

How to Enhance the Inter-Korean Exchange and Cooperation

Based upon the Inter-Korean Exchange and Cooperation Act

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I . Introduction

The relation between the two Koreas divided along the 38th parallel in 1945 has been contentious with ideological and sometimes military confrontations after the Korean War. Ever since the South Korean Red Cross delegates met with the North Korean counterpart in 1971 for the first time in the cold war era, the two Koreas increased the exchange of goods and services, and allowed limited visits each other. The Inter-Korean relation was put into high gear in July 7, 1988, when the South Korean government disclosed "Special Declaration for the Self-Esteem of the Nation and the Unification of Prosperity".

As the inter-Korean cooperation developed in every sector, the existing legal system governing such relations turned out to lag behind. In August 1990, the South Korean government hurried to establish the Inter-Korean Exchange and Cooperation Act. Nevertheless problems remained to be solved in its actual implementation.

In the meantime, a series of significant events took place on the Korean Peninsula:

- Adoption of the Inter-Korean Basic Agreement in December 1992;
- Taking measures to promote the Inter-Korean economic cooperation in April 1998;
- The start-up of Mt. Geumgang tour by sea in November 1998;
- Adoption of the Inter-Korean Mutual Declaration during the summit meeting in June 2000;
- Ground breaking of Gaeseong industrial site in June 2003;
- Record making of over one million visitors of Mt. Geumgang in June 2005;¹⁾ and

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1) On November 18, 1998, hundreds of South Korean visitors set the first sail to Mt. Geumgang by sea. Hyundai Asan, the exclusive private operating company, disclosed on June 7, 2005 that more than one million cumulative visitors traveled around Mt. Geumgang. Since South Korean

- The ever-increasing investment in the North by South Korean companies, e.g., 1,151 million dollar investments during the period from 1996 to June 2003 (including KEDO-related projects).²⁾

At present, South Korea is making the largest market for the North Korean suppliers. The Inter-Korean Cooperation Fund, established by the South Korean government, has been an effective financial vehicle through which 4.92 trillion won (equivalent to US\$4.73 billion) was invested and lent to the North Korea-related projects. In 2005, the Fund up to 1.25 trillion won (equivalent to US\$1.2 billion) has been prepared via the Fund for the promotion of economic cooperation between the North and the South.

In terms of law, the above-mentioned events have been regulated by the Inter-Korean Exchange and Cooperation Act (hereinafter called as the "Act"). However, some discrepancies between the Act and the real world often create obstacles in Inter-Korean relations. This paper will describe the major content of the Act³⁾ and make some suggestions to improve the Inter-Korean exchange and cooperation.

II. Inter-Korean Exchange and Cooperation Act

1. Inter-Korean Exchange and Cooperation Act and Related Regulations

A. Inter-Korean Exchange and Cooperation Act

The Act came into force on August 1, 1990 (Law No.4239) to promote the

visitors approached the mountains by land through DMZ in September 2003, time and money could be remarkably curtailed. As a result, more than three thousand South Korean people stayed in Mt. Geumgang district in a single day at present. In 2004, when the official Inter-Korean dialogue came to a near deadlock because of the North's nuclear issue, more and more South Koreans up to 26,213 (excluding the Mt. Geumgang travelers) visited North Korea on non-political reasons than ever before.

- 2) There exist few official statistics on the investments in the North except an article of Yonhap News Agency on October 28, 2003.
- 3) This part of the article is largely based upon Professor Park Jeong-Won's thesis, "The Latest Trend and Issues in the Legal Framework of Inter-Korean Exchange and Cooperation", presented at the Korea-Taiwan International Conference held in Taipei on July 8, 2005.

mutual exchange and cooperation between the North and the South. Thereafter the Act was amended seven times, almost every other year.

It should be noted that the Act was made unilaterally by the South Korean government to prepare in advance for the impending Inter-Korean economic cooperation. In the early 1990s, the South Korean government started to officially approve its citizens' visit to North Korea and meetings with North Korean people. So the Act contained the detailed provisions on procedures for such visits, meetings, and other exchange and cooperation with North Korea. In particular, the Act is intended to preempt other laws and regulations with regard to North Korea and unification.

The legal nature of the Act is as follows:

- It is a basic law on the Inter-Korean exchange and cooperation for the promotion of the relation between the North and South, and provides for various subsidies and grants;
- It regulates the official procedures on the Inter-Korean exchange and cooperation; and
- Its provisions are comprehensive and transitional in view of the current developments of the Inter-Korean relation and the long-cherished unification of the Koreas.

The Act has 30 articles in total, including general provisions like Purpose, Definitions (arts. 1-3), the Inter-Korean Exchange and Cooperation Committee (arts. 4-8), Visits to the North and South (arts. 9-11), Trade in Goods (arts. 12-15), Cooperative Projects (arts. 16-18), Payment Systems, Transportation, Communication and Quarantine Affairs (arts. 19-23) and miscellaneous provisions on administrative support, demand for official cooperation and *mutatis mutandis* clause (arts. 24-26). Finally, the Act has a constructive clause to recognize the North Korean citizen (art. 30).

