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North Korean and Chinese Joint Equity Venture Laws: A Comparison

Chin Kim*

I. INTRODUCTION

North Korea (the Democratic People's Republic of Korea) and China (the People's Republic of China) both belong to the family of a socialist legal system which is based on the Marxist-Leninist outlook toward law.¹ North Koreanization of Marxism-Leninism has been conceptualized in "chuche self reliance thought." North Korean thought is a cherished dream of a self-reliant national economic, social, and political policy.² Meanwhile, Sinification of Marxism-Leninism is Mao Zedong Thought, which is primarily based upon Mao's teachings, with emphasis on such doctrines as universal application of those teachings, the primacy of human will over materialism, love of manual labor, and devotion to the Communist party.³ Writings about the Chinese legal system in English are available.⁴ However, the hermit policy undertaken by North Korea, since the creation of the socialist state, has obscured a clear picture of the

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1. As to the classification of legal systems and the identification of the socialist legal system, see R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 26-27 (1985); K. ZWIEGERT & H. KÖTZ, *1 AN INTRODUCTION TO COMPARATIVE LAW* 293-352 (1977). A more comprehensive analysis on the socialist legal system is made by Professor Christopher Osakwe in M. GLENDON, H. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITION* 672-714 (1985).

2. C. KIM, *SELECTED WRITINGS ON ASIAN LAW* 488-91 (1982) [hereinafter *SELECTED WRITINGS*].

3. *Id.* at 482-83.

4. Kim, *The Modern Chinese Legal System*, 61 *TUL. L. REV.* 1413 (1987) [hereinafter Kim, *The Modern Chinese Legal System*]. As to the Chinese legal system, with specific reference to business laws and practice, see Professor Alice Erhsoon Tay's analysis, which appears in *CHINA LAWS FOR FOREIGN BUSINESS* ¶ 2-105 (CCH Australia Ltd. 1987).

North Korean legal system. Therefore, it is worthwhile to outline its legal system, based on available sources.⁵

The 1972 Constitution of the Democratic People's Republic of Korea (North Korea) uses the Chuche Thought of the Worker's Party as its national ideology, being a localization or North Koreanization of Marxism-Leninism to North Korean reality.⁶ The Chuche Thought is being implemented by ideological, technical, and cultural revolutions.⁷ One widely used unique method in the revolutionary processes is the Tae'an method, which is a Chuche-oriented economic management.⁸

Under the 1972 Constitution, the unicameral Supreme People's Assembly (S.P.A.) remains the highest organ of state power and is the exclusive legislative body.⁹ A permanent standing committee is provided to exercise supreme power in the S.P.A.'s absence.¹⁰ However, the 1972 Constitution mandated the following structural changes in North Korean government: 1) the investment of considerable power in a newly-created Presidency;¹¹ 2) the creation of another government unit, the Central People's Committee (the C.P.C.)¹² (the highest leadership organ of state power) to provide an institutional check on the central state bureaucracy and to relieve the bureaucracy of policy-making functions;¹³ and 3) the elimination of an entire layer of government at the local level and the institution of the local people's committee, a control device similar to that employed at the central level.¹⁴

The 1972 Constitution has refined the structure and function of the court and the procuratorate.¹⁵ Further refinement of the court's role was made in 1976, when the court organization law went through

5. C. KIM, KOREAN LAW STUDY GUIDE 16-26, 80-88 (1987) [hereinafter STUDY GUIDE].

6. SELECTED WRITINGS, *supra* note 2, at 488.

7. S. CHO, LAW AND LEGAL LITERATURE OF NORTH KOREA 2 (1988).

8. Other methods include the Chongsan-ri method (management method of socialist economy inspired by the top leadership) and the Chollima movement (state orchestrated production drive as demonstrated by the mystic flying horse; "Chollima" means flying horse). As to the discussion of the three methods, see SELECTED WRITINGS, *supra* note 2, at 488-90.

9. *Id.* at 294-96.

10. *Id.*

11. *Id.* at 296.

12. The North Korean Constitution designates the C.P.C. as the government's top policy making organ. Headed by the President of North Korea, who nominates the other 24 Committee members, the C.P.C. makes high-level policy decisions and supervises the State Administrative Council (cabinet).

13. SELECTED WRITINGS, *supra* note 2, at 297-98.

14. *Id.*

15. STUDY GUIDE, *supra* note 5, at 19-26.

its revision.¹⁶ One of the unique features of the 1972 Constitution is the abolishment of the tax system as being "a hangover of the old society."¹⁷

Laws, as used in the generic sense, adopted and issued by various state organs pursuant to the 1972 Constitution, may be classified into six categories.¹⁸ Although it was reported in the 1970s that a comprehensive codification project had been carried out in North Korea, there is no official announcement regarding the outcome of the project.¹⁹ However, an unofficial source indicates that the several results were achieved.²⁰ First, extensive revisions of the Criminal Code and the Criminal Procedure Code took place in 1974. The law on court organization was also revised in 1976. Second, many new codes were enacted including Law on Management of Socialist Property, 1972; Law on Organization of Local Sovereign Organs, 1974; Code of Civil Procedure, 1976; Land Code, 1977; Socialist Labor Code, 1978; Law on People's Health Care, 1980; Provisional Civil Regulations, 1982; and Enforcement Rules of Provisional Civil Regulations, 1985.

On September 8, 1984, the North Korean Joint Venture Law (North Korean JVL) was adopted by the Standing Committee of the S.P.A.²¹ The law is designed to attract foreign capital and technology.²² The law consists of 26 articles, and covers such subjects as guiding principles of joint ventures; organization of a joint venture company; board of directors and business operations; audit and income distribution; and dissolution of a joint venture company and settlement of disputes.²³ This basic law was augmented on March 20, 1985 by

16. K.S. KIM, CHOSEN MINSHUSHUGI JINMIN KYOWAKOKU NO KEIJI HOSEI (CRIMINAL LEGAL SYSTEM DEALING WITH THE CRIMINAL MATTERS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA) 153-59 (1988).

17. SELECTED WRITINGS, *supra* note 2, at 290, 490.

18. The categories are as follows: (1) laws, ordinances and decisions adopted by the S.P.A. and decisions adopted by the Standing Committee of the S.P.A.; (2) presidential decrees; (3) decrees and decisions adopted and directives issued by the Central People's Committee; (4) decisions adopted and directives issued by the Administrative Council and directives issued by various ministries; (5) decisions adopted by the local people's assembly, decisions adopted and directives issued by the local people's committee and decisions adopted and directives issued by the local administrative committee; (6) directives issued by the Central Court and the Procurator-General.

19. STUDY GUIDE, *supra* note 5, at 18.

20. *Id.*

21. Joint Venture Law of the Democratic People's Republic of Korea, Decision Number 10, Standing Committee of the Supreme People's Assembly of the Democratic People's Republic of Korea, adopted Sept. 8, 1984 [hereinafter North Korean JVL], translated in Kim, *North Korean Joint Venture Laws*, 19 CAL. W. INT'L L.J., 175, 205, app. I (1988-89) [hereinafter Kim].

22. Kim, *supra* note 21, at 177.

23. *Id.*

an implementing statute entitled Detailed Regulations for the Joint Venture Law (North Korean JVL Regulations).²⁴ These two statutes were augmented by two enactments: the Joint Venture Company Income Tax Law²⁵ and the Alien Income Tax Law.²⁶ These tax laws were also accompanied by implementing regulations entitled Detailed Regulations for the Joint Venture Company Income Tax Law²⁷ and Detailed Regulations for the Alien Income Tax Law.²⁸ These statutes are expected to be supplemented in the future by a series of rules and regulations to deal with specific problems.

In the People's Republic of China, the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Chinese JVL) was enacted in 1979 to accelerate the introduction of foreign investment and technology.²⁹ This law, commonly known as the 1979 Sino-foreign Joint Equity Venture Law, is implemented by the 1983 Regulations (Chinese JVL Regulations). These implementing regulations are intended to cover unattended issues under the 1979 basic statute.³⁰ These two statutes are being supplemented by a series of rules and regulations to deal with specific problems.³¹

24. Detailed Regulations for the Joint Venture Law of the Democratic People's Republic of Korea, Decision Number 14, State Administrative Council, *adopted* Mar. 20, 1985 [hereinafter North Korean JVL Regulations], *translated in* Kim, *supra* note 21, at 211, app. II.

25. Joint Venture Company Income Tax Law of the Democratic People's Republic of Korea, Decision Number 12, Standing Committee of the Supreme People's Assembly of the Democratic People's Republic of Korea, *adopted* Mar. 7, 1985, *translated in* Kim, *supra* note 21, at 223, app. III.

26. Alien Income Tax Law of the Democratic People's Republic of Korea, Decision Number 12, Supreme People's Assembly of the Democratic People's Republic of Korea, *adopted* Mar. 7, 1985, *translated in* Kim, *supra* note 21, at 229, app. V.

27. Detailed Regulations for the Joint Venture Company Income Tax Law of the Democratic People's Republic of Korea, Decision Number 22, State Administrative Council, *approved* May 17, 1985, *translated in* Kim, *supra* note 21, at 225, app. IV.

28. Detailed Regulations for the Alien Income Tax Law of the Democratic People's Republic of Korea, Decision Number 23, State Administrative Council, *approved* May 17, 1985, *translated in* Kim, *supra* note 21, at 231, app. VI.

29. The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, *adopted* by the Second Session of the Fifth National People's Congress, July 1, 1979, *promulgated* July 8, 1979 [hereinafter Chinese JVL], *reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 6-550 (CCH Australia Ltd. 1987).

30. Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, *promulgated* by the State Council, Sept. 20, 1983 [hereinafter Chinese JVL Regulations], *reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 6-550 (CCH Australia Ltd. 1987). The implementing regulations, amended since 1983, update the Chinese JVL.

31. It is reported that:

All in all, from 1979-1986, 95 laws and statutes were enacted by the National People's Congress and its Standing Committee. The highest organ of administration, the State Council, issued over 400 economic regulations, while the people's congresses at the

In addition to the statutes specifically dealing with Sino-foreign joint equity ventures, there are two other important legislative pieces that are concerned with foreign investment enterprises in China. First, is the 1986 Law of the People's Republic of China Concerning Enterprises with Solely Foreign Investment,³² which is designed to permit the establishment of wholly foreign-owned enterprises where capital is provided totally by the foreign enterprises. Second, is the 1988 Law of the People's Republic of China on Sino-foreign Co-operative Enterprises.³³ This law appears to legalize already existing foreign and domestic cooperative ventures by differentiating purely domestic cooperative ventures and equity ventures.³⁴

One significant move undertaken by the Chinese government in the area of foreign investment and the introduction of foreign technology is the adoption of the 1986 State Council Regulations Concerning Encouragement of Foreign Investment (EFI Regulations).³⁵ The EFI Regulations are "formulated in order to improve the investment environment, to better absorb foreign investment, import advanced technology, improve the quality of manufactured goods, expand exports to earn foreign exchange and to develop the national economy."³⁶ Export enterprises and technologically advanced enter-

provincial level and their standing committees had promulgated another 700. The earlier arbitrariness and informality of political decision-making in these areas is thus being replaced with a body of public law and regulations of growing complexity but accessible to those affected.

CHINA LAWS FOR FOREIGN BUSINESS ¶ 2-145 (CCH Australia Ltd. 1987).

32. The Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment, *adopted* by the Fourth Session of the Sixth National People's Congress, Apr. 11, 1986, *reprinted and translated* in CHINA LAWS FOR FOREIGN BUSINESS ¶ 13-506 (CCH Australia Ltd. 1987). The 24 article law includes provisions on conditions guiding the establishment of the solely foreign-funded enterprises. It covers the qualifications of juridical person, taxation, foreign exchange, period of operation, labor unions, and protection of legitimate rights and interests. *Id.* It is reported that there are more than 100 foreign-funded enterprises in China. As in the case of the 1979 Sino-foreign Joint Venture Law, the law was again left intentionally vague by prescribing only a skeletal framework to be supplemented later with detailed regulations. Some unanswered questions include: (a) to what extent is general assistance in balancing foreign exchange to be given to allow the marketing of products domestically; (b) what procedure or mechanism for remittance of earned profits is to be used; (c) whether preferential treatment, such as the tax holidays offered to joint ventures, will be available; (d) what is the term (allowable number of years) of operation of foreign-funded enterprises; and (e) whether there are any industrial or commercial branches in China that do not allow foreign enterprises.

33. Law of the People's Republic of China on Sino-foreign Co-operative Enterprises, *adopted* by the First Session of the Seventh National People's Congress, Apr. 13, 1988, *reprinted and translated* in CHINA LAWS FOR FOREIGN BUSINESS ¶ 6-100 (CCH Australia Ltd. 1987).

34. *Id.*

35. State Council Regulations Concerning Encouragement of Foreign Investment, *promulgated* by the State Council, Oct. 11, 1986 [hereinafter EFI Regulations], *reprinted and translated* in CHINA LAWS FOR FOREIGN BUSINESS ¶ 13-509 (CCH Australia Ltd. 1987).

36. *Id.*

prises designated under the 1986 EFI Regulations are to receive preferential treatment over non-productive enterprises.³⁷ The treatment extended to these designated enterprises includes offering means to reduce production costs, relaxation of foreign exchange control, managerial autonomy and elimination of certain bureaucratic red tape.³⁸

Another significant legal infrastructure which protects foreign investment in general, and joint equity ventures in particular, appears in Article 18 of the 1982 Chinese Constitution.³⁹ Article 18 stipulates that:

The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China.

All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.⁴⁰

While the North Korean JVL, with 26 articles, was made into law in September 1984, and the North Korean JVL Regulations, with 71 articles, were adopted in March 1985, the Chinese JVL, with 15 articles, was enacted in July 1979, and the Chinese JVL Regulations, with 118 articles, were adopted in September 1983. Chronologically speaking, North Korean statutes on joint equity ventures are recent innovations compared to their Chinese counterparts. However, there has been a steady stream of legislative and executive acts passed in

37. . *Id.* at art. 2. Service industries are ineligible for certification under the 22 articles of the EFI Regulations.

38. As to the discussion of the 22 articles of the EFI Regulations, see Yuding, *Like Bamboo Shoots After a Rain: Exploiting the Chinese Law and New Regulations on Sino-foreign Joint Ventures*, 8 Nw. J. INT'L L. & Bus. 59, 106-17 (1987) [hereinafter Yuding]. According to Article 3 of the newly adopted regulations encouraging foreign investment in the Shanghai Development Zones by the Shanghai Municipal People's Congress, the Development Zones are to focus on attracting foreign capital to develop new technology and new industries and on establishing technologically advanced as well as export orientated enterprises. The preferential treatment includes exemptions from local tax, exemptions from building tax, and/or a reduction of exemption from Consolidated Industrial and Commercial Tax. See CHINA LAWS FOR FOREIGN BUSINESS ¶ 91-070 (CCH Australia Ltd. 1987) (English text of regulations).

39. The Constitution of the People's Republic of China, art. 18, adopted by the Fifth Session of the Fifth National People's Congress, Dec. 4, 1982, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 4-500 (CCH Australia Ltd. 1987).

40. *Id.*

China to augment the original laws and regulations.⁴¹ The trend of an active legislative program continues as of June 1989.

The purpose of this writing is to comprehend better the North Korean joint equity venture laws by comparing them to their counterparts in Chinese law. Both North Korean and Chinese national ideologies are based on Marxism and Leninism, under a centrally planned socialist economy.⁴² Nevertheless, in the case of China there has been an erosion of state-run economic policy in order to accommodate current state needs.⁴³ To what extent this trend will continue, in spite of the June 1989 turmoil, is not the subject of this study.

Laws dealing with both countries are the basic source documents which comparative law specialists consult in order to consider relevant questions of similarity, difference, derivation, and deviation. For this purpose, 10 essential elements of joint equity ventures that were written in the North Korean statutes will be used as the basis of comparison. These elements are: a) general principles and rules; b) organization of joint venture companies; c) capital investment; d) board of directors and management; e) purchase of materials and sale of products; f) labor management; g) foreign exchange control; h) audit and distribution; i) dissolution of a joint venture company; and j) settlement of disputes. Each of these elements will be discussed in light of Chinese legislative experience in the subject areas. Because of their importance, two subject areas, organization of joint venture companies and capital investment, will receive detailed analysis. Whenever necessary, shortcomings of Chinese legislation will be noted.

