

SANCTIONS, NUKES AND *JUCHE*: FRANCHISING IN NORTH KOREA

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ABSTRACT

Could North Korea (officially the Democratic People's Republic of Korea) actually become Northeast Asia's next big free market economy? At first blush, economic optimism about the "Hermit Kingdom" seems incredibly misplaced. North Korea is one of the most repressive countries in the world; with an overwhelming adherence to the state ideology of *juche* (national self-reliance), the North Korean government continues to systematically deny citizens almost all basic liberties. As if that were not enough, North Korea threatens to attack nearby nations and the United States with nuclear missiles, in spite of international sanctions that are meant to compel North Korean denuclearization.

On the other hand, North Korea has expanded its efforts to enhance its international profile, including talks of potentially reuniting with South Korea and unprecedented meetings with the heads of state of both the United States and China. A post-sanctions North Korea could present an opportunity for franchisors, franchisees, and foreign capital to enter the country, exponentially expand its market potential, and mutually benefit from the positive spillovers of economic liberalization (e.g., cross-cultural communication and technology transfers).

There are, indeed, tremendous challenges—risks and potential rewards—to bringing foreign capital and investment, including

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franchising, to North Korea. Economic liberalization and enhanced foreign capital, investment, and franchising can be achieved through the multilateral efforts of major trading nations and significant, but certainly attainable, changes in North Korean norms and laws.

Key Words: Korea, franchising, market potential, nuclear, sanctions, China, foreign enterprise, foreign investment, *juche*, franchisor, franchisee, economic liberalization, trade zone, foreign capital, East Asia

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I. INTRODUCTION

Supply and demand are the building blocks of any successful business, as well as the foundations of economics studies. A business must continuously innovate and create new intellectual property to retain the attention of consumers. This task may seem simple, but with the constant bombardment of news and commercials, business owners are perpetually waging “war” against their competitors. One approach to avoiding this war is to enter a country or city that has never seen your product or anything like it. While this may seem an implausible avenue to take in today’s globalized business environment, some countries have remained sheltered from significant foreign influence. If such a country were to open to the outside world, a business franchise would have an invaluable opportunity to capitalize on an untouched market.

North Korea, formally known as the Democratic People’s Republic of North Korea, is one such country, described as both a socialist state and a totalitarian dictatorship.¹ Its government excels in controlling its people, with large prison camps and no signs of political dissidence.² Indeed, North Korea is a secluded nation,³ closed from the outside world for the nearly eight decades since, at the end of World War II, Japan surrendered the Korean Peninsula to American troops in the south and Soviet troops in the north.⁴ Separated from its southern “brother” (South Korea), which became the nation officially known as the Republic of Korea, North Korea fell by the wayside despite being in close proximity to what became the strong East Asian economies of China, Japan, Taiwan, and South Korea.⁵

¹ Benjamin Elisha Sawe, *What Type of Government Does North Korea Have?*, WORLD ATLAS (Apr. 19, 2018), <https://www.worldatlas.com/articles/what-type-of-government-does-north-korea-have.html> [<https://perma.cc/B63U-D353>].

² Benjamin Katzeff Silberstein, *North Korea: Fading Totalitarianism in the “Hermit Kingdom”* 1 (Rsch. Inst. Indus. Econ., IFN Working Paper No. 836, 2010).

³ J. Alison Rosenblitt, *Rome and North Korea: Totalitarian Questions*, 59 GREECE & ROME 202, 203 (2012).

⁴ See HYUNG GU LYNN, *BIPOLAR ORDERS: THE TWO KOREAS SINCE 1989*, at 17-19 (2007).

⁵ CLAIRE O’NEAL, *WE VISIT NORTH KOREA* 12 (2014). Kim Il-sung, the founder of the North Korean dictatorship, established a “Korea First” principle. *Id.* at 27. This principle was a belief that the country should not depend on other countries for food, goods, or services. *Id.*

North Korean rulers, though, have responded. Changes begun in the mid-1980s⁶ continue to this day under the regime of the country's current ruler, Kim Jong-un.⁷ With outside political and economic pressures as well as domestic struggles (including an impoverished populace that periodically faces mass starvation),⁸ North Korea has endeavored to become more foreign investor-friendly.⁹ However, despite these efforts, poor North Korean leadership, confusing legal structures, and past behavior have deterred foreign investment.¹⁰ In addition, any business seeking to enter a new market—whether it be North Korea or another country with an autocratic leadership structure—should consider other factors. For example, the media's heightened focus on an individual politician's non-political characteristics in North Korea may be troubling if coverage of the supreme leader's personal life, including his family dynamics, physical appearance, or health status, give rise to any suspicions regarding Kim Jong-un's ability to keep afloat a country on the brink of economic failure.¹¹

⁶ In the 1980s, North Korea began realizing that its center-focused economy would not succeed, losing the support of the Soviet Union and China. David Kang, *The Economy, in NORTH KOREA: A COUNTRY STUDY* 133, 157 (Robert L. Worden ed., 2008).

⁷ Andrei Lankov, *North Korea Needs Foreign Investment, but Has Done Little to Attract It*, RADIO FREE ASIA (Sept. 20, 2016), <https://www.rfa.org/english/commentaries/parallel-thoughts/korea-investment-09202016152846.html> [<https://perma.cc/EZ3F-ZKE4>].

⁸ Choe Sang-Hun, *North Korea Urgently Needs Food Aid After Worst Harvest in Decade*, U.N. SAYS, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/world/asia/north-korea-food.html?module=inline> [<https://perma.cc/2HJP-UAPX>].

⁹ Oliver Hotham, *North Korea Seeking €6.8 Million in Foreign Investment for Domestic Industry*, NK NEWS (May 16, 2019), <https://www.nknews.org/2018/12/n-korea-seeking-e6-8-million-in-foreign-investment-for-domestic-industry/> [<https://perma.cc/MZ8J-BLWL>] (“North Korea is seeking over €6.8 million (USD\$7.7 million) in foreign direct investment in a range of projects . . . The projects, which span everything from foodstuffs to transportation, are being proposed by the Korea Foreign Investment and Economic Cooperation Committee (KFIECC), and partners can invest in the form of equity or a ‘contractual joint venture.’”). Even if not acted upon by foreign businesses, this availability for investment has long been present. Dae-Kyu Yoon, *Overview of the Legal Structure of Foreign Investment in the DPRK*, 5 J. KOR. L. 1, 2 (2005).

¹⁰ Yoon, *supra* note 9, at 19.

¹¹ Sun Ho Jeong & Na Yeon Lee, *Individualization or Privatization of the North Korea Leader? Different Types of Media Personalization About Kim Jong-Un*, JOURNALISM PRACT. 1, 2 (Oct. 26, 2021), <https://doi.org/10.1080/17512786.2021.1987296> [<https://perma.cc/W7DQ-X58S>].

With businesses relying so heavily on public perception and with the world being more interconnected than ever before,¹² it is vital for businesses to maintain a proper image – especially online – regardless of the location of the business. This reality is particularly important inasmuch as some consumers may boycott a company because of its business ties to a country whose government engages in practices they find repugnant.¹³ North Korea has a history of human rights violations and has even received a censure from the United Nations.¹⁴ Some Western consumers may be wary of patronizing a business whose activity directly or indirectly supports a repressive regime.¹⁵ However, some degree of foreign “collaboration” with North Korean authorities may be an effective way to resolve these human rights concerns.¹⁶ That is, the introduction of foreign companies and ideas may assist in correcting some of these grievances. Business models such as franchising could bring stability and effective business to an area, whether it be a city, region, or country. That principle applies even if there have been renewed concerns over working conditions in neighboring countries, such as China.¹⁷

¹² Press Release, U.N. Secretary-General, *Today’s Threats, Challenges More Interconnected Than Ever*, Secretary-General Says at Inaugural Meeting of Clinton Global Initiative, U.N. Press Release SG/SM/10108 (Sept. 17, 2005). Interconnection may have limited influence due to North Korea’s isolation.

¹³ See *Boycott List*, ETHICAL CONSUMER, <https://www.ethicalconsumer.org/ethicalcampaigns/boycotts> [<https://perma.cc/7PM3-2LZT>] (listing ongoing boycotts, many involving human rights violations and companies doing business in Israeli settlements) (last updated May 2022).

¹⁴ Patricia Goedde, *Legal Mobilization for Human Rights Protection in North Korea: Furthering Discourse or Discord?*, 32 HUM. RTS. Q. 530, 531 (2010). North Korea provides for a multitude of rights but restricts the use of those rights in the event their exercise violates the “Korea First” approach. O’NEAL, *supra* note 5, at 27. Additionally, a certain designation in North Korean society puts an individual at substantial risk of being sent to abusive prison camps. *Id.* at 28.

¹⁵ Note, however, that American sentiment towards North Korea may be shifting. Forty-six percent of Americans described North Korea as an enemy of the United States in 2018, down from 58% in 2013. See Jeffrey M. Jones, *Americans’ Opinions of U.S.-North Korea Relations Less Negative*, GALLUP (July 12, 2018), <https://news.gallup.com/poll/237125/americans-opinions-north-korea-relations-less-negative.aspx> [<https://perma.cc/2VPV-HSX4>].

¹⁶ *Combating Human Rights Abuses*, SEARCH FOR COMMON GROUND (July 21, 2014), <https://www.sfcg.org/combating-human-rights-abuses/> [<https://perma.cc/DB46-8DNA>].

¹⁷ Jamie Fullerton, *Suicide at Chinese iPhone Factory Reignites Concern Over Working Conditions*, TELEGRAPH (Jan. 7, 2018),

This Article examines the history of North Korea, its relations with the rest of the world, and its potential to become an *economic* power. Then, this Article will consider the use of franchising as a tool of foreign investment in closed economies around the world. Lastly, this Article synthesizes lessons learned from privatization and looks to options for improving relations between North Korea and other economic powers around the world.

II. WHY CONSIDER NORTH KOREA?

a. The Korean Peninsula: A Tale of Two Countries

Following World War II, the Korean Peninsula became a localized focal point of Cold War tensions.¹⁸ In 1945, the United States and the Soviet Union emerged as the post-World War II superpowers.¹⁹ Perhaps to ease any regional tensions between these two countries,²⁰ the Korean Peninsula was divided into zones of control at the 38th parallel.²¹ North of that latitude arose a communist satellite of the Soviet Union, while south of it was a budding capitalist nation under U.S. influence.²² After World War II, the Korean Peninsula also gained freedom from Japanese colonization.²³ At that time, North Korea had a relatively strong economy.²⁴ It controlled three-fourths of the Peninsula's mining

<https://www.telegraph.co.uk/news/2018/01/07/suicide-chinese-iphone-factory-reignites-concern-working-conditions/> [https://perma.cc/KS7K-XXY2].

¹⁸ EDWARD A. OLSEN, U.S. POLICY AND THE TWO KOREAS 2 (1988).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Andrew Salmon, *Explainer: Why Are the Two Koreas So Hostile?*, CNN (Mar. 28, 2010, 2:24 AM), <http://www.cnn.com/2010/WORLD/asiapcf/05/27/north.south.korea.explainer.background/index.html> [https://perma.cc/P8BX-4EVD]; Michael O'Hanlon & Mike Mochizuki, *Economic Reform and Military Downsizing: A Key to Solving the North Korean Nuclear Crisis?*, BROOKINGS (Sept. 1, 2003), <https://www.brookings.edu/articles/economic-reform-and-military-downsizing-a-key-to-solving-the-north-korean-nuclear-crisis/> [https://perma.cc/FBD6-32XX].

²² Salmon, *supra* note 21.

²³ O'Hanlon & Mochizuki, *supra* note 21.

²⁴ See *North Korea*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/korea/north-korea-history> [https://perma.cc/4NXN-8LKL] (noting that North Korea actually outpaced its

production, 90% of its electricity generation, and 80% of its heavy industry.²⁵ South Korea had a better climate, so its region was used largely for agricultural purposes.²⁶ North Korea quickly nationalized its industries and increased production.²⁷

After the division of the Peninsula, U.S. policy, at least initially, primarily focused on China and Japan.²⁸ The United States sought to help China, an ally at the time, rebuild from a costly war against Japan.²⁹ The Chinese Civil War, however, concluded with a communist victory that quickly stifled U.S. relations with China.³⁰ The People's Republic of China became a Cold War adversary.³¹ Japan, in contrast, turned out to be the cornerstone of U.S. policy in post-war Asia.

On June 25, 1950, North Korea attacked South Korea, sparking the Korean War.³² The conflict saw the United States defending South Korea, and, by the end of the year, China was supporting the presumed aggressors from North Korea.³³ In 1953, after the Peninsula was devastated and two million lay dead,³⁴ the two Koreas were able to reach an armistice but never a peace treaty.³⁵ As a result, the two countries technically remain in a state of war seventy years later.³⁶ The Korean War solidified U.S. relations with South Korea and firmly rooted U.S. interests in the region.³⁷

southern rival for some time due to investments in mining, steel production, and other heavy industries).

²⁵ O'Hanlon & Mochizuki, *supra* note 21.

²⁶ David J. Nameth, *The Geography of the Koreas*, ASIA SOC'Y <https://asiasociety.org/education/geography-koreas> [<https://perma.cc/NCE8-WF92>].

²⁷ See JOINT ECON. COMM. REPUBLICANS, ECONOMIC PERSPECTIVES ON NORTH KOREA 1 (2018), https://www.jec.senate.gov/public/_cache/files/5d22fa61-29ba-4cdf-a88c-80782b207d81/north-korea.pdf [<https://perma.cc/9E5K-7DXG>].

²⁸ OLSEN, *supra* note 18, at 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 4; ALLAN R. MILLETT, *THE WAR FOR KOREA, 1950-1951: THEY CAME FROM THE NORTH* 12 (2010).

³³ See MILLETT, *supra* note 32, at 13.

³⁴ Salmon, *supra* note 21.

³⁵ OLSEN, *supra* note 18, at 5.

³⁶ Charles K. Armstrong, *North Korea: U.S.-North Korean Relations*, in *THE FUTURE OF US-KOREAN RELATIONS: THE IMBALANCE OF POWER* 9, 13 (John Feffer ed., 2006).

³⁷ OLSEN, *supra* note 18, at 5.

Despite U.S. efforts, South Korea in the 1950s and 1960s remained burdened by poverty, a lack of economic infrastructure, scant natural resources, an ill-prepared and displaced population, and a corrupt, faction-laden political leadership.³⁸ North Korea, even with less support from its allies,³⁹ was able to thrive during this time period.⁴⁰ The country benefitted from a disciplined totalitarian regime that took advantage of North Korea's smaller population, Japanese-era industrial base, and plentiful natural resources—benefits unavailable to the South.⁴¹ The country also collectivized its agriculture in 1953 and implemented dictator Kim Il-sung's *juche* concept of self-reliance, autonomy, and independence,⁴² which deprived the country of foreign trade. However, with the aid of Soviet advice and support, North Korea also began defining its own

³⁸ *Id.* at 6.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* In particular, most of the Korean Peninsula's industry, mining, and power generation were located in North Korea. See JOINT ECON. COMM. REPUBLICANS, *supra* note 27.

⁴² FELIX ABT, A CAPITALIST IN NORTH KOREA: MY SEVEN YEARS IN THE HERMIT KINGDOM 73-74 (2014); BRUCE CUMINGS, KOREA'S PLACE IN THE SUN: A MODERN HISTORY 403-04 (1997); MICHAEL E. ROBINSON, KOREA'S TWENTIETH-CENTURY ODYSSEY 159 (2007). *Juche* ideology is the official autarkic state ideology of the Democratic People's Republic of Korea. See Grace Lee, *The Political Philosophy of Juche*, 3 STAN. J. E. ASIAN STUDS. 105, 105-07 (2003). Some scholars believe that North Korea's first leader, Kim Il-sung (the grandfather of the current leader, Kim Jong-un), popularized the concept of *juche* in the country as a result of his experience as a Korean guerilla fighter during the 1930s. See generally Hongkoo Han, *Colonial Origins of Juche*, in ORIGINS OF NORTH KOREA'S JUCHE: COLONIALISM, WAR, AND DEVELOPMENT 37 (Jae-Jung Suh ed. 2013) (using historical institutionalism as a theoretical framework to explain unique aspects of North Korea). During that time period, Korean guerilla fighters and Chinese communists allied together to fight against an imperialistic Japan. *Id.* at 37-39. However, in 1932, Chinese communists began to falsely believe that Japanese imperialists had somehow infiltrated the Korean guerilla fighters and, as a result, the Chinese communists began a series of purges in Manchuria over a two-and-a-half-year period killing between 500 and 2,000 Korean guerilla fighters, communists, and sympathizers of the same. *Id.* at 38. Seeing his fellow Koreans get slaughtered, and coming close to the same fate himself, in what is now known as the Misaengdan Incident, had a lasting impact on Kim Il-sung. See *id.* Caught between Japanese aggression and Chinese influence, Kim Il-sung sought to form a new path and way of thinking for North Korea—one based on its own goals, politics, national interests, and virulent independence. See *id.* *Juche* is an ideology that remains prevalent in North Korea, and its actions, today. Foster Klug, *Juche Rules North Korea Propaganda, but What Does It Mean?*, ABC NEWS (Sept. 29, 2019), <https://abcnews.go.com/International/wireStory/juche-rules-north-korean-propaganda-65947468> [<https://perma.cc/7ZT9-SWE2>].

nuclear security interests when it established its first nuclear research center and reactor at Yongbyon during the 1960s.⁴³

By the late 1960s, North Korea devoted 15-20% of its GDP to the military; meanwhile, its economic growth gradually slowed while South Korea's economic output increased.⁴⁴ During the early 1970s, North Korea tried to boost output by borrowing capital through international markets and purchasing whole factories from abroad, but the strategy was ruined by the shocks in oil prices and global stagflation.⁴⁵ This failure led to an increase in economic dependency on the Soviet bloc, as North Korea received from the bloc both finished goods and arms and sold to the bloc various minerals, textiles, and steel.⁴⁶ Ultimately, North Korea did increase its exports, which largely consisted of arms sales, such as to Iran.⁴⁷

In contrast, the Vietnam War proved to be an enormous economic boon for South Korea.⁴⁸ The war strengthened the bond between Japan and South Korea while allowing South Korea to receive the economic byproducts of military cooperation with the United States.⁴⁹ These alliances spurred onward the South Korean economy and, before the end of the decade, South Korea began to economically outpace North Korea.⁵⁰ South Korea also grew politically as it transitioned from an era of political coups⁵¹ and its

⁴³ Armstrong, *supra* note 36, at 14.

⁴⁴ O'Hanlon & Mochizuki, *supra* note 21; JOINT ECON. COMM. REPUBLICANS, *supra* note 27.

⁴⁵ *But see* Tomas Jezek, *The Czechoslovak Experience with Privatization*, 50 J. INT'L AFFS. 477, 483 (1997).

⁴⁶ O'Hanlon & Mochizuki, *supra* note 21. By the late 1980s, Soviet Union and North Korean trade relations had diminished markedly and so had the North Korean economy. JOINT ECON. COMM. REPUBLICANS, *supra* note 27. In particular, the Soviet Union's share of North Korean trade fell from nearly half to less than 8% in 1994. *Id.* Similarly, in 1987, the Soviet Union accounted for nearly half of all North Korean food imports. *Id.* The following year, the Soviet Union only accounted for a quarter of all North Korean food imports. *Id.* By the 1990s, North Korea received zero food imports from the Soviet Union. *See id.*

⁴⁷ O'Hanlon & Mochizuki, *supra* note 21.

⁴⁸ OLSEN, *supra* note 18, at 9.

⁴⁹ *Id.*

⁵⁰ Salmon, *supra* note 21.

⁵¹ *See* OLSEN, *supra* note 18, at 11.

own authoritarian regime⁵² under General Park Chung-hee⁵³ to a more democratic government.⁵⁴ These democratic aspirations came to fruition in 1987 when South Korea held its first direct presidential election.⁵⁵

When the Soviet Union collapsed in 1991,⁵⁶ North Korea lost support from its communist backers and fell into economic dissolution.⁵⁷ The collapse signified the end of the Cold War and established a new era in U.S. relations with the Korean Peninsula. North Korea had lost access to most of its markets and subsidized Soviet oil.⁵⁸ As a gesture to demonstrate its loyalty and a way to prevent the inflow of North Korean refugees across its borders, China provided coal and oil to the North Korean regime.⁵⁹ By the year 2000, however, North Korea's "energy resources were about half what they had been in 1990."⁶⁰

For the past three decades, "North Korea has suffered continuing economic contraction. GDP and per capita income have been cut roughly in half."⁶¹ Factors like drought, flooding, and a broken political system have not just worsened agricultural problems but have caused mass famine.⁶² Moreover, the rapid and

⁵² See Chaibong Hahm, *The Ties that Bind: Capitalism, Democracy, and Modernity*, in *THE FUTURE OF U.S.-KOREA-JAPAN RELATIONS: BALANCING VALUES AND INTERESTS* 97, 100-01 (Tae-hyo Kim & Brad Glosserman eds. 2004).

⁵³ OLSEN, *supra* note 18, at 12. Park won elections from 1963 to 1971, but thereafter simply ruled as a dictator until his assassination in October 1979.

⁵⁴ Hahm, *supra* note 52, at 101.

⁵⁵ *Id.*

⁵⁶ Brad Glosserman, *U.S. Public Opinion, U.S. Foreign Policy, and the Future of Trilateral Relations in Northeast Asia*, in *THE FUTURE OF U.S.-KOREA-JAPAN RELATIONS: BALANCING VALUES AND INTERESTS* 150, 163 (Tae-hyo Kim & Brad Glosserman eds. 2004).

⁵⁷ See James D. Seymour, *The Exodus: North Korea's Out-Migration*, in *THE FUTURE OF US-KOREAN RELATIONS: THE IMBALANCE OF POWER* 130, 132 (John Feffer ed. 2006).

⁵⁸ *Id.* at 131.

⁵⁹ *Id.*

⁶⁰ O'Hanlon & Mochizuki, *supra* note 21.

⁶¹ *Id.*

⁶² See Rhoda E. Howard-Hassmann, *State-Induced Famine and Penal Starvation in North Korea*, 7 *GENOCIDE STUDS. & PREVENTION: INT'L J.* 147, 151 (2012) (noting a new system of stratification between the rich and poor had developed; those that had access to hard currency from smuggling across the border with China or crime, could buy what little food was on the market). In fact, from 1994 to the end of the decade, it is estimated that somewhere between 600,000 and 1,000,000 North Koreans died as a result of mass famine. *JOINT ECON. COMM. REPUBLICANS*, *supra* note 27.

constant economic decline of North Korea has resulted in its dependence on extortion, drug trafficking, counterfeiting, arms exports, cyber-crime, and money transfers from North Korean connections overseas.⁶³ Economic hardships have also affected its trade; while roughly half of what it was in 1980, China now makes up most of North Korea's imports, and the rest comes mainly from Japan and South Korea. The efforts to aid North Korea with food and energy come from those same three Asian neighbors as well as the United States and the European Union.⁶⁴ This foreign largesse notwithstanding, North Korea's governmental system still largely will determine its future.⁶⁵

b. North Korea: An Opportunity for Growth

Most totalitarian regimes develop from a one-party system, with a sign being an adoption of radically different principles and values.⁶⁶ For example, the government sets the wages, prices, production levels, and everything else that may be related to a product.⁶⁷ Throughout modern history, these forms of government have competed with other systems, such as democratic republics and constitutional monarchies.⁶⁸ With dictator-ordered high-level familial assassinations as a key feature, the totalitarian Kim dynasty has held North Korea in its thrall for three-quarters of a century,

⁶³ Howard-Hassmann, *supra* note 62, at 151.

⁶⁴ See Seymour, *supra* note 57, at 131.

