

資產流動化

法的問題

(The Enlarged Applicability of Structured Financing in Korea)

(Park, Whon II)

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資產流動化

法的問題

I.

가 . 資產流動化
(asset-backed securitization: ABS)¹⁾ 가 .²⁾

成業公社³⁾가 公的資金 1998 9 16 「資產流動化
法律」(“ ”) .⁴⁾

5)

社債市場

가

ABS .⁶⁾

1) 破産 (bankruptcy remote) ‘特殊目的機構’(special purpose vehicle: SPV) 構造化 “ ” “ABS” ‘構造化金融’(structured financing)

2) , “IMF 協約 金融構造調整 問題點”, 「 」 35 1 (, 2000) 52 55

3) 成業公社 1999 12 31 「 「 」

4) (KAMCO) 1999.12.31() 2000.1.21 根抵當權附

5) , 社債 法制 紙上會社(paper company) 特例 , 租稅

6) 公示效果 1998.6.2 “ ” 三權分立 가 .
ABS- 「 (, 1999) 25 32 ;
/ , 「 」, KERI 2000-03 (, 2000), 5 ; , 「
」 (, 1998) 88 140 .

II. 流動化證券 發行現況

1. 流動化證券

2000

가 < 1> 2000 49 3,832

가 7 가 85%

가 58 6,628 69.9%

가 2000 80 154 1999 20 , 32

가 , 2000 186 56 1,541

< 1>

流動化證券

會社債市場

(:)

	1999			2000						
ABS		44,447 (74.5%)	15,204 (25.5%)	59,651 (100%)	409,944 (87.2%)	60,433 (12.8%)	470,377 (100%)	365,497 (822.3%)	45,229 (297.5%)	410,726 (688.5%)
	1	-	8,058	8,058	12,160	11,295	23,455	12,160 (-)	3,237 (40.2%)	15,397 (191.1%)
		44,447 (65.6%)	23,262 (34.4%)	67,709 (100%)	422,104 (85.5%)	71,728 (14.5%)	493,832 (100%)	377,657 (849.7%)	48,466 (208.3%)	426,123 (629.3%)
	306,714 (100%)			586,628 (100%)			279,914 (91.3%)			
	2	262,267 (85.5%)		176,684 (30.1%)		85,583 (32.6%)				
	ABS 3	44,447 (14.5%)		409,944 (69.9%)		365,497 (688.5%)				

: 2001.1.29 . <<http://www.fss.or.kr>>

: 1)

2)

3)

, SPC

< 1> 7) 債券 가 (95.3%) , (87.2%) 2000 債券擔保附證券(collateralized bond obligation: CBO) 27 7,227 CBO (47.0%) 2000 .

< 2> 2000 種類別 · 發行方式別 流動化證券 (:)

									()
	307,715	35,191	342,906	102,229	25,242	127,471	409,944	60,433	470,377 (95.3%)
	12,160	4,479	16,639	-	1,301	1,301	12,160	5,780	17,940 (3.6%)
	-	-	-	-	5,515	5,515	-	5,515	5,515 (1.1%)
	319,875	39,670	359,545 (72.8%)	102,229	32,058	134,287 (27.2%)	422,104 (85.5%)	71,728	493,832 (100%)

: < 1> .
: (KoMoCo)가
MBS() 3 (1 2,789) .

信用補強(credit enhancement) .
8) 1999 (83.2%, 16.8%)
10% 2000 (credit
crunch) AAA ,
(credit limit)

7) 特殊目的機構 , ‘Special Purpose Vehicle(SPV)’ ‘Special Purpose
Company(SPC,)’ 法的
實體(legal entity) ‘ 手段 容器’ .
8) 3
(internal credit enhancement) 가 .
, SPV
(
, (escrow account) (), SPV
() , 157 168 .