41. See Comment, *Equity Joint Ventures in the People's Republic of China: The Promised Land is Not Yet in Sight for Foreign Investors*, 10 U. PA. J. BUS. INT'L L. 257, 259-62 and n. 16 (1988) [hereinafter Comment]. For an inventory of the principal laws related to joint equity ventures, see CHU & DONG, *A COMPLETE GUIDE TO FOREIGN INVESTMENT IN CHINA* 249-57 (1987) [hereinafter CHU & DONG].

42. SELECTED WRITINGS, *supra* note 2, at 480-91.

43. Kim, *The Modern Chinese Legal System*, *supra* note 4, at 1414, 1446-48. A recent significant development on this subject is an amendment of Article 11 of the Chinese Constitution on April 12, 1988. Amended Article 11 reads:

The individual economy of urban and rural working people, operated within the limits prescribed by law, is a complement to the socialist public economy. The state protects the lawful rights and interests of the individual economy. The state guides, helps and supervises the individual economy by exercising administrative control. The state permits the private economy to exist and to develop within the limits prescribed by law. The private economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private economy and provides guidance, supervision and control.

The Constitution of the People's Republic of China, art. 11, *adopted by the Fifth Session of the Fifth National People's Congress, Dec. 4, 1982, amended Apr. 12, 1988, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS* ¶ 4-500 (CCH Australia Ltd. 1987).

Since this study is concerned solely with joint ventures, North Korean tax statutes dealing with joint venture enterprises and aliens,⁴⁴ Chinese law on enterprises which are 100% funded by foreign investment,⁴⁵ and Sino-foreign corporative foreign enterprises⁴⁶ will not be treated. However, the 1986 EFI Regulations will be used whenever they are found to be relevant.

II. GENERAL PRINCIPLES AND RULES

North Korea and China have set out general principles and rules to regulate the creation and operation of joint equity ventures. Five topics are chosen to highlight fundamentals of North Korean and Chinese joint equity venture legislation.

A. *The Purpose of Desired Joint Ventures*

The stated purpose of North Korean JVL is "to expand and develop economic and technological interchange and cooperation with many countries of the world."⁴⁷ To promote this purpose the North Korean government "encourages joint ventures within its territory between its companies and enterprises and foreign companies, enterprises and individuals, based on the principle of equality and reciprocity."⁴⁸ Joint venture companies are expected to have "up-to-date scientific technology to improve the quality of the products and the ability to export."⁴⁹ Meanwhile, with a view to expanding international economic cooperation and technological exchange, the Chinese government "permits" the existence of equity joint ventures "to promote the development of China's economy and the raising of scientific and technological levels for the benefit of socialist modernization."⁵⁰ Regardless of the use of the words "encourage" or "permit," both countries take the position that a series of government permissions are necessary to establish and operate joint equity ventures, in order to harmonize the capitalistic approach to a nationally controlled economy.

44. As to the English text of these statutes, including a discussion of the subject of North Korean tax statutes affecting joint venture enterprises and aliens, see Kim, *supra* note 21, at 190-201, 223-34.

45. See *supra* note 32 and accompanying text.

46. See *supra* note 33 and accompanying text.

47. North Korean JVL, *supra* note 21, at art. 1.

48. *Id.*

49. North Korean JVL Regulations, *supra* note 24, at art. 4.

50. Chinese JVL, *supra* note 29, at art. 1; Chinese JVL Regulations, *supra* note 30, at art.

The desired joint ventures in North Korea "may involve many fields including industry, construction, transportation, scientific technology, and tourism."⁵¹ This desired listing was extended by JVL Regulations to add broadly based industries, such as electronics and automation industries, metallurgy, extraction, machine manufacturing, chemicals, food processing, cloth-making, and daily commodity industries.⁵² Meanwhile, China permits desired joint ventures⁵³ including: a) energy development, building material, chemical, and metallurgical industries; b) machine manufacturing, instrument and meter industries and offshore oil exploitation equipment manufacturing; c) electronics and computer industries and communication equipment manufacturing; d) light textile, foodstuffs, medicine, medical apparatus, and packaging industries; e) agriculture, animal husbandry, and fish breeding; and f) tourism and service industries.⁵⁴ This expansive list suggests that the Chinese government wishes to limit, to some extent, permissibility of certain types of joint ventures. However, the fact that the list speaks in general terms would suggest that a great array of potential investments are possible.

B. *Limited Liability Companies*

Joint ventures organized in North Korea must be limited liability companies.⁵⁵ This means that the potential profits, losses or liability for any partner to the joint venture are limited to the amount of capital invested.⁵⁶ How a North Korean joint venture company functions as a legal entity is not clear due to the unavailability of texts of relevant codes and statutes.⁵⁷

Chinese joint venture laws also provide that the joint ventures shall take the form of a limited liability company.⁵⁸ The Chinese statutory

51. North Korean JVL, *supra* note 21, at art. 2.

52. North Korean JVL Regulations, *supra* note 24, at art. 3.

53. These desired ventures were stipulated by the 1983 implementing regulations of the 1979 Joint Venture law.

54. Chinese JVL Regulations, *supra* note 30, at art. 3.

55. North Korean JVL, *supra* note 21, at art. 8.

56. However, Article 9 of the North Korean JVL provides that the amount of registered capital may not be reduced. The North Korean JVL does not require a minimum level as a percentage of registered capital, but Article 7 of the North Korean JVL provides that the portion of capital investment is to be decided by agreement between the parties to the joint venture. North Korean JVL, *supra* note 21, at arts. 7, 9.

57. It is reported that North Korea adopted Provisional Civil Regulations in 1982 and Enforcement Rules of Provisional Civil Regulations in 1985. See STUDY GUIDE, *supra* note 5, at 18.

58. Chinese JVL, *supra* note 29, at art. 4.

scheme is based on the status of a company⁵⁹ qualified as a legal person.⁶⁰ The 1987 law prescribes general provisions on legal persons⁶¹ and a section on the company.⁶² Thus, a joint venture company as a legal entity functions as an organization which possesses civil and legal capacity, and the capacity for civil acts according to the law. Further, a joint venture company independently enjoys civil rights and assumes civil obligations.⁶³ Since there is no commercial code which deals with elaborated provisions on issues related to a company, they must be written in the joint venture contract or in the articles of incorporation of the joint venture.⁶⁴

C. *Equality and Reciprocity*

The guiding principle that governs all joint equity ventures in North Korea is "equality and reciprocity."⁶⁵ The basic approach to the joint venture scheme is equal sharing of mutually beneficial results based upon the equal status of the partners. Thus foreign and domestic parties to the joint ventures are to possess the same rights, privileges, and immunities, as well as being liable for the same obligations, based on mutual dependence.

China also prescribes a similar principle of "equality and mutual benefit."⁶⁶ In Chinese JVL the phrase "the principle of equality and mutual benefit" is repeated twice. While the first statement⁶⁷ appears in connection with the creation of joint equity ventures, the second one is: "in handling important problems the board of directors shall reach decisions through consultation by the participants on the principle of equality and mutual benefit."⁶⁸ Thus, China seems to clarify that the principle is to be applied both in the process of creation as

59. The 1987 Chinese Joint Venture Law provides joint equity venture enterprises with the status of a legal entity. This principle is somewhat elaborated by the 1987 General Principles of Civil Law, *infra* note 61, which sanctions Sino-foreign joint equity ventures.

60. General Principles of Civil Law of the People's Republic of China, art. 41, adopted by the Fourth Session of the Sixth National People's Congress, Apr. 12, 1986 [hereinafter General Civil Principles of PRC], reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 19-150 (CCH Australia Ltd. 1987).

61. *Id.* at arts. 36-40.

62. *Id.* at arts. 41-49.

63. *Id.* at arts. 36-49.

64. Any joint venture, *i.e.*, in any jurisdiction of the United States, requires the contract and the articles of incorporation.

65. North Korean JVL, *supra* note 21, at art. 1.

66. Chinese JVL, *supra* note 29, at arts. 1, 6.

67. *Id.* at art. 1.

68. *Id.* at art. 6.

well as in the solution of important problems in the actual operation of equity joint ventures.

North Korean joint venture laws stipulate only the principle that "the Democratic People's Republic of Korea encourages joint ventures . . . based on the principle of equality and reciprocity."⁶⁹ It is unclear if this provision covers problems involved with both the creation and solution of important problems of the joint ventures. This issue should be clarified in the joint venture contract or in the articles of incorporation of the joint ventures.

D. Legal Protection

One of the greatest concerns to participants in foreign joint ventures is the loss of their investment and acquired interests due to nationalization, expropriation or sequestration of the invested properties. North Korea's and China's arrangements to protect assets are aimed at eliminating or reducing governmental acts by the host country. Legal issues involving safeguarding foreign investment or investment security are a continuing concern for foreign investors and their advisors.⁷⁰

The North Korean government guarantees to the parties of a joint venture "all legitimate rights stipulated by its laws in connection with the managerial activities of the parties to a joint venture."⁷¹ Also, the government "protects by law the properties and income accruing from the operation of the enterprise."⁷² However, to be entitled to such protection, the laws adamantly require that the parties to the joint venture "shall respect and strictly observe the legal norms and regulations" of North Korea in all their activities.⁷³ Therefore, foreign joint venture participants would thus be well advised to familiarize themselves with North Korean laws.

The Chinese government also protects, by the legislation in force, the resources invested by a foreign participant in a joint venture and "the profits due him pursuant to the agreements, contracts and articles of incorporation . . . as well as his other lawful rights and

69. North Korean JVL, *supra* note 21, at art. 1.

70. See generally W. KOLVENBACH, PROTECTION OF FOREIGN INVESTMENTS: A PRIVATE LAW STUDY OF SAFEGUARDING DEVICES IN INTERNATIONAL CRISIS SITUATIONS (1989) (primarily discussing situation in United States and extraterritorial effects of confiscation and appropriation, but protective devices presented could be useful for investment in other countries).

71. North Korean JVL, *supra* note 21, at art. 4.

72. *Id.* at art. 3.

73. *Id.* at art. 4.

interests.”⁷⁴ Thus, not only does the government protect against possible nationalization, expropriation or sequestration, it also commits itself to the enforcement of the joint venture agreement. At the same time, all activities of a joint venture are subject to Chinese laws and regulations.⁷⁵

As to the question of legal protection, three observations can be made. First, both North Korea and China stipulate legal protection over foreign investments, acquired rights, and interests,⁷⁶ but require observation of domestic laws.⁷⁷ In order to avoid unexpected loss, foreign investors must have prior knowledge of the extent and detail of legal protection accorded to them, as well as what laws they are to observe. Needless to say, full disclosure of the domestic infrastructure that is linked to the laws governing joint equity ventures is needed. On this issue North Korea is lagging behind China. As noted earlier, availability of a text of basic legal source information either in Korean or in foreign languages is much desired.⁷⁸ On the other hand, China is actively engaged in the publication and announcement of its legal infrastructure through official⁷⁹ and unofficial sources.⁸⁰

The second observation relates to the question of Ex Post Facto law doctrine.⁸¹ In the course of joint venturing, enterprises may face the risk of subsequent adverse legislation. Socialist equity joint ventures with non-socialist partners are relatively new. Consequently, laws and regulations relating to joint equity ventures have often taken the course of trial and error, resulting in subsequent unexpected legislation affecting the operation of joint ventures.⁸² Regarding the question of how to treat Ex Post Facto law doctrine in connection with North Korean joint equity ventures, there is no way to assess

74. Chinese JVL, *supra* note 29, at art. 2.

75. *Id.*

76. North Korean JVL, *supra* note 21, at arts. 3, 4; Chinese JVL, *supra* note 29, at art. 2.

77. North Korean JVL, *supra* note 21, at art. 4; Chinese JVL, *supra* note 29, at art. 2.

78. STUDY GUIDE, *supra* note 5, at 18.

79. The Beijing Review, a monthly English edition magazine, regularly features new legislation.

80. China Laws for Foreign Business, a looseleaf service of CCH Australia Ltd., also regularly updates newly adopted legislation.

81. As to the Ex Post Facto law doctrine in the United States, see U.S. CONST. art. I, § 10, cl. 1; and U.S. CONST. art. I, § 9, cl. 3.

For a discussion of the Ex Post Facto law doctrine in United States law, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 632-56 (2d ed. 1988); J. NOWAK, D. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 385-97 (3d ed. 1986).

82. Moser, *Foreign Investment in China: The Legal Framework*, in FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 102-03 (1987) [hereinafter Moser]. See also Comment, *supra* note 41, at 264-66 (suggesting possibility that harm of subsequent adverse legislation may be reduced through use of contractual renegotiation clauses).

the situation in North Korea, due to lack of legal source information and actual governmental handling of joint equity ventures.⁸³

In China, adverse legal consequences retroactively changed by virtue of subsequent legislation have been the subject of discussion by western writers.⁸⁴ Chinese JVL prescribes that protection from Ex Post Facto law is provided by "legislation in force."⁸⁵ This legislation has been construed to mean that the effects of Ex Post Facto law are in principle accepted in China.⁸⁶ Thus, there is the possibility of impairing previously executed terms of joint venture contracts.⁸⁷ However, it has been expressed that the Chinese stand on Ex Post Facto law has been softened⁸⁸ as a result of the enactment of the 1985 Foreign Economic Contract Law, which stipulates that "equity joint venture contracts . . . may continue to be valid when new laws are enacted."⁸⁹ It is not clear to what extent the 1985 law changes the already existing practice.⁹⁰ A second way of avoiding Ex Post Facto law doctrine is to insert "renegotiation clauses" in joint venture contracts in the event that contract terms are subject to adverse effects as a result of the enactment of new legislation.⁹¹ Some successful instances of this proposal have been reported.⁹²

The third observation concerns bilateral investment protection agreements.⁹³ There has been an increasing use of bilateral legal instruments dealing with protection of foreign investment in the world

83. STUDY GUIDE, *supra* note 5, at 18. Since the 1972 North Korean Constitution is silent on the question of Ex Post Facto law, it is necessary to rely on Article 4 of the North Korean JVL, which prescribes that North Korea "guarantees all legitimate rights stipulated by its law in connection with the managerial activities of the parties to a joint venture." North Korean JVL, *supra* note 21, at art. 4. Unless a "renegotiation clause" (in the event of the enactment of adversely harmful subsequent legislation) was inserted in the joint venture contract, foreign investors must appeal to the government by asserting that the new legislation was unreasonable and unexpected.

84. Moser, *supra* note 82, at 102-03; Comment, *supra* note 41, at 265-66.

85. Chinese JVL, *supra* note 29, at art. 2. The Chinese Constitution did not treat the question of Ex Post Facto law.

86. The legislation has been construed this way in order to promote China's own interests.

87. Moser, *supra* note 82, at 102-03.

88. *Id.* at 103.

89. Foreign Economic Contract Law of the People's Republic of China, art. 40, *adopted by the Tenth Session of the Standing Committee of the Sixth National People's Congress, Mar. 21, 1985* [hereinafter FECL], *reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS* ¶ 5-550 (CCH Australia Ltd. 1987). For a discussion of the FECL, see Kim, *The Modern Chinese Legal System*, *supra* note 4, at 1447.

90. Comment, *supra* note 41, at 265.

91. *Id.*

92. Moser, *supra* note 82, at 103. As to the new legislation changing tariff rates and the income tax rate, see CHU & DONG, *supra* note 41, at 193.

93. See generally U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, *BILATERAL INVESTMENT TREATIES* (1988) (describing such agreements).

community.⁹⁴ Usually, this agreement is entered into between capital exporting and importing countries in order to clarify the legal protection of investors under the general principles of international law.⁹⁵ While capital exporting countries could obtain useful political guarantees to reduce the political risk attached to investments, capital importing countries would create a climate of confidence for the investors.

As far as North Korea is concerned, there is no ascertainable official announcement that the country has entered into an investment protection agreement with any non-socialist country. On the other hand, China is actively using this form of international agreement to encourage foreign investment, as China considers that the utilization of a bilateral agreement brings mutually beneficial results.⁹⁶ Starting with Sweden in 1982,⁹⁷ China concluded a series of investment protection agreements with more than twenty countries.⁹⁸ Recent agreements are with Australia⁹⁹ and Japan,¹⁰⁰ both concluded in 1988. The agreement with Australia, for instance, includes such clauses as national treatment of investments;¹⁰¹ settlement of disputes;¹⁰² transparency of laws;¹⁰³ and expropriation and nationalization.¹⁰⁴ Usually expropriation and nationalization of foreign investment has been the focal point in negotiating bilateral agreements.¹⁰⁵ The China-Australia

94. *Id.*

95. *Id.*

96. Note, *If the BIT Fits: The Proposed Bilateral Investment Treaty Between the United States and the People's Republic of China*, 2 J. CHINESE L. 405, 427-28 (1988) [hereinafter Note].

