



Inter-Korean Relations and the Unification Process in Regional and Global Contexts

Edited by Jong-Chul Park and Joseph Harte



Korea Institute for
National Unification



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FOREWORD

This year marks the 70th anniversary of Korea's liberation from Japanese occupation. At the same time, it marks the 70th year of a divided Korean peninsula. For this reason, the 2015 KINU-CKLS joint project on inter-Korean law and policy holds special meaning for its participants and all those concerned with its outcome.

In 2013, the Korea Institute for National Unification (KINU) in Seoul and the Center for Korean Legal Studies (CKLS) at Columbia Law School in New York began a 5-year joint project aimed at establishing in the United States an ongoing forum on the law and policy of inter-Korean relations and unification. The mission of the project has been to bring these topics to a wider international audience and to seek the participation of international scholars and experts in searching out new perspectives and proposals for advancing peaceful relations on the peninsula and a stable path to unification.

Now in its third year, the project has produced three volumes of research, including the present one, on a number of critical issues related to the ongoing development of inter-Korean relations and prospects for unification. In its first year, the project held a closed workshop that explored a number of foundational issues, including the historical and geopolitical roots of the Korean division, the challenge of addressing calls for transitional justice mechanisms, and preliminary legal considerations aimed at unraveling the complex and "special" legal status of the inter-Korean relationship in international law.

In its second year, the project held a second closed workshop and seminar that sought to develop the international perspective of the project. Topics included the South's policy of "trustpolitik" and its relationship to international cooperation, the impact of the U.S.-China rivalry in the region, questions of sovereignty and the limits of legalization on inter-Korean questions, legal approaches to Korea-related security issues, and legal perspectives on inter-Korean industrial development and the recent UN findings on the North Korean human rights situation.

In 2015, the project was pleased to hold its first conference open to the academic community at Columbia University and the general public, with project participants from Seoul, New York, Washington, D.C., Helsinki, Hong Kong, and a practicing U.K. attorney based in Pyongyang. This eclectic group of highly trained and highly specialized practitioners and experts brought the kind of international perspective to the project that was originally intended by its founders. This milestone represents the culmination of three years of hard work by all participants involved and is the result of careful attention to the project's long-term goals and vision.

The topic of this year's project reflects this milestone in its scope and focus. The aim was to locate inter-Korean relations and the unification process in the greater context of historical and contemporary regional and global considerations, both in terms of the relevant institutional architecture and the systemic economic and geopolitical order. In other words, our goal was to look at the inter-Korean question from the point of view of its international and global implications, as opposed to its meaning for the two Koreas alone.

The approach proved to be highly productive and in the editors' view

has opened up a number of truly innovative and eminently useful avenues of research previously unexplored in the difficult search for viable solutions to a now 70-year old challenge.

The present volume is a collection of the papers presented at the 2015 KINU-CKLS Conference, which was held in New York on October 22, 2015. In Part I, the authors examine and explore the historical and legal foundations influencing prospects for improved inter-Korean relations following 70 years of division. Under the rubric of historical and legal perspectives in a regional and global context, Jeong-Ho Roh reviews the earliest roots of the “Korean Question” and considers the meaning of independence under the evolving regional order of the early 20th century. In his review of the period 1870~1894, Roh highlights the ambiguous nature of Korean “independence” vis-à-vis China under (1) the principles previously governing the historical and long-running relationship between the two, (2) attempts by Western powers to define that relationship under the prevailing principles of international law at the time, and (3) Japan’s interests in defining Korea as a nation independent of China. Covering the period 1894~1910, Roh next reviews Japan’s moves to counter Korean claims to independence under international law and its eventual annexation of Korea.

In the same section, Chang-Seok Yang analyzes, in light of the many similarities and critical differences with the German experience, the efforts of previous ROK administrations concerning unification. After a thorough and useful review of the unification policies of each administration from Roh Tae Woo to Lee Myung Bak, Yang identifies improved consistency and coherence in ROK policy as a critical foundation for improved inter-Korean relations and offers suggestions

for ensuring a unified, bipartisan policy that will remain consistent beyond the election cycle.

To round out these foundational and framework chapters, Joseph Harte looks to the future and argues for the utility of a law and global governance approach to inter-Korean relations. He suggests that in a global environment that is increasingly regulated by overlapping institutional frameworks, a law and global governance approach is more productive than the traditional international relations and international law approach. He argues that studying the problem from a law and global governance perspective is not only more consistent with the state of the world in the 21st century but also offers the potential for new opportunities for inter-Korean cooperation and trust-building, as well as greater collaborative and multilateral support from the international community.

The next chapters by Sue Mi Terry, Jong-Chul Park and Jung-hyun Cho concern the influence and development of regional and global geopolitical and institutional factors that have the potential for significantly impacting inter-Korean relations and the unification process going forward.

Sue Mi Terry examines the competing interests of the Northeast Asian regional powers regarding a unified Korea. She argues that while a unified Korea offers significant gains for all parties concerned, the conflicting interests and views among the regional players, namely China, Japan, Russia and the United States, could present serious obstacles to any progress toward unification, as well as challenges to geopolitical stability in the event a unified Korea emerges. To mitigate the potential impact of these conflicts, Terry calls for the development of a preparatory unification dialogue among the parties, lead by

Seoul and Washington.

Jong-Chul Park provides a full review and discussion of efforts at confidence-building and peace regime development on the peninsula. Taking a law and governance view through his emphasis on institutional and agreement based development, Park's three stage program, grounded in security and culminating in trust, offers a level-headed approach to inter-Korean relations that reflects the trust-building efforts of the Park Geun-hye administration that is both practical and hopeful.

Finally, Jung-hyun Cho takes up the issue of UN involvement with the North Korean human rights situation, an example of regional and global cooperation on an issue having significant implications for regional stability. His chapter provides a review of recent developments related to the findings of the UN Commission of Inquiry (COI) on Human Rights in the Democratic People's Republic of Korea. It concludes with a number of questions raised by these developments which provide ample direction for research going forward related to the global governance aspects of this issue and the international human rights system's impact on inter-Korean relations.

In Part II, contributors take up specific systemic considerations and current issues impacting inter-Korean relations in a globalizing world. Focusing on systemic considerations, Charles Armstrong, Douglas W. Arner and Barry K. Gills provide transformative and framework perspectives on, respectively, the proper definition of the Korean separation, the global and East Asian financial architecture, and the implications of shifting globalizations as they relate to North Korea's missed opportunities for global engagement.

Charles Armstrong argues that the long-lasting division of the Korean Peninsula in a world that is becoming increasingly integrated can be explained on the basis of a critical historical and conceptual error in the characterization of the South-North separation. He argues that the current state of affairs on the Korean Peninsula is more properly defined as a “partition” as opposed to a “division.” This has critical significance for the progress of inter-Korean relations since it implies that the key obstacles to improved relations on the Korean Peninsula are in fact not Cold War based, but rather due to the “incomplete struggle over the nature and sovereign authority of post-colonial nation states.” The truly innovative nature of this breakthrough in the proper conceptualization of the Korean separation cannot be overstated, especially given its basis in the international legal principles that define “partition” as opposed to the more geopolitically based concept of “division.”

Turning to the broad framework of global and regional financial governance, Douglas W. Arner suggests research directions in considering increased DPRK engagement with international economic institutions. After providing a thorough grounding in the evolution of the current global and regional financial architecture, as influenced by the Asian financial crisis and the 2008 global crisis, Arner provides a highly useful overview of the state of East Asian financial regionalism and prospects for greater integration. He suggests that the experiences of China, Vietnam and Myanmar provide the appropriate models for increased DPRK involvement in global financial governance mechanisms, whereby each began with membership in the IMF, the World Bank and the Asian Development Bank, before reaching out to the more specifically relevant regional arrangements.

In his piece on globalization and the Korean question, Barry K. Gills locates inter-Korean relations in the broad context of economic globalization and the evolving institutions of global governance. Observing that North Korea's relative position in the evolving global governance framework has been increasingly marginalized over time, he argues that in spite of missed opportunities, increased participation by North Korea in the institutions of global governance can lead to greater stabilization of inter-Korean relations. Recent developments in the international political economy and the global governance institutions upon which it rests provide a favorable and contemporary context for advancing a peaceful resolution to the Korean question.

The final four contributions address two specialized subject areas of current concern that bring the broader frameworks discussed in earlier chapters into greater focus, namely (1) international investment in North Korea and (2) international cyber security issues.

Kyu-Chang Lee and Michael A. Hay take up the international investment question and have rather different perspectives on the significance of recent revisions to investment related laws. Lee provides an overview of recent changes to DPRK laws related to "external economics." Of significant note are specific changes to economic and trade zone laws that are clearly intended to raise investment norms, pertaining both to foreign and inter-Korean investment, to a level that is consistent with international standards. These include a ban on nationalization of property, guarantees of personal security, the introduction of administrative litigation, and the use of international rules of arbitration as opposed to those "determined by the [DPRK]" as contained in the former law. According to Lee, these are exceptional measures in the history of the North Korean legal system.

Michael A. Hay offers an alternative view in his description of recent legal reforms and the significance of those changes for improving inter-Korean relations and the unification process. After noting a number of recent changes to the arbitration laws, he argues that the evolving dispute resolution system probably does not have much to offer in terms of the unification process and that he does not see how the investment laws and dispute resolution methods have a role in reunification. In his piece, he laments that he can see no connection between defusing South-North flashpoints and improving the business laws involving disputes related to commercial ventures. In short, he does not see any relationship between an improving environment for economic exchange and a relaxing of confrontational tensions until the larger geopolitical issues are resolved.

The events and related frameworks surrounding the recent Sony cyber attacks are examined by Kyung-ok Do and Rhea D. Siers. Do provides an extremely thorough and multi-pronged legal analysis of the Sony attacks under the prevailing standards of international law, as well as the legal framework for considering and implementing justifiable responses. While not explicitly addressed in Do's piece, the ongoing development of these standards and their application to the growing threat of cyber attacks in the region, with potentially dangerous outcomes, have obvious implications for the development of regional commercial activities and trust-building efforts.

Finally, Rhea D. Siers considers the deterrence value of the existing international norms concerning cyber attacks by North Korea. After a review of the Sony case and numerous alleged instances of North Korean cyber attacks aimed at South Korean interests, her chapter considers the applicability of the proportionality principle, as well

as anticipatory self-defense, in determining appropriate responses to cyber attacks, both real or threatened. The value of these norms and principles are examined in view of an isolated and relatively disconnected society such as North Korea, with a prescription for preparedness in anticipation of the inherent law and policy issues raised.

Taking the contributions as a whole, a number of overarching, though certainly not exhaustive themes are recognizable in the project outcomes for 2015: (1) wholesale reconceptualizations of the roots of the inter-Korean relationship and the theoretical underpinnings of the historical and conventional international relations approaches to related issues are not only highly productive but are critically necessary for breaking through the 70-year impasse that lies at the heart of inter-Korean relations; (2) the necessity and timeliness of greater North Korean engagement with global and regional architectures, and the collaborative promotion thereof, both through preparative dialogue and cooperative projects, cannot be understated, especially in the critically important areas of financial governance, regional economic cooperation, and inter-Korean economic relations; (3) the long-term unresolved tensions that plague inter-Korean relations continue to be a threat to international and regional stability, the latest form of which is expressed through the growth of cyber security conflicts.

As of 2015, a divided Korea has been a fixture of the East Asian regional landscape for 70 years now and it should be apparent to all that efforts at finding a peaceable solution to this ongoing source of instability have proven to be elusive in the extreme. It is the hope of the editors that the research contained in this volume may offer some small hope for improved inter-Korean relations and a peaceful end

to Korean separation through the identification and development of a new outlook on inter-Korean concerns that is consistent with the contemporary global order within which they exist. It is hoped that this will lead to the development of previously unexplored directions in research as well as real and meaningful innovation in policy formation on all sides.

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I. Prospects for Inter-Korean Relations after 70 years of Division: Historical, Regional and Legal Perspectives

A. Historical and Legal Perspectives on Inter-Korean Relations in a Regional and Global Context



The Korean Question (1870~1910): The Question of Independence under a New Legal Order

Jeong-Ho Roh

I. Introduction

Korea has been “likened in shape to a rabbit, caught by the ear and held by Russia at Vladivostok, but to Oriental fancy it appears like a dagger pointed at the heart of Japan.”¹ These words written by George Herber Jones in 1907 describe Korea’s past complicated relations with its more powerful neighbors and underscore a problem which may be inherent in its geography. It is also a subtle foreshadowing of the ultimate misfortune that would befall Korea in 1910 which would, in the most profound way imaginable, transform the course of Korean history and identity. While the destiny of a nation might be determined by forces of geopolitics, geography or internal circumstance, in the case of Korea a combination of all of the above factors have played a role, directly or indirectly, in loss of independence and then creation of a divided modern day Korea. The loca-

¹ George Heber Jones, *Korea: The Land, People, and Customs* (New York: Jennings & Graham, 1907), p. 7.

tion of Korea has, without doubt, contributed to this misfortune. Regrettably, that in itself does not sufficiently explain how other smaller countries in Europe and Asia, similarly situated in a strategic intersection of powerful neighbors, have managed to maintain their independence as nation states.

During the late 19th and early 20th century, Japan waged wars against China and Russia over control of the “dagger pointed at the heart of Japan.” Japanese victory in the Sino-Japanese War provided for an independent Korea that was free from the rights of suzerainty that China had exerted for centuries and its victory in the Russo-Japanese War assured unopposed supremacy over the region. Having thus neutralized potential challenges from other powers that may stake a claim to Korea, the annexation of Korea in 1910 was but a mere formality in Japan’s goal to lay sole claim to the dagger.² Previous efforts by Korea to appeal to the international community at the 1907 Hague peace conference did not result in a redress of the loss of Korean independence since Japan had in the eyes of international law legally taken over the conduct of Korean foreign relations. The concept of peace during the early 20th century had to a large degree accepted colonization as not illegal per se under international law.³ At the conclusion of World War II in 1945 Korea regains its independence from Japanese colonial rule marking the second time in a span of 50 years that Korea secures independence as a result of outside circumstances. Much like Korea’s experience with independence from Chinese suzerainty in 1895, independence in 1945 which had been granted

² Charles A. Fisher, “The Role of Korea in the Far East,” *The Geographical Journal*, vol. 120, no. 3 (1954), pp. 285~286.

³ Alexis Dudden, *Japan’s Colonization of Korea: Discourse and Power* (Honolulu: University of Hawai’i Press, 2005), pp. 7~8.

by circumstances, rather than earned, did not result in creation of a fully independent sovereign state but left Korea powerless to oppose creation of a divided nation which to this day has endured.⁴

The phrase “Korean Question” has been used as a term to illustrate either an unresolved problem or as a means to highlight ambiguity that powers surrounding Korea have had regarding the precise status of Korea vis-à-vis their own interests. The question of ascertaining the precise nature of Korea as an independent nation has been central to what is known as the “Korean Question.” The formal formulation of the term “Korean Question” in the post-World War II era began with debates surrounding the question of Korean independence and sovereignty in 1947 when the United Nations General Assembly passed Resolution 112 (II) under the title of “The Problem of the Independence of Korea” stating “Inasmuch as the Korean Question...is primarily a matter for the Korean people itself and concerns its freedom and independence... [The General Assembly] calls upon all Members of the United Nations to refrain from interfering in the affairs of the Korean people during the interim period preparatory to the establishment of Korean independence...”⁵ However, use of the term “Korean Question” predates the 1947 Resolution to the mid-1860’s and revolves around the similar question of ascertaining the nature of Korean independence during the period marking the start of the open port trading system in Korea. During this period, much of the debate centered on whether Korea was a

⁴ Andre Schmid, *Korea Between Empires: 1895~1919* (New York: Columbia University Press, 2002), p. 27.

⁵ UN General Assembly, Resolution 112 (II), “The Problem of the Independence of Korea,” November 14, 1947, <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/038/19/IMG/NR003819.pdf?OpenElement>>.

fully independent and sovereign nation enjoying the full rights and privileges of nation states under the then forming concepts of international law. What was the nature of its relations with China that caused this country's refusal to follow the path of Japan which had ended its long period of self-isolation and had opened up to the burgeoning trade relations with the West since 1854?

Against this historical backdrop, this chapter examines the changing nature of "Korean independence" from the period 1870 to 1910. This chapter is the first of what is envisioned to be a four part series which will be forthcoming in subsequent publications. It provides the historic and legal framework from which to approach an examination of the evolution of the "Korean Question" for the subsequent periods that follow. Conceptually, the coverage of the questions relating to Korea and the Korean Question can be divided into four broad periods: (1) 1870~1910: This period is the topic of this chapter and covers the early period of Korea's opening up to the Western powers. During this period, the concept of "independence" of Korea under Western notions of international law created much confusion among the powers that were seeking to open up trade relations with Korea because of the perceived dependency relationship with China. Japan attempts to define the "Korean Question" couched in terms consistent with expansionism in Asia and uses international law as the basis upon which to achieve the goal of asserting supremacy over the region. This chapter relies on actual treaties and agreements as the basis for analyzing the historical and legal significance of this period. The aim of this chapter is not to provide a general historic chronology but to focus narrowly on the issue of "independence" and the evolution of Korean independence in the context of important historic events. (2) 1911~1946: The period immediately following

annexation by Japan up to the period prior to the “Korean Question” being taken up at the United Nations. The “Korean Question” during this period revolves around efforts to regain independence and gain recognition of Korea’s right to independence. It explores the events leading up to the Cairo Declaration and the infamous “in due course” debate and the ultimate failure of Korea to secure full independence and sovereignty. (3) 1947~1991: In the aftermath of division of the Korean Peninsula, the “Korean Question” becomes a formal debate at the United Nations. It is first expressed as one of achieving a unified, independent and democratic Korea under a representative form of government but with the advent of the Korean War and diplomatic competition for international recognition, there is very little development in formulating a solution to the Korean Question. The international community essentially becomes divided into two camps and the focus of the debate surrounding choosing between the two Koreas develops into the question of not which Korea to recognize but recognizing that there are two Koreas. (4) 1992~present day: With the simultaneous entry of both Koreas to the United Nations, the debate over competition and legitimacy becomes overshadowed by North Korea’s nuclear program. The “Korean Question” during this period undergoes a fundamental shift to a debate over the “North Korean” question or the “problem of North Korea.” The debate over unification continues but in conjunction with resolving the question of a nuclear North Korea.

II. The Korean Question (1870~1894): Defining Korea's Political and Legal Status

1. Early Contacts with the West

The geography of Korea, located within the confluence of interests of much more powerful and ambitious neighbors, sets the stage in the mid 1800's for what would ultimately become a competition among the then powerful neighbors, Japan, China and Russia to bring Korea within their sphere of influence. The Western powers barely knew of the existence of Korea during this period. While there had been sporadic contacts with the Western powers as early as 1593 when a Spanish Jesuit, Gregorio de Cespedes, visited Korea, for the most part, Korea had not constituted an important part of the Western interests in the region.⁶ Relations with China and Japan occupied a far greater importance to countries like the United States. For example, diplomatic correspondences relating to Korea from 1866 to the early 1870's had been classified under the heading of "China" in the official publications of the United States.⁷

The murder of three French missionaries in Korea and reports that an American ship, the *General Sherman*, had been destroyed and its entire crew killed at the Ping Yang river gave the impetus to an inquiry on the legal status of Korea as an independent nation or as a dependency of China. The French had earlier concluded that

⁶ M. Frederick Nelson, *Korea and the Old Orders in Eastern Asia* (Baton Rouge: Louisiana State University, 1946), pp. 109~134.

⁷ See for example, United States Department of State, *Diplomatic Correspondence, Foreign Relations of the United States, 1866~1867* (Washington, D.C.: Government Printing Office), p. XV; *Ibid.*, 1870~1871, p. 36.

Korea was subordinate to China and all questions relating to conduct of affairs had to be conducted through China.⁸ However, in a correspondence from the U.S. Legation in China informing the State Department of the news about the *General Sherman*, Burlingame writes “As Corea was formerly tributary to China I brought the affair to the attention of Prince Kung, who at once disavowed all responsibility for the Coreans, and stated that the only connection between the two countries was one of ceremonial.”⁹ The French had also taken the response by China to mean that Korea would be considered under operation of international law as an independent and sovereign nation legally responsible for acts against foreigners.¹⁰ The interpretation by the French and the United States relating to China’s statements that Korea had “formally” been in a tributary relationship with it suggested that this relationship had changed and what had existed previously no longer held true. Nonetheless, the precise nature of the relationship and whether use of the good offices of China should precede any contacts with Korea was yet far from clear. In the 1870 annual message delivered by President Grant of the United States authorizing treaty negotiations with Korea for the purpose of ensuring safety and humane treatment of sailors shipwrecked off the coast of Korea, he states “I instructed our minister at Peking to endeavor to conclude a convention with Corea...”¹¹ The Department of State cables instructions to the Minister in Peking to seek assistance of the Chinese

⁸ Nelson, *Korea and the Old Orders*, p. 112.

⁹ “Mr. Burlingame to Mr. Seward, December 16, 1866,” *Foreign Relations of the United States, 1866* (Washington, D.C.: Government Printing Office, 1866), p. 426.

¹⁰ Nelson, *Korea and the Old Orders*, p. 118.

¹¹ Ulysses Grant, “Message of the President of the United States,” 1870, p. VI.

government for the purpose of embarking on treaty negotiations with the Koreans since “some political connection exists between China and Korea.”¹² The subsequent response from the U.S. Minister in China confirms the uncertainty surrounding the status of Korea under international law and the nature of its relations with China. Minister Low responds that Korea “is substantially an independent nation” and that “the tribute is sent rather as a *quid pro quo* for the privilege of trading with the Chinese than as a governmental tribute.” He concludes erroneously that beyond this arrangement “there seems to be no connection between China and Korea” and that “China claims or exercises no control in any way over Korea, nor do the Koreans regard the Chinese as having any right to interfere or exercise any control over their governmental polity.”¹³ His simplistic interpretation of the relationship between China and Korea was an attempt to fashion a plausible explanation that would be comprehensible from a Western legalistic view of the world but had failed to grasp the fundamental principles that were central to the subtle relationship based on Confucian ideals.¹⁴

In preparation for the expedition to Korea, the United States had requested the good offices of China in transmitting a letter on its behalf to Korea stating the intentions of the United States to engage in negotiations regarding the safety of its sailors. The response from the Chinese Foreign Office in 1871 to Minister Low in Peking illustrates the awkward position of China in having to clarify to the West

¹² Hamilton Fish to Frederick F. Low, April 20, 1870, *Foreign Relations of the United States, 1870* (Washington, D. C.: Government Printing Office, 1870), p. 334.

¹³ Frederick F. Low to Hamilton Fish, July 16, 1870, *Foreign Relations of the United States, 1870* (Washington, D. C.: Government Printing Office, 1870), p. 362.

¹⁴ Nelson, *Korea and the Old Orders*, p. 125.

the nature of its relationship with Korea, something which it had little intention of fully clarifying. In a carefully drafted response it states that although Korea “is regarded as a country subordinate to China, yet she is wholly independent in everything that relates to her government, her religion, her prohibitions, and her laws; in none of these things has China hitherto interfered.”¹⁵ The response continues by stating that transmittal of letters to dependencies of China had never been a part of its functions but that in this particular instance “the permission now granted for it do such a thing was...only for this occasion; it was an extraordinary favor, quite in excess of usage, and one which could not, on any account, be again granted.”¹⁶ The precise nature of the relationship that Korea had with China was still far from clear but appeared to be inconsistent with Western ideas of a nation either being totally dependent on another or completely independent.¹⁷ The expedition to Korea in 1871 was met by armed hostilities in Korea who flatly refused all attempts at negotiation of a treaty. The response of the Korean officials underscore the unwillingness of Korea to engage in foreign relations and did very little to clarify the nature of the elusive relationship it maintained with China:

The non-intercourse of Corea with foreign states is a settled principle, established by our ancestors five centuries ago: a principle of which the whole world has heard, and of

¹⁵ Letter from the Chinese Foreign Office, dated March 28, 1871, reproduced in Low to Fish, April 3, 1871, *Foreign Relations of the United States, 1871* (Washington, D. C.: Government Printing Office, 1871), p. 112.

¹⁶ *Ibid.*, p. 112.

¹⁷ William Woodville Rockhill, *China's Intercourse with Korea from the XVth Century to 1895* (London: Luzac & Co., 1905), p. 1.

which the Emperor of China also is graciously aware. It is precisely because we must not break through the ancient policy [of our ancestors] that we cannot discuss and cannot settle that which the honorable envoy desires to discuss and to settle, whatever it may be...it is the will of Heaven and earth that the states of the East, and the nations of the West, regulating each in its own way its administration and its doctrines, and governing each its own people, should move on prosperously and concordantly without encroaching upon and taking way what is another's.¹⁸

III. New Treaty System

Although the United States had failed to enter into treaty relations with Korea through the 1871 expedition, Japan had attempted as early as 1868 to re-open relations with Korea based upon old observances of tribute.¹⁹ The overtures made by Japan were met with scorn from the Tai Won Kun who was the regent of the Chosun Kingdom at the time and had harbored deep anti-western sentiments. He considered Japan's acceptance of western ideals to be contrary to long standing customs of the East and treated Japanese envoys with open contempt.²⁰ These acts were considered a deep

¹⁸ "Translation of dispatch brought on board Colorado from Kang-Hoa high official," reproduced in Low to Fish, May 31, 1871, *Foreign Relations of the United States, 1871* (Washington, D.C.: Government Printing Office, 1871), p. 132.

¹⁹ Joseph Longford, *The Story of Korea* (New York: Charles Scribner's Sons, 1911), p. 297.

²⁰ Nelson, *Korea and the Old Orders*, p. 127.

affront to the dignity of Japan and a patriotic fervor broke out in Japan to invade Korea as a way to punish for their acts of insolence.²¹ In the meantime, Japan had entered into two treaties with its neighbors, China and Russia, which began to pave the way for securing Japanese interests in the region. The *Treaty of Tientsin [Tianjin]* signed on September 13, 1871 was the first treaty of friendship signed between China and Japan. Article I of the Treaty provides in relevant part “....In all that regards the territorial possessions of either country the two Governments shall treat each the other with proper courtesy, *without the slightest infringement or encroachment on the either side* (emphasis provided)...” The clause is significant for an implicit reference to Korea contained in Article I that has been interpreted to recognize that Korea is a part of Chinese influence and interests at the exclusion of Japan.²² The *Treaty of St. Petersburg* signed in May 1875 between Japan and Russia provides for an exchange of Japan’s rights in the Sakhalin in return for sovereignty over the central and northern islands of the Kurile. This treaty marks the start of Japan’s realignment of its territorial interests in the northern portion of Japan and efforts to ensure Russian neutrality

²¹ “The Korean Question,” *Nichi Nichi Shimbun*, September 30, 1875, reproduced in British Foreign Office: Japan Correspondence, 1856~1905: Japan, Section II, FO. 46/1-104, 1868~1890, pp. 50~51. See also, “The Memorial of the Risshisha,” *Japan Weekly Mail*, July 7, 1877, reproduced in Bingham to Everts, July 24, 1877, *Foreign Relations of the United States, 1877* (Washington, D.C.: Government Printing Office, 1877), p. 367. See also, Peter Duus, *The Abacus and the Sword: The Japanese Penetration of Korea, 1895~1910* (Los Angeles, CA: University of California Press, 1995), p. 45

²² Special correspondence of the Journal de St. Petersbourg, January 15, [27], 1872, reproduced in *Foreign Relations of the United States, 1872* (Washington, D.C.: Government Printing Office, 1872), p. 485, which contains the observation regarding Article I that “Corea being in a certain degree a vassal of China, this article seems intended to guarantee it against Japan.”

should conflict break out between Japan and Korea.²³ Having secured at least tacit agreement of non-Russian intervention, Japan set its sights on Korea to open treaty relations and to resort to arms should negotiations fail.

The Treaty of Gangwha was signed in 1876 without military incident. Although this treaty had been secured at the threat of war and was clearly an “unequal treaty” from the perspective of Korea,²⁴ several important points require mentioning. First, this treaty represented a victory for Japan in opening up, through a western style document modeled after the document that had been used in 1853 to open up its own country, the hermit kingdom which had thus far rejected foreign influences with the exception of China. In effect, Japan had succeeded where the United States had failed just five years earlier. Second, and more importantly, Japan attempts to clarify prior confusion regarding whether Korea is an independent state by inserting as the first article of the treaty a clause that declares Korea to be an independent nation and not a dependency of China: “Chosen, being an independent state, enjoys the same sovereign rights as does Japan.” While the message contained in this clause is undoubtedly directed at China, the other subtle implication of this clause was a message directed at other Western nations that a treaty relationship based on the western concept of the rule of law is attainable. The United States Minister to Japan, Bingham, while earlier had warned the United States of imminent war between Japan and Korea, cables the State Department that “it is gratifying to be able say that a treaty of peace and commerce has

²³ Duss, *Abacus*, p. 45.

²⁴ *Ibid.*, p.48.

been concluded...without further conflict.”²⁵ Notwithstanding the success of Japan in being the first nation to open treaty relations with Korea, in the eyes of many Japanese, Korea which had been a country that had formerly paid tribute to it “took advantage of intestine wars and ceased paying tribute...and now we have made a treaty with them on equal terms! We grieve for our Emperor, who is thus put on an equal foot with China’s vassal. Was ever our country more bitterly defiled?”²⁶ The growing influence of Japan over Korea as a result of treaty relations gave Japan a near monopoly in almost all aspects of activity in Korea, including commerce, diplomatic representation and the military. The former relationship which China enjoyed with Korea, one of informal advice and persuasion, was rapidly becoming ineffectual. China’s policy had shifted to one of encouraging Korea to expand its trade relations with other western nations in order to counter any one nation emerging as the dominant power in Korea.²⁷ Two events occurred in 1882 that would become pivotal in China’s attempts to reassert itself as the country enjoying superior status vis-à-vis Korea. The first was the successful conclusion of the *Treaty of Peace, Amity, Commerce and Navigation* concluded on May 22, 1882 between the United States and Korea. The second was the Imo incident of 1882 in which Chinese troops were dispatched to Korea to quell an uprising caused by disgruntled soldiers.

²⁵ Bingham to Fish, March 9, 1876, *Foreign Relations of the United States, 1876* (Washington, D.C.: Government Printing Office, 1876), p. 370.

²⁶ “The Plea of Shimada Ichiro and His Associates,” *Japan Daily Herald*, August 31, 1878, reproduced in Bingham to Evarts, *Foreign Relations of the United States, 1878* (Washington, D.C.: Government Printing Office, 1878), p. 507.

²⁷ Kirk W. Larsen, *Tradition, Treaties, and Trade: Qing Imperialism and Choson Korea, 1850~1910* (Cambridge: Harvard University Asia Center, 2008), p. 72.

China had successfully intermediated in the treaty negotiation between a reluctant Korea and a United States which had become increasingly eager to open trade relations with Korea and in 1882 successfully concluded the long awaited treaty. The treaty with the United States was an important milestone for Korea since it was the first of its kind with a western nation which would ultimately pave the way for a succession of similar treaties with other European powers. However, the real significance of this treaty lay not in the treaty itself but the attempts by China to persuade the United States to include a suzerainty clause indicating the special relationship that Korea had traditionally enjoyed with China. Commodore Shufeldt who had been leading the negotiations for the United States had opposed any mention of Korea's dependency status in the text of the treaty itself as that would undermine the concept of modern nation states entering into treaty relations as equal, independent and sovereign powers. Facing refusal of the United States to its request, China persuaded King Kojong of Korea to include a letter with the treaty clarifying Korea's traditional relations with it. The suzerainty clause in pertinent part states that Korea "is a dependency of China, but the management of her governmental affairs, home and foreign, has always been vested in the sovereign....In the matter of Corea being a dependency of China (in) any question that may arise between them in consequence of such dependency the Unites States shall in no way interfere."²⁸ The Chinese had only been partially successful in reasserting its rights of suzerainty over Korea, a right that in the minds of the Chinese had been eroded by the treaty of friendship concluded by Japan a few years earlier. That Korea had been persuaded to accept

²⁸ Larsen, *Tradition, Treaties, and Trade*, pp. 76~77.

the inclusion of such a letter indicating its dependency status to China reaffirms the unsettled state of Korea's own view of independence and sovereignty and the willingness to acquiesce to the dual role of both a dependency and an independent nation under international law.²⁹

Where China had failed through diplomacy in reasserting its status in Korea, it succeeded through military intervention to quell a rebellion of soldiers, known as the 1882 *Imo Mutiny*. Several important implications of Chinese troops being dispatched to Korea emerges from this event. First, this had been the first time in over two hundred years that China had dispatched troops to Korea and had actively intervened in the internal affairs of the country. The speed at which the decision was made to "aid" Korea, breaking a long tradition of non-interference in Korea's domestic affairs signaled a fundamental shift in China's view toward Korea in light of growing Japanese influence in the region.³⁰ The continued presence of Chinese troops and the growing conflict with Japan in Korea results in heightened tensions between the Chinese and Japanese, particularly in light of the failed Japanese coup d'état in 1884, commonly known as the Gapsin Coup. This sequence of events gives rise to an agreement between China and Japan known as the *Tientsin Convention* under which both countries agree to withdraw troops stationed in Korea. Under the terms of the agreement, in the event of a disturbance either country could, without the consent of Korea, send troops as long as previous notice of an intent to do so was given. In addition, the agreement required both parties to withdraw their troops once the matter had been settled.³¹ Rather than

²⁹ *Ibid.*, p. 77.

³⁰ *Ibid.*, pp. 85-88.

³¹ *Convention of Tientsin (Tianjin)*, signed April 18, 1885, between China and Japan.

interpreting the withdrawal of Chinese and Japanese troops from Korean territory as an act of honoring Korean independence and sovereignty, by retaining the right to intervene, Korea in actuality had become a full-fledged protectorate of both China and Japan. This convention would act as the catalyst which ultimately results in full scale conflict between the two countries and changes the balance of power in favor of Japan providing the groundwork for an eventual reversal of Korea's dependency status toward China. The impetus for what would eventually lead to the Sino-Japanese War was provided by the Donghak Peasant Revolution in 1894 where at the request of the Korean government Chinese troops re-entered Korea to help crush the rebellion. The Japanese seized upon this opportunity to formally declare war arguing that the Chinese had violated the terms of the Tientsin Convention.³² Prior to the start of the war, Korea had pledged support of Japan's war efforts by providing "every possible facility to Japanese soldiers regarding their movements and supply of provisions" through the *Treaty of Alliance Between Japan and Korea*.³³ The same treaty had stated as its objective "to maintain the Independence of Korea...and to promote the respective interests of both Japan and Korea by expelling Chinese soldiers from Korean territory."³⁴

Korea's formal independence from its former tributary relations with China comes about in 1895 as a result of China's defeat in the Sino-Japanese War. *The Treaty of Peace between China and Japan* (also known as the *1895 Treaty of Shimonoseki*), which formally ended the war

³² For a historic account of the events leading up the declaration of war, see Nelson, *Korea and the Old Orders*, pp. 206~213 and Duus, *Abacus*, pp. 66~102.

³³ *Treaty of Alliance Between Japan and Korea*, signed at Seoul, August 26, 1894.

³⁴ *Treaty of Alliance Between Japan and Korea*, Article I.

between the two countries contains an unambiguous statement as the first article that articulates the end of traditional dependency relations of Korea vis à vis China: “China recognizes definitively the full and complete independence and autonomy of Korea, and, in consequence, the payment of tribute and performance of ceremonies and formalities by Korea to China...shall wholly cease in the future.”³⁵ In an earlier draft of the agreement, China had asked for a reciprocal clause that formulated “China and Japan (emphasis added) recognize definitely the full and complete independence and autonomy, and guarantee the complete neutrality of Korea, and it is agreed that the interference by either in the internal affairs of Korea in derogation of such autonomy or the performance of ceremonies and formalities by Korea...shall wholly cease for the future.”³⁶ This proposal had been rejected by Japan and could be seen as a signal of its true intentions regarding Korea. Although independence from China had been attained through operation of the *Treaty of Shimonoseki*, true independence and full sovereignty of Korea as a nation state remained uncertain as it was unclear whether Japan would voluntarily relinquish claims to a country it had fought a war to claim.³⁷

³⁵ *Treaty of Peace Between China and Japan*, signed at Shimonoseki, April 17, 1895, reproduced in William Woodville Rockhill, *Treaties and Conventions with or concerning China and Korea, 1894~1904: together with various state papers and documents affecting foreign interests* (Washington, D. C.: Government Printing Office, 1904), p. 14.

³⁶ Frederick A. McKenzie, *The Tragedy of Korea* (London: Hodder and Stoughton, 1908), p. 298.

³⁷ Andre Schmid, *Korea Between Empires: 1895~1919* (New York: Columbia University Press, 2002), p. 27.

IV. The Korean Question (1895~1910): Japanizing Korea's Political and Legal Status

If the Sino-Japanese War could be expressed as one in which Japan waged war for territorial influence against the Chinese “dagger pointed at the heart of Japan,” the fitting analogy might be to suggest that the major cause of the Russo-Japanese War was for economic influence to force Russia to release the ear of the rabbit.³⁸ This period sees the beginning of a race for economic penetration in Korea and the rise of Russian political influence in Korea. The rivalry among the Japanese, American, British, German and Russians for concessions had begun in earnest from 1895.³⁹ However, internal political developments stemming from the murder of Queen Min by the Japanese set the stage for Russia to be thrust into the center of conflict with Japan in Korea. Empress Myeong-song, commonly known as Queen Min, had long been considered by the Japanese to be an impediment to their interests in Korea. Her assassination by the Japanese disguised as Koreans sparked outrage and deep anti-Japanese sentiment in Korea. A telegram from the U.S. Legation in Seoul in describing the murder of the Queen reported, “This Government is now under the control of King’s father and five traitors, under the guidance of the Japanese. The condition of His Majesty pitiful. Queen murdered; His own life in imminent peril...Japanese minister states that atrocities were committed by natives disguised to represent Japanese. It is

³⁸ See quotation “Korea has been likened in shape to a rabbit, caught by the ear and held by Russia at Vladivostok, but to Oriental fancy it appears like a dagger pointed at the heart of Japan,” Jones, *Korea: The Land, People, and Customs*, p. 7.

³⁹ For an account of the economic interests prevailing during this period, see, Duus, *Abacus*, pp. 134~168.

absurd. Charge d'affaires of Russia and myself saw 30 of them leaving the royal palace just after atrocities, armed with swords. They were Japanese...Sufficient evidence implicating Japanese minister overwhelming.”⁴⁰ Soon thereafter King Kojong takes refuge at the Russian legation and dismisses all Japanese advisors appointed to the ministries and in their place appoints pro-Russian and pro-American officials.⁴¹ With Japanese interests seriously undermined by the murder of the Queen and the King's self-imposed exile at the Russian legation, a series of treaties and understandings are entered into during 1896 separately among Russia, China and Japan in an effort to realign their respective interests in Korea and resolve the impasse relating to the King. One of the noteworthy aspects of treaty making during this era is that it was customary for parties to enter into agreements addressing their respective rights regarding a third country that is not a party to the agreement or treaty. On May 14, 1896 Japan and Russia enter into what is known as the *Komura-Waeber Memorandum*⁴² advising the King to return to the palace “when no doubts concerning his safety there could be entertained” and providing for a gradual reduction of troops from Russia and Japan in Korea.⁴³ This memorandum foreshadows the start of future Russian interests in Korea. During the same month, China and Russia enter into the *Treaty of Alliance between China and Russia* which provides in the first article that “every aggression

⁴⁰ Dun to Olney, October 13, 1895, *Foreign Relations of the United States, 1895* (Washington, D.C.: Government Printing Office, 1895), p. 972.

⁴¹ Duus, *Abacus*, pp. 117~118.

⁴² “Memorandum between Japan and Russia,” signed May 14, 1896, reproduced in *The American Journal of International Law*, vol. 1, no. 2, Supplement: Official Documents (April 1907), pp. 215~216.

⁴³ See Article I of the memorandum. See also, Duus, *Abacus*, p. 120.

directed by Japan, whether against Russian territory...China or... Korea” would obligate the parties to support each other militarily. Aside from the significance of Russia and China openly entering into an agreement for joint military action against Japan, the inclusion of Korean territory triggering the application of the treaty suggests the importance of Korea to the strategic interests of the parties. On June 9, 1896, Japan and Russia enter into the *Lobanoff-Yamagata arrangement*⁴⁴ which was a culmination of discussions between the parties in which a proposal for the division of Korea into a northern and southern zone had been proposed. This proposal as well as a clause to guarantee Korean independence had been rejected by Russia but the right of Russia to “establish a telegraph line from Seoul to her own frontier” was made part of the arrangement.⁴⁵ The refusal of the Russians to accept a division of Korea or to guarantee its independence when viewed in light of its recent military alliance with China against Japan display the careful balancing that Russia attempts to achieve in its relations with Japan relating to their interests in Korea.

In February 1897, King Kojong leaves the Russian legation and takes up residence at a newly built palace adjacent to the British and American legations. Shortly thereafter, he declares for himself a new title of “Emperor” at the insistence of his officials and sets October 12, 1897 as the coronation ceremony. Initially, this had caused some confusion among the foreign legations as to the purpose behind such a title change. Horace Allen in his cable to the State Department describes

⁴⁴ *Arrangement Between Russia and Japan, Relative to Affairs in Korea*, signed June 9, 1896.

⁴⁵ W. G. Beasley, *Japanese Imperialism 1894~1945* (New York: Oxford University Press, 1987), pp. 71~72.

the reason for the King's change of title to that of Emperor as being motivated not "from a desire for personal aggrandizement" but by the desire to be perceived semantically equal to the Emperors of Russia, China and Japan and not cause "him to be talked down to."⁴⁶ As expected, the Emperor of Russia is the first to recognize this new title, followed by Japan and the United States a short time thereafter. In a signal, however, to the demise of proactive Russian involvement in Korea, Japan and Russia enter into the *Nishi-Rosen Agreement* on April 25, 1898.⁴⁷ In this agreement, Japan and Russia recognize "the Sovereignty and entire independence of Korea, and pledge...to abstain from all direct interference in the internal affairs" of Korea. But the key provision in the agreement was Article III where Russia recognizes Japanese economic interests in Korea and agrees not to "hinder the development of commercial and industrial relations between Japan and Korea."⁴⁸ As an indication of the growing sphere of influence of the Japanese interest in Korea, the *Seoul-Fusan Railway Agreement* is signed between the two countries on September 8, 1898 giving Japan an important strategic access to the railway system which had been integral to its goals of expanding the sphere of influence on the continent. Article XV provides that the "railway company shall under no circumstances transfer its shares to governments or individuals other than the Japanese or the Korean governments," effectively granting exclusive rights to Japan only. During the period immediately preceding outbreak of the Russo-Japanese War in 1904, the status of Korea

⁴⁶ Allen to Sherman, October 14, 1897, *Foreign Relations of the United States, 1897* (Washington, D.C.: Government Printing Office, 1897), p. 484.

⁴⁷ *Agreement Relative to Independence of Korea and Neutral Rights*, signed April 25, 1898.

⁴⁸ See also, Beasley, *Japanese Imperialism*, p. 73.

as an independent and sovereign nation had begun to gain recognition among the Western powers. The *Treaty Between Korea and China*, signed on September 11, 1899 is a symbolically important treaty regarding Korean independence as China for the first time directly recognizes Korea as being fully independent and sovereign. In this treaty, China also recognizes the new Empire of Korea. A similar recognition is evident in the *Agreement Between the United Kingdom and Japan Relative to China and Korea* signed on January 30, 1902 where there is an explicit recognition of the Empire of Korea as an independent state. At the same time, Great Britain acknowledges that Japan has a paramount political as well as commercial and industrial interest in Korea.⁴⁹ Much of the gains that Korea had achieved in recognition of its independent stature however quickly erodes with the advent of the Russo-Japanese War and victory by Japan.

In what would become the first of a succession of treaties between Japan and Korea that would lead ultimately to annexation in 1910 and complete loss of independence and sovereignty for Korea, the *Protocol Between Japan and Korea* signed on February 23, 1904 required Korea to “adopt the advice of the latter [Japan] in regard to improvements in administration” and permit the Japanese to undertake military operations in Korea. In what can only be attributable to its need to maintain at least the façade of legality, Article III provided that Japan will “definitively guarantee the independence and territorial integrity of the Korean Empire.” In a pattern that would clearly indicate the ultimate intentions of Japan with regard to Korea, on August 22, 1904, through the *Agreement between Japan and Korea (1904 Japan-Korea Protocol of August 1904)*, Korea is required to

⁴⁹ See Article I of the Agreement.

engage financial and diplomatic advisors recommended by Japan and consult with such advisors on all matters relating to finance and foreign affairs. This protocol is an attempt to effectively take control over Korea's finances and foreign affairs through "protection, supervision, and guidance" which the United States had also given consent for Japan to do in Korea.⁵⁰ Near the end of the Russo-Japanese War when Japanese victory was all but assured, Great Britain and Japan enter into an agreement replacing the Agreement signed on January 30, 1902. The new agreement, renamed *Agreement respecting the integrity of China, the general peace of Eastern Asia and India, and the territorial rights and special interests of the parties in those regions* deletes all prior references to the Empire of Korea and reverts to use of the word "Corea" in its place. The implications are more than clear: the symbolic "dis-recognition" of Korea as an independently functioning state. The dispatch from the British Foreign Office dated September 6, 1905, one day after signing of the Treaty of Portsmouth, contains an explanation that it has "become evident that Corea, owing to its close proximity to the Japanese Empire and its inability to stand alone, must fall under the control and tutelage of Japan."

On November 17, 1905 *Agreement Between Japan and Corea, by which Japan Assumed Charge of Foreign Relations of Corea* is signed whereby Korea relinquishes its power to conduct foreign affairs. The U.S. Envoy, Edwin Morgan, closes the Legation on November 28, 1905 and departs Korea. Five years thereafter on August 22, 1910, the *Treaty between Japan and Corea arranging the annexation of Corea to Japan* completes the task of nullifying under international law the existence of an "independent" state which had been established in 1392.

⁵⁰ Duus, *Abacus*, p. 188.

V. Conclusion

The question of defining the concept of independence as it relates to Korea during this period is challenging because Korea had initially been reluctant to fully embrace the newly emerging legal order under a western concept of international law. This chapter analyzed the evolution of Korea's early status as a tributary of China to the eventual loss of independence and sovereignty. If we were to pose the question "when did Korea cease to exist as an 'independent' state?" The correct answer in the strictest sense would probably be August 22, 1910. An equally correct answer from a legal perspective could also be November 17, 1905 when the power to conduct foreign affairs was surrendered to Japan. On the other hand, as early as 1904, Japan had reverted to the use of the word "Corea" in treaties and agreements as a subtle but clear signal that it no longer considered Korea to be an independent state. The Treaty of Portsmouth also follows this pattern by providing that "The Imperial Russian Government, acknowledging that Japan possesses in *Corea* [emphasis provided] paramount political, military and...." Elevation of King Kojong to Emperor and creation of the Korean Empire in 1897 may be interpreted as the way in which Korea attempts to convey to Japan, China and Russia, as well as the rest of the world, that its status is that of an equal and independent state under international law. However, the failure of Emperor Kojong's secret mission to the Hague Peace Conference in 1907 to plead Korea's case eventually forced his abdication. The time had already passed for any actions that would have made a difference. In the aftermath of the annexation of Korea by Japan in 1910, President Taft's State of the Union address mentions Korea only in reference to China, perhaps also

recognizing that the time had passed to take meaningful action: “The center of interest in Far Eastern affairs during the past year has again been China. . . . The treaty annexing Korea to the Empire of Japan. . . marks the final step in a process of control. . . that has been in progress for several years past.”

The framework provided by this chapter is based primarily on analysis of actual treaties and agreements that had been the basis for formulating relations among nations during the early period of the “new legal order” under international law. This framework is the foundation from which will follow further inquiry on the evolution of the “Korean Question” during the time periods: (i) 1911~1946, (ii) 1947~1991 and (iii) 1992~present.

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Review on the Previous ROK Government Policies for Unification and Future Policy Options in View of German Unification

Chang-Seok Yang

I. Introduction

Germany was unified peacefully in October 1990, nearly 40 years after its division. The process for unification started with a mass exodus of East Germans to West Germany as well as a civil revolution called “Monday demonstration”¹ in major cities of East Germany, including Leipzig and Dresden. Despite many differences between Korea and Germany, it would be meaningful to draw lessons from the German case for the following reasons. First, it was a peaceful unification without any bloodshed. Second, the unification process was democratic and legally pursuant to the West German Constitution, the Basic Law (*Grundgesetz*). Third, the dictatorial

¹ From the early 1980s, a prayer meeting was held every Monday at the Nicholai Church in Leipzig. In October 1989, massive demonstrations took place on Monday in Leipzig, Dresden, and other East German cities.

communist regime with a planned socialist economy, the same Soviet model as North Korea's, collapsed. The East German parliament born through the free general election of March 1990 decided that the five East German states would enter the Federal Republic of Germany (West Germany) with a full-fledged democracy and a market economy. Fourth, 25 years after unification, unified Germany is better off, playing a leading role in Europe in economic, security, and humanitarian areas.

Let me first examine what lessons can be drawn from the German case, and then review unification policies of the past governments in South Korea. In conclusion, I will make policy suggestions for the peaceful unification of Korea.

II. Lessons of the German Unification

1. Coherent Policy of “Change through Contacts”

Former West German leader Willy Brandt's *Ostpolitik* toward East Germany contained two basic premises. First, as Egon Bahr, Brandt's spokesman, noted, “Conditions for reunification can be created only with the Soviet Union, not against it.”² Second, isolating or containing East Germany would not bring collapse of the East German regime but rather increase sufferings of the people there, deepening

² Egon Bahr, “Wandel durch Annaeherung,” (speech, Tutzing Christian Academy, July 15, 1963), <<http://web.ev-akademie-tutzing.de/cms/index.php?id=53>>, (Accessed on April 5, 2015); Timothy Carton Ash, *In Europe's Name: Germany and the Divided Continent* (London: Jonathan Cape, 1993), p. 65.

the chasm of division. Therefore, West Germany should press East Germany to allow for the maximum amount of contact between the German populations.³

The West German government stressed that the German question remained unresolved, but it was not able to pursue unification publicly, since the four victorious powers (the United States, U.S.S.R., Great Britain, and France) reserved the responsibility and rights over Berlin and all of Germany, including the question of German unification. Therefore, in its policy for East Germany, West German governments, both conservative and liberal, aimed to improve the living conditions of the East Germans. Based on the Basic Treaty of 1972, West Germany continued to engage with East Germany through exchanges and cooperation. Exchanges of people and materials, and cooperation in various areas between the two Germanys resulted in growing dependence of the East on the West and increasing leverage of the West against the East. East Germany's easing travel restrictions and improving human rights conditions in return for a massive loan in 1983~1984, amounting to DM 1.95 billion from West German banks, opened the gate wide for East Germans to visit West Germany.

It was meaningful that in 1982, a new conservative governing coalition of the Christian Democratic Union and the Christian Social Union (CDU/CSU) and the Free Democratic Party (FDP) under the leadership of Helmut Kohl inherited the so-called *Ostpolitik* from the liberal Social Democratic Party (SPD) government. It was partly due to the special nature of the West German political system that seeks

³ A. James McAdams, *Germany Divided: From the Wall to Reunification* (Princeton: Princeton University Press, 1993), pp. 99~100.

coordination and consensus, rather than confrontation and division by forming coalitions. Chancellor Kohl was required to go along with the *Ostpolitik*, which his coalition partner, the FDP led by Foreign Minister Genscher, had developed with the SPD in the 1970s. It had more to do with the need for the CDU/CSU union to accommodate a policy that had already been approved by the vast majority of the West German population.⁴ The West Germans' support for the *Ostpolitik* was growing, since the détente policy toward East Germany was threatened by surrounding international tensions over the deployment of intermediate nuclear forces (INF) in Europe. They did not want to see any chance of war grow in their German homeland.

2. Strong Alliance with the West

Throughout the period, West Germany strengthened its alliance with the Western bloc led by the United States. Its agreement to and implementation of the NATO Double-Track Decision (*Doppel Beschluss*) of December 1979 was a good example. The NATO members decided to pursue two-track policies; they would continue negotiations with the Soviet Union for banning nuclear-armed intermediate-range missiles from Europe, but should those negotiations fail, the United States would deploy its Pershing II and cruise missiles in West Europe. Due to its internal split over the decision as well as economic crisis, the ruling SPD had to break its coalition with the FDP, which formed a new coalition government with CDU in 1982. The new chancellor, Helmut Kohl, placed his priority on imple-

⁴ Fifty-five percent of the people supported *Ostpolitik*, and only 25 percent opposed. *Ibid.*, pp. 152~155.

menting NATO's decision, and U.S. Pershing II missiles began to be deployed in 1983. Kohl recalled, "Without the deployment, U.S.–German relations would have been hurt badly, probably putting NATO alliance at risk."⁵

When the East German regime was about to collapse and reunification of Germany seemed possible in 1989, West Germany alleviated the concerns of Western allies—particularly former foes like England and France—with assurances that German unification would be pursued only within the framework of an European integration. Chancellor Kohl's commitment to united Germany remaining in NATO helped gain U.S. President George H.W. Bush's strong support for German unification. Kohl and Bush closely and frequently discussed almost every issue concerning a German unification. Without President Bush's support, West German Chancellor Kohl could not have succeeded in achieving unification.

In particular, senior officials from the United States and West Germany consulted very closely to plan a strategy for the two-plus-four talks to settle external issues involving German unification. They agreed to speeding up the internal unification process, including the first general election in East Germany, while delaying convening of the two-plus-four meeting until after the election. They also restricted the agenda that could be discussed at the international meeting.

3. Consistent Dialogues between the Two Germanys

Inter-German dialogues in political, economic, cultural, and

⁵ Helmut Kohl, *Ich Wollte Deutschlands Einheit*, trans. Kim Joo Il (Seoul: Haenaem, 1998), pp. 26–27.

social aspects helped avoid misunderstandings and encouraged mutual cooperation during the critical period of 1989~1990. In August 1989, Chancellor Kohl exchanged letters with Erich Honecker, the General Secretary of the East German communist party. Ministerial-level discussions over the massive exodus of East Germans and a summit meeting in Dresden in December 1989 demonstrated the ability for the two Germanys to exercise self-determination.

When the situation was very destabilizing in East Germany with the mass exodus in the summer of 1989, senior officials from the two Germanys met frequently in Berlin and at the United Nations in New York to discuss how to handle tens of thousands of East German defectors staying at West German embassies. Chancellor Kohl also talked over the phone with the new General Secretary, Egon Krenz on October 26 to discuss matters of concern, including the new travel law of East Germany. Then-president Weizsaecker recalled, “Manfred Stolpe who worked after unification as minister-president of Brandenburg had made an important contribution (to unification) by providing internal information and arranging valuable meetings with religious and political leaders in the East.”⁶

During this upheaval period (*Wende*) in East Germany, the two sides had minister- or vice minister-level joint committees or experts meetings on 22 areas, including transportation, legal cooperation, and the economy. Even after the Berlin Wall fell and Prime Minister Hans Modrow took office in December 1989,

⁶ Richard von Weizsaecker, *Der Weg zur Einheit*, trans. Tak Jae Taek (Seoul: Changbi Publisher, 2009), p. 79.

minister-level talks involving the issues of transportation, postal service, health, the environment, and the economy continued between the two Germanys.

