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LITIGATING LABOR RIGHTS ACROSS A DEMILITARIZED ZONE: THE SOUTH KOREAN CONSTITUTIONAL COURT AS A FORUM TO ADDRESS LABOR VIOLATIONS IN NORTH KOREA'S KAESONG SPECIAL ECONOMIC ZONE

Lavanga V. Wijekoon[†]

Abstract: South Korea heralds North Korea's Kaesong Special Economic Zone as a shining example of inter-Korean cooperation. South Korean corporations at Kaesong combine South Korean expertise with North Korean labor. However, Kaesong operations violate the North Korean workers' labor rights.

This Comment explores the legal mechanisms available in South Korea to hold violative South Korean Kaesong corporations accountable. The South Korean Constitutional Court should entertain a constitutional petition from the North Korean workers. Such petition will compel the South Korean government to recognize the North Korean workers' rights under the South Korean Constitution and hold violative South Korean corporations at Kaesong accountable through stricter regulations and sanctions.

Practical and procedural obstacles hinder Kaesong workers from pursuing relief in the South Korean Constitutional Court. First, the North Korean government bars the workers from leaving North Korea. Second, the South Korean Constitutional Court bars third parties in South Korea from filing a petition on behalf of the workers. Third, the court has no clear jurisdiction over constitutional claims brought by North Korean workers in North Korea. Fourth, the court bars suit under pseudonyms, leaving potential petitioners vulnerable to retaliatory employment action.

Given these impediments, the Constitutional Court and the South Korean legislature should look to international developments in procedural law that facilitate transnational rights litigation. The court and legislature should adopt new court procedures that permit foreign petitioners physically absent in the jurisdiction to file in the Constitutional Court. Further, the South Korean government and South Korean shareholders of Kaesong corporations should take measures outside the courts to hold the corporations accountable.

I. INTRODUCTION

An hour's car ride from Seoul into the demilitarized zone that divides the Korean Peninsula into North and South Korea lies possibly the world's most heavily guarded Special Economic Zone ("SEZ").¹ The SEZ is

[†] Juris Doctor and Masters in International Studies expected in 2009, University of Washington, School of Law and The Henry M. Jackson School of International Studies. The author would like to thank Ms. Patricia Goedde and Professor Joel Ngugi for their valuable guidance and suggestions on this Comment. The author would also like to thank the editorial staff of the *Pacific Rim Law & Policy Journal* for their hard work and commitment. Any errors and omissions are the author's own.

¹ HUMAN RIGHTS WATCH, NORTH KOREA: WORKERS' RIGHTS AT THE KAESONG INDUSTRIAL COMPLEX 1 (2006) [hereinafter HRW], available at <http://hrw.org/backgrounders/asia/korea1006/korea1006web.pdf>. A "Special Economic Zone" is defined as an area where enterprises are treated more preferentially than in other areas in relation to such matters as the tax rate and the scope of operations in

comprised of a collection of factories, ringed by security fences.² This fortress of factories is the Kaesong Industrial Park (“Kaesong”), the poster-child of North Korea’s “capitalist experiment.”³ Opened in 2004, Kaesong boasts the sponsorship of the South Korean government and South Korean companies such as Hyundai Asan.⁴ Work at Kaesong combines South Korean technology and know-how with North Korean labor.⁵

The South Korean government sees Kaesong as the embodiment of South Korea’s earnest efforts in overcoming the legacy of the Cold War and pursuing a policy of reconciliation and cooperation with North Korea.⁶ South Korea hopes that this economic partnership will push North Korea toward economic reform and greater openness to the world.⁷ For both Koreas, Kaesong also represents a cornerstone in the efforts towards the eventual reunification of South and North Korea⁸ into the ethnically homogeneous “Korean nation.”⁹

Recently, this particular inter-Korean relationship has drawn criticism for egregious labor rights violations in Kaesong. Rights activists claim that the North Korean government cheats the workers by not giving them their full pay, by expecting them to work unpaid overtime, and by barring them from forming labor unions.¹⁰ The United States government has labeled the workers “trafficking victims”¹¹ and claimed that Kaesong demonstrates that South Korea economically supports the repressive Kim Jong-Il regime.¹²

order to attract foreign capital and advanced technology for modernization. See Sonoko Nishitaten, *China’s Special Economic Zones: Experimental Units for Economic Reform*, 32 INT’L & COMP L.Q. 175, 176 (1983).

² Norimitsu Onishi, *South Brings Capitalism, Well Isolated, to North Korea*, N.Y. TIMES, July 18, 2006, at A3.

³ *Id.*

⁴ HRW, *supra* note 1.

⁵ Jan Jettel, *Kaesong Industrial Park Emerges as NK Human Rights Flashpoint*, KOREA TIMES, April 13, 2006, available at <http://times.hankooki.com/lpage/200604/kt2006041317270310220.htm>.

⁶ See Welcome to the Ministry of Unification, <http://www.unikorea.go.kr/english/EAM/EAM0102I.jsp> (last visited Aug. 21, 2007).

⁷ Norimitsu Onishi, *supra* note 2.

⁸ *Id.*

⁹ GI-WOOK SHIN, *ETHNIC NATIONALISM IN KOREA: GENEALOGY, POLITICS, AND LEGACY* 3 (2006). Both Koreas believe in a “ethnic homogeneity-national unification thesis,” which declares that a politically divided Korea must and will be reunified as Koreans are ethnically homogenous. *Id.* at 186.

¹⁰ HRW, *supra* note 1, at 6.

¹¹ Christopher Carpenter, *US Questions Legitimacy of Kaesong Wage System*, KOREA TIMES, June 7 2006. A former Western diplomat has compared the working conditions at Kaesong to those of a “labor camp.” Peter Ritter, *Risky Business: Investing in North Korea Might Seem Like a Crazy Idea, but Some Are Betting that Stronger Commercial Links Could Push the Hermit Kingdom Toward Reform*, TIME, October 22, 2007.

¹² See State Dep’t Press Releases & Documents, *Labor Contracts with North Korea Inadvisable*, U.S. Envoy Says, Jan. 16, 2007; Norimitsu Onishi, *supra* note 2.

The starting point of this Comment is the following statement on Kaesong made by Human Rights Watch: “Seoul (and Pyongyang alike) must ensure basic rights and protections of the North Korean workers.”¹³ This Comment argues that a judicial mandate from the South Korean Constitutional Court can compel the South Korean government to recognize the North Korean workers’ rights. The court has authority to extend its jurisdiction over Kaesong workers. South Korean constitutional law offers North Korean workers the opportunity to make a constitutional petition based on an equal protection claim in the Constitutional Court. By granting this petition, the court can compel the South Korean government to recognize the workers’ rights and hold the offending South Korean corporations accountable through regulations and sanctions.

However, filing this petition in South Korea is no straightforward task. The workers are physically restricted to North Korean territory by the North Korean state. Procedural barriers inherent in the South Korean legal system compound this practical barrier. However, recent developments in procedural law in other countries have facilitated rights actions against transnational corporations in the individual corporation’s home country. The South Korean legislature and the Constitutional Court should look to these international trends in adopting procedural reforms that will allow the North Korean workers to file a constitutional petition in the Constitutional Court.

Non-judicial measures in South Korea will complement the workers’ constitutional petition. For example, South Korea should make extant governmental assistance to Kaesong corporations conditional upon a record of good labor practices. Further, South Korean shareholders of violative Kaesong corporations should use shareholder resolutions to compel corporate authorities to protect workers’ rights.

This Comment proposes a comprehensive solution for Kaesong workers to obtain legal redress for labor rights violations at Kaesong. Part II of this Comment shows how Kaesong operations violate labor rights. Part III argues that international guidelines place no legal obligation upon South Korean corporations to protect Kaesong workers’ rights. Part IV advocates that Kaesong workers be given the opportunity to seek redress by bringing an equal protection claim in the South Korean Constitutional Court. Part V shows that practical and procedural barriers will hinder the worker’s potential suit. Part VI advocates that the Constitutional Court and the South Korean legislature adopt international developments in procedural law to

¹³ Human Rights Watch, *North Korea: Labor Rights at Risk in Joint Industrial Complex: South Korean Companies Violate Labor Law*, Oct. 3, 2006, available at <http://hrw.org/english/docs/2006/10/02/nkorea14284.htm>.

remove procedural barriers inherent in South Korean law. Part VII urges that non-judicial measures be used also to hold offending corporations accountable. Part VIII acknowledges that the viability of these recommendations depends on the political vicissitudes of foreign relations between South Korea, North Korea, and the United States.