⁶⁵ See Victor Cha & Lindsay Lloyd, *The Case for Humanitarian Aid to North Korea*, FOREIGN POL'Y (July 17, 2019, 10:58 AM), <https://foreignpolicy.com/2019/07/17/the-case-for-humanitarian-aid-to-north-korea/> [<https://perma.cc/F96Z-PGNH>] (noting that "[h]istorically, the United States and other democratic countries have provided help intended for the North Korean people" but "such assistance has not always gone to those who needed it most, and [North Korea] strongly resists any kind of international monitoring to try to make sure it does"). As discussed above, North Korea's official state ideology of *juche* places political, economic, and military self-reliance as the top priority for the country and the principle informs all of the actions of the country and its leadership as it interacts with the rest of the world. See JOINT ECON. COMM. REPUBLICANS, *supra* note 27, at 3.

⁶⁶ Hannah Arendt, *Ideology and Terror: A Novel Form of Government*, 15 REV. POL. 303, 303 (1953).

⁶⁷ Esther Pan, *North Korea's Capitalist Experiment*, COUNCIL ON FOREIGN RELS. (June 7, 2006, 5:06 PM), <https://www.cfr.org/backgrounder/north-koreas-capitalist-experiment> [<https://perma.cc/K8RZ-4ABK>].

⁶⁸ See Arendt, *supra* note 66.

with no end in sight;⁶⁹ the founder's grandson is the supreme leader, and the oppressive regime continues. Still, ultimately tyrannies do collapse, and sometimes the nation that remains not only recovers rather quickly, but in time forms an economic powerhouse.⁷⁰

With this political backdrop, North Korea represents an opportunity for businesses to reach millions of new consumers with boundless economic potential. In the short term the country could be seen as a great pool of cheap, unskilled labor,⁷¹ and the development of a strong educational system could drastically increase human capital over time. The educational leaps and bounds displayed by students in neighboring countries, such as South Korea and China,⁷² give hope to the idea that North Korea could develop a similarly strong educational system. With the potential for rising human capital, the Korean Peninsula could serve as an excellent source of technological and cultural development.⁷³ Currently, human capital is often exported from the Peninsula because of a lack

⁶⁹ Time Photo & Charlie Campbell, *The Despotism Dynasty: A Tree of North Korea's Kim Clan*, TIME (Feb. 24, 2017, 4:17 PM), <https://time.com/4681304/north-korea-kim-family-album/> [<https://perma.cc/N33L-A55R>]. In the absence of any known rules for succession, analysts can only base predictions about who comes after the Kims on previous transfers of power. However, the lack of succession protocols is not necessarily by design given that North Korea has only had three leaders in its seventy-three-year history. Benjamin Brimelow, *North Korea May Be Making Plans for a Future Without Kim Jong Un*, INSIDER (Oct. 24, 2021, 6:52 PM), <https://www.businessinsider.com/north-korea-may-be-planning-for-kim-jong-un-successor-2021-10> [<https://perma.cc/H9BB-GALC>].

⁷⁰ Germany, for example, once a totalitarian Nazi regime, developed into one of the economic strongholds of Europe. *But see* Ashoka Mody, *Germany's Economy Will Be Europe's Problem*, BLOOMBERG (Dec. 7, 2018, 3:00 AM), <https://www.bloomberg.com/opinion/articles/2018-12-07/germany-s-economy-will-be-europe-s-problem> [<https://perma.cc/N4DX-X87L>]. This concept is especially true when an economy is centrally planned. *See* O'NEAL, *supra* note 5, at 154.

⁷¹ Alexandra Stevenson, *Who Wants to Do Business in North Korea?*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/business/north-korea-business-kim-trump-summit.html> [<https://perma.cc/7FN6-USQE>].

⁷² Ashoka Mody, *Germany's Flagging Economy Will Be Europe's Problem*, MALAYSIAN RESERVE (Dec. 10, 2018), <https://themalaysianreserve.com/2018/12/10/germanys-flagging-economy-will-be-europes-problem/> [<https://perma.cc/5RWQ-67HS>] ("Korean and Chinese high-school students were outperforming their German counterparts in science and, especially, in mathematics."). Additionally, universities in China and Southeast Asia are beginning to outrank those in established first world countries. *Id.*

⁷³ *See* Kang, *supra* note 6, at 11 (citing South Korea as a world leader in technology and innovation).

of opportunity.⁷⁴ However, with pro-business development in North Korea, human capital would grow and tend to remain in place as companies take advantage of low cost, educated workers; a free market North Korea might even, eventually, constitute an economic powerhouse of its own.

North Korea additionally represents an untapped resource of raw materials, such as coal, iron, lead, and other raw resources used for manufacturing.⁷⁵ Due to high levels of expenditure elsewhere, the country has neither the funds nor the proper infrastructure to extract these resources.⁷⁶ Some of the raw materials necessary for developing high-tech products are abundant in the Hermit Kingdom,⁷⁷ and—with a smart, trained, but inexpensive workforce—a manufacturer or research development company could minimize its costs if it sought to expand into North Korea.⁷⁸

⁷⁴ Florence Lowe-Lee, *Brain Drain: Korea Exports Human Capital*, KOREA ECON. INST. AM. (May 25, 2011), <http://keia.org/publication/brain-drain-korea-exports-human-capital> [<https://perma.cc/R8LS-E6BF>]. Whether as highly skilled information technology workers, manual laborers, or any other type of employee, nearly 100,000 North Koreans work overseas, with about 80% of them employed in China and Russia for incredibly long hours (perhaps as many as sixteen hours daily); North Korea taxes earnings to the tune of around a half billion dollars annually. Matthew Zweig, *North Korea's Use of Slave Labor Will Limit Any Prospective Sanctions Relief*, FOUND. DEF. DEMOCRACY (Feb. 27, 2019), <https://www.fdd.org/analysis/2019/02/27/north-koreas-use-of-slave-labor-will-limit-any-prospective-sanctions-relief/> [<https://perma.cc/N4MG-JGBY>].

⁷⁵ Steve Mollman, *North Korea is Sitting on Trillions of Dollars of Untapped Wealth, and Its Neighbors Want In*, QUARTZ (June 16, 2017), <https://qz.com/1004330/north-korea-is-sitting-on-trillions-of-dollars-on-untapped-wealth-and-its-neighbors-want-a-piece-of-it/> [<https://perma.cc/7ZDS-3Z5X>] (stating North Korea has roughly 200 different types of minerals). Such goods may be considered to be “capital goods.” Capital goods are man-made, durable items that businesses use to produce goods and services. Capital goods include tools, business, vehicles, machinery, and equipment. Kimberly Amadeo, *What are Capital Goods?*, BALANCE (May 17, 2022), <https://www.thebalance.com/capital-goods-examples-effect-on-economy-3306224#:~:text=They%20include%20tools%2C%20buildings%2C%20vehicles,real%20capital%2C%20and%20economic%20capital> [<https://perma.cc/7MJ6-GGGN>].

⁷⁶ Tsvetana Paraskova, *There's a \$10 Trillion Resource that North Korea Can't Tap*, BUS. INSIDER (Sept. 14, 2017, 6:00 PM), <https://www.businessinsider.com/theres-a-10-trillion-resource-that-north-korea-cant-tap-2017-9> [<https://perma.cc/8KBM-NX3W>].

⁷⁷ See Mollman, *supra* note 75.

⁷⁸ It should be noted that the average operation rates of all existing mining facilities in North Korea are below 30% of capacity due to restricted financial assistance and the deteriorating infrastructure of those mining facilities. Choi Kyung-soo, *The Mining Industry of North Korea*, NAUTILUS INST. SEC. & SUSTAINABILITY (Aug. 14, 2011), <https://nautilus.org/napsnet/napsnet-special-reports/the-mining-industry-of-north-korea/> [<https://perma.cc/A5QT-UHTQ>].

Currently, nearly all North Korean mines lack the electricity and equipment necessary to create a competitive market.⁷⁹ Furthermore, North Korea has plenty of available land, and a recent pledge to fortify a friendly relationship with South Korea has supported rapid development in the real estate market along the demilitarized zone between North Korea and South Korea.⁸⁰

Recent developments in North Korea give hope to the prospect that the outside world can someday tap into this market and all its potential. These developments include the Choson Exchange, which has been training North Korean citizens in the ways of entrepreneurship,⁸¹ and talks concerning the development of a railroad system to reconnect the country with South Korea⁸² seem to steer North Korea closer to its goal of providing an “economically comfortable future” for its people.⁸³

In addition, the energy shortage in the country is one of the main obstacles hampering North Korean mineral production. *Id.* Due to the age and poor conditions of the existing power grid, North Korean mines suffer from a lack of electric power. *Id.*

⁷⁹ *Id.*

⁸⁰ Joori Roh & Cynthia Kim, *Peace Talks Ignite Land Buying Frenzy Along South Korea's Fortified Border*, REUTERS (May 13, 2018, 7:18 PM), <https://www.reuters.com/article/us-southkorea-border-property/peace-talks-ignite-land-buying-frenzy-along-south-koreas-fortified-border-idUSKCN1IE14H> [<https://perma.cc/FW22-5CZJ>]. Interestingly, the land has been purchased without viewing the property or even seeing it via online resources, such as Google Earth. *Id.*

⁸¹ Wenchi Yu, *North Korea's Businesswomen Need Networks and Role Models*, FORBES (June 22, 2014), <https://www.forbes.com/sites/wenchiyu/2014/06/22/north-koreas-businesswomen-need-networks-and-role-models/#665c027462d5> [<https://perma.cc/Q9VG-77TK>]. Geoffrey See, founder of the Singapore-based Choson Exchange, explained that the program has reportedly trained “close to 3,000 North Koreans in economic policy, business and entrepreneurship.” Jongsoo Lee, *Entrepreneurship, Business, and Economic Reform in North Korea*, DIPLOMAT (Feb. 5, 2021), <https://thediplomat.com/2021/02/entrepreneurship-business-and-economic-reform-in-north-korea/> [<https://perma.cc/73TK-RUHP>]. This program has reportedly contributed to an increasing sophistication among North Korean entrepreneurs, and over time, the program has seen property development, manufacturing, and even e-commerce take root. *Id.*

⁸² Roh & Kim, *supra* note 80.

⁸³ *Id.* Heonik Kwon, *North Korea Now*, 34 ANTHROPOLOGY TODAY 1, 1-2 (2018) (“North Korea today may still be a totalitarian society; economically, however, it is now a heavily marketized and market-driven place. Kim Jong-un knows this well, and he has given his word to his people that he is going to deliver to them an economically comfortable future.”).

*c. North Korea's Nuclear Chess Matches**i. Versus the United States*

Various obstacles should give great pause to foreign investors considering the North Korean market: the country's totalitarian regime, international sanctions, potential for regional instability, and danger associated with its nuclear program.⁸⁴ In the first instance, the nature of the North Korean regime has led to diplomatic conflict on the international stage, chiefly with the United States. The first nuclear crisis between the United States and North Korea occurred in the early 1990s when U.S. intelligence and reports from the International Atomic Energy Agency indicated that the North Koreans were extracting spent plutonium from their Yongbyon nuclear reactor.⁸⁵ In 1993, the Central Intelligence Agency concluded that North Korea had established a nuclear weapons program and had extracted enough plutonium to build two nuclear weapons.⁸⁶ On the brink of war, the two countries negotiated and signed "the Agreed Framework"; the United States agreed to build, by around 2003, two light-water energy reactors on the North Korean coast⁸⁷ and provide North Korea with fuel on the condition that North Korea freeze its nuclear activities.⁸⁸

The Agreed Framework was the first time the two countries had an institutional mechanism for dialogue and mutual cooperation⁸⁹ as both countries appeared to be on a path of diplomatic normalization.⁹⁰ However, this optimism was short-lived, as the 1994 U.S. mid-term elections brought to power a Republican-controlled Congress opposed to Democratic President Bill Clinton's

⁸⁴ Yu, *supra* note 81.

⁸⁵ Armstrong, *supra* note 36, at 9, 12.

⁸⁶ *Id.*

⁸⁷ Young Whan Kihl, *U.S.-DPRK Nuclear Accord & Kedo*, 21 *ASIAN PERSP.* 99, 102-03 (1997).

⁸⁸ Armstrong, *supra* note 36, at 13.

⁸⁹ Erin Blakemore, *Bill Clinton Once Struck a Nuclear Deal with North Korea*, *HISTORY* (Sept. 1, 2018), <https://www.history.com/news/north-korea-nuclear-deal-bill-clinton-agreed-framework> [<https://perma.cc/N5HA-JUU7>].

⁹⁰ *Id.*

policies on North Korea.⁹¹ Originally on a path of diplomatic normalization, Clinton began taking a more “passive” approach to U.S.–North Korean relations.⁹² Still, while tensions remained high, North Korea became the world’s largest beneficiary of U.S. humanitarian aid (e.g., food and medicine) after the country struggled with mass flooding and famine.⁹³

Although the George W. Bush administration promised to “review” the U.S. policy on North Korea following the 2000 Presidential election,⁹⁴ the first year of Bush’s presidency policy toward North Korea “appeared uncertain and adrift.”⁹⁵ The new administration viewed the Agreed Framework as appeasement and eventually the movement toward normalization between the two countries began to reverse.⁹⁶ Bush’s 2002 State of the Union speech listed North Korea as part of an “axis of evil” that included nations accused of harboring terrorism such as Iran and Iraq.⁹⁷ Meanwhile, North Korea still had at its disposal the nuclear weapons it had already developed.⁹⁸

⁹¹ Robert M. Hathaway & Jordan Tama, *The U.S. Congress and North Korea During the Clinton Years: Talk Tough, Carry a Small Stick*, 44 *ASIAN SURV.* 711, 719-21 (2004).

⁹² Armstrong, *supra* note 36, at 14. Thus, the significant steps toward normalized relations between the two countries, which the North Korean leadership expected to immediately occur following the signing of the Agreed Framework, never materialized.

⁹³ Armstrong, *supra* note 36, at 15. Total U.S. aid to North Korea was estimated to have been around a billion dollars. *Id.* In 1995 and 1996, the United States assisted North Korea when floods devastated the country and pushed the North Korean economy to the “brink of disaster.” *Id.* During the late 1990s, crops failed, and hundreds of thousands of North Koreans, possibly millions, died of famine. *Id.*

⁹⁴ Armstrong, *supra* note 36, at 15.

⁹⁵ *Id.*

⁹⁶ *Id.* at 16.

⁹⁷ *Id.* For more on the developments thereafter, including the collapse of the Agreed Framework and during Bush’s second term in office, see *id.* at 13-19; Daniel A. Pinkston, *Outposts of Tyranny: North Korea*, *WASH. POST* (Apr. 19, 2005, 1:00 PM), <http://www.washingtonpost.com/wp-dyn/articles/A28189-2005Apr5.html> [<https://perma.cc/RKY9-9VSC>]. Also, starting in 2003, and continuing for many years, were the Six-Party Talks in which China, North Korea, South Korea, Russia, Japan, and the United States came together to negotiate options for denuclearizing the Korean Peninsula. Samuel S. Kim, *China’s New Role in the US-DPRK Nuclear Confrontation*, in *THE FUTURE OF US-KOREAN RELATIONS: THE IMBALANCE OF POWER* 101, 104-05 (John Feffer ed. 2006).

⁹⁸ *Six Party Talks*, [GLOBALSECURITY.ORG, http://www.globalsecurity.org/wmd/world/dprk/6-party.htm](http://www.globalsecurity.org/wmd/world/dprk/6-party.htm) [<https://perma.cc/Y4XG-7DTU>].

January 2009 ushered in a new President and the promise of a new era in U.S.-North Korean relations; Barack Obama came into office, vowing to renew engagement with even the most “trying” of diplomatic relationships.⁹⁹ However, this attitude changed when North Korea announced that the agreements made during previous talks were void and followed up by testing a Taepodong-2 missile, all within a few months of Obama’s inauguration.¹⁰⁰ Soon after, Obama dismissed the idea of negotiating with North Korea without a concrete shift in North Korea’s military posturing.¹⁰¹ In March 2010, North Korea’s actions became more provocative with the sinking of a South Korean warship, which killed 46 sailors. That fall, North Korea announced that it had a newly built uranium enrichment facility, and in November 2010 its armed forces shelled a South Korean island.¹⁰²

The Obama administration insisted that North Korea comply with previous agreements to disarm its nuclear capabilities,¹⁰³ and that further diplomacy would otherwise wait, with “strategic patience”;¹⁰⁴ meanwhile, the United States and its allies isolated North Korea and levied harsh economic sanctions to force North Korea to cease its provocative military posture and return to the negotiating table regarding its nuclear program.¹⁰⁵ Nevertheless, North Korea continued its nuclear aspirations and carried out nuclear tests in February 2013 and then twice in 2016.¹⁰⁶ It was during this span of three years that the country’s short-range,

⁹⁹ Scott Conroy, *Obama’s Tough Line on North Korea Faces Limits*, REAL CLEAR POL. (Dec. 1, 2010), http://www.realclearpolitics.com/articles/2010/12/01/obamas_tough_line_on_north_korea_put_to_test_108099.html [<https://perma.cc/6XUX-YVYV>].

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Commentators say that Obama’s more “hardline” approach toward North Korea was reminiscent of the “neoconservative” pressure tactics of Bush’s first term. *Id.*

¹⁰² *Id.*

¹⁰³ *Press Briefing by Press Secretary Robert Gibbs*, WHITE HOUSE (Nov. 29, 2010), <http://www.whitehouse.gov/the-press-office/2010/11/29/press-briefing-press-secretary-robert-gibbs-11292010> [<https://perma.cc/X3G5-WGQP>]; Conroy, *supra* note 99.

¹⁰⁴ *National Security Strategy*, WHITE HOUSE (Nov. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf [<https://perma.cc/S954-VHF6>].

¹⁰⁵ *North Korean Nuclear Negotiations 1985-2019*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/north-korean-nuclear-negotiations> [<https://perma.cc/S88A-4TMD>].

¹⁰⁶ *Id.*

medium-range, and long-range missile capabilities improved, and North Korea conducted more missile tests under Kim Jong-un than under his father and grandfather combined.¹⁰⁷ By the end of his presidency, Obama warned then President-Elect Donald Trump that North Korea would be the top international security concern that his administration would face.¹⁰⁸ It was therefore no surprise that when Trump became President of the United States in January 2017, he inherited a hostile and nuclear North Korea that remained isolated and largely unaddressed.¹⁰⁹ In September of the same year, North Korea conducted its sixth nuclear test and, in response, Trump designated North Korea as a state sponsor of terrorism.¹¹⁰ Tensions subsequently ran high after Kim Jong-un boasted that his country now had the capability to reach U.S. soil with nuclear-tipped long-range missiles; the Trump Administration in turn threatened a military strike.¹¹¹

On June 12, 2018, after a cancelled meeting and highly publicized threats and promises between Trump and Kim Jong-un, President Trump, in an unprecedented change of pace, became the first sitting President to meet with a North Korean leader at a world summit in South Korea.¹¹² During that meeting, the two leaders signed a joint statement to pledge peace and to complete a denuclearization of the Korean Peninsula.¹¹³ These denuclearization talks resumed when Trump visited the demilitarized zone between North and South Korea in June 2019, becoming the first sitting U.S. President to step

¹⁰⁷ *Id.*

¹⁰⁸ Claudia Rosett, *Obama Left a Crisis in North Korea that Trump Just Might Be Able to Clean Up*, DALLAS MORN. NEWS (Oct. 21, 2018), <https://www.dallasnews.com/opinion/commentary/2018/10/21/obama-left-a-crisis-in-north-korea-that-trump-just-might-be-able-to-clean-up/> [<https://perma.cc/SB69-UM6V>].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* On Twitter, Trump tweeted, "North Korean Leader Kim Jong-Un just stated that the 'Nuclear Button is on his desk at all times.' Will someone from his depleted and food starved regime please inform him that I too have a Nuclear Button, but it is much bigger & more powerful than his, and my Button works!" Donald Trump (@therealdonaldtrump), TWITTER (Jan. 2, 2018, 7:49 PM), <https://twitter.com/realdonaldtrump/status/948355557022420992?lang=en> [<https://perma.cc/YBF9-GK9M>].

¹¹² COUNCIL ON FOREIGN RELS., *supra* note 105.

¹¹³ *Id.* Both leaders also committed to recovering the remains of U.S. soldiers who died in the Korean War. Trump also agreed to suspend military exercises in South Korea while Kim, in exchange, agreed to destroy a missile test site in North Korea. *Id.*

foot in North Korea. In October 2019, Trump and Kim Jong-un met once again, although this time, diplomatic relations between the two countries broke down.¹¹⁴ In January 2020, the Trump Administration made overtures to North Korea to resume talks but, as former national security adviser John Bolton so poignantly stated, “three years into the [Trump] Administration . . . [there is still] no visible progress toward getting North Korea to make the strategic decision to stop pursuing deliverable nuclear weapons.”¹¹⁵

Discussions focused on the prospect of denuclearization have been a major concern for investors.¹¹⁶ They understandably do not want to enter a market that is on the brink of war, internationally sanctioned, and unstable.¹¹⁷ Many of the sanctions against North Korea are a response to that isolated country’s missile launches and its continued development of a nuclear program. If North Korea were to denuclearize, the path for foreign investors to enter the North Korean market would suddenly become much less onerous.¹¹⁸

The first year of the Biden administration has signaled a new approach to North Korea that may achieve at least some foreign

¹¹⁴ AJ Willingham, *5 Things to Know for January 13: Iran, Impeachment, North Korea, Australia’s Fires*, CNN (Jan. 13, 2020), <https://www.cnn.com/2020/01/13/us/five-things-january-13-trnd/index.html> [<https://perma.cc/V3Y2-65ST>]. North Korea railed against the prospect of denuclearization and threatened to send the United States a “Christmas gift” in the form of what many believed to be a long-range missile. Paul LeBlanc, *White House Tells North Korea They Want to Resume Negotiations, National Security Adviser Says*, CNN (Jan. 12, 2020), <https://www.cnn.com/2020/01/12/politics/north-korea-trump-diplomacy-robert-obrien/index.html> [<https://perma.cc/U5V3-FMWA>].

¹¹⁵ LeBlanc, *supra* note 114.

¹¹⁶ *Id.* But see Alex Ward, *Trump Just Admitted North Korea Might Keep its Nuclear Weapons*, VOX (Jan. 30, 2019), <https://www.vox.com/2019/1/30/18203569/trump-north-korea-intelligence-nuclear-kim> [<https://perma.cc/4TDP-LEXE>] (noting that the likelihood of North Korea completely denuclearizing is very small).

¹¹⁷ Andy Sharp, *Investing in North Korea Is Not for the Faint of Heart*, BLOOMBERG (June 14, 2018), <https://www.bloomberg.com/news/articles/2018-06-14/investing-in-north-korea-is-not-for-the-faint-of-heart> [<https://perma.cc/V547-P7G7>].