Article 3 of the Act says, "This Act shall preempt other laws to the extent that any act or conduct for the exchange and cooperation between the North and South is regarded as proper and appropriate." Therefore, this Act would justify the act or conduct even though that same act or conduct is punishable under the National Security Act.⁴⁾

(1) Visits and Meetings

The Act requires a South Korean citizen who wants to visit North Korea to obtain the certificate issued by the Minister of Unification⁵⁾ together with his or her own personal references and any document which ensures the safety and return of the visitor. The Minister's certificate issued to the North Korean applicant to visit South Korea operates as a personal ID in the South. It may be exempted by the Inter-Korean specific agreement or the resolution of the Inter-Korean Exchange and Cooperation Committee.⁶⁾

Korean citizens with a permanent residency in foreign countries are allowed to visit North Korea freely upon a written report to the South Korean embassy or consular office.⁷⁾ On the contrary, Korean citizens in a foreign country with the North Korean passport or no nationality may come to South Korea only with permission.

The Act also requires a South Korean citizen who wants to meet with North Koreans to obtain the approval of the Minister of Unification⁸⁾ together with his or her own personal references and application for the meeting with North Koreans. If that South Korean happens to meet with other North Korean inhabitants after he or she arrives at the destination, such meetings are not required to be approved in advance in so far as the meeting is deemed necessary to attain the purpose of visit.⁹⁾ Also, while prior approval is not required for meetings with North Koreans at an international conference or incidental meetings in a foreign country, such meetings must be reported to the Minister of Unification.

Further, the Act requires a South Korean citizen who wants to meet with North Koreans in a foreign country to apply for the approval of the meeting from the head of South Korean embassy or consular office, who must promptly

4) For example, the Chairman of the Gaeseong Industrial District Administration, which has been established within the purview of the Act, is currently appointed by the North Korean government. However, it is not deemed in breach of Article 3 of the National Security Act under which a person who is admitted to an anti-Korea organization, e.g., the North Korean government, shall be punished as felony.

5) Paragraph 1 Article 9 of the Act.

6) Article 20 of the Enforcement Decree of the Act.

7) Paragraph 2 Article 9 of the Act.

8) Paragraph 3 Article 9 of the Act.

9) Paragraph 1 Article 19 of the Enforcement Decree of the Act.

forward the application documents to the Minister of Unification via the Minister of Foreign Affairs and Trade.¹⁰⁾

(2) Inter-Korean Trades

The Act requires a South Korean trader who wants to take goods to/from North Korea¹¹⁾ to apply for the goods to be traded, types of trade and necessary payments, and to obtain the approval from the Minister of Unification.¹²⁾ Also, such goods are subject to the Notice on Taking Goods to/from the North and the Approval Procedures. The Minister of Unification should approve after confirming whether i) such item falls within the scope of any necessary approval, notification, confirmation or certification by the Minister of Commerce, Industry and Energy in accordance with Chapter III of the Foreign Trade Act, ii) such item taken to the South is in a category of books (including e-mails, electronic publications, and other digitalized publication items), phonographic records and disks, fine arts, chinaware and industrial art products, stamps, currencies (not in circulation), photographs, films, greeting cards, etc. or iii) such item taken to the South is a computer.¹³⁾

It should be noted that the goods and services delivered from the North are subject to the value-added tax (VAT) levied by the customs office. If any item delivered from the North is subject to the special excise tax, liquor tax or transportation tax of South Korea, such taxes shall be levied at the point where they pass the CIQ area.¹⁴⁾

When the goods to be taken to the North are deemed necessary for the promotion of the Inter-Korean exchange and cooperation, any necessary subsidy or other grants may be provided to the person who operates such businesses in accordance with this Act.¹⁵⁾

10) Paragraph 3 Article 19 of the Enforcement Decree of the Act.

11) Because the Inter-Korean trade in goods is carried out within the boundary one country, South Korea's export/import is replaced with taking goods to/from North Korea. So taking goods to/from the North means the movement of goods, including a simple movement via a third country, based upon sales, exchange, lease, grant, etc. between the two Koreas.

12) Article 13 of the Act, Paragraph 1 Article 26 of the Enforcement Decree thereof.

13) Article 3 of the Notice on Goods Taken to/from the North and the Approval Procedures.

14) Article 51 of the Enforcement Decree of the Act. Here CIQ stands for customs clearance, immigration inspection and quarantine procedures on the border line.

15) Article 24 of the Act.

(3) Inter-Korean Cooperative Projects

The Act requires a South Korean businessman who wants to conduct the cooperative works with North Korean counterparts in such areas as culture, art and science, sports, economic activities¹⁶⁾ to obtain the approval from the Minister of Unification.¹⁷⁾ The eligible business man should be qualified as i) having a tendency to contribute to the Inter-Korean exchange and cooperation, ii) having achieved performance records in the areas where he or she is going to be engaged within the past three years, and iii) having appropriate capital, technology, etc. enough to conduct the cooperative works.¹⁸⁾ However, the approval may be withdrawn by the Minister of Unification, if the businessman, who has obtained the approval, i) violates the provisions and procedures of the Act, ii) conducts detrimental to the Inter-Korean exchange and cooperation, iii) jeopardizes the national security, public order and welfare, or iv) has achieved few performance records within the past three years.¹⁹⁾