Kohl visited Dresden, where the Monday demonstration was taking place, and had summit talks with East German Prime Minister Modrow on December 19~20, 1989. They agreed to form *Vertragsgemeinschaft*, a confederative structure under two states and two governments. By having inter-German meetings at various levels, the two Germanys could send the message to the international community, including the four victorious powers, that they were in full control of the situation in East Germany and could pursue unification in a peaceful and democratic manner through dialogue.

4. Winning the Hearts of the East Germans

One of the major reasons why the four victorious powers could not intervene much in the process of unification despite their responsibility and rights over Germany was that they were compelled to respect the self-determination of the German people. In his interview with *Washington Post* on September 18, 1989, U.S. President Bush stated that unification should be decided by the Germans themselves. Gorbachev also said the Soviet Union had no reason to object to self-determination by the Germans if they wanted unification.

While stressing the importance of the Germans' self-determination for unification and freedom stipulated in the Basic Law, Kohl was careful to show respect for the self-determination of the East Ger-

mans as well.⁷ He was patient enough to wait for them to form a new democratic government through free, democratic, and secret elections. In the first general election in March 1990, about 48 percent of East German voters supported the union of parties, which was committed to early unification with West Germany. On August 23, 1990, the *Volkskammer*, the East German Parliament formed by the election, passed the resolution that the five East German states would enter the effective area of the Basic Law (*Beitritt zum Geltungsbereich des Grundgesetzes*) of the Federal Republic of Germany on October 3, 1990. Thus, it was the East Germans who played a key role in this process of democratic and peaceful unification.

Why did East German voters decide on unification with West Germany? During the Monday demonstrations, they called for early monetary union by shouting, “If the DM [Deutsch Mark] comes, we will stay here - if not, we will go to you [DM]!” They wanted to live as rich as their West German brothers and sisters. Ms. Gunda Roeschel, former head of the Green Party after unification, who was born and brought up in East Germany, recalled in a seminar held in Seoul in March 2015 that “she could smell freedom through cosmetics, chocolates, and coffees sent by her West German relatives.” Unlike the two Koreas, for many years prior to unification, there were active exchanges and cooperation between the two Germanys. They could send mail and gifts by post, and visits were possible. More than 80 percent of the people in the East watched West German television.

⁷ For instance, in his remarks at the dinner for Gorbachev visiting Bonn in June 1989, Kohl stressed the political will of his government to complete German unification and freedom based on self-determination without outside interference. Kohl, *Ich Wollte Deutschlands Einheit*, p. 48.

Essentially, during the night, Germany had already been united. East Germans came to know about the better and freer life in the West and began to question their destiny under socialism, putting less and less confidence in their own regime. The dictatorial regime could not deliver daily necessities and clean air and transportation to them, while it suppressed the population with naked force. When a window of opportunity opened to the East Germans, they decided to “shift their loyalties, expectation, and political activities” to the West.⁸

5. Decisive Role of the West German Leadership

Leaders of West Germany—from both the social democrats and the Christian democrats—made the right decisions at the right time, all of which contributed to ultimate unification.

Since West Germany concluded the Moscow treaty with the Soviet Union in August 1970, West German politicians, including Chancellor Brandt and Minister Bahr, kept up good relations with Russian politicians. They believed improved, stable relations between Bonn and Moscow would facilitate better relations between East and West Germany. West Germany’s economic power contributed to the work of the diplomats and politicians in achieving their goal of good Bonn–Moscow relations.⁹ Trust

⁸ Earnst Haas defined political integration as a “process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities toward a new center, whose institutions possess or demand jurisdiction over the preexisting national states.” James Dougherty and Robert Pfaltzgraff, Jr., *Theories of International Cooperation and Integration*, 5th ed. (New York: Harper & Row Publisher, 1990), p. 510.

⁹ Ash, *In Europe’s Name*, p. 365.

was built between the two countries, and that was helpful to the unification process.

Chancellor Kohl recalled in his testimony at the hearing of the *Enquete-Kommission* that the loan to the GDR was “the most important decision in intra-German relations as well as more difficult decision than any other in his political life.”¹⁰ His government offered a state guarantee to West German banks for a loan amounting to DM 1.95 billion to the financially troubled East Germany. Kohl hoped his decision would widen chances for more East Germans to visit West Germany, during which they would become personally familiar with the West and no longer be deceived by the hostile propaganda of the SED.¹¹ After the loan, Erich Honecker eased travel restrictions drastically, resulting in a dramatic increase in the number of East German visitors to the West.¹² Honecker also started forming sisterhood partnerships between cities of the two Germanys from 1986. Sixty-two cities had signed sisterhood agreements with West German cities by the time of unification.

Kohl was also proud that by the time of unification, his Christian Democratic Party had kept rejecting East German requests that West Germany recognize a separate East German citizenship. He believed such a policy contributed to the quick, efficient entry and settlement of hundreds of thousands of East German defectors (*Uebersiedler*), thus paving the way for unification. “If we had accepted East Ger-

¹⁰ Helmut Kohl, “Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland,” (hearing, *Enquete-Kommission*, November 3~5, 1993).

¹¹ SED stands for *Sozialistische Einheitspartei Deutschlands*, the ruling communist party of East Germany.

¹² The number of East German visitors (including pensioners) to the West increased to 2 million in 1986, 5 million in 1987, and 6.75 million in 1988.

man request for recognizing its own citizenship, the defectors would have applied for political asylum as foreigners, even though we and they are the same Germans.”¹³

Kohl took the initiative in promoting unification first by proposing on November 28, 1989, his 10-point unification plan. His insight into the dynamics in East Germany and his strong will for unification were driving forces facilitating the unification process. In his congratulatory speech for the fall of the Berlin Wall on November 10, Kohl stressed the most important things were Germany, unification, rights, and freedom.¹⁴ He succeeded in winning support for early unification from East German voters in the March 1990 general election by proposing a monetary union with a one-to-one exchange rate between East and West German currencies.

Without Kohl’s shrewd diplomacy and his coalition partner Genscher, unification could not have been achieved. They won full support from U.S. President Bush and Secretary of State James Baker, and worked together to persuade Gorbachev to make a deal for unification. In addition, Kohl’s personal relationship with Gorbachev was a decisive factor for the Soviet leader’s decision not to object to a unified Germany remaining in NATO. Kohl’s generous provision of economic and financial assistance to the U.S.S.R. also played a part in winning Gorbachev’s support for German unification.

¹³ Kohl, *Ich Wollte Deutschlands Einheit*, p. 68.

¹⁴ *Ibid.*, pp. 100~101.

III. Review on ROK Government's Policy for Unification

ROK governments have shown less consistency than the West German governments in unification policy. Let me examine key features of the unification policy pursued by South Korean governments from President Roh Tae Woo to President Lee Myung Bak. Since significant interaction with North Korea began in 1988, I have not included the governments before President Roh.

1. Roh Tae Woo Administration

In September 1989, President Roh Tae Woo announced the “Korean National Commonwealth Formula” for the unification of the Korean Peninsula.¹⁵ The formula set independence, peace, and democracy as basic principles of unification. These principles were not only based on a national consensus but were borrowed from the North–South joint communiqué of July 4, 1972, which called for independence, peace, and grand national unity.

The formula proposed the creation of a “Korean Commonwealth” linking the two Koreas together in an intermediate stage toward unification. The proposed commonwealth was not meant to be the final form of a unified Korea but rather a transitional framework for promoting inter-Korean exchanges and cooperation. In other words,

¹⁵ Commonwealth has different connotations from its use in the British Commonwealth. It refers to the special relationship between the two separate systems of North and South Korea in the interim stage, pending full-fledged unification. National Unification Board, *Korea's Unification Policy* (Seoul: NUB, 1993), p. 9.

the Korean commonwealth is not a union of states or a federal state. Its basic character was meant to be similar to that of the European Community or the Nordic Council in which a number of states formed a single economic, social, and cultural community with the ultimate goal of political integration.

The Korean commonwealth would have a “Council of Presidents,” or the chief executives from the two Koreas, as its highest decision-making organ. There would be a Council of Ministers composed of delegates from both governments as well as a “Council of Representatives” composed of members of the legislatures in the two Koreas.

The Korean National Commonwealth Formula was created to meet fundamental changes in the world order at the end of the Cold War, including moves toward reform and openness in the communist bloc countries. The formula’s principle is that North and South Korea recognize coexistence of the two different systems and promote exchanges and cooperation to build a national community.¹⁶ The Roh Administration pursued a new North Korea policy based not on adversarial confrontation but on mutual cooperation and reconciliation. In his special declaration on July 7, 1988, President Roh announced radical steps to promote exchanges and cooperation with North Korea for national unification; cross-border visits and exchanges by citizens with government approval; recognition of inter-Korean trade as domestic, that is, internal trade and not between separate states; and equal development of the national economy, meaning no objection to trade between North Korea and

¹⁶ Lee Hong Koo, *Crisis in a Transitional Era: Future of Unified Korea* (Seoul: Jisiksanup-Sa, 2010), p. 59.

the Republic of Korea's allies. The declaration marked an epochal change in South Korea's policy for unification.

The Korean commonwealth formula also reflected domestic changes resulting from democratization in the South, including stronger civilian voices regarding unification. To develop a new unification formula, the Roh government liberalized discussion on unification and conducted 250 seminars and round-table discussions with the academic, media, religious, cultural, and business communities. Some of these sessions were held abroad with the participation of Korean communities in the United States, Japan, Canada, and Europe. The government also reflected the views of the major political parties and other participants in the hearings hosted by the ad hoc Committee on Unification in the National Assembly. Thus, the formula won bipartisan support, particularly from the heads of the three opposition parties, two of whom subsequently became South Korean presidents. President Roh told Unification Minister Lee Hongkoo that the new unification formula should be agreed to by the opposition parties, which at the time had more than a majority of the seats (174 out of 299).¹⁷

The Roh government shaped a new reconciliatory unification policy, as South Korea had gained solid self-confidence regarding its capability and its status in the world community. It achieved democratization and grew economically into one of the 10 largest trading nations in the world. It also successfully hosted the Seoul Summer Olympics in 1988.

¹⁷ Lee Hong Koo, in meeting with the author, September 2015.

The Roh Administration laid legal and institutional foundations for unification, and exchanges and cooperation between the two Koreas. It stipulated a new paragraph regarding “peaceful unification” in the Constitution, reaffirming the government’s willingness to address the issue of national unification positively and realistically. Article 4 of the Constitution says, “The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.” The government also legislated the Act on North–South Exchanges and Cooperation in August 1990 to encourage various exchanges and cooperation. Albeit with state permission, the Roh Administration legalized inter-Korean exchanges of people and materials and other forms of cooperation, which had previously been banned by the national security law. At the same time, the government enacted the Act on Inter-Korean Cooperation Fund to render financial support for inter-Korean cooperation and humanitarian projects. Such legislative measures encouraged civic participation in the process of moving toward unification.

The dramatic changes in South Korea’s perception of North Korea and unification policy contributed to improving inter-Korean relations. On the other hand, taking advantage of the new policy, liberal persons (including religious leaders and a student) visited North Korea “illegally,” which sparked conflicting reactions from domestic political and social groups.¹⁸

¹⁸ South Korean nationals’ visit to North Korea without prior approval from or consultation with the government is illegal. In 1989 several persons, including Reverend Moon, visited North Korea without such permission and were put on trial on charges of violating the national security law.

The most remarkable progress in inter-Korean relations was the historic Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation (hereinafter called the Basic Agreement) signed at the conclusion of the inter-Korean prime ministers meeting of December 10~13, 1991. This agreement was highly significant in several aspects: it was a basic framework for improved relations and peaceful coexistence between the two Koreas, equivalent to the German *Grundvertrag* (Basic Treaty) of 1972; it defined the character of the two Koreas not as foreign countries but as a special kind of nation formed in the process of moving toward unification; it laid a groundwork for reconciliation and cooperation by agreeing that North and South Korea shall recognize and respect each other's system, not interfere in internal affairs, and cease actions aimed at toppling the other's system; it agreed on mutual nonaggression and military confidence-building measures and disarmament; and it promised to carry out exchanges and cooperation in various fields, including reunion of separated families. In effect, the Basic Agreement reflected a gradual functional approach to reaching the "national commonwealth."

However, such a dramatic agreement did not contribute much to normalizing relations between the two Koreas. First of all, North Korea's nuclear weapons program emerged as the biggest obstacle for improving inter-Korean relations. The Joint Declaration on Denuclearization of the Korean Peninsula signed by the two Koreas at the end of 1991 paved the way for negotiating denuclearization in North Korea. But the North-South Joint Committee for Nuclear Control failed to reach an agreement on modalities regarding mutual inspection and verification by the end of 1993. In addition, South and North Korea pursued different objectives in implementing the Basic Agreement. South Korea sought to institutionalize exchanges

and cooperation with North Korea, while the latter wanted such an agreement with the South as a means of overcoming its crisis caused by the collapse of its communist allies. North Korea hoped that improved relations with the South would pave the way for its improving relations with the United States and Japan.

The Roh Tae Woo Administration laid the groundwork for unification with the proposal of the Korean National Commonwealth Formula for unification. Succeeding administrations inherited the unification formula, which is still valid as the South Korean government's official formula for unification. The Roh government opened an era of reconciliation and cooperation with North Korea by signing the historic Basic Agreement and the Joint Declaration on Denuclearization. North and South Korea held eight rounds of prime ministers' talks alternately in Seoul and Pyongyang. But at the eighth round of the prime ministers' talks held in Pyongyang in September 1992, in a period of conservative backlash in the South and increasing international pressure in the North over the nuclear issue, the two sides failed to agree on humanitarian projects, including exchange visits by separated families, establishment of a reunion center at Panmunjom, and reciprocal repatriation of South Korean seamen and a North Korean patriot long held in a South Korean prison. After the plan for an annual ROK–U.S. joint military exercise, “Team Spirit,” was announced, North Korea stated at the end of January 1993 that it would shut down all channels of meetings with the South.

Why did North Korea come to improve relations with its sworn enemy, South Korea? Due to German unification and the collapse of the Soviet Union and its socialist allies in East Europe, North Korea

faced a crisis of regime survival. According to Kim Jong U, North Korea's deputy chairman of the Committee for External Cooperation, North Korea lost almost 70 percent of its external markets with the collapse of the Soviet Union and its communist bloc countries.¹⁹ In his New Year address in 1991, Kim Il Sung turned defensive in his unification policy. Fearing unification through absorption, he proposed a "confederation under two governments and two systems," stressing that unification should not be achieved in the way that "one party eats the other, or one party is eaten by the other." In his previous proposal in 1980 for a Democratic Federal Republic of Koryo, he did not mention "two governments and two systems," presumably because he believed his socialist system would win over the South Korean system.

His fear for survival prompted him to improve relations with South Korea, as if he had followed Lenin's theory of a "breathing spell" in times of crisis or weakness. Kim Il Sung sought to prevent South Korea from containing or isolating North Korea, while obtaining assurance of coexistence and nonaggression from the South. He heartily welcomed the North Korean delegation to the prime ministers talks by sending a helicopter to bring members to Pyongyang after they had signed the Basic Agreement in December 1991. He must have been relieved of his fear of absorption by the South, as the North and South agreed "to recognize and respect each other's system (Article 1), not to interfere in each other's internal affairs (Article 2), and not to attempt any actions or sabotage or overthrow against each other (Article 4).

¹⁹ Kim Jong U, "North Korea's External Economic Policy," (paper, presented at Korea: Prospects for Economic Development, sponsored by Gaston Sigur Center for East Asian Studies, George Washington University, Washington, D.C., April 1996).

In addition, South Korea's normalizing relations with North Korea's allied countries were "a blow to North Korea's prestige"²⁰ and meant defeat in competition with the South. The Roh Administration succeeded in establishing diplomatic relations with two close allies of North Korea—the Soviet Union in 1990 and China in 1992—and thus created a favorable external environment for its unification policy. The normalization was a culmination of President Roh's *Nordpolitik*, a strategy to reach Pyongyang via Moscow and Beijing.

2. Kim Young Sam Administration

The Kim Young Sam Administration inherited the Roh government's unification formula, developing it into a three-phased approach to unification. The first phase consisted of reconciliation and cooperation, the second phase of the Korean commonwealth, and the final phase of a unified Korea of one nation, one state. During the first phase, North and South Korea were to overcome their hostility and mutual distrust and develop relations of reconciliation and cooperation through confidence-building measures. The Kim government set "the phase of reconciliation and cooperation" as the first stage for the sake of ensuring implementation of the Basic Agreement and the Joint Declaration on Denuclearization, which went into effect in February 1992 under the Roh government. Although the Basic Agreement was concluded and a number of inter-Korean talks on the governmental level were held during the Roh Administration, inter-Korean relations had not reached a satisfactory level of reconciliation and cooperation, which meant things were still stuck

²⁰ Lee Hong Koo, "Unification through a Korean Commonwealth," *Korea and World Affairs*, vol. 13, no. 4 (Winter 1989), p. 839.

in the first phase. The planned second phase of the Korean commonwealth would be similar to a confederative structure in which the two Koreas reached a wide range of agreements to augment a common sphere of living, and developed communities of economic, social, and cultural activities.

The Kim government set “democratic national consensus, coexistence and co-prosperity, and national well-being” as the three guiding principles in implementing the three-phased approach to a unification formula.

The Kim government took the initiative in promoting inter-Korean reconciliation by deciding on March 11, 1993, to repatriate to North Korea Ri In Mo, who had spent 40 years in a South Korean jail as a political prisoner, unwilling to renounce his allegiance to the North. Pyongyang had persistently asked the South for the return of the old communist prisoner. In his inaugural address, President Kim stated, “Any allied country cannot be better than the same nation,” hinting that he would move forward with the North Koreans. Regrettably, however, on March 12, 1993—in a move apparently planned for many months—North Korea announced its withdrawal from the NPT (Nuclear Non-Proliferation Treaty). It had refused to accept IAEA’s call for special inspection on “two undeclared facilities” in the North. Against this backdrop, President Kim’s attitude toward the North Koreans turned sour as he stated at a press conference marking 100 days into his presidency in June 1993 that “he [could not] shake hands with those who have nuclear weapons.” North Korea’s withdrawal from the NPT dealt a fatal blow to President Kim’s intention to promote reconciliation and cooperation with the North.

Working-level contacts for exchange of special envoys between North and South Korea to discuss the nuclear issue were held eight times from October 1993 to March 1994, but no agreement was reached. The vice minister-level contacts ended with the North Korean threat to “turn Seoul into sea of fire.” On the other hand, beginning in June 1993, the United States and North Korea held talks to resolve the nuclear issue, finally signing a historic “Agreed Framework” in Geneva in October 1994.

The North Korean nuclear issue was the source of a long-running dispute between Washington and Seoul. The liberal U.S. administration under President Bill Clinton pursued a comprehensive package deal with North Korea, including normalization of relations. President Kim opposed a direct deal between Washington and Pyongyang, particularly while inter-Korean relations remained stalemated. The United States felt it was crucial to negotiate with the North Koreans since it was in the United States’ interest to prevent North Korea from developing nuclear weapons and long-range missiles, which would undercut the NPT regime. Concern with the NPT was especially compelling since a renewal conference was scheduled for April 1995 to review and extend the NPT.²¹ As a result, South Korea felt marginalized in the process of the nuclear deal between Washington and Pyongyang, though U.S. delegates debriefed South Korean diplomats over the outcome of each day’s talks with the North Koreans. One of the reasons why President Kim did not

²¹ According to the UNODA, on May 11, 1995, the treaty was extended indefinitely. A total of 190 parties have joined the treaty, including the five nuclear-weapon states. More countries have ratified the NPT than any other arms limitation and disarmament agreement, a testament to the treaty’s significance. UNODA, *Non-proliferation of Nuclear Weapons (NPT)*, <<http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml>>. (Accessed on September 22, 2015).

appreciate the Agreed Framework was due to his wishful thinking about a possible collapse of the North Korean regime after the death of its founder Kim Il Sung in July 1994. In President Kim's calculation, "any American deal would help prop up a Pyongyang regime on the verge of collapsing, thus postponing reunification."²²

It is noteworthy that the Kim Young Sam government started preparing for possible unification, largely influenced by German unification and Kim Il Sung's death. From 1995 the Ministry of Unification (MOU) and related ministries defined specific scenarios for unification, ranging from gradual integration to radical German-type unification. For this purpose, the MOU trained officials from a dozen ministries and state-run think tanks and sent them overseas to do case studies for the transformation and integration process. In addition, all ministries designated a division that assumed responsibility for preparing for unification, although most of the ministries were not very active in fulfilling that mission.

The defection to Seoul in February 1997 of Hwang Jang Yup, a party secretary and architect of North Korea's *Juche* ideology, fed the Kim government's hopes for collapse of the Pyongyang regime. Hwang was the highest senior official to come over to the South. The Kim Administration legislated the Act on Protection and Settlement Support for North Korean Defectors in mid-July 1997, as the number of defectors was rising largely due to economic difficulties, including serious famine, in North Korea.

Before Kim Il Sung died of a heart attack, the South Korean govern-

²² Don Oberdorfer, *The Two Koreas: A Contemporary History* (Reading: Addison-Wesley, 1997), p. 358.

ment was excited over the prospect of progress made in its path toward unification at the upcoming inter-Korean summit meeting, the first of its kind since the division of the Korean Peninsula. The summit was arranged by former U.S. President Jimmy Carter during his meetings with Kim Il Sung in Pyongyang in mid-June 1994. The two Koreas agreed to hold summit talks between Kim Young Sam and Kim Il Sung on July 25~27, 1994. Former South Korean prime minister Lee Hong Koo, head of the South Korean delegation to the preparatory talks for the summit meeting, expressed his regret that “Kim Il Sung’s death led to cancellation of the summit, which could have marked a significant milestone in the history of inter-Korean relations.”²³ Lee’s analysis was that Kim Il Sung had intended to dramatically improve relations with the South and change the North Korean system radically, while trying to gain its economic assistance and normalize relations with the United States in return for denuclearizing the North. Negotiations over the terms of the summit meeting were very quickly concluded, and Kim Il Sung was supposedly making final preparations to entertain Kim Young Sam when he died. In other words, in June 1994 things had lurched back to a better place for North–South relations, and then lurched back again with Kim Il Sung’s death.

After Kim Il Sung’s death, inter-Korean relations went into a deep freeze due to North Korea’s strong resentment that the South Korean government refused to express condolences or allow South Koreans to pay tribute to the late Kim Il Sung. The issue of paying tribute ignited controversy and division among South Korean

²³ Lee Hong Koo, “South–North Summit Meeting: Regret and Wish,” *JoongAng Daily*, July 14, 2014.

political circles and public opinion. The conservative government succumbed to the temptation to assume that Kim Il Sung's death and the North's economic collapse—exacerbated by a disastrous famine—had created a real opportunity for unification. Seoul either did not know or underestimated the fact that Kim Jong Il had already been appointed heir apparent in the early 1970s and had been deeply involved in running the affairs of the state for almost two decades.

President Kim's policy for North Korea and unification was inconsistent and sometimes ambiguous. "President Kim was strongly willing not to isolate North Korea in the beginning," and it was possible that South Korea could have helped North Korea improve its relations with the United States and Japan.²⁴ Although North Korea's withdrawal from the NPT swept away such desire from President Kim, he nevertheless was opposed to military action, a conviction he demonstrated when he opposed U.S. preparations in early June for a surgical strike on North Korea's nuclear facilities.

Kim was reluctant to provide food assistance for the famine-stricken North Korea but suddenly decided to deliver 150,000 tons of rice without sufficient preparation in June 1995. He took a very nationalistic stance by insisting that South Korean food deliveries precede those from Japan. Yet when the international community began delivering food assistance to the North, which was hit by floods in 1995 and drought in 1996, Kim turned stingy. In early 1996, his government decided to donate only USD 3 million to the World Food Programme appeal for humanitarian aid to North Korea.

²⁴ Han Wan-Sang, *The Korean Peninsula Is Sick: Tragedy of Hostile Coexistence* (Seoul: Hanul, 2013), pp. 81–82.

Washington asked Seoul to give more, and it agreed to give additional food assistance worth USD 10 million through WFP in 1997.

On April 16, 1996, as a result of Seoul's concerns about appearing sidelined due to the U.S.–DPRK Agreed Framework, and the possibility of additional U.S.–DPRK bilateral discussions over the future of the 1953 Korean Armistice Agreement, U.S. President Clinton and President Kim jointly proposed the four parties—South Korea, North Korea, United States, and China—hold talks to discuss a peace mechanism on the Korean peninsula. The South Korean government considered the timing for this proposal favorable for the ruling party in the coming parliamentary election.²⁵ It wanted to demonstrate to the Korean voters that U.S.–ROK relations had improved after a rough patch.

3. Kim Dae Jung Administration

President Kim Dae Jung aimed at achieving de facto unification by political and military confidence-building, establishment of a peace system, bona fide inter-Korean economic, social, and other cooperation and exchanges, and external inter-Korean cooperation for common national interests. His unification policy announced on his inauguration day was based on three principles: no tolerance of military provocation, no pursuit of unification through absorption, and promotion of reconciliation and cooperation.

A liberal politician and expert on the unification issue, President Kim Dae Jung (commonly referred to as DJ) made considerable progress

²⁵ Jung Se Hyun, *Unification Talk* (Seoul: Seohaemunjip, 2013), pp. 300–305.

in inter-Korean reconciliation and cooperation. Above all, he pushed for the first ever inter-Korean summit meeting, which produced the North–South Joint Declaration of June 15, 2000. In the Joint Declaration, President Kim agreed with Kim Jong Il on the direction of unification, cooperation and exchanges in economic, civic, cultural, sports, health, environmental, and other fields, and governmental dialogue to implement their agreements. In particular, the two leaders agreed to promote unification based on their understanding that “there is a common element in the South’s concept of a confederation and the North’s formula for a loose form of federation.”

There have been conflicting interpretations regarding this agreement on a unification approach. Critics, including the conservative party, argued that President Kim was persuaded by Kim Jong Il to accommodate the North Korean unification formula of “Confederal Republic of Koryo,” which they claimed aimed at unifying Korea by communizing the South. Liberal circles, however, hailed the agreement for its common direction for unification. Lim Dong Won, the architect of the Joint Declaration and chief negotiator for the summit talks, stated the two leaders agreed to pursue unification gradually on a long-term basis in accordance with the South Korean unification formula of the Korean national commonwealth. He pointed out that although the North Korean unification formula of the Confederal Republic of Koryo seeks “first unification, and later exchanges and cooperation,” Kim Dae Jung persuaded Kim Jong Il to pursue a gradual unification through peaceful coexistence, and exchanges and cooperation with the South.²⁶

²⁶ Kim Dong Won, “20 Years of North–South Korean Relations and North Korean Nuclear Issue,” (lecture, National Assembly, July 2008).

The DJ Administration quickly put the Joint Declaration into action by promoting inter-Korean ministerial talks and various forms of exchanges and cooperation, including family reunions between North and South Koreans long separated after the Korean War. A key element stabilizing the situation and promoting interactions was ministerial-level talks and other working-level meetings between responsible authorities. During DJ's presidency, ministerial talks were held nine times, with the first taking place in Seoul in July 2000, soon after the summit. Ministerial talks were frequently followed up by a meeting of the Committee for Promoting Economic Cooperation for agreement on the logistical details for shipping South Korean rice and fertilizer to the North.

As a result of the summit, the two Koreas held their first defense minister's meeting and other military talks to discuss nonaggression and tension-reduction measures, as well as necessary steps to support joint economic projects, including the Kaesong Industrial Park, Mount Geumgang tours, and the linking of North–South railways. These three projects contributed to lessening tensions on the Korean peninsula and reawakening people's enthusiasm for unification. In significant symbolic gestures, North Korea moved its military units out of the Kaesong Industrial Complex and the Jangjin port at the foot of Mount Geumgang, both strategically important areas for North Korea.

In addition to delivery of rice and fertilizer for the North Koreans, the DJ government liberalized provisions for humanitarian assistance by South Korean NGOs and encouraged such nongovernmental aid by providing matching subsidies through government funds. Both government and civilian assistances were criticized by conser-

vative circles for propping up the North Korean regime, which they believed was on the verge of collapse. In fact, however, the government delivery of rice and fertilizer was linked with the humanitarian project of reuniting separated families, though such linkage was not publically acknowledged. Liberal circles claimed such assistance was essential as a peace dividend.

Improved relations with and humanitarian assistance from the South created favorable conditions for the North Korean regime to start economic reform at home and to improve relations with the United States. From mid-2002, Kim Jong Il introduced market elements into the North's planned economy by giving autonomy to managers of enterprises and allowing market activities. He authorized more power to his cabinet, led by the prime minister, in running the state economy at the expense of the party and military. Reconciliation and cooperation with the South made Kim Jong Il less afraid of the "capitalist yellow winds" from the South, a frequent target of ideologically focused propaganda.

President Kim's Sunshine Policy of engaging North Korea on a large scale would have been impossible without support from the U.S. government and improved relations between Washington and Pyongyang. After suspicion arose over North Korea's possible underground nuclear facilities at Kumchang-ri in August 1998, the U.S. administration asked former Defense Secretary William Perry to conduct a thorough review of its North Korea policy. During this so-called "Perry Process," the United States and South Korea consulted very closely and agreed on a road map to engage North Korea with a comprehensive approach. In accordance with a final report Perry issued and after consultation with South Korea, President

Clinton moved forward in normalizing relations with North Korea by exchanging visits of special envoys in the latter half of 2000. In the joint communiqué of October 12, 2000, the two sides agreed “to take steps to fundamentally improve their bilateral relations in the interests of enhancing peace and security in the Asia Pacific region,” and particularly “agreed on the desirability of greater transparency in carrying out their respective obligations under the Agreed Framework.” President Clinton had wished to visit Pyongyang, but gave it up in December 2000 after Republican candidate George W. Bush won the presidential election.

After President Bush took office in January 2001, President Kim had to struggle with the United States over how to deal with North Korea. President Bush took a hard-line posture toward North Korea based on the neo-con’s strategy of seeking regime change in North Korea.²⁷ Two incidents particularly stood as obstacles to Kim Dae Jung’s path toward a de facto unification process. The terrorist attacks on the World Trade Center buildings in New York and the Pentagon on September 11, 2001, profoundly shook the United States. In his State of the Union address in January 2002, President Bush stated one of his administration’s primary goals was “to prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction,” and he labeled Iran, Iraq, and North Korea as an “axis of evil.” It was revealed in October 2002 by the U.S. government that North Korea had secretly developed a nuclear weapons program based on HEU (highly

²⁷ Gary Schmitt and William Kristol stated, “The lasting solution to the threat they [North Korea and Iraq] pose is a change of regimes,” from “Lessons of a Nuclear North Korea,” *The Weekly Standard*, vol. 8, no. 7 (October 28, 2002).

enriched uranium) in what the Bush administration portrayed as a violation of the Agreed Framework. Conservatives in the administration used this as the excuse they had been waiting for to get out of the 1994 Agreed Framework with Pyongyang, setting in place a chain of events that culminated in the North Koreans withdrawing from the NPT, one month before the end of Kim Dae Jung's presidency.

4. Roh Moo Hyun Administration

President Roh Moo Hyun inherited his predecessor's Sunshine Policy and developed inter-Korean relations closer to the phase of "Korean commonwealth." The declaration of October 4, 2007 was agreed at the end of summit talks between President Roh and Kim Jong Il, and its implementation agreement, concluded at inter-Korean prime ministers talks, in November 2007 laid out comprehensive measures that, if executed well, were meant to lead the two Koreas to the stage of Korean commonwealth.²⁸

The Roh Moo Hyun administration called its engagement policy the Policy for Peace and Prosperity. The goals were promotion of peace on the Korean peninsula, pursuit of mutual prosperity for North and South Korea, and contribution to prosperity in Northeast Asia. Three action plans were set to accomplish these goals: (1) peaceful resolution of the North Korean nuclear issue and promotion of peace, (2) expansion of inter-Korean cooperation and laying the foundation for a durable peace regime, and (3) conclusion of an inter-Korean peace agreement and creation of a durable peace regime.

²⁸ Lim Dong Won, in meeting with the author, July 2008.

As it committed itself, the Roh government succeeded in pushing for a breakthrough for a resolution of the North Korean nuclear issue by the agreement on the joint statement at the Six-Party Talks on September 19, 2005. In the joint statement, the six countries agreed to the verifiable denuclearization of the Korean peninsula in a peaceful manner and the promotion of economic cooperation in the fields of energy, trade, and investment. North Korea and the United States undertook steps to normalize their relations. Until the last minutes of the agreement, the United States and North Korea had not narrowed their differences over two issues—North Korea’s right to peaceful uses of nuclear energy and provision of light water reactors to North Korea, and a permanent peace regime on the Korean peninsula. In the end, an agreement was made over these issues. The provision of the LWR was deferred to be discussed at an appropriate time, while the directly related parties would negotiate a permanent peace regime at an appropriate separate forum.

The September 19, 2005, statement was a great accomplishment, as North Korea committed to abandoning all nuclear weapons and existing nuclear programs and returning to the NPT and to IAEA safeguards. Former minister of unification Lee Jong Seok described the statement as a “historic agreement to drastically change the security map on the Korean peninsula and Northeast Asia.” He stated, “The statement had been implemented well; we could now see a permanent peace regime and a Northeast Asian multilateral the security cooperation system in place.”²⁹

However, an unexpected stumbling block rolled in, dashing hopes

²⁹ Lee Jong Seok, *Peace on the Sword* (Goyang: Gaemagowon, 2014), p. 339.

for an end to the North Korea nuclear issue by the implementation of the joint statement. On September 15, the U.S. Treasury Department designated the Banco Delta Asia (BDA) in Macau as a financial institution of primary money-laundering concerns. Subsequently, BDA froze North Korea's 50 bank accounts with a deposit of USD 24 million. North Korea reacted vehemently to the move and seized the opening presented by BDA to advance its nuclear weapons program to a new and more dangerous phase.³⁰ On October 9, 2006, North Korea conducted its first nuclear test, and several days later, the UN Security Council adopted its resolution (1718) to impose strong diplomatic and economic sanctions on North Korea.

North Korea's nuclear test and the departure of hard-liner senior U.S. officials, including Defense Secretary Donald Rumsfeld, brought changes of U.S. policy toward North Korea. Ironically the nuclear test "gave Washington the opportunity to significantly alter the U.S. approach to North Korea."³¹ U.S. officials resumed direct contact with North Korean counterparts in Beijing three weeks after the test and in Berlin in January 2007. Implementation agreements were made at the Six-Party Talks in February and in early October 2007 when the second inter-Korean summit meeting took place in Pyongyang. Accordingly, the North Koreans would disable all their nuclear programs by year's end and make a declaration of their past nuclear activities. In return, the United States agreed to remove North Korea from its list of state sponsors of terrorism and lift other sanctions, including the Trading with the Enemy Act against North Korea.

³⁰ Don Oberdorfer and Robert Carlin, *The Two Koreas: A Contemporary History*, 3rd ed. (New York: Basic Books, 2014), p. 411.

³¹ *Ibid.*, p. 417.

One of the greatest achievements of the Roh Moo Hyun government on its path toward unification was active economic cooperation with North Korea on three major fronts - Kaesong Industrial Complex (KIC), the Mount Geumgang tour project, and linking cross-border roads and railways. These three cooperative projects contributed to reducing tensions and promoting peace on the Korean peninsula.

An administrative agency called Kaesong Industrial District Management Committee (KIDMAC) was established in October 2004 to manage registration of firms, labor supply, and infrastructure, including electricity and water. The first product came out of the KIC in December 2004. By the end of President Roh's term, 65 companies were in operation with about 23,000 North Korean workers in the KIC. From September 2003, Mount Geumgang tours by land began, and the total number of tourists to this beautiful spot reached 1.7 million by the end of 2007. The construction to link roads across the DMZ in the west and the east of the Korean Peninsula was completed in November 2004, and the railway linking both sides was completed in December 2005. Joint ceremonies by the two Koreas to commemorate the first test run of trains on the cross-border railways took place in May 2007, and freight trains started operation across the border in December 2007.

The North's October 2006 nuclear test was seized on by conservative circles in South Korea as proof that the Roh government's engagement policy toward North Korea had failed. At National Assembly sessions, the opposition party strongly attributed the nuclear test to the failed engagement policy of the Roh government and demanded that it scrap the engagement policy, which the con-

servative party had never favored to begin with. However, Unification Minister Lee Jong Seok made it clear that “though there could be some modification of policy reflecting the post-nuclear test situation, no change will be made in the basic tenets of the engagement policy.”³²

The Roh government’s endeavor to develop inter-Korean relations into the phase of “national commonwealth,” or a confederative structure, nearly bore fruit during the second inter-Korean summit and ensued implementation meetings between the two side’s prime ministers. Yet the timing was bad. The summit meeting came too late in its term for the Roh administration to implement any agreement. However, the October 4 declaration was very comprehensive and specific, ranging from creation of a special peace and cooperation zone in the West Sea and a Joint Committee for Inter-Korean Economic Cooperation to promote humanitarian cooperation, including expanding reunion of separated family members.

A noteworthy institutional accomplishment of the Roh government was that the South Korean National Assembly passed the Law on the Development of the South–North Korean Relations in December 2005, a few months after the six-party joint statement was released. The law specified basic principles for developing inter-Korean relations, modalities for appointing delegations to inter-Korean dialogues, and legislative procedures for inter-Korean agreements. By obligating the government to report to the National Assembly its plan to develop inter-Korean relations, the law laid a foundation for the government to pursue a long-term biparti-

³² Lee Jong Seok, *Peace on the Sword*, pp. 512–513.

san policy on North Korea and unification. Regrettably, however, the Committee of Foreign Affairs and Unification of the National Assembly dominated by the conservative opposition party refused to discuss the government plans to develop inter-Korean relations in November 2007 after the October North–South summit had opened the door to progress.

During the Roh administration, there was a big gap between the United States and South Korea over dealing with North Korea. The relations between the two traditional allies became difficult and uncomfortable. Roh wanted to engage the North Koreans, but knew that Washington would be unhappy unless there was progress on the nuclear issue first. That is why President Roh was unhappy when the North announced in February 2005 that it was a nuclear state and why success at the Six-Party Talks in September 2005 was such a relief, only to be dashed a day or two later when the United States announced the BDA measures.

Over the issue of frozen North Korean assets connected with the BDA affair, President Roh met President Bush in mid-November 2005 at the APEC meeting in Kyongjoo, the capital of the old Shilla dynasty, and asked him to lift sanctions connected to BDA, which had dealt a serious blow to the Six-Party Talks. Roh pointedly even asked the U.S. president whether it was a “coincidence that the BDA action and the September joint statement came together.”³³ “It was one of the worst meetings the two ever had.”³⁴

According to the former unification minister Lee, the BDA action by

³³ Lee Jong Seok, *Peace on the Sword*, p. 346.

³⁴ Oberdorfer and Carlin, *The Two Koreas*, p. 410.

the United States prevented two “amazing achievements of the Roh government” for peace on the Korean peninsula—the September 19 joint statement and a tentative agreement with Pyongyang to hold the summit meeting in the fall of 2005—from bearing fruit.³⁵ BDA short-circuited Roh’s plans to move ahead with the North once progress on the nuclear issue left him freer to do so. Eventually, the United States backed away and transferred the frozen assets back to the North, but by then considerable time and a potentially useful window of opportunity for North–South progress had slipped away. President Roh came close to accusing Washington of having wrecked his policy when he said in December 2006 that “if you look at it in a bad light, you may say [the Treasury and the State Departments] were playing a prearranged game.”³⁶

Although President Roh expressed his resentment with the United States over North Korean issues, he was well aware of the importance of the U.S.–ROK alliance and, thus, decided to dispatch non-combat medical and construction units to Iraq and started negotiations for the FTA with the United States. However, his relationship with President Bush was as bad as the one between President Kim Young Sam and President Clinton. President Bush asked Roh to “conduct inter-Korean exchanges and cooperation in light of developments on the North Korean nuclear issue,”³⁷ while President Kim Young Sam had asked the Clinton administration to link U.S.–

³⁵ Lee Jong Seok, *Peace on the Sword*, p. 353.

³⁶ President Roh’s remarks at the standing committee meeting of the National Unification Advisory Council, December 22, 2006.

³⁷ Joint statement between the United States and the Republic of Korea released at the conclusion of a summit meeting at the White House on May 14, 2003.

North Korean ties with inter-Korean relations. Regarding the KIC, the U.S. administration pressed the Roh government to slow down the pace of developing the industrial park. But when Unification Minister Chung Dong Young visited Washington, D.C. in June 2004 and met with Secretary of State Colin Powell and Secretary of Defense Donald Rumsfeld, he persuaded them to render cooperation. Specifically, South Korea needed U.S. approval—stipulated in the U.S. export regulations—for delivering equipment using U.S. technology to the KIC.³⁸ Washington approved such deliveries.

During the Roh administration, there were many joint events with the North Koreans, including regular joint commemorative events held alternately in the North and South to celebrate the June 15 joint declaration and Korea's August 15 National Liberation Day. North Korea dispatched a cheering squad numbering in the hundreds to the 2003 Summer Universiade in Daegu. Exchange of visits by large groups across the border assured people of both North and South Korea of the homogeneous nature of the nation and possibly of early peaceful unification.

5. Lee Myung Bak Administration

The first ever North Korean nuclear test became a central element in President Lee Myung Bak's North Korea policy. As part of his election campaign platform, he announced "Vision 3000 through Denu-

³⁸ Chung Dong Young and Ji Seung Ho, *Unification in 10 Years* (Seoul: Salimteo, 2013), pp. 90–100.

clearization and Openness.”³⁹ This plan linked inter-Korean economic cooperation with denuclearization in order, first of all, to resolve the North Korean nuclear issue. The “vision” rejected his predecessor’s engagement policy of unconditionally funneling massive humanitarian assistance to North Korea.

President Lee proclaimed “the policy of mutual benefits and common prosperity” at his address on July 11, 2008, at the National Assembly. Lee noted the importance of the 1991 Basic Agreement.⁴⁰ In fact, his concepts of “benefits” and “prosperity” were developed from the two key words found in the Basic Agreement: “exchanges” and “cooperation.” As tools to pursue mutual benefit and common prosperity, the Lee administration used the three pillars of his vision for denuclearization of North Korea, the opening of North Korea, and development of the North Korean economy.

Despite its priority on denuclearization, the Lee administration did not make much progress in the issue. Rather, denuclearization became more difficult because, following North Korean leader Kim Jong Il’s stroke in August 2008, U.S.–DPRK relations deteriorated, and on May 25, 2009, the North conducted a second nuclear test. Against this backdrop, the Lee government proposed a comprehensive package deal called a “Grand Bargain” on September 21, 2009, to induce North Korea’s complete and verifiable denuclearization.

³⁹ Presidential candidate Lee Myung Bak announced this policy on June 14, 2007, which meant if there was progress in denuclearization of North Korea and its opening to the international community, the Lee administration would assist North Korea in achieving its economic growth with USD 3,000 per capita income.

⁴⁰ Suh Jae Jean, *The Lee Myung-bak Government’s North Korea Policy* (Seoul: KINU, 2009), p. 10.

The Grand Bargain outlines “big action for big action” between North Korea and the other five parties. Denuclearization measures would consist of North Korea’s irreversible steps from the initial stage, which would be linked to the corresponding measures (security assurances, normalization of relations and economic assistance) by the five parties.⁴¹

Prior to the Grand Bargain proposal, President Lee elaborated on August 15, possible inter-Korean cooperation projects in economy, education, finance, infrastructure, and improving living standards if North Korea abandoned its nuclear weapons program. But North Korea rejected these proposals by repeating its old position that the nuclear issue should be discussed between the United States and North Korea. In addition, it insisted that a peace treaty should be concluded before denuclearization on the Korean peninsula.

Like his predecessors, President Lee pursued a summit meeting with the North. The death on August 18, 2009, of former president Kim Dae Jung provided an opportunity for the two Koreas to have high-level talks in Seoul, both public and behind the scenes. After a chilly period in 2008 and early-2009 prompted in July 2008 through the killing of a tourist by the North Korean army at Mount Geumgang, things began warming up again in the summer of 2009, with Clinton’s visit to Pyongyang for the release of two U.S. journalists held in captivity in North Korea. DJ’s death provided an opportunity for the North to move that process one step ahead by sending a high-rank-

⁴¹ Republic of Korea, Ministry of Foreign Affairs, *Grand Bargain*, <<http://www.mofa.go.kr/webmodule/htsboard/template/read/engreadboard.jsp?typeID=12&boardid=318&seqno=309478>>. (Accessed on September 5, 2015).

ing delegation to Seoul. The North Korean delegates dispatched on funeral mission, including Kim Yang Gun, head of the Department of the United Front, paid a courtesy call on President Lee on August 23, 2009, carrying a message from Kim Jong Il, and talked about a possible summit meeting.

On October 18, Kim Yang Gon and South Korean Minister of Labor Im Tae Hee met secretly in Singapore where they reached temporary agreements on holding summit talks within the year. The two Koreas held working-level meetings two times in Kaesong in November to materialize the temporary agreement, but failed to reach any final agreement. According to President Lee, the deal ended in vain because the North Koreans demanded too much compensation for the summit meeting, including the delivery of 500,000 tons of rice and corn and 300,000 tons of fertilizer.⁴² But Minister Im's explanation about the compensation differed from the president's. According to him, the North Koreans agreed to something similar to the German *Freikauf* (free trade between political prisoners and material aid) approach. In this case, South Korea would provide food assistance in return for North Korea's humanitarian gestures regarding South Korean POWs still in the North, abducted persons, and separated families.⁴³

Secret talks between the two Koreas on a summit continued but ultimately foundered. The heads of the two side's security agencies

⁴² Lee Myung Bak, *President's Time 2008~2013* (Seoul: Random House Korea, 2015), p. 335.

⁴³ Don Oberdorfer and Robert Carlin, *The Two Koreas*, p. 444; in Minister Yim's interview with a South Korean monthly magazine, "In an Interview with Ex-Minister Yim on Closed inter-Korean Negotiations," *Shindonga*, vol. 641 (February 2013), pp. 88-90.

met to discuss the idea of another inter-Korean summit. According to President Lee, a senior official from the South Korean National Security Agency visited Pyongyang in July 2010 and discussed a summit meeting and modalities for North Korea's expressing regret over the sinking of Cheonan, an ROK navy corvette that the North torpedoed in March 2010 with a loss of 46 sailors. In turn, a high-ranking North Korean security official visited Seoul on December 5, 2010, shortly after the shelling of Yeonpyong Island.⁴⁴ It was alleged by the spokesperson of the National Defense Commission of North Korea on June 1, 2011, that secret talks between senior officials of the two Koreas took place again in May 2011 to discuss an inter-Korean summit meeting.

It seems to me that the Lee Myung Bak administration could not move ahead in engaging with the North Koreans for two reasons: first, because of the Cheonan and Yeonpyong-do incidents, which were the most serious military attacks on South Korean citizens and territory since the Korean War, and second, due to wishful thinking that the North was near collapse following Kim Jong Il's stroke in August 2008. Senior officials in Seoul thought Kim would not last long and that they should be prepared for any contingencies as the regime imploded.

In retaliation for the sinking of the Cheonan in March 2010, South Korea imposed sanctions on North Korea on May 24, 2010, banning all inter-Korean exchanges and cooperation except the joint venture at Kaesong. Eight months later, on November 23, North Korean

⁴⁴ Lee Myung Bak, *President's Time 2008~2013*, pp. 355~356; Minister Yim said the Lee government tried talks three times to agree on a summit meeting. "In an Interview with Ex-Minister Yim on Closed inter-Korean Summit," *Shindonga*, vol. 643 (April 2013), pp. 130~131.

artillery shelled Yeonpyong Island in the West Sea. Two soldiers and two civilians were killed. Regarding North Korea's motivation for the two provocations, President Lee denied any allegation that his hard-line policy toward Pyongyang should be blamed. He referred to a history of North Korean provocations including naval clashes in the West Sea and the first nuclear test during the Kim Dae Jung and Roh Moo Hyun administrations. He attributed the provocations to internal problems in Pyongyang, but provided no details.⁴⁵

The Arab Spring, including the Jasmine Revolution in Tunisia at the end of 2010 and in Egypt in January 2011, and pro-democracy protests in China in 2011 fed Seoul's wishful thinking on the possible collapse of unpopular dictatorship in the North. On September 25, 2012, President Lee told members of his National Unification Advisory Council that "unification will come just like a thief" and that "the wind of democratization is blowing now and no country in the world can resist it."

The Lee government shifted its policy focus from "managing division," or "development of inter-Korean relations," to unification preparations. In his commemorative speech for Liberation Day in August 2010, President Lee stressed that "a new paradigm in inter-Korean relations should aim at peaceful unification, transcending management of division," and proposed the establishment of "peace community," "economic community," and "national community." These community ideas were intended to put into practice the Korean National Commonwealth Unification Formula.⁴⁶ Lee suggested a broad discussion take place regarding realistic preparation

⁴⁵ Lee Myung Bak, *President's Time 2008-2013*, p. 353.

⁴⁶ *Ibid.*, pp. 363~364.

for unification, including a “unification tax.” Preparation for unification became a priority for the Ministry of Unification in the last two years of the Lee administration. The ministry spent millions of dollars contracting research on peace, economic, and national communities and on estimates of unification costs. At the same time, the government started raising funds for unification. President Lee donated his monthly salary to the fund, and his cabinet members naturally followed his lead. In December 2010, the Lee government submitted to the National Assembly a draft law to create an account for the unification fund. As of today, however, the bill has not yet been reviewed by the parliamentarians.⁴⁷

Most inter-Korean festive events to commemorate the June 15 joint declaration and the August 15 Liberation Day have evaporated, partly due to the Lee government’s reluctance to respect the joint declaration and largely due to the May 24 sanctions. A key issue that has divided the North and South Korean governments over the past eight years has been whether to respect the June 15 joint declaration and the October 4 declaration. Conservative circles in the South did not support these two legacies left by the progressive governments. President Lee showed his distaste for the two declarations by attempting to abolish the Ministry of Unification upon his election in late 2007. The Minister of Unification was in charge of chairing preparatory meetings attended by related ministries, including the Ministry of Finance and Economy, for the 2007 summit talks as well as for implementing the October 4 declaration.

⁴⁷ President Park Geun-hye expressed a negative response to the fund and bill, thus dampening efforts by the Ministry of Unification to raise funds for unification.

IV. Conclusion - Policy Recommendations

Seeing Germany unified, the Koreans believed a peaceful unification would be possible on the Korean Peninsula. But Germany and Korea are more different than they are similar. Therefore, German experiences might not be useful for South Korean unification policy. As Egon Bahr noted, however, “Unification would not be a single act, but a process with many steps and stops.” Thus, despite differences, we can draw very important lessons for South Korea. Unification policy should remain consistent and ideally bipartisan despite changes of government. In particular, the South Korean government, the National Assembly, and the civic society should build consensus on key elements of unification policy, that is, inter-Korean dialogue, humanitarian assistance, and alliance relations.

All South Korean presidents after Roh Tae Woo have accepted the Korean National Commonwealth Unification Formula as an official unification formula. The Basic Agreement, the “Sunshine Policy” of Kim Dae Jung, the October 4 joint declaration of Roh Moo Hyun, and Lee Myung Bak’s proposal for peace, economic, and national community were all fundamentally based on Roh Tae Woo’s unification formula. In addition, there is consistency in terms of goals in their unification policies despite differences in policy direction or implementation. All governments aimed to induce change in both the North Korean regime and society. In terms of direction, the conservative governments under Kim Young Sam and Lee Myung Bak resorted to pressure and containment to bring a North Korean regime undergoing serious economic difficulties to its knees. Their policy focused more on unification than management of division or improvement of

inter-Korean relations. On the other hand, the governments under Roh Tae Woo (conservative), Kim Dae Jung (liberal), and Roh Moo Hyun (liberal) pursued engagement with North Korea, expecting gradual changes of the regime and society.

Why were there differences between the policy of the liberals and the conservatives? The first reason has to do with different expectations on the future of North Korea. Kim Young Sam and Lee Myung Bak thought it was more likely that North Korea would collapse soon and put greater stress on preparation for unification rather than on the development of inter-Korean relations. On the other hand, presidents Roh Tae Woo, Kim Dae Jung, and Roh Moo Hyun believed that North Korea would gradually change, probably and hopefully following the Chinese or Vietnamese model, if they could effectively influence the regime's policy choices by creating the right environment. Thus, their policy placed priority on engaging North Korea to improve inter-Korean relations, something that would inevitably promote chances of unification. At the least, they believed a wide range of agreements and cooperation between the North and South and establishment of a peace mechanism would bring the two Koreas to the phase of Korean commonwealth, tantamount to a de facto unification.

Nevertheless, the choice was not only in Seoul's hands. The North Korean regime also affected the South's policy direction. South Korean governments tended to react to North Korea's behavior instead of taking proactive action pursuant to their strategy or grand design. For instance, North Korean provocations like the sinking of Cheonan poisoned the atmosphere for inter-Korean exchanges and cooperation.

In addition, the U.S. policy for North Korea has been a wild card in shaping South Korean policy for North Korea and unification. Discord arose between the conservative government in Seoul and the liberal administration in Washington, and vice versa, over dealing with North Korea. The Bush Administration's policy of seeking regime change in North Korea slowed the pace of reconciliation and cooperation between the two Koreas.

Second, different unification policies had much to do with partisan interest and ideological division in South Korea. Thus, in order to secure consistent, bipartisan unification policy, domestic political culture—which tends to be confrontational and uncompromising—should be changed. Put another way, “a unification-friendly political system” needs to be created. In addition to deep ideological differences, political circles in Korea are so fractured by region, blood, and school that consensus or compromise can hardly be achieved in the National Assembly. To change such culture, the election system itself will have to be revised so that one party cannot dominate a specific electoral district. The current election system of “winner takes all” gives rise to a zero-sum game in politicking. We should seriously consider introducing a German-type electoral system, under which one party can hardly win a majority in a district and needs to seek a coalition with other parties to form a ruling government.

When political culture supports coalitions or partnerships, there will be a better chance for bipartisan policy on critical state affairs, including unification. For instance, a five-year plan and an annual plan for developing inter-Korean relations pursuant to the law for the development of inter-Korean relations should be discussed and agreed on at the National Assembly. The Korean national common-

wealth has survived as an official unification formula under six different governments since its birth in 1989, “because the four parties agreed to the formula at the National Assembly.”⁴⁸

The South Korean government should work out a sustainable plan for developing inter-Korean relations pursuant to the relevant law that is supported by all political parties. In this context, the plan should contain three key elements for the unification policy. If future South Korean governments pursue a coherent policy of promoting these three elements, mutual trust and a sense of community will be enhanced between the two Koreas, ultimately advancing democratic and peaceful unification.

The first key element is that channels for dialogue should always remain open between the two Koreas. “Even sworn enemies would not shoot each other while they are talking.” This is an old German saying that Lothar de Maiziere, the last prime minister of East Germany, would want to tell leaders of both North and South Korea.

The North Koreans tend to use dialogue to extract assistance or political gains from South Korea and other countries. Therefore, they usually set preconditions for participating in talks or they propose talks after raising tension or creating a crisis to raise the ante. For these reasons, skeptics, arguing “no talks for talk’s sake,” gain the upper hand over proponents for dialogue.

Nevertheless, for several reasons, South Korea should open dialogue channels, whether public or secret, particularly at this juncture when the situation in North Korea is foggy and unpredictable.

⁴⁸ Lee Hong Koo, in meeting with the author, September 2015.