¹¹⁸ Obviously, sanctions matter immensely. We can assume that any serious improvement in the North Korean economy depends on denuclearization. Woojung Jon, *North Korean Legal Systems Regarding Foreign Investment* 31 (Sept. 1, 2020) (unpublished manuscript) (on file with the University of Pennsylvania Journal of International Law) (“The most important factor for the success of the North Korean economy will be [North Korea]’s commitment to de-nuclearization on the Korean Peninsula . . . Until Kim Jong-un dissolves his nuclear programs [and thus brings sanctions to an end], foreign investors will stay away from North Korea due to these restrictions.”).

investor expectations for denuclearization and improved political and economic stability in the country. In a speech before a joint-session of the U.S. Congress, after his first 100 days in office, President Joe Biden called North Korea's nuclear program, and that of Iran's, "serious threat[s] to American security and world security," remarking further that "[the U.S.] will be working closely with our allies to address the threats posed by both of these countries through diplomacy and stern deterrence."¹¹⁹ Learning from the experience of the previous four Presidential administrations that have each tried, but failed, to get North Korea to abandon its nuclear aspirations,¹²⁰ Biden's policy "will not focus on achieving a grand bargain, nor will it rely on strategic patience."¹²¹ Instead, the Biden Administration vows to pursue a "calibrated practical approach that is open to and will explore diplomacy" with North Korea while making "practical progress" on increasing security for the United States and its allies.¹²² If the Biden Administration is successful with continuing engagement and negotiations and practical progress in the years to come, it is likely that North Korea's nuclearization will become a controllable problem for investors, the threat of which is outweighed by the benefit of North Korea's untapped market potential.

ii. *Versus the World*

The international sanctions placed on North Korea are particularly concerning given how they effectively limit foreign investment in the country as well as business interactions between other nations and North Korea.¹²³ The fifteen-member U.N. Security

¹¹⁹ *Read the Full Transcript from President Joe Biden's Address to a Joint Session of Congress*, USA TODAY (Apr. 29, 2021, 10:09 PM), [usatoday.com/story/news/politics/2021/04/28/joe-bidens-speech-congress-read-full-transcript/4883244001/](https://www.usatoday.com/story/news/politics/2021/04/28/joe-bidens-speech-congress-read-full-transcript/4883244001/) [<https://perma.cc/AA49-ESJG>]. It should be noted, however, that North Korea has since rebuked these statements calling these statements "hostile" and indicating that such statements were both "intolerable" and "a big blunder." *North Korea Accuses Joe Biden of Pursuing Hostile Policy of Its Nuclear Programme*, BBC NEWS (May 2, 2021), <https://www.bbc.com/news/world-asia-56960008> [<https://perma.cc/E3ZJ-DWJ3>] [hereinafter: BBC News].

¹²⁰ BBC News, *supra* note 119.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Eleanor Albert, *What to Know About Sanctions on North Korea*, COUNCIL ON FOREIGN RELS. (July 16, 2019), <https://www.cfr.org/backgrounder/what-know->

Council (“UNSC”) has passed nearly a dozen unanimous resolutions condemning North Korea and its nuclear pursuits and also imposing sanctions.¹²⁴ These U.N. sanctions include: a ban on the trade of arms and military equipment, dual-use technologies, vehicles, industrial machinery, and metals; freezing the assets of individuals involved in the country’s nuclear program; a ban on the import of certain luxury goods; a prohibition on the export of electrical equipment, coal, minerals, seafood and other food and agricultural products, wood, textiles, and stones; a ceiling on North Korean labor exports; a cap on imports of oil and refined petroleum products; a ban on natural gas imports; a limit on fishing rights; a restriction on scientific and technical cooperation with North Korea; and a prohibition on U.N. members from opening North Korean bank accounts and banking offices, which would be highly useful if not essential when developing various businesses.¹²⁵ In September 2017, the UNSC banned joint ventures with North Korea and its nationals, and banned North Korean nationals from working abroad.¹²⁶

The United States has similarly imposed its own unilateral sanctions on North Korea that seek to, among other things, restrict more economic activities and target a much larger group of actors than the U.N. sanctions; targets have included banks, companies, and individuals outside of North Korea, including both China and Russia, for supporting, directly or indirectly, North Korea’s nuclear program.¹²⁷ The sanctions are designed to impede North Korea’s

about-sanctions-north-korea [<https://perma.cc/X542-FX92>]. For example, in 2019, the United States had no trade whatsoever with North Korea. See U.S. CENSUS BUREAU, REPORT ON U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES 49 (2020), https://www.census.gov/foreign-trade/Press-Release/ft900/ft900_1911.pdf [<https://perma.cc/6U78-W5ME>].

¹²⁴ Albert, *supra* note 123.

¹²⁵ *Id.*; see *Making Sense of UN Sanctions on North Korea*, CARNEGIE ENDOWMENT INT’L PEACE, <https://carnegieendowment.org/publications/interactive/north-korea-sanctions> [<https://perma.cc/7J3T-SLEU>]; see also S.C. Res. 2397 ¶¶ 6-8 (Dec. 22, 2017) (banning a number of exports from and prohibiting member states from exporting certain materials to North Korea); Junaid Daudpota, Alan R. Greenfield & Tao Xu, *Franchising’s Last Frontier: Cuba, Iran, Myanmar and Other Sanctioned Countries*, 14 INT’L J. FRANCHISING L. 17, 17 (2016) (“Over the past few years, Iran, Cuba and Myanmar have become countries in which prospective businesses have focused their international expansion efforts, but, have remained relatively subdued as a result of existing (or slowly fading) sanctions regimes imposed by the US and European Union.”). Please note that none of these U.N. sanctions prevent humanitarian aid to North Korea. Albert, *supra* note 123.

¹²⁶ S.C. Res. 2375 ¶¶ 17-18 (Sept. 11, 2017).

¹²⁷ Albert, *supra* note 123.

development of nuclear technology, and they have also been deployed in response to North Korea's cyber and ransomware attacks on Sony in 2014¹²⁸ and WannaCry in 2017,¹²⁹ as well as its extensive human rights violations, censorship within the country, and money laundering activities.¹³⁰ The North Korea Sanctions and Policy Enhancement Act (2016) and the Countering America's Adversaries Through Sanctions Act (2017), are two key pieces of U.S. legislation concerning North Korea; they each require, among other things, Presidential sanctions against anyone contributing to the proliferation of weapons of mass destruction¹³¹ as well as a prohibition on U.S. assistance to any foreign governments that aid North Korea. These were supplemented by President Trump's authorizing the U.S. Treasury Department to block *any* foreign business or individual that facilitates trade with North Korea from the U.S. financial system as a part of the Trump Administration's "maximum pressure" campaign in 2017.¹³²

Trump's Executive Order (the "Executive Order") entitled "Imposing Additional Sanctions with Respect to North Korea" set forth sweeping sanctions on the Kim Jong-un regime: the U.S. Office of Foreign Assets Control ("OFAC") was to impose sanctions against (i) any individual or entity that owns, operates, or controls certain specified North Korean industries; (ii) any North Korean

¹²⁸ This attack released personal information from Sony's employees and erased Sony's computer infrastructure.

¹²⁹ The WannaCry ransomware attack was a worldwide cyberattack originating from North Korea, which targeted computers running Windows operating systems by encrypting data and demanding ransom payments in Bitcoin.

¹³⁰ These efforts to constrain North Korea have been, to date, far from successful. For example, hacking in order to steal cryptocurrency has proven to be a significant source of North Korean funds. See *North Korean Hackers Have Prolific Year as Their Unlaundered Cryptocurrency Holdings Reach All-Time High*, CHAINALYSIS (Jan. 13, 2022), <https://blog.chainalysis.com/reports/north-korean-hackers-have-prolific-year-as-their-total-unlaundered-cryptocurrency-holdings-reach-all-time-high/> [<https://perma.cc/CRA7-5GAH>] ("North Korean cybercriminals had a banner year in 2021, launching at least seven attacks on cryptocurrency platforms that extracted nearly \$400 million worth of digital assets. [They targeted] investment firms and centralized exchanges, and [used] phishing lures, code exploits, malware, and advanced social engineering to siphon funds out of these organizations' . . . into [North Korean] custody, [followed by a] careful laundering process, cover up and cash out.").

¹³¹ See NAT'L COMM. ON NORTH KOREA, SUMMARY OF THE NORTH KOREA SANCTIONS AND POLICY ENHANCEMENT ACT 1 (2016), https://www.ncnk.org/sites/default/files/content/resources/publications/HR757_Summary_Final.pdf [<https://perma.cc/9NKJ-9MCX>].

¹³² Albert, *supra* note 123.

port or any North Korean imports or exports or anyone who is a citizen of, or organized under the laws of, North Korea; (iii) any person or entity that has materially assisted, sponsored, or supported any person or entity blocked pursuant to the Executive Order; and (iv) any person who is owned or controlled by, or has acted on behalf of, any other person or entity blocked pursuant to the Executive Order.¹³³ In sum, all U.S. individuals or entities are prohibited from engaging in virtually all transactions with individuals or entities on the OFAC list, including entities majority-owned by such blocked persons.

The uncertainty of succession is also concerning, not only for investors but for the larger international community during any significant transfer of power which, by extension, includes the transfer of nuclear weapons. For now, the Kim family controls North Korea, but it is no secret that Kim Jong-un has health problems.¹³⁴ When reports speculated about whether Kim Jong-un had died, the obvious question arose: who would become the new ruler?¹³⁵ Not much is known about Kim Jong-un's offspring, but it is believed he has at least three children, with the oldest currently being a 12-year-

¹³³ See Exec. Order No. 13,810, 82 Fed. Reg. 44,705 (Sept. 20, 2017). Note the comprehensive language for exports and imports in Section 1(iii) of the Order: OFAC may proceed against anyone who "engaged in at least one significant importation from or exportation to North Korea of any goods, services, or technology." *Id.* Such broad sanctions have a ripple effect as they enhance the risk of U.S. enforcement for companies and investors doing business in countries with any potential exposure to North Korean business or banking. See Nancy Fischer, Stephan E. Becker, Christopher R. Wall, Aaron R. Hutman, Matthew R. Rabinowitz & Sahar Hafeez, *Evolving U.S. and UN Sanctions Against North Korea*, LEXOLOGY (Nov. 13, 2017), <https://www.lexology.com/library/detail.aspx?g=82c8efc1-8e80-4b8c-9585-2974ac31eaf4> [<https://perma.cc/JN28-ZL2Z>] (noting that the U.S. Treasury's authority to designate entities and persons for sanctioning creates special compliance challenges for Japanese, South Korean, and other Southeast Asian companies conducting business in China or otherwise "exposed to Asian banking, shopping, manufacturing, and supply chains," with "particular risks for companies in China, Russia and India who may have historically done business with North Korea and continue to do so").

¹³⁴ *South Korea: Kim Jong Un Did Not Have Surgery*, POLITICO (May 3, 2020), <https://www.politico.com/news/2020/05/03/south-korea-kim-jong-un-did-not-have-surgery-230177> [<https://perma.cc/5NGS-L9Q3>] (noting the widespread speculation over Kim Jong-un's medical condition as he went unseen for over a month).

¹³⁵ See Kanga Kong & Jon Herskovitz, *If Not Kim Jong-Un, Who? Possible Heirs to North Korea's Throne*, BLOOMBERG (Apr. 27, 2020), <https://www.bloomberg.com/news/articles/2020-04-21/if-not-kim-jong-un-who-meet-the-heirs-to-north-korea-s-throne> [<https://perma.cc/DRX4-3QUG>].

old son.¹³⁶ Kim Jong-un has not named a successor yet,¹³⁷ but should he suddenly die or become incapacitated, a close family member or senior government official may step in as a temporary leader until Kim-Jong-un's young son is ready to assume power.¹³⁸ North Korean experts have also suggested the possibility of a government by a group of elders until a successor is named.¹³⁹ Other than the leader's children, some possible successors among the Kim family members are Kim Pyong-il (Kim Jong-un's elderly half-uncle),¹⁴⁰ Kim Han-sol (Kim Jong-un's nephew),¹⁴¹ Kim Jong-chol (Kim Jong-un's older brother),¹⁴² and Kim Yo-jong (Kim Jong-un's younger sister).¹⁴³ It is speculated that Kim Yo-jong is being groomed to take the throne until her nephew (Kim Jong-un's son) is old enough to

¹³⁶ See Michelle Mark, *What We Know About Kim Jong-Un's 3 Possible Heirs*, BUS. INSIDER (Apr. 22, 2020), <https://www.businessinsider.com/kim-jong-un-heirs-what-we-know-2017-12> [<https://perma.cc/3ULD-2RGK>].

¹³⁷ See Kong & Herskovitz, *supra* note 135.

¹³⁸ Timothy W. Martin, *Kim Jong Un's Family Tree: What You Need to Know About the North Korean Dynasty*, WALL ST. J. (Dec. 15, 2021), <https://www.wsj.com/articles/north-korea-kim-jong-un-family-succession-11612436917> [<https://perma.cc/9GHB-ZY8K>].

¹³⁹ *Id.*

¹⁴⁰ Kim Pyong-il was sent to Eastern Europe as an ambassador in 1979 after losing out to his paternal half-brother and former leader, Kim Jong-il. He did not permanently return to North Korea until 2019, and North Korea experts say that he is one of the lesser likely candidates given his long absence and weak political base. *Id.*

¹⁴¹ Kim Han-sol's father, Kim Jong-nam, was assassinated in 2017, presumably under the orders of Kim Jong-un; should the current regime topple, North Korean experts position him as a potential successor. As of now, the 26-year-old nephew is under the protective custody of the CIA and living in secrecy somewhere in the United States or Europe. *Id.*; see also, Yoshihiro Makino, *Life of Brother of N. Korea Founder Shows Ferocity in Family Battles*, ASIAN SHIMBUN (Jan. 5, 2022, 1:30 PM), <https://www.asahi.com/ajw/articles/14508997> [<https://perma.cc/29QW-4L93>] (reporting the death of Kim Yong Ju and tracing back the history of North Korea dictatorship during twentieth century).

¹⁴² Although three years older than the current leader, Kim Jong-chol is said to live a private life in North Korea with apparently no interest in politics. South Korean intelligence officials have reported he instead has a strong interest in music and is believed to have formed a rock band that reflects his fondness for the guitar and Eric Clapton. Martin, *supra* note 138.

¹⁴³ Kim Yo-jong appears to be the strongest candidate as she has become increasingly involved in politics and is "intimately connected" with Kim Jong-un. Colin Zwirko, *Kim Yo Jong Unusually Prominent at North Korea's Latest Hypersonic Missile Test*, NK NEWS (Jan. 12, 2022), <https://www.nknews.org/2022/01/kim-yo-jong-unusually-prominent-at-north-koreas-latest-hypersonic-missile-test/> [<https://perma.cc/JFB7-KR39>]. She is the Deputy Director of the Propaganda and Agitation Department and was recently promoted to the State Affairs Commission, the top non-partisan decision-making body in North Korea. *Id.*

assume the throne.¹⁴⁴ Some wonder: would North Korea accept a female leader?¹⁴⁵ Kim Jong-un's declining health and the uncertainty of succession could hamper even simple ruminations about investment, as potential investors consider the abrupt changes wrought by a new leader, or even worse, a lengthy leadership struggle, perhaps even including civil war.¹⁴⁶ As such, investors are concerned with the political as well as the economic stability of the region.

North Korea's economy has become heavily, and almost exclusively, dependent on China, its closest ally and main source of food and energy.¹⁴⁷ Accordingly, the two countries have developed infrastructure to facilitate resource transportation.¹⁴⁸ China alone accounts for 90% of North Korea's trade volume,¹⁴⁹ an arrangement that has left North Korea highly susceptible to Chinese influence.¹⁵⁰ In simultaneously seeking to keep the North Korean regime alive and exerting its economic weight over the nation, China plays an important role in any resolution that materializes on the Korean Peninsula; it urges other powers (e.g., the United States) to not push too hard for fear of triggering dangerous military action.¹⁵¹ However, diversifying trade partners will be vital to motivating

¹⁴⁴ See Kim Yo-Jong: *North Korea's Most Powerful Woman and Heir Apparent?*, BBC NEWS (May 1, 2020), <https://www.bbc.com/news/world-asia-36210695> [<https://perma.cc/ZD6N-VJ28>].

¹⁴⁵ Amy Gunia, *Kim Yong Un's Sister Is in the Spotlight. But Could a Woman Ever Lead North Korea?*, TIME (Apr. 28, 2020), <https://time.com/5827767/kim-yo-jong-woman-north-korea/> [<https://perma.cc/SR5W-3BPK>].

¹⁴⁶ See Martin, *supra* note 138.

¹⁴⁷ Eleanor Albert, *The China-North Korea Relationship*, COUNCIL ON FOREIGN RELS. (Mar. 28, 2018), <https://www.cfr.org/background/china-north-korea-relationship> [<https://perma.cc/ZP9H-4C9M>].

¹⁴⁸ See *China Launches North Korean Shipping Route*, MARITIME EXECUTIVE (Sept. 25, 2015, 11:04 AM), <https://www.maritime-executive.com/article/china-launches-north-korean-shipping-route> [<https://perma.cc/TVB9-MGHQ>] (stating that North Korea exports coal and China exports groceries).

¹⁴⁹ Hyonhee Shin, *N. Korea's Trade with China Plunges 80% as COVID Lockdown Bites*, REUTERS (Jan. 19, 2021), <https://www.reuters.com/world/china/nkorea-trade-with-china-plunges-80-covid-19-lockdown-bites-2021-01-19/> [<https://perma.cc/XTH9-F9QW>].

¹⁵⁰ *Id.*

¹⁵¹ Albert, *supra* note 147. China's policy towards North Korea presents a puzzle: It opposes North Korean proliferation while practically 'funding' a large part of it through increasing bilateral trade. Weifeng Zhong, *Sanctioning an Unruly Ally: Understanding Sino-North Korean Trade Through the People's Daily* 31 (Am. Enter. Inst. Econ., Working Paper No. 2017-22, 2017). Furthermore, North Korea's nuclear proclivities are real. In 2013, for example, Kim Jong-un set off another nuclear weapon. O'NEAL, *supra* note 5, at 29.

change within North Korea and developing a more stable society,¹⁵² as it is doubtful that any country would want a single nation to have such great influence over its economy.

Looking past the above-mentioned concerns, foreign investors may worry about their ability to repatriate earnings from businesses in North Korea. These concerns stem in part from the plight of Egyptian engineering giant Orascom, the first foreign global corporation to make a significant investment in North Korea.¹⁵³ While the company was able to provide cell phone service to three million North Koreans, Orascom ultimately lost control of the company and was unable to repatriate its earnings which it estimated at around 540 million U.S. dollars.¹⁵⁴ This incident damaged North Korea's business credibility and undermined any hopes for building the confidence of foreign investors.¹⁵⁵ As one expert noted in 2015, and his conclusion still stands: "North Korea desperately needs a foreign direct investment success story."¹⁵⁶ Nonetheless, under Kim Jong-un's more economically inclined regime, perhaps all it will take is one *sustained* success story to get the ball rolling.

¹⁵² See Kwon, *supra* note 83.

¹⁵³ Donald Kirk, *Rare Insights on Business in North Korea from Being in the Hermit Country*, FORBES (July 31, 2020, 7:34 AM), <https://www.forbes.com/sites/donaldkirk/2020/07/31/rare-insights-on-business-in-north-korea-from-being-in-the-hermit-country/?sh=5851e0d65a78> [https://perma.cc/D647-QJTW].

¹⁵⁴ Anna Fifield, *North Korea Tells Egyptian Company: Thanks for the Cellphones. We'll Take the Company, Too.*, WASH. POST (Nov. 19, 2015, 6:47 AM), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/19/north-korea-tells-egyptian-company-thanks-for-the-cellphones-now-scam/> [https://perma.cc/8YWC-YCPE].

¹⁵⁵ See *id.*

¹⁵⁶ Marcus Noland, *Orascom: Further (Mis-)Adventures in North Korean Telecommunications*, PETERSON INST. INT'L ECON. (July 15, 2015, 3:00 AM), <https://www.piie.com/blogs/north-korea-witness-transformation/orascom-further-mis-adventures-north-korean> [https://perma.cc/6AR9-35SM]. Noland continued his assessment:

It does not inspire confidence to abuse a company financially that brought in technology and built one of the few components of the country's infrastructure that appears to meet 21st century standards by not agreeing to repatriation of profits at the official exchange rate and instead insisting on using a rate that one could get on a small transaction in a back alley in Hyesan. Reputation, credibility, and confidence are concepts that North Korea's elderly communist apparatchiks seem to have trouble grasping. This situation really might amount to cutting off one's nose to spite one's face.

Id.

III. A TOTALITARIAN NORTH KOREA

The economic predicaments that persist in North Korean production, ownership, employment, investment, and distribution are rooted in a society dominated by dictatorship for over seven decades.¹⁵⁷ It may seem to be merely a matter of semantics, but surely if an entire nation can be subject to one family's tyranny for three generations, that nation's governing structure could be deemed totalitarian, not "merely" authoritarian.¹⁵⁸ With that perspective, even small steps in loosening the reins of control over the economy can be significant.

a. Control of Production and Ownership

North Korea's totalitarian nature means that the state and cooperative organizations own production; therefore, "private investors, whether foreign or domestic, may not own the 'means of production.'" ¹⁵⁹ Essentially, "the state provides everything: including housing, health care, education, and jobs." ¹⁶⁰ So, unfortunately for North Korea's people, production is not as

¹⁵⁷ Political analysts have offered competing models of North Korean politics, including totalitarianism, post-totalitarianism, personalism, institutional pluralism, etc. See Elena Kolesova, *Patrick McEachern, Inside the Red Box: North Korea's Totalitarian Politics*. New York: Columbia University Press. 2011., 3 J. INT'L & GLOB. STUD. 82, 85 (2011) (book review) ("McEachern's focus is primarily concerned not with 'whether [power] is dispersed' within North Korean politics, but 'how [it] is dispersed . . .'").

¹⁵⁸ In a totalitarian state, the government's range of control over the people is virtually unlimited. The government controls nearly all aspects of the economy, politics, culture, and society. Education, religion, the arts and sciences, and even morality and reproductive rights are controlled by totalitarian governments. While all power in an authoritarian government is held by a single dictator or group, the people are allowed a limited degree of political freedom. Robert Longley, *Totalitarianism, Authoritarianism, and Fascism*, THOUGHTCO (Mar. 2, 2022), <https://www.thoughtco.com/totalitarianism-authoritarianism-fascism-4147699> [<https://perma.cc/4GA9-52QF>].

¹⁵⁹ Haksoo Ko, Note, *Foreign Investment in North Korea: An Assessment of Recent Laws and Regulations*, 38 VA. J. INT'L L. 221, 224 (1998).

¹⁶⁰ Anna Fifield, *Life Under Kim Jong Un*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/graphics/2017/world/north-korea-defectors/?utm_term=.90113fdb2592 [<https://perma.cc/43ZY-DMNK>].

efficient as it could be.¹⁶¹ For example, several mining projects have been stopped due to shortages and investors abandoning projects. The reason that North Korea does not operate to its full capacity can be attributed to a lack of financial assistance and a deteriorating infrastructure for its mining facilities.¹⁶² Accordingly, despite having a large amount of manufacturing resources, including raw materials and human capital, North Korea's economy is not succeeding.¹⁶³ In fact, many North Korean factories are abandoned, and less than 3% of the country's land is consistently used for farming.¹⁶⁴

North Korea continues to struggle even two decades after the nation announced plans for comprehensive economic reforms. Those proposals from 2002¹⁶⁵ indicate an unfulfilled desire on the part of the country's government to move toward a freer economy and capitalism. As a part of its comprehensive economic reforms, North Korea sought to increase prices and wages, alter its price-fixing mechanisms, change its distribution of goods system, decentralize national planning, increase autonomy in enterprise management, open and differentiate its distribution markets, and reorganize its social security system.¹⁶⁶ Despite a multitude of flaws—the restructuring processes were poorly implemented and created a complicated, decentralized economy¹⁶⁷—these reforms did allow for a shift in resource control from the government to the hands of industrial and commercial managers.¹⁶⁸

The movement to modernize—bringing with it some rare success—can be seen in the Hermit Kingdom's treatment of real

¹⁶¹ Since the government controls what crops a farmer is allowed to plant, farmers are not able to respond in the event of a crop failure. Martin Kich, *Korea, North*, in *ENCYCLOPEDIA OF WORLD POVERTY* 616, 616-17 (M. Odekon ed., 2006).

¹⁶² Kyung-soo, *supra* note 78. As mentioned above, there is also satellite evidence indicating that the country's electrical grid and infrastructure may also be in shambles. *JOINT ECON. COMM. REPUBLICANS, supra* note 27, at 3.

