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## **Legal Framework for Foreign Direct Investment in the Democratic People's Republic of Korea<sup>1</sup>**

**By**

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## Foreword

In June 2011, Choson Exchange visited Pyongyang to consult with the Joint Venture & Investment Commission, Ministry of Foreign Trade and the Kim Il Sung University Law School. Our goal was to clarify ambiguous aspects of North Korea's foreign investment laws, understand how these laws function in practice, and gain insights into how North Korea's legal regime for foreign investment is evolving.

Our accompanying legal workshop leader's opinion is that North Korea's investment laws bear a strong resemblance to those in China, albeit less developed at this stage. In this regard, he concludes that the laws generally provide a logical framework for managing inbound investment to the DPRK. He notes, however, that the DPRK will need to demonstrate a willingness to apply and enforce its laws consistently and fairly in order to gain investor confidence. Our discussions clearly indicated that much progress remains to be made in this area.

We also note that new foreign investment laws are currently being discussed and debated. Although there are internal disagreements on the substance of these new laws, they are not expected to significantly depart from the current foreign investment laws.

We are especially grateful to Peter Morley, our legal workshop leader, for volunteering his time and resources to prepare this report: we are pleased to provide this report as part of our outreach efforts. This report is intended as a reference only and does not constitute legal advice, nor should it be seen as an endorsement of investment in North Korea. Also, this report does not necessarily reflect the institutional position of Choson Exchange.

We welcome comments and inquiries at [CEteam@chosonexchange.org](mailto:CEteam@chosonexchange.org).

Yours sincerely,

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## Key Points

- **Investment projects categorized** into encouraged, permitted, restricted and prohibited categories.
- As in China, foreign enterprises require a **local business vehicle** to conduct FDI; the primary business vehicles available in the DPRK are limited liability corporate bodies and representative offices.
- The **JVIC** (Joint Venture and Investment Commission) and other government bodies (if applicable) will review the business scope, capitalization and other aspects of a proposed corporate body prior to incorporation.
- Investment in **Rason** will be particularly encouraged. According to JVIC, corporate bodies established in Rason can also apply to do business elsewhere in the DPRK.
- The **operations and governance of DPRK corporate bodies are set out in law**, including scope of activities, investment scale, limited liability, location, management, staffing and repatriation of profits.
- **Domestic and Foreign arbitration** is the primary mechanism for resolving commercial disputes between DPRK and foreign parties.
- Some **ambiguities** remain. Will laws be enforced uniformly and consistently?



Over the past several decades, the Democratic People's Republic of Korea ("**DPRK**") has gradually established a legal framework regulating inbound foreign direct investment ("**FDI**"). While there is currently a relatively small amount of FDI in the DPRK, there is potential that it will grow in the future as part of a gradual economic reform. This report provides an overview of the following aspects of the DPRK's legal framework for FDI: investment sectors, business vehicles, establishing a DPRK corporate body, characteristics of DPRK corporate bodies, and dispute resolution mechanisms. The legal analysis in this report is based primarily on a review of the DPRK's foreign investment laws (collectively, the "**DPRK Foreign Investment Laws**")<sup>1</sup>, and has been supplemented where noted with practical insights received from discussions with the DPRK's Joint Venture & Investment Commission ("**JVIC**")<sup>2</sup> and other branches of the DPRK government.

As an initial note, the DPRK's legal framework for FDI is similar in structure (albeit less comprehensive) to the framework employed in the People's Republic of China ("**China**"). The reasons for this are likely twofold: first, China provides a good model for the DPRK to follow in terms of a state planned economy seeking to develop an environment for FDI; and second, the legal system will be familiar to investors from China, being the DPRK's most important trading partner and geopolitical ally. The similarities between the two legal frameworks will be highlighted at various points in this report.