- 1) South Korea needs to diversify means of collecting information regarding North Korea. But that does not mean official and unofficial channels of communications with the North Koreans should be taken lightly. Experience has demonstrated that these channels are one of the most useful sources of information.
- 2) Dialogue is a very useful means of understanding each other, thus avoiding misunderstanding and miscalculation. When relations remain tense and hostile, conflicts are more likely to happen.
- 3) The two Koreas need to recognize each other as they are. In particular, wishful thinking of the collapse of the North Korean regime should be avoided, although contingency plans should be quietly prepared to cope with various scenarios. When the two Koreas are engaged in dialogue, “slandering” of the other side—a constant problem—diminishes.
- 4) North and South Korea can prevent neighboring powers from intervening in the process of unification. If there is no channel for dialogue between the two Koreas, in case of any contingency taking place in Pyongyang, stake-holding countries might intervene, greatly complicating the unification process. South Korea can claim the principle of self-determination, but it would not be persuasive without inter-Korean dialogue to discuss specific steps toward unification. The German experience seems especially relevant on this point.

The second key element is that South Korea should continue to provide humanitarian assistance to North Korea. The Lee Myung Bak Administration discontinued large-scale rice and fertilizer assistance, allegedly over concerns that such aid might be diverted to feed the military and consequently to prop up the Kim regime. Furthermore, the Lee government raised the bar for humanitarian assistance by South Korean NGOs, which were allowed to deliver only selected items even for the vulnerable portions of the population, including children.

It should not be ignored that the South Korean government has legal responsibility for feeding hungry North Koreans. According to its constitution (Article 3), South Korea has claimed sole representation over the North Korean population. Thus, the North Korean people should be treated as South Korean nationals. North Korean defectors are received into South Korea as South Korean nationals, just as the East German defectors enjoyed West German citizenship. Some experts argue that South Korea may be able to intervene in emergency situations in North Korea to protect its own nationals pursuant to its constitution. In the same vein, South Korea is responsible for feeding North Koreans suffering from hunger.

In addition, humanitarian assistance should be provided to the North Koreans for the sake of facilitating democratic unification. In terms of self-determination, North Korean citizens have the right to decide their future. There would be nothing better than having North Korean citizens decide to be unified with South Korea when given a chance to vote for unification. To this end,

North Korea policy should be geared to win the hearts of the North Koreans. The North Korean regime has spared no efforts to infuse hostility into their citizens' hearts against South Korea and the United States. By providing humanitarian aid, South Korea should turn hostile sentiment into a sense of affinity. Such assistance will not only help loosen North Korean hostility toward or fear of South Koreans but help educate the North about better living conditions in the South.

In terms of unification cost, the price would be high for a unified Korea to cure malnutrition, physical disabilities, and other afflictions of the younger generation in North Korea, unless South Korea provided medical, nutritional, and other necessary assistance now.

The third key element is that South Korea must strengthen its traditional alliances with the United States and Japan, while improving relations with China and Russia. Unlike Germany, South Korea needs not gain formal or legal approval for its unification from these powers. Nevertheless, the South should increase diplomatic efforts to win diplomatic and financial support for unification. No one would deny that the friendliest ally in support of unification is the United States. South Korea should increase bilateral consultation with the United States regarding strategies to achieve unification and to avoid possible emergency scenarios, including finding ways to handle nuclear weapons in North Korea.

It is no less important to explain to neighboring countries how Korean unification will satisfy their national interests. China is concerned about a potential flow of North Korean refugees and

possible movement of U.S. forces up to its border with Korea. In this regard, it would be beneficial to promote public diplomacy by creating an advisory group for unification, either multilateral or bilateral, composed of former senior officials or celebrities from the abovementioned four powers.

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Developing a Law and Global Governance Approach to Korean Unification and Inter-Korean Relations

Joseph Harte

I. Introduction

In this chapter, I attempt to flesh out some ideas about the usefulness of a law and global governance approach to Korean Unification and inter-Korean relations. This is not because I feel that the outcome of such an exercise would simply make for an interesting think piece. It is because I am convinced that the answers to the questions that have plagued the peninsula for over 70 years lie squarely in that direction.

So much of the discussion on the two Koreas, including unification, the nuclear issue, economic development and human rights is grounded in classic international relations theory and international law. This is in spite of the fact that everyday these theories and norms are observed to be crumbling around us.¹ By now it

¹ See generally, Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order," *The European Journal of International Law*, vol. 17, no. 1 (2006), pp. 1~13.

should be apparent to all observers that it is no longer the case that the world is changing. Instead, the world *has* changed. Numerous commentators these days like to talk about the UN becoming irrelevant in the face of intense economic and political globalization. I often wonder if this apparent irrelevance is actually due to the fact that the UN has ultimately fulfilled its original purpose and the world has simply moved on. It may be that the world is now asking for much more than the UN ever promised.²

In terms of global finance, manufacturing and trade, the story is similar. Those engaged in the global economy on a daily basis understand that a shift has taken place, while those in charge of formulating and implementing meaningful economic law and policy continue to view the world in strictly geographical terms. Writing on the state of American versus global manufacturing, Thomas Friedman wrote a few years back, “There is today an enormous gap between the way many CEO’s in America look at the world and how the average congressman, senator or president looks at the world. They literally are looking at two different worlds...” He notes that while politicians continue to see the world divided into blocs of voters living in specific geographies, the world of the CEO is now so integrated that they rarely talk

² See Thomas G. Weiss, “What Happened to the Idea of World Government,” *International Studies Quarterly*, vol. 53 (2009), p. 257 (“The supply of essential global public goods lags far behind the demand today, and tomorrow’s needs will only be more pressing and more transnational.”). For a discussion of related topics and a rather advanced proposal, see Richard Falk and Andrew Strauss, *A Global Parliament: Essays and Articles* (Berlin: Committee for a Democratic UN, 2011).

about “outsourcing,” since in their view there is no “out” and no “in.”³ According to Victor Fung, chairman of one of Hong Kong’s oldest textile manufacturers, “The whole notion of an ‘export’ is really disappearing.”⁴

This failure to recognize a permanent shift in the state of the global system goes for the Korean division as well. The conceptual framework that continues to underpin the prevailing approach is the very framework that made such an awful situation possible in the first place. A world viewed through the lens of multilateral power politics, geographical blocs and economically bounded populations is the only world in which a continued division of a population claiming 5,000 years of shared history can even make sense. In a world of vastly increased political cooperation, regional integration and fading economic boundaries, the continuation of such a division makes no sense at all. Just as the Korean division is a relic of the Cold War, so is the outdated conceptual framework that stubbornly persists in the search for a viable solution.

Law and global governance theory offers a viable and contemporary alternative. It moves beyond the aging paradigm of a patchwork international system made up of frightened and isolated

³ Thomas L. Friedman, “Made in the World,” *New York Times*, January 28, 2012, <www.nytimes.com/2012/01/29/opinion/sunday/friedman-made-in-the-world.html?_r=0>. (Last accessed November 15, 2015).

⁴ Friedman, “Made in the World.” For a full discussion on this point, i.e., the disjuncture between international relations theory and the state of the global system, see Bruce W. Jentleson, “The John Holmes Memorial Lecture: Global Governance in a Copernican World,” *Global Governance*, vol. 18 (2012), pp. 133–148.

states each desperately fighting for its own survival.⁵ Instead, it posits that there is an inherent ordering that takes place in all human societies as they reach greater and greater levels of complexity, and now that the world is moving toward consolidation in the direction of a single, though still multi-variant society through the forces of economic, social and political globalization, so too is the inherent ordering that has quickly followed.⁶ This chapter argues that the solution to improved inter-Korean relations and ultimate unification lies squarely in the present, not the past.

The first part of the chapter sets out a working definition of what I mean by a “law and global governance approach.” This constitutes

⁵ See Klaus Dingwerth and Phillip Pattberg, “Global Governance as a Perspective on World Politics,” *Global Governance*, vol. 12 (2006), p. 193 ([T]he concept of global governance seems more capable [than classical international relations theory] of accounting for the ‘crazy-quilt nature’ of contemporary world politics.”). See also, James N. Rosenau, “Governance in the Twenty-first Century,” *Global Governance*, vol. 1, no. 1 (1995).

⁶ Though perhaps inapplicable to a discussion on the emerging institutional order evoked by notions of “global governance,” Hayek’s work on spontaneous social ordering provides a useful inroad. See generally, Friedrich A. von Hayek, *Law, Legislation and Liberty, Vol. 1* (London: Routledge & Kegan Paul, 1973). For a discussion on Hayek’s concepts of spontaneous social order, see John Gray, *Hayek on Liberty* (London: Routledge & Kegan Paul, 1984), pp. 27~55. On the evolution of political orders, see Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: Farrar, Straus and Giroux, 2011). On the continuity and evolution of the current world system, see generally Andre Gunder Frank and Barry K. Gills, “The 5,000-year World System: An Interdisciplinary Introduction,” in *The World System: Five Hundred Years or Five Thousand?* eds. Andre Gunder Frank and Barry K. Gills (New York: Routledge, 1996), pp. 3~58. For a specific illustration of increasing global complexity leading to increased legal ordering, see Deborah Hensler, “How Economic Globalization is Helping to Construct a Private Transnational Legal Order,” in *The Law of the Future and the Future of the Law*, eds. Sam Muller, et al. (Oslo: Torkel Opsahl Academic Epublisher, 2011).

a substantial portion of the chapter since (1) the development of what is intended by the concept “law and global governance” is itself in its infancy and (2) it is nonetheless essential to work out a useful conceptual framework going forward. The second part sets out the approach as it might apply to inter-Korean relations. It attempts to demonstrate how a law and global governance approach is useful in searching out new solutions and strategies that are better aligned with the opportunities presented by the contemporary global system. It is suggested that a law and global governance approach offers not only an opportunity for strengthening inter-Korean relations, but also a more granular and particularized approach to a previously monolithic problem that has been stuck in the trap of outdated theories regarding inter-state motivations and in the limitations of classical theories of international law.

II. “Law and Global Governance” Defined

First, I will sketch out what I mean by global governance as I use that term. This is followed by an exploration of law and global governance theorizing as an approach to unifying international relations and international law in an era where the two can no longer exist as separate fields of inquiry.

1. Global Governance as Integrated, Institutional Interdependence

As most will know, the term “global governance” has had many uses

over time, some very general, some very specific.⁷ In my own view, what the term is essentially attempting to capture is the idea that the world community is experiencing a growing level of integration *in terms of the various international and domestic political and economic structures through which the world is governed*. I want to emphasize the phrase “structures through which the world is governed.” These structures constitute the institutions and practices that populate the international landscape and are therefore the primary channels through which the emerging global order has been and is being constructed.

In straightforward geopolitical terms, it is possible to characterize “global governance” as essentially an institutional approach to global politics, which is ultimately a classical international relations way of looking at things. But I think that characterization really only captures the “governance” aspect of the concept, since it merely captures the functional output of the system as a whole. What makes the subject *global* is its attempt to capture the identifiable and growing interdependence among these insti-

⁷ The seminal work on global governance as a notion separate from the concept of government and inter-state relations is James N. Rosenau and Ernst-Otto Czempiel, *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992). For a substantial review of the multiple uses of the term in the decade following, see Klaus Dingwerth and Phillip Pattberg, “Global Governance as a Perspective on World Politics,” *Global Governance*, vol. 12 (2006), pp. 185~203 (attempting to construct a more specific definition of the term in response to Finkelstein’s observation that “Global governance appears to be virtually anything”). Lawrence S. Finkelstein, “What is Global Governance?” *Global Governance*, vol. 1, no. 3 (1995), pp. 367~372. For a recent review, see Sophie Harmon and David Williams, “Introduction: Governing the World?” In *Governing the World?: Cases in Global Governance*, eds. Sophie Harmon and David Williams (New York: Routledge, 2013), pp. 1~10.

tutions. Something classic international relations theory simply cannot digest.⁸

Some examples of the broadest international institutions to date include of course the WTO, the IMF, the UN, the EU, and the ICJ. These are institutions that in and of themselves deal with specific governance objectives, and hence constitute the governance part of international governance. However, when we speak of these institutions in the context of *global* governance, the sense is that they are (1) in fact, *governing globally* and (2) *ultimately tending toward a single system*.⁹

On the first point, we can say these institutions are “governing globally” not because they are simply institutions that govern on some ethereal “global plane.” But rather, because they are global institutions that direct and guide the decisions and planning of their constituent members through the application of agreed upon norms. What else could such an institution be? They are institutions that are directing their members from an authority status

⁸ For a discussion of global governance as an analytical concept that provides a perspective on world politics different from the more traditional notion of “international relations,” see Klaus Dingwerth and Phillip Pattberg, “Global Governance as a Perspective on World Politics,” *Global Governance*, vol. 12 (2006), pp. 185–203 (“[Global governance] differs from the state-centric perspective of seeing world politics as essentially “international relations.”).

⁹ This second notion is reflected in the growing literature on the “global legal order.” It is a notion that suggests that what is emerging is not just a mosaic of overlapping, pluralistic legal regimes, but rather a totality of governance viewed from the point of view of the whole. For an accessible and thorough discussion of the global law perspective, see William Twining, “Globalisation and Law: Ten Theses,” in *The Law of the Future and the Future of the Law: Volume II*, eds. Sam Muller, et al. (The Hague: Torkel Opshal Academic EPublisher, 2012), pp. 27–38.

that is higher than any single member. This authority is indeed a *conferred* authority, as opposed to a *sovereign* authority, but it is nonetheless a *higher* authority when it executes the functions for which it was designed. Thus, these institutions are governing by function and globally authoritative by agreement, i.e., they are governing globally.

On the second, and perhaps more controversial point,¹⁰ these institutions and the interactions among them are ultimately moving toward a single or unified system of governance.¹¹ This is because they borrow from each other in terms of institutional framing, the logic of their relationship to their constituent members, and in substantive decision-making.¹² Where one institution is faced with a dilemma that is impeding its ability to carry out its function, it naturally looks to another for possible solutions. The adoption of a borrowed solution raises the level of consistency between the relevant institutions going forward. This contributes to an emerging body of norms and practices that is nowhere codi-

¹⁰ For a starkly critical view of this development, see B.S. Chimni, "International Institutions Today: An Imperial Global State in the Making," *The European Journal of International Law*, vol. 15, no. 1 (2004), pp. 1~37.

¹¹ It is important to note that the emergence of a "single system" does not imply, nor is it intended to imply, the emergence of a "world government." The distinction between a unified system of order and the construction of a formalized, elected, empowered and democratically accountable government at the global level is vast. For a discussion on the relationship between the term "global governance" and notions of "world government" popular circa 1930~1940, see Weiss, "What Happened to the Idea of World Government," pp. 253~271.

¹² For illustration, see Abigail C. Dushman, "Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture," *European Journal of International Law*, vol. 22 (2011), pp. 1089~1113.

fied yet everywhere followed.¹³ This, of course, is quite similar to the history of early legal development in both civil and common law systems.

It is important to note at this point that the term global governance often refers to not only the sorts of formal and immediately recognizable institutions represented by those cited above. It is also about the less formal ways in which states attempt to manage their transnational and international relationships through both direct and cooperative influence.¹⁴ The “global” element in this informal context refers to the fact that states themselves, similar to the emerging practice of international institutions, are governing, in both their domestic and international reach, in a manner that is more and more globally consistent. Which is to say, the actions and expected actions of a larger and larger number of players is beginning to show greater consistency across different circumstantial contexts.

It should also be noted that the term “governance” in discussions of global governance often refers as well to the contributions of an expanding international civil society. That is, the term “global governance” is often used to capture the activities and contributions of

¹³ This, of course, can also lead to the problem of fragmentation. In the history of law and legal institutions, it is safe to argue that only the presence of a true governing authority leads to the correction of inefficient divergences. For a discussion on overlapping legal regimes, fragmentation and “international government,” see Joel P. Trachtman, *The Future of International Law: Global Government* (Cambridge: Cambridge University Press, 2013).

¹⁴ Rosenau, *Governance Without Government: Order and Change in World Politics*. See also, Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) (Identifying the international system as networks of both formal and informal actors).

non-state actors to governing outcomes at the international level. However, in this author's view, such an expansive view of "governance" raises some very serious questions as to what we mean by "governing," and whether the term should be limited to the role and function of public entities who hold the proper public mandate for the responsibilities they carry out. While non-state actors, such as the many NGOs that do invaluable work on the international level, have great and consequential influence on governance outcomes, it is confusing the roles of the various actors in public life to say that these entities are "governing." Obviously, this is a discussion that is beyond the scope of this chapter. For purposes of this chapter, the definition of governance is primarily limited to the activities of formal, publicly mandated institutions.

Thus, given the institutional emphasis in the context of a globalizing system of world governance, it is possible to view the phenomenon of "global governance" as essentially the emergence of a single system of governance through the growth of integrated international and domestic institutional interdependence. The term "global governance" is obviously a much more convenient shorthand for this understanding of the current state of world order.

2. Law and Global Governance

Bringing now law into the picture the growth of "greater consistency across different circumstantial contexts" cited above is in the simplest of terms, precisely the function of law. Law serves to memorialize a set of agreed upon norms by which all those who partake in the system to which they are subject can judge and decide upon

their own actions, while determining the meaning of the actions of others. In the loosest sense, this is what is meant by “order.” This I think is perhaps the greatest contribution the UN has made to international society. While it has not necessarily formed a body of law in the same sense that a sovereign nation legislates, it has nonetheless created an emerging sense of continuity and consistency in expectations across the many different venues, contexts and circumstances, both formal and informal, through and in which states now engage and interact with each other. This in itself is a form of “legalizing,” though it is not “law” in the traditional sense.¹⁵

Hence, when we add law and legal theory to the global governance concept, what we are getting at is the way in which global institutional interdependence both impacts, and is impacted by, developments in domestic, transnational, and international norms and practices. To illustrate: the development of treaties or agreements (law) and international bodies (institutions) in itself creates, strengthens and alters the way actors behave toward one another in their international relations (global politics). These alterations in turn lead to the establishment of norms (legalization), which in turn influence national politics and shape the development and implementation of domestic policy and norms (domestic law).¹⁶

¹⁵ For theories of legalization in international politics, see Kenneth W. Abbot and Duncan Snidal, “Law, Legalization and Politics: An Agenda for the Next Generation of IL/IR Scholars,” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), pp. 33–56.

¹⁶ For an insightful discussion of the relationship among these norms, see generally Eyal Benvenisti, *The Law of Global Governance* (The Hague: Hague Academy of International Law, 2014).

Thus, the pursuit of legal ordering is itself a form of political settlement. One of the most essential qualities about law is that it is addressed to the specific, while retaining generalized statements of agreed upon norms. As such, the creation of law requires the making of specific, identifiable decisions. This is because in its most developed form it requires us to actually write something down (or to at least isolate specific principles in the case of unwritten law). In the writing down, we are forced to decide what the precise wording will be. When this is done among a group of negotiating parties, be they national legislators or international representatives, a dialogue emerges that is focused on parsing out the difference in various positions until an agreed upon set of norms that is satisfactory to all, though satisfying to none, is reached. Thus, the process of lawmaking, or “agreement crafting” on the international plane for lack of a better term, is itself a problem solving process that is fully an expression of political stabilization.

From the foregoing, it should be plain that “law and global governance” is essentially “law and politics” on a global scale. At the highest level of analysis, it becomes a debate about where these two fields of inquiry ultimately cross and overlap.¹⁷ Law and global governance as a discipline therefore provides a framework for bringing together both legal specialists and specialists in various non-legal fields such as political science, economics, history, etc. It provides an umbrella concept for the unification of international

¹⁷ For a thorough discussion of this question in the context of international relations and international law, see Abbot and Snidal, “Law, Legalization and Politics: An Agenda for the Next Generation of IL/IR Scholars.” See also, Kenneth W. Abbot et al., “The Concept of Legalization,” in *Legalization and World Politics*, eds. Judith L. Goldstein, et al. (Cambridge: MIT Press, 2001).

relations and international law research, resulting in a unified field of analysis that is ultimately far more insightful than the sum of its parts.¹⁸

III. Law and Global Governance as Applied to Inter-Korean Relations

So what does this mean for unification and inter-Korean relations? In terms of inter-Korean relations specifically, law and global governance provides a framework for exploring new perspectives and solutions that are far more consistent with the state of the world in the 21st century than the world in which the problem was created. For example, we've already seen the recent impact of the UN Human Rights system on the North Korean Human Rights issue, a topic taken up by Cho Jung-hyun in this volume.¹⁹ This is a perfect illustration of a law and global governance outcome having an impact on inter-Korean relations, since it involves the coordination of both international and domestic institutions, based on a framework with its source in international law, to address an issue that has significant influence on both inter-Korean relations and

¹⁸ For discussion, see Jeffrey L. Dunoff and Mark A. Pollack, "International Law and International Relations: Introducing an Interdisciplinary Dialogue," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), pp. 3~32.

¹⁹ Jung-hyun Cho, "Recent International Responses to the North Korean Human Rights Situation," in *Inter-Korean Relations and the Unification Process in Regional and Global Contexts*, eds. Jong-Chul Park and Joseph Harte (Seoul: KINU-CKLS, 2015).

regional order. While there are arguments on all sides of the political spectrum as to the value and impact of this outcome, it cannot be denied that it represents an attempt to access a globalizing set of institutions to address an issue of inter-Korean concern that has failed to find a solution through classically based efforts in international relations.

But what about the other major global institutions? For example, is there nothing the international financial institutions can do to facilitate better inter-Korean relations or bring North Korea “into the fold”? This may seem like a reach or even a question that is asked too soon, but it illustrates the gaping hole that exists in the search for possible solutions when we fail to consider the emerging opportunities offered by the currently existing global governance mechanisms.²⁰ Thus, the question for a law and global governance approach to inter-Korean relations and unification is how might the current globalized legal and institutional order be better utilized, and further developed, to promote and facilitate more peaceful inter-Korean relations, East Asian regional stability vis-à-vis South-North cooperation and meaningful prospects for unification? This is the key question I am raising in this chapter.

1. North Korean Participation in Global Governance Institutions

Obviously, any inquiry into the potential for a better use of law and

²⁰ Douglas Arner has tackled this very question head-on in his contribution to the present volume. Douglas W. Arner, “Global and Regional Financial Governance: Implications for Inter-Korean Relations and the Unification Process,” in *Inter-Korean Relations and the Unification Process in Regional and Global Contexts*, eds. Jong-Chul Park and Joseph Harte (Seoul: KINU-CKLS, 2015).

global governance mechanisms to address inter-Korean issues must begin with a review of the North's current membership in existing international institutions, since these organizations constitute the '*situs operandi*' of formal global governance participation. According to the CIA Factbook, the DPRK is currently a member of 26 international organizations.²¹ A number of these organizations represent areas of international cooperation that have a highly practical nature, such as the Universal Postal Union (UPU), the International Organization for Standardization (ISO), and the International Civil Aviation Organization (ICAO). Others have a much broader mandate and concern issues and activities of a more politically sensitive nature, such as the ASEAN Regional Forum (ARF), the Group of 77 (G-77), and of course, the United Nations. Organizing these institutions along a line of degree from "practical" to "politically sensitive" suggests a strategy for accessing the existing global governance framework to promote greater inter-Korean development. Organizations closer to the "practical" end offer opportunities for trust-build-

²¹ ASEAN Regional Forum (ARF), Food and Agriculture Organization of the United Nations (FAO), Group of 77 (G-77), International Civil Aviation Organization (ICAO), International Red Cross and Red Crescent Movement (ICRM), International Fund for Agricultural Development (IFAD), International Federation of Red Cross and Red Crescent Societies (IFRC), International Hydrographic Organization (IHO), International Maritime Organization (IMO), International Mobile Satellite Organization (IMSO), International Olympic Committee (IOC), Inter-Parliamentary Union (IPU), International Organization for Standardization (ISO), International Telecommunications Satellite Organization (ITSO), International Telecommunication Union (ITU), Nonaligned Movement (NAM), United Nations (UN), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific, and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), World Tourism Organization (UNWTO), Universal Postal Union (UPU), World Federation of Trade Unions (WFTU), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO). "The World Factbook," CIA, <<http://www.cia.gov/library/publications/the-world-factbook/geos/kn.html>>. (Last accessed November 15, 2015).

ing on issues that are less emotionally charged with greater levels of predictability and a potentially greater volume of regular interaction.²² Strengthening these areas first serves to establish a foundation for expanding efforts into more politically sensitive areas. Of course, any proposal for increased interaction or engagement in these areas requires a thorough review and evaluation of past and current efforts along these lines.

In this context, it is important to emphasize that it is critical that the “law” element of the law and global governance equation remain firmly intact. This is to say that even with a strategy that begins on the most practical levels, it is important that any engagement is founded upon a negotiated agreement with articulated expectations, limitations and mechanisms to address misunderstandings. As indicated above, it is the working out of articulated agreements, i.e., the very process of “lawmaking,” that constitutes a critical part of discussing differences and proposing solutions. Without this element, any engagement with the North simply returns to classic international relations theory and I have already argued the 70 years of failure that has resulted from this approach. Seventy years ago, international relations theorists may have had a point when arguing that international law (loosely defined) had very little relevance or reliability in a world dominated by the realities of geopolitics. In 2015, that view is no longer valid. International law, both hard and

²² On the trust-building policy agenda of the current ROK administration, see Park Geun-hye, “A New Kind of Korea: Building Trust Between Seoul and Pyongyang,” *Foreign Affairs*, vol. 90, no. 5 (2011), pp. 13–18. See also Jong-Chul Park, “A Search for Introducing Confidence-Building Measures and a Peace Regime on the Korean Peninsula,” in *Inter-Korean Relations and the Unification Process in Regional and Global Contexts*, eds. Jong-Chul Park and Joseph Harte (Seoul: KINU-CKLS, 2015).

soft, now has a complex grid of international institutions, practices and even civil society networks that provide support, legitimacy and identifiable consequences when it comes to addressing agreed upon expectations. The key at this stage in the evolution of the global system is to define those expectations through negotiated arrangements and embed those expectations into the larger, integrated world order that has emerged in the 21st century. The existing order is certainly nowhere near that of a state with a superior enforcing authority, but it is not necessary (nor advisable according to many) to have such an authority in today's thickly integrated legal order.

What is essential is the articulation of expectations. In the past, the South and North have reached working agreements but they have consistently lacked definition. While this may be a reflection of cultural attitudes toward the desirability of law as a guiding principle on the one hand, or the inability to reach anything greater due to a lack of political will on the other, what is important is that such general agreements are avoided going forward. The viability of articulated expectations is precisely what a "law and global governance" approach offers. If the desire is to capitalize on the current state of the global legal order to bring the inter-Korean relationship into the matrix of 21st century governance, agreements that reflect the current state of global legalization must be sought and utilized for the benefit of both sides. Anything less is a return to 20th century IR failures.

Returning to the discussion of institutional membership, a law and global governance approach suggests that a useful strategy is to pursue cooperative efforts where the ROK and DPRK share

membership in the same international organization. While an overlap in institutional membership between the ROK and the DPRK is not a prerequisite for global governance efforts by the larger community, since the international community has its own interests in bringing North Korea “into the fold,” the inter-Korean issue is by definition a fundamentally Korean problem and ultimately must be decided by the Koreans themselves. Thus, it is important to identify the international institutions that are shared by both sides.

The CIA Factbook lists 76 international organizations of which the ROK is a member.²³ Comparing this list to that of the DPRK, we can find 23 organizations in which the ROK and DPRK are both members.²⁴ Efforts at bringing the inter-Korean relationship into a law and global governance framework should begin with

²³ Asian Development Bank (ADB), African Development Bank Group (AfDB) (nonregional member), Asia-Pacific Economic Cooperation (APEC), Arctic Council (observer), Association of Southeast Asian Nations Regional Forum (ARF), Association of Southeast Asian Nations (ASEAN) (dialogue partner), Australia Group, Bank for International Settlements (BIS), Community of Democracies (CD), Conference on Interaction and Confidence-Building Measures in Asia, Colombo Plan (CP), East Asia Summit (EAS), European Bank for Reconstruction and Development (EBRD), Food and Agriculture Organization (FAO), Financial Action Task Force on Money Laundering (FATF), Group of Twenty Finance Ministers and Central Bank Governors (G20), Inter-American Development Bank (IADB), International Atomic Energy Agency (IAEA), International Bank for Reconstruction and Development (IBRD), International Civil Aviation Organization (ICAO), International Chamber of Commerce (ICC), International Criminal Court (ICt), International Red Cross and Red Crescent Movement (ICRM), International Development Association (IDA), International Energy Agency (IEA), International Fund for Agricultural Development (IFAD), International-Finance Corporation (IFC), International Federation of Red Cross and Red Crescent Societies (IFRC), International Hydrographic Organization (IHO),

International Labour Organization (ILO), International Monetary Fund (IMF), International Maritime Organization (IMO), International Mobile Satellite Organization (IMSO), International Criminal Police Organization (Interpol), International Olympic Committee (IOC), International Organization for Migration (IOM), Inter-Parliamentary Union (IPU), International Organization for Standardization (ISO), International Telecommunications Satellite Organization (ITSO), International Telecommunication Union (ITU), International Trade Union Confederation (ITUC), Latin American Integration Association (LAIA), Multilateral Investment Guarantee Agency (MIGA), United Nations Mission for the Referendum in Western Sahara (MINURSO), United Nations Stabilization Mission In Haiti (MINUSTAH), Nuclear Energy Agency (NEA), Nuclear Suppliers Group (NSG), Organization of American States (OAS) (observer), Organization for Economic Cooperation and Development (OECD), Organization for the Prohibition of Chemical Weapons (OPCW), Organization for Security and Cooperation in Europe (OSCE) (partner), Pacific Alliance (observer), Paris Club (associate), Pacific Islands Forum (PIF) (partner), Permanent Court of Arbitration (PCA), South Asian Association for Regional Cooperation (SAARC) (observer), Central American Integration System (SICA), United Nations (UN), United Nations–African Union Mission in Darfur (UNAMID), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific, and Cultural Organization (UNESCO), United Nations High Commissioner for Refugees (UNHCR), United Nations Industrial Development Organization (UNIDO), United Nations Interim Force in Lebanon (UNIFIL), United Nations Mission in Liberia (UNMIL), United Nations Mission in the Republic of South Sudan (UNMISS), United Nations Military Observer Group in India and Pakistan (UNMOGIP), United Nations Operation in Côte d'Ivoire (UNOCI), World Tourism Organization (UNWTO), Universal Postal Union (UPU), World Customs Organization (WCO), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO), World Trade Organization (WTO), Zangger Committee (ZC). "The World Factbook," CIA, <<http://www.cia.gov/library/publications/the-world-factbook/geos/2017.html>>. (Last Accessed Nov 15, 2015).

- 24 ASEAN Regional Forum (ARF), Food and Agriculture Organization of the United Nations (FAO), International Civil Aviation Organization (ICAO), International Red Cross and Red Crescent Movement (ICRM), International Fund for Agricultural Development (IFAD), International Federation of Red Cross and Red Crescent Societies (IFRC), International Hydrographic Organization (IHO), International Maritime Organization (IMO), International Mobile Satellite Organization (IMSO), International Olympic Committee (IOC), Inter-Parliamentary Union (IPU), International Organization for Standardization (ISO), International Telecommunications Satellite Organization (ITSO), International Telecommunication Union (ITU), United Nations (UN), United Nations Conference

these institutions. Again, my comments above regarding the range of practical versus politically sensitive areas and the primacy of early trust-building apply.

Where the DPRK and the ROK do not overlap in membership, a useful strategy for the South is to pursue efforts at actively persuading the North to seek membership in organizations of which the South is already a member, where relevant and appropriate. This offers a significant opportunity for trust-building since it suggests the South's willingness to support greater participation by the North in global governance institutions while implying a closer relationship with the North in the target institution's activities vis-à-vis other members. Of course, this latter course requires a greater awareness of political sensitivities from all sides, the obvious one being issues related to security, and is therefore not advised until at least the practical relationships in the shared organizations cited above have been reliably expanded and strengthened.

Finally, the focus on international institutions offered by a law and global governance approach suggests a further advantage to strengthening the South-North relationship in shared organizations and increasing the number of organizations that the North and South share. When both the ROK and the DPRK belong to any one organization, the international community that shares that organization has a greater opportunity to collaborate and coordinate with both together on the target issues of the organization. This has two

on Trade and Development (UNCTAD), United Nations Educational, Scientific, and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), World Tourism Organization (UNWTO), Universal Postal Union (UPU), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO), *ibid.*

advantages. First, it strengthens the place of inter-Korean relations in the emerging global order. As global institutions negotiate and settle issues that have a direct or indirect influence on the inter-Korean relationship, settlements reached will naturally include principles, rules or norms that take into account the inter-Korean relationship. Over time, these norms harden into practice and a global legal order develops that is accommodative to and supportive of inter-Korean concerns. This is not to say that the inter-Korean divide would or should therefore become permanent. Rather, it means that the principles that lead to greater integration and ultimate resolution of the inter-Korea question become a fixture of the global system itself. This is preferable to the current situation whereby the problem, as an existential concern for the Korean people, is ignored by the international community far more often than it should be.

The second advantage is to the long-term development of the inter-Korean relationship. When the international community is able to collaborate and coordinate with both the ROK and the DPRK in the same organization, the two sides have an opportunity to develop their approach to the demands of the global environment in a coordinated fashion. This is not at all to say that the advantage is to create some sort of coordinated counter-balance to the pressures of the organization. This kind of thinking is again a throwback to 20th century concepts of international power politics. What is possible instead is the coordination of South and North efforts in a manner that assures consistency, as opposed to conflict, with the emerging global order and thereby securing the synergies of that order to the advantage of the Korean Peninsula.

2. Inter-Korean Relations and the Global Governance Agenda

A final consideration for developing a law and global governance approach to inter-Korean relations involves a review of the global governance agenda to identify those issues that have (1) particular relevance to the development of inter-Korean relations and the promotion of unification, or (2) the potential for productive outcomes that contribute to a greater level of cooperation at the regional or global level. As may be imagined, the purview of issue areas that are now addressed by some form of global governance regime, institution, network or agreement reaches into practically all areas of modern life. These include trade, the financial system and capital movement, the environment and climate change, health care and disease control, agricultural and food management, economic and social migration, terrorism and other forms of criminal activity (politically or religiously motivated, or otherwise), human rights in their various civil, political, economic, social and cultural manifestations, humanitarian intervention and assistance, and management of ocean resources and maritime traffic, to name just a few of the more immediate concerns.²⁵ Broader concerns include the promotion of global justice and fair trade, rule of law development, economic development and stability, and democratic accountability in the very instruments and institutions

²⁵ For a useful treatment of a range of typical global governance concerns, see Harmon and Williams, eds., *Governing the World?: Cases in Global Governance* (studies in security, development, financial governance, corruption, trade, labor, communications, health, climate change, human rights, and migration).

of global governance itself.²⁶

Applied to the promotion of inter-Korean relations and unification, some areas ripe for expansion are obvious, while others are not.²⁷ The most obvious were mentioned previously and involve those of an economic nature. The need for greater engagement with North Korea, both by the South and the international community at large, in the areas of trade and finance is obvious and is consistent with the history and development of increased international integration and cooperation in other parts of the world.²⁸ Where there is increased cooperation, it has always had its roots in the economic domain.²⁹ Less obvious areas include the environment and management of ocean resources. These are areas that are not as uniquely sensitive to political concerns as some other areas, but offer ample room for coordination of inter-Korean policy proposals and agenda development in the relevant governance institutions. The point is to identify and explore significant areas of the global governance agenda that provide an opportunity for cooperative and coordinated agenda building contributions by the two Koreas to the development of

²⁶ On fair trade and global justice, see generally Barry K. Gills, ed., *Globalization and the Global Politics of Justice* (London: Routledge, 2008). On democratic accountability in global governance, see Falk and Strauss, *A Global Parliament: Essays and Articles*.

²⁷ For a sampling of governance issues specific to Asia, see G. Shabbir Cheema, Christopher A. McNally and Vesselin Popovski, eds., *Cross-border Governance in Asia: Regional Issues and Mechanisms* (Tokyo: United Nations University Press, 2011).

²⁸ The classic example is the development and evolution of the European Union.

²⁹ On economic integration in East Asia, see generally Ross P. Buckley, Richard Weixing Hu and Douglas W. Arner, *East Asian Economic Integration: Law, Trade and Finance* (Cheltenham, U.K.: Edward Elgar, 2011).

the emerging global governance system. The ultimate goal is to engage in these activities not only for the very real practical gains for the peninsula going forward, but also for the even more critical gains in trust-building.

IV. Conclusion

From the South's perspective, seeking greater utilization of the existing global framework presupposes a greater level of engagement with the North. There is obviously much to be said about refraining from such engagement until all outstanding security issues are fully addressed. To be absolutely clear, this chapter does not suggest that those efforts should in any way be sidelined or suspended. In fact, in the same way that a law and global governance approach requires the settlement of agreements with clearly articulated expectations, engagement with North Korea makes no sense without clearly defined, and clearly addressable, security assurances.

However, to suspend all engagement with North Korea until such assurances are absolute is not only unrealistic but more importantly, unproductive. Such an approach stems from a zero-sum international relations theory that is becoming largely irrelevant in an interconnected, interdependent, and therefore inter-accountable world. Seeking and promoting greater North Korean involvement in the emerging global order leads to greater predictability, and therefore greater stability in the

region.³⁰ This is not only because greater order leads to greater stability, but more importantly, because it is far more consistent with the world *as it is* than the world *as it was*.

³⁰ It also provides the South with additional opportunities to strengthen its leadership role in the region. See Jose Guerra Vio, “South Korea’s Leadership in East Asia: A Middle Power Advancing Regionalism,” in *Asian Leadership in Policy and Governance*, eds. Evan Berman and M. Shamsul Haque (Bingley: Emerald, 2015).

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B. Regional Cooperation, Inter-Korean Relations and the Unification Process



Novus Ordo Seclorum: Regional Interests in Korean Unification

Sue Mi Terry

I. Introduction

An independent, unified Korea, if and when it takes form, will mark a geopolitical shift in the region equal to or even eclipsing previous changes in the status quo: the Korea-Japan War of the 1590s, the Sino-Japanese War of 1894~1895, the Russo-Japanese War of 1904~1905, and the division of Korea and the ensuing Korean War in the mid-20th century. Historically, the vicissitudes of political fortune attendant to change in the regional balance have not been kind to Korea. Japan's invasion of Korea in 1592 presaged the long decline of the Chosun dynasty and the collapse of Korea's patron state, Ming China, leading to two devastating Manchu invasions in 1627 and 1636. The two wars waged by Meiji Japan in the late 19th and early 20th centuries spelled the end of an independent Korea and deprived the Korean nation of its sovereignty. Liberation in 1945 came at the price of partition and then the Korean War.

The next change in the status quo in Korea and the region, most likely the outcome of the political collapse of the Democratic People's Republic of Korea, will beget an autonomous and unified Korean state, the likes of which the world has not seen before: a Korea with a well-educated and hard-working population of approximately seventy-five million people and an economic standing in the world that surpasses that of most nations in Europe, with considerable natural resources (mostly in the North), advanced technology, and armed forces that are among the largest and most capable in the world. And when that happens, the past century or more, from the de facto loss of Korean sovereignty in 1905 to the day when unification takes place, may come to be remembered as an extended period of gestation for the emergence of an affluent, democratic Korean state and a new order for Northeast Asia.

This chapter explores the geopolitical impact on the region of unification both during the creation of a unified Korean state and in its aftermath. It first addresses how the United States and the regional powers currently view the prospect of Korean unification and how their conflicting views and interests regarding Korean unification may hinder the unification process. It then addresses the potential impact of Korean unification on the region, including how it will impact the balance of power; how China may try to reassert itself in the Korean Peninsula in the wake of the loss of its tremendous political and economic influence over North Korea; how Japan sees and may try to prevent the emergence of a unified Korea closely aligned with a hostile power (that is, China); how the United States may try to exploit the new regional dynamic by reinforcing its strategic posture in Korea and the Asia-Pacific vis-à-vis China; and, finally, how a unified Korea might handle its relations with the United States and

its powerful neighbors. In addition to these strategic implications, Korean unification will also mean the deliverance from bondage of over 20 million people living in North Korea. The human rights implications of Korean unification as well as other benefits of Korean unification to the region will also be addressed.

II. Regional Powers' Conflicting Interests and Views on Unification

Much of the success or failure of Korean unification will depend on the support and close cooperation of the United States as well as of the other regional powers. The consequences of a poorly planned response to instability or regime collapse in North Korea preceding unification are potentially devastating. Strong coordination and cooperation among the great powers will be essential to mitigating the harmful consequences of unification and ensuring that Korean unification winds up benefitting the entire region.

But how much are the United States and the regional powers prepared to support Korean unification? If and when that time comes, will these powers be able to work together effectively? Will the United States and the rest of the region see the net benefits of the unification of the two Koreas outweighing their respective security concerns? Currently standing in the way of regional cooperation are very different interests and assessments that divide the United States and the regional powers over whether and how to intervene in the North preceding unification. How do the various players view the prospect of unification?

1. China

On September 3, 2015, President Park Geun-hye was the only leader of an American ally to attend the massive military parade staged by Beijing to mark the 70th anniversary of the end of World War II. To many, her attendance, along with the leaders of states such as Russia, Venezuela, and Sudan, highlights the increasingly close nature of the South Korea–China relationship now that China has become South Korea’s top trade partner. In 2013, the total trade volume between China and South Korea surpassed \$270 billion, which is more than the value of South Korea–U.S. and South Korea–Japan trade combined.¹ Now that a South Korea–China free-trade deal has been signed, Seoul’s trade ministry estimates that bilateral trade will grow to over \$300 billion a year.²

But there is another factor that helps to explain President Park’s decision: She was seated prominently on the dais overlooking Tiananmen Square, next to Chinese President Xi Jinping’s wife, while her opposite number—Kim Jong-un of North Korea—was not in attendance at all. North Korea did send a delegation led by Choe Ryong-hae, one of Kim Jong-un’s closest confidantes (who now appears to have been purged), but its attendance was overshadowed by the prominence accorded to South Korea’s president. Back in Pyongyang, Kim must have been furious at this slight from North Korea’s

¹ Lee Kangkyu, “Discussion Nears Conclusion on China-South Korea FTA,” *Asia Briefing: Business Intelligence from Dezan Shira and Associates*, October 10, 2014; R.S. Kalha, “Chinese President Xi Jinping’s Visit to South Korea,” IIT Madras China Studies Center, July 9, 2014.

² Shannon Tiezzi, “It’s Official: China, South Korea Sign Free Trade Agreement,” *Diplomat*, June 2, 2015.

only real ally. That, in fact, may have been a large part of the reason why President Park was willing to grace Beijing's propaganda show. By cultivating a closer relationship with Beijing, she is hoping to change the very fabric of Sino–North Korea relations and ultimately retain Chinese support for Korean unification.

The only reason China is willing to risk international opprobrium and costly bills for continuing to support the Stalinist state in Pyongyang is that the Chinese leadership fears the emergence on its border of a unified, pro-Western Korean state—especially if that state continues to host U.S. troops. By cultivating a closer relationship with Beijing, President Park is hoping to assuage such fears, potentially making the Chinese leadership more comfortable with shifting its North Korea policy and acquiescing to Korean unification.

Yet President Park's efforts notwithstanding, Beijing simply does not yet see Korean unification as being in its interests; it fears, in particular, the instability that would precede any unification scenario. From Beijing's perspective, since North Korea is situated on China's doorway, not only could instability south of the Yalu River emit northward, including massive refugee flow that would add to the tens of thousands of North Korean refugees who already reside in China, but also any military actions by the United States and its South Korean ally in the event of a North Korean regime collapse would send shockwaves rumbling across the Sino–North Korean border. In Beijing's mind, the prospect of instability in North Korea means the disintegration of the North Korean barrier—"lips" to China's "teeth"—and raises the specter of U.S. and South Korean forces operating north of the demilitarized zone. To the Chinese leadership, this would raise the same concerns that prompted Mao

Zedong to intervene in the Korean War in 1950.

In addition, China's apprehension is geostrategic, as it is concerned about the possibility of a unified Korea metamorphosing into a "pawn" in the U.S.-led strategy of strategic containment of China.

As a result, despite all the rhetoric about supporting peaceful Korean unification, in reality Beijing supports the status quo, thus perpetuating the division in the Korean Peninsula. China, above all, wants to ensure a friendly nation on its northeastern border that would provide a buffer between China and the democratic, pro-America South Korea, home to 28,500 American forces.

For this reason, China continues to subsidize North Korea. North Korea depends on China for up to 90 percent of its energy supply, 80 percent of its consumer products, and 40~45 percent of its food supply.³ An estimated 80 percent of North Korea's foreign trade is conducted with China, with North Korea importing from China items such as oil, pork, electronics, and farming machinery, while exporting to China fish, low-grade steel, and minerals.⁴

China is also the biggest, most significant, and most consistent for-

³ Emma Chanlett-Avery, et al. "North Korea: U.S. Relations, Nuclear Diplomacy, and Internal Situation," *Congressional Research Service*, December 5, 2014, p. 10. For background information, see also Dick K. Nanto and Mark E. Manyin, "China-North Korea Relations," *Congressional Research Service*, December 28, 2010.

⁴ Chanlett-Avery and Rinehart, "North Korea: U.S. Relations, Nuclear Diplomacy, and Internal Situation," *Congressional Research Service*, December 5, 2014, p. 10. For background information, see also Nanto and Manyin, "China-North Korea Relations," and Trevor Park, "Lips and Teeth: Chinese-North Korean Trade and Foreign Direct Investment's Impact," *U.S.-Korea 2012 Yearbook*, U.S.-Korea Institute at SAIS, 2013.

eign direct investment (FDI) provider to North Korea; North Korea's only other significant source of FDI comes from the Kaesong Industrial Complex, which is a joint venture with South Korea.⁵ The bulk of foreign investment in the North, predominantly the extraction of mineral resources, port development, and closely related infrastructural commitments, emanates from Beijing, with business enterprises and provincial authorities in China's northeastern region playing a key role.⁶ China's trade with North Korea has steadily increased in recent years despite the strains caused by Kim Jong-un's execution in December 2013 of his uncle, the second-most powerful man in the regime, Jang Song-taek, on charges of plotting against him.⁷

In sum, China's primary goal regarding the Korean Peninsula remains maintaining stability and preventing the Kim regime's collapse.

2. Japan

Japan, too, despite rhetorically supporting peaceful unification of the Korean peninsula, has not viewed Korean unification through a favorable lens. Assessing Japanese views on Korean unification is speculative given the limited Japanese government statements (their rare but terse statements have been in general supportive of unification), little academic work done, and little or no official discussion

⁵ Trevor Park, "Lips and Teeth," p. 54

⁶ Drew Thompson, "Silent Partners: Chinese Joint Ventures in North Korea," (report, U.S.-Korea Institute at SAIS, February 2011), p. 22.

⁷ "Bank of Korea on the DPRK's Economic Performance in 2014," *North Korean Economy Watch: News and Analysis of the North Korean Economy*, July 17, 2015.

between Seoul and Tokyo on this topic thus far. But given the notoriously tense Japanese–South Korean relationship over Japan’s dark colonial legacy, Japan is likely to look askance at the emergence of a stronger, single Korean state.

On the security front, Japan likely fears that anti-Japanese animus, already deeply rooted in Korean society, could grow even more virulent after unification, which could unleash a new Korean nationalism. Tokyo likely fears that a unified Korea, absent a threat emanating from the North, would be able to direct more energy to highly charged historical disputes with Japan. There are several unresolved issues between the two countries, including territorial disputes over the Dokdo/Takeshima Islands, naming disputes regarding the East Sea/Sea of Japan, and numerous other issues originating from Japan’s colonization of the Korean Peninsula and World War II, most notably the “comfort women” issue—a euphemism for sex slaves used by Imperial Japan from occupied countries, including Korea.

On the economic front, too, there are reasons for Japan to be concerned about Korean unification. South Korea is already an economic competitor to Japan, not only catching up with Japan but also displacing Japan as a world leader in many manufacturing areas. South Korean manufacturers compete closely with Japan on exports such as cars and electronics, and that rivalry has further intensified amid Prime Minister Shinzo Abe’s campaign in the past few years to weaken the yen, which has fallen sharply against the dollar.⁸

In sum, Japan is skeptical about a Korean unification because of its

⁸ “Japan Losing Its Manufacturing Edge to South Korea,” *Japan Today*, January 27, 2012.

worst-case scenario, which is a unified Korea that is closely allied to China; a possible resurgence of Korean nationalism that may find expression in anti-Japanese sentiment or the potential of a nuclear-armed, unified Korea provoking a regional arms race that Tokyo would feel compelled to enter; and, finally, the unpalatable possibility of increased tension with Korea over a range of historical and territorial disputes. There are still Japanese who may recall the words of a military advisor from Germany, Major Jacob Meckel, who suggested to the Japanese government in the 1880s that Korea was “a dagger pointed at the heart of Japan.”⁹

Nonetheless, while Japan is cautious about the prospect of a Korean unification, once the North collapses and unification appears inevitable, Tokyo is likely to support it, even going as far as to offer assistance with food, shelter, medical services, and funding required to build a unified Korea. The Japanese government is likely aware that unification would represent an opportunity for Japan; Japanese generosity at such a momentous time in Korean history could help to repair the tense relationship between the two countries. As one prominent Japanese strategic thinker, Masashi Nishihara, has observed, what Japan ultimately wants is “a united Korea that is friendly to Tokyo and Washington, that is economically viable and politically open, and that will allow token U.S. presence to remain [on the Peninsula].”¹⁰ Tokyo can help to bring about such a Korean state by playing an active role in its birth.

⁹ Peter Duus, *The Abacus and the Sword: The Japanese Penetration of Korea, 1895~1910* (Los Angeles: University of California Press, 1995), p. 49.

¹⁰ David Coghlan, “Prospects from Korean Reunification,” p. 12.

3. Russia

Russia, like China and Japan, also prefers the status quo on the Korean Peninsula, rather than unification. Like China, Russia views North Korea as an important buffer to greater U.S. influence in continental Asia, so it is concerned about the strategic implications of unification, including the emergence of a pro-American, unified Korean state and increased U.S. leverage in Northeast Asia.

But, for Russia, there are potential upsides to Korean unification. It would likely give a boost to the Russian economy, leading to the development of Russia's Far Eastern provinces. With the end of the fortified border between the two Koreas, the development of a long-envisioned gas pipeline from Vladivostok to Seoul could finally become a reality, bringing much-needed Russian oil and natural gas to the South. The distance from Vladivostok to Busan, a southeastern port in the Peninsula, is a mere 700 kilometers (434.96 miles). In this regard, the interests of Russia and unified Korea converge, because unified Korea will badly need stable natural gas supplies, while Russia wants to stimulate its Far Eastern economy by developing its Siberian gas fields.

In the political sphere, too, historically, Russia has never had serious conflicts with Korea, and also it has no border problems. There are no fears about Korean migration to Russia since Korea, on the whole, is more developed. Past generations of Korean migrants to Russia have quickly assimilated and contributed significantly to the Russian economy. The Kremlin could also view a more powerful, unified Korea as a useful counterweight to rising Chinese influence. Russia likely hopes that the new state will conduct a more indepen-

dent foreign policy since the threat of war from the north would disappear as would the need to rely on Washington for its defense.

4. The United States

The United States has not, until recently, seriously considered Korean unification as a long-term objective for it to pursue. The United States did, for the first time, formally commit to Korean reunification as a desirable end state in the June 2009 U.S.–Republic of Korea (ROK) Joint Vision Statement and then again in 2013, but in practice, until very recently, there has not been active discussion or detailed planning in Washington regarding how to bring about this objective aside from military planning for various Korean contingencies.¹¹

Conventional wisdom in Washington for many years has been that even under the best of circumstances, the unification of South and North Korea would be more expensive and more challenging than the unification of East and West Germany, because the two Koreas

¹¹ In 2009, the “Joint Vision” statement from the U.S.-Republic of Korea Presidential Summit said, “Through our Alliance we aim to build a better future for all people on the Korean Peninsula, establishing a durable peace on the Peninsula and leading to peaceful reunification on the principles of free democracy and a market economy.” See The White House, Office of the Press Secretary, “Joint Vision for the Alliance of the United States of America and the Republic of Korea,” June 16, 2009. The 2013 Summit concluded: “We pledge to continue to build a better and more secure future for all Korean people, working on the basis of the Joint Vision to foster enduring peace and stability on the Korean Peninsula and its peaceful reunification based on the principles of denuclearization, democracy and a free market economy.” See The White House, Office of the Press Secretary, “Joint Declaration in Commemoration of the 60th Anniversary of the Alliance Between the Republic of Korea and the United States of America,” May 7, 2013.

are further apart when measured by standard of living, education, and a variety of other indices. Some American academics and policy analysts even argue that a divided Korean Peninsula may be in America's interest because it justifies a continuing U.S. military presence in South Korea (which can be used to contain China) and because the United States likely will find a unified Korea harder to influence than a South Korea that depends on the United States for military support. Some analysts even fear that a more nationalistic, united Korea would be more likely to engage in hostilities with Japan. (In a similar vein, before the fall of the Berlin Wall, many American analysts believed that a divided Germany was in America's interest because of fears that a united Germany could chart an independent foreign policy path that would wind up destabilizing Europe.)

Of more immediate concern to U.S. policymakers are the many pressing challenges that will likely accompany a Korean unification, including concerns about securing North Korea's loose nuclear weapons and averting the kind of chaos that has gripped post-Qaddafi Libya. The United States is understandably concerned, above all, about the dispersal of the North Korean weapons of mass destruction (WMDs), which could result in assembled atomic bombs, loose fissile material, pathogens, and toxic chemicals reaching the global market. This risk is indeed serious because North Korea has a substantial WMD program, and to subsist in North Korea today, many officials already engage in extensive black market activity.

Despite these concerns, there are signs that the U.S. policymakers are increasingly coming around to seeing that there may be a compelling necessity for Korean unification over the long run and

that there will be benefits as well as opportunities resulting from Korean unification.

To begin with, North Korea has proven to be one of the most vexing and persistent problems in U.S. foreign policy, ever since the outbreak of the Korean War in 1950. The threat did not decline with the end of the Cold War, as many once expected that it would. North Korea continues to pose major risks to the U.S. and regional security interests, including not just the threat of an attack on South Korea that would put U.S. troops in harm's way but also the ultimate threat of nuclear proliferation or even possibly the threat of actual attack on the American mainland from a North Korean intercontinental ballistic missile (ICBM) armed with a nuclear warhead.¹²

Given the somber realization of this reality and the intractability of the North Korean problem, combined with awareness of the increased potential for instability in the North under Kim Jong-un, Washington's views appear to be finally shifting from simply seeking denuclearization as a short-term goal toward embracing unification as a long-term objective. While the primary and most immediate focus of U.S. policy toward the Korean Peninsula will continue to be the North's nuclear missile program, there may be a consensus forming that Washington needs to seek a broader long-term strategy vis-

¹² The path of negotiations has proven no more promising in the era of Kim Jong-un than during the days of his father or grandfather. The first bilateral agreement concluded on February 29, 2012 between the U.S. and the new supreme leader of North Korea—the so-called “Leap Day” accord involving the provision of aid in return for freezing some nuclear and missile activities—fell apart after Pyongyang launched a satellite in April 2012 in a clear violation of that agreement as well as of several United Nations Security Council resolutions. Mark Fitzpatrick, “Leap Day in North Korea,” *Foreign Policy*, February 29, 2012, <www.foreignpolicy.com/2012/02/29/leap-day-in-north-korea/>.

à-vis the Korean Peninsula—namely, support South Korea in its effort to achieve the peaceful reunification of the Korean Peninsula into a single, democratic, free-market, pro-Western state that would be a bigger version of today's South Korea.¹³

5. Divergent Views Likely to Hamper Unification Process

As a result of the conflicting views on the desirability of Korean unification from these countries, we are likely to see sharp differences among regional powers over whether and how to intervene if and when there is a North Korean contingency preceding unification. One cannot possibly trace in advance how every disparate detail of the various unification scenarios will unfold. But regardless of how unification comes about—whether quickly or slowly, explosively or implisively—miscommunication, misunderstandings, and competing strategic interests between the United States, South Korea, and the regional powers could complicate a coordinated multilateral response.