¹⁶³ O'NEAL, *supra* note 5, at 35.

¹⁶⁴ *Id.*

¹⁶⁵ It is interesting that North Korea referred to the reforms as “adjustments”. As noted by David Kang, by calling them adjustments, North Korea could avoid the possible interpretation that the system was flawed in the first place. The government's foundation for power relies on a perception of perfection. Kang, *supra* note 6, at 157.

¹⁶⁶ Hong Ihk-pyo, *A Shift Toward Capitalism? Recent Economic Reforms in North Korea*, 14 *E. ASIAN REV.* 93, 93 (2002).

¹⁶⁷ *See id.* at 101-02.

¹⁶⁸ *See id.* at 102-03 (explaining that factories and enterprises achieved more management autonomy from the government, under supervision).

estate. Historically, North Korea prohibited private land ownership;¹⁶⁹ any products created from the use of land became state-owned,¹⁷⁰ and citizens could only live in assigned places for a limited period of time.¹⁷¹ However, in recent years, North Korea has allowed the use of land to be treated as a permissible property right in the context of foreign investment.¹⁷² Accordingly, individuals are now allowed to purchase and sell these granted land-use rights.¹⁷³ This change has caused the development of a real estate agency market as well as a “real estate development boom” in North Korea.¹⁷⁴ South Koreans are some of the eager customers that are interested in taking advantage of the newly available land.¹⁷⁵ In one of North Korea’s more developed cities, housing prices are roughly higher than \$730 per square meter.¹⁷⁶

b. Employment and Investment

At-will employment is prohibited in North Korea,¹⁷⁷ and most individuals do not have the opportunity to even select a job for themselves.¹⁷⁸ Foreign investors will have to overcome the stringent

¹⁶⁹ Ko, *supra* note 159, at 224.

¹⁷⁰ Wooyung Lee, *Researcher: North Korea’s Real Estate Market Is Booming*, UNITED PRESS INT’L (July 2, 2018, 8:27 AM), <https://www.upi.com/Researcher-North-Koreas-real-estate-market-is-booming/9101530262721/> [<https://perma.cc/2HEV-EEUM>].

¹⁷¹ *Id.*

¹⁷² Ko, *supra* note 159, at 224.

¹⁷³ Lee, *supra* note 170.

¹⁷⁴ *Id.*; see also Rob Schmitz, *Real Estate Jumps in Chinese City Bordering North Korea*, NAT’L PUB. RADIO (June 8, 2018), <https://www.npr.org/2018/06/08/618204107/real-estate-jumps-in-chinese-city-bordering-north-korea> [<https://perma.cc/L5ZE-8S2B>] (noting that in Dandong, “a surge of real estate investors into the city catapulted home prices by more than 50 percent”).

¹⁷⁵ Tae-jun Kang, *Housing in the Hermit Kingdom: North Korea’s Real Estate Market*, DIPLOMAT (Oct. 5, 2018), <https://thediplomat.com/2018/10/housing-in-the-hermit-kingdom-north-koreas-real-estate-market/> [<https://perma.cc/G8N3-DSG8>] (citing an expectation of “growth and demands in the future.”).

¹⁷⁶ *Id.* Note that this value was determined in an article dated October 5, 2018.

¹⁷⁷ Ko, *supra* note 159, at 230.

¹⁷⁸ Mina Yoon, *How Do You Get a Job in North Korea?*, NK NEWS (Nov. 29, 2013), <https://www.nknews.org/2013/11/how-do-you-get-a-job-in-north-korea/> [<https://perma.cc/P4TV-E9NR>].

limitations on an employer's ability to hire and fire employees¹⁷⁹ in addition to the required employment of North Koreans (except for "management personnel, technicians and skilled workers of special job classification.")¹⁸⁰

North Korea also sends its workers abroad to be an "important source of income" for the government.¹⁸¹ In some cases, these workers have become subject to slavery-like conditions.¹⁸²

Before the 1990s and the establishment of the country's Joint Venture Law,¹⁸³ North Korea could not attract major outside investment, primarily because of North Korea's low credit rating and high foreign debt.¹⁸⁴ More specifically, investors worried about North Korea's lack of hard currency holdings and no guaranteed repatriation rights.¹⁸⁵ North Korea had a relatively small domestic market in terms of per capita income,¹⁸⁶ and, because it controlled prices and distribution channels, successful market penetration of the North remained highly problematic.¹⁸⁷

c. Distribution of Food and Goods

North Korea has used a system of rationing that often leaves many people starving while the country's elite lives lavishly.¹⁸⁸ In the midst of one of its recurring food crises, North Korean leadership did relent and announce the acceptance of foreign aid in the form of

¹⁷⁹ Ko, *supra* note 159, at 230-31.

¹⁸⁰ *Id.* at 230.

¹⁸¹ Imke van Gardingen, *North Korean Worker Demands Accountability for Slave Labour in Supply Chain*, EQUAL TIMES (Dec. 6, 2018), <https://www.equalimes.org/north-korean-worker-demands?lang=en#.XCflqBNKjys> [<https://perma.cc/4JRB-Q9P4>].

¹⁸² *Id.*

¹⁸³ See *infra* Section IV.a.

¹⁸⁴ See *North Korea: Foreign Investment and Joint Ventures*, COUNTRY DATA (June 1993), www.country-data.com/cgi-bin/query/r-9581.html [<https://perma.cc/CK3V-RRA7>] [hereinafter *Country Data*] (analyzing North Korea's attempt to increase foreign direct investment).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Kich, *supra* note 161, at 615.

food,¹⁸⁹ despite national adherence to the tenets of *juche* ideology.¹⁹⁰ In 2019, for instance, South Korea agreed to send \$8 million in food aid to North Korea in response to some of the worst harvests and most severe food shortages ever experienced in North Korea.¹⁹¹ However, foreign aid has its risks; one worry is that the funds could be used for weapons rather than food for citizens. The misallocation of funds could financially support extracurricular projects, luxury items, and lavish lifestyles that benefit the elite rather than citizens.

This worry also extends to the inequitable distribution of food.¹⁹² As of August 2020, North Korea's leadership created "buffer zones" on the Chinese and Russian borders where soldiers were ordered to "unconditionally shoot" on sight anyone entering without permission.¹⁹³ Amid a food crisis, this order has effectively blocked almost all official and unofficial trade, and, more notably, the distribution of foreign aid into the country. Whether North Korea will accept monitored international assistance remains unclear as Kim Jong-un's continued calls for self-reliance has prompted all foreign diplomats and United Nations aid workers to leave the country.¹⁹⁴

IV. A SLOW SHIFT, PERHAPS, TO SOME AUTONOMY

a. Joint Venture Law

Foreign capital and investment in North Korea were essentially nonexistent until 1984 when the country established its Joint Venture Law,¹⁹⁵ targeting North Korean traders and manufacturers

¹⁸⁹ *Id.*

¹⁹⁰ Jae-Jung Suh, *Making Sense of North Korea*, in *ORIGINS OF NORTH KOREA'S JUCHE: COLONIALISM, WAR, AND DEVELOPMENT* 1, 1 (Jae-Jung Suh ed., 2013).

¹⁹¹ Anthony Kuhn, *Why South Korea Is Sending \$8 Million in Food Aid to North Korea*, NPR (June 9, 2019), <https://www.npr.org/sections/goatsandsoda/2019/06/09/730441007/why-aid-wont-fix-north-koreas-recurring-food-shortages> [https://perma.cc/9NEJ-5HKC].

¹⁹² *Id.*

¹⁹³ *North Korea: Covid-19 Used to Bludgeon Rights*, HUM. RTS. WATCH (Jan. 13, 2022, 12:00 AM), <https://www.hrw.org/news/2022/01/13/north-korea-covid-19-used-bludgeon-rights> [https://perma.cc/5LWJ-EA6M].

¹⁹⁴ *Id.*

¹⁹⁵ Hy-Sang Lee, *North Korea's Closed Economy: The Hidden Opening*, 28 *ASIAN SURV.* 1264, 1271 (1988).

residing in Japan. The law created a company whose purpose was to open the North Korean economy to foreign investment¹⁹⁶ which, along with the subsequently passed regulations, provided rules that concern the operation of joint ventures.¹⁹⁷ The twenty-six article law appears to be largely based on the Chinese joint venture law, alluding to the close, and well-documented, relationship between the two countries.¹⁹⁸ Some of the proscribed principles involve equal benefit to the parties in the joint venture to encourage the development of trust between those involved as well as the prevention of foreign-investor discrimination.¹⁹⁹ The law also focuses on accommodating certain industries preferred by North Korea,²⁰⁰ or “industries necessary for the people’s economy.” These targeted industries include electronics, automation, machinery, metals, chemicals, food processing, manufacturing, clothing, consumer goods, construction, transportation, and tourism.²⁰¹

A few early foreign joint venture projects under the law included a shipping company, a luxury hotel, a soft drinks store, a restaurant, a gold mine, and silk fabric and apparel plants.²⁰² Of course, for such investments to continue, and others to arrive, there must be the presence of and confidence in modest but genuine rule of law.²⁰³

¹⁹⁶ *Id.* at 1264.

¹⁹⁷ Chin Kim, *North Korean Joint Venture Laws*, 19 CAL. W. INT’L L.J. 175, 177 (1988).

¹⁹⁸ Patricia Goedde, *Update: Overview of the North Korea Legal System and Legal Research*, GLOBALEX (Mar. 2011), http://www.nyulawglobal.org/globalex/North_Korea1.html#foreigninvestment [<https://perma.cc/2XHY-6MK5>]; Country Data, *supra* note 184.

¹⁹⁹ Goedde, *supra* note 198.

²⁰⁰ *Id.* Country Data, *supra* note 184.

²⁰¹ Country Data, *supra* note 184. Tourism, however, has not been entirely successful in recent years. The United States enacted a ban on traveling to North Korea after the death of an American visitor. Justin McCurry & Amanda Holpuch, ‘You Would Have to Be a Lunatic’: Tourists to North Korea Describe Risks and Rewards, *GUARDIAN* (July 21, 2017, 9:26 PM), <https://www.theguardian.com/world/2017/jul/22/you-would-have-to-be-a-lunatic-tourists-to-north-korea-describe-risks-and-rewards> [<https://perma.cc/4REU-3ZCH>]. In fact, one travel agency specifically banned United States citizens from participating in North Korea-bound trips. *Can Americans Travel to North Korea?*, YOUNG PIONEER TOURS, <https://www.youngpioneertours.com/can-americans-travel-dprk/> [<https://perma.cc/JG6R-MC4D>]. Despite a dangerous reputation, there are approximately five thousand Western tourists that visit North Korea every year.

²⁰² *Id.*

²⁰³ The laws in North Korea still need to catch up in order to properly host foreign businesses. Tae-jun Kang, *What to Know About Doing Business in North Korea*, *DIPLOMAT* (Aug. 25, 2018), <https://thediplomat.com/2018/08/what-to-know->

North Korea's Joint Venture Law comes in two forms: the Equity Joint Venture Law and the Contractual Joint Venture Law.²⁰⁴

Equity joint ventures, the preferred vehicle for investment in high-tech and infrastructure projects in North Korea, can be established by means of a joint venture agreement between foreign investors and North Korean parties.²⁰⁵ Under North Korean law, equity joint ventures are considered legal persons, taking the form of limited liability companies, where liability is limited to each party's ownership interests in the joint venture.²⁰⁶ Contributions to the equity joint venture can be any capital in the form of cash, technical know-how, property rights, and other forms.²⁰⁷ All non-cash capital contributions are to be evaluated based on mutual agreement and according to international market prices at the time of contribution.²⁰⁸ Developments in other authoritarian regimes, with limited, if any, free markets, may offer some insights²⁰⁹ as to

about-doing-business-in-north-korea/ [https://perma.cc/HHX8-BMM7] ("North Korea lacks laws, systems, and rules for dispute settlement, insurance, wages and remittances. Infrastructure—from roads, railroads, and telecommunications to the supply of electricity, gas, and water—is extremely poor. And there are no commercial banks or insurance companies because all financial and insurance systems are controlled by the state.").

²⁰⁴ *The Foreign Investment Laws of North Korea*, FINDLAW (2018), <https://corporate.findlaw.com/law-library/the-foreign-investment-laws-of-north-korea.html> [https://perma.cc/V6SC-DK5L] [hereinafter FindLaw].

²⁰⁵ *Id.* Subject agreements require the approval of the external economic body of the Administration Council of North Korea or FETZL, the Free and Economic Trade Zone Law, authorities.

²⁰⁶ *Id.* These equity joint ventures can be quite lucrative. An example of such partnership is Egypt's Orascom Telecom Media and Technology and its mobile phone joint venture with North Korea's Postal and Telecommunications Company. Orascom recorded net assets from the mobile phone venture to be worth \$1.2 billion. See Ian Talley, *Cigarettes and Murky Joint Ventures Help North Korea Evade Crackdown*, WALL. ST. J. (Jan. 14, 2018), <https://www.wsj.com/articles/opaque-joint-ventures-help-north-korea-evade-crackdown-1515931201> [https://perma.cc/7EWQ-ZZV7].

²⁰⁷ FindLaw, *supra* note 204.

²⁰⁸ *Id.*

²⁰⁹ If foreign franchises are to succeed, countries such as Cuba must also get through a transition to more open markets and transparent finance. Both nations, of course, may start with their central bank and ancillary systems to advance the transition to private banking and a wider array of financial resources. K.M. Paparelli, *Legal Barriers and Other Challenges to Franchising in Cuba*, 14 INT'L J. FRANCHISING L. 33, 41 (2016) ("Transparency in banking, proven history of repatriating royalties, tax incentives, stability in capital markets, access to finance, exchange controls, licensing controls and productions regulation, supply chain issues, and product availability with local suppliers impact the financial feasibility of moving a franchise into a new international market.").

whether contracts between the parties will handle such valuation determinations or whether North Korean reviewing authorities will impose their own views as to proper contribution value.²¹⁰

Contractual joint ventures are the preferred vehicle for manufacturing, tourism, and services in North Korea.²¹¹ Under North Korean law, a contractual joint venture consists of joint business activities between North Korean investors and foreign investors, with the North Korean investors handling production and management while “the portion of the investment made by the foreign partner is redeemed or the portion of the profit to which the foreign partner is entitled is allotted in accordance with the provisions of the joint venture contract.”²¹² The joint venture contract may specify the procedures for the governance of the contractual joint venture, including the establishment of a governing body to make key decisions on behalf of the joint venture.²¹³ The contractual joint venture is similar to a partnership given that it has no limitation on liability;²¹⁴ it has features of a franchise in that the North Korean investor, like a “franchisee, controls the management and day-to-day operations of the joint venture”, or franchise, while the foreign investor, like a franchisor, brings goods and services, know-how, and intellectual property, sharing in the profits and success of the franchise.²¹⁵ However, unlike a partnership and more

²¹⁰ *Id.* The Equity Joint Venture Law also requires that the “registered capital” (i.e., the subscribed and paid-in capital) of an equity joint venture be at least 30% to 70% (based on the size of the joint venture) of total capital required. *Id.* It remains an open question as to whether local or foreign third-party debt financing will be available, and most projects will likely be funded through equity.

²¹¹ FindLaw, *supra* note 204. In particular, North Korea is “keen for joint ventures for which it offers land, factories and labour in return for money and technology from abroad . . .” See Song Jung-a, Kang Buseong, Nicolle Liu & Edward White, *North Korea Touts for Investment Ahead of Trump-Kim Summit*, FIN. TIMES (Feb. 26, 2019), <https://www.ft.com/content/8f4a1844-38e2-11e9-b856-5404d3811663> [<https://perma.cc/653E-EALL>]. Investors should be cautious given the lack of state protection and high level of political risk, however. *Id.*

²¹² FindLaw, *supra* note 204.

²¹³ *Id.* Important to foreign investors, North Korea amended its Enterprise Act in 2014 and 2015, fostering enterprise autonomy and promoting a system where each enterprise is responsible for its own operations. Planning rights independent of the state are given to each enterprise, a major step in the authoritarian state. Sung Taek Lim & Hee Suk Chai, *A Global Partner in the Making*, 37 INT’L FIN. L. REV. 65, 67 (2018).

²¹⁴ FindLaw, *supra* note 204. Similar to a partnership, each entity investor shares in the profits or losses incurred by the joint venture. See Kang, *supra* note 203.

²¹⁵ See Dean Fournaris, *The Inadvertent Employer: Legal and Business Risks of Employment Determinations to Franchise Systems*, 27 FRANCHISE L.J. 224, 224 (2008). See generally Elizabeth C. Spencer, *Consequences of Interaction of Standard Form and*

like a corporation, a contractual joint venture is a legal and taxable entity required to pay tax on distributed profits among the North Korean and foreign investors.²¹⁶ At the same time, a contractual joint venture is like a partnership under U.S. tax law given the partnership attributes, including limited duration, limited transferability of interests, and no limited liability.²¹⁷

b. Free Economic and Trade Zones

In December 1991, North Korea created the Free Economic and Trade Zone (“FETZ”) in the Rajin-Sonbong region, or the Rason Economic and Trade Zone.²¹⁸ In the FETZ, foreign investors earn income from preferential trade,²¹⁹ and have a considerable number

Relational Contracting in Franchising, 29 FRANCHISE L.J. 31, 31 (2009) (discussing the benefits of a franchise relationship); Robert Emerson & Jason Parnell, *Franchise Hostages: Fast Food, God, and Politics*, 29 J.L. & POL. 353, 354 (2014) (exploring business rights in the context of franchising).

²¹⁶ FindLaw, *supra* note 204.

²¹⁷ *Id.* Under U.S. tax law, a partnership is not a taxpayer for purposes of federal income tax. I.R.C. § 701 (2019); *Vainisi v. Comm’r*, 599 F.3d 567, 569 (7th Cir. 2010). As such, partnerships are considered “pass-through” entities and taxes are not paid at the entity level. *Route 231, LLC v. Comm’r*, 107 T.C.M. (CCH) 1155, at *12-13 (T.C. 2014). Instead, the individual partners will pay tax only on the income they receive from the partnership. *Id.* In contrast, U.S. corporations are considered a legal entity separate from its stockholders for purposes of federal income tax. AM. JUR. LEGAL FORMS 2D – FEDERAL TAX GUIDE TO LEGAL FORMS § 8:1 (2d ed. 2019). As such, corporations are subject to “double taxation” in that the corporation is taxed on its individual income at the entity level while its shareholders are subject to a second tax when the corporation’s after-tax income is distributed to them as dividends. I.R.C. §§ 11, 301(c); *Laciny v. Comm’r*, 105 T.C.M. (CCH) 1645, at *6 (T.C. 2015).

²¹⁸ Ko, *supra* note 159, at 222. In 1991, North Korea also created Special Economic Zones. Salvatore Babones, *If North Korea Opens Up Rason Could Become North Korea’s Shenzhen*, FORBES (May 2, 2018, 10:24 PM), <https://www.forbes.com/sites/salvatorebabones/2018/05/02/if-north-korea-opens-up-ration-could-become-north-koreas-shenzhen/#6d975e0c837a> [https://perma.cc/2CAU-EGGE]. For decades, the Rason Economic and Trade Zone has hosted an international trade fair where companies from within the zone and other parts of North Korea and foreign investors, mostly from China, promote their branding and sell household goods. Laura Zhou, *Chinese Investors Seek New Opportunities in North Korea, Sanctions or Not*, S. CHINA MORNING POST (Aug. 3, 2018, 10:30 PM), <https://www.scmp.com/news/china/diplomacy-defence/article/2158244/chinese-investors-seek-new-opportunities-north-korea> [https://perma.cc/FRQ8-BZAK].

²¹⁹ Ko, *supra* note 159, at 237–38.

of protective rights granted by law.²²⁰ Investors may adopt any form of business they choose with fewer restrictions in a limited, free market economy.²²¹ Furthermore, visas are not legally required for entry into a FETZ from abroad, although – in effect – there is no way around a visa inasmuch as Pyongyang does require a visa for entry, which is where all foreigners are expected to enter internationally.²²² Today, there are multiple trade zones in North Korea, each with its own approaches to foreign investment.²²³ Although good for foreign capital and investment in North Korea overall, the lack of uniformity across trade zones has hampered the country's efforts to encourage foreign capital and investment throughout the country.²²⁴ After creating the FETZ, an amendment to North Korea's constitution provided that "the state shall encourage joint operation and joint venture enterprise" between North Korean corporations and foreign investors.²²⁵ Some of these reforms, though, may be more aspirational than functional²²⁶ and, clearly, franchisors and their franchisees have an inherent interest in protecting their brand names. Foreign investors would be extremely hesitant to enter a market that does not protect their intellectual property.²²⁷

²²⁰ *Id.* at 238.

²²¹ *Id.*

²²² FindLaw, *supra* note 204.

²²³ Goedde, *supra* note 198 (describing the zones as having "different legal" personalities).

²²⁴ *See id.*

²²⁵ Ko, *supra* note 159, at 226.

²²⁶ There was, for example, copyright law reform in conjunction with the creation of North Korean economic zones. Apparently, the zones, and the accompanying copyright laws, may be mostly for show and do not effectively operate in North Korea. Deming Liu, *Copyright in North Korea: Reality or Hoax*, CHI.-KENT J. INT'L & COMP. L., Jan. 9, 2018, at 1, 18 ("[I]n attracting foreign investment, the government established the special economic zones; various economic laws including copyright law were enacted. At the very least, the success of the zones would boost the function of the law and confidence for its wider use in the whole country. However, the zones are not successful; copyright law does not function there, and the benefit of copyright law has not shown. The use of the laws is rare if at all; in effect, however, the laws remain on the book.").

²²⁷ Even though North Korea has taken steps in the development of its intellectual property laws, it does not mean that the laws are well observed or enforced in the country. U.S. foreign investors should note, however, that U.S. intellectual property law may pick up where North Korean intellectual property law leaves off. In the U.S., for example, the Lanham Act is the primary federal trademark act which prohibits a number of activities, including, among other things, trademark infringement, trademark dilution, and false advertising. *See generally* 15 U.S.C. § 1051-1072 (2021). The Supreme Court in *Steele v. Bulova Watch Co.* found that the Lanham Act not only applies domestically but also

c. Foreign Investment Law

In October 1992, North Korea enacted the Foreign Investment Law (FIL).²²⁸ The FIL is North Korea's basic law with respect to the general principles and systems related to foreign investment, declaring that it was made for the protection of rights and interests of foreign investors.²²⁹ Under the FIL, foreign investment is encouraged in "various sectors such as industry, agriculture, construction, transport, telecommunications science and technology, tourism, commerce and financial services."²³⁰ Moreover, preferential treatment is given to foreign investment (including tax exemptions and favorable loan terms) in "sectors that require high and modern technology, sectors that produce internationally competitive goods, the sectors of natural resource development and infrastructure construction, and the sectors of scientific research and technology development."²³¹ Any projects that hinder the development of the national economy or threaten the environment or national security, or which are obsolete, are strictly prohibited.²³² So, simply put, projects can be cutting-edge only.

extraterritorially to foreign commerce activities, given the broad "use in commerce" definition found in the statute. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952). Furthermore, the Ninth Circuit established a framework for applying the Lanham Act to foreign commerce when (1) the alleged trademark violations create some effect on U.S. commerce; (2) the effect presents an injury specific only to the plaintiffs; and (3) enforcing the statute does not interfere with other nations' sovereign rights. *Timberlane Lumber Co. v. Bank of Am. Nat'l Tr. & Savs. Ass'n*, 549 F.2d 597, 613 (9th Cir. 1976). Four decades later, the Ninth Circuit affirmed this *Timberlane* framework in *Trader Joe's Co. v. Hallatt*, where the court found a business owner in Canada in violation of the Lanham Act when he would cross over the U.S. border to buy large quantities of items from a Trader Joe's store in Washington, only to then resell those items at inflated prices with inferior customer service at a store he owned and operated in Canada called Pirate Joe's. *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 971-72 (9th Cir. 2016). Accordingly, North Korea's intellectual property laws (or lack thereof) may not be a U.S. foreign investor's only recourse.