II. BACKGROUND: LABOR VIOLATIONS TARNISH KAESONG AS A SYMBOL OF INTER-KOREAN COOPERATION

The Kaesong SEZ is heralded as a shining example of North Korea's "capitalist experiment"¹⁴ and is a potent symbol of inter-Korean cooperation.¹⁵ South Korea's interest in the success and expansion of Kaesong goes beyond mere economic gain as Kaesong also represents a step forward in engaging North Korea and bringing stability to the Korean peninsula.¹⁶ However, violations of the North Korean workers' labor rights at Kaesong taint this ambitious exercise of economic cooperation.¹⁷

A. *South Korea Sees Kaesong as a Significant Development in Peacefully Engaging North Korea*

The Kaesong SEZ opened in June 2004 and is located between the North Korean city of Kaesong and the border between the two Koreas.¹⁸ It was established through a contract between North Korea, the South Korean Hyundai Asan Corporation, and South Korea's state-owned Korea Land Corporation.¹⁹ The North Korean workers at Kaesong produce goods such as shoes, kitchenware, and clothes.²⁰ These products are primarily intended for the South Korean market.²¹ As of October 2007, twenty-six South Korean companies had opened facilities at Kaesong, employing about 19,430 North Korean workers.²² Largely because of Kaesong's productivity, North Korean exports to the South increased by 63.3% in the first half of

¹⁴ See Norimitsu Onishi, *supra* note 2.

¹⁵ Jettel, *supra* note 5.

¹⁶ Norimitsu Onishi, *supra* note 2.

¹⁷ See HRW, *supra* note 1, at 1.

¹⁸ "Communist" Korea Violates Workers' Rights, INDUS. WORKER (Indus. Workers of the World, Cincinnati, Ohio), Nov. 1, 2006, at 12.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² The Associated Press, *Inter-Korean Complex Surpasses U.S. \$200 Million Worth of Goods*, INT'L HERALD TRIB., Oct. 10, 2007.

2007.²³ South Korean officials have stated ambitious plans to expand the SEZ to 2000 companies, employing 700,000 North Koreans.²⁴

Kaesong was initiated with the blessing of South Korea's previous Kim Dae-Jung administration, and the current South Korean government lauds it as a symbol of inter-Korean cooperation.²⁵ South Korea's President Roh is convinced that progress in the economic development of North Korea is a shortcut to democratization.²⁶ Accordingly, President Roh earmarked 1.184 trillion won (approximately U.S. \$1.27 billion) in the fiscal year 2005 for spending on North Korean economic cooperation, with emphasis on developing Kaesong.²⁷ This approach relates to the concept that peace on the Korean peninsula and the prosperity of the Korean people are tied to each other and trigger synergistic effects.²⁸ Thus, Kaesong also represents one of South Korea's biggest efforts at engaging the North in de facto unification.²⁹

To these ambitious ends, the South Korean government has also provided tax breaks and other support to both state and private South Korean corporations in Kaesong.³⁰ The South Korean government has actively publicized the advantages of locating at Kaesong to South Korean corporations.³¹ Among the main advantages are low labor costs and an abundant labor force.³² Wage rates for North Korean workers are roughly half the rates in comparable industries in China³³ and provide a strong incentive for Korean firms to locate at Kaesong.³⁴

B. *Kaesong Operations Violate North Korean Workers' Rights*

Recently, rights activists and the United States government have brought to light several forms of labor rights violations at Kaesong. The

²³ Ritter, *supra* note 11.

²⁴ Norimitsu Onishi, *supra* note 2.

²⁵ See Jettel, *supra* note 5. Kim Dae-Jung's administration spanned between 1997 and December 2002. See *Kim Dae-Jung's Tainted Legacy*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/2590389.stm> (last visited Aug. 21, 2007).

²⁶ Hiroshi Minegishi, *South Korea Frontloading Larger Budget Helping North*, NIKKEI WEEKLY, Jan. 31, 2005.

²⁷ *Id.*

²⁸ MIN CHO, ESTABLISHMENT OF PEACE ON THE KOREAN PENINSULAR AND THE OUTLOOK FOR UNIFICATION 2 (2007).

²⁹ Norimitsu Onishi, *supra* note 2.

³⁰ *Id.*

³¹ See generally, Welcome to the Ministry of Unification, *supra* note 6.

³² *Id.*

³³ James Brooke, *An Industrial Park in North Korea Nears a Growth Spurt*, N.Y. TIMES, Feb. 28, 2006, at C5.

³⁴ Jettel, *supra* note 5.

most egregious violation alleged is that the North Korean government cheats the North Korean workers of their full pay.³⁵ Other allegations declare that unions are banned³⁶ and overtime work is unpaid.³⁷

The taking of North Korean workers' wages by the North Korean government is a blatant violation of the Labor Regulations for the Gaeseong Industrial Zone ("Kaesong Labor Law") adopted in 2003 by the North Korean state legislature.³⁸ Article 25 of the Kaesong Labor Law stipulates that North Korean workers must be paid a minimum of U.S. \$50 per month.³⁹ Article 32 of the Kaesong Labor Law mandates that "each enterprise," including the South Korean companies at Kaesong, must pay minimum wage to the workers *directly* in cash.⁴⁰ However, Kaesong companies pay the wages to a North Korean government labor broker.⁴¹ South Korean managers admit they have "no idea" how much of the salary is passed on to the workers from the broker.⁴² Human Rights Watch reports that the North Korean government takes thirty percent of the wages as a mandatory contribution to a fund that provides the workers with free housing, healthcare, and education.⁴³ The U.S. State Department reports that North Korea may be expropriating as much as forty-five percent of these salaries⁴⁴ and characterizes this practice as "forced labor" and the workers as "trafficking victims."⁴⁵

Even though the payment of the mandatory fees is incorporated into the Kaesong labor law, the *manner* in which the fees are taken away from the workers' wages violates that law. Article 42 of the Kaesong Labor Law requires that each enterprise pay a monthly social insurance premium equal to fifteen percent of its monthly payroll for North Korean citizens.⁴⁶ Article 43 mandates that North Korean citizens will pay a "given portion" of their monthly salaries towards a "social and cultural policy fee."⁴⁷ However, this

³⁵ *Id.*; Norimitsu Onishi, *supra* note 2; Brooke, *supra* note 33; HRW, *supra* note 1, at 1.

³⁶ Jettel, *supra* note 5; Brooke, *supra* note 33.

³⁷ Jettel, *supra* note 5.

³⁸ Labor Regulations for the Gaeseong Industrial Zone (adopted as Decision No.2 by the Standing Committee of the Supreme People's Assembly, Sept. 18, 2003) [hereinafter Kaesong Labor Regulations], available at <http://unikorea.go.kr/english/EUP/EUP0201R.jsp> (follow "LIST" hyperlink; then follow "article No. 22" hyperlink) (last visited Oct 26, 2007).

³⁹ *Id.* art. 25; HRW, *supra* note 1, at 6.

⁴⁰ Kaesong Labor Regulations, *supra* note 38, art. 32; HRW, *supra* note 1, at 6.

⁴¹ Brooke, *supra* note 33.

⁴² *Id.*

⁴³ HRW, *supra* note 1, at 6.

⁴⁴ State Dep't Press Releases & Documents, *supra* note 12.

⁴⁵ Carpenter, *supra* note 11.

⁴⁶ Kaesong Labor Regulations, *supra* note 38, art. 42.

⁴⁷ *Id.* art. 43.

statutory language neither permits the South Korean companies to pay wages to North Korean state officials nor permits the officials' practice of taking an indeterminate portion of those wages before the wages are handed to the workers. While North Korea's actions blatantly violate the Kaesong Labor Law, state-run and private South Korean companies at Kaesong are also complicit in these wrong-doings.

Labor rights violations at Kaesong also include prohibitions on union formation and operation⁴⁸ and the expectation that workers must work unpaid overtime.⁴⁹ Shortcomings in the Kaesong Labor Law have allowed South Korean corporations and the North Korean government to commit these violations with impunity.⁵⁰ Although the Kaesong Labor Law addresses certain workers' rights, many of the most fundamental rights are missing, including the right to freedom of association and collective bargaining, the right to strike, the prohibition of sex discrimination and sexual harassment, and the ban on harmful child labor.⁵¹ Thus, the on-going violations at Kaesong raise the specter of other unreported violations.⁵²

III. INTERNATIONAL GUIDELINES DIRECT BUT DO NOT REQUIRE SOUTH KOREAN CORPORATIONS AT KAESONG TO PROTECT THE RIGHTS OF NORTH KOREAN WORKERS

International codes of conduct for transnational corporations direct the South Korean corporations at Kaesong to conform to international labor rights standards. The current international codes of conduct are the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises ("OECD Guidelines") and the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises & Social Policy ("ILO Declaration").⁵³ While these guidelines set ideal standards, they do not place a legal duty upon the corporations to protect labor rights. Thus, as "soft law,"⁵⁴ the OECD Guidelines and the ILO Declaration place aspirational, but legally unenforceable, obligations upon the South Korean corporations at Kaesong.

⁴⁸ Jettel, *supra* note 5; HRW *supra* note 1, at 12.

⁴⁹ Jettel, *supra* note 5.

⁵⁰ *North Korea: Labor Rights at Risk in Joint Industrial Complex*, U.S. FEDERAL NEWS, Oct. 3, 2006.

⁵¹ HRW, *supra* note 1, at 2.

⁵² U.S. FEDERAL NEWS, *supra* note 50.

⁵³ BINDA PREET SAHNI, *TRANSNATIONAL CORPORATE LIABILITY: ACCOUNTABILITY FOR HUMAN INJURY* 47 (2006).