This is problematic, because however Korean unification comes about, the consequences of an uncoordinated regional response to it, particularly in a North Korean contingency scenario, is potentially calamitous. Rapid cooperation will be essential because many response missions will be time sensitive. The longer it takes to orga-

¹³ In a panel discussion on Korean reunification, for example, former U.S. ambassador to Seoul Kathy Stephens articulated the U.S. desire for “shared prosperity, shared peace and genuine stability.” She added that “we support reunification—too long postponed, too long delayed, too tragically prolonged—by peaceful means and in accordance with the wishes of the Korean people.” Evan Ramstad, “U.S., Japan, Russia on Reunification: Good!” *Wall Street Journal Asia*, April 8, 2011, <<http://blogs.wsj.com/korearealtime/2011/04/08/u-s-japan-russia-on-reunification-good/>>.

nize humanitarian efforts by the regional powers, the more North Korean citizens there may be who might perish or decide to leave their homes. The longer North Korean WMDs are left unsecured, the higher the risk will be that they will disappear across international borders. Preemptive diplomacy—strong and forthright cooperation among the great powers—will be essential to mitigate the negative consequences of unification.

III. Implications of Korean Unification for the Region

Hard as it may be to marshal the regional powers in advance of Korean unification, once it occurs, there will be even less international unity. All of Korea's neighbors will be scrambling to influence the unified state. The Hideyoshi invasions of the 16th century, the Sino-Japanese war at the close of the 19th century, and the Japanese colonization of the Korean Peninsula in the 20th century all stemmed in one way or another from international competition for a foothold on the peninsula. The strategic importance of Korea for the regional powers, particularly to China and Japan, was especially evident during the Cold War, when the peninsula served as a forward line of defense for Japan and a rear line of defense for China. If history is any indicator, Sino-Japanese interaction over Korea will be again a key ingredient in the stability of a post-unification Northeast Asia.

1. Impact on the Balance of Power

Korean unification will have far-reaching implications for the balance of power in the region. After unification, East Asia will lose a dysfunctional socialist command economy and gain a more powerful market economy, although given the high costs of rebuilding the northern half of the country, the Korean economy may be in for some difficult years. How much unification will cost depends upon its timing, conditions in North Korea, the economic goals of the unification process, and whether unification proceeds peacefully by stages or is imposed in haste. For years economists have been making predictions about the cost of unification, but there is little consensus. One of the difficulties of compiling an accurate cost analysis of such an event is the lack of transparency from Pyongyang regarding its current economic condition. The best estimates from economists warn that the total bill for unification likely would be considerably higher than the USD 1.9 trillion cost of German unification. The entire rehabilitation process over a thirty-year period could well cost USD 5 trillion if unification began today.¹⁴ Nevertheless, a unified Korea will emerge as wealthier and more powerful than the divided peninsula of today.

The impact of unification on the regional balance of power will depend on which way the new Korean state orients itself strategically. Will it remain close to the United States, move closer to

¹⁴ In 2010, South Korea's unification minister mentioned the USD 5 trillion sum. "Hyun In-taek: It would be Hard for Two Koreas to Coexist If Peace Not Achieved," *Interfax* interview, September 17, 2010, cited in *Korean Unification and the Positions and Roles of the Four Neighboring Powers [in Korean]*, ed. Bae Jung-Ho (Seoul: KINU, 2011).

China, or adopt an independent posture balancing between the two Pacific superpowers? Other permutations are also possible, such as a multilateral security arrangement or a collective security pact on the Korean Peninsula, but for the most part, a unified Korea would likely confront these broad strategic choices. Given Korea's strategic location and the fact that it has already become a middle power in its own right, unified Korea's future choice of alignment among the great powers could potentially tilt the balance of power in the region.

This is why Korea's neighbors are so eager to influence united Korea's strategic orientation. Historically, China has viewed the Korean Peninsula as part of the Sinic sphere of influence.¹⁵ China likely hopes that its geographic proximity and strong economic links to both North and South Korea will be the determining factors in the strategic orientation of a unified Korea. And although Beijing will not be able to reestablish a new form of the old tributary system it maintained with the Korean Peninsula for hundreds of years—Korea is too rich and powerful now to make that possible—Beijing could seek to create an asymmetrical patron-client relationship of the kind that it currently has with Pyongyang. If those efforts don't succeed,

¹⁵ As China scholars Andrew J. Nathan and Andrew Scobell have noted in *China's Search for Security*, Beijing appears to think of national security in terms of four concentric "rings": the first ring is a domestic one that relates to internal security with the territory China administers (i.e., Taiwan, Tibet, and Xinjiang); the second consists of a ring directly proximate to Chinese territory, which includes countries adjacent to China; the third ring is more expansive, encompassing China's wider Asia-Pacific neighborhood; and the fourth ring encompasses the rest of the world. The Korean Peninsula firmly belongs in the second ring and is perhaps the most important of these neighboring states because of its intimate proximity to China's political and economic center. See Andrew J. Nathan and Andrew Scobell, *China's Search for Security* (New York: Columbia University Press, 2012), especially chapter 5.

China's more realistic hope would be that a unified Korea would not be a U.S. ally and that it would be deferential to China. To this end, Beijing will lobby hard for unified Korea to remove any U.S. military footprint from the peninsula.

The Japanese, too, have long regarded the Korean Peninsula as vitally important to their national security—so much so, indeed, that Tokyo fought two wars in one decade near the turn of the 20th century to keep it out of Chinese or Russian hands. After the unification of the Korean Peninsula, Japan will work hard, along with the United States, to reduce the likelihood of Korea aligning with China. Japan would like to see that Korea-U.S. alliance commitments are kept post-unification, because a continued alliance between unified Korea and the United States will assure Japan that a unified Korean state will be neither hostile to it nor allied with countries unfriendly to Japan (especially China).

As for the United States, the optimal scenario would be a continued alliance with a unified Korea and continued deployment of U.S. troops on the Korean Peninsula in hope that this would forestall a nuclear arms race in Northeast Asia, dampen the hostility between Japan and Korea, and project American power in the region. As a result, Washington would likely to do what it can to preserve the special relationship between the two governments and militaries, facilitate coordination of regional strategy, and serve as a deterrent to others seeking advantage on the peninsula. A unified Korea allied with the United States will also receive more respect from Beijing, which might otherwise be high handed in its dealings with a Korean state that, even united, will be only a fraction of China's size and power.

However, after unification, a continued alliance with the United States will not necessarily mean the continuation of the status quo. If the U.S. realizes it would not be possible to maintain a continuing U.S. troop presence (save perhaps for occasional deployments for joint exercises and training), it would still maneuver to make it possible to maintain an alliance in a more attenuated form. While the U.S. government would not have the power to dictate the policy of a unified Korea any more than it does today, Washington is likely to take active steps to ensure that a unified Korean state continues to align closely with the United States.

Already, since the Joint Vision Statement of 2009 and the Joint Declaration of 2013, which promised to strengthen and globalize future cooperation, the two sides have accelerated steps to transform the alliance, broadening it from the original purpose of deterring and defending against a North Korean attack to a regional and global partnership that includes political, economic, diplomatic, and cultural cooperation. The two sides are likely to continue to expand the alliance's agenda to include issues beyond the Korean Peninsula, including peacekeeping, counterterrorism, nonproliferation, counter-narcotics, cybersecurity, space, missile defense, nuclear safety, climate change, humanitarian assistance, and disaster relief. Washington's rationale is that the more the alliance expands beyond its original threat-based rationale to an alliance based on common values, such as democracy, human rights, and free markets, the more difficult it would be for a unified Korea to jettison the alliance.

It is impossible to predict which way the unified Korean state will lean—although the best bet is that it will keep some version of its existing alliance with the United States because that is the path of

least resistance. The U.S.-ROK alliance has underpinned South Korea's political and economic development and will likely be seen as a boon for a unified Korean state as well.

In reality, despite the apprehensions that will accompany Korean unification and the inevitable jockeying for power among regional powers once it occurs, unification will be a boon not only for Koreans but also for the entire world.

2. Security Gains

The disappearance of North Korea would eliminate one of the biggest sources of instability and weapons proliferation in Northeast Asia. Gone will be concerns about North Korea selling its nuclear weapons, fissile material, or missiles abroad, staging armed attacks against South Korea, and potentially drawing U.S. forces into a second major war on the Korean Peninsula. South Korea would no longer have to worry about North Korean artillery pulverizing Seoul and the North Korean navy torpedoing its ships.

China will benefit as well. The existence of North Korea serves as one of the primary justifications for a U.S. commitment in Northeast Asia, as well as for its missile-defense program. With North Korea gone, there will be less justification for the U.S.-led missile defense system in the region. If Beijing were to think strategically, it might be able to see that unified Korea will be able to provide more stability in the region and ultimately for China itself. The disappearance of North Korea could even allow for better relations between Washington and Beijing by removing a major irritant from the relationship—China's support for the

Kim regime. And China's attempts to establish its reputation as a responsible international "stakeholder" would be enhanced if it were no longer associated with propping up the most despotic regime in the world.

And despite Japan's concerns, particularly should unified Korea stay within the American-centered alliance network, Japan could enjoy significant security benefits from post-unification. For example, even though Tokyo will need to maintain a robust defensive force against potential Chinese incursions, the removal of North Korea's nuclear and missile threat would eliminate the most immediate security threat to Japan. Korean unification would also dramatically improve the potential for resolving the abductee issue, a key foreign-policy objective of the Japanese government and the populace.

From the U.S. perspective, it may be true that a unified Korea would not be as closely aligned with the United States as South Korea is today. But the odds are it would still be democratic, capitalist, and broadly aligned with the United States. The model here is unified Germany, which, despite its relatively warm ties with Moscow (at least until the Ukraine crisis), remains a member of the NATO alliance and a close U.S. ally. In all likelihood, unified Korea will be a nonnuclear, nonaggressive state that will comply with the nonproliferation treaty and various other international laws.

3. Economic Gains

Economically, unified Korea would be a particularly valuable trade partner for the region. South Korea's success in utilizing the North's untapped mineral resources and relatively young workforce could

boost not only the Korean economy but also the economy of its close trading partners, particularly the United States and China.

For China, its perennial, unrequited resource transfers to North Korea for fuel, food, and other goods (around USD 500 million~1 billion annually) can be replaced by capital investments and corresponding yields in a unified Korea. This would also likely be accompanied by the acceleration of economic growth and gainful employment within North Korea, which would ease the pressure of potential refugee flows into China's northern provinces.

Moreover, in the event of unification, China would be even more economically important to Korea. Korea would face a massive rebuilding project in the underdeveloped and impoverished North. China would be the logical choice to help jump-start this region's new economy, which would fulfill China's long-held dream of full access to North Korean markets and resources. In addition to reaping the economic benefits of new contracts and trade flows, China would also make itself even more indispensable as an economic partner for a unified Korea.

As for Japan, while a unified Korea could become a stronger economic competitor, Korean unification could conversely be seen as providing a larger Korean market and creating opportunities for Japanese businesses. Japanese firms would likely be among those involved in developing the North's dilapidated infrastructure, and its manufacturers and retailers could profit in the long run from an expanded Korean export market.¹⁶

¹⁶ Meredith Shaw and Taylor Washburn, "East Asia's Ultimate Geopolitical Puzzle: Korean Unification," *National Interest*, June 13, 2014, <www.nationalinterest.org/feature/east-asias-ultimate-geopolitical-puzzle-korean-unification-10653>.

For Russia, the unification of the two Koreas, as previously noted, would bring great promise for expanded Russian energy exports in the Far East. Currently, the chief limitation is a lack of distribution infrastructure. A great deal of Russia's resources are ideally situated to serve Pacific Rim markets, from vast oil and natural gas fields in eastern Siberia to reserves on Sakhalin Island. By itself, Sakhalin Island, just north of Japan, holds 25 percent of Russia's oil and 6 percent of its natural gas. Due to a lack of reliable infrastructure, these resources remain largely untapped. To add to that inefficiency, there is a lack of access to a true ice-free port in Russia's Far East. This has led to Russia's interest in North Korean ports. By gaining access to North Korean ports, Russia hopes to relieve congestion in Vladivostok, increase year-round trade with South Korea and Japan, and make progress on connecting its railroad network to a trans-Korean railroad.¹⁷ If Russia can connect its rail network to an ice-free port and eventually to South Korea, it would not only expand the volume of its own exports but also create a land bridge stretching from Busan to Europe. Eventually the overland transit route of goods from Asia to Europe could replace the circuitous shipping lanes via the Indian Ocean as the route of choice. The overland route would be two to three times faster than the route by sea and also safer as pirate-infested ship-

¹⁷ Bernard A. Gelb, "Russian Oil and Gas Challenges," *Congressional Research Service*, January 3, 2006; James Brooke, "North Korea's Other Axis: With Moscow," *New York Times*, March 24, 2002, <www.nytimes.com/2002/03/24/world/north-korea-s-other-axis-with-moscow.html>; "Russia, North Korea, South Korea: Hurdles to a Strategic Rail Project," *Stratfor Global Intelligence*, May 20, 2008, <www.stratfor.com/analysis/russia_north_korea_south_korea_hurdles_strategic_rail_project>; Georgy Bulychev, "A Russian View on Inter Korean Summit," *Nautilus Institute*, <www.nautilus.org/fora/security/07068Bulychev.html>.

ping lanes could also be avoided.¹⁸

This only scratches the surface of the potential economic opportunities for the region from Korean unification. Overall, Korean unification will lead to increased regional economic cooperation and development as well as increased trade between Asia and Europe through transportation network linkages in Eurasia. In the fields of manufacturing, logistics, and energy, there is a possibility of creating enormous synergy. There will also be more business opportunities for the region, as the region works together to rebuild underdeveloped North Korea. There are potential investment opportunities for reconstruction and expansion of infrastructure such as energy, transportation, and telecommunication networks, as well as opportunities related to steel manufacturing and the shipbuilding industry.

4. Human Rights Boon

Needless to say, the creation of a unified Korea—and the disappearance of North Korea as it currently is—would also be a tremendous human rights boon for the region. Just imagine the benefits of freeing 25 million people from the grip of the world's last remaining Stalinist dictatorship. Ordinary North Koreans could move from a starvation diet, both literally and intellectually, to the plentiful availability of food, information, consumer products, and all the

¹⁸ See Xu Shu, "The New Asia-Europe Land Bridge - Current Situation and Future Prospects," *Japan Railway & Transport Review*, <www.jrtr.net/jrtr14/pdf/f30_xu.pdf>; Boris Dynkin, "Comments on the Regional Railroad Network and Electric Grid Interconnection" (Khabarovsk, Russia: Far Eastern State Transport University, 2002), <www.nautilus.org/archives/energy/grid/2002Workshop/materials/DYNKIN.PDF>.

other benefits of modern capitalism. Most of the North's 80,000 to 120,000 prisoners could leave the government's slave-labor camps, where most have been consigned for political, rather than criminal, offenses. Like apartheid South Africa, North Korea is a moral abomination. North Korean human rights abuses constitute a core threat not just to the people of the North but also the region's stability and prosperity, and this threat is as severe as that posed by the regime's nuclear weapons programs. Because the current character and system of the Kim regime—and its cult of personality leadership—lie at the core of the human rights abuses in the North, only the unification of the Korean Peninsula will resolve the dismal humanitarian situation in the North.

IV. Conclusion

Miscommunication, misunderstanding, and competing strategic interests between the United States, South Korea, and the regional powers could complicate a coordinated multilateral response to Korean unification. If sufficiently severe, misunderstandings could even lead to an inadvertent conflict between the powers (for example, the United States and China) in attempting to intervene on the Korean Peninsula, particularly in a sudden and dramatic North Korean contingency.

To prevent miscalculation, Seoul and Washington should work together to prepare for different unification scenarios. Only with detailed preparation, planning, and close coordination between South Korea, the United States, and other key regional powers can

various challenges of unification be mitigated. The financial cost and social challenges of unification will be far less if proper preparation is made for unification.

South Korea has already launched an internal campaign and an external, diplomatic initiative aimed at preparing for unification and contingency scenarios. This effort must continue at an accelerated pace, even after President Park Geun-hye leaves office in February 2018. Korean unification could come about suddenly. As it was largely impossible to predict the East German collapse at the end of the Cold War, so it is impossible to predict the timing of a North Korean government collapse other than to say it could happen, perhaps even in the next few years, before unification preparation is complete.

The time is now for the United States and South Korea to augment their joint military planning by crafting a comprehensive and detailed political, diplomatic, economic, legal, and social strategy for unification. Once a common bilateral vision is developed between Seoul and Washington, the United States and South Korea should then actively encourage first Tokyo and then Beijing and Moscow to participate in multilateral talks.

Undertaking a unification dialogue will not be easy with Beijing, but if the message is delivered patiently and persuasively, over time it may start to sink in with the Chinese Politburo. Chinese receptivity to such a message may have increased because of the growing strains between Beijing and Pyongyang. Instead of standing by, hoping that China will change its policy toward the North on its own, Washington and Seoul should be working hard in behind-the-scenes talks to make China understand that a unified Korea could be in its interest

as well, and that continuing to provide the Kim family dynasty with a virtual blank check is a strategic liability for China. Even if such talks don't succeed in the short term, simply the process of initiating them and continuing them over a long period could increase China's comfort level with the unification of the Korean Peninsula. And that, in turn, could be the key to ensuring that Korean unification, when it eventually occurs, occurs in as orderly a manner as possible while avoiding some of the worst-case scenarios associated with this massive geopolitical shift.

It is imperative that such efforts to smooth the way for Korean unification begin today. Unless South Korea can attest that all of the regional stakeholders will play a constructive role in unification, the process could become more messy, protracted, and costly than it would be otherwise. By contrast, if South Korea can succeed today in getting the support of its neighbors for a variety of unification scenarios, it can ensure that the creation of a unified Korean state, while still expensive, will be as smooth as possible under these extremely challenging circumstances. The beneficiaries under such a scenario will be not only the people of the Korean Peninsula but also the people of the neighboring states and indeed the people of Asia and the world. All would experience great benefits from the merger of North Korea into a new and unified Korean state with free markets and free elections.

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A Search for Introducing Confidence-Building Measures and a Peace Regime on the Korean Peninsula

Jong-Chul Park

I. Introduction

Unstable peace has lasted on the Korean Peninsula for more than 60 years after the Korean War. This unstable peace is sustained by the two Koreas' balance of military force. The two Koreas have attempted to resolve their security anxieties by building up their arms, but this has worsened their security anxieties and put them in a security dilemma. North Korea is increasing its conventional military power and promoting forward deployment while continuing to develop nuclear missiles.

From the perspective of international law, the armistice system is the system that controls peace on the Korean Peninsula. The armistice system consists of the Armistice Agreement, managed and supervised by an armistice commission and the Neutral Nations Supervisory Commission. However, after North Korea's nullification of

the armistice system, it transformed into an abnormal state and is maintained only in form. Given that a peace regime has not yet been established on the peninsula, unstable circumstances have persisted.

The meaning of peace should be reexamined in order to find a way to settle peace on the Korean Peninsula. According to Johan Galtung, peace can be divided into “negative peace,” represented by the absence of conflict, and “positive peace,” in which the structural conditions that cause conflicts are removed.¹ In order to establish negative peace, the causes of conflicts should be eliminated by suppression of power. Afterward, agreed regulations and devices that can systematically guarantee peace should be arranged. Measures such as armistices, nonaggression pacts, and arms control are used to establish negative peace. In order to establish positive peace, fundamental solutions—such as settlement of political conflicts, alleviation of economic and social inequality, conversion of confrontational structures to coexistent systems—are required.

In order to establish peace on the peninsula, a framework for coexistence should be prepared by terminating the unstable situation on the Korean Peninsula and eliminating the possibility of an outbreak of war. In order to establish such a peace, a peace system, including explicit and implicit regulations, principles, and processes of policy decisions should be established with the goal of attaining negative peace. To this end, institutional procedures and devices—such as arms control, settlement of a peace treaty, and the assurance of peace—are needed. In this vein, areas of contention include prioritizing agendas, issues concerning the parties, the content and

¹ Johan Galtung, “Violence, Peace and Peace Research,” in *Essays in Peace Research*, Vol. 1 (Copenhagen: Christian Ejlertsen, 1975), pp. 109–134.

method of concluding the agreement, the means to provide international assurance, and the means to manage peace.

Peace establishment on the Korean Peninsula can be understood from the perspective of conflict management.² Conflict management consists of conflict regulation and conflict resolution. Conflict regulation limits the possibilities that can cause a conflict by reducing, for example, tensions; armistice, trust establishment, arms control, and disarmament. Moreover, conflict resolution provides resolutions for the causes of conflict; nonaggression treaties and peace treaties are some examples. In order to establish peace on the Korean Peninsula, conflict should be regulated by easing tensions and building trust. At the same time, conflict resolution can be done by converting to a peace regime and giving international assurances.

However, the stances of South and North Korea, the parties directly involved with establishing peace on the peninsula, are exceedingly different. First, they have differing views on the basic directions to establish peace. North Korea argues that peace can be established on the Korean Peninsula by substituting the armistice system with a North Korea–United States peace treaty, the dissolution of the United Nations Command, and the evacuation of U.S. Armed Forces in Korea. North Korea emphasizes the legal and institutional aspects of a peace establishment. On the other hand, the Republic of Korea argues that peace treaties do not guarantee peace and what enables peace are peace assurance devices, arms control, and the will to establish peace.

² C. R. Mitchell, *The Structure of International Conflict* (New York: St. Martin's Press, 1981), pp. 253–279.

Second, the two Koreas have differing stances on armament reduction, an important condition for peace assurance. North Korea argues for simultaneous disarmament of troops and military equipment. On the other hand, South Korea argues for a phased arms control because it is not only difficult to agree on arms reduction, but also to implement it. South Korea's stance is that by utilizing Europe's experience of arms control, it is rational to reduce armament in stages, by establishing rudimentary military trust, operational arms control, and structural arms control. Moreover, South Korea stresses the importance of verification, which confirms the implementation process of arms control.

Third, the essential point of establishing peace on the Korean Peninsula is conciliating the principles of the concerned parties and the role of neighboring states. South Korea maintains the principle that the two Koreas are the main parties concerned, which acutely conflicts with North Korea's stance that a peace treaty should be concluded through negotiations between the United States and North Korea while excluding South Korea.

Fourth, there is a problem in deciding the order and through which process to implement issues concerning the establishment of peace on the peninsula, including the conclusion of a peace treaty, arms control, and international assurance measures. This is also related to the problem of deciding in which dimension and under which players' guidance these issues will be dealt with regarding the establishment of a peace regime on the Korean Peninsula.

Meanwhile, North Korea's development of nuclear weapons has qualitatively changed the issues regarding the establishment of peace and trust on the peninsula. To establish peace on the Korean

Peninsula, not only are measures to bring peace in the field of the traditional military necessary, but it is also important to resolve nuclear threats. In order to establish peace, denuclearization and peace establishment are inseparable. In this context, North Korea's denuclearization and the issue of building a peace regime on the Korean Peninsula have been dealt with simultaneously in the Six-Party Talks.

The following are suggestions to establish a sustainable peace on the Korean Peninsula. The paper first analyzes North Korea's previous stance on establishing peace on the Korean Peninsula, then its changed stance, and finally a policy direction to establish sustainable peace on the Korean Peninsula.

II. North Korea's Nullification of the Armistice System and Insistence on Concluding a North Korea–United States Peace Treaty

1. North Korea's Previous Stance

Until 1974, North Korea had been insisting on a North Korea–South Korea peace treaty. However, in March 1974, North Korea insisted on concluding a North Korea–United States peace treaty on the grounds that the United States is in charge of the United Nations Command and that the command is the party to the armistice treaty. North Korea's insistence on a North Korea–United States peace treaty may have resulted from its observation that Vietnam was communized after it concluded a peace treaty with the United

States. In January 1984, North Korea suggested a three-party talk with a two-tier structure of signing a North Korea–United States peace treaty and adopting a declaration of nonaggression between North and South Korea.

From the 1990s, North Korea gradually ended the armistice and disabled armistice organizations (the Military Armistice Commission and the Neutral Nations Supervisory Commission). In March 1991, a South Korean representative was appointed as the chief delegate of the United Nations Military Armistice Commission, and North Korea refused to participate in the general meetings. North Korea withdrew its representative (April 1994) and the Chinese representative (December 1994) from the Military Armistice Commission representatives. Also, North Korea set up the Democratic People's Republic of Korea Military Panmunjom representatives to substitute the Military Armistice Commission in May 1994, attended a colonel-level chief secretary conference under the name of representatives, and insisted on holding North Korea–United States general-level talks. In addition, North Korea withdrew Czech representatives (April 1993) and Polish representatives (February 1995) from the Neutral Nations Supervisory Commission. With this, the two largest armistice organizations, the Military Armistice Commission and the Neutral Nations Supervisory Commission, virtually lost their functions.

Moreover, in May 1995, North Korea closed down the North Korean Neutral Nations Supervisory Commission office in Panmunjom following a Panmunjom representative's statement and announced it will limit access to the Neutral Nations Supervisory Commission as well as the U.S. military forces' access to the North Korean part of

the joint security area. As North Korea disabled the armistice system, the clause on the maintenance of the demilitarized zone was the only part left in the armistice pact.

Through a statement by a foreign ministry spokesperson, North Korea in April 1994 suggested substituting the armistice treaty with a peace treaty and establishing a “new peace assurance system” to substitute the Military Armistice Commission. In February 1996, North Korea suggested details of the new peace assurance system through a foreign ministry spokesperson. North Korea suggested that until a complete peace treaty could be concluded, North Korea and the United States should settle for a temporary treaty on the issues of the military demarcation line, the maintenance of the demilitarized zone, and the solution to the armed clash. North Korea also suggested forming a North Korea–United States joint military organization to substitute the Military Armistice Commission to carry out the temporary agreement.³

At present, the UNC–North Korea general-level meeting has been organized and is operating in lieu of an armistice commission as the armistice system lost its normal function, and the Military Armistice Commission has not been performing its role. The UNC and South Korea understands this arrangement to be a meeting within the framework of the Military Armistice Commission. However, North Korea perceives the UNC–North Korea general-level meeting to be different from the Military Armistice Commission in that it is an interim stage from the armistice system on its way to a North Korea–United States temporary agreement.

³ “Statement by North Korean Foreign Ministry Spokesperson,” *North Korean Central Broadcasting*, February 22, 1996.

2. North Korea's Insistence on Nuclear Disarmament Talks and the Conclusion of a North Korea–U.S. Peace Treaty

After issues concerning North Korean nuclear development surfaced, the nuclear program was linked to discussions on a peace regime on the Korean Peninsula. Following North Korea's second nuclear crisis in October 2002, North Korea argued for the United States' abandonment of its hostile policy⁴ and demanded assurance for the North Korean regime before the discarding of their nuclear weapons. In particular, North Korea argued for the need to conclude a North Korea–U.S. peace treaty. North Korea proposed that the Six-Party Talks should function as talks for disarmament (March 31, 2005) and argued for the necessity of legal and institutional devices to establish a peace regime and a peaceful North Korea–U.S. coexistence. This shows North Korea's stance of linking nuclear issues to peace and the U.S. Armed Forces in Korea.

North Korea carried out three nuclear tests and declared itself a nuclear power state in its constitution (April 2012). Since then, North Korea has hoped to be internationally recognized as a nuclear power state and attempted to conclude a peace treaty with the United States by using nuclear power as its bargaining chip. North Korea has asked the United States to halt its hostile policy toward North Korea, grant negative security assurances, and make the Korean Pen-

⁴ Abandonment of the United States' hostile policy toward North Korea refers to a commitment of nonaggression toward North Korea–U.S. diplomatic relations and discontinuation of disturbance of economic cooperation between North Korea and neighboring states. Jong-Chul Park, "North Korea–U.S. Relations under the Bush Administration," Korea Institute for National Unification academic monograph, in *Domestic Environment Change of the ROK and the U.S. and Peace on the Korean Peninsula* [in Korean] (Seoul: KINU, 2004), pp. 114–132.

insula a nuclear-free zone.

On April 18, 2013, North Korea's National Defense Committee demanded the following three conditions for denuclearization: 1) the lifting of UN sanctions on North Korea; 2) the granting of negative security assurances; 3) the denuclearization of the Korean Peninsula and surrounding areas. First, North Korea argues that the United States should withdraw its hostile policy toward North Korea, diplomatically approve North Korea, and normalize their relationship. Second, a negative security assurance excluding a nuclear preemptive strike on non-nuclear power states should be applied to North Korea. Third, North Korea argued that not only should North Korea denuclearize, but the United States should also realize a nuclear weapon-free zone in which the United States does not deploy nuclear weapons on the Korean Peninsula and surrounding areas, including its nuclear umbrella. In particular, North Korea argues that since the United States is also a nuclear power state, a one-sided denuclearization is unfair and that nuclear disarmament should be carried out in an equal manner.

North Korea has been strengthening a peace offensive against the United States along with asking for talks of nuclear disarmament. In early 2013, while North Korea increased military tensions, it also strengthened a peace offensive against the U.S. While increasing tensions on the Korean Peninsula through mentions of an "armistice treaty nullification statement" (March 5, 2013) and a nonaggression treaty between South and North Korea, North Korea also suggested concluding a peace treaty with the United States. Based on its nuclear and missile capability, North Korea is concentrating its power to acquire a new negotiating position against the United

States.

After June 2013, North Korea concentrated its efforts on an offensive dialogue proposal toward the United States. North Korea, through the National Defense Committee's spokesperson (June 16, 2013), suggested holding high-level discussions between North Korea and the United States, proposed easing military tensions and changing the armistice system to a peace regime, and presented other issues that were of mutual interest to both parties.⁵ North Korea's stance was readdressed by the North Korean ambassador to the UN, Park Kil-yon, in his speech at the UN General Assembly (October 1, 2013).⁶ Meanwhile, through a series of 1.5 track discussions⁷ between the United States and North Korea, it appeared that North Korea was testing U.S. views on its proposal.

North Korea's goal is to achieve military superiority on the Korean Peninsula through assuring North Korea's security by concluding a North Korea–U.S. peace treaty and evacuating U.S. Armed Forces. North Korea judges that it has produced an effective leverage required for negotiations with the United States through its nuclear capability. North Korea has been using its nuclear threat to attain the goal of disintegrating the ROK–U.S. alliance and evacuating U.S. Armed Forces from Korea.

⁵ "North Korea's National Defense Committee spokesperson," *NKCB*, June 16, 2013.

⁶ Ambassador Park Kil-yon argued for the abandonment of U.S. hostile policy, hosting of nuclear disarmament discussions, dissolution of the UNC, and substitution of the armistice treaty with a peace treaty, etc.

⁷ Several 1.5 track discussions occurred between the United States and North Korea (August 6~7, 2013, Geneva; September 25~26, 2013, Berlin; October 1~2, 2013, London; May 2014, Mongolia; January 2015, Singapore).

III. Direction of Establishing Peace on the Korean Peninsula through Confidence-Building

The path to establishing peace on the Korean Peninsula is still a far way off. North Korea has been violating the armistice system and has been continuing to provoke South Korea in a variety of ways. Moreover, by developing nuclear weapons and missiles, North Korea has been comprehensively utilizing asymmetric infiltration power, traditional military forces, and nuclear weapons to threaten security. Meanwhile, there have been international agreements on the need for North Korea's denuclearization and rudimentary agreements on the need to build trust, including the Inter-Korean Basic Agreement. However, given that North Korea does not abide by these agreements, the agreements have lost their regulatory power and have been disabled.

Sustainable peace should be made in order to establish peace on the Korean Peninsula. Peace is not assured by treaties or agreements, and as such an environment, as well as conditions, that would guarantee and precipitate compliance should be prepared. In addition, in order to establish sustainable peace, it is important to foster trust between the parties concerned. A mutual trust needs to be formed so that the parties concerned do not perceive each other as a threat, such that they can coexist and increase cooperation to establish peace.

Considering the distrust and conflict within the two Koreas, as well as the state of military confrontation, establishing sustainable peace on the Korean Peninsula should take place in a gradual process. First, peace should be maintained by deterrence and national

security preparedness. Second, previous agreements should be restored and trust-building measures should be done in order to create conditions for trust to form between South and North Korea. Third, discussions of a peace regime should be propelled according to the process of trust-building and denuclearization.

These tasks do not have to be carried out in the particular order discussed. Time is required in propelling these tasks, but it is suitable to have a level of strategic flexibility. Tasks can be carried out simultaneously, and preparation time between assignments can be abridged. Also, these tasks can overlap one another for a certain period of time. What is important is that the actual conditions for trust and peace are prepared.

1. Maintenance of Peace through Deterrence and Security Preparedness

Deterring and resolving North Korea's nuclear issue is not only a security policy but a fundamental basis to carrying out unification policies. Deterrence of North Korea's provocations should be implemented in three directions: nuclear deterrence against a nuclear threat, deterrence against a missile attack, and deterrence against traditional and nontraditional provocations.

First, deterring North Korea's nuclear threat is the biggest task. Among many alternative responses to nuclear threats, launching a preemptive attack is difficult to realize because of its uncertainty and the possibility of escalating into a full-scale war. Also, South Korea's nuclear armament is not feasible, considering South Korea's membership of the Nuclear Non-Proliferation Treaty (NPT) and the

ROK–U.S. Atomic Energy Agreement. Moreover, if South Korea develops nuclear weapons, it would be at the cost of breaking the ROK–U.S. alliance and risking international sanctions.

In addition, it would be unfeasible to deploy tactical nuclear weapons again in South Korean territory. In terms of military technology, the United States judges that it is possible to provide a nuclear umbrella over the Korean Peninsula by employing tactical nuclear weapons. Moreover, the Obama administration, with the goal of making “a world without nuclear weapons,” will not consider deploying again the tactical nuclear weapons withdrawn from the Korean Peninsula in 1991.

One alternative is to increase the actual effectiveness of the United States’ nuclear umbrella by strengthening the ROK–U.S. alliance. South Korea and the United States are devising measures to strengthen South Korea’s deterrence capability through the Extended Deterrence Policy Committee. Section 6 of the joint statement from the 45th ROK–U.S. Security Consultative Meeting held in October 2013, “reaffirmed the U.S.’s continuous promise to provide and strengthen the extended deterrence by using all categories of defense capabilities including the U.S.’s nuclear umbrella, traditional strike capability, and missile defense capability.”⁸

Second, a South Korean model defense system should be built as a provision to North Korea’s missile threat. In accordance with the revised ROK–U.S. new missile guidelines, the South Korean government can develop a combat arrangement of ballistic missiles

⁸ “45th ROK–U.S. Security Consultative Meeting (SCM) joint statement,” section 6, October 2, 2013.

with a range of 800 kilometers. Also, measures to build a kill chain are being sought, such that North Korea's missiles can be detected, distinguished, and targeted before they are launched. Moreover, plans to develop the Korean Air and Missile Defense (KAMD) are being carried out in case a preemptive strike on North Korea's missile attacks fails.

Third, there should be contingency plans in case of North Korea's provocation, infiltration, and terror. South Korea and the United States signed a combined counter-provocation plan (March 22, 2013). This contingency plan works against all kinds of provocations conducted by North Korea and prepares South Korea and the United States' joint response protocols. It is stipulated that when North Korea provokes certain places, such as the Northern Limit Line (NLL) and the demilitarized zone, the South Korean army can respond in acts of self-defense and receive military assistance from the United States. In the past, there was no clear standard for a reaction plan against North Korea's possible local provocations. However, now that there are clear response protocols according to the type of provocation, it has become possible to react rapidly when local provocation occurs. Also, it is meaningful that the United States, which previously adopted a passive stance toward North Korea's provocation for fear of conflict escalation, has now prepared contingency plans for local provocations with South Korea.

2. Constructing Gradual Military Confidence-Building Measures

Considering the reality of the state of affairs on the Korean Peninsula, such as North Korea's military threats and provocations and its

nullification of previous agreements on military trust-building, it is important to create the conditions for peace by taking measures to ease military tensions.

Construction of the conditions for peace can be carried out in three directions. First, previous agreements concluded by the two Koreas on easing military tensions should be restored. Until now, South and North Korea have concluded four types of military confidence-building measures: 1) Direct telephone lines have been set up between South and North Korea. 2) Military agreements that assure exchange and cooperation have been adopted. In order to provide military assurance on the connection of the Gyeongui rail lines and roads, an agreement on military assurances on operations of rail and road works (September 2002) as well as a provisional agreement on military assurances on the train's test operation (May 2007) were adopted. 3) As a means to prevent accidental collision, measures to prevent accidental collision on the west coast were adopted (June 2004). 4) In order to ease tensions near the military demarcation line, an agreement to halt propaganda near the area was concluded (June 2004).

However on January 30, 2009, North Korea announced that it would “nullify all the agreements related to the political and military conflict situation,” and thereby disable all agreements concerning military confidence-building. Furthermore, the sinking of the Cheonan and the shelling of Yeonpyeong Island heightened military tensions on the peninsula and ceased the channels of military talks between the two Koreas.

Considering such a reality, it is necessary to restore measures to build military trust stated in previous inter-Korean agreements, by resuming inter-Korean military talks. To this end, holding military

working-level talks and defense ministerial talks are recommended.⁹

Second, in order to promote exchange and cooperation, functional aspects of military confidence-building are needed. One aspect of easing tensions on the peninsula is that rather than easing military tensions itself, military trust-building must be carried out from a functional aspect to induce inter-Korean cooperation. One example in which a military agreement was reached for functional inter-Korean cooperation is the case in which a partial demilitarization was implemented in the demilitarized zone to construct the Gyeongui rail lines and roads. In addition, the Jangjeon Harbor, North Korea's military harbor, was opened and the North Korean army was relocated due to Mount Geumgang tourism. Furthermore, operations in the Kaesong Industrial Complex also had the effect of pushing North Korea's military forces to a different location.¹⁰

In order to create the DMZ World Peace Park, one of the main undertakings of the trust-building process on the Korean Peninsula, it is important to build military trust and hold military talks. In doing so, it is also necessary to receive the cooperation of the United Nations, which is managing the demilitarized zone. To this end, in connecting the Gyeongui rail lines and roads, the precedent in which the UNC acknowledged inter-Korean cooperation for the peaceful utilization of the demilitarized zone can be applied. In addition, through this plan, the two Koreas should hold military talks and come to an agreement about military measures concerning

⁹ Cho Seong-Ryoul, "The Trust-Building Process on the Korean Peninsula and a Balance Policy: In the Field of Security and Peace [in Korean]," *Arms Control on the Korean Peninsula*, vol. 53 (June 2013), pp. 50-56.

¹⁰ Jong-Chul Park, *Plans to Implement Military Measures to Increase Inter-Korean Cooperation* [in Korean] (Seoul: KINU, 2002), pp. 3-15.

removing land mines, withdrawing troops and equipment, opening paths, and constructing facilities.

Third, with consideration to the rudimentary restoration of peace between the two Koreas, it is necessary to adopt additional military confidence-building measures. Military confidence-building measures should be agreed upon according to the Inter-Korean Basic Agreement and the annex agreement on nonaggression. Above all, peaceful resolution to conflicts and prevention of accidental military collisions must be sought. In addition, agreements should be made to implement confidence-building measures mentioned in clause 12 of the Basic Agreement, including large-scale transfer of troops and notification of military practices as well as arms control, peaceful utilization of the demilitarized zone, and exchanges of military personnel and information.

Meanwhile, North Korea has been against such measures, claiming that exchange of military personnel or information and notification of military practices will weaken its military superiority and expose its military situation. Therefore, it is necessary to find incentives in order to bring North Korea to the negotiating table to build military trust. West Germany provided economic incentives to East Germany to gain certain compromises such as extension of free passes, easing border control procedures, disarmament in the border areas, and such.¹¹

¹¹ The federal government of West Germany gave East Germany DM 1 billion in commercial loans in 1983, and DM 950 million in commercial loans in 1984. In return, East Germany took actions such as the improvement of national border control measures and passing procedures, the demolition of SM-70 automatic launchers in four borderline areas, and the removal of land mines. Short-term research group for German economic and social integration, *Research on Germany's Economic and Social Integration* [in Korean] (1990), pp. 122~123.

In the case of pursuing inter-Korean trust, there are ways to carry out rudimentary confidence-building measures by linking the provision of economic aid, economic cooperative projects, and the provision of loans. For example, South Korea can utilize a part of the Inter-Korean Cooperation Fund or form a separate North Korean loan fund and provide loans to North Korea. Also, depending on the degree of trust built between South and North Korea, military trust building can be linked to cooperative projects that construct North Korea's infrastructure, including electricity, transportation, and communication.

3. Establishing a Peace Regime on the Korean Peninsula According to Denuclearization and Confidence-Building

After the North Korean nuclear issue came into the limelight, measures have been sought to resolve the problems of denuclearization and establish a peace regime in a comprehensive manner. Accordingly, in the September 19 joint statement following the Six-Party Talks (September 19, 2005), it was agreed that the "related parties will resolve North Korea's nuclear issue and discuss a lasting peace regime on the Korean Peninsula in a separate forum." Based on such a framework, it is stated that a Korean Peninsula peace forum would be organized in accordance with the progress of the Six-Party Talks.

When the Six-Party Talks are reconvened and the discussions of denuclearization take place, the establishment of a peace regime on the Korean Peninsula should be carried out at the same time. It would be desirable to take the following basic directions into consideration when implementing a peace regime on the Korean Peninsula.

First, in whatever form and operation the Korean Peninsula peace

forum may be, the initiative of both South and North Korea must be respected. Based on this principle, the two Koreas must lead the resolution of the problem on the peninsula, and the international community must fulfill the role of supporting and cooperating with the two Koreas. This principle also implies that it excludes the influence of neighboring states that compete for the upper hand in the affairs of the Korean Peninsula. Moreover, it will block the interference of neighboring states during the process of and after unification. The principle is an elucidation of the right to self-determination in resolving problems concerning the Korean Peninsula, which is necessary to recover national dignity damaged due to division and inter-Korean conflict.

In order to attain North Korea's consent to the principle, South Korea should persuade North Korea that establishing peace will not be realistically possible without South and North Korea's agreement. It should be made clear to North Korea that establishing peace is fundamentally a problem between South and North Korea, and that the role of neighboring countries, including the United States, should be limited to that of assuring peace. South Korea should remind North Korea that only after the autonomy principle of South and North Korea is respected can inter-Korean leadership in the construction of a Korean Peninsula economic community and inter-Korean economic cooperation have meaning.

Second, the establishment of a peace regime on the Korean Peninsula should be promoted at multiple levels. Conditions to establish a peace regime on the Korean Peninsula should be created by inter-Korean military talks, and measures to control arms in South and North Korea should be discussed. In addition, the Korean Peninsula peace forum should discuss the means to manage the peace

regime, the contents, and the methods to implement the peace treaty. The Six-Party Talks should discuss how the international community will guarantee a peace regime on the Korean Peninsula.

Third, it is desirable to maintain a flexible position toward the method of establishing a peace regime and the measures to control the peace. There are several measures regarding the specific methods of establishing a peace regime, signing the peace treaty, and creating measures for assurances. It is desirable to adopt an open position that allows for plausible alternatives among several methods and takes into consideration the positions of interest states, the corresponding effectiveness and the like.¹²

Fourth, establishing a peace regime on the Korean Peninsula should be done in parallel with arms control. North Korea's stance is that arms control should first take place in order to eliminate elements that threaten peace on the Korean Peninsula. However, without specific plans to establish a peace regime and set up measures to manage the peace, North Korea's stance is unrealistic. Therefore, it is desirable to discuss the basic structure of a peace regime on the Korean Peninsula and arms control at the same time.

IV. Conclusion

It has been over 60 years since the armistice, yet unstable peace

¹² For various measures such as the formation, methods, and assurance plans in establishing a peace regime on the Korean Peninsula, refer to Jong-Chul Park, "Denuclearization and Establishing a Peace Regime on the Korean Peninsula [in Korean]," *South Korea and International Politics*, vol. 22, no. 1 (Spring 2006), pp. 118~134.

persists amid the malfunctioning armistice system. Moreover, with North Korea's development of nuclear weapons, the security condition on the Korean Peninsula has changed qualitatively. The Kim Jong-un regime stipulates in its constitution that North Korea is a nuclear power and has officially adopted a national strategy of simultaneously developing its economy and nuclear weapons.

In this situation, the Park Geun-hye administration pursues the difficult task of carrying out the trust-building process on the peninsula, normalizing inter-Korean relations, and establishing peace. Considering the security circumstance on the Korean Peninsula and North Korea's position, it will take much effort and time to establish peace and trust on the Korean Peninsula. Therefore, it is desirable to build trust on the Korean Peninsula and establish peace through a gradual process. First, peace should be maintained by deterring North Korea and setting up national security. Then, an environment for peace must be made through measures to build military trust. Afterward, in accordance with the degree of trust-building and the progress of denuclearization, measures must be sought to establish a peace regime on the Korean Peninsula.

The trust-building process on the Korean Peninsula, the peace process on the Korean Peninsula, and the Northeast Asia Peace and Cooperation Initiative are all interconnected. Normalization of inter-Korean relations, one of the tasks of the trust-building process, is related to denuclearization and establishing peace. In order for inter-Korean relations to improve qualitatively, denuclearization and establishing peace are necessary. The denuclearization and peace process will create an environment to improve inter-Korean relations. In addition, the Northeast Asia Peace and Cooperation Initiative will

not only cultivate an environment that can develop inter-Korean relations but will also create the circumstances needed for denuclearization and establishing peace. Therefore, it is necessary to devise a comprehensive strategy that can link the trust-building process on the Korean Peninsula, the peace process on the Korean Peninsula, and the Northeast Asia Peace and Cooperation Initiative.

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Recent International Responses to the North Korean Human Rights Situation

From the UN COI Report, through the Establishment of the UN Human Rights Office in Seoul and the Panel Discussion at the UN Human Rights Council, and to the North Korean Overseas Workers Problem

Jung-hyun Cho

I. Introduction: North Korean Human Rights and Korean Unification

The North Korean human rights issue is a significant topic, not only as a matter of universal value to mankind, but in the context of the Korean reunification as well. First, in order to achieve reunification in a peaceful way, both Koreas need to pursue national homogeneity, which has been damaged for the past 70 years. In that sense, ensuring general respect for human rights in the North and, more specifically, securing the freedom of respective populations to express their free opinion on unification could be regarded as a precondition for a peaceful unification process.

Second, even after physical and political reunification, to achieve some genuine national and social integration, the same or at least similar human rights conditions of both Koreas are required. In addition, during that post-unification era, how to harmonize between the criminal punishment of responsible persons for gross human rights violations and the reconciliation process, such as establishing a truth commission, could be a big challenge to all Koreans. The so-called “transitional justice” question therefore needs to be discussed and prepared more concretely from this time on.¹

In recent years, the international community, including the United Nations (UN), has been very active in dealing with the North Korean human rights issue. Especially since the establishment of the UN Commission of Inquiry (COI) on North Korean Human Rights in March 2013, the issue has become a significant global problem and agenda. This international concern and cooperation are believed to affect positively the advancement of human rights in North Korea and also toward peaceful unification on the Korean Peninsula. As discussed above, the North Korean human rights issue is not only a serious humanitarian issue but also a significant one in the context of the Korean reunification, considering the need to pursue national homogeneity prior to, and during, the peaceful process toward the unification and also considering the need to prepare for social integration after reunification. The North Korean human rights issue raises various international legal questions and provides some implications

¹ For more details on transitional justice and Korean unification, see Jung-hyun Cho, “Transitional Justice in a Reunified Korea: Some Initial Observations,” in *Transitional Justice in Unified Korea*, eds. Baek Buhm-Suk and Ruti G. Teitel (New York: Palgrave Macmillan, 2015).

in the context of global governance as well.

In this sense, this paper includes examination of recent UN activities, from the UN COI report on the North Korean human rights situation, to the newly established UN Office of the High Commissioner for Human Rights (OHCHR) office in Seoul, the UN Human Rights Council's panel discussion focusing on abduction issues, and a new issue that is the North Korean overseas workers problem.

II. 2014 UN Commission of Inquiry (COI) Report: PAST

The UN COI on North Korean Human Rights was established by the UN Human Rights Council in March 2013. It issued its final report in February 2014.² The report concluded that a range of human rights violations perpetrated in North Korea—such as the operation of political prison camps, starvation resulting from State policy in the mid-1990s, and systematic abductions and enforced disappearances of foreign nationals—constitute crimes against humanity under international criminal law. “Crime against humanity” can be considered a key word in the report, because it is one of the four international crimes under the jurisdiction of the International Criminal Court (ICC) and is directly connected with the

² United Nations, Human Rights Council, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/63 (February 7, 2014); United Nations, Human Rights Council, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/CRP.1 (February 7, 2014).

principle of responsibility to protect (R2P). In addition, it can directly or indirectly affect the transitional justice measures, which would be implemented once the Korean peninsula is reunified. In this context, the COI recommended that the UN Security Council refer the situation in the North to the ICC and that the R2P of the international community be applied to this case, both second (international assistance) and third pillars (international intervention) of the principle. It also mentioned the necessity to consider transitional justice mechanisms.

Those conclusions and recommendations made by the COI were subsequently confirmed by the UN Human Rights Council in March last and this year and the UN General Assembly last December, both by way of adopting their respective resolutions,³ and finally by the UN Security Council last December by way of adopting the issue as its official agenda for the coming three years.

The activities and report of the UN COI and the subsequent international responses from the various UN organs have shown the following important points. First, it actually changed the North Korean human rights issue into a real international agenda, and it developed that issue from the international human rights law perspective, including simple monitoring of the situation, into an international criminal law aspect, such as crimes against humanity and referral to the ICC. Of course it cannot be disregarded that the COI also sug-

³ United Nations, Human Rights Council, *Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/RES/25/25 (April 9, 2014); United Nations, Human Rights Council, *Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/RES/28/22 (April 8, 2015); United Nations, General Assembly, *Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/RES/69/188 (January 21, 2015).

gested many cooperative methods such as human rights dialogues, technical cooperation, and humanitarian assistance.

Second, the quick and excellent completion of the COI activities after just one year and the following prompt responses, not only from the Human Rights Council and the General Assembly but also from the UN Security Council, clearly shows the gravity of the situation and the strong consensus of the international community on that problem. It is really interesting that most other UN COI activities and the UN Security Council's involvement in human rights issues have been related to situations involving some armed conflicts such as civil wars. The only exception is the North Korean human rights situation.

This development surely provides some momentum to the North Korean human rights movement. However, simultaneously it has made us realize that there are also many practical difficulties, including the veto power of the permanent members of the Security Council in relation to the referral of the case to the ICC, and the reluctant position of the North Korean government despite some recent positive changes. Therefore, how can we keep this momentum moving toward the actual improvement of the North Korean human rights situation? Below are some of what we are doing now in 2015.

III. 2015 Establishment of the UN OHCHR Field-Based Structure (Seoul Office) and the UN Human Rights Council Panel Discussion: PRESENT

1. The Opening of the OHCHR Office in Seoul

Some new efforts are being made by the United Nations this year, such as the establishment of the OHCHR office in Seoul and the panel discussion focusing on abductions at the Human Rights Council.

Based on the 2014 Resolution 25/25 of the Human Rights Council, the field-based structure was finally established in Seoul on June 23, 2015. It was previously welcomed by the UN General Assembly as well.⁴ The mandates of the regional office specializing in the North Korean human rights (NKHR) issue are as follows:

- i) To strengthen the monitoring and documentation of the NKHR situation;
- ii) To ensure accountability;
- iii) To provide the special rapporteur with increased support;
- iv) To enhance the engagement and capacity-building of the governments of all States concerned, civil society, and other

⁴ United Nations, UN Doc. A/RES/69/188 (January 21, 2015), paras. 9~10.

stakeholders; and

- v) To maintain the visibility of the NKHR situation, including through sustained communications, advocacy, and outreach initiatives.

The reactions from North Korea have been very harsh against the opening of this office, which ironically shows very well how important the mandates of the office will be. In a practical sense, the work of the OHCHR Seoul office is expected to produce more concrete results as a permanent UN agency specializing only in North Korean human rights issue, with close cooperation and coordination with another Human Rights Council's special procedures mandate-holder Marzuki Darusman, the Special Rapporteur on the North Korean human rights situation.

The Seoul office needs to be secured so that it can function with independence, has sufficient resources, and is not subjected to reprisals and threats. The UN OHCHR and the South Korean government concluded a bilateral treaty to deal with those questions on May 22, 2015. According to the Exchange of Notes on the Operation of the Field-based Structure of the OHCHR in South Korea, the 1946 Convention on the Privileges and Immunities of the United Nations is applicable to the office as part of the United Nations, its property and assets, its officials, and experts on mission in South Korea (Article 1), and the relevant authorities of the government are required to take all appropriate measures to ensure the security and protection of the premises of the office and exercise due diligence to ensure that the tranquility of the office is not disturbed by any unauthorized entry of persons or groups of persons from outside or by disturbances in its immediate vicin-

ity (Article 2). In addition, the South Korean government must respect the freedom of expression of all participants of meetings, seminars, training courses, symposiums, and workshops organized by the office (Article 3), and take all necessary measures, without undue delay, to facilitate the entry into and exit from, and movement and sojourn within South Korea of the following persons: the OHCHR officials and their families, the experts on mission for the office, the UN officials having official business with the regional office, and other persons invited by the office on official business (Article 4).

On the other hand, it is the duty of all persons of the OHCHR Seoul office and relevant experts and UN officials enjoying such privileges, immunities, and facilities to observe the laws and regulations of South Korea (Article 6).

The six-person office is a new step in a process by the United Nations to gather information about alleged crimes against humanity in North Korea. The Seoul office is looking to bring more depth to the COI report, and Seoul can be the best place to be for that purpose. Ms. Signe Poulsen, representative for the office, expressed in an interview that her office would coordinate information gathering from North Korean refugees, activist groups, academics, and other North Korea-related parties, and despite limited prospect of progress at the UN Security Council, her office would help to keep the issue of North Korean human rights on the UN agenda.⁵

⁵ Alastair Gale, "UN Office in Seoul Intensifying Probes of Alleged Rights Abuses in North Korea," *Wall Street Journal*, September 23, 2015.

2. Panel Discussion at the Human Rights Council

In addition, the Human Rights Council decided, in its resolution of March 2015, to convene a panel discussion on the North Korean human rights situation as a prominent platform to bring together relevant stakeholders, including various UN and national bodies and NGOs, with a special focus on the issue of international abductions, enforced disappearances, and related matters.⁶ The panel discussion was held at the Human Rights Council in Geneva on September 21, 2015. Several experts including former COI members and victim groups attended the discussion as panelists, and governments including North Korea and related governmental and nongovernmental organizations also participated in the discussion.

Michael Kirby, former chair of the COI and panel moderator, explained that the panel had decided to address the issues of abductions, disappearances, and detentions for political reasons due to the very large number of abducted or disappeared people mentioned in the COI report. Marzuki Darusman, Special Rapporteur on the North Korean human rights situation and panelist, said that the main findings by the COI had led to conclusions that crimes against humanity had taken place and were continuing to take place in North Korea. These crimes included murder, enslavement, forced abortion, and enforced disappearances. The report had galvanized the international community to end the violations committed in North Korea, which is now a permanent item on the

⁶ United Nations, UN Doc. A/HRC/RES/28/22 (April 8, 2015), paras. 10~11.