²²⁸ Sang-Jick Yoon, Comment, *Critical Issues on the Foreign Investment Laws of North Korea for Foreign Investors*, 15 WIS. INT'L L.J. 325, 327-28 (1996). North Korea has also enacted more than forty other laws and regulations for foreign investment in North Korea. *Id.*

²²⁹ *Jon*, *supra* note 118, at 13.

²³⁰ *FindLaw*, *supra* note 204.

²³¹ *Id.*

²³² *Id.* THE LAW OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA ON FOREIGN INVESTMENT, UNITED NATIONS CONFERENCE ON TRADE AND DEV. COMPENDIUM OF INVESTMENT LAWS art. 11, INV. POL'Y HUB., <https://investmentpolicy.unctad.org/investment-laws/laws/173/korea-dem->

Under the FIL, repatriation of profit and capital is guaranteed, although subject to some exchange controls.²³³ The FIL provides the assurances that foreign investments are not subject to seizure or nationalization except if “unavoidable circumstances make it necessary to nationalize or seize such enterprises and assets,” and provided that fair compensation is paid in exchange.²³⁴ If nationalization is required, the FIL stipulates that notification thereof shall be made in advance, and legal proceedings will determine sufficient compensation corresponding to its value.²³⁵

The FIL also provides some intellectual property protection,²³⁶ namely “managerial secrets of foreign-invested enterprises.”²³⁷ North Korea is a country in which there could be substantial risk of misappropriation of intellectual property.²³⁸ Under the FIL, investors are well-served to deal with this risk via extensive confidentiality and liquidated damages provisions that deter intellectual property violations; this has been the practice in technology transfer contracts in South Korea.²³⁹ The enforceability of such provisions, however, remains to be seen.²⁴⁰

people-s-rep-of-foreign-investment-law [https://perma.cc/JJK6-ZES3]
[hereinafter Law on Foreign Investment].

²³³ *Id.* Importantly, North Korea’s passage of the Central Bank Act in 2015 took important steps to implement a two-tier banking system that is similar to what is found in capitalist markets. The focus of the amendment increases the convenience for bank customers and sets a standard exchange rate. See Lim & Chai, *supra* note 213, at 67.

²³⁴ Law on Foreign Investment, *supra* note 232.

²³⁵ Although the FIL seems to operate as the main source of protection for foreign investors, investors are still advised to include extensive confidentiality and liquidated damages provisions in their investment contracts given that the North Korean legal system has routinely been criticized for its lack of independence and impartiality with respect to the recognition and enforcement of judicial remedies. See Jon, *supra* note 118, at 17.

²³⁶ Notably, the FIL states that the North Korean government shall protect the business secrets of foreign-invested companies and banks and shall not disclose them without the consent of the foreign investor concerned. *Id.* at 16-17. Enforcement, however, is still questionable in practice. *Id.* at 32 (“[T]he most troubling concern for foreign investors would be how the North Korean government would enforce these laws when their real practice rarely adheres to their own laws or contracts. The authoritarian regime hardly abides by the rule of law, which threatens the safety of all foreign businesspeople.”).

²³⁷ Law on Foreign Investment, *supra* note 232.

²³⁸ FindLaw, *supra* note 204.

²³⁹ *Id.*

²⁴⁰ *Id.*

d. Foreign Enterprise Law

North Korea has a Foreign Enterprise Law (the "FEL") which, at its core, is a basic framework for the creation of wholly foreign-owned subsidiaries in the country.²⁴¹ These wholly foreign-owned subsidiaries are only permitted in the FETZ and apply to projects related to high-tech production of internationally competitive goods, including electronics, automation, food processing, consumer goods, machinery pharmaceuticals, chemicals, construction, transportation, and a number of other vital sectors.²⁴² By contrast, investment is prohibited in projects where "equipment and production processes are outdated economically and technologically, or for products [that lack] local or international demand."²⁴³ Also prohibited are projects whose "type of business and mode of management . . . do not conform with or may have a negative impact on the sound ideological emotions of the people and the mode of life" in North Korea.²⁴⁴

Wholly foreign-owned subsidiaries are subject to a number of taxes in North Korea, including enterprise income, property, turnover, and local taxes. Generally, enterprise income tax is imposed at a rate of 25% for business-generated income;²⁴⁵ wholly foreign-owned subsidiaries in a FETZ will pay an enterprise income tax rate of only 14% and an enterprise income tax rate of only 10% is

²⁴¹ *Id.*

²⁴² *Id.* In these special economic zones, there are special rules that set out the settlement of commercial and investment disputes through an arbitration center that functions as a separate juridical body. Choi Hyeonjung & Lee Soo-hyun, *Regulatory Readiness of the DPRK for Attracting Foreign Direct Investment*, ASIAN INST. FOR POL'Y STUD. (July 23, 2019), <http://en.asaninst.org/contents/regulatory-readiness-of-the-dprk-for-attracting-foreign-direct-investment> [<https://perma.cc/UK98-B5ME>].

²⁴³ FindLaw, *supra* note 204 (internal citations omitted).

²⁴⁴ *Id.* What constitutes a negative impact can be ambiguous and can put investors at risk of arbitrary decisions and interpretations by North Korean authority that may undermine regulatory stability. Hyun Yoon Shin, *Development and Problems of North Korea's Foreign Investment Legislation and Tasks Ahead*, 2 YONSEI L.J. 160, 168 (2011).

²⁴⁵ FindLaw, *supra* note 204. It's important to note that North Korea has taken steps to allow foreign-invested banks to establish and operate branches in the free economic and trading zone. These banks may deposit and invest in foreign currencies, give guarantees in respect to currency liabilities, and process and accept securities in foreign currencies. This has allowed for an influx of capital into North Korea. Susan Tiefenbrun, *U.S. Foreign Trade Zones, Tax-Free Trade Zones of the World, and Their Impact on the U.S. Economy*, 12 J. INT'L BUS. & L. 149, 176-77 (2013).

imposed on wholly foreign-owned subsidiaries in specific sectors such as technology, natural resources development, infrastructure and construction, and scientific research.²⁴⁶ Foreign invested businesses in the service sector, such as transport, power, commerce, tourism, banking, advertising, recreation, insurance, catering, and hotel industries are subject to an additional business income from services tax ranging from 2-10%.²⁴⁷

There are some notable exemptions from enterprise tax that could be appealing to franchises anticipating modest to high profitability. Foreign invested enterprises operating in a priority or production sector within the special economic zones are entitled to a full exemption from enterprise income tax for the first three years following a year of profitability and a 50% reduction in tax for the following two years.²⁴⁸ To qualify for this exemption, the business must ultimately be operated for more than 10 years.²⁴⁹ There is also a similar full enterprise income tax exemption for 4 years after the first year of profitability and up to 50% for the following 3 years for foreign investors that partake in development of infrastructure such as roads, railways and airports.²⁵⁰ This exemption applies regardless of sector or location.²⁵¹ Thus, foreign companies in any sector or region with available capital that are forecasting high profits may be wise to consider strategic upfront investments in infrastructure improving access to their businesses in amounts that are lesser than their projected tax burden over seven years following the first year of profitability.

²⁴⁶ Taxation Law of the Democratic People's Republic of Korea for Foreign-Invested Business and Foreign Individual Tax, ch. 2: Enterprise Income Tax, art. 9 (2002).

²⁴⁷ Taxation Law of the Democratic People's Republic of Korea for Foreign-Invested Business and Foreign Individual Tax, ch. 7: Business Tax, arts. 43-45 (2002).

²⁴⁸ Taxation Law of the Democratic People's Republic of Korea for Foreign-Invested Business and Foreign Individual Tax, ch. 2: Enterprise Income Tax, art. 15(2) (2002).

²⁴⁹ *Id.*

²⁵⁰ Taxation Law of the Democratic People's Republic of Korea for Foreign-Invested Business and Foreign Individual Tax, ch. 2: Enterprise Income Tax, art. 15(3) (2002).

²⁵¹ *Id.*

e. Franchising in North Korea

The FIL emphasizes equal treatment of foreign investment by giving them equal protection with domestic investments.²⁵² Under the FIL, the foreign investors operating as equity joint ventures, contractual joint ventures, or wholly foreign-owned enterprises gain equal access to national policies supporting industrial development, get input in the legislative process, and participate in government procurement processes and standard development.²⁵³

North Korean contractual joint ventures may come in the form of franchising,²⁵⁴ provided that the foreign investor only incorporates and operates a joint venture with a North Korean "institution, enterprise, or association,"²⁵⁵ and the fields in which foreign investors can invest are also limited in scope.²⁵⁶ For example, the FIL only allows investment in industries such as agriculture, construction, transportation, and telecommunication, and it prohibits investment in projects harming economic development, the environment, or national security.²⁵⁷ However, the FIL encourages investment in "sectors that require high and modern technologies, those which produce internationally competitive goods, sectors of natural resource development and infrastructure construction, and scientific research and new technology development sectors."²⁵⁸

The FIL prohibits investors from investing in "projects which hinder the development of the national economy and do harm to national security, or which are technically outdated and harmful to environmental protection."²⁵⁹ North Korea has a broad interpretation of what constitutes "harmful to the development of

²⁵² Z. Alex Zhang & Vivian Tsoi, *China Adopts New Foreign Investment Law*, WHITE & CASE (Mar. 29, 2019), <https://www.whitecase.com/publications/alert/china-adopts-new-foreign-investment-law> [<https://perma.cc/R8EM-5Q73>].

²⁵³ *Id.*

²⁵⁴ Ko, *supra* note 159, at 225.

²⁵⁵ *Id.* at 225-26.

²⁵⁶ *Id.* at 226. Note, that this may be subject to change. Since North Korea embraced foreign investment at a late stage, much of this is a relatively new concept for Pyongyang and the pace at which it is expanding to meet demands of foreign investors is commendable. See Yoon, *supra* note 9, at 19.

²⁵⁷ Ko, *supra* note 159, at 226.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

the national economy,"²⁶⁰ and has not designated any criteria for the approval of an investment project or any grant of preferential treatment.²⁶¹ Absent any criteria, many different types of franchises could open in North Korea. Franchise Direct lists some franchise opportunities for sale in North Korea, including the Growth Coach, Skyhawks Sports Camps, and Chem-Dry Carpet Cleaning International.²⁶² There is hope for the eager food franchisor, as reports indicate that Kim Jong-un was interested in opening a Western hamburger franchise in the capital of North Korea.²⁶³ Such an endeavor has the potential to either exacerbate or bridge the stark political, societal, and economic gaps between the United States and North Korea.²⁶⁴ A research analyst at Stimson Center said, "[o]nce [communist countries] start to get different points of contact with the West, it changes their views – and it usually starts with McDonald's or Coca-Cola."²⁶⁵ For example, North Koreans did not know what a hamburger was when a franchise started selling them

²⁶⁰ *Id.*

²⁶¹ *Id.* at 227.

²⁶² *US Franchises Available in North Korea*, FRANCHISE DIRECT, <https://www.franchisedirect.com/internationalfranchises/north-korea/110/> [<https://perma.cc/5FBC-ZEAW>]. Other industries of particular interest include metals, electronics, machinery, building materials, transport, and food and consumer goods. North Korea had its largest international trade fair at the 22nd Pyongyang Spring International Trade Fair, hosting more than 450 companies from North Korea, China, Russia, Pakistan, and other regional players. While sanctions currently imposed prohibit all joint ventures and most businesses in North Korea, the attendance at the Trade Fair indicates preparations are underway for when sanctions are lifted. See Josh Smith, *Hundreds of Foreign Companies Attend North Korea Trade Fair Despite Sanctions*, REUTERS (May 21, 2019), <https://www.reuters.com/article/us-northkorea-trade-fair/hundreds-of-foreign-companies-attend-north-korea-trade-fair-despite-sanctions-idUSKCN1SR0GJ> [<https://perma.cc/5JQS-4BRH>].

²⁶³ Thomas Maresca, *They're Lovin' It: Meet the Man Who Introduced the Hamburger to North Korea*, USA TODAY (June 11, 2018), <https://www.usatoday.com/story/news/world/2018/06/11/north-korean-summit-fast-food-hamburgers/690192002/> [<https://perma.cc/5JQS-4BRH>].

²⁶⁴ Recall the 1990s when the American fast food franchise McDonald's expanded into China and Russia. Caitlin Dewey, *North Korea Reportedly Wants a McDonald's. That Could Be a Pretty Big Deal.*, WASH. POST (June 2, 2018, 10:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/06/02/north-korea-reportedly-wants-a-mcdonalds-that-could-be-a-pretty-big-deal/> [<https://perma.cc/R7WP-RNW7>].

²⁶⁵ Choi Hyun-june, *Dream of Fried Chicken Empire in N. Korea Goes Bust*, HANKYOREH (Feb. 17, 2014), http://english.hani.co.kr/arti/english_edition/e_northkorea/624469.html [<https://perma.cc/ME2W-EJX3>].

in the country, and, despite the lack of knowledge, the franchise turned out to be very successful.²⁶⁶

i. "The Rakwon Chicken Restaurant": A Case Study

In 2007, a South Korean fried chicken franchise called "The Rakwon Chicken Restaurant" decided to expand to North Korea.²⁶⁷ This was the first foreign-run fried chicken restaurant in North Korea, and its South Korean owner, Choi Won-ho, was hopeful that a successful franchise would improve the lives of North Koreans experiencing food shortages.²⁶⁸ Opening in a country fraught with challenging obstacles,²⁶⁹ Mr. Choi nevertheless partnered with a North Korean investor, agreeing to a profit sharing arrangement where he was to receive 70% of the companies' profits and the North Korean investor would receive 30%.²⁷⁰ The North Korean partner provided the building and the staff, while Mr. Choi, planning to hire twenty North Koreans,²⁷¹ was responsible for the management system, recipes, ingredients, and interior of the restaurant.²⁷²

The ensuing results of this venture encapsulate both the upside and risk of foreign franchises entering North Korea. The initial opening of the restaurant became international news and was featured in prominent outlets such as The Washington Post and

²⁶⁶ Maresca, *supra* note 263.

²⁶⁷ Moon So-young, *Fried Chicken Franchise Goes North*, KOREA JOONGANG DAILY (Nov. 2, 2007), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2882297> [<https://perma.cc/WW95-GGAA>].

²⁶⁸ *Id.*

²⁶⁹ *Id.* Organizational selection theory holds that business owners, including franchisors, select their franchisee based on common goals and similar mindsets. Anna Watson, Olufunmilola (Lola) Dada, Marko Grünhagen & Melody L. Wollan, *When Do Franchisors Select Entrepreneurial Franchisees? An Organizational Identify Perspective*, 69 J. BUS. RSCH. 5934, 5943 (2016). Under this theory, foreign investors seeking success in the Hermit Kingdom must establish businesses in North Korea with the right kind of employees, associates, or partners. Are North Koreans looking for more of an entrepreneurial partner or someone that provides the brand and leaves the running of the business to them? These concerns extend to the particulars of a franchised business, of the overall field or industry, and, broadly, differences of history, culture, and perhaps ideology.

²⁷⁰ Hyun-june, *supra* note 265.

²⁷¹ *Id.*

²⁷² *Id.*

NHK, Japan's public broadcaster;²⁷³ early sales figures were high, with the restaurant bringing in an estimated \$1,000 USD a day.²⁷⁴ The average price of a chicken was \$11.30 USD, and the customers willing to pay for this relatively expensive meal were mainly from North Korea's upper class and Chinese visitors.²⁷⁵ The restaurant got off to such a strong start that Mr. Choi began meeting with North Korean officials seeking approval to open a second restaurant in the Hermit Kingdom.²⁷⁶

This optimism was short-lived, however, after Lee Myung-bak became president of South Korea in 2008.²⁷⁷ A series of sanctions imposed on North Korea by the new South Korean President, Mr. Choi explained, effectively halted cross-border interactions and shipments; he had not yet received a single share of his revenue as had been agreed upon.²⁷⁸ After the sinking of the South Korean ROKS warship by North Korea in 2010, sanctions were tightened and any lingering hopes of seeing a return on this venture were dashed for Mr. Choi. Just a few years earlier in 2007, economic cooperation between the two Koreas had been near an all-time high.²⁷⁹ As of 2013, the restaurant appeared to still be operating in North Korea, albeit without Mr. Choi, after being shown in YouTube videos filmed by western tourists.²⁸⁰

²⁷³ *Id.* From an advertising standpoint, this type of publicity could be appealing for international franchises looking to bolster their brand recognition.

²⁷⁴ John Sudworth, *South Korea Chicken Success in NK*, BBC NEWS (Jan. 1, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/7805578.stm> [<https://perma.cc/9PC6-WKJJ>].

²⁷⁵ Hyun-june, *supra* note 265.

²⁷⁶ *See* Sudworth, *supra* note 274.

²⁷⁷ Hyun-june, *supra* note 265.

²⁷⁸ *Id.* After President Lee banned all economic ties with the North, Mr. Choi was unable to recover a single penny from the government as his documents "failed to convince the authorities of his investment losses." Park Chan-kyong, *How South Korea's 2010 Ban on Cross-Border Trade Burned One Man's Dream of Building a Fried Chicken Empire in the North*, S. CHINA MORNING POST (Feb. 19, 2019, 8:03 AM), https://www.scmp.com/week-asia/geopolitics/article/2186708/how-south-koreas-2010-ban-cross-border-trade-burned-one-mans?utm_source=mediacorp&utm_medium=partner&utm_campaign=contentexchange [<https://perma.cc/V6HR-DFE5>]. Mr. Choi now operates a modest chicken-and-beer restaurant with his wife in South Korea. *Id.*

²⁷⁹ *Id.*

²⁸⁰ Jonny Blair, *National Day in Pyongyang Near the Parade by Arc de Triumph North Korea*, YOUTUBE (Sept. 13, 2013), <https://www.youtube.com/watch?v=ZVlJmKWgqY> [<https://perma.cc/A2VK-7TP3>].

This example illustrates that it is possible for franchises to succeed and even flourish and North Korea, but the country will need to establish that it can be trusted in profit sharing arrangements. This process of building trust will need to be mutual between North Korea and any country trying to do business there. The reward may be entirely worth the risk if a business leader is comfortable with taking on the challenge of developing a business given the historical, legal, political, social, and economic complexities of North Korea.²⁸¹ The country has been severely limited in what is allowed within its borders, and a U.S.-based franchisor could introduce entirely new concepts to the country without having to reinvent the wheel. Currently, franchises are still a relatively new concept in North Korea.²⁸²

f. What Now? Practice Pointers for Foreign Investors

North Korea traditionally has been a command economy, meaning that the economy is centrally planned and coordinated by the government.²⁸³ As a result, almost all of North Korea's larger domestic companies must have close ties to the North Korean government to stay in business.²⁸⁴ Compared to his predecessors, Kim Jong-un has made efforts at reforming the economy and invigorating the private sector.²⁸⁵ Despite the economy being underdeveloped, there are domestic companies that are profitable in the country, and these companies are likely to be hostile to the introduction of foreign competitors. "The last thing a North Korea firm would like is for a South Korean firm like Samsung to come in."²⁸⁶

²⁸¹ Beyond lacking laws, systems, and rules for dispute settlement, insurance, wages, and remittances, North Korea also lacks infrastructure, including roads, railroads, telecommunications, electricity, gas, and water, which are critical to any franchisor seeking to expand to the market. See Kang, *supra* note 203.

²⁸² See Yu, *supra* note 81.

²⁸³ See Choe Sang-Hun, *As Economy Grows, North Korea's Grip on Society Is Tested*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/world/asia/north-korea-economy-marketplace.html> [<https://perma.cc/F3LY-VY76>].

²⁸⁴ Stevenson, *supra* note 71.

²⁸⁵ Sang-Hun, *supra* note 283.

²⁸⁶ Stevenson, *supra* note 71.

Many individuals who run small businesses in North Korea fear growing too large because the country does not legally recognize the individual ownership of businesses. North Korea severely restricts internet access, with an estimated 1% of the population having access to a heavily censored version of the world wide web. North Korea's mineral deposits are a particularly valuable asset, but private mining operations remain illegal in the country. The income gap between the wealthy and the poor in the country has resulted in the development of two separate economies: the state-run economy and an underground, shadow economy. As a result, there are two prices for everything, and pricing can depend on which class the buyer is from. Underground black markets, known as "jangmadang" have been a staple in North Korea for years; in a 2015 survey, over half of the North Korean participants revealed these markets to be their primary source of food.²⁸⁷ Furthermore, North Korea has earned a reputation as a corporate graveyard over the last few decades.²⁸⁸ Some examples include North Korea stiffing Sweden on the bill for 1,000 Volvo sedans shipped to the country during the 1970s; a Chinese mining company referring to its four-year venture in the country as a "nightmare"; and an Egyptian telecom giant doing business in the country being unable to repatriate its profits.²⁸⁹

With this negative history, Kim Jong-un may be interested in having a "Western hamburger franchise" set up shop in North Korea as a way of easing tensions with the United States.²⁹⁰ McDonald's—a long time symbol of Western culture, capitalism, and globalization—has found great success in non-capitalist countries, including China and Russia.²⁹¹ In fact, when Moscow received its first McDonald's franchise on January 31, 1990, Russians waited in line for hours to eat at the city's "notorious symbol of

²⁸⁷ Travis Jeppesen, *A Consumer Class Wields New Power in North Korea*, WALL ST. J. (June 1, 2018, 11:38 AM), <https://www.wsj.com/articles/a-consumer-class-wields-new-power-in-north-korea-1527867489> [<https://perma.cc/T5JB-TH4A>].

²⁸⁸ Andy Sharp, *Invest in North Korea? It's Been a 'Nightmare' for Some Who Did*, BLOOMBERG (June 7, 2018, 5:00 PM), <https://www.bloomberg.com/news/articles/2018-06-07/invest-in-north-korea-great-upside-cheap-labor-and-oh-so-risky> [<https://perma.cc/57K4-TVUX>].

²⁸⁹ *Id.* For a discussion of this Egyptian company, Orasacom, and a discussion of its experience in North Korea, see *supra* notes 153-56 and accompanying text.

²⁹⁰ Dewey, *supra* note 264.

²⁹¹ *Id.*

capitalism.”²⁹² Moreover, in 2011, one South Korean newspaper reported that Kim Jong-il and his cronies were flying McDonald’s into the country daily from South Korea, despite widespread food shortages in the country.²⁹³ In practice, foreign franchises looking to succeed financially in North Korea will likely need to gear their products and services towards the wealthy elite and upper middle class. For example, the demand for South Korean products, particularly cosmetics, has sky-rocketed in recent years.²⁹⁴ Despite being banned by authorities, these products have reportedly become popular presents among the North Korean elite who are willing to pay any price for exclusive, foreign goods.²⁹⁵ By stark contrast, many state workers struggle to earn the equivalent of one U.S. dollar monthly, so, from a humanitarian perspective, these franchises could provide jobs that increases wages for the poor.

Regardless of the holes in the FIL and the existing legal framework in North Korea as a whole and the undoubtedly relevant cultural, economic, and political history of the country, foreign investors may be able to take at least some measures to protect their own interests, including pre-engagement due diligence and contractual protections. Due diligence, in the business and contractual as well as anti-corruption context, is the best and most effective way for a foreign investor or franchisor to learn necessary details about the location, industry, and reputation of a prospective North Korean counterpart, business partner, or franchisee.²⁹⁶ Notably, most potential North Korean business allies, if they have any experience at all, are only familiar with working alongside

²⁹² *Id.*; *This Day in History: January 31: First McDonald’s Opens in Moscow*, HISTORY (Nov. 13, 2009), <https://www.history.com/this-day-in-history/first-mcdonalds-opens-in-soviet-union> [https://perma.cc/6Q3N-7Z3X].