97. Agreement on the Mutual Protection of Investments, Mar. 29, 1982, China-Sweden, reprinted in 4 E. ASIAN EXECUTIVE REP. 25 (1982).

98. Note, *supra* note 96, at 427-28.

99. Agreement on the Reciprocal Encouragement and Protection of Investment, Australia-China, reprinted in 28 I.L.M. 121 (1989) [hereinafter Australia-PRC Agreement].

100. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Aug. 27, 1988, China-Japan, reprinted in 10 E. ASIAN EXECUTIVE REP. 23, (1988).

101. Australia-PRC Agreement, *supra* note 99, at art. III; 28 I.L.M. at 127-28.

102. *Id.* at arts. V, XII, and XIII; 28 I.L.M. at 129-31.

103. *Id.* at art. VI; 28 I.L.M. at 130. Article VI provides:

Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect investments in its territory of nationals of the other Contracting Party:

(a) make such laws and policies public and readily accessible;

(b) if requested, provide copies of specified laws and policies to the other Contracting Party; and

(c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.

Id.; 28 I.L.M. at 130.

104. *Id.* at art. VIII; 28 I.L.M. at 130-31.

105. As to the discussion of nationalization and expropriation from the Australian perspective, see Kohona, *Investment Protection Agreements: An Australian Perspective*, 21 J. WORLD TRADE L. 79, 95-98 (1987).

agreement, for instance, stipulates that:

A Contracting Party shall not take measures of expropriation or nationalization or other measures having a similar effect relating to any investment unless the measures are in the public interest, non-discriminatory, in accordance with the law of the Contracting Party which has admitted the investment and against reasonable compensation.¹⁰⁶

China and the United States have been negotiating toward the completion of an investment protection agreement since 1983.¹⁰⁷ In the course of its negotiations, the United States has been using its 1982 model bilateral investment agreement.¹⁰⁸ The following three vexing issues have surfaced:¹⁰⁹ 1) national treatment of foreign investments;¹¹⁰ 2) expropriation and compensation;¹¹¹ and 3) dispute settlements.¹¹²

E. Overseas Korean Capital

North Korean JVL¹¹³ and JVL Regulations¹¹⁴ have special provisions to induce Koreans living abroad to participate in North Korean joint equity ventures. There are no similar provisions in Chinese

106. Australia-PRC Agreement, *supra* note 99, at art. VIII; 28 I.L.M. at 130-31. Article VIII stipulates the method of valuation in the following words:

The compensation referred to in paragraph 1 of this Article shall be computed on the basis of the market value of the investment immediately before the measures became public knowledge. Where the market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. The compensation shall include interest at a reasonable rate from the date the measures were taken to the date of payment, shall be paid without undue delay, shall be freely convertible and shall be freely transferable between the territories of the Contracting Parties at the average of the daily exchange rates, determined on each of those days in accordance with the law of the Contracting Party which has admitted the investment, over the six months immediately prior to the taking of the measures.

Id.; 28 I.L.M. at 131.

107. Note, *supra* note 96, at 432-57.

108. Treaty between the United States of America and ____ Concerning the Reciprocal Encouragement and Protection of Investment, Jan. 11, 1982, reprinted in EXPORT WEEKLY (BNA) 734 (Mar. 23, 1982); Revised Model Bilateral Investment Treaty, Feb. 24, 1984, reprinted in 20 EXPORT WEEKLY (BNA) 960 (1984). See also Vandervelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201 (1988).

109. Note, *supra* note 96, at 432-57.

110. *Id.* at 433-41.

111. *Id.* at 441-51. The Note discusses the *Otis Elevator* case at 450-51. As to the Chinese experiences of nationalization, see Laifman, *Treaties and Nationalization: The People's Republic of China Experience*, 11 HASTINGS INT'L & COMP. L. REV. 325 (1988).

112. Note, *supra* note 96, at 452-55.

113. North Korean JVL, *supra* note 21, at art. 5.

114. North Korean JVL Regulations, *supra* note 24, at art. 9.

law.¹¹⁵ North Korean law makes special reference to Korean traders and manufacturers in Japan¹¹⁶ whose political ideology is comparable to the North Korean party line. This reference is in line with the 1972 North Korean Constitution¹¹⁷ and the 1963 North Korean Nationality Law.¹¹⁸ According to the report, Korean residents in Japan, who are sympathetic to the North Korean cause, have become a primary source of investment in North Korea.¹¹⁹

China has also adopted similar legal measures to encourage overseas Chinese to invest in China by providing tax benefits.¹²⁰ In the eyes of Chinese authorities, it is surmised that overseas Chinese are well versed concerning the situation in China. It is easy to communicate with them by appealing to their compatriotic spirits. At the same time, investment by overseas Chinese in China may become a stimulus for other foreign nationals to invest in China.

III. ORGANIZATION OF EQUITY JOINT VENTURE COMPANIES

Both North Korea¹²¹ and China¹²² prescribe a process involved in organizing joint equity ventures.

115. Provisional Regulations for Foreign Exchange Control of the People's Republic of China, arts. 5-12, adopted by the State Council, Dec. 5, 1980, promulgated Dec. 18, 1980, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-550 (CCH Australia Ltd. 1987). The Regulations prescribe exchange control relating to enterprises with overseas Chinese capital. See also Rules for the Implementation of Exchange Control Regulations Relating to Enterprises with Overseas Chinese Capital, Enterprises with Foreign Capital and Sino-foreign Joint Equity Ventures, approved by the State Council, July 19, 1983, promulgated by the State Administration of Exchange Control, Aug. 1, 1983, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-670 (CCH Australia Ltd. 1987). The Rules define the term "enterprises with overseas Chinese capital" as "corporations, enterprises or other economic entities registered in China with overseas Chinese capital or capital of compatriots in Hong Kong and Macao areas, and managed independently or jointly with Chinese enterprises." *Id.*

116. North Korean JVL, *supra* note 21, at art. 5; North Korean JVL Regulations, *supra* note 24, at art. 9.

117. Article 65 of the North Korean Constitution prescribes that "all the Korean citizens abroad are legally protected by the Democratic People's Republic of Korea." Socialist Const. of Democratic People's Republic of Korea, Article 65.

118. As to the discussion of overseas Koreans in connection with the 1963 Nationality Law, see SELECTED WRITINGS, *supra* note 2, at 313.

119. *Predictions and Realities*, 136 FAR E. ECON. REV. 115 (1987). According to *Chongnyon Bank Delegation Visits Pyongyang*, FBIS-EAS-89-076 at 15 (Apr. 21, 1989), there is the joint venture bank of the General Association of Korean Residents in Japan (Chongnyon). It was further reported that the first meeting of the Council of the Korean Joint Venture Bank was held in Pyongyang on April 20, 1989, and officers of the bank were elected. See *Council of Joint Venture Bank Meets 20 April*, FBIS-EAS-89-080 at 21 (Apr. 27, 1989). As to the new joint venture with the participation of Korean residents in Japan, see *Hamhung Chemical Joint Venture Construction*, *id.* at 25.

120. Suzuki, *Koben kanrenho (Joint Venture Related Laws)*, in Chugoku kenkyujo (The Chinese Research Institute ed.), CHUGOKU KIHON HOREISHU (COLLECTED FUNDAMENTAL LAWS OF CHINA) 571 (1988).

121. See North Korean JVL, *supra* note 21; North Korean JVL Regulations, *supra* note 24.

122. See Chinese JVL, *supra* note 29; Chinese JVL Regulations, *supra* note 30.

A. North Korea

In North Korea at least four identifiable procedures are required.

1. *Finding Parties*

If a North Korean enterprise wishes to establish an equity joint venture with a foreign partner, it must obtain approval from the Ministry of External Economic Affairs in order to commence negotiations.¹²³ If a foreign partner wishes to form a joint equity venture with a North Korean entity, the Ministry of External Economic Affairs can introduce the foreign partner to potential domestic partners.

2. *Conclusion of the Joint Venture Contract*

Once the foreign party and the North Korean partner have agreed to form a company, they "shall conclude a contract concerning the organization of the joint venture company, and then shall receive the approval of the Ministry of External Economic Affairs."¹²⁴ This contract should contain such terms as contracting parties; name of the joint venture; duration of the joint venture; total amount of registered capital and each party's share; organization of the board of directors; number of company employees; and provision for wages and security of living conditions for employees.¹²⁵

3. *Adoption of Articles of Incorporation*

The next step is for the board of directors of the joint venture to adopt articles of incorporation which contain the principles and procedures of the joint venture's business activities.¹²⁶ The articles contain such information as the name and location of the company; the total capital investment and proportion of contributed capital investment by each party; and the life duration of the joint venture.¹²⁷

123. North Korean JVL Regulations, *supra* note 24, at art. 10.

124. *Id.* at art. 11.

125. *Id.* at art. 12.

126. *Id.* at art. 15.

127. *Id.*

4. Registration

The joint venture is required to register with the appropriate provincial people's committee.¹²⁸ This requires submission of an application for registration of the company, documents showing joint venture contract approval, articles of the company's incorporation, and confirmed documents to certify capital investment.¹²⁹ From the day of registration, a joint venture company becomes a judicial entity.¹³⁰ If the joint venture company wishes to revise the content of the registered documents, it must seek approval of the Ministry of External Economic Affairs, and then notify the registering agency of the revised content.¹³¹

B. China

At least 10 discernible procedural steps are set out to organize and reach the final stage of receiving an operational license for a joint equity venture.¹³²

1. Finding Parties

Foreign investors who are unable to find Chinese partners may seek assistance in finding potential Chinese participants through the central and provincial government organizations, including the China International Trust and Investment Corporation (CITIC).¹³³

2. Project Proposal and Preliminary Feasibility Study

When there is a union of foreign and domestic partners, both sides must prepare a project proposal and a preliminary feasibility study through negotiations.¹³⁴ The statute requires that the Chinese side submit both the project proposal and preliminary feasibility

128. North Korean JVL Regulations, *supra* note 24, at art. 13.

129. *Id.*

130. *Id.*

131. *Id.* at art. 14.

132. See Chinese JVL, *supra* note 29; Chinese JVL Regulations, *supra* note 30.

133. Chinese JVL Regulations, *supra* note 30, at art. 12. As to the discussion of how to find the right partner, see Yuding, *supra* note 38, at 67-78. As to the discussion of the Charter of the CITIC, see Comment, *supra* note 41, at 257-67. See also CHU & DONG, *supra* note 41, at 282-84 (discussion of requirements for foreign and Chinese partners).

134. Chinese JVL Regulations, *supra* note 30, at art. 9. As to the definition of the term "project" used in project proposal, see CHU & DONG, *supra* note 41, at 276-80.

study to the government department in charge of the Chinese partner in the proposed joint venture.¹³⁵

3. *Approval by the Department in Charge*

Both the project proposal and the preliminary feasibility study are examined by the government department in charge.¹³⁶ Through negotiations, the preliminary feasibility study develops into a more refined and formalized study. Once the proposal and feasibility study meet with the approval of the department in charge, documents are transmitted to the Ministry of Foreign Economic Relations and Trade (MOFERT) in the capital.¹³⁷

4. *Initial Approval*

MOFERT renders an initial approval of the project proposal and feasibility study.¹³⁸ In the event the matter is entrusted to another government agency with the power to examine and approve the establishment of the joint venture, the entrusted agency examines and disposes of the initial approval.¹³⁹

5. *Conclusion of Joint Venture Agreement and Contract*

When the parties receive initial approval from MOFERT or its entrusted agency, the next step is to arrive at a joint venture agreement and contract.¹⁴⁰ According to the statute, the agreement precedes the contract.¹⁴¹ The statutory definition of the joint venture agreement is "a document agreed upon by the parties to the joint

135. Chinese JVL Regulations, *supra* note 30, at art. 9.

136. *Id.* A model outline of a feasibility study for a Chinese-foreign joint venture in English is available elsewhere. See Moser, *supra* note 82, at 90, 139-41.

137. Chinese JVL Regulations, *supra* note 30, at art. 8. However, Article 3 of the Chinese JVL prescribes that the examining and approval authority is the Foreign Investment Commission of the People's Republic of China. Chinese JVL, *supra* note 29, at art. 3. Created by the Regulation of the State Council, the Foreign Investment Commission was established by the law of the National People's Congress. Obviously the National People's Congress is superior in power to the State Council; however, there seems to be no distinction between law enacted by the National People's Congress and a regulation adopted by the State Council in China.

138. Chinese JVL Regulations, *supra* note 30, at art. 8.

139. *Id.*

140. *Id.* at art. 9. As to the approval authority, Article 3 of the Chinese JVL designated the Foreign Investment Commission of the People's Republic of China, but MOFERT became the approval authority under Article 8 of the Chinese JVL Regulations. See Chinese JVL, *supra* note 29, at art. 3; Chinese JVL Regulations, *supra* note 30, at art. 8.

141. Chinese JVL Regulations, *supra* note 30, at art. 9. There is no formal requirement for the parties to sign the agreement. *Id.* at art. 13.

venture on some main points and principles governing the establishment of a joint venture.”¹⁴² The statute also defines a joint venture contract as “a document agreed upon and concluded by the parties to the joint venture on their rights and obligations.”¹⁴³ The contract represents the final agreement of the parties concerned, and is the basic organic document which lays the groundwork for the establishment of the venture. The statute further stipulates that only Chinese law will be applied in the settlement of disputes related to the formation of the joint venture contract.¹⁴⁴ When terms of a joint venture agreement and contract conflict, the latter prevails.¹⁴⁵

6. *Adoption of Articles of Incorporation*

When a joint venture contract is concluded, the next task is to adopt articles of incorporation, which serve as the enterprise's rules of governance.¹⁴⁶ Definition of articles of incorporation, according to statute, is “a document agreed upon by the parties to the joint venture indicating the purpose, organizational principles and method of management of a joint venture in compliance with the principles of the joint venture contract.”¹⁴⁷ “The examining and approval authority and the registration and administration office are responsible for the supervision and inspection of the execution of the joint venture contract” and the articles of incorporation.¹⁴⁸

7. *Applications*

The Chinese side is responsible for processing the application before the examining and approval authority to establish the joint

142. *Id.* at art. 9.

143. *Id.*

144. *Id.*

145. *Id.* at art. 13. MOFERT has published a model joint venture contract and other model contracts are also available. See Moser, *supra* note 82, at 142-56. As to another model, see 1 PRC LAWS FOR CHINA TRADERS & INVESTORS: PRACTICE & INTERPRETATION 458-70 (Chiu ed. 1983) [hereinafter PRACTICE & INTERPRETATION]. See also KIYOKAWA & NISHIMURA, CHUKOGU GOBENKIKYOHU NO RIRON TO JIZUMU (THEORY AND PRACTICE OF THE CHINESE JOINT VENTURE LAWS) 102-49 (1988) [hereinafter KIYOKAWA & NISHIMURA] (discussing contents of nine models of Chinese joint venture contracts).

146. Chinese JVL Regulations, *supra* note 30, at art. 9.

147. *Id.* at art. 13.

148. *Id.* at art. 18. MOFERT has drafted model articles of incorporation and other models are also available. See Moser, *supra* note 82, at 157-69. As to another model, see PRACTICE & INTERPRETATION, *supra* note 145, at 458-70. See also KIYOKAWA & NISHIMURA, *supra* note 145, at 151-85 (discussing contents of three models of Chinese articles of incorporation).

venture.¹⁴⁹ The statute stipulates the submission of the following five documents:¹⁵⁰

- 1) an application for establishment of the joint venture;
- 2) the feasibility study, jointly prepared by the parties to the venture;
- 3) the joint venture agreement, contract and articles of incorporation, duly signed by representatives of the parties concerned;
- 4) a list of the chairman, vice-chairman, and candidates for the board of directors of the joint venture, nominated by the parties; and
- 5) written opinions of the department in charge of the Chinese participant and the opinions of appropriate provincial, autonomous or municipal government where the joint venture is located, with regards to the establishment of the joint venture.