Security Council's agenda.⁷

David Hawk, author of *The Hidden Gulag* and panelist, explained that abducted nationals were deported by the police to penal labor colonies located in the mountainous regions of North Korea. The North Korean government should be asked to explain how many nationals there were, to account for their fates and whereabouts, and to provide locations and information on the conditions in detention facilities. Kochiro Iizuka, Vice Secretary-General of the Association of Families of Victims Kidnapped by North Korea and panelist, warned that North Korea misused information about abductees. There had been at least several hundred Japanese citizens whose abduction by North Korea cannot be doubted. Given the fact that abductees were of many nationalities, abductions constitute an important international issue, and States should unite to resolve it. Kwon Eun-Kyoung, representing the International Coalition to Stop Crimes against Humanity in the Democratic People's Republic of Korea (ICNK) and panelist, drew attention to the recent executions and enforced disappearances of citizens in North Korea because they possessed phones or had access to forbidden foreign news in the country. Hundreds of public executions had been carried out in recent years on similar allegations. This policy sought to spread fear in society.⁸

However, North Korea, speaking as the concerned country, rejected

⁷ Office of the High Commissioner for Human Rights, "Human Rights Council Holds Panel Discussion on the Human Rights Situation in the Democratic People's Republic of Korea," September 21, 2015.

⁸ *Ibid.*

the panel discussion, which it claimed followed ill-minded political objectives and represented a product of conspiracy of hostile forces led by the United States pursuing a plot against North Korea. The COI report had been based on false information provided by so-called North Korean defectors. The sponsors of the panel were not qualified to refer to the situation of other countries. A bad precedent was being created at the Human Rights Council, leading to an abnormal situation and resulting in greater damage to the credibility of the Council. All countries that had been struggling against politicization and double standards should reject the confrontational panel discussion.⁹

In the ensuing interactive dialogue, 36 countries and four civil society organizations took the floor and were disturbed by the catalogue and gravity of human rights violations involved, ranging from rape, forced abortion and infanticide in political prison camps, to violations of freedom of religion and belief. They called for an immediate solution to the human rights situation in North Korea, adding that the UN Security Council should refer the situation to the ICC. It was also noted that North Korea did not act alone. In the past two decades, many abductions and forced repatriations took place in and from China. China was complicit in North Korea's crimes against returnees and its efforts to ensure silence and impunity for those crimes. Some countries, however, opposed any action that might lead to a regime change in North Korea and stressed acting in a spirit of cooperation and mutual respect and the usefulness of the Universal Periodic Review (UPR) mechanism.¹⁰

⁹ *Ibid.*

¹⁰ *Ibid.*

This UN Human Rights Council panel discussion shows some recent tendency that the international community has slightly shifted its focus from political prison camps to abduction and enforced disappearances issues, which has some comparative advantages, in that there are more direct witnesses such as families, more countries involved, and they are still ongoing issues as continuing crimes.

IV. North Korean Overseas Workers Problem: FUTURE?

In addition to issues of political prison camps and abductions, a new issue related to North Korean overseas workers, which was not included in the COI report, has just started to be discussed internationally, originating from some studies conducted by NGO groups.

According to various studies, it is estimated that more than 50,000 workers from North Korea operate abroad. The vast majority are currently employed in China and Russia. Other countries where workers operate include countries in Africa, the Middle East, and Asia, such as Algeria, Angola, Equatorial Guinea, Ethiopia, Nigeria, Kuwait, Libya, Oman, Qatar, the United Arab Emirates, Cambodia, Malaysia, Mongolia, Myanmar, and even one European country, Poland. The overseas workers are employed mainly in the mining, logging, textile, and construction industries. The rationale behind this State-sponsored system appears to be to circumvent UN sanctions imposed on North Korea with a view to earning foreign currencies. It is believed that the North Korean government earns

through the system between USD 1.2 billion and 2.3 billion per year.¹¹

According to studies based on direct interviews with former overseas workers, the working conditions may amount to forced labor or can be regarded as a contemporary form of slavery: no freedom of movement, harsh labor conditions, and long working hours (usually more than 12 hours and up to 20 hours) without adequate food, health and safety measures, and indirect payment of salary (that is, the salary is paid first to the companies run by the government itself, and up to 90 percent of the amount is collected by the government for various reasons). The more detailed findings are as follows:

- i) The workers do not know the details of their employment contract;
- ii) Tasks are assigned according to the worker's State-assigned social class: lower classes are reportedly assigned the most dangerous and tedious tasks. Workers with relatives in North Korea are preferred, to ensure that they will fully comply while abroad;
- iii) Workers earn on average between USD 120 and 150 per month, while employers in fact pay a significantly higher amount to the government of North Korea (employers deposit the salaries of the workers in accounts controlled by companies from North Korea);

¹¹ United Nations, *Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/70/362 (September 8, 2015), paras. 25~27.

- iv) Workers are forced to work sometimes up to 20 hours per day, with only one or two rest days per month. In some instances, if they do not fulfill the monthly quota imposed, they reportedly do not get paid;
- v) Health and safety measures are often inadequate. Safety accidents are reportedly not reported to local authorities but handled by security agents;
- vi) Workers are given insufficient daily food rations;
- vii) Freedom of movement of overseas workers is unduly restricted. Workers are under constant surveillance by security personnel from North Korea in charge of ensuring that they comply with the government's rules and regulations. These security agents confiscate the workers' passports. The workers are also forbidden to return to North Korea during their assignments;
- viii) Workers are threatened with repatriation if they commit infractions or do not perform well enough. Defectors apprehended are sent back to North Korea.¹²

This new issue of overseas workers may raise some complex questions in that their labor conditions are not only related to the North Korean government and companies but are related to the poor monitoring of the relevant host countries and their companies as well. The international community, including the UN Special Rapporteur on the North Korean human rights situation and the Spe-

¹² *Ibid.*, paras. 25~27.

cial Rapporteur on contemporary forms of slavery, needs to pay more attention to this other North Korean human rights violation issue,¹³ occurring not in the North Korean territory itself but in many foreign countries.¹⁴

V. Concluding Remarks

Compared to other current issues such as cyber attacks, human rights issues can be regarded as one of the well-established international problems that can reach international consensus comparatively easily and has its own monitoring mechanisms, such as the UN Human Rights Council and many international human rights NGOs. In this sense, global concern and related global governance have actually played a very important role in protecting the human rights of North Koreans.

On the other hand, the international human rights regime clearly has its limits as well. There is no centralized enforcement mechanism, so it basically depends on voluntary implementation by States themselves. This aspect may cause a serious problem, especially when the international human rights mechanisms encounter an uncooperative

¹³ The UN Special Rapporteur on the North Korean human rights situation, Marzuki Darusman, has already promised that he would pay close and sustained attention to the issue in the future, and also formally asked the UN Special Rapporteur on contemporary forms of slavery to pay attention to this issue as well. United Nations, *Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/70/362 (September 8, 2015), paras. 31, 33.

¹⁴ In this sense, the North Korean escapee case is also a very important issue, together with the international abduction problem.

country such as North Korea. Nevertheless, the various North Korean positive and negative reactions we have seen last year and this year surely indicate that the North Korean government actually minds very much the international responses to its human rights situation. And this somewhat changed position and the reaction of the North should be taken more seriously by the international community, including South Korea and the United States. This actually seems to ask for a constant and principled but simultaneously more creative or flexible approach in dealing with North Korean human rights issues.

How does one make use of that unprecedented concern and reaction from North Korea with respect to its human rights situation? How does one balance between pressure and engagement? Namely, how does one balance between more aggressive approaches such as pursuing criminal punishment, blaming and shaming, and more cooperative ways such as human rights dialogues, technical cooperation, and humanitarian assistance? How does one harmonize various domestic actions with regional and international ones, and public efforts with private ones? What could be a more effective way to resolve this deplorable human rights situation—through a clear indication of the problem or in an indirect way, or both ways together? It is high time that more concrete and well-balanced strategy and coordination on the North Korean human rights question developed, not only as it is one of the most pressing global concerns but also in regard to appropriate law and policy of inter-Korean relations and the unification process.

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II. Inter-Korean Relations in a Globalizing World: Systemic Considerations and Current Issues

A. Global and Systemic Considerations



Divided Nations in an Integrated World: Explaining the Post-War Continuity of Korean Division

Charles Armstrong

I. Divided Nations, Partitioned Countries

More than seventy years after the end of World War II, more than sixty years after the end of the Korean War, and more than a quarter-century after German unification and the end of the Cold War, the continued division of Korea seems a paradox. If Korea, as most Koreans and foreigners alike agree, was a single nation for many centuries before the arbitrary North-South division imposed by the Cold War, then one might have expected the end of the Cold War to lead to rapid unification between the two Koreas. Yet this did not happen. There are many reasons for the continued division of Korea between North and South, including geopolitics among the Great Powers surrounding the peninsula; the severe lack of trust and communication between the two Koreas, despite over forty years of contacts; and, not least, the stubborn survivability of the North Korean regime.

But Korean division does not seem like such a paradox if one looks beyond the Cold War to other, possibly more relevant, points of historical origin and comparison. In this chapter, I argue that most explanations of Korean division have been looking in the wrong place and making inadequate comparisons for understanding the origin, dynamic, and longevity of Korean division. This involves both a historical error and a conceptual one. The historical error rests in seeing Korean division as a result of the Cold War, when in fact the Cold War was a necessary but not sufficient condition for the division of Korea. The conceptual error lies in conceiving of Korean division as an externally imposed separation between zones that began in 1945. This confuses two very different kinds of separation: the original 38th parallel dividing line introduced in August 1945, and the armistice line imposed to stop Korean War fighting in July 1953. The former was an arbitrary division across the middle of the country established by the United States and the Soviet Union in order to create two occupation zones to facilitate the surrender of Japan, Korea's colonial occupier. The latter, the Military Demarcation Line surrounded by a De-Militarized Zone (DMZ) was established at the point of contact between rival armies, in order to keep two warring parties apart. The former was a separation imposed by outsiders, the latter a separation resulting from a combination of internal warfare and international negotiation to end a state of compact. The former type of separation we can call *division*, the latter *partition*. Both instances involve the separation of a community that is generally considered to be a single nation but becomes divided into two (or more) distinct political units under separate and independent governments. But for the purposes of this analysis, we can define division as *a separation imposed by external powers on a pre-existing*

nation-state, whereas partition here will be defined as *a separation resulting from a combination of civil war conditions and international agreement in order to end active hostilities*. Division is primarily a political arrangement, whereas partition has a legal (if often contested) status as a mechanism for implementing a negotiated end to a conflict.

The pre-existence of open conflict is the key variable here, and it does not matter if the hostilities originate in political, ethnic, religious, or other differences. Hence, the fact that pre-division Korea was a relatively homogenous nation like Germany, and not an ethnically divided community like the Indian subcontinent, does not mean that Korean division will follow the German path of sudden unification rather than the long-term path of partition like India and Pakistan. Korea's 1945 *division* was similar to Germany's in 1949, but Korea's 1953 *partition* was more like India's in 1947, the outcome of intense and bloody internal conflict. Hence, we should not be surprised that Korea's partition has long outlasted Germany's division. If other partitioned countries offer any lessons, eventual Korean reunification will be a long, complex, and difficult process.

The title of this chapter is inspired by the book *Divided Nations in a Divided World* by Gregory Henderson, Richard Lebow, and John G. Stoessinger, a product of the Institute on the United Nations at the City University of New York. The collection takes pains to distinguish "divided nations" from "partitioned countries."¹ The former

¹ Gregory Henderson, Richard Lebow, and John G. Stoessinger, *Divided Nations in a Divided World* (New York: David McKay, 1974).

category includes Korea, Germany, China, Vietnam, Cambodia and Laos, and Mongolia; the latter includes Ireland, India and Pakistan, Rwanda-Burundi, and Palestine-Israel. The “divided world” of Henderson, Lebow and Stoessinger’s title is the bipolar world of the Cold War, in which divided nations like Germany, Korea and Vietnam seem to be perfect microcosms. Ireland, India, and Israel on the other hand are “partitioned countries” that were all sundered in the process of decolonization. If the Cold War is the key variable, the end of global bipolarity leads to the end of both a “divided world” and divided nations created by the Cold War. But if the key variables are decolonization and internal conflict, it is evident that the world is far from integrated. Indeed all the “partitioned countries” listed by Henderson et al in 1974 remain divided today, and numerous countries have continued to be partitioned since that time, including Yugoslavia, Czechoslovakia, the Soviet Union, Indonesia/Timor-Leste, Ethiopia/Eritrea, and Sudan/South Sudan, among others. The 1953 partition of Korea lies in the latter category, as Korea then was a post-colonial nation undergoing a civil conflict that was stopped (but not permanently settled) by international agreement. Therefore Korea today should be considered a “partitioned country” rather than a “divided nation.”

This conceptual separation gives two sets of countries rather different from those proposed by Henderson, Stoessinger, and LeBow:

Table 1
Partial List of Divided Nations and Partitioned Countries

Divided Nations	Partitioned Countries
Germany 1949~1990	Ireland/Northern Ireland, 1921~present
Vietnam, 1954~1975	Korea, 1945~present
Yemen, 1967~1990	India/Pakistan, 1947~present
	Israel/Palestine, 1948~present
	China/Taiwan, 1949~present

The *partition* of Korea, as opposed to its initial *division* in 1945, is therefore a case of unresolved conflict over post-colonial boundary-making similar to past and present conflicts in Africa, South Asia and the Middle East. As the table above indicates, partition is much longer lasting than division: indeed, all of the partitioned countries listed above remain partitioned to this day. The key issue for most partitioned countries, including Korea, is not the Cold War, which divided Europe and Germany and made Korean division possible. Rather, it is the incomplete struggle over the nature and sovereign authority of post-colonial nation-states. The closest parallel to Korea in East Asia is China, split since 1949 between the Republic of China on Taiwan and the People's Republic on the mainland. Although Vietnam was also a case of post-colonial nation building, the Vietnamese nation was divided at the 17th parallel by the Geneva Conference of 1954 *before* significant civil conflict began. This division did not reflect lines of internal conflict in Vietnam and was always unstable. North Vietnam was able to infiltrate the South throughout the period of division and finally conquered the South by force in 1975. In other words, Vietnam was divided *prior* to conflict, whereas China and Korea were divided *as a result of* conflict. Germany, on the

other hand, had no immediate prior history of major internal conflict before its division in 1945, and was split between East and West because of rival power blocs in Europe. Once that rivalry ended, German division ended as well. But the end of the Cold War did not lead to the unification of China or Korea, and the straits of Taiwan and the Korean DMZ remain hostile boundaries to this day. Rather than see these East Asian divisions as Cold War by-products, it might be more useful to see them as cases of post-colonial partition.

II. Theorizing Division

There has been surprisingly little theorization of national division. In the political science literature, integration and conflict tend to get more attention than disintegration and division, even though the latter may be just as common as the former if not more so. The number of states has proliferated since World War II, and partition continues—most recently the separation of South Sudan from Sudan proper, and before that Timor-Leste from Indonesia. Regional integration has also been growing recently, but it often comes hand in hand with national disintegration, most clearly in Europe itself, from Yugoslavia and Czechoslovakia at the end of the Cold War to Scotland and Catalonia today. In one of the few comparative studies of partition, Jassla and Ben-Ari define partition as “the violent territorial and political separation of groups.”² The groups need not be ethnically or religiously distinct—they may also, in the case of Ger-

² Smita Tawari Jassla and Eyal Ben-Ari, eds., *The Partition Motif: Concepts, Comparisons, Considerations* (Thousand Oaks: Sage, 2007), p. 21.

many and the East Asian division, *politically* distinct. Mixed populations across these externally imposed boundaries—whether the mixture is religious, ethnic, or political—leads to migration, often rapid and violent, of which “ethnic cleansing” is the most extreme example.³ The twentieth century was a century of partition. The territorial separation of smaller communities by larger has of course a very long history, but the imposed sundering of communities considered by many if not most of their inhabitants to be a single nation-state, could only arise with the rise of the nation-state as the dominant form of community. The increasing technical capacity and reach of the state has made partition more powerful in recent times. Modern partition can be traced back to the scramble for Africa in the 1880s or the breakup of the Ottoman Empire after World War I, and forward to the collapse of the Soviet Union in 1991, but neither the imposition nor the disintegration of empires quite gets to the meaning of partition as we are using it here. The nineteenth and early twentieth-century concept of “spheres of influence,” combined with trusteeship as guided decolonization, made Cold War division in Europe and East Asia possible. Still, it is the separation of conflicting groups *internal* to the pre-divided polity that established the justification for and basis of partition. Thus, again, purely externally imposed separation can be considered distinct from partition that separates groups in conflict with each other.

Even a relatively peaceful form of division, such as that of Germany between 1949 and 1990, becomes to a greater or lesser degree internalized or “domesticated” at the level of the constituent states, at the boundary, and in the individuals affected (“Die Mauer im Kopf” or

³ *Ibid.*, p. 20.

“the Wall in the Mind,” as they continue to say in Germany). Presumably if division lasts long enough, new nation-states are created. In practice this rarely if ever happens between parts of divided nations with widely accepted ethnic unity—or perhaps none of these divided nations have lasted long enough yet for this to happen. But separation is constructed through local practices and not merely by creating boundary lines on a map. Division is not just a political context. It is also a foundation for everyday practice, the formation of identity, and the development of new collective memories and forms of community.⁴ Over time, identities harden across boundaries, and although the two sides may develop relationships of co-existence and co-operation, voluntary re-integration is extremely rare. Recent attempts at re-integrating ethnic Russian parts of the former Soviet Union, to give a particularly obvious example, have been beset by violence and international opprobrium. The European Union has been the world’s largest experiment at integration across national borders, and arguably the most successful one, but seems to be reaching its limits in the early twenty-first century. Even within the EU some nation-states, such as Britain and Spain, are subject to powerful forces for ethnic separation.

III. The Cold War, Decolonization and Partition

National borders in many areas of the world were reconfigured in the first post-war decade, particularly between 1948 and 1954.

⁴ See John Borneman, *Belonging in the Two Berlins: Kin, State, Nation* (Cambridge: Cambridge University Press, 1992).

Large-scale population displacement (“ethnic cleansing”), civil war, and violence characterized this period in several parts of the regions, particularly East and South Asia, the Middle East, and Africa. This phenomenon was largely the conjuncture of two processes: the advent or acceleration of decolonization, and emergence of the Cold War. A second wave of boundary reconstitution took place in the early 1970s, including the second partition of India in 1971, related in part to changes in the global Cold War. Boundaries simultaneously became harder and more open in the era of *détente*. The development of Korean division fits squarely within this history: independence and the creation of two regimes in 1948, solidification of division with the Korean War armistice of 1953, and the beginning of mutual recognition in the early 1970s in the context of Sino-U.S. rapprochement and the changing configuration of global Cold War relations. Below is a brief recapitulation of the comparative cases of divided China and Vietnam, followed by a detailed exploration of inter-Korean relations from 1948 to the present day, and some concluding thoughts on the problem of Korea’s seventy-year existence as a divided nation.

1. China

The division of China is a maritime one, across the Straits of Formosa, but just as militarized and volatile as the land borders of the early Cold War. The historian Michael Szonyi’s *Cold War Island* examines the local experience of PRC-Taiwan confrontation among the residents of Quemoy (Jinmen), a small island just off the Chinese coast claimed by the Republic of China on Taiwan that was shelled by mainland force in 1955 and 1958, bringing China and

the U.S. to the brink of military conflict in the so-called “Taiwan Straits Crises.”⁵ Szonyi describes vividly what he calls the “geopolitization” of everyday life at the local level, a concept applicable to all of these cases, and indeed many others.

Shortly after the Straits Crises subsided, the mainland was consumed with the Great Leap Forward and the Cultural Revolution, and the threat of military attack subsided. By the early 1970s there was no serious military threat from the mainland. But it was precisely at this moment with militarization in Taiwan, and Jinmen as a frontline area in particular, intensified. This militarization reached its peak in the 1970s and 1980s, just as the PRC-ROC relationship established an ambiguous stability. This militarization was undertaken by the ROC state for domestic reasons, not for reasons of external security. The authoritarian state capitalized on the external threat—the state of emergency—in order to justify its existence and avoid unification on the other’s terms. Thus, the transformation of the Cold War in East Asia both opened up the possibility of reunification and led to the hardening of boundaries. A similar combination of boundary relaxation and internal rigidification and deepening authoritarianism occurred in South Korea in the early 1970s, and for similar reason.

2. Vietnam

Vietnamese division shares some characteristics with both China and Korea, but the outcome was very different. In order to facilitate the surrender of the occupying Japanese forces at the end of

⁵ Michael Szonyi, *Cold War Island: Quemoy on the Front Line* (Cambridge: Cambridge University Press, 2008).

World War II, Vietnam was initially split at the 16th parallel, with Chinese Nationalist Forces taking the North and British forces in the South. With the beginning of the French-Indochinese War in 1946, the nascent Democratic Republic of Vietnam was challenged by a revived French colonialism. This conflict ended with the division of Vietnam at the 17th parallel following the Geneva conference of 1954, leading to a new phase of conflict. Vietnam's partition, like partitions elsewhere, involved massive population transfer—in particular, the movement of some 100,000 Catholics from North to South. But unlike Germany, China, and Korea, the inter-Vietnamese boundary was never stabilized. On the contrary, movement across the boundary destabilized the South, which was never able to consolidate itself as an effective regime. Ultimately, the South collapsed under military pressure from the North after the American withdrawal in 1973, and Vietnam was unified in 1975.

So far, Vietnam is the only one of the three divided East Asian states to become unified, through a process of military conquest that cannot be replicated in Korea (or for that matter China) without catastrophic consequences. Vietnamese division was closer to a purely externally imposed division like Cold War Germany than a frozen civil war like Korea and China. Nevertheless, Vietnam's post-division conflict was intense and the process of unification difficult and violent. None of the three East Asian divided nations was unified as a result of the end of the Cold War: Vietnam was unified by force fifteen years before the Cold War ended, Korea and China remain divided to this day. Even though Vietnam was not a case of post-conflict partition like Korea, its division was also related to an incomplete process of national consolidation, and therefore less amenable to peaceful resolution than the division of Germany.

IV. The Evolution of Inter-Korean Relations

Gregory Henderson in *Divided Nations in a Divided World* wrote, “no division in the present world is so astonishing in its origin as the division of Korea; none is so unrelated to conditions of sentiment within the nation itself at the time the division was effected; none is to this day so unexplained; in none does blunder and planning oversight appear to have played such a role.”⁶ Henderson is correct, but he focuses on the initial division of 1945, which was indeed an arbitrary imposition that had no correspondence whatsoever to internal Korean “sentiment.” By the time the Armistice Line was imposed in 1953, two rival Korean states had existed for eight years, and the conflict that the armistice was designed to stop was devastatingly real. The Korean War led to the creation of the DMZ as the most heavily fortified boundary on earth, and after 1953 each of the two Korean states attempted, with considerable success, to consolidate itself over its respective citizens and eliminate any internal subversion from—and overt sympathy for—the rival regime on the other side. From the time the two contemporary Korean states were founded in 1948, they have vied with each other for domestic legitimacy and international recognition. The devastating war between the two in 1950~1953 intensified rather than resolved these rival claims, and the competition for legitimacy between Seoul and Pyongyang remained fierce for decades after the Korean War. Despite North Korea’s periodic challenges to the maritime Northern Limit Line from 1973 onward, the inter-Korean boundary was firmly established by the Armistice Agreement.

⁶ Gregory Henderson, “Korea,” in *Divided Nations in a Divided World*, eds. Gregory Henderson, Richard Lebow, and John Stoessinger (New York: David McKay, 1974), p. 43.

In the early 1970s North-South contact was established at the same time that the two dictatorships, especially in the South, were consolidated. While there was some limited cross-border contact, especially in the decade between the late 1990s and late 2000s, the inter-Korean boundary remains the most impervious on earth—even though neither side considers it a “national” boundary. From the initial breakthrough in 1972 to the present, inter-Korean relations moved fitfully and gradually toward greater contact and mutual recognition, a process reaching its peak in the “Sunshine Policy” decade of 1998~2008.

Seoul-Pyongyang relations have evolved through five stages: the first stage, characterized by a zero-sum game of mutual antagonism, ended with the July 4 Communique of 1972, on the basis of which Seoul and Pyongyang for the first time established official contacts. The second stage, a period of on-again, off-again talks and exchanges, culminated in the 1991 Basic Agreement on Reconciliation, Non-Aggression, Exchanges and Cooperation, the 1992 agreement on de-nuclearization of the Korean Peninsula, and the entry of the two Korean states simultaneously into the United Nations. Both the 1972 and 1991 agreements raised high hopes for reconciliation and reunification on the Korean Peninsula, but such hopes were soon overtaken by renewed distrust and mutual hostility.

The third stage in inter-Korean relations was a transitional Period from roughly 1993 to 1998, in which a severe domestic crisis in the DPRK and confrontation with the US over North Korea’s nuclear program inhibited progress in North-South relations. The fourth stage was the “Sunshine Decade” of 1998 to 2008. During

this time South Korean rapprochement toward Pyongyang, initiated by President Kim Dae Jung and continued by his successor Roh Moo-hyun, converged with improving relations between the U.S. and North Korea going back to the U.S.-DPRK Agreed Framework of October 1994 (despite the missile crisis of the late 1990s and the second nuclear crisis of 2002~2003), followed by multi-lateral negotiations involving North Korea in the form of the Six-Party Talks. Characterized by greater contact between North Korea and the outside world, and a general if inconsistent lessening of tensions in Northeast Asia, this was a period of intensifying economic linkages within the broader framework of an evolving regional dialogue among the two Koreas, Russia, China, Japan and the United States.

The current, fifth stage in inter-Korean relations began in the latter part of 2008 and continues to the present. This stage is characterized by an impasse in North-South relations as well as North Korea's relations with the U.S. and Japan. Seoul-Pyongyang relations deteriorated, reaching a nadir with the sinking of the South Korean naval vessel Cheonan, attributed to North Korea, and the North Korean shelling of the Yoenpyeong Island on the South Korean side of the DMZ. At the same time, the Six-Party Process became suspended, North Korea underwent a leadership transition from Kim Jong Il to his son Kim Jong Un, and Pyongyang became a self-declared nuclear weapons state in defiance of much of the world. Compounding North Korea's isolation for its nuclear and missile programs, which have evoked sanctions from the United Nations, North Korea in early 2014 became the subject of one of the most extensive and detailed condemnation for human rights violations of any country in the world: the 400-page Report of the Commission

of Inquiry on Human Rights in the Democratic People's Republic of Korea.⁷ North Korea's nuclear program and the issue of human rights remain major impediments for improved relations with the U.S. and other Western countries.

While some limited North-South contacts continue, notably the Kaesong Industrial Complex where South Korean companies continue to employ North Korean workers, inter-Korean relations by 2015 had reached an impasse. There were some hopeful signs of progress in inter-Korean relations during the second half of 2015, notably the family reunions of October and high-level official talks in December. But prospects are dim for a return to the active engagement of the "Sunshine Decade," much less a genuine overcoming of Korea's partition. And despite much speculation about instability under Kim Jong Un, the regime showed no obvious sign of weakening, as the ruling Korean Workers' Party announced a Party Congress for May 2016, the first in nearly 36 years. North Korea, and therefore the partition of Korea, seems likely to continue for some time to come.

V. Implications and Prospects

A great deal of analysis regarding Korea's division, the development of inter-Korean relations, and potential scenarios for Korean unification has been based on a Cold War bias. This bias has given rise in turn

⁷ For the full text, see UN Office of the High Commissioner for Human Rights, *Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, <<http://www.ohchr.org/EN/HRBodies/HRC/ColdPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>>.

to false analogies: Korea and Germany, East Asia and Europe. A more appropriate and illuminating historical context is post-colonial partition rather than Cold War division. In its violence, intensity and longevity, Korea's partition is more like the partition of India or Palestine than the division of Germany. From a global perspective divided Korea is more like other divided nations in East Asia and other cases of post-colonial partition in the non-Western world, most of which have been much more enduring than Cold War divisions in Europe. The Cold War divided Europe with Germany at its center; Germany was split between the victors of World War II when the Cold War began and unified when the Cold War ended. Nowhere else in the world—with the possible exception of Yemen, a case beyond the scope of this current chapter—was the Cold War the decisive factor in national unification. In East Asia, even the question of when the Cold War ended does not lend itself to a simple answer. The Cold War in East Asia could be said to have ended when Japan normalized relations with Beijing in 1972; in Southeast Asia, the Cold War took on a new local character after the U.S. withdrawal from Vietnam in 1973, and ended definitively when Vietnam joined ASEAN in 1995. What did not end was the confrontation across the Taiwan Straits and the Korean DMZ. This only appears to be a paradox if we consider the Cold War to be the driving force between all these divisions. If we see Korea instead as an incomplete nation-state and a frozen civil war, the difficulty of inter-Korean reconciliation becomes much more explicable.

Post-conflict partition appears to be more difficult to overcome than externally imposed division. Somewhat counter-intuitively, partition may be more stable than division, since partition is an alternative to an open hostility to which neither side wishes to return, and partition holds a legal force binding on the parties of the conflict. Once the exter-

nal conditions that gave rise to a divided nation are removed—such as the Cold War conflict in Europe, in the case of Germany—there is little to hinder the process of reunification. But the opposing sides of partitioned countries are much more internally invested in the conditions of division, which are foundational for the security and survival of the separated states. To put it another way: East and West Germany were *rivals*, whereas North and South Korea since the outbreak of war in 1950 have been *enemies*. The Korean War taught each side to view the other as an existential threat, and only partition—as the negotiated and legally binding end to hostilities—keeps that existential threat in check. One of the major problems with the common understanding of Korea as a divided nation is that it assumes a natural inclination toward unity. While at an abstract level unification may be a desire held in common by the citizens of both North and South Korea, in reality both Korean states have become deeply integrated into the cultural and social fabric of their respective societies. Identification with North or South Korea is much more immediate and powerful than identification with an abstract unified Korea that transcends the two existing states. Conversely, each Korean state had long relied on the threat of the other for the mobilization and support of its citizens.

Reconceiving Korean division as partition suggests that North-South separation will remain deeply entrenched, possibly for a very long time, and can only be overcome through a gradual and incremental process of increasing communication, cooperation, and trust-building. In order for this to happen, each side would need to go much farther than it does at present in recognizing the reality and depth of partition, and the legitimacy and sovereignty of the other side. It may be that in order for Korea finally to become one, it must first openly and explicitly be two.

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Global and Regional Financial Governance: Implications for Inter-Korean Relations and the Unification Process

Douglas W. Arner

I. Introduction

At present, the Democratic People's Republic of Korea (DPRK) is almost certainly the most financially isolated country in the world. In fact, it is also probably the country that is the least connected to the international economy as well. The DPRK is, however, a member of the United Nations (since 1991). As one aspect of its UN participation, the United Nations Development Program (UNDP) now has a number of projects as well as a representative office in the DPRK. At the same time, the DPRK is not a member of the International Monetary Fund, World Bank, Asian Development Bank, World Trade Organization, or any other major international financial or economic organization.

Nonetheless, the DPRK over the past decade has dramatically increased its economic exchanges with China in particular. Com-

bined with its pilot involvement with UNDP projects, this indicates that there may be some consideration taking place of possible options in the context of economic reform. In this context, the experiences of countries such as China and Vietnam and (more recently) Myanmar may provide possible examples of the way a country such as the DPRK could use engagement with the international and regional economic and financial architecture as part of a process of economic reform. China and Vietnam in particular provide very successful examples of economic engagement through the international and regional financial architecture as mechanisms to support economic reform. Likewise, Myanmar provides a more recent example of a country seeking to pursue a similar process of international and regional financial and economic engagement in order to support domestic economic reform.

This chapter thus considers the international and regional financial architecture and the possible implications for the DPRK in a possible process of international and/or regional financial engagement. The first section discusses the evolution of the international financial architecture, highlighting some of its limitations. The second section then considers the emerging regional financial architecture. The third section suggests that there may be emerging a parallel China/BRICs financial architecture and outlines its current directions. The final section suggests some possible initial considerations for the DPRK in increasing engagement, drawing lessons from the experiences of China, Vietnam, and Myanmar.

II. Global Financial Governance and the International Financial Architecture

The global financial crisis of 2008 and the subsequent Eurozone debt crisis of 2010 have had a profound impact not only on global finance and international financial regulation but also on the political context in which both operate.

1. Global Financial Governance: The Pre-crisis Evolution

Global financial governance has evolved through a variety of economic, financial, and political contexts over the century preceding the global financial crisis of 2008, and it is necessary to have some understanding of this development in order to understand the changes emerging in the years since 2008.

a. The first great financial globalization

During the previous period of financial globalization commencing in the final decades of the 19th century and ending with World War I, global financial governance comprised two main elements. The first was private law relating to transactions, most often English contract law—interestingly still the most important framework for international financial transactions today. The second was the gold standard, the dominant domestic and international monetary system until the establishment of the Bretton Woods system at the end of World War II. During this period, international institutional arrangements supporting economic and financial globalization were essentially nonexistent.

In the political context, this was the period of great power struggles emanating from Europe. In this period, as in the political sphere, in the financial sphere, international cooperation and coordination were largely a matter of occasional discussions among great power central bankers, particularly focused on efforts to maintain the gold standard and also to occasionally deal with cross-border financial crises, most often resulting from periodic sovereign defaults. In the context of the frequent financial crises of the time, resolution tended to focus on great power intervention into the economic (and sometimes political and/or territorial) affairs of the country experiencing problems (and potentially causing losses to great power creditors).¹

World War I signaled a break but not a fundamental change in character. In the aftermath of the war, great powers worked to build a new international system to address political issues (through the League of Nations). However, this framework largely ignored financial issues. At the same time, the first formal international institution to support finance was established: the Bank for International Settlements (BIS). The BIS as established had a twofold purpose: first and foremost to assist the flow of international payments (particularly reparations payments) among the great powers and second to support financial coordination, particularly in relation to cross-border financial crises and issues surrounding the international operation of the gold standard. We thus see in the period between World War I and II the emergence of one of the major

¹ See C. Kindleberger, *A Financial History of Western Europe* (Oxford: Oxford University Press, 1984).

forums for international financial cooperation and one that continues to play a central role today.²

Despite these developments, the Great Depression and the Second World War finally ended the first great period of financial globalization and signaled the end of the dominance of the European great powers in finance as well as politics.

b. Bretton Woods

By the end of the Second World War, a new paradigm emerged in global financial law, formalized through the Bretton Woods system established in 1944.

As at the end of the First World War, the victorious powers sought to put in place a new framework for international political, economic, and financial affairs. This framework centered on the United Nations and related institutions. Unlike the League of Nations, the UN was designed to have a central focus on economic and financial matters, formalized in the Economic and Social Council. Likewise, unlike the League system, the new international order included two new treaty-based international institutions that formed the basis of a new public international financial law: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank). At the same time, the BIS was meant to be wound up, but clearly this did not actually take place, primarily because it continued to prove a useful forum

² See D. Arner, M. Panton, and P. Lejot, "Central Banks and Central Bank Cooperation in the Global Financial System," *Pacific McGeorge Global Business & Development Law Journal*, vol. 23, no. 1 (2010).

for discussion in Europe.³

Under the Bretton Woods system, international financial law was characterized by three main elements. In terms of international monetary arrangements, the gold standard was replaced by a U.S. dollar standard, with the U.S. dollar linked to gold and other currencies linked to the U.S. dollar. Changes in fixed exchange rates took place via the IMF. Likewise, the IMF was the central mechanism to address monetary crises to the extent they existed—and they were far fewer during this period than in the previous or subsequent periods. In terms of international financial transactions, these were to be limited through capital controls, as were cross-border operations of financial institutions. At the same time, the World Bank was to support cross-border lending.

In terms of the political context, the central change in this period is a fundamental shift from the previous dominance of the European great powers to the dominance of the United States and the U.S. dollar. Finance was largely deglobalized. Neither of these characterizations was to continue for very long.

Deglobalization of finance at the end of the Second World War began to unravel almost immediately. In fact, today's second financial globalization is largely the result of the ad hoc reemergence of cross-border finance through the 1970s followed by an important change in policy to support globalization of finance from the 1980s up to the 2008 crisis. Likewise, the political dominance of the United States was likewise almost immediately challenged by

³ See H. James, *International Monetary Cooperation since Bretton Woods* (Oxford: Oxford University Press, 1996).

the Soviet Union and the Cold War. Particularly in the West, the U.S. dollar and the IMF played central roles internationally until the unilateral decision by the United States to end the link between the U.S. dollar and gold in 1974, marking the end of the Bretton Woods period.

c. Internationalization of finance and financial governance

The period of U.S. dollar instability from the late 1960s marked the emergence of new approaches to international financial law. In particular, the Group of Six (subsequently Seven and now Eight) and the Basel Committee on Banking Supervision (as it is now known) were established in this period as mechanisms for international financial cooperation and coordination, particularly in the context of increased cross-border financial activities and linkages. It was also in this period that important steps began to be taken in the context of Europe toward greater monetary and financial cooperation, eventually resulting in the Single Currency and the Single Financial Market.

Unlike the Bretton Woods period, international finance during the 1970s and 1980s was allowed to internationalize at an increasing rate, and fixed exchange rates were giving way to floating exchange rates, bringing new challenges to financial regulation. In this environment, once again unlike the Bretton Woods system, the approach was secretive and nonbinding discussions and agreements among financially active nations, dominated by the United States but extending to the full G7. This pattern of G7 dominance of international monetary and financial affairs would continue until 2008, as would the ever-increasing interactions of domestic financial officials

through an ever increasing variety of regulatory organizations (highlighted by Slaughter).⁴

d. The Washington Consensus

By the mid-1980s, the dominant paradigm for international finance had changed to one supporting the globalization of finance, with a preeminent role for the United States and the U.S. dollar. At the same time, this period is characterized by increasing frequency and the severity of financial crises, albeit usually centered on developing /emerging market countries (1980s debt crisis, 1994 Mexican peso crisis, 1997 Asian financial crisis, 1998 Russian financial crisis). While the political context of U.S. ideological and financial dominance did not change, the G7 did seek to build new arrangements to address the challenges of the second great financial globalization, particularly in the wake of the 1997 Asian financial crisis. At the same time, Europe began to focus seriously on developing both a single financial market and a single currency—a reaction to the dominance of the United States and U.S. dollar but also an attempt to compete with the financial advantages of the United States.

e. The New International Financial Architecture

In the wake of the Asian financial crisis, the G7 agreed to establish a new framework to support financial globalization and financial stability. Under this framework, overall policy was coordinated through the G7 finance ministers and central bank governors, with key elements disseminated through a new G20 (encompassing major

⁴ See A. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

emerging markets in addition to the G7/10) and soft-law international financial regulatory standards developed by the main regulatory organizations (the Basel Committee; the International Organization of Securities Commission, or IOSCO; and the International Association of Insurance Supervisors, or IAIS) and coordinated through a new Financial Stability Forum (FSF). These standards were to be implemented by individual countries but with support and monitoring from the IMF and World Bank (particularly through the Financial Sector Assessment Program – FSAP). Likewise, Europe focused on ever-deeper integration, particularly following the creation of the single currency.⁵

Thus, by the time of the 2008 global financial crisis, international financial law was largely a matter of soft-law standards led by G7 financial regulators combined with private law contracts, with the U.S. dollar and floating exchange rates dominant, although with rapidly increasing use of the euro and interest in regional fixed exchange rate – and single market arrangements.

2. The Global Financial Crisis of 2008 and Global Financial Governance

By the initial stages of the global financial crisis in 2007, the international consensus relating to global finance could largely be summed up as a G7 (particularly U.S. and U.K.)-led efficient markets paradigm supporting globalization, floating exchange rates and free movement of capital and financial services, with regulation seeking

⁵ See D. Arner, *Financial Stability, Economic Growth and the Role of Law* (Cambridge: Cambridge University Press, 2007).

to address market failures and in particular to minimize transactions costs through expert-led soft-law mechanisms. The rest of the world was viewed by the global financial elites as students in need of tutelage. In the early stages of the crisis, issues were seen largely in this context and to be limited to rather esoteric areas of U.S. and U.K. finance. As the crisis moved into its acute phase during 2008, this consensus rapidly shifted, most specifically in the autumn of 2008 following the nationalization of Fannie Mae and Freddie Mac, the collapse of Lehman Brothers, and the bailout of AIG. During this period, it rapidly became clear beyond any doubt that, while emanating from complex transactions among large institutions previously thought to be sophisticated, the crisis in fact was spreading to all corners of the global financial system⁶ and directly impacting the global economy. However, by the end of the global financial crisis (in this author's estimation, 2013), the context had once again began to change.

The following sections consider the evolution of the political context in the main areas of the international financial architecture.⁷

a. Coordination and the G20

In November 2008, then U.S. president George Bush signaled the most high-profile change in the political context of global finance with the first G20 heads of government summit in Washington,

⁶ See D. Arner, "The Global Credit Crisis of 2008: Causes and Consequences," *The International Lawyer*, vol. 43 (2009), p. 91.

⁷ This framework is based on R. Buckley and D. Arner, *From Crisis to Crisis: The Global Financial System and Regulatory Failure* (Dordrecht, The Netherlands: Kluwer, 2011).

D.C. This was an important landmark in the evolution of the politics of global financial regulation. First, it expanded the core group of countries involved to include the major emerging markets in addition to the developed Western economies of the G7. Second, it brought finance and financial regulation out of its previous technocratic home with finance ministers, central bankers, and financial regulators and placed it firmly in the context of the global political arena, with the direct involvement of all the leaders of major economies. In addition, since the advent of the G20 heads of government annual summit, other summits (in particular the G7/G8) largely fell into the shadows of the G20, becoming points to build consensus among the various groups concerned in preparation for each annual summit.

During the period of the crisis (2008~2013), G20 summits tended to place very high emphasis on financial regulation and related arrangements, and, in fact, these summits (particularly those of 2008~2011) achieved a tremendous amount of change in global financial regulation. This was largely the result of the continuing evolution of the crisis, first in the United States and United Kingdom and then the Eurozone with the Greek crisis, with periodic reinvigoration of efforts as a result of developments such as the LIBOR scandal.

At the same time, by the later stages of the crisis, as the sense of urgency waned, the G20 began to be less effective in developing consensus, though it remained the most important body in international financial cooperation and coordination.

b. Monetary affairs: The IMF, the Federal Reserve, and the European Central Bank

In the realm of monetary affairs, throughout the crisis, the IMF has played at most a supporting role. Moreover, even the annual World Bank–IMF meetings have largely become subsidiary to the annual G20 leaders summits. At the same time, the political environment in which the IMF operates has changed dramatically, with four frequently diverging groups most active: the United States, Western Europe, other developed countries, and emerging markets.

In the context of the crisis, the IMF quickly became a political focus, with major emerging markets seeking to use the crisis and the rise of the G20 to support an increase in their influence in the organization, albeit with limited success.

In terms of monetary affairs, the floating exchange rate paradigm continues. At the same time, however, there has been a major shift in consensus on capital controls, with a general acceptance in some circumstances, marking a major political change reflected in IMF policy. Further, somewhat surprisingly given increasing concerns regarding U.S. debt levels, the dominance of the dollar has increased at the expense of the Euro, reflecting instabilities in the Eurozone.

c. International financial regulation

In the context of international financial regulation, the crisis has not on the face of things triggered a major rethinking of the system. Just below the surface, however, important aspects of financial globalization do appear to be changing. With the central focus of the G20 leaders on financial regulation, it is not surprising to see that there

have been significant agreements in major areas.⁸ Similar to the aftermath of the Asian financial crisis of 1997, there have also been changes to structure, with the creation of the Financial Stability Board (FSB) in place of the FSF.

Despite initial enthusiasm, the FSB seems to face many of the same limitations as its predecessor, FSF.⁹ Outside of the EU, there continues to be very limited interest in moving from soft-law to hard-law approaches to international financial regulation.

In addition to the FSB, the various international regulatory bodies (Basel Committee, IOSCO, IAIS, etc.) have all expanded their membership to include the full G20 and FSB membership. In this author's view, this has been an important development. In particular, regulators from a number of non-G7 economies are now playing much larger roles in these organizations than before the crisis, suggesting there is greater scope for their participation in the G20 and FSB as well, in which they nonetheless continue to play largely passive roles.

The area in which the most interesting developments are taking place at the moment relates to enforcement: how to make sure that soft-law standards are implemented and enforced and how to address conflicts between G20/FSB members arising in the context of implementation.¹⁰ Going forward, this issue of dispute resolution among

⁸ For full analysis, see D. Arner, "Adaptation and Resilience in Global Financial Regulation," *North Carolina Law Review*, vol. 89, no. 5 (2011), p. 1579.

⁹ See D. Arner and M. Taylor, "The Global Credit Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?" *University of New South Wales Law Journal*, vol. 32, no. 2 (2009), p. 488.

¹⁰ See Atlantic Council, *The Danger of Divergence: Transatlantic Financial Reform and the G20 Agenda* (November 2013).

differing approaches to financial regulation is likely to continue to be one of the most challenging and also interesting intersections of politics and international financial regulation.

3. Global Financial Governance: Looking Forward

Looking forward, a number of trends are discernible in global financial governance.

a. The role of regional monetary and financial arrangements

Prior to the global financial crisis, the single currency and single market project of the EU were seen as very appealing models for other regions to pursue, particularly as a means of both enhancing growth within the region concerned and also balancing against the financial weight of the United States and EU.¹¹ Regional currencies were frequently discussed, and plans were being developed in a variety of other regions, including East and Southeast Asia.

As a result of the Eurozone debt crisis of 2010, this is no longer the case: the crisis has very clearly demonstrated the risks and challenges in building a regional currency and shown that such arrangements are not suitable in the context of most regions, particularly in light of the surrender of sovereignty necessary to make them work.¹² Nonetheless, regional financial integration continues to be

¹¹ See D. Arner, P. Lejot, and W. Wang, "Assessing East Asian Financial Cooperation and Integration," *Singapore Yearbook of International Law*, vol. 12 (2010), p. 1.

¹² See E. Avgouleas and D. Arner, "The Eurozone Debt Crisis and the European Banking Union: A Cautionary Tale of Failure and Reform," University of Hong Kong Faculty of Law Research Paper No. 2013/037 (October 2013).

pursued in a number of regions. In this context, despite the crisis, the EU experience in building the single market should still prove extremely valuable in informing others in seeking to build the architecture necessary to support regional financial markets. While the EU's passport structure and the concurrent need for centralization of regulation and in many cases enforcement and resolution may not be suitable in most cases, the EU experience of harmonization of regulatory standards as a prerequisite to market access certainly is. This is the case not only in the regional context but in the international context, as regulators struggle with concepts of mutual recognition and regulatory equivalence.

b. Financial globalization: Still the paradigm?

While there has been limited official interest in G20/FSB circles for deglobalizing finance (per Bretton Woods), there are increasing questions about whether domestic decisions are in fact moving in this direction as a matter of fact, if not of rhetoric. It is in fact surprising how little discussion there has been of changing the overall policy direction in this respect. Nonetheless, that has in fact been the case.

At the international level, while there has been agreement in large areas of the post-crisis financial regulatory response, divergence domestically in terms of detailed implementation is increasingly raising issues and conflicts between jurisdictions. Capital, leverage, liquidity, derivatives regulation, and accounting standards all fall into this category. Beyond these, certain jurisdictions have gone beyond international consensus in financial regulation in their domestic regulatory systems, and these divergences are likewise raising issues and conflicts.

At this point, it is probably too early to say whether these sorts of issues and conflicts herald a new world of a global financial system comprising a series of bridged domestic/regional financial systems. On the one hand, such a structure may have benefits for financial stability—not the least in that it may be easier to understand. On the other hand, such a system may limit the allocation of capital across jurisdictions, thereby hindering economic growth and innovation. Regardless, however, this situation highlights the complexity of the politics of international financial law in the aftermath of the global financial crisis, with interlinkages between domestic, regional, and international approaches and potential conflicts and divergences at and across each level. This is particularly the case in the absence of a global leader in this area—a major change from the pre-crisis period in which the United States and EU were largely able to lead the rest of the world toward eventual adoption of their approaches. With the leadership credentials of both the United States and EU in the area of financial regulation decidedly weakened by the crisis, others have begun to take higher profile roles in standard setting, with Australia, Canada, and Hong Kong being leading examples. At the same time, the major emerging markets have in most cases not yet shown any real interest in taking greater roles in setting the regulatory agenda. The situation in the area of monetary affairs, however, appears different.

III. Asian Regional Financial Governance

In the aftermath of the Asian financial crisis of 1997, two sets of policies (and approaches to economic development) battled for supremacy in East Asia: (1) protectionism, which conditions eco-

conomic development on closed markets, and (2) liberalization and regional market integration. This was a battle that was soon lost by the supporters of protectionism. In the 2000s liberalization and market integration came to be regarded as the only sustainable paths to the region's future economic prosperity. East Asian countries have expended a great deal of effort in the development of regional financial arrangements to support regional economic integration and growth. These include, in particular, the Asian Bond Markets Initiative (ABMI), the Chiang Mai Initiative Multilateralization (CMIM), the ASEAN+3 Macroeconomic Research Office (AMRO), and the Executives' Meeting of East Asia Pacific Central Banks (EMEAP). ASEAN is now in the process of seeking to build an ASEAN Economic Community (AEC), many aspects of which will likely extend to ASEAN+3 as a result of bilateral arrangements and potentially to the EAC and even APEC.

Prior to the global and Eurozone financial crises of 2008~2013, the EU was often portrayed and in fact often served as a positive model for East Asian regional institutional arrangements. The design of institutions underpinning regional integration has to be a step-by-step process. From CMI to CMIM and AMRO and from ASEAN to ASEAN+3 and AEC, East Asian arrangements follow a pattern of development of institutions that presents striking similarities with that followed by the EU, albeit over several decades, starting with the European Coal and Steel Community and the European Economic Community (EEC) and from there to the EU and ultimately to the European Economic and Monetary Union (EMU) and the introduction of the single currency. As a result of the Eurozone crisis of 2010, this is arguably now much less the case in the context of regional financial governance.

1. Asian Financial Regionalism: A Brief Overview

From the 1950s to the 1980s, individual economies in Asia adopted a range of models to support primarily domestic financial development. These ranged from Soviet-style models of state ownership and control to liberal *laissez-faire*, with approaches to finance varying from model to model. By the end of the 1980s, the basic model in use was the Japanese model of “the developmental state with strong administrative direction of finance,” and this particular model proved the most successful in supporting balanced and inclusive economic growth and development in most of the East Asian economies. This model focused on employing an export-led strategy to support economic growth through a close relationship between government, business, and finance. Finance in this model largely originated through bank loans rather than equity markets.¹³ During this period, economic regionalism, generally, and financial regionalism more specifically remained very limited and fragile. However, with the collapse of the Bretton Woods monetary system, the tremendous increase in cross-border capital flows and currency instability over the 1970s through the 1990s led to the beginning of the formation of transnational regulatory international networks.

During the 1990s, in the context of the then-dominant Washington Consensus, East Asian economies focused on integration with the global economy (primarily the developed Western financial systems and markets) by following rapid liberal economic and financial policies in certain specific areas. Selective market liberalization without

¹³ Q. Liu, P. Lejot, and D. Arner, *Finance in Asia: Institutions, Regulation and Policy* (London: Routledge, 2013).

a backstop of appropriate legal and regulatory institutions set the stage for the 1997 crisis, highlighting flaws in the combination of the Japanese-inspired, state-led model of development and selective liberalization. However, the reforms pursued after the Asian crisis marked the first beginning of significant economic and financial regionalism in East Asia, as economies started looking at common interests, which were not appropriately addressed under the prevalent international financial architecture.¹⁴ The developments in the western world and the 2008 global financial crisis marked another turning point from the export-led growth model, as the decrease in demand for Asian exports shifted regional consensus to support economic rebalancing domestically, regionally, and internationally.

***a. Central Bank and Banking Regulatory Cooperation:
Executives' Meeting of East Asia-Pacific (EMEAP)
Central Banks***

EMEAP was established in 1991 to provide the main mechanism for central bank, regulatory, and financial infrastructure cooperation in the region among the more developed financial jurisdictions, to some extent as a reaction to the fact that the only Asian member of the Basel Committee was Japan. EMEAP plays a significant role in central bank coordination and cooperation among its membership and works closely with ASEAN/+3/+6, ADB, BIS (especially the BIS Asian Consultative Committee and Asian Office), and international standard setters. As a result of shared crisis experiences, the effectiveness and impact of the group have grown, with regional initia-

¹⁴ D. Arner and L. Schou-Zibell, "Responding to the Global Financial and Economic Crisis: Meeting the Challenges in Asia," Working Paper Series on Regional Economic Integration No. 60 (Asian Development Bank, October 2010).

tives such as ABMI and support for CMIM.¹⁵

In addition, the ASEAN/+3/+6 Finance Ministers process plays a policy-setting role, including through the CMIM process (ASEAN+3 + Hong Kong). The standards adopted have largely been derived from the international process but with an increasing trend to develop regionally tailored equivalents through regional groups of international organizations, such as IOSCO. At the same time, there has been some movement to develop an Asian Financial Stability Dialogue (AFSD) to coordinate regional cooperation, coordination, and a surveillance mandate. Implementation of international standards is widespread in the region, but willingness to participate in international monitoring through the IMF has traditionally been limited, albeit now increasing rapidly as a result of G20 commitments to FSAP participation. These arrangements may be sufficient for coordinative purposes; however, surveillance arguably requires a higher level of attention, with the AMRO having the potential to provide an appropriate framework, if effectively designed and implemented.

Looking forward, EMEAP provides an important forum for supporting regional financial stability and integration, particularly in the context of the AEC. In this context, the process of development of common minimum standards derived from international regulatory standards combining regional harmonization through domestic implementation of these common regional regulatory standards, an approach pioneered by the EU in the 1980s in the context of the development of the Single European Act, holds

¹⁵ *Ibid.*

the biggest promise. While East Asian regulatory standards are unlikely in the near future to have the binding force of EU directives, EMEAP can also serve an important monitoring and dispute resolution function.

b. Market Development: Asian Bond Market Initiative (ABMI)

Currency and maturity mismatches and a heavy reliance on bank loans in East Asia, under the developmental state approach to finance, were at the heart of the 1997 Asian financial crisis. The 1997 crisis provided not only the biggest impetus to later regional developments but also highlighted the depth of infrastructure-related gaps extant in the Asian financial markets.¹⁶ Post-crisis attention to regional capital market development initially focused on the debt and money markets, but later began to consider wider securities market reform as well.

Debt markets reform has mainly focused on the ASEAN+3 Asian Bond Markets Initiative (ABMI). ASEAN+3 launched ABMI in 2003 to help promote domestic reforms aimed at expanding the size of national and regional bond markets, attracting regional and foreign investors, and strengthening the bond market infrastructure-related needs. Another motive behind ABMI was also to help divert savings to local and regional investments. In this regard, the Asian Bond Fund (ABF), supported by EMEAP, promoted the development of national and regional bond markets by directly creating bond funds. The first such fund, ABF1, was launched in 2003. The ABF completed phase two of the eight ABF2 single market funds in

¹⁶ See D. Arner, J. Park, P. Lejot, and Q. Liu, eds., *Asia's Debt Capital Markets: Prospects and Strategies for Development* (New York: Springer, 2006).

May 2011.¹⁷ On the basis of this progress, the Roadmap+, identifying nine priorities,¹⁸ was adopted in order to produce tangible and concrete outcomes going forward with the support from the ADB and to reinvigorate the ABMI discussions.¹⁹

*c. Regional Liquidity Arrangements and Macroeconomic
Coordination and Monitoring: CMIM and AMRO*

The CMIM is the regional financial sovereign financial liquidity safety net in ASEAN+3 (plus Hong Kong). The CMI was created with the purpose to “provide sufficient and timely financial support to ensure financial stability”²⁰ in East Asia and to supplement existing international facilities, primarily of the IMF. CMI has been growing and expanding on its inception goals and was multilateralized to become a collectively managed reserve-pooling arrangement (CMIM) governed by a single contract in 2010²¹ with USD 120 billion in commitments,²² now doubled to USD 240 billion. Since its inception, 20 percent of

¹⁷ The PRC, Indonesia, the Republic of Korea, Malaysia, the Philippines, Singapore, Thailand, and Hong Kong, China.