⁵⁴ In international law "soft law" constitutes "[g]uidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding." BLACK'S LAW DICTIONARY (8th ed. 2004).

A. *The OECD Guidelines Place Non-Enforceable Duties on South Korean Corporations to Recognize Kaesong Workers' Rights*

Although Kaesong is situated in North Korean territory, South Korea has a responsibility as a member of the OECD to ensure that South Korean corporations respect international labor standards as laid out in OECD Guidelines.⁵⁵ The OECD Guidelines establish principles and standards that cover a broad range of issues in business ethics including employment, industrial relations, and human rights.⁵⁶ Each country that is a member of OECD is expected to recommend to multinationals headquartered in that country to consider voluntarily adopting and complying with OECD Guidelines.⁵⁷ As a party to the OECD Convention since 1996, South Korea has made a commitment to “align its economic system more closely with international standards.”⁵⁸ OECD Guidelines explicitly state, “where corporate conduct and human rights intersect . . . [multinational enterprises] are encouraged to respect human rights . . . in their dealings with employees . . . in a manner that is consistent with host governments’ international obligations and commitments.”⁵⁹ Because North Korea is party to four main human rights treaties that protect workers’ rights, OECD Guidelines thus direct South Korean companies in Kaesong to respect the human rights of the North Korean workers.⁶⁰ Furthermore, OECD workplace guidelines include the right to free association and collective bargaining⁶¹—rights that have been denied to Kaesong workers.⁶²

However, the OECD Guidelines are aspirational and do not place a binding legal obligation upon South Korean corporations. The guidelines merely constitute an instrument of soft law.⁶³ Consequently, the OECD Guidelines do not provide the workers with a cause of action for legal relief.

⁵⁵ HRW, *supra* note 1, at 5.

⁵⁶ Theodora M. Lee & Littler Mendelson, *Global Employment Claims: Emerging International Labor and Employment Issues*, in LITIGATION 2005, at 681 (PLI Litig. & Admin. Practice, Course Handbook Series No. 730, PLI Order No. 6740, 2005).

⁵⁷ *Id.*

⁵⁸ Economist Intelligence Unit, *South Korea: The Operating Environment*, TMC.NET, Aug. 8, 2007, <http://www.tmcnet.com/usubmit/2007/08/08/2848638.htm>.

⁵⁹ Organization for Economic Co-Operation and Development [OECD], *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications* 41 (rev. ed. 2000), <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

⁶⁰ HRW, *supra* note 1, at 4. North Korea is party to International Covenant on Civil and Political Rights, International Covenant on Economic and Social Rights, Convention on the Elimination of All Forms of Discrimination against Women and Convention on the Rights of the Child.

⁶¹ Lee & Mendelson, *supra* note 56.

⁶² See *supra* Part II.B

⁶³ SAHNI, *supra* note 53, at 47.

B. *The ILO Declaration Requests but Does Not Require South Korean Courts to Recognize Kaesong Workers' Rights*

The ILO Declaration is also a universal legal instrument that offers guidelines to multinational corporations, employers, and workers' organizations.⁶⁴ It relates to such areas as employment, training, conditions of work and life, and industrial relations.⁶⁵ The ILO Declaration compels the government of a member state to ensure that both multinational and national enterprises⁶⁶ meet the core labor standards of the ILO convention, even if the government has not ratified the individual conventions that enshrine these standards.⁶⁷

Because the government of South Korea has been a "State Member of the ILO" since 1991,⁶⁸ the declaration compels the government to ensure that South Korean Kaesong companies meet these labor standards. However, much like the OECD Guidelines, the ILO Declaration does not place any legal duties or liability upon the companies for their labor violations at Kaesong. Instead, the instrument merely "invites" the actors "to observe the principles embodied" in the ILO Declaration.⁶⁹ Therefore, the workers cannot rely on the ILO Declaration for a cause of action.

IV. NORTH KOREAN WORKERS CAN POTENTIALLY SEEK REDRESS AND PROTECT THEIR RIGHTS BY BRINGING AN EQUAL PROTECTION CLAIM IN THE SOUTH KOREAN CONSTITUTIONAL COURT

"Soft law" such as the OECD Guidelines and the ILO Declaration alone do not compel South Korean corporations to conform to just labor practices at Kaesong. Therefore, it is important to ground the arguments for just labor practices in laws that will force the South Korean government to punish offending South Korean corporations. The most potent means to these ends is to allow the North Korean workers to seek a constitutional petition in the South Korean Constitutional Court, claiming that the North Korean workers' labor rights are protected under the South Korean

⁶⁴ Int'l Labor Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises & Social Policy*, at v, (3d ed. 2001) [hereinafter ILO Declaration].

⁶⁵ *Id.*

⁶⁶ *Id.* art. 37.

⁶⁷ SAHNI, *supra* note 53, at 44. The core labor standards are freedom of association and the right to collective bargaining, elimination of all forms of forced or compulsory labor, effective abolition of child labor and elimination of discrimination in employment and occupation.

⁶⁸ EQUITAS: INTERNATIONAL CENTRE FOR HUMAN RIGHTS EDUCATION, A UN ROAD MAP: A GUIDE FOR PROTECTING THE RIGHTS OF MIGRANT WORKERS 131-34 (2d ed. 2004), available at <http://www.equitas.org/english/ed-manuals/un-road-map/ch-07-ILO-Member-States.pdf>.

⁶⁹ ILO Declaration, *supra* note 64, at 1.

Constitution. This strategy seeks to place a legal duty upon the South Korean government to recognize and protect the labor rights of the North Korean workers. This obligation on the government, in turn, will compel the government to hold South Korean corporations accountable through stricter regulations and sanctions.

A. *South Korean Jurisprudence Suggests that North Korean Kaesong Workers Are Protected Under the South Korean Constitution*

South Korean constitutional jurisprudence indicates that South Korean courts may extend constitutional protections to North Korean Kaesong workers. Previously, South Korean courts have extended South Korean nationality to North Koreans.⁷⁰ The South Korean Supreme Court has ruled that North Korea is part of the Korean peninsula and thus subject to the sovereignty of South Korea.⁷¹ Therefore, North Korean residency does not “interfere with the acquisition of the nationality of [South Korea].”⁷² The South Korean government supports this judicial assertion of sovereignty over North Korea: “[The Republic of Korea] does not recognize the nationality of North Korea. Therefore, a resident of North Korea can be considered as having [South Korean] nationality.”⁷³ Thus North Koreans may fall under the constitutional protections afforded to South Korean citizens.⁷⁴

Recent developments in relations between the Koreas make the possibility of extending South Korean constitutional rights to North Koreans more than just a legal theoretical possibility. In December 2004, the Roh administration announced a policy change that those who hold “criminal records” in North Korea will not be accepted into South Korea.⁷⁵ The Vice Unification Minister stated that those found to have committed crimes in North Korea could be tried in South Korea, thus implying South Korean jurisdiction over all of North Korea with regard to criminal acts.⁷⁶ In light of these events, a commentator raised the following question: “if South

⁷⁰ Decision of August 31, 2000, 12-2 KCCR 167, 97 HunKa 12 (Korean Supreme Court) [hereinafter Nationality Act Case].

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Constitution of Republic Of Korea, ch. II, translated in MINISTRY OF GOVERNMENT LEGISLATION, ECONOMIC LAWS ON FOREIGN INVESTMENT IN KOREA 47 (2004) (establishing the constitutional rights and duties of South Korean citizens) [hereinafter Constitution of Republic of Korea].

⁷⁵ David Scofield, *Seoul's Double-Talk on Reunification*, ASIA TIMES ONLINE, MAY 1, 2004, <http://www.atimes.com/atimes/Korea/GA04Dg01.html>.

⁷⁶ *Id.*

Korea's criminal code extends to those accused of crimes in the North, what of the South Korean labor laws and human rights code?"⁷⁷ Specifically, since Kaesong workers are legally South Korean citizens under the South Korean Constitution, "would it not be illegal to pay them salaries amounting to less than one-tenth the nationally defined minimum wage?"⁷⁸ The answer is, arguably, yes. If the South Korean state accepts North Koreans as citizens, then, as *de jure* citizens of South Korea, under the South Korean Constitution, the North Korean Kaesong workers are entitled to the protection of their "fundamental and inviolable human rights" by the South Korean state.⁷⁹

B. An Equal Protection Claim in the South Korean Constitutional Court Serves as a Basis for the North Korean Workers' Potential Litigation

As *de jure* South Korean citizens, the North Korean workers may bring a constitutional petition in the South Korean Constitutional Court alleging violations of the equal protection clause of the Constitution. Under the Korean legal system, the main role of the Constitutional Court is "to protect the individual constitutional rights of the Korean people."⁸⁰ The South Korean Constitutional Court has held that the principle of equality enshrined in Article 11(1) of the Constitution, which states that all citizens shall be equal before the law,⁸¹ is the "supreme principle in the field of protection of basic rights."⁸² There are two prerequisites to bringing an equal protection petition within the court's jurisdiction. First, there must be a present and direct harm to the petitioner.⁸³ Second, the petition must have exhausted all ordinary remedies.⁸⁴ A Kaesong workers' petition would satisfy both these prerequisites.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Constitution of Republic Of Korea, *supra* note 74, ch. II, art. 10.