The above mentioned documents must be written in Chinese, but the second, third, and fourth documents can be simultaneously written in a foreign language, subject to agreement by the parties to the joint venture.¹⁵¹ In this instance, both versions are equally authentic.¹⁵² Applications to establish joint ventures must meet one or more of the following requirements:

- 1) They shall adopt advanced technical equipment and scientific management which enable the increase of the variety of products, the raising of quality and output, and the saving of energy and materials;
- 2) They shall provide benefits in terms of technical renovation of enterprises and result in less investment, quicker returns and bigger profits;
- 3) They shall enable the expanded production of products for export and result in increasing income in foreign currency; and
- 4) They shall enable the training of technical and managerial personnel.¹⁵³

8. Authorization To Establish a Joint Venture by the Examining and Approval Authority

The approval authority is usually MOFERT.¹⁵⁴ If the matter is entrusted to another agency under the statute, a final report by the

149. Chinese JVL Regulations, *supra* note 30, at art. 9.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at art. 4.

154. Chinese JVL Regulations, *supra* note 30, at art. 8. Article 8 requires that the approval

entrusted agency to MOFERT is required.¹⁵⁵ The authority is required to render a decision regarding approval or disapproval of the application within three months from the date the required documents were received.¹⁵⁶ The authority may request a revision of submitted documents within a time frame set by the authorities.¹⁵⁷ Approval may be denied if the revisions are not made within that time limit.¹⁵⁸

The application is denied if the joint venture involves any of the following conditions:

- 1) Detriment to China's sovereignty;
- 2) Violation of Chinese law;
- 3) Nonconformity with the requirements of the development of China's national economy;
- 4) Environmental pollution; and
- 5) Obvious inequity in the agreements, contracts and articles of association signed, impairing the rights and interests of one party.¹⁵⁹

9. *Registration*

Within one month after receipt of the certificate of approval by the approval authority, the joint venture is required to register with the Administrative Bureau for Industry and Commerce in the province, autonomous region or municipality where the joint venture is located.¹⁶⁰ Provisions of the Regulations of the People's Republic of China on the Registering and Administration of Joint Ventures Using Chinese and Foreign Investment require the submission of the following documents:

- 1) a request for registration in triplicate, signed by at least one representative from each side;
- 2) the document of approval issued by the ratifying authority, in triplicate;
- 3) the basic agreements of the joint venture, including the joint

authority examine if the applicant has complied with the following:

- 1) The total amount of investment is within the limit set by the State Council and the source of capital of the Chinese participants has been ascertained; and
- 2) No additional allocations of raw materials by the state are required and the national balance of fuel, power, transportation and foreign trade export quotas are not affected.

Id.

155. *Id.*

156. *Id.* at art. 10.

157. *Id.*

158. *Id.*

159. Chinese JVL Regulations, *supra* note 30, at art. 5.

160. *Id.* at art. 11.

venture contract and articles of association (in Chinese and the languages of the foreign parties, in triplicate);

4) the feasibility study;

5) a certificate of legitimacy issued by the appropriate government department in the foreign partner's or partners' country; and

6) "(v)erified documents concerning construction conditions, such as environmental protection, urban construction, water and power supply" issued by the Chinese authorities concerned.¹⁶¹

Revision of the terms of agreement, contract or articles of incorporation is forbidden without permission of the examining and approving authority.¹⁶²

10. *Receipt of License to Operate the Joint Venture*

The Administrator of Industry and Commerce issues the business license.¹⁶³ When the license is issued, a joint venture enterprise becomes a judicial entity. The date of the joint venture is formally established.¹⁶⁴

C. *Comparative Analysis*

The foregoing discussion shows that a wide gap exists between North Korean and Chinese procedural aspects in establishing equity joint ventures. As far as the procedures for finding partners is concerned, North Korea requires that the domestic partner, who wishes to engage in the establishment of a joint venture, must receive approval from the Ministry of External Economic Affairs.¹⁶⁵ On this issue, Chinese law is silent. It may be surmised that China is somewhat relaxed and allows Chinese enterprises to use their own initiative in finding foreign partners. Ordinarily, Chinese traders can find foreign partners by attending international trade fairs and may undertake immediate preliminary negotiations.

Notably lacking in the North Korean procedural steps, but appearing in the Chinese procedures, are the following four illustrations: First, as discussed earlier, the Chinese statute stipulates the procedures involved in the preparation and approval of the project proposal and the preliminary feasibility study. Further, the statute

161. As to a summary of this aspect of procedure, see Yuding, *supra* note 38, at 71.

162. Chinese JVL Regulations, *supra* note 30, at art. 5.

163. *Id.* at art. 11.

164. *Id.*

165. North Korean JVL Regulations, *supra* note 24, at art..10.

dictates the flow of the procedure from the government department in charge of the Chinese partner, to the role of the examining and approval authority in the initial steps of establishing a joint venture.

There is no North Korean statute dealing with this process. Given North Korea's unknown body of civil code and commercial law, initial steps for preparing the project proposal and feasibility study may be very much needed. These initial steps help lead to a meticulously drafted joint venture contract. A series of thorough negotiations to provide a list of the rights and liabilities of the parties to the joint venture may also be helpful.

Second, the North Korean statute does not require a conclusion of a joint venture agreement; however, China provides the agreement as an optional step. China gives statutory definitions of an agreement, a contract, and articles of incorporation of the joint venture. Through official and non-official sources, China provides sample models of agreements, contracts, and articles of incorporation. Needless to say, sample models are useful for investors to examine in advance to learn about the required contents of the basic legal documents. This area of activity is much desired in North Korea, in order to attract viable foreign investors.

Third, the Chinese statute designates that the Chinese partner prepare a project proposal and feasibility study, and also process the application to establish the joint venture. The Chinese statute also prescribes clearly the most essential documents and also the language requirement in the application process. The statute of North Korea may require further improvement in this area to incorporate Chinese practices into its own use.

Fourth, the Chinese statute prescribes two important time limits with respect to the creation of joint ventures. The Chinese examining and approval authority is under an obligation to approve or disapprove the application within three months of the date that the application to establish a joint venture is submitted. The Chinese statute further requires the submission of specified documents within one month from the date on which the examining and approval authority renders a final decision. As discussed earlier, North Korea does not have the two time limits which are incorporated into the Chinese statute. Because of this, potential western investors would face the difficulty of planning within the time frame.

Chinese law is silent as to which side of the proposed joint venture should be responsible for incurred expenses.¹⁶⁶ At the same

166. This silence has created concern over the preparation of the project proposal and the

time, there may be a need for legislation to specify the basis for the approval of the joint venture application by the examining and approval authority in China. On this issue, Yugoslavia provides a legislative example. Article 42 of its 1978 Law on Foreign Investment in Yugoslav Organizations of Associated Labor prescribes that:

[T]he investment contract shall be approved if the following conditions are met:

- 1) if it conforms to the provisions of this law and other statutes;
- 2) if it provides for business cooperation which guarantees increased production, higher labor productivity and larger exports or construction of new facilities on the basis of up-to-date technology and business economics; if it provides for the introduction and application of up-to-date engineering, technology and organization of production and business operation in the domestic organization of associated labor; if it provides for environmental protection, or if it contributes to advancement of scientific research in the domestic organization of associated labor;
- 3) if the total amount of capital which the parties to the contract are to invest in the joint venture ensures attainment of the conditions referred to under Point 2 of this paragraph;
- 4) if the terms of business cooperation envisaged conform to the conditions under which such cooperation is normally conducted in international economic relations;
- 5) if the share of the foreign person (patent rights, licenses, technology, etc.) has been realistically assessed;
- 6) if the capital to be invested by the foreign person is not less than the limit or value set by the Federal Executive Council;
- 7) if it conforms to the policy governing Yugoslavia's economic relations with foreign countries and Yugoslavia's balance of payments.¹⁶⁷

China has been actively engaged in the enactment of a series of legislation dealing with equity joint ventures since 1979. Problems arising under the equity joint venture legislation have been resolved by means of trial and error.¹⁶⁸ There seems to be a question of how to treat articles of incorporation, which are an essential element of the joint venture. Suffice to note here two issues which are highly relevant, the first of which is what the solution should be when

feasibility study of a proposed creation of a joint venture. See Comment, *supra* note 41, at 268 n.48.

167. As to the English text of the law, see ICSID, 10 INVESTMENT LAWS OF THE WORLD (1984).

168. Kim, *The Modern Chinese Legal System*, *supra* note 4, at 1446.

articles of incorporation conflict with subsequent legislation. In terms of a joint venture contract adversely affected by subsequent legislation, a suggestion was made to insert this issue in the joint venture contract by stipulating the need for renegotiations.¹⁶⁹ However, it should be argued that when the terms of the articles of incorporation are adversely affected by subsequent legislation, the terms of the articles of incorporation should be honored, because the very terms were approved by a government agency. It should also be noted that the government is a semi-partner to the joint venture by virtue of the state planned economy. It could also be argued that governmental approval of the terms of the articles of incorporation and subsequent legislation are both governmental actions, and there should be no discrimination between the two actions.

Second, there is the need to improve the public notice aspect of articles of incorporation. Chinese law is silent as to how to create public access to articles of incorporation of a joint venture company. The terms of the articles of incorporation should be publicly pronounced to protect the interests of the employees of the joint venture enterprise as well as third parties.¹⁷⁰ If the Chinese government is opposed to releasing articles of incorporation in public, then it should encourage joint enterprises to adopt by-laws, which do not usually require filing with a public office.¹⁷¹ Providing a definition of by-laws in the statute, which could be distinguished from articles of incorporation, may serve the purpose.

IV. CAPITAL INVESTMENT

Both North Korea¹⁷² and China¹⁷³ stipulate issues related to capital investment made by equity joint venture companies.

169. See *supra* note 82 and accompanying text.

170. See generally R. SCHLESINGER, et al., *COMPARATIVE LAW*, 696-702 (5th ed. 1988) (publication of articles of incorporation). The public notice requirement of articles of association can be found in the SOUTH KOREAN COMMERCIAL CODE at art. 396; and in the Japanese *SHŌHŌ* [Commercial Code] at art. 263. The English texts of these two articles respectively appear in the Korean Legal Center, 3 *LAW OF THE REPUBLIC OF KOREA* (1987) and EHS, *LAW BULLETIN SERIES*, JAPAN: ROPPO (1984).

171. HENN & ALEXANDER, *LAW OF CORPORATIONS* 306-10 (3d ed. 1983).

172. North Korean JVL, *supra* note 21, at arts. 7-9; North Korean JVL Regulations, *supra* note 24, at arts. 16-23.

173. Chinese JVL, *supra* note 29, at arts. 4-5; Chinese JVL Regulations, *supra* note 30, at arts. 19-32.

A. North Korea

The subject of North Korean capital investment can be discussed under four headings.

1. Total Amount of Investment and Registered Capital

The statute prescribes that the total amount of investment is determined by the joint venture contract,¹⁷⁴ without providing a definition of the total amount of the investment. It is surmised that by using words such as "total amount of investment," North Korea would allow the equity in the joint venture as collateral to secure outside borrowing, probably from North Korean banks. The statute provides also that registered capital cannot be reduced.¹⁷⁵

2. Forms of Capital Investment

According to the statutes, capital contributions can be made in cash, buildings, raw materials, machine equipment, invention rights, technical documentation, and land.¹⁷⁶

a. Cash Contributions

In the case of cash contributions, the currency designation is subject to agreement by the parties to the joint venture.¹⁷⁷

b. Non-Cash Contributions

When the capital contribution is in the form of either buildings, raw materials or machine equipment, the valuation of investment is to be made by the parties to the joint venture, based upon international market prices.¹⁷⁸ If the land is not part of the capital investment, the joint venture pays a land-use fee, established by the state agency.¹⁷⁹

174. North Korean JVL Regulations, *supra* note 24, at art. 6.

175. *Id.* at art. 21; North Korean JVL, *supra* note 21, at art. 9.

176. North Korean JVL, *supra* note 21, at art. 7; North Korean JVL Regulations, *supra* note 24, at art. 17.

177. North Korean JVL Regulations, *supra* note 24, at art. 18.

178. *Id.* at art. 19; North Korean JVL, *supra* note 21, at art. 7.

179. North Korean JVL Regulations, *supra* note 24, at art. 20.

c. The Ratio of Foreign Capital Contribution

There is no statutory minimum or maximum limitation on the ratio of capital contribution by the foreign and domestic partners to the joint venture.¹⁸⁰ The ratio is determined by the joint venture contract.¹⁸¹ The parties to the joint venture assume liability only for their portion of the investment which regards debts incurred by the joint venture company in the course of its operation.¹⁸²

d. Transferability of Shares of Registered Capital

The statutes prescribe a restriction on transfers of invested capital.¹⁸³ A transfer of a part or the whole portion of a party's investment can be made only with the consent of the other party to the joint venture.¹⁸⁴

B. China

The Chinese approach to capital investment can be discussed under five headings.

1. Total Amount of Investment and Registered Capital

Chinese law clearly distinguishes between the total amount of investment and registered capital.¹⁸⁵ While the former is the total amount of the registered capital, including loans (external borrowings),¹⁸⁶ the latter is capital investment registered with the registering agency.¹⁸⁷ By recognizing the concept of the total amount of investment, in addition to registered capital, the Chinese approach allows exemption from customs duty, and from industrial and commercial consolidated tax, for importation of machinery, equipment, parts and other materials, and also allows equity funds which

180. *Id.* at art. 16; North Korean JVL, *supra* note 21, at art. 7.

181. North Korean JVL, *supra* note 21, at art. 7; North Korean JVL Regulations, *supra* note 24, at art. 16.

182. North Korean JVL, *supra* note 21, at art. 8; North Korean JVL Regulations, *supra* note 24, at art. 22.

183. North Korean JVL, *supra* note 21, at art. 8; North Korean JVL Regulations, *supra* note 24, at art. 23.

184. North Korean JVL, *supra* note 21, at art. 8; North Korean JVL Regulations, *supra* note 24, at art. 23.

185. Chinese JVL Regulations, *supra* note 30, at arts. 21-22.

186. *Id.* at art. 21.

187. *Id.*

are part of the joint venture's total amount of investment.¹⁸⁸ The 1987 Provisional Regulations of the State Administration for Industry and Commerce on the Ratio between the Registered Capital and Total Investment of Sino-foreign Joint Equity Enterprises sets a ratio between registered capital and the total amount of investment.¹⁸⁹ There is a statutory provision which prohibits a change in registered capital.¹⁹⁰ In principle, registered capital is presented in Renminbi, Chinese official currency.¹⁹¹ However, registered capital can be in a foreign currency, pursuant to an agreement by the parties to the joint venture.¹⁹²

2. Forms of Capital Contribution

The statute stipulates two forms of capital contribution.¹⁹³

a. Cash Contributions

Cash contributions can be made either in Renminbi or foreign currency.¹⁹⁴ The statute requires cash contributions by the Chinese partner to be in Renminbi.¹⁹⁵ The foreign partner may make his contribution in either Renminbi or foreign currency.¹⁹⁶ In the latter case, foreign currency is to be converted into Renminbi, according to the exchange rate announced by the State General Administrator of Foreign Exchange Control on the day of its submission, or cross-exchanged into a predetermined foreign currency.¹⁹⁷ In the case of conversion of Renminbi into foreign currency, conversion is made according to the exchange rate announced by the State General

188. *Id.* at art. 71. This approach seems to provide, indirectly, preferential treatment for foreign investors. In the course of the operation of an equity joint venture company, foreign investors could use the equity for loans from a Chinese bank, thus minimizing the political and economic risks.

189. As to the discussion of this statute, see Moser, *supra* note 82, at 106. It is reported that the State Council issued "Certain Regulations on the Subscription of Capital by the Parties to Sino-foreign Joint Equity Enterprises" on December 30, 1987, in order to set a deadline for parties to all existing joint ventures to contribute promised capital. Of the nearly \$20 billion promised in foreign investment, only \$6.75 billion had actually been received as of 1988. See Recent Development, *Current Development in the People's Republic of China: Has China Changed?* 1 TRANSNAT'L LAW. 505, 519-20 (1988).

190. Chinese JVL Regulations, *supra* note 30, at art. 22.

191. *Id.* at art. 21.

192. *Id.*

193. *Id.* at arts. 25-32; Chinese JVL, *supra* note 29, at art. 5.