¹⁸ These included (1) launching guarantee programs under the Credit Guarantee and Investment Facility (CGIF); (2) developing infrastructure-financing schemes (including a pilot project involving Laos and Thailand); (3) fostering an investment-friendly environment for institutional investors and sharing ABMI expertise with them; (4) enhancing ASEAN+3 Bond Market Forum (ABMF) activities (including the Common Bond Issuance Program); (5) facilitating the establishment of the Regional Settlement Intermediary (RSI); (6) further developing government bond markets; (7) enhancing financial access to consumers and small and medium-sized enterprises (SMEs); (8) strengthening the foundation for a regional credit rating system; and (9) raising financial awareness.

¹⁹ See Asian Development Bank, *Asian Economic Integration Monitor* (July 2012).

²⁰ “Joint Ministerial Declaration of the ASEAN+3 Finance Ministers Meeting,” *ASEAN+3 Macroeconomic Research*, May 2000, <www.amro-asia.org/wp-content/uploads/2011/11/AFMM3_ChiangMai20000605.pdf>.

the aggregate amount has been made available for drawing under CMIM by a user state, delinked from any IMF conditionality, but subject to rules to be developed by ASEAN+3 members. In May 2012 ASEAN+3 added a crisis-prevention facility - CMIM Precautionary Line (CMIM-PL) - to further support the CMIM given the high degree of contagion risks highlighted by the global financial crisis.²³

The ASEAN+3 Economic Review and Policy Dialogue (ERPD) is the most important mechanism for information exchange on economic conditions and policies in Asia. The ASEAN Surveillance Process was established in 1998 to monitor macroeconomic and financial vulnerabilities and strengthen policy dialogue through peer review.²⁴ In May 2000, ASEAN+3 finance ministers launched the ERPD process, which also played a vital role in formulation of the CMI. Most significantly, AMRO was established in 2011 to institutionalize the ERPD and to support the CMIM. While at an early stage, AMRO has a very significant role both in addressing potentially contagious macroeconomic risks and also enabling the functioning of CMIM as a liquidity support (rather than a mechanism to address solvency). The important prescription that follows from the Eurozone crisis is that regional surveil-

²¹ “Phnom Penh Declaration on the East Asia Summit Development Initiative,” ASEAN, November 2012, <www.asean.org/storage/images/2012/new/documents/Phnom%20Penh%20Declaration%2020%20November%202012%20-final.pdf>.

²² “Joint Media Statement - Action Plan to Restore Economic and Financial Stability of the Asian Region,” ASEAN, February 22, 2009, <www.asean.org/joint-media-statement-action-plan-to-restore-economic-and-financial-stability-of-the-asean-region-phuket-thailand-22-february-2009/>.

²³ See I. Azis, “Asian Regional Financial Safety Nets? Don’t Hold Your Breath,” *Public Policy Review*, vol. 8, no. 1 (2012), p. 357.

²⁴ See Asian Development Bank, *Emerging Asian Regionalism: A Partnership for Shared Prosperity* (Manila: Asian Development Bank, 2008).

lance must complement global surveillance.²⁵

d. Financial Services Liberalization: ASEAN, APEC, and ASEAN+3

ASEAN is the main regional arrangement addressing financial services liberalization. Over the years, ASEAN and ASEAN+3 have cooperated in three broad areas of macroeconomic and financial policy - (1) economic review and policy dialogue, (2) regional financial safety nets, and (3) regional financial markets - all of which have been further strengthened since 2008.²⁶ The integration scale, however, has been far higher for trade in goods than in financial services. At present, the various AEC and ASEAN+3 treaties would appear to have greater potential to support further regional financial integration, with ASEAN+3 and ASEAN+6²⁷ having largely eclipsed APEC's role.²⁸

e. Looking Forward:

Building an East Asian Single Financial Market?

East Asian economies lag behind European and North American economies in financial integration. At the same time, both trade and investment flows in the region have grown very rapidly over the past 20 years. The Asian financial crisis in the late 1990s provided an impetus for more financial integration within the region. At the same time, most would agree that in reality, the region's markets largely remain fragmented. Despite the rise in trade related integration,

²⁵ See Asian Development Bank, "Regional Surveillance for Economic Stability," *Asia Economic Monitor* (December 2009).

²⁶ Asian Development Bank, *Asian Economic Integration Monitor* (July 2012), p. 48.

²⁷ Including India, Australia, and New Zealand.

²⁸ P Hsieh, "Reassessing APEC's Role as a Trans-Regional Economic Architecture: Legal and Policy Dimensions," *Journal of International Economic Law*, vol. 16, no. 1 (2013), p. 119.

financial integration lags behind trade and investment in East Asia.

The clear need is for indigenous institutional infrastructure required to support integrated supranational banking markets on the one hand, and the more transnational issues of financial liberalization and free movement of capital, financial services, and trade on the other hand, in the context of the AEC. Importantly, these ideas are also being taken into account more broadly in ASEAN+3/ASEAN+6 with the launch of the ASEAN Regional Comprehensive Economic Partnership (RCEP) to create a free trade area with comprehensive economic cooperation. Significantly, while East Asian financial integration has largely proceeded through weak institutional arrangements, the AEC and RCEP provide a much firmer institutional basis going forward.

2. Financial Integration: AEC

The ASEAN Vision 2020, first adopted by the ASEAN Heads of State /Government in the Kuala Lumpur summit in December 1997, was made more concrete in January 2007 when ASEAN Heads of State/Government signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community²⁹ by 2015. As a central component, the AEC envisages the following key characteristics: (1) a single market and production base, (2) a highly competitive economic region, (3) a region of equitable economic development,

²⁹ The ASEAN Community comprises of three pillars: the ASEAN Political-Security Community, ASEAN Economic Community, and ASEAN Socio-Cultural Community. Each pillar has its own blueprint, and, together with the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan Phase II (2009~2015), they form the Roadmap for an ASEAN Community 2009~2015.

and (4) a region fully integrated into the global economy.

Under the AEC roadmap, monetary and financial integration is broadly structured around three themes: (1) harmonizing regulations, market standards, and rules; (2) developing market infrastructure and regionally focused products and intermediaries; and (3) strengthening member countries' capacities. The influence of the EU experience is thus immediately apparent. At the same time, the underlying focus of regionalism in ASEAN and its supporting framework is different, with a focus on integration to support growth and financial stability rather than political integration. A very important element emerges from this central difference in purpose: treatment of members at divergent levels of development.

From this roadmap, the AEC has so far developed initial plans in two areas: financial market integration and cross-border financial institutions.

With respect to capital markets, in addition to the ABMI, the ASEAN Capital Markets Forum (ACMF) has developed the Capital Market Implementation Plan. The Implementation Plan "provides for a comprehensive approach at building an integrated regional capital market, with strategic initiatives and milestones, to strengthen financial intermediation, enhance capacity and manage risks to support national and regional growth" through a core strategy of harmonization and mutual recognition, starting with a core group of the more advanced economies and progressively supporting the development and eventual inclusion of all of ASEAN. It is designed in three phases and organized around six principles: (1) adoption of international standards to the maximum extent possible; (2) progressive liberalization to facilitate more open access and cost reduction through

greater competition; (3) sequencing of regional integration initiatives taking into account ease of implementation, market preferences, and technical linkages; (4) the ASEAN secretariat as the main coordinator; (5) consistent implementation of policies to support regional integration at country level, with effective monitoring mechanisms; and (6) strong communication plans and consultative processes to build consensus and set priorities for integration initiatives.

To date, the ACMF has focused on two initiatives: cross-recognition of qualifications and development of ASEAN and Plus standards. Cross-recognition of qualifications is proceeding very slowly, with only a limited MoU between Singapore and Thailand so far in place. However, development of ASEAN and Plus standards is proceeding more smoothly. Essentially, these are regional versions of international standards for equity and debt offerings and listings, including adoption of international accounting and auditing standards.

With respect to cross-border financial institutions, so far the focus has been on banks. The ASEAN Banking Integration Framework (ABIF) has yet to be made publicly available, but adoption announcements set timelines for a pan-ASEAN banking strategy to be adopted in two stages. The first stage will focus on pan-ASEAN banking through separately capitalized subsidiaries. This will initially be done through the developed members, with the developing members following at a later stage.³⁰ Such platforms necessitate regulatory convergence across jurisdictions. However, the framework may be applicable to both ASEAN banks and non-ASEAN banks meeting

³⁰ A double-track implementation plan has been adopted for the developed ASEAN 5 (Singapore, Malaysia, Thailand, the Philippines, and Indonesia) and the developing BCLMV countries (Brunei Darussalam, Cambodia, Laos, Myanmar, and Vietnam).

the requirements. The idea is to have “qualified ASEAN banks” (QABs), with regulatory harmonization across ASEAN (once again, with the five developed countries going first, followed later by the developing members). Asian authorities have agreed upon four pre-conditions to ensure the banking integration framework is successfully implemented. The first is harmonization of regulations; second, building financial stability infrastructure; third, assisting the less developed countries to build their banking capacity; and fourth, establishment of set criteria for ASEAN-qualified banks to operate in any ASEAN country with a single “passport.” The ABIF’s concept of integration is restricted to the commercial presence of qualified banks. Thus, it takes such presence as the benchmark for ASEAN banking integration by 2020.

The second stage will allow branching, based on harmonization and QABs, which will require addressing issues such as supervision, resolution, and deposit insurance. This resembles closely the patterns adopted in the EU prior to the banking union. The Eurozone debt crisis has clearly exposed the weaknesses of regulatory structures divided along national lines when these have to deal with integrated cross-border financial markets, necessitating the adoption of regional supervisory and resolution mechanisms. This approach is unlikely to appear in the ASEAN in the foreseeable future.

IV. Emerging Alternatives?

Perhaps the most significant change in the politics of international financial law compared with the period prior to 2008 is the emer-

gence of China. While China's reemergence as one of the world's major economies and major powers has not been sudden, the global financial crisis has marked a paradigm shift. Going forward, the role of China is likely to be one of the most important aspects of the global economy and financial system in the aftermath of the global financial crisis.

a. The G20 and global economic and financial cooperation and coordination

In many ways, the most important aspect of the rise of the G20 to preeminence in global economic and financial cooperation and coordination is the inclusion of China. During the crisis, China became the world's second largest economy and also the world's largest exporter—the result of decades of opening and reform. As a result, the role of China in the global economy is now a first order political as well as economic issue. At the same time, its role in financial and monetary matters remains below its economic weight.

In the context of the G20, China has so far taken a rather low profile, although it has been a major focus of attention in questions relating to global imbalances, exchange rates, and climate change. China is an active participant in discussions, albeit more reactive than leading at present. As China hosts the G20 in 2016, this is likely to present a major opportunity for China to highlight issues on which it places the highest priority, in the same way that other chairs have done previously. In terms of its approach, like other members and other groupings (such as the G7 and EU), China seeks to build coalitions with other members. Unlike the G7 and EU, though, China has fewer historically close relationships. In the context of East Asia, the relationship with Japan is difficult and

the relationship with the other Asia-Pacific members carefully balanced. Probably the highest profile organization to emerge is BRICS (Brazil, Russia, India, China, South Africa), which now meets annually. Similar to relations in the Asia-Pacific, BRICS members are economically self-interested and politically wary of one another. Nonetheless, BRICS does provide a forum with the potential to support G20 coalition building outside the G7 and EU and has taken some notable steps, including a decision to establish a development bank, the New Development Bank.

b. Financial law and regulation

In the area of financial law and regulation, given that China still operates a largely closed financial system, it has so far taken a relatively low-key role. Instead, it has preferred to leave leadership in this area to other more open and financially developed G20/FSB members. Viewing itself very much as a developing country in the context of finance, China continues to feel that it has more to learn than to lead in this area. At the same time, the global financial crisis brought into stark question the desirability of Anglo-American financial models and has led to new questioning in China of the best approach to financial development going forward. One could say that in the aftermath of the global financial crisis, China no longer sees itself as a developing country looking to developed countries for guidance but rather an emerging market country, seeking solutions that will best suit its own developmental needs and objectives. China has thus gained confidence in this area. However, given the importance of its economy, China's financial system is now globally, systemically significant in a way that it never has been before. As a result, the approaches taken by

China with respect to domestic financial regulation are now globally politically significant as well.

c. International investment and finance

The global financial crisis arguably has forced China to come to terms with the need to restructure its economic model away from overreliance on exporting to the United States and EU. This has taken a number of forms, first focusing on diversifying exports to other markets, particularly Asia and emerging markets and developing countries around the world. Today, for almost every country in the world, China is one of the top trading partners (import and export). Second is the focus on restructuring the domestic economy toward greater consumption and increased innovation (moving up the value chain). Third is the focus on reducing the role of domestic investment in driving the economy. In order to balance exports and to deploy savings outside the country, China is focusing on increasing outgoing investment (a policy of “going out” that applies to exporters, to companies, and to finance). The “going out” policy is rapidly changing China into a major investor and exporter of capital to the rest of the world. As one aspect, China and Germany now trade places frequently as the countries with the most international investment treaties.

This “going out” policy over time will have very important implications for the role of China in the global economy and financial system, as it moves toward the role of major international investor and creditor. As this takes place, not only its companies but its financial institutions and eventually its currency will find themselves in ever more places and contexts around the world. China, as with previous

major power creditor nations, will need to adjust its approach to international political and economic relations in order to protect its interests overseas.

This policy is now embodied in the “One Belt, One Road” initiative, perhaps China’s major foreign economic policy initiative and one covering much of the world in various forms and bringing together a wide range of previously disparate initiatives, including RMB internationalization and the establishment of regional development banks such as the new Asian Infrastructure Investment Bank (AIIB) and the Shanghai Cooperation Organisation Bank (SCOB).

d. International monetary affairs

Like Western Europe, East Asian nations have had a long-standing preference for stable exchange rates—a preference that played a significant role in the Asian crisis and also has been the source of political contention, particularly between the United States and Japan in the 1980s and China in the 2000s. Despite the fact that in response to the 1997 Asian crisis and the 2008~2013 crises, East Asia has been progressing in respect of regional integration, these initiatives and institutional arrangements are at a nascent stage of sophistication as compared to EU levels of development, because regional financial cooperation is constrained by national strategic rivalry and regulatory competition. Asian reforms and regionalism initiatives focus only on increased rather than comprehensive and profound market integration; therefore, the possibility of regional monetary union in the near future is very unlikely, given the EU experiences on the one hand, and political differences across East Asia on the

other.³¹

While it appears that there is little appetite for the development of an Asian counterpart to the Euro, there is very strong interest in encouraging regional use of domestic currencies. Apart from encouraging cross-investment in each other's bond markets, China, Japan, and ROK in December 2011 agreed to promote the use of local currencies in cross-border transactions. More significantly, China has been promoting the international use of the renminbi as a regional and international currency, culminating in the inclusion of the renminbi in the IMF Special Drawing Right (SDR) in November 2015.

As the global financial crisis highlighted to China the dangers of overreliance on G7/EU markets for export and finance, the global financial crisis has also highlighted the dangers of overreliance on G7/EU currencies. This has driven the decision to increase the use of China's currency, the yuan. Importantly, this at present is not a drive to replace the dollar as the world's major currency. Rather, it is a drive to increase the use of the yuan in order to better support and protect China's interests, in much the same way as the euro was developed and has evolved into a (but not "the") major international currency. This decision has also certainly been reinforced by the failure of IMF reforms to date to rebalance power in that institution and by the difficulties of regional currency arrangements demonstrated by the Eurozone debt crisis.

The renminbi's potential as reserve currency could help China shield its domestic economy from U.S. dollar volatility. While this move

³¹ See Q. Liu, P. Lejot, and D. Arner, *Finance in Asia: Institutions, Regulation and Policy* (London: Routledge, 2013).

raises deep and extensive implications for both regional and global economic cooperation and integration, it demands several preconditions to meet before the renminbi can enjoy the status of a reserve currency in parallel to the U.S. dollar and euro, and financial liberalization would be only one such requisite.

In the context of monetary integration, the renminbi presents possibilities of widespread regional use in a relatively short period of time. An important lesson from the global and Eurozone financial crises relates to liquidity: the central bank of the issuer of an international currency is the liquidity provider of last resort. While CMIM has a role to play in this context, China's adoption of increasing numbers of bilateral currency swap arrangements shows that lessons have already been learned and that as the international use of the renminbi increases, the People's Bank of China will be well positioned to provide liquidity support as necessary.

What would this take, and is it reasonable? In terms of increasing the use of the yuan, this is already clearly taking place, albeit from a very low level. The first stage relates to the confidence of others outside (and also inside) China in using the currency: Is the currency an effective store of value? Is it useful for making cross-border payments? With respect to effectiveness as a store of value, the yuan has remained stable through both the Asian and the global financial crises, increasing confidence and trust among potential users. With respect to payments, as China is now the largest or at least one of the largest bilateral trading partners of every economy in the world, the currency is clearly useful for making payments in receipt for both exports and imports. China since the 1990s has maintained an open current account, albeit with limitations. As a way around these,

there are now payment systems for offshore yuan transactions in an increasing number of major centers, beginning with Hong Kong, followed by Singapore, Taiwan, the United Kingdom, and Australia, with more to follow, each supported by central bank swap lines between the Chinese central bank (the People's Bank of China) and partner jurisdiction central banks. The confidence, rationale, and infrastructure for use of the currency for trade now all exist, with use increasing rapidly.

Second, there must be mechanisms to manage the yuan in between transactions - namely, deposit accounts. As is the case with payments, yuan deposit services are now widely available, and the pool of offshore yuan deposits in jurisdictions such as Hong Kong, Singapore, Taiwan, Australia, and the United Kingdom continues to increase. The corollary of deposits includes loans and, likewise, loan markets (both for trade finance and also term and syndicated lending) and are increasing, not unlike the early stages of the Euromarkets in the late 1950s and early 1960s.

Third, as cash balances increase, there are requirements for investments, particularly to support international treasury operations of corporations and financial institutions. In addition to deposits and loans, offshore yuan bonds are now widely available from an ever-increasing range of issues, once again not unlike the development of the Euromarkets in the mid-1960s and early 1970s.

Fourth, as financial activities increase, risk-management tools become necessary. In this respect, yuan swaps are being increasingly used to manage risks - an important intersection between a key element of the G20/FSB post-crisis regulatory agenda and the internationalization of the yuan.

Thus, one can say that the main elements are in place for increasing the internationalization of the yuan and that its use is in fact increasing in all these aspects rapidly. At the same time, one aspect that is widely seen as essential is not yet in place: full convertibility on the capital account. In my view, this is not strictly essential (many major currencies have experienced significant periods of capital controls and are still widely used for exactly the reasons highlighted in the preceding analysis). However, for the yuan to join the dollar and euro as a major international currency - for instance, with the euro and yuan taking up approximately similar shares of transactions and with the dollar still the leading international currency - convertibility is probably essential. This poses a challenge for China. On one hand, China is in the process of increasing convertibility and probably intends to have the currency largely convertible within five years. At the same time, China is likely to continue to maintain certain capital controls. On the other hand, as noted above, the global consensus now accepts a range of capital controls as useful (a major change from the Washington consensus period), and the end result is likely to be sufficient to see the yuan emerge as a major international currency, not replacing the dollar but rather joining the euro in the second tier.

V. Conclusion

Looking forward, one can identify major elements of global and regional financial governance continuing to evolve, including the emergence of new China/BRICS initiatives that may very well develop into alternatives to existing global financial governance structures.

From the standpoint of the DRPK, China, Vietnam, and Myanmar all followed a similar path, initially joining the UN and followed by participation in the major international and regional financial organizations. In all three cases, this initially focused on becoming a member of the IMF (which is often a prerequisite for participation in other institutions, including regional institutions such as the ADB, CMIM, and AMRO) and the World Bank (in order to access funds and expertise) as well as the ADB. After a period of involvement, China and Vietnam then became involved in international financial organizations such as IOSCO and the BIS. WTO membership has followed as the economic reform process has moved forward. Myanmar is now following a similar path. The three countries have also pursued greater participation in regional organizations, with Myanmar in particular having continually participated in ASEAN as well as CMIM and now AMRO. Vietnam likewise pursued ASEAN membership as well as CMIM and AMRO as its process of economic reform moved forward. While China is not and will not be a member of ASEAN, it has engaged actively with ASEAN and its members, particularly in the context of the ASEAN+3 process and the related CMIM and AMRO initiatives. Over time, as China's economic reform and development have progressed, it has moved from a process of participation to one where it is increasingly seeking leadership roles

in global and regional financial governance arrangements. Where its interests are not met by the existing institutions, it is increasingly seeking to lead the development of alternatives that would more closely reflect its objectives.

A similar path would thus seem the most obvious in the case of the DPRK. In particular, as a first step, it would seek greater regional and international financial engagement if it determines to move forward with a process of economic reform. Institutions such as the SCO and SCOB as well as the AIIB would seem to offer opportunities that may be more attractive than the IMF and World Bank at this point in time.

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Resolving the Korean Question: Beyond the Impasse in Inter-Korean Relations

Barry K. Gills

I. Introduction

This chapter provides an analysis of structural changes in the global political economy and their relation to the history of the Korean Question, contemporary inter-Korean relations, and North Korea's position in international order. It contains a brief overview of several decades of adaptive responses to the changing international system by both Koreas. The nature and consequences (domestic, regional, and global) of North Korea's strategy of regime continuity and relative political-economic autarky will be analyzed and contrasted with dominant trends of economic globalization and the increasing role and influence of the Global South in global governance, in relation to which North Korea stands in an increasingly marginalized position. This chapter will conclude with considerations of the future implications of North Korea's marginalization in regional and international orders and possible scenarios to move toward resolving the impasse in the Korean Question.

“Countries...which, for reasons of their own, are opposed to the *status quo*, would be quick to discover the weaknesses of the existing institutional order and to anticipate the creation of institutions better adapted to their interests. Such groups are pushing that which is falling and holding onto that which, under its own steam, is moving their way. It may seem as if they had originated the process of social change, while actually they were merely its beneficiaries, and may even be perverting the trend to make it serve their own aims.”¹

“Each of these three processes—appropriation, distribution, and production—is part and parcel of the history of legal and social orders. In every stage of social life, in every economic order, in every period of legal history until now, things have been appropriated, distributed, and produced. Prior to every legal, economic, and social order, prior to every legal, economic or social theory are these elementary questions: *Where and how was it appropriated? Where and how was it divided? Where and how was it produced?*”²

II. Explaining the Impasse in the Korean Question

The perspective taken in the analysis to follow attempts to examine the long-term and contemporary relationship between the geo-

¹ Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1944).

² Carl Schmitt, “Appropriation/Distribution/Production: An Attempt to Determine from Nomos the Basic Questions of Every Social and Economic Order [“Nehmen/teilen/Weiden: Ein Versuch, die Grundfragen jeder Sozial- und Wirtschaftsordnung vom Nomos her richtig zu stellen”],” in *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos Press Publishing, 1953).

litical framework of the Korean Question and the changing geo-economic conditions affecting the historical course and the future prospects for the resolution of the Korean Question. The underlying assumption of the argument is that the Korean Question is far too important to the Korean people and to the international community as a whole to be left unresolved and that its solution is necessary to establish future regional and international peace. To leave the Korean Question in its present state of impasse is not an acceptable option, and to do so would pose a serious danger to the prospects for international peace in the future. To resolve the Korean Question is therefore an urgent historical imperative for both Korean governments and the international community. This will require quite significant changes in policy by all significant parties involved and innovation of new institutional frameworks in order to break the impasse and move toward a real, historical, and peaceful resolution of the Korean Question.

This analysis seeks to understand the international and domestic sources and patterns producing the “relative backwardness” of the North Korean economy today, as well as the historical tendency toward “relative marginalization” of the DPRK in both the contemporary global political economy and current global governance structures. This in turn will be related to an attempt to understand the sources of the political tendency within the DPRK itself toward increased “regime rigidity” and “regime ossification,” which have gradually intensified since the early 1980s. A critical analysis of the political economy of development in the DPRK includes recognizing the historical limitations of a strategy of relative economic autarky (or self-reliance) and the centralized economic planning system, as well as the obstacles to reform in North Korea that are arguably due to the external responses to its policy reform changes.

While the Korean Question in the modern international order has a history of over a century,³ the present analysis will be confined primarily to examining the sources of the contemporary phase of “impasse” in resolution of the Korean Question in the new millennium.

I characterize the contemporary condition of the Korean Question as at an impasse in terms of making substantial progress toward a peaceful resolution of the Korean Question. The central issues in the resolution of the Korean Question include establishing a firm and lasting peace on the Korean Peninsula and in the regional context; establishing both domestic and international legal clarification of national sovereignty on the Korean Peninsula; agreement by all major parties, domestic and international, to a new road map toward the goal of peaceful national reunification; and consolidation of the position and the role of the two Koreas within the context of evolving regional integration processes.

It is my central argument here that the historical course toward the present impasse can best be explained by understanding the history of the divergent adaptive responses of North and South Korea to changing conditions in the global political economy and international order.⁴ In overview, while South Korea has successfully

³ See Jeong-Ho Roh, “The Korean Question (1870~1910): The Question of Independence under a New Legal Order,” in *Inter-Korean Relations and the Unification Process in Regional and Global Contexts*, eds. Jong-Chul Park and Joseph Harte (Seoul: KINU-CKLS, 2015); Charles Armstrong, “Divided Nations in an Integrated World: Explaining the Post-War Continuity of Korean Division,” in *Inter-Korean Relations and the Unification Process in Regional and Global Contexts*, eds. Jong-Chul Park and Joseph Harte (Seoul: KINU-CKLS, 2015); B. K. Gills, *Korea versus Korea: A Case of Contested Legitimacy* (London: Routledge, 1996), pp. 29, 30~52.

⁴ B. K. Gills, *Korea versus Korea: A Case of Contested Legitimacy*.

adapted over a period of several decades to the external context in ways that have cumulatively enhanced its domestic development and its international position of influence within the global political economy and dominant institutions of global governance and international order, North Korea, by contrast, has failed to make the type of adaptive response internally or externally that would enhance its position and influence within the evolving structure of the global political economy and institutions of global governance. The general historical path of successful modern economic development involves the strategic goal of achieving a high level of industrialization, with sustained technological innovation and infrastructural modernization and continual upgrading of these structures to conform to prevailing international standards in line with main currents in the global political economy.

The Polanyian observation (quoted above) on the nature of the strategies of status quo challengers, which includes so-called late industrializers⁵ during the post–World War II era, leads to the general conclusion that South Korea has been a successful state in these terms, as both beneficiary of the past and the extant international order and a proactive cocreator of emergent contemporary patterns, rules, and institutions of the global political economy and global governance. North Korea, by contrast, has gone from an initially relatively strong position and potentiality within the post–World War II international order (c. 1950–1980) in terms of both its domestic socioeconomic development and its international diplomacy (e.g., with members of the G-77 and the nonaligned movement during

⁵ Alice Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (New York: Oxford University Press, 1989).

the era of the New International Economic Order proposal and in the context of the global strategic framework of the Cold War), to an increasingly marginalized and ineffectual position in relation to both the globalizing world economy and the evolving configuration of global governance. In a globalizing world economic structure, national economic development strategies and economic planning have increasingly become interconnected with strategies of engaging productively in global value chains and integrating “national” economic activities with the global structures of production, trade, finance and investment. States in today’s global political economy may enhance their development prospects and their status and influence internationally by the pursuit of strategies that attempt to attract and consolidate advanced economic practices within their own territory while being closely linked to the global structure as a whole.

It could be argued that North Korea’s history of failed adaptive responses to the changing international order is the primary source of the contemporary impasse in the Korean Question. From this point of view, the peaceful resolution of the Korean Question is dependent upon North Korea’s ability to adopt a new strategy of adaptation to the globalizing world economy and to engage with contemporary institutions of global governance. There is certainly a strong link between the special historical origins of the DPRK and the reproduction of the communist party regime in North Korea, the composition of its distinctive ruling bloc and ideology, and the failure to achieve policy changes that adapt successfully to globalization and establish an influential role within evolving institutions of global governance.

However, it is also very important to recognize (and to resolve) the external sources of the failures of repeated attempts by North Korean governments since the 1980s to introduce economic reform policies that had the potential to lead to more successful adaptive responses to the changing global economic order. It could be argued that the negative responses, or at least not actively facilitative responses, from South Korean governments and significant international actors and governments (including the United States) reinforced the tendency of repeated North Korean reform efforts to fail. Such negative external responses to North Korean reform policies placed the reformers within the North Korean political apparatus at a disadvantage versus more conservative and hard-line elements in relation to implementation and consolidation of internal reform policies.

This situation has led to a long period of economic and diplomatic policy inconsistency by the DPRK, accompanied by inconsistency in the policies of South Korea and the United States in their respective responses to North Korean policy. Overall, this has produced a situation in relation to the Korean Question of “start and stop,” with intervals of apparent progress in resolving fundamental issues alternating with dramatic policy reversals and accompanying intensified obstacles blocking peaceful resolution of the Korean Question. This framework of reinforced policy failures has resulted in a “geopolitical blockage” surrounding the Korean Question today. There is now a vicious circle, whereby the failure of (past, repeated, and recent) domestic “economic reform and opening” policies by North Korea reinforces the “geopolitical blockage” and vice versa.

A new strategy by North Korea, if it were adopted, would be reflective of the Polanyian insight that successful challengers to the inter-

national order will devise strategies that combine seeking benefit for their own interests and aims from within the existing structures and institutions of world order with devising new means (both political-economic and diplomatic) to craft innovations that exploit new opportunities arising within an evolving or weakening old order and that will advance their own position and influence within the new order. At present, while South Korea is arguably successfully pursuing such a strategy (in broad terms), North Korea is defaulting upon these historical opportunities, including both increased domestic policy space and enhanced diplomatic space vis-à-vis the Global North. North Korea's relative and increasing failure in this regard is in sharp contrast to the increasing voice and influence being exercised by numerous other countries of the Global South, with emerging patterns of South-South cooperation that are gradually reshaping the established patterns of the global political economy and the institutions of global governance.⁶

The reasons behind and explanation for these sharply divergent historical pathways between North and South Korea may also be sought in the interface between the divergent Schmittian bases of historical origin of the two rival Korean states, the historical context of the civil war, the polarization by rival ideologies of modern political economy of development and national state formation, and the interaction of these domestic and regional factors with long-term patterns of restructuring in the post-World War II global political economy. The Schmittian points of the historical origins of the two states on the Korean Peninsula stand in a relation of acute con-

⁶ Kevin Gray and Barry K. Gills, "South-South Cooperation and the Rise of the Global South," *Third World Quarterly*, vol. 37, no. 2 (2016): forthcoming.

trast and mutual contradiction, which is the main historical source of their long-term divergent paths of development. This historical development divergence has “hardened” increasingly with the passage of time over the past several decades. This historical “hardening” in the case of North Korea has been increasingly manifesting over the past three decades as an ever-intensifying condition of “regime ossification.” This condition of regime ossification in North Korea is the consequence of a strategy in which the highest priority is given to pursuit of domestic regime survival and regime continuity (conforming to the Schmittian point of historical origins of the North Korean regime).

This framework of analysis, combining the Polanyian and Schmittian perspectives, produces an analysis of causal chains in the development of North Korea’s history of regime ossification and its relation to the impasse in the Korean Question as follows:

- Increasing tendencies in the global political economy toward intensification of economic globalization offer opportunities for Polanyian strategies by new challengers and “late industrializers.”
- North Korean nonparticipation in dominant trends of economic globalization produces increasing “relative technological and economic backwardness” in the North Korean political economy of development.
- North Korean nonparticipation in the dominant trends of economic globalization produces intensified internal tendencies to a condition of “regime ossification.”
- Increased “relative marginalization” from the dominant trends of globalization within the global political economy produces

increased “relative backwardness” of the North Korean political economy of development, which in turn increases the tendency for “regime hardening” (on the bases of its Schmittian historical point of origin) and reinforces the North Korean regime’s policy priority on regime survival.

- The priority of a regime survival strategy strengthens the tendency to increase regime reliance on domestic repression in order to maintain and reproduce the domestic order, and it strengthens the tendency toward militarization within the strategy (e.g., the military’s first policy).
- These tendencies in North Korea’s historical trajectory, in contrast to the ever more sharply divergent trajectory of the South Korean strategy of development and diplomacy, further strengthen and reproduce an increasing tendency to “regime hardening” in North Korea and of “structural rigidity” in the national division between North and South Korea.
- The increasing structural rigidity of the national division (the de facto two-state formation as a permanent rather than a temporary condition of Korean sovereignty and independence) produces a potential tendency and danger for an increase in bilateral and geopolitical political-military tensions on the Korean Peninsula and regionally.
- The persistence and deepening of the North Korean trajectory of relative marginalization from the dominant trends of economic globalization in the global political economy and the related tendency to increased regime ossification produce the effect of a decreasing potential for reform and adaptation within North

Korea that would potentially facilitate the adoption of a new (Polanyian) strategy of adaptation to the international order.

- The North Korean regime's failure (or default on the historical option) to undertake timely domestic reform (e.g., of the gradualist, communist party-led reform template of its principal ally, China) decreases its potential to actively seize upon new opportunities for international maneuverability in pursuit of its own interests, aims, and influence.
- This failure (or default) of domestic reform and adaptation by the North Korean regime decreases the potential for full normalization of diplomatic and economic relations between North Korea and South Korea and other regional powers (excluding China) and decreases the potential for peaceful stabilization of the national division and an eventual successful, peaceful unification of the two Koreas.

These conditions produce the hardening of the impasse in the Korean Question.

III. The Future Peaceful Resolution of the Korean Question

An argument can be made that now is the time to finally resolve the Korean Question, not only on the basis of the historical danger represented by the impasse, as argued at the outset of this paper, but also because there is now a more favorable conjuncture internationally for the peaceful resolution of the Korean Question. Many

significant changes have taken place in the international division of labor and the organization of the world economy in the past several decades. A substantial shift in manufacturing has taken place toward the Global South, and the role of the South in overall global trade and investment has also significantly increased in comparison to several decades ago. In the aftermath of the recent global financial and economic crisis that began in major Western financial centers in 2007~2008, there has been an upsurge in South-South economic and diplomatic relations, as well as enhanced roles for countries of the South in principal institutions of Global Governance, including the creation of the G-20. The economic and diplomatic rise of China, in particular, and the fact that China is now the principal economic partner of North Korea, could be a factor that facilitates future progress on resolving the Korean Question. With increasing influence in the global order being exercised by countries of the Global South, there is also theoretically the possibility that the Global South as a whole, perhaps via the auspices of the UN system, could help to facilitate a breakthrough to resolve the Korean Question and North Korea's fuller integration into the contemporary global system.

Economic self-interest within and between the two Koreas could also play a positive role. Recent indications from influential elements of the South Korean business community that favor more economic engagement with the North could converge with North Korea's present regime's intent of implementing far-reaching economic policy reforms within the DPRK, including sweeping changes in the laws relevant to encouraging and protecting foreign direct investment interests.⁷ The Kim Jung-un government's recent announcement of a "dual" policy places renewed emphasis upon economic growth

and development goals, thus indicating the political enhancement of the influence of reform-oriented economic technocrats in the cabinet inside the North Korean governing system. External supportive policy responses to these North Korean initiatives would be an extremely important factor in the prospects for further strengthening these reform elements within North Korea, while external negative or nonfacilitative policy responses would increase the probability of another failure at reform and adaptive policy and thus reinforce the vicious circle of impasse outlined in the analysis above.

Key external actors, including the United States (as well as South Korea), urgently need to adopt a cooperative, consistent, nonpartisan, long-term policy toward facilitating the consolidation and success of North Korea's economic reform and opening policies. This change in the external policy framework should have a positive impact on the regional security context and help to produce a situation in which many parties could convene to negotiate the conditions for a new regional security framework and establish the basis for a permanent peace on the Korean Peninsula. Confidence-building measures, arms control and disarmament, and especially denuclearization are central to the process of stabilizing a new regional security framework, which is itself vital to the peaceful resolution of the Korean Question. Such a process of reducing tensions and (re) establishing mutual trust and "friendship" between the two Koreas and their regional partners should be pursued in parallel with

⁷ Kevin Gary and Jong-Woon Lee, "Following in China's Footsteps? The Political Economy of North Korean Reform," *The Pacific Review* (2015); Kyu-Chang Lee, "Analysis and Evaluation of North Korea's Legal System for External Economics with a Focus on the Legal Regime for Special Economic Zones," in *Inter-Korean Relations and the Unification Process in Regional and Global Contexts*, eds. Jong-Chul Park and Joseph Harte (Seoul: KINU-CKLS, 2015).

economic talks at a regional level to give North Korean economic reforms a real chance of success and consolidation.

The unattractive default position for North Korea would be an ever-increasing bilateral economic dependence on Chinese trade and investment—but with continued relative marginalization from the global political economy and global governance institutions. South Korea would lose influence with and economic opportunities in North Korea in such a scenario that involves ever-increasing bilateral dependence of North Korea upon China.

The question that arises from this is that of how the contemporary impasse in the Korean Question might be overcome. What changes are necessary and effective within this configuration to produce new conditions that would facilitate a peaceful stabilization of the national division and eventual peaceful reunification? This is the most acute question at present being addressed by the South Korean state and other parties involved in seeking solutions to the Korean Question.

There is a set of fundamental observations that underlay the prospects for a process of peaceful stabilization of the national division and of any foreseeable process toward peaceful reunification on the Korean Peninsula, upon which I would like to conclude. These observations include the following:

1. Nuclear war on the Korean Peninsula must be prevented.
2. Denuclearization of the Korean Peninsula (and potentially regionally and globally) is necessary and desirable and in every nation's interest in order to preserve the peace and prevent nuclear war.

3. Permanent peace on the Korean Peninsula is in the interest of the Korean people, the region, and the world.
4. A wider disarmament process that encompasses all weapons of mass destruction and conventional weapons is in the interest of establishing permanent peace on the Korean Peninsula.
5. A wider disarmament process on the Korean Peninsula is in the interest of the Korean people, including releasing scarce resources needed to enhance national socioeconomic well-being and providing additional sources of finance for urgent climate change adaptation strategies in the future.
6. The significant reduction of North Korea's marginalization within the global political economy and dominant institutions of global governance is in the interests of the people of both North and South Korea, the region, and the world and will contribute to international peace.
7. The construction of a new regional framework to institutionalize denuclearization, permanent peace, and enhanced cooperation between North Korea and its neighbor countries in the region is necessary in order to overcome the impasse in the Korean Question.
8. The adoption of a new strategy of adaptation to the global political economy and institutions of global governance by the North Korean regime that embraces increased participation in these structures will facilitate the process of successful peaceful stabilization of relations on the Korean Peninsula and regionally, enhance North Korea's internal development,

and improve its position and influence within the evolving new international order.

9. Continuation of the present impasse in the Korean Question threatens peace on the Korean Peninsula and regionally, reinforces the marginalization of North Korea in the international order, and undermines the prospects for eventual peaceful reunification of the two Koreas.
10. Recent changes in the global political economy and global governance institutions present a more favorable international context and conjuncture today for the peaceful resolution of the Korean Question.

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B. Current Issues: International Investment and Cyber Security



Analysis and Evaluation of North Korea's Legal System for External Economics with a Focus on the Legal Regime for Special Economic Zones

Kyu-Chang Lee

I. Introduction

North Korea's legal regime for external economics can be subdivided into legal systems for foreign investment, special economic zones, and inter-Korean economic cooperation. In November and December of 2011, North Korea overhauled 12 laws pertaining to external economics. Coinciding with Kim Jong-Il's death on December 17, 2011, the newly enacted and amended laws may be significant indications of North Korea's policy orientation under the Kim Jong-Un regime. The newly enacted and amended laws in chronological order are as follows in Table 1.

Table 1
Overhaul of North Korea's Legal System for External Economics

Laws	Enactment/ Amendment Dates	Note
Law on Wholly Foreign-Owned Enterprises	Amended 29 Nov. 2011	Immediately preceding law 26 Sept. 2007
Law on Foreign Investment	Amended 29 Nov. 2011	Immediately preceding law 19 Aug. 2008
Law on Land Lease	Amended 29 Nov. 2011	Immediately preceding law 19 Aug. 2008
Law on Equity Joint Venture	Amended 29 Nov. 2011	Immediately preceding law 19 Aug. 2008
Law on Contractual Joint Venture	Amended 29 Nov. 2011	Immediately preceding law 19 Aug. 2008
Law on the Rason Economic and Trade Zone	Amended 3 Dec. 2011	Immediately preceding law 27 Jan. 2010
Law on the Hwanggumpyong and Wihwado Economic Zone	Amended 3 Dec. 2011	-
Labor Law for Foreign-Invested Enterprises	Amended 21 Dec. 2011	Immediately preceding law 21 Jan. 2009
Law on Financial Management of Foreign-Invested Enterprises	Amended 21 Dec. 2011	Immediately preceding law 2 Oct. 2008
Bankruptcy Law for Foreign-Invested Enterprises	Amended 21 Dec. 2011	Immediately preceding law 19 Apr. 2000
Law on Foreign-Invested Business and Foreign Individual Tax	Amended 21 Dec. 2011	Immediately preceding law 19 Aug. 2008
Law on Registration of Foreign-Invested Businesses	Amended 21 Dec. 2011	Immediately preceding law 4 Aug. 2009

Laws	Enactment/ Amendment Dates	Note
Accounting Law for Foreign-Invested Businesses	Amended 21 Dec. 2011	Immediately preceding law 29 Apr. 2008
Law on Foreign-Invested Banks	Amended 21 Dec. 2011	Immediately preceding law 7 Nov. 2002

This paper will first examine the intent and purpose of the overhaul of North Korea's legal system for external economics in Part II, followed by an analysis and evaluation of North Korea's legal system for external economics with a focus on the Law on the Rason Economic and Trade Zone in Part III. In lieu of a conclusion, I will end with a brief forecast for the economic growth advanced by North Korea.

II. The Intent and Purpose of the Overhaul of the Legal System for External Economics

Since Kim Jong-Il's rise to power, North Korea has pursued the goal of becoming a politically strong nation, a militarily strong nation, and an economically strong nation under military-first politics. Pyongyang had been boasting about completing the transformation and opening the new gate to a strong and prosperous nation by 2012. With its nuclear development, North Korea considers itself established as a military-strong nation, while the fulfillment of an economically strong nation remains to be accomplished. North Korea's 2011 New Year's joint editorial declared that "Year

2011 is the year of offensive war for decisive transformation in the establishment of a strong and prosperous nation by further kindling the fire of great upsurge of the people's livelihood."¹ Furthermore, it emphasized that the all-out offensive of year 2011 is the continuation of the great march for the grandiose improvement of the people's livelihood and a "new-high level." Then came the overhaul of the laws pertaining to foreign investment and special economic zones. Given this context, it appears that the intent and purpose of the overhaul was the establishment of an economically strong nation through economic growth and reinvigorated foreign investments. In other words, North Korea seems intent on facilitating foreign investment in the special economic zones through the amendment of the Law on the Rason Economic and Trade Zone and the enactment of the Law on the Hwanggumpyong and Wihwado Economic Zone and provide the necessary institutional support through the revision of laws on foreign investment. A paper by a North Korean scholar also emphasizes the necessity of the establishment of the economy as the strategic line for the establishment of a strong and prosperous nation. To quote a relevant passage:

“The establishment of an economic construction policy in an age of military-first politics becomes the strategic policy in the establishment of a strong socialist and prosperous nation, because this policy is the establishment of an economic policy that enables all problems

¹ Hong Sung Kook, “Characteristics and Forecasts of North Korea’s Economic Regime: With a Focus on the Succession Issue [in Korean],” *EXIM North Korea Economic Review* (Spring 2011), p. 29.

in the establishment of a productively strong socialist and prosperous nation...”²

North Korea’s aim of economic growth through foreign investments can be detected from the lectures on foreign investment, and the plan to adopt an investment-loss compensation system, etc. According to the media coverage of North Korea, about 20 North Korean officials attended a two-day comprehensive lecture by economic experts from Singapore on international financial systems and strategy, attraction of foreign investment, international business law, and other related matters in Pyongyang in mid-March of 2012.³ There are also reports that North Korea plans to adopt the investment-loss compensation system to attract foreign investment. North Korea reputedly founded Korean International Insurance Corporation, which will enter into a reinsurance agreement with an international insurance company, to reduce the investment risk for foreigners. Although North Korea has insurances against commodity theft or loss, this is the first time that it has founded a separate insurance company for international reinsurance to reduce the investment risk for foreigners.⁴ If such reports are true, it appears that Pyongyang will set out to enact a law to reduce the

² Kim Keum-Suk, “The Establishment of an Economy Line in the Age of Military-First Policy as the Strategic Line of the Establishment of a Strong Socialist and Prosperous Nation [in Korean],” *Study of Political Science and Law*, vol. 4, no. 36 (2011), p. 22

³ “North Korean Officials Train for International Economics at Pyongyang in March [in Korean],” *Radio Free Asia*, reported on March 2, 2012, <www.rfa.org/korean>.

⁴ “North Korea Adopts the South-North Economic Cooperation Model to Attract Foreign Investment [in Korean],” *Yonhap News*, reported on March 11, 2012, <www.yonhapnews.co.kr>.

investment risk for foreigners, tentatively called Insurance Law for Foreign-Invested Enterprises, because North Korea's insurance law, the *lex generalis*, contains no provisions on investment insurances. Under the current insurance law, insurances in North Korea are divided into personal insurances and property insurances. The personal insurances include life insurances, accident insurances, child insurances, and passenger insurances, while the property insurances include fire insurances, maritime insurances, agricultural insurances, liability insurances, and credit insurances (Article 2 of North Korea's insurance law).

III. Analysis and Evaluation of Laws on Special Economic Zones

The success of the special economic zones policy requires not only the development of legal systems, but also physical conditions such as the buildup of infrastructure as well as other policy environments. Among the various factors, law and institutions are the most essential components that form the nucleus of special economic zones and function as the guidance for all economic activities within the special economic zone. In other words, the overhaul of the legal system for special economic zones is significant as the economic agents can attain predictability on economic activities, and investment from law and institutions through which the market economy within the special economic zone may be stabilized, while the incompleteness of market stability can be complemented through legal overhaul to invigorate foreign investment in a business-

friendly environment.⁵ In this vein, this section will analyze the Law on the Rason Economic and Trade Zone last amended on December 3, 2011 and the Law on the Hwanggumpyong and Wihwado Economic Zone enacted on the same date. I will first analyze the revised provisions of the Law on the Rason Economic and Trade Zone and then compare it with the Law on the Hwanggumpyong and Wihwado Economic Zone. This will be followed by the comparison of the key provisions pertaining to investment protection in the legal systems for inter-Korean economic cooperation and North Korea's special economic zones, to show that the former has had certain influences on the latter's overhaul.

1. The Law on the Rason Economic and Trade Zone

a. Enactment and Amendment History

On December 28, 1991, North Korea's Administration Council (now the Cabinet) adopted decision no. 74, designating parts of Rajin and Sonbong for the region's development. Since this area is adjacent to China and Russia and has investment attraction as a logistics hub, Japan showed interest from the early stages of its development. Taking into consideration the Rajin–Sonbong area's geographical location, Pyongyang aimed to develop it as an international entrepôt, an export-processing zone, and a tourist zone.⁶

To support these ventures, North Korea enacted the Law on the

⁵ Yoo Hyun-Chung, "Study on Improvement of Laws in the Special Economic Zones of North Korea [in Korean]," (Ph.D. dissertation, Graduate School of Ewha Woman's University, 2008), p. 75.

⁶ *Ibid.*, pp. 59–60.

Rason Economic and Trade Zone on January 31, 1993. The Rason economic and trade zone claimed to be a comprehensive international economic zone, an international entrepôt zone, an international export-processing zone, an international financial zone, and an international tourist zone.⁷ Afterwards, the Law on the Rason Economic and Trade Zone was amended on February 26, 1999, November 7, 2002, April 19, 2005, September 26, 2007, and January 27, 2010 and again on December 3, 2011.

The Rajin and Sonbong Free Economic and Trade Zone was North Korea's first special economic zone, and it was significant for kindling interest in the establishment of special economic zones as a vehicle to introduce foreign capital and technology. However, the Rajin and Sonbong Free Economic and Trade Zone revealed considerable problems in the implementation of the special economic zone policy.

First, the over-emphasis on the geographical advantage resulted in insufficient efforts to develop the infrastructure. Second, the advancement of the special economic zone despite the failure to win the trust of the international community made it difficult to attract foreign investment. Third, the exclusive management and supervision of the special zone project by the central government led to inefficient progress.⁸

⁷ Jin Kil-Sang, "The Legal Status of the Rajin-Sonbong Economic and Trade Zone [in Korean]," *Kim Il-song Chonghap Taehak Hakpo (Yoksa, Pophak)*[*Kim Il-Sung University School Bulletin: History and Law*], vol. 46, no. 1 (2000), pp. 68~72.

⁸ Yoo Hyun-Chung, "Study on Improvement of Laws in the Special Economic Zones of North Korea [in Korean]," pp. 60~61.

North Korea has shown efforts to resolve the above problems of the Rason economic and trade zone. Infrastructure, such as road construction, is in expansion.⁹ The amendments of the Law on the Rason Economic and Trade Zone aimed to attract investment.

b. The Amended Provisions of the Law on the Rason Economic and Trade Zone

The Law on the Rason Economic and Trade Zone consists of five chapters and 45 articles. In contrast, the current law following the final amendment of December 3, 2011 consists of eight chapters and 83 articles as well as two articles in the addenda. A separate chapter, “The Development of the Economic and Trade Zone,” was newly inserted, while the provisions on promotion, privileges, and dispute resolution previously lumped together in Chapter 5 were augmented with each as a separate chapter. Chapter 4 included new provisions on the establishment of enterprises. The 2011 law has become more systematic and detailed than the 2010 law.

The 2011 law inserted a new provision that legal persons, individuals, and economic organizations of various nations of the world could invest in the Rason economic and trade zone. Overseas Koreans residing outside of North Korean territory could also invest in the Rason economic and trade zone (Article 4). This provision appears to

⁹ Andray Abrahamian, Executive Director of the Singapore-based NGO Chosun Exchange, stated that the social infrastructure has been much bolstered, recalling the paved roads as the most impressive experience during his visit to the Rason area. “The Rason Special District Requires More Investment in Infrastructure [in Korean],” *Radio Free Asia*, reported on February 24, 2012, <www.rfa.org/korean>.

Table 2
The Comparison of the Composition of the Law on the Rason Economic and Trade Zone

The 2010 Law	The 2011 Law
Chapter 1. The Basics of the Law on the Rason Economic and Trade Zone	Chapter 1. The Basics of the Law on the Rason Economic and Trade Zone
-	Chapter 2. The Development of the Economic and Trade Zone
Chapter 2. Management and Operation Organ for the Zone	Chapter 3. The Management of the Economic and Trade Zone
Chapter 3. Economic and Trade Activities	Chapter 4. The Establishment of Enterprises and Economic and Trade Activities
Chapter 4. Tariffs	Chapter 5. Tariffs
Chapter 5. Currencies and Finance	Chapter 6. Currencies and Finance
	Chapter 7. Encouragement and Privileges
	Chapter 8. Complaints and Dispute Resolution
(None)	Addenda

have South Korean investors in mind.¹⁰ The 2011 law greatly strengthened institutional protection to attract foreign investment.

¹⁰ Article 4(2) provides that “overseas Koreans [*Joseon dongpo*]” residing outside of North Korean territory can also invest in the Rason economic and trade zone. A question may arise if the scope of “overseas Koreans [*Joseon dongpo*]” includes South Korean enterprises and nationals. The North Korean literature explains that the scope of “overseas Koreans [*Joseon dongpo*]” includes South Koreans. External Economic Cooperation Steering Committee, “Rajin–Sonbong Free Economic and Trade Zone Investment Q&A [in Korean],” (Pyongyang: External Economic Cooperation Steering Committee, 1995), p. 45 cited in Kwon Eun-Min, “Changes and Prospects of North Korean Foreign Investment Laws [in Korean],” *Unification and Law*, vol. 9 (2012), p. 15.

(1) The Newly Inserted Provision on the Ban on Nationalization of the Investors' Property and Compensation

The 2011 law newly inserted the provision that stipulated the ban on nationalization of the investors' property and compensation for nationalization. The investors' property, legal income, and legally granted rights are protected by law, and the investors' property is not subject to nationalization, but in case of unavoidable nationalization or temporary use, there shall be adequate and effective compensation (Article 7).

(2) The Newly Inserted Provision on the Guarantee of Personal Security

The 2011 law newly inserted the provision on the guarantee of personal security. The personal security and human rights of the citizens in the Rason economic and trade zone are protected by law (Article 9). An interpretive question may arise whether "citizens" encompass foreigners. However, given that the fundamental purpose of the Law on the Rason Economic and Trade Zone is to facilitate the economy by increasing foreign investment, it would be appropriate to interpret the scope of "citizens" to include foreigners and South Koreans. Not many would venture to invest without the guarantee of personal security. In this regard, Chapter 5 of the constitution of North Korea stipulates the subject of fundamental rights and duties as "citizens."¹¹ In its second periodic report to the Human Rights Committee, North Korea stated that "every citizen" enjoys the guarantee of rights and freedoms, and happy material and cultural life under the constitution. This shows that "citizens," referring to

¹¹ United Nations, *Second Periodic Report of the Democratic People's Republic of Korea on Its Implementation of the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/PRK/2000/12 (May 4, 2000), para. 7.

“every citizen,” can be interpreted to include foreigners as well as North Koreans. It is also noteworthy that the 2011 law stipulates the protection of “human rights” of citizens. Before the stipulation of the amended constitution of April 2009 that “[t]he State...respects and protects human rights,”¹² only a number of individual subordinate laws such as the attorney law (Article 2), criminal litigation law (Article 5), and the people’s security constraint law (Article 6), stipulated human rights. Notwithstanding the issue of actual enforcement, the North Korean practice of including human rights in individual laws is likely to continue.

(3) Emphasis on International Standards

The 2011 law emphasizes international standards. The management principle for the economic and trade zone makes reference to “international custom” (Article 23), and management of origin of goods must abide by “international custom” (Article 35). Dispute resolution through arbitration must comply with the arbitral rules of international arbitral commissions (Article 82).

(4) Creation of an Independent Management Committee

The 2011 law created an independent management committee for the independence of the Rason economic and trade zone and provided several provisions for its management (Articles 24~28). This may be in response to the criticism that the exclusive management and supervision of the special zone project by the central government led to inefficient progress, as explained earlier.

¹² The Constitution of North Korea, Article 8: “...the State defends the interests of the workers, peasants, soldiers, working intellectuals and all other working people...and respects and protects human rights.”

(5) The Specification of the Land Lease Period

The 2011 law specified the land lease period as 50 years for the stable business management by foreign investors (Article 16). The old law had no such specification. Also, unlike the old law that only permits the foreign investor to rent buildings, it is possible to acquire ownership over them (Article 17).