가
 가 1999 2000 (80.2%)
 9)

2. 流動化證券市場

2.1. 流動化證券

2000

10) , IMF (non-performing
 loan: NPL) (capital adequacy ratio; “BIS ”)
 가

11)
 , 國債 (flight to quality) 가
 가
 國債 가

, 投信圈 , 債券時價評價 化
 (junk bond)
 (secondary CBO) (primary CBO)

9) CBO가 , 數種 (senior/subordinated bonds) 가

10) 2001.1.29 . <<http://www.fss.or.kr>>

11) 1999 15 28,510 , 2000
 21 48,445 (13 2 1,965) ABS

相生(win-win)

()

가 가

,12)

IMF

流入

(primary) CBO

가

2.2 流動化證券

CBO가

. 2000

CBO 55 27 7,227

13)

58.9%

, 2000

59 11 5,687

가

.14) 2000

CBO

12) 不實

, 無收益

가 가

13)

Primary CBO가 21

7 3,073

Secondary CBO가

34

20 4,154

. Primary CBO

2000 8

CBO 22

17 9,923

Secondary CBO

, 7 7,490

(43.1%)

CBO

14)

가

가

ABS

(2000.1.21

가

2 2

).

1999 12

2,278

(

1,900

,

378)

. 2000 5

179

(

125

,

54)

, 7

가

가

1,002

(

430

,

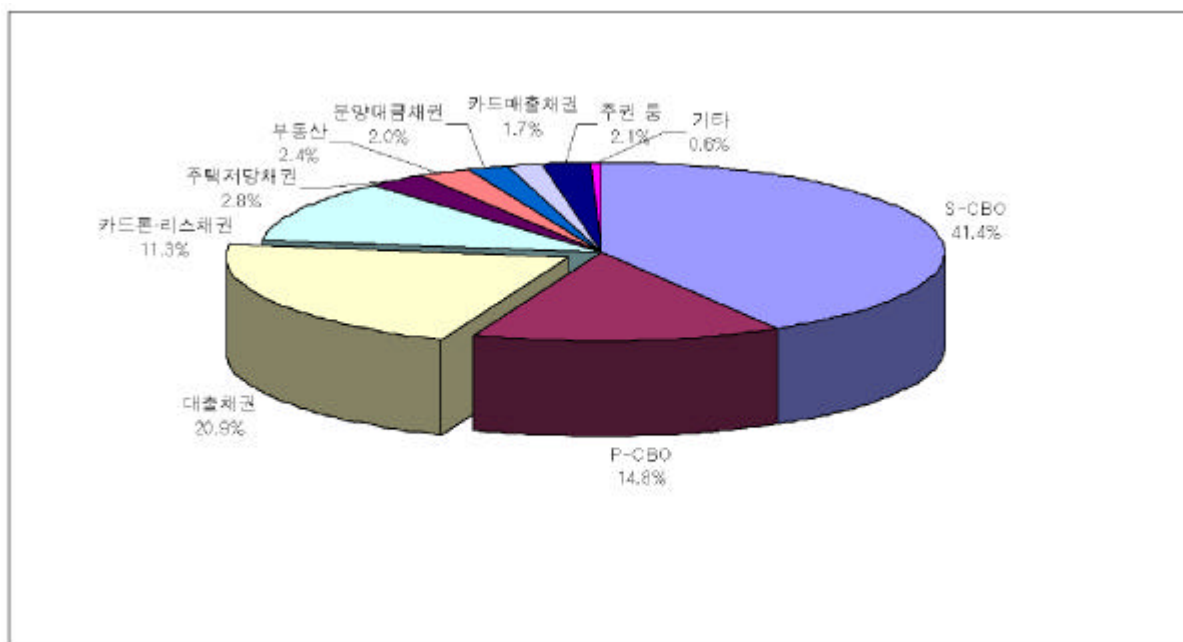
572)

