old-generation BITs for new-generation BITs is increasingly common⁹² and can help to adjust or update a state's policy position towards foreign investment.⁹³

VI. Conclusions

While the nuclear threat of the DPRK and its willingness towards CVID remain key determinants in any form of global economic integration, this report did not address matters of a geopolitical hue and instead looked at the key procedural and substantive regulatory obstacles facing inflows of foreign direct investment. The result of pursuing this approach was identifying that predictability and consistency of the implementation

and interpretation of DPRK law and its existing treaty obligations represent critical obstacles to foreign investment.

One inference that can be drawn from this conclusion is that harmonizing DPRK regulation with international institutions of investment law does not necessarily require sweeping law reform or change in political structure. The authoritarian nature of the government, its Socialist Constitution and its shadowy economic networks do not pose significant regulatory barriers to foreign investors as private entities seeking to invest. While this report sidestepped such issues, the regulatory implications to international investment of political transition in North Korea certainly warrants further study. Unless specifically mentioned as a condition to an international investment agreement like a BIT, the political structure of the host state or its ideologies, such as not being a democratic system, do not have regulatory implications for international investment. Investors make the decision to invest in North Korea deliberately and proceeding with the investment is premised on the assumption that investor fully understands any risks involved. In these cases, the foreign investor is obliged to observe and respect the laws and political orientation of the host state, whatever form they may take.⁹⁴

Simultaneously, investment treaty arbitration has shown that regardless of a state's ideological footing or economic isolation, they remain bound to their treaty obligations. The DPRK economy remains dependent on trade, which are built on economic relationships that are built on agreements, whether formal or informal. It remains in the best interest of the DPRK to maintain those ties by observing international legal mechanisms like investment treaty arbitration in good faith. Without such mechanisms, the vicissitudes of domestic politics may erode business climates to the extent that they become uninhabitable to foreign investment. In supporting this conclusion, one may look to Cuba as the basis for helpful comparison. In order to maintain its crucial economic ties to Italy, Cuba participated in investment treaty arbitration through the Permanent Court of Arbitration (PCA) in an investment dispute registered by Italian companies. The Italian investors did not think that the Cubans would recognize the jurisdiction of the PCA to rule on the dispute and would therefore not appear in its proceedings. The Cubans participated in these hearings and eventually came out of the dispute victorious.⁹⁵

The pathway to harmonizing with wider systems of global governance remains a long and complicated one. Embarking on that process depends, at the core, whether the DPRK keeps true to its agreements. One clear step in that direction shall be to satisfy

the conditions of multilateral sanctions such as that imposed by the UN. As this report showed, however, such steps are necessary but not sufficient. They are the first steps to fostering a conducive regulatory climate that induces foreign investment. These changes to its regulatory system, while gradual, shall have to lead to the harmonization of investment rules. Doing so can provide an opportunity for the DPRK to accumulate capital by building a regulatory climate that nurtures investor confidence.

International investment can be a powerful force, not only in economic growth, but also in strengthening domestic governance systems when it works in complementarity with international institutions.⁹⁶ While this approach to harmonization with larger regulatory regimes of international investment is driven by economic motives, it shall undoubtedly require political, social and diplomatic solutions. This report showed that the regulatory obligations and demands that come with international investment can help to upgrade domestic judicial and legislative infrastructure, two institutions that can act as the foundation of continued development and peaceful cooperation.