(6) Major Overhaul of the Dispute Resolution System

The 2011 law greatly overhauled the dispute resolution system. Whereas the old law had only one article pertaining to it, the amended law defines four methods of dispute resolution, namely complaints, mediation, arbitration, and litigation (Articles 80~83). This is progress compared to the old law or the Law on the Kaesong Industrial District with its expanded dispute resolution system.¹³

First, the dispute resolution system of the amended Law on the Rason Economic and Trade Zone added complaints and mediation to the methods of dispute resolution (Articles 80~81). The constitution of North Korea stipulates the subject of complaints as “citizens” (Article 69). Hence, North Korea’s complaints and petitions law also specifies the subject of complaints as “citizens” (Article 8). Therefore, permitting foreigners to submit complaints is an institutional improvement.

¹³ Yoo Wook and Kim Byeong-Pil, “Recent Developments in the Democratic People’s Republic of Korea’s Special Economic Zone Legislations and Its Evaluations: With an Emphasis on the Revised Rason Economic Trade Zone Act and the Hwanggumpyong, Wihwado Economic Zone Act [in Korean],” *Unification and Law*, vol. 11 (2012), p. 77.

Table 3
The Comparison of the Dispute Resolution Clauses in the Law on the Rason Economic and Trade Zone

The 2010 Law	The 2011 Law
<p>Article 45 (Dispute Resolution) A difference of opinion regarding the economic and trade activities within the Rason economic and trade zone shall be resolved through the method of consultation. If the method of consultation fails to resolve the difference, it shall be resolved through arbitration or court proceedings in the Democratic People's Republic of Korea, and it may also be resolved by submitting it to an arbitral organ of a third state.</p>	<p>Article 80 (Complaints and Their Disposition) An enterprise or an individual in the economic and trade zone may submit complaints to the management committee, Rason City People's Committee, central special economic zone guidance organ, and relevant organs. The organ that receives the complaint must examine it and notify the result to the complainant within 30 days.</p> <p>Article 81 (Dispute Resolution through Mediation) The management committee or the relevant organ may mediate a dispute at the request of the parties to the dispute. In this case, the mediation proposal shall be prepared based on the will of the parties to the dispute. The mediation proposal takes effect only if the parties to the dispute sign it.</p> <p>Article 82 (Dispute Resolution through Arbitration) The parties to a dispute may submit their dispute for arbitration to an international arbitral organ of our nation or other nations established in the economic and trade zone. The arbitration shall observe the arbitral rules of the relevant international arbitral commission.</p>

The 2010 Law	The 2011 Law
	<p>Article 83 (Dispute Resolution through Litigation)</p> <p>The parties to a dispute may submit their dispute to litigation before a court with jurisdiction over the economic and trade zone.</p> <p>The administrative litigation procedure in the economic and trade zone shall be stipulated separately.</p>

Second, the arbitral procedure stresses international standards. The current law deleted the phrase “determined by the Democratic People’s Republic of Korea” (former Article 45) and stipulated the observance of “relevant arbitral rules of international arbitral commissions” (Article 82). This is quite significant as the arbitral procedure follows the dispute resolution procedure in general international law rather than as determined by North Korea. It shows the determination to observe international norms in dispute resolution procedure to expand foreign investment.

North Korea emphasizes “independence” in its external relations.¹⁴ Article 17 of the constitution of North Korea thus states:

“Independence, peace and friendship are the basic ideals of the foreign policy and the principles of the external activities of the Democratic People’s Republic of Korea.

¹⁴ North Korea tends to emphasize independence in laws pertaining to external relations such as the constitution, treaty law, and aviation law. For details, see Kim Chan-Gyu and Kyu-Chang Lee, *Study of North Korean International Law [in Korean]* (Paju: Korean Studies Information, 2009), pp. 33-39, 133-139, 283-289.

The State establishes diplomatic as well as political, economic and cultural relations with all friendly countries, on the principles of complete equality, *independence*, mutual respect, non-interference in each other's affairs and mutual benefit. The State promotes unity with people all over the world who defend their *independence*, and resolutely supports and encourages the struggles of all people who oppose all forms of aggression and interference and fight for their countries' independence and national and class emancipation" (emphasis added).

North Korea's basic stance of emphasizing independence is reflected in its international law textbooks. North Korean textbooks regard respect of independence, equality, and mutual benefit, non-interference in internal affairs, and non-aggression as basic principles of international law. Among them, the principle of respect of independence forms the fundamental principle from which other principles originate to strictly secure it.¹⁵ Also, the international law dictionary of the DPRK explains, "Respect of independence among independent states is one of the fundamental principles of modern international law and is the necessary guarantee for the development of normal international relations."¹⁶ The principle of respect of independence can be glimpsed from North Korea's so-called "*juche* legal theory." North Korea claims that its *juche* legal theory is an original

¹⁵ Kim Young-Cheol and Seo Cheol-Won, *Study of Modern International Law* (Pyongyang: Scientific Encyclopedia Publisher, 1988), p. 18.

¹⁶ Academy of Social Sciences, *The Dictionary of International Law* [in Korean] (Pyongyang: Academy of Social Sciences, 2002), pp. 33~34.

legal theory based on *juche* ideology founded by Kim Il-Sung and developed and enriched by Kim Jong-Il.¹⁷ North Korea's international law textbook refers to its international law as "*juche* international law" and claims *juche* international law is an ideological weapon to punish the criminality of machination for aggression and interference by imperialists headed by the United States and hold it to account as well as to expose and punish the essence of bourgeois reactionary "theory" that protects the criminal machination by imperialists and viciously challenges the proletariat revolutionary theory of international law.¹⁸ Other works by North Korean scholars also emphasize independence and are representative in the claim that "the essence of fair international relations is the relation where independence, the life of a state and nation, is strictly supported and realized."¹⁹

Given such emphasis on independence in North Korea's external relations, the stress on international standards in the overhauled dispute resolution system in the Law on the Rason Economic and Trade Zone is an exceptional measure.

¹⁷ Shim Hyong-Il, *The Legal Theory of Juche* [in Korean] (Pyongyang: Academy of Social Sciences, 2002), p. 7.

¹⁸ *International Legal Studies for the Undergraduate Law Faculty* (Pyongyang: Kim Il-Sung University Press, 1992), p. 9.

¹⁹ Lee Seong-Hyeok, "Independence Is the Foundation of Fair International Relations [in Korean]," *Kim Il-song Chonghap Taehak Hakpo (Yoksa, Pophak)* [Kim Il-Sung University School Bulletin: History and Law], vol. 58, no. 1 (2012), p. 87. The following North Korean scholars also emphasize independence in their writings. Lee Su-Yeong, "An Original Thought on the Principle of Respect for State Independence [in Korean]," *Kim Il-song Chonghap Taehak Hakpo (Yoksa, Pophak)* [Kim Il-Sung University School Bulletin: History and Law], vol. 44, no. 3 (1998), pp. 61~66; Han Yeong-Seo, "Respect for State Independence Is the Fundamental Principle in International Organizations [in Korean]," *Kim Il-song Chonghap Taehak Hakpo (Yoksa, Pophak)* [Kim Il-Sung University School Bulletin: History and Law], vol. 54, no. 1 (2008), pp. 66~70.

Third, the 2011 law introduced administrative litigation. The introduction of administrative litigation is a first in North Korea's laws on special economic zones, opening the possibility for remedies through administrative litigation in case of disputes between the management committee or supervisory organs and foreign investors.²⁰ Most countries, including South Korea, have specialized litigations for patent, administrative, and labor disputes apart from general civil trials. With the adoption of administrative litigation, North Korea too expanded specialized litigation separate from general civil litigation. On January 19, 2011, the Presidium of the Supreme People's Assembly introduced maritime litigation by adopting the maritime litigation law as Decree No. 1356.

The reasons behind North Korea's adoption of administrative litigation in the legal system for special economic zones are unclear, but it appears to reflect China's demands. According to a study of China's administrative litigation, prior to China's administrative litigation law [officially translated as "Administrative Procedure Law"], enacted on April 4, 1989 and entered into force on October 1, 1990, lacking an independent administrative litigation law, administrative cases were tried under civil litigation procedure under the provisions of civil litigation law.²¹

²⁰ Yoo Wook and Kim Byeong-Pil, "Recent Developments in the Democratic People's Republic of Korea's Special Economic Zone Legislations and Its Evaluations," p. 78.

²¹ Jeong Yeon-Bu, "Study on the Object and Standing of China's Administrative Litigation [in Korean]," (Master's dissertation, Law Faculty of the Graduate School of Sungkyunkwan University, 2006), p. 26.

2. The Law on the Hwanggumpyong and Wihwado Economic Zone

The Hwanggumpyong and Wihwado economic zone is a special economic zone like the Rason economic and trade zone, but it has slightly different characteristics and accordingly there are differences in the methods of its development. The Rason economic and trade zone claims to be an international zone for international entrepôt, trade and investment, finance, tourism, and service (Law on the Rason Economic and Trade Zone, Article 1). Hence, it has plans to construct an industrial district for cutting-edge technology, international entrepôt, machinery-manufacturing industry, primary manufacturing industries, light industries, service industries, and modern agriculture (Article 3). By contrast, the Hwanggumpyong district seeks to develop the information, light, agriculture, commerce, and tourism industries, while the Wihwado district is to be developed according to the Wihwado development plan (Law on the Hwanggumpyong and Wihwado Economic Zone, Article 3). There are also provisions that show slight differences in their specific contents.

The significant differences between the Law on the Rason Economic and Trade Zone and the Law on the Hwanggumpyong and Wihwado Economic Zone are as follows. First, the Law on the Rason Economic and Trade Zone contains provisions for the acquisition of the land use right and the building use right by enterprises within the economic and trade zone (Article 17), but the Law on the Hwanggumpyong and Wihwado Economic Zone lacks corresponding provisions. Second, an enterprise in the Rason economic and trade zone may develop the natural resources to secure raw materials and fuels necessary for its production (Article 47), but the

Law on the Hwanggumpyong and Wihwado Economic Zone lacks corresponding provisions. Third, in corporate accounting, the Law on the Rason Economic and Trade Zone merely stipulates that internationally accepted accounting principles “may be applied,” making it voluntary (Article 52), whereas the Law on the Hwanggumpyong and Wihwado Economic Zone provides that it “shall be applied,” making it mandatory (Article 42).

However, the two laws share the overall basic object or purpose of revitalizing the economy through the attraction of foreign investment. Furthermore, although there are slight differences in the organization of chapters and articles between the two laws,²² the composition and number of articles are similar in general.

Table 4
Comparison of the Composition of the Law on the Rason Economic and Trade Zone and the Law on the Hwanggumpyong and Wihwado Economic Zone

The 2011 Law on the Rason Economic and Trade Zone	The 2011 Law on the Hwanggumpyong and Wihwado Economic Zone
Chapter 1: The Basics of the Law on the Rason Economic and Trade Zone (Articles 1~10)	Chapter 1: The Basics of the Law on the Economic Zone (Articles 1~10)
Chapter 2: The Development of the Economic and Trade Zone (Articles 11~22)	Chapter 2: The Development of the Economic Zone (Articles 11~21)

²² To take an example, the use of mail, phone, fax, and other means of communication is regulated in Chapter 7 (Encouragement and Privileges) of the Law on Rason Economic and Trade Zone (Article 75), whereas it is governed not in Chapter 6 (Encouragement and Privileges) but in Chapter 5 (The Guarantee of the Conditions for Economic Activities) of the Law on the Hwanggumpyong and Wihwado Economic Zone (Article 57).

The 2011 Law on the Rason Economic and Trade Zone	The 2011 Law on the Hwanggumpyong and Wihwado Economic Zone
Chapter 3: The Management of the Economic and Trade Zone (Articles 23~35)	Chapter 3: The Management of the Economic Zone (Articles 22~31)
Chapter 4: The Establishment of Enterprises and Economic and Trade Activities (Articles 36~52)	Chapter 4: The Establishment, Registration, and Management of Enterprises (Articles 32~44)
Chapter 5: Tariffs (Articles 53~58)	Chapter 5: The Guarantee of the Conditions for Economic Activities (Articles 45~59)
Chapter 6: Currencies and Finance (Articles 59~64)	
Chapter 7: Encouragement and Privileges (Articles 65~79)	Chapter 6: Encouragement and Privileges (Articles 60~70)
Chapter 8: Complaints and Dispute Resolution (Articles 80~83)	Chapter 7: Complaints and Dispute Resolution (Articles 71~74)
Addenda (Articles 1 and 2)	Addenda (Articles 1 and 2)

3. Comparison of the Legal Systems for North Korea's Special Economic Zones and Protection of Inter-Korean Investment

Interestingly, the provisions of the Law on the Rason Economic and Trade Zone and the Law on the Hwanggumpyong and Wihwado Economic Zone contain provisions and institutions that are similar to the legal system for inter-Korean economic cooperation, specifically the legal system for the protection of inter-Korean investment. The key contents are as follows.

First, the Kaesong industrial district is governed by an independent management organ, Kaesong Industrial District Management Committee (Law on the Kaesong Industrial District, Article 21). The Law

on the Rason Economic and Trade Zone and the Law on the Hwanggumpyong and Wihwado Economic Zone also created management committees. Second, the land lease period for the Kaesong industrial district is 50 years (Law on the Kaesong Industrial District, Article 12). This is the same for the Law on the Rason Economic and Trade Zone (Article 16) and the Law on the Hwanggumpyong and Wihwado Economic Zone (Article 16).

Third, with regard to the protection of investment assets, the provisions on the ban on nationalization and expropriation as well as compensation in the case of nationalization or expropriation also display similarities (Agreement on Investment Protection between the South and the North, Article 4; Law on the Rason Economic and Trade Zone, Article 7; Law on the Hwanggumpyong and Wihwado Economic Zone, Article 8).

Fourth, the guarantee of remittances of returns on investment shows resemblances as well (Agreement on Investment Protection between the South and the North, Article 5; Law on the Rason Economic and Trade Zone, Article 65; Law on the Hwanggumpyong and Wihwado Economic Zone, Article 47).

Fifth, with regard to personal security, the stipulations that no arrest, detention, or search shall be made without legal basis and that the relevant treaties with other states, if they exist, shall be observed are also similar (Law on the Kaesong Industrial District, Article 8; Law on the Rason Economic and Trade Zone, Article 9; Law on the Hwanggumpyong and Wihwado Economic Zone, Article 9). In terms of the protection of human rights, the legal system for the special economic zones and the protection of inter-Korean

investment show improvements over the legal system for the protection of inter-Korean investment. Whereas the Agreement on the Entry and Stay in the Kaesong Industrial Complex Zone and Mount Geumgang Tourism Zone stipulates the protection of the “inalienable rights to the person, resident and personal property” (Article 10(1)), the Law on the Rason Economic and Trade Zone and the Law on the Hwanggumpyong and Wihwado Economic Zone contain a more comprehensive rule that “human rights” is protected by law (Law on the Rason Economic and Trade Zone, Article 9; Law on the Hwanggumpyong and Wihwado Economic Zone, Article 9).

Sixth, dispute resolution provisions in the Law on the Kaesong Industrial District stipulate commercial dispute resolution procedure or arbitral procedure or litigation procedure (Article 46). The Agreement on Procedures for Resolution of Commercial Disputes between the South and the North stipulates that the arbitral tribunal will be constituted “by agreement of the parties” (Article 10) and that the applicable law for the arbitral award shall be in the order of the laws agreed upon by the parties; the relevant laws of the South or the North; general principles of international law; and the usage of international trade (Article 12). The agreement between North and South is emphasized in the composition of the arbitral tribunal and the determination of applicable law. By contrast, the Rason special economic zone and the Hwanggumpyong and Wihwado special economic zone stipulate four methods of dispute resolution (complaints, mediation, arbitration, and litigation). In the case of arbitration, the dispute may be submitted to arbitration by an international arbitral organ “by agreement” of the parties to the dispute,

in the same manner as the legal system for inter-Korean economic cooperation. However, the difference is that the arbitral rules shall be the “arbitral rules of the relevant international arbitral commission” (Law on the Rason Economic and Trade Zone, Article 82; Law on the Hwanggumpyong and Wihwado Economic Zone, Article 73). There is greater emphasis on international standards than agreement between North and South.

What is the significance of North Korea’s substantial application of the contents of the legal system on the protection of inter-Korean investment and concurrent display of progress in personal security and dispute resolution in the process of overhauling the Law on the Rason Economic and Trade Zone and the Law on the Hwanggumpyong and Wihwado Economic Zone? The experience of the Kaesong industrial district and Mount Geumgang tourism zone appears to have had influence on North Korea—in other words, learning effect. North Korea may have realized the difficulty of attracting foreign investment without the investment protection, including personal security, and the improvement of dispute resolution from the series of incidents, including the shooting death of a female tourist at Mount Geumgang in July 2008, the measures restricting the entry and stay at the Kaesong industrial complex in December 2008, the forced detention of Hyundai Asan employees at Kaesong in March 2009, and the confiscation and freezing of South Korean assets at Mount Geumgang in March 2010. Such realization appears to have been reflected in the overhaul of North Korea’s legal systems for special economic zones and foreign investment around the time of Kim Jong-Il’s death in 2011.

4. The Limits of Modifying Special Economic Zone Legal Systems

Although North Korea modified its special economic zone laws with great enthusiasm, limitations still exist, because in North Korea laws are regarded as a means to politics.²³ A North Korean legal expert has defined laws in North Korea as being “a powerful weapon to express and realize party policies.”²⁴ Even Kim Jong-Il has admitted that “our [North Korean] laws are an important weapon to realize state policies.”²⁵ In North Korea, Kim Il-Sung’s teachings, Kim Jong-Il’s sayings, and Kim Jong-Un’s orders are a basis for the establishment of laws or the standards for the interpretation of laws. North Korea’s legal theories are rooted on *juche* ideology, and laws are merely a means of executing the policies of either the leader or the *rodong* party.²⁶ The fifth principle of the *Ten Principles for the Establishment of the One-Ideology System* regulates that Kim Il-Sung and Kim Jong-Il’s teachings, the *rodong* party’s policies and directions, which are also laws, must be thoroughly abided by the North Korean people. In order to obtain the benefits of the legal modifications of North Korea’s special economic zones, an expanded understanding of the rule of law in North Korea must be realized.

²³ Office of Court Administration, *North Korean Criminal Law* [in Korean] (Seoul: Office of Court Administration, 2006), p. 11.

²⁴ Jung Yeon-Soo, “Establishment of Law and Order as a Prerequisite for Effective Protection Management of National Property [in Korean],” *Social Sciences*, vol. 1 (1983), p. 60.

²⁵ Kim Jong-Il, *In Strengthening Socialist Judicial Life* [in Korean] (Pyongyang: Chosun Rodongdang Chulpansa, 1989), p. 11.

²⁶ Yoon Dae-Gyu, “The Nature of Law in North Korean Society [in Korean],” *Studies on North Korean Law*, vol. 6 (2003), pp. 22–25, especially p. 24.

IV. Future Forecast and Tasks

1. North Korea's Efforts to Expand Foreign Investment

The Kim Jong-Un regime has been stressing the improvement of the people's livelihood and economic development. Notably, Kim Jong-Un declared during a speech commemorating the 100th anniversary of Kim Il-Sung's birth (Day of the Sun) that the North Koreans will never have to tighten their belts again and will enjoy socialist wealth and honor. Kim Jong-Un's determination can be glimpsed through numerous policies other than the overhaul of the legal system on external economics of November and December 2011 taken to overcome economic hardship.

First, North Korea adopted the strategic line of "parallel advancement of the establishment of the economy and establishment of nuclear forces" at the Plenary Meeting of the Central Committee of the Workers' Party on March 31, 2013.²⁷

Second, North Korea adopted the Law on the Economic Development District on May 29, 2013. The law consists of seven chapters, 62 articles, as well as two articles in the addenda. The economic development districts are classified as industrial development districts, agricultural development districts, tourism development districts, export-processing districts, and cutting-edge technology development districts. Their management is divided between the local-level economic development districts and the central-level economic development districts. Furthermore, the law stipulates that foreign legal persons, individuals,

²⁷ *Korean Central News Agency (KCNA)*, April 2, 2013.

economic organizations, and overseas Koreans may invest and freely pursue economic activities in the economic development districts.²⁸ The purpose of the enactment of the law appears to be economic revitalization through increased attraction of foreign investment.²⁹

Third, North Korea elevated the National Development General Bureau to the National Development Committee and founded the Korean Economic Development Association, a private organization, by a decree of the Presidium of the Supreme People's Assembly on October 16, 2013.³⁰

Fourth, as part of a follow-up to the amendment of the Law on the Rason Economic and Trade Zone, North Korea enacted by a decision of the Presidium of the Supreme People's Assembly on September 12, 2013 four subordinate regulations: the operation regulation for the establishment of enterprises in the Rason economic and trade zone; the labor regulation for foreign-invested enterprises in the Rason economic and trade zone; the operation regulation for the management committee in the Rason economic and trade zone; and the development regulation for the Rason economic and trade zone.³¹

²⁸ KCNA, June 5, 2013.

²⁹ With the enactment of the Law on the Economic Development District, the legal and institutional mechanism for foreign investment appears complete in practice. "Special Economic Districts to be Established throughout North Korea [in Korean]," *Tongil News*, reported on July 1, 2013, <www.tongilnews.com>.

³⁰ KCNA, October 16, 2013.

³¹ For the detailed analysis and evaluation of the subordinate regulations, see Kim Byeong-Pil, "The Analysis and Evaluation of North Korea's New Rason Economic and Trade Area Subordinate Regulations: With a Focus on the Operation Regulation for the Establishment of Enterprises and Labor Regulations for Foreign-Investment Enterprises [in Korean]," *KDI Review of the North Korean Economy* (February 2015), pp. 3~26.

Fifth, North Korea has made sustained efforts to attract greater foreign investment. For instance, *Voice of Korea*, North Korea's overseas radio service, broadcast footage encouraging foreign investment in about 10 special economic zones including Rason, Hwanggumpyong, and Sinuiju in May 2015.³²

Sixth, furthermore, North Korea revised and supplemented the customs law and the foreign trade law on April 3, 2012. The amended customs law and foreign trade law both strengthened the control of central administrative organs. The new customs law newly inserted an article stipulating the state's guidance and control over customs matters to the previous law of September 26, 2007.³³ The trade law added to the law of March 27, 2007 new articles requiring the relevant organs, enterprises, and organizations to submit a draft trade plan for the current year specifying preliminary figures and planned figures to the central trade guidance organ (Article 30), to prepare by month the trade plan delivered by the national planning organ, and to receive approval from the central trade guidance organ (Article 31).

As a result of these efforts, the North Korean economy exited the minus growth of -0.9 percent in 2009 and -0.5 percent in 2010 and recorded a modest growth of 0.8 percent in 2011, 1.3 percent in 2012, and 1.1 percent in 2013 – three years of consecutive positive growth.

³² “The Attraction of Foreign Investment in North Korea Hampered by Political Behavior [in Korean],” *Radio Free Asia*, reported on June 1, 2015, <www.rfa.org/korean>.

³³ Article 62 (Basic Demand of Guidance and Control): Strengthening of the guidance and control over customs matters is an important guarantee for the accurate execution of the state's customs policy. The state shall erect a guidance system over custom matters and strengthen control.

Table 5
North Korea's Economic Growth Rate Trend

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Growth Rate (%)	3.8	-1.0	-1.2	3.1	-0.9	-0.5	0.8	1.3	1.1

Source: Institute for Unification Education, Ministry of Unification, *Understanding North Korea 2014* (Seoul: Institute for Unification Education, 2014), p. 195.

2. Uncertainty about Investment Expansion and Obstacles to Investment

Although North Korea has extensively overhauled its legal system on foreign investment by improving the personal security and dispute resolution institutions and emphasizing international standards in investment protection, it is yet to be known whether North Korea under Kim Jong-Un will achieve the desired result. The overhaul of the legal system pertaining to external economics is a necessary condition, but not a sufficient condition for foreign investment and economic revitalization. To put it differently, for North Korea's policy of expanding the influx of foreign capital to succeed, the improvement of institutional and physical conditions is vital, but the shaping of policy conditions is paramount.

First, without the resolution of the nuclear question, in other words the renunciation of the nuclear-economic parallel advancement line, it is difficult to expect expansion of foreign investment.

Second, although North Korea has improved its legal system for investment protection through learning from the shooting death of a female tourist at Mount Geumgang in July 2008, the measures

restricting the entry and stay at the Kaesong Industrial Complex in December 2008, the forced detention of Hyundai Asan employees at Kaesong in March 2009, and the confiscation and freezing of South Korean assets at Mount Geumgang in March 2010, it has failed to gain the all-important trust. North Korea needs to forego its pattern of behavior—such as the unilateral confiscation and freezing of assets, the unilateral detention of South Korean personnel, and the rejection of talks—to reclaim the trust of the international community so that investments may flow.

Third, there are impediments to foreign investment in North Korea created by the internal regime instability shown by a special military trial by the State Security Department and the execution of Hyon Yong-Chol, the policy unpredictability such as the about-face on the attendance of Russia's Victory Day parade, the retraction of the invitation to UN Secretary-General Ban Ki-Moon to Kaesong, and military provocations.³⁴

Fourth, the human rights issue in North Korea is becoming an obstacle to foreign investment as well. The UN Human Rights Council created by its resolution³⁵ the UN Commission of Inquiry (COI) on human rights in North Korea on March 23, 2013. The COI concluded that systematic, widespread, and gross human rights violations have been and are being committed by North Korea, its institutions, and its officials. The COI report singled out the State Security Department, the Ministry of People's Security, the Korean

³⁴ "The Attraction of Foreign Investment in North Korea Hampered by Political Behavior [in Korean]," *Radio Free Asia*, reported on June 1, 2015, <www.rfa.org/korean>.

³⁵ United Nations, OHCHR, *Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/RES/22/13 (April 9, 2013).

People's Army,³⁶ the Office of the Public Prosecutor, the judiciary, the Workers' Party of Korea, and the National Defence Commission for institutional accountability.³⁷ In particular, the COI's report of the detailed findings stated that, apart from exercising power through his dominant role in the party and the National Defence Commission, the "supreme leader" also acts as an autonomous decision-making institution,³⁸ alluding to Kim Jong-Un's criminal accountability. Since the creation of the COI, the international community has continued to strengthen its pressure against North Korea.

³⁶ United Nations, OHCHR, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/63 (February 7, 2014), para. 80.

³⁷ United Nations, OHCHR, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/CPR.1 (February 7, 2014), paras. 1166~1190.

³⁸ *Ibid.*, para. 1191.

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Foreign Investment, Dispute Resolution, and the Korean Question

Michael A. Hay

This chapter raises more questions than it answers. However, it seeks to identify some key areas that give insight into the changing nature of society in North Korea and point to some key areas that may give rise to considerable difficulty in terms of the process of realizing reunification. The writer considers these questions to be undoubtedly better answered by others but offers some thoughts here.

It is easy to draw parallels between the two Koreas and the divided Germany, but the writer submits that while some common features do exist, the differences are greater than the similarities. Two key differences were the access that East Germans had to West German media and the relative ease of travel between the citizens of both countries. Not so on the Korean Peninsula.

But it would be quite wrong to assume that North Korea is not changing. This writer has witnessed, on the ground, more change in the past 5 years than in the previous 12 years of his dealings with the North. The almost explosive proliferation of high-end quality stores and department stores; the flourishing business in high-class restau-

rants; the massive increase in traffic density; the appearance within a matter of a few months of new taxi operators flooding the city, operated by Air Koryo, adding to the others already in existence; the continued nationwide construction of new apartments and nonresidential buildings and refurbishment of dwellings; and the spreading installation of solar panels for residences are just some strong indicators of the change that is taking place in the country.

And then there is the whole burgeoning area of telecommunications. Cell phones are to be seen everywhere and owned by virtually anyone above their midteens. Indeed, what is most surprising is the number of subscribers who possess two phones—and expensive ones. In addition, numerous people now own the Narae card, which is basically a charge/top-up card, used instead of hard cash, and topped up when depleted.

Pyongyang has yet to experience the rise of credit cards but is already seeing what appears to be an increase in disposable income—along with corresponding increases in prices—and a proliferation of luxury goods to an almost staggering degree.

Another development worth noting is the impressive new central bank building, just opened opposite the writer's offices, and other related financial institutions. What lies behind it is anyone's guess, but it is not unreasonable to assume that the North's desire to nurture closer relations with—that is, membership of—the world's key international financial institutions, including the Asian Infrastructure Investment Bank, is one of the motivating factors.

1. What does this all mean?

None of these remarkable changes could have occurred without a revision or relaxation of the legal system, and while there was a clampdown and rollback on cell phones in the early stages, this was largely abandoned as a lost cause for a number of practical reasons. And the telecommunications network is now in an advanced stage with many smartphones abounding domestically.

However, one may well ask, what comes first—the social urge or pressure for change or the creation or revision of the law? Arguably, the law lags behind, evolving to meet new changes or pressures, just as, for example, in the United States, there is now a scramble to regulate private drones.

Which leads the writer to another phenomenon: the rapid emergence and growth—visible growth—of an ever-expanding middle class. This is perhaps the most striking development in the country, along with the rapidly advancing area of IT. It need hardly be said that one cannot launch a satellite or a missile without some considerable knowledge and experience of the subject. But back to these phones. North Koreans of all types with time on their hands quickly turn to the games and apps on their phones, seemingly oblivious to things around them. And as to the middle class, they now possess hard cash—that means dollars—and plenty of it. The availability of luxury stores, luxury cars, high-class restaurants, high-end clothing, white goods, and luxury brands of alcohol, cosmetics, and jewelry is striking. The writer has raised this several times with both foreigners and Koreans and has yet to receive a satisfactory answer as to where they get such money from.

2. Arbitration—If We Build It, Will They Come?

Mentioned above is the continuing national preoccupation with the erection of numerous buildings, both dwellings and other, that continues to this day, having started in earnest around five or six years ago.

But there is another type of building—the building of a legal infrastructure to cope with the ever-changing realities of daily life in the North. One could spend an entire volume examining the investment laws for foreign direct investment, but this has been well covered by others before, with one caveat—many foreign sources for the makeup of the legal system of North Korea rely heavily on sources culled from the Internet, with many of them unfortunately out of date. Indeed, in one case, the writer received from a client its own analysis of one version of an investment law—which had one slight problem. The client (or its counsel) had researched the laws of *South* Korea.

Suffice it to say that there are now in North Korea well over 70 laws and regulations covering investment-related matters involving the so-called mainland DPRK and the special zones that have been set up, whether in Rason (previously Rajiin-Sonbong), Sinuiju, or elsewhere. There has in fact *not* been a major, wholesale revamping of investment laws as such (with some exceptions, including the Law on Environmental Protection and an interest in environmentally friendly “Green Zones”), but certainly, in the application and promotion of these laws, there is heightened activity by government entities—the “getting the message out” to the foreign community problem remains, however. One anecdote aptly illustrates some of

the constraints in getting that message out—the writer’s firm lost the chance at USD 60,000 in legal fees for three weeks’ work some years ago because North Korean counterparts could not, as a protocol, send out to the writer (who was abroad at the time) their answers to legal questions the client had on the investment laws—through e-mail. Things have fortunately relaxed dramatically since then.

For reasons that need hardly be stated here, new, “pure” commercial enterprises, with the exception of Russia, China, and Mongolia, are rare on the ground as foreign companies sit things out on the sidelines during these testing times on the Korean Peninsula and elsewhere. And while tourists still come in, having returned after ebola turned the “Hermit Kingdom” into the “Hermetical Kingdom” due to very strict quarantine rules, it is very noticeable that many foreign “businesses” from other countries that are operating on the ground—and there are some—are frequently enterprises set up and supported by charities or churches. Other than these three countries, times have changed—and not for the better in the past five years—in terms of the number and variety of foreign investors on the ground.

But no active legal system—which the North Koreans indeed have—can function properly without a subsystem covering the area of dispute resolution; in this context, that means international dispute resolution. Equally, the system of dispute resolution cannot survive and flourish—that is, be taken seriously by foreign investors—unless it works and is applied fairly. The area of dispute resolution is perhaps the number one question posed to the writer by audiences in private seminars or at diplomatic events—and it is remarkable how many local diplomats, including those charged with monitor-

ing the legal and economic environments, are unaware of the array of investment and other laws and the existence of a credible dispute resolution system. One ambassador from a permanent member country of the UN Security Council asked me recently, “Do they have any investment laws here?”

3. Change—the New Arbitration Law

A major development was the promulgation of a new (i.e., revised) External Economic Arbitration Law (EEAL) on July 23, 2014. This law is applied under the auspices of the number one entity charged with overseeing arbitration: the Korea International Trade Arbitration Committee (KITAC), which is somewhat of a misnomer since KITAC has jurisdiction over more than just trade disputes.¹

Why was the law revised when the previous revision was in 2008? The simple reason would appear to be a recognition that a legal system is only of value if it is an evolving entity that does not remain in a static time-warp but adapts to social changes, as well as keeping up with evolving trends in other countries in the field of international arbitration—one of them being speed. KITAC is at the forefront of these changes. KITAC is currently working on revisions to its rules of arbitration and for the time being is still applying the previously applicable rules while being governed by the newest version of the law. Having worked on both, and having successfully represented foreign entities before KITAC, the writer is convinced that

¹ Also, it should be noted that the EEAL (like its predecessor) provides for conciliation (EEAL Article 47) and mediation (Article 48) but surprisingly provides few details about these procedures. This paper focuses on the process of arbitration.

their efforts to keep up with social changes are not merely cosmetic. Indeed, those tasked with the application and revision of the law are simply swamped with work, whether overseeing disputes or revising the applicable legislation and regulations, and are consistently working six- or seven-day weeks, working late into the evening.

The revision of the Arbitration Law is not in quantity or quality. It still has 65 articles, as in the previous version of 2008, and the same seven chapters²; the law was first enacted in 1999. However, notable changes are to Article 3, which specifies in more detail the areas within the jurisdiction of KITAC, including disputes relating to computer software; Article 39, which strips down the previous version regarding the method of running the arbitration and emphasizing the agreement of the parties; and Article 62, which clears up some confusion in the previous version of the law regarding the execution of an award and extends from 10 to 30 days the time for a review of a request for execution of an award.

While the forays of North Korean companies or other entities in the field of international arbitration have been relatively few or far between, there is, and has been for years, a very great interest in the UNCITRAL method of dispute resolution. Ironically so, given the North's hostility toward many things "UN," but in part explained by the long-term willingness of Sweden, as an honest broker, to invite—that is, pay for—groups of senior North Korean lawyers and officials to visit for training and workshops on a regular basis.

² Chapter 1: Fundamentals; Chapter 2: Arbitration Agreement; Chapter 3: Arbitral Tribunal; Chapter 4: Arbitration Procedures; Chapter 5: Award; Chapter 6: Effect of an Award and Request for Revocation; Chapter 7: Execution of an Award.

They also are keen on examining anything coming from the China International Economic and Trade Arbitration Commission (CIE-TAC) in the People's Republic of China (PRC) though, in the grander scheme of things, well beyond that of arbitration, one way to get an enthusiastic welcome from a North Korean official is to suggest that he or she is not going to “follow the Chinese model” in cookie-cutter fashion—rather, the official will follow the “North Korean model.” This clearly has wider implications in terms of Sino-(North) Korean relations.

4. Again—If We Build It, Will They Come?

Two factors hamper their development of dispute resolution, though not fatally—first is the limited ability of North Koreans to travel, whether to conferences or other events or for law firm exchanges, although that is not through hostility but rather through a lack of funding. The second, unquestionably, is the inaccessibility of the Internet, which is awash with sources and discussions on issues so pertinent to their needs. The writer's own computers are the only ones in the office linked to the Internet (at the princely sum of USD 600 a month for broadband),³ and the writer's colleagues—all North Korean—are prohibited from viewing the screen.

In short, we are seeing the same activity that is so prevalent in other developing countries—the thorough examination and study of other systems of law and sometimes the cherry-picking or “cutting and pasting” of laws into the North's evolving legal system. The writer

³ Provided through the Telecommunications Bureau.

has witnessed this same phenomenon over many years in the South.

But here lies the problem—“building it” is *not* enough. One can construct the most beautiful of monuments or restaurants, but if it is not promoted and marketed, there will be few visitors. This is the challenge the authorities face with arbitration. They have no arbitration body website, and their forays into international legal conferences are rare, though the writer has accompanied them on several missions to Europe. The overwhelming number of disputes involve Chinese companies, which tend not to use lawyers when setting up business or in arbitrations. This information barrier is a constant burden in “getting the word out.” And foreigners, understandably unaware of the laws in place, are reluctant to invest, a matter not helped by the two or three themes that continuously (and understandably) occupy the international media. This remains a crucial problem or challenge.

5. Some Practical Features of Arbitration in North Korea

- One *can* win before a North Korean arbitral tribunal, in North Korea, with a presiding North Korean arbitrator, in proceedings against a North Korean company.
- The quality of arbitrators is high, sometimes very high. They are typically from KISU (Kim Il-Sung University) and contain some of the sharpest minds I have met, combined with a curious naiveté on occasion as to what the law on a certain aspect of arbitration is—as if there is one global law of arbitration.
- This writer’s observation from almost 25 years of work and over

a decade on each side of the 38th Parallel is that the proceedings closely follow those seen or applied in Korean Commercial Arbitration Board (KCAB) proceedings, Hong Kong International Arbitration Center (HKIAC), International Court of Arbitration of the International Chamber of Commerce (ICC), the Singapore International Arbitration Center (SIAC), and others.

- The arbitrators are (as most are, worldwide) more inquisitorial and hands on in leading the proceedings and questions, but counsel do have their say, just as elsewhere an arbitration under the auspices of the KCAB in the South has a relatively high chance of containing at least one businessperson as an arbitrator (certainly on a three-person panel). In contrast, before the KITAC in the North, the arbitrator or arbitrators are far more likely to be active lawyers or professors from Kim Il-Sung College of Law.
- There are, by the way, some very clear techniques, exclusively applicable to North Korea, that can be put to great use during cross-examination—and they work. However, they are beyond the scope of this article.
- Arbitration in North Korea is underpriced—and the relevant authorities would do well to hike the fees; arbitration costs would still be very reasonable.⁴
- It is quite possible to complete an arbitration from start to finish in under six months—the writer recently represented the for-

⁴ Fees and costs are tied directly to the size of the claim, according to the rules of KITAC.

eign party (as only he does) in the breakup of one of the country's most well-known joint ventures, and this took six months with three hearings (and only that long because of time lost due to ebola quarantining).

- Execution of an arbitral award (that is, local enforcement) is rapid before the local courts.
- There is one major “but.” One major impediment is the fact that North Korea is not a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In short, there is largely an incentive for the foreign party to put its faith in the DPRK legal system and seek redress locally—a daunting thought to many who believe the cards are totally stacked against them. Not so. And indeed, the EEAL curiously, without going into specific details and mechanisms, provides for the enforcement of foreign arbitral awards and then lists exceptions to the enforceability of foreign awards.

6. North Korea's Development under the Law and Implications for Unification

So what does North Korea's evolving—and constantly improving—legal system mean for the world and for unification if at all? What does the evolving dispute-resolution system mean, and how can it assist the process? Indeed, can it?

On this, (1) the writer is *not* optimistic that it can. (2) Such a conclusion for the bigger picture is drawn from his own experiences and reflections.

The differences are so great that it is hard to imagine a smooth transition and a functioning and functional dispute-resolution system between the two Koreas, among the two Koreas, and in a Korea in the midst of unification, however that manifests. Arguably, reunification will not be a planned, smooth process, and it is very difficult to see how the law can harness and control the energy that to this writer will undoubtedly develop and accumulate as “things change” between the two Koreas. In this regard the writer has in mind dispute commercial and business disputes, as opposed to disputes involving national and international security matters.

While it may be in the interests of the North Koreans to corral South Korean companies in areas such as Kaesong, this arguably constitutes a modest example of progress. The litmus test would appear whether—and if so, when and under what circumstances—the North would permit fully fledged North-South projects and ventures to be permitted in the mainland DPRK—which includes Pyongyang as well as outlying districts. While in the past the writer has, on a small number of projects, been approached by the North to “put a line-in” to South Korea on a small number of flagship projects, they failed to materialize, in part due to the concerns of some foreign companies located in South Korea and also South Korean companies about getting involved in a possible legal and business quagmire.

In short, no matter how many laws are passed, inviting foreign direct investment, no matter how many exchanges, and no matter if North Korea is willing—which, by all counts it is—to apply a fair system of arbitration, this will be of limited use, except largely to countries like the PRC and Russia, if the nuclear and weapons issues (let alone human rights issues) remain unresolved. At the risk of

digression, the question the writer asks everyone he meets regarding the “Korean Problem” but to which a satisfactory answer is yet to come is, What possible incentive, especially now (for several different reasons), does the North have to roll back its nuclear program, having finally found the Holy Grail, the Golden Fleece?

7. Dispute Resolution and Its Applicability to the Bigger Picture

There is a common argument to the effect that it is businesses and cultural events that lead the way, and the politicians and governments follow. However, so long as international businesses are severely restricted in dealings with the North—again, for understandable but also questionable reasons—and run for the hills as soon as the name North Korea is mentioned, it is very difficult to see how the first foundations for a future dialogue with the North—which it desperately wishes, I believe, despite overwhelming objections it seems in some quarters—can ever succeed. There is, sadly, some argument for saying that the window of opportunity has long since closed, or is only slightly ajar, and that the only change would come with a sudden event, such as July 8, 1994, and December 17, 2011. Change may indeed happen, but if there is one certainty, whatever the Korean statute books say, however polished their texts, any development of that nature, will be difficult, and any transition to a new Korea will by no means be soft, smooth, and stable.

There is frankly little to compare with domestic or international arbitration rules when examining resolution of the bigger picture issues facing Korea and the rest of the world. So many issues remain unre-

solved, including the willingness of international countries and institutions—financial institutions especially—to shun the North, which merely allows the North to continue its nuclear and other programs. The nuclear issue and that of the six-party talks—which in the writer’s opinion are now nothing more a pipe dream—could remain problematic through a steadfast refusal to “budge” by several countries (including North Korea). If so, one may see an evolving legal framework that may be increasingly attractive to Russia and China but bring little to the table in terms of foreign investment in North Korea, give little comfort to other countries, and provide the world with no prospect of a peaceful resolution (based on “the law”) to the Korean Problem in the near to medium future. A smooth, stable reunification indeed seems a distant prospect, if not a pipe dream.

In short, and despite searching, the writer fails to see how one can learn much from either the investment laws or the dispute-resolution methods applied in the North to the bigger picture of Korean reunification, given, among other things, the state of flux in the United States, Russia, and China find their relationship.

Among the very many unanswered questions and issues are the following:

- There are very few parallels between the mechanisms currently used for defusing flashpoints in the annual Korean calendar, as we have recently seen, and disputes involving the breakup of a joint venture or the reconciliation of a struggling business venture.
- On just the issue of land or real estate, which authority would decide on the thorny issue of the repossession - if at all - or

compensation in relation to the expropriation of land and other immoveable property some 70 years ago or more?

- Who is the “arbiter” of reuniting a country and deciding or supervising the decision of divided parties in their search for unification—assuming they both wish it?
- As to multiparty disputes, they are difficult at the best of times to arbitrate, whether as an arbitrator or attorney. We are seeing, and have seen for years now, the difficulties of multiparty attempts to find a path toward the resolution of key issues holding up the chance of reunification. I see not a convergence of techniques in dispute resolution but a divergence—few common points.
- On arbitral bodies, what will happen with the existence of the KCAB in the South and KITAC in the North? Will they merge? What are the consequences of that? And simply put, what laws and regulations will be applied? What will be the role of foreign arbitrators?

8. Closing Words

Make no mistake: North Korea and the North Korean people are at their very highest state of confidence this writer has ever witnessed—and vocally, visibly so. This, arguably, is a result of many factors, including the various technological achievements they have reached amid a regime of firm sanctions and having not just lived but prospered, haltingly, at times, under a regime of sanctions stretching back decades.

So, can the experiences of arbitration Korean-style, whether North or South, provide a stable, confidence-inspiring, and workable basis

for extrapolating to dispute resolution at the international level? Regrettably, this writer does not believe so. They are two different animals, as it were, and it is for the powers that be to find a method of defusing the current situation through exchanges and joint business ventures—the precise methods of which *would indeed* give rise to increased relationship with the world but would not be the first consequence of them but rather a development underpinned and supported by concomitant developments in the law. Again, arguably, the law generally follows developments in society and does not lead them.

Having spent 14 years in South Korea, one of the many things that struck the writer insofar as the issue of national reconciliation and unification was concerned was the difference in attitudes, largely on generational lines. Upon his arrival, the common sentiment was that “we are all brothers [or sisters] of the same stock, and we hope for reunification.” By the time I left for the North, the attitude was quite different. And to be perfectly frank, one did not get the sense that the motivating drive behind this shift of attitude was the number of incidents of infiltration that had occurred, from submarines to shelling, but the pocketbook, the wallet. South Korea had had the opportunity to witness and digest the effects of reunification in Germany—in plain English, the sheer, massive cost of it, largely absorbed by a powerful West Germany. In addition, there was the Asian financial crisis, precipitated by the collapse of the Thai Baht. There were very grim days, although; in 1997, the writer spoke in New York, predicting that the South Koreans would be the first to get out of that mess - which turned out to be the case - partly through sheer national determination; but this traumatic period left its mark upon the population. So the difficulties remain on both sides of the 38th

Parallel—one may not unreasonably state that those in the North are beginning to enjoy what is an emerging, although nascent and hybrid, capitalist structure and arguably “want more,” while those in the South may welcome reunification to a large extent, but not at a dreadful cost to the pocketbook and the risk of a return to the days of massive struggle against poverty. The fear that accumulated day by day, peaking on or around December 23, 1997, remains to this day marked in the writer’s mind.

With the improvement and evolution of the laws on joint ventures, one may hope for an increase in both international and cross-border business ventures. But, until and unless there is a resolution of the nuclear crisis, among other areas of dispute, it is difficult to see how improvements in North Korean investment laws can succeed in making a marked difference in the current status quo—which is in fact not a status quo but a slowly worsening crisis. In short, things are unlikely to improve merely based on investment law revisions in North Korea and exchange visits between North and South.

But where at least some progress could be made, arguably, would be a relaxation of the resistance of the international financial institutions to membership or participation by North Korea; this opposition is largely led by the United States and Japan.

As to the question of joint ventures and how they might or might not relate to improvements in relations, there is the thorny issue of three-party joint ventures.

It is no secret that in many respects, joint ventures in any country often have an inbuilt time clock and that ultimately they end up with a parting of the ways—a divorce, as it were, amicable or

otherwise—and that eventually at least one party finds that the reasons for entering the relationship no longer exist or else violate the underlying agreement (the writer oversaw the breakup of a famous one in the North just a few months ago). Joint ventures don't have to but can be difficult to operate and sustain. This truism becomes all the more valid when three different parties are involved. A joint venture between two entities can be a difficult affair at the best of times in any country. The writer has worked on cases involving three parties, including North Korean ministries—but still involving only two countries. The writer does not relish the thought of an attempt, outside of a special zone in North Korea where perhaps more concentration has been put into the matter, to be involved in a tripartite (i.e., three-country) joint venture.

The writer is reminded of a speech given by a South Korean senior government official in Seoul many years ago, but after the June 2000 summit. Much of the discussion centered on the issue of joint businesses set up in the North. The official explained clearly that there was the natural hope that any such ventures would “of course” be undertaken hand in hand with South Korea and with foreign companies. There was a ripple of hostility among the (largely foreign) audience that reflected concerns at the complexity and potential difficulty in maintaining a stable venture characterized by a tripartite structure.

9. Final Thoughts

In closing, the writer quotes from an article he published several years ago. Sadly, amid all the developments on so many fronts, the writer submits that these words remain as valid today as when they were written - in 2003. That is not just sad; it is dangerous.

As things stand, the Korean Peninsula is a virtual déjà-vu catastrophe waiting to happen. The disturbing thing is that so far the actors on all sides appear to be sticking rigidly to their scripts, without bothering to flick through to the last pages to see where we are all going, if things don't change. It's time for someone to ad-lib. May it happen, and happen soon.

Emerging Issues Relating to Cyber Attacks: An International Legal Analysis of the Sony Hack

Kyung-ok Do

I. Introduction

On November 24, 2014, Sony Pictures Entertainment (hereinafter SPE) was hacked, which crippled its computer systems and resulted in leaks of unreleased films, personal information about SPE employees and their families, and e-mails between employees. A group called #GOP, later identified as the Guardians of Peace, claimed to be behind to the SPE hack.¹ However, quickly after the incident, some speculated that the attack came from North Korea because SPE was to release the movie *The Interview*, a comedy about a plot to assassinate North Korean leader Kim Jong-un. North Korea has firmly denied charges that it was behind the cyber attack against SPE.²

¹ “Timeline of the Sony Pictures Entertainment Hack,” *New York Times*, December 18, 2014.

² Baik Sungwon, “North Korea Denies Involvement in Cyber-attack on Sony Pictures,” *Voice of America*, December 4, 2014.

An investigation by the FBI followed, and by December 19, 2014, it was confirmed that the North Korean government was responsible for these actions.³ This conclusion was based on the following: (1) technical analysis of the data-deletion malware used in this attack revealed links to other malware that the FBI knows North Korean actors previously developed; (2) the FBI also observed significant overlap between the infrastructure used in this attack and other malicious cyber activity the U.S. government has previously linked directly to North Korea; (3) separately, the tools used in the SPE attack have similarities to a cyber attack in March of last year against South Korean banks and media outlets, which was carried out by North Korea.⁴

On December 21, 2014, in a CNN interview, President Barack Obama said he did not think the actions of North Korea constituted an act of war but instead called it “an act of cyber vandalism” and went on to say that the United States “will respond proportionally” and “in a place and time and manner that we [the United States] choose.”⁵ On December 22, 2014, North Korea experienced Internet interference and connectivity issues, claiming that the United States was behind the Internet outage.⁶ On January 2, 2015, President Obama signed an executive order imposing increased economic sanctions against

³ FBI National Press Office, “Update on Sony Investigation,” December 19, 2014, <www.fbi.gov/news/pressrel/press-releases/update-on-sony-investigation>.

⁴ *Ibid.*

⁵ For text highlights and a transcript of the discussion, see “CNN’s Candy Crowley interviews President Barack Obama,” *CNN*, December 21, 2014, <<http://cnnpressroom.blogs.cnn.com/2014/12/21/cnns-candy-crowley-interviews-president-barack-obama>>.

⁶ Nicole Perlroth and David E. Sanger, “North Korea Loses Its Link to the Internet,” *New York Times*, December 22, 2014.

North Korea in response to the SPE hack.⁷ The sanctions allow the Treasury Department to block any North Korean official or agent from accessing its assets or entering the United States. The new measures marked the first time the United States had imposed sanctions on any country for cyber attacks on a U.S. company.

Against the backdrop of the SPE hack, this article seeks to explore a cyber attack like the SPE hack and possible response options from an international legal perspective. More specifically, this article will examine how the cyber attack on SPE fits within the extant international law framework and what might be a basis for responses by states to malicious cyber operations such as the SPE hack. In this regard, it needs to be mentioned that for the sake of analysis under international law, this article assumes that the cyber attack against SPE is attributable to North Korea and that the North Korea Internet outage is attributable to the United States—even though all the evidence indicating North Korean involvement in the SPE hack is circumstantial rather than direct, and the United States has never acknowledged that the North Korea Internet outage was a U.S. operation. For this same reason, this article will not focus only on assessment and response under domestic law. However, it needs to be emphasized that those involved in such attacks like the SPE hack may be indicted under domestic criminal law.⁸

⁷ White House, Office of the Press Secretary, “Executive Order - Imposing Additional Sanctions with Respect to North Korea,” January 2, 2015, <www.whitehouse.gov/the-press-office/2015/01/02/executive-order-imposing-additional-sanctions-respect-north-korea>.

⁸ Actually, five Chinese military hackers were indicted for economic espionage and computer hacking in May 2014 even though it is highly unlikely that they would stand trial in the United States.

II. Legal Assessment of the SPE Hack

1. Does the SPE hack constitute a use of force?

A variety of terms are used to refer to activities conducted in cyberspace. The term “cyber attack” in the introduction is used as an umbrella term to describe offensive cyberspace operations, including criminal activities and attacks that fall under the law of war. The challenging problem is to identify the nature of the SPE hack and which legal paradigm applies. Identifying the appropriate paradigm is important for determining how to respond to such activities. There has been controversy in regard to its characterization. As noted above, President Obama called the SPE hack “an act of cyber vandalism,” not an act of war. However, Senator John McCain countered Obama’s comments, calling the SPE hack “a new form of warfare.”⁹ Even if the FBI did not explicitly mention its nature, it is noted that the FBI said the following:

Though the FBI has seen a wide variety and increasing number of cyber intrusions, the destructive nature of this attack, coupled with its coercive nature, sets it apart. North Korea’s actions were intended to inflict significant harm on a U.S. business and suppress the right of American citizens to express themselves. Such acts of intimidation fall outside the bounds of accept-

⁹ For text highlights and a transcript of the discussion, see “Sen. John McCain responds to President Obama on N. Korea, Russia & Cuba with CNN’s Candy Crowley,” CNN, December 21, 2014, <<http://cnnpressroom.blogs.cnn.com/2014/12/21/sen-john-mccain-responds-to-president-obama-on-n-korea-russia-cuba-with-cnns-candy-crowley>>.

able State behavior. The FBI takes seriously any attempt—whether through cyber-enabled means, threats of violence, or otherwise—to undermine the economic and social prosperity of our citizens.¹⁰

It seems that describing the SPE hack as “destructive” and “coercive” in nature and referring to it as unacceptable “State behavior” implies something beyond cyber crime or cyber espionage, which fall within the law enforcement paradigm. Cyber crime is activity conducted for profit, primarily motivated by financial gain or notoriety, typically involving the production of malware, the distribution of child pornography, hijacking for ransom, and the sale of mercenary services.¹¹ Cyber espionage is characterized by a motivation to discover sensitive information rather than that of causing harm with the goal of pecuniary gain or strategic military advantage.¹²

Then, will the SPE hack be considered an attack that falls under the law of war? In fact, while there is a consensus that cyberspace operations qualify for categorization under the law of war,¹³ determining which cyberspace operations qualify as an attack to be considered under the law of war remains an unsettled issue. In this regard, article 2(4) of the Charter of the United Nations is the cornerstone of a

¹⁰ FBI National Press Office, “Update on Sony Investigation,” December 19, 2014, <www.fbi.gov/news/pressrel/press-release/update-on-sony-investigation>.

¹¹ Jonathan A. Ophardt, “Cyber Warfare and the Crime of Aggression: The Need for Individual Accountability on Tomorrow’s Battlefield,” *Duke Law & Technology Review*, vol. 9, no. 3 (2010), p. 4.

¹² *Ibid.*

¹³ Stephenie Gosnell Handler, “The New Cyber Face of Battle: Developing a Legal Approach to Accommodate Emerging Trends in Warfare,” *Stanford Journal of International Law*, vol. 48 (2012), p. 217.

jus ad bellum analysis.¹⁴ Article 2(4) of the UN Charter provides that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” The meaning of “force” in Article 2(4) is far from a settled area of law interpretation, and debates over it have been had over the years. If “force” as used in this provision has a broad meaning and includes cyber force, then cyber attacks would violate Article 2(4) of the UN Charter. If “force” as used in this provision has a narrow meaning and only refers to armed force, then cyber attacks would not violate Article 2(4) of the UN Charter. However, it will be more difficult to achieve international agreement on legal interpretation with respect to cyber attacks because major actors “have divergent strategic interests that will pull their preferred doctrinal interpretations and aspirations in different directions, impeding formation of a stable international consensus.”¹⁵

Nevertheless, to deal with cyber security challenges, the United States is moving toward an effects-based approach to categorizing cyber attacks under the UN Charter.¹⁶ In fact, the generally accepted interpretation of Article 2(4) is that only those interventions that produce “physical damage” will be regarded as an unlawful use of force. In reality, there exist some forms of cyber attacks that can cause physical damage, like the Stuxnet worm in 2010 that destroyed

¹⁴ The *jus ad bellum* is the international law governing resorting to force by states as an instrument of their national policy, and the *jus in bello* is the international law regulating the conduct of armed conflict.