## **1. Investment Sectors**

As in China, the DPRK Foreign Investment Laws divide potential investment projects into encouraged, permitted, restricted and prohibited categories. Generally speaking, investment in encouraged sectors may be approved and receive preferential treatment<sup>3</sup>, investment in permitted sectors may be approved but without the same preferential treatment as in encouraged sectors, investment in restricted sectors may not be approved or, if approved, may be subject to restrictive conditions, and investment in prohibited sectors will not be approved. While the following investment categories are less detailed than the *Catalogue on Industry Guidelines for Foreign Investment*<sup>4</sup> employed in China, they provide general insight into the DPRK's goals and parameters for FDI:

- (a) investment will be encouraged in the areas of high technology and other advanced technology, manufacturing of internationally competitive products, exploitation of natural resources, infrastructure construction, scientific research and technological development;<sup>5</sup>

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<sup>1</sup> *Laws and Regulations on Foreign Investment: Democratic People's Republic of Korea*, Legislation Press, Pyongyang, 2006.

<sup>2</sup> JVIC was established in July 2010, and is ostensibly the main branch of the DPRK government tasked with liaising with foreign investors and regulating foreign investment in the DPRK. The discussions with the JVIC took place in June 2011.

<sup>3</sup> Under Article 8 of the *Law of the Democratic People's Republic of Korea on Foreign Investment*, as amended November 30, 2004 (the "**Foreign Investment Law**"), investment in encouraged sectors may receive preferential tax treatment, more favourable land use conditions, and preferential bank loans. Under Article 9 of the Foreign Investment Law, additional preferential tariff and tax treatment may be enjoyed by enterprises established in the Rason Economic and Trade Zone.

<sup>4</sup> National Development and Reform Commission and Ministry of Commerce, as amended October 31, 2007.

<sup>5</sup> Foreign Investment Law, Article 7.

- (b) investment will be permitted in various industry sectors such as industry, agriculture, construction, transport, telecommunications, science and technology, tourism, commerce and finance;<sup>6</sup>
- (c) investment will be restricted where it is detrimental to the environment, relies upon outdated technology or production processes, involves exporting unprocessed natural resources of the DPRK, or involves low economic efficiency;<sup>7</sup> and
- (d) investment will be prohibited where it is detrimental to national security or to public interests.<sup>8</sup>

The DPRK Foreign Investment Laws provide that a foreign investor will not be permitted to make FDI in the following sectors without a local partner (i.e. a foreign-DPRK invested joint venture): publishing, press and broadcasting; education, culture and public health; telecommunications; and other sectors where the establishment of a wholly foreign-owned enterprise is prohibited by the state.<sup>9</sup> Although the JVIC has noted that in practice there is little if any distinction between the investment sectors available to wholly foreign owned enterprises (“**WFOE**”) as compared to foreign-DPRK invested joint ventures (“**JV**”), it stands to reason that, as in China, local participation may be required for FDI in sensitive or strategic industries.

## 2. Business Vehicles

Foreign enterprises are not permitted to conduct business activities in the DPRK except through a DPRK business vehicle. This restriction does not prevent foreign enterprises from entering into importing or exporting arrangements with DPRK entities (subject to compliance with the DPRK’s trade laws), although such arrangements are out of the scope of this report. As in China, the primary business vehicles available to foreign investors in the DPRK are limited liability corporate bodies and representative offices. Each of these forms of business vehicle are discussed below.

DPRK corporate bodies have the status of a legal person, and may be formed as either a JV<sup>10</sup> or as a WFOE. As legal entities under DPRK law, foreign invested DPRK

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<sup>6</sup> Foreign Investment Law, Article 6.

<sup>7</sup> *Regulations on the Implementation of the Law on Equity Joint Venture*, as amended January 17, 2005 (“**EJV Regulation**”), Article 12; *Regulations on the Implementation of the Law on Contractual Joint Venture*, as amended December 28, 2004 (“**CJV Regulation**”), Article 7. Note that the *Regulations on the Implementation of the Law on Wholly Foreign-Owned Enterprises*, as amended August 1, 2005 (“**WFOE Regulation**”), Article 11 refers to investment in these sectors as being prohibited as opposed to restricted with respect to wholly foreign owned enterprises.

<sup>8</sup> EJV Regulation, Article 11; CJV Regulation, Article 7; *Law of the Democratic People’s Republic of Korea on Wholly Foreign-Owned Enterprises*, as amended May 17, 2005 (“**WFOE Law**”), Article 3.

<sup>9</sup> WFOE Regulation, Article 12.