⁸⁰ Jibong Lim, *Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions*, 24 LOY. L.A. INT'L & COMP. L. REV. 327, 352 (2002).

⁸¹ See Constitution of Republic Of Korea, *supra* note 74, art. 11(1) (stating that all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of gender, religion, or social status).

⁸² Decision of Nov 29, 2001, 13-2 KCCR 714, 99 Hun-Ma 494 (Korean Supreme Court) [hereinafter Act on the Immigration and Legal Status of Overseas Koreans case].

⁸³ Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S.IL.U.L.J. 71, 91 (1997).

⁸⁴ *Id.*

1. *The Workers Have Suffered “Present and Direct” Harm*

The workers can demonstrate that they suffered “present and direct harm” in Kaesong at the hands of the South Korean government. Through its *inaction*, the South Korean government has failed to provide Kaesong workers the same labor rights afforded to South Korean workers. This failure resulted in the workers’ lost wages, uncompensated overtime pay, and the inability to associate in labor unions.⁸⁵

Article 68(1) of the South Korean Constitutional Court Act provides that any person whose basic rights are infringed upon by exercise or *non-exercise* of governmental power may file a constitutional complaint before the Constitutional Court.⁸⁶ The “governmental power” in Article 68(1) that is subject to constitutional adjudication refers to all powers including legislative, judicial, and administrative.⁸⁷ The North Korean workers may file an equal protection petition with the Constitutional Court claiming that, as South Korean nationals, they are denied the state protection granted to workers in South Korea. Specifically, there is a complete lack of both legislative and executive action to sanction South Korean corporations at Kaesong that violate South Korean constitutional rights. Under South Korean constitutional jurisprudence, the North Korean workers’ constitutional claim would constitute a “claim-right” that implicates a duty of the state to take affirmative action benefiting claimants.⁸⁸

2. *Ordinary Remedies Available to the Workers Are “Futile and Impracticable”*

The workers’ petition to the Constitutional Court will also satisfy the second requirement that ordinary remedies be exhausted. The court has relaxed this requirement, when it would be “futile or impracticable” to rely on such remedies.⁸⁹ The other remedies that would be available to the workers would be to negotiate with the corporations at Kaesong to ensure better working conditions,⁹⁰ or to complain to North Korean judicial fora,

⁸⁵ See *supra* Part II.B.

⁸⁶ Constitutional Court Act, art. 68(1), available at <http://www.ccourt.go.kr/home/english/welcome/act.jsp> (last visited Oct 23, 2007); Decision of Dec 24, 1997, 9-2 KCCR 842, 89 Hun-Ma 178 (Korean Supreme Court).

⁸⁷ Decision of Oct 15, 1990, 2 KCCR 365, 89 Hun-Ma 178 (Korean Supreme Court).

⁸⁸ Decision of Sept 4, 1989, 1 KCCR 176, 88 Hun-Ma 22 (Korean Supreme Court).

⁸⁹ Kyong Whan Ahn, *supra* note 83, at 92.

⁹⁰ Kaesong Labor Regulations, *supra* note 38, art. 48.

namely, the Kaesong labor tribunals⁹¹ and North Korean courts. However, both of these means of redress are futile.

There are indications that Kaesong corporations have made no efforts to hold their own operations accountable for labor violations and that these corporations are comfortably complicit in the North Korean state's oppression of the workers. As the president of Dosco Co., a South Korean Kaesong corporation, explained, "[i]f I can get good workers, I would build factories anywhere, even if the country were ruled by a regime worse than that of Kim Jong-Il."⁹² Such attitude illustrates that companies may prioritize profits over worker conditions.⁹³ Accordingly, the workers may not reliably expect redress and protection from their employer-corporation.

Similarly, seeking redress and protection in the North Korean judicial system is not a realistic option for the workers. North Korean law is "a derivative of North Korean party policy, [which is] a means to implement State objectives."⁹⁴ Courts and other judicial fora are accountable to the Supreme People's Assembly ("SPA") Presidium or to the SPA in session.⁹⁵ Thus, there exists no independent North Korean judiciary.⁹⁶ Furthermore, individual rights are often not acknowledged in North Korean courts.⁹⁷ Constitutional rights extend only to citizens who fulfill their duties to the State.⁹⁸ Due to the lack of independence of the North Korean courts from the government and the lack of acknowledgment of individual rights by those courts, a North Korean judicial forum will not provide a fair hearing to the Kaesong workers' labor complaints that would likely implicate government actions such as siphoning salaries and disallowing labor unions.

C. *The South Korean State Has Denied Kaesong Workers Protection Under Two Bodies of Law*

The workers' may assert an equal protection claim alleging that the South Korean state has denied them protection under two bodies of law. First, the workers could claim that the government has violated customary

⁹¹ *Id.*

⁹² Kim Hyo-jin, *The Gaeseong Project: The Dream of 'Dirt-Cheap' Labor*, JOON ANG DAILY, Nov. 2, 2003, available at <http://www.hartford-hwp.com/archives/55a/143.html>.

⁹³ SAHNI, *supra* note 53, at 275.

⁹⁴ Patricia Goedde, *Law "of Our Own Style": The Evolution and Challenges of the North Korean Legal System*, 27 FORDHAM INT'L L.J. 1265, 1268 (2004).

⁹⁵ *Id.* at 1276.

⁹⁶ U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (2005), available at www.state.gov/g/drl/rls/hrrpt/2005/61612.htm.

⁹⁷ *Id.*

⁹⁸ Goedde, *supra* note 94, at 1278.

international law enshrined in the South Korean Constitution. Second, they may claim that they are denied labor protections set forth in South Korean labor statutes and the Constitution.

1. The Workers Are Denied Protection Under International Law

The North Korean workers may claim that the South Korean state has not protected their labor rights granted under customary international law. Labor rights are human rights as the Universal Declaration of Human Rights (“UDHR”) includes standards for various labor rights.⁹⁹ These labor rights include the rights of assembly and association,¹⁰⁰ freedom of movement,¹⁰¹ freedom from slavery,¹⁰² freedom from discrimination,¹⁰³ and freedom from unjust labor practices,¹⁰⁴ which specifically refers to the right to join trade unions.¹⁰⁵ These rights are universal and restrict states, individuals, and corporations from infringing on human rights.¹⁰⁶ Thus, labor rights are enshrined in the UDHR.¹⁰⁷ Even though the UDHR has no formal legally binding effect, it is generally accepted that the human rights principles of the UDHR have attained the status of customary international law and are binding upon all states.¹⁰⁸

The South Korean state violates customary international law by failing to ensure the North Korean workers’ rights to just and favorable remuneration.¹⁰⁹ Specifically, South Korea has a duty to ensure that the workers are not denied their rightful wages by the North Korean state and the South Korean corporations.¹¹⁰ Also, if the workers are “trafficking victims,”¹¹¹ they are subjected to “forced labor” and are thus denied their

⁹⁹ See Universal Declaration of Human Rights, U.N.Y.B. 535, art. 20, U.N. Doc. A/810, U.N. Sales No. 1950.I.II (1948-49) [hereinafter UDHR].

¹⁰⁰ See *id.* art. 20.

¹⁰¹ See *id.* art. 13.

¹⁰² See *id.* art. 4.

¹⁰³ See *id.* art. 7.

¹⁰⁴ See *id.* art. 23.

¹⁰⁵ See *id.* art. 23(4).

¹⁰⁶ John C. Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. LAB. & EMP. L. 463, 467 (2000).

¹⁰⁷ *Id.*

¹⁰⁸ Barbara Macgrady, Note, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 BROOK. J. INT’L L. 271, 289 (1997) (citing U.N. ESCOR Comm’n on Hum. Rts., *Preliminary Report by the Special Representative of the Commission on the Human Rights Situation in the Islamic Republic of Iran*, at 8-9, U.N. Doc. E/CN.4/1985/20 (1985)). “Customary International Law” is a building block of the international legal system that derives from the practice of states and is accepted by them as legally binding. BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁰⁹ See UDHR, *supra* note 99, art. 23.

¹¹⁰ See *supra* Part II. B.

¹¹¹ Carpenter, *supra* note 11.

freedom from slavery.¹¹² Furthermore, since the Kaesong Labor Law does not explicitly grant the other labor rights in the UDHR, such as the right to freedom of association and collective bargaining, the right to strike, the prohibition of sex discrimination and sexual harassment,¹¹³ there may be other actionable rights violations.¹¹⁴

According to Article 6 of the South Korean Constitution, customary international law has the same effect as Korean domestic law.¹¹⁵ The Constitutional Court has confirmed that “international law that is generally approved” is a constituent element of the Constitution.¹¹⁶ The court has previously considered customary international law as the basis for the protection of South Korean citizens’ rights.¹¹⁷ Accordingly, the Kaesong workers may invoke Article 6 of the South Korean Constitution and base their constitutional claims on the UDHR as customary international law.