²⁹³ *North Korea’s Elite Has McDonald’s Burgers Flown in Daily*, SOUTH CHARGES, STAR (July 22, 2011), https://www.thestar.com/news/world/2011/07/22/north_koreas_elite_has_mcdonalds_burgers_flown_in_daily_south_charges.html [https://perma.cc/A9UF-KLGM].

²⁹⁴ Kim Chae Hwan, *North Korean Prices of South Korean Cosmetics Skyrocket 10-fold Since Start of 2022*, DAILY NK (Jan. 4, 2022, 4:09 PM), <https://www.dailynk.com/english/north-korean-prices-south-korean-cosmetics-skyrocket-10-fold-since-start-2022/> [https://perma.cc/3PFL-Q8PD].

²⁹⁵ *Id.*

²⁹⁶ Brendan Hanifin & Emerson Siegel, *What You Need to Know About North Korea Executive Order*, ROPES & GRAY (Sept. 22, 2017), <https://www.ropesgray.com/en/newsroom/alerts/2017/09/What-You-Need-To-Know-About-North-Korea-Executive-Order.aspx> [https://perma.cc/VH8M-EMS3].

people from one other country, China; because of this limited exposure, rarely do we find North Koreans who can navigate not only their own culture but also the cultures of those foreigners with whom they would want to work.²⁹⁷

U.S. investors seeking to join a post-sanction North Korean market would also need to consider possible language barriers given that English language media sources often have little information related to existing North Korean business owners.²⁹⁸ As such, it may be incumbent upon U.S. investors to consider conducting local-language media searches or engaging country reputational vendors to dig up dirt on their potential North Korean business partner or franchisee.²⁹⁹ In addition to pre-engagement due diligence, U.S. investors concerned about their prospective counterparts' historical or future dealings may seek to include in their contractual documentation certain venue and choice of law provisions to bring any disputes within the auspices of U.S. law³⁰⁰ as well as incorporate representations or warranties for specific concerns and exit rights in the event that the relationship becomes contrary to expectations.³⁰¹

V. INFLUENCE FROM OTHER NATIONS

Although North Korea may need reform both economically and politically to see real change, it could look to other nations, including its neighbors and countries with similar histories, for guidance on how to attract, develop, and maintain much needed foreign capital and investment.

²⁹⁷ Lee, *supra* note 81.

²⁹⁸ Hanifin & Siegel, *supra* note 296.

²⁹⁹ *Id.*

³⁰⁰ See generally Aaron R. Gruber & Caroline N. Mitchell, *Foreign Forum Selection Clauses: Limitations on Enforceability*, JONES DAY: INSIGHTS (Oct. 2013), <https://www.jonesday.com/en/insights/2013/10/foreign-forum-selection-clauses-limitations-on-enforceability> [<https://perma.cc/AL83-H2XQ>] (discussing the enforceability of foreign selection clauses in the U.S. and abroad); Brant C. Hardaway, *Protecting Your Client's Business-Related IP Rights in China and Beyond*, Aspatore (Nov. 2011), 2011 WL 5618043, at *4 (discussing the use of venue selection and choice of law clauses to protect intellectual property in China and similar jurisdictions).

³⁰¹ Hanifin & Siegel, *supra* note 296.

a. South Korea

Unlike North Korea, South Korea is a democratic republic with legislative, judicial, and executive branches.³⁰² As a dramatically different society and economy, South Korean success in international economic cooperation is key to having North Korea finally fully open its door to foreign investors.³⁰³

i. Governing Law for Franchises

South Korea is a civil law system³⁰⁴ and has the Korean Civil Act and the Korean Commercial Code that primarily govern the formation of business entities.³⁰⁵ The country offers five forms of business entities, including joint-stock companies, limited liability companies, private limited companies, general partnerships, and limited partnerships.³⁰⁶ Generally, a joint-stock company is the most common form of company for foreign investors seeking to do business in South Korea.³⁰⁷ Although taxation on its foreign income is one notable disadvantage,³⁰⁸ the benefits of this corporate form include limited liability and an open capital structure that can easily absorb a large scale of public capital in various South Korean stock exchanges.³⁰⁹

³⁰² Benjamin Elisha Sawe, *What Type of Government Does South Korea Have?*, WORLD ATLAS (Mar. 28, 2019), <https://www.worldatlas.com/articles/what-type-of-government-does-south-korea-have.html> [https://perma.cc/AA5X-CMQQ].

³⁰³ See North Korea's Kim Jong-un Pledges 'New History' with South Korea, BBC NEWS (Apr. 27, 2018), <https://www.bbc.com/news/world-asia-43914208> [https://perma.cc/T83F-SLWQ] (describing the physical opening of the border between North and South Korea).

³⁰⁴ RACHEL SHIN JUNG, TOM KWON, JAI HYUNG LEE & SONG HEE OH, ESTABLISHING A BUSINESS IN SOUTH KOREA § 1, Westlaw Practical Law (database updated Jun. 1, 2021).

³⁰⁵ Sun Chang & Terry Kim, *South Korea*, in FRANCHISE 2022, at 144 (2022), <https://www.franchise.org/sites/default/files/2021-09/Lexology%20GTD%20-%20Franchise%202022%20%28South%20Korea%29.pdf> [https://perma.cc/WB8E-PCFA].

³⁰⁶ JUNG ET AL., *supra* note 304, § 2.

³⁰⁷ *Id.*

³⁰⁸ See *id.*, §§ 26-28, [304](#)

³⁰⁹ *Id.* § 2. A joint-stock company in South Korea operates similarly to a corporation in the United States. Shareholders in a joint-stock company are liable only up to the amount of capital contributed to the company. This business format

From a regulatory standpoint, foreign capital and investment and foreign-backed joint and other business ventures in South Korea can be made through the establishment, acquisition, or partial ownership of existing domestic corporations,³¹⁰ which ostensibly would include franchises. All foreign capital and investment are subject to, and actively encouraged by, the Foreign Investment Promotion Act, the Foreign Exchange Transactions Act, and the Korea Trade Investment Promotion Agency.³¹¹ Unlike North Korea, establishing a presence in South Korea is as simple as reporting the establishment of a branch or local office to a foreign exchange bank and completing certain court and business registrations.³¹² Moreover, incorporation in South Korea is not required to do business in the country, and foreign investors who do not incorporate are only required to pay taxes on domestic income rather than both domestic and foreign income.³¹³

South Korea, unlike North Korea, also offers clear intellectual property protections for foreign investors and is considered a *first to file* jurisdiction.³¹⁴ To obtain reliable protection of trademark rights in South Korea, the owner should register it with the Korean Intellectual Property Office pursuant to South Korea's Trademark Act.³¹⁵ The owner may bring a claim for trademark infringement up until the application filing date.³¹⁶ In addition to the Trademark Act,

is appropriate for a large business requiring large amounts of fixed capital and continued procurement of funds. *Id.*³⁰⁴

³¹⁰ *Id.* §§ 3-4.

³¹¹ *Id.* §§ 20-22. “[T]he Foreign Investment Promotion Act was framed [to promote and] draw Foreign Direct Investment in South Korea The Act brought 99.8% of [South] Korea’s industries within the reach of foreign investment and served as a strong security cover for investors’ interests.” *Korea Company Registration: 2020 Requirements and Procedure*, PEARSON & PARTNERS (Jan. 11, 2020), <https://pearsonkorea.com/insights/Registering-a-Company-in-Korea-Requirements-and-Procedure> [<https://perma.cc/4XKC-FDD4>].

³¹² See JUNG ET AL., *supra* note 304, § 3.

³¹³ *Id.* § 27; SAMIL, DOING BUSINESS AND INVESTING IN KOREA 63 (2012), <https://www.pwc.de/de/internationale-maerkte/assets/doing-business-and-investing-in-korea.pdf> [<https://perma.cc/7PDZ-7AXJ>]. (“Income of foreign subsidiaries incorporated outside Korea is not included in the taxable income of a resident company. Income is recognized by a resident company only upon the declaration of dividends from a foreign subsidiary.”).

³¹⁴ See Yoon, *supra* note 228, at 325-26 (describing the myriad issues foreign investors face in North Korea).

³¹⁵ See Jihyun Kim & Susan Park, *Korea*, in INT’L COMPAR. LEGAL GUIDES: TRADE MARKS 2020, at 202, 202-08 (Nick Aries ed., 9th ed. 2020).

³¹⁶ *Id.* Notably, South Korea protects famous foreign trademarks even if not used domestically. The owner of the trademarks “can prevent a third party from

the Unfair Competition Prevention and Trade Secret Protection Act is available to protect certain soft intellectual property, including unregistered trademarks, trade secrets, and know-how.³¹⁷

South Korea additionally has laws dedicated specifically to franchising: The Fair Transactions in Franchise Business Act and its Presidential Decree.³¹⁸ These laws define what a franchise is, set forth requirements for establishing a franchise, provide requirements for exemptions, describe what franchisors must include in a disclosure document provided to potential franchisees, and govern certain provisions of the franchise agreement.³¹⁹

The Korea Fair Trade Commission (KFTC), a regulatory agency dedicated to enforcing, among other things, the country's franchise law, has the authority to impose stiff administrative measures against franchisors and franchisees who engage in unfair practices.³²⁰ The KFTC also regulates the reasonableness or unfairness of the franchisor's activities, as it levies penalties and issues corrective orders against violators depending on the unfair nature of the activity.³²¹

registering the identical or confusingly similar mark if the third party's application is filed in bad faith." This protection benefits foreign investors considering investment in South Korea, as its laws already afford protection for well-known brands. So-Jung Bae, *Trademarks in South Korea*, LEXOLOGY (Oct. 16, 2019), <https://www.lexology.com/library/detail.aspx?g=a321ba47-728c-4425-be7b-79b31b159fc6> [<https://perma.cc/ZD33-497R>].

³¹⁷ See Kim & Park *supra* note 315.

³¹⁸ *Id.* Note, that the definition of a franchise is "a continuous business relationship under which a franchisor allows a franchisee use of its business marks [and trade names] to sell goods or services in accordance with . . . standard[] . . . in exchange for . . . a franchise fee The South Korean Fair Trade Commission and the courts interpret this definition broadly to . . . benefit . . . franchisees." SEAN C. HAYES, SANGJONG KOOK & JEONGHA LEE, DOMESTIC AND INTERNATIONAL FRANCHISING, MASTER FRANCHISING, AND REGULATION OF FRANCHISE AGREEMENTS IN SOUTH KOREA: OVERVIEW, Westlaw Practical Law (database updated July 1, 2016).

³¹⁹ See Kim & Park *supra* note 315.

³²⁰ *Who We Are*, KOR. FAIR TRADE COMM'N, <http://www.ftc.go.kr/eng/contents.do?key=493> [<https://perma.cc/TN5Q-RN6M>].

³²¹ See *Abuse of Dominance*, KOR FAIR TRADE COMM'N, <http://www.ftc.go.kr/eng/contents.do?key=501> [<https://perma.cc/2PU6-43SX>].

ii. Investment in South Korea

About 90% of Korean companies are stock companies (or limited liability companies).³²² Foreign investments have had a successful presence in South Korea's market that has influenced domestic industries and its securities market.³²³ According to South Korea's Financial Supervisory Service, the total amount of foreign-owned South Korean securities is ₩543.3 trillion (approximately \$467 billion) as of August 2019.³²⁴

Unlike North Korea, South Korea has tax laws that are favorable to foreign investors seeking to sell goods or services in the country without having to form a South Korean business entity or form a partnership with a South Korean investor. Generally, South Korea distinguishes between foreign investors with a permanent establishment in the country (a main office or place of effective management) and foreign investors without such an establishment.³²⁵ Similar to corporations, foreign investors in South Korea must pay personal income tax based on whether such an investor is a resident or non-resident of the country.³²⁶ Therefore,

³²² KISEONG YOU & YU JIN LEE, *INVESTING IN SOUTH KOREA* § 20, Westlaw Practical Law (database updated Oct. 1, 2018).

³²³ Hee Chul Kang, *The Current State of Equity Investments by Foreign Funds [In South Korea] and Related Legal Issues*, 15 PAC. RIM L. & POL'Y J. 73, 74 (Eugene Kim trans., 2006); see also GHIL-WON JO & KWANG-CHUN PARK, *DOING BUSINESS IN SOUTH KOREA* §§ 4-6, Westlaw Practical Law (database updated Jan. 1, 2023).

³²⁴ See Park Ga-young, *Foreign Investors Keep Buying Korean Stocks in July, Sell Bonds*, INVESTOR (Aug. 12, 2019, 4:46 PM), <http://m.theinvestor.co.kr/view.php?ud=20190812000570&np=1> [<https://perma.cc/MN8N-76NV>].

³²⁵ JUNG ET AL., *supra* note 304, § 26. For foreign investors with a permanent establishment in South Korea, the country has a corporate tax rate of 10% for business entities that earn less than \$172,000 per year; \$17,200 plus a tax rate of 20% on the amount earned above \$172,000 for business entities that earn between \$172,000 but less than \$17.2 million per year; and \$3.42 million plus a tax rate of 22% on the amount earned above \$17.2 million for business entities that earn more than \$17.2 million per year. See *id.* All numbers have been converted from the South Korean Won to U.S. dollars utilizing an online currency converter. For foreign investors without a permanent establishment in South Korea, there is a corporate tax rate of 0% to 15% for jurisdictions that have a treaty with South Korea and 20%, which includes local income tax of 10% for jurisdictions without a tax treaty with South Korea. *Id.*

³²⁶ *Id.* Non-resident foreign investors only must pay personal income tax for income earned from South Korea. *Id.*; see also JO & PARK, *supra* note 323.

Foreign investors are also subject to capital gains and value added taxes in South Korea. In South Korea, all capital gains are treated as taxable income and subject to the above corporate income tax rates. *Id.* For the transfer of certain

North Korea could look to South Korea's robust regulatory framework, favorable tax treatment, intellectual property protections, and franchise-specific laws and agencies to make it significantly more desirable for foreign investors, including franchisors, to do business in the North.

iii. South Korean Investment in North Korea: Past and Present

1. North Korean Tourism

Although South Korea has sent food aid to North Korea for decades, South Korean private investment in North Korea was minimal until 1998. At this time, South Korean president Kim Dae-jung was elected and began to pursue a "sunshine policy" towards North Korea.³²⁷ The intent was to build a foundation for the reunification of the two Koreas by means of warmth and friendliness.³²⁸ During this time, hundreds of South Korean proposals for investment in North Korea were approved,³²⁹ but the two most prominent South Korean investments in North Korea have been the Mt. Kungang tourist project and the Kaesong Industrial Complex.³³⁰

The Mt. Kungang tourist project began with a sea route, launched in November 1998, allowing tourists from South Korea and other foreign nations to visit North Korea's Mt. Kungang by traveling via cruise ship and then on buses on a newly built road through the Korean Demilitarized Zone.³³¹ A floating resort was

residential and non-residential business real estate in designated areas within the country, the corporate income tax rate is on a sliding scale between 10% and 40%. *Id.* Value added taxes are imposed on foreign investors at a tax rate of 10% and paid on goods and services a business provides. *Id.*

³²⁷ Geetha Govindasamy, *Kim Dae Jung and the Sunshine Policy: An Appealing Policy Option for Inter-Korean Relations*, 27 SARJANA 1, 2-4 (2012).

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ Victoria Kim, *Investing in Resource-Rich North Korea Seems Like a Good Idea – But Businesses Find There's a Catch*, L.A. TIMES (Mar. 17, 2019, 3:00 AM), <https://www.latimes.com/world/la-fg-north-korea-investment-03172019-story.html> [<https://perma.cc/G28T-J3L7>].

³³¹ *A Blurred Postcard from North Korea*, ECONOMIST (Mar. 18, 2000), <https://www.economist.com/asia/2000/03/16/a-blurred-postcard-from-north-korea> [<https://perma.cc/W66G-W7UW>].

acquired by North Korea and stationed in the Mt. Kumgang region.³³² Much of the infrastructure in the Mt. Kumgang tourist region was built by the South Korean company, Hyundai Asan,³³³ an arm of South Korean conglomerate Hyundai. Hyundai Asan received a thirty-year exclusive deal to develop the region, with plans to include golf courses, ski resorts, and other hotels and facilities. Tourism in the area steadily increased, and by 2008, the region had reported more than 1.7 million visitors.³³⁴

Tragedy struck in July 2008, when a South Korean woman vacationing in the region was shot and killed by North Korean soldiers who claimed the woman was running into a military zone and ignored calls to stop.³³⁵ Forensics indicated that the woman was standing still or walking at a very slow pace at the time she was shot.³³⁶ The South Korean government immediately suspended tours to the area, after North Korea declined South Korea's request for a joint inquiry into the incident.³³⁷ The North responded by removing "unnecessary" South Korean workers from the area and threatened "extraordinary measures" if the suspension was not lifted.³³⁸ In 2010, North Korea seized five properties in the area owned by the South Korean government, claiming that this was compensation for damages suffered because of the suspension of tourism.³³⁹ To date, Hyundai Asan has lost an amount estimated to

³³² Carl Smith, *The Bizarre Story of Australia's Floating Hotel and Its 14,000km Round Journey to North Korea*, ABC NEWS (June 13, 2018, 2:53 PM), <https://www.abc.net.au/news/science/2018-06-14/the-bizarre-story-of-australias-floating-hotel/9849482> [https://perma.cc/9FWS-JYCE].

³³³ Park Han-na, *North Korean Leader Orders to Remove South Korean Facilities From Tourist Resort*, KOREA HERALD (Oct. 23, 2019, 5:07 PM), <http://www.koreaherald.com/view.php?ud=20191023000773> [https://perma.cc/N9VQ-LK36].

³³⁴ Govindasamy, *supra* note 327, at 4-5.

³³⁵ *ROK Woman Tourist Shot Dead at DPRK Resort*, CHINA DAILY (July 12, 2008), https://www.chinadaily.com.cn/world/2008-07/12/content_6839889.htm [https://perma.cc/UN7V-489X].

³³⁶ *Growing Tension: NKorea to Expel SKoreans From Tourist Resort*, WELT (Mar. 8, 2008), <https://www.welt.de/english-news/article2316267/NKorea-to-expel-SKoreans-from-tourist-resort.html> [https://perma.cc/UBY3-BBZ6].

³³⁷ *Id.*

³³⁸ *North Korea to Seize Property at Kumgang Resort*, BBC NEWS (Apr. 23, 2010, 9:15 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/8639065.stm> [https://perma.cc/R8WB-BSPK].

³³⁹ *Id.*

be in the hundreds of millions on the venture,³⁴⁰ and most facilities in the region appeared to be closed.³⁴¹

At its peak, this region showcased the strong potential of economic partnership between the two Koreas despite long standing political and military tensions. South Korean president Moon Jae-in and Kim Jong-un have separately both raised the prospect of reopening the area for tourism, and during their summit in 2018, an agreement was reached to “resume tours to Kumgang and reopen Kaesong ‘as soon as an environment is created.’”³⁴² In preparing for this reopening, Kim Jong-un had called for the remaining South Korean-developed properties in the area to be demolished and then replaced with more modern facilities built by North Korea.³⁴³ These plans appear to have been shelved or possibly delayed by the COVID-19 pandemic. Even if the area is reopened solely owned by North Korea, increasing tourism will be an important step towards achieving peace and stability as well as ultimately making North Korea a more attractive region in which to invest.³⁴⁴ North Korea has shown how desperate it is for the cash flows from tourism, and jumpstarting the Kumgang Tourist region would go a long way towards increasing South Korean and U.S. leverage as well as advancing denuclearization efforts.³⁴⁵

2. Entrepreneurship in North Korea

Another prominent South Korean venture in North Korea was the Kaesong Industrial Complex, also funded by Hyundai Asan.³⁴⁶ The stated purpose was for South Korea to utilize North Korean labor to manufacture products, encouraging local labor and

³⁴⁰ Han-na, *supra* note 333.

³⁴¹ HENRY MARR, NORTH KOREA: BRADT GUIDE 143 (2018).

³⁴² Justin McCurry, *Kim Jong-un Orders Razing of South's 'Unpleasant' Mount Kumgang Buildings*, GUARDIAN (Oct. 23, 2019), <https://www.theguardian.com/world/2019/oct/23/kim-jong-un-orders-razing-of-souths-unpleasant-mount-kumgang-buildings> [<https://perma.cc/K6F6-KHJY>].

³⁴³ *Id.*

³⁴⁴ Choi Moon-soon, *The Key to Unlocking Peace with North Korea for the United States Is Cross-Border Tourism*, CNN (Aug. 23, 2020), <https://www.cnn.com/2020/08/23/opinions/north-korea-united-states-peace-intl-hnk/index.html> [<https://perma.cc/ZP74-WFBC>].

³⁴⁵ *Id.*

³⁴⁶ *What is the Kaesong Industrial Complex?*, BBC NEWS (Feb. 10, 2016), <https://www.bbc.com/news/business-22011178> [<https://perma.cc/JTX6-N683>].

providing higher-paying jobs to the North Korean workforce.³⁴⁷ To ease investor reservations given North Korea's track record, companies were given incentives to move there, which included South Korean government-backed political risk insurance protecting against losses that stemmed from political turmoil in the region.³⁴⁸ This type of political risk insurance may be helpful in attracting future foreign investors to North Korea, although it is unclear what private insurer would wish to underwrite such a product. Like South Korea, perhaps other foreign governments interested in diplomacy can assume this risk to encourage private companies to invest in North Korea.

In 2013, the industrial park had employed an estimated 53,000 North Korean workers and their wages, totaling around \$90 million, were paid directly to the North Korean government.³⁴⁹ For South Korea, the venture was much more about symbolic progress towards peace between the two Koreas than extracting economic value from the project.³⁵⁰ Sensitive to outside criticism of its regime, the North Korean government was reportedly outraged over portrayals in the South Korean media that it could not afford to lose the cash flows from the Kaesong industrial park.³⁵¹ The park was temporarily closed in 2013 due to political turmoil but reopened later that year as tensions began to ease.³⁵² At the time, there were around 120 South Korean businesses in the park.³⁵³ As a condition to reopening, "both sides agreed to allow South Korean company managers to inspect their factories, as well as retrieve finished goods and raw materials."³⁵⁴ Similar or independent inspections may be necessary for building trust for foreign investors.

In early 2016, South Korea announced park operations would be suspended again following North Korean provocations, including a

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Alastair Gale, *Pyongyang Threatens to End Venture*, WALL ST. J. (Apr. 8, 2013), <https://www.wsj.com/articles/SB10001424127887323550604578410010892971052> [<https://perma.cc/P2MY-5B9R>].

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Kaesong Talks: North and South Korea Reach Agreement*, BBC NEWS (July 7, 2013), <https://www.bbc.com/news/world-asia-23208617> [<https://perma.cc/SP4L-LL37>].

³⁵³ *Id.*

³⁵⁴ *Id.*

satellite launch and an alleged hydrogen bomb test.³⁵⁵ North Korea then swiftly expelled all South Korean workers and froze South Korean assets and equipment at the park, stating that South Korea's actions were nearly a declaration of war.³⁵⁶ In a 2018 summit, the two nations' leaders agreed to work toward reopening the Kaesong Industrial Complex.³⁵⁷ As of late 2021, minimal progress had been made on reopening amid stalled denuclearization talks with the United States and the ongoing COVID-19 pandemic.³⁵⁸ Indeed, overall prospects for reconciliation on the Korean Peninsula appear to have been diminished by the conservative party's return to power in the March 2022 South Korean presidential election.³⁵⁹

b. China

The biggest influence on North Korea's change in foreign investment laws has been China.³⁶⁰ China has helped sustain Kim Jong-un's regime while opposing harsh international sanctions on North Korea in hopes of avoiding failure within the Kim regime.³⁶¹ China's success in foreign investment is pertinent to truly having open foreign investment in North Korea,³⁶² and investors are

³⁵⁵ JH Ahn, *S Korea Temporarily Closes Kaesong Industrial Complex*, NK NEWS (Feb. 10, 2016), <https://www.nknews.org/2016/02/breaking-south-korea-temporarily-closes-the-kic/> [<https://perma.cc/77XE-VT5M>].