<sup>10</sup> According to Article 2 of the EJV Regulation and the CJV Regulation, the local partner to a JV is required to be an institution, enterprise or organization of the DPRK. A DPRK natural person is not entitled to act as a local investor, even though natural persons

corporate bodies are permitted to engage in profit-making business activities within their approved business scope. The general characteristics of DPRK corporate bodies are discussed further in Section 4 below.

As in China, there are two types of JVs contemplated by the DPRK Foreign Investment Laws: Equity Joint Ventures (“**EJVs**”) and Contractual Joint Ventures (“**CJVs**”). EJVs are managed and operated as agreed by the parties to the EJV, and profits are distributed in proportion to the agreed investment by each party.<sup>11</sup> CJVs, in contrast, are managed by the DPRK investor, and are permitted to distribute profits to the investors in proportions other than the agreed investment by each party.<sup>12</sup> In particular, the laws contemplate that a CJV may structure its distributions to redeem some or all of the initial investment of the foreign party (which is only possible on liquidation of the JV for EJVs).<sup>13</sup> Although the DPRK Foreign Investment Laws specifically state that CJVs will be formed as corporate bodies, there are portions of the law which suggest that, as in China, CJVs may also be formed as a contractual agreement without independent legal personality. The DPRK Foreign Investment Laws should be clearer in identifying the structure of CJVs.

In contrast to corporate bodies, DPRK representative offices do not have independent legal personality and are not permitted to engage in profit making activities. Their primary purpose, as with their Chinese counterparts, will be to act as a consultative office for the foreign enterprise from which to form a network of DPRK contacts and investigate the feasibility of more substantial investment.<sup>14</sup> Given the limited scope of activity of representative offices, this report focuses on the establishment and operation of DPRK corporate bodies as a vehicle for FDI.

### **3. Establishing a DPRK Corporate Body**

The formalities of establishing a foreign invested corporate body in the DPRK are similar to those in China. Foreign investors should first determine which government bodies oversee the particular industry in which they wish to invest (mining, tourism, for example), and the particular characteristics of the investment (land use requirements, energy use requirements, pollution concerns, for example). The DPRK Foreign Investment Laws provide a non-exhaustive list of government bodies that may require consultation at this pre-approval stage:

- (a) the state planning institution should be consulted over such issues as the total amount of investment, a list of property in kind to be invested, provision of labour, raw and other materials, power and water, production and marketing of products and data on phased profitability;

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are entitled to act as foreign investors. According to the JVIC, domestic enterprises in the DPRK are all state owned enterprises – there are no enterprises held by DPRK citizens in their private capacity.

<sup>11</sup> EJV Regulation, Article 2.

<sup>12</sup> CJV Regulation, Article 2.

<sup>13</sup> CJV Regulation, Article 99.

<sup>14</sup> Based on discussions with the JVIC.

- (b) the central financial institution should be consulted over such issues as the total amount of investment, amount of contribution both in kind and in cash, source of funds and data on phased profitability; and
- (c) the central science institution should be consulted over such issues as technical analysis of investment in kind and technical investment and information concerning the transfer of technology.<sup>15</sup>

JVIC has noted that the Korea Chamber of Commerce and the Korea Foreign Investment and Economic Cooperation Committee can assist in determining which government bodies should be consulted, and it is expected that the JVIC will itself be of assistance. Foreign investors will also benefit from their local contacts (especially a DPRK partner to a proposed JV) and from foreign operated industry and investment associations in the DPRK.

Once the appropriate government bodies have been identified, the foreign investor will need to obtain investment approval from each such body. As in many cases in China, the government bodies will generally have significant discretion in determining the requirements and the satisfaction of such requirements. According to the JVIC, each government body should only require 15 days to process the investment application once all required documents have been received.<sup>16</sup>

Once all preliminary approvals have been obtained, the proposed investment will be subject to approval by the JVIC. According to the JVIC, such review and approval process will be completed within 15 days of receiving the required documents from the potential investors.<sup>17</sup> The documentation required by the JVIC is similar to the documentation required by China's Ministry of Commerce or its local equivalents, including:

- (a) an application setting out the background for the proposed investment;
- (b) a feasibility study describing numerous aspects of the intended investment including specific business activities, size of investment and timing for contribution of investment, financial projections, and employment requirements;
- (c) articles of association, which is essentially the constitutional document of DPRK corporate bodies (along with the joint venture contract, in the case of a JV);
- (d) a joint venture contract, in the case of a JV, setting out the agreement between the foreign investor and the DPRK investor; and

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<sup>15</sup> EJV Regulation, Article 17; CJV Regulation, Article 19.