Since the ILO Declaration and OECD Guidelines direct governments as well as corporations to follow international labor standards,¹¹⁸ these international instruments may also be invoked when appealing to protection under international law. Even as “soft law,” the principles in these instruments can help establish a normative structure of international labor rights to aid the court.¹¹⁹ Thus, the constitutional petition would be bolstered by the persuasive effect of these non-binding guidelines.

2. *The Workers Are Denied Protection Under South Korean Labor Law*

The Kaesong workers may also claim that they are denied protection under South Korean labor law statutes. The Labor Standards Act stipulates minimum working standards, such as the direct payment of wages to

¹¹² See UDHR, *supra* note 99, art. 4.

¹¹³ HRW, *supra* note 1, at 2.

¹¹⁴ U.S. FEDERAL NEWS, *supra* note 50.

¹¹⁵ Young-Sok Kim, *A Korean Perspective on the International Criminal Court and Universal Jurisdiction*, in INTERNATIONAL LAW IN KOREAN PERSPECTIVE 341-42 (Choon-Hyun Paik ed., 2004).

¹¹⁶ Decision of May 14, 2004, 16-1 KCCR 609, 2004 Hun-Na 12 (Korean Supreme Court) [hereinafter Impeachment of the President (Roh Moo-hyun) Case]

¹¹⁷ Decision of April 25, 2002, 14-1 KCCR 351, 98 Hun-Ma 425 (Korean Supreme Court) [hereinafter Pledge to Abide by the Law Case] (customary international law was invoked as a primary basis for the protection of the freedom of conscience in a recent dissenting opinion in the Constitutional Court); see also Act on the Immigration and Legal Status of Overseas Koreans Case *supra* note 82 (Both the South Korean government and the dissenting judges invoked “general principles of public international law” to advocate for the Past Nationality Principle as the basis for citizenship. They both argued that a *Jus Sanguinis* basis would amount to discrimination of individuals based on race or nationality.)

¹¹⁸ See *supra* Part III.

¹¹⁹ See JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 89 (2002).

workers¹²⁰ and restrictions on extended work.¹²¹ Kaesong operations violate these provisions as the workers' salaries are not directly handed to them and they are expected to work unpaid overtime.¹²² Because Kaesong operations ban unionization, they also violate the Trade Union and Labor Relations Adjustment Act, which grants the right to unionize.¹²³

The North Korean workers may also claim that they have not been afforded equal protection to enjoy the labor rights explicitly granted in the South Korean Constitution. The Constitution includes the right to "independent association, collective bargaining and collective action."¹²⁴ The Constitution also provides protection for a "minimum wage system under the conditions as prescribed by Act."¹²⁵ The "Act" in a Kaesong worker's case would be the Kaesong Labor Law, which the South Korean government and corporations violate by not paying the workers directly.¹²⁶ Thus, the worker's equal protection claim may appeal to protection under labor law statutes as well as the labor law provisions in the Constitution.

V. PRACTICAL AND PROCEDURAL BARRIERS STAND BETWEEN KAESONG WORKERS AND THEIR POTENTIAL LITIGATION EFFORTS IN THE SOUTH KOREAN CONSTITUTIONAL COURT

Opening the doors of the South Korean Constitutional Court to transnational rights litigation is no straightforward task. Both practical and procedural barriers hinder Kaesong workers' potential litigation in South Korea. First, Kaesong workers face severe penalties under North Korean law if they attempt to leave the state for purposes of pursuing litigation in South Korea. Second, the significance of this state-imposed barrier is heightened by Constitutional Court procedure that bars third parties from representing the Kaesong workers in court. Third, South Korean law does not establish clear jurisdiction over Kaesong workers. Fourth, South Korean law does not permit workers to file suits anonymously, which deters labor-related suits for fear of adverse employment action, such as retaliatory

¹²⁰ See Labor Standards Act, ch. III art. 42, Act No. 6974 (Sep. 15, 2003) (S. Korea), translated in MINISTRY OF GOVERNMENT LEGISLATION, ECONOMIC LAWS ON FOREIGN INVESTMENT IN KOREA 1883 (2004).

¹²¹ See *id.* at ch. IV 1885.

¹²² See *supra* Part II.B.

¹²³ See Trade Union and Labor Relations Adjustment Act, ch. II, Act No. 6456 (Mar. 28, 2001) (S. Korea), translated in MINISTRY OF GOVERNMENT LEGISLATION, ECONOMIC LAWS ON FOREIGN INVESTMENT IN KOREA 1912 (2004).

¹²⁴ See Republic Of Korea Constitution *supra* note 74, art. 33.

¹²⁵ *Id.* art. 32.

¹²⁶ See *supra* Part II.B.

termination. These practical and procedural hurdles obstruct the workers' transnational rights litigation in the Constitutional Court.

A. *The Workers Will Be Barred from Leaving North Korea to Pursue Litigation*

The North Korean workers will be unable to pursue litigation in South Korea because North Korean law prohibits the unauthorized departure of North Korean citizens from the state.¹²⁷ North Koreans who “illegally” cross or help others in crossing the North Korean border face penalties.¹²⁸ A person who illegally crosses “a frontier of the Republic” faces a sentence of up to three years in a *kwalliso*, a political penal labor colony.¹²⁹ Further, an official with the “frontier administration” who helps “someone to violate a frontier” faces a sentence in a *kwalliso* for a period of between two and seven years.¹³⁰

It is unclear under what conditions North Korean authorities would allow North Koreans to leave the country. However, the fact that tens of thousands risk these heavy penalties by crossing into China's northeastern provinces in search of food¹³¹ indicates that the authorities are not willing to authorize North Koreans to depart even to fulfill basic needs such as food. Thus, North Korean authorities will not likely authorize departure to pursue litigation abroad in which the North Korean state is implicated in the wrongs that are the focus of the litigation.

B. *Constitutional Court Procedure Bars Third Parties from Representing the Workers*

Compounding the immobility of the Kaesong workers, South Korean Constitutional Court procedure bars third parties in South Korea from filing the constitutional petition on behalf of the workers. Specifically, Constitutional Court procedure requires that “[a] constitutional complaint can only be filed by individuals whose basic rights have been violated.”¹³² A

¹²⁷ Amnesty Int'l, *Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)*, AI Index ASA 24/003/2004, Jan. 17, 2004, available at <http://web.amnesty.org/library/index/engasa240032004>.

¹²⁸ *Id.*

¹²⁹ The North Korean law which prohibits unauthorized departure is in clear breach of the fundamental right to leave one's own country. art. 12(2) of the ICCPR, to which North Korea is a state party, states that “(e)veryone shall be free to leave any country, including his own.” *Id.*

¹³⁰ Many who fled to countries like China and were forcibly returned to North Korea were subjected to punishment including arbitrary detention, forced labor, and, in some cases, the death penalty. *Id.*

¹³¹ *Id.*

¹³² Act on the Immigration and Legal Status of Overseas Koreans Case, *supra* note 82.

person whose basic right has been violated “does not include a third party who only has indirect, practical, or economic interest in the matter.”¹³³ The court thus places the burden on the petitioner that he or she is the “bearer” of the basic rights at issue.¹³⁴

The inability to have South Korean third parties file the petition on behalf of the North Korean workers and the requirement that the workers demonstrate that they are, in fact, the bearers of the rights at issue create barriers to filing a constitutional petition. Constitutional Court procedure requires that, in order to file a constitutional petition the North Korean workers would have to acquire the services of a qualified attorney.¹³⁵ Further, the workers (along with the attorney) would have to make written submissions to the court on such matters as the claimants’ and their attorney’s identities, the allegedly infringed right, and the exercise or non-exercise of public power that gave rise to the rights infringement.¹³⁶

Contacting and hiring an attorney who will take their case to the South Korean Constitutional Court and completing the necessary administrative procedures such as making the written submissions pose practical difficulties to the North Korean workers. The “qualified attorney”¹³⁷ that the North Korean workers will have to acquire will likely be an attorney currently in South Korea.¹³⁸ While average North Koreans cannot leave the country in order to pursue litigation,¹³⁹ they also have few channels of communication with the outside world due to North Korean governmental restrictions on freedom of expression.¹⁴⁰ For example, the government has banned the use

¹³³ Decision of April 29, 2004, 16-1 KCCR 601, 2003 Hun-Ma 81 (Korean Supreme Court).

¹³⁴ Act on the Immigration and Legal Status of Overseas Koreans Case, *supra* note 82.

¹³⁵ For cases in which the party is a private person, it is impossible for the Constitutional Court to make a request for judgment or conduct oral proceedings without the person’s representing attorney, unless the private person himself is a qualified attorney. In the event private persons have no financial resources to nominate an attorney to be their representative, they may request the Constitutional Court to nominate a court-designated attorney. THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA, CONSTITUTIONAL JUSTICE IN KOREA 29 (1990). See also Constitutional Court Act, art. 25(3) (Legal Representative), art. 70 (Court Appointed Counsel), available at <http://www.court.go.kr/home/english> (follow “Constitutional Court Act” hyperlink) (last visited Oct. 29, 2007).

¹³⁶ THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA, CONSTITUTIONAL JUSTICE IN KOREA 36 (1990); Constitutional Court Act, *supra* note 86, art. 71(1) (Matters to Be Stated On Written Request).