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14. While foreign investment is used loosely here, this report refers specifically to foreign direct investment exclusively, thereby excluding an examination of foreign portfolio investment (FPI). The conditions necessary to attract FPI are considerably different than those involving FDI, primarily due to the fact the former is direct and long-term while the former is passive and relatively short-term. The regulatory needs necessary to facilitate FDI and FPI reflect those differences. The regulation of FDI involves seeking a balance between foreign investor protections with state sovereignty. On the other hand, the regulation of FPI involves fiduciary and operational requirements for firms involving debt and equity as well as a system that facilitates the exchange of a range of asset classes. For instance, the poor performance of a company with foreign shareholders as a result of measures taken by the host state does not permit the shareholder to pursue claims against the host state. However, past disputes have shown that explicit interference by the host state that significantly affects the value of shareholding in the company can be interpreted as expropriation.
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20. Park, Hyong Joon. 2013. "A study of foreign investment relevant laws of North Korea" (in Korean). *Bukhan Yeongu (North Korea Research)* 9(2): pp 172-198. The DPRK's IP laws include *Law on the Protection of Computer Software* (2003), *Law on Copyright* (2001), *Law on Trademark* (1998), and *Law on Industrial Designs* (1998).
 21. Singapore Treaty on the Law of Trademarks (opened for signature 27 March 2006, entered into force 16 March 2009) TRT/SINGAPORE/001.
 22. Patent Law Treaty (opened for signature 1 June 2000, entered into force 28 April 2005) TRT/PLT/001.
 23. Park, *supra* note 20, at 185.
 24. Article 4 of the *Articles on State Responsibility* by the International Law Commission defined as an act of the state all conduct by the government, its organs and members, regardless of place in the hierarchy of authority (Responsibility of States for Internationally Wrongful Acts UNGA Res 56/83 (12 December 2001)).
 25. See, for instance, Segal, David. "Hosting Proms and Selling Cows: North Korean Embassies Scrounge for Cash." *New York Times*. 7 October 2017. Web. Accessed 23 October 2018. Available at: [https://www.nytimes.com/2017/10/07/business/north-korea-embassies.html].
 26. For a more comprehensive treatment of this issue, see Sachs, Lisa E. and Sauvart, Karl P. "BITs, DDTs, and FDI flows: An Overview," *The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP, 2009).
 27. Article 18: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."
 28. For those treaties texts found on the UNCTAD *International Investment Agreements Navigator*, available at: [http://investmentpolicyhub.unctad.org/IIA/CountryBits/110#iiaInnerMenu].
 29. The differences between older and newer generation BITs are easy to identify when comparing, for instance, the former Republic of Korea - Belgium-Luxembourg Economic Union (BLEU) BIT with the newer Korea-BLEU BIT or the Republic of Korea - Republic of Kenya BIT. The former primarily fosters a consistent and predictable regulatory atmosphere for foreign investors, focusing on their rights and protections. The latter are more expansive in that they consider a larger diversity of issues, such as social protection and the environment, in the regulation of foreign investments.
 30. The translations of Korean laws included herein are unofficial and by the author.
 31. Unofficial translation from Russian.
 32. Unofficial translation from Korean.
 33. Unofficial translation from Serbian.
 34. Agreement on Trade-Related Investment Measures (15 April 1994) LT/UR/A-1A/13 Preamble.
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 37. See, for instance, Welsh, Nancy A. 2011. "Mandatory Mediation and Its Variations," *Texas A&M Law Scholarship*.
 38. See, for instance, Cohen, Jerome A. 2014. "Settling International Business Disputes with China: Then and Now." *Cornell International Law Journal* 47, pp 555-568.
 39. See, for instance, Gaukrodger, David. "The balance between investor protection and the right to regulate in investment treaties: A scoping paper," *OECD Working Papers on International Investment* (2017/02), OECD Publishing, Paris.
 40. Minimum standards of treatment (MST), or simply the international minimum standard, is a principle of international customary law that requires standards of treatment towards foreign nationals and their property. The *Neer Claim* is most commonly associated with this idea, though its applicability to modern international investment law is debated (Brownlie, Ian. 2008. *Principles of Public International Law*, 7th ed. (OUP): p 525). the General Claims Commission set up by the United States and Mexico expressed the following on one such a standard:
Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.
 41. *LG&E v Argentina*, Decision on Liability, 3 October 2006.
 42. Schill, Stephan W. 2006. "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law," *International Law and Justice Working Papers* 2006/6 (New York University School of Law): pp 11-23.
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 44. Sornarajah, Muthucumaraswamy. 2010. *The International Law on Foreign Investment*, 3rd ed. (CUP): p 349.
 45. The preamble of *the Socialist Constitution* emphasizes the political, economic, cultural and military sovereign independence of the DPRK and *identifies* such sovereignty as being a central foundation of its state ideology, "*Juche*."

46. *Law on Land*, Chapter 1, Art. 8, Chapter 2, Arts 9 & 10.

47. This is premised on UN General Assembly Resolution 3202 (S-VI), the *Programme of Action on the Establishment of a New International Economic Order*, para V(b), which reads:
To regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements.

48. This is premised on UN General Assembly Resolution 3201(S-VI), the *Declaration on the Establishment of a New International Economic Order*, para. 4(e), which reads:
Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.