<sup>16</sup> This is consistent with Article 18 of the EJV Regulation and Article 20 of the CJV Regulation.

<sup>17</sup> Although under Articles 22 and 23 of the EJV Regulation, Articles 24 and 25 of the CJV Regulation, and Articles 20 and 21 of the WFOE Regulation, the process may take up to 25 days.

- (e) various other documents confirming the identity and credit status of the foreign investor.<sup>18</sup>

If JVIC approves the investment, the corporation will be established with effect from the issue date of the approval.<sup>19</sup> Upon receiving this approval, the newly established corporation is required to complete several formalities including enterprise registration with the local authority, registration with customs and taxation authorities, and opening a bank account in the DPRK.<sup>20</sup> A business license will be issued to the corporate body after completing enterprise registration, allowing the corporate body to commence business activities.<sup>21</sup>

#### **4. Characteristics of DPRK Corporate Bodies**

This section discusses certain of the key characteristics of DPRK corporate bodies, including scope of activities, investment scale, limited liability, location, management, staffing and repatriation of profits.

##### *Scope of Activities*

DPRK corporate bodies are approved to perform business activities within a specific business scope. The business scope will be reflected in the approved articles of association and, in the case of JVs, joint venture contract of the corporate bodies. DPRK corporate bodies are not permitted to perform business activities outside the approved business scope, although the scope may be amended with the JVIC's approval.<sup>22</sup>

##### *Investment Scale*

As part of the approval process set out in Section 3 of this report, investors need to specify the total investment, registered capital and contribution requirements for the proposed corporate body. The total investment of a corporate body refers to the total equity financing (known as “registered capital”) and debt financing required for the establishment and operation of the corporate body.<sup>23</sup> As in Chinese law, the registered capital of a corporate body is required to constitute a minimum proportion of its total investment.<sup>24</sup> The DPRK Foreign Investment Laws permit

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<sup>18</sup> EJV Regulation, Articles 13-17; CJV Regulation, Articles 15-19; WFOE Regulation, Articles 14-18. In discussions, the JVIC included a balance sheet of the foreign investor among the requirements. It is unknown whether or not, in practice, private companies may provide alternate or simplified financial documentation to satisfy this requirement.

<sup>19</sup> EJV Regulation, Article 23; CJV Regulation, Article 25; WFOE Regulation, Article 21.

<sup>20</sup> EJV Regulation, Articles 24-27; CJV Regulation, Articles 26-29; WFOE Regulation, Articles 22-24.

<sup>21</sup> EJV Regulation, Article 63; CJV Regulation, Article 56; WFOE Regulation, Article 38.

<sup>22</sup> EJV Regulation, Article 71; CJV Regulation, Article 63; WFOE Regulation, Article 14.

<sup>23</sup> EJV Regulation, Article 45; CJV Regulation, Article 53.

<sup>24</sup> Article 28 of the WFOE Regulation provides that corporate bodies with a total investment in the smallest category shall be required to have a registered capital of at least 65% of their total investment, while corporate bodies with a total investment in the largest category shall be required to have a registered capital of at least 30%. Article 45 of the EJV Regulation specifies that registered capital must constitute at least 20% of the total investment. There is no similar prescription in the CJV Regulation.



registered capital to be increased with the JVIC's approval, but not to be reduced.<sup>25</sup> Investors are required to contribute registered capital in the amounts, form<sup>26</sup> and on the schedule set out in the articles of association and joint venture contract (in the case of JVs). Failure to contribute registered capital in the correct amount, form and schedule may result in liability for breach of contract (for JVs), and loss of credibility with the DPRK authorities. There is no obligation to make use of the debt portion of the approved total investment - the corporate body may take out debt financing at its discretion.