³⁵⁶ See Euan McKirdy, *South Korean Workers Leave Kaesong Industrial Park*, CNN (Feb. 12, 2016, 3:42 AM), <https://www.cnn.com/2016/02/11/asia/south-korea-kaesong-industrial-complex-closed/index.html> [<https://perma.cc/CDT4-CG4M>].

³⁵⁷ McCurry, *supra* note 342.

³⁵⁸ *Ministry Hopes for Early Resumption of Kaesong Complex as it Marks Anniversary of Shutdown*, YONHAP NEWS AGENCY (Feb. 9, 2021), <https://en.yna.co.kr/view/AEN20210209005000325> [<https://perma.cc/82NM-SURM>].

³⁵⁹ Choe Sang-Hun, *Yoon Suk-yeol, South Korean Conservative Leader, Wins Presidency*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/world/asia/south-korea-election-yoon-suk-yeol.html> [<https://perma.cc/X8DT-MHHW>] (noting that the conservatives' victory was aided by "calls for a more confrontational stance against North Korea and a stronger alliance with the United States").

³⁶⁰ See Albert, *supra* note 147.

³⁶¹ *Id.*

³⁶² Some compare North Korea now to China in the 1980s. If North Korea were to follow China's path, it could exhibit a similar amount of economic growth and strength. See Sharp, *supra* note 117.

continuously trying to enter the North Korean market.³⁶³ One reason is that Chinese investors are seeking new business opportunities, including mining the country's rich mineral resources, ahead of international sanctions against the country eventually being lifted.³⁶⁴ However, so long as international sanctions remain, any money earned in North Korea cannot be sent to China.³⁶⁵

i. Influence on North Korea's Joint Venture Law

Enacted on September 8, 1984, North Korea's Joint Venture Law was modeled after China's successful legal and economic reforms, as reflected in the much larger nation's 1979 Law on Joint Ventures Using Chinese and Foreign Investments.³⁶⁶ Many provisions of North Korea's Joint Venture Law are, in fact, the same as that of China's;³⁶⁷ expansion of international economic cooperation and the establishment of joint ventures between Chinese and foreign companies were the goals behind China's Joint Venture Law.³⁶⁸ The response to North Korea's Joint Venture Law attracted foreign companies in the first term of its enactment, but the overall foreign response to the new law was not significant.³⁶⁹

One reason for the unfavorable foreign investment response in North Korea is that North Korea's Joint Venture Law did not provide the level of transparency that most foreign investors

³⁶³ Zhou, *supra* note 218.

³⁶⁴ *Id.*

³⁶⁵ *Id.* In particular, Chinese investors have sought to enter the North Korean market by buying real estate along the Chinese and North Korean borders in the hopes that the Hermit Kingdom would one day open, especially in more recent years. See, e.g., Amanda Lee, *The Ultimate in Speculation? Chinese Snap Up Homes in City Bordering North Korea in Bet Kim Jong-un Will Open Country Up*, S. CHINA MORNING POST (June 10, 2018, 12:00 PM), <https://www.scmp.com/business/companies/article/2149884/ultimate-speculation-chinese-snap-homes-city-bordering-north> [<https://perma.cc/RHL6-JEFQ>].

³⁶⁶ Eric Yong-Joong Lee, *Development of North Korea's Legal Regime Governing Foreign Business Cooperation: A Revisit Under the New Socialist Constitution of 1998*, 21 NW. J. INT'L L. & BUS. 199, 203 (2000).

³⁶⁷ *Id.* at 204.

³⁶⁸ *Id.*; see also CHRIS CARR & LOTUS SUN, JOINT VENTURES IN CHINA: OVERVIEW, Westlaw Practical Law (database updated Oct. 1, 2017) (noting a similarity to the North Korean Joint Venture Law that the purpose of the business must be legitimate and not harmful to China's national and social interests).

³⁶⁹ Lee, *supra* note 366, at 206.

desired.³⁷⁰ Nevertheless, despite this unfavorable outcome, North Korea appears to be expanding its goal of international economic cooperation.³⁷¹ In 2018, for example, North Korea participated in the PyeongChang Winter Olympics after first boycotting international sporting events in 1988.³⁷² South Korean President Moon Jae-in was the first South Korean president to speak directly to a stadium of North Koreans to discuss reunification and “building a new fatherland.”³⁷³ Kim Jong-un met with President Xi Jinping of China four times, including the Chinese leader visiting North Korea, which had not happened in 14 years.³⁷⁴ President Trump met with Kim Jong-un in North Korea, marking the first time a sitting American President stepped into the country and met with its leader.³⁷⁵ All of these events were unprecedented.

ii. The Chinese Business Model of Pilot Units

Similar to South Korea, China is a civil law jurisdiction that interprets franchise agreements as contractual obligations.³⁷⁶ Under

³⁷⁰ *Id.*; Lankov, *supra* note 7. North Korea may benefit from applying lessons learned in China’s Joint Venture Law. China’s Joint Venture Law calls for common governance issues to be negotiated and deliberated at the very beginning of the joint venture, taking into consideration the shareholder structure and expectations of the parties in relation to the joint venture. The parties thus take a more transparent approach to conducting business. See Yuan Wang, *Joint Ventures in China*, LEXOLOGY (Dec. 2, 2019), <https://www.lexology.com/library/detail.aspx?g=14215e6f-8f4a-48f7-9083-23e204354b29> [<https://perma.cc/39JR-MZUX>].

³⁷¹ See Lankov, *supra* note 7.

³⁷² *North Korea at the Winter Olympics: All You Need to Know*, BBC NEWS (Feb. 8, 2018), <https://www.bbc.com/news/world-asia-42770887> [<https://perma.cc/6L48-5F3Z>].

³⁷³ Kelly Kasulis, *Inter-Korean Summit Produces ‘Totally Unprecedented’ Results*, WORLD (Sept. 20, 2018), <https://www.pri.org/stories/2018-09-20/inter-korean-summit-produces-totally-unprecedented-results> [<https://perma.cc/A555-5C9S>].

³⁷⁴ Kim Tong-Hyung, *Key Moments in Kim Jong-Un’s Diplomatic Charm Offensive*, ASSOCIATED PRESS (Apr. 23, 2019), <https://apnews.com/ab9f14fcb61e45cdada2f68dc73b6178> [<https://perma.cc/N755-VJEF>].

³⁷⁵ Peter Baker & Michael Crowley, *Trump Steps into North Korea and Agrees with Kim Jong-un to Resume Talks*, N.Y. TIMES (June 30, 2019), <https://www.nytimes.com/2019/06/30/world/asia/trump-north-korea-dmz.html> [<https://perma.cc/TK6Q-YFUV>].

³⁷⁶ Paul D. Jones & Leo Xu, *Franchising in China*, LEXOLOGY (Jan. 14, 2019), <https://www.lexology.com/library/detail.aspx?g=9129ad4f-7e08-4b92-b0b8-3074a2b94973> [<https://perma.cc/6H96-E6GY>]; Paul Jones, *The Regulation of*

China's Franchise Regulation Law, a person must have at least two directly operated, company-owned stores and have operated them for at least one year to engage in franchising—a system known as the China Pilot Business Unit Law.³⁷⁷ This temporal requirement aids in determining whether a foreign franchisor is familiar with and duly organized under Chinese franchise law, and that the franchise agreement similarly meets all necessary qualifications.³⁷⁸ If North Korea decides to move toward a free market economy, it can look to the China Pilot Business Unit Law for guidance on how to protect new, domestic franchisees from a poorly planned or implemented franchise network.

While a law modeled after the China Pilot Business Unit Law might serve to protect franchisees, it might also be a barrier to entry for competent franchisors. In particular, franchisors seeking to enter China must have a mature business model and demonstrate compliance with Article 7 of the franchise regulations requiring, among other things, that a franchisor own and operate two or more franchise outlets for at least a year (more popularly known as the "2+1 Rule").³⁷⁹ According to the Ministry of Commerce, franchise outlets may be owned and operated by a franchisor's subsidiaries or, in some cases, other affiliates to meet the 2+1 Rule.³⁸⁰ The outlets may also be located outside China if operated under the same brand name.³⁸¹ For franchise outlets located outside China, franchisors

Franchising in China and the Development of a Civil Law Legal System, 2 E. ASIA L. REV. 78, 83 (2006).

³⁷⁷ Jones & Xu, *supra* note 376.

³⁷⁸ Jones, *supra* note 376, at 95-97.

³⁷⁹ *Id.*; see also AUDREY CHEN, DOING BUSINESS IN CHINA: OVERVIEW § 1, 31, Westlaw Practical Law (database updated Apr. 1, 2020) (describing a general overview of the franchise laws in China). It is important to note that Chinese courts generally agree that it is possible to have a mature system without complying with the 2+1 Rule, which in practice means that the franchise agreement will be valid but registering with the Ministry of Commerce may be problematic. Jones & Xu, *supra* note 376.

³⁸⁰ Jones & Xu, *supra* note 376. These other affiliates, as defined by the Ministry of Commerce, can be the franchisor's natural-person shareholders, parent company or wholly owned subsidiary or a company that is under common ownership or common control. DOMINIC HUI & RIBERIRO HUI, DOMESTIC AND INTERNATIONAL FRANCHISING, MASTER FRANCHISING, AND REGULATION OF FRANCHISE AGREEMENTS IN CHINA: OVERVIEW §§ 1, 4, Westlaw Practical Law (database updated Jan. 1, 2019).

³⁸¹ Paul Jones & Xin (Leo) Xu, *China: Franchise Laws and Regulations 2021*, ICLG.COM (Oct. 21, 2020), [https://iclg.com/practice-areas/franchise-laws-and-regulations/china#:~:text=have%20owned%20and%20operated%20at,2%2B1%20Rule%E2%80%9D\).&text=Corporate%20Downed%20outlets%20located%20outside,under%20the%20same%20franchise%20brand](https://iclg.com/practice-areas/franchise-laws-and-regulations/china#:~:text=have%20owned%20and%20operated%20at,2%2B1%20Rule%E2%80%9D).&text=Corporate%20Downed%20outlets%20located%20outside,under%20the%20same%20franchise%20brand) [https://perma.cc/JZN8-A2C3].

may use statements from franchise trade organizations to show compliance with the 2+1 Rule.³⁸²

c. United States

The United States may also be able to provide support to enhance foreign capital and investment in North Korea. In more recent years, the United States has been trying a different approach with North Korea: bargaining. The bargain involves substantial aid in exchange for denuclearization, reduced military forces, and movement in a direction similar to China.³⁸³ During his presidency, for example, Donald Trump made trips to North Korea and offered economic aid in exchange for the surrender of North Korea's nuclear program.³⁸⁴

Historically, North Korea "tried *modest* reforms—price liberalization, special economic zones, and limited business transactions with South Koreans—with little success."³⁸⁵ North Korea has not followed China's lead in terms of *substantial* economic reform, and the Hermit Kingdom still has astoundingly high military spending. One million of North Korea's 22 million citizens are troops; per capita, they constitute the largest military in the world, ten times the global average.³⁸⁶ Moreover, as a matter of proportionality (to its economy and its population), North Korea spends more on its armed forces than any other country,³⁸⁷ and it maintains the densest concentration of firepower in the world.³⁸⁸ Indeed, there may be an opportunity for the United States to offer

³⁸² *Id.*; Zoey Ye Zhang, *A Guide to Franchising in China*, CHINA BRIEFING (Feb. 11, 2009), <https://www.china-briefing.com/news/franchise-china-guide/> [https://perma.cc/3AZK-KRE6].

³⁸³ O'Hanlon & Mochizuki, *supra* note 21.

³⁸⁴ Sharp, *supra* note 288.

³⁸⁵ O'Hanlon & Mochizuki, *supra* note 21 (emphasis added); see Jon, *supra* note 118, at 31 ("North Korean Special Economic Zones are primarily aimed at building up economic development with the help of foreign investment, [but] foreign direct investment in [those zones] has been extremely limited, except for some project-oriented North Korean and Chinese joint ventures, and North Korean and Russian joint ventures.").

³⁸⁶ O'Hanlon & Mochizuki, *supra* note 21.

³⁸⁷ *N. Korea Ranks No. 1 in Military Spending as Percentage of GDP*, YONHAP NEWS AGENCY (Jan. 9, 2020), <https://en.yna.co.kr/view/AEN20200109007500325> [https://perma.cc/5LSC-FJBD].

³⁸⁸ *Id.*

economic and humanitarian aid in exchange for a reduction in North Korea's military forces. However, North Korea has clearly chosen its nuclear forces over the well-being of its own people, time and time again.³⁸⁹

VI. FUTURE INVESTMENT IN NORTH KOREA

a. North Korea Now

Under Kim Jong-un's father, President Kim Jong-il, as well as other North Korean leadership, efforts began to find a way to reform North Korea's economy. Kim Jong-il visited China several times, traveled to economic centers, and received briefings from Chinese economists.³⁹⁰ However, North Korea has only just begun to enact the laws needed to encourage foreign capital and investment in the country. Indeed, North Korea is unfamiliar with the free market policy it is trying to implement.³⁹¹

Success in the FETZs, which now have a limited, free market zone, is key to having North Korea fully engaged in a free market policy for foreign investments. Free market foreign investment is confined to the FETZs because the foreign investment would be subject to the government's control outside of the FETZs.³⁹² Therefore, a showing of an economic turn in the FETZs may influence North Korea to establish a free market policy throughout the whole territory of North Korea.³⁹³ However, due to the limited nature of the free market policy of the FETZs in North Korea, foreign investment is not truly incentivized in that country. The North Korean government has too much control over foreign investment

³⁸⁹ See, e.g., Benjamin Katzeff, *The Problem With Aid to North Korea Is Bigger Than Diversion*, 38 NORTH (Dec. 6, 2018), <https://www.38north.org/2018/12/bkatzeffsilberstein120618/> [<https://perma.cc/J9ET-AFTL>] (describing how humanitarian aid sent to North Korea for the North Korean people is diverted either to the military or the elites).

³⁹⁰ O'Hanlon & Mochizuki, *supra* note 21.

³⁹¹ Yoon, *supra* note 228, at 330.

³⁹² *Id.* at 331.

³⁹³ In 2014, North Korea had increased its amount of FETZs to four different zones. It also enacted the Law on the Kaesong Industrial Zone, which allows South Korean companies to invest within North Korean borders. NORTH KOREA: THE POLITICS OF REGIME SURVIVAL 43 (Young Whan Kihl & Hong Nack Kim eds., 2005).

franchising opportunities, making it risky for foreign franchisors to invest in the North Korean market.³⁹⁴

Furthermore, North Korea's domestic legislation and institutions remain a big concern as it lacks policy on matters such as mergers and acquisitions, anti-monopoly efforts and public-private partnership contracts that involve foreign investment.³⁹⁵ The North Korean judicial system has consistently been criticized for its lack of impartiality among arbitrators that oversee the dispute settlement mechanisms available to foreign investors,³⁹⁶ and as a non-party to major international institutions such as the Multilateral Investment Guarantee Agency and the U.N. Convention on the Recognition of Foreign Arbitral Awards (New York Convention), foreign investors lack the sort of risk insurance needed to support the recognition and enforcement of judicial remedies.³⁹⁷ Ironically, the seven reasons for recognition and enforcement of a foreign arbitration awards under North Korea's Foreign Economic Arbitration Act are almost consistent with that of the New York Convention.³⁹⁸ However, the seventh reason for refusal is still an obstacle given its room for broad interpretation: refusal on the grounds that an award would violate "the sovereignty, safety and social order of North Korea"; in practice, any foreign award runs afoul of this reason if interpreted arbitrarily.³⁹⁹ North Korea must develop a better legal system to protect free market foreign investment, create better incentives to persuade foreign investments, and allow foreign investors, such as franchisors, more control over their investments.

³⁹⁴ *Id.* at 40-41 ("[T]he regime is not prepared to abandon the socialist economic principles of management and self-reliance. The leadership is afraid of facing the so-called reform dilemma that will unleash popular demands for a better life once doors are open and reform measures are introduced.").

³⁹⁵ Xuechan Ma & Anran Zhang, *Be the First Investor to Eat Crabs in North Korea: Tips for Bilateral Investment Treaties*, 22 J. WORLD INV. & TRADE 181, 188-189 (2021).

³⁹⁶ *Id.* at 215.

³⁹⁷ *Id.* at 219.

³⁹⁸ Jon, *supra* note 118, at 30.

³⁹⁹ *Id.*

b. North Korea Tomorrow: It Takes a World “Village”

There is an old African saying, “it takes a village to raise a child.”⁴⁰⁰ Currently, North Korea’s economy is suffering, and so are its people. A brighter future for the country, with economic liberalization and enhanced foreign capital, investment, and franchising may require not only changing the country’s laws and the attitude of its government toward foreign influence, but may also require a multilateral effort (the work of the world “village”) – not just North Korea and its neighbors, not only the United States, but all major trading nations.

As an “isolated, xenophobic nation,”⁴⁰¹ North Korea may be little more than a paper tiger – something that looks scary but has no real bite.⁴⁰² Despite its large military spending, it is unlikely that North Korea would take military actions that could escalate to a full-scale war with the United States or its South Korean and Japanese allies.⁴⁰³ Such a decision could be so detrimental to the North Korean regime’s own interests,⁴⁰⁴ particularly because its already weak economy cannot support war-related resources;⁴⁰⁵ North Korea’s million-man army is poorly equipped and lacks the modern weaponry South Korean soldiers use.⁴⁰⁶ Furthermore, its already

⁴⁰⁰ HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* 12 (1996).

⁴⁰¹ Glen Kessler, *An Early Test for Obama’s Engagement Policy*, WASH. POST (May 26, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/25/AR2009052501961.html?sid=ST2009052502476> [https://perma.cc/H9DW-RBB9].

⁴⁰² Chris Seck, *North Korea, Not America, Is a Paper Tiger*, STAN. REV. (Feb. 13, 2009), <https://stanfordreview.org/north-korea-not-america-paper-tiger/> [https://perma.cc/9Y8H-QFAC].

⁴⁰³ *Id.*

⁴⁰⁴ In a Tweet, President Trump once said that the United States will be forced to “totally destroy” North Korea unless Pyongyang backs down from its nuclear challenge, mocking North Korean leader Kim Jong-un as a “rocket man” on a suicide mission. William Cummings, *Trump Threatens ‘Little Rocket Man,’ Says Kim May ‘Not Be Around Much Longer’*, USA TODAY (Sept. 23, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/09/23/trump-threatens-little-rocket-man-says-kim-may-not-around-much-longer/697452001/> [https://perma.cc/U36G-9JUW].

⁴⁰⁵ See Seck, *supra* note 402 (comparing North Korea’s \$40 billion gross domestic product and \$6 billion military budget comparison to South Korea’s \$1 trillion economy and \$26 billion military budget).

⁴⁰⁶ *Id.* While North Korea outnumbers South Korea in terms of armed forces, the armament between the two countries is very lopsided. Much of North Korea’s weaponry dates to the 1950s and 1970s. See Kim Min-Seok, *The State of the North Korean Military*, CARNEGIE ENDOWMENT INT’L PEACE (Mar. 18, 2020),

weak economy is vulnerable to a world united in imposing even more sanctions in the event of a North Korean strike against South Korea, Japan, or the United States.⁴⁰⁷ Accordingly, a scale-back of military spending and an increase in spending on human capital and modernization may be the first step of many toward North Korea's attracting more foreign capital and investment.

North Korea also needs to clean up its image. Although North Korea's true interests remain unclear, it is likely that the country wants formal guarantees of security and diplomatic relations along with the benefits of international trade.⁴⁰⁸ These goals, however, will not be achieved so long as the country continues to take actions that make it look like a bad or risky place to do business. For example, a House bill in 2010 found that North Korea had provided "missile technology and training" to the Iran surrogates of Hezbollah and Hamas; assisted Syria in the construction of a nuclear reactor in the Syrian Desert; refused to address in "a humane and sincere manner" the abduction of Japanese citizens; defied the international community's efforts to end nuclear proliferation; and failed to make "substantial progress" on human rights issues, including releasing and accounting for abductees, decriminalizing political expression, and reforming its labor camp system.⁴⁰⁹ As long as such dire accusations continue with no corresponding Pyongyang effort to rectify its transgressions, it will be nothing more than a fleeting ambition for North Korea to be a place where foreign investors and franchisors want to do business.⁴¹⁰ In fact, limiting its contacts with the outside world only works to discourage foreign investor confidence. A strong desire for self-reliance in addition to the ever-growing number of international sanctions makes doing business in

<https://carnegieendowment.org/2020/03/18/state-of-north-korean-military-pub-81232> [<https://perma.cc/LDX3-4NGW>].

⁴⁰⁷ The West's reaction to the 2022 Russian invasion of Ukraine may prove to be a warning lesson even for a bellicose Kim Jong-un, especially if he believes China would feel compelled to constrict its lifeline to Pyongyang in the aftermath of a unilateral missile strike or other military action by Kim's armed forces.

⁴⁰⁸ Seck, *supra* note 402. There are also some ethical concerns about conducting business in North Korea. Many foreign investors say that "ethical concerns about doing business with the government of Kim Jong-un are outweighed by the benefits of helping boost the North Korean economy." *How Does North Korea Do Business Under Sanctions?*, BBC NEWS (Dec. 29, 2017), <https://www.bbc.com/news/world-asia-pacific-42314219> [<https://perma.cc/D6D8-NRP8>].

⁴⁰⁹ H.R. 5350, 111th Cong. § 2 (2010).

⁴¹⁰ Under organizational selection theory, foreign franchisors should match investors' sentiments and goals for investing with those of domestic partners, managers, or key employees. *See* Watson et al., *supra* note 269.

Northeast Asia's "last economic frontier" particularly challenging without a certain degree of protective safeguards.⁴¹¹

i. South Korea

South Korea may be the best positioned, by way of example, and geographic proximity, to move North Korea down the pathway of enhanced foreign capital and investment. Historically, since the Great Powers divided the Peninsula in 1945, the relationship between the two Koreas "has run hot and cold".⁴¹² In 1998, the President of South Korea established a Sunshine Policy with North Korea to establish full economic cooperation between the two countries,⁴¹³ but this was seen "as appeasement" in early 2000s when North Korea admitted to enriching uranium.⁴¹⁴

Despite the two government's history of ongoing tension, South Korea continues to seek a policy of engagement with North Korea.⁴¹⁵ Both countries acknowledge their strong ethnic ties but remain torn along political lines;⁴¹⁶ South Korea, at times, has viewed North Korea as nothing more than a post-World War II communist satellite,⁴¹⁷ while North Korea has viewed South Korea as a puppet regime of U.S. imperialism.⁴¹⁸ Notwithstanding these perceptions, cooperation and normalized relations between the two countries is an essential first step in doing business in North Korea, and South Korean franchisors could pave the way for other foreign franchisors

⁴¹¹ Ma & Zhang, *supra* note 395, at 183.

⁴¹² Valerie Lynn, *North Korea: U.S. Foreign Policy Options*, in PERSPECTIVES ON U.S. POLICY TOWARD NORTH KOREA: STALEMATE OR CHECKMATE? 29, 36 (Sharon Richardson ed., 2006).

⁴¹³ *Id.* at 36-37.