가 28 7,690

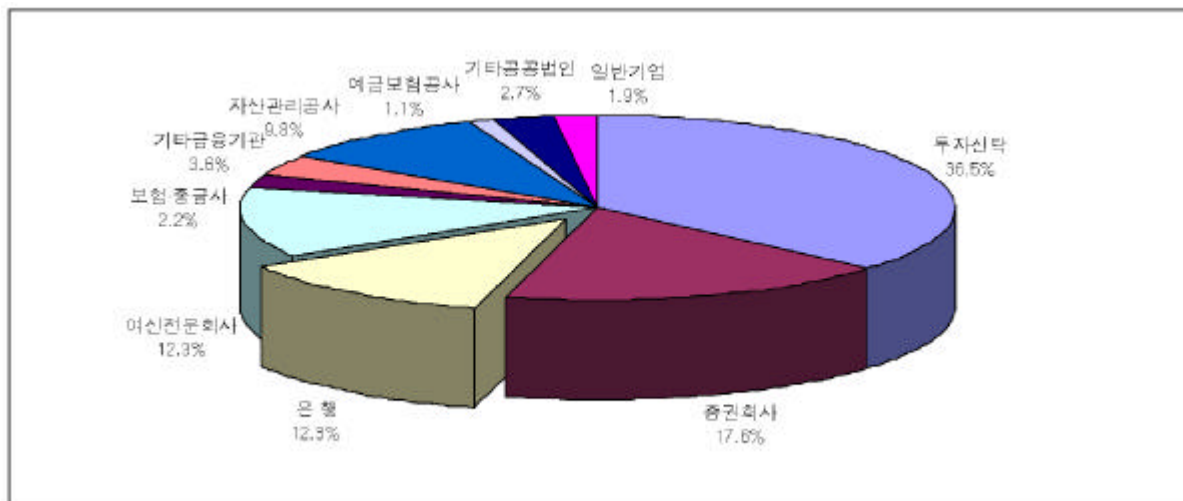
가 (58.3%) , , . ,
債權 19 4,232 (39.3%), 1 1,910 (2.4%)

< 1 >

2000 流動化證券 1)



2)



: 2001.1.29 . <<http://www.fss.or.kr>>

: 1) 2000 49 3,832 .

2)

(revolving) ABS/ABCP (ABCP),
 (,), (,) ,
), 가
 (future cash flow)
 . , 가
 ,
 .15)

III. 資産流動化 對象

1. 賣出債權

. 가 ,
 (: ,)
 가 (account
 receivables) 가 .16)
 長期 가 1 3
 短期 가
 가 . 가
 流動交替(revolving) .17)

15) ABS 가 , 2000 6 Primary CBO
 SPV
 () 가 가
 가 가 , 가
 가 가 「 가
 」 14 4 (「 가 」 23 4)
 . 2000.6.19 . <<http://www.fss.go.kr>>
 16) 1999 81
 , ,
 . 2000.12.7 . <<http://www.mofe.go.kr/mofe2/html/mainindex.php3>>
 17) 가 5 10

2000 12

가 , 가

(2 3) 가

가 가

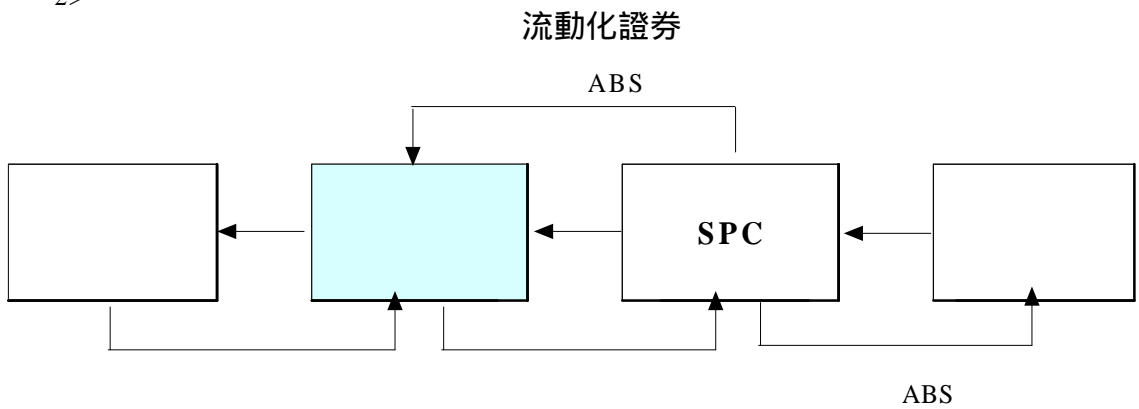
가 [短期] SPC SPC SPC

[長期]

(revolving) 가

< 2> 2000 12

< 2>



()

: 2000.12.7 . <<http://www.fss.go.kr>>

E 14 3

同 SPC .18) SPC

가 가

‘回轉’ (revolving structure) 가

가

가 / , 208 209 .

(SPC가)

가

E

SPC ()

가

가 ()

月

日

(3)가

가

SPC

10%

가

2. 將來債權

가 .19)

SPV

가

大法院判例

가

가 가

.20)

“

”

가

“

가 ”

가

.21)

18) SPC

19) , “ ”, 「 」 9 (, 2001.2) 20 21 .