### *Shareholder Liability*

The DPRK Foreign Investment Laws state that investors in an EJV are only liable for the debts and liabilities of the EJV to the extent of their agreed registered capital contribution.<sup>27</sup> There is no similarly clear limited liability prescription with respect to WFOEs, although the intention appears to be that all corporate bodies will be limited liability entities.<sup>28</sup>

As noted earlier, it is not clear whether CJVs are to be formed as corporate bodies, contractual arrangements without independent legal personality, or potentially both. To the extent that a CJV is established as a corporate body, its investors will likely have the same limited liability as for EJVs. If a CJV is established as an unincorporated JV, the investors will likely retain full liability for the debts and obligations of the JV.

### *Location*

The DPRK Foreign Investment Laws provide that foreign invested enterprises should generally be established in the Rajin-Sonbong Economic and Trade Zone ("**Rason**"), which is located in the far north-east of the DPRK.<sup>29</sup> According to the JVIC, very few foreign invested enterprises have been established outside of Rason. The JVIC has noted, however, that a foreign invested enterprise established in Rason may apply to the JVIC to establish offices and conduct business activities in other parts of the DPRK.<sup>30</sup> This is consistent with practice, as there are currently numerous foreign invested enterprises operating in parts of the DPRK outside of Rason.

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<sup>25</sup> EJV Regulation, Article 46; CJV Regulation, Article 54; WFOE Regulation, Article 30.

<sup>26</sup> Investment may be made in the form of currency, property in kind, industrial property, technical know-how and other assets and property rights, as approved by the JVIC. See Foreign Investment Law, Article 12; EJV Regulation, Article 31; CJV Regulation, Article 38; WFOE Regulation, Article 32.

<sup>27</sup> *Law of the Democratic People's Republic of Korea on Equity Joint Venture*, as amended November 30, 2004 ("**EJV Law**"), Article 4.

<sup>28</sup> Although Article 9 of the CJV Regulation notes that a CJV shall be liable for its debts within the limit of the property it owns.

<sup>29</sup> EJV Law, Article 2; *Law of the Democratic People's Republic of Korea on Cooperative Joint Venture*, as amended November 30, 2004 ("**CJV Law**"), Article 5. The WFOE Law and WFOE Regulation do not include a similar requirement, although the JVIC has noted that foreign invested corporate bodies of all structures should generally be established in Rason.

<sup>30</sup> Article 13 of the Foreign Investment Law notes that foreign-invested enterprises may open branch offices, representative offices, agencies or subsidiaries in the DPRK or other countries.

In addition to Rason, the DPRK has opened up special economic zones in Kaesong (in cooperation with South Korea) and Hwanggeumbyeong (in cooperation with China). These zones are focused on investment activities by South Korean and Chinese investors, respectively.

### *Management*

The DPRK Foreign Investment Laws provide that the board of directors is the highest decision making authority in an EJV.<sup>31</sup> The allocation of board positions (and thus control of the JV) among the investors will be as set out in the joint venture contract and the articles of association of the EJV. The law also prescribes that EJVs will have a managing director (equivalent to a CEO), a deputy to the managing director (equivalent to a deputy CEO), a chief accountant, and other staff.<sup>32</sup> As a cautionary note, members of the management body are personally liable to compensate the EJV for loss or damage suffered by the EJV as a result of their negligence.<sup>33</sup> There is no clear prescription in law for the management structure of WFOEs, but there is a strong implication that it will follow the same structure as for EJVs.<sup>34</sup>

The Foreign Investment Law specifies that management and control of CJVs is to remain with the local partner.<sup>35</sup> The CJV Regulation, however, contemplates that the parties to a CJV may set up a joint consultative board to decide key issues, with such decisions to be subsequently implemented by the parties to the CJV.<sup>36</sup> There is no requirement that the consultative board be controlled by the DPRK party. As noted earlier, greater legislative clarity will help investors understand the structure and operation of the CJV vehicle.