Application for the approval must be accompanied by the application form, cooperative work proposal and any necessary agreement with the North Korean counterpart.²⁰⁾ The cooperative work is approved by the Minister of Unification only if it is deemed capable of implementation, within the capacity of the business man, and having no adverse effect on the Inter-Korean relations. The accompanied payments are carried out subject to the Foreign Currency Management Guidelines on the Investment in the North, etc. Any gains generated from the cooperative works is subject to the local tax because the works are conducted within the country,²¹⁾ but the whole or part of income tax may be exempted when an agreement is made with the North Korean authorities.²²⁾

(4) Inter-Korean Exchange and Cooperation Committee

In March 1989, the South Korean government established the Inter-Korean

16) Item 4 Article 2 of the Act.

17) Article 16 of the Act.

18) Items 1 and 2 Article 30 of the Enforcement Decree of the Act.

19) Article 32 of the Enforcement Decree of the Act.

20) Paragraph 1 Article 17 of the Act, Paragraph 1 Article 34 of the Enforcement Decree thereof.

21) Paragraph 1 Article 53 of the Enforcement Decree of the Act.

22) Paragraph 3 Article 53 of the Enforcement Decree of the Act.

Exchange and Cooperation Committee in the Ministry of Unification. Later, the Committee was provided for in the Inter-Korean Exchange and Cooperation Act of 1990.

According to Article 4 of the Act, the Committee shall do the followings with respect to the Inter-Korean exchange and cooperation:

- To consult and coordinate the policies, and deliberate the important matters;
- To establish basic principles and policies;
- To approve and authorize important affairs;
- To determine the scope of goods to trade;
- To control and coordinate the Inter-Korean cooperative works;
- To support and promote the Inter-Korean exchange and cooperation;
- To enhance the cooperative relationship among related government agencies and departments; and
- To deliberate and resolve such matters as proposed by the Chairman of the Committee.²³⁾

For example, the Committee decided to form a single Inter-Korean team on the occasion of the Sixth World Youth Football Games in 1991 to represent both Koreas, and to provide financial assistance to the visiting group of separated families in August 1992.

B. Enforcement Decree of the Act

The Enforcement Decree of the Act is to provide for necessary matters mandated by the Act and to implement the Act. The Decree was established in August 1990 (Presidential Decree No. 13071) and has been amended from time to time.²⁴⁾

C. Enforcement Regulation of the Act

The Enforcement Regulation of the Act is to provide for necessary matters

23) Article 6 of the Act.

24) Detailed provisions of the laws and regulations explained in this paper are available in Korean at <<http://www.unikorea.go.kr>> Data Room → Law Information.

mandated by the Act and the Enforcement Decree thereof, and to implement the Enforcement Decree. The Regulation was established in November 1990 (Prime Minister Order No. 371) and amended from time to time.

The Regulation mandates, among others, that the Unification Education Institute provide orientation courses for visitors to the North as a prerequisite to issuing certificates in accordance with the Enforcement Decree of the Act.²⁵⁾

The Regulation provides for the necessary documents regarding Inter-Korean trade records for the report to the Minister of Unification.

D. Related Administrative Regulations

There are a number of ordinances and guidelines to implement the Inter-Korean Exchange and Cooperation Act. The administrative regulations have been established within the purview of the Inter-Korean Exchange and Cooperation Act as follows:

(1) Regarding Citizens' Visit and Traveling

A notice issued by the Minister of Unification in May 1999 in consultation with the head of related administrative agencies and departments provides for a list of permitted and prohibited items that may be carried along by the visitors.

Another notice established by the Customs Service in 2002 provided for the customs clearing procedure of the visitors and travelers.

The Minister of Unification issued a notice exclusively for the visitors, tour guides and staff members with respect to the issuance of Mt. Geumgang tour certificates.

Also the Minister of Finance and Economy issued a notice on the foreign exchange business for tourists in the North Korea region under the Foreign Exchange Transaction Regulation.

There are several directives and ordinances exclusive for the reunion of separated family members in order to streamline the procedures of certificate issuance and application for visiting North Korea.

25) Article 13 of the Enforcement Decree of the Act.

(2) Regarding Trade and Transportation of Goods

The Minister of Unification issued a notice in 1990 to notify the public of the list of goods for the Inter-Korean trade and the approval procedure for taking such goods to/from the North under the Act and the Enforcement Decree thereof.

In addition, the Customs Service amended the existing regulation in 2001 to facilitate customs clearance procedure of the goods traded between the two Koreas. The quarantine procedure for plants was also made by the Ministry of Agriculture and Forestry in 1998.

A recently issued notice provides for the application and approval procedure with respect to the operation of ships, aircraft, trains and automotive vehicles.

A Ministry of Unification notice was issued in 2003 to regulate the confirmation procedure of origin of goods traded between the North and the South based upon the Inter-Korean Agreement on the rules of origin.

With respect to the operation of the Inter-Korean Cooperation Fund, a notice was issued to provide subsidy to those suffering losses arising out of the Inter-Korean economic cooperation since May 14, 2004.