20) 1996.7.30 95 7932; 1991.6.25 88 6358.

21) , 22 23 ; 1997.7.25 95 21624.

가 .22)

3. 短期債權

가 , , .

CP

ABCP

(asset-backed commercial paper) .

ABCP 既 借換

CP .

가 ,

CP .

部分借換

ABCP . SPC가 長期 短

期 CP

ABCP 3 ,

私募 公募 ABCP 가

가 .

CP

가 .

4. 貸出債權

2000 12 BIS .

多段階 貸出債權擔保附證券(collateralized loan obligation: CLO) .23) , BBB

22) 1987 (Telefonos de Mexico SA)가

가

23) 2000.12.9 . 30 . <<http://www.mofe.go.kr/mofe2/html/mainindex.php3>>

CLO (pool) SPC SPC가
 (partial credit enhancement)
 95%, 5% .
 3,440 CLO , 2001 2 . 59
 7,476 CLO
 가 CLO 가 CLO
 1 CLO
 10% CLO
 ,24)
 Primary CBO用 . CLO
 가 CLO 50% 信用補強 , 後順位債
 가 가 가 가
 BIS .

IV. 資産流動化

金融 接木

1. 非遡求金融 類似性

ABS ABS
 가 가 (project finance)
 ABS .25)
 (social overhead capital: SOC)

24) . 2001.2.28 .

25) 節 ABS
 “民間主導 金融 法的 研究”(“ ”), 2000.2, 151
 ABS . 「 法律 가 」
 1995 初版 ‘ (The Future)
 , 1998 全訂版 ‘ (Current Trends) . Graham Vinter, *Project
 Finance - A Legal Guide*, 2nd Ed., 1998, pp.273- 283.

債券 10 25% ,26)
 .27) , 가
 가 , , 가
 投資等級 가 .
 (negative carrying cost)
 가 .28)
 SEC 144A 私募 29)
 賣出債權(future account
 receivables)
 .30)
 가
 (cash flow) , SPV
 가 非遡求金融(non-recourse financing)
 . 前者 SPV(, 2 7)가
 (sponsor) 가
 , 後者 SPV(:
 17)가
 (originator)
 (loan portfolio)
 (cash flow portion)

가 .
 31)가 .
 26) SOC 가 , 2000 8 1999 5 1
 가 4,040
 가 .
 27) , , , 가 , , ,
 . Financial Times, *Project Finance*, April 3, 1998; Simon Davies, *Project Finance*, Financial
 Times, August 10, 1998; , “ Project Finance ”, 「
 」(, 1998.9), 65 68 .
 28) Caroline Angoorly, "Financing Downstream Petrochemical and Refining Projects in Asia", *The 9th
 Annual Refining Congress - Focus on Asia*, Singapore, October 29, 1996.
 29) , 「 」(, 1995) 155 157 .
 30) , 「 」(, 1998) 176 .
 31) 1997 8 銅鑛 가
 1998
 3 CSFB가 617 CLO . , “

CLO³²⁾가
 CLO (ROE)
 (debt/capital) 가
 (pooling) 가
 . 複數 가
 ,33) 가
 ,34)
 投資者層
 流動化
 가
 ,35)

2. 天論高速道路 金融 事例

2.1 去來 成功

가 (CNE)
 1 6,507 7,300
 . BIS
 가 가
 . CNE 韓國産業銀行側 ABS

32) CLO ”, 「」(, 1998.11), 94 .
 , 滿期, 早期償還 , CMO · CBO 가

33) ”, 「」 17 2 (, 1998), 96 97 .
 , 96 99 . , 124 ; / , “

34) Vinter, *op.cit.*, p.279.

35) , , 168 .

