

Unilateral Cancellation of Exclusive Rights to Mt. Kumgang: Assessing the Legality and North Korea's Intentions

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On April 8th, a spokesman for the DPRK's Asia-Pacific Peace Committee (APPC) announced that the North had invalidated the terms of its contract with Hyundai Asan which granted the South Korean company exclusive rights to operate the Mt. Kumgang Resort. The spokesman stated that the APPC had informed Hyundai that the DPRK would take control of tours going to Mt. Kumgang through North Korean territory and those tours might be entrusted to other foreign businesses, while tours coming from South Korea would still be handled by Hyundai. Mt. Kumgang tourism had been on hold since tours were halted after the July 2008 incident in which a South Korean female tourist was shot to death. The following paper evaluates the cancellation of exclusive rights to Mt. Kumgang tourism from a legal perspective and considers the possible motivations of the North Korean authorities behind this decision.

The APPC claims that Hyundai's exclusive tourism rights to Kumgang are invalid on the following bases. First, it says that over the past three years the North has made all possible efforts to restart the tours and has taken steps to guarantee personal safety and prevent a recurrence according to the highest standards demanded by the

South Korean government. Second, they claim to have suffered losses of hundreds of billions of won by leaving the Kumgang complex idle over the past three years. Third, because the South Korean government unilaterally halted the tours and has gone for nearly three years without re-starting them, the existing contract on Kumgang tourism has been rendered invalid and therefore there should be no objections to North Korea unilaterally cancelling the contract. On the basis of these claims, the APPC argues it has no choice but to exercise its rights as a party to the agreement under North Korean and international laws.

However an examination of the statutes of North Korean and international law being quoted by the APPC shows that the North's claims are not legally valid. First, the unilateral cancellation of the Kumgang exclusivity contract is a violation of North Korea's domestic laws. The North Korean Civil Law states that one side can only cancel or alter a legal action if the law permits or the contractual partner consents (Article 25). Yet Hyundai, as the North's partner in the Mt. Kumgang Tourism Agreement, has never agreed to invalidate the exclusivity contract. Furthermore the North Korean Civil Law states that any legal actions which are deliberately deceptive, result from an error relating to essential basis of their consent, were compelled by force, or were concluded by minors over age 16 without a parent or guardian's consent, may be cancelled within 2 months (Article 28). However the agreement between Hyundai and North Korea on Mt. Kumgang tourism does not match any of these criteria. The Mt. Kumgang Tourism Area Law clearly states that the Mt. Kumgang area is subject to North Korea's domestic laws (Article 1).

Second, regarding the personal safety issue, the APPC claims that it provided sufficient guarantees matching the high standards demanded by the South Korean government and that North Korea suffered tremendous financial losses due to South Korea's unilateral halting of Mt. Kumgang tourism. Yet North Korea violated both inter-Korean agreements and international law regarding personal safety. In the process of handling the deadly shooting of a female tourist at Mt. Kumgang in July 2008, the North failed to adhere to the terms of the "Agreement on Admission and Lodging in the Kaesong Industrial Complex and the Mt. Kumgang Tourism Zone." In the event that personnel violate any of the laws applicable to the Mt. Kumgang Tourism Zone, the agreement calls for the offender's "suspension followed by an investigation." The agreement also stipulates that the South must be informed and the offender "may be reprimanded, fined, or deported to the South, according to the severity of the offense." However, "In the case of extreme violations agreed upon by both South and North, the situation must be resolved

through separate agreements by both sides" (Article 10 Clause 2).

Third, if Hyundai sustains losses due to the APPC's move to invalidate the exclusive terms of the contract, the North Korean authorities must take responsibility. In the Inter-Korean Investment Guarantee Agreement both Koreas agreed that neither side can restrict or expropriate the property of investors, and if they do take such measures following legal procedures then they must provide prompt, sufficient, and effective reimbursement (Article 4 Clause 1). The same document clearly states that "any business area which is endowed with economic value by a law or contract" is the investor's property (Article 1 Clause 1 e). It goes without saying that Hyundai's exclusive rights to Mt. Kumgang tourism fall within this category. North Korea's Civil Law states that the offender is liable for civil action when he violates another person's civil rights (Article 240). Possible ways of executing civil liability include return of property, restoration, and restitution of losses (Article 242).

Considering this, what are the North's intentions in invalidating Hyundai's exclusive rights to Mt. Kumgang tourism? First, looking at the APPC announcement, economic considerations appear to have played a large part; i.e., the need for foreign currency earnings. The APPC argues that it granted the South Korean side extremely preferential treatment in Mt. Kumgang, essentially operating it at a loss, and has suffered enormous losses as a result of the closure. Thus it appears the North is seeking to restart tours in order to earn foreign currency. The APPC has revealed that it will soon complete the supplementary measures involved in starting new Mt. Kumgang tours. It appears that these supplementary measures include recruiting Chinese tourists.

Second, they are attempting to force a change in the ROK government's North Korea policy by exacerbating the South-South conflict. The APPC spokesman's statement claimed that "(The halting of Mt. Kumgang tours) inflicted serious harm upon South Korean businesses as well as the people"; such statements attempt to create a rift between the South Korean government and people. The APPC statement also attempted to create friction between our government and Hyundai, saying "We have worked patiently all this time to keep faith with Hyundai and ... observe our agreement. However, our negotiations with Hyundai have been unable to bear fruit due to the obstructive machinations of the south Chosun authorities," adding, "Hyundai's loss of its exclusive rights to Kumgang tourism is entirely due to the south Chosun authorities' betrayal of the Korean people and destructive manipulation of tourism."

The third point of interest is the fact that the North did not throw out the entire

agreement on Kungang tourism, but only invalidated the clauses granting Hyundai exclusive rights. In other words, all other parts of the document except those clauses related to exclusivity remain in effect. We can clearly read the North's desire to continue Kungang tours with Hyundai. The North Korean side has taken over Mt. Kungang tours crossing through its territory, but by allowing Hyundai to continue handling tours coming from South Korea, they have reaffirmed their desire to continue to work with Hyundai on Kungang tourism.

The invalidation of the exclusivity clauses related to Mt. Kungang tourism represents a violation of both North Korean domestic law and the Inter-Korean Investment Guarantee Agreement, but we face the practical problem of lacking any effective measures for enforcing compliance. The Inter-Korean IGA arranges for resolving disputes through consultation, and if the conflict cannot be resolved in this way it may be presented to the Commercial Arbitration Board (Article 7 Clause 1). At present there exist two agreements on resolving inter-Korean disputes: the Agreement on Procedures for Resolving Inter-Korean Business Disputes and the Agreement on the Formation and Operation of the Inter-Korean Commercial Arbitration Board. However this Commercial Arbitration Board has not yet been formed. In international law, there is the International Convention for Settlement of Investment Disputes, or ICSID. This convention establishes an international office for resolving investment disputes and provides a way for individuals to be compensated for investment losses. However North Korea is not a signatory to this convention.

The UN Charter contains provisions for the resolution of disputes through peaceful means such as negotiation, investigation, mediation, settlement, arbitration, and legal resolution, or through other peaceful methods selected by the relevant parties (Article 33 Clause 1). In the Inter-Korean Investment Guarantee Agreement, the two Koreas agreed on a process to resolve investor disputes through arbitration (Article 7 Clause 1). Neither side wishes to see the Mt. Kungang tourism project fall apart. The two Koreas must continue to seek a win-win solution.