¹³⁷ See Constitutional Court Act, *supra* note 86, art. 25(3) (Legal Representative).

¹³⁸ A “qualified attorney” is an attorney, who has passed the South Korean Bar exam and spent two years at the Judicial Research and Training Institute, which is run by the Supreme Court. Asia Pacific Legal 500, Overview – South Korea, http://www.legal500.com/index.php?option=com_content&task=view&id=1136&15country_code=sk&15directory=as500&Itemid=398 (last visited Oct 23, 2007).

¹³⁹ See *supra* Part V.A.

¹⁴⁰ INTERNATIONAL BUREAU FOR CHILDREN’S RIGHTS, MAKING CHILDREN’S RIGHTS WORK: COUNTRY PROFILE ON NORTH KOREA (DRAFT), http://www.ibcr.org/Publications/CRC/Draft_CP_Asia/NorthKoreaPDF.pdf (last visited Oct. 29, 2007).

of cell phones¹⁴¹ and restricted internet access to high-ranking officials and other designated elites.¹⁴² Thus, these government restrictions on the workers' contact with the outside world severely impairs their ability to acquire the representation of a qualified attorney who can file their constitutional petition in the Constitutional Court and collaborate with that attorney to fulfill other procedural requirements such as producing written submissions.

C. South Korean Law Does Not Establish Clear Jurisprudence over North Koreans

Despite theoretical legal arguments and supporting international relations developments,¹⁴³ there is no well-established South Korean jurisprudence on transnational litigation that allows for South Korean jurisdiction over North Koreans. As explained above in Part V, the South Korean Constitutional Court may have jurisdiction over Kaesong worker claims for constitutional violations.¹⁴⁴ This ambiguity over jurisdiction is heightened by South Korea's stance that diplomatic tensions with North Korea will worsen if South Korean courts place North Koreans under South Korean jurisdiction.¹⁴⁵ Indeed, in spite of the unprecedented boom in constitutional adjudication at the Constitutional Court, the court has shown substantial reservation with regard to such cases with highly political implications.¹⁴⁶ Thus, the Constitutional Court may well dismiss the litigation for lack of jurisdiction over the North Korean workers.

D. Constitutional Court Procedure Does Not Allow for Suit Under Pseudonyms

Because the court requires the individuals to prove that they are the bearer of rights at issue,¹⁴⁷ the Kaesong workers cannot mask their identity. The South Korean procedural rules do not allow for pseudonyms to protect the identities of the workers.¹⁴⁸ This may leave the petitioner-workers

¹⁴¹ *North Korea Bans Mobile Phones*, TEXTUALLY.ORG, June 4, 2004, <http://www.textually.org/textually/archives/2004/06/004040.htm>.

¹⁴² U.S. DEPT. OF STATE, *supra* note 96.

¹⁴³ *See supra* Part IV.A.

¹⁴⁴ *See supra* section V.A.

¹⁴⁵ *See* Nationality Act Case, *supra* note 70.

¹⁴⁶ DAE-KYU YOON, RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY 42 (2000).

¹⁴⁷ Act on the Immigration and Legal Status of Overseas Koreans Case, *supra* note 82.

¹⁴⁸ *See* Constitutional Court Act, *supra* note 86, art. 71(1) ("Matters to Be Stated On Written Request" include "Indication of the complainant and his counsel" and provides no provision for filing under pseudonyms).

vulnerable to retaliatory termination of employment or other punitive action from either the North Korean state or employer corporations upon the workers' return to Kaesong.

VI. SOUTH KOREA MUST FOLLOW INTERNATIONAL DEVELOPMENTS IN TRANSNATIONAL LITIGATION TO SUBJECT CORPORATIONS TO SUIT FOR KAESONG LABOR VIOLATIONS

In light of the significant problems barring Kaesong workers from vindicating their labor rights, the South Korean Constitutional Court and the South Korean legislature should adopt a new set of domestic procedural rules to facilitate actions that hold South Korean corporations accountable for unjust labor practices at Kaesong and other extra-territorial economic operations. The procedural barriers inherent in the South Korean judicial system largely contribute to this denial of judicial consideration of Kaesong workers' rights violations. However, international developments in transnational litigation demonstrate ways to circumvent or overcome such barriers and allow courts to consider extraterritorial rights violations committed by corporations incorporated within its jurisdiction.

A. *The South Korean Legislature and the Constitutional Court Have the Capacity to Amend the Procedural Rules of the Constitutional Court to Accommodate Kaesong Workers' Litigation*

Both the legislature and the Constitutional Court have the capacity to amend the Constitutional Court's procedure. After the court was established in 1988, the legislature defined the procedural role of the Constitutional Court by passing the Constitutional Court Act.¹⁴⁹ While the Constitution briefly mentions the powers and the functions of the court,¹⁵⁰ the Constitutional Court Act elaborates upon these powers and functions.¹⁵¹ Thus, the legislature can alter the court's procedure within the bounds set by the Constitution.

The Constitutional Court defines its own procedure by making regulations and by liberally constructing extant procedural requirements. The court has the authority to make regulations to manage its own affairs, including its own procedures for adjudication—as long as they do not

¹⁴⁹ Kyong Whan Ahn, *supra* note 83, at 75-76.

¹⁵⁰ See Constitution of the Republic of Korea, *supra* note 74, arts. 111-13.

¹⁵¹ *Id.* See also Constitutional Court Act, *supra* note 86, ch. IV (includes detailed procedural rules set forth in chapters on "General Procedure of Adjudication" and "Special Adjudication Procedures").

exceed the bounds of the Constitutional Court Act.¹⁵² The court has also employed many new techniques in pursuing its intention to “safeguard the constitution” and to “protect the fundamental rights of the people.”¹⁵³ These techniques include liberally constructing procedural rules such as “justiciability requirements.”¹⁵⁴ Thus, the court itself can take measures to alter its procedural rules.

The South Korean legislature and the Constitutional Court have the capacity to change the procedural rules of the Constitutional Court. Therefore both the legislature and the court must look to the following international trends in transnational litigation in crafting procedural rules that would allow the North Korean Kaesong workers to pursue litigation in the Constitutional Court.

B. South Korea Should Follow Developments in South Asian Public Interest Litigation to Relax Standing Requirements and Allow Third Party Suits

The North Korean workers, whose freedom of movement is severely circumscribed by the North Korean state, face a formidable barrier in pursuing litigation in the South Korean Constitutional Court because standing rules require the injured party itself to file suit and bar third party suits.¹⁵⁵ Public interest litigation in South Asia, especially in India, provides a procedural model to circumvent this problem. South Asian courts have encouraged third party litigation on behalf of “those without the capacity to sue.”¹⁵⁶

Indian courts have relaxed the requirement that a litigant must be present in court to sue where there is an overriding public need. The seminal Indian Supreme Court judgment in *S.P Gupta v. Union of India* established that the strict rule of *locus standi*¹⁵⁷ changes “[when] there has been a violation of the constitutional or legal rights of persons who by reason of their socially or economically disadvantaged position are unable to approach

¹⁵² THE REPUBLIC OF KOREA, THE CONSTITUTIONAL COURT 15 (1996).

¹⁵³ Kyong Whan Ahn, *supra* note 83, at 88.

¹⁵⁴ *Id.* These requirements are substantially similar to the justiciability requirements under art. 3 of the U.S. Constitution. That the Court has made a lax reading of these requirements is portrayed by its holding that in some instances, such as when the danger of repeated infringement exists, ruling on the merits is necessary even when the justiciability requirements have expired. *Id.* at 91.

¹⁵⁵ See *supra* Part V.B.

¹⁵⁶ SAHNI, *supra* note 53, at 294 (citing *Bandhua Mukti Morcha v. Union of India* (1984) 3 S.C.C. 161 at para. 11).

¹⁵⁷ Latin for “place of standing,” *locus standi* means the right to bring an action or to be heard in a given forum. BLACK’S LAW DICTIONARY (8th ed. 2004).

the Court for judicial redress.”¹⁵⁸ Under this principle, the “reasons” that make a person unable to approach a court for relief include “poverty, helplessness or disability or socially or economically disadvantaged position.”¹⁵⁹

When such circumstances are present, the court asserted that any third party member of the public can maintain an application for an appropriate direction, order, or writ.¹⁶⁰ Thus, lawyers, public interest groups, social workers, and journalists would be able to file a *bona fide* plea on behalf of those who could not access the court.¹⁶¹ The Indian Supreme Court has further extended this principle by accepting letters or newspaper petitions.¹⁶² This principle has also been adopted by the Supreme Court of Pakistan¹⁶³ and has been considered in Bangladeshi courts.¹⁶⁴

Equitable considerations of fair access to justice compel South Korea to adopt a similar relaxed rule on *locus standi*. As mentioned before,¹⁶⁵ such equitable considerations are important because the constitutional petition in the Constitutional Court carries overtones of an equitable remedy.¹⁶⁶ The Constitutional Court and the South Korean legislature should change Constitutional Court procedure to ease current standing rules and allow for third parties to file suit on behalf of the North Korean workers. Doing so will allow concerned third parties in South Korea to file suit on the workers’ behalf. These concerned parties could potentially include the South Korean branch of Human Rights Watch,¹⁶⁷ human rights lawyers from “Lawyers for Democratic Society,”¹⁶⁸ and North Korean dissident groups.¹⁶⁹

¹⁵⁸ Parvez Hassan & Azim Azfar, *Securing Environmental Rights Through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 226-27 (2004).