	CNE								
				가					
	, CNE	-	-	가	4	81km		가	
						30km,			
20	25					1	6,507		
1997		2003	1	1					
					, LG				11
가	4,500			-	()			(SPC)	
2001	1			가 50%				4,607	
	, CNE		1999	5				URS	
			(URSGWC)		가				
(feasibility)		가	Fitch	IBCA ³⁶⁾	가				
					(stress)				
		節			2000	12			
CLO									
					2001	2			()
7,300									
	³⁷⁾				5	15	6		
	ABS								()
									가
가	가	SPC					SPC		
CNE					收支展望	5	8	가 6	7%
	, 10			1,700	7.82%, 15		4		8.62%
				11	가	(all-in cost)	8.59%		.38)

36) 3 가 , 2000 Duff & Phelps, Thomson BankWatch
Fitch 가()

FIMALAC社

37) 2000 Primary CBO

Primary CLO

38) CNE 10 15 長期

가 10, 15 가

CNE SOC ABS
破格的

有利 , 가

長期債 ,

適期 大滿

足 ‘ - ’ 가 .

2.2 法律

CNE ABS

가 .

CNE

가 , 가 가 .

10 가 , CNE

10 ‘AAA’, 10 ‘AA+’

() 10 1,500 .

(structuring) (pass-through)

- ()가

ABS

(servicer) (trustee) AAA ,

CNE

3 (ramp-up period) ,

가 SPC

SOC 債券

, SOC

가 가 12%

SPC . ABS
 (concentration)
 , 가 가가
 가 가 .
 ,
 , 白紙 補充
 權 .
 , 가 15
 (financial covenants)
 (events of default)
 .39)

V. 法的 問題點

實質 40)가 30
 CBO/CLO, ABCP ABS
 가 .
 ,
 ‘破産 絶縁’(“ (true sale)”) (13) ,41) 가 가 가
 가 , 가
 , 가
 ,
 42) 43)

39) CNE ABS 金·張 法律事務所
 40) 2000 12 ABS () 40 4,055 ,
 30 3,675 .
 41) Moody's, "KDBC Leasing Receivables Corp. 1 Plc Asset Backed Floating Rate Senior Notes Due 2006, *Pre-sale Report*, April 6, 2000. <<http://www.moody.com>>
 42) , “ ”, 「 가」 194 (가, 2001.1), 25 .
 43) 가
 가 가 . Fitch, KAMCO's Korea Asset Funding 2000-1 Limited, *Structured Finance*, 10 July 2000. <<http://www.fitchratings.com>>

ABS
 가
 ABS
 (secondary) CBO 가 (primary) CBO
 CLO
 민資
 가

1960 擔保附社債信託法⁴⁴⁾
 (mortgage bond)가

受託會社(trustee) 物上擔保
 가
 (SPV) 信託
 가 ()
 4) (legal framework)
 가

.⁴⁵⁾

가 統一時代

SOC

.⁴⁶⁾

, “ ”, 「 」 9 (, 2001.2).

, “ ”, 「 가」 194 (가, 2001.1).

44) 擔保附社債信託法 同名 1962 1 20 991

45) , “ ”, 「Samil Financial Review」, 2000 가 No.4(, 2000.11), 4 17 <<http://www.samil.com>>

46) , , 182 183 .

_____, “民間主導 金融 法的 研究”, (_____, 2000).

_____, “_____, ”, 『Samil Financial Review』, 2000 年 11 月, No.4 (_____, 2000.11).

_____, “IMF 協約 金融構造調整 問題點”, 『_____] 35 卷 1 期 (_____, 2000.12).

_____, “The Enlarged Applicability of Structured Financing in Korea”, *The KDB Economic and Industrial Focus*, Korea Development Bank, March 2001.

_____, “_____, Project Finance _____”, 『_____] (_____, 1998.9).

_____, 『_____] , _____, 1995.

_____, 『_____] , _____, 1998.

_____/_____, 『_____] , _____, 2000-03, 2000.

_____, 『_____] , _____, 1998.

_____/_____/_____, 『_____] , _____, _____, 99-02, 1999.12.

_____, 『_____, ABS- _____』, _____, 1999.

American Bar Association, *Structured Finance Techniques*, 1995.

Angoorly, Caroline, "Financing Downstream Petrochemical and Refining Projects in Asia", *The 9th Annual Refining Congress - Focus on Asia*, Singapore, October 29, 1996.

Bhattacharya, Anand/Fabozzi, Frank J., *Asset Backed Securitization*, FJF Associates, 1996.

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Financial Times, "Project Finance", April 3, 1998.

Henderson, John (ed.), *Asset Securitization: Current Techniques and Emerging Market Applications*, Euromoney Publications, 1997.

Norris, Nicholas, "Asset Securitisation - an Overview", *A Capital Guide to Asset Securitisation in Asia*, ISI Publications, 1998 Edition.