(3) Regarding the Inter-Korean Cooperative Works

In 1994, a notice was issued to implement the economic cooperative works for profit, which were mandated to the Minister of Unification, but not regulated otherwise under the Act. This notice is applied to the South Korean residents, legal entities and associations allegedly engaged in the economic cooperative works.

When a South Korean company or an association wants to establish an office or branch in the North, another notice of 1994 issued by the Minister of Unification shall be applied to the procedure of application and approval thereof.

Insofar as the Foreign Exchange Transaction Act is applied to foreign investment by Korean residents or Korean-managed foreign subsidiaries, the Minister of Finance and Economy established a notice to provide special treatments of such investment in the North (including the establishment of an office or branch) under the Act and its Enforcement Decree.²⁶⁾

Inter-Korean social and cultural exchange projects are regulated by a Ministry of Unification notice of 1997, while humanitarian help programs are

26) Paragraph 4 Article 26 of the Act, Paragraph 5 Article 50 of the Enforcement Decree thereof.

governed and promoted by a newly revised regulation under the Act and the Inter-Korean Cooperation Fund Act.

2. Inter-Korean Cooperation Fund Act and Related Regulations

A. Inter-Korean Cooperation Fund Act

The Inter-Korean Cooperation Fund Act was established in August 1990 to assist the economic cooperation and social and cultural exchange between the two Koreas which promote the purpose of the Inter-Korean Exchange and Cooperation Act.

Under the Act, the South Korean government is required to raise the fund by means of government contributions, long-term borrowings, deposit by the public capital management fund, earnings and revenues generated out of the Fund, and other sources of fund.²⁷⁾

The Minister of Unification is in charge of the operation and management of the Fund, but entrusts its operation and management to a banking institution,²⁸⁾ i.e., the Export-Import Bank of Korea (hereinafter referred to as the "Korea Eximbank"). When the Minister of Unification establishes the Fund management plan, the Minister shall consult in advance with the Minister of Finance and Economy as well as the Minister of Planning and Budget.²⁹⁾

B. Enforcement Decree of the Inter-Korean Cooperation Fund Act

The Enforcement Decree of the Inter-Korean Cooperation Fund Act is to provide for necessary matters mandated by the Act and to implement the Act. The Decree was proclaimed in December 1990 (Presidential Decree No. 13237) and has been amended from time to time.

When the Minister of Unification deems it necessary to issue bonds so as to efficiently raise the Inter-Korean Cooperation Fund, the Minister may designate the financial institution, which takes charge of selling and repayment of the

27) Articles 3 and 4 of the Inter-Korean Cooperation Fund Act.

28) Paragraphs 1 and 2 Article 7 of the Act.

29) Paragraph 3 Article 7 of the Act.

bonds, in consultation with the Minister of Finance and Economy.³⁰⁾

C. Enforcement Regulation of the Inter-Korean Cooperation Fund Act

The Enforcement Regulation of the Inter-Korean Cooperation Fund Act provides for the necessary matters mandated by the Act and the Enforcement Decree thereof, and the means to implement the Enforcement Decree. The Regulation was established in March 1991 and has been amended from time to time.

The Regulation specifies, among others, the subject matters within the jurisdiction of the Inter-Korean Exchange and Cooperation Committee.³¹⁾

D. Related Administrative Regulations

There are a number of ordinances and guidelines to implement the Inter-Korean Cooperation Fund Act. The administrative regulations have been established within the purview of the Inter-Korean Cooperation Fund Act as follows:

(1) Regarding the Operation of the Inter-Korean Cooperation Fund

The Minister of Unification issued a notice in April 1991, for the operation and management of the Inter-Korean Cooperation Fund, which is entrusted to the Korea Eximbank. The Korea Eximbank is required to make a quarterly report on the current operation status of the Fund to the Minister of Unification within 20 days after the end of each quarter. The Minister will then forward such report to the related administrative agencies and departments.

(2) Regarding Financial Support of the Fund

The Minister of Unification issued an independent notice to support the on-going Inter-Korean economic, social and cultural exchange and cooperation as follows:

- A notice of 1999 to provide a loan to the South Korean applicant engaged in

30) Article 4 of the Enforcement Decree of the Inter-Korean Cooperation Fund Act.

31) Article 2 of the Enforcement Regulation of the Inter-Korean Cooperation Fund Act.

- the economic cooperative works;
- A notice of 2001 to provide financial assistance to promote the Inter-Korean social and cultural cooperation;
 - A notice of 2002 to subsidize the traveling cost of Mt. Geumgang tourists including senior members of separated families over the age of 65, participants in the events hosted by unification-oriented NGOs, students of elementary and secondary schools and college students, teachers and unification-related lecturers;
 - A notice of 2000 to provide financial aid to the reunion events of separated families; and
 - A notice, as amended in 2005, to support the humanitarian aid programs under the Inter-Korean Exchange and Cooperation Act and the Inter-Korean Cooperation Fund Act.