¹⁵ Matthew C. Waxman, “Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4),” *Yale Journal of International Law*, vol. 36 (2011), pp. 425~426

¹⁶ *Ibid.*, p. 437.

almost one-fifth of centrifuges that Iran was using to enrich uranium. However, with considerable concern that in the Information Age cyber attacks can be as destructive as an attack that produces physical damage, cyber war scholars propose reforms to the existing international legal framework.¹⁷ The proposed approach is dilating the scope of Article 2(4) in order to encompass cyber attacks that, although not producing physical damage, nevertheless have a destructive impact.¹⁸

Such an approach is reflected in the recently published *Tallinn Manual on the International Law Applicable to Cyber Warfare* (hereinafter Tallinn Manual),¹⁹ an academic, nonbinding study on how international law applies to cyber conflicts and cyber warfare. The Tallinn Manual states that “a cyber operation that constitutes a threat or use of force against the territorial integrity or political independence of any State, or that is in any other manner inconsistent with the purposes of the United Nations, is unlawful” (Rule 10), and then states that “a cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force” (Rule 11). While the approach could provide no black-letter definition of a cyber use of force, it suggests that, when deciding whether to characterize a cyber operation as a use of force, states are likely to consider and place great weight on the following

¹⁷ Russell Buchan, “Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions,” *Journal of Conflict & Security Law*, vol. 17, no. 2 (2012), p. 213.

¹⁸ *Ibid.*

¹⁹ Michael Schmitt, ed., *Tallinn Manual on the International Law Applicable to Cyber Warfare* (New York: Cambridge University Press, 2013). The Tallinn Manual was written at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence by an independent “international group of experts” between 2009 and 2012.

factors: severity, immediacy, directness, invasiveness, measurability of effects, military character, state involvement, and presumptive legality.²⁰

As “the most significant factor in the analysis,” “severity” is stated as follows:

Subject to a *de minimis* rule, consequences involving physical harm to individuals or property will in and of themselves qualify the act as a use of force. Those generating mere inconvenience or irritation will never do so. Between the extremes, the more consequences impinge on critical national interests, the more they will contribute to the depiction of a cyber operation as a use of force. In this regard, the scope, duration, and intensity of the consequences will have great bearing on the appraisal of their severity. A cyber operation, like any operation, resulting in damage, destruction, injury, or death is highly likely to be considered as a use of force.²¹

Under this approach, we need to assess the extent of severity of the SPE hack because the SPE hack appears to be placed between the extremes. In my view, the SPE hack is not enough to meet the severity criteria considering it was an attack against a private company, not directed at any critical national infrastructure or banking system, and consequences crippled computer systems and released sensitive

²⁰ *Ibid.*, pp. 49~52.

²¹ *Ibid.*, pp. 49, 50.

information. This analysis is also supported by the consideration of the invasiveness factor. In the Tallinn Manual, “invasiveness” is stated as follows:

Invasiveness refers to the degree to which cyber operations intrude into the target State or its cyber systems contrary to the interests of that State. As a rule, the more secure a targeted cyber system, the greater the concern as to its penetration. For example, intrusion into a military system that has been accredited at Evaluation Assurance Level 7 (EAL7) of the *Common Criteria* is more invasive than merely exploiting vulnerabilities of an openly accessible non-accredited system at a civilian university or small business.²²

It is found that, even according to the Tallinn Manual as an attempt to overcome the traditional approach, the SPE hack would be unlikely to be seen as a use of force under the UN Charter. Moreover, with political consideration, it seems highly unlikely that the international community will characterize a cyber attack like the SPE hack as a use of force under the UN Charter. Michael Schmitt properly notes, “This hesitancy will be driven in part by concern over the U.S. position (a distinctly minority one) that all uses of force are also armed attacks that allow forceful responses.”²³ In other words, “Some States view the premise as potentially destabilizing in that it allows for an earlier use of force than would otherwise be the case.”²⁴

²² *Ibid.*, p. 50.

²³ Michael Schmitt, “International Law and Cyber Attacks: Sony v. North Korea,” December 17, 2014, <<http://justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea>>.

²⁴ *Ibid.*

Therefore, as it currently stands, the SPE hack cannot be regarded as an unlawful use of force according to Article 2(4) of the UN Charter. However, the fact that a cyber operation does not rise to the level of use of force under the UN Charter does not necessarily render it lawful under international law. Under certain circumstances, malicious cyber operations that fail to qualify as a use of force may constitute a violation of international law.

2. Does the SPE hack qualify as an internationally wrongful act of a state?

Article 2 of the ILC's articles on state responsibility provides that "there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State." In other words, conduct by a state can only amount to an "internationally wrongful act" if it is contrary to international law. As mentioned above, this article does not address the attribution issue. Let us move on to the question of whether the SPE hack violates international law, except in the case of a violation of a law of war.

While cyber attacks are not captured by Article 2(4) of the UN Charter, commentators have suggested that such attacks, under certain circumstances, can violate the non-intervention principle.²⁵ Although not expressly provided in the UN Charter, the prohibition of inter-

²⁵ Russell Buchan, "Cyber Attacks"; Johann-Christoph Woltag, "Computer Network Operations Below the Level of Armed Force," (European Society of International Law Conference Paper Series, conference paper no.1/2011, Tallinn Research Forum, May 26~28, 2011).

vention is implicit in the principle of the sovereignty of states laid out in Article 2(1) of the UN Charter. It is mentioned in a number of treaties and UN resolutions, including the declaration on friendly relations. The ICJ regards the non-intervention principle as “part and parcel of customary international law.”²⁶ In the *Nicaragua* case, the ICJ held,

In view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.²⁷

Accordingly, while the precise scope and content of the non-intervention principle remain ambiguous, “the essence of intervention is coercion.”²⁸ In this regard, it is suggested, “Only acts of a certain magnitude are likely to qualify as ‘coercive,’ and only those that are intended to force a policy change in the target State will contravene the

²⁶ “Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),” *International Court of Justice*, June 27, 1986, para. 202.

²⁷ *Ibid.*, para. 205.

²⁸ Maziar Jamnejad and Michael Wood, “The Principle of Non-Intervention,” *Leiden Journal of International Law*, vol. 22 (2009), p. 348.

principle.”²⁹ According to the Tallinn Manual, when acts meant to achieve regime change or political interference are taken or facilitated by cyber means, they are coercive, thus in violation of the non-intervention principle.³⁰ The manipulation by cyber means of elections or of public opinion on the eve of elections is presented as clear examples.³¹ In light of this, disruption of a private company’s activities, like the SPE hack, cannot be seen as coercion constituting an unlawful intervention. What the FBI described as coercive in nature in the SPE hack was its focus on threats to Sony’s freedom of expression, which is distinguished from coercion as mentioned above.

Now we need to examine the issue regarding breach of territorial sovereignty, because a state enjoying sovereignty over its territory has a power to exercise supreme authority over “everything” within its territory. According to the maxim, *quidquid est in territorio est etiam de territorio* (“Whatever is in the territory is indeed of the territory”), all individuals and all property within the territory of a state are under its dominion and sway.³² This right of a state is correlative to its duty to abstain from actions violating the relevant powers of other states. In the *Corfu Channel* case, the ICJ observed that “between independent States, respect for territorial sovereignty is an essential foundation of international relations.”³³ Then, does the principle of territorial sovereignty apply to cyberspace? In fact, there

²⁹ *Ibid.*

³⁰ Michael Schmitt, ed., *The Tallinn Manual on the International Law Applicable to Cyber Warfare*, p. 47.

³¹ *Ibid.*

³² Robert Jennings and Arthur Watts, eds., *Oppenheim’s International Law*, Vol. 1, 9th ed. (Harlow: Longman, 1992), p. 384.

³³ “The Corfu Channel Case,” Judgment, *ICJ Reports 1949*, April 9, 1949, p. 35.

has been a widely held view that cyberspace is not a physical place but a notional environment. In other words, “It defies measurement in any physical dimension or time-space continuum. It is a shorthand term that refers to the environment created by the confluence of cooperative networks of computers, information systems, and telecommunication infrastructures commonly referred to as the World Wide Web.”³⁴ These characterizations led to the conclusion that cyberspace is similar to the high seas, international airspace, or outer space, and thus not subject to the sovereignty of any single state.

However, it needs to be noted that cyber infrastructure is usually situated in the territory of a state. As Wolff Heintschel von Heinegg rightly pointed out, “The integration of physical components of cyber infrastructure located within a State’s territory into the ‘global domain’ of cyberspace cannot be interpreted as a waiver of the exercise of territorial sovereignty.”³⁵ Indeed states have “continuously emphasized their right to exercise control over such infrastructure, to assert their jurisdiction over cyber activities on their territory, and to protect their cyber infrastructure against transborder interference by other States or by individuals.”³⁶ The Tallinn Manual also confirms the general applicability of the principle of territorial sovereignty to cyberspace. The Tallinn Manual asserts that cyber infrastructure situated in the territory is subject to the sovereignty of the territorial state, and thus a cyber operation by a state directed against cyber infrastructure located in another state may violate the

³⁴ Thomas C. Wingfield, *The Law of Information Conflict: National Security Law in Cyberspace* (Falls Church: Aegis Research Corp., 2000), p. 17.

³⁵ Wolff Heintschel von Heinegg, “Territorial Sovereignty and Neutrality in Cyberspace,” *International Law Studies*, vol. 89 (2013), p. 126.

³⁶ *Ibid.*

latter's sovereignty.³⁷ It does not matter whether the cyber infrastructure belongs to the government, private entities, or individuals, nor do the purposes it serves matter.³⁸

The challenging problem is to identify the substantive criteria for breach of sovereignty by cyber means. It is clear that not all acts performed by one state in the territory of another violate the principle of territorial sovereignty. Yet as *Oppenheim's International Law* puts it, "It is not feasible to enumerate all such actions as might constitute a breach of a state's duty not to violate another state's independence or territorial or personal authority."³⁹ Some illustrative examples are presented as follows:

In the absence of treaty provisions to the contrary, a state is not allowed to intervene in the management of the internal or international affairs of other states, or to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse. A state is not allowed to send its troops, its warships, or its police forces into or through foreign territory, or its aircraft over it, or to carry out official investigations on foreign territory or to let its agents conduct clandestine operations there, or to exercise an act of administration or jurisdiction on foreign territory, without permission.⁴⁰

³⁷ Michael Schmitt, ed., *The Tallinn Manual on the International Law Applicable to Cyber Warfare*, p. 25.

³⁸ *Ibid.*

³⁹ Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*, p. 385.

⁴⁰ *Ibid.*, pp. 385, 386.

If the focus is placed on “intrusion” through the above examples, even if they presuppose “physical intrusion,” it could be argued that mere intrusions into the cyber infrastructure located within the territory of a state by other states always violate the principle of territorial sovereignty. However, it must be emphasized that international law does not prohibit espionage per se unless particular aspects of the espionage violate specific international legal prohibitions. In reality, all states engage in espionage, including via cyberspace.⁴¹ The U.S. Department of Defense *Law of War Manual* implies that cyber espionage does not violate the target state’s sovereignty by stating, “Generally, to the extent that cyber operations resemble traditional intelligence and counter-intelligence activities, such as unauthorized intrusions into computer networks solely to acquire information, then such cyber operations would likely be treated similarly under international law.”⁴² Thus, the above-mentioned examples are not likely to have a meaningful implication in identifying the substantive criteria for breach of sovereignty by cyber means.

Commentators suggesting general applicability of the principle of territorial sovereignty to cyberspace have also admitted that not all state acts that make an impact on the cyber infrastructure located in another state necessarily constitute a violation of the principle of territorial sovereignty. In the Tallinn Manual, the international group of experts agree that certainly a cyber operation breaches sovereignty if physical damage occurs. However, they achieve no consensus as to

⁴¹ Wolff Heintschel von Heinegg, “Territorial Sovereignty and Neutrality in Cyberspace,” p. 136.

⁴² U.S. Department of Defense, *Law of War Manual*, June 12, 2015, <<http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>>, p. 999.

whether the placement of malware that causes no physical damage constitutes a violation of sovereignty.⁴³ Nevertheless, it is noted that in the wake of the SPE hack, Michael Schmitt, the director of the project, argued that “it would seem reasonable to characterize a cyber operation involving a State’s manipulation of cyber infrastructure in another State’s territory, or the emplacement of malware within systems located there, as a violation of the latter’s sovereignty.”⁴⁴ His view was elaborated when he recently stated that “if the cyber operation destroys or alters data or somehow makes the cyber infrastructure operate in a manner in which it is not intended to operate, the sovereignty of the State where the cyber infrastructure is located has been implicated. I would likewise categorize emplacement of malware on another State’s infrastructure as violation if the malware is designed to do more than monitor activities.”⁴⁵ While this approach proposes to deal with challenges states confront today in the cyber environment, the only thing we can say for sure at this moment is that it is unsettled whether a cyber attack like the SPE hack constitutes a violation of the sovereignty of the target state under current international law. Even though international law has evolved to address newly emerging issues, it seems unlikely that states will come to a consensus as to when one state’s cyber operation constitutes a violation of the sovereignty of the territorial state.

⁴³ Michael Schmitt, ed., *The Tallinn Manual on the International Law Applicable to Cyber Warfare*, p. 25.

⁴⁴ Michael Schmitt, “International Law and Cyber Attacks: Sony v. North Korea,” *Just Security*, December 17, 2014, <<http://justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea>>.

⁴⁵ Michael Schmitt, “Cyber Responses ‘By the Numbers’ in International Law,” *EJIL: Talk!* August 4, 2015, <www.ejiltalk.org/cyber-responses-by-the-numbers-in-international-law>.

States will be rather hesitant to extend the scope of violation of sovereignty regarding malicious cyber operations considering the margin of discretion in response, which will be discussed in detail later.

In sum, the cyber attack on SPE does not constitute an unlawful intervention and a prohibited violation of territorial sovereignty within the current international law framework. An act of a state cannot be characterized as internationally wrongful unless it constitutes a breach of international obligation.

III. Possible Response Options

While there have been various interpretations and discussions among scholars and politicians, the U.S. government has not publicly expressed its position about whether the SPE hack constitutes a violation of international law and what provides a basis to respond against North Korea. A State Department spokeswoman Marie Harf said, “We aren’t going to discuss, you know, publicly operational details about the possible response options,” adding, “as we implement our responses, some will be seen, some may not be seen.”⁴⁶ Right after President Obama promised a proportional response, North Korea experienced Internet interference and connectivity issues. President Obama also authorized additional economic sanctions against North Korea. U.S. officials said it was the first step in retaliation for Pyong-

⁴⁶ Nicole Perlroth and David E. Sanger, “North Korea Loses Its Link to the Internet,” *New York Times*, December 22, 2014.

yang's alleged cyber attack on SPE.⁴⁷ In an executive order, the White House stated:

I, BARACK OBAMA, President of the United States of America, find that the provocative, destabilizing, and repressive actions and policies of the Government of North Korea, including its destructive, coercive cyber-related actions during November and December 2014, actions in violation of UNSCRs 1718, 1874, 2087, and 2094, and commission of serious human rights abuses, constitute a continuing threat to the national security, foreign policy, and economy of the United States, and hereby expand the scope of the national emergency declared in Executive Order 13466 of June 26, 2008, expanded in scope in Executive Order 13551 of August 30, 2010, and relied upon for additional steps in Executive Order 13570 of April 18, 2011.⁴⁸

There are views that imposition of additional economic sanctions was considered, as the reactive actions on North Korea's cyberspace had been ineffective and limited due to the nation's poor Internet connectivity and low degree of cyber dependence.⁴⁹ Given that far more vital domestic interests had taken hits from foreign hackers

⁴⁷ Carol E. Lee and Jay Solomon, "U.S. Targets North Korea in Retaliation for Sony Hack," *Wall Street Journal*, January 3, 2015.

⁴⁸ White House Office of the Press Secretary, "Executive Order."

⁴⁹ Shin Chang-hun, "South Korea's Response to North Korea's Cyber-Attacks and Threats: Lessons from the Sony Hack in November 2014 [in Korean]," *Asian Institute for Policy Studies*, issue brief (April 6, 2015), p. 8.

in recent years, it was an unprecedented response. It seems that the White House saw the SPE hack conducted by North Korea as “crossing a threshold” because of its destructive financial effects on a U.S. company and its threat to citizens’ rights to the freedom of expression.

If a cyber attack like the SPE hack qualifies as an internationally wrongful act of a state as some suggest, countermeasures are allowed as a response. It is an essential principle of international law that every internationally wrongful act of a state entails the international responsibility of that state. A state injured by an internationally wrongful act may resort to countermeasures against the responsible state as set out in articles 49–54 of the ILC’s articles on state responsibility. Countermeasures are state actions or omissions that would otherwise be contrary to the international obligations of an injured state vis-à-vis the responsible state, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.⁵⁰ Thus, countermeasures are impermissible as punishment. Since countermeasures are acts that would violate international law, but for the responsible state’s internationally wrongful act, there are many limitations in taking countermeasures. Thus, for example, countermeasures must be proportionate and must be temporary in character since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment.⁵¹

⁵⁰ International Law Commission, *Commentaries to Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), p. 128.

⁵¹ *Ibid.*

Meanwhile, it is noted that there is no requirement that the response should be limited to suspension of performance of the same or a closely related obligation.⁵² According to commentaries to *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, this conclusion is supported by the following considerations:

First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individual themselves. Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature.... This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation...⁵³

Hence, while the classic option is a hack back as an in-kind response, other measures could be taken in non-cyberspace. If the United States' responsive actions against North Korea are examined within

⁵² *Ibid.*, p. 129.

⁵³ *Ibid.*

the countermeasures framework, the North Korea Internet outage can be categorized as reciprocal countermeasures, and the imposition of economic sanctions against North Korea can be categorized as nonreciprocal countermeasures, if other requirements for lawful countermeasures can be satisfied. However, it needs to be noted that economic sanctions have been imposed in many cases without the need to identify the existence of an internationally wrongful act. As presented above, an executive order imposing increased economic sanctions against North Korea is not only in response to the SPE hack, but also in response to actions in violation of UN Security Council resolutions and commission of serious human rights abuses. This means that it is difficult to figure out whether the United States regarded the SPE hack itself as an internationally wrongful act, and accordingly to characterize the responsive actions.

If a cyber attack like the SPE hack fails to qualify as an internationally wrongful act of a state, what might be possible response options by states to malicious cyber operations? As examined above, my view is that international legal norms prohibiting a cyber attack like the SPE hack have not been established yet. Nevertheless, the injured state may be able to engage in retorsion. According to commentaries to *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, retorsion is defined as “unfriendly conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act.”⁵⁴ In other words, retorsion is wrongful not in the legal sense but only in the political or moral sense, irrespective of whether the initial act by the target state was in itself a violation of the reacting

⁵⁴ *Ibid.*, p. 128.

state's international legal rights or merely unfriendly or otherwise welcome.⁵⁵ Some suggested examples are as follows: the breaking-off of diplomatic relations; nonrecognition of acts of a law-breaking state; withholding of economic assistance; discontinuance or reduction of trade and investment; expulsion (on condition that such expulsion does not infringe treaty or customary rules) of nationals of the state that has taken the unfriendly act; imposition of heavy fiscal duties on goods from the offending state; and requiring visas for entry into the country or enforcing other strict passport regulations.⁵⁶ It seems that acts of retorsion may be more damaging than countermeasures. It has been suggested that this instrument of self-help reflects indispensable features of an international law still lacking centralized implementation and adequate and effective dispute settlement mechanisms.⁵⁷

Meanwhile, with regard to certain limits on retorsion, it needs to be noted that retorsion is distinguished from countermeasures, which are unlawful acts that become lawful in that they constitute a reaction to an internationally wrongful act by another state. Whereas countermeasures are "a potential threat to the stability of the international legal order" because they interfere with the international legal rights of the target state, measures of retorsion are not.⁵⁸ Thus, states using measures of retorsion enjoy a much wider margin of

⁵⁵ Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, Vol. VIII (Oxford: Oxford University Press, 2012), p. 976.

⁵⁶ Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), p. 310.

⁵⁷ Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law*, Vol. VIII, p. 976.

⁵⁸ *Ibid.*, p. 978.

discretion than states applying countermeasures, and the proportionality principle does not set legal (but perhaps ethical and/or political) limits to the use of measures of retorsion.⁵⁹ While some suggest that retorsion is still governed by the limitations of necessity and proportionality,⁶⁰ these views should be understood as implying necessity and proportionality in the political or moral sense in that acts of retorsion are taken as a response against the wrongdoer. The important thing is that the aggrieved state may consider various measures that could be very damaging, even without limitation in the legal sense. Acts of retorsion, like countermeasures, need not be of a similar kind or affect the same interests. Thus, retorsion may provide a basis for a hack back and the imposition of economic sanctions. Unilateral economic sanctions have been referred to as one of the most common forms of retorsion. There is “a range of sanctions that are applied by States against other States and non-state actors, that are not prohibitive rule or obligation of international law, and are therefore lawful to maintain.”⁶¹ Of course, acts of retorsion must not violate basic international obligations.

Putting aside legal implications of cyber attacks like the SPE hack being considered in violation of international law, it seems that the response measures the attacked state would take would have little to do with whether the attacks qualify as a violation of international

⁵⁹ *Ibid.*

⁶⁰ Antonio Cassese, *International Law*; Nigel White and Ademola Abass, “Countermeasures and Sanctions,” in *International Law*, 3rd ed., ed. Malcolm D. Evans (Oxford: Oxford University Press, 2010), p. 538.

⁶¹ Daniel H. Joyner, “International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions,” in *Economic Sanctions under International Law*, eds. Ali Z. Marossi and Marisa R. Bassett (The Hague: T.M.C. Asser Press, 2015), p. 86.

law. Rather, the attacked state has a margin of discretion in response within the retorsion framework, reflecting the underdeveloped state of international law. If the United States clearly categorized the SPE hack as an internationally wrongful act and responded within the countermeasures framework, in addition to the reaction being considerably regulated, the legality of measures taken by the United States would also have been debated. As a matter of fact, some people felt that the SPE hack qualified as a breach of international law in which countermeasures would be justified; however, there was little debate over whether measures the United States deployed were “lawful” countermeasures. It would have been difficult to deal with the legality of measures including the North Korea Internet outage, given that the imposition of economic sanctions was the only response the United States officially declared. Assuming that the North Korea Internet outage is attributable to the United States, whether this outage and the imposition of economic sanctions comply with legal requirements is difficult to verify when analyzed within the countermeasures framework. For instance, can the North Korea Internet outage be seen as a proportional response to the damage the North Korean cyber attack caused? Establishing a range of proportionate cyber countermeasures is a challenge in itself, once the difference between cyber environments of the two states is factored in. The imposition of economic sanctions also renders room for controversy, when necessity and proportionality as legal requirements are closely assessed. Thus, states are more likely to intentionally leave a cyber attack like the SPE hack and responsive actions to it in a gray area rather than address them within the extant international law framework.

IV. Conclusion

The SPE hack, referred to as “the most serious cyber attack ever made against U.S. interests,” alerted and shocked not only the United States, but the entire international community. The alleged North Korean act was an unprecedentedly destructive one as it crippled SPE’s computer systems and inflicted tangible economic harm by leaking personal information and unreleased films. The United States responded by deploying exceptionally bold and instantaneous measures. The North Korean Internet network was shut down for several days, and economic sanctions were imposed on several North Korean entities, including the Reconnaissance General Bureau. Such measures are retaliatory and at the same time act as deterrents.

However, an analysis of current international law reveals that cyber attacks like the SPE hack are merely regulated. While some cyber attacks constitute a breach of the principle of prohibition on the use of force, the non-intervention principle, or the principle of territorial sovereignty, it can be concluded that the SPE hack cannot be identified as breaching any of the abovementioned principles, as the attack was against a private company and resulted in economic harm, not physical. Questions can be raised as to what responses an attacked state can deploy in the event a cyber attack does not qualify as a violation of international law, but this qualification is not very important, given that acts of retorsion are permitted. Rather, attacked states have a margin of discretion within the retorsion framework, rather than within the countermeasures framework, in seeking various response measures. Thus, states are more likely to intentionally leave a cyber attack like the SPE hack and responsive actions to it in a gray area rather than address them within the extant international law framework.

The SPE hack raises an important issue in regard to international law and also renders implications to South Korea as a state vulnerable to similar attacks. South Korea already experienced a serious cyber attack, allegedly perpetrated by North Korea's Reconnaissance General Bureau (RGB), on March 20, 2013. Most computers at major media outlets and financial institutions were immediately shut down, and computer networks were paralyzed. However, South Korea's responsive actions to this attack were not reported until Jong In Lim, the special advisor to the president on cyber security, stated at the Seoul Defense Dialogue 2015 (September 9~11, 2015) that "economic sanctions and retaliatory attacks the United States took against North Korea's cyber attack created deterrence, while South Korea failed to respond at all," admitting to the inadequacy of South Korea's response and implying a change of strategy in the future. The SPE hack shows that North Korean cyber attacks have matured, for its object was a private company, and it leaked intellectual property. Given that the same can be inflicted on South Korea at any time, a stronger and more effective strategy should be established. Measures of retorsion are not necessarily ideal, especially considering the difficulties with proving attribution for cyber attacks. However, it is necessary to acknowledge that the attacked state may be able to engage in retorsion. Moreover, it is important to extensively review in advance measures that do not breach international law but are within the retorsion framework and highly deterrent. Needless to say, maximizing cyber defense is of the utmost importance, as cyber attacks against South Korea will be significantly more harmful than those against North Korea, considering the difference between the two Koreas in terms of cyber maturity and dependence.

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The Aftermath of Sony: Threat, Retaliation, Deterrence, and International Cyber Norms

Rhea D. Siers

After the shock of the attack by North Korea on Sony Pictures Entertainment (Sony), analysts and legal experts continue to search for lessons from this episode, including the motivations and strategy underlying the DPRK's cyber security strategy. While international legal norms have gained more attention and interest, there are justifiable questions as to the impact of these efforts by key cyber actor states and specifically whether they can form part of a deterrence strategy in terms of North Korea.

I. The Attack On Sony Motion Pictures¹

In November 2014 Sony Pictures' computer system experienced an

¹ It is important to differentiate between previous attacks on Sony PlayStation Network, which is part of the Sony Corporation. The largest attack resulted in an April to May 2011 denial of service for nearly 23 days. Attribution was never publicly announced, although there were indications that the group Anonymous was involved.

extensive and debilitating attack. The company, with its employees unable to use their computers, shut down the entire system, searching for a way to resurrect its computer operations, and engaged in a bit of denial, stating publicly on November 24, 2014, that “we are investigating an IT matter.”² In fact, the damage was massive and is considered one of the worst attacks against a U.S. company, reaching 75 percent of Sony’s servers.³ A group named “Guardians of Peace” claimed credit for the attack, citing its objection to an upcoming Sony comedy about North Korea entitled *The Interview*. The North Korean government previously branded the movie as “a blatant act of terrorism and war” and promised “merciless” retaliation, and Kim Jong-un allegedly had claimed cyber attacks as his “magic weapon.”⁴ However, the typical verbal North Korean hyperbole cannot be considered definitive evidence of the derivation of the cyber attack.

Sony officials contacted the FBI after the extent of the breach was discovered, and the FBI began its investigation immediately. The attack was actually carried out in several stages, beginning with a denial-of-service attack on November 24, 2014, and continuing with leaks of unreleased movies on November 26, 2014. This was followed by a large leak of Sony internal information, including personal files, on December 1, 2014, and later a large amount of

² Michael Cieply and Brooks Barnes, “Sony Cyberattack, First a Nuisance, Swiftly Grew into a Firestorm,” *New York Times*, December 31, 2014, <www.nytimes.com/2014/12/31/business/media/sony-attack-first-a-nuisance-swiftly-grew-into-a-firestorm-.html>.

³ *Ibid.*

⁴ Victor Luckerson, “Everything We Know about the Massive Sony Hack,” *Time Magazine*, December 1, 2014, <www.time.com/3612132/sony-hack-north-korea-interview/>.

financial data.⁵ The alleged hacker group, Guardians of Peace, also directly threatened Sony about the release of *The Interview* with actual physical violence, and Sony Pictures canceled the opening of the movie on December 25, 2014.

Since attribution is often a painstaking and lengthy process, many people were surprised when the FBI announced it had ascertained the derivation of the attack. The FBI described the attack as a result of “the deployment of destructive malware” and stated that it had enough evidence in collaboration with other unnamed U.S. government agencies to conclude, “The North Korean government is responsible for these actions.”⁶ The FBI provided the basis of its conclusions, noting, however, “the need to protect sensitive sources and methods.” When the cyber security community publicly voiced its doubts, the administration took a highly unusual course publicly and, for the first time, “explicitly charged another government with mounting a cyber attack on American targets.”⁷

This attribution debate demonstrates that while technical data is often useful, it is not always determinative of the derivation of attacks. Intelligence-derived information, including indications

⁵ “A Breakdown and Analysis of the December 2014 Sony Hack,” *Risk Based Security*, December 5, 2014, <www.riskbasedsecurity.com/2014/12/a-breakdown-and-analysis-of-the-december-2014-sony-hack/>.

⁶ Michael B. Kelley, “Here’s the Full FBI Statement Calling Out North Korea for the Sony Attack,” *Business Insider*, December 19, 2014, <www.businessinsider.com/heres-the-full-fbi-statement-calling-out-north-korea-for-the-sony-hack-2014-12>.

⁷ David Sanger and Martin Fackler, “NSA Breached North Korean Networks Before Sony Attack, Officials Say,” *New York Times*, January 18, 2015, <www.nytimes.com/2015/01/19/world/asia/nsa-tapped-into-north-korean-networks-before-sony-attack-officials-say.html>.

regarding motivations and objectives, must be part of the threat and risk analysis. This multidimensional approach to attribution is also the key to developing a proportionate and effective response or deterrence.

II. Capabilities and Growing Threat

For years, many people dismissed North Korea's cyber capabilities as channeled through and at the behest of the PRC. Given the lack of bandwidth within North Korea as part of its isolation of its population, it was assumed that North Korea could not compete with technologically advanced South Korea. However, after a series of several attacks believed to be North Korean in origin, concern rose regarding the DPRK's assets and capabilities. Up until the Sony hack, the real question was whether North Korea viewed cyber attacks against the United States, specifically targeting U.S. economic and business institutions, as a viable and destructive weapon. And even with the Sony attack, there remain questions about the PRC's role as cyber enabler and sponsor, since the PRC is known to use its cyber capability for espionage and commercial advantage but not to directly damage the U.S. economy.

In 2013, there were already serious concerns about North Korean cyber capabilities as discussed by the Department of Defense in a threat assessment:

Given North Korea's bleak economic outlook,

OCO may be seen as a cost-effective way to develop asymmetric, deniable military options. Because of North Korea's historical isolation from outside communications and influence, it is also likely to use Internet infrastructure from third-party nations. This increases the risk of destabilizing actions and escalation on and beyond the Korean peninsula.⁸

Before U.S. Presidential Policy Directive (PPD) 20 was discussed publicly, the North Korean leadership realized that Pyongyang certainly faced a formidable adversary in the cyber domain from South Korea and the United States, among others. Thus, the DPRK began an intense development of a cyber cadre, its first generation of "cyber warriors."⁹ Information primarily from North Korean defectors has provided some basic understanding of the DPRK cyber organizations, with estimates of the number of cyber warriors ranging from about 3,000 to 6,000,¹⁰ hardly competitive with the world's major cyber powers. However, given that criminal activity brings a great deal of cash into North Korea, analysts like James Lewis of the Center for Strategic and Inter-

⁸ Office of the Secretary of Defense, "Military and Security Developments Involving the Democratic People's Republic of Korea," *Annual Report to Congress*, <http://www.defense.gov/Portals/1/Documents/pubs/North_Korea_Military_Power_Report_2013-2014.pdf>.

⁹ Mark Clayton, "In Cyberarms Race, North Korea Emerging as a Power, Not a Pushover," *Christian Science Monitor*, October 19, 2013, <www.csmonitor.com/World/Security-Watch/2013/1019/In-cyberarms-race-North-Korea-emerging-as-a-power-not-a-pushover>.

¹⁰ *Ibid.*

national Studies believe that North Korean connections in the black market and its alliance with criminal gangs in Singapore, Malta, and Japan augment its “official” cyber cadre.¹¹ A recent Brookings report also confirms the criminal connection, noting that North Korea was utilizing criminal activity to obtain hard currency and moving toward a “criminal market economy.”¹² The criminal activity, which was initially sponsored and encouraged by the DPRK regime, had expanded to criminal elites in the population who expanded distribution networks of drug smuggling and several types of counterfeiting, including currency and pharmaceuticals.¹³

In its extensive report on North Korean capabilities, Hewlett Packard (HP) notes that the DPRK is “remarkably committed” to the development of its cyber capabilities, including training up a new generation of cyber warriors.¹⁴ The HP report notes an extensive cyber structure and cites South Korean estimates of a cyber offensive corps that may be the third largest in the world.¹⁵ The North

¹¹ *Ibid.*

¹² Parameswaran Ponnudurai, “North Korea Moving towards a ‘Criminal’ Market Economy: Report,” *Radio Free Asia*, April 14, 2014, <www.rfa.org/english/news/korea/illicit-04152014015031.html>.

¹³ *Ibid.*

¹⁴ HP Security Research, “Profiling An Enigma: The Mystery of North Korea’s Cyber Threat Landscape,” *HP Security Briefing*, episode 16, August 2014, <http://h30499.www3.hp.com/hpeb/attachments/hpeb/off-by-on-software-security-blog/388/2/HPSR%20SecurityBriefing_Episode16_NorthKorea.pdf>.

¹⁵ Charlie Osborne, “North Korea Cyber Warfare Capabilities Exposed,” *ZDNET*, September 2, 2014, <www.zdnet.com/article/north-korea-cyber-warfare-capabilities-exposed/>.

Korean cyber units, known as Office No. 91 and Unit 121, operate under the authority of the DPRK's Reconnaissance General Bureau, which oversees both conventional intelligence and cyber operations. Most interesting is the fact that these two units actually reside in the PRC, not in North Korea.¹⁶ This is due to North Korea's heavy Internet restrictions limiting outgoing connections, which necessitates the DPRK's reliance on other nations for its networks and bot-nets.¹⁷

While a large cyber corps does not guarantee sophisticated or broad impact immediately, one can see the gradual development in the efficacy of North Korean cyber attacks in the last 10 years. According to Hewlett Packard, the DPRK was able to successfully penetrate 33 of 80 South Korean military wireless communications networks in 2004. South Korea attributed to its northern neighbor this attack as well as an intrusion later that same year into U.S. State Department computers.¹⁸ Of course, given the difficulties in proving attribution, these reports are not definitive but certainly reflect available evidence.

McAfee's analysis of attacks against South Korean government and banking sites in 2011 and 2009 also concludes that there was a definite improvement in capabilities by the perpetrator, which the report attributes to North Korea. The McAfee report compared "the combination of technical sophistication juxtaposed with relatively

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

limited execution and myopic outcome to bringing a Lamborghini to a go-cart race.” Why use advanced capabilities for a rather low-level attack? According to McAfee, “the motivations appear to outweigh the attack, making this truly seem like an exercise to test and observe responses.”¹⁹

It is worth noting that North Korea’s motivation to show off its advanced capabilities is not an entirely unique phenomenon. Like others relatively new to the cyber ranks, North Korea sought to flex its muscles and create somewhat of a stir. Some experts believe that there is a pattern to the newest members of the cyber domain to engage in somewhat flamboyant attacks, including the targeting of private entities as opposed to state entities. Another relative newcomer to cyber ranks, Iran - which is believed to have targeted Saudi Aramco in a debilitating attack, essentially freezing its 30,000 computers in 2012 - demonstrates this.²⁰

North Korea continued to flex its cyber muscles against South Korea with an array of attacks, targeting banks and the country’s two largest TV stations. The March 2013 attacks on six banks in South Korea affected 30,000 computers and disrupted financial services throughout the country. The 2013 wave of cyber

¹⁹ “Ten Days of Rain: Expert Analysis of Distributed Denial-of-Service Attacks Targeting South Korea,” McAfee, <<http://blogs.mcafee.com/wp-content/uploads/2011/07/McAfee-Labs-10-Days-of-Rain-July-2011.pdf>>.

²⁰ Nicole Perloth, “In Cyberattack on Saudi Firm, U.S. Sees Iran Firing Back,” *New York Times*, October 23, 2012, <www.nytimes.com/2012/10/24/business/global/cyberattack-on-saudi-oil-firm-disquiets-us.html>.

attacks, from March through June 2013, is estimated to have cost South Korea millions of dollars to clean up.²¹ The attacks disabled ATMs and news broadcast facilities and appeared to originate from an Internet provider address in China.²² As previously noted, China had served as North Korea's cyber mentor, and North Korea was known to use facilities and servers in China.

One of the most recent North Korean Advanced Persistent Threats (APT)²³ and cyber espionage attacks against Seoul was detailed by Kaspersky in September 2014, which was dubbed "Kimsuky" after the registration of two Dropbox mail accounts involved in the attacks.²⁴ This is yet another demonstration of North Korea's intentions to use cyber attacks for political as well as economic purposes. This targeted attack, originating from North Korea and the PRC, was aimed against a number of organizations in South Korea and two in China, including the Korea Institute for Defense Analyses, a "defense research institution," and a group of other think tanks in Seoul, as

²¹ Alex Hern, "North Korean 'Cyberwarfare' Said to Have Cost South Korea 500 Million Pounds," *Guardian*, October 16, 2013, <www.theguardian.com/world/2013/oct/16/north-korean-cyber-warfare-south-korea>.

²² Choe Sang-hun, "Computer Networks in South Korea Are Paralyzed in Cyber-attacks," *New York Times*, March 20, 2013, <www.nytimes.com/2013/03/21/world/asia/south-korea-computer-network-crashes.html>.

²³ The term APT refers to the capabilities of the attacker, meaning that the attacker is broad with a specific mission and an organized adversary. For an excellent and succinct description of APT, please see Richard Bejtlich's blog TaoSecurity at <<http://taosecurity.blogspot.com/2010/01/what-is-apt-and-what-does-it-want.html>>.

²⁴ Dmitry Tarakanov, "The 'Kimsuky' Operation: A North Korean APT?" *Securelist*, September 11, 2013, <<http://securelist.com/analysis/publications/57915/the-kimsuky-operation-a-north-korean-apt/>>.

well as the Hyundai Merchant Marine, which provides “worldwide container shipping services.”²⁵

In March 2015, the South Korean government accused the North of engaging in a series of cyber intrusions and attacks against the South Korean nuclear company Korea Hydro and Nuclear Power and its 23 reactors.²⁶ Disclosures of the company’s information, including reactor facility blueprints, were posted by “hacktivists” who urged followers to demand the shutdown of three reactors. They even attempted blackmail, stating that if the three reactors were not shut down, they would carry out an attack on the facilities. Of course, no such events occurred, and South Korean authorities laid the blame on Pyongyang.²⁷

III. U.S. Response: Proportionality and Sanctions

President Obama enacted additional sanctions against North Korea on January 2, 2015, stating that the United States would respond “proportionally” to the North Korean cyber attack on Sony.²⁸ Under

²⁵ *Ibid.*

²⁶ Bruce Klingner, “The U.S. Needs to Respond to North Korea’s Latest Cyber Attack,” *Heritage Foundation*, March 20, 2015, <www.heritage.org/research/reports/2015/03/the-us-needs-to-respond-to-north-koreas-latest-cyber-attack>.

²⁷ *Ibid.*

²⁸ David Sanger, Michael Schmidt, and Nicole Perloth, “Obama Vows a Response to Cyberattack on Sony,” *New York Times*, December 19, 2014, <www.nytimes.com/2014/12/20/world/fbi-accuses-north-korean-government-in-cyberattack-on-sony-pictures.html>.

Executive Order 13687, signed by President Obama, sanctions were imposed on 10 North Korean officials and three entities (already on previous sanctions lists), including the Reconnaissance General Bureau, which the U.S. Treasury noted as the source of “many of North Korea’s major cyber operations.”²⁹ It did not appear that the 10 officials had any direct connection to the cyber attack or DPRK cyber operations. The impact of these sanctions is difficult to measure, as previous sanctions against North Korea and its financial institutions have essentially increased its isolation, especially from the worldwide banking system. However, there appears to be no evidence that the sanctions have impeded Pyongyang’s growing efforts to build a cyber force capable of computer network attacks.

Some people have equated the shutdown of North Korea’s Internet as some sort of U.S. reprisal. The U.S. government probably encouraged the speculation by refusing to comment on the outage on December 23, 2014,³⁰ and implying that there would be a covert response to the Sony attack.³¹ However, it is quite difficult to equate the North Korean Internet outage with a “proportional

²⁹ U.S. Department of the Treasury, “Treasury Imposes Sanctions Against the Government of the Democratic People’s Republic of Korea,” January 2, 2015, <www.treasury.gov/press-center/press-releases/Pages/jl9733.aspx>.

³⁰ Brian Fung, “North Korea’s Internet Outage Was Likely the Work of Hacktivists—but Not the Ones You Might Think,” *Washington Post*, December 23, 2014, <www.washingtonpost.com/news/the-switch/wp/2014/12/23/north-koreas-internet-outage-was-likely-the-work-of-hacktivists-but-not-the-ones-you-might-think/>.

³¹ David Sanger and Michael Schmidt, “More Sanctions on North Korea After Sony Case,” *New York Times*, January 2, 2015, <www.nytimes.com/2015/01/03/us/in-response-to-sony-attack-us-levies-sanctions-on-10-north-koreans.html>.

response,” given that North Korea has only one Internet service provider, connected through China and reportedly only with about 1,000 Internet addresses.³² Technical data now available to experts indicates that denial-of-service attacks targeted two servers that route Internet traffic to North Korean sites, as well as actual sites belonging to a North Korean university and the DPRK’s official government website.³³ The nature of the denial-of-service activity as well as attendant chatter on social media strongly indicated this as a “hactivist” activity, not a state-sponsored activity.³⁴ Even if the United States had decided to respond to the North Korean attack on Sony, it remains to be seen whether shutting down the limited bandwidth of the open North Korean Internet would be the type of proportional and impactful target the United States would have chosen.

IV. Proportionate Response in the Cyber Domain?

The language utilized by the U.S. administration leads naturally to an inquiry regarding whether the concept of proportionality as discussed in the law of armed conflict is applicable in the cyber realm and specifically to the Sony attack. “Proportionality in attack,” according to customary international humanitarian law, is discussed in rule 14, Proportionality in Attack, in the International Conference

³² Sara Buhr, “Who’s Behind the Internet Outages in North Korea, Anyway?” *TechCrunch*, December 27, 2014, <www.techcrunch.com/2014/12/27/whos-behind-the-internet-outages-in-north-korea-anyway/>.

³³ Brian Fung, “North Korea’s Internet Outage Was Likely the Work of Hactivists.”

³⁴ *Ibid.*

of the Red Cross's discussion of customary international humanitarian war, which states:

Launching an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.³⁵

This is an area still under consideration for many scholars and discussed within Tallinn 1.0 and now under Tallinn 2.0.³⁶ In his assessment of proportionality relating to the cyber domain, Eric Jensen notes that the key issue is whether the cyber activity rises to the level of an attack. The view on what constitutes an attack has been debated at length during the Tallinn discussions, and the manual indicates “that a cyber attack need not be characterized by the release of kinetic force.”³⁷ However, it is clear that the attack must include some destruction, death, or damage to invoke the proportionality principle (please see Section VI for additional discussion of the definition of an attack in international law in regard to cyber activities).

³⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge: Cambridge University Press, 2005), rule 14.

³⁶ The Tallinn Manual, a project of the NATO Cooperative Cyber Defence Centre of Excellence, seeks to apply the law of war to the cyber domain. Tallinn 1.0 was completed after work by a group of legal scholars, and Tallinn 2.0 is currently being reviewed prior to final publication. The manual can be found at <<https://ccdcoe.org/tallinn-manual.html>>.

³⁷ Eric Jensen, “Cyber Attacks: Proportionality and Precautions in Attack,” *International Law Studies*, vol. 89 (2013), p. 198.

In “Cyber Attacks and the Laws of War,”³⁸ the author notes:

What is prohibited under the principle of proportionality is an attack that is reckless, or an attack that knowingly takes civilian lives or destroys civilian property in excess of what is necessary for accomplishing a military objective...Proportionality applies to the indirect effects of an attack as well. For instance, a cyber attack is responsible for the indirect effects on the control system of an electrical generator.³⁹

Given the current standards of international law, it is clear that the Sony attack itself did not rise to the level of an attack invoking the proportionality principle, and certainly President Obama’s use of “proportional” was not meant to have any legal application.

V. Cyber Deterrence and Self-Defense

There has been considerable discussion about the growth of cyber deterrence. Often compared to nuclear deterrence as a “transformative technology,”⁴⁰ it is important to note that developing a cyber counterpart has been a policy conundrum for the great cyber pow-

³⁸ Michael Gervais, “Cyber Attacks and the Laws of War,” *Journal of Law and Cyber Warfare*, vol. 1, no. 1 (2012).

³⁹ *Ibid.*

⁴⁰ Joseph S. Nye, Jr., “Nuclear Lessons for Cyber Security?” *Strategic Studies*, vol. 5, no. 4 (2011).

ers, such as the United States. Simply put, deterrence is acting to prevent another party from taking its own action because of concern about the consequences. The potential response must be credible and clear, whether this response is manifested in denial, penalty, or retaliation (counterstrike).⁴¹

Media reports about the potential use of the Stuxnet virus against North Korea provide some context in this discussion. According to these sources, the United States had tried to use the Stuxnet virus against North Korean nuclear facilities in the 2009~2010 timeframe when it had been successfully deployed against Iran. However, Stuxnet did not succeed against North Korea because of the isolation of North Korea's communications networks. Interestingly, former National Security Agency director general Keith Alexander stated that given the DPRK's limitations on Internet access and its citizens' travel, North Korea is one of a limited number of nations that "can race out and do damage with relative impunity" since reprisals against them would be difficult.⁴²

General Alexander's remarks demonstrate that it is difficult to deter a regime with limited connections to the world economic and financial markets and that has maintained technological and physical isolation of its populace. But the response to a cyber attack does not necessarily have to be a cyber attack, according to NSA's current director, Admiral Michael Rogers:

⁴¹ Will Goodman, "Cyber Deterrence: Tougher in Theory than in Practice," *Strategic Studies Quarterly*, Fall 2010, p. 102.

⁴² Joseph Menn, "U.S. Tried Stuxnet-Style Campaign against North Korea but Failed," *Reuters*, May 29, 2015, <www.reuters.com/article/2015/05/29/us-usa-northkorea-stuxnet-idUSKBN0OE2DM20150529>.

Because an opponent comes at us in the cyber domain doesn't mean we have to respond in the cyber domain. We think it's important that potential adversaries out there know that this is part of our strategy. The whole goal is, you do not want to engage in escalatory behavior.⁴³

Rogers added, "It's situational dependent. What you would recommend in one scenario is not what you would recommend in another." In this short rejoinder, Rogers has summed up what many people believe to be existing U.S. policies and contingency planning on cyber deterrence and the response in PPD 20 signed in mid-October 2013. While couched largely in defensive terms, PPD 20 clearly provides for cyber offensive operations when authorized and specifically in accordance with the law of armed conflict. According to one senior official, "What [the directive] does, really for the first time, is it explicitly talks about how we will use cyber operations."⁴⁴ The official further elaborated, "Network defense is what you're doing inside your own networks...Cyber operations is stuff outside that space." Coupled with remarks by former defense secretary Leon Panetta and other Department of Defense officials, it is clear that U.S. forces were authorized, under distinct circumstances, to carry out preemptive or retaliatory cyber war operations.⁴⁵

⁴³ Robert Hackett, "Let's Get Physical? U.S. Weighs Options When It Comes to Cyber Attacks," *Fortune Magazine*, May 12, 2015, <www.fortune.com/2015/05/12/rogers-cyber-attacks-us-response/>.

⁴⁴ Carlo Munoz, "Obama Authorizes New Cyber Warfare Directive," *The Hill*, November 14, 2012, <www.thehill.com/policy/defense/267879-report-obama-authorizes-new-cyber-warfare-directive>.

⁴⁵ *Ibid.*

In his review of PPD 20, *Christian Science Monitor* reporter Mark Clayton claims to have reviewed the directive and discussed it with senior U.S. officials. He notes that “the document authorizes development of offensive and defensive cyber systems” consistent with U.S. and international law and “of a target list to hit with them.”⁴⁶ Additionally, the exact intent and outcomes of cyber operations do not always fit into neat categories such as defensive or offensive. There are gray areas in the practice of cyber activity or computer network operations (CNO), which include computer network exploitation (CNE), computer network defense (CND), and computer network attack (CNA). There are occasions in which seeking to exploit or infiltrate an adversary’s networks (CNE) can intentionally or unintentionally cause temporary or permanent damage or denial of service.

In the fast pace of cyber operations, how does policy clearly address both self-defense and “anticipatory self-defense”? Again, administration sources admit to a policy conundrum. “Suppose that somebody’s sending a signal to freeze all our computer networks,” an administration official said in a recent interview. “I think most people would agree that we can neutralize that virus and we can do that in self-defense.” Under the concept of anticipatory self-defense, “you don’t have to wait until they paralyze the server, because, once they do, the damage is done,” the official said. “But then the issue is, if you’re running around the world freezing servers of everybody you don’t like, it looks very offensive,” he added. “That looks preemp-

⁴⁶ Mark Clayton, “Presidential Cyberwar Directive Gives Pentagon Long-Awaited Marching Orders,” *Christian Science Monitor*, June 10, 2013, <www.csmonitor.com/USA/Military/2013/0610/Presidential-cyberwar-directive-gives-Pentagon-long-awaited-marching-orders-video>.

tive.”⁴⁷

To apply international law to the issue of self-defense, it is important to note that traditional international law is generally regarded as an exception to Article 2(4) of the UN Charter that prohibits the use or threat of force “against the territorial integrity or political independence of any state.”⁴⁸ In their study on “Anticipatory Self-Defense in the Cyber Context,” Terry Gill and Paul Ducheine seek to apply this self-defense exception to the cyber domain.⁴⁹ They define “anticipatory self-defense” as “defensive measures undertaken in response to a manifest and unequivocal threat of attack in the proximate future,” contrasting it to “preemptive self-defense,” which “signifies a defensive response to...a potential threat of attack at some indeterminate point in the future.”⁵⁰ While noting that this view is not held consistently by legal authorities, Gill and Ducheine state that the nature of the cyber attack, whether a singular event or as part of a hybrid and kinetic attack, may also impact whether a cyber anticipatory action would be considered self-defense.⁵¹

⁴⁷ Ellen Nakashima, “In Cyberwarfare, Rules of Engagement Still Hard to Define,” *Washington Post*, March 10, 2013, <www.washingtonpost.com/world/national-security/in-cyberwarfare-rules-of-engagement-still-hard-to-define/2013/03/10/0442507c-88da-11e2-9d71-f0feafdd1394_story.html>.

⁴⁸ *UN Charter*, <www.un.org/en/documents/charter/chapter1.shtml>.

⁴⁹ Terry Gill and Paul Ducheine, “Anticipatory Self-Defense in the Cyber Context,” *International Law Studies*, vol. 89 (2013), p. 438.

⁵⁰ Gill and Ducheine, “Anticipatory Self-Defense in the Cyber Context.”

⁵¹ *Ibid.*

VI. The Establishment of Norms in Cyberspace

Most experts believe that we are beginning the establishment of norms for conduct in cyberspace, at least partially as a result of the difficulty in applying established international humanitarian law or the law of armed conflict neatly to cyber activities. The Tallinn Manual and the Budapest Convention on Cybercrime best demonstrate this. The preeminent expert on international law in this area, Michael Schmitt, analyzed the Sony attack in light of the *Tallinn Manual on the International Law Applicable to Cyber Warfare* and found that while malicious, “it was not at the level of an armed attack” since it did not cause “substantial injury or physical damage.”⁵² Schmitt notes that the international community has not reached consensus on what constitutes a “use of force” in cyberspace; thus the Sony hack would not necessarily be a violation of UN Charter Article 2(4).⁵³ Schmitt notes that North Korea’s actions could be interpreted as a violation of U.S. sovereignty and that the United States could take countermeasures accordingly.⁵⁴

As the only treaty that directly discusses cybercrime, the Convention on Cybercrime - also known as the Budapest Convention - has also provided a set of norms overseen by the Council of Europe. It seeks to make separate national criminal laws consistent and to increase cooperation. It also defines specific offenses regarding illegal access and interception, interference, cyber or computer-related forgery,

⁵² Michael Schmitt, “International Law and Cyber Attacks: Sony v. North Korea,” *Just Security*, December 17, 2014, <www.justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea/>.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

and computer-related child pornography.⁵⁵ Of course, the DPRK is not a signatory to this treaty, nor its cyber mentor, China. However, China's recent agreement with the United States on cyber theft may also be the beginning of additional international norms. Despite a good deal of skepticism on whether the agreement will truly impact the Chinese theft of intellectual property, the United States has been pressing for international norms in this area for some time. According to a U.S. fact sheet on the agreement:

The United States and China agree that neither country's government will conduct or knowingly support cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors.⁵⁶

The United States made no secret of the fact that it had lost patience with Chinese industrial espionage. Before China's President Xi Jinping arrived in the United States, President Obama spoke to the Business Roundtable using particularly strong language, warning that the United States did not "want to see the Internet weaponized":

We have repeatedly said to the Chinese government that we understand traditional intelligence-gathering

⁵⁵ Council of Europe, *Convention on Cybercrime*, Treaty No. 185, November 23, 2001, <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185>.

⁵⁶ White House, "FACT SHEET: President Xi Jinping's State Visit to the United States," September 25, 2015, <www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.

functions that all states, including us, engage in. And we will do everything we can to stop you from getting state secrets or transcripts of a meeting that I've had, but we understand you're going to be trying to do that. That is fundamentally different from your government or its proxies engaging directly in industrial espionage and stealing trade secrets, stealing proprietary information from companies. *That we consider an act of aggression that has to stop* [emphasis added].⁵⁷

VII. Conclusion

The Sony attack surprised many observers, and it continues to challenge us as we discern its intent and objectives. Certainly the DPRK is committed to a full range of cyber activity, from defense to espionage and to destructive attacks. The choice of Sony as a target was one of a series of steps by the North Korean regime to announce its entry into the “cyber club” and its intention to develop its own cyber capabilities beyond those nurtured by the PRC.

The attack raised many issues critical to the application of international norms and law to the cyber domain, including attribution, self-defense, and deterrence. The pace of technological advances coupled with the availability of the cyber weapon to state and non-state actors necessitates stronger efforts to establish clearer norms at

⁵⁷ White House, “Remarks by the President to the Business Roundtable,” September 16, 2015, <www.whitehouse.gov/the-press-office/2015/09/16/remarks-president-business-roundtable>.

least among nation states.

In the case of North Korea, we see the limited impact of additional sanctions. It is unclear whether deterrence, i.e. the implication of cyber counterattacks, has really influenced the regime's cyber profile. While Pyongyang might now be hesitant to attack U.S. companies in the near future, there are no indications that it will cease its intrusions and attacks against institutions in South Korea. The lesson from the Sony attack is that the unexpected can occur in the cyber domain, and it is critical to go beyond the preparation of defenses in the cyber sphere to the anticipation of policy and legal issues inherent in a response.

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