¹⁵⁹ *Id.* at 227.

¹⁶⁰ *Id.*

¹⁶¹ SAHNI, *supra* note 53, at 294 (citing *SP Gupta v. President of India* (1982) A.I.R. S.C. 149, 192).

¹⁶² *Id.*

¹⁶³ Hassan & Azfar, *supra* note 158 at 233.

¹⁶⁴ *Id.* at 242-44.

¹⁶⁵ *See supra* Part V.

¹⁶⁶ Kyong Whan Ahn, *supra* note 83, at 77.

¹⁶⁷ Human Rights Watch has documented the abuses at Kaesong and has called for action to end those abuses. *See generally* HRW, *supra* note 1.

¹⁶⁸ DAE-KYU YOON, *supra* note 146, at 42. Formed in 1987, this organization comprises of members of the Korean Bar Association and has become the center of public interest activities, including constitutional litigation.

¹⁶⁹ Certain dissidents have spoken out against the Kaesong abuses. *See Jettel, supra* note 5.

C. *South Korea Should Follow Developments in the European Union and United States to Extend Court Jurisdiction to Hear Extraterritorial Constitutional Claims Against Domestically Owned Corporations*

Although the South Korean Constitutional Court may construe jurisdiction over North Koreans in North Korea,¹⁷⁰ there is no established rule to this effect. Lack of jurisdiction over extraterritorial violations of the Korean Constitution may prove fatal to the viability of the Kaesong workers' potential litigation. However, legal developments in the European Union and the United States indicate that there is a growing trend in transnational litigation that overcomes such jurisdictional barriers.

For example, as an E.U. member-state, the United Kingdom's courts are bound by the Brussels Regulation, which permits a company to be sued at its place of domicile—either the location of its statutory seat, central administration, or principal place of business.¹⁷¹ English common law has interpreted these provisions to conform with Article 2 of the Brussels Convention, which provides that an action must be brought in the defendant's domicile.¹⁷² Recently, the House of Lords has passed legislation permitting U.K. courts to hear compensation claims from claimants demanding the accountability of transnational corporations for torts committed in foreign countries.¹⁷³

The European Court of Justice ("ECJ") has extended its jurisdictional reach to plaintiffs domiciled in a state not party to the Brussels Convention.¹⁷⁴ The ECJ's holding provides a codified system for determining jurisdiction, and favors the employee as the weaker party.¹⁷⁵ Thus, the ECJ has effectively precluded the application of *forum non conveniens* if a defendant is based in the European Union.¹⁷⁶

In the United States, the Alien Tort Claims Act ("ATCA") is a means of holding corporations liable for international human rights violations.¹⁷⁷ The ATCA expressly provides U.S. district courts with original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁷⁸ The Ninth Circuit in

¹⁷⁰ See *supra* Part V. A & B (discussion on the Constitutional Court's jurisdiction over the North Korean workers).

¹⁷¹ SAHNI, *supra* note 53, at 22-23 (citing Council Regulation, 2000, E.C. 2001/44 (U.K.)).

¹⁷² *Id.* at 23.

¹⁷³ *Id.* at 24.

¹⁷⁴ *Id.* at 23-24.

¹⁷⁵ BOB HEPPLER, LABOR LAWS AND GLOBAL TRADE 162 (2005).

¹⁷⁶ SAHNI, *supra* note 53, at 23.

¹⁷⁷ HEPPLER, *supra* note 175, at 161.

¹⁷⁸ 28 U.S.C. § 1350 (1996). See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-87 (2d Cir. 1980).

Doe v. Unocal Corp. held that forced labor is among the “handful of crimes . . . to which the law of nations attributes *individual liability*” such that state action is not required.¹⁷⁹ This suit concerned human rights violations during Unocal’s construction of a pipeline in Myanmar. Unocal eventually settled the case in 2004.¹⁸⁰ A lawyer for the Myanmar villagers stated that the settlement would help “develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.”¹⁸¹ The effect of the suit on Unocal was substantial even before it agreed to the settlement. The suit had created uncertainty in Unocal’s future investing and was a costly disruption in its operations.¹⁸² The negative publicity that arose from the case was also expected to damage the company’s brand equity.¹⁸³

Even though no verdicts have been officially rendered against companies for extraterritorial torts under the ATCA, corporations are reacting to the possible impact of such litigation.¹⁸⁴ ATCA suits compel the corporations to consider the importance of complying with human rights laws in making their investment decisions.¹⁸⁵ For example, ChevronTexaco ended its oil development in Ecuador following a lawsuit that was eventually dismissed by a federal judge.¹⁸⁶ A ChevronTexaco official stated that the litigation was not a “positive indicator” for Ecuador as a venue for continued business, and that the threat of similar litigation adds an element of risk that makes the corporation less competitive.¹⁸⁷ Thus, whatever the outcome of the litigation, the very fact that plaintiffs are given the *opportunity* to be heard in court is an important mechanism to hold a corporation accountable.

The South Korean legislature and Constitutional Court must look to these jurisdictional developments in E.U. and U.S. law as normative models that facilitate transnational litigation in domestic courts. Both the legislature and the Constitutional Court should accordingly enact regulations that would allow for constitutional petitions from foreign litigants injured by the actions of South Korean corporations. The adoption of the procedural principles in

¹⁷⁹ *Doe I v. Unocal*, 395 F.3d 932, 946 (9th Cir. 2002). A threshold question in any ATCA case against a private party, such as a corporation, is whether the private party engaged in state action for ATCA liability to attach. However, the *Unocal* court attached ATCA liability even without state action. *See id.* at 945-46.

¹⁸⁰ *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Alex Markels, *Showdown for a Tool in Rights Lawsuits*, N.Y. TIMES, June 15, 2003, at 3-11.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (discussing *Aguinda v. Texaco, Inc.*, 142 F. Supp.2d 534 (S.D.N.Y. 2001)).

¹⁸⁷ *Id.*

these models will allow for North Korean Kaesong workers to sue the South Korean corporations in the Constitutional Court.

D. South Korea Should Follow the Model Established by U.S. Law That Allows Litigants to Maintain Anonymity in Labor Rights Cases

Because Constitutional Court procedure does not provide for suit under pseudonyms,¹⁸⁸ North Korean workers would be vulnerable to retaliation from both the South Korean employers and the North Korean state for bringing rights litigation in South Korea. Thus, in order to protect the workers from such negative repercussions, it is vital that the petitioner-workers' identities be protected.

A landmark labor rights case in the United States has demonstrated that suit under pseudonyms is an essential component in international labor rights litigation.¹⁸⁹ Recently, the U.S. Ninth Circuit found that foreign employees can anonymously bring suit under the Fair Labor Standards Act when the party's need for anonymity outweighs both prejudice to opposing party and public interest in knowing the party's identity.¹⁹⁰ The claimants in this case were mostly Chinese garment workers in Saipan, a commonwealth of the United States.¹⁹¹ The Ninth Circuit allowed the workers to use pseudonyms in place of their actual names because they feared that, if their identities were disclosed to defendants and other nonparties to the action, they would be fired from their jobs, deported, and subsequently arrested and imprisoned by the People's Republic of China.¹⁹²

Similarly, the South Korean Constitutional Court and the legislature must adopt such procedural rules that ensure anonymity of plaintiff-workers in order to protect Kaesong workers from retaliation by South Korean employers or the North Korean government. The Constitutional Court should permit anonymity to any claimant who can demonstrate the reasonable likelihood or fear of retaliation to file anonymously.

¹⁸⁸ See *supra* Part V.D.

¹⁸⁹ JULIE SMITH, INTERNATIONALLY BINDING LEGISLATION AND LITIGATION FOR THE ENFORCEMENT OF LABOUR RIGHTS (2002), in LAW, SOC. JUST. & GLOBAL DEV. J., http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2002_1/smith.

¹⁹⁰ See generally *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).

¹⁹¹ *Id.* at 1063.

¹⁹² *Id.* at 1071-72.

VII. MEASURES OUTSIDE THE COURTS WILL ALSO PROMOTE GREATER ACCOUNTABILITY OF THE SOUTH KOREAN CORPORATIONS

A constitutional petition from Kaesong workers would require the Constitutional Court and legislature to pursue progressive implementation of developments in transnational litigation. Moreover, litigation alone does not address the urgency of protecting the North Korean workers from ongoing labor rights violations. Therefore, the South Korean government and the South Korean public must take measures outside of the courts to achieve expeditious results. Two prominent and potentially effective measures outside the courts would be halting South Korean government assistance to corporations that commit rights violations and initiating shareholder pressure on Kaesong corporations that violate constitutional rights. These measures complement changes to the court's jurisdiction and should be pursued contemporaneously. They will foster an environment of accountability, which the Constitutional Court can eventually build upon when adjudicating the workers' claims. Thus, these extra-judicial measures effectively lay the ground for a potentially successful litigation of the Kaesong workers' rights.