III. Issues and Prospects Regarding the Inter-Korean Exchange and Cooperation Act

1. Legal Issues

A. To Many *mutatis mutandis* Clauses

As the Act was established in a hurry just before the iron gate between the North and the South was open to each other, it had to control and regulate everything from citizens' visits and meetings to the Inter-Korean trade in goods. Accordingly, some problems foreseeable during the course of the Inter-Korean cooperation were not fully covered by the Act.³²⁾

Against the backdrop of highly complex situation on the Korean Peninsula, there must be a limit to South Korea's participation in the Inter-Korean cooperation. Considering the reality which saw the increasing level of exchange and cooperation between the two Koreas, the government has to take a U-turn in the Act, i.e., from "command and control" to "support and assistance".³³⁾

32) Jhe Seong-Ho, "An Amendment Proposal of the Inter-Korean Exchange and Cooperation Act in a New Environment of the Inter-Korean Exchange and Cooperation", presented at a seminar in view of the "Rapprochement on the Korean Peninsula" organized by the Ministry of Unification in August 2000, pp.5-6.

Basically, the Act is comprised of a lot of *mutatis mutandis* clauses with such applicable laws as the Immigration Act,³⁴⁾ the Foreign Trade Act,³⁵⁾ tax laws,³⁶⁾ the Foreign Exchange Transactions Act,³⁷⁾ the Postal Act,³⁸⁾ etc. This makes it difficult to comprehensively understand the Act.

In this regard, the Act,³⁹⁾ and its Enforcement Decree⁴⁰⁾ thereof authorizes the relevant administrative agency or department to issue notices which allow special treatment in applying the *mutatis mutandis* clauses subject to the resolution of the Inter-Korean Exchange and Cooperation Committee.⁴¹⁾

It is argued that these provisions⁴²⁾ are in breach of the Constitutional principle⁴³⁾ against the delegation of comprehensive legislative duties, a comprehensive and systemic legal framework should be established, governing the foreseeable situations on the basis of the rule of law. Otherwise, such special treatment shall be entrusted to NGOs or individuals on a self-regulatory basis.⁴⁴⁾ Also it is argued that some provisions to withdraw the administrative approval are inconsistent or groundless.⁴⁵⁾

33) Some suggestions were already reflected in the 2005 amendment to the Act.

34) Article 21 of the Act.

35) Paragraph 1 Article 26 of the Act.

36) Paragraphs 2 and 3 Article 26 of the Act.

37) Paragraph 3 Article 26 of the Act.

38) Article 48 of the Enforcement Decree of the Act.

39) Paragraph 4 Article 26 of the Act.

40) Paragraph 5 Article 50 of the Enforcement Decree of the Act.

41) Professor Park Yoon-Heun pointed out that the eccentricity of the Act resulted from i) a number of *mutatis mutandis* clauses contained in the Act, ii) wider spectrum of legislative delegation than other administrative laws, and iii) more law-supplementary power granted to the administrative agencies than usual. Professor Park explained that the Act was supposed to regulate all the foreseeable matters but could never anticipate the ever-increasing trade in goods and economic cooperation between the two Koreas. As a result, the Act was made lacking considerable provisions of significance. Park, "How to Improve the Legal Framework of the Inter-Korean Exchange and Cooperation in Line with the Inter-Korean Basic Agreement", SNU Legal Research Institute Seminar on September 25, 1992, p.18.

42) For example, such provisions of the Act as Article 11 (Examination of the Proposed Visit to the North), Article 13 (Approval of Goods Taken to/from the North), Article 16 (Authorization of the Applicant of the Inter-Korean Cooperative Work), Article 17 (Approval of the Inter-Korean Cooperative Work) delegate the legislative power to the Enforcement Decree on a comprehensive basis. Park Jeong-Won, *op.cit.*, Footnote 22) p.16.

43) Paragraph 1 Article 75 of the Constitution of the Republic of Korea.

44) Park Jeong-Won, *op.cit.*, pp.16-17.

45) For example, there is no legislative delegation for the withdrawal of approval of the issuance of visit certificates, approval of meetings with the North Korean people, approval of taking

While the Act applies *mutatis mutandis* the Foreign Trade Act in terms of trade with the North,⁴⁶⁾ the Act replace the terms, "export" and "import" with "taking goods to/from the North". It implies that the Inter-Korean trade is carried out in the boundary of a state as envisaged in a federal state.⁴⁷⁾ This is one of the most controversial provisions of the Act.

B. Priority Issues of the Inter-Korean Trade and the National Security Act

The South Korean government has already declared the Inter-Korean trade is not a "foreign trade" in its official documents.⁴⁸⁾ So does the Special Act to Implement the World Trade Organization Agreement (Law No. 4858) of 1995.⁴⁹⁾ There is unique precedent for this in pre-unification Germany, commonly referred to as the "Inter-German trade (*Innerdeutscher Handel*)".⁵⁰⁾ Korean trade would benefit from this kind of clarification in an act of general nature rather than a special act on the international agreement.

The National Security Act is another source of controversy, because this act presupposes North Korea as the No. 1 enemy state. Though the Inter-Korean Exchange and Cooperation Act preempts the National Security Act in theory, no one is quite sure which law is first applied to a reportedly sensitive case.

For example, if an anti-government figure met with a North Korean politician, his act might be in breach of the National Security Act. However, he

goods to/from the North, etc. Park Jeong-Won, *op.cit.*, p.17.

46) Paragraph 1 Article 26 of the Act.