194. Chinese JVL Regulations, *supra* note 30, at art. 21.

195. *Id.* at art. 26. However, the cash Renminbi could be converted into foreign currency. *Id.*

196. *Id.*

197. *Id.*

Administrator of Foreign Currency on the day of submission of funds.¹⁹⁸

b. *Non-Cash Contributions*

Non-cash contributions include buildings, premises, equipment and other materials, industrial property, know-how, and the right to use a site.¹⁹⁹ Monetary valuation of non-cash contributions is made through consultation by the parties to the joint venture based upon fairness and reasonableness, or is made by a third party agreed upon by parties to the joint venture.²⁰⁰ Either way, the price fixed should not go higher than the current international market price for similar objects.²⁰¹

The monetary valuation of the right to use a site is the same as the site-use fee otherwise paid for acquiring such a site.²⁰² This means that the Chinese side could determine the price unilaterally.²⁰³ When the foreign partner contributes machinery, equipment or other materials as investment, the objects have to be indispensable for the production of the joint venture, and not capable of being manufactured by the Chinese.²⁰⁴ Justification is needed for exceptions, such as when the cost of manufacturing the object in China is too high, or when the technical performance and time availability fail to meet the demand.²⁰⁵ When the foreign partner contributes industrial property or know-how as investments, the objects have to meet one of the following three conditions:

- 1) capable of manufacturing new products urgently needed in China or products suitable for export;
- 2) capable of improving markedly the performance quality of

198. *Id.*

199. Chinese JVL, *supra* note 29, at art. 5; Chinese JVL Regulations, *supra* note 30, at art. 24.

200. Under Article 5 of the Chinese JVL and under Article 48 of the Chinese JVL Regulations, the Chinese participant to the joint venture is allowed to use his "right to use a site" as an investment. This right is to be exercised in accordance with Articles 47-53 of the Chinese JVL Regulations. As to assignment of rights to use land in China, see Law of the People's Republic of China on Land Management, adopted by the Sixteenth Session of the Standing Committee of the Sixth National People's Congress, June 25, 1986, as amended by the Fifth Session of the Standing Committee of the Sixth National People's Congress, Dec. 29, 1988, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 14-715 (CCH Australia Ltd. 1987).

201. Chinese JVL Regulations, *supra* note 30, at art. 27.

202. *Id.* at art. 48. As to the discussion of limits for site use, see Comment, *supra* note 41, at 273-74.

203. Chinese JVL Regulations, *supra* note 30, at art. 49.

204. *Id.* at art. 27.

205. *Id.*

existing products and raising productivity; and

3) capable of notable savings in raw materials, fuel or power.²⁰⁶

Technology and equipment contributed by any foreign party as investment must be "truly advanced and appropriate to China's needs."²⁰⁷ In case of losses caused by deception through intentional provision of outdated equipment or technology, the party who provided the outdated material must compensate for the losses.²⁰⁸

Non-cash contributions by the foreign partner require examination and approval of the department in charge of the Chinese partner. Next, the approval of the examining and approval authority must be requested.²⁰⁹ Accordingly, in the event the foreign partner contributes industrial property or know-how, he must present relevant documentation on the individual property or know-how, including photocopies of the patent certificates or trademarks, registration certificates, statements of validity, technical characteristics, practical value, the basis for calculating the price, and the price agreement signed with the Chinese partner.²¹⁰ All of these are to serve as an annex to the contract.²¹¹

To effectuate such non-cash contributions as industrial property or know-how, a series of legislation has been enacted, which includes Regulations on Administration of Technology Import Contracts of the People's Republic of China,²¹² Detailed Rules for the Implementation of the Administrative Regulations of the People's Republic of China on Technology Import Contracts,²¹³ and Law of the People's Republic of China on Technology Contracts.²¹⁴ It is assumed that the price fixed on non-cash contributions by the Chinese partner will

206. *Id.* at art. 28.

207. Chinese JVL, *supra* note 29, at art. 5. As to criteria for advanced technology, see Comment, *supra* note 41, at 275.

208. Chinese JVL, *supra* note 29, at art. 5.

209. Chinese JVL Regulations, *supra* note 30, at art. 30.

210. *Id.* at art. 29. See also Lee, *China's New Technology Import Regulations*, 5 CHINA L. REP. 27 (1988) [hereinafter Lee].

211. Chinese JVL Regulations, *supra* note 30, at art. 29.

212. Regulations on Administration of Technology Import Contracts of the People's Republic of China, approved by the State Council, Dec. 30, 1987, promulgated by the Ministry of Foreign Economic Relations and Trade, Jan. 20, 1989, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 5-570 (CCH Australia Ltd. 1987).

213. Detailed Rules for the Implementation of the Administrative Regulations of the People's Republic of China on Technology Import Contracts, approved by the State Council, Dec. 30, 1987, promulgated by the Ministry of Foreign Economic Relations and Trade, Jan. 20, 1989, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 5-573 (CCH Australia Ltd. 1987).

214. Law of the People's Republic of China on Technology Contracts, adopted by the Twenty-First Session of the Standing Committee of the Sixth National People's Congress, June 23, 1989, reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 5-577 (CCH Australia Ltd. 1987).

be properly evaluated by the foreign partner during the course of negotiations.

c. The Ratio of Foreign Capital Contribution

The ratio of contributing capital by foreign participants to the joint venture cannot go below 25%, but there is no maximum.²¹⁵ Even if the foreign participant contributes more than 50% of the joint venture capital investment, control of the joint venture is unlikely, because the statute prescribes that the chairman of the board of directors must be the Chinese participant.²¹⁶ The profits, risks and losses of a joint venture are shared by the participants in the venture, in proportion to their contribution to the registered capital.²¹⁷

d. Transferability of Registered Capital

The transfer of one party's share in the registered capital can be effected only with the consent of the other parties to the venture,²¹⁸ and is subject to approval from the examining and approving authority.²¹⁹ Furthermore, the other party has a preemptory purchase right to accept the transfer.²²⁰ It is assumed that if the other party lacks the capital or refuses to receive the transfer, transfer to a third party is allowed. However, the conditions of transfer to the third party should be as favorable as those offered to the joint venture participant.²²¹ An offer contrary to the above stated conditions indicates an ineffective transfer.²²²

215. Chinese JVL, *supra* note 29, at art. 4. According to Zhang Yuging:

In 1984 there were 651 Sino-foreign joint ventures in China. Projects in which a majority of total investment was assumed by Chinese parties accounted for 64% of this total; 27% of the projects had each side contribute 50%; projects in which the majority shares were assumed by foreign investors were around 9% [citation omitted]. Only one Sino-foreign joint venture had a foreign investment of 99% It also appears from the 1984 data that some foreign investors invested less than 25%.

Yuging, *supra* note 38, at 79. See also CHU & DONG, *supra* note 41, at 366-416 (discussing foreign capital contribution).

216. Chinese JVL, *supra* note 29, at art. 6; Chinese JVL Regulations, *supra* note 30, at art. 34.

217. Chinese JVL, *supra* note 29, at art. 4.

218. *Id.*; Chinese JVL Regulations, *supra* note 30, at art. 23.

219. Chinese JVL Regulations, *supra* note 30, at art. 23.

220. *Id.*

221. *Id.*

222. *Id.*

e. *Duty to Make Payments*

Participants to the joint venture are required to make payment of all the investment promised, according to the time limit stipulated in the joint venture contract.²²³ Pursuant to the 1988 Certain Regulations on the Subscription of Capital by the Parties to Sino-foreign Joint Equity Enterprises, delay or partial delay in payment must be subject to an interest payment on the arrears, or a compensation for the loss, as defined in the contract.²²⁴ The rate of interest on arrears follows the stipulation of the joint venture contract. If the contract lacks a stipulation, the legal rate of interest should be used. Since both the Foreign Economic Contract Law²²⁵ and General Principles of Civil Law²²⁶ are silent on this issue, special legislation may be needed. The certificates of payment are issued by the joint venture company, pursuant to prescribed formality,²²⁷ followed by verification by a Chinese registered accountant, stating that contributions of both sides have been fully paid up.²²⁸

3. *Comparative Analysis*

The foregoing presentation of North Korean and Chinese statutory schemes on capital investment shows that the North Korean statute provides fewer statutory provisions, whereas the Chinese statute prescribes more statutory articles to deal with the issues involved.

North Korean statutes do not provide a definition of the total amount of investment which can be distinguished from registered capital. Assuming that North Korea allows the concept of total amount of investment, there is a need to adopt a statute (perhaps patterned after the 1987 Chinese statute discussed earlier), to set up a ratio between registered capital and total amount of investment.

Both North Korea and China use the two forms of capital investment, cash and non-cash contributions. As the foregoing discussion

223. *Id.* at art. 31.

224. Chinese JVL, *supra* note 29, at art. 7; Chinese JVL Regulations, *supra* note 30, at art. 31.

225. FECL, *supra* note 89.

226. General Civil Principles of PRC, *supra* note 60.

227. Chinese JVL Regulations, *supra* note 30, at art. 32, requires the following information: name of the joint venture; date, month and year of the establishment of the joint venture; names of the participants and investment contributed; date, month and year of the contributions of the investment; and date, month and year of issuance of the investment certificate. *Id.*

228. *Id.*

indicates, Chinese statutory provisions are more elaborate than those of North Korea. Both countries allow currency designation, pursuant to the agreement of the parties to the joint venture. However, North Korea fails to follow the Chinese approach of conversion procedure in cases where foreign currency is designated.

Issues involving non-cash contributions as investment are thorny. While North Korean statutes are silent, China elaborates on the following issues: the use of a third party in valuing non-cash contributions as investment; the required substantiation that non-cash objects are either indispensable to production of the joint venture, or are not capable of being manufactured in China; the imposition of compensatory payments for deceptive or intentional introduction of outdated equipment or technology; and the approval process, statutory conditions and required documentation of non-cash contributions—notably industrial property or know-how.

Insofar as the ratio between foreign capital contribution and the contribution made by the domestic side is concerned, there is no statutory minimum requirement or maximum limitation in North Korea. However, China requires a minimum ratio of 25% foreign contribution, and there is no ban on maximum contribution. The permission of unrestricted foreign investment contribution allowed by China is offset by requiring that the chairman of the board of directors of a joint venture company be Chinese. This provides a safety valve to preventing foreign control over the joint venture company.

As to the transferability of shares of invested capital, North Korean statutes simply stipulate that the transfer of a part or the whole portion of the investment can be made with the consent of the other party to the joint venture. However, the Chinese statutes treat the following issues: approval required from the examining and approval authority; the other party's preemptory purchase right; and conditions which allow the transfer of shares to a third party.

As far as the question of the duty to complete the payment of investment is concerned, North Korean statutes are silent. As discussed earlier, China has adopted the 1988 Regulations dealing with delay or partial delay in payment of the promised investment. At the same time, Chinese statutes stipulate the required procedure for the issuance of certificate for payments made.

The articles appearing in the 1984 law are repeated verbatim in its implementing regulations in the North Korean text of 1984 JVL and its 1985 JVL Regulations. One wonders why these repetitions are

made in the implementing regulations, which were designed to supplement the shortcomings of the basic law. At least two instances should be noted:

- 1) For the debts incurred by a joint venture company in the course of its operation, the parties to the joint venture shall assume responsibility only for the portion of their respective investment.²²⁹
- 2) A joint venture company shall not reduce its registered capital investment.²³⁰

Meanwhile, Chinese implementing regulations are free from repetition. Article 5 of the 1979 JVL deals with capital investment. The 1983 JVL Regulations further elaborate on the subject by allocating at least thirteen articles under the two chapter headings of: *Form of Organization and Registered Capital*, and *Ways of Contributing Investment*.²³¹

The foregoing comparative presentation on the question of capital investment is made to show how deficiently the North Korean statutes prescribe the question as compared to the Chinese statutory scheme. At the same time, China also needs further improvement in dealing with the laws in this subject area. At least four issues are noteworthy.

First, when the parties to the joint venture fail to make the investment payment subscribed, according to the time limit stipulated by the joint venture contract, interest on arrears, caused by delay or partial delay in payment, has to be made. If the contract is silent concerning the rate of interest, the rate of interest will be the legal rate. At present, however, China does not have a law to set the legal interest rate.

The second issue relates to the protection of technological secrets. The foreign investor who contributes industrial property or know-how as the investment to the joint venture should be cautioned that there is no Chinese law which protects patented technological knowledge and know-how. The investor submits all the necessary documents, including the technology and know-how, as attachments to the application to establish a joint venture. The problem arises if the application is denied by the examining and approving authority. At present there are no safeguards to protect already-revealed secrets of technology and know-how. It seems appropriate to obligate the

229. North Korean JVL, *supra* note 21, at art. 8; North Korean JVL Regulations, *supra* note 24, at art. 22.

230. North Korean JVL, *supra* note 21, at art. 9; North Korean JVL Regulations, *supra* note 24, at art. 21.

231. Chinese JVL Regulations, *supra* note 30, at arts. 19-32.

Chinese side of the joint venture to register intangible property rights with the appropriate government agency, pursuant to currently effective industrial property legislation.²³² Until such measures are incorporated into the legislation, protection could be stipulated in the form of a letter of agreement at the initial stage of joint venture negotiations.

The third issue concerns the valuation of shares in a transfer. When one party to the joint venture intends to transfer his share of the investment to the other party, the problem of how to value the share in question arises. At present, Chinese law lacks valuation standards which could be applicable to the proposed transfer of shares. When the joint venture company is in good shape, the buyer of the share expects the investment amount specified in the joint venture contract. On the other hand, when the company is in bad shape, the seller of the share would ask for the investment amount appearing in the joint venture contract. It is difficult to assess the value of the share, since it is conditioned by a number of variables.

Assume that initially the Japanese yen was offered, and subsequently was converted into U.S. dollars and Renminbi, which then ultimately becomes the actual investment figures. If the foreign partner wishes to transfer his share, valuation has to be made, taking into consideration the fluctuation of foreign exchange. China needs special legislation to set up objective standards to value the share of the joint venture which is to be transferred.

The fourth issue relates to the nature of the joint venture company with specific reference to making the investment payments. Under the existing statutory provisions, the parties to the joint venture could establish a joint venture company without making full payment of the investment, by stipulating ways to make the promised payment in the joint venture contract.²³³ In the event one party defaults, the party who fulfills the investment obligation is eligible to apply to the original examining and approval authority²³⁴ for approval to dissolve the joint venture company, and to secure the rights and obligations

232. See Lee, *supra* note 210, at 35-40; Woods, *Trademark and Patent Law in the People's Republic of China*, 13 N.C.J. INT'L L. & COM. REG. 473 (1988); Marcuss & Watson, *Technology Transfer in the People's Republic of China: An Assessment*, 15 SYRACUSE J. INT'L L. & COM. 141 (1989).

233. Chinese JVL Regulations, *supra* note 30, at arts. 11, 32.

234. Within one month following the expiration of a one month notice period to the other party.

of the party in default, as stipulated in the joint venture contract.²³⁵ The procedure resembles a bilateral relationship between parties to a joint venture.

Where does the joint venture company stand in this process? Once a joint venture is registered with the legally designated authority, it acquires legal entity, and becomes an independent economic entity as a self-governing body. Theoretically, the process should evolve through the joint venture company, rather than party to party settlement. This issue needs clarification. To what extent would China give autonomous status to the joint venture company as a legal entity?

V. BRIEF COMPARISON OF OTHER SELECTED AREAS

This section is designed to highlight the similarities and differences which are reflected in North Korean and Chinese equity joint venture legislation. The subjects selected for discussion are board of directors and management; purchase of materials and sale of products; labor management; foreign exchange control; audit and distribution; dissolution of the joint venture company; and settlement of disputes.

A. Board of Directors and Management

Both North Korean and Chinese laws provide for the establishment within the joint venture company of a board of directors, with a chairman and vice-chairman, and a management office with a company president and vice-president.²³⁶ The Board of Directors becomes the highest decision-making body²³⁷ since there are no shareholders meetings in the equity joint venture companies. The management office is to engage in daily operation of the company under the direction of the board of directors.²³⁸ Both countries show legislative

235. Chinese JVL Regulations, *supra* note 30, at arts. 5, 7. See also Certain Regulations on the Subscription of Capital by the Parties to Sino-foreign Joint Equity Enterprises, *approved by* the State Council, Dec. 30, 1987, *jointly promulgated by* the Ministry of Foreign Economic Relations and Trade and the State Administration for Industry and Commerce, Jan. 1, 1988, *reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 6-556 (CCH Australia Ltd. 1987) (concerning ratio of invested capital); PENDLETON, INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA: A GUIDE TO PATENTS, TRADEMARKS AND TECHNOLOGY TRANSFER (1989).