### *Staffing*

The DPRK Foreign Investment Laws provide that foreign invested enterprises may employ foreign managerial staff, technical staff or other specialists.<sup>37</sup> In general, however, foreign invested enterprises are expected to staff their workforce with DPRK citizens.<sup>38</sup> The employees may form a “trade union” which will, among other responsibilities, enter into a collective agreement with the management of the foreign invested enterprise.<sup>39</sup> The hiring and replacement of DPRK employees will be conducted through a government labour department and, if applicable, in cooperation with the trade union of the foreign invested enterprise.<sup>40</sup>

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<sup>31</sup> EJV Regulation, Article 47.

<sup>32</sup> EJV Regulation, Article 56.

<sup>33</sup> EJV Regulation, Article 58.

<sup>34</sup> WFOE Regulation, Article 15.

<sup>35</sup> Foreign Investment Law, Article 2.

<sup>36</sup> CJV Regulation, Article 32.

<sup>37</sup> EJV Regulation, Article 87; CJV Regulation, Article 79; WFOE Regulation, Article 60.

<sup>38</sup> Foreign Investment Law, Article 16.

<sup>39</sup> EJV Regulation, Article 90; WFOE Regulation, Article 66. Note that there is no provision with respect to trade unions in the CJV Law and CJV Regulation.

<sup>40</sup> Foreign Investment Law, Article 16; WFOE Regulation, Article 62. The law does not allow a corporate body to terminate employees, but the JVIC has noted that the local labour departments will cooperate with corporate bodies to address such labour issues.

### *Repatriation of Profits*

Corporate bodies are required to pay enterprise income tax at the end of each calendar year.<sup>41</sup> The enterprise income tax rate is 25%, although it is reduced to 14% for corporate bodies taxed in Rason, and 10% for corporate bodies operating in one of the priority/encouraged sectors discussed in Section 1.<sup>42</sup> Corporate bodies are also required to contribute to their “reserve fund” at the end of each calendar year. “Reserve fund” refers to a fund maintained by a corporate body which is used to cover losses incurred by the corporate body or to fund an increase in the registered capital of the corporate body. The required annual contribution to the reserve fund is 5% of the annual net profits of the corporate body, up until the point that the reserve fund is equal to or greater than 25% of the registered capital of the corporate body (at which time it is no longer payable). Corporate bodies are also expected to reinvest approximately 10% of their annual profits to expand production, develop technology, or provide employee bonuses, welfare and training.<sup>43</sup> As in China, this reinvestment target may be more of a soft guideline than a firm requirement.

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<sup>41</sup> The fiscal year for corporate bodies is from January 1 to December 31. See WFOE Regulation, Article 52.

<sup>42</sup> *Tax Law of the Democratic People's Republic of Korea for Foreign-Invested Businesses and Foreign Individuals*, as amended November 7, 2002, Articles 9 and 10. Numerous tax incentives may be available to foreign invested enterprises.

<sup>43</sup> EJV Regulation, Articles 113 and 114; CJV Regulation, Articles 95 and 96; WFOE Regulation, Article 54. The WFOE Regulation notes that the amount of the funds to be reinvested is at the discretion of the WFOE.

Once a corporate body has paid its corporate taxes, made up any losses from previous years, contributed to its reserve, and made reinvestments as appropriate, it will be entitled to distribute any remaining profits as follows:

- (a) for EJV, the profits will be distributed among the investors to the EJV in proportion to their agreed registered capital contribution of registered capital to the EJV;<sup>44</sup>
- (b) for CJVs, the joint venture contract may provide for distribution of profits in proportions that differ from the proportion of agreed registered capital contributions of the parties, and may provide that profits are to be used to redeem the registered capital contributed by the foreign investor;<sup>45</sup> and
- (c) for WFOEs, the profits may be distributed to the foreign investor(s).<sup>46</sup>

In the event that the year-end distribution requires DPRK Won to be converted to foreign currency, an application for remittance must be submitted to the relevant bank.<sup>47</sup>

### **C) Dispute Resolution Mechanisms**

The DPRK Foreign Investment Laws provide that disputes involving foreign investors may generally be resolved through both DPRK and non-DPRK dispute resolution mechanisms. The determination of the appropriate mechanism in any given case will depend upon the nature of the dispute and the agreement between the parties to the dispute (if any).