A. *Cutting Off Government Assistance Is an Effective Means of Holding Violative Corporations Accountable*

The South Korean government should consider halting the assistance currently given to corporations that violate the labor rights of the Kaesong workers. The government should make the support it provides individual South Korean Kaesong corporations conditional upon the corporation's showing of a good corporate social responsibility record. Thus, the large tax breaks and publicity that the South Korean government provides¹⁹³ must be halted immediately to those corporations complicit in the Kaesong violations.

This recommendation follows from Canadian efforts to strengthen corporate social responsibility. In pursuing stronger corporate social responsibility in its transnational mining industry, the Canadian government considered linking the provision of government services to businesses, including export and project financing, to their adherence to corporate social responsibility standards.¹⁹⁴ These standards aim at achieving a sustainable

¹⁹³ Minegishi, *supra* note 26.

¹⁹⁴ HOUSE OF COMMONS COMMITTEE, GOVERNMENT RESPONSE TO THE FOURTEENTH REPORT OF THE STANDING COMMITTEE ON FOREIGN AFFAIRS & INTERNATIONAL TRADE (Can. Oct. 19, 2005), *available at* <http://cmte.parl.gc.ca/cmte/committeepublication.aspx?sourceid=131218>.

balance of benefits for business, employees, stakeholders, and the communities and the environment within which the business operates.¹⁹⁵

Enforcement of corporate social responsibility standards in North Korea may be difficult to implement. While the Canadian government had “National Contact Points,” which investigated corporate social responsibility violations in the countries where its corporations functioned,¹⁹⁶ the South Korean government has no such investigatory contact point in North Korea. Further, the North Korean state will not likely allow such an entity in Kaesong. Independent monitoring agencies will likely be denied access into the tightly-secured SEZ. Thus, it will be difficult for the South Korean government to discern which corporations should be deprived of government assistance. Nonetheless, placing a burden upon corporations to show good corporate practices as a condition to government assistance may compel the corporations to improve the conditions at Kaesong.

B. Shareholder Pressure Is an Effective Means of Holding Violative Corporations Accountable

South Korean shareholders of the Kaesong corporations must take advantage of such instruments as shareholder resolutions to hold offending corporations accountable. In the United States, through shareholder resolutions placed before corporate directors, shareholders increasingly call for companies to pull out of projects implicated in human rights law suits.¹⁹⁷ For example, responding to a shareholder resolution and negative publicity from a pending human rights law suit, Calgary-based Talisman Energy sold its U.S. \$770 million stake in an oil development project in Sudan.¹⁹⁸

Under South Korean law, shareholders have statutory authority to control certain aspects of the company through such mechanisms as the right to vote and binding shareholder resolutions.¹⁹⁹ Shareholders can discipline the company by such acts as electing or removing directors,²⁰⁰ merging or dissolving the corporation,²⁰¹ and transferring the whole or an important part of business.²⁰² Thus, statutorily, shareholders have substantial control over the activities of a corporation.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See Markels, *supra* note 184.

¹⁹⁸ *Id.*

¹⁹⁹ TRENDS AND DEVELOPMENTS IN CORPORATE GOVERNANCE: THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 214-15 (Dennis Campbell et al. eds., 2003).

²⁰⁰ *Id.* at 216.

²⁰¹ *Id.* at 216.

²⁰² *Id.* at 217.

Recent legal reform in corporate governance in South Korea has led to a rise in shareholder activism.²⁰³ Such activist efforts have been headed by non-governmental organizations such as *chamyeoyundai* (the Participatory Economic Committee of People's Solidarity for Participatory Democracy), which act on behalf of shareholders²⁰⁴ by revealing companies with low accountability.²⁰⁵ With the support of the South Korean government, such civic organizations have taken on the role of whistleblowers that strive to prevent managerial abuse and improve transparency and efficiency.²⁰⁶

South Korean shareholders and their representative civic organizations must take advantage of this climate of promoting corporate accountability and extend their activism to the advocacy of responsible labor practices in Kaesong. Thus, shareholder activism presents an effective means in the hands of the South Korean public to hold the Kaesong corporations accountable for labor rights violations.

VIII. BROADER POLITICAL REALITIES WILL HAVE A SIGNIFICANT EFFECT IN REALIZING THESE RECOMMENDATIONS

The feasibility of recommendations to hold South Korean corporations accountable both inside and outside the courts must be seen in light of the political realities of the Korean peninsula. On the one hand, tense relations between the North and the South pose a formidable barrier to implementing these recommendations. On the other hand, U.S. pressure on South Korea to cease economic support to the North may favor such implementation.

The South Korean government states that although it is frustrated with the North Korea's refusal to halt its nuclear ambitions, it sees no other option but to engage them.²⁰⁷ It believes that ending cooperative projects will only worsen inter-Korean relations and increase the danger of military clashes on the divided Korean peninsula.²⁰⁸ Thus, if South Korea were to hold Kaesong corporations accountable for labor violations in which North Korea is also complicit, then such a move would likely be viewed by North Korea as

²⁰³ Kyung Taek Jung & Hwa Soo Chung, *Korea Aims For World-Class Corporate Governance*, INT'L FIN. L. REV. (2004), <http://www.iflr.com/?Page=17&ISS=16145&SID=508230>.

²⁰⁴ *Id.*

²⁰⁵ Choe Sang-Hun, *Revenge of the Shareholders: Korean Firms on the Spot*, INT'L HERALD TRIB. Sept. 12, 2006.

²⁰⁶ Yeonho Lee, *Participatory Democracy & Chaebol Regulation in Korea: State-Market Regulation Under the MDP Governments, 1997-2003*, 45 ASIAN SURVEY 279, 298 (2005).

²⁰⁷ See generally Choe Sang-Hun, *South Korea Grapples with Competing Pressures as It Weighs Its Response to North Korea*, N.Y. TIMES, Oct. 13, 2006, at A12.

²⁰⁸ *Id.* See also Minegishi, *supra* notes 26.

adversarial or, at least, uncooperative. This could potentially undo the good relations that have developed between the two Koreas since the Sunshine Policy was instituted in 2000. It is possible that the Constitutional Court of South Korea will defer to the South Korean government's policy to pacify the North and deny suit to Kaesong workers.²⁰⁹

On the other hand, pressure from the United States on South Korea to halt funding of North Korean human rights abuses is at the fore of the ongoing developments in a free trade agreement ("FTA") between South Korea and the U.S. While South Korea wants Kaesong products to be recognized as "Made in South Korea," U.S. officials and lawmakers have not been receptive, raising questions about labor standards and reports that the North Korean state is siphoning the workers' wages.²¹⁰ Kaesong posed a persistent obstacle in the preliminary FTA negotiations between the two countries.²¹¹ As the FTA now awaits ratification in the U.S. Congress, the disagreement on Kaesong remains unresolved.²¹² Some U.S. officials claim that South Korea, in partnering with North Korea to establish Kaesong, is prolonging the life of the Kim Jong-II regime at the expense of the North Korean people.²¹³ The Bush administration's special envoy for human rights in North Korea stated that projects like Kaesong strengthened Kim Jong-II by pumping hundreds of millions of dollars into the North.²¹⁴ The administration accused the South of economically propping up the North, as the United States financially squeezed the North elsewhere.²¹⁵ Thus, an attempt by South Korea to follow the above recommendations with a view to holding violative corporations accountable may ease the roadblocks surrounding Kaesong in the ongoing FTA developments.

It is difficult to surmise which one of these countervailing pressures upon South Korea is stronger. Such political forces unpredictably ebb and flow on the volatile Korean Peninsula. These broader political realities influence whether Kaesong workers can look to South Korea for redress to and protection from the violation of their labor rights.

²⁰⁹ The Constitutional Court is noted for suffering heavy impacts by such political pressure from the South Korean government. Jibong Lim, *supra* note 80, at 353.

²¹⁰ Carpenter, *supra* note 11.

²¹¹ Norimitsu Onishi, *supra* note 2.

²¹² Oxford Analytica, *South Korea/US: FTA Jumps Major Hurdles, Faces Others*, INT'L HERALD TRIB., April 3, 2007.

²¹³ Jettel, *supra* note 5.

²¹⁴ Norimitsu Onishi, *supra* note 2.

²¹⁵ Norimitsu Onishi, *supra* note 2.

IX. CONCLUSION

If unification of the two Koreas is South Korea's ultimate goal in building a peace regime through inter-Korean cooperation,²¹⁶ then South Korea must see all Koreans as equal and extend to North Koreans the rights currently granted to South Koreans. However, the South Korean state has neglected to address the violations against the North Korean workers at Kaesong. Kaesong is of particular importance in the larger struggle for human rights in North Korea, as it is one of the few areas where South Korea exercises some political leverage over the North Korean government.²¹⁷ Allowing the Kaesong workers to pursue a constitutional petition in the South Korean Constitutional Court will be a significant advance towards South Korea's lofty goal of bridging the Cold War divide on the Korean peninsula.

²¹⁶ See also, CHO, *supra* note 28, at 4.

²¹⁷ Jettel, *supra* note 5.