236. North Korean JVL, *supra* note 21, at art. 10; Chinese JVL, *supra* note 29, at art. 6.

237. North Korean JVL Regulations, *supra* note 24, at art. 24; Chinese JVL Regulations, *supra* note 30, at art. 33.

238. North Korean JVL, *supra* note 21, at art. 12; North Korean JVL Regulations, *supra* note 24, at art. 30; Chinese JVL Regulations, *supra* note 30, at arts. 38-40.

inclination to provide the company with autonomy,²³⁹ but the extent of autonomy is difficult to gauge due to government red tape.

Chinese statutes prescribe installment of a treasurer under the supervision of the president, and an auditor under the supervision of the board of directors and the president, in order to handle the financial and accounting matters of the enterprise.²⁴⁰ Chinese law also requires that a registered accountant examine and certify the certification of investment, annual fiscal reports, and fiscal reports on liquidation.²⁴¹ North Korean statutes are silent as to the appointment of a treasurer and auditor. The statute does require a financial inspector, who is somewhat analogous to the Chinese registered accountant. However, his role is not accurately prescribed.²⁴² Both countries do not spell out specific qualifications required to be a registered accountant or financial inspector, and whether they are to be independent of management.

Since the board of directors is the highest decision-making body within the joint venture company, it becomes an important matter to decide who is to become chairman of the board. While North Korean law is silent as to which side of the joint venture is to become chairman and vice-chairman, Chinese law prescribes that a Chinese citizen is to be appointed by the Chinese partner, and one or more vice-chairmen are to be appointed by the foreign partner.²⁴³ Upon close examination of the Chinese statutory scheme concerning powers vested in the board chairman and the president of the company, it is not altogether clear whose power prevails regarding decisions to execute management operations. In particular, the scope of the chairman's power is uncertain, except that he has the power to represent the joint venture company legally,²⁴⁴ and to call and preside over meetings.²⁴⁵

As far as a quorum for board meetings is concerned, North Korean law is silent. However by failing to state whether all matters which are dealt with by the board of directors are to be unanimous, it implies that unanimous decisions are mandatory.²⁴⁶ On the other

239. North Korean JVL Regulations, *supra* note 24, at art. 24; Chinese JVL Regulations, *supra* note 30, at art. 33.

240. Chinese JVL Regulations, *supra* note 30, at art. 81.

241. *Id.* at arts. 32, 90.

242. North Korean JVL, *supra* note 21, at art. 20; North Korean JVL Regulations, *supra* note 24, at arts. 55-56.

243. Chinese JVL Regulations, *supra* note 30, at art. 34.

244. *Id.* at art. 37.

245. *Id.* at art. 35.

246. North Korean JVL Regulations, *supra* note 24, at art. 28.

hand, Chinese law requires a quorum of more than two-thirds of the directors, and unanimous decisions are specifically required for four selected matters.²⁴⁷

B. Purchase of Materials and Sale of Products

Both North Korean and Chinese laws prescribe the material procurement necessary for the operation of the joint venture, and sale of products produced by the operations of the company.²⁴⁸ Procurement of materials from domestic and foreign sources has to proceed within the context of a centrally planned economy. Both countries stipulate that in procuring materials to be used by the joint venture company, if conditions are the same, first priority should be given to purchases from domestic sources.²⁴⁹ Another similarity in the legislation of both countries is the encouragement of the sale of products abroad.²⁵⁰

Unique in North Korean provisions is the requirement that in the case in which materials are imported from abroad, the joint venture company is to use North Korean official trade organizations, with an exemption from paying a tariff, and waiver of an import permit.²⁵¹ At the same time, North Korean law requires payment of utility fees, and purchase of insurance on joint venture company properties.²⁵²

In comparison to North Korean legislation on material procurement and sale of products, Chinese regulations are much more detailed and address at least seven more areas: 1) supply route for the purchase of materials in China;²⁵³ 2) prices for materials purchased and services needed in China;²⁵⁴ 3) the amount of materials needed for office and daily operations of the joint venture;²⁵⁵ 4) conditions and ways to

247. The four selected matters are: (1) amendment of articles of incorporation; (2) termination and dissolution of the joint venture; (3) increase or assignment of the registered capital of the joint venture; and (4) merger of the joint venture with other economic organizations. Chinese JVL Regulations, *supra* note 30, at art. 36.

248. North Korean JVL, *supra* note 21, at arts. 14-15; North Korean JVL Regulations, *supra* note 24, at arts. 31-39; Chinese JVL, *supra* note 29, at art. 14; Chinese JVL Regulations, *supra* note 30, at arts. 54-68.

249. North Korean JVL Regulations, *supra* note 24, at art. 31; Chinese JVL Regulations, *supra* note 30, at art. 57.

250. North Korean JVL Regulations, *supra* note 24, at art. 33; Chinese JVL Regulations, *supra* note 30, at art. 60.

251. North Korean JVL Regulations, *supra* note 24, at arts. 35-36.

252. *Id.* at arts. 38-39.

253. Chinese JVL Regulations, *supra* note 30, at art. 58.

254. *Id.* at art. 65.

255. *Id.* at art. 59.

sell products on the Chinese market;²⁵⁶ 5) ways to sell products on the overseas market;²⁵⁷ 6) determination of prices for products of the joint venture on the Chinese and overseas markets;²⁵⁸ and 7) application and approval of import and export licenses.²⁵⁹

In spite of these detailed regulations, Chinese legislation is not free from further problems. At least three obvious problems can be noted. They are: 1) price, quality, and delivery date of materials procured in China; 2) price of machinery, equipment, and materials procured abroad; and 3) price, quality, and buyer and seller of products on sale abroad. These problems can be mitigated by stipulations in the joint venture contract.

Another important issue in connection with the line of products produced by the joint venture, is how to prohibit a similar product line by another enterprise within the same geographical confines. Since this issue concerns the basic nature of the joint venture enterprise, government legislation prohibiting the establishment of similar enterprises, rather than a prohibiting stipulation in the joint venture contract, is suggested.

Joint venture enterprises which fall into specified categories, by the 1986 EFI Regulations, now have the right to purchase materials independently and to import certain machinery, equipment, and raw materials without receiving government approval and import licenses.²⁶⁰ Furthermore, the 1986 EFI Regulations allow joint ventures to sell and produce on the Chinese market without government interference.²⁶¹

C. *Labor Management*

A joint venture is not only a joint investment by the foreign and domestic partners, but also encompasses the joint management of domestic personnel and labor. When the joint venture is established in socialist countries such as North Korea and China, there are complex problems which touch upon the nature of socialist society and its traditional culture.²⁶² Labor management is one of the most

256. *Id.* at art. 64.

257. *Id.* at art. 62.

258. Chinese JVL Regulations, *supra* note 30, at art. 66.

259. *Id.* at art. 63.

260. EFI Regulations, *supra* note 35, at arts. 13, 15.

261. *Id.* at art. 15.

262. As to the discussion of importance of culture to produce truly sustainable development, see Packard-Winkler, *Putting the Culture Back into Development*, 13 FLETCHER FORUM WORLD AFF. 251, 252 (1989). See also PYE, *THE MANDARIN AND THE CADRE: CHINA'S POLITICAL CULTURE* (1988); GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

difficult problems for the joint venture since it deals with human relations. When a joint venture enterprise is established in an East Asian socialist country such as North Korea or China, the foreign partner to the joint venture has to deal with at least three discernible categories of personnel: first, the higher echelon of domestic personnel;²⁶³ second, middle level supervisors and technicians; and third, ordinary office staff and workers.

As far as higher echelon domestic personnel is concerned, their conduct is directly related to their political motivation rather than to economic gains. In a socialist society where every activity is controlled by the state, the political status of a person is linked to his economic well-being. The successful establishment of a joint venture by top domestic managers may lead to attainment of their political goals. Once the joint venture is established, they may work to accomplish its success if it coincides with promotion of their political ambitions. They may use the creation of the joint venture for its political gains. However, once the interests of the joint venture conflict with the promotion of their political ambitions they often choose the latter. Every activity of the joint venture enterprise will become the instrument of their political goals, and will be used effectively.

As to domestic middle level supervisors and technicians, they are not obviously political, but are also not free from political control. These technicians and middle level cadre are dispatched from the domestic partners' parent enterprise. The dispatcher hopes that they will learn foreign technology and management skills, and often uses these persons to control workers in the joint venture enterprise. If the company president represents the domestic partners, middle level personnel will become the main body of support for the president's programs. However, if the president is chosen by the foreign partners, they will engage in surveillance of the president and other foreign personnel, in cooperation with the domestic vice-president. Middle level personnel are indeed in an insecure position, in that they may be recalled to the parent enterprise with a word from top management. If the domestic parent enterprise is separated from the joint venture by geographical distance, supervisors and technicians will wish to transfer their units to the locality in which the joint venture is located, resulting in the need for the relocation of their family members, employment of their spouses, and allocation of housing.

263. As to the reference to this category of personnel, see North Korean JVL Regulations, *supra* note 24, at art. 28; Chinese JVL Regulations, *supra* note 30, at art. 14(5).

Realization of these wishes depends on the whims of the domestic partners to the joint venture enterprise, thus strictly limiting the scope of their activities based on free will.

It will be difficult for foreign investors to expect loyalty from domestic higher management personnel, and middle level supervisors and technicians, toward the joint venture enterprise. It is also difficult to expect them to identify with the joint venture entity. As far as the ordinary office staff and workers are concerned, North Korea and China have adopted legal regulations for labor management. China's latest labor legislation²⁶⁴ is more extensive and proscribes explicit actions in joint venture companies.²⁶⁵ North Korea does not have similar legal measures.

In general, the joint venture laws of both countries dictate that matters relating to employment and discharge of workers are to be coordinated through state agencies.²⁶⁶ A definite shortcoming of the North Korean legislation is the lack of detailed guidelines for joint venture labor management. China gives specific legal guidelines for employment²⁶⁷ and dismissal²⁶⁸ of workers and ordinary staff members. Furthermore, any enterprise comes under the category specified by the 1986 EFI Regulations and may exercise discretionary powers to handle labor problems.²⁶⁹

North Korean law stipulates that matters relating to working hours, rest periods, and other protections are to be implemented pursuant to the labor laws and regulations.²⁷⁰ It is difficult to assess the contents of this legislation due to unavailability of the text and information related to their operations.²⁷¹ Meanwhile, similar matters

264. Provisions for the Implementation of the Regulations on Labour Management in Joint Ventures Using Chinese and Foreign Investment, *promulgated by* the Labour and Personnel Department of the People's Republic of China, Jan. 19, 1984 [hereinafter Chinese Provisions for Implementing LM Regulations], *reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 6-522 (CCH Australia Ltd. 1987). For a discussion of the numerous implementing regulations of the 1986 EFI Regulations, see Comment, *supra* note 41, at 260-62 & n.16. The implementing regulations are also evidenced by the Regulations of the People's Republic of China on Labour Management in Joint Ventures Using Chinese and Foreign Investment, *promulgated by* the State Council, July 26, 1980 [hereinafter Chinese LM Regulations]; and the Chinese Provisions for Implementing LM Regulations, *supra*.

265. See Chinese Provisions for Implementing LM Regulations, *supra* note 264.

266. North Korean JVL Regulations, *supra* note 24, at arts. 12, 40; Chinese LM Regulations, *supra* note 264, at arts. 3-4.

267. Chinese LM Regulations, *supra* note 264, at art. 3.

268. *Id.* at art. 4.

269. *Id.* at art. 15.

270. North Korean JVL Regulations, *supra* note 24, at art. 41.

271. The Socialist Labor Code was enacted in 1978, but the text is not available. See STUDY GUIDE, *supra* note 5, at 18.

in China are to be left to labor contract negotiations between the joint venture and the labor union.²⁷²

Both North Korea and China allow employment of aliens in the joint venture enterprise.²⁷³ While North Korea prescribes payment of income tax on their earnings and permits them to remit abroad 60% of their wages,²⁷⁴ China requires the alien employees to pay an additional 10% tax on profits remitted abroad.²⁷⁵ China demonstrates more concern over limiting alien employment by stipulating that hiring is to be based upon qualifications and needs.²⁷⁶ North Korea requires that all employees, including aliens, are to receive social insurance and social security benefits.²⁷⁷ China also requires that the company provide labor insurance and welfare funds to employees.²⁷⁸

While North Korean law is silent in addressing the question of wages of joint venture employees, including executives, China requires payment of approximately 120% to 150% of "real wages"²⁷⁹ for workers and staff members of state-owned enterprises of the same trade in the same locality.²⁸⁰ However, wage standards, form of wages paid, bonus, and subsidy systems are left for the board of directors to decide.²⁸¹ Both countries emphasize the upgrading of employees' professional and technical standards and the training of workers.²⁸²

In China,²⁸³ lower level staff and workers in a joint venture enterprise present continuous problems.²⁸⁴ If these provisions are observed, there seem to be no problems to reiterate.

272. Chinese LM Regulations, *supra* note 264, at art. 2.

273. North Korean JVL Regulations, *supra* note 24, at art. 42; Chinese LM Regulations, *supra* note 264, at art. 12.

274. North Korean JVL Regulations, *supra* note 24, at art. 52.

275. The Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, art. 4, *adopted by the Third Session of the Fifth National People's Congress, promulgated* Sept. 10, 1980, *amended by the Second Session of the Standing Committee of the Sixth National People's Congress, Sept. 2, 1983, reprinted and translated in* CHINA LAWS FOR FOREIGN BUSINESS ¶ 33-500 (CCH Australia Ltd. 1987).

276. Chinese Provisions for Implementing LM Regulations, *supra* note 264, at art. 2.

277. North Korean JVL Regulations, *supra* note 24, at art. 44. The joint venture company is required to contribute 7% of labor remuneration toward this purpose. In addition, employees are required to contribute 1% of their pay toward social insurance.

278. Chinese Provisions for Implementing LM Regulations, *supra* note 264, at art. 13.

279. Chinese LM Regulations, *supra* note 264.

280. *Id.* at art. 8. As to an estimate of actual labor cost, *see* Comment, *supra* note 41, at 289 n.189.

281. Chinese LM Regulations, *supra* note 264, at art. 9. As to a discussion of the principle of equal pay for domestic and foreign employees, *see* Comment, *supra* note 41, at 290.

282. North Korean JVL Regulations, *supra* note 24, at art. 43; Chinese Provisions for Implementing LM Regulations, *supra* note 264, at art. 6.

283. Except for personnel in higher echelon and middle level supervisory positions in the joint venture enterprise.

284. Solutions to these labor problems are prescribed by various provisions which have been discussed earlier.

However, there is the vexing issue of not granting Chinese citizens the freedom to choose their own occupations. This seems to be incompatible with the foundation of socialism. If the free labor market, which is based upon freedom to choose one's occupation, is not practiced in China, written labor legislation may run into difficulties. Therefore, foreign partners to the joint venture are well advised to conduct an in-depth study of the labor situation in China, and to a large extent in North Korea, by examining existing statutory provisions dealing with labor management. Unresolved and foreseeable problems should be sorted out and stipulated in the joint venture contract and articles of incorporation. Furthermore, companies relying on these documents are required to adopt employment regulations addressing procedures involving rewards for good performance, punishment, and hiring and firing.