47) Jhe Seong-Ho, *op.cit.*, pp.8-9.

48) The preamble of the four Agreements for the Economic Cooperation between the North and the South, including investment protection, prevention of double taxation of income, procedures for resolution of commercial disputes and clearing settlement contains the following statement: "The South and the North hereby confirm that the economic exchange and cooperation being pursued according to the "South-North Joint Declaration" announced at the Summit Meeting on June 15, 2000 are internal transactions among the Korean people and not transactions between two separate nations."

49) Article 5 of the Special Act to Implement the WTO Agreement says, "The Inter-Korean trade is the trade within the boundary of a state, and shall not be regarded as the international trade as provided for in the Agreement."

50) In an address before the General Assembly of the United Nations in 1974, West German Minister of Foreign Affairs, Hans-Dietrich Genscher, said, "As the currently divided states are not in the final stage of the German issue, the two Germanies will be reunited through self-determination of German people." He stressed the Inter-German relation as a very special one.

will be free of any probable punishment if he can answer the following questions in such a manner:

- Is his act at issue supposed to threaten the free democratic order of the Republic of Korea? *No.*
- Is his act intentionally harmful to the Korean government and conducive to North Korea? *No.*
- Was the act approved or consented by the authorities concerned? *Yes.*

C. Important Matters subject to Additional Regulation

The Act is evidently lacking the provisions concerning the reversion of property rights, marriage status, inheritance, etc. which would give rise to legal entanglement between the residents of the North and the South before and after the unification. It is advisable to establish a new special law to govern such cases in preparation for or on the occasion of unification.⁵¹⁾

Finally there is a question whether the members of a foreign association or organization, which is observing the policy lines of the North, are regarded as the North Korean residents.⁵²⁾ It is because the North Korean policy lines have wide spectrum from communist ideology to promotive campaign of foreign capital. The definition of a foreign organization is unclear under the Act because it includes North Korea-oriented organization like *Chochongnyeon* in Japan, as well as Pro-North Korean organizations and anti-government entities.

D. Some Problems Contained in the Inter-Korean Cooperation Fund Act

It has been argued that the government aid and subsidy should be provided to the Inter-Korean exchange and cooperation programs at the private level. Another issue is that the Inter-Korean Cooperation Fund has so many programs to help even though the Fund is not equipped with detailed criteria for selection and sufficient resources. At present, the operation and management of the Fund are entrusted to the Korea Eximbank.

51) Chang Myung-Bong, "Domestic Legal Issues Arising out of the Inter-Korean Basic Agreement and Its Adjacent Agreement", *Unification [Tong-il]*, Vol.135, December 1992, p.51.

52) Article 30 of the Act.

As the Inter-Korean cooperation program makes steady headway, the graduation policy should be adopted so that other programs with insufficient aid may be provided with financial assistance. And the aid programs of the Fund should be evaluated periodically with an efficient feedback system.

2. The Recent Amendment to the Inter-Korean Exchange and Cooperation Act

Recently the above-mentioned problems have been solved to some extent by the efforts of lawmakers and specialists. The lawmakers from both the ruling and opposition parties of the 17th National Assembly proposed a series of amendments to the Act. Those seven proposals were comprehensively combined and put before the plenary session of the National Assembly on May 3, 2005. The amendment to the Act (Law No.7539) came into force on May 31, 2005.

The main content of the 2005 amendment to the Act is as follows:

- The purpose of the Act has been more clarified as "to contribute to the peace on, and the unification of, the Korean Peninsula";⁵³⁾
- The priority issue with other laws has been solved by inserting a more concrete criterion like "within the purview of the purpose of this Act" rather than the old provision, "to the extent deemed proper";⁵⁴⁾
- The members of the Inter-Korean Exchange and Cooperation Committee have increased from less than 15 to less than 18 to usher in more specialists from the private sector;⁵⁵⁾
- The procedure for visit to the North has been streamlined for frequent visitors who no longer need to apply for approval, and "only report" is permitted, during a specified effective period, and the reasons for revoking a visit approval is explicitly set forth in the Act;⁵⁶⁾
- The meeting with a North Korean citizen requires only "report" rather than approval, and in an avoidable situation an *ex post facto* report is permitted;⁵⁷⁾
- The Minister of Unification shall not designate any more Inter-Korean trader, and the Inter-Korean trade is explicitly declared as a trade within one nation;⁵⁸⁾

53) Article 1 of the Act.

54) Article 3 of the Act.

55) Paragraphs 1 and 3 of Article 5 of the Act.

56) Paragraphs 3 and 4 Article 9 of the Act.

57) Article 9-2 was newly established in the Act.

- The Minister of Unification may approve the trading items and payment methods on a comprehensive basis when approving goods taken to/from the North;⁵⁹⁾
- The Minister of Unification may approve the applicant of the Inter-Korean cooperative work based upon the agreement between the North and the South, and such cooperative work at the same time;⁶⁰⁾ and
- Punishment for minor violations such as negligent notice and report has been downgraded from a criminal fine to an administrative penalty of less than three million won (equivalent to US\$2.9 thousand).⁶¹⁾

3. Prospects of the Inter-Korean Exchange and Cooperation Act

As explained above, large parts of the Inter-Korean Exchange and Cooperation Act have been revised in a proper way. However, other parts of the Act remain to be improved as follows:

- The Act has to be upgraded as a basic law regarding the Inter-Korean exchange and cooperation in every sector in anticipation for the full-fledged Inter-Korean relations;⁶²⁾
- The roles of both the government and the private sector should be reasonably separated and established in the Act;
- The North Korean authorities could be explained and persuaded the framework and operations of the Act in the understandable manner;
- The approval of the Minister of Unification⁶³⁾ regarding the Inter-Korean

58) Article 12 of the Act.