Arbitration is the primary DPRK mechanism for resolving disputes between DPRK entities and foreign investors. Depending on the nature of the dispute, the arbitration will be presided over by the Korean International Trade Arbitration Committee or the Korean Arbitration Committee of Maritime Affairs.<sup>48</sup> Rulings issued by either of these arbitration committees are enforceable by the courts of the DPRK.<sup>49</sup> As a note, neither the courts nor the arbitration panels of the DPRK are independent from government, and likely have limited experience presiding over complex commercial disputes.

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<sup>44</sup> EJV Regulation, Article 119.

<sup>45</sup> CJV Regulation, Articles 98 and 99. These articles also state that the profit and redemption amounts paid from a CJV to the foreign partner will primarily be in the form of products produced by the CJV.

<sup>46</sup> WFOE Regulation, Article 56.

<sup>47</sup> EJV Regulation, Article 122; CJV Regulation, Article 104. There is no similar provision in the WFOE Regulation.

<sup>48</sup> *Law of the Democratic People's Republic of Korea on External Economic Arbitration*, as adopted July 21, 1999 ("Arbitration Law"), Articles 2 and 4.

<sup>49</sup> Arbitration Law, Article 42.

In many cases, the DPRK Foreign Investment Laws permit DPRK entities and foreign entities to select an arbitration mechanism outside the DPRK for resolving disputes that may arise.<sup>50</sup> The law states, however, that a reciprocal enforcement treaty will need to be in place between the DPRK and the state where the judgment was rendered.<sup>51</sup> It is not clear whether this applies to arbitration rulings (or only judicial rulings), but it is important to note that the DPRK is not currently a party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.<sup>52</sup> The law also provides a certain amount of discretion for a DPRK court to refuse to acknowledge a foreign decision or judgment.<sup>53</sup>

In discussions with DPRK officials and foreign investors, there appears to be little if any knowledge of dispute resolution processes involving foreign investment having taken place within the DPRK (whether through internal mechanisms or enforcement of external mechanisms), let alone evidence of rulings rendered and enforced against DPRK state owned enterprises. At this stage, foreign investors should take whatever practical measures they can to limit their loss exposure from potential disputes<sup>54</sup>.

## D) Conclusion

The DPRK Foreign Investment Laws provide a logical if bureaucratic framework for developing the DPRK as a destination for FDI. The application of this framework in practice, however, remains largely unknown and uncertain. At present, it is expected that foreign investment will focus on the DPRK as a low cost manufacturing destination, particularly in relation to labour intensive processes requiring relatively low start up capitalization (i.e. investment and assets at risk in the DPRK). As discussed in the investment sectors section, this is not the type of investment that the DPRK wishes to encourage, but it is the logical starting point.

In order to gain investor confidence, the DPRK will need to establish a practice of applying and enforcing its laws fairly and consistently, even where the result is not in the immediate best interests of the DPRK or its state owned entities. If the application of the DPRK Foreign Investment Laws becomes increasingly reliable and predictable, foreign investors will feel increasingly comfortable making more substantial investments into the economy and infrastructure of the DPRK.

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<sup>50</sup> EJV Regulation, Article 146; CJV Regulation, Article 128. There is no similar provision for WFOEs.

<sup>51</sup> *Law of the Democratic People's Republic of Korea on External Civil Relations*, as amended December 10, 1998 ("External Civil Relations Law"), Article 59.

<sup>52</sup> 330 UNTS 38, in force as of June 7, 1959. Note that Section 7 of the Arbitration Law provides, "the state shall respect international treaties and practices and promote cooperation and exchange with foreign countries and international organizations in arbitration activities". This passage leaves open the possibility that foreign arbitration awards may be enforced in the DPRK even without a reciprocal enforcement agreement with the state where the arbitration occurred.

<sup>53</sup> External Civil Relations Law, Article 60.

<sup>54</sup> Geoffrey notes that JVIC has mentioned a high profile commercial dispute case in 2008 between a Chinese mining company and its DPRK partner over management rights. The case was eventually resolved not through domestic arbitration mechanisms, but through government intervention on both sides.

*This report is intended as a reference only and does not constitute legal advice.  
Potential investors in the DPRK should consult their own legal and financial advisors  
with respect to the investment laws and environment of the DPRK.*