Vinter, Graham, *Project Finance - A Legal Guide*, 2nd Ed., 1998.

<<http://www.fss.or.kr>>

<<http://www.mofe.go.kr/mofe2/html/mainindex.php3>>

Moody's <<http://www.moody.com>>

Fitch <<http://www.fitchratings.com>>

() , , ABS, , SPV, , CBO, CLO, ,

<Abstract>

The Enlarged Applicability of Structured Financing in Korea

Ever since the Korean government introduced asset-backed securities (ABS) in 1998 by legislating the ABS Act (as amended) to overcome the unprecedented financial crisis, the ABS market in Korea has been increasingly expanded. In 2000, public offerings of ABS reached 41 trillion Won, taking 69.9 percent of the total publicly offered corporate bonds. The most remarkable instance is the recently floated ABS-type bonds backed by the assets related with the Chunan-Nonsan Expressway (under construction), whose aggregate principal amount is 730 billion Won and maturity spreads from five to 15 years.

The various advantages of the ABS Act enable financial institutions and business entities to securitize their assets including distressed loan portfolios and real estate backlogs at a competitive cost. This is because the ABS Act does not confine the assets eligible for securitization to specific types, and provides for some exceptions in the registration of real estate transactions. Also the Korean tax laws afford considerable tax benefits to the ABS players.

The ABS Act allows qualified asset owners, or originators, to transfer assets such as claims, account receivables, real estate and other property rights, that are deemed to generate cash flow, to a special purpose company or a trust company (collectively referred to as the "special purpose vehicle" or "SPV"), and the SPV to float securities backed by such assets. The SPV is required by the ABS Act to register with the Financial Supervisory Commission (FSC) a securitization plan and the transfer of assets, respectively, in order.

Accordingly, a huge amount of non-performing assets owned by Korean financial institutions could be securitized through the SPV, thus improving liquidity and the financial ratio demanded by the Bank for International Settlements (BIS).

The ABS Act also provides that the transfer of assets to an SPV must satisfy certain conditions, under which such a transfer is deemed a true sale rather than a secured borrowing. In other words, a defined group or pool of assets can be structurally isolated, and thus serve as the basis of financing that is independent from the bankruptcy risks of the originator, i.e. "bankruptcy remote".

Structured financing has been further used to securitize junk bonds, future cash

flows and even loan portfolios arising from project financing.

First, as small businesses have difficulties in raising funds, the government authorities have allowed primary collateralized bond obligations (CBOs). Those small companies issue corporate bonds with a credit rating under investment grade, then securities companies underwrite the whole corporate bonds and sell them to the SPV. Finally, the SPV floats primary CBOs with top quality credit rating, backed by cash flows from the underlying corporate bonds, with an appropriate credit enhancement.

Second, in December 2000, the Ministry of Finance and Economy decided not to differentiate the future cash flow in ABS structuring. The first and foremost beneficiaries are credit card companies, department stores, apartment construction companies and so on.

Third, the ABS scheme could be used in project financing. As a non-recourse financing, structured financing is similar to project financing in that both require the creation of an SPV and initially look to cash flows. As exemplified by the Chunan-Nonsan Expressway bonds issued at the end of February 2001, ABS-type bonds are tapping the capital market to finance social overhead capital (SOC) build-up. In this case, the Korea Development Bank (KDB) originally extended a 730 billion Won loan to the Chunan-Nonsan Expressway Co., Ltd., a project company, and KDB transferred the whole loan portfolio to an SPV which, in turn, floated AAA/AA⁺ bonds of the same amount, in other words, collateralized loan obligations (CLOs).

Until now, there have been few cases in which SOC bonds are offered to the public for sale and distribution, since projects with considerably high risk would not generate sufficient cash flow. Only projects equipped with stable future cash flow or government support are eligible for public offerings.

As North Korea is in great need of SOC investments, how to mobilize financial resources for the development of the North is one of the top priorities on the agenda. In order to facilitate the economic development of North Korea, project financing is often seen as an efficient financial tool. Both structured financing and project financing will be properly arranged to rehabilitate and renovate deficient and ill-conditioned infrastructure of North Korea just before and after the reunification of the Korean Peninsula. These new methods are believed to curtail unification costs to a controllable limit.