59) Paragraph 2 Article 13 was newly established in the Act.

60) Paragraph 3 Article 17 was newly established in the Act.

61) Article 27-2 was newly established in the Act.

62) Such Inter-Korean relations regarding visits, meetings and family reunions, trade in goods, cooperative works, transportation, communications, quarantine services as provided for in the Act could be regulated and governed by a separated and individual act. Otherwise, they might be established comprehensively in a single Act. Park Jeong-Won, *op.cit.*, p.22.

63) At present, in accordance with Article 13 of the Act the approval of the Minister of Unification is required for taking goods to/from the North, types of trading and payment method. Virtual meetings with North Koreans on the Internet including access to the North Korean-made websites, downloads, listing on the bulletin, application for membership thereof, etc. have been argued whether such approval is necessary or not. In this case, the approval of the authorities concerned would be somewhat arbitrary. *Id*, p.23.

relations might be more freely obtained. For example, an authoritative approval would be replaced by a simple report or self-regulatory conduct on a case-by-case basis;⁶⁴⁾

- The extent of legislative delegation should be minimized so that the extent of the delegation is narrow and grounded in the Act; and
- When the Minister of Unification makes an order that the applicant should coordinate the content of the Inter-Korean cooperative works,⁶⁵⁾ his order should be grounded in the Act with respect to preconditions, presentation of applicant's opinion, explanation of order, appeal procedure, etc.

IV. Conclusion

The prospects for the Inter-Korean Exchange and Cooperation Act can be described from the both domestic and international point of view. In this regard, the relation between China and Taiwan serves as a useful reference to the Inter-Korean relation.

Both China and Taiwan are applying individual laws and regulations toward the cross-straight legal issues.⁶⁶⁾ China has established a principle of "one nation, two systems", and applied equal and reciprocal treatment to Chinese and Taiwanese residents in a flexible manner. In the economic area, particularly, China has afforded Taiwanese residents various incentives to promote investment in the Mainland.⁶⁷⁾ On the contrary, Taiwan has established few laws and regulations except the Cross-Straight Relation Ordinances. The Taiwanese government allows only indirect exchanges on a private level because it believes they stay in the first phase of "reciprocal exchange" toward the ultimate unification of China. In the next phase of "mutual trust and

64) When the authorities concerned are going to regulate unauthorized contacts or transactions on the Internet, its nature as an open network free of any supervision and regulation could jeopardize the policing authority of the government.

65) Paragraph 1 Art 18 of the Act.

66) Moon Joonjo, "The Recent Developments and Prospects of Legal Systems for the Cross-Straight and the Inter-Korean Relations", presented at the Korea-Taiwan International Conference held in Taipei on July 8, 2005.

67) People's Republic of China proclaimed the Regulation to Promote Taiwanese Investment in China in July 1988, and the Act to Protect Taiwanese Investment in March 1994, applicable to only the Taiwanese residents.

cooperation", the inter-governmental communication channel would be established to realize so-called "three Kinds of Exchanges".⁶⁸⁾

Looking into the Korean Peninsula, we have to differentiate the roles and functions of both the government and the private sector in line with the developments of the Inter-Korean relation. In the initial phase, the government should be obliged to perform traffic control and policing of the Inter-Korean relations. But in the advanced phase, the government should be satisfied with the role of a guardian. Also, the roles and functions of the South Korean government should be balanced with those of its North Korean counterpart.

However, Korea's declaration that the Inter-Korean trade is not a foreign trade but a transaction within one nation could meet considerable opposition on the international scene. It is likely for some countries to raise arguments.⁶⁹⁾ Several provisions in the local laws are not sufficient to persuade the foreign opponents. Theoretical and empirical reasoning should be developed utilizing the references of former divided states like Germany and Yemen. Also, as the case may be, specific circumstances including the issue of North Korean nuclear capability should be emphasized in an affirmative manner.

In terms of legal system, the framework of the Inter-Korean Exchange and Cooperation Act should be modified to tackle the above-mentioned issues, including the obscure nature as a basic law, too much legislative delegation and too many *mutatis mutandis* clauses, regulation-oriented complex provisions and disputes over jurisdictions. In this connection, consistency, foreseeability and transparency of the policy toward North Korea are badly needed.

On the other hand, substantive provisions concerning the reversion of property rights, marriage status, inheritance, etc. which could solve the legal entanglement between the residents of the North and the South before and after the unification should be established as a special law delegated by the Act.⁷⁰⁾

68) Between China and Taiwan, three Kinds of Exchanges mean free commerce, free transportation and free postal exchanges.