⁴¹⁴ *Id.*

⁴¹⁵ See Gi-Wook Shin & Paul Y. Chang, *The Politics of Nationalism in US-Korean Relations*, in THE FUTURE OF US-KOREAN RELATIONS: THE IMBALANCE OF POWER 46, 50-52 (John Feffer ed., 2006). Recently, in a bilateral meeting between President Joe Biden and South Korea's President Moon Jae-in, both countries expressed willingness to engage diplomatically with North Korea in exchange for a complete denuclearization of the Korean Peninsula. Owen Churchill & Mark Magnier, *Biden, Moon Hope to Engage Kim - US and South Korea Say They Are Willing to Take 'Pragmatic Steps' to Reduce Tensions with North Korea*, S. CHINA MORNING POST (May 23, 2021), <https://www.pressreader.com/china/south-china-morning-post-6150/20210523/281694028603356> [<https://perma.cc/7QSD-QYHB>].

⁴¹⁶ Shin & Chang, *supra* note 415, at 50.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

to do the same. If relations between the two nations are to improve, it will have to be through establishing relationships among the people of each nation. South Korean leadership will have to focus on cultural history and ethnic similarities to get the *people* of each country to relate to each other beyond political lines. A unified populace in the Korean Peninsula could dramatically improve North and South Korean relations. Achieving this goal, however, may require North Korea to fully open the country's borders—a probable roadblock not likely to be overcome without political regime change in the country.

ii. China

As North Korea's closest ally and largest economic supporter since the fall of the Soviet Union,⁴¹⁹ China is in a unique position to influence (or, perhaps, pressure) economic reform for foreign capital and investment in North Korea. China has particular leverage over North Korea because the two countries have a long history of relations, and China is the main supplier of oil and food to North Korea.⁴²⁰ For example, China provides between 70% and 90% of North Korea's annual energy supply⁴²¹ and 38% of North Korea's imports.⁴²² Since the Cold War, China has supported North Korea both ideologically and militarily because North Korea serves "as a buffer zone"⁴²³ between "communist," authoritarian China and the capitalist, democratic nations of South Korea and Japan.⁴²⁴ Given this relationship, foreign investors and franchisors may have to look to China to exert the pressure necessary to improve North Korea's relationship with the world. China's economic influence over North Korea, alone, may be enough to convince North Korea to abandon its nuclear program.⁴²⁵ North Korea is an energy-deprived country,

⁴¹⁹ Lynn, *supra* note 412, at 37-38.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ Andrew Salmon, *China's Support of North Korea Grounded in Centuries of Conflict*, CNN (Nov. 26, 2010, 7:03 AM), <http://www.cnn.com/2010/WORLD/asiapcf/11/26/china.north.korea.ties/index.html> [<https://perma.cc/G5LP-QRY5>].

⁴²⁴ See Lynn, *supra* note 412, at 38.

⁴²⁵ *Id.*

and China could use its leverage as an energy supplier⁴²⁶ to make it economically infeasible for North Korea to continue its current lackluster laws and policies toward foreign capital and investment.

China's economic influence over North Korea could dissipate if China decided that its relationship with North Korea is more of a liability than an asset.⁴²⁷ China may also have an interest in seeing North Korea transform itself, as China has, into a viable trade partner in the international political economy.⁴²⁸ Even further, the poor economic conditions in North Korea have caused a substantial immigration problem at China's borders.⁴²⁹ It is likely that a more economically prosperous North Korea would lower unwanted immigration flow into China.

Like the United States, China has an interest in preserving peace in the Korean Peninsula and improving North Korea's relations with the world abroad. War over Korea, therefore, is not an option as China has historically maintained a policy of stable relations with any country on its borders.⁴³⁰ China may also believe that its position in North Korea is strengthened because it has long subsidized the North Korean economy.⁴³¹ While China's financial support does not equate to Chinese economic or political control, China may thus still exert some influence over the policies and strategy of the Kim regime.⁴³² Although China is the second largest

⁴²⁶ *Id.*

⁴²⁷ In 2006, commentators believed that if North Korea's actions ever threatened the valuable relationships China had forged with the United States and South Korea, China would sever its ties with North Korea. *See generally id.* (explaining China's parallel interests). An example of U.S. influence over China's relations with North Korea was seen during the 2002 nuclear crisis when the United States pressured China to initiate the Six-Party Talks. *See generally id.* (explaining the Six Party Talks). As North Korea becomes more hostile, it is probable that China will need to host more Six Party Talks in the future *See DPRK Holds Key to Reopening Six Party Talks*, CHINA DAILY (Jan. 3, 2011), http://www.chinadaily.com.cn/world/2011-01/03/content_11788296.htm [<https://perma.cc/EQ84-F79Y>].

⁴²⁸ Lynn, *supra* note 412, at 38.

⁴²⁹ *Id.* The U.S. State Department estimates that there are between 30,000-50,000 North Koreans in China. RHODA MARGESSON, EMMA CHANLETT-AVERY & ANDORRA BRUNO, CONG. RSCH. SERV., RL34189, NORTH KOREAN REFUGEES IN CHINA AND HUMAN RIGHTS ISSUES: INTERNATIONAL RESPONSE AND U.S. POLICY OPTIONS 4 (2007). Some non-governmental organizations put the number as high as 300,000. *Id.*

⁴³⁰ Salmon, *supra* note 423.

⁴³¹ *Id.*

⁴³² *Id.*

creditor of the United States,⁴³³ it is still likely that the United States will continue to pressure China to be more forceful with North Korea.⁴³⁴

iii. Japan

With its own robust network of international Japanese franchisors and strong relations with the western world,⁴³⁵ Japan may also be in a position to offer North Korea foreign capital, investment, and franchising. However, Japan's legacy of colonization and oppression of the Korean Peninsula has historically tainted Japanese-Korean relations.⁴³⁶ In 1965, Japan normalized relations with South Korea in an attempt to overcome its historical legacy and create economic cooperation.⁴³⁷ In 2002, Japan subsequently attempted to do the same for North Korea through the Japan-North Korea Pyongyang Declaration.⁴³⁸

A stumbling block to normalized relations between Japan and North Korea has been the growing Japanese public resentment toward the Hermit Kingdom for its abduction of at least thirteen

⁴³³ As of November 2022, the three nations with the largest holding of U.S. treasury securities, by far, were Japan (\$1.082 trillion), China (\$870 billion), and the United Kingdom (\$646 billion), with those three nations holding collectively over 36% of the \$7.2 trillion in debt held by foreign countries. *Major Foreign Holders of United States Treasury Securities as of November 2022*, STATISTA (Jan. 30, 2023), <https://www.statista.com/statistics/246420/major-foreign-holders-of-us-treasury-debt/> [<https://perma.cc/J4E9-RNWF>]; Anthony Faiola & Zachary A. Goldfarb, *China Tops Japan in U.S. Debt Holdings*, WASH. POST (Nov. 19, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111803558.html> [<https://perma.cc/H8UB-38HZ>] (offering an historical view).

⁴³⁴ See generally U.S.-CHINA ECON. & SEC. REV. COMM'N, 109TH CONG., REP. TO CONG. 143-44, 161-64 (Comm. Print 2005) (problematizing some of China's support to North Korea and assessing China's importance to achieving a strategically advantageous outcome in North Korea).

⁴³⁵ See *Japan-Franchising*, INT'L TRADE ADMIN. (Sept. 6, 2019), <https://www.stopfakes.gov/article?id=Japan-Franchising> [<https://perma.cc/68TV-ETMU>] (giving an example of Japanese franchising in its relations with the United States).

⁴³⁶ Lynn, *supra* note 412, at 39.

⁴³⁷ *Id.*

⁴³⁸ Yoshihide Soeya, *Democratization in Northeast Asia and Trilateral Cooperation*, in THE FUTURE OF U.S.-KOREA-JAPAN RELATIONS: BALANCING VALUES AND INTERESTS 85, 90-91 (Tae-hyo Kim & Brad Glosserman eds., 2004); YOICHI FUNABASHI, THE PENINSULA QUESTION: A CHRONICLE OF THE SECOND KOREAN NUCLEAR CRISIS 1-2, 91 (2007).

Japanese citizens during the 1970s and 1980s.⁴³⁹ In 2002, the North Korean leadership admitted to the abductions and gave an explanation as to what happened to the abductees.⁴⁴⁰ Public opinion rejected this explanation,⁴⁴¹ which informed Japan's decision to delay providing North Korea with a \$10 billion humanitarian aid package following the 2002 Pyongyang Declaration.⁴⁴²

Not surprisingly, due to these political and social tensions between Japan and North Korea, trade relations between the two countries have suffered. In addition, Japan has also increased law enforcement efforts to prevent the illegal smuggling of pharmaceuticals,⁴⁴³ drugs, and counterfeit money into Japan from North Korea.⁴⁴⁴ These efforts have resulted in vigorous inspections and occasional detention of ships traveling from North Korea to Japan,⁴⁴⁵ and essentially have caused trade between the two countries to remain almost nonexistent.

The threat of North Korea's nuclear program is also particularly acute for the Japanese. Japan's geographic proximity to North

⁴³⁹ Lynn, *supra* note 412, at 39.

⁴⁴⁰ *Id.* COMMITTEE FOR HUMAN RIGHTS IN NORTH KOREA, TAKEN! NORTH KOREA'S CRIMINAL ABDUCTION OF CITIZENS OF OTHER COUNTRIES 9 (2011).

⁴⁴¹ Lynn, *supra* note 412, at 39.

⁴⁴² *Id.* In fact, Japan's Prime Minister, Junichiro Koizumi, would never have signed the 2002 Pyongyang Declaration unless Kim Jong-il not only admitted that North Korea committed the abductions but also *apologized* to the Japanese people for the abductions, which, up until that day, had been wholly unacknowledged by the North Korean leadership. See FUNABASHI, *supra* note 438, at 1-2. Needless to say, the abduction of the Japanese citizens was a huge sticking point with respect to Japanese-North Korean relations in Japan's court of public opinion. See Lynn, *supra* note 412, at 39.

⁴⁴³ See James Brooke, *Japan Detains 2 North Korean Ships, Part of Pressure Strategy*, N.Y. TIMES (June 11, 2003), <https://www.nytimes.com/2003/06/11/world/japan-detains-2-north-korean-ships-part-of-pressure-strategy.html> [<https://perma.cc/3B66-5U2G>] (explaining Japan's detention of two North Korea ships to prevent drug trafficking); Kim R. Holmes & James Jay Carafano, *Defining the Obama Doctrine, Its Pitfalls, and How to Avoid Them*, HERITAGE FOUND. (Sept. 1, 2010), <https://www.heritage.org/global-politics/report/defining-the-obama-doctrine-its-pitfalls-and-how-avoid-them> [<https://perma.cc/5KFJ-AFEW>] (referencing North Korean illegal activities including "the counterfeiting of currency and pharmaceuticals, the production and distribution of narcotics, and money laundering" and arguing that international law should be enforced to prevent such activities).

⁴⁴⁴ See Brooke, *supra* note 443.

⁴⁴⁵ Lynn, *supra* note 412, at 39.

Korea⁴⁴⁶ coupled with North Korea's ability to target and reach Japanese cities with its nuclear, biological, and chemical weapons⁴⁴⁷ has been particularly worrisome for Japanese military strategists;⁴⁴⁸ Japan does not have its own nuclear arsenal to protect itself.⁴⁴⁹ Japan is the only country in the world to have suffered the grave consequences of having nuclear weapons actually used against it, and, as a result, Japan's political culture is, perhaps, particularly "anti-nuke."⁴⁵⁰ Although Japan is satisfied that it is protected from any potential nuclear threats due to its security alliance with the United States,⁴⁵¹ North Korea and the proliferation of North Korean missiles still pose a major threat to Japan.⁴⁵²

Japan, like the United States, supports resolutions to maintain peace in the region⁴⁵³ while consistently supporting both dialogue and pressure to compel North Korea to cease its nuclear ambitions.⁴⁵⁴ Despite the tragic history between the two countries, Japan's offering the carrot of consistent and strong Japanese foreign capital, investment, and franchising in the country could be enough incentive, especially if combined with similar inducements from

⁴⁴⁶ *Nuclear Weapons Program - Japan*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/wmd/world/japan/nuke.htm> [<https://perma.cc/FVT2-PG8U>] (last modified Oct. 2, 2020).

⁴⁴⁷ See Lynn, *supra* note 412, at 40 (explaining an example of missile launch threats).

⁴⁴⁸ *Nuclear Weapons Program - Japan*, *supra* note 446.

⁴⁴⁹ *Id.*

⁴⁵⁰ Graham Allison, *Nuclear Disorder: Surveying Atomic Threats*, 89 FOREIGN AFF. 76, 83-84 (2010).

⁴⁵¹ *Id.* at 83; *Article 9 & the U.S.-Japan Security Treaty, Overview of Japan's Postwar Defense Policy*, ASIA FOR EDUCATORS, http://afe.easia.columbia.edu/special/japan_1950_usjapan.htm#top [<https://perma.cc/WU72-QYYX>] ("On the other hand, the Japanese government appreciates, especially after the destruction of Hiroshima and Nagasaki, the need to deter potential opponents from using nuclear weapons against it. For this it relies on the strategic arsenal of the United States, represented particularly by the 7th Fleet; and the public, while uneasy about the visits of the 7th Fleet to Japanese ports, has come increasingly to accept them.").

⁴⁵² See *North Korea Threatens Japan with 'Real Ballistic Missile'*, BBC NEWS (Nov. 30, 2019), <https://www.bbc.com/news/world-asia-50613051> [<https://perma.cc/E8C4-VPUP>] (giving an example of a recent threat).

⁴⁵³ Lynn, *supra* note 412, at 40.

⁴⁵⁴ See, e.g., *North Korea Threatens Japan with 'Real Ballistic Missile'*, *supra* note 452 (describing how in May 2019, Shinzo Abe, Japan's Prime Minister, said "he was ready to meet Mr. Kim 'without conditions', raising hopes of renewed negotiations on the nuclear issue as well as on the lingering historical issue of the North's abduction of Japanese citizens").

other economic powerhouses, for North Korea to open its borders and reform its economic policies.

VII. PROPOSALS AND CONCLUSIONS

The global community has both economic and security reasons for normalizing relations with North Korea in the form of foreign capital and investment, including franchising. Following the EU and North America, Northeast Asia is the third most prosperous zone of economic activity in the world.⁴⁵⁵ China, Japan, and South Korea account for nearly a quarter of the world's output with their combined capital surplus running at an annual rate of \$400 billion per year.⁴⁵⁶ Adding North Korea to the fold and helping the nation become more hospitable to U.S. investors and franchisors will add millions of new potential customers to an almost completely untapped market. Given that in South Korea nine of the top 61 franchise brands have been U.S. franchisors,⁴⁵⁷ the United States definitely has an interest in protecting and potentially expanding its economic stake in this part of the world.

These stakes, however, must be reinforced by legal protections and procedural safeguards recognizable under an independent and impartial judicial system. If North Korea opens its markets to the rest of the world, foreign investors will need some assurance that the presently unchecked courts interpreting North Korean foreign investment laws do not act arbitrarily or under the control of other government branches, particularly the supreme leader.⁴⁵⁸ Risk prevention is particularly important given that the Korean War has not formally ended; there must be a guarantee from North Korea that it will not use the ongoing war or other civil disturbances as an excuse to circumvent compensatory obligations to foreign

⁴⁵⁵ Salmon, *supra* note 21.

⁴⁵⁶ Michael Ivanovitch, *Business Is Booming Between China, Japan and South Korea – the US Should Get In on It*, CNBC (Nov. 27, 2017, 12:32 AM), <https://www.cnbc.com/2017/11/27/us-should-get-in-on-china-japan-and-south-korea-soaring-business-commentary.html> [<https://perma.cc/FJ4X-CY5Z>].

⁴⁵⁷ Jinjoo Lee, *Korea – Franchising*, EXPORT.GOV (Nov. 21, 2017, 8:17 PM), <https://2016.export.gov/southkorea/marketreports/2017franchising/index.asp> [<https://perma.cc/T3GE-3AZS>].

⁴⁵⁸ See Jon, *supra* note 118, at 32 (stating that “[o]nly an independent court system [can] keep lawmakers and the country’s top leaders in check to prevent abuses of power and human rights” and arguing that the absence of such prevention and protection has “hindered trade and economic development”).

investors.⁴⁵⁹ Developing North Korea's economic infrastructure must include some level of fairness and transparency; coupled with investor due diligence regarding contractual exit rights and foreign arbitration remedies, the applicable law will need to keep foreign investments safe.⁴⁶⁰

This legal, judicial, and economic infrastructure will also be a critically important means of safeguarding the rights of North Koreans themselves. It could be similar to the unconscionability doctrine in contract law, but more closely linked, one might say, to the East German experience as it quickly and dramatically merged with the larger West German polity, legal framework, and economy. The German word, "*Sittenwidrigkeit*" is used to describe the "overall character of the business" and how unequal bargaining powers fuel deceptive partnerships with expectedly gullible and inexperienced groups of interested parties.⁴⁶¹ North Korean insecurities related to actual, individual ownership of assets such as pieces of land or businesses are a consequence of living in a country where essentially everything has historically been (and remains) state-owned; its highly-centralized history has most likely limited the extent to which North Koreans perceive foreign trade and private ownership. South Koreans arguably stand in a superior bargaining position given that country's unencumbered, decades-long access to the world markets.

In comparison to their southern neighbor's sophisticated, savvy citizens, most North Koreans have lived in total isolation (in a physical, cultural and economic sense). This leaves North Koreans more vulnerable to dubious business practices with more experienced partners.⁴⁶² Therefore, the North Korean judicial system

⁴⁵⁹ See generally *id.* ("North Korea must establish an independent judicial system to quickly catch up with the rest of the world once it opens its markets.").

⁴⁶⁰ See generally *id.* at 31 ("Whether the North Korean Special Economic Zones are successful depends on how the administrative organization could function on a self-regulatory basis, balancing between the investment efficiency required by the North Korean authorities and the expected income by foreign investors. The key for North Korea's economic development is well-organized infrastructure, including relevant laws and regulations with fairness and transparency, which ensures safe investment and operation by foreign investors.").

⁴⁶¹ Michael Martinek, *Franchise Sales in the New Federal States: On the Suitability of German Franchise Law for the East*, 9 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 129, 129-40 (1992).

⁴⁶² *Id.* ("Exploitative franchisors implement exorbitant contractual penalties and other disciplinary measures in the franchise contracts for minor breaches of contract . . . The 'lure of franchising', quick profits without risk, little initial capital and the freedom to run an independent company, evidently seduce many business

should reflect a consideration of economic knowledge gaps while still maintaining the level of impartiality necessary to effectuate equal distribution of economic protection under foreign investment law, particularly if the country intends to remain a non-party to the international institutions that would otherwise recognize and enforce judicial remedies in this context.

U.S. investment and franchising in North Korea, on any level, necessarily starts and ends with North Korea abandoning its nuclear program. Accordingly, so long as North Korea has nuclear weapons, it remains a threat to the United States, U.S. business interests, and its South Korean and Japanese allies in the region. Hostilities among the United States, North Korea, China, and Japan could have a devastating impact on the world economy by slowing, stifling, or even ceasing trade relations in the region.⁴⁶³ If North Korea appears perpetually on the brink of nuclear war, the United States may need to develop a more realistic means of asserting its position with respect to nuclear weapons in North Korea. North Korea's indifference to the many sanctions imposed upon it has led many to believe that denuclearization is unlikely to happen any time soon. Some have suggested taking an "action-for-action" approach with incremental benchmarks that could help both sides better understand each other's negotiating positions and reasonable expectations moving forward.⁴⁶⁴ For example, easing sanctions in exchange for reducing North Korean military force on the border, particularly the "shoot on sight" policy currently employed, may give way to more, albeit small, improvements over time.⁴⁶⁵

Having given peace a chance, North Korea could adopt, in actual practice rather than just in form, foreign investment laws that mirror or at least incorporate the experience of some of East Asia's dynamic

people to rashly participate in a system with dubious business practices and without sufficient fundamentals.").

⁴⁶³ If the COVID-19 pandemic is any indication as to how a crisis in this region might look, then look no further than the growth rate. During 2020, East Asia and Pacific saw an estimated growth rate of 0.9%, which is equivalent to the economic numbers of the region in 1967. WORLD BANK, FROM CONTAINMENT TO RECOVERY: ECONOMIC UPDATE FOR EAST ASIA AND THE PACIFIC xii (2020).

⁴⁶⁴ MIA COLMAN, HARVARD MODEL CONGRESS, UNITED STATES-NORTH KOREA RELATIONS 8-9 (2022), <https://static1.squarespace.com/static/5cb7e5637d0c9145fa68863e/t/617f80d88a6dc90073275344/1635746008946/HouseFA1.pdf> [<https://perma.cc/EY4L-CWC8>].

⁴⁶⁵ *Id.* at 9 ("Liberals are more likely to agree with this incremental approach, while conservatives may feel it is not sufficient or does not address the urgency of the situation in North Korea.").

economies, such as South Korea and China.⁴⁶⁶ There are proven methods that exist to bring business to North Korea, but the impetus for such improvements has to come from within North Korea itself. Other East Asian nations, especially Japan,⁴⁶⁷ and other major economic powers, such as the United States, can certainly play an important role in the opening of North Korean markets,⁴⁶⁸ but history, culture, and geography point to South Korea and China as its most needed outside agents for change. Still, the Hermit Kingdom's brother nation on the Peninsula, South Korea, and its nearby, hugely important patron state of China can only proceed so far without North Korea's taking seemingly irreversible steps to open its economy.

While foreign investors may encounter ethical and ideological hurdles to expansion in North Korea, those contemplating such business ventures should conduct their due diligence, including assurance that there are, if need be, clear, appropriate, and enforceable contractual exits. Continuing, extreme economic and political uncertainties in the region would almost guarantee serious market fluctuations. However, a back-and-forth process between North Korea and sanctioning authorities (the United States and the United Nations) could - over time - improve matters considerably. As North Korea frees its markets and otherwise loosens its controls, the corresponding reduction of sanctions would in turn open North Korea to greater investment from surrounding countries. Even wary franchisors and other investors in the United States could see opportunities ahead; a cycle of improving diplomacy, better business, and, presumably, prosperity for North Korea's people would, one hopes, take root and endure.

Peaceful relations, or at least less militarism and security threats on the Korean Peninsula, would benefit, first and foremost, the people of North Korea. The resulting growth of commerce in North Korea, including franchised enterprises from abroad and - in time - domestically grown networks, could be at the fore of reconciliation for long-time enemies and a boon in business for all countries in Northeast Asia as well as the United States. Although not without some reservations, North Korean economists have acknowledged the general importance of foreign trade and investment as a means

⁴⁶⁶ See *supra* Part V, Section VI.b.

⁴⁶⁷ See *supra* Section VI.b.iii.

⁴⁶⁸ See *supra* Section V.b.iii.

of generating technological spillovers and economic growth.⁴⁶⁹ This economic opening via the “modernization-by-globalization” approach appears to *not* run afoul of the self-reliance principles of *juche*, although it remains unclear whether this is a true signal of ideological departure in favor of something else.⁴⁷⁰ Franchising could, as it has elsewhere, foster North Korea’s long-term integration into the world economy amid further participation in an efficient and fair commercial law environment. Driven by multilateralism and mutual cooperation, the rising tide of franchised and other business opportunities may ultimately lift all North Korean “boats” while leaving the missiles behind.

⁴⁶⁹ Alexander Kriebitz, *North Korea’s Knowledge Economy and Foreign Direct Investment*, 16 N. KOR. REV. 7, 18 (2020).

⁴⁷⁰ *Id.* (“KISU Journal articles attribute the growth in Asia in the 20th century to economic opening and highlight the concentration of investment in developing nations, which illustrates that foreign investment is not perceived necessarily as a threat or a breach of the self-reliance principle.”).