49. Sornarajah, *supra* note at 44, at 334.

50. Brownlie, *supra* note 40, at 293.

51. The following definition of denial of justice is pointed to in Brownlie (2008):
Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgement. (Brownlie, *supra* note 40, at 529).

52. Similar protections are offered in the laws governing the special economic zones.

53. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16.

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60. According the UN Commission on Trade and Development (UNCTAD) *Investment Policy Hub*, this currently stands at 24 BITs:

Bangladesh	Signed	Indonesia	Signed	Russian Federation	In force
Belarus	Signed	Iran	In force	Serbia	In force
Bulgaria	Signed	Italy	Signed	Singapore	In force
Cambodia	Signed	Macedonia	In force	Slovakia	In force
China	In force	Malaysia	In force	Switzerland	In force
Czech Republic	In force	Mali	Signed	Syrian Arb Republic	Signed
Denmark	In force	Mongolia	Signed	Thailand	In force
Egypt	In force	Romania	In force	Viet Nam	Signed

61. Orascom is an Egyptian company that built and operated North Korea's mobile telecommunications network through its joint venture with Koryolink.

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63. KPMG Hazem Hassan. *Review Report on Condensed Interim Consolidated Financial Statements* (2018 January 21): pp 10-11.

64. For more on this issue as a matter of public international law, refer to Brownlie, *supra* note 51, at 491, 650-651.

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66. Control is defined as the rights to returns on investment and the power to affect those returns. This power arises from the rights attributed to the investor over the decisions of the investee (in this case Koryolink) and are separate from the protective rights that remain at the center of this report's discussion Thus, in losing control over Koryolink, Orascom refers to the loss of its voting privileges despite owning 75% of that voting share. See, for instance, Deloitte. "IFRS 10 – Consolidated Financial Statements," *Deloitte Touche Tohmatsu Limited*. Web. Accessed 1 October 2018. Available at: [https://www.iasplus.com/en/standards/ifrs/ifrs10] and

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70. In this context, derogate refers to the withdrawal from or termination of treaties and their obligations.
71. VCLT, art 62(1), states:
The political structure or regime before the change must have been an “essential basis” of the consent to enter into the obligation.
The change in political structure or regime “radically” transformed the “extent of obligations.”
The change was not foreseeable by either of the contracting parties.
72. Binder, Christina. 2012. “Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited.” *Leiden Journal of International Law* 25: p 912.
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78. Egypt - Korea, Dem. People’s Rep. of BIT (1997).
79. Newcombe, Andrew and Paradell, Lluís. 2009. *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International): pp 299-300.
80. One early standard identifying the arbitrariness of a measure is the Neer standard that appealed to what “every reasonable and impartial man would readily recognize its insufficiency.” (*L.F. Neer v United Mexican States*, p 2).
81. The application of the rules and the powers the regulatory body applicable in SEZs in relation to the wider regulatory framework that the government may employ in application to FDI is unclear. This conflict of interests between the objectives of the SEZ to facilitate investment and those of the State to pursue its public policy goals is a common challenge in countries that operate SEZs with distinct rules, especially in East Asia where such investment facilitation practices are common (Farole, Tom and Kweka, Josaphat. 2011. “Institutional Best Practices for Special Economic Zones: An Application to Tanzania,” *Africa Trade Policy Notes* 25 (World Bank): p 2). Addressing such conflicts of interest are vital to fostering the leveled development of regulatory systems. The ASEAN noted in its *Guidelines of SEZ Development* that incongruent rulemaking between SEZs and the country as a whole with investment facilitation largely concentrated in the former can result in incentivizing high-risk investments and abusive practices that exploit more relaxed tax rules. Balanced regulation that addresses that conflict can result in alternative

legal frameworks that can act as pathways to broader, sustainable law reform in a more gradual and controlled manner (Association of Southeast Asian Nations. *ASEAN Guidelines for Special Economic Zones (SEZs) Development and Collaboration* (ASEAN, 2016): P 12). The OECD in its analysis of SEZs in the MENA region identified that the success of that gradual transformation depends largely on being able to identify, analyze and curb those unintended consequences, which in turn relies on the capacities of the autonomous regulator of the SEZ (Böhmer, Alexander and Farid, Nada. 2009 “Stocktaking of Good Practices for Economic Zone Development: MENA-OECD Good Practice.” *Background document for Working Group 1 meeting* (OECD): pp 53-54).