69) Basically, the transaction within one nation is not subject to tariffs. So exporting countries of such items as rice, cement and other agricultural products which are price competitive with those traded between the two Koreas are inclined to say against Korea's allegation.

70) Dr. Sohn Hee-Doo indicated a reference of the Taiwanese ordinance on the relationship between the residents of Taiwan and the Mainland. Sohn, *Study on the Improvement of the Legal Framework for the Inter-Korean Exchange and Cooperation Related with the North Korean Special Economic Zone* [in Korean], Korea Legislation Research Institute, November

In view of the unforeseeable developments of the Inter-Korean relation, we have to consider a draft "Basic Law on the Inter-Korean Relation" on a long-term basis. The draft Basic Law would be conceptualized based upon the followings:⁷¹⁾

- The draft Basic Law has to stipulate the special nature of the Inter-Korean relations⁷²⁾ to stave off foreign countries' arguments against the Inter-Korean trade out of the ambits of the WTO Pact;
- While the draft Basic Law provides for the core matters, the individual acts should govern such respective subjects as economic cooperation, social and cultural exchanges, etc.;
- In such case, those matters subject to lower level of administrative regulations should be marshaled and analyzed in a comprehensive manner;
- At the same time, systemic arrangements of regulations and jurisdictions with respect to the Inter-Korean relations are necessary; and
- The proposed legislation should be accelerated because the improvement of legal frameworks would facilitate the exchange and cooperation between the North and South.

Source: *Studies on North Korean Law*, Vol.8, pp.337-361, the North Korean Law Society, October 2005

2004, p.89.

71) Lawmaker Lim Chae-Jung proposed a draft bill "Basic Law to Enhance the Inter-Korean Relation" in 2004, which is still under discussion in the Standing Committee of the National Assembly owing to various reasons including the nuclear crisis. The North Korean Law Society, represented by Professor Chang Myung-Bong, presented its opinion to the legislators modifying some provisions of the bill after a series of discussion meetings in 2004.

72) The bill proposed by Lawmaker Lim contains the following provisions:

- The relationship between South Korea and North Korea shall be special relations, other than state-to-state relations, formulated provisionally in the course toward the unification of the Korean Peninsula.
- For the purpose of the Act, North Korea shall not be regarded as a foreign state, and the Inter-Korean trade shall be deemed as the internal transaction among the Korean people.

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<국문초록>

南北交流協力法制의 개선방향

박환일 (경희대 법대 교수)

남북교류협력법은 남북 교류가 본격화되기 전에 일어날 수 있는 문제점을 예상하여 남측이 일방적으로 제정·시행한 법률이다. 이 법은 남북간의 인적 왕래, 주민접촉, 교역, 협력사업을 개방한다는 전제 하에 다른 법률에 우선하여 적용되도록 하고 그 절차에 관하여 자세히 규정하고 있다.

남북교류협력법은 남북교류협력에 관한 기본법이자, 남북교류협력을 보장·촉진하는 촉진법인 동시에 절차법이다. 이 법은 통일지향적이며 남북한 관계의 발전적 상황을 고려하여 包括的이고 동시에 수시 개정될 수밖에 없는 過渡期的 특징을 갖고 있다.

남북교류협력법은 남북정상회담과 금강산관광, 개성공단 건설 등 남북교류협력이 급진전을 보이면서 오히려 교류협력의 제약요소로 작용하는 일이 많아졌다. 그러므로 남북관계의 변천에 비추어 남북교류협력법제를 조속히 개선할 필요가 있다.

남북교류협력법의 개선방안을 모색함에 있어서는 국내 및 국제적인 관점에서 큰 틀에서 접근할 필요가 있다. 국제적으로는 남북간 거래를 민족내부의 거래로 보는 데 적잖은 이의가 제기될 가능성이 있으므로 이들을 설득할 수 있는 규정화가 필요하다. 국내적으로는 남북간 교류협력의 진전에 따라 정부와 민간부분의 역할과 기능분담을 하되, 점차 정부는 후원자 역할을 하는 데 그치고, 북측 상대방의 지위와 성격에 따라 균형을 맞추는 것이 중요하다.

법체계상으로 남북교류협력법은 위임·준용규정의 과다, 규제일변도 절차의 번잡성, 업무관할이나 창구단일화 등에 대한 문제점이 계속 지적되어 왔으므로 장기적으로는 남북교류협력기본법(안)을 제정하고 경제교류협력, 사회문화교류협력 등의 분야별로 단행법률을 제정하는 것이 바람직하다. 이미 남북관계발전기본법안이 의원입법으로 국회에 제안되어 있다.

그리고 지금까지 하위규정에 위임하였던 사안들도 재조정하여 입법체계를 바로 잡도록 해야 한다. 현행 남북교류협력법 및 그 하위규정, 남북협력기금법 및 시행령 기타 각종 고시 및 훈령 등에 대한 체계적 분석을 토대로 법령을 체계화하고 각 부처 업무를 조정하여야 할 것이다.

주제어: 남북교류협력, 통일부, 국가보안법, 위임입법, 준용규정, 민족내부거래

Key Words: Inter-Korean exchange and cooperation, Ministry of Unification, National Security Act, legislative delegation, *mutatis mutandis* clause, transactions within a nation