D. Foreign Exchange Control

Both the North Korean Won and the Chinese Renminbi are not convertible into foreign exchange on the international money market. The use of "hard" currency (internationally convertible foreign currency) vis-a-vis domestic currency by the joint venture companies is the subject of government regulations. Examination of North Korean and Chinese laws in the area of foreign exchange control reveals at least five similar features, which are incorporated into their statutory schemes. First, a joint venture company has the option of opening both foreign exchange and domestic currency deposit accounts with an officially designated bank.²⁸⁵ Second, the officially designated bank handles the supervision of receipts and expenditures.²⁸⁶ Third, interest rates which will be earned on the deposit accounts are set and announced by the officially designated bank.²⁸⁷ Fourth, the joint venture company is allowed to open foreign exchange deposit accounts abroad.²⁸⁸ Fifth, the joint venture company is permitted to apply to the officially designated bank for loans in foreign and domestic currency.²⁸⁹

285. North Korean JVL Regulations, *supra* note 24, at art. 45; Chinese JVL Regulations, *supra* note 30, at art. 74.

286. North Korean JVL Regulations, *supra* note 24, at art. 45; Chinese JVL Regulations, *supra* note 30, at art. 74.

287. North Korean JVL Regulations, *supra* note 24, at art. 46; Chinese JVL Regulations, *supra* note 30, at art. 74.

288. North Korean JVL Regulations, *supra* note 24, at art. 47; Chinese JVL Regulations, *supra* note 30, at art. 76.

289. North Korean JVL Regulations, *supra* note 24, at art. 49; Chinese JVL Regulations, *supra* note 30, at art. 78.

Other than these similar statutory provisions, there is no available North Korean legal information concerning foreign exchange control. On the other hand, Chinese legislation on the subject is far more extensive as compared to its North Korean counterpart. In 1983, the Chinese statute mandated that "a joint venture shall, in general, keep a balance between its foreign exchange income and expenses."²⁹⁰ The statute, which is designed to augment the 1980 Provisional Regulations for Foreign Exchange Control of the People's Republic of China (FEC Regulations),²⁹¹ further prescribes that:

When a joint venture whose products are mainly sold on the domestic market under its approved feasibility study report and contract has an imbalance of foreign exchange income and expenses, the imbalance shall be solved by the people's government of a relevant province, an autonomous region or a municipality directly under the central government or the department in charge under the State Council from their own foreign exchange reserves; if unable to be resolved, it shall be resolved through inclusion into the plan after examination and approval by the Ministry of Foreign Economic Relations and Trade together with the State Planning Commission of the People's Republic of China.²⁹²

One task assigned to the joint venture is avoiding an imbalance between its foreign exchange income and expenditure. Usual sources for foreign exchange income under Chinese law include foreign capital investment,²⁹³ foreign loans,²⁹⁴ foreign currency earned by exportation of the company's products,²⁹⁵ encouragement of deposits of foreign currency by the foreign partner,²⁹⁶ preferential tax treatment granted on reinvestment of interest distribution received by the foreign partner,²⁹⁷ preferred procurement of materials, fuel and equipment which are needed for the operation of the joint venture from Chinese sources,²⁹⁸ and setting a lower usage fee on transferred technology.²⁹⁹ Thus, secured foreign exchange is to be used for the purchase of

290. Chinese JVL Regulations, *supra* note 30, at art. 75.

291. Provisional Regulations for Foreign Exchange Control of the People's Republic of China, adopted by the Regular Session of the State Council, Dec. 5, 1980, promulgated Dec. 18, 1980 [hereinafter FEC Regulations], reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 8-550 (CCH Australia Ltd. 1987).

292. Chinese JVL Regulations, *supra* note 30, at art. 75.

293. *Id.* at art. 21.

294. *Id.* at art. 78.

295. Chinese JVL, *supra* note 29, at art. 9.

296. *Id.* at art. 10.

297. *Id.* at art. 7.

298. *Id.* at art. 9.

299. Chinese JVL Regulations, *supra* note 30, at art. 46.

raw materials, fuel, equipment and office supplies from abroad,³⁰⁰ and for payment of transportation costs, royalties, transferred technology, wages for alien employees, and to allow foreign partners to remit their share of interest distribution abroad.³⁰¹

Starting in April 1985, when the government foreign exchange reserve drastically decreased and a foreign exchange crisis occurred, the Chinese government had to adopt new measures to regulate foreign exchange for the joint venture program.³⁰² The purpose of the 1986 statute is to encourage joint equity ventures and to promote "the balance of their foreign exchange income and expenditure to the advantage both of production management and repatriation of legally earned profits by foreign joint ventures."³⁰³ Important features of the statute include: first, adjustment of foreign exchange imbalance through a fund administered by either the central or the local authorities;³⁰⁴ second, adjustment of the foreign exchange imbalance by the state foreign exchange, if the products of the joint venture sold on the domestic market meet specific conditions, and are included in long term or annual plans for foreign exchange expenditure established by the state agencies;³⁰⁵ third, the possibility of adjusting the foreign exchange imbalance if the products of the joint venture could be sold in China, as import substitutions, for Chinese use;³⁰⁶ fourth, the possibility of achieving the balance of foreign exchange by purchasing export quality Chinese goods in Chinese currency, and then selling those goods for foreign exchange on the international market, with government approval;³⁰⁷ fifth, settlement of accounts in foreign exchange by selling products to enterprises located outside the designated areas that have the capacity to pay in foreign exchange;³⁰⁸ sixth, adjustment of foreign exchange among plural joint ventures, financed by the same foreign partners;³⁰⁹ and seventh,

300. Chinese JVL, *supra* note 29, at art. 9.

301. *Id.* at art. 10; Chinese JVL Regulations, *supra* note 30, at art. 46.

302. These measures appeared in the 1986 Regulations of the State Council Concerning the Balance of Foreign Exchange Income and Expenditure by Sino-foreign Joint Equity Ventures, promulgated by the State Council, Jan. 15, 1986 [hereinafter FEB Regulations], reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 6-590 (CCH Australia Ltd. 1987).

303. *Id.* at art. 1.

304. *Id.* at art. 3.

305. *Id.* at art. 4; Chinese JVL Regulations, *supra* note 30, at arts. 61, 75.

306. FEB Regulations, *supra* note 302, at art. 5; Chinese JVL Regulations, *supra* note 30, at arts. 61, 75.

307. FEB Regulations, *supra* note 302, at art. 6.

308. *Id.* at art. 8.

309. *Id.* at art. 9.

adjustment of foreign exchange imbalance by a joint venture reinvesting its share of Renminbi profits in other ventures in China, which have the capacity to generate new and additional foreign exchange earnings.³¹⁰ After commenting on the above 1986 regulations, one writer expressed his skepticism in the following words:

The FEB Regulations provide a legal basis for joint ventures with foreign exchange imbalances to obtain relief. Because, however, the relief is to come from government entities, Chinese trade corporations, or other Sino-foreign joint ventures, which are themselves typically in need of foreign exchange, the practical application of these provisions is suspect. It is probable that any attempt to get these other entities within China to share their scarce foreign exchange with a joint venture through the FEB Regulations will amount to little more than an attempt to get blood from the proverbial stone.³¹¹

The effects of remedial measures for balancing foreign exchange income and expenditure of a joint equity venture, appearing in the 1986 statute, will depend upon how well the Chinese government maintains a comfortable amount of foreign exchange reserve, and the foreign exchange available for the government agencies which are concerned with the administration of joint venture programs in China. Unless the Chinese foreign exchange situation substantially improves, there is not much to expect in the way of government assistance in balancing foreign exchange income and expenditure. Therefore, when the establishment of a joint venture enterprise is being negotiated, preferably at the stage of the feasibility study, the foreign partners to the venture will be well advised to do an in-depth study of how to generate foreign exchange and how to balance foreign exchange income and expenses in light of the currently effective statutory provisions.

E. *Audit and Distribution*

One of the important issues of the joint equity venture is how to determine the amount of legally earned profits and to distribute the profit among the parties to the venture. In order to reach the amount to be distributed to the parties, based upon each party's share of

310. *Id.* at art. 10.

311. Comment, *supra* note 41, at 297. See also UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, FOREIGN DIRECT INVESTMENT IN THE PEOPLE'S REPUBLIC OF CHINA 76-79, 90-92 (1988).

investment, it is necessary to go through such processes as auditing, payment of taxes, and setting aside of required funds.

Both North Korea and China prescribe the legal regulations for auditing and for managerial activities of the joint equity venture.³¹² There are at least three common features which appear in North Korean and Chinese statutory provisions. First, designation of the responsible person to audit the company's records;³¹³ second, the auditing year (January 1 through December 31);³¹⁴ and third, determination of net income of the joint venture company.³¹⁵

The extent of North Korea's statutory regulations on auditing stop here. On the other hand, China treats at least six more issues. First, determination of the method of accounting;³¹⁶ second, determination of the standard currency in keeping accounts;³¹⁷ third, Chinese language requirement, in principle, in preparing vouchers, accounting records, statistics, and reports;³¹⁸ fourth, recording the procedure dealing with currency exchange;³¹⁹ fifth, submission of annual fiscal reports to the designated government agencies;³²⁰ and sixth, certification of the fiscal report by an accountant registered in China.³²¹

312. North Korean JVL, *supra* note 21, at arts. 18, 20-21; North Korean JVL Regulations, *supra* note 24, at arts. 53-60; Chinese JVL Regulations, *supra* note 30, at arts. 89-90. *See also* The Accounting Regulations of the People's Republic of China for Joint Ventures Using Chinese and Foreign Investment, *promulgated by* the Ministry of Finance of The People's Republic of China, Mar. 4, 1985 [hereinafter Accounting Regulations], *reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS* ¶ 35-500 (CCH Australia Ltd. 1987).

313. North Korean JVL, *supra* note 21, at arts. 12-15; North Korean JVL Regulations, *supra* note 24, at arts. 55-56; Chinese JVL Regulations, *supra* note 30, at art. 82.

314. North Korean JVL Regulations, *supra* note 24, at art. 53; Chinese JVL Regulations, *supra* note 30, at art. 83.

315. North Korean JVL, *supra* note 21, at art. 21; Chinese JVL Regulations, *supra* note 30, at art. 87.

316. Chinese JVL Regulations, *supra* note 30, at art. 84. The joint venture is required to use the internationally adopted accrual basis and the debit and credit accounting system in their work.

317. *Id.* at art. 85. The joint venture must adopt Renminbi as the standard currency. However, on keeping accounts, another currency may be used through consent by the parties involved.

318. *Id.* at art. 84. All accounting documents must be written in Chinese. However, a foreign language may be used concurrently with the mutual consent of the parties to the joint venture.

319. *Id.* at art. 86. In addition to the use of standard currency to record accounts, joint ventures should also record accounts in currencies actually used in payments and receipts, if such currencies are inconsistent with the standard currency, in recording accounts. Joint ventures using foreign currency in accounting must work out a statement of accounts in Renminbi equivalents in addition to those in the foreign currency.

320. *Id.* at art. 89. The joint venture must submit quarterly and annual fiscal reports to the parties to the joint venture, the local tax authorities, the department in charge of the joint venture, and the financial department at the same level as those departments. Also, a copy of the annual fiscal reports must be submitted to the original examination and approval authority.

321. Chinese JVL Regulations, *supra* note 30, at art. 90. *See also* Accounting Regulations, *supra* note 312, at art. 65. The accounting reports are considered valid only after being examined by an accountant registered in China.

Chinese law requires that a formulated auditing scheme of the joint venture, which is incorporated into the joint venture contract, is to be filed with local financial departments and tax authorities.³²² Furthermore, joint venture accounting has to comply with the 1985 Accounting Regulations of the People's Republic of China for Joint Ventures Using Chinese and Foreign Investment.³²³ An examination of existing Chinese regulations on auditing shows that there seems to be no safety valve created to check on the company president, particularly if he is a Chinese national.³²⁴ The company president uses a treasurer to assist him and an auditor is appointed by the joint venture.³²⁵ However, there is no rule for any member of the board of directors to investigate the detailed fiscal situation of the company or to examine the accounting documents. To this extent, such a rule should be written into the joint venture contract, in order to check on the company president.

The North Korean statutes mandate the creation of a reserve fund to be contributed at 5% of the annual net income, until the contribution totals 25% of the joint venture's total registered capital.³²⁶ It is not clear whether the contribution to the reserve fund is to be estimated on net income before or after taxes.³²⁷ Chinese law also requires the establishment of a reserve fund, but does not mandate that a specific percent of net profits be contributed to the fund.³²⁸ The purpose of the reserve fund, as with North Korean law,³²⁹ is to supplement losses of the joint venture, thus prohibiting the distribution of profits unless losses of previous years have been made up.³³⁰ Both North Korean and Chinese law allow transfer of the reserve fund to registered capital investment.³³¹

In addition to the establishment of a mandatory reserve fund, both North Korean and Chinese law prescribe creation of a bonus and

322. Chinese JVL Regulations, *supra* note 30, at art. 80.

323. Accounting Regulations, *supra* note 312, at art. 1. Article 1 states in pertinent part that "the present regulations are formulated to strengthen the accounting work of joint ventures. . . ." *Id.*

324. Chinese JVL Regulations, *supra* note 30, at art. 81.

325. *Id.* at art. 82.

326. North Korean JVL, *supra* note 21, at art. 19; North Korean JVL Regulations, *supra* note 24, at art. 58.

327. Kim, *supra* note 21, at 192. As to the discussion of a tax holiday for the joint venture, and an exemption or reduction of its income tax, *see id.* at 193.

328. Chinese JVL Regulations, *supra* note 30, at art. 87. It is assumed that the joint venture contract determines the specific percentage.

329. North Korean JVL Regulations, *supra* note 24, at art. 58.

330. Chinese JVL Regulations, *supra* note 30, at arts. 87-88.

331. North Korean JVL Regulations, *supra* note 24, at art. 58; Chinese JVL, *supra* note 29, at art. 7; Chinese JVL Regulations, *supra* note 30, at art. 87.

welfare fund for employees, and an expansion and development fund.³³² Both laws further prescribe that the board of directors determine the proportion and allocation of the three funds.³³³ It is assumed that the proportion of contribution to these funds could be determined by one lump sum, or separately. As far as the bonus and welfare fund for employees (particularly welfare) is concerned, that amount is also subject to income tax.³³⁴ However, this rule seems inappropriate, since the fund supplements the welfare of the workers, which comes under state responsibility.

After the equity joint venture has met its tax obligations and its contributions to the stipulated funds, North Korean and Chinese law authorize that the profits are to be distributed among the parties according to their proportional ownership of registered capital.³³⁵ North Korean law is silent as to restrictions, including tax consequences, on repatriated earnings.³³⁶ In China, distributed profits are subject to income tax;³³⁷ however, reinvestment of the profits in China may result in a rebate on that portion of income tax already paid.³³⁸ Chinese law encourages the foreign party to deposit with the Bank of China any part of the foreign exchange which he is entitled to remit abroad.³³⁹

F. *Dissolution of the Joint Venture Company*

Parties to the joint venture usually stipulate questions involving dissolution of the joint venture company within the scope of the joint venture contract. However, stipulated terms in the contract are subject to the governmental regulations of the host country.

Both North Korean and Chinese legislation regulate three aspects of the dissolution of the joint venture.³⁴⁰ First, dissolution by agree-

332. North Korean JVL Regulations, *supra* note 24, at art. 59; Chinese JVL, *supra* note 29, at art. 7; Chinese JVL Regulations, *supra* note 30, at art. 87.

333. North Korean JVL Regulations, *supra* note 24, at art. 59; Chinese JVL, *supra* note 29, at art. 7; Chinese JVL Regulations, *supra* note 30, at art. 87.

334. Chinese JVL, *supra* note 29, at art. 7. In China, these funds are deducted from the after tax net profit.

335. North Korean JVL Regulations, *supra* note 24, at art. 60; Chinese JVL Regulations, *supra* note 30, at art. 87.

336. North Korean JVL, *supra* note 21, at art. 22; North Korean JVL Regulations, *supra* note 24, at art. 60.

337. Chinese JVL, *supra* note 29, at art. 7.

338. *Id.* For a discussion of this issue, see Comment, *An Analysis of Foreign Investment in the People's Republic of China in the Aftermath of the Sino-U.S. Tax Agreement*, 1 TRANSNAT'L LAW. 547, 581 (1988).