82. *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005).
83. *Id*, para 178.
84. *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007).
85. *Id*, para 281.
86. Gaukrodger, David. 2016. “The legal framework applicable to joint interpretive agreements of investment treaties,” *OECD Working Papers on International Investment*, 2016/01, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5jm3xgt6f29w-en>.
87. Subsequent treaties and practice refer to agreements that are made to provide a general rule of interpretation and/or rule on supplementary means of interpretation of an existing treaty. A joint interpretation would serve one such a function, where two states enter into a separate agreement to agree on a single or authentic means of interpreting a treaty in question – in this case, an international investment treaty like a BIT. Two conclusions by the commission of the 2013 ILC Annual Report are of particular relevance here in discussing the legal framework of a potential joint interpretation involving the DPRK and another contracting state.
Conclusion 1(3) states:
Article 31, paragraph 3, provides, inter alia, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
Conclusion 2 states:
Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31. (2013 ILC Report: pp 11-12)
88. The importance of this factor becomes pronounced when considering that the DPRK does not share investment agreements with major trading partners. This notably includes Mexico and its Latin American trading partners, such as Cuba and Brazil. Furthermore, while the DPRK shares a BIT with China, it also shares shadowy overseas networks of trade and investment with questionable government attribution. See, for instance, Woo, Jung-Yeop and Go, Myong-Hyun. 2016. “In China’s

- Shadow,” *Asan Report* (The Asan Institute for Policy Studies). Available at: [<http://en.asaninst.org/contents/in-chinas-shadow/>]; or Asan Institute for Policy Studies (AIPS). 2018. “The Rise of Phantom Traders: Russian Oil Exports to North Korea,” *Asan Report* (AIPS). Available at: [<http://en.asaninst.org/contents/the-rise-of-phantom-traders-russian-oil-exports-to-north-korea/>].
89. Variations to this challenge include, for example, not extending diplomatic protections to investors thus preventing the state on acting on behalf of those investors in the host state. See, for instance, *Italian Republic v. Republic of Cuba*, ad hoc state-state arbitration. Documents of relevance are available at: [<https://www.italaw.com/cases/580>].
90. See, for instance, *Republic of Ecuador v. United States of America* (PCA Case No. 2012-5), Request for Arbitration (28 June 2011): paras 2-4.
91. Roberts, Anthea. 2014. “State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretative Authority,” *Harvard International Law Journal* 55(1): pp 36-37
92. One example from the Republic of Korea includes the termination of the ROK-BLEU (Belgium-Luxembourg Economic Union) BIT that entered into force in 1976 with the ROK-BLEU BIT that entered into force in 2011.
93. Spears, Suzanne A. “The Question for Policy Space in a New Generation of International Investment Agreements,” *Journal of International Economic Law* 13(4): pp 1062-1064.
94. Hamida, Walid Ben. 2015. “Investment treaties and democratic transition: Does investment law authorize not to honor contracts concluded with undemocratic regimes?” in *International Investment Law and Development: Bridging the Gap*, Schill, Stephan W.; Tams, Christian J.; and Hofmann, Rainer, eds. (Edward Elgar Publishing Limited): p 317.
95. Volterra Fietta. “Victory for Cuba in rare inter-State investment arbitration initiated by Italy.” *News & Insights*. Available at: [<https://www.volterrafietta.com/victory-for-cuba-in-rare-inter-state-investment-arbitration-initiated-by-italy/>].
96. See, for instance, Ginsburg, Tom. 2005. “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance,” *International Review of Law and Economics* 25(1), pp 107-123. More positive discussion of this issue connects international investment law with the concept of global administrative law. See, for instance, Van Harten, Gus and Loughlin, Martin. 2006. “Investment Treaty Arbitration as a Species of Global Administrative Law,” *EJIL* 17(1), pp 121-150.

A S A N
R E P O R T

Regulatory Readiness of the DPRK for Attracting Foreign Direct Investment

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First edition July 2019

Published by The Asan Institute for Policy Studies

Registration number 300-2010-122

Registration date September 27, 2010

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Book design EGISHOLDINGS

ISBN 979-11-5570-204-8 93340

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Printed in the Republic of Korea



ISBN 979-11-5570-204-8