339. Chinese JVL, *supra* note 29, at art. 10.

340. North Korean JVL, *supra* note 21, at art. 23; North Korean JVL Regulations, *supra* note 24, at art. 61; Chinese JVL Regulations, *supra* note 30, at arts. 100-101.

ment;³⁴¹ second, premature dissolution;³⁴² and third, dissolution procedures.³⁴³

According to both North Korean and Chinese law, duration of the joint venture is determined by the parties to the joint venture.³⁴⁴ As to the period of duration of the joint venture, North Korean law is silent. However, Chinese law expects an ordinary period ranging from ten to thirty years, depending upon the nature of the business and its projects.³⁴⁵ Both countries leave the option of going beyond the stipulated period by complying with the six month initiation period by government approval and registration requirements.³⁴⁶

With reference to the causes of premature dissolution, North Korean and Chinese law share three general common features: first, continuous, heavy losses;³⁴⁷ second, failure to meet obligations stipulated by either party;³⁴⁸ and third, heavy losses due to *force majeure*.³⁴⁹ Furthermore, China treats two more causes for involuntary dissolution: first, failure to meet the desired objectives with no further prospects of improvement;³⁵⁰ and second, the occurrence of other reasons for dissolution, stipulated by the parties to the joint venture.³⁵¹ Both North Korean and Chinese law dictate that board appointed liquidators, who are responsible to the board of directors, report liquidation proceedings to the designated government agencies, make final asset distribution based upon pro-rata share of the registered capital investment, and notify the registration agency when the liquidation is complete.³⁵² At the same time, China prescribes

341. North Korean JVL, *supra* note 21, at art. 24; North Korean JVL Regulations, *supra* note 30, at art. 62; Chinese JVL Regulations, *supra* note 30, at art. 101.

342. North Korean JVL, *supra* note 21, at art. 24; North Korean JVL Regulations, *supra* note 24, at art. 62; Chinese JVL Regulations, *supra* note 30, at art. 102.

343. North Korean JVL, *supra* note 21, at art. 25; North Korean JVL Regulations, *supra* note 24, at arts. 63-67; Chinese JVL Regulations, *supra* note 30, at arts. 103-108.

344. North Korean JVL, *supra* note 21, at art. 23; North Korean JVL Regulations, *supra* note 24, at art. 61; Chinese JVL Regulations, *supra* note 30, at art. 100.

345. *But see* Chinese JVL Regulations, *supra* note 30, at art. 100 (period of the joint venture may be extended beyond 50 years).

346. North Korean JVL, *supra* note 21, at art. 23; North Korean JVL Regulations, *supra* note 24, at art. 61; Chinese JVL Regulations, *supra* note 30, at art. 101.

347. North Korean JVL Regulations, *supra* note 24, at art. 62; Chinese JVL Regulations, *supra* note 30, at art. 102.

348. North Korean JVL Regulations, *supra* note 24, at art. 62; Chinese JVL Regulations, *supra* note 30, at art. 102.

349. North Korean JVL Regulations, *supra* note 24, at art. 62; Chinese JVL Regulations, *supra* note 30, at art. 102. As to the Chinese concept of *force majeure*, see Chan, *In the Aftermath of Tiananmen Square*, INT'L FIN. L. REV. 13 (August 1989).

350. Chinese JVL Regulations, *supra* note 30, at art. 102.

351. *Id.*

352. North Korean JVL Regulations, *supra* note 24, at arts. 63-67; Chinese JVL Regulations, *supra* note 30, at arts. 103-107.

further provisions. These are as follows: preferred persons to be liquidators;³⁵³ priority payment for expenses involving liquidation, including remuneration for the liquidators;³⁵⁴ liquidators' liability to sue and be sued;³⁵⁵ and Chinese participant to the joint venture to become custodian of the dissolution-related documents when the dissolution is complete.³⁵⁶

G. Settlement of Disputes

The North Korean approach to settle "differing opinions arising in the course of the operation of the joint venture company" is to resort to conciliation first.³⁵⁷ If the dispute is not settled, the next step is to seek deliberation and settlement "by a court or by a trade arbitration organ of the Democratic People's Republic of Korea."³⁵⁸ Since statutes use the words "by a court or by a trade arbitration organ," it is surmised that, as far as the second step of the dispute settlement is concerned, parties to the dispute seem to have a choice of either court litigation or arbitration when the first step fails. It is unclear to what extent North Korean legislation recognizes the importance of arbitration in the settlement of disputes.

When the dispute is litigated in court, the trial is conducted in accordance with civil litigation procedures, and foreign and domestic parties enjoy equal procedural rights.³⁵⁹ When arbitration is used, parties must follow the established procedures on the examination of foreign arbitration cases, with the option of nominating arbitrators who are not listed in the official roster of arbitrators.³⁶⁰ Parties are allowed to submit disputes to the arbitration organ of a third country, pursuant to the agreement of the parties to the joint venture.³⁶¹ North Korean statutes are silent as to the basis of having arbitration. The

353. Chinese JVL Regulations, *supra* note 30, at art. 104. Members of the liquidation committee are usually selected from among the directors of the joint venture. Alternatively, the joint venture may invite accountants or lawyers registered in China to do the job. The liquidation committee may be supervised by the examination and approval authority. *Id.*

354. *Id.* The liquidation committee's compensation and the costs of liquidation are given top priority from the existing assets of the joint venture. *Id.*

355. *Id.* at art. 105.

356. *Id.* at art. 108.

357. North Korean JVL, *supra* note 21, at art. 26; North Korean JVL Regulations, *supra* note 24, at art. 68.

358. North Korean JVL, *supra* note 21, at art. 26; North Korean JVL Regulations, *supra* note 24, at art. 68.

359. North Korean JVL Regulations, *supra* note 24, at art. 70.

360. *Id.* at art. 69.

361. *Id.* at art. 71.

usual basis would be agreement between the parties to the joint venture.³⁶²

On the other hand, Chinese legislation on the question of dispute settlement is more transparent as compared to its North Korean counterpart. It clearly establishes a three-step approach to resolve "disputes arising over the interpretation or execution of an agreement, contract or articles of incorporation between the parties to a joint venture."³⁶³ As a first step, the preferable settlement of disputes is to deploy friendly consultation or conciliation.³⁶⁴ Settlement of disputes by way of amicable consultation or conciliation is the product of a uniquely East Asian legal culture.³⁶⁵ This method of dispute settlement does not appear in the joint venture laws of other socialist countries, including the 1987 Soviet Joint Venture Law.³⁶⁶ Disputes which can not be settled through these means may be settled through arbitration.³⁶⁷ Litigation is typically considered as the last resort.³⁶⁸

The parties to the joint venture seek arbitration pursuant to a written agreement.³⁶⁹ Arbitration may be conducted pursuant to the 1988 Arbitration Provisions of the China International Economic and Trade Arbitration Commission.³⁷⁰ The 1988 statute prescribes composition of an arbitration panel, hearings, and awards.³⁷¹ The parties may consent to arbitration in a third country.³⁷² Under an

362. A text of the above mentioned procedural rules on civil litigation and arbitration is not available, thus precluding further discussion of the subject matter. See STUDY GUIDE, *supra* note 5, at 18.

363. Chinese JVL, *supra* note 29, at art. 14; Chinese JVL Regulations, *supra* note 30, at art. 110.

364. Chinese JVL, *supra* note 29, at art. 14; Chinese JVL Regulations, *supra* note 30, at art. 109.

365. Kim, *The Modern Chinese Legal System*, *supra* note 4, at 1432.

366. As to the discussion of dispute settlement under the 1987 Soviet Joint Venture Law, see Osakwe, *The Death of Ideology in Soviet Foreign Investment Policy: A Clinical Examination of the Soviet Joint Venture Law of 1987*, 22 VAND. J. TRANSNAT'L L. 1, 64-66 (1989) [hereinafter Osakwe]; Hertzsfeld, *Applicable Law and Dispute Settlement in Soviet Joint Ventures*, 3 ICSID REV. 249 (1988).

367. Chinese JVL, *supra* note 29, at art. 14; Chinese JVL Regulations, *supra* note 30, at art. 109.

368. Chinese JVL Regulations, *supra* note 30, at art. 109.

369. *Id.* at art. 111.

370. Arbitration Provisions of the China International Economic Trade and Arbitration Commission, adopted by the Third Session of the First Meeting of the China Council for the Promotion of International Trade, Sept. 12, 1988 [hereinafter Arbitration Provisions], reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS ¶ 10-505 (CCH Australia Ltd. 1987).

371. *Id.* at arts. 2-4.

372. Chinese JVL Regulations, *supra* note 30, at art. 110. As to the arbitral sites in third country arbitration, e.g., Sweden and Hong Kong, see Comment, "Talking Disputes into Harmony": China Approaches International Arbitration, 4 AM. U.J. INT'L L. & POL'Y 137, 162-66 (1989).

ordinary situation, parties to the joint venture would choose one of three forums: China, a third country, or the defendant's country.³⁷³ The arbitration award is final and binding on both sides.³⁷⁴ China is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³⁷⁵ Therefore, foreign arbitral awards can be executed in China.³⁷⁶

In the absence of a written arbitration agreement between the parties to the joint venture, the dispute is to be litigated before the Chinese people's court, pursuant to the Code of Civil Procedure.³⁷⁷ According to the 1981 Foreign Economic Contract Law, "Contracts signed between the Chinese and overseas parties performed within the territory of China in the form of joint venture" are to be governed by Chinese law.³⁷⁸ Under existing statutes, MOFERT has the power to interpret JVL regulations.³⁷⁹ It seems that this ministerial power is far-reaching to resolve "disputes arising over the interpretation or execution of an agreement, contract or articles of incorporation of parties to a joint venture."³⁸⁰ Very little room is left for the judiciary to intervene in disputes related to joint ventures.

VI. CONCLUSION

It has become clear through a comparison of ten elements of the North Korean and Chinese joint equity venture legislation that current

373. Chinese JVL Regulations, *supra* note 30, at art. 110; Comment, *supra* note 372, at 162-66.

374. Arbitration Provisions, *supra* note 370, at art. 36. Article 193 of the Chinese Code of Civil Procedure for Trial Implementation prescribes that "[w]here an award has already been rendered by an arbitral board of the People's Republic of China having responsibility for arbitrating disputes involving foreign nationals, the parties may not institute legal proceedings in a people's court." Code of Civil Procedure for Trial Implementation, *adopted by the Twenty Second Session of the Standing Committee of the Fifth National People's Congress, Mar. 8, 1982, effective from Oct. 1, 1982* [hereinafter CCP for Trial Implementation], *reprinted and translated in CHINA LAWS FOR FOREIGN BUSINESS* ¶ 19-200 (CCH Australia Ltd. 1988).

375. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, *acceded to with reservations by the People's Republic of China, Dec. 2, 1986*, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. China's accession to the New York Convention was made by the Eighteenth Session of the Fifth National People's Congress.

376. *Id.*

377. Chinese JVL Regulations, *supra* note 30, at art. 111; CCP for Trial Implementation, *supra* note 374, at art. 192.

378. FECL, *supra* note 89, at art. 5. The 1986 General Principles of Civil Law dictate that a contract is governed by the principle of party autonomy, and, in the absence of choice, the law of the place with closest contact to the contract governs. *See* General Civil Principles of PRC, *supra* note 60, at art. 145. Reparation for injuries caused by torts is governed by *lex loci delicti commissi*; but torts should be recognized in China. *Id.* at art. 146.

379. Chinese JVL Regulations, *supra* note 30, at art. 117.

380. *Id.*

North Korean equity venture enactments require further improvement. At the same time, this study has shown that Chinese legislation on joint equity ventures is also far from being technically perfect, in spite of the remarkable efforts which have been made up until June 1989 to establish a legal framework to encourage joint venture activities.

It has also become apparent through this study that a transparency of laws in North Korea is desired. As is pointed out throughout this study, the availability of a legal text, which should be part of the North Korean legal infrastructure, seems to be limited and restricted. It must be emphasized here that as a result of the lack of a transparent legal structure, inducement of investment from non-socialist countries may run into difficulties. Ordinarily, foreign investors would consider transparency of laws as of primordial importance in order to assess their rights and liabilities in the event of materialization of a joint venture project.

Transparent laws require refined legislative draftsmanship. As discussed earlier in connection with capital investment, the articles appearing in the 1984 North Korean JVL are repeated verbatim in the 1985 JVL Regulations. There are also similar instances of verbatim repetition throughout the 1984 and 1985 statutes.³⁸¹ Since implementing regulations are designed to supplement the shortcomings of the basic law, the verbatim repetition which appeared in the basic law and then in the implementing regulations is redundant and totally unnecessary.

Foreign direct involvement by means of joint equity venture will continue to play an important role within the framework of the state-planned North Korean economy. Needless to say, joint equity venture programs will grow larger through more attractive incentives to the

381. See North Korean JVL, *supra* note 21, at art. 1(2), and North Korean JVL Regulations, *supra* note 24, at art. 2; North Korean JVL, *supra* note 21, at art. 5, and North Korean JVL Regulations, *supra* note 24, at art. 9; North Korean JVL, *supra* note 21, at art. 8(2), and North Korean JVL Regulations, *supra* note 24, at art. 23; North Korean JVL, *supra* note 21, at art. 10, and North Korean JVL Regulations, *supra* note 24, at art. 24; North Korean JVL, *supra* note 21, at art. 12, and North Korean JVL Regulations, *supra* note 24, at art. 30; North Korean JVL, *supra* note 21, at art. 13(1), and North Korean JVL Regulations, *supra* note 24, at art. 47; North Korean JVL, *supra* note 21, at art. 18, and North Korean JVL Regulations, *supra* note 24, at art. 53; North Korean JVL, *supra* note 21, at art. 19, and North Korean JVL Regulations, *supra* note 24, at art. 58; North Korean JVL, *supra* note 21, at art. 21, and North Korean JVL Regulations, *supra* note 24, at art. 57; North Korean JVL, *supra* note 21, at art. 23, and North Korean JVL Regulations, *supra* note 24, at art. 61; North Korean JVL, *supra* note 21, at art. 26(1), and North Korean JVL Regulations, *supra* note 24, at art. 68; North Korean JVL, *supra* note 21, at art. 26(3), and North Korean JVL Regulations, *supra* note 24, at art. 71.

non-socialist investors. In this regard, North Korea is competing with other developing Asian countries, which are actively seeking outside investment. As far as labor intensive enterprises are concerned, North Korea definitely provides an advantage, since subsidies for food and basic consumer goods keep wages low. In addition, as elaborated elsewhere, North Korea offers numerous incentives for foreign investors under the current statutes.³⁸² A possible course for North Korean actions to induce foreign investment include market strategies, creation of a free trade zone, and active governmental participation in international public financial institutions.³⁸³ In addition, it would be worth considering investment protection treaties with non-socialist countries, by utilizing Chinese experience as discussed earlier, and by possibly examining current debate on a Multilateral Investment Guarantee Agency.³⁸⁴

According to a recent report, \$2 billion has been invested through joint venture programs in North Korea from abroad, mainly by socialist countries and Korean residents in Japan.³⁸⁵ The same report notes two recent instances of Korean Americans who made arrangements to invest in North Korea.³⁸⁶

A recent innovation which North Korea has taken is the establishment of a Ministry of Joint Venture Industry.³⁸⁷ Undoubtedly, the new ministry faces challenging tasks. Its immediate task should be to create a viable legal infrastructure to lessen the anxiety of prospective foreign investors. Another ministerial task, following the Chinese experience, may be to undertake to publish sample models of joint venture contracts and articles of incorporation.

In 1987, the USSR joined a group of Eastern block countries to actively seek non-socialist capital by enacting joint equity venture legislation.³⁸⁸ It is still too early to tell how the new Soviet legislation on joint ventures will influence North Korean enactments on the subject. As evidenced in this study, North Korea has cautiously

382. Kim, *supra* note 21, at 198-201.

383. *Id.* at 201-04.

384. See Berger, *The New Multilateral Investment Guarantee Agency: Globalizing the Investment Insurance Approach Toward Development*, 15 SYRACUSE J. INT'L L. & COM. 13 (1988).

385. See N.Y. Times, July 9, 1989, at E3, col. 2.

386. *Id.*

387. *Id.*

388. As to the English text of the 1987 statute, see Osakwe, *supra* note 366, at 1-125; Eichmann, *Joint Ventures in Hungary: A Model for Socialist States*, 20 LAW & POL'Y INT'L BUS. 257 (1988). As to a discussion of joint venture policies of the socialist countries of eastern Europe, see U. N. CENTRE ON TRANSNAT'L CORP., JOINT VENTURES AS A FORM OF INTERNATIONAL ECONOMIC CO-OPERATIONS 30-47 (1988).

borrowed numerous features of Chinese legislation on joint equity ventures. In the midst of debate on *perestroika*, *glasnost*, and market socialism, particularly in the Eastern European countries and the emergence of the increased importance of East Asia in the world economy, this political and economic wind may add new dimensions to joint equity venture legislation. It will be interesting to observe how North Korea can successfully reconcile the concept of joint equity venture by non-socialist and domestic partners with Chuche Thought.

